IN THE SUPREME COURT
STATE OF FLORIDA

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

Petitioners,

vs.

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

Respondents.

CASE NO. 80,646

District Court of Appeal
5th District No. 91-2333

PETITIONERS' BRIEF ON THE MERITS

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JURISDICTIONAL STATEMENT

This Court has accepted conflict jurisdiction over this case based on conflicts with the decisions of this Court in University of Miami v. Bogorff, 583 So.2d 1000 (Fla., 1991), Barron v. Shapiro, 565 So.2d 1319 (Fla., 1990), and Nardone v. Reynolds, 333 So.2d 25 (Fla., 1976).

THE PARTIES

This brief is filed on behalf of the Defendants/Petitioners, **ORLANDO REGIONAL MEDICAL CENTER, INC., and ARNOLD LAZAR, M.D.**. The Plaintiffs/Respondents are **GREGORY ALLEN, a minor, by and through his parent and guardian, SANDRA ELIZABETH ALLEN, and SANDRA ELIZABETH ALLEN, individually.** The Respondents will sometimes hereinafter be referred to individually as "Gregory Allen" and "Sandra Allen."

STATEMENT OF THE CASE

The Petitioners are before this Court pursuant to this Court's acceptance of conflict jurisdiction over this case from the Fifth District Court of Appeal as the District Court's decision conflicts with this Court's decisions in University of Miami v. Bogorff, 583 So.2d 1000 (Fla., 1991), Barron v. Shapiro, 565 So.2d 1319 (Fla., 1990), and Nardone v. Reynolds, 333 So.2d 25 (Fla., 1976).

This is an appeal from a final order of the Fifth District Court of Appeal reversing summary final judgment in favor of Petitioners granted upon the grounds that the statute of limitations in a medical malpractice case had expired prior to the filing of Respondents' Notices of Intention to Initiate Litigation.

The Respondents, pursuant to filing the original suit to recover damages resulting from the alleged negligent care and treatment provided by the Petitioners to Gregory Allen during and after his birth on November 5, 1983 at Orlando Regional Medical Center, served on the Petitioners the statutorily required Notices of Intention to Initiate Litigation on October 5, 1987; three (3) years and eleven (11) months after the birth of Gregory Allen. The Respondents filed their complaint in the Circuit Court of the Ninth Judicial Circuit, In and For Orange County, Florida on February 19, 1988.

On July 19, 1991, the Petitioners filed a motion for summary judgment alleging the expiration of the medical malpractice statute of limitations time period prior to Respondents serving the Notices of Intent to Initiate Litigation. The trial court granted a motion for summary judgment in favor of Petitioners holding that there was no genuine issue of material fact due to the fact that Respondents knew of Gregory Allen's injury more than two

years prior to the Respondents filing of the Notices of Intent to Initiate Litigation. The trial court entered a Final Order of Dismissal with Prejudice on September 19, 1991, pursuant to the granting of summary judgment in favor of Petitioners. The Respondents appealed.

By its Order filed on September 18, 1992, the District Court of Appeal, Fifth District, reversed the Final Order of Dismissal with Prejudice entered by the trial court. The District Court's reasoning was two-fold. First, the District Court could not rule that, as a matter of law, the medical malpractice statute of limitations commenced to run when Sandra Allen was informed that her newborn son, Gregory Allen, had suffered a brain hemorrhage absent the knowledge that this injury was or could have been caused by medical negligence. Second, a genuine issue of material fact existed in this case regarding whether the Petitioners knew, or should have known through efficient diagnosis, of the cause of the physical injury Gregory Allen suffered, but failed to inform Sandra Allen, and thereby kept her in ignorance, thus tolling the commencement of the statute of limitations period.

Petitioners' Notice to Invoke the Jurisdiction of this Court was timely filed on October 13, 1992. This Court entered an order accepting jurisdiction and dispensing with the Oral Argument on January 25, 1993. References to the record below shall be noted by the letter "R" and the page number from the record.

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, Petitioner, 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. 281) 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 after its occurrence, Sandra Allen was informed of the brain hemorrhage suffered by Gregory Allen. (R. 607) The Respondents alleged in their complaint that the Petitioner, Dr. Arnold Lazar, failed to adequately monitor and provide the necessary medical treatment to the fetus during labor and delivery. (R. 284-287) The Respondents also alleged that Petitioner, ORMC, failed to monitor the fetal heart tones according to applicable standard medical care, failed to properly monitor the fetus by electronic fetal heart monitors, and failed to properly intubate Gregory Allen during the first hours of life. (R. 287-289) In their answer to Respondents' complaint, Petitioners, ORMC and Dr. Lazar, denied any negligence on their part pursuant to the care and treatment of Gregory Allen.

