O/a 1-9-90.

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 74,144

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

Petitioners,

-vs-

JOSEPHINE SHAPIRO, etc., et al.,

Respondent.

BRIEF OF RESPONDENTS ON THE MERITS

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PREFACE

This is an appeal by the Plaintiffs from a Final Summary Judgment entered in favor of the Defendants in a medical malpractice action. The parties will be referred to by their proper names or as they appeared below. The following designations will be used:

(R) - Record-on-Appeal
(A) - Petitioner's Appendix

STATEMENT OF THE CASE AND FACTS

The original Plaintiffs, Lee Shapiro and Josephine Shapiro, his wife, filed their Complaint on January 29, 1982, naming as Defendants James Barron, M.D., his professional association, and the Florida Patient's Compensation Fund (R50-3). Count I of the Complaint alleged that Dr. Barron had held himself out to be a licensed medical doctor skilled in colon and rectal surgery and that he had negligently performed such surgery on the Plaintiff, Lee Shapiro (R51). The negligence alleged was that Dr. Barron "failed to utilize antimicrobial prophylaxis perioperatively intraoperatively, and immediately postoperatively", i.e. that he failed to utilize antibiotics before, during and after surgery (R51). It was alleged that as a result of Dr. Barron's negligence, Mr. Shapiro was subject to a prolonged hospitalization of approximately 175 days and that at the conclusion thereof he was blind, sick, and disabled (R51). Count II of the Complaint alleged loss of consortium on behalf of

Josephine Shapiro, and Count III alleged a claim against the Florida Patient's Compensation Fund (R52-3).[1]

Dr. Barron and his professional association filed an Answer to the Complaint admitting that he was a physician licensed in the State of Florida, but denying the other allegations of the Complaint (R54-7). The Answer also contained certain affirmative defenses, including that the statute of limitations had expired on Plaintiffs' claims (R55). Contemporaneously with the filing of that Answer, Dr. Barron filed a Motion to Dismiss on the basis of the statute of limitations (R58-59). That motion was denied (R58-9, 67). Plaintiffs filed a reply denying the affirmative defenses alleged by Defendants (R64). id. at 1.

Mr. Shapiro died on April 22, 1983, and suggestions of death were filed by the parties (R99, 101). Plaintiffs obtained leave of court to file an Amended Complaint substituting Josephine Shapiro in her capacity as Personal Representative of Lee Shapiro's estate, as an additional Plaintiff (R110-14). Dr. Barron then filed an Answer to the Amended Complaint substantially similar to his previously filed Answer (R115-16).

The case was set for trial on May 4, 1987 (R243). Defendants filed a Motion for Summary Judgment claiming that the action was untimely filed and that they were entitled to a summary judgment on the statute of limitations defense

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[1]/The claim against Florida Patient's Compensation Fund was voluntarily dismissed by Plaintiffs (R125).

(R251-51A). That motion was heard before Judge Wennet on May 4, 1987, in conjunction with numerous motions in limine with respect to the trial (R1-49).

At the hearing on their Motion for Summary Judgment, Defendants relied on portions of the depositions of Josephine Shapiro, Dr. Emil Gutman, and Dr. Calvin M. Kunin (R19-23, 33). Plaintiffs submitted the depositions of Lee Shapiro and Dr. Barron for consideration with the Motion for Summary Judgment (R32).

Josephine Shapiro's deposition contained the following relevant testimony. Her husband originally saw Dr. Sonneborn, an internist, because there was blood in his stool (R331). He was then referred to Dr. Barron (R331). Dr. Barron hospitalized him briefly for an examination, and three polyps were discovered in his colon, one of which was malignant (R332, SR79, 83). Mr. Shapiro was admitted to Boca Raton Community Hospital again on August 13, 1979, for surgery to remove that portion of the colon where the malignant polyp was located (R341). At that time, Mr. Shapiro was 79 years old (R344). Although he was taking certain heart medicine, otherwise he was in good health (R338). Dr. Barron informed Mr. and Mrs. Shapiro that there were risks associated with the surgery (R340-41).

The surgery was performed on August 17, 1979. After the surgery, Mr. Shapiro experienced complications. He inadvertently

pulled out a tube that had been inserted in his stomach (R371).[2] Prior to that, Mrs. Shapiro's observation of his condition was only that he had after-effects from the anesthesia and was "restless" (R371). Sometime after he had inadvertently removed the tube, Mr. Shapiro developed an abscess and suffered other complications (R371). He was placed in the intensive care unit where he stayed until he was discharged in February 1980 (R347). He had various infections which were being treated with different antibiotics (R366). At one point he required a tracheotomy (R361). During this period, there were approximately a dozen doctors (in addition to Dr. Barron) providing care to Mr. Shapiro (R361-2).

In September 1979, while Mr. Shapiro was in intensive care, Dr. Barron and Dr. Sonneborn suggested to Mrs. Shapiro that there was little hope for Mr. Shapiro to survive and that she should authorize the removal of the life support systems (R347, 356-57). Mrs. Shapiro did not react favorably to this suggestion (R347). Dr. Barron suggested to her that she check with her husband's nephew (Dr. Emil Gutman), a physician, because he thought he would agree with that recommendation (R347). Mrs. Shapiro called Dr. Gutman, who was a radiologist in Ohio (R350). Dr. Gutman agreed to come immediately (R282). Mrs. Shapiro stated at her deposition (R352):

> He [Dr. Gutman] was a relative and I talked with him. He came down for a visit and I

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[2]The tube came out on other occasions as well (R370).

