IN THE SUPREME COURT
OF FLORIDA

CASE NO. 63,805

MEGAN MOORE, etc., et al.,

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF OF PETITIONERS TO BRIEF ON MERITS OF RESPONDENTS CHESTER MORRIS, M.D., WILLIAM J. BREWSTER, M.D. and NORTH SHORE HOSPITAL

SAMS, GERSTEIN, WARD,
NEWMAN & BECKHAM, P.A.
700 Concord Building
66 West Flagler Street
Miami, Florida 33130

and

DANIELS AND HICKS, P.A.
1414 duPont Building
169 East Flagler Street
Miami, Florida 33131
(305) 374-8171

Attorneys for Petitioners

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REPLY TO STATEMENT OF THE CASE AND FACTS

Respondents, Morris, Brewster and North Shore, contend that the Moores' Statement of Facts is accurate, but it is incomplete. Respondents' so-called attempt to complete the facts involves adding the version of disputed facts which favors them without identifying them as being controverted, thus, creating the false impression that the Moores knew every detail of what each physician stated on deposition about his examinations, suspicions, treatments, suppositions and concerns. In addition, certain statements made in an attempt to complete the record are plainly inaccurate. We will address the most significant errors.

On pages 2 and 3, Respondents believe it significant that Mrs. Moore knew that fetal distress involves a child close to dying. However, Susan continued the discussion of fetal distress by saying that it is life threatening "unless something is done. The child obviously could not stay in distress." (R. 4198) As to her own child, Susan believed the distress was caused by a natural biological phenomenon, swallowing meconium, that something was done about it -- a Cesarean section -- and that the baby fully recovered. Thus, put in its proper perspective, Respondents' assertion is essentially immaterial.

On page 3, Respondents erroneously state that Susan ". . . realized the problem with her child bore some relation to the Cesarean section." This statement implies that Susan

believed that the Cesarean section may have contributed to the difficult birth. However, Susan actually testified that because of the fetal distress, a Cesarean section was performed. (R. 4193)

On page 3, Respondents point out that in July of 1975 Megan had a seizure-like episode but they conveniently fail to tell the Court that the seizure was diagnosed as resulting from a second fever that Megan had contracted. (R. 4221) As noted in Dr. Brown's report of February 26, 1975, ". . . I do not have enough evidence at the present time to label the child as having seizures, either on the clinical or electrical basis." (R. 1563)

On page 4, after describing the seizure in 1975, which was diagnosed as being caused by fever, Respondents attempt to show that Mrs. Moore's testimony is incredible by citing, without further explanation, her statement that the neurologist told her that the seizure was "perfectly normal." To begin with, Dr. Brown's records demonstrate that he could not diagnose the episode as a seizure. (R. 1536) Dr. Brown also testified that ". . . children have seizures with fever from ages 18 months to five years of age. Seizures so seen with fever have very little significance. . . ." (R. 1530) It is clear that Mrs. Moore's statement is totally consistent with Dr. Brown's testimony and there is nothing inaccurate or incredible about it.

The issue of whether the statute began to run because Mrs. Moore, a high school graduate without medical training, felt "mismanaged," is adequately answered in our reply to this same point in Dr. Schatz' brief.

At the bottom of page 4, Respondents erroneously contend that Mrs. Moore testified that she was aware of problems with Megan's birth but elected not to sue until she determined that the problems were permanent. Respondents apparently believe that "problems" necessarily means injury caused by negligence, which is simply not true. In any event, an examination of the record references cited reveals that Mrs. Moore was aware of the difficult birth but believed that Megan was discharged from Jackson Memorial Hospital perfectly normal. Mrs. Moore did not adopt the term "problem." In fact, she testified that because everything resolved itself successfully, she didn't ". . . consider it a problem." However, it was counsel for Respondents that defined what he meant by "a problem," as the C-section and admitting the baby to Jackson. (R. 4143) Mrs. Moore then said "If that is what you call a problem," then yes, there was a problem that resolved itself. (R. 4143)

