IN THE SUPREME COURT OF THE STATE OF FLORIDA

Minnesota Mining & Manufacturing Co., et. al.,

Petitioners,

vs. Case No.: 94,544

Earl Barnes, et. al.,

Respondents.

_______________________________________/

ON A CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

CASE NO.: 97-03331

BRIEF AND APPENDIX OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS

Hugh F. Young, Jr.
Product Liability Advisory
Council, Inc.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
Of Counsel

and

Benjamin H. Hill, III
Florida Bar No. 094585
Marie A. Borland
Florida Bar No.: 847984
HILL, WARD & HENDERSON, P.A.
Suite 3700 - Barnett Plaza
101 E. Kennedy Boulevard
P.O. Box 2231
Tampa, Florida 33601
(813) 221-3900
(813) 221-2900 telecopier
Attorneys for Amicus Curiae
Product Liability Advisory Council, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST vi

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

THE "LATENT INJURY" EXCEPTION TO THE PRODUCTS LIABILITY STATUTE OF REPOSE CREATED BY THIS COURT'S DECISION IN DIAMOND V. E.R. SQUIBB AND SONS, INC. IS NO LONGER VIABLE IN LIGHT OF THIS COURT'S MORE RECENT DECISIONS UPHOLDING THE CONSTITUTIONALITY OF THE STATUTE AND ITS REFUSAL TO CREATE A LATENT INJURY EXCEPTION TO THE MEDICAL MALPRACTICE STATUTE OF REPOSE. 3

I. The Diamond "latent" injury exception to the Florida products statute of repose 3

II. Florida case law evolving after Diamond undermines any continued recognition of a "latent injury" exception to the products liability statute of repose. 5

III. This Court's determination that Florida's medical malpractice statute of repose is constitutional has led to the Court's outright rejection of a "latent injury" exception to the statute. 14

IV. This Court's rejection of a "latent injury" exception to the medical malpractice statute of repose applies equally to the products liability statute of repose. 21

V. This Court should end the confusion by laying Diamond to rest . . . 27

CONCLUSION 31

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

Cases **Page**

Barnes v. Clark Sand Co., Inc.,
721 So.2d 329 (Fla. 1st DCA 1998) 26

Battilla v. Allis Chalmers Mfg. Co.,
392 So.2d 874 (Fla. 1980) 5, 7-10, 22

Bauld v. J.A. Jones Construction Co.,
357 So.2d 401 (Fla. 1978) 22, 23

Carr v. Broward County,
541 So.2d 92 (Fla. 1989) 1, 13, 19-26

Carr v. Broward County,
505 So.2d 568 (Fla. 4th DCA 1987) 22

Conley v. Boyle Drug Co.,
570 So.2d 275 (Fla. 1990) 13

Damiano v. McDaniel,
689 So.2d 1059 (Fla. 1997) 2, 13, 19-22, 26-28

Diamond v. E.R. Squibb and Sons, Inc.,
397 So.2d 671 (Fla. 1981) . . . . vi, vii, 1-5, 7, 8, 10-22, 26-32

Firestone Tire & Rubber Co. v. Acosta,
612 So.2d 1361 (Fla. 1992) 7, 11, 12, 23, 27, 28

Harriman v. Nemeth,
616 So.2d 433 (Fla. 1993) 16-21, 26, 27

Kluger v. White,
281 So.2d 1 (Fla. 1973) 6, 8, 9, 22, 24-26

Kush v. Lloyd,
616 So.2d 415 (Fla. 1992) 14, 15, 18-24, 26, 27

Lloyd v. North Broward Hospital District,
570 So.2d 984 (Fla. 3rd DCA 1990) 14-18

Melendez v. Dreis and Krump Mfg. Co.,
515 So.2d 735 (Fla. 1987) 7, 11, 12, 15, 16, 23, 24, 27, 28

Nemeth v. Harriman,
586 So.2d 72 (Fla. 2nd DCA 1991) 16-18

Overland Construction Co., Inc. v. Sirmons,
369 So.2d 572 (Fla. 1979) 4-7, 22, 27

Owens-Corning Fiberglass Corp. v. Corcoran,
679 So.2d 291 (Fla. 3rd DCA 1996) 26, 29

Phelan v. Hauft,
471 So.2d 648 (Fla. 3rd DCA 1985) 22, 23

Pullum v. Cincinnati, Inc.,
476 So.2d 657 (Fla. 1985) 1, 5, 8-15, 17, 18, 22, 23, 25

Purk v. Federal Press Co.,
387 So.2d 354 (Fla. 1980) 22

Rotwein v. Gersten,
36 So.2d 419 (1948) 25

Universal Eng. Corp. v. Perez,
451 So.2d 463 (Fla. 1984) 23

University of Miami v. Bogorff,
583 So.2d 1000 (Fla. 1991) 19-21, 23, 24

Whigham v. Shands Teaching Hosptial and Clinics Inc.,

613 So.2d 110 (Fla. 1st DCA 1993) 21

Other Authorities

Article I, Section 21, Florida Constitution 6, 8, 25

§ 95.031(2), Fla. Stat. 1, 3, 9, 11

§ 95.11(3)(c), Fla. Stat. 4-6

§ 95.11(4)(b), Fla. Stat. 13, 14, 18

<u>STATEMENT OF INTEREST</u>

The Product Liability Advisory Council, Inc. ("PLAC"), is a non-profit corporation with 121 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers in a wide range of industries, from automobiles, to electronics, to pharmaceutical products. A list of PLAC's current corporate membership is attached. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (i.e. non-voting) members of PLAC.

