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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,127

HOSAIN DAEE, M.D., HOSAIN DAEE, M.D., P.A.; RAUL HERNANDEZ, M.D.; CITY OF HOMESTEAD, d/b/a JAMES ARCHER SMITH HOSPITAL; and THE FLORIDA PATIENTS COMPENSATION FUND,

Appellees,

v.

EBONY HALL, by and through her parents and natural guardians, JAMES HALL and EMILY HALL, and JAMES HALL and EMILY HALL, individually

Petitioners.

JOINT ANSWER BRIEF OF RESPONDENTS, RAUL HERNANDEZ, M.D., JAMES ARCHER SMITH HOSPITAL AND THE FLORIDA PATIENT'S COMPENSATION FUND

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Other Authorities

I. INTRODUCTION

Petitioners, EBONY HALL, by and through her parents as natural guardians and her parents individually will be referred to as "Petitioners". Respondent, RAUL HERNANDEZ, MD, will be referred to as "Dr. Hernandez"; respondent, CITY OF HOMESTEAD d/b/a JAMES ARCHER SMITH HOSPITAL will be referred to as "the Hospital" and respondent THE FLORIDA PATIENTS COMPENSATION FUND will be referred to as "the Fund". References to the record will be referred to by the letter "R" with appropriate page numbers. References to the trial transcript will be by the letter "T" with appropriate page references. All emphasis is added unless otherwise indicated.

In addition to the certified question from the Third District, Petitioners have raised three other issues that were previously determined to be without merit by the Third District on appeal. Although this Court has the authority to consider these other issues, in Trushin v. State, 425 So.2d 1126 (Fla. 1982), this Court stated:

> Although we have the authority to entertain issues ancillary to those in a certified case ...we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified case.

Id. at 1130.

The issues ancillary to the certified question include alleged errors in the jury instruction on the statute of limitations issue and the exclusion of evidence that was allegedly relevant to the determination of that issue. The limitations issue does not effect the Hospital, which has a four-year statute of limitations. In addition, although Dr.

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Hernandez and the Fund are subject to a two-year statute of limitations, the court did not enter a judgment in their favor on the statute of limitations because of the jury verdict absolving them from liability. Accordingly, this joint brief will not address the two issues regarding the statute of limitations. Rather, Dr. Hernandez and the Fund adopt the answer brief on this point being separately prepared by Dr. Daee's counsel.

The sections that follow will only address the certified question and the issues of whether an intervening cause jury instruction was necessary and whether the petitioner should have been allowed to demonstrate her injury to the jury.

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II. STATEMENT OF THE CASE AND FACTS

These are proceedings by plaintiffs to review a certified question from the Third District Court of Appeal.[1] The district court affirmed judgments for defendants in a medical malpractice case. (R. 1044, 1045, 1046, 1049, 1052-1052). Respondents respectfully supplement the statement of facts of petitioner as follows:

A. Voir Dire

Although the trial court permitted the three defendants to pool their peremptory challenges, the record shows that defendants exercised their challenges individually, and the trial court made a specific finding to that effect. (T. 308).

During the voir dire process, two groups of prospective jurors were placed in the box and questioned by all parties. After challenges for cause were made, the parties exercised peremptory challenges. (T. 15). The trial court first called upon plaintiffs to exercise peremptory challenges, and then called for challenges from each of the three defendants. (T. 15-17). At the conclusion of twenty-four rounds of this procedure, the six jurors who served on the jury were accepted. (T. 314-315). At that time, plaintiffs had two peremptory challenges remaining, which they chose not to exercise. (T. 315). Defendants

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[1] The Third District certified the following question:

> WHETHER, AS A MATTER OF LAW, A NEIL INQUIRY MUST BE CONDUCTED BY THE TRIAL COURT, EVEN THOUGH THE TRIAL COURT FOUND THERE HAD BEEN NO CHALLENGE OF JURORS ON A RACIALLY DISCRIMINATORY BASIS, WHERE THE DEFENDANTS EXERCISED PEREMPTORY CHALLENGES ON FOUR OUT OF FIVE BLACK PROSPECTIVE JURORS?

collectively had used nine challenges, of which, four were used to strike blacks.

At the end of fifteen rounds, five veniremen of the original group of twenty had been tentatively seated: Dixon, Palomo, Bolado, Martinez and Traurig. (T. 197). Two blacks, Parekh and Coley, had been stricken by Dr. Daee, and no objection to those peremptory challenges had been raised. (T. 183, 188). The record reflects that Mr. Parekh expressed concern over the length of the trial, and was then a plaintiff in a pending lawsuit alleging police brutality. (T. 34, 146).[2] Mr. Coley's wife was involved in a car accident and was also injured on the job and made personal injury claims in both instances. (T. 152).[3]

Fifteen more jurors were brought in, including three blacks: Thornton, Lowrey and Tigget. (T. 202-203). Ms. Thornton is a registered nurse on the nursing faculty at Florida International University. (T. 209-210). She teaches basic hands-on nursing skills, including charting. (T. 290-292). She also serves as academic advisor to nursing students. (T. 210). Thornton worked in primary health care for twelve to thirteen years. (T. 211). When Thornton was challenged by counsel for James Archer Smith Hospital, plaintiffs raised an

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[2] The statement of case and facts of petitioners is particularly misleading because the only issue discussed with respect to each of the individual veniremen is contact with the medical community. Obviously, other areas of inquiry were raised and discussed during the voir dire process.

[3] Of the twenty-five prospective jurors, seven answered that they, or members of their immediate family, had pursued personal injury claims as a plaintiff: Parekh (T. 146), Alvarez (T. 106-107), Woolf (T. 148), Carlucci (T. 150), Coley (T. 152), Amador (T. 98-99, 106, 136), and Rook (T. 279). Of these, Ms. Alvarez, Ms. Woolf and Ms. Amador were stricken for cause. (T. 180, 181). Defendants exercised peremptory challenges to strike the remaining four. (T. 183, 187, 188, 320).

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objection claiming that defendant's challenge was based solely on race. (T. 305).

The trial court noted that the defendants were exercising challenges individually, and that the prior challenges by counsel for the Hospital were of whites. (T. 307-308). In response to plaintiff's argument that a nurse "is absolutely a supreme juror" in a medical malpractice case, the trial court noted that "on the face of it, it would appear maybe there is a reason" for the challenge. (T. 308-309). The court found that there was no violation of the Neil decision, and accepted the challenge without inquiry as to the reasons. (T. 309).

After the trial court ruled that it would not inquire as to counsel's reasons for striking Ms. Thornton, plaintiffs reminded the court that Coley and Parekh were black and had also been stricken. (T. 309, 310). Plaintiffs did not argue that the challenges to Parekh and Coley were based solely on race, nor did they request an inquiry into the reasons for those challenges. (T. 309-310). The trial court reiterated its ruling as to Ms. Thornton. (T. 310).

Thereafter, a different defendant, Dr. Hernandez, challenged Ms. Dixon. (T. 311). Plaintiffs again objected and called for the court to inquire into the reasons for the challenge. (T. 311). The following exchange took place:

> [Mr. Rosenblatt] ...It's obvious what they are doing,and in that sense all the Defendants have a total concerted objective in this case. There will be no reason on earth to exclude Ms. Dixon. In fact, it is done at the 11th hour where now a black man -- it's just obvious, Judge.
>
> MR. BANKKLAYDER: She has two sisters that are nurses.[4]

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[4] Ms. Dixon stated that she had one sister who was "head nurse" at Jackson Memorial Hospital, and another who was a "head nurse" at Washington Medical Center in Washington, D.C. (T. 45).

THE COURT: There remains a black on the jury. I have no problem with Mr. Burnett excusing Ms. Dixon.

(T. 312).

B. Negligence and Causation[5]

Petitioners reargue their case by commenting upon the credibility of witnesses, ignoring important issues, and generally raising argumentative and contested issues to the level of fact. The sections that follows will attempt to point out to this Court those facts which were not addressed by petitioners' brief or which if they were addressed, were skewed in favor of a position not accepted by the jury and not supported by the evidence.

1. Negligence

With respect to the claims of negligence against the Hospital, the patient was seen by Nurse Collins sometime shortly before 3:00 a.m. The nurse did a pre-admission assessment of the patient; she performed a pelvic exam, checking to see if the membrane was intact and how far dilated the cervix was; listened to the fetal heartbeat with a Doppler monitor; and took the mother's temperature pulse and respiration. This occurred prior to the patients admission at 3:00 a.m. (T.2095; 2118; 2120), and would usually have taken 15 to 20 minutes (T.2138).

