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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO.

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.

APPLICATION FOR DISCRETIONARY REVIEW OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

BRIEF OF PETITIONERS ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioners, JAMES BARRON, M.D. and JAMES BARRON, M.D., P.A. (hereinafter collectively referred to as "petitioner") seek to have reviewed a decision of the District Court of Appeal, Fourth District, dated and filed February 15, 1989 (A 6). Timely motions for rehearing, rehearing en banc and certification were denied on March 31, 1989.

This is a medical malpractice case in which respondent sought damages for alleged failure to use antibiotics preoperatively on decedent, LEE SHAPIRO. LEE and JOSEPHINE SHAPIRO, husband and wife, commenced this action for damages and after LEE SHAPIRO's death amended the complaint to establish JOSEPHINE SHAPIRO as personal representative of LEE SHAPIRO's estate. Petitioner filed a motion for summary judgment on the issue of the statute of limitations. The motion was heard on the first day of trial, the court granted the motion and entered final summary judgment (A 1). Respondent appealed and the Fourth District Court of Appeal reversed the summary judgment.

Petitioner operated on LEE SHAPIRO on August 17, 1979 to remove potentially malignant polyps in the colon. In preparation for this surgery, petitioner chose not to use antibiotic coverage. Shortly following surgery, MR. SHAPIRO began to suffer from infections which eventually led to blindness (A 2). Prior to and throughout MR. SHAPIRO's hospitalization, MRS. SHAPIRO was

consulting with a relative who was also a physician, Dr. Emil Gutman. Dr. Gutman traveled from Ohio to Florida during the hospitalization, in September, 1979, to review the medical records and consult with MRS. SHAPIRO (A 2-3).

MR. SHAPIRO's blindness was apparent as early as October, 1979, consultations were ordered in early November, 1979, and the blindness was diagnosed by December 31, 1979. MRS. SHAPIRO was aware that the blindness came from infections her husband suffered postoperatively (A 4).

After MR. SHAPIRO's discharge from the hospital on February 4, 1980, the SHAPIROS received an expert physician's opinion that within reasonable medical certainty it was standard procedure to use antibiotics preoperatively in August, 1979, and that DR. BARRON's failure to use these antibiotics directly led to the blindness. Plaintiffs failed to file their claim for medical malpractice until January 29, 1982 (A 4).

UMMARY OF ARGUMENT

The Fourth District Court of Appeal's opinion in this case conflicts with this court's opinions in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), and Moore v. Morris, 475 So.2d 666 (Fla. 1985), and effectively deprives medical malpractice defendants of the benefit of the statute of limitations. Based on the opinion in this case, any plaintiff can avoid the statute's bar by claiming a lack of expert opinion despite the

constructive knowledge of negligence through the availability of medical records. This holding conflicts with Nardone's reasonable diligence requirements and guidance from this court is necessary to resolve the conflict.

ARGUMENT

THE DECISION IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS FROM THIS COURT WHICH ESTABLISH THAT THE STATUTE OF LIMITATIONS ON A CLAIM FOR MEDICAL MALPRACTICE COMMENCES EITHER WHEN A PLAINTIFF HAS NOTICE OF A NEGLIGENT ACT GIVING RISE TO A CAUSE OF ACTION OR WHEN A PLAINTIFF HAS NOTICE OF PHYSICAL INJURY WHICH IS THE CONSEQUENCE OF THE NEGLIGENT ACT

The Fourth District Court of Appeal's decision in this case expressly and directly conflicts with Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), and Moore v. Morris, 475 So.2d 666 (Fla. 1985), which establish that the statute of limitations on a claim for medical malpractice begins to run when a potential claimant knew or should have known of the injury or damages. In Nardone, this court addressed certified questions from the United States District Court for the Southern District of Florida regarding when the statute of limitations begins to run in a medical malpractice case. Answering the questions, the court examined earlier decisions holding that the statute commences either when the plaintiff has notice of the negligent act giving rise to the cause of the action or when the plaintiff has notice of the physical injury which is the result of the negligent act.

Where the condition is obvious and known, as it was in Nardone, the court determined that the cause of action accrued and the statute of limitations began to run both as to the injured, incompetent minor in his own right and as to the minor's parents as parents and legal guardians.

The parents in Nardone were aware of the severity of their son's injury as of the time the child was discharged from the hospital but they failed to file their lawsuit until five years later. This court acknowledged that the parents were aware of their child's condition and, based on this knowledge, were on notice of the possible invasion of their legal rights through the exercise of reasonable diligence. The Nardone opinion thus establishes the reasonable diligence requirement of potential plaintiffs with the opportunity to discover an injury or its cause. This court went further and held that the contents of the medical records which are available to the potential plaintiff should be imputed to the plaintiff or, as in Nardone, his legal representative. "The means of knowledge are the same as knowledge itself." Nardone, 333 So.2d at 34.

