OA 6-5-91

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,778

FLORIDA BAR NO. 191275

PUBLIC HEALTH TRUST OF DADE COUNTY, FLORIDA, d/b/a JACKSON MEMORIAL HOSPITAL,

Petitioner,

vs.

MAGDA MENENDEZ and AMERICO MENENDEZ, as the natural parents, legal guardians and next of friend of ADARIS MENENDEZ, a minor,

Respondents.

ANSWER BRIEF OF RESPONDENTS

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AUTHORITIES CITED

STATEMENT OF THE CASE

This action was commenced on September 30, 1985, when the respondents, plaintiffs below, Magda Menendez and Americo Menendez, filed a complaint for medical malpractice alleging that the obstetrical care rendered to Magda Menendez prior to the birth of her daughter, Adaris, on July 18, 1981 was below the accepted standard of care and resulted in Adaris suffering irreversible brain and nerve damage rendering her totally helpless and unable to care for her own needs for the duration of her life. (R 1-6)[1]

The petitioner, defendant below, the Public Health Trust of Dade County, denied the allegations of negligence and raised numerous affirmative defenses including the statute of limitations. (R 18-23, 530-536) Plaintiffs filed a reply alleging that the statute of limitations was tolled by fraud, misrepresentation and concealment by the defendants. (R 26-29, 556-559)

In their reply, plaintiffs alleged that a confidential, fiduciary relationship existed between Magda and the residents and attending physician at Jackson Memorial Hospital which imposed a duty to disclose adverse conditions known to the doctors or readily available to them through efficient diagnosis. (R 556-559)

Plaintiffs alleged that defendant concealed the baby's adverse condition at birth, and after Adaris was discharged from Jackson

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[1] In this brief the symbol "R" refers to the record on appeal. All emphasis is added unless otherwise indicated.

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Memorial Hospital, referred the parents to the University of Miami Mailman Center where Magda was told that the baby's condition was due to prematurity. (R 556-559) Plaintiffs alleged in their reply that as a result of the misrepresentations and failure to disclose known facts, defendant effectively succeeded in delaying plaintiffs from discovering the fraud. (R 556-559)

The defendant filed a motion for summary judgment on the issues of the statutes of limitations and repose. (R 147-157) In its motion for summary judgment, the Public Health Trust contended that "the applicable Statute of Limitations governing this case is Florida Statute, § 768.28," the separate four year statute applicable to claims against the state or one of its agencies or subdivisions which the legislature wrote directly into the statute waiving sovereign immunity. (R 151)

After a hearing on the issue (R 2795-2883), the trial judge entered summary judgment holding that plaintiffs' claims were barred as to all defendants by the four year statute of repose provided in section 95.11(4)(b) of the Florida Statutes. Plaintiffs' motion for rehearing was denied. (R 844-857, 858)

On appeal, the Third District held that "as to Jackson... we hold that the trial court erred in applying the provisions of section 95.11(4)(b)," because section 768.28(11) of the Florida Statutes, a four year limitation without a period of repose, "is the appropriate statute of limitations in negligence actions against Jackson...." This court accepted jurisdiction based upon alleged conflict with the decision in Carr v. Broward County, 505 So.2d 568 (Fla. 4th DCA 1987), affirmed, 541 So.2d 92 (Fla. 1989).

STATEMENT OF THE FACTS

On June 8, 1981 Magda experienced hemorrhaging during her pregnancy, and was taken by fire rescue to Jackson Memorial Hospital. (R 894, 1052-1053) Magda was examined by Manuel Penalver, M.D., a resident at Jackson, who determined that the fetus was viable and, upon measurement, was twenty-eight weeks by size. (R 1612-1613) He found no abnormalities with the baby. (R 1614). Dr. Penalver testified that "[i]f in my clinical evaluation the patient was bleeding actively and profusely" he would interrupt the pregnancy to protect the baby and the mother. (R 1618-1619)

Magda was hospitalized for a month at Jackson commencing on June 8th. (R 894, 1059) Upon admission, Magda was initially placed in the delivery room, but after having been observed, was changed to a regular room for rest and observation. (R 907, 1059-1060) During the first week of hospitalization from June 8th through June 15th, Magda had a second and third episode of hemorrhaging. (R 1060)

