IN THE SUPREME COURT OF FLORIDA

CASE NO. 63-805

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

Appellants/
Petitioners,

vs.

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

Appellees/
Respondents.

PETITIONERS' BRIEF ON JURISDICTION

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PETITIONERS' BRIEF ON JURISDICTION

JURISDICTIONAL FACTS

Megan Moore, Susan Moore and Henry Moore seek to invoke this Court's discretionary jurisdiction because the decision of the Third District expressly and directly conflicts with decisions of this Court and of other district courts of appeal.

The material portions of the Third District's decision are as follows:

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

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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.

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

* * *

Schwartz, C.J., (dissenting).

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.[1] 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. Johnson v. Mullee, 385 So.2d 1038 (Fla. 1st DCA 1980); see, School Board of Seminole County v. GAF Corp., 413 So.2d 1208 (Fla. 5th DCA 1982); Swagel v. Goldman, 393 So.2d 65 (Fla. 3d DCA 1981), and cases cited. (App. 1-3).

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.

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1 All emphasis is supplied unless otherwise indicated.

POINT I

THE THIRD DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH JOHNSON v. MULLEE, 385 So.2d 1038 (Fla. 1st DCA 1980); BROOKS v. CERRATO, 355 So.2d 119 (Fla. 4th DCA 1978); SALVAGGIO v. AUSTIN, 336 So.2d 1282 (Fla. 2nd DCA 1976) AND OTHER SIMILAR AUTHORITIES

The first case in conflict with the decision below is Johnson v. Mullee, 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 cited by the Third District establish nothing more than the existence of "fetal distress" of unknown biological origin with some depravation of oxygen because the child had ingested something. Significantly, no other facts were cited by the majority as to Megan's condition after her treatment for the difficulty she had breathing. The majority failed to point to any facts which would show that Megan did not appear fully recovered after her hospitalization (i.e., an injury).

This 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).

The majority opinion below expressly and directly conflicts with Johnson because it implicitly holds that the statute of limitations began to run where there was a possibility of injury from a difficult birth, even though the injury was scientifically undetectable at that time. Johnson requires knowledge of the injury and nothing less. See School Board of Seminole County v. GAF Corp., 413 So.2d 1208 (Fla. 5th DCA 1982), also cited by Judge Schwartz in his dissent; Tetstone v. Adams, 373 So.2d 362 (Fla. 1st DCA 1979); Eland v. Aylward, 373 So.2d 92 (Fla. 2nd DCA 1979).

Similarly, in Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978), cert. denied, 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 (neorufibromas) 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.

Express direct conflict also exists with Salvaggio v. Austin, 336 So.2d 1282 (Fla. 2nd DCA 1976). There, 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.

It is apparent from the foregoing that there is absolutely no way to reconcile the Third District's decision below with the above-cited cases. 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 particulary true since the brain damage could not be scientifically diagnosed at that time.

The Third District's 4-to-4 tie vote on rehearing en banc clearly demonstrates the need for this Court to accept jurisdiction in order to clarify the existing confusion and in order to maintain uniformity of decisions.

POINT II

THE THIRD DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976), MacMURRAY v. BOARD OF REGENTS, 362 So.2d 969 (Fla. 1st DCA 1978), and McCLOUD v. HALL, 180 So.2d 509 (Fla. 2nd DCA 1965).

The Third District relied upon the above authorities to support its decision below. Since these cases involved situations materially at variance with the case under review, the application of the holdings in those cases to the present suit constitutes an erroneous interpretation and misapplication of law and thus, creates express direct conflict with them.

In Nardone, supra, 333 So.2d 27 (Fla. 1976), a 13-year-old boy entered the hospital with headaches, blurred vision and experiencing difficulty with coordination. After several surgical and diagnostic procedures, he left the hospital totally blind, comatose, irreversibly brain damaged, and beyond help or

hope of recovery. Under these circumstances, this Court held that the child's injury was apparent and obvious when he left the hospital. Accordingly, the statute of limitations "... began to run when the injury was known."

The majority opinion in this case erroneously holds that, like Nardone, supra, there was knowledge of the injury as a matter of law simply because there was a difficult birth and the child had trouble breathing as a result of swallowing something. There are absolutely no facts cited in the majority's opinion which demonstrates that the Moores knew that the breathing problem resulted from anything even remotely involving negligence or that the problem caused an injury to their child. Without such a determination supported by the evidence, reliance upon Nardone, supra, creates express and direct conflict. The same conflict exists with MacMurray and McCloud, supra. Significantly, the First District in Johnson, supra (which Judge Schwartz relied upon in his dissent) and the Second District in Salvaggio, supra, determined that the holding in Nardone was inapplicable because the Nardone child's decerebrate condition was "known" and "obvious". In these two cases, the facts were found to be materially different that in Nardone, supra. Certiorari was denied by this Court in Johnson. 392 So.2d 1377 (Fla. 1981).

CONCLUSION

Based upon the foregoing express direct conflicts, the Moores respectfully request that this Court accept jurisdiction and decide the case on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to John W. Thorton, Esq., 720 Biscayne Bldg., Miami, FL 33130; to Michael J. Parenti, III, Esq., 66 W. Flagler St., Miami, FL 33130; to Howard E. Barwick, Esq., 9636 N.E. Second Ave., Ste. C., Miami, FL 33138; to Andrew S. Connell, Esq., 1428 Brickell Ave., Ste. 204, Miami, FL 33131; to Joe N. Unger, P.A., 66 W. Flagler St., Ste. 606, Miami, FL 33130; and to Richard A. Sherman, Esq., 524 S. Andrews Ave., Ste. 204-E, Ft. Laud., FL 33301, on this ~~29~~ 30th day of June, 1983.

Respectfully submitted,

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