SUPREME COURT OF FLORIDA

MINNESOTA MINING &
MANUFACTURING CO., et al.,

Petitioner,

v. CASE NO. 94,544

EARL BARNES and LYDIA BARNES,

Respondents.

ON CERTIFIED QUESTION FROM

THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
CASE NO. 97-03331

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman proportionally spaced font in accordance with this court's administrative order dated July 13, 1998.

STATEMENT OF THE CASE AND FACTS

The procedural history of the case and the facts pertinent to the issues raised below were accurately summarized by the district court as follows:

> Earl Barnes (Barnes) [respondent], formerly employed as a sandblaster, filed a negligence action against appellees (manufacturers) [petitioners], producers of sand used in sandblasting operations. He alleged that he had contracted a lung disease (silicosis) from exposure to silica dust emanating from the sand used in sandblasting operations and that appellees' products caused or contributed to his illness. Barnes claimed that he was exposed to the silica dust from 1972 to 1974. The manufacturers denied the material allegations of Barnes' complaint and argued that Barnes' action was barred by the now-repealed products liability statute of repose section 95.031(2), Florida Statutes (1975). The trial court granted the manufacturers' motion for summary judgment. . . . .
>
> Barnes' left lung was surgically removed on July 16, 1984, and he was informed by his physicians that his lung had been removed because of cancer; however, he was told several weeks later that the lung had been removed because of a fungal infection known as actinomycosis. Barnes testified that he did not know that his lung problems were related to silicosis or exposure to silica dust until 1992, and that the diagnosis of silicosis was not confirmed by tissue analysis until 1995.

Barnes v. Clark Sand Co. Inc., 721 So. 2d 329, 330 (Fla. 1st DCA 1998) (footnote omitted).

ISSUE PRESENTED FOR REVIEW

(as framed by the certified question)

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?

SUMMARY OF ARGUMENT

In *Pullum v. Cincinnati, Inc., infra*, this court held that the twelve-year product liability statute of repose, section 95.031(2), Florida Statutes, did not violate article I, section 21 of the Florida Constitution when applied to a case where a defective product that was more than twelve years-old caused immediate injury. As an exception to *Pullum*, this court in *Diamond v. E.R. Squibb & Sons, Inc., infra*, held that the product liability statute of repose could not be applied constitutionally in latent injury cases where the consequences of injury resulting from exposure to or ingestion of a defective product are not known until after the period of repose has expired. *Diamond* has been continually cited and acknowledged by this court as extant authority in latent injury cases and has not been overruled explicitly or implicitly, as petitioners suggest. Further, *Diamond* has not been overruled by recent decisions from this court sustaining the medical malpractice statute of repose in cases where the medical malpractice cause of action is extinguished before it accrues. The medical malpractice statute of repose is part of a complex, unique statutory framework and is founded on overriding public policy concerns expressed by the legislature which have never been articulated in the product liability context with respect to latent injuries. Accordingly, this court should reaffirm *Diamond's* continued viability and answer the certified question affirmatively.

Following *Diamond*, as interpreted by the third district in analogous asbestos product liability cases, the district court below correctly held that the repealed twelve-year product liability statute of repose could not constitutionally bar respondent's product liability action when respondent was exposed to petitioners' products between 1972 and 1974, before the statute of repose was enacted, but did not discover their harmful effects until 1992, long after the period of repose had expired and long after the statute had been repealed.

The district court also correctly held that manifestation of a latent injury sufficient to trigger the statute of repose does not occur until plaintiff is placed on reasonable notice of a causal relationship between exposure to the defective product and resulting injury. The court's holding in this respect is soundly based on analogous statute of limitations cases from this court and the district courts of appeal which hold that in latent injury cases a cause of action does not accrue until plaintiff has sufficient notice to establish a causal link between the defective product and the injury. In this case, although his lung was removed in 1984, respondent did not receive sufficient notice to connect the surgery or pulmonary problems to his use of sand and related products until 1992 when he received a tentative diagnosis of silicosis.

Finally, although respondent did not specifically plead the constitutionality of the statute of repose in its replies to petitioners' affirmative defenses, the record

clearly establishes that the issue was adequately raised in the trial court and preserved for appellate review.

ARGUMENT

A. History of Product Liability Statute of Repose

The repealed product liability statute of repose has traveled a tortured jurisprudential course virtually unparalleled in the annals of Florida legal history. Effective January 1, 1975, the legislature created section 95.031, Florida Statutes, to purportedly eliminate any cause of action based on fraud or product liability filed more than twelve years after the fraud was committed or the product was sold to its original purchaser. As originally enacted, section 95.031 provided:

> 95.031 Computation of time.--(1) Except as provided in subsection (3) and in 95.051 the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues, except as otherwise specifically provided in these statutes.
>
> (2) A cause of action accrues when the last element constituting the cause of action occurs.
>
> (3) Actions for products liability and fraud under section 95.11(3) must be begun within the period prescribed in this chapter with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence instead of running from any date prescribed elsewhere in §95.11(3), *but in any event within twelve (12) years after the date of delivery of the completed product to its original purchaser* or after the date of the commission of the alleged fraud *regardless of the date the defect in the product* or the fraud *was or should have been discovered*.

