THE SUPREME COURT OF FLORIDA

HEIDI PATE AND
JAMES PATE, her husband,

Appellants,

vs.

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.
_____/

1ST DCA CASE NUMBER: 92-02776

L.T. CASE NO.: 92-1277-CA

84,289

**ANSWER BRIEF OF APPELLEES
JAMES B. THRELKEL, M.D.,
JAMES B. THRELKEL, M.D., P.A. AND
GESSLER CLINIC, P.A.**

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STATEMENT OF THE CASE

This is a medical malpractice action involving the issue of whether a physician owes a duty to the children of a patient to warn the patient of the hereditary nature of a condition which the physician had diagnosed in the patient. In the instant case, the trial court entered an Order of Dismissal with Prejudice after hearing Appellees/Defendant's Motion to Dismiss Appellant's Complaint, based upon the Court's finding that there was no duty owed by the healthcare providers to the Appellant because of the lack of a patient-physician relationship with the Appellant. Further, the Court recognized that the factual allegations did not fit within any recognized exception to the requirement in Florida that there first must be a physician/patient relationship established before there may be an action for medical negligence. In Appellants' Initial Brief, it was erroneously stated that the Court granted summary judgment and that the appeal was from the final summary judgment.

The First District Court of Appeal affirmed the trial's Court's dismissal of the Complaint, but certified the following question to this Court as being a question issue 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?

STATEMENT OF FACTS

Because the Order being reviewed concerns Appellee's Motion to Dismiss Appellant's Complaint, the facts which the Appellate Court must consider are limited to the four corners of the Complaint. See Hembree v. Reaves, 266 So.2d 362 (Fla. 1st DCA 1972). (ROA-6).

The Complaint alleges as follows: that in March, 1987, James B. Threlkel, M.D. operated on Marianne J. New, mother of Plaintiff/Appellant Heidi Pate, for medullary thyroid carcinoma; that Dr. Threlkel knew, or should have known, the hereditary nature of the carcinoma and of the likelihood that Mrs. New's children would have inherited this condition; that Dr. Threlkel had a duty to warn Marianne J. New of the importance of testing her children for medullary thyroid cancer and that, had he done so, the children of Marianne J. New would have been tested; and, had Heidi Pate been tested in 1987 instead of in 1990, when Mrs. Pate's cancer was ultimately detected, she could have sought treatment in 1987, when the Appellant's condition "would have, more likely than not, been curable" (ROA 1-3). Dr. Threlkel's professional association, James B. Threlkel, M.D., P.A., and their alleged principal, The Gessler Clinic, are charged in the Complaint with vicarious liability for the alleged acts and omissions of Dr. Threlkel.

It should be noted that Heidi Pate sues as an adult or an emancipated minor on her own behalf. Her husband, James Pate, sues as a co-Plaintiff for loss of consortium and other derivative damages.

Appellees, James B. Threlkel, M.D., James B. Threlkel, M.D., P.A., and The Gessler Clinic, P.A. filed their Motion to Dismiss (ROA 9-10) alleging, intra alia that the Complaint failed to state a cause of action against Appellees because it failed to state that Appellees owed a duty of care to Appellants. Following oral argument and review of Memorandum of Law filed by both sides, the trial court granted Appellees' Motion to Dismiss and entered an Order of Dismissal with Prejudice based upon the lack of privity between Appellees and Appellants, finding that the Plaintiffs "were not patients of the Defendants' nor do they fit within any exception to the requirement that there be a physician-patient relationship before bringing an action for medical malpractice." (ROA 34-36).

Appellees object to allegations contained in paragraph 3 of Appellants' Statement of the Facts, page 2, that testing of Heidi Pate in 1987 "would have revealed Plaintiff, Heidi Pate did have the disease but in a very early stage; and that diagnosis and treatment in 1987 would have prevented the substantial damage to her that did occur because her cancer was not diagnosed until three years later." This language is not contained in the Complaint. Further, Appellees object to Appellants' Statement of the Facts, page 3, paragraph 2, to the extent that Appellants seem to imply that Defendants answered the Complaint. Rather, Defendant/Appellees filed only a Motion to Dismiss, which was granted by the trial court. Further, Appellees object to the allegation in the final paragraph of Appellants' State of the

Facts, which again erroneously states that the trial court granted the final summary judgment.

