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IN THE SUPREME COURT OF FLORIDA

BARRY S. KRONMAN, M.D. and
ENT HEALTH AND SURGICAL CENTER
BARRY S. KRONMAN, M.D., P.A.,

Defendants/Petitioners,

vs.

BYRON NORSWORTHY, a minor, by and through his parents and next friends, STEVE NORSWORTHY and LINNEA NORSWORTHY, and STEVE NORSWORTHY and LINNEA NORSWORTHY, individually,

Plaintiffs/Respondents.
_____/

SUPREME COURT NO. 80,061
[Fifth District Court of Appeal Case No. 91-01367]

AMICI CURIAE BRIEF OF THE FLORIDA HOSPITAL ASSOCIATION AND FLORIDA MEDICAL ASSOCIATION (IN SUPPORT OF PETITIONER)

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PREFACE

THE FLORIDA HOSPITAL ASSOCIATION and THE FLORIDA MEDICAL ASSOCIATION submit this Brief as amici curiae on behalf of the position presented by Petitioners BARRY S. KRONMAN, M.D., and ENT HEALTH AND SURGICAL CENTER, BARRY S. KRONMAN, M.D., P.A.

STATEMENT OF THE CASE AND FACTS

The amici curiae adopt by reference the Statement of the Case and Facts presented in the Petitioners' Brief. Our Brief will focus exclusively upon the legal analysis adopted by the Fifth District Court of Appeal, which we believe to be in direct and express conflict with decisions from this Court in **BARRON v. SHAPIRO, 565 So.2d 1319 (Fla. 1990)**, and **UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d 1000 (Fla. 1991)**. Thus, we will address only in passing the initial issue of whether the Norsworthys were on notice of any injury at all; otherwise, we will rely upon the treatment of that issue by the Petitioners.

Our primary purpose and thus our primary focus in this Brief will be upon what we perceive to be an improper analysis and application of the Statute of Limitations in a medical malpractice action which was adopted by the District Court at the urging of the Norsworthys.

SUMMARY OF THE ARGUMENT

In this Brief we will address the conflict between the District Court's opinion and numerous decisions from this Court. As this Court noted over 15 years ago in **NARDONE v. REYNOLDS**, and recently reaffirmed in **BARRON v. SHAPIRO** and **UNIVERSITY OF MIAMI, INC., v. BOGORFF**, the Statute of Limitations in a medical malpractice action is triggered when the Plaintiff has notice of either the injury or the negligent act.

Here, it is clear that the Norsworthys had notice of the injury to their son by the time that Dr. Kronman's care and treatment was completed, and the Norsworthys placed the care and treatment of their son in the hands of Dr. Belinda Dickinson. Indeed, the Norsworthys numerous inquiries to Dr. Dickinson in which the Norsworthys expressed their belief that Dr. Kronman had negligently treated their child, should establish as a matter of law that the Norsworthys were on notice not only of their son's injury, but also of Dr. Kronman's alleged negligence. Moreover, the fact that Dr. Dickinson did not believe then -- or now -- that Dr. Kronman had fallen below the standard of care cannot absolve the Norsworthys from the application of the two year statute of limitations. As this Court noted in **BARRON v. SHAPIRO**, statements made by a physician other than the allegedly negligent physician cannot trigger the "fraudulent concealment" portion of the statute of limitations, so as to extend the limitations period beyond two years. **565 So.2d at 1321.**

We will address the arguments raised by the Norsworthys in

their Briefs before the District Court. The Norsworthys argument in a nutshell is this: The only time that notice of an injury triggers the statute of limitations is where the injury is of such a nature that it automatically leads to the conclusion that it is the result of a negligent act. That position is not only a misstatement of the law, it is a subversion of the long settled principle, beginning with this Court's opinion in **NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976)**, and reaffirmed by this Court's opinions in **BARRON v. SHAPIRO, 565 So.2d 1319 (Fla. 1990)** and **UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d 1000 (Fla. 1991)**, that a plaintiff need only have notice (or constructive notice) of <u>either</u> the injury <u>or</u> the negligent act in order to trigger the statute of limitations. Despite the clear dictates of this Court, the District Court's opinion in this case engrafts this additional requirement onto the **NARDONE/BARRON/BOGORFF** analysis.

In this regard, we will demonstrate that contrary to the Norsworthy's position, there are not six subcategories of statute of limitations cases, and that virtually all of the decisions relied upon by the Norsworthys below are in fact cases where the plaintiff was either not on notice of an injury at all, or where the plaintiff was precluded from learning of his or her injury and/or the negligence of his or her physician by virtue of fraudulent concealment.

POINT ON APPEAL

I. WHETHER THE TWO YEAR STATUTE OF LIMITATIONS CONTAINED IN FLORIDA STATUTE §95.11(4)(b)(1989), IS TRIGGERED WHEN THE PLAINTIFF IS ON NOTICE (EITHER ACTUAL OR CONSTRUCTIVE) OF EITHER THE PLAINTIFF'S INJURY OR THE ALLEGED ACT OF NEGLIGENCE.

ARGUMENT

I. THE TWO YEAR STATUTE OF LIMITATIONS CONTAINED IN FLORIDA STATUTE §95.11(4)(b)(1989), IS TRIGGERED WHEN THE PLAINTIFF IS ON NOTICE (EITHER ACTUAL OR CONSTRUCTIVE) OF EITHER THE PLAINTIFF'S INJURY OR THE ALLEGED ACT OF NEGLIGENCE.

