IN THE SUPREME COURT OF THE STATE OF FLORIDA

LEROY H. MERKLE, JR., as Personal Representative of the ESTATE OF CARMELO L. TERLIZZI, deceased,

Petitioner,

vs.

CASE NO. 91,967

CARRIE HARGIS ROBINSON, an infant under the age of eighteen years who sues by her mother and next friend, SHIRLEY HARGIS,

Respondents.
_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT

Case No. 95-5178

AMENDED REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Other Authorities

ARGUMENT

A. This Court has jurisdiction over the present appeal.

Contrary to Respondents' contention, this Court in Celotex Corp. v. Meehan, 523 So. 2d 141 (Fla. 1988), did not answer the certified question presented to the Court in this case. The Court instead simply confirmed that under Bates v. Cook, 509 So. 2d 1112 (Fla. 1989), Florida courts will apply the "significant relationships" test in determining where a cause of action arose, for purposes of applying Florida's borrowing statute. Id. at 144. As Respondents concede, the issue before this Court has nothing to do with the borrowing statute.

Respondents' argument that this Court has no jurisdiction over the present case because the Third District's opinion in Rodriguez v. Pacific Scientific Co., 536 So. 2d 270 (Fla. 3d DCA 1988) and the Second District's opinion in the present case are not in conflict, is similarly meritless. The Third District in Rodriguez held that an action which is time-barred under Florida law may not be litigated in Florida, even though the action is not time-barred in the state having a more significant relationship to the cause of action. The Second District's ruling below is in direct conflict with Rodriguez.

Respondents' contention that the Second and Third District opinions may be "harmonized" on the grounds that the Second District determined that West Virginia had a more significant relationship to the cause of action, while the Third District in Rodriguez determined "sub silentio" that Florida had a more significant relationship to the action and therefore applied Florida's limitations statute, is also incorrect. The Third District in Rodriguez acknowledged that Puerto Rico had a more significant relationship to the cause of action. The Third District nevertheless correctly applied Florida's limitations statute, because the action was already time-barred under Florida law.

Respondents' further argument that Rodriguez "does not constitute a serious conflict in decisional law" because two recent Florida cases – Campo v. Tafur, 23 Fla. L. Weekly D218 (Fla. 4th DCA, January 14, 1998) and Mezroub v. Capella, 22 Fla. L. Weekly D2665 (Fla. 2d DCA, November 19, 1997) – do not mention Rodriguez, is nonsensical. Neither the Campo nor the Mezroub courts cited to Rodriguez because neither court was faced with the issue presented in Rodriguez and in the present case – the forum court's application of its own shorter statute of limitations, instead of the longer limitations statute of the state where the cause of action arose.

Finally, Respondents assert that the decisions are not in conflict because Rodriguez involved the application of a "statute of limitations," while the dismissal in the present case was based on a "statute of repose." Respondents' argument, which is discussed later in this reply, ignores that the Florida medical malpractice "repose" provisions are an integral and inseparable part of Florida's medical malpractice **limitations** laws. The trial court's dismissal, like the dismissal in Rodriguez, therefore was based on the expiration of Florida's limitations statute.

B. Respondents can offer no justification for the Second District's disregard of over 100 years of precedent mandating the application of Florida's own limitations laws to claims which are time-barred in the forum.[1]

As Respondents concede, no Florida court has ever followed comment (f) to § 142 of the Restatement (2d) of Conflict of Laws as authority for the court's disregard of its own limitations laws under "exceptional" or "rare" circumstances. Even if comment (f) could provide such authority, the "exception" set forth in the comment applies only where there is "no great difference in the period provided by the applicable foreign statute of limitations and that provided by [the forum]." There is a clear difference in

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[1]The Florida Supreme Court in Brown v. Case, 86 So. 684 (1920), relied upon its earlier opinion in Perry v. Lewis, 6 Fla. 555 (1856) for the "well-settled principle that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction."

the limitations periods applicable under Florida and West Virginia law, and the authors' comments therefore do not support the unprecedented rule Respondents urge this Court to adopt.[2]

More important, the Second District's application of West Virginia's longer limitations statute in order to accommodate the West Virginia litigants in their effort to litigate an over 20-year old medical malpractice claim in our court system, contravenes firmly established policies of this state.[3] This Court's holding

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[2]Notably, one American Law Institute author participating in the revision to Restatement § 142 expressed his "surprise" at that portion of comment (f) allowing a forum court on "rare occasions" to entertain an action that is barred by its own statute of limitations, emphasizing that the courts have "no such power," and that the statement was therefore "troublesome." See 54 U.S.L.W. 2597 (May 27, 1986).

