IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,127

FLORIDA BAR NOS: 068445
142163

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

Petitioners,

v.

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,

Respondents.
_____/

BRIEF OF PETITIONERS ON THE MERITS

Respectfully submitted,

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INTRODUCTION

This Brief is filed on behalf of Petitioners, JAMES HALL and EMILY HALL, individually and as parents and natural Guardians of their minor child, EBONY HALL. Petitioners will be referred to as Petitioners, "Plaintiffs" or "Hall".

The Respondents, Defendants below, HOSAIN DAEE, M.D., HOSAIN DAEE, M.D., P.A., RAUL HERNANDEZ, M.D. and CITY OF HOMESTEAD d/b/a JAMES ARCHER SMITH HOSPITAL, will be referred to collectively as "Respondents", "Defendants" or as "Dr. Daee", "Dr. Hernandez", and "James Archer Smith Hospital".

References to the original Opinion of the Third District Court of Appeal of April 17, 1990, including the dissenting Opinion of Chief Judge Schwartz, will be referred to as Appendix "A" 1-4; references to the Opinion on Motions for Rehearing, Clarification and Certification of November 2, 1990 shall be referred to as "A" 5-15.

References to the transcript shall be designated as "T"; references to the record on appeal shall be designated "R". References to testimony of Plaintiffs' expert, Dr. William Rosenzweig by videotape deposition (T.961-962), shall be designated "Rosenzweig _____". All emphasis shall be supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

The primary matter before this Court involves the selection of the Jury in a medical malpractice action that was tried in March, 1988 in Dade County Circuit Court. The minor brain damaged Plaintiff, EMILY HALL, and her parents are African-Americans; these black Plaintiffs sued non-black professional defendants (A.13). Although the majority Opinion of the Third District Court of

Appeal found in favor of the Defendants on the issues raised relating to jury selection, the Majority did certify to this Court, as a Question of Great Public Importance:

> 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?

Petitioners shall set forth in some detail the jury selection process that occurred on March 7, 1988. It was the goal of Plaintiffs and their counsel to select a fair and impartial jury to try this medical malpractice case against an obstetrician, Dr. Hosain Daee, a pediatrician, Dr. Raul Hernandez and a hospital, James Archer Smith Hospital.

Each of the defendants had three peremptory challenges and the trial Court allowed the three defendants to pool their peremptory challenges (A.6). Of the thirty-five veniremembers that were questioned, six were black; five of those six were reached during Voir Dire. Of those five prospective black jurors, the defendants collectively excused four.

Of the thirty-five prospective jurors questioned, twenty-five had ties of some sort to the medical community — clearly not good news for Plaintiffs in a medical malpractice action. Petitioners, shall very briefly, below, describe each prospective juror's connection to the healthcare/medical community. Those jurors whose names are underscored are black.

a. Mrs. Williams. She had a nursing background and worked as a doctors assistant for Dr. Fred Sameo, an Ob/Gyn in Kendall, for two years. She knows defense expert Dr. Kalstone since he was present at the birth of one of her children. (T.39,113)

b. Mrs. Dixon. She had been an account assistant for Southern Bell in customer service for eighteen years. Two of her sisters are registered nurses, one works in Washington, D.C. and the other at Jackson Memorial Hospital. (T.45) [Dr. Raul Hernandez exercised a peremptory challenge against Mrs. Dixon (T.311)].

c. Mrs. Bruce. There are two physicians in her family. Both her niece and nephew are gynecologists and both doctors were living with her while they were in medical school. She didn't know if that would influence her decision in the case. (T.49-50) She has observed literature in her physician's office regarding the subject of malpractice. (T.108)

d. Ms. Paloma. She has a close friend who is an oncologist. (T.53)

e. Mr. Parekh. He is originally from Kenya and his brother-in-law is a physician. (T.55-56) [Dr. Daee exercised a peremptory challenge against Mr. Parekh. (183)]

f. Mr. Aleman. He has a relative who is a physician and a very close friend who is a gynecologist, Dr. Benach. He could have problems serving as a juror in the case since Dr. Benach delivered his daughter. (T.60-64) Dr. Benach has also discussed the problems with him regarding malpractice. He has similar problems with insurance in his position as an engineer. (T.109-110) [Plaintiffs moved to excuse Mr. Aleman for cause and defense counsel objected (T.179); Mr. Aleman was originally from Cuba (T.57) He was excused for cause. (T.179)]

g. Ms. Anderson. Her mother worked at James Archer Smith Hospital approximately twenty-five years ago; her sister hooks people up to

dialysis. (T.65-66)

h. Ms. Alvarez. Her niece is a registered nurse at Doctor's Hospital. (T.71) She worked for four years as a nursing assistant for a general physician. (T.72)

i. Mrs. Masterson. She has a very close friend who is a registered nurse who works with infants, delivery and nursery. (T.77)

j. Ms. Wolf. Her cousins and nephews are physicians. (T.82-83)

k. Mrs. Martinez. Her cousin is in medical school presently. (T.85)

l. Ms. Carlucci. Her cousin is a nurses aid and a close friend is a lab technician. (T.88) She is very familiar with James Archer Smith Hospital since she works for Av-Med Insurance. (T.85-86)

m. Mr. Coley. He has two sisters in law that are nurses and a friend who is a surgeon. (T.90) [Mr. Coley was excused by Dr. Daee (T.188)]

n. Mr. Katz. His father is in the medical insurance business. (T.122)

o. Mrs. Traurig. Her son-in-law is a physician, her sister-in-law is a registered nurse at Doctor's Hospital and she has physician friends. (T.92-93)

p. Mr. Barreiro. He owns a construction company and is responsible in part for the design of James Archer Smith Hospital. (T.97)

q. Mrs. Thornton. She is a registered nurse that works on the faculty of FIU. (T.209-210) Her husband is a health planner for Metro Dade. Her daughter is an administrative assistant for a primary healthcare facility in

Dade County, the Family Health Center. (T.209,214) [James Archer Smith Hospital exercised a peremptory challenge against Mrs. Thornton. (T.305)]

r. Mr. Suarez. His daughter works as a registered nurse at Palmetto General Hospital for two surgeons. (T.216-217)

s. Mr. Gonzalez. His father is a retired physician, a general practitioner in Miami who retired one year ago. (T.219) He plays tennis with four doctors three times a week. (T.220)

t. Mr. Perez. He has close friends in the medical field. (T.226) He testified he didn't know if he would be qualified to judge a medical "report." (T.247)

u. Mr. Alvarez. His mother's former husband is a physician. (T.231) His former father-in-law used to complain of medical malpractice cases and insurance rates. (T.249)

v. Mr. Cuervo. His brother is a medical doctor in Spain. (T.233) He also testified that he is familiar with the Cuban legal system which uses Roman law and he cannot fully accept the jury system. (T.277,285) [Mr. Cuervo was approved by all defendants as an alternate juror but Plaintiffs objected. (T.319)]

w. Mr. Rook. His brother works for a radiologist in Miami Beach, either affiliated with Mount Sinai or The Heart Institute. (T.235)

x. Mr. Greig. His brother-in-law is a medical doctor in Coral Gables, in endocrinology. (T.241)

y. Ms. Andre. One of her sisters and two of her nieces are registered nurses. (T.243) One works at Jackson Memorial Hospital and South Miami Hospital (T.244)

After jurors were excused for cause and the parties exercised peremptory challenges, the jury consisted of the following:

1. Mrs. Martinez, originally from Cuba with a cousin in medical school.

2. Mrs. Traurig, her son-in-law is a medical doctor and a sister-in-law is a registered nurse at Doctor's Hospital; she has many physician friends. (T.92-93)

3. Mr. Suarez, originally from Cuba. He has one child, a daughter, who works as a registered nurse at Palmetto General Hospital for two latin surgeons. (T.215-217)

4. Ms. Igualada, she is originally from Cuba and works at Jordan Marsh. (T.223-224)

5. Mr. Lowry, he is black and works for the sanitation department. (T.225)

6. Mr. Perez, he is originally from Cuba and has friends in the medical field. (T.226) He doesn't know if he would be qualified to judge a medical "report." (T.247)

Jurors Alvarez and Tigget were the alternates. Mr. Alvarez also had ties to the medical community, as discussed above.

Petitioners shall present, below, the pertinent excerpts from the trial transcript on the subject of defense counsel's striking of four black jurors:

> [Plaintiffs' counsel] . . . . I think there is a pattern here where the defense is trying to eliminate blacks from the panel and we object to it. . . . (T.305)
>
> The Court: Perhaps I missed the case that has extended the Neil decision to the civil cases.
>
> * * * *
>
> [Plaintiffs' counsel] I am looking for it. I think it is City of Miami v. Cornett and I don't have a copy with me but I have the citation. . . .

