

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SCO2-1680**

**NAJI NEHME, as Personal  
Representative of the Estate of  
RHONDA NEHME,**

*Petitioner,*

**v.**

**SMITHKLINE BEECHAM CLINICAL LABORATORIES, INC.,  
WILLIAM H. SHUTZE, M.D., PREMIERE MEDICAL LABORATORIES,  
P.A., f/k/a DRS. SHUTZE & TECHMAN, P.A.,  
f/k/a DRS. SHUTZE & RENDON, P.A.,**

*Respondents.*

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On Review of a Certified Question from the  
District Court of Appeal, Fifth District

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**ANSWER BRIEF OF RESPONDENT SMITHKLINE BEECHAM  
CLINICAL LABORATORIES, INC.**

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**MERCER K. CLARKE  
SPENCER T. KUVIN  
CLARKE SILVERGATE WILLIAMS &  
MONTGOMERY  
799 BRICKELL PLAZA, SUITE 900  
MIAMI, FLORIDA 33131  
(305) 377-0700**

**ANDREW T. BAYMAN  
KING & SPALDING  
191 PEACHTREE STREET  
ATLANTA, GEORGIA 30303  
(404) 572-4600**

**ATTORNEYS FOR RESPONDENT SMITHKLINE BEECHAM CLINICAL LABORATORIES, INC.**

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## **STATEMENT OF THE CASE AND FACTS**

On May 23, 1994, plaintiff's decedent, Rhonda Nehme, had a Pap smear collected by a physician at the Volusia County Women's Health Department. The Pap smear was delivered to defendant SmithKline Beecham Clinical Laboratories, Inc., n/k/a Quest Diagnostics Clinical Laboratories, Inc. ("QDCL") for analysis. [R1-3-4]. QDCL subsequently referred it to defendant Premiere Medical Laboratories, P.A., f/k/a Drs. Shutze & Techman, P.A., f/k/a Drs. Shutze & Rendon, P.A., ("Premiere"), an independent contractor, for review and interpretation. [R1-14-19]. On June 3, 1994, Premiere cytotechnologist Vincenta Lannon reviewed the slide, which she interpreted and reported as "normal." [R1-3-4]. The laboratory report reflecting Ms. Lannon's interpretation was then sent back to the Volusia County Women's Health Department. [R1-4].

On February 21, 1997, Rhonda Nehme was diagnosed with cervical cancer. She died on December 9, 1997. [R1-5].

On September 7, 1999, plaintiff Naji Nehme filed his complaint for the alleged wrongful death of his wife, Rhonda Nehme, against QDCL, Dr. William Shutze, Premiere, and Vincenta Lannon.<sup>1</sup> Plaintiff claimed that defendants breached the standard of care they owed Rhonda Nehme by Vincenta Lannon's failure to correctly interpret Ms. Nehme's Pap smear slide. [R1-1-13].

On February 26, 2001, QDCL filed its motion for summary judgment on the basis of the statute of repose applicable to medical malpractice actions, § 95.11(4)(b), Fla. Stat. [R4-673-77]. Recognizing that more than four years had passed between the time of the alleged misinterpretation of the slide and the filing of plaintiff's lawsuit, and that there was no basis to toll the statute of repose, the trial court granted QDCL's motion. [R10-2144-46].

After the court entered its Final Summary Judgment on March 27, 2001, plaintiff appealed to the Fifth District Court of Appeal. In his appeal, plaintiff argued that defendants' alleged negligent failure to diagnose Ms. Nehme's slide properly was evidence of concealment, thus extending the statute of repose to seven years as permitted by § 95.11(4)(b) in cases of "fraud, concealment or intentional misrepresentation." QDCL responded that an alleged negligent failure to diagnose does not constitute "concealment" under the statute, relying on Myklejord v. Morris, 766 So. 2d 1160 (Fla. 5<sup>th</sup> DCA 2000), rev. denied, 789 So. 2d 347 (Fla. 2001).

