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IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NUMBER: 77,127

DISTRICT COURT CASE NO: 88-1628

CIRCUIT COURT CASE NO: 84-37591 CA (10)

EBONY HALL, A MINOR, BY AND THROUGH HER PARENTS AND NATURAL GUARDIANS, JAMES HALL AND EMILY HALL, AND JAMES HALL AND EMILY HALL, INDIVIDUALLY,

PETITIONERS

VS.

HOSAIN DAEE, M.D., HOSAIN DAEE, M.D., P.A., ET AL.,

RESPONDENTS

ANSWER BRIEF OF RESPONDENTS, CROSS-PETITIONERS HOSAIN DAEE, M.D., HOSAIN DAEE, M.D., P.A.

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INTRODUCTION

This brief is filed on behalf of Respondents Hosain Daee, M.D. and Hosain Daee, M.D., P.A., Defendants in the trial court medical malpractice action and Appellees/Cross-Appellants before the Third District Court of Appeal. Petitioners are Ebony Hall, a minor, by and through her parents and natural guardians, James Hall and Emily Hall, and James Hall and Emily Hall, Individually, Plaintiffs below, and Appellants/Cross-Appellees before the Third District Court of Appeal. Raul Hernandez, M.D., City of Homestead d/b/a James Archer Smith Hospital, and the Florida Patients Compensation Fund were also named Defendants in the trial court action, were Appellees before the District Court, and are Respondents in this matter.

The parties will be referred to as Petitioners/Plaintiffs and Respondents/Defendants as well as by name.

The following symbols will be used for reference purposes:

"R" for references to the record on appeal.

"TR" for references to the trial transcript.

Unless indicated to the contrary, all emphasis has been supplied by counsel.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Respondents have no objection to the statement of the case as set forth by Petitioners. However, Respondents do take issue with certain of the matters related in the statement of fact, and believe that additional facts are necessary in order to properly supplement the record.

Initially, Respondents would note that Petitioners' discussion regarding the selection of the jurors in this case conveniently omits any reference to the fact that Petitioners exercised four of their seven peremptory challenges on prospective latin jurors -- Alen, Barriero, Bolado and Gonzalez. (TR 186, 192, 303, 304) In addition, however, as Respondents are cross-appealing the propriety of the trial court's ruling denying Respondents' motion for directed verdict, the facts which Petitioners have set forth regarding the negligence issues must also be examined.

Respondents believe that additional facts must be presented to enable this Court to resolve Respondents' cross-appeal. As Respondents want to present those facts in the light most favorable to Petitioners, Respondents will simply repeat those relevant facts which were included by Petitioners in their initial brief before the Third District Court of Appeal, but which have been omitted from Petitioners' statement of the case and facts in the initial brief in this appeal.

Petitioners have previously characterized their claims against Dr. Daee as follows: 1) Mrs. Hall's pregnancy became a "post

date" pregnancy as of May 20, 1981, making it a "higher risk" pregnancy from that point forward (Rosenzweig 12-13, T 1159-1160); from that point forward, Dr. Daee should have utilized any of the widely available tests which were available to assess the status of the fetus, such as a non-stress test, blood tests to determine estriol levels, ultrasound evaluations and amniocentesis (Rosenzweig 14-17); 2) the labor and delivery nurse, Gail Collins, testified that she called Dr. Daee at 3:00 a.m. and told him that Mrs. Hall was in the hospital, in labor (T 2096-2097); Dr. Daee testified that the first call he received was at 4:25 a.m. (T 419-411) Dr. Daee arrived at the hospital at around 5:00 a.m. (T 418). Assuming Nurse Collins made the call at 3:00 a.m., Dr. Daee failed to respond by either coming to the hospital or at least ordering immediate, continuous electronic fetal monitoring for this high risk fetus (Rosenzweig 24-25). There was absolutely no monitoring of the fetus from 3:00 a.m. until 3:55 a.m. (Rosenzweig 25) When a monitor was hooked up to Mrs. Hall at 3:55 a.m., it immediately showed some severe "late decelerations," (Rosenzweig 35-36) indicating that the baby was already decompensating due to lack of oxygen. (Rosenzweig 36) In this situation, it is imperative that the baby be delivered as soon as possible, because continued oxygen deprivation causes brain damage. (Rosenzweig 37) If Dr. Daee had gotten to the hospital in a timely fashion, a caesarean section could have been performed. (Rosenzweig 41-42)

Petitioners identified expert testimony from the following witnesses as being supportive of these claims of negligence:

William Rosenzweig, M.D. a board certified OB/GYN, who is president of the California Association of Obstetricians and Gynecologists (Rosenzweig 6-7); Lynn Dollar, R.N., a registered nurse/certified midwife who instructs physicians and nurses in the techniques of electronic fetal monitoring (T 650) and was the head nurse for the labor and delivery unit at Bayfront Medical Center in Tampa; Gerald Katzman, M.D., who is a board certified in both pediatrics and neonatal-perinatal medicine (T 860), an associate professor at Wayne State University School of Medicine and director of the Neonatal Intensive Care Nursery at Toledo Hospital; and Phyllis Sher, M.D., a board certified pediatric neurologist, presently practicing at the University of Minnesota School of Medicine, and who previously was in private practice in Hollywood, Florida and a faculty member at the University of Miami Medical School (T 1259-1261).

In their factual discussion regarding causation in their brief before the Third District Court of Appeal, Petitioners identified certain critical time frames. The time frames involving Dr. Daee were identified as:

1. The time frame prior to labor, i.e. prior to 12:01 a.m.; assuming there was negligence which was a legal cause of damage during this time frame, the obstetrician, Dr. Daee, would be responsible; and

2. The time frame during labor itself, from 12:01 a.m. until Ebony's delivery at 5:20 a.m.; responsibility during this time frame would be shared between Dr. Daee and the labor nurse,

Gail Collins, a hospital employee. Petitioners identified two other critical post-delivery time periods which did not implicate Dr. Daee.

