IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 91,967
DCA No. 95-5178

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

Petitioner,

vs.

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

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS
(Brief Synopsis)

This is a medical malpractice action which arose in the State of West Virginia involving, at the time, West Virginia residents, and an insurer that had issued a per occurrence Professional Liability Policy in the State of West Virginia applicable to this event. A companion case was previously filed in the State of West Virginia. Because in personam jurisdiction could not be obtained over the physician who had moved to Florida, this case was commenced against The Personal Representative of The Estate of the Deceased, a physician who died a citizen-resident of the State of Florida. Although this action was not barred by the applicable West Virginia statute of limitations, the trial court applied the forum statute of repose, § 95.11(4)(b), Fla. Stat. entering its final judgment of dismissal.

On appeal, Robinson v. Merkle, 700 So. 2d 723 (Fla. 2d DCA 1997), the Second District Court of Appeal held that because the State of West Virginia had more significant relationships with the parties and the action, the West Virginia statute of limitations should have been applied by the trial court, thereby reversing the trial court and certifying to the Supreme Court of Florida the question whether its ruling conflicted with that of the Third District Court of Appeal in Rodriguez v. Pacific Scientific Company, 536 So. 2d 270 (Fla. 3d DCA 1988) rev. den., 545 So. 2d 1368 (Fla. 1989).

(Detailed Statement)

This case was brought by residents of the State of West Virginia, arising out of alleged medical malpractice by the deceased physician, **CARMELO L. TERLIZZI, M.D.**, in the birth and delivery of the Plaintiff, **CARRIE HARGIS-ROBINSON**, on May 12, 1977,

in the State of West Virginia, while the deceased, a physician, was licensed to practice medicine in the State of West Virginia (R.1-5, 83-88).

On May 12, 1977, **SHIRLEY HARGIS**, the mother, was admitted to **CABELL HUNTINGTON HOSPITAL** located in Cabell County, West Virginia, under the care and attendance of **CARMELO L. TERLIZZI, M.D.** for the delivery of the expectant child, the Plaintiff, **CARRIE HARGIS-ROBINSON**. **CARMELO L. TERLIZZI, M.D.** did attend to and provide prenatal obstetrical care to **SHIRLEY HARGIS** in the State of West Virginia prior to this hospital admission. It is alleged that **CARRIE HARGIS-ROBINSON** was, as a result of **CARMELO L. TERLIZZI, M.D.**'s medical negligence, born with perinatal asphyxia, hypoxia and seizure disorder and has suffered severe permanent and continuing injury. (R.1-5, 83-88).

Despite the injuries to **CARRIE HARGIS-ROBINSON**, her mother **SHIRLEY HARGIS** had no reason to suspect that her daughter was injured as a result of medical negligence until on or about February 15, 1994. (R.85).

THE STANDARD FIRE INSURANCE COMPANY issued a per occurrence professional liability policy in the State of West Virginia to **CARMELO L. TERLIZZI, M.D.**, 1616 13th Avenue, Huntington, West Virginia 25701, for the policy period covering January 1, 1977 to January 1, 1978, which would provide coverage for this incident which occurred on May 12, 1977 in the State of West Virginia. (R. 111).

CARMELO L. TERLIZZI, M.D. died a citizen/resident of the State of Florida on July 7, 1987, apparently after having moved to the State of Florida after retiring from the practice of medicine. (R. 1-2, 9-10). The Estate was first opened October 6, 1994 and this

action was commenced nineteen (19) days later with the filing of the Complaint on October 25, 1994. In the Complaint (R. 1-5), Plaintiffs alleged the applicability of West Virginia law. In addition to serving interrogatories and requests to produce, Plaintiffs also filed requests for compulsory judicial notice of West Virginia law. (R. 6-8, 20-27).

LEROY H. MERKLE, JR. accepted service on behalf of the Estate of **CARMELO L. TERLIZZI, M.D.**, deceased, waiving service of process, venue, and agreed to answer the Complaint within twenty (20) days; and discovery within forty-five (45) days. (R. 14)

After the acceptance of service by **LEROY H. MERKLE, JR.**, the parties entered into a joint stipulation for stay, and the Court entered its Order approving same on April 28, 1995. (R. 14-17). The stay was predicated upon the Personal Representative attempting to identify any medical malpractice insurance company that may have conceivably provided coverage to **CARMELO L. TERLIZZI, M.D.** at the times material to the cause of action. This stay was to preclude the cause from becoming stale from the lack of prosecution and for the Estate to avoid default during the reasonable time necessary for the purpose of identifying, and placing on notice, any medical malpractice insurance company that may be involved.

On May 25, 1995, Defendant filed a Motion to Dismiss the Complaint, alleging that the case was barred by the Florida statute of repose, § 95.11(4)(b), stating that since the alleged malpractice occurred in 1977, it was clearly over seven (7) years before the action was filed. (R. 18-19).

Unopposed requests for compulsory judicial notice of West Virginia law established that the statute of limitations under West Virginia law had not run as to this cause of action.

Also, the State of West Virginia's Long-Arm Statute would not be effective for acquiring personal jurisdiction over **CARMELO L. TERLIZZI, M.D.** for any cause of action occurring prior to its effective date on June 7, 1978. (R. 6-8, 20-27).[1]

On June 27, 1995, the Honorable Fred L. Bryson, Circuit Court Judge, sitting in substitution for the assigned Honorable Bruce Boyer, entertained hearing on Defendant's Motion to Dismiss, granting such motion on the basis of the Florida statute of repose. Such Order was entered on July 19, 1995. (R. 80).

On July 31, 1995, Plaintiffs filed a Motion for Rehearing on the Order of Dismissal (R.89-96) and Motion for Leave of Court to file an Amended Complaint (R. 81-88), alleging when the Plaintiffs had knowledge of injury and knowledge of the reasonable possibility that this injury was caused by medical malpractice.

On October 5, 1995, the trial court, after hearing, entered its Order denying Plaintiffs' Motion for Rehearing on Order of Dismissal and Motion for Leave of Court to file Amended Complaint (R. 99-100) and its Final Judgment of Dismissal. (R. 97-98).

On December 5, 1995, Plaintiffs timely filed a Notice of Appeal to the Second District Court of Appeal.

Thereafter, Appellants filed their Motion for Remand to consider Plaintiffs' Motion for Leave of Court to Add Party Defendant and file "Third Amended Complaint," alleging a direct action against the **STANDARD FIRE INSURANCE COMPANY**. (R. 107-118).

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[1] Plaintiffs had commenced an action in the State of West Virginia against **CABELL HUNTINGTON HOSPITAL** and the **ESTATE OF CARMELO L. TERLIZZI** but was unable to acquire in personam jurisdiction over the **ESTATE OF CARMELO L. TERLIZZI** and was also denied her attempt to join **CARMELO L. TERLIZZI, M.D.**'s professional liability carrier, **STANDARD FIRE INSURANCE COMPANY**. (R.148).

The Second District Court of Appeal entered its Order on March 14, 1996, granting the Motion for Remand. After hearing held April 18, 1996, the Circuit Court entered its Order on Remand May 1, 1996 (R. 155-156) denying Plaintiffs' Motion for Leave of Court to add party Defendant and file "Third Amended Complaint."

The Second District Court of Appeal reversed the trial court, based upon application of the significant relationships test, and certified to this Court the following question:

> **DOES THE SIGNIFICANT RELATIONSHIPS TEST ADOPTED IN BATES v. COOK, 509 SO.2D 1112 (FLA. 1987), FOR USE IN APPLYING FLORIDA'S BORROWING STATUTE, § 95.10, FLORIDA STATUTES, ALSO APPLY TO CASES INVOLVING FLORIDA'S STATUTE OF LIMITATIONS § 95.11, FLORIDA STATUTES?**

Raised, preserved and argued by Respondents at the trial and the district court levels is that § 95.11(4)(b), Fla. Stat., as applied, is unconstitutional under the United States and Florida Constitutions. See Appendix to Brief attached hereto. The Second District Court of Appeal did not address the constitutionality *vel non* of the statute given its disposition on other grounds.

SUMMARY OF THE ARGUMENT

This Court should decline accepting jurisdiction, affirming the Second District Court of Appeal, because ten (10) years ago this Court already implicitly answered the certified question by determining that the significant relationships test is applied whether or not you are looking at a foreign statute of limitations or Florida's statute of limitations. Celotex Corp. v Meehan. Further, there is no true conflict between the Second District's decision and that of the Third District. So, to accept jurisdiction would be improvident.

