

O/a 11-8-84

FILED

SID J. WHITE

JUL 17 1984

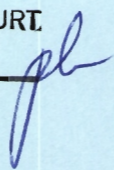
IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 65,004, 64,887, 64,898

3RD DCA CASE NUMBER: 81-2263 and 82-50

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk



DADE COUNTY PUBLIC HEALTH TRUST d/b/a
JACKSON MEMORIAL HOSPITAL and DAVID
FISHBAIN, M.D.,

Petitioners,

vs.

RALPH LIPSHAW, etc., et al.,

Respondents.

BRIEF OF PETITIONERS

DADE COUNTY PUBLIC HEALTH TRUST d/b/a
JACKSON MEMORIAL HOSPITAL and DAVID FISHBAIN, M.D.

STEPHENS, LYNN, CHERNAY, KLEIN
& ZUCKERMAN, P.A.
One Biscayne Tower, Suite 2400
Miami, Fl 33131
(305) 358-2000

BY: ROBERT M. KLEIN, ESQ.

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 65,004, 64,887, 64,898

3RD DCA CASE NUMBER: 81-2263 and 82-50

DADE COUNTY PUBLIC HEALTH TRUST d/b/a
JACKSON MEMORIAL HOSPITAL and DAVID
FISHBAIN, M.D.,

Petitioners,

vs.

RALPH LIPSHAW, etc., et al.,

Respondents.

BRIEF OF PETITIONERS

DADE COUNTY PUBLIC HEALTH TRUST d/b/a
JACKSON MEMORIAL HOSPITAL and DAVID FISHBAIN, M.D.

STEPHENS, LYNN, CHERNAY, KLEIN
& ZUCKERMAN, P.A.
One Biscayne Tower, Suite 2400
Miami, Fl 33131
(305) 358-2000

BY: ROBERT M. KLEIN, ESQ.

TABLE OF CONTENTS

Introduction-----1
Statement of the Case and Statement of Fact-----2
Issue on Appeal-----5
Argument-----6
Conclusion-----13
Certificate of Service-----14
Appendix

TABLE OF CITATIONS

COLLINS v. HALL
117 Fla. 282, 157 So. 646 (Fla. 1934)-----9

DOBER v. WORRELL
401 So.2d 1322 (Fla. 1981)-----11

DUVAL v. HUNT
34 Fla. 85, 15 So. 876 (1894)-----8,9

HUDSON v. KEENE CORPORATION
445 So.2d 1151 (Fla. 1st DCA 1984)-----10

VARIETY CHILDRENS HOSPITAL v. PERKINS
454 So. 2d 1010 (Fla. 1984)-----6,7,8, 10,12

WARREN V. COHEN
363 So.2d 131 (Fla. 3rd DCA 1978)-----9

WORRELL v. JOHN F. KENNEDY MEMORIAL HOSPITAL
384 so.2d 879 (Fla. 4th DCA 1980)-----10, 11 3

Other Citations:

Section 768.19, Florida Statutes (1981)----- 6,7

Section 95.11(4)(b), Florida Statutes -----2, 11, 12

Speiser's TREATISE ON WRONGFUL DEATH-----6

INTRODUCTION

Petitioners DADE COUNTY PUBLIC HEALTH TRUST, d/b/a JACKSON MEMORIAL HOSPITAL and DAVID FISHBAIN, M.D., were Defendants in this trial court action based upon an allegedly inappropriate medical diagnosis. Respondents RALPH LIPSHAW, etc., et al., were the Plaintiffs in that action. The other Petitioners include ALAN M. WAGSHUL, M.D., and ROBERT F. CULLEN, M.D., et al., who were also Defendants in the trial court action. All three groups of Defendants filed separate notices, invoking this Court's discretionary jurisdiction. All three cases were consolidated by an order of this Court dated June 19th, 1984.

In this brief, the parties will be referred to as Petitioners/Defendants and Respondents/Plaintiffs, as well as by name. The following symbols will be used for reference purposes herein:

"A" references to the Appendix attached to Petitioners' Brief.

All emphasis has been supplied by counsel, unless indicated to the contrary.

STATEMENT OF THE CASE AND STATEMENT OF FACT

Petitioners DADE COUNTY PUBLIC HEALTH TRUST d/b/a JACKSON MEMORIAL HOSPITAL (hereinafter JACKSON MEMORIAL) and DAVID FISHBAIN, M.D., were first named by the Plaintiffs in an Amended Complaint for medical malpractice filed on January 7th, 1981. The Plaintiffs filed their Third Amended Complaint on March 24th, 1981, to incorporate a cause of action under the Wrongful Death Act. Plaintiffs maintain that their cause of action accrued on February 11th, 1981, by reason of JONATHON LIPSHAW'S death, and that they should not be barred from pursuing their wrongful death claim.