Petitioners identified the following testimony as being dispositive of the causation issue. Plaintiffs' pediatric neurology expert, Phyllis Sher, M.D., testified that it was difficult to allocate and quantify the amount of brain damage caused as between the different time frames because there was "a lot of different things going on, and they were going on over a prolonged period of time." (T 1279) In her opinion, there was no evidence that the baby was damaged or compromised at all prior to labor (T 1281). In Dr. Sher's opinion, based on reasonable medical certainty, the time frame during which the greatest amount of damage occurred was between 6:30 a.m. and 1:30 p.m., after the baby had been delivered, (T 1280, 1306), because Ebony received inadequate amounts of oxygen (T 1280) during that seven to eight hour period. However, Dr. Sher opined that based upon the late decelerations (fetal heart rate abnormalities) shown on the fetal monitor strip during labor, some permanent damage could have occurred during labor. (T 1280-1281)

Dr. Rosenzweig testified that the fetal monitor strips indicated that the baby was decompensating due to lack of oxygen (Rosenzweig 36) and that as labor continued, so did the oxygen deprivation; this can cause cerebral palsy, seizure disorders and death. (Rosenzweig 36-38) Dr. Rosenzweig analogized the situation of a fetus in distress to that of a person drowning; the longer

the person stays under water without oxygen, the worse the situation becomes. (Rosenzweig 27-28)

Petitioners also set forth causation testimony from Dr. Katzman. Dr. Katzman testified regarding the specific levels of oxygen in Ebony's blood while she was at James Archer Smith Hospital. Normally, a new born infant's blood should have an oxygen level of between 50 and 70 (T 878). Anything below 35 is a real emergency. (T 878-879) Although Dr. Hernandez arrived at the hospital at 6:00 a.m., the first blood gas test on Ebony was not performed until 10:30 a.m. From that period forward, her measured oxygen levels were as follows:

10:30 a.m.:	16.6
10:40 a.m.:	11.8
10:50 a.m.:	20.8
11:10 a.m.:	27.9

On cross-examination, James Archer Smith's counsel elicited testimony that Ebony could have suffered additional brain damage during her transport by the Variety Children's Hospital team, because she was only receiving 70 percent (as opposed to 100 percent) oxygen during transport. (T 920-921) However, Dr. Katzman testified on redirect that having the baby on only 40 percent oxygen for the eight hours prior to transport would have caused a lot more damage. (T 921) On recross of Dr. Katzman, Dr. Daee's counsel elicited testimony that the "hypoxemia" (lack of oxygen in the blood) continued even after Ebony was transferred to Variety Children's Hospital. (T 926)

In their brief before the Court of Appeal, Petitioners also related the causation testimony which had been introduced by the defense. In essence, the defense experts testified that Ebony's injury occurred prior to labor and delivery, probably during the second or third trimester of pregnancy. (T 1977)

Conspicuous by its absence from Petitioners' discussion of causation is any reference to expert testimony asserting that anything which Dr. Daee did or failed to do "more likely than not" caused Ebony's injury. None of the testimony set forth by Petitioners in the causation section of their statement of facts met the standards enunciated by this Court with respect to establishing a prima facie claim for medical malpractice.

In addition to setting forth in the argument portion of their brief certain additional factual references where necessary, Respondents hereby adopt the statement of facts set forth by their Co-Respondents in their answer briefs.

POINTS ON APPEAL

POINT I

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

POINT II

WHETHER THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY ON THE STATUTE OF LIMITATIONS ISSUE AND IN EXCLUDING HIGHLY INFLAMMATORY EVIDENCE NOT RELEVANT TO THE STATUTE OF LIMITATIONS ISSUE.

POINT III

WHETHER THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT MRS. HALL HAD HAD A SUBSEQUENT ABORTION, WHERE SUCH EVIDENCE WAS IRRELEVANT TO THE ISSUES WHICH WERE BEFORE THE JURY.

POINT IV

WHETHER THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON "INTERVENING CAUSE."

POINT V

WHETHER THE TRIAL COURT ERRED IN REFUSING TO PERMIT EBONY TO BE QUESTIONED AT TRIAL.

ISSUE ON CROSS-APPEAL

WHETHER THE TRIAL COURT ERRED IN DENYING CROSS-PETITIONERS' MOTION FOR A DIRECTED VERDICT AT THE END OF CROSS-RESPONDENTS' CASE IN CHIEF AS CROSS-RESPONDENTS HAD FAILED TO ESTABLISH A PRIMA FACIE CASE OF NEGLIGENCE AGAINST DR. DAEE.

SUMMARY OF ARGUMENT

None of the points raised by Petitioners merit reversal of the jury's verdict in this matter. Petitioners have failed to demonstrate that the trial court erred in refusing to inquire as to the Respondents' exercise of their peremptory challenges. Contrary to Petitioners' assertions, Respondents did not systematically exclude potential black jurors.

The jury also properly found that the Halls knew or should have known of their cause of action more than two years prior to filing suit, and that their action was accordingly barred by the statute of limitations. Both the jury instructions and the verdict form submitted properly reflected the current law regarding the applicable statute of limitations.

Furthermore, the trial court did not err in excluding evidence that Mrs. Hall had had a subsequent abortion, as that evidence was irrelevant to the issues which were before the jury. The testimony which Petitioners sought to admit was highly inflammatory in addition to being irrelevant. Any benefit which the Halls could have obtained from this testimony would have been far outweighed by the prejudice to the Defendants. Additionally, the Halls were allowed to introduce evidence supporting their contention that they believed that the cause of Ebony's injury was something involving Mrs. Hall's body. This testimony was introduced by Mrs. Hall herself, and was confirmed by another witness, attorney Mazloff.

Two of the issues raised by Petitioners have no relevance to the true issues before this Court. Petitioners' contention that

the trial court erred in refusing to instruct the jury on intervening cause is meritless, as the jury did find that Respondents were negligent, notwithstanding the absence of such an instruction. Petitioners' argument regarding the trial court's refusal to allow Ebony to be questioned at trial is similarly without basis, given that this evidence would have been relevant only to damages, and Petitioners have not challenged the sufficiency of the damages which were awarded.

Finally, should this Court determine to reverse the jury verdict in favor of these Respondents, Respondents would respectfully submit that the trial court should have entered a directed verdict in favor of Dr. Daee at the close of Petitioners' case in chief, as Petitioners failed to introduce expert testimony establishing a causal connection between Dr. Daee's alleged negligence and Ebony Hall's injury.

ARGUMENT

POINT I

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

The question which is before this Court is extremely narrow, i.e., whether a trial court must conduct a NEIL inquiry whenever the defendants exercise four out of five peremptory challenges to strike prospective black jurors. In other words, is a trial judge stripped of his discretion whenever the defendants have utilized four out of five peremptory challenges to strike blacks and required to conduct a NEIL inquiry regardless of the circumstances surrounding the exercise of those strikes? Respondents assert that the answer to that question is a resounding "NO!"

In its many decisions on this issue, this Court has set forth the guidelines to be followed by a trial court in determining whether to conduct a NEIL inquiry. The common thread throughout these opinions has been the standard enunciated in **STATE v. NEIL**, 457 So.2d 481, 486 (Fla. 1984), i.e., that the complaining party must make a showing on the record that "there is a strong likelihood that [the subject jurors] have been challenged solely because of their race." Never has the Court suggested that there exists a "per se point" where numbers alone will satisfy the burden

of making that showing. Rather, the cases which have considered this issue have emphasized that the number of challenges is simply one factor to be considered; the jury selection process must be evaluated as a whole.

