OIA 2-16-84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,805

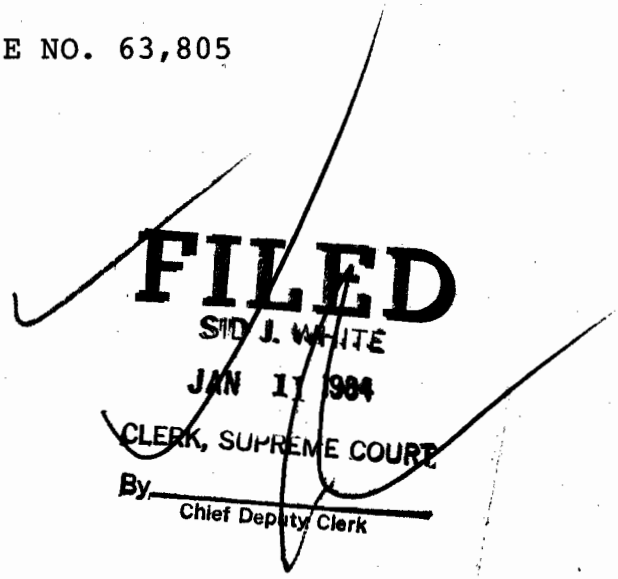
MEGAN MOORE, a minor, by and through her parents and next friends, HENRY MOORE and SUSAN MOORE, and HENRY MOORE and SUSAN MOORE, individually,

Petitioners,

vs.

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

Respondents.



BRIEF OF RESPONDENT ARTHUR SCHATZ, M.D. ON THE MERITS

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

and

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TABLE OF CITATIONS

INTRODUCTION

The depositions taken in this case will be referred to by the name of the witness, date the deposition was taken, and deposition page number. The depositions which will be used are in the Record on Appeal as follows:

Dr. Stuart Brown	- 6/27/78	R-1481-1605
Dr. Leonard Caputo	- 11/22/77	R-4821-4872
Dr. Adolfo Link	- 12/15/77	R-4984-5031
Susan Moore	- 9/20/77	R-4153-4228
Susan Moore	- 9/27/77	R-4031-4152

REPLY TO STATEMENT OF THE FACTS AND THE CASE

The dissent has an error in it. That a dissent has an error is not uncommon since by its nature the dissent is disagreeing with the two judges in the majority.

However, in the present case the Petitioner seeks to capitalize on this error by quoting certain testimony out of context in the Supreme Court to make it seem the error is true. Therefore we will quote testimony at greater length than we normally do to correct this error.

The error is that the dissent states that brain damage was not diagnosed until shortly before suit was filed. In fact the record is indisputably clear that Dr. Brown diagnosed brain damage at 11 3/4 months old, which was four years before suit was filed.

The testimony will be quoted at greater length in Point I, but the following are excerpts of Dr. Brown's testimony to the effect that he diagnosed brain damage on June 24, 1974, when the child was 11 3/4 months of age, which was four years prior to the time suit was filed (it should be noted that Dr. Brown treated the child after she left the hospital and is not a party to these proceedings):

> Q. When did you first become aware that this child had a brain malfunction in the way that you could make a diagnosis of that malfunction?
>
> A. I made that at 11-3/4 months of age when she was developmentally delayed.
>
> At that time, therefore, she had a brain malfunction.
>
> (Depo. Brown, Pg. 63)

* * * *

Q. I believe that as of your visit of June 24, 1974, that is reported in your narrative report dated June 25, 1974, as you previously stated, at that point you confirmed by examination that there was in fact brain malfunction in this child, as reflected by the delay in motor development and as reflected by the disproportion between the head size and the body size?

A. Correct.

(Depo. Brown 6/27/78, page 73)

* * * *

Q. What were the potential indications of those findings?

A. The potential indications were that the child was going to be slow developmentally from both motor and possibly from an intellectual basis

(Depo. Stuart Brown 6/27/78 - Pgs. 26-33)

Therefore, this impression given by the Petitioner that brain damage was not diagnosed until much later is in error, and in fact brain damage was conclusively diagnosed at 11-3/4 months old, four years before suit was filed.