After performing this pre-admission examination, Nurse Collins called Dr. Daee, the mother's obstetrician. (T.2117, 2120) Nurses cannot admit patients without the doctor's approval (T.2096; 2126), and Dr. Daee's routine admitting orders required the nurse to notify him

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[5] The remainder of the Statement of the Case and Facts is not relevant to the question certified by the Third District. Instead, these facts are relevant to other arguments raised by the Petitioner that the Third District considered and rejected in Petitioners' appeal.

about patient admissions. (T.2096; 2117; 2139). The nurse complied with this and signed off on the order sheet (T.2096; 2117; 2139).

Another of Dr. Daee's standing orders required the nurse to perform a peri-prep, which is shaving of the patient's perineum, and to give the patient a soapsuds enema to stimulate bowel movement. (T.2097; 2140) After this was accomplished, the patient was taken to the labor room at approximately 3:55 a.m. (T.2097) At that point, an external fetal heart monitor was placed upon the mother. Within three minutes, the presence of fetal heart decelerations was noted. (T.2098). This suggested some sort of fetal distress (T.2122).

Pursuant to recognized nursing intervention procedures, Nurse Collins lowered the head of the bed, rolled the patient on her side, gave the patient oxygen, and started her on an I.V. (T.2144; 677-78). These procedures, generally called fetal resuscitation, should be performed prior to contacting the physician. The purpose of these procedures is to maximize the oxygen delivery to the child. Turning the patient on the side tends to enhance the blood and oxygen flow to the uterus; the I.V. attempts to stabilize or increase the patient's blood pressure; the giving of oxygen is intended to increase the mother's oxygen level and thereby increase the ability to transport oxygen across the placenta to the child; and lowering the head of the bed decreases the resistance to the heart and, therefore, makes it easier for the heart to pump blood and oxygen into the baby (T.2144-45). These procedures will often alleviate the fetal distress; only when it does not should the doctor be called (T.2145; 677-78; 707).

In this case, the nurse's intervention would have taken 15-20 minutes (T.712) and indeed by 4:10 p.m., Nurse Collins was aware that no

change in fetal heart decelerations had occurred. Accordingly, she contacted Dr. Daee to inform him of this potentially dangerous condition (T.2122-23). Although Nurse Collins recorded a note of 4:25 a.m. stating that Dr. Daee was en route, she believed that she also may have called him sometime prior thereto and that the 4:25 note merely reconfirmed that he was on his way (T.2121-23). At 4:40 a.m. Nurse Collins took the patient to the delivery room. (T.2102).

At approximately 5:00 a.m., Dr. Daee arrived (T.471) and the child was delivered at 5:20 (T.472). Dr. Daee suctioned meconium from the child's mouth to attempt to prevent the child from breathing the meconium into its lungs, and then handed the child to Nurse Crosby, the CRNA. (T.761) Nurse Crosby noted that at the time of the birth felt that the child's Apgar score was a one (1), which essentially meant that the child had a heartbeat. Zero is considered dead. Indeed, Nurse Crosby originally felt that the child had been born stillborn. (T.762-63) Thereafter he inserted a laryngoscope and attempted to view the throat (T.748;771), but was unable to see the vocal cords as a result of all the meconium (T.765). He continued to monitor the child and suctioned meconium from the child's airway until Dr. Hernandez's arrival at approximately 6 o'clock. (T.765)

Dr. Hernandez, the child's pediatrician was not contacted until after the child was born. If Dr. Daee had asked the nurse to contact the pediatrician earlier, she would have done so and noted it in the chart (T.2123; 2126). A nurse at the hospital informed Dr. Hernandez by telephone that the child had been born, that there was large amounts of meconium present, and that he needed to attend to the child. (T.499; 501) He got out of bed, got dressed and arrived at the hospital

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approximately fifteen to twenty minutes later at 6:00 a.m. (T.498) Upon arriving at the hospital, Dr. Hernandez intubated the child and suctioned large amounts of meconium from the child's airway. (T.508) He discovered that the child's head was covered with thick meconium and had meconium staining of the fingernails, which would not be present unless the problem had been ongoing for several hours to several days (T.502). Although Dr. Hernandez immediately realized that the child would have to be transferred to a hospital that had a pediatric intensive care unit (T.502), there were a number of things that he had to do for the patient prior to arranging a transfer (T.609). He suctioned the meconium, took a sample from the patient's stomach, listened to the child's heart and lungs, felt the abdomen, checked the baby's blood sugar and did a chest X-ray. (T.603-05). He also checked the child for anemia, checked the child's calcium and checked for pneumothorax. (T.608-09) If he had not taken care of these conditions, the child would have died either prior to or during transfer. (T.609) He also placed the child on 40% supplemental oxygen in an isolette. (T.627)

During this period, Dr. Hernandez was the only doctor treating the child; he took and interpreted the X-rays himself and established the IV's himself. (T.616). At approximately 7:30, while Dr. Hernandez was interpreting the X-rays, a nurse in the delivery room contacted him and informed him of an apnea episode in which the child ceased breathing for a period of approximately 30 seconds. (T.560-62; 620) Apnea is not unusual in newborn children under stress (T.1103), and at the time Dr. Hernandez did not consider that this episode was indicative of seizures.

(T.567; 619) He ordered the nurse to place an apnea monitor on the child (T.566) in order to keep track of the child's respiration.

At approximately 8:00 A.M., Dr. Hernandez testified that he contacted Miami Children's Hospital in order to arrange a transfer of the patient. Although he felt that the child's condition was bad (T.508-09), he believed that the child's condition was sufficiently stable to allow a transfer at any time after that point. (T.630).

In 1981 in Dade County, there were only two Level three hospitals or tertiary care centers that had pediatric intensive care units that could care for a sick newborn child such as Ebony Hall. These were Jackson Memorial Hospital and Miami Children's Hospital. (T.115-116) Dr. Hernandez called Miami Children's Hospital, because he was aware from the nurse, who had called James Archer Smith's admission office, that the child's parents had insurance. (T.536) He had transferred at least 30 infants in the past, and if the patient had insurance he would call Miami Children's and if the patient did not have insurance coverage he would call Jackson Memorial. (T.534-36) Sometimes it would take anywhere from 6-12 hours to transfer a child (T.514-15) and if neither of these institutions could take the child, which occurred over 50% of the time, he would have to use a statewide Careline" system that was set up to locate hospital beds for sick newborn children.[6] (T.506;1120)

The nurse at Miami Children's Hospital informed Dr. Hernandez that a neonatologist was not available but said that she would ask the neonatologist to call him back. (T.509) At 10:00, after having received no further contact from Miami Children's Hospital, Dr.

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[6] Indeed, Dr. Hernandez had previously had to transfer a child to Pensacola, but prior to the transfer had treated the child for two days. (T.514-15).

Hernandez called again and spoke to the neonatologist, Dr. Carrol Hirsch. (T.513) Dr. Hirsch inquired of the child's condition and informed Dr. Hernandez that she would call him back with a decision as to whether or not the hospital would accept the child. (T.516)

At this point, Dr. Hernandez was unsure whether the baby would be transferred. He had previously been in situations in which he was unable to transfer a child and had to continue to care for the child indefinitely. Accordingly, he decided that he should take steps to further treat the child in the event he could not transfer her immediately. He took blood from the groin area for blood cultures and blood sugar tests and aspiration from the stomach. The cultures were taken to determine if the child had any infection that might acquire I.V. antibiotics. (T.615-16). When the child's condition started to deteriorate, he also did a blood gas test. (T.616).

