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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,783

BEN B. HARRIMAN, M.D.,

Petitioner,

vs.

VICKIE NEMETH, as personal representative of the Estate of Christopher Nemeth,

Respondent.

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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I.
STATEMENT OF THE CASE

Provided that the Court will disregard the argumentative phrase with which its second paragraph begins, we will accept Dr. Harriman's statement of the case.[1] The statement needs to be supplemented briefly, however, because it is incomplete. In actuality, two defendants were named in Mrs. Nemeth's complaint -- Dr. Harriman, and his employer, Clearwater Pathology Associates, M.D.'s, P.A. (R. 1). Both defendants appeared in the action and moved to dismiss the complaint, and the complaint was dismissed with prejudice as to both defendants (R. 39, 15). In the appeal by the plaintiff which followed, only Dr. Harriman filed an answer brief. The district court ultimately reversed the order of dismissal as to both defendants. Thereafter, only Dr. Harriman filed post-decision motions, and when those motions were denied, only Dr. Harriman sought discretionary review in this Court. As a result, the district court's decision has become final as to Clearwater Pathology Associates, M.D.'s, P.A.; this Court has no jurisdiction to quash the district court's decision as it relates to that defendant; and any relief which this Court may order in this proceeding must be limited to Dr. Harriman alone.

II.
STATEMENT OF THE FACTS

We are unable to accept Dr. Harriman's statement of the facts, because his brief contains no statement of the facts. Instead, he has simply referred the Court to the allegations of the plaintiffs complaint. We agree with Dr. Harriman that those allegations provide the controlling facts here, but we think that more than a mere reference to the underlying record was necessary. For the convenience of the Court, we reproduce the important factual allegations of the complaint as follows:

---

[1] For the convenience of the Court, we have included a copy of the district court's decision, as reported in the Southern Reporter, in the appendix to this brief.

9. On or about March 6, **1980,** Plaintiffs decedent presented himself to G. T. Raper, M.D., a Dermatologist, at his office in Clearwater, Pinellas County, Florida for evaluation of a dark brown lesion on his back. Dr. Raper diagnosed the condition as a possible melanoma and referred Christopher Nemeth to a plastic surgeon.

10. On March **17,** 1980 Christopher Nerneth went to see Kenneth Brown, M.D. Dr. Brown removed the pigmented lesion in his office the following day, March 18, 1980, and submitted a tissue sample to the Defendants for identification and evaluation.

11. On or about March **19, 1980,** Defendant HARRIMAN performed a microscopic study of the tissue sample and identified it as a "Hemangioma".[2/] **A** report was sent to Dr. Raper and Dr. Brown. A copy of Dr. Harriman's report is attached hereto as Exhibit "A".

12. Christopher Nemeth did not have any further concern about the removed lesion, because his physicians relied on Defendants' expertise and diagnosis that the lesion was not malignant. Plaintiffs decedent did not have any cause for alarm or other symptoms attributable to the lesion on his back thereafter until August of **1988,** as will be hereinafter described.

13. On or about August 20, 1988 Christopher Nemeth presented himself to Morton Plant Hospital Emergency Room with complaints of blurred vision[,] disorientation, and vomiting which had begun the evening before. He was admitted to the hospital wherein the diagnosis of "acute intracerebral hematoma and pulmonary lesions, possibly metastatic, unknown cause" was made.

14. On September **20, 1988,** Christopher Nemeth was seen in the ambulatory care clinic at H. Lee Moffitt Cancer and Research Center at the University of South Florida in Tampa where he was seen by Douglas S. Reintgen, M.D. The original slides of the lesion studied by Defendants in August of **1980** were reviewed by a Pathologist at the Moffitt Center and were identified as a malignant melanoma.

[2/] According to Dorland's Illustrated Medical Dictionary (26th Ed. 1985), a "hemangioma" is "a benign tumor made up of new-formed blood vessels."

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> **15.** Christopher Nemeth had developed metastatic brain cancer directly attributable to the melanoma on his back in 1980. Thereafter his health continued to decline and he expired from cancer on October 19, 1989.
>
> . . . .
>
> 18. Defendants knew or, had they complied with the appropriate standard of care, should have known that the physicians who had seen and treated Christopher Nemeth for the pigmented lesion on his back were relying on them to make an accurate identification and diagnosis of the tissue sample. Had defendants correctly identified the tissue as a melanoma, Dr. Brown would have done a much more radical procedure known as a wide excision whereby a large area of skin and tissue surrounding the melanoma would have been removed. Christopher would have been closely followed and monitored by physicians thereafter to be sure that the cancer did not recur or spread to other areas of the body.
>
> 19. The death of Christopher Nemeth was a direct and proximate result of negligence of the Defendants as heretofore alleged.
>
> . . . .

(R.2-5).

One important implication of these allegations is, of course, that Mr. Nemeth's highly localized cancer was simply a preexisting condition which was capable of cure until the point in time when it ultimately metastasized to the rest of his body, so it cannot legitimately be claimed that Dr. Warriman's negligence caused him any injury until that future point in time arrived. The legal significance of this "delayed injury" has simply been lost on the defendant here. It is critical to an understanding of the issue presented here, however, and we shall spend some time explaining its significance in the argument which follows.

III.
ISSUE PRESENTED FOR REVIEW

We offer the following, modified version of the certified question as the issue

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presented for review here:

> DOES THE FOUR YEAR STATUTE OF REPOSE IN §95.11(4)(b), FLA. STAT. (1989), **BAR** 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, AND SUIT **WAS** FILED WITHIN THE **TWO** YEAR STATUTE OF LIMITATIONS PERIOD COMMENCING WITH THE DATE ON WHICH THE INJURY **FIRST** MANIFESTED ITSELF.

IV.
SUMMARY OF THE ARGUMENT

Because our argument is intricate and detailed (and because we must respond to a mountain of misplaced minutia by the defendant), our argument is not easily summarized in a page or two. Suffice it to say here that the primary thrust of our argument will be this: the "blameless ignorance" doctrine, which has long been a staple of Florida jurisprudence, is part and parcel of §95.11(4)(b). That doctrine holds that, in "delayed injury" cases like this one, no "injury" occurs until it has manifested itself to the plaintiff; and because that is the first point in time at which a plaintiff can even possibly have notice of the possible invasion of his legal rights, that is the point in time at which the statute of limitations begins to run. There is nothing in the language of §95.11(4)(b) to indicate that this long-settled doctrine was meant to be rejected by the legislature, and the quintessentially general word "incident" which the legislature supplied as the trigger point for the statute of limitations is obviously broad enough to include and subsume this salutary and humane doctrine.

Because the legislature used the identical word "incident" to define the trigger point for the statute of repose, and because it must be assumed that the word means the same thing each time it is used, both the statute of limitations and the statute of repose begin to run at the same time under §95.11(4)(b) -- on the date of the "incident." The word

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"incident" has uniformly been defined by the decisional law as a negligent act which causes an injury. In "immediate injury" cases, therefore, both the statute of limitations and the statute of repose begin to run at the time a negligent act causes an injury, and the statute of repose will bar suit upon all completed tarts which have not been discovered within four years. In "delayed injury" cases like this one, where (because of the "blameless ignorance" doctrine) the plaintiffs "injury" does not occur until it manifests itself to the plaintiff, both the statute of limitations and the statute of repose begin to run at the time the injury caused by the defendant's negligence manifests itself for the first time to the plaintiff, and the statute of repose will bar suit upon any cause of action which has not been discovered by the fourth anniversary of that date. There is nothing complicated about that, and there is no reason why that should not be the law. That *is* the law, according ta Lloyd *v.* North ***Broward*** Hospital *District*, 570 So.2d 984 (Fla. 3rd DCA 1990), review pending, and if this Court should ultimately approve the Lloyd decision, then it simply must approve the district court's decision in the instant case.

We will argue alternatively that, if this Court should determine that the word "incident" means the act of medical malpractice alone, and that both the statute of limitations and the statute of repose therefore begin to run at the moment a negligent act is committed, whether the act causes an injury or not, then the statute violates Article I, §21, of the Florida Constitution. On that reading of the statute, the statute would be unconstitutional because it would attempt to bar a plaintiff's action in a "delayed injury" case before it ever existed, and before the plaintiff could even have had an inkling of the possible invasion of his or her legal rights. The precedent for that conclusion is this Court's decision in ***Diamond v. E. R. Squibb & Sons,*** 397 So.2d 671 (Fla. 1981) -- which, according to everything which this Court has written since, is still good law. The fact that this Court upheld §95.11(4)(b)'s statute of repose in *Carr v. Broward* ***County,*** 541 So.2d 92 (Fla. 1989), is beside the point because ***Carr*** was an "immediate injury" case, and there is nothing in ***Carr***

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which even arguably purports to overrule ***Diamond*** in "delayed injury" cases like this one. Although our arguments will be considerably more complicated than that, that is the sum and substance of them -- and we respectfully submit that the district court's decision should be approved, for either of the alternative reasons advanced in the argument which follows.

V.
ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE FOUR YEAR STATUTE OF REPOSE IN §95.11(4)(b), FLA. STAT. (1989), DID NOT BAR A MEDICAL MALPRACTICE SUIT WHERE 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, AND SUIT WAS FILED WITHIN THE TWO YEAR STATUTE OF LIMITATIONS PERIOD COMMENCING WITH THE DATE ON WHICH THE INJURY FIRST MANIFESTED ITSELF.

Although Dr. Harriman has accused the district court of ignoring, misinterpreting, and misapplying this Court's decisions, and has called the district court's decision everything short of "stupid" here, the district court's reading of §95.11(4)(b), Fla. Stat. (1989), is both logical and sensible, and it is consistent with every decision which this Court has ever rendered on the subject. In actuality, it is the defendant, rather than the district court, who has confused apples and oranges here -- and an introductory explanation of that confusion will go a long way toward clarifying and simplifying the issue before the Court.

One area of potential confusion needs to be cleared up at the outset. Although the plaintiffs action is a wrongful death action, and was filed within two years of Mr. Nemeth's death, it is not governed by the two-year statute of limitations for wrongful death actions. Instead, because the plaintiff's wrongful death action sounds in medical malpractice, the appropriate statute is §95.11(4)(b) -- and that statute began to run before Mr. Nemeth's death, upon the personal injury which resulted in his death. Although that legal anomaly

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makes little sense to most people (since a wrongful death action is a different cause of action belonging to persons other than the decedent, and cannot even exist until the decedent dies), this Court held in Ash v. Stella, 457 So.2d 1377 (Fla. 1984), that that is what the legislature intended. Our focus here will therefore be upon application of §95.11(4)(b) to the personal injury action which Mr. Nemeth would have had if he had not died, rather than upon the wrongful death action which arose out of his death.

