IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 74,144

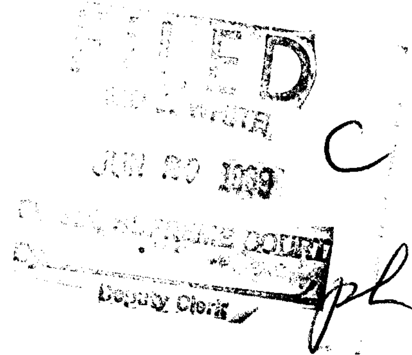
JAMES BARRON, M.D., et al.,

Petitioners,

-vs-

JOSEPHINE SHAPIRO, etc.,

Respondents.



BRIEF OF RESPONDENTS ON JURISDICTION

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PREFACE

This is a Petition for Review from an order of the District Court of Appeal for the Fourth District which reverses Summary Judgment entered in favor of a Defendant in a medical malpractice action. The parties will be referred to by their proper names or as they appeared in the trial court. The following designation will be used:

(A) - Petitioner's Appendix

STATEMENT OF THE CASE AND FACTS

Petitioner's rendition of the facts require some supplementation. As noted in the Fourth District's opinion, after the operation on Mr. Shapiro, tubes which had been inserted in his stomach became dislodged at various times (A8). Mrs. Shapiro testified that she was told by one of the physicians that her husband's post-operative condition was caused by those tubes being dislodged (A8). The Fourth District noted that Mrs. Shapiro's testimony created a reasonable inference that she believed that explanation for Mr. Shapiro's infections until she received an opinion from a physician that her husband's condition was caused by the failure to prescribe antibiotics at the appropriate time (A8).[1]

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[1]/The Fourth District's opinion states only that the Plaintiffs' contention was that Dr. Barron's failure to use antibiotics preoperatively caused Mr. Shapiro's blindness. However, the Complaint alleged that it was the failure to (Footnote Continued)

Dr. Barron notes that Mrs. Shapiro consulted with Dr. **Emile** Guttman, her husband's nephew. Dr. Guttman is a radiologist and not a surgeon, and testified unequivocally that he never gave any medical advice regarding the cause of Mr. Shapiro's infections or blindness (A8). It was Dr. Kunin who provided the opinion that the infections were caused by Dr. Barron's failure to prescribe antibiotics.

Although the surgery was performed in August of **1979,** due to the various complications, Mr. Shapiro was in intensive care until his discharge from the hospital in February of 1980. Thereafter, the Plaintiffs were informed that Dr. Barron had been negligent in failing to prescribe antibiotics in a timely fashion resulting in the injuries to Mr. Shapiro. This suit was filed on January **29, 1982** (A6).

SUMMARY OF ARGUMENT

The Fourth District's decision in **this case does not** conflict with prior decisions of this Court. The Fourth District properly relied on MOORE v. MORRIS, **475** So.2d 666 (Fla. **1985),** and properly characterized it as holding that the limitations period begins to run when a plaintiff is aware that there was negligence or injury caused by negligence. The Fourth District's decision is also consistent with other pronouncements of **this**

(Footnote Continued)
prescribe antibiotics prior to, during, and immediately after the operation that constituted the medical malpractice which led to Mr. Shapiro's injuries (see trial court order, **A2).**

Court with respect to this issue, including ASH v. STELLA, 457 So.2d 1377 (Fla. 1984), and FLORIDA PATIENT'S COMPENSATION FUND v. TILLMAN, 487 So.2d 1032 (Fla. 1986). The alleged conflict with NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976), is illusory since, in that case, this Court construed a different language in a statute of limitations. Consistent with MOORE v. MORRIS, supra, the Fourth District in this case determined that since there were differing explanations for Mr. Shapiro's condition, some of which were inconsistent with malpractice, there was a jury question as to when the Plaintiffs knew or should have known that his condition was caused by malpractice. Since the Fourth District's decision is in harmony with the numerous decisions of this Court with respect to the statute of limitations in a medical malpractice context, there is no need for further amplification, and this Court should decline to exercise jurisdiction in this case.