When the totality of circumstances is considered in the instance case, it is evident that the Defendants were not striking prospective jurors based on race. Petitioners' own statement of the facts with respect to this issue belies Petitioners' contention that Respondents were systematically excluding blacks from the jury. Petitioners acknowledge that only four prospective black jurors were the subject of peremptory strikes. A fifth prospective black juror was made a part of the jury. Petitioners also acknowledge that the alternate juror in the case, Ms. Tyget, was black.

In addition to those black jurors who were stricken by Defendants, numerous potential white and Latin jurors were stricken both by Respondents and Petitioners.[1] Thus, this Court is not presented with a situation where only black jurors were stricken by Respondents, or where all potential black jurors were stricken.

As this Court stated in **STATE v. SLAPPY**, 522 So.2d 18 (Fla. 1988), it is for the trial court to determine whether the

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[1] It is interesting to note that of the seven peremptory challenges exercised by Petitioners, four were used to strike Latin jurors -- Alen, Barriero, Bolado and Gonzalez. Petitioners also struck a potential alternate juror who was Latin. If Petitioners' suggestion that the number of minority jurors stricken is determinative, perhaps Respondents should have objected to Petitioners' repetitive striking of Latin jurors, as the Halls are black and one of the Respondents is Latin.

complaining party's objection is proper and not frivolous. Yet Petitioners are essentially asking this Court to take away the trial court's discretion and to instead set forth a per se rule of law mandating a NEIL inquiry whenever a certain percentage of peremptory challenges have been exercised against prospective black jurors.

As this Court noted in **NEIL**, the presumption is that a party will exercise peremptory challenges in a non-discriminatory manner. **STATE v. NEIL**, 457 So.2d 481, 486 (Fla. 1984). The challenging party must therefore make a timely objection and demonstrate both that the stricken jurors are members of a minority group and that there is a strong likelihood that they have been challenged solely because of their race. Supra. Here, the court properly exercised its discretion in determining that there was no basis for Petitioners' challenge.

Aside from the fact that Respondents had stricken whites as well as blacks and that blacks remained on the jury panel (and ultimately on the jury), the court observed that the strikes in question were exercised by different Defendants. Dr. Hernandez struck one black juror, the Hospital struck one, and Dr. Daee struck two. There did not appear to be a pattern of discrimination by any one Defendant, or by the Defendants as a whole. Under the circumstances, the trial court correctly rejected Petitioners' objection.

Petitioners present as "proof" of Respondents' discriminatory intent the "fact" that three of the stricken jurors had close ties

to the medical community and would have been ideal "defense jurors" had they not been black. Petitioners naively (and perhaps disingenuously) assume that defendant health care providers in a medical malpractice action always want individuals who have ties to the medical community to serve as jurors. Superficially, the assumption appears to be that these individuals would be more favorably inclined toward the defendant health care providers.

Respondents would submit that this type of assumption is not always warranted. While there are certainly instances in which defendants may believe that they will benefit from empaneling jurors who have a more sophisticated understanding of medicine, or close ties to the medical community, there are also situations where this kind of juror could prove to be detrimental to the defendants.[2]

Petitioners have also overlooked the fact that some nurses do not think highly of physicians, or otherwise tend to be overly critical, because of negative experiences in the workplace. Thus,

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[2] For example, Petitioners suggest that Ms. Thornton would have been a perfect defense juror, as she teaches nursing. However, as was demonstrated by the questioning from the attorney for James Archer Smith Hospital, that Defendant was concerned that Ms. Thornton would not judge the actions of the nurses by the standards enunciated by the expert witnesses during trial, but rather by the standards which she herself had taught in her own class. (In some respects, this can be viewed as tantamount to having an attorney on the jury. Plaintiff and defense lawyers are both uncomfortable with that prospect, since there is always the possibility that the other jurors will look to the attorney for guidance on the law. One juror can therefore dominate deliberations. Similar problems can arise if the parties select a health care provider to sit on a jury in a medical malpractice action.) Given the facts of the case, this was a reasonable concern.

some physicians actually balk at the suggestion that a nurse be empaneled.

Petitioners also suggest that Mr. Parekh would have been an ideal "defense juror," as his brother-in-law is a physician. However, Petitioners fail to mention that Mr. Parekh is a plaintiff in a pending action for police brutality. It is easy to understand why the Defendants might be concerned about having a juror on their panel who is himself a plaintiff in a pending action. The concern that someone who has a pending action might be sympathetic to another plaintiff could certainly outweigh any perceived benefit from the fact that the juror's brother-in-law happens to be a physician.[3]

Petitioners ignore the fact that parties often reject a potential juror for reasons other than race or occupation. Depending on the type of case, the parties may seek jurors who are well educated, possess certain skills, or simply have a particular outlook on life. There is also an intangible rapport (or lack of rapport) which may be present between the questioning attorney (or his client) and the potential juror, which may influence the attorney's choice of jurors.

Looking at the totality of the situation with which the trial court was faced, it is obvious that Petitioners did not meet their burden of showing that there was a strong likelihood that the

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[3] In fact, it is presumably for this very reason that juror questionnaires in many jurisdictions specifically ask prospective jurors about their own experiences with civil litigation.

stricken jurors had been challenged solely because of race. As Respondents have noted previously, the black jurors were stricken by various Defendants at different times during the proceedings, and the jury in fact included a black juror, as well as a black alternate. Petitioners can hardly complain that three Defendants struck four blacks, where Petitioners utilized four of their seven peremptory challenges to strike potential Latin jurors. Respondents would therefore submit that the trial court was correct in refusing to inquire of counsel as to the reason for the exercise of their peremptory challenges.

Respondents would finally suggest that there is simply no basis for any contention that a **NEIL** inquiry was appropriate in this matter, even in retrospect, given the manner in which the case was resolved by the jury. In this instance, the jury actually found that Respondent Daee was negligent and apparently agreed that Respondent's negligence proximately caused injury to Ebony Hall. A substantial amount of damages were assessed against Dr. Daee and his professional association and in favor of the Halls. The only reason that a judgment was not entered in favor of the Halls is that the jury also concluded that the Halls knew or should have known of their potential cause of action more than two years prior to the date that they filed suit. A Final Judgment was therefore entered in favor of Dr. Daee solely because the statute of limitations had expired on Petitioners' claim before they filed suit against Dr. Daee.

Given these findings, Respondents would respectfully submit that Petitioners are in no position to suggest that this jury was biased in favor of Dr. Daee. Undoubtedly, a jury that was weighted in favor of health care defendants would never have found against those defendants on the liability and proximate cause issues. To the contrary, one could reasonably have expected that a heavily partial jury would have found no departure from prevailing standards of care by the defendants.

