OA 11-8-84

IN THE SUPREME COURT OF FLORIDA

ALAN M. WAGSHUL, ETC., ET AL., Petitioners, vs. RALPH LIPSHAW, ETC., ET AL., Respondents.	CASE NO. 64,887 DCA NOS. 81-2263 & 82-50
ROBERT F. CULLEN, ETC., ET AL., Petitioners, vs. RALPH LIPSHAW, ETC., ET AL., Respondents.	CASE NO. 64,898 DCA NOS. 81-2263 & 82-50
DADE COUNTY PUBLIC HEALTH TRUST, ETC., ET AL., Petitioners, vs. RALPH LIPSHAW, ETC., ET AL., Respondents.	CASE NO. 65,004 DCA NOS. 81-2263 & 82-50

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

BRIEF OF RESPONDENTS ON THE MERITS

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

Nancy Little Hoffmann, Esq.
HOFFMANN and BURRIS, P.A.
644 Southeast Fourth Avenue
Fort Lauderdale, Florida 33301
763-7204

Co-Counsel for Respondents

TABLE OF CONTENTS

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

TABLE OF CITATIONS

TABLE OF CITATIONS CONTINUED

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

TABLE OF CITATIONS CONTINUED

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

QUESTIONS PRESENTED

POINT I

WHETHER A WRONGFUL DEATH ACTION ACCRUES ONLY UPON DEATH AND IS TIMELY IF BROUGHT WITHIN TWO YEARS THEREAFTER, EVEN WHERE THE DECEDENT'S OWN RIGHT TO SUE WAS TIME BARRED PRIOR TO DEATH.

POINT II

WHETHER THE MEDICAL MALPRACTICE SURVIVAL CLAIM WAS TIME BARRED BY SECTION 95.11(4)(b), FLORIDA STATUTES.

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

PREFACE

Although each of the Petitioners in these consolidated proceedings has presented an accurate statement of the case and facts, each deals only with the matters pertaining to that particular Petitioner. Accordingly, Respondents have included herein a complete history of the case and facts as they relate to the entire proceeding and all parties thereto.

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

STATEMENT OF THE CASE

This is a consolidation of three proceedings instituted to review a decision of the District Court of Appeal, Third District, reported at 442 So.2d 992 (Fla. 3d DCA 1983): ALAN M. WAGSHUL and LOPEZ, STEWART & WAGSHUL, P.A. v. LIPSHAW (Case No. 64,887); ROBERT F. CULLEN and VARIETY CHILDRENS HOSPITAL v. LIPSHAW (Case No. 64,898); and DADE COUNTY PUBLIC HEALTH TRUST d/b/a JACKSON MEMORIAL HOSPITAL and DAVID FISHBAIN, M.D. v. LIPSHAW (Case No. 65,004).

This brief is submitted on behalf of RALPH LIPSHAW etc., et al., Respondents in the consolidated proceedings. In this brief, the parties will be referred to by name or as Plaintiffs and Defendants. Reference to the record will be by "R.". Any emphasis appearing in this brief is that of the writer unless otherwise indicated.

This case commenced by the filing of a medical mediation claim against Drs. Mate and Pinosky (not party to these proceedings) on April 4, 1978 (R.341). The mediation claim proceeded through discovery, and a final hearing was held before the Honorable John Gale and a full mediation panel on January 8, 1979 (Vol. IX, R.61-171). A decision was rendered in favor of Drs. Mate and Pinosky on January 10, 1979 (R.1229).

On January 24, 1979, RALPH LIPSHAW, as JONATHAN'S guardian,[1] filed a claim in Circuit Court against Dr. Mate (R.1-4). Subsequently, he dismissed his counsel and retained his present trial counsel. On January 7, 1981, he amended his complaint to include all of the present Defendants (R.89).

---

[1] JONATHAN was at this time physically incompetent and his father had been appointed as the guardian of his person and property (R.242).

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

On February 11, 1981, JONATHAN LIPSHAW died. Since it was not determined whether the death was the result of the alleged medical malpractice or some wholly unrelated cause, Plaintiffs amended their complaint to add a claim for wrongful death and continued to claim damages for JONATHAN'S permanent disability, pain and suffering and financial loss, as a survival action (R.149).

The various Defendants moved to dismiss the third amended complaint on the grounds that Plaintiffs' claim was barred by the applicable statute of limitation (R.194,195-196,197-198). The trial court entered its order of final judgment in favor of the Defendants who are parties hereto (R.1230), dismissing the action with prejudice as to all counts on the grounds that it was barred by the applicable statute of limitation.

The Plaintiffs filed a motion for rehearing (R.204) which was subsequently amended (R.239) and also moved for leave to amend the complaint, filing therewith a proposed fourth amended complaint (R.208-238). After considering memoranda filed by all parties (R.239-330), the trial court entered its order on September 21, 1981, denying the motion for rehearing (R.334).

