IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,544

MINNESOTA MINING & MANUFACTURING CO., et al.,

Petitioners,

vs.

EARL BARNES, et al.,

Respondents.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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CERTIFICATE OF FONT SIZE

This brief is typed in Times New Roman 14 point 10 characters per inch.

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TABLE OF CASES

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I
STATEMENT OF THE CASE AND FACTS

The Academy adopts the respondents' statement of the relevant facts and of the procedural history of this case.

II
CERTIFIED QUESTION PRESENTED FOR REVIEW

> WHETHER THE EXCEPTION ESTABLISHED IN *DIAMOND v. E.R. SQUIBB & SONS, INC.*, 397 SO. 2D 671 (FLA. 1981), IS STILL VIABLE IN VIEW OF THE COURT'S RECENT DECISIONS HOLDING THE MEDICAL MALPRACTICE STATUTE OF REPOSE CONSTITUTIONAL.[1/]

III
SUMMARY OF THE ARGUMENT

This Court has declared on numerous occasions, in the very decisions invoked by the petitioners, that the *Diamond* decision continues to prescribe a viable exception to the applicability of the now-repealed product-liability statute of repose, § 95.031(1), Fla. Stat. (1975). The petitioners not only ignore these repeated pronouncements; they also ignore their underlying rationale. Indeed, in a classic strawman argument, the petitioners incorrectly attribute to *Diamond* a rationale which this Court repeatedly has rejected (that a statute of repose can never constitutionally abolish a cause of action

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[1/] Petitioner Minnesota Mining & Manufacturing Co. has briefed two additional issues not certified to this Court–whether the issue certified was waived at the trial level by the plaintiffs' failure to reply to the defendant's affirmative defense; and whether the plaintiffs' complaint was time-barred because Earl Barnes' injury assertedly manifested itself before the repose period had expired. The Academy will leave both issues to the parties, and will confine itself to the certified question.

before it arises), and then proclaim that in rejecting that argument, the Court necessarily overruled *Diamond*. As we will demonstrate, however, *Diamond* in fact is based upon an entirely different rationale (that a statute of repose cannot constitutionally apply to a product which is defective from the moment of its creation, even if its defect does not manifest itself until years later); and it is that rationale which this Court repeatedly has endorsed in recognizing that *Diamond* remains good law. The petitioners' briefs do not even address this point, but instead are content to attack *Diamond* on grounds which cannot be attributed to *Diamond*. Thus, their briefs offer no guidance in evaluating the question certified by the district court. That question should be answered in the affirmative.

IV
ARGUMENT

THE EXCEPTION ESTABLISHED IN *DIAMOND* IS STILL VIABLE NOTWITHSTANDING THE COURT'S RECENT DECISIONS HOLDING THE MEDICAL MALPRACTICE STATUTE OF REPOSE CONSTITUTIONAL.

As the Court is aware, no Florida statute of repose has ever been declared facially constitutional of all of its aspects. To the contrary, every application of such a statute is subject to constitutional scrutiny. As this Court has put it, "statutes of repose are always subject to constitutional attack under the access to courts provision of our constitution." *Kush v. Lloyd,* 616 So. 2d 415, 419 (Fla. 1992), *citing Carr v. Broward County,* 505 So. 2d 568 (Fla. 4th DCA 1987), *approved,* 541 So. 2d 92 (Fla.

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1989). Each application thus is subject to scrutiny under the formulation announced in *Kluger v. White,* 281 So. 2d 1 (Fla. 1973). The legislature may not abolish a common-law cause of action without providing a reasonable alternative, in the absence of an overpowering public necessity and no other means of achieving the legislative objective.[2/]