QUESTION PRESENTED

THE FOURTH DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT WITH REGARD TO WHEN THE STATUTE OF LIMITATIONS ON A CLAIM FOR MEDICAL MALPRACTICE COMMENCES.

ARGUMENT

Dr. Barron contends that the Fourth District's decision in this case conflicts with NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976), and MOORE v. MORRIS, 475 So.2d 666 (Fla. 1985). However, clearly, the Fourth District's decision does not expressly conflict with those decisions since it relies expressly on MOORE v. MORRIS. Furthermore, the Fourth District properly characterizes this Court's holding in MOORE v. MORRIS.

In MOORE v. MORRIS, supra, the parents of a child brought an action on behalf of their daughter for damages sustained at her birth. The facts revealed that the parents were aware that there was an emergency and the baby would be delivered by Ceserean section. The father was also aware that for a period in excess of thirty minutes the infant was "blue" while the doctors attempted unsuccessfully to administer oxygen. The father was also advised that the baby might not live due to oxygen deprivation caused by swallowing something while in the womb. The parents gave permission to transfer the infant to an emergency facility at another hospital and were aware that while the child was being transported, her chest was cut open and a tube inserted to assist her in breathing. The trial court determined that the parents were, as a matter of law, on notice

from the time of the birth of the alleged negligence or the injury to the child. Therefore, the court reasoned that summary judgment in favor of the defendants was appropriate where the action was not brought until more than two years after the birth. This Court reversed and, after reciting the facts relative to the parent's knowledge at the time of birth, stated (475 So.2d at 668):

> 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. Serious medical circumstances arise daily in the practice of medicine and because they are so common in human experience, they cannot, without more, be deemed to impute notice of negligence or injury caused by negligence. [Emphasis supplied.]

Thus, clearly, this Court determined that in order to justify the entry of a summary judgment against a medical malpractice plaintiff, the facts must conclusively and inescapably lead to the conclusion either that there was negligence or there was injury caused by negligence. In the case sub judice, the Fourth District properly characterized this Court's holding in MOORE v. MORRIS when it stated that (A7):

> [K]nowledge of physical injury alone, without the knowledge that it resulted from a negligent act, does not trigger the statute of limitations.

It should also be noted, that in MOORE v. MORRIS, this Court quoted with approval from ALMENGOR v. DADE COUNTY, 359 So.2d 892 (Fla. 3d DCA 1978), where the Third District reversed a summary

judgment entered in favor of the defendants in a case alleging negligence in the delivery of a child. In that case, there was evidence that the parents were aware that the baby was born mentally retarded, but that the facts were consistent with one possible explanation that the baby had been born with a congenital defect and not that the child had been injured during birth.

Similarly here, the evidence available to Mr. and Mrs. Shapiro was conflicting and does not justify a summary judgment on the issue of when they knew or should have had notice of the medical malpractice incident. The alleged malpractice constituted an omission and not a comission and, thus, imputing knowledge of the records to the Plaintiffs does not put them on notice of it. Additionally, the facts were consistent with other explanations for Mr. Shapiro's injuries, including the one suggested by one of the doctors during Mr. Shapiro's hospitalization, that is that the infections resulted from the dislodging of tubes in Mr. Shapiro's stomach. Thus, as in ALMENGOR, supra, there were alternative explanations for the patient's condition and it cannot be said, as a matter of law, that the Plaintiffs knew or should have known that there had been negligence on the part of Dr. Barron that had caused Mr. Shapiro's injuries. This is consistent with MOORE v. MORRIS, supra, 475 So.2d at 668, wherein this Court noted that summary judgments should be cautiously granted in malpractice actions, and only where "the facts are so crystallized that nothing remains but questions of law."

