OA 11-8-84 017

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 64,887

DISTRICT COURT CASE NOS. 81-2263
82-50

ALAN M. WAGSHUL, M.D., and)
LOPEZ, STUART & WAGSHUL, P.A.

Petitioners,)

vs.)

RALPH LIPSHAW, et ux, et al.,)

Respondents.)

FILED
SID J. WHITE
JUL 9 1984
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

INITIAL BRIEF OF ALAN M. WAGSHUL, M.D., AND LOPEZ, STEWART AND WAGSHUL, P.A.

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INTRODUCTION

The parties will be referred to as follows:

1. The Petitioners ALAN M. WAGSHUL, M.D., and LOPEZ, STEWART AND WAGSHUL, P.A., will be referred to as the Petitioner, WAGSHUL.

2. The Respondents, 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, will be referred to as the Respondents, LIPSHAW.

References to the Record on Appeal will be made to the original Index and the Amended Index as filed in the District Court of Appeal, Third District.

STATEMENT OF THE CASE

This is a Petition for Review brought pursuant to Rule 9.120 of the Florida Rules of Appellate Procedure, which has invoked the discretionary jurisdiction of this Court, as described in Rule 9.030(a)(2)(A), Florida Rules of Appellate Procedure, from a decision of the District Court of Appeal, Third District, dated November 8, 1983, which reversed an order of the Circuit Court, dismissing with prejudice, the Respondents' LIPSHAW'S third and fourth Amended Complaints.

STATEMENT OF THE FACTS

This case arises out of the dismissal of the Respondents' LIPSHAW'S third Amended Complaint and refusal to allow a fourth Amended Complaint on the ground that the Complaints, on their face, showed that their cause of action was barred by the applicable Statute of Limitiations: to wit, Florida Statute, Section 95.11(4)(b). The gravamen of the Respondents' LIPSHAW'S action was one of medical malpractice or medical negligence. Thus, the following pertinent allegations of the third

Amended Complaint, and proposed fourth Amended Complaint, in chronological order, will be taken as true, for purposes of the dismissal of the Petitioners, WAGSHUL.

October 8, 1976	Alleged treatment of the decedent, JONATHAN LIPSHAW, by the Petitioner, WAGSHUL.
February 25, 1977	The Respondents, LIPSHAW, were aware that the Petitioner, WAGSHUL, had misdiagnosed the true condition of their decedent, JONATHAN LIPSHAW.
January 7, 1981	The first Amended Complaint was filed which included the Petitioner WAGSHUL for the first time, as a Defendant.
February 11, 1981	The Respondents' decedent, JONATHAN LIPSHAW, died.
March 24, 1981	A third Amended Complaint for "Wrongful Death" was filed.

To simplify matters, after numerous defensive motions, and a motion on behalf of the Respondents LIPSHAW to file a fourth Amended Complaint, the Circuit Court dismissed, with prejudice, the third Amended Complaint, and refused leave to further amend the fourth Amended Complaint.

The Respondents, LIPSHAW, following the dismissal, perfected an appeal to the District Court of Appeal, Third District, which affirmed the dismissal of the third Amended Complaint (and consequent refusal for for leave to file fourth Amended Complaint) as to any "survival" action of JONATHAN LIPSHAW, but reversed the order of the trial Court as it pertained to the cause of action of the "wrongful death" of JONATHAN LIPSHAW. Following the denial by the Third District, of the Petitioner WAGSHUL'S Petition for Rehearing, the instant Petition was brought.

THE ISSUE INVOLVED ON APPEAL

WHETHER SECTION 95.11(4)(b) FLORIDA STATUTES, REQUIRES A CLAIM FOR DEATH, ARISING OUT OF MEDICAL NEGLIGENCE, TO BE BROUGHT WITHIN TWO YEARS FROM THE DATE THE ALLEGED NEGLIGENCE IS, OR SHOULD HAVE BEEN DISCOVERED, OR, IN ANY EVENT, WITHIN FOUR YEARS OF THE DATE OF THE INCIDENT OR OCCURRENCE GIVING RISE TO THE DEATH?

ARGUMENT

At issue is the interpretation of the Florida Statute 95.11(4)(b). Specifically, the Statute provides the following limitation action founded in medical negligence:

> (b)(A)n - Action for medical malpractice shall be commenced within two years from the time that the incident occurred giving rise to the action, or within two years from the time the incident was discovered or should have been discovered with the exercise of due diligence, provided, however, that in no event shall the action be commenced later that four years from the date of the incidence or occurrence out of which the cause of action accrued. An action for medical malpractice is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental or surgical diagnosis, treatment or care by any provider of health care. Florida Statute 95.11(4)(b), effective May 20, 1975.

