IN THE SUPREME COURT OF FLORIDA

ORLANDO REGIONAL MEDICAL CENTER,
and ARNOLD LAZAR, M.D.,

Petitioners,

v.

CASE NO. 80,646

5 DCA Case No.: 91-02333

GREGORY ALLEN, through his
mother SANDRA ELIZABETH ALLEN,
and SANDRA ELIZABETH ALLEN
individually,

Respondents,

RESPONDENTS' BRIEF ON THE MERITS

Submitted by Counsel for Respondents:

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STATEMENT OF THE CASE

Respondents adopt Petitioners' statement of the case with the following correction: Respondents disagree with the Petitioners' characterization that the Fifth District Court's decision in this case conflicts with this Court's prior decisions. Respondents submit that this case is before this Court to determine whether the District Court correctly harmonized its decision in this case with this Court's decisions in University of Miami v. Bogorff, et al., 583 So.2d 1000 (Fla. 1991); Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990) and Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976).

Respondents state in amendment of Petitioner's Statement of the Case, that the Complaint in this case was timely filed on 19 February 1988, within 150 days after mailing of the statutorily required notices of intention to initiate litigation on 5 October 1987. Rhoades v. Southwest Florida Regional Medical Center, 554 So.2d 1188, 1191 (Fla. 2d DCA 1990); see also footnote 1. in Allen v. Orlando Regional Medical Center, 606 So.2d 665 (Fla 5th DCA 1992).

STATEMENT OF FACTS

Respondents submit the following Statement of Facts, because Petitioners' Statement of Facts leaves out details which Respondents consider important to their case. The references are to page numbers in the Record.

Appellant Gregory Allen was born premature, at approximately 32 weeks of gestation, on 5 November 1983 at the Orlando Regional Medical Center (pp. 280-281). Appellants claim, inter alia, that Arnold Lazar, M.D., who was the delivering physician (pp. 284-285), failed to adequately monitor the fetus during labor and delivery and failed to provide the necessary medical treatment to a distressed fetus during labor and delivery, thereby causing Gregory Allen to suffer permanent disability.

Gregory's neonatal care was provided at Orlando Regional Medical Center (hereinafter abbreviated as "ORMC"). Appellants claim, inter alia, (pp. 280-281, 287-289) that ORMC staff failed to monitor the fetal well-being during birth according to then prevailing standards of care. Shortly after his birth Gregory Allen experienced difficulty breathing, and ORMC staff failed to properly intubate Gregory to facilitate his breathing during the first few hours of his life (p. 288).

As a result of the aforementioned acts and omissions of Appellee health care providers Lazar and ORMC, Gregory Allen subsequently developed a hemorrhage in the brain (p. 607) and

this hemorrhage has resulted in severe brain damage, manifesting as cerebral palsy with severe developmental deficits in Gregory Allen's mind and body (p. 281). Based on advice received from expert witnesses and medical consultants, including, but not limited to, the Affidavit of plaintiffs' expert witness Carl Vernon Smith, M.D. (pp.403-423), and specifically based on paragraphs 7 and 8 of said Affidavit, Appellants claim that the failures of Dr. Lazar and ORMC staff directly and proximately caused Gregory Allen's severe permanent disability of mind and body (pp. 285, 289). At present time Gregory suffers from psychomotor retardation, spasticity, dysplegia and blindness (p. 281), and is, and shall be for the rest of his life, completely dependent on others for care and provision of all of his needs.

When Sandra Allen, Gregory's mother, who was 19 years old and unmarried at the time of Gregory's birth, inquired of her health care providers what caused the hemorrhage, she was told that the hemorrhage occurred because Gregory was born premature (pp. 281, 607).

Because Sandra Allen relied on the representations of Gregory's health care providers that his brain hemorrhage occurred due to prematurity, she did not know, nor had reason to know: (i) that birth defects could be caused by negligence of health care providers, (ii) that Gregory's birth defects were caused by negligence of his health care providers at and after his birth, or (iii) suspect an injury, other than a natural process of impaired development due to a brain hemorrhage,

caused by premature birth (p. 607).

