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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

INITIAL BRIEF OF THE APPELLANT

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PREFACE

The Defendant/Appellant, Donald Hanft, will hereinafter be referred to as the "DOCTOR" and Catherine Van Hoosear Phelan the Plaintiff/Appellee will hereinafter be referred to as the "PATIENT". Reference to the record below will be made by the designation "R" with appropriate pagination. Reference to the attached appendix will be by the designation "A" with appropriate pagination. All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The PATIENT sued the DOCTOR for medical malpractice arising out of a surgical procedure called a dilation and curettage (commonly known as a "D & C") which was performed on the PATIENT on August 14, 1976 (R. 1-3, A. 1-4). The PATIENT filed suit against the DOCTOR on August 1, 1983 (R. 1-3, A 1-4). The PATIENT alleged that following the D & C procedure she experienced physical problems, longer menstrual periods and premenstruation depression (A. 1-4). She further alleged that on or about August 4, 1981 another physician performed a hysterectomy on her at which time she learned that an intrauterine device had not been expelled as she thought during a previous miscarriage, but was instead lodged in and projecting through the wall of her uterus (A. 1-4). This condition was not discovered by Doctor Hanft on August 14, 1976 during the D & C which is the claimed act of negligence (R. 1-3, A 1-4). Although the PATIENT sued the DOCTOR within two years of August 4, 1981, she did not sue him within the four year limitation contained in Florida Statute Section 95.11(4)(b) and the trial court entered a judgment on the pleadings in favor of Doctor Hanft based upon the two year discovery rule contained in Florida Statute Section 95.11(4)(b) and upon the four year absolute bar contained in the aforementioned statute (R. 20, 51-52).

The PATIENT appealed to the District Court of Appeals and on June 25, 1985, the Third District held that the four year

ultimate repose provision of Florida Statute Section 95.11(4)(b) "would render the statute unconstitutional as applied" to the PATIENT (A. 1-4). The Third District specifically ruled that if:

> "... Mrs. Phelan did not discover and should not have discovered her cause of action until, as she contends, August 4, 1981, then the statute of repose would unconstitutionally deny Phelan access to the courts and cannot be used against her to bar her claim" (A 1-3).

The Third District reversed and remanded the case to the trial court (A 1-3). This appeal follows.

JURISDICTION

This Court has jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution 1980 and Florida Rule of Appellate Procedure 9.030(a)(1)(A)(ii) in that the District Court of Appeals of the Third District specifically held in this case that the four year ultimate repose provision contained in Florida Statute Section 95.11(4)(b) was declared invalid as applied to the PATIENT because it would unconstitutionally deny her "access to the courts and cannot be used against her to bar her claim" (A 1-3).

QUESTION PRESENTED

DOES THE FOUR YEAR ULTIMATE REPOSE PROVISION CONTAINED IN FLORIDA STATUTE SECTION 95.11(4)(b) VIOLATE ARTICLE I SECTION 21 OF THE FLORIDA CONSTITUTION REGARDING ACCESS TO THE COURTS?

RELEVANT STATUTORY PROVISIONS

Florida Statute 95.11(4)(b) provides in pertinent part as follows:

> An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered; or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued. ...

SUMMARY OF THE ARGUMENT

This Court has previously determined in the case of Cates v. Graham, 451 So.2d 475 (Fla. 1984) and the Fourth District Court of Appeals has also decided in the case of Cobb v. Maldonado, 451 So.2d 482 (Fla. 4th DCA 1984) that the four year ultimate repose provision is constitutional and can be applied to bar a medical malpractice claim if the malpractice is discovered by the patient within four years from the date of the treatment giving rise to the malpractice.

In the instant case the Third District Court of Appeals has specifically held that where the PATIENT as alleged in this case

did not discover and should not have discovered a cause of action until more than four years after the date of treatment giving rise to the malpractice the statute of repose unconstitutionally denies her access to the courts and is invalid and cannot be used against her to bar her claim (A. 1-4).

