IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-829

D.H. and L.H., minor children, by and through their next friends and permanent guardians, RICHARD HARKINS and SUELLEN HARKINS,

Petitioner,

vs.

ADEPT COMMUNITY SERVICES, INC. and B.E.A.R.R., INC.,

Respondent.

DCA CASE NO. 2D15-677
L.T. Case No. 10-16698 CI-21

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

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PRELIMINARY STATEMENT

This appeal is brought by D.H. and L.H. (hereinafter collectively referred to as "the Twins"), minor children, by and through their next friends and permanent guardians, RICHARD HARKINS and SUELLEN HARKINS (hereinafter collectively referred to as "the Grandparents"), which arises from the Second District's affirmance of the trial court's order granting summary judgment in favor of B.E.A.R.R., Inc. (hereinafter "BEARR") and ADEPT COMMUNITY SERVICES, INC. (hereinafter "Adept"), based on expiration of the applicable four-year statute of limitations on negligence actions. Citations to the Second District's opinion in this matter will be by reference to the page numbers as they appear in the Appendix filed by the Twins.

INTRODUCTION AND JURISDICTIONAL STATEMENT

The supreme court may exercise discretionary jurisdiction to review decisions of district courts of appeal, which "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, Section 3(b)(3), Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(iv).

A conflict warranting supreme court jurisdiction pursuant to Art. V, Section 3(b)(3), Fla. Const., results when two or more district courts of appeal reach

opposite results on controlling facts, which are virtually identical. *Crossley v. State*, 596 So.2d 447, 449 (Fla. 1992) (citing *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla.1960)). The district court decision must "actually 'expressly and directly [conflict] with the decision of another court.'" *State v. Vickery*, 961 So.2d 309, 312 (Fla.2007) (quoting Art. V, § 3(b)(3), Fla. Const.).

In the instant matter, there is no actual direct or express conflict with any other district court of appeal opinion listed by the Petitioner. Here, the issue on appeal was whether the trial court properly granted final summary judgment in favor of Respondent based on expiration of the statute of limitations when the cause of action accrued outside the limitations period and when there was no applicable tolling provision.

Notably, the controlling facts of the underlying matter do not include allegations of sexual abuse as do each of the alleged "conflict" cases cited by the Twins. *See Doe No. 3 v. Nur-UI-Islam Academy, Inc.*, 2017 WL 1076928 (Fla. 4th DCA 2017); *S.A.P. v. State, Dept. of Health and Rehabilitative Services*, 704 So.2d 583, 584 (Fla. 5th DCA 1997); and *Drake v. Island Community Church, Inc.*, 462 So.2d 1142 (Fla. 3d DCA 1984).

As this Court held in *Davis v. Monahan*, 832 So.2d 708 (Fla.2002), the application of the delayed discovery doctrine in *Hearndon* only applies to cases of childhood sexual abuse and should not be read to extend beyond that set of facts.

Davis v. Monahan, 832 So.2d 708, 712 (Fla.2002) (discussing *Hearndon v. Graham*, 767 So.2d 1179 (Fla.2000)).

STATEMENT OF THE CASE AND FACTS

A. COURSE OF PROCEEDINGS

The Grandparents filed the Twins' Complaint in November 2010, asserting solely claims for negligence against BEARR, Adept, and another entity which is no longer involved in this matter. On January 6, 2015, the trial court entered an order granting summary judgment in favor of BEARR and Adept after reconsideration of their Motion for Summary Judgment based on expiration of the statute of limitations.

The Twins appealed and the parties presented oral arguments before the Second District on April 5, 2016. One year later, on April 5, 2017, the Second District affirmed the trial court's order granting summary judgment in favor of BEARR and Adept, holding there was no genuine issue of material fact the Twins' claims accrued more than four years before they filed suit, and there was no applicable tolling provision to prevent expiration of the statute of limitations.

The court found unconvincing the Twins' assertion their cause of action for negligence could not have accrued until March 15, 2007. The record evidence shows the cause of action accrued *at the latest* by May 19, 2006, and whether the Grandparents "knew or should have known" of the viability of the cause of action

was irrelevant to the issue of accrual. Based on this Court's decision in *Davis v. Monahan*, the Second District held the "knew or should know" accrual rule "is an expression of the delayed discovery doctrine, which is inapplicable to the facts in this case. Because the cause of action accrued at the latest in May 2006 and suit was filed more than four years later in November 2010, and no tolling mechanism interrupted the running of time, the Twins' claim was barred by the statute of limitations.

B. FACTS

Before the Twins' were born, their mother, a mentally disabled woman, contracted with Adept for services to aide in supporting herself in her daily life. (R. 2263, 2301). Adept then arranged for BEARR to provide the mother with a life coach. (R. 2299, 2301). BEARR was owned and operated by a husband and wife, Fay and Robert Calhoun, to provide services, such as live-in aides and life-coaching services, to mentally disabled individuals through Medicaid waivers.

The mother became pregnant with the Twins, who were born in September 2005. About seven months later, on April 11, 2006, the Twins were removed from their mother and sheltered due to allegations the mother was unable to care for herself and her children. (R. 2142). On that date, the mother terminated her professional relationship with BEARR. (R. 2142). At that time, BEARR no longer

provided any services to the mother and never had any further relationship or contact with the Twins.

Less than one month after their removal, the Twins were adjudicated dependent and placed with the Grandparents, RICHARD and SUELLEN HARKINS. (R. 2152-60). On May 19, 2006, the Florida Department of Children and Families ("DCF") produced behavioral health assessments on each of the Twins, which noted developmental delays and anxiety problems. (R. 2407-2445). The grandfather, RICHARD HARKINS, testified under oath he knew of the twins' injuries at that time and attributed those injuries to BEARR and Adept. (R. 2348). In fact, RICHARD HARKINS testified he knew of alleged injuries for which he faulted BEARR as early as November 2005. (R. 2331-33, 2318-19).