Respondents believe that a **NEIL** issue should only provide grounds for a new trial where there is some basis for a legitimate suggestion that the racial composition of the jury truly had a bearing on the ultimate outcome in the case. A **NEIL** inquiry should not be permitted merely because a party is not satisfied with all aspects of the jury's verdict, but where that party has actually received favorable rulings from the jury on material aspects of the claim.

Here, there is no basis whatsoever for a conclusion that the racial composition of the jury had any connection whatsoever with the jury's resolution of the statute of limitations issue. Thus, Petitioners' **NEIL** challenge should be rejected summarily. This Court should answer the certified question in the negative, and affirm the judgment that was rendered by the Court in favor of Respondents.

POINT II

WHETHER THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY ON THE STATUTE OF LIMITATIONS ISSUE AND IN EXCLUDING HIGHLY INFLAMMATORY EVIDENCE NOT RELEVANT TO THE STATUTE OF LIMITATIONS ISSUE.

As Respondents do not believe that the point on appeal as phrased by Petitioners correctly reflects the issue before this Court, Respondents have taken the liberty of rephrasing that point. The true issue which is before this Court is whether there was competent, substantial evidence to support the finding by the jury that the Halls knew or should have known of their cause of action more than two years prior to filing suit.

Where a jury verdict is supported by substantial competent evidence, the appellate court lacks authority to interfere with the verdict. The reviewing court may not reevaluate the evidence and substitute its judgment for that of the jury. **GROSSMAN v. C. R. TOWERS, LTD.**, 513 So.2d 686 (Fla. 3rd DCA 1987), rev. den., 520 So.2d 584; **LANDRY v. HORNSTEIN**, 462 So.2d 844 (Fla. 3rd DCA 1985); **JIMENEZ v. GULF WESTERN MANUFACTURING COMPANY**, 458 So.2d 58 (Fla. 3rd DCA 1984); **HIRSCH v. MOUNT SINAI MEDICAL CENTER, INC.**, 458 So.2d 6 (Fla. 3rd DCA 1984). In this instance, the jury's determination that the Halls had not filed their action within the applicable statute of limitations is supported by substantial, competent evidence and should be affirmed. However, to understand why the jury reached this conclusion, it is first necessary to

review certain portions of the testimony that was presented to the jury.

Both Mr. and Mrs. Hall were employed at the time of Ebony's birth. Mrs. Hall is a college graduate, and was employed as a receptionist at the University of Miami Department of Neurology. (TR 1517-1519) The following year, Mr. Hall commenced working as a licensed practical nurse. (TR 1721) There is therefore no basis for suggesting that the Plaintiffs' lack of due diligence in this matter was excusable. This is particularly true given a number of factors which would have led any reasonably curious individual to inquire further concerning the cause of Ebony's problems.

The record reflects that Mrs. Hall was aware shortly after her daughter's birth that the cause of her daughter's brain injury was the inhalation of meconium. Mrs. Hall testified that she had been advised by Dr. Hirsch that Ebony had suffered from a lack of oxygen as a result of inhaling feces around the time of delivery. Mrs. Hall was also aware that her daughter had suffered seizures the day she was born. This information was related by Mrs. Hall on various applications which she had submitted seeking social services for her daughter.

Certainly, this information was sufficient to cause the Halls to inquire further as to the cause of their daughter's injury. At a minimum, by the time that Mr. Hall began working as a licensed practical nurse, he possessed sufficient information and training to conclude -- or at least to suspect -- that his daughter's inhalation of meconium was not caused by his wife's sickle cell

trait, even assuming that she had previously come to that conclusion.

Respondents would point out that the catastrophic nature of Ebony's injuries alone might have been deemed sufficient by the jury to put virtually anyone on notice of the possibility that something untoward had happened in connection with Ebony's birth. Here, the Halls could have learned about their daughter's injury -- and what they ultimately argued was the cause of that injury -- simply by obtaining the medical records. There is no evidence whatsoever in this matter to suggest that the medical records would not have been made available to Petitioners had they requested them. To the contrary, the record reflects that copies of the records were provided to certain organizations when requested by Mrs. Hall, and that the Halls' attorneys were able to obtain the medical records without difficulty. As the records were readily available, Petitioners are charged with constructive knowledge of their contents. **NARDONE v. REYNOLDS**, 333 So.2d 25 (Fla. 1976).

The jury also heard testimony regarding the manner in which Petitioners "discovered" their cause of action. Petitioners did not learn of their cause of action as a result of further medical testing upon Ebony or the discovery of missing medical records. Rather, Petitioners allegedly learned of their cause of action when they fortuitously came in contact with an attorney who, when learning of the Halls' brain damaged child, sensed the possibility of a lawsuit. This attorney simply referred the Halls to another attorney who specializes in personal injury litigation, who

promptly obtained the necessary medical records and proceeded from there. There was nothing in the Halls' testimony -- or in the record -- which would have suggested that the same series of events could not have occurred had the Halls come into contact with an attorney a week after Ebony's birth, rather than three years later.

There is no legal basis for suggesting that an individual with a potential cause of action for medical malpractice may simply sit back and do nothing, and in effect wait until an attorney comes along to suggest that there may be a cause of action for medical malpractice. To the contrary, as is reflected by the case law which has developed on statutes of limitation in the State of Florida, there is an affirmative duty upon a prospective plaintiff to investigate and discover a potential cause of action.

The governing law regarding the medical malpractice statute of limitations has most recently been summarized by this Court in **BARRON v. SHAPIRO**, 565 So.2d 1319 (Fla. 1990). In **BARRON**, the Court reiterated its earlier holding in **NARDONE**, supra, to the effect that the statute of limitations in a medical malpractice action does not begin to run until either "the plaintiff has notice of the negligent act giving rise to the cause of action or when the plaintiff has notice of the physical injury which is the consequence of the negligent act."

The **BARRON** Court noted that the Plaintiffs in that matter, Mr. & Mrs. Shapiro, "were on notice of Mr. Shapiro's injury by at least December 31, 1979," when he was diagnosed as being blind. The fact that the Shapiros did not know at that time that the

injury had been caused by negligence did not prevent the commencement of the running of the statute of limitations. The fact that Mr. Shapiro had gone into the hospital for an operation on his colon and had come out blind was deemed to be sufficient to trigger the statute. In this case, the issue was when the Halls had notice or should have had notice of either the negligent act or the injury to Ebony. This is the precise issue which was presented to the jury.

In **FLORIDA PATIENTS COMPENSATION FUND v. SITOMER**, 524 So.2d 671, 674 (Fla. 4th DCA 1988), the Fourth District recently discussed the accrual of a cause of action for medical malpractice in great detail.

