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IN THE SUPREME COURT OF FLORIDA

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

Defendants/Petitioners,

vs.

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

Plaintiffs/Respondents.

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

ORIGINAL

PETITIONERS' REPLY BRIEF ON THE MERITS

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

JOSEPH M. TARASKA
Florida Bar No. 235571
JEANELLE G. BRONSON
Florida Bar No. 266337
TARASKA, GROWER, UNGER &
KETCHAM, P.A.
P.O. Box 538065
Orlando, FL 32853-8065
Phone: (407) 423-9545
Attorneys for Defendants/
Petitioners

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ARGUMENT

This Court, in the recent decisions of Barron v. Shapiro, 565 So. 2d 1319 (Fla. 1990) and University of Miami v. Bogorff, 583 So. 2d 1000 (Fla. 1991), reaffirmed the standard mandated 15 years earlier in Nardone v. Reynolds, 333 So. 2d 25 (Fla. 1976), that the statute of limitations begins to run when the plaintiffs knew or should have known that **either** injury **or** negligence had occurred. Respondents contend that this Court did not mean what it clearly and unambiguously stated on three separate occasions in Nardone, Barron and Bogorff. Petitioners assert that after three separate pronouncements by this Court, the message is quite clear and should not be misinterpreted. In fact, Petitioners submit that this standard was intended to be a bright line to be applied by lower courts in the application of the medical malpractice statute of limitations.

Respondents take great pains and, quite frankly, significant literary license in their attempt to try and persuade this Honorable Court to overrule its already clear mandate. Respondents' brief is skillfully crafted to confuse and muddle this sharply defined standard for the purpose of avoiding the running of the statute of limitations. We respectfully submit that the Court should hold steadfast to the bright line rule it established in Nardone, Barron and Bogorff.

Respondents stand before this Court with facts quite similar to those of both Barron and Bogorff but implore this Court to impose the additional requirement that an injury must communicate an inference of negligence in order to trigger the statute of

limitations. However, to do so would emasculate the legislative purpose in enacting the medical malpractice statute of limitations and this Court's clear mandate.

In support of their position, Respondents cite numerous cases which are clearly distinguishable from the facts of the instant case. Respondents then provide strained and confusing interpretations of these cases in order to support their position. However, once one cuts through the rhetoric of Respondents' arguments, it is clear that their position is simply that the only time that notice of an injury triggers the statute of limitations is when the injury is of such a nature that it automatically leads to the conclusion that it is the result of negligence. This contention is a misstatement of the law and flies directly in the face of both Nardone and Moore v. Morris, 475 So. 2d 666 (Fla. 1985). Barron, 565 So. 2d at 1321.

The erroneous interpretation which Respondents now argue before this Court, was accepted by the Fifth District to avoid the consequences which must be imposed upon Respondents because of their failure to diligently pursue their cause of action. The Fifth District, as requested by Respondents, went beyond the Nardone, Barron and Bogorff standard and imposed the additional requirement that the injury communicate some inference of negligence when it held:

> "On the other hand, if there is nothing about an injury that would communicate to a reasonable lay person that the injury is more likely a result of some failure of medical care than a natural occurrence that can arise in the absence of medical negligence, the knowledge of the injury itself does not necessarily trigger the

running of the statute of limitations." Norsworthy v. Holmes Regional Medical Center, 598 So. 2d 105 at 107, 108.

The Fifth District, much like the Respondents, rationalized its position which was obviously contrary to Nardone, Barron and Bogorff by attempting to narrow the application of said seminal cases as evidenced by the following language:

> "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." Norsworthy, at 107.

This reasoning used by the Fifth District represents the same outmoded standard which this Court rejected. As noted in Bogorff:

> "Thus, the District Court required the Bogorffs to have knowledge both of Adam's physical injury and that a negligent act caused his injury before the limitation period could begin to run.
>
> We do not find this to be an accurate statement of the law. In Barron, we expressly rejected the argument that knowledge of a physical injury, without knowledge that it resulted from a negligent act, failed to trigger the statute of limitations. Rather, we reaffirmed the principles set forth in Nardone and applied in Moore v. Morris, 475 So. 2d 666 (Fla. 1985), and held that the limitation period commences when the plaintiff should have known of either (1) the injury or (2) the negligent act." Barron, at 1002.

