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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 74,144

4TH DCA 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.

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PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF TEE CASE AND FACTS

On August 17, 1979, DR. BARRON admitted MR. SHAPIRO to the hospital for removal of malignant polyps in the colon (R 331, 334-35). MR. SHAPIRO was 79 years of age at the time of admission (R 343). DR. BARRON was averaging well over two cases a week of colon resection (SR 48-50) and up to this point in time he had never used antimicrobial or antibacterial medication prophylactically for these surgeries (SR 116). He made the treatment choice not to use antimicrobial or antibacterial medication in MR. SHAPIRO's surgery because he had been successful with other methods of colon cleansing in the past (SR 48-49). DR. BARRON surgically removed the polyps and, during the procedure, sutured hernias and removed the appendix (SR 12-14).

Almost immediately following surgery, MR. SHAPIRO had an alteration in his mental status leading to confusion and difficulty with postoperative care (SR 5, 8, 16-19). He began to develop a localized peritonitis by the 28th of August (SR 20); the infection continued throughout the course of his hospitalization ultimately leading to blindness, deafness and other complications[1]. DR. BARRON transferred care of MR. SHAPIRO to an internal medicine group on October 7, 1979 and the group

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[1] MR. SHAPIRO died after suit was filed; MRS. SHAPIRO was substituted as personal representative of the estate (R 110-14), but the complaint was not amended to claim wrongful death.

discharged the patient from the hospital on February 4, 1980 (SR 23).

A relative of MR. SHAPIRO's, Dr. Emil Gutman, became involved in MR. SHAPIRO's care and treatment in September, 1979. Dr. Gutman is a board certified radiologist who practiced in Dayton, Ohio (R 272). Before his radiologic practice, he was in general practice and he testified he had a broader background than some radiologists (R 275). Dr. Gutman spoke with MRS. SHAPIRO before MR. SHAPIRO's operation and advised her to bring her husband to Dayton for treatment. At his deposition, he testified that if she had followed his advice, MR. SHAPIRO would still be alive (R 275-76). He suggested traveling to Dayton because he was familiar with the surgeons up there and had a specific physician in mind who had operated on him previously. Dr. Gutman was very familiar with this physician's training and that he did the type of surgery MR. SHAPIRO needed (R 276-77).

Dr. Gutman spoke with MRS. SHAPIRO before the surgery and followed the hospitalization by phone and in person (R 278-79). At his deposition in April, 1987, Dr. Gutman testified that MR. SHAPIRO should have gotten antibiotics before his surgery and that with elective surgery such as this it was common practice as far back as 1979 to give bowel preparation by way of antibiotics prior to surgery (R 278-80). He was aware of MR. SHAPIRO's surgery, the fact that "things went bad" and that MR. SHAPIRO was

transferred to the intensive care unit and remained there through his hospitalization. MRS. SHAPIRO would call him and he would tell her what he thought, These telephone conversations took place frequently (R 280).

At some point during September, 1979, MRS. SHAPIRO called Dr. Gutman and requested him to come to Boca Raton to see her husband which he did immediately, arriving at the hospital near midnight. He remained at the hospital for an hour to an hour and a half looking through MR. SHAPIRO's hospital chart (R 282). Dr. Gutman was critical of the medical care because there was not a hematologist consulting regarding a bleeding problem. Based on this review, Dr. Gutman later testified he also thought the internists were at fault and he eventually participated in obtaining an expert for the lawsuit by personally calling physicians (R 283-85).

At the time of Dr. Gutman's midnight visit, MR. SHAPIRO was "more dead than alive." Dr. Gutman consulted with the physicians about the problems MR. SHAPIRO had with blood transfusions and gave them advice on how to treat MR. SHAPIRO so that he could accept the transfusions. Dr. Gutman took the credit for saving MR. SHAPIRO's life through this advice. Dr. Gutman remained in Boca Raton for the entire weekend after the midnight hospital visit (R 289-90).

After his return to Ohio, Dr. Gutman continued to follow MR. SHAPIRO's hospitalization through phone conversations. He was very familiar with the antibiotics that were being used, the fact that they were extremely powerful and the follow-up which was required when using these medications (R 292). At some point, Dr. Gutman talked to DR. BARRON in the hospital or by telephone. In Dr. Gutman's opinion as expressed in his deposition, DR. BARRON was operating as physicians did back in 1950, not the way they were operating in 1979. "He did a lot of things that shouldn't been done (R 294)." MRS. SHAPIRO told Dr. Gutman that MR. SHAPIRO had lost his vision before the patient was discharged from the hospital (R 296).

