IN THE SUPREME COURT OF FLORIDA

DONALD HANFT, M.D.,

Petitioner,

vs.

CATHERINE VAN HOOSEAR PHELAN,

Respondent.

CASE NO. 67,391

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS (AFTL) SUPPORTING POSITION OF RESPONDENT

THE ACADEMY OF FLORIDA TRIAL LAWYERS

AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (CON'T)

TABLE OF AUTHORITIES (CON'T)

PREFACE

The Respondent/Plaintiff, Catherine Van Hoosear Phelan, will hereinafter be referred to as "Plaintiff" and the Petitioner/Defendant, Dr. Donald Hanft will hereinafter be referred to as "Defendant".

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, AFTL, does not have a copy of the Record on Appeal and must defer to the statement of facts set forth in the written opinion of the Third DCA and the statement of facts in the briefs of the Plaintiff/Appellant which were filed with the Third District Court of Appeal and the Initial Brief filed with this Court by the Defendant/Petitioner in the instant appeal (of which, Amicus Curiae does have have copies). Essentially, the facts are:

1. This is a medical negligence action arising out the alleged negligent leaving in the uterus of Plaintiff of an intra-uterine device (IUD) by the Defendant and his informing her that the IUD had been spontaneous expelled from her body during a miscarriage.

2. The Defendant's alleged negligence occurred on or about August 14, 1976, when he performed a D & C procedure on the Plaintiff shortly after the miscarriage.

3. It is alleged that the retained IUD caused the Plaintif to experience insidious physical and emotional problems and, eventually as a result, she underwent a hysterectomy on August 4, 1981.

4. That only shortly after August 4, 1981 hysterectomy, did the Plaintiff learn from her surgeon that the IUD had remained in her body for over five years and that it had perforated her uterus.

5. The Plaintiff filed this lawsuit within two years of discovering that the retained IUD was responsible for her symptoms and within two years of the hysterectomy, on or about August 1, 1983.

6. The lower court, treating the Defendant's Motion to Dismiss the Complaint as a Motion for Judgment On the Pleadings, pursuant to an agreement reached between counsel, granted the Motion, dismissing the lawsuit with prejudice, based on the four-year repose provisions of Section 95,11(4)(b), Florida Statutes.

7. Admittedly, the applicable Statute of Limitations is Section 95.11(4)(b), Florida Statutes (1976-1983)(same statute).

8. The Plaintiff appealed to the Third District Court of Appeal and on June 25, 1985, the Third DCA held that the four-year repose provisions of Section 95.11(4)(b) is unconstitutional as applied to the claims of this Plaintiff, reversing and remanding the case to the trial court. (Case No. 84-2500)

The AFTL is a large statewide association of trial lawyers specializing in litigation in many areas of the law, including medical negligence, and is very interested in this potentially landmark case as it involves, a question of first impression for this Court. The issue is one of great constitutional importance with broad ramifications for other Florida claimants and, perhaps, eventually in other jurisdictions. The AFTL has sought leave to file this Amicus Curiae Brief in order, hopefully, to provide the Court with additional imput on this important issue.

JURISDICTION

This Amicus Curiae will present no discussion as to the jurisdiction of this Court, preferring to join, concur with and adopt the discussion and argument of the Plaintiff in her brief to this Court. This amicus brief is submitted in the assumption that this Court accepts jurisdiction in this matter.

POINT ON APPEAL AND QUESTION PRESENTED

WHETHER THE FOUR-YEAR STATUTE OF REPOSE PROVISION OF SECTION 95.11(4)(B), BARRING A CAUSE OF ACTION BASED ON MEDICAL NEGLIGENCE, IS UNCONSTITUTIONAL AS APPLIED WHERE THE ALLEGED NEGLIGENT INCIDENT OCCURRED MORE THAT FOUR YEARS BEFORE THE CLAIMANT DISCOVERED OR SHOULD HAVE DISCOVERED THE INCIDENT WITH THE EXERCISE OF DUE DILIGENCE, BECAUSE IT VIOLATES ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION REGARDING ACCESS TO THE COURTS?

