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.

INITIAL BRIEF OF PETITIONERS

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INTRODUCTION

Pursuant to this Court's briefing schedule, dated May 26, 1987, Petitioners ELLEN M. CARR and GEROW F. CARR, individually, and as parents and natural guardians of JON TIMOTHY CARR, a minor, hereby file their Initial Brief on the merits. Petitioners were plaintiffs in the trial court. Respondents, BROWARD COUNTY d/b/a BROWARD GENERAL MEDICAL CENTER, JAMES WEAVER, M.D., ROBERT GRENITZ, M.D., JOSEPH RAZIANO, M.D., and LAUDERALE GYNECOLOGIC ASSOCIATES, were the defendants.

The symbol "R" will be used to refer to the record on appeal. The symbol "A" will be used to refer to Petitioners' Appendix to this Brief. The parties will be referred to by name or as they stand before this Court. All emphasis has been supplied unless otherwise noted.

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STATEMENT OF THE CASE AND FACTS

This appeal arises out of the dismissal of Petitioners' action for medical malpractice in the trial court.

On September 26, 1985, Petitioners filed a complaint against the Respondents named herein. (R.1-10) This complaint was amended once to properly name a party and to drop a vicarious liability claim. (R.11-23) The amended complaint alleges, in pertinent part:

> 8. On or about March, 1975, Ellen M. Carr came under the care and treatment of Drs. Weaver, Grenitz and Raziano for prenatal care and treatment.
>
> 9. On or about December 20, 1975, at about 10 a.m., Ellen M. Carr was admitted to Broward General, said date being approximately two weeks after her estimated delivery date.
>
> 10. On or about December 20, 1975, at 3:48 p.m., the plaintiff, Ellen M. Carr, delivered the minor plaintiff, Jon Timothy Carr.
>
> 11. At the time of his birth, Jon Timothy Carr suffered complications which resulted in his sustaining severe brain damage.
>
> 12. Ellen M. Carr, through exercise of due diligence, was not able to discover the facts and circumstances surrounding her prenatal and obstetrical care as well as the care rendered to her son during birth and the neonatal period, so that she was unable to discover the negligent care and treatment that had been rendered. Furthermore, the defendants, 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)

On October 16, 1985, Respondents LAUDERDALE GYNECOLOGIC ASSOCIATES and DRS. GRENITZ and RAZIANO filed a motion to dismiss with

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prejudice. (R.24) Respondents asserted that the action was time-barred pursuant to section 95.11(4)(b), Florida Statutes (1975). The motion was granted by the Honorable George A. Shahood of the Seventeenth Judicial Circuit on October 30, 1985. (R.40) The remaining Respondents, DR. WEAVER and BROWARD COUNTY HOSPITAL DISTRICT, filed similar motions to dismiss with prejudice on November 1 and December 13, 1985, respectively. (R.41; 65-6) These motions were also granted by Judge Shahood on November 22, 1985, and January 22, 1986, respectively (R.51; 73).

The Petitioners filed Notice of Appeal from all Orders of dismissal in the Fourth District Court of Appeal. (R.52-3; 63-4; 72) The appeals were consolidated. On April 8, 1987, the Fourth District Court of Appeal rendered its opinion affirming the trial court and certifying conflict with Phelan v. Hanft, 471 So.2d 648 (Fla. 3d DCA 1985). (A) Based upon the Fourth District's conflict with the Third District, Petitioners filed Notice to Invoke Discretionary Jurisdiction on May 6, 1987.

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POINTS ON APPEAL

I.

WHETHER THE SEVEN-YEAR STATUTE OF REPOSE PROVISION OF SECTION 95.11(4)(b), FLORIDA STATUTES (1975), IS UNCONSTITUTIONAL AS APPLIED TO PETITIONERS WHO WERE UNABLE TO DISCOVER THE CAUSE OF THEIR INJURY WITHIN SEVEN YEARS DUE TO RESPONDENTS' FRAUDULENT CONCEALMENT OF THE FACTS

II.

WHETHER THE DECISION OF PULLAM V. CINCINNATI, INC., 476 SO.2D 657 (FLA. 1985), RECEDING FROM BATTILLA V. ALLIS CHALMERS MFG. CO., 392 SO.2D 874 (FLA. 1980) PROVIDES ANY PRECEDENT IN DETERMINING IF A CAUSE OF ACTION THAT ACCRUED AFTER THE PERIOD OF REPOSE IS TIME-BARRED

III.

