THE SUPREME COURT OF FLORIDA

1ST DCA CASE NO.: 92-02776
L.T. CASE NO.: 92-1277-CA

84,289

HEIDI PATE and
JAMES PATE, her husband,

Appellants,
v.

JAMES B. THRELKEL, M.D.;
JAMES B. THRELKEL, M.D., P.A.;
GESSLER CLINIC, P.A.; SHANDS
TEACHING HOSPITAL & CLINICS, INC.;
and FLORIDA BOARD OF REGENTS,

Appellees.
_____/

ANSWER BRIEF OF APPELLEES
SHANDS TEACHING HOSPITAL AND CLINICS, INC.
AND FLORIDA BOARD OF REGENTS

Francis E. Pierce, III
Florida Bar No. 0270921
Gurney & Handley, P.A.
Two Landmark Center
Suite 450
225 E. Robinson Street
P.O. Box 1273
Orlando, Florida 32802
(407) 843-9500
Attorneys for Appellees,
SHANDS HOSPITAL & TEACHING
CLINICS, INC. and FLORIDA
BOARD OF REGENTS.

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STATEMENT OF THE CASE

This action comes to this Court as a certified question from the First District Court of Appeals in Pate v. Threlkel, 640 So. 2d 183 (Fla. 1st DCA 1994).

Appellants brought an action against, *inter alia*, Shands Teaching Hospital & Clinics, Inc. (Shands), and the Florida Board of Regents (FBOR) in the Circuit Court in and for Polk County, Florida. (R 1-6). After venue was transferred to Alachua County, Florida, Appellees filed a Motion to Dismiss (R 11-13) and a Memorandum of Law in Support of their Motion to Dismiss (R 21-27).

On June 12, 1992, the Honorable Chester B. Chance, Circuit Judge, entered an Order of Dismissal With Prejudice of Plaintiff's Complaint (R 34-36).

Appellants filed a Notice of Appeal to the First District Court of Appeal. The First District Court of Appeal, in an opinion dated August 1, 1994, unanimously affirmed Judge Chance's Order and, *sua sponte*, in a two to one determination, determined that this case presented a case of first impression in Florida and certified the following question to this Court as being one of great public importance:

> DOES A PHYSICIAN OWE A DUTY OF CARE TO THE CHILDREN OF A PATIENT TO WARN THE PATIENT OF THE GENETICALLY TRANSFERABLE NATURE OF THE CONDITION FOR WHICH THE PHYSICIAN IS TREATING THE PATIENT?

Pate, 640 So. 2d at 186.

STATEMENT OF THE FACTS

Appellants Heidi Pate and James Pate, her husband, filed a Complaint against, *inter alia*, Shands and the FBOR. (R 1-6).[1] In their Complaint, Appellants allege that Maryanne J. New, who was not a party to this action, treated and/or consulted with an agent of the FBOR at Shands (paragraph 14), that Appellee FBOR's agent, a general surgeon, knew or should have know Maryanne J. New's medullary thyroid carcinoma was inheritable and could be passed on to a patient's children genetically (paragraph 15), and that Appellee FBOR's agent failed to warn Maryanne J. New of the inheritable nature of her cancer (paragraph 16). (R 1-6). Appellants further allege that if FBOR's agent had warned Maryanne J. New of the inheritability of her medullary thyroid carcinoma her children, specifically Appellant, Heidi Pate, would have been tested (paragraph 17) and that if she had been tested in March of 1987, the likelihood was that Heidi Pate would have had a low likelihood for developing "significant cancer" and that her cancer was curable (paragraph 18). (R 1-6). Finally, Appellants allege that as a proximate result of the negligence of FBOR's agent Heidi Pate developed "significant medullary thyroid carcinoma", allegedly resulting in damages (paragraph 19). (Emphasis supplied) (R 1-6).