To require in addition to notice of the injury or notice of the negligent act, that the injury carry with it an inference of negligence deprives Bogorff and Barron of all precedential value and would be a retreat from Nardone. Such an interpretation replaces the bright line previously drawn by this Court with an amorphous standard to be applied by lower tribunals. Such a ruling

would be an open invitation for conflicts between the districts, thereby creating unnecessary ambiguities with regard to the issue of when the statute of limitations begins to run.[1]

Respondents initially contend that even accepting the law established in Nardone, Barron and Bogorff, that they had no reason to know that Byron had suffered a distinct injury in the hospital because his condition upon discharge was no different than his condition upon admission. However, Byron's medical records note that Byron was admitted to the hospital for observation because of croup. Petitioners acknowledge some of the symptoms of croup are edema or swelling of the soft tissue in the subglottis area. However, Byron's admitting physician did not expressly diagnose Byron's presenting condition as subglottic stenosis. It was only upon discharge that he made the diagnosis that Byron had "developed" a tracheal stenosis, i.e., subglottic stenosis. **But even more importantly, Byron had not had three intubations and a tracheotomy when he was admitted to the hospital.**

It is extremely convenient for Respondents to contend in hindsight that they were simply not on notice as to the injury. However, it is important to scrutinize what was in their minds at the time of Byron's admission and at the time of his discharge by

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[1]This is evidenced by several cases currently pending before this Court, including but not necessarily limited to Harr v. Hillsborough Community Medical Health Center, 591 So. 2d 1051 (Fla. 2d DCA 1992), Tanner v. Hartog, 593 So. 2d 249 (Fla.2d DCA 1992), question certified on motion for reh., 17 Fla. L. Weekly 433 (Fla. 2d DCA Jan. 31, 1992), and Allen v. Orlando Regional Medical Center, 606 So. 2d 665 (Fla.5th DCA 1992).

their own admissions. Mrs. Norsworthy stated in her deposition that in her mind, there was a dramatic difference in Byron's condition. Mrs. Norsworthy's response was quite similar to that of Mrs. Bogorff and Mrs. Shapiro when she noted in her deposition:

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

Byron's condition upon discharge was dramatically worse from the condition upon admission, which clearly should have put the Norsworthys on notice of an injury and the need to conduct an investigation to determine whether there was an invasion of their legal rights. This notice was sufficient as a matter of law to commence the statute of limitations.

In addition to having actual notice of Byron's injury, the Respondents are deemed to have had constructive knowledge of Byron's injury as well, as a result of their possession of Byron's medical records since July of 1985. The record below contains various references to Byron's medical records indicating that Byron had "developed" subglottic stenosis possibly as a result of the intubations. These medical records chronicled the operations and procedures performed on Byron during his hospital stay. As early as July of 1985, the Norsworthys had all of the information which was necessary to make them not only aware of their injury, but also to make them aware of the alleged negligence of which they now complain. The same medical records which were provided to the Respondents in 1985 were used by Dr. Tucker in 1989 as the basis for his opinion regarding alleged negligence on the part of Dr.

Kronman.

There is no contention by Respondents that any new information was obtained by Respondents subsequent to July of 1985, other than, of course, Dr. Tucker's belated opinion in 1989 that Byron's condition was caused by negligence. Thus, one must conclude that Respondents and Dr. Tucker had the means, i.e., the medical records, to arrive at the same opinion as to negligence in 1985 as was belatedly arrived at in 1989. As noted in Nardone: "the means of knowledge are the same as knowledge itself." Nardone, at 34.

The record below shows that the Norsworthys not only had actual and constructive notice of their injury, but that they also strongly suspected negligence which is the second half of the "either/or test" established in Nardone and its progeny. This Court held in Nardone that once a plaintiff knows of an injury, it is incumbent upon him to investigate the facts surrounding the injury. Respondents now contend that Dr. Dickinson relieved them of any further duty to investigate. Dr. Dickinson's ambivalence or reluctance with regard to criticizing Dr. Kronman's care was not sufficient to relieve Respondents of the duty imposed by law to thoroughly investigate their cause of action and cannot toll the statute of limitations.[2]

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[2]Just as this Court noted in Barron, the fact that a doctor other than Dr. Barron suggested to Mrs. Shapiro that the tubes in Mr. Shapiro's body may have acted as a host for the infection could not serve to toll the statute, it should note that Dr. Dickinson's refusal to criticize Dr. Kronman and her statements as to her opinion that Dr. Kronman's care had been competent and appropriate, cannot serve to toll the statute of limitations as to Respondents.