SUMMARY OF ARGUMENT

Florida Case Law generally has required that there first be a healthcare provider-patient relationship in order to establish a duty of care owed to the patient. The Courts have steadfastly refused to extend a healthcare provider's scope of duty to a non-patient, except in the "contagious disease" cases. However, this exception is based upon the exigent circumstances existing when a patient with a contagious disease is likely to spread the disease to the patient's relatives or other persons in close contact to the patient. In these cases, non-patients can be prevented from contracting the disease by a warning from the physician or other healthcare provider.

The instant case does not fall within the "contagious disease" exception to the general rule. Appellants allege that Heidi Pate had an inheritable condition which admittedly could not have been prevented from occurring had Appellees warned or informed their patient of the inheritable nature of the condition. Appellants allege only that Heidi Pate's already existing cancerous condition could have been recognized sooner, resulting in earlier treatment which allegedly would have resulted in a more favorable outcome. Appellants do not allege or contend that Appellees could have acted in any way to prevent Appellant's cancer form occurring. Therefore, in this instance, there was no "special relationship" between the physician and Appellant on which to base a duty of care.

Appellants cite only two cases in which a physician's duty was extended to non-patients and which did not also involve a contagious disease. Both of these cases are from jurisdictions other than Florida, and both can be distinguished from the case at bar.

Florida case law is clear that a physician/patient relationship must exist as a sine-qua-non to a medical malpractice action based upon lack of legal duty between the healthcare provider and patient. The allegations set forth in Appellant's complaint do not fall within the one exception to the general rule recognized in Florida. Therefore, this Honorable Court should follow the well-reasoned Florida case law on this subject and answer the certified question in the negative.

ISSUE

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?

ARGUMENT

In order to prevail in a medical malpractice action, as in any tort action, the defendant must first owe a legal duty to the claimant. Navajo Circle, Inc. v. Development Concepts Corp., 373 So.2d 689 (Fla. App. 1979). The Complaint must allege ultimate facts showing a relationship out of which a duty is implied by law in order to state a cause of action. Drady v. Hillsborough County Aviation Authority, 193 So.2d 201 (Fla. App. 1966). The existence of a duty is a question of law for the court. Florida Power & Light Company v. Lively, 465 So.2d 1270 (Fla. 3d DCA 1985), petition for review denied 476 So.2d 674. In the instant case, the trial judge correctly ruled that Plaintiffs' Complaint failed to state facts establishing that Appellees owed a duty to the Appellants because there was no physician/patient relationship between Heidi Pate and Appellees.

The Florida cases which discuss this issue uniformly have held that without physician-patient privity, there is no cause of action. In Joseph v. Shafey, 580 So.2d 162 (Fla. 3rd DCA 1990), the Appellate Court upheld the trial court's summary judgment in favor of Defendant, a neurologist who had treated a City of Miami police officer for a pituitary gland tumor. Following surgery, the

physician prescribed medications to control psychotic episodes allegedly experienced by the patient. After the doctor informed the patient's employer that he could return to full duty as a police officer, the officer allegedly shot the plaintiff, due to a psychotic episode. The plaintiff brought a medical malpractice action against the physician for medical malpractice and negligence. The trial court entered summary judgment in favor of the physician based upon failure to state a cause of action: "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." 580 So.2d at 160.

The Third District Court of Appeal faced this issue in a different factual setting in Boynton v. Burglass, 590 So.2d 466 (Fla. 3rd DCA 1991). In this case, the plaintiff's decedent was shot and killed by an outpatient psychiatric patient of the defendant, Dr. Burglass. The decedent's parents sued Dr. Burglass for malpractice, alleging failure to hospitalize his patient and failure to warn the decedent and decedent's family that his patient was prone to violence and had threatened the plaintiff. Dr. Burglass moved to dismiss the Complaint for failure to state a cause of action, which was granted by the trial court and upheld by the Third District Court. The Court refused to deviate from the general rule requiring patient-physician privity in this context.

A case perhaps more closely analogous to the instant case is Greenwald v. Grayson, 189 So.2d 204 (Fla. 3rd DCA 1966). The defendant, a medical doctor, was alleged to have negligently failed to recognize the symptoms of a congenital disease in a child the Appellants/Plaintiffs were considering for adoption. It should be noted that the plaintiffs asserted both a tort and breach of contract claim against the physician. At trial, the defendant obtained a direct verdict on the negligence count and a jury verdict on the breach of contract count. The Appellate Court upheld the directed verdict on the negligence count based upon the lack of a physician-patient relationship. "A physician-patient relationship did not exist between the parties to this action. Appellants' relationship with the doctor was exclusively in contract. Therefore, the appellants, as plaintiffs, could have recovered only in contract." 189 So.2d at 205.

