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SUPREME COURT OF FLORIDA

Case No. 90,001

Susan F. Wood, Individually and as Personal Representative
of the Estate of Bettie W. Wood, Plaintiffs/Appellants,

versus

Eli Lilly and Company, an Indiana corporation, and
The Upjohn Company, a Delaware corporation, Defendants/Appellees.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA
PURSUANT TO ARTICLE V. SEC. 3 (b) (6) OF
THE FLORIDA CONSTITUTION

Eleventh Circuit Court of Appeals Case No. 95-4924

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTFUCT OF FLORIDA

District Court Case No. 89-6255-CIV-GONZALEZ

ANSWER BRIEF OF DEFENDANT/APPELLEE ELI LILLY AND COMPANY

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STATEMENT OF THE CASE

This is a negligence action in which the Plaintiffs seek to recover damages for varied injuries to their reproductive tracts alleged to have resulted from their *in utero* exposure to the pharmaceutical drug diethylstilbestrol ("DES"). The original Complaint in this action was filed on March 1, 1988 in the Circuit Court of the Seventeenth Judicial Circuit Court in and for Broward County, Florida, Case No. 88-5578-CS, against Eli Lilly and Company ("Lilly"), The Upjohn Company ("Upjohn") and other pharmaceutical companies who were alleged to have manufactured DES. The named Plaintiffs were Bettie W. Wood, Susan F, Wood, and Jonathan H. Wood, Jr., although only Bettie Wood signed the Complaint. (Rl-1). The Complaint alleged that Bettie, Susan and Jonathan Wood were exposed *in utero* to DES during their mother's pregnancy with each child. A "First Amended Complaint" was filed on March 25, 1988, signed by all three named Plaintiffs. (Rl-1). After Bettie Wood died in 1991, Susan Wood, as the personal representative of the Estate of Bettie W. Wood, was substituted as a party plaintiff. (R4-49).

The Defendants timely removed the action to the United States District Court for the Southern District of Florida (the "District Court"). (Rl-1). The District Court dismissed the action because of the Plaintiffs' inability to identify the manufacturer of the DES ingested by their mother. (R1-28). The Plaintiffs appealed to the United States Court of Appeals for the Eleventh Circuit, Case No. 89-6106. (R1-32). While the appeal was pending, this Court delivered its opinion in *Conley v. Boyle Drug Co.*, *570* So.2d *275* (Fla. 1990), which adopted a market share theory of liability, permitting a plaintiff to proceed with a lawsuit despite an inability to identify the manufacturer of the product which allegedly caused the plaintiff's injuries. The United States Court

of Appeals for the Eleventh Circuit therefore vacated the District Court's dismissal order and remanded the case for reconsideration in light of *Conley.*

On September 11, 1992, Susan Wood, individually and as personal representative of the Estate of Bettie W. Wood, and Jonathan H. Wood, Jr. filed an "Amended Complaint.'" (R4-61). On September 28, 1992, Upjohn moved to dismiss the Amended Complaint. (R4-68). The District Court granted the motion in part on December 28, 1992, and entered an Order dismissing all but the first count of the Amended Complaint. (R5-93). The Plaintiffs did not challenge the dismissal of Counts II through VI of the Amended Complaint. Count I of the Amended Complaint, titled "Market Share Alternative Liability," asserts a negligence claim by each of the Plaintiffs based on the market share theory of liability announced in *Conley.*

Following depositions, Lilly moved for summary judgment on Bettie Wood's claim, arguing that it was barred as a matter of law by the Florida statute of limitations, section 95.11, Florida Statutes. (R10-140). Upjohn moved for summary judgment on the claims of Bettie Wood and Susan Wood, arguing that they were barred as a matter of law by section 95.11, Florida Statutes. (R10-134; R12-162). Simultaneously, the Plaintiffs moved for partial summary judgment, arguing that the statute of limitations could not be applied to bar their claims because their lawsuit was filed before their cause of action was recognized by the Florida Supreme Court in *Conley.* On December 8, 1994, the District Court entered an Order denying the Plaintiffs' Motion for Partial Summary Judgment and granting the Defendants' Motions for Summary Judgment, ruling that, as a matter of

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[1] In the Amended Complaint and again in their Initial Brief to this Court, the Plaintiffs incorrectly identify Eli Lilly and Company as a New Jersey corporation. Eli Lilly and Company is an Indiana corporation.

law, Bettie Wood's and Susan Wood's claims against Upjohn and Bettie Wood's claim against Lilly were barred by the statute of limitations. (R13-179). Thereafter, Lilly moved for summary judgment on the claim of Susan Wood, arguing that her claim was also barred by the statute of limitations. (R13-181). On February 10, 1995, the District Court granted Lilly's Motion for *Summary* Judgment as to the claim of Susan Wood. (R14-184).

Following the District Court's December 8, 1994 Order, the Plaintiffs filed a Notice of Appeal. (R13-182). That action, in the United States Court of Appeals for the Eleventh Circuit, was assigned Case No. 95-405 1. Following the entry of the District Court's February 10, 1995 Order, the Plaintiffs filed a Notice of Appeal. (R14-185). That action, in the United States Court of Appeals for the Eleventh Circuit, was assigned Case No. 95-4383. On June 28, 1995, the United States Court of Appeals for the Eleventh Circuit dismissed Case Nos. 95-4051 and 95-4383 for lack of jurisdiction.