WHETHER RESPONDENTS ARE EQUITABLY ESTOPPED TO ASSERT THE STATUTE OF REPOSE AS AN AFFIRMATIVE DEFENSE AFTER THEIR FRAUDULENT CONCEALMENT OF THE FACTS WITHIN THE SEVEN-YEAR REPOSE PERIOD

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SUMMARY OF ARGUMENT

On September 26, 1985, Petitioners filed a complaint in the trial court alleging medical negligence on the part of Respondents at or about the time of the birth of JON TIMOTHY CARR on December 20, 1975. Petitioners' Amended Complaint alleges that they were unable to discover the negligent treatment rendered because of the fraudulent concealment by the Respondents. The trial court granted motions to dismiss with prejudice for all defendants based solely on the seven-year statute of repose contained within section 95.11(4)(b), Florida Statutes (1975). In so doing, the trial court violated Petitioners' constitutional right of access to the courts of this State, as provided in Article I, section 21, Florida Constitution.

The constitutional right of Petitioners to seek redress for their injury where they were unable, through due diligence, to discover the true cause of their injuries within the repose period, was declared by this Court in Overland Construction Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979), upon the authority of Kluger v. White, 281 So.2d 1 (Fla. 1973). That right was subsequently recognized by this Court in Diamond v. E. R. Squibb & Sons, Inc., 397 So.2d 671 (Fla. 1981) and by lower appellate courts in Phelan v. Hanft, 471 So.2d 648 (Fla. 3d DCA 1985), appeal dismissed, 488 So.2d 531 (Fla. 1986), and Perez v. Universal Engineering Co., 413 So.2d 75 (Fla. 3d DCA 1982).

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This Court's decision in Pullam v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) cannot stand as an obstacle to Petitioners' cause of action. Unlike the CARRS, Richard Pullum was not denied access to the courts. Unlike the CARRS, Richard Pullum was not prevented from learning the cause of his injury within the period of repose. As a matter of law, Pullum v. Cincinnati, Inc. offers no precedent for determining Petitioners' rights in this cause.

Respondents, who are the cause of Petitioners' injury and the concealment, should not be permitted to assert the statute of repose as a bar to any action against them. Petitioners may not be denied their right to bring a cause of action against the very parties who prevented them from learning the material facts within the period of repose. This Court should quash the decision of the lower tribunal and remand for a full trial on the merits, leaving the question of when the Petitioners discovered or should have discovered the source of their injury for a jury determination.

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ARGUMENT

I.

THE SEVEN-YEAR STATUTE OF REPOSE PROVISION OF SECTION 95.11(4)(b), FLORIDA STATUTES (1975), IS UNCONSTITUTIONAL AS APPLIED TO PETITIONERS WHO WERE UNABLE TO DISCOVER THE CAUSE OF THEIR INJURY WITHIN SEVEN YEARS DUE TO RESPONDENTS' FRAUDULENT CONCEALMENT OF THE FACTS

JON TIMOTHY CARR was born on December 20, 1975; he was severely brain-damaged at birth, or shortly thereafter, as a result of the medical negligence of Respondents. The child's parents, ELLEN M. CARR and GEROW F. CARR, individually and on behalf of the minor, filed suit against Respondents on September 12, 1985. The Complaint declares, at paragraph 12, that ELLEN M. CARR, through the exercise of due diligence, was unable to discover the facts and circumstances surrounding the negligent care and treatment that had been rendered and, furthermore, that Respondents fraudulently concealed those facts and circumstances from ELLEN M. CARR. The trial court dismissed the CARRS' action, with prejudice, on the basis of the Respondents' argument that section 95.11(4)(b), Florida Statutes (1975), relating to the limitations of actions for medical malpractice suits, constitutes a complete bar to the Petitioners' suit. The Fourth District Court of Appeal affirmed the trial court's dismissal.

Section 95.11(4)(b) provides in pertinent part:

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> An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued...In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year period, the period of limitations is extended forward 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.

