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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 THE MERITS

WAGNER, CUNNINGHAM, VAUGHAN &
McLAUGHLIN, P.A.
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-and-
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I. STATEMENT OF THE CASE

Because the petitioners' statement of the case is somewhat sketchy, we prefer to restate the case. The respondents, Byron Norsworthy, a minor, and his parents, Steve and Linnea Norsworthy, were plaintiffs below in a medical malpractice action against Barry S. Kronman, M.D. and his P.A. (R. 1).[1/] Their amended complaint alleged that Dr. Kronman had negligently injured Byron while rendering medical treatment to him in March, 1985; that the plaintiffs had discovered their causes of action more than two years but less than four years from the date of Dr. Kronman's negligent treatment; that notice of intent letters were served, and a petition to extend the statute of limitations was filed, within the four-year statute of limitations period; and that the action was timely filed (R. 220-30). Dr. Kronman and his P.A. answered; generally denied liability; and alleged affirmatively that the claims against them were barred by the statute of limitations (R. 232-37).

Following extensive discovery, Dr. Kronman and his P.A. moved for summary judgment on the ground that their statute of limitations defense was conclusively proven on the record (R. 629-30). The thrust of the defendants' position was that Mr. and Mrs. Norsworthy were on notice of Byron's "injury" shortly after it was inflicted in March, 1985; that the statute of limitations began to run at that time as a matter of law, according to *Barron v. Shapiro*, 565 So.2d 1319 (Fla. 1990); and that it was legally irrelevant that the plaintiffs did not discover Dr. Kronman's negligence, or that Byron's "injury" was actually an "injury caused by negligence," until a later date (R. 1-18, 606-28).

The thrust of the plaintiffs' responsive position was that, unlike the injury in *Barron v. Shapiro*, which carried facial notice that it was an "injury caused by negligence," Byron's

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[1/] The Norsworthys also sued Holmes Regional Medical Center, Inc. This defendant was dismissed before entry of the order in issue here, however, so it is not a party to this proceeding (R. 250-51).

"injury" was essentially the same condition for which Dr. Kronman had treated him in the first place; that Byron's "injury" therefore did not put them on constructive notice of their malpractice claims as a matter of law; that they did not discover Dr. Kronman's negligence, or that Byron's condition was actually an "injury caused by negligence," until early 1989, when they were informed by Byron's present treating physician that Dr. Kronman had negligently injured Byron; and that a jury question was presented on the issue of whether, in the exercise of reasonable diligence, they should have discovered their claims sooner (R. 18-54, 932-40, 941-57). In effect, it was the plaintiffs' position that the trial court should apply the principles of *Moore v. Morris*, 475 So.2d 666 (Fla. 1985) (which governs injuries which are ambiguous as to their cause and which therefore do not provide constructive notice that they are injuries caused by negligence), rather than misapplying *Barron v. Shapiro* to the different type of facts involved in this case.

At the hearing held on the defendants' motion, the trial court indicated that it really did not want to grant the motion, but that it felt compelled to do so by *Barron v. Shapiro* (R. 18, 54-57). After some procedural skirmishing not relevant here, the trial court entered a summary final judgment in favor of Dr. Kronman and his P.A., and the plaintiffs appealed the judgment to the District Court of Appeal, Fifth District (R. 967-70, 972-73). The district court reversed. *Norsworthy v. Holmes Regional Medical Center, Inc.*, 598 So.2d 105 (Fla. 5th DCA 1992), *review pending*. The district court's analysis of the decisional law and the facts in this case speaks very well for itself, so we simply refer the Court to the district court's decision for the remainder of our statement of the case. For the convenience of the Court, a copy of the reported decision is included as an appendix to this brief.

II. STATEMENT OF THE FACTS

Because the defendants' statement of the facts gives only lip service to the settled principle that we are entitled to have the facts stated in a light most favorable to the plaintiffs here, with all conflicts and reasonable inferences drawn in their favor, we must also

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restate the facts. On March 15, 1985, Byron Norsworthy, who was then 10½ months old, developed a viral infection known by the medical name of laryngotracheobronchitis, more popularly known as "the croup" (R. 317, 637-39, 727-29). His pediatrician determined that he was in respiratory distress as a result of swelling caused by the infection, which caused a narrowing of his airway below the vocal cords -- a condition known as subglottic stenosis -- and he was admitted to Holmes Regional Medical Center on that date (R. 637-38, 643, 703-11). His condition deteriorated thereafter, and by March 18, he was facing a life-threatening medical emergency requiring surgical intervention (R. 646-56, 713-15, 843). Although Mr. and Mrs. Norsworthy had wanted to hire Dr. Belinda Dickinson to manage the emergency, she was unavailable for reasons not relevant here, and Dr. Barry Kronman, who was "on call" at the hospital for such emergencies on that date, was brought in by Byron's pediatrician to handle the case (R. 346-47, 382-84, 649-52, 802-11).

Because it is extremely important that the Court understand that Byron *was* admitted to the hospital with essentially the same condition which he had upon his later discharge (a point which the defendants have steadfastly refused to acknowledge throughout this proceeding), a brief elaboration upon the record evidence supporting that fact is in order here. Before we examine the record evidence supporting that fact, however, a medical definition of the term "subglottic stenosis" might be helpful to the Court. According to Dorland's Illustrated Medical Dictionary (26th Ed. 1985), "stenosis" means "narrowing or stricture of a duct or canal," and "subglottic" means "beneath the glottis." "Glottis," in turn, means "the vocal apparatus of the larynx, consisting of the true vocal cords, and the opening between them." In other words, "subglottic stenosis" is a narrowing of the airway below the vocal cords -- and this condition, according to the evidence in the record, is *exactly* what Byron had when he was admitted to the hospital.

Byron's treating pediatrician, Dr. Vyas, testified to his initial diagnosis as follows:

Q. Did you form a diagnosis for Byron's condition on 3/15/85?

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A. Yes, I made the diagnosis of croup.

Q. Okay. Could you please explain in lay person's terms what croup is?

A. Croup is obstruction in the airway.

Q. And what part of the airway?

A. Mainly in the area near the vocal cords.

Q. Is there a medical term for the area near the vocal cords that is affected with croup?

A. Depending upon the swelling, it could be below the vocal cord, it could be above the vocal cord.

. . . .

Q. Do you know where Byron's was?

A. Below the vocal cord, subglottic.

Q. So he had some swelling in the subglottic area?

A. That's correct.

Q. "Subglottic" meaning below the vocal cords?

A. That's correct.

. . . .

Q. Does this obstruction of the airway that Byron had in the form of croup manifest itself in a narrowing of the airway?

A. Yes.

. . . .

Q. How severe was Byron's croup on 3/15 of '85?

A. His condition was stable. He was hospitalized mainly for observation.

Q. Okay. And why was it you wanted to have Byron observed?

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A. To make sure he doesn't get more respiratory distress.

(R. 637-40). In other words, Dr. Vyas determined that Byron was in respiratory distress as a result of swelling caused by his croup infection, which caused a narrowing of his airway below the vocal cords -- which is the condition known as subglottic stenosis.

Dr. Kronman himself also testified that Byron had subglottic stenosis when he first saw him in the hospital:

> Q. Doctor, can you tell us whether or not Bryon [sic] Norsworthy, when you first began treating him, had subglottic stenosis?
>
> A. The first time I saw Bryon [sic] Norsworthy he had soft subglottic swelling that was obstructing his airway.
>
> . . . .
>
> Q. When did you first become aware that Bryon [sic] Norsworthy had subglottic stenosis in your care and treatment of him?
>
> A. He had soft --
>
> Q. When in that range of treatment?
>
> A. I became aware of Bryon [sic] Norsworthy having soft subglottic swelling on 3/18/85.
>
> . . . .
>
> Q. And would this have been during your initial examination of him or would that have been hours later?
>
> A. It would have been when I first got a look at the larynx in the operating room.

(R. 708-11). Given the definition of "subglottic stenosis," we take it to be obvious that Dr. Kronman's description of the condition as "soft subglottic swelling that was obstructing his airway" is a description of subglottic stenosis.

Dr. Dickinson, the physician with whom the Norsworthys consulted after Byron's discharge from the hospital, also testified that Byron was admitted to the hospital with

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"subglottic edema," which she defined as "swelling . . . in the subglottic area just below the vocal cords" -- and because swelling of the airway results in a narrowing of the airway, she necessarily testified that Byron was admitted to the hospital with subglottic stenosis (R. 831, 850). Finally, Mr. Norsworthy testified that he understood the term "subglottic stenosis" to mean a swelling of the tissues in the airway below the larynx, and that Dr. Kronman told him that Byron had this condition -- on the evening of March 18, which is the evening that Dr. Kronman first examined Byron in the hospital (R. 410-11). In short, there is *abundant* record support for the fact that Byron had subglottic stenosis upon his admission to the hospital (including the testimony of Dr. Kronman himself), and that fact must therefore be accepted as established here in the present procedural posture of the case.

Because Byron's subglottic stenosis had essentially closed his airway, it was necessary that he be provided with an artificial airway, either by intubating him or by performing a tracheotomy -- procedures which were not uncommon in cases of croup (R. 654-56, 680-82). Dr. Kronman elected to intubate Byron, and the procedure was performed on the evening of March 18 (R. 710-19). By March 20, Byron's condition appeared to have improved, so Dr. Kronman elected to remove the tube; Byron did not do well in the recovery room, however, so he was reintubated in the recovery room and then returned to the operating room where he was reintubated once again (R. 743-55). On March 22, Byron's tube was removed once again; after 45 minutes of observation, Dr. Kronman determined that Byron would be unable to breathe on his own, so he was reintubated once again and then a tracheotomy was performed (R. 753-65).[2/]

[2/] In their brief, the defendants have gone out of their way to point out that Byron's multiple intubations were physically performed by three different anesthesiologists who are not defendants in the action. These facts are irrelevant here, however, because Dr. Kronman was responsible for ordering the intubations -- and the negligence with which he has primarily been charged by the plaintiffs' expert was in ordering multiple intubations, rather than the manner in which the intubations themselves were performed. That these anesthesiologists were not named as defendants in the action is also absolutely irrelevant to

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Byron was discharged from the hospital with his tracheotomy tube in place on March 28 (R. 656-57). His discharge diagnosis was the same condition for which he had been admitted to the hospital in the first place -- subglottic stenosis (R. 410-11, 657, 668-69, 678-79, 831-32, 850, 856-59). According to the testimony of his treating physicians, there were a number of possible causes for Byron's post-operative subglottic stenosis. Dr. Kronman testified that "subglottic stenosis can occur for a great variety of reasons," and that Byron's post-operative condition may even have been congenital (R. 705-08, 723-32). He also testified that some children develop subglottic stenosis simply from being intubated, no matter how carefully the procedure is performed (R. 723-25). The anesthesiologist who assisted Dr. Kronman in performing the tracheotomy assumed that the condition was the result of the initial infection (R. 918-19). And Byron's pediatrician had no opinion as to the cause of the condition (R. 657, 661).