> think his primary purpose was to look in on Lee and see how he was and see what the conditions were.

Dr. Gutman flew down and went right from the airport to the hospital (R282). He arrived at the hospital at approximately 1:00 in the morning and reviewed Mr. Shapiro's chart (R282, 289). Dr. Gutman testified that after reviewing the chart, his only recommendation was that they should get a hematologist to work on the case (R284). Mr. Shapiro had experienced negative reactions to the blood transfusions, and Dr. Gutman believed that a hematologist would know how to overcome those difficulties (R290).

Consistent with Dr. Gutman's testimony, Mrs. Shapiro stated that the only criticism or advice that Dr. Gutman gave at the time of his visit was that she should have a hematologist called in because Mr. Shapiro was reacting poorly to the blood transfusions (R352).

Contrary to Defendants' statement, Dr. Gutman did not consult with Mr. Shapiro's physicians; all Dr. Gutman stated was that he spoke with one internist and recommended that a hematologist be called in to administer the blood transfusions (R290). Dr. Gutman only went to the hospital on one occasion, i.e., the first night (R290-91). He claimed that advice saved Mr. Shapiro's life (R290). He stayed in Florida for a couple days and then returned to Ohio (R290).

Mrs. Shapiro testified that she became aware that Mr. Shapiro's blindness was caused by a fungus infection when Dr. Wallace diagnosed it (R366). Dr. Wallace originally examined Mr.

Shapiro in November and reached a final diagnosis that the blindness was caused by a fungus infection on December 31, 1979 (AP1-5). When Mrs. Shapiro was asked whether anyone had ever told her how the fungus might have been prevented, she testified (R367):

> A Tubes act as a host for fungii. He was filled with the tubes from top to bottom.
>
> When he got an infection, then it was one antibiotic after another, killing the good bacteria as well as the bad. The fungus took over.
>
> Q Now, who told you that?
>
> A Who told me that specifically? I gathered that information from a number of -- Well, a number of physicians. I mean Doctor Sonneborn was one of the people who said too many tubes.
>
> Q Okay, he said there were too many tubes, with what result?
>
> A That the tubes act as a host for fungii. And when you are in a weakened condition, they can take over.

As noted previously, after surgery Mr. Shapiro had pulled one of the stomach tubes out and some tubes had become disengaged on other occasions (R371). Dr. Gutman testified that he was told that Mr. Shapiro had pulled out a stomach tube after surgery, and he noted that many patients do that postoperatively in their confusion (R302).

In order to control the fungus infection, it was necessary to administer a drug called Ematherazine. When Dr. Sonneborn told Mrs. Shapiro that he had only administered that drug to a patient on one occasion, she told him to call in an "infectious

disease man" (R368). It was in that context that Mrs. Shapiro said she did not want "any more playing around with Lee [Mr. Shapiro]" (R368). Dr. Droeller was then called in to administer that drug. However, Dr. Droeller never suggested to Mrs. Shapiro that any doctor had done anything wrong in treating Mr. Shapiro (R369-70).

Mr. Shapiro was discharged from the hospital on February 4, 1980. At that time, he was blind, deaf in one ear, had significant problems with his blood, and was not ambulatory (R364).

While at his deposition Dr. Gutman was critical of Dr. Barron's treatment, he did not testify that he had any particular criticisms of Dr. Barron at the time of his visit to Florida in September, 1979. After Mr. Shapiro was discharged from the hospital in February, Dr. Gutman contacted a Dr. Kunin to review the hospital records (R287). Dr. Kunin reviewed the records and sent Dr. Gutman a report stating that there was evidence justifying a malpractice suit against the surgeon, i.e., Dr. Barron, but not against the other doctors (R288). Dr. Kunin's report indicated, inter alia, that Dr. Barron had been negligent in failing to prescribe antibiotics preoperatively, intraoperatively, and immediately postoperatively; and that omission had been a cause of Mr. Shapiro's demise (R299). Dr. Gutman never testified that he was aware of that omission when he visited Mr. Shapiro in 1979.

Mr. Shapiro's deposition was also filed with the court (R305-20). However, he was obviously in a very confused and

debilitated state at that time and could barely remember having been in the hospital for the six months in conjunction with the operation (R317).

Based on those depositions and the argument of counsel, Judge Wennet granted Defendants' Motion for Summary Judgment. In the Final Summary Judgment he noted that the hospital records revealed that Mr. Shapiro was suffering from an infection on September 1, 1979, and that the infection led to a fungus infection which had been diagnosed as affecting Mr. Shapiro's vision by November 14, 1979 (R502, A2). The order also referred to hospital records that indicated that a diagnosis had been made on December 31, 1979 that the fungus infection caused Mr. Shapiro's blindness (R502, A2). Judge Wennet noted that Dr. Gutman had travelled to Florida in September, 1979, reviewed Mr. Shapiro's hospital chart, and discussed the situation with Mrs. Shapiro (R502-3, A2-3). He also found that Mrs. Shapiro's deposition indicated that she was unhappy with the care and treatment rendered to her husband as early as September, 1979, and that she had requested that consulting physicians be called in during his hospitalization (R503, A3).

