A32743-7/SHL/vsc/250655

IN THE SUPREME COURT OF FLORIDA
CASE NO. 87,831
4TH DCA CASE NO. 96-0068

ALFRED DAMIANO as Personal Representative of the Estate of FRANCINE DAMIANO, deceased, ALFRED DAMIANO, individually, ANTHONY DAMIANO, MICHELLE DAMIANO, and CHRISTINE DAMIANO, minors, individually, by and through their parent 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, jointly and severally,

Respondents.
_____/

BRIEF OF RESPONDENTS, GROVER MCDANIEL, M.D., AND GROVER MCDANIEL, M.D., P.A.

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STATEMENT OF THE CASE AND FACTS*

This is an appeal from a question certified by the Fourth District Court of Appeal which inquires:

> 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?

This appeal arises from a summary final judgment which was entered on uncontested evidence that the statute of repose expired several years prior to the filing of a complaint for medical malpractice.

In June, 1986, Francine Damiano was hospitalized to give birth to twins. (R. 1-40) As a result of blood loss during delivery, Dr. McDaniel ordered a transfusion of three units of blood. (R. 1-40) While Damiano's brief and complaint asserts that the transfusion was unnecessary, there is no record discovery to support this contention. It is alleged that Damiano developed HIV/AIDS from

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* The symbol "R" refers to the Index to the Record on Appeal.

The symbol "S.R." refers to the Supplement to the Record on Appeal.

The symbol "T" refers to the hearings included at the end of the initial Index to the Record. These transcripts will be identified by date.

The Petitioners will be collectively referred to, where applicable, as "Damiano." These Respondents will be jointly referenced as "Dr. McDaniel."

the third unit of blood. (R. 1-40) There is no assertion that this blood was improperly tested for HIV by the BCBC or that it was known to be infected at the time Dr. McDaniel ordered the transfusion. At the time of the transfusion, Damiano knew that the HIV/AIDS could be transmitted in a blood transfusions yet she consented to this transfusion without inquiring about the risk of contaminated blood. (S.R. 131)

Mrs. Damiano learned that she was HIV positive in April, 1990. (S.R. 24-25) (T. 5-23-94, p. 21-22) Mrs. Damiano and her physician, Dr. Hunter, concluded in April, 1990, that she contracted the HIV virus from the 1986 blood transfusion. (S.R. 27-31)

Q. Okay. In April of 1990, you were diagnosed as being HIV positive--
A. Yes, sir.

Q. --is that correct?
A. Yes.
Q. Okay. Now in April of 1990, did you know of any other means, other than the blood transfusion, which would have made you become HIV positive?
A. No, uh-huh. No. (S.R. 28)

* * *

Q. Okay. In any event, are we to understand that in April of 1990 then you were diagnosed had been established as being HIV positive?
A. Uh-huh.
Q. And your husband's had also been established.
A. Yes, sir. (S.R. 30)

* * *

Q. Okay. So the conclusion that you reached in 1990 was that if he were positive by virtue of the testing done on him--
A. Uh-huh.
Q. --the most likely explanation was that he had received the infection from you; is that correct?
A. That's correct.
Q. And in April of 1990 your thought process was that the only explanation for how you could have become infected was from the blood transfusions that you received in Broward General Hospital in June of 1986; is that correct?
A. We thought about it, yes. (S.R. 31)

Mrs. Damiano was immediately referred to an infectious disease specialist, Dr. Gomez. (S.R. 32)

One week following Mrs. Damiano's diagnosis, her husband also tested positive for the HIV virus. (S.R. 29). In May, 1990, Mrs. Damiano and Dr. Gomez reconfirmed the conclusion that the source of the infection was the 1986 blood transfusion. (S.R. 36)

Q. So, again with Dr. Gomez in May of 1990, in terms of your answers to his questions, the only likely source of infection that the two of you could come up with would have been the blood transfusions that you received in June of 1986?
A. That's correct. (S.R. 36)

Dr. Gomez prescribed AZT treatment for Mrs. Damiano in May, 1990. (S.R. 33)

A notice of intent to sue was served February 25, 1992. The instant action was originally filed on June 27, 1992. (R. 1-40) Both events occurred more than four years from the date of the 1986 blood transfusion.