The Fifth District Court of Appeal affirmed the judgment in favor of QDCL in accordance with its previous holding in Myklejord. See Nehme v. Smith Kline Beecham Clinical Labs., Inc., 822 So. 2d 519 (Fla. 5<sup>th</sup> DCA 2002). It certified to this Court, however, the following question as one of great public importance: Does the term concealment as used in Section 95.11(4)(b), Florida Statutes, encompass negligent diagnosis by a medical provider?

## **SUMMARY OF ARGUMENT**

Plaintiff's action against QDCL is a simple claim for medical malpractice. As such, it is governed by the four-year statute of repose established under § 95.11(4)(b), Fla. Stat (1993). And, since plaintiff filed his action more than four years after the alleged act of QDCL that serves as the basis for his claim, that statute clearly bars plaintiff's action in its entirety.

Plaintiff argues, however, that the circumstances of the case extend the statute of repose to seven years. While § 95.11(4)(b) does permit the extension of the statute of repose under certain circumstances involving fraud, concealment, or intentional misrepresentation of fact, no such circumstances exist here. Under the 1993 Version of § 95.11(4)(b), which QDCL contends is applicable here, the limitations period is extended where fraud, concealment, or intentional misrepresentation prevent a plaintiff from discovering her injury within the four-year repose period. Since plaintiff discovered the alleged injury only two and one half years after it occurred, under the clear language of the statute, the tolling provision does not apply.

Even under the 1996 Version of § 95.11(4)(b), which plaintiff assumes is applicable here, the limitations period should not be extended. The 1996 Version also permits the limitations period to be extended where fraud, concealment, or intentional misrepresentation prevent the discovery of the injury, but it does not limit its impact to circumstances where the plaintiff was prevented from discovering her injury within the four-year repose period. As such, a plaintiff need only show fraud, concealment, or intentional misrepresentation prevented the discovery to receive the benefit of the tolling provision. But this plaintiff cannot do.

Plaintiff contends his case falls under the term "concealment," but all he alleges is a misinterpretation of a Pap smear slide. By the very nature of this claim, plaintiff concedes that defendants had no knowledge of Ms. Nehme's alleged true condition at the time the slide was reviewed. Without such knowledge, defendants could have nothing to conceal.

Were this Court to apply the 1996 Version of § 95.11(4)(b) and thereby seek to answer the question certified to it by the Fifth District Court of Appeal, it should clarify that an alleged negligent failure to diagnose does not constitute fraud, concealment, or intentional misrepresentation as required by the statute. Because there is no basis for extending the statute of repose, plaintiff's claim remains barred.

## ARGUMENT

The trial court granted QDCL summary judgment on the basis of § 95.11(4)(b)'s four-year statute of response. This Court reviews that decision de novo. See Major League Baseball v. Morsani, 790 So. 2d 1071, 1074 (Fla. 2001).

### **I. THE STATUTE OF REPOSE BARS PLAINTIFF'S CLAIM.**

#### **A. Because Plaintiff Filed His Claim Four Years after QDCL's Alleged Act of Negligence, Plaintiff's Claim against QDCL Is Barred.**

Plaintiff's case is an "action for medical malpractice" and is consequently governed by the limitations specified in § 95.11(4)(b), Fla. Stat. See § 95.11(4)(b), Fla. Stat. (1993) ("An 'action for medical malpractice' is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care."); Ash v. Stella, 457 So. 2d 1377 (Fla. 1984) ("[B]y defining an 'action for medical malpractice' to include a claim in tort for damages because of death, the legislature clearly intended [§ 95.11(4)(b)] to apply to wrongful death actions in cases where the basis for the action is medical malpractice."). Under § 95.11(4)(b), plaintiff's action is subject to a two-year statute of limitations and a four-year statute of repose. § 95.11(4)(b), Fla. Stat. ("An action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued...."); see also Carr v. Broward County, 505 So. 2d 568, 570 (Fla. 4th DCA 1987) ("The two-year provision [of § 95.11(4)(b)] is a statute of limitations . . . . The four-year . . . provision[] operate[s] as [a] statute[] of repose.").

