IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,299



THE PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL; TILO GERHARDT, M.D.; GEORGE BIKAJZI, M.D.; CEDARS OF LEBANON HEALTH CARE CENTER d/b/a CEDARS OF LEBANON HOSPITAL and THE UNIVERSITY OF MIAMI,

Petitioners,

vs.

MANUEL C. DIAZ, individually and as the father of DIANA MARGARITA DIAZ, a minor; MANUEL C. DIAZ and EMILIA BEATRIZ DIAZ-FOX, as trustees and/or legal guardians for DIANA MARGARITA DIAZ, BARBARA DIAZ, individually and as the mother of DIANA MARGARITA DIAZ,

Respondents.

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# REPLY BRIEF OF PETITIONER, UNIVERSITY OF MIAMI

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ON REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

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## I. INTRODUCTION

The following Reply Brief will address only those issues raised in the Diaz' Answer Brief regarding the University of Miami's cross-appeal of the denial of their Motion for Summary Judgment. This cross-appealed issue was the subject of a separate brief filed by the University of Miami on the merits. A joint brief on the part of the defendants, Jackson, UM and Cedars, was also filed that addressed the lack of prosecution portion of the trial court's order that Diaz appealed below. With respect to those issues, the University joins in the joint Reply Brief filed by Jackson's counsel on behalf of all parties.

The parties herein will be referred to as noted in Petitioners' initial brief on the merits. All emphasis is added unless otherwise noted.

## II. REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Diaz points out on page 2 of their brief that the parents of the minor child were not even aware until April of 1983 that the child's brain damage could have been caused by the defendants' malpractice. Nevertheless, a review of the complaint filed below shows that there are numerous allegations of perceived negligence that occurred before, during and after the child's birth. These included allegations that an alleged employee of the Trust stated that there was no hope for the child (R 4), that the patient was moved from room to room without further medical attention from

April 9, 1981 through April 10, 1981 (R 5), that the child's mother did not receive any attention from 6:00 a.m. to 2:00 p.m. on April 11, 1981 (R 5), that the defendant Sullivan stated that she did not know what to do with the mother and that she was afraid to act or do anything, that she asked the child's father what to do and then did nothing (R 5), that after a caesarean section was performed the child appeared battered with contusions and marks over her entire body, including the head region (R 6), that the child stopped breathing at various occasions on April 11, 1981, yet the defendants waited several minutes to respond to the alarms (R 6), that the defendants pressed various devices on the body of the child, causing severe and permanent injury, including a hole on the left side of her head and a hole on her leg (R 6), and that the child contracted a severe infection (R 6). Not only were the Diaz' aware of these acts on the part of the defendants and the child's alleged injuries, but by their own admission, they discovered the child's brain damage in April of 1982 (Appellants' brief p. 2; R-217, 250) and had previously refused to pay medical bills sent in 1981 based upon the defendants' alleged negligence. (R 223-24; 256-57).

Notwithstanding these numerous examples of notice as to the child's injuries, Diaz states that it was not until April of 1983, after a conference with a Miami malpractice attorney, that they were aware that the child's injuries may have been caused by the defendants' negligence. After the conference, this firm was

allegedly retained to represent the Diaz' interest (p. 2 of Appellants' brief; R 10). This is somewhat of an odd statement considering that the complaint was filed exactly two years after the birth of the minor child, on April 11, 1983 and was signed by Emilia Diaz-Fox (R 9). Not only was Mrs. Diaz - Fox acting as the child's attorney, but from the start of the case was also the Trustee/Legal Guardian of the minor child. (R 9).

In another incredible assertion, unsupported by the record, Diaz points out to this Court that the Order, signed by Judge Knight, was submitted over the objections of the Diaz' attorney. Nevertheless, there were a number of letters between Mr. Burnett and Mrs. Diaz-Fox regarding the contents of the proposed Order and two proposed orders were submitted to the court for approval. (R 279; R 282; R 288). Furthermore, after the order was entered, Mrs. Diaz-Fox attended an ex parte "status conference" with the Judge during which the Judge reiterated the Order that he signed, explained the reason behind his decision, and repeated his position, as detailed in his order, that he had fully intended to grant the University Summary Judgment, but was precluded from doing so based upon the prevailing case authority. Nevertheless, he indicated both in his Order and during the conference that in his opinion those cases should be revisited and reversed.[1] Based

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[1] A court reporter was present during this ex parte conference with Judge Knight, and transcribed the contents of that discussion. Unfortunately, this never became part of the record in this matter. Nevertheless, the University has appended the transcript of this proceeding to this Reply Brief and asks the court's indulgence in allowing a supplementation of the record at this time. It serves only to

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upon this conference, it is apparent that appellants' unprofessional and ill-advised attempts to characterize the Judge's actions, in denying their motion for rehearing, as belligerent or collusive is without validity and is merely an attempt to seek an emotional response on the part of this Court.

