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

REPLY BRIEF OF PETITIONER, THE PUBLIC HEALTH TRUST OF DADE COUNTY, FLORIDA

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STATUTES

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RESPONSE TO RESPONDENTS' STATEMENT OF THE FACTS

The Public Health Trust does not agree with the statement of the facts as set forth in Respondents' Answer Brief and would submit that most of the "facts" are irrelevant since they go to issues which are not raised in this appeal, namely, whether §95.11(4)(b), Fla. Stat. (Supp. 1980) applies to actions against state agencies. Therefore, Petitioner has set forth its disagreement with Respondents' statement of the relevant facts below.

Magda Menendez was experiencing a difficult pregnancy with Adaris Menendez in 1981. (R. 2). At approximately twenty-four weeks pregnant, on June 7, 1981, Magda was hemorrhaging and was admitted to Jackson Memorial Hospital. (R. 294, 1052).[1] She was hospitalized at Jackson for approximately one month due to complications from a condition known as placenta previa.[2] (R. 2, 301, 1059). During her admission she experienced three episodes of heavy bleeding and some spotting. (R. 894, 1052-53, 1060). The doctors at Jackson had informed Magda of her condition. (R. 304, 1062). The doctors explained that she had to remain at Jackson to obtain rest so that her placenta could return to its place. (R. 304, 1062).

Magda and her husband, Americo Menendez, were informed by physicians at Jackson that their unborn child's well-being depended in part upon postponing the delivery as long as possible to permit the fetus to mature. (R. 188, 196, 198, 250-51, 305, 1063, 1161, 1169,

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1 Magda Menendez was experiencing a difficult pregnancy before she was ever admitted to Jackson Memorial Hospital. Such hemorrhaging during pregnancy often "portends a greater likelihood of profound pregnancy complications." WILLIAMS OBSTETRICS 13 (F.G. Cunningham, P.C. MacDonald & N.F. Jant. 18th ed. 1989).

2 Placenta previa "is [the] abnormal implantation in terms of location of the placenta." (R. 1957-58).

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1171, 1224-25). However, on June 14th, Magda, appeared "anxious" over a bleeding episode and asked the nurse "are they going to do a C-section?" (R. 919).[3] At this point the gestational age of the fetus was approximately twenty-five to twenty-seven weeks, indicating that the chance of survival outside the womb was very low. (R. 2043). However, Magda continued to voice her concern, and on June 15th, she again asked Jackson physician, Dr. Rafael Penalver, "if it was already time for the operation." (R. 1060, 1065).

On June 19, 1981, Jackson's doctors deemed a conservative course of treatment appropriate under the circumstances in order to provide as much time for the baby to develop in utero as possible. (R. 2050). However, Magda's apprehension persisted as she lost blood and she voiced her concerns about the bleeding. (R. 936). She began to cry when her bleeding persisted and she passed a blood clot. (R. 939).

Magda was discharged on July 8th, 1981. She was advised that a Caesarian section would have to be performed if she experienced another hemorrhaging incident. (R. 4). When, on July 14, 1981, she again experienced bleeding, she called Dr. Mary O'Sullivan, the doctor whom Magda believed was in charge of her case, who instructed Magda to check in at Jackson's emergency room immediately. (R. 307-09, 1065-67). During her second stay at Jackson, Magda had a least three episodes of hemorrhaging. (R. 303, 1061). Magda also experienced vaginal bleeding and diabetes during her pregnancy with Adaris. (R. 1952).

After another week of hospitalization and continual bleeding and episodic hemorrhaging, Magda was taken to the delivery room. (R. 317, 1074). Magda's concern and apprehension

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[3] A Caesarian section or "C-section" is the surgical incision of the walls of the abdomen and uterus for delivery of offspring.

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for the safety of her child continued throughout her bleeding episodes; she testified that she was "scared of so much blood I was losing." (R. 196, 1169).

