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SUPREME COURT OF FLORIDA

HILLSBOROUGH COMMUNITY MENTAL HEALTH CENTER, ETC.,	**	
Petitioner,	**	CASE NO.: 79,266
vs.	**	District Court of Appeal 2nd District - No. 90-2842
MARJORIE J. HARR, ETC., ET AL.,	**	
Respondent.	**	

SAYYED HUSSAIN, M.D.	**	
Petitioner,	**	CASE NO.: 79,267
vs.	**	District Court of Appeal 2nd District - No. 90-2842
MARJORIE J. HARR, ETC., ET AL.	**	
Respondent.	**	

REPLY BRIEF OF PETITIONER,

HILLSBOROUGH COMMUNITY MENTAL HEALTH CENTER, INC.

(Petititon for Discretionary Review - Certified Question From District Court)

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ARGUMENT

Since this Court's decision in Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990, the Defendant, Mental Health Center, has had a clear, simple understanding of when the statute of limitations begins to run under the medical malpractice statute of limitations. That clear simple understanding was crystallized by University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991). When a claimant discovers the injury which he will claim to have been caused by the defendant's negligence, he is placed on notice of a possible invasion of his legal rights and the statute of limitations begins to run. From the date the claimant is placed on notice of a possible invasion of his legal rights by virtue of his discovery of the injury, he has two years in which to do what is necessary to enable him to file suit and to file suit. This is what Barron, Bogorff, and Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976) say and, this Defendant submits this is what they meant to say and correctly said. The Plaintiff, on the other hand, contends that the statute of limitations does not begin to run in a medical malpractice case until the plaintiff discovers that he has sustained an injury and that the injury was caused by the negligence of the defendant; in other words, until the Plaintiff has knowledge of all of the elements of his cause of action and therefore has knowledge of everything he needs to file suit. Then, once the plaintiff has knowledge of everything he needs to know in order to file suit, the statute of limitations begins to run and the plaintiff has two years of additional time to file suit. The Plaintiff contends that this is what the Court meant to say in Barron, Bogorff and Nardone even

though it said the opposite. Essentially, the Plaintiff contends that the "incident" is not discovered until all of the elements of the cause of action are known. The Defendants contend that the "incident" is discovered when any one of the elements of the cause of action is known. The issue presented by this discretionary review is which of these views is correct.

The Plaintiff presents a syllogistic argument in support of her position. She argues that the medical malpractice statute of limitations begins to run when the plaintiff discovers or should have discovered the incident. The Plaintiff then argues that the "incident" is all of the elements of the cause of action, namely, negligence, causation, and injury. The Plaintiff then concludes that the statute of limitations does not begin to run until the Plaintiff discovers or should have discovered the negligence, causation, and the injury.

The problem with the Plaintiff's argument is that it simply assumes its conclusion by assuming that the Plaintiff does not discover the "incident" until she has discovered all of the elements of her cause of action. Barron, Bogorff, and Nardone hold that a plaintiff discovers his cause of action when he knows or should know of any of the elements of the cause of action. The Plaintiff simply refuses to accept this holding and assumes instead that in order for a plaintiff to have discovered the incident or the cause of action, he must have discovered each and every one of the elements of the cause of action not any one of them as this Court's cases have clearly and simply held. The Plaintiff has pointed to no cases

which have held that a plaintiff does not discover an "incident" or a cause of action until he discovers each and every one of the elements of the cause of action. Of course, Barron, Bogorff, and Nardone hold exactly the opposite. The assumption which flaws the Plaintiff's basic argument not only has no basis in case law, but has no basis in logic either. Clearly in logic, the discovery of a part of something is discovery of that thing. The Plaintiff's assumption which forms the bridge to its conclusion is akin to the ship captain claiming not to have discovered an iceberg because he only saw the part which was above the surface. Under the clear straight forward holding of this Court's cases, when the plaintiff has knowledge of any one of the elements of the cause of action, whether it be negligence, causation, or injury, he has discovered the incident.

