

IN THE SUPREME COURT OF FLORIDA

FILED

JAN 11 1985

CLERK, SUPREME COURT

CASE NO. 65,004

By: *[Signature]*
Chief Deputy Clerk

DADE COUNTY PUBLIC HEALTH TRUST, etc., et al.,
Petitioners,
vs.
RALPH LIPSHAW, etc., et al.,
Respondents.

ALAN M. WAGSHUL, etc., et al.,
Petitioners,
vs.
RALPH LIPSHAW, etc., et al.,
Respondents.

ROBERT F. CULLEN, etc., et al.,
Petitioners,
vs.
RALPH LIPSHAW, etc., et al.,
Respondents.

CASE NO. 64,887

CASE NO. 64,898 ✓

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

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SUPPLEMENTAL REPLY BRIEF

Argument

To summarize the facts:

Beginning on June 27, 1975 Jonathan Lipshaw was treated by Dr. Cullen at Variety Children's Hospital [paragraph 34 of First Amendment To Complaint].

On February 25, 1977 Lipshaw's true condition was diagnosed as being Wilson's disease [paragraph 37 of First Amendment To Complaint].

On February 25, 1977 Lipshaws initially discovered that all of the Defendants had improperly diagnosed his condition and first discovered that all of the Defendants failed to diagnose his true condition [paragraph 37 of First Amendment To Complaint].

On January 7, 1981 Lipshaws filed their First Amendment To Complaint alleging medical malpractice and initially named Dr. Cullen and Variety Children's Hospital as Defendants.

On February 11, 1981 Jonathan Lipshaw died.

On March 24, 1981, Lipshaws filed a Third Amended Complaint alleging medical malpractice [survival action] and wrongful death.

The trial court dismissed the Third Amended Complaint.

The District Court affirmed the dismissal of the medical malpractice survival claim as time barred---the

Court held that plainly this action accrued when--as the Lipshaws allege in their Third Amended Complaint, their proffered Fourth Amended Complaint and their affidavits filed in support of the motion for rehearing--the medical misdiagnosis sued upon was actually discovered by them on February 25, 1977. Therefore, the survival count of the Third Amended Complaint filed on January 7, 1981 was untimely.

The District Court reversed the dismissal of the wrongful death claim on the ground that it did not accrue until February 11, 1981 when Lipshaw died. Therefore, the wrongful death count of the Third Amended Complaint filed on March 24, 1981 was timely.

To summarize the argument:

Petitioners contend that as set forth in the District Court's decision since the Lipshaws were precluded by the statute of limitations from maintaining their medical malpractice survival action, they were also precluded from maintaining their wrongful death claim.

Both Variety Children's Hosp. v. Perkins, 445 So.2d 1010 (Fla. 1983) and Ash v. Stella, 9 FLW 434 (Fla. S. Ct. Case No. 63,347, opinion filed October 11, 1984) support Petitioners' argument. These decisions hold:

A wrongful death action is not a separate and independent cause of action but rather derivative of the injured party's right to sue while living. Thus, if the injured party had no right of action against the tortfeasor at the time of death, then no wrongful death action survived

the decedent. Both medical malpractice and wrongful death based upon medical malpractice are governed by §95.11(4)(b), the two year statute of limitations.

Thus Lipshaw's medical malpractice action filed against Dr. Cullen and Variety Children's Hospital on January 7, 1981 based upon a known alleged improper diagnosis initially discovered by them on February 25, 1977 was time barred and, in addition, the wrongful death action filed on March 24, 1981 based upon the same alleged medical malpractice was also time barred. Both lawsuits were filed more than two years after the incident occurred or more than two years after the time the incident was discovered or should have been discovered.

The Lipshaws have admitted that Ash, if applied to the present case, is directly contrary to their position with respect to the accrual of the wrongful death claim. They contend, however, that if the basic medical malpractice survival action were timely brought then even under Ash the present action should not have been dismissed, whether viewed as a survival action or wrongful death action.

In an attempt to support this argument they allege there is a question of fact as to the discovery of the incident of medical malpractice and argue that it was not until January 8, 1979 that they were aware that Lipshaw's condition could have been properly diagnosed earlier than February 25, 1977. Thus, they contend that the statute of limitations did not commence to run until that date, since prior thereto they were unaware that any medical negligence

had occurred or that Lipshaw had suffered any injuries.

Lipshaws further submit that "the proper inquiry is whether the injured party knew or should have known sufficient facts to realize that he had a cause of action".

Respondents submit that as previously stated Ash is based on a unique factual situation which is not present in the case at bar and thus the reversal in Ash cannot be utilized by the Lipshaws in an attempt to obtain a reversal.