Section 95.11(4)(b) contains both a statute of limitations and a statute of repose. The former establishes a time limit within which an action must be brought, measured from the time of the accrual of the cause of action; the latter cuts off a right of action after a specified time. Bauld v. J. A. Jones Construction Co., 357 So.2d 401 (Fla. 1978)

The statute of repose for medical negligence has been found to be constitutional where it merely curtails the time in which to file a suit. Thus, a five- to six-month period remaining after discovery of injury is not so short that enforcing the statute would result in a denial of access to the courts. Cates v. Graham, 451 So.2d 475 (Fla. 1984) See also Cobb v. Maldonado, 451 So.2d 482 (Fla. 4th DCA 1984); Carlton v. Ridings, 422 So.2d 1067 (Fla. 1st DCA 1982); and Pisut v. Sichelman, 455 So.2d 620 (Fla. 2d DCA 1986); all of which cases involved a discovery of the injury prior

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to the cut-off date specified in the statute. In Pisut, the court observed, in dictum, that the statute of repose would not be constitutional as applied to a plaintiff who has only one day to file. No case has yet addressed the issue. In the non-medical context, this Court has addressed the validity of the statute of repose where there was no time left to file.

In Overland Construction Company, Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979), this Court declared that a twelve-year statute of repose is unconstitutional insofar as it acts as an absolute bar to lawsuits brought more than twelve years after events connected with construction of improvements to realty. The Overland court declared that the polestar decision for construction of the statute of repose is found in Kluger v. White, 281 So.2d 1, 4 (Fla. 1973), which declares:

> "Where a right of access to the courts for redress for a particular injury has been provided by statutory law pre-dating 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. Sec. 2.01, FSA, 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 no alternative method of meeting such public necessity can be shown."

This Court, in Overland, found no public necessity for abolishing a cause of action for injuries occurring more than twelve years after the completion of improvements to real property; it found no

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alternative means of redress for Jerry Sirmons. Thus, it held that, insofar as section 95.11(3)(c), Florida Statutes (1975) provides an absolute bar to lawsuits brought more than twelve years after events connected with the construction of improvements to real property, it violates Article I, section 21 of the Florida Constitution, which provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Subsequently, in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1981), this Court applied the same rationale to a product liability action against a manufacturer brought more than twelve years after the date of sale. The trial court had ruled that the action was barred by the statute of limitations, section 95.031, Florida Statutes (1975). This Court reversed on the authority of Overland, holding that, as applied to this case, section 95.031(2) unconstitutionally denied plaintiff's access to court under the Florida Constitution. In a dissenting opinion, Justice McDonald disagreed that Overland should apply to manufactured products. He observed that the normal useful life of buildings is greater than that of manufactured products and perceived a rational and legitimate basis for restricting liability to a time commensurate with the normal useful life of manufactured products.

The next year, this Court was faced, once more, with review of a product liability action against a manufacturer in Diamond v. E. R. Squibb & Sons, Inc., 397 So.2d 671 (Fla. 1981). In Diamond,

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the defective product, a drug known as Diethylstilbestrol (DES), produced by Squibb, was ingested during the pregnancy of the plaintiff's mother between 1955 and 1956; however, the drug's effects did not become manifest until after the plaintiff daughter reached puberty. The trial court had entered summary judgment for the drug manufacturer because Nina Diamond's pre-cancerous condition was not discovered until twenty years after the drug was administered to her mother, and eight years after the statute of repose; the District Court of Appeal had affirmed. This Court quashed the District Court's opinion under the principles laid down in Overland. Justice McDonald concurred specially, declaring:

> 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.

In 1984, in Universal Engineering Corp. v. Perez, (Fla. 1984), this Court was once more faced with a question involving the statute of repose in section 95.11(3)(c), the statute involved in Overland. Perez and Rodriguez had filed suit against their employers in 1975, alleging they had contracted manganese poisoning induced by fumes given off during the welding process and had become seriously ill in April, 1972 and October, 1972, respectively, but the cause of their illness was not determined until a much later date. The record was silent as to the exact date on which the men knew or should have reasonably known that their illness was occupationally related. It was undisputed that their

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cause of action accrued after the twelve-year repose period had run in 1970. On that basis, the trial court entered summary judgment for the manufacturer and the employees appealed. The Third District reversed and remanded, finding that section 95.11(3)(c), Florida Statutes (1975) was unconstitutional as applied to appellees' causes of action. The manufacturers then appealed to this Court, which found that the case must be analyzed in terms of the reasoning in Overland Construction Co. v. Sirmons and its clarification of Bauld v. J. A. Jones Construction Co. Appellees acknowledged that their illnesses were manifest in 1972, but alleged that the cause of their illness (occupational disease) was not determined until a later, unspecified date. Unable to determine the date of the accrual of the cause of action and whether the decision was controlled by Overland or by Bauld, this Court declared:

> If the cause of action is found to have accrued before January 1, 1975, the effective date of the statute, the savings clause will be controlled by Bauld. If, however, the cause of action accrued after January 1, 1975, the claim will be barred by the statute. According to Overland, this would result in an unconstitutional denial of access to the courts; thus, the statute would be unconstitutional as applied.

