O/A 2-16-84

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 ON THE MERITS OF RESPONDENTS, CHESTER MORRIS, M.D., WILLIAM J. BREWSTER, M.D., and NORTH SHORE HOSPITAL

LAW OFFICES OF JOE N. UNGER, P.A.
606 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 374-5500

BY: JOE N. UNGER
Counsel for Respondents,
Chester Morris, M.D.
William J. Brewster, M.D.
and North Shore Hospital

TOPICAL INDEX TO BRIEF

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd.)

OTHER AUTHORITIES

Florida Statutes

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 ON THE MERITS OF RESPONDENTS, CHESTER MORRIS, M.D., WILLIAM J. BREWSTER, M.D. and NORTH SHORE HOSPITAL

I.

STATEMENT OF THE CASE AND FACTS

Petitioners, plaintiffs in the trial court, sought damages against respondents in a medical malpractice action involving the birth of Megan Moore. Summary Final Judgment was entered for defendants based on the determination that the action was barred by the applicable statute of limitations. An appeal was taken to the District Court of Appeal, Third District, which affirmed the trial court. Moore, etc., et al. v. Morris, etc. et al., 429 So.2d 1209 (Fla. 3d DCA 1983). (R. 5217-5219.)[1]

The procedural posture of this case requires a detailed examination of the deposition testimony. The record is in excess of 5,000 pages, much of it depositions. While the Statement of Facts set forth in Petitioners' Brief is not necessarily inaccurate, it is incomplete in several material particulars. In the

[1] The abbreviation "R" stands for record on appeal. Depositions will be referred to by name, date and page number.

interest of presenting a complete picture to this Court for resolution of the merits, the following factual statement is presented which adds to and in some cases duplicates that presented by the petitioners, but necessary so that the facts can be stated in a continuous narrative and not out of context.

Prior to the delivery of Megan, Susan Moore was not aware of any problems with either her labor or delivery. She first learned that she had a caesarean section when, on July 9, 1973, she heard the nurse in the recovery room discussing "the complications" with someone. (Susan Moore, 9/20/77, pp. 16, 17.) She again heard her child had had some distress during delivery or prior to delivery when her husband told her. He was crying and said the child was in a different hospital. He told her that the baby was in "fetal distress." (Susan Moore, 9/20/77, pp. 23, 26.)

Mrs. Moore understood her child was delivered by caesarean section because of fetal distress, knew fetal distress had to do with irregular heartbeat, and understood that fetal distress involves a child close to dying. (Susan Moore, 9/20/77, pp. 31, 32, 36.) She was also informed that her baby had fluid in her lungs which was removed on the way to the neonatal emergency care unit at Jackson Memorial Hospital. (Susan Moore, 9/20/77, p. 43.) Her husband told her while she was still at North Shore Hospital that Dr. Rosenthal, the pediatrician, had told him he was not sure if the baby would live. (Susan Moore, 9/20/77, p. 52.)

Thus, on July 9, 1973, the date of Megan's delivery, Mrs.

Moore knew she had had an unexpected caesarean section; she knew it was done because a problem had developed; and she realized the problem with her child bore some relation to the caesarean section. (Susan Moore, 9/28/77, p. 32.)

It was Susan Moore's understanding on Megan's discharge from Jackson Memorial Hospital that she had not suffered any permanent injury as a result of anything that had occurred at North Shore Hospital. When Megan was discharged from Jackson, Susan Moore was alerted to look for ". . .twitching, or something else, that this would be symbolic of a problem. . . .Or trance-like staring, or something to that effect." (Susan Moore, 9/28/77, p. 13.)

Susan Moore knew that her child was taken immediately after birth to the neonatal intensive care unit at Jackson Memorial Hospital because of a problem that had developed at the time of the delivery. She acknowledged being told by doctors at the Mailman Center, to which she took her child for periodic visits, that there might be some problems in the future related to the delivery problem. (Susan Moore, 9/28/77, pp. 37, 39, 40, 41.)

When Megan was one year old, in July, 1974, she had what her mother described as something that appeared to be a seizure. (Susan Moore, 9/20/77, p. 56.) She was taken to the hospital and diagnosed as being in a postconvulsion state. She was informed that it "was associated with the fever." (Susan Moore, 9/20/77, pp. 56-58.)

In July, 1975, when Megan was two years old, she had another seizure and was again taken to the hospital. (Susan

Moore, 9/20/77, p. 59.) She had a third seizure in March, 1977. During the second and third seizures, Mrs. Moore observed the child twitching and jerking. (Susan Moore, 7/28/78, pp. 90, 92, 93.) Sometime around February 26, 1975, Susan requested a neurological evaluation because she had been noting that Megan was having "episodes in which the hand would become fisted and then the arms flexed and the child would appear to shiver for a second." (Susan Moore, 9/28/77, p. 100.) In response to questions concerning this episode, Mrs. Moore stated that the neurologist told her "it was perfectly normal". (Susan Moore, 9/28/77, p. 100.)

At the time of her discharge from North Shore Hospital in July, 1973, Mrs. Moore felt that her obstetricians, Drs. Morris and Gallagher had "mismanaged" her. She thought that they had mismanaged her labor and the baby's delivery and she felt that they had done something or had not done something that was in some way improper as far as the labor and delivery period of her child. (Susan Moore, 9/28/77, p. 103.) She felt that Dr. Morris had specifically "mismanaged" her in view of the complications. (Susan Moore, 9/28/77, p. 105.)

