IN THE SUPREME COURT OF FLORIDA

Case No.: 70,545

ELLEN M. CARR, et al.,

Petitioner,

vs.

BROWARD COUNTY, ETC., et al.,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT, JAMES WEAVER, M.D.

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PREFACE

The petitioners, Ellem M. Carr and Gerow F. Carr, are referred to by name or as petitioners. The respondent, James Weaver, M.D., is referred to by name or as respondent.

References to the record are referred to by the letter R and a page number. References to the petitioners' appendix are referred to by the letter A and a page number.

All emphasis is supplied unless otherwise indicated.

STATEMENT OF CASE AND FACTS

James Weaver, M.D., accepts petitioners' statement of the case and facts.

JURISDICTION

The Fourth District Court of Appeal certified that its decision in this case, finding that section 95.11(4)(b) Florida Statutes (1975) is constitutional even when it bars a cause of action before it has accrued, conflicts with the decision rendered in Phelan v. Hanft, 471 So.2d 648 (Fla. 3rd DCA 1985) appeal dismissed, 488 So.2d 531 (Fla. 1986). The apparent conflict is based on the Third District's alternative ruling that if section 95.11(4)(b) barred an action before it accrued, it would unconstitutionally deny access to the courts. This court, in dismissing the appeal in Phelan, held that the district court, by ruling in the alternative and remanding for a factual determination, did not declare a state statute invalid for purposes of appellate jurisdiction under article V, section 3(b)(3), Florida Constitution.

The respondent, James Weaver, M.D., submits that the Third District's alternative ruling in Phelan also did not declare a state statute invalid for purposes of conflict jurisdiction under article V, section 3(b)(4). Therefore, there is no conflict of decisions and James Weaver, M.D., respectfully requests that review be denied.

SUMMARY OF THE ARGUMENT

This court's decision in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), appeal dismissed, ___U.S.___, 106 S. Ct. 1626, 90 L. Ed.2d 174 (1986) overruled earlier precedent invalidating statute of repose and established a new or modified standard for reviewing those statutes under article I, section 21 of the Florida Constitution. Because there are rational and legitimate bases for enacting section 95.11(4)(b), Florida Statutes (1975), that medical malpractice statute of repose is constitutional and bars the Carr's action in this case, which was instituted some ten years after the incident at issue.

Even if the standard of review established in Kluger v. White, 281 So.2d 1 (Fla. 1983) has survived Pullum, the enactment of section 95.11(4)(b) meets that test. The preamble to Ch. 75-9, §7, Laws of Florida clearly establishes an overriding public necessity for enacting the statute of repose; that is, a medical malpractice insurance and health care cost and availability crisis. Furthermore, the statute of repose was the only means of limiting health care providers' perpetual exposure to laibility, a step necessary to controlling medical malpractice insurance premiums.

Finally, both the engrafting of a tolling provision on the statute of repose for any period of fraudulent concealment and the application of the doctrine of equitable estoppel to pre-

vent raising the statute as a defense would defeat the plain language of the statute and encroach on the legislature's policy making function. The legislature specifically contemplated circumstances of fraud, concealment, and misrepresentation. After weighing the interests of litigants and the public, that branch decided, as a matter of policy, that even where fraud, concealment or misrepresentation occurred, a medical malpractice plaintiff must bring suit within seven years. The plain language and intent of the statute should be enforced.

ARGUMENT

(I) THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN FINDING THAT SECTION 95.11(4)(b) FLORIDA STATUTES (1975) CONSTITUTIONALLY BARS THE CARR'S MEDICAL MALPRACTICE ACTION BECAUSE THIS COURT'S DECISION IN PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla. 1985) APPEAL DISMISSED, U.S. , 106 S. Ct. 1626, 90 L. Ed. 2d 174 (1986) OVERRULED EARLIER PRECEDENT INVALIDATING STATUTES OF REPOSE AND UPHELD THE VALIDITY OF LEGISLATIVE DETERMINATIONS OF THE NEED TO RESTRICT PARTICULAR CAUSES OF ACTION.

(A) The Statute of Repose in Section 95.11(4)(b) Florida Statutes (1975).

Section 95.11(4)(b) Florida Statutes (1975), provides that:

> (b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occured 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 .... In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of facts prevented discovery of the injury within the 4-year period, the period of limitations is extended 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred.

