OIA 1-9-90

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 74,144

4TH DCA CASE NO. 87-1530

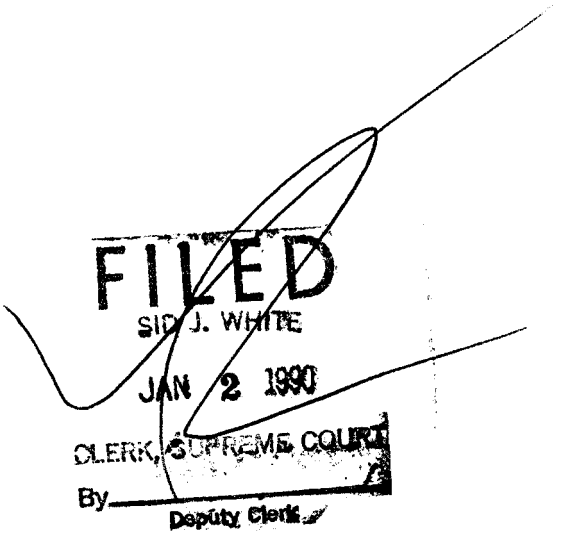
JAMES BARRON, M.D., et al.,

Petitioners,

vs.

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

Respondents.



PETITIONERS' REPLY BRIEF ON THE MERITS

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PREFACE

The parties will be referred to by their proper names. The following designation will be used:

(R) - Record-on-Appeal

STATEMENT OF THE CASE AND FACTS

DR. BARRON adheres to and adopts by reference in this reply brief the statement of the case and of the facts contained in his initial brief. Additionally, DR. BARRON corrects certain misunderstandings created by MRS. SHAPIRO's answer brief.

Although MRS. SHAPIRO argues in her answer brief that Petitioners only relied on portions of depositions to support their motion for summary judgment, DR. BARRON submitted the entire hospital record and designated the portions which demonstrated the definitive diagnosis of blindness during Mr. Shapiro's hospital stay. R29, 33, 38. DR. BARRON argued before the lower court that the statute of limitations should have expired in September, 1981, November, 1981, or at the very latest December, 1981. These dates represent two years from the date the blindness occurred and was diagnosed according to the hospital records.

Contrary to MRS. SHAPIRO's argument that Dr. Gutman came to visit Mr. Shapiro only because of a suggestion by the treating physicians that there be no heroic measures to sustain his life, Dr. Gutman testified that he consulted with MRS. SHAPIRO before Mr. Shapiro was even hospitalized and gave advice on the medical treatment. R275, 278-79. Dr. Gutman spoke to MRS. SHAPIRO

before the surgery and followed Mr. Shapiro's hospitalization by phone and in person. R279. MRS. SHAPIRO also did not testify that Dr. Gutman came to Florida only because of the suggestion regarding herioc measures. Regarding the absess, MRS. SHAPIRO stated that the absess did not develop in the area where the tube was pulled out, contrary to the suggestion in the brief that the complication arose from the tubes.

SUMMARY OF A IMENT

This court's opinion in Nardone v. Reynolds, 33 So.2d 25 (Fla. 1976) establishes a test for determining when the statute of limitations commences in medical malpractice cases. The test is not limited to the particular statute in effect at the time of the decision. Rather, it is a test which encompasses the concept of notice and determines that the statute commences when a plaintiff is on notice of the invasion of legal rights, which is when the plaintiff has notice of either the negligent act giving rise to the cause of action or of the existence of an injury that is the consequence of a negligent act.

This court has never rejected Nardone nor limited its application to specific statutory language. The district courts of appeal which have addressed the issue continue to cite Nardone as precedent although the Fourth District Court of Appeal varies in its own application of the case. In the instant case, the fourth district has failed to apply Nardone appropriately despite conceding in its opinion the existence of all factors necessary

to place MRS. SHAPIRO on notice of her cause of action. Even accepting MRS. SHAPIRO's argument, however, the summary judgment should have been affirmed where there was constructive notice of the cause of action,

QUESTION PRESENTED

I. NARDONE V. REYNOLDS REMAINS THE LAW OF FLORIDA AND THE FOURTH DISTRICT'S DECISION IMPROPERLY APPLYING NARDONE SHOULD BE REVERSED.

ARGUMENT

MRS. SHAPIRO's entire brief is devoted to an attempt to distinguish Nardone v. Remolds, 333 So.2d 25 (Fla. 1976) and convince this court that its opinion in Nardone, lost all precedential value as soon as the statute of limitations was amended in 1975 substituting "incident" for "injury." This court has never taken that position and should reject this attempt to negate its holding in Nardone.