When MRS. SHAPIRO was questioned in her deposition about Dr. Gutman's review, she indicated that Dr. Gutman's primary purpose was to look in on MR. SHAPIRO, see how he was and what the conditions were. When asked whether Dr. Gutman had any criticisms of DR. BARRON's treatment, she stated "You let him speak for himself (R 351)."

When questioned as to the complaints she had of DR. BARRON's treatment, MRS. SHAPIRO stated "I am complaining about the fact that my husband is blind. He drug [sic] himself into the hospital for a colon operation and came out blind. Came out deaf in one ear. ...That is my complaint (R 363)." MRS. SHAPIRO was aware that her husband's blindness was caused by the fungus

infection, as diagnosed by Dr. Wallace, who treated the patient during the hospital stay. She was also aware that the infectious process began when her husband acquired a postoperative infection which required one antibiotic after another, killing good and bad bacteria and allowing a fungus to take over (R 365-67).

When Dr. Wallace was called in to consult during the hospital stay, he told MRS. SHAPIRO that the candida infection, which arose from the extensive use of antibiotics to treat the postoperative infections, caused the blindness. To prevent the candida infection, MRS. SHAPIRO testified that specialists were called in during the hospitalization who administered the medication which eventually killed off the infection (R 367). MRS. SHAPIRO herself suggested the infectious disease physician to care for her husband during the hospitalization because "I didn't want any more playing around with Lee (R 368)." Based on the dangerous nature of the drug used to control the candida, MRS. SHAPIRO made sure that her husband's condition was monitored very carefully and that the clinic reports were read and the medication discontinued when there was an adverse reaction (R 368).

At the end of MR. SHAPIRO's hospital stay, MRS. SHAPIRO requested the hospital records to be sent to her. She gave them to her attorney. She never requested any records from DR. BARRON

but she did review the records when she obtained them (R 352; 368). Dr. Calvin Kunin was the expert physician who eventually testified by deposition on behalf of MR. and MRS. SHAPIRO. His criticism of the care and treatment rendered to MR. SHAPIRO was that DR. BARRON failed to use antibacterial or antimicrobial agents prior to the August, 1979 surgery. According to Dr. Kunin, it was widely accepted as far back as the 1940's and 1950's in the field of surgery to use this type of therapy (R 408). Dr. Kunin's opinion was based on the available medical literature and his review of leading surgeons in the country over a period of twenty years (R 409). Dr. Kunin testified that the medical process in MR. SHAPIRO's case began with a postoperative complication caused by the lack of use of the antibiotics (R 410-11). The lack of preoperative antibiotics allowed the infectious process to begin postoperatively and the infectious process then required the extensive use of antibiotics allowing a fungus to develop. The fungus entered the bloodstream and led directly to the blindness (R 420-22).

According to the medical records, it became apparent that MR. SHAPIRO was losing his eyesight as early as October, 1979. The treating internists ordered an eye consultation as early as November 12, 1979; the consultant visited MR. SHAPIRO on November 14, 1979 and reported that the candida infection had reached the eyes. MR. SHAPIRO was diagnosed as having lost his

vision in November, 1979, because of the growth of the fungus which became blood born and affected the optic area. The blindness was definitively diagnosed by December 31, 1979 (AP 1-5).

MR. and MRS. SHAPIRO filed a complaint for medical malpractice against DR. BARRON on January 29, 1982 (R 50-53). The complaint specifically alleged negligence in the failure to use antimicrobial prophylaxis preoperatively, intraoperatively and immediately postoperatively (R 51). DR. BARRON filed a motion for summary judgment on the basis of the statute of limitations (R 251). The lower court granted the motion (R 501).

Recognizing the caution which should be used in granting summary judgment motions in malpractice cases, the lower court determined there was no genuine issue of material fact and that DR. BARRON was entitled to judgment as a matter of law. The court stated that it was uncontroverted the records revealed that MR. SHAPIRO was suffering from an infection by September 1, 1979 and that this infection and its treatment led to a further fungus which affected the decedent's vision by November 14, 1979. The uncontroverted evidence demonstrated a diagnosis of blindness from the fungus infection by December 31, 1979. It was also clear that MRS. SHAPIRO was unhappy with the medical care and treatment her husband was receiving as early as September, 1979 and that she requested assistance from Dr. Gutman who traveled to

Florida and reviewed the records that same month.

MRS. SHAPIRO appealed to the Fourth District Court of Appeal which reversed the summary judgment. Shapiro v. Barron, 538 So.2d 1319 (Fla. 4th DCA 1989). DR. BARRON moved for a rehearing, a rehearing en banc and certification of the question whether the statute of limitations barred this medical malpractice claim. All motions were denied and DR. BARRON filed an application for discretionary review on the basis of conflict with prior cases of this court. This brief is submitted pursuant to this court's order accepting jurisdiction.