SUMMARY OF ARGUMENTS

The previous decisions of this Court and the issue presented to it in the instant appeal can be summarized in the following table:

	CONSTITUTIONALITY	
STAT. OF REPOSE	INJURY DISCOVERED WITHIN (DURING) STATUTE OF REPOSE PERIOD	INJURY DISCOVERED WITHOUT (AFTER) STATUTE OF REPOSE PERIOD
S. 95.11(3)(c) archit. & contr	Constitutional Case: Bauld (Fla.1978)	Unconstitutional As Applied Case: Overland (Fla.1979)
S. 95.031(2) prod. liabil w/discov.prov.	Constitutional Case: Purk (Fla.1980)	Unconstitutional As Applied Case: Diamond (Fla.1981)
S. 95.11(4)(b) med mal w/discov.prov.	Constitutional Case: Cates (Fla.1984)	? ? ? Case: Hanft (Fla.1985)

Based on Overland Constr. Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979), and Diamond v. E.R. Squibb & Sons, 397 So.2d 671 (Fla. 1981), Section 95.11(4)(b) is unconstitutional as applied to the claim of the Plaintiff, Catherine Phelan, whose cause of action is alleged in the Complaint not to have been discovered during the four-year provisions of that statute. If it were later discovered that Phelan could or should have discovered her cause of action within the four years after the incident, then Cates v. Graham,

451 So.2d 475 (Fla. 1984), analogous to Bauld v. J.A. Jones Constr. Co., 357 So.2d 401 (Fla. 1978) and Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980) would be controlling in a Motion for Summary Judgment.

Plaintiff cannot summarize its argument any better than to quote the Defendant's Initial Brief:

> "This Court has sustained statutes of repose against constitutional attack when the statute as applied to a plaintiff leaves the plaintiff with sufficient time to institute suit after injury or discovery of the cause of action. Cates, supra. Pullum v. Cincinnati, Inc., 458 So.2d 1136 (Fla. 1st DCA 1984)."

Petitioner/Defendant's Intial Brief at 5.

Amicus would argue that, in the instant case, the Plaintiff did not have any reason to file suit within four years of the "treatment and injury" and, contrary to the opinion voiced by the Defendant, the fact that she did not and could not discover the malpractice until more than four years after the incident is the issue of this appeal and, therefore, should not "be of no consequence."

ARGUMENT CONCERNING THE MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Rule 1.140(c), Fla.R.Civ.P., in a Motion for Judgment On the Pleadings, all material allegations of the non-moving party are to be taken as true and those of the moving party which have been denied as false. McAbee v. Edwards, 340 So.2d 1167 (Fla. 4th DCA 1976). Any allegations contained in the Answer, which requires no responsive pleading, are deemed denied. Butts v. State Farm Mutual Automobile Ins. Co., 207 So.2d 73 (Fla. 3d DCA 1968). The Motion may be granted only if, based on

uncontested facts, the movant is clearly entitled to judgment as a matter of law. Williams v. Howard, 329 So.2d 277 (Fla. 1976). The court may consider neither outside facts or other evidence. City of Miami v. J.C. Vereen & Sons, Inc., 359 So.2d 533 (Fla. 3d DCA 1978).

ARGUMENT

This Court has not ruled on this particular "statute of repose" contained in Section 95.11(4)(b), as applied to a cause of action essentially undiscoverable until after the expiration of the four-year repose provisions. It has, however, ruled on similar repose provisions of other statutes of limitations, consistently holding them unconstitutional as applied to causes of action that were discoverable only without the repose time period fixed by the applicable statute of limitations. See, Overland Constr. Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979)(holding unconsitutional the 12 year "statute of repose of Section 95.11(3)(c) as applied to that Plaintiff) and Diamond v. E.R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981)(holding unconstitutional as applied the 12-year "statute of repose" of Section 95.031(2)).

The Court has just as consistently held, however, that these same statutes, in causes of action that have accrued within the 12-year periods of the same statutes, are consititutional as applied to claimants who discover their injuries or causes of actions before the expiration of the repose period. See Bauld v. Jones Constr. Co., 357 So.2d 401 (Fla. 1978)(Section 95.11(3)(c)) and Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980)(Section 95.031(2)).

As admitted in Defendant's Initial Brief in this appeal, the

Court has similarly held that a cause of action based on medical negligence, discovered within the four-year provisions, must be brought within the four years after the "incident" and that the four-year repose provision of section 95.11(4)(b), Florida Statutes, is constitutional. Cates v. Graham, supra (in which the cause of action was barred because it was discovered within the four-year period but not filed within that period)

This Amicus Curiae would argue that four-year provision of Section 95.11(4)(b), Florida Statutes, is unconstitutional as applied to the Plaintiff who could not have discovered and did not discover her cause of action and injury until later than four years after the D&C performed by the Defendant Hanft.

