IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,805

MEGAN MOORE, a minor, by and through her parents and next friends, HENRY MOORE and SUSAN MOORE, and HENRY MOORE and SUSAN MOORE, individually,

Appellants/Petitioners,

vs.

CHESTER MORRIS, M.D., ARTHUR SCHATZ, M.D., WILLIAM J. BREWSTER, M.D., and NORTH SHORE HOSPITAL,

Appellees/Respondents.

ON PETITION FOR DISCRETIONARY REVIEW
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF RESPONDENT ARTHUR SCHATZ, M.D.

WICKER, SMITH, BLOMQVIST, TUTAN, O'HARA, McCOY, GRAHAM & LANE

and

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TABLE OF CONTENTS

POINT ON APPEAL

THE DECISION OF THE THIRD DISTRICT DOES NOT "EXPRESSLY AND DIRECTLY" CONFLICT WITH SIX OTHER CASES; THE PETITIONER IS MERELY SEEKING A SECOND APPEAL ON THE MERITS

TABLE OF CITATIONS

ARGUMENT

THE DECISION OF THE THIRD DISTRICT DOES NOT "EXPRESSLY AND DIRECTLY" CONFLICT WITH SIX OTHER CASES; THE PETITIONER IS MERELY SEEKING A SECOND APPEAL ON THE MERITS

The Petitioner goes into a lengthy discussion on the facts which are favorable to him. Additionally, he ignores the facts which are unfavorable to him. He also argues that the decision conflicts with six other cases. Nowhere is there a crisp discussion of issues of law, which is proper on a Petition for Discretionary Review. It is therefore apparent that the Petitioner is seeking a second appeal on the merits, which the Florida Supreme Court has often stated it will not do.

The jurisdiction of the Supreme Court derives from Art. 5 §3(b)(3) of the Florida Constitution, which states that the Supreme Court:

> May review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law .... (Emphasis supplied.)

The function of the Supreme Court in regard to conflict jurisdiction has long been to resolve conflicting points of law, and not to function as a second appeal on the merits. Ansin v. Thurston, 101 So.2d 808 (Fla. 1958); Karlin v. City of Miami, 113 So.2d 551 (Fla. 1959); Jenkins v. State,

385 So.2d 1356 (Fla. 1980). The decision of the Third District in the present case does not create a rule which is in express and direct conflict with the rule of law in other cases.

In his brief the Petitioner argues extensively from the dissent. Additionally he argues extensively from testimony which is in neither the majority decision nor the dissent. It is therefore apparent that the Petitioner is seeking a second appeal on the merits.

It is well settled that a dissent cannot be used to create jurisdiction. The Florida Supreme Court created this rule in Jenkins v. State, supra, where it said:

> Accordingly, we hold that from and after April 1, 1980, the Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court. The application for review in the instant case having been filed subsequent to March 31, 1980, it is therefore dismissed.

The majority opinion in this case does not express any rule of law which "directly and expressly" conflicts with a rule of law announced in other cases. In fact the rule of law it announces is in accord with all other cases on point. The entire majority decision reads as follows:

Appellants, as plaintiffs, filed a medical malpractice action against the defendants seeking damages for injuries sustained by the infant child at birth. The trial judge entered summary judgment for the defendants finding that the action was barred by the statute of limitations,[1] as the parents were put on notice at the time of the birth of the infant of the alleged negligent conduct or injury.

Prior to the mother being taken to the hospital for delivery, it was a normal pregnancy. After she commenced labor the husband was advised there was an emergency and the baby would be taken by Cesarean Section. After the baby was born the father was on notice that for a period in excess of thirty minutes, while the infant was "blue," the doctors had attempted to administer oxygen; that they were unsuccessful in their treatment, and received permission to transfer the infant to the emergency facility at Jackson Hospital, that one of the doctors did not expect the baby to live, another doctor told the father that he did the best he could and (apparently the baby would not live) and he, the father, would have to do what he had to do.

While the child was being transported to Jackson in an emergency vehicle, her chest was cut open and a tube inserted to assist her in breathing. The parents knew it was an emergency situation, that there was a problem with the delivery, that the child had swallowed something which restricted breathing, and that the child was starved for oxygen.

With these admissions in the record, as a matter of law they were on notice from the time of the birth of the alleged negligence or of injury to the infant and, therefore, the trial judge was correct in granting a summary judgment

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[1] The infant was born on July 9, 1973. The instant action was not filed until April 25, 1978 (after a medical mediation proceeding had been terminated, which commenced on July 7, 1977). The applicable statute of limitation is Sec. 95.11(6) Florida Statutes (1973) and the applicable time to commence the action was within 2 years of the infant's birth. Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (1981).

based on the statute of limitations. Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976); Robinson v. Sparer, 365 So.2d 438 (Fla. 3rd DCA 1978); MacMurrary v. Board of Regents, 362 So.2d 969 (Fla. 1st DCA 1978); Hill v. Virgin, 359 So.2d 918 (Fla. 3rd DCA 1978); McCloud v. Hall, 180 So.2d 509 (Fla. 2nd DCA 1965); Buck v. Mouradian, 100 So.2d 70 (Fla. 3rd DCA 1958).