Based on those factual findings and the principle that knowledge of the contents of the medical records are imputed to a plaintiff, the trial court determined that the operative date for the commencing of the statute of limitations was December 31, 1979 (R503-4, A3-4). Since Plaintiffs' Complaint was filed on January 29, 1982, the court determined it was untimely (R503-4, A3-5). In the order, Judge Wennet questioned the basic fairness

of commencing the statute of limitations period on that date, but he concluded that it was duty bound to grant Defendants' Motion for Summary Judgment (R504, A4).

Plaintiffs filed a timely appeal from that Judgment (R517). The Fourth District reversed, concluding in pertinent part, SHAPIRO v. BARRON, 538 So.2d 1319, 1320 (Fla. 4th DCA 1989):

> When ruling on the summary judgment motion, Mrs. Shapiro's testimony relating she was told her husband's condition was caused by tubes dislodging from his stomach during his postoperative hospital recovery period, together with the reasonable inference that flows therefrom that she believed such explanation until the rendering of Dr. Kunin's opinion, must be accepted as true; as must, Dr. Gutman's testimony that he never gave any medical advice as to causation to the Shapiros. MOORE, 475 So.2d at 667. This court thereupon concludes that a genuine issue of material fact, which has a direct bearing on when the statute of limitations began to run, exists as to when the Shapiros knew or should have known that Mr. Shapiro's complications were caused by Dr. Barron's failure to use antibiotics.

The Fourth District expressed no conflict with any other appellate decision in Florida, but relied on MOORE v. MORRIS, 475 So.2d 666 (Fla. 1985), for the proposition that knowledge of the injury alone does not trigger the statute of limitations, rather there must also be the knowledge that it resulted from a negligent act.

Dr. Barron filed a petition for discretionary review in this Court, and that petition was granted, with two justices dissenting.

SUMMARY OF ARGUMENT

The Fourth District properly reversed the summary judgment in favor of Defendants since, at a minimum, there were genuine issues of material fact regarding when the limitations period commenced. The statute of limitations that applied during the relevant events, which was in essence the **1975** version of the statute, provides that the limitations period begins when "the incident" occurred or when it was discovered or, in the exercise of due diligence, should have been discovered. In FLORIDA PATIENT'S COMPENSATION FUND v. TILLMAN, **487** So.2d 1032 (Fla. **1986),** this Court affirmed and approved a decision of the Fourth District determining that a medical malpractice "incident" contained three elements: (1) a medical procedure; (2) tortiously performed; (3) which injures the patient. In the case **sub judice,** it was alleged that Mr. Shapiro's blindness resulted from an infection which was caused by Dr. Barron's failure to utilize antibiotics immediately before, during, and after surgery. There was no evidence in the record that Mr. Shapiro or Mrs. Shapiro were ever aware of that "incident" during the hospitalization period. The lawsuit was filed within two years of Mr. Shapiro's discharge and, therefore, the statute of limitations should not be deemed to have expired. At a minimum, there are factual issues regarding whether Plaintiffs should have known of that medical malpractice incident prior to Mr. Shapiro's discharge, which would, of course, require reversal of the summary judgment and a remand for determination by the trier of fact.

Defendants rely heavily on NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976), however in that case, this Court construed a different statute of limitations. This Court determined that, under that statute, the limitations period commenced upon discovery of the injury. The statute applicable in the case sub judice does not provide for the limitations period to commence upon the date of the injury, but rather specifically provides for that period to begin upon discovery of "the incident." Therefore, NARDONE does not apply in this case and, based on the above-stated reasoning, the Fourth District's decision should be affirmed.

QUESTION PRESENTED

THE FOURTH DISTRICT PROPERLY DETERMINED THAT THE SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS SHOULD BE REVERSED AND, THEREFORE, ITS DECISION SHOULD BE AFFIRMED.

ARGUMENT

In their brief, Defendants argue that this Court should adhere to NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976), with regard to the construction of the statute of limitations governing medical malpractice actions. However, the relevant statute of limitations has been amended three times since the statute at issue in NARDONE. Defendants' discussion of the case law fails to note any of the amendments in the statute.[3]

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[3]/Defendants do not mention the amendments until pages 26-27 of their brief.

Defendants also fail to cite FLORIDA PATIENT'S COMPENSATION FUND v. TILLMAN, 487 So.2d 1032 (Fla. 1986), wherein this Court approved the Fourth District's decision construing the statute of limitations that applies in the case sub judice.[4] Based on these deficiencies, it is respectfully submitted that Defendants' arguments must be rejected since none of the cases they rely on construe the statute of limitations at issue herein.

History of the Statute of Limitations for Medical Malpractice Actions in Florida:

Prior to 1971, the statute of limitations governing medical malpractice actions was contained in Fla. Stat. §95.11(4)(1943), see WORRELL v. JOHN F. KENNEDY MEMORIAL HOSPITAL, 384 So.2d 897, 899 (Fla. 4th DCA 1980), aff'd in pertinent part, DOBER v. WORRELL, 401 So.2d 1322 (Fla. 1981). That statutory provision addressed miscellaneous actions, and provided:

> Actions other than those for the recovery of real property can only be commenced as follows:...(4) WITHIN FOUR YEARS - any action for relief not specifically provided for in this chapter.