ARGUMENT

I. THE TRIAL COURT AND THE MAJORITY HOLDING OF THE THIRD DISTRICT WERE CORRECT IN ENTERING SUMMARY JUDGMENT WHERE THE LAW IS CLEAR THAT FOR STATUTE OF LIMITATIONS PURPOSES THE PLAINTIFF IS ON NOTICE OF CONTENTS OF HOSPITAL AND MEDICAL RECORDS, AND IN THE PRESENT CASE THE RECORDS CLEARLY INDICATED INJURY BY THE PLAINTIFF'S FIRST BIRTHDAY, FOUR YEARS BEFORE SUIT WAS FILED AND THE RECORDS FURTHER SHOW THE MOTHER WAS ACTUALLY TOLD OF THIS

Discretionary jurisdiction was improvidently granted in that it was based on an inaccurate representation of the facts that brain damage was not diagnosed until shortly before suit was filed, when in fact the record is clear that it was diagnosed when the child was 11-3/4 months old, four years before suit was filed. Accordingly jurisdiction should either be discharged, or the language of the decision should be clarified and affirmed.

The decision is correct for two separate reasons: the medical records clearly reveal that brain damage was diagnosed by the Plaintiff's first birthday, four years before suit was filed and therefore the Plaintiff was on notice of those records; and because the Plaintiff was on notice at the time of birth, of negligence and of some injury resulting from that negligence.

In our second point we will discuss the fact that when a party has knowledge of negligence and of some injury resulting from that negligence the Statute of Limitations begins to run regardless of whether the full extent of the injury is known.

However, it is unnecessary to reach that point. The Plaintiff is on notice of medical records and by the first birthday the records reflected that permanent injury had been diagnosed and the mother actually was told of this.

The relevant law as to notice of medical records was summarized by the Third District in the case of Almengor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978):

> It is the established law of this state that the statute of limitatons in a medical malpractice action begins to run when the plaintiff has been put on notice of an invasion of his legal rights. This occurs when the plaintiff has notice of either (1) the negligent act giving rise to the cause of action, or (2) the existence of any injury which is the consequence of the negligent act, although the injury be slight and not involve all the damages later sustained. In this connection, the plaintiff is on notice as to the contents of relevant hospital and medical records which are available to or obtainable by the plaintiff pertaining to his treatment. Nardone v. Reynolds, 333 So.2d 25 (Fla.1976); City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954); Buck v. Mouradian 100 So.2d 70 (Fla. 3d DCA 1958); Nardone v. Reynolds, 538 F.3d 1131 (5th Cir. 1976).

(Emphasis added.)

This law as to notice of medical records was established by the Florida Supreme Court in the case of Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976). In that case, the United States Fifth Circuit Court of Appeal certified three questions to the Florida Supreme Court, one of which was the following:

> II. Is knowledge of the contents of the medical doctor, hospital, etc., records concerning the incompetent minor patient which are of a character as to be obtain-

> able by, or available to, the patient (or guardian) but the contents of which are actually not known, imputed to [the patient].

The records clearly showed the injury and as noted by the Florida Supreme Court:

> At all times, the records of Columbia were available to appellants from either Columbia or Dr. Cocco to whom a copy was sent in October, 1965, but appellants made no request for same.

The Court held that since obtainable medical records revealed the condition, the Plaintiff's were put on notice of these records and the claim was barred:

> For the aforegoing reasons, the first question is answered in the affirmative. The nature of the infant's condition was patent in 1965, before his discharge from the hospital, and was reaffirmed by Dr. Vicale in October, 1965; the records at all times were readily available Cf. City of Miami v. Brooks, supra, Cristiani v. City of Sarasota, supra, and Buck v. Mouradian, supra. The second question is answered in the affirmative. Again, we note that there was no attempt to conceal records from the plaintiffs, but rather, as conceded by the parties, the records were of such a character as to be obtainable by or available to the plaintiffs. Mere ignorance of the easily discoverable facts which constitute the cause of action will not postpone the operation of the statute of limitations as to the party plaintiffs....

