IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,127

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.
_____/

REPLY BRIEF OF PETITIONERS ON THE MERITS

ANSWER BRIEF OF CROSS-RESPONDENTS

Respectfully submitted,

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REPLY TO STATEMENT OF THE CASE AND FACTS

A. CAUSATION TESTIMONY AS TO DEFENDANT HOSAIN DAEE, M.D.

DR. DAEE asserts that the HALLS have failed to present any facts that would establish a prima facie face on causation. The transcript of testimony reflects the following evidence that more than established causation as to defendant DR. DAEE:

1. There were very serious decelerations on the fetal monitor strip that caused oxygen deprivation to EBONY HALL and in all probability also caused cerebral palsy, a seizure disorder and brain damage. (Rosenzweig at 37-38; 92-93).

2. DR. DAEE was negligent in failing to immediately treat MRS. HALL at James Archer Smith Hospital; every minute DR. DAEE delayed added to EBONY's brain damage. (Rosenzweig at 96-97).

3. From an obstetrical point of view one of the primary reasons for EBONY's brain damage was DR. DAEE's failure to diagnose impending placenta dysfunction. (Rosenzweig at 100-101)

4. In determining when the brain damage occurred to EBONY HALL, there are a number of things that compounded EBONY's damage. In addition to placental insufficiency prior to labor [that should have been detected by DR. DAEE], the stresses of labor were certainly a major factor. Labor was allowed to proceed without intervention by DR. DAEE and the length of time compounded the problem. (Rosenzweig at 136).

5. The longer EBONY HALL stayed in an environment where she was not receiving nutrition and sufficient oxygen, the more

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damage that was done to her. (Rosenzweig at 27-28).

6. As soon as the fetal monitor strips showed ominous signs, DR. DAEE should have immediately delivered the baby by Cesarean section. By failing to do so it is analogous to a drowning and this caused brain damage to EBONY. (Rosenzweig at 36-38; 92-93).

7. Plaintiff's expert pediatric neurologist, Dr. Phyllis Sher, testified that although she was of the opinion based upon a reasonable degree of medical certainty that the greatest damage occurred to EBONY after 6:30 a.m. when the baby was delivered until she was transferred to Miami Children's Hospital, that was certainly not the only time frame where damage occurred. The baby was brain damaged also as evidenced by the late decelerations shown on the monitor strip during labor. (T.1280-1281).

ISSUES PRESENTED

I. WHETHER, AS A MATTER OF LAW, A NEIL INQUIRY MUST BE CONDUCTED BY THE TRIAL COURT, EVEN THOUGH THE TRIAL COURT 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

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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?

ISSUE ON CROSS-APPEAL

WHETHER DEFENDANT DAEE'S MOTION FOR DIRECTED VERDICT WAS PROPERLY DENIED BY THE TRIAL COURT?

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].

A. 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.

Not surprisingly, the defendants have chosen to completely ignore pertinent facts that were disclosed by the trial transcript and discussed by Plaintiffs regarding Jury selection in this case. Instead, defendants philosophizes about the need for freedom in exercising peremptory challenges in an attempt to justify their conduct in this case. Defendants cannot escape the simple fact

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that they collectively excused each and every perspective black juror until the defendants exhausted all peremptory challenges. The defendants were out of challenges and thus one black juror remained on the Jury.

Incredibly, defendants suggest to this Court that EBONY HALL and her parents should not voice their complaints since the HALLS excused four latin jurors, [One of whom designed Defendant James Archer Smith Hospital (T.97) and another, whose father, a physician, retired from a general practice in Miami one year before -- and who played tennis with four doctors three times a week (T.219-220)]. The simple fact is that the six member Jury who decided this case was comprised of four latin jurors and the HALLS had two peremptory challenges left that they did not utilize against these Latin jurors. It is submitted that Defendants are truly grasping at straws.[1]

The defendants have argued before this Court and the Third District that jurors with strong ties to the medical community are not necessarily defense jurors and Plaintiffs are naive to believe otherwise. Significant by its absence is any response by any defendant to the basic fact presented by the HALLS, that the non-black jurors on this Jury panel had similar if not stronger ties to the medical community than the black jurors that were excused. Twenty-five of the thirty-five prospective jurors had ties to the medical community.

