IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO: 78,783

DISTRICT COURT CASE NO.: 90-3341

BEN B. HARRIMAN, M.D.,

Petitioner,

vs.

VICKIE NEMETH, as Personal Representative of the Estate of CHRISTOPHER NEMETH, Deceased.

Respondents.
_____/

PETITIONER BEN B. HARRIMAN, M.D.'S BRIEF

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INTRODUCTION

This brief is filed on behalf of the Defendant/Petitioner Ben B. Harriman, M.D. Vickie Nemeth, as Personal Representative of the Estate of Christopher Nemeth, Deceased, is the Plaintiff/Respondent. The Petitioner will be referred to as "Dr. Harriman." The Respondent will be referred to as the Plaintiff.

Unless indicated to the contrary, all emphasis has been supplied by counsel.

STATEMENT OF THE CASE

Petitioner, Dr. Harriman, appeals the District Court's opinion which reversed an order of the trial court that had granted Dr. Harriman's Motion to Dismiss the Plaintiff's complaint with Prejudice. (R.15-18) In this medical malpractice action the Plaintiff alleges that malpractice was committed by the Defendant when he misdiagnosed a tissue sample taken from a lesion on the back of the decedent, Christopher Nemeth, on March 17, 1980. The Plaintiff alleges that had the tissue sample been properly diagnosed at that time, it would have revealed the existence of the malignant melanoma which, it is alleged, resulted in the death of the decedent in October of 1989. (R.l-7)

In an apparent attempt to avoid the four year medical malpractice statute of repose, Section 95.11(4)(b), the complaint alleges that there were no further symptoms attributable to the lesion on the decedent's back until 1988. In 1990, Vickie Nemeth, as Personal Representative of the Estate of Christopher Nemeth, instituted this action.

Dr. Harriman moved to dismiss based upon the four year statute of repose, Section 95.11(4)(b), Florida Statutes (1989), and the controlling authority of CARR v. BROWARD COUNTY, 541 So.2d 92 (Fla. 1989). (R.39-46) The motion to dismiss was heard before the trial court on October 10, 1990.

By order dated October 30, 1990, the trial court dismissed the Plaintiff's complaint with prejudice and entered judgment in favor of the Defendants, stating:

> The incident in the case at bar giving rise to the Plaintiff's cause of action was the Defendant's alleged failure to properly diagnose the melanoma in 1980. Having failed to bring this action within four years of that date, the Plaintiff's claim is barred by the statute of **repose** set forth at section 95.11(4)(b), Florida Statutes. (R.**18)**

The Plaintiff appealed this order to the Second District Court of Appeal. On August 7, 1991, the Second District reversed the trial court's order in an opinion which relies upon LLOYD v. NORTH BROWARD HOSPITAL DISTRICT, **570** So.2d **984** (Fla. 3d DCA 1990)' and which purports to rely upon this Court's decisions in UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d 1000 (Fla. 1991); CARR v. BROWARD COUNTY, 541 So.2d 92 (Fla. **1989);** PULLUM v. CINCINNATI, INC., 476 So.2d ***657*** (Fla. 1985); DIAMOND v. E.R. SQUIBB & SONS, INC., 397 So.2d 671 (Fla. 1981). A copy of the District Court's opinion, NEMETH v. HARRIMAN, 16 FLW D2118 (Fla. 2d DCA 1991) is attached hereto as an appendix.

STATEMENT OF THE FACTS

Because this is an appeal concerning an order that granted final judgment in favor of the Defendant and dismissed the Plaintiff's complaint with prejudice, the Petitioner respectfully suggests that the Plaintiff's complaint, in its entirety (R.1-7),

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[1] Review of the decision in LLOYD is pending before this Court, Case number 77135, and is scheduled for oral argument on January 6, 1992.

represents an appropriate statement of the facts for the purposes of this appeal.

POINT ON APPEAL

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

SUMMARY OF THE ARGUMENT

The Second District's opinion in this matter must be reversed because it effectively eliminates the medical malpractice statute of repose, and is contrary to numerous decisions of this Court. The Second District's opinion is also contrary to prior decisions from the Second District itself. The District Court's opinion is nothing more than a resurrection of PHELAN v. HANFT, 471 So.2d 648 (Fla. 3rd DCA 1985), which was specifically disapproved by this court in *CARR* v. BROWARD COUNTY, 541 So.2d 92 (Fla. 1989).

The Second District has confused the medical malpractice statute of repose with the medical malpractice statute of limitations. Compare BARRON v. SHAPIRO, 565 So.2d 1319 (Fla. 1990), with CARR v. BROWARD COUNTY, 541 So.2d 92 (Fla. 1989) and UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d 1000 (Fla. 1991). This Court should reverse the Second District's decision and publish an opinion in this case which will once and for all put to rest any notion that the medical malpractice statute of repose (or any other statute of repose, for that matter) is triggered by notice of a cause of action or accrual of a cause of action. This Court should publish an opinion which reaffirms *CARR* and BOGORFF and which clearly states that those decisions apply to "acts of negligence that could not reasonably have been discovered in this period of [repose]." PUBLIC HEALTH TRUST v. MENENDEZ, 584 So.2d 567 (Fla. 2991).

ARGUMENT

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

The Four Year Statute of Repose for Medical Malpractice Actions.

This appeal turns largely upon interpretation of the four year medical malpractice statute of repose which is contained within Section 95.11(4)(b), Florida Statutes along with the two year discovery triggered statute of limitation for medical malpractice actions'. That statute provides in pertinent part:

> An action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred or within two 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 four years from the date of the incident or occurrence out of which the cause of action accrued for....In those actions covered by this paragraph and in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4 year period, the period of limitations is extended forward two years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed seven years from the date the incident

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[2] The complaint was likewise appropriately dismissed pursuant to the seven-year statute of repose contained within Section 95.11(4)(b).

giving rise to the injury occurred.