While statutes of limitations and statutes of repose both operate to extinguish a prospective plaintiff's cause of action after a certain amount of time has passed, the start-times of the two statutes are triggered by separate and distinct occurrences. As explained by the Florida Supreme Court in Kush v. Lloyd, 616 So. 2d 415 (Fla. 1993), while statutes of limitations begin to run once a cause of action has *accrued*, statutes of repose, which are typically longer, run from the date of the *alleged action/omission* of the defendant. Id. at 418 ("A statute of limitation begins to run upon the accrual of a cause of action except where there are provisions which defer the running of the statute in cases of fraud or where the

cause of action cannot be reasonably discovered. On the other hand, a statute of repose, which is usually longer in length, runs from the date of a discrete act on the part of the defendant without regard to when the cause of action accrued.).

In the instant case, the statute of repose began to run at the time of the alleged act of malpractice which allegedly caused Ms. Nehme's injury and death, i.e., when the slide was allegedly misinterpreted on June 3, 1994. It expired four years later, on June 3, 1998. Plaintiff did not file his complaint until September 7, 1999 – fifteen months after the expiration of the statute of repose. Accordingly, plaintiff's claim is barred by the statute of repose.

**B. There Is No Basis by Which to Extend the Statute of Repose to Seven Years.**

Plaintiff seeks to avoid § 95.11(4)(b)'s four-year limitation by arguing that QDCL's actions in allegedly failing to diagnose Ms. Nehme's cancer constituted "fraudulent concealment," thereby extending the statute of repose from four to seven years. Two versions of § 95.11(4)(b) are relevant to plaintiff's argument: the version that existed before its amendment in 1996 (the "1993 Version") and the version that existed thereafter (the "1996 Version"). Plaintiff assumes the 1996 Version applies to this case; it provides:

In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred .

...

§ 95.11(4)(b), Fla. Stat. (1996).

Plaintiff neglects to inform the Court, however, of the 1993 Version, which is the same as the 1996 Version but for its inclusion of one crucial phrase:

In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury *within the four-year period*, the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident

giving rise to the injury occurred . . . .

§ 95.11(4)(b), Fla. Stat. (1993) (emphasis added).

SBCL contends that the 1993 Version of § 95.11(4)(b) applies to this case and that under this version – because Ms. Nehme discovered her alleged injury within four years of its occurrence – the “fraud, concealment” tolling provision does not apply. However, even were this Court to decide that the appropriate version of the statute is the 1996 Version, the tolling provision still would not apply. QDCL did not engage in fraud or concealment and, therefore, plaintiff is not entitled to receive the benefit of the extension of the statute of repose.

**1. Under the 1993 Version of the Statute of Repose, the Tolling Provision Does Not Apply Because Ms. Nehme Discovered Her Injury within Four Years.**

As quoted above, the 1993 Version of the statute of repose extends the limitations period where fraud, concealment, or intentional misrepresentation of fact “*prevented the discovery of the injury within the 4-year period.*” § 95.11(4)(b), Fla. Stat. (1993). Thus, in cases governed by the 1993 Version, where a plaintiff discovers her injury before the expiration of the four-year period, she receives no benefit from § 95.11(4)(b)’s tolling provision. See Cobb v. Maldonado, 451 So. 2d 482, 483 (Fla. 4<sup>th</sup> DCA 1984) (“In this case, the discovery having been made within the four-year period, appellant failed to overcome the hurdle we have emphasized in the foregoing statute which plainly contemplates *successful* fraud, concealment or intentional misrepresentation; *i.e.*, prevention of discovery of the injury within the four-year period.”) (emphasis in original); Carlton v. Ridings, 422 So. 2d 1067, 1068 (Fla. 1<sup>st</sup> DCA 1982) (because the “fraud, concealment” tolling provision “is applicable only in cases where the injury is not discovered within four years of the date of injury,” and plaintiffs discovered their injury within four years, tolling provision did not apply and plaintiffs’ claim was deemed barred by the statute of repose).