Except for the illogical assumption that a plaintiff does not discover the incident until he discovers each and every element of it, the remainder of the Plaintiff's argument actually supports the Defendants' position rather than the Plaintiff's. First, the Plaintiff points out that under the standard for granting summary judgments, the moving party must show conclusively that the plaintiff knew or should have known of the incident more than two years prior to making her claim. In other words, whatever the Defendants must show in order to show that the Plaintiff knew of the incident they must show conclusively. Whatever the Defendants must show in order to show that the Plaintiff should have known of the incident, they must show conclusively. Moore v. Morris, 475 So.2d 666 (Fla.

1985); Holl v. Talcott, 191 So.2d 40 (Fla. 1966). This Defendant wholeheartedly agrees. Then the Plaintiff, based upon its illogical assumption, argues that since the Plaintiff does not know and should not know of the incident until she knows or should know of each and every element, that is, that there was negligence, that the negligence was the cause of the injury, and that there was an injury, the Defendants must conclusively show that the Plaintiff knew that there was negligence, that the negligence was the cause of the injury, and that there was injury, more than two years prior to the time she filed her claim. This Defendant agrees that if what the Plaintiff must know before the statute of limitations begins to run is that there was negligence, causation, and injury, then the Defendants in this and in all malpractice cases must conclusively show that the Plaintiff knew that there was negligence, causation and injury. But unless Barron, Bogorff, and Nardone are to be overruled, it is apparent that the Defendants do not have to show conclusively that the Plaintiff knew of all of the elements of her cause of action, but only that she knew of any one of the elements of her cause of action.

The flaw in the basic assumption by which the Plaintiff makes her case is demonstrated by even a cursory analysis of Barron, Bogorff, and Nardone. The defendants in Barron did not show that the plaintiff knew that there was any negligence on the part of the defendants or that negligence was the cause of her husband's injuries. Indeed, the court expressly recognized and did not dispute the plaintiff's contention that she had no reason to know that the

injury was negligently inflicted. Clearly, the defendants did not show conclusively that the plaintiff knew that there had been negligence or that negligence was the cause of her husband's injury. Likewise, in Bogorff, it is clear that the defendants did not conclusively show that the plaintiffs knew that there was negligence and that the negligence was the cause of the plaintiff's injury. Once again the court expressly acknowledged that the injury which the plaintiffs attributed to the intrathecal methotrexate treatment might not have been easily distinguishable from the effects of leukemia on his system. In Nardone, there was evidence that the parents did not even know that the offending procedure had been administered, much less know that the procedure had caused the child's injuries. There is no indication that the plaintiffs knew that there was any negligence on the part of any of the defendants at the time the court held the statute of limitations began to run. Once again, therefore, there was clearly no conclusive showing that the plaintiffs knew of the negligence and causation elements of their cause of action. In Barron, Bogorff, and Nardone the only conclusive showing made by the defendants was that the plaintiffs knew of the injury element of the cause of action.

In order for this Court to accept the Plaintiff's quantum assumption by which it makes its argument, it will be required to make a choice. Either it will have to overrule Barron, Bogorff, and Nardone and hold that the defendant must conclusively show that the plaintiff knew of all three of the elements of the cause of action or it must overrule Holl v. Talcott, and change the standard for

summary judgments to something less than a conclusive showing of the necessary facts. The answer, of course, is much simpler; the Court need only follow its holdings in Barron, Bogorff, and Nardone and reject the unwarranted assumption by the Plaintiff that the Plaintiff does not discover the incident until she discovers all three of the elements making up the incident.

Of course, the Plaintiff recognizes that this Court is unlikely to overrule Barron, Bogorff, and Nardone or to relax the standard for determining summary judgments and thereby overrule Holl v. Talcott. The Plaintiff, therefore, proposes a compromise. That compromise appears to be that while the Defendant must conclusively prove that the Plaintiff had notice of one of the elements of the cause of action, once the Defendant proves conclusively that the Plaintiff has notice of one of the elements of the cause of action, namely, injury, then the test for establishing the remaining elements of the statute of limitation defense, namely, notice of negligence and causation is relaxed and governed by a lesser standard. According to the Plaintiff, when a defendant has shown conclusively that the plaintiff has knowledge of the injury, the defendant still must show that the plaintiff had knowledge of negligence and causation but that showing can be made circumstantially from the type of injury itself. Because negligence and causation were not conclusively shown in Barron, Bogorff, and Nardone, the Plaintiff concludes that there is a lesser standard for the Defendants to show negligence and causation when they are showing that the Plaintiff had knowledge of those elements on account of the injury itself.

