IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC02-1680

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

Petitioner,

-vs-

SMITHKLINE BEECHAM CLINICAL
LABORATORIES, INC., etc., et al.,

Respondents.
_____/

BRIEF OF PETITIONER ON THE MERITS

On Appeal from the Fifth District Court of Appeal of the State of Florida

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
P.O. Drawer 3626
West Palm Beach, FL 33402
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
1615 Forum Place, Ste. 3A
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Petitioner

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PREFACE

This appeal is before the Court on the certification of a question of great public importance by the Fifth District Court of Appeal. The parties will be referred to by their proper names or as they appeared in the trial court. The following designation will be used:

(R) - Record-on-Appeal

STATEMENT OF THE CASE AND FACTS

The parties have been essentially in agreement regarding the facts relevant to the Motions for Summary Judgment which presented the issue now on appeal. Plaintiff's decedent, Rhonda Nehme, had a pap smear taken by a physician at the Volusia County Women's Health Department on May 23, 1994 (R3-615-60, Tab 1). There is evidence that Rhonda Nehme was a "high risk" for cervical cancer based on numerous factors including, inter alia, low socioeconomic background, numerous prior pregnancies, tobacco smoking, prior history of venereal disease, and early sexual activity (R6-1333-34; R9-1854-55). Nehme's pap smear slide was delivered to Smithkline Beecham Clinical Laboratories, Inc. (hereafter "Smithkline"), which subsequently referred it to Premier Medical Laboratories, P.A. f/k/a Drs. Shutze & Techman, P.A., f/k/a Drs. Shutze & Rendon, P.A. (hereafter "Premier") (R3-616). Vincenta Lannon, a licensed cytotechnologist and an employee of Premier, reviewed the slide and prepared a report of her findings on June 3, 1994 (R3-616-60, Tab 1).

Lannon's report characterized Nehme's pap smear results as follows: "General category: Normal Smear. Narrative description: Within normal limits" (R3-616-60, Tab 1). However, the Plaintiff has elicited testimony from Dr. Dorothy Rosenthal, Director of the Division of Cytopathology in the Department of Pathology at Johns Hopkins University, that Lannon obviously misread Nehme's pap smear slide. In fact,

Dr. Rosenthal testified that Lannon's interpretation was "egregious" and that the cytopathological evidence of malignancy was "big as a house" (R6-1289-90, 1321-22).

As a result of Lannon's interpretation of the pap smear slide as "normal," it was never viewed by any other cytologist or pathologist (R9-1929-30). The Defendants had a procedure for rescreening, whereby 10% of the pap smear slides designated as "normal" were reviewed by either a supervising cytologist or pathologist (R9-1929-30). Rhonda Nehme's slide was not part of the 10% that was rescreened (R9-1931). Thus, Rhonda Nehme's slide was viewed by only one cytotechnologist and the only information conveyed to her or her treating physician was that the pap smear slide was "normal" (R3-616-60, Tab 1).

On February 21, 1997, Rhonda Nehme was diagnosed with cervical cancer, and she died as a result of that condition on December 9, 1997 (R3-616-17). Both Dr. Barter and Dr. Rosenthal testified that if Rhonda Nehme's cervical cancer had been diagnosed at the time of the 1994 pap smear, she would have had a very high probability of cure, i.e., between 75% and 100% (R6-1312; R9-1898).

On January 27, 1999, Rhonda Nehme's estate filed a Petition for 90 day Extension of the Statute of Limitations (T2108), and subsequently the requisite notice of intent to initiate litigation and this litigation followed.

Procedural History

On September 7, 1999, Naji Nehme, as Personal Representative of the Estate of Rhonda Nehme, filed a wrongful death/medical malpractice complaint against the Defendants, Smithkline, Dr. William Shutze, and Premier (R1-1-13).[1] The Plaintiff sought recovery on behalf of the Estate, himself (as surviving husband), and their six minor children (R1-1-13). None of those Defendants filed motions to dismiss; each filed an answer denying the material allegations of the complaint and raising various affirmative defenses (R1-14-19, 26-28, 99-101). While Defendants Premier and Dr. Shutze unilaterally alleged the statute of repose as an affirmative defense, SBCL did not (R3-621, n.1). Plaintiff filed a reply to each of the Defendants' affirmative defenses and plead, as an avoidance of the statute of repose defense raised by Premier and Dr. Shutze, that the Defendants had engaged in concealment of their negligence sufficient to avoid that affirmative defense (R1-29-31, 118-21).

