IN THE SUPREME COURT OF FLORIDA

HUMANA OF FLORIDA, INC., d/b/a HUMANA HOSPITAL-BENNETT, n/k/a COLUMBIA HOSPITAL	**CASE NO.: SC01-1260**
CORPORATION OF SOUTH BROWARD, d/b/a WESTSIDE REGIONAL MEDICAL CENTER, Defendant/Petitioner, v. 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, Plaintiffs/Respondents, v. MARK S. GRENITZ, M.D.; and MARK S. GRENITZ, M.D., P.A.; Defendants/Respondents.	**DISTRICT COURT CASE NO.: 4D00-654**

PETITIONER'S REPLY BRIEF ON THE MERITS
On Review from The Fourth District Court of Appeal

Sylvia H. Walbolt FBN 033604
E. Kelly Bittick, Jr. FBN 654035
Joseph H. Lang, Jr. FBN 059404
CARLTON FIELDS, P.A.

One Progress Plaza
Suite 2300
St. Petersburg, FL 33701

Attorneys for Defendant/Petitioner
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.

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I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING PROFFERED TESTIMONY BY PSYCHOLOGIST BARRY CROWN ON MEDICAL CAUSATION.

The Bright-Line Rule Has Been Consistently Applied In Florida

In their Answer Brief (An. Br. 31), the Tomlians attempt to avoid the unequivocal nature of the bright-line rule established in the conflict cases, by characterizing those cases as being fact-based. But they are not so limited. All three cases state a clear-cut rule, as it has existed in Florida before the decision on review.

In GIW Southern Valve Co. v. Smith, 471 So. 2d 81 (Fla. 2d DCA 1985), the Second District unequivocally wrote: "a witness who is a psychologist and not a medical doctor lacks qualifications to trace retrospectively what would occur to the brain from a given trauma . . . ." Id. at 82. The portion of the opinion cited by the Tomlians goes on to address the discrete issue of whether a psychologist could trace prospectively what would happen to a brain in the future. The district court decided that a psychologist could not testify on that subject either, but in so holding wrote: "the witness (more specifically, the witness in this case) lack established qualifications to trace prospectively what

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[1] **The preliminary statement in the Initial Brief ("In. Br.") also applies here. The Answer Brief is designated "An. Br."**

would occur to the brain in the future." Id. In sum, the Second District stated a bright-line rule, not a rule limited to the facts before it.

In Bishop v. Baldwin Acoustical & Drywall, 696 So. 2d 507 (Fla. 1st DCA 1997), the First District affirmed a similar statement of the rule:

> Even though psychologists are competent to testify as to the existence of organic brain damage, Executive Car & Truck Leasing, Inc. v. DeSerio, 468 So. 2d 1027 (Fla. 4th DCA 1985), a psychologist cannot testify that an accident resulted in physical injury causing organic brain. Haas v. Seekell, 538 So. 2d 1333 (Fla. 1st DCA 1989). Since psychologist are not medical doctors, they cannot render an opinion as to physical cause of brain damage, considered in Florida to be a medical subject. DeSerio, 468 So. 2d at 1029.

Id. at 510. Although there was no evidence of head injury in that case, the court did not suggest that the rule would have applied any differently if the facts were different.

Likewise, in Haas v. Seekell, 538 So. 2d 1333 (Fla. 1st DCA 1989), the First District treated the bright-line rule unequivocally. Although it considered the admission of testimony to be harmless in that case, the court ruled that the testimony violated the rule because it went beyond the "existence" of brain damage to address causation by opining that "the accident caused some type of brain damage." Id. at 1336.

In sum, Florida has long acknowledged a bright-line rule that the cause of organic brain injury is a "medical subject."

Contrary to the suggestion of the Tomlians, it is not a narrow, fact-driven rule.

Case Law From Other States Is Inapposite

The Tomlians rely heavily upon the law of other states in asserting that Florida's longstanding rule that the cause of organic brain injury is a "medical subject" no longer has a place in Florida law. (An. Br. 40-45). But even that law is not uniform. Indeed, it has been recognized that Florida's traditional bright-line rule is not "fundamentally unsound." See Hutchison v. American Family Mut. Ins. Co., 514 N.W.2d 882, 887 (Iowa 1994). In the end, this Court should not determine the legal outcome of cases by headcount.