In any event, it is clear from undisputed points in the record that Respondents continued to be suspicious of the possibility of negligence as evidenced by their repeated questions of Dr. Dickinson on each of their visits. It is also evidenced by Respondents' acknowledgment that Dr. Dickinson advised them on several occasions that ENT's do not like repeated intubations and that she might have handled Byron's care differently. Mrs. Norsworthy expressly recalled that Dr. Dickinson told her that ENT's did not like to see kids intubated. Mrs. Norsworthy even acknowledged in her deposition that Dr. Tucker, Byron's treating physician and now, Respondents' expert witness, had advised her early in his treatment of Byron that Byron's injury could have been caused by intubations, (R. 305-306). In Mr. Norsworthy's deposition, he confirms that Dr. Moffitt, a pediatrician to whom Byron's care was transferred in Philadelphia, advised him that "usually children with croup do not have trachs for extended periods of time . . ." (R. 437-438). Even Dr. Tucker confirmed Respondents' continuing suspicion of negligence as noted below:

> Q: "Well, generally tell what they have told you about the treatment that they had received by Dr. Kronman and Holmes Regional and Dr. Dickinson."
>
> A: "The impression that I got, particularly Mr. Norsworthy was the more verbal of the two, he was always upset in his mind about the outcome of their son's illness." (R. 475)
>
> Q: "Is it your recollection that they were questioning the care and treatment rendered by Dr. Kronman literally from the time they came to see you in 1985?"

Barron, at 1321.

A: "Yes, I think he was. I think he was never 'happy'." (R. 485)

It is clear from the record that as a matter of law in Respondents' minds, there was sufficient reason to suspect alleged negligence.

As demonstrated by the trial court's judgment after reviewing the complete record, the undisputed facts were sufficient as a matter of law to commence the statute of limitations.

Beginning at page 19 of Respondents' brief, they embark upon a rather creative analysis of pre-Barron cases in an attempt to reverse this Court's rulings in Nardone, Barron, and Bogorff. In so doing, Respondents categorize the numerous pre-Barron decisions cited in their brief initially into six subcategories of statute of limitation cases which have not been recognized by any court. These six subcategories are ultimately narrowed by Respondents to two categories -- those cases involving knowledge of an "ambiguous" injury which does not carry with it a sufficient inference of negligence to place the Plaintiff on actual or constructive notice that the injury was caused by negligence and those cases involving injuries which are "so obvious" that they give fair notice without more that they were the probable consequence of a negligence act. Under this theory, the Nardone, Barron and Bogorff decisions fall within the second category. What Respondents fail to acknowledge, however, is that under their theory, both categories still require knowledge (either constructive or actual) of negligence which is the identical proposition which was rejected by this Court in Nardone, Barron and Bogorff.

Respondents go to great lengths to demonstrate that Nardone, Barron and Bogorff cannot be interpreted literally. The reason for this, of course, is that if they are, one must reason that the statute of limitations has run on Respondents' claim. To support their position, Respondents go back to the "blameless ignorance doctrine" adopted in City of Miami v. Brooks, 72 So. 2d 306 (Fla. 1954). Respondents presumptuously assert that the source of confusion surrounding the "improper interpretation" of Nardone and its progeny stems from the following sentence:

> "... this Court has held that the statute of limitations in a malpractice suit commences either when the Plaintiff has notice of a negligent act giving rise to the cause of action or when the Plaintiff has notice of the physical injury which is the consequence of a negligence act. City of Miami v. Brooks, 72 So. 2d 306 (Fla. 1954) ..."

Respondents say that this proposition which is the cornerstone of Bogorff, Barron and Nardone was "imported into Nardone somewhat carelessly, without the careful qualification which it deserved."[3] Petitioners take issue with Respondents' cavalier characterization of this Court's holding. The "blameless ignorance doctrine" is totally consistent with Nardone, Barron and Bogorff.