On June 19, 1995, the District Court entered four final judgments in which the District Court certified there was no just reason for delay in accord with Fed. R. Civ. P. 54(b). (R14-189; R15-190-192). The Plaintiffs filed a Notice of Appeal regarding the June 19, 1995 Final Judgments. (R15-193). The action in the United States Court of Appeals for the Eleventh Circuit has been assigned Case No. 95-4924.

STATEMENT OF THE FACTS

1. Bettie Wood

(A) Bettie Wood's Exposure to DES

Bettie Wood was born on December 25, 1956 in Jacksonville, Florida, the second child of Betty Constance Dorscheid Wood and Jonathan Henry Wood, Sr., M.D. (Rl 1-144; App. Ex. A, at

no. 3).[2] In an effort to support her pregnancy with Bettie, Mrs. Wood allegedly took DES, thus allegedly exposing Bettie Wood *in utero* to the drug. (R11-144; App. **Ex.** B, at ¶ 14). In 1956, Lilly manufactured **and** distributed DES for the treatment **of** certain accidents of pregnancy. (Rl 1-144; App. Ex. C, at ¶ **12).**

(B) Association Reported between DES and Clear Cell Adenocarcinoma

In April 1971, Dr. Arthur Herbst published an article in the New England Journal of Medicine reporting a statistical association between the use of DES in pregnancy and clear cell adenocarcinoma of the vagina in the female offspring of women who had taken DES. Dr. Arthur Herbst, et al., ***Adenocarcinoma of the Vagina: Association of Maternal Stilbestrol Therapy with*** *Tumor* ***Appearance in Young Women,*** **284** New Eng. J. Med. 878 (April 22,1971) (hereinafter, the "1971 Herbst Article"). (R11-144; App. Ex. Dj. In 1971, Dr. Herbst also established a Registry for Research on Hormonal Transplacental Carcinogenesis (the "Herbst Registry"), which began to monitor and study clear cell adenocarcinoma of the vagina and/or cervix, and to examine the reported statistical association between that form of cancer and DES exposure. (R11-144, App. **Ex,** E; see also Deposition of Dr. Robert *C.* Nuss ("Dr. Nuss deposition"), App. **Ex.** F, at 119-20). The 1971 Herbst Article led to the contraindication of DES for use during pregnancy. ***See, e.g., Payton v. Abbott Labs,*** 512 F. Supp. 1031, 1034 (D. Mass. 1981). It also led to litigation. ***See, e.g., Conley,*** 570 So.2d at 279-80 n.3 & 4 (Fla. 1990) (collecting cases), Indeed, when Bettie Wood was diagnosed with clear cell adenocarcinoma in 1978, ***see infra* at 5-6,** her treating gynecologic

[2] All citations in the form "App. Ex. __" are to the Appendix to the Answer Brief of Defendant/Appellee Eli Lilly and Company submitted herewith,

oncologist was already aware of DES-related lawsuits that had been brought against pharmaceutical manufacturers. (Rl 1-144; Dr. Nuss deposition, App. Ex. F, at 32).

(C) **Bettie Wood Learns of Her DES Exposure in 1977**

The 1971 Herbst Article, and the subsequent contraindication of DES for use in pregnancy, gave rise to concern among the parents of young women who had been exposed *in utero* to DES about the potential that their daughters could develop clear cell adenocarcinoma. (R11-144; Dr. Nuss deposition, App. Ex, F, at 53-55), Bettie Wood's parents shared the concerns of the parents of DES-exposed daughters. (Rll-144; Deposition of Dr. Jonathan Henry Wood ("Dr. Wood deposition dated Oct. 12, 1993"), App. Ex. G, at 113-14). Indeed, Bettie Wood's father, a general surgeon in Jacksonville, Florida, was aware of the 1971 Herbst Article and the follow-up research related to that article. (R11-144; Dr. Wood deposition dated Oct. 12, 1993, App. Ex. G, at 120). Therefore, in June 1977, the Woods sent Bettie to be examined by Dr. Robert C. Nuss, a gynecologic oncologist. (R11-144; Dr. Wood deposition dated Oct. 12, 1993, App. Ex. G, at 113-14; Dr. Nuss deposition, App. Ex. F, at 44-45, 54-55, and 86; see also App. Ex. H). During this visit, Dr. Nuss discussed her DES exposure with her. (R11-144; Dr. Nuss deposition, App. Ex, F, at 54-55, 85-86.) Following that visit, Dr. Nuss observed that Bettie Wood had certain "cervical changes compatible with diethylstilbestrol exposure," but that she did not have cancer, and he advised "only follow-up on a yearly basis." (R11-144; App. Ex. H; Dr. Nuss deposition, App. Ex. F, at 53-55).

(D) **Bettie Wood's 1978 Diagnosis of Clear Cell Adenocarcinoma**

In August 1978, Bettie Wood returned for her annual DES follow-up examination. (R1 1-144; Dr. Nuss deposition, App. Ex F, at 55). As a result of the tests performed during the August 1978 visit, Bettie Wood was diagnosed as having clear cell adenocarcinoma of the vagina. (R1 1-

144; Dr. Wood deposition dated Oct. 12, 1993 App. Ex, G, at 116; Dr. Nuss deposition, App. Ex. F, at 56-57; see also App. Ex. I). She was immediately informed of this diagnosis. (R11-144; Dr. Nuss deposition, App. **Ex.** F, at 59-61; see also App. Ex, J).

