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.

PETITIONER'S INITIAL BRIEF ON MERITS

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PRELIMINARY STATEMENT

The term "twins", means D.H. and L.H. The term "Petitioners" means, Richard and Suellen Harkins. The term "BEARR", means Respondent or Defendant. The term "ADEPT", means Respondent or Defendant. The Record on Appeal is identified by "R.", followed by the appropriate page number(s) of the Record. The Appellant's Appendix to Initial Brief is identified by "A", followed by the appropriate page number(s) of the Appendix.

INTRODUCTION AND JURISDICTIONAL STATEMENT

This matter stems from an appeal of two final summary judgments entered against Petitioner D.H. and L.H., minor children, by and through their next friends and permanent guardians, RICHARD HARKINS and SUELLEN HARKINS entered in favor of Respondents ADEPT COMMUNITY SERVICES, INC. and B.E.A.R.R., INC.

The Second District Court of Appeal affirmed the trial court's final summary judgment holding, in part:

1. Any argument that a cause of action for a minor child does not accrue until an adult capable of bringing the action knows of the invasion of the minor's legal rights is improper because it is an expression of the delayed discovery doctrine.

2. The statute of limitations would have expired if it ran from the date the grandparents learned of the abuse, because they could have sued as "next friends."

3. The statute of limitations was not tolled pursuant to section 95.051(1)(h) Florida Statutes because a dependency court guardian ad litem existed. [1]

The District Court's Opinion demonstrates a misunderstanding of when a cause of action accrues for a minor child. Its holding directly and expressly conflicts with the holdings contained in the majority opinions rendered by the Fourth District Court of Appeal in *Doe No. 3 v. Nur-Ul-Islam Academy, Inc.*, 217 So. 3d 85 (Fla. 4th DCA 2017), by the First District Court pf Appeal in *S.A.P. v. Dep't of Health & Rehab, Servs.*, 704 So. 2d 583, 586 (Fla. 1st DCA 1997), and the Third District Court of Appeal in *Drake v. Island Cmty. Church, Inc.*, 462 So. 2d 1142 (Fla. 3rd DCA 1984) all of which held that a cause of action for a minor child does not accrue until an adult capable of bringing the action knows of the invasion of the minor's legal rights. The controlling facts in all of these cases are substantially similar in that they all focus on the issue of when a cause of action accrues for a minor child.

[1] In addition, the Opinion rejects Petitioner's argument that the statute of limitations was tolled pursuant to section 95.051(h) Florida Statutes, because the issue of whether the existence of a dependency court guardian ad litem was sufficient to defeat tolling pursuant to section 95.501(h) while preserved in the trial court was not specifically raised in the briefs.

A significant conflict thus exists to invoke the jurisdiction of this court which it has exercised in this case. The Court should resolve the conflict between the districts by holding that the statute of limitations will begin to run as to the parents or the legal guardians of minors, in their capacity of next friend, when the parents or legal guardian knew or reasonably should have known of the invasion of legal rights.

The issue of is of great public importance because as a result of the express and direct conflict between the Districts, claims for minor children accrue at different times depending on the District. There is thus no statewide uniformity on the issue of when a cause of action for a minor child accrues. Claims thus made timely in one District, could be barred by the statute of limitations in another. This creates chaos, injustice, and would encourage forum shopping under certain circumstances.

Further, the District Court addressed but did not decide in its opinion whether a dependency court guardian ad litem is the type of guardian ad litem contemplated by section 95.051(h) Florida Statutes and whose existence is sufficient to defeat tolling of the statute of limitations as provided in section 95.051(h) Florida Statutes. Dependency court guardian ad litems are not authorized by statute, or by the order of appointment in this case, to bring legal actions on behalf of children. Their roles are limited to representing the best interests of the children in dependency court, and to make recommendations to the dependency court judge as to resolution of the

dependency case. This issue, if left open by this Court, suggests that dependency court guardian ad litems have a duty and commensurate responsibility to bring claims for damages on behalf of children outside of the dependency proceedings which they do not.

The District Court further improperly found that the grandparents in this case could have brought an action as "next friends" before they were conferred such power to file suit which did not occur until they were appointed permanent guardians of the children with plenary powers. The District Court found that the grandparents could have filed suit against third parties on the premise that the mother was unfit to care for her children with the assistance of these very same parties, during a dependency proceeding in which the mother's fitness was the issue. As argued herein, the grandparents could not have served as next friend to the children under these circumstances, particularly when they were unaware of the causes of action.

STATEMENT OF CASE AND FACTS

The Petitioners, D.H. and L.H. (hereinafter "the twins") are twin brothers and minor children. R. 2. Their biological mother is Kelley Harkins (hereinafter "Disabled Mother"), who was developmentally disabled. The twins were removed from the Disabled Mother's custody in April 2006 and currently reside with their maternal grandparents and permanent guardians, Richard and Suellen Harkins

(hereinafter "the grandparents"), who initiated this action in the Circuit Court on the twins behalf as their next friends and permanent guardians.

Respondent, ADEPT Community Services, Inc. (hereinafter "ADEPT") was a corporation which "provided Waiver Support Coordination Services for the Disabled Mother." R. 2, 35, 195-96. Respondent, B.E.A.R.R., Inc. (hereinafter "BEARR") was a corporation which "provided supported living coaching services to the Disabled Mother." R. 3, 196.

The Disabled Mother became pregnant with the twins and was due to give birth to them in September 2005. R. 1417. Judy Hamm, an employee of ADEPT, provided waiver support coordination services to the pregnant, Disabled Mother and arranged for Fay Calhoun, an employee of BEARR, to begin providing supported living coaching services to the Disabled Mother. R. 1385-86, 1391-92. A Support Plan was created for the Disabled Mother by ADEPT and BEARR in preparation for her to live on her own after giving birth to the twins, which most notably stated that the Disabled Mother required one-to-one ratio assistance, twenty-four hours per day, just to care for herself, regardless of whether or not she had children. R. 1420-21, 1746-47; A. 1, 35:20-36:11 & 63:23-64:21. Both Judy Hamm and Fay Calhoun testified that they were concerned that the Disabled Mother would not be able to provide care for the twins without the additional assistance. R. 1386, 1388, 1421, 1426-27; A. 1, 35:20-36:11 & 63:23-64:21.

On September 12, 2005, the twins were born. R. 2284. The Florida Department of Children and Families allowed the Disabled Mother to keep the twins with the understanding that she would be able to move into her own apartment with the twins as long as it was a safe environment for them, with a 24/7 live-in aide to assist the Disabled Mother. R. 1393-94, 1945; A. 1, 89:10-21 & Exhibit 19 at KH-ADEPT00051. When it was time for the Disabled Mother to move into her own apartment, the grandparents, called a meeting with all of the Disabled Mother's providers, including ADEPT and BEARR, to voice concerns they had in regard to the Disabled Mother's ability to safely care for the infant twins. R. 2338, 2341, 1403-04; A. 1, 95:2-21. Regardless of Richard and Suellen Harkins' concerns and with the support of ADEPT and BEARR, the Disabled Mother left the home of the grandparents to live in her own apartment with the twins, and a live-in aide, and continued to receive services from ADEPT and BEARR. A. 1, 95:22-96:8; R. 1404-05.

On April 11, 2006, the twins were removed from their Disabled Mother's care and a shelter petition was filed in the dependency court alleging that the Disabled Mother had fired her live-in aide and was not able to care for herself or the infant twins alone. R. 27, 1328. An Order on the Shelter Petition was entered by the dependency court and, pursuant to that order, the twins were placed in the custody of the Florida Department of Children and Family Services. R. 1267, 1333-36.