On Sunday, June 14th, Magda had "strong hemorrhaging" and was taken back to the delivery room where she spent the day, before being returned to her room. (R 1060) On June 14th when Magda was hemorrhaging, the nurses observed that Magda appeared "anxious over the bleeding episode" and asked the nurse "are they going to do a C section." (R 919) By the 15th of June Magda was still "oozing blood vaginally slowly." (R 923) After she had been in the room for an hour on June 15th, she received a transfusion and was transferred back to the labor and delivery room because she was hemorrhaging again. (R 925-930, 1060) Magda testified that "after

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the third hemorrhage, I kept bleeding and they kept counting the pads." (R 1061)

Magda recalled that when she had the third hemorrhage episode on June 15th, she was nervous because of all of the bleeding, and asked Dr. Penalver, "if it was already time for the operation. And he said no, because the best thing for the baby was to keep the child inside me for a longer period of time." (R 1060, 1065)

Magda continued to bleed after the hemorrhage episode on the 15th of June. One June 19th the chuck pads underneath Magda were soaked with blood, and Magda voiced concerns about so much bleeding. (R 936) Later on the same day, Magda passed a blood clot in the toilet, and after having saturated 5 pads with blood in the morning and one pad in the afternoon, Magda began to cry. (R 939) The bleeding continued, and on the 22nd of June the assessment was "bleeding active." (R 941)

Magda testified that the explanation that she had been given by Dr. Penalver that the best thing for the baby was to be inside of her seemed reasonable to her "because he knew; he was the doctor there. He was the one that knew." (R 1065)

On July 8th, 1981, Magda was discharged from the hospital. (R 1065) However, on July 14th, Magda was readmitted to Jackson. (R 976) She was "bleeding quite a bit," and continued to bleed in the hospital. (R 1071) Magda testified that between July 14th and July 18th "I had about three more hemorrhages and I was bleeding for that whole week." (R 1074)

Between July 14th until Adaris was delivered on July 18th, Magda was transferred to the labor and delivery floor four times.

(R 1338-1339) Magda was admitted to labor and delivery on July 14th, and was then transferred back and forth three more times because she was bleeding. (R 1338-1339, 1341) She was transferred to labor and delivery for the last time on July 18th at 1:00 a.m., and stayed there until she went into the operating room at 8:50 p.m. (R 1326)

The operative note was dictated and signed by Dr. Pedro Villa. (R 1370-1372) Dr. Villa was just beginning his second year residency. (R 1268-1269) The operative note does not identify who performed the C section surgery on Magda. (R 1371) Dr. Villa testified that he did not know who actually did the surgery, and did not recall whether he was the surgeon. (R 1371)

Dr. Villa wrote in the operative note that the baby was delivered "without any complications," and that after the umbilical cord was clamped and cut "the baby was then handled (sic) to the Pediatrician in apparently good condition." (R 1020, 1378)

Magda was unconscious during the C section, but testified as to what she was told following the delivery:

> Q. After Adaris was born, what did they tell you about her condition?
>
> A. Well, everything was fine.
>
> Q. Did they tell you that she had any problems at all during delivery?
>
> A. No.
>
> Q. As far as you knew she was born perfectly healthy?
>
> A. Yes.
>
> (R 1082)

Magda's husband, Americo, was given similar information. He testified:

> Q. What was your understanding as to the extent of her problems during the month and a half that she was in the hospital?
>
> A. The extent?
>
> Q. Yes.
>
> A. Premature and underweight. That's about it.
>
> Q. What did the doctors tell you about her mental problems?
>
> A. None.
>
> Q. Did the doctors tell you to wait and see?
>
> A. No.
>
> Q. Did they tell you that she would not have any problems?
>
> A. I'm trying to remember. They did not mention any permanent problems. Normal problems as to, since she is so small, when she starts to feed, et cetera, et cetera. (R 1218-1219)