The emphasized language, which creates a seven-year statute of repose, was added to the statute by Ch. 75-9, §7, Laws of Florida. A statute of repose, as distinguished from a statute of limitations, terminates a cause of action after a specified period of time measured from a particular event. In this case,

pursuant to section 95.11(4)(b), the period of time is seven years and the measuring event is the incident allegedly giving rise to the injury. The statute of repose has a substantive aspect in that it defines the life of a medical malpractice cause of action. Once seven years passes from the measuring event, no cause of action exists. There may be an injury in fact, but that injury is not legally cognizable in the sense that no remedy is afforded because the law does not recognize the cause of action as existing. See, Lamb v. Volkswagenwerk A.G., 631 F. Supp. 1144, 1147 (S.D. Fla. 1986); Dunn v. Felt, 379 A 2d 1140, 1141 (Del. Super. Ct. 1977) affirmed, 401 A.2d 77 (Del. 1979); Burmaster v. Gravity Drainage District No.2, 366 So.2d 1381, 1387-88 (La. 1978); Anderson v. Fred Wagner and Roy Anderson, Jr., Inc., 402 So.2d 320, 324 (Miss. 1981); Rosenberg v. Town of North Bergen, 293 A 2d 662, 667 (N.J. 1972).

Statutes of repose serve the purposes of encouraging diligent prosecution of claims, preventing the potential for abuse from stale claims, and promoting certainty and finality in liability. See Note, The Constitutionality of Statutes of Repose: Federalism Reigns, 38 Vand. L.R. 627 (1985); McGovern, The Variety Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am. Univ. L.R. 579 (1981). Additionally, statutes of repose are intended to reduce costs to consumers by reducing the liability insurance premiums paid by businesses or professionals. In fact, this was a stated purpose for enactment

of the Florida medical malpractice statute of repose. See Preamble to Ch. 75-9, Laws of Fla.; French, Florida Departs from Tradition: The Legislative Response to the Medical Malpractice Crisis, 6 Fla. St. U. L.R. 423, 431 (1978). It is important to keep the substantive aspect and the purposes of statutes of repose in mind when analyzing this court's treatment of Florida's statutes of repose.

(B) The Effect of Pullum on the Constitutional Analysis of Statutes Of Repose under Art. I, §21 of the Florida Constitution. [1]

This court's Pullum decision overruled precedent addressing the constitutionality of statutes of respose. The decision changed the standard for reviewing such statutes under article I, section 21 and, under the revised standard, section 95.11(4)(b) is constitutional. Even if this court finds that the standard of review under the access to courts provision remains as articulated in Kluger v. White, 281 So.2d 1, 4 (Fla. 1973),

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[1] §21. **Access to courts.**

"The courts shalll be open to every person for redress any injury, and justice shall be administered without sale, denial or delay."
Such constitutional provisions are commonly referred to as "access to court", "open courts" or "right to remedy" provisions.

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then the legislature's enactment of section 95.11(4)(b) meets that test.

(1) The Constitutional History of Statutes of Repose in Florida.

This court's treatment of statutes of repose under article I, section 21 of the Florida Constitution began in Bauld v. J. A. Jones Construction Co., 357 So.2d 401 (Fla. 1978). In Bauld this court ruled that a statute of repose which merely curtails the time in which a cause of action must be brought, as opposed to barring a cause of action before it accrues, is constitutional under article I, section 21. The court wrote that the repose revisions to the statute of limitations "did not abolish any right of access to the courts; they merely laid down conditions upon the exercise of such a right".

One year later, in Overland Construction v. Sirmons, 369 So.2d 572 (Fla. 1979), this court addressed the constitutionality of the application of section 95.11(3)(c), Florida Statutes (1985), the improvement to real property statute of repose. In Overland the plaintiff, Sirmons, was injured after the twelve-year repose period had passed. When the defendant moved for summary judgment on statute of repose grounds the trial court ruled that the statute, as applied to an injury occurring after the repose period had run, was unconstitutional.

