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IN THE SUPREME COURT OF FLORIDA

ARTHUR W. KUSH, M.D.; NORTH BROWARD HOSPITAL DISTRICT, ARTHUR A. MAISLEN, M.D.; JULIET G. HANANIAN, M.D.; PAUL TOCCI; CHARLES G. NORMAN; JERRIE DIANNE GILERT; THE UNIVERSITY OF MIAMI; and PEDRO A. DIAZ, M.D.,

Petitioners,

vs.

CONSOLIDATED CASE NOS. 76,476; 77, 135; 77,192 AND 77,193

BRANDON DAVID LLOYD, a minor child, by and through his parents, ANTHONY D. LLOYD and DIANE S. LLOYD, and ANTHONY D. LLOYD and DIANE S. LLOYD, individually,

Respondents.

ON DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

RESPONDENTS' BRIEF ON THE MERITS

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B. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE SO-CALLED "IMPACT RULE DID NOT PRECLUDE RECOVERY OF DAMAGES FOR MR. AND MRS. LLOYD'S MENTAL ANGUISH IN THEIR "WRONGFUL BIRTH" ACTIONS.

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I.
STATEMENT OF THE CASE AND FACTS

This discretionary review proceeding arises out of a medical malpractice action in which a number of defendants obtained summary final judgments in their favor, on the remarkable ground that the "ultimate repose" provision of the statute of limitations ran upon the plaintiffs' causes of action long before the defendants had even committed the torts for which they were sued. Prior to the entry of these judgments, the trial court had also stricken certain damage claim from the plaintiffs' actions. The District Court's disposition of these various rulings has given rise to three issues on review. These issues arise out of the following factual and procedural backgrounds, which we have elected to restate in brief detail because the various statements of the case and facts provided by the petitioners are sketchy and incomplete.[1/]

On March 5, 1976, Diane Lloyd gave birth to a son, Michael Anthony Lloyd, by her husband Anthony Lloyd, at Broward General Medical Center. Michael was horribly deformed and severely retarded, both mentally and physically. Chromosome studies were done at Broward General Medical Center, and reported back as normal. When Michael was six months old, his pediatrician, Dr. Pedro Diaz, referred the Lloyds to Dr. Arthur Maislen at the University of Miami for further chromosome testing to determine if his abnormalities were a freak accident or the result of an inheritable genetic defect. The purpose of this testing, of course, was to determine whether the Lloyds should ever

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[1/] The factual statements which follow (which we will streamline by eliminating all facts and parties which are not directly relevant to the issues presently before the Court) are taken from the plaintiffs' Fourth Amended Complaint. Because the defendants' motions for summary judgment were bottomed solely upon the legal ground that the statute of repose had run on the plaintiffs' alleged claims, the motions did not challenge the allegations of this complaint. In the interest of economy, and as we did below, we will therefore rely upon those unchallenged allegations here, instead of requiring the Court and the parties to wade through the extensive discovery supporting them in order to verify the accuracy of our factual statements. For the convenience of the Court, copies of both the Fourth Amended Complaint and the District Court's decision are included in the appendix to this brief.

attempt to have additional children -- because to have another child with the same grotesque deformities and deficits would simply be unthinkable.

The chromosome studies, which were to include both karyotyping and fluorescent banding studies, were performed by Dr. Paul Tocci and cytogenetic technologists Jerri Gilbert and Charles Norman, Although both studies were performed, Dr. Maislen apparently received only the karyotyping studies. He reported to Dr. Diaz that they were normal; that the fluorescent banding studies had not yet been received; and that if those studies revealed anything other than normal chromosomes, he would inform Dr. Diaz. At some time thereafter, Dr. Maislen left the University of Miami and was replaced by Dr. Juliet Hananian. Unfortunately, no one ever communicated the results of the fluorescent banding studies to either the Lloyds or Dr. Diaz.

Because he had received no reports of abnormal chromosomes in either the parents or the child, Dr. Diaz assured the Lloyds that Michael's abnormalities were simply a freak accident of nature, rather than the result of an inheritable genetic defect. In addition, he strongly recommended to the Lloyds that the best thing they could do to overcome their heartache at their deformed and helpless child was to have another child. According to a finding of fact contained in the order under review here (which, for purposes of this proceeding at least, there is no need to challenge), the last date upon which any of the persons and institutions named above provided any health care to the Lloyds was December 31, 1978 (R. 1659).

Acting on the advice of Dr. Diaz, the Lloyds began their attempts to have another child in November, 1981. Mrs. Lloyd became pregnant twice during 1982, but both pregnancies resulted in miscarriages. She become pregnant again in the spring of 1983, and Brandon David Lloyd was born on December 24, 1983 -- approximately five years after the last date that the health care services described above were rendered. Tragically, Brandon was born with essentially the same horrible abnormalities that afflicted Michael. Subsequent chromosome testing upon Brandon, which was performed

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by the Fuller Cytogenetics Laboratory in Texas, revealed that he had a 10p trisomy genetic abnormality.

Upon learning this, the Lloyds obtained the raw data from the studies which had previously been performed upon Michael and forwarded it to the Fuller Cytogenetics Lab. The Texas lab reviewed that data and determined that Michael had the same 10p trisomy genetic abnormality -- and that the abnormalities in both children had been inherited from Mrs. Lloyd, who carried the genetic defect. Upon learning this, Mr. and Mrs. Lloyd determined to bring suit against the persons and institutions named above (and others). The Notice of Intent letters required by §768.57, Fla. Stat. (1985), were sent on December 23, 1985, and filed (together with a Complaint) on December 24, 1985 -- within the two-year period commencing on the date of Brandon's birth (R. 1, 1659).

Following extensive procedural skirmishing not relevant here, a Third Amended Complaint was filed.[2] This complaint alleged that Mr. and Mrs. Lloyd had suffered severe mental anguish at the birth of Brandon and extraordinary expenses for his care; that they had submitted to the extensive chromosome testing described above for the singular purpose of avoiding the severe mental anguish and extraordinary expenses which were certain to follow if they had another child like Michael; and that the negligence of the persons and entities named above (among others) had caused the very damage which those defendants had been specifically engaged to prevent. The complaint contained a claim for "wrongful life" on behalf of Brandon, and claims for "wrongful birth on behalf of Mr. and Mrs. Lloyd. The latter claims sought damages for both the expenses required to care for Brandon and for Mr. and Mrs. Lloyd's severe mental anguish.

The defendant, North Broward Hospital District, thereafter filed a motion to "strike" Brandon's claim for "wrongful life" and Mr. and Mrs. Lloyd's claims for damages for mental anguish (R. 333). The trial court obliged by "striking" both aspects of the

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[2] The Third Amended Complaint is in the record of the first appeal taken below, Third DCA case no. 87-2250, at R. 2.

Third Amended Complaint (R. 605).[3] That order was appealed, and the appeal was docketed in the District Court as case no. 87-2250. In the meantime, the plaintiffs had filed a Fourth Amended Complaint, the allegations of which have been described above.

After additional procedural skirmishing not relevant here, Dr. Diaz filed a motion for summary judgment (R. 725). The motion contended that, notwithstanding that Mr. and Mrs. Lloyd's actions for "wrongful birth had been filed within the two-year statute of limitations provided by §95.11(4)(b), Fla. Stat. (1985), the actions had been filed more than four years after Dr. Diaz's alleged negligent acts had been committed -- and they were therefore barred by the four-year "ultimate repose" provision contained in the statute. Similar motions were thereafter filed by Dr. Tocci, Ms. Gilbert, and Mr. Norman (R. 751); by the University of Miami, Dr. Maislen, and Dr. Hananian (R. 758); and by North Broward Hospital District (R. 840).

Mr. and Mrs. Lloyd responded with a memorandum of law which argued two things (R. 789). It argued that the Lloyds' causes of action were not barred by §95.11(4)(b), because the date of the "incident" upon which both the statute of limitations and the statute of repose began to run on their claims for "wrongful birth was the date upon which the defendants had committed a tort against them -- i.e., the date on which Brandon had been born with his genetic abnormalities, not the earlier dates on which the negligent acts had been committed without initial injury. The memo argued alternatively that, if §95.11(4)(b) were to be construed in the manner suggested by the defendants, it would be violative of Article I, §21, of the Florida Constitution.

The trial court thereafter granted the several motions for summary judgment, and entered summary final judgments in favor of Dr. Diaz, Dr. Tocci, Ms. Gilbert, Mr. Norman, the University of Miami, Dr. Maislen, Dr. Hananian, and North Broward

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[3] Mr. and Mrs. Lloyd's claims for extraordinary expenses were not challenged below because recovery of those damages (at least through Brandon's 18th birthday) was clearly authorized in their "wrongful birth actions by *Fassoulas v. Ramey,* 450 So.2d 822 (Fla. 1984).

Hospital District (R. 1659).[4] Those judgments were appealed, and the appeal was docketed in the District Court as case no. 88-1419. On its own motion, the District Court consolidated both appeals for all appellate purposes.

In a unanimous decision, the District Court reversed the defendants' summary final judgments, holding that both the statute of limitations and the repose period contained in §95.11(4)(b) began to run at the same time, on the date of the "incident" -- that is, on the date that the defendants' negligence first caused an injury -- and that the Lloyds' actions were timely filed within two years from that date. The propriety of that ruling, which was certified to the Court as one of great public importance, will be the first issue on review. The District Court also reversed the order striking the Lloyds' claims for mental anguish, holding that the so-called "impact rule" did not bar their recovery (and that the "rule" was satisfied by the facts in any event). The propriety of that ruling, which was also certified to the Court as being in express and direct conflict with a Fifth District decision, will be the second issue on review. Finally, the District Court affirmed the order striking Brandon's claim for "wrongful life," but held that the extraordinary care and maintenance expenses which his parents would incur beyond the age of his majority were recoverable by them in their "wrongful birth actions. The propriety of that ruling will be the third issue on review.

11.
ISSUES PRESENTED FOR REVIEW

A. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT §95.11(4)(b), FLA. STAT. (1985), DID NOT BAR MR. AND MRS. LLOYD'S ACTIONS FOR "WRONGFUL BIRTH" BEFORE THE DEFENDANTS HAD EVEN COMMITTED A TORT AGAINST THEM.

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[4] Because the alleged negligence of Dr. Kush occurred in 1982 and 1983, he was unable to interpose §95.11(4)(b) as a defense, and he remains a defendant in the litigation at the trial court level. He has appeared as a petitioner here (as he appeared below), for the sole purpose of challenging the District Court's ruling on the issue of damages for mental anguish, since that ruling adversely affects his interests in the trial court.

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B. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE SO-CALLED "IMPACT RULE DID NOT PRECLUDE RECOVERY OF DAMAGES FOR MR. AND MRS. LLOYD'S MENTAL ANGUISH IN THEIR "WRONGFUL BIRTH" ACTIONS.

C. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT EXTRAORDINARY CARE AND MAINTENANCE EXPENSES BEYOND THE AGE OF BRANDON'S MAJORITY ARE RECOVERABLE BY MR. AND MRS. LLOYD IN THEIR "WRONGFUL BIRTH" ACTIONS.

111.
SUMMARY OF THE ARGUMENT

Because the defendants have challenged each and every adverse ruling in the District Court's decision (with arguments which make the issues more complex than they should have been), and because we must respond to multiple briefs (totalling nearly 90 pages), our responsive arguments will necessarily be lengthy. Space constraints therefore do not permit a suitable summary of the argument here. Respectfully requesting the Court's indulgence, we turn directly to the merits.

IV.
ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT §95.11(4)(b), FLA. STAT, (1985), DID NOT BAR MR AND MRS, LLOYD'S ACTIONS FOR "WRONGFUL BIRTH" BEFORE THE DEFENDANTS HAD EVEN COMMITTED A TORT AGAINST THEM.

1. Section 95.11(4)(b) was properly read and applied by the District Court; it did not bar Mr. and Mrs. Lloyd's claims.

Although the defendants have called the District Court's decision every hing short of "stupid" here, the District Court's reading of §95.11(4)(b), Fla. Stat. (1985), is both logical and sensible; it carefully tracks the language of the statute itself; and it is perfectly consistent with every decision which this Court has ever rendered on the subject. Before we prove that to the Court, we should establish two brief, unobjec-

tionable predicates for our argument. First, the Lloyds clearly have actions for "wrongful birth" as a result of the defendants' negligence. That aspect of the case was settled by this Court in ***Fassoulas v. Ramey,*** **450** So.2d 822 (Fla. **1984).** Second, we remind the Court that, although the negligent acts allegedly committed by the defendants occurred before December, **1978,** those acts did not initially cause any injury. No injury was caused until the "wrongful birth" occurred -- i. e., when Mrs. Lloyd, acting in reliance upon the defendants' past acts, gave birth to Brandon on December **24,** 1983. On **those** facts, no tort was committed by **the** defendants and no causes of action for "wrongful birth" existed in favor of the Lloyds until December **24,** 1983 -- and that conclusion is simply not debatable here.

The conclusion is not debatable here because the very statute upon which the defendants relied below explicitly defines an "action for medical malpractice . . . as a claim in tort . . . for damages because of the ***death, injury,*** or monetary *loss* to any person arising out of any medical . . . care by any provider of health care." Section **95.11(4)(b),** Fla. Stat. (1985) (emphasis supplied). It clearly follows that, until a death, injury or monetary loss is caused by an act of medical malpractice, no actionable tort has been committed and no action for medical malpractice exists. This conclusion is reinforced by a more general provision of Chapter 95, Fla. Stat., which states that "[a] cause of action accrues when the last element constituting the cause of action occurs." Section **95.031(1),** Fla. Stat. (1985).

These statutory provisions are consistent, of course, with the decades of common law from which they were derived. It has always been the law that an action for negligence requires proof of four elements: (1) a duty (2) negligently breached (3) which causes (4) an injury. ***Lake*** Parker Mall, ***Inc. v.*** *Carson,* 327 So.2d 121 (Fla. 2nd DCA **1976),** ***cert. denied,*** **344 So.2d 323** (Fla. **1977).** See Prosser & Keeton, The Law of ***Torts,*** **§30,** p. **164** (5th Ed. **1984).** As a result, it has always been the law that negligence which does not cause an injury simply does not result in an actionable tort:

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> Even assuming arguendo, that a "wrong" (in the form of negligence) was perpetrated by the defendants on the plaintiff, it is, nonetheless, well-established in the common law that there is no valid cause of action where there is shown to exist, at the very most, a "wrong" without "damage.". . .