[3]Respondents' citation to various treatises as evidence of the "considerable criticism of the rule that permits a forum state to apply its own statute of limitations regardless of the significance of contacts between the forum state and the litigation," is misleading. (Respondents' answer brief at p. 18) A review of these treatises reveals that the criticism is in fact directed toward requiring the forum state to **accept** jurisdiction of litigation having little or no connection to the forum, simply because its own limitations laws have **not expired** – a situation clearly not implicated in the present case. See, e.g., R. J. Weintraub, Commentary on the Conflict of Laws, § 9.2B, p. 517 (2d ed. 1980) (. . . It seems highly unreasonable for a forum that has no significant contact with the controversy to employ its own **longer** statute to extend the limitations period.); James A. Martin, Constitutional Limitations on Choice of Law, 61 Cornell L. Rev. 185, 221 (Jan. 1976) (". . . The forum may be justified in using its own statute of limitations to bar a cause of action that is still good in the state which created it, but a state should be forbidden from entertaining a cause of action after it is dead in the state which created it").

in Kinney System, Inc. v. The Continental Insurance Co., 674 So. 2d 86 (1996), supports Florida's clear policy interest in the application of its own limitations laws to bar the litigation of claims having no connection to the state. In Kinney, this Court criticized the continuous need to ask the state legislature "for an expansion of judicial funding to meet the ever-increasing crush of litigation now coming to our courthouses," and recognized that "nothing in our law establishes a policy that Florida must be a courthouse for the world, nor that the tax payers of the state must pay to resolve disputes utterly unconnected with this state's interest."

The treatises cited in Respondents' answer brief (referenced herein in footnote 3) also discuss the clear policy interest supporting the forum court's application of its own limitations laws to claims arising out of state. In his article entitled Constitutional Limitations on Choice of Law, 61 Cornell L.Rev. 185, 221 (1976), James Martin recognized that when the "factual connections between the case and the forum are more tenuous, or when they are nonexistent (but for the fact that the case is being tried within the forum), the forum may apply its own shorter statute of limitations, not its own longer statute." Id. at 223. Similarly, in his Commentary on the Conflict of Laws, R.J. Weintraub noted that as early as McElmoyle v. Cohen, 38 U.S. (13

Pet.) 312 (1839) it was "decided that a forum that has no substantial connection with a cause of action might apply its own statute of limitations to bar a cause of action that would not be barred under a statute of limitations of the state with which the cause does have its significant contacts," recognizing the forum's "interest simply as forum in preventing the prosecution of what its own statute of limitations would label as a stale claim." Id. at 515. The author states that it is "preferable for the state whose law is functionally relevant to the controversy to enact a long-arm statute that would confer jurisdiction on its courts,"[4] rather than to use a "due process clause to prevent a forum from asserting whatever legitimate interest it may have as forum in closing its doors." Id. at 515.

Respondents argue in the alternative that this Court may approve the Second District's reversal of the trial court's dismissal, on the grounds that the dismissal was based on a statute of repose and not a statute of limitations. Respondents cite to no

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[4]Ironically, the Second District has disregarded long-established Florida precedent so that these West Virginia Respondents will have a forum in which to litigate their 20-year old medical malpractice claim, while the West Virginia courts refused to disregard the state's own rule of law forbidding the retroactive application of West Virginia's long-arm statute, so that Respondents might litigate their claim in an appropriate forum. Query why the Second District ignored Florida's well-established policies in favor of these West Virginia litigants, when the West Virginia courts refused to disregard the state's own policies in order to protect its own citizens?