Adaris remained at Jackson for a month and a half following the delivery. (R 1083) Magda was told that Adaris was being kept in the hospital "because she was born prematurely." (R 1084) Moreover, Magda was told that whatever problems Adaris had following birth were due to prematurity. (R 1239) Magda did not suspect that the numerous bleeding episodes put her daughter at risk:

> Q. You understood that the more you bled the bigger the problems potentially were for Adaris, correct?
>
> ***

> WITNESS: No, because when the doctors kept telling me that I could relax. The best thing for Adaris was for her to stay inside as long as possible. I thought that that was the best thing for her.
>
> (R 1087-1088)

Following Adaris' discharge from Jackson, Magda was given instructions to take Adaris to the University of Miami Mailman Center the following month. (R 1084-1085)

Adaris was seen for the first time at the Mailman Center on September 21, 1981. (R 710) Dr. Charles Bauer, the director of the center wrote Magda and told her that Adaris "appears to be doing very well," and that "[o]n examination, we found everything to be normal." (R 790) Dr. Bauer told Magda that he wanted to follow Adaris "in our clinic and see how her growth and development progresses." (R 710)

In April of 1982 the Mailman Center told Magda that Adaris had cerebral palsy, and that Adaris would have permanent problems. (R 1094-1095) At that time, Magda did not attribute Adaris' cerebral palsy to the delivery:

> Q. In April of 1982 was it your understanding that this problem she had was related to her delivery?
>
> ***
>
> WITNESS: No, because they would always tell me that it was because she had been premature and I thought it was because she had been premature.
>
> (R 1095)

In January of 1984, the pastor from Magda's church asked a physical therapist who also belonged to the church if she would help Magda with her daughter. (R 1096) The physical therapist,

Mariana Barrett, went to Magda's house and looked at Adaris. (R 1100) Mariana told Magda that she thought her bleeding caused Adaris to lose oxygen, and "that's what caused her brain damage." (R 1100)

Although the operative report stated that the baby was delivered "without any complications," and was handed to the pediatrician in "apparently good condition," the report also stated that the baby had Apgar scores of 1, 1, 7. (R 1020)

The Apgar scores are a system for classifying the infant's condition during the first five minutes after birth. (R 1988-1991) The scoring system for an infant's condition is divided into categories of "vigorous, mildly depressed, moderately depressed and severely depressed." (R 1991) The scores provide that "vigorous is eight, mildly depressed is five, moderately depressed is three and severely depressed is one." (R 1991)

Dr. O'Sullivan, the attending physician at Jackson, testified that based on the Apgar scores, Adaris was "severely depressed" at birth. (R 1991-1991) Dr. O'Sullivan was of the opinion that Adaris' score "certainly implies that the baby sustained some kind of insult at the time of birth." (R 1992) Contrary to the operative report, Adaris was <u>not</u> born in "good condition," according to Dr. O'Sullivan:

> A. I think the protocol specifically says that an Apgar score of one is severely depressed. No matter how I would like to try and interpret that any other way, I don't think one could possibly call that -- what did you say?
>
> Q. Good condition.
>
> A. No, I don't think that one could actually say that.

(R 1992)

Dr. Villa testified that he does not know where he got the information he wrote in the operative report that the baby was handed to the pediatrician in good condition. (R 1378) When asked whether the information was accurate, Dr. Villa replied "I don't know." (R 1378-1379) Dr. Villa testified that in actuality Adaris was born in "critical condition," and required resuscitation. (R 1308-1309)

Defendant's obstetrical expert, Dr. Charles Kalstone, testified that at birth Adaris resembled a dead rag doll, and that it would have been hard to tell whether the infant was dead or alive. (R 2227-2228) Dr. Kalstone was of the opinion that the statement in the operative report about the baby's good condition was false because "the baby was born in poor condition, not good condition." (R 2178-2179) Dr. Kalstone stated that the standards of care applicable to obstetricians required defendant to disclose to the parents at birth that the child was born in poor condition and required resuscitation:

> ...most obstetricians would say what condition they thought the baby was in.
>
> In other words, if it had an Apgar of one, you would explain that in layman's terms. The baby was born and had a heartbeat. If I saw it and could hardly tell whether it was dead or alive, I would say that.
>
> If it was in poor condition, I would say that, if it were, and that it was resuscitation (sic) promptly and the outcome, you know, is yet to be determined.
>
> So you just tell them, if you think it is in good condition, it is in good condition. If it is poor, that it is in poor condition and that it had to be resuscitated.

