O/a 1-9-90

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

SUPREME COURT CASE NO.: 74,144

4TH DISTRICT COURT CASE NO.: 87-1530

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

Petitioners,

vs.

JOSEPHINE SHAPIRO, as Personal Representative of the Estate of LEE SHAPIRO and JOSEPHINE SHAPIRO, individually,

Respondents.

THE FLORIDA MEDICAL ASSOCIATION AND THE FLORIDA HOSPITAL ASSOCIATIONS' AMICI CURIAE BRIEF

STEPHENS, LYNN, KLEIN & McNICHOLAS, P.A.
9100 S. Dadeland Blvd.
One Datran Center, Suite 1500
Miami, FL 33156
PH.# (305) 662-2626

PHILIP D. PARRISH, ESQ.
ROBERT M. KLEIN, ESQ.

TABLE OF CONTENTS

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

TABLE OF AUTHORITY

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P. A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 . TELEPHONE (305) 662-2626

INTRODUCTION

This brief is submitted on behalf of the Florida Hospital Association (FHA) and the Florida Medical Association (FMA) pursuant to this Court's order dated November 2, 1989, which grants the FMA and FHA status as Amici Curiae. Together, the FHA and FMA represent thousands of health care providers throughout the State of Florida. Thus, the FHA and FMA have an intense and palpable interest in the outcome of this matter. That interest obviously transcends the parameters of this particular lawsuit, and extends to pending and future law suits, and particularly where there may be some question as to whether a cause of action has even accrued. In that regard, the FMA and FHA would urge this court to reiterate and revitalize the principles that were set forth by the Court in NARDONE vs. REYNOLDS, some thirteen years ago.

As this court reviews the record on appeal and the briefs that have been submitted by the parties and various Amici Curiae, the FMA and FHA wish to remind this court of the language from Corpus Juris Secundum which was adopted in NARDONE vs. REYNOLDS, 333 So.2d at 34:

> [M]ere ignorance of the facts which constitute the cause of action will not postpone the operation of the statute of limitations, but the statute will run from the time the cause of action first accrues notwithstanding such ignorance. The reason of the rule seems to be that in such cases ignorance is the result of want of diligence and the party cannot thus take advantage of his own fault.

LAW OFFICES OF STEPHENS. LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

Statutes of limitation are firmly entrenched in this State's jurisprudence. Indeed, statutes of limitation have been a legislative fixture in Florida--as in most states--for well over a hundred years, due to sound public policy considerations. The District Court's opinion in this matter undermines that public policy by ignoring the plain language of Section 95.11(4)(b), Florida Statutes, and numerous decisions of this court which construe that statute. The District Court's opinion should be reversed.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

STATEMENT OF THE CASE AND FACTS

Amici Curiae, The Florida Medical Association and The Florida Hospital Association, hereby adopt in full and incorporate herein, the Statement of the Case and Facts set forth in the Appellants', James Barron, M.D., et. al. Initial Brief in this matter.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

POINT ON APPEAL

I. WHETHER A REASONABLE PERSON SHOULD KNOW THAT BLINDNESS IS NOT A NORMAL RESULT OR COMPLICATION OF STOMACH SURGERY, AND THEREFORE SHOULD BE ON NOTICE OF THE SURGEON'S POSSIBLE NEGLIGENCE.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P. A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

SUMMARY OF THE ARGUMENT

Thirteen years ago this Court soundly rejected the proposition that the statute of limitations does not commence to run in a medical malpractice action until the Plaintiff actually becomes aware of the negligence of his physician. NARDONE vs. REYNOLDS, 333 So.2d 25, 32 (Fla. 1976). Instead, this Court held that the statute of limitations begins to run when the injury which is the consequence of the negligent act is known. 333 So.2d at 32. In doing so, this court drew a distinction between notice of the negligent act and notice of its consequences.

The District Court's opinion in this case turns NARDONE on its head. While the District Court's opinion purports to follow NARDONE's mandate (without citing to NARDONE), i.e., that knowledge of the contents of the Plaintiff's medical records must be imputed to the Plaintiff, and although the opinion recognizes that the medical records in this instance did in fact reveal the alleged negligence, the District Court nevertheless refused to affirm the summary judgment in favor of Dr. Barron.

