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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,390

PHYLLIS KAYE TANNER, individually, and
JAMES R. TANNER, individually and as
Personal Reporesentative of the Estate
of BABY BOY TANNER, deceased,

Petitioners,

vs.

ELLIE M. HARTOG, M.D.; ALBERTO DUBOY,
M.D.; HARTOG AND DUBOY, P.A.; and
LAKELAND REGIONAL MEDICAL CENTER,

Respondents.

_______________________________________/

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

**BRIEF OF AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS,
IN SUPPORT OF PETITIONERS**

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I.
STATEMENT OF THE CASE AND FACTS

This brief is filed by the Academy of Florida Trial Lawyers, as amicus curiae, in support of the position of the petitioners, who were plaintiffs below. It will rely upon the statement of the case and facts contained in the decision under review, and it will address only the issue presented by the question which the district court certified to the Court.

II.
ISSUE PRESENTED FOR REVIEW

> WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT KNOWLEDGE OF A MERE "INJURY IN FACT" OCCURRING DURING THE COURSE OF MEDICAL TREATMENT WAS SUFFICIENT TO START THE "SHOULD HAVE BEEN DISCOVERED" PROVISION OF THE STATUTE OF LIMITATIONS RUNNING AS A MATTER OF LAW.

III.
SUMMARY OF THE ARGUMENT

Because our argument must survey 15 years of decisional law, it cannot easily be summarized in a few pages here. The thrust of our argument will be that the Second District has read this Court's recent decisions in *Barron v. Shapiro*, 565 So.2d 1319 (Fla. 1990), and *University of Miami v. Borgorff*, 583 So.2d 1000 (Fla. 1991), much too narrowly -- and the legal predicate upon which the district court bottomed its decision is therefore flawed. In our judgment, the law is both subtler and considerably more reasonable than the Second District's recent announcements on the subject -- as the Third, Fourth, and Fifth Districts have recognized *after Barron* and *Bogorff* -- and neither *Barron* nor *Bogorff* deserve the rigorously literal reading which they were given by the Second District in this case.

The word "incident" in §95.11(4)(b) does not mean "injury"; it is settled that the word means a medical procedure, tortiously performed, which injures the patient -- i. e., an injury caused by negligence. The statute of limitations therefore clearly does not require that suit

be filed within two years of discovery of an "injury"; it requires that suit be filed within two years of discovery of an "injury caused by negligence" (with an outside limit upon delayed discovery of four years from the date the injury was caused by the negligent act). Put another way, the statute does not require that suit be filed within two years of discovery of an "injury in fact"; it requires that suit be filed within two years of discovery of a "legal injury" -- i. e., an "injury caused by negligence," or cause of action. That aspect of the statute is not complicated. The complication arises from the fact that some injuries provide constructive notice of negligence, and some do not. And because medically caused injuries fall into these two different categories, two different categories of cases have developed to deal with their differences.

Fairly read, and considered collectively, the numerous decisions which have construed §95.11(4)(b) over the last 15 years stand for the following propositions: (1) the word "incident" in §95.11(4)(b) means an act of medical malpractice which causes an injury -- i. e., all the elements of a completed tort; (2) the statute of limitations begins to run upon discovery of the "incident" (or, of course, when the "incident" "should have been discovered with the exercise of due diligence" -- and where the word "discovery" appears in the remainder of this paragraph, it includes that qualification); (3) discovery of the "incident" need not necessarily await discovery of each element of the tort; (4) knowledge of the negligent act which has caused an injury will start the statute of limitations running; (5) when the plaintiff has knowledge of only an "injury in fact" but the injury is reasonably ambiguous concerning its cause, the statute of limitations begins to run only upon discovery of the larger set of facts constituting the "incident" -- i. e., that the ambiguous injury was actually the consequence of a negligent act rather than some non-negligent act or a natural cause; and (6) when the plaintiff has knowledge of an injury which itself gives facial notice (or "constructive notice") that it was the probable consequence of a negligent act, the plaintiff has discovered the "incident" and the statute of limitations has begun to run.

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Barron and *Bogorff* belong in the sixth category of cases. The fifth category of cases is represented by *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 dozens of decisions like them. Our task here will be to convince the Court that, contrary to the Second District's recent readings of *Barron* and *Bogorff*, neither case was meant to overrule the numerous decisions which represent the fifth category, and that the decisions in the two different categories should be harmonized by this Court with a view to clarifying this now highly-confused area of the law.

We will also suggest that the district court's reading of §95.11(4)(b) in this case is absolutely inconsistent with this Court's decision in *Ash v. Stella*, 457 So.2d 1377 (Fla. 1984). *Ash* holds in no uncertain terms that knowedge of a fact or two which is insufficient to provide "constructive notice" of the larger set of facts constituting the "incident" does *not* trigger the statute of limitations, and that confirmation of the suspicion created by knowledge of that fact or two (in the exercise of reasonable diligence) is required before the statute of limitations begins to run. The only conceivable way in which the defendants can respond to *Ash* in reply is to assert that it must have been overruled *sub silentio* by *Barron* and *Bogorff*. To make such an assertion, however, is necessarily to assert that three justices who voted with the majorities in all three decisions changed their minds by 180 degrees between *Ash* and *Barron*. We think it far more likely that these three sets of votes were meant to be consistent, and the consistency of those votes will be demonstrated by the simple harmonization of the decisions which we will propose here.

We will also demonstrate to the Court that the plaintiffs' knowledge of the stillbirth of their child, while certainly knowledge of an "injury in fact," was clearly insufficient to put them on notice of the larger set of facts constituting the "incident" of medical malpractice upon which their suit was based. Section 95.11(4)(b) required only that the plaintiffs

exercise "due diligence" to discover their causes of action once learning of their child's stillbirth -- and, in our judgment, unless the "should have been discovered with the exercise of due diligence" provision in §95.11(4)(b) is to be written out of the statute altogether, the district court's decision in the instant case simply must be disapproved. The Court should not be content merely to disapprove the result in the instant case, however; instead, because the issue presented here is badly in need of clarification, the Court should go further and clarify the confusion created by the Second District's recent readings of *Barron* and *Bogorff*, by harmonizing those decisions with *Moore, Tillman, Cohen, Ash* (and the dozens of decisions like them), in the manner in which we will suggest here.

IV.
ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT KNOWLEDGE OF A MERE "INJURY IN FACT" OCCURRING DURING THE COURSE OF MEDICAL TREATMENT WAS SUFFICIENT TO START THE "SHOULD HAVE BEEN DISCOVERED" PROVISION OF THE STATUTE OF LIMITATIONS RUNNING AS A MATTER OF LAW.

A. Some introductory general observations.

Before we reach the more difficult specifics of the issue presented here, a few introductory general observations are in order. First, we note that the statute of limitations governing the plaintiffs' action is §95.11(4)(b), Fla. Stat. (1987), which reads in pertinent part as follows:

> An action for medical malpractice shall be commenced with 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; . . .

Second, we remind the Court that the judgment in issue here is a *summary* disposition entered in response to a motion to dismiss. In that circumstance, of course, the Court must assume the truth of all facts alleged in the plaintiffs' complaint. *See Hammonds v. Buckeye*

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Celluslose Corp., 285 So.2d 7 (Fla. 1973). The defendants' burden below was therefore a heavy one, and the standard of review here is a rigorous one -- analogous to summary judgment practice under Rule 1.510, Fla. R. Civ. P.:

> Summary judgment should be cautiously granted in negligence and malpractice suits. . . . The law is well settled in Florida that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought. . . . A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. . . .
>
> If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it. . . .

Moore v. Morris, 475 So.2d 666, 668 (Fla. 1985) (citations omitted). *Accord, Wills v. Sears, Roebuck Co.*, 351 So.2d 29 (Fla. 1977); *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966); *Visingardi v. Tirone*, 193 So.2d 601 (Fla. 1966).

In view of the language of §95.11(4)(b), and given these settled propositions governing the summary disposition of medical malpractice cases, it was the defendants' burden below to demonstrate either that the plaintiffs actually "discovered" the "incident giving rise to the action" more than two years prior to initiating litigation, or that the "incident" "should have been discovered with the exercise of due diligence" by the plaintiffs prior to that date. That demonstration had to be made *conclusively*, and as a matter of law on the allegations of the plaintiffs' complaint construed in every light most favorable to the plaintiffs. With respect to the first alternative of the statute, we note simply that the plaintiffs alleged below that they did not actually discover their potential causes of action until well *within* the two-year period preceding service of their notice of intent letters. Since the trial court was required to accept that evidence as true for the purpose of ruling on the defendants' motions to dismiss, it is clear beyond peradventure that the defendants did not

shoulder their heavy burden on the first alternative provided by the statute.