Should this Court elect to accept jurisdiction to dispose of the certified question, it should readily affirm the Second District's decision that the State of West Virginia has the most significant relationships and that the West Virginia statute of limitations applies. But, should this Court determine that the Second District's decision is incorrect, then this Court should nevertheless conclude the issue in favor of Respondents, recognizing that this is an exceptional case and expressly adopt Restatement (Second) Conflict of Law § 142 as revised May 19, 1988, refusing to apply the forum limitations rule to bar this action against this former West Virginia physician and his medical malpractice insurance carrier.

Should this Court not elect to expressly adopt Revised § 142 of the Restatement, concluding that the Second District's decision is incorrect and that this action is barred by application of Florida's statute of ***repose***, then, this Court must address outcome determinative issues that the statute of repose is, in application, unconstitutional under various provisions of the United States and Florida Constitutions.

POINTS ON APPEAL

I. The exceptional circumstances of this case require this Court to depart from the application of the forum statute of repose § 95.11(4)(b), Fla. Stat., in barring this West Virginia medical malpractice action from proceeding forward against the Estate of the deceased/retired West Virginia physician and his medical malpractice insurance carrier.

II. As applied in this choice of laws case, § 95.11(4)(b), Fla. Stat., is unconstitutional under the United States and Florida Constitutions.

Application of the State of Florida medical malpractice repose is arbitrary and fundamentally unfair, in violation of both the Due Process Clause and the Full Faith and Credit Clause of the United States Constitution.

As applied, Florida's medical malpractice statute of repose violates Article I, Sections 21 and 22 of the Florida Constitution.

As applied, Florida's medical malpractice statute of repose violates Article X, Section 6(a) Florida Constitution.

PREFATORY ARGUMENT
(False Conflict and Impropriety of Accepting Jurisdiction)

Inadvertently overlooked is that this Court has, ten (10) years ago, essentially answered the certified question in the affirmative. Celotex Corp. v. Meehan, 523 So. 2d 141, 148 (Fla. 1988) (finding that the significant relationships test is applicable in determining if a foreign state's limitation period *or* Florida's limitations is to be applied).

This Court has, after initially granting jurisdiction in cases presumed to present prima facie conflict, dismissed the petition for review on the basis that there either was no true conflict or that review was improvidently granted. *See, e.g.,* Curry v. State, 682 So. 2d 1091 (Fla. 1996); Kennedy v. Kennedy, 641 So. 2d 408 (Fla. 1994). Since this Court will very closely examine the "opinions" of the Second District Court of Appeal in this case compared to that of the Third District Court of Appeal in Rodriguez v. Pacific Scientific Company, 536 So. 2d 270 (Fla. 3d DCA 1988) rev. den., 545 So. 2d 1368 (Fla. 1989) in order to determine whether or not the "decisions" of those courts create direct conflict on the same point of law, it appears significant to fully appreciate that:

1. The Second District Court of Appeal's "opinion" is fully in consonance with this Court's opinions in Celotex Corp. v. Meehan, 523 So. 2d 141 (Fla. 1988); Bates v. Cook, Inc., 509 So. 2d 1112 (Fla. 1987); and Bishop v. Florida Specialty Paint Company, 389 So. 2d 999 (Fla. 1980) applying the significant relationships test to conflicts in substantive law *and* the application of statute of limitations. *A fortiori*, the Second District Court of Appeal's opinion in this case is also fully in consonance with the American Law Institute's Restatement (Second) Conflict of Law §142 (Revised) and §145.

2. About the only ultimate facts in common between this case and Rodriguez are that the statute of limitations in a foreign jurisdiction does not time-bar the cause of action and that the borrowing statute, § 95.10, Fla. Stat., is completely inapplicable. Because the Third District Court of Appeal did not, in its Rodriguez "opinion," seek to undertake a significant relationships analysis as did the Second District Court of Appeal in this case, it certainly cannot be concluded that a rule of law is being applied to produce a different result in a case which involves "substantially the same controlling facts as a prior case." *See* City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So. 2d 632, 633 (Fla. 1976). It should not be overlooked that the Third District Court of Appeal affirmed the trial court's rejection of the argument that Puerto Rico was the state with the most significant relationships to the occurrence and the parties. Accordingly, it seems implicit that the trial court and the Third District Court of Appeal concluded that Florida had the most significant relationships versus Puerto Rico and since Florida's statute of limitations barred the action, there was " ... no need to address the question whether the cause of action is also time-barred in the state or territory where it arose" - Puerto Rico. Rodriguez, *Id.* 536 So. 2d 270, 271-272. In other words, in analyzing the respective "opinions" of the Second District and the Third District Courts of Appeal, they may be harmonized in the sense that the Second District Court of Appeal did undertake a significant relationships analysis in determining that the State of West Virginia had the more significant relationships whereas in Rodriguez, the Third District Court of Appeal seemingly determined, *sub silentio*, that Florida had the most significant relationships. There would be, then, no true conflict between these decisions.

3. Since this Court's concern in cases based on conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law, Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985), it is submitted that the Rodriguez decision does not constitute a serious conflict in decisional law. This is exemplified in two recent cases: Campo v. Tafur, 23 Fla. L. Weekly D218 (Fla. 4th DCA, January 14, 1998) (refusing to apply § 95.10, Fla. Stat., to bar on limitations grounds, a cause of action for paternity, child support, fraud and quantum meruit even though two children were born in Columbia and the Columbian statute of limitations would have barred the action, the court seemingly concluding that Florida had the most significant relationship to the occurrence and the parties and, under Florida law, the claims would not be time-barred); Mezroub v. Capella, 22 Fla. L. Weekly D2665 (Fla. 2d DCA, November 19, 1997) (a different panel of the Second District Court of Appeal, yet having Judge Frank in common, applying the significant relationship test to determine that even though the cause of action for a motor vehicle personal injury suit would have been barred under Georgia law, the significant relationships established that Florida had the dominant interest with respect to the statute of limitations and that the case was not time-barred under Florida law. In footnote 7 of this opinion, Judge Altenbernd distinguished Robinson v. Merkle, 700 So. 2d 723 (Fla. 2d DCA 1997). In short, it does not appear that the Rodriguez decision is considered precedence as to this issue because it is not mentioned in either one of these decisions.

4. Predictably, Petitioner will attempt to convince this Court to address perceived conflict on the basis that the announced rule of law conflicts with other appellate expressions of law. *See,* City of Jacksonville v. Florida First National Bank of Jacksonville,

supra at 633. Yet, close examination of the "opinions" of each court does not support the existence of conflict on this basis either. The Third District Court of Appeal held in Rodriguez that where a tort cause of action is filed in Florida, but arose in some other state or United States Territory, and is time-barred by Florida's limiting statutes, the borrowing statute is inapplicable. The Second District Court of Appeal's opinion in Robinson v. Merkle does not conflict with this holding. The applicability of the borrowing statute in Robinson v. Merkle was never at issue. Both Petitioner and Respondent acknowledge that the borrowing statute is inapplicable. The Second District's holding that under the significant relationships test, West Virginia has more interest in this cause of action and therefore its statute of limitations should apply is not an announced rule of law which conflicts with the Third District's announced rule of law. Indeed, the Second District's holding seems mandated by this Court's decision in Celotex Corp. v. Meehan, 523 So. 2d 141, 148 (Fla. 1988) (the significant relationships test is to be applied in determining if a foreign state's limitation period *or* Florida's limitations is to be applied).

5. Again, in examining the "opinions" of the respective district courts, it is clear that the Rodriguez action was barred under Florida's four-year statute of ***limitations*** for tort actions. Yet, in this case, it is not clear from the Second District's opinion as to what part of §95.11(4)(b), Fla. Stat., was determined to bar the action. No doubt, Petitioner will respond it simply does not matter. Comparing the date of birth, May 12, 1977, with the date that this action was commenced, October 25, 1994, Petitioner will contend as below, that the action is barred by the outermost seven (7) year provision of § 95.11(4)(b), Fla. Stat. Petitioner is likely to couple this argument with the Second District's acknowledgment that this Court abandoned the conventional practice of justifying the use of different

analyses for making conflict of law determinations involving statutes of limitation based upon their classification as procedural, or substantive. Robinson v. Merkle, 700 So. 2d at 725 (citations to Bates v. Cook, Inc. omitted). But, significantly, the "opinions" of these District Courts are truly not in conflict when it is recognized, as it must be, that §95.11(4)(b), Fla. Stat., is a hybrid statute containing both a statute of limitations and a statute of ***repose***. Carr v. Broward County, 541 So. 2d 93, 94 (Fla. 1989). This point was preserved and argued at the trial court and district court levels and is not at all an insubstantial consideration when this Court is exercising its discretion in whether or not to accept jurisdiction. Unquestionably, no statute of repose was involved in Rodriguez. In the instant case, the action was commenced within the Florida two (2) year statute of ***limitations*** as it was not until February 15, 1994, only months before this action was commenced in Florida, that **SHIRLEY HARGIS** was aware that the injuries at childbirth were related to medical negligence (R. 83-88). So, the so-called "threshold presumed and distinguishing fact" that this cause is not barred by Florida's statute of limitations is satisfied here. Rodriguez, 536 So. 2d at 271. In short, there is no true conflict of decisions when it is obvious that the Third District in Rodriguez was never called upon to apply the so-called forum limitations rule in the context of a "statute of repose."

