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IN THE SUPREME COURT
OF FLORIDA

CASE NO. 63,805

MEGAN MOORE, etc., et al.,

Petitioners,

vs.

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

Respondents.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

Petitioners, Megan Moore, Henry Moore and Susan Moore seek to quash the Third District's 2-1 decision which affirmed the trial court's order granting a summary final judgment on the ground that this medical malpractice action is barred by the statute of limitations.

The Third District's majority opinion held that the Moores were "...on notice from the time of the birth of the alleged negligence or injury to the infant..."

As will be demonstrated below, the Third District misconstrued the legal significance of the facts of record and failed to consider them with the other facts and permissible inferences in a light most favorable to the Moores as it was required to do in reviewing a summary judgment.

A. General Facts Relating to Susan's Pregnancy.

On November 21, 1972, Susan Moore saw James Gallagher, M.D., who confirmed that she was pregnant with her first child. (R.4585). The prenatal care of Susan was administered by Dr. Gallagher, Dr. Morris and Dr. Schatz, medical associates in an obstetrical group. (R.1145; 4584).

On July 8, 1973, having gone into labor at home at noon (R.4173-4), Susan Moore was admitted to North Shore Hospital. (R.4665). She was under the care of Dr. Schatz until the morning of July 9, 1973. (R.1145; 4656). Beginning the morning of July 9, 1973, and continuing through her delivery, Susan Moore was under the care of Dr. Morris. (R.1145).

The specific acts of negligence by these health care providers which allegedly caused permanent and irreversible brain damage to Megan Moore at birth are detailed in the complaint. (R.4-7). They will not be summarized here because they are not relevant to the issues before this Court.

B. Specific Evidence Relevant to Statute of Limitations.

1. Testimony of Susan Moore.

Shortly after her admission to North Shore Hospital, Susan was given medication (Scopolamine - an amnesic R.4659) by a nurse and she did not remember anything until she woke up in the recovery room. (R.4177, 4183). She was not aware of any problems with her delivery or labor prior to that time. (R.4178). She did not know that a Cesarean Section had been performed until she returned to her room. (R.4178). After waking up in the recovery room she overheard a conversation between a nurse and someone else about whether her husband was back from the other hospital and inquiring whether the baby had lived. (R.4179).

The first time Susan learned that there had been some fetal distress during the delivery was when her husband visited her the evening after the delivery. (R.4185, 4188). Her husband was upset and told her that Megan was in another hospital as a result of a problem and that she was alive. (R.4060).

Susan remembered that later she was told that "when the child goes into distress, they swallow the feces and the cord gets wrapped around their neck..." (R.4190). Susan did not recall whether she was told that the cord was actually wrapped around Megan's neck. (R.4190). She understood that the Cesarean section was performed as a result of the fetal distress Megan was experiencing during birth. (R.4196).

Susan was also told by physicians that "[Megan] was doing well, beautifully at Jackson. Children are miraculous. Things of this sort. And the baby was doing fine." (R.4201). Her understanding of her child's condition immediately after delivery was that "She was alive and well at Jackson and doing very well." (R.4202). When Megan was discharged from Jackson it was Susan's understanding that Megan was fine. (R.4043, 4109). Susan was not aware of any damage to Megan when she was discharged. (R.4145). As a result of the complication, Susan felt that she had been mismanaged. (R.4133-4135, 4137). Essentially, Susan was unhappy about having a Cesarean section and having her baby taken to Jackson. (R.4140). However, there was no problem because it had resolved itself. (R.4139-4140).

Susan did not believe that her child was abnormal at birth. (R.4204-4205). It was her understanding that "when she was born, she had some fluid in her lungs or something like that and this is what I understood, that Jackson removed or somebody in the ambulance removed this fluid from her lungs." (R.4205, 4041). Upon Megan's discharge from Jackson, Susan was told that if Megan suffered twitching or trance-like staring in the future, this would be symbolic of a problem. (R.4043, 4071). She was also told that if there was a problem these symptoms would occur almost immediately. (R.4073). However, it is uncontroverted that Megan never had any of these symptoms. (R.4044).

After Megan's discharge from Jackson she was seen by Dr. Brown for an EEG "...just as a follow-up..." (R.4216, 4045, 4078). Subsequent to the follow-up in 1975, wherein the EEG was found to be normal, Dr. Brown told Susan that Megan "...was progressing very nicely and appeared to be normal, that future EEGs would be a kind of waste of time." (R.4216, 4046) In fact, Megan appeared to develop normally. (R.4217). She was very alert and very responsive. (R.4216). Susan was never told of any developmental delay during the routine follow-up visits. (R.4046, 4065). Dr. Brown pointed out that Megan's head size was small for a five or six month old child but he was not concerned about it. (R.4049). At no time did Dr. Brown express any concern about

Megan's development until March of 1977. (R.4217, 4219). At this time, Megan had a seizure which lasted 50 minutes and Dr. Brown put her on medication. (R.4218).