Non-black jurors that were not excused included Mrs.

[1]Defendants' argument on this point in addition to being legally irrelevant is also offensive. The trial transcript clearly reflects that Dr. Raul Hernandez was pandoring to the Jury consisting of four fellow Cuban jurors by talking of his involvement

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Traurig whose son-in-law was a physician; her sister-in-law, a registered nurse at Doctor's Hospital and who had numerous physician friends. Mrs. Traurig further stated that she wasn't sure she could be fair since she was extremely sympathetic, had young grandchildren, and did volunteer work for the retarded. (T.92,93; 135-6; 152). Mrs. Traurig said she would hope she could be fair but she simply wasn't sure. (T.169). In contrast, Mrs. Dixon, the fourth black juror excused by Defendants [Dr. Raul Hernandez] was an account assistant for Southern Bell for eighteen years; her husband worked for Florida Power & Light; she had two sisters that were registered nurses, one in Washington, D.C. and another at Jackson Memorial Hospital. Mrs. Dixon stated she would have no problem being fair and would not let sympathy enter into her Verdict; nor did Mrs. Dixon work with the mentally retarded. (T.43-45). The HALLS questioned this obvious disparate treatment in their Initial Brief and there has been no attempt at an answer by any of these defendants!

Nor have the defendants presented any rational basis for selecting Mrs. Martinez as a member of the Jury, who has a cousin in medical school and said she would have a problem being fair to the Defendants because she was very emotional. (T.137). Nor did defendants explain why Mrs. Suarez was selected who has a daughter who works as a registered nurse in Palmetto General Hospital for

in the war against Castro; working as a doctor for the Guerillas; time spent in jail in Cuba; announcing "I am a Cuban I talk a lot"; being the only Cuban doctor at St. Mary's Hospital in West Palm Beach, etc. (T.584;588-590).

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two surgeons. Nor have defendants explained why they preferred to retain Mr. Perez who has friends in the medical field and didn't know whether he could be qualified to judge medical matters. Notwithstanding far closer ties to the medical community, the latter jurors were all non-black and latin.

Nor did defense counsel even attempt to explain to this Court and counsel why no questions were asked of Mrs. Dixon as to her registered nurse sisters; whether any of them had ever been sued; whether they had a good relationship with the hospital where they worked, etc. It is obvious from the transcript of voir dire that Mrs. Dixon was excused because she was black and the Plaintiffs were black.

A black registered nurse [Mrs. Thornton] working on the faculty of Florida International University was excused who was married to a health planner for Metro Dade County and had a child who was an administrative assistant for a primary healthcare facility. (T.209-214). A black juror [Mr. Parekh] who was excused whose brother-in-law is a physician (T.56) and another black juror [Mr. Coley] was excused who has two sister-in-laws that are nurses and a friend who is a surgeon. (T.88-90)

As presented in Petitioners' Initial Brief on the merits, a key factor mandating a Neil Inquiry is evidence of disparate treatment of black jurors as contrasted with unchallenged non-black 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

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(Fla.1990); Parrish v. State, 540 So.2d 870 (Fla.3d DCA 1989); Floyd v. State, 511 So.2d 762 (Fla.3d DCA 1987). Simply stated, each of these cases stand for the proposition that where two jurors disclose information or relate in experience that is similar, one juror being black and the other, non-black the excusal of the black juror rather than the non-black one, raises a presumption of a racially motivated peremptory challenge. The question that must be asked is whether a peremptory challenge of a black juror is based on reasons equally applicable to a non-black juror who was not challenged; evidencing a pretext and subterfuge. See Parrish v. State, 540 So.2d 870, 872 (Fla.3d DCA 1989).

