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

PETITIONERS' BRIEF ON THE MERITS

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

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ORIGINAL

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JURISDICTIONAL STATEMENT

This Court has accepted conflict jurisdiction over this case based on 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 the decisions of the Second District Court of Appeal in Tanner v. Hartog, 593 So.2d 249 (Fla.2d DCA 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).

THE PARTIES

This brief is filed on behalf of the Defendants/Petitioners, BARRY S. KRONMAN, M.D. and ENT HEALTH AND SURGICAL CENTER BARRY S. KRONMAN, M.D., P.A. These Petitioners will collectively be referred to herein as "Dr. Kronman". The Plaintiffs/Respondents are BYRON NORSWORTHY, a minor, by and through his parents and next friends, STEVE NORSWORTHY and LINNEA NORSWORTHY, and STEVE NORSWORTHY and LINNEA NORSWORTHY, individually. The Respondents will be referred to collectively as "the Norsworthys" or as Plaintiffs. BYRON NORSWORTHY, a minor, will sometimes hereinafter be referred to individually as "Byron".

STATEMENT OF THE CASE

The Petitioners are before this Court because the Court has accepted conflict jurisdiction over this case from the Fifth District Court of Appeal because it conflicts with this Court's decisions 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, 593 So.2d 249 (Fla.2d DCA 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 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, 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 alleged 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 trial 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 reasoning that it could not, as a matter of law, say that when Respondents learned of their son's subglottic stenosis, i.e., injury, they were placed on notice of an incident giving rise to medical malpractice. 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. This Court entered an order accepting jurisdiction of this matter on November 13, 1992. References to the Record below shall be noted by the letter "R" and the page number from the Record.

STATEMENT OF THE FACTS

Byron was admitted by his pediatrician, Dr. Sharad Vyas, for observation to Holmes Regional Medical Center in Melbourne, Florida, on March 15, 1985. According to Dr. Vyas's admission notes and deposition, Byron had developed a slight cold which turned into a croupy cough and was admitted for observation (R.623, 642). Byron seemed to improve over the next couple of days (R.643-644). However, 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. Kronman, an ear, nose and throat specialist ("ENT"), was summoned for consult (R.652, 735-737).

Because of Byron's visible breathing difficulties, 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.715-720, 741-744).

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. Dr. Kronman observed Byron for a few minutes after completion of the extubation procedure, and Byron appeared to be stable and doing well. However, after Dr. Kronman left, Byron's condition worsened

in the recovery room and a subsequent emergency oral tracheal intubation was performed in the recovery room by an anesthesiologist on call. Shortly thereafter Byron was taken to the operating room, where the oral tracheal tube was replaced by Dr. Kronman with a nasotracheal tube. (R. 744-748).

On March 22, 1985, after consultation with the Norsworthys; Dr. Vyas, the pediatrician; Dr. Currie, the anesthesiologist, and Dr. Kronman, it was determined that Byron's tube should again be removed to see if he would be able to breathe on his own without the tube. A third extubation[1] was performed on March 22, 1985, and after approximately 45 minutes of observation, it was determined that Byron was still unable to breathe on his own as he continued to have difficulty breathing without the tube. Accordingly, Dr. Blunk, an anesthesiologist on staff at the hospital, reintubated[2] Byron. Shortly thereafter, a tracheotomy was performed by Dr. Kronman (R.754-764, 878-889, 654).

Byron was discharged from the hospital with his tracheotomy tube in place on March 28, 1985 (R.624-625, 656). Byron's pediatrician noted in his discharge summary that there was a strong

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[1]According to Dr. Kronman, in his deposition, it had been previously agreed in consultation with the Norsworthys, Dr. Vyas, Dr. Currie and Dr. Kronman, that should Byron not be able to breathe safely on his own after this intubation, that a tracheotomy would be performed.

[2]According to Dr. Kronman's deposition, he usually requires an intubation on patients in the pediatric age group prior to performing a tracheotomy because it makes the tracheotomy procedure easier.

possibility that Byron had developed a tracheostenosis (narrowing of the airway), i.e., subglottic stenosis (R.624-625, 656-657).

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 through July of 1985 (R.275, 398-399, 804, 824, 841). According to Dr. Dickinson's deposition and office medical records, the Norsworthys were advised by Dr. Dickinson on their first visit that Byron had been intubated in a life-threatening situation which may, unfortunately, have resulted in subglottic stenosis (R.626, 831-834, 842-843).

During the period that Dr. Dickinson was responsible for Byron's care, Byron was readmitted to the hospital on two occasions, April 23, 1985, and May 28, 1985 (R.846, 849) for additional procedures. Dr. Dickinson expressly noted in her hospital admission summary on April 24, 1985, and office notes of May 28, 1985, the presence of subglottic stenosis (R.626-627, 839-840, 849, 857).

Very early on, the Norsworthys began questioning the care that had been rendered by Dr. Kronman in March, 1985. Dr. Dickinson testified in her deposition as follows:

> **"... I do remember from the moment that I met them until Byron transferred his care out of state that there have always been questions by both Mr. and Mrs. Norsworthy about the quality of Byron's care prior to seeing me and whether or not Dr. Kronman had handled his care well and was trained to handle his care well."** (R.818).

The Norsworthys continued to question Dr. Dickinson on numerous occasions thereafter concerning the quality of Dr.

Kronman's care of Byron. There was no question in Dr. Dickinson's mind that the Norsworthys believed that there had been a problem with the care rendered by Dr. Kronman:

> "When patients walk in your office on every visit and ask you, did Dr. Kronman do something wrong, I think that's pretty straight-forward that they are concerned about the care given. I don't believe that there was a single office visit when that question wasn't raised." (R.819).