The Defendants filed Motions for Summary Judgment on the basis of the statute of repose applicable to medical malpractice actions, §95.11(4)(b), Fla. Stat.

[1]/Vincenta Lannon was also named as a Defendant, however, she was dismissed based on the trial court's determination that she had not been served with the requisite presuit notice of intent (R1-151-52). Therefore, she is not a party to this appeal.

(R3-496-567, 615-60; R9-1928-62).[2] The Plaintiff filed a response to those motions (R9-1911-27), arguing, inter alia, that there was a question of fact with respect to the concealment issue, and that Smithkline had waived the statute of repose by failing to allege it as an affirmative defense (R9-1911-27). Smithkline then filed a Motion to Amend Answer to allege the statute of repose defense (R9-1974-83).

A hearing was held on March 13, 2001, at which the statute of repose issues were argued (R10-2103-43). The Defendants argued that the court was bound by the Fifth District's recent decision in MYKLEJORD v. MORRIS, 766 So.2d 1160 (Fla. 5th DCA 2000), rev. den., 789 So.2d 347 (Fla. 2001). The Plaintiff responded that that case was not binding authority because it consisted of an aggregation of separate opinions by the three district judges, i.e., there was no concurrence in a single rationale for the result. At the conclusion of the hearing, the trial judge ruled that he would follow MYKLEJORD, supra, and that it was not necessary for Smithkline to have plead the statute of repose as an affirmative defense (R10-2140-42). An order consistent with that ruling was entered, and a Final Summary Judgment followed (R10-2098-99, 2144-46).

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[2]/The record contains four Motions for Summary Judgment filed by Smithkline (R3-615-60, 667-71, 673-77; R9-1968-73).

Plaintiff appealed the decision to the Fifth District, which issued an opinion affirming the trial court, but certifying a question to this Court as one of great public importance. The Fifth District agreed that the MYKLEJORD decision was not binding precedent, and noted that both Judge Pleus' opinion and Judge Daukst's dissenting opinion found support from language in NARDONE v. REYNOLDS, 333 So.2d 25, 39 (Fla. 1976). However, the court decided to rule "in accordance with" MYKLEJORD, thereby affirming the summary judgments for the Defendants.[3] Based on its recognition that language in NARDONE can be read to support a conclusion either way, the court certified to this Court the following question:

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

SUMMARY OF ARGUMENT

The Fifth District's decision should be reversed, because it fails to consider the plain language of the statute which provides that the repose period is to be tolled where

[3]/The Fifth District also rejected Plaintiff's argument that Defendant SmithKline waived the defense of statute of repose because it did not timely allege it as an affirmative defense. The Fifth District found there was no abuse of discretion in the trial court's ruling that SmithKline timely asserted the defense, and the Plaintiff is not seeking review of that aspect of the Fifth District's decision.

concealment prevented the discovery of the injury by the Plaintiff, §95.11(4)(b), Fla. Stat. Unlike in other limitations statutes, the legislature did not provide that the "concealment" must be intentional and, therefore, there is no reason to construe the statute as requiring an element of scienter. In other statutes of limitations and repose, the legislature has explicitly stated when it required fraudulent concealment or "affirmative steps to conceal" to be required in order to toll the statutory period. The legislature did not do that here, and the plain language of the statute only requires "concealment."

Construing §95.11(4)(b), Fla. Stat., accordingly is consistent with the policy behind the fraudulent concealment doctrine. That is, its purpose is to prevent a defendant from benefitting from his or her own wrongful conduct. Affirming the Fifth District would create that result here. Additionally, contrary to Defendants' contention, this does not mean that the statute of repose would be eliminated in all cases of negligent diagnosis. This situation is significantly different, because there was absolutely no means from which the Plaintiff's decedent could have learned, through the aggravation or continuation of symptoms or by other information in her medical records, that the pap smear slide was erroneously examined. There is no equitable basis to cut off the Plaintiff's cause of action under these facts, and the statutory language clearly does not compel that result. Therefore, the Fifth District should be

reversed and the cause remanded with directions to have the trial court set aside the summary judgments in favor of the Defendants.