SUMMARY OF ARGUMENT

This court in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976) and Moore v. Morris, 475 So.2d 666 (Fla. 1985), set forth the guidelines for determining when the statute of limitations begins to run in a medical malpractice case. The statute commences either when a plaintiff has notice of a negligent act giving rise to the cause of action or when a plaintiff is on notice of the physical injury which is a consequence of a negligent act. Despite many opportunities to do so, this court has not receded from its pronouncements in Nardone.

The Fourth District Court of Appeal in the instant case relied on an erroneous interpretation of Moore to hold that a plaintiff must have knowledge not only of a physical injury but also that the physical injury was caused by negligence before the

statute is triggered. This misinterpretation of Moore originated in earlier decisions by the district courts of appeal and has appeared frequently in cases denying defendants the benefit of the statute of limitations in medical malpractice cases. Application of this interpretation allows potential plaintiffs to control when the statute of limitations begins to run as to their claim and accords them the opportunity to prevent the statute's running until they obtain an expert opinion that negligence exists. Neither Nardone nor Moore indicated an intent to extend the statute in this fashion.

Although the Fourth District Court of Appeal also recognized Nardone's holding that the contents of medical records should be imputed to potential plaintiffs, the court failed to apply this to the facts in this case. The uncontroverted evidence before the trial court demonstrated that medical records containing the information necessary to determine whether negligence existed were available to and obtainable by respondents from the moment MR. SHAPIRO was hospitalized. The uncontradicted evidence also indicated that MRS. SHAPIRO took advantage of the availability of the medical records by having an independent medical advisor review those records as early as September, 1979 (R 282). This medical advisor continued to consult throughout the remainder of the hospitalization and his

expertise was available to respondents. There was no claim or evidence that anyone had prevented respondents from obtaining the medical records; there was also no claim or evidence of continuing treatment or continuing assurances to respondents misleading them as to the medical condition or its cause. Even under the restrictive analysis accorded the statute of limitations by the Fourth District Court of Appeal, the summary judgment entered by the trial court should have been upheld.

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL ERRED IN FAILING TO APPLY THIS COURT'S HOLDING IN NARDONE v. REYNOLDS AND IN MISINTERPRETING MOORE v. MORRIS

This court clearly established the guidelines for applying the statute of limitations in a medical malpractice case in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), and has repeated the principles established there in Ash v. Stella, 457 So.2d 1377 (Fla. 1984), and Moore v. Morris, 475 So.2d 666 (Fla. 1985). The Fourth District Court of Appeal's decision in the instant case conflicts with this court's pronouncements and effectively removes the possibility of a defense summary judgment on the basis of the statute of limitations in medical malpractice cases. The other district courts of appeal also have reversed summary judgments in medical malpractice cases, despite this court's rulings, in a fashion similar to that of the Fourth

District Court of Appeal. This court should quash the Fourth District Court of Appeal's opinion and direct reinstatement of the lower court's order.

In Nardone, the United States District Court had granted a summary judgment for the physicians in a medical malpractice case; the United States Circuit Court of Appeals for the Fifth Circuit certified questions to the Florida Supreme Court regarding when the statute of limitations commenced in a medical malpractice case and whether medical records' contents should be imputed to the potential plaintiffs. The parents in Nardone were aware prior to their child's discharge from the hospital that he was totally blind, no longer able to walk and beyond help or hope of recovery, although they were not aware of the possible causes for the child's condition. The hospital records were available to the parents at all times and subsequent treating physicians examined portions of those records in the years prior to the lawsuit's filing. Nardone, 333 So.2d at 29. The child was discharged in July, 1965 and the parents filed a lawsuit in May, 1971.

This court began its analysis by noting that the parents unquestionably were aware of the extent of their child's injury when he was discharged from the hospital. The parents argued that the court should hold that the statute began to run only when they became aware of the physicians' negligence.

Citing City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954), the court rejected this argument, stating that the statute of limitations commences

> [E]ither 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. Nardone, 333 So.2d at 32.

The statute began to run, therefore, when the injury was known.

