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THE SUPREME COURT OF FLORIDA

Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399-1927

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

HEIDI PATE and
JAMES PATE, her husband,

Appellants,

vs.

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

Appellees.

_____/

REPLY BRIEF OF APPELLANTS
HEIDI PATE AND JAMES PATE, HER HUSBAND

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TABLE OF CONTENTS

	PAGE
Table of Citations	ii
Reply	1
Certificate of Service	6

TABLE OF CITATIONS

Cases:	**Page**
Boynton vs. Burglass 590 So.2d 466 (Fla. 3rd DCA 1991)	4
Bradshaw vs. Daniel 854 S.W. 2d 865 (Tenn. 1993)	4
Gill vs. Hartford Accident and Indemnity 337 So.2d 420 (Fla. 2nd DCA 1976)	4
Greenwald vs. Grayson 189 So.2d 204 (Fla. 3rd DCA 1966)	5
Hoffman vs. Blackmon 241 So.2d 752 (Fla. 4th DCA 1970)	4
Joseph vs. Shafey 500 So.2d 162 (Fla. 32rd DCA 1990)	4
Santa Cruz vs. N.W. Dade Community Health Center 590 So.2d 444 (Fla. 3rd DCA 1991)	5
Shepard vs. Redford Community Hospital 390 N.W. 2d 239	4
Schroeder vs. Perkel 432 A.2d 834 (S.Ct. N.J. 1981)	4

BREACH OF DUTY

Appellees obviously have misread the decision of the lower Court which forms the basis of this Appeal. The First District clearly noted, and correctly so, that "...this case presents an issue of first impression in Florida...".

This "issue" is what duty does the physician have to his/her patient to warn them of the hereditary nature of their disease *and* what remedy is available for a breach of that duty.

Appellees' entire argument assumes the physician has a duty to warn his patient of the inheritable nature of her disease; they argue the children have no legal *remedy* for the *breach* of *that* duty because there is no physician-patient relationship between them and the physician. Appellants submit this is an absurd result: If the physician owes a duty to his patient, there must be a remedy for a breach of that duty. Otherwise, why have a "duty"?

The purpose of imposing the duty is to benefit the children, not the patient. The patient already has the full blown disease process! The "duty" arises so the children can be made aware of the inheritable nature of the disease and thus have an opportunity to seek *early* treatment and possible cure.

The physician is not required to warn *the children*, only his patient. That simple solitary act on his part discharges his duty. If the patient forgets, neglects, or for whatever reason does not convey the message to the children, the children may have a remedy against the parent but would not have a remedy against the physician.

PUBLIC POLICY

Appellants take a contrary view to Appellees of the "public policy" demands of this issue.

First: Who better knows the inheritable nature of a disease than a well-trained physician? Who better knows the injury that can occur to the children of a patient with an inheritable disease than a well trained physician? Should the "public" have to wait two or three generations before suspecting that a disease is congenital and then have offspring tested? Why have disease control centers or medical studies published in medical literature if the inheritable nature of a disease is not of critical importance to parents *and* children?

Second: Appellees say prevention of the spread of disease is the key to the contagious disease cases. However, Appellants submit that early diagnosis and treatment of inheritable diseases is truly *prevention* of the highest order.

It is common lay knowledge that almost all forms of cancer are treatable if caught early. Where a physician knows his patient has an inheritable cancer should he act to prevent needless suffering for the children? If he/she fails to act and the children endure

injury and suffering that could have been prevented, should the children have a right to hold the physician accountable? Appellants submit the clear answer is yes.

Third: Why is "Prevention" as urged by Appellees, a more worthy medical objective than "early detection and the opportunity for timely treatment"? Surely the children of parents with inheritable cancers suffer just as much as family members of patients with contagious diseases. In many cases, as here, more so!

Fourth: Allowing suits against physicians by children of a parent with an inheritable condition requires no new physician skills, training, specialized knowledge or affirmative undertaking. The physician is not required to undertake new and expensive testing procedures; he does not need additional medical training; he does not need to add new staff or expensive diagnostic equipment and, most important, he does not have to have any contact with anyone in the family of the patient except the patient. He discharges his duty fully by taking the few seconds necessary to say "your condition is inheritable; you should have your children checked or ask them to get a check-up".

Appellants submit public policy will be well served by requiring physicians to warn their patients of the inheritable nature of their disease and allowing suits by the children where the physician breaches that duty to his patient.

THE LAW

Appellee's argue that there is a dearth of case law on this subject and admit that the only cases to be found have been cited by Appellants. As expected they argue those cases are distinguishable.

Appellant's submit that the most *LOGICAL* conclusion to draw from this sparsity of precedent is that a well trained physician *does* warn his patients of the inheritable nature of his/her condition so this issue simply does not arise.

Overlooked, or ignored, by Appellees is the fact that every Appellate level Court that has reviewed cases involving the *transmission* of a *disease* to family members has held the physician liable to those family members. See *Bradshaw vs. Daniel*, 854 S.W. 2d 865 (Tenn. 1993) Wife contracts Rocky Mounted Spotted fever due to exposure to source of disease; *Gill vs. Hartford Accident and Indemnity*, 337 So.2d 420 (Fla. 2nd DCA 1976) Hospital roommate of patient contracts patient's disease; *Hoffman vs. Blackmon*, 241 So.2d 752 (Fla. 4th DCA 1970) Child contracts disease from father; *Shepard vs. Redford Community Hospital*, 390 N.W. 2d 239 Child contracts parents disease; and *Schroeder vs. Perkel*, 432 A.2d 834 (S.Ct. N.J. 1981) Second child inherits parents disease.

The only case law Appellees can muster involves *psychotic* patients causing harm to third parties. *Joseph vs. Shafey*, 500 So.2d 162 (Fla. 3rd DCA 1990) Police officer shot and killed third person; *Boynton vs. Burglass*, 590 So.2d 466 (Fla. 3rd DCA 1991)

Patient shot and killed third person; and *Santa Cruz vs. N.W. Dade Community Health Center*, 590 So.2d 444 (Fla. 3rd DCA 1991), *Rev. Den.*, 599 So.2d 1278 (Fla. 1992) Patient shot brother.[1]

Appellants suggest this Court should rule that "transmission of disease" cases and "psychotic injury" cases are at opposite ends of the spectrum and therefore neither is an exception to the other. This makes more sense because foreseeability will always be an issue in psychotic injury cases and never in contagious or heredity disease cases.

A physician treating a psychotic patient may or may not be able to foresee harm to persons having contact with the psychotic patient. On the other hand, if a disease process is hereditary or contagious the physician knows family members or the public have a definite, clearly foreseeable, likelihood of inheriting or contracting the disease.

CONCLUSION

Appellants have cited ample case law from Florida and other jurisdictions for this Court to resolve this "issue of first impression" in their favor.

They submit that a duty without an effective remedy produces an unjust result. Here, to allow a physician to escape accountability for his negligence because there exists no "physician-patient" relationship produces *the* most unequitable unjust result.

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[1] *Greenwald vs. Grayson*, 189 So.2d 204 (Fla. 3rd DCA 1966), as noted by the First District, was a contract action that resulted in jury verdict for a physician so is inapplicable here.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing notice has been furnished this 26th day of October 1994, upon the following: FRANK PIERCE, ESQUIRE, P.O. Box 1273, Orlando, Florida 32802-1273; and to J. BRENT JONES, ESQUIRE, P.O. Box 536487, Orlando, Florida 32853-6487.

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