SID J. WHITE

APR 2 1998

CLERK, SUPREME COURT
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IN THE FLORIDA SUPREME COURT

Case Nos. 91,966
92,382
92,451

MUSCULOSKELETAL INSTITUTE, CHARTERED, d/b/a Florida Orthopaedic Institute, CHESTER E. SUTTERLIN, III, M.D., CHESTER E. SUTTERLIN, III, M.D., P.A., and GENE A. BALIS, M.D.,

Petitioners,

v.

JAMES S. PARHAM,

Respondent.

Review of a Certified Question of Great Public Importance from the Second District Court of Appeal

Initial Brief of Musculoskeletal Institute Chartered, d/b/a Florida Orthopaedic Institute

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Issue I

The Plaintiff's Medical Malpractice Action was Barred by the Four-Year Absolute Statute of Repose because:

A. A Plaintiff May Not Unilaterally Extend the Statute of Repose by Filing a Petition for an Automatic Extension of the Statute of Limitations Under Section 766.104(2).

B. A Plaintiff May Not Unilaterally Extend the Statute of Repose by Mailing the Defendant a Notice of Intent to Initiate Litigation Under Section 766.106(4).

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Summary of Appeal

The defendants, Musculoskeletal Institute, Chartered, d/b/a Florida Orthopaedic Institute, Chester E. Sutterlin, III, M.D., Chester E. Sutterlin, III, M.D., P.A., and Gene A. Balis, M.D., seek review of a question of great public importance certified by the Second District Court of Appeal in Parham v. Balis, 704 So.2d 623 (Fla. 2d DCA 1997). In the underlying action, the plaintiff, James S. Parham, challenged the dismissal of his complaint based on the expiration of the four-year statute of repose for medical malpractice actions. § 95.11(4)(b), Fla. Stat. (1989). The plaintiff recognized that he commenced his action almost four years and six months after the "incident or occurrence" of alleged malpractice, but argued that he: (1) extended the four-year statute of repose by filing a petition for an automatic 90-day extension of the two-year statute of limitations under section 766.104, Florida Statutes, and (2) later tolled the statute of repose during this extended period by mailing a notice of intent to initiate litigation under section 766.106, Florida Statutes. Due to the delay of four and one-half years, Mr. Parham needed both the section 766.104 extension and the section 766.106 tolling provision to apply in order to avoid being time barred by the statute of repose.

Statement of the Case and Facts

On April 5, 1990, Mr. Parham, an assistant state attorney, was hurrying through the hallways of the Hillsborough County courthouse annex when he slipped and fell on a wet floor. R 27. He landed on the floor and injured his lower back and neck. R 27. His injuries lead to a two-part surgical procedure that was performed by Gene A. Balis, M.D., and Chester E. Sutterlin, III, M.D., at Tampa General

Hospital. R 27-28. Mr. Parham's surgeries involved posterior neck surgery with fixation using mechanical fixation devices (plates and screws). R 28. The two procedures were performed on December 18, 1990, and January 29, 1991. R 28. At that time, Dr. Sutterlin was employed by Musculoskeletal Institute, Chartered, doing business as Florida Orthopaedic Institute ("Florida Orthopaedic"). R 27.

On December 17, 1993, almost three years after his surgery was completed, Mr. Parham contends that he became aware of the alleged medical malpractice associated with his surgical procedures. R 28. On December 16, 1994, almost four years after the surgery was completed, Mr. and Mrs. Parham personally filed a petition for ninety-day automatic extension of time of the two-year statute of limitations for medical malpractice actions. R 38. The petition did not name, directly or indirectly, Florida Orthopaedic. It says: "This extension should be as to Dr. Chester Sutterlin, Dr. Gene Balis and Tampa General Hospital." R 38.

On March 16, 1995, the Parhams, now through an attorney, sent a notice of intent to initiate litigation to the two physicians and Tampa General Hospital enclosing a corroborating affidavit of their expert, Howard Balensweig, M.D. R 39. The Parhams, however, never sent the notice of intent to Florida Orthopaedic. R 98. Instead, they mailed it to Dr. Sutterlin at the address of his new employer, Spinal Associates of North Central Florida, located in Gainesville, Florida. R 39. At that time, Dr. Sutterlin was no longer employed by Florida Orthopaedic and had no legal relationship with Florida Orthopaedic. R 99.

On April 17, 1995, the Parhams' attorney sent a letter to the surgeons and Tampa General Hospital attaching an amended affidavit

by Dr. Balensweig. R 43. It states: "Previous Notice of Intent to Initiate Litigation has been served on you. With this letter is an Amended Affidavit of Dr. Howard Balensweig." R 43. The letter was sent to Florida Orthopaedic and represents the very first time that Florida Orthopaedic ever received any information from the Parhams or their attorney concerning any possible claim. R 98. The letter did not enclose a copy of the notice of intent or Dr. Balensweig's initial affidavit. R 99. Further, the letter and Dr. Balensweig's amended affidavit made no reference to any possible claim against Florida Orthopaedic. R 100. As testified by Dr. Sanders: "Florida Orthopaedic Institute never received a notice of intent to initiate litigation for medical malpractice. The only correspondence that Florida Orthopaedic Institute ever received from the Plaintiffs is [a] correspondence dated April 17, 1995, directed to the Claims Administrator at Florida Orthopaedic Institute." R 105.[1]

On July 20, 1995, the Parhams filed a complaint and named only Dr. Balis and Florida Orthopaedic as defendants. R 1. Thereafter, on September 1, 1995, the Parhams filed an amended complaint naming Dr. Sutterlin and his professional association as other defendants. R 26-46. On September 26, 1995, the circuit court entered an order granting the Parhams leave of court to amend the complaint pursuant

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[1] In response to the complaint, Florida Orthopaedic moved to dismiss the Parhams' action based upon their failure to comply with the notice of intent to initiate litigation condition precedent for medical malpractice actions on a timely basis. The trial court has not heard this motion yet. Whether this letter amounts to a notice of intent to initiate litigation is critical to the undecided issue of whether Mr. Parham's claim is otherwise barred by the statute of repose or statute of limitations. While this issue does not affect the statute of repose issue on appeal, we wanted to make clear that Florida Orthopaedic never received an "amended notice of intent to initiate litigation" as was maintained by Mr. Parham in his initial brief in the Second District Court of Appeal.

to the stipulation of Dr. Balis and the Parhams. R 47-48. In the amended complaint, the Parhams alleged that the physicians deviated from the standard of care in the two-part procedure of December 18, 1990, and January 29, 1991. R 28. In addition, they alleged that Mr. Parham was not aware of any alleged negligence until he watched a television news documentary on December 17, 1993. R 28.

Dr. Sutterlin filed a motion to dismiss the amended complaint. R 49-55. As part of the grounds for dismissal, he maintained that the lawsuit was time barred by the four-year statute of repose for medical malpractice actions. R 49-55. The circuit court heard the motion to dismiss, granted it in part, but denied it as it related to the statute of repose. R 75-77. Later, Dr. Sutterlin moved for a rehearing on this ground. R 84-91. The circuit court heard the motion for rehearing, ruled that Kush v. Lloyd, 616 So.2d 415 (Fla. 1992), governs the four-year statute of repose, and that Moore v. Winter Haven Hospital, 579 So.2d 188 (Fla. 2d DCA), review denied, 589 So.2d 294 (Fla. 1991), was no longer applicable in light of the Kush decision. R 112-13. Later, it entered an amended final order dismissing the action, which was joined in by Dr. Balis and Florida Orthopaedic. R 128. Mr. Parham, but not Mrs. Parham, appealed the dismissal. R 132.

The relevant dates are as follows:

Jan. 29, 1991	Mr. Parham's surgical procedure is completed.
Dec. 17, 1993	Mr. Parham, by his own admission, is aware of a possible cause of action.
Dec. 16, 1994	The Parhams filed a petition for automatic 90-day extension of the statute of limitations.
Mar. 17, 1995	The Parhams' attorney sent a notice of intent to initiate litigation to Dr. Balis and to Dr. Sutterlin.

Apr. 17, 1995	The Parhams' attorney sent a letter to Florida Orthopaedic which is the first notice that it received about the claim.
July 20, 1995	The Parhams filed their complaint against Dr. Balis and Florida Orthopaedic (Dr. Sutterlin's prior employer).
Sept. 1, 1995	The Parhams filed an amended complaint against Dr. Sutterlin and his P.A.

