

**ON APPEAL**

# Fourth DCA tosses \$2.5M award in birth defect case

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A state appeals court on Wednesday reversed a \$2.5 million award to a Palm Beach County woman who gave birth to a baby boy with severe deformities.

The Fourth District Court of Appeal ordered a new trial for the ultrasound providers, finding they should have been able to present evidence that most third trimester abortions are illegal in Florida.

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## APPEAL: Dissenting judge said abortion was still an option

Fourth District Judge Carole Taylor dissented, arguing it was not at all clear that Ana Mejia was in her third trimester. Even if she were, Taylor said she could have obtained an out-of-state abortion.

On Oct. 15, 2008, Mejia gave birth to Bryan Santana, who had no hands, one leg and a fraction of a foot attached to his hip. Mejia had been assured after each of two ultrasounds in June 2008 that the fetus was developing normally.

Mejia sued OB/GYN Specialists of the Palm Beaches P.A., Perinatal Specialists of the Palm Beaches Inc. and Dr. Marie Morel for wrongful birth. She alleged their errors in failing to discover and disclose the defects prevented her from terminating the pregnancy.

The opposing opinions focused heavily on whether it was proper for Palm Beach Circuit Judge Lucy Chernow Brown to rely on the estimated date of conception to start the clock on the pregnancy.

Fourth District Judge Mark Klingensmith wrote the majority opinion, with concurrence from Dorian Damoorgian. Klingensmith said the trial court should have relied on the gestational age based on Mejia's last menstrual period. By that method, Klingensmith

said Mejia's second ultrasound was performed was one day into the third trimester.

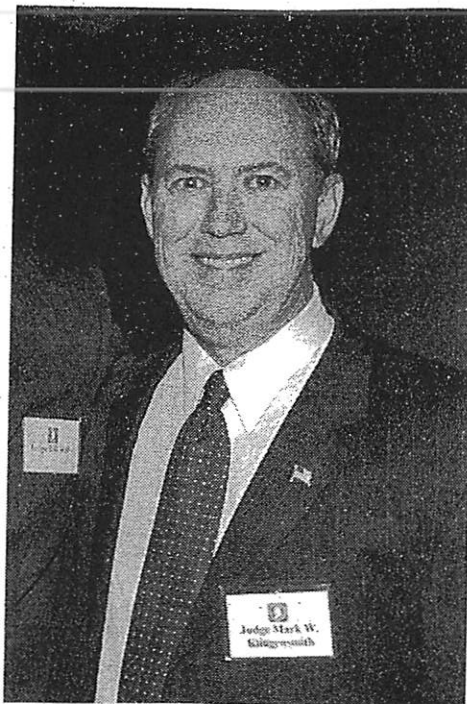
"In trying to get around the 24-week rule, the plaintiff came up with a very strained definition," said Steven Lubell of Lubell & Rosen in Fort Lauderdale, the defense attorney in trial. "Every OB/GYN, even the plaintiff's own expert, define pregnancy from the date of the last menstrual cycle. The plaintiff tried to use a dictionary definition."

Both sides recognized each measure relied on estimated dates, but Taylor insisted the plain meaning of "pregnant" must mean a developing embryo and that does not occur until some time after the last menstrual period.

"Because the mother was not in the third trimester under Florida law, the statute would not have precluded her from obtaining an abortion," Taylor said. "Even if the mother was past the deadline ... the mother could have obtained an abortion outside the state."

Klingensmith took issue with the trial judge determining the mother could have obtained an abortion in another state.

"No cases have been presented to this court holding that a physician has a duty



J. ALBERT DIAZ

Fourth District Judge Mark Klingensmith wrote the majority opinion.

to provide information to a patient about whether she could legally undergo a third-trimester abortion in another state

in which that physician is not licensed," he wrote. "As such, we decline to establish such a duty for the first time here."

Taylor shot back, "Contrary to the majority's suggestion, the availability of an abortion to the mother in another jurisdiction cannot be seriously questioned. For example, Maryland allows abortions in the third trimester where the 'fetus is affected by a genetic defect or serious deformity or abnormality.'"

Taylor said Brown's decision to exclude Florida's abortion statute must be viewed in light of the nature of the claim.

"The purpose of a wrongful birth claim is to recover damages for the extraordinary expense of caring for the impaired or deformed child, over and above routine rearing expenses," Taylor wrote.

The defendants were represented by Rebecca Mercier Vargas and Jane Kreuzler-Walsh of Kreuzler-Walsh, Compiani & Vargas in West Palm Beach.

Ana Mejia, her husband and son were represented by Bard Rockenbach of Burlington & Rockenbach of West Palm Beach. The attorneys did not respond to requests for comment by deadline.

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