On July 18, 1981, the doctors performed a Caesarian section when Magda's hemorrhaging was still a problem. (R. 311, 327, 1069, 1084). Adaris was born on July 18, 1981. (R. 2). Immediately following delivery, the three pounds, seven ounce infant was transferred to the Neonatal Intensive Care Unit ("NICU") in critical condition, where she remained hospitalized for over a month. (R. 3, 200, 244-45, 1218-19, 1173). Both parents knew that Adaris was not healthy from the time of her birth. (R. 252, 265, 327, 1084, 1226, 1239). In fact, Adaris could not be brought to Magda because she was in intensive care. (R. 325, 1082). Magda was told that Adaris was anemic, had jaundice and that her lungs were not fully developed. (R. 200-02, 1173-75). Both parents knew that Adaris would require long hospitalization. (R. 244, 327, 1084, 1218). Respondents' expert reviewed the medical records and concluded that the child would have appeared "moribund." (R. 2353-2354).

Although the extent of Adaris' problems could not be completely diagnosed at birth,[4] Jackson's doctors told Magda that Adaris would have to be watched closely because of her condition. (R. 203, 1176). Accordingly, Jackson's doctors directed that she take Adaris to the University of Miami's Mailman Center for Child Development so that she could be diagnosed. (R. 556-59).

Upon her discharge from the hospital, Adaris suffered from additional problems which her parents knew were not normal. (R. 249, 1094, 1223). For example, Magda noticed that

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[4] Respondents' own expert reviewed Adaris' medical records and could conclude nothing more definitive but that there appeared to be "an increased risk" of brain damage at birth. (R. 2634-35). This, by its terms, establishes that a conclusive diagnosis of brain damage would have been inappropriate at that time.

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newborn Adaris did not have normal body movements. (R. 337, 1094).[5] In fact, Adaris was treated by a doctor one month after her birth at the Mailman Center for Child Development and, when she was about seven or eight months old, Adaris was seen be a neurologist. (R. 327, 335, 1084, 1092). When Adaris was nine months old, the Mailman Center's neurologists, told her parents that Adaris had cerebral palsy since birth. (R. 337, 1094).[6]

In January of 1984 Magda was told by a physical therapist recommended by her pastor that the problems Adaris was facing may have been the result of Jackson's negligence. (R. 339, 363, 1096, 1119). The physical therapist told Magda that her loss of blood during the pregnancy resulted in a loss of oxygen to Adaris, causing brain damage. (R. 343, 1100). Despite the urging of the physical therapist that it might have been a mistake to prolong her delivery while losing so much blood, the Menendezes did not investigate the matter, did not request Adaris' medical records, or consult an attorney until one and one half years later on, July 16, 1985. (R. 167, 209, 343-44, 365, 1100-01, 1121, 1140, 1182).[7]

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5 Magda's other two children, two older boys, were delivered by caesarian section at full term, in good health and are healthy children today. (R. 1039-1043).

6 Due to continuing problems, Adaris began physical therapy before she was two years old. (R. 249, 1223). By 1983, she was receiving ongoing treatment from the Mailman Center, Easter Seal Society and Variety Children's Hospital. (R. 354-55, 1110-11). Adaris also had problems with her eyes and was additionally referred to an orthopedist and a neurologist for other various difficulties. (R. 354, 1110). Magda testified that she never requested Adaris' records from Jackson or the University. (R. 1121). No one ever discouraged the Menendez's from obtaining Adaris' medical records nor was she discouraged from seeking the advice of another doctor regarding the cause of Adaris' problems. (R. 366, 368, 1122, 1124). Additionally, neither Magda nor Americo spoke to any other physician or counselor regarding the cause of Adaris' problems or of her cerebral palsy. (R. 344-45, 1102-03).

7 Magda vaguely testified that her curiosity about "the truth" of Adaris' condition prompted her to contact an attorney. (R. 168, 1141). Respondents testified that they did not know "exactly" what caused Adaris' problem, until their attorney obtained the medical records, examined them and explained their contents. (R. 1179, 1182).

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Over four years after the birth of Adaris, on September 30, 1985, the Respondents filed their action for medical malpractice alleging that Jackson's doctors failed to timely perform a Caesarian section on Magda resulting in Adaris' brain damage. (R. 1-6, 479-493).[8]

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[8] Although the question of any alleged concealment is not an issue in this appeal, Respondents have raised the issue by way of innuendo in their statement of the facts. Therefore, the Public Health Trust is compelled to provide this more objective version of the facts.

