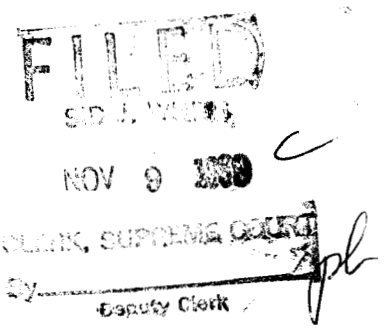
o/a 1-9-90

IN THE SUPREME COURT OF FLORIDA



JAMES BARRON, M.D., et al.,

Petitioners,

vs. Case No. : 74,144

JOSEPHINE SHAPIRO, etc.,

Respondents.

BRIEF OF
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AMICUS CURIAE

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PRELIMINARY STATEMENT

In this brief, the parties will generally be referred to either by name or as they stood in the trial court, respondent Josephine Shapiro (generally referred to herein as "Mrs. Shapiro") having been plaintiff and petitioner James Barron, M.D. (generally referred to herein as "Dr. Barron") having been defendant. Lee Shapiro, plaintiff's decedent, will be referred to as Mr. Shapiro.

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

As set forth in the Final Summary Judgment entered by the trial court and the opinion of the District Court of Appeal, Fourth District, the facts of this case' are as follows.

Mr. Shapiro underwent colon surgery on August 17, 1979. Dr. Barron performed the surgery, but failed to administer antibiotics to Mr. Shapiro prior to, during and after the surgery. By September 1, 1979, Mr. Shapiro was suffering from an infection, as shown by the hospital records. This infection led to a further fungus infection which had been diagnosed as affecting Mr. Shapiro's vision by November 14, 1979. The medical records further reveal, as of December 31, 1979, a diagnosis of a fungus infection to the eyes causing blindness. In the District Court's words, the complications arising from Mr. Shapiro's surgery were obvious to all by that time.

'Since this is an appeal from a summary judgment, all facts and inferences are stated in the light most favorable to the non-moving party. Holl v. Talcott, 191 So.2d 40 (Fla. 1966); Anderson v. Morgan, 172 So.2d 845 (Fla. 3d DCA 1965); Crepaldi v. Wagner, 132 So.2d 222 (Fla. 1st DCA 1961).

Mrs. Shapiro was in communication with her husband's nephew-in-law, Dr. Emil Gutman (a radiologist practicing in Ohio), both before and after the surgery. After the surgery, Dr. Gutman travelled to Florida; by September 20, 1979, Dr. Gutman had reviewed Mr. Shapiro's medical charts and records. Dr. Gutman even recommended to the treating doctors that they call in a specialist; however, he denied giving Mrs. Shapiro any medical advice as to the cause of the blindness or other complications.

After Mr. Shapiro's discharge, Dr. Gutman contacted a Dr. Kunin, who, in January of 1982, rendered an opinion that Dr. Barron's failure to use antibiotics preoperatively caused Mr. Shapiro's blindness. Dr. Kunin's opinion was based solely on the medical records and charts made available to plaintiff on and before December 31, 1979.

The trial court granted summary judgment in favor of Dr. Barron, finding that Mr. and Mrs. Shapiro knew or should have known what caused Mr. Shapiro's blindness, at the latest, on December 31, 1979. Therefore, the trial court concluded, this medical malpractice suit, filed January 29, 1982, was barred by the applicable statute of limitations.

The District Court reversed and remanded for further proceedings. The District Court reasoned that a factual issue existed as to whether the plaintiff knew or should have known, more than two years prior to filing suit, that the injuries were caused by Dr. Barron's failure to use antibiotics preoperatively. The District Court reached this conclusion notwithstanding: (1) its

recognition that the contents of medical charts and records (which in this case disclosed the failure to use antibiotics) must be imputed to the plaintiff; (2) its recognition that Dr. Gutman (who had access to and reviewed the medical records) was available to plaintiff as an independent medical advisor at all relevant times; and (3) its recognition that Dr. Kunin did not base his opinion on any information not available to plaintiffs on December 31, 1979.

This Court thereafter accepted jurisdiction based on conflict between the decision of the District Court and the decisions of this Court in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976) and Moore v. Morris, 475 So.2d 666 (Fla. 1985). Pursuant to Rule 9.370, Florida Rules of Appellate Procedure, Florida Defense Lawyers Association moved for leave to file this brief as amicus curiae.

