

IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC01-1260 & SC01-1259

District Court Case No. 4D00-654

HUMANA OF FLORIDA, INC.,
d/b/a/ HUMANA HOSPITAL-BENNETT,
n/k/a COLUMBIA HOSPITAL CORPORATION
OF SOUTH BROWARD d/b/a WESTSIDE
REGIONAL MEDICAL CENTER,

Petitioner,

vs.

JACOB THOMAS TOMLIAN, a minor, by
and through his parents and natural guardians,
DORA LEE TOMLIAN, and KEVIN JAMES
TOMLIAN; and DORA LEE TOMLIAN and
KEVIN JAMES TOMLIAN, individually,

Respondents.

RESPONDENTS' BRIEF ON THE MERITS

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-and-

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STATEMENT OF THE CASE AND FACTS

Jacob Tomlian was born with significant and permanent brain damage. (R. XXIV-2293) Broadly termed cerebral palsy or spastic diplegia, Jacob suffers from an array of mental and physical, functional and behavioral deficits including marked weakness and increase in tone in both legs and to a lesser extent motor problems in both arms, language problems, articulation problems, attention deficit hyperactive behavior disorder, severe learning disabilities, deafness in one ear, and an I.Q. in the mentally retarded range. (R. XVII-1281 to 1285) Age 7 at the time of trial, Jacob drools, wears braces on his legs, is incontinent, and tends to wander away if not closely supervised. (Id., at 1280, 1292; R. XXI-1880, 1892; R. XXXVI-3913, 3914)

The cause of Jacob's injuries was and is undisputed. Jacob suffered a hypoxic insult (i.e., oxygen deprivation) to his brain in utero. (R. XXIII-2176-7; XXIV-2293) The issue in this case is when that insult occurred.

Defendants, the delivering obstetrician and maternity hospital, posited that the insult occurred at some undetermined time 26 to 34 weeks into Jacob's mother's pregnancy (8 or more weeks before their alleged malpractice). (R. XV-1034, 1042, 1056, 1057) Plaintiffs maintained the insult occurred during a contraindicated and unduly protracted, failed trial of labor which culminated in Jacob's urgent delivery by cesarean section and necessary resuscitation. (Id., at 968 to 970)

The Pregnancy

At the time Jacob's mother, Dora Tomlian, became pregnant with Jacob, she returned to the gynecological practice that had delivered Jacob's older brother, Zachary, a few years before. (R. XXXV-3840, 3841) That practice, founded by Defendant Mark Grenitz's father, no longer had an obstetrician in the group, and Dora was referred across the hall to Dr. Grenitz who rented space from them. (Id., at 3845; R. XXVIII-2772 to 2776) At the time he accepted Dora as a patient, Dr. Grenitz had been in practice only a couple of months. (R. XXVIII-2775, 2844)

Dr. Grenitz claims to have reviewed Dora's chart from her earlier pregnancy with Zachary which revealed several "risk factors": that Dora had fractured her pelvis several years before in an equestrian accident; that Zachary, a big baby with a large head, would not descend; that Dora's uterus did not dilate progressively; that an attempt at Pitocin induction (a drug that enhances labor by stimulating contractions) had failed; and that Zachary had to be delivered by cesarean section following fetal distress. (Id., at 2792, 2793, 2798, 2799, 2802 to 2805, 2813, 2814) When Dora came under the care of Dr. Grenitz, Dora was also 35 years old, another known "risk factor", since older mothers produce older eggs. (R. XVI-1090) Second babies also generally tend to be bigger, and Dr. Grenitz conceded (at trial) he was "very concerned that she was going to have another large baby". (R. XXVIII-2808)

Notwithstanding all of these known “risk factors”, Dr. Grenitz advised Dora she was a fine candidate for a vaginal birth after cesarean section (“VBAC”), and he urged her to agree to the procedure which she reluctantly did. (Id., at 2804, 2816; R. XXXV-3857, 3858; R. XXXVI-3869)

Dora had a normal and uneventful pregnancy with Jacob. She underwent several routine tests to confirm Jacob’s health in utero, all of which produced perfectly normal results. (R. XVI-1115 to 1120; R. XXVIII-2822 to 2828) She also submitted to amniocentesis, due to her age, which confirmed the absence of any genetic defects, and she had ultrasound testing which was also perfectly normal but confirmed a big baby. (Id.)

At 40 gestational weeks and through Dora’s 42nd week of pregnancy (two weeks past her due date), Dr. Grenitz was naturally becoming concerned, however, about Jacob’s size and Dora’s lack of progress. (R. XXVIII-2829 to 2838) He rightly ordered several fetal non-stress tests during this period (which are used to detect a potential lack of fetal oxygenation) including tests performed five and two days before Jacob’s birth. (Id.) Those too were absolutely normal. (Id.) Dora also felt the baby moving around a lot throughout this period which was good. (R. XXXVI-3870, 3876)

Five days before Jacob’s birth and well past her due date, however, Dora wanted to schedule a cesarean section. (R. XXXVI-3874) She was extremely worried

about trying to deliver another huge baby. (Id.) Dr. Grenitz convinced her to wait a few more days. (Id., at 3874-5) She did, but nothing happened. Two days before Jacob's birth, Dora felt some slight contractions and she consulted Dr. Grenitz who sent her to the hospital for evaluation where she was examined and fetal heart tracing was performed. (R. XXVIII-2837, 2838) Dora had not progressed, Jacob was fine, and Dora was sent home, like many expectant mothers, with false labor. (Id.) Two weeks past her due date and carrying a very large baby, Dr. Grenitz then scheduled Dora for an "induction". (Id., and at 2841)

Labor and Delivery

Dora arrived at the Defendant Hospital that Saturday, as scheduled, shortly before 7:00 a.m. (R. XXVIII-2839 to 2841) The maternity unit at Defendant Humana-Bennett had only been in operation for a few months at the time, and no longer is. (R. XXVI-2564, 2565; R. XXXI-3216) Dora fell under the care of Nurse Pacifico who also had only a few months of recent labor and delivery experience and very little in her twenty year career. (Id., and at 2693, 2694) Nurse Pacifico attended Dora throughout the day and until Jacob's birth that evening. (R. XXVI-2561) She also admittedly knew, upon Dora's arrival and from reading her chart, that Dora was "at risk" for the sundry complications which occurred in her earlier labor and delivery with Zachary. (Id., at 2580, 2581, 2588-9, 2595, 2596, 2598-2601)

Dora was manually examined upon her arrival at the hospital. She was not in labor, she was having no contractions, and she was only 1 to 2 cms dilated and only 50% effaced (a mother needs to be 10 cms dilated and 100% effaced to deliver). (R. XXVI-2603) She was also at only minus 3 station, which meant the baby had not even begun his necessary descent (pelvic station measurements at the Defendant Hospital ranged from minus 3 at the onset of labor to plus 3 at delivery). (Id., and R. XVI-1150, 1151) At approximately 7:50 a.m., Dr. Grenitz broke Dora's water in an attempt to accelerate the process. (R. XXVIII-2845, 2846) He also wrote a note to wait 45 minutes to begin Pitocin.¹ (R. XXVI-2620, 2622)

Dr. Grenitz then examined Dora who remained only 2 cms dilated and 80% effaced. (R. XXVI-2604, 2605) Her station also stayed at minus 2, and she began to experience only mild contractions. (Id.)

Three hours later, at 10:50 a.m., nothing had changed except for a slight increase in Dora's contractions. She remained 2 cms dilated, 80 % effaced, and at minus 2 station. (Id., at 2606) At 11:05 a.m., Dora's contractions were noted as "moderate to strong", she was in labor, but still nothing else had changed. (Id., at 2606-2608) She remained 2 cms dilated, 80% effaced, and at minus 2 station. (Id.)

¹ As will be seen, Pitocin was not administered until 2:30 p.m., six and one-half hours later. (R. XXVI-2617)

At 11:40 a.m., Dora still had not progressed at all, but her contractions had markedly increased both in frequency and strength. (Id.) They were coming two minutes apart and were noted to be “strong”. (Id.) At 12:30 p.m., Dora was administered an epidural to block the pain of the contractions. (Id., at 2610, 2611)

At 1:15 p.m., more than six hours after her arrival at the hospital and five hours since her water had been broken, Dora remained only 3 cms dilated, 80% effaced, and at minus 2 station. (Id., at 2615) It was at this time Nurse Pacifico observed, and advised Dr. Grenitz, that Jacob’s heart rate had dropped to a very low 78 beats per minute (normal is 120 to 160 beats per minute). (R. XVI-1215, 1216; R. XXVI-2591, 2592, 2613, 2614) An internal fetal heart monitor was promptly affixed to Jacob’s skull at that point to more accurately track his heart rate. (Id.)

