IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,545

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

Respondents.

FILED
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JUL 21 1987
CLERK, SUPREME COURT
By
Deputy Clerk

RESPONDENTS, LAUDERDALE GYNECOLOGIC ASSOCIATES, ROBERT GRENITZ, M. D. AND JOSEPH RAZIANO, M.D.'S ANSWER BRIEF ON THE MERITS

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ISSUE ON APPEAL

WHETHER FLORIDA'S MEDICAL MALPRACTICE STATUTE OF REPOSE, WHICH SETS SEVEN YEARS AS THE OUTSIDE LIMIT WITHIN WHICH SUCH ACTIONS CAN BE BROUGHT, CAN BE SQUARED WITH THE FLORIDA CONSTITUTION'S ACCESS-TO-COURTS PROVISION, GIVEN THE ANNOUNCED NECESSITY FOR AGGRESSIVE LEGISLATION IN THIS AREA AND THIS COURT'S INABILITY TO FASHION ALTERNATIVE PROVISIONS?

STATEMENT OF THE CASE AND FACTS

Defendants/respondents, Lauderdale Gynecologic Associates, Robert Grenitz, M.D., and Joseph Raziano, M.D., accept plaintiffs/petitioners' statement of the case and facts.

SUMMARY OF ARGUMENT

This court should affirm the constitutionality of section 95.11(4)(b), Florida Statutes (1975), which sets a seven-year period within which medical malpractice claims must be brought. Under this repose provision, timeliness is an essential element of a cause of action. Plaintiffs did not bring a claim within seven years so they have no cause of action.

Making such determinations is a legislative prerogative. The subject statute does not offend the Florida constitution's access-to-courts provision because it was grounded on an announced public necessity and no less stringent measures would obviate the problems the legislature sought to

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solve. This conclusion is in keeping with the Fourth District's and with the cases in which this court has considered the constitutionality of Florida's several statutes of repose.

The fact that the instant case includes an allegation of fraud should not trouble the court. Plaintiffs' claim is wholly conclusory and therefore insufficient. That they allegedly did not discover their claim does not render it essentially undiscoverable; the legislature has legislatively determined that seven years is an objectively reasonable period within which such claims can be discovered. After that time, the equities favor the defendants, who may find their ability to defend against a stale fraud claim as impaired as their ability to defend against the stale malpractice claim.

The medical malpractice statute of repose is constitutional on its face and as applied. The opinion of the Fourth District should be affirmed.

ARGUMENT

FLORIDA'S MEDICAL MALPRACTICE STATUTE OF REPOSE, WHICH SETS SEVEN YEARS AS THE OUTSIDE LIMIT WITHIN WHICH SUCH ACTIONS CAN BE BROUGHT, PASSES CONSTITUTIONAL MUSTER BECAUSE IT REFLECTS LEGITIMATE PUBLIC NECESSITY AND LACK OF REASONABLE ALTERNATIVES.

A. Introduction.

Section 95.11(4)(b), Florida Statutes (1975), unambiguously provides the time limit for commencing a medical

malpractice action: "An action for medical malpractice shall be commenced within two years . . . [unless certain tolling provisions apply] . . . but in no event to exceed seven years from the date the incident giving rise to the injury occurred."

Plaintiffs sub judice brought their complaint in September 1985, nearly ten years after their son sustained severe brain damage at birth. (R.12,13) If the seven-year repose provision of section 95.11(4)(b) is facially valid, then plaintiffs' action is unquestionably time-barred and the Fourth District's affirmance of the order dismissing the case with prejudice is correct.

Statutes of repose, as noted by the Fourth District, are analytically distinct from statutes of limitation. Unlike a statute of limitation, which does not begin to run until the cause of action accrues, a statute of repose terminates the right to bring an action after a certain period expires. Universal Engineering Corp. v. Perez, 451 So.2d 463, 465 (Fla. 1985). That period bears no relationship to when a particular wrong occurred.