Prior to 1977, at one year of age, Megan had something that appeared to be a seizure, which Susan was advised resulted from a fever. (R. 4219-4220, 4079).

One year later Megan suffered another seizure which Susan was told was associated with another fever. (R.4221). Megan did not experience any more seizures or anything unusual until 1977. (R.4221, 4222). The only other thing Susan told Dr. Brown that she noticed was that two or three times Megan shivered for a second. (R.4130). Dr. Brown told her that this was perfectly normal. (R.4130).

Susan also testified that at no time did any doctor tell her that Megan suffered any brain damage or brain dysfunction. (R.4215, 4223).

2. Testimony of Henry Moore.

The day after Susan was admitted to the hospital to deliver her baby, Dr. Morris called Henry and asked him for permission to deliver the baby by Cesarean section because there was an emergency. (R.4882). Henry gave his permission and immediately left for the hospital. (R.4884). He went to the nursery, noticed that the baby's general complexion was blue and observed that Dr. Rosenthal, a pediatrician, was administering

oxygen. (R.4885, 4890). Dr. Rosenthal later told him that he didn't think the baby would make it and Dr. Morris told Henry that he did the best he could. (R.4875). He also told Henry that he should "...do what you have to do." (R.4896). Henry thought the statement was odd but he didn't understand what Dr. Morris meant. (R.4897). He had no feelings about whether or not any physician had done anything improper. (R.4954).

Henry was then told that the baby was going to be transferred to Jackson. (R.4898). At this time, he did not see Dr. Rosenthal administering oxygen and he did not recall anyone holding the baby. (R.4899). He remembers seeing the personnel from Jackson arrive. (R.4901). All of this was traumatic to Henry. He prayed, and then proceeded to Jackson. (R.4903).

At Henry's deposition, the following colloquy occurred:

> "Q. (By Mr. Womack): What is the first thing that occurred when you got over to Jackson?
>
> A. I immediately went up to ask where the newborn clinic was, and I arrived up there.
>
> I was rejoiced that -- I was either told or -- that the baby had made a turn-around, and I was very much relieved." (R.4906).

Henry spoke to Dr. Link, the physician who accompanied Megan to Jackson, and he stated that he inserted a tube into her chest cavity en route and this "...allowed her lung or chest cavity to expand or correct itself." (R.4906). Dr. Link said that the baby "...showed immediate and dramatic changes when this was done" and

that "...the baby was coming along nicely." (R.4907). Henry was told that Megan had swallowed something at birth. (R.4967). They used the term meconium aspiration. (R.4968). Henry saw Megan that night in the nursery and "[h]er color was beautiful..." "[n]ormal, pink; and she appeared restful." (R.4909).

Henry went back to North Shore Hospital and told Susan that "...the baby was getting along nicely and had been transferred to Jackson Memorial, where [they] had a unit that specialized in intensive care newborns, and the baby had beautiful brown eyes." (R.4912). Henry felt that the complication which occurred at the time of delivery resolved itself (R.4943) and he was not aware that any future problems might arise as a result of Megan's condition at the time of delivery. (R.4946). He believed that the follow-up at the Mailman Clinic was part of the routine established for babies who had been in intensive care at Jackson. (R.4947).

Henry did not have any other conversations with the physicians at North Shore who were involved in Megan's birth. (R.4913). No physician at Jackson ever advised him that Megan had sustained any permanent injury. (R.4916). Nothing occurred after Megan was discharged to indicate that she was anything other than a normal child. (R.4917). Henry and Susan were told by the Mailman Clinic that Megan was "...progressing within the average percentile." (R.4974). Henry's first knowledge that something was wrong with Megan was "when they had her third year

check-up at Mailman, we were told that her progress was below average." (R.4917; 4958). At that point he began investigating. (R.4955).

Henry also believed that the two seizures Megan had prior to 1977 were caused by a fever. (R.4926).

3. Medical Records and Testimony of Dr. Stuart Brown.

As we are entitled to do under the rules governing summary judgments, the following is a synopsis of the portions of Dr. Brown's testimony and records in a light most favorable to the Moores.

The most significant testimony by Dr. Brown occurred during the following colloquy:

> "Q. Up until the time this child was age 3, did you ever make a diagnosis that the child had been brain damaged at the time of delivery?
>
> Mr. Parenti: Objection to the form.
>
> The Witness: No." (R.3602).

Dr. Brown first saw Megan on July 18, 1973, at Jackson nine days after her birth, and he concluded as follows:

> "Neurological examination reveals a healthy normal appearing child in no distress." (R.1490).