The Plaintiff states the standard in her brief but seems rather uncertain as to what it should be as she changes it materially throughout the brief.

Plaintiff starts out by stating the standard to be that a plaintiff has notice of the incident when the injury is not reasonably ambiguous as to its cause and facially suggests that it is an injury caused by negligence. (Brief of Respondent at page 17). Next, Plaintiff states the standard to be that the injury itself gives facial (or "constructive notice") that it was the probable consequence of a negligent act. (Respondent's brief at page 18). Next, Plaintiff states the standard to be an injury which itself gives fair notice that it was probably the consequence of a negligent act. (Respondent's brief at page 22). The Plaintiff also states the standard to be an injury which is obviously an "injury caused by negligence," and which cannot be explained on any other non-negligent or natural ground. (Respondent's brief at page 22). Apparently at this point the Plaintiff recognizes that the this test will not hold up under Barron, Bogorff, and Nardone and therefore states the test to be that the nature of the injury is such that most reasonably intelligent persons would conclude from the injury itself that it was the consequence of a negligent act rather than an injury which may have some other non-negligent explanation. (Respondent's brief at page 25-26). Of course, this standard will not withstand application of the facts in Barron, Bogorff, and Nardone and so that Plaintiff tries again stating the test to be where it is obvious from the nature of the ultimate injury that the

procedure has been botched or that negligence is its probable cause. (Respondent's brief at page 26). The Plaintiff has doubts again, however, and restates the standard to be "when the 'injury' itself gives fair notice that it was the probable (or maybe 'possible') consequence of a negligent act". (Respondent's brief at page 28). The Plaintiff also states the test to be facts which support a confirmation or, at a minimum, a reasonable probability rather than a mere suspicion that the injury was caused by negligence. (Respondent's brief at page 35).

The most common statement by Plaintiff of the standard which she proposes is found on page 30 of her brief where she states the standard to be "where the nature of the injury is such that most reasonable persons would conclude that the physical injury was the consequence of a negligent act". It seems rather obvious that this was not the standard by which the court upheld the summary judgments in Barron, Bogorff, and Nardone. First, as the Plaintiff ably points out in her brief, questions of what a reasonable person would know or discover are generally questions of fact for a fact finder to determine, not the court on a motion for summary judgment. See Moore v. Morris, 475 So.2d 666 (Fla. 1985), and cases cited in Respondent's brief at page 9. Secondly, as pointed out above, it is clear from the facts in these cases as well as the court's statements concerning the Plaintiff's knowledge from those facts that reasonable persons would not necessarily have known from the mere injury itself that there was medical negligence or that the injury was caused by medical negligence. It is quite clear from

those cases that actual knowledge of the injury gave the plaintiffs notice of a possible invasion of their legal rights as a matter of law which started the statute of limitations running, not that the injury itself gave them knowledge that there was negligence or that the injury was caused by negligence.

The Plaintiff justifies this rather startling modification of the summary judgment standard as being necessary to harmonize this Court's decisions in Barron, Bogorff, and Nardone with Moore v. Morris, 475 So.2d 666 (Fla. 1985), Ash v. Stella, 457 So.2d 1377 (Fla. 1984) and Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323 (Fla. 1990). Changing the standard for determining summary judgments seems to be a rather drastic method for harmonizing these cases. Fortunately, no harmonization is necessary. Those cases are harmonized just as this Court said they were in Barron. In Barron, Bogorff, and Nardone there was no genuine issue of fact, that is, the defendants had conclusively shown, that the plaintiff had actual knowledge of one element of the cause of action, namely, the injury. In Moore, Ash, and Peat, Marwick, on the other hand, there was a genuine issue of fact as to whether or not the plaintiffs in those cases had knowledge of any of the elements of their causes of action. In Moore, as explained in Barron, there was a genuine issue of fact as to whether or not the parents knew that the child had been injured at all. The undisputed facts showed that the parents knew that there had been an emergency situation, that a cesarean section had been performed and that the parents had been advised that the baby might not live due to oxygen deprivation caused by

