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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.

CASE NO. 80,061
[FIFTH DISTRICT COURT OF
APPEAL CASE NO. 91-01367]

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.
_____/

PETITIONERS' JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, STATE OF FLORIDA

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STATEMENT OF THE CASE

This is an appeal from a final order of the Fifth District Court of Appeal reversing a Summary Final Judgment in favor of the Petitioners upon the grounds that the statute of limitations in a medical malpractice case had expired prior to the filing of Respondents' Complaint.

On June 29, 1989, the Respondents, BYRON NORSWORTHY, a minor ("Byron"), and his parents, STEVE and LINNEA NORSWORTHY, filed a medical malpractice action against Petitioners, alleging that Petitioners had negligently injured Byron during his treatment at Holmes Regional Medical Center, Inc. in March of 1985 by excessively intubating and extubating Byron with an inappropriate sized endotracheal tube. The Respondents allege that they discovered their causes of action more than two years but less than four years from the date of Petitioners' treatment of Byron. The Petitioners filed an Answer generally denying the allegations and affirmatively alleging that the Respondents' cause of action was barred by the statute of limitations.

The Circuit Court granted a Motion for Summary Judgment in favor of Petitioners holding that there was no genuine issue of material fact that Respondents knew of Byron's injury more than two years prior to the commencement of their lawsuit. The Respondents appealed. The Fifth District Court of Appeal reversed the trial court's order. Rehearing was denied on May 19, 1992, and Petitioners' Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed on June 18, 1992.

STATEMENT OF THE FACTS

Byron was admitted by his pediatrician for observation to Holmes Regional Medical Center in Melbourne, Florida, on March 15, 1985. Byron's presenting condition was a slight cold which turned into a croupy cough (R.639, 642). Byron seemed to improve over the next couple of days (R.643-644). But on the morning of March 18, 1985, his condition worsened and his pediatrician admitted him to the intensive care unit of the hospital at approximately 10:00 A.M. (R.645-647). At approximately 7:00 P.M. on March 18, Dr. Barry S. Kronman ("Dr. Kronman"), an ear, nose and throat specialist ("ENT"), was summoned for consult (R.652, 736-737).

To relieve Byron's respiratory distress, an emergency intubation was performed by Dr. Currie, an anesthesiologist on staff at the hospital. After the intubation, Byron's condition stabilized and noticeable improvement was observed over the next couple of days (R.738-744).

Since Byron's condition remained stable and his airway appeared clear, it was determined that the tube should be removed in order to see if Byron could breathe safely on his own. Extubation was performed by Dr. Kronman on March 20, 1985. However, Byron had to be reintubated shortly after the extubation because his condition worsened without the tube. Byron was again extubated two days later to see if he would be able to breathe on his own. Byron continued to have difficulty breathing on his own and accordingly, Dr. Blunk, an anesthesiologist on staff at the hospital, reintubated Byron. Shortly thereafter, a tracheotomy was

performed by Dr. Kronman (R.754-763, 886-892, 662-71).

Byron was discharged from the hospital with his tracheotomy tube in place on March 28, 1985 (R.656). Byron's pediatrician had noted in his discharge summary that there was a strong possibility that Byron had developed a tracheostenosis (narrowing of the airway), i.e., subglottic stenosis (R.656, 658).

After Byron's discharge from the hospital, his parents transferred his care to Dr. Dickinson, another ENT specialist. Byron was under Dr. Dickinson's care from April 18, 1985, through June 18, 1985 (R.286-88, 400-01, 802, 803). During this period Byron was readmitted to the hospital on two occasions for additional procedures (April 23, 1985, and May 28, 1985) (R.846, 849). Dr. Dickinson expressly noted in her hospital discharge summary on April 24, 1985, and office notes of May 28, 1985, the presence of subglottic stenosis (R.626-627, 839-840).

Dr. Dickinson testified in her deposition that she had advised the Respondents that Byron's injury to the subglottic area may very well have resulted from some instrumentation during the time that he was under the care of Dr. Kronman and that in her opinion some mechanical trauma had occurred (R.831-833, 839-840). In her office notes she reported that:

> "The parents appeared to understand the natural progression of subglottic edema and possible stenosis, they understand that he was intubated in a life-threatening situation which may, unfortunately have resulted in subglottic stenosis ..." (R.626, 839, 844)

On the other hand, Mrs. Norsworthy testified in her deposition that Dr. Dickinson told them there was no deviation from the norm

in Dr. Kronman's care. Similarly, Mr. Norsworthy testified that Dr. Dickinson had expressed the view that Dr. Kronman's care had been competent and professional.