QUESTION PRESENTED

THE FIFTH DISTRICT ERRED IN AFFIRMING THE SUMMARY JUDGMENT ENTERED BY THE TRIAL COURT BASED ON THE STATUTE OF REPOSE WHEN THERE WAS EVIDENCE SUPPORTING THE PLAINTIFF'S ASSERTION OF CONCEALMENT BY THE DEFENDANTS.

ARGUMENT

The Fifth District upheld the trial court's grant of summary judgment in favor of the Defendants on the basis that the Plaintiff's claim was barred by the statute of repose contained in §95.11(4)(b), Fla. Stat. While acknowledging that MYKLEJORD, supra, was not binding precedent, since it did not contain a majority rationale for the decision, the Fifth District affirmed "in accordance with MYKLEJORD." The Fifth District did not express a particular rationale for its decision, but presumably was following Judge Pleus' opinion in MYKLEJORD. For the reasons stated below, however, the Fifth District erred and its decision should be reversed.

Fraudulent Concealment - The Common Law

The doctrine of fraudulent concealment was originally addressed by this Court in PROCTOR v. SCHOMBERG, 63 So.2d 68 (Fla. 1953). In that case, a dentist removed an impacted wisdom tooth from the plaintiff's mouth, but allegedly left a piece of broken metal instrument or other foreign object in the area of the bone where the tooth had been removed. The plaintiff brought suit, however, the trial court dismissed the complaint, concluding that it affirmatively demonstrated the expiration of the statute of limitations. This Court reversed that ruling on the basis that the statute of limitations is an affirmative defense that had to be raised by the defendant and that, if that had occurred, the plaintiff would be permitted to file additional pleadings addressing that defense.

After concluding that reversal was appropriate, this Court stated in PROCTOR that it was going to address the second question presented on the appeal, which was whether fraudulent concealment of an injury would postpone the commencement of the limitations period until discovery (or reasonable opportunity of discovery) by the plaintiff. While this Court noted that its discussion of fraudulent concealment was dicta, the decision has subsequently been relied upon extensively and has been described as the adoption of the doctrine of fraudulent concealment in Florida, see BERISFORD v. JACK ECKERD CORP., 667 So.2d 809, 811 (Fla. 4th DCA 1995).

In PROCTOR, this Court analyzed the factual allegations as follows (63 So.2d at 71):

> The dentist necessarily handled the instruments in extracting the tooth and in cleaning them, examining them, or taking them apart after such extraction. He was the only one in position to know what had been done.
>
> After the extraction, the appellant continued to suffer pain in the region where the tooth had been extracted. She went back to her dentist where X-Rays were made and at that time he was in a better position than anyone else to determine the condition of the cavity and whether or not he had left some foreign substance in it. He did not advise her of any foreign substance in the cavity.

This Court concluded in PROCTOR that the plaintiff could plead fraudulent concealment in response to the defendant's assertion of the statute of limitations defense, and that the trial court would need to determine the sufficiency of such a pleading. In order to provide guidance to the trial court, this Court quoted extensively from American Jurisprudence on the doctrine of fraudulent concealment, including, inter alia (63 So.2d at 71-72):

> [U]nder this rule, one who wrongfully conceals material facts and thereby prevents discovery of his wrong or the fact that a cause of action has accrued against him is not permitted to assert the statute of limitations as a bar to an action against him, thus taking advantage of his own wrong, until the expiration of the full statutory period from the time when the facts were discovered or should, with reasonable diligence, have been discovered.

* * *

> The reasoning adopted in support of this view is that to hold that the statute of limitations ran against a person who had concealed the cause of action under such circumstances would be to permit the defendant to take advantage of his own wrong, and to sustain a defense of which in good conscience he ought not to be permitted to avail himself.

This Court again discussed the common law doctrine of fraudulent concealment in the context of medical malpractice in NARDONE v. REYNOLDS, supra. It should be emphasized, however, that both PROCTOR and NARDONE were decided at a time when the legislature had not specifically addressed the issue of fraudulent concealment with respect to the limitation of actions involving medical malpractice. The statutory language contained in §95.11(4)(b), Fla. Stat., which applies in the case sub judice, was not enacted until 1975, see Ch. 75-9, §7, Laws of Florida. While NARDONE was decided in 1976, it involved a complaint that had been filed in 1971 and, thus, the current version of the statute was not applicable there, nor was it mentioned in that opinion.[4] Therefore, the discussion in NARDONE regarding the

[4]/In footnote one in NARDONE, this Court noted amendments to §95.11, Fla. Stat., which were enacted in 1971 and 1974, and specifically noted that they were not material to the case before it, 333 So.2d at 32, n.1.

statute of repose must be construed as a discussion of the common law doctrine, and not a specific construction of the current statute.

