O/A 2-16-84

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 63,805

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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

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REPLY TO DR. SCHATZ' STATEMENT OF THE CASE AND FACTS

Dr. Schatz' Respondent's brief is a disservice to this Court since it contains gross violations of the rule that on a summary judgment, the evidence and all permissible inferences must be viewed in a light most favorable to the nonmoving party. Dr. Schatz has taken disputed evidence and only discussed the version most favorable to him and he has failed to even comment on the facts stated in Petitioner's brief. In addition, Dr. Schatz has taken deposition testimony totally out of context in an attempt to manufacture support for the summary judgment.

Dr. Schatz' statement of the facts is limited to the conclusory statment that Judge Schwartz was in error in his dissent because the evidence shows that Dr. Brown diagnosed brain damage when Megan was 11-3/4 months old. In support of this conclusion, Dr. Schatz quotes a portion of Dr. Brown's testimony totally out of context, which he again repeats in the argument portion of his brief along with other testimony of Dr. Brown. In order to avoid repetition, we will answer Dr. Schatz' contention under our reply to Point I.

REPLY TO POINT I

Under this point, Dr. Schatz argues that the record conclusively demonstrates that Dr. Brown diagnosed brain damage when Megan was 11-3/4 months old (June 24, 1974), that his records so indicate, that Dr. Brown told this to Megan's mother,

and that Mrs. Moore was on notice of Dr. Brown's records as a matter of law. Dr. Schatz' contentions are totally without merit.

It is our position that Dr. Brown's records of the June 24, examination do not reveal negligence or an injury to Megan and in any event, the contents of these records are not imputed to the Moores under the facts of this case. In addition, the Moores testified that at no time did any doctor tell them that Megan had suffered brain damage or brain dysfunction. (R. 4215, 4223)

Since the pertinent inquiry in this case is what the Moores knew or should have known, it is important to clearly distinguish between what was told to them, what was not communicated to them and what no one, including the physicians, knew prior to 1976.

The beginning point of this analysis is to emphasize that even the majority opinion of the Third District did not find that Dr. Brown diagnosed brain damage when Megan was 11-3/4 months of age. This was undoubtedly because Dr. Brown's testimony and medical records do not contain such a diagnosis. Consequently, there is no conflict between the majority and dissent on this point.

Dr. Schatz commences by making the unsupported statement that "Dr. Brown's records of June 25, 1974, contain the finding of permanent brain injury and further state that Mrs. Moore was told of this." (Schatz p. 6). Significantly, Dr.

Schatz never once quotes from the June 25, record or cites to any portion of it in support of his contention. Instead, Dr. Schatz cites, out of context, portions of Dr. Brown's present recollection about the examination on June 24, in order to make it appear that such testimony accurately reflects what is contained in Dr. Brown's records. This is simply not the case.

A review of the June 25, report reveals that the entire first paragraph is devoted to a summary given by Mrs. Moore of her observations of her daughter's development. The entire summary is totally consistent with Mrs. Moore's testimony that she believed that her daughter was a perfectly normal and happy child. (R. 1564, 4216-4217, 4046, 4065, 4215, 4223) The history given by Mrs. Moore is extremely significant because it is what she knew or should have known that this Court must consider in deciding whether a jury question exists. The hidden and uncommunicated suspicions of physicians are of no relevance.

The second paragraph of the June 25, report makes the observation that "Neurologically, she indeed showed very little from the hard neurological examination. . . but yet, overall, appeared to be functioning more at a 10-month, rather than an 11-3/4 month level." Dr. Brown further observed that Megan's head was not growing as fast as the rest of her body. The remainder of the report states as follows:

> An electroencephalogram was done, and this was mildly abnormal because the background was slightly slow for her age. Nothing focal was present, and no seizure discharging was seen.

> I have expressed to Mrs. Moore that I am concerned about the baby, [which Mrs. Moore denies (R. 4217, 4219)] but cannot find anything hard on examining her, except for a slight developmental delay and the disparity between her headsize and her length size on expected head and length charts. At this point I think that we can do nothing more than follow her neurologically, and I'd like to see her again in 6 months, where I hope that we'll see accelerated development rather than further relative regression. (emphasis supplied)

Clearly, there is absolutely nothing in this report which states that Megan suffered brain damage as contended by Dr. Schatz.