PLAC's primary purpose is to file Amicus Curiae briefs in cases with issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous Amicus Curiae briefs in both state and federal courts, including this Court.

This Court in the present case has been asked to address whether the "latent injury" exception to the products liability statute of repose created in this Court's opinion in <u>Diamond v. E.R. Squibb and Sons, Inc.</u>, 397 So.2d 671 (Fla. 1981) is still viable in light of this Court's more recent opinions refusing to create such an exception to the medical malpractice statute of repose. Should this Court accept jurisdiction to resolve this critical issue, the potential liability of a wide range of manufacturers and sellers will be resolved once and for all. PLAC urges this Court

to recede from Diamond in light of this Court's more recent opinions upholding the constitutionality of the products liability statute of repose and its decisions rejecting the application of a "latent injury" exception to the medical malpractice statute of repose.

SUMMARY OF THE ARGUMENT

The Florida products liability statute of repose clearly and unambiguously establishes a 12 year outer limit for filing a claim "regardless of the date the defect in the product...was or should have been discovered." Section 95.031(2), Fla. Stat. Nearly two decades ago this Court in Diamond v. E.R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981) ruled that the statute unconstitutionally denied a plaintiff "access to the courts" when applied to bar a cause of action before it accrued. The Diamond decision has since been recognized for its creation of a "latent injury" exception to the products liability statute of repose, although the majority in Diamond did not expressly create such an exception.

Since this Court's ruling in Diamond the Court has changed course and has held that the products liability statute of repose is constitutional even when it is applied to bar a cause of action before it has accrued. Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). Based largely on this Court's decisions upholding the constitutionality of the products liability statute of repose, the Court has also upheld the four year medical malpractice statute of repose. Carr v. Broward County, 541 So.2d 92 (Fla. 1989). This Court has expressly rejected the argument that Diamond supports the creation of a "latent injury" exception to the medical malpractice statute of repose on the ground that Diamond was decided years before the Court's more

recent decisions upholding the constitutionality of the statute. Damiano v. McDaniel, 689 So.2d 1059, 1061 n.4 (Fla. 1997).

There is no rational basis for the application of a "latent injury" exception to the products liability statute of repose where this Court has refused to create such an exception in the medical malpractice context. Since this Court's decision in Diamond, the Court has determined that the legislature demonstrated an overriding "public necessity" when it enacted both the products liability and medical malpractice statutes of repose and that both statutes are therefore constitutional. Now that the Court has determined that the products liability statute of repose is constitutional, there is no sound basis for the courts to second guess the judgment of the legislature by creating "exceptions" to the statute.

This case presents a good opportunity for the Court to recede from its ruling in Diamond. As this case demonstrates, the continued recognition of a "latent injury" exception in the products liability context will only result in confusion and illogical results. It is therefore respectfully suggested that the Court accept jurisdiction to eliminate the current inconsistency in the law resulting from the recognition of a "latent injury" exception to the products liability statute of repose and its rejection in the medical malpractice context. This Court should respectfully instruct the courts of this state that Diamond is no longer the law.

ARGUMENT

THE "LATENT INJURY" EXCEPTION TO THE PRODUCTS LIABILITY STATUTE OF REPOSE CREATED BY THIS COURT'S DECISION IN DIAMOND V. E.R. SQUIBB & SONS, INC. IS NO LONGER VIABLE IN LIGHT OF THIS COURT'S MORE RECENT DECISIONS UPHOLDING THE CONSTITUTIONALITY OF THE STATUTE AND ITS REFUSAL TO CREATE A LATENT INJURY EXCEPTION TO THE MEDICAL MALPRACTICE STATUTE OF REPOSE.

I. The Diamond "latent injury" exception to the Florida products liability statute of repose.

In 1974 the Florida legislature enacted the products liability statute of repose, §95.031(2), Fla. Stat. (1975), which provided as follows:

> Actions for products liability and fraud under subsection 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 actions were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in subsection 95.11(3), but in any event within twelve years after the date of delivery of the completed product to its original purchaser or 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.

The legislature in clear and unambiguous terms placed a 12 year outer limit on the filing of products liability claims, regardless of the date of a plaintiff's discovery of a product defect. The legislature did not incorporate any "exceptions" into the statute.

This Court in Diamond nevertheless created a limited exception to Florida's products liability statute of repose in a case where the alleged injury was not discoverable until the repose period had expired. The plaintiffs in Diamond alleged that they did not discover the harmful consequences of the plaintiff mother's ingestion of the drug DES from July 1955 to April 1956, until they learned in May 1976 that teenaged girls whose mothers had been treated with the drug were developing cancerous or precancerous conditions. Id. at 671. This Court quashed the district's court decision affirming the entry of summary judgment in favor of the drug manufacturer under the products liability statute of repose. Id. at 672. The Court based its decision on this Court's decision in Overland Construction Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979), where the Court found that §95.11(3)(c), Fla. Stat., the statute of repose relating to actions founded on the "design, planning or construction of an improvement to real property," violated the Florida Constitution's guaranty of access to courts when applied to bar a cause of action before it ever existed. Id. In his concurring opinion in Diamond Justice McDonald reasoned:

> 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.

Id.

II. Florida case law evolving after Diamond undermines any continued recognition of a "latent injury" exception to the products liability statute of repose.