She realized that there was a problem at the time of the delivery but felt that the "problem" had resolved itself. (Susan Moore, 9/28/77, pp. 108, 109.) She later explained that when she said there was no problem until 1976 or 1977 when she was definitely told that her child had <u>permanent</u> brain damage, she had meant that she did not consider the problems of delivery <u>permanent</u> problems. (Susan Moore, 9/28/77, pp. 110, 113.)

Susan Moore had no inclination to sue for that "problem" until many months later when she was advised there was permanent injury. She felt that she had to investigate what went on when she found out that her daughter had permanent damage. Prior to that time she was not inclined to investigate because apparently the problem at delivery had not caused any permanent damage. (Susan Moore, 9/28/77, p. 114.)

Henry Moore, Megan's father, stated that after he took his wife to the hospital on July 8 for a normal delivery he was called on July 9 by Dr. Morris to tell him that there was an emergency. He gave his permission for a caesarean section which was performed before he got to the hospital. (Henry Moore, 10/7/77, pp. 8, 9.) When he first saw his baby in the nursery, Dr. Rosenthal, the pediatrician, was administering oxygen. (Henry Moore, 10/7/77, p. 11.) Dr. Rosenthal came out of the nursery and told Mr. Moore that he didn't think the baby was going to make it. (Henry Moore, 10/7/77, p. 21.) As Mr. Moore described, it was a very traumatic time. He went downstairs to the men's room in the hospital, said a prayer, started crying and then proceeded to Jackson Memorial Hospital. (Henry Moore, 10/7/77, pp. 23, 29.)

On the night Megan was born, it was obvious to Mr. Moore that his baby was in bad shape. Dr. Rosenthal had told him that she might not live and he didn't expect her to live. She was taken to the intensive care unit for newborn children at Jackson Memorial Hospital because they were better equipped to handle this kind of situation than North Shore Hospital. (Henry Moore,

10/7/77, p. 62.) It was his understanding that his child was being hospitalized at Jackson in an effort to remedy whatever problem had occurred at the time of the delivery. (Henry Moore, 10/7/77, p. 62.)

On the first day after Megan's birth, Mr. Moore got good reports from whomever he talked to about the child at the Jackson Memorial intensive care unit. He didn't feel that in the short period of time what had occurred at birth was corrected. He was thankful that his daughter was alive. (Henry Moore, 10/7/77, p. 36.)

According to Mr. Moore, his first knowledge that Megan was not "progressing as a normal child should progress" was when they had her third-year checkup (in 1976) at the Mailman Center and was told that her progress was below average. (Henry Moore, 10/7/77, p. 43.)

As to the follow-up care provided by the Mailman Center for several years following Megan's discharge from Jackson Memorial Hospital, Mr. Moore thought it was prudent to pursue any follow-up that could help his child. (Henry Moore, 10/7/77, p. 72.) When, after three years, tests showed that Megan was having difficulty with comprehension, speech, and learning, Mr. and Mrs. Moore became "alarmed".

As to whether there was the slightest question in his mind about problems with his child and their relationship to the delivery period, Mr. Moore stated that other than the convulsions which he associated with high fever, there were none. (Henry Moore, 10/7/77, p. 81.)

Dr. Adolfo Link accompanied Megan in the van to the Jackson Memorial Hospital neonatal intensive care unit on the night of her birth. The baby was in serious condition at that point, cyanotic, and having trouble breathing. (Adolfo Link, 12/15/77, p. 8.) Dr. Link also worked at the "At-Risk Clinic" at Mailman Center. (Adolfo Link, 12/15/77, p. 31.) Mr. and Mrs. Moore were told to take the baby to the Mailman Center for follow-up care because the baby had "a serious disease" at the time of birth and there was a possibility in the future of continuing medical difficulties. This was discussed with the parents. (Adolfo Link, 12/15/77, p. 32.) For the baby to be seen at the clinic, there was an indication to the physicians and to the parents that a medical risk was involved with the child. (Adolfo Link, 12/15/77, p. 33.)

Dr. Leonard Caputo, intern in pediatrics at Jackson Memorial Hospital at the time of Megan's birth, remembers that upon admission Megan had a collapsed lung that was hindering her respiratory efforts. It was necessary to insert a needle into her chest wall to remove the air inside the chest. (Leonard Caputo, 11/22/77, pp. 4, 9.)

On July 14, 1973, five days after Megan's birth, Dr. Caputo performed a neurological examination on the child. While most of the acute problems that the baby had encountered at birth were overcome, the child still had a depressed blink reflex to light which suggested further consultation with an ophthalmologist. There was a mildly abnormal electorencephalogram. (Leonard Caputo, 11/22/77, pp. 13, 19, 20.)

One of the aspects of Megan's final diagnosis at the time of discharge from Jackson Memorial Hospital was that she had a questionably decreased eye function. (Leonard Caputo, 11/22/77, p. 25.) Dr. Caputo remembers talking to Mr. and Mrs. Moore about the blinking response and what it possibly meant. He remembered telling them that possibly the baby might not see. (Leonard Caputo, 11/22/77, pp. 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.
>
> Q: Or probable, is that correct?
>
> A: Probable more than possible. We would have told them at the time that we think the baby is this or that the baby is that. I was not projecting into the future. I don't think---
>
> (Leonard Caputo, 11/22/77, pp. 41-42, emphasis supplied.)