Although Dr. Hernandez tried to get arterial blood, the samples that he took were, in his opinion, venous blood. It is difficult to locate an artery in a child (T.616) and although he tried a number of times he was unsuccessful (T.624). The lab confirmed that these blood gas results were from venous blood (T.624). As such, the blood gas results, although dangerously low, were not true results and did not coordinate with the child's appearance. (T.625)

At approximately 11:15, Dr. Hernandez testified that Dr. Hirsch called back and informed him that the transfer had been approved and that the transport team was on its way. (T.628)

Petitioners alleged that Dr. Hernandez' version of the circumstances surrounding the transfer is unsupported by the record. The nurse who noted at approximately 11:00 o'clock in the James Archer

Smith Hospital chart that the child would be transferred agreed in her prior deposition testimony that prior to 11:00 o'clock Dr. Hernandez spoke from the quieter labor and delivery area to the person at Miami Children's Hospital who was responsible for the transfer and gave the person needed information. (T.1473). Thereafter, that person called Dr. Hernandez back at the nursery and that time he informed the nurse that the child would be transferred. This was noted in the chart. The nurse did not know what time the earlier telephone call had occurred, but testified that one had occurred. (T.1475) This is clearly consistent with Dr. Hernandez' testimony, since prior to 11:00 o'clock, Dr. Hernandez did not know whether the child would be transferred and establishes the existence of at least two earlier phone calls.

In addition, at Miami Children's Hospital, a nurse cannot admit a patient. Although a nurse will usually record a request for transfer, this can vary depending upon what the doctor says to her. A neonatologist is not always available and the timeliness of a response depends upon who was on call and where the neonatologist's at that particular time. After the ICU was called, the neonatologist on call was contacted and would call back the referring physician. If the neonatologist made a determination, based upon medical judgment that the child met the medical criteria for transfer and that beds were available, the neonatologist would then contact the hospital's admitting office to determine if the child was eligible for transfer based upon the hospital's admitting procedures regarding financial status (T.1110; 1131-33). Thereafter, once all the medical and business decisions were made, the neonatologist or hospital staff would contact the transferring physician to inform him that the transfer had been approved. (T.1110).

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After all the foregoing had occurred, the transfer would be arranged. If it was during a week day, they would have to call an on-call ambulance service, in this case Randle Eastern Ambulance Service; contact a nurse on call who was not allowed to be at the hospital; contact the neonatal resident on duty to go with the team; assemble the team; and then go to the transferring institution to pick up the child. (T.1111).

In this case, after the decision to transfer was made at approximately 11:15 a.m., it then took an hour and fifteen minutes or until 12:30 p.m., before the team was assembled and sent on their way to James Archer Smith Hospital (T.827). Although it generally took the admitting office approximately 15 minutes to approve a transfer, it sometimes took anywhere between 3 to 6 hours. In addition, although Randle Eastern Ambulance usually responded within 20 minutes, it sometimes took them 1½ to 2 hours as well. (T.1112). As such, it could take anywhere between 45 minutes to 6 hours to respond to a request for transfer. (T.1113).

With respect to the alleged failure of Dr. Hernandez to treat the child's seizures, Dr. Hernandez did not believe that these were seizures, but rather apnea episodes (T.619). Although in retrospect, they probably were mild seizures, his determination at that time was appropriate. (T.1103-05). In addition, the assertion that he should have treated these "seizures" with phenobarbital, even though they were not definitely seizures, is also incorrect. Phylis Sher, petitioners' expert pediatric neurologist, justified her opinion that phenobarbital should have been given by stating that although a <u>small dose</u> of phenobarbital might have depressed the child's level of consciousness,

this was a "minor price to pay" for control of the seizures. (T.1273). However, as Dr. Stuart Brown testified, apnea is not uncommon in babies who have experienced fetal distress and the most important thing is to observe the child. The doctor should give phenobarbital only if it is firmly established that child is experiencing seizures. The problem with prescribing this drug in a situation in which the diagnosis is not conclusively established is that the physician must give 4 times the normal daily dose of phenobarbital in order to cause the child to respond to the treatment. If a physician is going to use this drug, he must be able to intubate and ventilate the child because phenobarbital can cause respiratory depression and ultimately respiratory cessation. (T.1379-80). Accordingly, Dr. Hernandez should not have given the child phenobarbital. Rather the placement of the apnea monitor was appropriate since this would allow him to see changes in respiration or seizure activity on the monitor and respond as needed. (T.1381).

Petitioners assert that Dr. Hernandez was negligent in failing to give 100% oxygen. When oxygen is given in an isolette, however, the maximum level of oxygen that the child will receive and can be given is 50%. (T.627). Although he could have given the child 100% oxygenation after intubation with positive pressure, the use of positive pressure in this infant was contraindicated since you did not want to force meconium into the lungs or cause lung damage which could cause further problems. (T.625; 638; 688)[7]

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[7] Although Nurse Crosby ventilated the child by bag with positive pressure shortly after birth, this was in response to an emergency situation in which the child was not breathing on its own and was only performed to the limited extent necessary to keep the child alive and allow further suctioning of the meconium from the child's throat and lungs. (T.774-75) Under these circumstances, the plain-

(continued...)

After transfer the child was initially put on a pediatric ventilator. She fought the ventilator, however, so she was given a paralyzing drug which allowed the physicians to take over her breathing function. However, the blood oxygen level was still inadequate even with 100% oxygen given through the ventilator. (T.1094) At this point, a diagnosis of persistent fetal circulation was made. (T.1096)

Before birth gas exchange occurs in the placenta and the mother's body shunts blood away from the child's lungs, which are filled with fluid and do not work. As a result, the blood vessels in the lungs are very tight and constricted. At birth, the fluid is either expelled through the child's mouth or it is absorbed. After birth, under influence of increased oxygen in the lungs, the blood vessels open up and blood starts to enter the lungs. However, when the baby is subject to asphyxia, inadequate oxygenation, or shock for any number of reasons the blood vessels may remain constricted. As a result of this resistance, blood does not get into the lungs and, although you may be able to ventilate the lungs with air, the lack of sufficient blood in the lungs causes decreased profusion. If this condition is not treated it can result in death (T.1097-98).

In order to treat this condition, the child was given a blood vessel dilator, which is concentrated and causes a dramatic increase in the baby's blood oxygen level. The side effect of this drug is that all the vessels become dilated so the child's blood pressure drops dramatically. In response thereto, another drug was given to bring the blood pressure up to an adequate level. (T.1094-95). None of this

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[7](...continued)
tiffs' nurse/midwife expert agreed that the use of positive pressure would be appropriate. (T.714)

treatment could have been accomplished without an available pediatric ventilator under the supervision of neonatologists in a pediatric intensive care unit. However, pediatric intensive care units are only found in Level three hospitals. As noted previously the only Level three hospitals in Dade County are Miami Children's and Jackson. (T.1115-1116). A Level one hospital such as James Archer Smith Hospital contains only a normal newborn nursery, and the lack of a pediatric ventilator and other specialized equipment that would be present in a Level three tertiary care center is not below the standard of care. (T.1119). Under the circumstances, it was unreasonable to believe that treatment of this condition could be accomplished by a single pediatrician in a small community hospital without a newborn ICU. (T.1371).

With respect to the child's meconium aspiration and the manner in which it was handled, the meconium did not cause the child's problems but rather was an effect of prior intrauterine insult to the child. Indeed, X-Rays taken subsequent to transfer did not show a pattern of significant meconium aspiration. The treatment at James Archer Smith of the child's meconium problem was entirely appropriate (T.1102) and if the hospital and Dr. Hernandez had not acted as they did, the child would not have survived (T.1124). In fact, plaintiffs' expert, Dr. Katzman agreed that the meconium problem was handled appropriately while the child at James Archer Smith Hospital. (T.904, 917-18).

2. Causation

Petitioners' pediatric neurologist, Dr. Phylis Sher, opined that the greatest problem that this child faced was between 6:30 or 7:00 a.m., when the child had the greatest amount of difficulty in breathing. (T.1279-80). More importantly, however she noted that this breathing

difficulty went on for several hours and that even though very aggressive steps were taken at Miami Children's Hospital and "appropriate medical management was obtained" (T.1280) at some point the lack of oxygen became irreversible. As such, by the time the child was transferred to Miami Children's Hospital the problem could no longer be corrected. (T.1280) Therefore, she believed that permanent damage to the child occurred from 6:30 a.m. until the baby went to Miami Children's Hospital. The only exception to this was the possible complications that could have arisen from the late decelerations noted on the monitor strips. (T.1280-81). She did not testify that the child's damage occurred at Miami Children's Hospital or that there was any negligence in transportation of the child or the treatment at Miami Children's Hospital. Indeed, her testimony seemingly forecloses the possibility that the transport team or the doctors at Miami Children's could have prevented the child's injuries from occurring.