Moreover, Respondents' claims of concealment are not supported by the record. For example, Respondents' concealment argument hinges on protracted references to a single comment in a post-operative note, in which a Jackson resident states that Adaris was "handled (sic) to the Pediatrician in *apparently* good condition." (R. 1020, 1378) (emphasis added). It is difficult to see how this one limited observation, the record of which Respondents never read, could be the instrument of any "concealment," let alone outweigh the other more considerable visible and recorded evidence of Adaris' compromised physical condition.

Moreover, Respondents' assertion that their absolute trust in Jackson's doctors prevented them for four years from realizing that Adaris' problems may have been caused by the alleged negligence is contradicted by Magda's own repeatedly voiced concerns over their decision to delay the Caesarian section. Additionally, in 1988, she testified that she still recalled a conversation she overheard between two Jackson physicians, one of whom believed that Magda should have an immediate C-section. (R. 319-22, 1076-79). Magda recalled:

> Q. Do you recall any discussion with the doctors, during the second hospitalization, concerning whether or not to postpone your delivery?
>
> ...
>
> [Magda] [T]here was a woman doctor and a man doctor at delivery that night and she thought that they should perform the operation that night. But the other doctor told me that yes, that I could wait.
>
> ...
>
> Q. Why do you think the female doctor wanted you to deliver that night?
>
> [Magda] I think it must have been because of the amount of blood that I had lost.

(R. 319-22, 1076-79). (Emphasis supplied). Therefore, at the time of her delivery, Magda overheard one doctor recommend the Caesarian section, and concluded that the doctor's medical judgment was based on the "amount of blood that [she] had lost." (R. 319-22, 1076-79).

In light of these facts the Third District correctly concluded that concealment was not an issue in this case because Respondents discovered the alleged negligence within the four-year repose period. The Third District 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. *Pisut v. Sichelman, 455 So.2d 620 (Fla. 2d DCA 1984).* Even if the disclosure of the child's condition in the medical records were insufficient to furnish notice of defendants' negligence, *see Almengor,* plaintiffs 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

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.

Respondents argue that the Fourth District's decision in *Lewis v. North Broward Hosp. Dist., 574 So.2d 318 (Fla. 4th DCA 1991),* "dispels all potential conflict" in this case. In fact, the law is now even more unsettled.

In *Carr v. Broward County, 541 So.2d 92 (Fla. 1989),* this Court applied the statute of repose of §95.11(4)(b) to bar a medical malpractice action brought against a state agency. The Third District, in the instant case, ignored this decision and held that medical malpractice actions against state agencies are governed instead by the statute of limitations of §768.28(11), Fla. Stat. (Supp. 1980).[9] Now, in *Lewis,* the Fourth District has followed the Third District's decision and held that the statute of repose does not apply to medical malpractice actions brought against state agencies before October 1, 1988.[10] *574 So.2d at 319.* It noted that its prior decision, in *Carr v. Broward County, 505 So.2d 568 (Fla. 4th DCA 1987),* applied the statute of repose to bar a medical malpractice action brought against a state agency. However,

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possible negligence at that time, plaintiff 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.

Menendez v. Public Health Trust, 566 So.2d 279, 281 (Fla. 3d DCA 1990).

[9] Section 768.28(11), as explained in the initial brief, provides a statute of limitations governing general tort actions brought against state agencies, but does not provide a statute of repose.

[10] As explained in Petitioner's initial brief, Section 2 of Chapter 88-173, Laws of Fla., which became effective October 1, 1988, amended §768.28(12), Fla. Stat. (formerly 768.28(11)) to expressly provide that a medical malpractice action against the state or one its agencies must be commenced within the time limitations contained in 95.11(4)(b), Fla. Stat.

