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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.

PETITIONERS BEN B. HARRIMAN, M.D. and CLEARWATER PATHOLOGY ASSOCIATES, MD., P.A. f/k/a LEONARD N. GILOTTE, M.D., P.A's REPLY BRIEF

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INTRODUCTION

This reply brief if filed on filed on behalf of the Petitioners, Ben B. Harrirnan, M.D., and Clearwater Pathology Associates, M.D., P.A., f/k/a Leonard N. Gilotte, M.D., P.A. Respondent has taken the position now that the notice to invoke this Court's jurisdiction was filed solely on behalf of Petitioner Harriman, and not on behalf of Petitioner Clearwater Pathology Associates. Although Petitioners take issue with that interpretation of the "Notice to Invoke," Petitioners have, in an abundance of caution, filed simultaneous herewith a Motion for Leave to File an Amended Notice to Invoke to Cure Scrivener's Error. In this brief -- as it did in the initial brief -- reference to Dr. Harriman necessarily includes reference to his professional association, since there are no separate allegations of negligence against the Professional Association. Thus, at times, Dr. Harriman will be referred to in the singular, for the sake of brevity.

REPLY BRIEF

Plaintiff's approach to this case is fundamentally flawed. First, it is flawed because the Plaintiff now contends -- for the first time -- that Mr. Nemeth was not injured at the time of the alleged misdiagnosis of his cancer, and that he did not suffer a physical injury until such time as his cancer either exhibited symptomatology or became terminal.[1]

The second fundamental flaw is that the Plaintiff insists upon confusing and cross-referencing the separate analytical matrices to be applied to statutes of repose versus statutes of limitations cases. Plaintiff does this by essentially "backing

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[1] Although the Plaintiff argued in the District Court below that no "injury" had occurred for purposes of defining the term **"injury"** within the context of the term **"incident,"** i.e., to mean at the time that the injury became manifest, it was never argued below that Mr. Nemeth did not in fact suffer a physical injury when his cancer was misdiagnosed. This is a completely new and different argument on appeal before this Court which was not addressed by the District Court. Moreover, the Plaintiff concedes (brief of Respondent at Page 27) that the statute of repose will have run where "an evident act has caused an injury -- i.e., a completed tort had 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." Thus, the Plaintiff's shift in argument is more than semantic in nature. Our reading of the position taken by the Plaintiff below is confirmed by the District Court's opinion which concluded that "the [trial court] erred in ruling that the repose period expired before there was notice of injury." NEMETH v. HARRIMAN, 586 So.2d 72 (Fla. 2d DCA 1991). The District Court went on to note that:

> 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. 586 So.2d at 73.

into" a definition of the term **"incident"** which has evolved in certain statute of limitations decisions, and by thereafter applying that definition of **"incident"** (which does not appear in the statute) to statute of repose cases, simply because the word **"incident"** also appears in the statute of repose. At the same time the Plaintiff completely ignores (blamefully, we suggest) the remainder of the language of the statute of repose, which -- regardless of the definition of incident -- provides that the period of repose is triggered by the "occurrence out of which the cause of action accrued." Petitioners would submit that "occurrence" must necessarily refer to the act of negligence. **See** DADE COUNTY **v. FERRO, 384** So.2d 1283, 1286 (Fla. 1980) (where a statute of limitations is measured by occurrence rather than approval of the cause of action it must assumed that some claim arose upon the occurrence of the event causing the injury).

Plaintiff begins her defense of the District Court's Opinion "by noting that all the District Court really did was to apply the 'blameless ignorance' doctrine to §95.11(4)(b)." (Brief of Respondent, Page 10) Therein lies the problem with both the District Court's opinion as well **as** Respondent's Brief. As will be demonstrated herein, the "blameless ignorance" doctrine has no place within the "analytical matrix" of a statute of repose. Secondly, both the District Court and the Plaintiff wish to treat the various provisions contained within §95.11(4)**(b)** in the same fashion, even though the initial provision of that Statute is a **two** year discovery based statute of limitations, and the provision with

which we are concerned is a four year statute of repose which, like all statutes of repose, is "ignorant," if you will, of issues of notice or discovery.

