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 ADEPT COMMUNITY SERVICES, INC.'S BRIEF ON JURISDICTION

J. Robert McCormack
Florida Bar No. 864791
Lara J. Peppard
Florida Bar No. 520055
OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.
100 N. Tampa Street, Suite 3600
Tampa, FL 33602
Telephone: (813) 289-1247
Facsimile: (813) 289-6530
bob.mccormack@ogletreedeakins.com
lara.peppard@ogletreedeakins.com

Attorneys for Adept Community Services, Inc.

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

Petitioners, D.H. and L.H., who are twins, allege in their November 22, 2010, Complaint brought by their grandparents that Respondents B.E.A.R.R., Inc. and Adept Community Services, Inc. were negligent in providing services for the twins' developmentally disabled mother. The services were intended to help the twins' mother live independently and care for her children. The grandparents sued on behalf of the twins as their "next friends." They allege that Respondents knew the mother required constant assistance to take care of the twins yet negligently provided services that left the twins alone in their mother's care, resulting in physical, mental, and emotional injuries to the twins. (Appendix, p. 3-4). The Complaint contains no allegations of any intentional tort, and contains no allegations of sexual abuse.

B.E.A.R.R. filed a motion for summary judgment, in which Adept joined, arguing that Petitioners' claims were barred by the four-year statute of limitations for negligence claims. On a motion for reconsideration of the court's initial denial of the motion, the District Court of Appeals granted the motion for summary judgment and held:

(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). (Appendix, p. 8-11).

(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. (Appendix, p. 12-17).

(3) The limitations period was not tolled under § 95.051(1)(h), Fla. Stat. (Appendix, p. 18-19).

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal's opinion in the instant case (the "Opinion") does not directly and expressly conflict with any of the three cases cited by Petitioners. Accordingly, no basis exists for this Court to exercise its discretionary jurisdiction.

ARGUMENT ON APPEAL

The Florida Supreme Court has discretionary jurisdiction to review decisions of district courts of appeal that "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv); *see also* Fla. Const. Art. V, 3(b)(3). An express and direct conflict between decisions of the district courts of appeals occurs 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 (1992) (citing *Neilsen v. City of Sarasota*, 117 So. 2d 731, 734 (1960)) (for an express and direct conflict to exist, the controlling facts must be "substantially the same").

The Opinion of the Second District Court of Appeal correctly applies the legal standard set forth by this Court for determining when a cause of action accrues, and it does not expressly or directly conflict with the cases cited by counsel for Petitioner.

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 4 years before they filed suit, and the tolling provision for claims brought by minors contained in § 95.051(1)(h), Fla. Stat., did not apply. The court was fully cognizant of the difference between accrual and tolling and conducted separate legal analyses for each distinct doctrine. With respect to the delayed discovery issue, the court identified the appropriate legal standard for determining when a cause of action accrues for limitations purposes as being "the date upon which the plaintiff may bring an action on the claim asserted," citing *Hearndon v. Graham*, 767 So. 2d 1179, 1184-85 (Fla. 2000) and *State Farm Mut. Auto Ins. Co. v. Lee*, 678 So. 2d 821 (Fla. 1996). The Second DCA correctly observed, in its 22-page opinion (including Chief Judge Villanti's Specially

Concurring opinion), that the statute of limitations in this matter expired before the case was filed in November 2010.

The District Court conducted a thorough and independent analysis, first observing that each party asserted during summary judgment briefing that a cause of action for negligence accrues when the plaintiff knows, or through the exercise of diligence should know, of the invasion of his or her legal rights, citing, *D.B. v. CCH-GP, Inc.*, 664 So. 2d 1094, 1095 (Fla. 2d DCA 1995) (internal citation omitted).[1] However, the court identified a problem with these arguments which, it observed, were based upon a premise that has been invalidated by the Florida Supreme Court. In this respect, the lower court observed that the "knew or should know" accrual standard for negligence claims is an expression of the delayed discovery doctrine. This doctrine delays the accrual of a cause of action for statute of limitation purposes, until the plaintiff knows or reasonably should know of the invasion of his or her rights (*citing, Herndon*, 766 So. 2d at 1184). The lower court then correctly opined that this doctrine applies only when the Legislature has, by statute, provided for such application. *See Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002).

[1] Even if the "knew or should know" accrual rule for negligence, which is an expression of the delayed discovery doctrine, were valid based on the facts of the instant case, the District Court of Appeals noted in its Opinion that at least one of Petitioners' grandparents had actual knowledge of Petitioner's injuries and attributed to the negligence of Respondents, no later than May 19, 2006—more than four years before suit was filed. *See* Opinion, p. 12-17.

In *Davis*, this Court outlined the reasoning behind the Second District's analysis. The key language in the *Davis* opinion, which was emphasized in the District Court's Opinion in the case at bar indicates: "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. This Court in *Davis* found the delayed discovery doctrine applied in a single additional situation: cases of childhood sexual abuse. *Id*. at 712 (citing *Hearndon v. Graham*, 767 So. 2d 1179 (Fla. 2000)).