Dr. Stuart B. Brown, pediatric neurologist, carried out neurological evaluations on Megan from December, 1973 through June of 1978. Written records of all neurological evaluations were retained. (Stuart Brown, 6/27/78, pp. 3, 4.) He first saw her on July 18, 1973, nine days after her birth. The pediatric

neurology service which he was directing at that time had been asked to see the child in consultation because of a "neurological abnormality secondary to perinatal insult." (Stuart Brown, 6/27/78, p. 7.) Perinatal insult is based on trauma which the baby receives before, during, or at the time of birth. The history given to Dr. Brown by his resident assistant stated that at nine days after her birth, Megan ". . .had improved, but that indeed the child by history had sustained that type of [perinatal] insult." (Stuart Brown, 6/27/78, pp. 7, 8.)

The purpose of the consultation was to evaluate whether or not there was neurological damage secondary to this perinatal insult. Initial examination suggested "eye insult", while otherwise the infant looked good. (Stuart Brown, 6/27/78, p. 9.) While this is a "nonspecific response", it is the kind that you might see in a neurologically depressed or malfunctioning infant. (Stuart Brown, 6/27/78, p. 10.) This is suggestive of altered nervous system function. (Stuart Brown, 6/27/78, p. 11.) The electroencephalogram done on July 18, 1973 was mildly abnormal. This finding would be consistent with perinatal insult. (Stuart Brown, 6/27/78, p. 13.)

Dr. Brown saw Megan again in his office at the medical school on December 3, 1973, five months after her birth. (Stuart Brown, 6/27/78, p. 14.) At that time, Megan was being seen by the "At-Risk Clinic" which follows up on infants where there is evidence or suspicion of abnormality arising during pregnancy or at the time of delivery. (Stuart Brown, 6/27/78, p. 15.) Medical and neurological follow-up is necessary because it is

felt that such children are more likely to have a potential problem for abnormal development. (Stuart Brown, 6/27/78, p. 16.)

At this examination, Dr. Brown did not find any abnormalities other than a "relative smallness to the head", suggesting that it might have long-term significance. (Stuart Brown, 6/27/78, p. 19.)[2] The fact that Megan's head was relatively small raised a question in Dr. Brown's mind as to whether there was a delay in brain growth since the head circumference only grows as rapidly as the brain grows. (Stuart Brown, 6/27/78, p. 20.)

Dr. Brown stated that the advice given Mrs. Moore upon Megan's discharge from Jackson that she should look for any signs of trance-like staring or twitching would be appropriate for a child who had had perinatal insult inasmuch as seizures can be seen following such an insult. Parents are admonished to look out for that so the physician could be advised and treat the child. (Stuart Brown, 6/27/78, p. 24.)

On June 24, 1974, Dr. Brown did another neurological examination on Megan Moore. Mrs. Moore was present. He again observed an abnormality in the smallness of the head. (Stuart Brown, 6/27/78, p. 25, 26.) This disproportion in head size was seemingly progressive and was "most distressing" to Dr. Brown. (Stuart Brown, 6/27/78, pp. 27-28.) At this point in time, Dr. Brown was of the opinion that based upon reasonable medical

---

[2] Both Mr. and Mrs. Moore acknowledge having been told about the smallness of their child's head.

probability this disproportion reflected a diminished brain growth in the child. He was concerned that this was ". . .a major indicator that there might be major brain problems. (Stuart Brown, 6/27/78, p. 29.) Another electroencephalogram was also mildly abnormal. (Stuart Brown, 6/27/78, p. 29.) These findings were reflected in the medical report prepared the day after the examination.

When Megan was approximately a year old, Dr. Brown expressed concern about the baby to Mrs. Moore. (Stuart Brown, 6/27/78, pp. 31-32.) He told her that he was concerned the baby had a slight "motor delay" (Stuart Brown, 6/27/78, p. 32), and that indications were that she was going to be slow developmentally in both motor and intellectual function. (Stuart Brown, 6/27/78, p. 33.)

On February 18, 1975, Mrs. Moore called Dr. Brown's office to tell him that in the preceding two months she had seen the baby shivering intermittently. (Stuart Brown, 6/27/78, p. 35.) This raised a question in Dr. Brown's mind as to whether the shivering "represented seizure". (Stuart Brown, 6/27/78, p. 37.) Dr. Brown assumed that since he is always very candid with parents about his concerns, Mrs. Moore was made aware of these concerns. The two seizures which Megan suffered on approximately her first and second birthdays and the abnormal electroencephalograms were consistent with a convulsive disorder which was triggered by a fever. (Stuart Brown, 6/27/78, p. 49.)

Dr. Brown stated that as he saw the child on each examination he had concerns about brain damage or brain malfunction

based upon motor delay or based upon what he felt was inadequate growth of the head and the onset of the seizures. (Stuart Brown, 6/27/78, p. 60.) He first became aware that Megan had a brain malfunction when she was eleven and three-quarter months of age (1974) because she was developmentally delayed. (Stuart Brown, 6/27/78, p. 63.) Findings of examinations were summarized for the mother after each examination was concluded. (Stuart Brown, 6/27/78, p. 5.)

As far as relating to Mrs. Moore that there was a permanent injury to the child from the neonatal insult, Dr. Brown stated that he didn't think he'd ever sat down with he and used those terms. He did state that he was sure he related the motor delay and his concern about the difference in head circumference. "I had suggested that there might be some relationship with perinatal insult. I can't be specific about it because my recollections don't allow me to do so." (Stuart Brown, 6/27/78, pp. 64-65.) Dr. Brown did relate his examination findings, the E.E.G. abnormalities, and her seizure problems to the insult received at her birth. (Stuart Brown, 6/27/78, pp. 68-69.)