With respect to defendants' experts, each one of them opined that the cause of the child's problems were intrauterine asphyxia as a result of poor oxygen flow to the child before birth.

Dr. Duchowney the child's treating pediatric neurologist opined that her condition was a result of problems that arose sometime after conception but before labor and delivery (T.1977). In support of this opinion he noted, based on recent examinations, that the child suffered from brain damage that was characteristic of problems arising during the second or third trimester of pregnancy. If the brain damage had been the result of asphyxia during labor and delivery, the child would develop an increase in muscle tone, stiffness, and problems with motor development. Ebony on the other hand had a minor decrease in muscle

tone and she had generally natural motor development. (T.1978). The areas of the brain which, when damaged, result in spasticity problems are not formed until late in pregnancy. The child's problems were not consistent with injury to these brain areas and more consistent with damage occurring prior to this development of these higher brain functions. (T.1990-91).

The hospital's nursing expert also testified that the pattern on the fetal monitor strips were indicative of a chronic problem, in which the baby already had existing brain damage, rather than result of an acute condition occurring at the time of labor and delivery. (T.2149).

Dr. Stuart Brown opined that the incident occurred prior to labor and delivery as a result of insufficient circulation in utero that produced the brain damage. This was supported by the thick meconium covering the child, which indicated that it was not an acute problem but one that had been going on for sometime and the evidence of poor muscle tone after birth. (T.1365-67).

Finally, with respect to the alleged failure to properly oxygenate the child between birth and transfer, even assuming that such was negligence, Dr. Hernandez could have 100% oxygen for hours and would not have changed the outcome. (T.1106). The reason for this was that even after the child was transferred to Miami Children's Hospital, and placed upon 100% oxygen, the child's blood oxygen level gases did not increase to a normal level. (T.1369). This was because of the existence of persistent fetal circulation. Dr. Katzman, plaintiff's neonatology expert, agreed that persistent fetal circulation was the major problem in this child. (T.904). He stated that as a result of this condition, even though oxygen got into the air sacs in the lungs, it could not get

into circulation and this is why the child continued to be hypoxemic after he was born. (T.913). The persistent fetal circulation was caused by intrauterine asphyxia, which, as the defendants' experts testified, was a condition that the child suffered from before birth. (T.1099).

As such, even though there was perhaps one question directed to the possibility that lack of 100% oxygen in transport caused some minor damage to this child, it is clear that the plaintiffs and the defendants attributed the cause of this child's damage to problems occurring in utero. The only question was whether these problems preceded labor and delivery or whether they occurred during labor and delivery and were negligently treated before transport.

3. The Charge Conference

With respect to the charge conference and the issue of the causation instructions, the following occurred:

> The next one we have is under number 13, dealing with 5.1-A, B, C.
>
> MR. LYNN: No objection to 5.1-A or B, but I do not believe the intervening cause.
>
> Tell me, Mr. Rosenblatt, why did you request C?
>
> A and B I have no problem
>
> MR. BURNETT: Yes.
>
> MRS. ROSENBLATT: <u>If the jury were to decide that the transport team did not give enough oxygen and that also contributed, and if there were acts on the part of -- let me see, let me think about this for a moment</u>.
>
> <u>I know I had a reason, but I am a little confused about intervening cause</u>.
>
> Yes.

The subsequent things by the transfer team and what happened at Miami Children's Hospital with Hernandez following Dr. Daee, and there are so many steps that I thought intervening was appropriate because of the complexity of it all.

In fact, we are talking about the transport team.

MR. McGRANE: That is concurrent.

MR. BANDKLAYDER: Intervening means afterward.

Concurrent is the same time.

THE COURT: In the instruction book, under the notes, it indicates that 5.1-C is given only in cases where the Court concludes there is a jury issue as to the presence and effect of intervening cause.

I kind of looked at what you are suggesting to me, not so much as intervening cause, but something that happened in the middle, but something that happened subsequent to it.

In other words, the damage that occurred, if it did occur as a result of the Defendants' acts and everything occurred up until prior to the time that the child was transferred.

Now, you are saying, if I am to understand you, that the hospital -- excuse me, the Miami Children's Hospital, in transporting, might have been the intervening cause.

I don't quite look at it as intervening cause.

* * * *

MRS. ROSENBLATT: Well, it says -- and I admit I always am confused on intervening and concurring and some other cause occurring after negligence occurred, if such other cause is reasonable foreseeable and contributes to loss, injury or damage.

So, it talks about a cause occurring after even though the word "intervening" is used, it does not have to be in the middle, and, in effect, it is a subsequent act.

> THE COURT: Well, I think concurring is used in that question, but I have a problem with intervening cause.
>
> That is not the way I see it, so I will deny the C section of intervening cause, and I will just give A and B.

(T.2234-37).

After instructing the jury and going through the verdict form (T.2392-96), the judge told that if they had any questions with respect to the instructions or the verdict form, that they could certainly come back and submit a question on a piece of paper. (T.2397-99). He then excused them to deliberate.

Thereafter, the jury returned with their question as to causation and the court indicated that it would reinstruct the jury as to standard causation instructions 5A and 5B. In response, petitioners' counsel stated that they "would be happy if [the Court] did not even do that." (T.2402), and expressed concern as to what would happen if the jury still did not understand the instruction. However, the Court responded that he would just read instructions as he originally gave them and in response to the question of whether any parties had any objections, petitioners' counsel indicated that he did not have an objection to this course of action. (T.2402).

C. The Proposed Demonstration on Damages

Respondents do not dispute the existence of the damage testimony present in petitioners' statement. Any limited disagreements with petitioners' characterization of the Judge's ruling on this issue will be addressed in the argument section of this brief.

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III. ISSUES ON APPEAL

A. WHETHER THIS COURT SHOULD IMPOSE A NUMERICAL STANDARD FOR DETERMINING WHEN A SUBSTANTIAL LIKELIHOOD THAT CHALLENGES ARE RACE MOTIVATED HAS BEEN SHOWN; AND WHETHER THE TRIAL COURT'S DETERMINATION THAT NO NEIL INQUIRY WAS NEEDED IS ENTITLED TO DEFERENCE

B. WHETHER THE TRIAL COURT CORRECTLY DECIDED THAT THERE WAS NO ISSUE OF INTERVENING CAUSE AND CORRECTLY DENIED PLAINTIFFS' REQUESTED INSTRUCTION ON INTERVENING CAUSE.

C. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE REQUEST TO ALLOW THE MINOR PLAINTIFF TO TESTIFY IN ORDER TO "DEMONSTRATE" HER INJURIES FOR THE JURY.

IV. SUMMARY OF THE ARGUMENT

This Court has long recognized that a trial judge is vested with broad discretion in determining whether a substantial likelihood has been shown that peremptory challenges have been exercised in a discriminatory fashion. This discretion recognizes that the trial judge is in the best position to view and evaluate the nuances of the jury selection process, and thereby determine whether a Neil objection has merit. This Court has rejected calls for a "bright line" test similar to that made by plaintiffs and amici in this case, and has preserved the trial court's discretion. As the Third District held, that discretion was not abused in this case. The certified question should be answered in the negative.

The trial court's determination that there was no issue in this case regarding the existence or effect of an intervening cause was correct. There was no issue presented from the evidence at trial, as framed by the pleadings, regarding any act, cause or occurrence that

occurred after the alleged negligence of each of the defendants that would have relieved any defendant from the liability for this negligence. The only evidence was either that the child's injuries were the result of intrauterine insult prior to the birth or that the injuries started during labor and delivery and continued up until the child was transferred to Miami Children's Hospital. Under the circumstances, the trial judge correctly determined that only the concurring cause instruction was required.

In addition, even assuming that an intervening cause instruction was required, the failure to give it is harmless error since the jury was not misled. The jury found that Dr. Daee, who was responsible for the mother's care prior to admission and was responsible for the period of time up to the child's birth, was negligent. If they had determined that a subsequent intervening cause was sufficient to relieve the defendants from liability, they certainly would not have found Dr. Daee negligent in the initial instance, while at the same time finding the other defendants free from negligence. Rather, the evidence clearly supports the determination that the jury believed that the injury occurred at some time prior to the actual birth, while Mrs. Hall was directly under the care of Dr. Daee.