This court affirmed, utilizing an "access to courts"

test enunciated in Kluger v. White, 281 So.2d 1, 4 (Fla. 1973). This court found that the legislature had abolished Sirmons' right to sue Overland for his injuries without providing an alternative remedy. The court indicated that under Kluger the legislature could only do so if it showed (1) an overriding public necessity, and (2) the absence of an alternative means of meeting that need. The court found that the legislature had not expressed an overriding public necessity for abolishing causes of action for injuries occurring more than twelve years after the completion of improvements to real property. Therefore, section 95.11(3)(c), as applied to an injury sustained after the repose period had passed, was found unconstitutional. [2]

2

Virtually all of the pre-Pullum statute of repose cases can be explained by the holdings in Bauld and Overland. In those cases in which the cause of action accrued prior to the expiration of the repose period, but where there was a reasonable time to bring suit, the Bauld holding applied and the application of the statute was deemed constitutional. Cates v. Graham, 451 So.2d 475 (Fla. 1984); Purk v. Federal Press Co., 382 So.2d 354 (Fla. 1980); Cobb v. Maldonado, 451 So.2d 482 (Fla. 4th DCA 1984); Carlton v. Ridings, 422 So.2d 1067 (Fla. 1st DCA 1982). Where the cause of action accrued after the repose period had passed, the Overland holding applied and application of the statute was found to be unconstitutional. Overland; Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1984). This court's ruling in Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984), is consistent with the Bauld and Overland holdings, the ultimate result in that case simply turning on which statute would be applied and when the cause of action accrued.

In Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1981) this court applied the Overland holding to section 95.031(2) Florida Statutes, the product liability statute of repose. The court, in a two paragraph opinion, and on the authority of Overland Construction, reversed an order barring a product liability action. Justice McDonald dissented. Referring to the statute as "restrict[ing] actions against a manufacturer to twelve years from the date of sale of the product", Justice McDonald perceived a "rational and legitimate basis" for curtailing the perpetual and extended liability of manufacturers.

It is Justice McDonald's dissent which this court adopted in Pullum when receding from Battilla. In Pullum the plaintiff, Richard Pullum, was injured approximately nineteen months before the expiration of the twelve-year repose period while operating a press brake machine. He filed suit two years after the repose period expired, but within the four-year statute of limitations. The trial court granted summary judgment for the defendant based upon the statute of repose. [3]

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Under pre-Pullum law, application of the repose provision in such a case would not implicate article I, section 21 because application would only result in shortening the time within which suit need be brought. Therefore, the Bauld holding would apply and the repose provision would constitutionally bar the suit.

Mr. Pullum argued on appeal that section 95.031(2), as "amended" by this court's ruling in Battilla, violated his right to equal protection of the laws. Under Battilla a person injured more than twelve years after delivery of a completed product to its original purchaser had a full four years in which to sue because this court had declared application of the repose provision to such an individual a violation of article I, section 21. In view of that holding, Pullum argued that the statute, as interpreted, irrationally applied to a limited class of persons; that is, those persons, like Pullum, injured between eight and twelve years after delivery of the product. Those persons would have less than four years to sue.

This court eliminated the premise of Pullum's equal protection argument by receding from Battilla and adopting Justice McDonald's dissent in Battilla. This court held 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 twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing a product."

It is the respondent, James Weaver, M.D.'s position, that the Pullum case, besides receding from Battilla , overruled this court's holding in Overland Construction and receded from the Kluger analysis of statutes of repose under article I, section 21. [4]

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The petitioners argue under point II of their brief that

In Overland Construction, this court found the improvement to real property statute of repose unconstitutional under article I, section 21. This court utilized the test announced in Kluger and concluded that the legislature had failed to meet the test in enacting the statute of repose by failing to show an overriding public necessity.

In Battilla, this court found, on the authority of Overland Construction, that the product liability statute of repose was unconstitutional as applied to a cause of action which

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Pullum provides no precedent for a rule that a statute of repose constitutionally bars a cause of action accruing after the repose period expires. That position is incredulous and would mean that the Pullum decision did not recede from Battilla, which it clearly and expressly did. While the facts of Pullum would have been controlled by Bauld under pre-Pullum law, the legal holding of Pullum, receding from Batilla, which was controlled by Overland Construction, was that the product liability statute of repose could constitutionally bar both an action which accrued prior to the running of the repose period and one which accrued after the running of the period. See, Home Insurance Co. v. Advance Machine Co., 500 So.2d 664, 666 (Fla. 1st DCA 1986); Small v. Magara Machine & Tool Works, 502 So.2d 943 (Fla. 2d DCA 1987).

