047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,831
Florida Bar No: 184170

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 COMMUNITY BLOOD CENTER, INC., a Florida corporation,

Respondents.

original

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JUL 3 1996
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BRIEF OF PETITIONERS ON THE MERITS (ON CERTIFIED QUESTION)
ALFRED DAMIANO, as Personal Representative
of the Estate of FRANCINE DAMIANO, deceased,
ALFRED DAMIANO, individually, ANTHONY DAMIANO,
MICHELLE DAMIANO, and CHRISTINE DAMIANO, minors, individually

(With Appendix)

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POINT ON APPEAL

THE CERTIFIED QUESTION MUST BE ANSWERED IN THE AFFIRMATIVE; THE APPLICATION OF THE FOUR-YEAR STATUTE OF REPOSE VIOLATES ARTICLE I, § 21, OF THE FLORIDA CONSTITUTION IN THE PRESENT CASE, WHERE IT BARRED A MEDICAL MALPRACTICE ACTION WHEN THE ALLEGED ACT OF MALPRACTICE OCCURRED MORE THAN FOUR YEARS BEFORE THE ACTION WAS FILED, BUT THE INJURY RESULTING FROM THE ALLEGED MALPRACTICE DID NOT MANIFEST ITSELF WITHIN THE STATUTORY FOUR-YEAR PERIOD.

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INTRODUCTION

The Appellants/Petitioners, ALFRED DAMIANO, as Personal Representative of the Estate of FRANCINE DAMIANO, deceased, ALFRED DAMIANO, individually, ANTHONY DAMIANO, MICHELLE DAMIANO, and CHRISTINE DAMIANO, minors, individually, and by and through their parent and next friend, will be referred to collectively in the singular as Damiano.

The Appellees/Respondents, GROVER McDANIEL, M.D., and GROVER McDANIEL, M.D., P.A., will be referred to as Dr. McDaniel.

The Appellee/Respondent, COMMUNITY BLOOD CENTERS OF SOUTH FLORIDA, INC., f/k/a BROWARD COMMUNITY BLOOD CENTER, INC., a Florida corporation, will be referred to as Blood Bank.

The Record on Appeal will be designated by the Letter "R."

The hearing transcripts appearing at the end of the Record on Appeal will be referred to by date.

All emphasis in the Brief is that of the writer unless otherwise indicated.

STATEMENT OF THE FACTS AND CASE

This case is on a certified question, and is a case of first impression in the Florida Supreme Court; involving Mrs. Damiano, who contracted AIDS through an unnecessary blood transfusion during the delivery of her twins. Mrs. Damiano has since died and her husband is currently dying of AIDS as well. The legal issue involves the statute of repose in AIDS cases where notice of injury does not take place during the statutory period.

The question certified by the Fourth District Court of Appeal is as follows:

> IS THE MEDICAL MALPRACTICE STATUTE OF REPOSE UNCONSTITUTIONALLY APPLIED, AS A VIOLATION OF ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION, IN BARRING AN ACTION FOR MEDICAL MALPRACTICE WHERE THE INJURY, RESULTING IN AIDS, DOES NOT MANIFEST ITSELF WITHIN THE STATUTORY FOUR YEAR TERM FROM THE DATE OF THE INCIDENT RESULTING IN THE SUBSEQUENT INFECTION?
>
> Damiano v. McDaniel, 21 Fla. L. Weekly, D852 (Fla. 4th DCA, April 10, 1996).

In 1990, Mrs. Damiano was diagnosed as having AIDS and after it was established that the AIDS was transmitted through a blood transfusion she received in June 1986, she sued the physician and the Blood Bank. The transfusion was ordered by Dr. McDaniel. The Blood Bank had notice within months of the transfusion that recipients like Mrs. Damiano were exposed to AIDS, but this information was not released to anyone. Damiano filed suit in 1992 within the two-year statute of limitations. The doctor moved for Summary Judgment based on the fact that the Complaint

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was not filed within the four-year statute of repose. This Court was about to decide this exact issue in Whigham, infra, when the Whigham case was settled and voluntarily dismissed from the Supreme Court. This is the first opportunity that this Court has to rule on the precise question of whether the four-year statute of repose violates the Florida Constitution, when it bars an action or injury which will not and cannot manifest itself within the statutory four-year period.

The trial judge very reluctantly granted Summary Judgment for the doctor, after the Whigham case was settled in the Supreme Court. The judge stated that the Summary Judgment was unfair and unjust, but that the court was bound by "stare decisis," due to appellate decisions in the First and Third District Courts of Appeal. The trial judge agreed with the dissented opinions in those appellate cases, but left it to this Court to decide, as he must.

Mrs. Damiano went into the hospital to deliver her twin children, Christine and Michelle Damiano, on June 13, 1986 (R 1-40; 158-192). On June 14th, Dr. McDaniel delivered one of the twins by natural methods, but had to perform a cesarean for the delivery of the second twin (R 1-40; 158-192). On June 15, 1986 following the normal delivery of the twins, Dr. McDaniel ordered repeat blood transfusions for Mrs. Damiano, even though she was not in a life threatening situation and even know he was fully aware of the risk of HIV contaminated blood (R 140; 158-192). The blood supplied by the Blood Bank included a third unit of

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blood, which was contaminated and infected with the HIV/AIDS virus (R 1-40; 158-192).

Mrs. Damiano and her twins were discharged from the hospital and returned home. Mrs. Damiano was completely unaware of the fact that she had received contaminated blood (R 1-40; 158-192). Also, completely unknown to Mrs. Damiano, she infected and transmitted the AIDS disease to her husband, Alfred (R 1-40; 158-192).

In the meantime the Blood Bank, which did not have any "look back" procedure in effect, failed to notify the hospital; which in turn would have notified the doctor that Mrs. Damiano had received contaminated blood (R 1-40; 158-192). Apparently, the Blood Bank knew in October of 1986, shortly after Mrs. Damiano's hospitalization, that one of the units it supplied was contaminated with AIDS, but did not inform anyone (R 1-40; 158-192).

AIDS is a latent condition and its presence is only manifested after a slowly evolving process. Because of the latent characteristics of the disease, Mr. and Mrs. Damiano had absolutely no way of knowing about their being infected; and, of course, could subsequently not take any legal action to protect their legal rights (R 1-40; 158-192).

In August of 1990, Mrs. Damino discovered that she had contracted AIDS, and that the infection was due to the blood transfusion she received in the hospital in 1986 (R 1-40; 158-192). One week following her notification that she was HIV positive, her husband was also advised that he too was HIV

positive (R 1-40; 158-192).

On February 25, 1992, the Plaintiffs filed a Notice of Intent to Sue, which was served on Dr. McDaniel (R 212-236). This was followed by an Amended Notice of Intent filed on March 2, 1992 (R 212-236). Pursuant to Fla. Stat. §768.57, the statute of limitations was tolled for a period of 90 days and the Damiano Complaint was timely filed on June 26, 1992 (R 1-40; 158-192).

Dr. McDaniel moved for Summary Judgment on the basis that the statute of repose had run under the new Florida Supreme Court case Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992). With in days of McDaniel's Motion for Summary Judgment, the First District Court of Appeal decided a trio of lawsuits against Shands Hospital in Orlando, holding that even though the plaintiffs had no notice of their injury, the infection of AIDS, their complaints were barred by the statute of repose since they were filed beyond the four-year period. Whigham v. Shands Teaching Hospital & Clinics, Inc., 613 So. 2d 110 (Fla. 1st DCA 1993); Padgett v. Shands Teaching Hospital & Clinics, Inc., 616 So. 2d 467 (Fla. 3d DCA 1993); Doe v. Shands Teaching Hospital and Clinics, Inc., 614 So. 2d 1170 (Fla. 1st DCA 1993).

The Plaintiffs filed a Response to the doctor's Motion for Summary Judgment, noting that in no Florida Supreme Court case had the Court ever held that the statute of repose barred a medical malpractice action, when factually the plaintiff did not have notice of the injury (R 212; 236). Furthermore, in the Fourth District Court of Appeal, the law was that there had to be

notice of injury which was a completed fact, and in the present situation there could be no completed fact until the summer of 1990, when Mrs. Damiano first developed symptoms and was diagnosed with AIDS (R 212-236). If the court were to hold that the statute of repose barred the Damianos' Complaints against Dr. McDaniel then this would be in clear violation of the Florida Constitution, and the Supreme Court's decisions in Overland Construction Company v. Sirmons, 369 So. 2d 572 (Fla. 1979) and Diamond v. E. R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981) (R 212-236). Furthermore, the Damianos argued that there was an important distinction between delayed discovery and delayed notice of injury, asserting that the dissenting opinion of Judge Ervin in the Doe case was the correct way to view Florida law, and therefore Dr. McDaniel's Motion for Summary Judgment should be denied (R 212-236).

