SUPREME COURT OF FLORIDA
CASE NO. SC02-1680
Lower Tribunal No. 5D01-1218

NAJI NEHME, as Personal
Representative of the Estate of
RHONDA NEHME,

Appellant,

-vs-

SMITHKLINE BEECHAM
CLINICAL LABORATORIES, INC.,
WILLIAM H. SHUTZE, M.D.,
PREMIERE MEDICAL LABORATORIES, P.A.,
f/k/a DRS. SHUTZE & TECHMAN, P.A.,
f/k/a DRS. SHUTZE & RENDON, P.A.,

Appellees.
_____/

# AMICUS CURIAE BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION


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## PREFACE

The following citation forms will be used in this brief:

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In accord with the requirement of Rule 9.800 of the Florida Rules of Appellate Procedure that citation style be in the form prescribed by the latest edition of The Bluebook: A Uniform System of Citation, where not otherwise directed by the Rules, this brief follows Bluebook Rule 10.7 and omits subsequent history citations for cases older than 2 years which were denied discretionary review. See Fla.R.App.P. 9.800(n); Harvard Law Review Association, The Bluebook: A Uniform System of Citation rule 10.7, at 68 (17th ed. 2000).

## STATEMENT OF INTEREST OF AMICUS CURIAE

The Florida Defense Lawyers Association (FDLA) is a statewide association specifically designed to meet the needs and help solve the problems of the civil defense attorney. Founded in 1967, today FDLA is a group of more than 1000 of the leading civil defense lawyers in the state. Its membership includes many former Florida Bar Association presidents and many who have been active in the ranks of national civil defense attorney associations. FDLA is the only statewide organization

devoted exclusively to representing the interests of attorneys engaged in the defense of civil litigation.

The goals of the organization include supporting and working for the improvement of the adversary system of jurisprudence in our courts, as well as promoting improvements in the administration of justice and increasing the quantity and quality of the service and contribution which the legal profession renders to the community, state and nation. In furtherance of these efforts, FDLA seeks to contribute as a friend of the court in cases of systemic importance to the civil justice system and appreciates being granted leave to do so in the present case.

The FDLA is submitting this brief in support of the position of Appellee, Premiere Medical Laboratories, P.A., a defendant below.

## STATEMENT OF THE CASE AND THE FACTS

Amicus Curiae, Florida Defense Lawyers Association, adopts and incorporates by reference the Statement of the Case and the Facts submitted contemporaneously by the Appellee, Premiere Medical Laboratories, P.A. as if fully set forth herein.

## ISSUE ON APPEAL

DOES THE TERM CONCEALMENT AS USED IN SECTION 95.11(4)(b), FLORIDA STATUTES, ENCOMPASS NEGLIGENT DIAGNOSIS BY A MEDICAL PROVIDER?

## STANDARD OF REVIEW

FDLA suggests that the standard review for the certified question presented *de novo* because it is a questions of law about statutory construction.

## SUMMARY OF ARGUMENT

The term "concealment" within the exception to the statute of repose in section 95.11(4)(b) and in other parts of the law necessarily requires proof that a healthcare provider intentionally and actively misled the claimant, not a mere unintentional, unknown misdiagnosis by itself. The root verb of concealment, to conceal, is a transitive active verb both connoting and denoting deliberate action. Allowing the act of misdiagnosis itself to equate to concealment for purposes of bypassing the statute of repose would create an exception that swallows the rule for every routine misdiagnosis case that was not timely recognized by a claimant.

Such a construction is circular. It is inconsistent with the plain meaning of concealment. It is inconsistent with the other two exceptions to the statute of repose -- both of which require intentional actions to defraud or misrepresent the claimant about the underlying medical error before the statute of repose is excused. It also frustrates the public policy of the statute of repose in seeking predictability, certainty, and an effective limitation on medical liability necessary to respond to the crisis in medical liability insurance (and the attendant ills of fewer providers and higher costs of defensive medicine) that precipitated the enactment of the statute of repose at the time and that still constitute a recurring crisis today.

To avoid such inconsistencies, to fulfill the legislative purpose, and to give effect to the statute of repose, "concealment" within the meaning of section 95.11(4)(b), Florida Statutes, should be recognized by this Court to require proof that the healthcare provider actively misled the claimant, and correspondingly, this Court should hold that a negligent diagnosis, without more, is legally insufficient to meet this definition of "concealment."

## ARGUMENT

### ISSUE

DOES THE TERM CONCEALMENT AS USED IN SECTION 95.11(4)(b), FLORIDA STATUTES, ENCOMPASS NEGLIGENT DIAGNOSIS BY A MEDICAL PROVIDER?