On appeal, the Second District reversed the order of dismissal and reinstated Mr. Parham's lawsuit. In its decision, the majority reconfirmed its decisions in Wood v. Fraser, 677 So.2d 15 (Fla. 2d DCA 1996), and Moore v. Winter Haven Hospital, 579 So.2d 188 (Fla. 2d DCA), review denied, 589 So.2d 294 (Fla. 1991), and again opined that the sending of a notice of intent to initiate litigation under section 766.106(4) tolls the statute of repose. Parham, 704 So.2d at 625. Then, without any analysis, the majority decided that its reasoning in Moore applies where a claimant files a petition for a 90-day automatic extension of the statute of limitation under section 766.104(2). Parham, 704 So.2d at 625. Accordingly, the court reinstated Mr. Parham's action.

In her concurring opinion, Judge Fulmer stated very strongly that she disagreed with the majority and that the court should have "taken this opportunity to recede from Moore" and thus affirmed the circuit court's ruling. Parham, 704 So.2d at 625. In her opinion, Judge Fulmer explained why Moore was incorrectly decided:

> . . . I disagree with this court's holding in Moore that "[t]he 'statute of repose' is subsumed in the general term 'statute of limitations' of section 95.11(4) and is tolled by the service of the notice of intent to litigate." 579 So.2d at 190. This holding is premised upon the conclusion that "[t]o hold otherwise would frustrate the legislative intent of section 768.57 in its entirety." I also disagree with this conclusion. Therefore, I would have taken this opportunity to recede from Moore and would have affirmed the trial court's ruling.

> It is my view that the statute of repose in 95.11(4)(b) is neither extended nor tolled by the provisions of sections 766.104 and 766.106. Rather, it begins to run on the date the incident of medical malpractice occurs and continues to run without regard to what is transpiring with the cause of action or the statute of limitations, until it expires either four or seven years later, thereby barring any action not yet filed. My conclusion is based on a plain reading of the statutes, the differences between a statute of limitations and a statute of repose, and the supreme court's recognition that the time periods of each operate independent of the other.

Parham, 704 So.2d at 625.

Judge Fulmer then discussed the judiciary's duty to follow the Legislative will when reviewing clear and unambiguous statutes:

> When the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary meaning. Courts are without power to construe an unambiguous statute in a way which would modify its express terms. See Holly v. Auld, 450 So.2d 217 (Fla. 1984). Section 95.11(4)(b) was originally enacted as part of the Medical Malpractice Reform Act of 1975. See Ch. 75-9, Laws of Fla. The provisions contained in sections 766.104(2) and 766.106(4) were originally enacted as part of the Comprehensive Medical Malpractice Reform Act of 1985. See Ch. 85-175, Laws of Fla. Therefore, at the time the legislature drafted the language in sections 766.104 and 766.106, respectively granting "an automatic 90-day extension of the statute of limitations" and providing that "the statute of limitations is tolled" during the 90-day period following service of the notice of intent, section 95.11 had been in existence for ten years and provided for both a statute of limitations and a statute of repose. A plain reading of these statutes requires the conclusion that the legislature intended to "extend" and "toll" only the statute of limitations.
>
> This conclusion is also consistent with the language in the repose provisions of section 95.11(4)(b) which provides: "however, in no event shall the action be commenced later than 4 years" and "but in no event to exceed 7 years." I believe the words "in no event" preclude a statutory interpretation that allows an extension or a tolling of the four or seven year period. Furthermore, contrary to the suggestion in Moore that its holding was carrying out legislative intent, I would hold that limiting these statutes to their plain meaning is consistent with the distinctions between a statute of limitations and a statute of repose.

Parham, 704 So.2d at 625-26.

In addition to the clear and unambiguous language of the statute of repose, Judge Fulmer supported her strong disagreement with the majority by looking at the clear differences between a statute of limitations and a statute of repose:

> A statute of limitations is a procedural device that establishes a time period within which an action must be brought, and begins to run at the time an injury occurs or is discovered. It, therefore, operates as a defense to limit the remedy available on an accrued cause of action. A statute of repose cuts off a right of action after a specified period of time without regard to when the cause of action accrued, and begins to run from the date of a discrete act on the part of the defendant. It, therefore, essentially creates in those protected a substantive right to be free from liability after a legislatively determined period of time.
>
> In Kush v. Lloyd, 616 So.2d 415, 421-22 (Fla. 1992), the supreme court stated that:
>
> > [T]he medical malpractice 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 than the two-year statute of limitation, the legislature attempted to balance the rights of injured persons against the exposure of health care providers to liability for endless periods of time.
>
> As an example of the proper application of the medical malpractice statute of repose, the supreme court cited Carr v. Broward County, 541 So.2d 92 (Fla. 1989). In that case the parents of a child who suffered brain damage at birth alleged that they were unable to discover the negligence until almost ten years after the date of the malpractice incident. The supreme court affirmed the dismissal of the action on the grounds that the claim was barred by the statute of repose before it accrued. In doing so, the court held that, because the legislature had found an overriding public necessity in its enactment of section 95.11(4)(b), the plaintiffs were not unconstitutionally denied their access to the court as guaranteed by Article I, Section 21 of the Florida Constitution. Given the markedly different nature and purpose between statutes of repose and statutes of limitation, I cannot subscribe to the reasoning of Moore that the statute of repose is subsumed in the statute of limitations.

Parham, 704 So.2d at 626.

Last, Judge Fulmer found considerable support for her opinion in the decisions of this court:

> Finally, it seems to me that implicit in the supreme court's review of several medical malpractice cases is a recognition that the statute of limitations and the statute of repose operate independent of one another, which is another reason that one cannot be said to be subsumed in the other. In Tanner v. Hartog, 618 So.2d 177 (Fla. 1993), the supreme court traced the development of the rule announced in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), governing when the statute of limitations begins to run in a medical malpractice action. In an effort to ameliorate the harsh results which can occur by a strict application of this rule, the supreme court relaxed its prior interpretation and held that "knowledge of the injury as referred to in the rule as triggering the statute of limitations means not only knowledge of the injury but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice." Tanner, 618 So.2d at 181. Because the new interpretation of Nardone could be viewed as a departure from stare decisis, the court reconciled its action by stating, "[T]he fact that in Kush we have now definitively placed an outer time limit beyond which medical malpractice actions may not be commenced can be viewed as a justification for such a departure." Id. at 182. Categorizing the statute of repose as an outer time limit is inconsistent with a conclusion that this time limit is automatically extended or tolled by the circumstances which extend or toll the statute of limitation. Therefore, while the supreme court was never called upon in any of these cases to expressly address the tolling or extension of the statute of repose period, it seems clear to me that underlying the court's analyses was the assumption that the repose period ran without interruption from the day of the malpractice incident until the expiration of the statutory period without regard to the statute of limitations.

Parham, 704 So.2d at 626-27.

In deference to Judge Fulmer, the Second District certified to this court a question of great public importance:

> DO THE EXTENSIONS OF THE STATUTE OF LIMITATIONS ALLOWED BY SECTIONS 766.104(2) AND 766.106(4), FLORIDA STATUTES (1989), ALSO EXTEND THE STATUTE OF REPOSE CONTAINED IN SECTION 95.11(4)(B), FLORIDA STATUTES (1989)?

Parham, 704 So.2d at 625. All three defendants timely filed their notices to invoke the jurisdiction of this court.

Summary of Argument

The court should reverse the Second District's decision that vacated the dismissal of Mr. Parham's claim because the statute of repose for medical malpractice actions ran before he commenced his action. There is no dispute that Mr. Parham filed his action more than four years after the incident of alleged medical malpractice. Thus, absent an exception to the statute of repose, his action was time barred. § 95.11(4)(b), Fla. Stat. As for his arguments that he extended the four-year repose period by filing a petition for an automatic 90-day extension of the two-year limitation period under section 766.104(2), and that he later tolled the statute of repose by mailing two defendants a notice of intent to initiate litigation under section 766.106(4), the circuit court correctly decided that a claimant cannot unilaterally alter the four-year absolute statute of repose by utilizing the extension and tolling provisions of the two-year statute of limitations for medical malpractice actions.

