IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,805

MEGAN MOORE, etc., et al.,

Petitioners,

vs.

CHESTER MORRIS, M.D., et al.,

Respondents.

BRIEF IN OPPOSITION TO JURISDICTION OF RESPONDENTS, CHESTER MORRIS, M.D., WILLIAM J. BREWSTER, M.D., AND NORTH SHORE HOSPITAL

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TOPICAL INDEX TO BRIEF

		PAGES
	TABLE OF AUTHORITIES	ii
I.	INTRODUCTION	1-2
II.		
	POINT 1.	
	THE DECISION OF THE DISTRICT COURT IN THE INSTANT CASE DOES NOT EXPRESSLY NOR DIRECTLY CONFLICT WITH JOHNSON v. MULLEE, 385 So.2d 1038 (Fla. 1st DCA 1980); BROOKS v. CERRATO, 355 So.2d 119 (Fla. 4th DCA 1978); SALVAGGIO v. AUSTIN, 336 So.2d 1282 (Fla. 2d DCA 1976), OR OTHER SIMILAR AUTHORITIES.	1-5
	POINT 2.	
	THE DECISION OF THE DISTRICT COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976); MacMURRAY v. BOARD OF REGENTS, 362 So.2d 969 (Fla. 1st DCA 1978); AND McCLOUD v. HALL, 180 So.2d 509 (Fla. 2d DCA 1965).	6-8
III.	CONCLUSION	8
IV.	CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

CASES	PAGES
Ansin v. Thurston, 101 So.2d 808 (Fla. 1958)	2
Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978)	3, 4
Buck v. Mouradian, 100 So.2d 70 (Fla. 3d DCA 1958)	6
Hill v. Virgin, 359 So.2d 918 (Fla. 3d DCA 1978)	6
Jenkins v. State, 385 So.2d 1356 (Fla. 1980)	1, 3
Johnson v. Mullee, 385 So.2d 1038 (Fla. 1st DCA 1980)	2, 3
Lubell v. Roman Spa, Inc., 362 So.2d 922 (Fla. 1978)	6
MacMurray v. Board of Regents, 362 So.2d 969 (Fla. 1st DCA 1978)	6, 8
McBurnett v. Playground Equipment Corp., 137 So.2d 563 (Fla. 1962)	6
McCloud v. Hall, 180 So.2d 509 (Fla. 2d DCA 1965)	6, 7
Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976)	6, 7, 8
Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960)	5
Robinson v. Sparer, 365 So.2d 438 (Fla. 3d DCA 1978)	6
Salvaggio v. Austin, 336 So.2d 1282 (Fla. 2d DCA 1976)	4
Wale v. Barnes, 278 So.2d 601 (Fla. 1973)	6

OTHER AUTHORITY

Florida Constitution	
Art. V, § 3(b)(3)	1

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I.

INTRODUCTION

In support of conflict jurisidiction, petitioners cite the "material portions" of the decision rendered below,[1] with special emphasis upon facts and findings set forth in the dissenting opinion. This reliance upon "language and expressions found in a dissenting. . .opinion" cannot support jurisdiction of this Court under Article V, § 3(b)(3), Florida Constitution, since it is are not the decision of the District Court of Appeal. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

Accordingly, the "language and expressions" found in the majority decision will be relied upon to establish that express and direct conflict does not exist with any decision of this Court or other district courts of appeal. Furthermore, that the motion for rehearing in the instant case was denied in a 2-1 decision (not surprising since one of the panel had dissented)

[1] Now reported at 429 So.2d 1209 (Fla. 3d DCA 1983).

and the motion for rehearing en banc was denied in a 4-4 tie vote has no bearing whatever on the jurisdiction of this Court.

II.

POINT I.

THE DECISION OF THE DISTRICT COURT IN THE INSTANT CASE DOES NOT EXPRESSLY NOR DIRECTLY CONFLICT WITH JOHNSON v. MULLEE, 385 So.2d 1038 (Fla. 1st DCA 1980); BROOKS v. CERRATO, 355 So.2d 119 (Fla. 4th DCA 1978); SALVAGGIO v. AUSTIN, 336 So.2d 1282 (Fla. 2d DCA 1976), OR OTHER SIMILAR AUTHORITIES.

One essential aspect of this litigation must initially be noted. The only rule of law announced by the majority decision is that the parents of the minor plaintiff were on notice from the time of her birth of alleged negligence or injury to their child and, therefore, the trial judge was correct in granting a summary judgment based on the statute of limitations. This is the rule of law announced, and accords with every other authority dealing with the same statute: the statute of limitations begins to run at the time there is notice of negligence or injury. As such, the particular facts of the case cannot create a conflict with other decisions unless the decisions are ". . .based practically on the same state of facts and announce antagonist conclusions." Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958).

