

IN THE SUPREME COURT OF FLORIDA

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

3RD DCA CASE NO: 81-2263 and 82-50

FILED

SID J. WHITE

JAN 16 1985

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, et al.

Respondents.

SUPPLEMENTAL REPLY 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 FACTS

Petitioners will adopt the statement of the case and statement of fact which was contained in their original brief on the merits, and their supplemental brief.

POINT ON APPEAL

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

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.

Respondents' attempts to distinguish ASH v. STELLA, 9 FLW 434 (Fla. Case No. 63,347, opinion filed October 11th, 1984) can be summarized rather simply: Respondents knew that JONATHON LIPSHAW'S condition was improperly diagnosed on February 25th, 1977. On that date, they also discovered that JONATHON'S treatment had been inappropriate up until that time. However, Plaintiffs argue that the statute of limitations did not begin to run on that date, because they did not learn that JONATHON'S actual medical problems "could have been properly diagnosed" until hearing certain testimony in the mediation proceeding on January 8th, 1979. Based upon this contention, Plaintiffs argue as follows:

Thus, Plaintiffs believe, the statute of limitations did not commence until that date, since prior thereto, they were unaware that medical negligence had occurred, or that Jonathon had suffered any injury. If, for example, Jonathon's condition was not medically diagnosable at an earlier stage, or would not have responded to treatment even if diagnosed earlier, then there would be no cause of action. (Respondents' Supplemental Brief, at Page 3.)

Petitioners would respectfully submit that this Court's decision in ASH cannot possibly--or properly--be construed in that fashion.

From a factual standpoint, Petitioners must respond to the Plaintiffs' suggestion that they were unaware of their cause of action until January of 1979, and that they otherwise did not know that JONATHON had suffered any injury until that date. The

Court must recall that the parties were cross-examining a physician in the context of a medical mediation proceeding on that date. Query: why did the Plaintiffs initiate mediation proceedings if they were unaware of the fact that JONATHON had suffered injury as a result of alleged acts of negligence?

Plaintiffs in this matter have never denied that they knew of the misdiagnosis of JONATHON'S condition in February of 1977. The affidavits which they submitted in support of their proposed Fourth Amended Complaint do not alter that fact. Those affidavits (and the proposed Fourth Amended Complaint) simply state that the Plaintiffs did not actually know that the present Defendants could have diagnosed JONATHON'S condition at an earlier date until the cross-examination of Dr. Eugene Schiff during the medical mediation proceeding in January of 1979.

Petitioner would respectfully submit that it is irrelevant as to when the LIPSHAWS actually knew with any degree of certainty that JONATHON'S condition could have been diagnosed at an earlier date if they should have known of their cause of action before that time. The statute of limitations is not dependent solely upon a plaintiff's actual knowledge, but rather may also be deemed to commence once a plaintiff "should have known" of a potential cause of action.

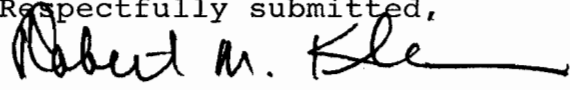
In this instance, the trial court and the Third District Court of Appeal have agreed that the Plaintiffs were put on notice of their potential cause of action in February of 1977, when--by their own admission--they learned of the misdiagnosis. They need not have waited until the actual mediation proceedings to secure

opinion testimony which would have confirmed those suspicions which would naturally have been occasioned by actual knowledge of a misdiagnosis. Those suspicions and their knowledge of the misdiagnosis should have triggered the running of the statute of limitations as a matter of law. The trial court and the Third District have ruled in that fashion, and this Court's decision in ASH v. STELLA commends that same result.

CONCLUSION

For all of the above-captioned reasons, and for the reasons which are expressed in Petitioners' main brief and supplemental brief on the merits, Petitioners would respectfully request the Court to enter an order affirming the trial court dismissal of the action against DADE COUNTY and DR. FISHBAIN.

Respectfully submitted,

A handwritten signature in black ink that reads "Robert M. Klein". The signature is written in a cursive style with a long horizontal flourish extending to the right.

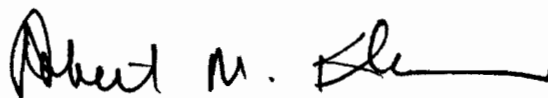
ROBERT M. KLEIN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 14th day of January, 1985, to the attached list of addressees.

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