Argument

The Plaintiff's Medical Malpractice Action was Barred by the Four-Year Absolute Statute of Repose because:

A. A Plaintiff May Not Unilaterally Extend the Statute of Repose by Filing a Petition for an Automatic Extension of the Statute of Limitations Under Section 766.104(2).

B. A Plaintiff May Not Unilaterally Extend the Statute of Repose by Mailing the Defendant a Notice of Intent to Initiate Litigation Under Section 766.106(4).

It is undisputed that Mr. Parham filed his medical malpractice action approximately four years and six months after the "incident" giving rise to his claim. Thus, unless there exists an exception, his action was time barred by the four-year statute of repose for medical malpractice actions. See § 95.11(4)(b), Fla. Stat. (1989);

Kush v. Lloyd, 616 So.2d 415 (Fla. 1992); University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991). In opposing the dismissal of his claim, Mr. Parham contended that he: (1) extended the four-year absolute statute of repose by filing his petition for an automatic 90-day extension of the two-year statute of limitations under section 766.104(2), Florida Statutes, and (2) then tolled the statute of repose for as much as another 90 days by mailing two defendants a notice of intent to initiate litigation under section 766.106(4), Florida Statutes, during this "extended" period. Because he filed his action almost four and one-half years after the incident, it is clear that Mr. Parham needed both of these provisions to apply in order to avoid being time barred.

A. The Four-Year Absolute Statute of Repose

Section 95.11(4)(b), Florida Statutes, sets out the time limitations for the filing of medical malpractice suits. Unlike most provisions which have a statute of limitations period only, section 95.11(4)(b) has a four-year repose period and an additional seven-year repose period if fraud is established:

> **95.11 Limitations other than for the recovery of real property.** -- All actions other than for the recovery of real property shall be commenced as follows:
>
> (4) WITHIN TWO YEARS. --
>
> (b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued. An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care any provider of health care. The limitation of actions within this sub-

section shall be limited to the health care provider and persons in privity with the provider of health care. In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year period, the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred.

§ 95.11(4)(b), Fla. Stat. (1989) (emphasis added).

B. Section 766.104(2) Does Not Extend the Statute of Repose

The Second District erred in holding that section 766.104(2), Florida Statutes, may be used by a claimant to extend the four-year absolute statute of repose. Section 766.104 states:

766.104 Pleading in medical negligence cases; claim for punitive damages.

(1) No action shall be filed for personal injury or wrongful death arising out of medical negligence, whether in tort or in contract, unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint or initial pleading shall contain a certificate of counsel that such reasonable investigation gave rise to a good faith belief that grounds exist for an action against each named defendant. For purposes of this section, good faith may be shown to exist if the claimant or his counsel has received a written opinion, which shall not be subject to discovery by an opposing party, of an expert as defined in s. 766.102 that there appears to be evidence of medical negligence. If the court determines that such certificate of counsel was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court shall award attorney's fees and taxable costs against claimant's counsel, and shall submit the matter to The Florida Bar for disciplinary review of the attorney.

(2) Upon petition to the clerk of the court where the suit will be filed and payment to the clerk of a filing fee, not to exceed $25, established by the chief judge, an automatic 90-day extension of the statute of limitations shall be granted to allow the reasonable investigation required by subsection (1). This period shall be

> in addition to other tolling periods. No court order is required for the extension to be effective. The provisions of this subsection shall not be deemed to revive a cause of action on which the statute of limitations has run.

§ 766.104, Fla. Stat. (1989).

1. Plain and Unambiguous Language of Statute

The trial judge adhered to the plain and unambiguous language of sections 95.11(4)(b) and 766.104(2), and correctly ruled that a petition for an automatic 90-day extension of the two-year statute of limitations under section 766.104 does not extend the four-year statute of repose under section 95.11(4)(b). On its face, section 95.11(4)(b) makes clear that absent fraudulent concealment by the tortfeasor, the statute of repose may "in no event" be extended or tolled. Because this statute states that "in no event" shall the action be commenced more than four years from the date of the incident or occurrence, it is an absolute statute of repose and must be read strictly. Bowery v. Babbit, 99 Fla. 1151, 1164, 128 So. 801, 807 (1930) (a "statute limiting the time to bring suit . . . is not regarded as a technical statute of limitations"). Florida's rule in this regard is consistent with the general rule in other states. "In construing a special statute of limitations the courts will not read another statute into it and thus incorporate exceptions not contained therein, or give it any new or unusual interpretation." 51 Am.Jur.2d, Limitation of Actions § 138; Simon v. United States, 244 F.2d 703 (5th Cir. 1957).

The law of statutory interpretation is well established:

> **§ 110. Interpretive powers of courts**
>
> The legislative intent, which is the primary factor of importance in construing statutes, must be determined primarily from the language of the statute. If the in-

tent of the legislature is clear and unmistakable from the language used, it is the court's duty give effect to that intent. A statute is to be taken, construed, and applied in the form enacted. This is so because the legislature must be assumed to know the meaning of words and to have expressed its intent by the use of words found in the statute.

Though the courts' role in the lawmaking process is recognized, and they have a limited power to adjust statutory provisions to fit changing concepts, the courts cannot use the machinery of construction to amend, modify, or repeal valid statutes. And it is well settled that courts are not concerned with the wisdom of an enactment. Their function is only to ascertain the will of the legislature. They must construe the law as given by the legislature and may not substitute judicial cerebration for the law or require the enforcement of what they think the law should be.

§ 111. Ambiguity as prerequisite for construction

Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resort to the rules of statutory interpretation. The plain and obvious provisions must control. Rules of statutory construction should be used only in case of doubt and should never be used to create doubt, only to remove it.

If the language of the statute is clear and admits of only one meaning, the legislature should be held to have intended what it has plainly expressed. There is no room for construction, and no necessity for interpretation. The only proper function of the court is to effectuate the legislative intent.

Where the language of a statute is both clear and reasonable and logical in its operation, the court should not search for excuses to give a different meaning to words used in the statute, nor should the court speculate as to what the legislature intended. Thus, the court is without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications.

49 Fla.Jur.2d, Statutes §§ 110-111 (1984). See also Holly v. Auld, 450 So.2d 217 (Fla. 1984).

In an analogous case, this court recently stated:

As a general rule, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed

that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983). Therefore, despite the Beaches' assertion that section 1635(f) should not be given its plain meaning, we read that section as unambiguously expressing Congress's intent to extinguish the statutory right of rescission three years after the transaction's closing.

Similarly, this Court traditionally has avoided "readings that would render part of a statute meaningless." Unruh v. State, 669 So.2d 242, 245 (Fla. 1996); Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 456 (Fla. 1992); Villery v. Florida Parole & Probation Comm'n, 396 So.2d 1107 (Fla. 1980); Cilento v. State, 377 So.2d 663 (Fla.1979). Underlying that caution is our assumption that legislatures do not "enact purposeless and therefore useless, legislation." Sharer v. Hotel Corp. of America, 144 So.2d 813, 817 (Fla. 1962). Furthermore, "[w]hen the legislature has used a term ... in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded." Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So.2d 911, 914 (Fla. 1995); see also Florida State Racing Comm'n v. Bourquardez, 42 So.2d 87, 88 (Fla. 1949) ("The legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction....").

More precisely, we have long recognized that "when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right." Bowery v. Babbit, 99 Fla. 1151, 1163-64, 128 So. 801, 806 (1930). In Bowery, we emphasized that the "statute limiting the time to bring suit ... is not regarded as a technical statute of limitations." 99 Fla. at 1164, 128 So. at 807. Therefore, Bowery controls our interpretation of TILA under Florida law.

Beach v. Great Western Bank, 692 So.2d 146, 152 (Fla. 1997).

Florida law is consistent with the law of many other states with respect to the statutory interpretation of statutes of repose and limitation.

§ 138. Generally.

While most courts give recognition to certain implied exceptions arising from necessity, it is now conceded that they will not, as a general rule, read into statutes of limitation an exception which has not been embodied therein, however reasonable such exception my seem and

even though the exception would be an equitable one. The modern rule of construction n this respect is that unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, it must receive a general construction, and the courts cannot arbitrarily subtract therefrom or add thereto. Undoubtedly, a hardship will result in many cases under this rule, but the court may construe only the clear words of the statute, and if its scope is to be enlarged, the remedy should be legislative rather than judicial. It is not for judicial tribunals to extend the law to all cases coming within the reason of it, so long as they are not within the letter. And whether, under a given set of facts, a statute of limitations is to be tolled, is a question of legislative intent as to whether the right shall be enforceable after the prescribed time.