Finally, the trial court was well within its discretion in excluding the petitioners proposed demonstration. The trial court determined that it would be prejudicial and would not assist the jury in making their damage determination and would otherwise be cumulative of other evidence presented as to the child's condition. In addition, even assuming that the trial court's refusal to allow plaintiff's counsel to "demonstrate" Ebony Hall's injuries to the jury is error, such error is

harmless since this goes to the issue of damages only and not to the issue of liability. Because the jury found in favor of these defendants on the question of liability and never reached the question of damages, this issue is moot.

V. ARGUMENT

A. THIS COURT SHOULD NOT IMPOSE A NUMERICAL STANDARD FOR DETERMINING WHEN A SUBSTANTIAL LIKELIHOOD THAT CHALLENGES ARE RACE MOTIVATED HAS BEEN SHOWN; THE TRIAL COURT'S DETERMINATION THAT NO NEIL INQUIRY WAS NEEDED IS ENTITLED TO DEFERENCE.

The certified question should be answered in the negative. A Neil inquiry is not always necessary to determine whether a challenge is racially based. Where non-racial reasons for a challenge are apparent to the trial judge who is in the best position to make such a determination, no inquiry need be conducted to determine whether there has been a violation of State v. Neil, 457 So.2d 481 (Fla. 1984). In this case, the trial court specifically determined that no violation of Neil had occurred. The Third District Court of Appeal held that there was no abuse of discretion in that finding. R. 1057-1067. In light of the finding that there was not a substantial likelihood that the challenges were based solely on race, the trial court properly refused to inquire into the basis for defendants' challenges.

Beginning with State v. Neil, this Court has recognized that the trial court should have broad discretion to determine whether a substantial likelihood has been shown that peremptory challenges have been exercised solely on the basis of race, sufficient to shift the burden to the challenging party for an explanation of his reasons for the challenges. In Neil, this court examined three cases from outside

jurisdictions involving this issue and crafted a test for use in Florida using elements from those cases. People v. Wheeler, 148 Cal.3d 258, 583 P.2d 748, 148 Cal. Reptr. 890 (1978); Commonwealth v. Soares, 387 N.E.2d 499, 377 Mass. 461, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979); People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981). This court noted that the court in Thompson "parted company" with Wheeler and Soares to the extent that those cases implied that an inquiry may be conducted into the reasons for challenges merely because the prosecutor had used a particular number of challenges to exclude black potential jurors.

In discussing the discretion to be afforded the trial judge, the court in Thompson reasoned:

> The determination of whether a defendant has met his initial burden of showing that there is a substantial likelihood that peremptory challenges have been exercised solely on the basis of race is a difficult one for a Trial Judge to make, even where the Trial Judge has keenly observed all aspects of the jury selection procedure. However, it is even more difficult for appellate courts to review such determinations because, by their nature, they rest to a peculiarly substantial degree upon the Trial Judge's personal observation of the voir dire proceedings, including the conduct of the attorneys and the demeanor and behavior of the potential jurors. For example, a black juror may have been peremptorily challenged, and properly so, because of some idiosyncrasy which does not appear on the cold record, but which was apparent to anyone who was intently observing the conduct of the voir dire. Accordingly, in reviewing such determinations, even greater deference than usual must be paid to the finder of fact.

435 N.Y.S.2d at 755 (emphasis supplied).

In crafting the test for use by Florida's courts, this court in Neil adopted that part of the reasoning in Thompson which gave greater deference to the discretion of the trial court, and specifically rejected a numerical standard. In adopting the reasoning of Thompson, this Court stated:

> We agree with Thompson that the exclusion of a number of blacks by itself is insufficient to trigger an inquiry into a party's use of peremptories. It may well be that the challenges were properly exercised but that fact would not be apparent to someone not in attendance at the trial. The propriety of the challenge, however, might be readily apparent to the judge presiding over the voir dire. We emphasize that the trial court's decision as to whether or not an inquiry is needed is largely a matter of discretion.

457 So.2d at 487, n. 10. Thus the question certified was answered in the negative in the Neil decision itself. The fact that defendants challenged four out of five black potential jurors does not, as a matter of law, compel an inquiry. Plaintiffs and amici in essence ask this Court to revisit Neil and reverse course by adopting the Wheeler and Soares approach. This court in Neil, however, carefully examined the issue and chose the approach which vested the trial court with broader discretion. The decision in Thompson is no less well-reasoned today than it was when Neil was decided.

In the wake of Neil, this Court has consistently recognized the important role of the discretion of the trial court. In Woods v. State, 490 So.2d 24 (Fla. 1986), a case relied upon by the district court, this Court reiterated the Thompson rule, and held that the fact that the prosecutor had challenged six of nine blacks was insufficient to demonstrate a "substantial likelihood" that the challenges were based solely on race. In that case, this court looked to the facts in the record and found that there were non-racial reasons for some of the challenges which would have been readily apparent to the trial judge. This court went on to state: "The three other peremptories exercised against blacks simply do not rise to the level needed under Neil." Id. at 26.

Similarly, in Parker v. State, 476 So.2d 134 (Fla. 1985), the state used four of its nine peremptory challenges to strike blacks. This Court held that the number of challenges alone was insufficient to demonstrate a substantial likelihood that the challenges were based on race. Again, although there was no inquiry by the trial court as to the reasons for the challenges, this Court examined the record. Finding that non-racial reasons for the challenges were apparent, this Court stated, at 138-139: "In fact, we find this record reflects nothing more than a normal jury selection process."

In King v. State, 514 So.2d 354 (Fla. 1987), this Court again recognized the discretion in the trial court, and refused to disturb his finding that no substantial likelihood showing had been made. In that case, the Court cited to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 1724, n. 21, 90 L.Ed.2d 69 (1986), which stated:

> Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.

In State v. Slappy, 522 So.2d 18 (Fla. 1988), this Court again ratified the position that the discretion of the trial court plays an important role in determining whether there has been a violation of State v. Neil. In Slappy, this court specifically resisted calls to limit the trial court's discretion by adopting a "test" similar to that requested here, and stated:

> Unfortunately, deciding what constitutes a "likelihood" under Neil does not lend itself to precise definition. It is impossible to anticipate and articulate the many scenarios that could give rise to the inference required by Neil and Batson. We know, for example, that number alone is not dispositive, nor even the fact that a member of the

> minority in question has been seated as a juror or alternate ...
>
> We nevertheless resist the temptation to craft a brightline test. Such a rule could cause more havoc than the imprecise standard we employ today, since racial discrimination itself is not confined to any specific number of forms or effects.

Id. at 21. That is exactly the issue before this court. Plaintiffs and amici would have this court adopt a bright line test, which divests the trial court of discretion. This was rejected in Slappy, and should again be rejected here.

In Reed v. State, 560 So.2d 203 (Fla. 1990), this court again held that the trial judge's initial determination as to whether a party has met the initial burden of demonstrating that there was a strong likelihood that jurors have been challenged because of their race is entitled to deference. In reasoning pertinent to the instant case, this Court stated:

> Within the limitations imposed by State v. Neil, the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. State v. Slappy. Only one who is present at the trial can discern the nuances of the spoken word and the demeanor of those involved ...
>
> In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process.

Id. at 206. In that case, despite the fact that the prosecutor had used eight of ten peremptories to excuse blacks from the jury, this Court held that the trial court did not abuse its discretion in ruling that the defendant had not made a prima facie showing of a strong likelihood that the challenges were racially motivated.

Plaintiffs and amici argue that once a numerical standard has been reached then the burden shifts as a matter of law upon objection. The position urged here is inconsistent with Neil and its progeny as outlined above because it divests the trial court of discretion to determine, based upon its observation of the voir dire process, whether the objection is well founded.

The position urged by plaintiffs is contrary to the presumption of color-blindness in the judiciary and attributes a cynicism and callousness to the trial court which is simply not warranted. In this regard, the Supreme Court of United States noted in Batson v. Kentucky, supra:

> We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

1065 S.Ct. at 1724.

Many of the arguments voiced by plaintiffs and amici were also raised by Justice Marshall in his concurring opinion in Batson which called for an end to the use of peremptory challenges all together. Although plaintiffs and amici stop short of making this request, by limiting the discretion of the trial court, the use of the peremptory challenge would be severely undermined, if it is to survive at all. As the court noted in Thompson, the peremptory challenge serves an important function, and its use should be preserved to the extent possible. People v. Thompson, supra at 752. The importance of the peremptory challenge was also noted by the Supreme Court in Batson when it answered Justice Marshall's concerns:

> We have no reason to believe that prosecutors will not fulfill their duty to exercise their

> challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising voir dire in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.