(E) **Bettie Wood Learns of the Association Between Her DES Exposure and Her Clear Cell Adenocarcinoma**

When Bettie Wood was diagnosed with cancer, her father firmly believed that her DES exposure had caused the cancer. (Rl l-144; Dr. Wood deposition dated Oct. 12, 1993 App. Ex. G, at 121). Dr. Wood communicated this opinion to Bettie Wood shortly after her August 1978 diagnosis. (R11-144; Dr. Wood deposition dated Oct. 12, 1993 App. Ex. G, at 120-21; Deposition of Dr. Jonathan Henry Wood ("Dr. Wood deposition dated Oct. 13, 1993"), App. Ex. K, at 53, 56). **As** of August 1978, Dr. Nuss believed that clear cell adenocarcinoma of the vagina and/or cervix and, specifically, Bettie Wood's clear cell adenocarcinoma, **was** specifically and definitely associated with *in utero* DES exposure. (Rl l-144; Dr. Nuss deposition, App. Ex. F, at 119-20). He described her exposure as "a very integral factor in the development of her disease," (Rl l-144; Dr. Nuss deposition, App. Ex. F, at 159), and communicated his views to her on numerous occasions in 1978. (R11-144; Dr. Nuss deposition, App. Ex. F, at 59-61, 85-86, 120,124,132-33,159-60). At the same time, he registered Bettie Wood in the Herbst Registry and spoke to her about the **work** of the Registry. (Rl l-144; Dr. Nuss deposition, App. **Ex,** F, at 119-21, 124; see *also* App. Ex. L). In the minds of Dr. Nuss and Bettie Wood herself, the association between Bettie Wood's cancer and her DES exposure was so close that during 1978 and the ensuing years, they referred to her cancer as "DES adenoca[rcinoma]," and even as "DES exposure," (Rl l-144; Dr. Nuss deposition, App. Ex. F, at 83-86; see also App. Exs. M, N).

(F) Bettie Wood Reiects Recommended Treatment

After Bettie Wood's August 1978 diagnosis, Dr. Nuss, Dr. Wood and others encouraged Bettie to have a radical hysterectomy, the conventional and accepted treatment for clear cell adenocarcinorna, (Rll-144; Dr. Nuss deposition, App. **Ex.** F, at 37-38, 61, 64; Dr. Wood deposition dated Oct. **12,** 1993 App. **Ex.** G, at 123-24, 127, 136-37; Dr. Wood deposition dated Oct. 13, 1993, App. **Ex,** K, at 57-59). Dr. Nuss estimates that, **if** Bettie Wood had undergone the recommended treatment in 1978, there was a better than 90 percent probability that her cancer would have been entirely cured. (R11-144; Dr. Nuss deposition, App. **Ex.** F, at 40-41, 83, 140-41, 149-50, 151-52, 161). Bettie Wood rejected the recommendation, however, opting instead for a wide local excision of her cancerous lesion, which **was** performed in November 1978. (Rl 1-144; Dr. Nuss deposition, App. **Ex.** F, at 64-65; Dr. Wood deposition dated Oct. 12, 1993 App. Ex. G, at 123-125, 127, 136-137; see *also* **App.** Exs. J, O).

(G) Bettie Wood's Cancer Recurs in 1984

Dr. Nuss firmly believed that the wide local excision performed in 1978 was only slightly better than nothing and **was** doomed to failure. (Rl 1-144; Dr, Nuss deposition, App. Ex. F, at 80-82, 137-38, 160-61). Specifically, he stated that the procedure "was inadequate by any accepted definition of what needed to be done for that lesion at that time." (Rl 1-144, Dr. Nuss deposition, App. Ex. F, at 137). While he stated that he hoped that the wide local excision would be successful, he knew that his hope was not grounded upon medical-based information or objectivity. (Rl 1-144; Dr. Nuss deposition, App. Ex. F, at 160-61). Dr. Nuss' fears were realized when, in 1984, he diagnosed a recurrence of Bettie Wood's clear cell adenocarcinoma, (R11-144; Dr. Nuss deposition, App. Ex. F, at 67-69). This was the same cancer that had been initially diagnosed in

1978. Bettie Wood had never been cured of that cancer. (Rl l-144; Dr. Nuss deposition, App. Ex. F, at 68-69, 74-75; Dr. Wood deposition dated Oct. 12, 1993 App. **Ex.** G, at 139; Dr. Wood deposition dated Oct. 13, 1993, App. **Ex.** K, at 51-52; *see also* App. **Ex.** P).