Damiano's complaint alleges only a claim of simple negligence against Dr. McDaniel for ordering a blood transfusion. (R. 1-40) Damiano does not allege

that Dr. McDaniel committed any fraud, concealment, or intentional misrepresentation regarding the wholesomeness of the blood which was supplied during the transfusion. Indeed, the unit of blood would not have been released for transfusion if the HIV testing done after donation proved to be positive for HIV. Petitioner does not allege that the HIV test result was improperly performed by the blood bank. Instead, the complaint alleges that the Blood Center[1] had a non-existent and/or ineffective "lookback" procedure and, as a result, the Blood Center failed to notify either the hospital and/or the doctor when it was discovered that this blood was contaminated.[2] Allegations are also made that the Blood Center negligently and/or intentionally concealed from Mrs. Damiano that she had received contaminated blood because of the poor "lookback" procedures. (R. 59-96) There

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[1]Community Blood Centers of South Florida, Inc., f/k/a Broward Community Blood Center, Inc., provided the blood which was transfused. The Blood Center remains as a defendant in the lawsuit. Broward General Hospital, where Mrs. Damiano was hospitalized, has never been joined as a defendant. The American Association of Blood Banks was recently added as a Defendant by order of the trial court dated June 6, 1996.

[2]The term "lookback" refers to the procedure that a blood bank should follow when a donor tests positive for HIV/AIDS when presenting for a repeat donation. The blood bank was duty bound to initiate a "lookback" when a donor tested positive for HIV on a subsequent donation by notifying the hospital where the blood was consigned in an effort to contact the blood recipient for the purpose of advising the recipient to be tested for HIV. *Estate of Blaine E. Hoyle v. American Red Cross*, 149 F.R.D. 215, 217, fn. 2 (Utah 1993). This does not mean that the HIV testing (which was state-of-the-art in 1986) was improperly performed on the blood that was initially donated and which was received by Damiano. It means that in all likelihood the donor had not formed enough antibodies to the presence of HIV to test positive on the ELISA assay (seroconvert from negative to positive). The implicated donor was in the "window period" of time for the transition of seroconversion to occur and sometime thereafter the donor became positive.

are no allegations that Dr. McDaniel had any involvement and/or awareness of the lookback results. Indeed, the parties agree that Dr. McDaniel had no knowledge of the blood's contamination prior to suit.

For convenience, the time of the relevant events is summarized:

DATE	EVENT
6/15/86	Blood transfusion. Damiano consented to a transfusion with the knowledge that the HIV virus and/or AIDS can be transmitted. (S.R. 132)
4/90	The Damianos learn that they are both HIV positive and the virus was contracted from the 1986 blood transfusion. (S.R. 24-25, 27-29, 31, 36)
5/90	Mrs. Damiano begins treatment with AZT. (S.R. 33)
6/15/90	Statute of repose expires.
2/25/92	Notice of Intent to Sue is served.
6/27/92	Suit is filed. (R. 1-40)

Dr. McDaniel originally moved to dismiss the complaint. (R. 41-43) The motion alleged that this lawsuit was barred by the statute of repose because it was filed more than four years after the date of the incident out of which the cause of action arose. The motion also asserted that the seven-year repose provisions were inapplicable because of the absence of any fraudulent concealment by Dr. McDaniel, and, further, that actions by the Blood Center could not affect the statute of repose as to Dr. McDaniel. The trial court granted this motion to dismiss and entered an order which stated that "the allegations of concealment which would extend the statute of limitations in this case relate only to defendant Community Blood Centers of South Florida, Inc. There is no allegation that any knowledge

came to the attention of these defendants [Dr. McDaniel or his P.A.] or their employees or their agents which these defendants concealed either negligently or intentionally." (R. 57-58)

Damiano filed an amended complaint which made no substantive changes as to Dr. McDaniel. (R. 59-96) (The only amendments to the complaint related to claims of concealment by the Blood Center.) After relevant discovery was completed, Dr. McDaniel moved for summary final judgment based on the statute of repose. (R. 97-101)

Numerous memoranda and supplements to the motion were filed and the trial court entertained extensive argument on multiple occasions. (R. 104-108, 147-152, 193-198, 207-210, 268-275) The trial court found that under settled law this claim is time barred and granted summary final judgment in favor of Dr. McDaniel. (R. 276-285) Damiano appealed to the Fourth District Court of Appeal, which agreed that settled law establishes that this claim is barred by the statute of repose. This appeal stems from a certified question contained within the district court's opinion.