(R 2247)

Dr. Kathryn Green is the director of pediatric neurology at St. Paul Children's Hospital in Minnesota. (R 2520) She testified that the cause of Adaris' brain damage was not prematurity as Magda had been led to believe, but was due to "chronic anemia that had gone on for, presumably weeks, or at least days." (R 2541, 2655)

Dr. Green testified that within reasonable medical probability the stress of delivery plus the chronic anemia, ischemia and iron deficiency was a more-likely-than-not cause of Adaris' condition at birth and her brain damage. (R 2633-2634) Moreover, defendant should have known about the child's chronic anemia and ischemia shortly after her delivery as soon as the initial hematocrit was measured. (R 2634) Dr. Green testified that within reasonable medical probability defendant had a duty to disclose to Magda that Adaris was at an increased risk for brain damage as a result of the chronic anemia:

> I believe that they should have told her that this was not a normal pre-term infant, and I do believe that the chronic anemia put her at greater risk for brain damage and the mother should have been told that.
>
> (R 2634-2635)

Dr. Green testified that within reasonable medical probability the child's brain damage, especially the chronic anemia, was preventable in this case either by transfusion or early delivery. (R 2641)

Dr. Green was of the opinion that under the particular circumstances of this case, the reassurances made to Magda that the longer the baby was left in her, the better it was for the baby

were not true, because "under these circumstances, I do not feel that this baby remaining in utero was an advantage to the child because of the continued stress and fall-off in growth." (R 2636)

Dr. Joseph Fleming, a board certified obstetrician, also testified as an expert for plaintiffs. Dr. Fleming was of the opinion, among others, that defendant misrepresented the facts to Magda:

> First of all during her bleeding, they told her that they were not doing a cesarean section because they wanted the baby to grow bigger. Well, that's a falsehood because under normal circumstances that's the ideal thing. The longer the baby is in utero the more chance it has of being normal. No question about that. But when you've got a complication, when you have something disrupting that process, which of course, is the bleeding, then it doesn't carry through.
>
> And again, going further into your answer to that question, what... right do they have to tell that poor woman the baby was in perfect health, in good condition? The baby is moribund. It's like handing her a wet sock.
>
> (R 2353-2354)

Based upon this evidence, the Third District Court of Appeal determined that "genuine issues of material fact exist as to when plaintiffs knew or should have known of either the injury or of the possible negligence for 768.28(11) purposes...."

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal correctly held that the four year statute of limitations provided in section 768.28(11) of the Florida Statutes (Supp. 1980) applies to this negligence action against the Public Health Trust.

Although the Fourth District Court of Appeal applied the statute of repose of section 95.11(4)(b) of the Florida Statutes to a malpractice action against Broward General Medical Center in Carr v. Broward County, 505 So.2d 568 (Fla. 4th DCA 1987), the Fourth District has recently clarified and explained that the issue of whether section 768.28(11) of the Florida Statutes or section 95.11(4)(b) should have been applied was neither presented to nor considered by the court in Carr.

In Lewis v. North Broward Hospital District d/b/a Broward General Medical Center, 16 F.L.W. D529 (Fla. 4th DCA Feb. 20, 1991) the Fourth District explained that its prior decision in Carr does not hold that the four year statute of repose contained in section 95.11(4)(b) of the Florida Statutes applies to malpractice claims brought against state agencies. In Lewis, the court held that the four year statute of limitations provided in section 768.28(12) of the Florida Statutes (formerly section 768.28(11)) rather than the four year statute of repose provided in section 95.11(4)(b) applies to a medical malpractice action brought against a state agency prior to October 1, 1988. In 1988, section 768.28(12) of the Florida Statutes was amended to provide that an action for medical malpractice against a state agency must be commenced within the time limitations set forth in section 95.11(4)(b) of the Florida Statutes. Ch. 88-173, § 2, Laws of Fla. However, for cases filed prior to October 1, 1988, the four year statute of limitations provided in section 768.28(12) of the Florida Statutes applies to medical malpractice actions against state agencies. Lewis, supra.