This peculiar circumstance presents a double irony here, of course, because it reduces the defendant's position to this: not only was the plaintiffs wrongful death action barred long before her husband died; it was barred long before her husband could even possibly have known that he had been injured by the defendant's malpractice. Most respectfully, in the immortal words of Charles Dickens, "if that is what the law says, then the law is an arse." Ultimately, we hope to convince the Court that the law makes a little more sense than that -- but for the moment, we return to our introductory clarification.

We point out that there are essentially two types of medical malpractice cases, each of which requires a different type of analysis where statutes of limitation and repose are concerned. The bulk of medical malpractice cases involve negligent acts which cause an immediate injury to the patient, and a large body of law has developed explaining application of §95.11(4)(b)'s limitation and repose periods to that type of case. It is these decisions upon which the defendant has relied here (and misread to some extent to boot), but the facts in the instant case simply do not fit within that analytical matrix.

The facts in the instant case present the much rarer type of case in which the negligence of the defendant initially causes no injury at all, and a substantial period of time elapses before any effect of the defendant's malpractice occurs or becomes manifest to the patient -- i. e., a substantial period of time elapses before it can logically be said that the malpractice has caused an injury to the patient. In the instant case, for example, Mr. Nemeth suffered no injury at all when the defendant misdiagnosed his localized melanoma

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as a benign tumor. Instead, Mr. Nerneth's preexisting condition (which cannot legitimately be characterized as either an injury or an effect of the defendant's malpractice) simply remained undiagnosed. During the 8½ years that followed, at any given point before the unexcised borders of the melanoma metastasized to other parts of Mr. Nemeth's body, a proper diagnosis would have resulted in a cure of his cancer -- and he would have had no action for malpractice against the defendant, because the defendant's negligence would have caused him no injury. That point, we think, is simply not debatable here.

The point is not debatable here because the very statute upon which the defendant relied below explicitly defines an "action for medical malpractice . . . as a claim in tort . . . for damages ***because*** of the ***death, injury, or monetary loss*** to any person arising out of any medical . . . care by any provider of health care." Section 95.11(4)(b), Fla. Stat. **(1989)** (emphasis supplied). It clearly follows that, until a death, injury or monetary loss is caused by an act of medical malpractice, no actionable tort has been committed and no action for medical malpractice exists. This conclusion is reinforced by a more general provision of Chapter 95, Fla. Stat., which states that "[a] cause of action accrues when the last element constituting the cause of action occurs." Section 95.031(1), Fla. Stat. (1989).

These statutory provisions are consistent, of course, with the decades of common law from which they were derived. It has always been the law that an action for negligence requires proof of four elements: (1) a **duty** (2) negligently breached (3) which causes **(4)** an injury. Lake Parker Mall, ***Inc. v. Canon,*** **327** So.2d **121** (Fla. 2nd **DCA** 1976), cert. ***denied,*** **344** So.2d ***323*** (Fla. 1977). ***See*** Prosser & Keeton, *The* Law *of* ***Torts,*** §30, p. **164** (5th Ed. 1984). ***As*** a result, it has always been the law that negligence which does not cause an injury simply does not result in an actionable tort:

> Even assuming arguendo, that a "wrong" (in the form of negligence) was perpetrated by the defendants on the plaintiff, it is, nonetheless, well-established in the common law that there is no valid cause of action where there is shown to exist, at the

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very most, a "wrong" without "damage.". . .

McIntyre v. McCloud, **334 So.2d 171, 172** (Fla. 3rd **DCA 1976).**

There are numerous decisions which say essentially the same thing. See, *e. g.,* ***Peat, Marwick, Mitchell & Co. v. Lane,*** **565** So.2d **1323, 1325** (Fla. **1990)** ("Generally, a cause of action for negligence does not accrue until the existence of a redressable harm or injury. . ."); ***McLeod v. Continental Insurance Co.,*** 17 FLW S33, **S34** (Fla. Jan. **9, 1992)** ("essential ingredient to any cause of action is damages"); ***Lloyd v. North Broward Hospital District*****, 570** So.2d **984** (Fla. 3rd **DCA** 1990), ***review pending*** (action for negligent misdiagnosis and misadvice will not lie until patient suffers an injury as a result); ***Airport Sign Corp. v. Dade County,*** **400** So.2d **828,829** (Fla. **3rd DCA 1981)** ("Until damages are actually incurred, a party cannot state a cause of action . . ."); ***Kellermeyer v. Miller,*** **427 So.2d 343, 345** (Fla. 1st **DCA** 1983) (". . . an act of negligence alone does not constitute a cause of action in tort without damages."). *Cf. Vilord v. Jenkins,* **226 So.2d 245** (Fla. 2nd **DCA** 1969) (action for negligent sterilization did not exist until patient became pregnant); ***Leenen v. Ruttgers Ocean Beach Lodge, Ltd., 662*** **F.** Supp. 240 (S.D. Fla. **1987)** (action for injury to fetus did not exist until injured child was born).?'

Clearly, until Mr. Nemeth suffered an injury as a result of the defendant's misdiagnosis, he had no cause of action upon which he could bring suit against the defendant. It was not until the point in time where his undiagnosed melanoma metastasized and became manifest to Mr. Nemeth as something other than a long-ago-removed mole that it can logically be said that he suffered any injury at all as a result of the defendant's malpractice, and it ought to be obvious that the analytical framework governing "immediate

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[3] In addition, ***see Town of Miami Springs v. Lawrence,*** **102** So.2d **143** (Fla. **1958); *City* of *Miami v. Brooks, 70*** So.2d 306 (Fla. **1954); *St. Francis Hospital, Inc. v. Thompson,* 149** Fla. **453, 31** So.2d **710 (Fla. 1947); *Neff v. General Development Corp.,*** **354** So.2d **1275** (Fla. 2nd DCA **1978).**

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injury" cases (upon which the defendant has constructed his argument) simply cannot be applied to a "delayed injury" case like this one -- and that a different analytical approach is clearly required.

What we intend to do is to demonstrate that this Court has consistently applied a different analytical approach to "delayed injury" cases like this one; that the language af §95.11(4)(b) is sufficiently general to accommodate and embrace that different analytical approach in "delayed injury" cases like this one; that the "immediate injury" cases upon which the defendant has inappropriately relied do not foreclose that different analytical approach, but actually support its application; and that the district court's construction of §95.11(4)(b) was not merely eminently sensible, but was consistent with precedent and clearly correct. We will argue alternatively that, if §95.11(4)(b) means what the defendant says it means, it violates Article I, §21, of the Florida Constitution, and it therefore cannot permissibly be enforced as a bar to the plaintiff's action.

A. Section 95.11(4)(b) was properly read and applied by the district court; it did not bar the plaintiffs action.

1. Our defense of the district court's decision.

Because the defendant's argument relies on the wrong cases and largely misses the point, we cannot respond to it on its own terms. We therefore propose to ignore the defendant's argument for the moment; to defend the district court's decision on its terms; and to respond to the defendant's argument after we have demonstrated the propriety of the district court's decision. We begin by noting that all the district court really did was to apply the "blameless ignorance" doctrine to §95.11(4)(b) -- a doctrine which has long been a part of Florida's jurisprudence in "delayed injury" cases like this one.

The doctrine appears to have its modern origin in *Urie v. Thompson,* 337 US. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949). In that case, the plaintiff was exposed to silica dust for approximately 30 years and he ultimately contracted the "occupational disease" of

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silicosis. He brought an FELA action against his railroad-employer within three years of the date he discovered that he had contracted the disease. The railroad contended that the three-year statute of limitations barred the claim, because the plaintiff obviously had acquired the slowly progressive disease more than three years prior to the time that it ultimately incapacitated him. In a passage which has been quoted by courts across the nation numerous times, the Supreme Court sided with the plaintiff:

> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have **known** he had silicosis at any earlier date. "It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves. . . ." [citation omitted]. The quoted language, . . . seems to us applicable in every relevant particular to the construction of the federal statute of limitations with which we are here concerned. Accordingly we agree with the view expressed by the Missouri Supreme Court on the first appeal of this case, that Urie's claim, if otherwise maintainable, is not barred by the statute of limitations.

337 U.S. at 170-71.

This doctrine was adopted in Florida by this Court in a medical malpractice case -- *City of Miami v.* Brooks, 70 So.2d 306 (Ha. 1954). In that case, the plaintiff received a negligent overdose of x-rays to her left heel in 1944, which finally manifested itself as an injury when the heel ulcerated in 1949. The defendant contended that the plaintiff's action was barred by the four-year statute of limitations. This Court disagreed. After quoting

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extensively from *Urie*, this Court held as follows:

> In other words, the statute attaches when there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action. In the instant case, at the time of the x-ray treatment there was nothing to indicate any injury or to put the plaintiff on notice of such, or that there had been an invasion of her legal rights. It is the testimony of one of the expert witnesses that injury from treatment of this kind may develop anywhere within one to ten years after the treatment, so that the statute must be held to attach when the plaintiff was first put upon notice or had reason to believe that her right of action had accrued. To hold otherwise, under Circumstances of this kind, would indeed be a harsh rule and prevent relief to an injured party who was without notice during the statutory period of any negligent act that might cause injury.

70 So.2d at 309.[4]

The "blameless ignorance" doctrine was applied again by this Court two years later, in an "occupational disease" case like ***Urie***: ***Seaboard Air Line Railroad*** Co. ***v. Ford,*** 92 So.2d 160 (Fla. 1956). The Court quoted once again from *Urie*; it quoted extensively from Brooks; and it made it clear (as the Supreme Court had in *Urie*) that, for purposes of determining the date upon when the plaintiffs cause of action accrued, the date upon which the plaintiffs injury ultimately manifested itself would be considered the date upon which the plaintiff was injured:

> In City of Miami **v.** Brooks, supra, 70 So.2d 306, we adopted the theory of the Urie case and applied it in a non-occupational disease case where there was no visible traumatic injury at the time of the negligent act nor other circumstances by which plaintiff could have "been put on notice of his right to a cause

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[4] The remainder of the Court's decision in ***Brooks*** distinguishes the situation in which the plaintiff learns of the defendant's ***negligent*** act during the statutory period, before the consequences of the act become fully manifest. In such a case, the statute begins to run upon notice of the negligent act. See, e. *g.*, ***Ash v. Stella,*** **457** So.2d 1377 (Fla. 1984). In the instant case, of course, Mr. Nemeth had no notice of Dr. Harriman's misdiagnosis before the injury caused by that misdiagnosis ultimately manifested itself, so the "blameless ignorance" doctrine (if it still applies in this state) controls the instant case.