Ch. 74-382, § 3, at 1208, Laws of Fla. (emphasis supplied). When Ch. 74-382, § 3, was incorporated into the Florida Statutes, the publisher edited and renumbered the provision so that subsection one became an unnumbered introductory paragraph and subsections two and three were renumbered as subsections one and two respectively. *See* 7 *Fla. Stat. Ann.* 16 (1982).

A statute of repose such as section 95.031(2) differs from a statute of limitations in that "a statute of repose precludes a right of action after a specified time which is measured from the incident . . . rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued." *University of Miami v. Bogorff*, 583 So. 2d 1000, 1003 (Fla. 1991). Because they hold the potential for extinguishing a cause of action before it ever accrues, statutes of repose have been subjected to close judicial scrutiny to ensure they do not infringe upon a person's right of access to the courts guaranteed by article I, section 21 of the Florida Constitution.[1] *See Kush v. Lloyd*, 616 So. 2d 415, 419 (Fla. 1992) ("[S]tatutes of repose are always subject to constitutional attack under the access to courts provision of our constitution.").

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[1] Article I, section 21 of the Florida Constitution provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Not long after its enactment, in *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980), this court declared the product liability statute of repose unconstitutional as a violation of Florida's guarantee of access to courts as provided by article I, section 21 of the Florida Constitution. The court relied on its earlier decision in *Overland Construction Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979), which had invalidated section 95.11(3)(c), Florida Statutes, a twelve-year statute of repose for actions founded on the design, planning or construction of improvements to real property, on the same constitutional grounds. The *Overland* court relied on *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), which held that a statute violates the right of access to courts when the legislature abolishes a common law right without providing a reasonable alternative, unless the legislature can demonstrate an "overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." *Kluger*, 281 So. 2d at 4.

Applying *Kluger*, the *Overland* court first determined that the real property improvements statute of repose abolished plaintiff's common law right to bring suit against a building contractor for injuries sustained as a result of negligence in the construction of a building. Concerning the question of "overpowering public necessity for the abolishment of such right," the court observed that the legislature had not expressed any perceived public necessity for abolishing a cause of action occurring more than twelve years after completion of improvements to real property.

Overland, 369 So. 2d at 574. Although the court acknowledged the alarming trend of expanded liability for professionals in the construction industry and noted the problems inherent in exposing builders and related professionals to potential liability for an indefinite time, the court found that these problems were not unique to the construction industry and were not sufficiently compelling to justify enactment of legislation which abolished a cause of action without providing a reasonable alternative. *Overland*, 369 So. 2d at 574. Because the *Battilla* court relied on *Overland* without elucidation, it must be assumed that this court found the same constitutional infirmities present in the product liability statute of repose that it found in its real property counterpart.[2]

Not long after *Battilla* was decided, this court addressed the validity of the product liability statute of repose as applied to latent injury or disease cases where the consequences of injury resulting from exposure to or ingestion of a defective product are not known until after the period of repose has expired. In *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So. 2d 671 (Fla. 1981), this court found the product liability statute of repose unconstitutional as a violation of the access to courts provision of the

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[2] In direct response to *Overland*, the legislature reenacted section 95.11(3)(c), effective July 3, 1980. *See* Ch. 80-322, Laws of Fla. The bill contained a preamble which recited various grounds purporting to justify the statute of repose pertaining to real property improvements. *See Durring v. Reynolds, Smith & Hills*, 471 So. 2d 603, 605 (Fla. 1st DCA 1985). The legislature, however, did not attempt to cure the constitutional defect found in *Battilla* by reenacting section 95.031(2).

Florida Constitution when applied to an action based on a mother's ingestion of a drug (DES) during her pregnancy in the mid-1950's, whose harmful effects were not discovered until her daughter's teenage years in 1976. Based on these compelling facts, the *Diamond* court felt constrained to follow its earlier precedent in *Overland* which had invalidated the real property improvements statute of repose where the legislature had not expressed any perceived public necessity for extinguishing a cause of action before it accrued. *Overland*, 369 So. 2d at 574. Notably, Justice McDonald concurred in *Diamond*, even though he had earlier criticized *Overland* in his dissent in *Battilla*, because he recognized that the plaintiff in *Diamond* "had an accrued cause of action but it was not recognizable, through no fault of hers, because the injury had not manifested itself." *Diamond*, 397 So. 2d at 672 (McDonald, J., concurring). As Justice McDonald explained:

> 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 limitation barring the action does, in my judgment, bar access to the courts and is constitutionally impermissive*.

Diamond, 397 So. 2d at 672 (McDonald, J., concurring) (emphasis supplied). Applying Justice McDonald's analysis to the present case, an injury occurred to Earl Barnes between 1972 and 1974, but his cause of action could not have been pursued within the twelve-year period of repose because the results of his injury were not

discovered until 1992, at the earliest. Therefore, application of the statute of repose to bar his cause of action would deprive Barnes of access to the courts and would be "constitutionally impermissive."

Five years after *Battilla* invalidated section 95.031(2) as applied to product liability actions, this court in *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986), receded from *Battilla* and decided that the product liability statute of repose was constitutional after all. Adopting the rationale of Justice McDonald's dissenting opinion in *Battilla*, the court reasoned that "[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 of a product." *Pullum*, 476 So. 2d at 659.