This is a case of first impression in the State of Florida with respect to the medical malpractice statute of ultimate repose. This Court has specifically recognized the legislative prerogative to enact such statutes of repose. Bauld v. J.A. Jones Construction Company, 357 So.2d 401 (Fla. 1978); Cates v. Graham, 451 So.2d 475 (Fla. 1984). In the instant case the statute of repose did not bar the patient's cause of action, but merely curtailed the time within which suit must be filed. 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). In the instant case the PATIENT had four years from the date of the treatment and injury within which to file suit and the fact that she claimed she did not discover the malpractice until four years after treatment should be of no consequence.

ARGUMENT

Effective May 20, 1975 Florida Statute Section 95.11(4)(b) was amended by Section 1 of Chapter 75-9, Laws of Florida. The amendment imposed the four year ultimate repose provision in the aforementioned statute.

Chapter 75-9, Laws of Florida, dealt with the comprehensive subject matter of medical malpractice. The Preamble to Chapter 75-9, Laws of Florida, stated as follows:

> "WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has sky-rocketed in the past few months, and
>
> "WHEREAS, it is not uncommon to find physicians in high-risk categories paying premiums in excess of $20,000 annually; and
>
> "WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
>
> "WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida; and
>
> "WHEREAS, the problem has now reached crisis proportion in Florida, NOW THEREFORE,"

The aforementioned preamble of this Chapter of the Laws of Florida contains legislative recitals, findings and determinations which are presumptively correct. Miami Home Milk Producers Association v. Milk Control Board, 169 So. 541 (Fla. 1936); Smithers v. North St. Lucy River Drainage District, 73 So.2d 235 (Fla. 1954); Seagram-Distillers Corp. v. Ben Greene Inc., 54

So.2d 235 (Fla. 1951); see also, Fla. Jur., Statutes, Section 107 and the cases cited therein.

This Court noted the presumptive correctness of such legislative findings as evidenced by Justice Brown's statement in Miami Home, supra at page 542 wherein he notes:

> Such legislative ascertainments and determinations of facts, unless plainly contrary to those matters of common knowledge of which the courts may take judicial notice, are entitled to such weight as to require clear allegation and proof showing the contrary before the courts would be justified in overturning them, thus casting the burden of allegation and proof upon the party attacking such legislative determinations; it being the general rule that all reasonable presumptions will be indulged in favor of the constitutionality of a legislative act. (Citations omitted)

In fact, the Supreme Court in the case of Carter v. Sparkman, 335 So.2d 802 (Fla. 1976) recited the aforementioned preamble with its legislative findings and stated:

> At the time of enactment of the legislation in question sub judice, there was an imminent danger that a drastic curtailment in the availability of the health care services would occur in this state. The legislature's recognition of the crisis in the area of medical care and the need for legislation for the benefit of public health in this state is evidenced by the preamble to Chapter 75-9, Laws of Florida,
>
> * * *
>
> The Legislature felt it incumbent upon itself to attempt to resolve the crisis through the exercise of the police power for the general health and welfare of the citizens of this State and accordingly enacted Chapter 75-9, Laws of Florida to effectuate that purpose.

Id. at 805-61.

When faced with a constitutional attack upon the laws enacted by Chapter 75-9, Laws of Florida, this Court in Carter stated:

> Although courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guarantee of access, there may be reasonable restrictions prescribed by law. Typical examples are the fixing of a time within which suit must be brought, payment of reasonable cost deposits, pursuit of a certain administrative relief such as zoning matters or workmen's compensation claims, or the requirement that newspapers be given the right of retraction before an action for libel may filed.

Id. at 805.

See also Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979) wherein the Federal court also recognized the presumptive correctness and validity of the legislative findings contained in the preamble to Chapter 75-9, Laws of Florida.

In Kluger v. White, 281 So.2d 1 (Fla. 1973) it was held that reasonable restrictions do not deny access to the courts:

> Obviously, a literal and dogmatic construction of said provision would deny both the Legislature and the Court the power to impose reasonable and logical limitations on the constitutional right to use the courts of Florida. It, of course, is assumed that the citizens who adopted the 1968 Constitution intended that the language therein be given the same construction as similar language in the prior Constitution in 1885.
>
> This Court has held that the right to maintain litigation is not absolute but, rather, is subject to reasonable restraints. We have

> repeatedly upheld statutes of limitation, which prevented aggrieved persons from litigating for redress of injury, unless the suits were filed within a time specified by statute.