Dr. Brown concluded his deposition with the following significant statements concerning Megan's problems and the knowledge her parents would have had of these problems:

> "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.

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

A: Yes." (Stuart Brown, 6/27/78, p. 73.)

On the facts, the trial judge determined that the two-year statute of limitations applicable to medical malpractice litigation barred the suit which was commenced by the complaint filed on April 25, 1978, four years and nine months after Megan's birth.

The District Court of Appeal affirmed the determination of the trial court that the action was barred by the two-year statute of limitations since Megan's parents were on notice of negligent conduct or injury from the time of her birth. One judge dissented based on his view that neither the parents nor the attending physicians knew that Megan had suffered permanent brain damage until it was scientifically determined shortly before suit was filed.

II.

POINT INVOLVED

Respondents respectfully submit that the point involved in these proceedings is more correctly stated as follows:

> WHETHER THE RECORD CONCLUSIVELY DEMONSTRATES THAT THE TRIAL JUDGE CORRECTLY DETERMINED THE PARENTS OF MEGAN MOORE KNEW OR SHOULD HAVE KNOWN OF ALLEGED NEGLIGENT ACTS OR INJURY TO THEIR CHILD MORE THAN TWO YEARS PRIOR TO THE FILING OF ANY PROCEEDINGS SO THAT THE ACTION WAS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Respondents submit that this should be answered in the

affirmative.

III.

ARGUMENT

THE RECORD CONCLUSIVELY DEMONSTRATES THAT THE TRIAL JUDGE CORRECTLY DETERMINED THE PARENTS OF MEGAN MOORE KNEW OR SHOULD HAVE KNOWN OF ALLEGED NEGLIGENT ACTS OR INJURY TO THEIR CHILD MORE THAN TWO YEARS PRIOR TO THE FILING OF ANY PROCEEDINGS SO THAT THE ACTION WAS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Upholding a summary judgment on appeal is, at best, a most difficult task. Almost 20 years ago, this Court discussed this problem in the landmark decision of Holl v. Talcott, 191 So.2d 40, 46 (Fla. 1966):

> "Some may take what we have said here to mean that it will be virtually impossible for the defendant ever to obtain a summary judgment in a malpractice suit. We will not speculate as to how this opinion may be interpreted. We do say that it is not intended to outlaw summary judgment proceedings in such cases. There undoubtedly be cases in which the issues are so clear, the proof of non-negligence so obvious, or the causes of injury to the patient so clearly shown not to be the fault of the practitioner that no trial is required. In such cases summary judgment ought to be granted."

This is such a case. The proof presented to the trial judge was clear that from the moment of Megan's birth (1) her parents were asserting that the defendants were negligent; (2) they knew Megan had been injured at birth; and (3) they knew or should have known during her first year of life that she had suffered a brain disfunction. The applicable two-year statute of limitations expired long before suit was finally brought.

What the Moores did not know, according to the statements

contained in their depositions, was that Megan had suffered permanent brain damage until shortly before suit was filed. As the argument below establishes, this knowledge is not determinative of the issue before the trial judge.

Little benefit is to be gained by reciting time-worn standards for properly granting summary final judgment. One statement of this Court does bear repeating because it directly controls the merits of this litigation. "All doubts regarding the existence of an issue are resolved against the movant, and the evidence presented at the hearing plus favorable inferences reasonably justified thereby are liberally construed in favor of the opponent." Harvey Building, Inc. v. Haley, 175 So.2d 780, 782 (Fla. 1965), emphasis supplied.

In accordance with this standard, petitioners are not entitled to all favorable inferences arising from the evidence. Petitioners are entitled to all favorable inferences reasonably justified by the evidence presented.

For Mr. and Mrs. Moore to maintain throughout their deposition testimony that they thought their infant child was perfectly normal during the first three years of her life violates this standard.

What is crucially significant is that by Mrs. Moore's own statement, she knew that she had been "mismanaged" and that this mismanagement had to do with her child's injuries. This statement was made while she was still in the hospital and alone is a sufficient basis for a determination that the statute of limitations ran two years after Megan's birth on July 9, 1973. Even if

this were not the case, both Dr. Brown's testimony and his written records reflect that he diagnosed Megan as having a brain malfunction within reasonable medical probability as early as June 24, 1974. Suit was not brought until April, 1978.

From July 9, 1973, to the present date, the statute of limitations governing medical malpractice actions has changed three times. Section 95.11(6), Florida Statutes (1973), stated that a cause of action in medical malpractice cases was not deemed to have accrued until the plaintiff discovers or through reasonable care should have discovered the injury. Effective January 1, 1975, Section 95.11(4)(a), Florida Statutes (1974 Supp.) provided that the period of limitations would run from the time the cause of action was discovered or should have been discovered with exercise of due diligence. Effective May 20, 1975, Section 95.11(4)(b), Florida Statutes (1975) provided that an action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred all within two years from the time incident discovered or should have been discovered with the exercise of due diligence.

It matters not which of these three statutes applies here. Under any of them, the Moores' claim for the alleged negligent acts which caused injury to their daughter was time barred long before suit was actually filed in 1978.