Petitioners argue that the instant case is in conflict with Johnson v. Mullee, 385 So.2d 1038 (Fla. 1st DCA 1980). In Johnson, the evidence revealed that had the defendant-doctor discovered the plaintiff's cancer, she would have had to undergone the same radical surgery which she later had. Therefore, there could be no knowledge of any injury until the cancer spread.

It is impossible to argue that under the facts set forth in the majority decision herein there was no knowledge of any injury at the time of the child's birth. After the birth, the infant was "blue" for a period in excess of 30 minutes; oxygen was administered; treatment was unsuccessful; the infant was transferred to the emergency facility of Jackson Hospital; one doctor told the father that he did not expect the baby to live; and the child's chest was cut open while being transferred to Jackson Hospital. It is simply not reasonable to argue that the parents had no knowledge whatsoever of any injury to their child at the time of her birth. Thus, there is no conflict with the Johnson decision.[2]

Contrary to the assertion of petitioners, the majority decision rendered in this case does not implicitly hold that the statute of limitations begins to run where there is a possibility of injury from a difficult birth even though the injury is scientifically undetectable at that time. It took neither scientific knowledge nor skill to detect that Megan Moore suffered an injury at her birth. The extent of the injury might not have been known, but that serious injury, including cutting open the child's chest, did occur cannot be questioned.

Petitioners next assert conflict with Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978). In the Brooks case, an operation was performed on February 8, 1973, and suit was filed on June 27,

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[2] Petitioners' reliance upon the facts and conclusions set forth in the dissent cannot create a conflict of decisions necessary to support jurisdiction. Jenkins v. State, supra.

1975. The issue was whether the plaintiff discovered or should have discovered the injury before June 27, 1973, or during the period of four months after the surgery. The Brooks decision holds there was an issue of fact as to whether the plaintiff should have discovered during this four-month period that there was an injury as opposed to merely post-operative discomfort. That situation is completely distinguishable what occurred in the instant case where there was no question of post-operative discomfort, but real, traumatic injury sustained by a newborn infant and known by her parents.

The third case cited in conflict with the instant decision is Salvaggio v. Austin, 336 So.2d 1282 (Fla. 2d DCA 1976). There, the appellate court found that for a given period the plaintiff had no knowledge of an injury to her breast and, therefore, could have no knowledge of negligence by the doctor she sued. The court also found that there was a factual question whether pain should have put the plaintiff on notice of the injury. Accordingly, the summary final judgment for the defendant-doctor was reversed.

Here, facts set forth in the majority decision establish without question that the parents of Megan Moore knew that she had sustained an injury when her father was on notice that for a period in excess of 30 minutes the infant was "blue" and that she had her chest cut open and a tube inserted to assist her in breathing. The facts in the instant case and those of the Salvaggio decision are so disparate as to come nowhere close to creating an express and direct conflict of decisions under the

rule set down in Ansin v. Thurston, supra.

In the cases cited by petitioners, the district courts of appeal examined the particular facts there involved and determined that under those particular facts the statute of limitations either had or had not commenced at a given time. The district court did the same here. That does not establish that these decisions are, in a constitutional sense, in express and direct conflict. No new rule of law is announced.

While any case involving injury to a young child is compelling and appeals to the humane instinct of the reviewer, still, the admonition of this Court in Nielsen v. City of Sarasota, 117 So.2d 731, 734-735 (Fla. 1960) cannot be ignored:

> "When our jurisdiction is invoked pursuant to this provision of the Constitution we are not permitted the judicial luxury of upsetting a decision of a Court of Appeal merely because we might personally disagree with the so-called 'justice of the case' as announced by the Court below. In order to assert our power to set aside the decision of a Court of Appeal on the conflict theory we must find in that decision real, live and vital conflict within the limits above announced."

Whether or not the extent of brain damage suffered by Megan Moore could have been scientifically diagnosed at the time of her birth is of no consequence whatsoever. Neither is the fact that there was a 4-4 tie vote on rehearing en banc which signifies only that a majority of the judges of the Third District Court of Appeal did not feel that there was an intradistrict conflict. There is no need for this Court to accept jurisdiction in order to clarify any existing confusion or to maintain uniformity of decisions.

POINT II.

THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976); MacMURRAY v. BOARD OF REGENTS, 362 So.2d 969 (Fla. 1st DCA 1978); AND McCLOUD v. HALL, 180 So.2d 509 (Fla. 2d DCA 1965).