Two orders appointing the guardian ad litem program (hereinafter "GALP") were entered on April 12, 2006 for each of the children. R. 2206-2207. The orders specifically stated the powers conferred to the guardian ad litems for the children which related solely to the dependency proceedings. The orders expressly did not confer on the guardian ad litems any power to bring a civil action for damages on behalf of the children. R 2206-2207.

On May 16, 2006, an order was entered by the dependency court that placed the twins in the "temporary care, custody, and control of the maternal grandparents, under the supervision of the Department and/or Safe Children Coalition of Pinellas County". R. 1268, 1343. The order specified that grandparents would have only limited rights "to authorize any necessary and emergency medical treatment and ordinary medical, dental, psychiatric, and psychological care for the children." R. 1268, 1343. This order expressly did not confer on the grandparents the power to bring a civil action for damages on behalf of the children.

"On June 6, 2006, Richard Miller was appointed as the Guardian ad Litem (hereinafter "GAL") for the twins." R. 2202, 2226-27. "During the time Richard Miller was assigned as GAL for [the Plaintiffs], the GALP was unaware of any injury the children suffered as a result of the care they received while living with their [Disabled Mother]." R. 2202. Richard Miller was discharged as the twins GAL by July 31, 2006. R. 2202. No one at the GALP was ever aware of any injury the twins

suffered as a result of the care they received while living with their Disabled Mother. R. 2204.

Throughout the dependency proceedings, the Disabled Mother maintained her position that she never harmed D.H. or L.H. and that she was a competent parent to her children. R. 2663. On February 5, 2007, although CT scans that had been performed on the Plaintiffs produced normal results, Richard and Suellen Harkins became concerned as to the mental development and neurological functioning of the Plaintiffs. R. 2662. At this time, however, they were still unaware that the Plaintiffs had suffered any actual injury. R. 2662. On or about March 15, 2007, Plaintiffs were diagnosed with sensory disorder by All Children's Hospital. R. 2662.

On April 13, 2007, the dependency court entered an order granting the grandparents permanent guardianship rights over the twins. R. 1269-70, 1355. The order confirmed the Report and Recommendations of the General Magistrate, which specifically stated that "[t]he permanent guardians shall have all the rights and duties of a parent." R. 1270, 1355, 1359. Until April 13, 2007, Richard and Suellen Harkins were merely custodians of the twins, who were under supervision of the Department and/or Safe Children Coalition of Pinellas County and they only had limited authority and rights concerning the twins. R. 1270, 1343-44.

On November 17, 2010, less than four (4) years after the grandparents were appointed as permanent guardians of D.H. and L.H., they filed a Complaint on behalf of the minor Plaintiffs, D.H. and LH. which included claims of negligence against Defendants ADEPT and BEARR, alleging that each entity "had or voluntarily assumed duties to provide assistance to the Disabled Mother to raise D.H. and L.H. recognizing that such assistance was necessary for the protection of D.H. and L.H.'s health and well-being" and that "[each defendant], through its agents and/or employees, breached [its] duties[,]" and "as a direct and proximate result of the aforementioned breaches, Plaintiffs were inappropriately cared for, neglected, and suffered, and will continue to suffer severe bodily harm....." R. 6-8, 10-12.

Thereafter, BEARR filed a motion for Summary Judgment which argued that the twins claim was barred by the statute of limitations based on when the cause of action accrued. R. 508-512. ADEPT filed its Notice of Adaption (sic.) of BEARR's Motion for Summary Judgment. R. 1247-48. Petitioners filed a response to BEARR's Motion for Summary Judgment, arguing that the statute of limitations was not a bar to their claim because they filed their Complaint within four (4) years from the time their cause of action accrued, and because tolling provisions for the statute of limitations applied to the facts of this case. R. 1272-1286. At the hearing, petitioners' counsel specifically argued that the court orders appointing the dependency court guardian ad litem program expressly did not confer on the

guardian ad litems the power to file civil actions for damages for the children R. 3095-3096. The trial court denied BEARR's Motion for Summary Judgment without prejudice. R. 1705.

BEARR later filed a Motion for Reconsideration which requested the court to reconsider the statute of limitations issue raised in its Motion for Summary Judgment, wherein it argued that the twins had access to the courts via next friends and/or the guardian ad litem and that the statute of limitations should not be tolled. R. 1707. ADEPT filed a nearly identical Motion for Reconsideration. R. 2032-2036. At the hearing Petitioners' counsel argued that section 95.051(h) Florida Statutes tolled the statute of limitations because D.H. and L.H. were minors and had no parent, guardian, or guardian ad litem without an interest adverse to them to file suit. R. 3052-3094. Petitioners' counsel again specifically argued at the hearing that the court orders appointing the dependency court guardian ad litem program expressly did not confer on the guardian ad litems the power to file civil actions for damages for the children. (R. 3135) The court granted final summary judgment in favor of the Respondents. R. 3046.

The Second District Court of Appeal affirmed the trial court's final summary judgment holding, in part:

> 1. Any argument that a cause of action for a minor child does not accrue until an adult capable of bringing the action knows of the invasion of

the minor's legal rights is improper because it is an expression of the delayed discovery doctrine.

2. The statute of limitations would have expired if it ran from the date the grandparents learned of the abuse, because they could have sued as "next friends."

3. The statute of limitations was not tolled pursuant to section 95.051(1)(h) Florida Statutes because a dependency court guardian ad litem existed.

4. The District Court declined to consider whether the existence of a dependency court guardian ad litem was sufficient to defeat tolling pursuant to section 95.501(h) Florida Statutes because while preserved in the trial court, it was not specifically raised in the briefs.

SUMMARY OF ARGUMENT

This Court should resolve the conflict between the First, Second, Third and Fourth Districts and reaffirm the longstanding doctrine that a cause of action for a minor child accrues when an adult with authority to sue on the minors behalf knew or should have known of the minor's injury and its connection to the defendant's negligence as held in *Doe No. 3 v. Nur-Ul-Islam Academy, Inc.*, 217 So. 3d 85 (Fla. 4th DCA 2017); *S.A.P. v. State of Florida, Department of Health and Rehabilitative Services*, 704 So. 2d 583 (Fla.1st DCA 1997) and *Drake v. Island Community Church, Inc.*, 462 So. 2d 1142 (Fla. 3rd DCA 1984)

Determining accrual based on the application of rule 1.120(b) Florida Rule of Civil Procedure is not as the Second District Court of Appeal suggests a variation of the delayed discovery doctrine. As the Fourth District Court of Appeal pointed out

in *Nur-Ul-Islam Academy, Inc.*, 217 So. 3d 85 (Fla. 4th DCA 2017), accrual for the cause of action for a minor is based on a separate rule and line of cases that are different from the principles of the delayed discovery doctrine. "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) to delay accrual of the cause of action is different from the rationale for protecting minors under the doctrine of delayed discovery (the trauma of the injury induces suppression of consciousness) to delay accrual." See Nur-Ul-Islam Id. at 43. A cause of action further cannot accrue until it can be commenced. *Berger v. Jackson*, 23 So. 2d 265, 269 (Fla. 1945). This Court did not abrogate this rule in its decision of *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002). This Court was not asked to consider the longstanding doctrine that a child's cause of action does not accrue until an action may be brought, and that a child may not bring an action on his or her own behalf pursuant to rule 1.210 but is dependent on a qualified guardian ad litem, or next friend.

The children in this case did not have a "next friend" up until the time the grandparents were appointed permanent guardians with plenary powers. Prior to that the grandparents could not self-appoint themselves as "next friends" to bring an action for damages against third parties based on the premise that the third parties failed to protect the twins from an unfit mother, because to do so would have usurped

the natural mothers' status as natural parent and guardian, and would have prejudged the outcome in the dependency case. The grandparents further could not act as "next friends" to assert the legal interests of the twins unless they were aware of legal interests that needed to be protected.

