IN THE SUPREME COURT
STATE OF FLORIDA

80,646

ORLANDO REGIONAL MEDICAL CENTER, and ARNOLD LAZAR, M.D.,

Defendants, Petitioners,

vs.

CASE NO. 91-2333

GREGORY ALLEN, by his mother and guardian, SANDRA ELIZABETH ALLEN, and SANDRA ELIZABETH ALLEN,

Plaintiffs, Respondents.

APPLICATION FOR DISCRETIONARY REVIEW OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA

AMENDED BRIEF OF PETITIONERS ON JURISDICTION

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CITATIONS OF AUTHORITY

STATEMENT OF THE CASE

Defendants, Petitioners, **ORLANDO REGIONAL MEDICAL CENTER** (hereinafter referred to as "ORMC") and **ARNOLD LAZAR, M.D.**, seeks to have reviewed a decision of the District Court of Appeal, Fifth District, dated and filed on September 18, 1992.

The Petitioners were the original Defendants below and the Appellees before the District Court of Appeal. The Respondents, GREGORY ALLEN and SANDRA ELIZABETH ALLEN, were the original Plaintiffs in the trial forum and were the Appellants before the District Court of Appeal. This was an appeal by the Respondents from a Final Order of Dismissal with Prejudice entered by the Circuit Court In and For Orange County, Florida on September 19, 1991 pursuant to a Summary Judgment in favor of Defendants, ORMC and Dr. Lazar, entered by the Circuit Court on August 26, 1991. The Summary Judgment was granted pursuant to Defendants' statutes of limitation defense. The District Court of Appeal, Fifth District, reversed the Final Order of Dismissal entered by the Circuit Court.

STATEMENT OF FACTS

On November 5, 1983, Sandra Allen was admitted to ORMC in active labor. In the early afternoon of November 5, 1983, the delivering physician, Dr. Arnold Lazar, delivered a baby boy, Gregory Allen. The initial impression, as set forth in the ORMC Patient Records, was that the baby was premature, having a thirty-two week gestation period, and was found to have suffered from perinatal asphyxia, RDS vs. pneumonia, and hypovolemia. (R. 235-240) Subsequent to this delivery, neonatal care was provided to Gregory Allen by ORMC (R. 606-607).

Within the first few days after his birth, Gregory Allen developed a hemorrhage in the brain. As a result of the hemorrhage, Gregory Allen has suffered brain damage, which has caused deficits in Gregory Allen's physical and mental development. (R. 281) Shortly thereafter, Sandra Allen was informed of the brain hemorrhage suffered by Gregory Allen. (R. 607) In their answer to Plaintiffs', Respondents' complaint, ORMC and Dr. Lazar denied any negligence on their part pursuant to the care and treatment of Gregory Allen.

The Plaintiffs, Respondents mailed their notice of intent to initiate litigation for malpractice to ORMC and Dr. Lazar on October 5, 1987, three (3) years and eleven (11) months after the birth of Gregory Allen, (R. 281) and well past the two (2) year statute of limitations established by F.S. §95.11(4)(b)(1987). The Plaintiffs, Respondents, in their complaints and appellate brief, state that Sandra Allen inquired of her health care providers as to the cause of Gregory Allen's brain hemorrhage and was informed that the hemorrhage occurred because the child was born premature. (R. 281) The Plaintiffs, Respondents argue that the providing of this information tolled the above referenced statute of limitations until

Ms. Allen became aware that procedures performed by the Appellees pursuant to its care of Gregory Allen may have caused or intensified Gregory Allen's injury. The Plaintiffs, Respondents claim that this tolling occurred as a result of alleged misrepresentation or intentional failure of Dr. Lazar and ORMC's physicians and representatives to disclose to Sandra Allen the cause of Gregory Allen's brain hemorrhage (R. 611).

SUMMARY OF ARGUMENT

The Florida Supreme Court, in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990), and University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991) has considered the issue of when the statue of limitations for medical malpractice claims commences to run. The Supreme Court established by its decisions in the above referenced decisions that the statute of limitations period commences when the plaintiff knew or should have known of either (1) the injury or (2) the negligent act.