The Florida Supreme Court indirectly faced the privity issue in Forlaw v. Fitzer, 456 So.2d 432 (Fla. 1984). The certified question before the Court was as follows:

> Is a physician who prescribes to a known drug addict liable to a third party for the negligence of the patient driving a car while under the influence of the drug?

Although the Florida Supreme Court decision focused on aspects other than privity and duty, the Court answered the certified question in the negative, upholding the trial court's ruling that the Complaint failed to state a cause of action.

The Florida Courts have carved out a narrow exception to the general rule in cases involving contagious disease. In Hoffman v.

Blackmon, 241 So.2d 752 (Fla. 4th DCA 1970), a minor child and her father brought medical negligence claims against the defendant/physician for failing to diagnose a contagious disease in the father, after the minor child contracted the disease. The Court stated,

> "It is recognized that once a contagious disease is known to exist, a duty arises on the part of the physician to use reasonable care to advise and warn members of the patient's immediate family of the existence and dangers of the disease...We hold that a physician owes a duty to a minor child who is a member of the immediate family and living with the patient suffering from a contagious disease to inform those charged with the minor's well being of the nature of the contagious disease and the precautionary steps to be taken to prevent the child from contracting such disease..." 241 So.2d at 753.

This case is easily distinguished from the case at bar. The salient element is that the child's condition could have been prevented had the physician issued a timely warning to the child's parent. Further, the Court limited its holding to a minor child who is a member of the immediate family. The duty to warn was limited to "those charged with the minor's well being" to warn of the "precautionary steps to be taken to prevent the child from contracting such disease." In the instant case, the Appellant/Plaintiff is not a minor, and the physician's patient is not alleged to be charged with her adult daughter's well being, as would be the case if the child were a minor. The Appellate Court in Hoffman perhaps was cognizant of the potential of opening physicians in general to a plethora of malpractice cases, and was very careful to narrowly limit its holding to that particular set of circumstances.

Another Florida Appellate case which discusses the physician-patient privity doctrine is Gill v. Hartford Accident and Indemnity Company, 337 So.2d 420 (Fla. 2nd DCA 1976). The defendant/physician was sued by a hospital patient, who shared a room with the defendant's patient and contracted an infectious disease from the patient. The physician was charged with failing to warn the plaintiff or the hospital authority of the infectious disease and undertake steps to prevent the spread of the infection to the plaintiff. The Appellate Court reversed the lower court's granting of defendant's Motion to Dismiss without discussion, other than holding that the Complaint did state a cause of action.

The Appellants have cited two cases from foreign jurisdictions in which non-patients were allowed to sue physicians in settings other than contagious disease. However, both of these cases can be readily distinguished from the instant case. In Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993), the Tennessee Supreme Court held that a physician owed a duty to the wife of a patient with Rocky Mountain Spotted Fever to warn the patient's wife of her risk of exposure to the source of disease. Even though this case did not technically involve a contagious disease, the Court recognized that the nature of the disease was similar in many respects to a contagious disease. Even though the disease apparently cannot be transmitted from one person to another, the Court noted that family members are at risk of contracting the disease from infected ticks. There was an imminent danger of the non-patient wife contracting the disease from contact with the same source from which her

husband had contracted the disease. 854 S.W.2d at 872 Therefore, all of the same exigencies which necessitated the creation of a duty in the contagious disease cases were also present here: the urgency to keep other persons, notably family members who were living with the patient, from contracting the disease by imposing a legal duty upon the physician to warn the patient. Such considerations are wholly lacking in the instant case. Another factor that distinguished the Bradshaw case from the instant case is that the Tennessee case law prior to Bradshaw recognized a legal duty of the physician to a non-patient third party for injuries caused by the physician's negligence in settings other than contagious disease cases, "if the injuries suffered and the manner in which they occurred were reasonably foreseeable." Wharton Transport Corporation v. Bridges, 606 S.W.2d. 521, 526 (Tenn. 1980). In the Wharton Transport Corp. case, the Tennessee Supreme Court recognized a duty on the part of the physician to a third party injured by a disabled truck driver's negligence, after the physician negligently treated the truck driver and certified the truck driver fit for employment. The existing Florida case law has not recognized a physician's duty to a non-patient in circumstances other than infectious disease cases. See Joseph v. Shafey (supra). Therefore, the Bradshaw case was decided under a different body of common law for precedent.

