

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In re: GUIDANT CORP. IMPLANTABLE  
DEFIBRILLATORS PRODUCTS  
LIABILITY LITIGATION

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MDL No.: 05-1708 (DWF/AJB)

CYNTHIA LAMOUREUX

Plaintiff,

0:06 - CV - 01567 - DWF - AJB

v.

GUIDANT CORPORATION  
Defendant

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**MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT GUIDANT  
CORPORATION'S MOTION TO DISMISS FOR LACK OF STANDING**

Plaintiff has no serious quarrel with the blanket statements of law made in Defendant's Memorandum. It is true that a survival action under Florida Statute Section 46.021 must be brought by the Personal Representative and further still, a Wrongful Death Action under Florida Statutes must be brought by the Personal Representative. The question then becomes whether this Court should dismiss the entirety of the Plaintiff's Complaint where seven weeks has passed since the Court's Order entered in anticipation of Howard Lamoureux's appointment as "executor" and where the Probate process is underweigh in the State of Florida.

A recent opinion from Florida's Third District Court of Appeal is instructive under these circumstances. In University of Miami v. Wilson, 2006 WL 1687685 (Fla..3d. DCA-June 21, 2006) the Florida Appellate Court held that although a Presuit Notice to commence medical malpractice litigation was served on Defendants when the patient's daughters were not Personal Representatives,

once the daughters did become Personal Representatives for the patient's Estate, their powers related back thereby validating the actions they took prior to their appointment.

For a Plaintiff to bring a medical negligence action in Florida as against a Defendant, the Plaintiff must provide the Defendant with a Notice of Intent to Initiate Litigation. Under Florida's Medical Malpractice Act (Florida Statute 766.106 et. sequential) Plaintiffs must provide the Defendant health care providers with an opportunity to conduct a presuit investigation, discovery and negotiations with the idea being that frivolous lawsuits will be screened out and defenses will be asserted early, thus encouraging a prompt determination of claims. At the time Lisa Wilson served her presuit notice on Defendants in the cited case, she had not been appointed Personal Representative. When the presuit period expired, an actual wrongful death lawsuit was filed which described the Plaintiffs as "Lisa Wilson and Keisha Salmon as nominated Co-Personal Representatives and/or any dually appointed Personal Representative(s) of the Estate of Marjorie Salmon Graham, deceased." The University of Miami's medical school moved to dismiss the Complaint arguing that as the daughters had not been appointed Personal Representatives of the decedent's estate during the presuit period, all actions taken by them were a nullity. At a hearing on the Motion to Dismiss, it was revealed that the daughters were a week or two away from being appointed. The trial Court denied the University's Motion to Dismiss and the University petitioned the Appellate Court for a Writ of Certiorari.

The Appellate Court upheld the denial of the Motion to Dismiss despite the argument that the Personal Representatives had not been appointed when the Complaint was filed. The Third District Court of Appeal noted as follows:

"Mrs. Wilson and Ms. Salmon argue that, because they were

ultimately appointed Personal Representatives, their powers as Personal Representatives should relate back, thereby validating the actions they took prior to their appointment. We agree as there is both statutory and case law support for such a finding. Chapter 733 of the Florida Statutes is the Probate Code and deals with the administration of the estates. Section 733.601, Florida Statutes (2002) specifically provides that: **The duties and powers of Personal Representative commence upon appointment. The powers of a Personal Representative relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring after appointment. A personal representative may ratify and accept acts on behalf of the estate done by others when the acts would have been proper for a personal representative.**” (emphasis added) 31 Fla. Law Weekly (D) 1682, 1685.

As is set out in the cited opinion, Florida law recognizes that the acts of a Personal Representative prior to his appointment may be validated upon appointment. Griffin v. Workman, 73 So.2d 844 (Fla.1954). This doctrine holds true where one brings a wrongful death action without having been appointed as Personal Representative but is subsequently appointed as Personal Representative, validating the cause of action for wrongful death. Talan v. Murphy, 443 So.2d207, 208 (Fla. 3d DCA. 1983). Indeed this doctrine has been extended to allow a wrongful death action to proceed when the Personal Representative has been appointed after the Statute of Limitations has already run. Bermudez v. Florida Power & Light Company, 433 So.2d 565 (Fla. 3d DCA 1983).

Finally, the Florida Supreme Court has held that a person who is not yet the Personal Representative of an estate can make a valid settlement offer to conclude the wrongful death claim where the person is subsequently appointed Personal Representative. Specifically, the legal acts of a Personal Representative relate back after Court appointment, thereby validating the previous acts of the Personal Representative on behalf of the estate. Berges v. Infinity Insurance Company, 896 So.2d 665 (Fla. 2004).

Florida law supports the position that once the Letters of Administration are issued to Howard Lamoureux, his acts relate back prior to his actual appointment. In light of the unique circumstances where the instant case occupies a niche in the global MDL litigation, this Court should apply the Florida law to this Federal litigation and deny the Defendant's Motion to Dismiss for Lack of Standing.

Respectfully submitted,  
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**s/ Jay Calvert Cooper**  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 30, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that I mailed the foregoing document and Notice of Electronic Filing by First Class mail to the following: Timothy A. Pratt, Esquire, SHOOK, HARDY & BACON, LLP, 2555 Grand Boulevard, Kansas City, MO 64108-2613, and Joseph M. Price, Esquire, FAEGRE & BENSON, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-3901.

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