The petitioners also assert that their case is like that in Diamond v. E. R. Squibb & Sons, Inc., 397 So.2d 671(Fla. 1981). If Diamond did survive Pullum, which the footnote in the Pullum decision suggests, that exception does not control this case. The Diamond exception is limited to a situation in which the injury occurs during the repose period but is both undiscovered and undiscoverable until after the repose period. Here the injury was immediately apparent and the plaintiff's had seven years to discover the causes or that the cause had been fraudulently concealed.

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accrued after the repose period had expired. The clear implication of the ruling was that the legislature, in enacting section 95.031(2), again failed to meet the Kluger test of showing an overriding public necessity and the absence of any alternative to meet that necessity. That implication was, however, demolished by this court's holding in Pullum.

The effect of the Pullum decision on the constitutional analysis of statutes of repose under article 1, section 21 is either (1) that article 1, section 21 and the Kluger test do not apply because the repose provisions do not "abolish" causes of action; or (2) the Kluger test has been modified by the adoption in Pullum of Justice McDonald's dissent in Battilla.

(2) The Applicability Of Art. I, §21 to Statutes Of Repose after Pullum.

The finding of unconstitutionality in the Overland Construction case required, as an initial proposition under the Kluger test, a finding that the legislature had "abolished" Jerry Sirmons cause of action. It is the respondent, James Weaver, M.D.'s, position that by receding from Battilla this court also receded from Overland Construction. In doing so, this court has recognized that statutes of repose do not "abolish" causes of action, but are a valid legislative vehicle restricting, limiting or defining causes of action in order to achieve certain public interests. In fact, Justice McDonald's

dissent in Battilla, relied on by the majority in Pullum, identifies the product liability statute of repose as a statute which "restricts" actions against a manufacturer.

Such a recognition would be consistent with the position taken by numerous courts from other jurisdictions, See Dunn, 379 A 2d at 1141; Burmaster, 366 So.2d at 1387-88; Anderson, 402 So.2d at 324; Rosenberg, 293 A.2d at 667, and would allow the legislature to fulfill its proper role of making policy decisions regarding competing or conflicting interests in society. See Yarbro v. Hilton Hotels Corp., 655 P.2d 822, 826 (Colo. 1982); Freezer Storage Inc. v. Armstrong Cork Co., 476 Pa. 269, 382 A.2d 715, 720-21 (Pa. 1976).

The respondent, James Weaver, M.D., respectfully submits that statutes of repose, including the seven-year medical malpractice repose provision at issue here, do not abolish causes of action. Repose provisions define, restrict or limit causes of action in order to achieve legitimate public purposes, such as the control of health care costs by reduction of medical malpractice insurance premiums. Therefore, the repose provision at issue does not violate article I, section 21 and the Fourth District Court of Appeal's ruling should be affirmed.

(3) A New Post-Pullum Analysis Under Article I, Section 21.

Even if the medical malpractice statute of repose can be construed as "abolishing" a cause of action, it is evident that

the Kluger test under article I, section 21 has been modified by this court's opinion in Pullum.

In Battilla this court found section 95.031(2), Florida Statutes, unconstitutional on the authority of Overland Construction. It is only logical that the court found that the legislature did not satisfy the Kluger test in enacting section 95.031(2), as it had similarly found with regard to section 95.11(3)(c) in Overland Construction.

It is interesting to note that Justice McDonald, in his dissent, did not utilize the Kluger test in taking the position that section 95.031(2) was constitutional. In other words, he did not use the same Kluger analysis utilized by the court in Overland Construction, and distinguish section 95.031(2) from section 95.11(3)(c). Instead, he indicated that because he found a rational and legitimate basis for the legislative restriction on product liability actions the statute was constitutional. A majority of this court adopted that "rational and legitimate" basis test as the standard of review in Pullum. It is that test which now applies to an analysis of statutes of repose under article I, section 21. So long as the abolition of a cause of action has a rational and legitimate basis, it is constitutional under article I, section 21.