Paragraph 27 of the Third Amended Complaint states that "on or about February 25th, 1977, JONATHON 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 the condition of JONATHON LIPSHAW and first discovered that all the Defendants failed to diagnose the true condition of JONATHON LIPSHAW."

At hearings which were held on the Motions to Dismiss which were filed by the various Defendants, the Defendants argued that this matter was governed by Section 95.11(4)(b), Florida Statutes (1975). That statute states that "an action for medical malpractice shall be commenced within two years from the time 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...." That statute further defines "an action for Medical Malpractice" 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

diagnoses, treatment or care by any provider of health care."

On April 29th, 1981, the trial court dismissed Plaintiffs' Third Amended Complaint as to all counts with regard to Petitioners FISHBAIN and JACKSON MEMORIAL. That order stated that the Third Amended Complaint was time-barred by application of Section 95.11(4)(b), Florida Statutes (1975). On May 26th, 1981, the Court instructed the Plaintiffs to submit a memorandum concerning the applicability of the Fourth District's decision in WORRELL v. JOHN F. KENNEDY MEMORIAL HOSPITAL, INC., 384 So.2d 897 (Fla. 4th DCA 1980). The court further indicated at that time that it would not consider the merits of the Plaintiffs' Motions for Rehearing unless it could be convinced that WORRELL did not apply to this claim. Ultimately, all Motions for Rehearing were denied, and the Plaintiffs appealed to the Third District Court of Appeal.

The Third District affirmed the dismissal of the survivorship action, noting that that claim was time-barred by the "applicable two-year statute of limitations for medical malpractice actions." According to the Third District, Respondents' medical malpractice cause of action accrued:

when the medical misdiagnosis sued upon was actually discovered by the Plaintiffs on February 25th, 1977. On that date, the Plaintiffs, by their own admission, were fully aware that the Defendants herein had completely misdiagnosed [Jonathon Lipshaw's condition] and had rendered inappropriate medical treatment to their son--the acts now sued upon in the third amended complaint. (A-4)

At the same time, however, the Third District reversed the dismissal of the Respondents' wrongful death claim, based upon the Third District's determination that the wrongful death action "could not and did not accrue until February 11th, 1981, when JONATHON

LIPSHAW died." (A-5)

All parties moved for rehearing, which was denied by the Third District. Three separate appeals were thereafter filed by the various Defendants, and those appeals were consolidated by an order of this Court dated June 19th, 1984.

ISSUE ON APPEAL

I. WHETHER A SEPARATE WRONGFUL DEATH ACTION MAY BE BROUGHT BY A DECEDENT'S SURVIVORS BASED UPON THE ALLEGEDLY NEGLIGENT DIAGNOSIS AND TREATMENT OF THE DECEDENT, WHERE THE DECEDENT'S OWN CLAIM FOR MEDICAL MALPRACTICE WAS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

ARGUMENT

I. A SEPARATE WRONGFUL DEATH ACTION MAY NOT BE BROUGHT BY A DECEDENT'S SURVIVORS BASED UPON THE ALLEGEDLY NEGLIGENT DIAGNOSIS AND TREATMENT OF THE DECEDENT, WHERE THE DECEDENT'S OWN CLAIM FOR MEDICAL MALPRACTICE WAS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

According to Section 768.19, Florida Statutes (1981), a defendant may be liable in damages for death caused by a wrongful act or negligence where "the event would have entitled the person injured to maintain an action and recover damages if death had not ensued." In the present situation, Petitioners would submit that the Respondents could not maintain a wrongful death action against DR. FISHBAIN and JACKSON MEMORIAL in March of 1981, because the statute of limitations had already run on any claim for bodily injuries due to professional negligence in the care and treatment of JONATHON LIPSHAW.

In VARIETY CHILDRENS HOSPITAL v. PERKINS, 445 So.2d 1010 (Fla. 1984), this Court ruled that a judgment for personal injuries which is rendered in favor of an injured party while that party is alive bars a subsequent wrongful death action based upon the same tortious conduct. The court's holding was specifically predicated upon the language of Section 768.19, Florida Statutes (1981).

In PERKINS, the court specifically took issue with the Third District's suggestion that the Florida Wrongful Death Act had created an independent cause of action in the statutory beneficiaries, which could not be barred by a prior judgment for the decedent's personal injuries. The reasons for this Court's concern were clearly expressed in the decision, which cited with approval to Speiser's TREATISE ON WRONGFUL DEATH:

In some cases the rule [against maintenance of a cause of action for wrongful death after an injured party has sued and recovered damages during his lifetime] has been based upon the ascertained legislative intention to provide a remedy, where, under the common law, none existed, and not to make the wrongdoer pay twice for one wrong. In other instances, it is based upon an express statutory provision that the right of action for death exists only in cases where the injured party could himself maintain the action if he were living in conjunction with an interpretation of such provision as requiring, as a condition precedent, the right of decedent to maintain the action at the time of his death. Supra at 1012.