The *only* legitimate issue presented below was therefore whether the allegations of the complaint proved, as a matter of law, the second alternative provided by the statute -- that the "incident" "should have been discovered with the exercise of due diligence" more than two years prior to initiating litigation:

> We note that the record shows appellant had no "actual knowledge" which would have caused the statute to run. Thus, the critical question before the trial court at the time that it entered the summary final judgment was whether appellant "should have known by the exercise of reasonable diligence" whether he had a cause of action against appellees. . . .

Rosen v. Sparber, 369 So.2d 960, 961 (Fla. 3rd DCA 1978), *cert. denied*, 376 So.2d 76 (Fla. 1979). *See Poulos v. Vordermeier*, 327 So.2d 245 (Fla. 4th DCA 1976).

The decisional law construing "should have discovered" provisions in statutes of limitation typically holds that such a question is rarely susceptible of determination as a matter of law -- and that it must ordinarily be decided by a trier of fact. *See 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); *Leyte-Vidal v. Murray*, 523 So.2d 1266 (Fla. 5th DCA 1988); *First Federal Savings & Loan Ass'n of Wisconsin v. Dade Federal Savings & Loan Ass'n*, 403 So.2d 1097 (Fla. 5th DCA 1981); *Phillips v. Mease Hospital & Clinic*, 445 So.2d 1058 (Fla. 2nd DCA), *review denied*, 453 So.2d 44 (Fla. 1984); *Weiner v. Savage*, 407 So.2d 288 (Fla. 4th DCA 1981); *Pinkerton v. West*, 353 So.2d 102 (Fla. 4th DCA 1977), *cert. denied*, 365 So.2d 715 (Fla. 1978); *Schetter v. Jordan*, 294 So.2d 130 (Fla. 4th DCA 1974); *Burnside v. McCrary*, 382 So.2d 75 (Fla. 3rd DCA 1980); *Rosen v. Sparber*, 369 So.2d 960 (Fla. 3rd DCA 1978), *cert. denied*, 376 So.2d 76 (Fla. 1979); *Green v. Bartel*, 365 So.2d 785 (Fla. 3rd DCA 1978); *Downing v. Vaine*, 228 So.2d 622 (Fla. 1st DCA 1969), *appeal dismissed*, 237 So.2d 767 (Fla. 1970).

The reason for this rule is that, in negligence cases, there are no fixed rules for what is and what is not "reasonable care" -- or its twin sister, "due diligence." Determinations of whether a party has exercised "reasonable care" or "due diligence" under all the circumstances belong to the "conscience of the community" impaneled to make that determination, according to prevailing community standards -- not to the court to determine as a matter of law. *See, e. g., Orlando Executive Park, Inc. v. Robbins*, 433 So.2d 491 (Fla. 1983); *Grissett v. Circle K Corp. of Texas*, 593 So.2d 291 (Fla. 2nd DCA 1992); *English v. Florida State Board of Regents*, 403 So.2d 439 (Fla. 2nd DCA 1981); *Nichols v. Home Depot, Inc.*, 541 So.2d 639 (Fla. 3rd DCA 1989); *Ten Associates v. McCutchen*, 398 So.2d 860 (Fla. 3rd DCA), *review denied*, 411 So.2d 384 (Fla. 1981); *Marks v. Delcastillo*, 386 So.2d 1259 (Fla. 3rd DCA 1980), *review denied*, 397 So.2d 778 (Fla. 1981); *Holley v. Mt. Zion Terrace Apts., Inc.*, 382 So.2d 98 (Fla. 3rd DCA 1980); *Acme Electric, Inc. v. Travis*, 218 So.2d 788 (Fla. 1st DCA), *cert. denied*, 225 So.2d 917 (Fla. 1969). And with those general introductory observations behind us, we turn to the specifics.

B. The district court's misreading of *Barron* and *Bogorff*.

There are at least two important things to note about the facts here. First, the district court held that, given that the statute of limitations began to run at the instant of their child's stillbirth, the plaintiffs' action was untimely filed by a mere 19 days -- so the defendants' position here necessarily boils down to this: *as a matter of law*, the "incident" in suit "should have been discovered with the exercise of due diligence" by the plaintiffs *within a mere 19 days* of first learning of their child's stillbirth. Second, *all* that the plaintiffs knew during that 19-day period was that their child had been stillborn, and that the child's mother had been receiving medical treatment from the defendants at the time. Most respectfully, if *that* constitutes discovery of the "incident" of medical malpractice which is the subject of the plaintiffs' suit *as a matter of law*, then the Court might as well declare that the

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delayed discovery provision of §95.11(4)(b) simply does not exist.

The defendants will concede what they must, of course -- that §95.11(4)(b) *does* contain a delayed discovery provision. They will argue, however, that "discovery" of an "incident" of medical malpractice occurs *as a matter of law* upon the mere discovery of an "injury in fact" during the course of medical treatment (rather than a "legal injury," and whether the nature of the injury suggests that malpractice may have been its cause or not), and they will purport to derive this position from two recent decisions of this Court: *Barron v. Shapiro*, 565 So.2d 1319 (Fla. 1990), and *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991). A good deal of our argument here will be devoted to demonstrating that *Barron* and *Bogorff* say no such thing.

Before we turn to that demonstration, however, and to be fair to the defendants, we should note that the Second District has rendered a spate of recent decisions in which a majority of the judges considering the issue have read *Barron* and *Bogorff* in that highly restrictive fashion. *See, e. g., Goodlet v. Steckler*, 586 So.2d 74 (Fla. 2nd DCA 1991); *Rogers v. Ruiz*, 16 FLW D3076 (Fla. 2nd DCA Dec. 13, 1991); *Harr v. Hillsborough Community Medical Health Center*, 591 So.2d 1051 (Fla. 2nd DCA 1991), *review pending*; *Tanner v. Hartog*, 593 So.2d 249 (Fla. 2nd DCA 1992).

Despite the majorities' conclusions in these cases, the decisions have provoked some highly apologetic opinions and some vigorous dissents -- and at least two certifications to this Court -- so the propriety of the Second District's reading of *Barron* and *Shapiro* is far from settled there. In *Goodlet*, for example, the majority confessed its "uncertainty" about the propriety of its reading of *Barron* and *Bogorff*. And in *Rogers*, the panel split three ways. Judge Lehan concluded that, because of *Barron* and *Bogorff*, knowledge of a death which occurred during risky heart surgery constituted notice of the "incident" of malpractice as a matter of law -- notwithstanding that death was a statistically predictable consequence of non-negligently performed surgery, and notwithstanding that the surgeon told the survivors

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that the patient's heart was old and simply gave up. Judge Ryder dissented, reading *Barron* and *Bogorff* essentially as we will read them in our argument here. Judge Parker concurred with Judge Lehan's opinion, but not without some rather pointed remarks:

> 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 shut.
>
> 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 once an adverse result occurs from a medical procedure, a grieving family member 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 have happened 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 lay person that malpractice has occurred.

16 FLW at D3083.

In his dissent in the instant case, Judge Patterson voiced a similar concern:

> I respectfully dissent. I am disturbed by the trend in this area of the law which creates a fiction that a normal, but unfortunate, incident of proper medical care and treatment in the eyes of a lay person is in fact legal notice of possible malpractice. In my view, the legislature recognized such circumstances when it included the "should have been discovered with the exercise of due diligence" language in section 95.11(4)(b), Florida Statutes (1989). A party litigant should be given the opportunity to establish by competent evidence that they fall within circumstances defined by the legislature to protect unwary and uneducated persons from the harsh consequences of their

> ignorance of the pitfalls of medical treatment.

593 So.2d at 253.

In other post-*Barron* decisions of note, the Third, Fourth, and Fifth Districts have squarely *rejected* the reading of *Barron* and *Bogorff* which is presently fashionable in the Second District. The Fourth District has accepted the argument which we intend to make here, holding as follows:

> . . . On the matter of when they reasonably should have known of the injury caused by negligence, *Moore v. Morris*, 475 So.2d 666, 668 (Fla. 1985), supports the view that knowledge that one suffered injury during or subsequent to an operation, which could be supposed to have arisen out of natural causes, need not constitute notice of negligence or injury caused by negligence.

Southern Neurosurgical Associates, P.A. v. Fine, 591 So.2d 252, 256 (Fla. 4th DCA 1991).[1] Consistent with this holding, the Third District has also recently observed that "a defect at birth does not necessarily put the parents on notice of injury or of possible negligence. *Moore . . . .*" *Menendez v. Public Health Trust of Dade County*, 566 So.2d 279, 282 n. 3 (Fla. 3rd DCA 1990), *approved*, 584 So.2d 567 (Fla. 1991).

And in the most recent decision on the subject, the Fifth District declined to follow the rigorously literal reading given to *Barron* and *Bogorff* by the Second District, and accepted the argument we intend to make here, holding as follows:

> 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. On the other hand, if there is nothing about an injury that would communicate to a reasonable lay person that

[1] The Fourth District has also held (consistent with what we intend to argue here) that knowledge of an injury constitutes notice of an "incident" of malpractice if the nature of the injury reasonably suggests that negligence was its probable cause. *See Vargas v. Glades General Hospital*, 566 So.2d 282 (Fla. 4th DCA 1990).