106 S.Ct. at 1724.

This court has carefully crafted a mechanism that ensures a fair trial, but at the same time preserves the use of peremptory challenges. The discretion of the trial court is an essential element of that mechanism, and should not be whittled away by imposing numerical standards.

This case highlights the need to exercise caution in calling for an inquiry into the use of a party's challenges. In this medical malpractice case, one of defendants' challenges was exercised to strike Ms. Thornton, a professor of nursing. She was an expert on matters which would be at issue in the trial. She was challenged by the Hospital which was defending a claim for nursing negligence. To call upon counsel to state case-specific reasons to explain why he did not want an expert in the jury box would be invasive. The standard set forth in Slappy is rigorous to be sure. In order to meet that standard, a party could be called upon to disclose mental impressions about the strengths and weaknesses of his case. In this light, the reasoning behind the trial court's deference to counsel's "strategy" is obvious. (T. 309). Petitioner's brief totally misconstrues the import of the trial court's comment.

This factor serves to distinguish the case of Reynolds v. State, 16 F.L.W. S159 (Fla. 1991) wherein the Court noted that the burden of explaining a challenge "is, at worst, minimal."[8] Such is not always the case as demonstrated here. It is certainly within the purview of the trial court's discretion to determine whether inquiry would be minimal, or would be invasive. The trial court clearly did not abuse its discretion in determining that no inquiry as to the reasons for the challenge was necessary to determine whether there had been a violation of Neil.

One of the linchpins of plaintiffs' argument is that "Defendants in a medical malpractice case want jurors with ties to the medical community." Brief of Petitioners, at 34. This naked assertion is made without support of any kind, and reflects a myopic view of the jury selection process in general, and in this case in particular. That the argument is fallacious is demonstrated by the fact that plaintiffs challenged five jurors who had no ties to the medical community: Allen, Bolado, Losey, Carter, and Barreiro.[9] This fact only serves to demonstrate that the jury selection process is multifaceted, and focus on one narrow issue to the exclusion of all others is not appropriate.

The Third District Court of Appeal held that the trial court did not abuse its discretion in ruling that there had been no violation of

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[8] Reynolds is further distinguishable because peremptories were used to excuse all blacks from the jury. The Court noted that an inquiry would be required, upon objection, as a matter of law in that "very limited context." This case does not present that issue.

[9] We do not agree with petitioners that Mr. Barriero's participation in construction of James Archer Smith Hospital can be viewed as a contact with the medical community in the context of this case.

Neil. That determination is supported by the record. Plaintiffs twice objected to defendants' peremptory challenges of blacks. There can be no question that the trial court properly refused to make an inquiry with respect to the challenge of Ms. Thornton. As to the second objection to the challenge of Ms. Dixon, it was within the trial court's broad discretion to determine, based on his observation of the voir dire proceedings and the conduct and demeanor of the potential jurors and the attorneys involved, whether the challenge constituted a cynical abuse of the trial court's first ruling, as argued here, or a part of a "normal jury selection process." Parker v. State, supra at 139. The fact that defendants exercised their challenges individually over the course of a process involving twenty-four rounds of challenges supports the latter view.

Although the challenges need not be "systematic" in order for there to be a Neil violation, the absence of systematic exclusion can and should be a factor to be weighed by the trial court in its determination. It was on this basis that the district court distinguished the case of Bryant v. State, 565 So.2d 1298 (Fla. 1990). There the prosecutor used five of his seven peremptories to challenge blacks. This pattern established a substantial likelihood that the challenges were race-motivated. No such pattern was present in the instant case.

In Bryant v. State, supra at 1301, this Court stated:

> The purpose of a trial judge's Neil inquiry is to (1) obtain additional information about the challenge from the challenging counsel and (2) permit the trial judge to evaluate all of the information that he heard during voir dire with the reasons given by challenging counsel.

Where, however, the trial court is satisfied that it needs no further information to fully evaluate the propriety of the challenge, the need for a Neil inquiry does not exist. Examining the record for reasons for the challenges does not in this context constitute a belated attempt to supply reasons sufficient to comport to the Slappy standard. Rather, the record must be examined to see, as best can be seen, what was apparent to the trial court in making its ruling. See e.g., Woods v. State, supra; Parker v. State, supra. In this case there are glaring non-racial reasons for the challenges, and these must be taken into account in determining whether the trial court abused its discretion in ruling that plaintiffs had not met their burden of demonstrating a "substantial likelihood" that the challenges were based solely on race. The Third District Court of Appeal evaluated the record and properly determined that no abuse of discretion had been shown.

In this regard, it should be noted that this Court has never addressed the issue of the extent to which State v. Neil applies in civil cases.[10] The Eighth Circuit Court of Appeals, for example, has expressed grave doubt as to whether Batson would apply in a civil case. Wilson v. Cross, 845 F.2d 163 (8th Cir. 1988). In Terrio v. McDonough, 450 N.E.2d 190 (Mass. App. 1983), the court stated:

> Reasons come fairly easily to mind as to why less vigorous monitoring of peremptory challenges might be permitted in civil cases. The stakes in a criminal case are likely to be higher, jail or freedom, compared with gain or loss of property in a civil case. Criminal proceedings, for this reason, are hedged with safeguards not thought essential in civil proceedings, e.g., right to counsel. . .and the strictures on amendment of

[10] The Third District is the only court that has applied State v. Neil to civil cases. City of Miami v. Cornett, 436 So.2d 399 (Fla. 3d DCA 1985).

> criminal complaints. . . compared with the more liberal right to amend complaints in civil cases. . . . Many cases involving substantial property rights, if they require equitable relief, are not tried to juries at all.

Id. at 195. Moreover, the institutional concerns regarding the accountability of public officials, e.g., state prosecutors, as expressed by this Court in Reynolds v. State, supra, are simply not present in civil cases involving only private litigants. Because of these differences, this case does not present the appropriate opportunity for this Court to take away discretion from the trial court. If anything, the discretion afforded a trial court in a civil case should be greater than in a criminal case.

The certified question should be answered in the negative, and the opinion of the court below should be approved.

B. THE TRIAL COURT CORRECTLY DECIDED THAT THERE WAS NO ISSUE OF INTERVENING CAUSE AND CORRECTLY DENIED PLAINTIFFS' REQUESTED INSTRUCTION ON INTERVENING CAUSE.

The trial court did not err in refusing to instruct the jury on intervening causes because the presence of an intervening cause-or its effect- was never an issue in this case.[11] Additionally, assuming the

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[11]. This issue, and the issue of whether plaintiff was entitled to demonstrate her injury tot he jury, are not related to the certified question. In fact, the motions for rehearing, rehearing en banc, clarification and certification only address the peremptory challenge issue and statute of limitations issue. The Third District denied these motions and only certified a question regarding the peremptory challenges. The petitioners have sought review in this Court only on the certified question. Although this Court has the authority to consider these other issues, in Trushin v. State, 425 So.2d 1126 (Fla. 1982), this Court stated:

> Although we have the authority to entertain issues ancillary to those in a certified case ...we

(continued...)

evidence that petitioners rely upon is somehow sufficient to suggest the appropriateness of an intervening cause instruction, the trial court's failure to give this instruction does not constitute reversible error because the jury was clearly not misled as to the state of the record.

None of the parties, either implicitly or explicitly, presented a theory of the case through pleadings or the evidence that raised the possible existence of an intervening cause.[12] Accordingly, an instruction on intervening causes was not appropriate. In Wynne v. Adside, 163 So.2d 760 (Fla. 1st DCA 1964), the First District held:

> [T]he principle is too firmly established to require a citation of authority that an instruction should not only be a correct statement of the law

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[11](...continued)
> recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified case.

Id. at 1130.