A. The basis underlying Diamond has been undermined by more recent decisions from this Court.

In order to understand why Diamond is no longer viable, it is important to place the decision in a historical context. Diamond was decided in 1981, shortly after this Court ruled in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980) that Florida's products liability statute of repose, when applied to bar a cause of action before it accrued,[1] denied a plaintiff access to the courts of this state in violation of Article I, Section 21 of the Florida Constitution. The Battilla majority, in its two paragraph opinion, based its ruling entirely on this Court's decision in Overland, supra.

This Court in Overland addressed the constitutionality of §95.11(3)(c), which bars a cause of action "founded on the design, planning, or construction of an improvement to real property" brought more than 12 years after the deadline set forth in the statute. The plaintiff in Overland was injured in a building more than 12 years

---

[1]Although the Court in Battilla did not set forth the facts of the case in its opinion, later decisions from this Court have clarified that the cause of action in Battilla did not accrue until after the statute of repose had expired. See, e.g., Pullum v. Cincinnati, Inc., 476 So.2d 657, 659 (Fla. 1985).

after construction was completed, and the cause of action was therefore barred before it ever accrued.

In considering whether §95.11(3)(c) unconstitutionally denied a plaintiff access to courts in violation of Article I, Section 21 of the Florida Constitution, this Court in Overland turned for guidance to its decision in Kluger v. White, 281 So.2d 1, 4 (Fla. 1973). The Court in Kluger held:

> ...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.

This Court in Overland concluded that problems which inhere in exposing builders and related professionals to potential liability for an indefinite period of time were not sufficiently compelling to justify the enactment of legislation which, without providing an alternative means of redress, totally abolished an injured person's cause of action. Id. at 574. The Court accordingly held that insofar as §95.11(3)(c) barred lawsuits brought more than 12 years after events connected with the construction of

improvements to real property, it violated the "access to courts" provision of the Florida Constitution. Id. at 575. The fact that the plaintiff's cause of action was already barred by the 12 year limitation when his injuries occurred, and therefore that "[n]o judicial forum would ever have been available to [the plaintiff] if the 12 year prohibitory portion of the statute were given effect," was the apparent basis for the Court's ruling. Id.

Diamond -- like Battilla -- was also based entirely on this Court's opinion in Overland. Diamond was therefore apparently based on the Court's determination that a statute of repose is unconstitutional when it bars a claim based on an injury which occurs outside of the repose period -- not on the need for a "latent injury" exception to the products liability statute of repose. The precedential value of the opinion is therefore called into question. Specifically, if Diamond was indeed premised solely on the concern expressed in Overland, then the exception it creates is no longer viable because this Court has since held that the products liability statute of repose is constitutional even when it is applied to bar a claim which arises after the repose period has expired. See, e.g., Melendez v. Dreis and Krump Mfg. Co., 515 So.2d 735 (Fla. 1987); Firestone Tire & Rubber Co. v. Acosta, 612 So.2d 1361 (Fla. 1992).

In the alternative, if the majority in Diamond intended to create an exception to the products liability statute of repose for injuries occurring during the repose

period but which are not discoverable until the period has expired -- an intent which was never expressed -- the decision is equally undermined by recent decisions from this Court refusing to create a "latent injury" exception to the medical malpractice statute of repose. As demonstrated below, there is no rational basis for the judicial creation of a "latent injury" exception in the products liability context and the rejection of such an exception in the medical malpractice context. Developments in the law post-Diamond therefore reveal an erosion of its precedential value under either alternative.

B. This Court in post-Diamond decisions has upheld the constitutionality of both the products liability and medical malpractice statutes of repose.

1. The products liability statute of repose.

The difficulty posed by the "exception" created by the Diamond decision begins to be seen with this Court's decision four years later in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). In Pullum, this Court expressly receded from Battilla and held that the products liability statute of repose **does not** violate Article I, Section 21 of the Florida Constitution. As required by this Court's decision in Kluger, the Court found that the legislature had demonstrated the "public necessity" required to bar an action filed more than 12 years after the date of delivery of the completed product to its original purchaser:

> The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that 12 years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product.

Id. at 659. In support of this finding of public necessity, this Court approved Justice McDonald's dissent in Battilla, where he reasoned:

> Until the decision of Matthews v. Lawnlite Co., 88 So.2d 299 (Fla. 1956), Florida recognized the early common law rule which inhibited recovery where there was no privity of contract. Since then the 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. West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976).
>
> 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 manufacturer products.
>
> The legislature, in enacting §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 ...

Battilla at 874-875.

Although the Court in Pullum departed from Battilla and found the products liability statute of repose constitutional based on the demonstration of a "public necessity" justifying the enactment of the statute, the footnote to its opinion -- where it distinguishes Diamond from the case before it -- reveals a reluctance by the Court to recede from the exception created by that opinion. Id. at 649 n. *.The Court distinguishes Diamond on the basis that the effect of the plaintiff mother's ingestion of the drug DES in that case did not become "manifest" until after the expiration of the 12-year statute of repose. Id. The Court concluded that applying the statute under such facts would violate the "access to courts" provision of the Florida Constitution. Id.

Pullum thus supports two divergent expressions of policy. On the one hand, the Court in Pullum recognizes the "public necessity" justifying a 12 year outer limit for filing a products liability claim without regard to "the date the defect in the product...was or should have been discovered." Notwithstanding this determination, the Court in Pullum nevertheless continues to recognize a limited exception to the products liability statute of repose created by the Court in the Diamond decision -- notwithstanding that the legislature did not incorporate such an exception into the statute.