Thus, section 95.11(4)(b) consists of three distinct subparts. The first is a two year statute of limitations which is discovery-based, i.e., the period is triggered by discovery of either the injury or the negligent act. See BARRON v. SHAPIRO, 565 So.2d 1319 (Fla. 1990).

The second provision is a four year statute of repose, which is not based on either discovery by or notice to the potential claimant. See PUBLIC HEALTH TRUST v. MENENDEZ, 16 FLW S496, Opinion decided Aug. 15, 1991. This is the provision of Section 95.11(4)(b) which served as the basis for the trial court's decision to dismiss the Plaintiff's complaint with prejudice.

The third portion of the statute provides both a period of limitations and a period of repose where there are allegations of fraud, concealment or intentional misrepresentation of fact that have prevented discovery of the injury within the four year period of repose. Thus, if discovery of the injury is prevented by fraud, concealment or intentional misrepresentation and the injury is not discovered within the four year period of repose, the period of limitations is extended for two years from the time that the injury is discovered, or should have been discovered. However, in no event can this extension exceed "seven years from the date of the incident giving rise to the injury." Thus, the third portion of the statute provides for both a two year discovery-based period of limitations, and an absolute seven year period of repose.

Apples and Oranges.

The Second District's opinion is internally inconsistent. The first paragraph of that opinion acknowledges that "no contention has been raised concerning the statute of limitations." 16 FLW at D2118. However, the opinion also holds that the trial court "erred in ruling that the repose period had expired before there was notice of injury." Id. These two consecutive sentences in the Second District's opinion demonstrate that the court did indeed apply principles of construction that are utilized in a statute of limitations context to a matter involving application of a statute of repose.

The District Court utterly failed to acknowledge the distinction between the statute of limitations and the statute of repose. The distinction, of course, is that the statute of repose is triggered by a particular event (the incident of negligence) in contrast to the triggering event which is applied to the statute of limitations, i.e., notice of either injury or negligence. In doing so, the District Court either ignored or misinterpreted a long line of decisions from this Court.

This Court recognized the distinction between statutes of repose and statutes of limitations as early as 1978, see BAULD **vs.** J.A. JONES CONSTRUCTION COMPANY, 357 So.2d 401 (Fla. 1978), and has reaffirmedthat distinction twice within the past year. PUBLIC HEALTH TRUST v. MENENDEZ, **584** So.2d 567 (Fla. 1991); UNIVERSITY OF MIAMI v. BORGORFF, 583 So.2d 1000 (Fla. 1991).

In BAULD, the Court discussed that distinction:

> We recognize the fundamental difference in character of these provisions [statutes of repose] from the traditional concept of the statute of limitations. Rather than establishing a time limit within which action must be brought, measured from the time of accrual of the cause of action, these provisions cut off the right of action after a specified time measured from the delivery of a product or completion of work. They do so reaardless of the time of the accrual of the cause of action or of notice of the invasion of a lesal right.

357 So.2d at 402.

The definition of "statute of repose" in Black's Law Dictionary (6th Ed.) likewise recognizes this distinction and cites as authority this Court's decision in UNIVERSAL ENGINEERING CORP. **v.** PEREZ, 451 So.2d **463** (Fla. 1981):

> **STATUTE OF REPOSE.** "Statutes of limitations" extinguish, after a period of time, a right to prosecute an accrued cause of action; "statute of repose," by contrast, limits potential liability by limiting time during which cause of action can arise. KLINE V. J.I. CASE CO., D.C. Ill., ***520*** F.Supp. **564**, 567. It is distinguishable **from** statute of limitations, in that statute of repose cuts off right of action after specified time measured from delivery of product or completion of work, regardless of time of accrual of cause of action or of notice of invasion of legal rights. UNIVERSAL ENGINEERING CORP. **v.** PEREZ, Fla., 451 So.2d 463, **465**.

The distinction between a period of repose and a period

of limitations can be demonstrated by comparing and contrasting four recent decisions from this Court, **CARR** v. **BROWARD COUNTY, 541** So.2d **92** (Fla. **1989)** (period of repose); **BARRON** v. SHAPIRO, **565 So.2d** 1319 **(Fla. 1990)** (period **of** limitations), UNIVERSITY OF MIAMI v. BORGORFF, supra, (discusses both), **PUBLIC** HEALTH TRUST v. **MENENDEZ,** supra, (discusses both).

CARR, **BARRON, BOGORFF and MENENDEZ: More Apples and Oranges.**

In BARRON, this Court reaffirmed the holding in **NARDONE** v. **REYNOLDS, 333 So.2d 25** (Fla. **1976), ie.,** that the discovery-based two year period of limitations within Section **95.11(4)** (b) is triggered by discovery of either the injury or the act of malpractice.

Unfortunately, in the years between **NARDONE** and **BARRON,** the various District **Courts** of Appeal demonstrated some difficulty in applying this Court's later decision in MOORE v. MORRIS, 475 So.2d 666 (Fla. **1985),** in a manner which was consistent with **NARDONE.** See generally, **JACKSON** V. **GEORGOPOLOUS, 552 So.2d 215** (Fla. 2d **DCA** 1989) (Lehan, J. concurring specially). In fact, in SHAPIRO V. **BARRON,** 538 So.2d **1319 (Fla.** 4th **DCA 1989),** the Fourth District Court of Appeal interpreted **MOORE** as holding that actual knowledge of a physical injury alone, did **not** trigger the statute of limitations unless coupled with knowledge that the injury resulted from a negligent act. This Court rejected that contention

in BARRON, 565 So.2d at 1321.[3]

Before discussing this Court's decision in CARR V. BROWARD COUNTY, supra, a review and analysis of the Fourth District Court of Appeal's decision in CARR V. BROWARD COUNTY, 505 So.2d 568 (Fla. 4th DCA 1987) would be instructive. On December 20, 1975 Ellen Carr delivered a child who was soon diagnosed as suffering from severe brain damage. However:, suit was not filed until September 26, 1985. The complaint contained an allegation that the Plaintiffs were "not able to discover the facts and circumstances surrounding...the care rendered...during birth," so that they had been unable to discern that negligence had occurred at some earlier point in time. 505 So.2d 569. The complaint also alleged fraudulent concealment. Id.

