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IN THE SUPREME COURT OF FLORIDA

BEP B. HARRIMAN, M.D. and
CLEARWATER PATHOLOGY
ASSOCIATES, M.D.'s, P.A.,
f/k/a LEONARD AND
GILLOTTE, M.D.'s, P.A.,

Petitioners,

vs.

CASE NO. 78,783

VICKIE NEMETH, as Personal
Representative of the Estate
of CHRISTOPHER NEMETH,
Deceased, for the use and
benefit of the survivors,
to-wit: VICKIE NEMETH,
et al.,

Respondents.

AMICUS CURIAE BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION (IN SUPPORT OF PETITIONERS' POSITION)

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PREFACE

The Florida Defense Lawyers **Association submits this brief as amicus curiae on behalf of the position advanced** by **Petitioner, Ben B. Harrirnan, M.D.**

In this brief, Petitioner Harriman will be **referred to as "Dr. Harrirnan", and Respondent, Vickie Nemeth, will be referred to as "Plaintiff."** All **emphasis is supplied unless otherwise indicated.**

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Defense Lawyers Association adopts the Statement of the Case and of the Facts set forth in the brief of Petitioner, Ben B. Harriman, M.D.

SUMMARY OF ARGUMENT

Section 95.11(4)(b), Florida Statutes, provides in pertinent part that an action for medical malpractice "in no event shall . . . be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued . . . ." Accepting the allegations of the complaint as true, the trial court properly dismissed Plaintiffs complaint because it was filed eight years after the incident of malpractice which was alleged to have resulted in the death of Mr. Nemeth.

In reversing the trial court, the Second District misinterpreted and misapplied the provisions of the statute of repose in Section 95.11(4)(b) and misinterpreted decisions of this Court which wholly support the trial court's dismissal of the complaint. In its ruling, the Second District determined that the four year statute of repose did not begin running until the patient had notice of the injury alleged to have resulted from malpractice. In so ruling, the Second District has confused the pronouncements of this Court that the two year ***statute*** of ***limitations*** in Section 95.11(4)(b) does not begin to run until a patient should have notice of a cause of action with the distinct rulings of this Court that the four year ***statute*** of ***repose*** commences when the incident of malpractice occurs, regardless of whether the patient has notice or knowledge of the injury or malpractice at that time.

The Second District's decision renders the statute of repose in Section 95.11(4)(b) wholly without meaning. If, as the Second District held, both the two year statute of limitations and the four year statute of repose each commence only when the Plaintiff has actual or constructive knowledge of the alleged malpractice or the resulting injury, then there is no occasion where the repose period would expire before the statute of limitations period. Because the Second District's decision renders a portion of the statute meaningless, it conflicts with accepted principles of statutory construction. *Also,* in determining that the repose period may never run before the limitations period, the decision of the Second District is directly contrary to decisions of this Court on that issue. The Second District's decision is in error and must be quashed.

ARGUMENT

I. THE FOUR YEAR STATUTE OF REPOSE IN SECTION 95.11(4)(B), FLORIDA STATUTES (1989), BARS A MEDICAL MALPRACTICE SUIT IF THE ALLEGED MALPRACTICE OCCURRED MORE THAN FOUR YEARS BEFORE SUIT WAS FILED BUT THE INJURY RESULTING FROM THE ALLEGED MALPRACTICE DID NOT MANIFEST ITSELF WITHIN THE STATUTORY FOUR *YEAR* PERIOD.

This case presents the single issue of the proper construction of the four year statute of repose established by Section 95.11(4)(b), Florida Statutes. Despite this Court's many opinions which hold that the four year statute of repose is distinct, both in operation and effect, from the two year statute of limitations set forth in Section 95.11(4)(b), the Second District's decision mistakenly concludes that the statute of limitation and the statute of repose are governed by the same rules, and that the statute of repose may not begin to run until a prospective plaintiff has actual or constructive knowledge of his cause of action. In so doing, the Second District has misinterpreted and misapplied this Court's precedents and has interpreted Section 95.11(4)(b) in a manner which nullifies the four year statute of repose.

Section 95.11(4)(b) prescribes (1) a statute of limitations of two years; (2) a statute of repose of four years absent fraud or intentional misconduct; and (3) a statute of repose of seven years where there is an allegation that fraud, concealment, or intentional misrepresentation of fact prevented discovery of the negligent conduct. *Carr v. Broward County*, 541 So.2d 92 (Fla. 1989). The statute provides 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 [statute of limitations]; 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 [statute of repose]. *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 even to exceed **7** years from the date the incident giving rise to the injury occurred [statute *of repose* in cases of fraud].

