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

DCA Case No.: 2D15-304; 2D15-677
Lower Tribunal Case No.: 10-16698-CI-21

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

Petitioners/Appellants,

vs.

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

Respondents/Appellees.

RESPONDENT/APPELLEE ADEPT COMMUNITY SERVICES, INC.'S ANSWER BRIEF TO PETITIONER'S INITIAL BRIEF ON MERITS

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STATEMENT OF THE CASE AND FACTS

A. COURSE OF PROCEEDINGS

Petitioners filed their Complaint on November 22, 2010, and alleged negligence on the part of BEARR, Adept Community Services, Inc., and Always Promoting Independence, LLC. BEARR filed its Motion for Final Summary Judgment on August 5, 2013, in which Adept joined. R. 1, 283, 1247. On February 4, 2014, the lower court heard oral arguments from the parties and denied the Motion for Final Summary Judgment. R. 1705. Both BEARR and Adept filed Motions for Reconsideration, which the trial court heard on August 4, 2014. R. 1706, 2032. At that time, the trial court reversed its original denial and granted final summary judgment in favor of BEARR and Adept because, as a matter of law, the statute of limitations had expired prior to the time the Appellants brought suit. R. 3155-56.

On January 6, 2015, the trial court issued an executed Order granting summary judgment in BEARR's and Adept's favor based on the expiration of the statute of limitations. R. 3046, 3155-56. After entry of final summary judgment, D.H and L.H. appealed same.

The District Court of Appeals upheld the trial court's ruling, holding:

(1) Under § 95.031(1), Fla. Stat., the accrual of a cause of action for ordinary negligence is not dependent upon the existence of a person with

knowledge of the alleged injury who can bring a claim on a minor's behalf. The only exceptions to this rule are those created by statue and in cases of childhood sexual abuse. *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002).

(2) Even if a cause of action for ordinary negligence accrued when an adult capable of bringing suit had knowledge of the invasion of the minor's legal rights, the twins' claims accrued outside the limitations period.

(3) The limitations period was not tolled under § 95.051(1)(h), Fla. Stat.

B. FACTS

Appellant, Adept, provides Medicaid waiver support coordination services. R. 2263, 2301. Appellant, BEARR, provides services, such as life-coaching, to mentally disabled individuals through Medicaid waivers. Kelly Harkins contracted with Adept, who provided her with Waiver Support Coordination Services. R. 2, 35, 195-196, 2263, 2720. Adept arranged for BEARR to provide life-coaching services to Ms. Harkins, who ultimately chose to hire BEARR for her life-coaching services. R. 2299, 2301.

Ms. Harkins became pregnant with twin boys, D.H. and L.H., who were born on September 12, 2005. R. 2, 2284. Ms. Harkins lived with her sons and with a live-in aide; however, she had difficulty caring for herself and her children due to mental and physical disabilities. R.2257, 2269. Ms. Harkins' parents, Richard Harkins and Suellen Harkins, were aware Ms. Harkins was abusing and neglecting

D.H. and L.H. during the time the twins lived with their mother. R.2314-15, 2317-21, 2323, 2331-34, 2714, 2729-34, 2749-54, 2757-60, 2847-50, 3021-23, 3033-45.

Mr. Harkins testified he was aware of Appellee's alleged negligence as early as October or November of 2005—*five years prior to filing suit*. R. 2331, R 2318-19, 2331-33. Mr. Harkins also testified he knew D.H. and L.H. suffered physical harm (i.e. being dropped and being scalded while taking showers while in the custody of their mother) within two to three months after they were taken from their mother on April 11, 2006. R. 2332 -33. He testified he knew of psychological harm because the children would not go near a shower and were afraid of it for approximately six years after they were removed from their mother's care. R. 2334. Regarding developmental disabilities or delays, Mr. Harkins stated it was believed "all along" that D.H. and L.H. had some form of autism. R. 2340.

On April 11, 2006, when D.H. and L.H. were seven months old, they were taken from their mother and sheltered due to allegations of abuse and neglect because of Ms. Harkins' alleged inability to care for herself and her children. R. 6, 2333-35, 2342-43. On that same date, Ms. Harkins terminated her professional relationship with BEARR. R. 5, 2297-98. Mr. and Mrs. Harkins admitted under oath that they were aware of physical and psychological injuries to the minor twins at the time D.H. and L.H. were taken from their mother on April 11, 2006,

and faulted Adept and BEARR for the minor twins' condition at that time. R. 2315, 2323-24, 2346, 2348, 2494, 2749-50.

Richard and Suellen Harkins became custodians of D.H. and L.H. in April 2006. R. 2584. Less than one month later, on May 9, 2006, D.H. and L.H. were adjudicated dependent and remained in the care of their grandparents, Mr. and Mrs. Harkins. R. 1338-46, 2402-06. On May 19, 2006, the Florida Department of Children and Families produced a Comprehensive Behavioral Health Assessment for each of the twins wherein they discussed developmental delays and psychological injuries due to abuse and neglect by their mother. R. 2407-2445. Mr. Harkins testified under oath that at that time, May 19, 2006, he attributed fault for the developmental delays and psychological injuries to Adept and BEARR:

> Q. And what I'm showing you now is the Comprehensive Behavioral Health Assessment. And it says, "Client Name: Louis Harkins. Completion Date: **May 19, 2006**." Did you have custody of the children at that time?
>
> A. Yeah, we had temporary custody, yes.
>
> Q. Were you aware of possibly – not all, but **were you aware of some of the injuries the children had suffered at that time?**
>
> A. **Yes.**

Q. All right. At that time, did you fault BEARR for – BEARR or Fay Calhoun for the injuries the children may have suffered?

A. **I faulted all of the providers**.

R. 2348 (emphasis added).

The Assessment for D.H. indicated he had a "history of trauma" and "neglect," and had been "dropped on many occasions by his mother." R. 2430. Further, the Assessment noted D.H. had experienced inconsistent feelings of security, and his "grandparents report that when coming into their home, [D.H.] and his brother were 'petrified' of taking baths" and he "was also subjected to very loud music." R. 2430, 2431. D.H. was noted as having developmental delays and anxiety issues, as reported by his grandparents. R. 2430-32, 2437. The Assessment for L.H. indicated similar findings, including developmental delays. R. 2407-17. Again, Mr. Harkins admitted to faulting the Appellees for the alleged "injuries." R. 2348.

Two to three months after the children were taken from Kelly Harkins – no later than July 2006, she admitted to Richard Harkins that she had dropped the children and scalded them with bath water. R. 2332-34. Four years *and seven months* after the accrual of the cause of action, Appellees filed a Complaint on November 22, 2010, alleging BEARR, among others, had failed to care for D.H.

and L.H., which caused psychological and physical harm—although there was no duty to care for the twins themselves. R. 1-13, 2299, 2337, 2302-03.

In response to BEARR's Motion for Summary Judgment, in which Adept joined, Petitioners filed an affidavit from Donna Rasmussen of the Guardian Ad Litem Program ("GALP"). R.220-2204. Ms. Rasmussen stated that "[b]ased on the GALP file, records, and information, the GALP was unaware of any injury D.H. and L.H. suffered as a result of the care they received while living with their disabled mother, Kelly Harkins." *Id*. at 2203. Ms. Rasmussen went on to say that "[h]ad there been any indication that D.H. and L.H. had been injured, the GALP would have been expected to make a request for services to the dependency case management agency and follow up with the dependency case worker of if needed before the dependency judge." *Id*. Further, "[a]ny issues concerning any damage to D.H. and L.H. would have been noted in their GAL file, in the ordinary course of business." *Id*.

