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.,
DAVID MILLER, D.O.,
and JOHN A. NEILY, D.O.,

Petitioners,

-vs-

MYRTLE PROPST and
MATTHIAS PROPST,

Respondents.

==========

RESPONDENTS' ANSWER BRIEF ON THE MERITS
AND APPENDIX

==========

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SUMMARY OF ARGUMENT

A medical malpractice cause of action does not accrue until the plaintiff becomes aware of the malpractice. In this case, the Propsts discovered the injury in October, 1980. Their cause of action therefore accrued, at the very earliest, in October, 1980, subsequent to the enactment of section 768.56 (July, 1980).

Section 768.56 therefore was properly applied to this case. Its application here was not retroactive. *Young v. Altenhaus*, 472 So.2d 1152 (Fla. 1985), and *Karlin v. Denson*, 472 So.2d 1155 (Fla. 1985) (Section 768.56 applies to causes of action which accrued after July 1, 1980).

Section 768.56 as applied to this case does not impair the obligation of contract in any way. The statute does, and is intended to, encourage a prospective plaintiff to evaluate the merits of a claim, and encourages a defendant to evaluate the merits of his or her defense. The statute does not regulate the doctor-patient relationship.

Section 768.56 as applied to this case does not violate Petitioners' due process rights. The statute does not impair any rights which had vested prior to its enactment. In addition, the statute is supported by a strong and legitimate state objective.

In summary, section 768.56 is constitutionally valid as applied in this case.

STATEMENT OF THE CASE AND THE FACTS[1]

The Complaint

In August, 1981, the Propsts sued osteopaths John Neily, James J. Yezbick, David Miller, John F. Thesing, and Sunrise Medical Group (Dr. Thesing's employer), for medical malpractice. [Pet.'s App. 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 from March, 1979 through June, 1980. [Pet.'s App. 2-3] The Complaint alleged that 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. [Pet.'s App. 4-7] The Complaint also alleged that other doctors had finally diagnosed the cause of Mrs. Propst's problems in October, 1980. [Pet.'s App. 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. [Pet.'s App. 12-15]

---

[1] References to Petitioners' Appendix are designated "Pet.s' App." References to Respondents' Appendix are designated "Resp.'s App."

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

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The Trial

The case was tried to a jury. As part of their case, the defendants (not plaintiffs) 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] [Pet.'s App. 9,12] The defendants also read into evidence Mr. Propst's deposition stating that he first suspected there might be a problem in October, 1980, when the doctors told him there was something wrong. [Resp.'s App. 16,17]

The jury rendered a verdict finding all defendants negligent. It also made specific findings regarding statute of limitations defenses by Drs. Neily and 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." [Pet.'s App. 18]

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. [Pet.'s App. 18]

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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*." [Resp.'s App. 18, emphasis added]

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The Appeals

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

ARGUMENT

Introduction

In *Frankowitz v. Propst*, 464 So.2d 125 (Fla. 4th DCA 1985), the Fourth District was faced with a very specific, limited argument, framed as follows:

> 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]

---

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.

4 Indeed, even Frankowitz based his separate 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* Resp.'s App. 18,19]

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In other words, the court did not consider whether the cause of action had accrued either prior to, or after, July 1, 1980.

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.2d at 1227 (emphasis added).

This Court in *Young v. Altenhaus*, 472 So.2d 1152 (Fla. 1985), indicated disapproval of the Fourth District's decision in this case, on the ground that section 768.56 may not be applied retroactively to causes of action which *accrued* before July 1, 1980.

This record shows conclusively, however, that the Propsts' cause of action **accrued** *after* July 1, 1980. The Fourth District's decision affirming an award of attorneys' fees is therefore consistent with *Young v. Altenhaus*, and should be affirmed.[5]

I. The Propsts' Cause of Action Did Not Accrue Until They Discovered The Injury In October, 1980

In October, 1980, the Propsts discovered that Mrs. Propst had been injured. That is an adjudicated fact. Petitioners may

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[5] The Fourth District did not pass upon Respondents' argument that Petitioners had waived their objections to the application of section 765.56 to this case by their successful insistence since the inception of the litigation that the statute had to be enforced against the Propsts.

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

October of 1980 is, therefore, the earliest the Propsts' cause of action could have accrued.