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.831-832, 834-837). In her office medical notes she reported that:

> "The parents appeared to understand the natural progression of subglottic edema and possible stenosis, they understood 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. The Norsworthys did acknowledge, however, that Dr. Dickinson had expressed her disapproval of repeated intubations and explained to them the pros and cons of intubations and tracheostomies. (R.291-294, 341-342, 393-394 and 396).

In July, 1985, the Norsworthys relocated to Pennsylvania, and

Byron was placed under the care of Dr. Tucker, a Philadelphia pediatric otolaryngologist. Mrs. Norsworthy, in her deposition, recalls that Dr. Tucker advised her early on that Byron's subglottis could have been mechanically injured by insertion of the tubes (R.295, 305-306). 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.266, 375). Byron underwent various procedures under Dr. Tucker's care to alleviate the effects of subglottic stenosis and to attempt to safely and permanently remove the tracheotomy tube (R.408, 479). 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 (R.473, 475, 477, 479, 484). Dr. Tucker further testified that he advised the Respondents that in his opinion, Byron's subglottic stenosis was an injury caused by inappropriate negligently administered intubations.[3] On June 28, 1989, more than four years after Dr. Kronman last saw Byron, the Norsworthys filed suit against Petitioners.

It was based upon the facts stated above that the trial court ruled as a matter of law that there was no genuine issue of material fact that the Norsworthys knew, or, with the exercise of due diligence, should have known of Byron's injury more than two

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

years prior to the commencement of their action against the Petitioners and, therefore, correctly granted Petitioners' motion for summary judgment.

SUMMARY OF THE ARGUMENTS

This Court in the recent decisions of Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990), and University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991), reaffirmed the standard mandated in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), that the statute of limitations begins to run when the Plaintiffs knew or should have known that **either** injury **or** negligence had occurred. In reaffirming this principle in Barron and Bogorff, this Court expressly 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 the healthcare providers. This Court in Barron and Bogorff went further and affirmatively established the standard which is to be applied by lower tribunals in determining the point at which the statute of limitations is triggered in medical malpractice actions. This Court in both Barron and Bogorff, in reaffirming Nardone, expressly held, again, that the statute of limitations in a medical malpractice action commences when a plaintiff has actual or constructive knowledge of **either** the injury **or** the negligent act.

In the instant case, however, the Fifth District has imposed upon the standard clearly established in Nardone, Bogorff and Barron, the additional requirement that in order to trigger the statute of limitations, the injury must, in some fashion, communicate the possibility of medical negligence. This is the

same standard which was rejected by this Court in Barron and Bogorff. This hybrid standard, imposed by the Fifth District in the instant case, directly conflicts with existing case law and creates obvious ambiguities as to the appropriate standard to be applied.

In less than two years after this Court's clear mandate reaffirming Nardone, the Fifth District appears to be fashioning a different standard, which for all intents and purposes has the effect of overruling the precedent clearly established in Nardone, Barron and Bogorff. In applying a standard which is different from the established rule of law in Nardone, Barron and Bogorff, the Fifth District has exceeded its authority.

Byron Norsworthy was admitted to the hospital for observation because of croup. He was discharged from the hospital with a tracheotomy tube in place on March 28, 1985. Dr. Vyas, Byron's pediatrician, noted in his discharge summary that there was a strong possibility that Byron had "developed" a tracheal stenosis i.e., subglottic stenosis. In mid-April, Byron's parents sought a second opinion and additional post-operative care for Byron from Dr. Dickinson. Dr. Dickinson noted in Byron's medical records in April and May of 1985, the presence of subglottic stenosis. Additionally, Dr. Dickinson, several times in her deposition, testified that the Norsworthys continually questioned her about the quality of care which Byron received from Dr. Kronman.

The mental state of the Norsworthys at the time of Byron's admission and at the time of Byron's discharge are important. As

evidenced by the record, in their minds, Byron's condition upon discharge was dramatically worse than the condition upon admission, which clearly should have put the Norsworthys on notice of an injury, and the possible invasion of their legal rights. This is sufficient in and of itself to start the statute of limitations running as a matter of law. Florida law is clear that actual knowledge of a physical injury, **or** the failure to exercise due diligence in the discovery that an injury has occurred, alone will trigger the statute of limitations. It is not necessary to have knowledge that the physical injury resulted from a negligent act in order to trigger the statute of limitations. Knowledge of either the injury **or** the negligence will suffice. In the instant case, not only was the injury discovered by the Norsworthys in 1985, but the alleged negligence was strongly suspected by the Norsworthys as well.

Additionally, Respondents acknowledged in their depositions that they had in their possession a complete copy of Byron's medical records in June of 1985 when they moved to Philadelphia, a copy of which was also provided to Dr. Tucker, Byron's subsequent treating physician and Respondents' expert witness in this action. Respondents now contend that they did not have sufficient notice of the alleged negligence of Dr. Kronman because Dr. Dickinson, who treated Byron from April until July of 1985, refused to criticize Dr. Kronman's care of Byron. However, this does not serve to toll the statute of limitations. It is undisputed that the Norsworthys were aware of Byron's tracheotomy upon his discharge. Likewise, it

cannot be disputed that Byron's medical records which were provided to Dr. Tucker as early as July of 1985, contained the same information used by Dr. Tucker to form his opinion of the alleged negligence of Dr. Kronman in 1989. Knowledge of the contents of accessible medical records is imputed to the Respondents. Accordingly, the opinion regarding Byron's alleged negligent medical care could just as easily have been formed from Byron's medical records four years earlier in 1985.

