Third District Court of Appeal

State of Florida

Opinion filed July 22, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-2136
Lower Tribunal No. 15-17158

Stacey Castro & Raul Castro,
Appellants,

vs.

Italo Linfante, M.D., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Alan S. Fine, Judge.

Jay M. Levy, P.A., and Jay M. Levy and Ryan L. Marks; James J. Traitz, LLC., and James J. Traitz, for appellants.

Wicker, Smith, O'Hara, McCoy & Ford, P.A., and Jessica L. Gross; Falk, Waas, Hernandez, Solomon, Mendlestein & Davis, P.A., and Norman M. Waas, for appellees.

Before FERNANDEZ, LINDSEY, and GORDO, JJ.

LINDSEY, J.

Stacey and Raul Castro appeal an order dismissing the claims of their three minor children for loss of parental consortium as barred by the statute of limitations. For the reasons set forth below, we affirm.

I. BACKGROUND

This appeal arises out of a medical malpractice action initiated by Stacey Castro and her husband, Raul Castro, related to medical care and treatment provided to Stacey between February 2011 and September 2012. In July 2015, the Castros sued Italo Linfante, M.D.; Radiology Associates of South Florida, P.A.; Jorge Pardo, M.D.; Neuroscience Consultants, LLC; and Baptist Hospital of Miami, Inc. ("Defendants/Appellees"). In the initial six-count complaint, Stacey sought damages for her own injuries, and Raul sought damages for loss of consortium.

In April of 2019, nearly eight years after the medical care and treatment and four years after the suit was filed, the Castros sought leave to amend the complaint to add claims by their minor children.[1] In May of 2019, the trial court entered an agreed order and the amended complaint attached to the motion was deemed filed as of that date. Specifically, in Count VII, the Castros, on behalf of their children, sought damages pursuant to section 768.0415, Florida Statutes, for "[p]ermanent loss of services, comfort, companionship, and society of their mother, Stacey

[1] In the same motion, the Castros additionally sought dismissal of their claims against Pardo and Neuroscience Consultants after agreeing to a settlement.

Castro[.]" Defendants/Appellees moved to dismiss Count VII of the amended complaint arguing that the two-year statute of limitations for medical malpractice pursuant to section 95.11(4)(b), Florida Statutes, barred the minor children's loss of parental consortium claims. After conducting a hearing, the lower court agreed and dismissed Count VII with prejudice. This timely appeal followed.

II. JURISDICTION

The minor children are named parties in Count VII only. Thus, the order dismissing Count VII with prejudice completely disposed of the minor children's claims. Ultra Aviation Servs., Inc. v. Clemente, 262 So. 3d 830, 831 (Fla. 3d DCA 2018). We have jurisdiction pursuant to Florida Rule of Appellate Procedure 9.110(k).

III. STANDARDS OF REVIEW

A trial court's ruling on a motion to dismiss is subject to de novo review. Mlinar v. United Parcel Serv., Inc., 186 So. 3d 997, 1004 (Fla. 2016). Likewise, a legal issue surrounding a statute of limitations question is an issue of law subject to de novo review. Hamilton v. Tanner, 962 So. 2d 997, 1000 (Fla. 2d DCA 2007). The determination of whether an amended complaint relates back to the filing of the original complaint is a question of law and is also reviewed de novo. Kopel v. Kopel, 229 So. 3d 812, 815 (Fla. 2017).

IV. ANALYSIS

Raul brought his claim under the common law, which allows a plaintiff to recover damages for loss of consortium resulting from his or her spouse's injury caused by the negligence of another. Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971). Consortium has been defined as:

> [T]he companionship and fellowship of husband and wife and the right of each to the company, cooperation and aid of the other in every conjugal relation. Consortium . . . consists, also, of that affection, solace, comfort, companionship, conjugal life, fellowship, society and assistance so necessary to a successful marriage.

Id. (citing Lithgow v. Hamilton, 69 So. 2d 776 (Fla.1954)). The Castro's three minor children brought their loss of consortium claims pursuant to section 768.0415, Florida Statutes, which similarly provides:

> A person who, through negligence, causes significant permanent injury to the natural or adoptive parent of an unmarried dependent resulting in a permanent total disability shall be liable to the dependent for damages, including damages for permanent loss of services, comfort, companionship, and society.

The Florida Supreme Court, in discussing both types of consortium claims, stated:

> Our legislature has recognized that recovery for loss of companionship is necessary to compensate the minor child of a permanently injured parent. § 768.0415, Fla. Stat. (1993). Similarly, this Court has extended the right to recover for the loss of marital consortium to the wife. Gates, 247 So. 2d 40. These legislative and judicial pronouncements make clear that it is the policy of this state that familial relationships be protected and that

> recovery be had for losses occasioned because of wrongful injuries that adversely affect those relationships.

United States v. Dempsey, 635 So. 2d 961, 964-65 (Fla. 1994).

In dismissing the minor children's claims for loss of consortium, the lower court relied on Daniels v. Weiss, 385 So. 2d 661 (Fla. 3d DCA 1980) and West Volusia Hospital Authority v. Jones, 668 So. 2d 635 (Fla. 5th DCA 1996). In so doing, the court found that the children's claims did not relate back to the initial complaint filed on July 28, 2015, and that there is no distinction between a spouse's consortium claim and a child's consortium claim as it pertains to the relation back doctrine.[2] The Castros contend the trial court erred because the claims arose out of the same negligent conduct as alleged in the initial complaint.

