IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,544

MINNESOTA MINING & MANUFACTURING COMPANY, et al.,

Petitioners,

v.

EARL RAY BARNES and LYDIA BARNES,

Respondents.
_____/

INITIAL BRIEF OF PETITIONER
MINNESOTA MINING & MANUFACTURING CO.

On Certified Question from the
First District Court of Appeal

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INTRODUCTION

The First District certified the following question to this Court:

> IS THE EXCEPTION ESTABLISHED IN DIAMOND v. E.R. SQUIBB & SONS, INC., 397 So. 2d 671 (Fla. 1981), STILL VIABLE IN VIEW OF THE COURT'S RECENT DECISIONS HOLDING THE MEDICAL MALPRACTICE STATUTE OF REPOSE CONSTITUTIONAL?

Petitioner, Minnesota Mining and Manufacturing Company ("3M"), submits the certified question should be answered in the negative and that Plaintiffs' action, filed more than twelve years after delivery of the Defendants' products to the initial purchaser, is precluded by the applicable, and in all respects constitutional, products liability statute of repose, section 95.031(2), Florida Statutes (1975). Accordingly, 3M seeks reversal of the decision of the First District Court of Appeal holding that the statute of repose was unconstitutional as applied, and, asks this Court for entry of an order directing the re-entry of judgment in 3M's favor.

The parties will be referred to as they appeared below or by proper name. References to the record will be designated by the symbol "R" followed by the volume and page number of the document.

STATEMENT OF THE CASE AND FACTS

The undisputed facts established that Earl Barnes worked as a sandblaster from 1972 through June 1974. (R. III 335-36) During that time, he was allegedly exposed to silica dust. (R. III 335-36; V 781, 807, 935)

On July 16, 1984, doctors removed Barnes' left lung. (R. V 782, 807) Prior to the surgery, he was told he may have lung cancer; following the surgery, he was told he had a fungal infection. (R. III 360-61, 410; V 782, 807-08) According to Barnes, it was not until 1992 that he first learned that the removal of his lung and other pulmonary problems were possibly related to silicosis. (R. III 357-58) The diagnosis was allegedly confirmed in 1995. (R. III 358)

In June 1995, Barnes and his wife filed this products liability action alleging that Mr. Barnes' exposure to silica caused silicosis. (R. I 1-25) Plaintiffs sued the sellers of the sand alleging that, as used for its intended purpose, it created the dangerous silica. (R. I 8) Plaintiffs also sued manufacturers and sellers of the safety equipment used during sandblasting. (R. I 9-15) Petitioner, 3M, is in the latter group. It manufactured a mask which, according to Plaintiffs, failed to protect against silicosis. (R. I 13-15) Plaintiff claimed damages due to the loss of his left lung in 1984 and for medical complications occurring subsequent to the surgery but allegedly related to that procedure. (R. VI 1072-73)

3M and other Defendants moved for summary judgment based on the product liability statute of repose, section 95.031(2), Florida Statutes (1975), arguing that since Barnes' last possible exposure to and/or use of Defendants' products was in June 1974, any products liability claim brought after June 30, 1986 was time barred. (R. V 811-29; V 834-948; VI 949-56; VIII 1337-42)

Plaintiffs responded that pursuant to Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981), the statute unconstitutionally denied him access to courts because he had a latent injury. (R. VI 1067-73) Defendants countered that the "Diamond exception" was inapplicable since the primary injury underlying Plaintiff's claim for damages manifested itself in 1984, **before** the statute of repose expired. Moreover, they argued that the Diamond exception was no longer viable after several decisions by this Court applying the medical malpractice statute of repose to latent injury claims. (R. VIII 1351-53)

The trial court granted Defendants' motion. (R. X 1615-16; X 1654-55)

On appeal, the First District relied on Owens-Corning Fiberglass Corp. v. Corcoran, 679 So. 2d 291 (Fla. 3d DCA 1996), rev. denied, 690 So. 2d 1300 (Fla. 1997), and adhered to the "Diamond exception." Barnes v. Clark Sand Co., Inc., 721 So. 2d 329 (Fla. 1st DCA 1998). The court also rejected Defendants' arguments that Diamond was inapplicable because Plaintiffs' injury manifested itself within the repose period. Id. at 332-33. Instead, the court found that "'manifestation' of a latent

injury in a products liability case occurs when the plaintiff is on notice of a causal connection between exposure and injury." Id. at 332. Accordingly, the Court reversed the summary judgment.