In any event, Mr. and Mrs. Norsworthy were not told any of these things initially; all that they knew is that their child had come out of the hospital with essentially the same condition for which he had been admitted in the first place, with a tracheotomy to bypass the condition (R. 267, 410-11, 660-61). Upon Byron's discharge, Dr. Kronman informed them that the tracheotomy tube could be removed and the incision repaired in about two weeks (R. 388). This prediction proved much too optimistic, however, and on April 18, the Norsworthys brought Byron to Dr. Belinda Dickinson for a "second opinion" and additional post-operative care (R. 286-88, 400-01, 802, 815). Byron was readmitted to the hospital by Dr. Dickinson for additional procedures on April 23 and May 28, but his condition had not improved to the point where his tracheotomy could be reversed at that time (R. 846-49, 852). According to Dr. Dickinson, Byron's tracheotomy might have to remain in place for an additional six months to a year (R. 268). It was during this period of treatment by Dr.

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the issue of whether the statute of limitations ran upon the claim against Dr. Kronman and his P.A. before suit was filed.

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Dickinson -- between April and June, 1985 -- that the defendants contend that the Norsworthys "should have discovered" their malpractice claims as a matter of law, so we will examine this aspect of the evidence in detail.

The Norsworthys were understandably upset at the outcome of Byron's bout with the croup. According to Mrs. Norsworthy, "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 tracheostomy" (R. 269). Mr. Norsworthy shared this disbelief, and it is undeniable that both parents questioned Dr. Dickinson on several occasions concerning the quality of Dr. Kronman's care (R. 292, 818-20). If Dr. Dickinson had criticized Dr. Kronman's care at that time, we could have little complaint about the summary judgment which the defendants received below; Dr. Dickinson did not criticize Dr. Kronman in any way, however (R. 836). According to her, she told Mr. and Mrs. Norsworthy only that Bryon's post-operative subglottic stenosis may have been caused by mechanical trauma during intubation, even a normal intubation, and although she did not normally perform multiple intubations upon small children, she was not prepared to criticize Dr. Kronman's care in any way -- and she did not (R. 819-26, 834-36).

The essence of what Dr. Dickinson led the Norsworthys to believe is summed up by the following answer which she gave at her deposition:

> Well, obviously, I had parents that were very upset by the whole experience and one of the things I was trying to relate to them, and I hope I related to them, is that this isn't an incidence [sic] that occurred with a healthy child that came in for routine surgery and was intubated in a calm and collected manner in surgery, but it was indeed a life-threatening situation because of his impending airway obstruction.
>
> You've already got significant edema to cause that obstruction and you have to put a tube through that edematous area which is going to result in some irritation of that tissue. I think I was trying at that time to get them to understand the severity of the problem and that indeed sometimes further irritation is inescapable in that situation.

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(R. 842-43).

The Norsworthys accepted this explanation. According to Mrs. Norsworthy, Dr. Dickinson left her with the impression that intubations can cause problems, but they are necessary in some cases, and that there had been no deviation from the norm or less than optimal care in Byron's case (R. 270, 293-94). According to Mr. Norsworthy, Dr. Dickinson never told him that Byron's post-operative subglottic stenosis was caused by mechanical trauma from intubations (either negligently or non-negligently performed) (R. 402).[3/] Instead, although Dr. Dickinson did tell him that she might have handled Byron's case differently, she also told him that this did not mean that Dr. Kronman had done anything wrong -- and she insisted on several occasions that Dr. Kronman's treatment was professional and competent, and that he did not do anything which was medically inappropriate (R. 393-97). And in answer to his concern about the length of time the tracheotomy would have to remain in place, Dr. Dickinson told him simply that "every child is different" and that "these things take time" (R. 397-98).

Having thus satisfied their initial concerns with the opinion of an expert whom they trusted, the Norsworthys did not pursue their concerns further. In June, 1985, the Norsworthys moved to Pennsylvania, where Mr. Norsworthy had located a better job (R. 337-38). With Dr. Dickinson's assistance, they obtained a referral to Dr. John Tucker in Philadelphia, a nationally recognized authority on pediatric airway management (R. 377-78, 861-65). The Norsworthys provided Dr. Tucker with a complete set of Byron's medical records; Dr. Tucker reviewed them but formed no opinion at that time concerning the

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[3/] As noted previously, Dr. Dickinson testified that she informed the Norsworthys that Byron's condition may have been caused by mechanical trauma (although she did not characterize the trauma as anything other than necessary trauma). Mr. Norsworthy's contrary testimony is the only real "conflict" in the evidence which we have found in our review of the record. In the present procedural posture of this case, of course, the plaintiffs are entitled to Mr. Norsworthys' version of the facts. This aspect of the facts is not particularly critical to the issue presented here, however.

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appropriateness of Byron's prior treatment, and he concentrated his efforts in the months which followed on treating Byron's condition (R. 375, 475-82). Mr. and Mrs. Norsworthy also concentrated their efforts upon Byron's treatment, which involved 14 additional operative procedures over the next three years (R. 434, 479, 561). Through Dr. Tucker's efforts, Byron was finally "decannulated" (i.e., his tracheotomy tube was removed and the incision was closed) in August, 1988, nearly 3½ years after Dr. Kronman's initial treatment (R. 444-45, 479, 549, 561).

With his child's medical problem finally resolved, Mr. Norsworthy approached Dr. Tucker in early 1989, and asked him to review the records and evaluate the medical care which Byron had received in Florida (R. 434-36, 477-82, 933-35). It was at that point that Dr. Tucker concluded that Dr. Kronman's care of Byron had been negligent in a number of respects, and that Byron's post-operative subglottic stenosis was actually an injury caused by inappropriate and negligently administered multiple intubations (among other things) (R. 933-35).[4/] Mr. and Mrs. Norsworthy were advised of this opinion, which was the first time that they were ever on notice that Dr. Kronman had negligently injured their child in March, 1985; in fact, Dr. Tucker had always previously referred to Byron's condition as subglottic stenosis, and it was not until after he reached his 1989 opinion that he ever described the condition to Mr. and Mrs. Norsworthy as an "injury" (R. 443-44, 936-40). The instant litigation was commenced within a few short weeks thereafter, less than four years from the

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[4/] The defendants have gone to great lengths to point out that the Norsworthys had Byron's medical records at all relevant times, and they argue that the Norsworthys were therefore on notice of Byron's "injury" because the discharge summary reflected that Byron "developed" subglottic stenosis during his hospitalization. This fact adds nothing of significance to the issue presented here, however, because the Norsworthys fully conceded below that they knew that Byron was discharged with subglottic stenosis, and our position here does not depend upon any fact to the contrary. In addition, of course, the fact that a medical *expert* in pediatric airway management was able to determine from a review of the records (coupled with his intimate knowledge of Byron's physical condition over a three-year period) that Dr. Kronman was negligent does not mean that the records would put the Norsworthys, who were not medical experts, on notice of Dr. Kronman's negligence.

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date of Dr. Kronman's first involvement with Byron (R. 59, 60-63, 64-72).

It was upon these facts that the trial court ruled as a matter of law that, in the "exercise of due diligence," Mr. and Mrs. Norsworthy "should have discovered" the "incident giving rise to the action" before March, 1987. As we hope to demonstrate in the argument which follows, this conclusion was bottomed upon a misapplication of *Barron v. Shapiro*, 565 So.2d 1319 (Fla. 1990) -- and, as the district court correctly concluded below, a proper application of *Moore v. Morris*, 475 So.2d 666 (Fla. 1985), required its reversal.

III. ISSUE PRESENTED ON REVIEW

WHETHER THE DISTRICT COURT CORRECTLY CONCLUDED THAT, ON THE EVIDENCE VIEWED IN A LIGHT MOST FAVORABLE TO THE PLAINTIFFS, A JURY QUESTION WAS PRESENTED ON THE ISSUE OF WHETHER THE STATUTE OF LIMITATIONS HAD RUN UPON THE PLAINTIFFS' CLAIMS, AND THAT THE DEFENDANTS WERE THEREFORE NOT ENTITLED TO SUMMARY JUDGMENT IN THEIR FAVOR AS A MATTER OF LAW.

IV. SUMMARY OF THE ARGUMENT

A. The relevant statute of limitations is §95.11(4)(b), Fla. Stat. (1985), which required that suit be filed "within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence." It was therefore the defendants' burden below to prove *conclusively*, on the evidence construed in every light most favorable to the plaintiffs, that the plaintiffs actually discovered the incident out of which their actions arose, or should have discovered the incident with the exercise of "due diligence," prior to March, 1987. Since the plaintiffs testified that they did not actually discover their causes of action until after that date, the *only* issue presented below was whether the evidence proved, as a matter of law, that they "should have discovered" their causes of action in the exercise of "due diligence" prior to that date. According to the decisional law, this question is rarely susceptible of

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determination as a matter of law, and it must ordinarily be decided by a trier of fact.

B. 1. The defendants' position below was that the plaintiffs were on notice of the "incident" out of which their causes of action arose shortly after Byron's discharge from the hospital in March, 1985, because they knew of his "injury"; that, as a result of this notice, the statute of limitations began to run at that time as a matter of law; and that it was simply irrelevant that they had no notice of Dr. Kronman's negligence, or notice of any causal relationship between that negligence and Byron's "injury" until early 1989. We will explain in due course that this position represents an overly simplistic reading of the decisional law; for our initial purposes, however, we are content to assume that the simple discovery of an "injury" is sufficient to start the statute of limitations running as a matter of law, because the facts in this case do not even support a conclusion that the plaintiffs were initially on notice that Byron suffered an "injury" as a result of Dr. Kronman's treatment.

Byron was admitted to the hospital with subglottic stenosis and he was discharged from the hospital with subglottic stenosis. With the benefit of hindsight (and Dr. Tucker's opinion), of course, it now appears that this condition had one cause upon admission and a different cause upon discharge -- but the fact remains that the condition upon discharge was no different than the condition upon admission, and that there was therefore no notice that Byron had suffered a separate "injury" in the hospital. For this simple reason alone, the district court properly concluded that the trial court erred in granting the defendants' motion for summary judgment.

