IN THE SUPREME COURT OF FLORIDA

CASE NO: SC02-1680

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

Petitioner,

vs.

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

Respondents.

____/

ANSWER BRIEF OF RESPONDENT WILLIAM H. SHUTZE, M.D.

ON REVIEW OF A CERTIFIED QUESTION FROM THE
FIFTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

In this Answer Brief, the parties will be referred to by their proper names or as Petitioner and Respondent(s).

References to the record on appeal and the transcripts of hearings contained therein are designated as (R.).

References to the Petitioner's Initial Brief on the Merits are designated as (I.B.).

STATEMENT OF THE CASE AND FACTS

Respondent, Dr. William H. Shutze, accepts the Statement of the Case and Facts set forth in the Petitioner's Initial Brief subject to the following additions and clarifications.

The Petitioner brought suit against Dr. Shutze in his individual capacity while also naming as defendants Vincenta Lannon, C.T. (the cytotechnologist who interpreted Mrs. Nehme's pap smear slide), Ms. Lannon's employer, Premiere Medical Laboratories, and Smithkline Beecham Clinical Laboratories.

Respondent Shutze wishes to emphasize that during 1994 and 1995, Dr. Shutze was out of state being treated for his own personal medical condition. **Accordingly, when Mrs. Nehme's pap smear was read by Ms. Lannon, and at all material times in this lawsuit, Dr. Shutze had no active role or involvement.** (R. 7-1446).

Respondent Shutze also wishes to clarify that the laboratory protocol of Respondent Premiere Medical Laboratories, whereby the primary screening was performed by a cytotechnologist and 10% of those pap smear slides read as normal were randomly re-screened by a pathologist for quality assurance purposes, was in accordance with industry standards and the standard of care. (R. 9-1936-37). Further, it is accepted pathology laboratory procedure and within the standard of care that when a cytotechnologist interprets a pap smear as "normal," that slide is not required to be automatically re-screened by a pathologist. (R. 9-1936-37). These procedures were followed by Respondent Premiere Medical Laboratories as well as

the laboratory which employed the Petitioner's pathology expert. (R. 6-1250, 1350-51).

For the convenience of the Court, the following is a list of the important dates and corresponding events relevant to the statute of repose issue presented:

May 23, 1994	Mrs. Nehme undergoes pap smear examination
June 3, 1994	Mrs. Nehme's pap smear slide interpreted as "normal" by Vincenta Lannon
February 21, 1997	Mrs. Nehme diagnosed with cervical cancer
December 9, 1997	Mrs. Nehme passed away
June 3, 1998	Four year statute of repose expired
January 27, 1999	Mrs. Nehme's estate petitions for 90-day extension of the statute of limitations
September 7, 1999	Estate files medical malpractice suit

On March 13, 2001, a hearing was held on all Respondents' Motions for Summary Judgment before Judge George Sprinkel of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida. (R. 10-2103-43). The Respondents collectively argued that Petitioner's lawsuit was barred by the four year statute of repose found in Florida Statute § 95.11(4)(b) because the malpractice action had not been initiated until after the four year statute of repose had expired.

The Petitioner relied on that portion of § 95.11(4)(b) which allows the statute of repose to be extended from four years to seven years when "it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery

of the injury ...." The Petitioner argued that cytotechnologist Lannon's alleged misinterpretation of the pap smear slide constituted the type of concealment contemplated by § 95.11(4)(b). (R. 10-2103-43).

The Respondents relied on the 5th DCA's decision in ***Myklejord v. Morris***, 766 So. 2d 1160 (Fla. 5th DCA 2000), ***rev. den.***, 789 So. 2d 347 (Fla. 2001), which held that a medical provider's misdiagnosis or failure to diagnose does not constitute "concealment," and therefore does not allow the extension of the statute of repose from four to seven years. (R. 10-2103-43).

After hearing the arguments, Judge Sprinkel granted final summary judgment in favor of all Respondents. (R. 10-2140-42). Following ***Myklejord***, he ruled that under the facts of the subject case, there had been no fraud, concealment, or intentional misrepresentation which would justify extension of the statute of repose from four to seven years. (R. 10-2140-42).

Pursuant to this ruling, an order granting summary judgment and a final summary judgment were entered and rendered for all Respondents on March 27, 2001. (R. 10-2098-99, 2144-46). On April 25, 2001, the Petitioner appealed Judge Sprinkel's ruling to the Fifth District Court of Appeal.

On June 28, 2002, the 5th DCA affirmed the trial court's final summary judgment. ***See Nehme v. Smithkline Beecham Clinical Laboratories***, Inc., 822 So. 2d 519 (Fla. 5th DCA 2002). In doing so, the 5th DCA stated that ***Myklejord*** was not binding precedent because the reasoning behind the holding had not been agreed to by two of the three judges on the panel. ***Id.*** at 522.

The 5th DCA pointed out that in ***Myklejord***, Judge Pleus had rendered the court's opinion that negligent diagnosis does not constitute concealment, Judge Sawaya had concurred in result only, and Judge Dauksch had issued a dissenting opinion. ***Id.*** The 5th DCA noted that this Court's decision in ***Nardone v. Reynolds***, 333 So. 2d 25 (Fla. 1976) was capable of different interpretations because it had been the basis for the contrasting majority and dissenting opinions in ***Myklejord***.

Nonetheless, the 5th DCA emphasized that the sole issue in ***Myklejord*** had been whether negligent diagnosis can constitute concealment for purposes of the statute of repose, and that the ***Myklejord*** court had affirmed the trial court's dismissal of the action on statute of repose grounds. Thus, the 5th DCA, in accordance with ***Myklejord***, affirmed final summary judgment. However, recognizing that language in ***Nardone*** could "support a conclusion either way," the 5th DCA certified the following question to this Court as one of great public importance:

> Does the term concealment as used in § 95.11(4)(b), ***Fla. Stat.***, encompass negligent diagnosis by a medical provider?

Id. at 522.

POINT ON REVIEW

THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE TERM CONCEALMENT AS USED IN § 95.11(4)(b), *FLA. STAT*. (1993) DOES NOT ENCOMPASS NEGLIGENT DIAGNOSIS BY A MEDICAL PROVIDER.

SUMMARY OF ARGUMENT

The 5th DCA properly affirmed summary judgment in favor of the Respondent as the concealment extension of the four year statute of repose contained in § 95.11(4)(b), ***Fla. Stat.***, (1993) does not encompass mere negligent diagnosis. This conclusion is supported by Florida case law, public policy, principles of statutory construction and the legislative purpose behind the statute.

The 5th DCA previously held in ***Myklejord v. Morris***, 766 So. 2d 1160 (Fla. 5th DCA 2000), ***rev. den.***, 789 So. 2d 347 (Fla. 2001) that the negligent diagnosis of a disease or medical condition does not constitute concealment in order to extend the statutory repose period from four to seven years.