In apparent response to *Pullum*, the legislature repealed the twelve-year statute of repose as applied to product liability actions by amending section 95.031(2), effective July 1, 1986. Ch. 86-272, § 2, at 2020, Laws of Fla. The legislature's repeal of the product liability statute of repose immediately raised questions concerning the viability of product liability causes of action that accrued during the *Battilla-Pullum* interim and that were barred by the statute of repose before its repeal. Addressing that issue, this court in *Melendez v. Dreis & Krump Mfg. Co.*, 515 So. 2d 735 (Fla. 1987), held that (1) the repeal of the product liability statute of repose could not be

applied retroactively to a cause of action that accrued before the effective date of the repeal; and (2) *Pullum* applied to causes of action that accrued after *Battilla* but before *Pullum*.

This court next considered the effect of the repeal of the product liability statute of repose on causes of action accruing *after* the repeal. In *Firestone Tire & Rubber Co. v. Acosta*, 612 So. 2d 1361 (Fla. 1992), plaintiff was injured in 1987, after the statute of repose had been repealed, by a defective product (a rim and wheel assembly which exploded in plaintiff's face) purchased in 1966. The twelve-year period of repose expired in 1978 when the statute of repose was in effect. Under those circumstances, the court held that the defendant had a constitutionally protected "vested right not to be sued" which could not be altered by the subsequent repeal of the statute of repose. Thus, if the period of repose as to a defective product lapsed before the statute's repeal, any subsequent action based on the defective product would be barred even though the action accrued after repeal. *Acosta*, 612 So. 2d at 1364.

If *Pullum* and *Acosta* applied to the facts at bar, Barnes' action would have been barred on June 30, 1986, the last effective date of the statute of repose, twelve years after Earl Barnes' last possible exposure to petitioners' products. *Diamond*, however, establishes a viable exception to *Pullum* and *Acosta* for latent injury cases,

such as the present case, where the consequences of exposure to or ingestion of a defective product are not known until after the period of repose has expired.

B. Continued Viability of *Diamond v. E.R. Squibb*

Petitioners have vehemently attacked and criticized *Diamond* in this court and the courts below and have argued that *Diamond's* precedential value has been undermined by subsequent decisions from this court. The following discussion, however, clearly demonstrates that *Diamond*, in its particular application to a product which is dangerous at the time of its creation and ingestion, but whose harmful effects extend beyond the statutory period of repose, remains the law in Florida, unchallenged by any subsequent decisions of this court.

Beginning the analysis with *Pullum*, in receding from *Battilla* and upholding the validity of the product liability statute of repose as applied, this court distinguished *Diamond* from the case before it as follows:

> *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 thereby 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 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[s'] 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 a denial of access to the courts.

Pullum, 476 So. 2d 659 n.*. Thus, the *Pullum* court, in this carefully worded footnote, not only distinguished its decision from *Diamond*, it expressly re-endorsed *Diamond* and its continued application to cases where the effects of product ingestion do not become evident until after the statute of repose expires.

Several years later, this court acknowledged *Diamond's* continued viability in *Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990). In adopting the market share theory of liability in DES cases, the court reaffirmed *Diamond* by recognizing the problems unique to products which are defective at the time of ingestion but whose deleterious effects are not apparent until much later:

> Adoption of such a theory of liability [market share] 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. 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).

Conley, 570 So. 2d at 283.

A year later, the court again recognized *Diamond's* continued efficacy in *University of Miami v. Bogorff*, 583 So. 2d 1000 (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 a 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.

Bogorff, 583 So. 2d at 1004 (emphasis supplied).

More recently, this court has continued to acknowledge *Diamond* without criticism or retrenchment. In *Damiano v. McDaniel*, 689 So. 2d 1059 (Fla. 1997), the court found that the four-year medical malpractice statute of repose was not unconstitutional when applied to a medical malpractice injury, resulting in AIDS, which did not manifest itself until after the four-year period expired. The court relied on its earlier medical malpractice decisions, discussed in the next section of this brief, *Carr v. Broward County*, 541 So. 2d 92 (Fla. 1989), and *University of Miami v.*

Bogorff, which found that the medical malpractice statute of repose did not unconstitutionally restrict access to the courts, even when the cause of action does not accrue until after the period of repose expires. Applying the *Kluger* test, the court found that the legislature had expressed an "overpowering public necessity" for enactment of the medical malpractice statute of repose. *Damiano*, 689 So. 2d at 1060. In a footnote, however, the court yet again acknowledged *Diamond's* continued viability in the product liability context, as distinguished from medical malpractice cases:

> We reject the Damianos' reliance on *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So. 2d 671 (Fla. 1981). That case was decided years before our decisions in *Carr v. Broward County*, 541 So. 2d 92 (Fla. 1989), *University of Miami v. Bogorff*, 583 So. 2d 1000 (Fla. 1991), *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992), and *Harriman v. Nemeth*, 616 So. 2d 433 (Fla. 1993). *Moreover, Diamond was a products liability action involving an entirely different statute of repose.*

Damiano, 689 So. 2d at 1061 n.4 (emphasis supplied).

As still further evidence of the decision's continued vitality, *Diamond* was most recently cited by this court, without trepidation, for the proposition "that the products liability statute of repose which was then in effect was unconstitutional as applied in a DES case because the statute operated to bar the cause of action before there was any manifestation of injury." *Wood v. Ely Lilly & Co.*, 701 So. 2d 344, 346 (Fla. 1997).