Petitioner's arguments concerning the definitions of a health care provider do not provide a legal basis for applying the four year statute of repose to the Public Health Trust. Although Jackson Memorial Hospital is a health care provider, the legislature specifically provided in section 95.011 of the Florida Statutes that "if a different time is prescribed elsewhere in these statutes," the action must be brought "within the time prescribed elsewhere." The legislature prescribed a time elsewhere in section 768.28(12) of the Florida Statutes by prescribing a four year statute of limitations for all negligence actions against state agencies.

POINT INVOLVED

THE THIRD DISTRICT CORRECTLY HELD THAT THE STATUTE OF REPOSE CONTAINED IN SECTION 95.11(4)(b) OF THE FLORIDA STATUTES (SUPP. 1980) DOES NOT APPLY TO MEDICAL MALPRACTICE ACTIONS BROUGHT AGAINST STATE AGENCIES SUCH AS THE PUBLIC HEALTH TRUST OF DADE COUNTY.

ARGUMENT

The point involved in this proceeding has been recently addressed by the Fourth District Court of Appeal in a dispositive decision which dispels all potential conflict, and clarifies and explains that the court's prior decision in Carr v. Broward County, 505 So.2d 568 (Fla. 4th DCA 1987) does not hold that the four year statute of repose contained in section 95.11(4)(b) of the Florida Statutes applies to malpractice claims brought against state agencies prior to October 1, 1988. The decision is Lewis v. North Broward Hospital District d/b/a Broward General Medical Center, 16 F.L.W. D529 (Fla. 4th DCA Feb. 20, 1991). As petitioner has chosen not to call the Lewis decision to this Court's attention, and seeks

to ignore the Fourth District's clarification and explanation of its decision in Carr, a discussion of Lewis will be provided by respondent.

In Lewis, the plaintiffs filed a medical malpractice action against Broward General Medical Center, the very same hospital that had been sued by the Carrs in Carr v. Broward County d/b/a Broward General Medical Center, 505 So.2d 568 (Fla. 4th DCA 1987). The trial court in Lewis entered a summary judgment in favor of Broward General Medical Center, holding that the four year statute of repose contained in section 95.11(4)(b) of the Florida Statutes (1979) applied to Broward General Medical Center, a state agency, based upon the Fourth District's decision in Carr v. Broward County, supra. The Fourth District Court of Appeal reversed the trial court in Lewis, and upon analysis of its prior holding in Carr determined that the four year statute of repose contained in section 95.11(4)(b) of the Florida Statutes (1979) is not applicable to medical malpractice actions brought against state agencies prior to October 1, 1988.

The court in Lewis commenced its analysis of the issue by observing that in 1988 the legislature amended section 768.28(12) of the Florida Statutes (formerly section 768.28(11)) to specifically provide that commencing on October 1, 1988 an action against the state or one of its subdivisions or agencies for damages arising from medical malpractice must be commenced within the time limitations contained in section 95.11(4) of the Florida Statutes. Ch. 88-173, § 2, Laws of Fla. However, prior to October 1, 1988, section 768.28(12) provided that:

> Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues;....

Thus, the issue decided in Lewis was whether section 95.11(4)(b) or section 768.28(12) applies to medical malpractice actions brought against state agencies prior to October 1, 1988. The Fourth District observed in Lewis that this issue was never raised nor considered by the court when it decided Carr. The Fourth District stated in Lewis:

> The issue here is whether, prior to October 1, 1988, an action for medical malpractice against a state agency for which sovereign immunity has been waived pursuant to section 768.28, Florida Statutes (1979) must be commenced within the four year statute of repose contained in section 95.11(4)(b), Florida Statutes. Although in the Carr case, supra this court did apply the statute of repose of section 95.11(4)(b) Florida Statutes to a malpractice action against this same appellee, a review of that decision and the briefs filed by the parties to that case shows that this issue was neither presented to nor considered by the court.

