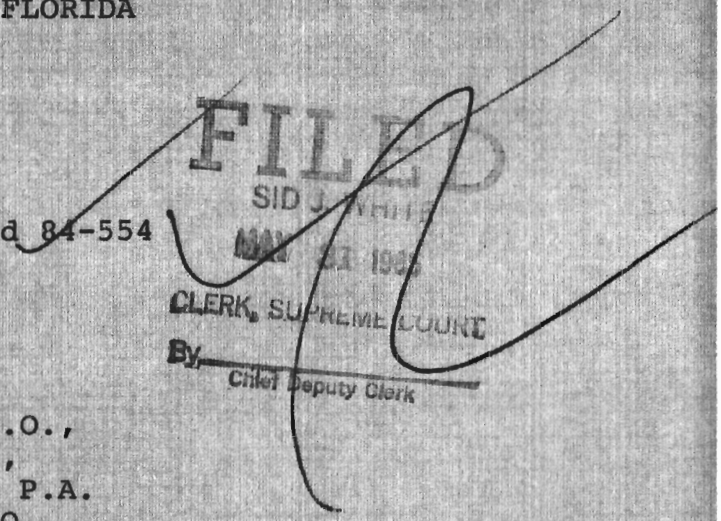
IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,972

DCA NOS. 84-402, 84-505 and 84-554



STANLEY FRANKOWITZ, D.O.,
JOHN THESING, D.O.,
SUNRISE MEDICAL GROUP, P.A.
JAMES J. YEZBICK, D.O.,
and DAVID MILLER, D.O.,

Petitioners,

v.

MYRTLE PROPST and
MATTHIAS PROPST,

Respondents.

RESPONDENTS' BRIEF ON JURISDICTION

Mercedes C. Busto, Esq.
BAILEY & DAWES,
a professional association
Attorneys for Respondents
Penthouse Two - IntrAmerica Building
1390 Brickell Avenue
Miami, Florida 33131-3399
(305) 374-5505

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SUMMARY OF ARGUMENT

Frankowitz v. Propst, 464 So.2d 1225 (Fla. 4th DCA 1985), holds that F.S. §768.56 applies to this case even though "the act of medical negligence" may have taken place before July 1, 1980 (the statute's effective date).

Frankowitz does not hold that the statute applies even though the cause of action accrues before July 1, 1980. That argument was never made to the district court; the district court never passed on that point.

Moreover, there had been a final adjudication that the earliest date the cause of action accrued was October, 1980, when the Plaintiff discovered that she was injured.

Therefore, although the acts of negligence took place before July 1, 1980, the Plaintiff's cause of action here did not accrue until October, 1980, or even later. Frankowitz does not conflict with the cases holding that F.S. §768.56 is inapplicable to causes of action which accrue before July 1, 1980.

The Court should therefore dismiss the Petitions for Review.

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STATEMENT OF THE CASE AND THE FACTS[1]

In August, 1981, the Propsts sued John Neily, D.O., James J. Yezbick, D.O., David Miller, D.O., John F. Thesing, D.O., and Sunrise Medical Group (Dr. Thesing's employer), for medical malpractice. [R. 1-11]

The complaint alleged that Dr. Neily had performed surgery on Mr. Propst in August, 1977, that Drs. Yezbick and Miller had treated Mrs. Propst through approximately March, 1979, and that Dr. Thesing had treated her in March, 1979. [R. 2-3] The Complaint alleged that surgeon Neily had performed the surgery negligently, and charged Yezbick, Miller and Thesing with failure to diagnose the cause of her subsequent problems, ultimately linked to the negligent surgery. [R. 4-7] The Complaint also alleged that other doctors had finally diagnosed the cause of Mrs. Propst's problems in October, 1980. [R. 5]

In December, 1982, the Propsts joined defendant Stanley H. Frankowitz, D.O., also a member of the Sunrise Medical Group, who had treated Mrs. Propst through June, 1980. [R. 299-302]

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[1] References to the record filed with the Fourth District Court of Appeal are designated "R."

Respondents, Myrtle Eileen Propst and Matthias J. Propst, will be called by their individual names, or will be called "Plaintiffs." Petitioners, John Neily, D.O., James J. Yezbick, D.O., David Miller, D.O., John F. Thesing, D.O., Stanley H. Frankowitz, D.O., and Sunrise Medical Group, P.A., may be referred to as "defendants" or by their individual names, or collectively as "Petitioners."