Over fifteen years ago this Court rejected the proposition that the statute of limitations does not commence to run in a medical malpractice action until the plaintiff actually becomes aware of the negligence of his or her physician. **NARDONE v. REYNOLDS, 333 So.2d 25, 32 (Fla. 1976).** Instead, this Court held that the statute of limitations begins to run when either the negligent act or the injury which is the consequence of the negligent act is known. **333 So.2d at 32.**[1]

Unfortunately, subsequent to this Court's decision in **NARDONE** and prior to 1990, certain language in this Court's decision in **MOORE v. MORRIS, 475 So.2d 666 (Fla. 1985)**, had been interpreted by various District Courts of Appeal as suggesting that knowledge of physical injury alone does not trigger the statute of limitations.

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[1] We have emphasized the descriptive phrase "which is the consequence of the negligent act" purposefully. The District Court held that in order to trigger the Statute of Limitations a plaintiff must know of the injury and also that the injury is a result of negligence. If that were the case, then the above phrase would have to be altered to read that the Statute of Limitations begins to run "when the injury and the fact that the injury is the consequence of the negligent act is known."

See, e.g., BOGORFF v. KOCH, 547 So.2d 1223 (Fla. 3d DCA 1989) rev'd sub nom UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d 1000 (Fla. 1991); SHAPIRO v. BARRON, 538 So.2d 1319 (Fla. 4th DCA 1989) rev'd 565 So.2d 1319 (Fla. 1990); SHAFER v. LEHRER, 476 So.2d 781 (Fla.4th DCA 1985); see generally JACKSON v. GEORGOPOLOUS, 552 So.2d 215, 216 (Fla. 2d DCA 1989) (Lehan, J. concurring).

In June of 1990, in BARRON v. SHAPIRO, 565 So.2d 1319 (Fla. 1990), this Court reaffirmed the holding in NARDONE v. REYNOLDS, to the effect that the limitations period for medical malpractice actions commences when the plaintiff should have known of either her injury or the defendant's negligent act. 565 So.2d at 1322; see generally Section 95.11(4)(b), Florida Statutes. Accord, VARGAS v. GLADES GENERAL HOSP., 566 So.2d 282, 285 (Fla. 4th DCA 1990); BABUSH v. AMERICAN HOME PRODUCTS CORP., 589 So.2d 1379 (Fla. 4th DCA 1991).[2] See also, HARR v. HILLSBOROUGH COMMUNITY MEDICAL HEALTH CENTER, 591 So.2d 1051 (Fla. 2nd DCA 1991); GOODLET v. STECKLER, 586 So.2d 74 (Fla. 2nd DCA 1991); and ROGERS v. RUIZ, 594 So.2d 756 (Fla. 2nd DCA 1991). This Court reaffirmed BARRON and NARDONE as recently as January of 1991, in UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d 1000 (Fla. 1981). In BOGORFF, as in BARRON, this Court affirmed a summary judgment on behalf of a medical malpractice defendant pursuant to Section 95.11(4)(b).

The Norsworthys seek to avoid BARRON and BOGORFF by arguing

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[2]BABUSH will be discussed in-depth later in this brief because it quite nicely lays out the distinction between the facts necessary to trigger the medical malpractice statute of limitations and the facts necessary to trigger the product liability statute of limitations.

that they did not in fact become aware of Dr. Kronman's alleged negligence until such time as they decided in 1989 to seek a specific opinion from a subsequent treating physician, almost four years after the last date upon which Dr. Kronman had been involved with the care and treatment of their son.

Here the Norsworthys argue precisely what Mrs. Shapiro argued in **BARRON v. SHAPIRO**, i.e., that she had no reason to be aware that she had a cause of action until the doctor's negligence was confirmed by a medical opinion which was rendered by another physician.[3] In **BARRON v. SHAPIRO**, Ms. Shapiro argued that she had no reason to suspect that her husband's blindness was a result of medical malpractice until she received a report to that effect by Dr. Kunin, a physician who had been retained by her attorney. **565 So.2d at 1320.**

In **BARRON**, this Court rejected Mrs. Shapiro's contention (which is identical to the contention of the Norsworthys herein) that the statute of limitations did not commence to run until she had reason to know that the injury in question had been negligently inflicted. **565 So.2d at 1321.** Finally, this Court concluded that:

> 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

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[3] It is important to note at this juncture that we are only concerned with determining whether the Plaintiffs were on notice of a potential claim. The period of limitations does not suggest that a Plaintiff immediately file a claim, merely because there was notice of some unexpected injury, without conducting some reasonable investigation.

limitations.

Id.

The confusion over the holding in **MOORE v. MORRIS, 475 So.2d 666 (Fla. 1985)**, which was manifested in the district court's opinion in **SHAPIRO v. BARRON**, supra, has likewise infected the District Court's opinion in this matter. As this Court's opinion in **BARRON v. SHAPIRO** notes, the Fourth District Court of Appeal misinterpreted the application of the **NARDONE** standard to the facts in **MOORE**, when it reversed the summary judgment in favor of Dr. Barron. As a result, the Fourth District applied the **MOORE** decision as though it had announced a standard which differed from **NARDONE**. The Fifth District Court has now done likewise, and must be reversed.