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> the injury is more likely a result of some failure of medical care than a natural occurrence that can arise in the absence of medical negligence, the knowledge of the injury itself does not necessarily trigger the running of the statute of limitations.

Norsworthy v. Holmes Regional Medical Center, Inc., 17 FLW D868, D869 (Fla. 5th DCA Apr. 3, 1992). In short, the issue presented here is badly in need of clarification by this Court. Hopefully, a detailed review of the decisional law during the 15-year existence of §95.11(4)(b) will aid it in that task -- and it is to that analysis that we now turn.

The defendants' position here depends entirely upon a rigorously literal reading (entirely divorced from the factual contexts in which it has been uttered) of the following sentence in *Nardone v. Reynolds*, 333 So.2d 25, 32 (Fla. 1976), which is repeated in one form or another in both *Barron* and *Bogorff*:

> . . . . This Court has held that the statute of limitations in a malpractice suit commences either when the plaintiff has notice of the negligent act giving rise to the cause of action or when the plaintiff has notice of the physical injury which is the consequence of the negligent act. *City of Miami v. Brooks*, 70 So.2d 306 (Fla. 1954). . . .

Although this sentence has become the cornerstone for the Second District's recent decisions holding that "injury in fact," by itself and with very little else, is sufficient to start the "should have been discovered" provision of the statute of limitations running as a matter of law, the proposition was actually first uttered in the decisional law of this state in an entirely different context, and for an altogether different purpose -- in *City of Miami v. Brooks*, 70 So.2d 306 (Fla. 1954), which was cited in support of the proposition in *Nardone*. The purpose of the proposition was simply to incorporate the "blameless ignorance" doctrine into the law of Florida, to govern cases in which a negligent act has caused a "delayed injury" which could not have been discovered within the ordinary statute of limitations period.

The doctrine appears to have its modern origin in *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949). In that case, the plaintiff was exposed to silica dust

for approximately 30 years and he ultimately contracted the "occupational disease" of silicosis. He brought an FELA action against his railroad-employer within three years of the date he discovered that he had contracted the disease. The railroad contended that the three-year statute of limitations barred the claim, because the plaintiff obviously had acquired the slowly progressive disease more than three years prior to the time that it ultimately incapacited him.

In a passage which has been quoted by courts across the nation numerous times, the Supreme Court sided with the plaintiff:

> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date. "It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently, the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves. . . ." [citation omitted]. The quoted language, . . . seems to us applicable in every relevant particular to the construction of the federal statute of limitations with which we are here concerned. Accordingly, we agree with the view expressed by the Missouri Supreme Court on the first appeal of this case, that Urie's claim, if otherwise maintainable, is not barred by the statute of limitations.

337 U.S. at 170-71.

This doctrine was initially adopted by this Court in a medical malpractice case -- *City of Miami v. Brooks*, 70 So.2d 306 (Fla. 1954). In that case, the plaintiff received a negligent overdose of x-rays to her left heel in 1944. The overdose caused progressive deterioration

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of the tissue, which finally manifested itself to the plaintiff as an injury when the heel ulcerated in 1949. The defendant contended that the plaintiff's action was barred by the four-year statute of limitations. This Court disagreed. After quoting extensively from *Urie*, this Court held as follows:

> In other words, the statute attaches when the there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action. In the instant case, at the time of the x-ray treatment there was nothing to indicate any injury or to put the plaintiff on notice of such, or that there had been invasion of her legal rights. It is the testimony of one of the expert witnesses that injury from treatment of this kind may develop anywhere within one to ten years after the treatment, so that the statute must be held to attach when the plaintiff was first put upon notice or had reason to believe that her right of action had accrued. To hold othewise, under circumstances of this kind, would indeed be a harsh rule and prevent relief to an injured party who was without notice during the statutory period of any negligent act that might cause injury.

70 So.2d at 309.[2]

The "blameless ignorance" doctrine was applied again by this Court two years later in an "occupational disease" case like *Urie*: *Seaboard Airline Railroad Co. v. Ford*, 92 So.2d 160 (Fla. 1956). The Court quoted once again from *Urie*; it quoted extensively from *Brooks*; and it made it clear (as the United States Supreme Court had in *Urie*) that, for purposes of determining the date when the plaintiff's cause of action accrued, the date upon which the plaintiff's injury ultimately manifested itself would be considered the date upon which the

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[2] The remainder of the Court's decision in *Brooks* distinguishes the situation in which the plaintiff learns of the defendant's *negligent act* during the statutory period, before the consequences of the act become fully manifest. In such a case, the statute begins to run upon notice of the negligent act. *See, e. g., Cristiani v. City of Sarasota*, 65 So.2d 878 (Fla. 1953). *Cf. Ash v. Stella*, 457 So.2d 1377 (Fla. 1984); *Swain v. Curry*, 17 FLW D538 (Fla. 1st DCA Feb. 19, 1992). In the instant case, of course, there is no allegation that the plaintiffs learned of the defendants' *negligent acts* within the 19-day period in question, so this line of cases is inapposite here.

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plaintiff was injured:

> In City of Miami v. Brooks, supra, 70 So.2d 306, we adopted the theory of the Urie case and applied it in a non-occupational disease case where there was no visible traumatic injury at the time of the negligent act nor other circumstances by which plaintiff could have "been put on notice of his right to a cause of action * * * " at that time. And it must be held, under those decisions, that until an occupational disease has manifested itself, there has been no "injury" to start the running of the statute. . . .

92 So.2d at 154. The "blameless ignorance" doctrine is still alive and well in this state. *See, e. g., Creviston v. General Motors Corp.*, 225 So.2d 331 (Fla. 1969); *Flanagan v. Wagner, Nugent, Johnson, Roth, Romano, Eriksen & Kupfer, P.A.*, 17 FLW D155 (Fla. 4th DCA Jan. 3, 1992); *Nemeth v. Harriman*, 586 So.2d 72 (Fla. 2nd DCA 1991), *review pending*; *Lloyd v. North Broward Hospital District*, 570 So.2d 984 (Fla. 3rd DCA 1990), *review pending*. And both *Brooks* and *Ford* were recently cited with approval in *Bogorff*.

On the facts in *Brooks*, of course, and because the "blameless ignorance" doctrine was designed to protect malpractice *victims* against the loss of their undiscovered claims, it made perfect sense to hold that the statute of limitations did not begin to run on the undiscovered negligent act until such time as the "delayed injury" ultimately manifested itself. That proposition is not easily transported into the different type of factual setting presented by an "immediate injury" case, however, without some risk that the policy favoring victims would be reversed to a policy favoring negligent defendants. That, we think, is essentially what happened when the proposition was imported into *Nardone* somewhat carelessly, without the careful qualification which it deserved. It is perhaps too late to quarrel with *Nardone's* slightly misplaced reliance on *Brooks*, but we mention the anomaly nevertheless to emphasize the need for careful analysis of the true meaning of the somewhat carelessly drafted sentence upon which the defendants rely here.

In any event, until the Second District's recent, rigorously literal reading of the

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sentence in *Nardone* (and *Barron* and *Borgoff*) which spawned the confusion presently before the Court, most courts reached the common sense conclusion that *some* injuries (like the injury at issue in *Nardone*, which we will discuss *infra*) provide constructive notice of the "incident" of malpractice, but other injuries do not. For example, when a patient submits to surgery for a bad left knee and awakes with an amputated right leg, notice of the "injury" is clearly notice of the "incident" of malpractice. In contrast, when a patient submits to surgery for a bad left knee and awakes with a bad left knee, it is not at all clear that an "incident" of malpractice has occurred, and these types of cases obviously deserve different treatment. As a result, the law developed that, notwithstanding the sentence in *Nardone* upon which the district court relied below, the statute of limitations does *not* begin to run as a matter of law upon the simple discovery of an "injury in fact" -- where that injury is reasonably ambiguous as to its cause and does not facially suggest that it is an "injury caused by negligence," and where the injury therefore does not place the victim on notice of an invasion of his "*legal* rights" or on notice of a "*legal* injury," or cause of action. All that the statute requires in such a case is that due diligence be exercised to discover the cause of action, and that suit be filed within two years of discovery -- and we believe that a detailed review of the decisional law will prove that point.