Nonetheless, because of its uncertainty as to the continued viability of Diamond, the First District certified the following question to this Court:

> IS THE EXCEPTION ESTABLISHED IN DIAMOND v. E.R. SQUIBB & SONS, INC., 397 So. 2d 671 (Fla. 1981), STILL VIABLE IN VIEW OF THE COURT'S RECENT DECISIONS HOLDING THE MEDICAL MALPRACTICE STATUTE OF REPOSE CONSTITUTIONAL?

Id. at 333.

Review was timely sought in this Court.

SUMMARY OF THE ARGUMENT

This case poses one of the few remaining questions concerning the product liability statute of repose -- the application of the statute in a latent injury case. The First District found that Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981) set forth an exception to the constitutionality of the statute of repose where Plaintiff suffered a latent injury. The First District's decision must be reversed for several reasons.

First, Plaintiffs are foreclosed from raising a constitutional challenge by virtue of their failure to properly raise the issue in the trial court. Specifically, Plaintiffs failed to assert this defense by way of a reply to Defendant's affirmative defense.

Even if considered, the "Diamond exception" is inconsistent with a plethora of cases interpreting the products liability and medical malpractice statutes of repose, which have upheld the constitutionality of those statutes in the context of latent injuries. Those cases apply to bar Plaintiffs' claim in this case.

Finally, 3M submits that even if viable, Diamond is inapplicable to this case, given that Barnes manifested symptoms of his illness prior to the expiration of the statute of repose. As such, the concerns set forth in Diamond are not implicated.

ARGUMENT

PLAINTIFFS' PRODUCTS LIABILITY ACTION WAS BARRED BECAUSE IT WAS FILED MORE THAN 12 YEARS AFTER THE DELIVERY OF THE COMPLETED PRODUCT TO THE ORIGINAL PURCHASER.

Florida's product liability statute of repose, section 95.031(2), Florida Statutes (1975), provided in pertinent part:

> Actions for product liability . . . must be begun within the period prescribed in this chapter, . . . **but in any event within twelve years after the date of delivery of the completed product to the original purchaser. . . . regardless of the date the defect in the product . . . was or should have been discovered** (Emphasis added).

This statute is constitutional. Pullum v. Cincinnati Inc., 476 So. 2d 657, 659 (Fla. 1985), appeal dismissed, 475 U.S. 1114 (1986).

A statute of repose "cuts off a right of action within a specified time limit after the delivery of a product . . ., regardless of when the cause of action actually accrues." Melendez v. Dreis & Krump Mfg. Co., 515 So. 2d 735, 736 (Fla. 1987). In fact, a statute of repose often "does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising." Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F. Supp. 1144, 1147 (S.D. Fla. 1986), aff'd, 835 F.2d 1369 (11th Cir.), cert. denied, 488 U.S. 822 (1988) (citing Rosenberg v. Tower [sic] of North Bergen, 293 A.2d 662, 667 (N.J. 1972)).

Accordingly,

> under the Florida statute of repose, an injury caused by a product which has reached its original purchaser more than twelve years prior forms no basis for recovery because the statute prevents the accrual of a right of action. "The injured party literally has **no** cause of action. The harm that has been done is *damnun absque injuria*—a wrong for which the law affords no redress." Id. The effect of the statute of repose may be to bar the cause of action before it has accrued.

Id. (emphasis in original). See also Universal & Eng'g Corp. v. Perez, 451 So. 2d 463, 465 (Fla. 1984); Bauld v. J.A. Jones Constr. Co., 357 So. 2d 401 (Fla. 1978). Indeed, the statute of repose confers upon a manufacturer a substantive right not to be sued after a legislatively determined time period lapsed, and this right vests when the repose period has expired. Firestone Rubber & Tire Co. v. Acosta, 612 So. 2d 1361, 1362 (Fla. 1992).[1]

Applying the foregoing, the trial court concluded that Plaintiffs' claims in this case were barred:

> Florida Statutes § 95.031(2) precludes product liability suits if the statute of repose expired prior to July 1, 1986.) Firestone Tire & Rubber Co. v. Acosta, 612 So.2d 1361, 1362 (Fla. 1992)
>
> Even if it were disputed, the last sale date of the products which allegedly contributed

[1] Effective July 1, 1986, the Florida legislature amended section 95.031(2) and repealed the statute of repose. The statutory amendment did not operate retrospectively to a cause of action accruing before the effective date of the amendment. Melendez, 515 So. 2d at 736. Further, in those instances where the twelve-year statute of repose period had expired prior to the effective date of the repeal without an action being filed, (i.e., prior to July 1, 1986), no products liability action could later be maintained. Acosta, 612 So. 2d at 1363-64.