6. Yet, should Petitioner initially persuade this Court that jurisdiction should be accepted to resolve this apparent conflict in decisions, there is ultimately another reason this Court may exercise its discretion and decline to do so. Notably, that reason is the alleged unconstitutionality, as applied, of the statute of repose provisions in § 95.11(4)(b), Fla. Stat., to the facts in this case. While the Second District was able to avoid these

properly preserved and argued constitutional issues because it reached its decision on non-constitutional grounds, should this Court accept jurisdiction and conclude, as Petitioner urges, that the Second District's decision is incorrect on the certified question, this Court will necessarily then have to address the outcome determinative constitutional issues. For, it is clear, without needless citation of numerous authorities, that this Court has the jurisdiction and authority to consider all issues appropriately raised as though the case had originally come to this Court on appeal. And the scope of review includes those issues which are dispositive of the case even if outside the question certified. *E.g.* Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982).

So, should this Court accept jurisdiction to determine the certified question and conclude that the Second District is incorrect, the efficient and proper administration of justice would then require this Court to address the constitutional issues involving the application of the statute of repose in this conflict of laws case. Remand to the Second District to address these penultimate constitutional issues portends piecemeal appeals.

For any or all of the reasons set forth above, it is respectfully submitted that this Court should decline accepting jurisdiction to address the certified question. The balance of this Answer Brief is committed to addressing the substantive issues on appeal.

ARGUMENT

POINT I

THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE REQUIRE THIS COURT TO DEPART FROM THE APPLICATION OF THE FORUM STATUTE OF REPOSE § 95.11(4)(b) FLA. STAT. IN BARRING THIS WEST VIRGINIA MEDICAL MALPRACTICE ACTION FROM PROCEEDING FORWARD AGAINST THE ESTATE OF THE DECEASED/RETIRED WEST

VIRGINIA PHYSICIAN AND HIS MEDICAL MALPRACTICE INSURANCE CARRIER.

Again, this is a medical malpractice case involving a birth and delivery on May 12, 1977 in the State of West Virginia. Sometime after this, the attending doctor, **CARMELO L. TERLIZZI, M.D.**, retired and moved to the State of Florida. It was not until February 15, 1994 that the Plaintiffs discovered the injuries at birth may have occurred from other than natural causes and that there was a reasonable possibility that the injuries were caused by medical negligence. Discovering that **CARMELO L. TERLIZZI, M.D.** had died a citizen/ resident of the State of Florida, his Estate was opened October 6, 1994 and the Complaint was filed October 25, 1995. (R. 83-88).

This Court has stated that § 95.11(4)(b), Fla. Stat.; prescribes (1) a statute of limitations of two (2) years; (2) a statute of repose of four (4) years; and (3) a statute of repose of seven (7) years when there is an allegation that fraud, concealment, or intentional misrepresentation of fact preventing discovery of negligent conduct. Carr v. Broward County, 541 So. 2d 93, 94 (Fla. 1989). This statutory section is, therefore, a hybrid containing both a statute of limitations and a statute of repose. The trial court in this case applied the outer limits seven (7) years statute of repose in dismissing this case.

West Virginia Code § 55-2-12(b) provides that every personal action for which no limitation is otherwise prescribed shall be brought within two (2) years next after the right to bring the same shall have accrued if it be for damages for personal injuries (R. 22).

West Virginia Code § 55-2-15, is a general tolling statute, preventing the statute of limitations from running against infants and insane until their disabilities have been removed, but in no event after twenty (20) years from the time when the right accrues. It

is uncontroverted that the statute of limitations of West Virginia had not expired at the time that this action was commenced in Florida.

In Bishop v. Florida Specialty Paint Company, 389 So. 2d 999 (Fla. 1980), this Court adopted the standards set forth in Restatement (Second) Conflict of Laws § 146 determining that the more significant relationship to the occurrence and parties would be applied to determine which law was to be applied in a personal injury case. In Bishop, the case involved a crash of a small plane en route from Jacksonville, Florida to Beach Mountain, North Carolina. All of the relevant parties were Jacksonville residents and the holiday trip began, and was to end, in Jacksonville. The plane crashed in South Carolina. Under South Carolina law, the aviation guest statute would require plaintiffs to show intentional misconduct or recklessness to recover, which they admittedly could not prove. Under Florida law, only a showing of ordinary negligence would be required for recovery. *This Court determined that the relationship of South Carolina to the personal injury accident was limited to the happenstance of the plane coming into contact with South Carolina soil after developing engine trouble in unidentified air space.* This Court, responding to a certified question from the First District Court of Appeal, departed from the *lex loci delicti* conflict of laws rule and adopted the more flexible, modern approach set forth in the Restatement. As cited in Bishop, at p. 1001, the significant relationship test is:

> § 145. The General Principle
>
> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred;
(b) the place where the conduct causing the injury occurred;
(c) the domicil, residence, nationality, place of incorporation and place of business of the parties; and,
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

§ 146. Personal Injuries

In an action for a personal injury, *the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship* under the principles states in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied. (Emphasis suppled.)

Based upon the relevant Restatement factors for consideration, the most significant relationship to the occurrence and the parties is obviously the State of West Virginia. West Virginia is where the injury occurred. It is the place where the conduct causing the injury occurred. On the date and at the place where the injury occurred, all the parties were residents of West Virginia. And, this is where **CARMELO L. TERLIZZI, M.D.** practiced medicine. West Virginia is also the place where the doctor/patient relationship between the parties was centered; and, where **THE STANDARD FIRE INSURANCE COMPANY'S** Professional Liability Policy was issued. In summary, all of the contacts with respect to the particular issues involved and the considerations under § 6 of the Restatement (Second) clearly point to the State of West Virginia.

Without replicating the Restatement (Second) criteria here, set forth in Bishop, 389 So. 2d at p. 1001, suffice it to state that the relative policies of West Virginia, the relevant policies of Florida, the protection of justified expectations and the basic policies underlying

the particular field of law, can, in significant part, be fully appreciated by reference to the West Virginia Supreme Court of Appeals' opinion in Whitlow v. Bd. of Educ. of Kanawha. County, 190 W.Va. 223, 438 S.E. 2d 15 (W.Va. 1993).

In Whitlow, the West Virginia Supreme Court examined the purpose of W.Va. Code § 55-2-15 extending the limitations, so that the rights of infants and other disabled persons may be protected. For example, an infant, upon reaching majority, still has the benefit of the applicable statute of limitations. This tolling statute was upheld against the Board of Education's attempt to bar a fifteen (15) year-old junior high school student's action for personal injuries resulting from collapsing bleachers. The Board of Education relied upon other provisions of the W. Va. Code which time-barred the action in cases against governmental entities. Application of the shorter limitations was sought to be justified by the Board of Education based upon legislative findings of uncanny similarity to those as set forth in the Florida Medical Malpractice Reform Act. The West Virginia Supreme Court rejected the application of the shorter limitations, permitting the claim to proceed. And, in Donley v. Bracken, 192 W.Va. 383, 452 S.E.2d 699 (W.Va. 1994), the West Virginia Supreme Court found that this twenty (20) year statute of limitations tolling provision represented a proper legislative goal of enhancing the period of time to bring claims on behalf of incompetents and minors as well as being reasonably related to the legislative interest *and* the right of defendants to be free of stale claims. Thus, it is manifestly clear beyond cajole that West Virginia considers its own statute of limitations and tolling provisions to be a long standing predominate policy consideration. Neither, are Florida's relevant policies subverted by applying West Virginia law. For example, § 95.051, Fla. Stat., a general tolling statute, recognizes minority and incapacity as a basis to extend the

limitations. Section 95.11(7), Fla. Stat. extends the limitations in cases involving abuse or incest. And, Chapter 96-167, Laws of Florida, was enacted to toll the limitations and repose for medical malpractice claims by minors.