The Petitioners claim that in the Spring of 1986, at a seminar sponsored by the Cerebral Palsy Association, Sandra Allen learned for the first time that Gregory Allen's birth

defects may have been caused by the negligent acts of his health care providers at or around the time of his birth. (R. 607) 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)(1988), the Respondents mailed their Notices of Intent to Initiate Litigation for malpractice to the Petitioners.

The Respondents, in their complaints and Appellate briefs, 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 Respondents argue that the providing of this information tolled the above referenced statute of limitations until Sandra Allen became aware in the Spring of 1986 that procedures performed by the Petitioners pursuant to the care of Gregory Allen could have caused or intensified Gregory Allen's injury. The 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). The Respondents allege that because Sandra Allen relied on the representations of Gregory's health care providers that his brain hemorrhage occurred due to prematurity, she did not know, nor had reason to know: (i) that birth defects could be caused by negligence of health care providers; (ii) that Gregory's birth defects were caused by negligence of his health care providers at and after his birth, or (iii) suspect an injury, other than a natural process of impaired development due to a brain hemorrhage, caused by premature birth. (R. 607)

SUMMARY OF ARGUMENT

The Petitioners respectfully submit that the Fifth District Court of Appeal erred in reversing the trial court's granting of Petitioners' motion for summary judgment pursuant to the expiration of the relevant statute of limitations. The agreed upon facts established that Respondent, Sandra Allen, was informed by her health care providers that her son, Respondent Gregory Allen, had suffered an injury, specifically a brain hemorrhage, within the first few days of his life. Sandra Allen was provided this information shortly after the injury occurred.

This Court in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976) established that the medical malpractice statute of limitations commences when the Plaintiffs knew of should have known that either an injury or negligence occurred. Therefore, the Nardone rule requires knowledge of only one of two critical factors, injury or negligence, to trigger the commencement of the statute of limitations. It does not require knowledge of both.

This principle has been reaffirmed by this Court's recent decisions in University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991) and Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990). In Bogorff this Court held that "the limitation period commences when the plaintiff should have known of either (1) the injury or (2) the negligent act." This Court specifically stated that "the triggering event for the limitation period was Bogorff's notice of injury to their child." Bogorff, at 1002. In Barron, this Court again held that the statute of limitations pursuant to a medical malpractice cause of action began to run when the injury was known by the plaintiff.

In rendering its decision in the instant case, the Fifth District has instituted the additional requirement that a plaintiff have knowledge or should have had 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 this Court in Nardone, Barron, and Bogorff continually refused to accept.

The Petitioners respectfully submit that pursuant to F.S. §95.11(4)(b)(1988) and established Florida case law, the statute of limitations was triggered in late 1983 when Sandra Allen was informed of the brain hemorrhage and expired in late 1985, one (1) year and eleven (11) months prior to Respondents mailing their Notices of Intention to Initiate Litigation for medical malpractice and therefore, the trial court was correct in dismissing this action with prejudice.

The Petitioners also respectfully submit that the Fifth District erred in ruling that an issue of material fact existed regarding the Petitioners' alleged fraudulent or negligent concealment of possible causes of the brain hemorrhage suffered by Gregory Allen.

In the second amended complaint filed by the Respondents in this matter, it is alleged that the Petitioners represented to Respondents that Gregory Allen's injuries were residuals of normal events. The Respondents elaborated on this allegation in their Appellate briefs by stating that when Sandra Allen inquired of her health care providers as to the cause of the hemorrhage, she was told that the hemorrhage occurred because Gregory Allen was born premature. The Respondents contend that these representations constituted fraudulent concealment of possible causes of the injury, thus tolling the commencement of the statute of limitations.

The Respondents argued before the Fifth District that the Petitioners had an obligation not only to inform the Respondents of the injury, but to speculate as to each and every possible cause of the injury and inform the Respondents of the same in order to avoid intentional concealment or negligent failure to inform which, in turn, tolls the running of the statute of limitations.

As in the first issue, the seminal Florida case addressing this argument is Nardone v. Reynolds, supra. This Court considered the same question of whether the alleged malpractitioners are required to disclose all possible causes of the injury. This Court held that the medical practitioner has a duty to disclose known facts and not conjecture and speculation as to possibilities. The Court stated that there is no duty imposed on the physician to relate all merely possible or likely causes of the injury.

As there is no evidence in the records that the Petitioners knew the cause of the hemorrhage, the Petitioners submit that a court is unable to place a duty on the part of the Petitioners to inform the Respondents of all possible causes of the injury, and therefore, is unable as a matter of law, to find that concealment on the part of the Petitioners occurred.

