

IN THE SUPREME COURT OF FLORIDA  
CASE NUMBER: 65,004, 64,887, 64,898  
3RD DCA CASE NO: 81-2263 and 82-50

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

Petitioners,

vs.

RALPH LIPSHAW, etc., et al.,

Respondents.

**FILED**

SID J. WHITE

NOV 27 1984 ✓

CLERK, SUPREME COURT

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Chief Deputy Clerk *pl*

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**SUPPLEMENTAL BRIEF OF PETITIONERS**  
**DADE COUNTY PUBLIC HEALTH TRUST d/b/a**  
**JACKSON MEMORIAL HOSPITAL and DAVID FISHBAIN, M.D.**

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## 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 are 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. 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., will essentially rely upon the statement of the case and statement of fact which is contained in their original brief on the merits. For the purposes of this supplemental brief, however, a few salient facts should be related.

Petitioners JACKSON MEMORIAL and FISHBAIN 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 of 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."

The trial court granted Petitioners' motion to dismiss with prejudice, since it was clear that the statute of limitations had run on the claim as a matter of law. The Third District affirmed the dismissal of the survivorship action, noting that the claim was time-barred by the "applicable two-year statute of limita-

tions 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.

At the same time, however, the Third District reversed the dismissal of the Respondent's 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."

On October 11th, 1984, this Court filed its opinion in ASHE v. STELLA, Case Number 63,347. Several of the parties filed Notices of Intent to Rely upon the Court's decision in ASHE.

On October 31st, counsel received phone calls from the Clerk of this Court, to inform counsel of record that the Court had removed these three consolidated cases from the oral argument calendar. Counsel were informed at that time that the cases had been withdrawn from the oral argument calendar in light of this Court's recent decision in ASHE v. STELLA. Accordingly, on that date, Respondents' counsel filed a Motion for Leave to File Supplemental Briefs, in order to discuss the impact of the Court's decision in ASHE upon these consolidated cases. On November 2nd, the Court entered an order requiring Petitioners to serve supplemental briefs on or before November 26th, 1984.

POINT ON APPEAL

WHETHER THE TRIAL COURT'S DECISION TO DISMISS PETITIONERS JACKSON MEMORIAL AND FISHBAIN SHOULD BE AFFIRMED, BASED UPON THIS COURT'S DECISION IN ASHE v. STELLA, Case Number 63,347, OPINION DECIDED OCTOBER 11TH, 1984.

### ARGUMENT

THE TRIAL COURT'S DECISION TO DISMISS THE CLAIM AGAINST JACKSON MEMORIAL AND DAVID FISHBAIN SHOULD BE AFFIRMED, BASED UPON THIS COURT'S DECISION IN ASHE v. STELLA, CASE NUMBER 63,347, OPINION DECIDED OCTOBER 11th, 1984.

In ASHE v. STELLA, this Court ruled that a survivor is barred from bringing a wrongful death action in cases where the decedent would have been precluded from filing suit had he survived because of the statute of limitations. In its decision in ASHE, the Court expressly determined that Section 95.11(4)(b), Florida Statutes, was intended to include a claim in tort for damages because of death, and that the legislature clearly meant to have the medical malpractice statute of limitations apply to wrongful death actions in cases where a death has allegedly been occasioned by medical malpractice. In that regard, the Court specifically endorsed the Fourth District's ruling in WORRELL v. JOHN F. KENNEDY MEMORIAL HOSPITAL, INC., 384 So.2d 897 (Fla. 4th DCA 1980), aff'd sub nom., DOBER v. WORRELL, 401 So.2d 1322 (Fla. 1981), a case which was specifically relied upon by Petitioners before the Third District Court of Appeal.

Based upon its interpretation of the applicable medical malpractice statute of limitations, this Court overruled the Third District's finding that a "wrongful death action is not limitations-barred when it is filed within two years of the death of the injured party." However, the ASHE court approved the reversal of a summary judgment in favor of the defendant physicians, since there was an issue of fact as to whether or not the plaintiffs truly knew of the defendants' allegedly improper diagnosis prior to March

30th, 1977.

In this instance, according to the Plaintiffs' pleadings and the decision of the Third District Court of Appeal, the Plaintiffs conclusively knew that the Defendants improperly diagnosed Jonathon's Lipshaw's condition on or about February 25th, 1977. Further, according to the allegations of the complaint, Jonathon Lipshaw had been treated improperly because of the misdiagnosis, and Plaintiffs also learned of this negligence on or about February 25th, 1977.

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 25th, 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. LIPSHAW v. PINOSKY, et al., 442 So.2d 992 (Fla. 3rd DCA 1983) at 993-994.

Based upon this finding, the Third District rejected any suggestion that the Plaintiffs did not realize that these alleged acts of misdiagnosis and mistreatment were acts of negligence, since they had actual knowledge as to the precise acts of negligence upon which they were suing long before they actually filed suit.

This Court did remand the ASHE case for further consideration, in light of the Court's determination that the trial court could not have decided as a matter of law that the plaintiff should have known of the allegedly improper diagnosis once she had in fact been given the correct diagnosis. In that regard, the ASHE court noted that the bench mark date used by the trial court was

the date on which the plaintiff had received what was "inarguably a preliminary diagnosis." The final results and confirming diagnosis were not available until March 30th, 1977. Under the circumstances, this Court felt that "a tentative diagnosis" does not start "the clock on an action for medical malpractice arising out of negligent failure to properly diagnose."

In this instance, as is reflected by the Third District's opinion, there is no question about the fact that MR. and MRS. LIPSHAW were aware of the improper diagnosis and improper treatment of their son's condition as of February 25th, 1977. Thus, the Plaintiffs had knowledge of the "incident" which gave rise to their cause of action on that date, within the meaning of Section 95.11(4)(b), Florida Statutes (1979). Having admittedly gained knowledge of the incident, i.e., the misdiagnosis and mistreatment, more than two years prior to the date that their claim was filed against DR. FISHBAIN and JACKSON MEMORIAL, the Plaintiffs' claim should be barred as a matter of law, and there are no remaining issues of fact to be resolved by the trier of fact. This Court should therefore affirm the dismissal with prejudice.

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 26th day of November, 1984, to the attached list of addressees.

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