IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,778

DCA CASE NO. 89-02332

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 friends of ADARIS MENENDEZ, a minor,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Florida Bar No. 500097

INITIAL BRIEF OF PETITIONER, THE PUBLIC HEALTH TRUST OF DADE COUNTY, FLORIA

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INTRODUCTION

Petitioner, defendant in the trial court, the Public Health Trust of Dade County, Florida, is an agent and instrumentality of Dade County which maintains and operates Jackson Memorial Hospital. The Public Health Trust will hereinafter be referred to as the "Public Health Trust," or alternatively as the "PHT," or "Defendant." Jackson Memorial Hospital will be referred to alternatively as "Jackson Memorial Hospital" or "JMH."

Respondents, Magda and Americo Menendez, plaintiffs in the trial court, will be referred to by their names or as "respondents." The University of Miami and Mary O'Sullivan, M.D. were additional defendants below but are not part of this appeal. They will be alternatively referred to in this brief as the "University" and "Dr. Mary O'Sullivan." References to the Appendix will be designated by (App. ____).

STATEMENT OF THE CASE AND FACTS

On June 8, 1981, Magda Menendez was hemorrhaging during a pregnancy and she was admitted to Jackson Memorial Hospital for treatment. (R. 294, 1052). She remained hospitalized for one month and was discharged on July 8, 1981. (R. 2, 301, 1059). On July 14, 1981, Magda was again admitted to JMH due to hemorrhaging and, on July 18, 1981, JMH doctors performed a Cesarean delivery of Adaris, a baby girl. (R. 307-09, 311, 1065-67). Adaris was born ten weeks prematurely and, after her birth, she was taken to JMH's intensive care unit, where she remained hospitalized until August 29, 1981. (R. 325, 1082).

Nine months later, in April 1982, Magda Menendez was told by a doctor at the University of Miami Mailman Center that Adaris had cerebral palsy and congenital brain damage and that she had been born with numerous other problems. (R. 337, 1094). In January

1984, a physical therapist told Magda that Adaris' brain damage may have been caused by the doctors' decision to delay delivery at which time Magda's blood loss had deprived Adaris of oxygen. (R. 339, 363, 1096, 1119).[1] The Menendezes took no action and did not consult a lawyer until July 16, 1985. (R. 811). On July 18, 1985, two days later, the four-year statute of repose governing medical malpractice actions expired. It was not until September 30, 1985, two months *after that*, that the Menendezes filed a complaint for damages for medical malpractice against the PHT, the University and Dr. O'Sullivan, alleging that the obstetrical treatment rendered to Magda fell below the reasonable standard of care resulting in Adaris' brain damage. (R. 1-6, 479-93).

The defendants denied the allegations and moved to dismiss the complaint on the basis that the statutes of limitations and repose barred the action. (R. 92-94, 130-46, 147-57). The Menendezes replied that the statutes of limitations and repose were tolled by the defendant's alleged fraud, misrepresentation and concealment. (R. 543-46, 552-59). However, the trial court rejected respondents' argument and dismissed the complaint, holding that the action was barred by §95.11(4)(b), Fla. Stat. (Supp. 1980), the statute of repose for medical malpractice actions. (R. 2936-37). The Menendezes appealed. (R. 859).

The Third District Court of Appeal affirmed in part and reversed in part. The appellate court held that the action, with respect to the private health care providers, The University of Miami and Dr. Mary O'Sullivan, was barred by the four-year statute of repose because the Menendezes discovered the possible negligence within the repose period and yet did not timely

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1 The Public Health Trust has denied this allegation.

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file their complaint. *Menendez v. Public Health Trust, 566 So.2d 279, 281 (Fla. 3d DCA 1990)*. The court stated:

> Although plaintiffs assert that defendants attempted to conceal their negligence, such concealment did not prevent plaintiffs from discovering the negligence within the four-year period of the statute of repose.... [P]laintiffs were informed of possible negligence as early as January of 1984, when the physical therapist informed plaintiffs that she thought the mother's hemorrhaging during pregnancy caused the child's brain damage. Despite their knowledge of possible negligence at that time, plaintiffs took no action until approximately eighteen months later, when they consulted an attorney, two days before the expiration of the statute; however, they did not file an action for an additional two months. Under the circumstances, the trial court did not err in applying the statute of repose contained in section 95.11(4)(b) to bar plaintiffs' action.