As additional support for its position, Petitioners submit that the Florida courts continue to reaffirm the holding that the determining factor as to when the statute of limitations has commenced to run is based on whether plaintiff has notice of the existence of any injury, or notice of a negligent act. In Vargas v. Glades General Hospital, 566 So.2d 282 (Fla. 4th DCA, 1990), the Court held that as the plaintiffs were aware of the injuries suffered by their child, there could not have existed any concealment of the injury by the

defendant and thus the running of the statute of limitations commenced to run when the plaintiffs became aware of the injury.

These decisions make it clear that when a plaintiff is made aware of the injury, as a matter of law, no fraudulent concealment or negligent failure to disclose facts can be found to exist.

POINTS ON APPEAL

POINTS ON APPEAL

ARGUMENT

I. WHETHER THE FIFTH DISTRICT COURT OF APPEAL APPLIED THE WRONG STANDARD IN HOLDING THAT RESPONDENTS KNOWLEDGE OF AN INJURY DOES NOT NECESSARILY TRIGGER THE RUNNING OF THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS

II. WHETHER THE FIFTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT IT WAS A QUESTION OF FACT AS TO WHETHER THE APPLICABLE STATUTE OF LIMITATIONS WAS TOLLED BECAUSE OF EITHER THE INTENTIONAL CONCEALMENT OR NEGLIGENT FAILURE OF PETITIONERS TO INFORM RESPONDENT, SANDRA ALLEN, THAT GREGORY ALLEN'S CONDITION COULD HAVE RESULTED FROM A CAUSE OTHER THAN HIS PREMATURE BIRTH

ARGUMENT

ISSUES

I. WHETHER THE FIFTH DISTRICT COURT OF APPEAL APPLIED THE WRONG STANDARD IN HOLDING THAT RESPONDENTS KNOWLEDGE OF AN INJURY DOES NOT NECESSARY TRIGGER THE RUNNING OF THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS.

The applicable statute of limitations governing this action is set forth in F.S. §95.11(4)(b)(1988) which provides:

> "An action for medical malpractice shall be commenced 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; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued. ... In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year period, the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred. (Emphasis added)

In their complaint, their filed memorandum in opposition to Petitioners' Motion for Summary Judgment, and their Appellate brief, Respondents admit that Sandra Allen knew of the injury which gives rise to this malpractice action shortly after the injury occurred. In each of the above referenced documents, the Respondents state that Sandra Allen was informed by her health care providers, the Petitioners in this action, that Gregory Allen had suffered a brain hemorrhage.

The case law in Florida establishes that the receipt of information that an injury has occurred triggers the statute of limitations pursuant to bringing a medical malpractice action

for damages resulting from the injury. In the seminal case of Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), this Court considered the issue of when the medical malpractice statute of limitations begins to run. This Court held that the statute of limitations commences when the Plaintiffs knew or should have known that either an injury or negligence occurred. Therefore, the Nardone rule requires knowledge of only one of two critical factors, injury or negligence, to trigger the commencement of the statute of limitations. It does not require knowledge of both.

This principle has been reaffirmed by this Court's recent decisions in University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991) and Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990). In Bogorff, this Court held that "the limitation period commences when the plaintiff should have known of either (1) the injury or (2) the negligent act." This Court stated specifically that "the triggering event for the limitation period was Bogorff's notice of injury to their child." Bogorff, at 1002. In Barron, this Court cites as precedent Nardone v. Reynolds supra. and again held that the statute of limitations pursuant to a medical malpractice cause of action began to run when the injury was known by the plaintiff. In each of these decisions, this Court expressly rejected the argument that knowledge of a physical injury, without knowledge that it resulted from a negligent act, did not trigger the statute of limitations.

However, in rendering its decision in the instant case, the Fifth District Court of Appeal has instituted the additional requirement that a plaintiff have knowledge or should have had 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. The

Fifth District 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 reversing the Trial Court's summary judgment. Petitioners respectfully submit that the Fifth District interpreted the opinion of the above cited Barron and Bogorff cases erroneously, and by applying this erroneous interpretation to the facts of the instant matter, erred in reversing the summary judgment entered by the Trial Court pursuant to the statute of limitations defense.

As stated in its opinion in Norsworthy, the Fifth District believed this Court's rulings in 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 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, 598 So.2d at 107.

In the opinion handed down in this matter, the Fifth District 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, 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.

Allen v. Orlando Regional Medical Center, 606 So.2d 665, 667 (Fla. 5th DCA, 1992) The Fifth District reasoned in the decision handed down pursuant to the instant matter:

> 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 at 108."