On appeal, the Third District Court of Appeal reversed in part and affirmed in part, holding unanimously that the wrongful death claim was improperly dismissed. In a 2 to 1 decision, Judge Ferguson dissenting, the court also held that the survival action was time barred. Lipshaw v. Pinosky, 442 So.2d 992 (Fla. 3d DCA 1983). Petitioners have sought review of that decision based upon jurisdictional conflict.

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

STATEMENT OF THE FACTS

The facts as alleged in the Plaintiffs' third amended complaint (R.149-173) included the following:

On November 19, 1974, JONATHAN LIPSHAW came under the care of Drs. Pinosky, Ibanez and Ludwig at Highland Park Hospital. He was treated as a psychiatric patient.

On January 1, 1975, JONATHAN was discharged from the care of those Defendants and came under the care of Dr. Mate. Dr. Mate cared for JONATHAN until February, 1977. During that time, JONATHAN was again treated as a psychiatric patient.

After May 20, 1975, and at various times until February 25, 1977, JONATHAN LIPSHAW was treated by Defendants CULLEN; VARIETY CHILDRENS HOSPITAL; Pinosky; WAGSHUL; WAGSHUL, P.A.; JACKSON MEMORIAL HOSPITAL; FISHBAIN and other as yet unserved agents of JACKSON MEMORIAL HOSPITAL.

On February 25, 1977, JONATHAN'S true condition was diagnosed as being Wilson's Disease, a hereditary metabolic disorder. The complaint alleged that "at that time the Plaintiffs first discovered that all of the Defendants improperly diagnosed the condition of JONATHAN LIPSHAW and first discovered that all of the Defendants failed to diagnose the true condition of JONATHAN LIPSHAW (R.154)."

The complaint alleged that the various Defendants were negligent in failing to properly diagnose and treat JONATHAN'S condition, and alleged that JONATHAN suffered a permanent disability, suffered in mind and body, endured a deterioration of his physical and mental well being, and lost earnings and earning capacity. The complaint

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

further sought damages on behalf of JONATHAN'S parents for the payment of medical and hospital bills, as well as the loss of their son's services, care and companionship. Alternatively, the third amended complaint alleged that JONATHAN died as a result of the unskilled medical practice of the Defendants, and sought damages on behalf of his parents individually and as personal representatives of the estate.

Additional facts, alleged in the proposed fourth amended complaint, included the following:

> (28) Neither JONATHAN LIPSHAW nor RALPH and ALICE LIPSHAW, the parents and Co-Personal Representatives of the Estate of JONATHAN LIPSHAW, were on notice as to either the negligence or any consequences caused thereby and had no knowledge of either fact because of concealment by one or more of the Defendants herein so as to prevent inquiry or elude investigation or otherwise mislead the Plaintiffs relating to the existence of any cause of action.
>
> (29) One or more of the Defendants herein failed to reveal to Plaintiffs facts known to or available to such physicians relating to such physicians' failure to examine for and detect certain signs and symptoms of JONATHAN LIPSHAW'S true condition by which Plaintiffs could have reasonably made inquiry concerning a possible cause of action.
>
> (30) On December 20, 1977, JONATHAN LIPSHAW was adjudicated incompetent by the Hon. Sidney Weaver, for which a copy of the Letters of Guardianship have been attached hereto as Exhibit "A" and incorporated by reference.
>
> (31) On January 8, 1979, during the cross-examination of Eugene Schiff, M.D., at the Medical Mediation hearing in the case of Lipshaw vs. Mate, etc., et al., RALPH LIPSHAW, then Guardian for JONATHAN LIPSHAW, incompetent, was first given notice and first had knowledge that the true condition of JONATHAN LIPSHAW was capable of being diagnosed earlier by the Defendants herein other than Mate, etc., and first knew that the failure to have made such diagnosis prior to February 25, 1977, was a deviation from the standard of care.

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

(32) On or about February 11, 1981, JONATHAN LIPSHAW died from causes yet unknown to Plaintiffs as evidenced by the Death Certificate and Affidavit of Defendant, WAGSHUL, attached hereto as Exhibits "B" and "C" and incorporated by reference.

Additionally, affidavits filed in support of the Plaintiffs' motion for rehearing indicated that although they first realized on February 25, 1977, that all of their son's previous physicians had not correctly diagnosed JONATHAN'S true condition, it was not until January 8, 1979, during the cross-examination of one of the expert medical witnesses in the mediation proceeding that the Plaintiffs realized that the failure of DRS. CULLEN and WAGSHUL to diagnose JONATHAN'S true condition was negligent. The affidavits further stated that it was not until still later that the Plaintiffs realized that each physician who treated JONATHAN between December of 1974 and February of 1977 had been negligent in failing to diagnose his true condition (R.243,245).