Here, similar to Bishop, the relationship of Florida to this medical malpractice action is limited to the happenstance of **CARMELO L. TERLIZZI, M.D.** having retired to the State of Florida. And, this Court has held that the same significant relationships test should be applied in deciding conflict of laws involving the statutes of limitations. Bates v. Cook, Inc., 509 So. 2d 1112 (Fla. 1987). Accordingly, W. Va. Code, § 55-2-15, General Saving as to Persons Under Disability, providing for a cap of twenty (20) years from the time when the right accrues should apply. (R.8).

Despite the above, Petitioner inflexibly contends that if the statute of *limitations* of the forum state bars the action, it matters not that the significant relationships point to another state or territory with a longer statute of limitations.[2] In support of this argument, Petitioner relies upon Rodriguez v. Pacific Scientific Company, 536 So. 2d 270 (Fla. 3d DCA 1988), *rev. den.*, 545 So. 2d 1368 (Fla. 1989).; *and*, Sullivan v. Fulton County Administrator, 662 So. 2d 706 (Fla. 4th DCA 1995), *affirmed*, 22 Fla. L. Weekly, S578 (Fla. September 25, 1997).

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[2] There has been 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. *See, e.g.,* R. Weintraub, Commentary on the Conflict of Laws § 9.2 B, p. 517 (2d ed. 1980); Martin, Constitutional Limitations on Choice of Law, 61 Cornell L. Rev. 185, 221 (1976); Comment, the Statute of Limitations and the Conflict of Laws, 28 Yale L. J. 492, 496-497 (1919).

Respondents concede the Borrowing Statute, § 95.10, Fla. Stat., is inapplicable when the case is time-barred by Florida's statute of *limitations*. Of course, by its terms, §95.10, Fla. Stat., is inapplicable except when the other state's limitations is *shorter* than that of Florida's. In other words, the Borrowing Statute does not even come into play when the statute of limitations of the other state is *longer* than that of Florida's. The purpose of the Borrowing Statute is to discourage "forum shopping" and the filing of lawsuits in Florida that have already been barred in the jurisdiction where the cause of action arose. Celotex Corp. v. Meehan, 523 So. 2d 141, 143 (Fla. 1988).

This concession is, however, not made without serious reservations concerning the application of this forum limitations rule when it is utilized to apply a Florida statute of repose to extinguish a right of action where all the significant relationships point to another state with a longer statute of limitations, discussed in more detail later in this Reply Brief. In short, suffice it to state here, that in neither Rodriguez nor Sullivan where the courts called upon to apply the forum limitations rule in the context of a "statute of repose." The distinguishing characteristics of a statute of repose from a statute of limitations was apparently not considered in these cases; nor, in the conflict of laws context, whether the forum limitations rule was an application of forum procedural law contrasted to substantive law as would be involved with a statute of repose.

Without drawing these distinctions, this Court can expressly adopt the position taken by the American Law institute in Restatement (Second) Conflict of Laws §142 as revised May 19, 1988 in determining that the longer statute of limitations of the alternative forum

(West Virginia) should apply, even though the claim is barred under the forum's (Florida's) statute of repose.[3]

The revised Restatement (Second) Conflict of Laws § 142, replacing original § 142 and § 143 provides: (emphasis added)

> Whether a claim will be maintained against the defense of the statute of limitations is determined under the principals states in § 6. *In general, unless the exceptional circumstances of the case make such a result unreasonable:*
> (1) The forum will apply its own statute of limitations barring the claim.
> (2) The forum will apply its own statute of limitations permitting the claim unless:
>
> > (a) maintenance of the claim would serve no substantial interest of the forum; and
> > (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

In Comment f to this Restatement (Second), it is recognized that " ... subject to rare exceptions, the forum will dismiss a claim that is barred by its statute of limitations ..." However, the Comment goes on to provide: (emphasis added)

> There will be rare situations when the forum will entertain a claim that is barred by its own statute of limitations but not by that of some other state. Thus, the suit will be entertained when the forum believes that under the special circumstances of the case, dismissal of the claim would be unjust. *This may be so when through no fault of the plaintiff an alternative forum is not available as, for example, where jurisdiction cannot be obtained over the defendant in any state other than that of the forum,* or where unenforceable elsewhere.

Under the exceptional circumstances of this cased, this forum (Florida) should not apply its own statute of repose (§ 95.11(4)(b))barring the claim. But for the fortuity of

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[3] Of course, this Court in Bishop v. Florida Specialty Paint Company, 389 So. 2d 999 (Fla. 1980) and Bates v. Cook, Inc., 509 So. 2d 1112 (Fla. 1987) already adopted the position taken by the American Law Institute in choosing the earlier significant relationships test to decide conflicts in substantive law and application of statute of limitations.

CARMELO L. TERLIZZI, M.D., moving from the State of West Virginia where he was a licensed physician and practiced medicine, he would have been subject to in personam jurisdiction there. Of course, a personal tort is not local, but transitory and can, as a general rule, be maintained wherever the wrongdoer can be found. 10 Fla. Jur. 2d, *Conflict of Laws* §43. **CARMELO L. TERLIZZI, M.D.**, was found in the State of Florida.[4] Florida was the sole forum available to acquire personal jurisdiction over the Petitioner.

Here, as noted in Comment f to revised Restatement (Second) § 142, it is unjust to dismiss this case under this forum's statute of limitations, § 95.11(4)(b), Fla. Stat., because an alternative forum was not available to Respondent. The West Virginia Long-Arm Statute, § 56-3-33(g), could not be utilized to acquire in personam jurisdiction over **CARMELO L. TERLIZZI, M.D.**, because the acts occurring in 1977 were prior to the effective date of that statute, June 7, 1978 (R. 24, 148).

Since jurisdiction could not be obtained over **CARMELO L. TERLIZZI, M.D.**, in any state other than that of Florida, and the West Virginia statute of limitations does not bar this action, coupled with virtually every significant contact and relationship existing in the State of West Virginia, this Court should recognize this as that type of rare case the Restatement addresses.

And, there is yet another situation recognized under Comment f to revised Restatement (Second) Conflict of Laws § 142 which this Court may decide is persuasive

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[4] Of course, it is elementary that there must be some person capable of being sued upon the claim, Cf. Drafe v. Island Community Church, 462 So. 2d 1142, 1144 (Fla. 3d DCA 1984), so the Estate for the Deceased, CARMELO L. TERLIZZI, M.D. was opened October 6, 1994, and days later, this Complaint was filed on October 25, 1994 (R. 1-5, 9-13).

so as to refrain from applying § 95.11(4)(b), Fla. Stat., to bar this action involving only foreign persons and foreign events on the ground that local policy does not require otherwise. Is not § 95.11(4)(b), Fla. Stat., a forum repose whose primary purpose is not to protect the local courts against stale evidence, but rather to insure that a specified claim involving either *local* persons or *local* events should be brought in a brief space of time?

Addressing the constitutionality of the repose provisions contained in this statutory section, this Court has sustained the perceived public necessity for the statutory medical malpractice reform and statute of repose predicated upon legislative findings expressed in the preamble of Chapter 75-9, Laws of Florida, the Medical Malpractice Reform Act of 1975, Carr v. Broward County, 541 So.2d 92, 94 (Fla. 1989) as follows: (emphasis added)

> **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**, 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 costs to the *citizens of Florida*; and
>
> **WHEREAS**, the problem has reached crises proportion *in Florida*, now **THEREFORE**...