While spousal consortium claims are derivative in nature, they are nevertheless separate and distinct causes of actions.[3] Philip Morris USA, Inc. v. McCall, 234 So. 3d 4, 12 (Fla. 4th DCA 2017) (citing Metro. Dade County. v. Reyes,

---

[2] The medical malpractice statute of limitations is two years from the time of the incident or from the time the incident is discovered, or should have been discovered, with the exercise of due diligence. See § 95.11(4)(b), Fla. Stat. The care and treatment at issue was provided in 2011. It is undisputed that the children's loss of parental consortium claims, brought for the first time on May 7, 2019—nearly eight years after the care and treatment at issue—were barred by the statute of limitations. See id. This is because the amended complaint alleges Stacey was properly diagnosed by September 2012. Thus, at the latest, the children's claims should have been brought by September of 2014.

[3] In Count VI of the amended complaint, Raul Castro timely sought damages for the loss of society, companionship, and consortium of his wife.

688 So. 2d 311, 312 (Fla. 1996); Busby v. Winn & Lovett Miami, Inc., 80 So. 2d 675, 676 (Fla. 1955); Randall v. Walt Disney World Co., 140 So. 3d 1118, 1121 (Fla. 5th DCA 2014)); Daniels, 385 So. 2d at 663. Like a spousal consortium claim, a minor's loss of consortium claim is derivative in nature and seeks damages for similar losses—comfort, companionship, and society. As separate causes of action, loss of consortium claims must be "timely" in their own right for purposes of the statute of limitations. McCall, 234 So. 3d at 12 (citing Gates, 247 So. 2d at 45 ("Where there is a cause of action brought by the injured husband pending, the wife's consortium action, if not time barred, may be joined with her husband's claim . . . .")).

Rule 1.190 governs amended pleadings and defines the relation back doctrine. Rule 1.190(c) provides:

> (c) Relation Back of Amendments. When the claim or defense asserted in the amended pleading **arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading**, the amendment shall relate back to the date of the original pleading.

(Emphasis added).

As with all pleading rules, this rule is to be liberally interpreted. C.H. v. Whitney, 987 So. 2d 96, 99 (Fla. 5th DCA 2008). However, the rule of liberality can only go so far. See Sch. Bd. of Broward Cty. v. Surette, 394 So. 2d 147, 154 (Fla. 4th DCA 1981). "[O]ne cannot defeat the bar of the statute of limitations by

filing a new cause of action labelled as an amended complaint." Id.; see also Cox v. Seaboard Coast Line R. Co., 360 So. 2d 8 (Fla. 2d DCA 1978) (same).

The relation back doctrine generally does not apply when an amendment seeks to add an entirely new party to the action after the statute of limitations has expired. Caduceus Props., LLC v. Graney, 137 So. 3d 987, 993-94 (Fla. 2014) (citing Schwartz v. Wilt Chamberlain's of Boca Raton, Ltd., 725 So. 2d 451, 453 (Fla. 4th DCA 1999); Kozich v. Shahady, 702 So. 2d 1289, 1291 (Fla. 4th DCA 1997)); see also McCall, 234 So. 3d at 13 (Fla. 3d DCA 2017) (citing Roback v. Cassaro, 837 So. 2d 1061, 1062 (Fla. 4th DCA 2003)); HSBC Bank USA, N.A. v. Karzen, 157 So. 3d 1089, 1091-92 (Fla. 1st DCA 2015); Russ v. Williams, 159 So. 3d 408 (Fla. 1st DCA 2015).

In Daniels, which involved a medical malpractice claim, we held that a wife's loss of consortium claim did not relate back to her husband's original complaint because the claim stated a new cause of action and was brought by a new party. 385 So. 2d at 663. Similarly, in West Volusia Hospital Authority, also involving a medical malpractice action, our sister court in the Fifth District found that a father's filial consortium claim did not relate back to the mother's filial consortium claim and held that the assertion of a separate claim by a separate party would have to be brought within the statute of limitations. 668 So. 2d at 636. The court expressly found that it was "not enough" that the defendant knew of the father's existence and

knew that he had a loss of consortium claim like the one asserted by the child's mother.[4] Id.

Not only did Count VII of the Castro's amended complaint assert a new and distinct cause of action, Count VII added a new party. The claims sought to be asserted in West Volusia Hospital Authority and Daniels were found not to relate back because they added a new party to the lawsuit. W. Volusia Hosp. Auth., 668 So. 2d at 636; Daniels, 385 So. 2d at 663. Kopel did not disturb this conclusion. See McCall, 234 So. 3d at 13 (Fla. 4th DCA 2017). As such, the three minor children were required to bring their claims within the applicable two-year limitation period. Because they failed to do so, we affirm.

Affirmed.

[4] In Kopel, which dealt with a dispute over a family business, the Florida Supreme Court clarified that under the rule 1.190(c), "an amendment asserting a new cause of action can relate back to the original pleading where the claim arises out of the same conduct, transaction, or occurrence as the original." 229 So. 3d at 819. The Court disapproved of West Volusia Hospital Authority and Daniels only to the extent that they established "a bright-line rule that amendments asserting new claims cannot relate back under any circumstances." Id. at 817. Further, the Court expressly provided that it was not "passing judgment as to the correctness" of the ultimate conclusions reached in West Volusia Hospital Authority or Daniels, thereby leaving the remainder of the precedent found therein intact. Id. at 817 n.4.