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> of action * * * " at that time. And it must be held, under those decisions, that until an occupational disease has manifested itself, there has been no "injury" to start the running of the statute. . . .

92 So.2d at 164. Most respectfully, if Brooks and Ford and the salutary doctrine they represent survived the 1975 enactment of §95.11(4)(b) -- and we intend to demonstrate both that they should and did -- then the instant action was not barred by §95.11(4)(b).

The statute reads in pertinent part as follows:

> ***An*** action for medical malpractice shall be commenced with 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.

Section 95.11(4)(b), Fla. Stat. (1989) (emphasis supplied).?'

We have emphasized the thrice-repeated word "incident" above, because it is the critical word in the sentence, and its meaning squarely controls the issue presented for review. It is also important that the Court understand that the word simply must be given the same meaning each time it is used, because no reasonable legislature would use a single word to mean two entirely different things in the same sentence. ***See Goldstein v. Acme Concrete Corp.***, 103 So.2d 202, 204 (Fla. 1958) ("We may assume that in both chapters [the legislature] intended certain exact words or exact phrases to mean the same thing."); Schorb *v. Schorb*, 547 So.2d 985, 987 (Fla. 2nd DCA 1989) (" . . . when statutes employ exactly the same words or phrases, the legislature is assumed to intend the same meaning."); ***Doctors***

5/ The statute contains an additional provision, which extends the four-year statute of repose to seven years where a plaintiff has been prevented from discovering the "incident" by fraudulent concealment. Because there are no allegations of fraudulent concealment in this case, and since this provision begins to run at the same time as the four-year statute of repose -- from the date of the "incident" -- it adds nothing of any relevance to the issue presented here. We will therefore limit our discussion of §95.11(4)(b) to the sentence quoted above, as the district court did.

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Hospital, Inc. of ***Plantation v. Bowen***, 811 F.2d 1448,1452 (11th Cir. 1987) ("A presumption is made that the same words used in different parts of an act have the same meaning.").

With that understanding -- that the word "incident" simply must be given the same meaning each time it is used -- it is simply undeniable that the statute's two-year limitations period and its four-year repose period begin to run at the same time, on the date of the "incident," so the decisions defining the word "incident" for puposes of application of the statute of limitations define the word "incident" for purposes of application of the statute of repose as well. ***See Lloyd v. North Broward Hospital District***, ***570*** So.2d 984 (Fla. 3rd **DCA** 1990), ***review pending.*** In our judgment, it is thoroughly settled that the word "incident" means the completed tort -- i. e., the negligent act, the injury, and the causal connection between the two:

> Discovery of the "incident giving rise to the cause of action" is the point when the statute begins to run. . . . The term "incident" . . . could not refer solely to the particular medical procedure since that would obviously be "discovered" at the time it was performed, rendering nugatory the additional 2-year period permitted by the statute for discovering the incident. **Thus,** the term must encompass **(I)** ***a medical procedure; (2) tortiously performed; (3) which injures (damages) the patient. . . .***

Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376, 1379 (Fla. 4th **DCA** 1984), ***approved in relevant part,*** 487 So.2d 1032 (Fla. 1986) (emphasis supplied).

On discretionary review, this Court ***approved*** the Fourth District's disposition of this issue. ***Florida Patient's Compensation Fund v. Tillman,*** 487 So.2d 1032 (Fla. 1986). The definition of "incident" in *Tillman* was reiterated by the Fourth District in ***Cohen v. Baxt,*** 473 So.2d 1340 (Fla. 4th DCA 1985), ***approved in relevant part,*** 488 So.2d ***56*** (Fla. 1986). On discretionary review, this Court once again ***approved*** the Fourth District's reiterated disposition of the issue. ***Florida Patient's Compensation Fund v. Cohen,*** 488 So.2d ***56*** (Fla. 1986). There are numerous additional decisions which define the word "incident" in precisely

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the same way.[6]

With the word "incident" thus defined (and, for the moment, without reference to the "blameless ignorance" doctrine), the sentence in issue here has the following perfectly sensible meaning: an action for medical malpractice must be brought within two years from the date on which the negligent act caused an injury, or within two years from the date the plaintiff discovered (or should have discovered) that a negligent act caused an injury; however, if the fact that negligence has caused an injury is not discovered within four years from the date on which the negligent act caused the injury, then any action brought to redress the tort will be barred as untimely. Thus defined, the portion of the sentence following the word "however" is a "statute of repose," to be sure -- but it places in repose only torts which are actionable because they have been ***completed,*** but which have gone ***undiscovered*** for four years. It does ***not*** place in repose torts which have ***yet to*** be ***committed,*** merely because a negligent act (which has initially caused no injury at all) has been committed.

The statute is therefore relatively simple to apply in "immediate injury" cases: the statute of limitations begins to run in such a case from the date the negligent act caused the "immediate injury," or upon discovery that a negligent act has caused an "immediate injury," and the statute of repose will bar the cause of action if it remains undiscovered (through what might be characterized as "blameful ignorance" thereafter) on the fourth anniversary of the date the negligent act caused the "immediate injury." In a "delayed injury" case like this one, the statute is no less difficult to apply, once the "blameless ignorance" doctrine is

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[6] ***See, e. g., Lloyd v. North Broward Hospital District***, ***570*** So.2d 984 (Fla. 3rd DCA 1990), ***review pending; Williams v. Spiegel,*** 512 So.2d 1080 (Fla. 3rd DCA 1987), ***quashed in part on other grounds,*** ***545*** So.2d 1360 (Fla. 1989); ***Jacbon v. Lytle,*** 528 So.2d 95 (Fla. 1st DCA 1988); ***Elliot v. Barrow***, ***526*** So.2d 989 (Fla. 1st DCA), ***review denied, 536*** So.2d 244 (Fla. 1988); Florida ***Patient's Compensation Fund v. Sitomer,*** 524 So.2d 671 (Fla. 4th DCA), ***review dismissed,*** 531 So.2d 1353 (Fla. 1988), *and* ***quashed in part on other grounds, 550*** So.2d 461 (Fla. 1989); ***Scherer v. Schultz,*** ***468*** So.2d 539 (Fla. 4th DCA 1985).

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recognized. Since an "incident" requires an "injury," and since an "injury" does not occur in a "delayed injury" case until the injury ultimately manifests itself to the victim, the statute of limitations begins to run on the date the negligently caused "injury" ultimately manifests itself as an "injury" to the victim, or upon discovery that a negligent act has caused a "delayed injury," and if the cause of action remains undiscovered (through what might be characterized as "blameful ignorance" thereafter) on the fourth anniversary of the date the negligently caused "injury" first manifests itself to the victim, it will be barred. This, in our judgment, is a perfectly sensible construction of the statute, and there is nothing complicated about it. There is also no language in §95.11(4)(b) which even arguably expresses a legislative intention to the contrary -- and the word "incident," because it is quintessentially general, is clearly broad enough to accommodate the "blameless ignorance" doctrine with respect to both the statute of limitations and the statute of repose.

In essence, of course, that is all that the district court did in the decision under review here -- it read §95.11(4)(b) as incorporating the "blameless ignorance" doctrine in "delayed injury" cases like this one. And because the doctrine has long existed in Florida law (for sound public policy reasons previously expressed by this Court in ***Brooks*** and ***Ford),*** and because the legislature most certainly expressed no intention to abolish the doctrine in the language it chose for §95.11(4)(b), no good reason suggests itself why this Court should abolish it now by giving §95.11(4)(b) the inhumane and perverse "construction" which the defendant has urged here in an effort to escape accountability for the fatal consequences of his malpractice.

There appears to be only one decision on the books which has construed §95.11(4)(b) in a "delayed injury" case like this one, and it reads the statute exactly as the district court read it in the instant case. In ***Lloyd v. North Broward Hospital District, 570*** So.2d 984 (Fla. 3rd DCA 1990), ***review*** pending, Mr. and Mrs. Lloyd gave birth to a badly deformed child. In an effort to determine whether the child's deformities were genetic in origin or a fluke

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of nature, so that they could decide whether to have another child, they engaged various health care providers to make that determination. The health care providers negligently performed the genetic testing, and the Lloyds were ultimately told that their first child was simply an accident of nature and that they could safely have more children. The negligent testing was performed and the negligent advice was given in 1978. In 1983, the Lloyds had a second child who suffered from the identical genetic defects which afflicted their first child. The defendants in Lloyd took the same position which the defendant has taken here -- that the statute of repose began to run in 1978, notwithstanding that their malpractice caused the Lloyds no "injury" until 1983. The trial court agreed with the defendants.

The district court rejected the defendants' position on appeal, construing §95.11(4)(b) exactly as **we** have urged the Court to construe it here:

> The effect of the trial court's ruling was to hold that the limitation period expired before Brandon was born. Under that approach, the limitation period expired before the Lloyds had experienced any injury and before they had any awareness of a possible claim.
>
> Dispositive for present purposes is our court's decision in ***Williams*** *v. Spiegel*, 512 So.2d 1080 (Fla. 3d DCA 1987), quashed **in** part ***on*** other grounds, 545 So.2d 1360 (Fla. 1989). There the court defined "incident" as "an ***injury*** caused by medical malpractice . . . ." Id. at 1081 (emphasis added); [additional citations omitted]. Until Mrs. Lloyd gave birth to a live baby, Brandon, the Lloyds had suffered no injury. The relevant moment for purposes of the statute was the date of the child's birth. The lawsuit was therefore timely.

570 So.2d at 986-87. (The remainder of the decision's discussion of the point distinguishes the various "immediate injury" cases upon which the defendant has relied in the instant case.)