Dr. Brown did not speak to Megan's parents during her hospitalization. (R.1495). Dr. Brown next saw the child in his office on December 3, 1973. (R.1495). Dr. Brown examined Megan physically and neurologically and he "...did not find any abnormalities at that time." (R.1500). Dr. Brown's records of that examination reveal the following history given by Susan:

> "Subsequent growth and development reveal that the child held her head up at 7 weeks, and her head and chest up thereafter. She began to smile at 2 months, and to recognize at 3 months, and in the past few weeks has been rolling over both ways, particularly from her stomach to her back. She is said to laugh and coo and to be a good baby. Her disposition is said to be fine, but she does cry and does not just remain placid. She eats well without any vomiting, and sleeps satisfactorily.
>
> She has not been subject to any unusual illnesses." (R.1560).

After observing that the growth of her head size was in the 25th percentile Dr. Brown concluded in his report to Megan's pediatricians that:

> "This little child is functioning perfectly well for her chronological age." (R.1560).

Her development was so normal that Dr. Brown decided not to see her again until she was one year of age. (R.1561).

Dr. Brown did not recall whether or not he discussed Megan's head size with her mother. (R.1502).

The next neurological examination was performed by Dr. Brown on June 24, 1974. (R.1506). Dr. Brown's narrative report of the examination to Megan's pediatricians reveals the following history given by Susan:

> "According to her mother, she's been doing more, and is crawling and creeping, and beginning to pull up to a stand. When placed in a standing position she is said to walk holding on. She's making sounds, but has not put any syllables together for words. She's playful and alert, and teases and understands what's going on." (R.1562).

While Dr. Brown stated that he expressed some concern to Susan about Megan's head size (which Susan denied R. 4217, 4219), he stated that he could not "...find anything hard on examining her." (R.1562). In any event, he testified during deposition that disparity in head/body size does not necessarily imply that a child is going to have a subsequent difficulty either intellectually or educationally. (R.1545). Dr. Brown did not want to examine Megan for another 6 months. (R.1562).

Megan was again examined by Dr. Brown on February 25, 1975, and he concluded in his report to her pediatricians as follows:

> "The neurological examination of the child was normal. I obtained a waking and sleep electro-encephalogram and this was also normal with no evidence of seizure discharge." (R.1563).

There is no mention in this report about Megan's head size. (R.1563). Dr. Brown does not recall whether Susan was aware that Megan had certain general indications that were bothersome to him. (R.1519). Moreover, at this February 1975 examination, Susan was told by Dr. Brown that there was no necessity to bring Megan back. (R.4175-6). In fact, for the first time the office notes and reports of Dr. Brown contain no reference to the necessity for further follow-up of Megan. (R.1563; 1573). Evidently Dr. Brown thought that Megan was progressing very rapidly and appeared to be normal and future EEGs would be a waste of time. (R.4216).

As to the two seizures Megan had during two episodes of fever, Dr. Brown testified that:

> "A small percentage of children have seizures with fever from ages 18 months to five years of age. Seizures so seen with fever have very little significance insofar as long-term outcome of the child..., the fact that this child's first two seizures occurred with fever therefore didn't necessarily mean that she was in any way abnormal." (R.1530).

Dr. Brown next saw Megan in May of 1977, almost one year after her third year testing and examination at Mailman Center when brain damage was first diagnosed. (R.1130-31; 4924; 4950; 4957). Susan testified that after Megan had had a 50 minute seizure in early 1977, she returned with Megan to Dr. Brown. (R.4217-8). At this examination, unlike prior EEGs, a definitely

abnormal EEG suggested "heightened seizure tendency" (R.1548-9) and Megan was first placed on medication by Dr. Brown. (R.1549; 1564; 4217). Dr. Brown's office notes and report of May 1977, provide the very first reference in his record to any diagnosis of brain damage, brain abnormality or seizures. (R.1564-1571). The office notes of May 1977, for the first time indicate seizure disorder - secondary to perinatal insult. (R.1571). In Dr. Brown's May 3, 1977 report to Megan's pediatricians, he states:

> "I would be inclined to treat this child on a daily basis rather than just treating her when she has fever. I am concerned that because of her perinatal insult that she has a structural abnormality in the left temporal lobe which is going to result in seizure problems for her even without fever." (R.1564).

4. <u>Testimony of the Other Physicians Who Cared for Megan</u>.

Dr. Link, the physician who transported Megan to Jackson, confirmed that upon withdrawing 70 cc's of air from Megan's chest to correct a collapsed lung, she improved markedly. (R.4994). Her complexion became pink. (R.4995). The records also show that large amounts of green material were suctioned from the baby in the van on the way to Jackson. (R.5007).