The statute of limitations is considered as intended to embrace all causes of action not specially excepted from its operation, and it should not be so construed as to defeat that object. Accordingly, as a general rule, where the legislature has not seen fit to except a particular person or class of persons from the operation of such statutes, the courts will not assume the right to do so. Except, therefore, as the statute of limitations makes express exceptions in favor of such persons, the statute will be applied against the rights of persons laboring under legal disability. Similarly, as a general rule where an exception to the operation of the statute of limitations is not expressly mentioned in the statute, no such exception will be made on the ground of inability to bring suit, absence of nonresidence of a party, or evasion of process.

51 Am.Jur.2d, Limitation of Actions § 138.

The words "in no event" are common words that are used in ordinary language, and thus, the courts are obligated to accord these words their commonly accepted meaning.

§ 123. Adherence to Commonly Accepted Meaning.

Words of common usage, when used in a statute, should be construed in their plain and ordinary sense as it must be assumed that the legislature knows the plain and ordinary meaning of words used in statutes. For example, it has been held that a statute providing that no person except witnesses may be present at sessions of a grand jury along with enumerated officials, and that violators may be found in contempt, did not mandate a conviction, since it was to be assumed that the legislature knew the plain and ordinary meaning of the word "may," which denotes a permissive rather than mandatory term.

> In the absence of ambiguity or conflict, the plain meaning of a statute will not be disturbed. There is no canon against using common sense to construe laws as saying what they obviously mean. The courts should attribute to the words of a statute the meaning accorded to them in common usage except where a different connotation is expressed or is necessarily to be implied from the context. Courts may not seek a meaning different from the ordinary and common usage connotation of the word unless, on a consideration of the act as a whole and the subject matter to which it relates, they are necessarily led to a conclusion that the legislature intended a different meaning to be ascribed to its language. This rule applies where the words have not acquired a technical meaning or a peculiar legal meaning, and where the interpretation in accordance with the accepted meaning is consonant with the object of the statute.

49 Fla.Jur.2d, Statutes § 123 (1984).

Applying these rules to the case at hand, there is no question that section 95.11(4)(b) sets out an outer time limit of four years for claimants to file a medical malpractice action. Any other conclusion is simply inconsistent with the plain and unambiguous language of section 95.11(4)(b) and contrary to the express legislative intent as indicated by the four corners of this provision. As this court has repeatedly stated, an appellate court has no authority to disregard the plain and unambiguous language of a statute no matter how inviting its interpretation may be. Given the plain language of the statute, the trial judge properly refrained from creating an unauthorized exception to the statute of repose. Holly.

2. The Rule Against Amendment by Implication

Second, Mr. Parham's argument overlooks the rule against the amendment of statutes by implication.

§ 93. Amendment by Implication.

> Amendment of a statute by implication occurs when it appears that a later statute was intended as a revision of the subject matter of the former or when there is an irreconcilable repugnancy between the two, so that there is no way the former rule can operate without conflicting

with the latter. Amendment of a statute by implication is not favored and will not be upheld in doubtful cases. The constitutional prohibition prohibiting the revision or amendment of a statute by reference to its title only is inapplicable to amendment by implication.

49 Fla.Jur.2d, Statutes § 93 (1984).

§ 212. As a matter of legislative intent.

The question whether a new act effects an implied repeal of an existing statute is one of legislative intention in the enactment of the alleged repealing act. Before the courts may declare that one statute amends or repeals another by implication it must appear that the statute later in point of time was intended as a revision of the subject matter of the former, or that there is such a positive and irreconcilable repugnancy between the law as to indicate clearly that the latter statute was intended to prescribe the only rule which should govern the case provided for, and that there is no field in which the provisions of the statute first in point of time can operate lawfully without conflict. Again, before the courts will declare that one statute impliedly repeals another, it must appear either that there is positive repugnancy or that the later act revises the subject or was clearly intended to prescribe the only governing rule. Each subsequent refinement of a law does not invalidate a previous enactment unless it is expressly stated in the law. Where two statutes are in irreconcilable conflict, the earlier act yields to the later statute, even though the later contains no repealing clause. If it is clear from its terms and purposes that the intent of a statute is that it should supersede another statute on a stated contingency, the courts will, in the absence of a violation of the constitution, give effect to that intent.

49 Fla.Jur.2d, Statutes § 212 (1984).

"It is well established that [an] amendment by implication is not favored and will not be upheld in doubtful cases." Quigley v. Quigley, 463 So.2d 224, 226 (Fla. 1985). This court has followed this rule for over fifty years. State v. J.R.M., 388 So.2d 1227 (Fla. 1980); Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So.2d 194 (1946); see also Corona Properties of Fla., Inc. v. Monroe County, 485 So.2d 1314 (Fla. 3d DCA 1986).

Before the courts may declare that one statute amends or repeals another by implication it must appear that the

> statute later in point of time was intended as a revision of the subject matter of the former, or that there is such a positive and irreconcilable repugnancy between the law as to indicate clearly that the later statute was intended to prescribe the only rule which should govern the case provided for, and there is no field in which the provisions of the statute first in point of time can operate lawfully without conflict.

Miami Water Works, 26 So.2d at 196.

In light of this well established rule, the circuit judge was correct to rule that section 766.104(2) did not "implicitly" amend section 95.11(4)(b). Had the Legislature desired to amend section 95.11(4)(b), it would have done so. Further, there is no "positive and irreconcilable repugnancy" in enacting an exception to the statute of limitations, but not applying the exception to an absolute statute of repose. Indeed, the purpose of a statute of repose is to set out an outer date after which no claim may be brought.

3. ***Expressio Unius Est Exclusio Alterius***

Third, while section 766.104(2) specifically authorizes an extension of the statute of limitations, it makes no reference to any extension of the statute of repose. As such, the circuit judge was correct not to read something into section 766.104(2) which was not included by the Legislature. When the Legislature enacts a statute and provides an exception to a general rule, the court must presume that the Legislature considered all of the events that it wanted to except from the general rule. See Martin v. Johnston, 79 So.2d 419 (Fla. 1955), cert. denied, 350 U.S. 835, 76 S.Ct. 71, 100 L.Ed. 745 (1956). The express mention of one thing implies the exclusion of all others things. See Thayer v. State, 335 So.2d 815 (Fla. 1976). Courts are not authorized to imply further exceptions. Williams v. American Surety Co., 99 So.2d 877 (Fla. 2d DCA 1958). Rather, they

must work within the framework of a general rule and the exceptions provided within the statute. Ideal Farms Drainage Dist. v. Certain Lands, 154 Fla. 554, 19 So.2d 234 (1944). It is not the province of the court to alter any statute because of its belief concerning the wisdom of the statute. Tatzel v. State, 356 So.2d 787 (Fla. 1978). Simply put, had the Legislature wanted to create additional exceptions to the statute of repose, it would have done so.

> **§ 126. Expressio unius est exclusio alterius.**
>
> As exceptions in a statute strengthen the force of the law in cases not excepted, enumerations weaken it in cases not enumerated. It is a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Hence, where a statute enumerates the things in which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned. Thus, the protection of a statute requiring a bond of licensed trailer coach dealers did not extend to the consignor of a trailer coach where the statute did not expressly mention anyone except the purchaser to be protected by the dealer's bond. The court could not extend the meaning of the language used to include a class of persons which the legislature did not include among those to be protected by the bond.

49 Fla.Jur.2d, Statutes § 126 (1984).

> **§ 56. Exceptions and provisos.**
>
> The general rule of statutory construction with regard to exceptions and provisos in statutes have been applied to the enumeration of specific exceptions and to saving clauses in statutes of limitation. As a general rule, the enumeration by the legislature of specific exceptions by implication excludes all others, and as is subsequently stated, the courts ordinarily are without power to read into statutes, by construction, exceptions which have not been embodied therein.
>
> In view of the favorable light in which statutes of limitation are now regarded, their application usually may not be evaded by implied exceptions, or by the interpolation of new provisions.