In 1971, the Florida Legislature adopted a statute of limitations specifically addressing medical malpractice, Laws of Florida 71-254. That statute, Fla. Stat. §95.11(6) (1971), provided in pertinent part:

> (6) Within two years - ...An action to recover damages for injuries to the person arising from any medical, dental, optometric,

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[4]/Both amicus briefs also fail to cite the TILLMAN case.

> or chiropractic treatment or surgical operation, the cause of action in such case not to be deemed to have accrued until the plaintiff discovers, or through use of reasonable care should have discovered, the injury. [Emphasis supplied.]

That statute was effective July 1, 1972, see Laws of Florida 71-254.

In 1974, the Florida Legislature amended the statute to provide that the two-year limitation period would commence when the plaintiff discovers, or through the use of reasonable care should have discovered, the "cause of action", Laws of Florida 74-382. That provision was effective January 1, 1975, see Laws of Florida 74-382.

In 1975, the Florida Legislature again amended the statute to provide:

> An action for medical malpractice shall be commenced within two years from the time the incident occurred giving rise to the action, or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence,.... [Emphasis supplied.]

That amendment was effective May 20, 1975, see Laws of Florida 75-9.

All of the relevant events involved in the case sub judice occurred subsequent to 1975. Thus, Fla. Stat. §95.11(4)(b) (1975) is the provision that applies in this case. Obviously, the issue before this Court is a question of statutory construction. NARDONE does not address the language of the 1975 statute, and thus, is not binding, precedent on the issue since it concluded that the event triggering the limitations period was

the injury (or discovery of it), and the relevant event under the 1975 statue is the incident (or discovery of it). It is not even persuasive precedent as to the appropriate interpretation of that provision. Nonetheless, in order to provide a relevant background to the discussion of this statute, NARDONE provides an appropriate starting point to analyze the evolution of case law regarding the medical malpractice statute of limitations.

Evolution of Case Law Addressing Medical Malpractice Statutes of Limitations:

In NARDONE v. REYNOLDS, supra, this Court addressed certain certified questions presented to it by the United States Court of Appeals for the Fifth Circuit. Those questions involved the proper interpretation of ~~Fla~~. ~~Stat~~. §95.11(4) (1971), which was the "miscellaneous" limitations provision effective prior to the 1971 amendment. That statute did not specifically state what event triggered the limitations period, but simply provided that such an action must be commenced within four years. Since that statute did not address that issue, this Court relied on common law principles previously utilized by it in CHRISTIANI v. CITY OF SARASOTA, 65 So.2d 878 (Fla. 1953), and CITY OF MIAMI v. BROOKS, 70 So.2d 306 (Fla. 1954), to resolve the question. Those cases provided that, consistent with the general rule applicable to negligence actions, the limitations period would commence upon notice of the negligent act or notice of the physical injury.[5]

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[5]/In NARDONE, this Court specifically noted the 1971 and (Footnote Continued)

Based on the common law principles regarding the accrual of a cause of action for negligence, this Court determined that the statute of limitations commenced to run when the nature of the child's condition was obvious and known to the plaintiffs, i.e., the parents and legal guardians, **333** So.2d at **33.** This Court determined that since the parents had access to the medical records, which detailed the child's condition and the causes thereof, they were on notice as to those relevant facts which further supported the conclusion regarding the date on which the statute of limitations commenced. This Court held **(333** So.2d at **40):**

> Mere ignorance of the easily discoverable facts which constitute the cause of action will not postpone the operation of the statute of limitation as to the party plaintiffs.

The next case in which this Court addressed the statute of limitations in medical malpractice actions was ASH V. STELLA, **457** So.2d **1377** (Fla. **1984).** The statute at issue therein was the one promulgated in **1975,** which provided that the limitations period was triggered at the date of "the incident," or the date the incident was discovered or should have been discovered with the exercise of due diligence, **457** So.2d at **1379.**

(Footnote Continued)
1974 amendments relating to the statute of limitations for medical malpractice actions, **333** So.2d at **32,** fn. 1. However, this Court noted that they were not material to the instant case, obviously because the relevant events occurred prior to the effective date of those statutes.

The cause of action in ASH arose from Defendants' alleged failure to diagnose a malignant tumor. The plaintiff alleged that his decedent came under the care and treatment of the defendant physician on January 7, 1977 and that he improperly treated her by failing to diagnose her condition, i.e., the existence of the tumor. The complaint alleged that a proper diagnosis was made on March 23, 1977, with the final results of the test confirming that diagnosis was made available on March 30, 1977. The plaintiff filed the action on March 30, 1979.

The defendant in ASH filed a motion for summary judgment, which was based on the fact that the plaintiff's decedent had been informed of the proper diagnosis more than two years prior to the filing of the action. The trial court granted that motion. The Third District reversed, holding that the two-year limitations period commenced upon the death of the decedent and, thus, had not expired at the time of the filing of the complaint.