The law in Florida is that a cause of action does not accrue until it is discovered. *Creviston v. General Motors Corp.*, 225 So.2d 331, 334 (Fla. 1969):

> *[T]he accrual* of...[a cause of action] *must coincide with the aggrieved party's discovery* or duty to discover the act constituting an invasion of his legal rights.
>
> [Emphasis added]

Accord, Lund v. Cook, 354 So.2d 940, 942 (Fla. 1st DCA 1978); *Senfeld v. Bank of Nova Scotia*, 450 So.2d 1157, 1163 (Fla. 3d DCA 1984); *Meehan v. Celotex Corp.*, 466 So.2d 1100, 1102 (Fla. 3d DCA 1985); *Phelan v. Hanft*, 471 So.2d 648, 650 n.3 (Fla. 3d DCA 1985); *See Franklin Life Ins. Co. v. Tharpe*, 179 So. 406, 407 (Fla. 1938) (where ascertainment of a fact is required by limitations statute, "the cause of action does not accrue until knowledge thereof is obtained"); *Steiner v. Ciba-Geigy Corp.*, 364 So.2d 47, 53 (Fla. 3d DCA 1978)(for a cause of action to accrue, the "moment of trauma" and the "moment of realization"

must both occur); *Tindall v. Miller*, 463 So.2d 1262 (Fla. 2d DCA 1985)(medical malpractice cause of action accrues when plaintiff becomes aware of the malpractice). *See also Layton v. Allen*, 246 A.2d 794, 799-800 (Del. 1968)(cited in *Phelan v. Hanft, supra, at 650 n.3*), noting a "wave of decisions" holding that a cause of action for medical malpractice does not accrue until plaintiff has discovered it.

II. Application of Fla.Stat. § 768.56 To This Case Is Not A Retroactive Application of The Statute

In *Young v. Altenhaus*, 472 So.2d 1152, 1154 (Fla. 1985), this Court held that Fla.Stat. § 768.56 may not be applied to a cause of action which accrues prior to the statute's effective date, July 1, 1980. As this Court noted:

> In the instant cases, Altenhaus' and Mathews' rights to enforce their causes of actions for malpractice against the defendants below vested prior to the effective date of the section 768.56. When these causes of action accrued, neither party was statutorily responsible for the opposing party's attorney's fee nor entitled to such an award.

In this case, however, the Propsts' right to enforce their cause of action against Petitioners vested *after* the effective date of section 768.56. When this cause of action accrued in October of 1980, or even later, all parties were potentially liable, depending on the outcome, for the opposing party's attorney's fee.

Therefore, application of section 768.56 to this case is not

retroactive. Such an application is compelled here, pursuant to *Karlin v. Denson*, 472 So.2d 1155 (Fla. 1985), holding that the statute applies to a cause of action which accrues subsequent to July 1, 1980.

Petitioners now seek to contend that the date of the negligentact -- rather than the date of accrual of the cause of action -- should determine the statute's applicability. That argument is of course contrary to this Court's own decisions.

But, be that as it may, there is no principled reason to support Petitioners' argument. There is no rational connection between the statute's purpose and intent, on the one hand, and a rule that would make the date of the medical services the determinative point for application of the statute. Section 768.56 is addressed to medical malpractice *actions*, not to the underlying negligent acts. The statute speaks of "prevailing parties" and "non-prevailing parties." It clearly is not intended to deter negligent acts. The statute's purpose is to deter frivolous suits. Indeed, this Court so stated in *Florida Patient's Comp. Fund. v. Rowe*, 472 So.2d 1145 (Fla. 1985):

> The preamble to section 768.56 indicates that the mandatory assessment of attorney fees in favor of a prevailing party in a medical malpractice action is intended to discourage non-meritorious medical malpractice claims.
>
> [*Id.* at 1147]
>
> * * *
>
> The statute may encourage an initiating party to consider carefully the likelihood of

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> success before bringing an action, and similarly encourage a defendant to evaluate the same factor in determining how to proceed once an action is filed. * * *
>
> [*Id.* at 1149]

Accord, Parrish v. Mullis, 458 So.2d 401 (Fla. 1st DCA 1984).

In view of the statute's purpose, the focus in determining whether the statute applies should be -- as it is -- the cause of action itself, not, as Petitioners suggest, the rendition of the medical services. In short, the determinative date for application of section 768.56 is the date the Propsts' "right to enforce their causes of action for malpractice against the defendants below vested." *See Young v. Altenhaus, supra*, at 1154. That date, October, 1980, is *after* the statute became effective.

The cases Petitioners cite are inapposite. *Van Bibber v. Hartford Accident & Indemnity Ins. Co.*, 439 So.2d 880 (Fla. 1983), involved the statute on non-joinder of insurers, Fla.Stat. § 627.7262. The Court found that, "by enacting this statute, the legislature sought to modify the third-party beneficiary concept adopted by this court in *Shingleton v. Bussy*, 233 So.2d 713 (Fla. 1969), to provide that an injured party has no beneficial interest in a liability policy until that person has first obtained judgment against an insured." *Id.* at 882. The case was a personal injury suit against Publix Super Markets; the accident had occurred prior to the enactment of the subject statute. There was no question there that the plaintiff's rights had accrued on the date of the accident. Since application of the

statute would impair the plaintiff's vested right, pursuant to *Shingleton*, to join the insurer, the Court held that the statute could not be applied retroactively.