566 So.2d at 281. (Citations omitted).

However, the Third District reversed the trial court's dismissal with respect to the Public Health Trust. *Id.* at 282. The court held that the statute of repose governing medical malpractice actions did not apply to a medical malpractice action brought against a government agency such as the PHT. Instead, the Court of Appeal held that medical malpractice actions brought against government health care providers are governed by 768.28(11), Fla. Stat. (Supp. 1980), the statute of limitations applicable to general tort actions brought against state agencies. *Ibid.* Section 768.28(11), Fla. Stat. requires that tort actions brought against state agencies be filed within four years after the cause of action accrues.[2] That statute, however, does not provide a statute of repose. Because a medical malpractice action often accrues when plaintiffs are put on notice of the invasion of a legal right, the Court of Appeal remanded the case for

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2 Section 768.28(11), Fla. Stat. (Supp. 1980) states:

> 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.

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a determination of when the Menendezes knew or should have known of either the injury or the possible negligence giving rise to the claim against the PHT. *Ibid.*

The PHT thereafter timely petitioned this Court to review whether the statute of repose contained in §95.11(4)(b), Fla. Stat. (Supp. 1980) applies to medical malpractice actions brought against governmental health care providers such as the PHT. The PHT asserted jurisdictional conflict between the Third District's decision and this Court's decision in *Carr v. Broward County, 541 So.2d 92 (Fla. 1989).* By order dated February 26, 1991, this Court accepted jurisdiction on the PHT's petition.

SUMMARY OF ARGUMENT

The Third District erred in holding that the four-year statute of repose of §95.11(4)(b), Fla. Stat. (Supp. 1980) does not apply to medical malpractice actions brought against government health care providers such as the Public Health Trust. Initially, it should be noted that the Third District erred in creating an exception to the statute's applicability which is not supported by its express terms. The statute of repose unequivocally applies to "health care providers." Because this clear and unambiguous language plainly includes any hospital which renders medical treatment to the sick or injured, the statute of repose applies to actions brought against the Public Health Trust, the operator of such an institution. Moreover, the fact that the statute applies comprehensively to actions arising from "any" medical treatment rendered by "any" health care provider does permit a construction which discriminates between different types of health care providers and renders the statute applicable to some health care providers and not others.

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Additionally, assuming *arguendo* that §95.11(4)(b) is not clear and unambiguous on its face, a review of the legislation which enacted the statute of repose demonstrates that it was intended to apply to claims arising from the treatment rendered by any licensed hospital, be it a private or a governmental entity. The statute of repose was enacted by the Medical Malpractice Reform Act of 1975, which refers to "health care providers" and applies to "hospitals licensed under chapter 395." Both private and governmental hospital are required to be licensed under chapter 395. Therefore, in applying the Medical Malpractice Reform Act to all "hospitals licensed under chapter 395," the legislature is presumed to have intended to apply the Act's statute of repose to actions brought against both private and governmental hospitals.

Moreover, subsequent amendments to the Medical Malpractice Reform Act reinforce the conclusion that any licensed hospital is a "health care provider" as that phrase is defined in §95.11(4)(b). Section 395.18, Fla. Stat. (1975) relating to internal risk management programs was enacted by Section 3 of the Act. That statute section was later transferred to §768.41, Fla. Stat. (Supp. 1976) and amended to clarify that it applies to "every" licensed hospital. Section 627.355, Fla. Stat. (1975) dealing with medical malpractice insurance was enacted by Section 4 of the Act and was later transferred to §768.52 (Supp. 1976) and amended to specify that it applies to "health care providers" as defined in §768.54(1)(b), Fla. Stat. (Supp. 1976). That statute section, in turn, provides that "health care provider" means "*any*...hospital licensed under chapter 395."

All licensed hospitals are included within the statutory definition of "health care provider" in still other amendments to the Medical Malpractice Reform Act which created new

statute sections. Section 768.45, Fla. Stat. (Supp. 1976) relating to standards of recovery for medical negligence and §768.50, Fla. Stat. (Supp. 1976) relating to collateral sources of indemnity apply to "health care providers" as defined in §768.53(9), Fla. Stat. (Supp. 1976). That statute section includes all hospitals licensed under chapter 395 within its statutory definition of "health care provider." Similarly, §768.48, Fla. Stat. (1977) dealing with itemized verdicts and §768.51, Fla. Stat. (1977) dealing with alternative methods of payment apply to "health care providers." Those statute sections reference the definition of the phrase in 768.50(2)(b), Fla. Stat. (1977) which states that "'[h]ealth care provider' means hospitals licensed under chapter 395." Therefore, because the legislature has uniformly defined the phrase "health care provider" to include all hospitals licensed under chapter 395, the statute of repose applies to actions against the Public Health Trust, the operator of a licensed hospital and therefore a "health care provider" as that phrase is defined throughout the Florida Statutes.