Fairly read, and considered collectively, the numerous decisions which have construed §95.11(4)(b) over the last 15 years stand for the following propositions: (1) the word "incident" in §95.11(4)(b) means an act of medical malpractice which causes an injury -- i. e., all the elements of a completed tort; (2) the statute of limitations begins to run upon discovery of the "incident" (or, of course, when the "incident" "should have been discovered with the exercise of due diligence" -- and where the word "discovery" appears in the remainder of this paragraph, it includes that qualification); (3) discovery of the "incident" need not necessarily await discovery of each element of the tort; (4) knowledge of the negligent act which has caused an injury will start the statute of limitations running; (5) when

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the plaintiff has knowledge of only an "injury in fact" but the injury is reasonably ambiguous concerning its cause, the statute of limitations begins to run only upon discovery of the larger set of facts constituting the "incident" -- i. e., that the ambiguous injury was actually the consequence of a negligent act rather than some non-negligent act or a natural cause; and (6) when the plaintiff has knowledge of an injury which itself gives facial notice (or "constructive notice") that it was the probable consequence of a negligent act, the plaintiff has discovered the "incident" and the statute of limitations has begun to run.

With respect to the first proposition, we believe it is thoroughly settled that the word "incident" means not merely the "injury" but all the elements of the completed tort -- i. e., the negligent act, the injury, and the causal connection between the two:

> Discovery of the "incident giving rise to the cause of action" is the point when the statute begins to run. . . . The term "incident" . . . 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 2-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. . . .*

Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376, 1379 (Fla. 4th DCA 1984), *approved in relevant part,* 487 So.2d 1032 (Fla. 1986) (emphasis supplied). On discretionary review, this Court *approved* the Fourth District's disposition of this issue. *Florida Patient's Compensation Fund v. Tillman,* 487 So.2d 1032 (Fla. 1986). The definition of "incident" in *Tillman* was reiterated by the Fourth District in *Cohen v. Baxt,* 473 So.2d 1340 (Fla. 4th DCA 1985), *approved in relevant part,* 488 So.2d 56 (Fla. 1986). On discretionary review, this Court once again *approved* the Fourth District's reiterated disposition of the issue. *Florida Patient's Compensation Fund v. Cohen,* 488 So.2d 56 (Fla. 1986).

There are numerous additional decisions which define the word "incident" in precisely the same way. *See, e. g., Lloyd v. North Broward Hospital District*, 570 So.2d 984 (Fla. 3rd DCA *1990), review pending*; *Williams v. Spiegel,* 512 So.2d 1080 (Fla. 3rd DCA 1987),

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quashed in part on other grounds, 545 So.2d 1360 (Fla. 1989); *Jackson v. Lytle,* 528 So.2d 95 (Fla. 1st DCA 1988); *Elliot v. Barrow*, 526 So.2d 989 (Fla. 1st DCA), *review denied,* 536 So.2d 244 (Fla. 1988); *Florida Patient's Compensation Fund v. Sitomer*, 524 So.2d 671 (Fla. 4th DCA), *review dismissed*, 531 So.2d 1353 (Fla. 1988), *and quashed in part on other grounds*, 550 So.2d 461 (Fla. 1989); *Scherer v. Schultz,* 468 So.2d 539 (Fla. 4th DCA 1985).[3]

With the word "incident" thus defined, the statute of limitations clearly does not require that suit be filed within two years of discovery of an "injury"; it requires that suit be filed within two years of discovery of an "injury caused by negligence" (with an outside limit upon delayed discovery of four years from the date the injury was caused by the negligent act). Put another way, the statute of limitations does not require that suit be filed within two years of discovery of an "injury in fact"; it requires that suit be filed within two years of discovery of a "legal injury" -- i. e., an "injury caused by negligence," or cause of action. That aspect of the statute is not particularly complicated.

Although this aspect of the statute should not be particularly complicated, the district court managed to read this aspect of the statute in two different and inconsistent ways, both of which are inconsistent with the plain language of the statute. In effect, it held that the statute provides a plaintiff two years *within* which to discover a cause of action. This reading of the statute is clearly untenable. The statute plainly provides that a plaintiff has *four* years *within* which to discover a cause of action, and two years *from* the date of discovery in which to file an action (with an outside limit of four years from the date the injury was caused by negligence). The district court also announced that the statute begins to run when the plaintiff is on notice of facts sufficient to suggest "that a timely investigation should

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[3] While some of these decisions fail to articulate carefully the difference between our propositions (5) and (6), and may therefore be too broad in announcing that *discovery* of the "incident" occurs only when all elements of the "incident" are discovered, their *definition* of the word "incident" is not rendered suspect for that reason alone.

commence to discover additional facts needed to support an action against the appropriate health care providers." *Tanner, supra* at 252. This reading of the statute is also clearly untenable. The statute plainly provides that it begins to run, not upon notice that an investigation should be commenced, but when the cause of action is discovered (or "should have been discovered") during the course of that investigation. Both positions announced by the district court are therefore plainly inconsistent with the language of the statute, and require that its "delayed discovery" provision be written entirely out of the statute.

We repeat, with the word "incident" defined as a medical procedure, tortiously performed, which injures the patient, the statute clearly does not require that suit be filed within two years of discovery of an "injury in fact"; it requires that suit be filed within two years of discovery of a "legal injury," or cause of action. And *that* aspect of the statute is relatively straightforward. The complication arises from the fact that some injuries provide constructive notice of negligence (and therefore a "legal injury"), and some do not. And because medically caused injuries fall into these two different categories, two different categories of cases have developed to deal with their differences -- the categories represented by the fifth and sixth propositions which we have set out to prove here.

Tillman and *Cohen* illustrate the fifth proposition. In both *Tillman* and *Cohen*, the patients sought medical treatment for bad knees, and they came out of the treatment with bad knees (and other complications). Both clearly knew of their "injuries" at the outset; however, the nature of the injuries was such that the injuries themselves did not necessarily point to malpractice, and neither Mr. Tillman nor Mr. Cohen discovered until much later that their ambiguous injuries were actually "injuries caused by negligence." And because this Court held in both *Tillman* and *Cohen* that the statute of limitations did not begin to run as a matter of law upon discovery of the "injury," but did properly begin to run as a matter of fact on the subsequent discovery of the larger set of facts constituting the "incident," both cases clearly demonstrate that the simple discovery of an "injury" is not necessarily an

automatic discovery of the "incident" itself.

Of course, both *Tillman* and *Cohen* simply follow this Court's earlier decision in *Moore v. Morris*, 475 So.2d 666 (Fla. 1985), which makes the point with considerably greater clarity. In that case, a baby suffered fetal distress and a severe medical crisis after delivery, resulting in some immediate injury to the child, and additional injury which ultimately manifested itself as mental retardation and abnormal development thereafter -- all of which was known to the parents. Because the parents knew of the initial injury (but not its entire extent), the Third District affirmed the summary judgment entered on the defendant's statute of limitations defense. This Court quashed that decision -- noting, in effect (and with language which is particularly appropriate to the point we are attempting to make), that not every injury carries with it its own obvious notice of malpractice necessary to start the statute of limitations running upon its infliction:

> 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 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 include notice of* negligence or *injury caused by negligence.*

Moore, supra at 668 (emphasis supplied).

We have emphasized the phrase "injury caused by negligence" for a purpose, and we believe this Court chose the phrase carefully for the same purpose. In our judgment, this passage, with its carefully chosen phraseology, asserts that not every known injury which occurs during medical treatment automatically starts the statute of limitations running -- that only an injury which is obviously an "injury caused by negligence," and which cannot be explained on any other non-negligent or natural ground, is sufficient to put a patient on

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constructive notice of the "incident" -- i. e., "an injury caused by negligence."[4]

There are additional decisions which make essentially the same point: that knowledge of an "injury" which does not itself give fair notice that it was the probable consequence of a negligent act does not automatically start the statute of limitations running -- that, where the "injury" is reasonably ambiguous concerning its cause, the statute of limitations begins to run only upon discovery that the ambiguous "injury" was actually the consequence of a negligent act rather than a non-negligent act or a natural cause. The point is nicely made in Judge Hubbart's opinion in *Almengor v. Dade County,* 359 So.2d 892, 894 (Fla. 3rd DCA 1978) -- which, incidentally, was quoted by this Court with *express approval* in *Moore v. Morris, supra*:

> . . . There is some evidence in the record that during this time the plaintiff was aware or should have been aware that the baby was born mentally retarded and thereafter showed signs of mental retardation and abnormal development. We do not believe, however, that this evidence put the plaintiff on notice as a matter of law that the baby was injured during birth because such evidence just as reasonably could have meant that the baby had been born with a congenital defect without any birth trauma. See *Salvaggio v. Austin,* 336 So.2d 1282 (Fla. 2d DCA 1976).

As the foregoing passage suggests, the Second District reached essentially the same conclusion in *Salvaggio v. Austin,* 336 So.2d 1282 (Fla. 2nd DCA 1976). In that case, the defendant-surgeon failed to remove a drainage tube from the plaintiff's breast after a

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[4] The Fifth District recently agreed with this reading of *Moore*, noting as follows:

> . . . Concededly, the *Morris* court also noted that their conclusion that the parents did not have notice was "particularly true where . . . the baby physically appeared to have made speedy and complete recovery" (*i. e.*, there was no "injury") but that is plainly not the focus of the court's reasoning.