As the Plaintiff points out, the "blameless ignorance" doctrine has its origin in URIE v. THOMPSON, 337 U S 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949), and was adopted -- for purposes of statute of limitations analysis -- by this Court in CITY OF MIAMI v. BROOKS, 70 So.2d 306 (Fla. 1954). Likewise, the remainder of the cases relied upon by the Plaintiff throughout her discussion of the "blameless ignorance" doctrine are statute of limitations cases. *See* e.g., SEABOARD AIRLINE RAILROAD CO., V. FORD, 92 So.2d 160 (Fla. 1956).

As the Plaintiff concedes, the one and only application of the "blameless ignorance" analysis to the statute of repose which is contained within §95.11(4)(b) is LLOYD v. NORTH BROWARD HOSPITAL DISTRICT, 570 So.2d 984 (Fla. 3d DCA 1990), review pending. It is respectfully suggested that the LLOYD decision was incorrectly decided, and should be reversed by this Court. However, contrary to the Plaintiff's contention, affirmance of the LLOYD decision does not require affirmance of the present case. That is because Mr. NEMETH most certainly was injured as of the date of the misdiagnosis in this case.

The Plaintiff has consistently confused the concept of injury with the concept of symptomatology. It simply makes no sense to argue -- as the Plaintiff does -- that Mr. NEMETH's cancer was a "pre-existing condition," but that nevertheless it was not an

"injury" until such time as it became terminal, or until such time as it became outwardly symptomatic.

Does the Plaintiff really expect this Court to believe that if the Plaintiff had discovered the misdiagnosis at a time prior to the point when the cancer actually became terminal, then Plaintiff would not have filed suit, given an arguably shortened life expectancy, and the cost and physical and emotional pain which may be associated with forms of treatment of the cancer which may not have been necessary had it been detected at an earlier stage?[2] Simply put, delayed symptomatology does not mean delayed injury.

In this regard, the present matter is easily distinguished from LLOYD. In LLOYD, the negligent failure to relate the true findings on certain genetic testing to the LLOYDs obviously did not create an injury until such time as the LLOYDs conceived another child. As the LLOYD Court noted:

> 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 LLOYD's had experienced any injury and before they had any awareness of a possible claim.

570 So.2d at 986. By contrast, in the present matter, Mr. NEMETH experienced an arguably progressive injury everyday for eight years prior to the time that the injury became "manifest" as a result of

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[2] See and compare GREEN v. GOLDBERG, 557 So.2d 589 (Fla. 4th DCA 1989); TAPPAN v. FLORIDA MEDICAL CENTER, INC., 488 So.2d 630 (See Fla. 4th DCA 1986); WILLIAMS v. BAY HOSPITAL, 471 So.2d 626 (Fla. 1st DCA 1985)

certain symptomatology.

This distinction between LLOYD and the present matter can be demonstrated by looking to the four year period following the alleged malpractice in each case. In LLOYD, the plaintiffs had not conceived a second child during the four year period of repose. Therefore, had they discovered the negligence of the physicians within that period, they would not have had a cause of action because they had not yet conceived a child. However, had MR. NEMETH somehow discovered his cancer during the four year period following Dr. HARRIMAN's alleged misdiagnosis, he could have filed suit because he had already sustained an injury.[3] At that point, it would have been a factual question for the jury to determine the extent of that injury. Resolution of that issue would depend upon the opinion of experts on questions of causation, e.g., how far the cancer had progressed, and what type of additional treatment might be required due to the failure to diagnose the problem in 1980. But those are matters which go to the extent of the injury, not the existence vel non of the injury,

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[3]Petitioners continue to fight a "misconception" of their argument below, which was fostered by an inappropriate statement in the District Court's opinion, to the effect that it was the Petitioners' position below that Mr. Nemeth was or should have been on notice of his injury within the four year period of repose. That has never been argued by the Petitioners. Rather, in an attempt to distinguish this case from DIAMOND v. E.R. SQUIBB AND CO., infra, and LLOYD, supra, we simply pointed out that Mr. Nemeth could have detected his cancer had he -- for whatever reason -- been retested within the four year statute of repose. There has never been a suggestion that Mr. Nemeth was in any way comparatively negligent.

which is not debatable here.