The hearing on the Motion for Summary Judgment was held on May 23, 1994 (H 5/23/94, 1-28). Dr. McDaniel, of course, argued that under the recent First District Court of Appeal cases, as well as the Supreme Court decision in Kush, the Damiano Complaint filed in 1992 was outside the four-year statute of repose period and therefore Dr. McDaniel was entitled to a Summary Judgment in his favor (H 5/23/94, 2-10). The Defendant noted that there was no Fourth District Court of Appeal case directly on point, but urged the court to follow the decisions out of two other district courts. By this point in time, a Third District Court of Appeal decision had been issued in Dampf v. Furst, 624 So. 2d 368 (Fla.

3d DCA 1993). Therefore, McDaniel argued that the trial court was bound to follow the decisions out of the First and Third Districts, as well as the Supreme Court's decision in Kush, supra, and enter Summary Judgment for the Defendant doctor (H 5/23/94, 2-10).

The Plaintiffs responded that there was no case out of the Fourth District, but that the Fourth District had issued a decision six months after Kush. It was clear that in this District the notice of injury must be a completed fact before the complaint could be barred, relying on Kahler v. Kent, 616 So. 2d 601 (Fla. 4th DCA 1993)(H 5/23/94, 10-12). Furthermore, none of the Supreme Court cases involve the situation in the Damiano case, where there was no notice of injury until the statute of repose period had run. Since the Supreme Court had accepted certiorari in one of the First District Court of Appeal cases, Whigham, it was clear that the Supreme Court was concerned that perhaps the statute of repose in AIDS cases required a different legal analysis (H 5/23/94, 11-17). The Plaintiffs urged that the court adopt the dissenting opinion in the Doe v. Shands case, to hold that the application of the statute of repose to bar a cause of action before it ever accrued was unconstitutional (H 5/23/94, 17).

Finally, in the AIDS situation, the court was dealing with a lawsuit that was a mix of a products liability case and a medical malpractice action. To bar the Damiano's Complaint would result in the anomalous situation that the Blood Bank could be held

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liable because there was no violation of the product liability statute of repose; but the doctor, who ordered the blood and who should have known it was not necessary, could not be sued under the malpractice statute of repose (H 5/23/94, 17-18). After further argument back and forth, the judge took the case under advisement (H 5/23/94, 18-27).

In August of 1994, the trial judge asked the parties to return to court and reargue the case again, because the judge was totally baffled by the situation (H 8/17/94, 3). Once again, the Plaintiffs asserted that since the Supreme Court had never overruled the Diamond case, under Diamond the statute of repose could not bar the Plaintiff's action (H 8/17/94, 3-6). Furthermore, in the Supreme Court cases relied on by McDaniels, again, in every single one of those cases the plaintiff was on notice of the injury long before the statute of repose period ran, a fact that this did not exist in the Damiano case (H 8/17/94, 6-9). The trial court then inquired if Mrs. Damiano, who had contracted AIDS had died, and whether this was a wrongful death action, and he was told that it was; and that Mr. Damiano had also contracted AIDS, but was still alive (H 8/17/94, 9-10).

Dr. McDaniel again argued that, even if the statute of repose barred a claim when there was absolutely no notice of any injury, the Supreme Court in Kush had put an absolute time limit beyond which malpractice actions could not be filed (H 8/17/94, 10-11). McDaniel also argued that in the Third District's decision in Dampf, the court had rejected the fact that the

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Supreme Court's decision in Diamond could be applied in a malpractice situation, and that the Supreme Court had refused to review the Third District's decision in Dampf (H 8/17/94, 11-12). Furthermore, the Whigham case, which had been proceeding in the Supreme Court, was settled and therefore there would be no decision from the Supreme Court (H 8/17/94, 11-12). Therefore, based on the four District Court cases, it does not involve a products liability situation such as Diamond and Summary Judgment had to be entered for Dr. McDaniel (H 8/17/94, 12-16).

The trial court then asked each side to research and give it a brief memo on a Utah Supreme Court case, which had held the statute of repose unconstitutional if it did not toll for minority (H 8/17/94, 16).

The Plaintiffs filed a Supplemental Memorandum of Law urging the court to adopt the rational in Lee v. Gaufin, 867 P.2d 572 (Utah 1993), and that there should be a tolling provision in the statute of repose for the unusual circumstances involving those infected with AIDS (R 256-267). Since the notice of injury to Mrs. Damiano was not a completed fact until 1990, to apply the statute of repose would be unconstitutional; and Dr. McDaniel had not shown how the elimination of all AIDS claims like the Damianos' would reduce the malpractice crisis sufficient to uphold the four-year statute of repose (R 256-267). The Damianos also asserted that the AIDS plaintiffs, as a class, were being excluded from recovery, since it was undisputed that the AIDS virus could incubate for an indeterminate period of time, as

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short as one-year and maybe even as long as 14 years; and because of the inherent latency, HIV would likely go undetected for a period of time longer than the statute of repose. Therefore, the arbitrary application of the four-year statute of repose to AIDS plaintiffs was unconstitutional (R 256-267). The Damianos discussed the fact that the Supreme Court had created this anomalous situation when an AIDS patient has a products liability lawsuit against the Blood Blank with no statute of repose, but a malpractice lawsuit against the doctor who ordered the blood unit and administrated it in spite of the danger of transmission of AIDS, but had to file this claim within the four-year statute of repose (R 256-267).

Finally, the Damianos point out that while the Supreme Court had talked about the fact that a statute of repose could cut off a cause of action before it accrued, in dicta in several cases, the Supreme Court had never actually held this in any case involving malpractice, when there was no notice of injury within the four-year repose period (R 256-267).

Dr. McDaniel replied to the Plaintiffs' Supplemental Memo arguing that the Lee case had absolutely nothing to do with the present situation since that involved minority, and in no way changed the fact that Dr. McDaniel was entitled to a Summary Judgment under the Supreme Court's decision in Kush and the District Court opinions in the four AIDS cases (R 268-275).

Reluctantly, the trial court entered an Order granting Dr. McDaniel's Motion for Summary Judgment, noting that it was unfair

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and unjust, but that the trial court was bound by the District Court opinions from the First and Third Districts (R 276-285). The statute and all the relevant case law was reviewed in the trial court's Order and it rejected the application of the Supreme Court's decision in Diamond, on the basis of the First District's decision in Whigham; which held that the AIDS situation was within the contemplation of the legislature when it passed the four-year statute of repose in the 1970's (R 276-285). The court then held that it was granting Dr. McDaniel's Motion for Summary Judgment based on the doctrine of "stare decisis," which required it to follow the appellate court decisions, since there was no decision out of the Fourth District (R 268-275).

However, the court's legal opinion was summaried as follows:

> However, this Court agrees with Judge Wolf's dissenting (sic) opinion in Whigham. Judge Wolf stated "it is difficult for me to understand how a statute which extinguishes a common law right of action prior to the accrual of such action cannot be repugnant to the right of access to courts guaranteed by article I, section 21 of the Constitution of the State of Florida." Id. at 114. In addition, this Court strongly agrees with Justice Kogan's dissenting opinion in Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992). Justice Kogan stated that it is unreasonable to suggest a person is under an obligation to discover within the time allocated under statute of repose an ailment which may not yet transpire.
>
> (R 276-285).

The Plaintiffs filed a timely Notice of Appeal, so that the appellate court would be given the opportunity to rule on the issue and to adopt the opinions of Justice Kogan, Judge Wolf,

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Judge Ervin, and the trial court, Judge Luzzo.

The Fourth District noted that the Florida Supreme Court had never ruled on whether the statute of repose would apply to a disease which usually does not manifest itself until after the statutory period, and certified this question to the Florida Supreme Court. Damiano, supra. The entire opinion is in the Appendix to this Brief.

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SUMMARY OF ARGUMENT

This case is on a certified question from the Fourth District Court of Appeal, and is a case of first impression in the Supreme Court. On June 15, 1986, Mrs. Damiano received three units of blood, one was tainted with AIDS, after she delivered twins. The transfusion was ordered by the Defendant, Doctor McDaniel. The Blood Bank had notice within months of the transfusion that Mrs. Damiano was exposed to AIDS, but the information was not released to her. In 1990, Mrs. Damiano was diagnosed with AIDS and later her husband was also diagnosed with AIDS. Mr. and Mrs. Damiano sued in June of 1992, well within the two-year statute of limitations period. Mrs. Damiano died on February 2, 1993, and the Complaint was amended to bring a wrongful death action against Dr. McDaniel.