The Court: I would like to see the case I am not familiar with the case. . . . There absolutely is a question as far as I'm concerned. First I want to see the case then I will make the decision. (T.306)

* * * *

The Court: Well, even if it is applicable [to civil cases] [counsel for, James Archer Smith Hospital] struck Ms. Anderson, who's white, and Ms. Carlucci who is Italian and white. There is still a black person on the jury.

How can you tell me . . . [counsel for James Archer Smith Hospital] is acting systematically?

Mr. Bandklayder [Plaintiffs' counsel] the defense as a whole --

The Court: As far as I'm concerned they're using their challenges individually.

. . . [Counsel for Dr. Daee] has been standing here with his thumb in his mouth for the last half an hour. I don't see they're using them together.

You can't -- assume for a moment that you're correct so far as the case being extended. The challenges that . . . [defense counsel] previously made were not of black jurors. There is still a black juror on the Jury.

Mr. Rosenblatt: [Plaintiffs' counsel]. . . [T]his is exactly what the cases say, that a Judge shouldn't put his head in the sand when something is happening in front of his eyes.

You take this juror [Mrs. Thornton] and if we're looking at the real world, if this juror is white she is a perfect juror, a nurse. To get a nurse in a medical malpractice case, that is absolutely a supreme juror. (T.308)

The Court: Mr. Rosenblatt I don't put myself in the place of the attorneys when they decide who they want on the Jury. His challenges have been black people. On the face of it, it would appear maybe there is a reason. Do you wish for me to inquire as to the reason for the strikes?

There is no reason for me to inquire as to the reasons of the strikes. His strategy may be all wet. That is his strategy. As long as he hasn't demonstrated to me a pattern of exclusion of blacks in this case or other cases, couldn't be other cases because he hasn't been in front of me. I find he has not been doing that.

I'll accept his challenge to Mrs. Thornton on no violation of the Neil decision as you say to me it has been extended to --

Mr. Bandklayder: [Plaintiffs' counsel] I want the record to be clear Mr. Coley was stricken by the defense.

The Court: Excuse me. Mr. Coley was struck by, I'll tell you in a minute, Mr. Lynn [counsel for Dr. Raul Hernandez]. He was not struck by Mr. McGrane. (T.309)

* * * *

Mr. Rosenblatt: There's three blacks, Judge. We're forgetting the black man from East Africa [Mr. Parekh from Kenya (T.55)].

The Court: He wasn't a black.

Mr. Burnett: He was Indian or something.

The Court: Indian or Pakistanian.

Mr. Rosenblatt: What color, Judge? That's black.

The Court: I'm sorry I don't consider it black as in black in the Neil decision. That's a different type.

That's my ruling. We're going to go on from there. (T.310)

* * * *

The Court: Mr. Burnett, you have one challenge left.

Mr. Burnett: I will challenge Ms. Dixon.

The Court: Dixon.

Mr. Bandklayder: That's the other black.

Mr. Burnett: I'm leaving a black on there. [At this point, all Defendants were out of challenges]

Mr. Rosenblatt: Now surely you see what's happening. It's exactly what the cases say. They have removed a strong black to keep an obviously weak uneducated black on. It's a distortion that is exactly what Judge Ferguson was talking about Judge.

We can't go into their minds, but basically what they're saying, as I understand the cases, is they are saying, Judge, a good lawyer is always going to come up with a reason, always going to come up with one. What's their reason?

* * * *

> [Mr. Rosenblatt] We started out with a very unrepresentative panel, Judge, and its obvious what they're doing. It's obvious what they are doing, and in that sense all the defendants have a total conserted objective in this case. There will be no reason on earth to exclude Ms. Dixon. In fact, it is done at the eleventh hour where now a black man -- it's just obvious Judge.
>
> * * * *
>
> The Court: There remains a black on the Jury. I have no problem with Mr. Burnett excusing Ms. Dixon.
>
> So now we have Ms. Martinez, Ms. Traurig, Mr. Suarez, Ms. Igualada, Mr. Lowry and Mr. Perez. (T.312)

The Court asked counsel for the Plaintiffs if he was "satisfied" with the Jury and Mr. Rosenblatt replied "No, absolutely not!" (T.314)

When picking the two alternate jurors, defense counsel for each of the defendants readily accepted Mr. Cuervo, whose brother is a physician in Spain, (T.333), and who stated he could not fully accept the Jury system since he believed in the Cuban system utilizing Roman law and a trial without Jury. (T.285,319) Defense counsel also readily accepted Mr. Alvarez whose former step-father was a physician who complained of medical malpractice problems and insurance rates. (T.231,249) Mr. Alvarez was selected as the first alternate and Ms. Tiggett, a black school teacher, as the second alternate. The Court inquired if Mr. Rosenblatt was "Happy" that defense counsel had agreed to accept as the second alternate a black woman, Ms. Tiggett. (T.320) Ms. Tiggett was excused prior to deliberation.

The transcript of trial reflects that Dr. Raul Hernandez "played" to his audience of four Latin [Cuban] jurors and one latin [Cuban] alternate juror.

> Q: [By Dr. Hernandez' counsel] Did you graduate from the medical school at the University of Havana?
>
> A: Yes.

> Q: What did you do with reference to your medical training career and training after that?
>
> A: Well as soon as I finished there, I was involved in the war against Castro and I got caught. I was working as a doctor for the Guerillas, and I was in jail and I was lucky enough to get out of jail. I went to the embassy and I went to Brazil and went to here in the end of 1963. (T.588-589)

Dr. Hernandèz further volunteered "I am a Cuban. I talk a lot". (T.584); when he worked at St. Mary's Hospital in West Palm Beach, "I was the only Spanish speaking one, and the other six were Americans". (T.590)

On the issue of jury selection, the majority of the appellate court in its original Opinion, per curiam, affirmed, with Chief Judge Schwartz dissenting. Judge Schwartz stated:

> I would reverse the defendants' judgment entered below for a new trial on all issues because I believe that the trial court abused its discretion in failing to hold that the defendants' peremptory excusal of five of six sitting black jurors "[d]emonstrate . . . that they're [was] a strong likelihood that they [were] challenged solely because of their race," so as to cross the threshhold erected by State v. Neil, 457 So.2d 481,486 (Fla.1984), and require a neutral, non-biased explanation for the challenges. Bryant v. State, _____ So.2d _____ (Fla. Case Nos. 71,356, 71,357, 71,258, 71,355, Opinion filed, March 29, 1990 [15 FLW S179]); Thompson v. State, 548 So.2d 198 (Fla.1989); City of Miami v. Cornett, 463 So.2d 399 (Fla.3d DCA 1985). (A.3)

Petitioners filed Motions for Rehearing, Clarification and Certification to the appellate court; the majority denied the Motions for Rehearing and Clarification but granted the Motion for Certification on the issue of jury selection. (A.6) The majority of the Third District, purporting to rely in part on this Court's recent decision in Reed v. State, 560 So.2d 203 (Fla.1990), held that the question of whether or not a Neil inquiry should be made in the first instance, is left to the sound discretion of the trial court, even where, as here, the defendants exercised peremptory challenges against four

of five black perspective jurors. In his dissenting Opinion, Chief Judge Schwartz reasserted and reemphasized why a Neil inquiry was mandated under these circumstances:

> I continue to believe that the exercise of defense peremptory challenges to remove four out of five black potential jurors demonstrated, on the face of it, a "strong likelihood" that the challenges were motivated by an impermissible bias against African-Americans -- one which was especially understandable, although certainly not excusable, in a case like this in which black plaintiffs were suing non-black professional defendants. While I confess myself unable to reconcile Bryant v. State, 565 So.2d 1298 (Fla.1990) and Reed v. State, 560 So.2d 203 (Fla.1990), cert. den., _____ U.S. _____, S.Ct.230, _____ L.Ed.2d _____ (1990), upon which the majority relies and which seems quite similar to Bryant but is not cited in that decision, I believe that because of the sensitivity of the issue and the announced policy that "any doubts as to the existence of a "likelihood" of impermissible bias must be resolved in the objecting party's favor", Thompson v. State, 548 So.2d 198,200 (Fla.1989) [citing State v. Slappy, 522 So.2d 18, 21-22 (Fla.1988), cert. den. 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988)], Bryant should control. Accordingly, I would hold that the trial court reversibly erred by declining to put the defendants to the Slappy test of presenting an acceptable, race-neutral explanation for their challenges. In my view, therefore, the Judgment below must be reversed. (A.13-14)

Since the Petitioners also raise as error the trial court's jury instructions on negligence [intervening cause], as well as the defense of the statute of limitations, Petitioners shall very briefly set forth, below, the pertinent facts in this case.