In a medical malpractice action, the plaintiff may not avoid the obligation imposed upon him by the statute of limitations by remaining ignorant of facts or law which alert him to his cause of action. In the instant case, sufficient facts regarding Byron's injury were available to the Norsworthys in 1985 to alert them of the possible invasion of their legal rights. The statute of limitations is tolled only for those who remain ignorant through no fault of their own. As noted in their own testimony, the Norsworthys are well educated individuals who are sticklers for detail and who were very persistent in their questions regarding their son's injuries. Yet the Respondents chose to sit on their rights and not bring their suit against Dr. Kronman until June of 1989, more than four years after Dr. Kronman last saw Byron Norsworthy. In light of these facts, the trial court below correctly ruled as a matter of law that Respondents' cause of action was time barred.

POINTS ON APPEAL

I. WHETHER THE FIFTH DISTRICT COURT APPLIED THE WRONG STANDARD IN HOLDING 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.

II. WHETHER THE RESPONDENTS KNEW OR WITH THE EXERCISE OF DUE DILIGENCE SHOULD HAVE KNOWN, AS A MATTER OF LAW, OF BYRON NORSWORTHY'S INJURY MORE THAN TWO YEARS PRIOR TO THE COMMENCEMENT OF THEIR ACTION AGAINST THE PETITIONERS.

ARGUMENT

I. WHETHER THE FIFTH DISTRICT COURT APPLIED THE WRONG STANDARD IN HOLDING 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.

The applicable statute of limitations with regard to this appeal reads, in pertinent part, as follows:

> "An action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence." (Section 95.11(4)(b), Fla. Stat. (1985).

In the seminal case of Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), this Court attempted to clearly define the standard which is to be used in applying the above-referenced statute of limitations. In Nardone, this Court held that the statute begins to run when the plaintiffs knew or should have known that **either** injury **or** negligence had occurred. The Nardone rule requires knowledge of **only one** of two critical factors, injury **or** negligence, to trigger the commencement of the statute of limitations. It does **not** require knowledge of both. The recent decisions of this Court in Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990) and University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991), reaffirmed the principle clearly established in Nardone that the statute begins to run when the plaintiffs knew or should have known that **either** injury **or** negligence has occurred. In establishing this standard,

this Court expressly rejected the proposition that knowledge of a physical injury, without knowledge that it resulted from a negligent act, failed to trigger the statute of limitations. The standard pronounced in Nardone, Barron and Bogorff should be sufficient to serve as a bright line to be applied by lower courts in interpreting application of the medical malpractice statute of limitations.

However, in the instant case, the Fifth District has declined to follow the standard clearly established in Nardone, Barron and Bogorff. The Fifth District, thus, expressly exceeded its authority when it held:

> "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." Norsworthy v. Holmes Regional Medical Center, 17 F.L.W. d. 868 (Fla.5th DCA, Opinion filed April 3, 1992) at 869.

The Fifth District held that it could not determine as a matter of law that when Respondents learned of their son's subglottic stenosis, i.e., injury, that such knowledge was sufficient to place them on notice of an incident giving rise to medical malpractice and, therefore, 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 after reviewing the facts, that Respondents knew of Byron's injury more than two years prior to the commencement of their action. In

its decision, the Fifth District reasoned that its difficulty in applying Barron and Bogorff lay in defining "injury" and more particularly, 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. The lower tribunal, thus, imposes upon the standard established in Nardone, Barron and Bogorff, the additional requirement that the injury must communicate an inference of medical negligence in order to trigger the statute of limitations.

The standard applied by the Fifth District in the case sub judice is similar to the standard which the Third District attempted to apply in Bogorff and which was soundly rejected by this Court. In overruling the Third District in Bogorff, this Court aptly noted:

> "Thus, the district court required the Bogorffs to have knowledge both of Adam's physical injury and that a negligent act caused his injury before the limitation period could begin to run.
>
> We do not find this to be an accurate statement of the law. In Barron, we 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. Rather, we reaffirmed the principle set forth in Nardone and applied in Moore v. Morris, 475 So.2d 666 (Fla. 1985), and held that the limitation period commences when the plaintiff should have known of either (1) the injury or (2) the negligent act." Barron, at 1002.

The triggering event in the instant case, just as it was in the Bogorff case was the Respondent's notice of injury to their child; not, as the Fifth District has required, additional notice

that Dr. Kronman's alleged negligence caused the injury.

This Court in Barron and Bogorff attempted to establish a concise and clear standard which, when properly applied, determines the point at which the statute of limitations is triggered. It is apparent that the Fifth District perceives this standard as a harsh rule and is looking for some way to soften its perceived effect. The Fifth District opines in Norsworthy:

> "The above-cited recent opinions suggest that some of Florida's intermediate appellate court judges are finding that imputing knowledge of an incident of medical malpractice based on mere knowledge of some injury that occurred in the course of medical care is a harsh rule." Norsworthy, at 869.

However, the Fifth District in imposing upon the standard established in Bogorff and Barron, the additional requirement that an injury must communicate an inference of medical negligence in order to trigger the statute of limitations, has declined to follow the clear standard established in Bogorff and Barron and has, thus, far exceeded its authority. As was noted in the seminal case of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973):

> "To allow a district court of appeal to overrule controlling precedent of this court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level." Hoffman v. Jones, at 434.