Ms. Rasmussen also testified that:

> During the time the GALP was assigned to D.H. and L.H.'s case, records indicate no one from the GALP observed any injuries or had any concerns related to damages suffered by them. If such concerns had been present, it is expected the GALP would have followed up to ensure services were in place, and objected to the case closing until needed services were in place. The GALP did not object to the case closing with permanent guardianship awarded to Richard and Sue Ellen Harkins.

Id. at 2203-04. Finally, she testified that "[t]here is no information in the GALP file for D.H. and L.H. indicating that anyone at the GALP knew that D.H. and L.H. were injured during the time the GALP was assigned to their case. *Id*. at 2204.

SUMMARY OF THE ARGUMENT

This Court does not have jurisdiction over this appeal, as there is no express or direct conflict among the District Courts of Appeal, despite Petitioners' contention such conflict exists. Specifically, all of the cases Petitioners contend conflict with the Second District Court of Appeals' decision in the instant case involve allegations of childhood sexual abuse and fraudulent concealment, where the defendants concealed from the minor children's parents the basis for the intentional tort claims. In stark contrast, Petitioners—the grandparents of the twins—knew as early as October or November 2005 and no later than May 19, 2006, that the twins were injured and blamed Adept and BEARR's alleged negligence for those injuries. There has never been an allegation that Adept or BEARR concealed anything from Petitioners. Accordingly, the cases are easily harmonized, and there is no express or direct conflict among the District Courts of Appeals that would confer jurisdiction on this Court to hear this appeal.

Nevertheless, if this Court determines jurisdiction exists, Petitioners' complaints accrued, and the statute of limitations ran, before they filed their complaint on November 22, 2010, asserting claims for negligence. The statute of

limitations for negligence claims is four years. *Fla. Stat*. § 95.011(3)(a). Under Florida law, unless another statute applies (it does not here), "[a] cause of action accrues when the last element constituting the cause of action occurs." *Fla. Stat*. § 95.031(1). Accordingly, Petitioners' negligence claims – including any damages incurred – accrued no later than April 11, 2006, when the twins were removed from their mother.

Even if Florida law were such that Petitioners' claims did not accrue until an adult capable of bringing suit had knowledge of the invasion of the twins' rights, the claims still accrued outside the limitations period. According to Florida Rule of Civil Procedure 1.210, the grandparents could have sued as next friends at any point. And the grandparents knew of the injuries to the twins' at the latest on May 19, 2006—more than four years before they filed their lawsuit.

Finally, no basis exists to toll the statute of limitations. Petitioners waived the ability to raise the tolling of the statute of limitations, Section 95.051(1)(h) of the Florida Statutes, with regard to their new argument, made for the first time before this Court, that the authority of the guardian ad litem appointed for the twins was limited. Petitioners' voluntary waiver of the tolling issue is not grounds for application of the doctrine of fundamental error.

STANDARD OF REVIEW

The standard of review of a grant of summary judgment is de novo, where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000) (citing *Menendez v. Palms West Condominium Ass'n,* 736 So.2d 58 (Fla. 1st DCA 1999)); *see also Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001).

The trial court properly granted, and the District Court properly affirmed, summary judgment against Petitioners because there is no genuine issue of material fact. Petitioners knew on either April 11, 2006 or by May 19, 2006—by their own admissions—that there were allegedly negligent acts by Adept and BEARR and resulting injuries. The negligence claims accrued more than four years before the Petitioners filed their complaint, and the statute of limitations was not tolled.

ARGUMENT ON APPEAL

A. NO "EXPRESS AND DIRECT" CONFLICT EXISTS AMONG THE DISTRICT COURTS OF APPEAL, AND THIS COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL.

Petitioners assert in their Initial Brief that the holding of the District Court below directly and expressly conflicts with decisions of the First, Third, and Fourth Districts in: *Drake v. Island Community Church, Inc*., 462 So. 2d 1142 (Fla. 3rd DCA 1984), *S.A.P. v. State of Florida, Dept. of Health and Rehabilitative Services*,

704 So. 2d 583 (Fla. 1st DCA 1997), and *Doe No. 3 v. Nur-Ul-Islam Academy, Inc*., 217 So. 3d 85 (Fla. 4th DCA 2017). However, as discussed below, the decisions are not in express and direct conflict, as the facts of *Drake*, *S.A.P.*, and *Nur-Ul-Islam* are substantially different from those in the instant case. All three of those cases involve the defendants' concealment of the alleged injury to the minor child/plaintiff from the parent or other person(s) who could bring a claim. However, in the instant case, there is no allegation that Adept or BEARR concealed anything from the grandparents. In stark contrast, the grandparents of the twins knew, as early as October or November 2005, just after their birth, and no later than May 19, 2006, that the twins were injured and blamed Adept and BEARR's alleged negligence for those injuries. R. 2315, 2318-2319, 2323-24, 2331-34, 2340, 2348, 2494, 2749-50.

This Court may exercise discretionary jurisdiction to review decisions of district courts of appeal that "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 that confers jurisdiction on this Court 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 that 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)) (emphasis added). 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*.).

Based on the significant factual (and procedural) differences on which the decisions of the First, Third and Fourth District Courts of Appeal and that of the Second District Court of Appeal were based, no express and direct conflict exists. This Court has, in other instances, initially accepted jurisdiction to review a decision of a District Court of Appeal based on express and direct conflict and concluded after further consideration that jurisdiction was "improvidently granted." *See, e.g., Ramirez v. McCravy*, 37 So.3d 240 (Fla. 2010).

Petitioners first claim the unpublished corrected opinion rendered by the Fourth District Court of Appeal in *Nur-Ul-Islam*, 217 So. 3d 85, is in conflict with the Second DCA's Opinion in the instant case. In *Nur-Ul-Islam*, the Fourth DCA reversed the lower court's decision dismissing Plaintiff's complaint with prejudice because it agreed with Doe's argument "that the defense [that the claims are barred by the statute of limitations] is not apparent from the four corners of her complaint." *Id*. at 86.

In *Nur-Ul-Islam*, plaintiff alleged she had been the victim of sexual abuse perpetrated by a teacher. She alleged that when she reported the abuse the school, the teacher and school intimidated her into silence and failed to report the

allegation of abuse to her parents and to the state. *Id*. She further alleged the retaliatory and abusive actions by defendants were specifically designed and intended to silence her and prevent her from taking legal action. *Id*. at 87.

Doe argued the dismissal with prejudice was error for two reasons: (1) the complaint did not specifically identify a date when the cause of action accrued, and (2) the appellees are equitably estopped from using the statute of limitations as a defense. The court agreed with Doe's first reason and found it dispositive, so it did not analyze the merits of the second reason. *Id*. at 87.

The instant case does not involve allegations of sexual abuse or concealment of the abuse or injury, as does *Nur-Ul-Islam*. Petitioners were well aware of the alleged injuries suffered by the twins no later than May 19, 2006, well outside the limitations period. Nor does the instant case lack the facts to determine when the case accrued. Indeed, unlike the instant case, *Nur-Ul-Islam*, based on the allegations of concealment, may have turned on an issue of equitable estoppel, as did *S.A.P.*, where the state concealed abuse of a minor child by her stepfather. *See Fla. Dep't. of Health and Rehabilitative Services v. S.A.P.*, 835 So. 2d 1091, 1100 (Fla. 2002) (holding that the doctrine of equitable estoppel, and not fraudulent concealment, as discussed in the district court, barred HRS from asserting that the complaint was untimely filed).

Petitioner's claim that *S.A.P. v. Department of Health & Rehabilitative Services*, 704 So.2d 583, 586 (Fla. 1st DCA 1997) conflicts with the instant case also is misplaced. First, the complaint in *S.A.P.* focused primarily on fraudulent concealment – an intentional tort – by Defendant HRS, which prevented any potential "next friend" from bringing an action on S.A.P's behalf. *Id*. at 586. Further, the plaintiff in S.A.P. alleged a series of conflicts of interests that resulted in there being no "next friend" who could bring an action on her behalf. *Id*.