ISSUE

THE CERTIFIED QUESTION MUST BE ANSWERED IN THE NEGATIVE: THE APPLICATION OF THE FOUR-YEAR MEDICAL MALPRACTICE STATUTE OF REPOSE COMPLIES WITH ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION AND MAY VALIDLY BAR A MEDICAL MALPRACTICE ACTION WHERE THE ALLEGED ACT OF MALPRACTICE OCCURS MORE THAN FOUR YEARS BEFORE SUIT IS FILED REGARDLESS OF WHETHER THE INJURY IS MANIFESTED WITHIN THE STATUTORY FOUR-YEAR PERIOD.

ARGUMENT SUMMARY

The certified question should be answered in the negative. The application of the statute of repose may constitutionally bar an action for medical malpractice where there is no outward manifestation of injury within four years of the date of the alleged negligent treatment.

Four factually identical cases have determined the precise legal issue raised in this case. Each decision has held that a claim of medical malpractice filed more than four years after receipt of tainted blood is constitutionally barred by the statute of repose even where the infection cannot be discovered earlier. These cases are in complete accord with numerous decisions of the Florida Supreme Court that hold that the statute of repose may constitutionally bar any medical malpractice claim even where the alleged negligent act could not reasonably been discovered within that period of time. Those decisions apply here, especially in light of the unrefuted evidence that the Damianos discovered the HIV infection before the repose period expired. Damiano's position is groundless and is based solely upon dissenting opinions and/or irrelevant product liability case law.

ARGUMENT

THE CERTIFIED QUESTION MUST BE ANSWERED IN THE NEGATIVE: THE APPLICATION OF THE FOUR-YEAR MEDICAL MALPRACTICE STATUTE OF REPOSE COMPLIES WITH ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION AND MAY VALIDLY BAR A MEDICAL MALPRACTICE ACTION WHERE THE ALLEGED ACT OF MALPRACTICE OCCURS MORE THAN FOUR YEARS BEFORE SUIT IS FILED REGARDLESS OF WHETHER THE INJURY IS MANIFESTED WITHIN THE STATUTORY FOUR-YEAR PERIOD.

Damiano's blood transfusion occurred in 1986. No activity whatsoever was taken to pursue a claim until six years later, which was at least two years after the 1990 expiration of the statute of repose.[3]

An unbroken line of cases supports the ruling that Damiano's claim is barred by the statute of repose.[4] The physician's order for a blood transfusion and

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[3]The applicable statute of limitations and statute of repose in medical malpractice actions are contained in Section 95.11(4), Florida Statute, which provides, in pertinent part,

> (b) An action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued. . ..

[4]The distinction between a statute of limitations and a statute of repose was succinctly explained by this Court in the case of *University of Miami v. Bogorff*, 583 So.2d 1000, 1003 (Fla. 1991): "In contrast to a statute of limitation, a statute of repose precludes a right of action after a specified time which is measured from the incident of malpractice. . . rather than establishing a time period within which the action must be brought measured from the point in time when the cause of

the receipt of the contaminated blood is the incident of alleged malpractice. This Court has repeatedly stated that these actions constitute the "incident" which begins the repose period. *Carr v. Broward County*, 541 So.2d 93 (Fla. 1989) ("the incident of malpractice begins the period of repose in a malpractice case"); *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991) ("in contrast to a statute of limitation, a statute of repose precludes a right of action after a specified time which is measured from the incident of malpractice"); *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992) ("a statute of repose, which is usually longer in length [than a statute of limitation], runs from the date of a discreet act on the part of the defendant without regard to when the cause of action occurred."); *Harriman v. Nemeth*, 616 So.2d 433 (Fla. 1993) (same).

The statute of repose has been applied in several factually identical cases involving transmittal of the HIV virus in a blood transfusion. In each instance, the appellate court held that the statute of repose applies despite the fact that the plaintiff may not have known of the injury until after the expiration of the repose period. *Whigham v. Shands Teaching Hosp.*, 613 So.2d 110 (Fla. 1st DCA 1993) ("Florida's statute of repose, applicable here, was 'triggered' by the incident occurring in 1983, that incident being Whigham's receipt of AIDS tainted blood. Knowledge of the injury or negligence is not a factor affecting the running of the four-year period of repose."); *Padgett v. Shands Teaching Hosp.*, 616 So.2d 467

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action accrued."