Ebony Hall is the only child of James and Emily Hall (T.15,18); she was born at 5:20 a.m. on June 5, 1981 at James Archer Smith Hospital in Homestead, Florida. This medical malpractice case arose from the facts and circumstances surrounding Ebony's birth and the care she received while hospitalized at James Archer Smith Hospital, through her transfer to Variety Children's Hospital.

Plaintiffs presented evidence at trial that Ebony's present brain damage was caused by the negligence of one or more of the defendants at or about the time of birth, and for a period thereafter. The defendants denied they were negligent, asserting that this was an intrauterine injury and further asserting through the cross examination of Plaintiffs' expert witnesses, that damage was done to Ebony during her subsequent transfer to Variety Children's Hospital or thereafter. (T.920-921) Two of the defendants, Dr. Raul Hernandez and Dr. Hosain Daee further raised the defense of the statute of limitations; said defense did not apply to James Archer Smith Hospital which is governed by a four year statute of limitations (§768.28(12), Florida Statutes).

There was conflicting evidence at trial on the issues of negligence, causation, and the defense of the statute of limitations. Since Petitioners raise as error the trial court's failure to instruct the Jury on intervening cause, the failure to instruct the Jury on fraudulent concealment, and the exclusion of evidence on the issue of fraudulent concealment, Petitioners shall present the evidence presented by Plaintiffs that is relevant on each of these issues. No attempt is made to present evidence presented by Defendants on these issues.

Mrs. Hall's due date was May 20, 1981 and she didn't give birth until approximately sixteen days later; as of May 20, 1981 her pregnancy was "post date" and "higher risk". (T.1159-1160; Rosenzweig 12-13). The standard of care in 1981 required that Dr. Hosain Daee utilize non-stress tests, blood tests to determine estriol levels, ultra sound evaluations and amniocenthesis; Dr. Daee did none of these. (Rosenzweig 14-17) There was a conflict in the evidence as to when Dr. Daee was called by the labor and delivery nurse at James Archer

Smith Hospital. The nurse claimed she called Dr. Daee at 3:00 a.m. on June 5, 1981 and Dr. Daee claimed the first call he received was 4:25 a.m. (T.410-11; 2096-2097). Dr. Daee arrived at the hospital at approximately 5:00 a.m. (T.418) According to Plaintiffs' expert on obstetrics, if Dr. Daee received the call at 3:00 a.m. he should have immediately come to the hospital or at the very least ordered immediate continuous electronic fetal monitoring for this high risk fetus that was post due; there was no monitoring of the fetus from 3:00 a.m. until 3:55 a.m. (Rosenzweig 24-25). Once the fetal monitor was hooked up at 3:55 a.m., it immediately showed severe late decelerations indicating that the baby was in trouble due to lack of oxygen. (Rosenzweig 35-36) Ebony should have been delivered as quickly as possible because of the oxygen deprivation in order to avoid brain damage; the cesarean section should have been performed earlier. (Rosenzweig 37,41-42)

The Halls testified, contrary to the medical records of James Archer Smith Hospital, that they arrived at the hospital at approximately midnight; if the Jury believed the Halls, there was no monitoring of the fetal heart rate for almost four hours. If Dr. Daee did not in fact receive a call from James Archer Smith Hospital until 4:25 a.m., the nurses fell below the standard of care in failing to contact the physician earlier; the nurse also fell below the standard of care if they didn't immediately notify Dr. Daee at 3:55 a.m. of the late decelerations. (Rosenzweig 38) A nurse at James Archer Smith Hospital also failed to call Dr. Raul Hernandez, the pediatrician, to attend the delivery of this high risk baby until approximately 5:45 a.m., some 25 minutes after Ebony was born. (T.498-499) Dr. Daee testified that he instructed the nurse to call Dr. Hernandez at 4:25 a.m., when he first spoke to her. (T.416-17)

The nurse anesthetist at James Archer Smith Hospital further failed to intubate and suction Ebony at the time of her birth to remove large amounts of meconium that were clogging her airway; the hospital records reflected that the nurse anesthetist did not do so although he testified that he did. (T.747-749) Dr. Hernandez arrived at the hospital at 6:00 a.m., forty minutes after Ebony was born, and was told that no intubation had been done. (T.520-21) At 6:00 a.m. Dr. Hernandez first intubated Ebony and suctioned large amounts of meconium from her airway. (T.508,602-03) As a direct and proximate result of the delay in properly intubating and clearing Ebony's airways, she suffered oxygen deprivation during the forty minute period of time between her birth and Dr. Hernandez' arrival at the hospital. (T.687; Rosenzweig 51-53)

James Archer Smith Hospital also failed to have available basic minimal equipment required for the care of newborns such as a blood pressure cuff and equipment to deliver 100 percent oxygen to a baby. (T.637-8; 1470) There was expert testimony presented that Dr. Raul Hernandez was negligent in failing to be present at Ebony's delivery, if, as the nurses at the hospital testified, he was called in a timely fashion. (T.498-9) Dr. Hernandez failed to check Ebony's blood gases to determine if she had adequate levels of oxygen in her blood until approximately 10:30 a.m., over five hours after her delivery (T.877); although the blood gases were alarmingly low, Dr. Hernandez failed to increase the amount of oxygen Ebony was receiving, causing further oxygen deprivation. (T.877-8; 1268-1270; 1277) Dr. Hernandez further failed to treat Ebony's seizures with Phenobarbital. (T.1271-1274) Dr. Hernandez failed to order or administer sodium bicarbonate to lower Ebony's acidotic blood. (T.1270-1) Finally, Dr. Hernandez fell below the standard of care in delaying

the transfer of Ebony to Variety Children's Hospital. Although Dr. Hernandez knew that a transfer was eminent at 6:00 a.m. since James Archer Smith Hospital did not have the facilities to treat a critically ill newborn, he did not call Variety to request a transfer until approximately 11:15 a.m., if one were to go by the hospital records -- Dr. Hernandez claimed he called at 8:00 a.m.; that call is not documented. (T.507-8; 821-822; 1140-41; Plaintiffs' Exhibit 6).

According to the nurses notes at James Archer Smith Hospital, a decision to transfer Ebony was not made until approximately 11:00 a.m. (T.1467); Variety Children's Hospital was set up to respond to the transfer within approximately thirty minutes. (T.823-4) Dr. Hernandez' delay of at least five hours in requesting Ebony's transfer, resulted in Ebony remaining at James Archer Smith Hospital where her blood pressure could not be properly monitored, she did not receive adequate oxygen, her seizures were not treated and aggressive prenatal care could not be administered. (T.827)

Plaintiffs presented ample expert testimony from board certified, well respected physicians on each of the above issues.

Since so many healthcare providers at James Archer Smith and Variety Children's Hospital treated Ebony in the hours following her birth, jury instructions on concurrent and intervening causes were particularly relevant in this case.

Evidence of "intervening causes", i.e., possible causes of Ebony's brain damage which occurred after the various acts of negligence on the part of James Archer Smith Hospital and/or Dr. Raul Hernandez, included a natural cause, Ebony's "persistent fetal circulation" which continued for several hours after she arrived at Variety Children's Hospital (T.1097-8); the alleged failure of

the Variety Children's Hospital transport team to administer 100 percent oxygen while Ebony was being transferred to Variety Childrens at approximately 1:30 p.m. (T.920-1); and Ebony's continuing uncontrolled seizures at Variety Children's Hospital.

At the Charge Conference, Plaintiffs requested that the trial court give Standard Jury Instruction 5.1(a) [legal cause], 5.1(b) [concurring cause] and 5.1(c) [intervening cause] (T.2234-2237; Plaintiffs' Requested Jury Instruction No. 13). The Court granted Plaintiffs' requested instructions on legal cause and concurring cause but denied Plaintiffs' request for an instruction on intervening cause. (T.2237)

After the Jury retired to deliberate, it sent out the following written question:

> We need further explanation on legal cause of injury. (Court's Exhibit No. 1)

In response, the trial court brought the Jury back to the courtroom and reread the Florida Standard Jury Instructions on legal cause and concurrent cause but not "intervening cause". The bailiff subsequently advised the trial court that the Jury wanted a copy of the instruction on causation but the trial court declined to provide same to the Jury.