As we will demonstrate, as the district court recognized relative to silicosis; and as another district court has recognized relative to asbestos cases, *see Owens-Corning Fiberglas Corp. v. Corcoran,* 679 So. 2d 291 (Fla. 3d DCA 1996), *review denied,* 690 So. 2d 1300 (Fla. 1997), *and Vilardebo v. Keene Corp.,* 431 So. 2d 620 (Fla. 3d DCA), *appeal dismissed,* 438 So. 2d 831 (Fla. 1983), application of the now-repealed statute of repose to such cases could not survive the *Kluger* test. And this conclusion has nothing to do with the principle that a statute of repose in proper cases may abolish a cause of action before it arises (which of course is what a statute of repose does). It has everything to do with the principle that a statute of repose is not constitutional

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[2/] Given this fundamental premise, recognized by all of the decisions in this area (to be discussed *infra*), we frankly do not understand how Petitioner Minnesota Mining can assert that "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" (brief at 15); and thus that *Diamond* presents "at best, a quarrel with the legislature"–"not a question that this Court may second guess" (brief at 16). At the risk of sounding like first-year Constitutional Law, we respond that the Constitution takes precedence over legislative judgments; it *exists* to "second guess" those judgments. Therefore, even if the legislature intended the statute of repose to apply to products like that in *Diamond* (which we doubt seriously), its judgment must yield to constitutional requirements. Every case discussed in this brief reaffirms that point.

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unless it serves a sufficient governmental purpose; and no purpose is served by protecting a product which is defective from the moment of its creation.

This conclusion is supported by a litany of pronouncements from this Court. In *Overland Construction Co. v. Sirmons,* 369 So. 2d 572 (Fla. 1979), this Court applied the *Kluger* test in disapproving application of the 12-year statute of repose governing the design or construction of improvements to realty, where the "legislature itself has not expressed any perceived public necessity . . . ." *Id.* at 574. In *Overland,* therefore, the underlying governmental objective was insufficient to overcome the deprivation of access to the courts. This is the first of a series of decisions analyzing these statutes by reference to the governmental goals which they purportedly serve. That is the key to the *Diamond* decision, and to its continuing viability.

In *Diamond,* 397 So. 2d at 672, this Court relied upon *Overland* in forbidding application of the product-liability statute of repose to bar an action based upon a mother's unknowing ingestion of a defective drug during her pregnancy 20 years earlier, whose harmful effects did not manifest themselves until her daughter's teenage years. Please note that the particular drug in question was defective from day one; only its harmful effects occurred later–not its defective condition. The Court in *Diamond* did not find the product-liability statute of repose facially invalid, but only invalid as applied to the particular product at issue. In reliance upon *Overland,* the Court held that the legislature had neither provided a reasonable alternative in cutting off a cause of action before it had accrued--that is, before it had resulted in a manifest injury; nor

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had it shown an overpowering public necessity for this particular prohibition. There was no public necessity in application of the statute to a product which was dangerous at the time of its creation and ingestion, but whose harmful manifestation occurred beyond the statutory period. Given that a statute of repose is supposed to protect a product which causes injury solely because it wears out, such a statute would serve no purpose in protecting a product which was dangerous from its inception.[3/]

Four years later, in overruling its 1980 *Battilla* decision (which had held that the product-liability statute of repose was unconstitutional even when applied to products which typically are not defective during the course of their useful lives[4/]), the Court

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[3/] Justice McDonald concurred in *Diamond*, even though he had earlier criticized the *Overland* decision, *see Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874, 874-75 (Fla. 1979) (McDonald, J., dissenting), because Justice McDonald recognized that the plaintiff in *Diamond* "had an accrued cause of action but it was not recognized because the injury had not manifested itself." *Diamond*, 397 So. 2d at 672 (McDonald, J., concurring). Justice McDonald continued:

> This is different from a situation where the injury is not inflicted for more than twelve years from the sale of the product. When an injury has occurred but a cause of action cannot be pursued because the results of the injury could not be discovered, a statute of limitations barring the action does, in my judgment, bar access to the courts and is constitutionally impermissive.