Defendants have also conveniently ignored other basic facts in this case. The trial Judge was of the opinion that State v. Neil, 457 So.2d 481 (Fla.1984), did not apply to civil cases; a Neil Inquiry need not be conducted; and even if in Neil v. State did apply to a civil case, Plaintiffs had no cause to complain where a black juror remained on the Jury. Not once but three times the trial Court repeated that there still remained a black on the Jury and therefore the HALLS had no cause for complaint. (T.307,308, 312). A black schoolteacher was accepted as the second alternate juror and the trial Judge inquired of Plaintiffs' counsel Mr. Rosenblatt if he was "happy". (T.320).

The trial Court concluded that there could not be a systematic exclusion of blacks if a black remained on the Jury. (T.308). The trial Court acknowledged that defense counsel's stra-

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tegy in excusing the black jurors "may be all wet" but as long as a black remained on the Jury, the Court wasn't going to make any inquiry. (T.309). The trial Court refused to consider a prospective black juror from Kenya as "black as in the Neil decision -- that's a different type". (T.310) The trial Judge's bottom line was he had no problems since "there remains a black on the Jury". (T.312).

The above comments and conduct on the part of the trial Court is clearly documented by the transcript of Voir Dire. Yet defendants are rewriting history and speak of the trial Judge's careful consideration of voir dire examination and the trial Court's ultimate determination that a Neil Inquiry was inappropriate under the facts of this case. The defendants' contention is a total fiction. The only determination that was ever made by Judge Sidney Shapiro was that "one black is enough", for the HALL family.

Defendants DR. HERNANDEZ, JAMES ARCHER SMITH HOSPITAL and THE FLORIDA PATIENT'S COMPENSATION FUND argue that this Court has never squarely addressed the issue of whether State v. Neil applies in civil cases; and argued that the Eighth Circuit Court of Appeals in Wilson v. Cross, 845 F.2d 163 (8th Cir.1988) expressed grave doubt as to whether Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986) would apply in a civil case. The defendants concluded that even if Neil v. State applied to civil cases, the discretion afforded a trial Judge in determining whether a Neil inquiry is

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appropriate in a civil case should be greater than in a criminal case. The United States Supreme Court disagreed on June 3, 1991 in Thaddeus Donald Edmonson v. Leesville Concrete Company, Inc., _____ S.Ct. _____, Case No. 89-7743, 1991 W.L. 89721 (U.S.1991) (Decided June 3, 1991) [A.1-62]. Justice Kennedy delivered the Opinion of the Court, holding that Batson v. Kentucky, applied equally in civil cases:

> We must decide in the case before us whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race. Recognizing the impropriety of racial bias in the Courtroom, we hold the race-based exclusion violates the Equal Protection Rights of the challenged jurors. This civil case originated in the United States District Court, and we apply the Equal Protection Component of the Fifth Amendment's Due Process Clause. . . . [At 2]

Edmonson, a black construction worker, was injured on a job-site and sued Leesville Concrete Company for negligence in the United States District Court. During voir dire the Defendant Leesville used two of its three peremptory challenges to remove black prospective jurors. Mr. Edmonson, citing Batson v. Kentucky, requested that the trial Court require the Defendant to articulate a race-neutral explanation for striking the two black jurors. The District Court, as in the case at bar, denied the request, asserting Batson did not apply in civil proceedings. The Jury as empaneled, and as in the case at bar, consisted of one black juror. Edmonson received a Verdict for money damages with a finding that he was eighty percent at fault. The Court of Appeals, on Rehearing

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en Banc, affirmed the district court judgment, holding that a private litigant in a civil case can exercise peremptory challenges without accountability for racial classifications. The United States Supreme Court granted certiorari and reversed.

The U.S. Supreme Court discussed "over a century of juris prudence dedicated to the elimination of race prejudice within the Jury selection process". (Id. at 3). The Court further stated:

> . . . . Indeed, discrimination on the basis of race in selecting a Jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial. . . . In either case, race is the sole reason for denying the excluded venereperson the honor and privilege of participating in our system of justice. (Id. at 4)
>
> . . . . When private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance. If peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation. Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the Courthouse itself. Few places are a more real expression of the constitutional authority of the government than a Courtroom, where the law itself unfolds. Within the Courtroom, the government invokes its laws to determine the rights of those who stand before it, in full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and Judges act with the utmost care to ensure that justice is done.
>
> Race discrimination within the Courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. [Citations omitted]

