

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,898

ROBERT F. CULLEN, M.D. and
VARIETY CHILDREN'S HOSPITAL,

Petitioners,

vs.

RALPH LIPSHAW, individually
and as Co-Personal representative
of the Estate of JONATHAN
MICHAEL LIPSHAW, deceased; and
ALICE LIPSHAW, individually
and Co-Personal Representative
of the Estate of JONATHAN
MICHAEL LIPSHAW, deceased,


Respondents.

FILED

SID J. WHITE

FEB 29 1984

CLERK, SUPREME COURT

By 
Chief Deputy Clerk

BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

Petitioners*, ROBERT F. CULLEN, M.D. and VARIETY CHILDREN'S HOSPITAL, seek review of the decision of the District Court Of Appeal, Third District, dated November 8, 1983. (A.1-8) A timely Petition For Rehearing was denied by order dated January 16, 1984. (A.9-13) The decision appears at 442 So.2d 992 (Fla.3d DCA 1983).

The facts are as follows:

On January 7, 1981 Plaintiffs/Respondents, Ralph and Alice Lipshaw, as guardians for Jonathan Lipshaw, filed a first amended complaint against certain Defendants including Petitioners, Dr. Cullen and Variety Children's Hospital, alleging medical malpractice. The complaint [later amended on February 10, 1981 in a second amended complaint] alleged that Defendants [directly or vicariously] negligently misdiagnosed the medical condition of Plaintiffs' son, Jonathan Lipshaw, and thereafter treated him; that the Lipshaws initially learned of this negligent misdiagnosis on February 25, 1977 and that as a result of the aforesaid medical malpractice Jonathan Lipshaw sustained permanent

*The parties will be referred to as they stand before this Honorable Court and the symbol "A" signifies Appendix Of Petitioners.

disability, loss of earnings and earning capacity. The Lipshaws also sought damages in their individual capacities due to this medical malpractice. It was implicitly asserted in this claim that the medical malpractice sued upon did not result in Jonathan Lipshaw's death.

Jonathan Lipshaw died on February 11, 1981. On March 24, 1981 the Lipshaws as co-personal representatives filed a third amended complaint sounding in medical malpractice and wrongful death against Defendants including Petitioners alleging that Jonathan Lipshaw died as a result of the aforesaid medical negligence.

The trial court granted Defendants/Petitioners' motion to dismiss the third amended complaint as being barred by the applicable statute of limitations. Lipshaws' motion for rehearing was denied.

Lipshaws' appeal to the District Court Of Appeal resulted in an affirmance of the dismissal of the medical malpractice survival claim on the ground that it was time barred by §95.11(4)(b), Fla.Stat. (1979). The District Court held that plainly this action accrued when as Plaintiffs admitted the medical misdiagnosis sued upon was actually discovered by them on February 25, 1977. On that date Plaintiffs admitted they were fully aware that the Defendants had completely misdiagnosed and had rendered

inappropriate medical treatment to their son.

Therefore, the medical malpractice action instituted against Defendants on January 7, 1981 [when the first amended complaint was filed]--nearly four years after the accrual of said action--was time barred by the applicable two-year statute of limitations §95.11(4)(b), Fla.Stat.(1979).

The District Court held that as to the wrongful death action, it did not accrue until February 11, 1981 when Jonathan Lipshaw died. At that point both the alleged medical negligence [i.e., negligent misdiagnosis] and resultant death of the deceased were known to the Lipshaws. Therefore, the wrongful death action first asserted in the third amended complaint filed March 24, 1981 was timely filed within the applicable two-year statute of limitations for wrongful death actions whether it be §95.11(4)(b), Fla.Stat. (1981) or §95.11(4)(d), Fla.Stat. (1981) citing Perkins v. Variety Children's Hospital, 413 So.2d 760 (Fla.3d DCA 1982).

POINT INVOLVED

WHETHER THE DECISION IS IN EXPRESS
DIRECT CONFLICT WITH VARIETY CHILDREN'S
HOSPITAL v. PERKINS So.2d (FLA.
1983) [8 FLW 501] AND HUDSON v. KEENE
CORPORATION So.2d (FLA.1st DCA
1984) [9 FLW 238].

ARGUMENT

The decision of the District Court holds that even though Jonathan Lipshaw would not have been able to maintain an action against Petitioners if death had not ensued due to the running of the statute of limitations on the medical malpractice survival claim, his parents, individually, and as personal representatives of his estate, may maintain a wrongful death action.

