

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,898

ROBERT F. CULLEN, M.D.)
 and VARIETY CHILDREN'S HOSPITAL,)
)
 Petitioners,)
)
 vs.)
)
)
 RALPH LIPSHAW, individually and)
 as Co-Personal Representative)
 of the Estate of JONATHAN MICHAEL)
 LIPSHAW, deceased; and ALICE)
 LIPSHAW, individually and as)
 Co-Personal Representative of)
 the Estate of JONATHAN MICHAEL)
 LIPSHAW, deceased,)
)
 Respondents.)
)

FILED
 SID J. WHITE
 MAR 26 1984
 CLERK, SUPREME COURT
 By [Signature]
 Chief Deputy Clerk

JURISDICTIONAL BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

POINT I

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH THE DECISION IN VARIETY CHILDREN'S HOSPITAL V. PERKINS.

POINT II

WHETHER ALTHOUGH CONFLICT DOES APPEAR WITH THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN HUDSON V. KEENE CORPORATION, THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO ACCEPT JURISDICTION. ALTERNATIVELY, THE COURT SHOULD, IF IT DETERMINES TO ACCEPT JURISDICTION, CONSIDER THE CASE ON ITS MERITS AND DECIDE ALL POINTS PASSED UPON BY THE DISTRICT COURT OF APPEAL AS COMPLETELY AS THOUGH THE CASE HAD COME ORIGINALLY TO THIS COURT ON APPEAL.

PREFACE

This brief is filed in response to the jurisdictional brief served by Petitioners, ROBERT F. CULLEN, M.D. and VARIETY CHILDREN'S HOSPITAL, in support of their notice to invoke this Court's jurisdiction to review an order of the District Court of Appeal, Third District, rendered January 16, 1984. That order of the District Court of Appeal affirmed in part and reversed in part the decision of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida rendered September 21, 1981, dismissing the Respondents' Complaint on the basis that it was barred by the statute of limitation.

Other Defendants in that action, and Appellees in the proceeding before the District Court of Appeal, have filed separate notices to invoke this Court's jurisdiction over the same order. Petitioners ALAN M. WAGSHUL, M.D. and LOPEZ, STEWART & WAGSHUL, P.A., have filed a separate jurisdictional brief in Case No. 64,887. Petitioners, DADE COUNTY PUBLIC HEALTH TRUST, d/b/a JACKSON MEMORIAL HOSPITAL and DAVID FISHBAIN, M.D., have filed a separate proceeding, Case No. 65,004, and have served therein a notice of their intent to rely upon the jurisdictional brief filed by Petitioners, WAGSHUL, et al., in Case No. 64,887. Respondents have separately responded to WAGSHUL'S brief and filed a motion to adopt that brief in Case No. 65,004 as well.

Petitioners, DADE COUNTY PUBLIC HEALTH TRUST, et al, have furthermore moved this Court to consolidate the three pending proceedings. This Court has indicated that it will consider that motion at the time it determines jurisdiction.

In this brief, the parties will be referred to by name or as Plaintiffs and Defendants. Any emphasis appearing in this brief is that of the writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Plaintiffs wish to clarify the relevant dates in this proceeding. They are as follows:

Medical Mediation Claim filed (against Defendants not parties hereto)..... April 4, 1978.
Mediation Decision..... Jan. 10, 1979.
Complaint filed in Circuit Court against same Defendants..... Jan. 24, 1979.
Complaint amended to include all present Defendants..... Jan. 7, 1981.
JONATHAN LIPSHAW'S death..... Feb. 11, 1981.
Complaint amended to allege wrongful death claim against all Defendants..... Mar. 24, 1981.

Plaintiffs would further point out that it has not yet been determined whether JONATHAN LIPSHAW'S death was the result of the alleged medical malpractice or some wholly unrelated cause. Accordingly, when Plaintiffs amended their complaint to add a claim for wrongful death, they continued to claim damages for JONATHAN'S permanent disability, pain and suffering and financial loss, as an alternative survival action. It was this Third Amended Complaint which the trial court dismissed with prejudice on the basis that it was barred by the applicable statute of limitation.