Further, Petitioner's argument that a negligent diagnosis is sufficient to extend the statute of repose in medical malpractice cases to seven years is inconsistent with the common law doctrine of fraudulent concealment. Petitioner's position is likewise not supported by the opinions of Florida's other District Courts of Appeal that have interpreted § 95.11(4)(b).

Contrary to Petitioner's argument, this Court's decision in ***Nardone v. Reynolds***, 333 So. 2d 25 (Fla. 1976) does not support the notion that a negligent failure to diagnose may also be used to satisfy the concealment requirement of § 95.11(4)(b) and extend the repose period to seven years. The holding in ***Nardone*** is simply that a medical provider has a duty to disclose possible **causes** of a **known** injury to the patient, and the doctor's failure to do so **may** amount (given the particular

facts) to a fraudulent withholding of facts sufficient to toll the running of the statute of limitations. The disclosure at issue in ***Nardone*** was not the disclosure of the **injury** itself (which was known to the medical providers and patient's family), but the disclosure of the **cause** of that **known** injury.

In the instant case, the alleged negligence was cytotechnologist Lannon's failure to properly interpret Mrs. Nehme's pap smear slide. By the very nature of the facts of the case at bar, neither Ms. Lannon nor any of the Respondents knew of any harm or injury; i.e., the undisclosed cervical cancer suffered by Mrs. Nehme. Therefore, the Respondents could not have knowingly, or even negligently, failed to disclose the possible **causes** of Mrs. Nehme's cervical cancer. It is impossible to construe Ms. Lannon's alleged failure to properly interpret a pap smear slide as a non-disclosure of a "possible cause of a known injury" as required by ***Nardone***. An alleged failure to disclose the possible causes of Mrs. Nehme's cancer is obviously an argument that makes no sense. If, as Petitioner urges, the ***Nardone*** rule were applicable to the facts of the subject case, Petitioner would have to argue that Ms. Lannon knew she was misinterpreting the subject pap smear slide, but nonetheless intentionally chose to call the pap smear normal in order to knowingly conceal the harm (i.e., the cervical cancer) and its possible causes from Mrs. Nehme. **Such an argument is without doubt ludicrous**, yet succinctly demonstrates the inapplicability of ***Nardone*** and the other cases relied upon by the Petitioner.

The legislative history behind § 95.11(4)(b) supports the Respondent's position that a negligent diagnosis does not qualify as a concealment and thus is insufficient to

extend the repose period. The legislature enacted this provision as part of the Medical Malpractice Reform Act of 1975 in an attempt to ensure the continued availability of medical malpractice insurance. As part of this plan, the legislature created a four year repose period with limited exceptions in order to assist insurers and medical providers in accurately predicting liability for future claims. According to materials housed in the Florida State Archives, the legislature envisioned a four year repose period that could be extended only when "the injury was **intentionally** concealed." (Appendix 1A at 5)(emphasis provided).

Moreover, the drafters of § 95.11(4)(b) placed the term "concealment" between the terms "fraud" and "intentional misrepresentation," both of which require more than mere negligence to extend the repose period. According to statutory construction principles discussed by the 2nd DCA in ***Doe v. Hillsborough County Hospital Authority***, 816 So. 2d 262 (Fla. 2d DCA 2002), placement of the term concealment in the same sentence as fraud and intentional misrepresentation suggests that concealment requires some level of knowledge or intent. This interpretation is consistent with the legislative history which indicates that only an intentional concealment is sufficient to extend the repose period.

This Court must also consider that if it were **to adopt the Petitioner's position** and hold that a negligent diagnosis falls within the concealment extension to § 95.11(4)(b), **the four year statute of repose for "all" negligent diagnosis cases would be abolished.** The effect would be to extend the repose period to seven years for all negligent diagnosis cases, which would make no sense as all other acts of

simple negligence would remain governed by a four year repose period. Certainly, if the legislature had intended to separate a certain class of medical malpractice cases (i.e., those predicated upon a negligent failure to diagnose) and apply a longer statute of repose for all cases in that class, it could and would have enacted a specific statute to effect that result.

However, even should this Court determine that a negligent diagnosis may constitute concealment under the statute of repose, the alleged concealment would only extend the repose period to seven years for the Petitioner's claim against Premiere Medical Laboratories (the employer of cytotechnologist, Vincenta Lannon, CT, who was previously dismissed as a party defendant by Petitioner), and Smithkline Beecham Clinical Laboratories. Under no circumstances would the alleged concealment extend the statutory repose period for the Petitioner's claim against Respondent Shutze as it is **undisputed** that he was **out of the state on medical leave** at all times material to this action and therefore **had no active role or involvement** in the interpretation of the subject pap smear slide.

Finally, this Court need not even reach the question presented - whether the term concealment encompasses negligent diagnosis - as the alleged concealment did not prevent the Petitioner from discovering the alleged misdiagnosis within the four-year repose period as required by § 95.11(4)(b). An examination of the record below demonstrates that Mr. Nehme was aware of both the injury and the reasonable possibility that the injury had been caused by medical malpractice more than one year prior to the expiration of the four-year statute of repose.

Mr. Nehme concluded, in **early 1997**, that something had **"gone wrong"** with his **wife's medical care** and that "a physician or somebody [had done] something wrong." Given the fact that the **statute of repose did not expire until June 3, 1998**, **over one year later,** this Court should find that the concealment exception to the repose period could not have been triggered as the alleged concealment did not actually prevent discovery by Mr. Nehme of the injury or the reasonable possibility that it had been caused by medical malpractice within the four-year repose period.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE TERM CONCEALMENT AS USED IN § 95.11(4)(b), *FLA. STAT.*,(1993) DOES NOT ENCOMPASS NEGLIGENT DIAGNOSIS BY A MEDICAL PROVIDER.

Under Florida Law, Petitioner's medical malpractice action is subject to the provisions of § 95.11(4)(b), ***Fla. Stat.***, (1993) which creates a two-year statute of limitations and a four-year statute of repose. The repose period may be extended up to seven years only in cases in which "fraud, concealment, or intentional misrepresentation of fact" prevent the timely discovery of the injury.

Specifically, § 95.11(4)(b) states as follows:

> An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued . . . . In those actions covered by this paragraph in which 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 time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred.

(emphasis supplied).

In the instant case, it is undisputed that the Petitioner commenced the medical malpractice action later than four years from the date of the occurrence from which the cause of action accrued. Specifically, the act which formed the basis of the medical malpractice action was Ms. Lannon's alleged negligent misinterpretation of the pap smear which occurred on June 3, 1994. (R. 3-616-60). Therefore, the four year statute of repose expired on June 3, 1998. The Plaintiff did not initiate this cause of action until January 27, 1999, the date he filed for an extension to the statute of limitations. (R. 10-2108). This was 238 days, about eight months, after the statute of repose had expired.