In NARDONE, this Court answered various questions certified by the Fifth District Court of Appeals, and with respect to fraudulent concealment stated (333 So.2d at 39):

> After careful analysis of the variant views of other jurisdictions in this country and previous views espoused by this Court and other Florida Appellate Courts, we hold that, although generally the fraud must be of such a nature as 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 a duty to disclose; but, this is a duty to disclose known facts and not conjecture and speculation as to possibilities. The necessary predicate of this duty is knowledge of the fact of the wrong done to the patient. Cf. Kauchick, supra. 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. [Emphasis supplied.]

As noted in the Fifth District's opinion, the two lines of reasoning reflected in the MYKLEJORD decision (i.e., Judge Pleus' and Judge Dauksch's opinions), construing §95.11(4)(b), Fla. Stat., are distinguished by whether they rely on the "active concealment" aspect of that quotation from NARDONE or the language that the condition must be known or "readily available...through efficient diagnosis." The

latter consideration receives additional emphasis in the penultimate paragraph of the NARDONE opinion, where this Court stated (333 So.2d at 40):

> 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 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. [Emphasis supplied.]

The Applicable Statute

The applicable statute in this case is §95.11(4)(b), Fla. Stat., which provides a two year statute of limitations for medical malpractice actions and a four year statute of repose, measured from the date of the incident or occurrence out of which the cause of action accrued. However, that statute includes a provision which incorporates a fraudulent concealment exception, §95.11(4)(b), Fla. Stat.:

> 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 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.]

It is important to emphasize that the legislature specifically separated the term "fraud" from "concealment" in that provision and included them in the disjunctive.

In HERNANDEZ v. AMISUB, INC., 714 So.2d 539 (Fla. 3d DCA 1998), the court explicitly concluded that the use of the term "concealment" in §95.11(4)(b), Fla. Stat., meant that the statute did not require a showing of scienter for the tolling period to be applicable. The court in HERNANDEZ quoted from Webster's New Collegiate Dictionary to the effect that one definition for "conceal" was "to hide or withdraw from observation," which the court noted did not include a scienter element, HERNANDEZ, supra, 714 So.2d at 541, n.1.

In HERNANDEZ, the medical negligence alleged was that the defendants had left a laparotomy pad inside the plaintiff's abdomen following surgery. The policy of the hospital required a "pad count," but that count did not reveal any discrepancy in the number of pads used in the surgery and those remaining thereafter. However, the Third District determined that there was evidence the hospital's employees failed to properly conduct the pad count, yet falsely reported that it had been properly conducted. The court ruled that conduct was either careless or reckless, and thereby sufficient to constitute concealment for purposes of §95.11(4)(b), Fla. Stat..

The same rationale was adopted by the Fourth District in MANGONI v. TEMKIN, 679 So.2d 1286 (Fla. 4th DCA 1996). There, the defendant physicians were

aware of the existence of a "cystic structure" in plaintiff's brain being revealed in a CT scan, but made only one unsuccessful attempt to notify the plaintiff. The trial court granted summary judgment in favor of the defendants based on the statute of repose. The trial judge rejected the plaintiff's fraudulent concealment argument on the basis that the defendant's failure to disclose must be separate from the defendant's negligence in order to extend the statute of repose. The Fourth District reversed, stating that there was no basis on which to conclude that §95.11(4)(b), Fla. Stat. requires that the negligence alleged and the concealment be separate acts, as the Defendants contend in the case sub judice. The court stated (679 So.2d at 1288):

> 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. Therefore, the entry of summary judgment was error.

The Fourth District relied on NARDONE, and characterized its holding as not requiring active concealment (Ibid):

> In *Nardone*, the claimed negligence was a certain diagnostic procedure that allegedly caused injury to the child, and the fraudulent concealment was the physician's failure to disclose to the parents of the child that the procedure had taken place. *Id*. at 28, 35. The court found that the doctor-

> patient relationship required the disclosure of the possible causes for the baby's condition and held that the physician's silence amounted to concealment, even though there was no active misrepresentation.

