IN THE SUPREME COURT OF FLORIDA

ELLEN M. CARR and GEROW F. CARR, as parents and natural guardians of JON TIMOTHY CARR, a minor, and ELLEN M. CARR and GEROW F. CARR, individually,

Petitioners,

vs.

BROWARD COUNTY d/b/a BROWARD GENERAL MEDICAL CENTER; NORTH BROWARD HOSPPITAL DISTRICT d/b/a BROWARD GENERAL MEDICAL CENTER; JAMES WEAVER, M.D.; ROBERT GRENITZ, M.D.; JOSEPH RAZIANO, M.D.; LAUDERDALE GYNECOLOGIC ASSOCIATES and TERGHOS, GRENITZ, HUNTSINGER, CARUSO & RODRIQUEZ, P.A.

Respondents.

CASE NO. 70,545

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

THE ACADEMY OF FLORIDA TRIAL LAWYERS

AMICUS CURIAE

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PREFACE

The Petitioners/Plaintiffs, Ellen M. Carr, Gerow F. Carr and the minor, Jon Timothy Carr, if not named individually will hereinafter be referred to as "Plaintiffs" or "Carrs" and the Respondents/Defendants will hereinafter be referred to as "Defendants"

STATEMENT OF THE CASE AND FACTS

This Amicus 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 Fourth District Court of Appeal and the statement of facts in the briefs of the parties filed with that court, of which this Amicus Curiae does have copies.

Amicus will present no discussion as to the facts of the case, preferring to joint, concur with and adopt the discussion and argument of the Petitioners in their brief to this Court.

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 Petitioners/Plaintiffs in their brief to this Court. This amicus brief is submitted in the assumption that this Court accepts jurisdiction in this matter.

POINTS ON APPEAL AND QUESTIONS PRESENTED

WHETHER THE SEVEN-YEAR (7) 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 DEFENDANTS' FRAUDULENT CONCEALMENT OF FACTS ABOUT THE NEGLIGENCE ALLEGEDLY RESULTED IN PLAINTIFFS' INABILITY TO HAVE DISCOVERED THE NEGLIGENCE WITHIN SEVEN YEARS.

SUMMARY OF ARGUMENTS

Section 95.11(4)(b), Florida Statutes (1975-1986) contains not one, but two separate and distinct "statutes of repose", the first a four-year statute pertaining to medical negligence causes of action in which fraud, concealment or intentional misrepresentation did not prevent or should not have prevented the discovery of the negligent incident within four (4) years, and the second, a seven-year statute for those in which it did.

Apart from the instant decision being appealed, neither this Court or any other appellate court in this state has ruled on this particular "statute of repose" contained in Section 95.11(4)(b), as applied to a claimant's cause of action that, because defendants fraudulently concealed facts, was essentially undiscoverable until after the expiration of the "seven-year" repose period of that statute.

Based on the same judicial reasoning behind the holdings in 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), the seven-year statute of repose of Section 95.11(4)(b) is similarly

unconstitutional as applied to the claim of the Plaintiffs, whose cause of action is alleged not to have been discoverable because of fraudulently concealed facts during the seven-year period provided for in that statute.

Up to this Court's ruling in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), the previous decisions of this Court about the related but separate issues 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) architects & contractors	Constitutional Bauld (Fla.1978)	Unconstitutional As Applied Overland (Fla.1979
s. 95.031(2) prod. liabil. w/discov.prov.	Constitutional Purk (Fla.1980)	Unconstitutional As Applied Diamond (Fla.1981)
s. 95.11(4)(b) med.mal (4 YR) w/discov.prov.	Constitutional Cates (Fla.1980)	? ? ? ? ? ?
s. 95.11(4)(b) med.mal (7 YR) w/discov.prov.	Constitutionality Not Ruled Upon But See Phillips(4th DCA 1984)	? ? ? Carr (Fla.1987)

Amicus would argue that, in the instant case, the Plaintiffs, deprived of material facts fraudulently concealed from them by the Defendants, relied on the representations of the Defendants and, therefore, did not have any reason to believe they had a cause of action for medical malpractice and could not discover the basis of their lawsuit within the statutorily-prescribed seven years of the "incident."

To deny the Plaintiffs the right to bring their cause of action under such conditions is constitutionally impermissive as violative of Article I, Section 21 of the Florida Constitution is against long-standing Florida courts' public policy. Furthermore, the Defendants should be equitably estopped to argue the statute of repose when by their intentional actions, they have prevented the Plaintiffs, patients, to whom they have a fiduciary duty to disclose material facts concerning their condition and its causes, from learning the allegedly negligent causes of their injuries.