Id. at 6.

In Holley v. Adams, 238 So.2d 401 (Fla. 1970) this Court set forth five principles of constitutional construction which must be followed in measuring any legislative act against the constitutional yardstick:

> "First, it is the function of the Court to interpret the law, not to legislate.
>
> Second, courts are not concerned with the mere wisdom of the policy of the legislation, so long as such legislation squares with the Constitution.
>
> Third, the courts have no power to strike down an act of the Legislature unless the provisions of the act, or some of them, clearly violate some express or implied inhibition of the Constitution.
>
> Fourth, every reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the Court to adopt that construction and sustain the act.
>
> Fifth, to the extent, however, that such an act violates expressly or clearly implied mandates of the Constitution, the act must fall, not merely because the courts so decree, but because of the dominant force of the Constitution, an authority superior to both the Legislature and the Judiciary. Amos v. Mathews, 99 Fla. 1, 126 So. 308 (1930)."

Id. at 404-5.

In the instant case we are dealing with a statute of repose which is somewhat different than the traditional statute of limi-

tations, however, this Court has specifically recognized the validity of a statute of repose in Florida and has specifically ruled that they are constitutional. Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla. 1978). In Bauld, Justice Boyd speaking for the Court recognized the distinction between the traditional statute of limitation and a statute of repose:

> Appellant calls our attention to the two interrelated twelve-year provisos contained in the revised statute, and characterizes them as being statutes of repose rather than statutes of limitation. We recognize the fundamental difference in character of these provisions from the traditional concept of a statute of limitations. Rather than establishing a time limit within which action must be brought, measured from the time of accrual of the cause of action, these provisions cut off the right of action after a specified time measured from the delivery of a product or the completion of work. They do so regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right. But Appellant presents us with no authority or argument to support her assertion that it is not within the power of the Legislature to enact such a statute.
>
> * * *
>
> [T]he revisions in question did not abolish any right of access to the courts; they merely laid down conditions upon the exercise of such a right.

Id. at 402.

Justice McDonald speaking for the Court in the case of Cates v. Graham, 451 So.2d 475 (Fla. 1984) cited the Bauld decision with approval in a medical malpractice situation:

> In Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla. 1978), we found constitu-

> tional a parallel statute, subsection 95.11(3)(c). In doing so we held that a statute of repose is constitutional and does not bar access to the courts when it merely curtails the time within which suit must be filed, as opposed to barring the cause of action entirely.

Id. at 476-7.

See also Pisut v. Sichelman, 455 So.2d 620 (Fla. 2d DCA 1984), Purk v. Federal Press Company, 378 So.2d 354 (Fla. 1980); Pullum v. Cincinnati Incorporated, 458 So.2d 1136 (Fla. 1st DCA 1984).

Specifically, in Pullum, supra, the First District stated:

> The Supreme Court of Florida has consistently sustained such statutes of repose against constitutional attack where application of the statute leaves the plaintiff with sufficient time to institute suit after injury or discovery of the cause of action.

Most recently, the Fourth District Court of Appeals has had occasion to pass upon the four year repose provision in Florida Statute §95.11(4)(b) in the case of Cobb v. Maldonado, 451 So.2d 482 (Fla. 4th DCA 1984) and Judge Glickstein on Motion for Rehearing stated:

> Florida's Supreme Court recently held that section 95.11(4)(b) is constitutional. Cates v. Graham, 451 So.2d 475 (Fla. 1984), affirming 427 So.2d 290 (Fla. 3d DCA 1983). The court reiterated that a statute of repose is constitutional so long as it merely curtails the time within which a suit must be filed but does not outright bar a cause of action.

Id. at 483.

Any fair reading of the medical malpractice statute of limitations would reveal that the Legislature had two clear intentions:

1. In the case where there is no concealment, fraud or misrepresentation the cause of action must be filed within two years from the date of discovery and within four years absolutely from the date of the commission of the acts which caused the injury regardless of discovery.