As noted above in the statement of the case, Plaintiffs filed their amended complaint for JONATHAN'S personal injuries on January 7, 1981, against the Defendants who are Petitioners herein. On March 24, 1981, 41 days after JONATHAN'S death, the Plaintiffs amended their complaint to include the wrongful death claim.

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

ARGUMENT

POINT I

A WRONGFUL DEATH ACTION ACCRUES ONLY UPON DEATH AND IS TIMELY IF BROUGHT WITHIN TWO YEARS THEREAFTER, EVEN WHERE THE DECEDENT'S OWN RIGHT TO SUE WAS TIME BARRED PRIOR TO DEATH.

Survivors' right to sue accrues only at death.

Where a death is caused by an act of medical malpractice or any other form of negligence, the survivors are granted a right of action against the responsible party by virtue of the wrongful death act (Section 768.16-27, Florida Statutes). Section 95.11(4)(d), Florida Statutes, provides a two-year limitation period for such actions. The courts have consistently held that the two-year statute applicable to wrongful death cases commences to run at the time of death. St. Francis Hospital, Inc. v. Thompson, 159 Fla. 453, 31 So.2d 710 (1947); Fletcher v. Dozier, 314 So.2d 241 (Fla. 3d DCA 1975). These decisions applied to cases where the death was caused by medical malpractice, as well as any other wrongful cause. Fletcher v. Dozier, supra.

Prior to the most recent amendments to Chapter 95, although the medical malpractice statute of limitation provided that the cause of action would not be deemed to have accrued until the plaintiff discovered or should have discovered his injury (Section 95.11(6), Florida Statutes), that "notice accrual" provision was applied only to medical malpractice cases resulting in injury, and not those resulting in death. Thus, if the alleged malpractice was not discovered until more than two years after the patient's death, no action could be brought.

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

In 1975, however, the legislature amended Chapter 95 and included within Section 95.11(4)(b) a definition of medical malpractice which included a claim for death as a result of treatment or diagnosis by any health care provider. Thus, there arose a body of law which held that in cases where medical malpractice results in death, the medical malpractice statute of limitation applies and the personal representative is entitled to the notice accrual provisions thereof. Worrell v. John F. Kennedy Memorial Hospital, 384 So.2d 897 (Fla. 4th DCA 1980); Glass v. Camara, 369 So.2d 625 (Fla. 1st DCA 1979). As the Glass court pointed out, the amendment extended the benefit of a postponed limitation period to all persons having an undiscovered cause of action for medical malpractice, whether it resulted in injury or death. Glass v. Camara, supra at 626-627.

Taking what we believe to be an improperly broad view of the language in those cases, the Defendants have argued that in all cases where medical malpractice results in death, the statute begins to run on the date of discovery of malpractice, even though death has not yet occurred. That contention is unsupported by any case law and is patently unreasonable, since it would operate to bar a wrongful death action prior to the death itself.

The same argument was properly rejected by the Fifth District Court of Appeal for that precise reason in Bruce v. Byer, 423 So.2d 413 (Fla. 5th DCA 1982). In Bruce, the patient discovered the alleged negligence on March 20, 1978 and filed suit within two years thereafter. When he died on March 28, 1981, his personal representative amended the complaint to plead a wrongful death action as an alternative to the existing survival action. At trial,

the survival action was withdrawn, and the Defendant then claimed that the wrongful death action was barred since it had been commenced more than two years after discovery of the medical negligence. In rejecting that claim, the court concluded:

> Based on the foregoing, it appears that the two-year period for wrongful death actions based on medical malpractice commences upon death, and that the 1975 legislation which included in Section 95.11(4)(b) actions based on death from medical malpractice postpones the running of the period on undiscovered causes of action for wrongful death by medical malpractice.

Bruce v. Byer, supra, at 415.

In the present case, the Third District Court of Appeal concluded that the wrongful death cause of action "could not and did not accrue" until the date of JONATHAN LIPSHAW'S death. The court observed:

> At that point both the alleged medical negligence (i.e., the negligent misdiagnosis) and the resultant death of the deceased were in fact known to the Plaintiffs.

Lipshaw v. Pinosky, 442 So.2d 996, Fla. 3d DCA 1983) at 994. The court pointed out the simple fact that the wrongful death claim could not have accrued when the alleged negligent misdiagnosis was first discovered, since "plainly, no wrongful death claim was viable at that time because JONATHAN LIPSHAW was still alive." Id. at 994.