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 seven-year repose provisions It has, however, ruled on other, if not similar, repose provisions of other statutes of limitations, consistently holding them unconstitutional as applied to causes of action that occurred during but 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 unconstitutional 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 constitutional 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)).

This Court has ruled on the "four-year" repose provisions of s. 95.11(4)(b), holding it constitutional for those causes of action discovered within four years, even if the period in which to bring the action is shortened to less than two years. Cates v. Graham, 451 So.2d 475 (Fla. 1984)(leaving the claimant with five to six months in which to bring an action does not impermissibly deny access to the courts). See also Cobb v. Maldonado, 451 So.2d 482 (Fla. 4th DCA 1984)(leaving the plaintiff with only two months not impermissible); Carlton v. Ridings, 422 So.2d 1067 (Fla. 1st DCA 1982). No Florida appellate court has ever ruled on the constitutionality of the seven-year statute of repose found in Section 95.11(4)(b), Florida Statutes. But cf., Phillips v. Mease Hospital & Clinic, 445 So.2d 1058 (Fla. 2d DCA), rev. denied, 453 So.2d 44 (Fla.1984)(action discovered after four years but filed before seven years).

It could be argued that the Carlton case did involve fraud, concealment or intentional misrepresentation and, for that reason, an appellate court has ruled on this issue. However that court held that the cause of action was discovered within four years, and, therefore, within the statutory definition of the four-year period, 422 So.2d at 1068, and, therefore, analogous to the later decision of this Court in Cates, supra. The First District Court held

that the seven-year repose provisions were applicable only "in those cases where it can be shown that fraud, concealment, or intentional misrepresentation prevented discover of the injury within the four-year period. 422 at 1068.

Similarly, it could be argued that the instant case is not in conflict with Phelan v. Hanft, 471 So.2d 648 (Fla. 3d DCA 1985), appeal dismissed, 488 So.2d 531 (Fla. 1986). Phelan, while holding Section 95.11(4)(b) unconstitutional as to Catherine Phelan's claim, considered only the four-year provision of that statute. Id. at 650. The Carrs' claim, as stated in the Fourth District Court of Appeal's decision, clearly involves the seven-year provisions of the statute. Carr v. Broward County, 4th DCA, Case Nos. 85-2690, 85-2820 and 4-86-0209, Opinion filed April 8, 1987 (12 FLW 992)

> The complaint alleged negligent treatment and that appellants, although exercising due diligence, were "not able to discover facts and circumstances surrounding...prenatal and obstetrical care rendered...during birth..." so that they were unable to earlier discern that negligence had occurred. It was further alleged that the appellees knew or should have known of the negligent treatment and fraudulently concealed these facts from appellants.
>
> . . . . .
>
> Thus, the latest date on which the "incident" could have occurred is December 20, 1975, so that an action commenced in 1985 is well beyond the seven-year statutory period for repose.

Id. at 992.

This Amicus Curiae would argue that the seven-year provision of Section 95.11(4)(b), Florida Statutes, is unconstitutional as applied to the Plaintiffs who could not have discovered and did not

discover their cause of action (although the brain damage of the infant was known but brain damage often occurs in the absence of negligence) until later than seven years after the negligent treatment by the Defendants, treatment that was the alleged cause of the minor Plaintiff's brain damage.

In the instant case, the Plaintiffs were not put on notice of either the allegedly negligent acts, which took place on or about December 20, 1975, the day of Jon Timothy's birth, or of the nexus between the treatment by the Defendants and all too apparent brain damage. Had the Defendant's not fraudulently concealed material facts from the Plaintiffs during at least the seven year period from December 20, 1975 and December 19, 1982, the Plaintiffs would have been able to discover both the negligence and made the connection between the negligence and the brain damage.

No court would require every parent who has a brain-damaged infant to suspect the possibility of a negligent act by the obstetrician or the hospital personnel (even her doctors did not suspect the true cause of the child's symptoms), to suspect malpractice and to bring a lawsuit on the possibility that the blatantly apparent symptoms of brain damage may have been caused by some unknown negligent act by the medical care providers.

In a case involving a brain-damaged infant and the statute of limitations in a medical negligence claim, this Court stated:

> "Serious medical circumstances arise daily in the practice of medicine and because they are so common in human experience, they cannot, without more, be deemed to impute notice of negligence or injury caused by negligence."

Moore v. Morris, 475 So.2d 666, 668 (Fla. 1985). There is nothing

about the fact that a baby or infant is brain-damaged that leads conclusively and inescapably to only one conclusion - that there was negligence or injury caused by negligence. Knowledge of a physical injury alone, without the knowledge that the injury resulted from a negligent act, does not trigger the limitations period. Id.; Ash v. Stella, 457 So.2d 1377 (Fla. 1984).