The potential conflict arising from the Court's creation in Diamond of an "exception" to the products liability statute of repose with its more recent decisions upholding the constitutionality of the statute -- even where it operates to bar a cause of action before it has accrued -- is further exemplified by this Court's holdings in Melendez v. Dreis and Krump Mfg. Co., 515 So.2d 735 (Fla. 1987) and Firestone Tire & Rubber Co. v. Acosta, 612 So.2d 1361 (Fla. 1992). In Melendez, the plaintiff -- who was injured by a defective press-brake machine nearly seven years beyond the 12-year statute of repose -- argued that the repeal of the statute should be applied retroactively so as to permit his case to proceed. Id. at 736. The plaintiff alternatively argued that Pullum -- which was decided while his suit was pending and held §95.031 constitutional even with respect to causes of action such as his accruing after the expiration of the 12-year product liability statute of repose -- should be given prospective effect only. Id.

This Court rejected both arguments and affirmed the entry of summary judgment in favor of the defendant manufacturer. Id. at 736-737. The Court in its decision recognized the unique nature of a statute of repose which "cuts off a right of action within a specified time after the delivery of a product...**regardless of when the cause of action actually accrues.**" Id. at 736. (emphasis added)

Similarly, in Firestone Tire & Rubber Co. v. Acosta, supra, this Court rejected the plaintiffs' argument that the 1986 repeal of the products liability statute of repose had the effect of reestablishing a cause of action that had been previously extinguished by the statute. Id. at 1363. In support, the Court noted the absence of any "authority or intent by the legislature to do so." Id. The Court also noted that its holding was consistent with the view and policy already established by the Court in Melendez, where the Court held that "absent the legislature's 'clear manifestation of retroactive effect, the subsequent elimination of the statute of repose [could not] save the plaintiffs' suit.'" Id. at 1363-1364. The Court concluded in Acosta that the plaintiffs' causes of action were extinguished when the statute of repose lapsed as to the products which caused their respective injuries, "regardless of the fact that the actions accrued after the statute of repose was repealed." Id. at 1364. Inherent in the Court's reasoning was its recognition that a party has a "right to have the statute of limitations period become vested once it has 'completely run and barred [the] action.'" Id.

In sum, this Court's opinion in Pullum upholding the constitutionality of the products liability statute of repose based on its finding of a public necessity underlying the legislature's enactment of the statute, coupled with the Court's determination in Melendez and Acosta that a manufacturer has a vested right not to

be sued once the statute of repose has expired, demonstrates a clear reluctance by this Court to “second-guess” the legislature’s judgment in establishing, without exception, a 12 year outer limit for filing suit. Diamond does not fit within this line of case law.[2]

2. The medical malpractice statute of repose.

Several years after its decision upholding the constitutionality of the products liability statute of repose in Pullum, this Court in Carr v. Broward County, 541 So.2d 92 (Fla. 1989) likewise determined that Florida’s four year medical malpractice statute of repose, §95.11(4)(b), Fla. Stat., was constitutional. Id. at 95. The plaintiffs in Carr were the parents of a child who was delivered in 1975 and was later diagnosed as brain damaged. Id. at 93. The plaintiffs waited almost 10 years to file their action against the hospital and the treating physicians. Id. This Court approved the Fourth District’s holding that the action was barred by §95.11(4)(b). Id. Notably, the Court relied, in part, on its reasoning in Pullum that "statutes of repose are a valid legislative means to restrict or limit causes of action in order to achieve certain public interests,” and its conclusion in Pullum that the products liability statute of repose "was constitutional even as applied to causes of action which had not accrued until

---

[2]Although this Court in more recent opinions has acknowledged in dicta the exception created by the Diamond opinion (See, e.g., Conley v. Boyle Drug Co., 570 So.2d 275, 283 (Fla. 1990)), it has most recently done so in order to distinguish Diamond from the case before it. See, e.g., Damiano v. McDaniel, 689 So.2d 1059, 1061 n.4 (Fla. 1997).

after the 12 year statute of repose had expired." Id. at 95. Like it did in Pullum, this Court in Carr determined that the legislature had found an overriding public necessity in its enactment of §95.11(4)(b) and that the statute was therefore constitutional. Id.

III. **This Court's determination that Florida's medical malpractice statute of repose is constitutional has led to the Court's outright rejection of a "latent injury" exception to the statute.**

While this Court has not expressly receded from Diamond, the Court has impliedly receded from the decision in its more recent decisions refusing to create a "latent injury" exception to the medical malpractice statute of repose. This departure from Diamond is first revealed in this Court's decision in Kush v. Lloyd, 616 So.2d 415 (Fla. 1992). In Kush, this Court quashed the Third District's decision in Lloyd v. North Broward Hospital District, 570 So.2d 984 (Fla. 3rd DCA 1990), where the court approved of the tolling of the medical malpractice statute of repose until the manifestation of the injury, based on this Court's decision in Diamond. Id. at 987.

In Lloyd, the Third District was confronted with the entry of a summary judgment under the medical malpractice statute of repose against the parents of a child born with severe genetic abnormalities on their claim for the child's "wrongful birth." Id. at 986. The defendant physician had advised the plaintiffs in 1978 that the results of their genetic tests revealed no abnormalities and had recommended that the plaintiffs have another child. Id. The plaintiffs gave birth to a child nearly five years

later in December 1983. Id. Because the medical advice was given to the plaintiffs at the end of 1978, and the suit was not filed until 1985, the trial court concluded that the action was barred by the four year statute of repose. Id.