51 Am.Jur.2d, Limitation of Actions § 56.

4. The Moore Holding Conflicts with Other Authorities

Fourth, the circuit judge's ruling follows several decisions from this court and several district courts holding that a claimant must commence a medical malpractice action within four years of the incident to avoid being barred by the statute of repose. Damiano v. McCaniel, 689 So.2d 1059 (Fla. 1997), approving, 670 So.2d 1198 (Fla. 4th DCA 1996); Kush; Public Health Trust of Dade County v. Menendez, 584 So.2d 567 (Fla. 1991); Bogorff; Carr v. Broward County, 541 So.2d 92 (Fla. 1989); Cates v. Graham, 451 So.2d 475 (Fla. 1984); Dampf v. Furst, 624 So.2d 368 (Fla. 3d DCA 1993), review denied, 634 So.2d 623 (Fla. 1994); Padgett v. Shands Teaching Hosp. and Clinics, Inc., 616 So.2d 467 (Fla. 1st DCA 1993); Doe v. Shands Teaching Hosp. and Clinics, Inc., 614 So.2d 1170 (Fla. 1st DCA 1993); Whigham v. Shands, 613 So.2d 110 (Fla. 1st DCA 1993). This court made clear in Menendez that the 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 with this period of time." Menendez, 584 So.2d at 568. The language of Menendez is very explicit and therefore the circuit judge properly relied upon it in making his ruling.

In Damiano, the Fourth District held that the claimant's "suit had to be filed" within four years of the alleged incident in order to fall within the statute of repose.

> 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." 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.

Damiano, 670 So.2d at 1199.

On review, this court affirmed the Fourth District's decision. Writing for the court, Justice Grimes stated:

> Our strict adherence in Kush to the outer time limits set by the statute of repose was one of the stated reasons in Tanner v. Hartog, 618 So.2d 177, 182 (Fla. 1993), for receding from a strict interpretation of when the statute of limitations begins to run.

Damiano, 689 So.2d at 1061, fn. 3.

The Damiano decision is representative of the cases which hold that a claimant must file suit "within four years" of the incident. Consistent with this court's decisions in Kush and Menendez as well as the clear language of the statute of repose, these cases adhere to the outer time limit of "four years" and recognize no exception save that of fraudulent concealment. Damiano, 670 So.2d at 1199.

In her concurring opinion, Judge Fulmer disagreed with Moore's holding that "[t]he 'statute of repose' is subsumed in the general term 'statute of limitations' of section 95.11(4)." Parham, 704 So.2d at 625. Instead, she believed that a "statute of limitations

is a procedural device that establishes a time period within which an action must be brought" whereas a "statute of repose cuts off a right of action after a specified period of time without regard to when the cause of action accrued." Parham, 704 So.2d at 626.

The precedent, which includes medical malpractice actions and other types of actions, shows that Judge Fulmer is correct. In the case of Hernandez v. Amisub (American Hospital), Inc., 659 So.2d 1316 (Fla. 3d DCA 1995), the Third District reviewed this court's decisions in Kush, Bogorff, Menendez, and Carr, and recognized the difference between the statute of repose and the statute of limitations in a medical malpractice action.

> We note that a statute of repose, as distinguished from a statute of limitations, will bar a cause of a action where that action is filed after a specified time period, normally measured from the occurrence of an event specified in the statute, without regard to whether the cause of action has accrued. A statute of limitation, on the other hand, will only bar a cause of action after a specified period of time has elapsed since the accrual of the cause of action. It is therefore altogether possible that a cause of action may be barred by the statute of repose before the statute of limitations has even commenced.

Hernandez, 659 So.2d at 1319 (citations omitted).

In areas of law other than medical malpractice, this court and several of Florida's district courts have recognized the difference between a statute of repose and a statute of limitation.

> In contrast, Congress did not include such a savings clause in section 1635 regarding the right of rescission. Indeed, section 1635(f) explicitly provides that both the right and the remedy expire three years after the closing date. Thus, as the district court notes, TILA mirrors a statute of repose, not a statute of limitations, 670 So.2d at 992 n. 3, in that it "precludes a right of action after a specified time ... rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued." Kush v. Lloyd, 616 So.2d 415, 420 (Fla. 1992).

Beach, 692 So.2d at 152.

> A statute of limitations is a procedural statute which bars enforcement of an accrued cause of action. In this regard, statutes of limitation establish the time period within which a cause of action must be commenced. The limitation period is directly related to the date on which the cause of action accrued. In contrast, a statute of repose is a substantive statute which not only bars enforcement of an accrued cause of action but may also prevent the accrual of a cause of action where the final element necessary for its creation occurs beyond the time period established by the statute. The period of time established by a statute of repose commences on the date of an event specified in the statute. At the end of that time period, the cause of action ceases to exist. Importantly, a statute of repose operates without regard to when the cause of action accrued. Kush v. Lloyd, 616 So.2d 415 (Fla. 1992); Universal Engineering Corp., v. Perez, 451 So.2d 463 (Fla.1984). See also University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991).

WRH Mort., Inc. v. Butler, 684 So.2d 325, 327 (Fla. 5th DCA 1996).

> The introductory adverbial phrase in section 733.702(1), "[i]f not barred by s. 733.710," means that the 2-year period of section 733.710 is paramount over the limitations period in section 733.702(1). Reading the two sections together, it appears that section 733.702 fixes the basic time frame for filing of claims in decedent's estates being probated in Florida, but section 733.710 sets an absolute deadline beyond which no claim may be entertained.
>
> * * *
>
> There is a fundamental difference between ordinary statutes of limitations, on the one hand, and statutes of repose or jurisdictional nonclaim statutes, on the other. As the court noted in Barnett Bank v. Estate of Read, 493 So.2d 447, 448 (Fla. 1986), ordinary statutes of limitations are mere affirmative defenses for the opponent of the claim to plead and prove, while jurisdictional statutes of nonclaim operate to bar untimely claims without any action by the opponent and deprive the court of the power to adjudicate them.

Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P., 673 So.2d 163, 165-66 (Fla. 4th DCA 1996).

> It is well settled, both as a general rule, see McCrory Stores Corp. v. Lee, 157 Fla. 274, 25 So.2d 567 (1946), and with respect to the alleged filing of untimely claims in probate proceedings, Adams v. Hackensack Trust Co., 156 Fla. 20, 22 So.2d 392 (1945), that fraud or misrepresentation which misleads a claimant into a justified

> failure to assert his rights bars reliance on a statute of limitations. It is true that this rule does not apply to a statute of repose which, by definition, absolutely bars a claim or action after the passage of a particular period of time regardless of the underlying circumstances. See University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991).

Baptist Hosp. of Miami, Inc. v. Carter, 658 So.2d 560, 563 (Fla. 3d DCA 1995).

The circuit judge's ruling also follows several decisions that hold that an extension or a tolling of the statute of limitations does not apply to a statute of repose. See Cook v. Deltona Corp., 753 F.2d 1552 (11th Cir. 1985); Wilder v. Meyer, 779 F.Supp. 164 (S.D.Fla. 1991) (equitable tolling provision for two-year statute of limitations does not also apply to five-year statute of repose); Timmereck v. Munn, 433 F.Supp. 396 (N.D.Ill. 1977).

> Where the statute expressly provides for a tolling period for a fraudulent concealment, and then includes a secondary date which 'in no event' can be surmounted, there is good basis for belief that the latter date was intended as an absolute barrier to the filing of suit.

Cook, 753 F.2d at 1562.

In addition to the precedent, the most commonly used treatises in Florida support a dismissal. Florida Jurisprudence and American Jurisprudence state that there are distinctions between statutes of limitation and statutes of repose. Florida Jurisprudence states in relevant part:

> **§ 4. Distinctions between statutes of limitation and other rules imposing time limits.**
>
> Statutes of limitation must be distinguished from statutes of repose. Although phrased in similar language imposing time limits within which legal proceedings on a cause of action must be commenced, a statute of repose is not a true statute of limitations since it begins to run not from accrual of the cause of action, but from an established or fixed event, such as the delivery of a product or the completion of work, which is unrelated to

accrual of the cause of action. Moreover, unlike a statute of limitations, a statute of repose abolishes or completely eliminates the underlying substantive right of action, not just the remedy available to the plaintiff, upon expiration of the limitation period specified in the statute of repose.

A wide distinction also exists between general statutes of limitation and the so-called short, special, nonclaim, or administrative statutes of limitations under which claims of deceased persons must be presented, and in some instances prosecuted, within a given time after the administration of an estate begins and notice is published for the benefit of the creditors. Not only is the purpose of the non-claim statute different, but the event which starts the period running and makes it effective is different; general statutes of limitation begin to run when the cause arises, whereas nonclaim statutes do not become effective except as to claims against decedents' estates and then only after an administrator has been appointed, letters of administration issued, and notice given to the creditors as required by the statute.