The constitutionality of the statute of repose as applied to a medical malpractice claimant whose cause of action accrues after the repose period has not yet been determined by this Court. In Phelan v. Hanft, 471 So.2d 648 (Fla. 3d DCA 1985), Catherine Phelan appealed to the Third District Court of Appeal from a dismissal of

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her action under section 95.11(4)(b), Florida Statutes (1975). Catherine Phelan's complaint alleged that on August 14, 1976, the defendant Dr. Hanft performed a dilation and curettage upon her, and informed her that her intrauterine device had been spontaneously expelled during an earlier miscarriage. For the next five years, Ms. Phelan experienced physical and emotional problems which led to another physician performing a hysterectomy on her on August 4, 1981. At that time, she learned that the I.U.D. had not been expelled, but instead was lodged in and projecting through the wall of her uterus. Within two years of the discovery, on August 1, 1983, Phalen sued Dr. Hanft. The trial court found as a matter of law that Ms. Phalen knew or should have known of the existence of her cause of action within four years of August 14, 1976, the date of the incident. The Third District found that the issue of when Ms. Phalen knew or should have known of the existence of her cause of action against Hanft was one of fact to be resolved by a jury.

Citing Overland, Diamond and Universal Engineering Corp., the Third District applied to Phelan's medical malpractice case the rule set forth in the context of product liability and construction defects cases, that where a claimant's cause of action is barred by the repose provision at the time it first accrues, and thus no judicial form is available, the statute of repose will be declared invalid as applied to such claim. The Third District reversed and remanded for further proceedings, declaring that if the factfinder concludes that Ms. Phelan did not discover and should not have

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discovered her cause of action until August 4, 1981, then the statute of repose would unconstitutionally deny her access to the courts and could not be used to bar her claim.

On appeal from the decision of the District Court of Appeal declaring the statute invalid as applied to Catherine Phelan, this Court in Hanft v. Phelan dismissed Hanft's appeal for lack of jurisdiction. Therefore, this Court has not yet ruled on the constitutionality of section 95.11(4)(b), Florida Statutes (1975), medical malpractice, as applied to a claimant whose cause of action accrued after the period of repose. The Third District opinion directly and expressly conflicts with the opinion of the Fourth District Court of Appeal in the case at bar. The Third District's opinion should be adopted by this Court for the following reasons.

Both the trial court and the appellate court reviewing the trial court in this cause relied upon this Court's holding in the case of Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). Pullum was an action for products liability, the applicable limitation period prescribed by section 95.11(3). Richard Pullum was injured in April, 1977, while operating a Cincinnati pressbrake machine which had been delivered to the original purchaser in November, 1966. He filed suit against the manufacturer in November, 1980, more than twelve years from the delivery date but within the applicable four-year statute of limitations. The trial court granted summary judgment against Pullum and the district court affirmed. On the authority of Purk v. Federal Press Co., 387 So.2d

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354 (Fla. 1980), the district court held that the reduction by the statute of repose of the time within which Pullum was required to file suit after his accident from four years to one and one half years did not deny him access to the courts or equal protection of the laws. The First District then certified, as a question of great public importance, the question of whether section 95.031(2), Florida Statutes, denies equal protection to appellants who, like Pullum, were injured by products delivered to the original purchaser between eight and twelve years prior to their injury.

