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IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,061

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

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,

Respondents.
_____/

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

RESPONDENTS' BRIEF ON JURISDICTION

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-and-
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I.
STATEMENT OF THE CASE AND FACTS

We have no quarrel with Dr. Kronman's statement of the case. We do quarrel with his statement of the facts, however, because his resort to the "record proper" to state the facts (and then to state them in the wrong light to boot) is entirely improper:

> This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record . . . . Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. . . .

Reaves v. State, 485 So.2d 829, 830 n. 3 (Fla. 1986).

Most respectfully, the only facts relevant to the jurisdictional question presented here are the facts stated on the face of the district court's decision (which are, incidentally, stated in the proper light). And of those facts, the critical facts are these: (1) Byron came under the care of Dr. Kronman because he had contracted a viral infection which caused swelling and narrowing of his airway below the vocal chords, a condition known as "subglottic stenosis"; (2) Byron was discharged from the hospital with the same condition, "subglottic stenosis"; (3) Byron's parents had no inkling that Byron's post-discharge condition had any cause different than its initial cause; (4) Byron's parents sought a second opinion from a competent expert, who told them, in effect, that Byron's post-discharge "subglottic stenosis" was an essentially unavoidable consequence of the procedure which had been necessary to save his life, and that Dr. Kronman's treatment had been professional and competent; and (5) Byron's parents learned from a subsequent treating physician that Byron's "subglottic stenosis" was in fact an injury caused by negligence, rather than an unavoidable consequence of competent treatment or a continuation of his initial condition -- i.e., they learned of the

"incident" of malpractice at that time -- and they filed suit within two years thereafter.

It was on *those* facts that the district court held that Byron's parents were not on notice, *as a matter of law*, of negligence or an injury caused by negligence, simply because they knew that their child came out of the hospital with the same condition for which he had initially been admitted -- and that they were therefore entitled to the benefit of the "due diligence/delayed discovery" provision of §95.11(4)(b), and a jury determination of whether they exercised due diligence in discovering the "incident" of malpractice when they did. It is also on *those* facts that this Court must judge the validity of Dr. Kronman's claim of "express and direct conflict."

II.
QUESTION PRESENTED ON JURISDICTION

WHETHER THE DECISION SOUGHT TO BE REVIEWED IS IN "EXPRESS AND DIRECT CONFLICT" WITH ANY OF THE FOLLOWING DECISIONS: *BARRON V. SHAPIRO*, 565 So.2d 1319 (Fla. 1990); *UNIVERSITY OF MIAMI V. BOGORFF*, 583 So.2d 1000 (Fla. 1991); *TANNER* V. HARTOG, 593 So.2d 249 (Fla. 2nd DCA 1992), *review pending; GOODLET V. STECKLER*, 586 So.2d 74 (Fla. 2nd DCA 1991).

III.
SUMMARY OF THE ARGUMENT

Fairly read, and considered collectively, the numerous decisions in which the courts of this state have considered the question of when knowledge of an injury will start the statute of limitations running have created two different, perfectly sensible categories: (1) when the plaintiff has knowledge of only an "injury in fact" but the injury is reasonably ambiguous concerning its cause, the statue 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 (2) 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

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plaintiff has discovered the "incident" and the statute of limitations has begun to run. The four decisions upon which Dr. Kronman relies for conflict fall into the latter category. The decision sought to be reviewed falls into the first category. The decisions are therefore harmonious, not in "express and direct conflict," and review should be denied.

IV.
ARGUMENT

THE DECISION SOUGHT TO BE REVIEWED IS HARMONIOUS WITH, NOT IN "EXPRESS AND DIRECT CONFLICT" WITH, THE DECISIONS UPON WHICH DR. KRONMAN RELIES.