An in-depth analysis of **MOORE v. MORRIS** reveals that it is simply a case where the parents of the injured child were not aware of the injury upon which they brought suit (mental retardation) until several years after the birth of their child. During birth, the child had suffered certain minor injuries, which were treated at or near the time of birth. The Moores did not sue upon those injuries which were immediately remediable; indeed, they did not file suit until several years later when their child's mental retardation was diagnosed.

In **MOORE**, the alleged malpractice arose out of complications which had developed during delivery of a baby. These complications had necessitated delivery of the baby by cesarian section. After delivery, the infant was "blue" for a period in excess of 30

minutes, and the doctors attempted to administer oxygen; they were unsuccessful in their treatment and transferred the infant to Jackson Memorial Hospital. Apparently, the doctors informed the father that they did not expect the baby to live. While en route to Jackson, the baby's chest was cut open and a tube was inserted to assist her in breathing.

Based upon these facts, the District Court of Appeal ruled as a matter of law that the parents were on notice of the alleged negligence at the time of delivery. This Court reversed, noting that the baby appeared to have made a speedy and complete recovery subsequent to the traumatic delivery, and was not and could not have been scientifically diagnosed as having brain damage until she was three years old. **475 So.2d at 669.**

In **MOORE**, it is clear that the parents were not suing the physicians for the "injuries" sustained at birth which resulted in the need to have their daughter's chest cut open on the way to Jackson Memorial Hospital.[4] Had they been suing for those injuries, they would have had to have initiated suit prior to the time that they learned of their daughter's mental retardation. Conversely, the injury upon which the Moores eventually sued, i.e., mental retardation, was not and could not have been known to them at the time of the birth of their child.

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[4]In the present matter, the Fifth District entertained this very prospect, but unfortunately did not follow it to its logical conclusion, i.e., that **MOORE** is entirely consistent with **NARDONE** because the parents were not aware of <u>either</u> the injury or the negligence until years later. Instead, the court adopted an analysis which is completely contrary to the dictates of **NARDONE**, **BARRON**, and **BOGORFF**.

Alternatively, **MOORE v. MORRIS** is but one of a long line of cases which presented a question of fact which had to be resolved by a jury in light of allegations of <u>fraudulent concealment</u> of the injury or the negligence. This interpretation of **MOORE v. MORRIS** is confirmed by this Court's opinion in **BARRON**. In discussing how the Fourth District Court of Appeal's decision in **SHAPIRO v. BARRON, 538 So.2d 1319 (Fla. 4th DCA 1989)** had misinterpreted **MOORE v. MORRIS**, this Court made the following observation:

> In resolving [MOORE v. MORRIS], this Court reaffirmed the principle of NARDONE that the Statute begins to run when the plaintiffs knew or should have known that either injury or negligence had occurred. However, the Defendants' summary judgment was reversed because there were genuine issues of material fact with respect to whether the parents were on notice that an injury had occurred more than 4 years prior to filing a medical malpractice action. <u>The court pointed to the physicians' assurances of the baby's good health and the mother's understanding at the time of the baby's discharge that she had suffered no damage.</u>

BARRON v. SHAPIRO, 565 So.2d at 1321.[5], [6]

Currently pending before this Court in Case No. 79,266 is the opinion of the Second District Court of Appeal in **HARR v.**

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[5]This observation makes sense only if it is conceded that the "damage" or "injury" upon which the Moores brought suit was their child's mental retardation, and not the traumatic but treatable physical injuries associated with the birth of the child.

[6]This language from the **MOORE** decision is in stark contrast to the testimony by the Norsworthys in this case, where Mrs. Norsworthy found her son's rapid change in status to be "unbelievable."

HILLSBOROUGH COMMUNITY MEDICAL HEALTH CENTER, 591 So.2d 1051 (Fla. 2nd DCA 1991). We urge this Court to reverse **HARR**, although we note that pursuant to the Second District's analysis, an affirmance in HARR would not require affirmance in this case. That is because, in this case the Norsworthys were aware of the identity of Dr. Kronman at the time of the injury. Nevertheless, **HARR** should be reversed because of the inappropriate and unnecessary analysis set forth in that case, and in **GOODLET v. STECKLER, 586 So.2d 74 (Fla. 2nd DCA 1991).**

Those cases hold that it is not sufficient for a plaintiff simply to know of his or her injury, but that the plaintiff must also know of the specific identity of the physician or hospital involved with his care in order to trigger the statute of limitations. This additional requirement is meaningless. As Judge Lehan noted in his opinion for the majority in **ROGERS v. RUIZ, 594 So.2d 756, 764 n.3**, in at least 99 percent of the cases, one having notice of an injury would also have notice that the injury resulted from the medical treatment of a particular physician. Judge Lehan goes on to note that this might not be the case in a wrongful death situation, where "what the decedent knew is not at all necessarily what the personal representative of the decedent knows." Id. Ironically, however, in wrongful death cases, there can be little doubt that the personal representative is immediately aware of the injury, and therefore has two full years to undertake an investigation which, in almost every conceivable case, would promptly identify the health care provider involved.

The **HARR** decision bears this out, as Mrs. Harr was able to learn with a minimum effort virtually all of the facts surrounding her son's suicide -- and his involvement with health care providers who arguably should have prevented his suicide -- within six months of her son's death. Thus, pursuant to this Court's holdings in **NARDONE, BARRON** and **BOGORFF**, Mrs. Harr was on notice of her son's injury (i.e., death) within a few days of his death, and the statute of limitations should be held to have been triggered at that point, thus giving Mrs. Harr two years time in which to file her complaint. The decisions from the Second District Court of Appeal in **GOODLET, HARR** and **ROGERS v. RUIZ**, and the District Court's opinion in this case suggest that this Court needs to once again reaffirm the principle set forth in **NARDONE, BARRON** and **BOGORFF**, and to specifically indicate that this principle, i.e., that notice of injury or notice of the negligent act is sufficient to trigger the statute of limitations, is not restricted to the particular factual scenarios of those cases.