Petitioner **concedes** that the medical malpractice **action** was **not initiated within the four year statute of repose**. Instead, Petitioner argues that the four year statute of repose should have been extended to seven years on the grounds that "fraud, concealment, or intentional misrepresentation of fact" occurred and prevented discovery of the alleged malpractice. Petitioner proposes that Ms. Lannon's alleged negligence in failing to properly read the pap smear slide, which is the act that formed the basis of the Petitioner's lawsuit, should be construed as an act of concealment to justify extension of the statute of repose to seven years.

Negligent Failure to Diagnose does not Extend the Repose Period in a Medical Malpractice Action.

The position urged by the Petitioner, that an alleged mere negligent failure to properly interpret a pap smear slide constitutes the type of concealment sufficient to extend the repose period, is inconsistent with the common law doctrine of fraudulent

concealment and those appellate cases which have interpreted the statute of repose in § 95.11(4)(b). Petitioner's argument also conflicts with the legislative intent of § 95.11(4)(b) and is contrary to public policy considerations relevant to a statute of repose.

The 5th DCA addressed this issue in ***Myklejord v. Morris***, 766 So. 2d 1160 (Fla. 5th DCA 2000), ***rev. den.***, 789 So. 2d 347 (Fla. 2001), and relied on ***Myklejord*** in affirming summary judgment in favor of the Respondents herein. In ***Myklejord***, which is factually identical to the case at bar, the 5th DCA held that a medical provider's alleged failure to diagnose cancer did not constitute concealment as contemplated by the statute of repose, and therefore did not allow extension of the four year limitation period to seven years.

In ***Myklejord***, the Plaintiff sued his health care providers for allegedly failing to accurately diagnose his cancer. ***Id***. at 1161. The action was not brought, however, until six years after the alleged misdiagnosis. ***Id***. In an attempt to extend the medical malpractice statute of repose beyond four years, the Plaintiff in ***Myklejord*** argued that the misdiagnosis which formed the basis of his suit also satisfied the concealment requirement and arguably extended the statute of repose to seven years. ***Id***.

The 5th DCA disagreed and noted that ***Myklejord*** was "not a case in which the health care providers **intentionally** withheld the diagnosis or **intentionally misrepresented** the results." ***Id***. at 1162 (emphasis supplied). The 5th DCA emphasized that the **type of concealment** necessary to extend the statute of repose

in medical malpractice cases to seven years **requires fraud**, **intent to conceal**, or some other **active element**. ***Id***.

The concealment element, according to the court in ***Myklejord***, also requires knowledge by the medical provider about the patient's condition which is not conveyed to the patient. ***Id***. In such circumstances, the patient is actively misled about his or her true condition by the tortfeasor. This intentional withholding of known information delays the patient's ability to discover the tortfeasor's wrongdoing or the nature of the injury itself. ***Id***. Furthermore, the ***Myklejord*** court found **no rational basis for making negligent diagnoses subject to a seven year repose period where other acts of simple negligence are governed by a four year period.** ***Id***.

In the instant case, the 5th DCA recognized that the issue presented is **identical** to that presented in ***Myklejord***. ***Nehme***, 822 So. 2d at 522. The 5th DCA further acknowledged that ***Myklejord*** had held that "a negligent misdiagnosis or failure to diagnose does not constitute concealment as contemplated by the statute." ***Id***. (citing ***Myklejord***, 766 So. 2d at 1162).

The alleged failure of Ms. Lannon to properly interpret the pap smear slide may, at best, be characterized as simple negligence. There is no evidence or inference that may be drawn from the evidence that Ms. Lannon's alleged failure to properly interpret the pap smear slide could be construed as having been based upon fraud or an intent to conceal. Like the defendant in ***Myklejord***, Ms. Lannon simply had no knowledge or information about Ms. Nehme's condition to conceal. The 5th DCA noted below, however, that in ***Myklejord***, both Judge Pleus' opinion for the court and Judge

Dauksch's dissenting opinion had cited this Court's decision in ***Nardone v. Reynolds***, 333 So. 2d 25 (Fla. 1976) to arguably support opposite conclusions. Specifically, Judge Pleus relied on language from ***Nardone*** to hold that the "concealment required to extend the statute of repose in medical malpractice matters to seven years requires fraud, intent to conceal or some other active element." ***Myklejord***, 766 So. 2d at 1162. Conversely, Judge Dauksch utilized language from ***Nardone*** to support his contention that the statute of repose may be extended to seven years in the event of an "inefficient" diagnosis. ***Id***. at 1163.

The Petitioner urges that two particular statements in ***Nardone*** support his position that the type of concealment necessary to extend the four year statute of repose in § 95.11(4)(b) may be satisfied by a "mere" negligent diagnosis. Specifically, the Petitioner isolates two paragraphs from the ***Nardone*** opinion and emphasizes phrases in each describing a doctor's duty to "disclose known causes" or "causes that should be known through the exercise of reasonable care and due diligence." (I.B. at 12-13, citing ***Nardone***, 333 So. 2d at 39, 40).

In order to determine whether ***Nardone*** supports the Petitioner's argument, a careful examination of the opinion is required. First, as the Petitioner has correctly pointed out, ***Nardone*** does not construe the statute of repose under § 95.11(4)(b), but instead deals with common law fraudulent concealment and its application to the statute of limitations. This distinction, combined with the legislative history of § 95.11(4)(b), which clearly envisioned that a knowing and intentional concealment

would be necessary to extend that statute of repose, are alone enough to render ***Nardone*** of little or no precedential value.

In addition, ***Nardone*** is factually distinguishable from the case at bar, and the precise legal issue dealt with by the ***Nardone*** court is quite different than the question presented herein. In ***Nardone***, a minor patient was hospitalized due to complaints of blurred vision, diplopia and headaches. ***Nardone***, 333 So. 2d at 28. After initial evaluation, the patient underwent five brain operations. Shortly before the patient's scheduled release from the hospital, one of his medical providers ordered a diagnostic procedure wherein dye was introduced into the ventricles of the brain. ***Id***.

It was later alleged that this procedure had been contraindicated and had caused the patient's resulting severe brain damage and blindness. It was further alleged that the patient's parents had never been informed of the diagnostic procedure, nor had they been advised that the procedure could have caused the subsequent brain damage and blindness. ***Id***. at 28-29.

The patient's parents sued the medical providers five years after the brain injury. ***Id***. at 30. The medical providers defended on the grounds that the statute of limitations had expired. ***Id***. at 31.

One of the issues presented to the Florida Supreme Court in ***Nardone*** was whether non-disclosure by the medical providers of the diagnostic test as a possible cause of the patient's medical condition constituted common law fraudulent concealment sufficient to toll the statute of limitations. ***Id***. at 36. This Court recognized that under the doctrine of fraudulent concealment, where the physician has fraudulently

concealed facts showing negligence, his actions would toll the limitations period. ***Id***. at 35. However, the precise issue before this Court in ***Nardone*** was whether non-disclosure or "mere silence" as opposed to "active misrepresentation" concerning possible or likely causes of an injury should likewise toll the limitations period. ***Id***. at 37.