McIntyre v. McCloud, **334** So.2d **171, 172** (Fla. 3rd **DCA 1976).** Accord, *Peat, Marwick, Mitchell & Co. v. Lane,* 565 So.2d **1323, 1325** (Fla. **1990**) ("Generally, a cause of action for negligence does not accrue until the existence of a redressable harm or injury . . ."); *Airport Sign Corp. v. Dade County,* 400 So.2d 828, 829 (Fla. 3rd DCA **1981**) ("Until damages are actually incurred, a party cannot state a cause of action . . ."); *Kellermeyer v. Miller,* **427** So.2d **343, 345** (Fla. 1st **DCA 1983**) (". . . an act of negligence alone does not constitute a cause of action in tort without damages."). *See Vilord v. Jenkins,* **226** So.2d **245** (Fla. 2nd DCA **1969**) (action **for** negligent sterilization did not exist until patient became pregnant); *Leenen v. Ruttgers Ocean Beach Lodge, Ltd., 662* F. Supp. **240** (S.D. Fla. **1987**) (action for injury to fetus did not exist until injured child was **born).**[5]

In short, until Brandon was born on December 24, **1983,** the defendants had not even committed an actionable tort against Mr. and Mrs. Lloyd upon which the Lloyds could bring suit, The defendants' position here is therefore bottomed upon the remarkable ground that the "ultimate repose" provision of the statute of limitations ran upon the Lloyds' causes of action long before the defendants had even committed the torts for which they were sued. The defendants cannot legitimately contest this characterization of their position, because they conceded it below -- and because it is simply not debatable here.[6]

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[5] In addition, *see Town of Miami Springs v. Lawrence,* **102** So.2d **143** (Fla. **1958**); *City of Miami v. Brooks,* 70 So.2d **306** (Fla. **1954**); *St. Francis Hospital, Inc. v. Thompson,* **149** Fla. **453, 31** So.2d **710 (Fla. 1947**); *Neff v. General Development Corp.,* **354** So.2d **1275** (Fla. **2nd DCA 1978).**

[6] Nevertheless, one set of defendants has argued in a footnote, with no supporting authority whatsoever, that the Lloyds could have sued them for medical malpractice even before Brandon was born. (Apparently, the trial court entertaining that hypothetical suit could not dismiss it, but would have to hold it in abeyance until such time that the

Instead, the defendants have argued that this ludicrous result, no matter how illogical and unfair it might seem, was mandated by the legislature when it enacted the following statute of limitations for medical malpractice actions in 1975:

> 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.

Section 95.11(4)(b), Fla. Stat. (1985) (emphasis supplied).[7/]

We agree with the defendants that this sentence governs the issue presented here, but we adamantly disagree with the defendants' reading of it. We have emphasized the thrice-repeated word "incident" above, because it is the critical word in the sentence, and its meaning squarely controls this issue on appeal. The defendants read the word "incident" to mean the act of medical malpractice alone, whether it causes an injury or not. It will be our position (with which the Third District agreed) that each time the word "incident" is used in the sentence, it means the same thing; it means (1) an act of medical malpractice (2) which causes (3) an injury -- i. e., a completed tort -- and if we are correct about that, then the Lloyds' actions were timely filed.

a. The decisions construing the word "incident" in the statute of limitations portion of §95.11(4)(b) fully support the District Court's reading of the statute.

Of course, the word "incident" itself is not particularly precise. As a result, its

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Lloyds had a baby, *if* they had a baby, and could then dismiss it only if the baby turned out to be normal.) Given the definition of an "action for medical malpractice" in §95.11(4)(b) and the long line of authority discussed immediately above, this peculiar, unsupported, and clearly erroneous assertion should not detain the Court here for an instant.

[7/] Because this provision was enacted in 1975, it was in existence at the time of Michael's birth as well as Brandon's birth, and it was therefore in existence at all times relevant to this appeal.

meaning has been the subject of extensive litigation and discussion in the decisional law, primarily with respect to its meaning the first two times it appears in the sentence. Most of the decisions address the second repetition of the word "incident," and decide when the respective plaintiffs discovered (or should have discovered) the incident in suit. Since some of those decisions state that the plaintiffs should have discovered the incident in suit when they discovered either the negligent act or the injury, the defendants assume that the word "incident" must mean either the negligent act or the injury, That is not what the cases say, however.

Fairly read, and considered collectively, the cases stand for the following propositions: (1) the word "incident" means an act of medical malpractice which causes an injury; (2) the statute of limitations begins to run upon discovery of the incident; (3) discovery of the incident need not necessarily await discovery of each element of the tort; (4) knowledge of the negligent act which has caused an injury will start the statute of limitations running; (5) when the plaintiff has knowledge of only an injury but the injury is reasonably ambiguous concerning its cause, the statute of limitations begins to run only upon discovery that the ambiguous injury was actually the consequence of a negligent act rather than some non-negligent act or a natural cause; and (6) when the plaintiff has knowledge of an injury which itself gives fair notice that it was the probable consequence of a negligent act, the plaintiff has discovered the incident and the statute of limitations has begun to run. In *no* case has this Court, or any other court, ever held that the word "incident" means the commission of a negligent act alone, where that act has caused no injury. A detailed review of the decisional law will prove each of the foregoing propositions.[8]

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[8] We apologize for the length of what follows. The defendants insist that the District Court was badly confused in its reading of the cases, and we insist that it is the defendants who are confused. Regardless of who is correct about who is confused, the confusion undeniably exists -- and we think the confusion has been caused by the decisional law's somewhat murky efforts to demarcate the two lines of authority represented by propositions (5) and (6) above. The matter is obviously in need of

With respect to the first proposition, we believe it is thoroughly settled that the word "incident" means the completed tort -- i. e., the act, the injury, and the causal connection between the two:

> Discovery of the "incident" giving rise to the cause of action" is the point when the statute begins to run. . . . The term "incident" . . . could not refer solely to the particular medical procedure since that would obviously be "discovered" at the time it was performed, rendering nugatory the additional 2-year period permitted by the statute for discovering the incident. Thus, the term must encompass ***(1) a medical procedure; (2) tortiously performed; (3) which*** injures ***(damages) the patient.*** . . .

Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376, 1379 (Fla. 4th DCA 1984), ***approved in relevant part,*** 487 So.2d 1032 (Fla. 1986) (emphasis supplied).

On discretionary review, this Court ***approved*** the Fourth District's disposition of this issue. Florida ***Patient's Compensation Fund v. Tillman,*** 487 So.2d 1032 (Fla. 1986). The definition of "incident" in *Tillman* was reiterated by the Fourth District in ***Cohen v. Baxt,*** 473 So.2d 1340 (Fla. 4th DCA 1985), ***approved in relevant part,*** 488 So.2d 56 (Ha. 1986). On discretionary review, this Court once again ***approved*** the Fourth District's reiterated disposition of the issue. ***Florida Patient's Compensation Fund v. Cohen,*** 488 So.2d 56 (Fla. 1986). There are numerous additional decisions which define the word "incident" in precisely the same way.[9]

Both *Tillman* and *Cohen* also illustrate another of the propositions which we have

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clarification, and clarification requires detailed review.

[9] ***See, e. g., Williams v. Spiegel,*** 512 So.2d 1080 (Fla. 3rd DCA 1987), ***quashed in*** part ***on other grounds,*** 545 So.2d 1360 (Fla. 1989); ***Jackson v. Lytle,*** 528 So.2d 95 (Fla. 1st DCA 1988); ***Elliot v. Barrow, 526*** So.2d 989 (Ha. 1st DCA), ***review denied, 536*** So.2d 244 (Fla. 1988); Florida ***Patient's Compensation Fund v. Sitomer,*** 524 So.2d 671 (Fla. 4th DCA), ***review dismissed,*** 531 So.2d ***1353*** (Fla. 1988), and quashed ***in part on other grounds, 550*** So.2d 461 (Fla. 1989); ***Scherer v. Schultz,*** 468 So.2d 539 (Fla. 4th DCA 1985). While some of these decisions fail to articulate carefully the difference between our propositions (5) and (6), and may therefore be too broad in announcing that ***discovery*** of the "incident" occurs **only** when all elements of the incident are discovered, their ***definition*** of the word "incident" is not rendered suspect for that reason alone.

set out to prove here. In both *Tillman* and Cohen, the patients sought medical treatment for bad knees, and they came out of the treatment with bad knees. Both clearly knew of their "injuries" at the outset; however, the nature of the injuries was such that the injuries themselves did not necessarily point to malpractice, and neither Mr. Tillman nor Mr. Cohen discovered until much later that their ambiguous injuries were actually "injuries caused by negligence." And because this Court held in both *Tillman* and Cohen that the statute of limitations did not begin to run as a matter of law upon discovery of the "injury," but did properly begin to run as a matter of fact on the subsequent discovery of the larger set of facts constituting the "incident," bath cases clearly demonstrate that the word "incident" means an injury caused by negligence -- rather than a negligent act alone, which has caused no injury.

Of course, both *Tillman* and Cohen simply follow this Court's earlier decision in Moore *v. Morris,* 475 So.2d 666 (Fla. 1985), which makes the point with considerably more clarity. In that case, a baby suffered fetal distress and a severe medical crisis after delivery, resulting in mental retardation and abnormal development thereafter -- all of which was known to the parents. Because the parents knew of the injury, the Third District affirmed the summary judgment entered on the defendant's statute of limitations defense. This Court quashed that decision -- noting, in effect, that not every injury carries with it its own obvious notice of malpractice necessary to start the statute of limitations running upon its infliction:

> There is nothing about these facts which lead conclusively and inescapably to only one conclusion -- that there was negligence or ***injury caused by negligence.*** To the contrary, these facts are totally consistent with a serious or life-threatening situation which arose through natural causes during an operation. Serious medical circumstances arise daily in the practice of medicine and because they are so common in human experience, they cannot, without more, be deemed to include notice of negligence or ***injury caused*** by ***negligence.***

Moore, supra at 668 (emphasis supplied).

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We have emphasized the phrase "injury caused by negligence" for a purpose, and we believe this Court chose the phrase carefully for the same purpose. In our judgment, this passage, with its carefully chosen phraseology, asserts that not every known injury which occurs during medical treatment automatically starts the statute of limitations running -- that only an injury which is obviously an "injury caused by negligence," and which cannot be explained on any other non-negligent or natural ground, is sufficient to put a patient on immediate notice of the "incident" -- i. e., an injury caused by negligence, or a completed tort.

There are numerous other decisions which make essentially the same point: that knowledge of an "injury" which does not itself give fair notice that it was the probable consequence of the negligent act does not automatically start the statute of limitations running -- that, where the "injury" is reasonably ambiguous concerning its cause, the statute of limitations begins to run only upon discovery that the ambiguous "injury" was actually the consequence of a negligent act rather than a non-negligent act or a natural cause. The point is nicely made in Judge Hubbart's opinion in *Almengor v. Dade County,* 359 So.2d 892, 894 (Fla. 3rd DCA 1978) -- which, incidentally, was quoted by this Court with express approval in Moore *v. Morris, supra*:

> . . . There is some evidence in the record that during this time the plaintiff was aware or should have been aware that the baby was born mentally retarded and thereafter showed signs of mental retardation and abnormal development. We do not believe, however, that this evidence put the plaintiff on notice as a matter of law that the baby was injured during birth because such evidence just as reasonably could have meant that the baby had been born with a congenital defect without any birth trauma. See *Salvaggio v. Austin,* 336 So.2d 1282 (Fla. 2d DCA 1976).

As the foregoing passage suggests, the Second District reached essentially the same conclusion in *Salvaggio v. Austin,* 336 So.2d 1282 (Fla. 2nd DCA 1976). In that case, the defendant-surgeon failed to remove a drainage tube from the plaintiffs breast after a mammoplasty, causing an "injury" which she experienced as continuous post-

operative pain. The trial court entered summary judgment on the defendant's statute of limitations defense, ruling that notice of the injury alone started the statute of limitations running against the plaintiff's malpractice claim. On appeal, the district court reversed the defendant's summary judgment, explaining as follows:

> In *Nardone, supra,* the plaintiffs were barred not because of any knowledge of negligence on the part of the physician, but because the condition of the plaintiff child was ***so obvious when he was discharged from the hospital that notice of the consequences was imputed,*** thereby initiating the running of the statute of limitations. . . .
>
> . . . Particularly important for the trial court on remand is the consideration of when Mrs. Salvaggio was aware of or had notice of the physical ailment which is the alleged ***consequence*** of ***the negligent act.*** [Citations omitted]. Since the pain experienced by Salvaggio constitutes a factual question as to whether it was sufficient notice of ***the consequences of the alleged negligence*** of Austin, summary judgment is precluded where such a genuine issue of material fact exists. [Citations omitted].

336 So.2d at 1283-1284 (emphasis supplied). *Salvaggio* was also cited with approval by this Court in Moore *v. Morris,* supra. There are, incidentally, numerous additional decisions which support the sensible distinction which we are attempting to draw here between medical injuries which carry their own notice of malpractice and ambiguous injuries which do not.[10/]

All of which brings us to the decisions upon which the defendants have relied here -- decisions which the defendants assert have ***overruled*** the consistent line of

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[10/] ***See, e.g., Ash v. Stella,*** 457 So.2d 1377 (Fla. 1984); ***Jackson v. Lytle,*** 528 So.2d 95 (Fla. 1st DCA 1988); Elliot *v. Barrow,* 526 So.2d 989 (Fla. 1st DCA), ***review denied, 536*** So.2d 234 (Fla. 1988); ***Sewell v. Flynn,*** 459 So.2d 372 (Fla. 1st DCA 1984), ***review denied,*** **471** So.2d **43** (Fla. 1985); ***Tetstone v. Adams,*** **373** So.2d 362 (Fla. 1st DCA 1979), ***cert. denied,*** 383 So.2d 1189 (Fla. 1980); ***Eland v. Aylward, 373*** So.2d 92 (Fla. 2nd DCA 1979); ***Swagel v. Goldman,*** 393 So.2d ***65*** (Fla. 3rd DCA 1981); ***Schaffer v. Lehrer, 476*** So.2d 781 (Fla. 4th DCA 1985); ***Scherer v. Schultz,*** 468 So.2d 539 (Fla. 4th DCA 1985); ***Brooks v. Cerrato,*** 355 So.2d 119 (Fla. 4th DCA), ***cert. denied,*** 361 So.2d 831 (Fla. 1978). In addition, see footnote 9, ***supra.***

authority discussed above, decisions which the defendants insist require this Court to define the word "incident" to mean the act of medical malpractice alone, whether it causes an injury or not. Mast respectfully, these decisions do no such thing. Although the decisions certainly reach different results than the decisions discussed above, the results are harmonious with the six propositions which we have set out to prove here; and they simply represent the sixth proposition -- that when the plaintiff has knowledge of an injury which itself gives fair notice that it was the probable consequence of a negligent act, the plaintiff has discovered the "incident" (i. e., the completed tort), and the statute of limitations has begun to run.