In reversing the Summary Judgment entered by the Circuit Court in the instant matter, the Fifth District Court of Appeal relied on a prior decision it handed down on these same issues, Norsworthy v. Holmes Regional Medical Center, 598 So.2d 105 (Fla. 5th DCA, 1992). In this opinion, the District Court interpreted the Supreme Court holdings in Bogorff and Barron as standing 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 beings 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, 598 So.2d at 107.

Based on this interpretation of the above referenced Supreme Court decisions, the Fifth District Court of Appeal has reinstituted the requirement that a plaintiff have knowledge or should have known of both the injury and the fact that the injury was the result of a negligent act before the medical malpractice statute of limitation commences to

run. This ruling conflicts with the plain and unambiguous language of the above cited Supreme Court opinions which state specifically that a medical malpractice statute of limitation "commences when the plaintiff should have known of either (1) the injury or (2) the negligent act" (emphasizes added). Bogorff, supra, at 1002.

QUESTION PRESENTED

WHETHER THE DECISION BY THE FIFTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT HOLDING THAT THE STATUTE OF LIMITATIONS PERIOD OF MEDICAL MALPRACTICE CLAIMS COMMENCES WHEN THE INJURY WAS KNOWN BY THE PLAINTIFF.

The Fifth District Court of Appeal, as support for its decision on the Statute of Limitation issue, acknowledged the Florida Supreme Court rulings in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990), and University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991), and then provided its own interpretation of the language of the Supreme Court opinions in making this ruling. Based on this interpretation of legal principles, which is set forth in the Appellate Court's Opinion, the Fifth District Court of Appeal reversed the Circuit Court's entry of a Summary Judgment pursuant to a statute of limitation defense. It is this interpretation and reversal which establishes the conflict with Florida Supreme Court's decisions required to establish this Court's jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981).

In the Nardone v. Reynolds, supra, the Supreme Court considered the medical malpractice statute of limitation issue which involved the filing of a suit on behalf of a thirteen (13) year old child by this parents. Seven months of continual medical treatment unfortunately ended with irreversible brain damage causing the child to suffer total blindness. Upon reaching this medical condition, the child was discharged from the hospital. At the time of his discharge and again upon the completion of a subsequent report by an independent physician five months after the child's discharge from the hospital, the parents

of the child were informed of the irreversible nature of the brain damage and the child's permanent condition.

The Supreme Court, as noted by the Fifth District Court of Appeal in its opinion, relied on its previous ruling in City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954) in holding:

> Previously, 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.

Nardone, supra, at 32. Pursuant to the facts in Nardone, the Supreme Court held specifically that:

> "Sub judice, the plaintiffs were on actual notice of the decerebrate state of their son, that he had suffered irreversible brain damage, and in accordance with Brooks, supra, the statute of limitations began to run when the injury was known. Id.

In Barron v. Shapiro, supra, the Supreme Court considered the statute of limitations issue pursuant to a medical malpractice claim. The court reaffirmed the principal of Nardone, supra, when stating that:

> "The statute begins to run when the plaintiffs knew or should have known that either injury or negligence had occurred."

Barron, supra, at 1321. The plaintiffs in Barron argued that the statute did not commence to run until the plaintiff had reason to know that the injury was negligently inflicted. The Supreme Court stated specifically that this contention "flies in the directly in the face" of both Nardone, supra, and Moore v. Morris, 475 So.2d 666 (Fla. 1985). Id.

In University of Miami v. Bogorff, supra, the Supreme Court again reviewed a medical malpractice statute of limitations' decision from the Third District Court of Appeal, which the required the plaintiffs:

> "To have knowledge both of (the plaintiffs) physical injury and that a negligent act caused his injury before the limitation period could begin to run.

Bogorff, supra, at 1002.

The Supreme Court opinion expressly stated:

> "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 limitation. Rather, we have reaffirmed the principal 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." Id.