Likewise, this Court's Opinion in DIAMOND v. E.R. SQUIBB AND CO., 397 So.2d 671 (Fla. 1981), is distinguishable from the present matter. We quite agree with the Plaintiff's contention (Brief of Respondent at Page 36-37 n. 16) that DIAMOND was not an "immediate injury" case. As the Plaintiff points out, neither the mother who ingested the DES nor her in-utero child were injured at that time. Rather, the DES remained inert until such time as certain biochemical or physiological reactions during the then-living child's puberty caused the long inert DES to create a scientifically diagnosable injury. As the Plaintiff points out, the injury upon which the child brought suit was a cancerous lesion which did not develop until nearly two decades after her mother had ingested the DES, and additional lesions which might appear in the future. See DIAMOND v. E.R. SQUIBB AND SONS, 366 So.2d 1221 (Fla. 3d DCA 1979), quashed, 397 So.2d 671 (Fla. 1981).

As Petitioners have consistently pointed out in the present matter, the DIAMOND decision has been kept alive either because there was no injury until 20 years after ingestion of the DES, or because if such injury existed, it was "scientifically undiagnosable" until children of the various mothers who ingested DES reached the age of puberty.

Indeed, the very District Court which issued the Opinion under review has adopted such an interpretation of DIAMOND in TIMES PUBLISHING CO., v. W.R. GRACE AND CO., 552 So.2d 314 (Fla. 2d DCA 1989). That decision was discussed in our Initial Brief, and will

not be repeated herein. Suffice it to say that the Plaintiff's distinction of that case rests entirely upon the Plaintiff's mistaken impression that Mr. NEMETH did not **sustain any injury** until **such** time as his cancer became either terminal or symptomatic.[4]

The Plaintiff's contention that Mr. NEMETH was not injured immediately upon the misdiagnosis leads to a rather absurd and illogical conclusion, which can be **demonstrated by comparing** this case with SHIELDS v. BUCHHOLZ, **515** So.2d **1379** (Fla. 4th **DCA** 1987). Essentially, the Respondent has argued that the **improper** installation of a crown by a dentist such that it perforated the lateral surface of a tooth, thereby creating a latent defect **which** eventually lead **to** the loss, i.e., death, of the tooth, was an "immediate **injury,"** notwithstanding the fact that this **injury** did not become manifest symptomatically for a number of years; on the other hand, the misdiagnosis of cancer, which is allowed to grow and spread until it becomes symptomatic and terminal, is not an

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[4]Once a statute of repose has met the test of constitutionality which is set forth in KLUGER v. WHITE, 281 So.2d 1 (Fla. 1973) -- and this Court held that the statute of repose contained within §95.11(4)(b), has met that test, See **CARR** v. **BROWARD** COUNTY, **541** So.2d 92 **(Fla.** 1989). -- it should not make any difference from an analytical standpoint whether the injury was diagnosable or not, or even if the injury had actually **occurred.** An otherwise valid cause of action or right **may** be abolished **or** curtailed if the legislature either provides a reasonable alternative or overwhelmingly establishes the public **necessity for** the particular time constraints imposed by the statute. **CARR** v. **BROWARD** COUNTY, **505** So.2d at **573.** This analysis lends credence to the conclusion that no injury had actually occurred in the **DIAMOND** case until the plaintiff child reached puberty and began to develop cancer. Again, that is a far cry from the present case, where Mr. NEMETH's "pre-existing" cancer was allowed to go undetected -- and **unchecked** -- allegedly **as** a result of Dr. HARRIMAN's misdiagnosis.

"immediate injury." This position cannot be logically maintained. The injury in this case was immediate, like the injury in **SHIELDS v. BUCHHOLZ.**

Even if this Court determines that Mr. NEMETH was not injured until eight years following the misdiagnosis, the statute of Repose nevertheless was triggered by that misdiagnosis, which is the "occurrence out of which the cause of action accrued.

Even if MR. NEMETH's injury was not immediate, the District Court's Opinion should nevertheless be reversed. That is because, even if one concedes that "an incident is an incident is an incident," the four year statute of repose provides an alternative triggering date, i.e., the date of the "occurrence out of which the cause of action accrued." Since, as the Plaintiff argues, the cause of action does not accrue until there is a "completed injury," the phrase "or occurrence out of which the cause of action accrued," clearly refers to the "occurrence" of malpractice (herein the alleged misdiagnosis) out of which the cause of action (later) accrues. Thus, the triggering date for the statute of repose in this case must be the date upon which Dr. HARRIMAN allegedly misdiagnosed the cancer.