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In the many times we have addressed the problem of racial bias in our system of justice, we have not "questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the Courts. . . To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin. [Id. at 9]

Our conclusion in Powers that persons excluded from jury service will be unable to protect their own rights applies with equal force in a civil trial. While individual jurors subjected to peremptory racial exclusion have the right to bring suit on their own behalf, "the barriers to a suit by an excluded juror are daunting. . . . We have no reason to believe these barriers would be any less imposing simply because a person was excluded from jury service in a civil proceeding. Likewise, we find the relation between the excluded venereperson and the litigant challenging the exclusion to be just as close in the civil context as in the criminal trial. Whether in a civil or criminal proceeding, "voir dire permits a party to establish a relation, if not a bond of trust, with the jurors", a relation that "continues throughout the entire trial". . . . Exclusion of a juror on the basis of race severs that relation in an invidious way. . . . [Id. at 10]

. . .[R]acial discrimination in the selection of jurors casts doubt on the integrity of the judicial process. . . and places the fairness of a criminal proceeding in doubt. . . The harms we recognized in Powers are not limited to the criminal sphere. A civil proceeding often implicates significant rights and interests. Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders. And, as we have observed, their Verdicts, no less than those of their criminal counterparts, become binding Judgments of the Court. Racial discrimination has no place in the Courtroom whether the proceeding is civil or criminal. . . .

Congress has so mandated by prohibiting various discriminatory acts in the context of both civil and criminal trials. See 18 USC 243; 28 U.S. 1861,1862. The Constitution demands nothing less. We conclude that Courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial. [Emphasis supplied] [At 10].

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> It may be true that the role of litigants in determining the Jury's composition provides one reason for wide acceptance of the Jury system and of its Verdicts. But if race stereotypes are the price for acceptance of a Jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a Jury's impartiality without using skin color as a test. If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury. By the dispassionate analysis which is its special distinction, the law dispels fears and preconceptions respecting racial attitudes. The quiet rationality of the Courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes. Whether the race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden and unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror. And if a litigant believes that the prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color. [Id. at 10-11]

The U.S. Supreme Court referred to its earlier Opinion in Batson v. Kentucky in discussing whether a prima facie case of racial discrimination had been established by a litigant. Under the criteria in Batson as well as criteria set forth under Florida law, the HALL family has more than met its burden of establishing a prima facie case, mandating a Neil Inquiry. The transcript of voir dire establishes the following facts without contradiction:

1. The Defendants collectively excluded each and every black juror until the defendants exhausted their peremptory challenges.

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2. There is clear evidence of disparate treatment of prospective jurors in that black jurors were excused, allegedly because of ties to the medical community, wherein non-black jurors with similar medical ties were not excused and kept on the Jury.

3. Little if any inquiry was made as to the alleged objectionable medical ties of the four black jurors, particularly Mrs. Dixon whose two sisters are registered nurses. No questions at all were asked of her on this subject.

4. Four out of five prospective black jurors were excused by the defendants in a case brought by a black family against non-black professional defendants.

5. The trial Judge was of the opinion that Neil v. State did not apply to civil cases.

6. The trial Judge was further of the opinion that if Neil v. State were applicable, there could never be a pattern of exclusion or discrimination if one black were to remain on the Jury.

Under these circumstances, a Neil Inquiry was required and the Certified Question should be answered in the affirmative. See Reynolds v. State, 576 So.2d 1300 (Fla.1991).

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,

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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".

It is the position of the HALLS that since the Jury selection process was tainted, this Cause should be remanded for a new trial on all issues, including the statute of limitations. Plaintiffs further submit that the instruction presented on the issue of the statute of limitations does not comport with Florida law and in particular Barron v. Shapiro, 565 So.2d 1319 (Fla.1990) and that the trial Court improperly removed from the Jury the issue of fraudulent concealment.