Furthermore, the Third District's selective application of the statute of repose to only private health care providers is not supported by case law. In *Carr v. Broward County, 541 So.2d 92 (Fla. 1989),* this Court held that the statute of repose barred an action against the operator of a governmental hospital. In *Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985),* this Court held that the legislature intended to apply §95.11(4)(b) to all defendants having an interest in the defense of the same medical malpractice action.

Additionally, the Third District also ignores that the purpose of the statute of repose is to supercede the statute of limitations and to place durational limits on medical malpractice liability. The Third District's decision frustrates this legislative intent because governmental health care providers are still subject to the longer statute of limitations, which does not

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commence until the patient discovers the invasion of a legal right. Moreover, because private health care providers remain liable to governmental providers in contribution, the liability of private health care providers is extended beyond the repose period whenever a private and a governmental health care provider are jointly implicated in the same allegation of malpractice.

Significantly, the Third District's application of the statute of repose to only private health care providers will also lead to unreasonable or absurd results. Under its decision, private defendants will be dismissed from actions while the remaining governmental defendant will bear the total burden of defending against allegations of joint misdeeds. Additionally, the application of the longer limitations period to the claims against governmental health care providers will permit the late joinder of the governmental defendant after the outcome of the litigation has been substantially decided in its absence.

The Third District based its decision on *Whitney v. Marion County Hosp. Dist., 416 So.2d 500 (Fla. 5th DCA 1982),* which held that medical malpractice actions against governmental health care providers are governed by the statute of limitations for general tort actions against state agencies and not by §95.11(4)(b). However, the legislature has now amended the law to expressly require that medical malpractice actions against governmental health care providers be brought in accordance with §95.11(4)(b). The fact that this statutory change was enacted in specific reaction to the *Whitney* line of cases strongly suggests that that decision misapprehended the original legislative intent and that the Third District's decision is base on authority which is no longer good law.

The Third District's construction of §95.11(4)(b) leads to unreasonable and absurd results and ignores the statute's language, purpose, legislative history and court decisions. In

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carving out an unwarranted exception for government health care providers, the decision below frustrates the legislative policy of providing for the absolute repose of medical malpractice claims. The legislature has determined, and this Court has agreed, that perpetual liability places an undue burden on health care providers. The statute of repose cannot effectively limit liability and contain health care costs if judicially created exceptions exclude a significant category of claims from its general applicability.

ARGUMENT

THE THIRD DISTRICT ERRED IN RULING THAT THE STATUTE OF REPOSE CONTAINED IN §95.11(4)(b), FLA. STAT. (SUPP. 1980) DOES NOT APPLY TO MEDICAL MALPRACTICE ACTIONS BROUGHT AGAINST GOVERNMENT HEALTH CARE PROVIDERS SUCH AS THE PUBLIC HEALTH TRUST.

The statute of repose contained in §95.11(4)(b), Fla. Stat. (Supp. 1980) provides that "[a]n action for medical malpractice shall be commenced...[no] later than 4 years from the date of the incident or occurrence out of which the cause of action accrued."[3] The instant action arises out of the allegedly negligent obstetrical treatment received by Magda Menendez during

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[3] In its entirety, §95.11(4)(b), Fla. Stat. (Supp. 1980) 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. 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.

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the delivery of her child, Adaris, at Jackson Memorial Hospital.[4] Although the alleged "incident" of malpractice is alleged to have occurred during the period leading up to the birth of Adaris Menendez on July 18, 1981, suit was not filed until September 30, 1985, almost four years and two-months after Adaris' birth. Therefore, under the statute of repose provisions in §95.11(4)(b), the instant action is barred because it was not brought within four years of the "incident" giving rise to the action.

However, the Third District Court refused to apply the statute of repose of §95.11(4)(b) to the instant case. Although §95.11(4)(b) was specifically enacted to provide a statute of repose and a statute of limitations for medical malpractice actions, the court ruled that §95.11(4)(b) does not apply to medical malpractice claims arising from the treatment rendered by governmental hospitals. *Menendez v. Public Health Trust, 566 So.2d 279, 282 (Fla. 3d DCA 1990).* Instead, the court held that medical malpractice actions brought against government health care providers are governed by §768.28(11), Fla. Stat. (Supp. 1980), which supplies a four-year statute of limitations for general tort actions brought against state agencies, but which does not provide a statute of repose.[5] *Ibid.* The Third District has ignored the rather consdierable evidence that, contrary to its ruling, the legislature intended to apply the statute of repose of §95.11(4)(b) to medical malpractice brought against any health care provider.