Suffice it to say that Plaintiffs' Third Amended Complaint alleged that on or about February 25, 1977 Lipshaw's true condition was diagnosed as being Wilson's disease and at that time the Plaintiffs first discovered that all the Defendants improperly diagnosed his condition and first discovered that all the Defendants failed to diagnose his true condition [paragraph 37 of First Amendment To Complaint and paragraph 27 of Third Amended Complaint].

The proposed Fourth Amended Complaint does not solve the statute of limitations problem. It alleges:

"31. On January 8, 1979, during the cross-examination of Eugene Schiff, M.D. at the Medical Mediation hearing in the case of Lipshaw vs. Mate, etc., et al., RALPH LIPSHAW, then guardian for JONATHAN LIPSHAW, incompetent, was first given notice and first had knowledge that the true condition of JONATHAN LIPSHAW was capable of being diagnosed earlier by the Defendants herein other than Mate, etc., and first knew that the failure to have made such diagnosis prior to February 25, 1977 was a deviation from the standard of care."

Thus, the Lipshaws have admitted that: on February 25, 1977 his true condition was diagnosed as being Wilson's disease; on February 25, 1977 they initially discovered the improper diagnosis and; all the information and knowledge to make a proper diagnosis was available at that time. As admitted by the Lipshaws, the alleged misdiagnosis was not caused by lack of advances in the field of medicine or available medical tests--the field of medicine had sufficiently advanced to permit Petitioners to accurately diagnose Lipshaw's condition prior to February 25, 1977 and for Lipshaws to discover the alleged malpractice.

Therefore, the mere fact that this information [which was equally available to the Lipshaws] did not come to their attention until January 8, 1979 during the cross-examination of Dr. Schiff is immaterial and did not toll the time for filing suit based upon medical malpractice.

As stated in the District Court's decision:

"As to the medical malpractice survival claim, we have no trouble in affirming the dismissal of same as being time barred by the applicable two-year statute of limitations for medical malpractice actions. §95.11(4) (b), Fla.Stat. (1979). Plainly, this action accrued when--as the plaintiffs allege in their third amended complaint, their proffered fourth amended complaint, and their affidavits filed in support of the motion for rehearing--the medical misdiagnosis sued upon was actually discovered by the plaintiffs on February 25, 1977. On that date, the plaintiffs, by their own admission, were fully aware that the defendants herein had completely misdiagnosed and had rendered inappropriate medical treatment to their son--the acts now

sued upon in the third amended complaint. The assertion that the plaintiffs, as claimed, did not realize until much later that these known acts of misdiagnosis and mistreatment were acts of negligence is plainly of no avail to the plaintiffs, as they were long ago on actual notice as to the acts of negligence now sued upon. It therefore follows that the medical malpractice action instituted against the defendants herein on January 7, 1981, when the first amended complaint was filed below--nearly four years after the accrual of said action--was time barred by the applicable two-year statute of limitations for medical malpractice actions. §95.11(4)(b), Fla.Stat. (1979).

Simply stated, Ash does not aid the Lipshaws.

They knew or should have known of any potential liability prior to the running of the limitation period in §95.11(4)(b). Parmenter v. Davey Tree Expert Company, (10 FLW 24, 2nd DCA Case No. 84-906. Opinion filed December 21, 1984).

In summary, the medical malpractice survival claim and the wrongful death claim are both barred by §95.11(4)(b).

CONCLUSION

For all the reasons submitted herein as well as in Petitioners' original brief on the merits and the briefs of the co-petitioners it is respectfully submitted that the decision of District Court of Appeal, Third District, which reversed the order of final judgment is erroneous and must be quashed.

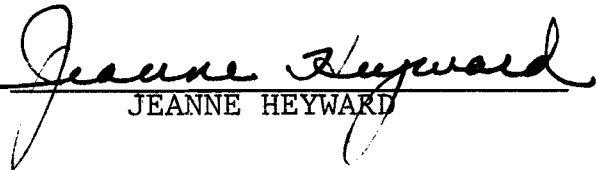
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CERTIFICATE OF SERVICE

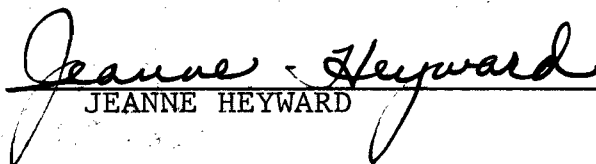
I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Reply Brief on the Merits of Petitioners, Robert F. Cullen, M.D. and Variety Children's Hospital, was mailed this 10th day of January, 1985 to all counsel of record on the attached list.

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