On the issue of the defense of the statute of limitations, this lawsuit was filed on October 11, 1984, approximately three years and four months after Ebony's birth. The Halls claimed in their pleadings and at trial that there was fraudulent concealment on the part of defendants Hernandez and Daee, preventing the Halls from learning of the injury and negligence. Both Dr. Daee and Dr. Hernandez reassured the Halls that Ebony would be a "normal child"; Dr. Hernandez testified at trial that he would never tell a mother that her baby was

brain damaged. (T.631)

In addition to being told that Ebony would be fine, the Halls were advised by Dr. Daee and Dr. Hernandez that Ebony's temporary problems were as a result of Mrs. Hall's sickle cell trait and abnormalities in Mrs. Hall's body. (T.1528-29; 1578; 1608) At her six week post partum checkup, Mrs. Hall was advised by Dr. Daee that he, (Dr. Daee) had spoken to Dr. Hersh at Variety Children's Hospital and "Ebony would be fine". (T.1529)

Mrs. Hall and other members of her family have the sickle cell trait and Mrs. Hall's brother has become disabled as a result of sickle cell anemia. (T.1530-1) It was Mrs. Hall's belief, based upon statements by Drs. Daee and Hernandez, that any lack of oxygen suffered by Ebony was caused by Mrs. Hall's sickle cell problem. (T.1579) The true facts were concealed and she did not have the slightest hint otherwise until she consulted an attorney on an unrelated matter in late December, 1983. (T.1580) Mrs. Hall continued to use Dr. Hernandez as Ebony's pediatrician through August 1984 and he kept advising Mrs. Hall that Mrs. Hall's problems resulted in the situation with Ebony and would reoccur in any subsequent birth. (T.549; 1578)

Mrs. Hall testified that during the first few years of Ebony's life she believed, based upon what Dr. Hernandez and Daee advised her, that Ebony would be a normal child. (T.1579)

The Court excluded relevant, key evidence on the defense of the statute of limitations and Plaintiffs' assertion of fraudulent concealment. The Court excluded all testimony from Mrs. Hall and her gynecologist, Dr. Olivia Graves, as to a subsequent pregnancy that resulted in a voluntary abortion in 1983. Mrs. Hall became pregnant in early 1983 and decided to terminate the pregnancy

based on conversations she had had with Dr. Dace and Dr. Hernandez that Ebony's problems were caused because of a problem with Mrs. Hall's body and this would recur in a subsequent birth. Prior to the time the Halls ever thought of bringing a lawsuit and prior to the time the Halls ever spoke to an attorney, Mrs. Hall advised her gynecologist, Dr. Olivia Graves, in February 1983, that her decision to terminate her pregnancy was because she did not want to have another child with problems like Ebony because of problems with Mrs. Hall's body. The proffered testimony of Dr. Graves included a history of another physician advising Mrs. Hall that if she had another child it would have similar or worse problems than Ebony. (T.806-808) In a pretrial Motion in Limine, the Court summarily excluded any and all evidence of the subsequent pregnancy and abortion (T.9-12) and testimony was proffered (T.1792-1793; 806-808). Counsel for Dr. Hernandez moved in limine to keep out all evidence regarding the subsequent abortion; Plaintiffs' counsel argued that this evidence was not being presented as evidence of damages but rather was critical on the defense of the statute of limitations and fraudulent concealment since it supported the Plaintiffs' position that the defendant doctors had led Mrs. Hall to believe that since she carried the sickle cell trait, Ebony's problems were as a result of that and would recur in a subsequent birth. (T.10-11) The Court responded:

> The Court: . . . . The fact that Ms. Hall may have had an abortion subsequently is totally and completely irrelevant to the damages that may be recovered in this instance.
>
> I am going to grant the Motion in Limine. There will be no mention whatsoever with regard to the subsequent abortion. (T.10-11)

The Court would not consider any further argument and advised counsel that he had ruled. (T.12)

Attorney Howard Mazloff testified that he originally was consulted by the Halls on December 23, 1983 when they had come to see attorney Richard Pollack on a real estate matter and explained that they had to sell their home to raise money for Ebony's care. (T.1604) Mr. Pollack shared space with Mr. Mazloff and suggested that the Halls speak to Mr. Mazloff about their daughter. Mrs. Mazloff confirmed through his original notes and testimony that Mrs. Hall was convinced Ebony's problems were related to Mrs. Hall's sickle cell problem, based upon information received from the defendant physicians, and she was very reluctant to have the matter investigated for possible negligence. (T.1622)

Although there was substantial competent evidence on the issue of fraudulent concealment, as raised by the Plaintiffs on the defense of the statute of limitations, the trial court refused to give Plaintiffs' requested Jury instruction number 9:

> In determining whether the action against Hosain Daee, M.D. and Raul Hernandez, M.D., is barred by the statute of limitations, you may also consider whether any concealment, or intentional misrepresentation of fact prevented the discovery of the alleged negligently performed medical procedure prior to October 11, 1982. (T.2231-2233)

Instead, the trial court, over Plaintiffs' objections, instructed the Jury and presented the following question, on the Verdict Form, on the defense of the statute of limitations:

> When should Mr. or Mrs. Hall have discovered the incident or injury giving rise to the present claim of negligence against the defendants?
>
> (a) On or before October 11, 1982 _____.
> (b) After October 11, 1982 _____. (R.315)

During the Jury's deliberation, it sent a written note to the Court asking whether the term "incident or injury" as used in the statute of limita-

tions question on the Verdict Form, was a typographical error; the Jury asked whether it should read instead "incident of injury". The Court advised the Jury that it was not a typographical error.

Although it was uncontroverted at trial that Ebony was mentally retarded, the extent of her retardation and physical disabilities were in dispute. Defendants presented testimony that Ebony's level of retardation was in the "mild" range rather than "moderate" range, as presented by Plaintiffs. (T.1034-5; 2062) Defendants witnesses testified that Ebony receives sufficient therapy in the Public School System; there were no modifications needed to her home; and that her developmental delays were mild. (T.992-3; 2060)

During Voir Dire examination and at other times during the trial (T.37), Plaintiffs' counsel alluded to the fact that Ebony would testify and the Jury could see for themselves the extent of her damage. Without any objections voiced by defense counsel, the trial court, on its own motion, refused to permit Ebony to testify or even to briefly demonstrate her disabilities to the Jury. (T.1450-1455; 1507-1514; 2198-2200)

The trial in this Cause lasted nine days and the Jury returned a Verdict finding no negligence on the part of Dr. Raul Hernandez and James Archer Smith Hospital. The Jury found Dr. Daee negligent and awarded Plaintiffs' damages in the sum of One Million One Hundred Thousand Dollars. The Jury further found that the Plaintiffs "should have discovered the incident or injury giving rise to the present claim of negligence" more than two years prior to filing suit. The trial court entered final Judgments in favor of Dr. Hernandez and James Archer Smith Hospital and entered an Order granting a Motion for Summary Judgment in favor of Dr. Daee based on the Jury's findings with regard to the

statute of limitations.

SUMMARY OF THE ARGUMENT

Petitioners are entitled to a new trial where the trial Court failed to conduct a Neil inquiry during Jury selection. Three non-black professional defendants pooled their peremptory challenges and excused four out of five black prospective jurors, where said defendants were being sued by a black family. Under these circumstances, and pursuant to Neil and its progeny, including this Court's recent decision in Reynolds v. State, _____ So.2d _____ (Fla. Case No. 75-680, Opinion filed, January 31, 1991 [16 FLW S159]), Petitioners assert that where non-black defendants are sued by black Plaintiffs, and the Defendants excuse four out of five black prospective jurors, the burden of proof automatically shifts to the Defendants and the trial Court should conduct a Neil inquiry to determine whether there are neutral, reasonable non-racially motivated reasons for the repeated excusals of blacks, rather than some pretext.

Even were this Court to determine that the number of black jurors excused does not automatically shift the burden of proof to the respondents, under the record in this case, it is abundantly clear that a Neil inquiry was mandated. The black jurors excused would ordinarily be ideal defense jurors; the white jurors selected to serve on this Jury had similar ties to the medical community and, objectively, were less desireable defense jurors based upon their answers to questions during Voir Dire, absent the color of their skin. The record herein clearly does not support a basis for excusing four out of five prospective black jurors who were educated, long time residents of Dade County, Florida, and held well respected jobs within the community. The Neil inquiry

must be conducted "on the scene"; the Neil inquiry should not be conducted in the appellate court or before the Florida Supreme Court, after counsel's careful review of the transcript. Chief Judge Schwartz' dissenting Opinions present the applicable case law on the issue of the peremptory excusal of black jurors during jury selection.

The trial court gave a very misleading Jury Instruction on the defense of the statute of limitations, particularly where the trial court refused to instruct the Jury on the issue of fraudulent concealment. Although this Court recently held in Barron v. Shapiro, 565 So.2d 1319 (Fla.1990), that knowledge of either the injury or negligent act commences the running of the statute of limitations, this Court emphasized that Barron did not involve any "fraudulent concealment". Petitioners were further precluded from presenting relevant testimony and evidence on the issues of fraudulent concealment and the statute of limitations, when the trial court excluded testimony of Dr. Olivia Graves and Mrs. Hall, as to a subsequent abortion.