Appellees object to Appellants' statement of the facts as there is no allegation in Plaintiffs' Complaint that Heidi Pate

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[1] Heidi Pate sues as an adult, or an emancipated minor, as she is joined in this action by her husband, James Pate, who sues for loss of consortium and other derivative damages.

learned from her doctor that her disease was hereditary and was advised that if she ever had children, she would need to have them tested for the presence of the disease. Appellees further object to Appellants' statement of the facts which suggests that testing of Heidi Pate in 1987 would have revealed the existence of medullary thyroid carcinoma in Heidi Pate, but in a very early stage and that diagnosis and treatment in 1987 would have prevented "substantial damage" as this was not plead in Appellants' Complaint.

Finally, Appellees would object to Plaintiffs' statement of the facts suggesting that the trial court granted "Final Summary Judgment". The trial court entered an Order of Dismissal with Prejudice based upon the parties' Motion to Dismiss. (R 34-36).

No where in the Complaint is any allegation that Heidi Pate had any physician-patient relationship with Appellees.

SUMMARY OF ARGUMENT

Appellant Heidi Pate was not a patient at Shands and did not enter into a physician-patient relationship with any agent, servant or employee of the FBOR. The patient who was seen by the agent of the FBOR, Maryanne J. New, is not a party to this action and it is not alleged that Maryanne J. New experienced any damages as a result of any care or treatment provided by either Shands or agents or employees of the FBOR.

In the absence of a physician-patient relationship, and in the absence of any privity between Appellants, Shands and the FBOR, Appellants are, as a matter of law, "strangers" to Shands and the FBOR. Shands and the FBOR did not know of Appellant's existence, did not agree to provide medical care or treatment to Appellant, Heidi Pate, and breached no duty towards Heidi Pate.

The First District Court of Appeal in Pate, *supra*, recognized the general and longstanding rule in Florida that there must be privity between a healthcare provider and patient. Pate, 640 So. 2d at 185. The First District further held that "contagious disease" cases represent the "outer limits of a physicians duty" to a non-patient. *Id.* The two foundations of the First District Court of Appeals opinion affirming the dismissal of the Appellants' Complaint for failure to state a cause of action was "... the absence of privity and breach of duty." *Id.* at 186.

There is no compelling medical, societal or public policy reason to expand a physician's duty to third party non-patients.

To do so would fundamentally change the foundation of the physician-patient relationship beyond which no court in Florida has gone. Appellants' requested change would add an unpredictable and unmanageable burden on healthcare providers in the State of Florida for the health and welfare of people who are not patients of that healthcare provider and saddle liability upon healthcare providers for patients who have not agreed to accept the advice, care and services of the healthcare provider.

ARGUMENT

ISSUE

DOES A PHYSICIAN OWE A DUTY OF CARE TO THE CHILDREN OF A PATIENT TO WARN THE PATIENT OF THE GENETICALLY TRANSFERRABLE NATURE OF THE CONDITION FOR WHICH THE PHYSICIAN IS TREATING THE PATIENT?

The restatement of the issue certified by the First District Court of Appeals is whether this Court wishes to expand the limits of liability that not only were recognized by the First District Court of Appeal in the opinion below, but beyond which the First District Court of Appeal was not willing to venture in attempting to define the outer boundaries of a physician-patient relationship.

Appellant, Heidi Pate, was never alleged to be a patient at Shands and was never alleged to be a patient of any employee of the FBOR. Appellants did not allege in their Complaint (R 1-6) that the individual who was a patient of the employee of the FBOR, Maryanne J. New, ever gave these physicians or healthcare providers any history that she in fact had any children, whether these children were alive and well or deceased, whether these children were minors or adults, whether these children lived with the patient, whether these children were estranged, or any other facts to support any physician-patient relationship between Appellant, Heidi Pate, and Appellees.

Florida law is clear that a physician-patient relationship must exist between the patient and the physician in an alleged

medical malpractice case and the absence of that relationship, as a matter of law, is fatal to a claim of alleged malpractice of an individual who does not enjoy a physician-patient relationship with the physician or healthcare provider.

