IN THE SUPREME COURT OF FLORIDA

HILLSBOROUGH COMMUNITY
MENTAL HEALTH CENTER, ETC.,

Petitioner,

vs. Case No. 79,266

MARJORIE J. HARR, ETC.,
ET AL.,

Respondent.

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SAYYED, HUSSAIN, M.D.,

Petitioner,

vs. Case No. 79,267

MARJORIE J. HARR, ETC.,
ET AL.,

Respondent.
****

ON REVIEW OF A CERTIFIED QUESTION FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT

AMICUS ACADEMY OF FLORIDA TRIAL LAWYERS
BRIEF IN SUPPORT OF
RESPONDENT HARR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. STATEMENT OF THE CASE AND FACTS

Amicus adopts the statement of case and facts as set forth by the Respondent in her brief.

II. ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT KNOWLEDGE OF A MERE "INJURY IN FACT", WITHOUT KNOWLEDGE OF ANY OTHER FACTS POINTING TO A CAUSE OF ACTION FOR MEDICAL MALPRACTICE AGAINST ANY PARTICULAR HEALTH CARE PROVIDER, WAS INSUFFICIENT TO START THE "SHOULD HAVE BEEN DISCOVERED" PROVISION OF THE STATUTE OF LIMITATIONS RUNNING AS A MATTER OF LAW.

III. SUMMARY OF ARGUMENT.

In the past several years, the District Courts of Appeal have issued varying opinions as to the standard for triggering the medical malpractice statute of limitations found in Fla. Stat. §95.11(4)(b). This Court's two recent opinions, Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990) and University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991), have, despite their clear language to the contrary, engendered some support in the District Courts of Appeal for a "injury in fact" standard. However, neither Barron nor Bogorff adopt an "injury in fact" standard despite Petitioners' arguments to the contrary. Both Barron and Bogorff indicate that

injury in fact is not always sufficient, but instead, plaintiffs must have sufficient facts regarding their injury so as to have been put on notice of the invasion of their legal rights. Bogorff, 583 So.2d at 1004.

This principle was applied by this Court in the cases of Moore v. Morris, 475 So.2d 666 (Fla. 1985), Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984), approved in relevant part, 487 So.2d 1032 (Fla. 1986), Cohen v. Baxt, 473 So.2d 1340 (Fla. 4th DCA 1985), approved in relevant part, 488 So.2d 56 (Fla. 1986), and Ash v. Stella, 457 So.2d 1377 (Fla. 1984). In each of these cases, the Court clearly considered whether the plaintiff had knowledge of sufficient facts to trigger the running of the statute of limitations. This type of factual inquiry is dictated by the language of Fla. Stat. §95.11(4)(b), which provides that an action for medical malpractice shall be commenced within two years from the time of the incident giving rise to the action occurred or within two years from the time the incident is discovered or should have been discovered with the exercise of due diligence. The restrictive "injury in fact" standard which has been at least partially adopted by some of the District Courts of Appeal must be disapproved by this Court so that some measure of certainty can be reintroduced to this area of the law. An injury in fact standard simply cannot be applied in every case without substantially encroaching upon a plaintiff's ability to redress injury sustained as a result of a medical care provider's medical negligence.

Moreover, an "injury in fact" standard is antithetical to the current legislative position regarding presuit investigation for medical malpractice actions. An injury in fact standard would encourage the bringing of medical malpractice actions based merely on suspicion of possible malpractice. Moreover, such a standard places patients and physicians in an unworkable adversarial position while treatment is still being undergone. Every time a patient has a downturn in condition, he or she would have to initiate a medical malpractice investigation in order to protect themselves from the running of the statute of limitations. Neither doctors nor patients would benefit from such a result.

IV. ARGUMENT.

On October 6, 1986, Marjorie Harr received a telephone call at her home in South Dakota informing her that her son, Michael Harr had died. Early the next morning she was additionally informed that Michael had been taken to a "crisis center" because of depression and that he had later taken his life. From this scant amount of information, Petitioners ask this Court to find that the medical malpractice statute of limitations was triggered such that Mrs. Harr's notice to initiate litigation filed two years and fourteen days later was untimely. In order to support this position, Petitioners argue that Mrs. Harr's discovery of her son's suicide constitutes discovery of an incident of malpractice as a matter of law. In the alternative, they argue that knowledge of the suicide triggered the statute because it put Mrs. Harr on notice of the need to investigate further. Neither of these arguments are supported by the language of the statute, the applicable case law or public policy considerations.

Statutes of limitations are intended to protect defendants from unusually long delays in the filing of lawsuits. They are not intended as a trap for the diligent but unfortunate souls who are not "lucky" enough to have immediate knowledge of when they have been injured through the negligence of a medical care provider. However, if Petitioners' reading of this Court's recent opinions in Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990) and University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991) are accepted, such

would be the result. Petitioners read these cases in such a rigorously literal manner that those persons whose injuries are in the least bit ambiguous are subject to an unforgiving standard.