NOTICE OF INJURY IN FACT IS SUFFICIENT TO TRIGGER THE TWO YEAR STATUTE OF LIMITATIONS

The Norsworthys, at Page 16 of their Brief before the Fifth District Court of Appeal, set forth the position which was ultimately -- yet erroneously -- accepted by the Fifth District:

> Most respectfully, the statute of limitations does not begin to run as a matter of law upon the simple discovery of a "injury" like the one suffered by Byron -- and injury which is vehemently and ambiguous as to its cause and which does not facially suggest that it is a "injury caused by negligence" -- and

we believe that a detail review of the decisional law will prove that point.

Fairly read, and considered collectively (and notwithstanding that the Supreme Court has not been particularly adept at harmonizing them), the cases stand for the following propositions: (1) the word "incident" in Section 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; (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 but 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 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.[7]

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[7]Counsel representing the Norsworthys before the Fifth District Court of Appeal and this Court also filed an amicus brief before this Court on behalf of the position of the plaintiffs in **TANNER v. HARTOG**, Case No.: 79,390. The undersigned counsel, representing the respondent Hartog in that action, has already addressed the Norsworthy/Academy of Florida Trial Lawyers analysis in the Tanner brief. Thus, our preemptive analysis of the position which we believe the Norsworthys will take in defense of the Fifth District Court of Appeal's opinion before this Court is necessarily similar to our arguments in the Hartog case. We believe that the

Despite the clear holdings of **NARDONE**, **BARRON** and **BOGORFF**, the Norsworthys insist upon complicating and obfuscating the message of those cases, i.e., in order to trigger the statute of limitations, the plaintiff need only know of either his or her injury or the negligence of his or her physician, but not both.

Stripped to its essentials, the Norsworthys' analysis suggests two categories of cases concerning discovery of injury. These categories, numbers 5 and 6 above, are complete fictions on the part of the Norsworthys -- and, it is submitted, wholly inaccurate fictions. As we will soon discover, the overwhelming majority of the cases which the Norsworthys attempt to pigeon-hole into category number 5 are really cases where either the plaintiff's injury or the defendant's negligent act was fraudulently concealed by the defendant.

The Norsworthys would take the clear holdings in **NARDONE**, **BARRON** and **BOGORFF** -- which were not limited to their facts, but which speak to the fashion in which the statute of limitations for medical malpractice actions is intended to be interpreted -- and

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legal analysis adopted by the Fifth District Court of Appeal in this case is not only directly at odds with this Court's opinions in **NARDONE**, **BARRON** and **BOGORFF**, supra, but also at odds with the Second District Court of Appeal's decision in **TANNER v. HARTOG, 593 So.2d 249 (Fla. 2nd DCA 1992)** question certified on motion for reh., 17 FLW 433 (Fla. 2d DCA Jan. 31, 1992). Perhaps for this reason, this Court has accepted jurisdiction over the present action, but has dispensed with oral argument. For the reasons set forth in this brief, as well as the reasons set forth in the Respondent's Brief in Tanner v. Hartog, we believe that the Norsworthys analysis, and the Fifth District Court of Appeal's analysis of the interplay between **MOORE v. MORRIS** and **NARDONE, BARRON** and **BOGORFF** is incorrect, and that the Fifth District Court of Appeal's decision herein should be quashed.

relegate them to category six, i.e., those cases where knowledge of the injury gives notice that it must have been caused by a negligent act.

We will also demonstrate that the category 6 cases -- the Norsworthys admit of only three (**NARDONE**, **BARRON** and **BOGORFF**) -- do not even fit the pigeon-hole which has been created for them by the Norsworthys. For one thing, the category 6 definition, i.e., injuries which carry with themselves the obvious prospect of negligence, would be impossible to apply. This point is made by the dramatic divergence of opinion among the various treating physicians in **UNIVERSITY OF MIAMI, INC. v. BOGORFF, 583 So.2d 1000, 10003 n.1 (Fla. 1992)**, which will be set forth in detail, infra.

THE FICTION OF CATEGORY #5

According to the Norsworthys, the complication in applying the statute of limitations arises from the fact that some injuries provide constructive notice of negligence, and some do not. Perhaps so, but the Norsworthys have focused on the wrong inquiry. The appropriate inquiry is whether or not the plaintiff knows that he or she has sustained an injury at all; it is of no consequence whether the injury provides actual or even constructive notice of negligence. The District Court erred when it held otherwise. The vast majority of the cases which the Norsworthys suggest fall within category number 5, i.e., knowledge of an injury in fact but one which is "ambiguous concerning its cause," are actually cases where it could not be said conclusively that the plaintiff was on notice of an injury at all.

In fact, without belaboring the obvious, the precise purpose of this particular statute is to provide a two year period of inquiry which will allow a lay person (generally through counsel) to conduct the investigation which is necessary to determine if an injury was at least arguably caused by an act of medical malpractice, once there is notice of that injury. No one actually makes that final determination of negligence -- yea or nay -- until a jury resolves any action that is ultimately filed.