> to Mr. Barnes' exposure to silica could not have been later than Mr. Barnes' last date of employment at Odom Tank Company, which was June, 1974. The statute of repose required Mr. Barnes to bring any product liability actions within 12 years of that date, which could be no later than June 30, 1986, coincidentally, the last effective date of the statute of repose.
>
> Accordingly, I find that the now repealed statute of repose for products liability is applicable in this case, and absent a legal reason that the statute of repose was not applicable to him, Mr. Barnes had until June, 1986 to bring a cause of action for product liability against the defendants or the action would be barred.

(R. X 1615-16)

3M submits that the trial court was eminently correct in its analysis and that consistent with well-established law, this Court should order the final judgment to be reinstated.

I. THERE IS NO "EXCEPTION" TO THE APPLICATION OF THE STATUTE OF REPOSE.

Since Pullum, this Court has been unwavering in its application of the statute of repose to products liability claims in which the product was delivered to the original purchaser prior to July 1, 1974, but suit was not filed until after July 1, 1986. See e.g. Firestone Rubber & Tire Co. v. Acosta, 612 So. 2d 1361, 1362 (Fla. 1992); Melendez v. Dreis & Krump Mfg. Co., 515 So. 2d 735 (Fla. 1987). Still, the First District in this case held that Diamond set forth an "exception" to the constitutional application of the statute in latent injury cases.[2]

[2] Plaintiff's conceded in the First District that absent an exception, their claim was barred by section 95.031(2).

Any constitutional challenge to the statute of repose was foreclosed by Plaintiffs' failure to properly raise this issue in the trial court. Moreover, even if Plaintiffs could pursue such a challenge, the "Diamond exception," if it ever existed, is no longer viable in light of the recent cases interpreting the product liability and medical malpractice statutes of repose. Those cases unequivocally confirm that the statute of repose is constitutional as applied to these Plaintiffs' claims.

A. Plaintiffs Have Waived any Right to Challenge the Constitutionality of Section 95.031(2).

Before turning to the merits, this Court must consider a procedural impediment to Plaintiffs' constitutional argument. 3M submits that Plaintiffs waived any constitutional argument concerning the statute of repose by failing to file a reply to 3M's affirmative defenses on this ground.

Florida Rule of Civil Procedure 1.100(c) requires a plaintiff to reply to an affirmative defense if he seeks to avoid it for any reason. The purpose of the requirement is to "lay a predicate for such proofs so that the parties may prepare accordingly." Moore Meats, Inc. v. Strawn, 313 So. 2d 660, 661 (Fla. 1975). Rule 1.100(c) controls when, as here, the plaintiff seeks to make an affirmative defense legally void, to prevent a defense's effectiveness or to render the defense without its ordinary legal effect. Id.

Accordingly, where a defendant raises a statutory affirmative defense such as a statute of repose, a plaintiff

seeking to avoid that defense as unconstitutional must ordinarily reply to the affirmative defenses. See Feil v. Challenge-Cook Bros, Inc., 473 So. 2d 1338, 1339 (Fla. 4th DCA 1985), rev. denied, 486 So. 2d 596 (Fla. 1986) (statute of repose attacked as unconstitutional in reply to affirmative defenses). See generally Hospital Correspondence Corp. v. McRae, 682 So. 2d 1177, 1178 (Fla. 5th DCA 1996) (raising affirmative defense that statute is unconstitutional); Tallahassee Regional Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc., 681 So. 2d 826, 830 (Fla. 1st DCA 1996); United Faculty of Fla. v. Board of Regents, 585 So. 2d 991, 992 (Fla. 1st DCA 1991); Loxahatchee River Environmental Control Dist. v. School Bd. of Palm Beach County, 496 So. 2d 930, 932 (Fla. 4th DCA 1986), approved, 515 So. 2d 217 (Fla. 1987); Storer Cable T.V. of Fla., Inc. v. Summerwinds Apartments Assocs., Ltd., 451 So. 2d 1034, 1036 (Fla. 3d DCA 1984), approved, 493 So. 2d 417 (Fla. 1986).