At 1:45 p.m., Jacob’s fetal heart tones measured 80 beats per minute for a continuum of 30 seconds - - not a good thing - - at which point Nurse Pacifico turned Dora on her side and began to administer to her, and thus the baby, oxygen. (Id., at 2616; R. XVI-1215, 1216; R. XXVIII-2852 to 2854) At 2:20 p.m., Nurse Pacifico observed that Jacob was experiencing bradycardia (i.e., a baseline heart rate below 120 beats per minute for a duration of 10 minutes or more). (R. XXVI-2592, 2593, 2646)

Notwithstanding these developments, at 2:30 p.m., Nurse Pacifico started to administer the Pitocin Dr. Grenitz had ordered early in the morning. (Id., at 2617,

2624; R. XXVIII-2859 to 2861) It will be recalled that Pitocin promotes the strength and frequency of contractions. At trial, Nurse Pacifico conceded her knowledge that Pitocin administration is contraindicated and potentially harmful when there are any signs of fetal distress or potential hypoxia (i.e., lack of oxygenation). (R. XXVI-2624) She further conceded there was no order in Dora's chart to begin Pitocin at 2:30 p.m., and Nurse Pacifico had no recollection at trial of a second Pitocin order by Dr. Grenitz although she maintained she would not have administered Pitocin without a physician's order. (R. XXVI-2618, 2619) Dr. Grenitz also had no recollection of ordering Pitocin at 2:30 p.m., but in the face of written hospital protocol which required the obstetrician to be present during the first 20 minutes of any Pitocin administration, Dr. Grenitz recalled he may have been present when the Pitocin was administered. (R. XVI-1225; R. XXVIII-2859 to 2862)

At 3:30 p.m., after an hour of Pitocin administration and resulting strong and frequent contractions, Dora still remained only 3 cms dilated, 80% effaced, and at minus 2 station. (R. XXVI-2634, 2635) At 3:40 p.m., Dr. Grenitz examined Dora, reviewed the most recent fetal heart tracings, and ordered a cesarean section. (Id., at 2636, 2638) Nurse Pacifico noted his order as "urgent", which to her meant it was to be performed as soon as possible. (Id., at 2639, 2640)

It was at about this time that Jacob's fetal monitoring strips show a recent

pattern of what some of the witnesses in this case identified as “late decelerations” (i.e., the baby’s heart rate is observed going down after a contraction ends as opposed to during the contraction and does not promptly return to baseline [R. XXVI-2592, 2593]), evidence that Jacob was potentially not receiving an adequate and consistent supply of oxygen. (R. XVI-1218 to 1220) Plaintiffs’ retained expert obstetrician-gynecologist noted several “lates” (in addition to equally concerning severe variable decelerations) beginning around 1:00 p.m., continuing through the 2:00 p.m. period, and markedly recurring following the administration of Pitocin at p.m. 2:31, 2:33, 2:37, 2:40, 2:56, 2:59, 3:01, 3:24, 3:44, 3:59, 4:02, and 4:05, shortly after which Nurse Pacifico suspended the fetal heart tracing (amidst bradycardia). (Id., at 1206, 1216 to 1218, 1230 to 1232; R. XXVI-2648, 2652)

At trial, Nurse Pacifico disagreed the strips show any “lates”, as opposed to less concerning “variables”. (R. XXVI-2648, 2719, 2720) Defendants’ retained expert witnesses admitted to a few true “lates”, characterized the rest as mostly moderate to mild variables, and explained that fetal heart monitoring is subject to some degree of interpretation. (R. XXX-3038, 3100) Unfortunately, and inexplicably, Jacob’s original fetal monitoring strips which are, pursuant to law and Hospital policy and procedure, supposed to be attached to and maintained as part of the patient’s chart, were unaccounted for in this case. (R. XXVI-2573 to 2575) The Defendant Hospital

produced what it represented to be computer generated reproductions of Jacob's strips which were used by the parties' experts and which do not contain Nurse Pacifico's notes which would have routinely been made on the original strips concurrent with the events they tracked.² (Id.)

Dr. Grenitz delivered Jacob by cesarean section at 4:44 p.m., more than an hour after the decision to perform the "urgent" surgery had been made. (R. XVI-1234) (He denied the cesarean was urgent, notwithstanding Nurse Pacifico's note to the contrary. [R. XXVIII-2869, 2870]) According to Plaintiffs' retained expert obstetrician-gynecologist, this violated Hospital protocol and the applicable standard of care which requires that all non-scheduled cesarean sections be accomplished within 30 minutes from the time of "decision to incision". (R. XVI-1233, 1234) Since fetal heart tracing was suspended at 4:21 p.m. (another violation of Hospital protocol and the standard of care according to Plaintiffs' expert), there is no uninterrupted 'strip' record of

² Also unfortunately, Nurse Pacifico, who has been out of labor and delivery nursing for several years following this incident, claimed to have no independent recollection of anything that happened on the day of Jacob's birth. (R. XXVI-2563, 2566, 2567) Her testimony in this case was informed entirely by what remained in the medical charts. (Id.) She even denied knowledge that Jacob was hypotonic (i.e., limp) and completely colorless at birth, which was observed by all other personnel in the operating room who witnessed the birth. Nurse Pacifico explained her job as a labor and delivery nurse was to attend Dora not Jacob. (R. XXVI-2657-8)

Jacob's condition from that point until the time of his delivery twenty three minutes later. (Id., at 1235, 1236, 1239)

Jacob was observed to be hypotonic (i.e., he had abnormally decreased tone) at birth. (R. XVII-1296; R. XXXI-3184, 3185) He was also blue in color. (Id.) He had a nuchal cord (i. e., his umbilical cord was wrapped two times around his neck). (R. XVII-1333) He required one minute of administered oxygen at birth, and he did not cry or otherwise react when given a vitamin K injection. (R. XXI-3187, 3189-90) His overall Apgar scores, as reported by Hospital staff, were unremarkable except for a "0" for color and a "1" for heart rate at birth, although these (subjective) scores were concededly changed by someone for reasons unknown. (Id., at 3186-7, R. XVIII-1370; R. XXIV-2356) Jacob's legs were also observed to be turned inward and his feet pointed down, but this was initially explained (and treated for more than 18 months) by Hospital staff physicians as an orthopedic, rather than neurologic, problem. (R. XXXI-3225, 3226; R. XXXVI-3888 to 3895)

Almost two years after Jacob's birth he was diagnosed by an independent neurologist as having sustained brain damage in utero. (R. XXXVI-3896, 3897) Defendants' experts at trial conceded the damaging event occurred in utero and that such damage occurred to an otherwise healthy brain. (R. XXIV-2292, 2293) But for the event, they admitted, Jacob would be perfectly normal. (Id.)

The Trial

The trial of this complex medical malpractice case naturally promised to be a “battle of the experts”. The subject matter was already difficult - - the etiology of fetal brain injury - - but the delicate contest over when that injury occurred would determine Defendants’ liability in this case. Plaintiffs’ burden was further complicated by the disappearance of the original fetal monitoring strips, by the failure to produce continuous strips for Jacob’s final twenty three minutes in utero, and by an ‘amended’ pathology report created by the Defendant Hospital’s staff pathologist approximately 2 ½ years after Jacob’s birth and at the suggestion of Dr. Grenitz (following the latter’s receipt of a medical records request from Plaintiffs’ counsel). (R. XXI-3229-3242; R. XXXII-3439 to 3445) The amendment postulated that an early (i.e., before labor and delivery) pre-natal infarction which the pathologist had observed on Dora’s placenta (but apparently found unremarkable at the time of his original study) may have been the cause of Jacob’s fetal hypoxia. (R. XXI-3240)

Plaintiffs’ first expert witness was Dr. Paul Gatewood, an obstetrician-gynecologist. (R. XVI-1076) Dr. Gatewood offered opinions as to certain departures from the applicable professional standards by Dr. Grenitz and Nurse Pacifico in their care and treatment of Dora and Jacob. The gist of Dr. Gatewood’s opinions was that Dora’s history confirmed she was absolutely not a candidate for a VBAC, and at the

outset should have been planned and scheduled for a cesarean section rather than subjected to a hopeless and considerably high risk trial of labor. (Id., at 1101) Dr. Gatewood further opined that any efforts at a vaginal delivery should have been promptly abandoned after several hours of completely unproductive, strong contractions, and in the face of numerous warning signs that Jacob was in distress. (R. XVI-1145, 1146, 1208, 1209, 1233, 1234) Dr. Gatewood concluded generally that Defendants' departures caused or contributed to Jacob's injuries. (Id., at 1170-3) As an obstetrician-gynecologist, however, Dr. Gatewood candidly acknowledged (on direct examination) that he was unqualified to analyze or opine the extent of Jacob's problems or their precise timing in utero, and he necessarily deferred to other specialists in this regard. (R. XVI-1171) Specifically, Dr. Gatewood conceded it was beyond his expertise to say whether Jacob suffered hypoxic injury pre- or post-Dora's admission to the hospital that day. (R. XX-1684, 1685)³

Plaintiffs' next expert witness was Dr. Lawrence Schneck, an adult and pediatric neurologist. (R. XVII-1271) Dr. Schneck opined, deductively, that Jacob's damage occurred on the day of his birth and due to the events surrounding the birth. (Id., at 1293-4) Dr. Schneck pointed to the battery of tests Dora underwent throughout her