Controlling Florida case law concerning Appellants' allegations begins with Greenwald v. Grayson, 189 So. 2d 204 (Fla. 3d DCA 1966). In that action, plaintiffs filed a two count complaint against a physician alleging negligent performance of medical duties and a breach of contract concerning his advice to the plaintiffs relating to the fitness of a child for adoption. Plaintiffs alleged that the physician committed medical malpractice by failing to recognize the symptoms of a congenital disease in a child that they were considering for adoption.

In Greenwald, *supra*, the trial court entered a directed verdict upon the medical malpractice claim. The District Court noted that there was "... no evidence of negligence on the part of the physician resulting in an injury to the patient. A physician-patient relationship did not exist between the parties to this action." Greenwald, 189 So. 2d at 205. As such, the District Court affirmed the directed verdict, as a matter of law, to that count of medical malpractice.

In the case at bar, as in Greenwald, the Appellant, Heidi Pate, was not a patient of the Appellees. The patient, Maryanne J. New, did not receive any injury. In both the case at bar and Greenwald, the issue is similar in an allegation of failing to recognize an inheritable, non-contagious disease. In both the case

at bar and Greenwald, the patient experienced no damage as a result of any medical care and treatment and the Plaintiffs enjoyed no physician-patient relationship with the defendant physicians. As such, no liability attaches as a matter of law in the absence of the physician-patient relationship.

The same result is dictated by the opinion of the Third District Court of Appeal in Santa Cruz v. N.W. Dade Comm. Health Ctr., 590 So. 2d 444 (Fla. 3d DCA 1991), *rev. den.* 599 So. 2d 1278 (Fla. 1992). In Santa Cruz, plaintiffs brought a medical malpractice claim against the Northwest Dade Community Health Center. Plaintiff's brother was taken to Northwest Dade because of violent, delusional behavior. He was transferred to several more institutions and was ultimately committed to a state hospital. However, plaintiff's brother escaped from confinement. Two weeks later, plaintiff's brother returned to Northwest Dade and was treated on an out-patient basis. Plaintiff was then shot and injured by his brother.

> The Appellant's Complaint for medical malpractice against Northwest Dade was dismissed for failure to state a cause of action. This was a correct ruling by the trial court. There is no recognized basis for these appellants to assert a third party claim against the medical facility. They were not patients of the medical staff at Northwest Dade nor did they fit into any exception to the physician-patient requirement. (Emphasis supplied).

Santa Cruz, 590 So. 2d at 445.

Under Greenwald and Santa Cruz, unless a physician-patient relationship exists between the Appellants and Appellees alleging medical malpractice, there is no liability as a matter of law.

Stated another way, there must be privity between a plaintiff and a defendant in an alleged medical malpractice action. Pate, 640 So. 2d at 185.

> In order to maintain a cause of action against Dr. Shafey, there must have existed privity between appellant and Dr. Shafey, and Dr. Shafey must have owed and breached a duty to appellant. Absent privity and a breach of a duty, no cause of action lies. *See*, Forlaw v. Fitzer, 456 So. 2d 432 (Fla. 1984); Greenwald v. Grayson, 189 So. 2d 204 (Fla. 3d DCA 1966).

Joseph v. Shafey, 580 So. 2d 160 (Fla. 3d DCA 1990).

In Joseph, the defendant physician, a neurologist, treated a Miami City police officer. During treatment, the officer experienced psychotic episodes. The defendant physician later certified that the officer could return to full duty. Thereafter the officer shot the plaintiff, a member of the public at large. Plaintiff brought an action for medical malpractice and the trial court entered summary judgment based on a lack of privity between the plaintiff and the defendant physician and because the complaint failed to state a cause of action. In the case at bar, as in Joseph, there is no privity between Appellant, Heidi Pate, and the Appellees. "Absent privity and a breach of duty, no cause of action lies." Joseph, 580 So. 2d at 160.

