IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

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

PETITIONER'S BRIEF ON JURISDCITION

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

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OTHER AUTHORITIES

STATUTES

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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 petition. 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. (App. 3). She remained hospitalized for one month and was discharged on July 8, 1981. 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. (App. 3). 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. (App. 3).

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. (App. 3). In January 1984,

a physical therapist told Magda that Adaris' brain damage had been caused by Magda's bleeding during her pregnancy which had deprived Adaris of oxygen. (App. 3). The Menendezes took no action and did not consult a lawyer until July 16, 1985, two days before the expiration of the four-year statute of repose. It was not until September 30, 1985, two months later, that they filed a complaint for damages for medical malpractice against the PHT, the University and Dr. O'Sullivan. They alleged that the obstetrical treatment rendered to Magda fell below the reasonable standard of care resulting in Adaris' brain damage. (App. 3-4).

The defendants denied the allegations and moved to dismiss the complaint on the basis that the statutes of limitations and repose barred the action. (App. 4). The Menendezes replied that the statutes of limitations and repose were tolled by the defendant's alleged fraud, misrepresentation and concealment. (App. 4). 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. (App. 4). The Menendezes appealed.

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 alleged negligence within the repose period and yet did not timely file their complaint. (App. 6). 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

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> 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.

(App. 6) (citations omitted).

However, the Third District reversed the trial court's dismissal with respect to the Public Health Trust. (App. 7). 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. (App. 7). Instead, the District Court 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. (App. 7).[1] 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. The statute 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 District Court remanded the case for 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.

The PHT thereafter filed its Notice to Invoke the Discretionary Jurisdiction of this Court.

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[1] 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.

SUMMARY OF THE ARGUMENT

Jurisdictional conflict exists in this case. The Third District's decision, holding that the statute of repose for medical malpractice actions does not apply to a malpractice action brought against a government hospital, expressly and directly conflicts with this Court's decision in *Carr v. Broward County, 541 So.2d 92 (Fla. 1989),* which held that the same statute of repose barred a medical malpractice action against Broward County. Moreover, the Court should accept jurisdiction of this case in order to ensure the uniformity in the application of the statute of repose and dispel the considerable confusion surrounding its applicability. In 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

I.

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL THAT §95.11(4)(b), FLA. STAT. DOES NOT APPLY TO MEDICAL MALPRACTICE ACTIONS AGAINST STATE AGENCIES DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT ON THAT QUESTION OF LAW.

The Third District Court of Appeal held that, §95.11(4)(b), Fla. Stat. (Supp. 1980), the statute of repose governing medical malpractice actions, does not apply to medical malpractice actions brought against a government agency such as the PHT. *Menendez v. Public Health*

Trust of Dade County, 15 F.L.W. 1922 (July 24, 1990), to be reported at 566 So.2d 279 (Fla. 3d DCA 1990). As such, the Third District's decision expressly and directly conflicts with this Court's decision in *Carr v. Broward County, 541 So.2d 92 (Fla. 1989)*, where this Court held that the very same statute of repose found in §95.11(4)(b) barred a medical malpractice action brought against Broward County.[2] In a virtually identical set of facts as the instant case, the plaintiffs in *Carr* brought a medical malpractice action against defendant health care providers 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, the operator of Broward County Medical Center, and against 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.*

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[2] Section 95.11(4)(b), Fla. Stat. provides a four-year statute of repose for medical malpractice actions. In cases where fraud, concealment or intentional misrepresentation prevents the discovery of the injury within the four-year period, the statute of repose is extended to seven years. However, the repose period is not extended if, notwithstanding such allegations of concealment, the plaintiff discovers the injury within the four-year period.

Section 95.11(4)(b), Fla. Stat., states in pertinent part:

> (b) 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.

Recognizing the public interest in providing for the absolute repose of medical malpractice actions, including actions brought against government 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).

541 So.2d at 95.

Jurisdictional conflict exists when a decision of the District Court expressly and directly conflicts with a decision of this Court on the same question of law. Fla. Const., art. V, §3(b)(3). Conflict exists when the District Court applies a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court. *Adams v. Seaboard Coast Line Railroad Co., 296 So.2d 1 (Fla. 1974); Nielsen v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960).* Moreover, an express and direct conflict of decision is manifest where the District Court opinion would overrule this Court's decision. *Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962).* In holding that the statute of repose found in §95.11(4)(b) does not apply to medical malpractice actions brought against government health care providers, the Third District has pronounced a rule of law which produces a result which expressly and directly conflicts with this Court's decision in *Carr.* This Court therefore has jurisdiction to determine whether the statute of repose for medical malpractice actions applies to the action against the PHT.[3]

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[3] Dicta can create the type of inconsistency in two decisions that the jurisdictional conflict provisions were designed to address. *Sweet v. Josephson, 173 So.2d 444, 446 (Fla. 1965).* Therefore, dicta conflict confers jurisdiction when the District Court pronounces a rule of law which conflicts with dicta in a decision of this Court.

II.