Pursuant to the instant matter, it was clear from the Appellate record and uncontested by the Plaintiffs, Respondents, that the Plaintiff, Respondent, Sandra Allen, was informed of the brain hemorrhage suffered by her child, Gregory Allen, shortly after his birth and while admitted to ORMC. ORMC and Dr. Lazar, in its brief and oral argument to the Fifth District Court of Appeal, stated that the notification of the brain hemorrhage constituted a notice of injury to the plaintiff, thus commencing the statute of limitations period. In addition, this notification by its very nature, precluded the finding of concealment or negligent failure to fully disclose pertinent information to the patient.

The Fifth District Court of Appeal, in reversing the District Court's Summary Judgment, relied on a prior decision it handed down on these same issues, Norsworthy v. Holmes Regional Medical Center, 598 So.2d 105, (Fla. 5th DCA 1992). ORMC and

Dr. Lazar respectfully submit that the Fifth District Court of Appeal interpreted the opinion of the above cited Barron and Bogorff cases erroneously, and by applying this interpretation to the facts of the instant matter, thereby reversing the Summary Judgment entered pursuant to the statute of limitations defense, created a conflict with the prior Supreme Court's decisions.

As stated in its opinion in Norsworthy, the Fifth District Court of Appeal believed that the Bogorff and Barron 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 beings 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, 598 So.2d at 107. In the opinion handed down in this matter, the Fifth District Court of Appeal emphasized that it "did not believe the Supreme Court in Barron intended to say that the knowledge of physical injury alone will always trigger the statute of limitations."

The Fifth District Court of Appeal, by its Norsworthy decision and the decision in the instant matter, has reinstituted the requirement that a plaintiff have knowledge or should have knowledge of both the injury and the fact that the injury was the result of a negligent act before the medical malpractice statute of limitation commences to run. This is the precise legal principle which the Supreme Court in Nardone, Barron, and Bogorff, continually refused to accept. Therefore, this interpretation of the Supreme Court's

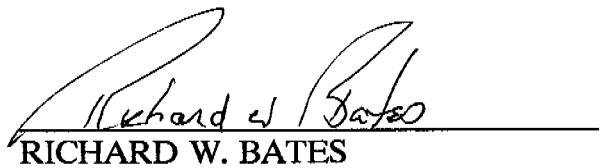
decisions by the Fifth District Court of Appeal clearly conflicts with the plain and unambiguous language of the above cited Supreme Court opinions which state specifically that a medical malpractice statute of limitations "commences when the plaintiff should have known of either (1) the injury or (2) the negligent act." (emphasizes added) Bogorff supra, at 1002.

CONCLUSION

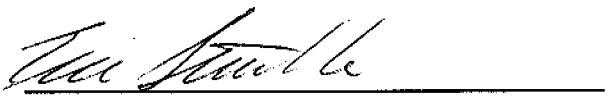
The decision of the District Court of Appeal, Fifth District, which the Defendants, Petitioners, ORMC and Dr. Lazar, seek to have reviewed is in direct and express conflict with the decisions of the Florida Supreme Court in the cases of Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990), and University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991). Because of the reasons and authorities set forth in this brief, it is submitted that the decision of the Fifth District Court of Appeal in the instant matter is erroneous and that the conflicting decisions of the Florida Supreme Court are correct and should be approved by this Court as the controlling law of this state.

The Defendants, Petitioners, therefore, request this Court to extend its discretionary jurisdiction to this cause, and to enter its order quashing the Fifth District Court of Appeal's decision and reaffirm its previous decisions set forth in the cases cited above, and granting such other and further relief as shall seem right and proper to the Court.

Respectfully Submitted,



RICHARD W. BATES



ERIC D. STRUBLE

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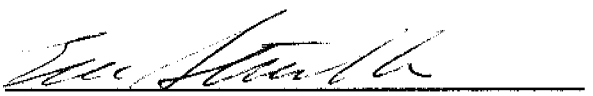
Attorneys for Defendants, Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Martin Trpis, Esquire, 7701 Woodmont Avenue, Suite 408, Bethesda, Maryland 20814 and John Militana, Esquire, Militana, Militana & Militana, 8801 Biscayne Boulevard, Miami, Florida 33138, this 26th day of October, 1992.