The records of Dr. Stuart Brown are conclusive that the Statute of Limitations began to run at the latest on June 24, 1974, when Megan was 11-3/4 months old, and four years prior to filing suit.

It should first be noted that Dr. Stuart Brown is not a Defendant in this suit, had nothing to do with the birth and therefore there has been no allegation that his records were not

readily available to the Plaintiff. Dr. Brown is a pediatric neurologist to whom Megan was referred after the birth to see if there was "neurological abnormality secondary to perinatal insult." (Brown p.7.) He examined her on several occasions over the next several years.

Dr. Brown's records indicate that on June 24, 1974, he concluded with "reasonable medical probability" that Megan had a brain malfunction, suffered diminished brain growth and would be slow developmentally. Dr. Brown reached these conclusions during an examination of Megan and Dr. Brown's records contain his narrative report dated the following day, (June 25, 1974) in which he states this, and <u>further states that he told this to Mrs. Moore</u>.

To repeat, Dr. Brown's records of June 25, 1974, contain the finding of permanent brain injury and further state that Mrs. Moore was told of this. Even if for some reason one would think she had not been told by this neutral party, the records nonetheless contain the finding and she is on notice as to the content of this record.

At this juncture, it is relevant to review excerpts of the deposition of Dr. Stuart Brown. That deposition was taken 6/27/78 and is contained in the record at R 1481-1605. Reference will be to the deposition page number and underlining indicates emphasis added:

> Q. <u>When did you first become aware that this child had a brain malfunction in the way that you could make a diagnosis of that malfunction</u>?
>
> A. <u>I made that at 11-3/4 months of age when she was developmentally delayed.</u>

At that time, therefore, she had a brain malfunction.

(Depo. Brown, page 63)

* * * *

Q. From the date that you first examined this child, which was July 18, 1973, shortly after birth at Jackson Memorial Hospital, up until your last visit in June of 1978, is it not true that throughout this period of time there has been a suspicion of brain malfunction, or disfuncton insofar as this child is concerned?

A. Yes. There has been a suspicion.

A. I believe that as of your visit of June 24, 1974, that is reported in your narrative report dated June 25, 1974, as you previously stated, at that point you confirmed by examination that there was in fact brain malfunction in this child, as reflected by the delay in motor development and as reflected by the disproportion between the head size and the body size?

A. Correct.

Q. Further, that as of that visit you expressed this concern to the mother and discussed this concern with her?

A. Yes.

MR. PARENTI: That's all I have.

(Depo. Brown 6/27/78, pg. 73)

* * * *

Q. From your neurological examination (on June 24, 1974) did you detect any abnormalities insofar as the child was concerned?

A. Basically, the main abnormality which I dected was, again, a smallness in the head size, which was relatively smaller on the examination of the 25th of June than it had been on the preceding examination in December of '73.

She had fallen from the 25 percentile for the head size to approximately the second percentile for head size.

The remainder of her examination was by and large within the broad range of normal.

She had slight motor delay at that time, but I was more concerned about her head size than anything else.

Q. Doctor, you said in quotes, 'However, the thing that is most distressing is that her length has stayed somewhere around the 40th to 50th percentile but her head circumference has tailed off.' What did you mean by 'most distressing?'

A. Although I was initially bothered by the fact in December of 1973 that her head size was in the 25 percentile and her length and weight were in the 50 percentile, I would have maintained the same degree of distress but not a great distress if the head size and length and weight had remained in the same percentile, proportionately the same.

Instead of that, the examination of the 24th of June, 1974, the child had continued to grow both in height and weight, and was still in the 40 to 50 percentile, but the same velocity of rate of her head growth did not take place and therefore her head was growing at a slower rate than was the rest of her body.

Q. Then, the disproportion was progressive?

A. Yes, it was.

Q. That was distressing to you?

A. Yes.

Q. For what reason was it distressing?

A. It was distressing forthe same reason as stated before, that the head circumference is a fairly good indicator of the rate of brain growth and therefore since the head circumference was not increasing velocity-wise as was the length and weight of the child, I was concerned there was concomitant reduction in the rate of the

increase and size of the brain.

