OA 11-8-84

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, M.D.P.A.

Petitioners, )

vs.

)

RALPH LIPSHAW, et ux, et al,

Respondents. )

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REPLY BRIEF OF PETITIONERS
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## INTRODUCTION

Since in the several briefs already submitted, numerous references to the proceedings below have been made, no further elaboration regarding a Statement of the Case and/or a Statement of the Facts is necessary.

However, the Petitioners, WAGSHUL, M.D., and LOPEZ, STUART and WAGSHUL, M.D.P.A., will respond to the points presented by the Respondents in reverse order.

## ARGUMENT

> Whether the medical malpractice survival claim was time-barred by Section 95.11(4)(b), Florida Statutes.

Here, the Respondents have taken the position that the Statute, regardless of the type of action involved, (i.e., death or survival) did not commence to run in February, 1977, when the Respondents were, by their own admission, aware that the Petitioners had failed to diagnose the "true" condition of Jonathon Lipshaw. Rather, the Respondents, incredibly, argue that the Statute did not commence to run until January 8, 1979, when they, at a medical mediation hearing, were aware that the Petitioner was negligent. Such an interpretation or construction of the degree of knowledge required of a potential plaintiff, in order to commence the running of a Statute of Limitations, is both contrary to the purpose of Section 95.11, and, obviously, illogical.

Since the ultimate arbiter of an alleged tortfeisor's guilt or innocence is the trier of fact, the logical extension of the Respondents' argument would not allow the Statute of Limitations

to commence running until after the jury's verdict in a particular case. Thus, lest the proverbial barn door be closed after the horse has escaped, such reasoning would render any Statute of Limitation a complete nullity.

As legal authority for these position, the Respondent has cited Florida Patients' Compensation Fund v. Tillman, So.2d 9 FLW 1547 (Fla.4th Dist.,1984), Phillips v. Mease Hospital and Clinic, 445 So.2d 1058 (Fla.2nd Dist.,1984), and Johnson v. Mullee, 385 So.2d 1038 (Fla.1st Dist.,1980). It is submitted that these cases are distinguishable from the one at bar. Specifically, the holding in Phillips, supra, concerned itself with the commencement of the Statute's running when a sufficient showing and/or sufficient allegations of fraudulent concealment were present; a factor not at issue in the present case. Secondly, both Tillman, supra, and Johnson, supra, dealt with the situation where the potential plaintiff was not aware that the act or omission of the defendant had caused any damage. Here, by contrast, the Respondents, from at least an objective standard, were aware that some damage had been sustained by Jonathon Lipshaw, since, according to the affidavit that his mother filed in support of the Fourth Amended Complaint, in February, 1977, Jonathon Lipshaw was "suffering". Further, Johnson, supra, dealt with the predecessor to the current Statute, which required discovery of the "cause of action", and did not require, as did the Statute under review, discovery of merely the "incident" which gives rise to the cause of action.

Alternatively, with respect to Tillman, supra, the above argument assumes that this recent decision is in accord with, and is a correct construction of the term "incident", as used in the Statute. Stated

another way, by making the above argument, the Respondents do not waive their initial argument or position that the term "incident" does not require discovery of "damage".

As indicated above, the position taken by the Respondents should not be adopted here, since it allows the running of a Statute of Limitation to be dependent on a subjective standard (i.e., when the plaintiff was aware that the defendant was negligent) as opposed to an "objective" standard, which, more properly serves the intent and and legislative purpose of a Statute of Limitation.

II. WHETHER SECTION 95.11(4)(b), FLORIDA STATUTES, BARRED, IN ADDITION TO THE SURVIVAL ACTION, THE ACTION FOR WRONGFUL DEATH.

Sifting through the arguments made by the Respondents, it is difficult to determine their bottom-line position on when the Statute of Limitation should commence to run, where medical negligence has resulted in death. Seemingly, they argue that the date of death is the controlling date, but, then, in the same breath, state that this "rule" doesn't apply when the "incident" isn't discovered until more than two years after the death. This position, as will be demonstrated below, is contrary to the purpose of the Statute, is contrary to the language of the Statute, and is contrary to the majority of cases interpreting the Statute.

First, a quote from preamble to Chapter 75-9, Florida Statutes, (1975)[the session law for Chapter 95.11(4)(b)] is in order:

> AN ACT . . . ; amending s. 95.11(4), Florida Statutes, 1974, supplement relating to the Statute of Limitations, to provide that actions for medical malpractice shall be commenced within two years from the time the incident occurred or the injury is discovered, but not to exceed four years from the date the incident occurred . . .
>
> WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and, WHEREAS, it is not uncommon to find physicians in high risk categories paying premiums in excess of $20,000 annually; and WHEREAS, the consumer ultimately must bear the financial burden created by the high cost of insurance; and, WHEREAS, without some legislative relief doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida . . . .

Reading then, the preamble to the Statute, it becomes clear that its purpose was to place some reasonable limitations on a patient's right to sue for medical negligence instead of ambiguously expanding his right, as suggested by the Respondents. Further, one need only look to the very language of the Statute itself, to determine the legislative intent on the issue. The Statute specifically uses the term "death" in the disjunctive with the term "injury" in setting forth its definitional purvue. The obvious effect of this language clearly hinges the running of the Statute on the date that the "incident", regardless of its ultimate effect, was, or should have been discovered. As indicated above, this is in harmony with the submitted statutory purpose of providing a clear and consistent criteria for determining the commencement of a Statute of Limitations.

Additionally, such an interpretation is not unconstitutional, as is suggested by the Respondents, as will be pointed out by the following:

The Respondents, for purposes of argument, state that the above interpretation bars those claims in which the death occurs more than two years from the date of the negligent act or omission. Such reasoning is, essentially, superficial and, also, incorrect. If a potential plaintiff was "objectively aware" of the negligence or incident, but was unaware of any damage produced thereby, then, one could rationally argue that the Statute would not begin to run until he or she were aware of some degree of resulting damage. However, this is not the case here. In the present case, the Respondents were aware, in February, 1977, of a misdiagnosis, and a certain degree of potential harm or damage therefrom resulting to Jonathon Lipshaw. What they are then, in effect, asserting, is that the Statute should not commence to run until they were aware of the full extent of that damage. It is submitted that this argument is without rational support or authority.[1]

With respect to the case law on this point, the Respondents have previously, in their initial brief, argued the cases supporting their position, and they will not be re-argued here. Rather, a few brief comments will be directed towards the cases cited by the Respondents. First, with respect to Bruce v. Byer, 432 So.2d 413 (Fla. 5th Dist.,1982) two comments are appropriate. Bruce was based, in part, on the Third District Court decision in Perkins v. Variety Children's Hospital, 413 So.2d 760 (Fla.3rd Dist.,1982). As this Court knows, that decision has now been reversed. Also, a close examination of Bruce simply reveals that the Court held that the incident, if discovered beyond two years from the date of death,

[1] To the contrary, the Court in Johnson v. Mullee, 385 So.2d 1038 (Fla.1st Dist.,1980) (cited by Respondents) states the generally known principle that it is the existence of an injury, however slight, that normally commences the running of the Statute, not subsequent knowledge of the full extent of that injury.

begins the running of the Statute (and, by implication, holds that the death is not the "incident" that gives rise to the running of the Statute). Secondly, with respect to the "separate right of action" argument, the Respondents have sought support in the cited decision of Dressler v. Tubbs, 435 So.2d 792 (Fla.,1983). To do so is to compare apples and oranges. What we are dealing with here is the proper interpretation to be given a Statute of Limitations for medical malpractice actions in light of the legislative intent behind the Statute in the first place. Dressler, supra, dealt with the rights of survivors to sue for wrongful death when faced with a potential bar to that action by the Doctrine of Interspousal Immunity. Clearly, one has nothing to do with the other.

Consequently, section 95.11(4)(b), does operate to bar the claim for wrongful death of Jonathon Lipshaw, since the Respondents were, on the face of the Complaint, aware of an incident (i.e., a misdiagnosis of Jonathon Lipshaw's true condition). Had the initial personal injury or "survival" action been timely filed, then this brief would never have been written, since it would have been a simple matter to amend the Complaint upon the death of Jonathon Lipshaw, and the amendment would relate back to the date of the original filing. This was, however, not the case, and, accordingly, the action is, on the face of the Complaint, time-barred by the Statute of Limitations.

## CONCLUSIONS

For the reasons set forth above, the Petitioners respectfully request this Court enter it's opinion quashing, in part, the decision of the District Court of Appeal, Third District, and affirming the validity of the Trial Court's order of dismissal previously entered herein.

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the aforesaid Reply Brief of Petitioners, ALAN M. WAGSHUL, M.D. and LOPEZ, STUART and WAGSHUL, M.D.P.A., was mailed to all attorneys of record as listed on attached service list.

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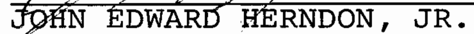

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