

To my

IN THE SUPREME COURT OF FLORIDA.

DADE COUNTY PUBLIC HEALTH
TRUST, ETC. ET AL.,

Petitioners,

vs.

RALPH LIPSHAW ETC., ET AL.,

Respondents.

CASE NO. 65,004

FILED

SID J. WHITE

DEC 3 1984

CLERK, SUPREME COURT

By *[Signature]*
Chief Deputy Clerk

ALAN M. WAGSHUL, ETC. ET AL.,

Petitioners,

vs.

RALPH LIPSHAW, ETC. ET AL.,

Respondents.

CASE NO. 64,887

ROBERT F. CULLEN, ETC., ET AL.,

Petitioners,

vs.

RALPH LIPSHAW, ETC., ET AL.,

Respondents.

CASE NO. 64,898

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SUPPLEMENTAL BRIEF ON THE MERITS OF PETITIONERS
ALAN M. WAGSHUL, M.D., and LOPEZ STUART & WAGSHUL, M.D. PA.

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INTRODUCTION

This is a Supplemental Brief filed in accordance with this Court's Order of November 2, 1984 based upon notification to Counsel that this cause has been removed the Court's Oral Argument Calendar based upon this Court's decision in Ash v. Stella, 9 Florida Law Weekly 434 (Supreme Court Case No. 63, 347 October 11, 1984).

STATEMENT OF THE CASE AND FACTS

In order to avoid duplication, the Respondents, WAGSHUL, M.D., and WAGSHUL, P.A. will adopt the statement of the case and facts submitted by the Petitioner, DADE COUNTY PUBLIC HEALTH TRUST and FISHBAIN, M.D., in their brief filed herein on November 26, 1984.

ISSUE

WHETHER THE TRIAL COURT'S DECISION TO DISMISS THE PETITIONERS, ALAN WAGSHUL, M.D., and LOPEZ STUART & WAGSHUL, M.D., P.A., SHOULD BE AFFIRMED BASED UPON THIS COURT'S DECISION IN ASH v. STELLA.

ARGUMENT

THE TRIAL COURT'S DECISION TO DISMISS THE PETITIONERS, ALAN M. WAGSHUL, M.D., and STUART LOPEZ WAGSHUL, M.D., P.A., SHOULD BE AFFIRMED.

As pointed out previously to this Court by the Supplemental Briefs of the other Petitioners, this Court, in Ash v. Stella, 9 Florida Law Weekly 434 (Supreme Court Case No. 63,347, October 11, 1984) has now determined, as a matter of law that the beginning point for the "running" of the Statutes of Limitation was when the incident occurred or was discovered and not, as previously considered, upon the death of JONATHAN LIPSHAW. This point having now been laid to rest, attention is turned to whether or not, based upon the complaint, the Respondents' action against the Petitioner WAGSHUL M.D. and WAGSHUL P.A., is now time-barred by the Statute of Limitations.

First, as succinctly pointed out by the Petitioner, DADE COUNTY PUBLIC HEALTH TRUST and FISHBAIN, this case, from the standpoint of the factual issue of "the discovery" is quite different from Stella supra. Specifically, as pointed out by the District Court in their opinion, the Respondents, on February 25, 1977, were "fully aware" that the Petitioners had "completely misdiagnosed" the condition of JONATHAN LIPSHAW and had rendered "inappropriate medical treatment" to JONATHAN LIPSHAW. Obviously, at that juncture, is when the Statute of Limitations begin to run.

As previously pointed out, to allow the type of subjective criterion, as advocated by the Respondents, to govern the commencement of the Statutes, would, in effect, render the Statute completely useless. The Respondents position, carried to its logical extreme, would not commence the running of the Statute of Limitation until a jury had already determined whether or not there had been "negligence" since, ultimately, the final arbiter of the issue of negligence is the trier of fact. Consequently, under this rationale, the Statute of Limitations really would not commence to run until the case has been concluded.

CONCLUSION

Based upon the reasoning of the authority stated above and in the briefs of the Co-Petitioners, it is respectfully submitted that this Court affirm the dismissal of the lower Court with prejudice.

Respectfully submitted,

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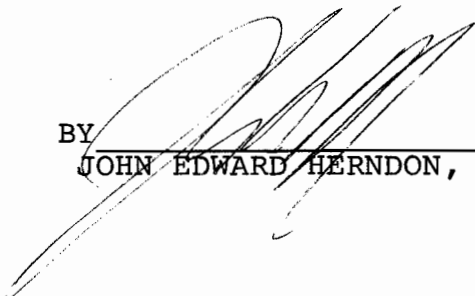
BY 

JOHN EDWARD HERNDON, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief on the Merits of Petitioners, ALAN M. WAGSHUL, M.D., and LOPEZ STUART & WAGSHUL, M.D. P.A, was mailed this 29th day of November, 1984 to all counsel on the attached list.

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