The Plaintiffs' Complaint was not barred by the four-year statute of repose, as notice of her injury was not a completed fact until 1990. The application of the statute of repose under the facts and circumstances of this case is unconstitutional and the Summary Judgment must be reversed. Dr. McDaniel never showed any rational basis for application of the four-year statute of repose in this case and did not show how the elimination of all AIDS claims, like Mrs. Damiano's, will somehow reduce the medical malpractice crisis, medical insurance premiums, or provide better and cheaper health care in Florida today. The Motion for Summary Judgment must be reversed based on the law in this District and the Florida Supreme Court.

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In the AIDS situation, the patient has absolutely no idea whatsoever that they are infected, since the virus sometimes does not even manifest itself for over a year, and sometimes up to 14 years. Therefore in the absence of notification from the blood bank that they had been exposed to AIDS, the vast majority, if not all, of the AIDS' patients will have absolutely no notice of any injury whatsoever within the four-year statute of repose period. To completely eliminate this entire class of plaintiffs, on the alleged basis that the elimination of AIDS claims will somehow reduce medical malpractice premiums, is unconstitutional, violative of equal protection, and equal access to courts under the Florida Constitution. Overland; Diamond; supra.

The decision of the Fourth District Court of Appeal is in the Appendix to this Brief.

Additionally, it should be pointed out that the United States Ninth Circuit Court of Appeal has recently addressed this question, and ruled that the statute of limitations does not begin to run until the patient develops AIDS. New v. Armour Pharmaceutical Co., 58 F.3d 445 (9th Cir. 1995).

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ARGUMENT

THE CERTIFIED QUESTION MUST BE ANSWERED IN THE AFFIRMATIVE; THE APPLICATION OF THE FOUR-YEAR STATUTE OF REPOSE VIOLATES ARTICLE I, § 21, OF THE FLORIDA CONSTITUTION IN THE PRESENT CASE, WHERE IT BARRED A MEDICAL MALPRACTICE ACTION WHEN THE ALLEGED ACT OF MALPRACTICE OCCURRED MORE THAN FOUR YEARS BEFORE THE ACTION WAS FILED, BUT THE INJURY RESULTING FROM THE ALLEGED MALPRACTICE DID NOT MANIFEST ITSELF WITHIN THE STATUTORY FOUR-YEAR PERIOD.

This is a case of first impression and is in this Court on a certified question. On June 15, 1986, Mrs. Damiano received three units of blood, one was tainted with AIDS, after she delivered twins. The transfusion was ordered by the Defendant, Doctor McDaniel. The Blood Bank had notice within months of the transfusion that Mrs. Damiano was exposed to AIDS, but the information was not released to her. In 1990, Mrs. Damiano was diagnosed with AIDS and later her husband was also diagnosed with AIDS. Mr. and Mrs. Damiano sued in June of 1992, well within the two-year statute of limitations period. Mrs. Damiano died on February 2, 1993, and the Complaint was amended to bring a wrongful death action against Dr. McDaniel.

The Plaintiffs' Complaint was not barred by the four-year statute of repose, as notice of her injury was not a completed fact until 1990. The application of the statute of repose under the facts and circumstances of this case is unconstitutional and the Summary Judgment must be reversed. Dr. McDaniel never showed any rational basis for application of the four-year statute of repose in this case and did not show how the elimination of all

AIDS claims, like Mrs. Damiano's, will somehow reduce the medical malpractice crisis, medical insurance premiums, or provide better and cheaper health care in Florida today. The Motion for Summary Judgment must be reversed based on the law in this District and the Florida Supreme Court.

To date, there is only one Florida Supreme Court case addressing a cause of action resulting from a patient who contracted AIDS. Silva v. Southwest Florida Blood Bank, Inc., 601 So. 2d 1184 (Fla. 1992). In Silva, the Supreme Court created an anomalous situation for Floridians, as it held that blood banks were not health-care providers, and were simply suppliers of a product. Therefore the medical malpractice statute of limitations did not apply. Silva, supra. In Florida, a patient who contracts AIDS has no statute of repose problem at all in suing the blood bank itself, because the blood is treated as a product; but is faced with a four-year statute of repose for suits brought against the doctor who orders the unit of blood. §95.11(4)(b), Fla. Stat. (1975). In other words, plaintiffs have an unlimited amount of time to sue the supplier, but an extremely limited amount of time to sue the distributor of the defective product; especially considering AIDS can remain latent and symptom free up to 14 years. In fact, most plaintiffs have not been able to sue the distributor (doctor) because of the four-year statute of repose, since their AIDS was not discovered for years after the patients received the defective unit of blood. Whigham; Padgett; Doe; Dampf; supra.

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Neither the Supreme Court nor the Fourth District Court of Appeal had addressed this anomalous situation, where the medical malpractice statute of repose bars a cause of action against the Doctor, as the distributor of a unit of blood tainted by AIDS, but the supplier of the blood may be sued with no repose period whatsoever. In arguing for the Summary Judgment, Dr. McDaniel cited numerous Supreme Court cases, none of which address the AIDS situation, and none involved notice of injury to the plaintiff long after the repose period had run. University of Miami v. Bogorff, 583 So. 2d 1000 (Fla. 1991); Carr v. Broward County, 541 So. 2d 92 (Fla. 1989); Kush, supra. In other words, the Supreme Court has talked about the fact in dicta, that the statute of repose could cut off a cause of action before it accrued, but the Supreme Court has never actually held this in any case involving medical malpractice. In each of the Supreme Court cases, there was notice of injury within the four-year repose period, so that the plaintiff was at least on notice of an injury, even if the plaintiff was not on notice that the injury was caused by medical malpractice.

In the AIDS situation, the patient has absolutely no idea whatsoever that they are infected, since the virus sometimes does not even manifest itself for over a year, and sometimes up to 14 years. Therefore in the absence of notification from the blood bank that they had been exposed to AIDS, the vast majority, if not all, of the AIDS' patients will have absolutely no notice of any injury whatsoever within the four-year statute of repose

period. To completely eliminate this entire class of plaintiffs, on the alleged basis that the elimination of AIDS claims will somehow reduce medical malpractice premiums, is unconstitutional, violative of equal protection, and equal access to courts under the Florida Constitution. Overland; Diamond; supra.

The Supreme Court took certiorari in Whigham and the case was briefed and argued at oral argument, which was held on November 3, 1993; but then the parties settled and voluntarily dismissed their lawsuit on February 25, 1994. Therefore, this Court was never given the opportunity to actually rule on the precise legal question of whether the statute of repose, as applied in AIDS cases, where the AIDS' patient does not have notice of injury, violates the Florida Constitution. Obviously, this Court felt that the legal issue needed to be addressed, because the decision in Whigham specifically relied on Kush, and therefore there was no apparent conflict with the most recent Supreme Court case. Therefore, jurisdiction had to be based on the fact that the decision in Whigham conflicted with the Florida Supreme Court's decision in Diamond and Overland. Whigham, 113. Either that or jurisdiction was accepted on the basis that the Whigham case, based on a similar AIDS situation, was one involving a question of great public importance.

The Court, by accepting jurisdiction to review Whigham, indicated that this question of law regarding the application of the statute of repose in AIDS cases did involve a legal issue which the Supreme Court needed to address and resolve.

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In Overland, the Court held that **any** statute of repose which barred a right before the cause of action ripened (therefore allowing no time within which to file an action) resulted in an unconstitutional denial of access to courts. In order to completely abolish a cause of action before it even accrues, the legislature must provide a reasonable alternative in lieu of the right that is abolished, or must show some overpowering public necessity for the abolishment of the right; and that no other method of meeting the public's necessity is available. Overland, supra. In the absence of such a showing, the statute would impermissively deny access to courts in violation of the Florida Constitution. Overland, supra.

Dr. McDaniel made absolutely no showing whatsoever that the virtually total elimination of all claims for malpractice related to AIDS, will somehow reduce medical insurance premiums, or lessen any alleged medical malpractice crisis that supposedly still exists in Florida; and certainly has not shown any other reasonable alternative. It is hard to see how the legislature or the doctor can justify the complete exclusion of these AIDS cases.

We are dealing with an limited number of patients infected in the mid-1980's, prior to improved screening procedures to identify the presence of AIDS in units of blood; and prior to the adoption of "look back" procedures, whereby patients were quickly notified if, in fact, they may have received a unit of tainted blood. It is respectfully submitted that the medical malpractice

crisis of 1975 cannot provide any basis to uphold the statute of repose, to bar a cause of action resulting from a tainted blood transfusion before the cause of action even accrues.

Even if there were evidence that a vast malpractice crisis is still in existence today, it is unlikely that it would still be a legitimate basis for discriminating against a specific class of malpractice claims. To hold the statute of repose unconstitutional as to AIDS claim will not open the flood gates of malpractice litigation; where there are now better screening procedures; greater understanding and awareness of the transmission of AIDS; better awareness by the public of the possibility of contracting AIDS; and the almost routine testing for AIDS; which will limit the number of claims significantly. In fact, all of the AIDS cases that are currently begin brought, relate to transfusions which took place in the early to mid-1980's.