Florida law has carved a very narrow exception to the general rule of privity required in a physician-patient relationship. In Hoffman v. Blackman, 241 So. 2d 752 (Fla. 4th DCA 1970), *cert. den.*

245 So. 2d 257 (Fla. 1971), the plaintiff's father was x-rayed concerning his condition of tuberculosis. A minor child was later found to have tuberculosis of the spine. The Fourth District Court of Appeals, citing cases from other jurisdictions, held that a duty exists on the part of a physician to use reasonable care to advise and warn members of a patient's family when a contagious disease is known to exist. The Fourth District specifically held that a physician owed a duty to a minor child, who is a member of an immediate family and living with that family, where a member of that family had a contagious disease, to advise of the precautionary steps to be taken to prevent the child from contracting the disease.

In the case at bar, there is no allegation that the patient is a minor child living with a patient suffering from a contagious disease and that precautionary steps could have been taken to prevent that minor child from contracting a contagious disease. Hoffman, therefore, is limited by its facts and inapplicable to the case at bar.

In Gill v. Hartford Acc. Indm. Co., 337 So. 2d 420 (Fla. 2d DCA 1976), the plaintiff was a roommate in a hospital with a patient of the defendant who had a highly contagious disease. The plaintiff alleged that the defendant failed to undertake any steps to prevent the spread of that infection from the infected patient to plaintiff. Based on those allegations, the Second District held that the plaintiff's complaint did state a cause of action. In the case at bar, there is no allegation that the Plaintiff was put into

immediate contact with a patient of the Appellees who was suffering from a highly contagious, infectious disease which could have been prevented. As such, Gill is limited to its facts and is inapplicable to the case at bar.

Appellants in this case do not allege that Heidi Pate's medullary thyroid cancer was preventable, and they cannot do so. Additionally, Appellants have not alleged that Heidi Pate would have suffered no damages because the medullary thyroid cancer could have been prevented. They simply allege that if she had been tested earlier, her medullary thyroid cancer would have been detected and more susceptible to treatment. Appellants have not alleged, and cannot allege, that Heidi Pate's medullary thyroid cancer was preventable.

Appellants' citation to Schroeder v. Perkel, 432 A.2d 834 (N.J. 1981), is inapplicable to the case at bar. The issue in Schroeder was whether a pediatrician owed a duty to the parents of a child with cystic fibrosis in order to allow them to prevent the birth of a second child with cystic fibrosis, either by contraception or abortion. In the case at bar, there is no allegation that Heidi Pate's medullary thyroid cancer could have been prevented. As such, Schroeder is inapplicable. Moreover, the Supreme Court of New Jersey appears to have abrogated the viability of the rational in Schroeder. Hummel v. Reiss, 608 A.2d 1341 (N.J. 1992).

Appellant attempts to rely upon Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993) in support of their position. In Bradshaw, the

defendant physician was called to treat Elmer Johns for a condition later diagnosed as Rocky Mountain Spotted Fever. During his treatment, the defendant communicated with Elmer Johns' wife, Genevieve, but never advised her of the risk of exposure to Rocky Mountain Spotted Fever. 854 S.W.2d at 867.

One week after her husband's death, Genevieve Johns was admitted to the hospital with similar conditions and symptoms and was treated for Rocky Mountain Spotted Fever, and later died. Genevieve Johns' son filed suit alleging negligence in the defendants' failing to advise Genevieve Johns that her husband died of Rocky Mountain Spotted Fever and failing to worn her of the risk of exposure to Rocky Mountain Spotted Fever. *Id.*

In reaching its conclusion that the defendant did owe a duty to Genevieve Johns, the Tennessee Supreme Court relied upon a string of contagious disease cases, including Hoffman v. Blackman, *supra*, and psychotherapist cases. Additionally, the Tennessee Supreme Court relied upon Wharton Transport Corp. v. Bridges, 606 S.W.2d 521 (Tenn. 1980), which held that a physician owed a duty to a third party injured by a disabled truck driver's negligence where the physician was negligent in his physical examination and certification of the truck driver to his employer. Bradshaw, 854 S.W.2d at 870.