§ 89. Generally.

Generally, statutes of limitation begin to run upon accrual of a cause of action, and continue to run without interruption. However, statutory tolling provisions in the general statutes of limitation act to suspend the commencement of the running of limitation periods due to: the defendant's absence from the state, concealment of the defendant's person or the defendant's use of a false name, and, under certain specified circumstances, the plaintiff's minority or incapacity. In addition, the death of either the plaintiff or the defendant will toll the running of statutes of limitation.

Although the tolling provision in the general statutes of limitation provides that no disability or reason other than those specified in the general statutes of limitation, the Florida Probate Code, or the Florida Guardianship Law, may operate to toll the running of any statute of limitations, there is case law holding that the statute of limitations governing an action may be tolled due to fraudulent concealment of the cause of action from the plaintiff.

CAUTION: Statutory tolling provisions operate only to toll statutes of limitation and, thus, are ineffective to suspend statutes of absolute repose.

35 Fla.Jur.2d, Limitation and Laches §§ 4, 89 (1996) (emphasis added); see also 51 Am.Jur.2d, Limitation of Actions § 138.

5. Section 766.104(2) May be Used Only by Attorneys.

On its face, section 766.104 requires only "attorneys" to conduct a "reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant" prior to filing a medical malpractice action. § 766.104(1), Fla. Stat. (1989). Section 766.104(1) has been held to not apply to a *pro se* claimant, even if the claimant is an attorney. Commenos v. Family Practice Medical Group, Inc., 588 So.2d 629 (Fla. 1st DCA 1991). Thus in those cases where an attorney needs additional time to conduct a reasonable investigation, section 766.104(2) gives him or her an avenue to file a petition in the court where the action is to be filed to permit "a reasonable investigation as permitted by the circumstances." Since non-attorneys (and attorneys filing *pro se*) are not burdened with the reasonable investigation requirement under section 766.104(1), logic dictates that *pro se* claimants may not avail themselves of the benefit of section 766.104(2). To hold otherwise allows them to have it both ways.

In this case, Mr. Parham filed the petition for the automatic 90-day extension of the statute of limitations. Attorney Terry was involved in the matter at that time or did not need additional time to conduct a "reasonable investigation." Thus, on its face and as applied to this case, nothing within section 766.104(2) permits for an extension of the statute of repose by *pro se* claimants.

6. The Petition did not Apply to Florida Orthopaedic

Mr. Parham's petition for an automatic 90-day extension of the statute of limitations did not identify, directly or indirectly, to Florida Orthopaedic. It provides: "This extension should be as to

Dr. Chester Sutterlin, Dr. Gene Balis and Tampa General Hospital." As such, by its own terms, the petition did not extend the statute of repose as to Florida Orthopaedic nor did it indirectly evidence an intent to apply to Florida Orthopaedic. Given that Mr. Parham chose not to include Florida Orthopaedic in his petition, he cannot re-write it after the statute of repose has expired.

7. Mr. Parham's Reliance on Wood and Moore is Misplaced

Mr. Parham argued that the trial judge erred by not extending the holdings of Wood and Moore to his case. In so doing, he overlooked the fact that those cases involved an analysis of section 766.106 instead of section 766.104. The differences in these sections are significant and justifies the trial judge's decision not to extend the Wood and Moore holdings to section 766.104. In both Wood and Moore, the claimants mailed the notices of intent to the defendants **prior** to the expiration of the statute of repose. When the defendants received them, they apparently did not respond to them until after the statute of repose expired. Under those facts, the Second District held that the section 766.106 notice of intent tolling provision prevents an action from being dismissed under the statue of repose.

In Wood, the relevant facts were as follows:

> On October 12, 1989, the appellee performed a surgical procedure on appellant which appellant later claimed was medically unnecessary and resulted in an aggravation of the injury for which she was being treated. On August 6, 1993, the appellant prepared and forwarded to appellee a notice of intent to initiate litigation for medical malpractice required by section 766.106. The appellee responded on November 2, 1993, with a written rejection of the claim, prompting the appellant to file a formal malpractice complaint in circuit court on November 15, 1993, more than four years after the date of surgery.

Wood, 677 So.2d at 16.

In Moore, the relevant facts were as follows:

> Moore gave birth to a son, Michael, on August 13, 1983. The child had a misshapen head and suffered seizures on the day of his birth. Twelve days later, she was advised by Michael's treating neurologist that he suffered from encephalopathy (a disease of the brain) and would be a slow learner. Moore alleges that on December 20, 1986, she first discovered that her son's brain condition could be the result of medical negligence. On March 27, 1987, she served a notice of intent to initiate medical malpractice litigation on Winter Haven Hospital. On June 18, 1987, she applied for, and received, the automatic ninety-day extension of the statute of limitations provided for in section 768.495(2), Florida Statutes (1987). On September 21, 1987, Moore filed a medical malpractice action against the hospital.

Moore, 579 So.2d at 189.

The Second District's opinions were based solely on the notice of intent provision currently set out in section 766.106 and not on section 766.104. The decisions smack of estoppel and should not be confused with a ruling that essentially eviscerates the statute of repose. Mr. Parham had over a year to retain an attorney and file his medical malpractice action before the statute of repose period ran. Nevertheless, he sat on his rights. The defendants in this case did nothing to offend equity and fair play.

C. Section 766.106 Does Not Extend the Statute of Repose

As to the tolling provision, the Second District held that the mailing of a notice of intent to initiate litigation under section 766.106(2) "tolls" the statute of repose under section 766.106(4). Parham; Wood; Moore. The current confusion over the issue arose as a result of the Second District's opinion in Moore, which confused a statute of limitation with a statute of repose. As shown above, there is a significant distinction between a statute of limitation and a statute of repose. Section 766.106 is a legislative attempt to curtail meritless claims brought against health care providers.

Like the statute of repose, it was enacted as part of a tort reform act and was intended to benefit health care providers. It states in relevant part:

> **766.106. Notice before filing action for medical malpractice; presuit screening period; offers for admission of liability and for arbitration; informal discovery; review.**
>
> (4) The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

§ 766.106(4), Fla. Stat. (1989).

1. The Purpose of an Absolute Statute of Repose

In Moore, the Second District held that this section tolls the statute of repose. In so doing, the court failed to appreciate the strictness and purpose of a statute of repose.

> **§ 154. Purpose of statute.**
>
> Where there is any doubt as to the meaning of a statute, the purpose for which it was enacted is of primary importance in the interpretation thereof. The courts may take judicial notice of the reasons that lead to and support the enactment of a statute.
>
> While the legislature's policy as declared in the statutory provisions is not necessarily binding upon the courts, such a declaration is persuasive and will be upheld unless clearly contrary to the judicial view. In case of ambiguity, the means adopted by the legislature for accomplishing the purpose of the statute are properly taken into consideration in ascertaining the legislative intent. A construction should be avoided that would operate to impair, pervert, nullify, or defeat the object of the statute. Different statutes have been given similar constructions because of the similarity of the purposes thereof.