2. In the case of misrepresentation, fraud or concealment suit must be filed within two years from the date of discovery if not discovered within four years from the date of the actions giving rise to the malpractice and all actions are barred seven years after the date of the rendering of the service which causes the injury regardless of discovery or lack of discovery of a fraud.

The inescapable conclusion from the enactment of §95.11(4)(b) is that the Legislature by enacting the statutes of repose intended to make an absolute cutoff for the filing of a malpractice action in the State of Florida. The legislative findings contained in the Preamble to the Amendment to Chapter 75-9, Laws of Florida, make it abundantly clear that the Legislature acting through its police power for the benefit of the health and well-being of the populace of the State of Florida found a crisis in health care and took reasonable steps inclusive

of the passage of these statutes of repose to insure the quantity and quality of health care in Florida.

The PATIENT comes forward with no allegations or proof that the Legislative findings were incorrect, that the crisis is over or that the intended purpose of the act was unreasonable or arbitrary and should not be enforced. Her simple argument is that it denies her the right to file suit in this particular case. Such argument can be advanced by any person who is barred from prosecuting a lawsuit because of a statute of limitations whether it is the traditional statute of limitations regarding discovery or an ultimate repose provision as contained herein. There are always going to be persons who fall outside the discovery cutoff or outside the repose provision. Under Article I Section 21 no one has an absolute right to maintain an action because as the Supreme Court stated in Kluger, "the right to maintain litigation is not absolute, but, rather, is subject to reasonable restrictions."

DECISIONS FROM OTHER JURISDICTIONS

The most closely analogous case that has been found outside the State of Florida is Dunn v. St. Francis Hospital Inc., 401 A.2d 77 (Del. 1979). Dunn is a malpractice action that was filed against a doctor and a hospital. The Delaware statute of limitations contained a three year repose provision and the Delaware Constitution, specifically Article I Section 9 of the Constitution of 1897 provided:

> All courts shall be open, and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by due course of law, and justice administered according to the very right of the cause and the law of the land ...

Id. at 80.

The Supreme Court of Delaware found that the repose provision contained in the medical malpractice statute of limitations in Delaware did not violate its constitutional mandate of open access to the courts. Surprisingly enough the Chapter of the Delaware Statutes which amended the statute of limitations contained preamble findings similar to the findings contained in the Preamble to Chapter 75-9, Laws of Florida. (See Dunn footnote at bottom of pg. 79).

The Delaware Supreme Court went on to cite two cases from Arizona and Arkansas respectively, Landgraff v. Wagner, 456 P.2d 26 (Ariz. 1976) and Owen v. Wilson, 537 S.W.2d 543 (Ark. 1976) which are substantially similar to Dunn.

Illinois has a medical malpractice statute of limitations which contains almost the exact wording of Florida's statutes of limitations and contains the same provisions, namely, the two year discovery rule and the four year repose provision. In the case of Anderson v. Wagner, 402 NE2d 560 (Ill. 1979) the Supreme Court of Illinois had occasion to pass upon the four year ultimate repose provision of its medical malpractice statute of limitations and upheld both the discovery and repose provisions as constitutional. With respect to barring a cause of action before it is discovered by the injured party the Illinois court stated as follows:

> Although such a result - a cause of action barred before its discovery - seems harsh and unfair, the reasonableness of the statute must be judged in light of the circumstances confronting the legislature and the end which it sought to accomplish. We have noted above that various reports, commissions, and authors recommended that the "long tail" exposure to malpractice claims brought about by the discovery rule be curtailed by placing an outer time limit within which a malpractice action must be commenced. The 4-year limit of our present statute follows the recommendations of the Medical Injury Reparations Commission contained in its report to the Governor and the 79th General Assembly cited above. This recommendation was made following extensive hearings by the Commission. Our 4-year time limit is also within the general area of limits that had been set by other States. Some are shorter than ours, and some are longer. It has not been demonstrated that the legislative action in establishing the 4-year outer limit within which to file a complaint for medical malpractice is unreasonable. We thus find no due process violation.

Id. at 568.