On appeal, the Third District noted that the effect of the trial court's ruling was to bar the claim before the plaintiffs had experienced any injury or had any awareness of a possible cause of action. Id. To avoid this result, the Third District held that the "incident or occurrence" causing the statute to begin running was not the erroneous medical advice, but the "injury" caused by the medical malpractice. Id. at 987. The Third District relied on this Court's reference to Diamond in the footnote of its opinion in Pullum, where the Court stated that the products liability statute of repose does not apply to bar a claim where the injury caused by the product does not become evident until the statute of repose has expired. Id. at 987.

This Court in Kush disagreed with the Third District's analysis, acknowledging the "considerable misunderstanding of the relationship between statutes of limitation and statutes of repose." Id. at 418. The Court emphasized that a statute of repose, unlike a statute of limitation, "runs from the date of a discrete act on the part of the defendant **without regard to when the cause of action accrued**." Id. (emphasis added). The Court then cited to Prosser and Keeton for the proposition that "[s]tatutes of repose 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. (emphasis added) Acknowledging the dissent's apparent "reluctance to eliminate a cause of action before it has accrued," the Court cited to Melendez for the proposition that "this is exactly what a statute of repose does." Id. at 421. The Court concluded:

> Because its application has the potential, as in this case, of barring of 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 is 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 421-422.

This Court's rejection of the Third District's holding in Lloyd that a statute of repose does not begin to run until knowledge of the "injury" -- which was squarely based on Diamond -- establishes that this Court has impliedly receded from the "latent injury" exception created in Diamond.

This Court's ruling in Harriman v. Nemeth, 616 So.2d 433 (Fla. 1993), similarly reveals that the Court has already receded from Diamond by refusing to carve out an exception to the medical malpractice statute of repose for injuries which are not manifested during the four year repose period. This Court in Harriman was called upon to review the following question certified by the Second District Court of Appeal in Nemeth v. Harriman, 586 So.2d 72 (Fla. 2nd DCA 1991):

> DOES THE FOUR YEAR STATUTE OF REPOSE IN SECTION 95.11(4)(B), FLORIDA STATUTES (1989), BAR A MEDICAL MALPRACTICE SUIT IF THE ALLEGED MALPRACTICE OCCURRED MORE THAN FOUR YEARS BEFORE SUIT WAS FILED BUT THE INJURY RESULTING FROM THE ALLEGED MALPRACTICE DID NOT MANIFEST ITSELF WITHIN THE STATUTORY FOUR YEAR PERIOD?

Id. at 73-74.

The plaintiff's husband in Nemeth was diagnosed with a metastatic brain tumor which was directly attributable to a malignant melanoma, and which caused his death. Id. at 73. A mole was removed from the decedent's back in 1980. Id. at 72. The decedent's pathologist diagnosed the tissue sample as showing no more than a benign tumor. Id. at 73. The decedent was rushed to the emergency room in 1988 complaining of blurred vision, disorientation and vomiting. Id. Slides of his 1980 biopsy were reviewed and revealed that the mole had been a malignant melanoma.

Id. The action was filed more than four years after the alleged malpractice -- the 1980 diagnosis. Id. The trial court dismissed the action with prejudice based on the medical malpractice statute of repose. Id. at 72.

The Second District reversed the dismissal on the authority of the Third District's opinion in Lloyd, Diamond, and this Court's reference to Diamond in its footnote in Pullum. Id. at 73. Relying on these cases, the Second District criticized the application of the statute of repose to bar a claim before the plaintiff experienced any injury or had any awareness of a possible cause of action. Id. "Consistent with Lloyd," the Second District concluded that the terms "incident" and "occurrence" in §95.11(4)(b) referred to the manifestation of the decedent's symptoms in 1988, and not the 1980 misdiagnosis. Id.

This Court in Harriman quashed the Second District's decision in Nemeth based on its opinion in Kush, where the Court quashed the portion of Lloyd relied upon by the Second District. Harriman at 433. In his concurring opinion in Harriman, Justice McDonald echoed this Court's deference to the judgment of the Florida Legislature in enacting the medical malpractice statute of repose:

> I concur. It may be that four years is too short a time for a statute of repose and the legislature may wish to extend the repose period. I believe, however, that we properly construed the existing statute in Kush v. Lloyd, 616 So.2d 415 (1992).

Id. Notably, Justice McDonald in his special concurrence in the Diamond decision, over 10 years earlier, supported the creation of a latent injury exception to the products liability statute of repose. Diamond at 672. His concurrence in Harriman -- where he refused to carve out such an exception -- is consistent with this Court's deference to the judgment of the legislature once it has upheld the constitutionality of the statute of repose, by applying the statute without exception.

This Court's decisions in Kush and Harriman establish a clear rejection by this Court of any attempt to create a latent injury exception to the medical malpractice statute of repose -- notwithstanding the Court's apparent creation of such an exception in the products liability context years earlier in Diamond. Notably, the basis offered by the plaintiffs in these medical malpractice cases to support the creation of such an exception -- which the Court outright rejects -- is Diamond.