Norsworthy v. Holmes Regional Medical Center, Inc., 17 FLW D868, D869 (Fla. 5th DCA Apr. 3, 1992).

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mammoplasty, causing an "injury" which she experienced as continuous post-operative pain. The trial court entered summary judgment on the defendant's statute of limitations defense, ruling that notice of the injury alone started the statute of limitations running against the plaintiff's malpractice claim. On appeal, the district court reversed the defendant's summary judgment, explaining as follows:

> In *Nardone, supra*, the plaintiffs were barred not because of any knowledge of negligence on the part of the physician, but because the condition of the plaintiff child was *so obvious when he was discharged from the hospital that notice of the consequences was imputed*, thereby initiating the running of the statute of limitations. . . .
>
> . . . Particularly important for the trial court on remand is the consideration of when Mrs. Salvaggio was aware of or had notice of the physical ailment which is the alleged consequence of the negligent act. [Citations omitted]. Since the pain experienced by Salvaggio constitutes a factual question as to whether it was sufficient notice *of the consequences of the alleged negligence* of Austin, summary judgment is precluded where such a genuine issue of material fact exists. [Citations omitted].

336 So.2d at 1283-1284 (emphasis supplied). *Salvaggio* was also cited with approval by this Court in *Moore v. Morris, supra.*

Almengor and *Salvaggio* are not isolated cases; we have highlighted them here simply because they are expressly approved in *Moore*. In fact, there are numerous additional decisions which support the sensible distinction which we are attempting to draw here between (1) medical injuries which carry their own constructive notice that they are the consequence of a negligent act, and (2) ambiguous injuries which do not provide constructive notice of the "incident." The Fifth District's decision in *Leyte-Vidal v. Murray*, 523 So.2d 1266, 1267 (Fla. 5th DCA 1988), contains a representative explanation of the point:

> The statute of limitations in a malpractice suit begins to run either when the plaintiff has notice of the negligent act giving rise to the cause of action, or when the plaintiff has notice of the physical injury which is the consequence of the negligent act.

> *Moore v. Morris*, 475 So.2d 666 (Fla. 1985); *Nardone v. Reynolds*, 333 So.2d 25 (Fla. 1976) . . . . *Knowledge of an injury alone does not necessarily put a plaintiff on notice that the injury was caused by the negligence of another. Such knowledge must be accompanied by either actual or constructive knowledge that the injury was caused by a negligent medical procedure to trigger the limitations period.* . . . Where there is a factual question as to notice or discovery in a medical malpractice action, it is for the jury to decide when the statute of limitation commences. *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); . . .

(Emphasis supplied). Since this passage makes our point in a nutshell, we think the district court got it exactly right in *Leyte-Vidal*.

There are a number of additional decisions which say essentially the same thing: *See, e. g., Norsworthy v. Holmes Regional Medical Center, Inc.*, 17 FLW D868 (Fla. 5th DCA Apr. 3, 1992); *Southern Neurosurgical Associates, P.A. v. Fine*, 591 So.2d 252 (Fla. 4th DCA 1991); *Florida Patient's Compensation Fund v. Sitomer*, 524 So.2d 671 (Fla. 4th DCA), *review dismissed*, 531 So.2d 1353 (Fla. 1988), *and quashed in part on other grounds*, 550 So.2d 461 (Fla. 1989); *Jackson v. Lytle*, 528 So.2d 95 (Fla. 1st DCA 1988); *Elliot v. Barrow,* 526 So.2d 989 (Fla. 1st DCA), *review denied*, 536 So.2d 234 (Fla. 1988); *Sewell v. Flynn,* 459 So.2d 372 (Fla. 1st DCA 1984), *review denied*, 471 So.2d 43 (Fla. 1985); *Tetstone v. Adams*, 373 So.2d 362 (Fla. 1st DCA 1979), *cert. denied*, 383 So.2d 1189 (Fla. 1980); *Eland v. Aylward*, 373 So.2d 92 (Fla. 2nd DCA 1979); *Swagel v. Goldman,* 393 So.2d 65 (Fla. 3rd DCA 1981); *Schaffer v. Lehrer*, 476 So.2d 781 (Fla. 4th DCA 1985); *Scherer v. Schultz*, 468 So.2d 539 (Fla. 4th DCA 1985); *Brooks v. Cerrato,* 355 So.2d 119 (Fla. 4th DCA), *cert. denied*, 361 So.2d 831 (Fla. 1978).

All of which brings us to the decisions upon which the district court relied in the instant case. Although they certainly reach different results than the decisions discussed above, the results are harmonious with the six propositions which we have set out to prove

here; and they simply represent the sixth proposition -- that when the plaintiff has knowledge of an injury which itself gives fair notice that it was the probable consequence of a negligent act, the plaintiff has constructive notice of the "incident," and the statute of limitations has begun to run.

The leading decision in this line of authority is, of course, *Nardone v. Reynolds,* 333 So.2d 25 (Fla. 1976). In that case, this Court wrote that "the statute of limitations in a malpractice suit commences either when the plaintiff has notice of the negligent act giving rise to the cause of action or when the plaintiff has notice of the physical injury which is the consequence of the negligent act." 333 So.2d at 32. This sentence -- extracted from its context and considered entirely by itself, and with the phrase qualifying the word "injury" entirely ignored -- might provide some arguable support for the district court's decision. There is far more to *Nardone*, however, than this language alone.

In *Nardone*, the 13-year old patient suffered from vision problems and headaches. He underwent several brain surgeries, and his condition improved so significantly that his parents were told he could go home in two weeks and have a birthday party. It was only *after* the significant improvement that the defendants attempted a contraindicated diagnostic procedure which had catastrophic effects. The procedure left the child totally blind, irreversibly brain damaged, and comatose. As this Court described it, "the injury was patent." 333 So.2d at 40. On *those* facts, of course, it was painfully *obvious* that the diagnostic procedure had been badly botched. And it was on *those* facts that this Court held that the statute of limitations began to run upon the claim of the negligently performed diagnostic procedure when the severe injuries which were its obvious consequence were discovered. In other words, because the nature of the injury was such that most reasonably intelligent persons would conclude from the injury itself that it was, in the words of the decision itself, "the consequence of [a] negligent act," rather than an injury which may have some other non-negligent explanation, discovery of the injury was, as a matter of both logic

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and law, discovery of the larger "incident" itself -- i. e., an injury caused by medical malpractice.

Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990), is similar. In that case, the patient underwent routine colon surgery, from which he developed an infection -- and four months later he was blind. Once again, as in *Nardone*, it was obvious from the nature of the ultimate injury that the colon surgery had been botched, and the injury itself therefore gave fair notice of a potential malpractice claim. As this Court put the point to emphasize the obviousness of the "notice" inherent in this "patent" injury: "As Mrs. Shapiro put it, her husband went in for an operation on his colon and came out blind." 565 So.2d at 1321. In our judgment, the teaching of *Barron* is simply this: when it is obvious from the nature of an injury suffered by a patient that negligence is its probable cause, discovery of the injury is necessarily discovery of the "incident" and starts the statute of limitations running against the claim, whether the particulars of the negligent act itself have actually been discovered or not. *Barron* simply cannot be read to mean that the Court intended to overrule *Moore v. Morris* (or *Tillman* or *Cohen*) -- especially when the Court expressly relied upon and approved *Moore* in its decision, and simply distinguished it in favor of applying *Nardone* because Mr. Shapiro's ultimate blindness was obviously the consequence of a negligent act.

This Court's latest decision on the subject is also consistent with the six propositions we have set out to prove here. In *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991), a child had leukemia, which was in remission. Shortly after the administration of methotrexate in 1972, the child lapsed into a coma, and within months was a severely brain-damaged quadriplegic. That same year, the child's parents read a medical journal article linking methotrexate treatment of leukemia to brain damage. By 1977, the parents were also on constructive notice from medical opinion letters in the child's medical records that the methotrexate was possibly the cause of their child's dramatically changed condition. On those facts, this Court held that the parents were on notice of the methotrexate "incident"

as a matter of law long before finally filing their complaint in 1982.

In the course of reaching that conclusion, this Court reiterated what it had said in *Barron*, in which it "reaffirmed the principle set forth in *Nardone* and applied in *Moore v. Morris*, . . ." 583 So.2d at 1002. The Court then observed that the "drastic" change in the child's condition -- from leukemia in remission to brain-damaged and quadriplegic within a short period of three months -- was the type of "injury" (like the "patent" injuries at issue in *Nardone* and *Barron*) which gave fair notice that it was the probable consequence of a negligent act, and that the plaintiffs were therefore on constructive notice of the "incident" when they knew of the unambiguous injury. That is consistent, of course, with the manner in which we have attempted to harmonize the cases here. In fact, we think *Bogorff* expressly validates the manner in which we have harmonized the cases here, because in the passage quoted above, the Court expressly recognized the continuing validity of *Moore v. Morris* and its principal observation that not every untoward event which occurs during medical treatment automatically "impute[s] notice of negligence or injury caused by negligence" as a matter of law.