The leading decision in this line of authority is, of course, Nardone *v. Reynolds,* *333* So.2d *25* (Fla. 1976). In that case, this Court wrote that "the statute of limitations in a malpractice suit commences either when the plaintiff has notice of the negligent act giving rise to the cause of action or when the plaintiff has notice of the physical injury which is the consequence of the negligent act." 333 So.2d at 32. Of course, this sentence provides no definition of the word "incident"; it merely defines the point at which a completed "incident" is discovered for purposes of commencing the running of the statute of limitations. Nevertheless, the defendants insist that this sentence and sentences like it in the decisons which we will discuss in a moment, have overruled Moore *v.* Morris and the consistent line of authority discussed above. The sentence -- extracted from its context (which was discovery of the "incident," not "incident" itself), and considered entirely by itself, and with the phrase qualifying the word "injury" entirely ignored -- might provide some arguable support for the defendants' argument, There is far more to ***Nardone,*** however, than this language alone.[11]

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[11] Unfortunately, the sentence has resulted in persistent confusion in the decisional law. The sentence in ***Nardone*** upon which the defendants' argument depends reads in its entirety (with supporting authority) as follows:

> , . . . This Court has held that the statute of limitations in a malpractice suit commences either when the plaintiff has notice of the negligent act giving rise to the cause of action

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In Nardone, the 13-year old patient suffered from vision problems and headaches. He underwent several brain surgeries, and his condition improved so significantly that his parents were told he could go home in two weeks and have a birthday party. It was only *after* the significant improvement that the defendants attempted a contraindicated diagnostic procedure which had catastrophic effects. The procedure left the child totally blind, irreversibly brain damaged, and comatose. As this Court described it, "the injury was patent." 333 So.2d at 40. On those facts, of course, it was painfully ***obvious*** that the diagnostic procedure had been badly botched. And it was on those facts that this Court held that the statute of limitations began to run upon the claim of the negligently performed diagnostic procedure when the severe injuries which were its obvious consequence were discovered. In other words, because the nature of the injury was such that most reasonably intelligent persons would conclude from the injury itself that it was, in the words of the decision itself, "the consequence of [a] negligent act," rather than an injury which may have some other non-negligent explanation, discovery of the injury

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> or when the plaintiff has notice of the physical injury which is the consequence of the negligent act. ***City of Miami v. Brooks,*** *70* So.2d 306 (Fla. 1954). . . .

Nardone, supra 333 So.2d at 32. Unlike the facts in Nardone, in which the negligent act caused an immediate injury, the facts in ***City of Miami v. Brooks*** involved the much rarer case of a "delayed injury": the overdose of x-rays administered to the plaintiffs foot in 1944 did not cause any discernable injury until the foot ulcerated in 1949 as a result of the overdose.

On the facts in Brooks, of course, and because the "blameless ignorance" doctrine had long existed to protect malpractice ***victim*** against the loss of their undiscovered claims, it made perfect sense to hold that the statute of limitations did not begin to run on the undiscovered negligent act until such time as the injury manifested itself. However, that proposition is not easily transported into the different type of factual setting presented by an "immediate injury" case, without some risk that the policy favoring victims would be reversed to a policy favoring negligent defendants. That, we think, is essentially what happened when the proposition was imported into Nardone somewhat carelessly, without the careful qualification which it deserved between injuries which obviously point to malpractice and ambiguous injuries which do not. It is perhaps too late to quarrel with *Nardone's* slightly misplaced reliance on *Brooks,* but we mention the anomaly nevertheless to emphasize the need for careful analysis of the true meaning of the somewhat carelessly drafted sentence upon which the defendants rely here.

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was, as a matter of both logic and law, discovery of the larger "incident" itself -- i. e., an injury caused by medical malpractice, or a completed tort.

Barron v. Shapiro,* 565 So.2d** 1319 (Ha. 1990), is similar. In that case, the patient underwent routine colon surgery, from which he developed an infection -- and four months later he was blind. Once again, as in ***Nardone, it was obvious from the nature of **the** ultimate injury that the colon surgery had been botched, and the injury itself therefore gave fair notice of a potential malpractice claim. ***As*** this Court put the point to emphasize the obviousness of the "notice" inherent in this "patent" injury: "**As** Mrs. Shapiro put it, her husband went in for an operation on his colon and came out blind." ***565*** So.2d at 1321. In our judgment, the teaching of *Barron* is simply this: when it is obvious from the nature of an injury suffered by a patient that negligence is its probable cause, discovery of the injury is necessarily discovery of the "incident" and starts the statute of limitations running against the claim, whether the negligent act itself has actually been discovered or not. ***Barron*** simply cannot be read to mean that the Court intended to overrule Moore *v.* Morris (or ***Tillman*** or ***Cohen)*** -- especially when this Court expressly relied upon and approved Moore in its decision, and simply distinguished it in favor of applying ***Nardone*** because of the obviousness of Mr. Shapiro's injury.

Notwithstanding that Moore was expressly reaffirmed in *Barron*, the defendants assert that our definition of the word "incident" is necessarily rejected by the following tentatively advanced dictum in *Barron*:

> . . . . In fact it could be argued that by using the word "incident" the legislature envisioned that there would be some factual circumstances in which the statute would begin to run before either the negligence or the injury became known. In any event, we cannot accept Mrs. Shapiro's contention that the word "incident" means the point in time at which the negligence should have been discovered. We believe that the reasoning of Nardone continues to be applicable to the current statute, Thus the limitation period commences when the plaintiff should have known either of the injury or the negligent act.

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565 So.2d at 1321-22.

Most respectfully, this language is not inconsistent with our reading of the word "incident" in any way. All that it says is that there might be circumstances where a negligent act has caused an injury -- i. e., a completed tort has been committed -- but the plaintiff has discovered neither the negligent act nor the injury which it caused within the statutory period. In that event, of course, the statute will have run. This language does *not* say that the legislature even arguably could have envisioned that the statute of limitations and the statute of repose would begin to run at the first instant an undiscovered negligent act was committed, even though the negligent act caused no injury giving rise to an action for malpractice. *Baron* therefore does not support the defendants' reading of §95.11(4)(b) in any way.

If there were any doubt about that, that doubt was clearly removed by this Court a month later, in Peat, *Marwick, Mitchell & Co. v.* Lane, 565 So.2d 1323 (Fla. 1990), which involved a "delayed-action" tort of the type in issue in the instant case. In that decision, this Court summarized its holding in Barron as follows:

> . . . Generally, a cause of action for negligence does not accrue *until the existence of a redressable harm or injury has been established* and the injured party knows or should know of either the injury or the negligent act. See *Barron v.* Shapiro, 565 So.2d 1319 (Fla. 1990).

565 So.2d at 1325 (emphasis supplied).

This capsule statement of the holding in *Barron* is exactly what we have argued here; it is exactly the way the Third District read Barron in the decision under review here; and it may even have been written with the instant case squarely in mind (since the decision under review here was published after *Barron*, and sixteen days before Peat, *Marwick*). The defendants therefore have no legitimate claim that Barron supports their peculiar contention that the medical malpractice statute of limitations and its statute of repose begin to run at the first instant a negligent act has been committed, even though no harm or injury has been caused by the act.

This Court's latest decision on the subject is also perfectly consistent with the **six** propositions we have set out to prove to the Court here. In ***University*** of *Miami* **v.** *Bogorff,* 16 FLW S149 (Fla. Jan, **18, 1991),** a child had leukemia, which was in remission. Shortly after the administration of methotrexate in **1972,** the child lapsed into a coma, and within months was **a** severely brain-damaged quadriplegic. That same year, the child's parents read a medical journal article linking methotrexate treatment of leukemia to brain damage. By 1977, the parents were also on constructive notice from medical opinion letters in the child's medical records that the methotrexate was possibly the cause of their child's dramatically changed condition. On those facts, this Court held that the parents were on notice of the methotrexate "incident" **as** a matter of law long before finally filing their complaint in **1982.**

In the course of reaching that conclusion, this Court reiterated what it had said in *Barron*, in which it "reaffirmed the principle set forth in Nardone and applied in Moore *v.* Morris, **. . ."** 16 FLW at S150. The Court then observed that the "drastic" change in the child's condition -- from leukemia in remission to brain-damaged and quadriplegic within a short period of three months -- was the type of "injury" (like the "patent" injuries at issue in *Nardone* and Barron) which gave fair notice that it was the probable consequence of a negligent act, and that the plaintiffs were therefore on notice of the "incident" when they knew of the unambiguous injury. That is consistent, of course, with the manner in which we have attempted to harmonize the cases here. In fact, *Bogorff* expressly validates the manner in which we have harmonized the cases here, because in the passage quoted above, the Court expressly recognized the continuing validity of Moore *v.* Morris and its principal observation that not every injury which occurs during medical treatment automatically "impute[s] notice of negligence or injury caused by negligence" **as** a matter of law.

That Moore *v. Morris* is still alive and well is also underscored in *Bogorff* by the Court's treatment of the Bogorffs' alternative contention, that their child's "injury" **was**

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an ambiguous injury of the type involved in Moore:

> We acknowledge that Adam's condition, which the Bogorffs now attribute to intrathecal methotrexate treatment, might not have been easily distinguishable from the effects of leukemia on his system. The knowledge required to commence the limitation period, however, does not rise to that of legal certainty [citation omitted]. Plaintiffs need only have notice, through the exercise of reasonable diligence, of the possible invasion of their legal rights. [Citations omitted]. The Bogorffs were aware not only of a dramatic change in Adam's condition, but also of the possible involvement of methotrexate. Such knowledge is sufficient for accrual of their cause of action. Furthermore, because knowledge of the contents of accessible medical records is imputed, the Bogorffs had constructive knowledge of medical opinion that the drug may have contributed to the injury in 1977. In either event, the Bogorffs had sufficient knowledge, actual or imputed, to commence the limitation period more than four years prior to filing their complaint in December, 1982. . . .

16 FLW at S151. In other words, even if the child's "injury" had been an ambiguous event of the type involved in Moore, the plaintiffs knew much, much more; they knew of both the ambiguous injury *and* a red flag marking the very claim upon which suit was ultimately brought, the contribution to the injury caused by the defendants' use of methotrexate -- and the two facts *in combination* put them on notice of their cause of action, notwithstanding that the injury, by itself, may not have been sufficient to start the statute of limitations running.

All things considered, the *Bogorff* decision fully supports the *six* propositions which we have set out to prove to the Court here. It designates knowledge of the "injury" as a trigger for the statute of limitations and statute of repose **only** when the "injury" itself gives fair notice that it was the probable (or maybe "possible") consequence of a negligent act, and it recognizes the continuing validity of Moore *v.* Morris (and, implicitly, *Tillman* and *Cohen*) where ambiguous injuries are concerned. It also acknowledges that, where an injury is ambiguous as to its cause, knowledge of something more (and considerably more specific) than the mere fact of "injury" is required to start the statute

of limitations running. And there is nothing in *Bogorff* which even arguably purports to overrule the definition of the word "incident" which this Court approved in *Tillman* and Cohen -- "(1) a medical procedure; (2) tortiously performed; (3) which injures (damages) the patient."

In short, the first two times the word "incident" is used in §95.11(4)(b), it means (1) a medical procedure (2) tortiously performed (3) which causes injury or damage to the patient -- i. e., all the elements of a completed tort -- and *discovery* of that "incident" may occur in different ways, depending upon whether the injury is ambiguous as to its cause or obviously the result of negligence. But there is no support whatsoever in the decisional law for the defendants' contention that the word "incident" means a negligent act alone, which has caused no injury.

Although we have been unable to find any decisions defining the word "incident" the third time it is used in §95.11(4)(b), common sense compels the conclusion that the word must be given the same meaning each time it is used -- because no reasonable legislature would use a single word to mean two entirely different things in the same sentence. ***See Goldstein v. Acme Concrete Corp.,*** 103 So.2d 202, 204 (Fla. 1958) ("We may assume that in both chapters [the legislature] intended certain exact words or exact phrases to mean the same thing."); ***Doctors*** Hospital, Inc. ***of Plantation v. Bowen,*** 811 F.2d 1448, 1452 (11th Cir. 1987) ("A presumption is made that the same words used in different parts of an act have the same meaning.").

With the word "incident" thus defined, the sentence in issue here has the following, perfectly sensible meaning: an action for medical malpractice must be brought within two years from the date on which the negligent act caused an injury, or within two years from the date that the plaintiff discovered (or should have discovered) that a negligent act caused an injury; however, if the fact that negligence has caused an injury is not discovered within four years from the date on which the negligent act caused the injury, then any action brought to redress the tort will be barred as untimely. Thus

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defined, the portion of the sentence following the word "however" is a "statute of repose," to be sure -- but it places in repose ***only*** torts which have been committed, but which have gone ***undiscovered*** for four years. It does not place in repose torts which have ***yet to*** be ***committed,*** merely because a negligent act (which has caused no injury at all) has been committed. In the instant case, since the Lloyds' actions for "wrongful birth" did not even exist until the defendants committed the tort of "wrongful birth" on December 24, 1983, and since the Lloyds discovered their actions and filed suit on them within two years from that date, the District Court correctly held that §95.11(4)(b) simply did not bar their action.

b. The decisions applying the statute of repose portion of §95.11(4)(b) also fully support the District Court's reading of the statute,

Although we have been forced to focus on the decisions construing the word "incident" the second time it is used in the sentence (by the defendants' misplaced reliance upon those decisions), we will not neglect the more pertinent decisions which have addressed the more particular problem presented here -- the repose period contained in the sentence. First, we will address the defendants' reliance upon this Court's recent decision in *Carr v. Broward County,* 541 So.2d 92 (Fla. 1989), in which it upheld §95.11(4)(b)'s statute of repose against constitutional challenge. In our judgment, this decision adds nothing to the defendants' position concerning the meaning of the word "incident," because, in this Court's words, "the brain damage injury to the Carr infant was a completed fact at the time of birth . . .". 541 So.2d at 94. In other words, the negligence in *Carr* caused an immediate injury, and there was therefore a completed tort at the time the negligent act was committed, so an "incident" clearly occurred at that point in time. Both the statute of limitations and the statute of repose therefore began to run at that time, and the only relevant question was whether the legislature could permissibly bar suit on the completed tort if it was not *discovered* within four years from the date it was committed. Most respectfully, *Carr* is entirely consistent with

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everything we have argued to this point, and there is no support in it whatsoever for any argument that the word "incident" means a negligent act, even though it has caused no injury resulting in a completed tort.

Apparently recognizing that this Court's decision in *Carr* provides no support for their peculiar construction of the word "incident," the defendants resort to a rather loose dictum in ***Carr v. Broward County, 505*** So.2d 568, 570 (Fla. 4th DCA **1987),** ***approved,*** **541 So.2d 92** (Fla. **1989) --** in which, while generalizing upon the problem presented by statutes of repose, the Fourth District penned the following sentence: "The period of time established by a statute of repose commences to run from the date of an event specified in the statute, such as delivery of goods, closing on a real estate sale, or the performance of a surgical operation." The difficulty with this observation is that the statute of repose for medical malpractice actions does not state that it begins to run upon "the performance of a surgical operation"; the "event specified in the statute" of repose in medical malpractice cases is the date of the "incident."

To be sure, the date of the "incident" may well be the date of "performance of a surgical operation" in some cases, as in *Carr* for example, where the negligent act committed during the surgical procedure caused an injury at that time. Indeed, because negligent surgery invariably leads to immediate injury, we suspect that an "incident" will almost always occur, and that the statute of repose will almost always begin to run in cases of negligent surgery, on the date of the surgery itself. But the date of the "incident" is clearly not the date of the negligent act in all cases, and the Fourth District obviously did not mean to suggest otherwise. It simply could not have meant to suggest otherwise, because (as we have taken some pains to demonstrate here) it has elsewhere consistently defined the word "incident" ta mean *all* the ***elements of a completed tort.***[12]

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[12] ***See, e.g., Florida Patient's Compensation Fund v. Tillman,*** 453 So.2d 1376 (Fla. 4th DCA 1984), ***approved in relevant part,*** 487 So.2d 1032 (Fla, **1986);** ***Cohen v. Baxt,*** **473 So.2d 1340** (Fla. 4th **DCA 1985),** ***approved in relevant part,*** **488** So.2d **56** (Fla. 1986); ***Scherer v. Schultz,*** 468 So.2d 539 (Fla. 4th DCA **1985).**

The Fourth District's decision in *Caw* is therefore also entirely consistent with everything we have argued to this point, and there is no support in it whatsoever for any argument that the word "incident" means a negligent act, even when it has caused no injury resulting in a completed tort.