B. 2. In any event, even if the defendants are correct that the plaintiffs' knowledge of Byron's post-operative subglottic stenosis was knowledge of an "injury," the decisional law simply does not support the defendants' position that the statute of limitations began to run on the facts in this case as a matter of law simply because the plaintiffs knew of Byron's "injury." Because our argument must survey 15 years of decisional law, it cannot easily be summarized in a few pages here. The thrust of our argument will be that the defendants

have read this Court's recent decisions in *Barron v. Shapiro*, 565 So.2d 1319 (Fla. 1990), and *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991), much too narrowly -- and the legal predicate upon which their argument is bottomed is therefore flawed. In our judgment, the law is both subtler and considerably more reasonable than the defendants' position on the subject -- as the Third, Fourth, and Fifth Districts have recognized *after Barron* and *Bogorff* -- and neither *Barron* nor *Bogorff* deserve the rigorously literal reading which they have been given by the defendants in this case.

The word "incident" in §95.11(4)(b) does not mean "injury"; it is settled that the word means a medical procedure, tortiously performed, which injures the patient -- i. e., an injury caused by negligence. The statute of limitations therefore clearly does not require that suit be filed within two years of discovery of an "injury"; it requires that suit be filed within two years of discovery of an "injury caused by negligence" (with an outside limit upon delayed discovery of four years from the date the injury was caused by the negligent act). Put another way, the statute does not require that suit be filed within two years of discovery of an "injury in fact"; it requires that suit be filed within two years of discovery of a "legal injury" -- i. e., an "injury caused by negligence," or cause of action. That aspect of the statute should not be complicated. The complication arises from the fact that some injuries provide constructive notice of negligence, and some do not. And because medically caused injuries fall into these two different categories, two different categories of cases have developed to deal with their differences.

Fairly read, and considered collectively, the numerous decisions which have construed §95.11(4)(b) over the last 15 years stand for the following propositions: (1) the word "incident" in §95.11(4)(b) means an act of medical malpractice which causes an injury -- i. e., all the elements of a completed tort; (2) the statute of limitations begins to run upon discovery of the "incident" (or, of course, when the "incident" "should have been discovered with the exercise of due diligence" -- and where the word "discovery" appears in the

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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.

Barron and *Bogorff* belong in the sixth category of cases. The fifth category of cases is represented by *Moore v. Morris*, 475 So.2d 666 (Fla. 1985); *Florida Patient's Compensation Fund v. Tillman*, 453 So.2d 1376 (Fla. 4th DCA 1984), *approved in relevant part*, 487 So.2d 1032 (Fla. 1986); *Cohen v. Baxt*, 473 So.2d 1340 (Fla. 4th DCA 1985), *approved in relevant part*, 488 So.2d 56 (Fla. 1986); and dozens of decisions like them. Our task here will be to convince the Court that, contrary to the defendants' readings of *Barron* and *Bogorff*, neither case was meant to overrule the numerous decisions which represent the fifth category, and that the decisions in the two different categories should be harmonized by this Court with a view to clarifying this now highly-confused area of the law.

We will also suggest that the defendants' reading of §95.11(4)(b) in this case is absolutely inconsistent with this Court's decision in *Ash v. Stella*, 457 So.2d 1377 (Fla. 1984). *Ash* holds in no uncertain terms that knowedge of a fact or two which is insufficient to provide "constructive notice" of the larger set of facts constituting the "incident" does *not* trigger the statute of limitations, and that confirmation of the suspicion created by knowledge of that fact or two (in the exercise of reasonable diligence) is required before the statute of limitations begins to run. We will also demonstrate to the Court that the plaintiffs'

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knowledge of Byron's post-discharge subglottic stenosis, even if it constituted knowledge of an "injury in fact," was clearly insufficient to put them on notice of the larger set of facts constituting the "incident" of medical malpractice upon which their suit was based. Section 95.11(4)(b) required only that the plaintiffs exercise "due diligence" to discover their causes of action once learning of their child's condition -- and, in our judgment, unless the "should have been discovered with the exercise of due diligence" provision in §95.11(4)(b) is to be written out of the statute altogether, the district court's decision in the instant case simply must be approved.

V. ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT, ON THE EVIDENCE VIEWED IN A LIGHT MOST FAVORABLE TO THE PLAINTIFFS, A JURY QUESTION WAS PRESENTED ON THE ISSUE OF WHETHER THE STATUTE OF LIMITATIONS HAD RUN UPON THE PLAINTIFFS' CLAIMS, AND THAT THE DEFENDANTS WERE THEREFORE NOT ENTITLED TO SUMMARY JUDGMENT IN THEIR FAVOR AS A MATTER OF LAW.

A. Some introductory general observations.

Before we reach the more difficult specifics of the issue presented here, a few introductory general observations are in order. First, we note that the statute of limitations governing the plaintiffs' claims reads in pertinent part as follows:

> An action for medical malpractice shall be commenced with 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; . . .

Section 95.11(4)(b), Fla. Stat. (1985).[5/]

[5/] Because the plaintiffs served their notice of intent letters, and filed a petition to extend the statute of limitations, within four years from the date that Byron was first treated by Dr. Kronman, no issue is presented in this case concerning the four-year repose period contained within this statute (and the defendants did not contend otherwise below). *Moore*

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Second, we remind the Court that the judgment in issue here is a *summary* final judgment. The defendants' burden below was therefore a heavy one, and the standard of review here is a rigorous one:

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

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

In view of the language of §95.11(4)(b), and given these settled propositions governing summary judgment practice, it was the defendants' burden below to demonstrate either that the plaintiffs actually "discovered" the "incident giving rise to the action" more than two years prior to initiating litigation, or that the "incident" "should have been discovered with the exercise of due diligence" by the plaintiffs prior to that date. This demonstration had to be made *conclusively*, and as a matter of law on the evidence construed in every light most favorable to the plaintiffs. With respect to the first alternative of the statute, we note simply that the plaintiffs testified by affidavit below that they did not actually discover their causes of action until early 1989, when Dr. Tucker advised them that

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v. Winter Haven Hospital, 579 So.2d 188 (Fla. 2nd DCA), *review denied*, 589 So.2d 294 (Fla. 1991). *See De Young v. Bierfeld*, 581 So.2d 629 (Fla. 3rd DCA), *review deniend*, 591 So.2d 180 (Fla. 1991); *Angrand v. Fox*, 552 So.2d 1113 (Fla. 3rd DCA 1989), *review denied*, 563 So.2d 632 (Fla. 1990); *Rhoades v. Southwest Florida Regional Medical Center*, 554 So.2d 1188 (Fla. 2nd DCA 1989).

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Byron had been negligently injured by Dr. Kronman (R. 932-40). Since the trial court was required to accept that evidence as true in ruling on the defendants' motion for summary judgment, it is clear beyond peradventure that the defendants did not shoulder their heavy burden on the first alternative provided by the statute.

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

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

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

The decisional law construing "should have discovered" provisions in statutes of limitation uniformly holds that such a question is rarely susceptible of determination as a matter of law -- and that it must ordinarily be decided by a trier of fact. *See Florida Patient's Compensation Fund v. Tillman*, 453 So.2d 1376 (Fla. 4th DCA 1984), *approved in relevant part*, 487 So.2d 1032 (Fla. 1986); *Cohen v. Baxt*, 473 So.2d 1340 (Fla. 4th DCA 1985), *approved in relevant part*, 488 So.2d 56 (Fla. 1986).[6/] The reason for this rule is that, in

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[6/] *See also Leyte-Vidal v. Murray*, 523 So.2d 1266 (Fla. 5th DCA 1988); *First Federal Savings & Loan Ass'n of Wisconsin v. Dade Federal Savings & Loan Ass'n*, 403 So.2d 1097 (Fla. 5th DCA 1981); *Phillips v. Mease Hospital & Clinic*, 445 So.2d 1058 (Fla. 2nd DCA), *review denied*, 453 So.2d 44 (Fla. 1984); *Weiner v. Savage*, 407 So.2d 288 (Fla. 4th DCA 1981); *Pinkerton v. West*, 353 So.2d 102 (Fla. 4th DCA 1977), *cert. denied*, 365 So.2d 715 (Fla. 1978); *Schetter v. Jordan*, 294 So.2d 130 (Fla. 4th DCA 1974); *Burnside v. McCrary*, 382 So.2d 75 (Fla. 3rd DCA 1980); *Rosen v. Sparber*, 369 So.2d 960 (Fla. 3rd DCA 1978), *cert. denied*, 376 So.2d 76 (Fla. 1979); *Green v. Bartel*, 365 So.2d 785 (Fla. 3rd DCA 1978); *Downing v. Vaine*, 228 So.2d 622 (Fla. 1st DCA 1969), *appeal dismissed*, 237 So.2d 767 (Fla. 1970).

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negligence cases, there are no fixed rules for what is and what is not "reasonable care" -- or its twin sister, "due diligence." Determinations of whether a party has exercised "reasonable care" or "due diligence" under all the circumstances belong to the "conscience of the community" impaneled to make that determination, according to prevailing community standards -- not to the court to determine as a matter of law. *See, e. g., Orlando Executive Park, Inc. v. Robbins*, 433 So.2d 491 (Fla. 1983).[7] And with those general introductory observations behind us, we turn to the specifics.

B. The trial court's misapplication of *Barron v. Shapiro*.

1. A short and simple demonstration of the trial court's error.

The defendants' position below was that the Norwsorthys were on notice of the "incident" out of which their causes of action arose shortly after Byron's discharge from the hospital in March, 1985, because they knew of his "injury"; that, as a result of this notice, the statute of limitations began to run at that time as a matter of law; and that it was simply irrelevant that they had no notice of Dr. Kronman's negligence, or notice of any causal relationship between that negligence and Byron's "injury" until early 1989. This position was bottomed upon the following sentence, which appears in several of the decisions upon which the defendants rely here: ". . . the statute of limitations in a malpractice suit commences either when the plaintiff has notice of the negligent act giving rise to the cause of action or when the plaintiff has notice of the physical injury which is the consequence of the negligent act." *Nardone v. Reynolds*, 333 So.2d 25, 32 (Fla. 1976).

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[7] *See also English v. Florida State Board of Regents*, 403 So.2d 439 (Fla. 2nd DCA 1981); *Nichols v. Home Depot, Inc.*, 541 So.2d 639 (Fla. 3rd DCA 1989); *Ten Associates v. McCutchen*, 398 So.2d 860 (Fla. 3rd DCA), *review denied*, 411 So.2d 384 (Fla. 1981); *Marks v. Delcastillo*, 386 So.2d 1259 (Fla. 3rd DCA 1980), *review denied*, 397 So.2d 778 (Fla. 1981); *Holley v. Mt. Zion Terrace Apts., Inc.*, 382 So.2d 98 (Fla. 3rd DCA 1980); *Acme Electric, Inc. v. Travis*, 218 So.2d 788 (Fla. 1st DCA), *cert. denied*, 225 So.2d 917 (Fla. 1969).