Nowhere does the Plaintiff address the importance of the phrase "or occurrence out of which the cause of action accrued," which appears in both the four year and seven year periods of repose within §95.11(4)(b). Rather, the Plaintiff focuses on the word "incident," and relies upon authority which has defined the term "incident" for purposes of the two year discovery based statute of limitations.

One of the primary principles of statutory construction provides that statutes should be construed to give effect to the words that are used within the statute. **GRETZ** v. **FLORIDA UNEMPLOYMENT** APPEALS COM'N, **572** So.2d **1384 (Fla. 1991). See** also, **KEPNER** v. **STATE, 577** So.2d **576** (Fla. 1991) (in construing statute, court must give effect to all parts of the statute); DESIST0 **COLLEGE,** INC. v. TOWN OF HOWEY-IN-THE-HILLS, 706 **F.** Supp. **1479, Aff'd. 888 F.2d 766** (11th Cir. 1990) (construction that would leave any part of language in statute without effect **should** be rejected); **IN RE: BROOKS, 51 B.R. 741** (Bkrtc. Fla. 1985) (some purpose should be ascribed to every word in a statute); **FINLAYSON** v. **BROWARD COUNTY,** 471 So.2d *67* (Fla. 4th DCA 1985), appeal after remand 533 So.2d 817, jurisdiction accepted 544 So.2d 199, decision approved in part, quashed in part 577 **So.2d 1211 (Fla. 1989)** (when interpreting statute, court should avoid interpretations which would render part of the statute meaningless). Thus, it is the Plaintiff, not Dr. Harriman, who has ignored principles of statutory construction.

The Plaintiff has attempted to **apply** statute of limitations decisions which have interpreted the term **"incident"** in the first portion of Section 91.11(4)(b) as "a negligent act which causes an **injury,"** to the repose provisions of that statute, as did the Court in LLOYD. The problem with this approach is that it fails to take into account the <u>context</u> in which the word incident appears in the various provisions of that statute.

With respect to the two year **discovery-based period of**

limitations, the word "incident" is used in conjunction with the phrase "giving rise to the action," and is, of course, triggered by the word "discovered." Thus, according to BARRON v. SHAPIRO, 565 So.2d 1319 (Fla. 1990), "discovery of the incident giving rise to the action" means discovery of either the injury or the negligent act. This is precisely because knowledse of either an injury or a negligent act should put a Plaintiff on notice that he (potentially) has a cause of action. Therein also lies the basis for the "delayed injury" or "blameless ignorance" analysis of the statute of limitations. Obviously, when dealing with the two year discovery-based provision, a plaintiff cannot "discover" a non-existent injury. Moreover, as a practical matter, if the Plaintiff has not discovered a latent, but existing injury, it is extremely doubtful that the Plaintiff would independently recognize that a negligent act has occurred.

This analysis has no place with respect to the four year period of repose, however, because that period of repose does not contain a "discovery" provision. With respect to the period of repose, the word "incident" is used in the disjunctive with the word "occurrence," both of which are further modified by the phrase "out of which the cause of action accrued." Thus, the emphasis is not upon the knowledge that gives rise to the cause of action, but upon the incident or occurrence out of which the cause of action later accrues. By use of the disjunctive phrase "incident or occurrence," the repose provision would clearly apply in the present matter where the occurrence (Dr. Harriman's alleged

misdiagnosis) occurred some ten years prior to the filing of the complaint, even if the word "incident" is defined identically in each instance in which it appears in the statute, as the Plaintiff argues.