In a similar vein, the defendants isolate and rely upon the following sentence in this Court's recent decision in University of *Miami v. Bogorff,* 16 FLW S149, **S150 (Fla. Jan. 18, 1991):** "In contrast to a statute of limitation, a statute of repose precludes a right of action after a specified time which is measured from the *incident of malpractice*, sale of a product, or completion of improvements, rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued [by discovery]" (emphasis supplied). This sentence adds nothing to the defendants' position concerning the meaning of the word "incident," however, because it simply repeats the word "incident" without defining it in any particular way. There was also no need to define the word at all in *Bogorff* because, as in *Carr*, it was perfectly clear that the defendants' negligent acts caused an immediate injury (and therefore a completed tort) upon which an action could be brought. Mast respectfully, *Bogorff* is also entirely consistent with everything we have argued to this point, and there is no support in it whatsoever for any argument that the word "incident" means a negligent act, even when it has caused no injury resulting in a completed tort.

The defendants' reliance upon this Court's decision in *Dade County v. Ferro,* 384 So.2d 1283 (Fla. 1980), is also misplaced. In the first place, the Court held that the statute at issue in the instant case, § 95.11(4)(b), simply did not apply to the pre-1975 incident in suit, so anything said in *Ferro* about § 95.11(4)(b) is undeniably dicta. More importantly, the only dictum in *Ferro* upon which the defendants rely is this:

> . . . The other limitation period is an "ultimate" or "final repose" provision which commences to run upon the date of the incident out of which the injury arose without regard to time of discovery. As noted, respondents' suit was filed within two years of the alleged discovery date but more than

four years from the incident or occurrence.

384 So.2d at 1285. Of course, the first sentence in this passage says exactly what we have been arguing here -- that the statute of repose begins to run upon the date of the "incident," not simply upon the date the negligent act was committed -- and it also does not define the word "incident" in any manner contrary to our position here.

Neither does the second sentence in this passage provide any support for the defendants' illogical definition of the word "incident," because, in *Ferro*, the plaintiff received excessive radiation treatments which immediately caused injury (and there was therefore an "incident"), but the injury was progressive and its full extent was therefore not discovered within the four-year statute of repose. This Court's assumption that §95.11(4)(b) might therefore apply to bar Mrs. Ferro's action (if it had not decided that the statute did not apply retroactively, and if it had also reversed Judge Wetherington's ruling that the statute was unconstitutional on the facts) is therefore perfectly consistent with our reading of the statute. There is nothing in *Ferro* to suggest that the word "incident" means anything other than a completed tort.

All other cases in which the medical malpractice statute of repose has been found applicable to date, and upon which the defendants rely, also deal with the circumstance in which the act of malpractice caused an injury at the time it was committed (or the malpractice was a failure to diagnose or correct an existing condition), but the completed tort went undiscovered for a substantial length of time.[13] Each of these cases is

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[13] *See Cates v. Graham*, 451 So.2d 475 (Fla. 1984) (surgeon engaged to remove glass from foot overlooked a piece which plaintiff discovered three years and seven months later; statute of repose not unconstitutional where plaintiff had five months in which to file suit); *Pisut v. Sichelman*, 455 So.2d 620 (Fla. 2nd DCA 1984) (physician's failure to diagnose existing condition discovered within four-year period; *Cates* followed; in dictum, if incident undiscoverable within four years, statute would be unconstitutional); *Phelan v. Hanft*, 471 So.2d 648 (Fla. 3rd DCA 1985), appeal *dismissed*, 488 So.2d 531 (Fla. 1986) (surgeon caused internal injury to plaintiff during surgery which was not discovered until more than four years later; statute of repose would apply but for the fact that it was unconstitutional); *Shields v. Bucholz*, 515 So.2d 1379 (Fla. 4th DCA 1987), *review dismissed*, 523 So.2d 578 (Fla. 1988) (dental patient suffered latent injury during dental

therefore consistent with our reading of the statute, and not one of them provides any support for the defendants' contention that the word "incident" means the negligent act alone, even when it has caused no injury resulting in a completed tort.

The defendants also contend that statutes of repose operate upon negligent acts rather than completed torts because this Court said so, in the context of products liability actions, in *Pullum v. Cincinnati,* Inc., 476 So.2d 657 (Fla. 1985), appeal *dismissed,* 475 U.S. 1114, 106 S. Ct. 1626, 90 L. Ed.2d 174 (1986). In our judgment, this argument badly misses the point. Unlike the statute of repose for medical malpractice actions (which, according to its express language, begins to run at the same time the statute of limitations begins to run, upon the date of the completed "incident"), the (now-repealed) statute of repose for products liability actions, according to its express language, begins to run long before the statute of limitations begins to run; it begins to run on "the date of delivery of the completed product to its original purchaser . . , regardless of the date the defect in the product . . . was or should have been discovered." Section 95.031(2), Fla. Stat. (1985).[14]

Since the language creating the statute of repose in products liability actions is both entirely different and far more specific than the language of the statute in issue here, *Pullum*'s holding that the products liability statute of repose begins to run on the

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work which was not discovered until exploratory surgery more than four years later; statute of repose constitutional and barred plaintiffs claim).

[14] This provision, incidentally, was an exception to the more general provision with which §95.031 begins: "A cause of action accrues when the last element constituting the cause of action occurs." Section 95.031(1), Fla. Stat. (1985). Thereafter, $95.031 created two express exceptions to this general provision, for fraud and for defective products. If the legislature had intended to create another exception to this general provision for medical malpractice cases, the logical place to have created the exception would have been in 995.031. No exception for medical malpractice actions is created there, however. The only statute of repose for medical malpractice actions is §95.11(4)(b), and it begins to run only when the statute of limitations begins to run -- at the time of the "incident." It therefore seems to us, as we argued at the outset, that §95.031(1) is both consistent with and reinforces the reading of §95.11(4)(b) which we have proposed to the Court.

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date the defective product is delivered to its original purchaser simply does not amount to a holding that all statutes of repose begin to run on the date of negligent acts rather than completed torts.[15] Unlike the products liability statute of repose, the statute of repose in medical malpractice actions begins to run *at the same time* the statute of limitations would ordinarily begin to run -- on the date of the "incident." And if that word means what all of the courts which have addressed its meaning to date say it means, then an action which is filed within the two-year statute of limitations period (and before four years expires) is necessarily filed within the statute of repose period -- and §95.11(4)(b) simply did not bar the Lloyds' action for "wrongful birth."

When all is said and done -- and since an "incident is an incident is an incident," and the word must logically be given the same meaning each time it appears in the sentence -- our reading of the sentence would seem to be the simplest and most logical disposition of the problem presented here. If further "construction" of the statute should seem necessary, however, we remind the Court of the settled rule that courts will not ascribe to the legislature an intent to create an absurd or harsh consequence, if a sensible interpretation avoiding the absurdity is available.[16] Surely, the reading of the statute proposed by the defendants results in an absurdly harsh consequence, because it results in barring redress for a tort before the tort has even been committed.[17] Of

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[15] The defendants' reliance upon other decisions applying the products liability statute of repose, as well as the statute of repose on actions relating to improvements to real property, is misplaced far the same reason that their reliance upon *Pullum* is misplaced --and there is therefore no need for us to parse those decisions here.

[16] *See, e. g., City of St. Petersburg v. Siebold,* 48 So.2d 291 (Fla. 1950); *Williams v. State,* 492 So.2d 1051 (Fla. 1984); *Wollard v. Lloyd's & Companies of* Lloyd's, 439 So.2d 217 (Fla. 1983); *McKibben v. Mallory,* 293 So.2d 48 (Fla. 1974); *Ferre v. State ex rel. Reno,* 478 So.2d 1077 (Fla. 3rd DCA 1985), *approved,* 494 So.2d 214 (Fla. 1986), *cert. denied,* 481 U.S. 1037, 107 S. Ct. 1973, 95 L. Ed.2d 814 (1987).

[17] *See Dade County v. Ferro,* 384 So.2d 1283, 1287 (Fla. 1980) (refusing to ascribe an intent to the legislature to give retroactive effect to a new statute of limitations, where to do so "achieves the absurd result of extinguishing a cause of action at the very time the act first became effective"); *Foley v. Morris,* 339 So.2d 215 (Fla. 1976) (similar);

course, if the legislature had expressly stated in §95.11(4)(b) that the statute of repose begins to run before the statute of limitations begins to run, as it did in the products liability statute of repose, then this Court would have no choice but to accept the legislature's expression (subject, of course, to Article I, §21, of the Florida Constitution, which we will address in a moment). However, since the legislature chose the *same* trigger point for both the statute of limitations and the statute of repose by commencing each with the word "incident" (with a qualification of the first for delayed discovery), the **only** logical construction of the sentence is that the statute of repose begins to run at the **same** time the statute of limitations ordinarily begins to run -- and there is no justification whatsoever for this Court to conclude that the legislature intended the statute of repose to begin to run before any tort had been committed upon which suit could be brought.

In short, the reading of §95.11(4)(b) which we have proposed, and which the Third District adopted in the decision under review, is both sensible and logical. It gives ample scope for the "statute of repose" to operate upon torts which have been committed but which have gone undiscovered for four years, without extending its operation to embrace the far harsher absurdity which the defendants have proposed -- barring redress for a tort before the tort is even committed. In addition, as we have taken considerable pains to demonstrate, the logical, sensible reading given to the statute by the District Court is consistent with everything which this Court has ever written on the subject, and there is no support whatsoever in the decisional law for the defendants' peculiar construction of the word "incident" to mean the commission of a negligent act alone, even where it has caused no injury upon which suit can be brought. For all of these reasons, we respectfully submit that the District Court correctly read §95.11(4)(b), and that the statute did not bar the Lloyds' action for "wrongful birth," which was filed

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Maltempo v. Cuthbert, 288 So.2d 517 (Fla. 2nd DCA), *cert. denied,* 297 So.2d 569 (Fla. 1974) (similar).

within two years from the date the defendants tortiously injured them.

2. Alternatively, if §95.11(4)(b) means what the defendants say it means, it is unconstitutional.

Although we frankly think it would be ludicrous for the Court to hold that the thrice-repeated word "incident" in §95.11(4)(b) means anything other than a completed tort -- especially since such a holding would also *necessarily* mean that the *statute of limitations* can begin to run in a medical malpractice case before the defendant has even committed a tort upon which suit can be brought -- the zeal with which the defendants have insisted on such a construction here requires us to advance a precautionary alternative position. We therefore assert that if the statute means what the defendants say it means, it violates Article I, §21, of the Florida Constitution. Of course, the mere fact that the defendants' peculiar construction of the statute creates the potential for such a problem is reason enough by itself to construe the statute in favor of the more sensible reading we have proposed, as the District Court did below. This Court may avoid the constitutional problem presented by the defendants' construction in the same way, of course, and we urge it to do so. However, in the event that it has accepted the defendants' contention that both the statute of limitations and the statute of repose begin to run in a medical malpractice case upon the commission of a negligent act alone, whether it has caused an injury or not, we respectfully ask the Court to hear us out briefly on this alternative contention.

There was a time in the jurisprudence of Florida, of course, when statutes of repose were routinely declared unconstitutional.[18] As the make-up of the Court changed, however, the meaning of Article I, §21, appears to have changed as well -- and in ***Pullum v. Cincinnati, Inc.***, 476 So.2d 657 (Fla. 1985), *appeal dismissed*, 475 US. 1114,

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[18] *See, e. g., **Overland Construction Co. v. Sirmons***, 369 So.2d 572 (Fla. 1979); ***Battilla v. Allis Chalmers Mfg. Co.***, 392 So.2d 874 (Fla. 1980); ***Diamond v. E.R Squibb & Sons, Inc.***, 397 So.2d 671 (Fla. 1984); ***Universal Engineering Corp. v. Perez***, 451 So.2d 463 (Fla. 1984).

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106 S. Ct. 1626, 90 L. Ed.2d 174 (1986), this Court receded from its earlier decision in *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980). The *reason* announced for the change of mind in *Pullum* was quite specific, however. According to this Court, it was perfectly rational for the legislature to restrict liability in products liability actions to a period of 12 years after the sale of a product (Article I, §21, notwithstanding), because "liability should be restricted to a time commensurate with the normal useful life of manufacturer [sic] products" -- and a manufacturer should not be subjected to "perpetual liability" for products which have outlived their normal useful lives, 376 So.2d at 660, 659.[19] However, that kind of reasoning simply has no application to the obviously different question presented here -- whether Article I, 921, is violated by barring an action for "wrongful birth before the tort of "wrongful birth has even been committed.

In any event, *Pullum* expressly recognizes that this Court has consistently excepted one type of case from its recent change of mind -- the type of "delayed injury" case like the one involved here. The initial decision declaring a statute of repose unconstitutional in that type of case is *Diamond v. E. R Squibb & Sons*, 397 So.2d 671 (Fla. 1981). In *Diamond*, the plaintiffs complained that a drug ingested during pregnancy, which did not initially cause any injury, nevertheless "planted the seed" for a subsequent injury which manifested itself only after the child had reached adulthood. This Court held that the statute of repose violated Article I, §21, on those facts, because "petitioners' right of action was barred before it ever existed" -- 397 So.2d at 672. In the instant case, of course, if §95.11(4)(b) means what the defendants say it means, it barred the Lloyds' right of action "before it ever existed -- and if *Diamond* correctly states the law, then

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[19] The question of whether such a statute would be constitutional if applied to a product which had a "normal useful life . . . obviously greater than most manufactured products," like an airplane, was left open by implication. Id. at 660. This aspect of the decision reinforces our conviction that *Pullum* was not meant to be quite as sweeping as the defense bar has consistently asserted it to be.

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the defendants' reading of §95.11(4)(b) simply must be declared unconstitutional.

Later, when this Court flipped-flopped on the constitutionality of the products liability statute of repose in *Pullum*, it was careful to observe that *Diamond* was not being overruled:

> Pullum also refers to *Diamond* v. E. *R Squibb* & Sons, Inc., **397** So.2d **671** (Fla. **1981)**, as being in accord with *Battilla*. In *Diamond*, we held that the operation of section **95.031(2)** operated to bar a cause of action before it accrued and thereby denied the aggrieved plaintiff access to the courts. But *Diamond* presents an entirely different factual context than existed in either *Battilla* or the present case where the product first inflicted injury many years after its sale. In *Diamond,* the defective product, a drug known as diethylstilbestrol produced by Squibb, was ingested during plaintiffs mother's pregnancy shortly after purchase of the drug between **1955-1956.** The drug's effects, however, did not become manifest until after plaintiff daughter reached puberty. Under the circumstances, if the statute applied, plaintiffs' claim would have been barred even though the injury caused by the product did not become evident until over twelve years after the product had been ingested. The legislature, no doubt, did not contemplate the application of this statute to the facts in *Diamond*. Were it applicable, there certainly would have been a denial of access to the courts.

