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 REPLY BRIEF ON MERITS

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ARGUMENT

I. The Second District is in express and direct conflict with the First, Third, and Fourth District, on the issue of when a cause of action accrues for a minor child.

Respondents incorrectly argue that this Court erred accepting jurisdiction in this case because no conflict between the districts exists. The Second District in the Opinion expressly held that 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. The Second District's opinion in *D.H.* directly and expressly conflicts with the majority opinions rendered by other appellate courts in the State of Florida, specifically the First, Third, and Fourth District. *See S.A.P. v. Dep't of Health & Rehab, Servs.*, 704 So. 2d 583 (Fla. 1st DCA 1997); *Drake v. Island Cmty. Church, Inc.*, 462 So. 2d 1142 (Fla. 3d DCA 1984); *Doe No. 3 v. Nur-Ul-Islam Acad., Inc.*, 217 So. 3d 85 (Fla. 4th DCA 2017). The First, Third, and Fourth Districts expressly 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.

Respondents argue that each of these holdings are distinguishable from *D.H.* because they involve issues of sexual abuse and fraudulent concealment, but these cases are not, as Respondents suggest simply articulations of this Court's holding in

Hearndon v. Graham, where the Court extended the delayed discovery doctrine to cases of childhood sexual abuse based on suppressed memory, 767 So. 2d 1179 (Fla. 2000). Instead, the holdings are based on the legal principle that a cause of action for a minor child cannot accrue until an action can be commenced. Pursuant to the Florida Rules of Civil Procedure, an action is commenced when a Complaint is filed and a minor child, such as the Petitioners, must have an adult representative to sue on their behalf. Fla. R. Civ. P. 1.050 & 1.210(b). It is inherent that the adult representative must have knowledge and authority to sue on behalf of the minor Plaintiff. Therefore, the issue concerns whether the minor has a representative with knowledge and authority to sue, and the issues of sexual abuse and fraudulent concealment had no effect on the holdings of the opinions relied on by Petitioners.

The Fourth District in *Nur-Ul-Islam* expressly stated that its holding was not based on the delayed discovery doctrine.

> 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, 217 So. 3d at 89. (emphasis added)

In *S.A.P.*, the First District did not premise its holdings on suppression of memory in a sexual abuse case. The court separately considered the issue of fraudulent concealment, but expressly stated

> …even if the allegations of the complaint were not sufficient to involve the doctrine of fraudulent concealment, this action should be permitted to proceed because S.A.P. has sufficiently alleged that during her minority there was no one acting on her behalf, no friend or guardian, who could have filed suit on her behalf.

S.A.P., 704 So. 2d at 585. The majority opinion specifically held that:

> 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.

Id. at 585-86 (citing *Drake*, 462 So.2d at 1144).

Finally, in *Drake*, the Third District did not premise its holding on either delayed discovery based on suppression of memory in a childhood sexual abuse case or fraudulent concealment. *Drake*, 462 So. 2d at 1144. The Court expressly held that

It is 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. .....
> .....

> 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. (alteration in original) (quoting *Berger v. Jackson*, 156 Fla. 251, 23 So. 2d 265, 269 (Fla. 1945)). The Plaintiff in *Drake* also made claims of negligent hiring and supervision and battery; however, the holding in *Drake* concerning accrual did not differentiate based upon the type of tortious conduct alleged.

Here, the Second District applied an entirely different rule of law in a case involving substantially the same controlling facts i.e. a minor child asserting a claim for damages and the effect of the child's incapacity on accrual of the cause of action for statute of limitations purposes. All these cases involved children filing tort claims against defendants based on their failure to protect them from abuse from third parties. The controlling facts of all these cases are thus substantially similar but the time of accrual would differ whether the child filed in the Second District or the First, Third, or Fourth District.

II. Petitioners' claims did not accrue until an adult with authority to sue on their behalf knew or should have known of the facts supporting a cause of action.