(Fla. 1st DCA 1993) ("appellant's action is based upon the hospital's provision of a blood transfusion which resulted in the deceased contracting AIDS which was traced to the presence of HIV virus in that transfusion. Appellant argues that the statutory period did not run until such time as she should have known of the injury or, in the alternative, that the statute resulted in an unconstitutional denial of access to the courts. Both of these arguments were rejected [by the Florida Supreme Court]. We therefore affirm the dismissal."); *Doe v. Shands Teaching Hosp.*, 614 So.2d 1170 (Fla. 1st DCA 1993); *Dampf v. Furst*, 624 So.2d 368 (Fla. 3d DCA 1993), *rev. denied* 634 So.2d 623 (Fla. 1994).

The constitutionality of the statute of repose in the precise situation presented by the instant case has been discussed in detail in the case of *Whigham, supra*[5]. As the *Whigham* court explained, this Court has repeatedly upheld the constitutionality of the four-year statute of repose even where there is no knowledge of either injury or negligence within that time period. The *Whigham* court noted that in the case of *Kush v. Lloyd, supra*, this Court stated that knowledge of either the injury or the allegedly negligent act does not affect the running of the four-year period of repose. This decision repeats numerous other rulings by this Court that

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[5]Damiano engages in pure conjecture when speculating about the reason this Court accepted the *Whigham* case for review. Research does not disclose any indication that this Court suddenly intended to reverse a long and unbroken line of case law upholding the constitutionality and applicability of the medical malpractice statute of repose (especially where many of these cases had specifically refused to apply the product liability repose provision to health care providers) in favor of following a product liability analysis.

"the statutory repose period for medical malpractice actions does not violate the constitutional mandate of access to the courts, even when applied to a cause of action which did not accrue until after the period had expired." *Bogorff*, *supra* at 1004. Even before ruling in *Bogorff*, this Court disapproved of a district court's decision[6] which had held that the statute of repose could not bar a medical negligence action where the record "did not conclusively show that the alleged medical malpractice was or should have been discovered within four years of its commission." *Carr*, *supra* at 94. The *Carr* court specifically addressed and affirmed the constitutionality of the medical negligence statute of repose even where the injury could not be discovered within the repose period.

In *Kush*, *supra*, the court again considered the relationship between the statute of limitations and a statute of repose. The court noted that:

> a statute of limitations begins to run upon the accrual of a cause of action accept where there are provisions which defer the running of the statute in cases of fraud or where the cause of action cannot be reasonably be discovered. On the other hand, a statute of repose, which is usually longer in length, runs from the date of a discreet act on the part of the defendant without regard to when the cause of action accrued.

Id. at 418.

The Court noted that a statute of repose may permissibly eliminate a cause of action before it even accrues. The Court explained that "a medical malpractice

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[6]*Phelan v. Hanft*, 471 So.2d 648 (Fla. 3d DCA 1985).

statute of repose represents a legislative determination that there must be an outer limit beyond which medical malpractice suits may not be instituted. In creating a statute of repose which was longer that the two-year statute of limitations, the legislature attempted to balance the rights of injured persons against the exposure of health care providers to liability for endless periods of time." *Kush, supra* at 421-422. This same holding was again reiterated in the case of *Public Health Trust v. Menendez,* 584 So.2d 567, 568 (Fla. 1991) in which the Florida Supreme Court stated that the repose period 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." Most recently, this Court declined to review the same ruling announced in the factually identical case of *Dampf v. Furst*, 624 So.2d 368 (Fla. 3d DCA 1994), *rev. denied*, 634 So.2d 623 (Fla. 1994) (where blood transfusion occurs in 1984, suit filed within two years of the 1990 discovery of HIV virus is barred by the statute of repose).

Florida Statutes Section 95.11(4) permits no exception to the running of the repose. The Florida Supreme Court has repeatedly stated that this statute is constitutional and that "this Court is not authorized to second guess the legislature's judgment." *Kush*, *supra* at 422; *Carr, Bogorff, supra.*

Despite Damiano's representation, this is not a case of first impression by this Court, although admittedly, this Court has not ruled on a case where a claim of HIV infection from a blood transfusion has been time-barred. However, this Court has considered and acknowledged the constitutional application of the statute

of repose in a variety of medical negligence actions where the manifestation of the injury does not occur before expiration of the statute of repose and this Court has repeatedly reiterated that the incident of treatment is the repose trigger.