Reviewing City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954), the Nardone court noted the general rule that where an injury is sustained, the statute of limitations attaches at once; the statute's running is not postponed by the later occurrence of substantial damages. In its analysis, the Brooks court distinguished between notice of a negligent act and notice of its consequences or the injury[2]. The Nardone court accepted this distinction and held the statute began to run when a plaintiff had notice of either the act or injury. This court determined that the change in the child's condition was obvious and known to the plaintiffs while the child was still hospitalized and before his discharge. With the available knowledge of the injury, this court held the parents were on notice of the possible invasion of

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[2] Because the Brooks plaintiff did not have notice of either the act or injury, the court affirmed the denial of a directed verdict on the statute of limitations.

their legal rights even without knowledge that the condition resulted from a negligent act.

Knowledge of the medical records which were obtainable was imputed to the parents. The court stated "the means of knowledge are the same as knowledge itself." Nardone, 333 So.2d at 34. Examining the purpose behind imputing knowledge of records, the court cited various sources explaining that ignorance of available facts should not postpone the statute of limitations and that a party should not be allowed to take advantage of their own fault in failing to examine available information. The statute will only be tolled where a party has remained ignorant of the facts through no fault of their own but the party must exercise reasonable care and diligence to learn the facts. Nardone, 333 So.2d at 35.

This court once again addressed the statute of limitations in a medical malpractice case in Ash v. Stella, 457 So.2d 1377 (Fla. 1984), when the trial court granted a summary judgment for the defendant's physician and the district court reversed. Although the court approved the reversal of the summary judgment without citation to Nardone, it did so only on the basis that the available diagnosis in that case was "inarguably a preliminary diagnosis." That tentative diagnosis, according to this court, was not sufficient to trigger the statute of limitations' running. Unlike Nardone, the Ash

plaintiff did not have knowledge of a negligent act or an injury until receipt of a diagnosis.

In Moore v. Morris, 475 So.2d 666 (Fla. 1985), this court quashed the affirmance of a final summary judgment based on the statute of limitations in a medical malpractice case. The court cited Nardone and its pronouncements that the statute of limitations begins to run when "either '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.'" Moore, 475 So.2d at 667. The court did not indicate any intention to recede this statement in Nardone.

Examining the facts of the alleged malpractice in Moore, which the patient claimed occurred during childbirth, the court determined that there were genuine issues of material fact where the parents were misled into believing their child had suffered reversible injury from a natural biological cause. The physicians told the parents the child was fine, that the distress had been temporary and the baby had recovered fully. There was also testimony indicating that the physicians were unable to diagnose damage until the child reached the age of three. Contrary to respondent's arguments in this case, the Moore opinion did not hold that the statute of limitations is triggered

only by knowledge of negligence or injury caused by negligence. The opinion did reaffirm that Nardone was still the law but reversed the summary judgment based on the facts demonstrating that the parents were misled as to the existence and cause of any injury.

The holdings in Nardone, Ash and Moore all interpret the statute of limitations in a similar fashion. They require only notice of a negligent act or a physical injury, which a plaintiff may later discover is a consequence of a negligent act. None of these opinions state that it is acceptable to delay the commencement of the statute of limitations until a plaintiff has an expert opinion stating that there was negligence in a medical procedure which caused injury. The effect of the Fourth District Court of Appeal's interpretation of these opinions in combination with other district court holdings in similar cases in recent years is to deprive defendants of the benefit of the statute of limitations in medical malpractice cases. The Nardone, Ash and Moore opinions do not lead to that result.

The Fourth District Court of Appeal's opinion in this case, along with those of other district courts of appeal recently, have gone far beyond this court's rulings regarding the statute of limitations. For example, in Schafer v. Leher, 476 So.2d 781 (Fla. 4th DCA 1985), the court stated "knowledge of a physical injury alone, without the knowledge that the injury

resulted from a negligent act, does not trigger the limitations period," citing Moore v. Morris. That specific language does not appear in this court's opinion in Moore. Although the court's opinion in Schafer also relied on records concealment in reversing a summary judgment ruling, the language referred to above implies that a plaintiff must have the knowledge that the injury resulted from negligence before the statute is triggered.

Similarly, in Almenqor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978), the court reversed a summary judgment on the statute of limitations despite knowledge within the limitations period that a baby was born mentally retarded and showed abnormal development. The court was careful to note that there was evidence in the record which could reasonably have meant that the baby's injuries were from congenital defects rather than birth trauma. More importantly, however, the court noted evidence that a defendant actively and successfully misled the plaintiff regarding the existence of an injury. Although the Third District Court of Appeal recognized the established law regarding the statute of limitations as set forth in Nardone, it did not apply that law because of the circumstances of the case. The Florida Supreme Court in Moore noted the Almengor opinion and the evidence of concealment.