Although the children's claims could not have accrued until they could have been brought, the delayed discovery doctrine should be extended to the facts of this case. In *Hearndon v. Graham*, 767 So. 2d 1179 (Fla. 2000), this Court extended the delayed discovery doctrine to causes of action arising out of childhood sexual abuse. In this case, the necessity for application of the doctrine is even more compelling because solely as a result of the disability of non-age, and the application of rule 1.210(b), minor children are barred from filing suit, and consequent access to the Courts, when no qualified adult with capacity to file suit and knowledge of the cause of action exists.

Applying the tolling provision of section 95.051(h) Florida Statutes to the facts of this case, the statute of limitations was tolled because the natural mother had interests adverse to the child; the grandparents were not appointed as guardians with plenary powers including the power to file suit until April 13, 2007; and the dependency court guardian ad litems were not guardian ad litems contemplated by section 95.051(h) Florida Statutes, because they had no power to file suit and only represented the children's best interests in the dependency case. Further the

dependency court guardian ad litem had no knowledge of the cause of action. Guardian ad litems, by definition, must be aware of the interests of the ward they are appointed to protect. *Section 744.3025 Florida Statutes*.

The Court can consider the argument that the dependency court guardian ad litem was not a guardian ad litem as referenced in section 95.051(h) Florida Statutes sufficient to defeat tolling even if not assigned as an error by Petitioners, because it involves a fundamental error which appears on the face of the record, and was properly preserved in the trial court.

STANDARD OF REVIEW

"The standard of review of an order granting summary judgment is de novo." *Mobley v. Gilbert E. Hirschberg, P.A.,* 915 So. 2d 217, 218 (Fla. 4th DCA 2005)(citing *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). The trial court erred in granting final summary judgment in favor of the Respondents because Petitioners' claims are not barred by the statute of limitations as a matter of law because a genuine issue of material fact exists in regard to when Petitioners' cause of action accrued, and whether the statute of limitations was tolled, and because if the inferences drawn and conflicts regarding the evidence presented to the Trial Court had been viewed in a light favorable to the Petitioners, as the non-moving party, the evidence shows that Petitioners timely filed their Complaint within the applicable statute of limitations period. [S]ummary

judgment procedures should be applied with special caution in negligence actions." *Holl v. Talcott*, 191 So. 2d 40, 46 (Fla. 1966); *see also Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985).

ARGUMENT

I. The trial court erred granting summary judgment on the twins negligence claims based on the statute of limitations because the minor's claims did not accrue until an adult with authority to sue on the minors' behalf knew or should have known of the minors' injury and its connection to the Defendants negligence.

As noted by the District Court in the Opinion all of the parties, in the trial court and in their briefs, agreed that a cause of action for a minor child accrues when an adult with authority to sue on the minors behalf knew or should have known of the minor's injury and its connection to the defendant's negligence. *S.A.P. v. State of Florida, Dept. of Health and Rehabilitative Services*, 704 So. 2d 583 (Fla. 1st DCA 1997) and *Drake v. Island Community Church, Inc.*, 462 So. 2d 1142 (Fla. 3rd DCA 1984).

The District Court in the Opinion further stated:

> "Agreeing on these principles, the parties' arguments are directed to disputing when the grandparents acquired the authority to sue on the twins' behalf and when they knew or should have known of the invasion of the twins' legal rights.
>
> The problem with those arguments is that the premise upon which they are based has been invalidated by the supreme court. The 'knew or should know' accrual rule for negligence is an expression of the delayed discovery doctrine under which a cause of action does not accrue for state of limitations purposes until the plaintiff knows or reasonably should know of the invasion of his or her rights. See

> Hearndon, 767 So. 2d at 1184. In *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002), the supreme court held that the doctrine applies only when the legislature has by statute provided that it does.
>
> As a result, the grandparents'' knowledge of the alleged invasion of the twins; rights is not pertinent to when the twin's negligence causes of action accrued. Although cases like S.A.P. and Drake have held otherwise, those cases predate the supreme court's decision in Davis. Under the plain language of section 95.031(1), as applied in Davis, the cause of action accrues when its last element occurs."

D.H. and L.H. v. Adept Community Services, 217 So. 2d 1072, 1077-1078 (Fla. 2017).

Considering the same legal issue, the Fourth District of Appeal in *Doe No. 3 v. Nur-Ul-Islam Academy, Inc.*, 217 So. 3d 85 (Fla. 4th DCA 2017) reached a contrary result finding that the decisions in Drake and S.A.P. were still good law on the issue of when a cause of action for a minor child accrues and were not invalidated by this Court's decision in *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002). The Fourth District Court citing Drake noted that in that decision the Third District deemed it elementary that:

> "A cause of action cannot be said to have accrued, within the meaning of [the statute of limitations], 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 1144 (alteration in original) (quoting *Berger v. Jackson*, 156 Fla. 251, 23 So. 2d 265, 269 (Fla. 1945)). Drake at 1144.

Noting that a minor may not bring suit on his or her own behalf, the Third District Court of Appeal in Drake further stated:

> "It follows, then, that the statute of limitations could not begin to run against the minor child in the present case until the parent knew or reasonably should have known those facts which supported a cause of action. Since the complaint in this action alleges that the parent did not have this knowledge, the statute did not commence to run as a matter of law against the minor child." Id.

The Fourth District Court of Appeal in Nur-Ul-Islam also cited as support for this principle the case of *S.A.P. v. State of Florida, Department of Health and Rehabilitative Services*, 704 So. 2d 583 (Fla. 1st DCA 1997), in which the First District Court of Appeal reached the same conclusion:

> "Under Florida Rule of Civil Procedure 1.210 a minor is incapable of bringing an action on his or her own behalf, but can only sue by and through a guardian ad litem, next friend, or other duly appointed representative. Thus, the statute of limitations will begin to run as to the parents or the legal guardian of the minor, in their capacity of next friend, when the parents or guardian knew or reasonably should have known of the invasion of legal rights. *Drake v. Island Community Church, Inc.*, 462 So.2d 1142, 1144 (Fla. 3d DCA 1984), Id at 585–86". (Citations omitted)

The Fourth District in Nur-Ul-Islam expressly disagreed with the Second District's that determining accrual based on the application of rule 1.120(b) is a variation of the delayed discovery doctrine stating:

> "Doe's contention regarding the accrual of her cause of action is based on a separate rule and line of cases that are different from the principles of the delayed discovery doctrine. 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) to delay accrual of the cause of action is different from the rationale for protecting minors under the doctrine of delayed discovery

(the trauma of the injury induces suppression of consciousness) to delay accrual." Nur-Ul-Islam at 89.

The Fourth District Court of Appeal's analysis that the running of the statute of limitations does not commence until a suit can actually be brought is correct. The only similar case decided since D.H. and Nur-Ul-Islam which addressed the conflict between the holdings in these two cases, agreed with the analysis of the Fourth District Court of Appeal in Nur-Ul-Islam as set forth above. *See Doe No. 60 v. G-Star School of the Arts, Inc*., 2017 WL 2212429 (S.D. Fla. May 19, 2017) (order on motion to dismiss).

As the Court noted in G-Star at *6, the Florida Supreme Court in Berger first articulated the principal that a cause of action cannot be said to have accrued until there exists some person capable of initiating the action (and some person or entity whom the action could be initiated against). 23 So. 2d at 269. There is no authority indicating the erosion of this principle. The cases cited by the Second District Court of Appeal in the Opinion, Hearndon, and Davis, do not undermine this longstanding principle.