In contrast, as the District Court in the instant case pointed out in its Opinion, Petitioners alleged only causes of action for negligence, and there was no claim of any alleged fraudulent concealment or any other intentional tort.[1] Further, the District Court in the instant case found that even if it had (incorrectly, in light of *Davis*) performed the accrual analysis under the delayed discovery doctrine, "an adult capable of bringing suit [had] knowledge of the invasion of the minor's legal rights [and] the twins' claims nonetheless accrued outside the limitations period." *D.H. and L.H.*, 217 So. 3d at 1080. For these reasons, there is no similarity in the controlling facts of this case and those in *S.A.P.*, and there is no direct and express conflict between the two cases.

[1] Further, even if the delayed discovery doctrine somehow applied in a case that did not involve a statutory exception or sexual abuse, after *Davis*, in *S.A.P.*, there was no one – no next friend or guardian ad litem – who was aware of HRS's alleged negligence in the supervision of S.A.P. *Id*.

Finally, there is no direct and express conflict between the Second and Third Districts because *Drake By and Through Fletcher v Island Community Church, Inc*., 462 So.2d 1142 (Fla. 3d DCA 1984) also differs substantively from the decision below. The causes of action alleged in *Drake* included not only negligence, but also battery and negligent hiring and retention of the alleged assailant teacher, who was alleged to have sexually abused the minor in the course and scope of his employment. Plaintiffs in *Drake*, as in *S.A.P.*, further alleged fraudulent concealment of the abuse from the minor child's parents, just as the plaintiff in *Nur-Ul-Islam* alleged equitable estoppel. The instant case once again differs significantly. As noted above, Petitioners in the instant case did not allege fraudulent concealment (or any concealment), and there was no battery or sexual abuse of the minor children alleged. Indeed, Petitioners knew all along of the alleged injuries and corresponding negligence of Adept and BEARR.

Alternatively, if this Court finds the facts of *Drake*, *S.A.P.*, and *Nur-Ul-Islam* to be sufficiently similar so that express and direct conflict exists with the instant case, as discussed below, and even if the "knew or reasonably should have known" standard espoused by the three cases applied in the instant case, the result in the instant case would be the same. Accordingly, there is no express or direct conflict between the cases, and this Court does not have jurisdiction over the appeal. *See Crossley*, 596 So. 2d at 449; *Nielsen*, 117 So.2d 731.

B. THE DISTRICT COURT PROPERLY FOUND THAT PETITIONERS' CLAIMS ACCRUED MORE THAN FOUR YEARS BEFORE THEY FILED THEIR COMPLAINT.

The Opinion of the Second District Court of Appeal (the "District Court") correctly applied the legal standard set forth by this Court in *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002), for determining when a cause of action accrues. Specifically, the court below affirmed summary judgment because the record demonstrated no genuine issue of material fact that the claims of the plaintiffs accrued more than four years before they filed suit, and the statute of limitations was not tolled, as discussed below.

As the District Court explained, the questions of when a cause of action accrues for limitations purposes, and whether a limitations period has been tolled, are legally distinct. *D.H. and L.H. v. Adept Community Services, Inc. and B.E.A.R.R., Inc.*, 217 So. 3d 1072, 1077 (Fla. 2d DCA 2017). The question of accrual is concerned with determining the date upon which the statute of limitations begins to run—i.e., the date upon which the plaintiff may bring an action on the claim asserted. *Id.* (citing *Hearndon v. Graham*, 767 So.2d 1179, 1184–85 (Fla. 2000); *State Farm Mut. Auto Ins. Co. v. Lee*, 678 So.2d 818, 821 (Fla. 1996); *Fla. Stat.* § 95.031). In contrast, tolling is concerned with determining whether, after a plaintiff's cause of action has accrued, an applicable statute suspends the running of the limitations period for a defined length of time. *D.H.*

and L.H., 217 So. 3d at 1077 (citing *Hearndon*, 767 So.2d at 1185; *Fla. Stat.* § 95.051). When a tolling statute applies, the time during which the statute of limitations has been tolled is excluded from the determination of whether the claim was brought within the required time after the cause of action accrued. *Id*.

Petitioners' Complaint, filed November 22, 2010, asserts only claims for negligence. R. 1-13. The statute of limitations for negligence claims is four years, pursuant to Section 95.11(3)(a) of the Florida Statutes. Accordingly, in order for the suit to be timely, Petitioners' claims must have accrued four years before the Complaint was filed – on or after November 23, 2006. Or, if Petitioners' claims accrued earlier, the limitations period must have been tolled "for at least as long as the time between the date the claims accrued and November 23, 2005." *D.H. and L.H.*, 217 So. 3d at 1077.

1. Petitioner's Claims Accrued Outside the Limitations Period.

a) Petitioners' Claims Accrued When the Last Element Constituting the Cause of Action for Negligence Occurred.

As the District Court correctly stated, under Florida law, unless another statute applies, the "time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues … A cause of action accrues when the last element constituting the cause of action occurs." *Id*. (citing *Fla. Stat*. § 95.031(1)).

In briefing this matter before the District Court, the parties in the instant case initially relied on the principle that a cause of action alleging negligence accrues when the plaintiff knows, or through the exercise of diligence should know, of the invasion of his or her legal rights. *See D.B. v. CCH–GP, Inc.*, 664 So.2d 1094, 1095 (Fla. 2d DCA 1995) (citing *Keller v. Reed*, 603 So.2d 717, 719 (Fla. 2d DCA 1992)).

However, the District Court described this "knew or should know" accrual rule for negligence claims stated in S*.A.P. v. Dep't of Health & Rehab. Servs*., 704 So.2d 583, 586 (Fla. 1st DCA 1997) and *Drake v. Island Cmty. Church, Inc*., 462 So.2d 1142, 1144 (Fla. 3d DCA 1984) as an expression of the delayed discovery doctrine. *D.H. and L.H*., 217 So. 3d at 1078 (citing *Hearndon v. Graham*, 767 So.2d 1179, 1184–85 (Fla. 2000)). This Court in *Hearndon* held that the delayed discovery doctrine applies to delay the accrual of the cause of action based on a claim of childhood sexual abuse accompanied by traumatic amnesia that prevented plaintiff from recalling the abuse for many years. *Hearndon*, 767 So. 2d at 1182, 1186.

S.A.P and *Drake* found that a cause of action accrues when an adult with authority to sue on the minor's behalf knows or should know of the minor's injury and its connection to the defendant's negligence. *D.H. and L.H*., 217 So. 3d at 1077. In *S.A.P*., the First District Court of Appeals found "the statute could not

begin to run against the minor child until a parent, guardian, or next friend knew or reasonably should have known of facts which supported the child's cause of action." 704 So. 2d at 586. In *Drake*, the Third District Court of Appeals held that minor's negligence claim does not accrue until an adult capable of bringing the action knows of the invasion of the minor's legal rights. 462 So. 2d at 1144.

However, as the District Court correctly explained, this Court in *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002) held that the delayed discovery doctrine only applies when the legislature has by statute provided that it does. *D.H. and L.H.*, 217 at 2078. This Court in *Davis* explained as follows:

> The Florida Legislature has stated that a cause of action accrues or begins to run when the last element of the cause of action occurs. An exception is made for claims of fraud and products liability in which the accrual of the causes of action is delayed until the plaintiff either knows or should know that the last element of the cause of action occurred. The [l]egislature has also imposed a delayed discovery rule in cases of professional malpractice, medical malpractice, and intentional torts based on abuse.
>
> ....
>
> Aside from the provisions above for the delayed accrual of a cause of action in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse, there is no other statutory basis for the delayed discovery rule.