[12] Dr. Daee's answer to the Second Amended Complaint contained an affirmative defense that any injury as alleged in the complaint resulted from the negligence of some person, corporation or entity other than Dr. Daee. However, a general denial is sufficient to put proximate cause, which is a requirement of plaintiff's cause of action at issue and defendant may show under such a general denial that the injury was caused solely by the negligence of a third person who is not party to the suit and for whom that person is not responsible. Clement v. Rousselle Corp., 372 So.2d 1156, 1158 (Fla. 1st DCA 1979). Accordingly, raising this affirmative defense was unnecessary and, in any event, it was insufficient to raise an "issue" regarding the existence of an effect of an intervening cause. Even if a defendant presents an "empty chair" defense, such an argument does not seek to relieve the party from the liability as the result of the existence of an intervening cause between their negligence and the injury, but rather merely asserts that the injury was not caused by any action or inaction [negligence] of that defendant. Furthermore, no evidence was presented by this defendant to support an argument that the injuries were caused by another person or entity, whether another party or a non-party. As such this was never an issue in the case.

> but it must also correctly state the law applicable to the case being tried and must be predicated upon the evidence adduced at trial under the issues drawn by the pleadings.

Id. at 762. See Fournier v. Lott, 145 So.2d 885 (Fla. 3d DCA 1962).

Petitioners erroneously suggest in their statement of facts that evidence was presented at trial as to the existence of intervening causes including "persistent fetal circulation" which continued for hours after the child arrived at Children's Variety Hospital, the alleged failure of the Childrens Variety Hospital transport team to administer 100 percent oxygen while the child was being transferred to Childrens Variety and continuing uncontrolled seizures at Childrens Variety. However, a review of the evidence reveals that the defense witnesses attributed the child's injuries to circumstances arising prior to the birth of the child. These experts opined that the meconium aspiration, the persistent fetal circulation, and the seizures did not cause any permanent injury to the child; that the child had been injured prior to labor and delivery and these conditions were merely effects of this pre-existing brain damage coupled with the trauma and stress of delivery itself.

Further, petitioners' experts did not opine that these other events contributed to the child's injuries. Regarding the continuing persistent fetal circulation after transport to Miami Children's Hospital, petitioners' expert pediatric neurologist testified that the child's brain damage occurred in part during labor and delivery and in part between delivery and transport, most probably between 6:30 and 7:00 in the morning. No expert opined that the continuing persistent fetal circulation contributed to the child's injury. By the time the transport team arrived, any alleged damage was essentially irre-

trievable.[13] To rise to the level sufficient to sustain an intervening cause instruction, PFC had to have been an independent intervening cause separate from the original alleged negligence. However, this is clearly a condition, which even pursuant to petitioners' own expert testimony, concurred with the alleged negligence of the various physicians and, in fact, was allegedly caused by such negligence. As such, it would not constitute an independent intervening cause.

Petitioners also erroneously rely on the alleged failure of the Variety Children's Hospital transport team to administer 100% oxygen as a "possible" intervening cause. Petitioners rely on the fact that their expert, during cross-examination by James Archer Smith Hospital's counsel, was asked- and answered- one question raising the possibility of additional injury at this time. Of course, appellant's expert clearly testified that the majority- if not all- of the damage occurred prior to this time. Additionally, the jury in this case did not believe that the use of 70% oxygen in transit was an independent act that relieved the defendants from liability as evidenced by the fact that the jury found Dr. Daee- the first actor in the sequence- negligent. Clearly the alleged lack of oxygen during the transfer was not an independent cause requiring an appropriate instruction.

At the charge conference, petitioners only argued that the failure to administer 100% oxygen during the transfer to Childrens Variety justified an intervening cause instruction. The trial judge properly

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[13] Appellants are estopped from taking a contrary position in this appeal. See, e.g., Montero v. Compugraphic Corp., 531 So.2d 1034, 1036 (Fla. 3d DCA 1988) ("a litigant cannot, in the course of litigation, occupy inconsistent and contradictory positions."); McKee v. State, 450 So.2d 563, 564 (Fla. 3d DCA 1984) ("it is axiomatic that a party will not be allowed to maintain inconsistent positions in the course of litigation.")

recognized that petitioners had consistently asserted that the damage, if the result of negligence, had occurred up until the time of transfer. As such, the trial judge was justifiably suspect when petitioners argued to the contrary, (T.2236, lines 2-11), and he appropriately denied the request for an intervening cause charge. Nothing presented in this second appeal requires a contrary result.[14]

The notes to the Florida Standard Jury Instructions, regarding causation state that:

> Charge 5.1c (intervening cause) is to be given only in cases in which the Court concludes that there is a jury issue as to the presence and effect of an intervening cause.

In this case, the trial judge during the charge conference was aware of this note and correctly determined that there was no issue in the case as to the existence or effect of an intervening cause, sufficient to require him to instruct the jury with Standard Charge 5.1c. (T.2234-37).

Petitioners mistakingly rely on the cases of Tilley v. Broward Hospital District, 458 So.2d 817 (Fla. 4th DCA 1984) and Higgins v. Johnson, 434 So.2d 976 (Fla. 2d DCA 1983). Tilley involved the failure to give a concurrent cause instruction, not an intervening cause instruction. In Tilley, the child developed an infection shortly after surgery and ultimately died. Plaintiff apparently asserted that the infection was the result of the negligent treatment and surgery provided by the hospital. On the other hand, the hospital asserted that the

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[14]. The appellants suggest at 16 that the child's continuing uncontrolled seizures at Variety Children's Hospital was a possible intervening cause. This argument was not made at the charge conference. Regardless, the experts at trial testified that the child had been injured prior to being transported to Children's Variety Hospital and that the seizures were merely effects of this pre-existing brain damage.

death was the result of some natural condition arising after their care and treatment, for which they were not responsible. Once the intervening cause element--subsequent infection and ultimate demise from allegedly natural causes--became an issue, then an instruction to the jury was appropriate in order to inform the jurors that the subsequent action would not relieve the defendants from their negligence if their negligence was a substantial contributing factor and the subsequent event was foreseeable. In addition, it is presumed, although not specifically noted, that the jury would have been instructed that the leaving of the sponge after the second surgery would be negligence per se and, therefore, the existence of defendants' negligence and the effect of a subsequent condition was clearly established. Under these circumstances, unlike the instant case, it is appropriate for an intervening cause instruction to be given.

Likewise Higgins does not require a reversal in this case. In Higgins, neither the concurring nor the intervening cause instructions were given. The allegations of negligence were that the defendant, a chiropractor, had treated the plaintiff for a low back strain. The condition grew progressively worse and ultimately resulted in serious paralysis and loss of bladder and bowel functions. The actual cause of the condition was a malignancy that originated in the prostate, involved the spinal column, and subsequently resulted in compression of the spinal cord. Plaintiff alleged that the defendant negligently failed to observe proper standards of chiropractic medicine and, accordingly, failed to timely diagnose, discover, or treat the condition. The defendant asserted that the plaintiff was comparatively negligent in that he did not heed defendant's later suggestion to consult a medical doctor

when the condition continued to progress. The trial court denied both the concurring and intervening cause instructions and only gave the standard instructions on legal cause of injury. On appeal the court held that both instructions were required to determine the liability issues, not just damages. It properly noted that the defendant's negligence was not the cause in fact of the patient's cancer, but may have combined with the natural cause to substantially contribute to the end result. In Higgins, the ultimate injury, paralysis and loss of bladder and bowel functions, occurred after the treatment of the defendant and as a result of an underlying natural condition. The failure of the plaintiff to seek medical intervention after the defendant's treatment was also alleged to be an intervening cause. As such, in that case the instruction was appropriate.

In the instant action, there was no question for the jury to determine regarding any defendant's freedom from negligence as the result an act or a cause occurring after that defendants contact with this child. Accordingly, there was no basis for instructing the jury on intervening cause.

Assuming that the evidence in this case was minimally sufficient to suggest the appropriateness of an intervening cause instruction, the failure to give this instruction was not reversible error, since the jury was clearly not mislead as to the state of the record. As the Third District stated in Morganstine v. Rosomoff, 407 So.2d 941-43 (Fla. 3d DCA 1981):

> Failure to give a requested instruction does not automatically, however, require reversal. Rather in determining whether the trial court erred, the requested jury charges must be interpreted in light of the evidence, pleadings, and other instructions to see whether, as a whole, the instructions fairly

> state the law, or whether the jury may have been mislead. Grimm v. Prudence Mutual Casualty Co., 243 So.2d 140 (Fla. 1971); Llompart v. Lavecchia, 374 So.2d 77 (Fla. 3d DCA 1979), *cert. denied* (385 So.2d 758 (Fla. 1980); Wages v. Snell, 360 So.2d 807 (Fla. 1st DCA 1978).