Although the Lloyd Court did not expressly identify the "blameless ignorance" doctrine by name, its reliance upon the doctrine is clearly revealed by its rejection of any construction of §95.11(4)(b) which would result in a conclusion that "the limitation period

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expired before the Lloyds had experienced any injury and before they had any awareness of a possible claim." 570 So.2d at 986. This, of course, is a precise echo of what this Court wrote in an earlier "delayed injury" case, ***City of Miami v. Brooks, 70*** So.2d 306, 309 (Fla. **1954):**

> In other words, the statute attaches when there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action. In the instant case, at the time of the x-ray treatment there was nothing to indicate any injury or to put the plaintiff on notice of such, or that there had been an invasion of her legal rights. It is the testimony of one of the expert witnesses that injury from treatment of this kind may develop anywhere within one to ten years after the treatment, so that the statute must be held to attach when the plaintiff was first put upon notice or had reason to believe that her right of action had accrued. To hold otherwise, under circumstances of this kind, would indeed be a harsh rule and prevent relief to an injured party who was without notice during the statutory period of any negligent act that might cause injury.

In other words, the ***Lloyd*** decision squarely holds that the "blameless ignorance" doctrine survived enactment of §95.11(4)(b) and is accommodated and embraced by it -- and if the ***Lloyd*** decision is ultimately approved by this Court (as it should be), then the decision under review in the instant case logically must be approved as well.

Although this Court has been presented with no "delayed injury" case requiring construction of §95.11(4)(b) (other than ***Lloyd,*** which has not been decided at this writing), the decisions which it has rendered in the various "immediate injury" cases which it has decided evidence no intent to read the "blameless ignorance" doctrine out of §95.11(4)(b). In fact, in the Court's most recent decisions on the subject, both Brooks and ***Ford*** were cited with approval for the proposition that an "incident" occurs and the statute of limitations (and therefore necessarily the statute of repose) begin to run when the plaintiff is on notice of the possible invasion of his legal rights. ***See University*** of ***Miami v. Bogorff,*** 583 So.2d 1000 (Fla. 1991); Barron ***v. Shapiro, 565*** So.2d 1319 (Fla. 1990). The logical implication of this

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Court's continuing reliance upon Brooks and Ford is that the "blameless ignorance" doctrine is alive and well, and that neither the statute of limitations nor the statute of repose can begin to run until the plaintiff is on notice of the possible invasion of his legal rights -- which, in "delayed injury" cases like Lloyd and this one, cannot occur until the "delayed injury" ultimately manifests itself to the plaintiff.

In short and in sum, the word "incident" in §95.11(4)(b) means a negligent act which causes an injury, and it means the same thing each time it is used in the statute. The statute of limitations and the statute of repose therefore begin to run at the same time. When the defendant's negligence causes an "immediate injury," the plaintiff has four years to discover the completed tort and bring suit, and if he is blamefully ignorant for four years his suit will be barred. However, when the defendant's negligence does not immediately cause an injury, neither the statute of limitations nor the statute of repose begin to run until such time as the plaintiff suffers an "injury" -- which, according to the "blameless ignorance" doctrine, is the date the "injury" ultimately manifests itself to the plaintiff. Once that "injury" occurs, the plaintiff has four years to discover the completed tort and bring suit, and if he is blamefully ignorant for four years his suit will be barred. There is nothing complicated about that. That reading of §95.11(4)(b) is also both logical and sensible; it preserves the salutary and humane "blameless ignorance" doctrine; and it is consistent with the language of both the statute and every decision which this Court has ever rendered on the subject. Most respectfully, the decision under review here is correct, and it should be approved.

2. Our response to the defendant's argument.

Reduced to its essentials, the defendant's position is this: §95.11(4)(b) incorporates a form of the "blameless ignorance" doctrine only into the "delayed discovery" provision of the two-year statute of limitations, allowing a victim of malpractice four years to discover his or her "injury"; the four-year statute of repose does not depend upon the existence of an "injury" at all, but begins to run from the date on which the negligent act was committed,

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whether the negligence has caused an injury or not; and the district court hopelessly confused the two things when it read the statute of limitations' "delayed discovery" provision into the statute of repose. In our judgment, this reading of the statute is simply indefensible, for some very simple reasons. First, the statute of limitations portion of the statute is ***not*** tolled until discovery of the "injury"; it is explictly tolled until discovery of the "incident." There are, to be sure, numerous decisions applying this portion of the statute, which hold that discovery of the "incident" occurs upon ***discovery*** of either the negligent act or an injury which provides constructive notice of the negligent act -- but none of these cases hold that the word "incident" means "injury."[7/] Instead, as we have previously explained, all of them

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[7/] In our Respondent's Brief on the ***Merits*** in the ***Lloyd*** case, we summarized these decisions as follows:

> Fairly read, and considered collectively, the cases stand for the following propositions: **(1)** the word "incident" means an act of medical malpractice which causes an injury; (2) the statute of limitations begins to run upon discovery of the incident; (3) discovery of the incident need not necessarily await discovery of each element of the tort; **(4)** knowledge of the negligent act which has caused an injury will start the statute of limitations running; ***(5)*** when the plaintif has knowledge of only an injury but the injury is reasonably ambiguous concerning its cause, the statute of limitations begins to run only upon discovery that the ambiguous injury was actually the consequence of a negligent act rather than some non-negligent act or a natural cause; and (6) when the plaintiff has knowledge of an injury which itself gives fair notice that it was the probable consequence of a negligent act, the plaintiff has discovered the incident and the statute of limitations has begun to run. In no case has this Court, or any other court, ever held that the word "incident" means the commission of a negligent act alone, where that act has caused no injury. . . .

We thereafter proceeded to prove these ***six*** propositions to the Court with a detailed review of the decisional law. Because the point is not really in issue here, will will not repeat that detailed review here. If the Court should desire to refresh its recollection, it can find support for the six propositions in the Respondents' Brief on the Merits in the Lloyd case -- consolidated case nos. 76,476; 77,135; **77,192;** and **77,193.**

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define the word "incident" as a negligent act which has caused an injury -- i. e., a completed, actionable tort -- and that is therefore the definition of the word "incident."

Second, the statute of repose provision does not say that it begins to run upon the date on which the negligent act was committed, irrespective of whether the negligent act has caused an "injury"; it says that the statute of repose begins to run on the date of "incident." And because the word "incident" simply must mean the same thing each time it is used in the statute, the statute of repose simply must begin to run at the same time the statute of limitations begins to run, on the date that a negligent act caused an injury -- i. e., the date on which a Completed, actionable tort was committed. And, as long as the word "incident" is defined in that manner, the "blameless ignorance" doctrine is properly applied to both the statute of limitations and the statute of repose contained in §95.11(4)(b). Most respectfully, it is the defendant who is attempting to rewrite the statute here, not the district court -- and the legislature's thrice-repeated use of the word "incident" simply will not admit of any construction of the statute which would start the statute of repose running at any time before an "injury" occurred to start the statute of limitations running.

That is the short and simple response to the defendant's argument, and unless this Court is prepared to hold that both the statute of limitations and the statute of repose can begin to run in a medical malpractice case before an "injury" has even been inflicted on the plaintiff, it ought to be dispositive of the error of the defendant's proposed construction of the statute. And if the Court ultimately approves the Third District's decision in *Lloyd*, which is squarely bottomed upon the construction of the statute which we have proposed here, the defendant's proposed construction of the statute will clearly be foreclosed. Because the result in *Lloyd* is not yet in at this writing, however, we have no choice but to address the mountain of minutia which the defendant has collected to support his tortured construction of the statute. We will address the defendant's miscellaneous points in no particular order, and we will be as brief as the circumstances will permit.

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The defendant asserts that our definition of the word "incident" is necessarily rejected by the following tentatively advanced dictum in ***Baron v. Shapiro***, ***565*** So.2d 1319, **1321-22** (Fla. 1990):

> . . . . In fact it could be argued 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 either the negligence or the injury became known. In any event, we cannot accept Mrs. Shapiro's contention that the word "incident" means the point in time at which the negligence should have been discovered. We believe that the reasoning of ***Nardone*** continues to be applicable to the current statute. Thus the limitation period commences when the plaintiff should have known either of the injury or the negligent act.

Most respectfully, this language is not inconsistent with our reading of the word "incident" in any way. All that it says is that there might be circumstances where a negligent act has caused an "immediate injury" -- i. e., a completed tort has been committed -- but the plaintiff has discovered neither the negligent act nor the injury which it caused within the statutory period. In that event, of course, the statute will have run. See, ***e.*** g., ***Shields v.*** *Bucholz*, 515 So.2d 1379 (Fla. 4th DCA **1987),** review *dismissed*, **523** So.2d **578** (Fla. **1988)** (discussed at page 37, *infra*). This language does ***not*** say that the legislature even arguably could have envisioned that the statute of limitations and the statute of repose would begin to run at the first instant an undiscovered negligent act was committed, even though the negligent act caused no injury giving rise to an action for malpractice. ***Barron*** therefore does not support the defendant's reading of §95.11(4)(b) in any way.

If there were any doubt about that, that doubt was clearly removed by this Court a month later, in ***Peat, Marwick, Mitchell & Co. v. Lane, 565*** So.2d 1323 (Fla. 1990), which involved a "delayed-action" tort of the type in issue in the instant case. In that decision, this Court summarized its holding in ***Barron*** as follows:

> . . . Generally, a cause of action for negligence does not accrue until the ***existence of a redressable harm or injury has been***

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> ***established*** and the injured party knows or should know of either the injury or the negligent act. ***See*** *Barron v. Shapiro,* **565** So.2d **1319** (Fla. **1990).**

565 So.2d at **1325** (emphasis supplied). This capsule statement of the holding in Baron is exactly what we have argued here, and it is exactly the way the Third District read Baron in the ***Lloyd*** case. The defendant therefore has no legitimate claim that Baron supports his peculiar contention that §95.11(4)(b)'s statute of limitations and its statute of repose begin to run at the first instant a negligent act is committed, even though no harm or injury has initially been caused by the act.