Allen, at 667. The Court continued on to state that the Respondents alleged in their complaint and Appellate brief that the Petitioners represented to the Respondents that Gregory Allen's injuries "were residuals of normal events," the result of his premature birth and that the Respondents did not know and apparently were not told by Petitioners that cerebral palsy may be caused by the negligence of health care providers. Therefore, the Fifth District found that the summary judgment must be reversed as there remained a genuine issue of material fact as to whether Sandra Allen knew or should have known that Gregory Allen's injuries may have been caused by a negligent act on the part of the Petitioners. The Fifth District, in rendering this decision, imposes upon the standard established in Nardone, Barron, and Bogorff the additional requirement that the injury must communicate an inference of medical negligence in order to trigger the statute of limitations. This is the precise legal principle which this Court in Nardone, Barron, and Bogorff continually refused to accept.

In Nardone v. Reynolds, supra., this Court considered a case which centered on brain damage suffered by a thirteen (13) year old child, Nicolas Nardone, after the negligent introduction of pantopaque ventriculogram into the shunt tube which had been placed between the child's brain spheres. Before the child's discharge from the hospital in July

1965, the parents were told that the child was totally blind and had suffered irreversible brain damage, although they were not specifically told of the pantopaque ventriculogram problem or the possible causes of the child's ultimate condition. The plaintiff's suit was not filed until May 1971, more than five (5) years after the child's discharge from the hospital. At the time of filing suit, the applicable statute of limitations required that this action be brought within four (4) years.

In response to statute of limitations defense asserted by the defendants/appellees in Nardone, the plaintiffs/appellants argued "that the statute of limitations did not commence until they became aware of the negligence of the physicians and hospital." Nardone, at 32. This additional "awareness of negligence" requirement is the same additional requirement that the Fifth District in the case sub judice has added to both the statutory language and this Court's precedential decisions. It is a requirement that this Court refused to accept.

In ruling on the Nardone case, this Court held that the plaintiffs knew of the injury their son had suffered and therefore, in accordance with the established precedent, the statute of limitations began to run when the injury was known. Id at 32. This Court held in Nardone, in accordance with precedent established in City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954), 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 physical injury which is the consequence of a negligent act. This Court specifically held that as the plaintiff's were on actual notice that Nicolas Nardone had suffered irreversible brain damage, the statute of limitations began to run when the injury

was known. As stated previously, the principle established in Nardone has been reaffirmed by this Court on two separate occasions.

This Court's ruling in Barron v. Shapiro, supra., considered the same triggering of medical malpractice statute of limitations issue. In August 1979, Dr. James Barron operated upon Lee Shapiro to remove malignant polyps in the colon. Following the surgery, Mr. Shapiro developed an infection which progressed to the point that he became in critical condition. The infection was brought under control by heavy doses of antibiotics. Unfortunately, Mr. Shapiro's eyesight began to deteriorate in October 1979 and by December 1979, Mr. Shapiro was diagnosed as blind.

In January 1982, the plaintiffs consulted an independent physician and received an opinion that Mr. Shapiro's blindness was caused by Dr. Barron's failure to administer antibiotics before the operation. On January 29, 1982, more than two (2) years after Mr. Shapiro was diagnosed as being blind, the plaintiffs filed suit. The trial court entered summary judgment for the defendants on the grounds that the suit was barred by the two (2) year statute of limitations governing medical malpractice. The summary judgment was appealed to the Fourth District Court of Appeal which reversed the granting of the summary judgment, holding that a genuine issue of material fact existed with respect to when the plaintiffs knew or should have known that Mr. Shapiro's complications were caused by Dr. Barron's failure to use antibiotics. The Fourth District reasoned as follows in reversing the trial court's ruling:

> "While the complications arising from Mr. Shapiro's surgery were obvious to all, at what time the Shapiros had or should have had knowledge of the cause of such complications becomes the focal point of this opinion, since knowledge of

> physical injury alone, without the knowledge that it resulted from a negligent act, does not trigger the statute of limitations. Moore v. Morris, 475 So.2d 666 (Fla., 1985)"

Shapiro v. Barron, 565 So.2d 1319, 1320 (Fla. 1990) Again, this reasoning is identical to the argument adopted by the Fifth District in the instant matter.

In quashing the Fourth District's opinion and reinstating the summary judgment entered by the trial court, this Court held that it was apparent that the plaintiffs were on notice of Mr. Shapiro's injury by at least December 31, 1979. In ruling on this case, this Court specifically held that:

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

Id. at 1321.