This Court noted that generally, the type of conduct necessary to toll the limitations period must constitute an "act of concealment to prevent inquiry or elude investigation or to mislead a person who could claim a cause of action." ***Id***. at 39. However, this Court recognized that in the context of the physician-patient relationship, the physician has a duty to disclose "known facts" as to the possible causes of harm done to the patient. ***Id***. This Court concluded that "the necessary predicate of this duty is **knowledge of the fact of the wrong** done to the patient." ***Id***. (emphasis added).

Importantly, the holding by this Court in ***Nardone*** is simply that a medical provider has a duty to disclose possible **causes** of a **known** injury to the patient, and the doctor's failure to do so **may** amount (**given the particular facts**) to a fraudulent withholding of the facts sufficient to toll the running of the statute of limitations. The ***Nardone*** decision does **not** support the Petitioner's contention that a negligent failure to diagnose, which is the basis of Mr. Nehme's medical malpractice action, may also be used to satisfy the concealment requirement of § 95.11(4)(b) and thus extend the statute of repose to seven years.

Additionally, in the instant case, the alleged negligence was Ms. Lannon's failure to diagnose, or more precisely, failure to properly interpret a pap smear slide. By the very nature of the facts of the case at bar, neither Ms. Lannon nor any of the Respondents knew of any harm or injury; i.e., the undiagnosed cervical cancer suffered by Mrs. Nehme. Therefore the Respondents could not have knowingly, or even negligently, failed to disclose the possible causes of Mrs. Nehme's cervical cancer. It is simply **impossible** to construe Ms. Lannon's alleged failure to properly interpret a pap smear slide as a non-disclosure of a possible cause of a known injury as required by ***Nardone***.

In light of significant factual and legal distinctions, ***Nardone*** simply cannot support Petitioner's argument that a negligent failure to diagnose should constitute concealment for the purposes of the statute of repose under § 95.11(4)(b). Even the following passage from ***Nardone***, partially quoted by Judge Dauksch in his ***Myklejord*** dissent and emphasized in isolation by Petitioner herein, fails to support Petitioner's argument when viewed in the full context of ***Nardone***:

> We hold that, although generally the fraud must be of such a nature to constitute active concealment to prevent inquiry or elude investigation or to mislead a person who could claim a cause of action, we do recognize the fiduciary, confidential relationship of physician-patient imposing on the physician the duty to disclose; but this is a **duty to disclose known facts** and not conjecture as to possibilities. The **necessary predicate of this duty is knowledge of the fact of the wrong done** to the patient [citation omitted]. Where an adverse condition is known to the doctor or readily available to him through **efficient diagnosis**, he has a duty to disclose and his failure to do so amounts to a fraudulent withholding of the facts sufficient to toll the running of the statute.

Nardone, 333 So. 2d at 39 (emphasis supplied)

Unlike ***Nardone***, in the instant case the medical providers were **not** aware of a "known" injury (i.e., the undiagnosed cervical cancer) and therefore could **not** have had any "knowledge of the fact of the wrong done to the patient," which is ***Nardone's*** prerequisite to a medical provider's duty to disclose. ***Id***. Further, **the duty to disclose** referred to in ***Nardone*** is the duty of a medical provider to disclose the **causes** of the **patient's known injury**. The disclosure at issue in ***Nardone*** was not the disclosure of the injury, but the disclosure of the **cause** of the **known** injury.

The following passage found later in the ***Nardone*** opinion clarifies this distinction:

> Although the confidential and fiduciary nature of the doctor/patient relationship does impose a **duty on the physician to disclose known causes** (or causes that should be known through the exercise of reasonable care and due diligence) readily available to him through **efficient diagnosis** and failure to do so constitutes sufficient concealment to toll the statute, there is **no** concomitant **duty** imposed on the physician **to relate all merely possible or likely causes of the injury**.

Nardone, 333 So. 2d at 39 (emphasis supplied)

As this passage from ***Nardone*** makes particularly clear, the information "known to the doctor or readily available to him through efficient diagnosis" refers not to the patient's injury, but to the potential **causes** of that injury. Petitioner misleadingly isolates the "readily available ... through efficient diagnosis" language from ***Nardone*** in an effort to support his argument that negligent diagnosis of the injury itself may constitute a concealment. The "efficient diagnosis" language used by the ***Nardone***

court obviously does not refer to the diagnosis of the patient's injury but to the determination of the cause of that injury.

The analysis in ***Nardone*** pre-supposes that the injury or condition afflicting the patient is **known**. In that scenario, ***Nardone*** then requires the involved medical providers to disclose potential causes that are known or ascertainable by "efficient diagnosis." Interpreted most favorably for Petitioner, this language in ***Nardone*** supports the conclusion that when a medical provider fails to disclose causes of a **known** injury, where those causes are either "known" to the medical provider or "readily available to him through efficient diagnosis," this failure to disclose the potential **causes may** constitute concealment. Of course, this does **not** mean that a negligent failure to "efficiently diagnose" the underlying condition or injury itself amounts to concealment, which is the position that Petitioner urges.

As indicated above, it would have been impossible for Ms. Lannon, or any of the medical providers in this case, to fail to disclose information about the cause of Mrs. Nehme's condition or about the condition itself, as it was **unknown by everyone**. Simply stated, the case at bar concerns a medical provider's alleged failure to diagnose. This Court's analysis in ***Nardone*** of a medical provider's failure to disclose possible **causes** of a **known** injury or harm is simply not applicable to the facts of the subject case.

The Petitioner also urges this Court to allow the **same act** that forms the basis of the medical malpractice action - Ms. Lannon's alleged failure to properly interpret

the pap smear - to also satisfy the concealment requirement in order to extend the statute of repose. Certainly, ***Nardone*** does not stand for this proposition.

The alleged negligence in ***Nardone*** was the medical provider's improper ordering of a diagnostic test. The alleged concealment was a **separate act**, namely, the medical provider's failure to disclose the diagnostic test as one of the possible causes for the patient's injury. In comparison, the alleged negligence which caused Mrs. Nehme's injury - Ms. Lannon's alleged misinterpretation of the pap smear slide - is the **same act** that Petitioner alleges to have constituted the "concealment."

The Petitioner also relies on the 3rd DCA's decision in ***Almangor v. Dade County***, 359 So. 2d 892 (Fla. 3d DCA 1978) and the 5th DCA's decision in ***Allen v. Orlando Regional Medical Center***, 666 So. 2d 665 (Fla. 5th DCA 1992). (I.B. 15-19). Both cases are distinguishable from the case at bar and neither supports Petitioner's position.

In ***Almangor***, a medical malpractice action was brought against a hospital alleging negligent delivery which caused mental retardation. ***Id***. at 894. The hospital defended on the grounds that the statute of limitations had run barring the claim. The trial court entered summary judgment in favor of the defendants on the statute of limitations defense.