In sum, although given several opportunities to criticize, if not overrule, *Diamond*, this court has continued steadfastly, long after *Pullum* was decided, to recognize *Diamond* as distinguishing authority without criticism or retrenchment. Thus, the district court below was justified in relying on *Diamond* and applying the decision to the facts at hand notwithstanding any developments related to the medical malpractice statute of repose discussed hereafter.

C. Medical Malpractice Statute of Repose

Petitioners argue that the repealed product liability statute of repose as applied to latent injury cases is indistinguishable from the medical malpractice statute of repose and that this court's recent decisions upholding the constitutionality of the medical malpractice statute, even when it bars a cause of action before accrual, have effectively overruled *Diamond*. In response, the medical malpractice statute of repose decisions are readily distinguishable based on the unique nature of medical malpractice actions, the complex statutory framework governing such actions and the express legislative history accompanying enactment of the medical malpractice statute of repose. As this court recently noted:

> The statutory framework governing medical malpractice actions is both uncommonly complex and unique among other Florida statutory schemes. *See Kukral v. Mekras*, 679 So. 2d 278, 280-81 (Fla. 1996) (detailing the numerous procedural requirements of chapter 766). Stringent presuit investigatory requirements are the hallmarks of this framework. Appended to this statutory scheme are the

> two-year statute of limitations and four-year statute of repose found in section 95.11(4)(b), which at least one commentator has argued "protect health care providers in a way no other class of defendants is protected." Scott R. McMillen, *The Medical Malpractice Statute of Limitations: Some Answers and Some Questions*, Fla. B.J., Feb. 1996, at 44, 47.

Musculoskeletal Inst. Chartered v. Parham, 24 Fla. L. Weekly S120, S121 (Fla. March 11, 1999) (footnote omitted).

Not only is the medical malpractice statute of repose an integral part of an unparalleled statutory framework, a review of this court's recent medical malpractice statute of repose decisions indicates that the legislature's expression of intent and the significance the legislature ascribed to the medical malpractice "crisis" persuaded this court to sustain the validity of the medical malpractice statute of repose, even when the statute extinguished a cause of action before accrual. In *Carr v. Broward County*, 541 So. 2d 92 (Fla. 1989), this court upheld the medical malpractice statute of repose (section 95.11(4)(b)) under the traditional *Kluger* analysis because the court found an overpowering public necessity for the legislation. Notably, in the case of the medical malpractice statute of repose, unlike the product liability statute of repose, the legislature expressly stated the overpowering public necessity for the legislation in the preamble to the bill. Quoting from the district court opinion, the court observed:

> The medical malpractice statute of repose had its genesis in section 7 of Chapter 75-9, Laws of Florida, the Medical Malpractice Reform Act of 1975. The public necessity for the statutory reform embodied in the act was expressed by the legislature in the preamble as follows:
>
> > 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 cost to the citizens of Florida; and
> >
> > WHEREAS, the problem has reached crisis proportion in Florida, NOW THEREFORE,....

Carr, 541 So. 2d at 94, quoting *Carr v. Broward County*, 505 So. 2d 568, 575 (Fla. 4th DCA 1987) . Thus, the legislature expressly declared in the preamble to the law the overpowering public necessity for the medical malpractice statute of repose sufficient to meet the *Kluger* requirements. With respect to the product liability statute of repose, however, no similar legislative purpose for enactment of the law has ever been expressed. Although the *Pullum* court inferred the existence of an overpowering public necessity, as applied to the facts of that case, without an express legislative declaration, this court has never made that finding with respect to latent

injury product liability cases and, in fact, specifically excepted such cases from its holding. *See Pullum*, 476 So. 2d at 659 n.*.

The district court decision in *Carr*, which this court approved, recognized the distinction between the product liability statute of repose as applied in *Diamond* and the medical malpractice statute of repose:

> 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.
>
> ***
>
> 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 a 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 (a right predating the Declaration of Rights or being part of the common law), 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, the statute effectively bars the specified right after expiration of the repose period. This, of course, is the bottom line; the rule the legislature seeks to establish when it adopts a statute of repose. . . .

> Provided, however: application of a statute of repose to the case of one whose cause of action had accrued prior to adoption of the statute is permissible only if the claimant has remaining a reasonable time within which to commence an action. *Bauld*; *Purk*; *Cates*; *Pullum*. *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, 505 So. 2d at 572, 573 (emphasis supplied). The distinction noted by *Carr* between the medical malpractice statute of repose and the product liability statute of repose as applied in *Diamond* is consistent with this court's later observation in *Damiano* that "*Diamond* was a products liability action involving an entirely different statute of repose." *Damiano*, 689 So. 2d at 1061 n.4.

The court followed *Carr* in *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992), holding that the medical malpractice statute of repose could be applied constitutionally to an

action for "wrongful birth" involving negligent failure to diagnose an inheritable genetic impairment when a genetically impaired child was born after the period of repose had expired. Again, in reviewing the medical malpractice statute of repose, the court refused to "second-guess the legislature's judgment." *Kush*, 616 So. 2d at 422. *See also University of Miami v. Bogorff*, 583 So. 2d 1000 (Fla. 1991). Completing the review of significant Supreme Court medical malpractice statute of repose cases, the court in *Damiano*, relying on *Carr* and *Kush*, held that the medical malpractice statute of repose was not unconstitutional as a violation of access to courts when applied to bar an action for medical malpractice where the injury, resulting in AIDS, does not manifest itself within the statutory period of repose.