In University of Miami v. Bogorff, supra., this Court reviewed a decision from the Third District Court of Appeal which reversed a summary judgment entered pursuant to the running of the applicable medical malpractice statute of limitations. The Third District, as does the Fifth District in the case sub judice, required that the plaintiffs have knowledge of both the physical injury and that a negligent act caused the injury before the statute of limitations period could begin to run. In reversing the Third District's holding, this Court stated that it did not find this requirement to be an accurate statement of the law. The Court held as follows:

> "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 affirmed the principle set forth in Nardone and applied in Moore v. Morris, 475 So.2d 666 (Fla. 1985), and held that the limitation period commences when the plaintiffs should have known of either (i) the injury or (2) the negligent act."

This Court continued on to hold specifically:

> "In the case under review, therefore, the triggering event for the limitation period was the Bogorff notice of injury to their child; not, as the district court required, additional notice that [the physicians] negligence caused the injury."

Id. at 1002.

The reasoning used by the Fifth District in the instant case, as well as in the Norsworthy v. Holmes Regional Medical Center, 598 So.2d 105 (Fla. 5th DCA, 1992) decision creates this additional requirement that the plaintiff be aware of negligence on behalf of the medical personnel before the statute of limitations for medical malpractice actions commences. As set out above, the appropriateness of this additional requirement has been argued before this Court on at least three (3) occasions and rejected by this Court each time. Therefore, the Fifth District's holding that the injury must communicate an inference of negligence to trigger the statute of limitations should again be rejected by this Court in accordance with the established precedents.

The Fifth District cites the Court's holding in Moore v. Morris, supra., as support for its attempt to distinguish the underlying standard established in Nardone, Bogorff, and Barron. The underlying facts in Moore, involved the birth in July 1973 of Megan Moore, who suffered fetal distress and a severe medical crises after delivery. The child was delivered by a cesarean section. After the baby was born, the father was told that for a period in excess of thirty (30) minutes, the infant was "blue" and the physicians were

unsuccessful in their attempts to administer oxygen to the infant. Shortly after Megan's birth, her father knew she was experiencing an emergency situation due to the fact that she was starved for oxygen. However, the child survived the immediate emergent situation and the parents were informed the next morning that Megan "was alive and ... doing very well." After Megan's discharge, the parents were repeatedly told by the physicians that Megan was fine. It was not until Megan Moore was three (3) years old that she was diagnosed as suffering brain damage. It was after this diagnosis that the plaintiffs filed suit for damages resulting from medical negligence.

This Court reversed the Third District Court of Appeal's finding that summary judgment pursuant to a statute of limitations defense was properly granted by the trial court. This Court reasoned that there was a genuine issue of material fact with respect to whether the parents were on notice at the time of child's birth that an injury had occurred. This Court specifically held that "there is nothing about these facts which leads conclusively and inescapably to only one conclusion - that there was negligence or injury caused by negligence. Id. at 668.

The Fifth District decision in the instant matter makes much of the fact that this Court in Moore made reference to the fact that the fetal distress and other facts surrounding the baby's birth such as the cesarean section are:

> "totally consistent with a serious or life-threatening situation which arose through natural causes during an operation. 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, at 668. The Fifth District seized upon this language to support its decision that in the instant case, there exists a genuine issue of material fact as to whether the plaintiffs "knew or should have known at Gregory [Allen's] birth on November 5, 1983 that his injuries may have been caused by a negligent act on the part of the Appellees (Petitioners). Allen, at 669. Petitioners respectfully submit that the Fifth District erred in relying on this Court's language in Moore to assert that the statute of limitations is not triggered until plaintiffs/respondents knew or should have known that the injury was caused by a negligent act on the part of the petitioners. It is respectfully submitted that in Moore, this Court was simply attempting to clarify why an emergency situation surrounding the child's birth was not sufficient in itself to put the plaintiffs on notice of either injury or negligence.

This Court in Barron, and Bogorff expressly acknowledged that Moore reaffirmed the principle of Nardone that the statute begins to run when the plaintiffs knew or should have known that either injury or negligence had occurred. Accordingly, the standard applied in Moore in actuality, is no different from the standard established in Nardone and reaffirmed by this Court in Barron and Bogorff. The Court in Barron attempted to put to rest ambiguities stemming from lower tribunals' interpretations of Moore when it noted:

> "In resolving the case, this Court reaffirmed the principle of Nardone that the statute begins to run when the plaintiffs knew or should have known that either injury or negligence had occurred. However, the defendant's summary judgment was reversed because there were genuine issues of material fact with respect to whether the parents were on notice that an injury had occurred...
>
> The district court of appeal misinterpreted Moore when it said that knowledge of physical injury alone, without knowledge that it resulted from a negligent act, does not trigger the statute of limitations." Barron, at 1321.