This Court quashed the Third District's decision in part on the basis of VARIETY CHILDREN'S HOSPITAL V. PERKINS, 445 So.2d 1010 (Fla. 1983), which held that the wrongful death action was derivative of the injured person's right while living to recover for personal injuries. Thus, the relevant event was when "the incident" occurred or was discovered or should have been discovered with the exercise of due diligence. Nonetheless, this Court determined that the reversal of the trial judge's ruling was appropriate based on the following reasoning (457 So.2d at 1379):

> The trial judge concluded that Cynthia Stella knew or should have known of Dr. Ash's allegedly improper diagnosis on March 23, 1977, when she received a proper diagnosis. However, the diagnosis on which the trial court based its decision was inarguably a preliminary diagnosis. Tests to confirm that diagnosis were not performed until March 29. The final results of those tests were not available until March 30. We do not believe that, as a matter of law, a tentative diagnosis, however proper it may turn out to be in hindsight, starts the clock on an action for medical malpractice arising out of negligent failure to properly diagnose. Thus there is an issue of fact as to whether notice that an inoperable, malignant tumor had been discovered did, in fact, put the respondent and his wife on legal notice that the tumor had existed at the time Dr. Ash treated Mrs. Stella and that Dr. Ash had been negligent in improperly diagnosing the problem.

This Court never cited NARDONE v. REYNOLDS in that case, and clearly rejected the principle that the cause of action commenced to run upon discovery of the injury, i.e., the inoperable tumor. Instead, this Court applied the language of the relevant statute and concluded that the appropriate event was the date of "the incident" or the date "the incident'' was discovered or should have been discovered with the exercise of due diligence. This is clear from the statement concluding this Court's discussion of the case (457 So.2d at 1379):

> 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. [Emphasis supplied.]

Subsequent to this Court's decision in ASH v. STELLA, supra, this Court issued its decision in MOORE v. MORRIS, 475 So.2d 666

(Fla. 1985). While decided subsequent to ASH, the court in MOORE was applying the predecessor statute, i.e., Fla. Stat. §95.11(6) (1973) (which was the statute promulgated in 1971). That statute provided that the event triggering the limitations period was the plaintiff's injury or plaintiff's discovery of the injury. Thus, the language of that statute was consistent with the common law principles applied in NARDONE.

In MOORE, the parents of a child brought an action seeking damages for injuries alleged sustained at the child's birth. The child was born on July 9, 1973, and the action was filed by her parents on April 25, 1978. The trial court granted summary judgment for the defendants on a statute of limitations defense, and the Third District affirmed. Applying NARDONE, this Court reversed, concluding that there was a genuine issue of fact whether the plaintiffs had notice of the negligent act giving rise to the cause of action or notice of the physical injury which was a consequence of the negligent act, more than two years prior to the filing of the action. In addition to relying on NARDONE, this Court also relied on ALMENGOR v. DADE COUNTY, 359 So.2d 892 (Fla. 3d DCA 1978), which applied the pre-1971 statute of limitations, i.e., Fla. Stat. §95.11(4) (1969). Thus, this Court's decision indicated that there was no significant difference between the pre-1971 statute of limitations and the 1971 statute with respect to the event that triggered the limitations period.

However, the subsequent amendments to that statute of limitations obviously were intended to change its meaning and

application. It is, of course, a recognized canon of statutory construction that in making material changes in a statute, the legislature is presumed to have intended some objective alteration of the law, CAPELLA v. CITY OF GAINESVILLE, **377** So.2d **658** (Fla. **1979**); SEDDON V. HARPSTER, **403** So.2d **409** (Fla. **1981**). This is further reflected in this Court's opinion in ASH v. STELLA, supra, which construed the **1975** version of the statute and did not rely on NARDONE. It is further clarified by this Court's subsequent decision in FLORIDA PATIENT'S COMPENSATION FUND v. TILLMAN, **487** So.2d **1032** (Fla. **1986**).

In TILLMAN, the plaintiff experienced knee problems which required the surgical implant of a two element prosthesis. Surgery was performed by Dr. Waxman on April 12, **1978**. Shortly after surgery, Dr. Waxman advised the plaintiff that mismatched elements had been implanted in the knee. The plaintiff contended that, nonetheless, Dr. Waxman assured him continuously that his condition was improving, while Dr. Waxman testified that during that period, Tillman felt he was not improving. In February **1979**, a Dr. Ennis took x-rays of the plaintiff's knee and informed him that he would need another operation, which was subsequently performed and resulted in the plaintiff's knee being fused.

The plaintiff filed suit on February **29**, **1980**, naming as a defendant, inter alia, Dr. Waxman. Dr. Waxman contended that the statute of limitations had expired because more than two years had passed since the date he had informed Tillman of the mismatched components and of the period of time after surgery

when Tillman felt he was not improving. The trial court denied Dr. Waxman's motion for summary judgment, and permitted the issue to be presented to the jury, who resolved it adversely to the defendant. Dr. Waxman appealed, and the Fourth District affirmed.