A. This apparent progressive disproportion head to body size was something that was significant to you as a pediatric neurologist?

A. Yes.

Q. Were you concerned at that time that the disproportion on future visits would also be progressive?

A. Was I concerned that this disproportion would continue?

Q. Yes, that it would be progressive to the extent that not only it was greater in disproportion on this visit than the previous one, but on the next it would continue in that pattern?

A. At that time, I wasn't making any specualtion as to whether that was going to be continuing phenomena. I was really concerned by the facts, as I saw them right then and there, that it was a child whose rate of overall development was not quite what I wanted, and I was concerned this being reflected in the decrease in the head circumference and the rate of growth of the brain, which was even slower, and I was concerned that this was a major indicator that there might be major brain problems.

Q. Did you at that point in time, based upon reasonable medical probability have an opinion as to whether or not this disproportion did in fact reflect a diminished brain growth in this child?

A. On reasonable medical probability I would say yes.

Q. Doctor, it goes on to say that an electroencephalogram was done and this was mildly abnormal?

A. Yes.

Q. When was this EEG done? Is this a repeat from that which was done in the hospital?

A. Yes. It was a repeat. It was a repeat done. I would assume it was done that day or the preceding day.

Q. Is that the second EEG that was performed, to your knowledge?

A. Yes.

Q. Two for two have been abnormal, now, as far as the EEG?

Q. Yes. They were abnormal in the same fashion. They are a bit slower. There was development of the EEG in June of 1974 in comparison with the EEG of the preceding year. There was maturity that was seen on the tracing but it was still a bit slow for her age.

Q. You mentioned in the letter that the child appeared to be functioning more at a 10 months rather than 11-3/4 months level. What did you mean by that?

A. I meant that for a child who was basically 11-3/4, 12 months of age, one would have expected the baby to do certain things on a developmental basis that a child was not doing, and was really functioning developmentally at a level that was more appropriate for a 10-month old child.

Q. I would assume at the time of this examination the child was 11-3/4 months old?

A. Yes.

Q. In your opinion, the child was functioning at a 10-month old level?

A. Yes.

Q. Doctor, you mentioned something about motor delay being noted by you on this visit.

A. Yes.

Q. Would you explore that a little bit more in detail with us?

A. Yes. The child, again, who was at 11-3/4 months of age, was pulling into a sitting position but apparently was not pulling up to stand.

She was crawling on her tummy but she

didn't get up on her hands and knees and wasn't creeping in that fashion.

Most children who are 12 months of age, although they might not be walking as yet, certainly are usually creeping on their hands and knees. The fact she was not was what I meant by motor delay.

Q. Let me refer you to the third paragraph of this letter where you stated, 'I have expressed to Mrs. Moore that I am concerned about the baby --'

I assume that she, of course, was present on this examination, and that you had occasion to discuss the results of the examination with her?

A. Yes.

Q. What did you mean specifically by these words, 'I have expressed to Mrs. Moore I am concerned about the baby'?

MR. WARD: I would like to point out that that is a phrase from a sentence, and in all fairness you should quote the entire sentence.

MR. PARENTI: You are more than welcome to do that on cross.

Q. (By Mr. Parenti) I am concerned about what it was that you expressed to Mrs. Moore about your concern?

A. I expressed to Mrs. Moore, actually, exactly what we have been discussing on the preceding questions.
I told her I was concerned about the baby's motor delay -- excuse me, that the baby had slight motor delay.

I discussed with her the fact that the head size was small in comparison to the child's length - I showed her the differences on the head charts and I discussed with her in general terms the potential indications of those findings.

Q. What were the potential indications of those findings?

A. The potential indications were that the child was going to slow developmentally from both motor and possibly

from an intellectual basis"

(Depo. Stuart Brown
6/27/78 - pgs. 26-33)

The relevant dates are as follows:

July 9, 1973	Birth
June 24, 1974	Dr. Brown's records reflect he diagnosed her as having brain malfunction within reasonable medical probability and told Mrs. Moore
April 25, 1978	Suit filed

As of June 24, 1974, at the very latest, the medical records reflect brain malfunction from the birth and therefore the trail court and the Third District properly held this action is barred by the Statute of Limitations of two years.