Like a majority of the cases cited by Respondents, Brooks involved a situation in which the plaintiff had no notice of the injury, because the injury had not manifested itself. As this Court observed, there was no visible injury at the time that the medical procedure was performed and there were no other circumstances by which the plaintiff could have been put on notice

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[3]Respondents' Brief on the Merits at page 27.

of his right to a cause of action. Similarly, in the case of Moore v. Morris, 475 So. 2d 666 (Fla. 1985) this Court held that the statute of limitations did not begin to run until the actual injury manifested itself. In that case, the injury was brain damage occurring at birth, but was not and could not have been diagnosed until three years later. Thus, Moore, like Brooks, is quite consistent with Nardone, Barron and Bogorff, but not for the reasons stated by Respondents.[4]

Respondents' reliance upon Ash v. Stella, 457 So. 2d 1377 (Fla. 1984), is also misplaced. Ash involved a situation in which Mrs. Stella was treated by Dr. Ash for back and shoulder pain in 1975. More than two years later, Mrs. Stella was diagnosed by another doctor as having an inoperable malignant tumor. This Court held that there was an issue of fact as to whether notice of the tumor put the plaintiff on notice that the tumor had existed more than two years earlier when she was treated by Dr. Ash. What Respondents overlook in their reliance upon Ash is that there was a factual issue as to notice of the injury as there was nothing in the medical records which clearly showed that the newly discovered tumor was the cause of the earlier problems.

Respondents also cite Peat, Marwick, Mitchell and Co. v. Lane, 565 So. 2d 1323 (Fla. 1990) for the proposition that mere suspicion that a plaintiff might have a cause of action is not enough to start the "delayed discovery" provision of the statute of

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[4]Petitioners would direct the Court's attention to pages 23-26 of Petitioners' Brief on the Merits for a more in-depth discussion and explanation of Moore and Respondents' misplaced reliance.

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. Although Peat, Marwick is clearly inapposite to this case as it involves an accounting malpractice claim, Petitioners will briefly address Respondents' misplaced reliance on Peat, Marwick. In that case, the plaintiffs received a Notice of Deficiency from the Internal Revenue Service which they chose to challenge in tax court. Ultimately they entered into a stipulated order in the tax court and filed a suit against Peat, Marwick for malpractice.

As this Court noted, a cause of action for negligence does not accrue until the existence of a redressable harm or injury has been established. In Peat, Marwick, this Court held that the injury did not occur until a final order was entered by the tax court. Contrary to Respondents' position on page 46 of their Brief on the Merits, we do not believe that this is a "piddling distinction" from Nardone. Even so, Peat, Marwick can still be interpreted to be consistent with Nardone, Barron and Bogorff in that the statute of limitations did not commence until the plaintiff had notice of an injury, i.e., the final order of the tax court.

Respondents' citation of numerous pre-Barron cases such as Florida Patient's Compensation Fund v. Tillman, 487 So. 2d 1032 (Fla. 1986), Schafer v. Lehrer, 476 So. 2d 781 (Fla. 4th DCA 1985), Florida Patient's Compensation Fund v. Sitomer, 524 So. 2d 671 (Fla. 4th DCA 1988), rev'd dismissed, 531 So. 2d 1353 (Fla. 1988), and quashed in part on other grounds, 550 So. 2d 461 (Fla. 1989),

should be scrutinized closely as they are clearly distinguishable from Nardone and its progeny. These cases and numerous others cited by Respondents in support of their position turn more so upon factual issues as to when the injury actually manifested itself and occurred prior to the guidance provided in this Court's clarifying mandate in Barron. Additionally, most involve allegations of fraudulent concealment, which are not relevant to this matter.[5]

The Fifth District has obviously exceeded its authority in declining to follow clearly established precedent. However, Petitioners take issue with Respondents' assertion that the Third and Fourth Districts have also declined to follow the controlling precedent of Nardone, Barron and Bogorff. In fact, the Fourth District in the recent decision of Kahler v. Kent, 18 Fla. L. Weekly 431 (4th DCA, February 3, 1993) distinguished its facts from Barron and expressly embraced the Barron holding when it noted:

> "In Baron, the court held that it was the discovery of an injury alone that triggered the statute of limitations. That is surely the law, but in our case, the facts are not nearly so crystallized as to when plaintiff discovered the fact of injury." Kahler at D431. (emphasis added)

Respondents' assertion that the Third District has squarely rejected the Petitioners and the Second District's reading of Bogorff is based upon the Third District's holding in Menendez v. Public Health Trust of Dade County, 566 So. 2d 279 (Fla. 3rd DCA 1990), approved 584 So. 2d 567 (Fla. 1991). However, Respondents'

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[5] For a more in-depth view of these cases, Petitioners would direct the Court's attention to amici curiae brief of the Florida Hospital Association and the Florida Medical Association filed in this action.

position is based solely on footnote 3 of Menendez which observed in part as follows: "a defect at birth does not necessarily put the parents on notice of injury or possible negligence." Menendez at 282 note 3. In this case, the Third District upheld a summary judgment in favor of one of the treating physicians and the University of Miami, but reversed as to Jackson Memorial Hospital, finding that genuine issues of material fact existed as to when the plaintiffs knew or should have known of either the injury or of the possible negligence. A reference in a footnote that a defect at birth did not necessarily put the parents on notice of an injury or of possible negligence is insufficient to assert that this is a square rejection of the literal reading of Bogorff and Barron.

