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.

PETITIONERS' BRIEF ON JURISDICTION

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INTRODUCTION

The parties will be referred to by name and/or designation as they appear in the trial court.

The initial "A" shall be used to refer to the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

This is a proceeding pursuant to Rule 9.120 of the Florida Rules of Appellate Procedure, seeking to invoke the discretionary jurisdiction of this Court as described in Rule 9.030(a)(2)(A). This notice seeks review of a decision of the District Court of Appeal, Third District, filed on November 8, 1983, and rendered on January 16, 1984. The basis for the aforesaid review is the apparent conflict between the decision which is the subject matter of this appeal, and a decision or decisions of this Court or other Courts of Appeal.

As set forth in the opinion, attached hereto as Appendix, the action began as a medical negligence suit in the Circuit Court in and for Dade County, Florida, brought by the Plaintiff/Respondents against, among others, the Defendants/Petitioners. Specifically, as the opinion reflects, the Plaintiffs'/Respondents' decedent, JONATHAN LIPSHAW, received medical treatment from, among others, the Defendants/Petitioners. It was further alleged that the treatment was improper in that the diagnoses made were incorrect. According to the allegations of the complaint, the Plaintiffs/Respondents learned of the misdiagnosis on February 25, 1977, but did not file their complaint against the Defendants/Petitioners herein until March 24, 1981. Between February,

1977, when the "malpractice" was discovered, and March, 1981, when the complaint against these Defendants/Petitioners was filed, the Plaintiffs' decedent, JONATHON LIPSHAW, died on February 10, 1981.

In the trial court, after numerous amendments to the complaint, the complaint was eventually dismissed with the trial court holding that both the survival action of JONATHON LIPSHAW and any action for his death were barred by the provisions of section 95.11(4)(b) of the Florida Statutes, which sets forth the time period within which a suit for medical negligence may be filed.

The order of dismissal was then appealed by the Plaintiffs/ Respondents in the District Court of Appeal, Third District. In the opinion attached hereto, the District Court of Appeal affirmed the dismissal of the survivorship action of JONATHON LIPSHAW, but reversed the dismissal of the wrongful death action for injuries and damages arising out of the death of JONATHON LIPSHAW. Specifically, in so reversing, the District Court of Appeal, Third District, held that, in an action for medical negligence which results in a death, the statute of limitations does not commence to run until the death of the Plaintiff's decedent.

It is this holding that the Defendants/Petitioners assert conflicts with other decisional law in this State.

ARGUMENT

Although there are several cases which, from a logical viewpoint, seemingly conflict with the decision in question (i.e., Eland v. Aylward, 373 So.2d 92 (Fla. 2nd Dist. 1979) and Variety Children's Hospital v. Perkins, 8 FLW 501 (Dec.16,1983), attention on this brief shall be focused on one significant opinion.

Specifically, the Fourth District, in the case of Worrell v. John F. Kennedy Memorial Hospital, Inc., 384 So.2d 897 (Fla. 4th Dist.1980) was faced with a similar question. In Worrell, the Plaintiff's decedent had died on January 14, 1973, and the Plaintiff, in her complaint, stated that she was not aware until December, 1976, of any medical malpractice. If the statute began to run on the date of death, then (absent any elements of fraudulent concealment, for which leave to amend was subsequently granted) the claim would have been barred. If, however, the statute began to run in December, 1976, when the Plaintiff became aware of the negligence, then the claim would have been timely. Since, however, the death occurred prior to the effective date of the statute of limitation in question on this appeal, the Court in Worrell spent a large part of the opinion discussing which would be the applicable statute. The Plaintiff below was seeking to rely upon the current statute which included death within the definition of medical malpractice. Thus, if death was included within the category of actions set forth in 95.11(4)(b), then the action would have been filed within two years from the time the Plaintiffs became aware of the incident in question. If, however, on the other hand, the time period began to run upon the death of the Plaintiffs' decedent, then the claim would have been untimely. Thus, the Worrell Plaintiff's reason for asserting the applicability of the current statute.

The Court in Worrell, in essence, held that the present statute could not be retroactively applied to the Plaintiff's claim and hence, the prior statute, which did not include death within the definition of medical negligence, was controlling. The prior statute thus required the claim to have been brought within two years from the date of death, and, accordingly, on this point, the Fourth District reasoned that under the prior statute, a claim for wrongful death,

whether or not due to medical negligence, began on the date of death.

However, in reading the opinion, it becomes clear that the Worrell Court also held that, under the current statute, the statute of limitations commences to run in a claim for "wrongful death" arising out of medical negligence, at the time of the incident. Specifically, the following passages from the opinion are noteworthy:

> We thus hold that section 95.11(6) Florida Statutes, 1973, applies to this case and that the cause of action for death due to medical malpractice herein accrued at the time of death. In doing so, we point out we would prefer the different result reached in Glass v. Camara, supra, under section 95.11(4)(b) Florida Statutes 1975, wherein death was expressly included in the definition of medical malpractice. This 1975 statute was the first time death was so included and we are bound by the legislative expression. . .
>
> The law started with a four-year limitation on negligence, including medical negligence. It was then changed to a two-year limitation on medical malpractice, with two years running from the date the Plaintiff should have discovered the "injury". This created an open-ended statute without apparent limit on discovery. It was then changed to a two-year limit from the date Plaintiff should have discovered the "cause of action". Again, there was no time limit on discovery. In all these versions, death was not included in the definition medical malpractice and "wrongful death", but always limited to two years from death by a separate provision. The statute has now been changed to two years from discovery of the "incident" with an outside four-year limit, unless fraudulent concealment is involved where a maximum of seven years is set. In this latest enactment, death is at last expressly included in the definition of medical malpractice. Id at 902.

Additionally, with respect to Worrell, supra, the instant opinion is seemingly in conflict with the literal language of section 95.11(4)(b) as set forth in and upheld by that opinion. Specifically, the statute in question provides as follows:

> (b) an action for medical malpractice shall be commenced within two years from the time the incident occurred giving rise to the action or within two years from the time the incident is discovered or should have been discovered with the exercise of due diligence, provided, however, that in no event shall the action be commenced later than four years from the date of the incident 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 section 95.11(4)(b), May 20, 1975.

Although the instant opinion did not quote the above-referenced statutory provision, it is clear from a review of the opinion that both the two and four year periods of time had lapsed between the day of the discovery of the incident (February 25, 1977) and of the filing of the action (March 24, 1981). Since, as pointed out in Worrell , supra, and Eland, supra, the "incident" to which reference and a discovery is made, concerns the act of medical negligence, the definition of the "incident" as given by the majority in the opinion in question, is in direct conflict with the definition ascribed to the "incident" as set forth in Worrell, supra, and Eland, supra.

CONCLUSION

Based upon the reasoning and authorities stated above, it is respectfully requested that this Honorable Court accept the jurisdiction of the instant matter pursuant to the provisions of Rule 9.030(a)(2)(A)(iv).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the aforesaid Petitioners' Brief on Jurisdiction was mailed this 24th day of February, 1984 to all attorneys of record as reflected in service list attached to Appendix.

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