IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 87,831

FRANCINE DAMIANO, individually and derivatively, ALFRED DAMIANO, her husband, individually and derivatively, ANTHONY DAMIANO, MICHELLE DAMIANO and CHRISTINE DAMIANO, minors, individually, by and through their parents and next friend,

Petitioners,

-vs-

GROVER McDANIEL, M.D., GROVER McDANIEL, M.D., P.A., and COMMUNITY BLOOD CENTERS OF SOUTH FLORIDA, INC., f/k/a BROWARD COUNTY BLOOD CENTER, INC., a Florida corp.,

Respondents,

_____/

BRIEF OF AMICUS CURIAE BY THE ACADEMY OF FLORIDA TRIAL LAWYERS

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PREFACE

This is an appeal from a Final Judgment entered by the Circuit Court. The parties will be referred to by their proper names or as they appeared below.

STATEMENT OF THE CASE AND FACTS

Amicus will rely upon Petitioners' Statement of the Case and Facts.

ARGUMENT

THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

The question certified by the Fourth District Court of Appeal should be answered in the affirmative, because a review of the statutory language and the principles governing this analysis compels the conclusion that application of this statute of repose in a manner which extinguishes the Plaintiffs' cause of action prior to its accrual is neither mandated by the statutory language, nor does it satisfy the criteria required to assure compliance with Article I, §21 of the Florida Constitution.

The relevant statutory language is contained in Fla. Stat. §95.11(4)(b) (1985):

> (b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; 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. An "action for medical malpractice" is defined as a claim in tort or in contact for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care.

It is important to note that based on the language of that statute, the only difference between the triggering act for the statute of limitations and the statute of repose is that for the former, it allows a period for discovery or "constructive" discovery (i.e. "should have been discovered with the exercise of due diligence), and that otherwise the triggering act is defined in the same terms. That is significant, because statute of limitations are considered to define when the cause of action accrues, and to set the limitations period accordingly, see UNIVERSITY OF MIAMI v. BOGOFF, 583 So.2d 1000, 1003 (Fla. 1991). Statutes of repose, on the other hand, often rely on a different act as triggering the repose period, such as the date of the act of a defendant, the sale of a product, etc., see KUSH v. LLOYD, 616 So.2d 415, 418 (Fla. 1992).

However, since statutory construction must be based on the actual language utilized by the legislature, the language of Fla. Stat. §95.11(4)(b), and not general principles, must control the analysis. Here, the triggering act is identical, i.e., "the incident giving rise to the action," and the only difference is the discovery period which is added to the statute of limitations. Therefore, the determination of the triggering act for the repose period must be based on the construction of the term "incident."

The term "incident" in Fla. Stat. §95.11(4)(b) is not defined either in statutory language, nor in the legislative history. BARRON v. SHAPIRO, 565 So.2d 1319 (Fla. 1990), addressed the issue of what was the triggering act for purposes of the statute of limitations, and this Court concluded (565 So.2d at 1322):

> The limitations period commences when the plaintiff should have known either of the injury or the negligent act.

As noted by Justice Shaw's dissent in that case, the Court's decision necessarily impacted on the analysis of the statute of repose, since it defined the same triggering act, the medical malpractice "incident."

In making the constitutional analysis it is, of course, an established principle of statutory construction that a statute must be construed in a manner that renders it constitutional, VILDEBILL v. JOHNSON, 492 So.2d 1047 (Fla. 1986). Additionally, this Court has also held that a statute of limitations is generally construed strictly and when there is a reasonable doubt as to the legislative intent, the preference is to allow the longer period of time, BASKERVILLE-DONOVAN ENGINEERS, INC. v. PENSACOLA EXECUTIVE HOUSE CONDOMINIUM ASSOC., 581 So.2d 1301, 1303 (Fla. 1991).

It is apparent that there is a reasonable doubt regarding the legislature's intention with respect to the statute of repose, since in BARRON, supra, this Court determined that the term "incident" must be construed to refer to either the negligent act or the injury. The doubt is further highlighted by the fact that the court relied upon the statute of limitations analysis adopted in NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976), which was developed when there was no specific statute of limitations for medical malpractice, see BARRON, supra, 656 So.2d at 1321. Since there is obviously a doubt as to what the legislature intended by the use of the term "incident," and this Court has

adopted an alternative definition in BARRON, the definition providing for the longer period of time must be relied upon in construing the statute of repose. That would mean using the date of the injury, in this case the manifestation of AIDS in 1990, as the triggering event for the statute of repose. Under that analysis, the summary judgment entered by the Circuit Court should be reversed.

Utilizing the analysis described above, it is not necessary for this Court to address the constitutionality of the statute. However, if it chooses to do so, it is respectfully submitted that the same result should obtain.

The applicable test in making the constitutional determination whether a statute violates the access to courts provision is that adopted by this Court in KLUGER v. WHITE, 281 So.2d 1 (Fla. 1973). That analysis assumes that the legislature intended to abolish a certain right that existed either at the common law or by statute prior to the adoption of the Florida Constitution. Once that occurs, the statute only survives constitutional scrutiny if there is an overpowering public necessity for the abolition of the right, and there is no alternative method of meeting that public necessity, KLUGER, 281 So.2d at 4. While that analysis was created in the context of the abolishment of a right, this Court applies the same test to a situation in which a statute of repose operates to extinguish a cause of action prior to its accrual, see DIAMOND v. E.R. SQUIBB & SONS, INC., 397 So.2d 671 (Fla. 1981). In that case, this Court held that a product liability statute of repose was unconstitutional as a denial of access to courts under Article

I, §21 of the Florida Constitution, because the statute barred a plaintiff's cause of action before it ever existed, 397 So.2d at 672.