> There is some evidence in the record that during this time the plaintiff was aware or should have been aware that the baby was born mentally retarded and thereafter showed signs of mental retardation and abnormal development. We do not believe, however, that this evidence put the plaintiff on notice as a matter of law that the baby was injured during birth because such evidence could have meant that the baby had been born with a congenital defect without any birth trauma.

Almengor v. Dade County, 359 So.2d 892, 894 (Fla. 3d DCA 1978)

Were the seven-year statute of repose of 95.11(4)(b) held constitutional as applied to the Carrs, who allegedly were the victims not only of medical malpractice but also of fraudulent concealment, and could not have discovered the "incidents" or their cause of action before seven years, their cause of action would be barred entirely. To forestall altogether and bar completely their cause of action, would be constitutionally impermissible and violative of Article I, Section 21 of the Florida Constitution of 1968 (but tracing back to the Constitution of 1838), 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 analogous 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 McDonald 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). Justice McDonald's dissent, adopted by this Court in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), although receding from Battilla, apparently, in dicta, reaffirmed Diamond, as suggested by Justice McDonald in his concurrence in Diamond. 476 So.2d at 659.

Similarly, to argue that the Carrs cannot pursue their cause of action and to bar their access to the courts for the injury incurred because the cause of their child's brain damage, where the Defendants fraudulently concealed the incidents, could not be discovered until more than the statutorily imposed seven years, should be constitutionally impermissive.

In Cates v. Graham, 451 So.2d 475 (Fla. 1984), the issue decided by the Court was analogous to that Court's previous

decisions in Bauld v. Jones Const. Co., 357 So.2d 401 (Fla. 1978) and Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980). In all three of these cases, the injury or incident was discovered within the statutorily required time period. 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.

> 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. [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 alternative method of meeting such public necessity can be shown.

Id. at 4. (Emphasis added).

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 seven-year statute of repose were to be applied to the claim of the Plaintiffs and were not ruled unconstitutional as applied to them, their 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 these Plaintiffs 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 the Carrs - the right to bring suit against physicians and other health care providers with whom they are 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 in section 7 of that bill, 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- and seven-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 this important constitutionally guaranteed right to redress in the courts for injuries suffered, an Article I, section 21 right, especially when such legislation impermissibly benefits only one class of defendants, health care providers, at the expense of injured parties.

Even if that Preamble to Chapter 75-9 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". While the Fourth District Court of Appeal considered the Kluger test, it failed to consider the second prong in its ruling in the instant case.

> We here determine, subject to supreme court scrutiny in this or a later appropriate case, that the legislature has established an overriding public interest meeting the Kluger test as applied in Overland and that the statute was therefore validly applied to the Carr's causes of action by the trial court.

Carr v. Broward County, 12 FLW at 995.

The 1985 and 1986 Florida Legislatures, again responding to a perceived need to enact legislation to combat another perceived "medical malpractice crisis", by their 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, and the "Tort Reform and Insurance Act of 1986, see Appendix C, with its lengthy 70 sections contained in 132 pages, clearly indicated that multiple alternative methods of meeting a perceived medical malpractice crisis also existed in 1975, methods apparently 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 that could not have been discovered until after the limitations period. See, e.g., City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954); Phillips 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 most of the above-cited cases were not decided under the present statute with its four- and seven-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 of medical negligence that was discovered after the statutory period and could not have been discovered during the statutory period, is barred by the applicable statute of limitations.

Similarly, the seven-year statute of repose should be tolled during the period of time that fraud, concealment or intentional misrepresentation prevented the Plaintiffs discovery of the negligence even if the period exceeds seven years. If that is done, then the statute would be tolled until the Plaintiffs learn of the incidents and it would be constitutionally impermissive to deny them any time, after discovery, in which to bring their claim. In such cases, the plaintiffs should have two years to bring such a claim, no matter when it is discovered.

> "[F]raudulent concealment by defendant so as to prevent plaintiffs from discovering their cause of action, where the physician has fraudulently concealed the facts showing negligence, will toll the statute of limitations until the facts of such fraudulent concealment can be discovered through reasonable diligence."