In Florida Patient's Compensation Fund v. Sitomer, 524

So.2d 671 (Fla. 4th DCA 1988), rev. dism'd, 531 So.2d 1353 (Fla. 1988), the court affirmed a trial court's failure to grant a directed verdict on the statute of limitations issue. The plaintiff had surgery replacing breast tissue with implants; she was discharged from the hospital in June, 1981. She noticed almost immediately that the breast area was swollen and discolored, had turned black and was crusty and blistering. The condition worsened and she eventually had emergency surgery at the point where the skin loss was great enough to allow the implants to be exposed.

Suit against the appellant was not filed until December, 1984, some three and a half years following the emergency surgical procedure to replace the implants. The patient presented testimony that she was not aware of an invasion of her legal rights until she got a second opinion from another physician. The patient did file an action against the doctor within the two-year period but failed to join the Fund until later. Despite the patient's knowledge'of her physical injury and drastic change in condition, the court upheld the trial court's failure to grant a directed verdict on the basis that there was a substantial question regarding the extent and timing of notice of the injury and its cause.

The only way of reconciling the holding in Sitomer with Nardone and Moore is to interpret the doctor's continuing

treatment as misleading the plaintiff. The plaintiff clearly had knowledge of the injury at the point where the implants became exposed and she had to undergo emergency surgery. She also had knowledge that there had been an act in which the defendant had been involved which was related to the ultimate injury. The dicta in the Fourth District Court of Appeal's opinion, however, seems to require that the plaintiff have knowledge the injury was caused by a negligent medical procedure before the statute of limitations begins to run. This was not a requirement set forth in Nardone or Moore; rather, it has evolved through the district courts of appeals' interpretations and applications of Nardone.

In Boaorff v. Koch, 14 F.L.W. 968 (Fla. 3d DCA April 28, 1989), the court reversed a summary judgment on the basis of the statute of limitations where parents of a minor child were aware as early as April, 1972 of the drastic change in their child's condition including an inability to walk or talk in a child who previously was being treated for leukemia. A lawsuit was not filed until December, 1982. Citing Sitomer, the court stated that even if the parents knew something was wrong with their child in 1972, it did not necessarily follow that they knew or should have known that the injury was caused by medical negligence. The Bogorff parents contended that the statute should not commence until 1982 when they first read a 1977 letter

which was sent by one treating physician to the defendant treating physician.

The district court of appeal relied on the existence of fraudulent concealment of the negligence to avoid the statute because the defendant treating physician indicated to the parents he did not believe his treatment had caused the damages. The court indicated that a plaintiff with no medical knowledge should not be charged with knowledge of technical, medical information[3].

There was no claim in Boqorff that the parents were prevented from obtaining the medical records which would have given them the knowledge of the allegedly negligent acts[4]. The Third District Court of Appeal's opinion basically admitted that the parents knew in April, 1972 that there was something drastically wrong with their child but relied on the fact that they did not necessarily know that his condition was caused by medical negligence. The opinion cited Sitomer and Schafer for

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[3] In Boqorff, the minor child's father discovered a medical journal article linking treatment such as his son received with brain damage such as his son experienced. When presented with this article, the defendant treating physician allegedly threw the article in the trash can and said there was no connection between the treatment and brain damage.

[4] The parents claimed that the defendant treating physician had the duty to disclose to them information he received from subsequent treating physicians that there might be a connection between the treatment and the eventual damage. The record demonstrated that the defendant treating physician maintained an alternative medical opinion and on that basis did not inform the parents of a possible connection.

support for this position that knowledge of the drastic change in condition or injury was not sufficient to put the parents on notice of their claim and that expert opinions on the existence of negligence were necessary. According to Nardone and its progeny, however, the issue is not whether plaintiffs themselves have the medical knowledge to reach the conclusion that they have been injured by negligence; rather, the issue is and should be when plaintiffs are on notice of injury sufficient to warrant further inquiry from experts whether they have a claim.

This court in Nardone did not hold that a plaintiff had to have knowledge of the physician's negligence in order to trigger the statute of limitations. Rather, the court indicated that the statute began to run when the injury was known when the parents were aware of their child's decerebrate state and irreversible brain damage. The court did not require that the parents have specific knowledge that the brain damage resulted from a physician or hospital's negligence. The Moore court, relying on Nardone, indicated that the Nardone holding was still the law in this state on the statute of limitations for medical malpractice cases even nine years and several statutes later.