The Fourth District then determined, upon presentation and consideration of the issue in Lewis, that the four year statute of limitations contained in section 768.28 applies to a medical malpractice action against a state agency rather than the four year statute of repose contained in section 95.11(4)(b):

> Appellee was subject to suit only by virtue of the waiver of sovereign immunity contained in section 768.28 Florida Statutes. Several cases involving medical malpractice actions against a state agency have held that the appropriate statute of limitations is the four-year statute contained in section 768.28 Florida Statutes, and not the two-year statute

> found in section 95.11(4)(b) Florida Statutes. See Whitney v. Marion County Hospital District, 416 So.2d 500 (Fla. 5th DCA 1982); Whack v. Seminole Memorial Hospital, Inc., 456 So.2d 561 (Fla. 5th DCA 1984); Public Health Trust v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986). While those cases did not involve the statute of repose, it would be illogical and inconsistent with the rationale of the holding in those cases to suggest that while the statute of limitations contained in section 95.11(4)(b) Florida Statutes did not apply, the statute of repose contained therein would.

The Fourth District concluded in Lewis that it was error for the trial court to apply the four year statute of repose contained in section 95.11(4)(b) of the Florida Statutes to Broward General Medical Center. In so holding, the Fourth District also relied upon the decision pending here in the case at bar in Menendez v. Public Health Trust of Dade County, Florida, 566 So.2d 279 (Fla. 3d DCA 1990) for its holding that:

> Section 768.28(11), Florida Statutes (Supp. 1980) which provides a four-year limitation without a period of repose for the filing of a negligence action against a state agency, is the appropriate statute of limitations in negligence actions against Jackson....

The decision in Lewis dispels all potential conflict between the decision in Carr, supra, and the Third District's decision in the case at bar, for it explains that the applicability of the four year statute of repose contained in section 95.11(4)(b) to a malpractice action against a state agency "was neither presented to nor considered by the court" in Carr. Therefore, Carr does not hold that the four year statute of repose contained in section 95.11(4)(b) of the Florida Statute applies to a malpractice claim against a state agency. Similarly, a review of this Court's

decision in Carr v. Broward County, 541 So.2d 92, 95 (Fla. 1989) reveals that this Court simply affirmed the decision of the Fourth District Court of Appeal on the issue presented which was whether "the subject statute [section 95.11(4)(b)] was constitutionally enacted and bars the Carrs' medical malpractice action under the circumstances of this cause." This Court was not presented with and never passed upon the issue of whether section 95.11(4)(b) or section 768.28(12) properly applied to a pre-October 1, 1988 medical malpractice action against a state agency.

Petitioner seeks to rely upon numerous statutory definitions of a "health care provider" to argue that section 95.11(4)(b) applies to the Public Health Trust, an agency of the State of Florida, that operates Jackson Memorial Hospital. Suffice it to say that there is no ambiguity in the law and no need to resort to statutory construction. The statutory definition of a health care provider is not dispositive or even persuasive as to whether the legislature intended section 95.11(4)(b) to apply to medical malpractice claims against state agencies prior to October 1, 1988. The legislature specifically provided in section 95.011 of the Florida Statutes that:

> A civil action or proceeding, called "action" in this chapter.... shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere.

When sovereign immunity was waived by the enactment of section 768.28 of the Florida Statutes, the legislature prescribed a separate four year limitation for all actions against the state in section 768.28(11) of the Florida Statutes. Because a different

time for actions against state agencies resulting from the waiver of sovereign immunity was prescribed elsewhere in the statutes until section 768.28(12) was amended in 1988, the time periods provided by section 95.11(4)(b) did not apply to state agencies regardless of whether the state agency operated as a hospital or a health care provider. This analysis was relied upon by the court in Whitney v. Marion County Hospital District, 416 So.2d 500, 501 (Fla. 5th DCA 1982) to hold that the four year statute of limitations provided by section 768.28 of the Florida Statutes applies to a hospital which operates in Florida as a state agency. The court held:

> The statute of limitations for a medical malpractice action under section 95.11(4)(b), Florida Statutes (1977), is two years from the date the incident occurred or was discovered, but no more than four years from the date of the incident. However, Chapter 95 also specifically provides that where a different statute of limitations is provided elsewhere in the statutes, that different statute of limitations will apply. § 95.011, Florida Statutes (1977). On its face, therefore, because the Hospital is admittedly a State agency, chapter 95 unambiguously requires application of the limitation period provided in § 768.28(11) for tort actions against the state. See, Dubose v. Auto-Owners Insurance Company, 387 So.2d 461 (Fla. 1st DCA 1980).