The case was tried to a jury. As part of their case, the defendants read into evidence Mrs. Propst's answers to interrogatories stating that in October, 1980, she learned her prior medical treatment had caused her injury.[2] [R. 866, 868]

The jury rendered a verdict finding all defendants negligent. It also made specific findings regarding statute of limitations defenses by Dr. Neily and Dr. Frankowitz. As to Dr. Neily, who had performed surgery in August, 1977, the jury found that Mrs. Propst had sued him timely in August, 1981, within two years from her discovery of the "incident." [R. 568C] As to Dr. Frankowitz, who had treated Mrs. Propst until June, 1980, the jury also found that Mrs. Propst had sued him timely in December, 1982. [R. 568C]

Thereafter, the parties appealed and cross-appealed from the final judgment. The Fourth District, upon stipulation, dismissed the appeals by all parties except Frankowitz.[3]

The judgment is therefore final as to Neily, Yezbick, Miller, and Thesing (and Sunrise Medical Group for Thesing's

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2 Based on this evidence, Frankowitz moved for directed verdict on his statute of limitations defense, arguing that the cause of action accrued in October, 1980, that the statute ran in October, 1982, and that he was not joined until December, 1982. Frankowitz's counsel argued: "[S]he knew that she had been damaged, injured, or her cause of action or her claims had occurred or accrued, that someone had harmed her or hurt her medically in October, 1980." [R. 608]

3 The pending appeal by Frankowitz (and by Sunrise Medical Group, derivatively) on the statute of limitations point is Case No. 83-2393 in the Fourth District Court of Appeal.

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liability). That judgment necessarily adjudicates the fact -- which has always been undisputed -- that Mrs. Propst did not discover the injury until October, 1980.[4]

ARGUMENT

At issue here is the application of Section 768.56, Florida Statutes (1983). The statute became effective on July 1, 1980. The Fourth District held that the statute applies to this case even though the "act of medical negligence" took place before July 1, 1980. Frankowitz v. Propst, 464 So.2d 1225, 1227 (Fla. 4th DCA 1985).

In Young v. Altenhaus, 10 F.L.W. 252 (Fla., May 2, 1985), this Court held that the statute may not be applied to causes of action which accrued before July 1, 1980. The Court approved the decisions in Parrish v. Mullis, 458 So.2d 401 (Fla. 1st DCA 1984), and in Tindall v. Miller, 463 So.2d 1262 (Fla. 2d DCA 1985), to the same effect. (Petitioners urge that those two decisions provide a basis for conflict jurisdiction in this case.)

Conversely, in Karlin v. Denson, 10 F.L.W. 261 (Fla., May 2, 1985), this Court held that the statute applies where the cause

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[4] Indeed, even Frankowitz bases his appeal on this fact, claiming that the two-year statute of limitations ran, as a matter of law, two years from October, 1980 -- the same argument he had made on his motion for directed verdict. [See R. 608-09]

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of action accrued subsequent to July 1, 1980. See also Florida Patients Compensation Fund v. Rowe, 10 F.L.W. 249 (Fla., May 2, 1985)(remanding for determination of when cause of action accrued, where record was silent on that point).[5]

From the foregoing decisions, it is clear that the determinative date for the application of §768.56 is the date of accrual of the cause of action. For example, in Parrish, the cause of action had accrued on February 16, 1980, prior to the statute's effective date. 458 So.2d at 402. Similarly, in Tindall, the cause of action accrued in April, 1980. In that case, the court held:

> Carolyn Tindall's knee surgery was performed on March 4, 1980, and the ensuing complications therefrom on which she based her complaint occurred shortly thereafter while she was still in the hospital. The record shows that Mrs. Tindall was aware of the alleged malpractice at least by the end of April, 1980, therefore, her cause of action accrued prior to July 1, 1980.
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> [463 So.2d at 1263; emphasis added]

Petitioners assert that the Fourth District's decision in this case conflicts with the foregoing authorities.

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[5] In Rowe, this Court also upheld §768.56 against constitutional attack. That decision forecloses Petitioners' constitutional arguments here. For that reason, the Court should refuse to accept jurisdiction based on that part of the Fourth District's decision holding the statute constitutionally valid. See Coffin v. State, 374 So.2d 504 (Fla. 1979).