476 So.2d at **659 n.***.

A similar conclusion has been reached for asbestosis cases -- that it would be unconstitutional for a statute of repose to "foreclose the plaintiffs cause of action before he received any indication that it existed." ***Vilardebo v. Keene Corp.,*** **431** So.2d **620, 622** (Fla. 3rd **DCA),** ***appeal dismissed,*** **438** So.2d **831** (Fla. **1983).** And this Court recently reaffirmed the exception represented by *Diamond* as follows:

> . . . We have recognized that, because of the delay between the mother's ingestion of the drug and the manifestation of the injury to the plaintiff, DES cases must be accorded different treatment than other products liability actions for statute of repose purposes. **See *Pullum v.*** *Cincinnati, Inc.,* **476 So.2d 657, 659 n.*** (Fla. 1985), ***appeal dismissed,*** **475 U.S. 1114 (1986);** *Diamond* v. *E. R Squibb* & Sons, *Inc.,* 397 So.2d **671** (Fla. **1981).**

Conley v. Boyle Drug Co., 570 So.2d 275, 283 (Fla. 1990).

This distinction was carefully maintained in the decision which ultimately upheld the constitutionality of the statute of repose contained in §95.11(4)(b), as it applied to the facts. In *Carr v. Broward County, 505* So.2d 568 (Fla. 4th DCA 1987), *approved,* 541 So.2d 92 (Fla. 1989), the Fourth District was careful to distinguish between (1) completed torts which have simply gone undiscovered during the repose period, and (2) tortious conduct which has merely "implanted . . . the seed that eventually will flower into injury" after the statute of repose has run. 505 So.2d at 573. It acknowledged that a statute of repose which purported to bar the latter type of case would violate Article I, 921, but held that the facts before it involved the first type of case -- because "[t]he injury to infant Carr was a completed fact" (505 So.2d at 574) at the time the negligent conduct occurred, and the thus-completed "incident," although capable of discovery within the statute of repose period, had not been discovered in time.

When the *Carr* case reached this Court, this Court was again careful to preserve the area carved out in *Diamond.* The Court specifically noted (as the Fourth District had noted in distinguishing the case from the different "implanted seed" cases), that "the brain injury to the Carr infant was a completed fact at the time of birth" -- i. e., that a discoverable injury had occurred at the time of the negligent act -- and it held that the statute of repose was therefore constitutional "under the circumstances of this case." *Carr v. Broward County,* 541 So.2d 92, 94, 95 (Fla. 1989). There is nothing in this Court's *Carr* decision which even arguably purports to overrule *Diamond,* or to retract the footnote in *Pullum* which expressly preserved *Diamond.* Neither did this Court take issue with the Fourth District's observation that statutes of repose remain unconstitutional in "implanted seed" cases. And, of course, *Diamond* was recently reaffirmed by this Court in *Conley*. *Diamond* and its progeny are therefore still good law.

As a result, the defendants have gone to exceptional lengths to distinguish the facts in *Diamond* from the facts in the instant case. The thrust of their argument is

that, in **Diamond,** the plaintiff-child was actually injured at the time her mother ingested the drug, and simply did not discover her injury until it manifested itself twenty years later -- whereas, in the instant case, the Lloyds suffered no injury until Brandon was born. With apologies to Justice McDonald (who read the majority's decision in *Diamond* in that fashion in his specially concurring opinion, to square it with the position he had taken in dissent in *Battilla*), we do not believe that is a fair reading of *Diamond*. Certainly the parents of the child, who were authorized to proceed on *their* 20-year old claims notwithstanding the statute of repose, suffered no injury when the drug was ingested. **And** neither, we think, did the plaintiff-child, since the injuries upon which she brought suit were a cancerous lesion which did not develop until nearly two decades later, and additional lesions which might occur in the future. See *Diamond v. E. R Squibb & Sons, Inc.*, 366 So.2d 1221 (Fla. 3rd DCA 1979), *quashed,* 397 So.2d 671 (Fla. 1981). Moreover, the majority's decision did not even arguably draw the distinction drawn by Justice McDonald. It simply declared the statute of repose unconstitutional because the "petitioners' right of action was barred before it ever existed." ***Diamond, supra*** at 672.[20]

We therefore believe that the Fourth District used exactly the right metaphor when it concluded in ***Carr*** that a statute of repose cannot constitutionally bar redress for tortious conduct which ***"implanted. . . the seed that eventually will flower into injury"*** after the statute of repose has run. 505 So.2d at 573 (emphasis supplied). We also believe

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[20] Neither did the Court's reexplanation of **Diamond,** in the footnote in which it preserved *Diamond* in *Pullum*, adopt Justice McDonald's characterization of the facts. It merely noted that the drug was ingested during the mother's pregnancy; that "[t]he drug's effects, however, did not become manifest until after plaintiff daughter reached puberty"; and that, if the statute applied, plaintiffs' claims would have been barred even though the injury caused by the product did not become evident until over 12 years after the product had been ingested. ***Pullum, supra,*** 476 So.2d at 659 n*. There is no commitment in this language to the notion that the plaintiff-daughter actually suffered an injury at the time her mother ingested the drug; it is perfectly consistent with the notion that the injury was both caused and manifested itself outside the period of the statute of repose.

that the instant case falls squarely within that category. While the defendants' various negligent acts did not initially cause a "wrongful birth (just as the DES ingested by Mrs. Diamond did not initially cause any cancer in her daughter), those negligent acts certainly planted the seed which ultimately flowered into a "wrongful birth" when the Lloyds relied upon the defendants and their negligent advice, foreswore birth control, and attempted to procreate -- resulting in three pregnancies, two of which ended in miscarriages, and one of which bore the misshapen flower of a tragically deformed child. Each of those pregnancies was the direct result of the poison seed placed in the Lloyds' minds by the negligent testing and advice, and not one of them would ever have occurred if the defendants had not negligently misdiagnosed the cause of Michael's horrible abnormalities in the first instance.

In short, the "delayed injury" represented by the "wrongful birth" of Brandon was not something which simply happened because Mrs. Lloyd had a genetic defect (as one set of defendants has disingenuously asserted here); it was the direct result of a perfectly predictable chain of events initially set in motion by the defendants' negligence, just as the daughter's cancer in *Diamond* was the ultimate result of the chain of events precipitated by her mother's ingestion of DES. Frankly, we cannot conceive of a case which would be a better paradigm for the "implanted seed" cases than the instant case -- and if *Diamond* is still the law in this Court (and it was the last time this Court spoke to the point in *Conley*), then (if it means what the defendants say it means) §95.11(4)-(b) barred the Lloyds' causes of action for "wrongful birth before they ever existed, and it is therefore unconstitutional in the circumstances of this case.

Before we close, we must address one additional point -- the defendants' contention that the constitutional right of access to the courts provided by Article I, §21, is no right at all on the facts of this case. According to the defendants, this provision of the Constitution must be ignored here -- and the legislature must be allowed to abolish the Lloyds' causes of action with an absurd statute of repose which bars those

claims before they ever existed -- because no cause of action for "wrongful birth" existed prior to 1968. This argument was not raised in any manner, shape, or form below, however, and it was therefore clearly waived -- and the Court should not consider it as a result.

In any event, the contention is completely without merit because it focuses solely upon one element of the plaintiffs' four-element causes of action, and ignores all the others. The "wrongful birth of which the plaintiffs are complaining is simply a shorthand phrase for the damage which was caused by the defendants' medical malpractice. The actions themselves are actions for medical negligence -- actions which were sanctioned in Florida law for decades before 1968 -- and they do not become actions for anything else simply because they allege negligence in the manner in which the various defendants utilized genetic testing technology developed after **1968.** To put the point another way, numerous medical technologies have been developed since 1968 -- like laser surgery, magnetic resonance imaging, and antidepressant drugs -- but negligence in the utilization of these new technologies is still redressed in a medical malpractice action, not in an action for "the injury" which their negligent utilization may have caused. New diseases have also developed since 1968, like AIDS -- but an action to redress a negligent misdiagnosis of the disease which has caused its spread to a spouse, for example, is a medical malpractice action; it is not an action for "wrongful acquisition of AIDS" not previously recognized in the law.

Most respectfully, Article I, $21, provides constitutional protection for medical malpractice actions. The actions in issue here are medical malpractice actions. And, if **§95.11(4)(b)** means what the defendants say it means with respect to the Lloyds' medical malpractice actions, then the propriety of the legislature's attempt to abolish the plaintiffs' causes of action for medical negligence before they ever existed must be judged by the higher authority of the Constitution which prescribes and limits the legislature's powers. See ***Smith v. Department of** Insurance,* **507 So.2d 1080** (Fla. **1987);**

Aldana v. Holub, 381 So.2d 231 (Fla. 1980); Carter *v. Sparkman*, 335 So.2d 802 (Fla. 1976), *cert.* denied, 429 U.S. 1041, 97 S. Ct. 740, 50 L. Ed.2d 753 (1977).

In sum, we continue to insist that the word "incident" means all the elements of a completed tort, and that the statute of repose therefore did not begin to run on the facts in this case until the statute of limitations began to run -- i.e., when the defendants' negligence finally caused the injury represented by Brandon's "wrongful birth." However, if the defendants are correct that the statute of repose began to run on the date of their negligent conduct alone, and therefore expired before Brandon was born, then the defendants' position here is necessarily that the statute of repose ran on the Lloyds' causes of action for "wrongful birth" before the effect of the defendants' negligent conduct ever manifested itself to the Lloyds. As *Diamond* squarely holds, however, the statute of repose is unconstitutional on those types of facts. And because *Carr* deals with the altogether different circumstance in which all the elements of a completed tort have occurred, but the discoverable cause of action has simply gone undiscovered during the statute of repose period, it clearly does not control the Diamond-like facts involved in the instant case. We therefore respectfully submit alternatively that, *Carr* notwithstanding, if the defendants are correct in their reading of §95.11(4)(b), then its apparent bar of the Lloyds' causes of action must be held violative of Article I, §21, on the unique facts in this case.

B. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE SO-CALLED "IMPACT RULE" DID NOT PRECLUDE RECOVERY OF DAMAGES FOR MR AND MRS. LLOYD'S MENTAL ANGUISH IN THEIR "WRONGFUL BIRTH" ACTIONS.

The defendants next contend that the District Court erred in concluding that the so-called "impact rule" did not preclude recovery of damages for Mr. and Mrs. Lloyd's mental anguish in their "wrongful birth" actions. They assert that Moores *v. Lucas*, 405 So.2d 1022 (Fla. 5th DCA 1981), which reached a contrary conclusion, is the "better reasoned decision. There is no "reasoning" in Moores, however; the Fifth District simply

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declared such damages unrecoverable in a single sentence, "on the basis of the impact doctrine," without any analysis of the problem whatsoever. 405 So.2d at **1026.** The **only** real analysis of the problem contained in the decisional law (prior to the decision under review) is in *Ramey v. **Fassoulas***, 414 So.2d **198** (Fla. 3rd **DCA 1982),** approved, **450** So.2d 832 (Fla. **1984).**[21]

In *Ramey*, which was also an action for the "wrongful birth of **a** defective child, the plaintiffs recovered damages for, among other things, their mental anguish. Although the defendants did not challenge this damage award on appeal (and notwithstanding that **the** District Court **was** aware of *Moores* at the time), the majority opinion stated that "the recoverable items of damages [in a 'wrongful birth' action] tend to be much the same as in any other negligence malpractice action." 414 So.2d at **199.** The late Judge Hendry, dissenting in ***Ramey*** on the single issue decided (the recoverability of "normal rearing expenses"), went further. He observed that, "[w]here the very purpose of the physician's actions is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequences which have in fact occurred -- and he opined that damages for mental anguish should be recoverable in such an action as a result. Id. at 202. **A** half-dozen decisions supporting that conclusion were cited. Id. at

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[21] The defendants claim that ***Pazo** v. Upjohn* **Co.,** 310 So.2d 30 (Fla. 2nd DCA 1975), also contains an analysis of the problem presented here. We disagree. ***Pazo*** was not a "wrongful birth" action to recover damages for a tort committed against the parents of a defective child. It was an action brought to redress the *personal injury* of a ***child,*** caused by the mother's ingestion of the defendant's drug during pregnancy. Although the child's mental anguish was clearly recoverable as an adjunct to his personal **injury,** the ***Pazo*** Court held that the parents' "derivative" claims for mental anguish were not. But the tort committed in that case was committed against the child, not against the parents. In contrast, as recognized in this Court's decision in *Fassoulas*, the tort of "wrongful birth" is committed not against the child, but against the parents of the child. The damages sought in the instant case are therefore not "derivative" damages; they are direct damages. **See *Robak v. United States,*** 658 F.2d 471 (7th Cir. 1981). ***As*** a result, the issue presented here is an entirely different issue than the one addressed in ***Pazo.*** **In** addition, ***Pazo*** was decided nearly a decade before this Court's decision in *Fassoulas*, and to the extent that it may be inconsistent in principle with *Fassoulas*, it must be disregarded. Finally, of course, ***Pazo*** is not binding on this Court in any way.

202 n. 1. In approving the majority's opinion in ***Ramey,*** this Court did not quarrel with either of these observations; it simply left the issue open.

In our judgment, the District Court's similar resolution of the problem in the instant case makes eminently good sense. As we noted in our statement of the case and facts, Mr. and Mrs. Uoyd engaged the services of the defendants for the singular purpose of avoiding the severe mental anguish (and extraordinary monetary losses) which were certain to follow if they had another child like Michael, and the defendants' negligence caused the very damages which they were engaged to prevent. That the mental anguish suffered as a direct consequence of that negligence is both real and severe is simply undeniable -- and we think it would be a perverse rule indeed which relieves such a defendant from accountability for most of the *very* damages which he was engaged professionally to prevent. In ***Moores,*** the Fifth District asserted that to be the rule, apparently because it concluded that the "impact rule" applied across-the-board to prevent recovery of intangible damages for mental anguish in *all* tort cases in which no "physical impact" is involved. This perception was clearly erroneous, however.

The law of Florida recognizes numerous torts involving no physical impact, the commission of which give rise to intangible damages for claims for mental anguish without the need to prove physical impact or physical injury.[22/] For example, the "impact rule" has never been considered applicable to actions for invasion of privacy, libel, slander, assault, false imprisonment, fraudulent misrepresentation, nuisance, malicious prosecution, conversion, interference with advantageous business relationships, and the like. The defendants attempt to dismiss this obvious point by arguing that all of these torts are ***intentional*** torts; however, this argument is plainly and simply wrong. Actions

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[22/] The defendants contend that damages for mental anguish are simply too speculative to allow their recovery. That contention was rejected decades ago, of course, and we respectfully submit that assessing damages for the Lloyds' mental anguish is no more speculative than assessing damages for mental anguish in any other type of tort case in which they are presently authorized.