Here, 3M raised the applicability of the product liability statute of repose as an affirmative defense. (R. V. 766) Plaintiffs did not file a reply to avoid this defense on constitutional grounds. (R. 792) As such, Plaintiffs waived any constitutional challenge to the statute, and the summary judgment on behalf of Defendants should be reinstated.

B. If It Ever Existed, The "Diamond Exception" Was Eliminated By Later Cases Involving The Products Liability Statute Of Repose.

The First District's holding is premised upon the so-called "Diamond exception." Placed in context, however, Diamond is merely an unremarkable ruling consistent with then existing law finding the statute of repose to be an unconstitutional denial of access to courts. Later cases interpreting the products liability statute of repose demonstrate that the "Diamond exception," to the extent it ever existed, has been overruled.

The starting point for any analysis of Florida's access to courts provision, Article 1, section 21, Florida Constitution, is Kluger v. White, 281 So. 2d 1 (Fla. 1973). That case, defined the circumstances under which a statute limiting or abolishing a right of redress would be an unconstitutional denial of access to courts:

> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.-01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, **unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.**

Id. at 4 (emphasis added).

Applying Kluger, the Court in Overland Construction Co., Inc. v. Sirmons, 369 So. 2d 572 (Fla. 1975), found that the statute of repose applicable to improvements to real property, section 95.11(3)(c), Florida Statutes (1975), unconstitutionally denied access to courts. The Court concluded that the problems of indefinite exposure to liability were not unique to the construction industry and thus did not constitute an overpowering public necessity sufficient to support the statute.

Thereafter, in Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1981), the Court in a two-paragraph opinion, applied Overland and summarily concluded that section 95.031(2), like section 95.11(3)(c) also unconstitutionally denied access to courts. Consistent with Battilla, several months later, a majority of this Court reached the same conclusion in Diamond, without drawing any distinction based on the type of injury. The Court simply found:

> A majority of the members of this Court (in Overland) declared the limitations period unconstitutional as applied . . . We find that binding precedent exists because petitioner's right of action was barred before it ever existed, as in Overland.

Diamond, 397 So. 2d at 672.

Several years later, however, this Court expressly overruled Battilla in Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985), appeal dismissed, 475 U.S. 1114 (1986), and found that there **was** an overwhelming public necessity for the product liability statute of repose:

> [T]he legislature, in enacting this statute of repose reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing a product.

Id. at 659.

In reaching this conclusion, the Court relied upon Justice McDonald's dissent in Battilla which stated:

> [t]he law of products liability has evolved to the point that we now recognize liability of a manufacturer which sells a product in a defective condition unreasonably dangerous to the user or consumer.
>
> This developing liability of a manufacturer creates a policy dispute. It could be logically argued that once a product is manufactured and sold a manufacturer should be subject to liability for an injury whenever caused by that product. It could also be argued that such liability would place an onerous burden on industry and that, therefore, liability should be restricted to a time commensurate with the normal useful life of manufactured products.
>
> The legislature, in enacting section 95.031(2), has determined that perpetual liability places an undue burden on manufacturers. It has determined that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturers of products. I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers. Because the normal useful life of buildings is obviously greater than most manufactured products there is a distinction in the categories of liability exposure between those sought to be limited by section 95.11(3)(c), struck down in Overland, and those listed in section 95.031(2).

Id. at 659-60.

When Battilla was overruled, nothing remained of Diamond, but the following footnote dicta in Pullum:

> In Diamond, the defective product, a drug known as diethylstilbestrol produced by Squibb, was ingested during plaintiff mother's pregnancy shortly after purchase of the drug between 1955-1956. The drug's effects, however, did not become manifest until after plaintiff daughter reached puberty. Under these circumstances, if the statute applied, plaintiffs' claim would have been barred even though the injury caused by the product did not become evident until over twelve years after the product had been ingested. The legislature, no doubt did not contemplate the application of this statute to the facts of Diamond. Were it applicable, there certainly would have been a denial of access to courts.