Fortunately, Barron and Bogorff do not require such a reading. In neither case did this Court adopt an "injury in fact" standard for triggering the running of the statute of limitations. Instead, the standard set by Barron and Bogorff is sufficient knowledge on the part of the plaintiff to put him or her on notice of an invasion of their legal rights. As fate would have it, in both Bogorff and in Barron, the injuries suffered by the plaintiffs were so significant and unambiguous that the plaintiffs were deemed to have sufficient knowledge to be on notice of the possible invasion of their legal rights. Likewise, in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), the patient's injuries were "apparent and obvious" and his parents had "actual notice" of their son's condition. However, such is not always the case, a fact which this Court has itself acknowledged.

For example, in Ash v. Stella, 457 So.2d 1377 (Fla. 1984), this Court found that the plaintiff did not have sufficient knowledge to put him on notice of the invasion of his legal rights. Although the plaintiff had knowledge of certain facts regarding possible malpractice, this Court found that these were insufficient to provide constructive notice of the larger set of facts constituting the incident. If knowledge of the injury in fact were sufficient, clearly the outcome in Ash v. Stella would have been different. The result in Ash v. Stella would also have been

different if Petitioners' were correct in their argument that the statute commences when the plaintiff is on notice that she should begin an investigation to discover her cause of action.

Similarly, in Moore v. Morris, 475 So.2d 666 (Fla. 1985), this Court concluded that there was a genuine issue of fact regarding whether the parents were on notice of an invasion of their legal rights. In Moore, the plaintiff's daughter suffered oxygen deprivation and a severe medical emergency immediately after birth. The parents knew of this "incident" at the time it occurred. When the child was three years old, doctors determined that she was brain damaged. On these facts, this Court reversed the summary judgment entered in favor of the defendants and stated as follows:

> 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.

This language clearly indicates that in certain circumstances, injury alone is not sufficient to trigger the statute. These circumstances are those where the injury is ambiguous in nature, such that the plaintiff's knowledge of a possible invasion of his legal rights cannot be imputed.

Again, in Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984), approved in relevant part, 487 So.2d 1032 (Fla. 1986), and Cohen v. Baxt, 473 So.2d 1340 (Fla. 4th DCA 1985), approved in relevant part, 488 So.2d 56 (Fla. 1986), this Court upheld the District Court findings that although the plaintiffs had knowledge of a problem with their treatment, they did not have knowledge of sufficient facts to inform them of the invasion of their legal rights.

What all of these cases indicate is that the standard for triggering the statute of limitations is knowledge on the part of the plaintiff of sufficient facts of an incident of medical malpractice. Simple knowledge of bad result is not enough. Perhaps the difficulty is the way in which one usually "discovers" an "incident". Although one may occasionally discover an "incident" in one fell swoop, one usually gains knowledge of individual facts which make up the "incident". At some point, a patient is aware of sufficient facts so that we can say they have knowledge of the incident itself. Either the incident itself must be of such an unambiguous nature that knowledge is imputed or the plaintiff discovers enough additional facts to inform the plaintiff of the invasion of his or her legal rights. Of course, the plaintiff must exercise due diligence in discovering those facts or suffer the consequences of failing to do so.

Applying this standard to the instant action, one can see ease of its application. First, we look at whether or not the facts which Mrs. Harr had on October 6th or 7th, 1986, were

sufficient to put her on notice of the possible invasion of her legal rights. At that time, she learned the fact that her son had been taken to a crisis center because of depression and that later that day he had taken his own life. She had no knowledge of whether he had even been treated by a health care provider, much less whether such treatment was in any way connected with his death. Clearly under these facts, the Second District properly found that on October 6th or 7th, 1986, Mrs. Harr had insufficient facts to put her on notice that her legal rights had been possibly invaded.

Next, we look at whether Marjorie Harr failed to exercise due diligence in not discovering within fourteen days that her son had been treated by a health care provider and of that treatment's connection with her son's suicide. Respectfully, it cannot be said that Fla. Stat. §95.11(4)(b)'s "due diligence" requirement required plaintiff to go to the extraordinary lengths which would have been necessary to discover the additional facts necessary to give her notice of the invasion of her legal rights within that two week period. Only if plaintiffs are to be held to this incredibly rigorous standard can Petitioners' arguments be accepted.