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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1992

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

GREGORY ALLEN, etc., et al.,

Appellants,

v. CASE NO. 91-2333

ORLANDO REGIONAL MEDICAL CENTER, et al.,

Appellee.

Opinion filed September 18, 1992

Appeal from the Circuit Court
for Orange County,
William C. Gridley, Judge.

Martin Trpis, Bethesda, Maryland,
and John Militana of Militana,
Militana & Militana, Miami, for Appellants.

Richard W. Bates and Eric D. Struble
of Mateer, Harbert & Bates, P.A.,
Orlando, for Appellees.

DAUKSCH, J.

This is an appeal from a final order, the trial court having previously granted appellees Orlando Regional Medical Center's ("ORMC") and Dr. Arnold Lazar's ("Lazar") motions for summary judgment. Appellees asserted below that they were entitled to summary judgment based on the expiration of the statute of limitations in this medical malpractice case, but we disagree and reverse.

Appellants' Second Amended Complaint, filed February 22, 1988,[1] alleges that on November 5, 1983, appellant Sandra Allen was admitted to ORMC in

[1] Appellants on October 5, 1987 filed notice of intent to initiate litigation pursuant to then section 768.57, Florida Statutes (1987). The statute was transferred to section 766.106, Florida Statutes, in 1988 and currently provides:

active labor and that early in the afternoon, the delivering physician, Lazar, delivered a baby boy, Gregory Allen. The complaint alleged that ORMC staff failed to properly monitor fetal well-being during the delivery and, when the child was born, the initial impression was that the baby was premature, suffering from perinatal asphyxia, pneumonia, and hypovolemia. The complaint alleged that Gregory showed evidence of cerebral palsy and demonstrated psychomotor retardation with dysplegia, blindness and marked spasticity. In particular, appellants further alleged:

> 12. During the time of the care and treatment of SANDRA and GREGORY, the Defendants in this matter, each and every one, represented to the Plaintiffs that GREGORY'S injuries were residuals of normal events. Plaintiffs did not know that Cerebral Palsy may be caused by negligence of health care providers.
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> * * *
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> 14. The Plaintiffs relied upon the representations of the Defendants, each and every one, and did not discover, nor could have discovered, until late spring of 1986, that GREGORY'S injuries had been

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> (4) The notice of intent to initiate litigation shall be served within the time limits set forth in Section 95.11. However, during the 90 day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation of the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

Therefore, the statute of limitations, assuming it had not already expired in late 1985, was tolled on October 5, 1987, and expired on January 3, 1988, after which appellants had 60 days, i.e. until March 3, 1988, to file their complaint in the medical malpractice action. Rhoades v. Southwest Florida Regional Medical Center, 554 So.2d 1188, 1191 (Fla. 2d DCA 1989).

> caused by negligence of the Defendant health care providers.

Appellants' count against appellee Lazar alleged that he knew or should have known the proper and acceptable methods of diagnosing Gregory's condition, yet failed to fully investigate and analyze the source of Sandra Allen's vaginal bleeding and failed to adequately monitor the fetus. The count against appellee ORMC made similar claims.

Appellees filed a motion for summary judgment, adopting the motion of another defendant who had alleged:

> Since plaintiffs discovered during late spring 1986 that the child's injuries were allegedly caused by the negligence of the defendants, this occurred before the expiration of the four-year statute of repose. However, since Sandra Allen had notice of the injuries of her child immediately after birth, the limitations period for this action commenced at that time. See Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990 and University of Miami v. Bogorff, [583 So.2d 1000 (Fla. 1991)].

Appellants responded that the statute of limitations did not proceed to run from the time Sandra Allen became aware of Gregory's brain hemorrhage at the child's birth, because there was nothing about a hemorrhage in the brain of a prematurely born infant which suggests that there was medical negligence or an injury caused by medical negligence. Appellants relied upon Moore v. Morris, 475 So.2d 666 (Fla. 1985).