swallowing something while in the womb. The court expressly held that these facts did not lead conclusively and inescapably to the conclusion that there was notice of negligence or of injury. The court simply rejected the ruling of the lower courts that notice of serious medical circumstances is sufficient in and of itself to impute notice of negligence or to impute notice of injury. As the court pointed out in Barron, it was this very difference which distinguishes Moore from Barron; in Barron the defendants showed conclusively that the plaintiff knew of the injury, whereas in Moore the defendants did not show conclusively that the plaintiffs knew of the injury. It is also quite clear from Moore and Barron that if the parents had known at the time of the birth of the injury, that is, that the child had been severely brain damaged, that the statute of limitations would have begun to run at that time.

In Ash v. Stella, 457 So.2d 1377 (Fla. 1984) the court held that there was not only a question of fact as to whether or not the plaintiff knew of the injury on the date the defendant contended she did, but also a question of fact as to whether it was even possible to know of the injury on that date. The court pointed out that the facts upon which the defendant was relying was a preliminary diagnosis which was not confirmed until later. The court simply held that the preliminary diagnosis was not sufficient to conclusively show that the plaintiff knew or should have known of the injury, that is, the undiagnosed cancer, on the date of the preliminary diagnosis. Clearly, if the defendant had conclusively shown that the plaintiff knew on the date of the preliminary diagnosis that the misdiagnosed

cancer existed, the statute of limitations would have begun to run at that time. The court held that the statute did not begin to run, not because the defendants had failed to prove that the plaintiff had notice of all of the elements of her cause of action but because the defendants had failed to prove conclusively that she had notice of any of the elements of her cause of action.

In Peat, Marwick, Mitchell & Company v. Lane, 565 So.2d 1323 (Fla. 1990) the court held that not only did the facts not conclusively establish that the plaintiffs had notice of the injury on the date claimed by the defendant but that as a matter of law the injury had not yet even occurred. The defendant contended that the statute of limitations began to run on the plaintiffs' accountancy malpractice claim when they received a ninety-day deficiency notice from the IRS. The court held that the injury did not occur when they received the ninety-day notice but rather occurred upon conclusion of the appeals process where the accountant disagreed with the Internal Revenue Service's determination. Therefore, Peat, Marwick, stands for the proposition that the statute of limitations cannot begin to run until the injury occurs. Of course, a plaintiff cannot have knowledge of an injury until it occurs. Peat, Marwick does nothing to dilute the holdings in Barron, Bogorff, and Nardone that the statute of limitations begins to run when the plaintiff has notice of the occurrence of any of the elements of his cause of action. Once again, the defendants did not prevail in Peat Marwick because they failed to prove knowledge of any of the elements of the

plaintiff's cause of action, not because they failed to prove notice of all of the elements of the cause of action.

This same distinction holds up in most of the district court cases which the Plaintiff uses as further justification for the modification of the summary judgment standard. An example is Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 1984). Plaintiff's analysis of the facts in that case is excellent. The plaintiff underwent surgery for an unstable knee and came out of surgery with an unstable knee. Until the defendant showed conclusively that Mr. Tillman knew that he had some injury other than the injury he started out with, there remained a question of fact as to whether or not he had discovered the injury. Mr. Tillman claimed that he did not discover that there was any injury other than his original condition until he learned that his knee prosthesis had been put in upside down. Once again, there is nothing inconsistent or out of harmony with the holdings in Barron, Bogorff, and Nardone. The defendants simply failed to conclusively show knowledge of any of the elements of the plaintiff's cause of action.

This Defendant does recognize that the district courts have rendered decisions which cannot be squared with Barron, Bogorff, and Nardone. The most obvious examples are Shapiro v. Barron, 538 So.2d 1319 (Fla. 4th DCA 1989) and Bogorff v. Koch, 547 So.2d 1223 (Fla. 3rd DCA 1989), which decisions, of course, were overruled by being reversed by this court in Bogorff and Barron. Any other district court cases which require the defendant to show not only that the plaintiff had knowledge of the injury but also knowledge of negli-

gence or causation have also been overruled by Barron and Bogorff. An example is Cohen v. Baxt, 473 So.2d 1340 (Fla. 4th DCA 1985). To the extent that this case requires proof of something more than knowledge of the injury, this Defendant respectfully submits that it has been overruled.