Next, we will address the defendant's reliance upon this Court's recent decision in ***Carr v. Broward County,*** 541 So.2d 92 (Fla. 1989), in which it upheld §95.11(4)(b)'s statute of repose against constitutional challenge. In our judgment, this decision adds nothing to the defendant's position concerning the meaning of the word "incident," because, in this Court's words, "the brain damage injury to the Carr infant was a completed fact at the time of birth . . .". **541 So.2d** at **94.** In other words, the negligence in ***Caw*** caused an "immediate injury," and there was therefore a completed tort at the time the negligent act was committed, so an "incident" clearly occurred at that point in time. Both the statute of limitations and the statute of repose therefore began to run at that time, and the only relevant question was whether the legislature could permissibly bar suit on the completed tort if it was not ***discovered*** (because the plaintiff was blamefully ignorant) within four years from the date it was committed. Most respectfully, ***Cur*** is entirely consistent with everything we have argued to this point, and there is no support in it whatsoever for any argument that the word "incident" means a negligent act, even though it has caused no injury resulting in a completed tort!

[8/] ***As*** we will explain in the next subsection of our argument (at page 37, ***infra***), ***Shields v. Bucholz***, 515 So.2d **1379** (Fla. 47th **DCA 1987**), ***review dismissed***, ***523*** So.2d ***578*** (Fla. 1988), and ***Phelan v.*** Hanft, **471** So.2d **648 (Fla.** 3rd DCA 1985), ***appeal dismissed,*** **488 So.2d 531**

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Apparently recognizing that this Court's decision in *Carr* provides no support for his peculiar construction of the word "incident," the defendant resorts to a rather loose dictum in ***Caw v. Broward County)*** ***505*** So.2d ***568,570*** (Fla. 4th DCA 1987), ***approved,*** 541 So.2d 92 (Fla. 1989)-- in which, while generalizing upon the problem presented by statutes of repose, the Fourth District penned the following sentence: "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." The difficulty with this observation is that the statute of repose for medical malpractice actions does not state that it begins to run upon "the performance of a surgical operation"; the "event specified in the statute" of repose in medical malpractice cases is the date of the "incident."

To be sure, the date of the "incident" may well be the date of "performance of a surgical operation" in some cases, as in ***Caw*** for example, where the negligent act committed during the surgical procedure caused an injury at that time. Indeed, because negligent surgery invariably leads to immediate injury, we suspect that an "incident" will almost always occur, and that the statute of repose will almost always begin to run in cases of negligent surgery, on the date of the surgery itself. But the date of the "incident" is clearly not the date of the negligent act in all cases, and the Fourth District obviously did not mean to suggest otherwise. It simply could not have meant to suggest otherwise, because (as we have taken some pains to demonstrate here) it has elsewhere consistently defined the word "incident" to mean ***all the elements of a completed tort?'*** The Fourth District's decision in

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(Fla. 1986), which this Court disapproved in ***Caw,*** also involve the type of "immediate injury" involved in ***Caw.*** They therefore provide no support for the defendant's proposed construction of §95.11(4)(b), for the same reason that ***Carr*** provides no support for the proposed construction.

[9] ***See, e.g., Florida Patient's Compensation Fund v. Tillman,*** 453 So.2d 1376 (Fla. 4th DCA 1984), ***approved in relevant part,*** 487 So.2d 1032 (Fla. 1986); ***Cohen v. Baxt,*** 473 So.2d

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Carr is therefore also entirely consistent with everything we have argued to this point, and there is no support in it whatsoever for any argument that the word "incident" means a negligent act, even when it has caused no injury resulting in a Completed tort.

In a similar vein, the defendant isolates and relies upon the following sentence in this Court's recent decision in *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, or 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 [by discovery]*

(Emphasis supplied and bracketed phrase supplied for clarity). This sentence adds nothing to the defendant's position concerning the meaning of the word "incident," however, because it simply repeats the word "incident" without defining it in any particular way. There was also no need to define the word at all in *Bogorff* because, as in Carr, it was perfectly clear that the defendants' negligent acts caused an almost immediate injury (and therefore a completed tort) upon which an action could be brought.

A similar analysis governs this Court's observation in *Bogorff* that the plaintiffs' action was barred by §95.11(4)(b), even if it was assumed arguendo that the cause of action did not "accrue" until after the statute ran. The Court's reference to "accrual" was to accrual by late discovery of the completed tort, not to accrual by the ultimate occurrence of a "delayed injury." Most respectfully, *Bogorff* is entirely consistent with everything we have argued to this point, and there is no support in it whatsoever for any argument that the word "incident" means a negligent act alone, which has caused no injury resulting in a completed tort.

The defendant also contends that statutes of repose operate upon negligent acts

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1340 (Fla. 4th DCA 1985), ***approved in relevant part,*** 488 So.2d *56* (Fla. 1986); ***Scherer v.*** *Schultz,* 468 So.2d 539 (Fla. 4th DCA 1985).

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rather than completed torts because this Court said so, in the context of products liability actions, in ***Pullum v. Cincinnati) Inc.,*** 476 So.2d ***657*** (Fla. 1985), ***appeal dismissed,*** 475 U.S. 1114, 106 S. Ct. 1626, 90 L. Ed.2d 174 (1986). In our judgment, this argument badly misses the point. Unlike the statute of repose for medical malpractice actions (which, according to its express language, begins to run at the same time the statute of limitations begins to run, upon the date of the completed "incident"), the (now-repealed) statute of repose for products liability actions, according to its express language, begins to run long before the statute of limitations begins to run; it begins to run on "the date of delivery of the completed product to its original purchaser. . . regardless of the date the defect in the product. . . was or should have been discovered." Section 95.031(2), Fla. Stat. (1985).[10/]

Since the language creating the statute of repose in products liability actions is both entirely different and far more specific than the language of the statute in issue here, *Pullum*'s holding that the products liability statute of repose begins to run on the date the defective product is delivered to its original purchaser simply does not amount to a holding that all statutes of repose begin to run on the date of negligent acts rather than completed torts.[11/] Unlike the products liability statute of repose, the statute of repose in medical

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[10/] This provision, incidentally, was an exception to the more general provision with which 995.031 begins: "A cause of action accrues when the last element constituting the cause of action occurs." Section 95.031(1), Fla. Stat. (1985). Thereafter, §95.031 created two express exceptions to this general provision, for fraud and for defective products. If the legislature had intended to create another exception to this general provision for medical malpractice cases, the logical place to have created the exception would have been in §95.031. No exception for medical malpractice actions is created there, however. The only statute of repose for medical malpractice actions is §95.11(4)(b), and it begins to run only when the statute of limitations begins to run -- at the time of the "incident." It therefore seems to us, as we argued at the outset, that §95.031(1) is both consistent with and reinforces the reading of §95.11(4)(b) which we have proposed to the Court.

[11/] The defendant's reliance upon other decisions applying the products liability statute of repose, as well as the statute of repose on actions relating to improvements to real property, is misplaced for the same reason that his reliance upon *Pullum* is misplaced --and there is therefore no need for us to parse those decisions here.

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malpractice actions begins to run ***at the same time*** the statute of limitations would ordinarily begin to run -- on the date of the "incident." **And** if that word means what all of the courts which have addressed its meaning to date say it means, then an action which is filed within the two-year statute of limitations period (and before four years expires) is necessarily filed within the statute of repose period -- and §95.11(4)(b) simply did not bar the plaintiffs action in the instant case.

The defendant also relies upon the following dictum (and it is clearly a dictum) in ***Public Health Trust of Dade County v. Menendez,*** **584** So.2d 567, ***568*** (Fla. 1991):

> Thus, under this statute [§95.11(4)(b)] a two-year limitation begins on the date of actual or constructive discovery; but there is also a "repose" period 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. . . .

Once again, this dictum is not inconsistent with our reading of the word "incident" in any way. All that it says is that there might be circumstances where a negligent act has caused an injury -- i. e., a completed tort has been committed -- but the plaintiff could not reasonably discover the negligent act within the statutory period. In that event, of course, the statute will have run. This language does ***not*** say that the legislature could even arguably have envisioned that the statute of limitations and the statute of repose would begin to run at the first instant an undiscovered negligent act was committed, notwithstanding that the negligent act caused no injury giving rise to an action for malpractice.

The defendant's reliance upon Times ***Publishing Co. v. W. R. Grace & Co., 552*** So.2d 314 (Fla. 2nd DCA 1989), is misplaced for essentially the same reason. In that case, the "injury" was the existence of asbestos in the plaintiffs premises. That "injury" clearly occurred at the time of construction of the premises, so it was an "immediate injury," and not even arguably analogous to the type of "delayed injury" created by the facts in the instant case. Neither can ***Times Publishing*** be analogized to the instant case by equating Mr.

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Nemeth's cancer with the asbestos contained in the building at issue in *Times Publishing*. Mr. Nemeth's localized melanoma was simply a preexisting condition, not an "injury" caused by the defendant's malpractice; it did not flower into an injury until it metastasized and became incurable. There is therefore no support whatsoever in *Times Publishing* for the peculiar construction of §95.11(4)(b) proposed by the defendant here.

A final word is in order concerning an even more peculiar argument advanced by the defendant -- that, because the defendant's malpractice was discoverable by obtaining the "second opinion" of another (more competent) pathologist within four years of the defendant's misdiagnosis, this Court should hold that the statute of repose barred the plaintiffs claim, notwithstanding that the injury caused by the defendant's misdiagnosis did not occur until 8½ years later. The district court disposed of this desperate contention with characteristic good sense as follows:

> We disagree with the defendants' contention to the effect that Mr. Nemeth had notice of the injury when the mole was removed and diagnosed in 1980 and that he should have had further diagnoses before he began to experience symptoms in 1988. He is not shown to have had any reason to do anything other than accept the diagnosis provided by defendants and conclude that he had no malignancy.

Nerneth v. Harriman, 586 So.2d 72, 73 (Fla. 2nd DCA 1991).

In our judgment, this conclusion was both sensible and correct, and the district court could not have held otherwise without violating the well-settled rule that patients are entitled to rely upon the expertise of their physicians, and that they have no legal obligation to obtain "second opinions" where medical treatment is concerned:

> Public policy dictates, and other jurisdictions have held, that a patient does not have an obligation or duty to determine whether an injury is being properly treated by a physician. Any other rule would offend common sense by requiring the patient to be the judge of a physician's professional competence. Thus, it was error not to strike [the defendant's comparative negligence] defense.