³ Accordingly, Defendants' statement that Dr. Gatewood "testified about the timing" of Jacob's injury (initial brief, at p. 5), is inaccurate and unfair.

pregnancy and the perfectly normal results of all of those tests including tests performed only two days before Jacob's delivery. (Id., at 1295, 1296) Dr. Schneck also pointed to an MRI and CAT scan of Jacob's brain which showed no anatomical malformations or cortical atrophy which should have been present if the injury had occurred several weeks before birth. (Id., at 1298) Dr. Schneck further pointed to the several ominous events which occurred during Dora's protracted and failed trial of labor and which supported his conclusion of a hypoxic event that occurred during labor and delivery, to wit: non-reassuring fetal heart rate tracings throughout the afternoon; several hours of strong, unproductive, and potentially deleterious contractions; an umbilical cord wrapped twice around Jacob's neck causing compression; Jacob's need for oxygenation both during labor and after delivery; and an MRI of Jacob's brain which showed "periventricular leukomalacia", an injury caused by an isolated insult. (R. XVII-1296, 1297, 1324, 1325, 1327, 1331 to 1336) Dr. Schneck also attempted to explain to the jury the extremely complex chemical processes by which decreased blood flow and lack of oxygenation will produce brain injury. (Id., at 1302 to 1311)

On cross-examination, Dr. Schneck agreed that fetal non-stress tests are inconclusive as to brain function; that there is a reported statistic that up to 78% of periventricular leukomalacia and spastic diplegia insults occur at or before 32

gestational weeks; and that Jacob was taken to the “well baby” nursery upon delivery where he exhibited no overt signs of brain injury. (R. XVIII-1401-1402, 1440, 1486-97)

Defendants called their principal timing and causation expert, pediatric neurologist Dr. Robert Vannucci, out of turn. (R. XXVIII-2145) Dr. Vannucci conceded that Jacob has cerebral palsy or spastic diplegia due to a hypoxic ischemic insult (i.e., oxygen deprivation and decreased blood flow) to his brain which occurred in utero. (R. XXIII-2161, 2162,; R. XXIV-2292, 2293) Dr. Vannucci dated the insult, however, as having occurred 26 to 34 gestational weeks in utero because, statistically, that is most often when such injuries occur. (R. XXIII-2176) Dr. Vannucci noted that the MRI of Jacob’s brain showed periventricular leukomalacia in the white matter region of Jacob’s brain which, he explained, is the area where pre-natal infants most frequently suffer such injury at or before 34 gestational weeks. (Id., at 2179-82, 2185)

According to Dr. Vannucci, had Jacob suffered a hypoxic insult at term, the injury most likely would have manifested itself in the cerebral cortex or gray matter portion of Jacob’s brain. (Id.)

On cross-examination, Dr. Vannucci conceded there was nothing in Dora’s medical history or in the medical record of her pregnancy with Jacob which suggests that Jacob’s hypoxic injury occurred between 26 and 34 weeks in utero. (R. XXIV-

2304 to 2306) Dr. Vannucci also conceded to having published and testified in another case that with severe pre-natal brain damage, an infant's head will usually be proportionately smaller at birth rather than larger as in Jacob's case. (Id., at 2308) He further conceded that brain damaged infants can have completely normal MRI's and, conversely, that functionally normal infants can have MRI's which show brain damage. (Id., at 2317) Dr. Vannucci reluctantly acknowledged the ("not likely") possibility that Jacob may have suffered an injury to a region of his brain besides the periventricular leukomalacia captured on his MRI, as well as the ("highly unlikely") possibility that Jacob's periventricular leukomalacia injury in fact occurred at or about the time of his birth. (R. XXIV-2317, 2318, 2320, 2321, 2323)

Plaintiffs' final liability expert was Dr. Barry Crown, a neuropsychologist with 29 years of academic and clinical experience and the President-Elect of the American Board of Professional Neuropsychology. (R. XXI-1868, 1869, 1873) Dr. Crown had evaluated and extensively tested Jacob and had formed certain critical opinions concerning the nature and timing of Jacob's deficits. When Plaintiffs called Dr. Crown on the eighth day of trial, only then did Defendants move in limine to preclude Dr. Crown from rendering those opinions on the ground that he is not a 'medical doctor' and was thus per se incompetent to testify to such matters. (R. XXI-1832 to 1835)

Defendants argued that the Fourth District's 1985 opinion in EXECUTIVE CAR & TRUCK LEASING, INC. v. DESERIO, 468 So. 2d 1027 (Fla 4th DCA), rev. denied sub. nom., COMMERCIAL UNION INS. CO. v. DESERIO, 487 So. 2d 1293 (Fla. 1985), which flatly prohibited the admission of expert testimony from a psychologist as to the cause of organic brain injury, was controlling and absolutely forbade Dr. Crown's proposed opinions in this case. (Id., at 1835 to 1838)

Defendants also argued that Drs. Gatewood and Schneck, Plaintiffs' expert obstetrician and neurologist, respectively, had already rendered timing and causation opinions and that Dr. Crown's testimony would thus only be cumulative. (Id.)

Defendants further contended that it would be unfair to allow Plaintiffs to call more experts than they on the same subject matter.⁴

⁴ As will be seen, the trial court rejected Defendants' latter two arguments and restricted Dr. Crown's testimony solely in reliance upon DESERIO. Curiously, however, Defendants reiterate here at some length their other arguments for exclusion of Dr. Crown. (Initial brief, at pp. 4-8) Plaintiffs address in the text, *infra*, Defendants' suggestion that Dr. Crown's excluded testimony was substantively cumulative. In an abundance of caution, however, Plaintiffs would briefly note that the record does not support Defendants' thesis that Plaintiffs had three "timing and causation" experts to Defendants' one. As already discussed, while Dr. Gatewood, Plaintiffs' retained expert obstetrician-gynecologist, opined generally that Defendants' alleged deviations from the standard of care facilitated Jacob's injuries, Dr. Gatewood specifically and candidly acknowledged he was unqualified to discuss the extent of Jacob's problems or, more importantly, to determine their timing in utero, which were matters admittedly beyond his expertise. (R. XVI-1171; R. XX-1684, 1685) Defendants also forget that all of their medical experts, as well as the Defendants themselves (Dr. Grenitz and the Hospital's Nurse

Plaintiffs' counsel pointed out that since the time DESERIO was decided, the Florida Legislature had amended Section 490.003(4), Fla. Stat., specifically to include in its definition of the recognized and authorized practice of psychology the diagnosis and treatment of mental "disorders, illness or disability . . . as well as the psychological aspects of physical illness, accident, injury, or disability, including neuropsychological evaluation, diagnosis, prognosis, *etiology*, and treatment," and that Dr. Crown was eminently qualified in these areas and had critical, non-cumulative opinions to offer in this case. (R. XXI-1838 to 1841, 1846)

The trial court permitted Defendants' counsel to voir dire Dr. Crown. (*Id.*, at 1850) Defendant Hospital's counsel simply asked for and obtained Dr. Crown's acknowledgment that he is a licensed psychologist with a subspecialty in neuropsychology but not a medical doctor. (*Id.*, at 1850 to 1852) Dr. Grenitz's counsel adopted that examination. (*Id.*) Neither Defendant explored Dr. Crown's

Pacifico), were asked and were allowed to offer opinions that Jacob's injury did not occur during what they maintained was a wholly routine and uneventful labor and delivery. (R. XXIII-2145 to 2228; R. XXVII-2673 to 2718; R. XXIX-2911 to 2986; R. XXX-3019 to 3175) Nurse Practitioner Lisa Miller, a standard of care expert retained by the Defendant Hospital, specifically opined, over Plaintiffs' objection, that no hypoxic insult occurred to Jacob at or about the time of his birth. (R. XXXIV-3573 to 3664, and esp. 3584) Dr. Grenitz also agreed with his lawyer "within a reasonable degree of medical probability" that Jacob suffered no fetal distress in the hospital (R. XXV-3373), and volunteered the unsolicited (and non-responsive) opinion on cross-examination by Plaintiffs that the late administered Pitocin did not cause Jacob any harm. (*Id.*, at 3394)

competency in fact. (Id.) The trial court initially allowed Dr. Crown to testify.