Appellants' expert witness, would testify that brain hemorrhage occurs spontaneously in a certain percent of premature births. However, the expert witness would also testify that certain acts and/or omissions by health care providers, such as failure to adequately monitor labor and diagnose and treat fetal distress (p. 285), improper intubation, failure to adequately monitor blood gas levels and failure to timely diagnose and correct misintubation and perinatal asphyxia (p. 288), all of which occurred in this case, can cause a brain hemorrhage or substantially increase the likelihood of its occurrence or its severity. Appellants' expert witness would also testify that Gregory Allen's medical records show his brain hemorrhage was the most severe type of brain hemorrhage, and that with reasonable medical probability, the acts and omissions of Gregory Allen's health care providers Lazar and ORMC caused his brain hemorrhage or substantially increased the likelihood of its occurrence or its severity.

In spring of 1986, at a seminar sponsored by a cerebral palsy association, Sandra Allen, then a 22 year old single mother, learned for the first time that Gregory's birth defects may have been caused by negligence of his health care providers at or around the time of his birth (p. 607).

On 5 October 1987, less than two years from the date Sandra Allen discovered that her son's cerebral palsy may have been caused by errors of health care providers, Appellants, by their

counsel, in accordance with Section 768.57 Fla. Stat. (1987), mailed, by certified mail, a notice of intent to initiate litigation for medical malpractice (p. 281), to Orlando Regional Medical Center, Arnold Lazar, M.D., and several other health care providers who were later dismissed from this case. On 22 February 1988, Appellants filed their initial Complaint in Circuit Court of the 9th Judicial Circuit, in and for Orange County, Florida (pp. 7-16).

ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE RECORD BEFORE THE COURT PRESENTS TWO ISSUES OF MATERIAL FACT PROPERLY SUBMISSIBLE TO A JURY, TO DETERMINE: (1) THE NATURE AND EXTENT OF SANDRA ALLEN'S KNOWLEDGE OF HER SON'S INJURY AND ITS CAUSES, AND (2) WHETHER THE HEALTH CARE PROVIDERS' FAILURE TO INFORM SANDRA ALLEN OF MISHAPS IN HER SON'S AND HER MEDICAL CARE KEPT HER IN IGNORANCE OF HER SON'S AND HER CAUSE OF ACTION.

SUMMARY OF ARGUMENT

Petitioners' contention that Respondents were on notice of an injury when Gregory Allen developed a brain hemorrhage is erroneous. When a plaintiff reasonably relies on an explanation that a medical condition is a result of natural causes, plaintiff is not on notice of an injury, until she has reason to suspect that the condition may have been caused by a negligent act, Moore v. Morris, 475 So.2d 666 (Fla. 1985); Allen v. Orlando Regional Medical Center, 606 So.2d 665 (Fla. 5th DCA 1992); Norsworthy v. Holmes Regional Medical Center, 598 So.2d 105 (Fla. 5th DCA 1992); Roberts v. Casey, 413 So.2d 1226 (Fla. 5th DCA 1982); Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978) cert. denied 361 So.2d 831 (Fla. 1978).

Given the Petitioners' explanation to Sandra Allen that her son's brain hemorrhage was caused by natural causes of premature birth, Respondents did not know, nor had reason to know, that the brain hemorrhage was caused by a negligent act. The statute of limitations was tolled until Spring of 1986, when Sandra Allen learned for the first time that birth-related injuries, such as brain hemorrhages and cerebral palsy, may be caused by health care providers at birth.

Petitioners also contend that because Sandra Allen knew of the brain hemorrhage, it was impossible for Petitioners to fraudulently conceal the injury. Since the knowledge that a brain hemorrhage has occurred does not coincide with being put

on notice of an injury per Moore, Allen, Norsworthy, Roberts and Brooks above, Petitioners' conclusion cannot stand. Petitioners' fraudulent concealment of the injury, its causes, or simply Petitioners' failure to reveal their knowledge of the incidents or mishaps in medical care which occurred as a result of the Petitioners' negligence during the labor, delivery and neonatal period of Gregory Allen resulted in tolling of the statute of limitations until Spring of 1986. Tetstone v. Adams, 373 So.2d 362 (Fla. 1st DCA 1979); Almengor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978); Nardone v. Reynolds, 538 F.2d 1131 (5th Cir. 1976) Therefore, Respondents respectfully submit, the case was timely filed within two years of the discovery and less than four years from the date of the incidents giving rise to the cause of action.

Whether it was reasonable for Sandra Allen to rely on representations by Petitioners that her son's brain hemorrhage was from natural causes, and whether Petitioners fraudulently concealed the injury when they failed to disclose to Sandra Allen facts about mishaps occurring in her son's and her medical care during and following the birth of Gregory Allen, are questions of fact properly submissible to a jury. Therefore, Respondents respectfully request that this Court uphold the decision of the Fifth District Court of Appeal in this case.