As was noted earlier, Florida's wrongful death statute only gives rise to a cause of action where "the event would have entitled the person injured to maintain an action and recover damages if death had not ensued." Section 768.19, Florida Statutes (1981).

The court in PERKINS was also concerned about the prospect of additional problems, including "'lack of repose, double recovery, discouragement of settlement, the interests of unborn heirs and res judicata." Supra at 1012 (Emphasis in original.) Similarly, in this instance, were the Court to allow Respondents to litigate their wrongful death action, despite the fact that the statute of limitations had clearly run on JONATHON LIPSHAW'S claim against the Petitioners, the Court would in effect be giving tacit endorsement to a virtually unlimited statute of limitations, i.e., even in instances where the statute of limitations has clearly run, new life could be breathed into a claim for many, many years, since the statute of limitations would never truly run while the party who had allegedly been subjected to malpractice was still alive.

While Respondents suggested in their jurisdictional brief

that the PERKINS case only involves situations where a judgment has actually been obtained for the decedent's personal injuries, the citation in the PERKINS opinion to DUVAL v. HUNT, 34 Fla. 85, 15 So. 876 (1894), refutes that suggestion. In DUVAL, the Florida Supreme Court held that the doctrine of comparative negligence barred a wrongful death action where the decedent could not have maintained an action had he been alive.

In determining the applicability of the wrongful death statute which was in effect at that time, the DUVAL Court noted:

If, then, a case is presented wherein the deceased party would have been defeated or barred from recovery for any reason had he been alive and suing for personal injury only, then the same reason or cause for his bar or defeat would bar and defeat a recovery for his death by anyone suing on that behalf.

15 So. at 882. Petitioners would submit that the PERKINS court's decision to cite with approval to its earlier opinion in DUVAL signals the court's clear intention to prohibit the prosecution of a wrongful death action in any circumstance where the decedent would not have been able to maintain a personal injury suit.

Simply put, the Wrongful Death Act was designed to perpetuate existing claims against a tortfeasor, and to otherwise streamline the procedures for the filing of a wrongful death claim. The Act was never intended to create a cause of action in favor of a decedent's estate where the decedent himself would not have had a cause of action, or where the decedent's cause of action would have been barred by operation of law.

Other citations from the PERKINS opinion support Petitioners' suggestion that the LIPSHAW family may not now maintain

a cause of action for wrongful death, given the fact that the personal injury action on behalf of JONATHON LIPSHAW was barred by the applicable statute of limitations. For example, in COLLINS v. HALL, 117 Fla. 282, 157 So. 646 (Fla. 1934), the Florida Supreme Court (citing to DUVAL), held that a judgment rendered against an individual during his lifetime with respect to injuries sustained by that person barred any action after his death.

'If the primary right of action has been extinguished in the lifetime of the deceased, how can there be substituted for it a right of action in someone else? It is inconceivable that there can be a substitution of a secondary action for an action which does not exist; that there can be a substitution of something for nothing. Such an absurdity cannot be attributed to the law making power in creating this action or be inferred from the terms of the statute, which indicate an intent to substitute for the primary action of the injured person, an action for the benefit of those suffering pecuniary loss through his death, notwithstanding his death, which extinguished the primary action. The term 'notwithstanding the death,' is indicative of the intent of the law making power that the primary action must be existing in the decedent at the moment of dissolution.' 157 So. at 648.

The existing wrongful death statute evinces the same statutory language, and the same intent.

It is interesting to note that the PERKINS decision cited to another Third District case which was argued before the Third District, and which Petitioners believe is totally at odds with the Third District's decision in this case. See WARREN v. COHEN, 363 So.2d 131 (Fla. 3rd DCA 1978). In WARREN, the Third District held that a decedent's beneficiaries were barred from filing a wrongful death claim where the decedent had executed a release in favor of the defendants, prior to his death. While that case

undoubtedly was founded upon the public policy which favors the settlement of lawsuits, and the attendant finality which settlement should bring, similar policy considerations apply where the decedent's cause of action would have been barred by the applicable statute of limitations. For as was noted earlier, the Third District has in effect fashioned a statute of limitations which is only limited by the length of an individual's life (assuming that the decedent's death can somehow be related--if in pleadings alone--to a particular defendant's negligence.)