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Mack v. Garcia, 433 So.2d 17, 18 (Fla. 4th **DCA),** ***review denied,*** **440** So.2d 352 (Fla. 1983). ***Accord, Norman v. Mandarin Emergency Care Center, Inc.*****, 490** So.2d **76** (Fla. 1st **DCA 1986);** ***Upjohn Co. v. MacMurdo*****,** 536 So.2d **337** (Fla. 4th **DCA 1988),** ***disapproved on othergrounds,*** 562 So.2d 680 (Fla. 1990). Most respectfully, if a patient has no duty to obtain a "second opinion," and cannot be found comparatively negligent for failing to do so, then it makes no sense at all to argue that the statute of limitations and the statute of repose should begin to run upon a negligent act which has caused no injury, simply because the patient was capable of discovering the negligent act by obtaining a correct "second opinion."

When all is said and done -- and since an "incident is an incident is an incident," and the word must logically be given the same meaning each time it appears in the sentence -- our reading of the sentence would seem to be the simplest and most logical disposition of the problem presented here. If further "construction" of the statute should seem necessary, however, we remind the Court of the settled rule that courts will not ascribe to the legislature an intent to create an absurd or harsh consequence, if a sensible interpretation avoiding the absurdity is available.[12/] Surely, the reading of the statute proposed by the defendant results in an absurdly harsh consequence, because it results in barring redress for a tort before the tort has even been committed, and before the plaintiff could even arguably have been on notice of the possible invasion of his legal rights.[13/]

Of course, if the legislature had expressly stated in §95.11(4)(b) that the statute of

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[12/] ***See, e. g., City of St. Petersburg v. Siebold,*** 48 So.2d 291 (Fla. 1950); ***Williams v. State,*** 492 So.2d 1051 (Fla. 1986); ***Wollard v. Lloyd's & Companies of Lloyd's,*** **439** So.2d **217** (Fla. **1983);** ***McKibben v. Mallory,*** 293 **So.2d** 48 (Fla. **1974);** ***Ferre v. State ex rel. Reno,*** 478 So.2d **1077** (Fla. 3rd **DCA** 1985), ***approved,*** **494** So.2d **214** (Fla. 1986), cert. ***denied,*** **481 US.** 1037, 107 S. Ct. **1973,** 95 L. Ed.2d 814 **(1987).**

[13/] ***See Dade County v. Ferro,*** 384 So.2d 1283, 1287 (Fla. 1980) (refusing to ascribe an intent to the legislature to give retroactive effect to a new statute of limitations, where to do so "achieves the absurd result of extinguishing a cause of action at the very time the act first became effective"); ***Foley v. Morris,*** 339 **So.2d** 215 (Fla. 1976) (similar); ***Maltempo v. Cuthbert,*** 288 So.2d **517** (Fla. 2nd **DCA),** cert. ***denied,*** 297 So.2d ***569*** (Fla. 1974) (similar).

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repose begins to run before the statute of limitations begins to run, as it did in the products liability statute of repose, then this Court would have no choice but to accept the legislature's expression (subject, of course, to Article I, §21, of the Florida Constitution, which we will address in a moment). However, since the legislature chose the *same* trigger point for both the statute of limitations and the statute of repose by commencing each with the word "incident" (with a qualification of the first for delayed discovery of a completed tort), the only logical construction of the sentence is that the statute of repose begins to run at the same time the statute of limitations ordinarily begins to run -- and there is no justification whatsoever for this Court to conclude that the legislature intended the statute of repose to begin to run before any tort had been committed upon which suit could be brought.

In short, the reading of §95.11(4)(b) which we have proposed, and which the Third District adopted in Lloyd, is both sensible and logical. It gives ample scope for the "statute of repose" to operate upon torts which have been committed but which have gone undiscovered for four years, without extending its operation to embrace the far harsher absurdity which the defendant has proposed -- barring redress for a tort before the tort is even committed. It also keeps alive the sensible and humane "blameless ignorance" doctrine, which has long been a staple of Florida law. It also prevents the statute from operating as a virtual immunity from suit for health care providers in the diagnostic end of the business, like the pathologist who is the defendant here, who will rarely be held accountable for his malpractice if his proposed construction of the statute is adopted by this Court.

In addition, as we have taken considerable pains to demonstrate, the logical, sensible reading given to the statute by the district court is consistent with everything which this Court has ever written on the subject, and there is no support whatsoever in the decisional law for the defendant's peculiar construction of the word "incident" to mean the commission of a negligent act alone, even where it has caused no injury upon which suit can be brought. For all of these reasons, we respectfully submit that the district court correctly read

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§95.11(4)(b) in light of the settled "blameless ignorance" doctrine, and that neither the statute of limitations nor the statute of repose barred the plaintiffs action for wrongful death before the injury caused by the defendant first manifested itself to Mr. Nemeth. Because the first manifestation of the injury to Mr. Nemeth was the very first point in time at which he could even arguably have had an inkling of the possible invasion of his legal rights, that is when the "incident" occurred, and that is when the statute of limitations and the statute of repose began to run -- and the district court's decision should therefore be approved.

B. Alternatively, if §95.11(4)(b) means what the defendant says it means, it is unconstitutional.

Although we frankly think it would be ludicrous for the Court to hold that the thrice-repeated word "incident" in §95.11(4)(b) means anything other than a completed tort -- especially since such a holding would also ***necessarily*** mean that the ***statute*** of ***limitations*** can begin to run in a medical malpractice case before the defendant has even committed a tort upon which suit can be brought -- the zeal with which the defendant has insisted on such a construction here requires us to advance a precautionary alternative position. We therefore assert that if the statute means what the defendant says it means, it violates Article I, §21, of the Florida Constitution.

Of course, the mere fact that the defendant's peculiar construction of the statute creates the potential for such a problem is reason enough by itself to construe the statute in favor of the more sensible reading we have proposed, as the district court did below. This Court may avoid the constitutional problem presented by the defendant's construction in the same way, of course, and we urge it to do so. See Lloyd ***v. North Broward Hospital District***, ***570*** So.2d 984 (Fla. 3rd DCA 1990), ***review pending.*** However, in the event that the Court has accepted the defendant's contention that the statute of repose begins to run in a medical malpractice case upon the commission of a negligent act alone, whether it has caused an injury or not, we respectfully ask the Court to hear us out briefly on this alternative

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contention.

There was a time in the jurisprudence of Florida, of course, when statutes of repose were routinely declared unconstitutional.[14] As the make-up of the Court changed, however, the meaning of Article I, §21, appears to have changed as well -- and in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114, 106 S. Ct. 1626, 90 L. Ed.2d 174 (1986), this Court receded from its earlier decision in *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980). The *reason* announced for the change of mind in *Pullum* was quite specific, however. According to this Court, it was perfectly rational for the legislature to restrict liability in products liability actions to a period of 12 years after the sale of a product (Article I, §21, notwithstanding), because "liability should be restricted to a time commensurate with the normal useful life of manufacturer [sic] products" -- and a manufacturer should not be subjected to "perpetual liability" for products which have outlived their normal useful lives. 376 So.2d at 660, 659.[15] However, that kind of reasoning simply has no application to the obviously different question presented here -- whether Article I, §21, is violated by barring a medical malpractice action before any resulting injury has manifested itself to the plaintiff, and therefore before the plaintiff can even possibly be aware of the possible invasion of his legal rights.

In any event, *Pullum* expressly recognizes that this Court has consistently excepted one type of case from its recent change of mind -- the type of "delayed injury" case like the one involved here. The initial decision declaring a statute of repose unconstitutional in that

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[14] *See, e. g., Overland Construction Co. v. Sirmons*, 369 So.2d 572 (Fla. 1979); *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980); Diamond v. E.R *Squibb* & Sons, *Inc.*, 397 So.2d 671 (Fla. 1984); *Universal Engineering Corp. v. Perez*, 451 So.2d 463 (Fla. 1984).

[15] The question of whether such a statute would be constitutional if applied to a product which had a "normal useful life . . . obviously greater than most manufactured products," like an airplane, was left open by implication. *Id.* at 660. This aspect of the decision reinforces our conviction that *Pullum* was not meant to be quite as sweeping as the defense bar has consistently asserted it to be.

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type of case is ***Diamond v.*** E. ***R. Squibb & Sons,*** 397 So.2d 671 (Fla. 1981). In ***Diamond,*** the plaintiffs complained that a drug ingested during pregnancy, which did not initially cause any injury, nevertheless "planted the seed" for a "delayed injury" which manifested itself only after the child had reached adulthood. In what appears to be a strong echo of the "blameless ignorance" doctrine itself, this Court held that the statute of repose violated Article I, §21, on those facts, because "petitioners' right of action was barred before it ever existed" -- 397 So.2d at 672. In the instant case, of course, if §95.11(4)(b) means what the defendant says it means, it barred any right of action which might have accrued to Mr. Nemeth "before it ever existed" -- and if ***Diamond*** correctly states the law, then the defendant's reading of §95.11(4)(b) simply must be declared unconstitutional.

Later, when this Court flip-flopped on the constitutionality of the products liability statute of repose in *Pullum*, it was careful to observe that ***Diamond*** was not being overruled:

> Pullum also refers to ***Diamond v. E. R. Squibb & Sons, Inc.,*** 397 So.2d 671 (Fla. 1981), as being in accord with ***Battilla.*** 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*** or the present case where the product first inflicted injury many years after its sale. In ***Diamond,*** the defective product, a drug known as diethylstilbestrol produced by Squibb, was ingested during plaintiffs mother's pregnancy shortly after purchase of the drug between 1955-1956. ***The drug's effects, however, did not become manifest until after plaintiff daughter reached puberty. Under the circumstances, if the statute applied, plaintiffs' claim would have been barred even though the injury caused by the product did not become evident until over twelve years after the product had been ingested. The legislature, no doubt, did not contemplate the application of this statute to the facts in Diamond. Were it applicable, there certainly would have been a denial of access to the courts.***

476 So.2d at 659 n.* (emphasis supplied).

A similar conclusion has been reached for asbestosis cases -- that it would be unconstitutional for a statute of repose to "foreclose the plaintiffs cause of action before he

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received any indication that it existed." *Vilardebo v.* Keene *Corp.,* 431 So.2d 620, 622 (Fla. 3rd DCA), appeal *dismissed,* 438 So.2d 831 (Fla. 1983). And this Court recently reaffirmed the exception represented by ***Diamond*** as follows:

> . . . We have recognized that, because of the delay between the mother's ingestion of the drug and the manifestation of the injury to the plaintiff, DES cases must be accorded different treatment than other products liability actions for statute of repose purposes. *See Pullum v. Cincinnati, Inc.,* 476 So.2d 657, 659 n.* (Fla. 1985), appeal *dismissed,* 475 **U.S. 1114 (1986); *Diamond v. E. R. Squibb & Sons, Inc.,*** 397 So.2d 671 (Fla. 1981).