Four years *and seven months* after the cause of action accrued, the Grandparents commenced a negligence lawsuit, alleging BEARR and Adept failed to care for the Twins, which resulted in physical and psychological damages.

SUMMARY OF ARGUMENT

The trial court properly granted, and the Second District correctly affirmed, summary final judgment in favor of BEARR and Adept when it ruled the Twins' claims were barred by expiration of the four-year statute of limitations because the Twins had access to the courts through their next friends, the Grandparents, at all times. Although the Appellants argue there are disputed issues of fact as to when

exactly the Appellants knew or should have known of the alleged injuries, these disputes are not genuine, not material, and not relevant to the issues of accrual or tolling in the facts of the instant matter.

Even if knowledge were a prerequisite to accrual or necessary for tolling in this case, the Grandparents each admitted under oath they knew of the Twins' alleged injuries, for which they faulted BEARR, at the time they gained custody of the Twins more than four years prior to filing suit. When even the slightest of damages occurred, the Twins' cause of action accrued and the statute of limitations began to run.

There also is no tolling mechanism available to interrupt the running of the limitations period in this case; equitable estoppel and the delayed discovery doctrine also do not apply to this set of circumstances. Equitable estoppel and delayed discovery operate to prevent the running of a statute of limitations when the defendant is in some way responsible for the plaintiff's failure to discover the injury and/or the plaintiff's failure to pursue legal action.

Because the Twins' cause of action accrued more than four years before they filed suit and nothing acted to interrupt or otherwise halt the running of the limitations period, the statute of limitations expired prior to the Twins commencing suit. Additionally, the Twins had their Grandparents who, as next friends, could have brought a claim on behalf of the Twins at any time. The Grandparents did not

need to obtain permanent legal guardian status to assert legal claims for the Twins. The Twins always had access to the courts, and their claims are time-barred by uninterrupted running of the four-year statute of limitations.

STANDARD OF REVIEW

The standard of review on an order of summary judgment posing a pure question of law is de novo. *Limones v. School Dist. Of Lee County*, 161 So.3d 384 (Fla.2015); *see also Major League Baseball v. Morsani*, 790 So.2d 1071, 1074 (Fla. 2001); *and Clay Elec. Coop., Inc. v. Johnson*, 873 So.2d 1182, 1185 (Fla.2003).

The trial court properly granted—and the Second District correctly affirmed—summary judgment in favor of BEARR and Adept in the underlying negligence action. There was no *genuine* issue of material fact; as a matter of law, the four-year statute of limitations expired prior to the Twins commencing suit. Based on the facts in this case, there is no legal mechanism, statutory or otherwise, available to toll the statute of limitations. At the latest, the Grandparents were aware by May 19, 2006—by their own admissions under oath—of the occurrence of alleged damages, which is last element in a cause of action for negligence. More than four years later, the Twins filed suit on November 17, 2010. As a matter of law, the Twins' cause of action is time-barred.

ARGUMENT

Section I of the Twins' Initial Brief discussed the doctrine of equitable estoppel as well as the delayed discovery doctrine. Because Section III of the Twins' Initial Brief addresses solely the delayed discovery doctrine, any response to, or discuss of, the Twins' arguments on that issue will be addressed only in Section III herein rather than in both Sections.

I. The trial court properly granted summary judgment on the twins negligence claim based on expiration of the statute of limitations because the minors' claims accrued more than four years before commencing suit.

The Second District correctly affirmed the trial court's order granting summary judgment in favor BEARR and Adept because the Twins' claims for negligence were time-barred by expiration of the statute of limitations. (A. 2). There were no genuine issues of material fact that the Twins' claims accrued more than four years prior to commencing suit, and the period of limitations was not tolled pursuant to § 95.051(1)(h). (A. 2).

Whether a cause of action is barred by the statute of limitations involves an analysis of two separate issues: (1) when the cause of action accrued, and (2) whether the limitations period was tolled. *Hearndon v. Graham*, 767 So.2d 1179, 1184-85 (Fla. 2000); *see also* (A. 6). "[A]ccrual pertains to the existence of a cause of action." *Hearndon v. Graham*, 767 So.2d 1179, 1185 (Fla.2000). A cause of action consists of elements, which must occur or exist for a cause of action to

become viable, *i.e.* to accrue. For example, a cause of action for negligence consists of four elements: duty, breach, causation, and damages. *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla.1992). When a cause of action is said to have "accrued," each of its elements have been satisfied. Only after all elements have occurred can a plaintiff file a valid lawsuit.

When the final element occurs, a plaintiff then has a period of time within which to file a lawsuit based on that cause of action. *See* § 95.031, Fla. Stat. (1987); *see also Hearndon*, 767 So.2d at 1184-85 (citing *State Farm*, 678 So.2d at 821 (Fla.1996) (holding, "a cause of action cannot be said to have accrued, within the meaning of the statute of limitations, until an action may be brought.")). The Legislature has provided these specific time periods—called "statutes of limitations"—for various causes of action, including negligence. *See*, *e.g.*, § 95.11, Fla. Stat. As set forth by the Legislature, for a cause of action based on negligence, a plaintiff has four years to commence suit from when the last element—damages—occurs. *See* § 95.11, Fla. Stat.

Time Limitations—§ 95.11(3)(a), Fla. Stat.

The applicable statute of limitations in the present matter, § 95.11(3)(a), Fla. Stat., states an action founded on negligence "shall be commenced" within four years. While the statute provides for the length of the limitation period, it does not provide *when* the limitations period is to begin. Because the plain language of the

statute of limitations does not require discovery as a prerequisite for accrual, the burden is on the plaintiff to show such a requirement should be read into the statute. *Houston v. Florida–Georgia Television Co.*, 192 So.2d 540 (Fla. 1st DCA 1966).