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We will explore the meaning of this sentence at considerable length in the next subsection of our argument, where we will demonstrate that it means something different than the simplistic meaning attributed to it by the defendants. For our initial purposes here, however, we are content to assume that it means what the defendants say it means -- that the simple discovery of an "injury" is sufficient to start the statute of limitations running as a matter of law -- because the facts in this case do not even support a conclusion that the Norsworthys were initially on notice that Byron suffered an "injury" as a result of Dr. Kronman's treatment.

As we took some pains to point out in our statement of the facts, Byron was admitted to the hospital with subglottic stenosis and he was discharged from the hospital with subglottic stenosis. With the benefit of hindsight (and Dr. Tucker's opinion), of course, it now appears that this condition had one cause upon admission and a different cause upon discharge -- but the fact remains that the condition upon discharge was no different than the condition upon admission, and that there was therefore no notice that Byron had suffered a separate "injury" in the hospital. It was not until Dr. Tucker advised the Norsworthys in 1989 that Byron's post-operative subglottic stenosis was actually an injury caused by negligence, rather than merely a continuation of the subglottic stenosis for which he had initially been hospitalized, that the Norsworthys were on notice of Byron's "injury." Suit was timely filed thereafter. *See Moore v. Morris*, 475 So.2d 666 (Fla. 1985). That, we respectfully submit, is the short and simple answer to the defendants' position -- and for this simple reason alone, the district court correctly reversed the summary final judgment at issue here.

2. A more complicated demonstration of the trial court's error.

In any event, even if the defendants are correct that the Norsworthys' knowledge of Byron's post-operative subglottic stenosis was knowledge of an "injury," separate and distinct from his pre-operative diagnosis of subglottic stenosis, the fact remains that the plaintiffs *did*

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exercise "due diligence" to discover any cause of action they may have had by obtaining an expert opinion on the subject from Dr. Dickinson, and they were told that there was no incident of malpractice. That is also all that they knew during the two-year period in which the defendants insist the statute of limitations ran on their claim. Most respectfully, if *that* constitutes discovery of the "incident" of medical malpractice which is the subject of the plaintiffs' suit *as a matter of law*, then the court might as well declare that the delayed discovery provision of §95.11(4)(b) simply does not exist.

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

Before we turn to that demonstration, however, and to be fair to the defendants, we should note that the Second District has rendered a spate of recent decisions in which a majority of the judges considering the issue have read *Barron* and *Bogorff* in that highly restrictive fashion. *See, e. g., Goodlet v. Steckler*, 586 So.2d 74 (Fla. 2nd DCA 1991); *Rogers v. Ruiz*, 594 So.2d 756 (Fla. 2nd DCA 1991); *Harr v. Hillsborough Community Medical Health Center*, 591 So.2d 1051 (Fla. 2nd DCA 1991), *review pending*; *Tanner v. Hartog*, 593 So.2d 249 (Fla. 2nd DCA 1992), *review pending*.

Despite the majorities' conclusions in these cases, the decisions have provoked some highly apologetic opinions and some vigorous dissents -- and at least two certifications to this Court -- so the propriety of the Second District's reading of *Barron* and *Shapiro* is far from

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settled there. In *Goodlet*, for example, the majority confessed its "uncertainty" about the propriety of its reading of *Barron* and *Bogorff*. And in *Rogers*, the panel split three ways. Judge Lehan concluded that, because of *Barron* and *Bogorff*, knowledge of a death which occurred during risky heart surgery constituted notice of the "incident" of malpractice as a matter of law -- notwithstanding that death was a statistically predictable consequence of non-negligently performed surgery, and notwithstanding that the surgeon told the survivors that the patient's heart was old and simply gave up. Judge Ryder dissented, reading *Barron* and *Bogorff* essentially as we will read them in our argument here. Judge Parker concurred with Judge Lehan's opinion, but not without some rather pointed remarks:

> Further, I agree with Judge Lehan that this court's decision in *Goodlet* and the Supreme Court's decision in *Bogorff* require that the statute of limitations' clock starts running upon the death of Mr. Rogers. I wish I could agree with Judge Ryder that something more than a death is required to put the plaintiff on notice that the limitations' period had begun to run. *Bogorff*, however, in my opinion, has slammed that door shut.
>
> It is my belief that *Bogorff* rips at the very fabric of our society. The message in that case is clear. Once the body is in the ground or once an adverse result occurs from a medical procedure, a grieving family member or dissatisfied patient, in order to protect a possible and unknown right to damages, should retain an attorney immediately and start subpoenaing medical records. This, to me, is a further wedge driven between formerly trusting relationships involving hospitals, doctors, patients, and attorneys. The message is clear. If one thinks anything adverse possibly could have happened to him or her or to a loved one while undergoing medical care, one immediately must demand all medical records and retain an expert to review those records and to advise the patient or family. This appears to be the only prudent way to proceed to avoid the statute of limitations' window closing upon an action for medical malpractice, even when the family or patient has nothing tangible which would indicate to a lay person that malpractice has occurred.

594 So.2d at 772.

In his dissent in *Tanner*, Judge Patterson voiced a similar concern:

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

593 So.2d at 253. And in *Harr*, even the majority concluded that mere knowledge of an "injury in fact," without more, was not sufficient to start the statute of limitations running as a matter of law (where the plaintiff did not learn the identity of the health care provider until later).

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

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

Southern Neurosurgical Associates, P.A. v. Fine, 591 So.2d 252, 256 (Fla. 4th DCA 1991).[8/] Consistent with this holding, the Third District has also recently observed that "a defect at birth does not necessarily put the parents on notice of injury or of possible negligence.

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

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Moore . . . ." Menendez v. Public Health Trust of Dade County, 566 So.2d 279, 282 n. 3 (Fla. 3rd DCA 1990), *approved*, 584 So.2d 567 (Fla. 1991). Note that this Court recently *approved* this decision.

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

> Perhaps we read *Bogorff* and *Barron* too optimistically, but we believe those cases simply stand for the proposition that when the nature of the bodily damage that occurs during medical treatment is such that, in and of itself, it communicates the possibility of medical negligence, then the statute of limitations begins to run. On the other hand, if there is nothing about an injury that would communicate to a reasonable lay person that the injury is more likely a result of some failure of medical care than a natural occurrence that can arise in the absence of medical negligence, the knowledge of the injury itself does not necessarily trigger the running of the statute of limitations.

Norsworthy v. Holmes Regional Medical Center, Inc., 598 So.2d 105, 107 (Fla. 5th DCA 1992). *Norsworthy* was more recently followed on this point by the Fifth District in *Allen v. Orlando Regional Medical Center*, 606 So.2d 665 (Fla. 5th DCA 1992). In short, the issue presented here is badly in need of clarification by this Court. Hopefully, a detailed review of the decisional law during the 15-year existence of §95.11(4)(b) will aid it in that task -- and it is to that analysis that we now turn.

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

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

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So.2d 306 (Fla. 1954). . . .

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

The doctrine appears to have its modern origin in *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949). In that case, the plaintiff was exposed to silica dust for approximately 30 years and he ultimately contracted the "occupational disease" of silicosis. He brought an FELA action against his railroad-employer within three years of the date he discovered that he had contracted the disease. The railroad contended that the three-year statute of limitations barred the claim, because the plaintiff obviously had acquired the slowly progressive disease more than three years prior to the time that it ultimately incapacited him. In a passage which has been quoted by courts across the nation numerous times, the Supreme Court sided with the plaintiff:

> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date. "It follows that no specific date of contact with the substance can be charged with being the

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> date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently, the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves. . . ." [citation omitted]. The quoted language, . . . seems to us applicable in every relevant particular to the construction of the federal statute of limitations with which we are here concerned. Accordingly, we agree with the view expressed by the Missouri Supreme Court on the first appeal of this case, that Urie's claim, if otherwise maintainable, is not barred by the statute of limitations.

337 U.S. at 170-71.

This doctrine was initially adopted by this Court in a medical malpractice case -- *City of Miami v. Brooks*, 70 So.2d 306 (Fla. 1954). In that case, the plaintiff received a negligent overdose of x-rays to her left heel in 1944. The overdose caused progressive deterioration of the tissue, which finally manifested itself to the plaintiff as an injury when the heel ulcerated in 1949. The defendant contended that the plaintiff's action was barred by the four-year statute of limitations. This Court disagreed. After quoting extensively from *Urie*, this Court held as follows:

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

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70 So.2d at 309.[9/]

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

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

92 So.2d at 154. The "blameless ignorance" doctrine would appear to be alive and well in this state. *See, e. g., Creviston v. General Motors Corp.*, 225 So.2d 331 (Fla. 1969); *Flanagan v. Wagner, Nugent, Johnson, Roth, Romano, Eriksen & Kupfer, P.A.*, 594 So.2d 776 (Fla. 4th DCA 1992), *review pending*; *Nemeth v. Harriman*, 586 So.2d 72 (Fla. 2nd DCA 1991), *review pending*. And both *Brooks* and *Ford* were recently cited with approval in *Bogorff*.

On the facts in *Brooks*, of course, and because the "blameless ignorance" doctrine was designed to protect malpractice *victims* against the loss of their undiscovered claims, it made

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[9/] The remainder of the Court's decision in *Brooks* distinguishes the situation in which the plaintiff learns of the defendant's *negligent act* during the statutory period, before the consequences of the act become fully manifest. In such a case, the statute begins to run upon notice of the negligent act. *See, e. g., Cristiani v. City of Sarasota*, 65 So.2d 878 (Fla. 1953). *Cf. Ash v. Stella*, 457 So.2d 1377 (Fla. 1984); *Swain v. Curry*, 595 So.2d 168 (Fla. 1st DCA), *review denied*, 601 So.2d 551 (Fla. 1992). In the instant case, of course, there is no allegation that the plaintiffs learned of the defendants' *negligent acts* more than two years before filing suit, so this line of cases is inapposite here.

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

In any event, until the Second District's recent, rigorously literal reading of the sentence in *Nardone* (and *Barron* and *Borgoff*) which spawned the confusion presently before the Court, most courts reached the common sense conclusion that *some* injuries (like the injury at issue in *Nardone*, which we will discuss *infra*) provide constructive notice of the "incident" of malpractice, but other injuries do not. For example, when a patient submits to surgery for a bad left knee and awakes with an amputated right leg, notice of the "injury" is clearly notice of the "incident" of malpractice. In contrast, when a patient submits to surgery for a bad left knee and awakes with a bad left knee, it is not at all clear that an "incident" of malpractice has occurred, and these types of cases obviously deserve different treatment.

As a result, the law developed that, notwithstanding the sentence in *Nardone* upon which the district court relied below, the statute of limitations does *not* begin to run as a matter of law upon the simple discovery of an "injury in fact" -- where that injury is reasonably ambiguous as to its cause and does not facially suggest that it is an "injury caused by negligence," and where the injury therefore does not place the victim on notice of an invasion of his "*legal* rights" or on notice of a "*legal* injury," or cause of action. All that the

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statute requires in such a case is that due diligence be exercised to discover the cause of action, and that suit be filed within two years of discovery -- and we believe that a detailed review of the decisional law will prove that point.