Without addressing the evidentiary issues surrounding review of a summary judgment, this *amicus curiae* brief is offered to the Court in support of Appellee, Premiere Medical Laboratories, P.A. in light of the question presented. Should the Court reach the question certified by the court below as being of great public importance, what is at stake is the very predictability and efficaciousness of the statute of repose should this Court be led to embrace petitioner's argument that any unknowing, unintentional, merely negligent diagnosis by a healthcare provider be deemed concealment. To embrace such an argument is tantamount to allowing seven years under section 95.11(4)(b), Florida Statutes, for the filing of any negligent diagnosis claim that is not timely recognized despite the clear intention of the legislature to establish shorter, predictable statutes of limitations and repose because of the recurrent crises with medical malpractice coverage that threatens the availability of medical care.

Given that the alleged negligent failure to properly diagnose Rhonda Nehme's cancer undisputably occurred on June 3, 1994, the version of section 95.11(4)(b) that applies to this case provides for exceptions to the four-year statute of repose as follows:

> In those sections covered by this paragraph where it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year period, the period of limitations is extended forward 2 years from the that the injury is discovered or should have been discovered... but in no event to exceed 7 years from the date of the incident giving rise to the injury occurred.

§ 95.11(4)(b), Fla. Stat. (1993).[1] The "4-year period" refers to the ordinary period of repose defined earlier in the same paragraph of the statute and commencing with the date of the incident. See id.

Based upon this statute, and as this case has been presented by the Petitioner, the dispositive question before this Court is whether the healthcare provider who allegedly negligently read Rhonda Nehme's PAP smear also "concealed" this fact during the 4-year period following the injury. The Court's ruling has significance even for later statutes because, for example, the 1996 amendment removed the phrase "within the 4-year period" thereby making the issue of concealment an equally salient

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[1] The 1996 amendment that removed the phrase "within the 4-year period" became effective July 1, 1996, but did not apply to "causes of action arising from acts, events or occurrences that take place before that date." Ch. 96-167, sec. 1-2, Laws of Florida.

legal concept during the entire seven years allowed for filing of medical malpractice claims that were hidden by "fraud, concealment, or intentional misrepresentation."

Although the various opinions of some judges in Myklejord v. Morris, 766 So. 2d 1160 (Fla. 5th DCA 2002), rev. denied, 789 So. 2d 347 (Fla. 2001), and Hernandez v. Amisub (American Hospital), Inc., 714 So. 2d 539 (Fla. 3d DCA 1998), suggest that "concealment" could be understood to include mere unknown, unintentional, mere negligence by a healthcare provider, these opinions do not fully examine the plain meaning of this word, which is the well-known touchstone of statutory construction.

Importantly, the root verb of concealment – "to conceal" – is a transitive verb. See The American Heritage Dictionary of the English Language (1st ed.). A transitive verb is, of course, significant in the English language because of the action it connotes. Grammatically defined, a transitive verb is one "[e]xpressing an action that is carried from the subject to the object...." Id. In other words, a transitive verb denotes affirmative action upon an object, not a mere state of being.

This grammatical observation has particular import for the verb "to conceal." Its synonym is "to hide" but is distinguished in meaning because of its active nature: "*Conceal* often implies deliberate intent to keep from sight or knowledge; whereas *hide* also can refer to natural phenomena...." Id. Thus, "to conceal" not only denotes

intentional action, but in standard usage, it also connotes intentional action. Together, these constitute the plain meaning of the verb – and, of course, concealment is simply the result of concealing something.

The law recognizes a similar deliberate, intentional, active meaning as being inherent in "concealment." The Restatement (Second) of Contracts, which is often followed in Florida, e.g., W.R. Grace & Co. v. Geodata Services, Inc., 547 So.2d 919, 924 (Fla.1989) (quoting Restatement (second) of Contracts § 90 (1979)), defines concealment as follows:

> Concealment is an **affirmative act intended or known** to be likely to keep another from learning of a fact of which he would otherwise have learned.

Restatement (Second) of Contracts, § 160 cmt. a (1981) (emphasis supplied). A review of the definition of concealment in Black's Law Dictionary (7th ed.) similarly identifies concealment as being active, fraudulent, or passive – and even "passive" is defined in the deliberate, knowing sense of "maintaining silence when one has a duty to speak." Id. at 282. By every common measure of the word, concealment, and its root verb, the only plain meaning is one that includes deliberate, knowing, intentional action. In this regard, the Myklejord opinion authored by Judge Pleus is correct in requiring that a plaintiff be "actively misled" in order to fall within the concealment

exception to the 4-year statute of repose of section 95.11. See Mylkejord, 766 So. 2d at 1162.