SUMMARY OF ARGUMENT

By December 31, 1979, plaintiff had knowledge of sufficient facts to commence the running of the statue of limitations: Mr. Shapiro's injury was known -- indeed, it was apparent to all -- and Dr. Barron's failure to use antibiotics was documented in the medical charts and records. Not only were the medical records available to plaintiff at all times, they were in fact reviewed by a physician who was related to the family, Dr. Gutman. Dr. Kunin's opinion that the failure to use antibiotics caused Mr. Shapiro's blindness was based entirely on information available to plaintiff in December, 1979.

Thus, actual or constructive knowledge of all of the elements necessary to trigger the statute of limitations was present more than two years prior to filing of suit, and the trial court properly granted summary final judgment. Plaintiff's own delay in acting on those facts by obtaining a medical opinion and bringing suit will not extend the statutory period; permitting plaintiff's own delays in inquiring into the legal ramifications of known facts to toll the statute would render the statute of limitations meaningless.

A cause of action accrues when the last element constituting the cause of action occurs and plaintiff is on notice that he has, or might have, a right of action. Once plaintiff is on inquiry of a potential claim, the statute begins to run. In a medical malpractice case, the statute begins to run when the plaintiff has been put on notice of an invasion of his legal rights, which occurs when the plaintiff has notice of either the negligent act giving rise to the cause of action or the existence of an injury that is the consequence of a negligent act. Here, plaintiff had actual or constructive knowledge of both the negligent act and the injury by December 31, 1979.

It is not necessary, to commence the running of the statute, that plaintiff know the specific cause of the injury. Rather, it is enough that the known facts point in the direction of the wrongdoer and are sufficient to put a reasonable person on inquiry as to whether his legal interests have been violated. That standard was amply met here. Plaintiff had actual knowledge of the

injury. Because the contents of the medical records must be imputed, plaintiff had (at a minimum) constructive knowledge of the negligent causation of the injury. That is all that is needed -- indeed, is more than is needed -- for limitation purposes. Ironically, it is also all that plaintiff has now, since Dr. Kunin's opinion, on which plaintiff relies, is based entirely on information known or available no later than December 31, **1979.** The only thing that has changed in the interim is that plaintiff let the statutory period expire before bringing suit.

The District Court's decision should be quashed, and the trial court's decision reinstated.

ARGUMENT

THE TRIAL JUDGE PROPERLY GRANTED SUMMARY JUDGMENT BASED ON THE STATUTE OF LIMITATIONS, SINCE ALL ELEMENTS OF THE CAUSE OF ACTION WERE ACTUALLY OR CONSTRUCTIVELY KNOWN TO PLAINTIFF MORE THAN TWO YEARS PRIOR TO FILING OF THE SUIT.

As set forth by the courts below, the crucial facts in this cause are relatively straightforward. Mr. Shapiro underwent colon surgery in August, **1979.** As a result of Dr. Barrons' failure to use antibiotics, Mr. Shapiro's eyesight deteriorated and the hospital records reflect that he was diagnosed as being blind by December 31, **1979.** After the surgery, and while Mr. Shapiro was still in the hospital, Dr. Gutman, who was a relative of Mr. Shapiro's, came to Florida, viewed Mr. Shapiro's medical charts and records, and recommended that a specialist be called in. The complications resulting from the surgery, the fungus infection, and

Mr. Shapiro's resulting blindness, were known to all in late 1979. Mr. Shapiro's medical charts and records were available at all times, and in fact were reviewed by Dr. Gutman. Suit was not filed, however, until January 29, 1982.

The trial judge, on these facts, properly granted summary judgment based on the statute of limitations. The District Court, noting that Dr. Kunin's opinion as to the causal connection between the failure to use antibiotics and the resultant blindness was not rendered until January, 1982, reversed. In so doing, the District Court placed itself in conflict with the decisions of this Court in Moore v. Morris, 475 So.2d 666 (Fla. 1985) and Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), as well as with numerous decisions of other District Courts of Appeal.