REVIEW SHOULD BE GRANTED IN ORDER TO GIVE EFFECT TO THE LEGISLATIVE POLICY FAVORING CERTAINTY AND FINALITY OF MEDICAL MALPRACTICE LIABILITY.

This Court should exercise its discretion and entertain this case on the merits in order to ensure uniformity in the operation of the medical malpractice statute of repose. *Zirin v. Charles Pfizer & Co., 128 So.2d 594, 597 (Fla. 1961).* There is significant confusion regarding the issue as evidenced by the almost simultaneous decision of the Third District in the case *Lloyd v. North Broward Hospital District, 15 F.L.W. 1989 (July 10, 1990),* where another panel of the same court assumed that the same statute of repose would apply to an action against a state agency in the appropriate case. *See Lloyd* (repose statute inapplicable on other grounds).[4] In fact, the *Lloyd* panel, which assumed that the statute of repose would be applicable to an action against a state agency, included one of the judges in the instant case which held that the statute was inapplicable!

Moreover, the legislature has made mandatory the terms of the statute of repose unless "a different time is prescribed elsewhere in these statutes." §95.011, Fla. Stat. In enacting the statute of repose for medical malpractice actions, the Legislature was acutely aware of the

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Id. As in the instant case, jurisdiction is conferred when one decision enforces the terms of a rule or statute in a way which conflicts with this Court's dicta regarding the statute's applicability. *Twomey v. Clawsohm, 234 So.2d 338 (Fla. 1970)* (jurisdictional conflict created between District Court decision holding nonclaim statute inapplicable and Supreme Court dicta that nonclaim statute cannot be waived); *Sweet v. Josephson, 173 So.2d at 446* (conflict established between District Court decision applying dogbite statute and Supreme Court dicta that statute had been implicitly repealed); *State v. Moore's Estate, 153 So.2d 819 (Fla. 1963)* (conflict established between District Court decision enforcing nonclaim statute and Supreme Court dicta stating statute inapplicable); *Shell v. State Road Dept., 135 So.2d 857, 858 (Fla. 1961)* (jurisdictional conflict created by district court decision reviewing discovery order in conflict with Supreme Court dicta that interlocutory appeals are limited to questions regarding jurisdiction and venue); *Garcia v. Cedars of Lebanon Hospital Corp., 444 So.2d 538 (Fla. 3d DCA 1984)* (conflict exists between decision holding statute unconstitutional and another decision enforcing statute's terms).

[4] A hospital district is a state agency. *Lee v. South Broward Hospital District, 473 So.2d 1322 (Fla. 4th DCA 1985).*

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failure of the medical malpractice statute of limitations in providing for certainty and finality of medical malpractice liability. Because such statutes of limitations 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 statute of repose contained in 95.11(4)(b) was specifically intended to supersede the statute of limitations, which was considered to be wholly ineffective in providing for the absolute bar of medical malpractice actions. Hooks, T., Medical Malpractice Reform Act, 4 Fla. St. L. Rev. 50, 62 (1976) (explaining the history behind the statute of repose in light of the "discovery rule" for medical malpractice statutes of limitations).[5] In judicially creating an exception to the statute of repose, the decision below frustrates the legislative policy of providing for the absolute repose of medical malpractice claims.[6]

Finally, in holding that the statute of repose for medical malpractice actions selectively

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[5] Moreover, the Third District's decision has ignored the Legislature's intention that statutes of repose apply generally to all actions unless a specific exception is created. *See* §95.11(4)(b), Fla. Stat. (statute of repose applicable to action brought against "any provider of health care") (emphasis added); *see also Kempfer v. St. Johns River Water Management District, 475 So.2d 920, 923-24 (Fla. 5th DCA 1985)* (assuming Florida Statute Section 95.031, the statute of repose for fraud actions, would apply to the water management district, a state agency, in the appropriate case).

[6] The Third District supported its conclusion by citing *Whitney v. Marion County Hosp. Dist., 416 So.2d 500 (Fla. 5th DCA 1982).* (App. 7). *Whitney* holds that the statute of limitations contained in §768.28, prescribing a four-year limitations period for actions brought against a state agency, supersedes any other conflicting statute of limitations. However, that case does not deal with the statute of repose, and must, therefore, be limited to its facts. Moreover, 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). Because the legislature intended to provide for the absolute repose of medical malpractice claims, superseding any statute of limitations, the medical malpractice statute of repose absolutely bars an untimely filed action even if, as in the instant case, a different statute of limitations applies to the action against the same defendant.

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applies to only some defendants in a case and not others, the decision below has judicially 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.[7] 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 recognized 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. Id. That burden is especially heavy for public hospitals who treat the vast majority of acute cases with high risk medical outcomes. It is noteworthy 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

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[7] Although §768.28, Fla. Stat. has been amended to require that actions against state agencies be brought in accordance with §95.11(4), see 1988 Fla. Laws §173, the amended statute may not retroactively apply to this or to other previously accrued actions. §768.28(12), Fla. Stat. (1989).

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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). 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.

CONCLUSION

For the above-stated reasons and authorities Petitioner respectfully requests that this Court accept jurisdiction of this case.

By: Aurora Ares
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of October, 1990 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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