The issue in this appeal is when the statute of limitations began to run. In Nardone v. Reynolds, 333 So.2d 25, 32 (Fla. 1976)[2] the Supreme Court of

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[2] In Nardone, a 13-year old boy who had been experiencing difficulty with coordination, blurred vision, and headaches was admitted to Jackson Memorial Hospital in January 1965. He underwent two surgical procedures that resulted in such "encouraging, marked, and steady progressive improvement in his condition" that he was told he could shortly go home. Nardone, 333 So.2d at 28. But after a diagnostic procedure was performed on him, he began to suffer

Florida held "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." See also Moore v. Morris, 475 So.2d at 667. The court reiterated this rule in Barron and Bogorff, notwithstanding various changes in the statute, but this court has recently found that "applying the rule of Barron and Bogorff to the widely divergent fact patterns presented by such cases is not easy." Norsworthy v. Holmes Regional Medical Center, 598 So.2d 105, 106 (Fla. 5th DCA 1992).

In Norsworthy, this court noted that Barron and Bogorff can be broadly read to mean that any adverse event arising in the course of medical care triggers the statute of limitations. Norsworthy, 598 So.2d at 107. This is the main thrust of appellees' argument in support of affirmance: They note that both in their motion in opposition to summary judgment and in the initial appellate brief, appellants admit that Sandra Allen knew her son's condition which gave rise to this action shortly after the injury occurred, that is, shortly after Gregory was born in late 1983. But this court in Norsworthy stated that it believed Bogorff and Barron

> 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

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constant headaches, drowsiness and "had spiking temperatures and experienced projectile vomiting." 333 So.2d at 29. He had deteriorated into a vegetative state, and upon discharge in July 1965, he was comatose, totally blind, and had suffered irreversible brain damage. The original complaint was filed in May 1971, but the supreme court held the boy's condition was "patent" in 1965. Nardone, 333 So.2d at 40.

> 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, 598 So.2d at 107. This court emphasized it did not believe the supreme court in Barron intended to say that knowledge of physical injury alone will always trigger the statute of limitations, but rather merely meant

> . . . 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.

Norsworthy, 598 So.2d at 108.

The injuries alleged to have been sustained by Gregory Allen do not appear to "speak for themselves" or to suggest that his "injury" was the "result of anything other than natural consequences of a recognized medical treatment competently performed." Norsworthy, 598 So.2d at 108. Appellants alleged below that the appellees represented to them that Gregory's injuries "were residuals of normal events," the result of his premature birth. Appellants also alleged they did not know, and apparently were not told, as discussed below, that cerebral palsy may be caused by the negligence of health care providers. Appellants contend their expert witness would testify that while brain hemorrhages occur spontaneously in a certain percentage of premature births, certain acts alleged to have occurred in this case can cause a brain hemorrhage or substantially increase the likelihood of its occurrence or its severity, including failure to adequately monitor labor and diagnose and treat fetal distress, improper intubation, failure to adequately monitor blood gas levels and failure to timely diagnose and correct misintubation and perinatal asphyxia.

In Moore v. Morris, which the supreme court reaffirmed in Bogorff, the supreme court reversed a district court ruling 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, reasoning:

> 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.

Moore v. Morris, 475 So.2d at 668. See also Norsworthy, 598 So.2d at 108. At the least, then, there remains a genuine issue of material fact whether Sandra Allen knew or should have known at Gregory's birth on November 5, 1983 that his injuries may have been caused by a negligent act on the part of appellees. We cannot analogize the alleged facts in this case to the facts in Nardone, Barron and Bogorff so as to conclude that when Sandra Allen learned of her son's premature birth, brain hemorrhage, and subsequent cerebral palsy, she was placed on notice as a matter of law of an incident giving rise to medical malpractice. Norsworthy, 598 So.2d at 108.

Appellants also argue that the statute of limitations was tolled in this case because of either the intentional concealment or negligent failure of appellees to inform Sandra Allen that Gregory's condition was anything other than a consequence of his premature birth. The supreme court has stated:

> An attending physician has a strong duty to fully address the concerns of patients and to be fully candid with them. If a doctor's communication to a patient was intended to cause that patient to abandon a claim or an investigation, it may amount to fraudulent concealment.