A statute of repose has a substantive as well as a procedural aspect. It defines, as a matter of substantive law, the scope of the right to bring a cause of action. It does not act as a bar: "its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising." Rosenberg v. Town of North Bergen, 293 A.2d 662, 667 (N.J. 1972). "The injured party literally has no cause of action. The harm that

has been done is damnum absque injuria--a wrong for which the law affords no redress." Id. There is no question that defining causes of action is an appropriate and exclusive legislative prerogative. "The function of [a statute of repose] is thus rather to define substantive rights than to alter or modify a remedy. The Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested rights are disturbed." Id.

A variety of persuasive rationales support the efficacy of repose provisions. Statutes of repose share a purpose of encouraging diligence in prosecution of claims, eliminating the potential for abuse from a stale claim, and fostering certainty and finality in litigation. In the areas of products liability, medical malpractice and construction liability, these concerns are especially pronounced. Intervening technology, passage of time and other circumstances make the tracing of injuries, and defending against allegations, very difficult. Insurance problems often prompt the enactment of repose provisions, as indeed they contributed to the enactment of section 95.11(4)(b). Physicians in particular are exposed to abnormally long periods of potential liability and unusually large numbers of potential claimants. Medical malpractice statutes of repose acknowledge, inter alia, the uncertainties with which a physician must deal in a given case and the fact that he has no control over discharged patients. In enacting section 95.11(4)(b), the Florida legislature limited the

liability of physicians and other health care providers to seven years' duration. The statute effectively defines a medical malpractice cause of action, declaring that an element of the cause of action is that it be brought within seven years.

Reduced to its essentials, the issue on appeal is whether the statute can insulate physicians from liability after this period, even in cases in which it is alleged that they prevented plaintiffs from timely discovering the cause of the child's injury through fraudulent concealment. More precisely, this court will decide whether section 95.11(4)(b) constitutes a violation of Article 1, section 21, of the Florida Constitution of 1968, known as the access-to-courts provision.

The Florida Supreme Court has not previously passed on whether the medical malpractice statute of repose can be reconciled with the access-to-courts provision even when it amounts to an absolute bar. The Supreme Court of Nebraska, however, has answered this question with a resounding "yes." In Colton v. Dewey, 212 Neb. 126, 321 N.W.2d 913 (Neb. 1982), a medical malpractice plaintiff claimed application of a professional negligence statute denied her the right of access to courts guaranteed by the Nebraska Constitution. Rejecting the argument that plaintiff must be aware of her claim before the statute of repose may run against it, the court responded:

> Likewise, we find no merit in her third constitutional argument. The requirement of Neb. Const. art. I, section 13, that all courts be open and every person have a remedy by due process of law for any injury to his person, does not mean that limits may

> not be imposed upon the time within which one must ask courts to act.
>
> * * *
>
> A review of the history leading to enactment of the period of repose is instructive. In [an earlier case], we held that an action for malpractice did not accrue until a patient discovered, or in the exercise of reasonable diligence should have discovered, the malpractice. Thereafter, the Legislature limited that period of discovery to 10 years. The question simply becomes one of whether the Legislature has the power to do so. It has long been the law of this state that the Legislature is free to create and abolish rights so long as no vested right is disturbed.

Id. at 916. We believe that a similar conclusion is warranted in Florida.[1] The Nebraska statute, like Florida's, applied to cases in which fraudulent concealment was alleged.

B. The Legislation Comports with Kluger v. White.

Whether section 95.11(4)(b), Florida Statutes (1975), passes constitutional muster must be decided with reference to Kluger v. White, 281 So.2d 1, 4 (Fla. 1973). As the court stated in that case, the legislature can create and abolish

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[1]Plaintiffs cite a number of opinions in which various statutes of repose have been stricken on state constitutional grounds. It should be noted that a greater number of states have sustained such statutes against constitutional challenges. See Anderson v. Fred Wagner and Roy Anderson, Jr., Inc., 402 So.2d 320 (Miss. 1981) (stating that of twenty-five states which have considered the issue, fifteen have upheld statutes' constitutionality and ten have not). It is also of interest that, although repeatedly asked to do so, the United States Supreme Court has declined to review the constitutionality of a state statute of repose. This disinterest suggests that the Supreme Court does not view statutes of repose as abridging any federal constitutional rights.

causes of action without violating the access-to-courts provision, so long as "[it] can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." Of course, the court must also be mindful of the axiom that legislation carries a presumption of constitutionality. See, e.g., Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA), rev. denied, 411 So.2d 383 (Fla. 1981).

