

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.

REPLY BRIEF OF PETITIONER ON THE MERITS

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

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii-iii
PREFACE	1
ARGUMENT	2-13
<u>QUESTION PRESENTED</u>	2-13
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.	
CONCLUSION	13
CERTIFICATE OF SERVICE	14
CERTIFICATE OF TYPE SIZE & STYLE	15

TABLE OF AUTHORITIES

	<u>PAGE</u>
ALLEN v. ORLANDO REGIONAL MEDICAL CENTER 606 So.2d 665 (Fla. 5 th DCA 1992) <u>appr'd</u> , 620 So.2d 993 (Fla. 1993)	11
ALMENGOR v. DADE COUNTY 359 So.2d 892 (Fla. 3d DCA 1978)	11
DOE v. HILLSBOROUGH COUNTY HOSPITAL AUTHORITY 816 So.2d 262 (Fla. 2d DCA 2002)	7, 8
FARANCZ v. ST. MARY'S HOSPITAL, INC. 585 So.2d 1151 (Fla. 4 th DCA 1991)	7
FIRST HEALTHCARE CORP. v. HAMILTON 740 So.2d 1189 (Fla. 4 th DCA 1999)	9
HERNANDEZ v. AMISUB, INC. 714 So.2d 539 (Fla. 3d DCA 1998)	4
NARDONE v. REYNOLDS 333 So.2d 25 (Fla. 1976)	8-10, 12
PROCTOR v. SCHOMBERG 63 So.2d 68 (Fla. 1953)	9, 10
SEAGRAVE v. STATE 802 So.2d 281 (Fla. 2001)	9
SHURGARD INCOME PROPERTIES FUND 16 v. MUNS 761 So.2d 340 (Fla. 4 th DCA 1999)	7
STATE v. ASHLEY 701 So.2d 338 (Fla. 1997)	10

TANNER v. HARTOG 618 So.2d 177 (Fla. 1993)	3
TGI FRIDAYS, INC. v. DVORAK 663 So.2d 606 (Fla. 1995)	6
WILLIAMS v. JONES 326 So.2d 425 (Fla. 1975)	9
§400.0236(3), Fla. Stat.	6
§400.4296(3), Fla. Stat.	6
§768.20, Fla. Stat.	3
§768.79, Fla. Stat.	6
§95.031(2)(d), Fla. Stat.	6, 7
§95.11(4)(b), Fla. Stat.	2, 4, 6, 7, 9, 10, 12

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 designations will be used:

(R) - Record-on-Appeal

(SmithKline AB) - Answer Brief of Appellee SmithKline

(Shutze AB) - Answer Brief of Appellee Schultze

(Premiere AB) - Answer Brief of Premiere Medical

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

Respondents contend that the 1993 version of §95.11(4)(b), Fla. Stat., applies in this case, not the 1996 version, a position that SmithKline acknowledges was not specifically argued in either the trial court or the district court (SmithKline AB10,n.3). The only difference is that the 1993 version contains the additional language “within the four year period” as follows, i.e., that tolling occurs when “fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the four year period [Emphasis supplied].” Respectfully, that should not change the result or the analysis here.

The Respondents argue that certain testimony of Mr. Nehme regarding his concerns when his wife was diagnosed with cancer, and his later contact with an attorney, would preclude the tolling of the limitations period. To support summary judgment there would have to be no genuine issue of material fact that Petitioner had

knowledge of her injury and the reasonable possibility that the injury was caused by medical malpractice, within the four year period, see TANNER v. HARTOG, 618 So.2d 177 (Fla. 1993). None of the Respondents made this argument to the Fifth District, and Mr. Nehme's testimony in his deposition (R2-434-36), is certainly not specific enough to satisfy it, especially since it makes no reference to his wife's knowledge, who was the patient and on whose behalf this action is brought. Mr. Nehme brought this action as personal representative of her estate, not in his individual capacity, as required by the Wrongful Death Act, §768.20, Fla. Stat. There is no evidence regarding what Mrs. Nehme was aware during the relevant time, and even assuming arguendo that Mr. Nehme's knowledge is imputed to her, it does not establish the requisite facts to the degree necessary to justify a summary judgment.¹

Defendant Premiere claims that (Premiere AB5), "The Estate has identified no fact or circumstances not known or available before June 3, 1998, but which came to

¹/Respondent, Dr. Shutze, also makes a factual argument that he is entitled to summary judgment, because he was on medical leave out of the state during the relevant time period. This, of course, was not relevant to the basis on which the trial court granted summary judgment, which was solely on the Respondents' affirmative defenses of statute of limitations. Dr. Shutze's role in Premiere Laboratories, P.A., which was formerly known as "Dr. Shutze and Techman, P.A." and formerly known as "Dr. Shutze and Rendon, P.A.," is beyond the scope of the affirmative defense and the certified question. Therefore, it is respectfully submitted that that factual issue which involves essentially a denial of any duty on his part to the Petitioner, is not properly addressed in the context of this appeal.