This Court has long recognized the clear distinction between a statute of repose and a statute of limitations:

> Rather than establishing a time limit within which [an] action must be brought, measured from the time of accrual of the cause of action, these [statutes of repose] provisions cut off the right of action after a specified time measured from the delivery of a product or the completion of work. They ***do*** so regardless of ***the*** time of *the* accrual of the *cause* of action *or* of notice *of the* invasion of ***a*** legal right.

Universal Engineering *Corp.* v. ***Perez,*** **451** So.2d **463** (Fla. 1984), quoting *Bauld* v. *J.* ***A.*** Jones Construction Co., **357** So.2d **401, 402** (Fla. **1978)** (emphasis supplied). In construing the

statute of repose in Section 95.11(4)(b), this Court held that it constitutes an absolute bar to commencement of an action, even when fraud prevented discovery of the cause of action until after the repose period had run. ***Id.; see also Armbrister v. Roland International Cop.***, *667* F.Supp. 802 (M.D. Fla. 1987) (action for conspiracy required to be initiated within four years from date of contract regardless of whether plaintiffs knew or should have known of facts underlying claims.) The four year repose period established by Section 95.11(4)(b) is constitutional even when applied to bar a medical malpractice claim of which a plaintiff had no actual or constructive knowledge until after the expiration of the repose period. *Carr v.* ***Broward County, supra.***

The ordinary two-year statute of limitations may be tolled or extended, but the four-year statute of repose is an absolute bar to the commencement of an action, "cutting off the right of action after a specified time." ***Universal Engineering Corp. v. Perez,*** 451 So.2d 463 (Fla. 1984); see ***also,*** *Carr,* ***supra.*** "At the end of time period [established by the statute of repose] the cause of action ceases to exist." *Carr v.* ***Broward County,*** 505 So.2d 568 (Fla. 4th DCA 1987), ***approved,*** 541 So.2d 92 (Fla. 1989).

Although both the statute of limitations and the statute of repose in Section 95.11(4)(b) are "limitations" on a person's right to commence an action, they operate in fundamentally different ways so as to make strict comparison and analogy improper, Statutes of limitations are designed to insure the timely filing of actions after a cause of action has accrued, and thus the tolling of a statute of limitation for periods during which

the plaintiff could or should not be required to commence his action does not do violence to the statutory **scheme.** On the other hand, because a statute of repose constitutes an ***absolute bar*** to the cornmencement of an action regardless of the accrual **of** the cause **of** action **or** a person's knowledge of his right to sue, the statutory prohibition on the commencement of actions is violated by allowing the repose period to be exceeded.

The Second District's decision turned on its conclusion that "the terms 'incident' and 'occurrence' in the four year statute of repose in Section 95.11(4)(b) must, under the circumstances of this case, refer to the manifestation of Mr. Nemeth's symptoms in apparently **1988** and not to the 1980 misdiagnosis by defendants." *Nemeth v. Harriman*, **16 F.L.W** D2118 (Fla. 2d **DCA** 1991). An examination of the cases decided and approved by this Court construing the medical malpractice four year statute of repose shows that the Second District's erroneous conclusion about the meaning of the terms "incident or occurrence"—the triggering event for commencement of the running of the statute of repose—was in error.

In reaching its conclusion, the Second District relied upon the Third District's decision in ***Lloyd v. North Broward Hospital*** *District*, 570 So.2d 984 (Fla. 3d **DCA** 1990).[1] In ***Lloyd,*** the plaintiff parents had a son who was born in 1978, severely deformed and retarded. The parents sought genetic testing to determine if the impairments were hereditary, but information showing the presence of a genetic defect was negligently not disclosed to the

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[1] Review **of** the decision in ***Lloyd*** is pending before this court, case nos. **76,476, 77,135, 77,192** and **77,193.**

parents. Accordingly, based on advice from their pediatrician that there was no genetic abnormality, the Lloyds had another child in 1983, who suffered from the identical physical and mental defects as their first child. Only after the birth of this second child did the Lloyds learn that they were not informed of test results which would have disclosed the possibility of another child being born with the same genetic defects. Based upon this knowledge, the Lloyds filed suit in 1985, more than four years after the medical malpractice which they alleged to have occurred. On these facts, the Third District ruled that the statute of repose did not begin to run until the discovery of an injury caused by medical malpractice, *i.e.*, the birth of the second child.