> However, in **SCHAFER v. LEHRER**, 476 So.2d 781 (Fla. 4th DCA 1985), this court held that knowledge of a physical injury alone, without knowledge that the injury resulted from a negligent act does not trigger the limitations period. While the plaintiff may not have actual knowledge of the negligence, if the plaintiff should have known that the injury was caused by tortious conduct, through constructive notice, then the limitations period begins to run. See **HUMBER v. ROSS**, 509 So.2d 356 (Fla. 4th DCA 1987). Thus, the statute of limitations in a medical malpractice case begins to run when the plaintiff has been put on notice of an invasion of his legal rights, which occurs when the plaintiff has notice of either the negligent act giving rise to the cause of action, or the existence of an injury that is the consequence of the negligent act. **NARDONE v. REYNOLDS**, 333 So.2d 25 (Fla. 1976); **WILHELM v. TRAINOR**, 434 So.2d 1011 (Fla. 5th DCA 1983), rev. den. 444 So.2d 418 (Fla. 1984); **ALMENGOR v. DADE COUNTY**, 359 So.2d 892 (Fla. 3rd DCA 1978).

Here, the record clearly reflects that Petitioners had knowledge of both the alleged acts of negligence and the existence of an injury that was allegedly a consequence of those negligent acts more than two years prior to the filing of their action.

In **NARDONE**, this Court observed:

> We agree with the United State District Court that since in 1965 the nature of the child's condition was obvious and known to the plaintiffs, it was then that the cause of action accrued and the statute of limitations commenced to run as to the parents and legal guardians of the incompetent minor in their own right, as to the parents and legal guardians of the minor as next friends in behalf of the minor, and as to the incompetent minor in his own behalf. Readily evidenced by the record, there could be no concealment and was none of the infant's obvious condition. Cf. **BUCK v. MOURDIAN**, supra, **SLAUGHTER v. TYLER**, 126 FLA. 515, 171 So. 321 (1936), **GASPARRO v. HORNER**, 245 So.2d 901 (Fla. App. 1971), **MANNING v. SERRANO**, 97 So.2d 688 (Fla. 1957), **BROWN, et al, v. UNITED STATES**, 353 F.2d 578 (9th Cir. 1965).
>
> With the knowledge of the severity of their son's resultant condition, the parents through the exercise of reasonable diligence were on notice of the possible invasion of their legal rights. Notice of the consequences of the physician's acts, assuming arguendo that they were negligent, occurred in 1965. The District Court of Appeal in **VILORD v. JENKINS**, 226 So.2d 245 (Fla. App. 2, 1969), a malpractice action for the negligent performance of a female sterilization procedure wherein the plaintiff became pregnant five years later, held:
>
> > As to the negligence count, the law in this state is that the statute of limitations begins to run when there has been **notice** of invasion of the legal rights of the plaintiff, i.e., when he has been put on notice of his right of action. In **CITY OF MIAMI v. BROOKS**, the plaintiff

> underwent x-ray therapy which, it was said, was negligently administered in 1944. It wasn't until 1949 that resulting x-ray burns became apparent for the first time. Recognizing the general rule that when there is notice of the negligent act the statute begins to run even if its full consequences are not known, the court went further and held that even though there is notice of the act itself, if its negligent character cannot become known until its consequences become apparent, then the statute does not begin to run until **notice of the consequences.** **NARDONE**, 333 So.2d at 33-34.

The **NARDONE** Court went on to find that knowledge of the medical records in the case were to be imputed to the parents, so long as those records were available to the patient, and even if the contents of the records were not in fact known to the parents.

Here, there is ample evidence demonstrating that the Halls knew or should have known of their cause of action more than two years prior to the filing of their suit. The record reflects that the Halls were aware that Ebony had sustained an injury almost from the time of her birth. While the record reflects that Ebony made some progress, and that the Halls were advised that further progress was likely, the fact that Ebony was obviously and seriously retarded was never truly in dispute. No one ever questioned whether Ebony had in fact sustained brain damage. Rather, the only question at the time was the degree of recovery which might be expected, or whether Ebony would ultimately recover at all.

The fact that Petitioners hoped that Ebony would recover and that she did in fact experience some improvement does not alter the fact that her parents were aware that their daughter had sustained brain damage prior to October 11th, 1982[4] Florida law does not suggest that the parents had to have been told that Ebony's injuries were permanent before the cause of action for medical malpractice would accrue. Nor was it necessary for the parents to know the full extent of their child's injury before the statute of limitations began to run. To the contrary, a cause of action accrued once it became obvious that the child had sustained some damage, even though Mr. and Mrs. Hall may not have known the full extent of Ebony's injuries until a later date. **CITY OF MIAMI v. BROOKS**, 70 So.2d 306 (Fla. 1954); **HUMBER v. ROSS**, 509 So.2d 358 (Fla. 4th DCA 1987).

In **HUMBER**, William Humber was admitted to Doctors' Hospital for the treatment of a herpes zoster infection. On December 10th, 1979, Mr. Humber was found sprawled on the floor by several nurses. The nurses put Mr. Humber back in bed, but did not immediately inform his doctor, Dr. Ross, of the incident. When Humber complained of hip pain, the nurses contacted Dr. Ross later that morning. Dr. Ross ordered an x-ray, which disclosed a fractured hip.

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[4] It must be noted that we are not dealing with a limited or unsuspected injury. The fact that Ebony had sustained brain damage was known to all immediately upon her admission to Variety Children's Hospital. It was also known that the damage was severe.

Dr. Ross notified Mrs. Humber of the fracture. Mr. Humber himself had no recollection of the fall and did not know how the fracture occurred. Subsequently, Mr. Humber suffered a myocardial infarction. He also showed neurological symptoms which were thought to have been caused by a stroke. Because of the skin infection and the heart attack, treatment for the hip fracture was postponed.

Mrs. Humber discussed the fact that her husband's fracture had not been set at once with a relative who was an attorney. The attorney suggested that Mrs. Humber talk to someone in the hospital administration, and that she inquire as to what had caused the fracture. Mrs. Humber in fact sought out an administrator; she received a letter one month later which told her that Mr. Humber had been found lying on the floor at 1:30 A.M. on the night of the fall. The letter did not explain how or why Mr. Humber fell.

Mr. Humber was subsequently transferred to another local hospital, and ultimately to a Veterans Administration Hospital in Massachusetts. He later developed infections in both of his lower legs, which resulted in amputation of the left leg in May of 1980, and the right leg in October of 1980.

When Mrs. Humber visited her attorney relative in Florida in early 1981, she broached the possibility of an action for medical malpractice. On February 12th, 1981, she obtained a copy of the Doctors' Hospital records. She obtained a copy of the nurses' notes on October 9th, 1981, and noted that the nurses' notes only

spoke of Mr. Humber's fall in the past tense. Suit was filed on December 28th, 1981, a little over two years after Mr. Humber's fall.