The foregoing analysis illustrates the distinguishing characteristics between the medical malpractice statute of repose, as construed in *Carr*, *Kush* and *Damiano*, and the product liability statute of repose as applied in *Diamond*. This distinction was recognized by the court below. Quoting from *Owens-Corning Fiberglass Corp. v. Corcoran*, 679 So. 2d 291, 294 (Fla. 3d DCA 1996), *rev. denied*, 690 So. 2d 1300 (Fla. 1997), a decision which applied *Diamond* to an asbestos product liability case, the court observed:

> The trial court, in the instant case, relied on a series of cases, including *Doe v. Shands Teaching Hosp. & Clinics, Inc.*, 614 So. 2d 1170 (Fla. 1st DCA 1993), and *Damiano v. McDaniel*, 689 So. 2d 1059 (Fla. 1997), for the proposition that both the Florida Supreme Court and this

> court have held that statutes of repose may operate to foreclose a cause of action even before it accrues. These cases, however, involved the medical malpractice statute of repose, which has been distinguished from the products liability statute of repose. As the *Corcoran* court noted:
>
>> It is important to stress that our decision today in no way refers to or affects application of the medical malpractice statute of repose. The overriding public necessity of its operation has been acknowledged and is set out in *Carr v. Broward County*, 541 So. 2d 92, 95 (Fla. 1989) (holding "section 95.11(4)(b) was properly grounded on an announced public necessity and no less stringent measure would obviate the problems the legislature sought to address, and thus the statute does not violate the access-to-courts provision.") Nor does our decision affect the general application of section 95.031(2), a question settled in *Pullum*.
>
> *Corcoran*, 679 So. 2d at 294. Although 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. Accordingly, in contrast to the medical malpractice cases, Barnes' knowledge of the connection between the disease and his exposure to the defective product is a factual issue. Unlike the medical malpractice cases, knowledge of a possible connection between the infliction of injury and the resultant symptoms is still necessary in a latent-injury products liability case.

Barnes, 721 So. 2d at 332.

Based on the foregoing analysis and the above-quoted rationale of the *Corcoran* and *Barnes* courts, this court's medical malpractice statute of repose

decisions, which are based on an unparalleled statutory framework and express legislative findings never articulated in the product liability context, should not control the product liability statute of repose as applied to latent injury cases.

D. *Diamond's* Application to Asbestos and Silicosis Cases

As previously noted, *Diamond* has been applied recently by the third district to asbestos product liability actions. *Diamond's* application to asbestos cases is particularly appropriate because asbestos-related diseases, like silicosis, involve an extended period of latency between ingestion of the harmful asbestos particles and manifestation of the disease. *See Borel v. Fibreboard Paper Products Corp*., 493 F.2d 1076, 1083 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). Workers exposed to asbestos generally do not experience any symptoms of asbestos-related disease for many years, frequently as long as twenty-five years after initial exposure. *Id*.[3]

In *Owens-Corning Fiberglass Corp. v. Corcoran*, 679 So. 2d 291, 294 (Fla. 3d DCA 1996), *rev. denied*, 690 So. 2d 1300 (Fla. 1997), the court held that application of the product liability statute of repose to an asbestos product liability action violated

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[3] Like asbestos-related diseases, silicosis is characterized by an extended period of latency between exposure to the silica dust and manifestations of the disease. *See Urie v. Thompson*, 337 U.S. 163, 170 (1949) (in silicosis case, court observed that "no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time . . . ."); *Kress v. Minneapolis-Moline Co.*, 102 N.W.2d 497, 500 (Minn. 1960) ("Silicosis . . . is an insidious disease which frequently fails to manifest itself to the point where physical impairment appears until much time has elapsed.").

the access to courts provision of the Florida Constitution. The facts, which closely parallel the facts at bar, revealed that plaintiff's decedent used asbestos products from 1966 to 1972, meaning that the twelve-year statute of reposed expired at the latest in 1984 before its repeal. Suit was not filed until 1993. On the authority of *Diamond*, the trial court denied the asbestos manufacturer's motion for summary judgment based on the statute of repose. On appeal, the asbestos manufacturer argued that it had a vested right under *Pullum* not to be sued after the statute of repose expired in 1984 and that recent medical malpractice statute of repose decisions from this court unambiguously hold that upon expiration of the period of repose, an action is barred without regard for plaintiff's knowledge of the injury or nature of the injury involved.

In affirming the trial court's ruling, the third district found that *Diamond* remained extant authority based on language previously quoted herein from *Pullum*, 476 So. 2d at 659 n.*, and *Conley*, 570 So. 2d 282. The court concluded:

> Because we find the instant facts directly analogous to those in *Diamond*, supported by our judgment that this is a correct application of *Kluger*, we conclude that the trial court properly held the instant claim not to be time-barred.

Corcoran, 679 So. 2d at 294. The third district followed *Corcoran* in two additional asbestos-statute of repose cases based on similar chronologies of product exposure. *See Owens-Corning Fiberglass Corp. v. Crane*, 683 So. 2d 552 (Fla. 3d DCA 1996)

(plaintiff exposed to asbestos products from 1956 through 1966 and died from asbestos-related disease in 1991); *Owens-Corning Fiberglass Corp. v. Rivera*, 683 So. 2d 184 (Fla. 3d DCA 1996) (plaintiff exposed to asbestos products from 1963 through 1966).