This was an extremely complex medical malpractice action with numerous potential negligent acts spanning a substantial period of time, with several possible natural causes as well. The trial court erred in not instructing the jury on intervening cause. The jurors were confused by the instruction on legal causation and asked for further explanation and a copy of the Jury charges on causation. The Respondents asserted at trial that negligence and damage to Ebony occurred at Variety Children's Hospital where Ebony was subsequently transferred. There was also an issue of Ebony's "persistent fetal circulation" (a natural cause) which continued for several hours after she arrived at Variety Children's Hospital and caused further seizures and damage to her. (T.1097-8)

This was a case where the Jury should have been instructed on intervening cause.

Both liability and damages were hotly contested; the parties prepared this case for four years for a trial that lasted one day shy of two weeks. Incredibly, and without any objection raised by the defendants, the trial Judge would not let Ebony Hall testify for a few minutes; nor would the trial Court even permit Plaintiffs' counsel to have Ebony draw a circle or attempt to follow a simple command so as to demonstrate her injuries. Plaintiffs were not asking Ebony to testify on any substantive issues, such as whether therapy provided through the Public School System was sufficient for her needs. The Plaintiffs had every right to introduce this child to the Jury and have her speak a few words.

ISSUES PRESENTED

I. 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? [Question as certified by the Third District Court of Appeal]

A. WHETHER A NEIL INQUIRY IS NECESSARY BEFORE A TRIAL COURT IS IN A POSITION TO DETERMINE THAT THERE HAS BEEN NO CHALLENGE OF JURORS ON A RACIALLY DISCRIMINATORY BASIS, WHERE NON-BLACK DEFENDANTS EXERCISE PEREMPTORY CHALLENGES AS TO FOUR OUT OF FIVE BLACK PROSPECTIVE JURORS, IN AN ACTION BROUGHT BY BLACK PLAINTIFFS?

II. WHETHER THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY ON THE ISSUE OF THE STATUTE OF LIMITATIONS AND IN EXCLUDING EVIDENCE RELEVANT TO THE ISSUE OF THE STATUTE OF LIMITATIONS?

A. WHETHER THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE ISSUE OF FRAUDULENT CONCEALMENT?

B. WHETHER THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE FROM MRS. HALL AND HER GYNECOLOGIST, DR. GRAVES, THAT MRS. HALL HAD A SUBSEQUENT ABORTION BECAUSE DRS. HERNANDEZ AND DAEE TOLD MRS. HALL THAT IF SHE HAD MORE CHILDREN "IT WOULD HAPPEN AGAIN"?

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

IV. WHETHER THE TRIAL COURT ERRED IN REFUSING TO PERMIT EBONY TO BE QUESTIONED BY COUNSEL AT TRIAL OR TO DEMONSTRATE HER DISABILITIES AT TRIAL.

ARGUMENT

I. 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. [Question as certified by the Third District Court of Appeal]

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In its Opinion on Motions for Rehearing, Clarification, and Certification, the Third District found that "the trial court carefully considered Plaintiffs' motion [for a Neil inquiry] and determined that there was no need to inquire as to the defendants' reasons for the strikes". (A.7) Most respectfully, the record unequivocally demonstrates the opposite.

The trial court either completely misunderstood or intentionally disregarded a long line of Florida cases, commencing with State v. Neil, 457 So.2d 481 (Fla.1984). The trial court's bottom line was that as long as there remained a token black on the Jury, everything was just fine. As black juror after prospective black juror was excused, over Plaintiffs' objections, the

trial court repeated "there is still a black person on the Jury"; "there is still a black juror on the Jury"; "they're remains a black on the Jury" (T.307,308,312); when the Defendants accepted a black school teacher as the second alternate juror, the trial court asked Plaintiffs' counsel, Mr. Rosenblatt, if he was "Happy" -- a comment totally inappropriate under the circumstances of this case. (T.320) Sensing the trial court's attitude on this subject, defense counsel exercised yet a fourth peremptory challenge of a black juror; when Plaintiffs objected, defense counsel boldly stated "I'm leaving a black on there". (T.312) This explanation satisfied the trial Judge, although it was clear that all defendants were out of challenges and Defendants had no choice except to let one black juror remain.

It is certainly established under Florida law that it matters not whether one (or even more) black jurors deliberate in a case, where there has been a challenge of other black jurors for racially motivated reasons. As the Florida Supreme Court stated in State v. Slappy, 522 So.2d 18,21:

> The striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.

In State v. Slappy, the final Jury panel contained one black; see also Thompson v. State, 548 So.2d 198 (Fla.1989); Bryant v. State, 565 So.2d 1298 (Fla.1990). In Bryant, six black jurors and six white jurors were eventually selected. That fact did not lessen the inappropriate excusal of other black jurors.

Contrary to Florida case law, the trial court was of the opinion that trial lawyers were entitled to their "seat-of-the-pants" peremptory challenges and the trial court was not about to question trial strategy, Neil and Slappy notwithstanding. The trial court stated:

> Mr. Rosenblatt, I don't put myself in the place of the attorneys when they decide who they want on the Jury. His challenges have been black people. On the face of it, it would appear maybe there is a reason. . . there is no reason for me to inquire as to the reasons of the striking. His strategy may be all wet. That is his strategy. (T.309)

This is precisely the type of reasoning on the part of trial counsel (let alone the trial court), that Neil and its progeny have done their best to erase. This reasoning and conduct is impermissible under Florida law, as Judge Schwartz points out in his dissent:

> I continue to believe that the exercise of defense peremptory challenges to remove four out of five black potential jurors demonstrated, on the face of it, a "strong likelihood" that the challenges were motivated by an impermissible bias against African-Americans -- one which was especially understandable, although certainly not excusable, in a case like this in which black plaintiffs were suing non-black professional defendants. . . . (A.13)

Florida law mandates that the trial court examine challenges of prospective black jurors, where, as here, the trial court states that there "may be" a reason; "his strategy may be all wet -- that is his strategy". For many reasons, not the least of which is how this practice appears to a family of black litigants and prospective black jurors, peremptory challenges can never be exercised in a racially - motivated manner. As the Court announced in State v. Slappy, 522 So.2d 18, the discriminatory use of peremptory challenges must be avoided.

> . . . . [D]iscrimination in Court procedure is especially reprehensible, since it is the complete antithesis of the Court's reason for being -- to insure equality of treatment and evenhanded justice. Moreover, by giving officials sanction to irrational prejudice, courtroom bias only inflames bigotry in the society at large.
>
> * * * *
>
> Unfortunately, the nature of the peremptory challenge makes it uniquely suited to masking discriminatory motives. See Batson, 476 U.S. at 96, 106 S.Ct. at 1722-23. Traditionally,

> a peremptory challenge permits dismissal of a juror based on no more than "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another". . . . We thus cannot permit the peremptory's use when it results in the exclusion of persons from jury service due to constitutionally impermissible prejudice. . . . (At 20)
>
> * * * *
>
> It is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal. . . . A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen" or "distant" a characterization that would not have come to his mind if a white juror had acted identically. A Judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. . . prosecutors peremptories are based on their "seat of the pants instincts" . . . yet "seat of the pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels. (At 23)

Nor is it required, as the trial court and the majority of the Third District apparently is of the opinion, that there be any type of "systematic" exclusion of blacks. This Court thoroughly discussed that point in Thompson v. State, 548 So.2d 198,202 (Fla.1989). The trial court had found, as in this case, that since there was a black remaining on the Jury, the State had not systematically excluded blacks from the Jury. (At 201) In language that is equally applicable here, the Florida Supreme Court stated:

> Moreover, the entire course of Voir Dire recounted here reflects a serious misunderstanding of our holdings in Neil and Slappy, as well as the related Federal case law. . . .
>
> * * * *
>
> . . . The present record reflects a grave possibility that the trial Court below relied upon the State's erroneous statement that Neil only comes into play if there is a "systematic" exclusion of blacks. . . . (At 202)

In a footnote, the Court then declared:

> The term "systematic" is derived from Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), a decision that was rejected on State law grounds by the Court in Neil and overruled by the United States Supreme Court in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986). Under Neil and Slappy, there is no requirement that the improper use of the peremptory be "systematic". (At 202, footnote 4).