Plaintiffs believe that the legislature's inclusion of death within the definition of medical malpractice was intended to achieve the equitable result of equalizing the position of one whose decedent had died as a result of medical malpractice, as opposed to suffering a non-fatal injury. A plaintiff in either case is now no longer barred from instituting an action until two years after his

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

discovery that the injury or death was, in fact, caused by the negligence of the health care provider. Plaintiffs submit that the legislature never intended to create a situation which would bar a personal representative's right to bring a wrongful death action for the survivors' benefit even before the patient died. In any event, where there is reasonable doubt as to the legislature's intention in amending a statute of limitation, the benefit of such doubt should be given to the Plaintiff. Haney v. Holmes, 364 So.2d 81 (Fla. 2d DCA 1978).

Indeed, any construction of Section 95.11(4)(b) which would bar a cause of action for wrongful death before it arose would clearly run afoul of Article I, Section 21 of the Florida Constitution, as interpreted by Kluger v. White, 281 So.2d 1 (Fla. 1973) and its progeny. This is so because it would abolish the survivors' right to recover for their decedent's wrongful death and would provide no alternative form of redress.

In Bruce v. Byer, supra, the trial court recognized that giving Section 95.11(4)(b) a construction such as that sought by Defendants here, i.e. barring a wrongful death claim prior to the death itself, would be an unconstitutional application of that statute in a wrongful death action. Thus, the trial court held Section 95.11(4)(b) unconstitutional and instead applied Section 95.11(4)(d), the subsection pertaining to wrongful death actions in general. On appeal, the Fifth District Court of Appeal disagreed with that construction of the statute and avoided the constitutional problem by construing Section 95.11(4)(b) as accruing upon death or the discovery of the cause of action, whichever occurred later.

We believe this interpretation of Section 95.11(4)(b) to be the proper one, and indeed the only one which would uphold the statute's constitutionality. To hold that a personal representative's right of action is barred before it arose would, under this Court's decisions in Overland Construction Company, Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979); Battilla v. Allis Chalmers Manufacturing Company, 392 So.2d 874 (Fla. 1980) and Diamond v. E. R. Squibb & Sons, Inc., 397 So.2d 671 (Fla. 1981), require that the statute be invalidated. Since the Court is to avoid an interpretation which would invalidate a statute, Smith v. Ayres, 174 So.2d 727 (Fla. 1965), we respectfully urge this Court to hold that the statute of limitation in medical malpractice cases resulting in death begins to run on the date of death, or the date the cause of action is discovered, whichever occurs later. This holding would support the Third District Court of Appeal's holding in the present case, and would be in line with the decisions of the Fifth District Court of Appeal in Bruce v. Byer; the Third District Court of Appeal in Stella v. Ash, 425 So.2d 122 (Fla. 3d DCA 1982); and the Second District Court of Appeal's decision in Eland v. Aylward, 373 So.2d 92 (Fla. 2d DCA 1979) [holding that the "incident giving rise to the action" was the patient's death].

Survivors' right to sue not barred by decedent's failure to bring a timely action for his own damages.

The major thrust of the Defendants' argument before this Court, however, is not the date upon which the statute commenced, but rather the argument that the survivors' right to bring a wrongful death action depended upon the decedent's ability to sue just prior

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

to death. This argument is based upon the language of Section 768.19, Florida Statutes, which provides:

> When the death of a person is caused by the wrongful act...of any person...and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person...that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act....

Assuming arguendo that JONATHAN LIPSHAW'S right to bring a medical malpractice action expired prior to his death,[2] his survivors are not thereby barred from bringing a wrongful death action for the damages they sustained in their own right. It has long been held in Florida that a right of action for wrongful death is separate, independent and distinct from the right of action of an injured party who later dies. In Ake v. Birnbaum, 156 Fla. 735, 25 So. 213 (1945), this Court made it clear that when a party suffers injury which ultimately causes death, two separate rights have been violated. One is the injured party's right to be secure in person and property, and the other is the right which his family had to the companionship, services or support of the decedent, coupled with the expectancy of a participation in the decedent's estate. The Court emphasized that two separate and distinct rights or interests are thus infringed upon by the tortfeasor, resulting in damage to such separate rights and interests. Id. at 220.

In Shiver v. Sessions, 80 So.2d 905 (Fla. 1955), similar language in Florida's earlier version of the wrongful death act was interpreted by this Court as not barring a wrongful death action by

---

[2] We contend that the action brought during JONATHAN'S lifetime was timely, for the reasons set forth in Point II infra. Should this Court agree, then the question presented here will be moot.

surviving minor children against the estate of their stepfather who shot and killed his wife and then killed himself. In that case, the defendant urged (as do the Defendants here) that there was no right of action for the wrongful death of the wife inasmuch as at the time of her death she had no right of action against her husband because of interspousal immunity. Although the trial court adopted that interpretation, this Court reversed, holding that it was the tortious injury to the wife that created in the statutory beneficiaries a right of action for her wrongful death -- not the ability of decedent to sue for that tort at the time of her death. The Court held that the right of action of the named beneficiaries to recover for the damages suffered by them was separate, distinct and independent from that which might have been sued upon by the injured person had she lived, and was not dependent upon the decedent's ability to sue at the time of her death. In so holding, the Court stated