Again, SHIRLEY HARGIS was not aware that injuries at child birth were related to medical negligence and has alleged that she was unaware of the possibility of medical malpractice until on or about February 15, 1994. (R. 85). In Hill v. Clarke, 241 S.E.2d 572, 574 (W.Va. 1978) the West Virginia Supreme Court held that pain, suffering, and manifestation of harmful effects of medical malpractice do not, by themselves, commence the running of the statute of limitations. This action was commenced October 25, 1994 (R. 12) and was timely filed within this forum's statute of limitations, to-wit: two (2) years from

the time the incident giving rise to the action occurred or within two (2) years from the time the incident is discovered, or should have been discovered, with the exercise of reasonable diligence. § 95.11(4)(b), Fla. Stat.[5]

This is a case that arose in the State of West Virginia between West Virginia residents. It is a case against a West Virginia hospital, and **CARMELO L. TERLIZZI, M.D.**, who, at the time of these events, was a physician licensed to practice in the State of West Virginia. Irrespective of perceived public necessity for the Medical Malpractice Reform Act as it impacts on the State of Florida, why should the statute of repose provisions be applied in the context of this case where all of the significant relationships are in the State of West Virginia and the alleged medical malpractice occurred there? Obviously, this State's statute of repose should be considered inapplicable because it is patently obvious West Virginia has both a quantitative and qualitative superior interest in protecting the reasonable expectations of the plaintiffs injured within its boundaries. Jaurequi v. John Deere Company, 986 F.2d 170, 175 (7th Cir. Ind. 1993) ("We can conceive of no legally cognizable reason why Indiana's legislature should be concerned with the application of

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[5] Respondents' original Complaint (R. 1-5) did not allege the discovery date, so the critical date for determining *limitations* did not appear on the face of the Complaint. Commenos v. Family Practice Medical Group, Inc., 516 So.2d 37 (Fla. 1st DCA 1987); Hanano v. Petrou, 683 So. 2d 637 (Fla. 1st DCA 1996); Waters v. Nu-Car Carriers, Inc., 500 So2d 224 (Fla. 1st DCA 1986); DOT v. White Construction Company, 452 So2d 33 (Fla. 1st DCA 1984). Respondents' later attempts to amend for this purpose (R. 9-13), *see* Tanner v. Hartog, 618 So. 2d 177 (Fla. 1993); Drake v. Island Community Church, Inc., 462 So2d 1142 (Fla. 3d DCA 1984), rev. den., 472 So. 2d 1181 (Fla. 1985), were denied by the trial court (R. 99-100), seemingly being convinced that it was unnecessary as the statute of repose extinguished the cause of action. *See also,* Arango v. Orr, 656 So. 2d 248 (Fla. 2d DCA 1995).

its statute (of repose) to extinguish a foreign resident's claim against a foreign corporation for injuries sustained on foreign soil.")

Further, to the extent that a Professional Liability Policy issued by **THE STANDARD FIRE INSURANCE COMPANY** in the State of West Virginia to **CARMELO L. TERLIZZI, M.D.**, is now implicated; or, may be implicated should this Court reverse and remand[6] this only reinforces the appropriate choice of laws. For, in consonance with the Restatement (Second) § 193, interpretation of the rights of the parties to contract are determined by the law of the place where the contract is made. Under West Virginia law it is clear that an action on **THE STANDARD FIRE INSURANCE COMPANY** medical malpractice policy would not be barred by the West Virginia statute of limitations, which had not run when this case commenced in the State of Florida. Since **THE STANDARD FIRE INSURANCE COMPANY** policy was issued in the State of West Virginia, to a resident of the State of West Virginia, not only would the construction and legal effect of the terms of the policy, but also the rights and obligations of the persons insured thereunder, be determined by the laws of West Virginia. *See, e.g.*, Allstate Insurance Company v. Pierce, 467 So.2d 536 (Fla. 3rd DCA 1985) (involving an uninsured motorist coverage policy issued in the State of North Carolina as it applied to an auto accident occurring in the State of Florida);

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Under either West Virginia or Florida law, it is clear that West Virginia law is the substantive law applicable to this cause of action, notwithstanding whether the issues concern the policy of insurance issued by **THE STANDARD FIRE INSURANCE COMPANY** issued in the State of West Virginia; or, from a tort standpoint, the fact that ALL contacts, including the occurrence, happened in West Virginia. *Compare*, Joy Technologies, Inc. v. Liberty Mutual Insurance Company, 187 W.Va. 742, 421 S.E.2d 493 (1992); City of Bluefield, ex rel San Bd. v. Autotrol Corp., 723 F.Supp. 362 (S.D. W.Va. 1989) *with* Bates v. Cook, Inc., 509 So.2d 1112 (Fla. 1987); Bishop v. Florida Specialty Paint Company, 389 So.2d 999 (Fla. 1980).

Andrews v. Continental Insurance Company, 444 So.2d 479 (Fla. 5th DCA 1984) (applying the significant relationship test and contract dispute conflict of laws principals to a Maine uninsured motorist policy in its application to an accident occurring in the State of Florida); Wilson v. Insurance Company of North America, 415 So.2d 745 (Fla. 3d DCA 1982); H.S. Equities, Inc., v. Hartford Accident & Indemnity Company, 334 So.2d 573 (Fla. 1976) (determining whether Florida or New York law should apply to the issue of fact of late notice under brokers' liability policy). Obviously the risk assumed under the **STANDARD FIRE INSURANCE COMPANY**'s professional liability policy is not only centered in the State of West Virginia, but all justifiable expectations of the insurer and insured are that West Virginia law would apply. The insured, **CARMELO L. TERLIZZI, M.D.**, retiring to the State of Florida, does not alter these principals, nor, can his mere fortuitous residence in this State even be considered incidental to the relationship between the insurer and the insured.[7]

If Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969) is considered procedural law as Respondents believe it is, it is well settled that in manners of procedure, forum rules control. *See generally* 10 Fla. Jur. 2d, *Conflict of Laws* §§ 45, 46 and 50. Surely, the

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[7] While unsuccessful on remand, the Plaintiffs believe that the procedural law of this forum permits a direct cause of action against THE STANDARD FIRE INSURANCE COMPANY in accordance with Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969); *See*, Bautre v. Tasta, 449 So.2d 311 (Fla. 2d DCA 1984), *rev. den.* 456 So.2d 1182 (Fla. 1984), Salyer v. Gainesville Dodge, Inc., 448 So.2d 1190 (Fla. 1st DCA 1984) (only incident occurring subsequent to October 1, 1982, the effective date of the non-joinder statute, §627.7262 of the Fla. Stat., bar direct action against the insurer). *See also* Lewis v. Allstate Ins. Co., 667 So.2d 261 (Fla. 1st DCA 1995) (holding that procedural defenses, such as a statute of limitations, would not bar an uninsured motorist claim even though the statute of limitations barred a claim against the tortfeasor).

Petitioner will not contend that the Florida Rules of Civil Procedure, the Florida Evidence Code, and the Florida Rules of Appellate Procedure do not apply in this case.[8] In Piccolo v. Hertz Corporation, 421 So.2d 535, 536 (Fla. 1st DCA 1982) the Court states "[t]he question of a joinder is different from the question whether a suit may be maintained in the first place; the former is procedural, whereas the latter is substantive." In Dosdourian v. Carsten, 624 So2d 241 (Fla. 1993) the Florida Supreme Court took a strong stand against charades at trial. Recently, this Court determined that the non-joinder of a UM carrier was pure fiction in violation of the policy. Geico v. Krawzak, 675 So.2d 115 (Fla. 1996).

Concluding this point, there are exceptional circumstances existing which make it unjust to apply § 95.11(4)(b), Fla. Stat., to extinguish this case. This is not a situation implicating forum shopping. Plaintiffs have no other forum to acquire in personam jurisdiction over **CARMELO L. TERLIZZI, M.D.**[9] No significant public policies of this state are violated by applying the West Virginia statute of limitations to permit this case to proceed on the merits. All the significant relationships, both as to the occurrence of this

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[8] As pointed out by Robert A. Suttler, Across State Lines, p 16-17 (ABA 1989), the principle of depecage is recognized in all modern approaches to the choice of laws. The court makes a choice between the laws of the involved states as to the particular issues rather than the law of the forum in its entirety or the law of the other involved state in its entirety. The principle of depecage recognizes that the law of one state may apply on one issue while the law of another state may apply on another issue in the same case, thus contributing to achieving functionally sound results in particular cases predicated upon the considerations of policy and fairness to the parties. See also LaPlante v. American Honda Motor Company, Inc. 27 F.3d 731 (1st Cir. NY 1994).

[9] in Smith v. Odeco, U.K., Inc., 615 So2d 407, 409 (4th Cir. 1993), writ denied, 618 So2d 412 (La. 1993) the Louisiana appellate court, citing to Comment F of the Restatement (Second) § 142, found that compelling considerations of remedial justice pointed to Louisiana as the only available forum to acquire jurisdiction over all defendants, refusing to apply the forum limitations rule which would have barred the claim.

action and the parties, arose in the State of West Virginia. It is unjust to deprive these West Virginia Plaintiffs of a viable transitory cause of action which is not barred by West Virginia law, simply because of the fortuity of **CARMELO L. TERLIZZI, M.D.** having moved to Florida. The law does not advance with an uncritical, rubber stamping blind adherence to precedent.