In 1984, as in 1978, Dr. Nuss corresponded with Dr. Herbst about Bettie Wood's case, and he had discussions with Bettie Wood about the association between her cancer and her DES exposure. (R11-144; Dr. Nuss deposition, App. **Ex.** F, at page 68-72, 74-75, 85-86, 133; *see also* App. Exs. P, Q). Dr. Nuss once again recommended a radical hysterectomy, and once again Bettie Wood refused the recommended treatment, opting instead for various diet and experimental treatments, (R11-144; Dr. Nuss deposition, **App. Ex.** F, at 69-72, 78, 83, 150-52, 161; *see also* App. Ex. R). Dr. Nuss estimates that, if Bettie **Wood** had accepted the medical community's recommendations in 1984, there was still a better than 75 percent chance that she would have been entirely cured. (R11-144; Dr. Nuss deposition, App. **Ex.** F, at 151-52, 161).

(H) Bettie Wood's Cancer-Related Death

Following the recurrence of her clear cell adenocarcinoma in 1984, and her rejection of the recornmended therapy, Bettie Wood's condition gradually deteriorated. The cancer metastasized throughout her body, and on December 11, 1991, she died. (R11-144, App. Ex. **A,** at No. 3; Dr. Wood deposition dated Oct. 12, 1993 App. **Ex,** G, at 117-18, Dr. Wood deposition dated Oct. 13, 1993, App. **Ex.** K, at 51, Dr. Nuss deposition, App. **Ex.** F, at 73-79; *see also* **App. Exs** R, **S).** The cancer from which she died was the same cancer Dr. Nuss had originally diagnosed in 1978 and that had recurred in 1984, (Rl l-144; Dr. Nuss deposition, App. **Ex.** F, at 73-79; Dr. Wood deposition dated Oct. 12, 1993 App. **Ex.** G, at 117-18; Dr. Wood deposition dated Oct. 13, 1993, App. **Ex.** K,

at **51**). On March **1, 1988,** almost ten years after her clear cell adenocarcinoma diagnosis, Bettie Wood filed this lawsuit. (Rl-1).

2. Susan Wood

Susan Wood was born on November **5, 1958** in Jacksonville, Florida. (Rl l-144; App. Ex. A, at no. 3). She is the third child of Betty Constance Dorscheid Wood and Jonathan Henry Wood, Sr., M.D. (Rl l-144; App. **Ex. A,** at nos. 1 and 3). Mrs. Wood **took** DES during her pregnancy with Susan, thus exposing Susan Wood *in utero* to the drug. (R11-144; App. **Ex.** B, at ¶ **14). In 1958,** Lilly manufactured and distributed DES for the treatment of certain accidents of pregnancy. **(R11-144;** App. **Ex. C,** at ¶ **12).**

Dr. Wood referred Susan Wood to Dr. Nuss in June **1976.** (R13-180; Deposition of Susan Wood ("Susan Wood deposition"), App. **Ex.** T, at 68; Rl l-144; Dr. Nuss deposition, App. Ex. F, at **54, 86).** During this visit, Dr. Nuss performed pap smears and a colposcopy, viewing cell changes that, in his opinion, were compatible with intrauterine DES exposure. He then performed a biopsy, which confirmed his diagnosis of adenosis. (Rl l-144; Dr. Nuss deposition, App. Ex. F, at **87**). Dr. Nuss informed Susan Wood that adenosis was an abnormality in her cervix and vagina that was, in his opinion, consistent with *in utero* DES exposure. (Rl l-144; Dr. Nuss deposition, App. **Ex.** F, at **87-88, 130-31).** Dr. Nuss explained to her that her mother had taken DES, and expressed to her his opinion that there was an association between her adenosis and her DES exposure. (Rl l-144; Dr. Nuss deposition, App. **Ex.** F, at **87-88).**

In August **1978,** Dr. Nuss performed a routine examination of **Susan** Wood and concluded at that time that she still had adenosis. His findings as to Bettie Wood, however, were quite different. **As** noted above, Bettie Wood was diagnosed in August **1978** as having clear cell

adenocarcinoma. (R11- 144; Dr. Wood deposition dated Oct. 12, 1993 App. Ex. G at 116; Dr. Nuss deposition, App. Ex. F at 56-57, App. Ex. I). Susan Wood learned of Bettie Wood's diagnosis before the end of **1978.** (R13-180; Susan Wood deposition, App. **Ex.** T, at 79). When she first learned of her sister's cancer, Susan Wood believed it was causally related to Bettie Wood's DES exposure. (R13-180; Susan Wood deposition, App. Ex. T, at 81-83). At that time, she developed a concern that she too might get cancer, (R13-180; Susan Wood deposition, App. Ex. T, at **81-83),** and that concern still persists in her mind as an injury she sustained as a result of her alleged exposure to DES.

SUMMARY OF THE ARGUMENT

The parties are in agreement that the sole issue before this Court is the issue of law presented by the Eleventh Circuit Court of Appeals — Did the statute of limitations commence on the date that ***Conley*** was issued or the date that the Plaintiffs knew, or reasonably should have known, of their injuries? So framed, the statute of limitations commences running from the date the plaintiffs knew, or reasonably should have known, of their injuries, and not from the date that ***Conley*** was issued. In *Conley,* this Court adopted a theory of market share liability, allowing a plaintiff to maintain a negligence claim despite the fact that he or she could not identify the manufacturer of the product which allegedly caused his or her injury. The ***Conley*** decision, however, had no effect, and can have no effect, on previously barred actions. Moreover, the Plaintiffs' argument is directly contrary to established principles in other decisions of this Court. In those cases, this Court has expressly held that changes in common law tort principles do not create a new accrual date for statute of limitations purposes. To hold otherwise would violate Lilly's due process right under the Florida Constitution.