It is clear from a literal reading of the Statute that the claim for medical negligence, even if that claim has resulted in the death of the patient, must be brought within two years from the date that the incident in question is discovered, or should have been discovered. It is further equally clear from the allegations of the third and fourth Amended Complaints, that more than two years elapsed from when the alleged misdiagnosis of the Petitioner WAGSHUL was known to the Respondents, and when the pleadings were amended to add the

Petitioner WAGSHUL as a Defendant, (i.e., February 25, 1977, to January 7, 1981). Thus, a simple, literal reading ot the Statute should serve as an effective bar to the Respondents' action, and as a valid basis for the dismissal of the Complaint against the Petitioner WAGSHUL.

Succinctly stated, the opposing argument of the Respondents has been that the cause of action did not accrue until the death of the Respondents' decedent, JONATHAN LIPSHAW. There are several reasons why this position lacks merit. First, is the principle of statutory construction in pari materia. This principle simply provides that Statutes are, if possible, to be construed with being consistent with one another, and not in derogation of one another. Singleton v. Larson, 46 So.2d 491 (Fla.1950). Here, especially since the latter of the two Statutes is Section 95.11 (4)(b), the operation of this principle would require that any action for "wrongful death" arising out of medical negligence, be brought within two years from the date the incident occurs or is discovered, or in no event, any later than four years from the date of medical treatment that gave rise to the death. Thus, the above doctrine would bar the action of the Respondents in the instant case.

However, throughout the progress of the case, the Respondents have asserted that, since the right of action for wrongful death exists separate and apart from the right of action for personal injuries, the Statute of Limitations for wrongful death, regardless of the nature of the acts giving rise to the death, does not begin to run until the cause of action accrues with the death. This rationale has, however, been dispelled and rejected by this Court in Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla.1984), and by the First District in Hudson v. Keene, 445 So.2d 1151 (Fla. 1st Dist. 1984), and in DuBose v. Auto-Owners Insurance Company, 387 So.2d 461 (Fla. 1st Dist. 1980).

Specifically, this Court in Perkins, supra, reasoned that the right of action for death was not independent of the right of action for personal injuries, and the First District, in Hudson, supra, applied this rationale to a similar issue. In Hudson, a four year "products liability" Statute of Limitations was construed by the lower Court as barring an action for wrongful death, filed more than four years after the alleged negligence was discovered, but within two years from the date of death. In affirming the dismissal, the First District rejected the identical argument made by the Respondents (and by the Third District) here, that, somehow, a death creates an independent cause of action. Thus, the First District concluded that an action for death, when delineated within the purview of a particular Statute of Limitations, must be brought within the time period applicable to the act or omission which gave rise to the pre-death injuries. Simple logic dictates that the same result applies here.

Lastly, on this point, the Fourth District Court of Appeal, in Worrell v. John F. Kennedy Memorial Hospital, 384 So2d 879 (Fla.4th Dist.,1980), pointed out that the present Statute of Limitations for medical negligence, which includes the term "death" within its definitional purview, is controlling over the general two year wrongful death provision of Section 95.11, Florida Statutes.

A second issue applicable to the Petitioner WAGSHUL, is the operation of the four year provision of Section 95.11(4)(b). As previously quoted, the Statute in question requires the plaintiff, regardless, to commence the action within four years of "the date of the incident or occurrence out of which the cause of action accrued". This Court, in Cates v. Graham, 9 FLW 206 (May 31, 1984), held that the

"occurrence" referred to in the statutory provision is the medical treatment in question and, further, the application of the Statute to preclude a cause of action for wrongful death filed outside of that four year provision, was constitutional. Thus, simple mathematics in the instant case shows that more than four years elapsed from October, 1976, (the alleged date of treatment by WAGSHUL) and January, 1981,(the date of the first amendment to the Complaint which included the Petitioner WAGSHUL as a Defendant). Thus, under the "four year provision", as well, the trial Court's dismissal of the Complaint as to the Petitioner, WAGSHUL, was correct.

CONCLUSION

Based upon the reasoning and authorities set forth in the above, it is respectfully submitted that the decision of the District Court of Appeal, Third District, which reversed the trial Court's order of dismissal, be quashed and remanded to the lower Court.

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WE HEREBY CERTIFY that a true and correct copy of the aforesaid was mailed this 6th day of July, 1984 to: All attorneys of record as reflected in attached service list.

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