I. DOES AN INDIVIDUAL HAVE NOTICE OF AN INJURY WHEN SHE REASONABLY BELIEVES THAT A MEDICAL CONDITION IS THE RESULT OF NATURAL CAUSES?

No. When a plaintiff reasonably relies on an explanation that a medical condition is a result of natural causes, plaintiff is not on notice of an injury.

Florida courts have consistently held that in certain situations, a plaintiff is not on notice of an injury, when there exist alternative explanations of the causes of the injury. Specifically, if plaintiff is only aware of the possible natural causes, of a medical condition that was actually caused by negligence of a health care provider, and there is nothing about the medical condition that suggests that there was medical negligence or an injury caused by medical negligence, the statute of limitations does not begin to run until plaintiff is able to discover the negligence. Moore v. Morris, 475 So.2d 666 (Fla. 1985)

In Moore, an emergency situation during a delivery of a normal pregnancy required a Caesarean delivery. The parents were on notice that while in the womb the baby had swallowed something which had the effect of restricting its breathing and they were told by one of the doctors that the baby was not expected to live. This Court held, Id. at 668, that

> There is nothing about these facts which leads conclusively and inescapably to only one conclusion--that there was negligence or injury caused by negligence. To the contrary, these facts are totally consistent with a serious or life

> threatening situation which arose through natural causes during an operation. Serious medical circumstances arise daily in the practice of medicine and because they are so common in human experience, they cannot, without more, be deemed to impute notice of negligence or injury caused by negligence.

In Norsworthy v. Holmes Regional Medical Center, 598 So.2d 105 (Fla. 5th DCA 1992), a child experiencing difficulty breathing as a result of croup, was hospitalized and treated by intubation and later by a tracheostomy. After he was released from the hospital, the child still experienced difficulty breathing. It was not until several years later that a physician reviewing his records determined that the breathing difficulties which the child experienced after discharge from the hospital were the result of negligently administered intubations. The court in Norsworthy, at 108 held

> Even if the Norsworthys were aware that the initial cause of the closure of the airway was different from the subsequent cause, and if they knew that subglottic stenosis could result from intubation, there is little, if anything in this record to suggest that the "injury" was the result of anything other than natural consequences of a recognized medical treatment competently performed.

In Roberts v. Casey, 413 So.2d 1226 (Fla. 5th DCA 1982) an infant plaintiff was admitted to a hospital on April 5, 1977 with diagnosis of bacterial meningitis. At the end of April 1977 plaintiff's mother was told by a physician that the infant may have contracted the meningitis at the hospital. The court held that the statute of limitations began to run against the

health care providers in late April 1977, when the appellants therein discovered that their child's condition may have been caused by a negligent act. Id. at 1229.

In Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978) cert. denied 361 So.2d 831 (Fla. 1978), plaintiff woke up from an operation, her arm hurt, and she could not lift it. She attributed the paralysis to an expected general physical weakness after surgery. It was not until later that she was held to have knowledge of her injury. This occurred when she was told by another doctor that she could not use her arm because of a damaged nerve in her neck.

In Moore, Norsworthy, Roberts, Brooks and in the case under review, the court ruled that plaintiffs did not have knowledge of an injury, even though a condition of a health defect was apparent to them, when there existed in the plaintiff's mind an explanation of the condition in terms of natural causes, not implicating negligence by their health care providers. In these cases the court held plaintiffs were put on notice of the injury when they learned that negligence of health care providers may have caused the condition.

Petitioners claim the cause of action in this case was properly barred by the trial court as it was filed more than two years after the Respondents discovered the brain hemorrhage in Gregory Allen, which, the Petitioners claim, commenced the running of the two year statute of limitations. This conclusion by the Petitioners is erroneous.

In support of their argument, Petitioners rely on this Court's decisions in University of Miami v. Bogorff, et al., 583 So.2d 1000 (Fla. 1991); Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990) and Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), holding that plaintiffs' discovery of the injury was sufficient to begin the running of the statute of limitations. Each of these cases is easily distinguishable on the facts from the case under review.

In Bogorff, Barron, and Nardone, the plaintiffs were, by the very nature of the injuries suffered, placed on notice that something very unexpected, untoward, something other than a natural process, caused the injury.

In Bogorff a child suffering from leukemia which was in remission became severely brain injured and quadriplegic after receiving treatment with a drug injected into his spine. In Barron the patient went in for a colon surgery and came out blind. In Nardone an adolescent suffering from vision problems and headaches underwent several brain surgeries and showed very significant improvement. Then he underwent a diagnostic test involving injection of a dye into the ventricles of the brain which rendered him irreversibly brain damaged, blind and comatose.