49 Fla.Jur.2d, Statutes § 154 (1984).

To truly understand the purpose of this statute of repose, it is helpful to review the history behind its creation. As part of the Medical Malpractice Reform Act of 1975, the Legislature enacted the statute of repose. § 95.11(4)(b), Fla. Stat. (1975); Ch. 75-9, § 7, Laws of Fla. It was enacted in part to balance the creation of a more liberal statute of limitations. The statutes and relevant cases are succinctly summarized as follows:

> Under traditional tort law, the limitation period for negligence cases commenced when the injury occurred, even though the plaintiff could not discover the injury until later. The Florida Supreme Court modified this traditional rule as it applied to medical malpractice cases. In Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), the plaintiff's minor son underwent brain surgery for vision and coordination problems. After surgery, the child's condition worsened until he was totally blind, irreversibly brain damaged, and permanently comatose. The plaintiff sued his son's doctor for medical malpractice five years after the hospital discharged his son, but less than two years after he discovered the defendant's negligence. Id. at 31-32. The plaintiff unquestionably knew of his son's vegetative state when his son was discharged from the hospital more than five years before this suit was filed. Id. at 29. The defendant doctors explained the hopelessness of the boy's condition and made his medical records continually available to the plaintiff. Id. at 29-30. However, the plaintiff claimed that he could not be charged with know-ledge of the defendants' negligence until the plaintiff discovered the negligence in the fall of 1969, approximately four years after his son was discharged from the hospital. Nardone v. Reynolds, 508 F.2d 660, 661 (5th Cir. 1975).
>
> The trial court granted summary judgment for the defendant. Nardone, 333 So.2d at 31. The court held that Florida's general four-year statute of limitations barred the suit. Id. The applicable statute of limitations was Fla. Stat. §95.11(4) (1971), which provided that "any action for relief not specifically provided for in this chapter" must be filed within four years. This general statute of limitations governed medical malpractice cases until 1972, when the Florida legislature amended Fla. Stat. § 95.11(6) to include medical malpractice cases. Fla. Stat. § 95.11(6) (1973). On appeal, the Fifth Circuit Court of Appeals certified several issues to the Florida Supreme Court. The most important question certified asked whether the limitation period commences when

a plaintiff discovers the injury or when the patient discovers that the defendant's negligence caused the injury.

The Florida Supreme Court held that the limitation period commences when a plaintiff first has notice of either a defendant's negligent act or the resulting injury. The Nardone court reasoned that the severity of the child's injury put the plaintiff on notice that the plaintiff's legal rights had been violated. Therefore, the limitation period commenced when the plaintiff knew of the injury, even though he did not know that the defendant's negligence had caused the injury.

While the Nardone suit was pending, the Florida legislature passed a specific statute of limitations for medical malpractice cases. The statute stated that plaintiffs had two years from the time they discovered or should have discovered "the injury" to file medical malpractice suits. Fla. Stat. § 95.11(6) (1973). This statute required that plaintiff file within two years "an action to recover damages for injuries . . . arising from any medical . . . treatment or surgical operation, the cause of action in such case not to be deemed to have accrued until the plaintiff discovers, or through the use of reasonable care should have discovered, the injury." In Moore v. Morris, 475 So.2d 666 (Fla. 1985), the Florida Supreme Court's first case interpreting the new statute, the court determined that the new statute did not change when the medical malpractice limitation period commences. Without discussion, the Moore court held that Nardone continued to control when the limitation period commences. Applying the Nardone rule, the Moore court reversed summary judgment for the defendant doctor, finding a genuine issue of material fact as to when the plaintiffs should have known that their daughter was brain damaged by oxygen deprivation during birth. Moore, 275 So.2d at 669. "The parents knew . . . that there was a problem with the delivery, that the child had swallowed something which restricted breathing, and that the child was starved for oxygen." Id. at 668 (quoting Moore v. Morris, 429 So.2d 1209, 1209-10 (Fla. 3d D.C.A. 1983)). The court noted, however, that the baby appeared to have fully recovered and was not diagnosed as brain damaged until she was three years old. Id. at 669. The court reasoned that some serious medical complications occur so frequently that knowledge of such complications could not constitute notice of medical negligence. Thus, mere knowledge of relatively common complications does not automatically trigger the limitation period.

While the litigation in Moore continued, the Florida legislature twice changed the medical malpractice statute of limitations. First, the 1974 version of the statute allowed a plaintiff two years from the time he or she should have discovered the "cause of action" to file a

> medical malpractice suit. The second amendment produced the present statute which requires plaintiffs to file suit within two years of the "incident" that gave rise to the action. The present statute also provides that if a plaintiff does not immediately ascertain the "incident" that caused the injury, the limitation period will commence when the plaintiff discovers, or should discover, that an "incident" has occurred. This version of the statute was part of the Medical Malpractice Reform Act of 1975, an expansive body of legislation aimed at reducing skyrocketing malpractice insurance rates and the accompanying rise in consumer medical costs.

Comment, Limitation of Actions: When Florida's Medical Malpractice Statute of Limitations Begins to Run, 43 U.F.Law.Rev. 129, 130-33 (Jan. 1991) (some footnotes included within the body of the text). Since then, this court has further modified the discovery rule test for determining when a cause of action accrues under the two-year statute of limitations. See Tanner v. Hartog, 618 So.2d 177 (Fla. 1993); Bogorff; Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990). Based on these decisions, it is clear that Florida currently has a liberal discovery rule for the statute of limitations. In fact, in Tanner, the court stated that it was receding from its prior strict interpretation of the statute of limitations in part because of the enactment of the statute of repose.

The Florida Legislature's response to the problems of medical malpractice in 1975 was not isolated. It appears that quite a few states enacted statutes of repose during the 1970s.

> Real difficulties have resulted where, as is frequently the case in actions for medical malpractice and in products liability actions involving toxic drugs or chemicals, the statute has run before the plaintiff discovers that he has suffered injury, and sometimes even before the plaintiff himself has suffered the injury. The older approach to such cases was a literal application of the statute to bar the action, regarding it as intended to protect the defendant, not only against fictitious claims, but also against the difficulty of obtaining evidence after the lapse of time even when the defendant is confronted with a genuine one--the hardship upon the

plaintiff being considered as merely part of the price to be paid for such protection.

Beginning in the medical malpractice area, a wave of decisions and legislative enactments has met the issue head-on by tolling the statute until the plaintiff has in fact discovered that he has suffered injury, or by the exercise of reasonable diligence should have discovered it. This "discovery rule" appears infectious, and it has been spreading from doctors to dentists, accountants, architects, lawyers, manufacturers of defective products, and a miscellany of negligence and other tort actions. Yet statutes of limitations are legislative creatures, and even courts that favor the discovery rule as a general proposition are bound to follow specific legislation that mandates a different approach.

The widening acceptance of the discovery rule has not been without cost, however, since the rule leaves the defendant vulnerable to suit indefinitely, sometimes decades after the event. Sparked by widening principles of liability including the discovery rule, the great majority of states have enacted legislation placing an outer time limit on negligence and related claims in certain contexts where the hardship to (and perhaps the political clout of) the defendant has appeared the greatest. Such statutes, called statutes of "repose," generally supplement or override the discovery accrual rule. Repose statutes were first widely applied to architects and contractors, in actions for defects in design and construction, and were adapted to the medical service and chattel sale contexts in the 1970's in response to perceived "crises" in the area of medical malpractice and products liability cases. Statutes of repose by their nature reimpose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists, and their constitutionality has been challenged on a variety of state and federal grounds. Although some of the statutes have been declared unconstitutional, the courts in most jurisdictions have upheld their statutes and the legislatures in those that have not have sometimes reenacted new repose legislation that has withstood constitutional attack.

Keeton, W., Prosser & Keeton on the Law of Torts § 30 (4th Ed.) (emphasis added).

Due to the broadening of the discovery rule for the statute of limitations, the statute of repose is now the true vanguard against stale and untimely claims. When the Moore court allowed the claimant to toll the statute of repose on a ground specified solely for

the statute of limitations, it went far beyond than the Legislature expressed and essentially re-wrote section 95.11(4)(b). Thus, the law is now inconsistent with the purpose of the statute of repose, i.e., to set an outer time limit for filing actions.

2. Legislative Intent

The Moore decision is troubling because it also states that it is relying on the legislative intent. The Second District decided to rely upon the rules of statutory construction even though it did not find any ambiguity in any statute. Therefore, it violated the rules of statutory construction:

> The primary guide to statutory interpretation is to determine the purpose of the legislature, and thus, most of the various rules or principles for the construction of statutes are designed to subserve one important object, namely, to ascertain the legislative will, and to carry that intent into effect to the fullest degree. To this principle, all rules of statutory construction are subordinate. The legislative intent is the polestar by which the courts must be guided, since it is the essence and vital force behind the law. This intent must be given effect even though it may appear to contradict the strict letter of the statute and well-settled canons of construction.
>
> The rules of statutory construction are the means by which the courts seek to determine the legislative intent when it is not clear. Thus, although a statute should be construed in its entirety and as a whole, this rule is subordinate to the cardinal rule of statutory construction that effect must be given to the intent of the legislature. Although fundamental principles of statutory construction dictate that an enactment should be interpreted to render it constitutional if possible, the courts may not vary the intent of the legislature with respect to the meaning of the statute in order to effect this result.
>
> The court, in construing a statute, cannot and will not attribute to the legislature an intent beyond that expressed. Any uncertainty as to the legislative intent should be resolved by an interpretation that best accords with the public benefit. It should never be presumed that the legislature intended to enact a purposeless and therefore useless piece of legislation.