Examination of this Court's Opinions on the Statute of Limitations

In Nardone, the parents of the brain damaged minor child argued that the statute of limitations on their medical malpractice claim should not begin to run until they became aware of the doctor's negligence. Without relying on the statutory language, this court rejected that argument in favor of its position that where a plaintiff is on notice of a possible invasion of legal rights, the statute of limitations begins to run immediately. 333 So.2d at 34,

The Nardone opinion, in its citation of earlier cases, relied most heavily on the concept of notice. Citing City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954), the court established a two part test to determine when the statute of limitations commence and stated that the statute begins to run upon notice of either the negligent act giving rise to the cause of action or the physical injury which is the consequence of the negligent act. Within that test alone and using the disjunctive "or," the court referred to notice of an injury, notice of an act, and notice of a cause of action.

MRS. SHAPIRO now argues that the Nardone holding does not apply to cases under post-1975 versions of the statute. This is a strained reading of the opinion. This court did not limit itself to a particular definition nor did it restrict its explanation of the statutes' commencement. Throughout the opinion, "causes of action," "incident," "act" and "injury" are used interchangeably. Reading the opinion as a whole rather than extracting words, it is clear that this court intended to hold that the statute of limitations commences upon notice of invasion of legal rights, which notice can arise from notice of an injury, notice of a negligent act or notice of a cause of action.

In the instant case, MRS. SHAPIRO had notice of an invasion of legal rights whichever statute existed and whatever language from Nardone applies. She was aware of the particular physical injury which was total and irreversible blindness by December 31,

1979. She was also aware that DR. BARRON performed a surgery which preceded the complications leading to blindness. Without DR. BARRON's surgery, according to plaintiff's complaint, the blindness would not have occurred. Interestingly, MRS. SHAPIRO does not contest Nardone's statements regarding imputation of medical records' contents to potential plaintiffs. Imputing that knowledge to her, MRS. SHAPIRO was on notice of the injury and the incident involving DR. BARRON, that is, the surgery.

MRS. SHAPIRO cites Ash v. Stella, 457 So.2d 1377 (Fla. 1984), and Moore v. Morris, 475 So.2d 666 (Fla. 1985) to support her evaluation of Nardone's precedential value. This court could have rejected or distinguished Nardone in each of those cases but chose not to do so. MRS. SHAPIRO claims the failure to cite Nardone in Ash is a "clear rejection" while the citation in Moore is inapplicable.

Regarding Ash, this court did not clearly reject Nardone; rather it affirmed the reversal of the summary judgment on the basis that there was factual question whether notice of the existence of a tumor was enough to establish notice that the tumor had existed during treatment and was misdiagnosed. The facts as presented in Ash established that a preliminary diagnosis was rendered on March 23, 1977, but this preliminary diagnosis was rendered without the benefit of diagnostic tests. The necessary tests were performed on March 29 and the results were available on March 30, 1977. This court found an issue of fact

regarding whether the plaintiff was aware of an incident or whether an injury had existed or occurred at the time of treatment, which began in January, 1977.

In Moore, this court cited and relied on Nardone. MRS. SHAPIRO argues that Moore's reliance on Nardone can be distinguished because the statute in effect in Moore was similar to the common law principles of Nardone. Once again, however, in Moore, this court had the opportunity to state definitively the boundaries of Nardone's application and to limit Nardone to cases decided under pre-1975 statutes. This court's decision in Moore was not rendered until 1985. Despite the many amendments to the statute of which the court clearly was aware, it did not engage in any discussion of varying tests to be applied depending on the language of the statute but defined the issue as when the plaintiff's had or should have had notice of either the injury or the negligent act. 475 So.2d at 667.

MRS. SHAPIRO claims that this court's decision in Florida Patient's Compensation Fund v. Tillman, 487 So.2d 1032 (Fla. 1986) demonstrates that the various changes in the statutes of limitations have altered this court's pronouncements. In Tillman the Fourth District Court of Appeal expressed doubt as to Nardone's precedential value. When this court had the opportunity to review the case, it chose not to refer to the fourth district's reasoning on the statute of limitations issue. Rather, this court simply affirmed upon a finding that there was

a factual issue regarding the Tillman plaintiff's knowledge whether he had been injured in light of the doctor's continuous assurances that no injury existed.