In the Allen case the prematurely born Gregory Allen experienced difficulty breathing and developed a brain hemorrhage shortly after he was born. When Sandra Allen

inquired about the cause of the brain hemorrhage, she was told by Gregory's and her health care providers that the brain hemorrhage was from natural causes of Gregory's premature birth.

Petitioners argue that Nardone, Barron, and Bogorff are dispositive of Respondents' argument that Respondents were not on notice of the injury until they learned that negligence of health care providers may have caused the condition. Petitioners advocate very broad application of the law which this Court applied only in those situations where the nature of the injury itself strongly suggested possibility of negligence by a health care provider.

If the law failed to distinguish between that class of cases and the case under review, the practical result would be untenable. The application of principles stated in Nardone, Barron, and Bogorff, to all cases, as advocated by the Petitioner, would result in all but eliminating the delayed discovery provision of Section 95.11(4)(b) Fla. Stat. (1988). Furthermore, it would give the patient little if any incentive to believe what her health care provider tells her about a medical condition, procedure or treatment. The health care provider would also have little if any incentive to disclose to the patient information about complications which were encountered during the course of diagnosis and treatment. Furthermore, a careful consumer would have every health care procedure which yielded less than optimum result evaluated by an

independent consultant for possibility of negligence. This state of the law would seriously erode the physician-patient relationship and would render virtually impossible the delivery of quality health care in the State of Florida.

II. IS IT POSSIBLE FOR A HEALTH CARE PROVIDER TO FRAUDULENTLY CONCEAL ITS NEGLIGENCE BY FAILING TO INFORM THE PATIENT OF A NEGLIGENTLY PERFORMED PROCEDURE AND THE CORRECTIVE MEASURES TAKEN AFTER DISCOVERING THE DELETERIOUS EFFECTS OF THE NEGLIGENCE, AND BY INFORMING THE PATIENT THAT THE RESULTING MEDICAL CONDITION IS THE RESULT OF NATURAL CAUSES?

Yes. Fraudulent concealment of the injury by Petitioners, and/or their failure to reveal to Respondent their knowledge of the cause of Gregory Allen's condition, resulted in tolling the statute of limitations until Spring of 1986.

When the health care provider reveals to plaintiff or discusses with plaintiff only natural causes of the injury but fails to mention any iatrogenic (physician-caused) causes of injury known to the health care provider or discoverable by him through efficient diagnosis relating to the nature and/or the cause of the plaintiff's condition, plaintiff is not charged with the knowledge of the injury, and the statute of limitations does not begin to run until plaintiff is able to discover the negligence. Tetstone v. Adams, 373 So.2d 362, 364 (Fla. 1st DCA 1979), Almengor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978)

In Tetstone plaintiff's history of abdominal pains and various surgical operations and her claim of suggestion made by a health care provider that her injury was due to natural causes

of the ureter spontaneously growing together, led the court therein to conclude that the issue regarding the statute of limitations was not a proper subject for summary judgment. Id. at 364.

In Almengor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978), involving allegations of negligent delivery and care of a baby resulting in severe brain damage, and allegations of active concealment or failure to inform plaintiff of the baby's injury, the court reversed and remanded for further proceedings the trial court's entry of final summary judgment for defendant hospital on the ground that the action was barred by then applicable four year statute of limitations. The court held:

> The Plaintiff is not on notice, however, as to either the negligent act or the injury caused thereby where he has no actual knowledge of either fact because (1) the medical defendant or his employee, servant or agent actively engages in concealment against the plaintiff so as to prevent inquiry or elude investigation or mislead the plaintiff relating to the existence of the cause of action, or (2) the medical defendant-physician or the medical defendant through his employee/servant/agent-physician fails to reveal to the plaintiff facts [as distinguished from mere possibilities or conjecture] known to, or available to such physician by efficient diagnosis, relating to the nature and/or cause of the plaintiff's adverse physical condition. The statute is tolled upon the happening of either of the above two events.

Id. at 894, emphasis added.

In reaching its decision the Court stated:

> There is some evidence in the record that during the time the plaintiff was aware or

> should have been aware that the baby was born mentally retarded and thereafter showed signs of mental retardation and abnormal development. We do not believe, however, that this evidence put the plaintiff on notice as a matter of law that the baby was injured during birth, because such evidence just as reasonably could have meant that the baby had been born with a congenital defect without any birth trauma.