Contrary to the Judge's invitation to do so, the Third District Court of Appeals refused to revisit its prior decisions on the subject or address the question left open by other courts and affirmed the Trial Judge's reluctantly entered denial of the University's Summary Judgment Motion.

## III. REPLY TO FIRST ISSUE

Diaz belatedly argues against this Court's acceptance of jurisdiction in this matter. Nevertheless, Diaz never even filed a jurisdictional brief previously. Diaz agrees that the matter before this Court on the cross-appeal question is certainly one of first impression that can only be resolved by this Court, yet denies the authority of this Court to settle hopelessly conflicting applications of the rules of procedure and the various case authority. Specifically, the issue involved herein is whether an intentional delay in the issuance of process on the part of the plaintiff in order to circumvent the statute of limitations will fail to toll the statute. The decisions which interpret the

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refute plaintiffs' counsel's unsubstantiated and inaccurate characterization of the trial judge's actions.

rules of procedure requiring prompt issuance of summons have found that this rule is only directed towards the Clerks of the Circuit Court. In practice, however, the Clerks of the State do not issue summons without some action upon the part of the plaintiff (R 132-133). The District Courts are aware of this practice, yet assume that the plaintiff's counsel will vigorously pursue their action and presume that the plaintiffs desire to prosecute cases and preserve evidence will protect the rights of the defendants (subject to the rule of dismissal for lack of prosecution). *See Pratt v. Durkop, 356 So.2d 1278, 1281 (Fla. 2d DCA 1978).* Other courts rule similarly, yet held open the possibility that if factual circumstances showed that the assumption was incorrect it may result in another ruling. *McArthur v. St. Louis-San Francisco Railway Co., 306 So.2d 575 (Fla. 1st DCA) cert. den., 316 So.2d 293 (Fla. 1975).*

Clearly, this confusing dichotomy between practice and procedure and its application by the Courts is sufficiently grave to require the review by this Court. Furthermore, although not directly raised as a basis for this Court's discretionary jurisdiction, this Court could have reviewed this case as one expressly affecting a class of constitutional or state officers--i.e., clerks of the court, trial judges, and attorneys--or if the District Court had accepted the Trial Judge's fervent request to revisit the question, could have reviewed it through this Court's pass through jurisdiction pur-

suant to *Florida Rule of Appellate Procedure, 9.125.* In any event, these additional reasons are not necessary for this Court's jurisdiction, but merely add to the imperativeness of this Court's original finding of jurisdiction. Furthermore, there is also clear conflict on the issues addressed in the defendants' joint brief, which this defendant continues to rely on. Once this court accepts jurisdiction on any grounds, all other issues are open for review.

## IV. REPLY TO SECOND ISSUE (A)

Diaz argues to this Court that it is necessary that the University show actual prejudice before it can assert its statutory right to notice of suit, embodied in the Statute of Limitations. Nevertheless, there is absolutely no case authority which holds that it is necessary to do anything other than to show that the Statute of Limitations has, in fact, run as to a claim. Notice of suit given outside that period is presumed to have a detrimental effect upon the defendant and the administration of justice. If the rule were otherwise, defendants would have a right under the statute but may not have a remedy. Clearly, such an outcome is contrary to the legislative intent behind the statute.

With respect to the date that the Statute of Limitations ran, the law in Florida is clear that it is only necessary that the plaintiff have knowledge of the injury or knowledge of the

malpractice, but not both in order to start the running of the limitations period. *Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976).*

*Moore v. Morris* is not inapposite, since the child in that case showed no signs of mental retardation until three years after birth. The issue was whether the noted evidence of trauma and problems at birth was sufficient to start the statute running. Since the parents were concerned with an emergency situation in which the child was transported to another hospital and were informed that the problem was a result of a child swallowing something while in the womb, there was insufficient evidence to show that they were on notice of negligence at the time of birth.