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it dismissed the precedent, concluding that the question of the statute's applicability "was neither presented to nor considered by the court." The *Lewis* court, as did the Third District, wholly ignored this Court's approval of the Fourth District's decision in *Carr v. Broward County, 541 So.2d at 96.*

Resolution by this Court of the question presented is even more compelling given that, with the *Lewis* decision, there now exist *two* decisions from *two* district courts which have wholly ignored and are arguably in conflict with this Court's decision in *Carr.* It is true that *Carr* expressly only decided the question of the statute's constitutionality.[11] However, it is equally true that *Carr* upheld the dismissal of an action brought against a state agency pursuant to the statute of repose and therefore necessarily decided that the statute of repose of §95.11(4)(b) applies to medical malpractice actions filed against state agencies before October 1, 1988. It is well-settled that a decision determines not only the questions expressly presented but also the questions decided by implication. As this Court stated in *Rogers v. State ex rel. Board of Public Instruction of Alachua County, 156 Fla. 161, 23 So.2d 154, 155 (Fla. 1945),* regarding the doctrine of the law of the case:

> Questions necessarily involved in the decision on a former appeal will be regarded as the law of the case on a subsequent appeal, although the questions are not expressly treated in the opinion of the court, as the presumption is that all the facts in the case bearing on the points decided have received due consideration whether all or none of them are mentioned in the opinion.

See also Sax Enterprises v. David and Dash, 107 So.2d 612, 613 (Fla. 1958) (decision determines all matters impliedly decided); *Valsecchi v. Proprietors Ins. Co., 502 So.2d 1310,*

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[11] *Carr* held that the statute of repose of §95.11(4)(b) does not deny access to the courts under art. 1, §21 of the Florida Constitution even if it operates to bar an action before its accrues. *541 So.2d at 95.*

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1311 (Fla. 3d DCA 1987) (same).[12] Consequently, in upholding the constitutionality of the statute of repose in a case brought against a state agency, the Court in *Carr* necessarily determined that the statute was applicable to such actions. The fact that the Fourth District has now noted that, in *Carr v. Broward County,* it imprudently reached the constitutional issue before it determined the statute's applicability,[13] does not mean that this Court did the same when it approved the Fourth District's decision.[14] In the instant case, the Third District has applied the statute of repose to produce a different result in a medical malpractice action which involves the same controlling facts as the prior case disposed of by the Court. *Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960).* Consequently, until such time as this Court either affirms or recedes from its decision in *Carr,* the confusion surrounding the applicability of the statute of repose will undoubtedly remain.

As to the merits of the case, it is noteworthy that Respondents have failed to explain why the statutory construction analysis employed by the Public Health Trust in its initial brief (and which has been employed by this and other courts when determining the applicability of the statute of repose) does not apply to this case. In *Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985),* this Court determined the applicability of

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12 This is another way of saying that questions without which the appellate judgment could not have been rendered are determined to have been decided by the reviewing court. *See Buckley v. City of Miami Beach, 559 So.2d 310, 311 (Fla. 3d DCA 1990)* (district court decision applying statute to facts of case necessarily determined statute's constitutionality).

13 *See State v. Covington, 392 So.2d 1321 (Fla. 1981)* (court should not pass upon constitutionality of a statute if case can be disposed of on other grounds).

14 Since the Court, on conflict jurisdiction, may decide other issues than those raised in the appeal, *Bankers Multiple Line Ins. Co. v. Farish, 464 So.2d 530, 531 (Fla. 1985),* this Court would not have imprudently reached the constitutional issue unless it first determined that the statute could appropriately be applied to the action.

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§95.11(4)(b) to an action against the Fund by analyzing the legislative history of the Medical Malpractice Reform Act of 1975 *in pari materia* with contemporary as well as subsequent statutes relating to medical malpractice actions. In *Carr,* the Court followed the same analysis of the statute's legislative history to determine the statute's validity. Similarly, in *Shields v. Buchholz, 515 So.2d 1379 (Fla. 4th DCA 1987),* the court also looked at the legislative history leading up to the Medical Malpractice Reform Act to determine whether the statute of repose applied to actions against dentists. The same analysis was used in *Silva v. Southeast Florida Blood Bank, Inc., 16 F.L.W. 1129 (Fla. 2d DCA April 26, 1991),* where the court determined that a blood bank was a "health care provider" under §95.11(4)(b) because a blood bank was included in the statutory definition of "health care provider" in statutes relating to medical negligence actions. *Accord: Smith v. Southwest Florida Blood Bank, Inc., 16 F.L.W. 1134 (Fla. 2d DCA April 26, 1991).* These cases confirm that the Public Health Trust's review of the legislative history of the Medical Malpractice Reform Act and subsequent medical malpractice reform statutes is the correct analysis when determining the applicability of the statute of repose to a particular case.