That *Moore v. Morris* is still alive and well is also underscored in *Bogorff* by the Court's treatment of the Bogorffs' alternative contention, that their child's "injury" was an ambiguous injury of the type involved in *Moore*:

> We acknowledge that Adam's condition, which the Bogorffs now attribute to intrathecal methotrexate treatment, might not have been easily distinguishable from the effects of leukemia on his system. The knowledge required to commence the limitation period, however, does not rise to that of legal certainty [citation omitted]. Plaintiffs need only have notice, through the exercise of reasonable diligence, of the possible invasion of their legal rights. [Citations omitted]. The Bogorffs were aware not only of a dramatic change in Adam's condition, but also of the possible involvement of methotrexate. Such knowledge is sufficient for accrual of their cause of action. Furthermore, because knowledge of the contents of accessible medical records is imputed, the Bogorffs had constructive knowledge of medical

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> opinion that the drug may have contributed to the injury in 1977. In either event, the Bogorffs had sufficient knowledge, actual or imputed, to commence the limitation period more than four years prior to filing their complaint in December, 1982. . . .

583 So.2d at 1004. In other words, even if the child's "injury" had been an ambiguous event of the type involved in *Moore,* the plaintiffs knew much, much more; they knew of *both* the ambiguous injury *and* two red flags marking the very claim upon which suit was ultimately brought, the contribution to the injury caused by the defendants' use of methotrexate -- and the three facts *in combination* put them on notice of a possible cause of action, notwithstanding that the injury, by itself, may not have been sufficient to start the statute of limitations running.

All things considered, the *Bogorff* decision fully supports the six propositions which we have set out to prove here. It designates knowledge of the "injury" as a trigger for the statute of limitations only when the "injury" itself gives fair notice that it was the probable (or maybe "possible") consequence of a negligent act, and it recognizes the continuing validity of *Moore v. Morris* (and, implicitly, *Tillman* and *Cohen*) where ambiguous injuries are concerned.[5] It also acknowledges that, where an injury is ambiguous as to its cause, knowledge of something *more* (and considerably more specific) than the mere fact of "injury" is required to start the statute of limitations running. And there is nothing in *Bogorff* which even arguably purports to overrule the definition of the word "incident" which this Court approved in *Tillman* and *Cohen* -- "(1) a medical procedure; (2) tortiously performed; (3) which injures (damages) the patient."

In short, the word "incident" means (1) a medical procedure (2) tortiously performed

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[5] The continuing validity of *Moore v. Morris* was also recently recognized in *Menendez v. Public Health Trust of Dade County*, 566 So.2d 279, 282 n. 3 (Fla. 3rd DCA 1990), *approved*, 584 So.2d 567 (Fla. 1991), in which the court observed: "a defect at birth does not necessarily put the parents on notice of injury or of possible negligence. *Moore*; *Almengor*." As the citation reflects, this Court approved that decision.

(3) which causes injury or damage to the patient -- and *discovery* of that "incident" may occur in different ways, depending upon whether the injury is ambiguous as to its cause or obviously the result of negligence. If the injury is obviously the result of negligence, then the plaintiff is on constructive notice of the "incident" as a matter of law. But if the injury is ambiguous as to its cause, if it could have been the result of a natural cause or the consequence of non-negligent treatment, then the statute does not begin to run until the larger set of facts constituting the "incident" is discovered, or when that set of facts "should have been discovered with the exercise of due diligence." And unless *Barron* and *Bogorff* were meant to overrule *Moore*, *Tillman*, and *Cohen*, that simply has to be the law -- and knowledge of a mere "injury in fact," without more, does not automatically start the statute of limitations running on every "legal injury" suffered by a victim of medical malpractice.

The defendants may contend that our effort to harmonize the decisions of this Court runs afoul of the following language in *Barron* (which is repeated in *Bogorff*):

> . . . The district court of appeal misinterpreted *Moore* when it said that knowledge of physical injury alone, without knowledge that it resulted from a negligent act, does not trigger the statute of limitations.

565 So.2d at 1321. We disagree that this languge is inconsistent with the six propositions we have set out to prove here. The district court in *Barron did* misstate the law "when it said that knowledge of physical injury alone, without knowledge that it resulted from a negligent act, does not trigger the statute of limitations." *Knowledge* of *both* the injury and the negligent act has never been absolutely required to trigger §95.11(4)(b). While knowledge of both the injury and the negligent act certainly triggers the statute, knowledge of the negligent act alone will also trigger the statute. And knowledge of the injury, without knowledge of the negligent act, may also trigger the statute -- *if* the nature of the injury is such that it provides constructive notice of the negligent act (as did the injuries in *Nardone*, *Barron* and *Bogorff*), because such an injury places the victim on notice of the invasion of his

or her legal rights. The relevant question in such a case is whether, given knowledge of the injury, the "incident" (or cause of action) "should have been discovered with the exercise of due diligence" -- and 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, and therefore a legal injury, then the statute of limitations begins to run.

This, incidentally, is precisely what the Fifth District recently held when confronted with the sentence from *Barron* quoted above:

> In discussing *Moore v. Morris* in the *Barron* case the supreme court did say:
>
> > The district court of appeal misinterpreted *Moore [v. Morris]* when it said that knowledge of physical injury alone, without knowledge that it resulted from a negligent act does not trigger the statute of limitations.
>
> *Barron*, 565 So.2d at 1321. We do not believe the supreme court intended by this statement to say that knowledge of physical injury alone will always trigger the statute of limitations; merely that it is erroneous to suppose that knowledge of injury alone cannot trigger the statute. Some injuries, as in *Nardonne* [sic], *Barron* and *Bogorff*, speak for themselves and supply notice of a possible invasion of legal rights. That is not to say, however, that all injuries carry that same communication. As the fourth district recently said in *Southern Neurosurgical Associates, P.A. v. Fine*, 591 So.2d 252 (Fla. 4th DCA 1991):
>
> > *Moore v. Morris,* 475 So.2d 666, 668 (Fla. 1985) supports the view that knowledge that one suffered injury during or subsequent to an operation, which could be supposed to have arisen out of natural causes, need not constitute notice of negligence or injury caused by negligence.
>
> *Id.* at 256.

Norsworthy v. Holmes Regional Medical Center, Inc., 17 FLW D868, D869 (Fla. 5th DCA Apr. 3, 1992).

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In other words, as the 15-year history of the decisional law makes clear, although some injuries provide their own constructive notice of malpractice, not every injury suffered in the course of medical treatment constitutes notice of the invasion of the injured person's *legal rights*. Some medical injuries are extremely subtle and terribly confusing as to their cause. For example, like the stillborn child in the instant case, babies are not infrequently born with brain damage from natural causes and unavoidable non-negligent causes, and knowledge of the mere fact that a baby is stillborn or brain damaged, without more, hardly puts the parents on constructive notice of a cause of action for medical malpractice. Rather, the parents are required to exercise due diligence in determining the cause of their baby's injury, and the statute begins to run only when the negligent cause of the injury is discovered or "should have been discovered in the exercise of due diligence." *See, e. g., Moore v. Morris*, 475 So.2d 666 (Fla. 1985); *Menendez v. Public Health Trust of Dade County*, 566 So.2d 279 (Fla. 3rd DCA 1990), *approved*, 584 So.2d 567 (Fla. 1991); *Almengor v. Dade County*, 359 So.2d 892 (Fla. 3rd DCA 1978). That is what §95.11(4)(b) says -- and to start the statute of limitations running in *every* case, as a matter of law, upon mere knowledge of an "injury in fact," whether the injury provides constructive notice of a *legal* injury or not, is to write this "delayed discovery" provision completely out of the statute.

The point is important enough that it deserves to be reinforced, at the risk of belaboring it. Several of the decisional law's "bad knee" cases will serve that purpose. 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), the plaintiff underwent surgery for an unstable knee, and he came out of surgery with an unstable knee. He was aware of his "injury," the post-operative instability of his knee, almost immediately after the surgery -- but because his post-operative condition was essentially the same as his pre-operative condition, the nature of the post-operative "injury" did not necessarily suggest that it was an "injury caused by negligence." The plaintiff exercised reasonable diligence to discover the cause of

his injury thereafter, and filed suit within two years of discovering that his post-operative condition was the result of one or more acts of negligence committed during the surgery. On those facts, the district court held that mere knowledge of the post-operative "injury," by itself (and with no substantial clue that malpractice may have been its cause), was not enough to trigger the statute of limitations as a matter of law -- and this Court thereafter approved that conclusion.