The Plaintiff's final justification for her strange hybrid summary judgment standard is that knowledge of the injury without more, is sufficient only to raise a mere suspicion of malpractice and that unless the court requires some intermediate standard for notice of the elements beyond the injury, claimants will be encouraged to bring malpractice suits on the basis of mere suspicion. The Plaintiff's acknowledgment that notice of the injury raises a suspicion that the injury was caused by negligence affirmatively supports the Defendants' position. As the court noted in Bogorff the knowledge required to commence the limitation period does not rise to that of a legal certainty. The statute of limitations commences once plaintiffs have notice of the possible invasion of their legal rights. University of Miami v. Bogorff, supra, at page 1004. This Defendant fails to see how a suspicion that the injury was caused by negligence is materially different from notice of the possible invasion of a legal right.

The Plaintiff's argument that in the absence of her proposed hybrid summary judgment standard, plaintiffs will be required to file medical malpractice suits upon a mere suspicion of malpractice, is entirely misplaced. As Plaintiff points out, §766.104, Florida Statute (1989) prohibits the filing of a medical malpractice action

unless the attorney filing it certifies that a reasonable investigation has been conducted and that grounds exist for the action. Furthermore, as Plaintiff points out, §766.203, Florida Statute (1989) requires that as a condition precedent to filing a medical malpractice suit the plaintiff must serve a notice of intent to initiate litigation which notice must include a verified, written medical expert opinion which corroborates that there are reasonable grounds to support the claim of medical negligence. The Plaintiff, therefore, is precluded by law from filing a suit on mere suspicion of medical negligence. Even though the statute of limitations provides that suit must be filed within two years after notice of a possible invasion of one's legal rights, if the claimant is unable to fulfill the conditions precedent of §766.104 and §766.203, of the Florida Statutes, the claimant can extend the statute of limitations for an additional period of ninety days to complete the inquiry mandated by discovery of the incident and file suit. Section 766.104(2), Florida Statutes (1989). The legislature has determined that two years plus ninety days of inquiry once the plaintiff is placed on notice of a possible invasion of his legal rights is sufficient for the plaintiff to have determined that there is reasonable grounds to support his claim of medical negligence.

CONCLUSION

The basis for the resolution of this case remains clear from this Court's holdings in Barron, Bogorff, and Nardone. In order for the moving party to prevail on a motion for summary judgment, that party must conclusively show that the plaintiff had notice of one of the elements of the cause of action. Once the moving party conclusively shows that the plaintiff either had notice that there was negligence, notice that negligence caused his injury or notice that he sustained an injury, the statute of limitations begins to run and the plaintiff must file suit within two years of that date. In the case at bar, the Defendants showed conclusively that the Plaintiff knew of the injury no later than October 7, 1986 and therefore her claim which was filed more than two years after that date was untimely.

Based on the foregoing, this Defendant respectfully submits that the decision of the Second District Court of Appeals should be quashed and the Court directed to reinstated the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was sent by regular U.S. Mail this 16th day of April, 1992 to RICHARD M. MITZEL, ESQUIRE, Post Office Box 3329, Tampa, Florida, 33601-3329; LEE S. DAMSKER, ESQUIRE, 606 East Madison Street, Post Office Box 172009, Tampa, Florida, 33672-0009; CLIFFORD L. SOMERS, ESQUIRE, 3333 Henderson Blvd., Suite 110, Tampa, Florida, 33609; KELLY B. GELB, ESQUIRE, Krupnick, Campbell, Malone and Roselli, P.A., Attorneys for Amicus AFTL, Courthouse Law Plaza Suite 100, 700 Southeast Third Avenue, Ft. Lauderdale, Florida, 33316 and JOEL EATON, ESQUIRE, 800 City National Bank, 25 W. Flagler Street, Miami, Florida, 33130.

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