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' REPLY BRIEF

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SUMMARY OF ARGUMENT

This Court has ruled and continuously reaffirmed that in potential medical negligence actions, the applicable statute of limitations is triggered when the plaintiff knows or should have known of either the occurrence of (1) an injury or (2) the negligent act. While various decisions has phrased these two (2) requirements in different ways, leading to some ambiguity as to the exact information which triggers the limitations period, this Court, in its rulings in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991) and Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990) has clearly established the above referenced standard.

The Fifth District Court of Appeal, by imposing an additional requirement upon this established standard, specifically that the injury must communicate an inference of medical negligence in order to trigger the statute of limitations, erred in its interpretation of the Bogorff and Barron cases and clearly exceeded its authority in creating this additional requirement.

The Fifth District, in reversing the Circuit Court's entry of summary judgment for the Defendants (Petitioners), ruled that there existed a material issue of act as to whether the Petitioners fraudulently concealed from the Respondents facts relating to the cause of Gregory Allen's injury. Thus tolling the commencement of the applicable statute of limitations should the trier of fact determine that fraudulent concealment did, in fact, exist.

The established case law establishes a duty on the health care provider to disclose only known facts. The rulings make it clear that the physician and other medical personnel are not required to provide all possible causes of an injury if this would entail conjecture and speculation on the part of the health care provider. There exists no record evidence of any

concealment by the Petitioners of known facts. Additionally, the case law has also established that when a plaintiff is made aware of the existence of an injury, as a matter of law, no fraudulent concealment or failure to disclose facts can be found to exist. Therefore, the Fifth District erred in determining that a material question of fact existed with regard to this issue.

ISSUES

I. REGARDLESS OF WHETHER AN INDIVIDUAL REASONABLY BELIEVES A MEDICAL CONDITION AND/OR AN INJURY IS THE RESULT OF NATURAL CAUSES, IF AN INDIVIDUAL HAS NOTICE OF THE EXISTENCE OF THE MEDICAL CONDITION OR INJURY, STATUTE OF LIMITATIONS FOR MEDICAL NEGLIGENCE ACTIONS COMMENCES.

Respondents claim that Florida courts have consistently held that a plaintiff is not on notice of injury if that plaintiff is only aware of the possible natural causes of a medical condition that was, in fact, caused by negligence of a health care provider, and there is nothing about the medical condition that suggests to the plaintiff that there was medical negligence or injury caused by medical negligence. Respondents contend that in situations where the condition or injury could be explained by natural causes, the statute of limitations does not begin to run until the plaintiff is able to discover the health care provider's negligence. This contention is, quite simply, a misstatement of the law as this Honorable Court has ruled and continuously reaffirmed that pursuant to a medical negligence action, the statute of limitations commences when the plaintiff knows or should have known of either: (1) the injury or (2) the negligent act. Nardone v. Reynolds, supra., University of Miami v. Bogorff, supra., and Barron v. Shapiro, supra.

The respondents rely primarily on this Court's decision on Moore v. Morris, 475 So.2d 666 (Fla. 1985) as support for their argument that the statute of limitations does not begin to run until the plaintiff is able to discover the negligence when there is nothing about the injury that suggests that there was medical negligence. In their initial brief on the merits, Petitioners dealt specifically with the Moore case and explained that in Moore, this

Honorable 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 the injury or negligence. This Court in Barron, supra. acknowledged that Moore reaffirmed the principle established in Nardone that the limitations period begins to run when the plaintiffs knew or should have known that either an injury or negligence had occurred. This Court in Barron attempted to put to rest ambiguities stemming from the 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....
>
> That 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 limitation." Barron, at 1321

As further support of their argument, the Respondents rely on three District Court decisions dealing with this statute of limitations issue. In Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978), respondents state that the Fourth District Court of Appeals ruled that the applicable statute of limitations did not commence, even though a health defect was apparent to the plaintiff, as there existed in the plaintiff's mind an explanation of the condition in terms of natural causes which did not implicate negligence by the plaintiff's health care providers. The respondents contend that the statute of limitations commenced when the plaintiff learned that the negligence of her health care provider may have caused

the injury. However, this contention does not reflect the Fourth District's holding. The Court held:

> "It is undisputed that the plaintiffs had actual knowledge of the injury August 1973 when she was told by another doctor that she could not use her arm because of a damaged nerve in her neck."