Reasoning from the foregoing, it is clear that Mrs. Moore did not believe her child was injured and she was not going to wait until someone diagnosed it as a permanent injury before bringing suit. Instead, Mrs. Moore believed she had a difficult delivery caused by a natural biological phenomenon and that the baby went through it beautifully and was discharged in a per-

fectly normal condition. In addition, Susan did not "apparently" decline to investigate after delivery because there was no evidence of permanent brain damage as contended by Respondents. Instead, Mrs. Moore stated, "I felt I should investigate what went on when I found out Megan had damage." (R. 4144) It was counsel for Respondents who then used the term, "permanent damage" and Mrs. Moore answered, "Yes." Read fairly, Mrs. Moore's testimony was that she did not investigate until she knew there was damage and it so happened that the damage was permanent when it was discovered. (R. 4144)

On pages 5 through 6, Respondents describe the delivery from Mr. Moore's perspective. Respondents cite, in isolation, Henry's statement that he didn't believe Megan could have fully recovered from the traumatic birth in the short period of time between delivery and the trip to Jackson Memorial Hospital. All this means is that when there is a trauma it takes time to get over it, and nothing more. This is particularly true since Henry believed that Megan was perfectly normal upon discharge and he was not aware of any problems that might arise in the future. (R. 4917, 4943, 4946)

On page 6, Respondents underscore the word " convulsions" used by Henry in connection with discussing the two episodes of high fever that Megan suffered. Respondents leave out the fact that Dr. Brown did not diagnose the problem as

convulsions or seizures and Henry's testimony that, because the incident was diagnosed as associated with a fever, he ". . . dismissed it for that reason." (R. 4955)

On page 7, Respondents claim that Dr. Link told the Moores that Megan had a "serious disease" at birth and that there was a possibility of further medical difficulties. The record cite provided by Respondents does not indicate that any of these things were discussed with the Moores. (R. 5016) Instead, Dr. Link stated that as a general proposition, parents of patients are told the reason for following the child at the Mailman Center. However, Dr. Link could not recall whether he discussed these matters with the Moores. (R. 5025) In view of the Moores' specific recollection that no physician told them that Megan was anything but normal, Respondents' point is without merit. In any event, the statement that Megan had a disease is consistent with a natural biological phenomenon and not with negligence or injury caused by negligence.

At the bottom of page 7, Respondents state that Megan had a mildly abnormal EEG and she was examined by an ophthalmologist because of a suspected depressed blink reflex. The Respondents fail to mention that after the examination at Bascom Palmer, Megan's eyes were found to be normal (R. 2241, 2265, 2281) and that Dr. Caputo testified that he reassured the Moores that the baby was not having serious problems the entire time he

took care of her at Jackson. (R. 4846-7) Respondents also fail to mention that the Jackson records state that the "neurological exam [was] grossly normal." (R. 5019)

On page 8, Respondents state that Dr. Caputo told the Moores that Megan had decreased eye function, that Megan might not see, and that there were probable neurological problems, although he ". . . was not projecting into the future." Aside from the evidence just discussed which neutralizes these contentions, there also exists the Moores' testimony that no physician ever told them that Megan was anything other than normal. Assuming arguendo that Dr. Caputo did have initial fears about Megan's condition, his own testimony, the Jackson records and the eye examination at Bascom Palmer establish that his initial fears were unwarranted. Thus, upon discharge, Dr. Caputo did not have any evidence that Megan was injured.