Statutes of limitation are not mere technicalities, but have long been respected as fundamental to a well-ordered judicial system. Board of Regents v. Tomanio, 446 U.S. 478, 487, 100 S.Ct. 1790, 64 L.Ed.2d 440, 449 (1980). As this Court observed in Nardone v. Reynolds, 333 So.2d 25, 36 (Fla. 1976):

> The purposes of the statutes of limitations are to protect defendants against unusually long delays in filing of lawsuits and to prevent unexpected enforcement of stale claims concerning which interested persons have been thrown off guard for want of reasonable prosecution.

The statute of limitations begins to run when there has been notice of an invasion of legal rights of the plaintiff; i.e., where

he has been put on notice of his right of action.[2] Stated differently, the statute attaches when there has been notice of an invasion of the legal rights of the plaintiff or he has been put on notice of his right to a cause of action.[3]

It is the accrual of a cause of action which commences the running of the statute of limitations.[4] A cause of action accrues, for statute of limitations purposes, when the last element constituting the cause of action occurs.[5] In the instant case, the applicable limitations statute is Section 95.11(4)(b), Florida Statutes (1979), which provides:

> An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred, or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued . . . .

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[2] Kelley v. School Board of Seminole County, 435 So.2d 804 (Fla. 1983); Hawkins v. Washinston Shores Savings Bank, 509 So.2d 1314 (Fla. 5th DCA 1987); Smith v. Continental Ins. Co., 326 So.2d 189 (Fla. 2d DCA 1976); Lucom v. Atlantic National Bank, 354 F.2d 51 (5th Cir. 1965), cert. den., 385 U.S. 898, 87 S.Ct. 199, 17 L.Ed.2d 130 (1966).

[3] Kelley v. School Board of Seminole County, supra; City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954).

[4] Kellermeyer v. Miller, supra; Section 95.031, Florida Statutes.

[5] Kellermeyer v. Miller, 427 So.2d 343 (Fla. 1st DCA 1983); Birnholz v. Blake, 399 So.2d 375 (Fla. 3d DCA 1981); Section 95.031(1), Florida Statutes.

In a medical malpractice case, an "incident" giving rise to a cause of action has three elements: (1) a medical procedure (2) tortiously performed (3) which injures the patient. Elliot v. Barrow, 526 So.2d 989 (Fla. 1st DCA 1988). The discovery provision of the limitations statute means that the event which triggers the running of the statute of limitations is notice to or knowledge by the injured party that a cause of action has accrued in his favor, and not the date on which the negligent act was committed which caused the damage. Birnholz v. Blake, 399 So.2d 375 (Fla. 3d DCA 1981). Once plaintiff is (or should be) aware that he has a cause of action, the "discovery" provision of the statute of limitations has been met and the statute of limitations starts to run.[6]

In this case, it is undisputed that plaintiff knew, by December 31, 1979, of Mr. Shapiro's injury. It is likewise undisputed that plaintiff had access to Mr. Shapiro's medical charts and records before that date, and that a physician relative carefully reviewed those medical charts and records. Those medical charts and records disclose that Dr. Barron had not used antibiotics. Knowledge of the contents of available medical records is imputed to plaintiffs. Nardone v. Reynolds, supra; Frankowitz v. Propst, 489 So.2d 51 (Fla. 4th DCA 1986). Thus, by December 31, 1979, plaintiff had actual knowledge of Mr. Shapiro's injury and (at least) constructive knowledge of its negligent

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[6] Prather v. Neva Paperbacks, Inc., 446 F.2d 338 (5th Cir. 1971). See also, to like effect, Kelley v. School Board of Seminole County, supra; Henzel v. Fink, 340 So.2d 1262 (Fla. 3d DCA 1976).

causation. The issue, then, is whether, with this information in plaintiff's hands, the statute of limitations commenced to run, or whether, as plaintiff contends, the statute did not begin to run until she eventually received an expert opinion that Dr. Barron's failure to use antibiotics caused Mr. Shapiro's blindness.[7]

The statute of limitations begins to run in a medical malpractice case when the plaintiff has been put on notice of an invasion of his legal rights, which occurs when the plaintiff has notice of either the negligent act giving rise to the cause of action, or the existence of an injury that is the consequence of the negligent act.[8] As the Third District expressed the point in Steiner v. Ciba-Geigy Corp., 364 So.2d 47, 53 (Fla. 3d DCA 1978):

> These and other cases on the subject lend themselves to the proposition that the statute of limitations will begin to run only when the "moment of trauma" and the "moment of realization" have both occurred. By "trauma," we simply mean the ill effect, damage or injury; and by "realization," we mean the "known or should have known" element associated with the trauma.

