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IN THE SUPREME COURT OF FLORIDA

CASE NO. 63, 347

TERRENCE M. ASH, D.C.,

Petitioner,

-vs-

NICHOLAS A. STELLA, as Personal Representative of the Estate of CYNTHIA LEE STELLA, deceased, etc., et al.,

Respondent.

PETITIONER'S REPLY BRIEF

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WOMACK, CARLSON & KNISKERN, P. A.
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MICHAEL K. McLEMORE

Of Counsel

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TABLE OF AUTHORITIES

OTHER AUTHORITIES

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ARGUMENT

I. THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT WRONGFUL DEATH IS A NEW CAUSE OF ACTION.

By opinion dated December 15, 1983, this Court reversed the decision of the Third District Court of Appeal in Perkins v. Variety Children's Hospital, 413 So.2d 760 (Fla. 3d DCA 1982), rev'd., Case No. 62,190 (Fla., opinion filed December 15, 1983). By so holding this Court rejected the argument that wrongful death is a new, independent cause of action, as argued by Respondent herein. Id. at 2, 4.

By implication, the opinion of the Fifth District Court of Appeal in Bruce v. Byer, 423 So.2d 413 (Fla. 5th DCA 1982), relying upon Perkins, supra, was also reversed by this Court's holding in Perkins, supra.

Respondent's Answer Brief acknowledges implicitly some of the further difficulties in attempting to overlook the expiration of the underlying limitation period for malpractice. First, as stated at pp. 16, 17 of Respondent's Brief, the operative statue of limitations for medical malpractice applicable to this action is §95.11 (4)(b), Fla.Stat. as amended in 1975. Section 4(b) states:

> (b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise

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> of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued. An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out y medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. The limitations of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year period, the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred. (emphasis added)

The specific definition of the malpractice limitation period was changed in 1975 to include any claim for death. Under the statutory scheme applicable to this lawsuit, a claim for medical malpractice dates from the discovery of the incident, even if a claim for death is involved. Respondent's Brief (pp. 17, 18) cites the opinion in Glass v. Camara, 369 So.2d 625 (Fla. 1st DCA 1979). That case points out the significance of the 1975 amendment to §95.11(4)(b). Because the 1975 amendment included an action for death resulting from medical

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malpractice, the operative date for commencing the running of the statute is the date of discovery of the incident and not the date of death. Id. at 626.

Similarly, Eland v. Aylward, 373 So.2d 92 (Fla. 2d DCA 1979), cited in both Petitioner's Brief (p. 5) and apparently referred to in Respondent's Brief (p. 18), rejected the date of death as the commencement of the running of the statute. Id. at 93. Rather, even when death results from medical malpractice, reference is made to the more specific statutory provision concerning death which results from medical malpractice in §95.11(4)(b), and not to the general statute applicable to wrongful death. As the court said in deciding which limitation period to apply: "This is an action for medical malpractice...", as opposed to strictly a wrongful death action, citing Glass v. Camara, supra. 373 So.2d at 93.

Petitioner respectfully submits that the proper limitation for a death resulting from medical malpractice is two years from the date the incident is discovered. §95.11(4)(b), Fla.Stat. Petitioner relies further on the authorities cited in its Initial Brief.

There is no constitutional pall on this legislatively enacted limitation. The decedent could have sued prior to death, and the personal representative could have sued after death at any time prior to the expiration of two years from the discovery of the incident. The doors to the courthouse were open during the full two year period

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following discovery of the incident. See, e.g., Velazquez v. Metropolitan Dade County, 8 FLW 2892 (Fla. 3d DCA opinion filed December 13, 1983).

II. THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT A CAUSE OF ACTION FOR MEDICAL MALPRACTICE DID NOT ACCRUE UPON DISCOVERY OF A MISDIAGNOSIS OF CANCER.

Respondent continues to insist that a cause of action for medical malpractice cannot accrue until a subsequent physician pronounces unequivocally that a prior physician has committed malpractice (Respondent's Brief, p. 27). Respondent makes this contention even while asserting that the discovery of the diagnosis of malignant cancer had a profound impact on Petitioner. (Respondent's Brief p. 27).

It cannot be the case that a cause of action must await a pronouncement of guilt by a professional before it can accrue. If such were the case, few tort claims which have arisen during the past century would be barred today.

Rather, a diagnosis of cancer which has probably spread is a clear-cut notice to the patient of both the incident giving rise to a claim and the full scope of the potential injury.

Schalm v. Mount Clemens General Hospital, 82 Mich. App. 669, 267 N.W.2d 479 (1978), cited by Respondent and the district court of appeal, relies upon different

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statutory language from a foreign state. That state's law required discovery of "the asserted malpractice". The holding in Schalm is thoroughly incontinent with the Florida cases on the subject, as cited in Petitioner's Brief.

Further, both the case of Wilhelm v. Traynor, 434 So.2d 1011 (Fla. 5th DCA 1983), cited in Petitioner's Brief, and Lipshaw v. Pinosky, 8 FLW 2685 (Fla. 3d DCA, opinion filed November 8, 1983), cited by Respondent, explicitly hold that the statute of limitations for medical malpractice commences on learning of a correct diagnosis of cancer. As stated in Lipshaw:

> The assertion that the plaintiffs, as claimed, did not realize until much later that these known acts of misdiagnosis and mistreatment were acts of negligence is plainly of no avail to the plaintiffs, as they were long ago on actual notice as to the acts of negligence now sued upon. 8 FLW at 2685.

It may be said that a property owner who sees his property in another's possession does not know for a fact that a conversion may have occurred. But such an owner cannot wait ten years to sue the person who has the property. There are such facts as may arise as a matter of law to place a party on notice of a potential invasion of legal rights. A diagnosis of malignant cancer by a second physician, after a recent prior physician has failed to make the diagnosis, is such a case.

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CONCLUSION

Petitioner respectfully submits that the decision of the District Court of Appeal should be reversed.

Respectfully submitted,

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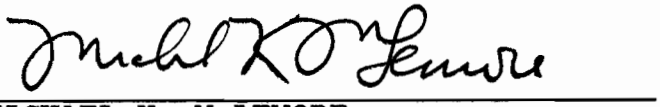
By 
MICHAEL K. McLEMORE
Attorneys for Petitioner

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF has been furnished, by mail, this 6 day of January, 1984, to EDWARD A. PERSE, ESQUIRE, Horton, Perse & Ginsberg, 410 Concord Building, Miami, Florida 33130, Attorneys for Appellans, and CARROLL, HALBERT & MEYERSON, P.A., 505 Coconut Grove Bank Building, 2701 South Bayshore Drive, Miami, Florida 33133.

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