In *Hearndon v. Graham*, 767 So. 2d 1179 (Fla. 2000), the Florida Supreme Court applied the "delayed discovery" doctrine, which generally provides that a cause of action does not accrue until the plaintiff, regardless of age or incapacity, either knows or reasonably should know of the tortious act giving rise to the cause

of action. (Emphasis Added) The plaintiff in Hearndon asserted a cause of action against her stepfather for injuries resulting from childhood sexual abuse. This Court held that the delayed discovery doctrine applies to "causes of action alleging subsequent recollection of childhood sexual abuse. The Court reasoned that the doctrine was appropriate in such cases because the lack of memory was caused by the abuser. Id. at 1182, 1185-86. The Court in Hearndon thus did not consider the effect of incapacity on accrual of a cause of action at all, but extended the delayed discovery or "blameless ignorance" doctrine to claims involving child sexual abuse where the abuse caused the loss or suppression of memory. This Court actually reaffirmed in Hearndon 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)' citing *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 821 (Fla. 1996).

Thereafter, in *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002), this Court held that there was no statutory basis for extension of the delayed discovery doctrine to the statute of limitations on a claim for misappropriation of the assets of an elderly woman by family members. The Florida Supreme Court explained, in relevant part, 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]egistlature 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."

Id. at 709-10 (citing section § 95.031 Florida Statutes, and section § 95.11(4) Florida Statutes (Supp. 2000)) (footnote omitted) (Emphasis added). In so holding, the Florida Supreme Court declined to extend Hearndon to the facts before it.

This Court in Davis did not, and was not asked to consider the longstanding doctrine that a child's cause of action does not accrue until an action may be brought, and that a child may not bring an action on his or her own behalf pursuant to rule 1.210 but is dependent on a qualified guardian ad litem, or next friend. Davis only holds, as it clearly states, that there is no other statutory basis for the delayed discovery doctrine except in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse. Taken to its logical conclusion, to accept the District Court's analysis in this case, this Court would have abrogated Hearndon in Davis if the existence of a statutory basis was the only criteria.

This issue was discussed in this Court's analysis of delayed discovery and the tolling statute, section 95.051 Florida Statutes in Hearndon. In Hearndon, this Court

stated that the tolling statute precludes application of any tolling provision not provided therein. Id. at 484-1185. See section 95.051(2) Florida Statutes (1987). The Court concluded that since delayed discovery due to lack of memory was not included in the statute as a basis for tolling, there could be no statutory tolling. This Court thereafter, however, continued to recognize the viability of equitable tolling for fraudulent concealment. *Fla. Dep't. of Health and Rehabilitative Services v. S.A.P.*, 835 So. 2d 1091 (Fla. 2002). This Court in S.A.P., noted that equitable estoppel is a basic tenet of the common law, and any statute enacted in derogation of the common law such as the statute of limitations must expressly so provide; …" In this case, the doctrine that a cause of action cannot accrue until it may be brought first established in Berger in 1945 had long been part of the common law in Florida. Id. at 1098 As a general rule of statutory construction "a statute in derogation of the common law must be strictly construed", and "court will presume that such a statute was not intended to alter the common law other than what was clearly and plainly specified in the statute". *Accident Cleaners, Inc. v. Universal Ins. Co.*, 186 So. 3d 1, 2 (Fla. 5th DCA 2015) (citations omitted).

The applicable statute of limitations section 95.031(1) Florida Statutes states "[a] cause of action accrues when the last element constituting a cause of action exists". It does not conflict with rule 1.210(b) which provides that a child may not commence an action in his or her own right, but may only do so through a qualified

adult with capacity. When no such person exists, accepting the District Court's analysis, an action for negligence for anyone less than twelve years of age would be barred by the statute of limitations before the action could ever be commenced by the child on his or her eighteenth birthday.

As in S.A.P. where the court found that the basic purposes served by the statute of limitations and the doctrine of equitable estoppel are in harmony, so are the statute of limitations and the case law regarding accrual of causes of action for minors based on Florida Rule of Civil Procedure 1.210(b). S.A.P. at 1098-1099. The main purpose of the statute of limitations is to protect defendants from stale claims, and surprise to Defendants. How could a claim on behalf of a minor be considered stale before it could even be lawfully commenced? How also would potential Defendant's be surprised, if their conduct forms the basis of the cause of action, and as here the children are the subject of a dependency proceeding where the mother is accused of being unfit to care for her children despite the Defendants' provision of services.

As noted by the Court in G-Star at *6 "to the contrary, the Florida Supreme Court has reiterated on numerous occasions that a cause of action cannot be said to have accrued *until the action can be brought*, and it has done so even after its decision in Davis and even when recognizing that, pursuant to section 95.031(1) Florida Statutes, a cause of action accrues when the last element constituting the

action occurs. *See, e.g., 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.") (citing *Loewer v. New York Life Ins. Co.*, 773 F.Supp. 1518, 1521 (M.D. Fla. 1991)); *Kipnis v. Bayerische Hypo-Und Vereinsbank, AG, etc., et al.*, 202 So. 3d 859, 861 (Fla. 2016) ("A cause of action accrues when the last element constituting the cause of action occurs.... [A] cause of action cannot be said to have accrued, within the meaning of the statute of limitations, until an action may be brought.")" "Indeed, the Davis court never mentioned Berger, let alone overruled it, and it did not have before it a minor's claim (and the import of rule 1.210(b)) or an accrual issue relating to whether a person capable of bringing a claim in a representative capacity had notice." G-Star at *6

As the Court explained in G-Star at *7 "it would seem, then, that in the context of accrual, the delayed discovery doctrine-delaying the accrual of a cause of action based upon knowledge of the tortious acts giving rise to it-operates separate and apart from the equally important consideration of whether at a given time the action can be brought in the first place-which, as Berger established, necessarily depends on whether there exists a "person capable of suing." 23 So. 2d at 269". Here, by the plain terms of rule 1.210(b), the twins simply could not have previously brought the negligence claim they now assert through their guardians, at least not on their own, because of their status as minors. And without knowledge on the part of someone

who could bring the claim Berger would dictate that a person capable of bringing suit did not exist, which in turn would mean under this Court's precedent that the suit could not have, at that time, been brought at all. See State Farm, 678 So. 2d at 821; Kipnis, 202 So. 3d at 861; see also *A.G.D. ex rel. Dortch v. Siegel*, 2009 WL 4421259, at *4 (S.D. Fla. Nov. 25, 2009). See G-Star *7. Accordingly, the statute of limitations does not begin to run in a case of abuse against the minor child, such as the present case, until an adult with capacity to bring an action on behalf of the minor child, knew or reasonably should have known those facts which supported a cause of action." Id.

Accepting the Second District Court of Appeal's analysis in the Opinion, the statute of limitations is triggered for minor children at the time they first suffer damages whether or not a person aware of the negligence and capable of suing on their behalf exists. This leaves thousands of children in the dependency system like the twins, including many children who spend their entire childhoods in the foster care system without redress. Article 1, section 21, Florida Constitution, provides: "The courts shall be open to every person for redress of any injury, and justice shall be administrated without sale, denial or delay". The essence of the District Court's Opinion is that the statute of limitations runs on the claims of minor children even

when actions cannot be brought. Access to the courts for these most vulnerable and voiceless members of society is accordingly denied.[2]

II. The trial court erred granting summary judgment because the twins did not have a "next friend" up until the time the grandparents were appointed permanent guardians with plenary powers.

A. The grandparents could not file a lawsuit on behalf of the twins until they were appointed permanent guardians with the power to file suit.

The District Court found that even assuming the cause of action accrued when an adult capable of bringing suit first had knowledge of the invasion of the minors' legal rights, the twins claims accrued outside the limitations period because the grandparents could have at all times sued as "next friend" of the twins.