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[7]The record available to this amicus does not reveal whether the delay in obtaining Dr. Kunin's opinion was due to delay in seeking that opinion, delay on his part in reviewing the records and rendering an opinion, or some other cause or causes. The record does demonstrate, however, that Dr. Kunin's opinion, rendered more than two years after the fact, was based entirely on information available to plaintiff by December 31, 1979.

[8]Nardone v. Reynolds, supra; Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988), rev.dism'd, 531 So.2d 1353 (Fla. 1988); Roberts v. Casey, 413 So.2d 1226 (Fla. 5th DCA 1982); Buck v. Mouradian, 100 So.2d 70 (Fla. 3d DCA 1958), cert. den., 104 So.2d 592 (Fla. 1958); Byington v. A.H. Robins Co., Inc., 580 F.Supp. 1513 (S.D. Fla. 1984).

See, to like effect, Byington v. A.H. Robins Co., Inc., 580 F.Supp. 1513 (S.D. Fla. 1984). In the instant case, plaintiff's "moment of trauma" clearly had occurred prior to December 31, 1979; the question is whether the "moment of realization" also occurred before January 28, 1980.[9]

Prior to that date, plaintiff had complete access to Mr. Shapiro's medical records, which showed that Dr. Barron had not used antibiotics in the operation, and which showed that Mr. Shapiro's deteriorating vision and blindness were caused by a fungus infection. Not only were these records available, they were in fact reviewed by Dr. Gutman, a physician who was related to Mr. Shapiro. The present allegations of negligent causation of Mr. Shapiro's blindness are based entirely on the same medical records Dr. Gutman reviewed. The only thing that changed between December 31, 1979, and the date suit was filed, is that plaintiff obtained an opinion from Dr. Kunin -- based on the same records Dr. Gutman had previously reviewed -- that Dr. Barron's acts caused Mr. Shapiro's blindness. In short, by December 31, 1979, plaintiff had on hand knowledge and/or the means of obtaining knowledge of every fact essential to a cause of action, yet inexplicably delayed in pursuing her legal rights until after the limitations period had expired.

Even if a plaintiff does not have actual knowledge of negligence, if a plaintiff should have known that the injury was

[9]Two years and a day prior to filing of this suit.

caused by tortious conduct, the limitations period begins to run. Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988), rev.dism'd, 531 So.2d 1353 (Fla. 1988). A lack of knowledge of the specific cause of injury will not prevent the statute from beginning to run, so long as the facts point to the correct wrongdoer. Kelley v. School Board of Seminole County, 435 So.2d 804 (Fla. 1983). Indeed, the function of modern discovery practice is to "flesh out" the facts of a case by permitting the parties to learn such things. To permit a plaintiff who has full knowledge of the injury, and complete access to the medical records, to avoid the statute of limitations until receipt of an opinion as to negligent causation -- the position espoused by plaintiff here -- would effectively emasculate the statute. Rather than exercising reasonable care and diligence, such a plaintiff could sleep on her rights for years, while essential records are discarded and witnesses' memories fade,[10] then eventually seek and

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"Avoiding that situation is, of course, the purpose of the statute of limitations, as this Court observed in Nardone, at 36-37:

> The purposes of the statues of limitations are to protect defendants against unusually long delays in filing of lawsuits and to prevent unexpected enforcement of stale claims concerning which interested persons have been thrown off guard for want of reasonable prosecution.
>
> "As a statute of repose, they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal

(continued...)

obtain a medical opinion of negligent causation and bring suit years after the fact. That cannot be the law.

The proper result in the instant case is clearly pointed out by the recent decision of the Second District Court of Appeal in Jackson v. Georgopolous, 14 F.L.W. 2429 (Fla. 2d DCA Oct. 4, 1989), a case involving an amazingly similar factual and legal situation.