Additionally, in 1988, the legislature amended §768.28(11) to clarify that "an action for damages arising from medical malpractice [against a state agency] must be commenced within the limitations for such actions in s. 95.11(4)(b)." Ch. 88-173, §2, Laws of Fla., codified at §768.28(12). Instead of a "retroactive" application, as Respondents suggest, this statutory amendment constitutes still further evidence that it was the legislature's original intent that §95.11(4)(b) apply to medical malpractice actions against state agencies.

In *Ivey v. Chicago, Ins. Co., 410 So.2d 494 (Fla. 1982),* the Court held that a subsequent amendment to the statute defining an "uninsured motor vehicle" could be considered in determining the application of the definition to a claim which arose out of an accident occurring before the amendment. Although the amendment post-dated the accident and had an effective date occurring thereafter, the Court held that the amendment clarified the legislature's original intent that an injured person could stack the uninsured motorist's coverage of all policies of which she is the beneficiary in determining whether another party is an uninsured motorist. The Court looked to a senate staff analysis and held that a 1977 amendment could be considered in determining the legislature's intent as to the scope the original statute, stating:

> An act's legislative history is an invaluable tool in construing the provisions thereof. We believe that the 1977 amendment to section 627.727(2)(b) was intended to clarify the legislature's intention, and that the amendment should be considered in construing said law. As Justice Roberts noted:
>
> > The rule seems to be well established the interpretation of a statute by the legislative department goes far to remove doubt as to the meaning of law. The court has the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation.
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> Likewise was the observation made in *Amos v. Conkling, 99 Fla. 206, 126 So. 283, 288 (1930)*:
>
> > [I]t is proper to consider, not only acts passed at the same session of the Legislature, but also acts passed at prior or subsequent sessions, and even those which have been repealed.

410 So.2d at 497 (citations omitted).

Similarly, in the instant case, the legislature has indicated its desire to correct the district courts' misguided interpretation of the law by expressly providing that actions brought against state agencies, pursuant to §768.28, are subject to the limitations periods of

§95.11(4)(b). The House Committee on the Judiciary noted the dilemma to be resolved by the bill's passage:

> The four-year statute of limitations provided in section 768.28, Florida Statutes, relating to actions against the state, its agencies, and subdivisions, has been held to supersede the two-year statute of limitations for medical malpractice and wrongful death actions found in section 95.11(4), Florida Statutes, where a governmental agency is the defendant in a medical malpractice action. *Cliffin v. H.R.S., 458 So.2d 29 (Fla. 1st DCA 1984); Whack v. Seminole Memorial Hosp., Inc., 456 So.2d 561 (Fla. 5th DCA 1982).* The effect of this holding is two-fold:
>
> 1) A governmental hospital may be sued in a malpractice or wrongful death action although the claim against the physician or other health care providers has been barred by the two-year limitation, thus making the governmental hospital the sole defendant; and
>
> 2) Although actions against the other health care providers have been barred, they would remain liable to the governmental hospital for contribution actions, and thus their exposure remains unless the hospital is found to have not acted in a negligent manner.

House of Representatives Staff Analysis, Petitioner's Initial Brief, App. A.

Therefore, the 1988 statutory amendment here, reveals the legislative intent to correct the misinterpretation of the law in that line of cases, represented by *Cliffin* and *Whack,* which hold that §95.11(4)(b) does not apply to actions against state agencies.[15]

Instead of a principled analysis of the legislative history leading up to the statute of repose, Respondents instead rely on a line of cases which do not deal with the statute of repose

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[15] In addition to providing that medical malpractice actions against state agencies be commenced within the limitations period of §95.11(4)(b), Section 2 of Chapter 88-173, Laws of Florida, also shortened from six (6) months to 90 days, the time period after which the Department of Insurance's inaction with regards to a notice of plaintiff's medical malpractice claim, is considered the equivalent of a denial of said claim.