On October 25, 1973 he saw Megan during a regularly scheduled periodic visit. His report states in part that the discharge diagnosis included a finding of meconium aspiration. (R.5019). In addition, the report provides as follows:

> "Mother states that since the baby was discharged, no apparent complication or diseases. Baby smiled, held his head, rolled over, and tolerates most of feedings normally."
>
> * * *
>
> "Neurological exam grossly normal.
>
> Impression: Three-month-old baby, pretty normal. Follow up in three months." (R.5019).

Dr. Link did not recall discussing with the Moores the possibility of neurological problems later on in Megan's life. (R.5025).

Dr. Rosenthal, the pediatrician who attended Megan at birth testified that he never discussed with the Moores what caused the "fetal distress" because, as Dr. Rosenthal explained, "I didn't know the cause." (R.5176).

Dr. Gallagher testified that Cesarean sections may be performed where the pregnancy is "perfectly normal" and the possibility of a "C" section is discussed with the patient. (R.4619).

Significantly, defendant's expert, Dr. Thomas Blake, testified that babies delivered in the same condition as Megan have grown up to be healthy and normal. (R.3512-3).

In the face of these facts, the trial court held that the respondents had conclusively demonstrated that there was no genuine issue of material fact on the issue of statute of limitations.

The Third District ignored most of the above facts and permissible inferences which may be drawn therefrom in its opinion and affirmed the trial court reasoning that:

> "Prior to the mother being taken to the hospital for delivery it was a normal pregnancy. After she commenced labor the husband was advised there was an emergency and the baby would be taken by Cesarean Section. After the baby was born the father was on notice that for a period in excess of thirty minutes, while the infant was 'blue', the doctors had attempted to administer oxygen; that they were unsuccessful in their treatment, and received permission to transfer the infant to the emergency facility at Jackson Hospital, that one of the doctors did not expect the baby to live, another doctor told the father that he did the best he could and (apparently the baby would not live) and he, the father, would have to do what he had to do.
>
> While the child was being transported to Jackson in an emergency vehicle her chest was cut open and a tube inserted to assist her in breathing. The parents knew that it was an emergency situation, that there was a problem with the delivery, that the child had swallowed something which restricted breathing, and that the child was starved for oxygen.

Judge Schwartz disagreed with the majority's analysis of the facts and their legal significance and dissented as follows:

> "While it is of course true, as the majority states, that Megan's parents were immediately aware that there had been an extremely difficult delivery, I think that this fact is essentially irrelevant. This is because there is surely a genuine issue -- indeed, the evidence is overwhelming to this effect -- that neither the Moores nor any of the medical professionals knew or could have known that the baby had sustained any significant injury, and specifically permanent brain damage, until it was scientifically ascertained shortly before suit was filed. I very strongly dissent from the conclusion, inherent in the summary judgment below and its affirmance here, that one is obliged as a matter of law to bring an action before there is a clear indication that damages have even been sustained. Such a holding will require the bringing of protective actions in every case in which a supposed medical misadventure may have occurred, on the off chance that an injury will subsequently manifest itself. I had thought that, particularly in this field, the policy of this jurisdiction was to discourage such lawsuits, not encourage them. In my view, the judgment below should be reversed."

Subsequent to this decision, the Moores moved for a rehearing and for a rehearing en banc (App. 4-17). The motion for rehearing was denied in a 2-to-1 decision and the motion for rehearing en banc was denied upon a 4-to-4 tie vote (App.18). Judge Nesbitt, who had the tie breaking vote, recused himself. Thereafter, the Moores filed a motion for rehearing directed to the tie-vote wherein the Third District was requested to certify

its tie-vote decision to this court on the authority of In re Rule 9.331, 416 So.2d 1127, 1130 (1982). This motion was denied (App.19), and these proceedings followed.

ARGUMENT

POINT I

THE RECORD FAILS TO CONCLUSIVELY DEMONSTRATE THAT THE MOORES KNEW OR SHOULD HAVE KNOWN OF NEGLIGENCE OR INJURY TO THEIR DAUGHTER PRIOR TO 1977.

It is well settled in Florida that a party moving for a summary judgment must show conclusively the absence of any genuine issue of material fact and the Court must draw every possible inference in favor of the party against whom a summary judgment is sought. Holl v. Talcott, 191 So.2d 40 (Fla. 1966); Wills v. Sears, Roebuck & Co., 351 So.2d 29 (Fla. 1977).[1]

In holding as a matter of law that the Moores were aware of the alleged negligence or injury to Megan "...from the time of the birth...", the Third District failed to apply these established principles to the facts in the record and misconstrued and misapplied existing Florida law in resolving the statute of limitations issue.

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[1] All emphasis is supplied unless otherwise stated.