This less strict standard is appropriate under our system of government, with its separation of powers. Such a standard allows the legislature to fulfill its policy-making function by

weighing competing interests and enacting laws rationally intended to accomplish particular policy goals. The Florida legislature must be free to abolish causes of action when to do so is a rational means to accomplishing some legitimate public policy. This court allowed such a legislative action in Rotwein v. Gersten, 36 So.2d 419 (Fla. 1948), where the legislature abolished actions for alienation of affection, criminal conversation and breach of contract to marry. In the face of challenges under the state equal protection and access to courts provisions and the state and federal due process clauses, the legislation was upheld as a valid exercise of legislative authority. This court stated that:

> "Under a democratic society the legislature is the policy making authority and the courts are expected to heed a declaration like this unless clearly shown to have been promulgated without authority to do so."

As previously noted, other jurisdictions have also recognized the importance, or the constitutional necessity, of allowing the legislature to have such freedom. See Yarbro; Freezer Storage. As stated by the Supreme Court of Pennsylvania:

> This Court would encroach on the Legislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the legislature rejects some cause of action currently preferred by the courts. To do so would be to place certain rules of the "common law" and certain non-constitutional decisions of courts above all change except by constitutional amendment. Such a result would offend our notion of the checks and balances between the various branches of

> government, and of the flexibility required for the healthy growth of the law.

Freezer Storage, Inc. v. Armstrong Cork Co., 382 A.2d at 721.

This court found in Pullum that there was a rational and legitimate basis for restricting product liability actions and, therefore, the product liability statute of repose was constitutional. There are also rational and legitimate bases for the medical malpractice statute of repose. It prevents health care providers from having to defend stale claims where evidence or witnesses may be lost. Additionally, it prevents indefinite exposure to liability for medical malpractice, which allows insurance companies to assess risks more accurately and with more certainty. That benefit allows the companies to lower premiums and promotes reduced medical costs for consumers. That was exactly the intent of the legislature in enacting the law, See Preamble to Ch. 75-9 Laws of Fla., and the measure is rationally related to accomplishing those goals. See Kochins v. Linden-Alimak, Inc., 55 U.S.L.W. 2146 (6th Cir. Sept. 21, 1986); Yarbro; Twin Falls Clinic & Hospital Building Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (Idaho 1982); Thornton v. Mono Manufacturing Co., 99 Ill. App. 3d 722 , 59 Ill. Dec. 657, 425 N.E.2d 522 (Ill. App. Ct. 1981); Burmaster; Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (Mass. 1982).

At the very least the Kluger test has been modified to

require, where a cause of action is abolished, either an alternative remedy or the showing (1) of an overriding public necessity and (2) that abolition of the cause of action is rationally related to meeting that public need. This modification eliminates the requirement, under Kluger, of showing the absence of another alternative. What means are used to accomplish a particular public policy is appropriately a legislative concern and, as long as the means is not arbitrary or irrational, it should be sustained. See Berry v. Beech Aircraft, 717 P.2d 670, 680-81 (Utah 1985) (adopting a similar test but finding the product liability statute of repose arbitrary and unreasonable). The rational basis for the statute of repose was presented above. The overriding public necessity is clearly expressed in the preamble to Ch. 75-9 Laws of Florida, notwithstanding the amicus' contention to the contrary.

Accordingly, the respondent, James Weaver, M.D., respectfully requests that the court apply either the new or modified analysis of the medical malpractice statute of repose at issue and affirm the Fourth District Court of Appeal's finding of constitutionality. [5]

(c) The Legislative Enactment of Section 95.011(4)(b) Meets the Kluger Test.

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The petitioners, in footnote 1 of their brief, cited cases from other jurisdictions which have invalidated statutes of repose. First, Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (N.H. 1983) and Austin

Finally, even if this court finds the Kluger test utilized in Overland Construction is still applicable to an analysis of statutes of repose under article I, section 21, the legisla-