The reasoning used by the Fifth District in the instant case represents an outmoded standard which has been previously rejected by this Court on at least three occasions in Nardone, Barron and Bogorff. To allow the analytical process used by the Fifth District to be reinstated creates obvious ambiguities as to the

appropriate standard to be applied and takes away from lower tribunals, the bright-line which was drawn by this Court in Nardone, Barron and Bogorff. It also has the effect of transforming the legislature's clear and direct mandate for a two year statute of limitations into a four year statute of repose in most instances.

The Fifth District in grafting onto the standard established by this Court in Nardone, Barron and Bogorff, the additional requirement that the injury communicate some additional inference of negligence, creates unnecessary ambiguities with regard to the issue of when the statute of limitations begins to run in most cases. In attempting to distinguish Bogorff and Barron from the instant facts, the Fifth District has interpreted this Court's decisions in Bogorff and Barron much too narrowly. The lower tribunal interprets Bogorff and Barron to stand for the proposition that the statute of limitations begins to run from the date of injury where the facts are such that any reasonable person would recognize that the injury probably resulted from some act or omission of medical personnel. This is not the rule established in Barron or Bogorff. In Bogorff, for instance, this court observed:

> "...the triggering event for the limitation period was the Bogorffs' notice of injury to their child; not as the district court required, additional notice that Dr. Koch's negligence caused the injury." Id., at 1002. (emphasis added)

Similarly, in Barron, this Court observed:

> "Mrs. Shapiro's contention that the statute of limitations did not commence to run until she had reason to know that injury was negligently inflicted flies directly in the face of both Nardone and Moore." Barron, at 1321.

In each instance, this Court expressly rejected attempts by the plaintiffs to impose the additional requirement that the injury must carry with it sufficient inference of medical negligence before the statute of limitations is triggered. Likewise, the Fifth District's holding that the injury must communicate an inference of negligence to trigger the statute of limitations, should again be rejected by this Court. Interpreting Bogorff and Barron to require in addition to notice of the injury or notice of the negligent act, the additional requirement that the injury carry with it some inference of negligence has the effect of depriving Bogorff and Barron of all precedential value.

The standard applied by the lower tribunal in this case places it squarely in conflict not only with Barron and Bogorff, but also with subsequent lower court decisions in Tanner v. Hartog, 593 So.2d 249 (Fla.2d DCA 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), which correctly followed the holding in Barron and Bogorff. In Tanner, the Second District held that the stillbirth of a child and the parents' knowledge of same while under the treatment of their physicians, 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 standard established in Barron and Bogorff, the Second District held that this information was sufficient knowledge of an injury to trigger the statute of limitations. Similarly, the Second District in the case of Rogers v. Ruiz, 594 So.2d 756 (Fla.2d DCA 1991), 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.[4] The Second District again followed the rule established in Barron and Bogorff when it held in Jackson v. Georgopolous, 552 So.2d 215 (Fla. 2d DCA 1989) that the statute of limitations commenced when plaintiffs received a copy of their decedent's death certificate even though they contended that the cause of death on the death certificate was not written in lay terms and did not put them on notice of negligence.

To allow the lower tribunal's current holding to stand, has the effect of allowing an inconsistent standard to be applied depending on the district in which the party is litigating. In the Second District, it is clear that knowledge of an injury and

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[4]Petitioners note that in Rogers, the Second District went further to hold that particular facts in Rogers, which involved significant questions of fact as to fraudulent concealment on the part of the treating physician and the hospital, tolled the running of the statutory period which originally commenced with plaintiff's notice of her husband's death.

knowledge of the identity of the healthcare provider are sufficient to trigger the statute of limitations. However, in the Fifth District, knowledge of the injury and of the identity of the healthcare provider are insufficient to trigger the statute of limitations unless there is also something about the injury which communicates an inference of medical negligence.

In attempting to distinguish the standard clearly established in Bogorff and Barron from the instant facts, the lower tribunal relies heavily upon this Court's ruling in Moore v. Morris, 475 So.2d 666 (Fla. 1985). Moore is clearly distinguishable from the facts of this case because in the instant case the Respondents were on notice of their injury when their son was discharged from the hospital with a diagnosis of subglottic stenosis and a tracheotomy tube in place. On the other hand, Moore involved a situation in which a baby suffered fetal distress and a severe medical crisis after delivery, resulting in mental retardation and abnormal development. The parents were told by the treating physicians after the delivery that the child had swallowed something in the mother's womb during delivery which had restricted breathing, that the child was starved for oxygen for a period in excess of 30 minutes and that the baby might not live. The parents were subsequently told in the recovery room that the baby had been transferred to another hospital but that she had made a complete recovery and was alive and doing very well. When the baby was discharged from the hospital, the parents were told that the baby was fine and were repeatedly told by the physicians until the child

was three years old that the child was fine. It was not until at least three years after the child's birth that the child was scientifically diagnosed with brain damage and mental retardation.

The district court ruled as a matter of law that the plaintiffs in Moore were on notice of possible negligence at the time of the baby's birth. This Court, however, reversed holding that there were genuine issues of material fact with respect to whether the parents were on notice at the time of the baby's birth that an injury had occurred. The basis for this decision as noted by this Court, lies in the fact that upon discharge from the hospital and thereafter, the physicians repeatedly assured the parents of the baby's good health and that the baby had suffered no damage as a result of the fetal distress. Additionally, this Court noted that the child was not and could not have been scientifically diagnosed as having brain damage until she was three years old. In Moore, the operative fact, which the Fifth District and Respondents apparently overlook, is the fact that the injury did not manifest itself until at least three years after the child's birth.