The revised Restatement (Second) Conflict of Laws § 142 should be expressly adopted by this Court permitting this action to proceed further. The Second District's decision should accordingly be affirmed and this case remanded with directions that Plaintiffs be permitted to bring a direct action against **THE STANDARD FIRE INSURANCE** Company on its Professional Liability Policy issued to **CARMELO L. TERLIZZI, M.D.**

POINT II

AS APPLIED IN THIS CHOICE OF LAWS CASE, § 95.11(4)(B), FLA. STAT., IS UNCONSTITUTIONAL UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

As a preface, Respondents acknowledge the fundamental rule of judicial restraint which requires courts, prior to reaching any constitutional question, to consider non-constitutional grounds for their decision. Jean v. Nelson, 472 U.S. 846, 86 L. Ed. 2d 664 (1985) (noting also, that the fact the court should not decide constitutional issues unnecessarily does not permit a court to press statutory construction to the point of disingenuous evasion to avoid a constitutional question.); Aldana v. Holub, 381 So. 2d 231 (Fla. 1980).

Yet, Plaintiffs have not discovered any Florida cases applying this State's medical malpractice statute of repose to extinguish a cause of action before it ever accrued, so that

no judicial forum was available to out-of-state residents seeking to pursue the case where *all* the significant and substantial relationships exist in the other state, and in the other state, West Virginia, the action would clearly not be barred. But for the mere fortuity of the Defendant moving to the State of Florida, this State would have absolutely no contacts bearing upon this case. And, because of the happenstance of the Defendant moving to the State, and the fact that in personam jurisdiction could not be obtained over this Defendant in the State of West Virginia, the State of Florida is the sole forum in which these out-of-state West Virginia Plaintiffs could acquire personal jurisdiction over the Defendant. So, it is not evident why, in this particular case, the public policy of the State of Florida underlying medical malpractice reform and its forum statute of repose should be invoked on behalf of the Defendant to prevent what is otherwise a viable medical malpractice cause of action in the State of West Virginia from ever arising in the State of Florida. Accordingly, application of the State of Florida repose provision is erroneous and, in application, constitutionally infirm.

APPLICATION OF THE STATE OF FLORIDA MEDICAL MALPRACTICE REPOSE IS ARBITRARY AND FUNDAMENTALLY UNFAIR, IN VIOLATION OF BOTH THE DUE PROCESS CLAUSE AND THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION.

> In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation (citation omitted). In order to insure that the choice of law is neither arbitrary or fundamentally unfair (citation omitted), the Court has invalidated the choice of law of a state which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction (footnotes omitted); Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 66 L. Ed. 2d 521, 527-528 (1981).

In Allstate Ins. Co. v. Hague, the United States Supreme Court determined that the State of Minnesota had obviously significant contacts with the parties and occurrence in applying Minnesota law, permitting the stacking of uninsured motorist coverage where the accident occurred in Wisconsin, the insurance policy was delivered in Wisconsin, and all persons involved were Wisconsin residents at the time of the accident. Unlike the facts of Allstate Ins. Co. v. Hague, the facts in this case are akin to those in Home Ins. Co. v. Dick, 281 U.S. 397, 74 L. Ed. 926, 74 ALR 702 (1930) and John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178, 81 L. Ed. 106 (1936). In both Dick and Yates, the selection of forum of law rested exclusively n the presence of non-significant forum contact. Without unnecessary replication of the facts in these cases:

> Dick and Yates stand for the proposition that if a state has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional (footnote omitted). Dick concluded that nominal residence - standing alone - was inadequate; Yates held that a post-occurrence change of residence to the forum state - standing alone- was insufficient to justify application of forum law. Allstate Ins. Co. v. Hague, 449 U.S. at 310-311, 66 L. Ed. 2d at 529.

Here, as in Yates, **CARMELO L. TERLIZZI, M.D.**'s post-occurrence change of residence to the forum state (Florida) is insufficient to justify application of the Florida statute of repose extinguishing this cause of action before it ever arose.[10]

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[10] Although constitutionality of choice of laws is measured by different standards than tradition choice-of-law analysis, it is, at least, interesting that in Judge v. American Motorist Corp., 908 F.2d 1565 (11 Cir. 1990) the court determined that either the law of Florida where the personal representative resided or the law of Michigan where the vehicle manufacturers and designers had principal places of business controlled, not the law of Mexico where the wrongful death occurred. Observing that "[a]s a general proposition, 'it is fitting that the state whose [policy] interests are most deeply affected should have its local law applied'," citing to the Restatement (Second), and Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980) the court also noting at p. 1568 that "conflict-of-laws

Again, § 95.11(4)(b), Fla. Stat., is a hybrid statute. That is to say, it has both a limitations which is a contingent bar to the enforcement of the remedy of a accrued cause of action and, a statute of repose which stands as an absolute, unyielding barrier preventing even the accrual of the cause of action, destroying the previously existing rights so that the cause of action no longer exists. *See, e.g.*, Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992). In this case, it is important to note that while Plaintiffs allege they had no reason to know that these birth related injuries may have been possibly caused by medical malpractice as opposed to natural causes until February 15, 1994 (R. 83), thus timely satisfying the Florida two (2) year statute of limitations with filing of their Complaint on October 25, 1994, the application of the repose provisions prevent what otherwise was a viable cause of action in West Virginia from ever arising in the only forum available to acquire in personam jurisdiction over the Defendant. Thus, it constitutes *damnum absque injuria* - a wrong for which the law affords no redress.

Constitutionality of the Florida statute of repose has been upheld by this Court, largely grounded upon the legislative presumption of overpowering public necessity as it impacts upon the perceived medical malpractice crisis and its effect on *citizens of Florida*, even when it operates to foreclose a cause of action before it ever accrued -- indeed,

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questions thus cannot be resolved by reciting general pronouncements; to determine which sovereign has the 'most significant relationship' to a particular issue, a court must instead examine the facts and circumstances presented in each particular case." *See also* Foster v. United States, 768 F. 2d 1278 (11 Cir. 1985) holding that the Illinois wrongful death statute applied where an airplane crash occurred, despite the fact the sole beneficiary had moved to Florida and the personal representative of the estate was a Florida resident and the estate was pending in Florida, finding that Illinois interest in deterring tortious conduct in Illinois and compensating its citizens was greater than Florida's interest in limiting recovery which benefitted only the defendant.

before it is discovered or perhaps before it even exists, Kush v. Lloyd, *supra*. That same justification cannot be rationally and permissively applied to " ... abrogate the rights of parties beyond its borders having no relationship to anything done or to be done within them." Phillips Petroleum Company v. Shutts, 472 U.S. 797, 822, 86 L. Ed. 628, 649 (1985) (quoting from Home Ins. Co. v. Dick). But, the application of the Florida statute of repose in this case has just that effect. The post accrual happenstance of **CARMELO L. TERLIZZI, M.D.**'s change of residence establishes absolutely no connection between the issues of this litigation and the purpose and scope of the State of Florida's perceived justification for its medical malpractice reform and statute of repose as it impacts upon health delivery services, its citizens, and its health care providers in this State. **CARMELO L. TERLIZZI, M.D.**'s post accrual residence in this State is totally unrelated to the substantive legal issues, and represents either a trivial or irrelevant contact that furthers no Florida perceived public policy underlying the medical malpractice reform and this associated repose provision.

While it is certainly true that the Estate of **CARMELO L. TERLIZZI, M.D.** was necessarily opened in this State and that the personal representative is a practicing attorney and resident of this State, that is a slender reed in the field of facts which would justify Florida applying its repose statute in this case. This is particularly so since Plaintiffs have stipulated to limit any claims against the Estate of the deceased to the extent of the Professional Liability Policy issued by **THE STANDARD FIRE INSURANCE COMPANY** (R. 223).

Indeed, in an unusual choice of law case, Hughes v. Fetter, 341 U.S. 609, 95 L. Ed. 12 (1951) the United States Supreme Court held that Wisconsin could not refuse the parties a forum on the basis that they would not apply Illinois law when Wisconsin was apparently the only available forum. In Hughes, the Wisconsin resident was killed in an Illinois accident involving another Wisconsin resident. The decedent's personal representative, also of Wisconsin, brought a wrongful death action in Wisconsin. Wisconsin, having its own wrongful death statute, nevertheless held that it was only applicable to death resulting from injuries within the state; and, because the decedent's death occurred in Illinois, Wisconsin law would not be applied; nor, would Illinois law be applied. Under these peculiar circumstances, Wisconsin's refusal to apply Illinois law amounted to denying Illinois law full faith and credit.