As confirmed by a review of Chapter 96-167, Laws of Florida – the 1996 act which amended § 95.11(4)(b) to remove the “within the 4-year period” language at issue – the 1993 Version of § 95.11(4)(b) applies to this case. While Section 1 of Chapter 96-167 deleted the specified language, Section 2 provided that “[t]his act shall take effect July 1, 1996, and shall not apply to causes of action arising from acts, events, or occurrences that take place before that date.” Plaintiff’s cause of action arises from an act that took place on June 3, 1994, the date of the alleged misinterpretation of Ms. Nehme’s Pap smear slide. Thus, by the legislature’s clear

intention, the 1996 version of the statute does not apply. See also Foley v. Morris, 339 So. 2d 215, 217 (Fla. 1976) (courts will not give retroactive effect to statutes of limitations unless the legislative intent to do so is “express, clear, or manifest”).

Under the 1993 Version of § 95.11(4)(b), plaintiff’s cause of action may not be tolled. As noted above, the alleged misinterpretation of the slide occurred on June 3, 1994. Two and a half years later, on February 21, 1997, Ms. Nehme was diagnosed with cancer. Ms. Nehme, thus, discovered her alleged “injury” within four years.<sup>2</sup> Like the plaintiffs in Cobb and Carlton, plaintiff is not permitted to rely on § 95.11(4)(b)’s tolling provision.<sup>1</sup>

2. **Under the 1996 Version of the Statute of Repose, the Tolling Provision Does Not Apply Because QDCL Did Not Engage In Fraud or Concealment.**

But even were this Court to determine that the 1996 Version of § 95.11(4)(b) is the appropriate one to apply to the facts of this case, plaintiff’s argument that the tolling provision applies still fails. QDCL did not engage in fraud or concealment. Indeed, plaintiff’s argument is merely that QDCL, a clinical laboratory, failed to properly interpret a Pap smear slide. No extension is permitted under these circumstances.

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<sup>1</sup> QDCL notes that it did not make this particular argument based on the 1993 Version of § 95.11(4)(b) in the courts below. However, as this Court reasoned in Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999), that should not discourage it from considering the argument now. Id. at 645 (“If an appellate court, in considering whether to uphold or overturn a lower court’s judgment, is not limited to consideration of the reasons given by the trial court but rather must affirm the judgment if it is legally correct regardless of those reasons, it follows that an appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below. It stands to reason that the appellee can present **any argument supported by the record** even if not expressly asserted in the lower court.”) (emphasis added).

a. **Because Plaintiff Does Not Argue QDCL Knew the True Nature of Ms. Nehme’s Condition at the Time It Reviewed Her Slide, It Could Not Have Engaged in Concealment.**

The phrase, “fraud, concealment, or intentional misrepresentation,” by its very terms, does not comprise negligent misinterpretation or failure to diagnose. Although the legislature’s inclusion of the term “concealment” does appear to offer parties seeking to take advantage of § 95.11(4)(b)’s extension an easier hurdle to overcome than do the terms fraud or intentional misrepresentation, the term still cannot be applied to the facts here. Indeed, how can a party “conceal” a condition it allegedly failed to diagnose in the first place? Plaintiff’s allegations against the defendants generally and his argument to toll the statute of repose here are incompatible.