Cohen v. Baxt, 473 So.2d 1340 (Fla. 4th DCA 1985), *approved in relevant part*, 488 So.2d 56 (Fla. 1986), is similarly illustrative. In that case, the plaintiff had a bad knee, the cause of which was misdiagnosed by the defendant. Because of the misdiagnosis, unnecessary anti-coagulation therapy was prescribed which caused blood clots in the plaintiff's kidneys, and contraindicated exercises were prescribed which aggravated the initial injury. Although the plaintiff knew of the blood clots in his kidneys and that his initial injury had become worse, he did not file suit until after he learned of the real nature of his initial injury from another physician, which put him on notice that the blood clots and the aggravation of his injury were unnecessarily caused by the defendant's misdiagnosis of his initial injury. On those facts, the district court held that mere knowledge of the post-diagnostic injuries, by itself (and with no clue whatsoever that the defendant had misdiagnosed the initial injury), was not enough to trigger the statute of limitations as a matter of law -- and this Court thereafter approved that conclusion.

Sewell v. Flynn, 459 So.2d 372 (Fla. 1st DCA 1984), *review denied*, 471 So.2d 43 (Fla. 1985), is similarly illustrative. In that case, the plaintiff underwent the surgical implantation of a prosthesis to correct a previously-injured problem knee, and he came out of surgery with a problem knee. Various causes of the lack of success in the surgery were suggested to him, and the defendant even corrected a misplaced tendon with a subsequent surgery. The knee did not improve, however, and no physician was able to determine the real cause of the problem until, during additional surgery performed by another physician, it was

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discovered that the defendant had initially installed the plaintiff's prosthesis upside-down. On those facts, the district court held that mere knowledge of the post-surgical "injury," by itself (and with no clue whatsoever that the cause of the injury was an upside-down prosthesis), was not enough to trigger the statute of limitations as a matter of law -- and this Court declined to review that conclusion.

A similar, highly illustrative case was recently decided by the Fifth District. In *Norsworthy v. Holmes Regional Medical Center, Inc.*, 17 FLW D868 (Fla. 5th DCA Apr. 3, 1992), a small child caught a viral infection (known as the "croup"), which caused a condition known as "subglottic stenosis" (or narrowing of the airway below the vocal cords). The condition prevented the child from breathing; emergency intubations were necessary; and a tracheotomy was ultimately performed. The child was discharged from the hospital with the same condition for which he had been admitted, "subglottic stenosis" -- and with his tracheotomy in place, with a prediction that the tracheotomy could be reversed in a few weeks. The prediction proved much too optimistic, however. The child's parents changed physicians, and upon inquiry by the parents, the new physician told them that their initial physician's medical care had been perfectly appropriate.

The parents then moved to Philadelphia because of a change in jobs, and engaged the services of a third physician to attempt a reversal of the tracheotomy (which required multiple surgeries over many, many months). Upon additional inquiry by the parents, this physician ultimately concluded that the child's post-operative "subglottic stenosis" had a different cause than the cause of his pre-operative "subglottic stenosis" -- that the post-operative "subglottic stenosis" was not caused by the virus, but by the negligence of the first physician in creating too much scar tissue by performing too many intubations before doing the tracheotomy. Suit was filed shortly thereafter, but more than two years from the date the child was discharged with his post-operative "subglottic stenosis." The trial court accepted the reading of *Barron* and *Bogorff* which the district court adopted in the instant

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case, and entered judgment for the defendant on the ground that the statute of limitations began to run as a matter of law when the parents knew of the child's post-operative "subglottic stenosis" -- notwithstanding that the nature of the highly ambiguous injury gave them no clue whatsoever that it was an "injury caused by negligence" rather than an injury caused by the virus, and notwithstanding that they had exercised exceptional diligence in attempting to discover the cause of the injury thereafter, by obtaining the opinions of two independent medical experts on the subject.

The district court disagreed with the trial court's conclusion and reversed the judgment. It held that, as this Court observed in *Moore* (and implicitly in *Tillman* and *Cohen*), not every "injury" which is suffered during the course of medical treatment suggests negligence as its cause, and that *Barron* and *Bogorff* therefore cannot reasonably be read to mean what the district court said they mean in the instant case -- that mere knowledge of *any* "injury in fact," whether it provides constructive notice that negligence was its cause or not, starts the "should have been discovered with the exercise of due diligence" provision of §95.11(4)(b) running as a matter of law. Most respectfully, because some medical injuries are considerably subtler than the injuries at issue in *Nardone*, *Barron*, and *Bogorff*, the law simply must be considerably subtler than the district court found it to be in the instant case, or the "delayed discovery" provision of §95.11(4)(b) simply does not exist. We respectfully submit that the *Norsworthy* court harmonized this Court's decisions properly, and we commend its analysis of the decisions to the Court as a correct statement of the law in this highly confused area.

Our point is also nicely made by the facts in the instant case. In this case, all that the plaintiffs knew during the brief 19-day "window" which the district court's stringent reading of *Barron* and *Bogorff* allows her here was this: that their child had been stillborn while the mother was under the medical care of the defendants. There is no notice in the stillbirth itself, of course, of a cause of action for medical malpractice against anyone, because

miscarriages and stillbirths frequently occur from natural causes alone. Perhaps, with the exercise of *exceptional* diligence, the plaintiffs could have learned that the stillbirth was caused by the defendants' malpractice within the mere 19 days which the district court allowed them in which to make that discovery -- but if the the Court will forgive us a rhetorical question at this point, why shouldn't the law allow them at least 20 days or more to gather that additional information? The answer is, of course, that it does. All that §95.11(4)(b) required is that the plaintiffs exercise "due diligence" to discover their cause of action, and it plainly states that, if reasonable diligence was exercised, the plaintiffs had two years from the date they discovered their cause of action in which to serve their notice of intent letters. And to conclude, as the district court held, that the "should have been discovered with the exercise of due diligence" provision of §95.11(4)(b) was triggered *as a matter of law* the instant the plaintiffs learned of their child's stillbirth is, we respectfully submit, to write this provision completely out of the statute.

Most respectfully, *Nardone*, *Barron* and *Bogorff* simply cannot mean what the district court said they mean where *ambiguous* injuries of the type in issue here are concerned, and they simply must be harmonized with *Moore*, *Tillman*, and *Cohen* (and the dozens of additional decisions like them) in the manner in which we have attempted to harmonize the decisions here -- or the Court might as well declare that the "delayed discovery" provision of §95.11(4)(b) simply does not exist. The provision *does* exist, however, so the latter conclusion is simply unavailable here. As a result, the only option available to the Court is to bring some sense to this now highly-confused area of the law by harmonizing the decisions along the lines we have suggested here.

There are several additional reasons why the decisions need to be harmonized as we have suggested. If the district court is correct that the statute of limitations begins to run as a matter of law upon discovery of an ambiguous "injury in fact" which does not provide constructive notice of malpractice, then the statute will necessarily begin to run in such cases

where the facts support only a mere suspicion that the injury was caused by negligence, rather than confirmation (or, at minimum, a reasonable probability) that the injury was the result of malpractice. Given the plain language of §95.11(4)(b), however, knowledge of facts creating a suspicion of malpractice simply do not trigger the statute; instead, such knowledge triggers only the requirement that the plaintiff exercise "due diligence" to "discover" the malpractice, and the limitations period is not triggered until the suspicion is confirmed by discovery of the cause of action.

If that were not plain enough from the "delayed discovery" provision of the statute itself, it was certainly made clear by this Court in *Ash v. Stella*, 457 So.2d 1377, 1379 (Fla. 1984):

> We now reach the question of whether the trial court properly granted summary judgment in favor of Dr. Ash. 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.* 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. *Further evidence may reveal that, without knowledge of the specific nature of the tumor, no medical expert could have conclusively stated that the cancer did, in fact, exist at the time of Dr. Ash's alleged misdiagnosis. 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).

Given the clarity of this Court's holding in *Ash* and the absolute inconsistency of that holding with the district court's reading of §95.11(4)(b) in the instant case, the only conceivable way in which the defendants can respond to *Ash* in reply is to assert that it must have been overruled *sub silentio* by *Barron* and *Bogorff*. To make such an assertion, however, is necessarily to assert that three justices of this Court changed their minds by 180 degrees between 1984 and 1990 -- because Justices Overton, McDonald, and Ehrlich, who voted with the majorities in both *Barron* and *Bogorff*, also voted with the majority in *Ash*. We think it far more likely that the three votes of these three justices were meant to be consistent, and the consistency of those votes is demonstrated by the simple harmonization of the decisions which we have proposed here. Most respectfully, if mere suspicion of a cause of action for medical malpractice, however justified it turns out to have been in hindsight, is not enough to start the "should have been discovered" provision running as a matter of law, as *Ash* squarely holds, then knowledge of a mere "injury in fact" which is reasonably ambiguous as to its cause, and which therefore creates only a suspicion of a cause of action for medical malpractice, should not be enough to start the "should have been discovered" provision running as a matter of law either.