II. THE TRIAL COURT AND THE MAJORITY HOLDING OF THE THIRD DISTRICT WERE CORRECT IN ENTERING SUMMARY JUDGMENT WHERE THE TESTIMONY OF MRS. MOORE WAS CLEAR THAT DURING THE FIRST YEAR SHE WAS ON NOTICE OF THE NEGLIGENT ACT AND THAT SOME INJURY HAD ACCRUED FROM THAT ACT.

This section of the Petitioner's Brief is based on the premise that brain damage was not diagnosed until shortly before suit was filed. As shown previously, brain damage was in fact diagnosed at age 11-3/4 months, four years before suit was filed. Therefore this discussion by Petitioner is by and large not relevant to the present lawsuit.

The law is clear that the Statute of Limitations begins to run when the Plaintiff is on notice of the negligent act and that some injury accrued from that act, even though the full extent of the injury has not yet occurred. In the present case this suit is barred for two reasons: (1) the Plaintiff at the time of birth was on notice of negligence and some injury resulting from that negligence, and (2) by the first birthday, four years before suit was filed, brain damage had been diagnosed.

In regard to the rule of law concerning this rule of law as to negligence and some injury resulting therefrom, it is worthwhile to again quote the established law from the recent Almengor case from the Third District:

> It is the established law of this state that the statute of limitations in a medical malpractice action begins to run when the plaintiff has been put on notice of an invasion of his legal rights. This occurs when the plaintiff has notice of either (1)

> the negligent act giving rise to the cause of action, or (2) the existence of injury which is the consequence of the negligent act, although the injury be slight and not involve all the damages later sustained. In this connection, the plaintiff is on notice as to the contents of relevant hospital and medical records which are available to or obtainable by the plaintiff pertaining to his treatment. (Emphasis supplied.)
>
> Page 894.

Numerous other cases have held this to be the relevant rule of law. The landmark case is City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954) where the Florida Supreme Court enunciated this rule of law:

> The general rule, of course, is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date. 34 Am. Jur. 126, Sec.160, Limitation of Actions.
>
> Page 308

The Third District restated this rule of law in the recent case of Carter v. Cross, 373 So.2d 81 (Fla. 3d DCA 1979):

> The law is well-settled that '[g]enerally, in actions for personal injuries resulting from the wrongful act of negligence of another, the cause of action accrues and the statute [of limitations] begins to run from the time the injury was first inflicted and not from the time the full extent of the damages sustained has been ascertained.' Seaboard Air Line Railroad Co. v. Ford, 92 So.2d 160, 164 (Fla. 1957)..."
>
> Pages 82-83

Similarly in the case of Christiani v. City of Sarasota, 66 So.2d 878 (Fla. 1953) the Florida Supreme Court said:

> The general rule seems to be that actions for personal injury based on the wrongful or negligent act of another accrue at the time of the injury and that the statute of limitations begins to run at the same time. The running of the statute is not postponed even though the injury may not materialize or be discovered till later....
>
> Page 879.

In accord, see Buck v. Mouradian, 100 So.2d 70 (Fla. 3d DCA 1958).

It should be noted that this rule of law is even stronger in regard to medical malpractice suits in that the period begins to run when the Plaintiff through due diligence should have been put on notice that injury should be made. A case of the Third District to this effect is Hill v. Virgin, 359 So.2d 918 (Fla.3d DCA 1978). In that case, the plaintiff was the patient of the defendant in connection with an infection in his leg and in January of 1973 his leg was amputated. He filed suit in February of 1975 and argued he did not know the amputation was the result of malpractice until more than a month after it occurred but received an adverse Summary Judgment. The Third District affirmed saying that as of the date of the amputation he was on notice he should make diligent inquiry:

> [H]e was provided with information which put him on notice to make reasonable and diligent inquiry into the cause of his problem. His failure to do so is unjustified in terms of the tolling of the statute of limitations. In January, 1973, plaintiff's leg was amputated. We find

> that the amputation, coupled with plaintiff's prior knowledge and suspicions, had to commence the running of the statute of limitations no later than January, 1973, and the two year prior would have expired in January, 1975, as determined by the trial court. Therefore, summary judgment was correctly entered.