The issue on appeal, as framed by the 3rd DCA, was whether the statute of limitations had been tolled by the hospital's active concealment of the existence of a cause of action or by its failure to reveal facts to the Plaintiff relating to the nature or

cause of the baby's condition. ***Id***. The 3rd DCA noted that the record contained evidence that a nurse as an employee of the defendant hospital had "actively and successfully" misled the Plaintiff as to the baby's true physical condition. ***Id***.

Additionally, the 3rd DCA found that a genuine issue of material fact existed as to whether the doctors, as employees of the defendant hospital, who had delivered the Plaintiff's baby actually knew, or should have known, of a physical injury to the baby inflicted during birth but failed to so inform the Plaintiff. ***Id***. at 895. As a result, the 3rd DCA reversed the trial court's summary judgment. ***Id***.

Similarly, in ***Allen***, the 5th DCA reversed summary judgment entered in favor of the medical providers on a statute of limitations defense in a negligent delivery case. ***Id***. at 665. The 5th DCA found that a genuine issue of material fact existed as to whether a physician and hospital personnel had "fraudulently concealed" possible causes of the child's injury thus precluding summary judgment on the statute of limitations. ***Id***. at 669.

The 5th DCA in ***Allen*** pointed out the record contained evidence that Plaintiff had been told by medical providers that the patient's injuries were "residuals of normal events" despite the fact the medical providers knew that the patient had been injured as a result of improper intubation. ***Id***. at 668-69.

In both ***Almangor*** and ***Allen***, the medical providers **knew of the patients' harmful conditions**. Interpreted most favorably for the Petitioner, ***Almangor*** and ***Allen*** **may**, although Respondent disagrees, stand for the proposition that in cases where medical negligence has resulted in injury or harm to a patient and that injury or

harm is known by the medical provider, the medical provider's failure to disclose facts that the medical provider knows or should have known relating to the nature or cause of the injury or harm will arguably toll the statute of limitations.

However, unlike the medical providers in ***Almangor*** and ***Allen***, the medical providers in the instant case were unaware of any injury or harm; i.e., the undiagnosed cervical cancer suffered by Mrs. Nehme, and therefore could not have possibly failed to disclose possible causes of that harm.

As such, neither decision supports Petitioner's position that the statute of repose should be extended based on a failure to diagnose a condition **unknown to both the patient and health care providers**.

Obviously, an alleged failure to disclose the "possible causes" of Mrs. Nehme's cancer is an argument that makes no sense. If the ***Nardone*** rule were applicable to the facts of the subject case, Petitioner would have to argue that Ms. Lannon **knew** she was misinterpreting the subject pap smear slide, but nonetheless **intentionally** chose to call the smear normal in order to knowingly conceal this harm; (i.e., the cervical cancer) and its possible causes from the patient. Such an argument is without doubt ludicrous, yet succinctly demonstrates the inapplicability of ***Nardone***, ***Almangor*** and ***Allen*** to the case at issue.

Additionally, it is worth mentioning that unlike the respondents in the instant case, the **medical providers** in ***Almangor*** and ***Allen*** were noted by the appellate court to have **engaged in active or fraudulent concealment**. Specifically, in ***Almangor***, the 3rd DCA pointed out that the defendant hospital had "actively and

successfully misled the Plaintiff." ***Almangor***, 359 So. 2d at 894. Likewise, in ***Allen***, the 5th DCA noted that the Plaintiffs were told that the patient's injuries were "residuals of normal events" despite the hospital's knowledge that the patient had been improperly intubated. ***Allen***, 666 So. 2d at 668-69.

The Petitioner also cited the 3rd DCA's decision in ***Hernandez v. Amisub, Inc.***, 714 So. 2d 539 (Fla. 3d DCA 1998) for the proposition that the term "concealment," as used in § 95.11(4)(b), ***Fla. Stat.***, does not necessarily include an element of "scienter." (I.B. 15). This proposition, however, is distinct from and not particularly relevant to the issue before this Court, which is whether a **mere negligent** failure to diagnose cervical cancer satisfies the requirement of "fraud, concealment, or intentional misrepresentation of fact" found in § 95.11(4)(b), ***Fla. Stat.***

In ***Hernandez***, a laparotomy pad was left inside the patient's abdomen following surgery. Years later, the patient began to experience abdominal pain. ***Hernandez***, 714 So. 2d at 540. The patient sued the hospital where the laparotomy had been performed alleging that the hospital's employees and the surgeon had been negligent in leaving the pad inside his body. The hospital defended the action on the grounds that the four year statute of repose in § 95.11(4)(b) had elapsed prior to the initiation of the malpractice action. A directed verdict was entered in favor of the hospital on this issue by the trial court. ***Id***.

The 3rd DCA found that the Plaintiff had proved concealment or, alternatively, intentional misrepresentation of fact. ***Id***. at 541. The specific misrepresentation was the hospital's report that it had performed an accurate count of lap pads at the

conclusion of the patient's operation when it had not. ***Id***. The 3rd DCA pointed out that not only was the count inaccurate, the hospital personnel had "demonstrated reckless disregard for the truth by its **false** report indicating that the count had been properly performed." ***Id***. at 541-42 (emphasis added).

As it turned out, not only had the count been inaccurate, it had also been improperly conducted. The hospital's operating room technician admitted that she did not visually inspect the pads. ***Id***. at 542. The circulating nurse admitted that she **falsely** signed the operating room technician's name to the medical record indicating that the pad count had been conducted by both the circulating nurse and the technician. ***Id***.

The 3rd DCA remarked that the hospital employees' disregard of hospital's policy amounted to **"more than mere negligence"** as the employees had failed to properly conduct a pad count, and had further **falsely reported** that the count had been properly conducted. ***Id***. (emphasis added). Under the facts of ***Hernandez***, the 3rd DCA found that the "intentional misrepresentation of fact" requirement in § 95.11(4)(b) had been satisfied and the statute of repose extended to seven years. ***Id***.

As with the other appellate cases cited by the Petitioner, the facts in ***Hernandez*** are completely distinguishable from the facts in the case at bar. Likewise, the holding of ***Hernandez***, that reckless disregard of hospital policy, which prevented the patient from discovering he had been injured as a result of medical negligence, rose to the

level of intentional misrepresentation of fact, is simply not applicable to the subject case.

The hospital staff in ***Hernandez*** not only improperly conducted the pad count, but falsely reported that the pad count had been properly completed. This false representation was the result of an affirmative act by the hospital staff to "conceal" its wrongful actions. Conversely, in the instant case, there was no affirmative act by either Ms. Lannon, Dr. Shutze, Smithkline Beecham Clinical Laboratories, or Premiere Laboratories to conceal the alleged misinterpretation of the slide, nor was any party even aware of the alleged misinterpretation.

Petitioner's reliance on the 4th DCA's decision in ***Mangoni v. Temkin***, 679 So. 2d 1286 (Fla. 4th DCA 1996) is also misplaced. (I.B. 16-17). ***Mangoni***, which does not deal with negligent diagnosis, is easily distinguishable from the case at bar.