University of Miami v. Bogorff, 583 So.2d at 1003. See also Norsworthy, 598 So.2d at 108, n. 3 ("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,' this concomitant duty of disclosure on the part of medical professionals concerning the possible causes should be given substance . . . ").

The parties here dispute the applicability of Almengor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978), a case cited by the supreme court as support for its ruling in Moore v. Morris. The trial court in Almengor had entered a final summary judgment for the defendant hospital on the ground that the action was barred by the statute of limitations. Appellees note the Almengor court acknowledged the established rule of Nardone, that the statute of limitations in a medical malpractice action begins to run when the plaintiff has notice of either the negligent act giving rise to the cause of action or the existence of any injury which is the consequence of the negligent act. Appellants, however, note the Almengor court reversed the summary judgment, reasoning:

> The plaintiff is not on notice, however, as to either the negligent act or the injury caused thereby where he has no actual knowledge of either fact because (1) the medical defendant or his employee, servant or agent actively engages in concealment against the plaintiff so as to prevent inquiry or elude investigation or mislead the plaintiff relating to the existence of the cause of action, or (2) the medical defendant-physician or the medical defendant through his employee/servant/agent-physician fails to reveal to the plaintiff facts [as distinguished from mere possibilities or conjecture] known to, or available to such physician by efficient diagnosis, relating to the nature and/or cause of the plaintiff's adverse physical condition. The statute is tolled upon the happening of either of the above two events.

Almengor, 359 So.2d at 894.[3]

In the instant case, appellants alleged that Sandra Allen was told by appellees that Gregory's injuries were the "residuals of normal events" and having relied on these representations, she could not and did not discover until late spring 1986 that Gregory's injuries "had been caused by the negligence of the Defendant health care providers." In their answer brief, appellees state "Ms. Allen was informed by her health care providers, the appellees in this action, that Gregory Allen had suffered a brain hemorrhage which was a natural cause of his premature birth." Yet appellants contend appellees both knew that Gregory was improperly intubated during approximately forty-five minutes shortly after birth and that this improper intubation resulted in very high concentrations of carbon dioxide in his blood, because they performed the blood gas analysis and later reintubated Gregory. They further contend appellees knew or through efficient diagnosis should have known that a condition of high concentrations of carbon dioxide in a premature infant's blood may cause a brain hemorrhage and cerebral palsy and, also, knew or through efficient diagnosis should have known, that failure to adequately

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[3] The Almengor court also held as we do in this case that there was a genuine issue of material fact as to whether the plaintiff was placed on notice whether her child was injured during birth:

> 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.

Almengor, 359 So.2d at 894.

monitor labor and timely diagnose and treat fetal distress would make a premature infant susceptible to brain injury and cause a brain hemorrhage and cerebral palsy. There remains, then, as in Almengor, another genuine issue of material fact in this case regarding the concealment of possible causes of Gregory's injuries.

The Moore court noted that 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. Moore, 475 So.2d at 668. The court noted summary judgments should be granted cautiously in negligence and malpractice suits. Id. Summary judgment is improper where the evidence reflects conflicting issues of material fact. Holl v. Talcott, 191 So.2d 40 (Fla. 1966). The record before this court presents two genuine issues of material fact: 1) whether Sandra Allen knew or should have known at Gregory's birth on November 5, 1983 that his injuries may have been caused by a negligent act on the part of appellees; 2) whether appellees knew, or should have known through efficient diagnosis, of physical injuries to Gregory inflicted after birth, but failed to inform Sandra Allen, and thereby kept her in ignorance. A jury may find that the statute of limitations bars this claim, if Sandra Allen was on notice of malpractice before spring 1986, or they may find, based on the nature of the injury and the information appellants were given, that the statute of limitations does not bar this claim. Norsworthy, 598 So.2d at 109.

REVERSED.

PETERSON and GRIFFIN, JJ., concur.