This case is on point with the present case in that the plaintiff's description of what he was told in the hospital after the birth reads like a nightmare. Upon birth, the baby was rushed to the High-Risk Center at Jackson Hospital with a needle in its chest; one doctor (Rosenthal) told them the baby might not live; another doctor (Caputo) told them the baby might not see; other doctors told them the baby might have future medical difficulties; the husband was crying and praying; they were told after discharge; (a) to watch the child for twitching, trance-like staring or catatonia, (b) to take the child back for check ups at the At-Risk Center of the Mailman Clinic, and (c) to take the child to a pediatric neurologist for examination, who ran EEG's among other tests and by the first birthday had concluded definitely there was permanent brain injury.

Their post-birth description of the experience in the hospital is conclusive that they were frighteningly on notice of an invasion of their rights. At the very least the parents were "on notice to make reasonable and diligent inquiry into the cause of the problem." Hill v. Virgin, supra.

With this law in mind it is important to look at the exact testimony of the Plaintiff, Susan Moore:

Q. And I believe you said that you remember waking up in the recovery room?

A. Yes.

Q. And at that time you heard some discussion about whether the baby had lived or not?

A. Yes.

Q. And I assume that upon hearing that you were, naturally, upset and concerned about it?

A. Yes.

Q. And at that time you were still coming out of sedation?

A. Yes.

Q. Al right. I believe the next time you have any recollection was actually in your hospital room?

A. Yes.

Q. And that was the same day, July 9th 1977?

A. Right, yes.

Q. And at that time your husband visited you?

A. Yes.

Q. And at that time your husband was very upset and crying?

A. Yes.

(Depo. Susan Moore
9/28/77 Pgs. 29-30)

* * * *

Q. In any case, he advised you a problem had occurred and for that reason the child was transferred to Jackson?

A. Yes.

Q. At that time did he mention the word fetal distress?

A. I don't remember.

Q. In any event, he indicated there had been a problem?

A. Yes.

Q. And I assume, again, your recollection as to that was one of upset and concern over the child's condition?

A. Yes.

(Depo. Susan Moore 9/28/77 Page 31)

* * * *

A. Someone there -- I don't remember who it was -- said something to the effect like if she were twitching, or something else, that this would be symbolic of a problem.

Q. In other words, if you observed any twitching, this would be an indication to you there was a problem?

A. Or trance-like staring, or something to that effect.

Q. What was that word?

A. I think it was trance-like staring, using my own words. He may have put it in medical terms, or whatever. I don't know.

Q. Is it my understanding you were alerted to look out for these symptoms?

A. Right.

(Depo. Susan Moore 9/28/77 Pages 13-14)

* * * *

Q. Did any doctor during the first year of your daughter's life ever say to you, 'There may be some problems in the future related to the delivery problem'?

A. Did any doctor say there would be?

Q. That there was a possibility in the future that there may be some problems?

A. Yes.

Q. What doctor was is that so advised you during the first year of your daughter's life?

A. I don't remember the doctor.

Q. All right. But in any case you were aware during the first year of your daughter's life that there may be future problems related to the problem which developed at or about the time of the delivery?

A. There was a doctor--I don't remember his name--who said that "If your child has little states of something like trance-like or catatonia, or whatever you like to call it, you will see it right away,'

Q. So at least you had knowledge during the first year there may be future problems which were caused by the problem that occurred at delivery?

A. Yes.

Q. That possibility existed?

A. Yes.

Q. And you were so advised by at least one physician about that?

A. Yes.

Q. And that was during the first year of your daughter's life?

A. Yes.

(Depo. Susan Moore
9/28/77 Page 41)

* * * *

Q. Is that clear? Well, let me back up a little bit.

You have acknowledged that in your own mind you were aware of a possibility in the future of some problems developing as a result of the problem that occurred at the time of the delivery?