In the instant case, the Plaintiff was not put on notice of either the negligent act, which took place on August 14, 1981, primarily the retention of the IUD or the existence of the injury, the discovery that her insidious symptoms were caused by the retained IUD and it resultant damage to, her uterus, until on or after the hysterectomy of August 4, 1981. Prior to this date, the Plaintiff had no known injury which could be attributed only to the alleged negligent incident and was not even aware that the performance of a D&C had allegedly caused the IUD to perforate the uterine wall. No court would require every patient who undergoes a D&C and postoperatively has some gastro-intestinal symptoms, not necessarily related to the possibility of a negligent act by the surgeon (even her doctors did not suspect the true cause of her symptoms), to suspect malpractice and to bring a lawsuit on the possibility that the insidious symptoms may have been caused by some

unknown negligent act by the surgeon. Therefore, the Plaintiff could not have discovered the alleged negligence before four years; her cause of action can only be barred by the repose provisions of Section 95.11(4)(b), Florida Statutes.

If the four-year "statute of repose" provisions of section 95.11(4)(b) were constitutional as applied to Catherine Phelan, who discovered the retained IUD more than four years after the "incident" and could not have discovered the "incident" or her cause of action before four years, her cause of action would be barred entirely. To forestall altogether and bar completely her cause of action, would be constitutionally impermissive and violative of Article I, Section 21 of the Florida Constitution, which provides:

> The courts shall be open to every person for redress of injury, and justice shall be administered without sale, denial or delay."

The cases of Overland, supra, and Diamond, supra, declared respectively that the 12-year repose provisions of Section 95.11(3)-(c) were unconstitutional as applied to Jerry Sirmons' cause of action, and that the 12-year provisions of section 95.031(2) were unconstitutional as applied to Nina Diamond's cause of action. This was because, in both cases, the causes of action were discovered after the statutory periods of "repose", and the court would not sanction barring the claimants' constitutional right to access to the courts. See also Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla.1980). The instant case is analagous to those of Overland and Diamond.

The Overland court first recognized that some states had held that such a statute of repose was not in violation of the

"access to courts" provisions of their state constitutions, but then ruled that Florida would not join this group, preferring to adopt the arguments of other state courts, such as Kentucky:

> A foreign decision which we do find persuasive, however, is Saylor v. Hall, 497 S.W.2d 218 (Ky.1973), in which a like statute was tested against a constitutional provision guaranteeing a right of access to courts similar to our own. The Kentucky courts recognized ...
>
> "the application of purported limitation statutes in such manner as to destroy a cause of action before it legally exists cannot be permissible if it accomplishes destruction of a constitutionally protected right of action."

369 So.2d at 575 (e.s.)

In Diamond, supra, the Court held that as applied to Nina Diamond's case, section 95.031(2) violated the Florida Constitution's guaranteed access to the courts, finding that binding precedent, as in Overland, existed because the claimants right of action was barred before it ever existed. 397 So.2d at 672.

Additionally, Justice MacDonald stated in a specially concurring opinion, that he had dissented and questioned the doctrine articulated in Overland when the court was considering Battilla v. Allis Chalmers Mfg Co., supra, but concurred in the results reached in Nina Diamond's case, even though the "incident" occurred over 20 years before the filing of the lawsuit:

> In this plaintiff's case the claim would have been barred, even though the wrongful act had taken place, before the injury became evident. She had an accrued cause of action but it was not recognizable, through no fault of hers, because the injury had not manifested itself. This is different where the injury is not inflicted for more than twelve years from the sale of the product. When an injury has occurred but a cause of action cannot be pursued because the results of the injury could not be

> discovered, a statute of limitation barring the action does, in my judgment, bar access to the courts and is constitutionally impermissive.

397 So.2d at 672 (J. McDonald, concurring specially)(e.s)

Similarly, to argue that Phelan cannot pursue her cause of action and to bar her access to the courts for the injury incurred because the results of her injury could not be discovered until little more than the statutorily imposed four years, should be constitutionally impermissive.

In the recent Cates case, supra, the issue decided by the Court was analagous to that Court's previous decisions in Bauld, supra, and Purk, supra. In all three of these cases, the injury or incident was discovered within the statutorily required time period. In considering a cause of action discovered within the four-year provisions of s. 95.11(4)(b), the Cates court did, in fact, analogize that case with Bauld and Purk, but hinted that its ruling might be different if given a fact situation wherein the negligence could not have been discovered during the statutory four-year period.