In order to trigger the statute of repose, there must be injury to the Plaintiff which is a completed fact; and such a completed fact does not occur in an AIDS case at the very earliest until the virus can be detected, even in the absence of overt symptoms. The Supreme Court has never addressed an AIDS case and the medical malpractice statute of repose. Unless the doctor demonstrated at least a rational basis for the legislature to believe that the medical malpractice crisis and medical insurance premiums will be reduced, if the entire class of plaintiffs affected by AIDS are excluded by the statute of

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repose, then the application of the statute was unconstitutional and does not bar the Plaintiffs' claims. Therefore, the Summary Judgment must be reversed.

The statute in question in §95.11(4), it states:

> **(4) Within two years--**
>
> (a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.
>
> (b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the actions 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.

As recently held by the Fourth District, where the defendant failed to conclusively establish when the plaintiff was on "notice of the fact of injury," it was improper to grant summary judgment. Kahler, supra. In reversing the summary judgment for the doctor, the court distinguished the case from Bogorff and Barron, infra, on the basis that a factual dispute existed "as to when the plaintiff learned of her injury." Kahler, 601. The court pointed out that in Bogorff and Barron, the defendants were able to show a clear lack of dispute as to when the plaintiffs discovered the fact of the injuries from the treatment. Kahler,

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601. In addition, in those cases the plaintiffs had attempted to show that the discovery of negligence occurred long after the discovery of the fact of injury. Kahler, 601.

In Kahler, relying on Barron, it was discovery of an injury alone that triggered the statute of limitations. Barron v. Shapiro, 565 So. 2d 1319 (Fla. 1990). Controversy, as in this case, surrounding what the Plaintiff knew and when created an issue of fact for the jury. Kahler, supra. Therefore, Dr. McDaniel abandoned his argument on the statute of limitations below and the Summary Judgment was based solely on the statute of repose.

A. No Violation of Statute of Repose.

Two of the latest Florida Supreme Court cases involving medical malpractice clearly support the legal conclusion that Mrs. Damiano's cause of action did not accrue until 1990, when she was first on notice that she had contracted AIDS. University of Miami v. Bogorff, 583 So. 2d 1000 (Fla. 1991); Carr v. Broward County, 541 So. 2d 92 (Fla. 1989)(Carr II). While the doctor relied on Bogorff in support of his Motion for Summary Judgment, a careful reading of the case clearly substantiates the fact that Mrs. Damiano's cause of action did not accrue until the last element constituting her cause of action accrued; or as some court have stated, when the incident was a "completed act." Carr I, infra.

In Bogorff, the child began treatment for leukemia in July

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of 1971 with Dr. Koch. Bogorff, 1001. In January 1972, Dr. Koch administered a final injection of methotrexate. Approximately one month later, the child's parents began noticing a marked change in the child's condition. Three months later, the child suffered a convulsion and lapsed into a coma. Bogorff, 1001. By **July 1972**, the Bogorff child was quadriplegic and severely brain damaged. Bogorff, 1001.

Suit was not filed until December 1982. In holding that the statute of limitations and statute of repose barred the Bogorff complaint, the Supreme Court held that the cause of action for the Bogorffs accrued "in July 1972." This was when the child manifested the acute and permanent symptoms of the drug poisoning and the medical malpractice. Therefore, all time periods used to calculate whether the statute of limitations and statute of repose had run, began in July 1972. It is important to note that in July 1972, the child was rendered quadriplegic and brain damaged as a result of the final injection of medication, which had occurred in January of 1972; but the pediatrician had begun treating the child in July 1971. In other words, the Bogorff cause of action did not accrue until the acute symptoms manifested themselves in July 1972. Bogorff, 1001.

In Bogorff, the Supreme Court noted that a plaintiff need only have notice of a possible invasion of their legal rights in order for their cause of action to accrue. Bogorff, 1004. Again, it is undisputed in the present case that Mrs. Damiano had no notice of any possible cause of action against Dr.

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McDaniel until 1990, when her pneumonia symptoms were diagnosed as AIDS, which was then linked to one of her transfusions in 1986.

In Bogorff, this Court pointed out that the parents were not only aware of a dramatic change in Adam's condition, but also of the possible involvement of the drug methotrexate and that such knowledge was sufficient for the accrual of their cause of action. Bogorff, 1004. Again, it is undisputed that there were no symptoms demonstrated by Mrs. Damiano until 1990. While there may be a genuine issue of material fact as to whether Mrs. Damiano knew at that time of the connection between her AIDS condition and the 1986 transfusion, it is clear that no cause of action could have accrued in this case prior to 1990, as a matter of law.

Throughout the Bogorff decision, when the Court discussed both the statute of limitations and the statute of repose, the cause of action, or the trigger date, for both the statutes was always July 1972, when the child manifested severe and permanent symptoms; not the date of the malpractice. In other words, the statute of repose was also triggered when the cause of action accrued in July 1972, when Adam Bogorff demonstrated the acute and permanent symptoms of his methotrexate poisoning. The trigger date for the statute of limitations and the statute of repose was not January 1972, when the doctor administered the final injection of the drug. Applying the facts of Bogorff to the present situation, it is clear that the trigger date for both

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the statute of limitations and the statute of repose in this case was not the date of the transfusion, June 15, 1986, but rather at the earliest 1990, when Mrs. Damiano first demonstrated symptoms of AIDS, or was on notice of the injury, and was diagnosed with AIDS.

Along the same lines, the decision of the Supreme Court in Carr II also did not support the Defendants' position that both the statute of limitations and the four year statute of repose ran in the present case. Dr. McDaniel relied on a single line of dicta taken out of context, that said that the "incident of malpractice" begins the period of repose in a malpractice case. Carr II, 94. Dr. McDaniel ignored the fact that it is not just the original act on the part of the healthcare practitioner that is the "incident of malpractice." Rather, the cause of action must be a "completed fact" in order to trigger either the statute of limitations or the statute of repose. Again, a close reading of the facts in Carr II, clearly supports the legal conclusion that the Complaint in this case had been timely filed, both as to the statute of limitations and the statute of repose.

It is important to remember that the statute in this case provides that an action for malpractice must be commenced within two years "from the time the incident giving rise to the action accrued," and no later than "four years from the date of the incident or occurrence out of which the cause of action accrued." Fla. Stat. §95.11(4)(b)(1975). If there is fraud, concealment, or intentional misrepresentation of fact, the statute of repose

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is seven years. Of course, in the present case, the blood bank concealed the fact that Mrs. Damiano was exposed to AIDS making her discovery of the malpractice impossible until she actually developed symptoms in 1990. However, that fraud did not inure to Dr. McDaniels.

The Fourth District in its decision in Carr v. Broward County, 505 So. 2d 568 (Fla. 4th DCA 1987)(Carr I), held that the cause of action in that case, or the "incident," occurred at the latest on December 20, 1975, the birth date of the child, who suffered severe and permanent brain damage on that date. Carr I, 569-670. Ten years later, the parents filed suit against the hospital and the treating physician. Carr I, 569. Since the cause of action accrued in December 1975, the two year statute of limitations was not at all relevant. Carr I, 570. Therefore, the only question in Carr I was whether the statute of repose, which barred the cause of action in four years; and seven years if there was fraud or concealment; barred the Carr's malpractice suit for the brain damage that occurred to their infant in 1975.

The court reviewed numerous prior Supreme Court decisions, including Overland, supra, which held that **any** statute of repose which barred a right before the cause of action ripened (therefore allowing no time within which to file an action) resulted in an unconstitutional denial of access to the courts. In that case, the Supreme Court noted that the failure of the legislature to either provide a reasonable alternative in lieu of the right that was abolished, or to show an overpowering public

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necessity for the abolishment of this right and that no other method of meeting that public necessity was available, impermissibly denied access to courts in violation of the Florida Constitution. Overland involved an accident where the plaintiff was injured in a building more than 12 years after its construction and therefore, his cause of action ripened after the statutory repose period had run and this was held to be an impermissible violation of the Florida Constitution. Carr I, 571.

The Fourth District then noted that, consistent with Overland, in Diamond, supra, the qualifying event was the delivery of a drug product in 1956, with no symptoms manifesting themselves until 20 years later. In that case, the mother had ingested DES, which ultimately resulted in a cancerous condition in her child when she reached her teenage years. Carr I, 572. Once again, the Supreme Court found that the statute of repose faulty for barring a right of action where the wrong was committed years before, but "was not recognizable, through no fault of (the plaintiffs), because the injury had not manifested itself." Carr I, 572; Diamond, 672.