832 So. 2d at 709-10. As the District Court stated, the sole exception to the rule that the delayed discovery doctrine does not apply unless the legislature has so stated involves intentional torts based on childhood sexual abuse. *D.H. and L.H.*,

217 So. 3d at 1078 (citing *Davis*, 832 So. 2d at 712) (explaining that *Hearndon*, which created the exception, "is limited to the specific facts in that case").

This Court in *Davis* made clear that unless another statute provides differently, courts applying a statute of limitations must follow the default rule codified in section 95.031(1) that "[a] cause of action accrues when the last element constituting the cause of action occurs." *Nat'l Auto Serv. Ctrs., Inc. v. F/R 550, LLC*, 192 So.3d 498, 506 n.7 (Fla. 2d DCA 2016) ("[T]he delayed discovery doctrine is a creature of statute and generally does not apply when a statute does not provide for it." (citing *Davis*, 832 So.2d at 710–12)).

For that reason, the District Court correctly explained, the delayed discovery doctrine is not applicable to causes of action alleging ordinary negligence, as distinguished from professional or medical negligence or intentional torts based on abuse or child sexual abuse. *D.H. and L.H.*, 217 So. 3d at 1078 (citing *W.D. v. Archdiocese of Miami, Inc.*, 197 So.3d 584, 587–88 (Fla. 4th DCA 2016) (holding that the delayed discovery doctrine does not apply to a claim for negligence against a third party based on child sexual abuse); *Cisko v. Diocese of Steubenville*, 123 So.3d 83, 84–85 (Fla. 3d DCA 2013) (same); *Krawchenko v. Raymond James Fin. Servs.*, No. 2:11–cv–409–FtM–29DNF, 2013 WL 489088, at *3 (M.D. Fla. Feb. 8, 2013) ("[T]he 'delayed discovery' doctrine is not available because there is no

statutory basis to apply the doctrine in negligence actions.”)). The twins allege only ordinary negligence in the instant case. R. 1-13.

Consequently, whether or not the grandparents knew of the alleged invasion of the twins’ rights is irrelevant to when the twins’ negligence causes of action accrued. *D.H. and L.H.*, 217 at 1078. As the District Court noted, cases like *S.A.P.* and *Drake* predate this Court’s decision in *Davis*, and under the plain language of Section 95.031(1) of the Florida Statutes, as applied in *Davis*, Petitioners’ cause of action accrued when its last element occurred. *Id*. at 1078-79.

Traditionally, a cause of action based on negligence is comprised of four elements: duty, breach, proximate cause, and actual loss or damage *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003). As the District Court noted, the last element constituting a cause of action for negligence is the occurrence of damages. *D.H. and L.H.*, 217 So.3d at 1079 (citing *Kelly v. Lodwick*, 82 So.3d 855, 857 (Fla. 4th DCA 2011); *Kellermeyer v. Miller*, 427 So.2d 343, 345 (Fla. 1st DCA 1983); *Fla. Stat*. § 95.031(1). “[A] cause of action for negligence does not accrue for limitations purposes until the existence of redressable harm or injury has been established.” *Chrestensen v. Eurogest, Inc*., 906 So.2d 343, 345 (Fla. 4th DCA 2005).

The record in the instant case is clear that the grandparents knew by either April 11, 2006 or by May 19, 2006—by their own admissions—that there were

allegedly negligent acts by Adept and BEARR and resulting injuries. R. 2315, 2323-24, 2348, 2430-32, 2437, 2494, 2749-50. The difference between April 11 or May 19, 2006, is not a material issue because no matter whether the accrual happened on the first or second date, both dates occurred more than four years before November 22, 2010, when the Complaint was filed. R.1. By the time the twins were removed from their mother's custody on April 11, 2016, the twins had suffered injuries from being dropped, malnourished, and "scorched" when bathed in excessively hot water. R. 2315, 2323-24, 2348, 2494, 2749-50. *See, e.g., N.G. v. Arvida Corp.*, 630 So.2d 1164, 1165 (Fla. 3d DCA 1993) (holding that minor's negligence claim based on sexual abuse accrued on the date the abuser was arrested, which was the last date upon which she could have been abused). The grandparents also were aware by May 19, 2006 (four years and six months before filing their claim), based on comprehensive behavioral assessments of the twins, that the twins had suffered psychological injuries. R. 2348, 2407-445.

Although Petitioners argue the twins later were diagnosed with a "sensory disorder," their negligence claim accrued when "injury ... in consequence of the agents' alleged wrongful acts first was sustained." *City of Miami v. Brooks*, 70 So.2d 306 (Fla. 1954); *Kellermeyer v. Miller*, 427 So.2d 343, 346 (Fla. 1st DCA 1983). Under the "first injury" rule set out in these cases, it is "not material that all the damages resulting from the [negligent] 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." *Kipnis v. Bayerische Hypo-Und Vereinsbank, AG*, 202 So.3d 859, 861–62 (Fla. 2016).

Finally, the District Court acknowledged the cases, such as *Drake*, 462 So. 2d at 1144, that have held that notwithstanding the presence of a cognizable injury, a minor's cause of action cannot be deemed to have accrued until there is a person capable of bringing the cause of action on the minor's behalf. *D.H. and L.H.*, 217 So. 3d at 1078. The District Court found such decisions do not survive this Court's decision in *Davis,* which acknowledged Section 95.031(1)'s directive that a cause of action accrues when its last element occurs. *Id*. The statute does not require as an additional condition to accrual of a minor's cause of action that an adult capable of bringing the claim exist, and to do so would involve "inserting words into a statute that the legislature did not put there, an exercise that is foreclosed" to the court. *Id*. (citing *Hayes v. State*, 750 So.2d 1, 4 (Fla. 1999) ("We are not at liberty to add words to statutes that were not placed there by the [l]egislature")).

In *Headley v. City of Miami*, 215 So. 3d 1 (Fla. 2017), this Court stated: "We have long held that a 'statute must be given its plain and obvious meaning.'" (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984); *A.R. Douglass, Inc. v. McRainey*, 137 So. 157, 159 (1931)). If the language of the statute is "clear and unambiguous and conveys a clear and definite meaning" there is no need to resort

to statutory construction. *Id.*; accord F*orsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992) ("Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.").

b) Petitioners' Arguments Regarding Accrual are Unavailing.

Petitioners rely on *Nur-Ul-Islam* to argue that *Davis* did not invalidate the reasoning in *Drake* or *S.A.P. See* Initial Brief, p. 16. The court in *Nur-Ul-Islam*, though finding the case did not turn on the delayed discovery doctrine,[2] found that the cause of action did not begin to accrue until Doe's parents knew or should have known of the abuse (or she reached age eighteen). 217 So. 3d at 90; Initial Brief, p. 16-17. The *Nur-Ul-Islam* court found, without citing authority, that the accrual of Doe's cause of action was based on "a separate rule and line of cases that are different from the principles of the delayed discovery doctrine." *Id.* at 89. The court stated the rationale for protecting minors using rule 1.210(b) in conjunction with the statute of limitations (an adult must bring the action, so the adult must have knowledge of the injury) delays accrual of the cause of action. *Id.* According

[2] Even though the court in *Nur-Ul-Islam* determined the delayed discovery doctrine did not apply to the facts of that case, the same principles discussed above in *Davis* apply: "A cause of action accrues when the last element constituting the cause of action occurs." *Fla. Stat*. § 95.031(1)).

to Petitioners, *Nur-ul-Islam, Drake,* and *S.A.P.* all correctly hold that a minor can only sue once the parents or legal guardian of the minor knows or reasonably should have known of the invasion of legal rights. *Id*. at p. 16-17.