authority to support their argument that the medical malpractice repose provisions are not part of the state's limitations laws and should not be applied to bar a claim arising out of state. To the contrary, the fact that the legislature intended these "repose" provisions to form an integral and inseparable part of Florida's limitations laws is clearly evident from the language of the statute, which is titled "**Limitations** other than for the recovery of real property," and which provides in relevant part as follows:

> 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 . . . **The limitation of actions** within this subsection 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. (emphasis added)

Florida case law also defeats Respondents' argument that the medical malpractice repose provisions are separable from Florida's medical malpractice limitations statute. Specifically, while

Florida courts have recognized that a statute of repose differs in its"application" from a statute of limitations, the Florida courts have always considered a statute of repose to be otherwise indistinguishable from a statute of limitations.[5] See, e.g., Wiley v. Roof, 641 So. 2d 66, 68 n.2 (Fla. 1994) ("As we mentioned in Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361 (Fla. 1992), the statute of repose and statute of limitations are analogous"); Comerica Bank & Trust v. SDI Operating Partners, L.P., 673 So. 2d 163, 164 n.1 (Fla. 4th DCA 1996) ("While statutes of limitation are distinguishable **technically** from statutes of repose, their ultimate effect is the same . . . Accordingly, statutes of limitation are generally looked on by the courts with favor as statutes of repose"); Moore v. Winter Haven Hospital, 579 So. 2d 188, 189-190 (Fla. 2d DCA 1991) (". . .a statute of repose is a form of a statute of limitations and the terms are often used interchangeably"); Lovey v. Escambia County, 141 So. 2d 761, 764 (Fla. 1st DCA 1962) (The ultimate effect of a statute of limitation and of repose is the same).

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[5]Respondents urge this Court to find that the "repose" provisions are substantive, and therefore do not apply in this action which they assert is more appropriately governed by the substantive law of West Virginia. Respondents ignore the Florida courts' consistent application of its own limitations laws in a conflicts of law analysis, without regard to whether the limitations laws are deemed substantive or procedural. (See Petitioner's initial brief at pp. 8-9)

That the 4 and 7 year repose provisions in Florida's medical malpractice limitations statute cannot be separated from the statute's 2-year limitations provisions for choice of law purposes is evident for yet another reason. This Court in Damiano v. McDaniel, 689 So. 2d 1059, 1061 n. 3 (Fla. 1997), acknowledged that its strict adherence in Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992) to the outer time limit set by the 4 and 7 year medical malpractice repose provisions, was one of the reasons it adopted a more liberal interpretation of the 2 year medical malpractice limitations statute notice requirement in Tanner v. Hartog, 618 So. 2d 177, 182 (Fla. 1993). Without these repose provisions the medical malpractice statute of limitations might never run, given the liberal notice requirements adopted in Tanner. Surely neither the legislature nor this Court contemplated such a result. This is just the result, however, Respondents urge this Court to adopt, when they argue that the Florida courts should refuse to apply Florida's medical malpractice repose provisions in a conflict of law analysis, and find that a non-resident is instead bound only by Florida's 2 year liberal notice requirements. Ironically, not even West Virginia's own limitations statute – which has a 20-year outer limit – creates such an indefinite period of time for filing suit.

Finally, contrary to Respondents' argument, West Virginia's own policies are not subverted by virtue of the application of

Florida's medical malpractice limitations statute to bar Respondents' medical malpractice claim against the deceased physician's estate. In Oakley v. Wagner, 431 S.E. 2d 676, 681 (W.Va. 1993), the West Virginia Supreme Court of Appeals recognized the "well-established principal of conflict of laws" that "if an action is barred by the statute of limitations of the forum, no action can be maintained though the action is not barred in the state where the cause of action arose." Because West Virginia's own laws mandate the application of the forum state's limitations statute, West Virginia would have no expectation of having its own limitations statute apply in another jurisdiction.