In its opinion in the instant case, the Fourth District Court of Appeal recognized that the respondent's surgical complications were obvious to all. The court also cited its own earlier opinion, Frankowitz v. Propst, 489 So.2d 51 (Fla. 4th DCA 1986), for the Nardone maxim that the contents of medical charts

and records must be imputed to the plaintiffs. Indeed, in Shapiro, the respondents had the records reviewed before discharge and there was no controversy that such records were available at all times.

In Nardone, the parents knew upon their child's discharge that he was totally blind and beyond hope of recovery but they were not told of the possible causes of their son's condition. Although the hospital records were available at all times, the parents failed to request the chart other than for use by a rehabilitation center four years later. The United States District Court held evidentiary hearings and concluded that the case did not involve fraudulent concealment of the child's condition and that the plaintiffs sought to use information that had been available to them at all times through the exercise of due diligence. In response to the plaintiffs' specific request that the court rule the statute of limitations did not begin to run until they became aware of the defendants' negligence, the court determined that it was bound by City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954), which held that the statute began to run when the injury was known.

More recently, in Moore v. Morris, 475 So.2d 666 (Fla. 1985), this court repeated its holding in Nardone that the statute of limitations begins to run either when the plaintiff has notice of the negligent act or notice of a physical injury

which is a consequence of the negligent act. In Moore, the parents sued for negligence during the caesarean section birth of their child. Examining the facts surrounding the birth, this court determined that those facts were consistent with natural causes leading to the damages. Additionally, the parents were affirmatively mislead as to their child's condition throughout the entire period of the statute of limitations. The court noted that the neurological physicians could not scientifically diagnose any brain damage until the child reached the age of three. Based on this testimony, the court noted that the parent did not know or suspect injury or negligence. Based on these distinguishing facts, this court quashed the District Court of Appeal's affirmance of a final summary judgment on the basis of the statute of limitations. Despite this holding, however, this court affirmed the viability of the Nardone opinion.

In the instant case, the Fourth District Court of Appeal has quoted Moore v. Morris, but has taken statements from the opinion out of context thus creating conflict with both Moore and Nardone. Moore does not establish any higher standard than Nardone and does not require that a plaintiff be aware of an injury and be told that the injury was caused by negligence before the statute of limitations begins to run. The Moore court found evidence in the record that the plaintiffs were not on notice of either the negligent act or the injury at the time of

the infant's birth. By contrast, in the instant case, there is no question that plaintiffs were on notice of the injury itself and on constructive notice of its cause. Thus, if any differences exist at all between Nardone and Moore, they are attributable to the factual situation presented in Moore. This court did not recede from or distinguish Nardone in any fashion in the Moore opinion; rather, the court relied on the Nardone holding in reaching its decision in Moore.

In the instant case, while paying lip service to the language contained in the Nardone opinion, the Fourth District Court of Appeal failed to cite the opinion which remains along with Moore v. Morris this court's latest pronouncement on the application of the statute of limitations in medical malpractice cases. Further, the appellate court "recognized" that many of the factors required in Nardone such as knowledge of medical records contents and medical advice exist in this case yet reversed the lower court's decision.

The issue of the statute of limitations' commencement is a controversial one in the medical malpractice area and promises to continue to as such. This court has not rendered a definitive opinion since the Nardone opinion in 1976. District courts of appeal throughout the state have examined and re-examined Nardone but have applied its holding inconsistently. Frankowitz v. Propst, 489 So.2d 51 (Fla. 4th DCA 1986); Humber v.

Ross, 509 So.2d 356 (Fla. 4th DCA 1987). The appellate courts need guidance from this court as to this issue. In this case, the respondents clearly had knowledge of the injury, access to the medical records, advice of a family physician throughout the course of a six-month hospitalization and the means to determine the cause of the injury. All of the factors of importance in the Nardone opinion are present in this case and yet the Fourth District Court of Appeal ignored Nardone and reversed the summary judgment.

CONCLUSION

The Fourth District Court of Appeal's opinion in this case is in express and direct conflict with this court's opinion in Nardone and Moore and should be quashed. Petitioner requests this court to exercise its discretionary jurisdiction by quashing the decision and reinstating the lower court's order.

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, by mail, this 10th day of May, 1989.

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