The trial court and defense counsel also were of the erroneous opinion that a prospective black juror that was stricken did not "count" since he was from Kenya and therefore wasn't the "right kind of black". Defense counsel thought "he was Indian or something"; the Court indicated "Indian or Pakastinian" and the Court concluded "I'm sorry, I don't consider it black as in black in the Neil decision. That's a different type". (T.310) How does one explain to their clients who are Afro-Americans this type of exchange between counsel and the Court? It is apparent that the trial court simply tried to "humor" Plaintiffs and their counsel and viewed this subject as some sort of clever game; it is also apparent that a Neil inquiry was contrary to the trial court's belief in the free exercise of peremptory challenges, no matter what. It wasn't a game to the Hall family, though.

In order to fully illustrate to this Court what transpired during Voir Dire, it was necessary for Plaintiffs' counsel to discuss in some detail the makeup of the panel of thirty-five prospective jurors that were questioned by counsel. Whether one looks at the bare record or whether one considers the reasons proposed by counsel in the appellate court, a key question is whether there is evidence of disparate treatment of black jurors as contrasted with the unchallenged white jurors. Slappy v. State, 503 So.2d 350 (Fla.3d DCA 1987); State v. Slappy, 522 So.2d 18 (Fla.1988); Bryant v. State, 565 So.2d 1298 (Fla.1990); Parrish v. State, 540 So.2d 870 (Fla.3d DCA 1989); Floyd v. State,

511 So.2d 762 (Fla.3d DCA 1987). The disparate treatment of the black jurors in the case at bar is glaring.

Mrs. Dixon was the fourth black juror excused by defendants, and she was excused by counsel for Dr. Raul Hernandez. (T.311) She had lived in south Florida for twenty one and a half years and for eighteen years had been an account assistant for Southern Bell. Her husband worked for Florida Power and Light. Mrs. Dixon had two children ages nine and fifteen. Two of her sisters were registered nurses, one worked in Washington, D.C. and the other was a nurse at Jackson Memorial Hospital. (T.43-45) Plaintiffs' counsel had inquired of each of the jurors as to their connection to the medical field and unfortunately for Plaintiffs, twenty-five of the thirty-five prospective juors had ties to the medical community! Defense counsel did not inquire of Mrs. Dixon at all as to the specialty of her registered nurse sisters, whether they had ever been sued, how they got along with physicians or any questions at all about the "medical connection". Dr. Raul Hernandez excused Mrs. Dixon and in an appellate setting suggested the reason being she had ties to the medical field.

Yet Mrs. Traurig was not excused and was a member of this Jury. Mrs. Traurig's son-in-law is a physician and her sister-in-law is a registered nurse at Doctor's Hospital. She further testified that she had numerous physician friends. (T.92,93) Even more significant, is the fact that Mrs. Traurig stated that she wasn't sure she could be fair as a juror in this type of case because of the sympathy factor. She had two young grandchildren that she would think of and would have problems being fair. She also did volunteer work at the Hope School for the mentally retarded and worked with the mentally retarded, taking them on field trips. (T.135-6; 152) She said she would "hope" she could be

fair, but wasn't sure. (T.169)

In contrast, Mrs. Dixon did not indicate in any way that she would have any problem with "sympathy" or being fair; Mrs. Dixon didn't work with the mentally retarded. One difference between Mrs. Dixon and Mrs. Traurig was that Mrs. Traurig was white.

How about Mrs. Martinez who also was a member of this Jury. Mrs. Martinez has lived in Miami for twenty-five years and was originally from Cuba. (T.84) She testified that her cousin was presently in medical school. (T.85) She further testified that she would also have a problem being fair to Defendants because she is very emotional. (T.137) Why was Mrs. Martinez preferable over Mrs. Dixon, other than the fact that Mrs. Martinez was a white Latin?

And why did defense counsel prefer Mr. Suarez over Mrs. Dixon? Mr. Suarez has been in Dade County for sixteen years and was originally from Cuba. He has one child, a daughter, and she works as a registered nurse in Palmetto General Hospital for two surgeons. (T.215-217) Certainly, Mr. Suarez had a closer linkage to the medical community than Mrs. Dixon, yet Mrs. Dixon was excused --Why? Mr. Suarez was a white Latin.

The same question can be asked about Mr. Perez, also a member of the Jury. Mr. Perez works for Venezuelan airlines and has been in Dade County for twenty-six years, originally from Cuba. He testified he has "friends in the medical field". (T.226) He also questioned if he would be qualified to judge medical matters ["a medical report"], as a layman. (T.247) Why wasn't Mr. Perez excused?

Again, the same question with Mr. Alvarez, the first alternate juror.

Mr. Alvarez stated that his mother had been married to a physician. (T.249) And does it make any sense, based upon the defendants expressed concerns [in appellate proceedings] of the black jurors ties to the medical community, that defendants objected to the excusal for Cause of prospective juror, Mr. Aleman, a south Florida engineer who was originally from Cuba? (T.179) Mr. Aleman stated that he had a relative that was a physician and a "very close friend", Dr. Benach, who is a gynecologist who delivered Mr. Aleman's daughter. Mr. Aleman quite candidly admitted he could have problems sitting on this case because of his close relationship to the gynecologist and the fact that he has discussed problems regarding malpractice with his friend and has his own problems with regard to insurance relating to his engineering company. (T.60-64; 109-110) Yet when Plaintiffs' counsel moved to excuse Mr. Aleman for cause, counsel for Dr. Daee objected and counsel for Dr. Hernandez stated "he just wanted to get off the Jury". (T.179) Why did defense counsel want Mr. Aleman and excuse Mrs. Dixon? Mr. Aleman was also a white Latin.

The same is true with regard to the other three black jurors that were excused. Mrs. Thornton had lived in Dade County for twenty-six years and was originally from Georgia. She is a registered nurse working on the faculty of Florida International University. (T.209-210) Plaintiffs' counsel questioned her about her close relationship with the medical field and whether she would be fair to a Plaintiff; she testified she would not "necessarily" be in favor of her profession. (T.212) Mrs. Thornton is married to a health planner who works for Metro Dade County and one of her children is an Administrative Assistant for a primary healthcare facility, The Family Health Center. (T.214) She also served as a juror before in a civil case. Counsel for James Archer Smith

Hospital excused Mrs. Thornton. (T.305)

Counsel for Dr. Daee similarly excused black juror Mr. Parekh. He has been in south Florida for fifteen years, originally from Kenya. (T.55) He owns a gas station and his wife is a real estate agent. Mr. Parekh's brother-in-law is a physician. (T.56)

Another black juror that was excused by counsel for Dr. Daee was Mr. Coley; he has been in Dade County for twenty-eight years and is a cook. His wife has worked as a clerk at a bank for eighteen years. Mr. Coley has two sisters-in-law that are nurses and a friend who is a surgeon. (T.88,90)

It is uncontroverted that the trial court refused to conduct a Neil inquiry so defense counsel never uttered the first reason for excusing any one of the four black jurors; the trial court's repeated rationale being that "we still had a black juror" and apparently one was enough. In appellate Briefs before the Third District Court of Appeal, defense counsel argued that the black jurors were excused because of their ties to the medical community. A Neil inquiry cannot be conducted in an appellate court on the cold, bare record, after counsel's close scrutiny of the transcript. By its very nature, it should always be "on the scene" and that is what the case law dictates. See Bryant v. State, 565 So.2d 1298,1301 (Fla.1990):

> Although the State proffered no reasons to justify its actions to the trial court, it now contends that the record shows reasons which were neutral and reasonable and not a pretext. By making this argument, the state is asking this Court to review the bare record and make a determination without the benefit of an inquiry and an independent evaluation by the trial Judge. 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 court to evaluate all of the information that he heard during Voir Dire with the reasons given by challenging counsel. This process was established to assure that trial counsel gives his or her reasoning at or near the time the challenges are made and to permit the trial court to evaluate

> those reasons in light of the jurors' responses to determine whether the reasons are neutral and reasonable and not a pretext.

Additionally, the bare record strongly suggests and Petitioners submit that defense counsel could not possibly have had any "clear and reasonably specific racially neutral explanation of legitimate reasons" for the use of its peremptory challenges. State v. Slappy at 22. The Record herein is probably the strongest record presented on this issue of the cases reviewed. A Neil inquiry is not an empty symbolic exchange between a trial judge and counsel so that any reason presented will be "rubber stamped" as appropriate and legitimate. The trial court must closely scrutinize the reasons presented and see if the so-called "reasons", would equally apply to a juror that was not challenged.