Similarly, applying Florida's limitations laws to bar Respondents' from pursuing an action against the deceased physician's medical malpractice insurer also does not violate West Virginia policies, because a West Virginia litigant is not entitled to pursue a direct action against an insurer. See Davis v. Robertson, 332 S.E. 2d 819 (W.Va. 1985). Respondents in fact were precluded from asserting an action against the deceased physician's medical malpractice insurer in their West Virginia action, Robinson v. Cabell Huntington Hospital, 1997 W.L. 725914 (W.Va. Nov. 21,

1997), and should not be permitted to look to Florida law to permit such a claim in the present case.[6]

C. Dismissal of Respondents' medical malpractice claim under § 95.11(4)(b) is constitutional.

The United States Supreme Court has held that a forum state's application of its own statute of limitations to a claim governed by the "substantive" law of a foreign state violates neither the full faith and credit nor due process clauses of the United States Constitution. Sun Oil Co. v. Wortman, 108 S. Ct. 2117, 2119 (1988). The Court reasoned that the full faith and credit clause "does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" Id. at 2122. The Court instead observed that "the period sufficient to constitute a bar to the litigation of stale demands is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience."

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[6]Because Respondents know that they are precluded under West Virginia law from pursing an action against the medical malpractice insurer, they predicably assert that the joinder of an insurer is a "procedural" matter and therefore governed by Florida law. Respondents overlook this Court's opinion in Hertz Corp. v. Piccolo, 453 So. 2d 12 (Fla. 1984), wherein this Court held that the direct action statute at issue is substantive. Accordingly, even if Respondents' attempt to "pick and choose" the law of the state which best suits their purpose were proper (and it is not), Respondents argument that Florida "procedural" law permits the joinder of the insurer is meritless.

Id. at 2123-2124. Notably, the Sun Oil Court also acknowledged that "it cannot possibly be a violation of the full faith and credit clause for a state to decline to apply another state's law in a case where that other state **itself** does not consider it applicable," as in the present case. Id. at 2125 n.3. Oakley v. Wagner, supra, at 681.

The Sun Oil court also rejected the petitioner's "due process" attack upon the forum court's application of its statute of limitations. The Court observed that at the time the Fourteenth Amendment was adopted, it had not only explicitly approved the forum state's application of its own statute of limitations, but that the practice had gone essentially unchallenged. Id. at 2126. In this regard, the Court recognized "a state's interest in regulating the workload of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations."

Respondents argument that the application of § 95.11(4)(b) in the present case amounts to an unconstitutional denial of Respondents' access to the courts of this state, because the "policy concerns" underlying the repose provisions of the statute do not apply to out of state citizens, is also incorrect. Without regard to the policy concerns justifying the legislature's adoption

of the repose provisions, the clear language of the statute and the case law of this state reveal that the repose provisions are an integral and inseparable part of the state's limitations laws, and will be applied as such in a choice of law determination. Notably, Respondents' argument ignores this Court's recognition in Damiano v. McDaniel, 689 So. 2d 1059 (Fla. 1997), that the medical malpractice repose provisions are constitutional, even when they operate to bar a litigant's claim before it has accrued. Surely neither the legislature, nor this Court, have intended to confer upon a non-resident more extensive rights in the Florida court system, than those accorded to the citizens of this state.

Finally, the application of § 95.11(4)(b) to bar Respondents' claim does not violate Article X, Section 6(a), of the Florida Constitution, because Respondents have no "property right" to pursue their time-barred claim in the Florida court system. Any "right" Respondents had to pursue their medical malpractice claim in this state expired over ten years before Respondents elected to file their claim in Florida. Notably, it is not surprising that Respondents attempt to take advantage of rights afforded under the Florida Constitution, while arguing at the same time that Florida substantive law does not apply to their claim, where Respondents have demonstrated no hesitation in "picking and choosing" the law of each state they believe best advances their position.

Predictably, however, Respondents have cited to no case law to support their contention that they have a greater "property right" than a citizen of our own state to pursue a time-barred claim in the Florida court system under our state's Constitution, and their argument is meritless.

CONCLUSION

For the reasons more particularly set forth herein and in Petitioner's initial brief to this Court, Petitioner respectfully requests that this Court quash the opinion of the Second District Court of Appeal, and reinstate the trial court's final judgment of dismissal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 30 day of April, 1998, to Roy L. Glass, Esquire, 3131 - 66th Street North, Suite A, First Union National Bank Bldg., St. Petersburg, Florida 33710.

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