Defendant DAEE contends that where, as here, a cause of action for medical negligence is discovered by the Plaintiffs within four years after the incident and a lawsuit is filed within four years, fraudulent concealment on the part of the defendants cannot as a matter of law toll the statute of limitations. This contention is erroneous.

EBONY was born on June 5, 1981 and suit was filed on October 11, 1984, approximately 3½ years after EBONY's birth and within the four year statute of repose. Without repeating all of the facts on this issue that were set forth in the HALL's Initial Brief on the merits, EBONY's parents were advised by defendants DAEE and HERNANDEZ that EBONY's condition was temporary and she would get better and be normal; that EBONY's condition was caused by a condition in MRS. HALL's body related to her sickle cell trait; and not until EBONY's parents consulted an attorney on a

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real estate transaction involving the sale of their house to provide for EBONY's needs, were they in any way aware that there may have been a cover up.

According to defendant DAEE, any fraudulent concealment by him is a legal nullity under these facts. Taking DR. DAEE's premise one step further, had the HALLS sold their house on June 6, 1985, four years and one day after EBONY's birth, and had suit been filed on June 5, 1987, the issue of fraudulent concealment could properly be presented to the Jury. DR. DAEE's argument defies logic.

This Court's recent Opinion in Barron v. Shapiro, 565 So.2d 1319 (Fla.1990) involved an incident that occurred at the earliest on August 17, 1979 and a lawsuit was filed on January 29, 1982, some two and a half years later. In determining that under the facts in Barron, the statute of limitations had run, this Court emphasized that in Barron "there was no fraudulent concealment". [At 1321] The Court's language would make no sense if fraudulent concealment would not have tolled the statute of limitations had it been applicable.

The two cases cited by defendant DAEE in support of his contention that fraudulent concealment does not toll the statute of limitations if discovery occurred within the four year period, are Cobb v. Maldonado, 451 So.2d 482 (Fla.4th DCA 1984) and McDonald v. McIver, 514 So.2d 1151 (Fla.2d DCA 1987). These cases would only support DR. DAEE's contention if the HALLS filed suit

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against DR. DAEE and the other defendants more than four years after EBONY's birth, as was the case in Cobb and McDonald. Judge Glickstein in Cobb v. Maldonado, on Motion for Rehearing, expressed extreme displeasure in precluding a claimant from bringing an action after the four year period where the claimant had discovered the concealment just prior to the expiration of the four year limitation period. Again, that is not the case here and Plaintiffs also question the validity of the holding in Cobb.

The general rule was recently announced by the Third District in Menendez v. Public Health Trust, 566 So.2d 279 (Fla.3d DCA 1990):

> . . . .[W]hen defendants actively misrepresent or conceal their negligence, or conceal known facts relating to the cause of the injury, the statute of limitations does not begin to run until Plaintiff is able to discover the negligence. [Citations omitted]. Id. at 281

In Menendez, the child was born on July 18, 1981; in January 1984 a physical therapist advised the parents of possible negligence; Plaintiffs consulted an attorney eighteen months later on July 16, 1985; and the lawsuit was filed on September 30, 1985, more than four years after the child's birth. Thus, in contrast to the facts in the case at bar, the negligence was discovered within the four year period but a lawsuit was not filed until after the four year statutes of limitation and repose. Relying upon Florida Statute §95.11(4)(b), the Third District held that Plaintiffs should have filed their action within the four year period or by

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July 18, 1985, approximately a year and a half after learning of the alleged negligence. Implicit in the decision is the fact that fraudulent concealment or active misrepresentation did toll the statute of limitations but not beyond the four year statute of repose. While Plaintiffs disagree with limiting the statute of limitations, after the tolling provision, to the four year statute of repose, that is an academic argument in this case since the Complaint was filed well within the four years.