In his deposition, Dr. Brown testified that his reference to a "slight developmental delay" in the report and to a brain malfunction in his prior deposition testimony involved the slight motor delay Megan had in which she appeared to be about seven weeks behind schedule in her development. (R. 1507, 1544-1545, 1550-1552)

As noted by Dr. Brown, aside from the small head size, "the remainder of her examination was by and large within the broad range of normal." (R. 1507) Dr. Brown also testified, "I would say that the motor delay could be a normal variant." (R. 1545) In addition, as to the headsize, Dr. Brown stated, "It does not necessarily imply that the child is going to have subsequent difficulty intellectually or educationally. . .". (R. 1545) In fact, Susan testified that Dr. Brown advised her that Megan's head was small but he was not concerned about it. (R. 4049) The following colloquy then occurred:

Q (By Mr. Ward) When she came back on February 26, 1975 --

A Yes.

Q -- your second paragraph.

A Yes.

Q Neurological examination of the child was normal?

A Yes.

Q So she had a normal EEG in 1975?

A Yes. When I read the EEG I felt it was normal . . .

* * *

Q In your own interpretation in February of 1975, there was a normal EEG?

A My own interpretation was that, yes.

Q Then, in May of 1977, there was a definitely abnormal EEG with discharge that you interpreted as being epilepsy?

A In May of '77 I said that the EEG was suggestive of heightened seizure tendency. It would be definitely abnormal consistent with seizure disorder. The fact that it did not show that and showed other form of activity, it led me to feel there were seizure disorders going on there." (R. 1547-1549)

* * *

Q (By Mr. Ward) All through this time, up until the abnormal EEG, the clearly abnormal EEG, you had adopted a wait and see type of approach. In most every report you stated that.

A Yes.

Q You stated in this report that you had no evidence of residual deficit, for instance, in your report of December 4, 1973.

A Yes.

Q As late as June 25, 1974, you said here that you have expressed to Mrs. Moore that you are concerned about the baby but could not find anything hard on examining her except for a slight developmental delay and the disparity between her head size and the length size, and all you suggested was just to follow her and keep track of what was going on with her. Is that not true?

A Yes. What I am alluding to there was that on the examination I didn't find that the child had abnormally leaned on one side of the body, the child didn't have weakness, she didn't have an abnormal way of walking, or something of that nature, but merely that the child was developmentally delayed, and I therefore did not specifically say that this child has brain damage. This is due to difficulty at birth. I did not use those terms.

Q You adopted an expectant posture?

A Yes.

Q You eventually told her to wait six months and then you would hope to see all these improvements and become normal, I believe you stated here as accelerated development?

A Yes.

Q February 26th the EEG you stated was normal, and the neurological examination was also normal at that time?

A Yes.

Q Children do develop at varying rates, do they not?

A Within certain growth perimeters.

Q What I mean is: They don't all develop at the same rate?

A No.

Q Some crawl earlier than others and sit up earlier than others, and that doesn't necessarily have any clinical signficance unless it persists; is that not true?

A Correct. (R. 1550-1552)

* * *

Q In that June of 1974 report do you recall telling her specifically that this small head and that this child had had brain damage at birth?

A No. I do not recall ever saying that. I doubt I ever would have.

Q Why?

A If the child had a small head and was clearly neurologically impaired, then there was no question in my mind that I would have absolutely told her that the small head size indicated brain malfunction, brain damage, and I could possibly relate it to a specific cause.

If the head was just on the small side, then the child's overall development, or be it slightly delayed, was not great, and I could not find hard neurological deficit, I am sure I would have not been so specific to tell her that the smallness of the head indicated definite perinatal cause.

Q You weren't absolutely positive of that yourself, were you?

A That is correct.

Q This might have just been a small child, that is a possibility, is it not?

A It is a possibility. (R. 1555-1556)

* * *

Q All during this time obviously she was being checked neuologically, everyone was concerned that there might develop some serious neurological problem; is that not true?