Plaintiffs nevertheless established Dr. Crown's credentials. Dr. Crown is a Florida licensed psychologist and neuropsychologist who limits his practice to the areas of clinical and forensic psychology and neuropsychology. (Id., at 1868) He received his Ph.D. in 1969. (R. XXI-1869) Thereafter, Dr. Crown was a National Institute of Mental Health post-doctoral fellow in clinical psychology at Harvard Medical School and Massachusetts General Hospital. (Id.) After that, he accepted a teaching position at Boston University in a joint Bachelors-M.D. degree program where he taught developmental psychology and neurodevelopment. (Id.) After that, he joined the faculty of the University of Illinois School of Medicine and thereafter the University of Miami School of Medicine. (Id.) Dr. Crown is presently on the faculty of Florida International University in the Department of Psychology teaching in its doctoral program. (R. XXI-1870) He has taught courses in pediatric psychology, child psychopathology, and forensic psychology. (Id.) He also remains an adjunct associate professor at the University of Miami School of Medicine where he teaches and consults physicians in several areas including brain damage. (R. XXI-1871)

Dr. Crown is also a consultant and national advisor to a post-doctoral graduate program in neuropsychology developed by the Fielding Institute. (Id.) He is a Diplomate and the President-Elect (at the time of trial) of the American Board of

Professional Neuropsychology, a Diplomate of the American Board of Forensic Examiners, a fellow of the American College of Professional Neuropsychology, and an Affiliate Member of the American Board of Neurology. (R. XXI-1872-5)

Dr. Crown also has a full-time clinical practice. (Id., at 1876) He is the Head of Neuropsychology at Miami Children's Hospital and is on the medical staff of six hospitals in Dade County. (R. XXI-1877) Neurologists and other physicians refer patients to Dr. Crown for examination, evaluation, and testing which includes, and has included for the past 29 years, the etiology and prognosis of brain injury. (Id., at 1879-80; 1920) Dr. Crown explained that neuropsychology is that area of psychology that specifically addresses how the brain works, how it functions, and its relation to human behavior. (Id., at 1868) Dr. Crown's work, both academically, and through his clinical evaluation and treatment of patients, has included cerebral palsy, mental retardation, and related conditions. (Id., at 1878) He has made etiology determinations regarding such patients throughout his career and he did so in Jacob's case. (R. XXI-1880)

Dr. Crown evaluated and extensively tested Jacob over a period of five hours using a variety of well recognized and accepted neuropsychological functional,

behavioral, and intelligence tests.⁵ (R. XXI-1880 to 1885, 1887 to 1895, 1898-1901) Dr. Crown explained that unlike certain medical tests used to diagnose and analyze brain injury such as electroencephalograms (EEG's) and CAT scans, which are accurate or produce a 'hit rate' of only 30% and 70%, respectively, the accuracy rate of such neuropsychological testing is around 90%. (Id., at 1885, 1886)

Jacob's test results were significant. His scaled scores--which are usually expected to be roughly the same on all tests--varied greatly. (R. XXI-1896) For example, on certain tests (e.g., arithmetic), Jacob scored in the first percentile (meaning 99% of the populus would do better than he). On others (e.g., object assembly), Jacob scored in the eightieth percentile (meaning that only 20% of the populus would do better than he). (Id.) This "scattered" variability was produced throughout the several tests administered. (Id., at 1897)

Dr. Crown explained that such scattering of scores is an indicator of impairment due to insult to an otherwise normal, healthy brain. (R. XXI-1902 to 1904) He further opined, without objection, that such damage occurred at or about the time of Jacob's birth. (Id., at 1904, 1905) Defendants did object, however, and the trial court sustained their objections, to Dr. Crown's explanatory and illuminating opinions as to

⁵ Defendants did not request a Frye hearing or otherwise purport to object to the underlying methods or tests employed by Dr. Crown.

just why Jacob's injuries could not have occurred several weeks before his birth as contended by Defendants. (R. XXI-1905 to 1910)

At side bar, Defendants reiterated that the Fourth District in DESERIO had flatly prohibited the admission of expert testimony from a psychologist concerning the cause of organic brain injury. (Id.) Plaintiffs reiterated that since DESERIO, the Legislature had expressly recognized etiology as a subject within the expertise of psychologists and neuropsychologists, and that Dr. Crown certainly possessed and had established his qualifications in fact to render his non-cumulative, empirical opinions as to the timing of Jacob's *functional* and *behavioral* deficits which were critical to Plaintiffs' case. (Id.) The trial court felt constrained to abide DESERIO in the absence of any contrary judicial precedent and precluded such testimony by Dr. Crown. (R. XXI-1905 to 1910)

Before Dr. Crown was excused, Plaintiff proffered his excluded testimony. For the convenience of this Court and counsel, that proffer is reproduced here:

THE COURT: You can have a seat, Doctor.

Q. [PLAINTIFFS' COUNSEL] Doctor, were you trained in the hospital setting?

A. Yes, I was.

Q. What hospital?

A. Massachusetts General Hospital.

Q. Associated with what institution?

A. Harvard Medical School.

Q. Are you on staff at hospitals now?

A. Yes, I am.

Q. What hospital?

A. I am a member of the medical staff at Baptist Hospital, South Miami Hospital.

* * *

Q. In the course of your treating patients on a day-to-day basis, in your practice in evaluating patients, do you make determinations as to etiology?

A. Yes.

Q. Is that important and essential to what you do?

A. Yes.

Q. And for how long have you been making determinations as a neuropsychologist as to the etiology of the conditions of the patients you are faced with?

A. Twenty-nine years.

Q. In the case of Jacob Tomlian, did you come to opinions with regard to the etiology of his condition?

A. Yes.

Q. What is that etiology, sir?

A. Oxygen deprivation at the intrapartum or neonatal period.

Q. And when you say “intrapartum” or “neonatal,” what do you mean?

A. At birth or shortly thereafter.

Q. And how can you determine that?

A. From reviewing the records, and also from looking at the test scores, which indicate a fully developed brain.

Q. If you assume that pediatric neurologists examined Jacob Tomlian and came to the conclusion that there was asphyxia or there was hypoxia during labor and delivery that’s the root cause of Jacob’s condition, would you have an opinion regarding that?

A. I would concur that that seems to be the reason, the causative basis, the etiology of Jacob Tomlian’s neuropsychological deficits and impairments.

Q. Is that determination any different than you make on a day-to-day basis with patients that you see in your office?

A. No.

Q. You have been qualified in courts of law in the State of Florida, particularly Broward County, to make that determination in the past?

A. Yes.

Q. In this very courthouse?

A. In this courthouse, yes.

Q. Is Jacob’s condition, as you see it now, consistent with a picture of hypoxia and ischemia occurring during the time of labor and delivery?

A. Yes, it is.

Q. Why do you say that, sir?

A. Because there's a pattern of deficits, as well as preserved islands of integrity and that pattern is consistent with that type of early experience.

Q. What does the preserved island of integrity tell you?

A. It means that he had the potential to do much better in terms of functioning than, in fact, he is able to do now.

Q. And if you assume that the defendant's pediatric neurologist, Dr. Vannucci, testified that hypoxic injury occurred at 24 to 34 weeks and that's the root cause of Jacob's condition, what's your opinion regarding that?

A. My opinion is that it occurred much later.

Q. And can you - -

Well, you're familiar with "rule out diagnosis"?

A. Yes.

Q. Can you rule out injury occurring during the 24- to 34- week period?

A. Yes, to the extent that - - that his functioning includes those aspects of the brain that are the last to develop; and, in fact, his highest score on object assembly involves that kind of visual motor processing, yes.

Q. As a neuropsychologist, how can you do that?

A. As I said, there are functions that were tested that he scored - -

Actually, his highest score on one test was in that area, and that's the last area of the brain that actually develops.

Q. Do you have an opinion within a reasonable degree of neuropsychological probability as to whether Jacob sustained a hypoxic injury at the 24- to 34-week period.

A. I believe that it was after that.

Q. And the basis for that opinion, sir?

A. The basis is that there appears to be an intact brain based on neuropsychological functioning, that there wasn't a delay in total brain development, and that, in fact, rather than a delay, there's an impairment and that would have come much later in the process.

Q. More likely than not was Jacob's injury - - did Jacob's injury occur during the intrapartum period when Dora was at Bennett Hospital on May 11th?

A. Yes.

Q. More likely than not did Jacob's injury not happen during the 24- to 34-week period?

A. It is most likely that it did not happen, yes.

Q. "Intrapartum," itself, means what?

A. Birth. At birth. In the birthing process.

[PLAINTIFFS' COUNSEL]: Your Honor, Thank you.

Judge, what we would request from the Court is that we be permitted to present that testimony to the jury, because, as I told the jury in opening statement, that is the key dispute in this case.

Their own expert admits that Jacob's problems are caused by oxygen deprivation. The question in this case is did it occur during birth or did it occur, as their expert said, between 24 and 34 weeks. Both sides have

hired pediatric neurologists, and the pediatric neurologists disagree on that issue.

This man is a neuropsychologist who works with physicians, who was -
- I think he said he was the head of neuropsychology at Miami Children's Hospital, and has excessive (sic) experience with the medical profession; and we think he has the qualifications to assist the jury in understanding why the plaintiff's position in this case is the correct one, that the insult occurred during birth, not at 24 to 34 weeks, as suggested by the defendant's pediatric neurologist. We think it's important key evidence and should be presented to the jury.

(R. XXII-1967 to 1972)

The trial court stood by its ruling and reiterated that the proffered testimony would be excluded based upon (and only upon) DESERIO:

THE COURT: I've excluded the doctor's opinion because he's not and hasn't been presented to be a medical doctor; and based on the case law that's furnished to me, it's the doctor - - This is not a medical doctor.

The Court should not have allowed him to testify as to the physical cause or contributions to the cause of the damage.