> ...it is clear that the legislature intended that the right of action created by the wrongful death act in favor of the named beneficiaries must be predicated upon operative facts which would have constituted a tort against their decedent under established legal principles -- in other words, they must state a 'cause of action' for tort against the tortfeasor, subject to the defenses of contributory negligence and the like which the tortfeasor could have pleaded in a suit against him by the decedent during his or her lifetime, and this Court has so held in many cases. But we think it is unreasonable to imply that the legislature intended to bar the 'right of action' created by the act on account of a disability to sue which is personal to a party having an entirely separate and distinct 'right of action' and which does not inhere in the tort -- or 'cause of action' -- upon which each separate right is based.

Shiver v. Sessions, supra at 908.

In the present proceeding, Defendants are relying heavily upon this Court's decision in Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983), which they claim to be controlling. Indeed, Defendant WAGSHUL even goes so far as to suggest that this Court found that "the right of action for death was not independent of the right of action for personal injuries." (WAGSHUL brief at page 5). That is clearly an overbroad reading of Perkins. Rather, Perkins stands for the proposition 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 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. It had nothing to do with any statute of limitation issue.

The 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 he did not himself bring a timely action during his lifetime, simply was not involved in Perkins. Indeed, Justices Ehrlich and Overton, although concurring in the result

by the majority, reemphasized 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 years after his death, simply because suit had not been timely brought during his lifetime.

The cases cited by the majority in Perkins do not lend themselves to the interpretation advanced by Defendants, i.e. that Perkins bars a wrongful death action whenever a deceased, for whatever reason, did not himself bring a timely action to recover for his injuries while alive.

In Duval v. Hunt, 34 Fla. 85, 15 So. 876 (1894), this Court simply held that the survivors of a railroad worker could not bring a wrongful death action, where the worker's own comparative negligence would have prevented him from suing while alive. The broad language quoted from Duval in the Defendants' briefs (DADE COUNTY PUBLIC HEALTH TRUST brief at page 8; CULLEN brief at page 7) was simply dicta and not controlling law. In any event, this Court has made it clear in Dressler v. Tubbs, 435 So.2d 792 (Fla. 1983) that this is not the law, since it held that a wrongful death action would not be barred simply because the deceased was unable to sue during her lifetime because of the doctrine of interspousal immunity. Dressler, supra at 793. It is clear, then, that there

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

is no "across the board" bar that would apply to all cases. The contention by Defendant DADE COUNTY PUBLIC HEALTH TRUST at page 8 of its brief that this Court intended to prohibit the prosecution of a wrongful death action in any circumstance where the decedent would not have been able to maintain a personal injury suit, simply ignores the reality of Dressler v. Tubbs, which compels a different conclusion.

In Collins v. Hall, 117 Fla. 282, 157 So. 646 (1934), also cited in Perkins, the widow was barred from bringing a wrongful death action against a defendant who had been exonerated in a personal injury action during her husband's lifetime. Res judicata thus clearly applied in Collins, but has no relevance to the present case.

In Warren v. Cohen, 363 So.2d 129 (Fla. 3d DCA 1978), cert. den'd. 373 So.2d 462 (Fla. 1979), the other case cited in Perkins, the Third District Court of Appeal held that a wrongful death action could not be maintained where the deceased had settled his cause of action prior to his death. That court made it quite clear that a survivor's right of action was separate and distinct from the deceased's right of action during his or her lifetime, and that its determination to bar the wrongful death action in this case was based upon the public policy favoring the settlement of lawsuits and the express language of the release agreement involved. Again, that policy would be wholly inapplicable here.

The other case besides Perkins which the Defendants have relied upon for establishing conflict jurisdiction is Hudson v. Keene Corporation, 445 So.2d 1151 (Fla. 1st DCA 1984). In that case, Mr.

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

Hudson was diagnosed as having asbestosis in March 1977, and died in July 1981. Several months thereafter a wrongful death claim was filed, but dismissed by the trial court on the basis that the four year personal injury limitation period had run prior to death. The First District Court of Appeal affirmed, based on what we believe is an overbroad and unwarranted extension of this Court's opinion in Perkins, supra. Although recognizing that this Court's decision in Perkins was based upon principles of res judicata, the First District observed that both res judicata and the running of the statute of limitation are "waivable affirmative defenses", and held that:

> [b]ecause of that decision we are bound to conclude the circuit judge in the present case properly granted appellees' motion for summary judgment, because under the Supreme Court interpretation of the statutory language in Perkins, Ela Hudson would not have been able to maintain an action against appellees if death had not ensued due to the running of the limitations period with regard to the personal injury suit.