The product liability cases cited as primary support for Damiano's assertions are all inapplicable, readily distinguishable, and irrelevant to a claim of alleged medical negligence. *Silva v. Southwest Florida Blood Bank*, 601 So.2d 1184 (Fla. 1992); *Doe, supra*. It cannot be overlooked that the Florida legislature itself has separated the product liability and medical negligence statutes of repose and has independently addressed these different repose provisions. Fla. Stat. §95.11(3)(c); 95.11(4)(b); *Doe, supra*. This Court has also acknowledged the distinction between the product liability and medical negligence repose provisions. *Bogorff, supra at* 1004-1005. Even before the *Bogorff* case, this court specifically recognized the dissimilarities between the product liability and medical malpractice repose provisions. *Carr, supra* at 375. Further, the case law holds that a physician is not liable merely because the blood which is ordered is contaminated. *Whitlock v. Drazinick*, 622 So.2d 142 (Fla. 5th DCA 1993). It should also be noted that the case of *Diamond v. E.R. Squibb & Sons, Inc.*, 357 So.2d 671 (Fla. 1981) (involving damages following ingestion of DES) did not include any claims against the prevailing doctors, but rather was solely limited to a product liability claim. The case therefore has no precedential value in the instant case. The case of *Overland Constr. Co. v. Simmons*, 369 So.2d 572 (Fla. 1979) is equally distinguishable because it addressed repose provisions in claims arising out of

improvements to realty. The policies and considerations involved in establishing time bars for claims stemming from a commercial manufacturing process or development of real estate have no bearing in a medical negligence claim. *See: also, Walls v. Armour Pharmaceutical Co.*, 832 F. Supp. 1467, *aff'd.* 53 F.3d 1184 (M.D. Fla. 1993).

Damiano repeatedly argues, with absolutely no citation to authority, that Dr. McDaniel has the burden to show a rational basis for application of the statute of repose in this case. Damiano's assertion is simply meritless. Not only have factually indistinguishable cases upheld the constitutionality of the statute of repose, this Court has repeatedly found that the statute of repose is constitutional in a variety of factually similar situations. *Whigham; Padgett; Doe; Dampf; Bogorff; Kush; Carr; Menendez, supra.* Further, Damiano fails to address those decisions which specifically acknowledge the continuation of a medical malpractice crisis in Florida and the necessity for strict application of the statute of repose.[7] *McGibony v. Florida Birth-Related Compensation Plan*, 564 So.2d 177 (Fla. 1st DCA 1990); *University of Miami v. Escharte*, 618 So.2d 189 (Fla. 1993).[8] Further, as the

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[7]The Florida Legislature obviously agrees that the medical crisis is ongoing by its complete absence of change to the statute of repose. If the Legislature disagreed with this court's many decisions, by now it would have repealed or amended the medical malpractice statute of repose, just as it did when it disagreed with decisions regarding the product liability statute of repose. *See, for example, Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1976); Fla. Stat. §95.031.

[8]It should be noted that, as was the case in the district court, Damiano cites only to the Third District Court's opinion in *Escharte* which this Court overruled.

person who seeks to avoid the statute of repose, it is Damiano who bears the burden of proof. *Landers v. Milton*, 370 So.2d 368 (Fla. 1979). Damiano also suggests, with absolutely no support from the record or elsewhere, that AIDS cases are not likely to flood the courts and should be exempt from these considerations. Damiano is simply wrong in stating that litigation relating to AIDS and/or other blood transfusion -- related diseases is limited to the mid-1980s. The unsafe aspects of blood, whether HIV, hepatitis, or other transmissible diseases, simply cannot eliminated. One can never fully eliminate the "window" between the date of infection with HIV and the date the infection become detectible. HIV/AIDS tests are sensitive to antibodies in the blood (which are developed through a process known as "seroconversion"). Development of these antibodies takes a minimum of 90 to 180 days to occur. One cannot eradicate or eliminate the possibility of a donation prior to the time an infection is discoverable (and, hence, there is a need for adequate lookback procedures in the event of a re-donation of blood by a previously "clean" donor whose blood passed all tests).

