IN THE SUPREME COURT OF THE

STATE OF FLORIDA

CASE NO.: 67,391

DONALD HANFT, M.D.,

Defendant/Appellant,

vs.

CATHERINE VAN HOOSEAR PHELAN,

Plaintiff/Appellee.

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

This is a medical malpractice case in which the trial court entered a judgment on the pleadings against the Plaintiff/Appellee on the basis of Statute of Limitations even though the Plaintiff/Appellee did not know, and had no reason to know, that there had been a possible invasion of her legal rights until after the Statute of Limitations had purportedly expired.

The Plaintiff/Appellee alleged that the Defendant/Appellant, DONALD HANFT, M.D., negligently left an IUD in her uterus and negligently informed her that the IUD had been spontaneously expelled during a miscarriage when, in fact, it had not been expelled but remained in her body, lodged in and projecting through the wall of her uterus. The Defendant/Appellant's negligence was alleged to have occurred on or about August 14, 1976, when he performed a D & C procedure shortly after the miscarriage (R 1-3).

It was also alleged that the retained IUD caused the

Plaintiff/Appellee to experience insidious physical and emotional problems which grew so severe that she underwent a hysterectomy 5 years later on August 4, 1981. Only after the hysterectomy did she learn from her surgeon that the IUD had remained in her body for over 5 years and that it had perforated her uterus. This was the first time that she suspected, or had reason to suspect, that the IUD that the Defendant/Appellant said had been expelled was in fact not expelled and was responsible for the insidious subsequent medical problems she eventually experienced (R 1-3). Within two years of learning of this invasion of her legal rights, the Plaintiff/Appellee filed suit on August 1, 1983.

The Defendant/Appellant originally filed a Motion to Dismiss the Complaint based on the Statute of Limitations but pursuant to an agreement between counsel, the lower court treated the Motion to Dismiss as a Motion for Judgment on the Pleadings. This motion was granted by the Honorable JON GORDON and a Final Judgment was entered on October 25, 1984, dismissing the case with prejudice. This judgment was appealed to the Third District Court of Appeals which held on June 25, 1985, that the statute relied upon by the trial court was unconstitutional. This appeal followed.

On Page 5 of his brief, the Defendant/Appellant misstates one important aspect of this case when he states that the four-year repose provision of §95.11(4)(b) "did not bar the patient's cause of action, but merely curtailed the time within

which suit must be filed." This is incorrect. The repose provision completely barred the Plaintiff/Appellee's cause of action about a year before she knew or should have known that it existed.

APPLICABLE STATUTE OF LIMITATIONS

Effective January 1, 1975, §95.11(6) was amended and renumbered as §95.11(4) by Ch. 74-382, Laws of Florida. The amendment retained the two-year Statute of Limitations for medical malpractice actions, but provided that "the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence." See BROOKS v. CERRATO, 355 So.2d 119 (Fla. 4th DCA), cert. denied, 361 So.2d 830 (Fla. 1978).

Effective May 20, 1975, §95.11(4) was again amended by Ch. 75-9, §7, Laws of Florida. The amendment retained the two-year Statute of Limitations for medical malpractice actions, but added a four-year "ultimate repose" provision. Section 95.11(4)(b) now reads in pertinent part as follows:

> [1] An action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered, or should have been discovered with the exercise of diligence; [2] however, in no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued.

As the bracketed numerals reflect, §95.11(4)(b) contains two different limitations periods. The first limitations period

begins to run upon discovery of the incident giving rise to the cause of action. The second period, the "ultimate repose" provision, begins to run upon the date of the incident, whether or not the incident is discovered before the four-year period has run.

STANDARD OF REVIEW FOR MOTION FOR JUDGMENT ON THE PLEADINGS

Under Rule 1.140(c), Fla.R.Civ.P., all material allegations of the opposing party's pleading are to be taken as true, and all those of the movant which have been denied are taken as false. McABEE v. EDWARDS, 340 So.2d 1167 (Fla. 4th DCA 1976). Since an answer requires no responsive pleading, all allegations contained therein are deemed denied. BUTTS v. STATE FARM MUTUAL AUTOMOBILE INS. CO., 207 So.2d 73 (Fla. 3d DCA 1968). Such a motion is to be decided wholly on the pleadings, without the aid of outside matters. CITY OF MIAMI v. J. C. VEREEN & SONS, INC., 359 So.2d 533 (Fla. 3rd DCA 1978). Judgment on the pleadings may be granted only if, on admitted facts, the moving party is clearly entitled to judgment as a matter of law. WILLIAMS v. HOWARD, 329 So.2d 277 (Fla. 1976). It is improper for a trial court to enter judgment on the pleadings where a factual question is involved. KRIEGER v. OCEAN PROPERTIES, LTD., 387 So.2d 1012 (Fla. 4th DCA 1980).