Id. 659 n*.[3]

Thus, but for this footnote, there would be no basis whatsoever for Plaintiffs' argument that the statute of repose is unconstitutional when applied to the facts of this case. Indeed, while courts have referred to the "Diamond exception," see, e.g., Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990), none have permitted an otherwise barred action to proceed until the Third District's ruling in Corcoran and the First District decision in this case. Rather, in case after case, the statute was applied

[3] This footnote was likely precipitated by Justice McDonald's concurrence in Diamond wherein he noted that a statute of limitation cannot constitutionally be applied to bar a cause of action before discovery. Diamond, 397 So. 2d at 672. While Justice McDonald may have been correct with respect to a statute of limitation, the same is not true with respect to a statute of repose which operates irrespective of the date of injury or discovery.

without any consideration of the type of injury involved. See e.g., Firestone; Melendez.

The only "analysis" provided in the footnote is that "the legislature, no doubt did not contemplate the application of this statute to the facts in Diamond," 476 So. 2d at 659 n*. When the footnote is analyzed, however, it cannot withstand scrutiny for several reasons.

First, whether the legislature considered the facts of Diamond in enacting the statute is beside the point. As Pullum itself acknowledged, to pass constitutional muster under the access to courts clause, there only needed to be an overwhelming public necessity for abrogating an existing or future claim. This Court in Pullum held that the legislature's rationale constituted such a necessity. Once that finding was made, the statute could be constitutionally applied, as Pullum itself recognized, to bar claims **even if they had not yet accrued or been discovered**.

Second, there is no basis to conclude that the legislature did not contemplate the facts of Diamond when enacting the statute of repose. As a statute of repose by definition bars claims before they exist, there is every reason to believe that the legislature contemplated the situation in Diamond, but did not desire to carve out an exception for latent injuries, as have other states. Indeed, the legislature specifically refused to except latent injury cases when it omitted any exception for latent injuries from the text of the statute. Cf. Wyatt v. A-

Best Prods. Co., 924 S.W.2d 98, 102 (Tenn. Ct. App. 1995) (discussing Tennessee statute of repose which provides exception for asbestos injuries); Love v. Whirlpool Corp., 449 S.E.2d 602, 605 (Ga. 1994) (discussing Georgia statute of repose providing exception for birth defects).[4]

In the end, it is clear that the dicta suggesting a "Diamond exception," and the First District's reliance thereon is, at best, a quarrel with the legislature, and its decision not to exempt latent injuries from the statute of repose. Whether the legislature appropriately chose which claims should be barred and which others should survive "in its effort to balance the rights of injured persons against the exposure of [manufacturers] to liability for endless periods of time," however, is not a question that this Court may second guess. Kush v. Lloyd, 616 So. 2d 415, 421-22 (Fla. 1992).

Accordingly, it is plain that any "exception" purportedly set forth in the footnote in Pullum simply ignores the holding of the case -- that a statute of repose may be constitutionally applied even where it bars a claim that does not "accrue" until after the statutory period expires. It also ignores the plain language of the statute stating that discovery of the defect is

[4] Any contrary analysis would mean that the Legislature must expressly note every situation it considered in enacting the statute. This is not the law. Indeed, courts in other states have reached this same conclusion with respect to their statutes of repose. E.g., McIntosh v. A&M Insulation Co., 614 N.E.2d 203, 205-06 (Ill. Ct. App. 1993) (the fact that the legislature did not expressly articulate that it was barring latent injury claims by its statute of repose did not render it unconstitutional).

irrelevant. Accordingly, this Court should find that the statute of repose is constitutional without regard to the type of injury involved.

C. Rejection Of A Latent Injury Exception Is Required By The Court's Recent Decisions Confirming The Constitutionality Of The Medical Malpractice Statute Of Repose.

In light of Pullum and the many other cases interpreting the products liability statute of repose, it should be clear that the "Diamond exception" is not viable. However, perhaps the strongest support for this position is found in the unbroken line of cases by this Court finding Florida's medical malpractice statute of repose, section 95.11(4)(b), Florida Statutes, constitutional even under circumstances where the injury resulting from the malpractice was not or could not be discovered until after the statutory period expired.

In Carr v. Broward County, 541 So. 2d 92 (Fla. 1989), the plaintiffs filed a malpractice claim ten years after giving birth to a child diagnosed with severe brain damage. To avoid the four year statute of repose, the plaintiffs argued that they did not know about the malpractice until after the statute expired. Disagreeing, the Court acknowledged the legislature's authority to restrict or limit actions by statutes of repose as a means to achieve certain public interests. Id. at 95. The Court found the grounds for the statute -- limiting open-ended liability for medical malpractice -- constituted an overriding public necessity sufficient to overcome an access to courts challenge.