Petitioners claim this rationale shared by the First, Third, and Fourth District Courts of Appeal is based on a "longstanding doctrine that a child's cause of action does not accrue until an action can be brought." *See* Initial Brief, p. 20. However, none of the cases decided by this Court and relied on by Petitioners as part of the purported "longstanding doctrine" have anything to do with knowledge, children, or negligence actions. Instead, those cases involve the occurrence of legal procedures that must take place in order for the putative plaintiff to have an entity to sue (*Berger*) or to be damaged and therefore have a cause of action (*State Farm* and *Kipnis*), as discussed herein.

First, Petitioners rely on *Berger v. Jackson,* 156 Fla. 251, 23 So. 2d 265 (1945), in which this Court stated: "A cause of action cannot be said to have accrued, within the meaning of that statute, until an action can be instituted thereon. There must be some person capable of suing or being sued upon the claim in order for the statute to begin to run." *Id*. at 269. However, *Berger* involved an estate administration issue. This Court held that "where a cause of action accrues after the death of the person against whom it lies, the limitation does not begin to run until there is a **grant of administration of the estate**." *Id*. (emphasis added).

Indeed, in such a situation there was no entity against which to bring a lawsuit until the legal process occurred to allow the administration of the estate to proceed.

Notably, this Court never has relied on the above-quoted language from *Berger* in the context of a negligence claim, and it only has done so twice since the effective date of Section 95.031 of the Florida Statutes in 1975. *See Bauld v. J. A. Jones Const. Co*., 357 So.2d 401, 402 (Fla. 1978); (citing Chapter 74-382, Laws of Florida (Section 95.031 deals with the computation of time. It states that "(e)xcept as provided . . . in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.")

This Court stated in *Kipnis v. Bayerische Hypo-Und Vereinsbank, AG*, 202 So.3d 859 (Fla. 2016) that:

> Generally, "the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues." § 95.031, Fla. Stat. (2013). "A cause of action accrues when the last element constituting the cause of action occurs." § 95.031(1), Fla. Stat.; *see also State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So.2d 818, 821 (Fla.1996) ("[A] cause of action cannot be said to have accrued, within the meaning of the statute of limitations, until an action may be brought."). Damages are often the last element of a cause of action to accrue.

Id. at 861-62. However, *Kipnis* did not relate in any way to a "child's cause of action" or whether anyone knew about alleged damages. Instead, the Court considered with whether the plaintiff taxpayers' claims accrued at the time the IRS issues a notice of deficiency or when the taxpayers' underlying dispute with the

IRS is final. The Court found that an action against the bank could not accrue until the underlying IRS dispute was final because there were no damages to plaintiffs until that time. *Id*. at 864.

In addressing when the claims accrued, this Court noted that two interrelated rules were at issue: the "first injury" rule and the "finality accrual" rule. *Id*. at 862. The "first injury" rule is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. 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*. (citing *City of Miami v. Brooks*, 70 So.2d 306, 308 (Fla.1954)). However, "a special rule applies when the plaintiff's damages exist by virtue of an enforceable court judgment." *Kipnis*, 202 So. 3d at 862. In such circumstances, this Court found, the statute of limitations begins to run when the underlying judgment becomes final, which the Court labeled the "finality accrual rule." *Id*.

Notably, this Court in *Kipnis* determined that, without the underlying judgment becoming final, plaintiff would have no damages (and no basis on which to bring a claim). *Id*. at 864. In other words, the claims in *Kipnis* could not be brought until the legal process in question had progressed to the point a judgment

had been obtained, which resulted in damage to plaintiff. Accordingly, this Court's statement in *Kipnis*, originally set forth in *Berger*, that "a cause of action cannot be said to have accrued, within the meaning of the statute of limitations, until an action may be brought" does not suggest in any way the need for an individual with knowledge to bring a claim, contrary to Petitioners' assertions. 202 So. 3d at 861-62; *see* Initial Brief, p. 23.

Petitioners also point out that even after *Davis*, this Court continues to recognize the viability of the doctrine of equitable estoppel (though they mischaracterize it as "equitable tolling for fraudulent concealment"), as held by this Court in *Fla. Dep't of Health and Rehabilitative Services v. S.A.P.*, 835 So. 2d 1091 (Fla. 2002). Petitioners correctly note that equitable estoppel is a basic tenet of the common law that survives the enactment of statutes of limitations. *See Id*. at 1098. Indeed, equitable estoppel prevents a party that willfully prevents the other party from bringing a claim from benefiting from such action. *Id*. at 1098-99. Accordingly, the wrongdoer is precluded from asserting the statute of limitations as a defense. *Id*. The doctrine of equitable estoppel does not affect a claim's accrual, nor does it toll a statute of limitations. *Major League Baseball v. Morsani*, 790 So.2d 1071, 1077 (Fla. 2001) (equitable estoppel does not "toll" the statute of limitations and thus is not covered by the exclusionary provisions of section 95.051). Accordingly, Petitioners' argument is inapposite.

Additionally, Petitioners' attempt to include this Court's decision in *Berger* – which dealt specifically with the administration of an estate and found that a cause of action could not be brought until the estate existed – as part of "the common law in Florida" and therefore unaffected by statutes of limitations, is misplaced. For the reasons discussed above, *Berger* does not add a requirement that someone have knowledge of a claim; rather, it discusses what legal process must occur as a prerequisite to bringing a specific type of claim.

Similarly, Petitioners' reliance on *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So.2d 818, 821 (Fla. 1996), for the statement that "a cause of action cannot be said to have accrued, within the meaning of the statute of limitations, until an action may be brought," is misplaced. In *State Farm*, this Court addressed whether a claim accrued at the time of the accident in question, or when State Farm denied the PIP benefits to which plaintiff claimed to be entitled. *Id*. This Court found that, because a cause of action on a contract accrues and the statute of limitations begins to run from the time of the breach of contract, it was only upon State Farm's denial of the PIP claim that the limitations period began running. *Id*. As with *Berger* (the existence of an estate) and *Kipnis* (the existence of damages), *State Farm* does not set forth a requirement of knowledge to bring a claim, but rather, discusses the necessity of the existence of an element of the claim – the existence of the breach of contract in a contract action – for the claim's accrual. *Id*. Accordingly, *Berger*,

Kipnis, and *State Farm* do not represent a separate common law doctrine that would prevent accrual of a claim in a case of abuse against a minor child, until an adult with capacity to bring an action on behalf of the minor child, knew or reasonably should have known the facts supporting a cause of action, as claimed by Petitioners. *See* Initial Brief, p. 24.

Even if these cases did represent a doctrine that authorized the "knew or should have known" standard proposed by Petitioners, the grandparents knew of the alleged invasion of the twins' legal rights more than four years before they filed suit, which they could have done as next friends at any point after the twins were sheltered.

2. The Grandparents Were Next Friends of the Twins And Could Have Brought the Instant Claims Any Time After the Twins Were Sheltered.

a) Even if the "Knew or Should Have Known" Rule Applied, the Petitioners' Claims Still Are Untimely, as the Grandparents Could Have Sued as "Next Friends" of the Twins at Any Time.

As the District Court discussed, even if the rule were that the twins' claims accrued when an adult capable of bringing suit had knowledge of the alleged invasion of the minor's legal rights, the twins' claims still accrued outside the limitations period. *D.H. and L.H.*, 217 So. 3d at 1080. The summary judgment record demonstrates beyond any genuine dispute the existence of a person authorized to sue on the twins' behalves who knew or should have known of the

twins' injuries and their connection to the alleged negligence of Adept and B.E.A.R.R. more than four years before the filing of the complaint on November 22, 2010. *D.H. and L.H.*, 217 So. 3d at 1080 (citing *S.A.P.*, 704 So.2d at 586; *Drake*, 462 So.2d at 1144).