[PLAINTIFFS' COUNSEL]: Well, I understand.

THE COURT: I'm standing on that basis, and that's the basis I'm denying - -

[PLAINTIFFS' COUNSEL]: I understand that. And the only thing we'd point out, Florida Statutes have been amended and changed since that case law came out and we think that's significant. And, plus, those cases I really think are distinguishable. We don't need to re-argue that.

THE COURT: I didn't find any other cases other than the one that was from - - Let's see the one from the Second District, which it said the

same thing.

It says, there's been no authority cited permitting a psychologist to give expert opinion testimony as to the future condition of a brain as a result of an accident.

And it's the same basis as set forth in that case, so I'm granting the defendant's motion to exclude that.

[DEFENDANTS' COUNSEL]: Thank you, Your Honor.
(R. XXII-1972 to 1974)

In closing argument, Defendants were able to emphasize their expert neurologist's opinion as to the timing of Jacob's injuries, which was supported by a formidable statistic (unrefutable by Plaintiffs' expert neurologist) and an MRI, and which deductive opinion stood unrebutted by the empirical- - but excluded - - testimony of Dr. Crown. (Id., at 4322 to 4326)

The jury returned a "NO" liability verdict in favor of both Defendants. (R. VIII-1408 to 1410) The 'retired judge' appointed to try this case retired permanently before ruling on Plaintiffs' motion for new trial which reiterated the grounds assigned in the district court as error. (R. VIII-1419-23) A successor judge was want to do so under the circumstances and denied Plaintiffs' motion. (January 21, 2000 hearing transcript [Supplement to DCA Record on appeal]; and R. VIII-1499 to 1501) *The Appeal*

Plaintiffs appealed to the Fourth District. (R. VIII-1502 to 1509) During the pendency of that appeal, the Fourth District, sitting en banc, released a unanimous

opinion in *BROWARD COUNTY SCHOOL BOARD v. CRUZ*, 761 So. 2d 388 (Fla. 4th DCA (2000), approved, 800 So. 2d 213 (Fla. 2001), receding from DESERIO's blanket prohibition of testimony by non-medical doctor psychologists concerning the cause of organic brain damage. 761 So. 2d at 394-5. Contrary to Defendants' reading of *CRUZ*, the Fourth District did not replace DESERIO's 'bright line' rule of incompetency with a 'bright line' rule of admissibility:

Next, we address whether it was error for the trial court to allow Dr. Appel to give a medical opinion on the cause of Cruz's organic brain damage, even though she is not a medical doctor. Generally, a witness may be qualified as an expert based upon 'knowledge, skill, experience, training, or education' §90.702, Fla.Stat. Qualification of a witness as an expert, as well as the range of subjects about which the witness will be allowed to testify, are within the trial judge's broad discretion. *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 335 (Fla. 4th DCA 1991); *see also Seaboard Air Line R. Co. v. Lake Region Packing Ass'n*, 211 So. 2d 25, 31 (Fla. 4th DCA 1968) ('[I]t is generally recognized that one may qualify to express an opinion as a skilled or expert witness by virtue of study of authoritative sources even without practical experience.'). An appellate court will not interfere with the trial judge's discretion absent a showing that it is clearly erroneous and prejudicial to the adverse party. *See Holiday Inns, Inc.*

In considering whether a neuropsychologist is qualified to render an opinion about the cause of organic brain damage, we must reexamine *Executive Car & Truck Leasing, Inc. v. DeSerio*, 468 So. 2d 1027 (Fla. 4th DCA), *rev, denied sub. non., Commercial Union Ins. Co. v. DeSerio*, 480 So. 2d 1293 (Fla. 1985). In *DeSerio*, this court held that although a clinical psychologist who was not a medical doctor could testify to the existence of organic brain damage, he could not testify that the accident caused the organic brain damage. *Id.* at 1029. The court held that since psychologists are not medical doctors, they cannot render

opinions as to the physical cause of brain damage, as that is considered in Florida to be a medical subject. *DeSerio*, 468 So. 2d at 1029. The error in *DeSerio* was ultimately held to be harmless, however, because it was determined that medical testimony was not necessary to establish causation where the logical sequence of events established that prior to the accident, DeSerio did not manifest the symptoms, and after the accident she did. *Id.*

The field of psychology has evolved significantly since the *DeSerio* decision, and that decision now represents the minority view. *See, e.g., Huntoon v. T.C.I. Cablevision of Colorado, Inc.*, 969 P.2d 681 (Colo. 1998) (en banc)(disagreeing with *DeSerio*, and holding that neuropsychologists are not per se unqualified to speak on the causation of organic brain injury); *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W2d 882 (Iowa 1994) (refusing to impose limitations on expert testimony other than those imposed by the rules of evidence). In fact, Chapter 490, Florida Statutes (1997), the Psychological Services Act, was amended after *DeSerio*, to include in its definition of the ‘practice of psychology’ the diagnosis and treatment of ‘the psychological aspects of physical illness, accident, injury, or disability, including neuropsychological evaluation, diagnosis, prognosis, *etiology* and treatment.’ §490.003(4), Fla. Stat. (1997) (emphasis added). Thus, because the practice of psychology had expanded to the point where psychologists who are not doctors are increasingly becoming involved in areas which were traditionally considered to be purely medical, a blanket prohibition of testimony by psychologists concerning causation of brain injury no longer seems practical.

Instead, the more prudent approach is to allow trial judges, in their discretion, to qualify psychologists and neuropsychologists to testify on causation as any other expert would be qualified to testify in his or her area of expertise. A psychologist’s or neuropsychologists’s competency to give an opinion will be subject only to the limitations imposed by 90.702, Florida Statutes. We, therefore, recede from *DeSerio* to the extent that it precludes a psychologist or neuropsychologist, whose education, training and experience are found by the trial court to be sufficient, from rendering an opinion on the cause of a mental disorder

or condition.

In this case, the record showed that Dr. Appel is a neuropsychologist whose study of the brain goes back as far as 1964 when she obtained her undergraduate degree. Subsequently, she was involved in considerable research and experimentation concerning the effects of various visual stimuli on the brain, the effects of gravity on the brain, and the effects of other forces on the brain. She continued in her study of neuropsychology, focusing primarily on fetal brain and spinal cord surgery. She taught neuro-opthamology, and served as a consultant in a major hospital to the departments of neurosurgery, neurology and endocrinology. She explained that her work frequently requires her to consult and work side by side with neurosurgeons, neuropathologists, neuroopthamologists, and neuroradiologists.

The trial court's conclusion that Dr. Appel was qualified to give an opinion as to the cause of Cruz's organic brain damage is amply supported in the record. Therefore, it was not an abuse of discretion to allow her to testify.

CRUZ, 761 So. 2d at 394-5 [underscored emphasis supplied].

In the instant case, since the trial court undeniably did not exercise any discretion in excluding Dr. Crown's proffered testimony and there never was any serious question as to Dr. Crown's qualifications in fact to render his excluded opinions which concerned the timing of Jacob's *functional* disabilities and *behavioral* deficits, the Fourth District, applying CRUZ, concluded that Dr. Crown's significant, competent, non-cumulative opinions should have been admitted:

We are, of course, bound to apply the law as it exists on appeal, [citation omitted], and therefore agree with plaintiffs that the neuropsychologist's testimony should have been admitted.

* * *

The key issue, as we noted earlier, was whether the injuries occurred during birth or weeks earlier. The excluded testimony of the neuropsychologist consisted of his opinion as to why, based on the facts, the injury could not have occurred prior to birth. Neither the testimony of the obstetrician nor the pediatric neurologist were cumulative to this specific testimony, and accordingly the error is not harmless.

TOMLIAN v. GREINITZ, 782 So. 2d 905, 906, 907 (Fla. 4th DCA 2001) [A.1-4].

Defendants invoked this Court's interdistrict conflict jurisdiction based upon two decisions which relied upon DESERIO before its withdrawal in CRUZ: GIW SOUTHERN VALVE CO. v. SMITH, 471 So. 2d 81, 82 (Fla. 2d DCA 1985) (decided three weeks after DESERIO and holding that same rationale precluded the prognosis by a *particular* psychologist of the future condition of plaintiff's brain following accident); BISHOP v. BALDWIN ACOUSTICAL & DRYWALL, 696 So. 2d 507, 510, 511 (Fla. 1st DCA 1997) (summarily affirming decision of Judge of Compensation Claims denying permanent total disability benefits to claimant, and which decision was premised in part on JCC's rejection, in reliance on DESERIO, of psychologist's opinion that industrial accident caused an organic brain injury; record contained no medical evidence of any head injury). See also HAAS v. SEEKELL, 538 So. 2d 1333, 1336 (Fla. 1st DCA 1989) (disapproving, pursuant to DESERIO, psychologist's opinion that claimant suffered from "organic personality syndrome"

as a result of subject industrial accident, where psychologist conceded in his report that such a condition is necessarily consequent to some kind of organic brain injury of which there was no evidence adduced in the case).

This Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

This Court should decline Defendants' invitation to adopt the DESERIO bright-line rule that psychologists are incompetent per se to testify regarding the cause or effects of brain damage. It is well-settled in Florida's common law and Rule of Evidence 702 that the qualifications of a witness to render expert opinion testimony may derive from the witness's knowledge, skill, experience, training or education, and generally does not hinge on a particular license or academic degree. Defendants' analogy to this Court's FRYE jurisprudence is misplaced. FRYE is concerned with the *reliability* of novel scientific methods and techniques, not the *qualifications* vel non of the expert. This Court has repeatedly held that expert competency determinations are governed by the flexible standards of §90.702, Fla. Stat.

In advocating this Court's adoption of the DESERIO blanket rule of exclusion, Defendants do not even address what other jurisdictions have done. This is not surprising, however, since virtually every court that has decided the issue (twenty!) has flatly rejected such an arbitrary rule, and has done so on the very same bases

employed by the en banc Fourth District in CRUZ when it receded from DESERIO: rule of evidence 702 and their state statutes expounding the authorized practice of psychology and neuropsychology consistent with the advancement of those disciplines.

In the instant case, Dr. Barry Crown, Ph.D., an eminently credentialed neuropsychologist with 29 years of academic and clinical experience in brain injury, mental retardation, and cerebral palsy, and the Head of Neuropsychology at Miami Children's Hospital, was arguably the most competent witness in this case to relate Jacob's personal and functional disabilities to the period in utero when those disabilities would have been triggered. Unlike neurologists and other 'medical doctors', neuropsychologists objectively test brain function and establish its relation to human aptitude, ability, and behavior. Dr. Crown extensively tested Jacob and objectively found certain functions and tasks which Jacob was able to perform remarkably well and which, Dr. Crown noted, Jacob would have been unable to replicate had the insult to his brain occurred in the earlier gestational period advocated by Defendants. As Dr. Crown explained, the regions of the brain which control those functions and tasks are the very last to develop, and were obviously and completely developed in Jacob's case.

This was credible, graphic testimony arrived at through empirical testing rather

than statistical supposition or general deductions from an MRI. It is anomalous to suggest that Dr. Crown is authorized by law to diagnose and treat children with such disabilities and deficits and to determine their etiology, and that physicians refer patients to Dr. Crown for such determinations, but that he is nevertheless unqualified to explain these matters in Court.

This case demonstrates the hazards of a ‘bright-line’ rule denouncing the competency of a whole category of professionals on a given subject matter. Presented with the blanket prohibition of DESERIO which afforded him no measure of discretion, the trial judge in this case supinely precluded an indisputably highly qualified expert from rendering critically relevant and illuminating opinions which were clearly within the realm of his expertise and everyday practice. This Court should not adopt the arbitrary and unreasonable DESERIO rule, and the conflict cases should be disapproved to the extent they follow it.

The two-issue rule does not apply in this case. As Judge Farmer aptly noted in his concurring opinion below, Dr. Crown’s excluded opinions as to the *timing* of Jacob’s injuries in this medical malpractice case went to the elements of both negligence and causation. Plaintiffs’ claim was that Defendants subjected Jacob to an ill-fated trial of labor and failed timely to rescue him when he was in distress. If Plaintiffs are correct, the timing of Jacob’s oxygen deprivation rendered Defendants

negligent and established proximate cause. The error was prejudicial to both. As an academic matter, the two-issue rule does not apply in a case where, as here, the two issues involve two elements of a single cause of action.

ARGUMENT

I. THIS COURT SHOULD DECLINE DEFENDANTS' INVITATION TO ADOPT THE *DESERIO* BRIGHT-LINE RULE THAT PSYCHOLOGISTS ARE INCOMPETENT TO TESTIFY REGARDING THE CAUSE OR EFFECTS OF BRAIN DAMAGE.

It is well-settled in Florida that the competency of a witness to render expert opinion testimony may derive from the witness's knowledge, skill, experience, training or education, and generally does not hinge on a particular license or academic degree. This sensible precept is firmly rooted in Florida's common law and has been codified in the Rules of Evidence. See e.g. *DAVIS v. STATE*, 32 So. 822, 823-4 (Fla. 1902); *ATLANTIC COAST LINE R. CO. v. CROSBY*, 43 So. 318, 330 (Fla. 1907); *COPELAND v. STATE*, 50 So. 621, 624 (Fla. 1909); *ROWE v. STATE*, 163 So. 22 (Fla. 1935); *FRED HOWLAND, INC. v. MORRIS*, 196 So. 472, 475 (Fla. 1940); §90.702, Fla.Stat. ("If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education

may testify about it in the form of an opinion”); *BUCHMAN v. SEABOARD COAST LINE R. CO.*, 381 So. 2d 229, 230 (Fla. 1980) (“human factors” expert); *BROOKS v. STATE*, 762 So. 2d 879, 892-3 (Fla. 2000) (expert crack cocaine dealer).⁶

Ironically, the *DESERIO* court applied this flexible standard in determining that psychologists are qualified to opine the *existence* of organic brain damage:

In general, it is the trial court’s responsibility to determine the range of subjects on which an expert witness may testify, and this determination will not be disturbed on appeal absent a clear showing of abuse of discretion. *E.g.*, *Guy v. Kight*, 431 So. 2d 653 (Fla. 5th DCA), *pet. for rev. den.*, 440 So. 2d 352 (Fla. 1983). *See also* § 90.702, Fla.Stat. (1983). Expert testimony may be given only if a witness is ‘skilled in the subject matter of the inquiry.’ *Kelly v. Kinsey*, 362 So. 2d 402, 403 (Fla. 1st DCA 1978). *See Huskey Industries, Inc. v. Black*, 434 So. 2d 988 (Fla. 4th DCA 1983). That determination, however, should be based on the overall qualifications of the expert and not solely on an academic degree. In *Jenkins v. United States*, 113 U.S.App.D.C. 300, 307 F.2d 637 (D.C. Cir. 1962) (en banc) the court said:

The determination of a psychologist’s competence to render an expert opinion based on his findings as to the presence or absence of mental disease or defect must depend upon the nature and extent of his knowledge. It does not depend upon his claim to the title ‘psychologist.’ And that determination . . . must be left in each case to the traditional discretion of the trial court subject to appellate

⁶ The Legislature has recognized an exception, and established more particularized requirements, where an expert in a medical malpractice case proposes to testify that the defendant health care provider breached the prevailing professional standard of care governing that provider. §766.102, Fla.Stat.

review [T]he lack of a medical degree, and the lesser degree of responsibility for patient care . . . are not automatic disqualifications. Where relevant, these matters may be shown to affect the weight of their testimony 307 F.2d at 645-646 (footnotes omitted).

* * *

We find compelling the logic of *Simmons v. Mullen*, 231 Pa.Super. 199, 331 A.2d 892 (1974). In *Simmons*, the court allowed a clinical psychologist to testify to the existence of organic brain damage, and noted that '[w]hen dealing with the brain, consultation with non-medical practitioners may be not only desirable but necessary.' *Id.* 331 A.2d at 898. At trial, a neurosurgeon had testified that he relied upon the clinical psychologist to detect, through psychological testing, possible organic disturbances to brain functions. The court concluded that to adopt the view that psychologists are not competent to testify to the existence of organic brain dysfunctions 'would be to ignore present medical and psychological practice.' *Id.* 331 A.2d at 899. These same considerations are applicable to the instant case.

A number of other jurisdictions allow psychologists to testify to the existence of organic brain damage. *E.g.*, *Stock v. Massachusetts Hospital School*, 392 Mass. 205 467 N.E.2d 448 (1984); *Virginia Department of Corrections v. Clark*, 318 S.E.2d 399 (Va. 1984); *Chambers v. State*, 250 Ga. 856, 302 S.E. 2d 86 (1983); *State v. Hall*, 136 Ariz. 219, 665 P.2d 101 (1983); *Kinsey v. Kolber*, 103 Ill.App.3d 933, 59 Ill.Dec. 559, 431 N.E.2d 1316 (1982); *Litton v. Home Indemnity Co.*, 391 So. 2d 541 (La.App.3d Cir. 1980). *See also Martin v. State*, 455 So. 2d 370 (Fla. 1984); *Jackson v. State*, 366 So. 2d 752 (Fla. 1978), *cert. denied*, 444 U.S. 855, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979) (noting that psychologists and psychiatrists were allowed to testify to brain damage of defendant in death penalty case).

We hold, therefore, that the trial court did not abuse its discretion in allowing a clinical psychologist who was not a medical doctor to testify to the existence of organic brain damage. A clinical psychologist's lack of a medical degree properly can be raised during cross-examination, or during closing argument, to affect the weight of such testimony. *See*

Jenkins v. United States, 113 U.S.App.D.C. 300, 307 F.2d 637, 646 (1962).

DESERIO, 468 So. 2d at 1028-9.