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

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

> Discovery of the "incident giving rise to the cause of action" is the point when the statute begins to run. In *Swagel v. Goldman*, 393 So.2d 65 (Fla. 3d DCA 1981), the court equated "incident" with the "now-alleged surgical malpractice." The term "incident", however, could not refer solely to the particular medical procedure since that would obviously be "discovered" at the

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> time it was performed, rendering nugatory the additional 2-year period permitted by the statute for discovering the incident. Thus, the term must encompass *(1) a medical procedure; (2) tortiously performed; (3) which injures (damages) the patient. . . .*

Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376, 1379 (Fla. 4th DCA 1984), *approved in relevant part*, 487 So.2d 1032 (Fla. 1986) (emphasis supplied). On discretionary review, this Court *approved* the Fourth District's disposition of this issue. *Florida Patient's Compensation Fund v. Tillman*, 487 So.2d 1032 (Fla. 1986). The definition of "incident" in *Tillman* was reiterated by the Fourth District in *Cohen v. Baxt*, 473 So.2d 1340 (Fla. 4th DCA 1985), *approved in relevant part*, 488 So.2d 56 (Fla. 1986). On discretionary review, this Court once again *approved* the Fourth District's reiterated disposition of the issue. In fact, it squarely held that, notwithstanding that the plaintiff knew of his "injury," "there was a genuine, material issue of fact as to when respondent discovered his *cause of action* . . . ," which prevented summary disposition of the issue as a matter of law. *Florida Patient's Compensation Fund v. Cohen*, 488 So.2d 56, 57 (Fla. 1986) (emphasis supplied). There are numerous additional decisions which define the word "incident" in precisely the same way.[10/]

With the word "incident" thus defined, the statute of limitations clearly does not require that suit be filed within two years of discovery of an "injury"; it requires that suit be filed within two years of discovery of an "injury caused by negligence" (with an outside limit

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[10/] *See, e. g., Williams v. Spiegel*, 512 So.2d 1080 (Fla. 3rd DCA 1987), *quashed in part on other grounds*, 545 So.2d 1360 (Fla. 1989); *Jackson v. Lytle*, 528 So.2d 95 (Fla. 1st DCA 1988); *Elliot v. Barrow*, 526 So.2d 989 (Fla. 1st DCA), *review denied*, 536 So.2d 244 (Fla. 1988); *Florida Patient's Compensation Fund v. Sitomer*, 524 So.2d 671 (Fla. 4th DCA), *review dismissed*, 531 So.2d 1353 (Fla. 1988), *and quashed in part on other grounds*, 550 So.2d 461 (Fla. 1989); *Scherer v. Schultz*, 468 So.2d 539 (Fla. 4th DCA 1985). While some of these decisions fail to articulate carefully the difference between our propositions (5) and (6), and may therefore be too broad in announcing that *discovery* of the "incident" occurs only when all elements of the "incident" are discovered, their *definition* of the word "incident" is not rendered suspect for that reason alone.

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

Although this aspect of the statute should not be particularly complicated, the Second District has managed to read this aspect of the statute in two different and inconsistent ways, both of which are inconsistent with the plain language of the statute. In effect, the Second District has held that the statute provides a plaintiff two years *within* which to discover a cause of action. This reading of the statute is clearly untenable. The statute plainly provides that a plaintiff has *four* years *within* which to discover a cause of action, and two years *from* the date of discovery in which to file an action (with an outside limit of four years from the date the injury was caused by negligence). The Second District has also announced that the statute begins to run when the plaintiff is on notice of facts sufficient to suggest "that a timely investigation should commence to discover additional facts needed to support an action against the appropriate health care providers." *Tanner, supra* at 252. This reading of the statute is also clearly untenable. The statute plainly provides that it begins to run, not upon notice that an investigation should be commenced, but when the cause of action is discovered (or "should have been discovered") during the course of that investigation. Both positions announced by the Second District are therefore plainly inconsistent with the language of the statute, and require that its "delayed discovery" provision be written entirely out of the statute.

We repeat, with the word "incident" defined as a medical procedure, tortiously performed, which injures the patient, the statute clearly does not require that suit be filed within two years of discovery of an "injury in fact"; it requires that suit be filed within two years of discovery of a "legal injury," or cause of action. And *that* aspect of the statute is

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relatively straightforward. The complication arises from the fact that some injuries provide constructive notice of negligence (and therefore a "legal injury"), and some do not. And because medically caused injuries fall into these two different categories, two different categories of cases have developed to deal with their differences -- the categories represented by the fifth and sixth propositions which we have set out to prove here.

Tillman and *Cohen* illustrate the fifth proposition.[11/] In both *Tillman* and *Cohen*, the patients sought medical treatment for bad knees, and they came out of the treatment with bad knees (and other complications). Both clearly knew of their "injuries" at the outset; however, the nature of the injuries was such that the injuries themselves did not necessarily point to malpractice, and neither Mr. Tillman nor Mr. Cohen discovered until much later that their ambiguous injuries were actually "injuries caused by negligence." And because this Court held in both *Tillman* and *Cohen* that the statute of limitations did not begin to run as a matter of law upon discovery of the "injury," but did properly begin to run as a matter of fact on the subsequent discovery of the larger set of facts constituting the "incident" -- or, in this Court's words in *Cohen*, upon discovery of the "cause of action" (488 So.2d at 57) -- both cases clearly demonstrate that the simple discovery of an "injury" is not necessarily an

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[11/] The defendants' amicus argues that this fifth category of cases does not exist, because in each of the cases we have placed in this category, the courts found some "fraudulent concealment" sufficient to toll the running of the statute. We disagree. "Fraudulent concealment" is a separate and distinct ground for avoiding the statute of limitations, which depends upon a *different* sentence of §95.11(4)(b) than the one in issue here -- *see Rogers v. Ruiz*, 594 So.2d 756 (Fla. 2nd DCA 1991) -- and none of the decisions upon which we rely turns on this separate "tolling" provision of the statute. The subject is not even mentioned in *Cohen*. And in *Tillman*, although the Fourth District did note that the defendant had assured the plaintiff that his condition would improve, it did not hold that this statement amounted to "fraudulent concealment" sufficient to "toll" the statute. It simply collected the defendant's statement as one of several facts which supported the jury's finding of fact that the plaintiff had filed suit within two years of discovering his cause of action in the exercise of "due diligence." We stand by our analysis of these cases, and we respectfully submit that amicus' attempt to distinguish them on this ground is a red herring.

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automatic discovery of the "incident" (or "cause of action") itself.[12/]

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

> There is nothing about these facts which lead conclusively and inescapably to only one conclusion -- that there was negligence or *injury caused by negligence.* To the contrary, these facts are totally consistent with a serious or life-threatening situation which arose through natural causes during an operation. Serious medical circumstances arise daily in the practice of medicine and because they are so common in human experience, *they cannot, without more, be deemed to include notice of* negligence or *injury caused by negligence.*

12/ *Sewell v. Flynn*, 459 So.2d 372 (Fla. 1st DCA 1984), *review denied*, 471 So.2d 43 (Fla. 1985), is similarly illustrative. In that case, the plaintiff underwent the surgical implantation of a prosthesis to correct a previously-injured problem knee, and he came out of surgery with a problem knee. Various causes of the lack of success in the surgery were suggested to him, and the defendant even corrected a misplaced tendon with a subsequent surgery. The knee did not improve, however, and no physician was able to determine the real cause of the problem until, during additional surgery performed by another physician, it was discovered that the defendant had initially installed the plaintiff's prosthesis upside-down. On those facts, the district court held that mere knowledge of the post-surgical "injury," by itself (and with no clue whatsoever that the cause of the injury was an upside-down prosthesis), was not enough to trigger the statute of limitations as a matter of law -- and this Court declined to review that conclusion.

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Moore, supra at 668 (emphasis supplied).

We have emphasized the phrase "injury caused by negligence" for a purpose, and we believe this Court chose the phrase carefully for the same purpose. In our judgment, this passage, with its carefully chosen phraseology, asserts that not every known injury which occurs during medical treatment automatically starts the statute of limitations running -- that only an injury which is obviously an "injury caused by negligence," and which cannot be explained on any other non-negligent or natural ground, is sufficient to put a patient on constructive notice of the "incident" -- i. e., "an injury caused by negligence."[13/]

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

[13/] The Fifth District agreed with this reading of *Moore* in the instant case, noting as follows:

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

Norsworthy v. Holmes Regional Medical Center, Inc., 598 So.2d 105, 108 (Fla. 5th DCA 1992). *See also Allen v. Orlando Regional Medical Center*, 606 So.2d 665 (Fla. 5th DCA 1992). We also insist that *Moore* cannot fairly be read as a "no injury" case. The decision which this Court reversed details several serious physical injuries sustained by the Moore baby at the time of her birth; indeed, it was the parents' knowledge of these injuries which caused the district court to affirm the summary judgment in favor of the defendants which this Court later held to be erroneous.

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Morris, supra:

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

As the foregoing passage suggests, the Second District reached essentially the same conclusion in *Salvaggio v. Austin,* 336 So.2d 1282 (Fla. 2nd DCA 1976). In that case, the defendant-surgeon failed to remove a drainage tube from the plaintiff's breast after a mammoplasty, causing an "injury" which she experienced as continuous post-operative pain. The trial court entered summary judgment on the defendant's statute of limitations defense, ruling that notice of the injury alone started the statute of limitations running against the plaintiff's malpractice claim. On appeal, the district court reversed the defendant's summary judgment, explaining as follows:

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

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

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

> The statute of limitations in a malpractice suit begins to run either when the plaintiff has notice of the negligent act giving rise to the cause of action, or when the plaintiff has notice of the physical injury which is the consequence of the negligent act. *Moore v. Morris*, 475 So.2d 666 (Fla. 1985); *Nardone v. Reynolds*, 333 So.2d 25 (Fla. 1976) . . . . *Knowledge of an injury alone does not necessarily put a plaintiff on notice that the injury was caused by the negligence of another. Such knowledge must be accompanied by either actual or constructive knowledge that the injury was caused by a negligent medical procedure to trigger the limitations period.* . . . Where there is a factual question as to notice or discovery in a medical malpractice action, it is for the jury to decide when the statute of limitation commences. *Florida Patient's Compensation Fund v. Tillman*, 453 So.2d 1376 (Fla. 4th DCA 1984), *approved in part, quashed in part*, 487 So.2d 1032 (Fla. 1986); . . .