The only proper function of a court engaged in the task of statutory construction is to effectuate the legislative intent. *Florida State Racing Com. v. McLaughlin, 102 So.2d 574 (Fla.*

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4 The Public Health Trust is an agency and instrumentality of Dade County which operates Jackson Memorial Hospital.

5 See footnote 2.

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1958). Legislative intent is determined primarily from the plain meaning of statutory language. *Public Health Trust of Dade County v. Lopez, 531 So.2d 946, 948-49 (Fla. 1988).* When the language of a statute is clear and unambiguous, the plain and obvious meaning of its terms control its construction.

The statute of repose of §95.11(4)(b), Fla. Stat. unequivocally applies to "health care providers and persons in privity with the provider of health care." The plain and obvious meaning of the phrase "health care provider" necessarily encompasses institutions such as hospitals, which provide health care to the sick or injured. Jackson Memorial Hospital is one such "health care provider." Therefore, the Public Health Trust, as the operator of Jackson Memorial Hospital, is a "health care provider" under §95.11(4)(b).

In holding that §95.11(4)(b) did not apply to the instant action, the Third District created an exception to the statute's general applicability which is at odds with its express terms. However, this Court has stated:

> Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." It has also been accurately stated that courts of this state are "without power to construe an unambiguous statute in a way which would extend, modify, or *limit,* its express terms or its *reasonable* and *obvious implications.* To do so would be an abrogation of legislative power."

531 So.2d at 949, (citations omitted, emphasis in original), quoting, *Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984).*

There is nothing in the plain and obvious meaning of the phrase "health care provider" which exempts "governmental" health care providers from the statute's application. In fact, the

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statute of repose defines "an action for medical malpractice" as a damage claim "arising out of *any* medical, dental, or surgical diagnosis, treatment, or care by *any* provider of health care." (Emphasis supplied). The use by the legislature of this comprehensive phrase indicates an intent to include everything embraced within its terms. *Florida State Racing Com. v. McLaughlin, 102 So.2d at 576.* Therefore, a statute which unambiguously applies to "any" treatment rendered by "any" provider of health care does not *permit* a construction which discriminates between different types of health care providers and renders the statute applicable to some health care providers and not others. Instead, the clear and unambiguous terms of §95.11(4)(b) unequivocally evince the legislative intent that the statute of repose apply universally to medical malpractice actions brought against any "health care provider," be it private or public. Consequently, under the "plain meaning" rule, the Public Health Trust is a "health care provider" under §95.11(4)(b), and the Third District erred in creating a statutory exception which is unwarranted by the plain meaning of the statute's terms.

Moreover, a statute should be construed in its entirety. *Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist., 274 So.2d 522 (Fla. 1973).* Assuming *arguendo* that §95.11(4)(b) is ambiguous on its face, a review of the legislation which enacted the statute of repose clearly demonstrates that it applies to claims arising from the treatment rendered by any licensed hospital, be it a private or a governmental entity. The statute of repose in §95.11(4)(b) had its origins in the Medical Malpractice Reform Act of 1975.[6] The Medical Malpractice Reform Act refers to "health care providers" in several sections, see Ch. 75-9, Preamble, §§7, 10, Laws of Fla., and specifically applies to "hospitals licensed under chapter 395." Ch. 75-

[6] Ch. 75-9, §7, Laws of Fla.

9, §§3, 13, & 15, Laws of Fla. Moreover, at the time the legislature enacted the Medical Malpractice Reform Act, Section 395.03, Fla. Stat. (1975), specifically stated:

> Licensure. After December 31, 1947, no person or *governmental unit* acting severally or jointly with any other person or governmental unit shall establish, conduct, or maintain a hospital in this state without a license under this law. (Emphasis supplied.)

Therefore, at the time the legislature enacted the Act, it was presumed to have known that the Public Health Trust, an agency of Dade County which operates Jackson Memorial Hospital, was a hospital operator under chapter 395. *Collins Invest. Co. v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964).* Consequently, the legislature is deemed to have intended to apply the Medical Malpractice Reform Act, including its statute of repose, to medical malpractice actions brought against operators of governmental hospitals such as the Public Health Trust.