The Pullum case is significant because it served as the vehicle for this Court's receding from its earlier opinion in Battilla v. Allis Chalmers Mfg. Co. As previously discussed, Battilla was a product liability action. In 1980, this Court had ruled in Battilla that section 95.031(2) was unconstitutional as applied to the plaintiffs who had brought their suit against a manufacturer more than twelve years after the date of sale. In Pullum, this Court adopted the dissent of Justice McDonald in Battilla. Justice McDonald opined that Overland should be limited in its application to section 95.11(3)(c). He had found a rational distinction between a twelve-year limitation of liability for manufacturers' products and not for liability for improvements to real property. He observed that the law of product liability had actually expanded by virtue of the extension of the privity requirements. Justice McDonald also declared:

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> The legislature, in enacting §95.031(2) has determined that perpetual liability places an undue burden on manufacturers. It has determined that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturers of products. I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers. Because the normal useful life of buildings is obviously greater than most manufactured products, there is a distinction in the categories of liability exposure between those sought to be struck down by §95.11(3)(c), struck down in Overland, and those listed in §95.031

Although this Court has receded from its original holding in Battilla, the principle of the Overland case remains intact. In declaring that Jerry Sirmons could not be prevented from suing Overland Construction Co., this Court recognized both the rationale and the exceptions to the statute of repose. It acknowledged that exposing builders and related professionals to potential liability for an indefinite period of time creates difficulty of proof, among other things. Clearly, an injured plaintiff should not be permitted to sleep carelessly on his legal rights. See Nardone v. Reynolds, 333 So.2d 25 (Fla. 1956) The Pullum decision declares the public necessity for receding from Battilla. The opinion carefully distinguishes this Court's opinion in Diamond v. E. R. Squibb & Sons, Inc., a product liability case in which the product, Diethylstilbestrol (DES), first inflicted injury many years after its sale. Since the drug's effects did not become manifest until after the plaintiff, Nina Diamond, reached puberty, more than twelve years

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after the product had been ingested by her mother, the statute if applied would certainly have been a denial of access to the courts.

The Fourth District opinion of April 8, 1987 in this cause is an omnibus opinion attempting to trace a straight path from Bauld to Pullum. The opinion treats Battilla as an aberration and Diamond as an exception. At page 14 of its opinion, the Court confesses difficulty in fitting the Perez implications into the pattern drawn from the other precedents. The difficulty of the Fourth District in tracing a straight path arises from its excessive reliance upon Pullum and its failure to recognize the enduring significance of Overland. Without declaring statutes of repose unconstitutional, Overland, applying the two-pronged test of Kluger v. White, found that such statutes may not be applied to deny access to the courts in the absence of an overpowering public necessity for the abolishment of such right, and the unavailability of an alternative method of meeting such public necessity.

The Fourth District considered the Kluger test and decided that there exists an overriding public necessity in applying the statute of repose to the CARRS' action. The medical malpractice statute of repose originated in Chapter 75-9, Laws of Florida, the Medical Malpractice Reform Act of 1975. The public necessity for the statutory reform embodied in the Act was expressed by the legislature in the preamble as follows:

> WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few years; and

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> WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
>
> WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire or practice defensive medicine at increased cost to the citizens of Florida; and
>
> WHEREAS, the problem has reached crisis proportion in Florida; NOW THEREFORE...

The initial purpose of this Act was to contain the costs of liability insurance for health care providers; the ultimate purpose of this Act was to protect the public. Cutting off the rights of an injured plaintiff who was unable, through the fraudulent concealment of the tortfeasor, to learn the cause of the injury within the repose period bears no rational relation to the objective of protecting the public's interest in adequate health care. On the contrary, it further injures the already injured plaintiff, who has no other remedy available, while rewarding the tortfeasor who has managed to conceal his negligence for a considerable period of time. In addition, it encourages negligence and may, if not curtailed, cause a further rise in the insurance rates. Thus, the Fourth District overlooked the implications of applying the statute of repose to the CARRS' cause of action. Furthermore, it ignored the fact that "overpowering public necessity" did not prevent this Court from declaring unconstitutional another provision of Chapter 75-9, namely, the Medical Malpractice Mediation Statute. See Aldana v. Holub, 381 So.2d 321 (Fla. 1980)

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The Fourth District also failed to consider the second prong of the Kluger test, that is, the availability of alternative means of meeting the medical malpractice insurance crisis. That there exist alternative means less onerous than the denial of Petitioners' access to the Court (for which there is no alternative remedy) is evidenced by the multitudinous provisions of the Comprehensive Medical Malpractice Reform Act of 1985 and the Tort Reform and Insurance Act of 1986.