There is nothing in the Appellate record filed in the instant matter to dispute the fact that Sandra Allen was informed of the injury suffered by her son shortly after his birth on November 5, 1983. In fact, in their initial Appeal Brief, the Respondents acknowledged that they were informed by hospital personnel shortly after it occurred in November 1983, that Gregory Allen had suffered a brain hemorrhage. Therefore, pursuant to F.S. §95.11(4)(b) (1988) and above cited Florida case law, the statute of limitations was triggered in late 1983 when Sandra Allen was informed of the brain hemorrhage and expired in late 1985, one (1) year and eleven (11) months prior to Respondents mailing their notices of intention to initiate litigation for medical malpractice on October 5, 1987.

The Petitioners do not contest Respondents position that pursuant to F.S. §766.106(4) (1988) filing Notices of Intention to Initiate Litigation tolls the running of the statute of limitations for a ninety (90) day period and that pursuant to Rhoades v. Southwest Florida Regional Medical Center, 554 So.2d 1188 (Fla. 2d DCA, 1990), an additional sixty (60) days after this ninety day tolling period ends shall be provided to the plaintiff in which to file a complaint. Petitioners simply state that this statute and case law is irrelevant to this action as the statute of limitations had run even before the notices of intention to initiate litigation had been mailed by Respondents. Therefore, the trial court was correct in dismissing this action with prejudice.

II. WHETHER THE FIFTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT IT WAS A QUESTION OF FACT AS TO WHETHER THE APPLICABLE STATUTE OF LIMITATIONS WAS TOLLED BECAUSE OF EITHER THE INTENTIONAL CONCEALMENT OR NEGLIGENT FAILURE OF PETITIONERS TO INFORM RESPONDENT, SANDRA ALLEN, THAT GREGORY ALLEN'S CONDITION COULD HAVE RESULTED FROM A CAUSE OTHER THAN HIS PREMATURE BIRTH.

In reversing the Trial Court's entry of summary final judgment, the Fifth District ruled that a second issue of material fact existed: "Whether the Appellees (Petitioners) knew, or should have known through efficient diagnosis, of physical injuries to Gregory (Allen) inflicted after birth, but failed to inform Sandra Allen, and thereby kept her in ignorance", Allen, at 669, thus tolling the commencement of the statute of limitations." Specifically, the Fifth District found that there remains a genuine issue of material fact in this case regarding the concealment of possible causes of Gregory's injuries. Id. at 668. The Petitioners respectfully submit that the Fifth District has erred by requiring the medical provider to alert a potential plaintiff to all possible causes of the injury before the statute of limitations commences to run.

In the second amended complaint filed by the Respondents in this matter, it is alleged that the Petitioners represented to Respondents that Gregory Allen's injuries were residuals of normal events. The Respondents elaborated on this allegation in their Appellate briefs by stating that when Sandra Allen inquired of her health care providers as to the cause of the hemorrhage, she was told that the hemorrhage occurred because Gregory was born premature. The Respondents argued to the Fifth District that these representations constituted fraudulent concealment of possible causes of the injury, thus tolling the commencement of the statute of limitations.

The record in this matter establishes that the Petitioners did not actively misrepresent any known causes of the hemorrhage. What the Respondents argued before the Fifth District is that the Petitioners had an obligation to not only inform the Respondents of the injury, but speculate as to each and every possible cause of the injury and inform the Respondents of the same in order to avoid intentional concealment or negligent failure to inform which, in turn, tolls the running of the statute of limitations. The Petitioners respectfully submit that the Fifth District erred in ruling that there is a question of fact as to whether intentional concealment or negligent failure to inform occurred, thus tolling the statute of limitations, in light of the fact that the Respondents were informed of the existence of the injury and there is no evidence in the record that the Petitioners knew the cause of the hemorrhage.

As in the first argument, the seminal Florida case addressing this argument is Nardone v. Reynolds, supra. This Court considered the same question of whether, under the doctrine of tolling the statute of limitations where there is knowledge by the parents of a child's injury, the alleged malpractitioners are required to disclose all possible causes of the injury. This Court, while recognizing the fiduciary, confidential relationship of a physician-patient imposing on the physician a duty to disclose; this Court held that:

> "... this is a duty to disclose known facts and not conjecture and speculation as to possibilities. The necessary predicate of this duty to disclose known facts is knowledge of the fact of the wrong done to the patient. (cite omitted) Where an adverse condition is known to the doctor or readily available to him through efficient diagnosis, he has a duty to disclose and his failure to do so amounts to a fraudulent withholding of the facts, sufficient to toll the running of the statute. But, where the symptoms or the condition are such that the doctor in the exercise of reasonable diligence cannot reach a judgment as to

> the exact cause of the injury or condition and merely can conjecture over the possible or likely causes, he is under no commanding duty to disclose a conjecture of which he is not sure." Nardone at 39.