This Court has held that the statute of limitations in a medical malpractice case does not begin to run until either "...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." Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976). As will be made clear by discussing the cases which have applied this principle, the Moores did not have notice of a negligent act or of physical injury which was the consequence of a negligent act until 1977.[2]

In Almengor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978), the plaintiffs filed a medical malpractice action against the defendant hospital on the grounds that their baby daughter was negligently delivered at birth, thereafter negligently cared for and that as a result the baby suffered severe brain damage. The plaintiffs did not file suit until four years after the baby's birth. The trial court entered summary judgment in favor of the defendant on the ground that the action was barred by the then applicable four-year Statute of Limitations. Fla.Stat. § 95.11(4) (1969).

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2 Brain abnormality was not diagnosed by Dr. Brown until May of 1977 and the very earliest indication of any abnormality was in July of 1976, when Mailman Center first diagnosed a speech delay. This action was brought well within the two year statute of limitations.

Judge Hubbart, writing for a unanimous Court, reversed the summary judgment, having concluded that genuine issues of material fact existed as to whether the plaintiffs were on notice of an invasion of their legal rights more than four years prior to the filing of the medical malpractice action. In reaching its decision, the Court stated as follows:

> Our review of the record reveals a genuine issue of material fact as to whether the plaintiff was placed on notice more than four years prior to the filing of the action that her baby daughter was injured during birth. <u>There is some evidence in the record that during this time the plaintiff was aware or should have been aware that the baby was born mentally retarded and thereafter showed signs of mental retardation and abnormal development. We do not believe, however, that this evidence put the plaintiff on notice as a matter of law that the baby was injured during birth because such evidence just as reasonably could have meant that the baby had been born with a congenital defect without any birth trauma.</u> See Salvaggio v. Austin, 336 So.2d 1282 (Fla. 2d DCA 1976).

It is apparent from this decision that the existence of an adverse physical or mental condition at birth does not <u>as a matter of law</u> put parents on notice that their child suffered an "injury" where the cause of the child's condition is also consistent with a congenital defect, illness, disease, or a natural biological condition (fetal distress) which is not uncommon in giving birth. Under these circumstances, a jury issue is created on the question of when the parents should have

known of the invasion of legal rights. The wisdom of this rule is obvious. The Court cannot impute knowledge as a matter of law where reasonable men could logically believe that a physical or mental condition exists by virtue of something other than the infliction of an injury.

The application of this rule is even more compelling where, as here, the lack of oxygen to Megan appeared to result from something she swallowed while in her mother's womb (i.e., a natural complication), her distress was temporary and she was thought to have fully recovered. In Almengor, supra, the Third District reversed a summary judgment despite the fact that the parents knew at birth that mental retardation existed, and the parents were also aware of such retardation during the child's growth and development.

In Johnson v. Mulley, 385 So.2d 1038 (Fla. 1st DCA 1980), which Judge Schwartz cited in his dissent as mandating a contrary result in this case, Nancy Johnson underwent a breast examination in 1982 and the defendant found lumps but pursued no further investigation into the nature of the lumps. In March of 1973, Nancy was examined by another doctor. A radical mastectomy was performed after a biopsy revealed a malignancy. In 1975 it was determined that the cancer had spread to her ribs and skull. Nancy died in 1978. The trial court ruled that Nancy's cause of action was barred in March of 1975 by the two year statute of limitations. The First District reversed the summary judgment.

In reaching its decision, the Court specifically found that at the time of the mastectomy (1973) "...Nancy had actual knowledge of the alleged negligent failure of appellee doctor to diagnose her cancer...." However, the Court held that:

> At the time the radical mastectomy was performed, she had no cause of action against appellee doctor because there was no evidence that his alleged negligence had resulted in any harm to her. It was only in February 1975, when the cancer appeared in other parts of her body, that she discovered her cause of action. It was only then that she could have known she had been harmed by the alleged negligent diagnosis.
>
> * * *
>
> It is knowledge of injury which the court stated as the criterion under the general rule and not notice of probable or possible injury. In the case sub judice, while decedent may have had reason to believe that it was possible that her operation did not cure her cancer, she would have had no basis for then filing a lawsuit because she had no knowledge that the cancer had spread and, thus, no knowledge of injury.

Thus, in Johnson, the plaintiff discovered the negligence in 1973 when the mastectomy was performed and since the cancer had spread to the lymph nodes, the plaintiff had reason to suspect that the cancer might spread further. In the present case, the facts establish nothing more than the existence of "fetal distress" of unknown biological origin with some de-

pravation of oxygen because the child had ingested something. None of these facts prove notice of negligence or injury caused by negligence.

