IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,887

ALAN M. WAGSHUL, M.D. and LOPEZ, STEWART & WAGSHUL, P.A.,

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.

JURISDICTIONAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

HOFFMANN AND BURRIS, P.A.
644 SOUTHEAST 4TH AVENUE, FORT LAUDERDALE, FL. 33301 • (305) 763-7204

TABLE OF CITATIONS

HOFFMANN AND BURRIS, P.A.
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QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH THE DECISIONS IN ELAND V. AYLWARD, VARIETY CHILDREN'S HOSPITAL V. PERKINS, OR WORRELL V. JOHN F. KENNEDY MEMORIAL HOSPITAL, INC.

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PREFACE

This brief is filed in response to the jurisdictional brief served by Petitioners, ALAN M. WAGSHUL, M.D. and LOPEZ, STEWART & WAGSHUL, P.A., 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 ROBERT F. CULLEN, M.D. and VARIETY CHILDREN'S HOSPITAL have filed a separate jurisdictional brief in Case No. 84,898, to which Respondents will reply separately. 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, LIPSHAW, et al., are filing simultaneously herewith in Case No. 65,004 their motion to adopt the present brief in that case 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.

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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 must correct an error in WAGSHUL'S Statement of the Case and Facts to the effect that the Complaint against those Defendants was not filed until March 24, 1981. The correct dates 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

HOFFMANN AND BURRIS, P.A.
644 SOUTHEAST 4TH AVENUE, FORT LAUDERDALE, FL. 33301 • (305) 763-7204

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.

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ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH THE DECISIONS IN ELAND V. AYLWARD, VARIETY CHILDREN'S HOSPITAL V. PERKINS, OR WORRELL V. JOHN F. KENNEDY MEMORIAL HOSPITAL, INC.

Without presenting any argument or suggesting the reasons therefor, Defendant WAGSHUL asserts that the decision in the present case "seemingly conflicts" with Eland v. Aylward, 373 So.2d 92 (Fla. 2d DCA 1979) and Variety Children's Hospital v. Perkins, __ So.2d__, 8 FLW 501 (Fla. Case No. 62,190, opinion filed Dec. 15, 1983, Motion For Rehearing pending). Although the reasons for conflict are not explained in Defendants' brief, Plaintiffs will nonetheless discuss those cases to show why they do not conflict with the decision in the present case.

In Eland v. Aylward, the plaintiff's decedent died as the result of alleged medical malpractice. Suit was filed more than two (2) years after his death and the trial court entered final summary judgment for the defendant on the basis that Section 95.11(4)(b), Florida Statutes, barred the action. In reversing, the Second District held that the plaintiff should have had the benefit of the extended discovery period and, since the record was devoid of any evidence as to when the plaintiff knew or should have discovered the cause of action, the court remanded for further proceedings. The court observed that the "incident giving rise to the action" was Mr. Eland's death, Id. at 93, and that although the action was filed more than two (2) years thereafter, the statute of limitation would not begin to run until the plaintiff became aware through another

HOFFMANN AND BURRIS, P.A.
644 SOUTHEAST 4TH AVENUE, FORT LAUDERDALE, FL. 33301 • (305) 763-7204

doctor's deposition that the death was the result of the defendant's medical negligence.

In the present case, there was no question as to whether the action was filed within two (2) years of death, as was the case in Eland. Here, the issue was whether the decedent's alleged failure to timely bring a medical malpractice action could act as a bar to his survivors' later bringing a wrongful death action for their damages after his death. Neither the issues nor the facts were the same, and there is thus no express or direct conflict so as to vest this Court with jurisdiction.

The Defendants also claim conflict with Perkins v. Variety Children's Hospital. 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 basis for that holding was the fact that the deceased's action had already been litigated, proved and satisfied.

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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.

The only case which Defendants seriously contend to be conflicting with the decision below, is Worrell v. John F. Kennedy Memorial Hospital, Inc, 384 So.2d 897 (Fla. 4th DCA 1980). It is clear, however, that Worrell does not expressly or directly conflict with the present decision. In Worrell, as in Eland, the plaintiffs did not learn of the medical malpractice which allegedly caused the death of their decedent until more than two years after his death. In dicta, the Fourth District Court of Appeal noted that had the present statute been applicable, the plaintiffs would have been given the advantage of the lengthened discovery period, and their action would not have been barred, since under the present medical

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644 SOUTHEAST 4TH AVENUE, FORT LAUDERDALE, FL. 33301 • (305) 763-7204

malpractice statute death is included in the definition of medical malpractice.

Defendants seem to interpret the Worrell dicta to mean that even where a death has not yet occurred, the statute of limitation must begin when the injury was discovered rather than at death. Plaintiffs suggest that such an interpretation is plain error, and that even the Worrell court could not agree with such a conclusion. Rather, as the Worrell court seems to suggest at page 902 of its opinion, it was the intent of the legislature in bringing death within the definition of medical malpractice to enlarge rather than restrict a plaintiff's time for bringing suit. The amendment was intended to give a plaintiff whose decedent has died as a result of medical malpractice the benefit of the more liberal notice accrual provisions contained in the medical malpractice statute of limitation. Again, the facts and legal issues are completely different from those in the case at bar.

In summary, Defendants have failed to show the requisite express and direct conflict between the decision of the Third District Court of Appeal and any of the other cases cited in their brief, 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

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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 the cases cited by Defendants, so as to vest this Court with jurisdiction, and the petition should be denied.

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CONCLUSION

For the reasons set forth above, this Court should deny the Defendants' petition for review.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that copies of the foregoing were served by mail this 20th day of March, 1984, upon all counsel listed on the attached service list.

By 
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