We have already made this point with respect to **MOORE**, infra. There, the Moores were not on notice at all that their child had been rendered mentally retarded at the time of birth, nor could they have been, as the condition remained undiagnosable for several years. Exemplary of this line of cases are the so called "bad knee" cases which the Norsworthys place in category number 5. See, e.g., **FLORIDA PATIENTS COMPENSATION FUND v. TILLMAN, 453 So.2d 1376 (Fla. 4th DCA 1984), aff'd 487 So.2d 1032 (Fla. 1986); COHEN v. BAXT, 473 So.2d 1340 (Fla. 4th DCA 1985), aff'd 488 So.2d 56 (Fla. 1986).**[8]

This point is made nicely by the very first post-**BARRON**

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[8] The Norsworthys' treatment of **TILLMAN** below was superficial to say the least. Not only was the **TILLMAN** holding premised in part upon Dr. Waxman's fraudulent concealment of the plaintiff's injury, it was also premised in part on a secondary injury which had nothing to do with the mismatched prosthesis. Dr. Waxman's counsel conceded that the plaintiff could not possibly have known of that injury. These factors from the **TILLMAN** decision (which do not fit the Norsworthys' analysis) heavily influenced the court's opinion in **COHEN v. BAXT, 473 So.2d 1340 (Fla. 4th DCA 1985)**, which was affirmed by this Court without discussion in **FLORIDA PATIENTS COMPENSATION FUNDS v. COHEN, 488 So.2d 56 (Fla. 1986).**

decision by a district court of appeal in **VARGAS v. GLADES GENERAL HOSPITAL, 566 So.2d 282 (Fla. 4th DCA 1990).** In 1979, sixteen month old Marisol Vargas was taken to Glades General Hospital because she was having seizures. When the family physician (Dr. Piedra) arrived, he tried unsuccessfully to administer an intravenous anti-convulsant medication. Marisol's father later testified that she turned cyanotic (blue) while in the Glades Hospital Emergency Room. She was transferred first to Hendry General Hospital under the care of Dr. Valiant, and ultimately to Variety Children's Hospital in Miami. She remained in Variety Children's Hospital for two months and went through extensive diagnostic testing. Her parents were told that she had experienced brain damage as a result of the seizures, but that maybe she would "outgrow it." **566 So.2d at 283-84.** Although Marisol eventually regained her sight, she never learned to walk, talk or feed herself. When her parents filed suit many years after the incidents in question, they claimed that the Statute had not run, either because the Hospital had fraudulently concealed material information or because they were not on notice of an injury which was the consequence of a negligent act. **566 So.2d at 284.**

The District Court of Appeal first disposed of the fraudulent concealment argument. The court noted that since the Hospital had no contact with Marisol or her parents after the child left the Hospital on the night of October 10, 1979, and because the knowledge which was allegedly concealed (her blue condition) was already known by the parents as a result of their own observations,

there had been no fraudulent concealment. 566 So.2d at 285. Here, Dr. Kronman had no contact with the Norsworthys after March of 1985, and the necessity for a semi-permanent tracheotomy was observed by the Norsworthys in March of 1985.

The **VARGAS** court made the following pertinent observations:

> The proper inquiry is whether they were on notice that her condition was an "injury." Thus, we distinguished this case from BROOKS v. CERRATO, 355 So.2d 119 (Fla. 4th DCA 1978), and SWAGEL v. GOLDMAN, 393 So.2d 65 (Fla. 3d DCA 1981), as well as FLORIDA PATIENTS COMPENSATION FUND v. TILLMAN, 453 So.2d 1376 (Fla. 4th DCA 1984) aff'd., 487 So.2d 1032 (Fla. 1986), which dealt with post-surgery symptoms which the respective plaintiffs did not realize were an injury but instead believed and were told by their doctors were normal post-operative symptoms which would improve.
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> * * *
>
> In BARRON v. SHAPIRO... the Supreme Court reaffirmed the principle set forth in NARDONE and reaffirmed in MOORE v. MORRIS,... that the statute of limitations begins to run when the plaintiffs knew or should have known either that an injury or negligence had occurred. In doing so it reversed this Court's holding that notice of physical injury alone, without knowledge that it resulted from a negligent act, does not trigger the statute of limitations... Thus, it is clear that the triggering event for the statute of limitations in this case was the Vargas' knowledge of the injury to their child, not the knowledge that the injury was caused by a negligent act.

566 So.2d at 286(citations omitted).

Thus, the Fourth District Court of Appeal has confirmed our point with respect to **TILLMAN**, and many of the other "category 5" cases relied upon by the Norsworthys. The Norsworthys' suggestion that the Fourth District Court of Appeal has squarely rejected our reading of **BARRON** and **BOGORFF** in a post **BARRON** decision, e.g., **SOUTHERN NEUROSURGICAL ASSOC., P.A. v. FINE, 591 So.2d 252, 256 (Fla. 4th DCA 1991)**, is itself refuted by **VARGAS**. In fact, the Fourth District Court of Appeal's opinion in **FINE** does not even present sufficient factual information to determine whether or not it is consistent with the Norsworthys' reading of **BARRON** and **BOGORFF**.