And if *Ash* is not enough to make that point, this Court's more recent decision in *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So.2d 1323 (Fla. 1990) -- which was decided less than six weeks after *Barron* was decided -- should put the question to rest. In that case, the taxpayers received a "90-day letter" from the IRS advising them of a tax deficiency. The taxpayers contested the assessment, and suffered an adverse decision in the United States Tax Court. More than two years from the date they received the "90-day letter," but less than two years from the date they received the Tax Court's judgment, the taxpayers filed a malpractice action against their accountants. The accountants contended that the "should have been discovered" provision of §95.11(4)(a) began to run as a matter of law upon

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receipt of the "90-day letter." The Third District disagreed. It noted that, until the taxpayers received a decision from the Tax Court they knew only that the accountants "*might* have been negligent," and that the statute therefore did not begin to run until their suspicions were confirmed by the Tax Court's judgment. 565 So.2d at 1325 (emphasis supplied). Consistent with its earlier decision in *Ash*, this Court approved the Third District's decision, holding in effect that mere suspicion of a negligently caused injury, without confirmation, was not enough to trigger the "should have been discovered" provision of the statute of limitations for professional malpractice.

To be sure, *Peat, Marwick* is distinguishable from the instant case in one small detail -- because the uncertainty created by the "90-day letter" in that case was over whether the plaintiffs had actually suffered an injury, rather than over whether the defendants were a negligent cause of a known, but ambiguous injury -- but in our judgment, that simply has to be a distinction without a difference. For one thing, it has to be a distinction without a difference because the uncertainty in *Ash* was over whether the defendant was *negligent*, rather than over whether the plaintiff had actually suffered an "injury." More importantly, the point of both cases is clearly broader than the details to which these niggling distinctions relate. Their point is that knowledge of a fact which gives rise to a mere suspicion of a potential cause of action is not enough, by itself, to start a "should have been discovered" provision in a statute of limitations running *as a matter of law*.

Instead, if the known fact is insufficient to provide constructive notice of a "legal injury," or cause of action, then the statute of limitations does not begin to run until, in the exercise of "due diligence," the cause of action is finally discovered by confirmation of the suspicion, and the plaintiff has two years in which to file suit thereafter -- and that, we submit, is consistent with everything we have argued here. Most respectfully, the conclusion reached by the district court in the instant case is completely inconsistent with *Ash* and *Peat, Marwick*, and unless those two decisions are to be overruled here, *Nardone, Barron* and

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Bogorff simply must be harmonized with *Moore, Tillman* and *Cohen* (and the dozens of decisions like them) along the lines we have suggested here.

There is one final reason why the decisions need to be harmonized as we have suggested. Although it is not fully articulated in the decisional law, there is an additional (and fairly obvious) reason why mere suspicion should not be enough to trigger the "should have been discovered" provision in the medical malpractice statute of limitations. If the statute were to be triggered by mere suspicion, then plaintiffs would be encouraged -- indeed, *compelled* -- to file their lawsuits within two years of their first suspicion, whether the suspicion was confirmed at that point or not. Elsewhere in the statutory law governing medical malpractice suits, however, the legislature has made it abundantly clear that medical malpractice actions bottomed upon suspicion rather than confirmation are contrary to public policy, and therefore prohibited.

For example, §766.104, Fla. Stat. (1989), prohibits the filing of a medical malpractice action unless an attorney certifies that a reasonable investigation has been conducted and that grounds exist for an action -- and it provides that such a certificate is presumptively made in good faith if the attorney has received a written opinion from a medical expert confirming that there appears to be evidence of medical negligence. Section 766.203, Fla. Stat. (1989), goes even further. It requires that, as a condition precedent to filing a medical malpractice suit, the plaintiff must provide a "notice of intent to initiate litigation" to the prospective defendant, and that this notice must include a "verified written medical expert opinion . . . which . . . shall corroborate reasonable grounds to support the claim of medical negligence."

The obvious purpose of these statutes is to *discourage* (indeed, *prevent*) medical malpractice suits based on suspicion rather than confirmation -- and, in our judgment, it would be entirely inconsistent (and therefore antithetical to public policy) for a court to *encourage* the filing of medical malpractice suits based on suspicion rather than confirmation

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by holding that the statute of limitations is triggered as a matter of law upon mere unconfirmed suspicion of a cause of action as complex as a medical malpractice action. Surely, the various statutes governing the initiation of medical malpractice suits should be read *in pari materia*, and harmoniously if at all possible -- which is probably why this Court defined the trigger point at confirmation rather than suspicion in *Ash v. Stella, supra*.

Most respectfully, *Barron* and *Bogorff* simply cannot mean that the mere discovery of a simple "injury in fact," without knowledge of any additional facts pointing to a "legal injury," or cause of action for medical malpractice, is *always* sufficient to start the "should have been discovered" provision of §95.11(4)(b) running as a matter of law. To the extent that *Barron* and *Bogorff* merely reinforce what the Court first announced in *Nardone* -- that the statute of limitations is triggered by knowledge of an injury which itself provides constructive notice that it was an injury caused by negligence -- we have no quarrel with them. But, as the Court recognized in *Moore, Tillman,* and *Cohen*, not every "injury in fact" suffered during the course of medical treatment provides constructive notice of a cause of action for an injury caused by malpractice -- and where the known injury is reasonably ambiguous concerning it cause, the statute of limitations begins to run only upon discovery that the ambiguous injury was actually the consequence of a negligent act, rather than some non-negligent act or a natural cause (or when that discovery should have been made in the exercise of reasonable diligence).

The same conclusion would seem to be required by this Court's decisions in *Ash* and *Peat, Marwick*, since they both announce that mere suspicion that a plaintiff *might* have a cause of action for professional malpractice is not enough to start the "delayed discovery" provision of the statute of limitations running as a matter of law, and that the statute is tolled until such time as, in the exercise of reasonable diligence, the plaintiff confirms his or her suspicions. And given the legislature's current policy to prohibit medical malpractice lawsuits based on suspicion, rather than confirmation, we believe that the defendants'

reading of *Barron* and *Borgoff* simply must be rejected here as placing an entirely too stringent requirement upon victims of medical malpractice faced with ambiguous injuries of the type at issue in the instant case -- which brings us to our conclusion.

In the instant case, in the tiny 19-day "window" which the district court begrudged the plaintiffs as sufficient time to discover their cause of action for medical malpractice, the plaintiffs learned only that their child had been stillborn while the mother was under the defendants' care. Given the ambiguity of that injury, those facts, without more, were simply not enough to put them on notice (actual, constructive, or otherwise) that they had suffered a "legal injury" in the form of a cause of action for medical malpractice against the defendants. Section 95.11(4)(b) required only that the plaintiffs exercise "due diligence" to discover their cause of action -- and, in our judgment, no reasonable court could legitimately conclude that, *as a matter of law*, a mere 19 days were enough in which to discover the complex facts supporting that cause of action. And, unless the "should have been discovered with the exercise of due diligence" provision in §95.11(4)(b) is to be written out of the statute altogether, the district court's decision in the instant case simply must be disapproved.

The Court should not be content merely to disapprove the result in the instant case, however. Instead, because the issue presented here is badly in need of clarification, the Court should go further and clarify the confusion created by the Second District's recent, rigorously literal readings of *Barron* and *Bogorff*. We respectfully submit that the Court should clarify those decisions by harmonizing them with *Moore, Tillman, Cohen, Ash*, and *Peat, Marwick* (and the dozens of decisions like them) in the manner in which we have suggested here (as the Third, Fourth, and Fifth Districts have already done) -- and if the cases are to be harmonized in that fashion, of course, the result which the district court reached below clearly must be disapproved as well.

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V.
CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the question certified to this Court should be answered in the negative, and that the result reached by the district court on the facts in the instant case should be disapproved.

VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 20th day of April, 1992, to: KENNAN GEORGE DANDAR, ESQ., Dandar & Dandar, P.A., 4830 W. Kennedy Boulevard, Suite 447, Tampa, Florida 33609; MARILYN DRIVAS, ESQ. and JERRY L. NEWMAN, ESQ., Shear, Newman, Hahn & Rosenkranz, P.A., 201 E. Kennedy Boulevard, Suite 1000, Tampa, Florida 33601; PHILIP DIXON PARRISH, ESQ. and ROBERT M. KLEIN, ESQ., Stephens, Lynn, Klein & McNicholas, P.A., 9100 S. Dadeland Boulevard, Suite 1500, Miami, Florida 33156; ROBERT L. TROHN, ESQ. and CHARLES T. CANADY, ESQ., Lane, Trohn, Clarke, Bertrand & Williams, P.A., 202 E. Walnut Street, Lakeland, Florida 33801; and to MARGUERITE H. DAVIS, ESQ., Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, P.A., P.O. Box 1877, Tallahassee, Florida 32302.

Respectfully submitted,

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