In addition, the Third District's failure to attach any significance to the facts of record which demonstrate that the child appeared fully recovered after her difficult birth was error. This is an implicit holding by the Third District 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. Johnson requires knowledge of the injury and nothing less. See also Tetstone v. Adams, 373 So.2d 362 (Fla. 1st DCA 1979); Eland v. Aylward, 373 So.2d 92 (Fla. 2d DCA 1979).

Our contention is further supported by Judge Schwartz in his dissenting opinion, wherein he stated that Megan's parents' awareness of a "...difficult delivery..." is irrelevant because "...neither the Moores nor any of the medical professionals knew or could have known that the baby had sustained any significant injury, and specifically permanent brain damage, until it was scientifically ascertained shortly before suit was filed." (App.3).

In Swagel v. Goldman, 393 So.2d 65 (Fla. 3d DCA 1981), the Third District held that a patient's belief -- based upon his physician's assurances -- that his incontinent condition was only a temporary injury caused by his surgery was insufficient to

support a summary judgment on the ground that the Statute of Limitations had expired. The Third District reasoned that the Statute did not begin to run until the patient was informed that the injury was permanent. <u>See also</u>, <u>Nolan v. Sarason</u>, 379 So.2d 161 (Fla. 3d DCA 1980).

Thus, even though the patient <u>knew of his injury</u> immediately after the operation but believed it was <u>temporary</u>, he was not deemed to have sufficient notice to initiate the running of the Statute of Limitations.

The facts of the present case involve far more compelling reasons to reverse the summary judgment entered below than existed in <u>Swagel</u>, <u>supra</u>. The holding in <u>Swagel</u>, <u>supra</u>, was predicated only upon the existence of the doctor's assurances that the injury was temporary. Here, the Moores were not only told by the physicians and nurses that their child was normal and healthy, but when the child was discharged from Jackson there was no physical or medical way to determine otherwise, until the child reached three years of age. At that time, the permanent brain damage was first discovered.

Similarly, in <u>Brooks v. Cerrato</u>, 355 So.2d 119 (Fla. 4th DCA 1978), <u>cert. denied</u>, 361 So.2d 831 (Fla. 1978), a summary judgment holding that a malpractice claim was barred by the statute of limitations was reversed. There, the plaintiff underwent an operation on February 8, 1973, to remove some nerve tissue tumors (neurofibromas) on her neck. After the operation,

plaintiff's "...arm hurt and she could not lift it...." She believed it was caused by general physical weakness after surgery. In August 1973, she was told that a nerve had been damaged during the operation. Suit was filed on June 27, 1975. The Fourth District reversed the summary judgment on three grounds including that the:

> ...[D]efendants have not conclusively shown that the plaintiff discovered or through use of reasonable care should have discovered, prior to June 27, 1973, that an injury (as opposed to a mere temporary post-operative symptom) had occurred.

Thus, in Brooks, supra, the plaintiff was continually aware of pain and a significant disability of her arm after the operation. Here, as noted by the majority opinion, the parents were told that the lack of oxygen was attributed to the baby swallowing something which restricted breathing, rather than as a result of the negligence of the physicians. In addition, the Moores were not aware of anything more than a "temporary" complication which appeared fully cured when the baby left the hospital.

In Salvaggio v. Austin, 336 So.2d 1282 (Fla. 2d DCA 1976), the Second District reversed a summary judgment which barred a malpractice action on the ground of statute of limitations. The facts were that in 1967 the plaintiff had a mammoplasty in which a rubber tube was left in her chest. Within a

short period of time after the surgery, plaintiff felt an ever increasing pain deep in her left breast. Five years later, in 1973, the tube was discovered after an X-ray was taken. Despite the continuous pain for five years, the Court held that the plaintiff could not be deemed to have knowledge of an injury as a matter of law. Instead, an issue of fact existed as to whether the plaintiff had sufficient notice of the consequences of the negligence to start the running of the statute of limitations.

The fact that the Moores knew of a difficult birth (not uncommon), and that some oxygen depravation occurred as a result of the baby swallowing something (which doesn't, without additional facts, imply negligence) cannot impute as a matter of law knowledge of negligence or injury sufficient to start the running of the statute of limitations. This is particularly true since the brain damage could not be scientifically diagnosed at that time.

A very significant case which was recently decided by the Third District is Brown v. Armstrong World Industries, Inc., So.2d ___, 8 F.L.W., No. 44, p.2619 (Fla. 3d DCA November 1, 1983). While this case did not involve medical malpractice, its holding is very important. There, the Third District reversed a summary judgment predicated upon the statute of limitations in a suit against a manufacturer for injuries caused by exposure to asbestos. Judge Barkdull, who wrote the majority opinion in the present case, dissented in Brown and cited this case as authority

for his dissent. Judge Barkdull predicated his dissent on testimony by the plaintiff that he was concerned early onthat his breathing problems might have had something to do with his exposure to asbestos.