Florida Rule of Civil Procedure 1.210(b) provided in 2006 that:

> **"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.)

[2] Such children do not have protection as the District Court suggests pursuant to section 95.051(h) Florida Statutes since most if not all have dependency court guardian ad litems appointed who have no plenary powers to bring actions and may have no knowledge of potential claims. The Opinion leaves open the question of whether such dependency court guardian ad litems are guardian ad litems per section 95.051(h) Florida Statutes whose existence are sufficient to defeat tolling of the statute of limitations. D.H. F.N. 5.

The District Court stated that the grandparents could have sued as next friend 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 do not conflict with those of the twins citing *Fla. Dep't. of Health and Rehabilitative Services v. Powell*, 490 So. 2d 1043, 1044 (Fla. 2nd DCA 1986). In that case, the Department of Health and Rehabilitative Services serving as the petitioner in the action took the position that a grandmother as the consensual custodian of children was a proper person to request the department for assistance in bringing an action for support for the children.[3]

The flaw in this analysis is that the children were the subject of a Chapter 39 dependency proceeding in which the natural parent argued that she was a good mother who could safely care for the twins and sought reunification. Against this backdrop the dependency court entered an Order that:

> [T]he children shall be placed in the temporary care, custody and control of Suellen and Richard Harkins, maternal grandparents, under the supervision of the Department and/or Safe Children Coalition of Pinellas County, pending further order of the Court. . . . The current

[3] The factual situation in Powell is distinguishable. The Court in that case found that a grandparent could at least be considered a "next friend" in the context of requesting HRS for assistance in bringing an action for support. A party to a dependency proceeding, however, does not include a legal custodian including a grandmother. See *In Re K.M.*, 98 So. 2d 211, 212-213 (Fla. 2nd DCA 2008). Further, a grandparent is not a party, nor may they intervene in a dependency proceeding. See *In re. J.P.*, 12 So. 3d 253, 245 (Fla. 2nd DCA 2006).

> custodians of the children shall have the right to authorize any necessary and emergency medical treatment and ordinary medical, dental, psychiatric, and psychological care for the children.

R. 1267-1270. Such order granted Richard and Suellen Harkins only the limited authority to provide care for the twins and obtain medical, dental, and psychiatric or psychological treatment they needed. At that point in time, Richard and Suellen Harkins were merely relative caregivers to the Plaintiffs and acted in a role similar to a foster parent. The natural mother still existed and her parental rights were not terminated. A custodian of that nature does not have legal standing to bring a claim on behalf of the children over which he or she has custody.

In *Buckner v. Family Servs. of Cent. Fla., Inc.*, 876 So. 2d 1285, 1286 (Fla. 5th DCA 2004), a minor child's former foster parents filed suit against the Department of Children and Families individually and as next friend of the minor child seeking declaratory relief, visitation and adoption of the minor child. *Buckner v. Family Servs. of Cent. Fla.*, 876 So. 2d 1285, 1286 (Fla. 5th DCA 2004) (per curiam).

The Fifth District stated that:

> "[a]cceptance of the Buckners' position 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. This effort by the Buckners to self-appoint themselves as next friends and initiate an action on behalf of a minor in DCF custody would usurp the DCF's statutory authority and interfere with the jurisdiction and procedures of the dependency court. It is the

> dependency court which is charged under Florida law with protecting the rights and interests of dependent children, section 39.001, Fla. Stat. (2003), and it does so through various devices, including periodic judicial reviews and appointments of guardians ad litem and attorneys ad litem." Id. at 1287

The District Court in the Opinion distinguished Buckner stating:

> "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. 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." D.H. at 1082.

This ignores the point that the dependency proceeding in this case was being conducted based on allegations that the natural mother, whose parental rights had not been terminated, was unfit to safely care for the children. The grandparents were advocating that position. Given this background, the grandparents were as involved in the proceedings in the same capacity as the foster parents in Buckner. To permit them to self-appoint themselves as "next friends" to bring an action for damages against third parties based on the premise that the third parties failed to protect the twins from an unfit mother would have usurped the natural mothers' status as natural parent and guardian, and would have prejudged the outcome in the dependency case. Although it is our position that the mother had manifestly adverse interests to the children in bringing a suit against third parties to protect the twins from her, this

issue had not yet been determined by the dependency court. From her perspective, a reasonable inference exists that she believed the grandparents had an adverse interest to her children. Contrary to the District Court's conclusion that the third parties' conduct was "unrelated" to the dependency case, this claim had the same factual basis and was related to the dependency petition which ultimately concluded the mother could not safely care for her children even with the assistance of third parties.

This is no small matter. A mother is the natural guardian of her children during their minority. section 744.201(1) Florida Statute. In *Tallahassee Memorial Regional Center, Inc. v. Petersen*, 920 So. 2d 75, (Fla. 1st DCA 2006) the First District Court of Appeal, considered a case in which a defendant filed a motion to appoint a guardian ad litem for a child, despite the presence of a natural parent without adverse interests. The First District Court of Appeal noted that "under the defendants' theory, virtually any litigation decision made by the parents could be reviewed by a stranger to the parent-child relationship". 920 So. 2d 75, 80 (Fla. 1st DCA 2006) The First District Court noted that Florida recognizes "a constitutionally protected interest in preserving the family and raising ones children" and that the "Florida Constitution explicitly declares that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life." Id (citing to Art. I, § 23, Fla. Const.).

The First District Court stated in Petersen that:

> "Case law has extended the constitutional right of privacy to encompass family privacy. *See, e.g., id.* at 1272 (invalidating a grandparent visitation statute because "the challenged paragraph infringes upon the rights of parents to raise their children free from government intervention"). Florida recognizes "a constitutionally protected interest in preserving the family and raising one's children." *S.B. v. Dep't of Children & Families,* 851 So.2d 689, 692 (Fla.2003); *see Padgett v. Dep't of Health & Rehab. Servs.,* 577 So.2d 565, 570 (Fla.1991) (recognizing "a longstanding and fundamental interest of parents in determining the care and upbringing of their children free from the heavy hand of governmental paternalism"). .....
>
> The Florida Supreme Court has repeatedly held that natural parents have a right to make decisions about their child's welfare without interference by third parties. *See generally Von Eiff v. Azicri,* 720 So.2d 510 (Fla.1998)."

Petersen, 920 So. 2d at 80"

Thus, in the present case the grandparents could not have self-appointed themselves next friends to bring a claim against third parties based on the same premise as a pending, but not yet decided dependency case – i.e. that the mother was unfit to care for her children.

Finally, the District Court stated in the Opinion that the mere existence of a person who might qualify to be a next friend was, in and of itself, enough to establish a minor had a next friend citing *Gasparro v. Horner,* 245 So. 2d 901 (Fla. 4th DCA 1971). The District Court's reliance on Gasparro is misplaced. In Gasparro, the Fourth District Court of Appeal stated that "an infant's cause of action at its

inception is, and thereafter remains in the infant" and that "an infant, through a next friend, is at all times authorized to sue, even though no next friend comes forth and initiates such a suit on behalf of the infant." Id. at 905. The Third District Court of Appeal in Drake correctly found Gasparro to be wrongly decided. The Third District Court in Drake cited *Youngblood v. Taylor*, 89 So. 2d 503 (Fla. 1956) for the proposition that a next friend is "an officer of the court, especially appearing to look after the interests of the minor who he represents"(making it logical that the person actually appears). Id. at 505. The First District in Drake stated that a next friend relationship does not exist until some competent person is appointed by the court or on his own initiative commences an action in the name of one who is incapable of suing on his or her behalf. Accordingly, the First District concluded that "[a] next friend in the air, so to speak, will not do". Id. The twins had no such "next friends" in this case until the grandparents were appointed permanent guardians.