[4/] *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1974). Justice McDonald had dissented in *Battilla*, arguing that *Overland Construction* was not authority for the *Battilla* majority's holding, because *Overland* concerned the statute relating to improvements to realty, while *Battilla* concerned the product-liability statute of repose. 392 So. 2d at 874. As to the latter, Justice McDonald argued that the repose statute reflected the legislative determination that "liability should be restricted to a time

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made clear in *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla. 1985), *appeal dismissed,* 475 U.S. 1114, 106 S. Ct. 1626, 90 L. Ed. 2d 174 (Fla. 1986), that it was not upholding the product-liability statute of repose in all of its applications, but only as applied to products which are not initially defective, and thus that the rule announced earlier in *Diamond* remained Florida law.[5/] Indeed, the Court explicitly distinguished *Diamond* from the fact situation of *Pullum*, in which the product was not defective when originally designed and manufactured, but became defective only after the expiration of its presumed useful life, 476 So. 2d at 659 n.*:

> Pullum also refers to *Diamond v. E.R. Squibb and Sons, Inc.*, 397 So. 2d 671 (Fla. 1981), as being in accord with *Battilla*. In *Diamond*, we held that the operation of section 95.031(2) operated to bar a cause of action before it accrued and therefore denied the aggrieved plaintiff access to the courts. But *Diamond* presents an entirely different factual context than existed in either *Battilla* or the present case where the product first inflicted injury many years after its sale. In *Diamond*, the defective product, a drug known as

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commensurate with the normal useful life of manufactured products." In Justice McDonald's view, therefore, the product-liability statute of repose was applicable only to products which are safe during their normal useful lives--not to products like asbestos and silica dust, which are dangerous from the outset. Justice McDonald's view in *Battilla* was later adopted by the full Court in *Pullum*, discussed *infra.*

[5/] We agree entirely with Petitioner Minnesota Mining (brief at 15) that "[t]his Court in *Pullum* held that the legislature's rationale constituted [an overriding public] necessity." The product in *Pullum*, a press brake machine, was not defective from the outset, but rather wore out after the passage of time. Thus, mindful that the court must look at each particular application of such a statute, *see supra* p. 2, the statute as applied in *Pullum* satisfied its underlying purpose. But as the Court noted in *Pullum*, *see* text above, the statute as applied in *Diamond* did not.

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> 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 in *Diamond*. Were it applicable, there certainly would have been denial of access to the courts.

Thus, the Court not only made clear that the *Pullum* decision did not affect *Diamond* in any way; the Court in fact re-endorsed the holding of *Diamond*, noting that application of the statute of repose in *Diamond* "certainly would have been a denial of access to the courts."[6/]

These conclusions were not altered in *Carr v. Broward County,* 541 So. 2d 92 (Fla. 1989), which concerned a different statute. *Carr* upheld application of the medical-malpractice statute of repose (§ 95.11(4)(b)) under the traditional *Kluger* test, because of the perceived overriding public necessity for the legislation. As Petitioner Minnesota Mining puts it (brief at 17-18), "[t]he Court [in *Carr*] found the grounds for

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[6/] In upholding application of the statute in *Pullum*, the Court quoted and adopted Justice McDonald's dissenting opinion in *Battilla* (discussed *supra* note 3), which had argued for the statute's application in cases involving products which are safe during their useful lives, and become unsafe only with age. Consistent with *Diamond*, which the *Pullum* Court said remained good law, the Court in *Pullum* offered no argument for application of the statute to a product like asbestos or silica dust, which is dangerous from the moment of its manufacture.

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the statute–limiting open-ended liability for medical malpractice–constituted an overriding public necessity sufficient to overcome an access to courts challenge." The product-liability statute has a different purpose–to protect products which are not defective in their design or manufacture, but merely wear out over time. That particular purpose is not served by protecting a product which is defective from the outset. Thus, the district court in *Carr*, in a decision which this Court later approved, had upheld the medical-malpractice statute on the basis of the particular objective it serves--in the process distinguishing the facts at issue from those in *Diamond*:

> It is significant that the defendant [in *Diamond*] was the manufacturer of an allegedly defective product rather than the health care provider who negligently administered the drug to the fetus.
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> * * * *
>
> Interestingly, and by way of *dicta* in a footnote, the *Pullum* court affirmed the viability of *Diamond v. E.R. Squibb and Sons, Inc.*, stating that if the statute of repose were held to apply, there would have been a denial of access to the courts.
>
> Recapitulating, under the present state of the law the statute of repose does not violate the constitutional guarantee of access to the courts even if it abolishes a cause of action or right otherwise protected . . . provided the legislature either provides a reasonable alternative or overwhelmingly establishes the public necessity for the particular time restraints imposed by the statute. When public necessity is not shown, the statute as applied may be held to deny access to the courts in an unconstitutional manner. *Overland.* Where such necessity is demonstrated,

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> the statute effectively bars the specified right after expiration of the repose period. . . .
>
> Provided, however: application of a statute of repose to the case of one whose cause of action has accrued prior to adoption of the statute is permissible only if the claimant has remaining a reasonable time within which to commence an action. [Citations omitted]. The statute will not be applied or is impermissibly applied to the case of one injured by a product where the ill effects of that injury do not manifest themselves within the statutory period. *Diamond.* The distinction, admittedly a fine line, between ingestion of a dangerous drug and falling through a defective floor is that in the former situation a particular claimant has been injured, or the potential for injury has been initiated, but no symptoms appear before the running of the period of repose, whereas in the latter situation the injury does not occur nor is the claimant particularized until after expiration of the period established by the statute of repose.
>
> In other words, if plaintiff number one has been implanted with the seed that eventually will flower into injury to plaintiff number one, then the "incident" which commences the running of the statute of repose is the eventual manifestation of symptoms of injury, not implantation of the seed.

Carr v. Broward County, 505 So. 2d 568, 572, 573 (Fla. 4th DCA 1987), *approved,* 541 So. 2d 92 (Fla. 1989). After thus reaffirming the continuing viability of *Diamond,* the district court in *Carr* upheld application of the medical-malpractice statute, because "the legislature has established an overriding public interest meeting the *Kluger* test as applied in *Overton* . . . ." *Id.* at 575. This Court affirmed that ruling, emphasizing that the medical-malpractice statute of repose had survived constitutional scrutiny only

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because "the Fourth District Court recognized the principles of *Kluger* and properly applied them in determining that the legislature had found an overriding public necessity in its enactment of [the statute]." 541 So. 2d at 95. Again, it is the nature of the governmental interest which decides the constitutional question. In *Carr*, the district court and this Court expressly recognized an overriding public necessity. In *Diamond*, in contrast, there could be no overriding public necessity for protecting a product which is dangerous from the outset, as opposed to a product which becomes dangerous merely because of the passage of time. Therefore, the *Diamond* rationale easily survives the *Carr* decision.

If there were any doubt at that point of the continuing viability of *Diamond*, this Court resolved it a year later, in the course of approving the market-share theory of liability in a DES case in *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 283 (Fla. 1990). In adopting the market-share theory, the Court recognized the problems unique to products which are defective at the time of injection, but do not manifest their ill effects until much later. It did so by reaffirming the theory announced almost a decade earlier in *Diamond*:

> Adoption of such a theory [the market-share theory] of liability would not be the first time this Court has recognized the unique circumstances surrounding the injury suffered by the DES plaintiff. We have recognized that, because of the delay between the mother's ingestion of the drug and the manifestation of the injury to the plaintiff, DES cases must be accorded different treatment than other products liability actions for statute of repose purposes. *See Pullum v.*

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> *Cincinnati, Inc.,* 476 So. 2d 657, 659 n.* (Fla. 1985), *appeal dismissed,* 475 U.S. 1114, 106 S. Ct. 1626, 90 L. Ed. 2d 174 (1986); *Diamond v. E.R. Squibb & Sons, Inc.,* 397 So. 2d 671 (Fla. 1981).