The trial court concluded as a matter of law that because Mrs. Humber was aware of the injury which Mr. Humber had sustained due to the fall on December 10, 1979, and since Mr. Humber must have known or should have known of it no later than December 27th, 1979, the date that he was transferred out of Doctors' Hospital, the claim had been filed too late against both Dr. Ross and Doctors' Hospital. As it was uncontroverted that the hospital's records would have been made available to the plaintiffs if requested, the trial court found that the plaintiffs were charged with constructive knowledge of their contents, relying upon **NARDONE v. REYNOLDS**, 333 So.2d 25 (Fla. 1976).

On appeal, the Humbers argued that the limitations period had not begun to run when the Humbers knew or should have known of the fall and the fractured hip, as the amputations did not occur until May and September of 1980, and as the causal connection was not known until receipt of the hospital records in February and April of 1981. The Fourth District rejected the Humbers' position and affirmed the trial court finding in favor of the defendants.

Here, as opposed to **HUMBER**, we have a jury verdict, not a summary judgment. Given the prevailing presumption favoring the correctness of a jury verdict and the enhanced standard of review required to affirm a summary judgment, it would appear clear that

the jury's verdict should be affirmed where the summary judgment in **HUMBER** was approved.

Petitioners have suggested that the jury instructions and verdict form were inappropriate. Respondents would submit that the jury instruction regarding the statute of limitations and the question on the verdict form pertaining to that issue were entirely consistent with existing law in Florida on the statute of limitations.

The statute of limitations which is applicable to medical malpractice actions provides that "an action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence...." The jury instruction which was given by the court in this instance virtually tracked the statute verbatim.

> Now, on these defenses, the issues (sic) for your determination is whether the Plaintiff (sic) commenced their action within two years of the date that Mr. or Mrs. Hall discovered or should have discovered the incident or this incident giving rise to this action.
>
> This action was filed October 11th, 1984.
>
> Therefore, in order for the Defendants, Dr. Daee and Dr. Hernandez to prevail on their Affirmative Defense, they must prove by the greater weight of the evidence that the Plaintiff (sic) discovered or should have discovered the incident given (sic) rise to this action on or before October 11th, 1982.
>
> To discover an incident, the Plaintiff (sic) must have discovered or should have discovered, either a negligent act on the part

> of one or more such Defendants or an injury to Ebony resulting from the incident or incidents. (TR 2386-2387)

Thus, this jury instruction effectively and appropriately advised the jury that the statute of limitations commenced to run when the Plaintiffs discovered the negligent act, or when they discovered the injury which was the result of the incident of negligence.

As was discussed in detail previously, this Court stated in **BARRON** that the statute of limitations in a medical malpractice action commences "when the plaintiff should have known either of the injury or the negligent act." That is exactly what the jury was told through use of the instruction that was given in the instant case. The verdict form similarly asked the jury to indicate when the Halls were aware of the incident or injury which gave rise to their cause of action. The jury thus quite properly determined that the Halls knew or should have known of their cause of action more than two years prior to the filing of this suit. The jury's finding regarding the statute of limitations issue should not be disturbed.

Petitioners have suggested that the statute of limitations was tolled as a result of alleged statements by Dr. Daee and Dr. Hernandez to the effect that the cause of Ebony's injury was something which was wrong with Mrs. Hall's body. Yet it is clear that the tolling provisions of the statute of limitations do not apply where a cause of action is discovered less than four years after the incident giving rise to the cause of action. To the contrary, the tolling provisions only apply when "it can be shown

that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the four year period...." Section 95.11(4)(b), Florida Statutes. **McDONALD v. McIVER**, 514 So.2d 1151 (Fla. 2nd DCA 1987); **COBB v. MALDONADO**, 451 So.2d 482 (Fla. 4th DCA 1984)

Here, the Halls' cause of action was (or should have been) discovered less than two years after the incident which gave rise to the cause of action; it was undoubtedly discovered within four years from that date. In addition, the "injury" had been discovered almost immediately. Accordingly, the trial court was correct in not instructing the jury on fraudulent concealment.

Respondents would also note that Petitioners did not sufficiently plead fraudulent concealment so as to entitle them to an instruction on that point. In their Second Amended Complaint, Petitioners generally alleged that there had been fraudulent concealment; however, they did not allege any specifics.

> In addition, thereto, the Defendants through their agents, employees or servants, fraudulently concealed from James and Emily Hall the facts and circumstances surrounding the negligent treatment rendered to Emily Hall during her prenatal and obstetrical period as well as the prenatal and neonatal care rendered to Emily Hall.

Petitioners did not expand upon those allegations in their reply to the affirmative defenses which were filed by Respondents. Having failed to do so, they waived this point.

In the case of **PHILLIPS v. MEASE HOSPITAL AND CLINIC**, 445 So.2d 1058 (Fla. 2nd DCA 1984), pet. for rev. den. 453 S.2d 44

(Fla. 1984), the Court found that the plaintiffs had not sufficiently pled fraudulent concealment where they had merely alleged that "appellees fraudulently and intentionally concealed from appellants the fact that Mrs. Phillips' problems were caused by the administration of antibiotics by appellees Mease and Emerson." Here, the Halls also failed to sufficiently plead fraudulent concealment. Even if they had, as was noted previously, they would not have been entitled to an instruction on fraudulent concealment, as they did discover both their cause of action and the injury to Ebony within four years.

POINT III

WHETHER THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT MRS. HALL HAD HAD A SUBSEQUENT ABORTION, WHERE SUCH EVIDENCE WAS IRRELEVANT TO THE ISSUES WHICH WERE BEFORE THE JURY.

In an attempt to overcome the statute of limitations defense, Petitioners repeatedly maintained that the Halls believed that Ebony's retardation was caused by a problem with Mrs. Hall's own body, i.e., her sickle cell trait, and not by malpractice. This belief was allegedly occasioned by misleading statements which were attributed by Mrs. Hall to Dr. Daee and Dr. Hernandez; these statements were vehemently denied by the physicians. As a result of these statements by Dr. Daee and Dr. Hernandez, Petitioners maintained that they had determined not to have more children, for fear that their other children would be subject to the same handicap as Ebony.

Petitioners were not restricted in any way from advising the jury of the statements which had purportedly been made by Drs. Daee and Hernandez or from arguing the effect which those statements allegedly had on the Halls. To the contrary, Petitioners presented both testimony and argument on this point.

The Defendant physicians denied having made the misleading statements which were attributed to them. In order to support their position, the Defendants introduced evidence which in fact demonstrated that Emily Hall was aware that Ebony's injury had been caused by a lack of oxygen, which was in turn due to the fact that Ebony had swallowed meconium during the delivery.