The district courts of appeal in this case and other opinions cited above have misconstrued the Nardone holding by determining that knowledge of an injury without knowledge that it

resulted from a negligent act does not trigger the statute of limitations. Contrary to these interpretations, the Nardone opinion states: "[T]he statute of limitations began to run when the injury was known." The Nardone court also specifically rejected the argument that the statute did not commence until the parents were aware of the physician's negligence. Nardone requires diligence by plaintiffs in investigating their rights: the fact that knowledge of medical records is imputed to patients is evidence that these potential plaintiffs have the responsibility to use the knowledge available to investigate whether a claim exists. There is no other reason to impute this knowledge to a patient if not to require them to exercise due diligence by using that information.

A recent concurring opinion in Jackson v. Georgopolous, 14 F.L.W. 2429 (Fla. 2d DCA, October 20, 1989), has postulated that the varying district courts of appeal opinions may be harmonized by interpreting the language in Nardone to require only knowledge or notice of an injury and of an incident involving the defendant which resulted in that injury. The Third District Court of Appeal in Jackson affirmed a final judgment entered on a directed verdict on the basis of the statute of limitations. The plaintiff was hospitalized and operated on between December, 1984 and February, 1985 but the family failed to investigate until February, 1986 or file suit until August,

1987. Where the family was aware of the surgeries and the decedent's seriously deteriorating condition and the hospital records were available to the family, the court determined that the statute of limitations barred the action. The court cited Nardone and indicated that the family, with due diligence, could have investigated the records and death certificate and determine whether a cause of action existed. Judge Lehan wrote a special concurring opinion to explain apparent inconsistencies between Nardone and its progeny and the other district court of appeal cases which reach conclusions different from Nardone. Judge Lehan made an admirable attempt at harmonizing these cases.

The district courts of appeal's opinions also can be reconciled with Nardone by recognizing that in each of those cases there existed either some type of fraudulent concealment or a course of continuing treatment accompanied by misleading assertions that there was no injury. Neither of these conditions occurred in the instant case.

Although there may be ways of viewing the district courts of appeal's opinions on the statute of limitations so that those opinions are not in conflict with Nardone, it appears the better approach would be for the district courts of appeal to follow Nardone and Moore in all cases except those where continuing treatment or fraudulent concealment exist. This would

allow the courts to recognize that Nardone remains the law in Florida but that the factual circumstances of some cases indicate that either continuing treatment or concealment of the injury removes the case from the strictures of Nardone. There is no need to restrict Nardone's holding by allowing potential plaintiffs the latitude to claim ignorance of their cause of action until they receive an expert opinion on the existence of negligence.

In the instant case, the Fourth District Court of Appeal acknowledged that the complications of surgery were obvious to all and that the blindness was diagnosed by December 31, 1979. The court also acknowledged that the contents of medical records must be imputed to respondents, that there was an independent medical advisor available throughout the hospitalization and that the expert opinion as finally submitted was limited to the facts available through the medical records. Despite the recognition of factors which, under Nardone would support a summary judgment, the court cited Moore as requiring knowledge of the injury and that the injury came from negligence before the statute of limitations is triggered.

The only genuine issue of material fact the court was able to find to justify reversal in this case was a statement regarding the cause of the fungus infection which respondent indicated came from tubes dislodging during the postoperative

recovery period. What the court failed to take into account, however, was that this information also was available through the hospital records which MRS. SHAPIRO had in her possession before her husband was even discharged from the hospital. Additionally, MRS. SHAPIRO testified that the physicians had told her the infection in the postoperative period is what led to the blindness (R 365-67). She thus was aware that the infection came from the extensive use of antibiotics postoperatively to fight other infections her husband was suffering.

The allegations in the complaint were that the infection arose directly from the treatment decisions not to use antibiotics preoperatively to prevent a postoperative infection (R 50-53). MRS. SHAPIRO was aware of the result of the use of tubes in her husband and that the use of those tubes may have led to the infection which led to the blindness. All of this information was available to her and in fact known by her during her husband's hospitalization. She had all of the facts necessary to supply to an expert who could have given a definitive opinion whether negligence existed; all of the same information, in fact, had been supplied to Dr. Gutman for his review as early as September, 1979. MRS. SHAPIRO's delay in obtaining an expert opinion is not sufficient to extend the statute of limitations. This is particularly true in this case

where she admitted having obtained the hospital records regarding her husband before his discharge in February, 1980.

The instant case did not involve concealment or continuing treatment justifying a deviation from Nardone's holding. These factual circumstances are similar to those which occurred in Nardone and Nardone's reasoning should have guided the Fourth District Court of Appeal to the conclusion that respondents had failed to file their action timely.

