OA 11-8-84

FILED
SID J. WHITE
AUG 13 1984
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

ALAN M. WAGSHUL, ETC., et al,

Petitioners,

vs.

RALPH LIPSHAW, ETC., et al.,

Respondents.
_____/

CASE NO. 64,887

ROBERT F. CULLEN, ETC., et al,

Petitioners,

vs.

RALPH LIPSHAW, ETC., et al.,

Respondents.
_____/

CASE NO. 64,898

DADE COUNTY PUBLIC HEALTH TRUST, ETC., et al.,

Petitioners,

vs.

RALPH LIPSHAW, ETC., et al.,

Respondents.
_____/

CASE NO. 65,004

BRIEF OF AMICUS CURIAE, THE ACADEMY OF FLORIDA TRIAL LAWYERS, IN SUPPORT OF POSITION OF RESPONDENTS

THE ACADEMY OF FLORIDA TRIAL LAWYERS

By: Larry Klein
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

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ISSUE

WHETHER A SEPARATE WRONGFUL DEATH ACTION MAY BE BROUGHT BY A DECEDENT'S SURVIVORS BASED UPON THE ALLEGEDLY NEGLIGENT DIAGNOSIS AND TREATMENT OF THE DECEDENT, WHERE THE DECEDENT'S OWN CLAIM FOR MEDICAL MALPRACTICE WAS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

ARGUMENT

A review of the petitioners' brief demonstrates that they have no authority whatsoever for their position other than the argument that this Court's decision in Variety Childrens Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983), which involves different facts, controls. This Court's statements in that opinion, however, are probably the most compelling arguments which can be made to demonstrate the distinctions between the two cases and the reasons why the opinion of the Third District in the present case should be affirmed. Almost every statement of this Court in Variety is grounded upon the fact that a lawsuit was brought, recovery was made, and the tortfeasor paid. None of those occurred in the present case.

Petitioners have cited no authority from any jurisdiction which would support their position.

Certainly, situations are foreseeable wherein the injury will appear so slight at the time of the accident that the plaintiff will decide it is not worth the trouble to sue. If, five years later, this injury causes a death, there is no logical reason for the decedent's survivors to be deprived of the cause of action which does not accrue, under the wrongful death statute, until death.

There is good reason for the distinction made where suit is brought during the decedent's lifetime and recovery had, because in that lawsuit, plaintiff will theoretically recover all of his damages, including a shortening of his life expectancy.

The Florida cases involving the wrongful death statute which clearly demonstrate the distinction between Variety, supra, and the present case, were cited in Justice Ehrlich's concurring opinion in Variety. Anything we would add to that discussion would be merely repetitious.

The only authority cited by either petitioner in support of its argument is Hudson v. Keene Corporation, 445 So.2d 1151 (Fla. 1st DCA 1984), in which the First District gave no reasons for its decision other than it found no

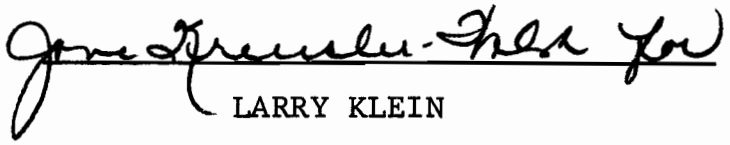
distinction between that case and Variety. That decision is, therefore, not persuasive.

CONCLUSION

The opinion of the Third District in the present case should be approved and the opinion of the First District in Hudson v. Keene, supra, should be disapproved.

THE ACADEMY OF FLORIDA TRIAL LAWYERS

By: LARRY KLEIN
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455



LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished, by mail, this 9th day of August, 1984, to:

THORNTON & HERNDON
720 Biscayne Building
19 West Flagler Street
Miami, FL 33130

GEORGE BUNNELL
P. O. Drawer 22988
Ft. Lauderdale, FL 33335

MOTTLAU & WAKEFIELD
Suite 511, Biscayne Bldg.
19 West Flagler Street
Miami, FL 33130

HORTON PERSE & GINSBERG
410 Concord Bldg.
66 West Flagler Street
Miami, FL 33130

LEE SCHULTE MURPHY & COE
800 Peninsula Federal Bldg.
200 Southeast First Street
Miami, FL 33131

NANCY LITTLE HOFFMAN
HOFFMAN AND BURRIS
644 Southeast Fourth Avenue
Fort Lauderdale, FL 33301

JEANNE HEYWARD
300 Roberts Building
28 West Flagler Street
Miami, FL 33120

LAW OFFICE OF MILLARD GLANCY
450 N. Park Rd, 4th Floor
Hollywood, FL 33021

RATINER & GLINN
60 S.W. 13th Street
Miami, FL 33130

STEPHENS LYNN CHERNAY
KLEIN & ZUCKERMAN
Suite 2400
One Biscayne Tower
Miami, FL 33131

PHILLIP BLACKMON
PYSZKA, KESSLER & ADAMS
2699 South Bayshore Drive
Miami, FL 33133

SAMS, GERSTEIN, WARD, NEWMAN
& BECKHAM, P.A.
707 Concord Building
66 West Flagler Street
Miami, FL 33130

LARRY KLEIN