> "The real question is whether a five- to six-month period remaining after discovery of any injury is so short that to enforce the terms of the statute would result in a denial of access to the courts and hence make subsection 95.11(4)(b) unconstitutional as applied."

451 So.2d at 476.

In Overland, supra, however, the supreme court clearly distinguished its previous ruling in Bauld, supra:

> Consequently, the absolute twelve year prohibitory provision did not operate to abolish Pearl Bauld's cause of action, but merely abbreviated the period within which suit could be commenced.... Although shortened, the time for bringing suit was found to

> be ample and reasonable; it was not forestalled altogether.

369 So.2d at 574-75 (e.s.).

As stated in Overland, supra, "[t]he polestar decision for the construction of Article I, section 21, Florida Constitution, is Kluger v. White, 281 So.2d 1 (Fla. 1973)." 369 So.2d at 573.

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constituition of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. s.2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right and no alternative method of meeting such public necessity can be shown.

281 So.2d at 4 (e.s.)

Thus, in Kluger, this Court established a two-pronged test for the abolition of the right to access to the courts for redress of an injury, as guaranteed by Article I, section 21: (1) the Legislature must show an overpowering public necessity for its abolishment and (2) it must show that there exists no less onerous alternative methods.

It is clear that if the language of the four-year "statute of repose" were to be applied to the claim of the Plaintiff, Catherine Phelan, and were not ruled unconstitutional as applied to this Plaintiff, her cause of action will have been abolished entirely.

The next issue then is whether the right to redress for an injury such as that sustained by this Plaintiff falls under the provisions of the Kluger test. In declaring section 95.11(3)(c)

unconstitutional as applied to the plaintiff, Sirmons, the Overland court stated:

> It is undisputed that a cause of action of the type asserted by Sirmons in this case-the right of an injured person to bring suit against a building contractor with whom he is not in privity for damages suffered as a result of alleged negligence in construction even after the owner has accepted the completed building-is one for which a right of redress is guaranteed by article I, section 21.

369 So.2d at 573.

Similarly, the cause of action of Catherine Phelan - the right to bring suit against a physician with whom she is in privity for injuries suffered as a result of the alleged medical negligence in treatment or diagnosis - is one for which a right of redress is guaranteed by the same constitutional provision.

In deciding the issue in the instant case, the only remaining issue under Kluger, then, is two-pronged: whether the Legislature has shown an overpowering public necessity for this prohibitory provision of section 95.11(4)(b) and an absence of less onerous alternatives.

In the Preamble to Chapter 75-9, see Appendix A, arguably, the Florida Legislature has expressed its opinions as to the public necessity of enacting that bill, in section 7 of which, a special statute of limitations for medical malpractice and section 95.11(4) was amended by the addition of subsection (b) to include the four-year statute of repose provisions. While this Preamble might be interpreted as a legislative expression of a public necessity, it should not be construed as voicing a public necessity so overpowering as to abolish such an important constitutionally guaranteed right to redress in the courts for injuries suffered as that

expressed in Article I, section 21, especially when such legislation impermissibly benefits only one class of defendants at the expense of an injured party.

Even if that Preamble to Chapter 75-9, enacted in 1975, in light of a supposed "medical malpractice crisis", is construed as expressing a special legislative indication of an overpowering public necessity to enact such an abolition of a constitutionally guaranteed right, there is clearly absent any indication of the second prong of the Kluger test, that there was "no alternative method of meeting such public necessity".

The 1985 Florida Legislature, again responding to its perceived need to enact legislation to combat another perceived "medical malpractice crisis", by its passage of the "Comprehensive Medical Malpractice Reform Act of 1985", see Appendix B, with over 45 amendments to existing statutes, creation of new statutes and additional provisions to already existing ones, clearly indicated that multiple alternative methods of meeting a perceived medical malpractice crisis also existed in 1975, methods less onerous than the abolishment of a constitutionally guaranteed right without providing an alternative form of redress.

Additionally, it should be noted that other provisions of that same Chapter 75-9, enacted in 1975, have been found unconstitutional by this Court, although, arguably, the same "overpowering public necessity" existed for the enactment of those provisions. See Aldana v. Holub, 381 So.2d 231, 238 (Fla.1980).