The facts of the Brooks case are similar to the instant matter. In Brooks, the plaintiff underwent an operation to remove tumor masses in her neck. During the course of the operation, a portion of the deltoid nerve in the plaintiff's neck was damaged. As a result, the plaintiff no longer had the full use of her right arm. The plaintiff was informed on August 1973 that she had suffered an injury, specifically the damaged nerve in her neck. The plaintiff contends that it was not until a time subsequent to being informed of a nerve damage that she was advised that the injury could have resulted from medical negligence.

As affirmed by this Honorable Court in Nardone, Barron, and Bogorff, the Fourth District when determining the statute of limitations commenced, correctly focused on when the plaintiff became aware of the injury, not as to when the plaintiff was informed that negligence may have caused the injury.

In the instant matter, as in Brooks, respondent Sandra Allen, was informed within hours that her son, Gregory Allen, had suffered an injury, specifically a brain hemorrhage. Therefore, in accordance with both the decisions handed down both this Court and Brooks v. Cerrato, supra., cited by the Respondent, the statute of limitations period commenced when Ms. Allen was informed of the injury suffered by Gregory Allen.

As additional support for their argument that the plaintiff must be made aware of medical negligence causing the injury before the applicable statute of limitations commences,

the Respondents rely on the decisions handed down by the Fifth District Court of Appeals in Roberts v. Casey, 413 So.2d 1226 (Fla. 5th DCA 1982) and Norsworthy v. Holmes Regional Medical Center, 598 So.2d 105 (Fla. 5th DCA 1992), a case which this Court has also accepted conflict jurisdiction over to determine the appropriateness of the Fifth District's decision regarding the commencement of statute of limitations period.

In Roberts, the Fifth District relied on language in Almengor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978) in holding that knowledge of medical negligence is a necessity for the commencement of the statute of limitations. The Almengor court stated that the statute of limitations commence to run: "When the plaintiff has notice of either the negligent act which causes the injury or the existence of an injury which is the consequence of the negligent act." Almengor, supra. at 1894.

The Petitioners respectfully submit that this language is at best, ambiguous and more likely, erroneous. This Court has set up two specific and distinct requirements to trigger the running of the statute of limitations. However, the Almengor Court held that the plaintiff must have notice of either (1) the negligent act which causes the injury or (2) the existence of an injury which is a consequence of the negligent act. If this language is interpreted in the way the Fifth District suggests in Roberts, the result is that only one requirement exists; that the plaintiff be aware of a negligent act which causes an injury. The Petitioners respectfully submit that this interpretation could not have been what this Court intended as it set out two distinct criteria for the commencement of the statute of limitations period. Proof of the Petitioners contention can be found in Nardone, supra., which is cited by both the Almengor court and the Roberts court. In Nardone, this same language exists which

requires that the plaintiff has notice of a negligent act or notice of a physical injury which is the consequence of a negligent act. The interpretation provided by this Court of the second phrase is clear when this Court specifically held immediately after citing these two requirements, that "the statute of limitations began to run when the injury was known."

Any ambiguity regarding this language was further alleviated by this Court's decisions in Barron and Bogorff in which it reaffirmed Nardone and set out in a precise manner the two distinct triggering events of the medical negligence statute of limitations period. These two requirements being specifically that the plaintiff knows or should have known of either (1) the injury or (2) the negligent act.

Even after this ambiguity was resolved, the Fifth District of Appeal in Norsworthy, supra. imposed an additional requirement upon the standard established in Bogorff and Barron that the injury must communicate an inference of medical negligence in order to trigger the statue of limitations. In doing so, the Fifth District Court of Appeal declined to follow the clear standard established in Bogorff and Barron and thus, exceeded its authority.