Contrary to Respondents' Answer Brief, there is longstanding common law doctrine that a child's cause of action does not accrue until an action may be brought, and that a child may not bring a cause of action on his own behalf pursuant to rule

1.210, but is dependent on a qualified guardian ad litem, or next friend to do so. As the Second District noted in its opinion in *D.H. & L.H. v. Adept Community Services*, Petitioner and Respondents agreed that this was the state of the law. 217 So. 2d 1072, 1077-1078 (Fla. 2017).

The Respondents now argue that the holding in *Berger* that a cause of action cannot accrue until it can be commenced has no application to the present case, because *Berger* concerned the appointment of an administrator in an estate proceeding. This is a distinction without a difference. In *Berger*, the Court held that a limitations period could not run against an Estate until an administrator was appointed. *Berger*, 23 So. 2d at 269. In an action involving a minor child, the child cannot, pursuant to Rule 1.210, bring an action on his own behalf. Only when a qualified adult with capacity exists can a minor sue or defend through said adult. Without knowledge on the part of someone capable of bringing the claim, logically a person capable of bringing the suit does not exist, and the suit could not be brought. In both cases, a cause of action cannot be brought, and therefore has not accrued because of the absence of an administrator as in *Berger*, or the absence of a qualified adult with knowledge as in the present case.

The doctrine that a cause of action cannot accrue until it may be brought has been part of the common law in Florida even before *Berger*. *See Coe v. Finlayson*, 26 So. 704 (Fla. 1899). As a general rule of statutory construction "a statute in

derogation of the common law must be strictly construed," and a "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." *Ady v. Am. Honda Fin. Corp.*, 675 So. 2d 572, 581 (Fla. 1996) (citations omitted). In this case, the applicable statute of limitations in section 95.031(1), Florida Statutes states that "[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 own right, but may only do so through a qualified adult with capacity to bring the suit. When no such person exists, the Second District's analysis would mean an action for negligence for anyone less than fourteen years of age would be barred by the statute of limitations before the action could ever be commenced by the child on his eighteenth birthday. This would leave some of the most vulnerable of our population, for example, the infant Petitioners in this case who suffered abuse, with no legal recourse.

This Court has not receded from this principle and reaffirmed this principle in *Kipnis v. Bayerische Hypo-Und Vereinsbank, AG*, 202 So. 3d 859 (Fla. 2016) and *State Farm Auto. Ins. Co. v. Lee*, 678 So. 2d 818 (Fla. 1996), which both followed *Berger* stating that a cause of action cannot accrue until an action may be brought. Respondents attempt to distinguish these decisions arguing they dealt with different accrual issues. Both adhered, however, to the principle that irrespective of what type

of claim was made or what type of accrual issue was involved, that a cause of action cannot be said to have accrued within the meaning of the statute of limitations, until a claim may be brought. Similarly, a minor cannot, pursuant to Fla. Rule 1.210, bring or defend an action, but may do so only through a qualified adult, and in the absence of such an adult, the minor's action cannot be brought and the cause of action cannot accrue.

This Court 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.'" *Hearndon*, 767 So. 2d at 1185 (quoting *Lee*, 678 So. 2d at 821). However, in *Hearndon*, the Court extended the delayed discovery doctrine to cases involving childhood sexual abuse and suppressed memory. *Id.* at 1186. The *Hearndon* Court did not address any issue regarding the age or incapacity of the plaintiff, and the effect of Rule 1.210(b), and its effect on accrual of the cause of action was not considered.

This Court did not recede from this doctrine in *Davis v. Monahan* where the 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. 832 So. 2d 708 (Fla. 2002). In *Davis*, this Court did not consider the claim of a minor claim nor did it consider the impact of Rule 1.210 on the accrual of causes of action for minors. Other cases cited by the

Respondents, such as *Houston v. Florida-Georgia Television Co.*, 192 So 2d 540 (1st DCA Fla. 1966) and *Franklin Life Ins. Co., v. Tharpe*, 179 So 406 (Fla. 1938), strictly dealt with application of the delayed discovery doctrine and did not consider the issue of accrual of a cause of action for a minor and the impact of Rule 1.210(b).