Petitioner's reliance on the definition of a health care provider is misplaced because all of the limitations provided by section 95.11(4)(b) apply to health care providers and persons in privity with the provider of health care. Thus, if the definition of health care provider was dispositive of the issue, both the two year statute of limitations as well as the four year statute of repose would have to apply to a medical malpractice action against

a state agency. Such a construction would render meaningless the provisions of section 95.011 requiring the application of a different time period where prescribed elsewhere in the statues. It is for this reason that the court in Lewis observed that it would be illogical to suggest that while the two year statue of limitations contained in section 95.11(4)(b) does not apply to a medical malpractice action against a state agency, the four year statute of repose therein would.

In Moore v. Winter Haven Hospital, 16 F.L.W. D1018 (Fla. 2d DCA April 12, 1991) the court observed that:

> Although we recognize distinctions in the application of a statute of repose as opposed to a general statute of limitations, a statute of repose is a form of a statute of limitations and the terms are often used interchangeably. See Webster's Third New International Dictionary 2230 (1986). The "statute of repose" is subsumed in the general term "statute of limitations" of section 95.11(4)(b)....

Because section 95.011 of the Florida Statutes unambiguously requires application of the time prescribed elsewhere where "a different time is prescribed elsewhere in these statutes," the Fourth District correctly observed in Lewis, supra, that prior to the October 1, 1988 amendment to section 768.28(12) of the Florida Statutes, neither the two year statute of limitations nor the four year statute of repose found in section 95.11(4)(b) applied to a medical malpractice action against a state agency. The legislature prescribed an entirely different time period in section 768.28(12) of the Florida Statutes.

Every court in Florida that has been presented with the issue has held that the four year statute of limitations provided within

section 768.28 applies to a medical malpractice action brought against a state agency prior to October 1, 1988. Lewis v. North Broward Hospital District d/b/a Broward General Medical Center, supra; Florida Patient's Compensation Fund v. S.L.R., 458 So.2d 342, 343 (Fla 5th DCA 1984); Menendez v. Public Health Trust of Dade County, Florida, 566 So.2d 279 (Fla. 3d DCA 1990); Public Health Trust of Dade County v. Knuck, 495 So.2d 834, 837 (Fla. 3d DCA 1986); Whack v. Seminole Memorial Hospital, Inc., 456 So.2d 561, 564 (Fla. 5th DCA 1984); Whitney v. Marion County Hospital District, supra.

These decisions are entirely consistent with this Court's pronouncement in Beard v. Hambrick, 396 So.2d 708, 711 (Fla. 1981) concerning the intention of the legislature in prescribing a separate four year statute of limitations, within the enactment waiving sovereign immunity:

> We believe that the legislature intended that there be one limitation period for all actions brought under section 768.28. We base this belief on the prerequisite notice provisions of this section and the need to have a uniform period for actions against government entities. See, DuBose v. Auto Owners Insurance Co., 387 So.2d 461 (Fla. 1st DCA 1980).

In Beard, this Court held that the four year statute of limitations contained in section 768.28 applied to a wrongful death action against a state agency rather than the two year statute of limitations for wrongful death actions provided in Chapter 95 of the Florida Statutes.