The Fifth District and Respondents make much of the fact that this Court in Moore made reference to the fact that the fetal distress and the other facts surrounding the baby's birth such as the cesarean section are totally consistent with a serious or life-threatening situation which arose through natural causes during an operation. The Court goes on to explain that 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 impute notice of negligence or injury caused by negligence. This explanation by the Court should be interpreted in the context of the facts of the case. It is respectfully submitted that the Court was simply attempting to add additional clarification as to why the emergency situation surrounding the baby's birth was not sufficient in and of itself to put the Plaintiffs on notice of **either** injury **or** negligence.

This discourse by the Court should not be taken out of context and used as a springboard to support a mass retreat from the standard already clearly established in Nardone, Barron and Bogorff. Because the Court takes great pains to explain why the facts were not necessarily notice to the parents of negligence or injury caused by negligence, it should not be interpreted to mean that the Court is requiring that the injury when manifested must carry with it some inference of negligence. Too much is being made by the Fifth District and the Respondents of the Court's reference to "injury caused by negligence". Moore, at 668. To conclude that this explanation requires that an injury carry with it some indication of negligence is to interpret it out of context and is a misapplication and misunderstanding of Moore.

This Court in Barron and Bogorff expressly acknowledged that Moore 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. Accordingly, the standard applied in Moore is in actuality, no different from the standard established in Nardone and reaffirmed by this Court in Barron and

Bogorff. This Court in Barron attempted to put to rest ambiguities stemming from lower tribunals' interpretation of Moore, when it noted:

> "In resolving the case, 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 defendant's 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...
>
> 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." Barron, at 1321.

Like the Fourth District in Moore, the Fifth District misinterprets Moore when it relies upon Moore to substantiate its holding that Respondent's knowledge of the injury without more was insufficient to trigger the statute of limitations. In Moore, the parents' lack of knowledge of the injury was compounded by the fact that the parents were repeatedly assured by the physicians that the infant had suffered no damage at birth.[5] The issues of fact created in Moore do not in any fashion detract from the standard clearly established in Nardone and reaffirmed in Barron and Bogorff. This is the same standard which should have been applied by the Fifth District in the case sub judice.

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[5]This created not only an issue of fact as to whether the parents had knowledge of the injury but also possibly created an issue of fact as to whether or not fraudulent concealment by the defendant physicians was involved.

II. WHETHER THE RESPONDENTS, AS A MATTER OF LAW, KNEW OR WITH THE EXERCISE OF DUE DILIGENCE SHOULD HAVE KNOWN OF BYRON NORSWORTHY'S INJURY MORE THAN TWO YEARS PRIOR TO THE COMMENCEMENT OF THEIR ACTION AGAINST PETITIONERS.

This Court in interpreting the medical malpractice statute of limitations in Barron and Bogorff expressly held that the statute of limitations period commences when a plaintiff knew or should have known **either** of the injury **or** the negligent act. In the instant case, the record below reveals that Respondents had **both** actual and constructive notice of their son's injury. In light of this, the trial court correctly ruled that Respondents, as a matter of law, knew or with the exercise of due diligence should have known of Byron Norsworthy's injury more than two years prior to the commencement of their action against Petitioners and that accordingly, their Complaint filed more than four years after the actual injury was time barred.

Alternatively, even if one were to accept Respondents' contention that they had neither actual or constructive notice of their son's injury; it is clear from the record below that they had strong suspicions of malpractice, i.e., negligence in 1985. Their strong suspicions of negligence were sufficient to put them on notice of the possible invasion of their legal rights and required that they commence a thorough investigation as to whether they had a legal cause of action. Accordingly, the entry of summary judgment in favor of Petitioners was still appropriate under the second half of the "either/or" test established in Nardone, Barron

and Bogorff.

In the instant case, as revealed in the Statement of Facts, Byron Norsworthy was admitted to the hospital on March 15, 1985, by Dr. Vyas, his pediatrician. According to Dr. Vyas's admission notes and deposition, Byron had developed a slight cold which turned into a croupy cough and was admitted to the hospital for observation (R.642). It is clear from the record below that at the time of his admission, Byron's condition was stable and he was hospitalized mainly for observation. Over the next several days Byron's condition worsened and on March 18, 1985, an emergency intubation was performed to relieve Byron's breathing difficulties. Subsequently on two occasions, the tube was removed to see if Byron could breathe on his own without the tube. In each instance he was reintubated because of continued breathing difficulties. On March 22, 1985, a tracheotomy was performed on Byron by Dr. Kronman and on March 28, 1985, Byron was discharged from the hospital with a tracheotomy tube in place (R.642, 654, 656, 715-720, 744-748, 754-764, 878-889). According to Respondents' own testimony, Dr. Kronman advised them that Byron's tracheotomy tube could be removed within two weeks to a month.

On April 18, 1985, Byron's parents sought a second opinion and additional post-operative care for Byron from Dr. Belinda Dickinson. Dr. Dickinson treated Byron from April 18, 1985, to June, 1985. Dr. Dickinson's April 18, 1985, office notes state that the Norsworthys were advised that Byron had been intubated in a life-threatening situation which may, unfortunately, have

resulted in subglottic stenosis (R.275, 398-399, 626, 831-834, 842-843). During the period that Dr. Dickinson was responsible for Byron's care, Byron was readmitted to the hospital on April 23, 1985, and May 28, 1985, for additional procedures. Dr. Dickinson noted in her hospital admission summary on April 24, 1985, and office notes of May 28, 1985, the presence of subglottic stenosis (R.626-627, 839-840, 844-846, 849, 857).

In July of 1985, Respondents moved to Philadelphia and transferred Byron's tracheotomy care to Dr. Tucker, a pediatric ENT doctor, and transferred his general pediatric care to Dr. Moffitt, a general pediatrician.