Contrary to Respondents' assertion, this is hardly a "substantial revision" of the law nor a change which is compelled by the shorter limitations and repose periods of §95.11(4)(b). Therefore, this amendment to the notice provision does not negate the inference that the 1988 amendments with regards to the statute of repose/limitations were intended to clarify existing law.

and which were decided before the courts had the benefit of the 1988 statutory amendments. In *Beard v. Hambrick, 396 So.2d 708 (Fla. 1981),* this Court held that the sheriff's office was a "county official" and, therefore, a "political subdivision of the state" for the purpose of applying the statute of limitations of §768.28. In rejecting the plaintiff's claim that actions against the sheriff's office were governed instead by the statute of limitations for actions for wrongful death, the Court concluded that it was the legislative intent "that there be one limitation period for all actions brought under section 768.28." *396 So.2d at 711.* However, since *Beard*, the legislature in 1988 has clarified that a *different* statute of limitations, i.e., the two-year statute of limitations for medical malpractice actions, governs actions against state agencies. Thus, the 1988 amendment renders obsolete *Beard's* rationale that the legislature intended to preserve a "uniform [limitations] period for action against government entities." *Ibid.*

Respondents' also rely on a line of cases which hold that the four-year statute of limitations of §768.28, and not the two-year statute of limitations of §95.11(4)(b), governs medical malpractice actions brought against a state agency. *See Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986); Florida Patient's Compensation Fund v. S.L.R., 458 So.2d 342 (Fla. 5th DCA 1984); Whack v. Seminole Memorial Hospital, Inc., 456 So.2d 561 (Fla. 5th DCA 1984); Whitney v. Marion County Hospital District, 416 So.2d 500 (Fla. 5th DCA 1982).* However, Respondents' reliance on these cases is similarly misplaced. As noted above, the 1988 amendment of §768.28(11) was enacted in specific reaction to the *Whitney* and *Whack* line of cases, and therefore indicates that they misperceived the applicability §768.28(11) and 95.11(4)(b).

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Alternatively, assuming *arguendo*, that the 1988 amendments do not clarify pre-existing law, Respondents' reliance on the *Whitney* line of cases is again misplaced because these cases involved the statute of limitations and not the statute of repose. Moreover, even if *Whitney's* rationale is persuasive, it supports the Public Health Trust's argument. The *Whitney* court applied §768.28(11) because it noted that the limitations periods of chapter 95 do not apply if "a different time is prescribed elsewhere in the statutes...." §95.011, Fla. Stat. Consequently, *Whitney* held that, because §768.28(11), at that time, was deemed to supply a different limitations period for tort actions against state agencies, "chapter 95 unambiguously require[d] application of the limitation period provided in §768.28(11) for tort actions against the state." *416 So.2d at 501.* However, it is well-settled that a statute of limitations and a statute of repose are two very different devices which operate independently of one another.[16] Section 768.28(11), Fla. Stat. (Supp. 1980) provides a statute of *limitations* but does not provide a statute of *repose*. Nor is a different statute of repose for actions against state agencies "prescribed elsewhere" in the Florida statutes. Therefore, under *Whitney's* rationale, §95.011

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16 The distinction between the two was noted in *Carr* as follows:

> First, a statute of limitation bars enforcement of an accrued cause of action whereas a statute of repose not only bars an accrued cause of action, but will also prevent the accrual of a cause of action where the final element necessary for its creation occurs beyond the time period established by the statute.
>
> . . .
>
> Secondly, a statute of limitation runs from the date the cause of action arises; that is, the date on which the final element (ordinarily, damages, but it may also be knowledge or notice) essential to the existence of a cause of action occurs. The period of time established by a statute of repose commences to run from the date of an event specified in the statute, such as delivery of goods, closing on a real estate sale or the performance of a surgical operation. At the end of the time period the cause of action ceases to exist.

505 So.2d at 570.

does not operate to prevent the application of the statute of repose of chapter 95 to actions brought against state agencies.

CONCLUSION

For the above-stated reasons and authorities, Public Health Trust respectfully requests that this Court reverse that part of the Third District's decision which held that the statute of repose does not apply to the claims against state agencies.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of May, 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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