This decision is in express and direct conflict with Variety Children's Hospital v. Perkins, supra [which quashed* the Perkins decision relied upon by the District Court in the present case] which held that where the injured party had no right of action against the tortfeasor at the moment of his death, then his personal representative could not bring a wrongful death action.

*Conflict certiorari jurisdiction exists when a District Court relies on a decision that has been overruled by the Supreme Court. Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla.1980).

This Honorable Court based its opinion on §768.19, Fla.Stat. (1981) which provides:

" When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony." [Emphasis supplied]

Pursuant to this statute, this Court said:

"...Since there was no right of action existing at the time of death, under the statute no wrongful death cause of action survived the decedent. See *Collins v. Hall*, 117 Fla.282, 157 So.646 (1934); *Duval v. Hunt*, 34 Fla.85, 15 So.876 (1894); *Warren v. Cohen*, 363 So.2d 129 (Fla.3d DCA 1978), cert. denied, 373 So.2d 462 (Fla.1979)."

The decision is also in express and direct conflict with Hudson v. Keene Corporation, supra involving the following factual situation: Ela Hudson was diagnosed as having asbestosis in March, 1977. He died on July 14, 1981. On November 2, 1981, a wrongful death action was filed against appellees. This was more than four years after the diagnosis of asbestosis [although within two years of his death]. There had been no claim for personal injuries

against appellees within four years of the diagnosis.

Appellees successfully moved for summary judgment on the ground that death did not revive an extinguished cause of action, i.e., since the four year personal injury limitations period had run before the wrongful death suit was filed, appellant could not recover.

The District Court in affirming said:

" Appellant relied on Perkins v. Variety Children's Hospital, 413 So.2d 760 (Fla. 3d DCA 1982), in which the Third District held, among other things, that the pertinent language, underscored above, refers to the qualifying nature of the event rather than whether the decedent sued in his lifetime, and that the two year wrongful death limitations period began to run at the time of death. The Florida Supreme Court recently rejected in its entirety the approach taken by the Third District, see Variety Children's Hospital v. Perkins, ___ So.2d ___ (Fla.1983) [8 FLW 501]. Both the defense of res judicata, discussed at length by the Supreme Court in the Perkins opinion, and that of the running of the statute of limitations are waivable affirmative defenses. Because of that decision we are bound to conclude the circuit judge in the present case properly granted appellees' motion for summary judgment, because under the Supreme Court interpretation of the statutory language in Perkins, Ela Hudson would not have been able to maintain an action against appellees if death had not ensued due to the running of the limitations period with regard to the personal injury suit. Therefore the summary judgment appealed is AFFIRMED."

The decision in the present case holds that even though Lipshaw's medical malpractice survival action was time barred by the two-year statute of limitations, his personal representative could maintain a wrongful death action [relying in part on Perkins which has been quashed by this Court]. Variety Children's Hospital* and Keene hold directly to the contrary. The conflict cannot be denied.

CONCLUSION

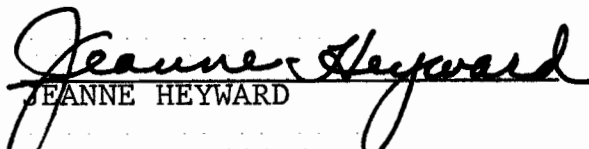
Wherefore, Petitioners, Robert F. Cullen, M.D. and Variety Children's Hospital, respectfully request that the Petition Should be granted.

Respectfully submitted,

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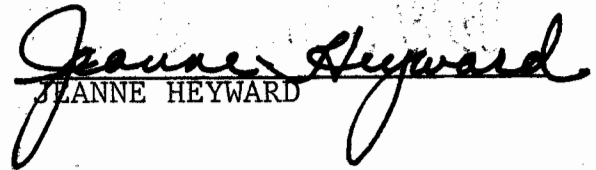
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*The reason for barring the survival action is not limited. This Court in Duval v. Hunt, supra cited in Variety Children's Hospital, supra said if the deceased party was barred for any reason had he been alive then the same reason will bar or defeat a recovery for his death by any one suing on his behalf.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief Of Petitioners and Appendix were mailed this 28th day of February, 1984 to all counsel listed on the attached service list.


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