In ***Mangoni***, the medical providers were sued for failing to inform the patient of the existence of a brain tumor. ***Mangoni***, 679 So. 2d. at 1287. The medical providers defended the action by asserting that the cause of action was barred by the four year statute of repose in § 95.11(4)(b). ***Id***. Plaintiff responded that the medical provider's failure to disclose the condition extended the limitations period to seven years.

The ***Mangoni*** court recognized that in prior appellate decisions determining the same issue, the alleged negligent act which formed the basis for the medical malpractice claim had always been **separate** from the act which extended the statute. However, under the specific facts presented, the 4th DCA found that the negligence

and the "concealment which extends the statute" need not be separate acts. ***Id***. at 1288. As a result, the 4th DCA found that the medical providers' alleged negligence in failing to inform the patient of the brain tumor also amounted to a "concealment" sufficient to extend the limitations period to seven years.

First, it must be pointed out that ***Mangoni*** appears to be an aberration in that it is the **only** appellate decision to allow the **same act** which had formed the basis of the malpractice claim to also satisfy the concealment requirement for extending the statute of repose under § 95.11(4)(b). ***Mangoni*** directly conflicts with ***Myklejord*** in this regard, and at least indirectly conflicts with ***Nardone*** and all of the other District Court of Appeal opinions that have dealt with this issue, as those cases have only allowed extension of the repose period by an act of concealment which had been **separate** and apart from the act of negligence underlying the malpractice claim itself.

Additionally, although the 4th DCA's decision in ***Mangoni*** partially supports the Petitioner's position in that it allows the **same** negligent act, which had formed the basis of the medical malpractice claim, to also serve as the basis for extending the limitations period, there are significant factual differences which distinguish ***Mangoni*** from the instant case.

In ***Mangoni***, the act which allowed extension of the limitations period to seven years was a **true** "concealment" of a **known** fact. Specifically, the medical providers in ***Mangoni*** knew about the existence of a medical condition; i.e., the brain tumor, yet failed to disclose this fact to the patient.

Unlike ***Mangoni***, the provider in the instant case, cytotechnologist Lannon, did **not** know of the existence of the medical condition; i.e., the cervical cancer, and was allegedly merely negligent for failing to make this diagnosis. Lannon's actions, therefore, cannot be construed as a failure to disclose or concealment, and this distinguishes her actions from those of the medical providers in ***Mangoni***.

In order to fairly compare ***Mangoni*** with the instant case, this Court must consider whether the holding in ***Mangoni*** would have been the same had the medical providers in ***Mangoni*** simply failed to uncover the existence of the brain tumor in the first place. The answer to this question may be found in the 4th DCA's emphasis on the medical providers' failure to disclose a known condition to the Plaintiff and the resulting breach of the physician-patient relationship:

> Drs. Temkin and Gilderman were notified of the results of this test . . . and made one attempt to notify Ms. Mangoni by telephone but were unable to reach her. No other efforts were made to notify Mangoni of the results of this CT Scan. Mangoni had contact with Drs. Temkin and Gilderman as late as December 19, 1986, but neither she nor her husband were informed of the cyst.
>
> . . . .
>
> Here, the doctor-patient relationship created a duty to disclose the adverse condition but the diagnosis was withheld from the patient. This concealment may have prevented Mangoni from learning of the existence of the cyst until after the termination of her relationship with appellees. Thus, by their silence, the defendants may have effectively concealed their own neglect of a medical condition that demanded attention.

Id. at 1287-88.

It is respectfully submitted that had the facts cited above been absent, and had the ***Mangoni*** Court simply been presented with a negligent diagnosis case, the result would have been different. The limitations period would not have been extended, and summary judgment for the medical providers would have been affirmed.

Legislative Intent and Public Policy Considerations

Further support for Respondent's position that negligent diagnosis does not constitute concealment under § 95.11(4)(b) may be found in the legislative materials housed in the Florida State Archives. These records reflect that the 1975 session of the Florida Legislature enacted the Medical Malpractice Reform Act of 1975 (which contained the repose language at issue herein) in an attempt to ensure the continued availability of medical malpractice insurance for hospitals and physicians. These materials are attached to Respondent Shutze's Answer Brief and labeled as Appendices 1A through 1F.

In March of 1975, Florida's then largest malpractice insurance carrier, Argonaut Insurance Company[1], was denied its request for an increase in its malpractice rates and threatened to discontinue providing malpractice coverage in Florida. (Appendix 1B at 1; Appendix 1C at 1). The Medical Malpractice Reform Act was an effort by the legislature to provide for continued malpractice coverage, in light of Argonaut's threat to leave the state, while also protecting medical providers from exorbitant premiums. (Appendix 1A at 1-2; Appendix 1B at 102).

[1] Argonaut insured 5,342 of Florida's 8,103 physicians in 1975. (2B at 1).

One of the concerns addressed by the legislature was the ability of medical malpractice insurance carriers to accurately predict the number of malpractice claims that would be generated during a given policy year. Without an accurate prediction of liability, insurers were obligated to increase rates in order to protect against future claims. (Appendix 1A at 5).

The legislature dealt with this problem by requiring statutes of limitations and repose so that medical malpractice actions would have to be commenced within two years of the occurrence or two years of its discovery, but no later than four years from the occurrence "unless it [could] be shown that the injury was **intentionally concealed**, in which event the period of limitations [would be] extended forward two years up to a maximum of seven years from the date of the incident which gave rise to the injuries." (Appendix 1A at 5) (emphasis added).

Without this repose period, the legislature noted that a medical malpractice action "could be brought at any time within two years of the discovery of the injury, even if that happened to be ten or twelve years after the injury was inflicted." (Appendix 1A at 5). By creating a repose period with limited exceptions for "fraud, concealment, or intentional misrepresentation," the legislature made it possible for the insurers and medical providers to more accurately predict their future liability.

Importantly, the legislature's expressed intent supports Respondent's position that the **statute of repose requires more than mere negligence** to trigger the concealment extension. Such is evidenced by the use of the terms "**intentionally concealed**" in the legislative materials themselves. (Appendix 1A at 5). Otherwise, if

mere negligence was to have been sufficient, the purpose of the statute to provide reliable predictions of prospective liability for both physicians and their insurers would have been totally nullified.

The same reasoning supports Respondent's argument that the negligent act which constitutes the medical malpractice cannot also be the act that satisfies the concealment extension for the repose period. If this statutory requirement of concealment could be satisfied by the same act that forms the basis of the malpractice action, the legislature's intention to assist insurance carriers and physicians in predicting their prospective malpractice liability would be frustrated. Simply stated, there would be nothing to distinguish a negligent diagnosis claim from a negligent diagnosis claim which was allegedly concealed from the patient, therein defeating the legislature's intent in enacting the four-year provision.