A I don't know -- I would have to speak for myself. I don't know whether I was really concerned that she was going to develop serious neurological problems because her development tended to negate that likelihood. Her development was not that far off the normal range.

I had suspicions that she had some evidence of neurological malfunction. I don't think I ever thought she had severe problems. I'm sure, therefore, I never so expressed it to the mother. (R. 1557) (emphasis supplied)

It is apparent from the foregoing testimony that Dr. Brown's use of terms such as "slight developmental delay", and "mildly abnormal EEG", when placed in their proper context do not constitute a diagnosis by him of brain damage. As noted by Dr. Brown, everything except the head size was within the normal variant for a child of 11-3/4 months of age.[1] In addition, Dr. Brown answered an emphatic "No" to the question: "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?" (R. 3602) This is totally consistent with Dr. Brown's report of Febru-

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1 Dr. Caputo testified that there is a statistical percentage of normal people with mildly abnormal EEGs. (R. 4870) Thus, he probably would not have mentioned this to the Moores. (R. 4870)

ary 26, 1975, (6 months later) which does not event mention any developmental delay or that her head size was a problem. (R. 1563; 1573)

In fact, at the February 1975 examination, Susan was told by Dr. Brown that there was no necessity in bringing Megan back (R. 4175-6) and, for the first time, Dr. Brown's report contained no reference to the necessity for future follow-ups for Megan. (R. 1563; 1573) Evidently, Dr. Brown thought that Megan was progressing very nicely, appeared to be normal, and future EEGs would be a waste of time. (R. 4216) Susan further testified that at no time did any doctor tell her that Megan suffered any brain damage or brain dysfunction. (R. 4215, 4223)

Clearly, Dr. Brown's inability to diagnose any brain damage, coupled with the Moores' testimony and buttressed by Susan's statements contained in Dr. Brown's reports that they believed Megan was a completely normal, healthy child cannot constitute notice as a matter of law sufficient to commence the running of the Statute of Limitations.

The only other argument advanced by Dr. Schatz under this point is that Almengor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978) and Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), impute knowledge of the contents of all pertinent medical records to the patient in determining whether the statute of limitations has run. This contention is absolutely incorrect. The only time that the contents of medical records are imputed as a matter of law is when their contents can be understood by a lay person and

when the injury is so severe as to place a reasonable person on notice that he should exercise due diligence in investigating the matter, Tetstone v. Adams, 373 So.2d 362 (Fla. 1st DCA 1979); Nardone, supra; Nolen v. Sarasohn, 379 So.2d 161 (Fla. 3rd DCA 1980). In Nardone, this Court imputed knowledge of the medical records ". . . under the peculiar facts of this case. . .", i.e., the child entered the hospital with headaches and blurred vision and left totally blind, comatose and with irreversible brain damage. Thus, the child's injury was apparent and due diligence required that the medical records be examined. Similarly, in Tetstone, supra, the First District agreed with this interpretation of Nardone and held that:

> ". . . we do not think, as a matter of law, her resulting condition, as opposed to her prior condition, was so severe as to put her on notice of the possible invasion of her legal rights through the exercise of reasonable diligence. Therefore, the content of the hospital records need not, as a matter of law, be imputed to the Tetstones. Nardone, 333 So.2d at 34." 373 So.2d 362 at 363, (emphasis supplied); Nolan, supra, Almengor, supra.

In the present case, there is nothing in Dr. Brown's records which would put the Moores on notice of negligence or of an injury caused by negligence even if such were imputed to them. However, assuming arguendo that the records contained such evidence, their contents would not be imputed to the Moores because they justifiably believed that Megan fully recovered from the difficult birth and that she was healthy and normal.

REPLY TO POINT II

Under this point, Dr. Schatz claims that the Moores were on notice of negligence or some injury caused by negligence at the time Megan was born. We disagree.