The court below followed the *Corcoran* analysis in the instant case. Barnes was exposed to silica dust and used petitioners' sandblasting equipment from 1972 until June, 1974. However, he had no knowledge of the possible connection between his exposure to silica and his subsequent pulmonary problems until 1992. Based on these facts, and following *Corcoran's* analysis of *Diamond* and the medical malpractice statute of repose, the court held that the repealed product liability statute of repose could not constitutionally bar his cause of action.

E. This Court Should Confirm *Diamond's* Continued Viability.

When applying the product liability statute of repose, latent injury cases arise from circumstances which deserve more heightened constitutional scrutiny than product liability cases involving immediate impact injuries. In *Diamond*, *Corcoran* and the instant case, the plaintiffs were exposed to *new* products, not twelve-year-old products, but, unfortunately, because of the latency of the disease processes, did not learn of the harmful consequences of the product ingestion or exposure for more than twelve years. In contrast, in cases like *Acosta*, where a twenty-one-year-old rim and wheel assembly exploded, the plaintiff was exposed to a product that was more than

twelve years old and experienced the unfortunate injurious consequences immediately. These markedly different factual scenarios provide a sound basis for retaining the *Diamond* latent injury exception to the product liability statute of repose under the unique facts of that case and the facts presented by the instant case. *See Pullum*, 476 So. 2d at 659 n.* ("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.").[4]

When this court receded from *Battilla* and found the product liability statute of repose constitutional, it reasoned that "[t]he legislature in enacting this statute of repose, reasonably decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product." *Pullum*, 476 So. 2d at 659. Barnes respectfully suggests, however, that the *Pullum* court never intended to hold, nor should this court now hold, that the legislature, by enacting the product liability statute of repose, meant to extinguish a manufacturer's liability when the product user has been exposed to a new product but did not discover its harmful effects until more than twelve years later. As the court in *Corcoran* explained:

> Rather, *Diamond*, *Pullum*, and *Conley*, confirm our analysis that because a public necessity was never

[4] As a further distinguishing characteristic compelling application of *Diamond* to the facts at bar, Barnes was exposed to petitioners' products before the statute of repose was enacted but did not learn of the resulting harmful consequences until after the statute of repose had been repealed.

> enunciated, demonstrated, or contemplated for application of the now defunct section 95.031(2) to a case such as this one, resulting in a long delay in manifestation of symptoms that will support a medical diagnosis of injury, such application is constitutionally impermissive.

Corcoran, 679 So. 2d at 294-95. *See also Vilardebo v. Keene Corp.*, 431 So. 2d 620, 622 (Fla. 3d DCA), *appeal dismissed*, 438 So. 2d 831 (Fla. 1983) (where plaintiff was exposed to asbestos between 1941 and 1947, but did not learn of the existence of his asbestos-related disease until he was diagnosed by a physician in 1976, section 95.031(2), as interpreted by *Diamond*, was unconstitutional as applied to the facts).

F. Manifestation of Injury

Although not included in the certified question, petitioner 3M argues that the district court erroneously held 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. 3M specifically contends that *Diamond* does not apply because Barnes' cause of action arose during the twelve-year period of repose when his lung was removed in 1984, even though Barnes was not then aware of any causal connection between the removal of his lung and exposure to sand or related products. 3M cites language from several of this court's decisions which, 3M argues, ostensibly limits *Diamond* to cases where the injuries "manifest" themselves *after* the period of repose has expired. For example, in *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 283 (Fla. 1990), the court

referred to *Diamond* as a case involving "delay between the mother's ingestion of the drug and the *manifestation of the injury* to the plaintiff." (emphasis supplied). In *University of Miami v. Bogorff*, 583 So. 2d 1000, 1004 (Fla. 1991), the court distinguished *Diamond* as "a case where a drug was ingested and the alleged *effects did not manifest themselves* until years later." (emphasis supplied). Again, in *Wood v. Eli Lilly & Co.*, 701 So. 2d 344, 346 (Fla. 1997), the court confirmed *Diamond's* holding "that the products liability statute of repose which was then in effect was unconstitutional as applied in a DES case because the statute operated to bar the cause of action before there was any *manifestation of injury*." (emphasis supplied).

In response, Barnes submits that a closer examination of the authorities indicates that the term "manifestation" in the context of the *Diamond* exception to the product liability statute of repose necessarily presupposes knowledge on plaintiff's part of the relationship between symptoms of disease and exposure to the allegedly defective product. For example, in Justice McDonald's frequently cited concurring opinion in *Diamond*, he explained:

> 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 limitation barring the action does, in my judgment, bar access to the courts and is constitutionally impermissive.

Diamond, 397 So. 2d at 672 (McDonald, J., concurring) (emphasis supplied). The language selected by Justice McDonald, "results of the injury" strongly suggests knowledge of a causal relationship rather than manifestation of symptoms without knowledge of their cause.