Furthermore, Florida case law is replete with examples of appellate court decisions upholding the causes of action for

negligent actions brought more than four years after the actual "incident", but not discovered until four years after the incident. See, e.g., City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954); Philips v. Mease Hospital & Clinic, 445 So.2d 1058 (Fla. 2d DCA 1984); Johnson v. Mullee, 385 So.2d 1038, (Fla. 1st DCA 1980); Nolen v. Sarasohn, 379 So.2d 161 (Fla. 3d DCA 1980). It is admitted, however, that some of the above-cited cases were not decided under the present statute with its four-year repose provisions, although the Nolen court stated:

> It is unclear which of the above statutes was relied upon by the Defendants in support of their motion for summary judgment. Nevertheless, regardless of which statute may be applicable, the general principle of law is that the running of the statute is tolled until the claimant, through the exercise of reasonable diligence, is put on notice as to the negligent act or the injury caused thereby. Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976). In fact, this principle of law is embodied in the following language of the last three statutes cited above: ". . . from the time the cause of action is discovered or should have been discovered with the exercise of due diligence." (e.s.)

Id. at 162-63.

While City of Miami v. Brooks, as an example, was decided on the basis of a statute that did not contain the precise language of the present statute, that statute contained a flat four-year limitation without an discovery provision. Section 95.11(4), Florida Statutes (1943-1969) stated:

> "(4) WITHIN FOUR YEARS - Any action for relief not specifically provided for in this chapter."

Notwithstanding the absence of discovery or repose provisions, the Brooks court held that the statute was tolled until the claimant discovered the injury or the negligent act. No matter which statute

was applicable, this Court has never held that a cause of action that was discovered after the statutory period and that was not or could not have been discovered during the statutory period, is barred by the applicable statute of limitations.

DECISIONS FROM OTHER JURISDICTIONS

Without expressly wishing to make this brief any longer, it is necessary to comment on the cases from other jurisdictions cited by the Defendant in his Initial Brief.

First, the Arizona case of Landgraf v. Wagner and the Kentucky case of Ferguson v. Cunningham are both incorrectly cited as decisions of those states' supreme courts. The correct cites of those two intermediate appeal court cases are Landgraf v. Wagner, 26 Ariz.App. 49, 546 P.2d 26 (1976) and Ferguson v Cunningham, 556 S.W.2d 164 (Ky.App. 1977), respectively.

Second, additional research by the Defendant would have revealed that the Supreme Court of Arizona, in Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984), clearly distinguished the intermediate court's decision in Landgraf and in dicta stated its state's three-year statute of repose was constitutional but held that the plaintiff's cause of action, which was undiscoverable during that three-year period, and the running of the statute of limitations began when she discovered her injury, not at the time of the negligent act. To hold otherwise, it stated, would be offensive to Article 18, Section 6 of the the Arizona Constitution.

> Instead of an open court provision, Arizona has a more specific and stronger requirement. Article 18, section 6, provides as follows:

> The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.
>
> In our view, abolition of a cause of action before injury has occurred, and thus before the action could have been brought, is abrogation, not regulation.

688 P.2d at 966.

Similarly, although Ferguson, supra, was never reviewed by the Supreme Court of Kentucky and that court has never ruled on the issue presented to this Court in the instant appeal, the Sixth Circuit Court of Appeals, commented on the Ferguson decision in relation to the Kentucky Supreme Court's decision in Saylor, supra, which the Overland, supra, Court found persuasive.

> A decision of an intermediate appellate court in Kentucky applying a medical malpractice statute of limitations without discussion of the potential constitutional infirmaties outlinted by the Kentucky Supreme Court...does not convince us that the vitality of Saylor is in doubt, as defendants suggest. See Ferguson v. Cunningham, 556 S.W.2d 164 (Ky. App.1977). We note that the Kentucky Supreme Court more recently has reiterated the proposition in Saylor that a "cause of action does not exist until the conduct causes injury that produces loss or damage." Louisville Trust Co. v. Johns-Manville Products, 580 S.W.2d 497 (Ky.1979)(Reed, J.), quoting Saylor v. Hall, 497 S.W.2d 218, 225 (Ky. 1973)(applying "discovery rule" to actions from latent disease).

In Re Beverly Hills Fire Litigation, 695 F.2d 207, 226 n.41 (6th Cir. 1982).