B. The grandparents could not act as "next friends" unless they were aware of facts supporting a negligence claim for the twins including damages.

The grandparents could not act as "next friends" to assert the legal interests of the twins unless they were aware of legal interests that needed to be protected. As stated in the preceding section, this Court in Youngblood stated that a "next friend" specially appears to look after interests of minors. Youngblood at 505. Accordingly, in order for a qualified person to act as a "next friend", they would

have to have knowledge of the facts supporting a claim, otherwise there would be no reason to specially appear on the minor's behalf to represent their interests on a claim.

In *Paul v. Gonzalez*, 960 So. 2d 858 (Fla. 4th DCA 2007), the Fourth District considered a factual situation wherein a party became incompetent after a claim had already been filed. In that case the Fourth District stated:

> "Under rule 1.210, when the unrepresented plaintiff in this action became incompetent, the trial court itself should have either appointed a guardian ad litem or entered "such other order as it deems proper for the protection" of the incompetent plaintiff. The policy of the rule is that the court should insure that the interests of the incompetent party will be protected until someone is qualified to succeed to his interests. In this instance, the trial court did neither. Not only does rule 1.210 authorize these actions, it plainly *requires* them. In failing to do either one, the dismissal clock began ticking on Paul's lawsuit without any representative capable of understanding the lapse of time and the consequent effect on his legal rights. He was left without any person qualified to take action on his behalf.
>
> We conclude that it is a denial of due process to dismiss the claim of a person who is then incompetent without the presence of someone in the case able to prosecute-or, at a minimum, prevent dismissal for lack of prosecution. In short, the "limitations" period of rule 1.420(e) cannot be fairly applied against a party who is incapable of complying with its requirements.

Paul 960 So. 2d at861."

Although the present case deals with the statute of limitations set forth in section 95.11 Florida Statutes and a next friend rather than the limitations set forth in rule 1.420(c), Florida Rule of Civil Procedure and a guardian ad litem; the

underlying principle is the same. Unless the grandparents were aware of the claim, they could not prosecute the claim, and the statute of limitations should not be applied against the twins when they, as minors, were incapable of complying with its requirements.

The District Court relied upon the Third District Court of Appeal case *N.G. v. Arvida Corp., et al.*, 630 So. 2d 1164 (Fla. 3d DCA 1993) (per curiam) in support for its position that the grandparents could have filed a claim on behalf of the twins as their "next friends" before they obtained permanent guardianship rights. The N.G. case involved a child who was sexually abused and the abuser had been arrested. Id. at 586. The Third District suggested that anyone aware of the child's predicament could have acted as next friend. A few years later, the First District distinguished N.G. in its opinion in S.A.P. as follows: "Although the N.G. opinion does not explain the 'plaintiff's predicament,' it appears that the child abuse was open and notorious and well-known. In the instant case, however, it has been alleged that [plaintiff's] records were confidential under Florida law and that, unlike N.G., no one, no parent, no adoptive parent, no guardian ad litem and no next friend, was aware of HRS's negligence in the supervision of [plaintiff.]" *S.A.P.* 704 So. 2d at 587. Accepting the Third District's analysis of N.G. would be to utterly undercut the intent of Florida Rule of Civil Procedure 1.120(b) which is to protect incompetent parties including children. Such an expansive view of who can be a

"next friend" would start the clock ticking on the statute of limitations in all cases involving children based on phantom members of the public who might qualify as "next friends". Trial courts would be asked to review the qualifications of literally every relative, case worker, teacher, or any person coming in contact with the child, to determine if they could have qualified as a next friend.

C. The grandparents were not aware that the twins sustained damages until March 15, 2007 at the earliest.

While the grandparents were worried that their daughter could not properly care for the newborn twins, they did not know that the twins had actually suffered damages from the abuse and neglect until March 15, 2007, at the earliest. Particularly, the grandparents deposition testimony demonstrates that while they may have had some suspicions that there was negligence occurring while the twins were in the custody of their Disabled Mother, they did not know the twins had been injured, especially when they took the twins to a pediatrician, who did not note any injury in regard to the children. R. 2317-2320, 2848-50 Similarly, in regard to learning that the twins had been dropped by the Disabled Mother, Richard Harkins testified that he was not aware that they suffered any injury in the incident. R. 2336. The grandfather testified he was aware that one of the children was admitted at All Children's Hospital due to being picked up inappropriately by the arm, but there was no damage done and the disabled mother did not tell them anything else. R. 2340-2342.

On May 19, 2006, each child was given a Comprehensive Behavioral Health Assessment (CBHA) in the dependency proceedings to determine the needs of the children who are the subject of such proceedings. R. 2348, 2353, 2409, 2437. The CBHA report specifically states that at the time the abuse report concerning the twins was made on April 11, 2006, "the children did not have any injuries." R. 2409, 2437. The assessment concluded with a diagnostic impression that the twins were observed and evaluated for "other suspected mental condition," which was "not found" in either twin. R. 2417, 2438. On or about March 15, 2007, the twins were diagnosed with sensory disorder at All Children's Hospital. R. 2662. This is the first time that Richard and Suellen Harkins were made aware of specific damage suffered by Plaintiffs as a result of the Defendants, and they diligently investigated the Plaintiffs' claim and timely filed a Complaint on behalf of the Plaintiffs on November 17, 2010. As lay persons, Richard and Suellen Harkins relied on the assessments and diagnoses of professionals, not just their suspicions. Where the factual situation is such that "the aggrieved party has knowledge of an act of negligence by another party, but no actual damages have occurred[,] . . . the aggrieved party only has the mere possibility of damage at a later date." *Kellermeyer v. Miller*, 427 So. 2d 343, 346-47 (Fla. 1st DCA 1983). Accordingly, the cause of action for the twins accrued as of March 15, 2007, when the grandparents first learned that the twins had been damaged.

III. Although the twins' claims could not have accrued until they could have been brought, the delayed discovery doctrine should be extended to the facts of this case.

Florida courts have followed the longstanding doctrine that a cause of action for a minor child does not accrue until an adult with capacity who knows or should know of the invasion of legal rights of the minor exists based on the line of cases interpreting Florida Rule of Civil Procedure 1.210(b). This doctrine is not simply an expression of the delayed discovery doctrine and was not overruled by this Court's decision in Davis. That said, pursuant to this Court's decision in Hearndon the application of the delayed discovery doctrine to the facts of this case are as much, if not even more justified than they were on the facts the Court considered in Hearndon.

This Court in Hearndon, extended the delayed discovery doctrine to causes of action arising out of childhood sexual abuse. The delayed discovery or "blameless ignorance" doctrine generally provides that a cause of action does not accrue until the plaintiff, irrespective of that person's capacity to bring an action, either knows, or reasonably should know of the tortious act giving rise to the cause of action.

This Court in Hearndon stated:

> "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."

Thereafter, this Court in Davis, considering its decision in Hearndon, stated:

> "While we applied the delayed discovery doctrine to causes of action arising out of childhood sexual abuse and repressed memory in *Hearndon,* we did so only after considering the unique and sinister nature of childhood sexual abuse, as well as the fact that the doctrine is applicable to similar cases where the tortious acts cause the delay in discovery."

Davis 832 So. 2d at 712

In this case, the necessity for application of the doctrine is even more compelling because solely as a result of the disability of non-age, and the application of Florida Rule Civil Procedure 1.210(b), minor children are barred from filing suit, and consequent access to the courts, when no qualified adult with capacity to file suit and knowledge of the cause of action exists to represent the child. The statute of limitations instead starts running on children's claim before their action can be commenced. The premise underlying statute of limitations to discourage "stale claims" certainly cannot be said to exist when an action cannot be commenced because minor children have no right to bring a claim on their own behalf.

