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

REPLY BRIEF OF THE APPELLANT

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The PATIENT relies heavily upon the two decisions cited by the Third District in its decision; namely, Diamond v. E.R. Squibb & Sons, Inc., 397 So.2d 671 (Fla. 1981), and Overland Construction Company v. Sirmons, 369 So.2d 572 (Fla. 1979). The PATIENT'S reliance on these authorities is misplaced. In Overland, Jerry Sirmons did not enter the building which ultimately collapsed on him until the twelve year ultimate repose provision contained in the statute of limitations for improvements to reality had already expired. (Building constructed in 1961; statute of repose passed for all persons in 1973; Jerry Sirmons first enters the building in 1975). In the instant case, the patient was treated by the DOCTOR wherein he performed a dilation and curettage (commonly known as a D & C) and thereafter she experienced physical problems, but did not file suit until seven years later. (PATIENT treated by DOCTOR on August 14, 1976; statute of repose runs August 14, 1980; PATIENT sues DOCTOR August 1, 1983). The distinguishing factor between the instant case and Jerry Sirmons case is the fact that Jerry Sirmon's case was barred before he was even injured. The PATIENT was injured on August 14, 1976, suffered consequences therefrom, but did not sue until almost seven years after her last treatment by the DOCTOR.

The PATIENT can take no solace in Diamond v. E.R. Squibb & Sons, Inc., 397 So.2d 671 (Fla. 1981) because although Ms. Diamond was exposed to a dangerous product, she

was not "injured" as was the PATIENT in this case, because the injury did not manifest itself until after the statute of repose would have barred the cause of action. As pointed out by Justice McDonald in his specially concurring opinion, in Diamond, a wrongful act had occurred but the injury did not take place and was not evident until after the repose provision barred the cause of action. Such is not the case in the instant appeal. The injury, if there was one, occurred on August 14, 1976, and its affects were felt by the PATIENT immediately, although she claims she did not discover the cause of her injury until less than two years before she filed suit in August of 1983. This is an entirely different situation than the DES product that was the subject of the complaint in Diamond where the product's deleterious affects do not occur until after the claim is already barred by the repose provision.

The case of Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984), cited by the Third District in support of its decision, is inapposite to the issues involved in this case. In Universal, the Court was dealing with the savings clause contained within the legislation enacting the twelve year repose provision in the products liability statute. (Florida Statute Section 95.031) The instant case does not involve a situation where the wrongful act occurred before the enactment of the repose provisions contained in the Medical Malpractice Act. The treatment given by the DOCTOR to the PATIENT in this case occurred at a time after

the legislature had enacted the four year ultimate repose provision contained in Florida Statute Section 95.11(4)(b) and accordingly, the discussion by the Supreme Court in the Universal case regarding the savings clause provision is distinguishable from the instant case.

This Court has recently receded from its previous holdings regarding statutes of repose in the products liability arena. Pullum v. Cincinnati, Inc., et al., ____ So.2d ____ (Fla. 1985); decided August 30, 1985, and contained in Vol. 10, Florida Law Weekly, p. 428. In Pullum, this Court receded from its previous holding in Batilla v. Alice Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980). In doing so, the Supreme Court resurrected the twelve year ultimate repose provision contained in the products liability statute of limitations within Florida Statute Section 95.031(2), and Justice Alderman, speaking for the Court, stated:

> "We recede from this decision and hold that Section 95.031(2) is not unconstitutionally violative of Article I, Section 21 of the Florida Constitution. The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that 12 years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product." (Emphasis added).

Likewise, the Legislature, when enacting Florida Statute Section 95.11(4)(b), reasonably decided that perpetual liability for doctors places an undue burden upon

them as practitioners. Furthermore, as enunciated in the preamble to the aforementioned statute, the legislature had reason to believe that under its police powers, it had to deal with the "crisis" faced by doctors and that "without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at an increased cost to the citizens of Florida" and furthermore, that the "problem has now reached crisis proportion in Florida." [Preamble to Laws of Florida Chapter 75-9]

In overruling Batilla, this Court cited with approval the dissent of Justice McDonald in the Batilla case which reads in pertinent part as follows:

> "This developing liability of the manufacturer creates a policy dispute. It could be logically argued that once a product is manufactured and sold, a manufacturer should be subject to liability for an injury whenever caused by that product. It could be argued that such liability would place an onerous burden on the industry, and that, therefore, liability should be restricted to a time commensurate with the normal useful life of manufacturer or products.
>
> I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments and expanding the liability of manufacturers. Because the normal useful life of buildings is obviously greater than those most manufactured products, there is a distinction in the categories of liability exposure between those sought to be limited by Section 95.11(3)(c) struck down in Overland, and those listed in Section 95.031(2)."

The medical malpractice crisis recognized by this Court on more than one occasion and by the Legislature by the enactment of this statute of repose is logical and reasonable and meets a desired state objective; namely, the cutting off of the unlimited tail of exposure for past treatment rendered by physicians. It is also reasonable to conclude that four years is sufficient time since the effects of hands on treatment by medical practitioners, if not manifest within four years, should carry and does carry from a common sense standpoint a presumption that the treatment rendered was not negligent.

It seems a curious anomaly, as pointed out by the Fourth District Court of Appeals in Cobb v. Maldonado, 451 So.2d 42 (Fla. 4th D.C.A. 1984), to cut off a diligent plaintiff's right of action which is discovered just prior to the expiration of the statute of repose, when at the same time the courts reason that an injured plaintiff who discovers his cause of action after the running of the statute of repose is entitled to the full benefit of the discovery rule under the statute of limitations. This anomaly was not intended nor expected on the part of the Legislature and has only been allowed because of the District Court's erroneous misapplication of the discovery rule in the statute of limitations and the repose provisions which have competing policies behind their enactment. It is only through a misapplication of the legislative intent of these two statutes that has lead to the disparate results reached be-

tween cases such as the instant case and Cobb v. Maldonado and Cates v. Graham, 451 So.2d 475 (Fla. 1984).

CONCLUSION

Based upon the applicable Florida Statutes and the case law cited in this and the Initial Brief, the DOCTOR respectfully requests this Court to quash the decision of the Third District Court of Appeals in the instant matter and remand this case to the Third District Court of Appeals with directions to affirm the Trial Court's judgment on the pleadings in favor of the DOCTOR. Additionally, the DOCTOR respectfully requests the Court to clarify and enunciate for the lower court the distinction and difference between the repose provisions and the discovery rule in medical malpractice cases.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was mailed this 18Th day of September, 1985, to: THOMAS CALDWELL, ESQ., Attorney for Appellee, Barkas & Caldwell, Suite 600, Concord Building, Miami, Florida 33130; DAVID CURRIE, ESQ., Co-counsel for Appellant, 975 Johnson Ferry Road, Suite 300, Richmond 400 Building, Atlanta, Georgia 30303; and to JOEL S. CRONIN, ESQ., Cone, Wagner, Nugent, Johnson, Ruth & Romano, P.A., Servico Centre East, Suite 400, 1601 Belevedere Road, Post Office Box 3466, West Palm Beach, Florida, 33402.

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