In June, 1985, the Norsworthys relocated to Pennsylvania, and Byron was placed under the care of Dr. Tucker. When the Respondents transferred to Pennsylvania, they took with them a complete copy of Byron's medical records which Mrs. Norsworthy acknowledged reading in 1985 (R.302). Dr. Tucker testified that the Norsworthys had always seemed upset about the outcome of their son's illness but that it was not until early 1989, that Mr. Norsworthy asked him to review the records of the original hospitalization and evaluate the medical care Byron had received. Dr. Tucker testified that he advised the Respondents that in his opinion, Byron's subglottic stenosis was an injury caused by inappropriate negligently administered intubations.[1] On June 28, 1989, more than four years after Dr. Kronman last saw Byron, the Norsworthys filed suit against Petitioners.

The trial court ruled as a matter of law that there was no genuine issue of material fact that the Respondents knew of Byron's injury more than two years prior to the commencement of their action.

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[1]On March 13, 1989, almost four years after Dr. Kronman's care and treatment, the Respondents petitioned to extend the statute of limitations.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal held that 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; and that accordingly, it could not determine as a matter of law that when the Respondents learned of their son's subglottic stenosis they were placed on notice of the incident giving rise to medical malpractice. The lower tribunal acknowledged that its difficulty in this decision lay in "defining "injury" and in judging when the injury carries with it sufficient inference of medical negligence that the victim is deemed to have notice of the incident of malpractice." In essence, the Fifth District requires a suspicion of negligence in all circumstances. This decision thus directly and expressly conflicts with this Court's recent ruling in Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990), in which this Court expressly held that the limitation period commences when the plaintiff should have known either of the injury or the negligent act. Further, the lower tribunal's decision cannot be reconciled with this Court's more recent decision in University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991), which reaffirmed Barron and expressly rejected the argument that knowledge of a physical injury without knowledge that it resulted from a negligent act, failed to trigger the statute of

limitations.

Additionally, the lower tribunal's decision is in direct conflict with the decisions of the Second District Court of Appeal in the cases of Tanner v. Hartog, 17 F.L.W. 173 (Fla.2d DCA Jan. 3, 1992), question certified on motion for reh., 17 F.L.W. 433 (Fla.2d DCA Jan. 3, 1992), and Goodlet v. Steckler, 586 So.2d 74 (Fla.2d DCA 1991). In Tanner the Second District held that knowledge of the injury, i.e., knowledge of the stillbirth of a baby was sufficient, without more, to trigger the running of the statute of limitations. Further, in Goodlet, the Second District held that a treating physician's telephone call to a plaintiff advising her of his identity as treating physician and advising her of her daughter's death was sufficient, without more, to trigger the statute of limitations. In Tanner and Goodlet, the Second District followed this Court's holding in Barron and Bogorff that notice of the "injury" and of the incident involving the defendant resulting in the injury is sufficient to trigger the running of the statute of limitations.

This Court should grant certiorari and review the merits of this action to correct the inconsistent application of the law with respect to what knowledge is sufficient to trigger the running of the statute of limitations. Additionally, the Court's Opinions in Barron and Bogorff have heretofore established a cogent standard for lower courts to follow concerning the issue of the sufficiency of notice of an injury to trigger the statute of limitations, which the present case confuses and confounds.

ARGUMENT

THE DECISION OF THE LOWER TRIBUNAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN UNIVERSITY OF MIAMI V. BOGORFF, 583 So.2d 1000 (Fla. 1991) AND BARRON V. SHAPIRO, 565 So.2d 1319 (Fla. 1990) AND DECISIONS OF THE SECOND DISTRICT COURT OF APPEAL IN TANNER V. HARTOG, 17 F.L.W. 173 (Fla.2d DCA Jan. 3, 1992), QUESTION CERTIFIED ON MOTION FOR REH., 17 F.L.W. 433 (Fla.2d DCA Jan. 31, 1992), AND GOODLET V. STECKLER, 586 So.2d 74 (Fla.2d DCA 1991).