The Fourth District stated that the applicable statute was ~~Fla~~. ~~Stat~~. §95.11(4)(b), which was the 1975 version of the statute, FLORIDA PATIENT'S COMPENSATION FUND v. TILLMAN, 453 So.2d 1376, 1378 (Fla. 4th DCA 1984). In doing so, the court specifically stated that since the 1975 version of the statute was at issue, "cases under the former version of the statute relied upon by Waxman [are] of doubtful value as precedent", 453 So.2d at 1378. The court then construed the 1975 statute, noting that the limitations period commenced upon discovery of the "incident giving rise to the cause of action", 453 So.2d at 1379. The court rejected the Third District's holding in SWAGEL v. GOLDMAN, 393 So.2d 65 (Fla. 3d DCA 1981), that the incident must be the date of the surgical malpractice (453 So.2d at 1379), stating:

> The term "incident," however, could not refer solely to the particular medical procedure since that would obviously be "discovered" at the time it was performed, rendering nugatory the additional two year period permitted by the statute for discovering the incident. Thus, the term must encompass (1) a medical procedure; (2) tortiously performed (3) which injures (damages) the patient. The question, then, is when did Tillman discover the "incident."

The court noted that there was conflicting testimony regarding when Tillman discovered the incident and, thus, it applied the

principle that where there is a question as to notice or discovery in a medical malpractice action, it is for the jury to decide when the statute of limitations began to run, **453** So.2d at **1380.** It should be noted that nowhere in its discussion of the statute of limitations did the Fourth District cite NARDONE.

This Court affirmed the Fourth District's decision with respect to the statute of limitations issue, stating **(487** So.2d at **1034):**

> Under the statute, discovery of the "incident giving rise to the cause of action" is the crucial date that triggers the running of the statute. The evidence on this issue was conflicting. Dr. Waxman contending that Tillman discovered the incident as early as April, **1978,** when he told Tillman of the mismatched components, or during the period thereafter when Tillman felt he was not improving, and Tillman contending that Dr. Waxman assured him continuously that he was improving and that he had no reason to believe otherwise until January or February of **1979** when Dr. Ennis took x-rays and told him he needed another operation. We believe that the district court was correct in concluding that the evidence presented was sufficient to take the statute of limitations issue to the jury and sustain the finding that the cause of action was not barred. [Emphasis supplied.]

Again, it is instructive that this Court did not cite NARDONE, since it obviously recognized that the legislature had significantly altered the statute with respect to the event which triggered the limitations period.

Application of the Law to This Case:

Under ASH and TILLMAN, it is clear that the appropriate standard to utilize in this case is whether Plaintiffs discovered the medical malpractice incident more than two years prior to the

filing of suit, or whether, in the exercise of due diligence, they should have discovered that incident prior to that time period. The three elements which must be demonstrated are that Plaintiffs were aware that a medical procedure which was tortiously performed had injured Mr. Shapiro. As noted in the Fourth District's opinion in TILLMAN, **453** So.2d at **1379,** it is obvious that the mere fact that Plaintiffs were aware that Mr. Shapiro had undergone surgery was not sufficient to demonstrate that they were aware of the medical malpractice incident.

An analysis of this issue must also consider the procedural context of this case, i.e., that it was presented to the trial court on Defendants' Motion for Summary Judgment. It is settled law that a party moving for summary judgment has the burden of conclusively showing the absence of any genuine issue of material fact and that, even considering every possible inference in favor of the non-moving party, the movant is entitled to judgment as a matter of law, HOLL v. TALCOTT, **191** So.2d 40 (Fla. **1966);** WILLS v. SEARS ROEBUCK & **CO., 351** So.2d **29** (Fla. **1977).** A summary judgment should not be granted unless the facts "are so crystallized that nothing remains but questions of law," MOORE v. MORRIS, supra, **475** So.2d at **668.** This Court also noted in MOORE that summary judgment should be cautiously granted in negligence or malpractice actions, citing GIALLANZA v. SANDS, **316** So.2d **77** (Fla. 4th DCA **1975).**

Defendants basically argue three factual elements as supporting their contention that Plaintiffs were sufficiently on notice of all relevant facts during Mr. Shapiro's hospitalization

so as to justify the commencement of the limitations period. In this respect, it should be noted that there was no evidence that Mr. Shapiro, who was initially a Co-Plaintiff in this cause, was ever aware of the nature of his complications and any relationship between those complications and the alleged negligence of Dr. Barron. With respect to Mrs. Shapiro, Defendants argue that because Mrs. Shapiro discussed her husband's situation with Dr. Gutman, she was indisputably on notice of all relevant facts. The second factual element Defendants rely on is that Mr. Shapiro's blindness was diagnosed during the hospitalization, thereby justifying that date as the beginning of the limitations period. The third contention of Defendants is that because Mrs. Shapiro had access to the medical records during the hospitalization, the limitations period commenced at that time. These three factual elements will be discussed separately.

It is undisputed that Mrs. Shapiro discussed her husband's condition with Dr. Gutman, a radiologist. From her testimony, it is clear that Mrs. Shapiro requested Dr. Gutman to come to Florida when Dr. Barron and Dr. Sonneborn recommended to her that she disconnect the life support systems which were keeping her husband alive. There was no suggestion that Dr. Gutman was called down to determine whether any person had been negligent or to determine the initial cause of Mr. Shapiro's demise. Dr. Gutman flew down to comfort Mrs. Shapiro and to provide assistance, if he could, in treating her husband. Moreover, it is undisputed that Dr. Gutman came down to Florida in September

1979, and that the diagnosis of blindness did not occur until months later.