Predictably, counsel for the Petitioner will no doubt urge that, simply because Florida is the forum court is sufficient enough for it to apply its own statute of limitations without running afoul of either the Due Process or Full Faith and Credit Clauses of the United States Constitution, Sun Oil Company v. Wortman, 486 U.S. 717, 100 L. Ed. 2d 743 (1988). Actually Sun Oil Company v. Wortman, is a companion case to Phillips Petroleum Company v. Shutts, 472 U.S 797, 86 L. Ed. 2d 688 (1985). In this class action suit seeking unpaid gas royalties where, apparently only one to three percent (1% to 3%) of the class members were residents of Kansas, most being located in Texas, Oklahoma and Louisiana, the United States Supreme Court determined in Phillips that Kansas was required to apply the substantive law of the other states as it would be arbitrary and fundamentally unfair to apply Kansas law due to that state's lack of interest in the claims involved, and such would exceed the constitutional limits of Due Process and Full Faith

and Credit Clauses of the United States Constitution. In Sun Oil, the United States Supreme Court determined that the State of Kansas was not precluded from applying its forum statute of limitations to these claims governed by the substantive law of these different states. Apparently these other states' statute of limitations were *shorter* than that of Kansas' five (5) year statute of limitations. The United States Supreme Court determined that Kansas did not have to apply its own statute of limitations to claims governed by other states' substantive law, only that they could. Perhaps, not clearly articulated, is that the underlying rationale for this decision was that these other states would certainly desire that their substantive law be furthered by the case continuing in a Kansas court. In any event, the bottom line analysis was that Kansas, electing to apply a longer statute of limitations under these particular facts, did nothing that was arbitrary or unfair. Sun Oil Company v. Wortman, 486 U.S. at 730. In any event, the Respondent in this case on appeal did satisfy the Florida two (2) years statute of *limitations* and this case is closer to the facts and law in Hughes v. Fetter, supra, than Sun Oil.

So, as it concerns the application of the Florida statute of repose, the question appears to be whether or not these repose provisions are *substantive* for as Justice Brennan noted in his concurring opinion, Sun Oil Company v. Wortman, 486 U.S. at 736, 100 L. Ed. 2d at 761 "[w]here the statutes of limitations are purely substantive, the issue would be an easy one, for where, as here, a forum state has no contracts with the underlying dispute, it has no substantive interest and cannot apply its own law on a purely substantive matter." Thus, if the Florida statute of repose provisions represent substantive law of this forum, there are insufficient contacts such that the *substantive* statute of repose should be applied to extinguish Respondents' cause of action.

Under Sun Oil, it appears necessary to characterize or label the West Virginia Statutes and the Florida Statutes bearing on this matter. Certainly, this Court could justifiably conclude that the West Virginia Supreme Court's treatment of West Virginia Code Section 55-2-15 is such that it should be characterized as substantive. This Court could also justifiably conclude that the Florida statute of repose under § 95.11(4)(b), Fla.Stat. is substantive. The United States Supreme Court was not presented with this dilemma.

This Court has distinguished statutes of repose from statutes of limitations. Carr v. Broward County, 505 So. 2d 568, 570 (Fla. 4th DCA 1987), *approved*, 541 So. 2d 92 (Fla. 1989); Universal Engineering Corp. v. Perez, 451 So. 2d 463, 465 (Fla. 1984). A statute of repose does not, like a statute of limitations, bar a cause of action. Rather, its effect is to prevent what might otherwise be a cause of action from ever arising. Walker v. Miller Electric Manufacturing Company, 591 So. 2d 242, 244 (Fla. 4th DCA 1991), *approved*, 612 So. 2d 136 (Fla. 1992) (additionally holding that a statute of repose provides a defendant a vested right not to be sued).

In contradistinction, statutes of limitation are generally regarded as being *procedural* in character because it affects the remedy. *See, e.g.*, Strauss v. Sillin, 393 So. 2d 1205, 1206 (Fla. 2d DCA 1981). Ordinarily, statutes of limitation are construed as being applicable only to the *remedy* and not the substantive right. Walter Denson & Son v. Nelson, 88 So. 2d 120 (Fla. 1956).

Since the statute of repose provided in § 95.11(4)(b), Fla. Stat., operates to determine whether one has the *right* to maintain a suit in the first place, it must be

considered substantive rather than procedural. *See generally*, Piccolo v. Hertz Corporation, 421 So. 2d 535, 536 (Fla. 1st DCA 1982) (determining in a conflict of laws context, that the Louisiana direct action statute was substantive, not procedural). *See also*, State v. Garcia, 229 So. 2d 236, 238 (Fla. 1969) (procedural law is sometimes referred to as law of *remedy* whereas substantive law is defined as that which creates, defines, and regulates *rights*).

Accordingly, to apply Florida's substantive statute of repose provision, disenfranchising these Plaintiffs of their cause of action which is not barred under West Virginia law is so totally arbitrary or fundamentally unfair to them that it violates both the Due Process Clause and the Full Faith and Credit Clause. This is so because Florida, as the forum court, has no connection to the lawsuit other than jurisdiction over the parties and its decision to apply Florida substantive law so "frustrates] the justifiable expectations of the parties" as to be unconstitutional. Allstate Ins. Co. v. Hague, 449 U.S. 302, 327, 66 L. Ed. 2d. 521, 540 (1981).

Plaintiffs readily concede that they have discovered no Florida cases that have determined, in the choice of laws context, whether statutes of repose should be characterized as either procedural or substantive. Apparently, under Federal law, statutes of repose are considered substantive in nature. *Compare* Alves v. Siegle's Broadway Auto Parts, Inc., 710 F.Supp. 864, 866 (D.C. Mass. 1989) (applying Connecticut statute of repose) *with* Cosme v. Whitin Machine Works, Inc., 632 N.E.2d 832 (Mass. 1994), (distinguishing Alves, and applying the Massachusetts limitations period). *See also* Boudreau v. Baughthman, 322 N.C. 331, 368 S.E. 2d 849 (N.C. 1988) (statute of

limitations is procedural whereas a statute of repose acts as a condition precedent to action itself and is therefore a substantive definition of rights rather than procedural limitation in remedy to enforce rights; R. Weintraub, Commentary on the Conflict of Laws, Section 3.2 C2, p 58 and fn. 50 (3d ed 1986) (statutes of repose are, in the conflict of laws context, considered substantive).

As has been previously pointed out under Point I, all the justifiable expectations of the parties, including **THE STANDARD FIRE INSURANCE COMPANY**, is clearly and undisputedly centered in the State of West Virginia. Obviously, Florida applying its statute of repose is a most unexpected result and certainly constitutes unfair surprise in this choice-of-laws context. The parties would certainly not have sought the trial court's approval of a stipulation avoiding a default against Defendants and stay so as to preclude dismissal for a want of prosecution against the Plaintiffs (R. 14-17) had they even remotely envisioned that once the medical malpractice carrier was identified, they would seek to dismiss this case on the Florida statute of repose. (R. 18-19, 207-208). *See* Pezzi v. Brown, 697 So. 2d 883 (Fla. 4th DCA 1997) (holding that even though § 733.710, Fla. Stat., is a statute of non-claim (repose), since it is a statute restricting access to courts it must be narrowly construed in a manner favoring access and so it does not preclude a plaintiff from bringing a cause of action and recovering to the extent of liability insurance).

For the same reasons, Plaintiff's fundamental right to a jury trial for the purpose of determining compensatory damages, a vested property right, is being *arbitrarily undermined* under this State's concept of procedural due process. *See* Aldana v. Holub, 381 So. 2d 231 (Fla. 1980). *See also* Boddie v. Connecticut, 401 U.S. 371, 377, 28 L. Ed.

2d 113 (1971). In application, it cannot be seriously justified that the Florida statute of repose and its attendant local legislative underpinnings bear a reasonable relationship to a permissible legislative objective as to this West Virginia case. Accordingly, its application is discriminatory, arbitrary or oppressive and also violative of the due process clauses of the Florida constitution. Lasky v. State Farm Ins. Co., 296 So. 2d 9, 15 (Fla. 1974). In a frail effort to sustain the constitutional application of the Florida statute of repose to the unique facts of this case, Defendant has contended that Florida's interest in deterring so-called stale claims constitutionally outweighs West Virginia's concerns for its infants and incompetents. Since Florida is the *only* jurisdiction in which service could be had on the deceased defendant, Florida's sole status as the forum is an insignificant nexus to elevate this "staleness" housekeeping concept over the constitutional rights of these West Virginia Plaintiffs.