Further evidence that the legislature intended for § 95.11 (4)(b) to require more than mere negligence in order to satisfy the concealment extension to the repose period is found in the placement of the term "concealment" between the terms "fraud" and "intentional misrepresentation." This was recently explained by the 2nd DCA in ***Doe v. Hillsborough County Hospital Authority***, 816 So. 2d 262 (Fla. 2d DCA 2002), a decision which cited ***Myklejord*** as the binding law of the 5th DCA, and which is conspicuously absent from the Petitioner's analysis of the statutory construction of § 95.11(4)(b).

In ***Doe***, the 2nd DCA noted that the placement of the word concealment between the words **fraud** and **intentional misrepresentation** "suggests as a matter

of statutory construction that concealment involves some level of knowledge or intent." ***Id***. at 266 (citing to ***Cepcot Corp. v. Department of Bus. and Profl. Regulation***, 658 So. 2d 1092 (Fla. 1995) for the proposition that the court should examine other words used within a string of concepts to derive the legislature's overall intent for the statute).

In his analysis, the Petitioner ignores both the ***Doe*** decision and the historical legislative materials, and instead cites three unrelated statutes for comparison in order to shape a convoluted argument that the legislature did not intend to require that the concealment be intentional in order to extend the statute of repose. According to Petitioner's argument, because the legislature has drafted concealment exceptions in other statues of repose using modifiers such as "intentional" or "fraudulent," the absence of such modifiers in § 95.11(4)(b) evinces the legislature's design to allow unintentional or unknown conduct to qualify as a concealment for statute of repose purposes in medical malpractice cases. (I.B. 20).

The other statutes of repose cited by the Petitioner do not assist in discerning the meaning of concealment in § 95.11(4)(b). These other repose provisions are not only inapplicable to the instant case, but are entirely irrelevant to the process of statutory construction and discovering the legislative intent behind § 95.11(4)(b). Fortunately, as explained above, this Court has the benefit of the historical materials which speak to the legislative intent behind § 95.11(4)(b), an intent that mandates that this Court construe the term concealment as requiring an intentional act in order to further the purpose behind the Medical Malpractice Reform Act of 1975.

This Court must also consider that **if the Petitioner's position were to be adopted, the four year statute of repose in all medical negligence cases arising from an alleged failure to diagnose would be abolished**. Specifically, if the mere failure to make a diagnosis were to be construed as "fraud, concealment, or intentional misrepresentation of fact," then the statute of repose for all such cases would be seven years.

The legislature certainly never intended such a result when it enacted § 95.11(4)(b). If the legislature had intended to separate a certain class of medical malpractice cases; i.e., those predicated upon a negligent failure to diagnose and apply a longer statute of repose for all cases in that class, it could and would have enacted a specific statute to effect that result. As the 5th DCA noted in ***Myklejord***, there would be "**no rational basis** for **making negligent diagnosis subject** to a **seven year repose** period where **other acts of simple negligence are governed by a four year period**." ***Myklejord***, 766 So. 2d at 1162. (emphasis added).

Petitioner argues that construing Ms. Lannon's alleged negligent interpretation of the pap smear as concealment for the purpose of extending the statute of repose would not create a rule of law extending the repose period in all negligent diagnosis cases, and refers to the Respondent's argument is this regard as "hyperbole." Petitioner reasons that in many cases, the negligent diagnosis would be obvious from a continuation or worsening of the patient's symptoms which would place the patient on notice of the negligently misdiagnosed condition sooner than seven years. (I.B. 23)

Petitioner's reasoning is specious as the issue of what constitutes concealment has nothing to do with a patient's ability to discover his or her injury or the presence of medical negligence by other means. Whether the particular conduct of a medical provider is deemed "concealment" is unrelated to when the patient might discover or otherwise be put on notice of the injury or medical negligence. The fact that in some negligent diagnosis cases, the injury may be discovered within the four year period is of no relevance to the issue of whether the medical provider has concealed something from the patient, and certainly does justify extending the statute of repose.

As with all statutes of repose, application of the repose period contained in § 95.11(4)(b) may potentially result in harsh outcomes. However, this possibility does not justify abolishing the four year statute of repose in failure to diagnose cases by judicial fiat. Moreover, Florida Courts have applied the statute of repose in medical malpractice cases despite its having the effect of extinguishing a cause of action **before that cause of action has even accrued**.

Such an outcome has been repeatedly upheld as constitutional. ***See, e.g. Damiano v. McDaniel***, 689 So. 2d 1059 (Fla. 1997), ***Kush v. Lloyd***, 616 So. 2d 415 (Fla. 1992), and ***Karr v. Broward County***, 541 So. 2d 92 (Fla. 1989). In doing so, the Florida Supreme Court has steadfastly recognized that the legislature intended a reasonable end point to a medical provider's exposure to litigation. As explained by this Court in ***Kush***:

> 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 initiated**. In creating a statute of repose which was longer

> than the 2 year statute of limitations, the Legislature attempted to balance the rights of the injured persons against the exposure of health care providers to liability for endless periods of time. Once we determined that the statute was constitutional, our review of its merits was complete. **This Court is not authorized to second guess the Legislature's judgment.**

Id. at 421-22. (emphasis supplied).

Petitioner's Concealment Argument
Is Not Applicable to this Respondent

Regardless of whether this Court determines that Ms. Lannon's alleged misinterpretation of the pap smear slide qualifies as concealment for purposes of extending the statute of repose, this Court must still recognize that Petitioner's argument in favor of extending the statute of repose does not apply to Respondent, William H. Shutze, M.D. Under Petitioner's theory, the alleged concealment - cytotechnologist Lannon's misinterpretation of the pap smear slide - would only serve to extend the statute of repose for Petitioner's claims against Premiere Medical Laboratories (the employer of Ms. Lannon, the cytotechnologist) and SmithKline Beecham Laboratories.

Under no circumstances would Ms. Lannon's alleged concealment extend the statute of repose for Petitioner's claim against Dr. Shutze in his individual capacity. It is **undisputed** that at the time of the alleged pap smear interpretation, Dr. Shutze was on **medical leave of absence out of the state**. (R. 7-1446). There is no evidence in the record below to establish any action on the part of Dr. Shutze that could possibly

be construed as concealment for purposes of extending the statute of repose in the claim against him in his individual capacity.

In order for Petitioner's concealment argument to apply to Dr. Shutze in his individual capacity several non-sensical assumptions would have to be made. These assumptions demonstrate the absurdity of trying to apply Petitioner's concealment argument to Respondent, Dr. Shutze.

First, it would have to be assumed that Mrs. Nehme's pap smear slide, which was interpreted as normal by cytotechnologist Lannon at the time of the primary screening, **should** have been brought to Dr. Shutze's attention. It is **undisputed** that it is accepted pathology laboratory procedure and within the standard of care to have initial pap smear screening performed by cytotechnologists such as Ms. Lannon. (R. 9-1936-37). Likewise, it is accepted procedure and within the standard of care that when a cytotechnologist interprets a pap smear slide as "normal", that slide is **not** required to be automatically re-screened by a pathologist. (R. 9-1936-37).