That conclusion is consistent with the policy underlying the fraudulent concealment doctrine. The tolling of the limitations or repose period is not intended to punish a defendant for intentional misconduct such as fraud, but to prevent the Defendant from benefitting from his or her own misconduct, see PROCTOR, supra.

The rationale of AMISUB and MANGONI is in direct conflict with Judge Pleus' opinion in MYKLEJORD. Judge Pleus states that the term "concealment," "requires fraud, intent to conceal or some other active element," citing NARDONE, supra, and ALMENGOR v. DADE COUNTY, 359 So.2d 892 (Fla. 3d DCA 1978). However, as noted in the Fifth District's decision below, there is also support in NARDONE for the proposition that no element of scienter is required in order to demonstrate fraudulent concealment. More importantly, NARDONE did not attempt to construe the statutory language at issue in the case sub judice, since §95.11(4)(b), Fla. Stat., did not apply in that case.

Additionally, ALMENGOR does not support the conclusion that "concealment" requires an active element, since it specifically notes that the tolling applies if the medical defendant knew or should have known through efficient diagnosis, of facts

relating to the nature and/or cause of the plaintiff's adverse physical condition, 359 So.2d at 894.

In ALMENGOR, supra, the court reversed a summary judgment entered in favor of the defendants in a case arising out of the delivery and care of a newborn who suffered brain damage. The court stated (359 So.2d at 895):

> [T]here is a genuine issue of fact as to whether the doctors as employees of the defendant hospital who delivered plaintiff's baby actually knew, or should have known through efficient diagnosis, of a physical injury to the baby inflicted during birth but failed to so inform the plaintiff which thereby kept the plaintiff in ignorance thereof. If true, such non-disclosure resulting in successful concealment would also toll the running of the statute of limitations. [Emphasis supplied.]

Thus, ALMENGOR supports the conclusion that the concealment required to toll the limitations or repose period under §95.11(4)(b) did not have to be intentional, because it could arise from the physician's failure to disclose something that he or she did not actually know, but should have known through efficient diagnosis.

Similarly, in ALLEN v. ORLANDO REGIONAL MEDICAL CENTER, 606 So.2d 665 (Fla. 5th DCA 1992), appr'd, 620 So.2d 993 (Fla. 1993), the Fifth District reversed a summary judgment in favor of the defendants based on the statute of limitations, finding that the record presented two genuine issues of material fact. The first factual issue was whether the plaintiff knew or should have known on the date of

her child's birth that his injuries may have been caused by a negligent act of the defendants. The second issue related to fraudulent concealment, and was described as follows (606 So.2d at 669):

> [W]hether appellees knew, or should have known through efficient diagnosis, of physical injuries to Gregory inflicted after birth, but failed to inform Sandra Allen, and thereby kept her in ignorance. [Emphasis supplied.]

Statutory Construction

Respectfully, Judge Pleus was in error in MYKLEJORD in concluding that the concealment required by §95.11(4)(b), Fla. Sta., requires an active element, since the term "fraud" is stated disjunctively, as is the term "intentional misrepresentation of fact." The legislature clearly knows how to express a scienter requirement in the context of the fraudulent concealment doctrine. For example, in both §400.0236(3) and §400.4296(3), Fla. Stat., the legislature provided:

> In actions where it can be shown that fraudulent concealment or intentional misrepresentation of fact prevented the discovery of the injury, the period of limitations is extended forward two years from the time that the injury is discovered with the exercise of due diligence, but in no event more than four years from the effective date of this section. [Emphasis supplied.]

Similarly, in §95.031(2)(d), Fla. Stat., the legislature provided for the tolling of a repose period in products liability actions as follows:

> The repose period prescribed within paragraph (b) is tolled for any period during which the manufacturer through its officers, directors, partners, or managing agents had actual knowledge that the product was defective in the manner alleged by the claimant and took affirmative steps to conceal the defect. Any claim of concealment under this section shall be made with specificity and must be based upon substantial factual and legal support. Maintaining the confidentiality of trade secrets does not constitute concealment under this section. [Emphasis supplied.]

Thus, if the legislature had intended to require that a party had to show intentional or fraudulent concealment as a prerequisite to tolling of the statute of repose in §95.11(4)(b), Fla. Stat., it clearly knew how to do so.