Rather, this Court should determine Florida law based on jurisprudential considerations under Florida's over-all structure. Here, the law from other states advanced by the Tomlians is inapposite in the light of this Court's well-known and extraordinary commitment to ensuring reliability of expert testimony in Florida lawsuits, both civil and criminal. Evidence of this Court's dedication to assuring reliability in expert testimony can be found in its adherence to the Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) doctrine, whereas many other jurisdictions have moved to the less stringent admissibility threshold set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

The Tomlians attempt to cloud our Frye analogy by arguing that (i) Frye is concerned with the reliability of novel scientific methods and techniques, not the qualifications vel non of the expert (An. Br. 39); and that (ii) no Frye hearing was requested at trial (An. Br. 20 n.5). But our argument is not that the Frye doctrine itself precluded this testimony in this case. Instead, our point is this: the requirement that any expert witness be appropriately qualified is imposed to ensure the reliability of the expert's testimony, just as the Frye standard is utilized when novel scientific evidence is at issue.

Thus, the same policy reasons that led this Court to maintain the common law doctrine set forth in Frye in the face of arguments that the evidence code had overtaken that doctrine, see Hadden v. State, 690 So. 2d 573, 577 (Fla. 1997), should also lead this Court to maintain the rule that the physical cause of organic brain damage is a medical subject, despite arguments that it has been overtaken by code. In both cases, the long-standing rule still makes good sense and good law. In both cases, the reliability of expert testimony is preserved.

In sharp contrast to Florida's strong, continuing adherence to the common-law Frye standard of reliability, many of the foreign jurisdictions that the Tomlians cite have moved away from Frye in favor of the Daubert standard. These

include Iowa, Ohio, Alabama, Nebraska, and Delaware. In these instances, it is not surprising that no protection is in place to guard against medical causation testimony from psychologists, since those same states have (unlike this Court) also eliminated the common-law protections afforded by the Frye standard in favor of a general relevancy standard under the code.

Consequently, this Court should not simply accept the law of other jurisdictions in determining whether Florida should, under its common law and code, abide by the longstanding rule at issue. That is especially so when many of those jurisdictions have not been as protective of the need for reliability in expert testimony in civil and criminal trials. Further, as stated in our Initial Brief (In. Br. 30 n.2), the concern with reliability is particularly important in a case like this one. Unlike cases where there is traumatically induced injury to a live person whose brain function (before and after) can be compared, in this case, there was no such undisputed trauma. To the contrary, the cause of the brain injury is itself the very issue to be determined, and there was a substantial medical dispute as to the cause of the injury.

Section 490.003(4), Florida Statutes, Must Be Read Correctly

On pages 30-35 of our Initial Brief, we explain why section 490.003(4), Florida Statutes, which defines the "practice of psychology," does not allow psychologists to diagnose the medical cause of organic brain damage. For instance, we explained that the "comprehensive regulatory scheme controlling the practice of medicine" would be undermined if the word "including" in section 490.003(4) were read broadly enough to allow medical diagnoses by psychologists, because that reading of the statute would allow psychologists to do everything medical doctors could do.

In response, the Tomlians do not meaningfully address that result of their construction. Instead, they incorrectly and conclusorily call our analysis a "deconstruction of the statute," (An. Br. 45), and spend almost two pages making policy arguments, without any citations to authority, as to why Dr. Crown is qualified. This Court should reject those ad hoc policy arguments (leaving them for legislative consideration) in favor of tried and true rules of statutory construction. Thus, the Court should refuse to read section 490.003(4) as authorizing psychologists to diagnose the medical cause of organic brain damage.

The Tomlians' Incorrect Statements About Dr. Crown's Qualifications and Testimony

In their Answer Brief, the Tomlians argue that Dr. Crown was qualified to opine on the cause of Jacob's brain injury. They assert 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%." (An. Br. 20). But this argument actually makes our point.

That testimony relates to testing that identifies "a problem when it's there." (21R 1885-86). That does not support a psychologist's ability to determine the medical cause of brain damage, but only confirms that his testing can locate the presence of brain damage, which is not at issue. In sum, this testimony goes to a different issue from the one for which the disputed opinions were excluded. Determining the existence of brain damage is a very different exercise from that of determining the medical cause of brain damage.

For this same reason, the Tomlians' attempt to discredit defendants' expert's medical testimony as being "deductive," as opposed to Dr. Crown's so-called "empirical" testimony, is misplaced. The question is whether he was qualified to determine the medical cause of organic brain damage, not whether he could opine that organic brain damage existed.