Under the standard of care it is **undisputed** that the only time a pap smear slide initially interpreted as "normal" would be subject to review by a pathologist is if that slide were among the 10% **randomly** chosen for re-screening for quality assurance purposes. (R. 9-1936-27). There has been **no criticism** of Dr. Shutze or Premier Medical Laboratories for **following these procedures**. In fact, these are the **exact same procedures followed by** the laboratory which employed the **Petitioner's pathology expert**. (R. 6-1250, 1350-51).

Under the circumstances, there is simply no evidence that Dr. Shutze, or any other supervising pathologist, should have read the subject pap smear slide. Since the pap smear slide was interpreted as normal at the time of the original screening, and since it was not among the 10% of slides randomly selected for re-screening, there would simply have been no opportunity for that particular slide to have been brought to Dr. Shutze's attention. Dr. Shutze would have had no opportunity to even know of the existence of the slide, much less Ms. Lannon's alleged misinterpretation. It is therefore **ludicrous** to suggest **that Dr. Shutze could have concealed any fact** from Ms. Nehme as he neither knew nor could possibly have known of the alleged misdiagnosis or even the existence of the pap smear slide itself.

More striking still, not only is there a total lack of evidence that the subject pap smear slide should have been brought to Dr. Shutze's attention, there is no evidence it **could** have been brought to Dr. Shutze's attention. As indicated above, on the date that Mrs. Nehme's pap smear slide was allegedly misinterpreted by cytotechnologist Lannon, and at all material times in this lawsuit, **Dr. Shutze was out of state being treated for his own personal medical condition.** As a result, Dr. Shutze did not and could not have had any active role or involvement in the interpretation of the subject pap smear slide or the supervision of cytotechnologist Lannon. It is **impossible**, therefore, **to construe any conduct on his part as concealment** for purposes of extending the statute of repose for the claim against him.

Respondent Shutze's position is unique in this regard. Unlike Respondents Premiere and Smithkline, Dr. Shutze in his individual capacity is not vicariously

responsible for Ms. Lannon's alleged misread of the pap smear slide. Moreover, even under the most liberal construction of the term concealment, there is simply no evidence or reasonable inference to support the notion that Dr. Shutze ever concealed anything. Therefore, regardless of how this Court ultimately rules upon the question presented, Dr. Shutze must be exonerated and summary judgment in his favor must be upheld.

The Concealment Exception to the Four Year Statute of Repose Does Not Apply as the Alleged Concealment did not Prevent Discovery of the Injury within the Four-Year Repose Period.

Although not specifically raised below, this Court need not even reach the question presented - whether a mere negligent diagnosis may serve as a concealment sufficient to extend the repose period under § 95.11(4)(b) - as the alleged concealment did not prevent the Petitioner from discovering the alleged misdiagnosis within the four year repose period.

In order to trigger the concealment exception and extend the statute of repose from four to seven years, it must be shown that the concealment "prevented the discovery of the injury **within the 4-year period** . . ." ***See*** § 95.11(4)(b), ***Fla. Stat.***, (1993). Interestingly, Petitioner has **incorrectly** cited the version of § 95.11(4)(b) as amended in 1996 which does not contain the requirement that the concealment must prevent discovery of the injury within the four year period in order for the extension to take place.

However, the **1996 amendment** is, by its own terms, not retroactive, and therefore, **not applicable to the subject case**. **See** Ch. 96-167, § 2, Laws of Florida,

which provides in pertinent part that "[t]his act shall take effect July 1, 1996 and **shall not apply to causes of action** arising from acts, events, or occurrences that take place **before that date**." (emphasis supplied). Accordingly, in order for this Court to even consider application of the concealment exception, Petitioner is **required** to demonstrate that the alleged concealment **actually prevented discovery of the injury** within the four year repose period.

In the case at bar, it is undisputed that Mr. and Mrs. Nehme knew of the injury; i.e., Mrs. Nehme's cervical cancer, within the four year repose period. Specifically, Mrs. Nehme was **diagnosed with cervical cancer** on **February 21, 1997**. (R. 3-616-617). Mrs. Nehme **died** as a result of cervical cancer on **December 9, 1997**. (R. 3-616-617). The four year **statute of repose** did not expire until **June 3, 1998**.

Respondent acknowledges that the "discovery of the injury" language referred to in § 95.11(4)(b) has been interpreted by this Court to mean "not only knowledge of the injury, but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice." ***See Tanner v. Hartog***, 618 So. 2d 177, 181 (Fla. 1993). However, an examination of the record below demonstrates that **Mr. Nehme** was **aware** of both the injury **and** the reasonable possibility that the injury had been caused by medical malpractice within the four year repose period.

According to his deposition testimony, Mr. Nehme believed that there had been something "wrong" with his wife's medical care when he was told that her cancer had progressed from stage one to stage three or four early on during her treatment (R. 2-434-435). Mr. Nehme was "very concerned" and believed that a **"doctor or**

somebody did something wrong." (R. 2-434-435). Mr. Nehme stated that he thought something had gone wrong with his wife's medical care, and that he had **come to this conclusion some time between January and April of 1997**, which was more than **one year before** the **expiration of the four year statute of repose**.

Mr. Nehme's testimony reveals that he was on notice not only of his wife's injury, but also of the reasonable possibility that her injury had been caused by medical malpractice more than one year prior to the expiration of the repose period. Under the facts of the subject case, this Court should find that the concealment exception to the repose period could not have been triggered as the alleged concealment did not prevent discovery of the injury or the reasonable possibility that it had been caused by medical malpractice within the four year repose period. As such, this Court should simply decline to exercise its discretion because it is not necessary to answer the question presented - whether concealment encompasses negligent diagnosis - as the concealment exception is not triggered under the facts of this case.

CONCLUSION

WHEREFORE, for the reasons set forth above, it is respectfully requested that this Court rule in accordance with the 5th DCA's decision in ***Myklejord v. Morris***, and the expressed legislative purpose behind § 95.11(4)(b) and uphold the 5th District Court of Appeal's affirmance of the trial court's final summary judgment in favor of all Respondents.

Even if this Court were inclined not to follow ***Myklejord***, and were to find that Ms. Lannon's alleged misinterpretation of the pap smear slide constituted concealment,

this so called concealment would only extend the statute of repose to seven years for Petitioner's claim against Premiere Medical Laboratories and Smithkline Beecham Clinical Laboratories. It is **uncontroverted** that there is no evidence in the record below to establish **any** action that could **possibly** be attributable to Dr. Shutze that would amount to concealment **on his part** for purposes of extending the statute of repose as to the claim against him.

Additionally, this Court need not even determine the issue of whether a negligent diagnosis constitutes concealment sufficient to extend the repose period as the alleged **concealment did not prevent Petitioner from discovering** the alleged **misdiagnosis** within the four-year repose period. An examination of the record below demonstrates that **Mr. Nehme was aware** of **both** the **injury "and"** the reasonable **possibility** that the **injury** had been **caused by medical malpractice** more than one year before the expiration of the four-year statute of repose.

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