Although this Court has ruled that the medical malpractice statute of repose is constitutional even when it extinguishes a cause of action before it accrues, and although this Court has recognized that "the legislature envisioned that there would be some factual circumstances in which the statute [of repose] would begin to run before the negligence or the injury became known",[2] the *Lloyd* decision was colored by the court's reluctance to foreclose a claim where "the limitation period expired before the Lloyds had experienced any injury and before they had any awareness of a possible claim." ***Lloyd,*** at **986.** Apparently because of this concern, the Third District ruled that the "incident" which begins the running of the statute of repose is an "injury caused by medical malpractice." ***Id.*** at **987.**

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[2] ***Barron v. Shapiro,*** 565 So.2d 1319, 1322 (Fla. 1990).

In reaching the decisions in ***Nemeth*** and ***Lloyd,*** the Second and Third Districts have confused the test for determining when a cause of action accrues, *i.e.*, when a person has actual or constructive knowledge of either the injury or the incident of malpractice, with the test for determining the commencement of the running of the statute of repose, ***i.e.***, the time at which the incident of malpractice occurred, irrespective of whether the patient had knowledge of the incident at that time. The Second and Third Districts grafted onto the test for determining when the statute of repose begins running the notice requirements which are part of the test for determining when the cause of action accrues. **This** Court's decisions have long established, however, that a statute of repose begins running regardless of whether a person has notice of invasion of his legal rights; notice is only relevant to a determination of when the cause of action accrues.

In support of its holding that the statute of repose does not begin to run until an injury is discovered? the Second District also cited to this Court's decisions in ***Pullurn v. Cincinnati, Inc.***, **476** So.2d 657, **659** n.* (Fla. 1985), and ***Diamond v. E. R. Squibb*** & **Sons,** *Inc.,* **397** So.2d **671** (Fla. 1981). Neither of those cases, however, support the ruling of the Second District below. ***Pullum*** does not support the court's holding because this Court ruled that the 12-year statute of repose for products liability actions "**is** not unconstitutionally violative **of** Article **I,** Section **21** of the Florida Constitution", even if it extinguishes causes **of** action which were unknown to **a** prospective plaintiff. *Pullurn,* ***supra*** at ***659.*** In rendering

its decision in *Pullum*, however, the Court in a footnote made reference to ***Diamond v. E. R. Squibb & Sons, Inc., supra,*** another products liability case, as follows:

> In ***Diamond,*** we held that the operation of Section 95.031(2) operated to bar a cause of action before it accrued and thereby denied the aggrieved plaintiff access to the courts. But ***Diamond*** presents an entirely different factual context than existed in either ***Battilla [v. Allis Chalmers Manuf. Co.,*** 392 So.2d 874 (Fla. 1980)] or the present case where the product first inflicted injury many years after its sale ***. . . . the legislature, no doubt, did not contemplate the application of the statute to the facts in Diamond.*** Were it applicable, there certainly would have been a denial of access to the courts.

According to that footnote, this Court ruled that ***Diamond*** was restricted to its own facts, ***i.e.,*** where a plaintiff could not possibly have known that the ingestion of DES during pregnancy would result in cancerous or pre-cancerous conditions among her offspring some 20 years later. The conclusion that ***Diamond*** is to be narrowly construed and limited to its own facts, and that it does not stand for the proposition that the medical malpractice statute of repose begins to run only from the discovery of injury is bolstered by this Court's ruling in *Barron* ***v. Shapiro, supra.*** There, this Court recognized that, unlike the statute of repose involved in ***Diamond,*** "the legislature envisioned that there would be some factual circumstances in which the statute [of repose in Section 95.11(4)(b)] would begin to run before the negligence or injury became known." 565 So.2d at 1322. Since ***Diamond*** was decided under the products liability statute of repose and, by this Court's own ruling, is limited to its own facts, it does not support the Second District's construction of the medical malpractice statute of repose, particularly in light of this Court's pronouncements that the statute of repose may

constitutionallybegin to run from the date of malpractice and that the legislature anticipated that claims might **be** barred even when a plaintiff has no notice or knowledge of the cause of action.