In *Houston*, a minor child and her mother as next friend and natural guardian brought an action for invasion of privacy more than four years after occurrence of the facts giving rise to the cause of action. *Id.* at 541. Pursuant to § 95.11(4), Fla. Stat. (1959), an action for invasion of privacy had a four-year statute of limitations period. *Id.* at 542. The defendant argued the action was time-barred while the plaintiffs argued the cause of action accrued at the time they discovered the invasion, which was less than four years before suit was filed. *Id.* The trial court dismissed the plaintiff's action, and the First District affirmed. *Id.* at 541.

The First District noted the statute provided the limitations period but made no reference to the time when the limitations period begins to run on such a claim. *Id.* The court found subsection (5)(d) of the statute (1959 version) provided an action founded on fraud does not accrue until the aggrieved party discovers the facts constituting the fraud. *Id.* The court found the Legislature delineated a time for accrual for fraud likely because fraud typically involves concealment, and it would be unjust to allow the limitations period to run while the fraud was concealed from the injured party. *Id.*

Because the Legislature specifically set forth a discovery provision for the accrual of fraud but not for invasion of privacy, the court held the burden was on the plaintiffs to show such a provision should be read into the statute of limitations for an invasion of privacy. *Id.* The plaintiffs, however, could not show concealment of any of the defendant's actions giving rise to the claim and cited no authority for reading additional requirements into the statute. *Id.* at 543. With no controlling precedent at the time, the First District turned to this Court's general rule set forth in *Franklin Life Ins. Co. v. Tharpe*, 131 Fla. 213, 179 So. 406 (1938). In *Franklin*, this Court cited 37 Corpus Juris, Limitations of Actions, page 969, par. 350:

> 'Ignorance and Concealment of Causes of Action—a. Ignorance in General. Omitting at this place any consideration of the effect of a mistake, trust relations in general, or laches, and except where there has been secret fraud or fraudulent concealment on the part of the defendant, the rule is generally established that mere ignorance of the facts which constitute the cause of action will not postpone the operation of the statute of limitations, but the statutes will run from the time the cause of action first accrues notwithstanding such ignorance. The reason of the rule seems to be that in such cases ignorance is the result of want of diligence and the party cannot thus take advantage of his own fault.'

See also 21 Fla.Jur., Limitations of Actions, Section 37, pages 194 and 195. Stated more plainly, absent fraud or concealment, a party's ignorance of the facts supporting his cause of action does not postpone the running of the statute of limitations. The First District held the plain language of § 95.11(4) did not require

discovery as a prerequisite for accrual, and if the Legislature had so desired such a requirement, they easily could have written it in as they did for actions founded in fraud. *Id.* at 543.

Here, just as in *Houston*, § 95.11(3)(a) provides for the length of the limitations period for an action founded on negligence but does not set forth when the limitations period begins to run. The *Houston* opinion was issued in 1966, which predated the enactment of § 95.031, Fla. Stat., titled "Computation of Time." According to § 95.031, "the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues," and "[a] cause of action accrues when the last element constituting the cause of action occurs."

Neither § 95.11(3)(a) nor § 95.031 provides a "knowledge" or "discovery" requirement before accrual and the running of the statute of limitation. However, the Legislature specifically provided for a discovery requirement in subsection (4)(b) of § 95.11, which involves medical malpractice claims, including those involving fraud and/or concealment. There, the Legislature also expressly provided the limitations period for medical malpractice "shall not bar an action brought on behalf of a minor on or before the child's eighth birthday." *See* § 95.11(4)(b), Fla. Stat. The Legislature further provided an extension of two years when a medical malpractice claim involves fraud, concealment, or intentional misrepresentation,

and could not exceed seven years from the date of the incident. *See* § 95.11(4)(b), Fla. Stat. Again, the Legislature expressly stated the seven-year period "shall not bar an action brought on behalf of a minor on or before the child's eighth birthday." *See* § 95.11(4)(b), Fla. Stat.

Clearly, if the Legislature had desired discovery or knowledge to be a prerequisite for accrual of a negligence action, the Legislature easily could have written it in as they did for medical malpractice actions. The Legislature also easily could have provided an exception for a minor's claim founded on negligence, but the Legislature did not do so.

Similarly, for computation of time in § 95.031, Fla. Stat., the Legislature plainly stated a statute of limitations begins to run when a cause of action accrues, and an action accrues when the last element constituting the action occurs. In the very next subsection, (2), the Legislature provided the limitations periods for actions founded on fraud and products liability begin when the cause of action is "discovered or should have been discovered with the exercise of due diligence." *See* § 95.031(2)(a)-(b), Fla. Stat.

Had the Legislature desired for the discovery of a cause of action for negligence, the Legislature easily could have written in such a provision. Here, like the plaintiffs in *Houston*, the Twins have the burden to show such a requirement should be read into the statute. The Twins have not provided any basis for altering

or adding to what the Legislature intended in either §§ 95.11(3)(a) or 95.031, Fla. Stat.

Berger v. Jackson – accrual issue

The crux of the Twins' argument in Section I of their Initial Brief is that a cause of action cannot accrue until a person capable of bringing the cause of action exists. In support of this assertion, the Twins cite to this Court's decision in *Berger v. Jackson*, 23 So.2d 265 (Fla.1945).