In *Almengor*, the opposite situation occurred in that the child's mental retardation appeared immediately at birth, and there was slow development thereafter. More importantly, however, was the fact that in *Almengor* there was evidence of active concealment on the part of hospital personnel that would have tolled the Statute of Limitations.

In the instant case, it is clear from the face of the complaint that not only were the plaintiffs on notice as to injuries occurring at the time of birth and actions prior to, during, and after birth that seemed out of the ordinary, but in addition they were aware at least two years and five months prior to the belated service upon the University of Miami and the other defendants of the result of that alleged negligence. (R 217; R 250).

Were the Diaz' subjective position taken to its logical extension, the Statute of Limitations may never have begun running in this matter since it appears to be pure happenstance that they found out the child's injuries were the result of malpractice after speaking to a lawyer. Nevertheless, if speaking to a lawyer is sufficient, Mrs. Diaz-Fox, who herself is a lawyer, obviously had or should have had knowledge of the child's injuries and development prior to seeking co-counsel. One can only assume if the law firm of Colson and Hicks had stated that there was no malpractice (and they may have), then the Diaz' would argue that they were still not on notice at that time. To hold that the counsel for the plaintiff should not have any obligation to vigorously bring their case to trial, but rather can file suit exactly two years from the incident, investigate the case, review records, contact other counsel for assistance, and obtain experts, (R 10-11) before ever putting the defendant on notice that an action is pending against him is contrary to the reason behind the statute of limitations. Under the circumstances, the Trial Judge was correct in determining that the granting of the Summary Judgment would be appropriate. Unfortunately, he was constrained by an interpretation of the rules of procedure and conflicting case authority, which when applied to the actual practice of counsel in the State of Florida effectively "tied his hands" and forced him to rule as he did. Clearly such a result should be avoided and can only be addressed by this Court.[2]

Finally, this Court's presumptive time periods contained in the Rules of Judicial Administration are binding on the courts of this state, and, contrary to Diaz' assertion, it is only in exceptional circumstance that a court will allow a case to go on longer than 18 months. Under Diaz' reasoning, since this is a malpractice case, they could wait any number of months before serving the defendants, and still assure themselves another 18 months or more to prepare before trial. Unfortunately, neither this Court nor a trial court has suggested or held to such effect. The assurances of counsel in this regard, therefore, are not very comforting in the light of the current time requirements for the trial courts. Under the circumstances, the trial court certainly should have the power to grant a summary judgment on the statute of limitations issue. This Court should take this opportunity to sort out the confusion in this area and adopt principles consistent with prior law that effectuates the laudable goals of efficient administration of justice in the State of Florida and sends a strong signal to the bench and bar regarding expected conduct.

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2 Furthermore, even if this Court deems that the Statute of Limitations issue is one that requires additional discovery, it can rule that the intentionally delayed service of process will vitiate the tolling of the Statute of Limitations caused by the filing of a complaint, deem the complaint filed as of the date of service, and reverse and remand for proceedings consistent with the opinion to determine the actual date of the running of the Statute of Limitations. *Cf. Ash v. Stella*, 457 So.2d 1377 (Fla. 1984).

## IV. REPLY TO SECOND ISSUE (B)

This defendant adopts the contents of the joint brief filed by all defendants on this issue.

## V. CONCLUSION

WHEREFORE, the petitioner, UNIVERSITY OF MIAMI, respectfully requests that this Court reverse the appellate court's decision that affirmed the trial court's ruling on the UNIVERSITY's summary judgment motion and remand with instructions to have judgment entered in favor of THE UNIVERSITY.

Respectfully submitted,

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By: 
STEVEN E. STARK

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26th day of May, 1987, to: Christopher Lynch, Esquire, Adams Hunter Angones Adams Adams & McClure, 66 West Flagler Street, Miami, Florida 33130; Kathleen M. O'Connor,

Esquire, Thornton David & Murray, P.A., 2950 S.W. 27th Avenue, Suite 100, Miami, Florida 33133; and Emilia Diaz-Fox, Esquire, Suite 424, 200 S.E. First Street, Miami, Florida 33131.

By: _____
STEVEN E. STARK