In *Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981), the question was whether the sovereign immunity statute could be applied retroactively to impair the plaintiff's vested right "either in the form of an accrued cause of action...or in the form of a matured cause of action" as a result of a favorable jury verdict. *Id.* at 1157. This Court held that the law could not be applied retroactively to impair the plaintiff's vested right. There was no question in *Knowles* either that the cause of action had accrued on the date of the "motor vehicle mishap." *Galbreath v. Shortle*, 416 So.2d 37 (Fla. 4th DCA 1982), also involved an automobile accident which occurred prior to the effective date of the sovereign immunity statute considered in *Knowles*. Based on the *Knowles* rationale, the court held that the statute could not be applied retroactively.

In these cases, the rights protected were rights to causes of action which no doubt had accrued on the dates of the accidents in question. Those cases did not involve causes of action, such as in medical malpractice, which do not accrue until their discovery. *See* Fla.Stat. §95.11(4)(b)(1975).

There is therefore no support in the cases for Petitioners' suggestion that, to determine retroactivity, the Court should

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look at the date of the negligence and ignore the date of accrual of the right to sue.

III. Application of Fla.Stat. § 768.56 To This Case Does Not Impair The Obligation Of Contract.

Petitioners argue that Fla.Stat. § 768.56 imposes an obligation for which they did not bargain, and that the statute therefore impairs the obligations of their contracts with Mrs. Propst.

The starting point of analysis of such an argument must be the maxim that:

> All contract...rights are held subject to the fair exercise of the power inherent in the State to promote the general welfare of the people through regulations that are reasonably necessary to secure the health, safety, good order, general welfare.

Golden v. McCarty, 337 So.2d 388, 390 (Fla. 1976).

Therefore, to determine whether there has been an unconstitutional impairment of contract, the Court must balance the nature and extent of impairment with the importance of the state's objective. *Pomponio v. Claridge of Pompano Condo.*,[6] 378 So.2d 774 (Fla. 1980); *Yellow Cab Co. of Dade County v. Dade County*, 412 So.2d 395 (Fla. 3d DCA 1982). This analysis compels the conclusion that section 768.56 does not unconstitutionally impair any contract.

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[6] In *Pomponio*, the court explained: "Our conclusion in Yamaha [Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975)] that 'virtually' no impairment is tolerable necessarily implies that some impairment is tolerable..." *Id.* at 780.

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1. Nature And Extent Of The Supposed "Impairment."

The new obligation imposed by section 768.56 is the liability for attorneys' fees after an adverse judgment. The statute obviously does not regulate or burden the doctor-patient contract. Rather, it operates merely as a consequence of the outcome of litigation.

That this was the Legislature's intent clearly appears from the statute's language. The statute applies to "actions" and not to contracts, as in *Fleeman v. Case*, 342 So.2d 815 (Fla. 1976), on which Petitioners rely. In *Fleeman*, the statute in question declared void escalation clauses in leases for recreational facilities in condominiums or management contracts for condominiums. The Court held that the statute could not be applied to nullify such clauses in contracts already in effect at the date of its enactment.

Fleeman does not apply here because section 768.56 does not change or revise any contractual obligation between the doctor and the patient. It does not affect the doctor's duty to render medical services, or the patient's duty to pay for the medical services. The substance of the doctor-patient contract therefore remains intact. All section 768.56 does is to allow attorneys' fees arising out of medical negligence litigation. The statute

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simply does not affect the contract itself.[7]

2. The Importance Of The State's Objective

The preamble to Fla.Stat. § 768.56 sets forth the state's objective in enacting the law: to curtail the malpractice crisis in Florida by, among other things, discouraging meritless claims and defenses. This is an important and legitimate state objective. *E.g., Florida Patients Comp. Fund v. Rowe*, 472 So.2d 1145, 1147 (Fla. 1985).

This case therefore involves no effect at all on the parties' "contractual obligation", and an important and legitimate state objective, properly within the state's police powers. The balance weighs heavily on the side of the state's objective. Under these circumstances, there can be no question that Fla.Stat. § 768.56 does not unconstitutionally impair the obligation of contract in this case.

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7 Nor does Hunter v. Richie's Economy Cars, 406 So.2d 1285 (Fla. 1st DCA 1981), support Petitioners' contention. That case involved the right to worker's compensation benefits. After the plaintiff was injured, the relevant statute was amended to limit the amount of compensation benefits available to injured workers. The court held that the right to such benefits is fixed as of the accident date; the Legislature could not retroactively impair a *vested* right to those benefits. Here, on the other hand, there is no impairment of a vested right at all.

Love v. Jacobson, 390 So.2d 782 (Fla. 3d DCA 1980), also provides no support for Petitioners' argument. That case held that the *date of filing suit* is what determines whether an attorneys' fee statute is being applied retroactively.