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> rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims which are not usually left to gather dust or remain dormant for lons periods of time. Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 19 L.Ed. 257; 1 Wood, Limitations of Actions, supra §4; Spath v. Morrow, supra. To those who are unduly tardy in enforcing their known rights, the statute of limitations operates to extinguish the remedies; in effect, their right ceases to create a legal obligation and in lieu thereof a moral obligation may arise in the aid of which courts will not lend their assistance. Cf. 34 Am.Jur., 'Limitation of Actions,' §11, p.20. (e.s.) Wilkinson v. Harrington, R.I., 243 A.2d 745 at 752 (1968). (emphasis in original).

Moreover, it might be noted, the danger posed to a malpractice defendant as a result of a missing medical record has substantially increased as a result of the Court's decision in Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987) (establishing a rebuttable presumption of negligence if the plaintiff demonstrates that the absence of records hinders her ability to establish a prima facie case). Thus, medical records which have been misplaced or destroyed as a result of plaintiff's delay in bringing suit not only may increase the difficulty of defending a malpractice case on the merits, but may even give rise to a presumption of negligence.

In Jackson, plaintiff's decedent died due to multiple organ failure. The incident giving rise to the malpractice cause of action occurred between December 25, 1984, when decedent was admitted to the hospital, and February 23, 1985, when he died in the hospital. The hospital records were available at all times and were never denied to the family, and the death certificate indicated the nature of the surgery and of the injury. Plaintiff was aware of decedent's seriously deteriorating condition prior to his death. Nonetheless, the family investigation was not begun until February of 1986, and suit was not filed until August of 1987. The trial court directed a verdict based on the statute of limitations, and the Second District affirmed. Pointing to the availability of the medical records and plaintiff's awareness of the decedent's medical condition prior to his death, and citing this Court's decision in Nardone, supra, the District Court noted that a party seeking protection from the effects of the statute of limitations must have exercised reasonable care and diligence in seeking to learn the facts. Since plaintiff had failed to timely pursue her cause of action, the court held, it was barred by limitations.

In the instant case, plaintiff was aware of Mr. Shapiro's deteriorating medical condition and had access, at all times, to the medical records and charts. Indeed, she was in a better position than the plaintiff in Jackson, since she also had a physician relative review those medical records while Mr. Shapiro was still alive. As in Jackson, she failed to timely pursue the

cause of action. As in Jackson, the result should be that her claim is barred by limitations.

In Moore v. Morris, 475 So.2d 666, 667 (Fla. 1985), this Court specifically reaffirmed its prior decision in Nardone v. Reynolds, supra, quoting from it to the effect that the medical malpractice statute of limitations does not begin to run until either plaintiff has notice of the negligent act giving rise to the cause of action or has notice of the physical injury which is the consequence of the negligent act. Here, Mrs. Shapiro had actual knowledge of the injury and constructive knowledge (through the available medical records) of the negligent act, prior to December 31, 1979. Once all of these facts were in hand, she had two full years to consult with any medical expert whom she chose to review the facts and determine whether Dr. Barron's failure to use antibiotics (or, for that matter, any other act or omission on Dr. Barron's part) was the cause of Mr. Shapiro's blindness. For whatever reason, she delayed more than two years in obtaining that opinion -- which was admittedly based solely on facts known as early as December 31, 1979 -- and filing suit. Such a delay by the plaintiff does not in any way extend the statutory limitation period. To permit it to do so would emasculate the statute of limitations by permitting a plaintiff with knowledge of all relevant facts to decide, in plaintiff's unbridled discretion, when the statute of limitations would begin to run, based on when they decided to submit already-known facts to a medical expert for an opinion on breach of the

applicable standard of care and causation. That is not, and cannot be, the law in this state.