A similar rationale has been brought to bear by the First District Court of Appeal in HUDSON v. KEENE CORPORATION, 445 So.2d 1151 (Fla. 1st DCA 1984). In HUDSON, the First District ruled that a wrongful death action predicated upon exposure to asbestos-containing products was barred where the four year product liability statute of limitations had run before the wrongful death suit was filed. (The lawsuit was filed within two years of the decedent's death.) Citing to this Court's decision in PERKINS, the First District squarely held that the administrator of the decedent's estate could not maintain a wrongful death action where the decedent "would not have been able to maintain an action...if death had not ensued due to the running of the limitations with regard to the personal injury suit." HUDSON, supra at 1153.¹

Petitioners would finally point out that conflict in this matter has also been predicated upon the Fourth District's decision in WORRELL v. JOHN F. KENNEDY MEMORIAL HOSPITAL, 384 So.2d 879 (Fla. 4th DCA 1980). In the WORRELL case, the Fourth District

1/ Petitioners would point out that the HUDSON matter is presently pending before this Court. OPEL F. HUDSON, etc. v. KEENE CORPORATION, et al., Florida Supreme Court Case Number 65,155.

held that prior to May 20th, 1975, a cause of action for death due to medical malpractice under Section 95.11(4)(b), Florida Statutes, accrued as of the date of death, not when the plaintiff became aware of the medical negligence which ultimately resulted in the death of the decedent.

In this instance, Respondents have conceded that the amended version of Section 95.11(4)(b), effective May 20th, 1975, applies to their cause of action. According to the WORRELL court's interpretation of that version of the current statute of limitations, a cause of action for death due to medical malpractice accrues as of the date when the plaintiff discovered or should have discovered the medical malpractice (the incident which ultimately resulted in the death of the decedent), and not on the date of death. ²

The trial court in this matter held as a matter of law that any action for bodily injury to JONATHON LIPSHAW was barred by the applicable statute of limitations. The Third District affirmed this ruling by the trial court, although the intermediate appellate court felt that JONATHON'S death had given rise to a separate cause of action, pursuant to the wrongful death statute.

For the reasons which have been cited above, Petitioners would submit that there could have been no cause of action for wrongful death once a determination was made as a matter of law that the bodily injury action was barred by the applicable statute of limitations. While the Third District has ruled that the

2/ The WORRELL decision was affirmed by this Court. "We agree with the district court in its construction and application of the applicable statute of limitations." DOBER v. WORRELL, 401 So.2d 1322 (Fla. 1981).

decedent's estate may now maintain a separate cause of action for wrongful death, Petitioners would submit that this Court's prior holdings in PERKINS and the cases that were cited by the PERKINS court make it clear that there can be no separate cause of action where the original, underlying claim would have been legally barred, either by judgment, release, contributory negligence or a statute of limitations. Accordingly, the Third District's ruling should be modified by this Court to the extent that the Third District has allowed Respondents to prosecute a wrongful death action. That action is barred by operation of Section 95.11(4)(b).

CONCLUSION

For all of the above-cited reasons, Respondents DADE COUNTY PUBLIC HEALTH TRUST d/b/a JACKSON MEMORIAL HOSPITAL and DAVID FISHBAIN, M.D., respectfully request this Court to enter an order quashing in part the opinion from the Third District Court of Appeal, to the extent that the Third District's opinion allowed Respondents' wrongful death action, and otherwise affirming the trial court's dismissal of the Respondents' complaint in all respects.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert M. Klein", with a horizontal line extending to the right.

ROBERT M. KLEIN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 16th day of July, 1984, to the attached list of addressees.

STEPHENS, LYNN, CHERNAY, KLEIN
& ZUCKERMAN, P.A.
One Biscayne Tower, Suite 2400
Miami, Florida 33131
(305) 358-2000

BY: 
ROBERT M. KLEIN

SERVICE LIST

Jeanne Heyward, Esq.
300 Robert Bldg.
28 West Flagler St.
Miami, Fl 33130

Marco B. Loffredo, Esq.
604 Commerical Bank
12550 Biscayne Blvd.
N. Miami, Fl 33181

Phillip Blackmon, Esq.
2699 South Bayshore Drive
Third Floor
Miami, Fl 33133

Walter C. Ward, Esq.
700 Concord Bldg.
66 West Flagler Street
Miami, Fl 33130

Nancy Little-Hoffman, Esq.
Suite 201, Jay Mark Bldg.
500 S.E. 6th Street
Ft. Lauderdale, Fl 33301

George E. Bunnell, Esq.
P.O. Drawer 22988
Ft. Lauderdale, Fl 33335

H. Dane Mottlau, Esq.
511 Biscayne Bldg.
19 W. Flagler Street
Miami, Fl 33130

John W. Thornton, Esq.
720 Biscayne Bldg.
19 W. Flagler Street
Miami, Fl 33130

Arnold Ginsberg, Esq.
410 Concord Bldg.
66 West Flagler Street
Miami, Fl 33130

Edwin C. Ratiner, Esq.
60 S.W. 13th Street
Miami, Fl

Jack M. Coe, Esq.
800 Peninsula Federal Bldg.
200 S.E. 1st Street
Miami, Fl 33131