The Tomlians also argue that defendants' causation evidence "stood unrebutted" because part of Dr. Crown's testimony was excluded, (An. Br. 27), and they further argue

that Dr. Crown's testimony would not have been cumulative or unfair. (An. Br. 16 n.4). Neither is true.

The Tomlians state that Dr. Gatewood "acknowledged he was unqualified to discuss the extent of Jacob's problems or, more importantly, to determine their timing in utero . . . ." (An. Br. 16 n.4). The Tomlians ignore, however, that defendants specifically sought to preclude Dr. Gatewood, an obstetrician and a standard of care expert, from testifying about causation. (16R 1067-70). Even though the Tomlians argue on review that such testimony was "beyond his expertise," at trial those arguments by the defense were overruled. (16R 1169-70). Thus, Dr. Gatewood was permitted to opine that the cause of Jacob's injuries was several hours of unnecessary episodes of hypoxia, resulting in decreased oxygenation, because of the failure to perform the caesarean-section at an earlier time. (16R 1067-69, 1169-71; 19R 1558).

The Tomlians also called Dr. Schneck, a neurologist who served as another causation expert for plaintiffs and discussed, in detail, the tests and procedures he utilized to reach his conclusions about the cause of Jacob's condition. (17R 1280-1293). The Tomlians then presented Dr. Crown. As the Tomlians concede in their answer brief at page 20, Dr. Crown specifically testified that Jacob's brain damage was caused around the time of his birth.

As the record shows, then, the Tomlians presented considerable causation testimony from three experts. Their experts were effectively challenged on cross-examination, and the possibility certainly exists that the jury may have simply rejected their opinion that Jacob's cerebral palsy was caused around the time of birth. But it cannot be said that defendants' experts' opinions went "unrebutted" as a result of the exclusion of a portion of Dr. Crown's proffered testimony.

Finally, the Tomlians' statement that "the trial court rejected Defendants' latter two arguments and restricted Dr. Crown's testimony solely in reliance upon DeSerio" is not correct. (An. Br. 16 n.4). The trial court never reached defendants' other grounds since the trial court cited DeSerio and stated: "I'm standing on that basis." (22R 1973-74; An. Br. 26-27). But it is crystal clear in the record that the trial court did not reject those other grounds. Nowhere do the Tomlians provide any record support for this supposed rejection of the other grounds. In any event, this Court should affirm the trial court's ruling for any reason that is correct. See Dade County School Board v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999)("if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the

record. This Court has adhered to this principle on many other occasions.").

II. THE VERDICT FOR THE HOSPITAL SHOULD BE AFFIRMED UNDER THE TWO ISSUE RULE.[2]

As shown in our Initial Brief, defendants presented two separate defenses at trial: (1) no conduct on their part fell below the applicable standard of care, and (2) Jacob's injuries were caused, not by anything defendants did, but by events that took place in utero, long before the complained-of conduct. The jury could have found for the defendants on either of these issues. We argued that, because there was no error with respect to the first issue, it independently supports the jury's verdict, and affirmance was required under the two issue rule.

In response, the Tomlians argue that Dr. Crown's excluded opinions go to both negligence (standard of care) and causation.[3] (An. Br. 47). They state without explanation: "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

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[2] As the Tomlians have devoted only three pages to this issue, we will rest in large measure upon our Initial Brief and limit our response to the few points the Tomlians contest.

[3] Notably, the Tomlians rely upon a concurring opinion below as the source of this new argument. That is not surprising because the Tomlians never made this argument themselves in the briefing below.

Plaintiffs are correct, the timing of Jacob's oxygen deprivation rendered Defendants negligent and established proximate cause." (An. Br. 47). To the contrary, Dr. Crown's excluded testimony would have done nothing to establish that the defendants' conduct fell below the standard of care. The reason for this becomes clear when one considers the specific negligence issues actually presented to the jury and the nature of Dr. Crown's excluded testimony.

The negligence issues were: (1) whether the standard of care precluded Dr. Grenitz' decision to deliver Jacob vaginally in the first place, and (2) whether, given the readings on the fetal monitoring strips as labor progressed, indicating contractions and reflecting Jacob's heartbeat, as well as other external signs such as the degree of descent and dilatation, the standard of care required that Dr. Grenitz perform a Caesarean section earlier than he did. (e.g. 16R 1084, 1210-11, 1234; 39R 4306-07).