The reasoning used by the Fifth District in Norsworthy, and subsequently in the instant matter represents an outmoded standard which has been previously rejected by this court on at least three (3) occasions in Nardone, Barron, and Bogorff. To allow the analytical process used by the Fifth District to be reinstated creates obvious ambiguities as to the appropriate standard to be applied and takes away from the lower tribunals the bright line which was drawn by this court in Nardone, Barron, and Bogorff. It also has the effect of transforming the legislature's clear and direct mandate for the two (2) statute of limitations into a four (4) year statute of repose in most instances.

The error of the Fifth District's interpretation of this Court's holdings in Bogorff and Barron is made clear by this Court's specific decision in Barron regarding the plaintiffs' contention that the statute of limitations does not commence until the plaintiff has reason to know that the injury was negligently inflicted. In Barron the plaintiff was contending that as §95.11(4)(b), Florida Statutes (1979) read in part:

> "an action for medical practice shall be commenced within two (2) years from the time the incident giving rise to the action occurred or within two (2) years from the time the incident is discovered, or should have been discovered with the exercises of due diligence..."

The word incident means the point in time which the negligence should have been discovered, thus preventing the commencement of the statute of limitations until the negligent act was or should have been discovered. This Court stated specifically that they did not accept the plaintiff's contention that knowledge of negligence was required before the statute of limitations was triggered and that the limitations period commences when the plaintiff should have known either of the injury or the negligent act. Thus, this Court in Barron citing Nardone, again reestablishes the fact that two (2) specific and distinct events can and will trigger the statute of limitations.

II. 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 DUE TO EITHER INTENTIONAL CONCEALMENT OR NEGLIGENT FAILURE OF PETITIONERS TO INFORM RESPONDENTS OF ALL POSSIBLE CAUSES OF GREGORY ALLEN'S BRAIN HEMORRHAGE.

In their answer brief, Respondents allege that petitioners actively misrepresented or concealed their negligence and known facts relating to the cause of the brain hemorrhage suffered by respondent, Gregory Allen. Therefore, due to this fraudulent concealment by petitioners, the applicable statute of limitations was told until respondent, Sandra Allen, was advised that the injury suffered by Gregory Allen may have been the result of negligence on the part of Gregory Allen's health care providers.

It is respectfully submitted by the Petitioners that the Fifth District Court of Appeal erred by even considering the issue of fraudulent concealment as the Respondents did not properly allege in their complaint the existence of fraudulent conduct as required by Florida Rules of Civil Procedure 1.120(b)(1989). The rule specifically states:

> "In all averments fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit...."

Nowhere in the respondent's pleadings is there the specific allegation that the Petitioners, Orlando Regional Medical Center, Inc. and/or Dr. Arnold Lazar, ever made any fraudulent statements or representations to the respondent. The only allegation remotely referencing a potentially fraudulent situation was alleged in paragraph number 12 in Respondents' second amended complaint (R. 281) which states:

> "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."

The Petitioners respectfully submit that this allegation does not set forth the allegation of fraud with the specificity required as established by this Court in American International Land Corporation v. Hanna, 323 So.2d 567 (Fla. 1975). Therefore, as the petitioners were deficient in its allegations of fraud, the Fifth District erred in considering this issue.

However, assuming arguendo that the Fifth District was correct in considering this issue, the Respondents would respectfully submit that the Fifth District erred in finding that a material fact existed as to "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 v. Orlando Regional Medical Center, Inc., 606 So.2d 665, (Fla. 5th DCA 1992) In essence, the Fifth District has required that a medical provider alert a potential plaintiff to all possible causes of an injury before the statute of limitations period is triggered. This requirement is unsupportable when considered in light of the decisions handed down by this Court and other district courts of appeal which have been cited specifically in the Petitioners initial brief on the merits.