The District Court's opinion in this case has crafted an entirely new standard. The opinion can only be interpreted to stand for the proposition that the statute of limitations is not triggered until the Plaintiff is on notice of the specific theory of negligence which the Plaintiff intends to pursue at trial.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

This brief will attempt to locate the root of the Fourth District's confusing application of NARDONE, which appears to stem from the Court's interpretation--or misinterpretation--of certain language in this Court's opinion in MOORE vs. MORRIS, 475 So.2d 666 (Fla. 1985). In so doing, we hope to convince this court to reaffirm the principles which it enunciated in NARDONE, and to reject the District Court's interpretation and misapplication of MOORE vs. MORRIS.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND ELVD., MIAMI. FLORIDA 33156 • TELEPHONE (305) 662-2626

ARGUMENT

I. WHETHER A REASONABLE PERSON SHOULD KNOW THAT BLINDNESS IS NOT A NORMAL RESULT OR COMPLICATION OF STOMACH SURGERY, AND THEREFORE SHOULD BE ON NOTICE OF THE SURGEON'S POSSIBLE NEGLIGENCE.

Florida's medical malpractice statute of limitations requires a party to file suit within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence. Section 95.11(4)(b), Florida Statutes; NARDONE vs. REYNOLDS, 333 So.2d 25 (Fla. 1976). In the thirteen years since this court's decision in NARDONE vs. REYNOLDS, there has been a persistent and dramatic erosion of the "should have known" provision of the statute. Aided by certain language in this court's decision in MOORE vs. MORRIS, 475 So.2d 666 (Fla. 1985), Florida's District Courts of Appeal have virtually negated any realistic prospect of demonstrating that a cause of action truly should have been discovered before actual knowledge of the potential claim has been shown to exist.

The confusion which has resulted on this issue amongst practitioners, laymen, and judges alike was most recently chronicled in Judge Lehan's epic concurring opinion in JACKSON vs. GEORGOPOLOUS, 14 FLW 2429 (Fla. 2d DCA, Opinion filed October 4, 1989). Judge Lehan's heroic attempt to clear up the confusion which reigns with respect to the "should have known" provision of the medical malpractice statute of limitations

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

underscores the need for this court to reaffirm the vitality of the statute of limitations, as well as this court's application of that statute in NARDONE vs. REYNOLDS, supra.

In NARDONE, this court held that the statute of limitations in a medical malpractice case does not begin to run until either "the Plaintiff has notice of the negligent act giving rise to the cause of action or notice of the physical injury which is the consequence of the negligent act." 333 So.2d 25 (Fla. 1976). That language, like the language of the statute itself, is in the disjunctive. However, the District Court's opinion in the present case utilizes a conjunctive construction. Thus, the District Court has effectively ruled that a Plaintiff not only must have notice of a physical injury which is the consequence of a negligent act, but also notice of that specific act of negligence.

In other words, the District Court in this instance has ruled that it is not sufficient for purposes of the period of limitation that Mrs. Shapiro was aware that her husband had developed blindness as a complication of his colonoscopy. Rather, the District Court has ruled that Mrs. Shapiro also had to have knowledge (or should have had knowledge) that the blindness was in fact a result of the Doctor's failure to prescribe antibiotics before the statute began to run. That is not the law. Florida's medical malpractice statute of limitation has never required absolute and specific knowledge of the exact nature of a physician's negligence in order to

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

trigger the period of limitation.

In NARDONE vs. REYNOLDS, this court answered certain certified questions from the Fifth Circuit Court of Appeal with respect to the application of the medical malpractice statute of limitations. A review of the facts in that case is in order.

In January of **1965,** Nicholas Nardone was admitted to Jackson Memorial Hospital in Miami. Between January and March of **1965,** he underwent four operations upon his brain. After the initial surgery, there was a period of "encouraging, marked, and steadily progressive improvement in his condition." 333 So.2d *28.* However, on February **25, 1965,** a diagnostic procedure was performed wherein a dye was introduced into the ventricals of the brain. (It was this procedure which the parents were later to claim constituted medical malpractice.) Subsequent to that diagnostic procedure a third, emergency procedure was required. After that procedure, the child was basically comatose and in a vegetative state. The child was discharged from Jackson in July of **1965,** and was subsequently admitted to and assessed at Columbia University Hospital in New York City.

Although the parents of the child never requested the medical records, the records were at all times available to them and would have revealed the diagnostic procedure which was conducted in February of **1965.** In March of **1969,** Mrs. Nardone requested and received the Jackson Memorial Hospital records.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER. 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

However, Mr. Nardone kept the records and finally took them to his lawyers in 1971, at which time suit was filed.

For the purposes of determining whether the statute of limitations had been triggered, this Court noted that:

> Although the infant's condition wavered during hospitalization, before discharge, he was totally blind and had suffered irreversible brain damage. His parents were told and knew that this was their son's condition prior to his discharge from the hospital in July, 1965...Unquestionably, the Appellants/Plaintiffs below were aware of the extent of the injury in 1965. 333 So.2d at 31.