The issue is not whether the twins failed to file suit because of "ignorance" arising from a "want of diligence," but instead the fact that they had no capacity to do so and could only do so through a next friend or guardian ad litem, who would not be able to sue on their behalf unless they knew what rights of the children been violated and how that caused damage to the children.

III. The twins did not have a "next friend" until the time their grandparents were appointed permanent guardians with plenary powers.

The Respondents argue that the grandparents could have acted as "next friends" to the twins and brought suit on their behalf at any time. They argue that by virtue of the grandparents' existence, the cause of action accrued.

Respondents rely on *Gasparro v. Horner*, 14 So. 2d 901 (Fla. 4th DCA 1971) and *N.G. v. Arvida Corp., et al.*, 630 So. 2d 1164 (Fla. 3d DCA 1993) both of which held that a minor is deemed represented by a "next friend" for Rule 1.210 purposes whether such a person exists, or comes forth and represents the minor's interests. However, more recently the Third District in *Drake* correctly found *Gasparro* to be wrongly decided. *Drake*, 462 So. 2d at 1144 n. 2. *Drake* cited *Youngblood v. Taylor* 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." 89 So. 2d 503, 505 (Fla. 1956). 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 behalf. "[a] next friend in the air, so to speak, will not do". *Drake*, 462 So. 2d at 1144 n. 2.

Further, the decision in *Gasparro* is incompatible with this Court's decision in *Lanier v. Chappell,* 2 Fla. 621, 631 (1849) cited in the Florida's Children First ("FCF") Amicus Brief. In *Lanier*, the Court stated:

> Although an infant *may* sue by *prochien amie* it is not a consequence that he must do so necessarily to save the statute. The right to sue and the privilege of availing himself of the statute are not incompatible. The law gives both. Besides, to say, that inasmuch as the infant could at any time sue, and not having sued therefore the statute cannot avail him, independent of depriving him of a possitive right, it strikes us as a doctrine replete with the rankest injustice to a class of persons, whose interests the courts will go far to protect.

Lanier, 2 Fla. at 632.

Similarly, the First District in the more recent *S.A.P.* opinion distinguished the *N.G.* decision stating that the Plaintiff in *S.A.P.*, unlike *N.G.*, had no parent, no adoptive parent, no guardian ad litem and no next friend with knowledge of HRS' 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 Rule 1.210(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" but never come forth.

Finally, Respondents argue that the order appointing the grandparents temporary caregivers was sufficient to confer on them the power to initiate suits on behalf of the twins. The dependency court entered an order which granted The grandparents only the limited authority to provide care for the twins. At that point in time, The grandparents 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, and the issue of the children's custody was obviously adversarial between their mother and grandparents. 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 only temporary physical custody any more than the foster parents had *Buckner v. Family Servs. of Cent. Fla., Inc.*, 876 So. 2d 1285 (5th DCA Fla. 2004).

IV. The delayed discovery doctrine should be extended to the facts of this case.

Respondents argue that the delayed discovery doctrine should not be extended to the facts of this case. *Franklin Life Ins. Co. v. Tharpe*, cited by Respondents, stated that mere ignorance of the facts will not ordinarily postpone the operation of the statute of limitations. 179 So. 406 (Fla. 1938)(per curiam). The Court explained:

> The reason of the rule seems to be that in such cases ignorance is the result of want to diligence and the party cannot thus take advantage of his own fault. It is otherwise where the cause of action does not arise

> except upon ascertainment or knowledge of a particular fact, or where a demand is a necessary prerequisite to recovery and plaintiff is in no position to make demand until he has learned the facts.

Id. at 214.

The twins are certainly not guilty of failing to be diligent in the discovery of the facts of the claim. Further, a next friend cannot appear to represent the interests of the children until the next friend is aware of those interests. The rationale against the delayed discovery rule does not exist under these circumstances.