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IV. Application of Fla.Stat. § 768.56 to This Case Does Not Violate Due Process

As this Court has already held, section 768.56 imposes a new obligation which attaches upon the accrual of a cause of action for medical malpractice. *Young v. Altenhaus*, 472 So.2d 1152, 1154 (Fla. 1985). The new obligation arose in this case when the Propsts' cause of action accrued in October of 1980, or later, but certainly after the statute became effective in July of 1980.

Petitioners contend that the statute violates their due process rights because it imposes a new obligation not in existence when they rendered the medical services. They claim this is a retroactive application of the statute. This argument is contrary to this Court's decisions, and to the statutory purpose and intent, as previously discussed in Point II, *supra*, at pages 6-9.

But even were this in fact a retroactive application -- which it is not -- the required analysis still yields the conclusion that there is no violation of due process in this case.

In *Dept. of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981), this Court set forth the "due process" factors concerning retroactive application of a statute:

> Despite formulations hinging on categories such as "vested rights" or "remedies," it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: *the strength of*

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> *the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.*
>
> [at 1158; emphasis added]

Taking these factors in turn, it is clear that application of section 768.56 does not violate Petitioners' due process rights. The strength of the public interest served by this statute has been the subject of analysis in prior cases. In *Florida Patients Comp. Fund v. Rowe*, 472 So.2d 1145, 1147 (Fla. 1985), this Court held that section 768.56 serves the state objective of discouraging non-meritorious medical malpractice suits.

The public interest served by Fla.Stat. § 768.56 is a strong one indeed, one that has been recognized not only by the Legislature, but by this Court, and by other courts of the state.

The second factor to be considered is "the extent to which the right affected is abrogated." *Knowles, supra*, at 1158. Section 768.56 abrogates no right existing before its enactment. This factor therefore does not apply. The third factor, "the nature of the right affected," *id.*, is inapplicable for the same reason.

What comes out of this analysis is solely a public interest embraced by the Legislature and the courts. This strong public interest sustains this statute against due process attack by these Petitioners.

In summary, Petitioners have totally failed to show -- nor

could they show -- that section 768.56 violates their due process rights. All section 768.56 does is to provide attorneys' fees to the prevailing party in litigation where the cause of action accrues after the statute's effective date. The statute abrogates no rights. The statute is supported by a legitimate public interest. Plainly, the statute does not deny Petitioners due process.[8]

---

[8] Respondents object to Petitioners' "incorporation by reference" of their arguments contained in briefs to the Fourth District Court of Appeal. To the extent this Court allows such a procedure, however, Respondents would also adopt their prior arguments in the lower appellate court.

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CONCLUSION

For any or all of the foregoing reasons, the Fourth District's decision applying section 768.56 to this case should be affirmed.[9]

Respectfully submitted,

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[9] Should the Court hold otherwise, however, Respondents respectfully request that the case be remanded to the Fourth District Court of Appeal for decision on the issues of estoppel, on which the Fourth District did not rule.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 18th day of November, 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.

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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA. CIVIL ACTION

MYRTLE EILEEN PROPST AND MATTHIAS J. PROPST,

Plaintiffs,

vs.

JOHN A. NEILY, D.O., et al.,

Defendants.

No. 81-15764

"J" Marko

Fort Lauderdale, Florida

July 11th, 1983

9:30 o'clock, A.M.

APPEARANCES:

BAILEY & DAWES, ESQS., BY: GUY B. BAILEY, JR., ESQ., and MERCEDES C. BUSTO, Attorney at Law, of counsel appearing on behalf of the Plaintiffs.

DAVID L. KAHN, P.A., BY: DAVID L. KAHN, ESQ., and HARRY M. HAUSMAN, ESQ., of counsel, appearing on behalf of the Defendants, Miller, Yezbick, Frankowitz, Theising and Sunrise Medical Group, P.A.

CONROY & SIMBERG, ESQS., BY: BRUCE SIMBERG, ESQ., and MORTON J. MORRIS, ESQ., of counsel, appearing on behalf of the Defendant, Neily.

The above-styled case came on for trial before the Honorable PAUL M. MARKO, III, Presiding Judge, and a jury, at the Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 11th day of July, 1983, commencing at 9:00 o'clock A.M.

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Whereupon, the following proceedings were had:

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MR. KAHN: Your Honor, I'm ready to proceed, if you'll allow me, to explain to the jury what I'm going to read. Or would the Court like to do it?

THE COURT: No, it would be better probably if you do it.

MR. KAHN: All right.

I'm going to read to the jury questions that were propounded, that is, mailed and typed in writing before this case came to trial, and answered under oath by Mrs. Propst.

These were questions sent by different parties, and I'll identify each party-defendant in the case by name and then read the question that they sent Mrs. Propst, the response, and the date of her answer, which would have been before a notary.