Petitioners are entitled to the same relief accorded Nina Diamond. The injury to JON TIMOTHY CARR occurred at or about the time of his birth, which was well within the time frame for the statute of repose; the discovery of the medical negligence that caused his injuries was delayed, through no fault of his own, but rather as a result of a concealment by Respondents. The construction of the statute of repose in Diamond is equally applicable to section 95.11(4)(b). The Fourth District's failure to see the analogy is based on an apparent misunderstanding that the incident which commences the running of the statute of repose is the manifestation of the symptoms of the injury. Admittedly, Nina Diamond's cause of action accrued when the injuries caused by her mother's ingestion of DES were manifested during puberty. JON TIMOTHY CARR's injuries were manifested at or soon after his birth. Nevertheless, the District Court mistakenly restricted the word "injury" in the second part of the statute to "physical injury."

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A cause of action in a medical malpractice action necessarily includes a negligent act, omission or breach of contract, and a resulting injury. The second part of section 95.11(4)(b) speaks of an "injury" not discovered within the four-year period provided in the first part of the statute. "Injury" in part two of the statute refers also to the "incident" in part one. Reading the statute as a whole requires that both incident (or act) and injury must be known and that fraud, concealment or intentional misrepresentation of fact that conceals either will extend the limitations period. See Phillips v. Mease Hospital & Clinic, 445 So.2d 1058 (Fla. 2d DCA 1984) Certainly, the interpretation of the statute offered by the Second District in Phillips is in accord with this Court's holding in Universal Engineering Co. v. Perez that it was necessary for the appellees, whose illness was manifest for several years, to know when they discovered that the cause of their illness was occupational in origin. Such an interpretation does no violence to Diamond. In fact, such an interpretation tends to harmonize this Court's holding in Diamond with Universal Engineering and with Phelan, as well as the case at bar.

Petitioners have not slept carelessly on their rights. Although they became aware that JON TIMOTHY CARR suffered from brain damage shortly after the child's birth, in 1975, they did not become aware of the cause of his injury until after the seven-year period specified in section 95.11(4)(b) as the ultimate period of repose in medical malpractice actions. The situation is directly analogous to that of appellant Diamond and, potentially, of appellants Phelan and

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appellee Perez. In his dissent from the original Battilla opinion, Justice McDonald observed that the normal useful life of buildings is greater than most manufactured products, thus there is a valid distinction in the categories of liability exposure established by the legislature. JON TIMOTHY CARR has had no useful life; he will have none. The manufacturers of defective products have no fiduciary duty to their customers as do doctors to their patients.

There is no "overwhelming public necessity" to protect from uncertainty a medical doctor or hospital that, through fraud, concealment or misrepresentation, has prevented Petitioners from learning of the cause of their injury until after the statute of repose has run. There are alternative means of curbing the cost of medical liability insurance, but there is no viable alternative to an action for damages by Petitioners. Article I, section 21 has appeared in every revision of the Florida Constitution since 1838, has no counterpart in the Federal Constitution and derives its scope and meaning solely from Florida case law.[1] Overland Construction

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1 Although the question of the constitutionality of §95.11(4)(b), Fla. Stat. (1975), as applied to Petitioners can and should be determined by Florida law, it is instructive to note that other jurisdictions have found similar statutes of repose to be unconstitutional where they act as a bar to an action before it has accrued. See, e.g., Kenyon v. Hammer, 688 P.2d 961 (Ariz. 1984); Nelson v. Kursen, 678 S.W.2d (Tex. 1984); Austin v. Litrak, 682 P.2d 41 (Colo. 1984); Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983); Kennedy v. Cumberland Engineering Co, Inc., 471 A.2d 195 (R.I. 1984); Daugaard v. Baltic Co-op Building Assoc., 349 N.W.2d 419 (S.D. 1984); Langford v. Sullivan, Long & Hagerty, 416 So.2d 996 (Ala. 1982); and Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973).

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Company at 573. Given the rationale, and the public policy of the applicable statute, as expresssed in Florida case law, it is clear that Petitioners, who alleged in paragraph 12 of their Complaint, that they were unable, with due diligence and because of the fraudulent concealment of the Respondents, to learn of the cause of injury prior to the expiration of the seven-year period of repose, should not be barred from bringing their action. The issue of when Petitioners knew, or with the exercise of reasonable diligence should have known, of the existence of their cause of action against Respondents is one of fact which must be resolved by the factfinder. See Phelan v. Hanft

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II.