Accordingly, the Court relied on Pullum, and held that the statute was constitutional "even as applied to causes of action which had not accrued until after the twelve-year statute of repose had expired." Id. at 95.

Also enlightening is the language of the Fourth District in the underlying decision which was approved by the Supreme Court:

> Whether the Carrs knew or should have known of the 'incident' and whether the incident or its effects were fraudulently conceded, their cause of action was permanently barred . . . by the . . . statute of repose.

Carr v. Broward County, 505 So. 2d 568, 574-75 (Fla. 4th DCA 1987), aff'd, 541 So. 2d at 92 (Fla. 1989). Noting that a different date -- such as when a plaintiff became aware of the malpractice -- could have been chosen by the legislature, the Court held that "[w]hether public policy supports such a distinction is a matter for the legislature, not this court to decide." Id. at 574-75.

Next, in University of Miami v. Bogorff, 583 So. 2d 1000 (Fla. 1991), the plaintiff claimed that the medical malpractice statute of repose could not be constitutionally applied because the alleged malpractice did not become evident until after the statute expired. This Court disagreed and, relying on Carr and Pullum, held that the statute was constitutional even as applied to causes of action that they were not aware of until after the repose period expired. Id. at 1004.

The Court faced the issue again in Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992), wherein the plaintiff claimed doctors failed to

diagnose an inheritable genetic impairment and that more than four years later, they had a genetically impaired child. In response to defendant's summary judgment, plaintiffs argued that they could not discover the malpractice until the child was born outside of the repose period. They further contended that the statute did not begin to run at the time of the malpractice, but rather when there was knowledge of the malpractice. According to plaintiff, to interpret the statute otherwise would violate access to courts and render the statute unconstitutional as applied.

This Court disagreed and held that the statute began to run, by its terms, at the time of the act of malpractice, and that the statute was constitutional **despite the plaintiff's inability to know about the cause of action**. Id. at 418. Quoting Dean Keeton, Kush explained that such statutes "by their nature reimpose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists." Id. at 418 (citing W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 30, at 168 (5th ed. 1984)). And despite being continuously under constitutional attack, Kush noted that "the courts in most jurisdictions have upheld their statutes." Id. at 419.

Next, the Court squarely faced the contention that where an injury is inflicted before the statute expires, there must be knowledge of the injury for the statute to constitutionally apply. Kush explained that the statute of repose does not run

from the same time as a statute of limitation; the former runs from a discrete act enunciated in the statute, the latter from when the cause of action accrued. Imposing a knowledge requirement on a statute of repose, therefore, would convert that statute into an extended statute of limitations without a discovery clause. Id. at 421. Thus, the Court concluded:

> **In the final analysis, the dissenting opinion seems to rest upon its reluctance to eliminate a cause of action before it has accrued. Yet, this is exactly what a statute of repose does.** See Melendez v. Dreis & Krump Mfg. Co., 515 So. 2d 735 (Fla. 1987) (holding that the former product liability statute of repose barred the suit before the cause of action accrued). Because its application has the potential, as in this case, of barring a cause of action before it accrues, Florida has enacted few statutes of repose. However, the medical malpractice statute of repose represents a legislative determination that there must be an outer limit beyond which medical malpractice suits may not be instituted. In creating a statute of repose which was longer than the two-year statute of limitation, the legislature attempted to balance the rights of injured persons against the exposure of health care providers to liability for endless periods of time. **Once we determined that the statute was constitutional, our review of its merits was complete. This Court is not authorized to second-guess the legislature's judgment.**

Id. at 421-22 (emphasis added). Accord Harriman v. Nemeth, 616 So. 2d 433 (Fla. 1993).

Most recently, in Damiano v. McDaniel, 689 So. 2d 1059 (Fla. 1997), the Court again held that the medical malpractice statute of repose barred a cause of action, notwithstanding that the injury did not manifest itself within the statutory term.

Relying on Kush, this Court dispelled the contention that the statute does not begin to run until the plaintiff is put on notice of his injury -- even where the injury has not been discovered. Id. at 1060-61. Once the statute was found to be constitutionally enacted, the Court's review ended. Id.

Damiano also rejected the contention that the "Diamond exception" rendered the malpractice statute unconstitutional where the injury occurs before repose but does not manifest until after. Id. at 1061 n.4. While noting in passing that Diamond concerned a different statute, the court explained that Diamond was decided years before the more recent decisions in Carr, Bogorff, and Kush, all of which held that the fact that an injury was inflicted before the repose period but the plaintiff did not know until after the statute expired did not render the medical malpractice statute of repose unconstitutional as applied.