This precise issue was before the Third District in Parrish v. State, 540 So.2d 870 (Fla.3d DCA 1989). The Opinion in Parrish was recently approved by this Court in Reynolds v. State, _____ So.2d _____ (Fla. Case No. 75,680, Opinion filed, January 31, 1991 [16 FLW S159]). In Parrish, a black defendant was charged with sale of cocaine and the State exercised a peremptory challenge to strike the only black prospective juror. Although the trial Judge did not consider a Neil inquiry necessary, the prosecutor volunteered her reasoning for striking the black juror; her reason was that the prospective juror had stated that there was someone in town who looked like her and she was constantly mistaken for that person; the key issue in the case was going to be the identification of the defendant by an eye witness. The trial court accepted this reason and reaffirmed that it did not consider a Neil inquiry necessary in any event. (At 871) The Third District reversed, finding that the expressed reason was legally insufficient. Specifically, the record in Parrish reflected

that another prospective juror, a white male, also related an experience with misidentification but he was not challenged. The court concluded that "the reason voiced by the State may have been a mere pretext for its conduct". (At 872)

The Third District in Parrish reemphasized the holding of the Florida Supreme Court in State v. Slappy, as to the list of factors which weigh heavily against the legitimacy of a race-neutral explanation. One key factor is whether the challenge is based on reasons that are equally applicable to a juror who was not challenged and actually sat as a juror in the case. (At 872, footnote 2)

The record herein more than demonstrates this "factor". White jurors who candidly admitted that they would have a serious problem being fair in a case involving a young child who was mentally retarded because of the sympathy factor, and who also had ties to the medical community, were selected to sit as jurors in the case over black jurors with medical ties, where the sympathy factor was not even an issue. This is a classic case of pretext and subterfuge.

Not only is there pretext and subterfuge because of the obvious disparate treatment between black jurors and white jurors who were not challenged, the reason that has been presented for the first time in an appellate forum for excusing the black jurors is an insult to the intelligence of any reasonable person. Defendants in a medical malpractice case want jurors with ties to the medical community. Plaintiffs' counsel many times try to excuse for cause prospective jurors with medical training in a medical malpractice case. The panel in this case had an overwhelming number of prospective jurors [25 out of 35] who had ties to the medical field. What occurred here is not even subtle.

Another recent case with far less compelling facts is Floyd v. State, 511 So.2d 762 (Fla.3d DCA 1987). There, the issue before the Third District was whether the trial Judge had properly accepted at face value the prosecutor's race-neutral explanations for the removal of black jurors through the exercise of peremptory challenges. Immediately, a distinguishing feature is that a Neil inquiry was conducted, which of course should have occurred here. The appellate court, at the outset, considered that the accused was black, the victim was of a different race, and the State had used five challenges to excuse black prospective jurors. Additionally, "there were characteristics of some of the persons excused which suggest that they would not have been excused had they been white". (Id. at 764) The party who has utilized peremptory challenges to exclude black jurors "must articulate legitimate reasons which are clear and reasonably specific and which are related to the particular case to be tried". (Id. at 764, citing the language in Slappy).

> . . . .The following, we said [in Slappy] would weigh heavily against the legitimacy of any race-neutral explanation. . . . (5) disparate treatment where there is no difference between responses given to the same questions by challenged and unchallenged venere persons (at 764).

In Floyd, the appellate court noted that a black student had been excused but a white student had not been challenged by the State. According to the Court, this "is strong evidence that the State Attorney's explanation was a subterfuge to avoid admitting discriminatory use of the peremptory challenge". (At 765).

Two recent cases decided by this Court, Bryant v. State, 565 So.2d 1298 (Fla.1990) and Reynolds v. State, _____ So.2d _____ (Fla. Case No. 75-680, Opinion filed, January 31, 1991 [16 FLW S159]), strongly support

Petitioners' position herein. In Bryant, the State exercised five of its first seven peremptory challenges to excuse black jurors and the trial court denied a request for a Neil inquiry. Eventually, six of the twelve jurors that were selected in the case were black. This Court reemphasized the holding in Slappy and Neil that if there is "any doubt as to the existence of a likelihood of impermissible bias" it "must be resolved in the objecting party's favor". (At 1300) This was clearly not done here. The fact that six blacks sat on the Jury mattered not and a new trial was granted for failure to conduct a Neil inquiry. The Court emphasized that the Neil inquiry must be conducted on the scene, at the time of trial, and not before the appellate court or Florida Supreme Court.

In Reynolds v. State, the single black juror among the prospective jurors was stricken by the State. This Court held that the burden automatically shifted to the prosecution and the Neil inquiry was mandated. The excusal of the black juror must be "justified by neutral reasonable and nonpretextual reasons". (At S160) It is submitted that under Reynolds, the burden must also shift to Defendants, here, since the sole remaining black juror here only sat because Defendants were out of challenges. Interestingly, the First District's Opinion in Reynolds v. State, 555 So.2d 918 (Fla.1st DCA 1990), which was quashed by the Florida Supreme Court, reflected that the sole black juror had stated during Voir Dire that her cousin had "overdosed" from taking cocaine and this was a case against a black defendant for possession of cocaine. The Florida Supreme Court found that "the minority venire member's answers suggest no valid reason for excusal and the trial court then failed to require the State to explain its actions".

Clearly, then under the facts in this case, there was no basis for

excusal of the four black jurors, particularly when the "pretext" of a "medical connection" was equally applicable to white jurors that sat on the Jury who were not excused. The Third District herein apparently conducted some type of "de facto" Neil inquiry on the bare record and accepted the defendants' contention on appeal that "three of the four stricken black panel members had close ties to the medical community". (A.7), and that somehow justified their excusal. This simply is not supported by the record, as reflected by the dissenting Opinion of Judge Schwartz.

The Third District herein relied in its majority Opinion on Rehearing, Clarification and Certification, on this Court's recent decision in Reed v. State, 560 So.2d 203 (Fla.1990). That case is distinguishable on several grounds. Firstly, a white defendant brutally raped and murdered a white minister's wife and argued that black jurors had been improperly excused by the prosecution. The prosecutor volunteered the basis for excusing the jurors. The Court discussed the fact that both the defendant and victim were white and two black jurors were already seated in the case and stated that under those circumstances the trial Judge had not abused his discretion in concluding, after hearing the prosecutor's explanation, that the defense had failed to make a prima facie showing there was a strong likelihood the jurors were challenged because of race. Significantly, this Court recently discussed Reed in Reynolds v. State and explained its holding:

> . . . . However, Reed rested on the assumption that, in the context of that case, some sort of Neil inquiry must have been made in the first instance. Here, there was none at all. Deference cannot be shown to a conclusion that was never made. (At S160)

Similarly, deference cannot be shown to a conclusion that was never made by the trial court herein, where no Neil inquiry was conducted.

II. THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY ON THE ISSUE OF THE STATUTE OF LIMITATIONS AND IN EXCLUDING EVIDENCE RELEVANT TO THE ISSUE OF THE STATUTE OF LIMITATIONS.

A. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE ISSUE OF FRAUDULENT CONCEALMENT.

B. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE FROM MRS. HALL AND HER GYNECOLOGIST, DR. GRAVES, THAT MRS. HALL HAD A SUBSEQUENT ABORTION BECAUSE DRS. HERNANDEZ AND DAEE TOLD MRS. HALL THAT IF SHE HAD MORE CHILDREN "IT WOULD HAPPEN AGAIN".

The Jury Instruction given on the defense of the statute of limitations was very misleading[13] and incomplete. Although this Court recently held in Barron v. Shapiro, 565 So.2d 1319 (Fla.1990), that the limitation period commences when the Plaintiff should have known either of the injury or the negligent act, the Jury Charge given and the question on the Interrogatory Verdict do not comport with Barron. The following question appeared on the Verdict Form, over Plaintiffs' objections:

> When should Mr. or Mrs. Hall have discovered the incident or injury giving rise to the present claim of negligence against the defendants. (R.315)

The choices were "on or before October 11, 1982" or "after October 11, 1982".

During deliberations, the jurors sent out a written note asking whether the term "incident or injury" on the Verdict Form was a typographical error; the Jury asked whether the question should read "incident of injury". The Court advised the Jury that it was not a typographical error.

This Court emphasized in Barron v. Shapiro:

> . . . . This is not a case where the disasterous consequences of the surgery does not become apparent until less than two years before the suit was filed. Moreover, Mrs. Shapiro had full access to the medical records, and there was no fraudulent concealment. . . (At 1321).