V. The statute of limitations was tolled pursuant to section 95.051(h) Florida Statutes

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 children.

Respondents concede the natural mother had interests adverse to the twins.

B. The grandparents were not appointed guardians with plenary powers, until April 13, 2007, making the filing of the lawsuit on November 7, 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. The May 16, 2006, dependency court Order granted the grandparents only the limited authority to provide care for the twins. R. 1267-1270. Respondents argue that the grandparents' status as custodians to the minor children equated them to guardians. Respondents have, however, failed to provide any authority to support this position. The Order granting them custody did not confer on them any plenary powers or power to file suit. Until April 13, 2007, when the dependency court entered an order giving the grandparents permanent guardianship of the twins with plenary powers, the twins did not have a guardian pursuant to section 95.051(h) Florida Statutes.

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

As was argued in the Initial Brief, 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 existence would prevent tolling under the statute. The dependency court guardian ad litem, nonetheless, had no knowledge of a cause of action for the twins. 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; *see also* § 744.102(10), Fla. Stat.; *see also* Fla. Prob. R. 5.120(4)(5). Accordingly, by its very definition, a guardian ad litem appointed to

represent specific interests, which in this case would be filing a claim on behalf of the twins, would have to have knowledge of those interests. 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 was not a guardian ad litem as referenced in section 95.051(h) Florida Statutes.

This issue has been extensively briefed in Petitioners' Initial Brief, the Florida's Children First Amicus Brief, and the Guardian Ad Litem Program Amicus Brief. Respondents do not argue in their answer briefs that a dependency court guardian ad litem was a "guardian ad litem" as referenced in section 95.051(h), Florida Statutes. They instead argue that Petitioners waived the issue.

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

Petitioners assert that they did preserve the issue in the trial court. At the hearing on Respondents' Motions for Summary Judgment,[1] Petitioners' counsel "identified section 398.822 [sic] of the Florida Statutes and indicated that the statute did not authorize a guardian ad litem to file suit." (R. 3095-3096)[2] Further, during the

[1] The trial court denied Respondents' Motion for Summary Judgment at the February 4, 2014 hearing, which is why they later moved for reconsideration that order, which was heard on August 4, 2014.

[2] It is apparent that this referenced § 39.822 Florida Statutes, which concerns appointment of a guardian ad litem in dependency cases.

hearing on Respondents' Motion for Reconsideration on August 4, 2014, Petitioners' counsel made the same argument. (R. 3135)

However, should the Court decide that it was waived because of failure to assign as error, it may still consider the argument as it was a fundamental error. 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 *D.H.* 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 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 solely 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. Accordingly this issue should be considered by the Court. *See Guzman v. State*, 211 So. 3d 204 (Fla. 3d DCA 2016).

Finally, Respondent ADEPT argues for the first time that the issue of tolling was waived because it was not raised in reply to its affirmative defense number ten

which stated: “Plaintiff claims are barred by the Statute of Limitations”. (R. 34-41) Petitioner did file a reply arguing failure to set forth sufficient ultimate facts to support the defense. (R. 129-134) Petitioner contemporaneously filed a motion to strike this defense asserting statutory tolling pursuant to section 95.051(1), Florida Statutes. (R. 135-161) Such is required by Rule 1.140(b). The tolling issue was not waived.

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

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. R. 2317-2320, 2348, 2353, 2409, 2417, 2437, 2438, 2848-50. As lay persons, the grandparents 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.

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.*, SUSAN W. FOX, ESQ., (susanfox@flappeal.com), *Attorney for FCF as Amicus Curiae* and DENNIS MOORE, ESQ., (dennis.moore@gal.fl.gov; thomasina.moore@gal.fl.gov; dave.krupski@gal.fl.gov; appellant.e-service@gal.fl.gov), *Attorneys for Guardian ad Litem Program* on this 19th day of January, 2018.

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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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