This unbroken line of cases establishes that the discovery of a cause of action and/or accrual of a cause of action is irrelevant to the statute of repose and that there is no impediment to the application of the statute in these types of cases.

D. There Is No Basis To Interpret The Products Liability Statute Of Repose Different From The Medical Malpractice Statute Of Repose.

Given the clear pronouncements from this Court as to the medical malpractice statute of repose, the only question is whether there is any basis to treat the products liability statute any differently. The answer is a resounding "No!"

Like the medical malpractice statute of repose, the products liability statute of repose is constitutional. Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985), appeal dismissed, 475 U.S. 114 (1986); Melendez v. Dries & Krump Mfg. Co., 515 So. 2d 735 (Fla. 1987); Firestone Rubber & Tire Co. v. Acosta, 612 So. 2d 1361 (Fla. 1992). Like the situation prompting the medical malpractice statute, in 1975, there was an overwhelming public need to limit the otherwise perpetual liability imposed on manufacturers who sell products. This Court has upheld that need as a legitimate basis for the statute. Pullum. Like the medical malpractice statute of repose, the products liability statute of repose, which bars claims years after a fixed event, whether or not the cause of action has been discovered or has accrued, does not violate the access to courts provision of the Florida Constitution.

In sum, if one statute of repose that bars a claim before it accrues or is discovered is constitutional as applied because of the interests of terminating otherwise perpetual liability, there is no basis to conclude that another constitutional statute, enacted to the same end, and operating to the same effect, is not similarly constitutional.

Indeed, the medical malpractice cases rely heavily upon the products liability statute to reach their conclusion. For example, Kush relied on the interpretation of the products liability statute of repose found in Melendez to conclude that the plaintiff's malpractice action was barred even though the

injury could not be discovered until after the statutory period expired. 616 So. 2d at 421. See also Bogorff, 583 So. 2d at 1003 (relying on Melendez as defining the effect of any statute of repose); Carr, 541 So. 2d at 95 (relying on Pullum); Murphy v. Owens-Corning Fiberglas Corp., 129 F.3d 1264 (6th Cir. 1997) (unpublished opin.) (Cited in Westlaw at 1997 WL 705185) (relying on medical malpractice cases in holding Tennessee's product liability statute of repose barred claim even though injury was not known until after statute expired.)

In its decision below, the First District acknowledged the many cases interpreting the medical malpractice statute. But, it failed to offer any justification for deviating from these decisions other than to note that "[a]lthough the supreme court has held section 95.11(4)(b) constitutional in medical malpractice cases involving latent injuries, the court has made no similar finding with regard to products liability cases involving latent injuries." 721 So. 2d at 332. While this may be true, it does not provide any support for deciding products liability cases in direct contravention of medical malpractice cases.

Accordingly, this Court should follow its decisions in Damiano, Carr, Kush, and Bogorff, and hold that the product liability statute of repose bars Plaintiffs' claim. To the extent that Diamond is inconsistent with such a decision, it must be disavowed.

I. THE "DIAMOND EXCEPTION" DOES NOT APPLY TO THIS CASE BECAUSE PLAINTIFFS MANIFESTED SYMPTOMS WITHIN THE REPOSE PERIOD.

Finally, even if there is an exception for latent injury claims, Barnes must demonstrate that his claim falls within the exception. While Plaintiffs' argument presupposes that his injury did not manifest itself until after the repose period expired, in fact, for purposes of the statute of repose, Plaintiff's injury manifested itself when Plaintiff had his lung removed in 1984.

Relying on a case involving the statute of limitations, Celotex v. Copeland, 471 So. 2d 533 (Fla. 1985), the First District concluded that "'manifestation' of a latent injury occurs when the plaintiff is on notice of a causal connection between exposure to the allegedly defective product and the resultant injury." Barnes, 721 So. 2d at 732-33. The First District improperly broadened the term "manifestation" beyond what Diamond intended, and in so doing, turned the statute of repose into a statute of limitations.

If Applicable At All, Diamond Is Limited To Cases In Which There Has Been No Manifestation Of Symptoms During The Repose Period.