The Fourth District pointed out that the statute of repose will not be, or is impermissibly, applied to a case of one injured by a product, where the ill effects of that injury do not manifest themselves within the statutory period. Carr I, 573. Of course, that is directly applicable to the present case, where the injury suffered by Mrs. Damiano was due to a defective unit of blood and the injuries, due to the product, did not manifest

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themselves within a four year period from the time the transfusion was given.

The Carr court held that if a plaintiff, such as the one in Diamond who ingested a defective drug, or by analogy Mrs. Damiano was given a defective unit of blood; is implanted with a seed that eventually will flower into injury, then the "incident" which commences the running of the statute of repose is the eventual manifestation of the symptoms of injury, not the implantation of the seed. Carr I, 573. This was the same rationale this Court used in Bogorff. Clearly than under these legal principles, there is no question whatsoever that Mrs. Damiano's Complaint was timely filed, within two years of the manifestation of her symptoms and any application of the statute of repose would be unconstitutional.

The Carr court, based on the legal analysis that the injury to the Carr infant was "a completed fact on or before December 20, 1975," held that the statute of repose barred the parents' complaint, which was filed 10 years later. Carr I, 574-575. While the Fourth District goes on in dicta to state that the incident of malpractice begins the period of repose, it is clear that the date used to determine the "incident" was when the injury was a "completed fact." In other words, when the baby suffered brain damage on the day of its birth, the injury to the infant was a completed fact and this was the "incident" giving rise to the beginning or triggering of the statute of repose.

The court also went on to note that there was an overriding

public interest established in order to uphold any type of statute or repose in a medical malpractice situation due to the insurance crisis which existed in **1975**. Carr I, 575. If the malpractice crisis still exists today, twenty years later, then it is unlikely that the four-year repose period has had any effect and any strong public policy for it has disappeared along with the illusory reduction in malpractice premiums.

In affirming that decision, this Court, in Carr II, accepted the Fourth District's determination that the incident in question, which triggered the statute of repose, was when the brain damage injury was a completed fact; which in that case was at the time of birth of the infant Carr. Carr II, 94. The Supreme Court went on, in a 4-3 decision, to approve, in dicta, the Fourth District's conclusion that the malpractice insurance crisis, which exited in 1975, provided an overpowering public necessity for the imposition of the statute of repose back then. Carr II, 95. On that basis, the Supreme Court held that the statute of repose was constitutional and "bars the Carrs' medical malpractice action under the circumstances of this cause." Carr II, 95.

In other words, where the incident of malpractice was a completed act on the date of the child's birth, with the baby suffering brain damage on that day, this triggered the statute of repose; which expired in December 1982, therefore barring the complaint filed in September 1985.

Applying Carr to the circumstances of this case, there is no

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question that the "incident" of malpractice did not become a completed act until 1990; when Mrs. Damiano displayed permanent and severe symptoms, was diagnosed as having AIDS, and was on "notice of an injury;" it was a completed act.

B. Section 95.11(4)(b) Unconstitutional in AIDS Cases.

Assuming arguendo that the doctor was correct that the only "incident" which could trigger the statute of repose was the June 15, 1986 transfusion date, then the application of the repose statute to the facts in the present case would be unconstitutional; as it would bar Mrs. Damiano's action before it accrued. Overland, supra, (application of the statute of repose to bar a recognized right before the cause of action ripened or symptoms manifested themselves, results in an unconstitutional denial of access to the courts); Diamond, supra, (application of statute of repose unconstitutional where it bars a cause of action before it ever accrued); Carr, supra, (statute of repose will not be applied, or is impermissibly applied, to a case of one injured by a product where ill effects of that injury do not manifest themselves within the statutory repose period); In re Estate of Smith, 640 So. 2d 1152 (Fla. 1st DCA 1994)(application statute, that imposes a repose period which bars appellant's cause of action long before it accrues, is unconstitutional).

Florida's constitutional guarantee of access to courts restrain the legislature from abolishing a pre-existing statutory or common law cause of action without providing an alternative

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form of redress. Kluger v. White, 281 So. 2d 1 (Fla. 1973). In the absence of an alternative remedy for Mrs. Damiano, and there is none, the trial court's Judgment, based on the statute of repose, was unconstitutional. No evidence at all was present by the doctor that such a result was necessary because of an "over powering public necessity:"

> ... we are dealing with a constitutional right which may not be restricted simply because the legislature deems it rational to do so. Rationality only become relevant if the legislature provides an alternative remedy or abrogates or restricts the right based on a showing of overpowering public necessity and that no alternative method of meeting that necessity exists. Her, however, the legislature had provided nothing in the way of an alternative remedy or commensurate benefit and one can only speculate, in an act of faith, that somehow the legislative scheme will benefit the tort victim. We cannot embrace such nebulous reasoning when a constitutional right is involved. Further the trial judge below did not rely on--nor have Appellees urged before this Court--that the cap is based on a legislative showing of "an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." Kluger, 281 So. 2d at 4.
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> Smith v. Department of Insurance, 507 So. 2d 1080, 1089 (Fla. 1987).

Preemption of Mrs. Damiano's claim by use of a statute which never allowed the claim to arise offends the Florida constitution. In re Smith, 1155. This is exactly what the trial judge believed the law to be, but he was bound by District Court cases to the contrary.

In Kush, supra, in a 4-3 opinion, the Court addressed a

question of great public importance as to when a cause of action for wrongful birth was extinguished by the statute of repose; where there was a negligent failure to diagnosis an inheritable genetic impairment. In Kush, the Lloyds had an a deformed son that was born in 1976. At some later point in time, genetic studies were done and the physician assured the Lloyds that any subsequent children would be free of any genetic defect. In December 1983, the Lloyds had a second son who had the same identical genetic deformities as the first child. They filed suit for wrongful birth. A species of medical malpractice, within a two-year period against all the physicians and entities involved. The doctors moved for summary judgment based on the statute of repose; claiming that the date that the Lloyds' first received their negligent advice and not the date of the birth of the second child, triggered the four-year repose period; and therefore, the Lloyds' claim was time barred. Kush, 417-418. Relying on its prior decision in Carr II, the Court held that the medical malpractice statute of repose was constitutional because, in its enactment, the legislature had met the requirements of Kluger v. White, 281 So. 2d 1 (Fla. 1973). Kush, 418-420. This Court also relied on its prior decision in Public Health Trust of Dade County v. Menendez, 584 So. 2d 567, 568 (Fla. 1991), for the principle that a statute of repose 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. Kush, 421. The Court held that

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regardless of the fact that the statute of repose eliminated a cause of action before it accrued, this was the intention of the legislature. Under the facts of the Kush case, the plaintiff's cause of action against the doctor, for negligent advice, was time barred by the statute of repose and was constitution. Kush, 421.

The common thread running through all of the cases is the discussion in Barron, supra; Bogorff, supra; Kush, supra; and Carr, supra; of the discovery of the negligence. In all these cases, where the discovery of the injury occurred long before the discovery of any negligence, the Supreme Court has uniformly held that the statute of repose barred the plaintiff's cause of action. In none of these cases was the situation like the one in Kahler and the present case; where the suit was filed within a two-year period from the notice of injury. To be a completed fact, there has to be notice of injury; and at that point, both the statute of limitations and the statute of repose begin to run. This was acknowledged even in the decision in Kush; where this Court cites from its prior decision in Carr, to find the statute of repose constitutional:

> Applying our analysis and preliminary conclusions to the facts of the present case, we briefly conclude. The injury to infant Carr was a completed fact on or before December 20, 1975....Whether the Carrs knew or should have known of the "incident" and whether the incident or its effects were fraudulently concealed, their cause of action was permanently barred in December of 1982 by the seven-year statute of repose, if that statute is validly imposed here. Unlike the products liability statute of repose,

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> (§95.031(2), under which, where fraud is involved, the period runs from "the date of the commission of the alleged fraud") the incident of malpractice begins the period of repose in a medical malpractice case despite fraudulent concealment. Whether public policy supports such a distinction is a matter for the legislature, not this court, to determine.
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> Kush, 419-420; citing, Carr II, 574-575.

Therefore, based on the facts of each case, when there is a completed fact, the statute of repose begins to run and will extend an otherwise valid cause of action to four years; or to seven years, if there is fraudulent concealment.

C. The AIDS Cases and the Dissenters.

The importance of the distinction between delayed discovery and delayed injury was raised in the dissenting opinion of Judge Ervin in Doe v. Shands, supra. Doe was one of three recent First District Court of Appeal cases involving plaintiffs who died from AIDS, as a result of blood transfusion received at Shands Hospital. Doe, supra; Padgett, supra; Whigham, supra. In this trio of cases, the First District simply held that Kush was a ruling that the knowledge of the injury or notice of the injury, and the discovery of negligence, were not factors effecting the four-year statute of repose; and that regardless of the facts of each case, four years from the date of the transfusion all cause of actions are extinguished. Whigham, supra; Padgett, supra; Doe, supra. Unlike the Fourth District Court of Appeal, the First District, and later the Third District, held that notice of

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injury is irrelevant, as are the facts of each individual case; and that Kush established a bright line test, that four years from the date of a transfusion no cause of medical malpractice can ever exist. See, Dampf, supra.