light after that date, that brought to light the reasonable possibility that the decedent's injury was caused by medical malpractice." Respectfully, that contention ignores the fact that the laboratory report at issue states only "normal smear...within normal limits," and that that was the only information conveyed to the decedent or her treating physician (R3-616-60, Tab 1). As stated in the Initial Brief, and not disputed by any Defendant, the actual slides were not provided to the Petitioner or her treating physician and, thus, were not part of her accessible medical records. Thus, the information on those slides was "concealed" as that term is defined in Webster's New Collegiate Dictionary, to mean "to hide or withdraw from observation," see HERNANDEZ v. AMISUB, INC., 714 So.2d 539 (Fla. 3d DCA 1998). As noted in the Initial Brief, Petitioner presented expert testimony that contrary to the report of the lab, the cytopathological evidence of malignancy on the slides was "big as a house" (R6-1289-90, 1321-22). Thus, a genuine issue of material fact exists with regard to whether Petitioner's suit is barred by §95.11(4)(b), Fla. Stat.

In an argument not previously made in this case, Premiere states that the term "concealment" is "unquestionably ambiguous," thereby permitting consideration of the legislative history (Premiere AB11). However, the legislative history submitted by Premiere and Shutze provides essentially no guidance on this issue.

Premiere Appendix 2A, which is the only document upon which Dr. Shutze and Premiere rely, has no heading and does not identify either its author or its date. The Respondents refer to it only as an “archival document,” since it has been retained in the Florida State Archives. They provide no further description, so presumably they do not know its actual origin either. The document describes itself as an “article” (Premiere Appendix 2A p.3), which is not an appropriate description of a document intending to reflect legislative intent. Moreover, it is not even a final draft, as evidenced by handwritten changes made on pages 3 and 7. Respectfully, simply because a draft of a document is contained in the state archives, that does not justify considering it as evidence of legislative intent.

Of the other five documents submitted as legislative history, three of them simply recite the statutory language without explanation (Premiere Appendix 2B p.5; 2D p.23; 2F p.2); and two, make no mention of the language at issue in this case (Premiere Appendix 2C, 2E). Respectfully, the one “archival document” of unknown origin and authority is simply an inadequate basis on which to base any conclusion regarding legislative intent.

In his Initial Brief, Petitioner cited three statutes in which the legislature specifically provided that the tolling of a limitations or repose period would require “fraudulent concealment” or “affirmative steps to conceal,” see §400.0236(3), Fla.

Stat.; §400.4296(3), Fla. Stat.; and §95.031(2)(d), Fla. Stat. Premiere dismisses the relevance of those statutes, stating that they are not helpful in determining the meaning of the language at issue, since “they only suggest what the legislature did not do in 1975; not what it did” (Premiere AB15). Petitioner would agree, and that logic supports his position, since what the legislature did not do in 1975 was require that the concealment had to be intentional in order to toll the repose period under §95.11(4)(b), Fla. Stat., as it did with those other statutes.

Premiere claims that the reference to the different “concealment” language in those other contexts “is a far cry from the traditional manner by which courts construe statutes...” (Premiere AB15). Respectfully, that is not true. Florida courts have often construed statutes by comparing them to other provisions which demonstrate that the legislature understands a distinction, and knows how to express it. For example, in *TGI FRIDAYS, INC. v. DVORAK*, 663 So.2d 606 (Fla. 1995), this Court ruled that the reasonableness of a party’s rejection of an offer pursuant to §768.79, Fla. Stat., is irrelevant to the question of entitlement to an award of attorney’s fees under that statute. This Court stated (663 So.2d at 613):

It is also clear that the legislature understands how to write a reasonable test requirement because such a requirement is included in section 45.061. It chose not to include such a provision in section 768.79.

See also, FARANCZ v. ST. MARY’S HOSPITAL, INC., 585 So.2d 1151 (Fla. 4th DCA 1991) (court finds no tolling in statute at issue, citing language of a different statute which demonstrates that the legislature knew how to draft explicit tolling provision); SHURGARD INCOME PROPERTIES FUND 16 v. MUNS, 761 So.2d 340 (Fla. 4th DCA 1999) (court found no cause of action created by statute, noting other statutes demonstrating that legislature knew how to draft a provision creating cause of action). This analysis is especially persuasive here since, in 1974, the year before the statute at issue was drafted, the legislature drafted §95.031(2)(d), Fla. Stat., which included a repose period for products liability cases, and specifically required “affirmative steps to conceal the defect” in order to toll the repose period. Thus, contrary to Premiere’s argument, logic and precedent supports Petitioner’s position that if the legislature intended to require intentional concealment in order to toll the repose period, it could, and would, have said so explicitly.

The Respondents rely on dicta in DOE v. HILLSBOROUGH COUNTY HOSPITAL AUTHORITY, 816 So.2d 262, 266 (Fla. 2d DCA 2002), in which the court refers to the doctrine of noscitur a sociis as supporting the conclusion that, as a matter of statutory construction, the term “concealment” in §95.11(4)(b), Fla. Stat., should involve “some level of knowledge or intent.” While the noscitur a sociis doctrine can be helpful in certain situations, it is respectfully submitted, that it is not

persuasively applied here where the terms at issue involve legal concepts, and the legislature has specifically chosen language different from what it has used in similar contexts, as discussed above.