Separate and distinct from the health care crisis considerations that support the public policy behind the instant statute of repose, the public's need for an adequate and readily available blood supply mandates the application of a statute of repose in a claim such as this. To carve the special exception urged by Damiano would drastically affect the available blood supply which is a vital part of health care. Blood is a non substitutable, unique living tissue, which is an essential aspect of much medical treatment. The Florida Blood Transfusion Act sets forth Florida's

policy of encouraging the "maintenance of an adequate supply of voluntary donated blood of the highest quality assessable to all in need of blood." Florida Stat. §381.698. At the time of Damiano's transfusion and today, blood banks are unable to ensure, through the exercise of reasonable care, that the blood supply is 100% free from HIV. Despite this risk, blood is needed to save patients' lives because there is no known substitute. This public policy of setting narrow parameters relating to the donation and/or transfusion of blood is set forth by the Legislature in both the Florida Blood Transfusion Act, Florida Statute §381.698, as well as in the Blood Shield Act, Florida Statute §672.316. (The provision of blood is a service, not a sale.) This Court has noted that the Blood Shield Act was enacted "for the purpose of eliminating strict liability against blood banks." *Silva v. Southwest Florida Blood Bank*, 601 So.2d 1184, 1188 (Fla. 1992); *See: also, Rostocki v. Southwest Florida Blood Bank*, 276 So.2d 475, 476 (Fla. 1973) ("in most jurisdictions . . . the handling of blood is a service not subject to strict liability as opposed to a sale."); *Edward Chadbourne, Inc. v. Vaughn*, 491 So.2d 551, 553 (Fla. 1986) (a liability claim relating to provision of a service rather than the sale of a product does not state a claim for strict liability in tort); *Rasmussen v. South Florida Blood Service, Inc.*, 500 So.2d 533, 537-538 (Fla. 1987) ("society has a vital interest in maintaining a strong volunteer blood supply, a task that has become more difficult with the emergence of aids. The donor population has been reduced by the necessary exclusion of potential blood donors through AIDS screening and testing procedures, as well as by the unnecessary reduction in the

donor population as a result of the widespread fear that donation itself can transmit the disease. In light of this, it is clearly 'in the public interest to discourage any serious disincentive to volunteer blood donation.'") Therefore, in light of the convergence of multiple public policies and concerns (the need for a statute of repose because of the ongoing health care crisis in this state, coupled with a vital interest in a strong volunteer blood supply), the application of the statute of repose in the instant case is particularly strong. Damiano's plea for an exception to the statute of repose is without any foundation.

Damiano cannot avoid the statute of repose by asserting that she had no knowledge of her HIV infection within four years of the incident of the blood transfusion. First, the record shows this assertion is patently incorrect. Not only was Damiano well aware of her HIV status (and that of her husband) within four years of the transfusion, the cause of this infection was also discovered within this time period. For this reason, Damiano's attempt to distinguish the *Bogorff* and *Carr* cases must fail. Secondly, even assuming *arguendo* that Damiano had no such knowledge, the case law uniformly holds that the statute of repose bars even those claims that could not be discovered until more than four years after the actual incident. *Bogorff; Carr; Menendez; Kush; Dampf; Doe; Whigham; Padgett, supra.*

Damiano also argues that the date of transfusion is irrelevant and that the date of knowledge of infection should trigger the statute of repose. This position overlooks the fact that the transfusion of tainted blood, standing alone, establishes a completed fact of injury. No subsequent course of treatment can reverse the

disease process which begins at the moment of transfusion; the incident is a "complete act", just as the injury to the infant in *Carr* was a completed act on or before the child's birth. Damiano's argument also ignores the laws which holds that knowledge of injury is irrelevant to triggering the statute of repose. It further ignores the uncontroverted evidence in the record that Damiano knew of both the infection and its source (and had even begun treatment) within four years of the transfusion.

Damiano's attempt to create a distinction between "delayed discovery" and "delayed injury" based upon various dissenting opinions must be fully discounted because (1) Damiano discovered her injury within the four-year repose period and (2) this Court's decisions uphold the plain, unambiguous wording of Section 95.11(4)(b) which mandates a time bar to any claim filed more than four years after the incident of malpractice. There is absolutely no question whatsoever that the alleged incident of malpractice is the 1986 order for a blood transfusion and its contemporaneous administration. While Damiano struggles to merge triggering events for the statute of limitations and statute of repose, this effort flies in the face of every decision by this Court. The statute of limitations is triggered by knowledge of injury and knowledge of a reasonable possibility it was caused by medical negligence. *Tanner v. Hartog*, 618 So.2d 177 (1993). The statute of repose is triggered by the incident of malpractice. *Bogorff, Carr, Menendez, Kush, supra.*