In support of his position, Dr. Schatz cites a number of authorities for the proposition that once a party knows of negligence or injury caused by negligence, the limitations period begins to run even though the full extent of the damage has not manifested itself. Two out of the six cases cited by Dr. Schatz actually support our position and the other four authorities are totally inapplicable to the facts of this case because they involve actual knowledge of the injury caused by the negligence. These latter cases include Hill v. Virgin, 359 So.2d 918 (Fla. 3d DCA 1978) [advice from a physician of medical mismanagement and the amputation of a leg]; Buck v. Mouradian, 100 So.2d 70 (Fla. 3d DCA 1958) [burns received from x-rays]; Carter v. Cross, 373 So.2d 81 (Fla. 3d DCA 1979) [automobile accident with injuries]; Cristiani v. City of Sarasota, 66 So.2d 878 (Fla. 1953) [truck collided with a tricycle causing injuries]. However, in City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954), x-ray burns which did not surface for several years were held not to start the running of the limitations period until they became apparent. In Almengor v. Dade County, supra, the statute did not begin to run at birth when the parents had knowledge of mental retardation

". . . because such evidence just as reasonably could have meant that the baby had been born with a congenital defect without any birth trauma."

In the present case, the Moores only knew that there was a difficult delivery and that some fetal distress existed because the baby was born with fluid in her lungs (a biological phenomenon). In addition, the Moores were told that everything turned out fine and they believed that the child developed normally. Clearly, the circumstances are not even remotely analogous to being burned by an x-ray or being injured in an automobile accident.

On page 16 of his brief, Dr. Schatz inaccurately summarizes the evidence in an attempt to make it read like a "nightmare." However, the actual testimony of Susan Moore cited on pages 17 and 18 of Dr. Schatz' brief simply reveals that she was advised of the difficult birth and that she and her husband were concerned about their child's welfare. Conspicuously absent from Dr. Schatz' brief is the Moores' testimony that they were later advised that the baby was doing fine and that she had recovered from her traumatic experience.

On page 18, Dr. Schatz cites Mrs. Moore's testimony that she was told to watch for trance-like staring or twitching when Megan was discharged from Jackson Memorial Hospital. Dr. Schatz has failed to include Susan's testimony that a physician

told her that if there was a problem, these symptoms would occur almost immediately. (R. 4073) It is uncontroverted that Megan never had any of these symptoms. (R. 4044)

Dr. Schatz next points to Susan's testimony (i.e., the testimony of a lay person with a high school education untrained in medicine) wherein Susan felt unhappy about having a Cesarean section and about having her baby taken to Jackson. Again, Dr. Schatz fails to cite Susan's testimony that ultimately she felt that there was no problem because the traumatic situation resolved itself. (R. 4139-4140) In addition, a lay person's general unhappy feelings about not having an uneventful vaginal delivery is not notice of negligence or injury as a matter of law.

Dr. Schatz' recitation of Dr. Caputo's testimony leaves out 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) As to asking them to watch for blinking responses and the possibility of blindness or neurological problems, the Moores deny that any physician told them that their daughter was anything but normal. As to blinking, Mrs. Moore testified that a physician told her to watch for trance-like staring and if this symptom did not occur almost immeditely, there would be no problem. (R. 4073) This symptom never occured. (R. 4044) Megan was also examined by John T. Flynn, M.D. of the Bascom Palmer Eye Institute and Megan's eyes were found to be normal. (R. 2241, 2265, 2281)

In closing, Dr. Schatz quotes the testimony of Dr. Link that Megan was admitted to Jackson's "At-Risk Clinic" and that all babies discharged from this clinic are followed up at the Mailman Center. He also stated that Megan had a serious disease.

The fact that Megan was involved in a traumatic situation which required her to be transported to Jackson is of no relevance because the Moores were told that she fully recovered. Dr. Link's records show that Mrs. Moore reported that everything was normal and the records also show that the "neurological exam [was] grossly normal." (R. 5019) Dr. Link did not recall discussing with the Moores the possibility of future problems. (R. 5025) His reference to disease clearly indicates a natural biological phenomenon rather than negligence. Moreover, there is no testimony that Dr. Link's statement was ever conveyed to the Moores.

Dr. Schatz' contention that these facts put the Moores on notice to make a diligent inquiry is frivolous. The physicians believed that the baby was normal when she left Jackson and since she developed normally until she was 3, there is nothing that the Moores could have reasonably done prior to Megan's third birthday.

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

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.

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