IV. The statute of limitations was tolled pursuant to section 95.051(h) Florida Statutes until the grandparents were appointed permanent guardians of the twins with plenary powers including the power to file suit.

The claim for the twins was statutorily tolled pursuant to section 95.051 Florida Statutes which provides that:

> "(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; except with respect to the statute of limitations for a claim for medical malpractice as provided in s. 95.11. In any event, the action must be begun within 7 years after the act, event, or occurrence giving rise to the cause of action."

The statute of limitations was tolled in this case pursuant to section 95.051(h) Florida Statutes because the natural mother had interests adverse to the child; the grandparents were not appointed as guardians with plenary powers including the power to file suit until April 13, 2007; and the dependency court guardian ad litem was not a guardian ad litem contemplated by section 95.051(h) Florida Statutes, and had no knowledge that the twins had suffered damage during the appointment.

A. The disabled mother had interests adverse to the minor child.

On April 12, 2006, the Plaintiffs were removed from the Disabled Mother based on allegations of abuse, abandonment, and/or neglect. R. 2200-2232. As soon as the twins were removed from her custody, the Disabled Mother's interests became adverse to the twins interests because she was a party in the dependency proceedings and she sought reunification with her children. As a party potentially subject to losing her parental rights, the Disabled Mother was in no position to bring a suit on behalf of the twins alleging that due to BEARR and ADEPT's negligence, the twins were inappropriately cared for and neglected by her and were damaged as a result. R. 12.

Had the Disabled Mother filed such a claim, she would have admitted that the twins' injuries were caused by her inappropriate care and neglect. By filing such a claim, the Disabled Mother would have acknowledged that she engaged in egregious conduct, providing the dependency court with potential grounds for terminating her parental rights. *See* section § 39.806(1)(f), Florida Statutes (2006). From these facts, an inference can be drawn that the Disabled Mother had adverse interests to the twins, which tolled the statute of limitations, and it can also be inferred that the Disabled Mother did not have the capacity to bring a claim on behalf of the Plaintiffs. As the non-moving party, such inferences must be drawn in favor of BEARR and ADEPT's motions for summary judgment (in the form of a motion for reconsideration) should have been denied.

B. The grandparents were not appointed guardians with plenary powers, including the power to bring an action on behalf of the twins, until April 13, 2007, making the filing of the lawsuit on November 17, 2010 timely.

The twins did not have a "guardian" pursuant to section 95.051(h) Florida Statutes until the grandparents were granted permanent guardianship with all rights of a natural guardian, including the power to bring civil causes of action on their behalf. On May 16, 2006, the dependency court entered an Order granting the grandparents the limited authority to provide care for the boys and obtain medical, dental, and psychiatric or psychological treatment they needed. R. 1267-1270. At

this point in time, Richard and Suellen Harkins were merely relative caregivers to the twins and acted in a role similar to a foster parent.

On April 13, 2007, the dependency court entered an order giving Richard and Suellen Harkins permanent guardianship over the children, terminating protective supervision by the Department, and indicating that as permanent guardians, they had all rights of a natural parent. R. 1269-70, 2288, 2784-85. Until that time, the twins did not have a guardian pursuant to section 95.051(h) Florida Statutes and the statute of limitations was accordingly tolled. The suit filed on November 17, 2010, less than four years later was therefore timely.

C. The dependency court guardian ad litem did not have knowledge of a cause of action.

As will be argued in the next section, the dependency court guardian ad litem was not a guardian ad litem contemplated by section 95.051(h) who had the power to bring a claim on behalf of the twins and whose existed would prevent tolling under the statute. The dependency court guardian ad litem, nonetheless, had no knowledge of a cause of action for the twins. During the time that the GALP was appointed, it was unaware of any damage to the twins caused by the defendants. Donna Rasmussen, the corporate representative for the GALP for this case, testified that "[d]uring the time Richard Miller was assigned as GAL for D.H. and L.H., the GALP was unaware of any injury the children suffered as a result of the care they received while living with their disabled mother, Kelley Harkins." R. 1299-2232.

The District Court in the Opinion, however, stated that any attempt to suggest that section 95.051(h) Florida Statutes required a guardian ad litem "to know or should know of the claim" was an attempt to add delayed discovery language to the statute. This is not, however, a case where the Court is being asked to add language to a statute. A guardian ad litem, unlike a guardian of property or guardian of the person, who have continuing control over the person or property, is specially appointed to represent specific interests of minors. See 28 Fla. Jur. 2d Guardian and Ward §1.

Section 744.102(10) Florida Statutes states that "guardian ad litem means a person who is appointed by the court having jurisdiction of the guardianship or a court in which a particular legal matter is pending to represent a ward in that proceeding." Pursuant to section 744.3025 Florida Statutes, "Claims for Minors" "a court may appoint a guardian ad litem if the court believes a guardian ad litem is necessary to protect the interest of the minor". Logically, the court must be aware of the interests of the minors that need to be protected and any appointed guardian ad litem would be charged to protect those specific interests. To that end, Florida. Probate Rule 5.120 states that a petition for appointment of a guardian ad litem shall state to the best of the petitioner's information and belief:

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(4) a description of the interest in the proceedings of each minor, person with a developmental disability, or incapacitated person; and

(5) the facts showing the necessity of the appointment of a guardian ad litem.

Accordingly, by its very definition, a guardian ad litem appointed to represent specific interests, as in this case filing a claim; would have to know what those interests are. No such guardian ad litem existed in this case so as to defeat tolling pursuant to section 95.051(h) Florida Statutes.

D. The dependency court guardian ad litem bereft of any plenary powers including the power to file suit, was not a guardian ad litem as referenced in section 95.051(h) Florida Statutes whose existence would be sufficient to defeat tolling.

Judge Villanti concurring specially in the Opinion stated that:

> "However, the majority asserts-as did B.E.A.R.R. and Adept below-that the tolling statute does not apply because the twins had a guardian ad litem appointed on April 12, 2006. And while this is nominally true, I believe more is required to avoid the tolling statute than simply the existence of an entity called a "guardian ad litem."
>
> "The guardian ad litem in this case was appointed by the dependency court to represent the best interests of the twins in the dependency case. (Emphasis added). The guardian ad litem did not have plenary powers over the twins for any other matter. Cf. § 39.820(1), Fla. Stat. (2006) (providing for the guardian ad litem to be appointed to represent the best interest of the child in that proceeding). To hold that the mere existence of a guardian ad litem-even one wholly bereft of the legal authority necessary to bring the civil action in questions-is sufficient to avoid the tolling statute is to elevate form over substance at the expense of the very persons the statute is intended to protect. At a minimum, there was a question of fact as to whether the guardian ad litem was authorized by that appointment to file a civil action for negligence on behalf of the twins. And that question of fact alone should have precluded entry of the summary judgment here."

D.H., 217 So. 3d at 1085, (Villanti, J, concurring).