The other non-contagious disease case cited by Appellant's in support of their argument is Schroeder v. Perkel, 432 A.2d 834 (N.J. 1981). In this case the parents of the defendant/patient

brought suit against the physician for his alleged late diagnosis of cystic fibrosis in their child. By the time the physician made the diagnosis, patient's mother was pregnant with her second child, who was also born with cystic fibrosis. The parents were later determined to be carriers of the disease. The gist of the cause of action was that if the physician had made the diagnosis earlier, the parents would have been able to prevent having a second child born with the disease. Despite argument from the defendants that there was no cause of action due to lack of privity between the physician and the parents of this patient, the court held that the physician owed an independent duty to the parents to advise them that their child was suffering from a genetically transferable condition.

The Schroeder case is also distinguishable from the case at bar. First, once again the Courts imposed a duty where the non-patient's harm could be prevented, and not simply diminished. The basis of the parent's cause of action against the physician was that the parents could have prevented having a second child inflicted with cystic fibrosis had the doctor warned them that their first child had the disease, and that it was genetically transferrable. In the instant case, Appellants concede that Appellees could have done nothing to prevent Heidi Pate from contracting cancer.

Second, the facts of Schroeder involve medical treatment of a minor child rather than an adult child. The Supreme Court of New Jersey discussed the parent's duty to provide medical care for

their minor children, and implied that such an obligation carried with it a remedy in the form of a cause of action against a physician who negligently treated their minor child. "It would be unreasonable to compel parents to bear the expense of medical treatment required by a child and to allow the wrongdoer to go scot-free" 432 A.2d at 839. Obviously, these considerations are absent in circumstances such as the instant case, where the injured person is an adult child and the patient/parent is not legally responsible for the child's medical care. There simply are no facts alleged in the Appellant's complaint which could form a relationship of any type between Appellees and Appellants, on which to fashion a legal duty.

The plaintiffs cite the Michigan case of Shepard v. Redford Community Hospital, 390 N.W.2d 239 (Mich. App. 1986) in support of their position. This case involved a defendant/physician's failure to diagnose the infectious condition of spinal meningitis in his patient. The patient's child later contracted the disease after the physician allegedly failed to warn his patient of the nature of the disease. Although this case recognized a duty from the physician to the non-patient child, it simply restates the contagious disease exception, which is not applicable here.

There are several public policy reasons which should constrain this Honorable Court from extending existing case law to create a duty on the part of physicians to warn family members of possible hereditary conditions. The physician would have to rely upon his patient to convey a medical warning to the patient's family. If

the patient, called upon to act as a messenger, incorrectly conveyed the message or if the message was incorrectly interpreted by the patient's child, improper medical attention may be rendered to the child. Thereafter, if the patient's child or children ultimately discovered that they had the inheritable condition or disease, the child could bring suit against the physician for failure to properly warn the patient of the genetically transferrable nature of the condition. The physician would then be placed in the position of having to prove that he or she conveyed the proper message to the patient, and that the message was misconveyed by the patient, misinterpreted when heard by the child, or possibly that the child misconveyed the warning to the child's physician who performed the tests. The defendant/physician could then find himself subject to multiple lawsuits from children of his patients located anywhere in the world. Further, genetically transferrable conditions could extend not only to immediate children but also to grandchildren and great-grandchildren, creating an even greater number of potential plaintiffs. The defendant/physician would literally be at the mercy of his patient to convey medical warnings and instructions to whatever lineal descendants the patient may have, wherever they may be located. Such a legal proposition could create a Pandora's box of litigation for Florida's physicians.

CONCLUSION

Based upon the facts alleged in Appellant's Complaint, there was no physician/patient relationship between Appellees, Dr. Threlkel, his professional association, and The Gessler Clinic on the one hand, and Appellant, Heidi Pate, on the other hand. Consequently, there was no duty on the part of Appellees to Appellants to warn Appellee's patient of the genetically transferrable nature of her condition. The facts alleged in Appellants' Complaint do not fall within the "contagious disease" exception, the only exception recognized under Florida case law to the requirement of physician-patient privity in order to bring a medical negligence action. Further, Appellants have cited no compelling reason to extend a physician's duty of care to non-patients in circumstances involving a condition which could not have been prevented by a timely warning from physician to patient, and where the non-patient is an adult, emancipated child to which the patient has no obligation to provide medical care.

Wherefore, Appellees urge this Honorable Court to answer the certified question in the negative, and affirm the First District Court of Appeal's ruling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above has been furnished via U.S. Mail to Nolan Carter, Esquire, P. O. Box 2229, Orlando, FL 32802-2229, Frank Pierce, Esquire, Post Office Box 1273, Orlando, Florida, 32802-1273 and Stephen H. Sears, Esquire, P. O. Box 1531, Tampa, Florida 33601 this 19th day of October, 1994.

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