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for negligent invasion of privacy, negligent libel, negligent slander, and the like clearly lie in Florida. *See, e. g., Miami Herald Publishing Co. v. Ane,* 423 So.2d 376 (Fla. 3rd DCA 1983), *approved,* 458 So.2d 239 (Fla. 1984); *Cason v. Baskin,* 155 Ha. 198, 20 So.2d 243 (1944). And, of course, Florida law recognizes negligence actions by parents for the wrongful death of their children, and authorizes recovery of damages for their mental anguish, notwithstanding that *they* suffered no physical impacts at all. *See, e. g., Walt Disney World Co. v. Goode,* 501 So.2d 622 (Fla. 5th DCA 1986), *review dismissed, 520* So.2d 270 (Ha. 1988). The instant case, we submit, is clearly analogous.

The reason that such actions exist is that the "impact rule" is applicable to only a specific class of cases -- cases in which the defendant's negligent conduct is of the type which would normally have been expected to produce a bodily injury, but which has caused only mental distress. Put another way, where the interest sought to be protected by recognition of a right of action is the interest in physical security, and no invasion of that interest has occurred, then damages for mental distress arising out of a *threatened* invasion of that interest are not recoverable.[23/] Application of the "impact rule" in those types of cases is thought to be desirable to eliminate trifling, easily feigned claims. *See Eastern Airlines, Inc. v. King,* 557 So.2d 574 (Fla. 1990) (C. J. Ehrlich, concurring); *Restatement (Second) of Torts,* §46 (and comments thereto).

But where the interest which the law seeks to protect is some interest other than physical security, and the law *authorizes* a recovery of compensatory damages for conduct

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[23/] This Court's recent forays into this field have involved only these types of cases. In *Brown v. Cadillac Motor Car Division,* 468 So.2d 903 (Fla. 1985), this Court was faced with application of the "impact rule" to an automobile accident case; it carefully framed the question as "whether a person who suffers no physical injuries *in an accident* has a cause of action for mental distress or psychic injury caused by the tortious event," and then answered the question in the negative. 468 So.2d at 904 (emphasis supplied). Similarly, in *Champion v.* Gray, 478 So.2d 17 (Fla. 1985), the Court identified the two circumstances in which the "impact rule" has historically been applied as (1) accidents which cause "fear for one's own *physical* safety" and *(2)* those which cause anxiety or stress for the injury or death of another." 478 So.2d at 19. *Eastern Airlines, Inc. v. King,* 557 So.2d 574 (Fla. 1990), is similar.

which invades that interest ***without*** a requirement for proof of "physical impact" -- such as actions for wrongful death, invasion of privacy, libel, slander, false imprisonment, and the like -- the law has already made a policy decision that these types of claims should ***not*** be eliminated as trifling claims. And to import an "impact" requirement into these types of previously recognized "non-impact" actions does nothing but abolish the torts for no policy reason at all.

In addition, of course, because the "impact rule" applies only to cases in which emotional distress is the only consequence of the defendant's conduct, and the effect of the rule is to eliminate the action entirely, it cannot logically be applied to an action in which the recovery of tangible damages has been authorized for the invasion of a legally recognized interest other than physical security, and in which the effect of the rule would be to eliminate only one element of damage. When an action for the invasion of a legally protected interest lies notwithstanding the "impact rule," then damages for mental distress are recoverable as additional damages to the authorized recovery. ***See, e. g., Champion v. Gray,*** 478 So.2d 17 (Fla. 1985) (intangible damages for mental anguish suffered without "physical impact" are recoverable where other tangible damages in the form of physical injury are sustained); ***Firestone v. Time, Inc., 305*** So.2d 172 (Fla. 1974) (damages for mental anguish accompanying injury to reputation are recoverable in defamation action), ***approved in relevant part, vacated*** on ***other grounds,*** 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed.2d 154 (1976).[24]

The point of all of this is that the "impact rule" is simply one device for answering a ***threshold*** question which must addressed in every case. Either a cause of action for certain injury-producing conduct is to be recognized by a court, or it is to be

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[24] ***Accord, Boyles v. Mid-Florida Television Corp.***, 431 So.2d 627 (Fla. 5th DCA 1983) (same), ***approved,*** 467 So.2d 282 (Fla. 1985); ***Miami*** Herald ***Publishing Co. v. Ane,*** 423 So.2d 376 (Fla. 3rd DCA 1983) (same), ***approved,*** 458 So.2d 239 (Fla. 1984). **See** Lowd ***v. Cal Kovens Construction Corp., 546*** So.2d 1087 (Fla. 3rd DCA 1989) (similar to ***Champion).***

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denied at the outset. Applied at this threshold level of inquiry, the "impact rule" says that threatened negligent invasions of physical security which cause only mental anguish are too trifling and too easily feigned to justify the expenditure of judicial resources, and they are therefore eliminated in their entirety. But once a court answers the threshold question affirmatively, and recognizes a cause of action to redress the invasion of a legally protected interest ***without*** any requirement for a "physical impact," then the bridge has been crossed -- and the "impact rule" has become an irrelevant concept left behind on the opposite shore, It is not to be applied thereafter to eliminate one element of the consequential damages flowing from the now-actionable tort.

All of this is nicely expressed in a form of the "impact rule" stated in **947** of the ***Restatement (Second) of Torts:***

> Except as stated in §§21-34 [governing actions for assault], and in §46 [governing actions for intentional or reckless infliction of mental distress], conduct which is tortious because intended to result in bodily harm to another or ***in the invasion of any other of his legally protected interests*** does not make the actor liable for an emotional distress which is the ***only*** legal consequence of his conduct.

(Emphasis supplied). Comment *b* to §47 explains the corollary of this rule as follows:

> Where the actor's tortious conduct in fact results in the ***invasion of another legally protected interest,*** as where it inflicts bodily harm, or imposes a confinement [or, we would add, causes extraordinary monetary losses,] emotional distress caused either by the resulting invasion or by the conduct may be a matter to be taken into account in determining the damages recoverable. In many instances there may be recovery for emotional distress as an additional, or "parasitic" element of damages in an action for such a tort. . . .

(Emphasis supplied).

The same proposition is stated in Comment b to §46 of the ***Restatement (Second) of Torts,*** which this Court adopted as the law of Florida in ***Metropolitan*** Life Insurance ***Co. v. McCarson,*** **467** So.2d **277** (Fla. 1985):

> As indicated in [Section] **47,** ***emotional distress may be an***

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> ***element of damages in** many **cases where other interests have been invaded,** and **tort liability has arisen apart from the emotional dktress.*** Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress ***standing alone. . . .***

(Emphasis supplied). See Prosser & Keeton, ***The*** Law ***of Torts,*** §54, p. 361 (5th Ed. 1984) ("Where the defendant's negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, ***and in the* absence *of some other independent basis for tort liability,*** the great majority of courts still hold that in the ordinary case there can be no recovery"; emphasis supplied).

In the instant case, the Lloyds have a "legally protected interest" -- fully established by ***Fassoulas v. Ramey,*** **450** So.2d *822* (Fla. 1984) -- to be free of the extraordinary monetary losses which would result from a negligently caused "'wrongful birth." If the defendants' negligence had caused no monetary losses, and had caused ***only*** mental anguish, then §47's "impact rule" would arguably prevent recovery of damages for mental anguish alone. Those are not facts in this case, however. The defendants' negligence indisputably invaded the Lloyds' legally protected interest to be free of the extraordinary monetary losses which that negligence caused, and an action exists for recovery of those pecuniary losses -- without the need to prove "physical impact" at all. **And** once this Court answered the threshold question affirmatively in *Fassoulas* -- where it ***recognized*** a cause of action for "wrongful birth," and ***allowed*** the recovery of extraordinary pecuniary losses ***without*** any requirement for proof of "physical impact" -- it effectively declared the "impact rule" irrelevant to actions for **"wrongful** birth." Having declared the "impact rule" irrelevant at the threshold, it would make no sense whatsoever for the Court to resurrect the rule to determine what type of ***additional*** damages should be recoverable in the now-recognized action.

Put another way, it makes no sense whatsoever to ***authorize*** the recovery of the

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Lloyds' extraordinary pecuniary losses in one breath, with no requirement for proof of a "physical impact," and then deny them recovery of their substantial additional damages for the very mental anguish which the defendants were engaged to prevent, on the inconsistent ground that proof of a "physical impact" is required. Once the tort of "wrongful birth" is recognized as actionable without the impediment of the "impact rule," then the "impact rule" has simply become irrelevant, and all consequential damages caused by the tort should be recoverable -- which is essentially what the District Court concluded in the decision under review.[25/]

In any event, as §47 makes clear, the purpose of the "impact rule" is to eliminate potentially fraudulent or trifling claims involving *only* intangible damages -- not to eliminate indisputably legitimate claims involving both tangible and intangible damages. Where tangible damages have been suffered, additional intangible damages are recoverable. This Court recently made that clear in *Champion v. Gray*, 478 So.2d 17 (Fla. 1985), where it modified the "impact rule" to allow the recovery of intangible damages for mental anguish suffered without "physical impact," where the mental anguish ultimately resulted in tangible damages in the form of physical injury. The reason offered for this modification of the rule was that, once tangible damages have been suffered, the public policy reasons behind the "impact rule" are no longer compelling, and intangible damages should therefore be recoverable as well. That reasoning is consistent with §47, of course, and it fits the instant case like a glove.

In the instant case, the Lloyds have suffered *tangible* damages. Those damages are not in the form of physical injury, to be sure, but they are no less tangible than a physical injury -- because the extraordinary out-of-pocket expenses which will be required to care for their defective child are tangible indeed. And, of course, the law of Florida

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[25/] One set of defendants argues that the District Court's decision rests solely upon a determination of the "foreseeability" of the Lloyds' mental anguish. Even a cursory reading of the District Court's decision will reveal that it did no such thing, however; it clearly adopted the quite different analysis of the problem set forth above.

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has provided the plaintiffs with a cause of action for "wrongful birth to recover those extraordinary pecuniary losses, without any requirement for proof of a "physical impact." It therefore seems to us that, if the "impact rule" has not already been declared irrelevant by the simple recognition of the tort itself, the reasoning of ***Champion*** should clearly apply to require modification of that rule here. In short, even if the "impact rule" is relevant here, the Court should hold that, in view of ***Champion,*** once the Woyds suffered ***tangible pecuniary*** damages which are recoverable in a tort action, their right to recover intangible damages flowing from the same negligent conduct should not be abrogated by blind, unreasoning application of the "impact rule."

The defendants have cited a few cases from other jurisdictions which they claim support their position.[26/] Most of them involve the much more difficult and delicate question of whether damages for mental anguish are recoverable for negligent ***post-conception*** advice which did not allow a pregnant woman to make an informed decision concerning termination of the pregnancy by abortion -- which we perceive to be a considerably different question than the one presented here. In cases involving ***pre-conception*** testing and advice, where the pregnancy itself would have been prevented if the defendant had exercised reasonable care (and even in the different type of case relied upon by the defendants), the overwhelming majority rule, is that damages for mental anguish *are* recoverable when a deformed and helpless child is born as a direct result of the defendant's malpractice. See, *e. g., Gallagher v. Duke University*, 852 F.2d 773 (4th Cir. 1988); ***Phillips v. United States,*** 575 F. Supp. 1309 (D.S.C. 1983); *Viccaro v. Milunsky*, 406 Mass. 777, 551 N.E.2d 8 (1990); *Naccash v. Burger*, 223 Va. 406, 290 S.E.2d 825 (1982); ***Berman v. Allen,*** 80 N.J. 421, 404 A.2d 8 (1979); ***Shelton v. St.***

26/ One of the cases cited by Dr. Kush was actually reversed, on the ground that Georgia simply would not recognize any action for "'wrongful birth," ***see Atlanta Obstetrics & Gynecology Group, PA. v.*** *Abelson*, 260 Ga. 711, 398 S.E.2d 557 (1990). Since this Court already crossed that Rubicon in *Fassoulas*, that decision is obviously irrelevant here. Dr. Kush has also cited a Delaware decision. As cited at least, the "decision" is simply a line in a table of unpublished decisions.

Anthony's Medical Center, **781** S.W.2d **48** (Mo. **1989); *Owens v. Foote,* 773** S.W.2d **911** (Tenn. **1989);** Speck ***v. Finegold,* 497** Pa. **77, 439** k2d **110 (1981); *Harbeson v. Parke-Davis,*** Inc., 98 Wash.2d 460, 656 P.2d **483 (1983); *Blake v. Cruz,*** 108 Idaho **253, 698** P.2d **315 (1985); *Ochs v. Borrelli,* 187** Conn. **253, 445** k2d **883 (1982); *Proffitt v. Bartolo,* 162** Mich. App. **35,** 412 N.W.2d 232 **(1987).**[27] For the reasons stated in those decisions -- particularly in the Virginia Supreme Court's explanation of the inapplicability of the "impact rule" in ***Naccash v. Burger, supra*** -- we commend this majority rule, and the District Court's adoption of it, to the Court.

Finally, in an abundance of perhaps unnecessary caution, we respectfully submit that even a blind application of the artificial "impact rule" to the facts in this **case** should result in a conclusion that damages for mental anguish are recoverable -- because the Lloyds suffered "physical impacts" of the most intimate sort on the facts in this case. The treatment to which the Lloyds submitted to determine whether they should ever attempt to have another child involved the not entirely painless insertion of needles into them for the withdrawal of their blood. In addition, the defendants' negligence resulted in three pregnancies, two miscarriages, and the delivery of a baby -- none of which would have occurred if the defendants had not breached their duty of reasonable care.

For Mrs. Lloyd to carry the seed of the defendants' negligence *inside* her body for nine months, and then suffer the physical trauma of a delivery which would never have occurred if the defendants had not been negligent is clearly to suffer a "physical impact." ***See Eagle-Picher Industries, Inc. v. Cox,* 481** So.2d **517** (Fla. 3rd **DCA** 1985), *review* ***denied,* 492** So.2d **1331 (Fla. 1986)** (mere inhalation of one asbestos fiber sufficient to satisfy "impact rule"). And there is, of course, the horrible "physical injury" suffered by

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[27] Additional decisions supporting the recoverability of such damages in a "wrongful birth" action are collected in Annotation, ***Wrongful Birth*** or ***Life -- Distress,* 74** A.L.R.4th **798 (1989),** and Annotation, ***Tort Liability for Wrongful Birth,*** 83 A.L.R.3d 15 **(1978). *See generally*,** Note, ***Wrongful Birth Actions: The Case Against Legislative Curtailment,* 100** Harv. L. Rev. **2017 (1987).**

Brandon himself -- an injury which would never have occurred "but for" the defendants' negligence. To the defendants' complaint that these final arguments are artificial, we respond simply that the "impact rule" is artificial in the extreme to begin with -- and if a "physical impact" or "physical injury" is to be required to overcome the artificial rule, it should not matter that the impact is something less than a straightforward punch in the mouth.