At the outset of their argument, petitioners state the general rule of law set forth in Nardone v. Reynolds, 333 So.2d 25, 32 (Fla. 1976):

> "Previously, this Court has held that the statute of limitations in a malpractice suit commences either when the plaintiff has notice of the negligent act giving rise to the cause of action or when the plaintiff has notice of the physical injury which is the consequence of the negligent act."

Thereafter, petitioners discuss ten decisions of various district courts of appeal ". . .which have applied this principle. . . ." (Brief of Petitioners', p. 17.)

Not included in petitioners' discussion are the two earlier decisions of this Court which, along with Nardone, establish that the determinations of the trial court and the District Court of Appeal in the instant case are correct.

In Christiani v. City of Sarasota, 65 So.2d 878 (Fla. 1953), a city employee backed a city truck negligently so as to cause injury to the minor plaintiff. This occurred on November 8, 1948. These injuries resulted in blindness of one eye which was not discovered for sixteen months. The question involved was whether the action was barred by a 12-month statute of limitations ". . .from the time of the injury or damages." It was argued by the plaintiff that at the time of the injury its full import, the blindness, did not materialize and was not known for 18 months or more, at which time the action was brought. In determining that the action was barred by the statute of limitations, this Court makes the following statement which is dispositive of the issue in these proceedings:

> "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." Christiani v. City of Sarasota, supra at page 879.

Shortly thereafter, this Court decided City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954), a medical malpractice action later cited by this Court in Nardone. At issue was the question of the statute of limitations where a patient had received X-ray treatment in 1944. The injury developed and became known in 1949 while there was nothing to put the plaintiff on notice of any "probable or even possible injury" before that time. City of Miami v. Brooks, supra at page 308.

The following statement in the Brooks case is also dispositive of the issue presently before the Court:

> "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." City of Miami v. Brooks, supra at page 308.[3]

The decision in the Brooks case also points up another basis for ruling in respondent's favor. The Court notes that there is a distinction between notice of a negligent act and notice of its consequences.

---

[3] As recently as July, 1983, this Court had occasion to cite the Brooks case for the general proposition that a statute of limitations begins to run where there has been notice of an invasion of legal rights or a person has been put on notice of his right to a cause of action. Kelley v. School Board of Seminole County, 435 So.2d 804 (Fla. 1983).

The Brooks decision carefully distinguishes between notice of the negligent act and notice of its consequences, citing Christiani in which there was no notice of the consequences of the act until 18 months later. Nevertheless, there was notice of the act at the time of the incident and, consequently, of the cause of action so that the statute began to run even though notice of consequences did not materialize until later. Thus, the statute of limitations attaches when there has been notice of the invasion of a legal right of the plaintiff or the plaintiff has been put on notice of his right to a cause of action.

In the instant case, all three statutes of limitation which might apply bar this suit because the Moores discovered or should have discovered that Megan had sustained an injury at birth even though they did not know the extent of injury or whether it was permanent until sometime later. Further, Mrs. Moore was asserting the negligence of her obstetricians before she left the hospital after Megan's birth. All of this occurred more than two years before the the complaint was filed or medical mediation instituted.

Whether the statute ran from the time that the injury was or should have been discovered, or, from the time the cause of action was or should have been discovered or from the time the incident giving rise to the action was or should have been discovered, the statute of limitations expired at least a year and a half before this action was instituted.

Many years after the Brooks and Christiani decisions, the Third District Court of Appeal again reiterated the prevailing

rule of law concerning knowledge of injury but not knowledge of its extent as it bears upon running of the statute of limitations:

> "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." Almengor v. Dade County, 359 So.2d 892, 894 (Fla. 3d DCA 1978). (Emphasis supplied.)

Neither conjecture, nor inference, nor supposition is necessary to establish as a matter of law that on July 9, 1973, Mr. and Mrs. Moore had actual notice of the alleged negligent act giving rise to a cause of action and actual notice of the existence of an injury to their child, even though the injury then suffered by their child might have been "slight and not involve all the damages later sustained." Almengor v. Dade County, supra. Notice of both factors causing the statute of limitations to commence is found in the deposition testimony of Susan and Henry Moore.

Susan Moore stated that at the time of her discharge from North Shore Hospital she felt that her obstetricians had "mismanaged" her. She thought that they had mismanaged her labor and the baby's delivery and she felt that they had done something or had not done something that was in some way improper as far as

the labor and delivery period of her child. She felt that Dr. Morris had specifically "mismanaged" her in view of the complications. She knew that the unexpected caesarean section which she underwent had been performed because a problem had developed. She knew that the problems which brought her child close to death bore some relation to the caesarean section. She understood that Megan was in a condition known as "fetal distress" at the time of birth, and she understood that this condition involves a child close to dying. She was informed that her baby had fluid in her lungs which was removed on the way to the neonatal emergency care unit at Jackson Memorial Hospital by the insertion of a needle into the child's chest.

Significantly, Susan Moore stated that until she was definitely told that her child had permanent damage, she did not consider the problems arising at delivery permanent problems and had no inclination to sue for "that" problem until many months later when she was advised there was permanent injury. She felt that she had to investigate the matter when she found out that her daughter had permanent damage. Prior to that time she was not inclined to investigate because apparently the problem at delivery had not caused her any permanent damage. This is not the same as denying any knowledge that her child had suffered some injury, however slight, at birth.