The trial court granted the defendant's motion to dismiss on the basis of the four and seven year periods of repose which are contained in Section 95.11(4)(b), Florida Statutes, (1975). On appeal, the District Court noted that:

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[3] This Court's decision in BARRON discussed the MOORE decision and indicated that "it was not until the child was three years old that a physician was able to scientifically diasnose that he suffered from brain damage." 565 So.2d at 1321. This Court's decision in DIAMOND V. E.R. SQUIBB & SONS, 397 So.2d 671 (Fla. 1981), which will be discussed at length, infra, also involved an injury which was scientifically undiagnosable until after the period of repose had run. Although Petitioner questions the applicability of such an analysis to a period or repose, as opposed to a period of limitations, the "scientifically undiagnosable" explanation of the DIAMOND and MOORE decisions certainly has appeal. See also TIMES PUBLISHING COMPANY V. W.R. GRACE & COMPANY--CONN., 552 So.2d 314, 315 (Fla. 2d DCA 1989) applying the scientifically undiagnosable analysis of DIAMOND.

> The two-year provision is a statute of limitations, not pertinent here. The four year and seven year provisions operate as statutes of repose. Both are to be measured from "the incident giving rise to the injury. . ." The injury occasioning this litigation, brain damage, is alleged to have resulted from either prenatal care or from treatment at the time of birth. Thus, the latest date on which the "incident" could have occurred is December 20, 1975, so that an action commenced in 1985 is well-beyond the seven year statutory period for repose.

505 So.2d at 570.

The Fourth District went on to determine that the four and seven year periods of repose meet the test for constitutionality outlined in KLUGER v. WHITE, 281 So.2d at 1 (Fla. 1973). The KLUGER test requires the legislature to demonstrate "an overpowering public necessity for abolishment [of the right of action beyond a certain period] and that no other method of meeting that public necessity was available." 505 So.2d at 571.

The district court then canvassed earlier decisions from this Court interpreting statutes of repose. The court focused primarily on decisions interpreting the twelve year statute of repose for product liability actions, which is triggered by the delivery of the product to its original purchaser. See PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla. 1985); DIAMOND v. E.R. SQUIBB & SONS, INC., 397 So.2d 671 (Fla. 1981); PURK v. FEDERAL PRESS COMPANY, 387 So.2d 354 (Fla. 1980); BATTILLA v. ALLIS CHALMERS MANUFACTURING COMPANY, 392 So.2d 874 (Fla 1980); OVERLAND

CONSTRUCTION COMPANY v. SIRMONS, 369 So.2d 572 (Fla. **1979);** BAULD V. J.A. JONES CONSTRUCTION COMPANY, **357** So.2d **401 (Fla 1978).**

After discussing these decisions, the Fourth District summarized the state of the law with respect to statutes of repose:

> Recapitulating, under the present state of law, the statute of repose does not violate the constitutional guarantee of access to the courts even if it abolishes a cause of action or right otherwise protected...provided the legislature either provides a reasonable alternative or overwhelmingly establishes the public necessity for the particular time restraints imposed by the statute. When public necessity is not shown, the statute as applied may be held to deny access to courts in an unconstitutional manner. 505 So.2d at **573.**[4]

In closing, the Fourth District Court of Appeal noted that its decision in ***CARR*** was in conflict with the Third District Court of Appeal's decision in PHELAN V. HANFT, 471 So.2d **648** (Fla. 3rd DCA 1985), appeal dismissed, **488** So.2d 531 (Fla. 1986).

This Court accepted jurisdiction of the District Court's decision in CARR on the basis of conflict with PHELAN. Ultimately, the Court approved CARR and disapproved PHELAN. 541 So.2d at 93. However, before this Court affirmed the Fourth District's decision in *CARR,* the Fourth District itself revisited CARR in SHIELDS V. BUCHHOLZ, **515** So.2d **1379 (Fla.** 4th DCA **1987).**

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[4] The Fourth District's opinion in ***CARR*** V. BROWARD COUNTY discussed the Supreme Court's decision in DIAMOND, supra. However, this Court's opinion in CARR **v.** BROWARD COUNTY, 541 So.2d 92 (Fla. 1989), does not adopt the Fourth District's treatment of DIAMOND.

SHIELDS was a dental malpractice action in which the incident of malpractice occurred on August 14, 1978. The Plaintiff alleged that a dentist had cemented a post in his maxillary right cuspid that extended into and perforated the lateral surface of the tooth, creating a latent defect in the periodontal tissue that in most cases takes years to manifest itself symptomatically. Mr. Shields developed symptoms approximately two weeks prior to the running of the four year statute of repose. Then, four days short of the expiration of the statute of repose, Mr. Shields underwent exploratory and corrective dental surgery. At that point the corrective surgery revealed that the defendant dentist had negligently performed the treatment which had been rendered on August 4, 1978. 515 So.2d at 1380. Shields filed suit after the four year statute of repose had run.