Decisions by the courts of Arizona, Utah, and Kentucky analyzing the constitutionality of other states' statutes of repose under foreign constitutions have no bearing on the efficacy of Florida's repose statute under Florida's constitution. Further, the decisions in these foreign jurisdictions are inapplicable because of factual distinctions as well as variations in the purposes and/or public policy behind the enactment of their various malpractice acts. For example, the Utah court's decision in the case of *Lee v. Gaufin*, 867 P.2d 572 (Utah 1993) is inapplicable because (1) the Utah Supreme Court had previously found the Utah statute of repose to be constitutional in a claim brought by an adult, *Allen v. Intermountain Health Care, Inc.*, 636 P.2d 30, 32 (Utah 1981), (2) the *Lee* case arose out of a claim of a minor and not an adult, (3) the Utah case did not involve AIDS, (4) the Utah case did not involve a blood transfusion, (5) the purpose and/or public policy behind enactment of the Utah Health Care Malpractice Act are vastly different than the legislative intent behind Florida Statute 95.11(4), (6) the constitutionality of the repose provision of Florida Statute 95.11(4) has been repeatedly affirmed in medical negligence lawsuits, including factually identical claims of discovery of AIDS more than four years after the administration of blood transfusion, *Doe; Bogorff; Carr; Kush; Dampf; Tanner, supra*, and (7) unlike Utah, Florida has a health care crisis which has been specifically recognized by this Court, *Escharte, supra*. The Arizona and Kentucky cases are distinguishable for similar reasons.

Damiano's attempt to re-characterize this claim against Dr. McDaniel as one of product liability rather than one of medical negligence cannot succeed for

numerous reasons: (1) the claim against Dr. McDaniel has not been pled as a suit for product liability, (2) it is well settled that Dr. McDaniel is not a supplier of blood or a blood product, *Silva, supra; Whitlock, supra*, (3) Damiano readily acknowledges that no product liability cause of action exists against a health care provider where the blood defect (such as AIDS) is undetectable by reasonable scientific procedures as was the case at the time of this transfusion, *Williamson v. Memorial Hosp. of Bay County*, 307 So.2d 199 (Fla. 1st DCA 1975), and (4) provision of blood products constitutes a service, not a sale and therefore cannot support a product liability claim even against a blood bank, let alone the physician who prescribes a transfusion as part of medical therapy. Fla. Stat. §672.316(5); §381.698; *Silva v. Southwest Florida Blood Bank, supra.*

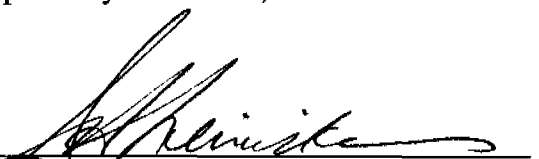
The case of *Kahler v. Kent*, 616 So.2d 601 (Fla. 4th DCA 1993), which underpins a significant portion of Damiano's argument, has no relevance to the issue before this Court. The *Kahler* case focused on the statute of *limitations*, not the statute of *repose*, and whether questions of fact existed as to when that plaintiff had learned of the injury. These concerns and facts addressed by the *Kahler* court are irrelevant to the resolution of the pending matter.

Finally, the case law is clear that Damiano cannot avoid the statute of repose as to Dr. McDaniel because of the actions of any other party. *Bogorff supra*, (at 1004-1005); *Powell v. Radkins*, 506 F.2d 763 (5th Cir 1975), *rehearing denied*, 509 F.2d 576, *cert. denied*, 423 U.S. 873 (1975) (fraudulent concealment perpetuated by a third party does not toll the statute).

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Honorable Court answer the certified question in the negative. The statute of repose is constitutional as applied in an AIDS case, just as it is constitutionally applied in all other claims of medical negligence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 25th day of July, 1996, to: Richard A. Sherman, Esq., Richard A. Sherman, P.A., Suite 302, 1777 South Andrews Avenue, Fort Lauderdale, Florida 33316, counsel for the Damianos; Wilton L. Strickland, Esq., Strickland & Seidule, P.A., P.O. Box 14246, Fort Lauderdale, Florida 33302, Co-Counsel for the Damianos; and David F. Cooney, Esq., Cooney, Haliczer, Mattson, Lance, Blackburn, Pettis & Richards, 301 East Las Olas Boulevard, Post Office Box 14546, Fort Lauderdale, Florida 33302.

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