Petitioners also moved for a rehearing en banc on the basis that the Fourth District Court of Appeal's opinion conflicted with its own earlier decisions. In Humber v. Ross, 509 So.2d 356 (Fla. 4th DCA 1987), the Fourth District Court of Appeal recognized that plaintiffs are charged with constructive knowledge of the contents of available medical records. Additionally, the court also noted that Nardone indicates the limitations period should commence when plaintiffs have knowledge of the drastic change in a physical condition regardless of whether they know of the causal connection with the defendant's acts or failure to act.

Respondents in this case clearly had such knowledge of the drastic change in physical condition when MR. SHAPIRO began to lose his eyesight after a colon operation. Despite this knowledge, respondents failed to file suit until more than two years had passed. The lower court cited Moore for a requirement

that respondents needed knowledge that their physical injury resulted from a negligent act before the statute would be triggered. The lower court's opinion therefore conflicts not only with Nardone but with its own opinion in Humber.

Further, in Frankowitz v. Probst, 489 So.2d 51 (Fla. 4th DCA 1986), the Fourth District Court of Appeal reversed the denial of a motion for directed verdict on the statute of limitations where the means of discovering the physician's involvement was readily available through examination of the medical records and any delay in examining the records, according to Nardone, could not postpone the statute's running. In the case at bar, not only is there a lack of evidence that medical records were concealed, MRS. SHAPIRO herself testified that she had obtained the medical records before her husband was discharged from the hospital and that Dr. Gutman had reviewed the medical records while her husband was still hospitalized (R 282; 352).

The statute of limitations applicable in Nardone was §95.11(4), Fla. Stat. (1969). The Nardone court noted that the statute had been amended in 1971 and again in 1974 although those amendments were not deemed to be material to the opinion. The 1971 amendment which became effective in 1972 provided a two year statute of limitations for causes of action, which accrued when

the plaintiff discovered or through the use of reasonable care should have discovered the injury.

The 1974 amendment provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. In May, 1975, the statute was amended again to provide that an action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered or should have been discovered with the exercise of due diligence. The use of the word "incident" remains the same to this date. The requirement of reasonable care appeared within the statute by the 1971 amendment but was changed to due diligence by the amendment effective January 1, 1975. The due diligence requirement remains the same to the present date.

In the instant case, the applicable statute is §95.11(4)(b), Fla. Stat. (1979). The 1971 version of the statute required discovery of the injury, §95.11(4), Fla. Stat. (1971), while the 1974 amendment effective January 1, 1975 required discovery of the cause of action. This language was further amended in May of 1975 to require discovery of the incident giving rise to the action. The analysis in Nardone regarding discovery of a cause of action is particularly appropriate to the later legislative modifications to the statute of limitations.

The Nardone opinion established the need for diligence in investigating a potential invasion of legal rights.

> Unawareness of facts or law, alone, does not justify suspending the operation of the statute. ...The party seeking protection under this doctrine [tolling the statute of limitations] must have exercised reasonable care and diligence in seeking to learn the facts which would disclose fraud. Nardone, 333 So.2d at 35, citing Morgan v. Koch, 419 F.2d 993 (7th Cir. 1969).

Once a plaintiff is on notice of the possible invasion of legal rights, the duty to investigate arises.. This is not only statutory law in the statute of limitations but the law as set forth in Nardone. Application of the diligence requirement in the statute and the reasoning in Nardone requires reversal of the Fourth District Court of Appeal's opinion in this case and reinstatement of the trial court's final summary judgment.

> 11. ASSUMING THE FOURTH DISTRICT COURT OF APPEAL'S INTERPRETATION OF MOORE V. MORRIS IS CORRECT, RESPONDENTS FAILED TO FILE THEIR CLAIM WITHIN TWO YEARS OF WHEN THEY WERE ON NOTICE OF THE ALLEGEDLY NEGLIGENT ACT.

Accepting the Fourth District Court of Appeal's legal analysis in its opinion, the respondents still failed to file their medical malpractice case on a timely basis. Even if this court determines that the district courts are appropriately interpreting Nardone and Moore, the court should still reverse the Fourth District Court of Appeal and order reinstatement of

the trial court's final summary judgment.

The court in this case reversed the summary judgment on the basis that there was a question regarding when the SHAPIROS should have had knowledge of the cause of the complications, citing Moore. The court answered this question in its own opinion by noting MRS. SHAPIRO's testimony that she was told the cause of her husband's condition was tubes dislodging from his stomach during the postoperative period. Even according to the district court, however, MRS. SHAPIRO therefore had knowledge of an incident or a negligent act during the hospitalization which was sufficient to put her on notice that there was a cause of action for medical malpractice.