Respondents' reliance upon note 3 in Menendez is similar to their reliance upon a passing reference to Moore in the Fourth District's opinion in Southern Neurosurgical Associates, P.A. v. Fine, 591 So. 2d 252, 256 (Fla. 4th DCA 1991). The fact is that the Fine decision turns on procedural issues of notice of intent. There are simply not enough facts discussed in Fine to determine the Fourth District's position on the issue of the statute of limitations. On the contrary, the Fourth District's decisions in Kahler and Vargas v. Glades General Hospital, 566 So. 2d 282 (Fla. 4th DCA 1990) support the position that the Fourth District is indeed, aligned with the Second District's reading of Nardone, Barron and Bogorff. In Vargas, the Fourth District observes:

> "In Barron v. Shapiro ... the Supreme Court reaffirmed the principles set forth in Nardone and reaffirmed in Moore v. Morris, ... that the statute of limitations begins to run when the plaintiffs knew or

> should have known either that an injury or negligence had occurred. In doing so it reversed this Court's holding that notice of physical injury alone, without knowledge that it resulted from a negligent act, does not trigger the statute of limitations ... Thus, it is clear that the triggering event for the statute of limitations in this case was the Vargas's knowledge of the injury to their child, not the knowledge that the injury was caused by a negligent act. Vargas at 286. (emphasis added)

Petitioners also take issue with Respondents' contention that to interpret Nardone, Barron and Bogorff as Petitioners suggest would have the effect of writing the delayed discovery provision out of the statute of limitations. Many of the cases cited by Respondents demonstrate that there are numerous occasions in which the delayed discovery provision of the statute of limitations would still apply, such as in instances when there is a delay in external manifestation of an injury, such as was the case in Brooks, Moore and Tillman. On the contrary, if one accepts Respondents' very narrow interpretation of Nardone, Barron and Bogorff, it will transform the legislature's direct mandate for a two year statute of limitations into a four year statute of repose.[6] This in turn will result in creating unnecessary uncertainty and ambiguities concerning application of the medical malpractice statute of limitations. The standard pronounced in Nardone and reaffirmed in Barron and Bogorff was designed to avoid the ambiguities and conflicts which will surely be created if this Court accepts Respondents' position and replaces the clear pronouncement of

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[6]To the extent possible, legislation should be construed in light of the manifest purpose to be achieved by the legislation. See Tampa Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc., 444 So.2d 926 (Fla. 1983).

Nardone, Barron and Bogorff with the amorphous standard announced by the Fifth District.

CONCLUSION

Respondents are asking this Court to retreat from Nardone and to limit it and its progeny to a narrow factual interpretation. This would realistically deprive Nardone, Barron and Bogorff of all precedential value. Instead, the standard established in Nardone, Barron and Bogorff should again be clearly reiterated, i.e., that the statute of limitations commences when the potential plaintiff knew or should have known that **either** injury **or** negligence has occurred. Accordingly, the decision of the Fifth District should be reversed and the final summary judgment entered by the trial court in favor of the Petitioners should be reinstated.

Respectfully submitted,

JOSEPH M. TARASKA
Florida Bar No. 235571
JEANELLE G. BRONSON
Florida Bar No. 266337
TARASKA, GROWER, UNGER & KETCHAM, P.A.
P.O. Box 538065
Orlando, FL 32853-8065
Phone: (407) 423-9545
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail delivery, this 22nd day of February, 1993, to Wagner, Cunningham, Vaughan & McLaughlin, P.A., 708 Jackson Street, Tampa, FL 33602, and Joel D. Eaton, Esq., of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Attorneys for Plaintiffs/Respondents, 25 W. Flagler St., Suite 800, Miami, FL 33130.

JOSEPH M. TARASKA
Florida Bar No. 235571
JEANELLE G. BRONSON
Florida Bar No. 266337
TARASKA, GROWER, UNGER & KETCHAM, P.A.
P.O. Box 538065
Orlando, FL 32853-8065
Phone: (407) 423-9545
Attorneys for Petitioners