047

IN THE SUPREME COURT OF FLORIDA

HILLSBOROUGH COMMUNITY MENTAL HEALTH CENTER, ETC.,

Petitioner,

vs.

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

Respondent.
---/

CASE NO. 79,266

District Court of Appeal
2d District - No. 90-2842

SAYYED HUSSAIN, M.D.,

Petitioner,

vs.

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

Respondent.
---/

CASE NO. 79,267

District Court of Appeal
2d District - No. 90-2842

REPLY BRIEF OF PETITIONER
SAYYED HUSSAIN, M.D.

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

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ARGUMENT

The Second District Court of Appeal certified a question to this Court as being of great public interest. It was as follows:

> Does the statute of limitations in §95.11(4)(b) commence:
>
> (A) when the potential plaintiff has notice of an injury in fact; or
>
> (B) when the potential plaintiff has an additional notice that the injury in fact resulted from an incident involving a health care provider?

This petitioner recited that question in his initial brief and then set forth separate headings of argument. The respondent and the amicus, Academy of Florida Trial Lawyers, simply restated the court's question and never addressed it directly. The gist of the Second District Court's question is whether it is sufficient for a plaintiff to know of an injury in fact to initiate the running of the statute of limitations or whether plaintiff must have notice additionally that the injury in fact resulted from an incident involving a health care provider. This petitioner does not suggest that the substance of the Second District Court's question is not addressed by any of the parties. Quite the contrary. However, it appeared relevant at this

point to restate the original question and set that question in the context of the parties' arguments.

Because petitioner Hillsborough County Mental Health Center has already filed its reply brief, this petitioner has had the luxury of reviewing that brief while preparing his own. It would be fair to state that in large part this petitioner is in agreement with the arguments set forth in the reply brief of the Hillsborough County Mental Health Center, Inc. (HCMHC). As a result, this reply brief will be somewhat abbreviated. Furthermore, an examination of the brief of the amicus, the Academy of Florida Trial Lawyers, discloses that it does not state any new arguments or insights as compared to the brief of respondent. Therefore, this reply brief will speak to the argument put forth by respondent with confidence that the arguments of the amicus will be refuted as well.

Because we will need to refer to it from time to time, petitioner will once again set forth the pertinent part of §95.11(4)(b), Fla. Stat. (1985) which is at issue in this cause:

> An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered or should have been discovered with the exercise of due diligence; ...

The central tenet of respondent's argument is that the word "incident" means not merely "injury" but all the elements of a completed tort to include the negligent act, the injury and the causal connection between the two. (Brief of Respondent at page 18.) Respondent believes that this meaning of "incident" is "thoroughly settled" as a result of the cases of Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984) and Cohen v. Baxt, 473 So.2d 1340 (Fla. 4th DCA 1985). (Brief of Respondent at pages 18 to 19.) From that premise, respondent reasons that to initiate the running of the statute of limitations plaintiff must be on notice of all the elements of a cause of action in medical malpractice. This would mean that the decisions of the Florida Supreme Court in Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990) and University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991) stand for the proposition only that there are some types of injury which inherently give notice of the potential of a cause of action against a health care provider and in those cases it is enough simply to be on notice of the injury because the nature of the injury provides constructive notice of the rest of the elements of the cause of action. Counsel for respondent has apparently even convinced the Fifth District Court of Appeal to echo some of that language

in the case of Norsworthy v. Holmes Regional Medical Center, Inc., 17 F.L.W. D868 (Fla. 5th DCA April 3, 1992). In that case, the district court said:

> Perhaps we read Bogorff and Barron too optimistically, but we believe those cases simply stand for the proposition that when the nature of the bodily damage that occurs during medical treatment is such that, in and of itself, it communicates the possibility of medical negligence, then the statute of limitations begins to run.
> Norsworthy, supra at D869.

Respondent and the Fifth District are clearly and inescapably wrong. Whether one examines the literal wording of the statute of limitations or the cases decided by this honorable court, the position being put forth by respondent absolutely contradicts the decisions of this court.

If we examine the language of the statute, it says that an action for medical malpractice is required to be commenced within two years "from the time the incident giving rise to the action occurred". §95.11(4)(b), Fla. Stat. (1985) If the word "incident" were meant to be the equivalent of the cause of action, the language "incident giving rise to the action" would not make sense. This language implies that the incident is not the cause of action. In fact, the obvious meaning of the word "incident"

in this context ties it in some way to the medical treatment itself. Thus, the interpretation of the statutory language itself points away from "incident" meaning the same thing as cause of action.