407 So.2d 143; See also Sears Roebuck & Company v. McKenzie, 502 So.2d 940 (Fla. 3d DCA 1987); Wilson v. Boca Raton Community Hospital, Inc., 511 So.2d 313 (Fla. 4th DCA 1987); Gallagher v. Federal Insurance Co., 346 So.2d 95, 97 (Fla. 3d DCA 1977) Florida East Coast Railway Co. v. Lawler, 151 So.2d 852 (Fla. 3d DCA 1963).Cf. General Syndicators of America v. Green, 522 So.2d 1081 (Fla. 5th DCA 1988) (Appellate court found that even if an independent contractor instruction, which excused the defendant from liability if the acts complained of were performed by an independent contractor, was improperly given, it was harmless error to give it since the jury found the defendant was negligent and that such negligence was a legal cause of plaintiff's injuries. If jury had believed that an independent contractor insulated the defendant from liability they would not have found the defendant liable).

Petitioners merely assert that the jury had a question regarding the causation instructions and, therefore, the jury was obviously confused. However, the fact that the jury may have been concerned with causation and requested further instruction on causation is not dispositive. Rather, the question is whether the failure to give the intervening cause instruction mislead the jury by not providing proper instruction on a material issue.

In the instant action, it is virtually impossible that the jury was mislead as to the effect of a intervening cause since the jury found that Dr. Daee, who petitioners admit was the first actor in the sequence, was negligent. If, as petitioners assert, the jury might have

found from the evidence in the record that an action subsequent to the negligence relieved the original negligent actor from liability, then it is unlikely, indeed impossible, that the jury would have returned a verdict against Dr. Daee. If it is possible that the jury might have determined that some negligence on the part of the transport team or the personnel at Variety Children's Hospital excused Dr. Hernandez and James Archer Smith Hospital or that some natural condition caused the injury after transport,[15] such a determination would also hold true with respect to Dr. Daee. Clearly, the jury, in finding Dr. Daee negligent, accepted the proposition that the injury to Ebony Hall was the result of intrauterine insult that occurred prior to her admission into the hospital while she was under Dr. Daee's care, or was result of Dr. Daee's negligence in failing to go to the hospital immediately and in failing to adequately respond to the late decelerations that arose during labor and delivery and, therefore, an intervening cause instruction was not necessary.[16]

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[15] As noted in the earlier section, the plaintiff never took a position that there was negligence on the part of Miami Children's Hospital staff or the transport team or that the child's injuries could have been prevented after transport. Indeed, they took the opposite position.

[16] Indeed, recent case authority suggests that the two issue rule might be applied to this case to preclude appellants from showing harmful error as a result of a lack of intervening cause instruction; since the jury on the basis of this record and the verdict forms submitted could have determined that the physicians were not negligent and never determined the causation question. That is, it is perfectly consistent that the jury determined that Dr. Hernandez and the hospital were not negligent and, therefore, never reached the question of whether such negligence was a legal cause of the injury. See Brown v. Sims, 538 So.2d 901,907 n.4 (Fla. 3d DCA 1989).

C. THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING THE REQUEST TO ALLOW THE MINOR PLAINTIFF TO TESTIFY IN ORDER TO "DEMONSTRATE" HER INJURIES TO THE JURY.

The trial court correctly refused to permit the minor plaintiff, Ebony Hall, to be questioned at trial. It was acknowledged by all parties that Ebony Hall suffers from brain damage and retardation; and several expert witnesses testified as to the mental condition of the child. During plaintiff's case, plaintiff's counsel indicated to the trial judge that he was "intending to call or give some type of demonstration with Ebony." (T.1450) Counsel stated that he wished to ask the six and a half year old child certain basic questions and perhaps to have her draw a circle on a piece of paper in order to show the extent of injury and damage (T.1451-1452): "I would like to see this child have the jury hear her voice for a few moments." (T.1454). The trial judge noted that the jury had seen the child, who had been present in the courtroom for a short period. The trial judge ruled that the demonstration of the plaintiff's retardation was excluded because "the prejudicial effect would be so great that it would outweigh the probative value . . .and I will not allow the proffered demonstration. . . " (T.1511).

The question of whether to permit a demonstration of injury in front of a jury is a matter which rests within the sound discretion of the trial judge. Talcott v. Holl, 224 So.2d 420 (Fla. 3d DCA 1969), cert. denied, 232 So.2d 181 (Fla. 1969). This discretion will not be disturbed on appeal in the absence of a clear showing of abuse. Additionally, a demonstration of an injury is generally disfavored:

> Although the decision of whether to permit an exhibition or demonstration of injuries in front of

> a jury is generally a matter resting in the discretion of the trial court, such exhibitions are generally frowned upon.... Demonstrations of injuries are especially suspect where the injuries are of such a nature that they cannot be seen by the jury.... Any exhibition of injuries which is intended to excite sympathy or pity in the jury or which inflames or prejudices the jury is obviously grounds for a new trial....
> In the present case, we must accord great weight to the findings of the trial judge on this matter since he was in a superior vantage point to determine any prejudicial effect the demonstration might have had on the jury.

Del Monte Banana Co. v. Chacon, 466 So.2d 1167, 1174-1175 (Fla. 3rd DCA 1985).

Petitioners erroneously rely on Talcott , Florida Greyhound Lines v. Jones, 60 So.2d 396 (Fla. 1952), and Florida Motor Lines v. Bradley, 164 So. 360(Fla. 1935). In Talcott, the Court held it was in the "sound judicial discretion of the trial judge" as to whether to allow the plaintiff to take the stand and answer a few questions as part of a demonstration of mental injuries. Jones involved whether the injured plaintiff could be present in the courtroom- not a demonstration of the plaintiff's injuries. Finally, in Bradley, this Court held that the trial judge has discretion as to whether to allow the plaintiff to exhibit a physical injury. In this case, as discussed above, the trial judge did not abuse his discretion in refusing Petitioner's request.

Assuming for purposes of argument that the proffered demonstration was relevant to the assessment of damages, the jury's verdict made the exclusion of the proffered demonstration harmless error. The jury found that there was no negligence, i.e., no liability, on the part of Dr. Hernandez and the hospital. Once the jury found that the doctors and the hospital were not negligent, exclusion of damage evidence could only be harmless error.

In a case close on point, the Third District determined that the exclusion of photographs taken of a minor plaintiff upon release from the hospital could not constitute reversible error "since this would seem to have a bearing only on the extent of the injuries suffered," rather than on the issue of liability that had been determined in the defendant's favor based upon a directed verdict at trial. Oliva v. Baum, 194 So.2d 319, 321 (Fla. 3d DCA 1967).

As to Dr. Daee, the jury found him negligent and awarded the plaintiffs damages of $1,100,000. Petitioners do not raise as an issue on appeal that the damage award against Dr. Daee is insufficient because of the exclusion of the demonstrative evidence described above. In the absence of an argument that the $1,100,000 awarded as against Dr. Daee was less than the jury would have otherwise awarded had it seen the proffered demonstration, no prejudicial error can be shown. The jury also found that the statute of limitations had run on the claim against Dr. Daee. This determination also makes any error which might have occurred in connection with excluding the proffered demonstration relating only to damages harmless.

The discretion of the trial judge in excluding the demonstration must be accorded great weight. No abuse has been shown. Further, it cannot be said that the trial court clearly abused its discretion or erred in relying on Section 90.403 to exclude the demonstration, the prejudicial effect of which outweighed its probative value. Thus, even without the harmless error doctrine of Section 59.041, Florida Statutes (1987), no reversible error occurred in connection with excluding the testimony of the minor plaintiff and demonstrating the extent of the retardation to the jury.

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VI. CONCLUSION

WHEREFORE, the respondents, RAUL HERNANDEZ, M.D.; CITY OF HOMESTEAD, d/b/a JAMES ARCHER SMITH HOSPITAL; and THE FLORIDA PATIENTS COMPENSATION FUND, respectfully request that this Court affirm the verdict and judgment rendered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of April, 1991, to: **DANIEL K. BANDKLAYDER, ESQ.**, Stanley Rosenblatt, P.A., 66 West Flagler Street, Miami, FL 33130 and to **DEBRA SNOW, ESQ.**, Stephen, Lynn, et al., 9100 S. Dadeland Blvd., Miami, FL 33156.

MICHAEL L. FRIEDMAN

MLF.24277.02.5B