In *Berger*, the plaintiff claimed the decedent agreed to pay a sum of money to the plaintiff upon the decedent's death. *Id.* After her death on December 16, 1938, multiple wills were located and filed with the probate court. *Id.* The validity of each will was "hotly and vigorously" contested for several years. *Id.* at 266. While the wills were being contested, a curator was appointed to perform administration duties until a personal representative could be appointed at the resolution of the wills' validity. *Id.*

When the plaintiff attempted to recover on his claim against the estate, the administrator argued the plaintiff's cause of action was time-barred pursuant to section 186 of the Probate Act of 1933, which extinguished claims against unadministered estates after three years from the decedent's death. *Id.* This Court disagreed, finding this limitation was not applicable because it applied only to *unadministered* estates. *Id.* at 268-69. An unadministered estate is one "where *no*

steps have been taken with reference to the administration of an estate." *Id.* at 269. [Emphasis in original]. For the estate in *Berger*, however, steps toward administration were taken beginning only a few days after the decedent's death. *Id.* Because the estate was not "unadministered," the three-year rule did not apply. *Id.* Instead, the plaintiff had eight months from the date of the first notice of publication to creditors pursuant to section 272 of the Probate Act. *Id.* at 268.

The *Berger* opinion has been interpreted far more broadly than it appears it was intended. In the opinion, this Court held that *within the meaning of the Probate Act*, an action against an estate could not accrue until an estate administrator existed. *Id.* at 269. The three-year limitation in the Probate Act pertained to extinguishment of the cause of action itself—not of the time period during which a claimant could assert his or her rights. *Id.*

A creditor had eight months within which to file a claim, the running of which would begin at the time the notice of publication was filed. *Id.* at 268. A creditor could not file a claim unless the notice was filed, and a notice could only be filed by an administrator. *Id.* Stated differently, a creditor's cause of action accrued when an estate administrator filed a notice. *Id.* The existence of an administrator, then, was an *element* of a creditor's cause of action.

The *Berger* case established only that the Probate Act of 1933 required the existence of an estate administrator before such estate would become liable for

claims against it. Reliance upon *Berger* for any position outside an analysis of the Probate Act of 1933 reaches beyond what this Court apparently intended in its decision.

Equitable Estoppel

The Twins also assert the doctrine of equitable estoppel should apply in this matter. Equitable estoppel is a "seasoned common law doctrine," which primarily exists to prevent a party from profiting from his or her own wrongdoing. *Florida Dep't of Health & Rehab. Servs. v. S.A.P*, 835 So.2d 1091, 1101 (Fla.2002); *see also Rubio v. Archdiocese of Miami, Inc.*, 114 So.3d 279, 281 (Fla. 3d DCA 2013). This doctrine "is based on principles of fair play and essential justice and arises when one party lulls another into a disadvantageous legal position." *SAP*, 835 So.2d at 1096-97 (citing *State ex rel. Watson v. Gray*, 48 So.2d 84, 87–88 (Fla.1950) (quoting *3 Pomeroy's Equity Jurisprudence* § 804 (5th ed.1941); and *Major League Baseball v. Morsani*, 790 So.2d 1071, 1076 (Fla.2001).

Equitable estoppel is not trumped by a statute of limitations; instead, "[t]he two concepts, *i.e.* the statute of limitations and equitable estoppel, thus work hand in hand to achieve a common goal, the prevention of injustice." *Morsani*, 790 So.2d at 1078. To assert a valid claim to equitable estoppel, a plaintiff must show the defendant's willful words, actions, or conduct must have caused the plaintiff to believe in a certain state of the circumstances, thereby convincing the plaintiff to

act on this belief to the detriment of his or her legal rights. *SAP*, 835 So.2d at 1096-97 (citing *State ex rel. Watson v. Gray*, 48 So.2d 84, 87–88 (Fla.1950) (quoting *3 Pomeroy's Equity Jurisprudence* § 804 (5th ed.1941); *and Major League Baseball*, 790 So.2d at 1076; *see also John Doe No. 23 v. Archdiocese of Miami, Inc.*, 965 So.2d 1186, 1187 (Fla. 4th DCA 2007); *and Major League Baseball v. Morsani,* 790 So.2d 1071, 1079 (Fla.2001).

Where a defendant is willfully and directly responsible for a plaintiff's delay in filing suit, equitable estoppel may defeat a statute of limitations defense. *SAP*, 835 So.2d at 1094. In *SAP*, a minor was severely abused in 1979 at the age of four while she was in foster care supervised by a state department. *Id.* at 1093. At the time of the abuse, the department was the only legal entity in a position to assert and protect the minor's legal rights. *Id.* at 1099. When the department discovered the abuse, it allegedly falsified and altered government reports and obstructed a law enforcement investigation to conceal its wrongdoing. *Id.*

The minor did not actively remember the abuse because of her young age and was unaware of it until the department released an internal investigation report in 1992, more than ten years after the abuse occurred. *Id.* Three years later, the minor had reached the age of majority and filed suit against the department for negligence. *Id.* at 1094. Because the minor was unaware of her abuse and because the department actively attempted to conceal the existence of the abuse until

releasing the report, the plaintiff was unable to bring a lawsuit. *Id.* at 1100. This Court found the doctrine of equitable estoppel applied to prevent the department from profiting from its own wrongdoing in concealing the abuse until well after the statute of limitations expired. *Id.* at 1094.

The doctrine of equitable estoppel is not available in every instance where a defendant has willfully attempted to conceal its wrongdoings. *See Rubio*, 114 So.3d at 282. In *Rubio*, a plaintiff brought suit against an archdiocese, alleging negligence and vicarious liability regarding alleged sexual abuse by a priest, which occurred more than three decades prior to the lawsuit. *Id.* at 280. To overcome the expiration of the statute of limitations, the plaintiff argued equitable estoppel should apply because the archdiocese knew of the abuse, failed to report it to authorities, and actively attempted to conceal the abuse from the public. *Id.* at 280-81.