Citing to CITY OF MIAMI vs. BROOKS, 70 So.2d 306 (Fla. 1954), this Court held that the Plaintiffs in NARDONE were on actual notice of the decerebrate state of their son, and the fact that he had suffered irreversible brain damage. In accordance with BROOKS, supra, this Court held that the statute of limitations began to run when the injury was known. 333 So.2d 32.

A review of the context in which NARDONE arose, and a comparison with the facts of the present case will readily reflect that the District Court's opinion in this case is at odds with the NARDONE decision. In NARDONE, this court rejected the "Plaintiffs' request that this court adopt the view that the statute of limitations did not commence to run until they became aware of the negligence of the physicians and hospital." 333 So.2d at 32. However, that is precisely what the Fourth District Court of Appeal did in the present case. There is no other reasonable explanation for the lower court's discussion of whether Ms. Shapiro knew that her husband's

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

blindness was as a result of the failure to employ antibiotics, or because of some problem with the tubes that had been placed in her husband. That issue is not at all dispositive of whether Ms. Shapiro should have been on notice of an invasion of her legal rights, since Florida's courts have never required that a medical malpractice claimant be aware of the precise nature of the health care provider's negligent act before the statute of limitations is triggered.[1]

---

[1] In this respect the medical malpractice statute of limitations is no different from any other discovery-based statute of limitations. This court's recent decision in ALMAND CONSTRUCTION COMPANY, INC. vs. EVANS, 547 So.2d 626 (Fla. 1989), reaffirms the long-held proposition that a Plaintiff need not be on notice of the specific act of negligence where the Plaintiff is on notice of the injury or defect, in order for the statute of limitations to be triggered.

In the EVANS case, the Plaintiff's home began settling some time prior to 1978, resulting in structural damage. In 1978 the Plaintiffs notified Almand Construction about the damage, and repairs were made in 1979. However, the settling continued and the Plaintiffs filed suit against Almand in 1985.

At a hearing on Defendant's Motion for Summary Judgment, Plaintiffs' counsel agreed that the Plaintiffs had notice of the defective condition of the house in 1978 but nevertheless argued that the Plaintiffs did not have knowledge of the actual cause of the problem until 1982, when they received the report of an engineer who had been retained by their insurance company, which stated that the settling and resulting damages were caused by construction of the house on unsuitable fill. The trial court granted the summary judgment.

On appeal, the District Court affirmed a portion of the summary judgment, but reversed the summary judgment on the remaining counts, because the Plaintiffs had alleged that the settling and the resulting damage to the house was a result of a latent defect, the nature of which was not known prior to 1982.

Almand Construction Company appealed to this court, relying upon this court's decision in KELLY vs. SCHOOL BOARD OF SEMINOLE COUNTY, 435 So.2d 804 (Fla. 1983). In KELLY this court had rejected the "continuous treatment" doctrine and

This conclusion is borne out in the NARDONE decision, which distinguished between "notice of the negligent act and notice of its consequences." 333 So.2d at 33. See also CHRISTIANI vs. CITY OF SARASOTA, 65 So.2d 878 (Fla. 1952).

In CHRISTIANI, this Court had to consider injuries which had been occasioned immediately upon impact in a vehicular/tricyclist accident, but which did not manifest themselves until eighteen months after the incident. This Court held that there was notice of the act of negligence and the right of action at the time of the incident, so that the statute began to run even though notice of the consequences of the accident did not materialize until later.

In the present case, although the injury (blindness) manifested itself almost immediately after surgery, the particular nature of the negligence (failure to utilize prophylactic antibiotics) was not arguably discovered until later. Nevertheless, Ms. Shapiro was on notice of her husband's blindness, and was certainly aware that blindness is

---

approved the Second District Court of Appeal's decision in HAVATAMPA vs. MCELVY, JENNEWEIN, STEFANY & HOWARD ARCHITECTS/PLANNERS, INC., 417 So.2d 703 (Fla. 2d DCA 1982). The HAVATAMPA decision had affirmed the proposition that a plaintiff cannot rely on the lack of knowledge of the specific cause of a defect to avoid a statute of limitations. 417 So.2d at 704.

In EVANS, this court further noted that the Plaintiff's knowledge of the settling of the house and the resultant structural damage (i.e., the injury) was sufficient to put the Plaintiffs on notice that they had, or might have had, a cause of action. "This knowledge," this Court noted, "meets the discovery component of Section 95.11(3)(c)." 547 So.2d at 628.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

not a normal result or complication of a colonoscopy. Thus, the statute of limitations clearly began to run no later than December 31, 1979, when a final diagnosis of blindness was rendered.