Henry Moore, Megan's father, was told immediately after the baby's birth that the pediatrician didn't think the baby was going to make it. It was obvious to him that his baby was in bad shape. The pediatrician told them that the child might not live

and he didn't expect her to live. She was then taken to the intensive care unit for newborn children at Jackson Memorial Hospital in an effort to remedy whatever "problem" had occurred at the time of the delivery. "Problem" is the equivalent of "damage".

The fact that permanent brain damage was not definitively diagnosed until July, 1976, has no bearing whatever on whether the statute of limitations began running on July 9, 1973. On that date, the undisputed statements of both Mr. and Mrs. Moore establish that they were on notice that the legal rights of themselves and their infant daughter had been invaded. Knowledge of either negligence or injury was sufficient to begin the statute of limitations. See, Roberts v. Casey, 413 So.2d 1226 (Fla. 5th DCA 1982); pet. rev. den., 424 So.2d 763 (Fla. 1982).

Buck v. Mouradian, 100 So.2d 70 (Fla. 3d DCA 1958), cert. denied, 104 So.2d 592 (Fla. 1958) was a medical malpractice action in which the defense of the statute of limitations was raised. The Buck case involved allegedly negligent X-ray treatments in 1951 at which time the patient experienced some skin burns and skin reaction. It was not until 1955 that she learned the extent of the injuries occasioned by the X-ray burns sustained in 1951. The trial court concluded that the statute of limitations barred recovery and entered summary final judgment on behalf of the defendants. In affirming, the appellate court determined that since the plaintiff was aware of her injury in 1951 through her own admission, the suit was barred by the statute of limitations. The statute began to run even though

notice of full consequences did not materialize until later. See also, Foley v. Morris, 325 So.2d 37 (Fla. 2d DCA 1976); rev'd. on other grounds, 339 So.2d 215 (Fla. 1976).

The landmark case involving the statute of limitations in a medical malpractice case is Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976). Nicholas Nardone, age 13, underwent four brain operations in January, 1965, which were performed to correct difficulties with coordination, blurred vision, and headaches. In July, 1965, Nicholas was discharged from the hospital in a comatose condition, totally blind. He had suffered irreversible brain damage. The parents were apparently not informed of the cause of their son's condition; an improper diagnostic procedure which had taken place on February 25, 1965. Complaint was filed in May, 1971. At that time, the applicable statute of limitations was four years. The parents argued that this Court should adopt the view the statute of limitations did not commence to run until they became actually aware of the negligence of the physicians and the hospital, which awareness came about within four years of the date the complaint was filed. (The same contention is made here.)

This Court acknowledges its previous decision in City of Miami v. Brooks, supra, holding the statute of limitations in a malpractice suit commences either when the plaintiff has notice of the negligent act giving rise to the cause of action or plaintiff has notice of the physical injury which is the consequence of the negligent act.

Nardone, while decided on different facts, does stand for

the proposition that one aspect of reasonable notice is knowledge that legal rights have been invaded (the negligent act), although there is no knowledge of the severity of the injuries sustained. See also, Carter v. Gross, 373 So.2d 81 (Fla. 3d DCA 1979).

Other decisions have not hesitated to find, under the proper circumstances, summary final judgment to be correctly rendered where it is clear that the statute of limitations has expired prior to filing of a suit. One such case determines that where a plaintiff knows or has reason to know of any negligence on the part of a defendant doctor more than two years prior to filing a suit, the action is barred and summary judgment is proper. Hill v. Virgin, 359 So.2d 918 (Fla. 3d DCA 1978).

Steiner v. Ciba-Geigy Corporation, 364 So.2d 47 (Fla. 3d DCA 1978), cert. denied, 372 So.2d 461 (Fla. 1979), affirmed a summary final judgment for a defendant where it conclusively appeared from the evidentiary matters before the trial court that the facts giving rise to the cause of action were discovered or should have been discovered more than four years prior to the filing of the cause of action. In this product liability case involving ingestion of a harmful drug manufactured by the defendant, the court comments:

> "These and other cases on the subject lend themselves to the proposition that the statute of limitations will begin to run only when the 'moment of trauma' and the 'moment of realization' have both occurred. By 'trauma', we simply mean the ill effect, damage or injury; and by 'realization', we mean the 'known or should have known' element associated with the trauma. In Nardone, as in the present case, the trauma itself, plus the surrounding circumstances, immediately gave rise to the

realization." Steiner v. Ciba-Geigy Corp., supra at page 47.

Here, the moment of trauma to Megan Moore occurred on the date of her birth, July 9, 1973. Her parents realized that she had sustained a trauma, discussed it, witnessed her transfer to a neonatal intensive care unit, and expressed the view that the trauma was caused by mismanaged labor and delivery. There could not be a clearer case for the commencement of the statute of limitations on July 9, 1973.

One case decided after the instant case is instructive on the issue that the extent of ultimate consequence is not the determinative factor in establishing when the statute of limitations begins to run in a medical malpractice action. Wilhelm v. Traynor, 434 So.2d 1011 (Fla. 5th DCA 1983) cites both Roberts v. Casey, supra, and Almengor v. Dade County, supra, in support of its determination that the statute of limitations had run on the plaintiff's cause of action even though the full extent of the plaintiff's disease and its ultimate consequences were not known at the time plaintiff was told that a lesion was cancerous.

In footnotes to the Wilhelm dissent, the dissenting judge opines that it would be a "better view" to hold that a statute of limitations does not begin to run in a medical malpractice case until the patient knows, or with reasonable diligence should know, of his injury and the possible negligence of the physician or hospital. The well-established law in Florida is impliedly conceded to be the contrary. A plaintiff need only know of his injury or possible negligence of the defendant to commence the

statute of limitations.