Virtually all of the cases which fall within the Norsworthys' category 5 are cases wherein the health care provider fraudulently concealed either the injury or the negligence. In addition to **MOORE v. MORRIS**, the following cases involved allegations of fraudulent concealment which, perforce, preclude any determination as a matter of law as to when the statute of limitations began to run: **FLORIDA PATIENTS COMPENSATION FUND v. TILLMAN, 487 So.2d 1032 (Fla. 1986)** (defendant doctor continuously assured plaintiff that he was improving); **SHAFER v. LEHRER, 476 So.2d 791 (Fla. 4th DCA 1985)** (plaintiff's reasonable efforts to obtain the medical records from physicians were thwarted and the true facts concealed from her); **FLORIDA PATIENTS COMPENSATION FUND v. SITOMER, 524 So.2d 671 (Fla. 4th DCA), rev'd dismissed, 531 So.2d 1353 (Fla. 1988)**, and quashed in part on other grounds, **550 So.2d 461 (Fla. 1989)** (doctor

assured plaintiff that breast implants were not being rejected, that she did not have an infection, and that she should not worry); **ELLIOTT v. BARROW, 526 So.2d 989 (Fla. 1st DCA 1988)** (defendant assured the plaintiff that no harm had resulted from the defendant's treatment of the plaintiff); **PHILLIPS v. MEASE HOSPITAL AND CLINIC, 445 So.2d 1058 (Fla. 2nd DCA 1984) rev'd denied, 453 So.2d 44 (Fla. 1984)** (physicians concealed the cause of plaintiff's problems and continued to treat the plaintiff and to intentionally misrepresent to her that her problems were normal and not due to negligent care), **BROOKS v. CERRATO, 355 So.2d 119 (Fla. 4th DCA), cert. denied 361 So.2d 831 (Fla. 1978)** (some indication in the record of affirmative misrepresentation by surgeon as to damaged nerve during surgery which patient assumed was temporary post operative symptom) **SWAGEL v. GOLDMAN, 393 So.2d 65 (Fla. 3d DCA 1981)** (surgeon informed plaintiff that post surgical incontinence would resolve itself); **ALMENGOR v. DADE COUNTY, 359 So.2d 892 (Fla. 3d DCA 1978)** (nurse actively and successfully mislead plaintiffs as to baby's true physical condition).

THE FICTION OF CATEGORY 6

The District Court's decision in this case runs afoul of this Court's decisions in **NARDONE, BARRON** and **BOGORFF.**

The Fifth District Court of Appeal's analysis of **BOGORFF** and **BARRON** cannot be rationally reconciled with those decisions. The Fifth District Court of Appeal noted in its opinion that:

> 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 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.

17 FLW at D869. Thereafter, the Fifth District honored this Court's opinion in **BARRON** in the breach by noting that:

> 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 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 NARDONE, BARRON and BOGORFF, speak for themselves and supply notice of a possible invasion of legal rights.

17 FLW at D869.

The entire creation -- and a creation it is -- of category 6 for what are inarguably this Court's three most important statute of limitations decisions is pure folly.

First, the Norsworthys and the Fifth District would have **NARDONE, BARRON** and **BOGORFF** restricted to such an extent that the rule of law set forth in **NARDONE** and reiterated in **BARRON** and **BOGORFF** applies only to the factual scenario presented in those three cases! The Norsworthys' analysis of these cases collapses upon itself. Why would this Court make the pronouncement -- three separate times -- that the knowledge that is necessary to trigger the running of the statute of limitations is knowledge of either the injury or the negligence, if that rule of law holds up only where knowledge of injury is tantamount to knowledge of negligence?

BOGORFF DOES NOT FIT THE PATTERN

Unlike the Norsworthys (and apparently the Fifth District Court of Appeal), we do not believe that it is an easy matter to determine precisely what constitutes a "category 6" injury. Who is to decide that an injury is so obvious that it "smacks" of negligence? The Norsworthys suggested to the District Court that the injury in **BOGORFF** obviously pointed to negligence on the part of Dr. Koch; but a review of the medical record in that case reveals a great deal of uncertainty about the cause of the injury.

The alleged negligence in **BOGORFF** was the administration of an intraspinal injection of a drug known as methotrexate, as a treatment regimen for Adam Bogorff's leukemia. **583 So.2d at 1001.** Within three months of the administration of the drug, Adam

suffered convulsions and lapsed into a coma. Within one year, he was a quadriplegic and has suffered severe brain damage. Id.

According to the Norsworthys and the Fifth District, these injuries were so severe, abrupt and inconsistent with a non-negligent explanation that they are one of only three instances in the last fifteen years of Florida jurisprudence where it can be said that notice of the injury was in and of itself notice of negligence. Yet these injuries -- which the Norsworthys argue were "obviously" caused by negligence -- were a matter of much dispute among Adam Bogorff's physicians.

Dr. Giesecke, a neurologist, wrote a letter to Dr. Koch (the defendant), and offered three possibilities as to the type of brain damage: localized leukemic implant, multi-focal leuko-encephalopathy, or subcortical demyelination. Dr. Cullen, who had roused Adam from his coma, attributed his condition to "some type of peculiar encephalopathy, either related to his leukemia, radiation, or perhaps related to a folic acid deficiency accompanying use of methotrexate. Finally, Dr. Winick, in yet another letter to Dr. Koch, noted that "whether this whole business is secondary to methotrexate is difficult to ascertain." See generally, **UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d at 1002-03 n.1.**

As this Court noted in **BOGORFF** (addressing the issue of fraudulent concealment):

> Differing expert opinions generally do not amount to fraudulent concealment or misrepresentation when there are other equally, or

> more likely causes of a patient's condition.