For the proposition that "incident" encompasses all of the elements of a cause of action for malpractice, respondent cites two cases in particular. These are Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984), approved in part, quashed in part, 487 So.2d 1032 (Fla. 1986) and Cohen v. Baxt, 473 So.2d 1340 (Fla. 4th DCA 1985) disapproved in part, approved in part, 488 So.2d 56 (Fla. 1986). It is true that the Tillman case contains the following language:

> 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.
> Tillman, supra at 1379.

The same language is quoted from Tillman in Cohen at page 1343. Respondent concludes that because both of these cases went to the supreme court and in neither case did the supreme court specifically disapprove this part of the decisions, then it is "thoroughly settled" that the word "incident" means all of the elements of a medical malpractice cause of action.

Even if this position weren't absolutely nonsensical in light of the statutory language, the position of respondent could not possibly be sustained. This court specifically dealt with the meaning of the word "incident" in this statute in Barron v. Shapiro. Therein, this court said:

> In fact, it could be argued that by using the word 'incident' the legislature envisioned that there would be some factual circumstances in which the statute would begin to run before either the negligence or the injury became known. In any event, we cannot accept Mrs. Shapiro's contention that the word 'incident' means the point in time at which the negligence should have been discovered. We believe that the reasoning of Nardone continues to be applicable to the current statute. Thus, the limitation period commences when the plaintiff should have known either of the injury or the negligent act.
> Barron, supra at 1321-22. (Emphasis supplied.)

Thus, in 1990, in the case that can most logically be described as the current leading case on this subject, this court specifically rejected the contention that discovery of the "incident" means the point in time at which the negligence should have been discovered. If it doesn't even mean the point in time at which the negligence should have been discovered, it cannot possibly mean the point in time at which negligence, causation and damages have been discovered.

In both Barron v. Shapiro and University of Miami v. Bogorff, this court rejected the contention that it would be necessary for a plaintiff to know not only that an injury had taken place but that the injury was the consequence of medical negligence. This court clearly did create an "injury in fact" standard. Regardless of whether that standard is universal, in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976) and Bogorff, this court also explained the guiding principle behind the standard. The court spoke in both of those cases of the requirement in order to initiate the running of the statute of limitations that plaintiffs be on notice of the possible invasion of their legal rights. Nardone, supra at 34, Bogorff, supra at 1002 and 1004. This measuring test is not irrelevant; it is critical.

Petitioner Sayyed Hussain, M.D. does not come before this court arguing that every notice of injury will initiate the running of the statute of limitations. For instance, in this case, had Mrs. Harr been notified only that her son had committed suicide in Florida, this petitioner would not be arguing that she had received enough information to initiate the running of the statute of limitations. We would acknowledge that would not be enough information to put her on notice of the possible invasion of her legal rights.

In this case, however, the respondent was on notice not only of the death of her son (the injury in fact) but of many other facts as well. She knew that her son had been found by law enforcement authorities hooking up a flexible hose from the exhaust of his truck to the cab of the truck. He was depressed. He was taken to a crisis center which could have had no other possible function than to assist in this depression and obvious suicidal effort. He left that facility and immediately committed suicide. Mrs. Harr knew all of these things by October 7, 1986, more than two years before the notice of intent to initiate litigation was sent. This is obviously enough information for her to suspect something went wrong at the crisis center and her son was allowed to commit suicide. This not only is enough as a matter of law to cause her to be on notice that she should

start an investigation (the alternate question proposed by the Second District Court of Appeal), but it was in fact enough for her to actually begin the investigation that led to her learning more than one year before the expiration of the statute of limitations all she needed to know to sue. It is submitted by this petitioner, in concert with petitioner HCMHC, that the statute is not intended to require that a plaintiff know everything necessary to institute suit before the statute begins to run. The decided cases of this court make it clear that it is only necessary to be on notice of a possible invasion of one's legal rights by notice either of the injury or the negligence for the statute to begin to run. It then allows two years within which to complete an investigation and bring suit. If that's not enough, there is provision in the law for the extension of that period for another 90 days. §766.104(2), Fla. Stat. (1985).