Since Respondents introduced evidence which contradicted Mrs. Hall's testimony to the effect that she had been told by Drs. Hall and Hernandez that Ebony's injuries were caused by a problem in her own body, Petitioners maintained that they should have been allowed to introduce evidence that Mrs. Hall had had a subsequent abortion. Petitioners argued that evidence of the subsequent abortion would have provided some kind of prospective corroboration of Mrs. Hall's testimony, i.e., that she believed that Ebony's condition was a result of problems with her own body. In reality, evidence concerning the abortion had no relevance to the issues which were before the jury, and was properly excluded.

In addition, any relevance which testimony regarding Mrs. Hall's abortion might have had was far outweighed by the prejudice which would have resulted from that type of self-serving testimony. Section 90.403, Florida Statutes, allows the exclusion of relevant evidence if the probative value of that evidence is substantially outweighed by the danger of unfair prejudice.

In this case, the fact that Mrs. Hall had had an abortion -- allegedly as a result of statements which had purportedly been made to her by certain of the Defendants -- would have had the effect of unduly prejudicing the jury against the Defendants. In addition, a very strong possibility exists that the jury would have considered the evidence for improper purposes, i.e., the jury would have considered the testimony in determining liability and assessing damages, as well as with respect to the statute of limitations issue.

Abortion is a highly controversial issue, particularly as of late. It is easy to understand how a jury could have become improperly inflamed by testimony to the effect that Mrs. Hall actually had had an unnecessary abortion as a result of statements by the Defendants. At the same time, since Mrs. Hall was allowed to testify that she believed that Ebony's problems were caused by her own body and not by any negligence on the part of the Defendants, further self-serving testimony regarding the abortion would have been cumulative, as well as being unduly prejudicial.

The cumulative nature of the testimony regarding the abortion is further confirmed by the fact that the trial court actually allowed testimony from Attorney Howard Mazloff, to the effect that Mrs. Hall had told Mr. Mazloff that Ebony's brain damage had been caused by a problem with Mrs. Hall's body which she related to her sickle cell trait. As Mr. Mazloff's testimony on this point was allowed by the court, Petitioners were able to present evidence corroborating Mrs. Hall's testimony regarding her belief as to the cause of Ebony's injuries. Yet the testimony from Mr. Mazloff did not have the same inflammatory effect which testimony concerning the abortion would have had.[5]

The jury had before it all of the admissible testimony regarding the commencement of the running of the statute of limitations, and was presented with jury instructions and a verdict

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[5] Without belaboring the obvious, it should also be noted that testimony from Plaintiff's gynecologist, Dr. Grace, on this point would have been nothing more than clearly inadmissible hearsay. Sections 90.801, 90.802, Florida Statutes.

form which accurately reflected the prevailing law on this issue. Additionally, the jury's verdict on this point is supported by competent, substantial evidence. The judgment in favor of Respondents on the statute of limitations issue should therefore be affirmed.

POINT IV

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON "INTERVENING CAUSE."

Respondents adopt the argument presented on this point by their Co-Respondents. Additionally, Respondents would note that the failure to give an instruction on intervening cause cannot constitute reversible error as to Respondents, as the jury found Dr. Daee negligent notwithstanding the absence of such an instruction.

POINT V

THE TRIAL COURT DID NOT ERR IN REFUSING TO PERMIT EBONY TO BE QUESTIONED AT TRIAL.

For some inexplicable reason, although Petitioners have not challenged the amount of damages which the jury assessed in favor of Ebony, they have raised an alleged error which is relevant solely to the issue of damages. Petitioners sought to place Ebony on the witness stand, and to ask her certain basic questions, and perhaps to have her draw a circle on a piece of paper in order to show the extent of her injury and damages. The trial court initially indicated that it would not permit the demonstration because the minor Plaintiff was not competent to testify, and could not take an oath. Subsequently, the demonstration of the Plaintiff's retardation was excluded because the prejudicial effect would be so great that it would outweigh the probative value.

As authority for their argument that Ebony should have been allowed to present this demonstration and answer some questions for the court, Petitioners have cited to the decision of the Third District Court of Appeal in **TALCOTT v. HOLL**, 224 So.2d 420 (Fla. 3rd DCA 1969), cert. den. 232 So.2d 181 (Fla. 1969). In finding that it was not error to allow Mrs. Holl to be brought into the courtroom on a stretcher and to be questioned, the Court observed, "The matter was one in the sound judicial discretion of the trial judge, and no abuse of discretion in that regard was shown."

Just as it was within the proper exercise of the trial court's discretion to allow Mrs. Holl to testify, it was within the trial

court's discretion to refuse to allow Ebony to attempt to answer questions and/or to perform a demonstration for the jury.

The other case which is cited by Petitioners is **FLORIDA GREYHOUND LINES v. JONES**, 60 So.2d 396 (Fla. 1952). In **JONES**, the plaintiff was brought into the courtroom on a stretcher, accompanied by attendants. There is no suggestion in the opinion that the plaintiff was presented solely for demonstrative purposes or that the plaintiff was unable to present meaningful testimony. As the Court noted, the plaintiff had a right to appear at his own trial, and the plaintiff's physical condition did not afford a basis for excluding the plaintiff from the courtroom. There is no information given as to whether the plaintiff actually presented testimony, or the nature of that testimony.

Here, Ebony was in the courtroom at various times throughout the trial. In addition to being able to observe Ebony, the jury heard extensive testimony not only from Ebony's parents and school teachers, but also from her physicians regarding her condition. The fact that Ebony was not allowed to testify or to perform a demonstration did not in any way deprive the jury of evidence which was necessary for them to properly assess Ebony's damages.

The Third District has held in **DEL MONTE BANANA COMPANY v. CHACON**, 466 So.2d 1167 (Fla. 3rd DCA 1985) that exhibitions or demonstrations of injuries in front of a jury are generally frowned upon. In **DEL MONTE**, the plaintiff contended that he was blind in one eye as a result of an injury that had been caused by the defendant. While on the witness stand, plaintiff's counsel had his

client place his hand over his "good eye." When the plaintiff stated that he could not see any light, his counsel made several striking motions with a dagger to the plaintiff's "bad eye," to demonstrate to the jury that the plaintiff truly was blind in that eye, because he did not blink. The defendant's motion for a mistrial was denied.

The court noted that demonstrations of injuries are especially suspect where the injuries are of such a nature that they cannot be seen by the jury or when they can be easily faked. The court went on to observe that any exhibition of injuries which is intended to excite sympathy or pity from the jury or which inflames or prejudices the jury is obviously grounds for a new trial. The court stressed that the decision whether to allow such an exhibition rests in the sound discretion of the trial judge. In the instant case, the trial court properly exercised its discretion in refusing to allow the Plaintiffs to call Ebony to the stand for the purpose of demonstrating her injuries.