The Fourth District's confusion with regard to the medical malpractice statute of limitations appears to have its genesis in this Court's opinion in MOORE vs. MORRIS, 475 So.2d 666 (Fla. 1985). As will be demonstrated below, the Fourth District Court of Appeal has misinterpreted the application of the NARDONE standard to the facts in MOORE, and applied the MOORE decision as though it had announced a new standard. A review of MOORE vs. MORRIS should help to put this matter into proper focus.

The Third District Court of Appeal had affirmed a summary judgment which had barred the Moores from bringing a medical malpractice action against their daughter's health care providers. The alleged malpractice arose out of complications which had developed during delivery of the baby. These complications had necessitated delivery of the baby by Cesarean section. After delivery, the infant was "blue" for a period of in excess of thirty minutes, and the doctors attempted to administer oxygen; they were unsuccessful in their treatment and transferred the infant to Jackson Memorial Hospital. Apparently, the doctors informed the father that they did not expect the baby to live. While enroute to Jackson, the baby's chest was cut open and a tube was inserted to assist her in

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

breathing.

Based upon these facts, the District Court of Appeal ruled as a matter of law that the parents were on notice of the alleged negligence at the time of delivery. This Court reversed, noting that:

> There is nothing about these facts which leads conclusively and inescapably to only one conclusion--that there was negligence or injury caused by negligence. To the contrary, these facts are totally consistent with a serious or life-threatening situation which arose through natural causes during an operation....
>
> Caesarean sections are not a natural way to give birth. However, the performance of "C" sections as a result of difficulties with delivery are so common in our society that they are accepted as normal and they are not associated with negligence or injury. **475** So.2d at 668-69.

In addition, the court noted that the baby appeared to have made a speedy and complete recovery, subsequent to the traumatic delivery, and was not and could not have been scientificly diagnosed as having brain damage until she was three years old. **475** So.2d at 669.

In so ruling, the MOORE court analogized to the Third District's decision in ALMENGOR vs. DADE COUNTY, 359 So.2d 892 (Fla. 3d DCA 1978). ALMENGOR is another medical malpractice case involving alleged negligence at the time of delivery which resulted in mental retardation. Even though the parents in that case were on notice rather quickly concerning the fact that the baby was mentally retarded, the Third District Court

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

of Appeal held that statute of limitations had not necessarily run:

> We do not believe, however, that this evidence put the Plaintiff on notice as a matter of law that the baby was injured during birth because such evidence just as reasonably could have meant that the baby had been born with a congenital defect without any birth trauma. 359 So.2d at 894.[2]

In stark contrast to MOORE vs. MORRIS and ALMENGOR vs. DADE COUNTY, which both involved injuries that either could not be detected initially, or were completely consistent with a congenital problem, Mr. Shapiro's blindness in the present case was neither congenital nor reasonably consistent with the expected results of his elective surgery.

In SCHAFER vs. LEHRER, 476 So.2d 781 (Fla. 4th DCA 1985), the Fourth District Court of Appeal took out of context certain language from the MOORE vs. MORRIS decision, and ruled that "knowledge of a physical injury alone, without the knowledge that the injury resulted from a negligent act, does not trigger the limitations period." 476 So.2d at 783. However, that was **not** the holding in MOORE vs. MORRIS. Rather, this court held, under the particular circumstances in MOORE vs. MORRIS, that the alleged injury was entirely consistent

---

[2] We agree with Petitioner's position that ALMENGOR represents a departure from this Court's decisions in NARDONE and MORRIS. However, for the purposes of the present discussion, it is sufficient to note that the situation in ALMENGOR is distinguishable from the present case. While mental retardation can commonly be present at birth under non-negligent circumstances, it is rather extraordinary to note blindness following a colonoscopy.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

with and could be adequately explained by a non-negligent medical intervention in response to an emergency situation-and, therefore, it could not be said that the Plaintiff should have known that the injury was attributable to negligence. Again, however, the present case simply cannot be analogized to that scenario.