The grandparents could have sued as "next friends" of the twins at any time. In that regard, Florida Rule of Civil Procedure 1.210(b) provided in 2006 as follows:

> **Infants or Incompetent Persons.** When an infant or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant 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 an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

(Emphasis added.)

The District Court explained that under the above rule, a next friend may sue on behalf of a minor when the minor does not have "a representative, such as a guardian or other like fiduciary." *D.H. and L.H.*, 217 So. 3d at 1090 (citing *Gilbertson v. Boggs*, 743 So.2d 123, 127 (Fla. 4th DCA 1999), disagreed with on other grounds *by B.K. v. S.D.C.*, 122 So.3d 980 (Fla. 2d DCA 2013), and receded from on other grounds, *Beckford v. Drogan*, No. 4D16-947, 216 So.3d 1, 2017 WL 383429 (Fla. 4th DCA Jan. 27, 2017)).

As the District Court correctly found, a next friend must be an adult of reasonable judgment and integrity whose interests do not conflict with those of the minor he or she represents. *See Kingsley v. Kingsley*, 623 So.2d 780, 784 (Fla. 5th DCA 1993) ("[T]he courts require that an adult person of reasonable judgment and integrity conduct the litigation for the minor as the latter's next friend."); *cf. Gilbertson*, 743 So.2d at 128 (holding that a putative father was not a proper next friend in paternity case because his interests conflicted with those of the minor).

The District Court correctly found that neither the text of Rule 1.210 nor the cases interpreting it require that a next friend be appointed by the court to sue on a minor's behalf. *See Gasparro v. Horner*, 245 So.2d 901, 905 (Fla. 4th DCA 1971) ("Florida law does not require that a next friend be 'appointed' before he can act."). Indeed, in an action alleging negligence based on the abuse of a minor, the Third District held that "[a]nyone who was aware of the [minor's] predicament had the authority to and could assert the [minor's] legal rights." *N.G.*, 630 So.2d at 1165.

Under the above case law, the District Court held that the grandparents could have sued as next friends of the twins if (1) the twins did not have a representative, such as a guardian or other like fiduciary; (2) they were people of reasonable judgment and integrity; and (3) their interests did not conflict with those of the twins. *D.H. and L.H.*, 217 So. 3d. at 1081.

As the District Court noted, the record below shows that between April 2006 and the grandparents' appointment as the twins' permanent guardians in April 2007 the twins had no appointed guardian or other like fiduciary who could have filed a negligence suit on their behalves. Nor does the summary judgment record reflect any genuine dispute about the grandparents' judgment or integrity or the conformity of the grandparents' own interests with those of the twins. Accordingly, the grandparents had the authority to sue as the twins' next friends as of April 2006. *Cf. Fla. Dep't of Health & Rehab. Servs. v. Powell*, 490 So.2d 1043, 1044 (Fla. 2d DCA 1986) (holding that a grandmother as the custodian of the children was entitled to petition for support for the minors because "[w]e must certainly consider the grandmother in this case as at least 'a next friend'").

b) Petitioners' Arguments That the Twins Had No Next Friend Until the Grandparents Were Appointed Permanent Guardians Is Unsupported by Any Authority.

Petitioners claim that the grandparents were merely "relative caregivers" to the twins and acted in a role similar to that of a foster parent. *See* Initial Brief, p. 27. They rely on *Buckner v. Family Servs. of Cent. Fla., Inc.*, 876 So. 2d 1285, 1286 (Fla. 5th DCA 2004), for the proposition that a custodian does not have legal standing to bring a claim on behalf of the children over whom he or she has custody. Petitioners also claim that allowing the grandparents to assert the twins' negligence claims against Adept and BEARR would impermissibly interfere with

the duties of the DCF and the dependency court proceedings *See* Initial Brief, p. 27-28. As the District Court found, Petitioners' reading of *Buckner* is too broad. *D.H. and L.H.*, 217 So. 3d at 1082.

In *Buckner*, former foster parents sued the Department on behalf of a minor seeking to challenge the Department's decisions not to approve the former foster parents' adoption of the minor and to preclude contact between them and the minor. 876 So. 2d at 1286. The court recognized that allowing the former foster parents to sue the Department over an adoption decision as next friends of the child whose adoption placement was being determined "would mean that any former foster parent would have standing to sue DCF acting ostensibly on behalf of a dependent minor child who is or at one time had been in the foster parent's custody." *Id*. at 1287. The Fifth District held that allowing the former foster parents to proceed "would usurp ... DCF's statutory authority and interfere with the jurisdiction and procedures of the dependency court." *Id*. at 1287.

The placement of a dependent minor in an appropriate adoptive home, where called for under Chapter 39 of the Florida Statutes, is a key function of both the Department and the dependency court. *D.H. and L.H.*, 217 So. 3d at 1082 (citing *Fla. Stat*. § 39.001(1)(h), (i)). "Allowing a disappointed former foster parent to use next friend status to sue the Department over an adoption decision—effectively leveraging the minor to facilitate litigation of a private grievance of the former

foster parent against the Department—would understandably interfere with that purpose." *D.H. and L.H.*, 217 So. 3d at 1082. As the District Court in the instant case found, "the same cannot be said of allowing the close relative of a minor to litigate the minor's tort claims against third parties based on conduct unrelated to any dependency proceeding or function." *Id*.

Petitioners argue the twins had no "next friend," until the grandparents were appointed permanent guardians. *See* Initial Brief, p. 31. The court in S.A.P. contemplates that a parent or legal guardian may sue as next friend, 704 So.2d at 586, but it neither held nor implied that the legal capacity to sue as next friend is limited to parents and legal guardians. *D.H. and L.H.*, 217 So. 3d at 1081. On the contrary, S.A.P. explicitly acknowledged that individuals other than parents or guardians may sue in that capacity: "the statute could not begin to run against [a] minor child until a parent, guardian, **or next friend** knew or reasonably should have known of facts which supported the child's cause of action." 704 So. 2d at 586 (emphasis added). And holding that the claims of the minor in that case were not time-barred, the court held that the limitations period did not begin to run on the date of accrual because "no one, no natural parent, no adoptive parent, no guardian ad litem, **and no next friend**, was aware" of the facts underlying the minor's claim at that time. *D.H. and L.*H., 217 So. 2d at 1081 (citing *S.A.P.*, 704 So. 2d at 587) (emphasis added). *S.A.P.* is consistent with the principle that any

adult of reasonable judgment and integrity whose interests are not in conflict with those of the minor may litigate on behalf of the minor as his or her next friend. *D.H. and L.*H., 217 So. 2d at 1081.

Finally, to the extent Petitioners claim a next friend must be appointed by the court, they immediately contradict this claim by asserting that a next friend may come forward "on his own initiative to commence an action in the name of one who is incapable of suing on his or her behalf." *See* Initial Brief, p. 30-31, citing *Drake*, 462 So.2d at 1144, n.2. Petitioners have cited no authority for their contention the grandparents were not appropriate next friends until they became permanent guardians of the twins.

c) The Grandparents Had Notice of the Twins' Injuries and Connection to the Alleged Negligence of Adept and BEARR.

