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IN THE SUPREME COURT OF FLORIDA

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

Petitioners.

vs.

RALPH LIPSHAW, ETC., ET AL.,

Respondents.

CASE NO. 65,004

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

BRIEF ON THE MERITS OF PETITIONERS, ROBERT F. CULLEN, M.D. AND VARIETY CHILDREN'S HOSPITAL

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TOPICAL INDEX

CITATION OF AUTHORITIES

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, appearing at 442 So.2d 992 (Fla.3d DCA 1983).

The facts are as follows:

On January 7, 1981 Respondents, Ralph and Alice Lipshaw, as guardians for Jonathan Lipshaw, filed a first amendment to complaint alleging medical malpractice and initially named Dr. Cullen and Variety Children's Hospital. The complaint [later amended on February 10, 1981 in a second amended complaint] alleged in part:

Paragraph 34:

> "Beginning on or about June 27, 1975, JONATHAN LIPSHAW was attended to and treated by Defendant CULLEN at VARIETY. JONATHAN LIPSHAW was treated for a condition which he did not have."

Paragraph 37:

> "On or about February 25, 1977, JONATHAN LIPSHAW's true condition was diagnosed as being Wilson's Disease and at that time the Plaintiff first discovered that all of the Defendants improperly diagnosed the condition of JONATHAN LIPSHAW and first discovered that all of the Defendants failed to diagnose the true conditions of JONATHAN LIPSHAW."

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

The complaint alleged that Jonathan Lipshaw sustained permanent disability, loss of earnings and earning capacity and the Lipshaws also sought damages in their individual capacities due to 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 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 Respondents admitted they actually discovered the medical misdiagnosis sued upon on February 25, 1977. On that date Respondents admitted they were fully aware that

the Petitioners had completely misdiagnosed and had rendered inappropriate medical treatment to their son.

Therefore, the medical malpractice action instituted against Petitioners on January 7, 1981 [when the first amended complaint was filed]--nearly four years after the accrual of said action [February 25, 1977] and five and a half years after the date of the commencement of the treatment [June 27, 1975]--was time barred by the applicable two-year statute of limitations §95.11(4)(b), Fla.Stat. (1979).

The District Court held that the wrongful death action 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). (A 1-5)

POINT INVOLVED

WHETHER §95.11(4)(b), FLA.STAT. (1979) AND §768.19, FLA.STAT. (1981) PRECLUDE RESPONDENTS FROM MAINTAINING A WRONGFUL DEATH ACTION AGAINST PETITIONERS WHERE THE BASIC MEDICAL MALPRACTICE SURVIVAL CLAIM WAS TIME BARRED BY THE APPLICABLE 2-YEAR STATUTE OF LIMITATIONS, §95.11(4)(b), FLA.STAT. (1979).

ARGUMENT

APPLICABLE STATUTES:

§95.11(4)(b) provides:

"An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 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..."

* * * * * * *

§768.19 Right of action 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."

MEDICAL MALPRACTICE SURVIVAL CLAIM TIME BARRED BY §95.11(4)(b), FLA.STAT. (1979):

The District Court correctly held that Jonathan Lipshaw's medical malpractice survival claim was time barred by §95.11(4)(b)*. This is based upon the following undisputed facts:

1- The first amended complaint filed on January 7, 1981 initially alleged that Lipshaw was treated by Dr. Cullen at Variety Children's Hospital on June 27, 1975.

2- The first amended complaint alleged that on February 25, 1977 Lipshaw's true condition was diagnosed as being Wilson's Disease and on that date Respondents first

*Eland v. Aylward, 373 So.2d 92 (Fla.2d DCA 1979) holds that §95.11(4)(b) is the applicable statute of limitations for medical malpractice rather than §95.11(4)(d) which applies to wrongful death actions.

discovered that Petitioners had improperly diagnosed his condition and failed to diagnose his true condition.

Based thereon, since the alleged malpractice occurred in 1975 and the Respondents admitted that they discovered the alleged negligence on February 25, 1977, the lawsuit filed against Dr. Cullen and Variety Children's Hospital on January 7, 1981 was untimely and barred by the statute of limitations. It was more than two years from the time of the incident giving rise to the action [the treatment and alleged improper diagnosis on June 27, 1975]; it was more than two years from the time the incident had been discovered [Respondents admitted they discovered Petitioners had allegedly improperly diagnosed Lipshaw's condition on February 25, 1977]; and the lawsuit was filed more than four years after the date of the "incident or occurrence out of which the cause of action accrued." [the incident occurred on June 27, 1975].

Thus the District Court correctly held that the medical malpractice survival claim was time barred by §95.11(4)(b).

WRONGFUL DEATH CLAIM ALSO BARRED BY §95.11(4)(b), FLA.STAT. (1979) AND §768.19, FLA.STAT. (1981):

The District Court incorrectly held that the wrong-

ful death claim was not time barred. Petitioners' argument finds direct support in Variety Children's Hosp. v. Perkins, 445 So.2d 1010 (Fla.1983) which held that where an 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 based upon the express language in §768.19, Fla.Stat. (1981). 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 464 (Fla.1979)."

The guidepost was set forth in Duval v. Hunt, supra which held that:

> "No recovery can be had for the death of any one caused by the wrongful act, negligence, carelessness, or default of another, unless the wrongful act, negligence, carelessness, or default from which the death ensues was such as would have entitled the deceased person to a recovery of damages had death not ensued. If, for any reason, the deceased person would have been defeated or barred from recovery had he been alive and suing for personal injury only, then the same reason or cause for his bar or defeat will bar and defeat a recovery for his death by any one suing on that behalf." [emphasis supplied]

Petitioners' argument is also supported by Hudson v. Keene Corp., 445 So.2d 1151 (Fla.1st DCA 1984) 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 District Court's decision that even though the medical malpractice survival action was time barred by the 2-year statute of limitations, Lipshaw's personal representative could maintain a wrongful death action is erroneous and fails to follow the clear mandate of §768.19 and the decisions interpreting it.

In addition, the wrongful death claim is also barred by §95.11(4)(b)--it was filed more than 2 years from the time the incident giving rise to the action occurred [June 27, 1975] and more than 2 years from the time the incident was discovered [February 25, 1977] and more than 4 years from the date of the incident or occurrence out of which the cause of action accrued [June 27, 1975]. Thus, under the 2-year limitation as well as the 4-year limitation,

the wrongful death action is also barred by §95.11(4)(b).

CONCLUSION

For all the reasons submitted herein as well as the Briefs of Co-Petitioners in Case Nos. 64,887 and 65,004 [consolidated with this Petition], it is respectfully submitted that the decision of the District Court Of Appeal, Third District, which reversed the Order of Final Judgment is erroneous and must be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief On The Merits Of Petitioners, Robert F. Cullen, M.D. and Variety Children's Hospital, was mailed this 13th day of July, 1984 to all counsel listed on the attached service list.

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