This Court summed up this ruling by stating that "there is no concomitant duty imposed on the physician to relate all merely possible or likely causes of the injury." Id. at 40.

As support for their position that Petitioners intentionally or negligently concealed medical practices provided to Gregory Allen, the Respondents argued that their expert witness would testify that brain hemorrhage occurs spontaneously in a certain percent of premature births. Their expert would also testify that certain acts and/or omissions by health care providers can cause a brain hemorrhage or substantially increase the likelihood of its occurrence or its severity. Thus, the Respondents' own expert testifies that the cause of the hemorrhage is, at best, a matter of speculation regardless of the tests results, monitoring and information obtained by the attending physician. Therefore, in accordance with this Court's holding in Nardone, the Petitioners did not have a duty to convey to Respondents any and all possible causes of the hemorrhage.

In their Appellate briefs, the Respondents argued that Petitioners response to Sandra Allen's inquiry as to the cause of Gregory Allen's brain hemorrhage, specifically that the brain hemorrhage was a natural cause of his premature birth, effectively prevented the Respondents from learning within the two-year statute of limitations time period that medical negligence could have caused the injury. As a result, the Respondents argued that the statute of limitations should have been tolled until Sandra Allen discovered a potential cause of her son's brain hemorrhage other than the natural result from a premature birth.

This contention was rejected by this Court in Nardone, supra., by its ruling which specifies when the patient records are obtainable by or available to the plaintiffs, the "mere ignorance of the easily discoverable facts which constitute the cause of action will not postpone the operation of the statute of limitations as to the party plaintiffs." Nardone at 40. There is no contention by the Appellants in the Appellate record or their Appellate brief that the Appellants were prevented in any way from obtaining the medical records pertaining to the care and treatment Gregory Allen received from Dr. Lazar and ORMC in 1983. This fact, when coupled with Sandra Allen's knowledge of the injury sustained by her son, further supports the Appellees position that the two year statute of limitations relevant to this case was not tolled until 1986, when Sandra Allen was first informed that physician negligence may have caused or intensified her son's injuries.

The Fifth District relied on the decision reached in Almengor v. Dade County, 359 So.2d 892 (Fla. 3rd DCA, 1978) as support for its position that a medical malpractice statute of limitations is tolled if a health care provider fails to disclose a cause known by the doctor or discoverable by him through efficient diagnosis. The Petitioners respectfully submit that the Fifth District misapplied the holding in the Almengor case to the instant matter.

The facts of the Almengor case centered on the alleged negligent delivery and care of a baby at Jackson Memorial Hospital in Dade County. The Court stated specifically that there was some indication in the record that a nurse of the defendant hospital actively and successfully mislead the plaintiff as to the baby's true condition. The Court was also persuaded there is a genuine issue of material fact as to whether the doctors as employees of the defendant hospital who delivered the plaintiff's baby actually knew or should have

known through efficient diagnosis, of a physical injury to the baby inflicted during birth but failed to so inform the plaintiff which thereby kept the plaintiff ignorant of the injury. Id. at 895.

The Fifth District, citing Almengor, ruled that a genuine issue of material fact in this case remained regarding the concealment of possible causes of Gregory Allen's injuries. It is this ruling which the Petitioners respectfully contend is not supported by the Almengor holding. The Third District Court of Appeal ruled in Almengor that the statute of limitations will be tolled should a medical defendant or employee, servant, or agent actively engage in concealment of an injury or fails to reveal facts known to the defendant regarding the nature of the injury or the cause of the injury.

The Third District held specifically that the statute of limitations is tolled when the plaintiff is not on notice as to either the negligent act or the injury caused by the negligent act where the plaintiff 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 his agent fails to reveal to plaintiff facts, [as distinguished from mere possibilities or conjuncture] known to, or available to such defendant by efficient diagnosis, relating to the nature and/or cause of plaintiff's adverse condition. Id.

The Court stated that "the statute of limitations is tolled upon the happening of either of the above two (2) events." Id. at 894. In Almengor, the Third District found that there was a question of fact as to whether both the injury and negligent act had been concealed or the defendant failed to reveal facts available to them which would indicate either an injury or

negligent act, and therefore ruled that the statue of limitations for medical negligence was tolled.

No such fact situation exists in the instant matter. It is uncontested that the Respondents were informed by Petitioners that Gregory Allen had suffered an injury, specifically a brain hemorrhage. It is also uncontested that Sandra Allen understood that Gregory Allen had suffered a traumatic injury when she inquired of medical personnel as to the cause of the injury. Therefore, Fifth District erred in holding that there exists a genuine issue of material fact regarding whether the statute of limitations tolled in this matter as the Almengor holding specified that the statute of limitations is tolled only upon the concealment of both the existence of an injury and the existence of a negligent act.