If Kush and Harriman are not enough -- this Court's recent decision in Damiano v. McDaniel, 689 So.2d 1059 (Fla. 1997) should lay to rest any continuing doubt regarding the viability of the "latent injury" exception created by Diamond. In Damiano, this Court answered the following certified question in the negative:

> IS THE MEDICAL MALPRACTICE STATUTE OF REPOSE UNCONSTITUTIONALLY APPLIED, AS A VIOLATION OF ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION, IN BARRING AN ACTION FOR MEDICAL MALPRACTICE WHERE THE

INJURY, RESULTING IN AIDS, DOES NOT MANIFEST ITSELF WITHIN THE STATUTORY FOUR-YEAR TERM FROM THE DATE OF THE INCIDENT RESULTING IN THE SUBSEQUENT INFECTION?

Id. at 1059-1060.

This Court in Damiano advised that the certified question had already been resolved adversely to the plaintiffs by this Court's prior decisions in Carr, Bogorff, and Kush. Id. at 1060. The Court noted that the medical malpractice statute of repose had been upheld as constitutional in Carr on the ground “that the legislature had properly found an overpowering public necessity for the enactment of the statute ..." Id. The Court also observed that it had already determined in Bogorff that the statute was constitutional as applied to bar a cause of action which did not accrue until after the period of repose had expired. Id. The Court further recognized that the Court had already rejected the argument that the statute of repose did not begin to run until a plaintiff was on notice that an injury had occurred in its opinion in Kush. Id. Finally, the Court observed that while it had not yet applied the statute of repose to bar a malpractice case involving HIV/AIDS, the district courts of appeal had done so on several occasions and "in each instance, these courts have held that the receipt of the tainted blood triggers the running of the four year statute of repose regardless of when the victim gains knowledge of the infection." Id. at n.2.

Notably, this Court in a footnote to its opinion in Damiano rejected the plaintiffs' reliance on Diamond. Id. at 1061 n.4. The Court explained that Diamond was decided years before the Court's decisions in Carr, Bogorff, Kush and Harriman. Id. While the Court added that Diamond was a products liability action involving an entirely different statute of repose, the Court did not elaborate on any basis for treating the statutes differently. Id.[3]

IV. This Court's rejection of a "latent injury" exception to the medical malpractice statute of repose applies equally to the products liability statute of repose.

A. This Court has frequently turned for guidance to opinions of the Court considering the application of the products liability statute of repose when considering the application of the medical malpractice statute of repose.

The plaintiffs will likely argue that the Court's refusal to create a latent injury exception to the medical malpractice statute of repose has no bearing on the creation of such an exception in the products liability context because two different statutes are involved. Such an argument is without merit. This Court has not treated the statutes differently, but has in fact consistently looked for guidance to opinions of the

---

[3]It is also noteworthy that the First District in Whigham v. Shands Teaching Hospital and Clinics, Inc., 613 So.2d 110 (Fla. 1st DCA 1993), an AIDS case referenced in Damiano where the Court also dismissed the action under the medical malpractice statute of repose, also declined to follow Diamond "in light ... of more recent pronouncements from the Supreme Court ..." Id. at 113.

Court upholding the constitutionality of the products liability statute of repose in its opinions upholding the constitutionality of the medical malpractice statute of repose. See, e.g., Carr; Bogorff; Kush. Because this Court has not distinguished between the application of the two statutes, there is no basis for the courts of this state to acknowledge a "latent injury" exception to the products liability statute of repose where this Court has rejected the creation of the very same exception in the medical malpractice context. Indeed, treating the statutes differently is illogical and leads to absurd results. Accordingly, this Court's rejection of a "latent injury" exception to the medical malpractice statute of repose in Kush, Harriman, and Damiano, applies equally in the products liability context, and undermines any continued viability of the Diamond decision.

An example of this Court's reliance on products liability cases for guidance in applying the medical malpractice statute of repose is evident in Carr, where the Fourth District turned to a series of decisions interpreting the products liability statute of repose when considering the constitutionality of the medical malpractice statute. Carr v. Broward County, 505 So.2d 568, 571 (Fla. 4th DCA 1987). The court in Carr specifically addressed this Court's opinions in Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla. 1978), Overland, Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980), Battilla, Diamond, and Pullum -- all products liability actions. Id. at 571-572.

After analyzing these decisions, the Fourth District concluded that the legislature had established an overriding public interest meeting the Kluger test when it enacted the medical malpractice statute of repose, and that the statute was therefore constitutional when applied to bar the plaintiffs' cause of action. Id. at 575. The Court certified conflict with Third District's opinion in Phelan v. Hauft, 471 So.2d 648 (Fla. 3rd DCA 1985), where the court refused to recognize the constitutionality of the medical malpractice statute of repose when applied to bar a cause of action before it accrued. Id.

In approving the Fourth District's decision in Carr and disapproving Phelan, this Court followed the lead of the Fourth District in turning for guidance to a series of cases considering the legislature's authority to restrict or limit actions under the products liability statute of repose. Carr, 541 So.2d at 95. Immediately following its analysis of these products liability decisions, this Court agreed with the Fourth District that the legislature had found an overriding public necessity in its enactment of the medical malpractice statute of repose. Id.

This Court again turned for guidance to decisions construing the products liability statute of repose in University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991). Id. at 1003, citing to Melendez, supra; Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984); Bauld, supra. Relying on these opinions, the Court

clarified that a statute of repose "precludes a right of action after a specified time which is measured from the incident of malpractice, sale of a product, or completion of improvements, rather than establishing a time period when the action must be brought measured from the point in time when the cause of action accrued." Id. The Court also relied on its opinion in Pullum that, like the products liability statute of repose, the medical malpractice statute of repose is constitutional even when applied to a cause of action which does not accrue until after the repose period has expired. Id. at 1004.