This case presents the Court with the opportunity to end the confusion which apparently still exists concerning the manner in which Section 95.11(4)(b) is to be interpreted and applied. Reviewing the statute and this Court's most recent pronouncements, it is evident that the term "incident", as used in Section 95.11(4)(b), means the act of malpractice itself. ***See, e.g., University of Miami v. Bogorff, 583*** So.2d 1000, 1004 (Fla. 1991). ("After subsection 95.11(4)(b) became effective on May 30, 1975, the repose period set forth therein cut **off** the Bogorffs' right of action, absent fraud, in January 1976—four years after the incident of malpractice, ***i.e. when Dr. Cock administered the final injection of intrathecal methotrexate.***"); ***Public Health Trust of Dade County v. Menendez,*** 584 So.2d ***567,*** 568 (Fla. 1991)("Thus, under this statute a two-year limitation begins on the date of actual or constructive discovery; but there is also a "repose" that bars any and all claims brought more than four years after the actual incident, even for **acts** of negligence that could not reasonably have been discovered within this period of time."). ***Carr v. Broward County, 505*** So.2d ***568,*** 575 (Fla. 4th **DCA** 1987), approved, 541 So.2d 92 (Fla. 1989) ("It seems clear from the recital of facts in that **case** [*Phelan v. Hanft*] that the incident occurred and the cause of action arose after the effective date of the applicable statute **of** repose, and that Plaintiff filed the action more than four years after the "incident," a surgical procedure.

What this Court said in ***Barron v. Shapiro,*** 565 So.2d 1322 (Fla. **1990)** was that the cause of action does not accrue, and the two year statute of limitations does not begin to run, until a plaintiff has actual or constructive notice of either the act of malpractice **or** the resulting injury, With regard to the four year statute of repose, however, this Court has been explicit and uniform in holding that the four-year repose period begins to run at the time **of** the incident **of** malpractice, regardless of whether the plaintiff knew or should have **known of the cause** of action. See, ***e.g.,*** *Menendez, supra* at *568* (The four year repose **period** "bars any and all claims brought more than four years after the actual incident, even for acts **of** negligence that could not reasonably have been discovered within **this** period of time."); ***University of Miami v. Bogorff, 583*** So.2d 1000, 1003 (Fla. 1991)("In contrast to a statute of limitation, a statute of repose precludes a right of action after **a** specified time which **is** measured from ***the incident*** of ***malpractice,*** sale of a product, OF a completion of improvements, rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued.) ***Carr v. Broward County, 505*** So.2d at 575 (" **. . .** The ***incident of malpractice*** begins the period of repose in a medical malpractice case despite fraudulent concealment,"); **see** *also* ***Shields v. Buchholz,*** 515 So.2d **1379** (Fla. 4th **DCA** 1987), ***rev. dism.,*** *523* So.2d *578* (Fla. 1988), in which the Fourth District, relying on its decision in *Carr,* expressly rejected appellant's claim that where an injury does not manifest itself for a long period of time after negligent treatment, the statute **of** repose does not begin to run until the symptoms appear. ***Id.*** at

1382. The court expressly disagreed with this argument, which **is** the same argument made by plaintiff in this case. The Fourth District clearly stated that "Carr held that 'the ***incident*** of *malpractice* begins the period of repose in a medical malpractice case . . . ." ***Id.*** at 575 (emphasis in original).

The Fourth District has recognized that the distinction between a statute **of** limitations and statute of repose has real meaning and effect. In *Shields v.* ***Buchholz, supra,*** the court held that the **four** year statute of repose in Section **95.11(4)(b)** constitutionally barred the plaintiffs claim for dental malpractice even though the plaintiff did not learn until four days before the expiration of the repose period that he had suffered an injury as **a** result of malpractice. In that case, the Plaintiff received dental treatment on August **14, 1978,** but did not develop symptoms that caused him to **seek** the care of an oral surgeon until July **28, 1982,** and did not determine that there had been negligence until August **9, 1982.** Despite the fact that the Plaintiff had no actual or constructive knowledge of the injury or the malpractice until only four days before the repose period expired, the court ruled that the four year statute of repose constituted an absolute bar to the Plaintiffs claim,