Conley v. Boyle ***Drug*** Co., 570 So.2d 275, 283 (Fla. 1990). The exception represented by ***Diamond*** was also implicitly reaffirmed in the medical malpractice context in *University* of *Miami v. Bogorff,* **583** So.2d 1000, 1004 (Fla. 1991) ("This is not a case where a drug was ingested and the alleged effects did not manifest themselves until years later. *E. g., Diamond* . . . . Rather, in this case, the alleged effects of methotrexate manifested within months of Adam's last treatment.").

This distinction was also carefully maintained in the decision which ultimately upheld the constitutionality of the statute of repose contained in §95.11(4)(b), as it applied to the "immediate injury" in that case. In *Carr v. Broward County,* ***505*** So.2d 56S (Fla. 4th DCA 1987), ***approved,*** **541** So.2d ***92*** (Fla. 1989), the Fourth District was careful to distinguish between (1) completed torts which have simply gone undiscovered during the repose period, and (2) tortious conduct which has merely "implanted, . . the seed that eventually will flower into injury" after the statute of repose has run. 505 So.2d at 573. It acknowledged that a statute of repose which purported to bar the latter type of case would violate Article I, §21, but held that the facts before it involved the first type of case -- because "[t]he injury to infant Carr was a completed fact" (505 So.2d at 574) at the time the negligent conduct occurred, and the thus-completed "incident," although capable of discovery within the statute of repose period, had not been discovered in time.

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When the *Carr* case reached this Court, this Court was again careful to preserve the area carved out in ***Diamond.*** The Court specifically noted (as the Fourth District had noted in distinguishing the case from the different "implanted seed" cases), that "the brain injury to the Carr infant was a completed fact at the time of birth" -- i. e., that a discaverable injury had occurred at the time of the negligent act -- and it held that the statute of repose was therefore constitutional "under the circumstances of this case." ***Caw v. Broward County,*** **541** So.2d 92, 94, 95 (Fla. 1989). There is nothing in this Court's ***Caw*** decision which even arguably purports to overrule ***Diamond,*** or to retract the footnote in *Pullum* which expressly preserved ***Diamond.*** Neither did this Court take issue with the Fourth District's observation that statutes of repose remain unconstitutional in "implanted seed" cases. And, of course, ***Diamond*** was recently reaffirmed by this Court in ***Conley*** and ***Bogorff***. ***Diamond*** and its progeny are therefore still good law.

The defendant does not deny that ***Diamond*** is still good law; he argues only that subsequent cases have limited ***Diamond*** to is facts. We disagree with this unsupported assertion, but there is no need to debate the point because "the facts" in ***Diamond*** present precisely the type of "delayed injury" presented by the facts in the instant case. The only distinction between the two cases is that the "delayed injury" in ***Diamond*** was the effect of a negligently designed drug (which took a long time to "flower" and manifest itself as an injury in the form of an observable and incurable cancer), and the "delayed injury" in this case was the result of a negligent diagnosis of a localized preexisting condition (which was initially curable, but fatal if left to progress and "flower" into brain cancer by metastasis).

Put another way, the only difference between the two cases is that a poison seed was planted by the defendant in ***Diamond,*** whereas the defendant in this case failed to diagnose a poison seed at a time when it could have been effectively removed -- but for purposes of the subject under discussion, that minor distinction simply has to be a distinction without a difference. As long as the preexisting condition represented by Mrs. Diamond's ingestion

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of DES can be analogized to the preexisting condition represented by Mr. Nemeth's misdiagnosed localized melanoma -- and we think the two things are clearly analogous in the context presented here, since each provided a "seed" which, as a result of the defendants' negligence, would ultimately flower into an incurable injury to the respective plaintiffs -- then *Diamond* is not legally distinguishable from the instant case, and *Carr* is beside the point here.[16]

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[16] A brief digression is in order here to dispose of an argument which the defendant has not made, but which is occasionally made in cases like this one. The thrust of that argument is that, in *Diamond,* the plaintiff-child was actually injured at the time her mother ingested the drug, and simply did not discover her injury until it manifested itself 20 years later -- an argument which, if correct, would arguably obliterate the distinction which we have been attempting to draw between *Diamond* and *Carr.* With apologies to Justice McDonald (who read the majority's decision in *Diamond* in that fashion in his specially concurring opinion, to square it with the position he had taken in dissent in *Battilla*), we do not believe that is a fair reading of *Diamond.* Certainly the *parents* of the child, who were authorized to proceed on *their* 20-year old claims notwithstanding the statute of repose, suffered no injury when the drug was ingested. And neither, we think, did the plaintiff-child, since the injuries upon which she brought suit were a cancerous lesion which did not develop until nearly two decades later, and additional lesions which might occur in the future. *See Diamond v. E. R. Squibb & Sons, Inc.,* 366 So.2d 1221 (Fla. 3rd DCA 1979), *quashed,* 397 So.2d 671 (Fla. 1981). Moreover, the majority's decision did not even arguably draw the distinction drawn by Justice McDonald. It simply declared the statute of repose unconstitutional because the "petitioners' right of action was barred before it ever existed." *Diamond, supra* at *672.*

Neither did the Court's reexplanation of *Diamond,* in the footnote in which it preserved *Diamond* in *Pullum,* adopt Justice McDonald's characterization of the facts. It merely noted that the drug was ingested during the mother's pregnancy; that "[t]he drug's effects, however, did not become manifest until after plaintiff-daughter reached puberty"; and that, if the statute applied, plaintiffs' claims would have been barred even though the injury caused by the product did not become evident until over 12 years after the product had been ingested. *Pullum, supra,* 476 So.2d at 659 n.*. There is no commitment in this language to the notion that the plaintiff-daughter actually suffered an injury at the time her mother ingested the drug; it is perfectly consistent with the notion that the injury was both caused and manifested itself outside the period of the statute of repose. In short, *Carr* is an "immediate injury" case; *Diamond* is a "delayed injury" case; and there is nothing in *Carr* which even arguably purports to overrule *Diamond,* either explicitly or implicitly.

In any event, the point is probably largely semantic. What is clear is that Justice McDonald's concurring opinion in *Diamond* expresses the "blameless ignorance" doctrine in a nutshell -- and because the quintessentially general word "incident" in §95.11(4)(b) is capable of accommodating that doctrine (unlike the products liability statute of repose, whose triggering language was too specific to admit of such a construction), we should think that Justice McDonald would be inclined to avoid the constitutional question presented here by a simple construction of the word "incident" to accommodate the "blameless ignorance"

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Neither ***Shields v. Buchholz***, 515 So.2d 1379 (Fla. 4th DCA 1987), ***review dismissed,*** 523 So.2d 578 (Fla. 1988), nor this Court's disapproval in *Carr* of ***Phelan v. Hanft,*** 471 So.2d 648 (Fla. 3rd DCA 1985), ***appeal dismissed,*** 488 So.2d 531 (Fla. 1986), require a different conclusion here, because both of them involve the type of "immediate injury" involved in ***Carr.*** In each of them, the injury to the plaintiff was a completed fact at the time of the negligent act. In ***Shields,*** the defendant dentist negligently perforated a lateral surface of the plaintiffs tooth while installing a post, and the perforation was the injury which gave rise to the cause of action. In ***Phelan,*** the defendant obstetrician negligently performed a D & C in such a way that the plaintiffs IUD perforated the wall of her uterus (and then misinformed her that her IUD had been expelled during an earlier miscarriage), and the perforation and its post-operative effects were the injury which gave rise to the cause of action. In both cases, as in ***Caw,*** the injuries were completed facts at the time of the negligent acts, and they simply went undiscovered before the four-year statute of repose ran on the fully extant causes of action. ***As*** a result, neither ***Shields,*** nor the fact that this Court disapproved ***Phelan*** in ***Caw,*** even arguably supports the defendant's position that ***Diamond*** has no applicability here, and that (if it means what the defendant says it means) the medical malpractice statute of repose is constitutional even in "implanted seed" cases.

We therefore believe that the Fourth District used exactly the right metaphor when it concluded in *Carr* that a statute of repose cannot constitutionally bar redress for tortious conduct which "***implanted. . . the seed that eventually will flower into injury***" after the statute of repose has run. 505 So.2d at 573 (emphasis supplied). We also believe that the instant case falls squarely within that category. While the defendant's negligent misdiagnosis of Mr. Nemeth's localized melanoma did not initially cause him any injury (just as the DES ingested by Mrs. Diamond did not initially cause any cancer in her daughter), that negligent act

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doctrine. In no event, at least, can the defendant take any solace from Justice McDonald's concurring opinion in ***Diamond.***

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certainly planted the metaphorical seed which ultimately flowered into metastatic brain cancer when Mr. Nemeth relied upon the defendant's negligent advice, and paid the ultimate price for that reliance. Because the melanoma was initially curable upon a proper diagnosis, Mr. Nemeth's brain cancer and ultimate death was the direct result of the defendant's negligent failure to diagnose the poison seed represented by the initially localized melanoma 8½ years before Mr. Nemeth could even arguably have been on notice of the possible invasion of his legal rights -- and frankly, we cannot conceive of a medical malpractice case which would be a better paradigm for the "implanted seed" cases than the instant case. If ***Diamond*** is still the law in this Court (and it was the last time this Court spoke to the point in *Conley*), then (if it means what the defendant says it means) §95.11(4)(b) barred the plaintiffs cause of action before it ever existed, and it is therefore unconstitutional in the circumstances of this case.

In sum, we continue to insist that the word "incident" means all the elements of a completed tort, and that the statute of repose therefore did not begin to run on the facts in this case until the statute of limitations began to run -- i. e., when the defendant's negligence finally caused the injury which first manifested itself to Mr. Nemeth 8½ years later. However, if the defendant is correct that the statute of repose began to run on the date of his negligent conduct alone, then the defendant's position here is necessarily that the statute of repose ran on the plaintiff's cause of action before the effect of his negligent conduct ever manifested itself to Mr. Nemeth. As *Diamond* squarely holds, however, the statute of repose is unconstitutional on those types of facts. And because ***Carr*** (and ***Shields*** and this Court's disapproval of *Phelan*) deal with the altogether different circumstance in which all the elements of a completed tort have occurred, but the existing cause of action has simply gone undiscovered during the statute of repose period, *Carr* clearly does not control the ***Diamond***-like facts involved in the instant case. We therefore respectfully submit alternatively that, ***Carr*** notwithstanding, if the defendant is correct in his reading of §95.11(4)(b), then its

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apparent bar of the plaintiffs cause of action must be held violative of Article I, §21, on the "delayed injury" facts in the instant case.