An even more in-depth analysis of the MOORE vs. MORRIS decision reveals that Megan Moore's parents were not even on notice of the injury at the time of birth. That is because the parents were **not** suing for the emergency surgery on the child's chest. Rather, they were suing because they had detected--some three years later--that the child was mentally retarded. None of the traumatic yet ephemeral symptomatology which had been demonstrated at the time of child's birth had given any indication that the child was retarded--particularly in light of the fact that the child seemed to make a speedy physical recovery. Here, however, Ms. Shapiro was aware that her husband was going blind as early as October of **1979** and certainly no later than December **31, 1979.**[3]

---

[3] It is interesting to note that the Fourth District's misinterpretation of MOORE in its decision in SCHAFER, was made in the context of an analysis as to whether the Plaintiff in SCHAFER was on actual notice of the injury. The court then engaged in an analysis of whether the Plaintiff should have known that the negligence occurred more than two years before suit was filed. In that regard, the Plaintiff's affidavit revealed that her efforts to obtain the critical medical records from the doctor were thwarted and the true facts were concealed from her until **1982,** thus tolling the statute of limitations. Given that affidavit, the court found that it was unreasonable to suggest that the Plaintiff in SCHAFER should have known of her cause of action, because it was concealed

The Fourth District's confusion concerning the import of the MOORE decision, as evidenced by their opinion in SCHAFER, supra, is at the root of the problem with the District Court's decision in the present action. The District Court noted that:

> While the complications arising from Mr. Shapiro's surgery were obvious to all, at what time the Shapiros had or should have had knowledge of the cause of such complications becomes the focal point of this opinion, since knowledge of physical injury alone, without the knowledge that it resulted from a negligent act, does not trigger the statute of limitations. MOORE vs. MORRIS, **475** So.2d **666** (Fla. **1985).**

538 So.2d at **1319.** However, had the District Court properly applied this Court's analysis in MOORE, it is clear that the Court of Appeal would have determined that Mr. Shapiro's blindness was not "totally consistent with a serious or life-threatening situation which arose through natural causes during an operation." MOORE, **475** So.2d at **668.** Nor was Mr. Shapiro's blindness "so common in our society that [it is] accepted as normal and...not associated with negligence or injury," where it occurred as a result of a colonoscopy. MOORE, **475** So.2d at **668-69.** Rather, it is completely unreasonable to suggest that a layman would assume that the blindness had been the result of something other than negligence--regardless of what research and reflection might

---

from her. However, in the present case, the Plaintiff has neither plead nor argued at any stage of the proceedings that Dr. Barron attempted to conceal anything.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

subsequently reveal to have been the specific act of negligence. To the contrary, the possibility of some kind of negligent injury would have been the paramount consideration to virtually any individual, given these circumstances.

The District Court's opinion continues as follows:

> Recognizing knowledge of the contents of medical charts and records must be imputed to the Plaintiffs, FRANKOWITZ vs. PROPST, **489** So.2d **51** (4th DCA **1986)**; recognizing Dr. Gutman was available to the Plaintiffs as an independent medical advisor throughout the hospitalization; and recognizing Dr. Kunin did **not base his** opinion on any information ~~not available to the Appellants on December 31, 1979, we,~~ nevertheless, reverse. **538** So.2d at **1319-20.**

The latter finding alone requires affirmance of the summary judgment. For if this court meant what it said in NARDONE vs. REYNOLDS i.e., that "the means of knowledge are the same as knowledge itself," and since the District Court has conceded that the Plaintiff had the "means of knowledge'' as of December **31, 1979** to determine not only that her husband had been injured by the negligence of another, but also the specific act of negligence itself, then the statute was triggered as of that date.

Indeed, it was the inability of this court to make such a determination in ASH vs. STELLA, **457 So.2d 1377 (Fla. 1984),** which lead this court to reverse in **that** case. ASH involved **an** alleged misdiagnosis of cancer. This court held that:

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

> Absent a finding of fact that before March 30, 1977, medical records showed that the newly discovered tumor had been the cause of Mrs. Stella's earlier problems, constructive knowledge of the incident giving rise to the claim cannot be charged to the Stellas.

457 So.2d at 1379. In this instance--as the District Court's opinion acknowledges--Mr. Shapiro's medical records demonstrated as of December 31, 1979 that Mr. Shapiro's blindness was due to Dr. Barron's failure to use prophylactic antibiotics pre-operatively. Thus, the Plaintiff clearly must be charged with constructive notice of the incident as of that date.

The Fourth District's opinion is indicative of an increasing reluctance on the part of the District Courts of Appeal in this state to uphold the public policy which underlies the medical malpractice statute of limitations, or to interpret the plain language of that statute as expressed in this court's opinion in NARDONE vs. REYNOLDS, supra. This reluctance is dramatized in a case such as this, where a Court of Appeal seeks solace in "summary judgment maxims" that are elicited from cases such as HOLL vs. TALCOTT, 191 So.2d 40 (Fla. 1966), and otherwise refuses to apply a common sense interpretation of the "should have known" standard.