The majority disagreed with Judge Barkdull and held:

> In addition to the testimony upon which the dissent focuses, plaintiff also testified that he has visited physicians regularly during his adult life, in later years complaining of shortness of breath, and that he was not informed by any physician until 1979 that he suffered from an asbestos-related disease. There is no showing by the defendants that any physician could have established to a reasonable medical certainty--prior to 1979--a cause and effect relationship between plaintiff's exposure to asbestos and his physical disability.

Cited in Meehan v. The Celotex Corporation, __ So.2d ___, 8 F.L.W., p.2728 (Fla. 3d DCA, November 15, 1983).

In the present case, there is evidence that there were no problems during Megan's development which raised a concern by her parents that she suffered an injury at birth. However, there is ample evidence in this record that the brain damage could not be diagnosed until Megan was 3 years old.

Based upon the foregoing authorities, it is clear that the majority opinion in the instant case failed to recognize the difference between notice of an injury (i.e., the bodily harm inflicted by the negligence -- brain damage) and what the jury could believe the Moores understood existed -- a temporary

condition resulting from a natural biological phenomenon, disease, illness or defect which caused no real damage (i.e., fetal distress producing partial blockage of air passageways and a deprivation of some oxygen). Since notice of an "injury" is only imputed as a matter of law when a patient either knows that his doctor's negligent treatment caused an untoward result or when the result is so devastating and unexpected an outcome that any reasonable person would inquire as to its cause, it cannot be imputed here because neither of these criteria appears conclusively from this Record.[3]

In its opinion, the Third District appears to have placed great significance upon the existence of an emergency situation, the performance of a Cesarean section, and that the father was advised that the baby might not live due to oxygen depravation caused by swallowing something while in the womb.

There is nothing about these facts which leads conclusively and inescapably to only one conclusion -- that there was negligence or injury caused by negligence. To the contrary, these facts are totally consistent with a serious or life threatening situation which arose through natural causes during an operation. Serious medical circumstances arise daily in the

3 Notice of probable or possible injury is insufficient to constitute knowledge of an injury. Johnson v. Mulley, 385 So.2d 1038 (Fla. 1st DCA 1980); Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976); Almengor, supra.

practice of medicine and because they are so common in human experience, they cannot, without more, be deemed to impute notice of negligence or injury caused by negligence.

Cesarean sections are not the natural way to give birth. However, the performance of "C" sections as a result of difficulties with delivery are so common in our society that they are accepted as normal and they are not associated with negligence or injury.

The blue complexion of the baby which the Moores believed resulted from a natural biological cause (swallowing something in the womb) and the fact that it was life threatening also does not lead conclusively to the conclusion reached by the Third District. This is particularly true where, as here, the baby physically appeared to have made a speedy and complete recovery. The parents were also repeatedly told by the physicians, including Dr. Brown who examined Megan neurologically until she was three years old, that Megan was fine. In addition, Dr. Brown could not and did not scientifically diagnose any brain damage until the child was three years old.

The Third District also found something conclusive about Dr. Morris' statement to Henry that he did the best he could and that Henry would have to do what he had to do. This statement was made at a traumatic time when Henry was worried about his child's welfare. Viewing the statement in retrospect knowing what we no know about the brain damage, its meaning is at best

confusing and unclear. However, the statement is totally inconclusive when put into the perspective of the physicians telling the Moores that the baby was fine. In any event, Henry testified that he did not know what Dr. Morris meant by the statement and he had no feelings about whether or not any physician had done anything improper. (R.4897, 4954). In fact, Dr. Morris has never testified that he made the statement or what was meant by the statement.

Thus, under this record, Henry's interpretation of the statement is uncontroverted. Clearly, Henry's testimony coupled with the statement by Dr. Morris, which to this day is unclear as to its exact meaning, supports the Moores' position that they did not know or suspect injury or negligence.

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. Since this essential element of the tort was unascertainable until Megan was three, the cause of action would not accrue until then.

Judge Schwartz' dissent clearly points out that under the majority's opinion, the absurd result will follow that every mother whose baby suffers fetal distress or other maladies must sue prior to being able to determine whether the difficult birth caused any real injury -- even where no damage is apparent. Those

who do not file their claim run the risk of an injury surfacing in the future and being barred from suing by the Statute of Limitations.