(Emphasis supplied). Since this passage makes our point in a nutshell, we think the district court got it exactly right in *Leyte-Vidal*. There are a number of additional decisions which say essentially the same thing.[14/]

[14/] *See, e. g., Norsworthy v. Holmes Regional Medical Center, Inc.*, 598 So.2d 105 (Fla. 5th DCA 1992); *Allen v. Orlando Regional Medical Center*, 17 FLW D2164 (Fla. 5th DCA Sept. 18, 1992); *Southern Neurosurgical Associates, P.A. v. Fine*, 591 So.2d 252 (Fla. 4th DCA 1991); *Florida Patient's Compensation Fund v. Sitomer*, 524 So.2d 671 (Fla. 4th DCA), *review dismissed*, 531 So.2d 1353 (Fla. 1988), *and quashed in part on other grounds*, 550 So.2d 461 (Fla. 1989); *Jackson v. Lytle*, 528 So.2d 95 (Fla. 1st DCA 1988); *Elliot v. Barrow,* 526 So.2d 989 (Fla. 1st DCA), *review denied*, 536 So.2d 234 (Fla. 1988); *Sewell v. Flynn,* 459 So.2d 372 (Fla. 1st DCA 1984), *review denied*, 471 So.2d 43 (Fla. 1985); *Tetstone v. Adams*, 373 So.2d 362 (Fla. 1st DCA 1979), *cert. denied*, 383 So.2d 1189 (Fla. 1980); *Eland v. Aylward*, 373 So.2d 92 (Fla. 2nd DCA 1979); *Swagel v. Goldman,* 393 So.2d 65 (Fla. 3rd DCA 1981);

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All of which brings us to the decisions upon which the defendants have relied in the instant case. Although they certainly reach different results than the decisions discussed above, the results are harmonious with the six propositions which we have set out to prove here; and they simply represent the sixth proposition -- that when the plaintiff has knowledge of an injury which itself gives fair notice that it was the probable consequence of a negligent act, the plaintiff has constructive notice of the "incident," and the statute of limitations has begun to run.

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

In *Nardone*, the 13-year old patient suffered from vision problems and headaches. He underwent several brain surgeries, and his condition improved so significantly that his parents were told he could go home in two weeks and have a birthday party. It was only *after* the significant improvement that the defendants attempted a contraindicated diagnostic procedure which had catastrophic effects. The procedure left the child totally blind, irreversibly brain damaged, and comatose. As this Court described it, "the injury was patent." 333 So.2d at 40. On *those* facts, of course, it was painfully *obvious* that the diagnostic procedure had been badly botched. And it was on *those* facts that this Court held

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Schaffer v. Lehrer, 476 So.2d 781 (Fla. 4th DCA 1985); *Scherer v. Schultz*, 468 So.2d 539 (Fla. 4th DCA 1985); *Brooks v. Cerrato,* 355 So.2d 119 (Fla. 4th DCA), *cert. denied*, 361 So.2d 831 (Fla. 1978).

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that the statute of limitations began to run upon the claim of the negligently performed diagnostic procedure when the severe injuries which were its obvious consequence were discovered. In other words, because the nature of the injury was such that most reasonably intelligent persons would conclude from the injury itself that it was, in the words of the decision itself, "the consequence of [a] negligent act," rather than an injury which may have some other non-negligent explanation, discovery of the injury was, as a matter of both logic and law, discovery of the larger "incident" itself -- i. e., an injury caused by medical malpractice.

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

This Court's latest decision on the subject is also consistent with the six propositions we have set out to prove here. In *University of Miami v. Bogorff,* 583 So.2d 1000 (Fla. 1991), a child had leukemia, which was in remission. Shortly after the administration of

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methotrexate in 1972, the child lapsed into a coma, and within months was a severely brain-damaged quadriplegic. That same year, the child's parents read a medical journal article linking methotrexate treatment of leukemia to brain damage. By 1977, the parents were also on constructive notice from medical opinion letters in the child's medical records that the methotrexate was possibly the cause of their child's dramatically changed condition. On those facts, this Court held that the parents were on notice of the methotrexate "incident" as a matter of law long before finally filing their complaint in 1982.

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

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

> We acknowledge that Adam's condition, which the Bogorffs now attribute to intrathecal methotrexate treatment, might not have been easily distinguishable from the effects of leukemia on his

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> system. The knowledge required to commence the limitation period, however, does not rise to that of legal certainty [citation omitted]. Plaintiffs need only have notice, through the exercise of reasonable diligence, of the possible invasion of their legal rights. [Citations omitted]. The Bogorffs were aware not only of a dramatic change in Adam's condition, but also of the possible involvement of methotrexate. Such knowledge is sufficient for accrual of their cause of action. Furthermore, because knowledge of the contents of accessible medical records is imputed, the Bogorffs had constructive knowledge of medical opinion that the drug may have contributed to the injury in 1977. In either event, the Bogorffs had sufficient knowledge, actual or imputed, to commence the limitation period more than four years prior to filing their complaint in December, 1982. . . .

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

All things considered, the *Bogorff* decision fully supports the six propositions which we have set out to prove here. It designates knowledge of the "injury" as a trigger for the statute of limitations only when the "injury" itself gives fair notice that it was the probable (or maybe "possible") consequence of a negligent act, and it recognizes the continuing validity of *Moore v. Morris* (and, implicitly, *Tillman* and *Cohen*) where ambiguous injuries are concerned. The continuing validity of *Moore v. Morris* was also recently recognized in *Menendez v. Public Health Trust of Dade County*, 566 So.2d 279, 282 n. 3 (Fla. 3rd DCA 1990), *approved*, 584 So.2d 567 (Fla. 1991), in which the court observed: "a defect at birth does not necessarily put the parents on notice of injury or of possible negligence. *Moore*; *Almengor*." As the citation reflects, this Court approved that decision. *Bogorff* also

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acknowledges that, where an injury is ambiguous as to its cause, knowledge of something *more* (and considerably more specific) than the mere fact of "injury" is required to start the statute of limitations running. And there is nothing in *Bogorff* which even arguably purports to overrule the definition of the word "incident" which this Court approved in *Tillman* and *Cohen* -- "(1) a medical procedure; (2) tortiously performed; (3) which injures (damages) the patient."

In short, the word "incident" means (1) a medical procedure (2) tortiously performed (3) which causes injury or damage to the patient -- and *discovery* of that "incident" may occur in different ways, depending upon whether the injury is ambiguous as to its cause or obviously the result of negligence. If the injury is obviously the result of negligence, then the plaintiff is on constructive notice of the "incident" as a matter of law. But if the injury is ambiguous as to its cause, if it could have been the result of a natural cause or the consequence of non-negligent treatment, then the statute does not begin to run until the larger set of facts constituting the "incident" is discovered, or when that set of facts "should have been discovered with the exercise of due diligence." And unless *Barron* and *Bogorff* were meant to overrule *Moore*, *Tillman*, and *Cohen*, that simply has to be the law -- and knowledge of a mere "injury in fact," without more, does not automatically start the statute of limitations running on every "legal injury" suffered by a victim of medical malpractice.

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

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

565 So.2d at 1321. We disagree that this languge is inconsistent with the six propositions we have set out to prove here. The district court in *Barron did* misstate the law "when it said that knowledge of physical injury alone, without knowledge that it resulted from a negligent

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act, does not trigger the statute of limitations." *Knowledge* of *both* the injury and the negligent act has never been absolutely required to trigger §95.11(4)(b). While knowledge of both the injury and the negligent act certainly triggers the statute, knowledge of the negligent act alone will also trigger the statute. And knowledge of the injury, without knowledge of the negligent act, may also trigger the statute -- *if* the nature of the injury is such that it provides constructive notice of the negligent act (as did the injuries in *Nardone, Barron* and *Bogorff*), because such an injury places the victim on notice of the invasion of his or her legal rights. The relevant question in such a case is whether, given knowledge of the injury, the "incident" (or cause of action) "should have been discovered with the exercise of due diligence" -- and where the nature of the injury is such that most reasonable persons would conclude that the physical injury was the consequence of a negligent act, and therefore a legal injury, then the statute of limitations begins to run.

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

> In discussing *Moore v. Morris* in the *Barron* case the supreme court did say:
>
> > The district court of appeal misinterpreted *Moore [v. Morris]* when it said that knowledge of physical injury alone, without knowledge that it resulted from a negligent act does not trigger the statute of limitations.
>
> *Barron*, 565 So.2d at 1321. We do not believe the supreme court intended by this statement to say that knowledge of physical injury alone will always trigger the statute of limitations; merely that it is erroneous to suppose that knowledge of injury alone cannot trigger the statute. Some injuries, as in *Nardonne* [sic], *Barron* and *Bogorff*, speak for themselves and supply notice of a possible invasion of legal rights. That is not to say, however, that all injuries carry that same communication. As the fourth district recently said in *Southern Neurosurgical Associates, P.A. v. Fine*, 591 So.2d 252 (Fla. 4th DCA 1991):

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

Norsworthy v. Holmes Regional Medical Center, Inc., 598 So.2d 105, 108 (Fla. 5th DCA 1992).

In other words, as the 15-year history of the decisional law makes clear, although some injuries provide their own constructive notice of malpractice, not every injury suffered in the course of medical treatment constitutes notice of the invasion of the injured person's *legal rights*. Some medical injuries are extremely subtle and terribly confusing as to their cause. For example, babies are not infrequently born with brain damage from natural causes and unavoidable non-negligent causes, and knowledge of the mere fact that a baby is born brain damaged, without more, hardly puts the parents on constructive notice of a cause of action for medical malpractice. Rather, the parents are required to exercise due diligence in determining the cause of their baby's injury, and the statute begins to run only when the negligent cause of the injury is discovered or "should have been discovered in the exercise of due diligence." *See, e. g., Moore v. Morris*, 475 So.2d 666 (Fla. 1985); *Menendez v. Public Health Trust of Dade County*, 566 So.2d 279 (Fla. 3rd DCA 1990), *approved*, 584 So.2d 567 (Fla. 1991); *Almengor v. Dade County*, 359 So.2d 892 (Fla. 3rd DCA 1978); *Allen v. Orlando Regional Medical Center*, 606 So.2d 665 (Fla. 5th DCA 1992). That is what §95.11(4)(b) says -- and to start the statute of limitations running in *every* case, as a matter of law, upon mere knowledge of an "injury in fact," whether the injury provides constructive notice of a *legal* injury or not, is to write this "delayed discovery" provision completely out of the statute.

Most respectfully, *Nardone*, *Barron* and *Bogorff* simply cannot mean what the defendants say they mean where *ambiguous* injuries of the type in issue here are concerned, and they simply must be harmonized with *Moore*, *Tillman*, *Cohen*, and *Menendez* (and the dozens of additional decisions like them) in the manner in which we have attempted to

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harmonize the decisions here -- or the Court might as well declare that the "delayed discovery" provision of §95.11(4)(b) simply does not exist. The provision *does* exist, however, so the latter conclusion is simply unavailable here. As a result, the only option available to the Court is to bring some sense to this now highly-confused area of the law by harmonizing the decisions along the lines we have suggested here.