The net result has been an unintended yet alarming abdication of the appellate courts' responsibility, i.e., the Courts have been finding (creating?) "questions of fact" where none actually exist. These courts are in reality requesting juries to perform a task which the courts were selected to

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER. 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

perform--and must perform--where warranted, i.e., where there are no legitimate issues of fact for resolution by the jury. Unfortunately, as a result, the Statute of Limitations has been effectively negated in medical malpractice cases.[4]

In the present case, the District Court of Appeal misinterpreted its role. The court predicated its decision to reverse upon an alleged factual dispute over which specific act or failure to act caused the blindness. Initially, it must be noted that this determination was not necessary to resolution of the limitations issue in light of the fact that Mrs. Shapiro clearly had reason to investigate her potential cause of action, i.e., should have known of the potential claim, by December 31, 1979. Thus, there was no remaining, legitimate question of **"material"** fact.

Dr. Barron was not obligated to demonstrate conclusively that Mrs. Shapiro knew specifically what Dr. Barron had done or failed to do which lead to her husband's blindness. Rather, in this kind of case, where the injury (1) was readily apparent to everyone, (2) was not consistent with non-negligent

---

[4] This troubling state of affairs is graphically illustrated by a recent Third District Court of Appeal decision. BOGORFF vs. KOCH, 547 So.2d 1223 (Fla. 3d DCA 1989). For the sake of brevity we will not repeat the analysis and criticism of that case which is contained in the Petitioner's brief in this matter. Needless to say, the FMA and FHA strongly endorse Judge Jorgenson's dissent in that matter. Further, we have been informed that this court is currently considering whether it should accept jurisdiction over the BOGORFF case. We would urge this court to do so, and to reverse both the BOGORFF decision and the District Court opinion in the present matter.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER. 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

complications arising from the surgery, and (3) was not a commonly accepted problem which a layman would have associated with this procedure, knowledge of the injury **was** equivalent to knowledge of the actual negligence. **See**, HUMBER vs. ROSS, 509 So.2d 356 (Fla. 4th DCA) (limitations period commences when the Plaintiffs have knowledge of physical condition and drastic change therein, although they do not know the causal connection with the Defendants' acts or failure to act.) ~~See also~~, ROBERTS vs. CASEY, 413 So.2d 1226 (Fla. 5th DCA 1982).[5]

In NARDONE vs. REYNOLDS, this court ruled that the medical malpractice statute of limitations is triggered given the occurrence of either of two events, i.e., either when "the Plaintiff has notice of the negligent act giving rise to the cause of action or when the Plaintiff has notice of the physical injury which is the consequence of the negligent act." 333 So.2d at 32. The summary judgement in this instance was

---

[5] We are informed by counsel for Dr. Barron that Judge Glickstein, who authored the opinion in HUMBER vs. ROSS, and who was on the District Court panel in the present action, expressed some frustration at oral argument as to how to distinguish this case from HUMBER. It is interesting to note in this respect that the District Court's opinion in the present case contains no reference whatsoever to the HUMBER decision. Instead, after setting forth those facts which should clearly have compelled the Court to rule that Mrs. Shapiro should have been on notice of her cause of action in December of 1979, the District Court relied on an alleged dispute with respect to a non-material fact, i.e., the precise cause of the fungal infection which resulted in Mr. Shapiro's blindness. The Plaintiff attempted to distinguish the HUMBER decision in her brief before the District Court by noting that the parties in that matter had agreed that the court could hear the statute of limitations issue on a non-jury basis. In this instance, that is truly a distinction without a difference.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

granted because the trial court determined that Mrs. Shapiro clearly had actual notice of the physical injury which was the consequence of the negligent act more than two years prior to the filing of this action. The trial court properly applied NARDONE, which does not require that a plaintiff be fully conversant with the specifics of an allegedly negligent act. Rather, so long as a reasonable person would have questioned whether the physical injury was the consequence of a negligent act--and in this case there was no other reasonable explanation--then the Plaintiff is on notice of the potential claim.[6]

AS was noted earlier, the NARDONE court rejected the suggestion that "the statute of limitations did not commence to run until the Plaintiffs became aware of the negligence of the physicians and hospital." 333 So.2d at 32. Yet, that is the precise standard which was utilized by the District Court in this case. Here, Mrs. Shapiro was on notice not only of the

[6] It is important to note at this juncture that we are only concerned with determining when the Plaintiff was on notice of the potential claim. The period of limitations does not suggest that a Plaintiff must immediately file a claim, merely because there is notice of some unexpected injury, without conducting some reasonable investigation. To the contrary, the period of limitations allows a potential plaintiff adequate time to investigate the claim, once that individual is on notice of a potential invasion of that party's legal rights, i.e., once there is actual notice of some untoward event which might arguably be related to the negligence of the treating physician. Were it otherwise, there would be no need for any kind of period of investigation before a statute of limitations would be deemed to have run, i.e., if the statute did not commence to run until a patient had actual notice of the specific details of a particular physician's alleged malpractice.