Besides the acknowledged fact that the Moores had actual knowledge of the injuries sustained by their child and the asserted negligence or "mismanagement" by the attending physicians at the time of Megan's birth, yet another reason exists for determining that the statute of limitations expired long prior to filing of the action here. This position is best exemplified by one statement made by this Court in the Nardone decision: "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." Nardone v. Reynolds, supra at page 40.

This philosophy of the Nardone case was followed by the District Court of Appeal of Florida, Third District, in Steiner v. Ciba-Geigy Corporation, supra. As stated by the court, the question is whether the facts known to the plaintiff were sufficient as a matter of law to begin the running of the statute of limitations. To further pinpoint the exact issue with which the court was dealing, the "question" is footnoted to a statement set forth in the Nardone case which is quoted from a federal decision: "The means of knowledge are the same as knowledge itself." Scroggin Farms Corp. v. McFadden, 165 F.2d 18 (8th Cir. 1948).

The following quotation from the Steiner case applies four-square to the facts in the instant case:

> "In this regard, the plaintiff is in much the same position as the parents in the Nardone case, who, in 1965, were not fully aware of the complete facts when their son's condition after post-surgical treatment became consider-

> ably worse than anyone could have expected. However, from 1965 to 1971, the year the parents learned of the negligent treatment, there was no tolling of the statute of limitations because the facts known by, or accessible to, the parents in 1965 was sufficiently adequate to put them on notice that there was something or someone primarily or totally responsible and probably legally liable for their son's adverse and tragic condition." Steiner v. Ciba-Geigy Corp., supra at page 52, emphasis supplied.

See also, MacMurray v. Board of Regents, 362 So.2d 969 (Fla. 1st DCA 1978), cert. denied, 370 So.2d 460 (Fla. 1979).

The written records of Dr. Stuart Brown establish unequivocally that the statute of limitations began to run at the very latest on June 24, 1974, almost four years before the complaint was filed.

Dr. Brown is not a defendant in this action and his written records were readily available to the plaintiffs. On June 24, 1974, this pediatric neurologist who followed Megan's progress from shortly after her birth for the next several years concluded in his report of June 24, 1974, that within "reasonable medical probability" Megan was then suffering from a brain disfunction evidenced by diminished brain growth and that the potential indications were that Megan was going to be slow developmentally from both a motor and possibly an intellectual basis.

It must be emphasized that this information did not exist in a vacuum, nor in the absence of other circumstances which would have caused any reasonable person to conclude that their child had suffered an "ill effect" or "damage" or "injury". These circumstances commenced the applicable statute of limita-

tions running long before Megan's parents were definitively told their child had suffered permanent brain damage.

The trauma of the birth, the advice given by the neonatal intensive care unit at Jackson Hospital to watch for symptoms of brain disfunction, the seizures which Megan suffered during the first three years of her life, as well as the written reports of Dr. Brown all operated to start the running of the statute of limitations as a matter of law, even if it be conceded (which is somewhat beyond reasonable inference) that Dr. Brown was not advising Mr. and Mrs. Moore of the neurological findings of his repeated examinations of Megan.

The tragedy which befell Megan Moore cannot overshadow the fact that the legislature of the state has seen fit to enact a two-year statute of limitations, after which an injured party cannot seek redress for medical malpractice. Petitioners do not argue the merits of enacting a statute of repose, but seek to convince the Court that the Moores brought their action within the requisite period of time.

The authorities relied upon by petitioners do not establish error by the trial court or the District Court of Appeal in the instant case because of the peculiar facts which here exist. For example, reliance upon Almengor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978), is misplaced. There, the court determined that the evidence of that case was not sufficient to put the plaintiff on notice as a matter of law that their baby was injured during birth because of a reasonable inference that the baby had been born with a congenital defect without any birth

trauma. Here, the unrebutted medical evidence established that whatever occurred to Megan Moore at her birth was the result of "perinatal insult", not a congenital defect. This is repeated time and again in Dr. Brown's records and, in fact, was acknowledged by Mrs. Moore who stated that she felt her baby's injury had occurred because her obstetricians had "mismanaged" her labor and delivery.

Reliance upon the decision in Johnson v. Mullee, 385 So.2d 1038 (Fla. 1st DCA 1980), is unavailing. The Johnson case holds that there was no notice of any alleged negligent act and no evidence that the alleged negligence had resulted in any harm to the patient during the prescriptive period. Petitioners cite this case as authority for the proposition that in the instant case the Moores had no basis for filing a lawsuit until they had knowledge of the brain damage which occurred to Megan. There was, however, unquestionably acknowledged notice of alleged negligence to an extent at the time of Megan's birth.

Further, reliance on those cases which would appear to require knowledge of injury and nothing less to commence running of the statute of limitations flies directly in the face of this Court's determination in Nardone and various district court decisions exemplified by Almengor that the statute of limitations in a medical malpractice suit commences either when the plaintiff has notice of the negligent act giving rise to the cause of action or when the plaintiff has notice of the physical injury which is the consequence of the negligent act.

Similarly, reliance on decisions involving "temporary"

injury is equally unavailing since Dr. Brown's medical report of June 24, 1974, established unequivocally that Megan Moore had a "brain malfunction" at that time. Neither common sense nor common law would dictate that with this knowledge the Moores still thought that their child had suffered only a temporary condition caused by the trauma of her birth. See, Swagel v. Goldman, 393 So.2d 65 (Fla. 3d DCA 1981); and Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978), cert. denied, 361 So.2d 831 (Fla. 1978).