AS APPLIED, FLORIDA'S MEDICAL MALPRACTICE STATUTE OF REPOSE VIOLATES ARTICLE I, SECTIONS 21 AND 22 OF THE FLORIDA CONSTITUTION.

> There are political systems where constitutional rights are subordinated to the power of the executive or legislative branches, but ours is not such a system. Smith v. Department of Insurance, 507 So. 2d 1080, 1089 (Fla. 1987) (noting that the constitutional right of access to the court for redress of injuries is not to be subordinated to, and a creature of legislative grace or, "majoritarian whim").

Plaintiffs readily acknowledge that this Court has held that the medical malpractice statute of repose can be applied so as to eliminate a cause of action before it has accrued. Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992). But, the constitutionality of the statute of repose was justified based upon the legislature's establishment of an overpowering public necessity as it concerned the impact of the perceived medical malpractice crisis on *citizens*

of the State of Florida. Carr v. Broward County, 541 So. 2d 92 (Fla. 1989). Yet, this Court has implicitly noted that when the statute of repose operates to impinge upon vested rights, the courts may be required to curtail that effect. Carr v. Broward County, 505 So. 2d 568, 570 (Fla. 4th DCA 1987), *approved*, 541 So. 2d 92 (Fla. 1989). This is just such a case.

As applied in this choice-of-laws context, the overwhelming public necessity justifying the repose is totally inapplicable. In this case, the alleged medical malpractice occurred in West Virginia. At the time and place of the occurrence, the Plaintiffs and the Defendant doctor were residents of the State of West Virginia. The Defendant doctor practiced medicine in the State of West Virginia - not Florida. **THE STANDARD FIRE INSURANCE COMPANY** issued a per occurrence policy in the State of West Virginia. All the justifiable expectations were clearly centered in West Virginia and on the application of West Virginia law.

Here, as in Owens-Corning Fiberglas Corp. v. Rivera, 683 So. 2d 154 (Fla. 3d DCA 1996), *rev. den.*, 691 So. 2d 1080 (Fla. 1997); Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981) and Overland Construction Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979) the statute of repose operates to bar a cause of action before it ever accrued so that no judicial form is available to the aggrieved Plaintiffs. Florida was the *only* forum available to these West Virginia Plaintiffs to acquire in personam jurisdiction over the former West Virginia doctor who had retired and died in this State.

Satisfying the two (2) year Florida statute of limitations, Plaintiffs alleged (R. 85, specifically paragraphs 13 and 14):

> Plaintiff, **CARRIE HARGIS-ROBINSON**, was diagnosed to be suffering from perinatal asphyxia, hypoxia, and seizure disorder; yet, this diagnosis was

neither communicated or explained to **SHIRLEY HARGIS** such that she had any reason to suspect that **CARRIE HARGIS-ROBINSON** was injured as a result of medical negligence.

Neither Plaintiff, **CARRIE HARGIS-ROBINSON** nor her mother, **SHIRLEY HARGIS**, knew or should have known that the actions and inactions of the Defendant, **CARMELO L. TERLIZZI, M.D.**, fell below the standard of care, until on or about February 15, 1994 when Plaintiff, **SHIRLEY HARGIS**, discovered that her daughter, **CARRIE HARGIS-ROBINSON**'s, condition may have occurred from other than natural causes and that there was a reasonable possibility that **CARRIE HARGIS-ROBINSON**'s injuries were caused by medical malpractice.

These West Virginia Plaintiffs' cause of action for medical malpractice occurring in West Virginia has been impermissibly abrogated by the application of Florida's statute of repose. There are not adequate alternatives available because Florida is the only state where personal jurisdiction could be acquired over the Defendant. And, because the overpowering public necessity justifying the repose as part of Florida's medical malpractice reform is inapplicable, the abolishment of this cause of action fails to comply with Article 1, Sections 21 and 22 of the Florida Constitution. Kluger v. White, 281 So. 2d 1 (Fla. 1973).

Application of Florida's statute of repose in this choice-of-laws context is *uniquely unfair* in depriving access to the courts of this state as the only forum available to these Plaintiffs for personal jurisdiction over the Defendant doctor. Here the injury occurred at birth on May 19, 1977, in the State of West Virginia, but the diagnosis of the baby's perinatal asphyxia, hypoxia and seizure disorder were never communicated or explained to the mother who had no reason to suspect that her baby was injured as a result of medical negligence. It was not until February 15, 1994, well outside Florida's statutory repose period, that the mother discovered her daughter's condition may have occurred

from other than natural causes and that there was a reasonable possibility that her child's injuries were caused by medical malpractice. Again, despite this Court's clear holding in Carr v. Broward County, 541 So. 2d 92 (Fla. 1989), that the statute of repose was constitutional ***only*** because of the legislature's establishment of an overpowering public necessity addressing the perceived medical malpractice crisis on the ***citizens of the State of Florida***, Defendant has sought to justify the constitutional application of the Florida statute of repose simply upon the public policy argument that barring litigation of stale claims is a sufficient predicate to deny access to the court. Yet, no authority has ever been cited by the Defendant nor discovered by the Plaintiff which supports Defendant's contention that the "staleness" concept has been determined to be equivalent to the overpowering public necessity found to justify the application of Florida's statute of repose to Florida citizens.

Under these circumstances, the repose provisions of § 95.11(4)(b), Fla. Stat. unquestionably constitutes an unconstitutional denial of access to the courts of this state.

AS APPLIED, FLORIDA'S MEDICAL MALPRACTICE STATUTE OF REPOSE VIOLATES ARTICLE X, SECTION 6(a), FLORIDA CONSTITUTION.

It is well settled, that a cause of action in tort for damages creates a "property right" in the injured person. *See, e.g.*, Logan v. Zimmerman Brush Company, 455 U.S. 422, 71 L. Ed. 2d 265 (1982).

In Gibson v. West Virginia Department of Highways, 185 WVA. 214, 406 S.E.2d 440, 451 (WVA. 1991), the West Virginia Supreme Court in addressing the constitutionality of a ten (10) year statute of repose concerning the construction of highways, clearly stated

that an accrued cause of action is a vested property right protected by the guarantee of due process.

The constitutional protection provided by Article X, Section 6(a) Florida Constitution is afforded to *all* property rights, real and personal. *See, e.g.*, Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc., 521 So. 2d 101 (Fla.) *cert. den.*, 488 U.S. 870, 102 L. Ed. 2d 149 (1988) (citrus trees and nursery products).[11] Here, these West Virginia Plaintiffs substantive rights vested upon accrual of their cause of action. *See, e.g.*, L. Ross, Inc. v. R.W. Roberts Construction Company, 466 So. 2d 1096 (Fla. 5th DCA 1985), *affirmed*, 481 So. 2d 484 (Fla. 1986). Plaintiffs had cognizable protected rights to the recovery of compensatory damages. The application of the Florida statute of repose to their West Virginia cause of action constitutes an unconstitutional "taking" *Cf.* Gordon v. State, 585 So. 2d 1022 (Fla. 3d DCA 1991), *approved*, 608 So. 2d 800 (Fla. 1992).

CONCLUSION

Based upon the unique facts of this case, the cited authorities, and the application of law and arguments, this Court should reverse and remand this case for further proceedings against the Defendant, **CARMELO L. TERLIZZI, M.D.** and his medical malpractice insurer, **THE STANDARD FIRE INSURANCE COMPANY**.

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[11] In addition, see Alford v. Finch, 155 So. 2d 179 (Fla. 1963) (personal property right to hunt game on one's real property); State ex rel. Davis v. City of Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307 (1929) (money appropriated in the guise of taxation); Pensacola & A.R. Co. v. State, 25 Fla. 310, 5 So. 833 (1889) (money appropriated by confiscatory tariff regulations); Morton v. Zuckerman-Vernon Corp., 290 So. 2d 141 (Fla. 3d DCA), cert. den., 297 So. 2d 32 (Fla. 1974) (interest payments owing upon note); Mullis v. Division of Administration, 390 So. 2d 473 (Fla. 5th DCA 1980) (leasehold interest); Platt v. City of Brooksville, 368 So. 2d 631 (Fla. 2d DCA 1979) (personal property); Kirkpatrick v. City of Jacksonville, 312 So. 2d 487 (Fla. 1st DCA 1975) (personal property).

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Marie A. Borland, Esquire, 101 East Kennedy Boulevard, Suite 3700, Tampa, FL 33601, this 20th day of March, 1998.

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