THE DECISION OF PULLAM V. CINCINNATI, INC., 476 SO.2D 657 (FLA. 1985), RECEDING FROM BATTILLA V. ALLIS CHALMERS MFG. CO., 392 SO.2D 874 (FLA. 1980) PROVIDES NO PRECEDENT IN DETERMINING IF A CAUSE OF ACTION THAT ACCRUED AFTER THE PERIOD OF REPOSE IS TIME-BARRED

In determining that Petitioners' right of access to the courts was time-barred, the Fourth District ignored the continuing validity of Overland and placed excessive reliance on this Court's opinion in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). Pullum should not stand as an obstacle to Petitioners' maintaining their cause of action against Respondents. Richard Pullum was injured in April, 1977 by a Cincinnati brakepress machine that had been delivered to the original purchaser in November, 1966. At the time of Pullum's injury, the statute of repose, section 95.031(2), provided that actions for product liability must be begun within twelve years after the date of the completed product to its original purchaser. Pullum filed suit against Cincinnati in November, 1980, more than twelve years from the delivery date. Thus, his case was controlled by Bauld and not by Overland. Unlike the CARRS', Richard Pullum was not denied access to the courts of this State. Unlike the CARRS', Richard Pullum was not prevented from learning the cause of his injury within the period of repose. As a matter of law, Pullum v. Cincinnati, Inc. offers no precedent for determining Petitioners' rights in this cause.

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Richard Pullum had raised an equal protection argument in the First District Court of Appeal. The question was certified to this Court as being one of great public importance. This Court subsequently determined that Pullum had been denied equal protection and receded from its prior opinion in Battilla. Given the fact that Pullum had not been denied his day in court, it was inappropriate for the First District to certify the question. It is a basic rule of construction, stated many times by this Court, that courts should not pass upon the constitutionality of a statute if the case may be effectively disposed of on other grounds. Singletary v. State, 322 So.2d 551 (Fla. 1975). The Pullum case was properly decided under Bauld. The constitutional question was beyond the scope of an appellate court. In deference to the First District, this Court accepted jurisdiction and ruled on the merits. As a result, Pullum has been used, by the Fourth District in the case at bar, and by other district courts as well, as precedent in determining the constitutional rights of parties who are not similarly situated.

Richard Pullum was not denied access to the courts. Instead of granting Pullum relief to which he was not entitled, this Court receded from its earlier opinion in Battilla v. Allis Chalmers Mfg. Co. This Court's opinion perceived an overwhelming public necessity for imposing a strict bar to actions in product liability cases brought after the repose period had run. It is axiomatic that the legislature declares public policy of this State by means of a statute and the provisions of that statute control unless they are

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shown, by the courts, to violate organic law. See, e.g., Steigerwalt v. City of St. Petersburg, 316 So.2d 554 (Fla. 1975). The statute of repose involved in both Pullum and Battilla was promulgated in Chapter 74-382, Laws of Florida. In Battilla, this Court held that the statute was unconstitutional as applied to cases in which injury was sustained more than twelve years after delivery to the initial purchaser. The legislature made no attempt to reenact section 95.031(2), Florida Statutes. As this Court has held, the failure of the legislature to amend a statute that has been construed in a particular manner may amount to a legislative acceptance or approval of the construction. White v. Johnson, 59 So.2d 532 (Fla. 1952). Clearly, the inaction on the part of the legislature in response to the Battilla decision expressed the legislative belief that there was no requisite compelling public necessity for a statute of repose in product liability actions and, further, evidenced the legislature's acceptance of this Court's holding that persons injured after twelve years from the date of the delivery of the product to the initial purchaser should not be barred from filing suit.

In contrast to the legislative inaction that followed the Battilla decision, this Court's decision in Pullum brought a swift reaction. The Pullum decision became final on November 4, 1985. The legislature immediately enacted Chapter 86-272, section 2, Laws of Florida, repealing outright the twelve-year statute of repose for product liability actions. This legislative pronouncement unequivocally demonstrated the intent of the legislature that the

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statute of repose should not be revived. This intent is further illustrated by the enacting of section 3 of Chapter 86-272, Laws of Florida, which mandates that the repeal of the statute of repose take effect immediately (i.e., July 1, 1986), whereas the remainder of the Chapter became effective as of October 1, 1986. Thus, it is clear that the legislature of this State did not recognize the "overwhelming public necessity" declared in the Pullum decision. Since Pullum was not denied access to the courts and since the rationale for receding from Battilla has been negated by the legislature, there remains no continuing validity to applying Pullum to causes of action accruing after the period of repose. Certainly, the decision in Pullum should not bar Petitioners, whose cause of action accrued after the repose period, from maintaining their action. This Court has already found that Chapter 75-9, enacted in 1975, is unconstitutional when its application denies an injured plaintiff access to the courts of this State. See Aldana v. Holub. The time has come for this Court to recede from Pullum and to declare that section 95.11(4)(b) is likewise unconstitutional in denying Petitioners their access to the courts.