Application of other rules of statutory construction support this conclusion. For example, in construing statutes, it is proper to consider not only acts passed at the same session of the legislature, but also acts passed at subsequent sessions. *Watson v. Holland, 155 Fla. 342, 20 So.2d 388, 393 (1944), cert. denied, 325 U.S. 839, 65 S.Ct. 1408, 89 L.Ed.2d 1965 (1945),* (subsequent enactments aid in the interpretation of original legislative intent). Subsequent amendments to the Medical Malpractice Reform Act reinforce the conclusion that any licensed hospital is a "health care provider," as that phrase is used in §95.11(4)(b). Section 395.18, Fla. Stat. (1975) relating to "Internal risk management program," was enacted by Section 3 of the Medical Malpractice Reform Act of 1975.[7] That statute section was transferred

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7 Ch. 75-9, §3, Laws of Fla.

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to §768.41, Fla. Stat. (Supp. 1976) and amended to clarify that it applies to "*[e]very* hospital licensed pursuant to ch. 395." (Emphasis supplied.) Similarly, §627.355, Fla. Stat. (1975), dealing with "Medical malpractice insurance," was enacted by Section 4 of the Act.[8] That statute section was transferred to §768.52 (Supp. 1976) and amended to specify that it applies to "health care providers" as defined in §768.54(1)(b), Fla. Stat. (Supp. 1976). That statute section, in turn, provides that "'[h]ealth care provider' means *any*...[h]ospital licensed under chapter 395." (Emphasis supplied).

Moreover, statutes pertaining to the same or closely allied subject are regarded as *in pari materia. Sanders v. State ex rel. v. Shamrock Properties, Inc., 46 So.2d 491, 495 (Fla. 1950).* All licensed hospitals, whether private or governmental, are included within the statutory definition of "health care provider," as that phrase is defined in subsequent amendments to the Medical Malpractice Reform Act which address the "continuing" medical malpractice and liability crisis. For example, §768.45, Fla. Stat. (Supp. 1976) relating to "Medical negligence; standards of recovery" and §768.50, Fla. Stat. (Supp. 1976) relating to "Collateral sources of indemnity" apply to "health care providers" as defined in §768.53(9), Fla. Stat. (Supp. 1976).[9] That statute section defines "health care providers" as follows:

> "Health care provider" means hospitals licensed under chapter 395; physicians licensed under chapter 458; osteopaths licensed under chapter 459; podiatrists licensed under chapter 461; dentists licensed under chapter 466; chiropractors licensed under chapter 460; naturopaths licensed 462; nurses licensed under chapter 464; nursing homes licensed under chapter 400; clinical laboratories registered under chapter 483; physicians' assistants certified under chapter 458; physical therapists and physical therapist assistants licensed under

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[8] Ch. 75-9, §4, Laws of Fla.

[9] See the 1976 amendments to the Medical Malpractice Reform Act, Ch. 76-260, §§11, 12, Laws of Fla.

> chapter 486; health maintenance organizations certified under part II of chapter 641; ambulatory surgical centers as defined in paragraph (b); blood banks, plasma centers, industrial clinics, and renal dialysis facilities; or professional associations, partnerships, corporations, joint ventures, or other associations for professional activity by health care providers.

§768.53(9), Fla. Stat. (Supp. 1976).[10]

Similarly, §768.48, Fla. Stat. (1977), dealing with "Itemized verdict" and §768.51, Fla. Stat. (1977), dealing with "Alternative methods of payment of damage awards" also apply to "health care providers." Those statute sections reference the definition of that phrase in §768.50(2)(b), Fla. Stat. (1977), which provides:

> "Health care provider" means hospitals licensed under chapter 395; physicians licensed under chapter 458; osteopaths licensed under chapter 459; podiatrists licensed under chapter 461; dentists licensed under chapter 466; chiropractors licensed under chapter 460; naturopaths licensed 462; nurses licensed under chapter 464; clinical laboratories registered under chapter 483; physicians' assistants certified under chapter 458; physical therapists and physical therapist assistants licensed under chapter 486; health maintenance organizations certified under part II of chapter 641; ambulatory surgical centers as defined in paragraph (c); blood banks, plasma centers, industrial clinics, and renal dialysis facilities; or professional associations, partnerships, corporations, joint ventures, or other associations for professional activity by health care providers.