ISSUE ON APPEAL

WHETHER THE FOUR-YEAR ABSOLUTE LIMITATION PERIOD OF F.S. 95.11 MAY CONSTITUTIONALLY DEPRIVE AN INJURED CLAIMANT OF ACCESS TO THE COURTS WHEN THE CLAIMANT

FIRST RECEIVED NOTICE OF THE INCIDENT GIVING RISE TO THE MALPRACTICE MORE THAN FOUR YEARS AFTER THE INCIDENT GIVING RISE TO THE MALPRACTICE OCCURRED.

SUMMARY OF ARGUMENT

The application of the four-year period of ultimate repose of F.S. 95.11(4)(b) is unconstitutional as applied to the facts of this case. The doors to the courthouse were closed to the Plaintiff/Appellee before she even knew of the existence of a possible claim and therefore operation of F.S. 95.11(4)(b) as applied to the facts of this case is clearly unconstitutional. This case does NOT present a situation where the operation of the four-year ultimate repose provision simply shortened the limitation period but rather the four-year limitation period served to completely abolish the Plaintiff/Appellee's cause of action altogether without providing any alternate source of remedy to the Plaintiff/Appellee. This court has consistently ruled on several occasions that very similar statutes are unconstitutional when applied under such circumstances and there is no reason to rule differently in this context.

ARGUMENT

I

THE FOUR-YEAR ABSOLUTE LIMITATION PERIOD OF F.S. 95.11 MAY NOT CONSTITUTIONALLY DEPRIVE AN INJURED CLAIMANT OF ACCESS TO THE COURTS WHEN THE CLAIMANT FIRST RECEIVED NOTICE OF THE INCIDENT GIVING RISE TO THE MALPRACTICE MORE THAN FOUR YEARS AFTER THE INCIDENT GIVING RISE TO THE MALPRACTICE OCCURRED.

The instant suit was filed more than "four years from the date of the incident or occurrence out of which the cause of

action occurred," and would be barred except that, as applied to this case, this portion of F.S. 95.11(4)(b) is unconstitutional as being violative of Article I, Section 21 of the Florida Constitution and of the Equal Protection and Due Process clauses of the United States and Florida Constitutions.

The "ultimate repose" provision, in practical effect, closed the door of the courthouse to the Plaintiff/Appellee before she even discovered or should have discovered that the Defendant/Appellant had negligently performed the D & C procedure and left the IUD protruding through her uterus. Put another way, the four-year limitation period simply abolished the Plaintiff/Appellee's common law cause of action against the Defendant/Appellant before she knew it existed. The four-year limitation period therefore violates Article 1, §21 of the Florida Constitution:

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

In the instant case, the legislature has declared that the courts shall not be open to the Plaintiff/Appellee for redress of her injury, and the issue has therefore been squarely drawn.

Whether or not the legislature may close the courts to a particular class of claimants, in view of the express mandate of Article 1, §21, is a question which has engaged the increasing recent attention of this court. In each instance in which the legislature has attempted to close the door of the courthouse to a particular class of claimants, this court has

declared the statute violative of Article 1, §21. The polestar decision is, of course, KLUGER v. WHITE, 218 So.2d 1, 4 (Fla. 1973), in which this court held as follows:

> We hold, therefore, that where 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 Constitution of the State of Florida, or where such right has become a part of the common law of the state pursuant to Fla. Stat., §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 this 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.

KLUGER has been faithfully followed in a number of contexts. FAULKNER v. ALLSTATE INSURANCE CO., 367 So.2d 214 (Fla. 1979); OVERLAND CONSTRUCTION CO., INC., v. SIRMONS, 369 So.2d 572 (Fla. 1979); GRIFFIS v. UNIT CRANE & SHOVEL CORP., 369 So.2d 342 (Fla. 1979)(declaring unconstitutional the twelve-year "ultimate repose" provision for product liability actions, §95.031(2), Fla. Stat.); DIAMOND v. E. R. SQUIBB AND SONS, INC., 397 So.2d 671 (Fla. 1981).