In making the argument that a medical provider's failure to inform plaintiff of all possible causes of injury suffered by the plaintiff constitutes fraudulent concealment, thereby tolling the medical negligence statute of limitations, the Respondents rely primarily on Tetstone v. Adams, 373 So.2d 361, 364 (Fla. 1st DCA 1979) and Almengor, supra. However, both of these cases specifically cite as support this Court's ruling in the Nardone v. Reynolds,

supra. in which this Court considered the same question or whether, under the doctrine of tolling the statute of limitations where there is knowledge by the parent of a child injured, the alleged malpractitioners are required to disclose all possible causes of the injury. In considering this issue, this court specifically held that there is:

> "...a duty to disclose to 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 conditions 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.

The 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 injury." Id. at 40

This holding has been reaffirmed in both of the decisions cited by Respondents as support for their position that a material issue as to fraudulent concealment existed in this matter. In Tetstone, the court specifically set out that the health care provider, Dr. Adams,

> "failed to reveal to (plaintiff) facts [as distinguished from mere possibilities or conjecture] known to him relating to the nature and/or cause of her adverse physical condition." Tetstone, supra. at 363.

The same proviso exists in Almengor v. Dade County, supra. at 894. The Almengor case was discussed at length in Petitioners brief on the merit therefore, in order to prevent

repetition, petitioners respectfully direct this court's attention to the argument regarding Almengor v. Dade County made in their initial brief.

Regarding the instant matter and the alleged fraudulent concealment, the Respondents argued that their expert witness testified that a brain hemorrhage occurred spontaneously in a certain percentage of premature births. Their expert also testified that certain acts or omissions by health care providers can cause a brain hemorrhage or substantially increase the likelihood of its occurrence or severity. Thus, the Respondents own expert testifies the cause of the hemorrhage is, at best, a matter of speculation regardless of test 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 the Respondents any and all possible causes of the brain hemorrhage suffered by Gregory Allen as it would be conjecture and speculation provided by the Petitioners.

Finally, even in the context of the alleged fraudulent concealment on the part of Petitioners, both this Court and Appellate Courts continue to affirm the decisions establishing that the determining factor as to when the statute of limitations has commenced to run based on whether the 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 injury 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 Bogorff, supra. this Court stated that it was an issue of fact as to whether the defendant

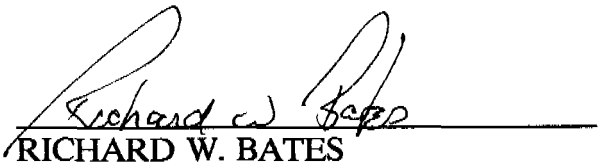
doctor's actions constituted fraudulent concealment when he did not make the plaintiffs aware that their son had suffered a "distinct injury" as opposed to the natural spread of leukemia to the brian or a viral infection causing the brain damage. These decisions make it clear that when a plaintiff is 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 Appellate, 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

The Fifth District Court of Appeal erred in finding the existence of two (2) genuine issues of material fact: (1) whether (Respondent) 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 his health care providers (Petitioners); and (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, and in doing so, reversing the summary judgment entered by the Circuit Court in favor of the Petitioners.

The case law set forth in both the initial brief on the merits and this reply brief filed by Petitioners establish the erroneous interpretation by the Fifth District of this Court's previous rulings handed down on the same issues. As the Fifth District, upon interpreting this Court's rulings in this manner subsequently reversed the summary judgment. The Petitioners respectfully submit the Fifth District erroneously reversed the lower court's ruling. As the facts admitted by Respondents prove that only matters of law remained when the motion for summary judgment was heard by the lower court and the lower court correctly applied the applicable case law regarding the commencement of the medical negligence statute of limitations, the Petitioners respectfully submit that the trial court's ruling of summary judgment for the Petitioners be reinstated.

Respectfully Submitted,



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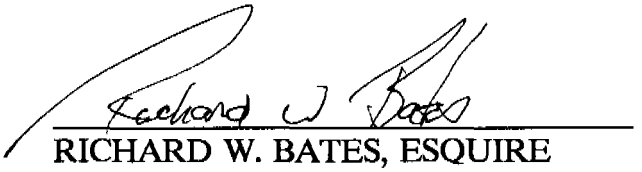
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to the Supreme Court in Tallahassee and 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 5th day of April, 1993.



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