Dr. Barron claims that the Fourth District's decision conflicts with NARDONE v. REYNOLDS, supra. However, the operative language in the statute of limitations in that case differed from that applicable in the case **sub** judice. In NARDONE, this Court specifically noted that the statute of limitations at issue provided that suit had to be brought within two years of when "the plaintiff discovers, or through use of reasonable care should have discovered, the injury," [Emphasis supplied.] 333 So.2d at 32, fn.1. However, the statute applicable in the case sub judice (and in MOORE v. MORRIS), provides that the action must be commenced within two years from the time "the incident is discovered, or should have been discovered with the exercise of due diligence'' (Fla. Stat. **§95.11(4)(b)(1975).** This distinction was noted in FLORIDA PATIENT'S COMPENSATION FUND v. TILLMAN, 453 So.2d 1376 (Fla. 4th DCA 1984), which decision was specifically approved by this Court in FLORIDA PATIENT'S COMPENSATION FUND v. TILLMAN, 487 So.2d 1032 (Fla. 1986). In that case, the court defined the term "incident" as containing three elements (453 So.2d at 1379):

> (1) A medical procedure; (2) tortiously performed **(3)** which injures (damages) the patient.

In TILLMAN, the patient was informed a few days after the operation that his surgeon had implanted the wrong or mismatched prosthesis in the patient's knee. The surgeon told the patient that he thought the prosthesis would work, however the patient admitted that he never improved after the operation. The patient filed suit more than two years after the operation. Nonetheless,

the Fourth District determined that summary judgment in favor of the doctor was not appropriate unless the subsequent injury to the patient was clearly caused by the mismatched components. Since there was evidence of other explanations for the damage to the plaintiff, including the excessive removal of bone, failure to use a proper component, etc., the issue was one for the jury. On review, this Court specifically approved the Fourth District's reasoning with respect to the statute of limitations issue, 487 So.2d at 1035.

In the case sub judice, the situation is very similar to that in TILLMAN, supra. Mr. Shapiro suffered from various infections after the surgery and was provided with at least one explanation that was inconsistent with malpractice, that is that the infections were caused by the dislodging of the tubes in his stomach. There was no evidence that Mr. and Mrs. Shapiro were aware of Dr. Barron's failure to prescribe antibiotics since that constituted an omission and not a comission. Since there is no evidence that Mr. and Mrs. Shapiro knew that Mr. Shapiro's blindness resulted from Dr. Barron's failure to prescribe antibiotics prior to his discharge from the hospital, the only other justification for summary judgment would be a finding, as a matter of law, that they should have discovered those facts with the exercise of due diligence. Consistent with this Court's admonition in MOORE v. MORRIS, supra, that was properly a jury issue and could not properly be determined as a matter of law.

In summary, the Fourth District's decision was consistent with this Court's numerous opinions construing the particular language at issue in Fla. Stat. §95.11(4)(b) including, MOORE v. MORRIS, supra, FLORIDA PATIENT'S COMPENSATION FUND v. TILLMAN, supra, and ASH v. STELLA, 457 So.2d 1377 (Fla. 1984). Under the facts of this case, there was an issue of fact as to when the Plaintiffs were on notice that there was negligence or injury caused by negligence. For that reason, this Court should decline to exercise its discretionary jurisdiction since there is no conflict caused by the Fourth District's decision.

CONCLUSION

For the reasons stated above, this Court should decline to exercise its jurisdiction in this case because there is no conflict created by the Fourth District's decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to NANCY P. MAXWELL, ESQ., 1615 Forum Place, Ste. 300, West Palm Beach, FL 33401; and ANNE B. MacLEAN, ESQ., 2700 N.E. 14th Street Causeway, Pompano Beach, FL 33062, by mail, this 19th day of June, 1989.

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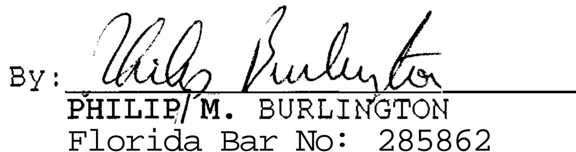
By: 
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