In this case, the opposite is true. Although the Plaintiffs were aware n a general sense that their child had problems, they were reassured by the

defendant physicians that Ebony would be fine and would be a normal child. They certainly weren't aware of the disasterous consequences of Ebony's mental retardation until less than two years prior to the time suit was filed. Moreover, there were ample allegations and evidence of fraudulent concealment on the part of the physician doctors. Dr. Hernandez admitted at trial that he would never tell a mother that her baby was brain damaged and he never told Mrs. Hall, although he remained Ebony's pediatrician through August 1984. (T.631; 549) Dr. Hernandez told Mrs. Hall that Ebony's problems, although he predicted she would be normal, were associated with the sickle cell trait of Mrs. Hall and that everything that occurred to Ebony was related to abnormalities in Mrs. Hall's body. (T.1528-29; 1578; 1608; 1579) Mrs. Hall was advised by Dr. Hernandez that Ebony's problems would reoccur in any subsequent birth, because of Mrs. Hall's problems. (T.549; 1578)

Plaintiffs requested an instruction to the Jury on the issue of fraudulent concealment (Plaintiffs' requested Jury Instruction No. 9), but the Court refused this instruction. (T.2231-2233) The instruction given by the trial court and the special Interrogatory Verdict simply eliminated this entire concept from the Jury's consideration.

Under Florida law, in a medical malpractice action, the limitations period may be tolled by a defendants' concealment of the true facts. Swagel v. Goldman, 393 So.2d 65 (Fla.3d DCA 1981); Elliott v. Barrow, M.D., 526 So.2d 989 (Fla.1st DCA 1988). In Phillips v. Mease Hospital and Clinic, 455 So.2d 1058 (Fla.2d DCA 1984), the Second District held that fraud, concealment or intentional misrepresentation of facts that conceal either the negligence or injury will extend the limitations period. It was clearly error for the trial court

to prevent Plaintiffs from presenting their theory to the trial court.

Additionally, critical evidence on the issue of fraudulent concealment and the defense of the statute of limitations was improperly excluded by the trial court. The trial court excluded evidence that based upon misrepresentations from Dr. Daee and Dr. Hernandez, Mrs. Hall terminated a subsequent pregnancy to avoid the congenital problem which she was told would recur if she had any more children. (T.1528,1530-1) The history contained within the medical records of Dr. Graves, Mrs. Hall's gynecologist during the subseqent period in question, reflects that it was Mrs. Hall's understanding, through her history, that she could not have additional children because of a problem with her body that had caused problems to Ebony.

Prior to trial, the trial court granted a Motion in Limine, excluding any and all evidence relating to the subsequent abortion and the trial court never waivered from that ruling. (T.9-12) Much of this testimony was proffered. (T.1792-3; 806-808) Although Plaintiffs' counsel advised the Court that there was no claim for damages in connection with the subsequent abortion, he argued that the evidence was nevertheless very relevant on the issue of fraudulent concealment and the defense of the statute of limitations. The trial court indicated it would not consider any further argument. (T.12)

This evidence was clearly relevant in that it tended to prove or disprove material facts, including Mrs. Hall's state of mind and the defendants' concealment and misrepresentations §90.401, Florida Statutes (1987).

In his original dissenting Opinion, Judge Schwartz stated that the trial court erred in excluding evidence of the subsequent abortion, for the reasons set forth above:

> . . . . [T]he court should not have excluded evidence that the child's mother, believing that her child's injury had been caused by a congenital problem in her which might recur, rather than the malpractice of the present appellees, aborted a subsequent pregnancy. This testimony was obviously persuasively significant as to whether she actually knew or should have known the actual cause of the first child's injuries and was thus directly relevant to the limitations issue. Since all relevant testimony is presumptively admissible, Fla. Evidence Code Section 90.402, and I see no foundation for the claim that there was any prejudicial impact to this testimony, much less one which would overcome its probative value, ... I would find error on this ground as well. (A.4)

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

The concept of intervening cause refers to an act of negligence, some natural cause, or some other causal factor which occurs after the negligence complained of. This is distinguishable from a concurring cause which refers to a causal factor which occurs at the same time as the negligence complained of. Tilley v. Broward Hospital District, 458 So.2d 817 (Fla.4th DCA 1984).

In this case there were multiple tort feasors as well as natural causes; indeed, there were a "string of causes" that did not occur at the same time, commencing with Mrs. Hall's pregnancy through Ebony's transfer and hospitalization at Miami Children's Hospital (referred to as Variety Children's Hospital at trial). There was evidence of multiple causes of Ebony's damage, including natural causes and negligence that occurred after the negligence on the part of the Hospital and Dr. Raul Hernandez; said causes may also have contributed or acted in combination with the negligence of James Archer Smith Hospital and/or Dr. Raul Hernandez. There was evidence that the transfer team from Variety Children's Hospital failed to provide sufficient oxygen to Ebony

and she suffered multiple seizures; that Ebony had a continuing disease process "persistent fetal circulation" that caused her brain damage over an extended period of time, including the period of time after she was transferred to Variety Children's Hospital.

Plaintiffs requested that the trial court give Standard Jury Instructions 5.1(a) [legal cause] 5.1(b) [concurring cause]; and 5.1(c) [intervening cause] (T.2234-2237). The Court denied Plaintiffs' request for an instruction on intervening cause. (T.2237) As if on cue, the Jury sent a note to the trial judge during deliberations stating:

"We need further explanation on legal cause of injury."

The Jury was reinstructed on legal cause and concurrent cause but again the trial court did not instruct the Jury on "intevening cause". The bailiff then advised the trial court that the Jury had asked for a copy of the instruction on causation but the trial court declined to do so.

Where, as here, there are multiple defendants, complex facts, natural causes and a time frame, consisting of pregnancy through early prenatal care, an instruction on intervening cause is necessary.

Litigants have the right to have the trial court instruct the Jury on the law applicable to all issues in the case. Tilly v. Broward Hospital District, supra. A concurring cause is one that occurs "at the same time" and is clearly distinguishable from an "intervening cause". The giving of an instruction on concurrent causes did not cure the error, here. See Autrey v. Carroll, 240 So.2d 474 (Fla.1970); Higgins v. Johnson, 434 So.2d 976 (Fla.2d DCA 1983).

The instructions on causation, as given, were misleading and incomplete, as evidenced by the Jury's confusion.

IV. THE TRIAL COURT ERRED IN REFUSING TO PERMIT EBONY TO BE QUESTIONED BY COUNSEL AT TRIAL OR TO DEMONSTRATE HER DISABILITIES AT TRIAL.

Petitioners urge this Court to also find that it was an abuse of discretion for the trial court to refuse to permit the minor brain damaged child, Ebony Hall, to be briefly questioned by counsel at trial. The extent of Ebony's brain damage was contested at trial; the defendants claiming that Ebony was only very mildly retarded and would not need additional therapy or equipment. During Closing Argument, Dr. Hernandez' counsel stated that "her mild retardation, according to Dr. Duchowny, is improving". (T.2334)

As is certainly customary in trials of this nature, Plaintiffs' counsel called Ebony Hall to the witness stand, to ask her a few questions, have her attempt to draw a circle and demonstrate her capabilities to the Jury. Earlier in the trial, Plaintiffs' counsel alluded to the fact that Ebony would be testifying and the Jury could see for themselves that she was retarded. (T.37) Without any objections from defense counsel, the trial court, on its own, excluded Ebony's testimony and would not permit Ebony to even briefly demonstrate her disabilities to the Jury. (T.1450-1455; 1507-1514; 2198-2200) The trial court stated that the minor Plaintiff was not competent to testify and could not take an oath. (T.1452) The Court further stated, after hearing further arguments from counsel, that any testimony should be excluded because the prejudicial effect would greatly outweigh any probative value. (T.1511)

Petitioners submit that this two week trial was all about Ebony Hall and she had a perfect right, although only seven and brain damaged, to respond to a few questions presented to her by counsel. It is most respectfully submitted that the trial court improperly acted as an advocate for defense counsel

in summarily excluding this testimony. See Talcott v. Holl, 224 So.2d 420 (Fla.3d DCA 1969), cert. den. 232 So.2d 181 (Fla.1969); Florida Greyhound Lines v. Jones, 60 So.2d 396 (Fla.1952); Florida Motor Lines v. Bradley, 164 So.2d 360 (Fla.1935).

CONCLUSION

Ebony Hall and her parents did not receive a fair trial. For the reasons stated above, the final judgments in favor of these defendants should be reversed and the case remanded for a new trial on all issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 18th day of February, 1991 to: Betsy Gallagher, Esquire, Penthouse, 25 West Flagler Street, Miami, Florida 33130; Debra Snow, Esquire, Stephens, Lynn, Klein & McNicholas, P.A., Suite 1500, One Datran Center, 9100 South Dadeland Boulevard, Miami, Florida 33156; Steven Stark, Esquire, Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., 175 N.W. 1st Avenue, Courthouse Tower, 11th Floor, Miami, Florida 33128; Joe N. Unger,

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By: Susan Rosenblatt
SUSAN ROSENBLATT