There are several additional reasons why the decisions need to be harmonized as we have suggested. First, according to a settled rule of statutory construction, any doubt as to what the legislature intended by delaying commencement of the statute of limitations until discovery of an "incident" (which is a quintessentially general, and therefore highly ambiguous, word) must be resolved in favor of medical malpractice *victims* -- not those who have negligently injured them:

> In this case, we must also keep in mind the pertinent rules of construction applicable to statutes of limitations. This Court has previously stated that "[w]here a statute of limitations shortens the existing period of time the statute is generally construed strictly, and where there is reasonable doubt as to the legislative intent, the preference is to allow the longer period of time." *Baskerville-Donovan Eng'rs, Inc. v. Pensacola Executive House Condominium Ass'n, Inc.*, 581 So.2d 1301, 1303 (Fla. 1991); *see also Angrand v. Fox*, 552 So.2d 1113, 1116 (Fla. 3d DCA 1989) ("It is well established that a limitations defense is not favored[,] and that therefore, any substantial doubt on the question should be resolved by choosing the longer rather than the shorter possible statutory period." (citations omitted)), *review denied*, 563 So.2d 632 (Fla. 1990). Thus, ambiguity, if there is any, should be construed in favor of the plaintiffs.

Silva v. Southwest Florida Blood Bank, Inc., 601 So.2d 1184, 1187 (Fla. 1992).[15/]

[15/] To the suggestion of the defendants' amicus that the legislature's recent failure to enact a proposed bill clarifying the statute represents an endorsement of the defendants' reading of the statute, we note simply that legislative inaction has never been viewed by this Court as authority for ignoring settled rules of statutory construction. Legislative inaction is the rule, rather than the exception, and legislative silence can hardly be accepted as an affirmative expression of legislative opinion about any subject. To be sure, there is authority for the proposition that *long* acquiescence by the legislature in an *initial* judicial construction

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Second, if the defendants are correct that the statute of limitations begins to run as a matter of law upon discovery of an ambiguous "injury in fact" which does not provide constructive notice of an "incident" of malpractice, then the statute will necessarily begin to run in such cases where the facts support only a mere suspicion that the injury was caused by negligence, rather than confirmation (or, at minimum, a reasonable probability) that the injury was the result of malpractice. Given the plain language of §95.11(4)(b), however, knowledge of facts creating a suspicion of malpractice simply do not trigger the statute; instead, such knowledge triggers only the requirement that the plaintiff exercise "due diligence" to "discover" the "incident" of malpractice, and the limitations period is not triggered until the suspicion is confirmed by discovery of the cause of action.

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

> We now reach the question of whether the trial court properly granted summary judgment in favor of Dr. Ash. The trial judge concluded that Cynthia Stella knew or should have known of Dr. Ash's allegedly improper diagnosis on March 23, 1977, when she received a proper diagnosis. However, the diagnosis on which the trial court based its decision was inarguably a preliminary diagnosis. Tests to confirm that diagnosis were not performed until March 29. The final results of those tests were not available until March 30. *We do not believe that, as a matter of law, a tentative diagnosis, however proper it may turn out to be in hindsight, starts the clock on an action for medical malpractice arising out of negligent failure to properly diagnose. Thus there is an issue of fact as to whether notice that an inoperable, malignant tumor had been discovered did, in fact, put the respondent and his*

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of a statute can be given some weight in determining the meaning of a statute, but that proposition supports *our* position here -- because the legislature *long* acquiesced in the construction which this Court initially gave to the statute in *Moore, Tillman*, and *Cohen*. Most respectfully, there is no authority supporting amicus' suggestion that the simple failure of the legislature to pass a clarifying amendment in the single session following an apparent *change* in the judicial construction of a statute represents a legislative endorsement of the change.

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> *wife on legal notice that the tumor had existed at the time Dr. Ash treated Mrs. Stella and that Dr. Ash had been negligent in improperly diagnosing the problem.* The etiology of malignancy is not well enough understood, even by medical researchers, that the courts should impute sophisticated medical analysis to a lay person struggling to cope with the *fact* of malignancy. *Further evidence may reveal that, without knowledge of the specific nature of the tumor, no medical expert could have conclusively stated that the cancer did, in fact, exist at the time of Dr. Ash's alleged misdiagnosis. Absent a finding of fact that before March 30, 1977, medical records showed that the newly discovered tumor had been the cause of Mrs. Stella's earlier problems, constructive knowledge of the incident giving rise to the claim cannot be charged to the Stellas.*

(Emphasis supplied).

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

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And if *Ash* is not enough to make that point, this Court's more recent decision in *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So.2d 1323 (Fla. 1990) -- which was decided less than six weeks after *Barron* was decided -- should put the question to rest. In that case, the taxpayers received a "90-day letter" from the IRS advising them of a tax deficiency. The taxpayers contested the assessment, and suffered an adverse decision in the United States Tax Court. More than two years from the date they received the "90-day letter," but less than two years from the date they received the Tax Court's judgment, the taxpayers filed a malpractice action against their accountants. The accountants contended that the "should have been discovered" provision of §95.11(4)(a) began to run as a matter of law upon receipt of the "90-day letter." The Third District disagreed. It noted that, until the taxpayers received a decision from the Tax Court they knew only that the accountants "*might* have been negligent," and that the statute therefore did not begin to run until their suspicions were confirmed by the Tax Court's judgment. 565 So.2d at 1325 (emphasis supplied). Consistent with its earlier decision in *Ash*, this Court approved the Third District's decision, holding in effect that mere suspicion of a negligently caused injury, without confirmation, was not enough to trigger the "should have been discovered" provision of the statute of limitations for professional malpractice.

To be sure, *Peat, Marwick* is arguably distinguishable from the instant case in one small detail -- because the uncertainty created by the "90-day letter" in that case was over whether the plaintiffs had actually suffered an injury, rather than over whether the defendants were a negligent cause of a known, but ambiguous injury -- but in our judgment, that simply has to be a distinction without a difference. For one thing, it has to be a distinction without a difference because the uncertainty in *Ash* was over whether the defendant was *negligent*, rather than over whether the plaintiff had actually suffered an "injury." More importantly, the point of both cases is clearly broader than the details to which these piddling distinctions relate. Their point is that knowledge of a fact which gives

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rise to a mere suspicion of a potential cause of action is not enough, by itself, to start a "should have been discovered" provision in a statute of limitations running *as a matter of law*.

Instead, if the known fact is insufficient to provide constructive notice of a "legal injury," or cause of action, then the statute of limitations does not begin to run until, in the exercise of "due diligence," the cause of action is finally discovered by confirmation of the suspicion, and the plaintiff has two years in which to file suit thereafter -- and that, we submit, is consistent with everything we have argued here. Most respectfully, the conclusion urged by the defendants in the instant case is completely inconsistent with *Ash* and *Peat, Marwick*, and unless those two decisions are to be overruled here, *Nardone, Barron* and *Bogorff* simply must be harmonized with *Moore, Tillman*, *Cohen* and *Menendez* (and the dozens of decisions like them) along the lines we have suggested here.

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

For example, §766.104, Fla. Stat. (1989), prohibits the filing of a medical malpractice action unless an attorney certifies that a reasonable investigation has been conducted and that grounds exist for an action -- and it provides that such a certificate is presumptively made in good faith if the attorney has received a written opinion from a medical expert confirming that there appears to be evidence of medical negligence. Section 766.203, Fla.

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Stat. (1989), goes even further. It requires that, as a condition precedent to filing a medical malpractice suit, the plaintiff must provide a "notice of intent to initiate litigation" to the prospective defendant, and that this notice must include a "verified written medical expert opinion . . . which . . . shall corroborate reasonable grounds to support the claim of medical negligence."

The obvious purpose of these statutes is to *discourage* (indeed, *prevent*) medical malpractice suits based on suspicion rather than confirmation -- and, in our judgment, it would be entirely inconsistent (and therefore antithetical to public policy) for a court to *encourage* the filing of medical malpractice suits based on suspicion rather than confirmation by holding that the statute of limitations is triggered as a matter of law upon mere unconfirmed suspicion of a cause of action as complex as a medical malpractice action. Surely, the various statutes governing the initiation of medical malpractice suits should be read *in pari materia*, and harmoniously if at all possible -- which is probably why this Court defined the trigger point at confirmation rather than suspicion in *Ash v. Stella, supra*.

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

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than some non-negligent act or a natural cause (or when that discovery should have been made in the exercise of due diligence).

The same conclusion would seem to be required by this Court's decisions in *Ash* and *Peat, Marwick*, since they both announce that mere suspicion that a plaintiff *might* have a cause of action for professional malpractice is not enough to start the "delayed discovery" provision of the statute of limitations running as a matter of law, and that the statute is tolled until such time as, in the exercise of reasonable diligence, the plaintiff confirms his or her suspicions. And given the legislature's current policy to prohibit medical malpractice lawsuits based on suspicion, rather than confirmation, we believe that the defendants' reading of *Barron* and *Borgoff* simply must be rejected here as placing an entirely too stringent requirement upon victims of medical malpractice faced with ambiguous injuries of the type at issue in the instant case -- which brings us to our conclusion.

In the instant case, all that the Norsworthys knew when their baby was discharged from the hospital was that he had essentially the same physical condition for which he had been admitted in the first place -- subglottic stenosis -- and they had no inkling that this condition might have had a different cause upon discharge than upon admission. Thereafter, they did exactly what §95.11(4)(b) required -- they exercised "due diligence" to discover whether they had a cause of action against the defendants. They consulted with an expert, who told them that the defendants had *not* been negligent -- and that their child's condition was, at worst, an unavoidable natural consequence of a recognized medical treatment competently performed. Certainly, the Norsworthys were not on notice of a possible invasion of their *legal* rights at that point in time, which is what this Court's decisions require. The Norsworthys then continued to exercise "due diligence" thereafter, and obtained a *second* expert opinion. And it was not until they obtained this second expert opinion that they were even arguably on notice that their child's condition might have had a different, negligent cause upon discharge -- i. e., it was not until they received this second

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expert opinion that they were even arguably on notice of a possible invasion of their *legal* rights.

Why, then, should the "delayed discovery" provision of §95.11(4)(b) begin to run the instant the Norsworthys knew of their child's post-operative subglottic stenosis (and nothing else), rather than when, in the exercise of "due diligence," they ultimately discovered their cause of action? Most respectfully, it should not -- because to reach such a conclusion would require the Court to write the "delayed discovery" provision of §95.11(4)(b) completely out of the statute. We therefore respectfully submit that the district court correctly harmonized this Court's several decisions on the point, and properly concluded that, on the facts construed in a light most favorable to the plaintiffs, a question of fact was presented as to when the statute of limitations began to run on their cause of action for medical malpractice -- and we respectfully urge the Court to approve that perfectly sensible conclusion here.