Finally, this Court in Kush reiterated its reliance in Carr and Bogorff on the series of cases from this Court addressing the constitutionality of the products liability statute of repose, in upholding the constitutionality of the medical malpractice statute of repose. Kush at 420 - 421. Further, in rejecting the dissent's reluctance to eliminate a cause of action before it has accrued, the Court cited to Melendez where the Court held that the products liability statute of repose applied to bar a claim even before the cause of action accrued. Id. at 421. Agreeing with Melendez, this Court observed that "this is exactly what a statute of repose does." Id.

B. This Court has determined that the legislature demonstrated the "public necessity" required to justify the enactment of both the medical malpractice and products liability statutes of repose and that both statutes are therefore constitutional.

The plaintiffs will also likely argue that while the Florida legislature "expressed" an overriding public interest in the preamble to the medical malpractice statute of repose, it did not do so when it enacted the products liability statute of repose, and that the latter statute is therefore unconstitutional when applied to bar a latent injury claim. Such an argument ignores the fact that nowhere in Kluger -- where this Court held that the legislature must show an overpowering public necessity before abolishing a party's right of access to the courts -- did the Court require an "express" statement of public necessity by the legislature. In fact, this Court's opinion in Kluger establishes that **the Court itself** may find the requisite public necessity, whether or not the legislature has included an express statement of public necessity in a preamble to the statute. For example, the Court in Kluger explained that the Court itself had found the requisite public necessity for the legislature's abolishment of an individual's right to sue for alienation of affections, criminal conversation, seduction, or breach of promise, in its opinion in Rotwein v. Gersten, 36 So.2d 419 (1948).

In line with Kluger, this Court found the "public necessity" necessary to uphold the constitutionality of the products liability statute of repose in Pullum, when it held that:

> The 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 the manufacturing of a product.

Pullum at 659. This Court in Carr subsequently reaffirmed its holding in Pullum that the products liability statute of repose did not unconstitutionally violate the access-to-courts provision of Article I, Section 21 of the Florida Constitution, or the principles enunciated in Kluger, even as applied to causes of action which had not accrued until after the 12 year statute of repose had expired. Carr at 95. Accordingly, any argument that the "public necessity" necessary to support the constitutionality of the products liability statute of repose has not been demonstrated -- when offered as a basis for distinguishing decisions from this Court refusing to create a latent injury exception to the medical malpractice statute of repose -- is soundly defeated by a review of Kluger, Pullum and Carr.

The plaintiffs may also argue -- as the First District reasoned below -- that a "public necessity" was never demonstrated for the application of the products liability statute of repose to a case involving latent injuries, and that the Diamond "latent injury" exception is therefore still viable. Barnes v. Clark Sand Co., Inc., 721 So.2d 329, 331 (Fla. 1st DCA 1998), citing to Owens-Corning Fiberglass Corp. v. Corcoran, 679 So.2d 291 (Fla. 3rd DCA 1996). In so reasoning, the First District below sought

to distinguish the application of the products liability statute of repose from the medical malpractice statute of repose on the apparent basis that this Court has found a "public necessity" necessary for the application of the medical malpractice statute in latent injury cases. Id. at 332. The First District's analysis is flawed.

This Court, when it upheld the constitutionality of the medical malpractice statute of repose in Carr, did not state that the statute was constitutional as applied in "latent injury" cases. Nor did the legislature in its preamble to the medical malpractice statute express a public necessity for the application of the statute in latent injury cases. This Court in Kush, Harriman and Damiano instead rejected the creation of a latent injury exception to the medical malpractice statute of repose based on its general determination that the statute was constitutional, whether or not applied in a case involving an apparent or a latent injury. This Court has similarly determined that the products liability statute of repose is constitutional. Therefore, as in the medical malpractice context, the Court's review of the merits of the statute is complete and the Court -- as it has done in the medical malpractice context -- should apply the statute as worded, without "second-guessing" or exception.

In sum, there is no rational basis for the recognition of a"latent injury" exception to the products liability statute of repose where this Court has rejected the creation of such an exception in the medical malpractice context. This Court has

determined that the legislature, in enacting **both** the medical malpractice and the products liability statute of repose, demonstrated the requisite "public necessity" and that **both** statutes are therefore constitutional. This Court's recent opinions in the medical malpractice context therefore apply equally to the products liability statute of repose.

V. This Court should end the confusion by laying Diamond to rest.

The context in which Diamond was decided in 1981 -- when considered with case law evolving to the present -- reveals that the basis underlying the Diamond opinion no longer exists. Diamond appears to have been a response to this Court's opinion in Overland that a statute of repose is unconstitutional where it bars a cause of action before it ever accrues. Diamond at 672. The evolution in the case law post-Diamond reveals that the Court does not adhere to this position, but has instead found the products liability statute of repose constitutional even when it is applied to bar a cause of action which has not yet accrued. See, e.g., Melendez; Acosta. While the Court has even rejected the creation of a "latent injury" exception to the medical malpractice statute of repose -- the Court has not squarely addressed the continued viability of the same exception created by Diamond in the products liability context -- thus creating confusion in cases such as the one presently before the Court.