On page 9, Respondents state that Megan was sent to Dr. Brown because of a "neurological abnormality secondary to perinatal insult" (purportedly quoting Dr. Brown). This statement was obviously made to give the impression that Megan had a neurological abnormality caused by a perinatal insult and that her parents knew about it. Dr. Brown's exact testimony is that he was asked to see Megan ". . . in consultation <u>because of a question</u> of a neurological abnormality secondary to perinatal insult." (R. 1489) Dr. Brown defined perinatal insult as any "variety" of "trauma" to a child during birth. (R. 1489) It is apparent from Dr. Brown's actual testimony that because Megan had

undergone a difficult delivery she was referred to him to see if she had sustained any neurological damage. As noted by Dr. Brown's testimony cited in our main brief, Megan's neurological examinations were within the normal variant until she was three. In any event, there is no evidence that the Moores were told the quoted language. To the contrary, the Moores testified that they were told that Megan was going to see Dr. Brown for routine follow-up visits. (R. 4947, 4046, 4065)

Respondents' next attempt to detail Dr. Brown's findings from his initial examination by using terms like "mildly abnormal," "suggestive of altered nervous system" and "insult" in order to make it sound as if Megan was in terrible shape. However, Dr. Brown's testimony actually states that the "'Neurological examination reveals a healthy normal appearing child in no distress.'" (R. 1490) Dr. Brown also found a depressed blink reflex and some decreased muscle tone. (R. 1491)

In discussing the depressed blink reflex, Dr. Brown stated as follows:

> Q Was this something you were happy to see or unhappy to see as a finding?
>
> A One would be just as happy if it was there -- whether it lasts, the long-term significance, would depend on follow-up examinations. (R. 1492)

As to Megan's muscle tone, Dr. Brown said that it could mean a lot of things. ". . . it may or may not have long-term significance . . . or it may disappear shortly after the newborn period." (R. 1493)

In addition, Dr. Brown was asked whether he recalled discussing these matters with Megan's parents or whether it was his practice to have such conversations with parents. He answered, "No" to both inquiries. (R. 1495) In addition, in his December 4, 1973, report of his examination of Megan, Dr. Brown stated that Megan had ". . . a perfectly normal development to date." (App. 1)

As to Megan's head size, discussed on page 10, it is important to note that while Dr. Brown wanted to follow its development, all prior concern about it disappeared by the examination of February 20th. (App. 3) In addition, Mrs. Moore testified that Dr. Brown never expressed any concern about it. (R. 4049)

On page 11, Respondents erroneously contend that Dr. Brown expressed some concern to the Moores about Megan's slight motor delay. However, the Moores expressly controvert this statement. (R. 4046) The Moores' version of the facts is particularly believable because Megan's motor delay was within the normal variant for children her age. (R. 1545).

Respondents next discussed an episode of shivering that Megan had and they imply that this in some way should have put the Moores on inquiry as to possible negligence. However, Dr.

Brown's report of February 26, specifically mentions the episode and concludes that there is no evidence of a seizure. (App. 3) In addition, Mrs. Moore testified that Dr. Brown told her that some shivering is perfectly normal for young children. (R. 4130)

On page 12, Respondents discuss Megan's examination when she was 11-3/4 months old, the motor delay (within normal limits) and the head size. This was discussed in detail in our response to Dr. Schatz' brief. However, it should be noted that Dr. Brown's testimony is not that he told Mrs. Moore that the motor delay and head size might have some relationship with the perinatal insult. Instead, Dr. Brown said that he "probably" told Mrs. Moore but he ". . . can't be specific about it because my recollections don't allow me to do so." (R. 1546) However, Mrs. Moore did specifically remember that she was not told that Megan was anything but normal. (R. 4130, 4049)

Respondents conclude their factual recitation by quoting a portion of Dr. Brown's deposition which purportedly states that he expressed concern to Mrs. Moore about a brain malfunction due to the head size and motor development as of June 24, 1974. Assuming arguendo that this is a correct statement, it would not start the limitations period as a matter of law because:

a. The Moores were told that the problem resulted from a biological phenomenon;

b. Dr. Brown determined that the motor delay was within the normal variant; and

c. By February 1975, Dr. Brown did not feel that either of these matters ever developed into a problem and that Megan was developing normally.

Thus, even if the Moores were told of Dr. Brown's concerns (which they both denied (R.4215, 4223, 4317, 4219, 4046, 4065), a diligent inquiry would not have uncovered anything except those concerns because Megan's brain damage was not scientifically ascertained by Dr. Brown until 1977.