Judge Villanti was correct. As discussed in the preceding section, while a guardian of person or a guardian of property has powers to protect the general interests of incompetents, a guardian ad litem is appointed to represent specific interests of incompetents. As Judge Villanti points out, a court can, in the context of a dependency proceeding appoint a guardian ad litem to represent the best interests of a child in that proceeding. A court may also appoint a guardian to represent a minor's interest in a variety of other contexts.[4] Ultimately, a guardian ad litem is appointed to represent specific interests of a child or incompetent. In this case, the dependency court guardian ad litem did not specially represent the dependent children to bring a third party tort action. To say otherwise, as Judge Villanti describes, is "to elevating form over substance at the expense of the very persons the statute is intended to protect" D.H., 217 So. 3d at 1184 (Villanti, J., concurring). Accordingly, the dependency court guardian ad litem that existed in this case, who had no powers conferred to him by virtue of the orders of appointment, or by section §39.802(1) Florida Statutes, to bring a third party tort action; was not

[4] A Court may appoint a guardian ad litem to represent a minor in estate and trust proceedings, section 731.303(4) Florida Statutes; settlement of minor's claims, section 744.3025(1)(a) Florida Statutes; dissolution of marriage proceedings, section 61.052(1)(b) Florida Statutes, section 61.401 Florida Statutes; quiet title proceedings section 73.021 Florida Statutes, as well as other specific proceedings enumerated by statute.

a guardian ad litem sufficient to defeat tolling of the statute of limitations pursuant to section §95.051(h) Florida Statutes.

E. The Court can consider this issue because it constitutes a fundamental error.

The remaining question is whether Petitioners waived the argument that a dependency court guardian ad litem is not a guardian ad litem contemplated by section 95.051(h) Florida Statutes, because while it was preserved in the trial court, it was not assigned as an error.

Judge Villanti concluded that this issue could not be considered by the District Court stating:

> "Nevertheless, 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. See Universal Ins. Co. of N. Am. V. Warfel, 82 So. 3d 47, 64 (Fla. 2012) (noting that fundamental error may be used to correct errors that "reach down into the validity of the trial" and which were raised on appeal but not preserved with a contemporaneous objection in the trial court (quoting Jaimes v. State, 51 So. 3d 445, 448 (Fla. 2010)). So while I believe it was fundamental error to grant summary judgment in the face of fact questions surrounding the applicability of a statute that requires the tolling of the statute of limitations for the protection of minors who have no one who can legally protect their interest, I am bound by precedent that definitively precludes such a result. Therefore, I reluctantly concur in this affirmance."

Id. at 1085.

The majority agreed in a footnote to the Opinion stating that:

> "We acknowledge the argument raised by the concurrence that the term "guardian ad litem" in section 95.051(1)(h) means only a guardian ad litem legally authorized to file suit on the minor's behalf. Because that argument has not been raised by the twins in this appeal, we are unable to resolve it here. See Weaver v. Weaver, 95 So. 3d 1029, 1030 (Fla. 2d DCA 2012); I.R.C. v. State, 968 So. 2d 583, 588 (Fla. 2d DCA 2007)

Id. at n. 5

The District Court cited two cases in support of this position. *Weaver v. Weaver*, 95 So. 3d 1029, 1030 (Fla. 2nd DCA 2012) and *IRC v. State*, 968 So. 2d 583, 588 (Fla. 2nd DAC 2007). In Weaver the Second District Court of Appeal held that since Florida Rule of Appellate Procedure 9.210(b)(5) provides that the initial brief shall include arguments with respect to each issue, and failure to include a specific argument in the brief waives that argument. Weaver 95 So. 3d at 1030 citing *Mendoza v. State*, 87 So. 3d 644, 663 n. 16 (Fla. 2011). In IRC, the Second District Court of Appeal noted that a reviewing court ordinarily reverses only on the basis of the specific arguments raised by the appellant, but focused its analysis primarily on lack of preservation of an issue in the trial court. (emphasis added) IRC, 968 So. 2d at 588

Petitioners' counsel did argue to the trial court at the hearing on Motion for Summary Judgment that the orders appointing the Chapter 39 dependency guardian ad litem did not confer on those persons the power to file suit. (R. 3095-3096)

Petitioners' counsel at the hearing on BEARR and ADEPT's motion for

reconsideration, which resulted in the final summary judgments in favor of Respondents, made the same argument:

> 9 I also argued at the last hearing that by
> 10 virtue of the order appointing the guardian
> 11 ad litem program, these folks don't analyze
> 12 cases to see if they can bring lawsuits on
> 13 behalf of children, their duties are to
> 14 report to the court in terms of best
> 15 interests to the children, custodial-type
> 16 issues, that sort of thing.
> 17 So I made that argument, but I don't
> 18 think I even need to make it because the
> 19 order itself and the affidavit clearly
> 20 demonstrates it.

(R. 3135)

The trial court thus was given an opportunity to consider this specific argument at hearing. The issue was accordingly properly preserved for appellate purposes. Petitioner's 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) Florida Statutes whose existence was sufficient to defeat tolling.

Judge Villanti opined in his concurrence that this issue constituted fundamental error, which it does, but noted that "the concept of fundamental error had yet to be extended to allow an appellate court correct an error that was preserved in the trial court but not raised on appeal. See *Universal Ins. Co. of North America v. Warfel*, 82 So. 3d 47, 64 (Fla. 2012). It is the longstanding rule of this Court, however, that when assignments of error are not argued in the briefs they will be abandoned unless jurisdictional or fundamental error appears in the record, *Bell v. State*, 289 So. 2d 388 (Fla. 1973). "Except for fundamental errors, an appellate court will not reverse except for some well-founded assignment of error that has been argued in the brief, and no point made in the brief will be considered unless it is found to be within the scope of an assignment of error. *Reddit v. State*, 86 So. 2d 317 (Fla. 1955). (emphasis added) While ordinarily this Court should not review an issue not specifically raised in the briefs filed in the District Court, in this case this fundamental error should be considered.

A "fundamental error" which can be considered on appeal, without objection in the lower court, is an error which goes to the foundation of the case or goes to the merits of the cause of action. *Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970)". As Judge Villanti pointed out in his concurrence to the Opinion, it was fundamental error to "grant summary judgment in the face of fact questions surrounding the applicability of a statute that requires the tolling of the statute of limitations for the

protection of minors who have no one who can legally protect their interests". D.H., 217 So. 3d at 1085 (Villanti, J., concurring).

In cases involving the application of the statute of limitations defensively it had been held that it is a matter of fundamental error if the error appears clear on the face of the record. See *Guzman v. State*, 211 So. 3d 204, (Fla. 3rd DCA 2016) and *Smith v. State*, 211 So. 3d 176 (Fla. 3rd DCA 2016); Maguire *v. State*, 453 So. 2d 438, 440 (Fla. 2nd DCA 1984), *Bridenthal v. State*, 453 So. 2d 437, 438 (Fla. 2nd DCA 1984) and *Mitchell v. State*, 25 So. 2d 73 (Fla. 1946). [5]

In this case it appears on the face of the record that the only guardian ad litem the twins had was the dependency court guardian ad litem who was appointed only to represent their best interests in the dependency proceedings and whose order of appointment specifically did not confer the power to bring actions against a third parties on their behalf. Treating such a person as a guardian ad litem as provided in section 95.051(h) Florida Statutes is fundamental error because it improperly defeats tolling of the statute of limitations on the twins' claims and clearly appears on the face of the record. Accordingly this issue should be considered by the Court.

[5] Please note that this Court has accepted for review the case of State v. Smith, 2017 WL 3483657 (Fla. 2017).

CONCLUSION

Petitioners request that this Court quash the decision of the Second District Court of Appeal in this case; disapprove of its Opinion; and remand this case to the trial court for an entry of an order denying Respondents' Motions for Reconsideration of Respondents' Motion for Summary Judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Florida E-Portal Service to: **KEVIN M. DAVIS, ESQ.**, (kdavis@defensecounsel.com, grivera@defensecounsel.com), *Attorney for Defendant, B.E.A.R.R. Inc.* and **J. ROBERT MCCORMACK, ESQ.**, (bob.mccormack@ogletreedeakins.com, christine.skalla@ogletreedeakins.com), *Attorney for Defendant, Adept Community Services, Inc.*, on this 19th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

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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Richard A. Filson