In support of its determination that the parents of Megan Moore were on notice from the time of her birth of alleged negligence or of injury sustained by her and, therefore, the trial judge was correct in granting a summary final judgment based on the statute of limitations, the District Court of Appeal cited six cases, all of which generally stand for the proposition that where one is aware of either injury or negligence the statute of limitations begins to run from that time. Three of these decisions are decisions of the Third District Court of Appeal.[3]

Petitioners argue the district court of appeal cited as controlling precedent other decisions materially at variance with the facts of the instant case, thus constituting a misapplication of law and a basis for conflict jurisdiction. McBurnett v. Playground Equipment Corp., 137 So.2d 563 (Fla. 1962); Wale v. Barnes, 278 So.2d 601 (Fla. 1973); The Court is respectfully directed to the dissent in Lubell v. Roman Spa, Inc., 362 So.2d 922 (Fla. 1978). What petitioners do is disagree with the district court as to the quantity or quality of the evidence concerning knowledge by Megan's parents. The principle that knowl-

[3] These decisions are Robinson v. Sparer, 365 So.2d 438 (Fla. 3d DCA 1978); Hill v. Virgin, 359 So.2d 918 (Fla. 3d DCA 1978); Buck v. Mouradian, 100 So.2d 70 (Fla. 3d DCA 1958).

edge is required remains intact. There is no conflict.

The key word in establishing conflict under such circumstances is that the cited case is materially distinguishable from the citing case. Every case is distinguishable in some respect. Nardone, supra, involved several surgical and diagnostic procedures on a young boy who left the hospital totally blind, comatose, and with irreversible brain damage. The instant case involves a child injured at birth with less dramatic effects immediately ascertainable. Notwithstanding, the cases are materially similar in that the legal question involved in both is whether there was notice of alleged negligence or injury so as to begin the running of the statute of limitations.

Petitioners argue that it was error for the District Court to cite Nardone ". . .simply because there was a difficult birth and the child had trouble breathing as a result of swallowing something." Brief of Petitioners, page 9. Megan's parents knew that their baby was "blue" for a period of 30 minutes; that she was not expected to live; and that her chest had to be cut open so that a breathing tube could be inserted, i.e., that she had been injured. One doctor told the father that he had done the best he could; that apparently the child would not live; and he, "the father, would have to do what he had to do". This statement unmistakably indicates that some act of negligence which occurred during the birthing process caused the injury sustained by the child.

Conflict with McCloud v. Hall supra, based on a misapplication theory is impossible to ascertain from the adjudicative por-

tion of the decision which contains no facts. Similarly, there is no conflict with Nardone which holds that the nature of the infant's condition was patent before his discharge from the hospital. In the instant case the fact that an injury had been suffered by Megan was patent at the time she was removed to the emergency care unit of Jackson Memorial Hospital. There is no conflict with MacMurray v. Board of Regents, supra, which cites Nardone v. Reynolds, supra, for the proposition that mere ignorance of easily discoverable facts which constitute a cause of action will not postpone the operation of the statute of limitations. No conflict exists.

III.

CONCLUSION

There is no "confusion" in the law of Florida which needs resolution by accepting jurisdiction in the instant case. It was and is the established law of Florida that in a medical malpractice action the statute of limitations begins to run when a plaintiff has been put on notice of either a negligent act or any injury which is a consequence of the negligent act, even though the injury is slight and does not involve all the damages later sustained. This acknowledged principle was applied to the facts of the instant case because, as the majority decision indicates the parents of the child were on notice that their child had been injured at the time of her birth as well as being told that their child was not expected to live because of negligence which had occurred at the time of birth. The petition for writ of certiorari herein should be denied.

IV.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Sams, Gerstein & Ward, 700 Concord Building, 66 West Flagler Street, Miami, Florida 33130; Daniels and Hicks, 1414 duPont Building, Miami, Florida 33131; John W. Thornton, Esquire, 720 Biscayne Building, Miami, Florida 33131; Howard E. Barwick, Esquire, 9636, N.E. 2nd Avenue, Suite C, Miami, Florida 33138; Andrew S. Connell, Esquire, 1428 Brickell Avenue, Suite 204, Miami, Florida 33131; Richard A. Sherman, Esquire, 524 South Andrews Avenue, Suite 204-E, Ft. Lauderdale, Florida 33301; and Michael J. Parenti, III, Esquire, 12th Floor Concord Building, 66 West Flagler Street, Miami, Florida 33130, this 21st day of July, 1983.

Respectfully submitted,

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