Other cases illustrate the same essential point. In Lipshaw v. Pinosky, Pinosky, P.A., 442 So.2d 992 (Fla. 3d DCA 1982), approved in part, reversed in part sub nom. Wasshul v. Lipshaw, 464 So.2d 551 (Fla. 1985),[11] a medical malpractice case, plaintiffs alleged in several successive amended complaints, as well as in subsequent affidavits, that the medical misdiagnosis sued upon was actually discovered in February, 1977, but claimed that they did not know until later that these known acts of misdiagnosis and mistreatment of their son's medical condition were negligent. Suit was not filed against these defendants until January, 1981, nearly four years after the plaintiffs became aware of the misdiagnosis. The trial court dismissed on the basis of the statute of limitations. The Third District affirmed, stating that plaintiffs, by their own admission, were fully aware of the misdiagnosis in February, 1977, and pointing out (442 So.2d at 994):

> On that date, the plaintiffs, by their own admission, were fully aware that the defendants herein had completely misdiagnosed and had rendered inappropriate medical treatment to their son -- the acts now sued upon in the third amended complaint. The assertion that the plaintiffs, as claimed, did

[11] Lipshaw involved both a "survival" medical malpractice action, discussed herein, and a wrongful death claim arising out of precisely the same facts. The Third District upheld the dismissal of the "survival" claim, but reversed as to the wrongful death claim. This Court, reviewing the Third District's decision, approved the Third District's decision as to the "survival" claim, but reversed the Third District as to the wrongful death claim and reinstated the trial court's dismissal of that claim. In the present case, only a "survival" claim is asserted.

> not realize until much later that these known acts of misdiagnosis and mistreatment were acts of neslisence is plainly of no avail to the plaintiff, as they were lons ago on actual notice as to the acts of neslisence now sued upon. It therefore follows that the medical malpractice action instituted against the defendants herein on January 7, 1981, when the first amended complaint was filed below -- nearly four years after the accrual of said action -- was time barred by the applicable two-year statute of limitations for medical malpractice actions. §95.11(4) (b), Fla. Stat. (1979).

In Price v. United States, 775 F.2d 1491 (11th Cir. 1985), the Eleventh Circuit affirmed a summary judgment based on the statute of limitations in a medical malpractice case in which plaintiffs had lost a fetus as a result of an operation. Plaintiff wife had been tested for pregnancy prior to the operation, and the test results were reported as negative. Later-discovered information revealed that it was likely that the test result had actually been positive. Even though this information was not learned until almost three years after the operation, the Eleventh Circuit held that the action had not been timely filed, and observed (775 F.2d at 1494):

> Although appellant did not know exactly what mistake, or whose mistake, led the doctor to believe that she was not pregnant when in fact she was, she had to know that her injury was probably connected to some act of those responsible for her treatment. If she intended to pursue the matter, there was no reason for her not to seek advice from others as to whether her treatment had been negligent, and whether she should bring a legal claim.
>
> The fact that appellant did not know whether the particular cause of her injury was the failure of the pregnancy test to yield an

> accurate result, or the failure of a person to record the result of the test accurately, did not toll the statute of limitations period. Upon learning that she lost a fetus, appellant was on notice that there had probably been an act of negligence. Appellant was no longer at the mercy of those who treated her. The only reason she did not find out the particular cause of her injury is that she did not ask.

In Roberts v. Casey, 413 So.2d 1226 (Fla. 5th DCA 1982), the Fifth District affirmed a final summary judgment based on the statute of limitations in a medical malpractice case. In that case, the minor child had been born on February 4, 1977, an apparently healthy child; she was readmitted to the hospital on April 5 and treated for bacterial meningitis, then transferred to Shands Teaching Hospital because of the severity of her illness. While the child was at Shands, the mother learned that the child had probably suffered severe brain damage; she also heard that other babies in the same nursery at about the time her daughter was born had contracted infectious diseases. Around the end of April 1977, she talked to the treating physician about bringing suit against the hospital, and he advised her to consult an attorney. Nonetheless, the complaint was not filed until December 18, 1979, well beyond the statutory two year period. The court observed that the statute in a medical malpractice action begins to run when plaintiff has been put on notice of an invasion of his legal rights, and that this occurs when plaintiff has notice of either the negligent act causing the injury or the existence of an injury which is a consequence of the negligent act. The court pointed out that appellants had discovered, in April, 1977, that their child's

condition may have been caused by a negligent act, and that the statute of limitations began to run at that time; the fact that appellants were not aware that the physician's treatment may have contributed to the condition did not alter the result, since they had been put on notice of an invasion of their legal rights at that time. Accordingly, the court affirmed the summary judgment in favor of the defendants.