The trial court granted the dentist's motion to dismiss on the basis of the statute of repose. 515 So.2d at 1381. The Fourth District affirmed on the authority of its earlier decision in CARR V. BROWARD COUNTY, supra, noting:

> Whether the CARRS knew or should have known of the 'incident' and whether the incident or its effects were fraudulently concealed, the cause of action was permanently barred in December of 1982 by the seven year statute of repose.

In SHIELDS, the plaintiff argued that where an injury does not manifest itself until long after the negligent treatment, the statute of repose should not begin to run until symptoms appear.

515 So.2d at 1382. The Fourth District specifically disagreed with that contention, relying upon its holding in *CARR*, ie., that "the incident of malpractice begins the period of repose in a medical malpractice case." 505 So.2d at *575*. The Fourth District went on to note that it would have found SHIELDS' argument persuasive if the case had involved a statute of limitation rather than a statute of repose. Id. The SHIELDS court also expressly distinguished the Third District's opinion in PHELAN V. HANFT, supra, which had not yet been disapproved by this Court.

The holding in the present matter is virtually identical to the holding of the Third District Court of Appeal in PHELAN V. HANFT, 471 So.2d 648 (Fla. 3d DCA 1985), which was specifically disapproved by this Court in its decision in *CARR* V. BROWARD COUNTY, supra. In PHELAN, the Third District Court of Appeal held that where the record did not conclusively show that a physician's malpractice was or should have been discovered within four years from the date that it occurred, then the action was not barred as a matter of law notwithstanding the fact that it had been brought after expiration of the four year statute of repose.

PHELAN would have required a case by case analysis of precisely when a plaintiff was or should have been on notice of his injury. Yet in CARR, this Court held that the statute of repose is not triggered by notice or knowledge.

In January of 1991, this Court reaffirmed the validity of the medical malpractice statute of repose. In UNIVERSITY OF

MIAMI v. BORGORFF, 583 So.2d 1000 (Fla. 1991), this Court held that:

> In contrast to a statute of limitations, the 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.

583 So.2d at 1003 (citing MELENDEZ v. DREIS & KRUMP MANUFACTURING COMPANY, 515 So.2d 735 (Fla. 1987), UNIVERSAL ENGINEERING CORP. v. PEREZ, supra; and BAULD v. J.A. JONES CONSTR. CO., supra).

BOGORFF likewise reaffirmed the holding in CARR v. BROWARD COUNTY, supra. "[A]ssuming arsuendo that the BOGORFFS' cause of action did not accrue until, as they contend, 1982, the statute of repose would still bar their action." 583 So.2d at 1004. The Court went on to hold that:

> In CARR...we held that the statutory repose period for a medical malpractice action does not violate the constitutional mandate of access to courts, even when applied to a cause of action which did not accrue until after the period had expired....Thus, under the interpretation of the facts most favorable to the Bogorffs, accrual of their cause of action in 1982 would result in their complaint being timely filed within the statute of limitation, but their suit would be barred by the statute of repose.

583 So.2d at 1004.[5]

The District Court's (Mis)Treatment of CARR and BOGORFF.

Despite the clear and unequivocal distinction between a statute of repose and a statute of limitation which is set forth in this Court's decisions from BAULD through **BOGORFF,** the Second District completely misconstrued and misapplied the statute of repose. Moreover, the Second **District's** treatment of this Court's decisions in *CARR* and BOGORFF is extremely weak. Instead of appreciating statements of law which have issued from this Court for the **past** 15 years concerning the triggering of the statute of repose, as opposed to the triggering of the statute of limitations, the District Court focused solely upon a non-issue, i.e., notice of the injury.

Thus, the Second District purports to distinguish *CARR* because in that case the plaintiffs were aware that their child suffered from brain damage shortly after the child was born. Likewise, the Second District distinguished **BORGORFF** because **"the** Plaintiffs were fully aware of the injury to their son within months of the incident of alleged **malpractice."** Thus, the Second District concludes that:

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[5] In her initial brief before the Second District, the Plaintiff dismissed this language as "mere **dicta."** (Initial Brief of Plaintiff at page 11, footnote 4) Plaintiff apparently subscribes to the maxim that dicta, like beauty, is in the eye of the beholder. However, this Court could not have been more **clear;** where discovery of the injury occurs <u>after</u> the running of the period of repose, the claim is barred notwithstanding the fact that suit has been filed within two years of actual discovery of the injury.

> 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 eightyears after themalpractice occurred.

16 F.L.W. at D2118.[6]

The Second District's treatment of this Court's opinion in BOGORFF is particularly troubling. While it is true that the Court reversed the Third District's opinion in BOGORFF, and reinstated a summary judgment in favor of the UNIVERSITY OF MIAMI on statute of limitations grounds, this Court nevertheless addressed the statute of repose, because the statute of repose would have cut off the Bogorffs' cause of action even if they had not been aware of their child's injury until--as they contended--more than four years after the alleged act of negligence.

In its effort to distinguish this case from CARR and

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[6] The next paragraph of the Second District's opinion is factually inaccurate. The District Court purports to "disagree" with Dr. Harriman's "contention" that Mr. Nemeth had notice of the injury when the mole was removed and diagnosed in 1980. Dr. Harriman has never taken that position; not in the trial court, not in the brief which was filed before the Second District, nor during oral argument. Indeed, it has always been Dr. Harriman's position that notice is a concept which is completely alien to *any* interpretation of the statute of repose. Petitioner did note the possibility that Mr. Nemeth might have undergone further testing in the four years subsequent to the alleged misdiagnosis in order to point out the distinction between this case and DIAMOND v. E.R. SQUIBB, i.e., that the injury in this case was in fact scientifically diagnosable. In fact, Petitioner was sued in this matter precisely because of an alleged misdiagnosis of cancer in 1980. This factual error on the part of the district court was the subject of a motion for clarification, which was denied.