Omitted from Defendant's Brief, in his discussion about the Supreme Court of Illinois' decision in Anderson v. Wagner, 79 Ill.2d 295, 402 N.E.2d 560 (1979), reh'g denied (1980), was that the issue before that court was the constitutionality of that state's statute of repose for a cause of action discovered within the repose period, analagous to the fact situation facing this Court

in Cates, supra. Defendant is correct in stating that the Illinois Supreme Court upheld the constitutionality of its statute of repose, which is identical to that of Florida, as did this Court in Cates. Naturally, the issue of the instant appeal is not that decided in either Anderson or Cates.

Another case cited by the Defendant, Ishler v. Miller, 56 Ohio. St.2d 447, 384 N.E.2d 296 (1978), as standing for the proposition that "Ohio also follows the view that the time of discovery is immaterial as to a statute of repose in medical malpractice." is clearly erroneous and misleading.

The Ishler case does not concern and does not even mention the issue of Ohio's medical malpractice's or any other statute's repose provisions. The issue confronting the Ohio court was whether the statute of limitations in a medical negligence action begins to run during or only at the end of a ongoing doctor/patient relationship. The fact that the court held that a statute of limitations on malpractice claims did not begin to run until the physician/patient relationship had ended and that the discovery rule does not apply in the period before the termination of such a relationship, while interesting, is entirely irrelevant to the issues of the instant case.

Owen v. Wilson, 537 S.W.2d 543 (Ark. 1976), also cited by the Defendant in his Initial Brief, is clearly one of the outside state supreme court cases that upholds the constitutionality of medical malpractice repose provision in a case of a foreign body left inside the body of the patient but not discovered until after that repose period. But see Dalbey v.Banks, 245 Ga. 162, 264 S.E.2d 4

(1980). Arkansas' statute of limitations for medical malpractice has a flat two-year period after the negligent act in which to bring the cause of action.

Mr. Owen underwent an operation performed by Dr. Wilson in 1969, but it was not until returning to Dr. Wilson in 1975, who ordered the first x-rays since the operation, that the presence of a surgical instrument left in the abdomen at the time of the original operation was discovered. Mr. Owen filed suit five months later and the lower court granted summary judgment based on the statute of limitations/repose. Distinguishing that case from the instant one is the fact that Arkansas Statutes, Section 37-205 (Repl.1962), upon which the Owen decision was based, does not have any discovery provisions, as does Florida, but, instead, is a harsh two-year statute of limitations/repose.

The Supreme Court of Delaware, in deciding to uphold the constitutionality of its medical malpractice three-year statute of repose in Dunn v. St. Francis Hospital, Inc., 401 A.2d 77 (Del. 1979), cited both the Arkansas Supreme Court decision of Owen, supra, and the Arizona Appeal Court decision of Landgraf, supra, as persuasive authorities. Based on the language found in the court's opinion, it is not very likely hat the Dunn Court would have decided differently even if it had before it the later 1984 Arizona Supreme Court decision in Kenyon, supra, which held unconstitutional the Arizona medical malpractice statute of repose as applied to a cause of action undiscoverable until after the repose period.

As to other states that have held medical malpractice statutes

of repose unconstitutional as to causes of action that were not discoverable until after the running of the repose time period, see, e.g., Nelson v. Kursen, 678 S.W.2d 918 (Tex. 1984) and Austin v. Litvak, 682 P.2d 41 (Colo. 1984). But see Colton v. Dewey, 212 Neb. 126, 321 N.W.2d 913 (1982).

CONCLUSION

Based on the record in this case, the applicable Florida Statutes and the case law cited hereinabove, the application of the four-year statute of repose found in Section 95.11(4)(c), Florida Statutes, is clearly unconstitutional as applied to this Plaintiff's cause of action, denying the constitutional access to courts provisions found in Article I, Section 21. Therefore, it is respectfully requested that this Court affirm the decision of Third District Court of Appeal who reversed the lower court's entry of Judgment on the Pleadings.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing brief with attached appendices has been furnished, by mail, this 27th day of August 1985 to: MICHAEL J. MURPHY, ESQUIRE, of Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., 501 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, Attorneys for Petitioner; THOMAS J. CALDWELL, ESQUIRE, of Barkas & Caldwell, Suite 600, Concord Building 66 West Flagler Street, Miami, Florida 33130, Attorney for Respondent; and to DAVID CURRIE, ESQUIRE, Co-Counsel for Petitiner, 975 Johnson Ferry Road, Suite 300. Richmond 400 Building, Atlanta, Georgia 30303.

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