Id.

Respondent Sandra Allen was never told by Petitioner health care providers that her Gregory was injured as a result of health care providers actions during and shortly after his birth. Nor was Sandra Allen informed about various mishaps which occurred during the labor, delivery and neonatal period, including, but not limited to, the fact that Gregory was misintubated for approximately 45 minutes causing high amounts of carbon dioxide gas to accumulate in Gregory's blood, which is recognized as a cause of fluctuating blood supply to the brain, often leading to development of bleeding in the brain, especially in premature infants who have experienced a difficult birth.

When Petitioners discovered that they improperly intubated Gregory, they took action to correct the defective intubation, but never communicated this fact to Sandra Allen. On pages 9 and 10 of their Answer Brief which the Petitioners filed in the District Court, the Petitioners stated: " Ms. Allen was informed by her health care providers, the Appellees in this action, that Gregory Allen had suffered a brain hemorrhage which was a natural cause of his premature birth." This statement was left

out of the Petitioner's Statement of Facts herein, but it is very relevant to the issues under consideration.

"... [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." Menendez v. Public Health Trust, 566 So.2d 279, 281 (Fla. 3d DCA 1990) approved, 584 So.2d 567 (Fla. 1991), citing Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), Almengor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978), Buck v. Mouradian, 100 So.2d 70 (Fla. 3d DCA) cert. denied 104 So.2d 592 (Fla. 1958). Petitioners knew that Gregory Allen had been improperly intubated for a period of approximately 45 minutes, yet failed to disclose this fact to Sandra Allen, when she inquired about the causes of her son Gregory's brain hemorrhage. Therefore, the statute of limitations did not begin to run until plaintiff learned in Spring of 1986 that Gregory's condition may have been caused by negligence of his health care providers.

Sandra Allen knew of her son's brain hemorrhage shortly after his birth, however, as a 19 year old single mother, she did not know, nor had reason to know that a brain hemorrhage in a premature neonate could be caused by anything other than what she was told by her health care providers, i.e., the baby's premature birth.

On page 26 of the Petitioners' Brief on the Merits, Petitioners argue that Sandra Allen could have discovered the

possible alternative causes of her son Gregory's brain hemorrhage by obtaining and reviewing Gregory's medical records.

Knowledge of contents of medical records is not imputed to patient when records contain many technical terms that an ordinary person would not be expected to understand. Nolen v. Sarasohn, 379 So.2d 161 (Fla. 3d DCA 1980), Tetstone v. Adams, 373 So.2d 362, 364 (Fla. 1st DCA 1979) In Tetstone, the Court further held "... the hospital records contained many technical medical terms and any reference as to the cause of Mrs. Tetstone's condition was effectively buried in the records. There is no evidence to suggest Mr. or Mrs. Tetstone possessed any medical acumen beyond that of ordinary lay persons.

The medical records of Gregory Allen from his birth and neonatal hospitalization comprise several hundred pages of highly technical notes and laboratory test results. The events which caused or contributed to Gregory's injury were discoverable and/or discernible only to a medically trained practitioner. A working knowledge of blood gas analysis, laboratory test result interpretation, knowledge of medical abbreviations, symbols and conventions, ability to interpret fetal monitoring strips, and other highly technical medical knowledge is needed to discern the negligence of Gregory and Sandra Allen's health care providers, and its causal connection to Gregory's current injuries. For example, the only mention of Gregory's misintubation and corrective measures taken is made in an obscure note comprising two words, four numbers, two

acronyms, the chemical symbol for carbon dioxide, and two arrows. This note, which takes up one handwritten line, was interlineated into a medical record that comprises several hundred pages. None of this information was communicated by Petitioners to Sandra Allen. Rather, Petitioners told Sandra Allen that her son Gregory developed a brain hemorrhage as a result of his premature birth.

There is no evidence what so ever to suggest that Sandra Allen at any time possessed any medical acumen beyond that of ordinary lay person. Therefore, the content of the medical records need not, as a matter of law, be imputed to Sandra or Gregory Allen. Tetstone at 363.

Petitioners argue that since Sandra Allen knew that her son Gregory had developed a bleed in his brain shortly after he was born, fraudulent concealment of the injury by Petitioners was not possible. This conclusion is logically possible only if the argument in the foregoing section is rejected and the Court concludes that a 19 year old high school educated single female may not rely on her health care provider to inform her about the causes of her son's condition. When Sandra Allen made such an inquiry of the Appellees, she received what she considered a true, logical and satisfactory explanation in terms of natural, non-iatrogenic causes. She had no other reason to suspect negligence by her health care providers, nor did she know, or had reason to know, that cerebral palsy, a condition which Gregory Allen developed several months later as a result of his

medical care at birth and during the first hours of life, may have been caused by negligence of health care providers.