Florida's common law precedent as to a physician's duty to a third party is contrary to Tennessee's common law precedent identified in Wharton. *See* Joseph v. Shafey, *supra*. Florida's common law concerning psychotherapist relationships is also

contrary to the authority relied upon by the Tennessee Supreme Court in Bradshaw. *See* Santa Cruz v. N.W. Dade Comm. Health Ctr., *supra*. In fact, while the Tennessee Supreme Court in Bradshaw seems to adopt the Tarasoff line of cases of "special relationship between psychiatrists or psychotherapists and third parties allegedly in a zone of danger" (Tarasoff v. Regents of University of California, 17 Cal. 3d 425), Florida Courts have rejected the Tarasoff holding in an *en banc* decision of the Third District Court of Appeal, Boynton v. Burglass, 590 So. 2d 446 (Fla. 3d DCA 1991).

It is therefore clear that the Bradshaw rationale has been rejected by Florida courts and is inapplicable. In Bradshaw, there was an identifiable third person that the defendant knew about. Bradshaw is further limited to its facts as the Tennessee Supreme Court analogized the phenomenon of clustering of Rocky Mountain Spotted Fever risk to that of a contagious disease. 854 S.W.2d at 872. Bradshaw is therefore limited to its own facts and Tennessee precedent, neither of which are applicable in the case at bar.

Appellants' citation to Sheppard v. Redford Community Hosp., 390 N.W.2d 239 (Mich. Ct. App. 1986) is but another example of the limited and narrow exception of a physician's duty to a non-patient third party where an infectious, contagious condition, spinal meningitis is at issue. Therefore, Sheppard adds nothing to the analysis.

Appellants' citation to Coker v. Wal-Mart Stores, Inc., 19 Fla. L. Weekly D1910 (Fla. 1st DCA September 8, 1994) is inapplicable. In that opinion, the First District held that Wal-

Mart's violation of 19 U.S.C. §922(b)(1), the Federal Gun Control Act, by selling ammunition to a minor, properly created a duty under the concept of negligence *per se*. However, the First District also held in Coker that the trial court mis-applied the concepts of causation in dismissing plaintiff's complaint.

Citing McCain v. Florida Power Corporation, 593 So. 2d 500 (Fla. 1992), the court in Coker was unwilling to hold, as a matter of law, that a sale of ammunition to a minor in violation of the Gun Control Act could not be found to be the proximate cause of death caused by a purchaser's intentional or criminal act. Coker, 19 Fla. L. Weekly at D1912.

In McCain, cited by the District Court in Pate, this Court distinguished the foreseeability found in the concept of duty from the foreseeability applied specifically in the concept of proximate cause. "The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." McCain, 593 So. 2d at 502 (emphasis supplied). In this action, there is no allegation that Appellees' action created a broader zone of risk that posed a general threat of harm to others. Heidi Pate's risk of inheriting medullary thyroid cancer existed without any action or inaction of Appellees.

There is no societal nor policy reason for this Court to extend the boundaries and parameters of the physician-patient relationship or the duty of the physician to his patient. Under the facts of this case, there is no allegation that Appellees knew

that Maryanne New, the patient of the Appellees, had any children. Additionally, to require the rule which Appellants suggest, Appellees would be burdened with multiple responsibilities which are outside of the province of providing medical care and treatment to the patient, Maryanne J. New. Contrary to Appellants' assertions at page 11 of their Brief, this rule would be more than a "minimal burden on the physician." First, Appellees would have to determine whether Maryanne J. New could in fact communicate with Appellant, Heidi Pate. Next, Appellants would require Appellees to determine whether Maryanne J. New was a competent person to transmit complex medical information. Next, the rule which Appellants would thrust on Appellees would require Appellees to determine whether Maryanne J. New and Heidi Pate were estranged from each other and whether Maryanne J. New had any motivation to inform her daughter of the existence of complex medical issues.