A year later, the Court again reaffirmed the continued viability of *Diamond*, in the context of enforcing the product-liability statute of limitations in *University of Miami v. Bogorff,* 583 So. 2d 1000, 1004 (Fla. 1991):

> We now turn to the products liability claim against Lederle Laboratories. For the reasons expressed by the district court, we agree that it cannot be determined from the record whether the twelve-year statute of repose set forth in subsection 95.031(2), Florida Statutes (1975), bars the Bogorffs' action against Lederle. 547 So. 2d at 1228. Nevertheless, their action is barred because the statutory limitation period expired before they filed their complaint. By July 1972 the Bogorffs were clearly aware of Adam's paralyzed and brain-damaged condition. They knew sometime in 1972 that the child had been treated with methotrexate. This is not a case where the drug was ingested and the alleged effects did not manifest themselves until years later. *E.g., Diamond v. E.R. Squibb & Sons, Inc.,* 397 So. 2d 671 (Fla. 1981). Rather, in this case, the alleged effects of methotrexate manifested within months of Adam's last treatment.

Again, therefore, the Court distinguished and therefore reaffirmed the viability of its 1981 decision in *Diamond.*

A year later, in *Kush v. Lloyd,* 616 So. 2d 415 (Fla. 1992), the Court again upheld application of the four-year statute of repose in a medical-malpractice case, in reliance on the prior decisions recognizing an overpowering governmental rationale for

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that particular legislation. The doctor in *Kush v. Lloyd* assertedly had failed to diagnose an inheritable genetic impairment, which did not manifest itself until the birth of the impaired child four years after the asserted act of negligence. Holding that the statute of repose had begun to run at the time of the assertedly-negligent act, the Court acknowledged that "statutes of repose are always subject to constitutional attack under the access to court's provision of our constitution." 616 So. 2d at 419. However, the court properly attributed to its earlier decision in *Carr v. Broward County,* 541 So. 2d 92 (Fla. 1989), the holding "that the medical malpractice statute of repose was constitutional because in its enactment the legislature had met the requirements of *Kluger v. White*, 281 So. 2d 1 (Fla. 1973)." 616 So. 2d at 419. Given the overwhelming public necessity recognized in earlier cases for the medical-malpractice statute of repose, the Court in *Kush v. Lloyd* rejected the dissenting Justices' "reluctance to eliminate a cause of action before it has accrued," because "this is exactly what a statute of repose does." *Id.* at 421. As it had in the past, with specific regard to the medical-malpractice statute of repose, the Court yielded to the "legislative determination that there must be an outer limit beyond which medical malpractice suits may not be instituted." *Id.* In the process, the Court said nothing which in any way retreated from its prior decisions regarding other statutes of repose. If anything, the Court's repeated emphasis upon the underlying rationale of the medical-malpractice statute of repose emphasizes the controlling importance of a case-by-case analysis of the underlying governmental interest at stake, and with it the recognition that a product-

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liability statute of repose is designed only to protect those products which cause harm after their useful life has expired. As *Diamond* holds, such a statute serves no purpose if applied to a product which is dangerous and defective from the outset, and not because of the expiration of its useful life. That rationale is entirely consistent with the *Kush* decision.

It is not surprising, therefore, that in the same year it decided *Kush*, the Court again reiterated the continued viability of its 1981 decision in *Diamond*. In *Firestone Tire & Rubber Co. v. Acosta,* 612 So. 2d 1361 (Fla. 1992), the Court held that the legislature's repeal of the product-liability statute of repose could not have the effect of re-establishing a cause of action which had been extinguished while the statute of repose was still on the books. The Court thus approved the district court's decision in *Walker v. Miller Electric Manufacturing Co.,* 591 So. 2d 242, 245 (Fla. 4th DCA 1991), *approved,* 612 So. 2d 1361 (Fla. 1992), in which the district court had rejected the plaintiff's reliance upon a Sixth Circuit asbestos decision, on the ground that "slowly evolving injury cases should be treated differently from cases where an injury occurs instantaneously." As the district court put it in *Walker*, 591 So. 2d at 245-46:

> Appellant also relies on *Cathey v. Johns-Manville Sales Corp.,* 776 F. 2d 1565 (6th Cir.), *cert. denied,* 478 U.S. 1021, 106 S. Ct. 3335, 92 L. Ed. 2d 740 (1986), an appeal that consolidated two cases. As to plaintiff James O. Cavett, the Court of Appeals confronted the issue we now address. Starting in 1939, Mr. Cavett worked for over forty years as a boilermaker in close proximity to asbestos insulation. He recalled seeing Johns-Manville insulation

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products on all his jobs. On July 1, 1978, the State of Tennessee's ten year statute of repose became effective. By amendment, after July 1, 1979, the statute excluded asbestos cases. In 1981 Mr. Cavett first discovered that he was suffering from an injury as a result of his exposure to asbestos. Johns-Manville, like appellees, argued that it had a vested right in the statute of repose, which constitutionally could not be abrogated by the retroactive application of the amendment. The Court of Appeals held that "due to the fact that Cavett's cause of action accrued after the effective date of the amendment, Johns-Manville, neither acquired nor developed a vested right. It is the time of the accrual of the action which determines the applicable statute of limitation." *Id.* at 1576.

We believe, as the Tennessee legislature apparently did about asbestos cases, that slowly evolving injury cases should be treated differently from cases where an injury occurs instantaneously. Therefore, we distinguish *Cathey* because the case involved lung cancer, the illness caused by Mr. Cavett's prolonged exposure to asbestos. Although medical professionals cannot pinpoint when a minute structure of a human cell begins its cancerous transformation, it is common knowledge that the process takes many years to develop. Johns-Manville wanted to limit Mr. Cavett's proof to only that asbestos first purchased after July 1, 1969, the ten year period immediately before the last effective date of the originally enacted statute of repose. To do so would have ignored thirty of the years that Mr. Cavett inhaled asbestos and would have excluded the high probability that his cancer began before 1969. Each day of the ten year period before 1979 something was happening to Mr. Cavett's body that probably resulted from his inhaling of the insulation products delivered before 1969. The same can be said as to the ten year periods before 1978, 1977, 1976, and so on. Johns-Manville could not establish that the statute of repose ran.

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> Sub judice, during the twelve year period before 1986 absolutely nothing happened to appellant as a result of the machine manufactured or delivered by appellees. Appellees established that the statute of repose had run.

That, of course, is precisely the distinction which this Court had made in 1981 in *Diamond.* The district court's decision in *Walker* was approved by this Court in *Firestone.*

Finally, in *Damiano v. McDaniel,* 689 So. 2d 1059, 1060 (Fla. 1997), the Court again upheld application of the medical-malpractice statute of repose, again emphasizing the "overwhelming public necessity" for that particular statute. And in the process, as Petitioner Minnesota Mining reluctantly concedes (brief at 21), the Court distinguished *Diamond* because it was "a products liability action involving an entirely different statute of repose." Here again, as on every prior occasion, the dispositive factor was the particular statute at issue, and the particular governmental interest reflected in that statute. And here again, in distinguishing *Diamond*, the Court implicitly recognized that *Diamond* remains good law.

Thus, from the beginning of its consideration of the product-liability statute of repose in 1981 in *Diamond*, to its latest pronouncement on the subject in 1997 in *Damiano*, the Court consistently has reaffirmed the continuing viability of the *Diamond* rationale. The product-liability statute of repose cannot constitutionally apply to bar a cause of action arising from the use or exposure to a product which is defective at the time of its creation, but whose effects may not manifest themselves until after the

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statutory repose period. That was the district court's holding in the instant case, and that holding was correct.

V
CONCLUSION

It is respectfully submitted that the question certified by the district court should be answered in the affirmative, and the district court's decision approved.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed originally on the 19th day of March, 1999, and mailed in revised form on the 23rd day of March, 1999, to all counsel of record on the attached service list.

Respectfully submitted,

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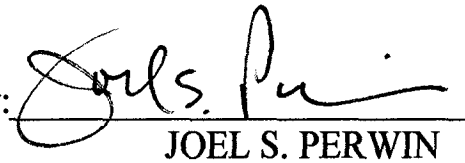
By: 

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