Most respectfully, it makes no sense whatsoever to authorize the recovery of the Lloyds' extraordinary pecuniary losses in one breath, with no requirement for proof of a "physical impact," and then deny them recovery of their substantial additional damages for the very mental anguish which the defendants were engaged to prevent, on the inconsistent ground that proof of a "physical impact" is required. Once the tort of "wrongful birth" is recognized as actionable without the impediment of the "impact rule," then the "impact rule" has simply become irrelevant, and all consequential damages caused by the tort should be recoverable. We therefore respectfully submit that the District Court did not err in disagreeing with the single, unexplained sentence in *Moores* upon which the defendants rely, and in holding that the trial court erred in striking the Lloyds' claims for mental anguish.

C. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT EXTRAORDINARY CARE AND MAINTENANCE EXPENSES BEYOND THE AGE OF BRANDON'S MAJORITY ARE RECOVERABLE BY MR AND MRS. LLOYD IN THEIR "WRONGFUL BIRTH" ACTIONS.

The final issue is whether the District Court erred in holding that the Lloyds are entitled to recover the extraordinary expenses they will incur in caring for Brandon, not merely during the period of his minority, but during the equally helpless days and years which will follow his 18th birthday. This question was left open in this Court's decision in *Fassoulas*. We do not perceive that the question was left open because there might be a legitimate reason for denying recovery of these expenses altogether, however. We think the question was left open simply because a legitimate question existed at the

time as to whether those expenses should be recoverable in an action for "wrongful life" by the child, or in an action for "wrongful birth by the parents. Surely, if extraordinary care expenses are recoverable at all (and they are, according to *Fassoulas*), then they are recoverable by someone for the entire period in which they will be incurred.

Whether the Lloyds have a legal duty, or only a moral duty, to support their helpless child until he dies would seem to be an irrelevant question. The point is that the child can never support himself, and the expenses to care for him will therefore necessarily be incurred by the Lloyds from the date of his birth to the date of his death -- and it is an arbitrary line indeed which would require the defendants to compensate them for those damages until Brandon's 18th birthday, and then let the defendants simply walk away from the subsequent future damages which their negligence undeniably caused. We therefore believe that the **only** relevant question here is whether the extraordinary care expenses beyond the date of Brandon's 18th birthday should be recoverable by the parents or the child.

To put the law to this choice, the two claims were filed in the alternative below. Following the clear weight of authority, which has rejected claims for "wrongful life" on purely philosophical grounds, the District Court held simply that the expenses were recoverable by the parents in their "wrongful birth actions, rather than by Brandon in a "wrongful life" action. Although there is an isolated decision or two to the contrary, the clear majority of courts which have considered this question in other jurisdictions are in agreement with the District Court's answer to it. ***E. g., Phillips v. United States,* 575 F. Supp. 1309 (D.S.C. 1983);** ***Viccaro v. Milunsky*, 406** Mass. *777,* **551 N.E.2d 8 (1990);** ***Lininger v. Eisenbaum*, 764** P.2d **1202** (Colo. **1988);** Blake ***v. Cruz*,** 108 Idaho **253, 698** P.2d **315 (1984);** ***Smith v. Cote,* 128 N.H.** 231, **513** A.2d **341 (1986);** James **G.** *v.* ***Caserta*,** 332 S.E.2d **872** (W. Va. **1985);** ***Garrison v. Medical Center of Delaware, Inc.*, 581** ***k 2 d 288*** (Del. **1990).** ***See Robak v. United States*, 658** F.2d **471** (7th Cir. **1981).** We commend these sensible decisions to the Court -- and because the only alternative even arguably

suggested by the defendants is that Brandon simply be thrown upon the mercy of the State when he reaches his 18th birthday, we respectfully submit that the question should not even be a close one.

Because both the substantial weight of authority and fundamental notions of fairness are clearly against them on this issue, the defendants resort to arguments on purely collateral matters -- like separation and divorce, collateral sources in the form of medical insurance, the Lloyds' life expectancies, and how the awards should be handled and protected post-judgment.[28/] There are no record references supporting any of the facts upon which these collateral arguments are made, so we are unable to determine if a predicate for the arguments even exists. Moreover, none of these collateral arguments were made to the District Court, so they should not be entertained here.

In any event, the more important point is that the issue is before the Court on a simple "motion to strike" the Lloyds' prayer for these damages on the ground that their recovery is disallowed as a matter of law, and on an order striking the prayer on that *legal* ground. As a matter of procedure, the motion did not place any *factual* matters in controversy, and the order itself is therefore not bottomed upon any *factual* matters at all. The order which the District Court reversed therefore disposes only of a threshold legal question, to which all of the collateral factual arguments made by the defendants are simply irrelevant. We therefore respectfully submit that the only appropriate disposition here is approval of the District Court's reinstatement of the illegally stricken portion of the prayer. The *factual* matters which relate to this element

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[28/] The defendants also make the curious argument that "[a] tort action is just not the proper forum in which the potential future expenses, even assuming the parents' obligations for them beyond the age of majority, can or should be determined." (Brief of Dr. Maislen, et al., p. 45 n. 11). Most respectfully, future pecuniary losses are recoverable in every tort action of which we are aware, notwithstanding their lack of certainty -- which is probably why the defendants have cited no authority whatsoever for their curious assertion, or even suggested what a "proper forum" might be for recovery of the damages they caused.

of damage, including all of the collateral matters which the defendants have raised here, remain for development and adjudication at a subsequent date.

Finally, in an abundance of caution, we respectfully submit that if the District Court erred in authorizing the recovery of extraordinary expenses beyond Brandon's 18th birthday in the Woyds' wrongful birth actions (as an adjunct to the first eighteen years of expenses already authorized by *Fassoulas*), those expenses should be recoverable in Brandon's "wrongful life" action -- because they surely must be recoverable in one or the other. **See *Harbeson v. Park-Davis, Inc.*, 98 Wash.2d 460, 656** P.2d 483 **(1983); *Procanik v. Cillo*, 97 N.J. 339, 478** A.2d **755 (1984).** Therefore, if the Court should conclude that the District Court erred on this final point, it should instruct the District Court upon remand to reinstate Brandon's claim for extraordinary expenses in his "wrongful life" to the extent that it seeks recovery of those expenses.

V. CONCLUSION

It is respectfully submitted that the District Court's decision should be approved in its entirety. If the Court should conclude that the extraordinary expenses for Brandon's care beyond his 18th birthday are unrecoverable by the Lloyds in their "wrongful birth actions, the portion of the District Court's decision which disapproves recovery of those expenses in Brandon's "wrongful life" action should be quashed, and the cause should be remanded with directions to order reinstatement of that claim.

VI. CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the forgoing was mailed this 22nd day of April, 1991, to all counsel on the attached service list.

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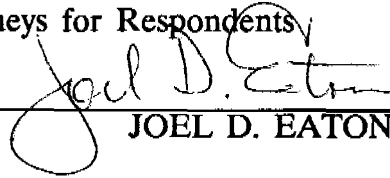
By: 
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APPENDIX

Second, we are requiring the Miami Herald to prove that vacation of the expunction order would serve the public interest. I confess some confusion as to the proof necessary to establish the requisite "public interest." If the trial court lacked jurisdiction or authority to enter the order or if the order was obtained upon fraudulent evidence, I can accept the proposition that a vacation of the expunction order would serve the public interest. I am very concerned that this process could be abused in cases in which the "public interest" is established by evidence of events after the conclusion of the criminal proceeding. This seems similar to granting the newspaper relief from the earlier order on the ground that it is "no longer equitable" to enforce the order. *Cf.* Fla.R.Civ.P. 1.540(b)(5).

Expunction is intended to give a person a fresh start or a second chance. In cases in which the person has been falsely arrested or wrongfully charged, it acts to minimize the harm caused by incorrect government activity. Undoubtedly, there are many fine citizens who have been given a break by understanding trial judges at some point in their lives. I do not believe the first amendment or the policies strongly supporting access to court records compel courts to reveal unproven accusations of drunkenness, petit theft, or other minor crimes, which occurred ten or more years ago, merely because a citizen has become a pemon of public interest. Although I do not question the motives or integrity of the Miami Herald in this specific case, I do not believe that, as a general rule, a public figure should be haled into court under the modified *Press-Enterprise* standards for a public rehearing of the expunction of some youthful transgression—merely because enquiring minds wish to know.

On the other hand, if it is established that the beneficiary of an expunction order did not profit from the act of judicial grace and has been subsequently convicted of other crimes, arguably it is no longer equitable to conceal history. The orders which expunged Mr. Russell's judicial history gave him a limited right to legally deny history. § 943.058(6), Fla.Stat. (1987). Even though expunction, as a method to artificially erase history, is a concept that conflicts with our democratic principles of free speech and access to government records, I believe the courts should be very circumspect at hearings designed to eliminate rights that were earlier extended by the courts.

Third, although a criminal court may always retain subject matter jurisdiction over its sealed records, the same is not true for personal jurisdiction over the recipients of expunction orders. In this case, Mr. Russell voluntarily appeared and did not challenge the court's personal jurisdiction. I question whether the trial court could have entered an order modifying Mr. Russell's right to expunction if Mr. Russell now lived in another state and was not subject to personal jurisdiction in Florida. The procedure used by the Miami Herald effectively allows one private entity to sue another in a criminal court. This suggests that we may be overly generous in granting standing to an outsider in a criminal case when the criminal court has lost jurisdiction over the accused. Procedurally, it might be more appropriate to require an action for declaratory relief in which the paper sued Mr. Russell and the state.

Brandon David LLOYD, a minor child, By and Through his parents, Anthony D. LLOYD and Diane S. Lloyd, and Anthony D. Lloyd and Diane S. Lloyd, individually, Appellants,

v.

NORTH BROWARD HOSPITAL DISTRICT, etc., et al., Appellees.

Nos. 87-2250, 88-1419.

District Court of Appeal of Florida, Third District.

July 10, 1990.

On Motion for Rehearing, Clarification and Certification Dec. 18, 1990.

In suit against hospital district and pediatrician arising out of failure to dis-

cover genetic abnormality prior to second child's birth, the Circuit Court, Dade County, Richard S. Fuller, J., dismissed child's "wrongful life" claim and granted summary judgment against parents on their "wrongful birth" claim on limitations grounds. On appeal, the District Court of Appeal, Cope, J., held that: (1) relevant "incident or occurrence" for limitations purposes was child's birth, and suit was thus timely; (2) parents could recover damages for mental anguish; and (3) no cause of action existed for general damages for wrongful life, and child had no right to recover on his own behalf the special damages associated with his care and maintenance to age 18 and beyond.

Affirmed in part, reversed in part, and remanded.

1. Limitation of Actions ⚷95(12)

Relevant "incident or occurrence" for purposes of limitations period on parents' "wrongful birth" claim was child's birth, not pediatrician's erroneous medical advice that abnormalities of parents' previous child were accident of nature rather than result of genetic defect; thus, claim was timely under four-year statute of repose. West's F.S.A. § 95.11(4)(b).

See publication Words and Phrases for other judicial constructions and definitions.

2. Damages ⚷50

"Impact rule" did not bar parents' recovery of damages for mental anguish for their son's wrongful birth.

3. Physicians and Surgeons ⚷18.110

Child's "wrongful life" claim for general damages on account of his severely impaired existence would not be recognized.

4. Physicians and Surgeons ⚷18.110

Child born with severe mental and physical impairment did not have "wrongful life" claim on his own behalf for special damages for his care and maintenance to age 18 and beyond; under circumstances, claim belonged to parents.

Searcy, Denney, Scarola, Barnhart & Shipley and James L. Torres, Edna L. Caruso and Philip M. Burlington, West Palm Beach, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin and Joel Eaton, Miami, for appellants.

Wolpe, Leibowitz, Berger & Brotman, Fowler, White, Burnett, Hurley, Banick & Strickroot and A. Blackwell Stieglitz, Miami, Korman, Schorr & Wagenheim, Ft. Lauderdale, Stephens, Lynn, Klein & McNicholas and Debra J. Snow and Robert M. Klein, Miami, Miller, Hodges, Kagan & Chait, Deerfield Beach, and G.J. Godfrey, Miami, for appellees.

Before HUBBART, FERGUSON and COPE, JJ.

COPE, Judge.

Anthony, Diane and Brandon Lloyd appeal adverse judgments in their suit for wrongful birth and wrongful life. We affirm in part and reverse in part.

The present appeal is one from a summary judgment against Mr. and Mrs. Lloyd on the basis of the statute of limitations, and from orders striking certain other claims. For purposes of this appeal we take the facts in the light moat favorable to the Lloyds.

In 1976 Anthony and Diane Lloyd had a sou, Michael, who was born severely deformed and severely retarded. The Lloyds sought an evaluation to determine if Michael's deformities were the result of an inheritable genetic defect so that they could determine whether to have more children. Mr. and Mrs. Lloyd consulted initially with their pediatrician, appellee Dr. Pedro Diaz, who referred them to other health care providers for testing. The other appellees are health care providers to whom Mr. and Mrs. Lloyd were referred, and were involved at various stages in one or another of the aspects of the testing.

Some of the genetic testing results were normal. Those findings were reported to Dr. Diaz along with the information that a fluorescent banding study was being performed and was not complete. Dr. Diaz was advised that he would be informed if

the results were abnormal. Dr. Diaz was never provided any results of any abnormality.

In the absence of any negative information, Dr. Diaz assured the Lloyds that Michael's abnormalities were an accident of nature, rather than the result of a genetic defect. Dr. Diaz recommended that the Lloyds have another child. For present purposes, the last date of provision of health care to the Lloyds was December 31, 1978.

Acting on the advice, the Lloyds proceeded with family plans. Mrs. Lloyd became pregnant twice in 1982 but both pregnancies ended in miscarriages. On December 24, 1983 Brandon Lloyd was born. He suffers from the identical physical and mental abnormalities as Michael,

The Lloyds initiated genetic testing of Brandon. Those tests revealed a genetic abnormality. The Lloyds then requested that the same laboratory evaluate the raw data from the chromosome studies that had been earlier performed upon Michael. The evaluation showed that Michael had the same genetic abnormality, and that both children had inherited the abnormality through the mother. It appears that through a personnel change or other error, the late 1970's fluorescent banding studies of Michael, which revealed the genetic defect, were never communicated either to the Lloyds or Dr. Diaz.

The Lloyds initiated a medical malpractice action against the appellees, which was filed within two years after Brandon's birth. Mr. and Mrs. Lloyd brought suit on *their* own behalf for the "wrongful birth" of Brandon, in which they claimed damages for the extraordinary expenses required to care for Brandon and damages for *their* own mental anguish. They also brought suit for "wrongful life" on behalf of Brandon.

The trial court dismissed Brandon's claims for wrongful life for failure to state a cause of action. The court entered summary judgment against Mr. and Mrs. Lloyd on the basis of the statute of limitations. The court also ruled that, in any event, Mr. and Mrs. Lloyds' claims for mental anguish were not cognizable in the "wrongful birth" action.

[1] We first consider the statute of limitations issue. Insofar as pertinent here, paragraph 95.11(4)(b), Florida Statutes (1985), provides:

> 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.*

(Emphasis added).[1] As the last health advice was given to the Lloyds at the end of 1978, and suit was not filed until 1986, the trial court concluded that the action was barred by the four-year statute of repose.