Dr. Crown's excluded testimony, on the other hand, involved an elaboration of the reasoning for his opinion that the problems experienced by Jacob pointed to organic brain damage occurring around the time of his birth, rather than earlier in utero. This excluded testimony

would have no bearing at all on whether there was a departure from the standard of care by defendants. Indeed, the Tomlians never proffered any standard of care opinions by Dr. Crown, and a neuropsychologist obviously would not be qualified to testify about the standard of care owed by an obstetrician or obstetrical nurse. The sole issue below was whether he was qualified to testify as to causation. The jury could have found for the defendants on the issue of negligence and therefore never reached the issue of causation. That is why the two-issue rule properly applies in this case.

The Tomlians argue that "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." (An. Br. 47). That is not correct. As shown in the detailed discussion in our Initial Brief, when a defense verdict is involved, Barth v. Khubani, 748 So. 2d 260 (Fla. 1999), requires the application of the two-issue rule. Specifically, where the jury returns a general verdict for the defendant, the two issue rule is applied by focusing on the defenses -- not on the number of claims or causes of action. Where two or more defense theories are presented to the jury and it returns a verdict for the defense, a claimed error as to only one defense theory will not result in reversal "since the verdict may

stand based on another theory." Barth, 748 So. 2d at 261-62. As this Court explained, "The focus on the winning party's actions or defenses, as the case may be, is logical given that the opposing party has the burden of establishing prejudice on appeal." Id.

In short, the Court stated in Barth, the foundation for the two issue rule is the requirement that the party complaining of error on appeal demonstrate that the error was harmful. Accordingly, "reversal is improper where no error is found as to one of the issues that can independently support the jury's verdict". Id. at 261.

In other words, the defense may prevail at trial by establishing the non-existence of any one of the critical elements of the plaintiff's theory of recovery, or by prevailing on an affirmative defense. Accordingly, where a defendant presents evidence and argument at trial from which the jury could properly have concluded that the plaintiff failed to prove more than one discrete element of the plaintiff's claim, and a general verdict is returned for the defense, the two issue rule precludes review as long as no error is found as to any one of those discrete elements. As shown in our Initial Brief, both Barth's reasoning concerning the two issue rule and the Barth Court's application of that

reasoning to the specific facts of that case -- points which the Tomlians fail to address -- make this clear.[4]

The Tomlians also argue that the Fourth District's decision in Lobue v. Travelers Ins. Co., 388 So. 2d 1349 (Fla. 4th DCA 1980), supports their argument. Yet, this Court expressly disapproved Lobue in Barth precisely because of its focus on the existence of multiple theories of recovery as a predicate for application of the two issue rule. See Barth, 748 So. 2d at 260 n.1 & 262 n.7. Because the jury could have decided the case on that basis alone, this is a classic case for application of the two issue rule.

The two-issue rule should be applied to quash the decision under review, with directions that the trial court's judgment be affirmed.

Respectfully submitted,

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Sylvia H. Walbolt
Florida Bar No. 033604
E. Kelly Bittick, Jr.

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[4] **The Ohio case law cited by the Tomlians (An. Br. 48-49) does not control this Court, particularly in the light of the development of Florida's two-issue rule. As Barth makes clear, Florida law is now such that the two-issue rule should apply in these circumstances. Negligence and causation are two separate issues, both of which are necessary to recovery, and either of which may therefore support a defense verdict if decided adversely to plaintiff.**

Florida Bar No. 654035
Joseph H. Lang, Jr.
Florida Bar No. 059404
CARLTON FIELDS, P.A.
One Progress Plaza, Suite 2300
Post Office Box 2861
St. Petersburg, Florida 33731
(727) 821-7000 (phone)
(727) 822-3768 (telecopier)

Attorneys For Defendant/Petitioner

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished to Todd R. Schwartz, Esquire, GINSBURG & SCHWARTZ, 66 West Flagler Street, Suite 410, Miami, Florida 33130, and to Debra Potter Klauber, HALICZER, PETTIS, & WHITE, 101 N.E. Third Avenue, Sixth Floor, Fort Lauderdale, FL 33301, by Federal Express this 25th day of March, 2002.

BY:

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Joseph H. Lang, Jr.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Reply Brief was prepared using Courier New 12 point font, this 25th day of March, 2002.

BY:

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Joseph H. Lang, Jr.