BOGORFF, the Second District seized upon the fact that the Plaintiffs in CARR and BOGORFF were on notice of their injuries within four years of the act of negligence, whereas it is conceded in the present matter that the Plaintiff's decedent did not know of his injuries until, at the very earliest, eight Years following the alleged incident of malpractice. However, the District Court did not promote sound legal analysis when it relied solely upon factual distinctions between the present matter and those decisions from this Court, while simultaneously ignoring the appropriate application of the legal principles which had been announced in those cases.[7]

The District Court's opinion conflicts with CARR v. BROWARD COUNTY, notwithstanding the Second District's discerned factual distinction that the injury was known to the Plaintiffs in CARR prior to the running of the period of repose. In CARR, this Court referred to its landmark decision in PULLUM v. CINCINNATI, INC., 476 So.2d 657 (Fla 1985), appeal dismissed, 475 U.S. 114, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986) noting that in PULLUM:

> [W]e concluded that Section 95.031 was constitutional even as applied to causes of action which had not accrued until after the twelve year statute of repose had expired. 541 So.2d at 95. (Emphasis added.)

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[7] Indeed, a similar misinterpretation and misapplication of the facts from MOORE v. MORRIS, 475 So.2d 666 (Fla. 1985), led the Fourth District astray in its opinion in SHAPIRO v. BARRON, 538 So.2d 1319 (Fla. 4th DCA 1989), rev.'d 565 So.2d 1319 (Fla. 1990).

It is precisely because the statute of repose is triggered regardless of when the cause of action accrues that the issue of notice of the injury is irrelevant to its application.

As recently as August 15, 1991--a mere eight days after the decision was rendered by the Second District in the present matter--this Court again reaffirmed that a statute of repose works as a bright line bar to a potential claim regardless of when the plaintiff knew or should have known of his cause of action. In PUBLIC HEALTH TRUST v. MENENDEZ, **584** So.2d 567 (Fla. 1991), this Court unanimously concluded that:

> Under this statute 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 in this period of time.

584 So.2d at 568. (Emphasis added; footnote omitted). Thus, if there was any doubt that CARR and BOGORFF might be construed as narrowly as the Second District's opinion in this case has done, the unanimous statement of law in MENENDEZ **should** put any such doubt to rest.[8]

Ironically, the need to apply the statute of repose in

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[8] Dr. Harriman relied upon this Court's opinion in PUBLIC HEALTH TRUST v. MENENDEZ in his motion for rehearing before the Second District. However, the district court denied that motion without comment.

a bright-line fashion, i.e., regardless of when the plaintiff knew or should have known of his injury or cause of action, is brought more sharply into focus by two decisions of the Second District and specifically by two concurring opinions which were authored by Judge Lehan, the author of the opinion under review. See JACKSON v. GEORGOPOLOUS, 552 So.2d 215 (Fla. 2d DCA 1989), and GOODLET v. STECKLER, 16 FLW D2121 (Fla. 2d DCA, Opinion decided Aug. 7, 1991), an opinion which was rendered on the same day as the present opinion.

Judge Lehan's concurring opinion in GOODLET, 16 FLW at D2122-23, which harkens back to his prior concurring opinion in JACKSON v. GEORGOPOLOUS, supra, bears comment. In that concurring opinion, Judge Lehan argues for an interpretation of the two year statute of limitations which requires not just notice of the injury but also notice of the incident involving the defendant which results in the injury. Judge Lehan goes on to suggest that this would provide "a measure of predictability of the consequences of one's conduct which has not been prevalent in this area of the law." In other words, Judge Lehan does not approve of this Court's decision in BARRON v. SHAPIRO, supra, which had rejected this type of conjunctive standard.

While acknowledging the considerable judicial effort which Judge Lehan has brought to bear upon the issue of just what constitutes sufficient notice to trigger the two-year medical malpractice statute of limitations, Petitioner would respectfully

submit that any confusion created by the "diverse other versions of the law in arguments of counsel in this and other cases," GOODLET, supra, 16 FLW at 2122 (Lehan, J., concurring) can be avoided if the statute of repose is properly read as a bright line bar to the right to bring a medical malpractice action, which is triggered solely by the date of the incident of malpractice, i.e., the date of the alleged negligence, without regard whatsoever to whether the Plaintiff knew or should have known of either his injury or the negligence which caused that injury. Such a bright line rule was in fact adopted by this Court in CARR and BOGORFF. Any uncertainty on that point should have been put to rest by the MENENDEZ decision. Thus, not only does a bright line rule promote ease of application, it is also the law in Florida!

The Second District's opinion simply cannot be reconciled with this Court's decisions in PULLUM, CARR, BOGORFF and MENENDEZ. Although the Second District purports to distinguish CARR and BOGORFF on the basis of the time when the Plaintiffs became aware of their injuries, that analysis completely ignores the distinction between a statute of limitations and a statute of repose; it also badly misconstrues the holdings in CARR and BOGORFF.

Having either ignored or misinterpreted this Court's decisions in CARR and BOGORFF, the Second District instead relied primarily upon the Third District's decision in LLOYD v. NORTH BROWARD HOSPITAL DISTRICT, 570 So.2d 984 (Fla. 3d DCA 1990) (review

granted). LLOYD is eminently distinguishable from the present matter.[9] Indeed, the Second District's opinion quotes the very sentence in LLOYD which serves to distinguish that case from the present matter:

> Under [the trial court's] approach, the limitation period **expired** before the Lloyds had experienced any injury and before they had **any awareness** of a possible claim. LLOYD 570 So.2d at **986**.