The DESERIO court abandoned such analysis, however, in concluding that psychologists are unqualified, categorically, to opine the *cause* of such damage:

As to causation, appellants correctly contend that the trial court erred in permitting Dr. Bessette to testify that the accident in question caused the organic brain damage. Because Dr. Bessette is not a medical doctor, we hold that the trial court should not have allowed him to testify to the physical cause of brain damage. *Id.*, at 1029.⁷

Defendants nevertheless endorse the DESERIO “bright-line” rule of exclusion,

⁷ The DESERIO court cited two decisions in support of its blanket holding in this regard: *SIMMONS v. MULLEN*, 331 A.2d 892, 898-99 (Pa.Super.Ct.App. 1974); and *KRIEWITZ v. SAVOY HEATING AND AIR CONDITIONING CO.*, 396 So. 2d 49 (Ala. 1981). *Id.* The court in *SIMMONS* noted that the psychologist’s report there failed to relate the underlying accident as the cause of plaintiff’s cognitive defects, and indicated that if it had, then his causation opinion might have been admissible. 331 A.2d at 899 (“Perhaps a psychologist is able to ascertain causation, but the record does not support this conclusion.”). The same court recently distinguished *SIMMONS* on this basis and held that a psychologist should have been allowed to so testify. *See McClain v. Welker*, 761 A.2d 155, 157-8 (Pa.Super.Ct.App. 2000) (citing Pennsylvania Rule of Evidence 702), *rev. den.*, 771 A.2d 1286 (Pa. 2001). In *KRIEWITZ*, the court based its decision on a 1975 state statute which severely circumscribed the authorized practice of psychology, required all psychologists who engage in psychotherapy to work in conjunction with a licensed physician, and admonished that “a psychologist must not attempt to diagnose, prescribe for, treat or advise a client with reference to problems or complaints falling outside the boundaries of psychological practice.” 396 So. 2d at 52. The same court later relaxed its posture on this issue. *See Fabianke v. Weaver*, 527 So. 2d 1253, 1256-7 (Ala. 1988) (holding neuropsychologist’s causation opinion should have been admitted).

arguing that it is easier for trial courts to apply and more consistent with this Court's retention of the FRYE test notwithstanding the United States Supreme Court's rejection of FRYE based on the lack of any mention of FRYE in the text of the subsequently enacted Federal Rules of Evidence.

As to Defendants' first argument, Plaintiffs offer the obvious response that any blanket rule of exclusion is easier to apply, but same is hardly a sufficient reason to constrict the most fundamental right of litigants (especially in this complex area): the right to call witnesses. See e.g. STEWART AGENCY, INC. v. LESUEUR, 785 So. 2d 1242, 1244 (Fla. 4th DCA 2001) ("The right to present evidence and call witnesses is perhaps the most important due process right of a party litigant.").

Defendants' analogy to this Court's FRYE jurisprudence is also misplaced. FRYE is concerned with the reliability of novel scientific methods and techniques, not the qualifications vel non of the expert. HADDEN v. STATE, 690 So. 2d 573 (Fla. 1997). This Court has consistently held that expert qualification determinations are governed by the flexible standards of §90.702, Fla.Stat. See e.g. TERRY v. STATE, 668 So. 2d 954, 960 (Fla. 1996); BROOKS v. STATE, 762 So. 2d 879, 892 (Fla. 2000); and see RAMIREZ v. STATE, 651 So. 2d 1164, 1167 (Fla. 1995) (confirming that FRYE reliability inquiry and Rule 702 witness competency inquiry are distinct

considerations).⁸

In advocating this Court's adoption of the DESERIO blanket rule of exclusion, Defendants surprisingly do not deign to mention that virtually every court that has addressed the issue has flatly rejected such an arbitrary rule. Indeed, at least twenty courts, including seven supreme courts, have done so on the very same bases employed by the unanimous, en banc Fourth District court in CRUZ when it receded from DESERIO: the broad standards of qualification codified in Rule of Evidence 702 and state statutes expounding the authorized practice of psychology and neuropsychology consistent with the recognized advancement of those disciplines. See e.g. HUNTOON v. TCI CABLEVISION OF COLO., INC., 969 P.2d 681, 689, 91 (Colo. 1998) (psychologist qualified to testify as to cause of organic brain injury based upon his education, background, training, and tests he administered to plaintiff); HUTCHINSON v. AMERICAN FAMILY MUT. INS. CO., 514 N.W.2d 882, 887-9 (Iowa 1994) (same; high court refused "to impose barriers to expert testimony other than the basic requirements of Iowa rule of evidence 702," which court noted "are too broad to allow distinctions based on whether or not a proposed expert belongs to a

⁸ As an academic matter, the FRYE "general acceptance" test can also hardly be viewed as a 'bright-line' jurisprudential tool as evidenced by its requirement of an evidentiary hearing in any given case and the steady stream of appeals from trial court FRYE determinations.

particular profession or has a particular degree.”); *VALIULIS v. SCHEFFELS*, 547 N.E.2d 1289, 1296-7 (Ill. Ct. App. 1989) (neuropsychologist who had been called upon in many cases by medical doctors to assist in diagnosis of patients who had multiple sclerosis held competent to render opinion of causal connection between trauma suffered by plaintiff in accident and onset of multiple sclerosis: “Indeed, it would be somewhat anomalous to conclude that Dr. Housepion would not be qualified to testify about multiple sclerosis when the neurologists and psychiatrists who sought out his expertise and assistance in diagnosing the disease would most likely be qualified to do so.”); *MADRID v. UNIV. OF CALIF.*, 737 P.2d 74, 76-7 (N.Mex. 1987) (clinical psychologist qualified to testify to causal connection between employee’s disability and his employment: “It consequently appears to us a curious proposition that the legislature has enough confidence in the competence of non-physician health care providers to grant them licenses to practice their professions, and to authorize treatment by them to injured compensation claimants, but to have intended that those same health care providers be prohibited from testifying concerning the cause of injury which lies squarely within the areas of their competency.”); *CUNNINGHAM v. MONTGOMERY*, 921 P.2d 1355, 1357 (Or. Ct. App. 1996) (en banc) (recognizing that “A neuropsychologist is a specialist in the area of clinical psychology, a discipline which focuses on the brain and behavioral relationships of

individuals who have brain impairment due to dementia, head injury or other kinds of brain disease.”, and holding that proffered neuropsychologist should have been allowed to offer opinion that plaintiff suffered hypoxia that caused cognitive damage as a result of the defendant dentist’s use of nitrous oxide during office procedure); SHILLING v. MOBILE ANALYTICAL SERVICES, INC., 602 N.E.2d 1154 (Ohio 1992) (psychologist/neurotoxicologist held qualified to render opinion that ingestion of gasoline caused injury to plaintiffs’ brains although witness not a medical doctor); FABIANKE v. WEAVER, 527 So. 2d 1253, 1256-7 (Ala. 1988) (neuropsychologist’s opinion, that premature infant whose birth was negligently induced but who tested negative for learning disabilities nevertheless remained at risk for such disabilities in the future as a result of respiratory distress occasioned at birth, held competent and admissible); SANCHEZ v. DERBY, 433 N.W.2d 523 (Neb. 1989) (neuropsychologist qualified to testify that plaintiff’s behavioral changes may have been due to organic-affective disorder secondary to a mild subcortical brain injury from automobile accident at issue; opinion based upon interviews, tests, and medical history “which ultimately resulted in a diagnosis based on the expertise of this witness.”); ADAMSON v. CHIOVARO, 705 A.2d 402 (N.J. Ct. App. 1998) (neuropsychologist with Ph.D. but no medical degree could opine that cognitive defects plaintiff suffered were causally linked to automobile accident; expert had diploma in neuropsychology,

extensive clinical practice and taught at medical hospital); MEANS v. GATES, 2001 WL1661582 (S.C. Ct. App. 2001) (neuropsychologist competent to opine that plaintiff's chronic pain resulted from injuries sustained in automobile accident); DUPONT HOSP. FOR CHILDREN v. PIERCE, 2001 WL755326,*6,*7 (Del. Ct. App.) (psychologist competent to testify to causal relation between industrial accident and disability), aff'd., 2001 WL1586824 (Del. 2001); SENECA FALLS GREENHOUSE & NURSERY v. LAYTON, 389 S.E.2d 184, 186-7 (Va. Ct. App. 1990) (neuropsychologist competent to opine that plaintiff's disability was caused directly by insecticide exposure); LANDERS v. CHRYSLER CORP., 963 S.W.2d 275 (Mo. Ct. App. 1997) (neuropsychologist qualified to testify to organic brain injury); TUCKER v. AT&T CORP., 794 F. Supp. 240 (W.D. Tenn. 1992) (psychologist competent to testify to medical causation in products liability suit claiming loss of hearing from noise heard over the phone); O'LOUGHLIN v. CIRCLE A CONSTRUCTION, 739 P.2d 347, 351-3 (Idaho 1987) (clinical psychologist competent to testify to causal connection between claimant's panic disorder and his employment); KINSEY v. KOLBER, 431 N.E.2d 1316, 1329-30 (Ill. Ct. App. 1982) (clinical psychologist who held doctorate of psychology, had studied brain functioning and behavior, taught classes for neurologists in brain function, and had extensive clinical practice, held competent to diagnose chronic organic brain syndrome; since

expert's "credentials and qualifications were so thoroughly established, the fact that he did not have a medical degree was no bar to his testimony."); *McCLAIN v. WELKER*, 761 A.2d 155, 156-8 (Pa. Ct. App. 2000) (psychologist competent to relate children's cognitive defects to lead paint poisoning), rev. den., 771 A.2d 1286 (Pa. 2001); *NICHOLS v. COLONIAL BEACON OIL CO.*, 132 N.Y.S.2d 72, 76 (N.Y. App. Div. 1954) (neuropsychologist 25 years in practice qualified to relate delirium tremens to hernia operation).