In no particular order, I'll be reading first from the interrogatory or written questions that were propounded by the Defendant, Doctor Neily, to Mrs. Propst, that is, they were mailed on the 2nd day of September, 1981 and they were answered by Mrs. Propst under oath on November 16th, 1981.

And the first question I will be reading

will be Number 17 from that set and the answer.

The question: "On what day did you receive notice of injuries complained of in this action?"

Answer: "October, 1980."

Question 18.

"Describe the circumstances under which you received notice of each of the injuries complained of in this action.

"Answer: While in Miami Heart Institute, November 3rd, 1980 through November 16th, 1980 and later from Doctor Richard Clay, who was to be the surgeon for the corrective operation planned upon my return to the hospital in late October."

Question 41.

MR. BAILEY: You mean 48; don't you?

MR. KAHN: Did I say 48?

MR. BAILEY: That's what you said on the first set.

MR. KAHN: That's the other set.

Let me just make sure I'm correct.

MR. BAILEY: 41 is just extra witnesses.

MR. KAHN: What I intend to read is not the entire list, but one after -- Let me show you what the name is. It's underlined.

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MR. SIMBERG: 41, is that where you're at?

MR. KAHN: 41.

MR. BAILEY: You have witnesses.

MR. KAHN: Name -- Knowledge of any facts.

MR. BAILEY: I do object to reading just the one name. I think you should read them all, if you want to read them all. He's entitled to read them all.

I'm sorry, Judge.

THE COURT: I don't know which one it is.

MR. KAHN: Judge, I don't mind showing this to you. What I propose to do -- I want to read the question that's circled, and I want to read only the part of the response on the next page that's underlined, as the other being immaterial to my purpose in my case.

The only one I will read is the one that's underlined. Counsel objects; says he wants me to read the whole thing.

MR. BAILEY: I think it's misleading. The question calls for all people who have knowledge of facts.

MR. KAHN: I don't mind explaining that there are many other names, but --

MR. BAILEY: All right. Let me just say

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that's one of the names. That's all right.

MR. KAHN: An additional question that was submitted in writing to Mrs. Propst:

"What is the name or names, or means of identification, address, occupation and name of the employer of each person known by the Plaintiffs to have knowledge of any fact or record relating to this action?"

And there's two and a portion of pages of names. So, you know, this isn't the only name. It was on the page -- One of the names on the page was Stanley Frankowitz, D.O.

And reading number 67.

"State the names and addresses of all doctors and the specialty, if any, of each doctor whom the Plaintiff has seen or consulted during the five years preceding the incident in this cause sued upon, and the nature of the ailment or illness or other reason for which the doctor was consulted."

The answers are: "Doctor James Yezbick, D.O. Consulted for general health, emphysema, heart condition, and backache.

"Doctor David O. Miller, D.O. Consulted for general health, emphysema --

MR. BAILEY: Excuse me.

MR. KAHN: -- heart condition, and backache."

MR. BAILEY: What he's doing is reading part of it, and then repeating part of it.

I think it should be read as it's answered.

THE COURT: Let me see how the whole language --

MR. BAILEY: It's not that long. I've got your Court file. I'm sorry.

He's talking about 67. See, he read that name. Then he read this. Then he read that.

The answer is the answer.

THE COURT: I think we probably best read the whole question and the whole --

MR. KAHN: That was the only portion of the answer at the bottom of the page. I didn't intend to read the second.

MR. BAILEY: I'm sorry.

MR. KAHN: Next, I will be reading from the interrogatories propounded by the Defendant, James Yezbick, D.O.

MR. BAILEY: Excuse me, Your Honor.

I'm sorry. But I do object to reading part of that answer. It's important, and I ask that

the entire answer be read.

THE COURT: Can you just go ahead, read the --

MR. BAILEY: Read the whole question and answer as it's written, please.

MR. KAHN: "State the names and add - name and address of all doctors, and the specialty, if any, of each doctor with whom the Plaintiff has seen or consulted during the five years preceding the incident in this cause sued upon, and the nature of the ailment or illnesses or other reason for which the doctor was consulted."

"James Yezbick, D.O.; David O. Miller, D.O.," which I read, and "consulted for general health, emphysema, heart condition, and backache.

"Sunrise Medical Group. Doctors Frankowitz, Saltzman, and others referred to by Doctor Yezbick."

MR. BAILEY: Judge -- Excuse me, Judge.

It would be very simple if he read the full question and the full answer as it's typed.

MR. KAHN: Does that mean I read the address, as well?

MR. BAILEY: Yes, sir; yes, sir. Read it just the way it is.

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MR. KAHN: I withdraw it, then. I don't seek to cover them.

THE COURT: Don't edit them. Read them the way they're answered, if that's what you're going to do.

MR. KAHN: Well, "Doctor James Yezbick, D.O.; Doctor David O. Miller, D.O., 4244 Northwest 12th Street, Lauderhill, Florida, consulted for general health, emphysema, heart condition and backache. General practitioners.