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v. Litvak, 682 P.2d 41 (Colo. 1984) are equal protection cases, not access to court cases. Second, Saylor v. Hall, 497 S. W. 2d 218 (Ky. 1973) was overruled on the facts and limited on the law in Carney v. Moody, 646 S.W. 2d 40 (Ky. 1982). Finally, the petitioners failed to note a substantial number of other jurisdictions which have validated statutes of repose against equal protection, due process, and access to court challenges. Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982); Dunn v. Felt, 379 A.2d 1140 (Del. Super. Ct. Del. 1977) Aff'd, 401 A.2d 77 (Del. 1979); Twin Falls Clinic and Hospital Building v. Hamill, 103 Idaho 74, 644 P.2d 341 (Idaho 1982); Thornton v. Mano Manufacturing Co., 99 Ill. App. 3d 722, 54 Ill. Dec. 657, 425 N.E.2d 522 (Ill. App. Ct. 1981); Beecher v. White, 447 N.E.2d 622 (Ind. Ct. App. 1983); Burmaster v. Gravity Drainage District No. 2, 366 So.2d 1381 (La. 1978); Hall v. Fitzgerald, 304 Md. 689, 501 A.2d 27 (Md. 1985); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (Mass. 1982); Anderson v. Fred Wagner and Roy Anderson, Jr. Inc., 402 So.2d 320 (Miss. 1981); Colton v. Dewey, 212 Neb. 126, 321 N.W. 2d 913 (Neb. 1982); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (N.J. 1972); Tetterton v. Long Manufacturing Co., 314 N.C. 44, 332 S.E.2d 67 (N.C. 1985); Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 868 (N.C. 1983); Davis v. Whiting Corp., 660 Or. App. 541, 674 P.2d 1194 (Or. Ct. App.) rev. denied 297 Or. 82, 679 P.2d 1367 (Or. 1984); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 269, 382 A.2d 715 (Pa. 1976); Harmon v. Angus R. Jessup Associates, Inc., 619 S.W.2d 522 (Tenn. 1981); Harrison v. Schrader, 569 S.W.2d 822 (Tenn. 1978). Many of these courts have utilized some form of a rational basis test in doing so. But see Berry v. Beech Aircraft Corp. 717 P.2d 670 (Utah 1985). (also utilizing a rational basis test but reaching a different conclusion).

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tive enactment of section 95.011(4)(b) meets that test.

Under Kluger the legislature can only abolish a right to redress for injury if (1) it provides a reasonable alternative, or (2) it shows both an overriding public necessity and no alternative method of meeting that necessity. Kluger, 281 So.2d at 4.

The Fourth District Court of Appeal found that the preamble to Ch. 75-9 Laws of Florida clearly expressed an overriding public necessity. (A.15). In that preamble the legislature charactized the medical malpractice insurance problem, and the resulting health care problems, as having "reached crisis proportion". Clearly, the contention in the amicus brief that the preamble does not express an overriding public necessity is without merit. What more must the legislature do to meet this test?

Both the petitioners and the Academy of Florida Trial Lawyers suggest that the Fourth District's decision must be reversed because that court failed to find, as required by Kluger, that there was no alternative method of meeting the

established public necessity. [6] It is true that the lower appellate court made no such finding, but this court can itself make that finding.

The legislation was intended to reduce medical malpractice insurance premiums and ensure the availability and affordability of health care. Clearly a rational way of accomplishing that goal was to limit the health care providers' perpetual exposure to liability and thereby make risk and premium assessments more certain. The only way to limit perpetual exposure was to establish some definite point in time at which exposure to liability ends; that is, enact a statute of repose. The legislature found that limiting health care providers exposure to liability was a public necessity. It enacted a statute of repose as the only method of achieving that goal.

Accordingly, even under the Kluger test section 95.011(4)(b) is constitutional and the respondent, James Weaver, M.D., respectfully requests that the decision of the Fourth

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The petitioners appear to suggest that this court, in Aldana v. Holub, 381 So.2d 231 (Fla. 1980), utilized the Kluger test under article I, section 21, and found an overriding public necessity, but still found the medical medication act unconstitutional. In fact, the holding in Aldana was that the act was an unconstitutional denial of due process under the state and federal constitutions. Article I, section 21 impacted the case only by virtue of the court's observation that if extensions of time were permitted under the act, the act would violate the right to speedy access to the courts.

District Court of Appeal be affirmed.

(II) THE REPOSE PERIOD SHOULD NOT BE TOLLED DURING PERIODS OF FRAUDULENT CONCEALMENT AND THE RESPONDENTS SHOULD NOT BE EQUITABLY ESTOPPED TO RAISE THE AFFIRMATIVE DEFENSE OF THE STATUTE OF REPOSE BECAUSE THE LEGISLATURE HAS SPECIFICALLY DEALT WITH THE FRAUD ISSUE IN THE STATUTE AND MADE A CONSCIOUS POLICY CHOICE IN THAT REGARD.