The trial judge below expressly stated in his Order that he agreed with the dissenting opinions of Justice Kogan in Kush, and Judge Wolf in Whigham, that it was unreasonable and unconstitutional for a common law right of action to be extinguished by a statute of repose prior to the accrual of that cause of action (R 276-285). Justices Kogan, Barkett, and Shaw dissented to the Supreme Court's opinion in Kush. Then Chief Justice Barkett stated:

> I disagree with the majority's conclusion, however, that the statute or repose bars the Lloyd's cause of action. I concur with Justice Kogan's cogent analysis that the statute of repose in this case did not begin to run until the day Brandon was born. Any other conclusion would violate the access-to-courts provision of the Florida Constitution by cutting off a plaintiff's right to seek legal redress **before the cause of action ever existed.** See, Carr v. Broward County, 541 So. 2d 92, 96 (Fla. 1989)(Kogan, J., dissenting); see also, Barron v. Shapiro, 565 So. 2d 1319, 1322 (Fla. 1990)(Shaw, J., dissenting). Accordingly, I dissent from Part I of the majority opinion.
> SHAW, J., concurs.
>
> Kush, 425.

Justice Kogan, began his dissenting opinion by noting that a repose period runs from whatever point in time the statute itself specifies, and not from some point arbitrally selected by a court. Kush, 425. In fact, the majority conceded as much when

it quoted the Carr decision. Kush, 425; citing, Carr, 419. Justice Kogan found that §95.11(4)(b) was not a model of clarity because it merely specified that both the statute of limitations and the statute of repose were measured "from...the incident." Therefore, the entire case, like the one in the present situation, hinged on what the meaning of the undefined term "incident" was. Kush, 426. Noting that the prior case law on the question had been muddled because they failed to adequately focus on a critical distinction in cases of this type--the distinction between delayed discovery and delayed injury. Kush, 426. Delayed discovery means that the injury already occurred but had not been discovered as exemplified in Carr I. Kush, 426. Delayed injury on the other hand meant the injury itself had not yet occurred, even though an agency had been set in motion that would cause the injury at sometime in the future. Kush, 426.

The example selected by Justice Kogan was Bogorff, where an injection resulted in an injury some six months later. Since the Bogorff case, like the Damiano case, involves a delayed injury and not delayed discovery, the majority's discussion was unpersuasive. Kush, 426. The statutory language clearly was designed to address delayed discovery and not delayed injury, since under the statute, the cause of action is barred if the discovery does not occur within four years from the incident. However, the same statutory language simply does not address the problem of "delayed injury." Kush, 426. Justice Kogan felt it was very unreasonable to suggest, as the four majority justices

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would, that a person is under an obligation to discovery what does not yet exist. Kush. 426. Justice Kogan pointed out that on this question the majority opinion cites no relevant authority, other than a single, highly unpersuasive sentence out of Bogorff, supra; Kush, 426.

The Supreme Court in Bogorff, in a single unsupported sentence, stated that the statute of repose barred the cause of action four years after the date of the injection was administered, even though no injury occurred until six months later. Kush, 426. Justice Kogan found this statement was unnecessary to decide the case, as the cause of that action was clearly barred under any construction of the statute, where the lawsuit had not been filed for more than 10 years. Kush, 426.

Justice Kogan was not convinced that the legislature intended the statute to be applied as suggested in Bogorff, which is what led to his dissenting opinion in that case. Kush, 426. He found that the word "incident" was simply to vague to say that in delayed injury cases, the legislature wanted to gauge the repose period from the date of the last medical consultation. Incident just as reasonably could mean the date the injury occurred, whether or not the injury was discovered on that date. Kush, 426. Since the law was settled that any reasonable doubt about the meaning of the statute regarding when an action may be brought has to be resolved in favor of the longer time period, Justice Kogan found the majority's opinion one-sided and the throw away statement in Bogorff very unpersuasive. Kush, 426.

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The correct thing to do, when there was two reasonable constructions to the statute, was to adopt the one which preserved the cause of action. Kush, 426.

As previously mentioned the AIDS cases would be rather limited since they would basically only involve transfusions received in the early to mid 1980's, when the screening procedures were not perfected. Along the same lines, Justice Kogan in Kush noted that the delayed injury cases (like AIDS cases) would be rather rare by their peculiar nature. Kush, 426. There is no injury relevant to a wrongful birth claim, which is what the Kush case involved, if the child was never conceived, was aborted, or miscarried. Kush, 426.

Similarly, in the AIDS situation there is no injury relevant to the transfusion, if the blood does not contain AIDS, or if the patient is immune to AIDS. It is only when the AIDS virus manifests itself through physical symptoms such as tumors or pneumonia that the injury itself occurs. Kush, 426-427. Like in many of the prior Supreme Court cases, in Kush, discovery of injury coincidently occurred at the same time, when the infant was born obviously deformed. Kush, 427. Justice Kogan then speculated as to what would happen if the child was born with a latent defect and the parents failed to discover the impairment until four years elapsed from his birth. This would result in the statute of repose extinguishing the cause of action, even though the statute of limitations would not have expired because of the discovery rule. Kush, 427. That, of course, is the exact

same situation that exists in the Damiano case.

In Whigham, Judge Wolf filed a specially concurring opinion, noting that he, like the trial judge in the present case, was compelled to concur with the summary judgment for the hospital, but it was difficult for him to understand how a statute which extinguished a common law right of action prior to the accrual of such action could not be repugnant to the right of access to the courts guaranteed by the Florida Constitution. Whigham, 114.

Of all the dissenting opinions, Judge Ervin's in Doe, supra, is the lengthiest and most comprehensive. He traces the development of the right of access to courts from the Magna Carta and the development of statutes of repose. Doe, 1173-1174. In reviewing the constitutionality of Florida statute of repose, he noted that the standard is Florida's own unique constitutional standard and interpretive case law, rather than decisions of other jurisdictions, relying on Overland, supra. Doe, 1174. The seminal decision of course is Kluger, supra, which held that an established right could not be abolished by the legislature without providing a reasonable alternative, unless the legislature can show an overpowering public necessity for the abolishment of the rights and no alternative means of meeting the public necessity. Doe, 1174-1175. In applying Kluger, Judge Ervin found that it was obvious that an action for damages allegedly caused by another's negligence is a right of redress guaranteed by Article I, §21, of the Florida Constitution. Doe, 1175. Therefore, the critical question in deciding whether the

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statute of repose abolishes this cause of action was not whether the repose statute was in existence at the time of the event that triggered the commencement of the period for filing the cause of action, but rather whether a general right of access to courts for redress of injury was available pursuant to either a statute or common law of this state, predating the adoption of the declaration of rights. Doe, 1175. If this common law right was in existence before the adoption of the Florida Constitution, the legislature is without the constitutional power to enact legislation abolishing such a right, unless the requisites of Kluger were met. Doe, 1175.

Judge Ervin also relied on the Kentucky Supreme Court decision of McCollum v. Sisters of Charity, Nazareth Health Corporation, 799 S.W. 2d 15 (Ky. 1990), which had decided that the Kentucky medical malpractice statute of repose violated the open courts provision of the Kentucky constitution," under a similar analysis used by the Supreme Court in Overland and Kluger. Doe, 1175.

Since the common law right to sue for medical malpractice existed long before the readoption of the Florida Constitution in 1968, as did the right of redress, in the form of negligence actions, the subsequent enactment of the medical malpractice statute of repose, in January of 1975, had the effect of abolishing the Doe's right of action under the circumstances because, as they allege in their complaint, the fact of injury was unknown to them until after the repose period had elapsed.

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Doe, 1176. Since the statute fails to provide the plaintiff with any alternative remedy, the first part of the Kluger test to establish unconstitutionality had been satisfied. Doe, 1176. That only left the question of whether the legislature had shown an overpowering public necessity for the application of the statute and an absence of a less onerous alternative. Doe, 1176. In order to pass constitutional muster both prongs of the latter test of Kluger must be met. Smith, supra; Psychiatric Association v. Siegel, 610 So. 2d 419 (Fla. 1992).