As was noted previously, any error with respect to the trial court's ruling was harmless error, in that the jury found that Dr. Hernandez and James Archer Smith Hospital were not negligent, and as Petitioners have not challenged the amount of the damages which were assessed by the jury with respect to the claim against Dr. Daee. **OLIVA v. BAUM**, 194 So.2d 319 (Fla. 3rd DCA 1967). Nor is the lack of a demonstration relevant to the limitations issue. The judgment should be affirmed on this point.

INITIAL BRIEF ON CROSS-APPEAL

THE TRIAL COURT ERRED IN DENYING CROSS-PETITIONERS' MOTION FOR DIRECTED VERDICT AT THE END OF CROSS-RESPONDENTS' CASE IN CHIEF AS CROSS-RESPONDENTS HAD FAILED TO ESTABLISH A PRIMA FACIE CASE OF NEGLIGENCE AGAINST DR. DAEE.

This Court has unequivocally stated in **GOODING v. UNIVERSITY HOSPITAL BUILDING, INC.**, 445 So.2d 1015 (Fla. 1984) that in order to establish a prima facie case of medical malpractice so as to allow a claim to be presented to the jury, the plaintiff must establish both that the defendant's action or inaction fell below the applicable standard of care and that the plaintiff's injury more likely than not resulted from that negligence. In the instant case, the Halls entirely failed to establish that Dr. Daee's alleged negligence more likely than not caused the injury which had been sustained by Ebony Hall.[6]

The Halls relied on the testimony of three expert witnesses in an effort to make out a prima facie case of negligence on the part of the various Defendants, and particularly on the part of Dr. Daee. Two of those three expert witnesses, namely Drs. Sher and Katzman, not only failed to establish the required causal connection with respect to Dr. Daee's conduct, they in fact failed to discuss Dr. Daee's conduct at all.

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[6] For the purposes of this cross-appeal, Cross-Petitioner will acknowledge that the Halls did present expert testimony to the effect that Dr. Daee's care and treatment fell below the applicable standard of care.

In fact, Dr. Sher's testimony supports Cross-Petitioners' argument that the injury was not caused by Dr. Daee's alleged negligence. Dr. Sher stated during her testimony that the principle difficulty which the child had experienced "occurred probably starting at 6:30 or 7:00 in the morning." (TR 1280). It is undisputed that Dr. Daee had finished the delivery of the child by that time, and that he had turned the child over to the nurse anesthetist, while he continued to care for Mrs. Hall. Dr. Sher also testified that there was no evidence whatsoever that the baby was in any way compromised prior to the onset of labor. (TR 1281) Thus, at no time did Dr. Sher testify that any injury to the child had been caused by any particular conduct on the part of Dr. Daee. More importantly, at no point did Dr. Sher testify that Ebony Hall more likely than not would not have sustained her injury in the absence of any negligence on the part of Dr. Daee.

The only expert whom the Halls presented who did discuss Dr. Daee's conduct was Dr. Rosenzweig. Dr. Rosenzweig criticized Dr. Daee for failing to conduct certain laboratory tests in the later stages of Mrs. Hall's pregnancy. Significantly, Dr. Rosenzweig did not testify that Dr. Daee's lapses in that area more likely than not caused Ebony Hall's injury. To the contrary, Dr. Rosenzweig never suggested that Ebony Hall would have been born normal had the recommended tests been performed.

There is no way that Dr. Rosenzweig could have testified that there was a causal connection between Dr. Daee's failure to conduct certain pre-natal tests and Ebony's injury without an impermissible

stacking of inferences. The first inference is that the tests would have revealed an abnormal condition. The second inference is that any action taken as a result of obtaining abnormal test results would have been successful in preventing Ebony's injury.

The law is well established that in order to use one inference as a basis for another inference, the initial inference must outweigh all reasonable inferences to the contrary. **GAIDYMOWICZ v. WINN-DIXIE STORES, INC.**, 371 So.2d 212 (Fla. 3rd DCA 1979). In this case, the inference that the tests which Dr. Rosenzweig believed should have been performed would have revealed something abnormal does not outweigh all reasonable inferences to the contrary. It is just as reasonable to assume that those tests would not have revealed anything abnormal. (This conclusion is supported by testimony from one of the Plaintiffs' other experts, Dr. Sher, to the effect that there was no evidence to suggest that the baby was in any way compromised prior to the onset of labor.) Given that this first inference does not rise to the level of an established fact, Dr. Rosenzweig could not further infer that any action taken as a result of potential test results would have prevented Ebony's injury.

Aside from Dr. Daee's alleged negligence in failing to order certain laboratory tests, the other issue as to Dr. Daee's malpractice involved the question of when Dr. Daee was called to come to the hospital, and whether he promptly responded to that call. Even assuming that the jury concluded that Dr. Daee was in fact notified of the emergency at 3:00 A.M. rather than at 4:25

A.M., as he maintained, and that he was in fact negligent in failing to arrive at the hospital sooner, there is still a total lack of evidence that this alleged negligence more likely than not was the cause of Ebony Hall's injury.

Rather than testifying that Dr. Daee's alleged delay in arriving at the hospital caused Ebony's injury, Dr. Rosenzweig actually suggested that everything was fine until Dr. Daee turned the baby over to the Hospital personnel.

> His deposition, in fact, states that he did not have time, and wouldn't have had time to do a cesarean section before the patient would have delivered by herself. I agree with that. He did deliver the baby by forceps. And he sectioned the baby with a bulb, taking the meconium out of the nasal pharynx and the mouth. Up until that point, everything was fine.
>
> At this point, he turned the baby over to an expert in the field, or we presume an expert in the field, of taking care of this type of problem, the problem being a baby who may well have meconium, heavy, thick meconium, down into its lung or certainly in the trachea. (depo. pg. 48).

Thus, given the Halls' inability to present expert testimony that Dr. Daee's alleged negligence more likely than not injured Ebony, the trial court should have directed a verdict in favor of Dr. Daee at the close of Plaintiffs' case in chief. **BEISEL v. LAZENBY**, 444 So.2d 953 (Fla. 1984).

CONCLUSION

For the aforementioned reasons, Respondents Hosain Daee, M.D. and Hosain Daee, M.D., P.A. respectfully request that this Court affirm the jury verdict in favor of Respondents. Should this Court

determine to reverse the judgment in Respondents' favor, Respondents respectfully request that this Court reverse the trial court's denial of Respondents' motion for directed verdict, and remand this case to the trial court with directions to enter a directed verdict in Respondents' favor.

Respectfully submitted,

Robert M. Klein

DEBRA J. SNOW
ROBERT M. KLEIN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 15th day of April, 1991 to counsel of record on attached service list.

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