Petitioners' argument is exemplified by two statements from their brief: (1) ". . .there is evidence that there were no problems during Megan's development which raised a concern by her parents that she suffered and injury at birth" (Brief of Petitioners, p. 25); and (2) "Moreover, even if the Moores had suspected negligence during the delivery (which they deny) any investigation would have resulted in a finding of no brain damage caused by the negligence." (Brief of Petitioners, p. 28.)

The record before this Court simply belies both of these statements. There were problems during Megan's development which, if they did not, should have raised a concern by her parents that she suffered an injury at birth. Any investigation of Dr. Brown's written reports would have resulted in a determination that their child had suffered brain damage caused by perinatal insult, which Mrs. Moore had characterized as "mismanagement".

Lastly, petitioners rely on the argument that the facts of the instant case would lead to a situation where, had the Moores filed suit within two years after Megan's birth, she would have

recovered only nominal damages because the brain damage would have later manifested itself after the suit was concluded. This position is simply not maintainable under the facts of the instant case where the medical records in existence within the prescriptive period reveal that Megan was suffering from a brain malfunction.

Armed with this knowledge, the Moores were required to bring suit against those whom they thought responsible within the presecriptive period. Just as the medical records of Dr. Brown were obtainable by taking his deposition testimony during the suit which was filed and later dismissed, the records and his testimony would have been available during a suit which was filed two years earlier.

Had that been done, the Moores would be in no different position than any other plaintiffs in a medical malpractice action (or any other personal injury suit) who is forced to prove the damages which actually exist at the time of trial as well as those which might subsequently occur within reasonable medical probability. This is the burden which the applicable statutes of limitations impose upon every litigant.

In most cases involving orthopedic injury, for example, there is testimony that in subsequent years an arthritic condition will develop. This arthritic condition is not scientifically detectable at the time of trial, yet it is the burden of the plaintiff to prove that such future damages are within reasonable medical probability. Whether or not Megan's permanent brain damage was "scientifically detectable" at the time of trial, it

certainly could have been an element of probable future consequences based upon appropriate medical testimony.

Petitioners' reliance upon federal cases which appear to permit a party to split a cause of action into one involving "temporary" results and a later-filed action for the "permanent" more serious results conflicts with the extant law of Florida concerning bringing an action when injury or negligence is known regardless of the seriousness of the injury detected at that time. The cited case involving "asbestos-related disease" determines only that the time to commence litigation does not begin to run on a separate and distinct disease until that disease becomes manifest. Here, there is no separate and distinct disease which became manifested after the prescriptive period had run. The brain malfunction which was scientifically determined to be permanent in 1976 or 1977 was the same brain malfunction discussed by Dr. Brown and contained in this medical records in 1974.

IV.

CONCLUSION

It is impossible to view the facts of the instant case and to conclude other than that, as a matter of law, Mr. and Mrs. Moore knew in 1974 that their legal rights and Megan's had been violated. Further, they were on notice to make reasonable inquiry into the brain damage suffered by their child at her birth.

Mrs. Moore stated that there was negligence or "mismanagement" by the defendants at the time of her daughter's birth.

This alone is sufficient to begin the statute of limitations under the applicable law. This factor, coupled with what occurred during the prescriptive period makes it impossible to state that known or easily discoverable facts of negligence or injury, however slight, did not exist.

No matter what statute of limitations is utilized in the instant case, the result is the same. In medical malpractice cases, the limitations period begins to run when a plaintiff discovers or through reasonable care should have discovered the "injury", the "cause of action", or the "incident". Discovery is the key factor and this "discovery" can be imputed from facts which could have been ascertained. This is legislative recognition of a policy developed by this Court in the Christiani and Brooks cases making actual knowledge the equivalent of imputed knowledge.

The question here is whether the facts which the Moores knew or should have known were sufficient as a matter of law to begin the running of the statute of limitations. Examination of the unrebutted facts presented here leads inescapably to the conclusion the action of the trial court in granting the defendants a summary judgment on the statute of limitations issue and affirmance by the District Court of Appeal should be accepted and ratified by this Court.

V.

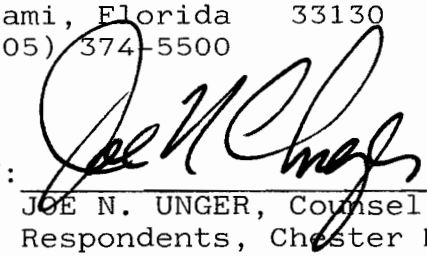
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Daniels and Hicks, 1414 Alfred I.

duPont Building, Miami, Floirda 33131; Sams, Gerstein, Ward, Newman & Beckham, P.A., 7th Floor Concord Building, 66 West Flagler Street, Miami, Florida 33130; and Law Offices of Richard A. Sherman, 204E Justice Building, 524 South Andrews Avenue, Ft. Lauderdale, Florida 33301, this 10th day of January, 1984.

Respectfully submitted,

LAW OFFICES OF JOE N. UNGER, P.A.
606 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 374-5500

BY: 

JOE N. UNGER, Counsel for Respondents, Chester Morris, M.D., WILLIAM J. BREWSTER, M.D., and NORTH SHORE HOSPITAL