The only basis offered by the courts to reconcile the application of a latent injury exception in one instance and its rejection in the other, is that two different statutes of repose are involved. See, e.g., Damiano, supra, at 1061 n.4. Yet no court has explained why the public necessity justifying a limitation of liability in the medical malpractice context, does not apply equally to ending the perpetual liability of product manufacturers and sellers. This Court has recognized that both statutes are grounded on an overpowering public necessity. No sound explanation has been provided for treating them differently.

Just as there is no rational basis for extinguishing the liability of a health care provider four years after the incident of malpractice whether or not an injury is discoverable during the repose period, while imposing perpetual liability on a product manufacturer in the case of a purported latent injury -- there also is no rational basis for denying an AIDS victim a right of action four years after a blood transfusion, while permitting an individual suffering from silicosis or some other allegedly "latent disease" an endless period of time for filing suit on the basis that the victim's disease was not "discoverable." This Court has never addressed why a "latent injury" exception is necessary in the context of a products liability action, but is rejected in the medical malpractice context. The legislature itself did not create such an exception. There is no logical reason for the inconsistency.

Aside from the obvious conflict arising from the creation of a "latent injury" exception in the products liability context with the rejection of the same exception in the medical malpractice context, Diamond presents additional concerns. Diamond involved the ingestion of the drug DES, a "defective product" whose injurious effects could not be recognized for many years. However, the case has now been extended to injuries arising from exposure to asbestos on the ground that "exposure to asbestos is very much like the ingestion of DES." Corcoran at 294. According to the Third District in Corcoran,"other than the actual chemical involved, the method of human absorption and the nature of the resulting physical reaction, the facts are alike." Id. Presumably, the "only" fact which is "alike" is the alleged "long delay in manifestation of symptoms that will support a medical diagnosis of injury..." Id. at 294-295.

Yet, the Diamond exception has been extended further -- this time in the present case to the lung disease silicosis. Thus, a DES "latent injury" case has now been extended to subject a sand producer and the manufacturers of sand blasting equipment to liability 25 years after the plaintiff's last exposure to silica dust. Moreover, the defendants are exposed to potential liability even though the "injury" was apparent before the repose period expired when the plaintiff's lung was removed, because his "disease" was not. The Diamond latent "injury" exception has therefore

been extended to a latent “disease,” and potential liability imposed on the manufacturers of equipment purportedly contributing to the plaintiff’s “disease process” -- an outcome clearly outside of this Court’s opinion in Diamond.

Because no court has sought to define the boundaries of the Diamond opinion or the exception it purportedly creates, the possibilities for its future application are endless. Persons claiming that the use of saccharin contributed to cancer? Adults claiming injury resulting from childhood exposure to lead paint? Why these matters are more appropriately left to the legislature --as this Court has already determined in the medical malpractice context -- is made obvious by the case presently before this Court. This Court should respectfully recede from Diamond and end the confusion once and for all.

CONCLUSION

The “latent injury” exception to the products liability statute of repose created nearly two decades ago in this Court’s decision in Diamond is no longer viable. Subsequent to Diamond this Court has consistently upheld the statute to constitutional challenge on the basis that the legislature demonstrated the requisite "public necessity" in enacting the statute. Further, this Court’s refusal to create a “latent injury” exception to the medical malpractice statute of repose -- based in part on decisions of the Court upholding the constitutionality of the products liability

statute of repose -- reveals that there is no legitimate or rational basis for continuing to acknowledge such an exception in the context of a products liability action. The difficulty and the confusion which Diamond continues to create is exemplified by the First District's decision below, which has extended the limited exception set forth in Diamond beyond recognition.

The time has come for this Court to recede from its ruling in Diamond, and to clarify -- as it has done in the medical malpractice context -- that the legislature's judgment in declining to incorporate a latent injury exception within the products liability statute of repose should be respected, now that the Court has upheld the constitutionality of the statute. Accordingly, for the reasons set forth herein, the Products Liability Advisory Council, Inc. respectfully urges this Court to recede from its ruling in Diamond, and to instruct the courts that the "latent injury" exception to the products liability statute of repose created in Diamond is no longer viable.

Respectfully submitted,

____

Benjamin H. Hill, III
Florida Bar No. 094585
Marie A. Borland
Florida Bar No.: 847984
HILL, WARD & HENDERSON, P.A.
Suite 3700 - Barnett Plaza
101 E. Kennedy Boulevard

P.O. Box 2231
Tampa, Florida 33601
(813) 221-3900
(813) 221-2900 telecopier
Attorneys for Product Liability Advisory Council, Inc.

and

Hugh F. Young, Jr.
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
Of Counsel

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail, postage pre-paid to the following parties this ____ day of February, 1999.

W. Mark Edwards, Esq.
Brown, Watt & Buchanan, P.A.
3112 Canty Street
P. O. Box 2220
Pascagoula, MS 39569-2220

Wendy F. Lumish, Esq.
Carlton, Fields, Ward, Emmanuel
Smith & Cutler, P.A.
100 SE Street, Suite 4000
Miami, FL 33131-2148

Robert A. Mercer, Esq.
Dadeland Towers North
Suite 412
9300 South Dadeland Boulevard
Miami, FL 33156

Louis K. Rosenbloum, Esq.
Louis K. Rosenbloum, P.A.
P. O. Box 12443
Pensacola, Florida 32582-2443

Brian C. Sanders, Esq.
P. O. Box 2529
Fort Walton Beach, Florida 32549-2529

Andrew D. Weinstock, Esq.
Duplass, Zwain & Williams
2900 Three Lakeway Center
3838 North Causeway Boulevard
Metairie, Louisiana 70002

____
Attorney