This Court in both Barron and Bogorff held that the statute of limitations period commences when a plaintiff should have known either of the injury or the negligent act. In establishing this standard, this Court expressly rejected the argument that knowledge of a physical injury, without knowledge that it resulted from a negligent act, failed to trigger the statute of limitations. In the instant case, however, the Fifth District held that it could not determine as a matter of law that when Respondents learned of their son's subglottic stenosis that such knowledge was sufficient to place them on notice of an incident giving rise to medical malpractice and that it could not determine as a matter of law that the statute of limitations had been triggered. The lower tribunal rendered this opinion despite the trial court's express finding that Respondents knew of Byron's injury more than two years prior to the commencement of their action. Additionally, the lower tribunal opined that if there is nothing about an injury which 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

statute of limitations. The lower tribunal thus imposes upon the standard established in Bogorff and Barron, the additional requirement that the injury must communicate the possibility of medical negligence in order to trigger the statute of limitations. This holding merits review by this Court, both because it conflicts with existing case law and because it creates obvious ambiguities as to the appropriate standard to be applied. The reasoning used by the lower tribunal represents an outmoded and previously rejected standard. This Court in Barron and Bogorff established a concise and clear standard which, when properly applied, determines the point at which the statute of limitations is triggered.

The analysis of the lower tribunal places it squarely in conflict with not only Barron and Bogorff but also with subsequent lower court decisions in Tanner and Goodlet. In Tanner, the Second District held that the stillbirth of a child without more was sufficient under the Bogorff and Barron rulings to trigger the statute of limitations. Similarly, Goodlet involved a situation in which a mother was telephoned by a physician who informed her that he had treated her daughter at the hospital and that her daughter was dead. Following the rule established in Barron and Bogorff, the Second District held that this information was sufficient knowledge of an injury to trigger the statute of limitations. The Second District in Rogers v. Ruiz, 16 F.L.W. 3076 (Fla.2d DCA Dec. 13, 1991), corrected at 17 F.L.W. 592 (Fla.2nd DCA Feb. 27, 1992), again reaffirmed its commitment to the Barron and Bogorff rule when it noted that the plaintiff's knowledge of the death of her husband

after surgery was sufficient notice of injury to trigger the statute of limitations even though she had no knowledge or reason to believe that medical malpractice was involved.[2] The instant case is in direct conflict with these decisions. To allow the lower tribunal's current holding to stand, has the effect of allowing an inconsistent application of current decisional law such that in the Second District, knowledge of an injury and knowledge of the identity of the health care provider are sufficient to trigger the statute of limitations. However, in the Fifth District, knowledge of the injury and of the identity of the health care provider are insufficient to trigger the statute of limitations unless there is something about the injury which communicates an inference of medical negligence.

The lower tribunal cites the case of Moore v. Morris, 475 So.2d 666 (Fla. 1985), in support of its holding. In Moore, parents of an infant born on July 9, 1973, filed a medical malpractice action on April 25, 1978, seeking damages for injuries allegedly sustained at birth. The parents were advised that there had been complications with the delivery but that the child had suffered no adverse effects. Almost four years later, the child was scientifically diagnosed as brain damaged. The Court noted that the parents did not have actual notice of the injury where the baby appeared to have made a speedy and complete recovery. In

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[2]Petitioners note that in Rogers the Second District went further to hold that under the particular facts in Rogers, there were questions of fact as to whether fraudulent concealment tolled the running of the statutory period.

reviewing the Moore decision, this Court in Barron noted:

> "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

The Fifth District misinterprets Moore when it relies upon Moore to substantiate its holding that knowledge of the injury without more was insufficient to trigger the statute of limitations. However, this argument is an issue for a brief on the merits. What is important for jurisdictional purposes is that the lower tribunal made it clear that the Fifth District requires not only knowledge of the injury, but also requires that the injury communicate some additional inference of negligence regarding the incident prior to the triggering of the statute of limitations which creates an express conflict in the decisional law.

CONCLUSION

The opinion of the lower court conflicts with the rule established in Barron and Bogorff and conflicts with several cases in the Second District and raises legal issues which merit this Court's attention. Petitioners urge this Court to exercise its discretionary jurisdiction and review the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail delivery, this 26th day of June, 1992, to Wagner, Cunningham, Vaughan & McLaughlin, P.A., 708 Jackson Street, Tampa, FL 33602, and Joel D. Eaton, Esq., of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Attorneys for Plaintiffs/Respondents, 25 W. Flagler St., Suite 800, Miami, FL 33130.

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APPENDIX TO
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