Despite alleged representations from Dr. Kronman that Byron's trach tube could be removed in two weeks to a month, under Dr. Tucker's care, it was determined that the tube could not in actuality be safely and permanently removed for some time. In fact, the tracheotomy tube could not be and was not safely and permanently removed by Dr. Tucker for approximately three years and only after 14 or 15 subsequent medical procedures and operations were performed by Dr. Tucker to alleviate the subglottic stenosis and facilitate removal of the tracheal tube (R.408, 473, 479, 484).

Applying the principle of Nardone, Barron and Bogorff to the facts of this case, it is apparent that Respondents were on notice of Byron's injury by at least July of 1985 when they left Florida and moved to Philadelphia. They had to be continuously on notice of this injury over the next several years as they cared for Byron with his tracheotomy tube still in place and as Byron underwent

repeated surgeries to alleviate the subglottic stenosis.

Unlike the factual scenario in Moore, the case sub judice does not involve a situation in which the injury did not manifest itself until much later. All of the facts necessary evidencing the injury and to place Respondents on notice that they should initiate an investigation to determine whether there had been an invasion of their legal rights were present and available to Respondents in July of 1985. As noted by this Court in Barron:

> "This is not a case where the disastrous consequences of the surgery did not become apparent until less than two years before the suit was filed." Barron, at 1321.

In order to salvage their claim, Respondents contend that they had no reason to know that Byron had suffered a distinct injury in the hospital because he was admitted to the hospital with subglottic stenosis and was discharged from the hospital with subglottic stenosis. As pointed out earlier, Byron's medical records from the hospital note that Byron was admitted to the hospital for observation because of croup. Petitioners acknowledge that croup is a laryngotracheobronchitis viral infection, with some of the symptoms involving edema or swelling of the soft tissue in the subglottis area. However, Byron's admitting physician did not expressly diagnose Byron's condition as subglottic stenosis upon his admission to the hospital. It was only upon his discharge that he made the diagnosis that Byron had "developed" a tracheal stenosis, i.e., subglottic stenosis. **Just as importantly, Byron had not had three intubations and Byron also did not have a tracheotomy when he was admitted to the hospital.**

In any event, it is important that we look not only to Respondents' present contentions regarding Byron's condition when hindsight makes it extremely convenient for them to contend that they were simply not on notice as to the injury, but that we also scrutinize their understanding of Byron's condition in 1985. In that regard it is important that we look not only to expert opinions more than four years after the occurrence as to the technical definition of subglottic stenosis, but that we also look very closely at what was in the mind of the Respondents upon Byron's discharge from the hospital. Byron was admitted to the hospital with croup, a relatively common viral infection of the laryngotracheobroncheoli; but was discharged after several endotracheal intubations with a tracheotomy and a diagnosis of subglottic stenosis. Mrs. Norsworthy acknowledges that in her mind, there was a dramatic difference in Byron's condition when he was admitted to the hospital and when he was discharged. In Barron, this Court observed:

> "that the Shapiros were on notice of Mr. Shapiro's injury by at least December 31, 1989. As Mrs. Shapiro put it, her husband went in for an operation on his colon and came out blind." Barron, at 1321.

In Bogorff, this Court observed:

> "No party disputes that Adam Bogorff's injuries occurred, at the latest, by July, 1972. At that time the Bogorffs knew of Adam's paralyzed and unresponsive condition. Although they did not know if medical negligence caused that condition, they knew that Dr. Koch had treated Adam and knew of his injury. This was sufficient for their cause of action to accrue, thereby commencing the statutory limitation period against Dr. Koch and the University of Miami... As a matter of law, the Bogorffs were on notice of the possible invasion of their legal

> rights and the limitation period began running." Bogorff, at 1002.

Similar to the responses by Mrs. Bogorff and Mrs. Shapiro, Mrs. Norsworthy notes:

> "... the whole experience was just so unbelievable...I guess it was unbelievable that we took a very healthy child into a hospital with a little bit of croup and he comes out with a tracheotomy." (R.268).

What is important here is what was in the minds of the parents at the time of admission and at the time of discharge. As evidenced by the record, in their minds, Byron's condition upon discharge was dramatically worse from the condition upon admission, which clearly should have put the Norsworthys on notice of an injury and the need to conduct an investigation to determine whether there was a possible invasion of their legal rights. As was the case in Barron and Bogorff, this notice was sufficient to commence the statute of limitations as a matter of law.

It is clear from the record below that the Norsworthys not only had actual notice of their injury, but that they also strongly suspected negligence which is the second half of the "either/or test" established in Nardone and reaffirmed in Barron and Bogorff. The Norsworthys, as noted in the record below, are well educated individuals[6] who were very concerned about their son and his

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[6]Mr. Norsworthy testified that he has a total of four academic degrees, a Bachelor of Arts degree in music, a Master of Arts degree in music, a Bachelor of Science degree in electrical engineering, and a Master of Science degree in electrical engineering (R.429). Mrs. Norsworthy testified that she has a Bachelor of Arts degree in music, as well as a Master of Fine Arts and two additional years of postgraduate training (R.265).

treatment. Mr. Norsworthy admits that he was always probing:

> "I am an engineer, and I am a stickler for details and I don't take anything at face value... I'm a perfectionist." (R.366-367).