Finally, §627.351(7)(i)(1), Fla. Stat. (1977), which deals with "Insurance risk apportionment plan" also applies to "health care providers" and provides that "'health care provider' means hospitals licensed under chapter 395."[11]

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10 See Ch. 76-260, §5, Laws of Fla.

11 At the time the instant action accrued, the phrase "health care provider" similarly included within its statutory definition, hospitals licensed under chapter 395. See §768.45, Fla. Stat. (1979), dealing with standards of medical negligence; §768.48, Fla. Stat. (1979), dealing with itemized verdicts; 768.50, Fla. Stat. (1979), dealing with collateral sources of indemnity and; §768.51, Fla. Stat. (1979), dealing with alternative methods of payment of damage awards. These statute sections all apply to "health care providers" as defined in §768.50(2)(b), Fla. Stat. (1979), which, in turn, provides that "'[h]ealth care provider' means hospitals licensed under chapter 395...." Additionally, §768.54, Fla. Stat. (Supp. 1980) applies to "health care providers" and also defines the phrase to include any hospital licensed under chapter 395.

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Where the legislature uses the same exact phrase in different statutory provisions, the Court may assume that they intended to mean the same thing. *Goldstein v. Acme Concrete Corp., 103 So.2d 202 (Fla. 1958).* Therefore, the statute of repose of §95.11(4)(b) unambiguously applies to actions against the Public Heath Trust, the operator of a licensed hospital, and therefore a "health care provider" as that phrase is defined throughout the Florida statutes.

Prior court decisions are in agreement with this conclusion. In *Carr v. Broward County, 541 So.2d 92 (Fla. 1989),* this Court held that the statute of repose found of §95.11(4)(b) barred a medical malpractice action brought against Broward County, the operator of Broward General Medical Center. In a virtually identical set of facts as the instant case, the plaintiffs in *Carr* brought a medical malpractice action alleging negligent prenatal and obstetrical treatment and negligent care rendered during birth of their child, who was later diagnosed to be suffering from severe brain damage. 541 So.2d at 93. Plaintiffs waited ten years after the alleged incident of malpractice to file their complaint against Broward County, and the treating physician. *Carr v. Broward County, 505 So.2d 568, 569 (Fla. 4th DCA 1987).* On appeal, this Court rejected plaintiffs argument that §95.11(4)(b) unconstitutionally denied them access to the courts under article 1, section 21, of the Florida Constitution. *541 So.2d at 94.* Recognizing the public interest in providing for the absolute repose of medical malpractice actions, including those brought against governmental hospitals, this Court stated:

> In *Pullum,* we recognized that statutes of repose are a valid legislative means to restrict or limit causes of action in order to achieve certain public interests.
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> . . .
>
> We find that the Fourth District Court recognized the principles of *Kluger* and properly applied them in determining that the legislature had found an overriding public necessity in its enactment of section 95.11(4)(b).

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541 So.2d at 95.

Moreover, this Court has recognized that, in enacting §95.11(4)(b), the legislature intended to provide uniform repose and limitations periods to all persons or entities having an interest in the defense of the same medical malpractice action. In *Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058, 1062 (Fla. 1985)*, plaintiffs in two consolidated cases timely filed medical malpractice actions against health care providers but did not join the Florida Patient Compensation Fund until after the expiration of the statute of limitations of §95.11(4)(b).[12] As in the instant case, the *Taddiken* plaintiffs argued that the Fund was not a "health care provider" and was therefore subject to such longer limitations period as the four-year statute of limitations for negligence actions under §95.11(3)(a), Fla. Stat. or the statute of limitations for statutory liability under §95.11(3)(f), Fla. Stat. *See Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956, 957 (Fla. 3d DCA 1984).*

However, this Court rejected the argument that different limitations period applied to different defendants in the same medical malpractice action. The Court held that, in applying §95.11(4)(b) not only to the "health care provider," but also to persons "in privity with the health care provider," the legislature intended to broadly apply the same limitations period to all parties with an interest in the defense of a medical malpractice action. *Id.* at 1061-62. To apply a longer limitations period to one defendant would "illogically" permit the late joinder of a party with a "stake in the outcome of the litigation after the outcome [has] been largely determined." *Ibid.*

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[12] The Florida Patient Compensation Fund was established by the legislature to compensate medical malpractice plaintiffs. 478. So.2d at 1060-61.