There is no basis for concluding that the legislature intended any differently. This Court recognized in Carr v. Broward County, 541 So. 2d 92 (Fla. 1989), that the statute of repose arose from the public necessity of skyrocketing liability insurance for healthcare providers – and the corresponding curtailment of medical practices and increase in costly defensive medical testing by those practices that remain. Id. at 94. The problem was found by the legislature to have reached "crisis proportions," which conclusion was embraced by this Court. Id. (quoting ch. 75-9, § 7, Laws of Florida).

In Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992), this Court upheld the constitutionality of the medical malpractice statute of repose. In that case, the Court held that the statute of repose begins to run from the date of the incident of medical malpractice, and specifically noted that the statute of repose may operate to preclude an action for medical malpractice before that action has even accrued, i.e., before the injury could have been discovered with due diligence. The Court stated:

> Because its application has the potential, as in this case, of barring a cause of action before it accrues, Florida has enacted few statutes of repose. **However, the medical malpractice statute of repose represents a legislative determination that there must be an outer limit beyond which medical malpractice suits may not be instituted.** In creating a statute of repose which was longer than the two-year statute of limitation, the legislature attempted to balance the rights of injured persons against the

> exposure of health care providers to liability for endless periods of time. Once we determined that the statute was constitutional, our review of its merits was complete. This Court is not authorized to second-guess the legislature's judgment.

Id. at 421-422 (emphasis supplied).

With the crisis before the legislature and its intent in enacting the statute of repose so clearly recognized, it makes little sense to accept a construction of concealment by Petitioner that would in effect allow any unknown, unintentional, missed diagnosis by a physician a full seven-years to be discovered when any other kind of ordinary medical negligence is subject to a two-year statute of limitations and a four-year statute of repose. Yet, Petitioner's argument here contemplates exactly such a result. If a claimant can say that his or her healthcare provider missed a diagnosis, no matter how slight or unintended, then that claimant essentially has seven years in which to uncover such simple negligence and file suit. Under such a rule, the most innocent mistakes of a healthcare provider in diagnosing would allow for greater potential for suits than the even most deliberate and reckless of medical malpractice in treating. Such a result simply cannot obtain in light of the language, history, and purpose of section 95.11(4)(b) and the crisis it addressed -- which even a casual reading of most newspapers demonstrates is a persistent concern even today.

On such a record – and with such grave public policy concerns afoot – the Petitioner's reliance upon the parenthetically expressed dicta from Nardone v.

Reynolds, 333 So. 2d 25, 40 (Fla. 1976), about concealment theoretically including a healthcare provider's duty to be aware of undetected errors cannot be accepted by this Court as dispositive. For one, this parenthetical aside was internally contradictory in Nardone. Just the page before, this Court stated "we hold that" the provider had a "duty to disclose **known** facts...." and that "[t]he necessary predicate of this duty is **knowledge**." Id. at 39. There was no issue of constructive knowledge in the Nardone case – rather the case was about what facts were actually known to the physician. That it is why it was pure dicta for the Court later on page 40 of the opinion to imply that one could conceal what one never knew.

Moreover, without it being an issue in the case, the Nardone Court never had the opportunity to examine the inherent circularity of its dicta. Logically, the dicta implies that because a provider was negligent in failing to reach the correct diagnosis that he should have known through exercise of reasonable care, the provider also was guilty of a separate act of concealment within the meaning of section 95.11(4)(b). However, the only such "concealment" was the very same act of medical misdiagnosis that constitutes the cause of action: a botched diagnosis. The act of medical negligence cannot be defined any differently from the alleged concealment and vice versa.

This circularity is contrary to what would be the case with a "fraud" or an "intentional misrepresentation" – the other two exceptions to the statute of repose authorized by section 95.11. Such a circular construction of a "concealment" would not only be inconsistent with these other categories of exceptions and their requirement for a separate act by the healthcare provider so as to avoid the statute of repose, but such a construction would ill serve the very purpose of having a statute of repose. If allowed, the exception would swallow the rule. No unrecognized act of simple medical misdiagnosis would ever be limited to the 4-year statute of repose because every healthcare provider who misdiagnosed what should reasonably have been known about the patient's condition but was not known would simultaneously be said to have concealed the a misdiagnosis that should reasonably have been known but was not known, which was the whole problem to begin with. This Court should not allow the statute of repose to be gutted through such an illogical, ungrammatical, and statutorily inconsistent definition of "concealment."

## CONCLUSION

For the foregoing reasons and legal authority, this Court should **AFFIRM** the lower court's disposition and **UPHOLD** the conclusion that the term "concealment" in section 95.11(4)(b) requires proof that the healthcare provider sought to actively mislead the claimant as to the existence of a cause of action and that, accordingly, proof of a negligent misdiagnosis, without more, is insufficient to meet this standard.

Respectfully submitted,

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