As to the first part of the Kluger standard, the Fourth District correctly concluded that the legislative preamble to the 1975 Medical Malpractice Reform Act demonstrates the requisite public necessity for the repose provision embodied in the Act. Twelve years ago, the legislature declared problems in the malpractice system to be of crisis proportions, it recognized that doctors' ability to practice their profession would be imperiled without legislative relief, and it specifically acknowledged the problem of skyrocketing malpractice insurance premiums. Such a preamble would be equally fitting in 1987. The malpractice crisis has not abated but has become more acute; legislative efforts to ameliorate the problem are ongoing. Clearly, there is a public interest that overrides the interests of any individuals or vested interest groups.

Plaintiffs should take little solace from Aldana v. Holub, 381 So.2d 231 (Fla. 1980), in which a reluctant court struck certain provisions of the 1975 Act which pertained to medical mediation panels. Plaintiffs contend that this action

undercuts the argument that the Act's preamble adequately states public necessity. The Aldana opinion does not justify such an inference. It struck certain mediation provisions for very different reasons than are presented here. Noting that it had affirmed the particular provisions' facial constitutionality in Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), the Aldana court concluded that in the intervening years the provisions had proven themselves unworkable in application. While the provisions did not facially violate the access-to-courts clause, in practice they were shown to impinge on claimants' right of due process. 381 So.2d at 231. The court declared its conclusion "unfortunate," and certainly did not venture any opinion concerning the legitimacy of the 1975 Act's legislative purpose. The legislature's judgment in assessing the need for a repose provision warrants this court's deference.

Plaintiffs and their amicus contend that the second part of the Kluger standard is not met, in that the legislation fails to show consideration of alternative methods. This portion of the Kluger test was recently considered in Smith v. Department of Insurance, 12 F.L.W. 189 (Fla. April 23, 1987), in which the court struck a portion of the 1986 Tort Reform and Insurance Act on grounds that the legislature failed to provide an alternative solution or a rational basis for curtailing non-economic damages. The court stated that only by an "act of faith" could it speculate that the damages cap met the stated legislative aims. Id. at 192.

By contrast, there is a clear and rational relationship between the legitimate goals stated in the preamble to the 1975 Act, and an absolute cut off of physician's liability after a certain time. Any intermediary measure would have been fraught with pitfalls. Had the legislature, for example, created a fraud exception to the seven-year limitation, the statute would have been vulnerable to an equal protection challenge. Austin v. Litvak, 682 P.2d 41 (Colo. 1984), involved an equal protection challenge to a medical malpractice statute of repose which, unlike Florida's, specifically exempted fraudulent concealment cases from the three-year repose period. Plaintiffs alleged that, although exercising due diligence, they had been unable to discover their cause of action for negligent misdiagnosis within the prescribed period. Their right to equal protection of the laws was abridged, they claimed, by the disparate treatment of plaintiffs claiming fraud and those asserting other reasons for their failure to timely discover their cause of action. The Colorado Supreme Court agreed, largely on the rationale that by including this exception in its repose statute, the legislature had "substantially undermine[d] the apparent purpose of enacting a strict statute of repose." 682 P.2d at 50. In concluding that the two classifications were arbitrary, the court commented, "[c]laims dependent upon knowing concealment to avoid the repose provision are far more likely to be frivolous or involve stale evidence than claims of negligent misdiagnosis." Id.

By enacting an evenhanded statute of repose, the Florida legislature avoided the Austin problem. Plaintiffs in negligent misdiagnosis cases might have led the charge, but undoubtedly others would also have claimed impermissible discrimination if Florida had chosen such an act. A legitimate public necessity is stated in the preamble, and the choice of means is rational. No intermediate or equivocal measures would resolve the "long tail" and other problems which plague physicians and the other groups for whose protection statutes of repose have been enacted. The subject legislation passes both prongs of the Kluger test.