REPLY TO RESPONDENTS' POINT

Respondents argument erroneously asserts that the Moores admit knowing of an injury caused by negligence but they deny knowing that the injury was permanent. This is totally inaccurate. The evidence, in a light most favorable to the Moores, shows that they did not know of any injury caused by negligence at birth whether it be permanent or temporary. The only thing the Moores knew was that their daughter had suffered fetal distress from swallowing meconium (a natural biological phenomenon unconnected with negligence) and that she fully recovered from this difficult delivery. This does not constitute knowledge of negligence or of an injury caused by negligence sufficient to commence the limitations period as a matter of law.

Respondents are trying to make this a case like that of a broken arm caused by an automobile accident which, years later, after appearing to mend fully, becomes useless. In this example, the injury (broken arm) caused by negligence (the accident) is

known by the victim at the time it happens, even though the complete paralysis does not manifest itself for years. In the present case, the Moores believed that there was simply a difficult delivery caused by a natural phenomenon which resulted in some distress to Megan, which did not appear to ultimately cause her injury. There is simply no analogy between this case and the example of the automobile accident.

Significantly, Respondents rely upon Cristiani v. City of Sarasota, 65 So.2d 878 (Fla. 1953), which involved an accident between a truck and a tricycle. Clearly, this case is totally inapplicable since the child's parents knew of the truck driver's negligence on the day of the accident. There was no such evidence in the present case.

Respondents also cite City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954), which actually supports our position because it held that the limitations period did not begin to run in 1944, when the x-ray burn occurred, but instead, it began in 1949 when the injury became apparent.

The remainder of Respondents' argument simply cites cases such as Nardone v. Reynolds, 333 So.2d 24 (Fla. 1976) and Steiner v. Ciba-Geigy Corp., 364 So.2d 47 (Fla. 3d DCA 1978) as providing analogous facts. However, Nardone involved knowledge that a child left the hospital in a comatose condition and Steiner involved blindness from taking a particular drug. These facts are in no way similar to this case. This is particularly true if the facts and permissible inferences are viewed in a

light most favorable to the Moores as reflected in our main brief and in our two reply briefs. Here, the Moores knew of a difficult birth which the physicians stated was caused by fetal distress and not negligence. In addition, the difficult birth resolved itself so completely that science could not detect brain damage until Megan was three years old.

The remainder of Respondents' brief simply reargues all of the innaccurate factual recitations contained in their statement of facts. We will rely upon our reply to their statement of facts to refute these contentions.

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,

SAMS, GERSTEIN, WARD,
NEWMAN, & BECKHAM, P.A.
700 Concord Building
66 West Flagler Street
Miami, Florida 33130
and
DANIELS AND HICKS, P.A.
1414 duPont Building
169 East Flagler Street
Miami, Florida 33131
(305) 374-8171

By: Mark Hicks
MARK HICKS

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioners was mailed this 3 day of February, 1984, to all counsel on the attached service list.

By: Mark Hicks
MARK HICKS

SERVICE LIST

MICHAEL J. PARENTI, III, ESQ.
Preddy, Kutner & Hardy, P.A.,
12th Floor, Concord Building
66 West Flagler Street
Miami, Florida 33130

HOWARD E. BARWICK, ESQ.
Barwick, Caldwell & Currie, P.A.
The Everett Building, Suite C,
9636 N.E. 2nd Avenue
Miami Shores, Florida 33138

JOHN W. THORNTON, ESQ.
Thornton & Herndon, P.A.
720 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

RICHARD A. SHERMAN, ESQ.
524 South Andrews Avenue
Suite 204E
Ft. Lauderdale, Florida 33301

JOE N. UNGER, ESQ.
606 Concord Building
66 West Flagler Street
Miami, Florida 33130

ANDREW CONNELL, ESQ.
Marlow, Shofi, et al.
1428 Brickell Avenue
Suite 204
Miami, Florida 33131