"Sunrise Medical Group. 5795 Sunrise Boulevard, Sunrise, Florida. Doctor Frankowitz, Theising, Saltzman, and others referred to by Doctor Yezbick for minor urinary tract operation by Doctor Jerald Lynn and treatment of others by the group for heart condition, emphysema.

Doctor David C. Horowitz, D.O. 4344 West Oakland Park Boulevard, Fort Lauderdale, Florida, 33313. Referred by Doctor Frankowitz for allergy tests and treatment."

That's all in that set.

Now, the set of Doctor Yezbick had sent to Mrs. Propst. Question 7 from Doctor Yezbick to Mrs. Propst.

MR. BAILEY: I'm sorry.

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Tell me again the date of these so I can just find them.

MR. KAHN: Propounded on December 8th, 1981 and answered by Mrs. Propst, service date of January 15th, 1982.

MR. BAILEY: Excuse me.

Can you just wait one second. I'm sorry to do this to you, but I can't find my -- Thank you. I'm sorry.

MR. KAHN: Question No. 7.

"When did you first learn or suspect that the Defendant did not provide you with adequate care, or that the Defendant's care and treatment caused you injury?"

"October, 1980 "

Question number 30.

"Did this Defendant recommend to you the removal of your gall bladder, and if so, on what date or occasion?"

Answer: "Not that I remember."

Number 48.

"Do you still suffer from fever, chills, or diarrhea? And if so, describe with particularity the frequency of the suffering or experience, and the last date that you experienced fever, chills or

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diarrhea."

Answer is "No." Not a refusal, but the answer is "No" to "Do you still suffer?"

MR. BAILEY: Well, you know --

MR. KAHN: Well, the way I said it --

MR. BAILEY: Move to strike counsel's comments. He's now editorializing what it means.

THE COURT: Let's not editorialize. Let's just read the answer.

MR. KAHN: Okay, Your Honor.

THE COURT: Just listen to the answer, please, ladies and gentlemen.

MR. KAHN: Now I'm going to read a set of written questions sent by Doctor Miller on the same day as Doctor Yezbick's and answered on the same date by Mrs. Propst as the one Doctor Yezbick had sent.

No. 7 --

MR. BAILEY: Would you say the date, please? I'm sorry.

MR. KAHN: Yes. They were sent on December 8, 1981 and I believe they're answered --

MR. BAILEY: January.

MR. KAHN: -- January 15th.

MR. BAILEY: January 15th.

MR. KAHN: January 15th, '82.

Counsel, would you prefer me just to make a blanket statement or reread all of --

MR. BAILEY: Just identify which one, please, then go ahead and read them -- You just want to say they're the same?

MR. KAHN: I want to say the same questions were asked of each, if you want me to do that. Doesn't matter.

This next set of questions is identical.

MR. BAILEY: Except for Frankowitz.

MR. KAHN: I'm only going to name the ones -- The set by Doctor Miller -- The first one I read was by Doctor Yezbick. The set by Doctor Miller is identical; was mailed on the same date, answered on the same date, and the responses as to those last three I read were the same, the ones Doctor Miller sent.

Thirdly, Doctor Theising sent the same questions on the same date in December of 1981, and they were answered by Mrs. Propst on the same date in 1982, January of '82. The three questions, again, that I just read were answered by Mrs. Propst identically.

Thirdly, Sunrise Medical Group -- Or

fourthly, Sunrise Medical Group, P.A. sent these questions on January - rather in December of 1981, and they were answered on January 15th of 1982. I will reread those again as to Sunrise Medical Group, P.A.

The question: "When did you first learn or suspect that the Defendant did not provide you with adequate care, or that the Defendant's care and treatment caused you injury?"

Answer: "October, 1980."

That's question number 7.

Question number 30.

"Did this Defendant recommend to you the removal of your gall bladder, and if so, on what date or occasion?"

Answer: "Not that I remember."

And question 48.

"Do you still suffer from fevers, chills or diarrhea? And if so, describe with particularity the frequency of the suffering or experience, and the last date that you experienced fever, chills or diarrhea."

Answer: No.

That's all of the interrogatory answers that I seek to offer at this time.

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I want to advise the Court as to my next witness, and when he will be here. And, also, I have some other documents to offer into evidence.

THE COURT: Well, we'll discuss your documents in evidence, please.

MR. KAHN: All right. I believe there's going to be some discussion about it. It might be appropriate to send the jury out.

THE COURT: Take the jury out, please.

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CERTIFICATE

I HEREBY CERTIFY that the foregoing, pages 1 to and including 12, is a true and correct transcription of my stenographic notes of testimony taken and proceedings had before the Honorable PAUL M. MARKO, III, Presiding Judge, and a jury, at the Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 11th day of July, 1983, commencing at 9:30 o'clock A.M.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 10th day of October, 1984.