This reading of the various provisions of the statute in question not only comports with general principles of statutory construction, it also comports with numerous decisions from this Court, which have defined the distinction between a period of limitations and a period of repose, Our reading of the statute is consistent with the doctrine of noscitur a sociis, which provides that words take meaning based upon their context and their association with other words in a statute. **DESIST0** COLLEGE, **INC.** v. **TOWN OF** HOWEY-IN-THE-HILLS, **706** F.Supp. 1479, 1495 (M.D. Fla. **1989), Aff'd.** ***888*** F.2d 766 (11th Cir. 1990). Our reading of the statute is also consistent with the "fundamental difference in character" between statutes of limitations **and** statutes of repose, which this Court has recognized for years. See **BAULD** v. **J.A. JONES CONSTRUCTION CO., 357** So.2d 401, 402 (Fla. 1978); DADE **COUNTY** v. **FERRO, 384** So.2d **1283, 1286 (Fla. 1980); UNIVERSAL ENGINEERING** CORP. v. **PEREZ,** 451 So.2d 463, 465 **(Fla.** 1981); **CARR** v. BROWARD **COUNTY,** 541 So.2d 92, **95** (Fla. **1989); UNIVERSITY OF MIAMI** v. **BOGORFF,** 583 **So.2d 1000,** 1003 (Fla. 1991); **PUBLIC HEALTH TRUST** OF **DADE COUNTY** v. **MENENDEZ,** 584 So.2d *567,* 568 (Fla. **1991).**

Petitioners' reading of the statute is consistent with this Court's analysis in DADE COUNTY v. FERRO, **384 So.2d 1283 (Fla. 1990):**

> While the date of discovery is entirely relevant in ascertaining the attachment date of a statute of limitations which measures from that date, it is equally irrelevant in ascertaining the attachment date of a statute of limitations which measures by its terms from the date of the incident giving rise to the injury. The only relevant date in the case of the latter type of statute of limitations [repose] is the date of occurrence or incident. (Emphasis in original)

384 So.2d at 1286. This Court has reaffirmed that distinction twice within the past year.

In UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d 1000 (Fla. 1991), this Court **reversed** a decision from the Third District Court of Appeal, 547 So.2d 1223 **(Fla. 3d** DCA 1989), involving a statute of limitations analysis. However, this Court had the opportunity to address the alternative argument of the plaintiffs in that case i.e., that their cause of action had not accrued until the point in time when they became aware of certain letters which had been written by physicians, and which characterized the medical care which had been rendered in 1972 as possibly contributing to the injuries of their child:

> Moreover, assuming arguendo that the Bogorffs' **cause** of action did not accrue, as they contend, until 1982, the statute of repose would still bar their action. In **CARR v. BROWARD COUNTY, 541** So.2d 92 (1989), we held that the statutory repose period for medical malpractice actions 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. ***See*** also, PULLUM v. CINCINNATI, INC., 476 So.2d *657* (Fla. 1985) ... 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 1004. Even more recently, in **PUBLIC HEALTH TRUST OF DADE** COUNTY V. MENENDEZ, 584 So.2d 567 (Fla. 1991), this Court observed unanimously that:

> [U]nder this statute a two year limitation begins on the date of actual constructive discovery; but there also is 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.

584 So.2d at 568. The Plaintiff's response to this language is that **it** is dictum, Perhaps so, but as Judge Letts recently observed, dictum can be "powerful stuff." LOVE V. GARCIA, 16 FLW D1458, 1460 (Fla. 4th DCA 1991) (Letts, J., concurring in part and dissenting in part). Thus, although the Petitioners believe that the CARR decision is directly on point, since it specifically holds that the statute of repose is triggered and becomes effective regardless of the Plaintiff's awareness of his injury or for the negligence of the physician, Petitioners would nevertheless rely upon this Court's language in BOGORFF, supra and MENENDEZ **as** well. That language is "powerful stuff."

CONCLUSION

In *CARR* v. BROWARD COUNTY, supra, this Court held that the four year statute of repose contained within §95.11(4)(b) met the requirements set forth in KLUGER v. WHITE and demonstrated the overwhelming public necessity for a statute of repose. The advisability of a statute of repose is a matter of public policy on which the legislature has the final say. BIBBER v. HARTFORD ACCIDENT AND INDEMNITY INSURANCE CO., 439 So.2d 880 (Fla. 1983). The District Court has refused to adhere to the legislative intent embodied in the four year statute of repose for medical malpractice actions, and should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 3rd day of February, 1992, to LEONARD M. VINCENTI, ESQ., 28050 U.S. 19 N. Ste. 401, Clearwater, FL 34621; PHILIP BURLINGTON, ESQ., Suite 4B/Barristers Bldg., 1615 Forum Place, W. Palm Beach, FL 33401 and JOEL D. EATON, ESQ., 25 W. Flagler Street, Suite 800, Miami, FL 33130.

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