Unlike the plaintiffs in LLOYD, Mr. Nemeth **did** experience an injury in 1980 when his cancer was misdiagnosed. Every day that the cancer went undiagnosed, Mr. Nemeth was further damaged.

By contrast, in LLOYD, Mrs. Lloyd did not become pregnant with her second child (who suffered from the same genetically transmitted defects as his older sibling) until more than four years after the alleged malpractice. In that case, the defendants were charged with failing to properly interpret certain tests which were conducted in order to see if the family's first child suffered from a genetic disorder. If the parents had been aware of the true test results within four years of the genetic testing, they would not have had a cause of action because they

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[9] The fact that Dr. Harriman has taken this opportunity to distinguish LLOYD from the present matter should not be misconstrued to suggest that LLOYD was properly decided--for it was not. Dr. Harriman believes that LLOYD should be overruled and would urge this Court to do just that. However, even if this Court affirms LLOYD, this Court nevertheless can and should quash the opinion herein on the basis of the distinctions which are set forth in this brief.

would not yet have conceived another child. Here, however, if Mr. Nemeth had undergone further testing, or had he developed acute symptomatology within four years of the 1980 misdiagnosis, he would have had a viable cause of action, and he could have filed suit within the period of repose.

Among other things, the LLOYD decision relied upon a line of cases which interpret and apply the two year statute of limitations. See, e.g., WILLIAMS v. SPIEGEL, 512 So.2d 1080 (Fla. 3d DCA 1987), quashed in part on other grounds, 545 So.2d 1360 (Fla. 1989); and SCHERER v. SCHULTZ, 468 So.2d 539 (Fla. 4th DCA 1985). These cases are of dubious validity in light of this Court's decision in BARRON v. SHAPIRO. Moreover, the Third District's reliance upon these cases in LLOYD is reflective of the same improper "commingling" of the standards for application of the statute of limitations and the statute of repose as is demonstrated by the Second District's opinion in this matter. See MENENDEZ, supra and UNIVERSAL ENGINEERING CORP. v. PEREZ, 451 So.2d 463, 465 (Fla. 1981), which notes that a statute of repose is distinguishable from a statute of limitations in that a statute of repose cuts off the right of action after a specified time which is measured from delivery of the product or completion of the work, regardless of the date of accrual of the cause of action or notice of an invasion of legal rights.

In contrast, the Second District's opinion in this matter emphasizes the time of accrual of the cause of action and/or

notice of the invasion of the Plaintiff's legal rights, in resolving a statute of repose issue. Clearly, such notice-based concepts are not applicable to statutes of repose.

In support of its holding, ie., that the statute of repose does not begin to run until an injury is discovered, the district court also relied upon DIAMOND v. E.R. SQUIBB & SONS, INC., 397 So.2d 671 (Fla. 1981). In PULLUM v. CINCINNATI, INC., 476 So.2d 657, 659n.* (Fla. 1985), this Court failed to expressly overrule its previous decision in DIAMOND. However, the referenced footnote in PULLUM expressly restricts the DIAMOND decision to its facts, i.e., where a product is ingested by a mother with a child in utero, which product remains inert until the child reaches puberty, and thereafter injures the child, the statute of repose does not bar the cause of action.[10]

Given this Court's ruling in CARR, ie., that the medical malpractice statute of repose is constitutional, and given the fact that this Court specifically failed to adopt the Fourth District's analysis of DIAMOND, there can be little doubt that the Second District Court improperly relied upon DIAMOND herein in concluding that the medical malpractice statute of repose is triggered by notice of injury, instead of the incident of

[10] Before the Plaintiff chastises us for restricting DIAMOND to its facts while we are simultaneously criticizing the Second District Court of Appeal for distinguishing this case from CARR and BOGORFF on their facts, it must be noted that this Court itself chose to carve out a narrow exception to the rule which it announced in PULLUM, and thus restricted the DIAMOND holding to its own facts.

malpractice. The Second District's contention that the "incident of malpractice" must in this case mean notice of the injury is nothing more than semantic gymnastics. It turns the statute and numerous decisions of this Court an their respective heads. Dr. Harriman would respectfully request this Court to reverse that ruling, and return the statute of repose and this Court's previous decisions to their rightful posture.

The District Court's Decision Directly and Expressly conflicts with TIMES PUBLISHING COMPANY v. W.R. GRACE & COMPANY--CONN., 552 So.2d 314 (Fla. 2d DCA 1989).

It would appear not to be necessary to establish conflict of jurisdiction before this Court given the fact that the Second District has certified this case as presenting a matter of great public importance. Indeed, Petitioner recognizes that intra district conflict would not support an exercise of this Court's discretionary conflict jurisdiction. Nevertheless, Dr. Harriman wishes to paint out that the opinion in this matter expressly and directly conflicts with another decision from the Second District Court of Appeal.

In TIMES PUBLISHING COMPANY, a publishing company sued W.R. Grace because a substance containing asbestos which had been sold by W.R. Grace was incorporated by a contractor into a building which the Times Publishing Company had constructed in 1969. Times did not learn of the presence of the asbestos until more than twelve years after the construction had been completed. W.R. Grace

procured a summary judgment on the basis of the twelve year product liability statue of repose, Section 95.031(2), Florida Statutes (1983). *552* So.2d at 315.

In an attempt to avoid the clear meaning and effect of that statute, as well as this Court's decision in PULLUM, supra, TIMES PUBLISHING argued that its case fell within the exception which had been expressed in DIAMOND V. E.R. SQUIBB & SONS, INC., supra. As was noted earlier, DIAMOND was not overruled in PULLUM; however, it was limited to its fact through a footnote in the PULLUM decision. That footnote and the DIAMOND decision were relied upon as authority by the panel in the present matter. 16 FLW at D2118.