ARGUMENT

I. A RULING THAT THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL 1990, WHEN THIS COURT RENDERED ITS OPINION IN *CONLEY,* WOULD DEPRIVE LILLY OF A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FLORIDA CONSTITUTION

The due process clause of the Florida Constitution, Article I, section 9, provides in pertinent part that "No person shall be deprived of ... property without due process of law ..." *Wiley* ***v. Roof,*** 641 So.2d 66 (Fla. 1994) compels the conclusion in the instant case that a ruling that *Conley* is the benchmark for the commencement of the running of the statute of limitations would deprive Lilly of a constitutionally protected property interest in violation of the due process clause of the Florida Constitution. In ***Wiley,*** plaintiff Roof filed an action in 1991 against her grandfather, defendant Calvin Wiley, and other relatives, based upon alleged sexual abuse occurring in **1973.** *Id.* at **66-67,** The trial court dismissed plaintiff Roofs amended complaint based upon the expiration of the applicable four year statute of limitations. ***See*** § 95.11 (3) (o), Fla. Stat.; *Id.* at 67. While Roofs appeal was pending before the Second District Court of Appeal, the Florida Legislature amended section 95.11 to enlarge the statute of limitations period for intentional torts based on abuse. ***See*** § 95.11 (7), Fla. Stat.; *Id.* at ***67.***

In ***Wiley,*** this Court held that section 95.11 (7) could not "revive a cause of action that has already been barred by the expiration of the pre-existing statute of limitations," *Id.* at 67. This is so because, "[o]nce the defense of the statute of limitations has accrued, it **is** protected as a property right interest just as the plaintiffs right to commence an action is a valid and protected property interest." *Id.* at ***68; see*** *also In* ***Re*** *Estate* ***of Smith,*** 685 So.2d 1206, 1210 (Fla. 1996) ("Once a claim

has been extinguished by the applicable statute of limitations, the claim cannot be revived because a constitutionally protected property right to be free from the claim has vested in the defendant."); ***Firestone Tire & Rubber Company v. Acosta***, 612 So.2d 1361 (Fla. 1992) (held that the repeal of the statute of repose did not reestablish a cause of action that had been previously extinguished); ***Estate of Weidman***, 476 N.W. 2d 357, 364 (Iowa 1991) (held that United States Supreme Court decision, requiring executors to give notice by mail to all known or reasonably ascertainable heirs-at-law of commencement of probate proceedings and of time periods for filing claims, could not be applied retroactively where statute of limitations for heirs' will contest action had already expired when decision was announced). The *Wiley* Court concluded that the application of section 95.11(7) to revive plaintiff Roofs cause of action, previously barred by the expiration of the pre-existing statute of limitations, deprived defendant, Wiley, "of a constitutionally protected property interest and is violative of the Article I, section 9 of the Florida Constitution." *Id.* at 69. Stated simply, "... Florida's statute of limitations, section 95.11, bans all actions unless they are commenced within the times designed by the statute." ***Mason v. Salinas***, 643 So.2d 1077, 1078 (Fla. 1994) (relying upon *Wiley*). The same constitutional basis was invoked by the court in ***Waller v. Pittsburgh Corning*** *Group* ***Corp.***, 742 F. Supp. 581 (D.Kan. 1990) in holding that a Kansas statute which purported to revive causes of action for latent diseases allegedly caused by exposure to harmful materials violated due **process** by removing vested rights of defendants. The *Waller* court noted that:

> Most of the state courts addressing the issue have held that the legislation which attempts to revive claims that have been previously time barred impermissibly interferes with vested rights of the defendant, and thus violates due process. These courts have taken the position that the passing of the limitations period creates a vested right of defense in the defendant, which cannot be removed by subsequent legislative action expanding the limitations period citing,

among other cases, *Mazda Motors of America, Inc. v. S.D. Henderson & Sons, Inc.*, 364 So.2d 107 (Fla. 1st DCA 1978), *cert. denied,* 378 So.2d 348 (1979).

In the instant case, therefore, Lilly has a constitutionally protected property interest in the accrual of the applicable statute of limitations, section 95.11, Florida Statutes. Under the rationale of *Wiley*, a holding that *Conley* revives Plaintiffs' claims would be violative of Article I, section 9 of the Florida Constitution.

II. THIS COURT'S ADOPTION OF MARKET SHARE LIABILITY IN *CONLEY* CANNOT REVIVE A CAUSE OF ACTION THAT HAS ALREADY BEEN BARRED BY THE EXPIRATION OF THE STATUTE OF LIMITATIONS

The Plaintiffs contend that their cause of action did not accrue until the Florida Supreme Court's decision in *Conley v. Boyle Drug Co., 570* So.2d 275 (Fla. 1990), in which this Court adopted a market-share alternate theory of liability. The Plaintiffs moved for partial summary judgment in the District Court arguing that, even if they had knowledge that they had been injured and that their *in utero* exposure to DES was responsible for their injuries, the limitations period did not begin to run until *Conley*.[3] The District Court properly rejected the Plaintiffs' argument and denied their motion for partial summary judgment. For the following reasons, this Court should respond to the certified question by holding that the statute of limitations in the instant case did not commence on the date this Court decided *Conley*.