The testimony reflects that Dr. Gutman did not specifically criticize Dr. Barron's treatment of Mr. Shapiro, except with respect to the failure to call in a hematologist to ensure that Mr. Shapiro did not have a negative reaction to the blood transfusions. As a result of Dr. Gutman's recommendation, a hematologist was called in, the blood transfusions were successfully administered, and Mr. Shapiro survived. Thus, there was no evidence to support the inference that any alleged negligence in failing to call a hematologist caused any injury to Mr. Shapiro. Additionally, that is not an allegation in Plaintiffs' complaint. Thus, that advice by Dr. Gutman cannot be deemed to have placed Plaintiffs on notice that there had been a medical procedure tortiously performed which had injured Mr. Shapiro. As noted previously, there is no evidence that Dr. Gutman ever advised Mrs. Shapiro of the cause of Mr. Shapiro's demise, i.e., that the failure to utilize antibiotics at the time of surgery resulted in the subsequent complications. Moreover, even assuming arguendo, that Mrs. Shapiro was displeased with Dr. Barron, mere dissatisfaction with a professional's performance is not the equivalent of notice of negligent conduct, see PINKERTON v. WEST, 353 So.2d 102 (Fla. 4th DCA **1977).**

Therefore, Defendants are not entitled to a summary judgment based on Dr. Gutman's involvement in the case since there is no evidence that he advised Plaintiffs that Dr. Barron had negligently performed a medical procedure which had injured Mr.

Shapiro. There is no evidence that Dr. Gutman ever noticed that the failure to administer antibiotics at the time of surgery even occurred, let alone that it had harmful consequences. While at his deposition Dr. Gutman stated that opinion, it is clear that he did so based on his conversations with Dr. Hunin, Plaintiffs' expert, whose report contained that analysis.

Defendants argue that the statute of limitations should have commenced on the date that Mrs. Shapiro was informed of the diagnosis of her husband's blindness. This contention is based in part on the erroneous assumption that the NARDONE v. REYNOLDS standard applies here which, as discussed previously, it does not. Fla. Stat. §95.11(4)(b) does not state that the limitations period commences on the date of injury or the discovery of the injury. It clearly provides that the date of the incident or its discovery, is the relevant event. Therefore, the appropriate means of analyzing Defendants' factual contention is whether that diagnosis put Plaintiffs on notice of the medical malpractice incident at issue, i.e., the failure to prescribe antibiotics. It is respectfully submitted that the diagnosis of blindness does not, as a matter of law, put Plaintiffs on notice that there had been a medical procedure tortiously performed which had injured Mr. Shapiro.

In making this analysis, it is important to remember the factual context of this case. Mr. Shapiro, a 79 year old man, underwent major surgery for removal of a portion of his colon. After surgery, he had numerous tubes implanted in him. On at least one occasion Mr. Shapiro removed one of those tubes, and

there was testimony that the tubes became disengaged on other occasions as well. Mr. Shapiro suffered numerous complications, including various infections for which he was treated with numerous antibiotics. Additionally, he became infected with a fungus which eventually travelled into his eyes, resulting in his blindness. Mrs. Shapiro was informed by at least one doctor that the tubes acted as a host for the fungus and, thus, that they were, to some degree, causally related to that condition. Under these facts, it cannot be said, as a matter of law, that the diagnosis of blindness placed Plaintiffs on notice that there had been a medical procedure tortiously performed which resulted in injury to Mr. Shapiro.

While MOORE v. MORRIS, supra, construed a different statute of limitations, certain language therein is instructive on this issue. MOORE v. MORRIS involved the birth of a child which necessitated an emergency Cesarean section. Additionally, after the baby was born, the infant was "blue" for a period in excess of thirty minutes, as a result of swallowing something in the womb which restricted breathing (475 So.2d at 668). The parents were aware of the emergency situation, that there had been a problem with the delivery, and that the child had been starved for oxygen, Ibid. Nonetheless, this Court held that those facts did not, as a matter of law, put the parents on notice of negligence or injury caused by negligence. This Court stated (Ibid):

> There is nothing about these facts which lead 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 throuuh 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.]

Similarly here, the fact that Mr. Shapiro suffered complications after the surgery, more particularly various infections, does not lead inescapably to one conclusion, i.e., that there was a medical procedure tortiously performed which injured him. Not only are infections a recognized source of complications from surgery, but in this case there was the additional element of the stomach tubes. Mrs. Shapiro was informed by some of the treating physicians that they acted as a source of infection. She was aware that her husband had pulled one of them out on one occasion and that they had become disengaged on other occasions as well. Thus, there were many possible explanations for the infections. Mrs. Shapiro's awareness of the existence of an infection that caused blindness does not compel the conclusion that she was on notice that a medical procedure had been tortiously performed which injured her husband.