The effect of the trial court's ruling was to hold that the limitation period expired before Brandon was born. Under that approach, the limitation period expired before *the* Lloyds had experienced any injury and before they had any awareness of a possible claim.

Dispositive for present purposes is our court's decision in Williams *v. Spiegel,* 512 So.2d 1080 (Fla. 3d DCA 1987), *quashed in*

1. The statute goes on to say:
An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, *dental,* or surgical diagnosis, treatment, or care by any provider of health care. The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. 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.

part on other grounds, 545 So.2d 1360 (Fla.1989). There the court defined "incident" as "an *injury* caused by medical malpractice. ..." *Id.* at 1081 (emphasis added); accord *Elliot v. Barrow,* 526 So.2d 989 (Fla. 1st DCA), review *denied,* 536 So.2d 244 (Fla.1988); *Scherer v. Schultz,* 468 So.2d 539 (Fla. 4th DCA 1985); *Florida Patient's Compensation Fund v. Tillman,* 453 So.2d 1376 (Fla. 4th DCA 1984), *aff'd on this issue,* 487 So.2d 1032 (Fla.1986). *See generally Jackson v. Georgopolous,* 552 So.2d 215 (Fla. 2d DCA 1989)(Lehan, J. concurring specially). Until Mrs. Lloyd gave birth to a live baby, Brandon, the Lloyds had suffered no injury. The relevant moment for purposes of the statute was the date of the child's birth. The lawsuit was therefore timely.

Appellees argue that the statutory "incident or occurrence" should be interpreted to mean the erroneous medical advice, rather than the birth of Brandon. Appellees rely in part on *Carr v. Broward County,* 541 So.2d 92 (Fla.1989), but *Carr* is consistent with the approach we take here. In *Carr* the Florida Supreme Court held that the aeven-year statute of repose could constitutionally be applied to bar an action for medical malpractice.[2] In that case "the brain damage injury to the Carr infant was a completed fact at the time of birth. ..." 541 So.2d at 94. The allegations of negligence in that case included claims for negligent prenatal and obstetrical care, as well as care rendered during birth. In the present case, as in *Caw,* the "occurrence" for purposes of the statute of repose was the birth of the infant. *See also Nardone v. Reynolds,* 333 So.2d 25, 40 (Fla.1976) ("The nature of the infant's condition was patent in 1966, before his discharge from the hospital.. ..."); *Barron v. Shapiro,* 565 So.2d 1319, 1321 (Fla.1990) ("Applying the principle of Nardone to the facts of this case, it is apparent that the Shapiros were on notice of Mr. Shapiro's injury by at least December 31, 1979. As Mrs. Shapiro put it, her husband went in for an operation on his colon and came out blind.").

Appellees also rely on cases decided under the statute of limitations for products liability actions, and in particular *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985), *appeal dismissed,* 475 U.S. 1114, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986). The approach we take is, however, consistent with *Pullum.* There the plaintiff was injured prior to the expiration of the twelve-year statute of repose set forth in subsection 95.031(2), Florida Statutes (1979), but did not bring suit until two years after expiration of the statute of repose. 476 So.2d at 658-59. Although the court upheld the statute of repose, it distinguished *Diamond v. E.R. Squibb & Sons, Inc.,* 397 So.2d 671 (Fla.1981). 476 So.2d at 659 fn. The court stated, in part:

> In Diamond, the defective product, a drug known as diethylstilbestrol produced by Squibb, was ingested during plaintiff mother's pregnancy shortly after purchase of the drug between 1955-1956. The drug's effects, however, did not become manifest until after plaintiff daughter reached puberty. Under these circumstances, if the statute applied, plaintiffs' claim would have been barred even though the injury caused by the product did not become evident until over twelve years after the product had been ingested. The legislature, no doubt, did not contemplate the application of this statute to the facts in *Diamond* Were it applicable, there certainly would have been a denial of access to the courts.

476 So.2d at 669 fn.

While a different statute applies to the present case, the reasoning of *Pullum* lends support to the statutory construction we adopt here. Under familiar principles of statutory construction, we are obliged to adopt the construction which will render the statute constitutional, rather than unconstitutional, See, *e.g.,* Sandlin *v. Criminal Justice Standards & Training Comm'n,* 531 So.2d 1344, 1346 (Fla.1988); *Emhart Corp. v. Brantley,* 257 So.2d 273, 275 (Fla. 3d DCA 1972). The interpretation we have adopted *is,* in our view, logical and avoids a construction which would other-

2. *See* § 95.11(4)(b), Fla.Stat. (1975); see *also supra* n. 1.

wise render the statute infirm under article I, section 21 of the Florida Constitution. As the action was not time-barred, we reverse the summary judgment.

[2] We next consider the trial court's order striking Mr. and Mrs. Lloyd's claim for mental anguish. The Florida Supreme Court recognized a cause of action for the wrongful birth of a deformed child in *Fassoulas v. Ramey*, 450 So.2d 822 (Fla.1984). *Fassoulas* allows the parents to recover "special upbringing expenses associated with a deformed child," *id.* at 824 (citation omitted), but not ordinary child rearing costs. *Id.* The *Fassoulas* court expressly did not reach the issue of claims for parental pain and suffering. *Id.*

In considering Mr. and Mrs. Lloyd's claim for mental anguish, the trial court followed *Moores v. Lucas*, 405 So.2d 1022 (Fla. 5th DCA 1981). That case holds that parental claims for past and future emotional pain and suffering are barred by the impact rule. Id. at 1026. The trial court followed *Moores* and struck the parental claims for mental anguish.

We decline to follow *Moores* on that issue, and conclude that damages for mental anguish are recoverable. Mr. and Mrs. Lloyd's "wrongful birth" claim is a tort cause of action recognized in *Fassoulas*. Under that decision, they may claim compensatory damages for the special *care* expenses for Brandon. The claim for mental anguish is properly viewed as an additional element of their claim for damages. See generally *Ramey v. Fassoulas*, 414 So.2d 198, 199 (Fla. 3d DCA 1982) ("the recoverable items of damages tend to be much the same as any other negligence malpractice action. . . ."), *aff'd*, 450 So.2d 822 (Fla. 1984).

Appellees *argue* that the impact rule bars recovery here. For two distinct reasons, we disagree. First, the impact rule comes into play "[w]here the defendant's negligence causes ***only mental disturbance***, without accompanying physical injury, illness or other physical consequences, ***and in the absence of some other independent basis for tort liability. . . .*** " *W.* Keeton, ***Prosser & Keeton on The Law of Torts***, § 54, at 361 (1984) (emphasis added); *see* Brown *v. Cadillac Motor Car* Division, 468 So.2d 903, 903–04 (Fla.1985), *affirming Cadillac Motor Car Division v. Brown*, 428 So.2d 301, 302 (Fla. 3d DCA 1983) (plaintiff's sole claim was for emotional distress); *Restatement (Second) of Torts* § 47 & Comment b (1965).[3] Here, however, there has been an injury to the parents' legally protected interest, for which the parents are entitled to compensatory damages under the measure approved in *Fassoulas*. Under the facts of the present case, emotional distress is a natural consequence of the tort and is properly seen as an additional element of damage incident to the "wrongful birth" claim. See, *e.g.*, *Gallagher v.* Duke *University*, 852 F.2d 773, 778–79 (4th Cir.1988); *Phillips v.* United *States*, 575 F.Supp. 1309, 1317–19 (D.S.C.1983); *Naccash v.* Burger, 223 Va. 406, 290 S.E.2d 825, 830–31 (1982). *Contra Moores*, 405 So.2d at 1024–26; *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill.2d 230, 111 Ill.Dec. 302, 310–11, 512 N.E.2d 691, 707–08 (1987); *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex.1975). See *generally* W. Keeton, ***Prosser & Keeton on The Law of Torts***, § 55, at 371.

Second, if it is assumed arguendo that the impact rule does apply, the rule has been satisfied. Mr. and Mrs. Lloyd submitted to physical testing after Michael's birth and on the basis of the medical advice, Mrs. Lloyd proceeded through two unsuccessful pregnancies, as well as the birth of Brandon, Under either analysis,

3. Two of the cases relied on by *Moores*, 405 So.2d at 1026, involve claims solely for mental distress. In *Gilliam v. Stewart*, 291 So.2d 593 (Fla.1974), the plaintiff sued for distress after a car collided with her house. *See Stewart v. Gilliam*, 271 So.2d 466, 467 (Fla. 4th DCA 1972), *quashed*, 291 So.2d 593 (Fla.1974). In *Herlong Aviation, Inc. v. Johnson*. 291 So.2d 603 (Fla. 1974), the claim was for fright suffered during an air trip. *See Johnson v. Herlong Aviation, Inc.*, 271 So.2d 226, 227 (Fla. 2d DCA 1972), *approved in part, quashed in part*, 291 So.2d 603 (Fla.1974). The third case, *Pazo v. Upjohn Co*, 310 So.2d 30 (Fla. 2d DCA 1975), applied the impact rule to bar recovery for mental pain and suffering where the mother had ingested a prescription drug which caused the child to be born with physical anomalies.

the claims for mental anguish should not have been stricken.[4]

We next turn to Brandon's claim for damages for "wrongful life" for having been born as a result of the appellees' negligence. The trial court struck the claims on behalf of Brandon for failure to state a cause of action.

[3] The "wrongful life" claim presents two distinct theories of recovery. The first of these is a claim for general damages on account of the child's severely impaired existence. We concur with the trial judge that such a claim is not cognizable. This result follows, in our view, from *Fassoulas v. Ramey*, which has declined to compensate parents where there has been an unintended birth. 450 So.2d at 823-24; see also *Ramey v. Fassoulas*, 414 So.2d at 199-201. In common with the other courts to have considered the issue, we decline to recognize a cause of action for general damages for wrongful life. See, *e.g., Moores v. Lucas*, 405 So.2d at 1024-26; *Viccaro v. Milunsky*, 406 Mass. 777, 551 N.E.2d 8, 12-13 (1990).

[4] The second aspect of the "wrongful life" claim is the request for special damages for the care and maintenance required for Brandon on account of his severe mental and physical impairment. According to the record now before us, Brandon has essentially a normal life expectancy, but his disabilities will not improve and will last throughout his lifetime.

In *Fassoulas*, the supreme court left open "[t]he issue of whether, by whom, and under what circumstances, special damage8 may be recoverable beyond the age of majority if severe infirmities, such as mental retardation, preclude an individual from being self-sustaining as an adult. ..." 450 So.2d at 823 n. 1. The present case squarely presents the issue left open in *Fassoulas.*

The appellants assert that Brandon has a right to recover on his own behalf the special damages to age eighteen and beyond.[5] There is a division of authority among the courts to have considered this question, the majority of which have declined to recognize a cause of action on behalf of the minor child, Compare *Lininger v. Eisenbaum*, 764 P.2d 1202, 1209-10 (Colo.1988) *and Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986) with *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984) and *Harbeson v. Parke-Davis, Inc.*, 98 Wash.2d 460, 656 P.2d 483 (1983).

On the facts here presented, there is a claim for the special care and maintenance expenses for a disabled child, both before and after the age of majority. In the present circumstances we conclude that the claim is that of the parents, not the child. Again viewing the record most favorably to the Lloyds, it is abundantly clear that the parents sought medical evaluation and advice specifically so that they could avoid giving birth to a second child with the defects suffered by their first child. As a result of a breach of duty owed to the parents, Brandon was born and will require a lifetime of special support, for there is no possibility that Brandon will become self-sustaining. Apart from moral obligations, there is a parental duty of support where the child continues to suffer from physical or mental deficiencies after attaining the age of majority. *See Perla v. Perla*, 58 So.2d 689,690 (Fla.1962); *Shufflebarger v. Shufflebarger*, 460 So.2d 982, 984 (Fla. 3d DCA 1984). The special care expenses for Brandon are logically and properly part of the parents' damage claim pursuant to *Fassoulas.* Under the circumstances of the present case, we affirm the trial court's order striking Brandon's claims.'

The summary judgment entered against Mr. and Mrs. Lloyd is reversed and the cause remanded for further proceedings consistent herewith. The order striking the claims on behalf of Brandon Lloyd is affirmed.

4. We certify express and direct conflict with *Moores v. Lucas.*

5. Appellants acknowledge that there can be but a single recovery.

6. We do not say that circumstances could never arise under which a cause of action would be recognized for the child, but only that such circumstances arc *not* present in this case.

ON MOTION FOR REHEARING, CLARIFICATION AND/OR CERTIFICATION

PER CURIAM.

The court certifies that in interpreting paragraph 95.11(4)(b), Florida Statutes (1985), it has passed on a question of great public importance. The motions for rehearing and clarification are denied.

David M. SUMMERS, Appellant,

v.

STATE of Florida, Appellee.

No. 90–1508.

District Court of Appeal of Florida, **First District,**

Aug. 13, 1990.

Defendant sought postconviction relief. The Circuit Court, Okaloosa County, Erwin Fleet, J., denied motion, and defendant appealed. On receipt of defendant's initial brief, the District Court of Appeal, sua sponte, struck brief as result of failure to include citations to record, and defendant moved for clarification. The District Court of Appeal held that clerk of lower tribunal was required to transmit to court amended record in which pages were numbered and which included an index so that defendant could include proper citations in brief.

Ordered accordingly.

1. Criminal Law ⚷1106(1)

Rule of appellate procedure ordering clerk of lower tribunal to transmit to court conformed copies of motion, order, motion for rehearing and order with certified copy of notice limited items included in record and established different time period for transmittal of record but did not dispense with other requirements for preparation of record, such as numbering pages and indexing. West's F.S.A. R.App.P.Rules 9.140(g), 9.200(d)(1)(B), (d)(2); West's F.S.A. RCrP Rule 3.850.

2. Criminal Law ⚷1106(1)

Clerk of lower tribunal was required to prepare and transmit to appellate court amended record in which pages were numbered, and including an index, so that post-conviction relief appeals could be filed containing appropriate citations to record. West's F.S.A. R.App.P.Rules 9.140(g), 9.200(d)(1)(B), (d)(2); West's F.S.A. RCrP Rule 3.850.

Sharon Bradley of Daley and Miller, Tallahassee, for appellant.

James W. Rogers, Asst. Atty. Gen., Tallahassee, for appellee.

ON MOTION FOR CLARIFICATION

PER CURIAM.

Appellant moves for clarification of this court's order striking appellant's brief. We grant the motion.

Appellant appeals an order of the trial court which denied his motion for post-conviction relief pursuant to Florida Rule of Criminal procedure 3.850. Upon receipt of appellant's initial brief, this court, sua sponte, struck appellant's brief because it failed to comply with the requirements of Florida Rule of Appellate Procedure 9.210(b), as there were no citations to the record on appeal. The court's order striking appellant's brief gave appellant 10 days to file an amended brief which complied with the rule. Appellant has responded with a motion for clarification of the order striking the brief. Appellant asserts that the brief did not contain citations to the record because the record was not prepared in accordance with Florida Rules of Appellate Procedure 9.200(d)(1)(B) and 9.200(d)(2); specifically, the record was not indexed and the pages were not numbered. Appellant asks this court to clarify its order to specify how citations to the record