The California Supreme Court's decision in *Jolly v. Eli Lilly & Company, 751* P.2d 923 (Cal. 1988), is directly on point. In *Jolly,* the plaintiff argued that because she did not know who had

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[3] This same argument was made and rejected in a DES case in a Florida circuit court. *Ushman v. Abbott Laboratories,* No. CL 88-9851 AF (Fla. Cir. Ct. Jan. 13, 1994) (See App. Ex. U, for a copy of the trial court decision.)

manufactured the **DES** to which she was exposed, she did not have a cause of action until California adopted, as Florida later did in *Conley,* a market share alternative theory of liability. In rejecting the plaintiffs argument, the court stated that the "mere existence of a contrary precedent has never been considered sufficient to toll the statute of limitation." ***Jolly,*** 751 P.2d at 931. The Jolly court stated three reasons that justified the application of the rule against reviving time-barred claims upon a change of common law precedent:

> First, the rule encourages people to bring suit to change a rule of law with which they disagree, fostering growth and preventing legal stagnation. Second, the statute of limitations is not solely a punishment for slow plaintiffs. It serves the important function of repose by allowing defendants to be free from stale litigation, especially in cases where evidence might be hard to gather due to the passage of time. Third, to hold otherwise would allow virtually unlimited litigation every time precedent changed.

Jolly, 751 P.2d at 932.[4]

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[4] While factually distinguishable, this same principle was announced by the Supreme Court of Kansas in ***Kneller v. Federal Land Bank of Wichita,*** 799 P.2d *485* (Kan. 1990) is also instructive. There, the owners of real property and a one-half mineral interest in the property brought suit to determine the ownership of the other one-half mineral interest. The defendant bank had received royalty payments as to the one-half mineral interest not owned by the plaintiffs for a period of approximately 26 years, from 1950 until 1976, pursuant to a reservation in a deed between the bank and the plaintiffs' predecessor in interest.

The royalty payments to the bank were terminated in 1976 based on a title opinion, which itself relied upon a 1972 Kansas Supreme Court decision, ***Smith v. Home Royalty Association, Inc.***, ***209*** Kan. 609,498 P. 2d 98 (1972), the application of which clearly terminated the bank's interest in the minerals. *Id.* at **404.** All royalties attributable to the property were paid to the plaintiffs from 1976 until 1984, when a new title opinion **was** issued which determined that the bank's one-half mineral interest in the property was valid under application of a 1980 Kansas Supreme Court decision, ***Classen v. Federal Land Bank of Wichita,*** 617 P. 2d 1255 (1980). A dispute arose as to the renewed payment of royalties to the bank **as** a result of the 1984 title opinion, and the plaintiffs filed a declaratory judgment action seeking an interpretation of the one-half mineral reservation in the deed in favor of the bank and a determination that they were the owners of the one-half interest in dispute. ***Kneller,*** 799 P. 2d at 487. The lower court entered summary judgment in plaintiffs'

The reasoning of the California Supreme Court in *Jolly* and the Kansas Supreme Court in ***Kneller*** is entirely consistent with that of this Court in ***Penthouse North Ass'n, Inc. v. Lombardi, 46*** 1 So.2d 1350 (Fla. 1984). In ***Penthouse North,*** this Court expressly recognized that judicial changes in common law remedies do not revive time-barred claims:

> This Court has often changed common-law tort rules or recognized new causes of action without affecting time-barred claims. This may seem unfair to those plaintiffs who would have had viable claims if the change of law had occurred earlier, but potential and actual liability must end with finality at some point. Persons should have the right to conduct their affairs without fear of liability for their actions once an appropriate limitation period has passed.

Id. at **1352.**

The Plaintiffs attempt to distinguish ***Penthouse North*** by suggesting that "[t]he Court's language in that regard is ***dicta*** and therefore not binding on this Court." See Plaintiffs' Initial Brief at 13. ***Dicta*** is defined as "opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself." ***Black's Law Dictionary*** 454 (6th ed. 1990) (under definition of "Dictum"). Plainly, the plaintiffs are incorrect in labeling the ***Penthouse North*** Court's

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favor and the bank appealed, arguing that the 1980 Kansas Supreme Court decision should be applied retroactively to revive the bank's one-half mineral interest. ***Kneller,* 799** P. 2d at 488, The court in ***Kneller*** rejected the bank's argument:

> Application of ***Smith*** clearly terminated the Land Bank's interest. ***Classen*** was filed in **1980,** modifying ***Smith.*** To apply ***Classen*** retroactively herein would make a phoenix out of a defeasible or mineral interest which had, under existing Kansas law, expired eight years prior to the filing of ***Classen.*** Such would not constitute an extension of the term interest but a revival of the same many years after its demise.