Even if MRS. SHAPIRO's position is correct that this court's deicision in Tillman rejected the Nardone principles and accepted the fourth district's test, the decision in the instant case should have been affirmed applying that test. The Tillman test defined an incident as a medical procedure tortiously performed which injures the patient. Considering the knowledge available in the medical records, MRS. SHAPIRO was on notice of the medical procedure, that is, the surgery and the preparation or alleged lack thereof, and the damage to the patient or the total irreversible blindness. There is no evidence that MRS. SHAPIRO was ever denied access to the medical records or that they would have been withheld from her had she requested them.

Comparison of the District Court of Appeal's Opinions Applying Nardone

The decisions of the Fourth District Court of Appeals regarding the statute of limitations in medical malpractice cases have been inconsistent in applying the principles of Nardone. The fourth district questioned the viability of Nardone in light of the various statutory amendments in Tillman, supra, issued in 1984 interpreting the statute of 1975. The same court, however, addressed a case in 1985 in which the 1983 statute was applicable and cited Nardone as precedent. Schafer v. Lehrer, 476 So.2d 781 (Fla. 4th DCA 1985).

In 1986 and 1987 the fourth district decided cases also involving subsequent statutes and relied on Nardone for a determination of when the statute of limitations commenced. Frankowitz v. Probst, 489 So.2d 51 (Fla. 4th DCA 1986) and Humber v. Ross, 509 So.2d 356 (Fla. 4th DCA 1987). Most recently, the Fourth District Court of Appeal cited Nardone for the following holding: "[T]he statute of limitations in a medical malpractice case begins to run when the plaintiff has been put on notice of invasion of his legal rights, which occurs when the plaintiff has notice of either the negligent act giving rise to the cause of action, or the existence of an injury that is the consequence of a negligent act." Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671, 672 (Fla. 4th DCA 1988).

The fifth district discussed the issue recently in Leyte-Vidal v. Murray, 523 So.2d 1266 (Fla. 5th DCA 1988) and relied on Nardone although applying a post-1975 statute of limitations. In Jackson v. Georgopolous, 14 F.L.W. 2429 (Fla. 2d DCA, October 20, 1989), which MRS. SHAPIRO chose not to address in her brief, Judge Lehan's special concurring opinion is devoted to a discussion of Nardone and the effect of its language on cases decided subsequently. Judge Lehan argues persuasively that this court had intended notice of the injury in Nardone to include not just knowledge or notice of an injury but knowledge or notice of an incident involving a defendant which resulted in the injury. Rather than rejecting Nardone by a restrictive reading of the

opinion, Jackson offers a compromise giving effect to Nardone. See, also, Judge Jorgenson's dissent in Bosorff v. Koch, 547 So.2d 1223 (Fla. 3d DCA 1989). This court did not intend to limit its opinion to the existing statute but did attempt to establish a test applicable to limitations cases universally. In Jackson, the court cited Nardone despite the fact that it was addressing the statute of limitations effective in 1987. The courts of the state have not limited application of Nardone, as MRS. SHAPIRO argues they should have, to cases arising under pre-1975 or pre-1971 cases. This court should reject MRS. SHAPIRO's attempt to limit Nardone's application in the instant case.

Each time the opportunity to amend the statute of limitations was presented, the legislature had the opportunity to accept MRS. SHAPIRO's position and word the statute to require knowledge of a physician's or hospital's negligence before the statute commences. If this court accepts MRS. SHAPIRO's argument, the court will be rewording the statute to read:

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

The leglislature has not chosen to require knowledge of a negligent act and this court should not judicially legislate such a requirement.

Application of Nardone and its Proseny to the Instant Case:

Although conceding the existence of undeniable facts in this case, the fourth district's opinion essentially establishes a new standard for the statute of limitations by requiring the existence of expert opinion on malpractice before the statute will begin to run. The court's opinion admits that the complications arose from Mr. Shapiro's surgery, that these complications were obvious to all; the court's opinion also acknowledges that MRS. SHAPIRO must be deemed to have knowledge of the medical records and that there was an independent medical advisor available. The expert who eventually gave an opinion on negligence based it on information available prior to December 31, 1979. Despite all of these conceded facts, the court reversed the summary judgment. MRS. SHAPIRO argues that the statute should not have commenced until Mr. Shapiro's discharge in February 4, 1980. There is no citation, however, to any new fact which was discovered between December 31, 1979, and February 4, 1980.