Cases from other jurisdictions also support our position. In Lee v. United States, 485 F.Supp. 883 (E.D.N.Y. 1980), the defendants in a medical malpractice action sought unsuccessfully to defeat the plaintiffs' claims by asserting the statute of limitations in a case involving facts somewhat similar to ours. There, a Cesarean section was done as a result of fetal distress and when the baby was born it had fluid in her lungs. Like Megan, the baby was transferred to another hospital which had specialized facilities for treating newborn infants. Unlike Megan's condition the child in Lee was diagnosed to have brain damage. In Lee, the father was told by the physicians that they did not know why the child had fluid in her lungs and no one even insinuated that the manner of the delivery had anything to do with the child's condition. In finding against the defendants, the Court reasoned that:

> In the usual personal injury case the action is deemed to accrue when the injury is inflicted. In such situations, for example an automobile accident, the plaintiff is generally aware of his injury and the source from which it stemmed. But in medical malpractice actions the matters to be considered are frequently more complex. The patients may not know that they have been injured or, if they do, they may not know that acts of their doctor have contributed to the injury. The doctor will hardly be inclined to proffer information which may lead to action against

> him, and relying on his vastly superior knowledge and experience, the patients may be slow to learn the critical facts.
>
> * * *
>
> So here in order to bar plaintiffs' claim the government must show not merely that Lee knew within the two years before filing that claim that Kristen had had fluid in her lungs but that he knew or in the exercise of due diligence should reasonably have known that the alleged acts of the hospital doctors brought about that condition.

See also Landes v. Delp, 327 F.Supp. 766 (E.D. Penn. 1971); United States v. Kubrick, 444 U.S. 111, 62 L.Ed. 259, 100 S.Ct. 352 (1979); Reid v. U.S., 224 F.2d 102 (5th Cir. 1955); Tool v. U.S., 306 F.Supp. 1063 (D.Conn. 1969).

It is clear that the instant case presents far stronger facts for reversing a summary judgment since no brain damage manifested itself for 3 years.

POINT II

ASSUMING THE PROBLEMS AT MEGAN'S BIRTH ARE DEEMED TO BE AN INJURY CAUSED BY NEGLIGENCE, THE STATUTE OF LIMITATIONS SHOULD NOT BEGIN TO RUN ON A SEPARATE AND SCIENTIFICALLY UNDETECTABLE BRAIN DAMAGE.

Even if this Court is able to say that the Moores knew of "an injury" resulting from a difficult birth (which is denied) this Court should not hold that the Statute of Limitations began to run on the separate serious injury (brain damage) which did

not manifest itself until the baby was three years old. Any other rule could lead to a situation where, had Megan's mother filed suit after the birth, she would have recovered only nominal damages. Thereafter, the brain damage would have manifested itself and she would have been prohibited from suing under the doctrine of res judicata. Consequently, the Third District's opinion puts Megan in an incredible "Catch 22" position. She loses her right to sue for the brain damage if she files suit after the birth, and she loses her right to recover if she waits until the brain damage manifests itself and is scientifically detectable.

The proper rule of law in such circumstances appears in Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982). There, the Court of Appeals stated that:

> ...We are asked to decide whether manifestation of any asbestos-related disease (in this case, asbestosis) triggers the running of the statute of limitations on all separate, distinct, and later-manifested diseases (here, malignant mesothelioma, an extremely lethal form of cancer) engendered by the same asbestos exposure. We hold that time to commence litigation does not begin to run on a separate and distinct disease until that disease becomes manifest.
>
> * * *
>
> ...Upon diagnosis of an initial illness, such as asbestosis, the injured party may not need or desire judicial relief. Other sources, such as workers' compensation or private insurance, may provide adequate recompense for the initial ailment. If no further disease ensues, the injured party would have no cause

> to litigate. However, if such a person is told that another, more serious disease may manifest itself later on, and that a remedy in court will be barred unless an anticipatory action is filed currently, there will be a powerful incentive to go to court, for the consequence of a wait-and-see approach to the commencement of litigation may be too severe to risk. Moreover, a plaintiff's representative in such a case may be motivated to protract and delay once in court so that the full story of his client's condition will be known before the case is set for trial.

See Brown, supra. See also, Bridgford V. U.S., 550 F.2d 978 (4th Cir. 1977) wherein the court held that knowledge of some nominal damage after an operation does not require a patient to "...immediately [] file a claim for these nominal damages or be forever barred from seeking relief. In Portis, we found that fact situation to constitute "an exception to the general rule that causes of action may not be split." Portis v. U.S., 483 F.2d 670 (4th Cir. 1973).

Reasoning from the foregoing, if knowledge of negligence without any manifestation of any significant injury does not create a cause of action which commences the limitations period, then knowledge of temporary or nominal injury alone should not cause the period to run on injuries which were scientifically undetectable at the time. Any other result would be grossly unfair to the plaintiff because in situations like Megan's, recovery is likely to be barred by any legal route taken. Statutes of limitation were never designed to completely block

plaintiffs from access to the courts for redress of injuries. Rather they were designed to get rid of dilatory and stale claims.

CONCLUSION

Based upon the foregoing, petitioners respectfully request that the decision of the Third District be quashed with instructions to reverse the trial court's final judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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