A. Right.

(Depo. Susan Moore
9/28/77 Page 43)

Q. At the time of your discharge from North Shore Hospital were you in any way discontent with Drs. Morris or Gallagher?

A. I felt they mismanaged me.

Q. That was the predominant reason why you didn't continue with them thereafter?

A. Yes.

Q. What was it that led you to believe they mismanaged you after your discharge?

A. I just thought they mismanaged my labor and the baby's delivery.

Q. By the time of discharge you felt they did something or didn't do something that was in some way improper as far as the labor and delivery period of your child?

A. Yes.

(Depo. Susan Moore
9/28/77 Page 103)

Also significant is the testimony of Dr. Leonard Caputo and Dr. Adolfo Link. They are doctors who cared for the Plaintiff after her transfer to Jackson Memorial and are not parties to this suit. Dr. Caputo testified as follows:

Q. Where the parents reassured of this? Did you talk to the parents?

A. Yes, I talked wtih the parents, and I remember them quite well.

Q. You kept them apprised of the baby's condition?

A. Yes. Yes. Yes, definitely.

Q. You told them basically, what you have just told us?

MR. WINITZ: Objection.

MR. WOMACK: Objection. A leading question.

Q. What did you tell them, Doctor; what

kind of information did you---

MR. WINITZ: I think when is important.

A. Well, I think my own-- I would have interpreted the information and I wouldn't have withheld anything from the parents. I would have softened it or put it in terms that they might understand more easily. I remember problems of talking to the mother about--and to the father even, about the blinking responses and what they possibly meant. I remember talking to them and tellling them the possibility that the baby might not see.

(Depo. Caputo
11/22/77 Pgs. 27-28)

* * * *

Q. During this hospitalization you were aware of certain neurological problems or suspicions of---

A. Suspicions of neurological problems, right.

Q. Were the suspicions discussed between you and Mr. and Mrs. Moore?

A. Yes, I am sure they were.

Q. So that they were aware that there might be possible neurological problems with this child?

A. Or probable.

(Depo. Caputo
11/22/77 - Page 41)

Similarly, Dr. Link testified as follows:

Not every baby that is either born in Jackson Memorial Hospital or is cared for at Jackson Memorial Hospital is followed up later at the At-Risk Clinic of the Mailman Center, is that correct?

A. That is correct.

Q. Why was this particular baby, Megan Moore, why were the parents told to take the baby to the Mailman Center for follow--

up care at the At-Risk Clinic?

A. Because he was admitted to the high-risk unit.

Q. As a physician, what does that mean?

A. That the baby was or had a serious disease at that time.

Q. And has a possibility, in the future, of continuing medical difficulties?

A. It is possible, yes, sir.

Q. That is why the doctors want it followed up and to be seen?

A. Yes, sir.

Q. Is this the sort of thing that is discussed with the parents?

A. Yes, sir.

Q. At the Mailman Center, is there more than one clinic?

A. Yes, sir.

Q. The particular clinic, where this baby was seen, was the At-Risk Clinic?

A. Yes, sir.

Q. Are there other clinics where babies, who are not at risk seen?

A. Yes.

Q. For the baby to be seen in this clinic is an indication to the physicians, and to the child's family or parents that there is a risk, a medical risk involved in this particular child?

MR. WARD: I object to the form of the question. It is not only leading, but it is grossly unfair in the way that it is phrased, because it takes into mind or tries to take in or ask this doctor to comment on the state of minds of persons not present, namely the parents. That's the basis of my objection.

Q. Do you remember my question, Doctor, because the young lady will read it back to you, if you would like to have it read back?

A. I remember.

Q. What is your answer?

A. I think, yes.

(Depo. Link
12/15/77 Pgs. 32-33)

In summary, the testimony is replete that the Plaintiff was on actual notice of invasion to their legal rights and some injury resulting therefrom.

At the very least they were certainly on notice to make "reasonable and diligent inquiry into the cause of the problem." The ruling by the trial court and by the majority of the Third District was correct.

CONCLUSION

Discretionary jurisdiction was improvidently granted based on an inaccurate representation as to the facts and jurisdiction should be discharged.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of January 1984 to all counsel on the attached list.

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