Clearly, neither the physicians who followed Adam Bogorff's condition nor this Court were prepared to state that Adam Bogorff's injuries fell within what the Norsworthys argue is an unequivocal category 6 injury, i.e., an injury that obviously had to have been caused by an act of negligence. Of course, it would never have occurred to this Court to make such a distinction; according to this Court's opinions in **NARDONE**, **BARRON** and **BOGORFF**, it is not necessary that an injury carry with it notice of <u>any</u> negligence in order to trigger the statute of limitations.

The Norsworthys failed to cite to the District Court below the decision in **HUMBER v. ROSS, 509 So.2d 356 (Fla. 4th DCA 1987)**, presumably because it also does not fit within the Norsworthys' analysis. In that case, Mr. Humber fell out of his hospital bed (allegedly as a result of negligence in the physician's prescription of drugs, and the hospital's negligence in failing to adequately monitor the patient). The fall caused Mr. Humber to break his hip, an injury which was in fact made known to him and to his wife immediately. Nevertheless, he failed to file suit within two years. **509 So.2d at 357.**

The Fourth District Court of Appeal relied upon this Court's decision in **NARDONE** as follows:

> NARDONE states also that the limitation period commences when the plaintiffs have knowledge of the physical condition and drastic change therein but do not know of the causal connection of the defendant's acts or failure to act.

509 So.2d at 359. We believe that the Fourth District Court of Appeal's use of the adjective "drastic" was meant to do nothing more than to suggest that in situations where the plaintiff already suffers from some type of condition, the plaintiff must be made aware of a further injury in order to trigger the statute of limitations. This analysis is consistent with our view of those category 5 cases where the plaintiff was not on notice of an injury at all. Nevertheless, the injury need not be of such a nature that it leads ineluctably to the conclusion that it was caused by negligence. All that is necessary is notice of a separate and distinct injury, i.e., something that is different in kind from the condition which is being treated by the physician. In this case, that occurred when a tracheotomy was performed on Byron Norsworthy, a circumstance which is not found to be "unbelievable" in light of his condition upon admission.That is the holding in **NARDONE, BARRON, BOGORFF, VARGAS** and **HUMBER v. ROSS.**[9]

The Norsworthys' position that the medical malpractice statute of limitations is not triggered until the plaintiff has notice of an injury which because of its nature suggests that it was caused by negligence is nothing more than an attempt to engraft the standard for determining when a products liability cause of action must be commenced onto the analysis which is appropriate for

[9]The **HARR, ROGERS**, and **GOODLET** decisions from the Second District follow a modified version of **BARRON** and **BOGORFF** which requires notice of injury and notice of the fact that the injury occurred in the context of medical treatment or intervention. Those decisions, however, do not require the plaintiff to have notice, constructive or otherwise, that the injury resulted from negligence.

determining when a medical malpractice cause of action must be filed. Yet these tests and the relevant statutes are distinct. See, **UNIVERSITY OF MIAMI, INC. v. BOGORFF, 583 So.2d 1000 (Fla. 1991); BABUSH v. AMERICAN HOME PRODUCTS CORP., 589 So.2d 1379 (Fla. 4th DCA 1991).** The Norsworthys' position is a reprise of the requirement in a product liability action that the statute of limitations begins to run only when both the "moment of trauma" and the "moment of realization" have occurred. See **STEINER v. CIBA-GEIGY CORP., 364 So.2d 47, 53 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 461 (Fla. 1979).**

In this regard, a review of how the Third District Court of Appeal interpreted **STEINER** in its opinion in **BOGORFF v. KOCH, 547 So.2d 1223, 1228 (Fla. 3d DCA 1989)** is important:

> Although at times the moment of trauma and the moment of realization may coincide, there are instances in which the trauma is not of a type which would give rise to the realization that it was caused by negligence.

547 So.2d at 1228 (quoting STEINER v. CIBA-GEIGY, supra, 364 So.2d at 53). If the word "injury" is substituted in the above quotation for the word "trauma," then the above quotation is identical to the position of the Norsworthys in this case. Of course, this Court reversed the opinion of the Third District in **BOGORFF.** As the Fourth District Court of Appeal noted in **BABUSH v. AMERICAN HOME PRODUCTS, CORP.,** supra, the difference is that in a medical malpractice cause of action, notice of either the injury or the negligence is sufficient to trigger the statute of limitations,

whereas in a product liability action, there must be notice of both the injury and a causal connection to the use of the product. **589 So.2d at 1381.**

THE PLAINTIFFS' BAR AS LOBBYIST

It should be obvious by now that the Norsworthys' appellate counsel is simply trying to convince this Court to modify its decisions in **NARDONE**, **BARRON** and **BOGORFF** virtually out of existence. Attached as an Appendix hereto is a copy of House Bill Number 625 which was introduced during last spring's legislative session, but not adopted. This House Bill, if passed, would have inserted into **Florida Statute §95.11(4)(b)** the following language:

> Knowledge of an injury without knowledge that the injury resulted from malpractice does not constitute discovery of the incident.

The proof is in the pudding with respect to this attempt to amend the statute of limitations. There would be no need to amend the statute to add the above quoted language if **NARDONE, BARRON** and **BOGORFF** are restricted as the Fifth District Court of Appeal has held. Suffice it to say, the District Court's opinion is simply wrong. Neither **Florida Statute §95.11(4)(b)**, nor this Court's decisions in **NARDONE, BARRON** and **BOGORFF** require the plaintiff to have knowledge that the injury resulted from malpractice before the limitations period begins to run.