In OVERLAND CONSTRUCTION CO., INC., v. SIRMONS, supra, this court faced the identical problem presented in the instant case, in connection with the twelve-year "ultimate repose" provision contained in §95.11(3)(c). As here, the provision purported to bar the plaintiff's cause of action before it ever accrued. Applying KLUGER v. WHITE, supra, this court determined that the common law right asserted by the plaintiff had existed

prior to the readoption of Article 1, §21, in 1968. This court then noted:

> [The statute] unquestionably abolished Jerry Sirmons' right to sue Overland for his injuries and provided no alternative form of redress. The only remaining issue under Kluger, therefore, is whether the legislature has shown an overpowering public necessity for this prohibitory provision, and an absence of less onerous alternatives.

369 So.2d at 574. This court then noted that the legislature had not expressed any perceived public necessity for abolishing the plaintiff's cause of action, and that the reasons advanced in support of the statute were neither unique to the construction industry nor "sufficiently compelling to justify the enactment of legislation which, without providing an alternative means of redress, totally abolishes an injured person's cause of action." This court, following KLUGER, therefore found the statute unconstitutional. As a result of this court's finding that no "overpowering public necessity" had been demonstrated, it did not reach the conjunctive question of whether "no alternative method of meeting such public necessity can be shown."

There is no "overpowering public necessity" for the four-year "ultimate repose" provision of §95.11(4)(b) and the Defendant/Appellant has pointed to none. The legislature certainly has not made any findings that there was an "overpowering public necessity" to abolish the Plaintiff/Appellee's cause of action and no legislature could

make such findings in good conscience--since Statutes of Limitations of four years and greater are commonplace, and since litigants in Florida always had four years from the date of discovery of the malpractice to institute suit until the legislature revised the malpractice Statute of Limitations in 1972.

Which brings us to the second point regarding KLUGER and its progeny. In KLUGER this court made it perfectly clear that the legislature must make findings supporting two important conclusions in order to escape the mandate of Article 1, §21. The legislature, according to this court, must show "[1] an overpowering public necessity for the abolishment of such right, and [2] no alternative method of meeting such public necessity can be shown." KLUGER v. WHITE, supra, at 4. In OVERLAND CONSTRUCTION CO. v. SIRMONS, supra, the Supreme Court restated that proposition, and delineated its task as one of determining whether the abolition of a common law right "is grounded both on [1] an overpowering public necessity and [2] an absence of any less onerous alternative means of meeting that need." 369 So.2d at 573. In the absence of a specific finding by the legislature that there is no alternative available but to bar the instant Plaintiff/Appellee's claim altogether--and there is no such finding--§95.11(4)(b) fails constitutional muster.

The Defendant/Appellant cannot sincerely advance any argument supporting the notion that "no alternative method of

meeting such public necessity" is available. Certainly there are less onerous alternative means of meeting the need to reduce medical malpractice insurance premiums--for example, the very things that the legislature recently considered that were sponsored by the physician lobbies, i.e., abolition of joint and several liability, limitation on plaintiffs' attorneys' contingent fees, limitation on damages for pain and suffering, etc.

The "ultimate repose" provision of §95.11(4)(b) is, in the final analysis, arbitrary, capricious, and altogether unreasonable. The legislature has neither shown an overpowering public necessity for the abolition of the Plaintiff/Appellee's cause of action, nor has it shown that no alternative method of meeting any public necessity is available. If there is any doubt whatsoever on this score, this Court should defer to the Florida Constitution, not to the legislature. In the context of this case, the "ultimate repose" provision of §95.11(4)(b) clearly contravenes the constitutional mandate that the courts "shall be open to every person for redress of an injury." The statute would operate to deprive the Plaintiff/Appellee of her

constitutional right of access to the courts and it should be declared unconstitutional as applied to the instant case.[1/]

II

Alternatively, it is contended that §95.11(4)(b) violates the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution, and Article 1, §§2 and 9, of the Florida Constitution. There are two aspects of equal protection which are important here. First the classification made by the statute must not be arbitrary; it must be reasonable:

> For a statutory classification to satisfy the equal protection clauses found in our organic documents, it must rest on some difference

---

[1/] It is also noted that some types of medical malpractice, such as the malpractice committed in the instant case, will not be discoverable within four years because the effect of the malpractice will not manifest itself within that period of time. See, e.g., CITY OF MIAMI v. BROOKS, 70 So.2d 306 (Fla. 1954); VILORD v. JENKINS, 266 So.2d 245 (Fla. 2nd DCA 1969). For these types of injuries, §95.11(4)(b) will always allow the tortfeasor to escape before the commission of the tort can ever be discovered by the claimant. The statute, in effect, simply withdraws remedies for all delayed-reaction torts of the kind involved in this case. Such a statute is also violative to Article 1, §21, for reasons different than those expressed in KLUGER and OVERLAND CONSTRUCTION CO.:

> To hold otherwise would result in the anomaly of fault without liability and wrong without a remedy, contrary to our sense of justice and directly conflicting with the express mandate of the Florida Constitution, Declaration of Rights, that "every person for any injury done him . . . shall have a remedy . . . ."

SIMMONS v. OWENS, 363 So.2d 142 (Fla. 1st DCA 1978), quoting SALVIN v. KAY, 108 So.2d 462, 467 (Fla. 1959).

> that bears a just and reasonable relation to the statute in respect to which the classification is proposed.

ROLLINS v. STATE, 354 So.2d 61, 63 (Fla. 1978); GEORGIA SOUTHERN & FLORIDA R. CO. v. SEVEN-UP BOTTLING CO., 175 So.2d 39 (Fla. 1965). Second:

> In order to comply with the requirements of the equal protection clause, statutory classifications must be reasonable and non-arbitrary, and all persons in the same class must be treated alike.

LASKY v. STATE FARM INSURANCE CO., 296 So.2d 9, 18 (Fla. 1974).

Closely tied to the foregoing requirements of the Equal Protection clauses of the two Constitutions is the following requirements, mandated by the Due Process clauses of both Constitutions:

> The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, or oppressive.

LASKY v. STATE FARM INSURANCE CO., supra; HARRELL v. SCHLEMAN, 160 Fla. 544, 36 So.2d 431 (1948).

The express purpose of Chapter 75-9 is the reduction of medical malpractice insurance premiums. We do not doubt that this is a permissible legislative objective. The means employed in §95.11(4)(b), however, are unreasonable, discriminatory, arbitrary, and oppressive as applied to the Plaintiff/Appellee. Neither does the statute treat all persons in the same class alike. Neither do the means chosen to reduce

insurance premiums bear any just or reasonable relation to that purpose.

The statute initially creates a class of persons which can be described generally as victims of medical malpractice. It creates a shortened Statute of Limitations of two years for all members of that class (which is perhaps a permissible means of reducing insurance premiums). It attempts to treat all persons within the class fairly by providing that suit may be brought within two years from the time the incident is discovered--so that delayed-reaction victims have the same access to the courts as those who know of the malpractice immediately upon its occurrence. The statute goes on, however, to provide an arbitrary cut-off date of four years from the date of the occurrence--effectively closing the courthouse to the small percentage of delayed-reaction medical malpractice victims who simply cannot discover within four years of the occurrence (even "with the exercise of due diligence," in the words of the statute) that they have been a victim of malpractice.

There is nothing reasonable in such an arbitrary cut-off date. The statute discriminates badly against a small portion of the class created by the statute who are helpless to seek a remedy within the time allotted to other members of the class. The four-year cut-off also does not bear a just or reasonable relation to the statute's purpose of reducing insurance premiums. The objective of the statute may fairly and

reasonably be obtained by allowing all victims of malpractice a period of two years from the date of discovery in which to bring suit. No reasonable construction of the objective of the statute, however, can support an arbitrary abolition of all causes of action which are not and cannot reasonably be discovered within four years from the date of the occurrence.

In the instant case, §95.11(4)(b) provides a total immunity for physicians committing malpractice which is undiscoverable for at least four years. The arbitrary classification of the statute falls on only those victims of malpractice who cannot discover within four years, even in the exercise of due diligence, that they have been victims of malpractice. The statute is arbitrary and capricious. It has no rational basis reasonably related to the objective of the Act--and it is therefore violative of the Equal Protection and Due Process clauses of the United States and Florida Constitutions.

