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

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

SUPPLEMENTAL 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

SUPPLEMENTAL BRIEF

Petitioners, ROBERT F. CULLEN, MD and VARIETY CHILDREN'S HOSPITAL, submit this supplemental brief in accordance with the order of this Court dated November 2, 1984 and notification that the case had been removed from the oral argument calendar based upon the recent decision in Ash v. Stella, 9 FLW 434 (Fla. S. Ct., Case No. 63,347, opinion filed October 11, 1984).

Ash holds that the statute of limitations governing wrongful death actions based upon medical malpractice is 95.11(4)(b) Fla. Stat. (1979) thus reaffirming Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983) which held that a wrongful death action was not a separate and independent cause of action but rather was derivative of the injured person's right while living to recover for personal injuries. Thus where the decedent, had he survived, would not have had a right of action existing at the time of his death under the statute of limitations, no wrongful death action survived the decedent.

Ash also remanded the cause for further proceedings because of the unresolved issue of fact as to whether notice that an inoperable, malignant tumor had been discovered did, in fact, put respondents on legal notice that the tumor had existed at the time Dr. Ash treated Mrs. Stella and that Dr. Ash had been negligent in improperly diagnosing the problem.

The decision also held that further evidence might establish that, without the knowledge of the specific nature of the tumor, no medical expert could have conclusively stated that the cancer did, in fact, exist at the time of Dr. Ash's alleged misdiagnosis. Furthermore, this court held that absent a finding of fact that before March 30, 1977 medical records showed that the newly discovered tumor had been the cause of Mrs. Stella's earlier problems, constructive knowledge of the incident giving rise to the claim cannot be charged to the respondents.

Ash was based upon a unique factual situation not present in the case at bar.

The facts in the case at bar are markedly different from Ash and compel a conclusion that the wrongful death claim is barred by §95.11(4)(b). Respondents admit they knew that petitioners had allegedly improperly diagnosed Lipshaw's condition on February 25, 1977 but attempt to avoid the obvious statute of limitations bar by alleging in a motion for rehearing that on January 8, 1979 on cross-examination of a doctor in medical mediation proceedings they initially realized that Dr. Cullen and others were negligent in their aforesaid misdiagnosis.

Stated otherwise, respondents admit they did not avail themselves of the opportunity to discover whether this was a negligent misdiagnosis until cross-examination of an expert witness almost two years after being on notice that petitioners and others had allegedly improperly/negligently misdiagnosed Lipshaw's condition.

§95.11(4)(b) provides that an action for medical malpractice shall be commenced within two years from the time of the incident giving rise to the action occurred or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence and in no event more than four years from the date of the incident or occurrence. The statute does not require ultimate knowledge of negligence or a finding of fact by a jury but only a reasonable suspicion in order for the time to begin to run.

Respondents' proposed fourth amended complaint alleged that Dr. Cullen and Variety Children's Hospital treated Lipshaw on June 27, 1975 and respondents admitted they had been advised of the improper misdiagnosis on February 25, 1977 and were advised of Lipshaw's true condition at the same time. However, they waited until January 8, 1979 [almost 2 years later] to actually obtain notice or knowledge that his true condition was capable of being diagnosed earlier by petitioners and initially learned at that time that the failure to have made such diagnosis prior to February 25, 1977 was a deviation from the standard of care. This establishes that respondents could or "should have discovered with the exercise of due diligence" any alleged negligence at the time the diagnosis was made on February 25, 1977. Their allegation that the "true condition of Jonathan Lipshaw was capable of being diagnosed earlier by defendants..." merely supports the conclusion that the medical malpractice survival claim was time barred thus effectively distinguishing

it from Ash. Succinctly stated, any claim for medical malpractice accrued on February 25, 1977 when the alleged improper/negligent misdiagnosis was first discovered by plaintiffs and any alleged negligence based thereon was either discovered or could have been discovered at that time.

In summary, the wrongful death claim filed March 24, 1981 is 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], more than 2 years from the time the incident was discovered or with the exercise of due diligence should have been 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 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief on the Merits of Petitioners, ROBERT F. CULLEN, M.D. and VARIETY CHILDREN'S HOSPITAL, was mailed this 26th day of November to all counsel on the attached list.

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