MRS. SHAPIRO acknowledged that the physicians had told her the infection led to the blindness. The Fourth District's interpretation of her testimony, that she allegedly believed the infection originated with the dislodged tubes, leads to only one conclusion, that is, that MRS. SHAPIRO was aware early in the hospitalization of these postoperative complications and that these postoperative complications led to her husband's blindness. In her complaint, MRS. SHAPIRO alleged that the infection arose directly from DR. BARRON's treatment decision not to use preoperative antibiotics to prevent a postoperative or operative infection (R 50-53; 110-14). Regarding the testimony about the

tubes and their dislodging, there is no other reasonable inference than that MRS. SHAPIRO knew an incident had occurred, knew complications existed and was on notice of potential negligence and its result, blindness.

Additionally, the Fourth District Court of Appeal recognized that the knowledge of the contents of medical records must be imputed to the plaintiffs pursuant to Frankowitz v. Probst, 489 So.2d 51 (Fla. 4th DCA 1986). Accepting that premise, MR. SHAPIRO's medical records reflected all treatment beginning in August and through his discharge in February, 1980. MRS. SHAPIRO testified that she requested and obtained those medical records before her husband's discharge (R 352; 368). MRS. SHAPIRO had the means of obtaining the knowledge regarding the incidents during her husband's hospitalization. Indeed, the factual situation is even more compelling than that in Nardone because MRS. SHAPIRO had physical custody of the hospital records within a month after her husband's blindness was diagnosed.

Assuming the statute of limitations was triggered only upon the last mention of the blindness and its cause in the hospital records, on December 31, 1979, MRS. SHAPIRO had two years within which to investigate and file her claim. She also had the advantage of a physician relative, Dr. Gutman, who was familiar with the hospitalization and willing to obtain expert review for her. Dr. Gutman in fact not only took credit for

having made treatment decisions which saved MR. SHAPIRO's life but for obtaining the expert who eventually testified (R 283-85; 289-90). This case does not involve the fraudulent concealment of medical records or facts crucial to determining whether a cause of action exists. There are no claims of continuing treatment or false assurances to respondents encouraging them to ignore a potential claim. DR. BARRON's treatment ended on October 7, 1979 (SR 23). The alleged negligence took place on or about August 17, 1979. The complications which constitute the damage begin almost immediately with the development of a localized peritonitis by August 28, 1979 (SR 20). At the very latest, the damages were complete by December 31, 1979.

This court could determine that the statute of limitations was triggered when MRS. SHAPIRO called for outside help from a physician relative who reviewed the chart in September, 1979 (R 282), when MR. SHAPIRO began losing his eyesight in October, 1979, when the consultants recorded in the medical records that the candida infection had reached the eyes on November 14, 1979 or, at the latest, when the blindness was again noted in the records to have come from the candida infection on December 31, 1979 (AP 1-5; R 363-67). Even assuming the Fourth District Court of Appeal's analysis is correct and a plaintiff must have knowledge of a physical injury and that the

physical injury was caused by negligence to trigger the statute of limitations, MR. and MRS. **SHAPIRO** clearly had actual knowledge and constructive knowledge by virtue of the hospital records in this case sufficient to start the statute of limitations running at the very latest by December 31, 1979. Their complaint in January 29, 1982, was not filed timely and the summary judgment should have been affirmed. Thus, even under the Fourth District Court of Appeal's relaxation of Nardone's requirements, the trial court should have been affirmed.

CONCLUSION

This court defined the law regarding the statute of limitations in medical malpractice cases in Nardone v. Reynolds and reaffirmed it as recently as Moore v. Morris. The Fourth District Court of Appeal failed to follow Nardone's guidelines and this court should reverse and order reinstatement of the final summary judgment. In the alternative, accepting the Fourth District Court of Appeal's legal analysis, under the facts of this case the summary judgment also should have been affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to PHILIP M. BURLINGTON, ESQUIRE, EDNA L. CARUSO, P.A., Attorneys for Appellants, Suite 4-B, Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401; THOMPSON AND O'BRIEN, Post Office Box 14334, Fort Lauderdale, Florida 33302; ANNE B. MacLEAN, ESQUIRE, 2700 N.E. 14th Street Causeway, Pompano Beach, Florida 33062; ROBERT M. KLEIN, ESQUIRE, STEPHENS, LYNN, KLEIN & McNICHOLAS, P.A., 9100 South Dadeland Boulevard, One Datran Center, Suite 1500, Miami, Florida 33156; JACK W. SHAW, JR., ESQUIRE, MATHEWS, OSBORNE, McNATT & COBB, P.A., 1 Enterprise Center, Suite 1400, 225 Water Street, Jacksonville, Florida 32202, by mail, this 8th day of November, 1989.

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