Thereafter, Plaintiffs filed a Motion For Rehearing and moved for leave to amend the Complaint, filing therewith a proposed Fourth Amended Complaint. The proposed Fourth Amended Complaint alleged

inter alia that it was not until January 8, 1979, during the cross-examination of an expert at the medical mediation hearing, that Plaintiffs were first aware that JONATHAN'S true condition was capable of being diagnosed earlier, and that failure to have done so was a deviation from the standard of care. Affidavits were also filed with the Motion For Rehearing, attesting to the fact that the Plaintiffs had not discovered the Defendants' negligence until January 8, 1979. The trial court denied the Motion For Rehearing and refused to permit amendment of the Complaint.

Finally, the Plaintiffs would point out that the decision of the Third District Court of Appeal, while unanimous as to reversing the trial court's dismissal of the wrongful death claim, contained a lengthy dissent by Judge Ferguson on the question of whether the personal injury survival action was time barred. Judge Ferguson was of the opinion that the Motion For Leave to Amend the Third Amended Complaint should have been granted, and that the proposed Fourth Amended Complaint was sufficient to withstand a Motion to Dismiss, since fact issues remained as to when the Plaintiffs should have discovered that the misdiagnosis resulted from negligence and not some other cause.

ARGUMENT

POINT I

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH THE DECISION IN VARIETY CHILDREN'S HOSPITAL V. PERKINS.

The Defendants claim conflict exists with Perkins v. Variety Children's Hospital, ___ So.2d ___, 8 FLW 501 (Fla. Case No. 62,190, opinion filed Dec. 15, 1983, Motion For Rehearing pending). A close reading of that opinion reveals, however, that there is no conflict. In Perkins, this Court held that a judgment for personal injuries recovered during the lifetime of an injured person bars a subsequent wrongful death action by the personal representative of the deceased where death is the result of the same injuries. It is clear from the opinion of the majority (Justices Alderman, Overton and McDonald) that its decision was based upon the fact that the defendant had already been held accountable for its conduct, and that relitigation of the case by the estate to obtain an additional judgment would not further the paramount purpose of the Florida Wrongful Death Act. While the majority made the statement that "since there was no right of action existing at the time of death, under the statute no wrongful death cause of action survived the decedent", it is clear that the only basis for that holding was the fact that the deceased's action had already been litigated, proved and satisfied, and had nothing to do with any statute of limitation issue.

A central issue in the present case, i.e. whether the Deceased's survivors are barred from bringing an action for his wrongful death

solely on the basis that the Deceased (for whatever reason) did not himself bring a timely action to recover for his injuries while alive, simply was not involved in Perkins. Indeed, Justices Ehrlich and Overton, although concurring in the result reached by the majority, re-emphasized that wrongful death actions are independent causes of action in favor of the statutory beneficiaries, and are not derivative actions. It was the opinion of those two members of the Court that as a matter of policy and equity, the defendant's payment of damages should end his liability. There was no finding by any member of the Court that the survivors could not bring a wrongful death action against the party responsible for the death of their decedent, within two (2) years after his death, simply because suit had not been timely brought during his lifetime.

Finally, Defendants assert that conflict jurisdiction exists because the District Court decision was based on a decision overruled by this Court (i.e. Perkins), citing Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980). It is clear, however, that such jurisdiction exists only where the court relied upon the overruled case for the same proposition of law. Gibson at 522. Such is not the case here, as discussed above.

Defendants have failed to show the requisite express and direct conflict between the decision of the Third District Court of Appeal and the Perkins decision so as to vest this Court with jurisdiction. Decisional conflict does not exist unless the District Court of Appeal "...has announced a decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision of this Court or another court of appeal on the same point, thereby

generating confusion and instability among the precedents." Kyle v. Kyle, 139 So.2d 885 (Fla. 1962).

Again, conflict must be such that if the later decision and the earlier decision were rendered by the same court, the former would have the effect of overruling the latter. Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). If the points of law settled by the two cases are not the same, there is no conflict. Florida Power and Light Company v. Bell, 113 So.2d 697 (Fla. 1959); Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

Plaintiffs respectfully suggest that there is no conflict with Variety Children's Hospital v. Perkins so as to vest this Court with jurisdiction.

ARGUMENT

POINT II

ALTHOUGH CONFLICT DOES APPEAR WITH THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN HUDSON V. KEENE CORPORATION, THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO ACCEPT JURISDICTION. ALTERNATIVELY, THE COURT SHOULD, IF IT DETERMINES TO ACCEPT JURISDICTION, CONSIDER THE CASE ON ITS MERITS AND DECIDE ALL POINTS PASSED UPON BY THE DISTRICT COURT OF APPEAL AS COMPLETELY AS THOUGH THE CASE HAD COME ORIGINALLY TO THIS COURT ON APPEAL.