Though the plaintiff asserted the archdiocese took actions to conceal the plaintiff's abuse, the plaintiff failed to allege the archdiocese's actions actually caused his delay in filing suit. *Id.* at 282. The court found the plaintiff knew the abuse had occurred, knew the identity of his abuser, and knew the abuser's employer. *Id.* Distinguishing the circumstances in Rubio from those in *SAP*, *supra*, the Third DCA found that although the archdiocese worked to conceal its

wrongdoing, its willful concealment did not affect the plaintiff's delay in commencing suit as did the defendant's concealment in *SAP*.

Here, the Twins assert multiple legal mechanisms work to delay the accrual of their claims. However, none of those mechanisms apply to the facts in this case. The statute of limitations and the statute governing computation of time do not provide for a knowledge or discovery requirement before the accrual for a cause of action for ordinary negligence. If the Legislature had intended to provide such requirements, it certainly could have done so, especially when it has set forth such requirements for other causes of action.

The doctrine of equitable estoppel does not apply here because there are no allegations or evidence that BEARR's conduct lulled the Twins into inaction or caused their delay in commencing suit. The Berger case also does not act to delay accrual here because this case involves ordinary negligence, not a claim under the Probate Act of 1933. As a matter of law, the Twins' cause of action for negligence accrued when the last element constituting the cause of action occurred, which was at the very latest on April 11, 2006 when the Twins were removed from their mother's care. The Twins' suit was filed more than four years after accrual and is therefore time-barred.

II. The trial court properly granted summary judgment because the Twins had the Grandparents as next friends at all times material.

A. The Grandparents could act as next friends at any time and did not have to wait until they were appointed as the Twins' permanent guardians.

According to the Florida Rules of Civil Procedure, Rule 1.210(b), a minor cannot sue on his or her own behalf but instead must access courts through a parent, guardian, guardian ad litem, or next friend. Rule 1.210(b) states:

> When a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. **A minor or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem.** The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person.

Based on the plain language of Rule 1.210(b), a "next friend" does not have to be appointed. He or she must be an adult with reasonable judgment and integrity without adverse interests to those of the minor. *Kingsley*, 623 So.2d at 784; *Gasparro*, 245 So.2d at 905; *Gilbertson*, 743 So.2d at 127; and *N.G.*, 630 So.2d at 1165. The court in *Kingsley* described the disability of minority as a procedural issue rather than a jurisdictional one because if a minor were to bring an action in his own name, the defect could be cured by securing a guardian ad litem or a next friend. *Id.*

The Third District has held anyone aware of a child's predicament has authority under Rule 1.210, Fla.R.Civ.P., to assert the child's legal rights during the statute of limitations period. *N.G.* at 1165. In N.G., when the minor's abuser was arrested for the subject abuse, the date of the arrest was the last date the minor possibly could have been abused. Id. From that date, the minor had access to the courts at all times because a minor can bring a cause of action by next friend or by a guardian ad litem, so "[a]nyone who was aware of the plaintiff's predicament had the authority to and could assert the plaintiff's legal rights." *Id.* Because the minor in *N.G.* had access to the courts at all times during the limitations period, the statute of limitations was not tolled. *Id.*

Rule 1.210(b) was modeled from the Federal Rules of Civil Procedure, Rule 17(c); therefore, federal decisions reviewing Rule 17(c) are pertinent to an analysis of Florida Rule 1.210(b). *Smith v. Langford*, 255 So.2d 294, 297 (Fla. 1st DCA 1971). Federal courts have held where there is evidence the party in interest cannot pursue his or her own action due to minority or incompetence, a next friend may act on the minor or incompetent's behalf if the next friend is truly dedicated to the interests of the minor. *See Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000); and *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990).

Even where a natural parent's rights have not been terminated, a child's next friend still may be permitted to act on behalf of the child; a parent does not have an

absolute right to act as next friend for a child. *Gonzalez*, 212 F.3d at 1352 fn.20 (citing *Fong Sik Leung v. Dulles*, 226 F.2d 74, 82 (9th Cir.1955)). In *Gonzalez*, the 11th Circuit recognized "the best interests of even a loving parent can clash" with the interests of the child. *Id.* In such circumstances, a child does not lose his or her access to the courts due to the parent's adverse interest, but instead can act through a next friend or guardian ad litem. *Id.*

The court further acknowledged the laws of the United States tend to treat even distant familial relationships as important. *Id.* (citing, *e.g.*, Kan. Stat. Ann. § 38–1541 (permitting any person related within the fourth degree to child to move to intervene in "child in need of care" proceedings); Ala.Code § 12–16–150(4) (allowing challenge for cause where potential juror is related within ninth degree to party); O.C.G.A. § 15–12–135(a) (disqualifying persons related within the sixth degree to interested parties from jury service)).

Here, the Twins had their Grandparents as next friends at all times material. The Grandparents at all times were adults with reasonable judgment and integrity without adverse interests to those of the Twins. The Twins have not argued otherwise, and there is no record evidence indicating this to be untrue. That the Twins' and their mother were involved in a dependency case had no bearing on the Grandparents' capacity to assert the Twins' legal rights against third parties. In

support of their argument to the contrary, the Twins cite *Buckner v. Family Services of Central Florida, Inc.*, 876 So.2d 1285, 1286 (Fla. 5th DCA 2004).

Buckner involved a child's former foster parents' attempt to leverage the child to pursue the foster parents' own interests in visiting and adopting the child after their petition for same was denied. *Id.* As the Second District explained, the former foster parent in *Buckner* used the child "to facilitate litigation of [the foster parent's] private grievance," which is entirely distinct from allowing a minor's grandparent to provide the minor access to courts to litigate the minor's interest in a tort claim against a third-party.

Based on both Florida and federal case law and rules of civil procedure, the Grandparents were qualified to act as the Twins' next friends at all times material. There is no requirement that the Grandparents could not act until they were appointed permanent guardians. *See Gasparro v. Horner*, 245 So.2d 901, 905 (Fla. 4th DCA 1971). To hold otherwise would leave the Twins and other children in the dependency system without access to courts potentially for years until children either age-out of the system or until they are adopted or reunited with their parent.