Nardone v. Reynolds, 333 So.2d 25, 37 (Fla. 1976). See also, Buck v. Mouradian, 100 So.2d 70 (Fla. 3d DCA 1958)

To permit the Defendants to fraudulently conceal their negligence for seven years and then reward them for their being so good at their concealment by not allowing the Plaintiffs to bring

their cause of action, should be against public policy. To do so this Court would be equivalent to telling negligent health care providers that, if you can hide your negligence for seven years, we will reward you by assuring that you cannot be sued. Try to hide it for more than seven years and you're home free. But be careful, it you hide it for only four years or less than seven, you can be sued for it. See Phillips v. Mease Hospital & Clinic, 445 So.2d 1058 (Fla. 2d DCA), rev. denied, 453 So.2d 44 (Fla. 1984); Carlton v. Ridings, 422 So.2d 1067 (Fla. 1st DCA 1982)

Such a policy encourages concealment, fraud and intentional misrepresentation. Contrarily, if a health care provider knew that if he did not commit any of the above-mentioned intentional acts, that there would be a shorter time period in which he could be sued and, therefore, a reduced chance to be sued than if he fraudulently concealed facts, that would tend to encourage him or her, if not to be honest with the patients, at least not to intentionally mislead them. Victims of medical negligence, further victimized by fraud, concealment or intentional misrepresentation, should have two years in which to bring or initiate their cause of action, no matter when when the medical negligence is discovered unless it is discovered within four years of the negligent incident. In the latter case, they would have only two years or the time remaining in the four-year period, whichever is shorter. Phillips, 445 So.2d at 1061. This would effectively eliminate the seven-year statute of repose and allows patients two full years if they could not discover the negligence within four years because of the fraud, concealment or intentional misrepresentation of the health care provider.

This Court has always considered that there exists a fiduciary nature to the relationship between health care provider and his or her patient and this duty requires the physician to disclose facts to his patients even if such facts would demonstrate negligence on the health care provider's part. Nardone v. Reynolds, 333 So.2d at 39. Given the fiduciary nature of the doctor-patient relationship, clearly the doctor's duty extends beyond non-concealment. Schafer v. Lehrer, 476 So.2d 781 (Fla. 4th DCA 1985) See also Nardone v. Reynolds, 333 So.2d at 39; Almengor v. Dade County, 359 So.2d 892, 894 (Fla. 3d DCA 1978). Certainly, if the doctor's duty goes beyond non-concealment, then an act, intentional and going far beyond mere silence, such as fraudulent concealment should invoke the condemnation of this Court as a matter of public policy.

Public policy dictates that the Defendants in the instant case not be allowed to profit from their alleged fraudulent concealment to the extent that the Plaintiffs are prevented from bringing their cause of action. Florida courts have always upheld the right of an injured person to bring his cause of action if the case has been infected with an element of fraud or deception. See e.g., Miami Nat'l Bank v. Greenfield, 488 So.2d 559 (Fla. 3d DCA 1986); Brooksville v. Hernando County, 424 So.2d 846 (Fla. 5th DCA 1982).

Florida courts have often held that any intentional act on the part of the defendant acts as an equitable estoppel to that defendant's invoking the statute of limitations or any other defense. See Id. at 848; Fletcher v. Dozier, 314 So.2d 241, 242 (Fla. 1st DCA 1975); North v. Culmer, 193 So.2d 701 (Fla. 4th DCA 1967). The Defendants in the instant case should be estopped from

asserting the statute of repose as a defense because it was allegedly their actions that prevented the Plaintiffs from learning the true cause of their child's brain damage, i.e., the negligence of these very health care providers.

CONCLUSION

Based on the record in this case, the applicable Florida Statutes and the case law cited hereinabove, the application of the seven-year statute of repose found in Section 95.11(4)(b), Florida Statutes, is clearly unconstitutional, generally and as applied to Petitioners' causes of action, denying the constitutional access to courts provisions found in Article I, Section 21 of the Florida Constitution, against public policy. Additionally, the Respondents should be estopped from arguing any statute of repose because their actions allegedly prevented the Petitioners from discovering their cause of action. Therefore, it is respectfully requested that this Court reverse the decision of Fourth District Court of Appeal who affirmed the lower court's granting of Respondents' Motions to Dismiss.

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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 18th day of June 1987 to: STEVEN R. BERGER, ESQUIRE, 8525 Southwest 92nd Street, Miami, Florida 33156; REX CONRAD, ESQUUIRE, Conrad, Scherer & James, Post Office Box 14723, Fort Lauderdale, Florida 33302; JOHN W. THORNTON, ESQUIRE, Thornton & Hinshaw Culbertson, 19 West Flagler Street, Suite 720, Miami, Florida 33130; and LAURA ROTSTEIN, ESQUIRE, Stanley Rosenblatt, P.A., 66 West Flagler Street, 11th & 12th Floors, Miami, Florida 33130

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