III

CASES FROM OTHER JURISDICTIONS CITED BY DEFENDANT/APPELLANT

It is unnecessary to consider authorities from other states on the issue presented because this court has already ruled on the same issue on several previous occasions and has consistently held that abolishing a victim's cause of action before the victim has notice of his claim is unconstitutional. OVERLAND CONSTRUCTION CO., INC., v. SIRMONS, supra; GRIFFIS v. UNIT CRANE & SHOVEL CORP., supra; DIAMOND v. E. R. SQUIBB AND

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SONS, INC., supra.

Furthermore, the foreign cases cited by Defendant/Appellant are distinguishable because they come from jurisdictions with less stringent constitutional requirements than Florida. In order for the Florida legislature to constitutionally abolish a cause of action, it must meet all the following criteria:

> 1. Article 1, §21, Florida Constitution: The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay; and
>
> 2. There must be an "overpowering public necessity" to abolish a claim shown by the legislature, Kluger v. White, 218 So.2d 1, 4 (Fla. 1973), and other authorities cited in this brief; and
>
> 3. There is no alternative method of meeting the objectives of the statute, Overland Construction Co., Inc., v. Sirmons, 369 So.2d 572 (Fla. 1979) and other authorities cited in this brief; and
>
> 4. Article 1, §§2 and 9 of the Florida Constitution--Equal Protection and Due Process clauses.

None of the foreign jurisdictions relied upon by the Defendant/Appellant have all these same requirements, making the foreign cases cited by the Defendant/Appellant distinguishable.

Cases in point are DUNN v. ST. FRANCIS HOSPITAL, INC., 401 A.2d 77 (Del. 1979), OWEN v. WILSON, 537 S.W.2d 543 (ARK 1976), and ANDERSON v. WAGNER, 402 N.E.2d 560 (Ill. 1979). In none of these cases was there any mention of the Florida constitutional requirements (or the substantial equivalent) of an overpowering necessity to abolish a cause of action and the absence of less

onerous means to accomplish the objectives of the statute. Moreover, the opinions in OWEN v. WILSON, supra, and ANDERSON v. WAGNER, supra, make no mention of an "open courts" provision in their respective states' constitutions.

Likewise unavailing to the Defendant/Appellant is FURGESON v. CUNNINGHAM, 556 S.W.2d 164 (KY 1977), in which the Kentucky Court of Appeals affirmed a summary judgment against a Plaintiff without ever discussing or ruling on any constitutional issues. Furthermore, a case overlooked by the Defendant/Appellant, SAYLOR v. HALL, 497 S.W. 218 (KY 1973), from the Kentucky Supreme Court, holds that it is unconstitutional in Kentucky to bar a victim's cause of action before it legally exists.

Defendant/Appellant also favorably cites ISHLER v. MILLER, 384 N.E.2d 296 (Ohio 1978) although there is no discussion in that case regarding any constitutional issues. LANDGRAFF v. WAGNER, 546 P.2d 26 (Ariz. 1976) is cited by the Defendant/Appellant, yet this intermediate appellate court decision was overruled by the Arizona Supreme Court in KENYON v. HAMMER, 688 P.2d 961 (Ariz. 1984).

IV

CASES FROM OTHER JURISDICTIONS HOLDING IT UNCONSTITUTIONAL TO BAR A CAUSE OF ACTION BEFORE IT HAS ACCRUED

A. ARIZONA:

In KENYON v. HAMMER, 688 P.2d 961 (Ariz. 1984) the Arizona

Supreme Court, favorably citing cases from this court, held an Arizona statute unconstitutional which purported to bar a medical malpractice victim's claim before she knew it existed. The court held it impermissible to provide economic relief to one segment of society (in the form of lower insurance premiums) by passing statutes of repose which deprive some of those who have been wronged of access to, and remedy by, the state's judicial system. The court noted that if such a practice was approved, any profession, business, or industry experiencing difficulty could be made the beneficiary of special legislation designed to ameliorate its economic adversity by limiting access to the courts. The Court reasoned that under such a system, Arizona's constitutional guarantees would be gradually eroded until the state became "a playground for the priviledged and influential."