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III.

RESPONDENTS ARE EQUITABLY ESTOPPED TO ASSERT THE STATUTE OF REPOSE AS AN AFFIRMATIVE DEFENSE AFTER THEIR FRAUDULENT CONCEALMENT OF THE FACTS WITHIN THE SEVEN-YEAR REPOSE PERIOD

The Fourth District recognized the similarity between the situation of the CARRS and that of Ms. Phelan in Phelan v. Hanft. On that basis, the District Court certified the conflict. It is possible, based solely on the similarity between the two cases, to quash the Fourth District's opinion in the case at bar and remand the matter for trial on the merits. Should there be any doubt on that subject, this Court should recognize that there also exists a difference between the two cases. Phelan involves the four-year provision of the statute of repose for medical malpractice actions; the case at bar involves the seven-year provision. The difference is significant. The significance exceeds the fact that the claimant has an additional two years in which to file a claim.

In Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), this Court recognized that the confidential, fiduciary relationship of a physician and patient gives rise to a duty of the physician to disclose to the patient the fact of any injury done to him. Nardone at 37. Failure to disclose, where there exists a duty to do so, constitutes fraudulent concealment sufficient to toll the running of the statute of limitations for medical malpractice. Nardone at 39. Where, as here, the fraudulent concealment extends beyond the period of repose, there must be another remedy.

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Where a son induced his foreign-born and illiterate mother to convey to him certain realty based on non-disclosure of material facts, the conveyance could be canceled and an accounting ordered on the ground of fraudulent non-disclosure by a fiduciary. Soud v. Hike, 56 So.2d 462 (Fla. 1952). And where a partner having exclusive superintendance of partnership accounts purchases partnership property from the other partner, without giving a full account of the state of the partnership, the purchase will be set aside on a showing that the purchase price was inadequate. White v. Walker, 5 Fla. 478 (1854).

Respondents fraudulently concealed from Petitioners the cause of their injury. Respondents were successful in concealing this material fact, which they had a duty to disclose, for more than seven years. If Petitioners' action for medical malpractice is time-barred, and the Respondents are able to prevail, their victory is an enhanced one; their reward is to benefit from tort upon tort. The injustice of the situation is obvious. The doctrine of estoppel was invented to prevent injustice to parties in the position of the Petitioners and to prevent fraud by parties such as Respondents. Applying that doctrine to the facts of this cause, it is clear that the Respondents should be equitably estopped from asserting the statute of repose as a bar to Petitioners' maintaining their action for medical malpractice.

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CONCLUSION

Based upon the foregoing legal argument and citations of authority, Petitioners submit that this Court should quash the decision of the Fourth District Court of Appeal which affirmed the trial court's dismissal of their action for medical malpractice on the grounds that it was time-barred by the applicable statute of repose. This Court should quash the opinion of the District Court on the authority of Overland, Diamond, Universal Engineering Corp. and Phelan v. Hanft. If necessary, this Court should recede from its holding in Pullum v. Cincinnati, a holding which lacks continuing precedential value. In the alternative, this Court should declare that Respondents are equitably estopped from asserting the statute of repose against Petitioners from whom they concealed the fact of their negligence. Principles of justice and equity, as well as the Florida Constitution, require that Petitioners be permitted to seek redress of their injuries in the courts of this State.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioners was mailed this 22nd day of June, 1987, to the following counsel of record: STEVEN R. BERGER, ESQ., Suite B-5, 8525 S.W. 92nd Street, Miami, FL 33156; REX CONRAD, ESQ., Conrad, Scherer & James, Post Office Box 14723, Fort Lauderdale, FL 33302; and JOHN W. THORNTON, ESQ., Thornton & Hinshaw Culbertson, 19 West Flagler Street, Suite 720, Miami, FL 33130.

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