Not only does the language of the statute and this Court's previous decisions support Respondent's arguments in this case, public policy also dictates that an injury in fact standard is untenable. As noted by Judge Parker in his concurrence in Rogers v. Ruiz, 16 F.L.W. D3076 (Fla. 2d DCA, December 13, 1991):

> Further, I agree with Judge Lehan that this Court's decision in Goodlet and the Supreme

> Court's decision in Bogorff require that the statute of limitations' clock starts running upon the death of Mr. Rogers. I wish I could agree with Judge Ryder that something more than a death is required to put the plaintiff on notice that the limitations' period had begun to run. Bogorff, however, in my opinion, has slammed that door.
>
> It is my belief that Bogorff rips at the very fabric of our society. The message in that case is clear. Once the body is in the ground or an adverse result occurs from a medical procedure, a grieving family or dissatisfied patient, in order to protect a possible and unknown right to damages, should retain an attorney immediately and start subpoenaing medical records. This, to me, is a further wedge driven between formerly trusting relationships involving hospitals, doctors, patients and attorneys. The message is clear. If one thinks anything adverse possibly could happen to him or her or to a loved one while undergoing medical care, one immediately must demand all medical records and retain an expert to review those records and to advise the patient or family. This appears to be the only prudent way to proceed to avoid the statute of limitations window closing upon an action for medical malpractice, even when the family or patient has nothing tangible which would indicate to a layperson that malpractice had occurred.

Both Judge Lehan in his majority opinion and Judge Parker in his concurrence misapprehend this Court's opinion in Bogorff as requiring the statute of limitations beginning at the point of injury. However, Judge Parker correctly states what the probable results of such a holding would be. Imagine a patient who is still being treated by a physician who has less than a favorable result in a medical procedure. Does he at that point turn on his physician and begin investigating for possible malpractice? If

injury in fact is sufficient, clearly this is the result. Was the plaintiff in Tillman supposed to instigate litigation the moment he learned of the mismatching of the components of his prosthetic device? Were the Moores supposed to immediately begin litigation when they knew their daughter had suffered oxygen deprivation and undergone a serious medical emergency? Such a practice invites shotgun approaches and overly aggressive pursuit of any possible malpractice action. While the Petitioners herein clearly feel that an injury in fact standard would be to their benefit, at least in this case, such a standard would only harm the medical profession and further deteriorate the relationship between doctor and patient. One can only expect that for every adverse result, there would now be an instigation of litigation.

Clearly, the Legislature clearly does not want to encourage such practices. The Legislature's enactment of the medical malpractice statutes, including Fla. Stat. §766.104, §766.106 and §766.203, clearly demonstrates the Legislature's desire to discourage medical malpractice suits based merely on suspicion. As stated by the Second District Court of Appeal in Rhoades v. Southwest Florida Regional Medical Center, 554 So.2d 1188 (Fla. 2d DCA 1989):

> These sections evidence a clear legislative intent to discourage costly and time-consuming medical malpractice litigation, to promote the culling of meritless claims, and to encourage settlement of meritless claims. The public benefits by a potential reduction in the cost of medical care by escalating medical malpractice insurance premiums.

Obviously, the intent was to encourage plaintiffs to investigate and develop facts before pursuing a malpractice claim against their physician. It is patently inequitable to put the onus on plaintiffs to discover these additional facts before proceeding with a malpractice action and yet at the same time hold that the plaintiffs have notice of their cause of action with just a scant amount of facts.

One might look at this Court's opinion in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), and its discussion of when a physician has a duty to disclose possible malpractice to his patient as a guide to establish a reasonable standard for triggering the statute of limitations:

> Where an adverse condition is known to the doctor or readily available to him through efficient diagnosis, he has a duty to disclose and his failure to do so amounts to a fraudulent withholding of the facts, sufficient to toll the running of the statute. But, where the symptoms or the condition are such that a doctor in the exercise of reasonable diligence cannot reach a judgment as to the exact cause of the injury or condition and merely can conjecture over the possible or likely causes, he is under no commanding duty to disclose a conjecture of which he is not sure. Therefore, his silence as to a possible condition or cause which he is unable to verify in the exercise of reasonable diligence does not, standing alone, constitute sufficient fraudulent withholding to toll the statute of limitations.

The standard for a physician is to exercise reasonable diligence to verify an adverse condition. Such a standard when applied to the plaintiff would also be appropriate and in line with

this Court's previous opinions. Where a plaintiff has knowledge of an adverse condition or where knowledge thereof is readily available to him through due diligence, then the statute of limitations is triggered. Where the condition is of an ambiguous nature or the plaintiff otherwise has insufficient facts to indicate that an injury has been suffered, then the statute is not triggered.

V. CONCLUSION.

In conclusion, this Court should affirm the Second District's opinion reversing the summary judgment entered in favor of Petitioners. In addition, this Court should take t his opportunity to clarify the law regarding when the medical malpractice statute of limitations is triggered.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this 30th day of March, 1992, to: JOEL D. EATON, ESQ., 25 West Flagler Street, Suite 800, Miami, Florida 33130; LEE S. DAMSKER, ESQ., P. O. Box 172009, Tampa, Florida 33672-0009; JOHN W. MITZEL, ESQ., P. O. Box 3329, Tampa, Florida 33601-3329; CLIFFORD L. SOMERS, ESQ., 3333 Henderson Boulevard, Suite 110, Tampa, Florida 33609-2913; and EDWIN J. BRADLEY, ESQ., 711 North Florida Avenue, Suite 310, Tampa, Florida 33602.

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