This court has previously determined that a "tentative diagnosis" does not, as a matter of law, "start the clock" for the running of the medical malpractice statute of limitations. *Ash v. Stella*, 457 So. 2d 1377, 1379 (Fla. 1984). That rationale has been applied to asbestos statute of limitations cases which offer a useful analogy to the case at hand. In *Celotex Corp. v. Copeland*, 471 So. 2d 533, 539 (Fla. 1985), this court held "that, in a case where the injury is a "'creeping disease,'" like asbestosis, the action accrues when the accumulated effects of the substance manifest themselves in a way which supplies some evidence of the causal relationship to the manufactured product." Similarly, in *Colon v. Celotex Corp.*, 465 So. 2d 1332, 1333 (Fla. 3d DCA 1985), *quashed on other grounds*, 523 So. 2d 141 (Fla. 1988), the court held that the statute of limitations in asbestos cases is measured from the date the plaintiff "knew or reasonably should have known the occupational origin of the disease" based on a confirmed medical diagnosis. A similar result was reached in another asbestos case, *Brown v. Armstrong World Industries, Inc.*, 441 So. 2d 1098, 1099 (Fla. 3d DCA 1983), *rev. denied*, 451 So. 2d 847, 850 (Fla. 1984), where the court held that the statute of limitations was not triggered until "a cause and effect relationship" between

product exposure and physical disability is made to a "reasonable medical certainty." *See also Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517, 519 n.1 (Fla. 3d DCA 1985), *rev. denied*, 492 So. 2d 1331 (Fla. 1986); *Szabo v. Ashland Oil Co.*, 448 So. 2d 549 (Fla. 3d DCA 1984) (in action for injuries sustained as a result of exposure to chemical products manufactured by defendants, material issue of fact concerning date plaintiff became aware of causal connection between chemical products and his disease precluded summary judgment for defendants based on statute of limitations).

When read together, *Copeland*, *Colon* and *Brown* establish that under Florida law the statute of limitations in asbestos product liability actions does not begin to run until the diagnosis of asbestos-related disease is confirmed medically, or, at the very least, until the plaintiff is placed on reasonable notice that a causal connection exists. This statute of limitations analysis was extended to the product liability statute of repose in *Corcoran*:

> Rather, *Diamond*, *Pullum*, and *Conley*, confirm our analysis that because a public necessity was never enunciated, demonstrated, or contemplated for application of the now defunct section 95.031(2) to a case such as this one, *resulting in a long delay in manifestation of symptoms that will support a medical diagnosis of injury*, such application is constitutionally impermissive.

Corcoran, 679 So. 2d at 294 (emphasis supplied). Applying the *Corcoran* analysis and the previously cited asbestos statute of limitations cases, the court below correctly determined that "manifestation of injury necessarily presupposes the

plaintiff's knowledge of the relationship between the symptoms of the disease and exposure to the allegedly defective product." *Barnes,* 721 So. 2d at 332-33. Applying that holding to the present facts, manifestation of injury sufficient to charge Barnes with knowledge of the causal relationship between his exposure to sand and related products and his subsequent pulmonary problems did not occur until 1992, at the earliest, when his physician first suggested the diagnosis of silicosis, well after the twelve-year period of repose had expired. (R-III 357-58). Thus, the removal of Barnes' lung in 1984, without any notice of a causal connection between the surgery and exposure to petitioners' products, should not prevent the application of the *Diamond* exception to the product liability statute of repose. *See Vilardebo v. Keene Corp.*, 431 So. 2d 620, 622 (Fla. 3d DCA), *appeal dismissed*, 438 So. 2d 831 (Fla. 1983) (where plaintiff was exposed to asbestos between 1941 and 1947, but "did not learn of the existence of his asbestos-related disease until he was diagnosed by a physician in August, 1976," material issues of fact precluded summary judgment as to whether section 95.031(2), as interpreted by *Diamond*, could constitutionally bar plaintiff's action).

G. Pleadings -- Waiver Issue

In another matter well beyond the scope of the certified question, 3M contends that Barnes waived his constitutional argument by failing to challenge the constitutionality of the repealed product liability statute of repose by specific

allegations in reply to 3M's affirmative defense. Initial Brief at 9-11. The same argument was advanced by 3M and other defendants in the trial court and in the district court of appeal. Apparently unimpressed with 3M's contention, neither the trial judge nor the district court has addressed this argument.

3M's pleading argument should be rejected based on the following chronology of events in the trial court which demonstrates that the constitutional issue, although not specifically alleged in plaintiffs' reply to affirmative defense by confession and avoidance, was timely and properly preserved in the court below. On April 3, 1997, plaintiffs filed an amended complaint. (R-IV 559-622). In response, each defendant raised the repealed product liability statute of repose as an affirmative defense. (R-IV 633, 643, 648, 702, 718, 727; R-V 763, 771). Plaintiffs filed responses to defendants' affirmative defenses which "denied" all affirmative defenses without elaboration. (R-IV 681, 684, 734, 738, 742, 745; R-V 775, 778, 792). Following discovery, defendants filed motions for summary judgment based on various grounds, including their affirmative defenses based on the product liability statute of repose. (R-V 811, 815, 826, 834, 936; R-VI 949; R-VIII 1337; R-X 1618). Although plaintiffs had not raised the constitutionality of the statute of repose in their replies to affirmative defenses with particularity, defendants' motions for summary judgment fully anticipated the issues that would be argued subsequently in that respect. For example, as the following language indicates, 3M's motion for summary judgment

specifically anticipated the issue whether the statute of repose could be applied constitutionally to bar an action that does not accrue until after expiration of the period of repose:

> The product liability statute of repose formerly contained in F.S. 95.031(2) barred the plaintiffs['] claim 12 years after last delivery of the defendant's product. Thus the plaintiff's claim expired June 30, 1986. The interpretations that the Florida Supreme Court and the First District Court of Appeal have given similar statutes of repose indicate that the defendant acquired a vested right under section 95.031(2) that survives despite the subsequent repeal of the section. Furthermore, the courts have held that the fact that the particular cause of action does not accrue until after the expiration of the period of repose does not effect [sic] the impact of such a statute in cutting off a right of action. Consequently, the plaintiff's claims against the defendant are barred by the statute of repose under the uncontroverted facts.