C. The Fourth District Correctly Analyzed Precedential Case Law Concerning Statutes of Repose.

The Fourth District's conclusion that the subject statute satisfies Kluger is compatible with the series of cases in which this court has passed on the validity of sister statutes. Bauld v. Touchette, 357 So.2d 401 (Fla. 1978), first in the series, simply held the products liability statute did not offend the access-to-courts provision as applied to a plaintiff who was injured, but failed to file suit, within the twelve-year period. The same statute withstood a federal constitutional challenge in Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980). In Cates v. Graham, 451 So.2d 475 (Fla. 1984), the court likewise concluded that the medical malpractice statute of repose did not impermissibly bar a case discovered within the applicable four-year period but not timely filed. In

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a pair of decisions, Overland Construction Co., Inc. v. Simmons, 369 So.2d 572 (Fla. 1979) and Battilla v. Allis Chamlers Manufacturing Co., 392 So.2d 874 (Fla. 1980), the court declared that the construction and products liability statutes of repose, respectively, were unconstitutional as applied to bar claims not accruing within the statutory period.

Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984), gave pause to the Fourth District. Perez, however, is consistent with defendants' analysis. In it, the court purposefully did not rule on whether Overland retained vitality. It acknowledged the possibility that the prefatory language of chapter 80-322, Laws of Florida, cured the Kluger problem articulated in Overland. Indeed, we agree with the Second District's conclusion that the curative language did render the construction statute of repose valid in all respects:

> The legislature has the last word on declarations of public policy. VanBibber v. Hartford Accident & Indemnity Insurance Co., 439 So.2d 880 (Fla. 1983). The courts are bound to give great weight to legislative determinations of fact. Miami Home Milk Producers Association v. Milk Control Board, 124 Fla. 797, 169 So. 541 (1936) . . .. In enacting the preamble to the new section 95.11(3)(c), we believe the legislature has met the requirements of Overland Construction Co., thereby sustaining the validity of the statute. Cf. Rotwein v. Gersten, 160 Fla. 736, 36 So.2d 419 (1948) (court deferred to legislative declaration of policy in upholding statute which abolished the cause of action for alienation of affection).

American Liberty Insurance Co. v. West and Conyers, 491 So.2d 573, 575 (Fla. 2d DCA 1986).

The Fourth District, in Carr, reasoned that if the Perez court had found that the products liability statute of repose governed the cause of action, it would have held the statute unconstitutional as applied. This may have been so, since Perez was decided subsequent to Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980) and prior to Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). The Pullum court explicitly receded from Battilla, holding that the products liability statute of repose could bar claims arising after the twelve-year period. In essence the Pullum court, following Justice MacDonald's Battilla dissent, held that the products liability statute satisfied the Kluger standard. It was not necessary for the Perez court to rule on the ultimate issues, due to deficiencies in the record which required remand. Its comments as to possible application of the two statutes are in no way tantamount to a finding that a statute absolutely barring certain causes of action is constitutionally foreclosed. Pullum made clear that such a statute can pass constitutional muster.

Plaintiffs argue vigorously that Pullum lends no support to our argument that the medical malpractice repose provision is valid, because Pullum involved the products liability statute of repose. Anomolously, plaintiffs then invoke Diamond v. E. R. Squibb & Son, Inc., 397 So.2d 671 (Fla. 1981). Diamond offers no solace to plaintiffs. The rule from that case is quite clearly limited to latent injuries--i.e., those which

are both unknown and unknowable because they have not yet progressed to the point that they can be diagnosed. The Diamond plaintiff's precancerous condition--allegedly the result of in utero ingestion of DES--did not manifest itself until puberty. The supreme court held that the products liability statute of repose did not bar the claim on the rationale that "[T]he legislature, no doubt, did not contemplate the application of this statute to the facts in Diamond." Pullum, 476 So.2d at 659.

The Fourth District properly deemed Diamond a narrow exception to the statute of repose's overall validity. This was certainly the message of the Pullum court. Diamond does not create a doctrine with broad implications. It is confined to the factual context of a latent injury, and does not avail plaintiffs sub judice.