In Diamond, the plaintiff claimed her injury was caused by her mother's ingestion of a drug during pregnancy 20 years earlier. The Court found that under then controlling law, namely Battilla, the statute unconstitutionally barred plaintiff's cause of action before it ever existed. Id. at 672. In a specially concurring opinion, Justice McDonald explained that because the **effect of the drug did not materialize** until after the repose period expired, a statute of limitation could not be constitutionally applied. Id. (emphasis added). Justice McDonald reasoned that it was impermissible to bar a claim where the wrongful act had taken place, but the injury had not become evident.

Cases interpreting the "Diamond exception" confirm that the prerequisite to invoking it was the absence of **manifestation of the injury.** Most significantly, Pullum described Diamond as follows:

> [In Diamond] the drug's effects, however, did not become manifest until after plaintiff's daughter reached puberty. . . . **The injury caused by the product did not become evident** until over twelve years after the product has been ingested.

476 So. 2d at 659 n.* (emphasis added).

Similarly, Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990) described Diamond as a case involving "delay between the mother's ingestion of the drug and the **manifestation of the**

injury to the plaintiff. . . . Id. at 283 (emphasis added). Again, Wood v. Eli Lilly & Co., 701 So. 2d 344 (Fla. 1997), cited Diamond as a case which held that the statute could not be applied where it barred a cause of action "[b]efore there was any **manifestation of injury.**" (emphasis added).

In light of the foregoing, it is apparent that the purported Diamond exception does not apply where, as here, the symptoms of an injury become evident before the expiration of the statute. In such a case, Diamond is inapplicable and there is no impediment to the application of the statute of repose.

Earl Barnes had a lung removed in 1984. The statute of repose did not expire until two years later in June 1986.[5] As such, unlike Diamond, manifestation of injury occurred before the statute of repose expired, and Diamond, if viable, does not apply.

A. Manifestation Of Injury In The Context Of The Statute Of Repose Is Not Synonymous With Accrual In The Context Of The Statute Of Limitations.

The First District distorted the meaning of manifestation so as to require **accrual** of the cause of action in order to commence the running of the statute of repose. Imposing such a requirement ignores the effect of the statute of repose and impermissibly turns it into a statute of limitations. The court's attempt to bootstrap an accrual requirement onto the statute of repose, therefore, must fail.

[5] This Court has also made clear that a statute of repose is not unconstitutional simply because it shortens the time to sue. Pullum.

As discussed at length above, this Court has rejected imposing an accrual requirement on to the running of a statute of repose. For example, in Melendez v. Dreis & Krump Mfg. Co., 515 So. 2d 735, 736 (1987), the Court held:

> A statute of repose cuts off a right of action within the specified time limit after delivery of a product or the completion of an improvement, **regardless of when the cause of action actually accrues**. (Emphasis added.)

The medical malpractice statute of repose cases are in accord. For example, in Carr v. Broward County, 505 So. 2d 568 (Fla. 4th DCA 1987), aff'd 541 So. 2d at 92 (Fla. 1989), the court explained:

> First, a statute of limitation bars enforcement of an accrued cause of action whereas a statute of repose not only bars an accrued cause of action, but will also prevent the accrual of a cause of action where the final element necessary for its creation occurs beyond the time period established by the statute . . .
>
> A second distinction may be made with reference to the event from which time is measured. A statute of limitation runs from the date the cause of action arises; that is, the date on which the final element (ordinarily, damages, but it may also be knowledge or notice) essential to the existence of a cause of action occurs. The period of time established by a statute of repose commences to run from the date of an event specified in the statute, such as delivery of goods, closing on real estate or the performance of a surgical operation. At the end of the time period the cause of action ceases to exist.

Id. at 570.

Similarly in Kush v. Lloyd, 616 So. 2d 415, 421 (Fla. 1992) the Court observed:

> If, as the dissent now seems to say, the statute of repose beings to run when the injury occurs, regardless of the plaintiff's knowledge, the statue of repose has simply been converted into a lengthened statute of limitations without a discovery clause.

Based on the foregoing, it is clear that the First District's interpretation of "manifestation", which would effectively toll the statute of repose until the cause of action accrues, is directly contrary to decisions from this Court. Thus, even if the Court concludes that a Diamond exception remains, 3M urges the Court to find that exception inapplicable where there is a manifestation of symptoms during the repose period.

CONCLUSION

Based on the foregoing, 3M respectfully requests the Court to reverse with directions to enter judgment for Defendants.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail this _____ day of February, 1999 to all counsel on attached service list.

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