In her brief, MRS. SHAPIRO argues that the independent medical advisor consulted only because of a suggestion that the life support systems be disconnected. Regardless of the reasons for this consultation, it is clear that an independent medical advisor was available prior to December 31, 1979. MRS. SHAPIRO herself concedes that the independent medical advisor flew down "to provide assistance, if he could, in treating her husband." MRS. SHAPIRO's brief at 23.

MRS. SHAPIRO further argues that any advice given by the advisor should not place her on notice that there had been a medical procedure tortiously performed which injured her husband. The issue is not whether the advisor specifically told MRS. SHAPIRO that there had been negligence; the issue is, rather, whether the opportunity existed for MRS. SHAPIRO to discover that there had been negligence.

MRS. SHAPIRO contests whether the diagnosis of blindness after major surgery was sufficient to place her on notice of the possible malpractice. The uncontroverted facts are that Mr. Shapiro had surgery for the removal of polyps from his colon. Unquestionably, he suffered numerous complications following the surgery; the awareness of those complications alone were sufficient to encourage MRS. SHAPIRO to seek advice from Dr. Gutman. Even without that independent medical advice, however, the existence of the unexpected and untoward complications and the drastic change in Mr. Shapiro's condition was sufficient to place MRS. SHAPIRO on notice of possible malpractice, as it was in Nardone. Also, in this case, blindness clearly was not a serious situation arising through a natural cause during an operation for the removal of colon polyps, as the asphyxia in utero could have been in Moore.

MRS. SHAPIRO further argues that because of her knowledge of the stomach tubes and their action as a source of infection, somehow this knowledge misled her into believing that the blind-

ness arose from the stomach tubes. MRS. SHAPIRO's knowledge of the stomach tubes and their affect is further support for DR. BARRON's position that she was on constructive notice of possible malpractice, As MRS. SHAPIRO stated, she was informed that there were "too many tubes." R367. The logical assumption from a physician's statement of "too many tubes" is that there was a reason for the problem, which in this case allegedly was the failure to use the antibiotic and the necessity for extraordinary post-operative treatment,

MRS. SHAPIRO also argues that because of her husband's serious condition during his hospitalization, she should not have begun an investigation to determine whether there had been malpractice, MRS. SHAPIRO admittedly requested and received the medical records upon her husband's discharge in February, 1980. There is no evidence that the same medical records could not have been made available to her as early as September, 1979, or at the very latest, December 1979, and she had two years following December, 1979, to exercise due diligence in determining whether malpractice had occurred.

MRS. SHAPIRO cites Ash, supra, for its statements that a tentative diagnosis is not sufficient to commence the statute of limitations. There is no evidence in this record that the blindness was a tentative diagnosis or that there was any question as to the cause of the blindness. There was also no evidence of new facts discovered between December 31, 1979, and February 4, 1980,

the date of discharge.

MRS. SHAPIRO further states "absent evidence that Plaintiffs were on actual notice of a 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". MRS. SHAPIRO's brief at 29. It is clear from this statement that MRS. SHAPIRO's position is that expert opinion is the only triggering event for the statute of limitations. Neither the legislature nor this court ever intended that result. Admittedly this is the effect often given to the statute of limitations by the various lower court's opinions, but this case presents this court an opportunity to correct that misapprehension. This court recently reaffirmed this position in a case involving a similar notice statute. Almand Construction Company, Inc. v. Evans, 547 So.2d 626 (Fla. 1989). The language of Nardone, as it has been cited by the various district courts requires notice or constructive notice of the existence of malpractice to trigger the statute of limitations.

MRS. SHAPIRO had the means of determining whether malpractice caused the infection which resulted in the blindness. "The means of knowledge are the same as knowledge itself." Nardone, at 333. MRS. SHAPIRO admits that the medical records were available to her but claims that the records would not reflect sufficient information to put her on notice because the alleged act of

negligence was a failure to prescribe the antibiotics. MRS. SHAPIRO is unable to cite, however, any case or statute which indicates that the knowledge to commence the statute of limitations must be the claimant's own knowledge as opposed to that available through independent experts.

MRS. SHAPIRO's argument in this case is that the statute of limitations does not commence in any situation until an expert informs the potential plaintiff of their opinion that malpractice exists. The Fourth District Court of Appeals decision in this case will have that effect and will prevent any medical malpractice defendant from enjoying the benefit of the statute of limitations. This position clearly conflicts with Nardone and this court's subsquent decisions.

CONCLUSION

Based on the conflict established between the lower court's decision and opinions of this court, the decision of the Fourth District Court of Appeals should be reversed.

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 Petitioners, 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 28 day of December, 1989.

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