CONCLUSION

For the reasons set forth in this Brief, amici curiae respectfully request this Court to quash the Fifth District Court of Appeal's opinion herein, and to issue an opinion consistent with **NARDONE**, **BARRON** and **BOGORFF**.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 8th day of December, 1992, to: Joseph Taraska, Esquire, and Jeanelle G. Bronson, Esquire, PO Box, 538065, Orlando, FL 32853-8065; Joel P. Eaton, Esquire, 25 West Flagler Street, Suite 800, Miami, FL 33130; Wagner, Cunningham, Vaughan & McLaughlin, P.A., 708 Jackson Street, Tampa, FL 33602; William Bell, Esquire, Florida Hospital Association, 208 S. Monroe Street, Jacksonville, FL 32203; John Thrasher, Esquire, Florida Medical Association, PO BOX 2411, 760 Riverside Avenue, Tallahassee, FL 32303.

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IN THE SUPREME COURT OF FLORIDA

BARRY S. KRONMAN, M.D. and
ENT HEALTH AND SURGICAL CENTER
BARRY S. KRONMAN, M.D., P.A.,

Defendants/Petitioners,

vs.

BYRON NORSWORTHY, a minor, by and through his parents and next friends, STEVE NORSWORTHY and LINNEA NORSWORTHY, and STEVE NORSWORTHY and LINNEA NORSWORTHY, individually,

Plaintiffs/Respondents.
_____/

SUPREME COURT NO. 80,061
[Fifth District Court of Appeal Case No. 91-01367]

APPENDIX TO AMICI CURIAE BRIEF OF THE FLORIDA HOSPITAL ASSOCIATION AND FLORIDA MEDICAL ASSOCIATION (IN SUPPORT OF PETITIONER)

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introduced Jan. 14, 1992
last action March 11, 1992

Florida House of Representatives - 1992 **CS/HB 625***

By the Committee on Judiciary and Representative Burke

A bill to be entitled

An act relating to limitations of actions; amending s. 95.11, F.S.; extending the period for bringing a malpractice claim against attorneys when fraud, concealment, or intentional misrepresentation prevents filing within the 2-year limitation period; specifying action which triggers statute of limitations in medical malpractice cases and providing for extension for certain purposes; reenacting ss. 95.051(1)(h), 766.106(4), and 768.28(12), F.S., relating to when limitations are tolled, notice of intent to initiate medical malpractice litigation, and sovereign immunity waiver in medical malpractice actions, to incorporate said amendment in references thereto; creating s. 766.317, F.S.; providing that the provisions of ch. 766, F.S., do not apply to prisoners in state, county, or municipal detention facilities; providing an effective date and providing retroactive applicability.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraphs (a) and (b) of subsection (4) of section 95.11, Florida Statutes, are amended to read:

95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

(4) WITHIN TWO YEARS.--

CODING: Words stricken are deletions; words underlined are additions.

(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional. However, for an attorney authorized to practice law under rules adopted by the Florida Supreme Court, in an action covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 2-year period, the period of limitations is extended until 4 years after the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event more than 7 years after the date the incident giving rise to the injury occurred.

(b) 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; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued. Knowledge of an injury without knowledge that the injury resulted from malpractice does not constitute discovery of the incident. An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. The limitation of

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actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the incident injury within the 4-year period, the period of limitations is extended forward 2 years from the time that the incident injury is discovered or should have been discovered with the exercise of due diligence; but in no event to exceed 7 years from the date the incident giving rise to the injury occurred.

Section 2. For the purpose of incorporating the amendment to section 95.11, Florida Statutes, in references thereto, the subdivisions of Florida Statutes set forth below are reenacted to read:

95.051 When limitations tolled.--

(1) The running of the time under any statute of limitations except ss. 95.281, 95.38, and 95.84 is tolled by:

(h) The minority or previously adjudicated incapacity of the person entitled to sue during any period of time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to the minor or incapacitated person, or is adjudicated to be incapacitated to sue; except with respect to the statute of limitations for a claim for medical malpractice as provided in s. 95.11. In any event, the action must be begun within 7 years after the act, event, or occurrence giving rise to the cause of action.

Paragraphs (a)-(c) shall not apply if service of process or service by publication can be made in a manner sufficient to confer jurisdiction to grant the relief sought. This section

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shall not be construed to limit the ability of any person to initiate an action within 30 days of the lifting of an automatic stay issued in a bankruptcy action as is provided in 11 U.S.C. s. 108(c).

766.106 Notice before filing action for medical malpractice; presuit screening period; offers for admission of liability and for arbitration; informal discovery; review.--

(4) The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.--

(12) Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues, except that an action for contribution must be commenced within the limitations provided in s. 768.31(4), and an action for damages arising from medical malpractice must be commenced within the limitations for such actions in s. 95.11(4)

[illegible]

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Section 3. Section 766.317, Florida Statutes, is created to read:

766.317 Inapplicability to prisoners.--The provisions of this chapter may not be used by an inmate or prisoner who is incarcerated within the state correctional system or within a county or municipal detention facility or who has previously been incarcerated within the state correctional system or county or municipal detention facility for purposes of filing a claim arising out of circumstances that occurred during the period of incarceration.

Section 4. This act shall take effect upon becoming a law, and shall apply retroactively to pending causes of action.

This publication was produced at an average cost of 1.12 cents per single page in compliance with the Rules and for the information of members of the Legislature and the public.

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