Legislative intent is determined primarily from the plain language of the statute, HAWKINS v. FORD MOTOR CO., 748 So.2d 993 (Fla. 1999). The term "concealment" is not inherently ambiguous; its meaning is easily ascertainable from the dictionary, see HERNANDEZ v. AMISUB, supra, 714 So.2d at 541, n.1.[5]

Even assuming arguendo any doubt regarding the legislature's use of the term "concealment," one way to resolve it is to examine the use of that term in other

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[5]/Reference to a dictionary to ascertain plain and ordinary meaning of statutory term is appropriate, L.B. v. STATE, 700 So.2d 370 (Fla. 1997).

contexts, HANKEY v. YARIAN, 755 So.2d 93 (Fla. 2000). As noted previously, when the legislature has intended to require the term "concealment" to be construed as limited to intentional conduct, it has known how to express that, see §95.031(2)(d), Fla. Stat.; §400.0236(3), Fla. Stat.; §400.4296(3), Fla. Stat. This Court has stated that it is inappropriate to add words to statutes in the process of construing them, ARMSTRONG v. CITY OF EDGEWATER, 157 So.2d 422 (Fla. 1963). Additionally, when the legislature has used a term in one section of a statute, but omits it in another section, the court should not imply that term where it has been excluded, see LEISURE RESORTS, INC. v. FRANK J. ROONEY, INC., 654 So.2d 911 (Fla. 1995). Although §95.031, Fla. Stat., is separate from §95.11, Fla. Stat., they are clearly related statutes and, thus, support the conclusion that this Court should not add language to §95.11(4)(b), Fla. Stat., to require the term "concealment" to include a scienter element.

Policy Considerations

While the public policy considerations underlying statutes of repose and their exceptions are, of course, primarily for the legislature to determine, see KUSH v. LLOYD, 616 So.2d 415, 419-20 (Fla. 1992), an analysis of relevant policy considerations also supports Plaintiff's position. The purpose of the tolling of a

statute of repose (or limitation) as a result of a defendant's concealment is to prevent a defendant from taking advantage of his or her own wrongful conduct, see PROCTOR, supra. Since NARDONE and HERNANDEZ, supra, both recognized that neither scienter nor intentional fraud is required for purposes of the tolling provision, clearly it is not merely intentional conduct that the exception is intended to address.

There is obviously an equitable basis for that reasoning, especially in this case. Here, no one has ever suggested how the decedent could have learned of the negligent reading of her pap smear slide, until the symptoms of cancer were manifested and accurately diagnosed (at which time, in this case, it was too late to save her life). While statutes of repose can constitutionally extinguish a cause of action before the plaintiff is aware of it, that does not mean they have to do so, nor that they must be construed in order to achieve that result. It would appear that the language of §95.11(4)(b), Fla. Stat., was expressly designed to prevent that result in an appropriate case. None of the Defendants suggest an equitable basis for the holding they seek, instead they simply rely on the principle that the legislature is entitled to enact statutes of repose, and that those provisions often engender harsh results. However, given the precise language of §95.11(4)(b), Fla. Stat., that argument should not prevail here.

Defendants have also contended that to reverse the summary judgment would require abolishing the statute of repose for all negligent diagnosis cases. That is hyperbole. In many cases, negligent diagnosis would be manifest by a continuation or worsening of symptoms, or other evidence in the medical record for which the patient is deemed to be on notice, see NARDONE, supra. The aspect of this case which is different is that all the patient received was a report of the reading of a slide as "normal," with nothing else to trigger further evaluation or knowledge of her condition. Under these circumstances, the false reading of that slide and the evidence of a failure by the Defendants to become aware of what was apparent from an efficient diagnosis creates an issue of fact regarding the tolling of the statute of repose. However, clearly that does not mean that every negligent diagnosis case would require that result. Therefore, that argument of the Defendants is unpersuasive.

CONCLUSION

For the reasons stated above, the Fifth District should be reversed and the cause remanded with directions to have the trial court set aside the summary judgments in favor of the Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to all counsel on the attached service list, by mail, on December 27, 2002.

Earl Denney, Esq.
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
P.O. Drawer 3626
West Palm Beach, FL 33402
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
1615 Forum Place, Ste. 3A
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Petitioner

By:_____
PHILIP M. BURLINGTON
Florida Bar No. 285862

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CERTIFICATE OF TYPE SIZE & STYLE

Appellants hereby certify that the type size and style of the Brief of Petitioner on the Merits is Times New Roman 14pt.

_____

PHILIP M. BURLINGTON
Florida Bar No. 285862