In the case sub judice, it is respectfully submitted that there is serious doubt as to whether the legislature ever intended the medical malpractice statute of repose to extinguish any common law claim prior to its accrual. This concern is not simply limited to the construction of the statute, but also to the analysis of whether the criteria required under KLUGER have been met in this case. That is, the first criteria is whether there had been an overpowering public necessity for the abolishment of the right. This Court's decision in CARR v. BROWARD COUNTY, 505 So.2d 568 (Fla. 4th DCA 1987), approved, 541 So.2d 92 (Fla. 1989), relied upon the general findings of a medical malpractice crisis which provided the justification for the entire Medical Malpractice Act. There was no specific finding by the legislature, nor any explicit discussion in the legislative history, that that crisis justified the abolishment of any particular right. The primary thrust of the Act was to create a presuit screening procedure, and to encourage other means of resolution, such as arbitration and settlement. In view of the apparent uncertainty regarding what the legislature intended in the statute of repose, it is a rather attenuated conclusion to find that general legislative findings supporting the entire Act provide the requisite justification for the abolishment of a particular class of claims.

In BARRON, supra, this Court apparently found sufficient uncertainty regarding the definition of "incident" for purposes of Fla. Stat. §95.11(4)(b) to justify an alternative definition, i.e., either the negligent act or the injury. Nonetheless, in KUSH v. LLOYD,

supra, this Court held that the statute of repose ran from the date of the negligent advice, and not from the date of injury, which was the birth of the deformed child. The rationale was that the statutes of repose generally run "from the date of a discrete act on the part of the defendant," 616 So.2d at 418. However, the statute does not define the term "incident" in those terms, and in BARRON this Court held that the term meant either the negligent act or injury to the plaintiff. To hold that such an abolishment is justified because the legislature specifically determined that there was a public necessity for the elimination of a certain number of medical malpractice claims prior to their accrual, is simply not justified when the statutory language does not demonstrate that the legislature intended the negligent act to be the triggering act.

This weakness also carries over to the second factor in the KLUGER analysis, that "no alternative method of meeting such public necessity can be shown," 281 So.2d at 4. Since the legislature never defined the term "incident," and never explicitly provided that the negligent act was to be the triggering event for the statute of repose, it is not possible to reasonably conclude that the legislature specifically found that no alternative method, other than abolition of certain medical malpractice rights, was possible to deal with the alleged public crisis.

As noted by Judge Ervin in his dissent in DOE v. SHANDS TEACHING HOSPITAL AND CLINICS, INC., 614 So.2d 1170, 1177 (Fla. 1st DCA 1993), neither the Fourth District's decision in CARR, nor this Court's decision in that case, ever addressed the second aspect of the KLUGER analysis. It is respectfully submitted that

this Court cannot find, from the general preamble to the Medical Malpractice Act, a sufficient showing that there is no alternative method of meeting the public necessity created by the alleged medical malpractice crisis other than to abolish certain causes of action before they accrue. The legislative history never addressed this method of conflict reduction, nor even specified that it intended that result to occur. There is no showing in the legislative history of the frequency, size, or effect of such causes of action, and whether their abolition would have any significant effect on the alleged medical malpractice crises. It is respectfully submitted that to find that the second criteria of KLUGER has been satisfied here, based on the preamble to the Medical Malpractice Act which has no discussion of the abolition of any rights, is to essentially eliminate the second prong of the KLUGER analysis.

In closing, the words of Judge Altenbernd are appropriate to consider (PATRY v. CAPPS, 618 So.2d 261, 265 (Fla. 2d DCA 1993) (Judge Altenbernd dissenting), rev. granted, 632 So.2d 1027 (Fla. 1993)):

> If the common law system has been adding unnecessary expense to our health care system, the solution is not found in procedures which force our judiciary to appear unjust. We cannot mend our health care system by destroying our judicial system. Neither can it be fixed at the expense of such basic constitutional rights as trial by jury and access to courts.

While spoken in a different context involving the Medical Malpractice Act, those words bear consideration here. To uphold the abolition of the common law rights at issue in this case, where the statutory language does not compel that result, the legislative history

does not support it, and the requisite legislative findings are much too general to satisfy the KLUGER analysis, is to give up significant ground on the access to courts provision of the Florida Constitution. It is clear from the language of that provision and the case law previously construing it, that it is intended to create a very heavy and specific burden on the legislature to justify the abolition of pre-existing common law and statutory rights. Finding that that burden has been met in this case essentially eliminates the second prong of the KLUGER analysis, since there has never been any showing that the abolition of the rights at issue is the only method of meeting the public necessity, and that no alternative is available. If that part of the KLUGER analysis is to have any meaning, the certified question should be answered in the affirmative in this case.

CONCLUSION

For the reasons stated above, the certified question should be answered in the affirmative, and the Judgment of the Circuit Court should be reversed and the cause remanded for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to DAVID F. COONEY, ESQ., P.O. Box 14546, Ft. Lauderdale, FL 33302; SHELLEY H. LEINICKE, ESQ., P.O. Box 14460, Ft. Lauderdale, FL 33302; WILTON L. STRICKLAND, ESQ., P.O. Box 14246, Ft. Lauderdale, FL 33302; and RICHARD A. SHERMAN, ESQ., 1777 S. Andrews Ave., Ste. 302, Ft. Lauderdale, FL 33316, by mail, this 1st day of July, 1996.

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