Reporter and Notary Public

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA. CIVIL ACTION

MYRTLE PROPST and MATTHIAS J. PROPST,

Plaintiffs,

vs. No. 81-15764 CS

JOHN A. NEILY, etc., et al.,

Defendants.

Fort Lauderdale, Florida

July 13, 1983

9:30 o'clock A.M.

Excerpt of proceedings before the Honorable PAUL M. MARKO, III, Presiding Judge, at Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 13th day of July, 1984, commencing at 9:30 o'clock A.M.

APPEARANCES:

BAILEY & DAWES, P.A.,
by GUY BAILEY, ESQ., of counsel,
appearing on behalf of the Plaintiffs.

DAVID L. KAHN, P.A.,
by DAVID L. KAHN, ESQ., of counsel,
appearing on behalf of Defendants, Frankowitz and Sunrise Medical Group, P.A.

CONROY & SIMBERG, ESQS.,
by BRUCE SIMBERG, ESQ., of counsel,
-and-
MORTON MORRIS, ESQ.,
appearing on behalf of Defendant, Neily.

Thereupon:

The following proceedings were had:

* * * * * * * * * *

MR. KAHN: Your Honor, I am going to read from the sworn testimony given by the plaintiff, Matthias Propst, on May 13, 1982, where I was in attendance on behalf of my clients, Miss Busto was in attendance on behalf of the plaintiffs, and Mr. Simberg and Mr. Morris were there on behalf of the Defendant, Dr. Neily.

Page 31, commencing on line 14. This question was asked of Mr. Propst.

"Q When did you first suspect that there might be a problem with that second surgery?

"A In October of 1980, when the doctors

told us there was something wrong.

"Q Can you be more specific as to the day?

"A It was during the first hospital stay in Miami Heart Institute, between October 3rd and 16th. I can't give you an exact day."

That's all I have from that deposition, Your Honor.

* * * * * * *

MR. KAHN: Your Honor, comes now the defendant, Stanley Frankowitz, D.O., to move the Court to direct a verdict in his favor on his affirmative defense in that the action commenced against him by virtue of an order of the Court on the 8th day of December, 1982, is barred as a matter of law because of the controlling statute of limitations; that being Florida Statute 95.11, subsection (4)(b), which requires that an action be commenced within two years from the date the incident giving rise to the accident occurred or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence.

The statute of limitations, according to the decisions in Florida, begins to run when the plaintiff, Mrs. Propst, had been put on notice of an invasion of her or his legal rights - this being

Mr. Propst. This occurs when the plaintiff has notice of either the negligent acts giving rise to the cause of action or the existence of any injury which is the consequence. And this is a motion that I think will be granted because the evidence is beyond dispute that Mrs. Propst knew that an invasion of her rights had occurred in October of 1980.

The answers to interrogatories of five defendants in this case, Sunrise Medical Group, P.A., Miller, Yezbick, Thesing and even Neily, she answered under oath and in writing that she knew that she had been damaged, injured, or her cause of action or her claims had occurred or accused that someone had harmed her or hurt her medically in October of 1980. Even if you gave her till the 31st day of October, 1980, she had to commence her lawsuit against Dr. Frankowitz by October 31, 1982. The record is clear she commenced her action against the other defendants on August 11, 1981, but did not commence the action against Dr. Frankowitz until December 8th, 1982. December 8, '82, is one month - six weeks after the statute could have run, giving her the benefit of the 31st day of October.

Mr. Propst testified today through his

deposition, those two questions to the jury, that he first knew - he said we first knew when - he was indicating he and his wife first knew there had been something done wrong as to her medical care during the first admission to Miami Heart Institute. And I asked him what date and he said he didn't know the exact date. But his testimony was that it occurred between the 3rd and the 16th of October, 1980.

Now, that testimony is clear. It's of record. It is uncontradicted, as are the sworn admissions and the interrogatories of Mrs. Propst uncontradicted. Not only are they uncontradicted but they can't be contradicted to bring or raise a dispute of facts. This is elevated to such a high level that is beyond a dispute of fact. There is no - and can be no - dispute of fact. This is not a case where a jury can try to interpret whether she had enough information to make a decision in her brain or in her mind or with the help of anybody else that she had been harmed. She has admitted five times under oath in interrogatories that she was harmed and knew it in October of '80, because the question that was propounded to her was specifically pointed to the Statute of Limitations defense --

THE COURT: Let me ask you a question. What

are you going to argue to me that is new that I haven't heard before? Because I have heard it all before and I want to hear what is new that I haven't heard before because I heard it three or four times.

MR. KAHN: I have additional cases, I think.

THE COURT: And my inclination is that it goes to the jury. And it has been and it will be, and I don't think there is going to be anything you are going to say to change me. And I want you to preserve the record for whatever you want to do because you can go back and Xerox whatever you said before and it is going to be the same result.