After examining the preamble to the Medical Malpractice Reform Act, which indicated that the legislation was necessary because of skyrocketing health malpractice liability premiums, Judge Ervin determined that the court's opinion in Carr was that the legislative findings could not support a judicial determination of overpowering public necessity; as applied to a factual situation such as those involving the AIDS cases, in which the plaintiff neither knows nor with the exercise of due diligence is able to know until after the repose period has elapsed of the existence of the injury giving rise to the cause of action. Doe, 1177. Judge Ervin then cited the portion of Carr I, where the court concluded that the Diamond decision left several questions unanswered, including whether under the fact pattern in Diamond where there was delayed injury, the legislature could ever bar the right by an appropriate showing of public necessity; and that, in Diamond, the inference could be drawn that the legislature may not validly do so. Doe, 1177. Of

course, the court's decision in Doe was affirmed by the Supreme Court on the based that the court had applied the principles of Kluger properly under the circumstances of that case. Doe, 1177-1178. Of course, the distinguishing factor was that apparently the plaintiff in Carr had knowledge within the repose period of the existence of their child's injury. Doe, 1177.

Assuming arguendo that the legislature some how could still, 20 years later, support the statute of repose with alleged skyrocketing malpractice premiums, it still did not address the second part of the Kluger requirement, that the legislature has to show that there is an absence of any less onerous alternative means of meeting the end. Doe, 1178.

The two-prong test was also imposed by the Arizona Supreme Court in Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984). Doe, 1178. The Supreme Court of Arizona decided that no compelling stated interest had been demonstrated regarding the perceived public necessity of reducing the spiraling costs of malpractice insurance; but even if it were assumed that this compelling statement of interest were present, there still was no showing that the statute could achieve the legislative goals of reducing malpractice premiums and making quality medical care available to the public at reasonable costs. Doe, 1178. No evidence was presented to support the hypothesis that the abrogation of the discovery rule was the least restrictive means available to achieve the stated goals. Doe, 1178.

In Doe, the appellants presented no evidence challenging the

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legislative findings supporting the enactment of the medical malpractice statute of repose. Doe, 1178. In contrast, the Damianos did challenge the legislative findings and discussed at length the alleged malpractice crisis based on the decision in the Utah Supreme Court case Lee v. Gaufin, supra (R 256-257). Even in the absence of such a challenge, however, Judge Ervin found that this was not fatal to the assault on the statute, because the healthcare provider had made no showing that an abolishment of a cause of action under the circumstances, in which the appellants alleged they were unaware of the existence of the child's injury until after the passage of the repose term, was the least restrictive means available to achieve the legislative goals of reducing medical costs; and the court may not presume from the enactment of a statute that no such method exists. Doe, 1179; University of Miami v. Echarte, 585 So. 2d 293 (Fla. 3d DCA 1991). In the absence of such an explicit legislative finding, the statute's constitutionality then must be measured by the Supreme Court's rule in Diamond, and under this Court's opinion in Carr I, where it was stated:

> The statute will not be applied or is impermissibly applied to the case of one injured by a product where the ill effects of that injury do not manifest themselves within the statutory period. Diamond.
>
> Carr I, 573; Doe, 1179.

Therefore, this Court's approval of the statute of repose in Carr, Borgorff, and Kush was not intended to extend beyond the facts in those cases and did not include the facts like the ones

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in the AIDS cases, where the plaintiffs were not aware of the injuries suffered until after the lapse of the statutory period. Doe, 1179.

Finally, Judge Ervin noted that the Supreme Court has never receded from its holding in Diamond and until it did, an appellate district court was without powers to overrule this controlling precedent of the Florida Supreme Court. Doe, 1179. Therefore, under Diamond, as applied to the facts alleging the inability of a plaintiff to be aware of the existence of an injury until after the expiration of the repose period, the statute was an unconstitutional denial of the parties' right of access to courts, in that: 1) no showing was established of overpowering public necessity; or that 2) the abolishment of the plaintiff's cause of action was the least onerous means of achieving the legislative goal of reducing malpractice insurance premiums. Doe, 1179.

For an interesting discussion of the developments of the alleged malpractice crisis in the United States see Lee, supra, 583-584 (the alleged malpractice crisis in the early 1970's was supported by little effort to actually investigate the empirical causes and over the ensuing years when the alleged causes of the malpractice crisis were challenged, many courts around the country found that the alleged crisis did not warrant a restriction on the rights of individuals injured by malpractice and some entire malpractice acts were held unconstitutional).

Judge Ervin, in Doe, suggested that at least the Supreme

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Court had never receded from its decision in Diamond, so the case involved a question of great public importance which he framed as follows:

> DOES THE FOUR-YEAR STATUTE OF REPOSE, PROVIDED IN §95.11(4)(b), FLORIDA STATUTES, VIOLATE ARTICLE I, §21 OF THE FLORIDA CONSTITUTION, IF IT IS APPLIED TO BAR A MEDICAL MALPRACTICE ACTION WHEN THE ALLEGED ACT OF MALPRACTICE OCCURRED MORE THAN FOUR YEARS BEFORE THE ACTION WAS FILED, BUT THE INJURY RESULTING FROM THE ALLEGED MALPRACTICE DID NOT MANIFEST ITSELF WITHIN THE STATUTORY FOUR-YEAR PERIOD?
>
> Doe, 1180.

Clearly, this Court is concerned with the blanket application of Kush, especially to AIDS cases; where it is unlikely that there would ever be any notice of injury before the statute of repose ran, having already accepted certiorari review in Whigham; which was briefed and argued before it was voluntarily dismissed. Both in Doe and Whigham, it was argued that Overland and Diamond are directly on point and prevent the unconstitutional application of the four-year statute of repose to an AIDS case. Until this Court rules on this issue and overrules its decisions in Overland, Diamond, and Carr II, notice of injury triggers the statute of repose; because that is what is necessary for the completed act of malpractice; and any application of the statute of repose is unconstitutional.

D. Products Liability Statute of Repose.

It is clearly established in Florida law that a transfusion,

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with a contaminated unit of blood, gives rise to a product's liability action against both the hospital and the physician, where the defect (AIDS) in the blood is detectable or removable by use of reasonable scientific procedures or techniques. Williamson v. Memorial Hospital of Bay County, 307 So. 2d 199 (Fla. 1st DCA 1975). Therefore, where the malpractice and negligence of the physician is related to a disease resulting from a blood transfusion, then clearly the case law involving products liability law could and should be applied as well; so that Mrs. Damiano's cause of action is not totally barred before it even accrued. This was the exact result, that the plaintiff's cause of action was not barred, in Diamond; due to the ingestion of a drug in 1956, with symptoms not manifesting themselves until 1977. Diamond, supra.

In other words, unlike the routine medical malpractice case, where the alleged negligence is some physical act resulting in brain damage to an infant at birth; or the situation where a sponge is left in the patient during an operation; the alleged act of malpractice in this case involves a contaminated blood transfusion, with no symptoms or notice of any problem whatsoever until years later. In fact, when giving a transfusion, the blood could be uncontaminated or the patient could be immune to AIDS. The present facts are much more analogous to those cases involving the ingestion of drugs; where transfusions, with long delayed manifestation of symptoms, cannot result in a "completed act" and so no cause of action accrues for many years after the

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incident of the patient receiving the drug or the transfusion. The Supreme Court's decisions in Overland and Diamond would bar dismissal of the present Complaint, as being outside any four-year repose period and this is an additional reason why the Summary Judgment should be reversed.

Along the same lines, it is submitted that it would be extremely difficult, if not impossible, for the doctor to be able to show an overriding public necessity in the enactment and application of a four-year statute of repose, to a case involving a blood transfusion and the disease AIDS. Doe, 1176-1180. In other words, in order for the doctor to overcome any constitutional impairment of Mrs. Damiano's rights, he had to show that the insurance crisis in **1975**; which was the stated "public necessity" for passing the statute of repose; somehow would be sufficient to override the current overwhelming public need for the immediate diagnosis and prevention of this century's most devastating communicable disease, AIDS! This is especially true where AIDS does not manifest itself for many years after the patient has become expose to the virus.

It is respectfully submitted that any insurance crisis, which existed nearly 20 years ago, with no empirical evidence that the statute of repose significantly reduced malpractice premiums or has led to better and cheaper health care, cannot provide the overwhelming public necessity to bar Damiano's cause of action. Doe, supra; Kluger, supra. In reality, it has been the presuit screening procedures that have reduced malpractice

claims, and insurance premiums and costs of health care are the same or higher. The overriding public necessity should be for the prevention of such a horrible fatal disease like AIDS, which has reached epidemic proportions. Whether viewed as a product liability action or malpractice action, it is clear that the four-year statute of repose simply cannot be applied in this case to bar Mrs. Damiano's cause of action prior to the time that it accrued. Diamond, supra; Carr, supra. The Summary Judgment must be reversed.

E. New Federal Appellate Case on Point.

The United States Ninth Circuit Court of Appeal has recently addressed this precise issue, in New v. Armour Pharmaceutical Co., 58 F.3d 445 (9th Cir. 1995). The court held that the statute of limitations does not begin to run until the patient develops AIDS, and not HIV positive. In New, the court found that the clock does not start ticking to bring suit until the plaintiff has a "true cause of action, by which we mean that events have developed to a point where plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages," for being HIV positive with no symptoms of AIDS. New, 448-451; quoting, Davies v. Krasna, 535 P.2d 1161 (Cal.App. 1975).