B. The Grandparents were aware of the facts supporting the Twins' claim for negligence, including damages, by May 19, 2006 at the latest.

The Twins argue the Grandparents could not act as next friends because they were not aware of the Twins' alleged injuries until they were officially diagnosed

with a sensory disorder in March 2007. This assertion is contradicted by the Grandparents' own deposition testimony.

The May 2006 health assessment revealed a history of trauma and neglect, and indicated the Twins suffered from developmental delays and anxiety. (R. 2430-32, 2437, 2407-17). When the behavioral health assessment was completed on each of the Twins on May 19, 2006, RICHARD HARKINS was aware of injuries to Twins and testified he faulted "all providers" for those injuries, including BEARR. (R. 2348). Additionally, the mother admitted to the Grandparents in July 2006 that she had dropped the Twins and scalded them with hot bath water. (R. 2332-34).

The trial court granted summary judgment in favor of BEARR because the Grandparents always were available as next friends. (R. 3124). Under Rule 1.210(b), a minor may sue by parent, guardian, guardian ad litem, or by next friend. The Grandparents were at all times aware of the alleged injuries and faulted BEARR at all times. The Twins' arguments to the contrary are not supported by a plain reading of the record in this case.

C. The Grandparents were aware of the Twins' alleged damages by May 19, 2006 at the latest.

The Twins' argument the Grandparents did not know of their injuries until March 15, 2007 is disingenuous at best. Despite an attempt to characterize the

Grandparents' knowledge as mere "suspicions," such assertions are blatantly contradictory to the Grandparents' own deposition testimony. The above Section II, B, and the Facts Section detail the Grandparents' knowledge of the cause of action no later than May 19, 2006 when the behavioral health assessment was released, detailing the Twins' physical and mental issues.

As a general rule, any injury, no matter how slight, sustained as a result of a wrongful or negligent act begins the running of the statute of limitations if there is a remedy for the injury and a wrongful act under the law. *Kellermeyer v. Miller*, 427 So.2d 343, 346 (Fla. 1st DCA 1983). "It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date." *Id.*

III. The delayed discovery doctrine does not apply to the facts of this case.

Generally, a cause of action accrues when the last element of the cause of action occurs. *See* § 95.031(1), Fla. Stat.; *see also Hearndon*, 767 So.2d at 1184-85; and *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So.2d 818, 821 (Fla.1996). An exception to this general rule occurs where a defendant's actions *cause* the plaintiff's delay in discovering his or her claim. *Hearndon*, 767 So.2d at 1184-85. This exception is known as the delayed discovery doctrine. *Id.*

Under the delayed discovery doctrine, a cause of action does not accrue until the plaintiff "knows or reasonably should know of the tortious act giving rise to the cause of action." *Hearndon* 1184 (citing *Hillsborough Community Mental Health Ctr. v. Harr*, 618 So.2d 187, 189 (Fla.1993); and 35 Fla. Jur.2d Limitations and Laches § 60 (1996)). The delayed discovery doctrine applies only to the accrual of a cause of action and does not apply to tolling the running of the limitations period. *Id.* The Twins argue the delayed discovery doctrine should apply to delay the accrual of their cause of action for ordinary negligence. In support of this argument, the Twins cite primarily to three cases, including opinions from this Court and from the Fourth and Third Districts.

(1) *Hearndon*, 767 So.2d 1184

The Twins heavily rely on this Court's opinion in *Hearndon* to support their argument the delayed discovery doctrine should apply to delay the accrual of their cause of action for ordinary negligence. This reliance is misplaced. The *Hearndon* opinion expressly held the delayed discovery doctrine "is applicable to childhood sexual abuse cases." 767 So.2d at 1186. The plaintiff in *Hearndon* did not have the benefit of the 1992 enactment of the delayed discovery doctrine (§ 95.11(7), Fla. Stat. (1999)) to be applied in cases of childhood sexual abuse because the plaintiff's action preceded the effectiveness of the statute. *Id.* This Court applied the delayed discovery doctrine to the plaintiff's action for several reasons:

> First, it is widely recognized that the shock and confusion resultant from childhood molestation, often coupled with authoritative adult demands and threats for secrecy, may lead a child to deny or suppress such abuse from his or her consciousness.
>
> Second, the doctrine is well established when applied, for example, in cases involving breach of implied warranty or medical malpractice; it would seem patently unfair to deny its use to victims of a uniquely sinister form of abuse.
>
> Accordingly, application of the delayed discovery doctrine to childhood sexual abuse claims is fair given the nature of the alleged tortious conduct and its effect on victims, and is consistent with our application of the doctrine to tort cases generally; thus, we hold that the doctrine is applicable to childhood sexual abuse cases.

Id. [Internal citations omitted]. This Court's decision in *Hearndon* must be limited to the specific facts in that case—namely, the uniquely sinister circumstances of childhood sexual abuse which lead to suppression of the child's memory of the abuse all together. *Id.*; *see also Davis v. Monahan*, 832 So.2d 708, 712 (Fla. 2002).

(2) *Doe No. 3 v. Nur-Ul-Islam Academy, Inc.*, 217 So.3d 85 (Fla. 4th DCA 2017) (for clarification, the Twins' reliance on this case is discussed in Section I of their Initial Brief)

In *Nur-Ul-Islam*, the material facts involved allegations of sexual abuse of a child. There, the plaintiff alleged the defendant's actions "were specifically designed and intended to silence [her] and to prevent her from…taking legal action." 217 So.3d at 87. The court ultimately reversed the dismissal of the plaintiff's claim because the four corners of the complaint did not reveal the dates

and times necessary for a determination of whether the statute of limitations had expired. 217 So.3d at 90.