The Fourth District Court of Appeals doesn't like it. I might have a case before you right back in my lap. The Fourth District doesn't like summary judgments and directed verdicts, and they say let it go to the jury.

MR. KAHN: I agree they don't.

THE COURT: I don't want to try something three times and try it against another doctor.

MR. KAHN: Then I better give you something new right now.

THE COURT: That's right. Just Xerox what you said before and put it in the record to preserve it. I don't think you are going to tell me anything

different. I think it is a question to the jury and not to me.

MR. KAHN: Here is what is new. The last time I argued it you ignored it because of the very same thing. The case law in the Fourth District says we don't want tort actions to be ended in summary judgment because there's questions of fact as to the conduct of the parties that have to be made and resolved by the jury. And I agree with that contention. This is a --

THE COURT: Why don't you let the jury determine this thing?

MR. KAHN: Because the juries throw sympathy in the place of the rational result of what the law mandates. In this case we are not talking about a dispute whether he did exercise reasonable care or she did exercise reasonable care or they did not. We are saying this is a numbers game. This is a numbers game based not on inferences but by admissions under oath that cannot be refuted. Absolutely can't be.

There has never been a motion made in this case that had more merit in this case to date.

Number two, summary judgment is a different burden because when I come before you in a summary

judgment in the midst of a case, any slight inference that there could be something different and for some reason you found one or for some reason you were disposed to allow it to go, must be considered by you. But at this stage of the case your burden, Your Honor, is to make sure reasonable men could differ as to the results and, Judge, there's no way any reasonable man, any unintoxicated person, anybody who mentally got their faculties, could differ from the facts that Mrs. Propst admitted she knew in October of '80 and she didn't file suit until '82. Nothing mitigates that fact. It is not by implication. It is by direct sworn admission and her husband corroborates it by his deposition under oath.

The state law in Florida says she did not have to know Frankowitz hurt her as long as she knows she was hurt. She then has two years and a duty to investigate to find out who caused the injury. And in that regard, because the case law says once you are aware of the invasion of your rights you don't have to identify the perpetrator. You just have to be aware of the invasion of the rights.

Reynolds v. Nardone, we didn't argue it the first time around. We argued in regard to

Dr. Stuart's case. Our case is stronger than Dr. Stuart's because we have strong admissions.

The Reynolds case was such an unfortunate result for the plaintiff Reynolds because they were held to knowledge of what was in records that they hadn't even read but they had ordered them. And they have said that once you are on notice of something wasn't right, it doesn't matter whether you know what doctor fouled up or not. You have to get your motor running, find out who the culprit was, and sue.

Mrs. Propst did that. She sued Thesing, Miller, Yesbick and Sunrise Medical Group, P.A. But she didn't sue Frankowitz. But the law mandated that she sue him within two years when she knew her rights were invaded, and she didn't. She didn't have to know he was at fault. She had to sue him and find out about it then; not after the cause of action. The rights had expired by statute.

Your Honor, in the decisions that we have - and we have also cited in our jury instruction for the Court, and they are a matter of record for other counsel on this particular defense - Robinson v. Sparer, Third District Court of Appeals, Almengor v. Dade County, go to this very point along with

Nardone v. Reynolds, which is a Supreme Court of Florida decision at 333 So.2d 25. Buck v. Mouradian, M-o-u-r-a-d-i-a-n, Third District, 1958, 100 So.2d 70. And the cases that have been additionally cited, including, I guess, Roberts v. Casey, 413 So.2d 1226. We have a situation where the statute of limitations commenced to run for Mrs. Propst because she knew in October of '80 that she had been harmed. Dr. Clay told her, told her husband. She was active in the pursuit of that claim and decided to sue doctors. She sued everybody but Dr. Frankowitz. A year and two months later she decided to sue Dr. Frankowitz, but not for something different; not for a different kind of injury. You know, some other kind of injury; an ankle, knee or elbow; but for the same damages. The same failure to diagnose a condition that arose in her surgery with a gallbladder.

And for that reason there is no reasonable man that could differ - or a woman that could differ on the evidence. And we pray, Your Honor, that you will relieve Dr. Frankowitz from the responsibility of further defending this case and direct a verdict as the law mandates. And thank you for hearing me.

THE COURT: Same argument?

MR. KAHN: I have made the same argument before.

THE COURT: Motion denied. I will let it go to the jury. But now let's go back to his. Your argument was a good argument.

* * * * * * *

CERTIFICATE

I HEREBY CERTIFY that the foregoing, pages 1 to and including 11, is a true and correct transcription of my stenographic notes of proceedings had before the Honorable PAUL M. MARKO, III, Presiding Judge, at Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 13th day of July, 1984, commencing at 9:30 o'clock A.M.

IN WITNESS WHEREOF I have hereunto affixed my hand this 15th day of February, 1984.

(Registered Professional Reporter)