What would then become of the rule advocated by Appellants if Appellees determined that Maryanne J. New was an inappropriate conduit for medical information which should otherwise be provided directly between a physician and a patient? Would Appellees then have a direct duty to search out Heidi Pate to transmit information and force a physician-patient relationship on Heidi Pate? If Maryanne J. New were unwilling to have her own medical condition discussed with her daughter, would Appellees be required to balance this new duty advocated by Appellants with the rights of patient confidentiality under Section 455.241, Fla. Stat.? If so, would

Appellees encounter liability if they chose to honor patient confidentiality?

Unaddressed by Appellants is what liability occurs if Heidi Pate is unwilling to follow advice from her mother, if her condition is misdiagnosed or mistreated. Under Appellants' proposed rule, would Appellees be required to affirmatively follow Hiedi Pate's progress to guide her against these exingencies?

To take Appellants' proposed rule of law to its logical conclusion, if a patient came to a healthcare provider with high blood pressure and evidence of high cholesterol, that healthcare provider would then be obligated to have the patient contact all living lineal descendants and lineal ascendents to have their blood pressure and cholesterol checked because of the hereditary predisposition for high blood pressure and cholesterol problems. If one of these third party, potential generation-skipping non-patients thereafter experienced heart disease resulting from high blood pressure and high cholesterol, any one of these third party non-patient lineal descendants or ascendents could have a cause of action against the healthcare provider.

This simple but illustrative analogy by definition describes the inappropriate extension of the rule of law which Appellants suggest in this case. The only foundation that the courts of the State of Florida have found for extending the privity requirement of a physician-patient relationship involves circumstances in which a contagious disease can be prevented from being transmitted. In this action, Heidi Pate was either going to have her medullary

thyroid cancer or not irrespective of anything that Appellees did or did not do. Her condition cannot be prevented by Appellees.

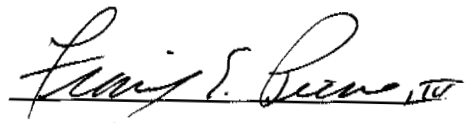
Heidi Pate was not Shands' or the FBOR's patient. Heidi Pate had no privity with Shands or the FBOR. Absent privity, there is no duty. Shands and the FBOR owed no duty to Heidi Pate. Therefore, Heidi Pate has no cause of action against Shands or the FBOR.

CONCLUSION

Appellants' Complaint failed to state a cause of action against Appellees as there was no privity between Appellant, Heidi Pate, and Appellees, Shands and the FBOR. The facts of this case do not present any exception to the Florida law requiring privity between the healthcare provider and a patient, which is required before any duty exists for the healthcare provider.

As such, this Court should determine the answer to the certified question in the negative.

Respectfully submitted,



Francis E. Pierce, III
Florida Bar No. 0270921

Gurney & Handley, P.A.
Two Landmark Center
Suite 450
225 E. Robinson Street
P.O. Box 1273
Orlando, Florida 32802
(407) 843-9500

Attorneys for Appellees, SHANDS TEACHING HOSPITAL & CLINICS, INC. and FLORIDA BOARD OF REGENTS.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail Delivery this 24th day of October, 1994 to: NOLAN CARTER, ESQUIRE, Post Office Box 2229, Orlando, Florida 32802; J. BRENT JONES, ESQUIRE, Post Office Box 536487, Orlando, Florida 32853; and STEPHEN H. SEARS, ESQUIRE, Post Office Box 1531, Tampa, Florida 33601.

Francis E. Pierce, III
Florida Bar No. 0270921
Gurney & Handley, P.A.
Two Landmark Center
Suite 450
225 E. Robinson Street
P.O. Box 1273
Orlando, Florida 32802
(407) 843-9500
Attorneys for Appellees,
SHANDS TEACHING HOSPITAL &
CLINICS, INC. and FLORIDA
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