VI. CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the district court's decision should be approved.

Respectfully submitted,

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APPENDIX

Byron NORSWORTHY, etc., Appellants,

v.

HOLMES REGIONAL MEDICAL CENTER, INC., et al., Appellees.

No. 91-1367.

District Court of Appeal of Florida, Fifth District.

April 3, 1992.

Rehearing and Rehearing En Banc Denied May 19, 1992.

Child and his parents brought medical malpractice action against physician and health care facility, seeking to recover for child's injuries. The Circuit Court, Brevard County, Edward M. Jackson, J., entered summary judgment in favor of physicians and health care facility on grounds that statute of limitations barred action. Child and parents appealed. The District Court of Appeal, Griffin, J., held that jury question was presented as to whether child's parents were on notice that child's injury may have been caused by medical negligence, as would trigger running of statute of limitations.

Reversed.

1. Limitation of Actions ⇐95(12)

When nature of bodily damage that occurs during medical treatment is such that, in and of itself, it communicates possibility of medical negligence, then statute of limitations begins to run; however, if there is nothing about injury that would communicate to reasonable lay person that injury is more likely the result of some failure of medical care than a natural occurrence that can arise in absence of medical negligence, knowledge of injury itself does not necessarily trigger running of statute of limitations.

2. Limitation of Actions ⇐199(1)

Jury question was presented as to whether child's parents were on notice that child's injury may have been caused by medical negligence even though parents were aware that child's initial condition requiring medical treatment was not cause of subsequent injury for which recovery was sought; there was insufficient evidence to conclude as matter of law that parents were placed on notice that injury was result of anything other than natural consequences of recognized medical treatment competently performed.

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No appearance for appellee, Holmes Regional Medical Center, Inc.

GRIFFIN, Judge.

This is the appeal of a summary final judgment premised on the expiration of the

1. Whatever the truth of the statement of the third party purchaser of the formerly leased premises, and its inference that the purchaser may be the beneficiary of some broken promise of the seller-former lessor, those matters are between those parties and do not in anywise inure to the benefit of the former lessee in this action by the former lessor against the former lessee for damages for the former lessee's breach of a covenant of repair contained in the former lease.

statute of limitations in a medical malpractice case. We reverse.

On March 15, 1985 Mr. and Mrs. Norsworthy's ten and one-half month old son, Byron, developed laryngotracheobronchitis, a viral infection commonly known as "croup", and was hospitalized. He experienced increasing difficulty breathing and his treating pediatrician called for a consult from an otolaryngologist [ear, nose and throat specialist ("ENT")]. Appellee, Dr. Kronman, was on call and began treating Byron on March 18. Because of the swelling of his airway in the area below the vocal cords (subglottis), it was necessary to provide a substitute airway, either by intubation or tracheotomy. Dr. Kronman elected intubation. Byron thereafter began to improve and the tube was removed. The child subsequently began to fail and was reintubated. Once again the child improved and Dr. Kronman removed the tube. After observing Byron's continued breathing difficulty, a tracheotomy was performed. Upon discharge from the hospital, Dr. Kronman estimated the "trach" tube could be removed in two weeks to a month.

The Norsworthys continued with Dr. Kronman until mid-April, 1985 when they decided to change doctors because they were concerned about the somewhat casual attitude Dr. Kronman appeared to have about the "trach" tube removal procedure, and they had been told by others that another ENT specialist, Dr. Dickinson, was better.

The testimony of Dr. Dickinson and the Norsworthys concerning their subsequent discussions is in conflict. Dr. Dickinson claimed she told the Norsworthys that Byron had subglottic stenosis, a narrowing of the airway at the subglottis that may have resulted from a mechanical trauma during the intubation. ("I think I was trying at that time to get them to understand ... that indeed sometimes further irritation is inescapable.") Her own notes suggest she communicated that subglottic stenosis is an "unfortunate" result that may occur in such "life threatening situations." The Norsworthys conceded that Dr. Dickinson told them that ENT's don't like intubations because they can cause problems but she also said that tracheotomies have problems of their own. Mrs. Norsworthy testified Dr. Dickinson told them there was no deviation from the norm in Dr. Kronman's care. Mr. Norsworthy testified Dr. Dickinson had expressed the view that Dr. Kronman's care had been competent and professional.

In June 1985, the Norsworthys relocated to Pennsylvania, where Mr. Norsworthy had found a better job and Byron went under the care of Dr. Tucker, a specialist in the field of pediatric airway management. Dr. Tucker testified that the Norsworthys had always seemed upset about the outcome of their son's illness but it was not until early 1989, after Byron's trach was finally removed, that Mr. Norsworthy asked him to review the records of the original hospitalization and evaluate the medical care Byron had received. Dr. Tucker did so and advised them that Byron's subglottic stenosis was, in his opinion, an injury caused by inappropriate and negligently administered intubations. A few weeks later, on June 28, 1989 (within Florida's four-year statute of repose) [1] the Norsworthys filed suit against Dr. Kronman.

The issue is when the statute of limitations began to run in this case. Like the other district courts of appeal, we are called upon to apply the recent rulings of the Florida Supreme Court in *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991) and *Barron v. Shapiro*, 565 So.2d 1319 (Fla.1990) in attempting to determine whether the two-year statute of limitations applicable to medical malpractice actions had expired as a matter of law prior to the filing of this lawsuit. *See, e.g., Tanner v. Hartog*, 593 So.2d 249 (Fla.2d DCA 1992), *question certified on motion for reh.; Rogers v. Ruiz*, 594 So.2d 756 (Fla.2d DCA 1991); *Vellanti v. Maercks*, 590 So.2d 495 (Fla.3d DCA 1991). Like the other district courts, we find that applying the rule of *Barron* and *Bogorff* to the widely divergent fact patterns presented by such cases is not easy.

1. The Norsworthys had timely filed a petition to extend the statute of limitations.

The *Bogorff* and *Barron* decisions are clear 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. The difficulty lies 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. *Barron* and *Bogorff* can be broadly read to mean that any adverse physical event arising in the course of medical care triggers the statute of limitations. *See Tanner*, 593 So.2d at 252 (when pregnant woman was admitted to the hospital for delivery of her baby but the baby was stillborn, the statute of limitations began to run on the date of the stillbirth). 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.[2]

[1] 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.

In *Nardone v. Reynolds*, 333 So.2d 25 (Fla.1976) the case relied on most strongly in both *Barron* and *Bogorff*, a thirteen-year old boy who had been experiencing difficulty in coordination, blurred vision, dyplopia and headaches, was admitted to the hospital and underwent two surgical procedures that resulted in marked and steady improvement such that he was told he could shortly go home. Then, after a diagnostic procedure subsequently performed on him, he immediately began to suffer severe symptoms, including constant headaches, drowsiness, incoherence, projectile vomiting. Within two weeks, he had deteriorated into a vegetative state. The *Nardone* court concluded that these circumstances were enough to put the parents on notice that their son may have been the victim of malpractice during the diagnostic procedure.

On the other hand, the *Bogorff* court also reaffirmed its earlier holding in *Moore v. Morris*, 475 So.2d 666 (Fla.1985). In *Mor-*

2. *Tanner v. Hartog*, 593 So.2d 249, 253 (Fla.2d DCA 1992); *question certified on motion for reh.* (Patterson J., dissenting):

> I am disturbed by the trend in this area of the law which creates a fiction that a normal, but unfortunate, incident of proper medical care and treatment in the eyes of a lay person is in fact legal notice of possible malpractice.
>
> A party litigant should be given the opportunity to establish by competent evidence that they fall within circumstances defined by the legislature to protect unwary and uneducated persons from the harsh consequences of their ignorance of the pitfalls of medical treatment.

Rogers v. Ruiz, 594 So.2d 756, 764 (Fla.2d DCA 1991):

> Thus, whether or not one may feel that a plaintiff's medical malpractice suit should not be barred by the statute by reason of the plaintiff, who had no notice of negligence, having received only the relatively slight notice of the injury more than two years prior to the service of the presuit notice, we are bound by the foregoing parameters established by the supreme court.

ris, the court reversed a ruling by the lower court that, as a matter of law, the plaintiffs were on notice of malpractice because they knew of oxygen deprivation at the time of their child's birth. The *Morris* court explained:

> There is nothing about these facts which leads conclusively and inescapably to only one conclusion—that there was negligence or injury caused by negligence. To the contrary, these facts are totally consistent with a serious or life threatening situation which arose through natural causes during an operation. Serious medical circumstances arise daily in the practice of medicine and because they are so common in human experience, they cannot, without more, be deemed to impute notice of negligence or injury caused by negligence.

Id. at 668. Concededly, the *Morris* court also noted that their conclusion that the parents did not have notice was "particularly true where ... the baby physically appeared to have made speedy and complete recovery" (*i.e.*, there was no "injury") but that is plainly not the focus of the court's reasoning.

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 *Nardone*, *Barron* and *Bogorff*, speak for themselves and supply notice of a possible invasion of legal rights. That is not to say, however, that all injuries carry that same communication. As the fourth district recently said in *Southern Neurosurgical Associates, P.A. v. Fine*, 591 So.2d 252 (Fla. 4th DCA 1991):

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

Id. at 256.

[2] We must view the facts in the record of this case most favorably to the nonmoving party, as is appropriate in summary judgment cases. 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 cords 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 cords. Even if the 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 medical malpractice.[3] Nor

3. Another aspect of the *Bogorff* decision is worthy of consideration in this case. The supreme court in *Bogorff* found there was a question of fact of fraudulent concealment in that case that would have tolled the running of the statute of limitations. The supreme court noted in *Bogorff:*

> An attending physician has a strong duty to address the concerns of patients and to be fully candid with them.

583 So.2d at 1003.

If lay persons are to be charged with notice that there may have been an invasion of their legal rights simply upon knowledge of an "injury,"

could we say exactly when the statute would have been triggered.

In this case, the jury may well find the Norsworthys were on notice of malpractice before 1989, or they may find, based on the nature of the injury and the information the Norsworthys were given, that the statute of limitations does not bar this claim.

REVERSED.

GOSHORN, C.J. and PETERSON, J., concur.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 27th day of January, 1993, to: Jeanelle G. Bronson, Esquire, and Joseph M. Taraska, Esquire, Taraska, Grower, Unger and Ketcham, P.A., P.O. Box 538065, Orlando, Florida 32801; and to Philip D. Parrish, Esq. and Robert M. Klein, Esq., Stephens, Lynn, Klein & McNicholas, P.A., 777 Brickell Avenue, Fifth Floor, Miami, Fla. 33131.

By: Joel D. Eaton
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