The petitioners and amicus argue either that the repose period should be tolled during any period of fraudulent concealment or that those committing fraud should be equitably estopped from raising the statute of repose as a defense. The respondent, James Weaver, M. D., respectfully submits that the doctrine of equitable estoppel, designed to prevent injustice in instances of fraud and misrepresentation, should not be utilized to defeat the legislature's intent when that body has specifically contemplated and addressed the issues of fraud and misrepresentation and made a conscious policy choice in that regard. The same is true for engrafting a tolling provision onto the repose statute.

In order to demonstrate estoppel it is necessary to show (1) misrepresentation of a material fact, (2) reliance on the representation, and (3) a detrimental change in position. State, Department of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981). The doctrine was invented to prevent wrongs and injustice and guard against fraud. Griffin v. Bolen, 5 So.2d 690, 693 (Fla. 1942).

In enacting section 95.11(4)(b) the legislature clearly contemplated situations in which fraud, concealment or misrepresentation prevented discovery of medical negligence. Undoubtedly, the legislature was aware of the case law cited by petitioners which engrafted tolling provisions onto statutes of limitations or applied the doctrine of equitable estoppel to prevent fraud. Still, the legislature considered the health care and medical malpractice insurance crisis of sufficient weight to override a plaintiff's interest in being free from misrepresentations or the fraudulent concealment of facts. The legislature balanced the interests of medical malpractice litigants and the interests of the public and decided that giving plaintiffs an additional three years to discover any misrepresented or fraudulently concealed facts was fair and appropriate considering the countervailing interests of the defendants and the general public.

That decision was a policy choice appropriately made by the legislature. Rotwein v. Gersten, 36 So.2d 419, 421 (Fla. 1948). It is inappropriate for the courts to question the wisdom or justice of such a legislative policy decision, State v. Yu, 400 So.2d 762 (Fla. 1981); Fraternal Order of Police v. Department of State, 392 So.2d 1296 (Fla. 1980), and such an action would trespass into the decisional process of the legislature, See Carter v. City of Stuart, 468 So.2d 955 (Fla. 1985). Furthermore, engrafting a tolling provision onto section

95.11(4)(b), or applying the doctrine of equitable estoppel, would inappropriately depart from the plain language of the statute and completely defeat the legislature's specific and obviously intended policy choice. Citizens of State v. Public Service Commission, 425 So.2d 534, 541-42 (Fla. 1983).

Accordingly, if this court agrees that section 95.11(4)(b) is constitutional, then the policy choice made regarding fraud, concealment and misrepresentation must stand and the Fourth District Court of Appeal must be affirmed.

CONCLUSION

In enacting section 95.11(4)(b) to restrict medical malpractice causes of action, the Florida legislature has clearly and expressly made a policy choice regarding the rights of litigants in medical malpractice suits, medical malpractice insurance rates and the availability and affordability of health care. Both this court's Pullum decision and caselaw from other jurisdictions support a finding that there is a rational and legitimate basis for the statute of repose in section 95.11(4)(b). Additionally, the legislature utilized the only means of eliminating the perpetual liability of health care providers in order to meet the overriding need of controlling medical malpractice insurance premiums and health care costs. Accordingly, section 95.11(4)(b) is constitutional and, regardless of this court's

opinion regarding the wisdom of the act, should be enforced as plainly written.

Respectfully submitted,

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By: _____
ROBERT J. BURKE, ESQ.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and copy of the foregoing has been hand-delivered this 20th day of July, 1987 to: Laura S. Rotstein, Esq., of Stanley M. Rosenblatt, P.A., Attorneys for Petitioners, 11th and 12th Floors, Concord Building, 66 West Flagler Street, Miami, Florida 33130, Steven R. Berger, Esq., Suite B-5, 8525 S. W. 92nd Street, Miami, Florida 33156, Rex Conrad, Esq., Conrad, Schrer & James, Post Office Box 14723, Fort Lauderdale, Florida 33302 and Robert J. Cousines, Esq., 707 Southeast 3rd Avenue, P.O. Box 14126, Fort Lauderdale, Florida 33301.

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