Defendants assert an express and direct conflict with Hudson v. Keene Corporation, __So.2d__, original opinion at 9 FLW 238, substituted opinion on Motion For Rehearing and Clarification at 9 FLW 536 (Fla. 1st DCA, Case No. AN-453, opinion filed March 8, 1984). In that case, the First District Court of Appeal affirmed summary judgment for the defendants in a wrongful death action based on the fact that the deceased had not timely brought an action for personal injuries prior to his death. The court relied upon this Court's decision in Variety Children's Hospital v. Perkins, supra, and extended that holding to apply where the deceased was unable to sue at the time of his death, not because of res judicata (as was the case in Perkins) but as a result of his failure to timely sue the defendant prior to his death.

Plaintiffs are unable to distinguish the Hudson case from the decision in the present case, and would thus concede that this Court may accept jurisdiction should it choose to do so. We would point out, however, that the Perkins decision is not yet final, since there remains pending a Motion For Rehearing filed by the respondents in that case. Additionally, we believe that even if the Perkins decision is not modified or withdrawn on the Motion For

Rehearing, the Hudson decision is based upon an improper interpretation of Perkins, a position which will be asserted at length in the briefs on the merits should this Court accept jurisdiction.

Finally, in the event this Court does determine to accept jurisdiction, it will then be empowered to and should consider all issues raised before the District Court of Appeal, including the trial court's failure to permit Plaintiffs to further amend their complaint. That issue is inextricably entwined with the issue upon which Defendants claim conflict to exist, i.e. whether the deceased had a cause of action at the time of his death, since we agree with Judge Ferguson that the proposed Fourth Amended Complaint was sufficient to withstand a Motion to Dismiss with respect to the malpractice survival action.

It is well established that once this Court acquires jurisdiction, it should then proceed to consider the entire cause on the merits. Bould v. Touchette, 349 So.2d 1181 (Fla. 1977) at 1183. As this Court stated in Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961), once this Court accepts conflict jurisdiction

...it becomes our duty and responsibility to consider the case on its merits and decide the points passed upon by the District Court which were raised by appropriate assignments of error as completely as though such case had come originally to this court on appeal.

Tyus, supra at 585. Once the record is properly before this Court for review, it may consider any error in the record. Lawrence v. Florida East Coast Railway Company, 346 So.2d 1012 (Fla. 1977).

This Court has the authority to consider issues other than those upon which jurisdiction is based, where those issues have been properly briefed and argued and are dispositive of the case.

Savoie v. State, 422 So.2d 308 (Fla. 1982). That is clearly the situation here, and should this Court accept jurisdiction at all, it should review that aspect of the case as well.

CONCLUSION

Although there is no conflict between the present decision and this Court's decision in Variety Children's Hospital v. Perkins, we agree that conflict appears to exist with the First District's opinion in Hudson v. Keene Corporation.

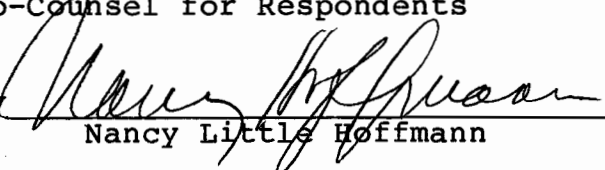
Should this Court determine to accept jurisdiction on that basis, we respectfully urge the Court to follow its long standing precedent and exercise its jurisdiction over the entire cause on its merits.

Respectfully submitted,

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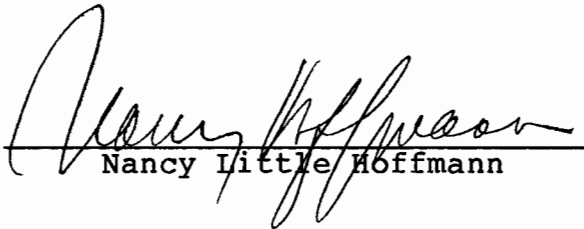
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WE HEREBY CERTIFY that copies of the foregoing were served by mail this 22nd day of March, 1984, upon all counsel listed on the attached service list.

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