Kentucky has a five year repose provision in its malpractice statute of limitations that has been upheld as constitutional even though the malpractice was not discovered until after the running of the five year statute. Furgeson v. Cunningham, 556 S.W.2d 164 (Ky. 1977). Ohio also follows the view that the time of discovery is immaterial as to a statute of repose in medical malpractice. Ishler v. Miller, 384 NE 2d 296 (Oh. 1978).

Although a book could be written on this subject and numerous string citations found from various jurisdictions, the aforementioned cases are representative of cases from other jurisdictions which have repose provisions and to avoid unnecessary repetition we refer the Court to the following annotations:

> 1. 74 ALR 1317. When Statute of Limitations commences to run against actions against physicians, surgeons, or dentists for malpractice. ["It is generally held that the period of limitations for actions of this kind commences from the date of wrongful act or omission, rather than from the date of the damage caused." pg. 1318, "[T]he bare fact that the plaintiff was not advised of the extent of his injuries or his right to a cause of action has been generally held to be immaterial." pg. 1319].
>
> 2. 144 ALR 209. When statute of limitations commences to run against actions against physicians, surgeons, or dentists for malpractice. [This supplements the original annotation cited above]. ["As in the earlier cases, and most of the cases subsequent to those in the original annotation, the mere fact that the plaintiff was not aware of the existence or extent of his injuries or of his right to a cause of action for malpractice has been held to be immaterial, and not to

postpone the commencement of the limitation period." pg. 212].

3. 80 ALR 2d 368. When statute of limitations commences to run against malpractice against physician, surgeon, dentist or similar practitioner. [This annotation supplements 1 and 2 above]. ["[I]t has been held by some of the authorities that in determining the time when the statute of limitations commences to run against a malpractice action, it is immaterial when the patient discovered, or by the exercise of reasonable diligence should have discovered, the act of malpractice with resulting injury." pg. 396].

4. 61 Am. Jur. 2d, Physicians and Surgeons, Section 321 and the cases cited therein.

5. See also 70 ALR 3d 7. When Statute of Limitations commences to run against malpractice action based on leaving foreign substance in patient's body.

Other professions regarding same subject matter see the following annotations:

1. 4 ALR 3d 821. Statute of Limitations: when a cause of action arises on an action against manufacturer or seller of product causing injury or death.

2. 91 ALR 3d 991. Statute of Limitations: running of Statute of Limitations on products liability claim against manufacturer as affected by plaintiff's lack of knowledge of defect allegedly causing personal injury or disease.

3. 3 ALR 4th 318. When Statute of Limitations begins to run in dental malpractice suits.

4. 18 ALR 3d 978. When Statute of Limitations begins to run upon action against attorney for malpractice.

5. 90 ALR 3d 507. When Statute of Limitations begins to run on negligent design claim against architect.

A survey of the above authorities and cases cited therein will reveal that in the majority of jurisdictions which have specific statutes of limitations as to professionals such as doctors, lawyers, dentists and architects, wherein there is both a discovery rule and a repose provision or simply a repose provision, those repose provisions have been held constitutional with times as small as two years and as large as 12.

CONCLUSION

Based upon the record in this case, the applicable Florida Statutes and case law cited above, the PATIENT'S cause of action is barred by the four year repose provision of the statute of limitations which is constitutional. It is respectfully requested that this Court reverse and quash the decision of the District Court of Appeals Third District and remand this case to the Third District with directions to affirm the trial court's entry of a Judgment on the Pleadings in this cause.

Respectfully submitted,

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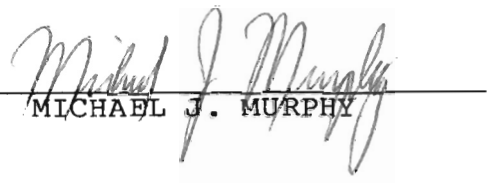
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief with attached appendix was mailed this 7th day of August, 1985, to: THOMAS CALDWELL, ESQUIRE, Attorney for Appellee, Barkas & Caldwell, Suite 600, Concord Building, Miami, Florida 33130; and to DAVID CURRIE, ESQUIRE, Co-counsel for Appellant, 975 Johnson Ferry Road, Suite 300, Richmond 400 Building, Atlanta, Georgia 30303.

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