The final summary judgment under review is affirmed.

Affirmed.

The Petitioner in his brief repeatedly argues from the dissent rather than from the majority opinion, as follow:

"... cited in his dissent ...." (Page 4)

"... in his dissenting opinion ...." (Page 5)

"... relied upon in his dissent ...." (Page 9)

Additionally, the Petitioner repeatedly argues facts, and particularly facts which are not in the majority opinion, and usually not even in the dissent but which are being argued out of context from the trial court record. The following are all examples from the Petitioner's Brief on Jurisdiction:

... In the present case, the facts cited by the Third District establish nothing more than .... Significantly, no other facts were cited by the majority .... The majority failed to point to any facts .... (Page 5)

* * * * *

... neither the Moores nor any of the medical professionals knew or could have known .... (Page 5)

* * * * *

The majority opinion ... implicitly holds... (Page 6)

* * * * *

... the Moores were not aware of anything.... (Page 7)

* * * * *

... The fact that the Moores knew.... (Pages 7-8)

* * * * *

... This is particularly true since.... (Page 8)

* * * * *

... There are absolutely no facts cited in the majority's opinion.... (Page 9)

In summary, this is not an argument that the Third District Court of Appeal in this case announced a rule of law which conflicts with the rule of law announced in other cases; this is an argument for a second appeal on the merits.

The cases relied on by Petitioner are not on point. The first case relied on is Johnson v. Mullee, 385 So.2d 1038 (Fla. 1st DCA 1980). Johnson v. Mullee is not on point because in that case the court specifically stated that the plaintiff could not have discovered an injury until less than two years before suit was filed. However, in the present case the Plaintiff was aware of permanent injury at the time of birth which was more than two years

prior to the time of filing suit.

The next case relied on by Petitioner is similarly not on point, much less does it "expressly and directly conflict" with the present case. That case is Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978). In that case there is a question of concealment and also affirmative misrepresentation to hide the injury. Those issues were not present in the case at bar and in fact the decision in the present case even states that one of the doctors told the Plaintiff of the problems.

The case of Salvaggio v. Austin, 336 So.2d 1282 (Fla. 2nd DCA 1976) is also not on point. In that case after an operation the plaintiff had pain in her chest. The pain continued for approximately four years and finally her family doctor did an x-ray and discovered that a drainage tube had been left in her chest during the earlier operation. The suit was filed within a year from the x-ray which initially revealed the drainage tube. The trial court held that the statute of limitations ran from the initial operation, and the Court of Appeal reversed stating that the plaintiff had no reason to think that the pain was caused by a negligent operation as opposed to a normal physical condition.

The next three cases are not on point and in fact all support the Respondent's position in that they held

that the claims were barred by the statute of limitations. The first case relied on by the Petitioner is Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976). That case is similar to the present one in that there was injury during birth and the question was when the statute of limitations began to run. The court held that since the parents were aware of the injury and all of the information relating to the negligence were in the medical records which were readily available to the parents, the statute of limitations began to run when the parents through reasonable diligence could have discovered this information. This case mandates a finding for the Respondent since it is undisputed that the medical records as well as the hospital records clearly reveal both the existence of negligence and of permanent injury more than two years prior to the lawsuit being filed, and in fact the records of a neurologist to whom the child was sent for follow-up treatment stated that he had told the mother more than two years prior to the lawsuit that the child had permanent injury.

We do not know why the Petitioners cite the next case for "direct and express conflict" since it is actually favorable to the Respondent and held that the plaintiffs claim was barred by the statute of limitations. That case is MacMurray v. Board of Regents, 362 So.2d 969 (Fla. 1st DCA 1978), which held that where the medical records clearly

had revealed the existing of negligence and injury and therefore the "easily discoverable facts" were available to the plaintiff, this would not postpone the running of the statute of limitations, and therefore the plaintiff's claim was barred. That case supports the position of Respondent since in the present case the Plaintiff not only was on notice of negligence and injury, but additionally the hospital and doctors' records revealed this.

The last case relied on by the Petitioners also supports the position of Respondent. McCloud v. Hall, 180 So.2d 509 (Fla. 2nd DCA 1965). That decision is only approximately one-eight of a page and merely states that the action is barred by the statute of limitations. There certainly is no jurisdictional conflict with that decision since that decision, like the present one, simply states that under the facts the statute of limitations had run.

In summary, there is no express and direct conflict and it is apparent that the Petitioners simply grieve that they lost below and is seeking a second appeal on the merits. However, there is no express and direct conflict and therefore there is no jurisdiction.

CONCLUSION

The decision does not "expressly and directly" conflict with six other cases; the Petitioners are merely seeking a second appeal on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of July, 1983, to all Counsel on the attached list.

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