Contrary decisions comprising the so-called "minority view" have since been superseded by amended state statutes recognizing the expanded practice of psychology and neuropsychology in those jurisdictions. See *DRAKE v. LaRUE CONSTR. CO.*, 451 S.E.2d 792, 793 (Ga. Ct. App. 1995) (neuropsychologist's causation testimony admitted pursuant to amended statute defining practice of neuropsychology); *HOOPER v. IND. COMM. OF ARIZONA*, 617 P.2d 538, 539 (Ariz. 1980) (same); and compare *MARTIN v. BENSON*, 481 S.E.2d 292, 295-6 (N.C. Ct. App. 1997) (acknowledging that Rule 702 would allow causation testimony by neuropsychologist, but excluding such testimony as invading the realm reserved for the practice of medicine because: "There is no statute specifically defining the practice of 'neuropsychology' in our State . . . The privileges and limits of the psychology profession are primarily matters to be determined by our legislature. Any expansion

of such privileges must be made by legislative enactment, not court decision.”), rev’d on other grounds, 500 S.E.2d 664 (N.C. 1998), with N.C. Sess. Laws 1999-292 §1,2 (amending §90-270.2(7a), N.C. Gen. Stat., specifically to add definition of “neuropsychology” which includes authorized determinations of “etiology”).

The Florida Legislature’s amendment of the Psychological Services Act post-DESERIO gives patent recognition to the competency of psychologists and neuropsychologists on the subject matter at issue, Defendants’ deconstruction of the statute notwithstanding. Section 490.003(4), Fla. Stat. (2001), plainly states:

The ethical practice of psychology includes, but is not limited to, psychological testing and the evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning, . . . and use of psychological methods to diagnose and treat mental, nervous, psychological, marital, or emotional disorders, illness, or disability . . . as well as the psychological aspects of physical illness, accident, injury or disability, including neuropsychological evaluation, diagnosis, prognosis, etiology, and treatment. [e.s.]

In the instant case, Barry Crown, Ph.D., an eminently credentialed neuropsychologist with 29 years of academic and clinical experience in brain injury, mental retardation, and cerebral palsy, and the Head of Neuropsychology at Miami Children’s Hospital, extensively evaluated and tested Jacob Tomlian and was arguably the most competent witness in this case to relate Jacob’s personal and functional - - i.e., psychological and neuropsychological - - disabilities to the period in utero when

those disabilities would have been triggered. Unlike neurologists and other ‘medical doctors’, neuropsychologists objectively test brain function and establish its relation to human aptitude, ability, and behavior.

Dr. Crown extensively tested Jacob and objectively found certain functions and tasks which Jacob was able to perform remarkably well and which, Dr. Crown explained, Jacob would have been unable to replicate had the insult to his brain occurred in the earlier gestational period advocated by Defendants. As Dr. Crown noted, the regions of the brain which control those functions and tasks are the very last to develop, and were obviously and completely developed in Jacob’s case. In contrast Jacob scored in the lowest possible percentile on other tasks, further confirming an abrupt impairment rather than an early developmental delay. This was credible, graphic testimony arrived at through empirical testing rather than statistical supposition or general deductions from an MRI. Dr. Crown’s significant and unique testimony would have potentially met Defendants’ causation expert, Dr. Vannucci’s, erudite opinions concerning “white matter” injury and his reliance upon a formidable statistic that injuries like Jacob’s are most often observed several weeks before birth. It is anomalous to suggest that Dr. Crown is authorized by law to diagnose and treat children with such disabilities and deficits and to determine their etiology, and that physicians are educated by and refer patients to Dr. Crown for such determinations,

but that Dr. Crown is nevertheless unqualified to explain these matters in court.

Although Dr. Crown's excluded opinions did not concern the medical *cause*, but rather only the *timing*, of Jacob's functional deficits, this case nevertheless demonstrates the hazards and shortcomings of a 'bright-line' rule denouncing the competency of a whole category of professionals on a given subject matter. Presented with the blanket prohibition of DESERIO which afforded him no measure of discretion, the trial judge in this case supinely precluded an indisputably highly qualified expert from rendering critically relevant and illuminating opinions which were clearly within the realm of his expertise and everyday practice. This Court should not adopt the arbitrary and unreasonable DESERIO rule, and the conflict cases should be disapproved to the extent they follow it.

II. THE TWO-ISSUE RULE DOES NOT APPLY IN THIS CASE.

As Judge Farmer noted in his concurring opinion below, 782 So. 2d at 908, Dr. Crown's excluded opinions as to the *timing* of Jacob's injuries in this medical malpractice case went to the elements of both negligence and causation. Plaintiffs' claim was that Defendants subjected Jacob to an ill-fated trial of labor and failed timely to rescue him when he was in distress. If Plaintiffs are correct, the timing of Jacob's oxygen deprivation rendered Defendants negligent and established proximate cause. Accordingly, and as Judge Farmer observed, "we can tell from the defense verdict that

the error was prejudicial.” Id.

As an academic matter, this Court has never held that the two-issue rule applies in a case where the two issues involve two elements of a single cause of action. In *LOBUE v. TRAVELERS INS. CO.*, 388 So. 2d 1349 (Fla. 4th DCA 1980), one of the conflict cases at issue in *BARTH v. KHUBANI*, 748 So. 2d 260 (Fla. 1999), the Fourth District specifically rejected such an application of the rule:

For instance, the appellees assert that appellant has failed to demonstrate *reversible* error because the jury may have rejected her claim of negligence and never considered the issue of permanent injury or damages as required by the no fault statute. We do not believe this calls for the application of the two-issue rule enunciated in *Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181 (Fla. 1978). Here, the appellant’s claim was not predicated on multiple theories of responsibility and we do not believe the rule should be extended to require a claimant to specifically demonstrate the precise element of the cause of action the jury found lacking. To do so would require the use of an interrogatory type verdict in all cases detailing the elements of the claim and the defenses thereto. We do not believe this was contemplated by the Supreme Court in *Scarbrough, supra*.

388 So. 2d at 1351-2 fn.3 [emphasis the court’s].

In *BARTH*, this Court approved that specific holding of *LOBUE*:

Although we disapprove of the conflict cases to the extent they employ a misdirected focus in their application of the ‘two issue rule,’ we do not disapprove of them to the extent they hold or explain that the rule does not apply where there is only one cause of action or one separate and distinct defense theory. *See, e.g. Lobue*, 388 So. 2d at 1351-52 n.3 (stating that “we do not believe the rule should be extended to require a claimant to specifically demonstrate the precise element of the cause of

action the jury found lacking”).

BARTH, 748 So. 2d at 262 n.7. See also GALLAGHER v. COOPER, 471 N.E.2d 468, 469-70 (Ohio 1984) (holding that issues of negligence and proximate cause do not invoke the two-issue rule: “ and with good reason - - proximate cause is an *element* of negligence. Proximate cause and negligence are *not* complete and independent issues.” [emphasis the court’s]); McCRYSTAL v. TRUMBULL MEMORIAL HOSP., 684 N.E.2d 721, 728 (Ohio Ct. App. 1996) (same).⁹

Defendants’ parting suggestion, that they also raised ‘defense theories’ that Jacob’s injuries were caused either by maternal/paternal factors or periventricular leukomalacia which occurred long before his birth, fails for the same reason. Whether deemed affirmative defenses or ‘defense theories’, same inarguably were not “separate and distinct” defenses or theories as required by BARTH, 748 So. 2d at 262. Rather, they related directly to the timing of Jacob’s injuries and their cause - - the very subject of Dr. Crown’s excluded testimony. The two-issue rule does not apply in this case.

CONCLUSION

For the foregoing reasons and upon the authorities cited, Respondents respectfully suggest that the conflict cases be disapproved to the extent they follow

⁹ In BARTH, this Court reminded that it adopted the two-issue rule from the same Ohio case law. 748 So. 2d at 262.

DESERIO, and the decision of the Fourth District in this case should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Smith, Ballard & Logan, P.A., 402 East Park Avenue, Tallahassee, FL 32301; Sylvia Walbolt, Esq. and Joseph Lang, Jr., Esq., One Progress Plaza, Suite 2300, St. Petersburg, FL 33701; and Debra Potter, Esq., 101 NE 3rd Avenue - 6th Floor, Fort Lauderdale, FL 33301 on February ____, 2002.

Todd R. Schwartz

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing was typed in 14 point Times New Roman.

Todd R. Schwartz