In holding that the legislature intended a uniform limitation period to apply to all actions brought under section 768.28, this

Court in Beard relied upon the fact that the legislature provided separate notice provisions which had to be complied with prior to instituting suit against the state or one of its agencies. When the legislature amended section 768.28(12) in 1988 to provide that an action for damages arising from medical malpractice against a state agency must be commenced within the limitations for such an action provided in section 95.11(4), the legislature shortened the notice provisions by providing that "in medical malpractice actions, the failure of the Department of Insurance or the appropriate agency to make final disposition of a claim within 90 days after it is filed shall be deemed a final denial of the claim." Prior to the amendment the state was allotted 6 months to deny a claim. Thus, in amending section 768.28 in 1988 the legislature changed both the notice provisions and the period of limitations applicable to medical malpractice actions against a state agency. The statutory change was not designed to correct a misinterpretation of existing law as suggested by petitioner at page 20 of its brief, but was a substantial revision of several interrelated provisions of the waiver of sovereign immunity law.

By requesting this Court to apply section 95.11(4)(b) to the Public Health Trust, petitioner is in actuality seeking a retroactive application of the 1988 amendment to section 768.28(12). In Foley v. Morris, 339 So.2d 215 (Fla. 1976) this Court held that a limitation of action will not be applied retroactively to an action that was filed prior to the adoption of the amendment. The intent must be express, clear, and manifest in the statute before retroactive application will be permitted.

There is no such intent found in the 1988 amendment to section 768.28 which provided that the amendment shall take effect on October 1, 1988. Ch. 88-173, § 5, Laws of Fla. In the case at bar, plaintiff's rights became vested when the action was commenced in 1985, three years before section 768.28(12) was amended so as to make section 95.11(4)(b) applicable to medical malpractice actions against state agencies. Section 95.11(4)(b) may not be retroactively applied to this action. Petitioner conceded this much in its brief on jurisdiction. Petitioner's brief on jurisdiction, page 9, f.n. 7.

Petitioner suggests at page sixteen of its brief that this Court recognized in Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985) that the legislature intended the same limitations periods be made applicable to all persons who are joined in a medical malpractice action. The decision in Taddiken does not address the separate limitation period found in section 768.28(12) of the Florida Statutes. The only issue addressed in Taddiken was whether the Fund was in privity with its participating health care providers so as to be subject to the same two year statute of limitations. This Court determined that the requisite privity existed. The issues presented in the case at bar concerning the waiver of sovereign immunity and the applicability of the limitation period found in section 768.28 are entirely different. The decision in Taddiken does not support the application of section 95.11(4)(b) to the Public Health Trust.

Petitioner attempts to advance numerous policy arguments as to why the four year statute of repose contained in section

95.11(4)(b) should be retroactively applied to the Public Health Trust in this case. For example, at page seventeen of its brief, petitioner asserts that application of the limitations period of section 768.28(12) to a state agency will permit late joinder of the governmental health care provider. Suffice it to say that in the case at bar, all defendants were joined when the initial complaint was filed. Moreover, in view of the fact that the legislature has now amended section 768.28(12) effective October 1, 1988, to provide that medical malpractice actions against state agencies must be commenced within the time periods set forth in section 95.11(4)(b), there is no need for this Court to address these concerns. Moreover, to do so would require retroactive application of the 1988 amendment to section 768.28(12).

When the Public Health Trust filed its motion for summary judgment in this case, it stated that the "applicable statute of limitations governing this case is Florida Statute § 768.28...." (R 151) Thereafter, the Public Health Trust sought to rely on the fact that Broward General Medical Center was a party to the Carr case, supra, to argue that section 768.28 no longer applied to a public hospital. Now that the Fourth District has addressed this very issue in Lewis by explaining that the issue of which statute properly applies was never presented to nor considered by the court in Carr, petitioner requests this Court to construe the law in such a fashion that would require no less than a retroactive application of the 1988 amendment to section 768.28. As the legislature has spoken and determined to apply section 95.11(4)(b) to malpractice actions against state agencies only after October 1, 1988, there

is no basis in the law for granting the relief requested by petitioner.

CONCLUSION

The decision of the Third District Court of Appeal is correct and should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of April, 1991, to: AURORA ARES, ESQUIRE, THORNTON, DAVID, MURRAY, RICHARD & DAVIS, P.A., 2950 S.W. 27th Avenue, Suite 100, Miami, Florida 33133.

Respectfully submitted,

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