The fact that fraudulent concealment does toll the statute of limitations when it occurs within ther four year statute of repose, is supported by several Florida cases. See Swagel v. Goldman, 393 So.2d 65 (Fla.3d DCA 1981); Martin v. Drylie, 560 So.2d 1285 (Fla.1st DCA 1990). The recent decision of this Court in University of Miami v. Bogorff, 16 FLW S150 (Fla.1991), also supports Plaintiff's position. There, the Plaintiffs did not file an action until approximately ten years after their child had been rendered a quadriplegic, following treatment for leukemia. This Court concluded that the Plaintiffs' action was barred since "absent fraud" the Plaintiffs had four years after the malpractice within which to bring their suit under the statute of repose. This Court further held that "even if there were fraudulent concealment by Dr. Koch, which could have extended the repose period until January 1979, the action would still be barred as untimely". Contrary to DR. DAEE's position here, the Court clearly indicated that fraudulent concealment would toll the statute of limitations.

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The Court further stressed the duty of an attending/ treating physician to be candid with his patient:

> . . . An attending physician has a strong duty to fully address the concerns of patients and to be fully candid with them. If a doctor's communication to a patient was intended to cause that patient to abandon a claim or an investigation, it may amount to fraudulent concealment. [Id. at S150]

For the reasons set forth in Plaintiff's Initial Brief on the Merits, the dissenting Opinion of Judge Schwartz in the Third District should be adopted by this Court; evidence of MRS. HALL's subsequent pregnancy and abortion should have been admissible as relevant testimony on the issue of fraudulent concealment.

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

Defendants argue that since it was not Plaintiffs' position at trial that some third party or natural cause intervened and caused damage to EBONY, the HALLS are now estopped from taking a contrary position in this appeal. An acknowledged principal of law is that a party has the right to have the Jury instructed on issues or defenses raised by its adversary, or raised through testimony and evidence at trial.

Defendants also argue that it would be "virtually impossible" that the Jury was misled on the issue of intervening cause since the Jury found the first actor in the sequence, DR. DAEE, negligent [although Plaintiffs' claim was also found to be barred by the statute of limitations]. The negligence of DR. DAEE

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involved damage to EBONY before or during labor; in this multi-defendant litigation, the Jury could easily have determined that only a portion of EBONY's damages were caused by DR. DAEE's negligence and that subsequent negligence on the part of the Hospital and pediatrician were absolved because of negligence on the part of the Miami Children's Hospital transport team, personnel at Miami Children's Hospital or EBONY's natural evolving condition.

Moreover, the Jury panel expressed its confusion on the issue of causation and asked for the Jury Instructions to be repeated; subsequently advising the bailiff that they wanted a copy of the Jury Instruction on causation.

Defendants further argue that Plaintiffs' counsel's honest comments to the Court to the effect that she was always a bit confused on the distinction between intervening and concurring causes, somehow detracts from the significance of this issue. Plaintiffs' counsel clearly indicated to the Court that if the Jury were to decide the transport team of Miami Children's Hospital did not give EBONY enough oxygen, that would be a cause occurring after the negligence and an intervening causation charge was requested. The Court mistakenly concluded that a concurring charge would cover that situation, as defense counsel suggested, and denied the requested charge on intervening cause.

Under the facts in this case, the charges presented to the Jury on causation was confusing; the Jury expressed its confusion; and a charge on intervening cause was required. Tilly v. Broward Hospital District, 458 So.2d 817 (Fla.4th DCA 1984).

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

Defendant DAEE argues that the trial Court properly exercised its discretion in refusing to allow EBONY to take the stand to demonstrate her injuries, citing the decision of Del Monte Banana Co. v. Chason, 466 So.2d 1167 (Fla.3d DCA 1985), and further noting 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". [Brief at 40] Apparently a suggestion has been made that perhaps the trial Judge prohibited EBONY from taking the stand to prevent six year old EBONY from "faking her injuries".

Defendants further argue that Plaintiffs waived this issue since they did not challenge the amount of damages "awarded" to EBONY [were one to disregard the bar of the statute of limitations].

The HALLS' position is very simple. A brain damaged young child who is brought briefly into the Courtroom should be permitted to take the stand, draw a circle and utter a few words so the Jury has an opportunity to observe the Plaintiff for five minutes. Excluding the Plaintiff from "testifying" is particularly aggregious where, as here, no defendant objected to EBONY taking the stand and the trial Court acted as an adversary.