Dr. Dickinson's ambivalence or reluctance with regard to criticizing Dr. Kronman's care was not sufficient in light of the facts of this case to relieve Respondents of the duty imposed by law to thoroughly investigate their cause of action. This Court made it clear in Nardone that once a potential plaintiff knows of an injury, it is incumbent upon him to investigate the facts surrounding the injury. Similarly, Respondents should not be allowed to take advantage of their failure to uncover facts which were reasonably discoverable. Dr. Dickinson's refusal to criticize Dr. Kronman and her statements to the effect that as far as she could tell that Dr. Kronman's care had been competent and appropriate, cannot serve to toll the statute of limitations as to Respondents. Barron, at 1321. Having had sufficient facts available to them as early as July of 1985, Respondents cannot now bask in their own alleged ignorance to avoid having their complaint time barred. To indulge Respondents in such a fashion flies directly in the face of Nardone, Barron and Bogorff.

Dr. Dickinson testified in her deposition that she recalled from the moment that she met them until Byron transferred to another state, the Norsworthys questioned the quality of care provided by Dr. Kronman (R.818-819, 836). There is not really a conflict in this contention as Respondents themselves acknowledged in their depositions that they questioned Dr. Kronman's care

(R.268, 285, 287, 288, 341-342, 365-366, 388, 397-400). This supports the conclusion that the Norsworthys were not only on notice of their injury but very much suspected that the injury was caused by negligence. However, in an attempt to salvage a time-barred claim, Respondents now contend that their concerns regarding Dr. Kronman's care were alleviated because Dr. Dickinson told them that:

> "She felt that Dr. Kronman did not do anything that was medically inappropriate...She told me that she did not criticize Dr. Kronman for whatever choices he made for whatever he did at that time, she told me." (R.394).

Even assuming, as we must, for purposes of summary judgment, the accuracy of this contention, it is still clear from undisputed points in the record that Respondents remained suspicious of the possibility of negligence in their son's care by Dr. Kronman. For instance, we can look to additional testimony by Respondents which indicates that despite Dr. Dickinson's unwillingness to criticize Dr. Kronman, she also advised them on several occasions that ENT's do not like repeated intubations and that she might have handled Byron's care differently. In fact, Steve Norsworthy expressly noted in his deposition as follows:

> "... and Dr. Dickinson, I do believe was the first one who described that to me ... -- she described in detail some of the pros and cons of endotracheal tubes versus tracheostomies ... well, she told me that sometimes it's better to give a tracheotomy than to have an endotracheal tube, depending on the circumstances, the judgment of the physician. She went on to say that you would have to see. She said she would have to see. She said you would have to be the doctor, look into the airway and make that judgment ... <u>She said she</u>

> might have done it differently but that doesn't mean that he did it wrong...She said she might have introduced the tracheotomy tube earlier, and not intubated a second and a third time. But she said that was conjecture on her part." (R.394-395). (emphasis added)

Mr. Norsworthy further notes that:

> "... She went on to say that you have to be there, you have to look at the child, you have to know the situation, etc., etc. She went out of her way, because of my curiosity, to tell me that she was not going to fault Dr. Kronman. She made that extremely clear..."(R.396). (emphasis added)

Mrs. Norsworthy recalled:

> "She did say that ENTs don't like intubations. They don't like to see kids intubated." (R.341-342)

Respondents now contend that Dr. Dickinson's refusal to criticize Dr. Kronman's care somehow approached fraudulent concealment and relieved them of their burden of due diligence with regard to Byron's obvious injury. They contend this, despite the fact that they acknowledge that Dr. Dickinson, in the same breath that she advised them that she would not criticize Dr. Kronman's care because she had not been in the operating room, also advised them on the pros and cons of intubations and tracheotomies; and further advised them that she probably would have handled Byron's care differently and that ENT's do not like to see repeated intubations in children. Respondents' contention here that they were relieved of any further due diligence because of Dr. Dickinson's refusal to criticize Dr. Kronman and her opinion that Dr. Kronman's care had been competent, cannot be accepted. A similar argument was made by Mrs. Shapiro in Barron. In response

to such contention, this court noted:

> "Moreover, Mrs. Shapiro had full access to the medical records, and there was no fraudulent concealment. The fact that a doctor other than Dr. Barron suggested to Mrs. Shapiro that the tubes in Mr. Shapiro's body may have acted as a host for the infection could not serve to toll the statute. Mrs. Shapiro's contention that the statute of limitations did not commence to run until she had reason to know that injury was negligently inflicted flies directly in the face of both Nardone and Moore." Barron, at 1321. (emphasis added)

There is more in the record below to indicate that the Norsworthys were not only aware of their son's injury but that they suspected negligence as well. Mrs. Norsworthy, for instance, even acknowledged in her deposition that Dr. Tucker had advised her early in his treatment of Byron that Byron's injury could have been caused by intubations (R.305-306). Dr. Dickinson testified below that she recalled that from the moment she met them until Byron transferred to another state, the Norsworthys questioned the quality of care provided by Dr. Kronman (R.818-819, 836). Additionally, in Mr. Norsworthy's deposition, he confirms that Dr. Moffitt, the pediatrician to whom Byron's care was transferred in Philadelphia, advised him that **"usually children with croup don't have trachs for extended periods of time..."** (R.437-438).

Respondents' concern about the care received by Byron during his March hospitalization continued even after they transferred his care to Dr. Tucker as evidenced by Dr. Tucker's responses to

questions regarding the Respondents' concern about Dr. Kronman's care:

> Q: "Well, generally tell me what they have told you about the treatment that they had received by Dr. Kronman and Holmes Regional and Dr. Dickinson.
>
> A: The impression that I got, particularly Mr. Norsworthy was the more verbal of the two parents, he was always upset in his mind about the outcome of their son's illness. (R.475)
>
> Q: Is it your recollection that they were questioning the care and treatment rendered by Dr. Kronman literally from the time they came to see you in 1985?
>
> A: Yes, I think he was. I think he was never 'happy'." (R.485)

It is clear that in Respondents' minds, there was sufficient reason to suspect alleged negligence. Accordingly, it was incumbent upon Respondents to conduct a sufficient investigation to determine whether there was a possible invasion of their legal rights. This notice and obvious suspicion of negligence was sufficient to commence the statute of limitations as a matter of law.