Similarly, in the instant case, to apply the shorter *repose* period of §95.11(4)(b) to an action against the private health care provider and the longer *limitations* period of §768.28(11) to same action against the governmental health care provider, would "illogically" permit the late joinder of a governmental health care provider after substantial issues in a case have been decided in its absence.[13] Therefore, under *Taddiken*, the Third District erred in ignoring the legislature's intent to apply §95.11(4)(b) to all health care providers whose relationship to the case gives rise to an interest in the early joinder in the defense of a medical malpractice action.

The reasons that led to the enactment of the statute of repose also support its universal application to all medical malpractice actions. *State v. Webb, 398 So.2d 820, 824 (Fla. 1981)* (in construing statutes, courts should consider their purpose). In enacting the statute of repose, the legislature was acutely aware of the failure of the medical malpractice statutes of limitations in providing for the certainty and finality of medical malpractice liability. Because statutes of limitations in medical malpractice actions are liberally construed to not commence until the plaintiff discovers or should discover the invasion of a legal right, *see City of Miami v. Brooks, 70 So.2d 306 (1954),* it is not unusual for a health care provider to have to defend against an allegation of malpractice years after the rendering of the medical treatment. *See Carr v. Broward County* (suit filed more than ten years after treatment). The legislature was persuaded that this "discovery rule," which delayed the commencement of the statute of limitations and prolonged the period of liability, was a "significant factor contributing to the medical malpractice crisis." Hooks, T., *Medical Malpractice Reform Act,* 4 Fla. St. L. Rev. 50, 62

13 As discussed, *infra,* a statute of limitation has a longer durational operation than a statute of repose in that it does not commence until the plaintiff "discovers" or is deemed to be aware of facts indicating the invasion of a legal right.

(1976) (explaining the history behind the statute of repose in light of the "discovery rule" for medical malpractice statutes of limitations). The statute of repose of 95.11(4)(b) was therefore specifically enacted to supersede the statute of limitations, which was considered to be wholly ineffective in providing for the absolute bar of medical malpractice claims.

However, the Third District's selective application of the statute of repose manifestly frustrates this legislative intent to provide for the finality of medical malpractice liability. Under the Third District's decision, a medical malpractice action against a private health care provider is barred under §95.11(4)(b) if not commenced within four years of the alleged incident of malpractice. Under 768.28(11), the same plaintiff's action against the governmental health care provider is not extinguished until after four years after the plaintiff has discovered the invasion of a legal right. Because of the "discovery rule," the action against the governmental health care provider could conceivably be commenced long after the expiration of the statute of repose.[14] Because the private health care provider remains liable to the governmental health care provider in contribution,[15] the liability of the private health care provider is indirectly extended beyond the four-year repose period whenever a private and a governmental health care provider are jointly implicated in the same allegation of malpractice. A construction which nullifies or defeats the object of a statute should be avoided. *State v. Webb, 398 So.2d at 824.* Therefore, the Third District erred in creating an exception to the

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14 Such, in fact, would have been the case in *Carr v. Broward County, 541 So.2d 92,* where the statute of limitations had not expired when the statute or repose barred the claim.

15 *See Showell Industries, Inc. v. Holmes County, 409 So.2d 78, 79 (1st DCA 1982)* (defendant's third-party action in contribution lies even though statute of limitations has run on plaintiff's direct claim).

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statute of repose which effectively nullifies the statute's operation in a significant number of cases.

The Third District supported its conclusion by citing *Whitney v. Marion County Hosp. Dist., 416 So.2d 500 (Fla. 5th DCA 1982).* *Whitney* holds that the four-year statute of limitations contained in §768.28(11) and not the two-year statute of limitations of §95.11(4)(b), governs medical malpractice actions brought against the state agencies. However, *Whitney* deals with the statute of *limitations* and not the statute of *repose,* and therefore, must be limited to its facts. Moreover, the *Whitney* court concluded that the statute of limitations of §95.11(4)(b) did not apply because chapter 95 provides that "where a different statute of limitations is provided elsewhere in the statutes, that different statute of limitations will apply." *Whitney, 416 So.2d at 501,* construing, §95.011, Fla. Stat. (1977). However, a statute of repose operates independently from a statute of limitations. *Carr v. Broward County, 505 So.2d at 570-71,* (statute of repose barred cause of action even though statute of limitations not triggered). Therefore, the legislature can enact a statute of repose for medical malpractice actions under §95.11(4)(b), even though a different statute of limitations applies to the same defendant.[16]

Additionally, and most significantly, the legislature has amended §768.28(11) to now require that medical malpractice actions against state agencies be brought in accordance with the limitations periods provided in §95.11(4)(b). Ch. 88-173, §2, Laws of Fla., codified at §768.28(12), Fla. Stat. (1989). This statutory change was enacted in specific reaction to the

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[16] Moreover, in the event of a conflict between statutes, the specific statute covering a particular subject matter is controlling over a general statutory provision covering the same subject in general terms. *Adams v. Culver, 111 So.2d 665 (Fla. 1959).* In the instant case, the statute of repose governing medical malpractice actions controls over the more general statute of limitations governing general tort actions against state agencies.