Most respectfully, Dr. Kronman's entire argument is constructed upon an overly-broad reading (and therefore, in our judgment, a misreading) of the four decisions upon which he relies for conflict, and the conflicts claimed here simply do not exist. Although Dr. Kronman's argument appears at least colorable, that is only because he has constructed it by sleight-of-hand -- by taking a sentence or two from here and there in the four decisions, removing them from their context, and ignoring altogether the facts in the cases which gave rise to the sentences upon which he relies. There is more to a judicial decision than that, however. All judicial decisions must be read in light of their facts, and against the background of other existing judicial decisions on the subject -- and once the four decisions relied upon for conflict are properly read in that fashion, we think it will be clear that Dr. Kronman's claim of conflict is without merit.

Barron and *Bogorff* are not the only decisions which this Court has written on the subject. There are several others, some of which are cited with approval in both *Barron* and *Bogorff*. As undersigned counsel has argued to this Court in at least four different proceedings presently pending here (none of which has been decided to date), 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)

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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.

The fifth proposition is illustrated by this Court's decisions in *Moore v. Morris*, 475 So.2d 666 (Fla. 1985) (and the several decisions cited with approval therein); *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); and *Cohen v. Baxt*, 473 So.2d 1340 (Fla. 4th DCA 1985), *approved in relevant part*, 488 So.2d 56 (Fla. 1986). As we will demonstrate in a moment, the decision sought to be reviewed falls into this category of decisions. Additional post-*Barron* decisions falling into this category are *Menendez v. Public Health Trust of Dade County*, 566 So.2d 279 (Fla. 3rd DCA 1990), *approved*, 584 So.2d 567 (Fla. 1991), and *Southern Neurosurgical Associates, P.A. v. Fine*, 591 So.2d 252 (Fla. 4th DCA 1991).

The sixth proposition is represented by *Nardone v. Reynolds*, 333 So.2d 25 (Fla. 1976); *Barron v. Shapiro, supra; University of Miami v. Bogorff, supra*; and the two decisions of the District Court of Appeal, Second District, upon which Dr. Kronman relies for conflict here.

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In the instant case, the district court did not decline to follow *Barron* and *Bogorff*, as Dr. Kronman implies; it simply examined both decisions against the background of their facts and other existing decisions on the subject, and placed them in the category of cases represented by our sixth proposition:

> 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.
>
> This appears to have been what occurred in both *Bogorff* and *Barron*. In *Bogorff*, the supreme court found the victim's developing severe symptoms and lapsing into a coma triggered the statute of limitations where the leukemia for which the victim had been under treatment was in remission and the treatment whose negligent administration actually caused the injury had been done as a purely prophylactic measure. Similarly, in *Barron*, the victim had gone into the hospital for removal of polyps in his colon and left the hospital blind.

(Slip opinion, pp. 5-6).

The district court thereafter examined the decisions in the category defined by our fifth proposition -- including *Moore v. Morris, supra* -- and held that the facts in the instant case belonged in that category, rather than in the category defined by our sixth proposition:

> . . . The Norsworthys' child was hospitalized because he was having difficulty breathing due to the complications of the viral infection, including swelling of the airway below the vocal chords at the subglottis. It was necessary to provide an alternative vehicle for the child to breathe. Two methods were available, the method preferred by the physician was tried, and when it was not successful, the alternative method was used. Thereafter, the child was diagnosed as having subglottic stenosis, the narrowing of the airway below the vocal chords. Even if the

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> Norsworthys were aware that the initial cause of the closure of the airway was different from the subsequent cause, and if they knew that subglottic stenosis could result from intubation, there is little, if anything, in this record to suggest that the "injury" was the result of anything other than natural consequences of a recognized medical treatment competently performed. We cannot analogize the facts of this case to *Bogorff* and *Barron* enough to say that, as a matter of law, when the Norsworthys learned of their son's subglottic stenosis they were placed on notice of the incident giving rise to [a cause of action for] medical malpractice. . . .

(Slip opinion, pp. 7-8). In short, the district court simply harmonized *Barron* and *Bogorff* with the several other existing decisions on the subject (and did so, we believe, in a perfectly sensible way) -- and if the decisions were correctly harmonized, then there can be no legitimate claim here that the district court's decision is in "express and direct conflict" with either *Barron* or *Bogorff*.[1/]

We also believe there can be no legitimate claim here that the district court's decision

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[1/] To Dr. Kronman's contention that *Barron* proves that the district court misread *Moore v. Morris*, we offer the district court's own perfectly sensible response:

> 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.