Moreover, the rationale employed by the Pullum court to justify the Diamond exception simply does not obtain here. It is evident from the wording of section 95.11(4)(b) that the legislature was acutely aware of, and carefully considered, problems of discovering medical malpractice causes of action. It expressly authorized tolling of the ordinary, two-year statute of limitations to accommodate the interests of claimants. Just as emphatically, it declared seven years to be an outer limit on that period of time.

Phelan v. Hanft, 471 So.2d 648 (Fla. 3d DCA 1985), certified by the Fourth District to be in conflict with its holding in Carr, did not involve the ultimate, seven-year repose

provision of 95.11(4)(b), Florida Statutes (1975). At issue was the four-year period, which operates as an absolute cut-off point unless fraud is alleged. Reviewing a motion for summary judgment for the defendant, the court held first that defendant did not conclusively prove that plaintiff knew or should have known of her claim within four years. If she did not, the court held that the four-year statute of repose provision could not validly be applied to her claim. Noting that the rule invalidating repose provisions as a bar to late-arising claims arose in the construction and product liability cases, the court held it applied equally to medical malpractice cases and reversed the judgment.

The Phelan decision predated Pullum, which case renders the Phelan court's analysis invalid. Plaintiffs protest that defendants improperly attempt to give Pullum undue weight outside the products liability context in which it was decided. Phelan, however, clearly relied on the older cases and it is evident that its vitality is no greater than theirs.

Pullum heralded a recognition by this court as to the scope, and the exclusive nature of, the legislature's prerogative to define causes of action. That the legislature intended to bar certain suits from being brought is clear. The harsh effect that may obtain in a small number of cases does not warrant a finding that the legislature has acted impermissibly.

D. <u>Plaintiffs' Conclusory Allegations of Fraud Invoke No Special Equities</u>.

Plaintiffs are of the mind that the mere incantation of the words "fraudulent concealment" entitle them to avoid the timeliness requirement of the statute of repose. This position should not engender extraordinary sympathy from the court.

In the first place, plaintiffs' allegations are entirely insufficient. Their fraud claim consists, in its entirety, of a statement that

> [D]efendants, their employees, agents, and officers and/or servants knew or should have known that negligent treatment had been delivered and fraudulently concealed from Ellen M. Carr the facts and circumstances surrounding the negligent treatment rendered to her during her prenatal and obstetrical care as well as the care rendered to her son during birth and in the neonatal period.

(R.12,13) It is axiomatic that, in addition to alleging ultimate facts, a complaint that includes fraud allegations must be pled with special particularity. Florida Rules of Civil Procedure 1.120(b). Plaintiffs allege no specific facts supporting their contention that they could not have learned of their claim in the first seven years of the child's life. Undisputedly, the child's condition was known from the time of birth. This distinguishes the case from <u>Moore v. Morris</u>, 475 So.2d 666 (Fla. 1985), in which the child's distress at birth appeared temporary and the actual injury was not capable of clinical diagnosis until after the ordinary, two-year limitation period passed. Plaintiffs plead no ultimate facts supporting their contention that facts were intentionally withheld, and

they plead no triggering event by which they became apprised of their alleged claim ten years after the birth.[2]

Even in cases brought timely, the pleading burden imposed on similarly situated claimants should be very stringent in light of the countervailing interests at stake. Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976) makes clear that a physician's duty to disclose is limited to those situations in which he can judge the exact cause of an injury or condition. Id. at 39. To be actionable fraud, a physician in possession of such knowledge must have "actively concealed [it] to prevent inquiry or elude investigation or mislead a person who could claim a cause of action . . .." Id. This is a strict standard, as indeed it should be. It is not enough for plaintiffs to plead boilerplate language unsubstantiated by ultimate facts.

The skimpiness of plaintiffs' allegations should impress upon the court the burden it will impose on physicians if it strikes that part of the statute which sweeps asserted frauds within the scope of the seven-year limit. Cases in which fraud is actually proven will undoubtedly be few and far between. Plaintiffs argue this as a factor outweighing the legislature's policy statement. If fraud allegations are recognized as an exception to the seven-year limit, however,

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[2]The transcript of the hearing on defendants' motion to dismiss reveals that plaintiffs' counsel acceded to the ruling of dismissal without requesting any opportunity to amend. They are thus foreclosed from doing so here. See, e.g., Hohrenberg v. Kirstein, 349 So.2d 765 (Fla. 3d DCA 1977).

physicians can expect to see a proliferation of suits which include this element.