Moreover, the dicta in DOE that “some level of knowledge or intent” was intended by the legislature’s use of the term “concealment” is not inconsistent with the argument herein that constructive knowledge, i.e., what the defendant should have known in the exercise of reasonable care, is sufficient. That is also consistent with the discussion of this concept in the context of the common law doctrine in, NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976), discussed infra.

In its brief, SmithKline asks the rhetorical question “how can a party ‘conceal’ a condition it allegedly failed to diagnose in the first place?” (SmithKline AB11). The answer is contained in the language of NARDONE, supra, where this Court stated (333 So.2d at 39, 40):

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.

* * *

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.]

As noted in the Initial Brief, NARDONE did not address the specific statutory language at issue. However, its analysis is clearly relevant to the construction of §95.11(4)(b), Fla. Stat., as the result of two well-established principles of statutory construction. The first is that the legislature is presumed to know the existing law, including case law regarding a subject upon which it enacts a statute, WILLIAMS v. JONES, 326 So.2d 425, 434 (Fla. 1975); SEAGRAVE v. STATE, 802 So.2d 281 (Fla. 2001). The common law doctrine of fraudulent concealment discussed in NARDONE had been a part of Florida law long before the enactment of §95.11(4)(b), Fla. Stat., in 1975, see PROCTOR v. SCHOMBERG, 63 So.2d 68 (Fla. 1953).

Additionally, the law is well settled that unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the law, FIRST HEALTHCARE CORP. v. HAMILTON, 740 So.2d 1189, 1196 (Fla. 4th DCA 1999), citing STATE v. ASHLEY, 701 So.2d 338, 341 (Fla. 1997). Thus, the legislature must be presumed to have known the doctrine of fraudulent concealment at the time it enacted

§95.11(4)(b), Fla. Stat., and the case law interpreting it, such as PROCTOR v. SCHOMBERG, supra. Therefore, the statute should not be construed in a manner inconsistent with the cases interpreting that common law doctrine, since the statute does not unequivocally state that it alters the common law, nor is it repugnant to it.

SmithKline claims that NARDONE does not apply to it, because it involved a physician who owed a duty to disclose “known causes” to a patient, a duty arising from the confidential fiduciary relationship between them. SmithKline argues that a laboratory does not owe the same duty, however, it cites no authority supporting that proposition. Respectfully, it defies common sense to say that a medical laboratory analyzing tissue samples from a patient does not have a confidential fiduciary relationship with that patient and a duty to disclose relevant information regarding the patient’s condition which is solely within its possession.

Dr. Shutze emphasizes that NARDONE addressed disclosure of “causes” and argues that there is no contention that the Respondents failed to disclose a “cause” in the case sub judice. However, the statute at issue addresses concealment or intentional misrepresentation “of fact,” not a “cause.” Therefore, that argument should not be persuasive in this case.

The Respondents contend that ALLEN v. ORLANDO REGIONAL MEDICAL CENTER, 606 So.2d 665 (Fla. 5th DCA 1992), appr’d, 620 So.2d 993 (Fla. 1993),

involved a situation where the defendant had actual knowledge of information which it failed to disclose, but ignores that court's framing of the issue 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.]

Similarly, in *ALMENGOR v. DADE COUNTY*, 359 So.2d 892, 895 (Fla. 3d DCA 1978), while the court found evidence of active concealment, it stated that the statute of limitations would also be tolled by the failure to reveal facts "known to, or available to such physician by efficient diagnosis, relating to the nature and/or cause of the plaintiff's adverse physical condition."

Respondents argue that if this Court rules in Petitioner's favor, it would eliminate the statute of repose in all cases involving a failure to diagnose. As discussed in the Initial Brief, that is not true. The circumstances which give rise to the concealment in this case are very limited, as it involves a situation in which the only information provided to the decedent or her treating physician by these Respondents was a report stating that a laboratory test was "normal." However, the empirical data upon which that report was based was withheld by the laboratory. Additionally, these types of laboratory tests are normally not taken as a result of particular symptoms, but

rather as a precautionary measure and, thus, the patient is usually not otherwise investigating the potential of a harmful diagnosis or injury. Under such circumstances, it is not unreasonable for a plaintiff to be entirely unaware of her injury and the reasonable possibility of malpractice in the laboratory analysis until years after, when harsh consequences ensue. While the Respondents note that statutes of limitations and repose necessarily cause harsh results in some cases, that does not mean that such statutes should be necessarily construed in a harsh manner.

It is clear from this Court's discussion of the issue in NARDONE that the term "concealment" as used in the common law doctrine was broad enough to encompass negligent diagnosis under certain circumstances. The Fifth District's certified question with respect to §95.11(4)(b), Fla. Sta., should be answered in a manner consistent with NARDONE. The certified question does not ask this Court whether negligent diagnosis automatically constitutes concealment for purposes of that statute and, thus, the broad ruling feared by the Respondents should not result from this Court's decision.

CONCLUSION

Therefore, for the reasons stated above, the certified question should be answered affirmatively, and the decision of 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 Respondents.

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.

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CERTIFICATE OF TYPE SIZE & STYLE

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

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