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

SUPPLEMENTAL BRIEF OF RESPONDENTS

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QUESTION PRESENTED

WHETHER THIS COURT'S DECISION IN ASH V. STELLA SUPPORTS THE CONCLUSION THAT THE PRESENT ACTION WAS NOT TIME BARRED.

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PREFACE

This brief is submitted on behalf of 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, pursuant to this Court's order of November 2, 1984.

In this brief, as in Respondents' briefs previously filed with this Court, 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.

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ARGUMENT

THIS COURT'S DECISION IN ASH V. STELLA SUPPORTS THE CONCLUSION THAT THE PRESENT ACTION WAS NOT TIME BARRED.

Plaintiffs have contended throughout this proceeding that their right to bring a wrongful death action was a separate right which accrued only upon death of the decedent, irrespective of whether the underlying claim was in medical malpractice, or some other form of negligence. This Court's decision in Ash v. Stella, 9 FLW 434 (Fla. S.Ct. Case No. 63,347, opinion filed October 11, 1984) has, however, declared that where a wrongful death action is based upon an act of medical malpractice, the survivors are precluded from bringing a wrongful death action more than two years after discovery of the incident of medical malpractice, irrespective of the date of death. Thus Ash, if applied to the present case, is directly contrary to Plaintiffs' position with respect to the accrual of the wrongful death claim.

If, however, the medical malpractice action were brought timely, then even under Ash v. Stella, the present action should not have been dismissed, whether viewed as a survival action or a wrongful death action.[1]

Plaintiffs have alleged that a question of fact remains as to the discovery of the incident of medical malpractice. The factual basis for this contention is Plaintiffs' allegation and sworn

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[1] The Court will recall that Plaintiffs pleaded alternative causes of action under Sections 46.021, Florida Statutes, and Sections 768.16-768.27, Florida Statutes, since the cause of death has not yet been factually determined. Smith v. Lusk, 356 So.2d 1309 (Fla. 2d DCA 1978).

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averment 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. Thus, Plaintiffs believe, the statute of limitation did not commence until that date, since prior thereto they were unaware that any medical negligence had occurred, or that JONATHAN had suffered any injury. If, for example, JONATHAN'S condition was not medically diagnosable at an earlier stage, or would not have responded to treatment even if diagnosed earlier, then there would be no cause of action.

Here, there are questions of fact on those issues, precluding a finding as a matter of law that Plaintiffs were charged with the knowledge that JONATHAN had suffered some harm from a negligent misdiagnosis, for which he had a right of redress. Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984); Phillips v. Mease Hospital and Clinic, 445 So.2d 1058,1061 (Fla. 2d DCA 1984).

We respectfully submit that this Court's decision in Ash v. Stella, although perhaps distinguishable to some extent on its facts, would support a decision by this Court in the present case that factual issues exist on the question of discovery so as to require reinstatement of the action below. In Ash, this Court specifically stated:

> Thus there is an issue of fact as to whether notice that an inoperable, malignant tumor had been discovered did, in fact, put the Respondent and his wife on legal notice that the tumor had existed at the time Dr. Ash treated Mrs. Stella and that Dr. Ash had been negligent in improperly diagnosing the problem.

9 FLW at 435.

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Thus, although the specific factor singled out by this Court for reversal of the summary judgment in Ash was the distinction between a tentative and conclusive diagnosis, it is apparent from the language chosen by this Court that the statute of limitation would not begin to run until the Plaintiffs in that case were on legal notice not only that the tumor had existed at an earlier time, but also that the defendant doctor had been negligent in failing to recognize it.

We respectfully suggest that this Court in Ash has thus approved those District Court decisions cited above which hold that a statute of limitation does not begin to run until the "incident" of medical malpractice, defined as encompassing the negligent nature thereof as well as the fact that some injury resulted, is or should have been discovered. Florida Patient's Compensation Fund v. Tillman, supra; Phillips v. Mease, supra. Ash is thus also consistent with the dissenting opinion of Judge Ferguson to the opinion of the Third District in the present case, wherein he stated:

> 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 v. Pinosky, 442 So.2d 992,995 (Fla. 3d DCA 1983) [emphasis in original].

Again, Plaintiffs contend that the cause of action did not accrue until they had some reason to believe that the misdiagnosis was negligent and that JONATHAN had been harmed thereby. Plaintiffs made it clear in their Motions For Rehearing, Affidavits and Proposed Fourth Amended Complaint that it was not until January

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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.

The Defendants suggest in their briefs that this position is not well taken, claiming that if carried to its extreme, it would result in an anomalous rule that a cause of action for negligence would not accrue until a jury had determined the issue of negligence. We respectfully suggest that that is clearly not the case, and that the question of when an injured party has constructive notice of a negligent act is a factual question, based upon the information available to that party and all the facts and circumstances involved.

It would be absurd to contend that a statute of limitation did not commence until the jury determined a defendant to have been negligent. The proper inquiry is whether the injured party knew or should have known sufficient facts to realize that he had a cause of action. This would necessarily include some evidence upon which he could reasonably conclude that he had been the victim of a tortious act which resulted in injury to him.

We believe that this Court's decision in Ash v. Stella supports that rule of law, and that a holding in the present case ordering the trial court to reinstate the cause of action would be entirely consistent with, and is indeed required by, the Ash decision.

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CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request this Court to hold that questions of fact remain as to whether the decedent timely asserted a medical malpractice claim prior to his death, and that accordingly the present claim should be reinstated as an alternative wrongful death/survival action.

Respectfully submitted,

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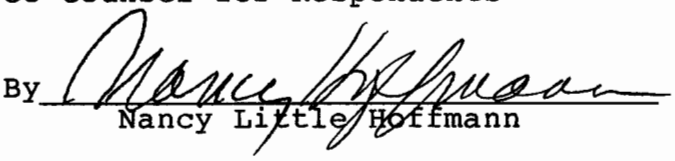
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served by mail this 14th day of December, 1984, upon all counsel listed on the attached service list.

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