Id. at 1153.

We respectfully suggest that the Hudson court erred in barring the wrongful death action in that case, and that the correct approach was that of the Third District Court of Appeal in Lipshaw. An examination of this Court's opinions makes it clear that the operative language of Section 768.19, Florida Statutes, applies to bar a wrongful death action only in situations where the deceased no longer had a "cause of action" (as opposed to a "right of action", or a right to assert his cause of action). Thus, in Perkins the "cause of action" was extinguished because it was merged into the judgment recovered by Anthony Perkins for his death. In Duval,

there was no cause of action because of the deceased's own comparative negligence. In Collins there was no cause of action because the defendant had been found not guilty.

It is equally clear that where a deceased had a cause of action at his death, but did not have the right to enforce it, his survivors are not barred from bringing a wrongful death claim. In Shiver v. Sessions and Dressler v. Tubbs, the deceased had no right to sue because of interspousal immunity. Nonetheless, the surviving family members were permitted to sue for wrongful death, since the cause of action against the guilty party remained.

The distinction between "cause of action" and "right of action" was made long ago by this Court in Shiver v. Sessions, as discussed above. That distinction is clearly applicable here, where JONATHAN LIPSHAW'S "cause of action" against his physicians gives rise to his family's "right of action" to sue them for wrongful death, even if JONATHAN'S own "right of action" may have lapsed prior to his death. Dean Prosser has pointed out that language such as that contained in Section 768.19

> ...obviously is intended at least to prevent recovery for death where the decedent could never at any time have maintained an action, as, for example, where there was simply no tortious conduct toward him....

Law of Torts (Fourth Edition 1971), page 910. Prosser goes on to observe that

> It is not at all clear, however, that such provisions of the death acts were ever intended to prevent a recovery where the deceased once had a cause of action, but it has terminated before his death. The more reasonable interpretation would seem to be that they are directed at the necessity of some original tort on the part of the defendant, under circumstances giving rise to liability in the first instance, rather than to subsequent changes in the situation affecting only the interest of the decedent....

Id. at 911. As to the defense of statute of limitation, Prosser points out that the considerable majority of the courts have held that the statute runs against the death action only from the date of death, even though at that time the decedent's own action would have been barred while he was living. Id. at 912, citing the following cases: DeHart v. Ohio Fuel Gas Company, 84 Ohio App. 62, 85 N.E.2d 586 (1948) [death after twelve years]; Western Union Telegraph Company v. Preston, 254 F. 229 (3rd Cir. 1918), cert. den'd. 248 U.S. 585 [death after ten years]; Smith v. McComb Infirmary Association, 196 So.2d 91 (Miss. 1967); and Lawlor v. Cloverleaf Memorial Park, Inc., 101 N.J. Supp. 134, 243 A.2d 293 (1968).

We believe this Court has made it quite clear that the wrongful death act provides a deceased's survivors a right on their own behalf to recover the separate and distinct damages suffered by them as a result of the wrongful death. This Court has reiterated that view in Dressler v. Tubbs, reaffirming in that decision the continued vitality of Shiver v. Sessions, despite intervening amendments to the wrongful death act. Indeed, this Court quoted from its opinion in Shiver, pointing out that the wrongful death act creates

> ...an entirely new cause of action, in an entirely new right, for the discovery of damages suffered by [the named beneficiaries], not the decedent, as a consequence of the wrongful invasion of their legal right by the tortfeasor. This right is separate, distinct and independent from that which might have been sued upon by the injured person, had he or she lived.

Id. at 907 (citations omitted) (emphasis in original).

Barring of the Plaintiffs' wrongful death act in the present case merely because of JONATHAN'S alleged failure to bring a timely

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

malpractice action prior to his death would run completely counter to this Court's interpretation of the wrongful death act in Shiver v. Sessions, and Dressler v. Tubbs. An affirmance of the Third District's decision would, however, be entirely consistent with those cases and may be harmonized with Perkins as well. Indeed, the special concurring opinion of Justices Ehrlich and Overton emphasized the separate and distinct nature of the wrongful death action, and pointed out that such actions are not considered derivative. Although the survivors in Perkins were barred from pursuing a wrongful death claim, that determination was based upon policy considerations of res judicata and double recovery. The court was of the opinion that a defendant's payment of damages to the injured party should end his liability to the survivors as well.

Such considerations do not appear here. The legislature has given to JONATHAN LIPSHAW'S survivors a right of action in their own name to recover their damages sustained as a result of the Defendants' alleged medical malpractice. The reasons for barring that right found in Perkins, Duval, or Collins do not exist here, and the Third District Court of Appeal was eminently correct in holding that the Plaintiffs could proceed upon their claim. Accordingly, we respectfully request this Court to approve the decision below and to hold that Plaintiffs' have the right to pursue their wrongful death claim.