In TIMES PUBLISHING COMPANY, the Second District saw no reason to expand the "narrow DIAMOND exception" beyond the facts which were outlined in the DIAMOND decision. The District Court held that:

> The critical element in DIAMOND, distinguishing it from the present matter, was the fact that the injurious effect of Squibb's product would not have been manifested in the child until many years following its ingestion by the mother. Indeed, there **was** no medical technique or means by which the mother or the child could have become aware of the jeopardy occasioned by the drug within the period preceding repose. Here, however, it cannot be said that Times Publishing could not have discovered the presence of asbestos in its premises **prior** to the expiration of twelve years. 552 So.2d at 315. (Emphasis added.)

That reasoning is precisely analogous to the present situation, ie., while Mr. Nemeth did not learn of his cancer within four years of the misdiagnosis, the cancer was in fact scientifically diagnosable. Just as TIMES PUBLISHING could have discovered the presence of asbestos on its premises, so too could Mr. Nemeth have learned of his cancer within the four year medical malpractice statute of repose. Thus, in addition to the many other infirmities from which the district court's opinion suffers, it is also in conflict with another opinion of that same court.

CONCLUSION

Dr. Harriman respectfully requests this Court to reverse the Second District's opinion and remand for the entry of a final judgment in favor of Dr. Harriman.

Respectfully submitted,

BY _____
PHILIP D. PARRISH, ESQ.

BY _____
ROBERT M. KLEIN, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 18th day of November, 1991, to LEONARD M. VINCENTI, ESQ., 28050 U.S. 19 N. Ste. 401, Clearwater, FL 34621 and PHILIP BURLINGTON, ESQ., Suite 4B/Barristers Bldg., 1615 Forum Place, W. Palm Beach, FL 33401.

BY Robert M. Klein
ROBERT M. KLEIN, ESQ.

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO: 78,783

DISTRICT COURT CASE NO.: **90-3341**

BEN B. HARRIMAN, M.D.,

Petitioner,

vs.

VICKIE NEMETH, as Personal Representative of the Estate of CHRISTOPHER NEMETH, Deceased.

Respondents.
_____/

APPENDIX TO PETITIONER BEN B. HARRIMAN, M.D.'s BRIEF

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area. The police officer, however, was not aware of any burglaries that occurred that day. After traveling the area, the police officer saw the Jaycees' school bus in a parking lot adjacent to a building owned by the Jaycees. Upon entering the parking lot, the police officer did not observe any criminal mischief, but he did see a person's head "bobbing inside the school bus." At that point, the police officer told whoever was in the bus to exit. Watts emerged. Some minutes later, the officer placed Watts under arrest for loitering and prowling. A patdown produced a brass pipe containing a substance later determined to be cocaine residue. Subsequently, at the police station, Watts was again arrested for the possession of paraphernalia and cocaine.

Based upon the foregoing circumstances, and our recent opinion in *Woody v. State*, 16 F.L.W. D1643 (Fla. 2d DCA June 19, 1991), we are persuaded that the patdown and subsequent arrests were improper:

> No circumstance here suggests that either of the *two* elements of a proper arrest for loitering and prowling is present. The individual must loiter or prowl in a place, at a time, or in a manner not usual for law-abiding individuals and the circumstances must warrant a reasonable alarm or immediate concern for the safety of persons or property in the vicinity. (citations omitted).

Id.

Here, not unlike the controlling considerations requiring reversal of the convictions in *Woody*, Watts' proximity to the Jaycees' club house "was not supported by any articulable facts which could reasonably warrant" a concern that he would unlawfully enter the structure. Any concern the police officer may have had at the moment when he detected Watts in the bus "was based on pure speculation; there was nothing to suggest any independent criminal activity afoot." *Id.*

In sum, the search yielding the drug paraphernalia and the residue was incident to an invalid arrest,

We reverse the trial court and direct that Watts be discharged. (SCHEB, A.C.J., and THREADGILL, J., Concur.)

* + *

Wrongful death—Medical malpractice—Limitation of actions—Statute of repose—Action not barred by statute of repose where defendant pathologist misdiagnosed tissue sample as non-malignant more than four years prior to filing of action, but plaintiff was not made aware of misdiagnosis until manifestation of symptoms less than four years prior to filing of action—Question certified as to whether four year statute of repose bars a medical malpractice suit if the alleged malpractice occurred more than four years before suit was filed but the injury resulting from the alleged malpractice did not manifest itself within the statutory four year period

VICKIE NEMETH, as Personal Representative of the Estate of Christopher Nemeth, Deceased, for the use and benefit of the survivors, to wit: VICKIE NEMETH, 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. 2nd District. Case No. YO-03341. Opinion filed August 7, 1991. Appeal from the Circuit Court for Pinellas County: Crockett Farnell, Judge. Leonard M. Vincenti, Clearwater, for Appellant. 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 Appellant.

(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 defendants 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 alter 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*, 16 F.L.W. S149 (Fla. Jan. 18, 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 third 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,)

* * *

Criminal law—Judge's answer to jury's factual question during deliberations without knowledge or participation of counsel, wherein judge stated that jury would have to recall facts from their own memories—Trial court's response without knowledge of counsel constitutes reversible error

GEORGE A. PORR and EVA FIRIOS, Appellants, v. STATE OF FLORIDA, Appellee. 2nd District. Case Nos. 90-02566, 90-02502. Opinion filed August 9, 1991. Appeal from the Circuit Court for Pinellas County; Mark R. McGarry, Jr., Judge. Dcnis M. dc Warning, Clearwater, for Appellanl. Robert A. Butterworth, Allorncy Gcncral, Tallahassee, and Wendy Buffington, Assistant Attorncy Gcncral, Tampa, for Appellcc.