No matter how many cases are examined, no matter how much history is looked into, both the statute and this court's current decisions are clear. The long and torturous reasoning process set forth in respondent's brief is nothing more than an attempt to obscure the obvious. The obvious is that this court has said emphatically and unequivocally that it <u>does</u> <u>not</u> take knowledge of negligence to start the

running of the medical malpractice statute of limitations. Respondent is trying to argue otherwise by setting up multiple classes of conclusions to be reached and inventing a category in which one type of injury does not give notice of negligence. By assuming that category does not meet the court's test for starting the statute of limitations running, respondent is ignoring what the court has explicitly said. All of the torturous reasoning of respondent and the seven part test of the Second District Court of Appeal are unnecessary. It is only necessary to ask whether plaintiff was on notice of the injury or the negligence such that the plaintiff was on notice of a possible invasion of his or her legal rights. The court's decisions are wholly consistent and there is no reason to deviate now. However, in light of the several recent Second District Court opinions on this subject, it is obviously necessary to say this again to the district courts of appeal and it is necessary to reverse the second district's determination in this case.

There are one or two other points made in respondent's brief to which this petitioner will reply briefly.

The first of these points is respondent's argument that the case of Ash v. Stella, 457 So.2d 1377 (Fla. 1984) and the case of Peat Marwick Mitchell & Company v. Lane, 565

So.2d 1323 (Fla. 1990) contradict this petitioner's position. Respondent is wrong because she misreads Ash and Lane. It appears to be the position of respondent that these two cases stand for the proposition it is not enough to be on notice of a possible invasion of one's legal rights. The apparent reason for respondent's error is that in Ash v. Stella, although the plaintiff knew that there had been a tentative diagnosis of cancer, this knowledge did not start the statute running and in Lane, although the plaintiff knew that the IRS had issued a 90 day letter, this knowledge did not start the statute. Therefore, according to respondent, one must know that there is in fact a cause of action. This position is incorrect. In fact, both Ash and Lane stand for a very different proposition. The proposition is that where plaintiff is on notice only of a possible injury, that's not enough. Plaintiff must be on notice of an actual injury. That, in fact, is the basis of the distinction by this honorable court between the result in Moore v. Morris, 475 So.2d 666 (Fla. 1985) and the result in Barron. Contrary to the contention of respondent, it is not necessary for petitioner to argue that Barron overruled Ash sub silentio. It did not. The factual situation is simply different. And this is not a "niggling" difference. The justices who voted with the majority in Ash and Barron were not taking different positions.

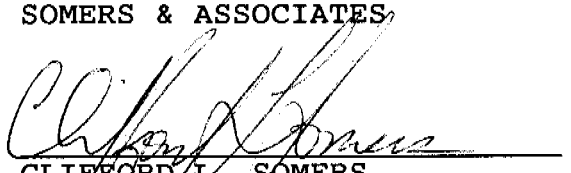
The other issue which petitioner would like to address briefly is respondent's contention concerning the "fourteen day discovery" proposition. That is, the plaintiff herein served her notice of intent to initiate litigation fourteen days after two years from October 7, 1986. Therefore, it is argued that the position of petitioner is that as a matter of law, respondent should have only been given fourteen days within which to discover what she needed to know in order to initiate the running of the statute of limitations. That obviously is not the position of petitioner. Petitioner's position is that she did in fact discover the possible invasion of her legal rights on October 7, 1986. Because she discovered all she needed to know then, the statute started to run then. The only relevance of fourteen days is that she was fourteen days too late after the expiration of two full years. No one, least of all this petitioner, would be leadheaded enough to argue that a plaintiff should only have fourteen days to discover the injury or the negligence. Any effort aimed at discrediting such a position is wasted.

CONCLUSION

Plaintiff herein was on notice of the death of her son (the injury) on October 7, 1986. She had enough additional facts to be on notice of a possible invasion of her legal rights. These are the appropriate tests and they are the ones set forth by the Florida Supreme Court. The decision of the Second District Court of Appeal herein should be reversed and the summary judgment below should be reinstated.

Respectfully submitted,

SOMERS & ASSOCIATES



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to RICHARD M. MITZEL, P.O. Box 3329, Tampa, FL 33601-3329; LEE S. DAMSKER, P.O. Box 172009, Tampa, FL 33672-0009; EDWIN J. BRADLEY, #310, 711 North Florida Avenue, Tampa, FL 33602-4499; KELLY B. GELB, Courthouse Law Plaza, #100, 700 Southeast Third Avenue, Ft. Lauderdale, FL 33316 and JOEL D. EATON, 800 City National Bank, 25 West Flagler Street, Miami, FL 33130, by mail, this 22nd day of April, 1992.

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