In addition to having actual notice of Byron's injury and strong suspicions of the alleged negligence which Respondents contend caused Byron's injury, the Respondents can be deemed to have had constructive knowledge of Byron's injury as well because of their possession of Byron's medical records since July of 1985. As noted earlier, Dr. Vyas, Byron's pediatrician, noted in his hospital discharge summary that there was a strong possibility that Byron had "developed" a tracheal stenosis, i.e., subglottic

stenosis (R.656-657). Dr. Dickinson's April 18, 1985, office notes state that the Norsworthys were advised that Byron had been intubated in a life-threatening situation which may, unfortunately have resulted in subglottic stenosis (R.626, 831-834, 842-843). During the period that Dr. Dickinson was responsible for Byron's care, Byron was readmitted to the hospital on April 23, 1985, and May 28, 1985, for additional procedures. Dr. Dickinson noted in her hospital admission summary on April 24, 1985, and office notes of May 28, 1985, the presence of subglottic stenosis (R.626-627, 839-840, 849, 857).

In July of 1985 when the Respondents left Florida for Philadelphia, they carried with them a complete and thorough set of Byron's medical records. Mrs. Norsworthy even acknowledged in her deposition that she had reviewed these medical records in 1985 and on several occasions thereafter (R.266, 375). Additionally, these same medical records were delivered to Dr. Tucker, the pediatric ENT doctor to whom Byron's care was transferred in July of 1985. The medical records chronicled the operations and procedures performed on Byron during his hospital stay, including the repeated intubations and the size and type of tubes used. It is clear from the above facts which cannot be disputed that as early as July of 1985, that the Norsworthys had all of the information which was necessary to make them not only aware of their injury but also to make them aware of the alleged negligence of which they now complain.

Respondents argue that it was not until sometime in 1989 that they asked Dr. Tucker to review these records to determine whether or not there had been any negligence in the care and treatment provided to Byron by Dr. Kronman. However, they do not contend, and there is nothing in the record below which indicates that any new or additional information was obtained by them regarding Byron's medical condition subsequent to July of 1985, other than Dr. Tucker's opinion in 1989 that Byron's subglottic stenosis was caused by Dr. Kronman's negligent treatment. Both, Respondents and Dr. Tucker, had all of the information which was necessary for them to reach the same conclusion in 1985 regarding Dr. Kronman's treatment. There is nothing in the record which indicates why it was not until 1989 that they allegedly reached the conclusion that Byron had been injured by Dr. Kronman's alleged negligence, other than responses in the Respondents' depositions that they were concerned during this period of time more about Byron's tracheotomy, the proper care of the tracheotomy and when it would be removed.

It is clear that Respondents had full access to the medical records, and that there was no fraudulent concealment. Pursuant to the holding in Nardone and Bogorff, Respondents are imputed with knowledge of the contents of the medical records. Respondents contend that even though they had access to the medical records, they did not have actual knowledge of Byron's injury or the cause of Byron's injury because there was nothing in the record to alert them to Byron's injury or the cause of his injury. However, as

noted in Bogorff, the knowledge required to commence the limitation period does not rise to the level of legal certainty. In fact, the issue as to negligence is a determination which must ultimately be made by a jury. In any event, as acknowledged by Respondents, the same medical records which were provided to the Respondents in 1985 were used by Dr. Tucker in 1989 as the basis for his opinion regarding alleged negligence on the part of Dr. Kronman. As noted, these records were provided to Dr. Tucker in 1985. Accordingly, one must conclude that Respondents had the means, i.e., the medical records, to arrive at the same opinion of negligence in 1985 as was eventually arrived at in 1989. As noted in Nardone:

> "The means of knowledge are the same as knowledge itself." Nardone, at 34.

The Respondents' contention that it was not until July of 1989 that Dr. Tucker advised them of his opinion that Dr. Kronman had been negligent does not serve to toll the statute of limitations which commenced in June of 1985. As noted in Nardone citing Florida Jurisprudence:

> "cf.21 Fla.Jur. Limitation of Actions, Section 37, stating in part, 'but mere ignorance of the facts which constitute the cause of action will not postpone the operation of the statute of limitations, where such ignorance is due to want of diligence; a party cannot thus take advantage of his own fault.'" Nardone, at 35.

Having had sufficient facts available to them as early as July of 1985, Respondents cannot now bask in their own alleged ignorance to avoid having their complaint barred by the statute of

limitations. To indulge Respondents in such a fashion flies directly in the face of Nardone, Barron and Bogorff.

CONCLUSION

Applying the standard established by this Court in Nardone, Barron and Bogorff, it is clear that the Respondents knew or with the exercise of due diligence should have known as a matter of law, of Byron Norsworthy's injury more than two years prior to the commencement of their action against the Petitioners and additionally strongly suspected negligence in Byron's care. The Fifth District Court of Appeal applied the wrong standard, holding 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. Petitioners humbly request that this Court once again clearly reiterate and reaffirm the standard established in Nardone, Barron and Bogorff, that the statute of limitations commences when the potential plaintiff knew or should have known that either injury or negligence has occurred. Accordingly, the decision of the Fifth District should be reversed and the final summary judgment entered by the trial court in favor of Petitioners should be reinstated.

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 7th day of December, 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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