With the hope that this case will ultimately be retried before a panel of jurors that were selected fairly and without

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racial motivation, the HALLS most respectfully request that this Court announce to the trial Court that a minor Plaintiff should be permitted to face the Jury for a few minutes, utter her name and draw a circle.

CROSS-APPEAL

DEFENDANT DAEE'S MOTION FOR DIRECTED VERDICT WAS PROPERLY DENIED BY THE TRIAL COURT

This Court is undoubtedly familiar with the law on directed verdicts; the issue presented here is whether Plaintiffs presented sufficient evidence at trial on the issue of causation to defeat a motion for directed verdict. DR. DAEE has acknowledged that there was ample evidence of DR. DAEE's negligence.

Plaintiffs' expert witness on obstetrical care, Dr. William Rosenzweig, a board certified obstetrician/gynecologist testified by videotaped deposition, that in all probability serious decelerations on the fetal monitor strip caused oxygen deprivation to EBONY HALL, resulting in her cerebral palsy, seizure disorder and brain damage. Dr. Rosenzweig emphasized that these were "probabilities" rather than "possibilities". [Rosenzweig at 37-38; 92-93]. Every minute DR. DAEE delayed in arriving at the Hospital, examining MRS. HALL and delivering EBONY, added to EBONY's brain damage. [Rosenzweig at 96-97]. DR. DAEE's failure to diagnose the impending placenta dysfunction and treat same, is one of the primary reasons for EBONY's brain damage. [Rosenzweig at 100-101].

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Dr. Rosenzweig explained to the Jury that the length of time this labor was permitted to proceed without intervention by DR. DAEE compounded EBONY's damages. [Rosenzweig at 136] EBONY was not receiving sufficient nutrition and oxygen and the longer the delay the more damage that was done to her; DR. DAEE should have immediately delivered EBONY by Cesarean section as soon as the fetal monitor strip showed ominous signs -- he should not have even changed his clothing before seeing MRS. HALL. The failure to immediately treat this baby is analogous to a drowning, causing brain damage to EBONY. [Rosenzweig at 27-28; 36-38; 92-93]

Additionally, a board certified pediatric neurologist, Dr. Phyllis Sher, testified that EBONY sustained brain damage as a result of the late decelerations shown on the fetal monitor strip during labor; in Dr. Sher's opinion the greatest damage occurred after the child's birth but she was certain that brain damage occurred to EBONY as a result of the the tumultuous labor. (T.1280-1281).

After hearing argument on the Motions for Directed Verdict, the trial Court concluded:

> "I have gone through the various memorandums and I have been trying to come up with a reasonable solution to the issues that have been raised.
>
> * * * *
>
> The causation issued raised by all defendants is disposed of most easily.
>
> It makes little difference on consideration of these motions that the testimony was presented supporting the defendants' position. The question is whether the Plaintiff has made a prima facie showing to support its position.

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> And the answer is yes as to the causation which leaves this Court to conclude and to deny the defendants' motions on this point. (T.1852-3)

DR. DAEE has not presented the evidence in a light most favorable to the non-moving party, the Plaintiffs, as well as all inferences reasonably derived from that evidence. To the contrary, in arguing that this Motion for Directed Verdict should have been granted, DR. DAEE presents only that testimony, out of context, favorable to his position. The Motion for Directed Verdict was properly denied.

CONCLUSION

The Petitioners, EBONY HALL, by and through her parents and natural Guardians, JAMES HALL and EMILY HALL, and JAMES HALL and EMILY HALL, Individually, most respectfully request that this Court reverse the Judgments in favor of these defendants and remand this Cause for a new trial on all issues.

Respectfully submitted,

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By: _____
STANLEY M. ROSENBLATT

By: _____
SUSAN ROSENBLATT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 10th day of June, 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, Esquire, 11th Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130; Roy Watson, Esquire, 44 West Flagler Street, 4th Floor, Miami, Florida 33130; Jesse McCrary, Esquire, 2800 Biscayne Boulevard, Suite 800, Miami, Florida 33137; and H.T. Smith, Esquire, 1017 N.W. 9th Court, Miami, Florida 33136.

By: Susan Rosenblatt
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