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

POINT II

THE MEDICAL MALPRACTICE SURVIVAL CLAIM WAS NOT TIME BARRED BY SECTION 95.11(4)(b), FLORIDA STATUTES.

The Third Amended Complaint, which was dismissed with prejudice by the trial court, included alternative causes of action under Sections 46.021, Florida Statutes (the survival statute) and 768.16-768.27, Florida Statutes (the wrongful death act). Since it is a factual question as to whether JONATHAN'S death resulted from the alleged medical malpractice or some wholly unrelated cause, the claims were filed in alternative form until such time as a fact finder determines the cause of death, thereby determining whether the action is properly brought as a survival or a wrongful death action. Smith v. Lusk, 356 So.2d 1309 (Fla. 2d DCA 1978).

Since this Court has acquired jurisdiction over the case, the entire cause is before the Court, including all points passed upon by the District Court of Appeal. Bould v. Touchette, 349 So.2d 1181 (Fla. 1977) at 1183; Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961) at 585; Lawrence v. Florida East Coast Railway Company, 346 So.2d 1012 (Fla. 1977); Savoie v. State, 422 So.2d 308 (Fla. 1982). Thus, the decision of the District Court of Appeal affirming a dismissal of the survival action is properly before this Court. We would respectfully urge this Court to adopt the dissenting opinion of Judge Ferguson on that issue.

Judge Ferguson concluded that the trial court erred in not granting a motion for rehearing, since the amended motion and attached affidavits contained allegations and sworn statements which, if included in the complaint, would state a cause of action

which was not time-barred. He noted that although Plaintiffs alleged that they knew of a misdiagnosis in February 1977, it was not conclusively established that the misdiagnosis gave rise to the cause of action. Instead, he observed:

> The incident giving rise to the cause of action here is not the medical misdiagnosis discovered on February 25, 1977, but is, instead, the negligent misdiagnosis which, as alleged in the proposed fourth amended complaint, was not discovered until January 8, 1979.

Lipshaw, supra at 995 (dissenting opinion of Judge Ferguson).

We believe Judge Ferguson's view to be the correct one for a number of reasons. Plaintiffs made it clear in their motions for rehearing, affidavits and proposed fourth amended complaint that it was not until January 8, 1979 that they knew that JONATHAN'S condition was even diagnosable at some earlier time, or that physicians applying the requisite skill and care could have diagnosed it at a time when recovery was possible. Plaintiffs swore in their affidavits and proposed fourth amended complaint that they did not realize that such negligence was committed by Defendants WAGSHUL and CULLEN until they heard expert testimony to that effect on January 8, 1979, and that they later realized that the failure of all Defendants to recognize the Wilson's disease was negligent.

As Judge Ferguson pointed out in his dissent, the reviewing court may look to a proposed amended complaint to determine whether any deficiency in the prior complaint may be cured by amendment. DeMaris v. Asti, 426 So.2d 1153 (Fla. 3d DCA 1983). Thus, even if the third amended complaint did not sufficiently raise a question of fact as to the date of discovery, the more complete allegations contained in the proposed fourth amended complaint, as well as the

affidavits accompanying the amended motion for rehearing, clearly raise that issue.

Where, as here, the alleged negligence consists of an omission or failure to diagnose, it is overly simplistic (and inaccurate) to say that the discovery of the "cause of action" or of the "incident" of medical malpractice occurs when it is learned that a diagnosis was incorrect. Rather, a party must have some reason to believe that the misdiagnosis was negligent, and further, that he has or will suffer some harm thereby for which he has a right of redress. The term "incident" encompasses the injury sustained by the patient, and is not "discovered" within the meaning of Sec. 95.11(4)(b) until he becomes aware that the treatment or diagnosis was negligent, and that he was harmed thereby. Florida Patient's Compensation Fund v. Tillman, ___So.2d___, 9 FLW 1547 (Fla. 4th DCA, Case No. 82-1197; opinion filed July 13, 1984); Phillips v. Mease Hospital and Clinic, 445 So.2d 1058 (Fla. 2d DCA 1984), at 1061.

In Johnson v. Mullee, 385 So.2d 1038 (Fla. 1st DCA 1980), the court reversed a ruling that a cancer patient's action was time barred, observing the following:

> It was in February 1975 that she first learned that the cancer had metastasized beyond the surgically removed portions. From the evidence presented, there is no basis on which to conclude that her cause of action should have been discovered with due diligence prior to that time. Although she had a basis for belief that appellee doctor was negligent in not discovering her cancer, the evidence is to the effect that, had he discovered the cancer at the time, she would have been required to undergo the same radical mastectomy, which she later had. At the time the radical mastectomy was performed, she had no cause of action against appellee doctor because there was no evidence that his alleged negligence had resulted in any harm to her. It was only in

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

> February 1975, when the cancer appeared in other parts of her body, that she discovered her cause of action. It was only then that she could have known she had been harmed by the alleged negligent diagnosis.