injury, but also of the specific incident, i.e., the surgery and post-operative care which had resulted in the injury (blindness). Mrs. Shapiro was not left to engage in conjecture or speculation. Indeed, if--as NARDONE requires--knowledge of the medical records were imputed to her, Ms. Shapiro had actual notice that the blindness was the result of negligence.[7]

Indeed, the Fourth District's treatment of the medical malpractice statute of limitations (particularly in FLORIDA PATIENTS COMPENSATION FUND vs. SITOMER, 524 So.2d **671** (Fla. 4th DCA) rev. dismissed, **531 So.2d 1353 (1988))** is **so** strained that Judge Lehan felt compelled to devote the majority of his concurring opinion in JACKSON vs. GEORGOPOLOUS, supra, to an attempt to harmonize that language with this Court's decisions in MOORE and NARDONE. In this respect, we cannot improve upon Judge Lehan's analysis, where he noted:

---

[7] This precise point was made by Judge Lehan in his concurring opinion in JACKSON vs. GEORGOPOLOUS, supra. Judge Lehan noted that the statute of limitations in NARDONE was held to have been triggered at the time that the injured child's parents had knowledge of the injury.

Although the Florida Medical Association and Florida Hospital Association will rely upon Judge Lehan's concurring opinion in JACKSON vs. GEORGOPOLOUS throughout this brief, neither the FMA nor the FHA concur with Judge Lehan's conclusion that the various decisions which were discussed in his concurring opinion can be harmonized. Rather, we have reluctantly determined that the Fourth District has simply misinterpreted this court's ruling in MOORE vs. MORRIS. As a consequence of the intermediate appellate courts' confusion, the opinion in this matter has eviscerated that portion of the statute which was interpreted in NARDONE.

> Under MOORE and NARDONE...notice of a "negligent act" is an alternative to notice of "injury" as a basis for triggering the statute and must, in order to distinguish each of those alternative bases from the other, refer to notice of negligence in the performance (or non-performance) of an act, as contrasted with notice of injury and of the incident involving defendant resulting in the injury. Stated in another way, if the reference in the above quoted language in SITOMER to knowledge or notice of causation of an injury by the term "negligent act" is a requirement, in addition to knowledge or notice of the injury, in order to trigger the statute, meant knowledge or notice of negligence, then knowledge or notice of injury as one alternative basis under NARDONE and MOORE for triggering the statute would be superfluous because the other alternative basis is knowledge or notice of a "negligent act," i.e., of negligence, which would trigger the statute by itself.... 14 FLW 2432.

Interestingly enough, in FLORIDA PATIENTS COMPENSATION FUND vs. SITOMER, supra, the Fourth District attempted to conform its decision in SHAFER with MOORE vs. MORRIS, i.e., by noting that "knowledge of an injury, without more, does not necessarily put a patient on notice that the injury was caused by the negligence of another." 524 So.2d at 674. Nevertheless, the court clearly committed error in SITOMER when it affirmed the use of the following jury instruction:

> To discover an incident the Plaintiff either must have discovered or should have discovered three things. They are: 1) that a medical procedure was performed; 2) that the medical procedure was negligently performed: 3) that the plaintiff suffered an injury as a result. 524 So.2d at 674.

To the extent that this jury instruction can be interpreted to mean that the statute of limitations commences to run where a patient has knowledge of an injury that results from a medical procedure and which is not consistent with a non-negligent explanation, then we agree with that jury instruction. However, this instruction may also be interpreted to mean that a plaintiff must be aware that the procedure which has lead to the injury was in fact negligently performed. In that case, this jury instruction is plainly incorrect, since the period of limitations will only be triggered once a claimant has actual notice of the potential cause of action.