49 Fla.Jur.2d, Statutes § 114 (1984); Holly. In this case, there is nothing ambiguous about the statutes. Thus, the Second District improperly relied on the rules of statutory interpretation to come to its decision in Moore.

Even if the language of the statute is insufficient to ascertain the legislative intent behind the statute of repose, then this court need not look any further than the preamble of the Medical Malpractice Reform Act of 1975, which contains express statements of legislative intent:

> WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and
>
> WHEREAS, it is not uncommon to find physicians in the high risk categories paying premiums in excess of $20,000 annually; and
>
> WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
>
> WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida; and
>
> WHEREAS, the problem has reached crisis proportion in Florida, NOW THEREFORE . . .

Ch. 75-9, Preamble, Laws of Fla.

As was observed by one professor in 1975: "The amendment is a response to claims by insurance companies that open-ended limits, like Florida's previous 'discovery' approach, necessitated large reserves against the contingency of undiscovered claims and thus contributed significantly to skyrocketing claims." Probert, W., Nibbling at the Problems of Medical Malpractice, 28 U.F.Law.Rev. 56, 68 (Fall 1975). Professor Probert stated: "One thing is clear: the amendment reflects a legislative purpose to move Florida back

from its position among the most liberal of states." Nibbling, 28 U.F.Law.Rev. at 69.

Although some may disagree with the Legislature's conclusion that there existed a medical malpractice crisis, it is clear that "the Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of fact." University of Miami v. Echarte, 618 So.2d 189, 196 (Fla. 1993), cert. denied, 510 U.S. 915, 114 S.Ct. 304, 126 L.Ed.2d 252 (1994). "Further, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous." Echarte, 618 So.2d at 196; State v. Division of Bond Fin., 495 So.2d 183 (Fla. 1986). Thus, if there is any doubt regarding legislative intent, the court must interpret the statute of repose in a way that will stabilize medical malpractice insurance premiums. Any interpretation of the statute of repose must fully recognize the Legislature's concern that "without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida."

Since 1975, the Legislature has repeatedly recognized the problem that confront this state's health care providers with medical malpractice actions. A review of the Florida statutes shows that the Legislature has oftentimes studied the issues and taken various measures to alleviate the increase in health care costs and medical malpractice insurance premiums. During the 1980s, it created the Academic Task Force to review the health care system and make recommendations. After reading the Academic Task Force's report, the Legislature again found that there was a "financial crisis in the

medical liability insurance industry" and that "the cost of medical liability insurance is excessive and injurious to the people of Florida and must be reduced." Ch. 88-1, Preamble, Laws of Fla. It also made other findings concerning medical malpractice claims.

> WHEREAS, the Legislature finds that there is in Florida a financial crisis in the medical liability insurance industry, and
>
> WHEREAS, it is the sense of the legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their noneconomic losses, and
>
> WHEREAS, the people of Florida are concerned with the increased cost of litigation and the need for a review of the tort and insurance laws, and
>
> WHEREAS, the Legislature believes that, in general, the cost of medical liability insurance is excessive and injurious to the people of Florida and must be reduced, and
>
> WHEREAS, the Legislature finds that there are certain elements of damage presently recoverable that have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily measured on a monetary basis or reflect ultimate monetary loss, and
>
> WHEREAS, the Legislature desires to provide a rational basis for determining damages for noneconomic losses which may be awarded in certain civil actions, recognizing that such noneconomic losses should be fairly compensated and that the interests of the injured party should be balanced against the interests of society as a whole, in that the burden of compensating for such losses is ultimately borne by all persons, rather than by the tortfeasor alone, and
>
> WHEREAS, the Legislature created the Academic Task Force for Review of the Insurance and Tort Systems which has studied the medical malpractice problems currently existing in the state of Florida, and
>
> WHEREAS, the Legislature has reviewed the findings and recommendations of the Academic Task Force relating to medical malpractice, and
>
> WHEREAS, the Legislature finds that the Academic Task Force has established that a medical malpractice crisis exists in the state of Florida which can be alleviated by

the adoption of comprehensive legislatively enacted reforms, and

WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action,

Ch. 88-1, Preamble, Laws of Fla. See also Ch. 90-295, § 1, Laws of Fla.

The Legislature has enacted various statutes that attempted to resolve, or at least alleviate, the problems that exist for medical malpractice claims.

766.201 Legislative findings and intent. -

(1) The legislature makes the following findings:

(a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians.

(b) The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.

(c) The average cost of defending a medical malpractice claim has escalated in the past decade to the point where it has become imperative to control such cost in the interests of the public need for quality medical services.

(d) The high cost of medical malpractice claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury.

(e) The recovery of 100 percent of economic losses constitutes overcompensation because such recovery fails to recognize that such awards are not subject to taxes on economic damages.

§ 766.201, Fla. Stat. (1993). In 1992, the Legislature reaffirmed these findings. § 408.005, Fla. Stat. (1993) (created through Ch. 92-33, §§ 3, 6, Laws of Fla.).

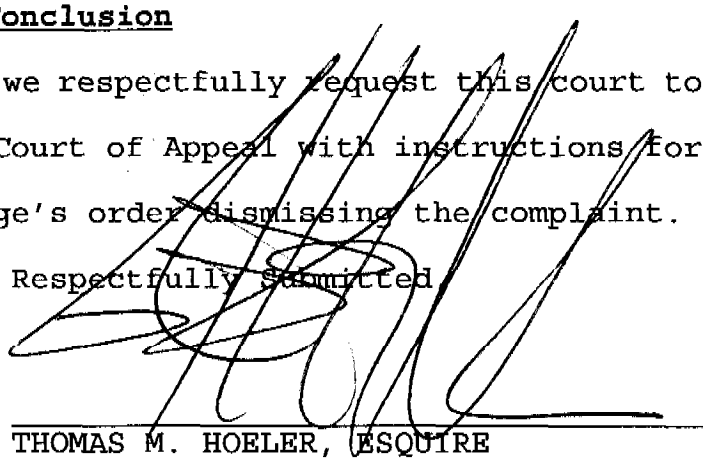
In Coy v. Florida Birth-Related Neurological Injury Compensation, 595 So.2d 943 (Fla. 1992), the court upheld the Birth-Related Neurological Compensation Plan based upon the findings of a trial judge who found that "the medical malpractice crisis . . . engulfed this state and severely disrupted the delivery of health care services and the day-to-day operations of hospitals throughout the state." Coy, 595 So.2d 945. The avalanche of medical malpractice actions caused physicians to spend too much time in the courthouse instead of the hospital. Coy, 595 So.2d at 946. Insurance premiums were skyrocketing beyond the physicians' ability to maintain their insurance. Thus, this court held that the Legislature could validly make a public policy decision to replace civil negligence claims with no-fault administrative remedies.

Given the numerous legislative factual findings, public policy statements, and precedent on statutes that address the problem of rising medical malpractice costs and the unavailability of health care, it is clear that the legislative intent is the same now as it was in 1975 when it enacted the statute of repose, i.e., to reduce rising medical malpractice insurance premiums and encourage health care providers to remain in Florida. While some may quarrel about the wisdom of the Legislature's intent, nobody can deny that this is the legislative intent. Because the legislative intent remains the same, the trial court in this case was correct in ruling that section 766.106 does not toll the statute of repose. Any other interpretation would be directly contrary to the purpose and intent of section 95.11(4)(b). Simply stated, there is nothing in section 766.106 which leads to a conclusion that the Legislature intended to implicitly create an exception to the statute of repose.

Conclusion

Based on the foregoing, we respectfully request this court to reverse the Second District Court of Appeal with instructions for it to affirm the circuit judge's order dismissing the complaint.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to William J. Terry, Esquire, Barnett Plaza, Suite 2560, 101 East Kennedy Boulevard, Tampa, FL 33602; Clifford L. Somers, Esquire, 3333 Henderson Boulevard, Suite 110, Tampa, FL 33609; and Martin B. Unger, Esquire, Brian D. Stokes, Esquire, Unger, Swartwood, Latham & Indest, P.A.. Post Office Box 4909, 701 Peachtree Road, Orlando, FL 32802-4909; by Mail on this 30th day of January, 1998.

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