Id. at 1040.

A plaintiff's awareness of an improper diagnosis cannot, therefore, be considered to commence the running of the limitation period until he has also been aware that he has suffered injury therefrom. Here, Plaintiffs alleged by affidavit that it was not until January 8, 1979 that they were aware that JONATHAN'S condition could have been properly diagnosed earlier than February 25, 1977, and that the Defendants were negligent in failing to do so. It is certainly a question of fact as to when Plaintiffs discovered that JONATHAN'S disability was preventable by early diagnosis, and thereby discovered that there has indeed been an incident of medical malpractice.

Questions of fact remain as to both the discovery of the incident of medical malpractice, so as to commence running of the two year portion of the statute, and also as to when the "incident" occurred, for purposes of applying the four-year statute of repose. Although the third amended complaint recites the dates on which treatment by each of the Defendants was begun, that date does not (as the Defendants appear to suggest in their briefs) necessarily represent the date on which the misdiagnosis occurred. Again, that is a question of fact, and as to those Defendants who still had JONATHAN under their care in January of 1977 (four years prior to institution of this action), it simply cannot be said as a matter of law that his claim would be barred by the four-year statute.

Dismissal would be proper only if Defendants could show conclusively on the face of the complaint that it was time barred. Wimpey v. Sanchez, 386 So.2d 1241 (Fla. 3d DCA 1980), quashed on other grounds, 409 So.2d 20 (Fla. 1982). We respectfully submit that it was error to dismiss the survival action since the proposed fourth amended complaint did indeed demonstrate that questions of fact remain as to the commencement of the statute of limitation, and that the survival action should accordingly be reinstated by this Court.

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

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request this Court to approve the holding of the District Court of Appeal, Third District, that their wrongful death action was not barred by Sec. 95.11(4)(b), Florida Statutes.

We would further suggest to the Court that a medical malpractice claim was timely asserted by the decedent prior to his death, and that the Plaintiffs' survival action should accordingly be reinstated.

Respectfully submitted,

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

HOFFMANN and BURRIS, P.A.
644 Southeast Fourth Avenue
Fort Lauderdale, Florida 33301
763-7204

Co-Counsel for Respondents

By _____
Nancy Little Hoffmann

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served by mail this 10th day of August, 1984, upon all counsel listed on the attached service list.

By 
Nancy Little Hoffmann

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

SERVICE LIST

George E. Bunnell, Esq.
Atty. for DR. MATE
P. O. Drawer 22988
Ft. Lauderdale, FL 33335

LAW OFFICE OF MILLARD C. GLANCY
Atty. for DR. CULLEN & VARIETY
450 North Park Road-4th Floor
Hollywood, FL. 33021

Jeanne Heyward, Esq.
Atty. for DR. CULLEN & VARIETY
300 Roberts Bldg.
28 W. Flagler St.
Miami, FL 33130

H. Dane Mottlau, Esq.
MOTTLAU AND WAKEFIELD, P.A.
Attys. for PCF
Suite 511, Biscayne Bldg.
19 W. Flagler St.
Miami, FL 33130

John W. Thornton, Esq.
THORNTON & HERNDON
Attys. for WAGSHUL
720 Biscayne Bldg.
19 W. Flagler St.
Miami, FL 33130

Edwin C. Ratiner, Esq.
RATINER & GLINN, P.A.
Attys. for WAGSHUL
60 S.W. 13th St.
Miami, FL 33130

Arnold Ginsberg, Esq.
HORTON, PERSE & GINSBERG
Attys. for WAGSHUL AND LOPEZ/STEWART & WAGSHUL, P.A.
66 West Flagler St.
410 Concord Bldg.
Miami, FL 33130

Robert M. Klein, Esq.
STEPHENS, LYNN, CHERNAY, KLEIN & ZUCKERMAN, P.A.
Attys. for JMH and doctors at JMH
Suite 2400, One Biscayne Tower
Miami, FL 33131

SERVICE LIST CONTINUED

Jack M. Coe, Esq.
LEE SCHULTE, MURPHY AND COE, P.A.
Attys. for PINOSKY and IBANEZ
800 Peninsula Federal Bldg.
200 S.E. First St.
Miami, FL 33131

Phillip Blackmon, Esq.
PZSZKA, KESSLER & ADAMS
Attys. for NATIONAL MEDICAL CARE OF MIAMI, INC.
d/b/a HIGHLAND PARK HOSPITAL
2699 S. Bayshore Dr.
Miami, FL 33133