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Whitney line of cases holding that the statute of limitations of §95.11(4)(b) does not apply to medical malpractice actions brought against state agencies. See House of Representatives Staff Analysis of House Bill 750, attached hereto as Appendix A. Consequently, this legislative action strongly suggests that *Whitney* misapprehended the original legislative intent with respect to the general applicability of §95.11)(4)(b). *State ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529, 531 (Fla. 1973)* (statutory changes may be designed to correct a misinterpretation of existing law). Therefore, it is readily apparent that, in addition to ignoring the statute's language and legislative history, the Third District's decision is based on authority which is no longer good law.

Finally, in construing statutes, courts should avoid a construction which would lead to unreasonable or absurd results. *State v. Webb, 398 So.2d at 824.* The Third District has created an exception to the statute's general applicability which ensures that liability, in a given case, will be arbitrarily determined by a party's status and not according to a party's wrongdoing. Consistently, private defendants will be dismissed from an action and the public, through the remaining government defendant, will bear the total burden of defending against allegations of joint misdeeds. Moreover, as previously discussed, the application of the longer limitations period of §768.28(11) to the medical malpractice claims of governmental health care providers will permit the late joinder of the governmental defendant after the outcome of the litigation has been decided in its absence.

It is significant to note that public hospitals are often in the same position as private health care providers in their need to obtain liability insurance or to otherwise obtain coverage against the negligent acts of their employees and servants. In fact, the legislature has the

authority to direct government hospitals to pay judgments over the sovereign immunity maximums. See §768.28(5), Fla. Stat., (authorizing the legislature to direct state agencies to pay judgments over the sovereign immunity caps), and see §111.072, Fla. Stat. (authorizing counties, municipalities and political subdivision to purchase liability insurance for negligent acts of their officers, employees and agents); and *Hess v. Metropolitan Dade County, 467 So.2d 297 (Fla. 1985)* (statute authorizing legislature to direct payment of claims over cap not unconstitutional). Therefore, there exists no reasonable basis for excluding governmental hospitals from the statute's application.

This Court has recognized the validity of statutes of repose in a variety of contexts, *Pullum v. Cincinnati, Inc., 476 So.2d 657, 659 (Fla. 1985)* (upholding constitutionality of product liability repose statute); *Cates v. Graham, 451 So.2d 475 (Fla. 1984)* (rejecting constitutional challenge to medical malpractice repose statute), and has noted the public necessity for such repose periods in stemming the cost of medical malpractice insurance which affects the cost of health care for all consumers. *Carr, 541 So.2d at 94* (quoting preamble to statute). In enacting the statute of repose for medical malpractice actions, the legislature determined that perpetual liability places an undue burden on health care providers and that no less stringent measure would obviate the problems created by the medical malpractice crisis. *Ibid.* That burden is especially heavy for public hospitals who treat the vast majority of acute cases with high risk medical outcomes. The statute of repose for medical malpractice actions cannot effectively perform its function of limiting liability and holding down health care costs if exceptions, unintended by the legislature, are judicially created to exclude a significant

category of cases from its general applicability. Therefore, the Third District erred in holding that §95.11(4)(b), Fla. Stat. does not apply to the instant action against the Public Health Trust.

CONCLUSION

For the above-stated reasons and authorities, Petitioner, The Public Health Trust of Dade County, Florida, respectfully requests that this Court reverse the Third District's ruling that the statute of repose of §95.11(4)(b), Fla. Stat. (Supp. 1980) does not apply to medical malpractice actions brought against governmental health care providers.

Respectfully submitted,

By: Aurora Ares
AURORA ARES
CALVIN F. DAVID

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3rd day of April, 1991 to: GEORGE W. CHESROW, ESQ., 3127 Ponce de Leon Blvd., Suite 200, Coral Gables, FL 33134; and STEVEN STARK, ESQ., Fowler, White, Burnett, et al., 175 N.W. 1st Avenue, 11th Floor, Miami, FL 33128.

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