Based on its earlier decision in *Carr* ***v. Broward County,*** the Fourth District determined that the incident of malpractice which started the running of the statute **of** repose was the treatment on August 14, 1978, and not the Plaintiffs subsequent injury and knowledge in July, **1982.** The Fourth District rejected the Third District's analysis in *Phelan* ***v. Hanft,*** **471 So.2d 648** (Fla. **3d DCA** 1985), appeal dismissed, **488 So.2d 531** (Fla. **1986),**

in which the court ruled that the statute of repose did not begin to run until the Plaintiff had actual or constructive **knowledge** of her cause of action. Because the result in ***Shields*** was based on the Fourth District's reasoning in *Carr*, which was later affirmed by this Court, and because it was contrary to the reasoning in *Phelan*, which was rejected **by** this **Court's** decision in ***Carr***, the ***Shields*** decision constitutes an accurate pronouncement **of** the manner in which the statute of repose in Section 95.11(4)(b) should be interpreted and applied. The only difference between the facts of this case and those of ***Shields*** is that the decedent in this case did not discover **his** cause of action until after the statute of repose had run, while the plaintiff in *Shields* discovered the cause of action four **days** before the expiration of the repose period. This **is** truly a distinction without a difference, however. Because a claimant's knowledge of a cause of action **is** wholly irrelevant in determining when the repose period begins to run, it does not matter whether the claimant became aware of the cause of action before or after the repose period expired. ***As*** the Fourth District stated in ***Shields:***

> Since the incident **of** malpractice giving rise to Appellants' claim occurred after the enactment of the medical malpractice reform act and appellants failed to file suit within four years of the incident of malpractice, we hold that the statute of repose barred their claim.

Id. at **1383.** The same result should obtain here, and the Second District's opinion should be quashed.

If the Second District's construction of Section 95.11(4)(b) were to stand, it would also moot the seven year statute of repose which exists in cases of fraudulent concealment. Under the statute, if a plaintiff shows

> that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year [repose] period, the period of limitations is extended forward 2 years from the time 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 malpractice occurred.

If, as the Second District held below, the repose period does not even begin to run until the plaintiff has actual or constructive knowledge of the cause of action, there is no reason for the statutory provision extending the repose period in cases of fraud or misrepresentation. Under the Second District's analysis, if a plaintiff were unaware of an injury or malpractice for any reason, whether it be because of fraud or even impossibility, the four year repose period would never run, and so there would be no need to extend the period to seven years.[3]

This Court has recognized that by using the word 'incident', the legislature envisioned that there would be some factual circumstances in which the statute would begin to run before the negligence or the injury became known." *Barron v.* Shapiro, 565 So.2d 1319,1322 (Fla. 1990). "It is not the court's duty or prerogative to modify or shade clearly expressed

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[3] Likewise, of course, under the Second District's analysis, the seven year repose period would also never begin to run until a plaintiff had knowledge of his cause of action, and so it too would be rendered a nullity.

legislative intent in order to uphold a policy favored by the court", *Holly v.* Auld, 450 So.2d 217,219 (Fla. 1984), and so this Court must defer to the legislative judgment and uphold the trial court's dismissal of the complaint. While the plaintiff may question the wisdom and desirability of the legislative establishment of the four-year repose period, this Court is bound to adhere to it. To do otherwise would require rejection of the legislative will and wholesale abandonment of the many years of precedent construing and refining the meaning of Section 95.11(4)(b).

CONCLUSION

For the foregoing reasons, the opinion of the second District Court of Appeal should be quashed.

Respectfully submitted,

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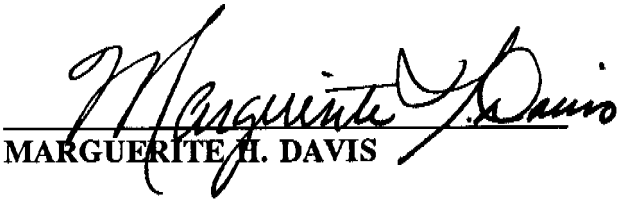
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a** true and correct copy of the foregoing has been furnished by US. mail to Joel Eaton, Esquire, 25 W. Flagler Street, Suite 800, Miami, FL 33130, Leonard M. Vincenti, Esquire, 28050 **U.S.** 19 North, Suite 401, Clearwater, FL **34621** and Philip Burlington, Esquire, Suite 4B/Barristers Bldg., 1615 Forum Place, W. Palm Beach, FL **33401** and Philip D. Parrish, Esquire, 9100 S. Dadeland Blvd., One Datran Center, Suite 15090, Miami, FL 33156, this 18th day of November, 1991.



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