There is no dispute of material fact that the grandparents had notice of the twins' injuries in connection with the alleged negligence of Adept and BEARR as of May 19, 2006, at the latest, and summary judgment properly was granted by the trial court and affirmed by the District Court. The grandfather testified in his deposition that as of May 19, 2006, he knew about some of the twins' physical and psychological injuries and attributed them to the negligence of Adept and B.E.A.R.R. R. 2348, 2407-39. Although Petitioners argue that they received a diagnosis of sensory disorder in March 2007, *see* Initial Brief, p. 35, it is not

necessary that all of their injuries have materialized for their negligence causes of action to accrue, as discussed above. *See Kelly*, 82 So. 3d 855; *Kellermeyer*, 427 So. 2d 343. Accordingly, there is no genuine issue of material fact that someone with authority to sue on the twins' behalves was on notice of the invasion of their legal rights no later than May 19, 2006.

d) The Delayed Discovery Doctrine Should Not Be Extended to the Facts of This Case Because the Grandparents Were Aware of the Twins' Injuries.

Petitioners argue that the delayed discovery doctrine should be extended to the instant case, despite the fact that this Court in *Davis* declined to extend the doctrine to any cause of action not specified in Section 95.031 of the Florida Statutes, other than the unique facts of *Hearndon*. *See* Initial Brief, p. 36-37; *Davis*, 832 So. 2d at 711; *Hearndon*, 767 So. 2d 1179. This Court in *Hearndon* held that the delayed discovery doctrine applies to delay the accrual of the cause of action based on a claim of childhood sexual abuse accompanied by traumatic amnesia that prevented plaintiff from recalling the abuse for many years. *Hearndon*, 767 So. 2d at 1182, 1186. As discussed above, the grandparents experienced no delay in discovering the twins' injuries and their connection with the alleged negligence of Adept and BEARR, and there is no basis to extend the delayed discovery doctrine to this case.

C. THE STATUTE OF LIMITATIONS WAS NOT TOLLED, AND PETITIONERS WAIVED ANY CLAIM THAT IT WAS.

1. The Running of the Four Year Statute of Limitations for Petitioners' Negligence Claims Was Not Tolled.

Petitioners argue that the limitations period was tolled under section 95.051(1)(h) from the time their claims accrued until the grandparents were appointed the twins' permanent guardians in April 2007. *See* Initial Brief, p. 38. If true, their November 2010 Complaint would be timely, as the tolled four-year period would not have run until April 2011. *See D.H. and L.H.*, 217 So. 3d at 1082-83.

Section 95.051(1)(h) provides, in relevant part, that the limitations period is tolled by:

> [t]he 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 ....

The limitations period is tolled as to the claim of a minor when there is no (1) parent, guardian, or guardian ad litem, (2) without interests adverse to those of the minor, and (3) who has not been adjudicated incapacitated to sue. *See D.H. and L.H.*, 217 So. 3d at 1083.

As for the first element, the twins assert that although their mother is a parent, she had interests adverse to them both by virtue of the dependency court

proceedings through which her parental rights were in jeopardy and the fact that the twins' negligence claims are based on her inability to care for them. *See* Initial Brief, p. 38-39. Next, the twins claim they had no guardian until the grandparents were appointed guardians in April 2007. *Id*. at p. 39-40. And finally, they acknowledge that they had a guardian ad litem beginning on April 11, 2006, but contend that the guardian ad litem was unaware of the twins' injuries and therefore did not request services to address those needs. *Id*. at p. 40

As the District Court correctly held, the twins' argument concerning the guardian ad litem's awareness of their injuries is, as a matter of statutory text, irrelevant to whether section 95.051(1)(h) applies. D.H. and L.H., 217 So. 3d at 1083 (citing *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So.3d 362, 367 (Fla. 2013) ("Our statutory analysis begins with the plain meaning of the actual language of the statute ....")). The District Court correctly concluded that under the plain language of the statute, the limitations period on a minor's cause of action is not tolled when a guardian ad litem exists, except when that guardian ad litem has interests adverse to the minor or has been adjudicated incapacitated. *See D.H. and L.H.*, 217 So. 3d at 1083. The twins assert only that the guardian ad litem did not know about their injuries, which is not a basis for tolling. *See* Initial Brief, p. 40; *D.H. and L.H.*, 217 So. 3d at 1083. As the District Court pointed out, in order to find that lack of knowledge was a basis for tolling, the words "or does not know of

the minor's injuries" would have to be added to the statutory list of circumstances that toll the limitations period. *D.H. and L.H.*, 217 So. 3d at 1083. "That is an editorial prerogative that belongs to a legislature performing a policymaking function and is denied to a court performing an interpretative one." *Id.* (citing *Hayes*, 750 So.2d at 4; *FINR II, Inc. v. Hardee County*, 164 So.3d 1260, 1264 (Fla. 2d DCA 2015)). Petitioners' reliance on section 95.051(1)(h) is therefore misplaced.

2. Petitioners Waived the Issue of the Guardian Ad Litem's Not Having Plenary Powers.

Petitioners contend the guardian ad litem appointed for the twins was not the type of guardian ad litem contemplated by Section 95.051(1)(h). *See* Initial Brief, p. 41-44. However, at every opportunity, Petitioners waived the ability to raise the tolling of the statute of limitations due to the guardian ad litem's being limited in its scope. Petitioners first failed to raise the issue of tolling in their Reply to Adept's Affirmative Defense number 10 (Statute of Limitations). R.132. Such a failure constitutes a waiver. *Landers v. Milton*, 370 So.2d 368 (Fla. 1979) (a party seeking to toll the statute of limitations has the burden of proving and pleading the circumstances that in fact toll the statute). In *Landers*, this Court held that "[i]f an answer… contains an affirmative defense and the opposing party seeks to avoid it, he shall file a reply containing the avoidance." In the instant case, while a separate reply was filed with respect to each defendant, only the reply to the affirmative

defenses of B.E.A.R.R. identified tolling as an avoidance to the statute of limitations defense. R. 253-54. Hence, Petitioners are not permitted to raise this in the first instance on their second appeal of the granting of a motion for summary judgment. *Dober v. Worrell*, 401 So. 2d 1322, 1324 (Fla. 1981) (though aware of their affirmative defense of tolling before initial pleading, respondents chose not to file a reply until appeal, which waived the affirmative defense).

Not only did Petitioners fail to raise the issue of tolling in general in their Reply to Adept's Amended Answer and Affirmative Defenses, the specific issue which Petitioners and Amicus now seek to have addressed in this Court was not raised with respect to either Respondent until now. Petitioners now assert that the existence of a guardian ad litem (GAL) did not bar the tolling of the statute of limitations because theirs was a "dependency" GAL. S*ee* Initial Brief, p. 43-44.

Petitioners assert on page 9 of their Initial Brief that in their written response to BEARR's Motion for Summary Judgment, they asserted that the statute of limitations was not a bar to their claim because tolling provisions applied to the facts of this case and that "counsel specifically argued that the court orders appointing the Dependency Court, Guardian ad litem program expressly did not confer on the guardian ad litems (sic) the power to file civil actions for damages for the children. R. 3095-3096."

This, however, is not supported by the record. With respect to their written response to the motion for summary judgment, contrary to their assertion in the Initial Brief, Petitioners merely asserted that "[n]o one at the GALP was ever aware of any injury to the Plaintiffs suffered as a result of the care they received while living with their Disabled Mother." R. 1270, at ¶ 45. Further, Petitioners specifically suggested in the next paragraph that the GAL had the ability to address any such injuries, asserting "had there been any indication that the Plaintiffs had been injured during the time the GALP was assigned to their case, the GALP would have made a request for services and ensured that appropriate action was taken." *Id*. at ¶ 46. Nearly identical language is contained in the argument section of the same response. R. 1280, ¶¶ p and q. Finally, this same asserted fact is based upon paragraphs 18 and 19 of the Affidavit of Donna Rasmussen, which contains nearly identical language. R. 2203.