Even in the context of fraudulent concealment on the part of the alleged malpractitioner, both this Court and Appellate Courts continue to reaffirm the holding held that the determining factor as to when the statute of limitations has commenced to run is based on whether plaintiff has notice of existence of any injury, or notice of negligent act. In Vargas v. Glades General Hospital, 566 So.2d 282 (Fla. 4th DCA, 1990), the Court held that as the plaintiffs were aware of the injuries suffered by their child, there could not have existed any concealment of the injury by the defendant and thus the running of the statute of limitations was triggered when the plaintiffs became aware of the injury. In University of Miami v. Bogorff, supra., this Court stated that it was an issue of fact as to whether the defendant doctor's actions constituted fraudulent concealment when he did not make the plaintiffs aware that their son had suffered a "distinct injury" as opposed to the natural spread of leukemia to the brain or a viral infection causing the brain damage.

These decisions make it clear that when a plaintiff is made aware of the injury, as a matter of law no fraudulent concealment or failure to disclose facts can be found to exist. As stated previously, it is uncontested in this action that the Appellant, Ms. Allen, was made aware shortly after its occurrence in November, 1983, that her son had suffered a brain hemorrhage. Therefore, as a matter of law, the applicable statute of limitations was triggered at the time Sandra Allen was informed of the injury suffered by her son.

CONCLUSION

In Moore v. Morris, 475 So.2d 666, 668 (Fla. 1985), the Supreme Court held that "a summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Based on this premise, the lower court was correct in entering the summary final judgment in this action pursuant to the expiration of the statute of limitations on medical malpractice claims and the Fifth District Court of Appeal erred in reversing this ruling.

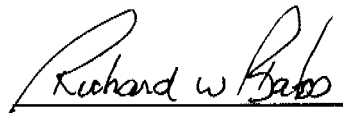
Regarding the first issue of what information and/or occurrences trigger the running of the medical malpractice statute of limitations, this Court's ruling in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), which has been reaffirmed in Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990) and University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991), establishes that the statute of limitations period for medical malpractice commences when the plaintiff knew or should have known that either an injury or negligence has occurred. It is admitted that the Respondents that Sandra Allen had notice of the injuries suffered by her son, Gregory Allen, shortly after its occurrence in November 1983. As notice of an injury commences the running of the two (2) year statute of limitations, and Respondents admit that their notice of intent to initiate litigation was not mailed until October 5, 1987, it is a matter of law for the court to determine that the statute of limitations had run prior to the mailing of the initiation letters by the Respondents.

The Fifth District also ruled that a second question of fact existed regarding a possible fraudulent or negligent concealment of the cause of the action or failure to provide known facts by the health care personnel to Sandra Allen. The Fifth District, while correct

in ruling that such concealment if found to exist, would toll the commences of the statute of limitations, erred in ruling that the medical personnel has a duty to speculate and inform the plaintiff of all possible causes of the injury in order to prevent the finding of concealment. This is simply a misstatement of the law as Florida precedent establishes that an alleged medical malpractitioner has no duty to disclose known facts to the patient and is under no duty to relate all merely possible or likely causes of the injury. Nardone v. Reynolds, supra. In addition, a fraudulent concealment or failure to inform, as a matter of law, cannot exist if the plaintiff has notice of the injury. Vargas v. Glades General Hospital, 566 So.2d 282 (Fla. 4th DCA, 1990) Again, as Respondents admit to having notice of Gregory Allen's injury, as a matter of law, the statute of limitations was not tolled pursuant to fraudulent concealment or failure to disclose known facts.

Even upon drawing every possible inference in favor of the Respondents, as is required for granting a summary final judgment action, the facts admitted by Respondents prove that only matters of law remained when the motion for summary judgment was heard by the lower court. The Petitioners respectfully submit that the lower court was correct in ruling that the applicable statute of limitations period had run prior to the Respondents filing of their notices of intent to initiate litigation. Therefore, Petitioners also submit that trial court's ruling should be reinstated as the trial court correctly interpret the Florida case law applicable to these issues and correctly entered a summary final judgment with prejudice for the Petitioners.

Respectfully Submitted,



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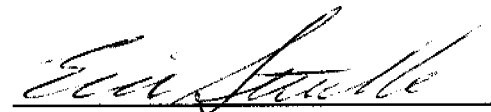

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CERTIFICATE OF SERVICE

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 18th day of February, 1993.

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