(R-V 811-12).

In reply to defendants' motion for summary judgment, on June 16, 1997, Barnes filed Plaintiffs' Response to Defendants' Motions for Summary Judgment Based on Statute of Limitations and Statute of Repose in which he specifically raised the *Diamond* case and the constitutionality of the product liability statute of repose as applied to latent injury cases. (R-VI 1064, 1068-74). The hearing on the motions for summary judgment was held June 30, 1997. After the hearing, on July 14, 1997, defendants filed a Joint Brief on Common Defenses in which they thoroughly and exhaustively analyzed the constitutional issue and directly replied to the points

addressed by Barnes in his memorandum. (R-IX 1357-1460). Additionally, the trial judge's letter ruling clearly indicates that she decided the case based on the merits of plaintiffs' constitutional challenge as argued in the memoranda of law submitted by the parties. (R-X 1615-16).

Although pleadings should furnish adequate notice to the opposing party, defects or insufficiencies in the pleadings which do not affect the determination of the case on the merits or prejudice the substantial rights of the opposing party do not afford a basis for reversal under Florida law. *See S.H. Kress & Co. v. Powell*, 132 Fla. 471, 180 So. 757, 763 (1938); *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 238 (Fla. 5th DCA 1991). The foregoing chronology of procedural events confirms that the constitutional issue raised on appeal was fully aired in the trial court with both sides taking advantage of the opportunity afforded by the trial judge to extensively brief the issue. Neither 3M nor the other defendants were ever misled or "blindsided" by plaintiffs' constitutional argument, nor has 3M suggested to this court that it suffered any prejudice from the procedural course this case followed below. Accordingly, 3M's procedural waiver argument lacks merit. *See Steinhardt v. Steinhardt*, 445 So. 2d 352 (Fla. 3d DCA 1984) (in affirming judgment based on res judicata, court found no prejudice to plaintiffs resulting from defendants' failure to plead the affirmative defense with specificity where plaintiffs were advised of the specifics of the defense well in advance of trial).

As a practical matter, had the trial court been inclined to grant defendants' motions for summary judgment on the ground that plaintiffs had failed to specifically plead the constitutional issue in their replies to affirmative defenses, the trial court would have been required to grant the summary judgment with leave to amend. *See Hart Properties, Inc. v. Slack*, 159 So. 2d 236, 240 (Fla. 1963) ("[W]here a summary judgment should be entered, yet the matters presented indicate that the unsuccessful party may have a cause of action or defense not pleaded, or a better one than pleaded, the proper procedure is to enter the summary judgment with leave to the party to amend."). Plaintiffs then would have amended their replies to the affirmative defenses to specifically plead the constitutional issue, and the trial court thereafter would have made the very same ruling presently before the court. In the meantime, considerable judicial and litigant resources would have been squandered unnecessarily. It thus appears that any error committed by the trial judge in ruling on the merits of plaintiffs' constitutional argument without specific pleadings directed to that issue caused petitioners absolutely no prejudice and was completely harmless.

CONCLUSION

The certified question should be answered in the affirmative and the decision of the district court approved.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished **W. Mark Edwards, Esquire**, Brown & Watt, P.A., 3112 Canty Street, Post Office Box 2220, Pascagoula, Mississippi 39569-2220, attorney for petitioner Minnesota Mining & Manufacturing Co.; **Robert A. Mercer, Esquire**, Dadeland Towers, Suite 412, 9300 South Dadeland Boulevard, Miami, Florida 33156, attorney for petitioner Pulmosan Safety Equipment Corporation; **Andrew Weinstock, Esquire**, 2900 Three Lakeway Center, 3838 North Causeway Boulevard, Metairie, Louisiana 70002, attorney for petitioner Key Houston; **Millard L. Fretland, Esquire**, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., 25 West Cedar Street, 4th Floor, Pensacola, Florida 32501, attorney for petitioner Minnesota Mining & Manufacturing Company; **Wendy F. Lumish, Esquire**, and **Jeffrey A. Cohen, Esquire**, Carlton, Fields, Ward,, Emmanuel, Smith & Cutler, P.A., 4000 NationsBank Tower, 100 S.E. Second Street, Miami, Florida 33131, attorneys for petitioner Minnesota Mining and Manufacturing Co.; **Joel S. Perwin, Esquire**, Podhurst, Orsek, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130, attorney for amicus curiae Academy of Florida Trial Lawyers; **Hugh F. Young, Esquire**, Product Liability Advisory Council, Inc., 1850 Centennial Park Drive, Suite 510, Reston, Virginia 20191, of counsel for amicus curiae Product Liability Advisory Council, Inc.; and **Benjamin H. Hill, III, Esquire**, and **Marie A. Borland, Esquire**, Hill,

Ward & Henderson, P.A., Post Office Box 2231, Tampa, Florida 33601, attorneys for amicus curiae Product Liability Advisory Council, Inc., by United States Mail this 22nd day of March, 1999.

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