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CONCLUSION

The application of the statute of repose in this case was blatantly unconstitutional and the Summary Judgment must be reversed. The certified question must be answered in the affirmative.

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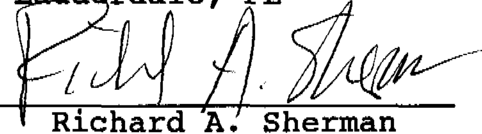

By: Richard A. Sherman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of July, 1996 to:

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Appendix

support a guilty verdict on either theory, we reverse. *See Meeks v. State*, 667 So. 2d 1002 (Fla. 3d DCA 1996). *See also Tape v. State*, 661 So. 2d 1287 (Fla. 4th DCA 1995); *Harris v. State*, 658 So. 2d 1226 (Fla. 4th DCA 1995); *Lamb v. State*, 21 Fla. L. Weekly D515 (Fla. 2d DCA Feb. 21, 1996).

The state contends that this court has authority to reduce each of the three attempted first degree murder convictions to the lesser included offense of attempted second degree murder, citing to *Alfonso v. State*, 661 So. 2d 308 (Fla. 3d DCA 1995), *review granted*, No. 86,739 (Fla. Jan 30, 1996). In *Alfonso*, the trial court was ordered to discharge the defendant as to his conviction of attempted felony murder. The third district rejected the state's contention that either the trial court or the appellate court had the authority to reduce a conviction for a non-existent crime to a lesser included offense. However, the third district certified the question. *Id. See also Lee v. State*, 664 So. 2d 330 (Fla. 3d DCA 1995).

In *Thompson v. State*, 667 So. 2d 470 (Fla. 3d DCA 1996), the third district distinguished *Alfonso* in that charges of attempted premeditated murder were not viable. In *Thompson*, however, as in the subsequent *Meeks* case and as in this case, the defendant was charged in the alternative with both attempted premeditated and attempted felony murder. The *Thompson* court saw "no impediment to reversing and remanding for a new trial on the charge of attempted premeditated murder where the facts of the case could support a guilty verdict on that charge." *Id.* at 471.

Accordingly, we reverse appellant's convictions for attempted first-degree murder (Counts II-IV) and remand for a new trial only on charges of attempted first degree premeditated murder. (KLEIN and GROSS, JJ., concur.)

* * *

STATE v. HAYWOOD. 4th District. #95-2412. April 10, 1996. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County. AFFIRMED on the authority of *Scates v. State*, 603 So. 2d 504 (Fla. 1992), and *Fox v. State*, 608 So. 2d 810 (Fla. 1992).

PHILLIPS v. STATE. 4th District. #96-0615. April 10, 1996. Appeal of order denying rule 3.800(a) motion from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. AFFIRMED. *See Washington v. State*, 662 So. 2d 1027 (Fla. 5th DCA 1995); *Reynolds v. State*, 590 So. 2d 1043, 1044 (Fla. 1st DCA 1991).

* * *

Wrongful death—Medical malpractice—Limitation of actions—Death resulting from AIDS after decedent received HIV-infected blood transfusion—Suit against physician alleging medical malpractice incident to ordering transfusion was barred regardless of when infection was discovered because plaintiff did not commence suit until more than four years after the transfusion—Question certified: Is the medical malpractice statute of repose unconstitutionally applied, as a violation of article I, section 21 of Florida Constitution, in barring an action for medical malpractice where the injury, resulting in AIDS, does not manifest itself within the statutory four year term from the date of the incident resulting in subsequent infection?

ALFRED DAMIANO as Personal Representative of the Estate of FRANCINE DAMIANO, deceased; ALFRED DAMIANO, individually; ANTHONY DAMIANO, MICHELE DAMIANO, and CHRISTINE DAMIANO, minors, individually, by and through their parent and next friend, Appellants, v. GROVER McDANIEL, M.D.; GROVER McDANIEL, M.D., P.A.; and COMMUNITY BLOOD CENTERS OF SOUTH FLORIDA, INC., f/k/a BROWARD COMMUNITY BLOOD CENTER, INC., a Florida corporation, jointly and severally, Appellees. 4th District. Case No. 95-0068. Opinion filed April 10, 1996. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John T. Luzzo, Judge. L.T. Case No. 92-17513 07. Counsel: Richard A. Sherman and Rosemary B. Wilder of Richard A. Sherman, P.A., and Wilton L. Strickland of Strickland & Seidule, P.A., Fort Lauderdale, for appellants. Shelley H. Leinicke of Wicker, Smith, Tutan, O'Hara, McCoy, Graham, Lane & Ford, P.A., Fort Lauderdale, for appellees.

(STONE, J.) We affirm the final order granting summary judgment in favor of Appellees on the authority of *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992), *Carr v. Broward County*, 505 So. 2d 568 (Fla. 4th DCA 1987), *approved*, 541 So. 2d 92 (Fla. 1989), *University of Miami v. Bogorff*, 583 So. 2d 1000 (Fla. 1991), *Dampf v. Furst*, 624 So. 2d 368 (Fla. 3d DCA 1993), *rev. denied*, 634 So. 2d 623 (Fla. 1994), *Padgett v. Shands Teaching Hospital and Clinics, Inc.*, 616 So. 2d 467 (Fla. 1st DCA 1993), *Doe v. Shands Teaching Hospital*, 614 So. 2d 1170 (Fla. 1st DCA), *rev. denied*, 626 So. 2d 204 (Fla. 1993), and *Whigham v. Shands Teaching Hospital and Clinics, Inc.*, 613 So. 2d 110 (Fla. 1st DCA 1993), *rev. dismissed*, 634 So. 2d 629 (Fla. 1994).

Section 95.11(4)(b), Florida Statutes, provides, in relevant part, that a medical malpractice action "in no event shall . . . be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued."[1] In the instant case, Francine Damiano, now deceased, received an HIV- infected blood transfusion in June 1986 and tested positive for HIV in April 1990. She sued the appellee/doctor alleging medical malpractice incident to ordering the transfusion.

Applying section 95.11(4)(b), as interpreted by the above cited authority, in order to preserve Appellants' cause of action, suit was required to be commenced by June 1990, regardless of when Appellants, in fact, discovered that Mrs. Damiano had AIDS. We note that Appellants assert that Mrs. Damiano did not discover that she had AIDS until August 1990 although the record reflects that she consulted with her doctor and an infectious disease specialist concerning her HIV positive test results in April and May 1990. At that time, the doctors determined that a likely source of infection was the blood transfusion. The question of the date of discovery was not addressed by the trial court and disputed issues of fact may remain as to that issue. However, because we conclude that the suit had to be filed, in any event, by June 1990, we need not address any dispute over the date of discovery. As the record on appeal indicates that a notice of intent to sue was not filed until February 25, 1992, and suit was not commenced until June 26, 1992, Appellants' cause of action was barred by the statute of repose.

Notwithstanding the foregoing, we recognize that allowing the harsh repose deadline to bar a suit otherwise filed within the limitations period (which runs from the date that the incident giving rise to the injury was or should have been discovered) may be viewed as uniquely unfair in the context of a disease that often does not reveal itself until well after the repose period will have expired. We note that the supreme court has never directly addressed the application of this statute of repose to a disease that ordinarily does not manifest itself until after the statute runs, thereby raising substantial constitutional questions by depriving a large class of persons of access to the courts. Therefore, we certify the following question to the supreme court:

> IS THE MEDICAL MALPRACTICE STATUTE OF REPOSE UNCONSTITUTIONALLY APPLIED, AS A VIOLATION OF ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION, IN BARRING AN ACTION FOR MEDICAL MALPRACTICE WHERE THE INJURY, RESULTING IN AIDS, DOES NOT MANIFEST ITSELF WITHIN THE STATUTORY FOUR YEAR TERM FROM THE DATE OF THE INCIDENT RESULTING IN THE SUBSEQUENT INFECTION?

(POLEN and PARIENTE, JJ., concur.)

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[1]Because Appellants made no allegations of fraud, concealment, or intentional misrepresentation, the extension of time applicable to such claims under section 95.11(4)(b) cannot apply.

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Torts—Premises liability—Fall from bicycle after it struck pieces of concrete in defendants' parking lot—Error to grant summary judgment for defendants where evidence of crushed and strewn about portions of concrete from an eroding bumper stop would support conclusion that defendants had constructive notice of condition of parking lot—Reversed and remanded for trial on the merits

SUZANNE JOHNSON, n/k/a SUZANNE CROUCH, Appellant, v.