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SID J. WHITE

JUL 29 1991

CLERK, SUPREME COURT.

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
SUPREME COURT CASE NUMBER: 77,127
DISTRICT COURT CASE NO: 8841628
CIRCUIT COURT CASE NO: 84-37591 CA (10)

EBONY HALL, A MINOR, BY AND THROUGH HER
PARENTS AND NATURAL GUARDIANS, JAMES HALL
AND EMILY HALL, AND JAMES HALL AND
EMILY HALL, INDIVIDUALLY,

PETITIONERS

VS.

HOSAIN DAEE, M.D., HOSAIN DAEE, M.D., P.A., ET AL.,

RESPONDENTS

REPLY BRIEF OF RESPONDENTS, CROSS-PETITIONERS
HOSAIN DAEE, M.D., HOSAIN DAEE, M.D., P.A.
ON CROSS-APPEAL

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INTRODUCTION

This brief is filed on behalf of Respondents/Cross-Petitioners Hosain Dae, M.D. and Hosain Dae, M.D., P.A., Defendants in the trial court medical malpractice action and Appellees/Cross-Appellants before the Third District Court of Appeal. Petitioners/Cross-Respondents are Ebony Hall, a minor, by and through her parents and natural guardians, James Hall and Emily Hall, and James Hall and Emily Hall, Individually, Plaintiffs below, and Appellants/Cross-Appellees before the Third District Court of Appeal. Raul Hernandez, M.D., City of Homestead d/b/a James Archer Smith Hospital, and the Florida Patients Compensation Fund were also named Defendants in the trial court action, were Appellees before the District Court, and are Respondents in this matter.

The parties will be referred to as Petitioners/Plaintiffs and Respondents/Defendants as well as by name.

The following symbols will be used for reference purposes:

"R" for references to the record on appeal.

"TR" for references to the trial transcript.

Unless indicated to the contrary, all emphasis has been supplied by counsel.

POINT ON CROSS-APPEAL

THE TRIAL COURT ERRED IN DENYING CROSS-
PETITIONERS' MOTION FOR DIRECTED VERDICT AT
THE END OF CROSS-RESPONDENTS' CASE IN CHIEF AS
CROSS-RESPONDENTS HAD FAILED TO ESTABLISH A
PRIMA FACIE CASE OF NEGLIGENCE AGAINST DR.
DAEE.

Plaintiffs have seemingly misinterpreted statements made in Cross-Petitioners' Initial Brief in the Cross-Appeal, as they have stated that Dr. Daeë has acknowledged that there was ample evidence of his negligence. This statement is incorrect. Dr. Daeë has not acknowledged that there was ample evidence of his negligence; he merely acknowledged that Plaintiffs introduced expert testimony to the effect that his conduct fell below the applicable standard of care.

Dr. Daeë suggests that this Court carefully examine the testimony Plaintiffs have cited as sufficient to establish a prima facie case against Dr. Daeë. Plaintiffs assert that Dr. Rosenzweig testified "that in all probability serious decelerations on the fetal monitor strip caused oxygen deprivation to EBONY HALL, resulting in her cerebral palsy, seizure disorder and brain damage." (Answer Brief pg. 21) Dr. Rosenzweig actually testified as follows:

- Q. Can this time of oxygen deprivation cause brain damage?
- A. It can.
- Q. Cerebral palsy?
- A. It can.
- Q. Seizure disorders?

- A. It can.
Q. And if it continues severely enough, and long enough, can it cause the death of the baby?
A. Yes, it can.

(Rosenzweig at 37-38).

Dr. Rosenzweig's testimony as to what "can" happen amounts to nothing more than opinions as to medical possibilities.

Plaintiffs seek to turn Dr. Rosenzweig's testimony as to medical possibilities into testimony of medical probabilities by referring to Dr. Rosenzweig's statement on cross-examination fifty-four pages later that "we are talking about probabilities, not possibilities." (Rosenzweig at 92). Dr. Dae asserts that this type of catch-all statement made fifty pages after the initial opinion is not sufficient to elevate a statement that something "can" happen into an opinion of medical probabilities.

Rather than testifying that Dr. Dae's alleged delay in arriving at the hospital caused Ebony's injury, Dr. Rosenzweig actually suggested that everything was fine until Dr. Dae turned the baby over to the Hospital personnel.

His deposition, in fact, states that he did not have time, and wouldn't have had time to do a cesarean section before the patient would have delivered by herself. I agree with that. He did deliver the baby by forceps. And he sectioned the baby with a bulb, taking the meconium out of the nasal pharynx and the mouth. Up until that point, everything was fine.

At this point, he turned the baby over to an expert in the field, or we presume an expert in the field, of taking care of this type of

problem, the problem being a baby who may well have meconium, heavy, thick meconium, down into its lung or certainly in the trachea. (Rosenzweig pg. 48).

The balance of the opinions of Dr. Rosenzweig relied upon by the Plaintiffs also were not expressed as opinions of medical probabilities.

The opinion of Dr. Sher cited by Plaintiff also did not meet this standard. As Plaintiffs' failed to present testimony that Dr. Dae's alleged negligence more likely than not caused Ebony Hall's injury the trial court should have entered a directed verdict in favor of Dr. Dae. **GOODING v. UNIVERSITY HOSPITAL BUILDING, INC.**, 445 So.2d 1015 (Fla. 1984); **BEISEL v. LAZENBY**, 444 So.2d 953 (Fla. 1984).

CONCLUSION

For the aforementioned reasons, Respondents/Cross-Petitioners Hosain Dae, M.D. and Hosain Dae, M.D., P.A. respectfully request that this Court reverse the rulings of the trial court and Third District Court of Appeal and direct that a verdict be entered in favor of Cross-Petitioners and against Cross-Resopndents.

Respectfully submitted,

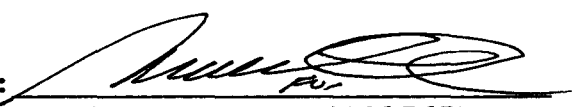
DEBRA J. SNOW
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 25th day of July, 1991 to counsel of record on attached service list.

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