Just as every products liability plaintiff jeopardized by <u>Pullum</u> has tried to fit within the <u>Diamond</u> exception, every stale medical malpractice claim could survive the dismissal stage were a judicially-created exception to the repose provision created. This would be particularly true if pleadings as conclusory and simplistic as plaintiffs' were deemed legally sufficient.

It does not offend public policy to limit the time within which fraud can be discovered, and pursued, in the medical malpractice context. Even in the context of ordinary fraud actions, the statute of limitations is phrased in objective terms: it runs from when someone knew or should have known of the fraud. Florida Statutes section 95.11(3)(1)(1985). It is not a subjective standard and, as has been repeatedly pointed out in <u>Nardone</u> and other cases, "mere ignorance of the facts which constitute the cause of action will not postpone the operation of the statute of limitations." 333 So.2d at 34. In the case of the medical malpractice statute of repose, the legislature has made a policy determination that seven years is a reasonable time within which alleged victims of medical malpractice and fraud can discover their claims. It is not for this court to question the wisdom of this determination.

Cutting off all liability at seven years permits physicians to avoid defending stale malpractice claims and stale

fraud claims. Both causes of actions are torts; it may be as difficult to disprove a fraud claim seven years following treatment as it is to defend against the malpractice allegations. It is difficult to conceive of a situation in which a truly motivated plaintiff could not learn of--or at least attain a reasonable suspicion of--fraud within a seven-year period. The legislature no doubt weighed this consideration when it set a seven-year limitation. After seven years, there is an increased likelihood that fraud allegations are mere ruses to prosecute a stale claim.

Finally, plaintiffs and their amicus argue that the doctor defendants should be equitably estopped from invoking the statute of repose. They cite no authority, and indeed there is none, for the proposition that a defendant cannot invoke a valid, jurisdictional statute as grounds for dismissal of a complaint. Assuming the provision is valid, defendants and all other physicians have every right to rely on it.

CONCLUSION

Although plaintiffs guise their request as one to have section 95.11(4)(b) declared unconstitutional as applied, granting the relief they seek would in fact require the court to find it unconstitutional on its face. If the statute cannot withstand plaintiff's challenge, then it would not pass muster under any circumstances. Plaintiffs effectively seek a judicial repeal of the seven-year repose provision. This is particularly

evident in the brief filed by amicus curiae, which baldly proposes a new, two-years from date of discovery standard. (Brief of Amicus Curiae, The Academy of Florida Trial Lawyers (AFTL) Supporting Position of Petitioner at 16.)

The court should decline plaintiffs' invitation. The subject statute was passed with a purpose, and based on findings, that satisfy Kluger v. White, 281 So.2d 1, 4 (Fla. 1973). Plaintiffs' conclusory allegations should not permit them to circumvent the statute of repose so as to prosecute a claim involving the birth of a child now ten years old.

The opinion of the District Court of Appeal, Fourth District, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents, Lauderdale Gynecologic Associates, Robert Grenitz, M.D. and Joseph Raziano, M.D.'s Answer Brief on the Merits was mailed this 20th day of July, 1987, to: LAURA S. ROTSTEIN, ESQ., Stanley M. Rosenblatt, P.A., Attorneys for Petitioners, 11th and 12th Floor, Concord Building, 66 West Flagler Street, Miami, Florida, 33130; STEVEN R. BERGER, ESQ., 8525 Southwest 92nd Street, Miami, Florida, 33156; JOHN W. THORNTON, ESQ., Thornton & Hinshaw Culbertson, 19 West Flagler Street, Suite 720, Miami, Florida, 33130; and to JOEL S. CRONIN, ESQ., Cone, Wagner, Nugent, Johnson, Roth & Romano, P.A., Attorneys for Amicus Curiae , Academy of Florida Trial Lawyers, Post Office Box 3466, West Palm Beach, Florida, 33402.

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