In Almand Construction Co. v. Evans, 547 So.2d 626 (Fla. 1989), this Court recently addressed the extent of knowledge necessary to start the running of the statute of limitations. In Almand, plaintiffs sued a builder for structural damages to their home caused by settling. Plaintiffs alleged in their five count complaint that they became aware of the settling in 1978 and attempted repairs in 1979. However, plaintiffs did not file their suit until 1985. The defendant moved for summary judgment, claiming that plaintiffs' knowledge of the existence of a problem in 1978 started the running of the statute of limitations regardless of plaintiffs' allegation of at least three separate negligent causes of that damage, and thus their claim was barred. Plaintiffs opposed summary judgment, arguing that although they knew the problem existed in 1978, they did not know "the actual cause of the problem until 1982." 547 So.2d at 627. The trial court granted summary judgment on all counts on the basis of the statute of limitations, and plaintiffs appealed. The district court reversed the summary judgment on the counts relating to damages caused by settling of the house, ruling that the statute

of limitations did not begin to run until plaintiffs had actual or constructive knowledge of the "true cause" of the problem in **1982.** In its recent Almand decision, this Court quashed the district court's reversal of the summary judgment, holding **(547** So.2d at **628)** that lack of knowledge of "the specific cause" of the defect does not toll the running of the statute of limitations:

> The Evans' knowledge of the settling of the house and resultant structural damage, which they concede they had as early as **1978,** was sufficient to put them on notice that they had, or might have had, a cause of action. This knowledge meets the discovery component of Section **95.11(3)** (c).

Similarly in the instant case, plaintiff had sufficient knowledge, as early as December **31, 1979,** to put her on notice that she had, or might have had, a cause of action, and that knowledge met the discovery component of Section **95.11(4)(b),** Florida Statutes. She had until December **31, 1981,** in which to bring suit. When she failed to bring suit within that period, her claim was barred by the statute of limitations, as the trial court correctly held.

In Steiner v. Ciba-Geigy Corp., supra, the Third District affirmed a summary judgment based on the statute of limitations in an action against a drug manufacturer whose product had caused the plaintiff to lose his eyesight. In that case, the drug was first prescribed in August, **1971,** and the first change in plaintiff's eyesight occurred during the second week of September of the same year, when plaintiff noticed a "rising tide effect." Plaintiff again took the drug for several days in April, **1972,** and noticed

to point in a single, general direction in the search for the responsible party or parties, and that factual basis for pursuing the inquiry was sufficient to trigger the running of the statute of limitations. See also, to like effect, Seaboard Air Line Railroad Co. v. Ford, 92 So.2d 160 (Fla. 1955).

Similarly, in the instant case, it is plaintiff's contention that she could not have "known in fact" that Dr. Barron's failure to use antibiotics was the cause of Mr. Shapiro's blindness until

she received a medical opinion to that effect from Dr. Kunin in January, 1982. As observed in Steiner, that is not the law; rather, the statute requires only that the facts giving rise to the cause of action be discovered or discoverable with the exercise of due diligence.

As the District Court correctly noted in the instant case, the contents of medical charts and records must be imputed to plaintiff. Nardone v. Reynolds, supra; Frankowitz v. Propst, supra. Here, those medical charts and records (not only available to plaintiff, but in fact reviewed by a physician relative) disclose all of the facts constituting the cause of action. At a bare minimum, there was a factual basis for pursuing the inquiry sufficient to trigger the running of the statute of limitations.

The trial court correctly rejected plaintiff's theory, and properly entered summary final judgment based on the statute of limitations. The District Court erred in reversing that holding, and its decision in this cause should be quashed.

CONCLUSION

For the reasons set forth above, the statute of limitations barred plaintiff's claim. The contrary holding of the District

Court of Appeal should be quashed and the cause remanded with directions to reinstate the Final Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by United States Mail to NANCY P. MAXWELL, ESQUIRE, 1615 Forum Place, Suite 300, West Palm Beach, Florida 33401; ANNE B. MacLEAN, ESQUIRE, 2700 N.E. 14th Street Causeway, Pompano Beach, Florida 33062; KEVIN L. O'BRIEN, ESQUIRE, 888 S.E. 3rd Avenue, Suite 300, Fort Lauderdale, Florida 33316; and PHILIP M. BURLINGTON, ESQUIRE, Suite 4-B/Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401, this 8th day of November, 1989.

Attorney