B. TEXAS:

The Supreme Court of Texas in NELSON v. KURSEN, 678 S.W.2d 918 (Tex. 1984), found a two-year statute of repose in medical malpractice actions to be unconstitutional as violative of the open courts rule of Article 1, Section 13 of the Texas Constitution and found that "the limitation period of ...[the statute of repose], if applied as written, would require the ... [plaintiffs] to do the impossible--to sue before they had any reason to know they should sue. Such a result is rightly described as 'shocking' and is so absurd and so unjust that

ought not to be possible."

C. COLORADO:

In AUSTIN v. LITVAK, 682 P.2d 41 (Colo. 1984) the Colorado Supreme Court declared a medical statute of repose unconstitutional as being violative of the state's equal protection clause. The court found that the Colorado statute of repose was arbitrary, not reasonable, and had no rational basis when it unfairly discriminated against certain classes of patients who could not learn of their cause of action within the period of the repose provision.

D. NEW HAMPSHIRE:

In HEATH v. SEARS, ROEBUCK & CO., 464 A.2d 288 (N.H. 1983), a non-medical case, the New Hampshire Supreme Court declared a twelve-year statute of repose unconstitutional which attempted to bar all product's liability claims filed after twelve years.

E. RHODE ISLAND:

In KENNEDY v. CUMBERLAND ENGINEERING COMPANY, INC., 471 A.2d 195 (R.I. 1984), the court determined that a ten-year statute of repose relating to defective products was unconstitutional in that it violated the "provisions of Article 1, Section 5 of the Rhode Island Constitution." The court found that "[t]he total denial of access to the courts for adjudication of a claim even before it arises, however, most certainly files in the face of the constitutional command found

in Article 1, Section 5." Citing previous Rhode Island authority and Prosser, Handbook of the Law of Torts, Section 30 at 144 (4th Edition 1971), the court found that "to require a man to seek a remedy before he knows of his rights, is palpably unjust."

F. SOUTH DAKOTA:

In DAUGAARD v. BALTIC CO-OP. BUILDING ASSOCIATION, 349 N.W.2d 419 (S.D. 1984), the court found a six-year statute of repose relating to the design and construction of buildings to be unconstitutional. The DAUGAARD court found the statute of repose to be unconstitutional because Article 6, Section 20 of the South Dakota Constitution provides that:

> All courts shall be open, and every man for an injury done him in his property, person, or reputation, shall have remedy by due course of law, and right or justice administered without denial or delay.

The court differentiated between a statute of repose, which would violate the open courts provision of South Dakota's Constitution, and a statute of limitations.

G. ALABAMA:

The Alabama Supreme Court also found that the open courts provision in its state constitution served as a basis for finding that a ten-year statute of repose, which barred products liability actions, was unconstitutional. In LANGFORD v. SULLIVAN, LONG & HAGERTY, 416 So.2d 996 (Ala. 1982), the court recognized that if the statute of repose were allowed to bar a

claim before the injured plaintiff had any reason to know of his injuries, the plaintiff would be denied access to the courts. Further, the court found that "legislation which abolishes or alters a common-law cause of action, or enforcement through legal process, is automatically suspect."

H. KENTUCKY:

In SAYLOR v. HALL, 497 S.W.2d 218 (KY 1973) the Kentucky Supreme Court held unconstitutional a statute of repose which purported to bar a victim's cause of action before it accrued.

CONCLUSION

Section 95.11(4)(b) is unconstitutional as applied to this case because it purports to completely abolish the Plaintiff/Appellee's cause of action before she knew of its existence. The authorities cited by the Defendant/Appellant in which the repose provision only curtailed or shortened the time to sue are distinguishable and therefore inapplicable. It clearly was not necessary to abolish the Plaintiff/Appellee's cause of action because there are numerous less onerous alternatives available. As amply demonstrated in this brief, the offending statute, F.S. 95.11(4)(b), meets NONE of the Florida constitutional requirements and accordingly the statute should be declared unconstitutional, the final judgment should be reversed, and this case remanded to the lower court for further proceedings.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed this 27th day of August, 1985, to MICHAEL J. MURPHY, ESQ., Fowler, White, etc., 5th Floor, City Natl. Bank Bldg., 25 West Flagler Street, Miami, Florida 33130.

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