(SCHEB, Acting Chief Judge.) Codefendants George Porr and Eva Firios were convicted by a jury on various drug charges including conspiracy to traffic and trafficking in cocaine. On appeal, they raise two arguments, the first being that the trial court erred in denying their motion for mistrial after it was discovered there had been communications between the judge and the jury without counsels' knowledge or participation. We agree.

During its deliberations, the jury sent out written questions asking the make of a car involved in the crimes and how Defendant Porr got to work on a specific day. Without notifying the prosecutor and defense counsel of the jury's communication, the judge sent the bailiff to tell the jurors they would have to recall these facts from their own memories.

We must agree with the defendants that Florida Rule of Criminal Procedure 3.410 was violated:

> After the jurors have retired to consider their verdict, if they ***request additional instructions or to have any testimony read to them*** they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. ***Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.***

(Emphasis added.)

We cannot accept the state's argument that the factual questions the jury asked were not requests for additional instructions or to have additional testimony read to them. In *Curtis v. Store,* 480 So. 2d 1277 (Fla. 1985), the jury asked a specific factual question regarding whether there was record corroboration for a witness's statement. There, as here, the judge responded to the jurors that they had to base their decision on the evidence. The judge's failure to notify counsel was held to be reversible error, The court specifically stated that any "'direction . . . concerning the law of the case' in response to *a question about an aspect of the evidence*" constitutes an additional instruction. *Id.* at 1278 (emphasis added).

We think the factual questions the jury asked in the instant use were "questions about an aspect of the evidence," equivalent to requests for testimony to be reread. Thus, the jury's questions fall within the scope of Rule 3.410. The supreme court has held that any violation of Rule 3.410 is per se reversible. *Williams v. State*, 488 So. 2d 62, 64 (Fla. 1986); *Curtis.* Accordingly, the trial court should not have responded without counsels' knowledge, and we must reverse Porr's conviction without conducting a harmless error analysis.[1]

The only remaining question is whether this reversible error mandates a new trial only for Porr on certain counts or for both Porr and Firios on all counts. The state argues that error, if any, was isolated in that the questions seemed to focus solely on Porr's actions on June 19. Thus, the state urges that Porr's convictions relating to drug transactions occurring on any other date and Firios's convictions should be unaffected. We cannot agree.

It appears that error can be segregated in the manner the state suggests. *See Norton v. State,* 516 *So.* 2d 1078 (Fla. 2d DCA 1987), *review denied,* 523 *So.* 2d 578 (Fla. 1988) (error within the scope of Rule 3.410 considered harmless because it applied only to a burglary charge, of which Norton was acquitted, not to his aggravated assault conviction). However, absence of prejudice must be shown beyond a reasonable doubt. *Diguilio v. State,* 491 So. 2d 1129 (Fla. 1986). Here, the defendants were convicted of conspiring to traffic with, among other people, each other on two dates two days apart. Given the temporal proximity of the transactions in all counts, the nature of the charges, and the fact that both codefendants were allegedly involved in all the events, we cannot say beyond a reasonable doubt that the error in responding to questions about Porr's activities on June 19 did not prejudice him on other counts and did not prejudice Firios.

In light of our disposition of the first issue, the defendants' second issue, regarding a tax lien and investigative costs assessed against them, is moot.

Accordingly, we reverse and remand for a new trial on all counts as to both defendants. (LEHAN and ALTENBERND, JJ., Concur.)

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[1] Although we obey *Williams* and *Curtis* in this case, we would note that the specific facts of this case do not in our view require a rule of per se harmful error. The instruction which the judge gave to thin jury without notice to counsel is a correct instruction. If the attorneys had been notified, it is probable that they would have agreed to this instruction. Even if the auorncys had objected, it appears that the trial court would have been within its discretion to have given this common instruction. The jury, of course, was sequestered in the jury room and never knew who participated in the decision to give them this brief additional instruction. We cannot perceive any significant possibility that *this* error actually affected the jury's deliberations or its verdict. In our view, the rule of per se harmful error should be reserved for procedural errors that could affect the trial's outcome under some reasonable circumstances, when the harmful effect cannot be assessed reliably from the appellate record. *See generally* Arizona v. Fulminante, __ U.S. __, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983).

Criminal law—Search and seizure—Vehicle stop—Information furnished to officer that black male who was suspect in auto theft associated with people who drove around in red over white Cadillac insufficiently detailed to justify investigatory stop where officer had no founded suspicion that person in automobile had committed, was committing, or was about to commit a crime

REGINALD D. BRISTOL, Appellanl, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-01233. Opinion filed August 9, 1991. Appeal from the Circuit Court for Pinellas County; W. Douglas Baird, Judge. Joel E. Grigsby, Lake Alfred, for Appellanl. Robert A. Butterworth, Allorncy General, Tallahassee, and Joseph R. Bryant, Assistant Allorncy General, Tampa, for Appellee.

(PARKER, Judge.) Reginald Bristol appeals his judgment and sentence for trafficking in cocaine. Bristol pleaded no contest and reserved his right to appeal the denial of his motion to suppress the evidence. We reverse.

The following facts were presented at the hearing on the motion to suppress the evidence. Officer Terry Naumann, of the Clearwater Police Department, was informed by her sergeant that a car, owned by Gilbert Phipps and driven by Andre Blanchard, had been taken. When Officer Naumann spoke to Phipps whom she knew and considered reliable, Phipps told her that "Polo" had "jacked" his car by holding Blanchard at gunpoint. Officer Naumann knew "Polo" to be a black male, but she did not know his legal name and did not have a description of him. When the officer asked Phipps how to find "Polo," Phipps told the officer that "Polo" associated with guys that drove around in a red over white long Cadillac from St. Petersburg. Phipps was