Additionally, the fact that during his hospitalization Mr. Shapiro was struggling for his life and his wife was attempting to assist him, is a further consideration in determining whether the fact of blindness in itself should commence the limitations period. In ASH, it was noted that there was an issue of fact

whether discovery of an inoperable malignant tumor put the plaintiffs on notice that the tumor had existed at the time of the prior treatment by the defendant. This Court stated (457 So.2d at 1379):

> The etiology of malignancy is not well enough understood, even by medical researchers, that the courts should impute sophisticated medical analysis to a lay person struggling to cope with the fact of malignancy. [Emphasis in original.]

Similarly here, Plaintiffs were dealing with a life threatening situation and were clearly struggling with the fact of Mr. Shapiro's possible death. Dr. Barron and Dr. Sonneborn had already recommended that the life support systems be removed. Certainly, at a minimum, there is a question of fact as to whether due diligence would require, under these circumstances, that Plaintiffs begin to pursue an investigation regarding whether medical malpractice was one of the causes of Mr. Shapiro's demise. Clearly, due diligence at that point mandated that all efforts be marshaled to ensure that Mr. Shapiro survived. This Court should not hold that, as a matter of law, due diligence required that Plaintiffs should have commenced an investigation to determine whether the fungus infection which caused the blindness resulted from the negligence of one of the doctors.

Additionally, in ASH, a tentative diagnosis was determined to be insufficient to commence the limitations period for a case involving the negligent failure to properly diagnose that condition. Similarly here, the mere possibility that the

infection which caused Mr. Shapiro's blindness resulted from some act or omission of one of the treating physicians, does not justify triggering the limitations period. Absent evidence that Plaintiffs were on actual notice of the medical malpractice incident which caused the infection resulting in Mr. Shapiro's blindness (which this record does not contain), a summary judgment for the Defendants should not be granted in this case.

Defendants also argue that the fact that the hospital records were available to Mrs. Shapiro put her on notice regarding the relevant facts sufficient to justify the commencement of the limitations period. However, the alleged negligence in this case was an omission; i.e., the failure to prescribe antibiotics immediately preceding, during, and after surgery. There is no statement in the medical records affirmatively reflecting that omission; there is simply no mention of that decision by Dr. Barron. As a result, imputing knowledge **of** the medical records to Plaintiffs does not put them on notice regarding that fact. Therefore, they cannot be deemed to have had constructive knowledge of the medical malpractice incident at issue herein.

In ASH, in which the alleged negligence was the failure to properly diagnose a tumor, this Court stated **(457** So.2d at **1379):**

> Absent a finding of fact that before March **30, 1977,** medical records show 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.

It should be noted that in STELLA, prior to March 30, **1977,** there had been a preliminary diagnosis of the malignant tumor. Clearly this Court was holding that knowledge of the injurious medical condition itself did not automatically put the plaintiffs on notice of the medical malpractice incident. Additionally, this Court obviously declined to impute to the plaintiffs' medical knowledge not affirmatively appearing in the medical records. Therefore, here, where the alleged medical malpractice incident involved an omission and, thus, does not appear on the face of the medical records, knowledge of it cannot be imputed to Plaintiffs through those records.

This case is easily distinguishable from FRANKOWITZ v. PROBST, **489** So.2d 51 (Fla. 4th DCA **1986),** where the issue was whether a particular doctor had been involved in the treatment of the plaintiff. That fact was readily discoverable in the records since the physician's name appeared therein. Thus, the records clearly presented that plaintiff with the relevant information and it did not require any particular medical knowledge to interpret its meaning. However, in the case sub judice, the medical records did not affirmatively reflect the negligent act at issue, i.e., Dr. Barron's decision not to prescribe antibiotics at the time of surgery. It would take a medical specialist's understanding to interpret the records to derive that information, and there is no suggestion that Plaintiffs possessed such knowledge or understanding. Therefore, imputing knowledge of the contents of the medical records to Plaintiffs does not compel the conclusion that, as a matter of law, they

were on notice regarding the medical malpractice incident at issue herein.

The policy considerations underlying statutes of limitations do not support Defendants' argument in this case. As noted in NARDONE (333 So.2d at 36):

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

In this case, suit was filed within two years of Mr. Shapiro's discharge from the hospital. Clearly, that is not an unusually long delay, nor is there any suggestion that any interested persons have been prejudiced as a result of that passage of time.

In summary, the relevant determination is whether Plaintiffs in this case knew or should have known of the medical malpractice incident, i.e., Dr. Barron's failure to prescribe antibiotics at the time of surgery. While relying on MOORE, the Fourth District properly determined that there were factual issues which precluded summary judgment, since there was no evidence that Plaintiffs knew or were advised of Dr. Barron's omission or its significance. The question whether Plaintiffs exercised due diligence is a question of fact which cannot be conclusively resolved against them based on the record before this Court. For these reasons, the Fourth District properly reversed the trial court and remanded for further proceedings, including the resolution of this issue by the trier of fact.

CONCLUSION

For the reasons stated above, the decision of the Fourth District should be affirmed.

CERT OF SERVI

I HEREBY CERTIFY that a true copy of the foregoing was furnished to NANCY P. MAXWELL, ESQ., P.O. Box 024486, West Palm Beach, FL 33402-4486; and ANNE B. MacLEAN, ESQ., 2700 N.E. 14th Street Causeway, Pompano Beach, FL 33062, by mail, this 8th day of December, 1989.

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