Petitioners argue that, once Sandra Allen found out that her son had a brain hemorrhage, and its causes were explained to her as natural, she was, nevertheless on notice that an injury has occurred and the statute of limitations began to run. Petitioners state that the Respondents' cause of action was readily discernible to Sandra Allen when she learned that her son had developed a brain hemorrhage, yet at the same time, Petitioners maintain that they had no duty to disclose facts concerning Sandra's and Gregory's medical care which were readily available and known to them as factors which cause or contribute to the development of brain hemorrhages, because these would be highly speculative as to the cause of the hemorrhage.

The case law limits the required revelation of information to facts known or available to the health care provider, as distinguished from mere possibilities or conjecture. Petitioners knew that Gregory Allen was improperly intubated during approximately 45 minutes shortly after birth and that this improper intubation resulted in very high concentrations of carbon dioxide in his blood. Petitioners knew these facts, because they performed the blood gas analysis and later reintubated Gregory.

Petitioners knew or through efficient diagnosis should have known that a condition of high concentrations of carbon dioxide

in a premature infant's blood may cause a brain hemorrhage and cerebral palsy. Petitioners also knew or through efficient diagnosis should have known that failure to adequately monitor labor and timely diagnose and treat fetal distress would make a premature infant extremely susceptible to hypoxic-ischemic injury to the brain and cause brain hemorrhage and cerebral palsy. Yet, Petitioners, by their own admission, represented to Sandra Allen that Gregory Allen's condition was a result of natural causes of his premature birth. Sandra Allen was never told by the Petitioner health care providers that Gregory was injured as a result of health care providers actions during and shortly after his birth, but rather, she was told that Gregory developed problems as a result of his premature birth.

In Nardone v. Reynolds, 538 F.2d 1131, 1136 (5th Cir. 1976), the Court held: "[I]f the doctor during the existence of the [doctor-patient] relationship has or should have knowledge of the cause of the condition, the statute is tolled as long as the doctor fails to reveal his knowledge to the patient."

In their Appellate Brief, pages 14 and 20 of the Answer Brief, Petitioners argued that "... it is plaintiff's burden to show not only successful concealment of the cause of action, but also fraudulent means to achieve that concealment. No where in the Appellant record is there any evidence, either by deposition or affidavit, which the plaintiff can rely on to show existence of question of fact regarding the required fraudulent means." Respondents will point out that neither are there any affidavits

from the Petitioners denying fraudulent concealment. All that exists in the record are the Respondents' allegations in the complaint and motions, and Petitioners' denial thereof in the answer, therefore, there exists a disputed issue of fact regarding the date of commencement of the limitations period.

While plaintiff ultimately bears the burden of proof on the issue of fraudulent concealment and misrepresentation, Florida law is clear on the fact that in order to succeed on motion for summary judgment based upon the statute of limitations, the movants in the case at issue must conclusively show that there exists no disputed issue of fact with respect to the date of commencement of the limitations period. Cohen v. Baxt, 473 So.2d 1340 (Fla. 4th DCA 1984), modified on other grounds 488 So.2d 56, Board of Trustees of Santa Fe Community College v. Caudill Rowlett Scott, Inc., 461 So.2d 239 (Fla. 1st DCA 1984) No such showing of lack of disputed issues of fact with respect to the commencement of the limitations period was made by the Petitioners at the trial court level.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits, that the Fifth District Court correctly concluded that the record before the court presents two issues of material fact properly submissible to a jury to determine (1) the nature and extent of Sandra Allen's knowledge of her son's injury and its causes, and (2) whether the health care providers' failure to inform Sandra Allen of mishaps in her son's and her medical care kept her in ignorance of her son's and her causes of action. Respondents therefore respectfully request that this Court uphold the decision of the District Court in this matter

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing document was mailed, first class postage pre-paid, this 24 day of MARCH, 1993, to: Richard W. Bates, Esq., and Eric D. Struble, Esq., MATEER, HARBERT & BATES, P.A., P.O. Box 2854, Orlando, Florida 32802, attorneys for Petitioners Orlando Regional Medical Center and Arnold Lazar, M.D.

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