(3) *Drake v. Island Community Church, Inc.*, 462 So.2d 1142 (Fla. 3d DCA 1984) (for clarification, the Twins' reliance on this case is discussed in Section I of their Initial Brief)

In *Drake*, another case involving childhood sexual abuse, the plaintiff alleged a private church school was negligent in hiring and retaining a teacher who sexually abused the plaintiff. 462 So.2d at 1143. The plaintiff claimed the school fraudulently concealed the abuse from her parents until after the statute of limitations expired. *Id.* The court held the statute of limitations cannot run against a minor until a parent knows or should know of the invasion of the minor's legal rights. *Id.* at 1144. In support of this opinion, the court cited to *Nardone v. Reynolds*, 333 So.2d 25 (Fla.1976) (medical malpractice case); *Roberts v. Casey*, 413 So.2d 1226 (Fla. 5th DCA), rev. denied, 424 So.2d 763 (Fla.1982) (medical malpractice case); and *Almengor v. Dade County*, 359 So.2d 892 (Fla. 3d DCA 1978) (medical malpractice case).

In the present matter, the Second DCA correctly held the "knew or should know" rule for *accrual* of a negligence cause of action is an expression of the delayed discovery doctrine. (A. 8). When the Second DCA stated, "The problem with those arguments is that the premise upon which they are based has been invalidated by the supreme court," the court was referring to the counsels'

arguments imposing the premise from *Drake* and *S.A.P.* onto the facts at issue in the present case—the "premise" being the knew-or-should-know rule applies to the accrual of a cause of action. (Appendix, page 8). Notably, the court did not state the **law and opinions** in *Drake* and *S.A.P.* **themselves** were invalidated.

Here, there is no evidence or even allegation BEARR's conduct somehow led the Twins into denying or suppressing some alleged abuse from their consciousness. There also are no allegations or evidence of fraud or concealment, which lulled the Twins into inaction. Consistent with this Court's holding in *Monahan* that *Hearndon* be limited to the specific facts of that case, the Twins' claims are founded upon allegations of ordinary negligence and do not give rise to the application of the delayed discovery doctrine.

IV. The statute of limitations was not tolled at any time because the Twins had access to the courts at all times material.

While accrual pertains to the existence of a cause of action itself, after which the statute of limitations may begin, tolling pertains to an interruption of the running of the limitations period. *Hearndon*, 767 So.2d at 1185 (Fla. 2000) (citing § 95.051, Fla. Stat.); *see also Carroll v. TheStreet.com, Inc.*, No. 11-CV-81173, 2014 WL 5474061, at *5 (S.D.Fla. July 10, 2014); *and Major League Baseball v. Morsani*, 790 So.2d at 1077.

The Legislature has set forth an exclusive list of specific grounds for tolling limitations periods. *See* § 95.051, Fla. Stat. The tolling statute, which must be strictly construed, specifically precludes the application of any tolling provision not specifically provided therein. *Hearndon*, 767 So.2d at 1185 (citing *Major League Baseball*, 790 So.2d at 1077). The plain language of the tolling statute provides, in pertinent part:

> (1) The running of the time under any statute of limitations except ss. 95.281, 95.35, and 95.36 is tolled by:
> …
> (h) The minority or previously adjudicated incapacity of the person entitled to sue during any period of time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to the minor or incapacitated person, or is adjudicated to be incapacitated to sue

See § 95.051(1)(h), Fla. Stat. Based on its plain language, a minor's limitations period may be tolled by the nonexistence of: (A) a parent, (B) a guardian, or (C) a guardian ad litem whose interests are not adverse to the minor. At all times, the Twins had access to the courts through their next friends and guardians, the Grandparents, whose interests were not adverse to those of the Twins.

A. The disabled mother had interests adverse to the Twins.

The Twins argue their mother had interests adverse to those of the Twins at all times material. This particular issue is not disputed.

B. The Grandparents did not have to be appointed as the Twins' permanent guardians before filing suit on the Twins' behalf.

As this Court held in *Hearndon* and in *Major League Baseball*, the tolling statute must be strictly construed. "A basic canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' " *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). When a statute is clear, it must be given its plain and obvious meaning. *Rollins v. Pizzarelli*, 761 So.2d 294, 297 (Fla.2000).

Here, the tolling statute provides the existence of a "guardian" whose interests are not adverse to those of the minor is sufficient to defeat the tolling of the minor's cause of action due to minority. *See* § 95.051(1)(h), Fla. Stat. Notably, the statute does not state the guardian must be "permanent" or of any other specific type. If the Legislature desired *only* a "permanent guardian" to be sufficient to defeat the tolling statute, it easily could have written in such a qualifier. *See Houston*, 192 So.2d at 543.

When the Twins were removed from their mother's custody on April 11, 2006, they became the custody of the State. (R. 2142, 2147). On May 9, 2006, the Twins were adjudicated dependent and were placed in the "care, custody, and control" of the Grandparents. (R. 2156-57). Essentially, the Grandparents were guardians of the Twins. (R. 2156-57). If no guardian apart from a court-appointed

permanent guardian can access the courts on a minor's behalf, then children who spend their a large part of their lives in the dependency system may be forced to forgo certain causes of action due to statutes of repose, which limit the extension of limitations periods beyond a certain point. Had the Legislature intended such a result, surely it would have provided for it.

C. Whether the Twins' guardian ad litem had knowledge of the alleged cause of action is not relevant.

The tolling statute does not specifically set forth a requirement that a guardian ad litem have knowledge of a cause of action to implicate the tolling of a limitations period. Instead, § 95.051 simply states the existence of a guardian ad litem is sufficient to avoid tolling a minor's cause of action. As discussed in Section I, had the Legislature desired to create further barriers to avoid tolling, it easily could have written in such provisions. *See Houston*, 192 So.2d at 543. Here, the Legislature declined to do so, and the statute must be strictly construed based on its plain, unambiguous meaning.