***Kneller,* 799** P. 2d at **489.**

language on the issue as *dicta. Penthouse North* came to this Court because of a direct conflict between the lower court case before the Fourth District Court of Appeal and *Burleigh House Condominium, Inc. v. Buchwald,* 368 So.2d 1316 (Fla. 3rd **DCA),** *cert. denied,* 379 So.2d 203 (Fla. 1979) on the issue of whether a condominium association's cause of action for breach of fiduciary duties and unjust enrichment by its former officers and directors accrued upon this Court's decision in *Avila South Condominium Ass'n, Inc. v. Kappa Corp.*, 347 So.2d 599 (Fla. 1977). The language which the Plaintiffs label as *dicta* in *Penthouse North* was, in point of fact, dispositive to the issue on appeal and this Court specifically "disapprove[d] [of] any implication in *Burleigh House* that *Avila South* breathed new life into those causes of action previously barred by a statute of limitations or laches," *Penthouse North,* 461 So.2d at 1352.

Rather than meet *Penthouse North* head on, the Plaintiffs argue that the application of the statute of limitations denies them due process of law and violates their guarantee of access to the courts in light of this Court's decision in *Diamond v. E.R.. Squibb & Sons, Inc.*, 397 So.2d 671 (Fla. 1981).[5] The plaintiff in *Diamond* was alleged to have been exposed *in utero* to DES in 1955 and 1956. She first learned of a possible link between her DES exposure and her cancerous or precancerous conditions in 1976, and filed suit in April **1977.** *Diamond,* 397 So.2d at 671. The defendant moved for summary judgment, arguing that the then-existing twelve-year statute of repose, section 95.031(2), Florida Statutes, barred the action.[6] This Court rejected the defendant's

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[5] Section 21 of Article I of the Florida Constitution provides that "[t]he Courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

[6] At that time, section 95.031(2), Florida Statutes (1975) provided:

(continued..,)

argument, holding that under the circumstances presented, the statute of repose would have barred the plaintiffs cause of action before it had ever accrued. *Diamond,* 397 So.2d at **671-72.** According to the Court, such a decision would violate the plaintiffs guarantee of access to the courts under Article I, section 21, of the Florida Constitution. *Diamond,* **397** So.2d at 672. Thus, the *Diamond* court held that the then-existing twelve-year statute of repose was unconstitutional because the claim itself did not accrue within the twelve-year limitation period.

The instant case presents an entirely distinguishable set of circumstances. Here, the claims of the Plaintiffs accrued in the late **1970s.** There existed no legal impediment to the institution of an action against defendants upon accrual of the Plaintiffs' claims. Instead, they chose to sit on their legal rights well beyond the expiration of the statute of limitations. Simply put, there has never been a constitutional bar to the Plaintiffs seeking redress for their injuries in court, despite the fact they could not identify the manufacturer of the DES to which they were exposed. Unlike the plaintiff in *Diamond,* the Plaintiffs had an entire four-year limitation period in which to seek access to the courts. They did not have to wait for *Conley* before they sued Lilly. The best evidence of this fact is the Plaintiffs' own complaint, filed on March 1,1988, two years before *Conley* was decided. The complaint names Lilly, and it contains twelve counts including a Count I captioned "Enterprise

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(...continued)

> Actions for product liability and fraud under subsection 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the action of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in subsection § **95.1** l(3), but in any event within twelve (12) years after the date of delivery of the completed product to its original purchaser or the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

and/or Industry Wide Liability," a Count Il captioned "Concerted Action," a Count III captioned "Market Share Liability," and a Count IV captioned "Alternative Liability." The Plaintiffs could have raised these claims well before 1988 and been the ones, rather than Terri Lynn Conley, who brought the case that led to the adoption of market share liability in Florida. *See Jolly,* 751 P. 2d at 932 ("Moreover, in early 1978, plaintiffs legal situation was not as dismal as it initially appeared. First, she was in no worse a position than Judith Sindell, who ultimately prevailed in changing the law").

Further, the continuing vitality of *Diamond* is seriously suspect. In *Damiano v. McDaniel, M.D.,* 689 So.2d 1059 (Fla. 1997), this Court recently held that Article I, section 21 of the Florida Constitution was not violated by application of the medical malpractice statute of repose to bar an action, even though the injury, Acquired Immune Deficiency Syndrome, did not manifest itself within the statutory four-year term from the date of the incident that resulted in infection. In *Damiano,* this Court quickly dispatched the plaintiffs' reliance upon *Diamond:* "We reject the Damianos' reliance on *Diamond* v. *E.R. Squibb* & *Son, Inc.,* 397 So.2d 671 (Fla. 1981). That case was decided years before our decisions in ***Carr*** **v.** *Broward County,* 541 So.2d 92 (Fla. 1989), *University of Miami* **v.** ***Bogorff,*** 583 So.2d 1000 (Fla. 1991), *Kush v. Lloyd,* 616 So.2d 415 (Fla. 1992), and ***Harriman*** *v. Nemeth,* 616 So.2d **433** (Fla. 1993)." *Id.* at 1061 n.4.[7]

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[7] In ***Carr,*** this Court noted that the running of the statute of repose begins with the incident of malpractice for purposes of the malpractice statute of repose and upheld the statute against the claim that it unconstitutionally denied access to the courts, reasoning that the legislature had properly found an overpowering public necessity for the enactment of the statute. *Damiano,* 689 So.2d at 1060. In *University of Miami,* this Court held that the statute of repose may be constitutionally applied to bar claims even when the cause of action does not accrue until after the period of repose has expired. *Damiano,* 689 So.2d at 1060. In *Kush,* this Court addressed the (continued...)