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PENTHOUSE TWO, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3399 • TELEPHONE (305) 374-5505

To determine whether such conflict exists, this Court must examine the resulting decision in Frankowitz. Niemann v. Niemann, 312 So.2d 733, 734 (Fla. 1975). In other words, the district court's opinion must be viewed in light of the facts of this case. Dept. of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983)(where decisions are factually distingishable, there is no conflict).

Frankowitz v. Propst

In this case, the Fourth District was faced with a very specific, limited argument:

> Appellants first contend that because the acts of negligence alleged by appellees all occurred before July 1, 1980, the effective date of the statute, the award of attorneys' fees to Mrs. Propst constitutes an impermissible retroactive application of the statute.
>
> [464 So.2d at 1226; emphasis added]

Petitioners did not argue that the statute was inapplicable because the cause of action accrued prior to July 1, 1980. The date of Mrs. Propst's discovery of the injury -- October, 1980 -- had always been undisputed; in fact, the discovery and accrual date had already been adjudicated. Petitioners could not assert otherwise. See Kimbrell v. Paige, 448 So.2d 1009, 1012 (Fla. 1984)(a judgment on the merits is conclusive as to every matter which was or could have been offered to sustain or defeat the claim). See also, American Nat'l Bank & Trust Co. of Ft. Lauderdale v. Egidi, 388 So.2d 51, 52 (Fla. 4th DCA 1980)

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PENTHOUSE TWO, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3399 • TELEPHONE (305) 374-5505

(party may not relitigate the same facts previously set to rest when the affirmative defense was resolved).

In view of Petitioners' limited contention, the Fourth District made a limited holding: Section 768.56, Florida Statutes (1983), applies in this case, even though "the act of medical negligence may have taken place before" July 1, 1980. 464 So.3d at 1227(emphasis added).

This holding poses no conflict with the authorities establishing that §768.56 is inapplicable to causes of action which accrue before July 1, 1980. This is so for two reasons.

First, the Fourth District did not decide that the statute applies to a cause of action accruing before July 1, 1980. Its decision therefore is not authority on that point. City of Miami v. Stegemann, 158 So.2d 583, 584 (Fla. 3d DCA 1964)(no decision is authority on any question not raised and considered).

Second, the record in this case shows that Mrs. Propst did not discover her injury until October, 1980, the earliest date her cause of action could have accrued. In that respect, the Frankowitz decision is completely consistent with Young v. Altenhaus, Karlin v. Denson, Florida Patients Compensation Fund v. Rowe, Parrish v. Mullis, and particularly with Tindall v. Miller, holding that the plaintiff's cause of action did not accrue until she was aware of the malpractice. 463 So.2d at 1263.

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PENTHOUSE TWO, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3399 • TELEPHONE (305) 374-5505

The bottom line here is that Frankowitz does not conflict with other decisions which hold that the date of accrual is the determinative date.

Respondent therefore respectfully submits that the Court ought to disregard words in the opinion which may arguably have significance in other contexts beyond the facts underlying the decision itself. For, as stated in Niemann v. Niemann, 312 So.2d 733, 734 (Fla. 1975), in determining whether there is conflict, the Court should look not merely at the words of the opinion, but at the resulting decision.

CONCLUSION

For any or all of the foregoing reasons, the Court should dismiss the Petitions for Review.

Respectfully submitted,

BAILEY & DAWES,
a professional association
Attorneys for Respondents
IntrAmerica Building
1390 Brickell Avenue
Penthouse Two
Miami, Florida 33131-3313
Telephone: (305) 374-5505

By: Mercedes C. Busto
Mercedes C. Busto

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 28th day of May, 1985 to: DAVID L. KAHN, ESQUIRE, David L. Kahn, P.A., 514 S. E. 7th Street, Fort Lauderdale, Florida 33302; BRUCE F. SIMBERG, ESQUIRE and STEVEN J. CHACKMAN, ESQUIRE, Conroy & Simberg, P.A., 2206 Hollywood Blvd., Hollywood, Florida 33020; MORTON J. MORRIS, ESQUIRE, Law Offices of Morton J. Morris, P.A., 2500 Hollywood Blvd., #212, Hollywood, Florida 33020; and MELANIE G. MAY, ESQUIRE, Bunnell, Denman & Woulfe, P.A., P.O. Drawer 22988, Fort Lauderdale, Florida 33335.

Of Counsel

BAILEY & DAWES, A PROFESSIONAL ASSOCIATION
PENTHOUSE TWO, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3399 • TELEPHONE (305) 374-5505