Petitioners now assert that the holding of the District Court below directly and expressly conflicts with decisions of the First, Third, and Fourth Districts. However, even a cursory review of these decisions demonstrates that the decisions are easily harmonized. Contrary to Petitioners' assertion in the instant Petition, not a single decision of any District Court of Appeal in Florida actually conflicts with the Opinion in the instant case.

Petitioners first claim the unpublished corrected opinion rendered by the Fourth District Court of Appeal in *Doe No. 3 v. Nur-Ul-Islam Academy, Inc*., 2017 WL 1076928 (Fla. 4th DCA 2017), is in direct conflict with the Second DCA's Opinion. In *Doe No. 3*, the Fourth DCA reversed the lower court's decision dismissing Plaintiff's complaint with prejudice upon Defendant's motion to

dismiss 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." Accordingly, the case is not and cannot be directly in conflict with the ruling in the instant case, as it was procedurally distinguishable, at the outset.

Further, the Fourth DCA's opinion in *Doe No. 3* centered around two primary concerns. First (as outlined above), the four corners of the complaint did not establish the date of accrual of the cause of action; and, second, since the delayed discovery doctrine applied (as the claim concerned a case of childhood sexual abuse), the cause of action in *Doe* would not have started to accrue until Doe's parents knew or should have known of the sexual abuse (or Doe reached age 18). Hence, the Fourth DCA concluded that the statute of repose did not bar her cause of action on the review, limited to the four corners of the complaint to which the lower court was restricted. The instant case differs substantively as well as procedurally from *Doe*. The case at bar does not involve allegations of sexual abuse, and the decision below was based upon a full set of facts after discovery was concluded.

Petitioner's citation to *S.A.P. v. Department of Health & Rehabilitative Services*, 704 So.2d 583, 586 (Fla. 1st DCA 1997) 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, 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 Second DCA 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 other intentional tort.[2] Further, the Second DCA 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." (Appendix, p. 9, 12).

Notably, the court in *S.A.P*. also points out that S.A.P. alleged sexual abuse, and the court in *S.A.P*. relied on *Drake By and Through Fletcher v Island Community Church, Inc*., 462 So.2d 1142 (Fla. 3d DCA 1984), a case that also involved sexual abuse, in finding the delayed discovery doctrine applied. *See S.A.P*., 704 So. 2d at 585-86. Further, in light of this Court's decision in *Davis*, which limited the application of the delayed discovery doctrine to cases involving those enumerated by statute (fraud, products liability, professional malpractice,

[2] 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*. at *10.

medical malpractice, and intentional torts based on abuse) and torts involving childhood sexual abuse, *S.A.P.* (decided prior to *Davis*) cannot be construed to stand for the proposition that the accrual of a cause of action for negligence is subject the delayed discovery doctrine. *See Davis*, 832 So. 2d at 710, 712. For all of the above 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.

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. *Drake* also was decided upon a motion to dismiss. 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.

The instant case once again differs significantly. As noted above, Plaintiffs in the instant case did not allege fraudulent concealment, negligent hiring, or negligent retention. Further, there was no battery or sexual abuse of the minor children alleged. Finally, like *S.A.P*., *Drake* (also decided prior to *Davis*) cannot be construed to stand for the proposition that the accrual of a cause of action for negligence is subject the delayed discovery doctrine. *See Davis*, 832 So. 2d at 710,

712. Accordingly, *Drake* is not sufficiently similar factually or otherwise to create express and direct conflict with the Opinion below.

CONCLUSION

No express and direct conflict between the instant decision below and the three cases cited by Petitioners exists; accordingly, there is no basis for this Court to exercise discretionary jurisdiction over Petitioners' purported appeal.

Dated: June 6, 2017.

Respectfully submitted,

/s/ J. Robert McCormack

J. Robert McCormack
Florida Bar No. 864791
Lara J. Peppard
Florida Bar No. 520055
OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.
100 N. Tampa Street, Suite 3600
Tampa, FL 33602
Telephone: (813) 289-1247
Facsimile: (813) 289-6530
bob.mccormack@ogletreedeakins.com
lara.peppard@ogletreedeakins.com

Attorneys for Adept Community Services, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 6, 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:

Richard A. Filson, Esq.
Filson & Penge, P.A.
2727 South Tamiami Trail, Suite 2
Sarasota, FL 34239
eservice@filsonlaw.com
filsonlawfirm@gmail.com
Co-Counsel for Appellants

Howard M. Talenfeld, Esq.
Talenfeld Law
1776 N. Pine Island Road, Suite 222
Ft. Lauderdale, FL 33322
howard@justiceforkids.us
nicole@justiceforkids.us
andrea@justiceforkids.us
Co-Counsel for Appellants

Allison C. Simpson, Esq.
Mintzer Saraowitz Zeris Ledva & Meyers, LLP
6921 Pistol Range Road
Tampa, FL 32256
asimpson@defensecounsel.com
Counsel for B.E.A.R.R., Inc.

/s/ J. Robert McCormack
Attorney

CERTIFICATE OF COMPLIANCE

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

/s/ J. Robert McCormack
Attorney

30039442.1