VI.
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the certified question should be answered in the negative, and that the district court's decision should be approved. Alternatively, if §95.11(4)(b) means what the defendant says it means, it should be declared violative of Article I, §21, of the Florida Constitution as applied to the facts in this case.

Respectfully submitted,

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By: _____
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APPENDIX

Robert A. Butterworth, Atty. Gen., Tallahassee, and Nancy Ryan, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

AFFIRMED.

COBB, HARRIS and GRIFFIN, JJ., concur,

ON MOTION FOR REHEARING/CERTIFICATION

HARRIS, Judge.

We grant appellant's motion for rehearing solely for the purpose of certifying the following question to be of great public importance:

DO FLORIDA'S UNIFORM SENTENG ING GUIDELINES REQUIRE THAT LEGAL CONSTRAINT POINTS BE ASSESSED FOR EACH OFFENSE COMMITTED WHILE UNDER LEGAL CONTRAINT?

COBB and GRIFFIN, JJ., concur.

Vickie NEMETH, as Personal Representative of the Estate of Christopher Nemeth, Deceased, for the use and benefit of the survivors, to wit: Vickie Nerneth, Anthony Paul Nemeth, a minor, Monica Lynn Nemeth, a minor, and Danielle Mychal Nemeth, a minor, Appellants,

v.

Ben B. HARRIMAN, M.D., and Clearwater Pathology Associates, M.D.'s, P.A., f/k/a Leonard and Gillotte, M.D.'s, P.A., Appellees.

No. 90-03341.

District Court of Appeal of Florida, Second District.

Aug. 7, 1991.

Rehearing Denied Sept. 30, 1991,

Personal representative of decedent brought medical malpractice action against physician for misdiagnosis. The Circuit Court, Pinellas County, Crockett Farnell, J., dismissed and personal representative appealed. The District Court of Appeal, Lehan, J., held that action was not barred by the four-year statute of repose.

Reversed and question certified.

Limitation of Actions ⇐95(12)

Statute of repose in medical malpractice action did not bar wrongful death action brought more than four years after incorrect diagnosis, where manifestation of injury from malignant mellanoma which had been misdiagnosed did not occur until eight years after the misdiagnosis. West's F.S.A. § 95.11(4)(b).

Leonard M. Vincenti, Clearwater, for appellants.

Philip D. Parrish and Robert M. Klein of Stephens, Lynn, Klein & McNicholas, P.A., Miami, for appellees.

Philip M. Burlington of Edna L. Caruso, P.A., West Palm Beach, amicus curiae by Academy of Florida Trial Lawyers, for appellants.

LEHAN, Judge.

We reverse the dismissal with prejudice of this wrongful death suit for medical malpractice. We disagree with the trial court's conclusion that the statute of repose, section 95.11(4)(b), Florida Statutes (1989), precludes the suit. We conclude that the court erred in ruling that the repose period had expired before there was notice of injury. No contention has been raised concerning the statute of limitations.

The complaint includes the following allegations, In 1980 a pigmented lesion, apparently a mole, was removed from the back of Christopher Nemeth, plaintiff's husband. Biopsied tissue from the mole was given to the defendant pathologists for identification and evaluation. The defen-

dants diagnosed the tissue sample as showing no more than a "hemangioma," a benign tumor. Based upon that diagnosis, Mr. Nemeth's physician took no further action in that regard. In 1988 Mr. Nemeth went to a hospital emergency room complaining of blurred vision, disorientation and vomiting. The slides of his 1980 biopsy were then reviewed and identified as showing that the mole had been a malignant melanoma. Mr. Nemeth was thereafter diagnosed as having a metastatic brain tumor which was directly attributable to the malignant melanoma and which caused his death, This suit was filed more than four years after the 1980 diagnosis which is alleged to have constituted malpractice.

We agree with plaintiffs that Lloyd *v.* North *Broward Hospital* District, 570 So.2d 984 (Fla. 3d DCA 1990), was properly decided and provides precedent for our reversal in this case. In *Lloyd*, the plaintiffs, Mr. and Mrs. Lloyd, underwent genetic testing in 1978 after the birth of a deformed child in order to determine whether the child's abnormalities were the result of a genetic defect. The complete results of the tests were never communicated to the Lloyds' physician, and he advised them that their son's problems were not genetic. In 1983 Mrs. Lloyd gave birth to another son with the same abnormalities. The Lloyds subsequently learned that the 1978 testing had revealed the genetic defect but that that revelation had never been communicated to their physician. The trial court dismissed the Lloyds' malpractice suit because, although it was filed within two years after the birth of their second son, it was filed more than four years after the date the genetic tests were performed and therefore was barred by the four year statute of repose in section 95.11(4)(b), Florida Statutes, 1989.

On appeal the third district in Lloyd reversed because "[t]he effect of the trial court's ruling was to hold that the limitation period expired before [the second son] was born. Under that approach, the limitation period expired before the Lloyds had experienced any injury and before they had any awareness of a possible claim." *Id.* at 986. Consistent with *Lloyd* we conclude the terms "incident" and "occurrence" 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 the 1980 misdiagnosis by defendants. See *id.* at 987–88. See also *Pullum v. Cincinnati, Inc.*, 476 So.2d 657, 659 n. * (Fla.1985); *Diamond v.* E.R. *Squibb & Sons, Inc.*, 397 So.2d 671 (Fla. 1981).

Defendants rely upon *Carr v.* Broward *County*, 541 So.2d 92 (Fla.1989). However, we agree with plaintiffs that *Carr* is distinguishable because the injury to the Carrs' child was fully evident at the time of the child's birth, which took place almost 10 years prior to the filing of suit.

Defendants also rely upon a discussion of the repose provision of section 95.11(4)(b), Florida Statutes (1989), contained in *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla.1991). However, *Bogorff* is distinguishable for the same reason as is *Carr*. That is, in *Bogorff* the plaintiffs were fully aware of the injury to their son within months of the incident of alleged malpractice. In the present case, unlike *Bogorff* and *Carr*, the plaintiff was allegedly injured by malpractice but, because of the nature of the alleged malpractice, there was no notice to plaintiff of the injury until eight years after the malpractice occurred.

We disagree with the defendants' contention to the effect that Mr. Nemeth had notice of the injury when the mole was removed and diagnosed in 1980 and that he should have had further diagnoses before he began to experience symptoms in 1988. He is not shown to have had any reason to do anything other than accept the diagnosis provided by defendants and conclude that he had no malignancy.

As did the thud district in *Lloyd*, 570 So.2d at 990, in interpreting section 95.11(4)(b), Florida Statutes (1989), we have passed upon a matter of great public importance. We therefore certify to the supreme court the following question:

DOES THE FOUR YEAR STATUTE OF REPOSE IN SECTION 95.11(4)(B),

FLORIDA STATUTES (1989), BAR 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?

Reversed.

DANAHY, A.C.J., and PATTERSON, J., concur.

Blanche GOODLET, individually, and as Personal Representative of the Estate of Terri Lynn Christy (Flateau), Appellant,

v.

Dr. Eric STECKLER, Appellee.

No. 90–03483.

District Court of Appeal of Florida, Second District.

Aug. 7, 1991.

Rehearing Denied Sept. 11, 1991.

The Circuit Court, Pinellas County, Owen S. Albritton, III, J., granted summary judgment in favor of physician in medical malpractice action, and mother and personal representative of patient's estate appealed. The District Court of Appeal, Altenbernd, J., held that mother, who received telephone call from daughter's treating physician informing her of daughter's death, received the minimum factual information necessary to commence running of statute of limitations for medical malpractice action.

Affirmed.

Lehan, J., filed a concurring opinion.

Limitation of Actions ⇐95(12)

Mother, who received telephone call from daughter's treating physician informing her of daughter's death, received the minimum factual information necessary to commence running of statute of limitations for medical malpractice action. West's F.S.A. §§ 95.11(4)(b), 766.106.

Joseph N. Perlman, Largo, for appellant.

Kenneth C. Deacon, Jr., and Russell Ellis Artille of Harris, Barrett, Mann & Dew, St. Petersburg, for appellee.

ALTENBERND, Judge.

Blanche Goodlet, the mother of Terri Lynn Christy and personal representative of her daughter's estate, appeals a final summary judgment concerning the estate's medical malpractice action against Dr. Steckler. The trial court granted the judgment on the ground that the action had been filed outside the applicable statute of limitations. We affirm, because Dr. Steckler had provided the personal representative with at least the minimum factual information necessary to commence the running of the statute of limitations more than two years before the personal representative served the presuit notice. *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991); *Barron v. Shapiro*, 565 So.2d 1319 (Fla.1990).

Terri Lynn Christy died on March 26, 1987, at the age of twenty-eight. According to the plaintiff's complaint, on March 11, 1987, Ms. Christy visited the emergency room at Largo Medical Center Hospital with complaints of pain in her right leg. She was hospitalized on March 12, and she was treated by Dr. Steckler for a deep venous thrombosis until her release on March 25. Ms. Christy returned to the hospital on March 26 and died of an apparent cardiac arrest.

The medical malpractice action against Dr. Steckler was filed on September 21, 1989. Although the plaintiff had apparently sent a presuit notice to the hospital on March 7, 1989, no notice was sent to Dr. Steckler until August 10, 1989. *See* § 768.-

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 13th day of January, 1992, to: Robert Klein, Esq., Stephens, Lynn, Klein & McNicholas, P.A., 9100 S. Dadeland Blvd., One Datran Center, Suite 1500, Miami, Fla. 33156; Marguerite H. Davis, Esq., Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, P.A., Post Office Box 1877, Tallahassee, Fla. 32302-1877; and to Philip Burlington, Esq., Suite 4B/Barristers Building, 1615 Forum Place, West Palm Beach, Fla. 33401.

By: Joel D. Eaton
JOEL D. EATON