Therefore, the Second District correctly held the guardian ad litem's knowledge, or lack thereof, is not relevant to a determination of whether the tolling statute applied to interrupt the running of the four-year limitations period.

D. Whether the Twins' guardian ad litem was sufficient to defeat the statutory tolling provision is not a reviewable issue.

The Second District did not review the merits of whether the Twins' guardian ad litem was the type of guardian ad litem contemplated by the Legislature in the tolling statute. The issue regarding the sufficiency of the Twins' guardian ad litem to defeat the tolling statute was not reviewed or decided because it was not expressly appealed as an issue by the Twins. By failing to include the issue in their initial brief to the Second District, the Twins have waived this argument.

According to the Florida Rules of Appellate Procedure, Rule 9.210(b)(5), the initial brief shall contain arguments regarding each issue to be reviewed. A failure to raise an issue "clearly, concisely, and separately as points on appeal" is sufficient for an appellate court to decline consideration of the matter. *State Comprehensive Health Ass'n v. Carmichael*, 706 So.2d 319, 321 (Fla. 4th DCA 1997) (citing *Singer v. Borbua*, 497 So.2d 279, 281 (Fla. 3d DCA 1986), *F.M.W. Properties, Inc. v. Peoples First Fin. Sav. & Loan Ass'n*, 606 So.2d 372, 376 (Fla. 1st DCA 1992); and Fla. R. App. P. 9.210(b)). In *Carmichael*, the defendant appealed an unfavorable trial verdict regarding the effect of a particular insurance policy exclusion. *Id.* at 319.

The Fourth District declined to review one of the defendant's points, noting the issue was argued on only two pages in their brief. *Id.* at 321. Finding the issue was not clearly, concisely, and separately raised as an issue on appeal, the court

declined to examine and decide the issue. *Id.* Similarly, the Third District identified and declined to address an issue where a party failed to raise the issue at all in its appeal. *State Dept. of Revenue ex rel. Gould v. Mustaf*, 919 So.2d 570, 573 (Fla. 3d DCA 2006) (citing *Fla. Emergency Physicians–Kang and Assocs., M.D., P.A. v. Parker*, 800 So.2d 631, 636 (Fla. 5th DCA 2001); and *Carmichael*, 706 So.2d at 321).

The Fifth District also has declined to review an issue on appeal where the issue was not addressed clearly, concisely, and separately as an issue to be decided. *Parker*, 800 So.2d at 636. There, the court noted the appellant raised four issues on appeal but attempted to raise additional issues in the "Statement of Facts" and "Argument" sections. *Id.* Because the issues were not specifically and separately identified as those to be reviewed, the court declined to do so. *Id.*

In this case, the Twins failed to raise the guardian ad litem issue as a specific issue on appeal. The only issue clearly and separately raised, which related to the guardian ad litem, was whether the Twins' guardian ad litem was aware of the alleged damages—not whether the guardian ad litem was qualified to bring suit on their behalf. Like the appellant in *Mustaf*, *supra*, the Twins failed to raise this issue at all in their initial brief. The Twins' Initial Brief on Merits before this Court admits this failure:

> Petitioner's [*sic*] initial brief and reply brief did contain arguments that related to the dependency court guardian ad litem's lack of

> knowledge of any claim on behalf of the twins, **but not specifically** the argument that the dependency court guardian ad litem was not a guardian ad litem as specified in section §95.051(h) [*sic*] Florida Statutes whose existence was sufficient to defeat tolling.

See Initial Brief, page 46. [Emphasis added]. Because the Twins failed to raise this issue clearly, concisely, and separately in their initial brief, the Second District properly found the issue has been waived. It is, therefore, not available as a reviewable issue before this Court.

E. The issues surrounding the sufficiency of the Twins' guardian ad litem are not reviewable as fundamental error.

Though a party waives an issue by failing to identify it in the initial brief before the appellate court, an issue still may be reviewable if it constitutes fundamental error by the trial court. A "[f]undamental error is one that 'goes to the foundation of the case or goes to the merits of the cause of action.'" *Jaimes v. State*, 51 So.3d 445, 448 (Fla.2010).

The guardian ad litem issue also did not constitute fundamental error by the trial court because even if the trial court found the Twins' guardian ad litem was sufficient to defeat the tolling statute, it had no bearing on the court's ultimate order granting summary judgment. The trial court found the Twins had access to courts at all times through their temporary guardians, the Grandparents, as next friends; therefore, no tolling provision applied to interrupt the limitations period, which began more than four years before the Twins commenced suit.

CONCLUSION

There is no express and direct conflict between the cases cited by the Twins and the instant matter. Each of the Twins' cases involves allegations of sexual abuse against a minor, which this Court previously held is a "unique and sinister" form of abuse allowing for application of the delayed discovery doctrine. This case involves only allegations of ordinary negligence, and there are no allegations or record evidence showing the Respondents' actions were the cause of the Twins' failure to timely assert their claims. Should this Court retain jurisdiction of this matter, BEARR respectfully requests this Honorable Court to uphold and affirm the Second District's approval of summary judgment in its favor.

Dated: December 15, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 15, 2017, the foregoing Respondent's Answer Brief was electronically filed through the Florida Courts E-Filing Portal, which will send a notice of electronic filing to:

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CERTIFICATE OF TYPESTYLE COMPLIANCE

I HEREBY CERTIFY that the typeface used for Respondent's Answer Brief on the Merits is Times New Roman, 14-point, in compliance with the requirements set forth in Florida Rules of Appellate Procedure, Rule 9.210(a)(2).

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