Likewise, the Plaintiffs in the instant case certainly could have espoused precedent from other jurisdictions in support of their claims. For example, in the landmark case ***Sindell* v. *Abbott Laboratories*, *607*** P. 2d 924, ***cert. denied,*** 449 U.S. 912 (1980), decided in March 1980, the California Supreme Court established a market share theory of liability concept, which allows DES victims who can not identify the manufacturers of the drugs their mothers had taken, to sue the producers of a substantial percentage of the market. *Id.* **937.** In 1984, the Washington Supreme Court in ***Martin* v. *Abbott Laboratories,*** 689 P. 2d 368 (Wash. 1984) modified the ***Sindell*** pure market-share approach in adopting a market-share alternate liability theory for DES cases. ***Id.*** at ***380*** - 383. Also in 1984, the Michigan Supreme Court crafted an expanded form of alternate liability specific to DES cases in *Abel* **v. *Eli Lilly*** *and* ***Company,*** 343 N.W. 2d 164 (Mich. 1984) and the Wisconsin Supreme Court created yet another nonidentification theory separate from market share liability for DES cases in ***Collins* v. *Eli Lilly*** Co., **342** N.W. 2d ***37, cert. denied*** *sub nom, E.R.. Squibb & Sons, Inc.* **v. *Collins,*** 469 U.S. 826 (1984). In *Conley*, this Court adopted the ***Martin*** approach to market share liability with two exceptions. *Conley*, 570 So.2d at 286. First, "as a prerequisite to its use, a plaintiff must make a showing that she has made a genuine attempt to locate and to identify the manufacturer responsible for her injury." *Id.* at 286. Second, the Court

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[7](...continued)
application of the statute of repose to a wrongful birth malpractice action alleging negligent failure to diagnose an inheritable genetic impairment. After their first son was born with deformities, the plaintiffs underwent genetic testing but were never informed that the mother had a genetic abnormality. The suit was filed following the birth of their second genetically impaired son, seven years after the alleged malpractice incident. While recognizing that the cause of action for purposes of the statute of limitations did not accrue until the birth of the second son, this Court held that the suit **was** nevertheless barred by the statute of repose. *Damiano,* 689 So.2d at 1061. In ***Harriman,*** this Court, in a per curiam decision, followed *Kush*. ***Harriman,* 616** So.2d at 433.

"restrict[ed] this vehicle of recovery to those actions sounding in negligence; it may not be used in conjunction with allegations of fraud, breach of warranty or strict liability." *Id.* at **286.** *See generally, Bly v. Tri-Continental Industries, Inc.*, 633 **A.** 2d 1232 (Dist.Col.Ct.App. 1995) (discussing history of market share liability, including *Sindell*, *Martin* and ***Conley*** cases); *Annot., "Concertof Activity," "AlternateLiability," "Enterprise Liability," or Similar Theoy as Basis For Imposing Liability Upon One or More Manufacturers of Defective Uniform Product in Absence of Identification of Manufacturer of Precise Unit* ***or*** *Batch Causing Injuy, 22* A.L.R. 4th 183 (1983 & Supp. Sept. 1994) (collecting cases); *Annot., Products Liability: Diethylstilbestrol (DES), 2* **A.L.R.** 4th 1091 (1980 & Supp. Sept. 1994) (collecting cases). As such, *Diamond* offers no **support** for the Plaintiffs' argument.

Finally, the Plaintiffs' reliance on Article I, section **21** of the Florida Constitution is misplaced. Section 21 prohibits the Florida Legislature, without showing an "overpowering public necessity and an absence of any less onerous alternatives. . ." from abolishing causes of action which existed prior to 1968, when the Florida Constitution was readopted. *Overland Construction Co., Inc. v. Sirmons*, 369 So.2d **572, 573** (Fla. **1979**). A products liability cause of action for negligence did exist before *Conley* and that cause of action has not been abolished. If, however, *Conley* did recognize a new cause of action in 1990, as the Plaintiffs argue, then no existing cause of action was eliminated and the constitutional guarantee of Article I, section 21 is, therefore, not implicated.

CONCLUSION

For the foregoing reasons, Defendant/Appellee Eli Lilly and Company respectfully requests that the Court respond to the certified question by holding that the four year statute of limitations applicable to the Plaintiffs' claims, Fla. Stat. § 95.11, did not commence running on the date that *Conley* was issued.

Respectfully submitted,

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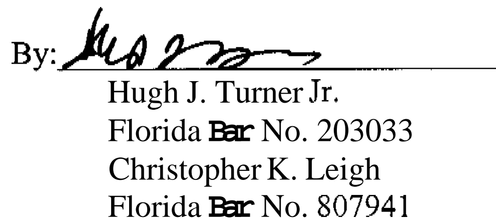
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and accurate copies of the Answer Brief of Defendant/Appellee Eli Lilly and Company have been furnished this 8th day of May, 1997, by mail, postage prepaid, to counsel for each of the parties in this case, as listed below.

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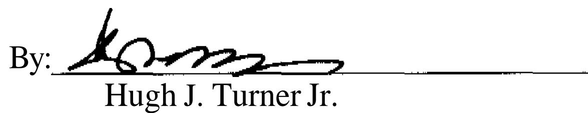
By: 
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