As was noted above, MOORE vs. MORRIS can be distinguished from the present case in part because MOORE vs. MORRIS involved allegations of active concealment of the negligent act.[8]

Nevertheless, such distinctions have been largely ignored in recent appellate decisions. Instead, often unfortunate or careless dicta has been applied from each of the

---

[8] The same is true of FLORIDA PATIENTS COMPENSATION FUND vs. TILLMAN, 487 So.2d 1032 (Fla. 1986) (Defendant doctor assured Plaintiff continuously that he was improving); SCHAFER vs. LEHRER, supra (plaintiff's reasonable efforts to obtain the medical records from physicians were thwarted and the true facts concealed from her); FLORIDA PATIENTS COMPENSATION FUND vs. SITOMER, supra (doctor assured Plaintiff that breast implants were not being rejected, that she did not have any infection, and that she should not worry about it); ELLIOTT vs. BARROW, 526 So.2d 989 (Fla. 1st DCA 1988) (the Defendant assured the Plaintiff that no harm had resulted from the Defendant's treatment); ALMENGOR vs. DADE COUNTY, 359 So.2d 892 (Fla. 3d DCA 1978) (nurse actively and successfully mislead plaintiff as to baby's true physical condition.).

cited cases to justify the reversal of an otherwise appropriate summary judgment, or to explain a trial court's otherwise inappropriate decision to send a limitations issue to the jury, despite that lack of any real, material dispute with regard to material issues of fact.

In this regard, it must be noted that the outcome of this case should be controlled by the Fourth District's earlier decisions in HUMBER vs. ROSS, supra, and FRANKOWITZ vs. PROPST, **489** So.2d **51** (Fla. 4th DCA **1986).** In both cases, the court held that the Plaintiff was on notice of the medical records and their contents, and that there had been no attempt to conceal any facts from the Plaintiffs. Indeed, as the Petitioners note in their brief, the District Court's opinion in this case conflicts with its prior decision in HUMBER.

The Florida Medical Association and Florida Hospital Association respectfully submit that this court should once again reaffirm the vitality of its opinion in the NARDONE case, and otherwise make it clear that the analysis that was utilized in that decision is the only appropriate method for determining when a statute of limitations has begun to run. As was noted earlier, since this court's decision in NARDONE, the Courts of Appeal have slowly but inexorably distinguished the NARDONE decision, to the point where it is no longer viable authority to be cited in any motion for summary judgment.

Florida's medical malpractice statute of limitations has also lost some of its import, with each and every dent that has

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

been put into the NARDONE decision. Even a cursory review of the authorities that were recited by the Fourth District should make it clear to this court that there literally is no statute of limitations in Florida at this time, save in those instances where a claimant is ready to admit to actual knowledge of an act of medical negligence which caused a particular injury. But that clearly is not what was intended by the legislature when it enacted Section 95.11(4)(b), Florida Statutes.

To the contrary, while it is clear that the statute of limitations may begin to run once a patient has actual knowledge of an act of medical malpractice which has caused an injury, it is equally clear that the statute begins to run where the claimant reasonably should have been on notice of the potential claim. While there may be no reasonable notice--and a jury question presented--where the injury to the claimant can reasonably be related--and most logically would be related--to some non-negligent act, it is also true that the statute of limitations should begin to run where there is a readily apparent, unexpected complication of the medical procedure, so long the injury or incident are not otherwise concealed by the medical practitioner. Without an affirmative ruling to that effect by this court, it is clear that virtually any health care provider will be condemned to have a jury determine a limitations issue, notwithstanding the fact that these issues should properly be resolved in summary fashion, in some instances.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS. P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626

CONCLUSION

Amici Curiae, the Florida Medical Association and the Florida Hospital Association, respectfully request this court to reverse the District Court's opinion and remand this matter to the trial court for entry of final summary judgment in favor of Dr. Barron. We would also ask this court to issue a clear and concise reaffirmation of the principles that were enunciated in NARDONE vs. REYNOLDS over a decade ago.

Respectfully submitted,

STEPHENS, LYNN, KLEIN & McNICHOLAS, P.A.
9100 S. Dadeland Blvd.
One Datran Center, Suite 1500
Miami, FL 33156
PH.# (305) 662-2626

BY _____
ROBERT M. KLEIN, ESQ.

BY _____
PHILIP D. PARRISH, ESQ.

CERTIFICATE OF SERVI

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 8th day of November, 1989, to NANCY MAXWELL, ESQ., 1615 Forum Place, Suite 300, West Palm Beach, FL 33420-4486; PHILIP BURLINGTON, ESQ., 1615 Forum Place, Suite 4-B, West Palm Beach, FL 33401; THOMPSON & O'BRIEN, P.O. Box 14334, Ft. Lauderdale, FL 33302 and ANNE MACLEAN, ESQ., 2700 N.E. 14th Street Causeway, Pompano Beach, FL 33062.

BY _____
PHILIP D. PARRISH, ESQ.

LAW OFFICES OF STEPHENS, LYNN, KLEIN & MCNICHOLAS, P.A.
SUITE 1500 ONE DATRAN CENTER, 9100 SOUTH DADELAND BLVD., MIAMI, FLORIDA 33156 • TELEPHONE (305) 662-2626