Further, in their response to the motion for summary judgment, Petitioners argued not only that the GAL had no knowledge of the alleged damages, but also claimed that if the GAL had had such knowledge, it "would have prompted the guardian to take legal action on behalf of the Plaintiffs." R. 1278, at Section I(b)(i). More importantly, Petitioners took the opposite position below to the position currently asserted by both amici and Petitioner. Permitting this argument is improper and unfair. Respondents should not be required to address issues not

raised below and especially should not be required to respond to issues that were effectively precluded by Petitioners' position taken below.

All argument surrounding the GALP focused on the GALP's knowledge of injury to the twins. Such arguments do not relate to tolling. In this regard, counsel for Petitioners identified the affidavit filed by the GAL and read from Section 95.051of the Florida Statutes, but once again argued that the GAL was unaware of any injury, not that the GAL did not have the ability to act. R. 3078. In the closest attempt to reach the issue of tolling, Petitioners' counsel identified Section 398.822 (sic) of the Florida Statutes and indicated that the statute did not authorize a GAL to file suit. R. 3093-95.

This is not the same as making an argument that the statute was tolled. "[I]n order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely, and separately as points on appeal." *Florida Emergency Physicians-Kang and Associates, M.D., P.A. v. Parker*, 800 So. 2d 631, 636 (Fla. 5th DCA 2001) (citing *Singer v. Borbua*, 497 So.2d 279, 281 (Fla. 3d DCA 1986); *F.M.W. Prop., Inc. v. Peoples First Fin. Sav. & Loan Ass'n*, 606 So.2d 372, 376 (Fla. 1st DCA 1992) (failure to organize arguments under cogent and distinct issues on appeal presents sufficient reason for an appellate court to decline consideration of a matter); *see also* Fla. R. App. P. 9.210(b)(5) (1999). Indeed,

Petitioners admit they did not brief the issue of whether the GAL was a GAL listed in Section 95.051(1)(h). *See* Initial Brief, p. 46.

In fact, the authority to file suit was fully briefed and argued before the District Court, which recognized the "authority to sue" as a separate issue and addressed it completely. *D.H. and L.H.*, 217 So. 3d at 1080-83. Although the District Court's Opinion is restricted to the grandparents' authority to sue, this is simply a product of addressing the arguments raised in the briefs to the District Court. With respect to the issue of tolling, the District Court observed that Petitioners' argument was only concerned with whether the GAL was aware of the twins' injuries. *Id*. at 1083. Astutely, the District Court also observed that as a result of this lack of awareness, the GAL "therefore did not request services to address those needs." *Id*. This once again runs contrary to Petitioners' and amici's current assertion that the GAL was not in a position to address those needs. *Id*. at 1082-84.

Finally, while Judge Villanti in his concurrence did not address the observation by the majority that the GAL did not request services because it did not know of the injuries, he specifically observed that the issue of tolling as it related to the GAL's authority to act was never raised as a basis for reversal on appeal. *D.H. and L.H.*, 217 So. 3d at 1085.

It is well-settled that a party may not raise an issue for a first time on appeal. *See Weaver v. Weaver*, 95 So.3d 1029, 1030 (Fla. 2d DCA 2012) (husband abandoned challenge on appeal to trial court's allocation of parenting coordinator fees, in action for divorce, where he did not address claim in body of argument in his appellate brief); *I.R.C. v. State*, 968 So.2d 583, 588 (Fla. 2d DCA 2007) (consideration of the lawfulness of the detention issue was precluded not only because that specific basis for reversal was not preserved but also because it was not argued by I.R.C. on appeal).

Section 95.051(1)(h) of the Florida Statutes tolls the running of the statute of limitations on the claims of unrepresented minors in specific circumstances. *L.H. and D.H.*, 217 So. 3d at 179-80. As the District Court noted, "[i]f that tolling statute is insufficiently protective of minors' rights, that problem is—barring a constitutional issue, which no one here has raised—a problem of policy for the legislature to solve." *Id.* at 180.

3. The Petitioners' Failure to Raise and Preserve the Issue of the Capacity of the Guardian Ad Litem Does Not Constitute Fundamental Error.

Petitioners claim that their newly-raised argument that a dependency court guardian ad litem is not a guardian ad litem contemplated by Section 95.051 of the Florida Statutes, should not be considered in this forum. Petitioners claim they preserved the argument in the trial court, though it was not assigned as error when

Petitioners initially appealed to the Second District Court of Appeal. *See* Initial Brief p. 2, n.1, p. 44. In support, Petitioners assert that this newly-raised argument constitutes a fundamental error, based upon dicta in the concurring opinion by the District Court stating "the argument concerning the guardian ad litem's authority to act was not raised as a basis for reversal on appeal, and the concept of fundamental error has yet to be extended to allow an appellate court to correct an error that was preserved in the trial court but not raised on appeal." *D.H. and L.H.*, 217 So. 3d at 1085. Petitioners' claim of fundamental error is both legally without merit and factually unsupported.

This Court has long held that "[an] Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." *Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970) (citations omitted). The use of "fundamental" error is extremely limited as applied in civil cases. *Coba v. Tricam Industries, Inc.*, 164 So.3d 637, 646 (Fla. 2015). In contrast to criminal cases where the "fundamental error" doctrine is utilized, in civil cases, reversal based on the concept of "fundamental error" where a timely objection has not been made is exceedingly rare. This Court has explained that fundamental error must implicate a constitutional right, such as due process, or the error must be so significant that requiring a new trial is essential to maintain public trust in our jury trial system. *See, e.g., Murphy v. Int'l Robotic Sys., Inc.*, 766 So.2d 1010, 1026 (Fla. 2000). In

other words, the error must have been so significant that it deprived one party of the right to a fair trial and due process. In *Coba*, this Court found that where the defendant did not immediately object to a jury's inconsistent verdict, the defendant waived the ability to later claim the error was fundamental. 164 So.3d at 646. Accordingly, here Petitioners should not be able to benefit from their decision not to brief the capacity of the GAL previously.

From a factual standpoint, in the instant case, the issue of the GAL's ability to act was not properly preserved at the trial court level. The record demonstrates that Petitioners, in response to the Motion for Summary Judgment, took a position contrary to their newly-raised argument, as discussed above. Petitioners failed to advise the lower court that Section 95.051 does not contemplate a guardian ad litem appointed in a dependency Court proceeding. Rather, they claimed the sole reason the GAL failed to file any claim on behalf of Petitioners was its lack of knowledge as to any injury. Petitioners further claimed that if the GAL had had such knowledge, it "would have made request for services **and ensured that appropriate action was taken**." R. 2203-04 (emphasis added). These assertions cannot be deemed erroneous, or misunderstood, as they are contained in three separate portions of Plaintiffs' Response to Defendant BEARR Inc.'s Motion for Summary Judgment, including: Plaintiffs Disputed Facts Nos. 45-46 (R. 2084), Plaintiffs' Memorandum of Law, (R. 2094, at ¶¶ p and q), and of the Affidavit of

Donna Rasmussen filed in support (R. 2203, at ¶¶ 18-19, 21). The position previously taken by Petitioners and the Guardian ad litem Program is contrary to their current positions. Hence, these arguments should not be considered by this Court, and the doctrine of fundamental error should not be extended to this case.

CONCLUSION

No express and direct conflict between the instant decision below and the three cases cited by Petitioners exists; accordingly, Adept respectfully requests this Court to decline discretionary jurisdiction over Petitioners' appeal. If the Court retains jurisdiction, Adept respectfully requests this Court uphold the District Court's approval of summary judgment in its favor.

Dated: December 15, 2017. Respectfully submitted,

/s/ J. Robert McCormack

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 15, 2017, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Filing Portal which will send an electronic copy to:

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I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellant Procedure 9.210(a)(2).

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