(Slip opinion, p. 7).

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is in "express and direct conflict" with either *Goodlet* or *Tanner*. Although the Second District has certainly been inclined to read *Barron* and *Bogorff* much more broadly than we believe they deserve to be read, both *Goodlet* and *Tanner* fit comfortably within the category of cases defined by our sixth proposition, involving injuries which provide constructive notice of possible negligence. In *Goodlet*, for example, the plaintiff's 28 year-old, otherwise healthy daughter sought medical treatment for a simple pain in her right leg. Following the defendant's treatment, she died of an apparent cardiac arrest. Certainly, the nature of *that* injury put the plaintiff on notice of a possible invasion of her legal rights sufficient to start the statute of limitations running. And there is certainly nothing in that conclusion which would require a different result in the instant case, where the plaintiffs' child was discharged from the hospital with the same condition for which he had been admitted. Given the totally different factual circumstances of the two decisions, we respectfully submit that they are harmonious.

Tanner can be disposed of similarly. In that case, the pregnant plaintiff entered the hospital for testing of her viable fetus; the following day her baby was delivered stillborn. The district court held that the nature of this injury appeared no different than the nature of the injuries in *Barron* and *Bogorff*, and that the injury therefore put the plaintiff on notice of a possible invasion of her legal rights sufficient to start the statute of limitations running. Although a decent argument can be made that Mrs. Tanner's "injury" did not provide quite the same "constructive notice" of malpractice as did the injuries in *Barron* and *Bogorff*, the fact remains that the *Tanner* Court concluded that it did -- and there is certainly nothing in that conclusion which would require a different result in the instant case, where the plaintiffs' child was discharged from the hospital with the same condition for which he had been admitted. Given the totally different factual circumstances of the two decisions, we respectfully submit that they are harmonious as well.

That *Tanner* and the decision sought to be reviewed are harmonious is also

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demonstrated by the fact that the *Tanner* Court was sensitive to the two different categories of cases defined by our fifth and sixth propositions (and recognized in the decision sought to be reviewed), because its certified question asks this Court, in effect, to determine whether the stillbirth of the plaintiff's child falls into the category of cases defined by our fifth proposition, or into the category defined by our sixth proposition (and *Barron* and *Bogorff*):

> Whether, as a matter of law, the stillbirth of a child is such an obvious injury as to place a plaintiff on notice of the possible invasion of the plaintiff's legal rights and commence the limitations period under Section 95.11(4)(b), Florida Statutes (1989).

Since there would have been no reason for the *Tanner* Court to have certified this question unless it was in basic agreement with the manner in which this Court's several decisions on the subject were harmonized in the decision sought to be reviewed here, the lack of "express and direct conflict" between them should be clear.[2/]

Most respectfully, unless (as Dr. Kronman appears to be claiming here) this Court meant to overrule all of the decisions contained in the category represented by our fifth proposition when it decided *Barron* and *Bogorff* -- and thereby write the "due diligence/delayed discovery" provision of §95.11(4)(b) completely out of the statute of limitations -- the decision sought to be reviewed here must be viewed as harmonious with the four decisions relied upon for conflict. If we are correct about that, then this Court lacks jurisdiction to review the district court's decision, and review should be denied.

[2/] To the extent that Dr. Kronman may also be claiming conflict with *Rogers v. Ruiz*, 16 FLW 376 (Fla. 2nd DCA Dec. 13, 1991), corrected at 17 FLW 592 (Fla. 2nd DCA Feb. 27, 1992), we note simply that Mrs. Rogers' husband died on the operating table during bypass surgery. He therefore suffered an injury which was sufficiently out of the range of expected results to fit arguably within the category of cases represented by our sixth proposition -- so the decision sought to be reviewed here can be viewed as harmonious with *Rogers* as well.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 21st day of July, 1992, to: A. Scott Noecker, Esq., Taraska, Grower, Unger and Ketcham, P.A., P.O. Box 538065, Orlando, Florida 32801.

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