Plaintiff references the definition of the term, “concealment,” in his brief, but, incredibly, claims it supports his argument. Plaintiff is mistaken. As quoted in Hernandez v. Amisub (American Hospital), Inc., 714 So. 2d 539 (Fla. 3<sup>rd</sup> DCA 1998), rev. denied, 728 So. 2d 200 (Fla. 1998), Webster’s dictionary defines the term “conceal” as: “To hide or withdraw from observation; to withhold knowledge of.” Id. at 541, n.1 (quoting Webster’s New Collegiate Dictionary 170 (2d ed. 1960)). This definition *requires* that the concealer have knowledge of information to be withheld. And because failure to diagnose means that the party failed to obtain knowledge of the relevant issue, rather than that he merely failed to disclose it, concealment cannot include the act of failing to make a proper diagnosis.

Interestingly, plaintiff devotes an entire section of his brief to an argument on statutory construction. Plaintiff explains that “[l]egislative intent is determined primarily from the plain language of the statute.” [Petitioner’s Brief on the Merits at 21 (quoting Hawkins v. Ford Motor Co., 748 So. 2d 993 (Fla. 1999))]. As described above, the “plain language” of § 95.11(4)(b) requires “concealment,” and therefore, knowledge of information to be concealed, to extend the statute of repose. The plain language does *not* permit extension on the basis of an alleged failure to diagnose alone. Indeed, to borrow plaintiff’s argument, had the legislature intended negligent diagnosis to be a basis for extension of the statute of repose, it could have included that language in § 95.11(4)(b). [Id. (citing Armstrong v. City of Edgewater, 157 So. 2d 422, 425 (Fla. 1963) (holding that it is inappropriate to add words to statutes in the process of construing them)].<sup>3</sup> The rules of statutory construction, therefore, support QDCL’s argument that a claim of failure to diagnose does not toll the statute of repose. See also Doe v. Hillsborough County Hosp. Auth., 816 So. 2d 262, 266 (Fla. 2<sup>nd</sup> DCA 2002) (“We note that the word

‘concealment’ in the statute is placed between the words ‘fraud’ and ‘intentional misrepresentation,’ which would suggest as a matter of statutory construction that concealment involves some level of knowledge or intent.”).

Indeed, under plaintiff’s reading of the statute, every misdiagnosis case of any kind would constitute concealment and permit the tolling of the statute. This, obviously, was not the legislature’s intent.

The case of Myklejord v. Morris, 766 So. 2d 1160 (Fla. 5<sup>th</sup> DCA 2000), rev. denied, 789 So. 2d 347 (Fla. 2001), is directly on point. In Myklejord, the plaintiff sued his health care providers who allegedly failed to diagnose his cancer. Id. at 1161. However, the plaintiff did not file suit until six years after the alleged misinterpretation. In an attempt to extend the statute of repose to seven years, the plaintiff argued that the misinterpretation could be considered concealment which, as such, would extend the statute of repose. Id. The Fifth District Court of Appeal disagreed, stating that “[t]his is not a case in which the health care providers intentionally withheld the diagnosis or intentionally misrepresented the results. The complaint does not set forth any facts which would establish a basis to extend the statute of repose beyond four years.” Id. at 1162. The court added:

“Concealment” required to extend the statute of repose in medical malpractice matters to seven years requires fraud, intent to conceal or some other active element. ***Concealment also requires knowledge (by the tortfeasor) about plaintiff’s condition which is not conveyed to plaintiff.*** In such instances, the plaintiff is being actively misled about his or her true condition by the tortfeasor. Conceptually, this intentional withholding of information acts to delay plaintiff’s ability to discover the tortfeasor’s wrongdoing or the nature of the injury itself.

We find no rational basis for making negligent diagnosis subject to a seven-year repose period where other acts of simple negligence are governed by a four-year period.

Id. at 1162 (emphasis added) (internal citations omitted); see also Goldman v. Agarwal, 789 So. 2d 1179 (Fla. 4<sup>th</sup> DCA 2001) (following and citing Myklejord as precedent to affirm).<sup>2</sup>

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<sup>2</sup> In Myklejord, Judge Sawaya concurred only in the “result” of Judge Pleus’s opinion and Judge Dauksch filed a dissenting opinion. While this “aggregation of separate judicial opinions” did not produce a law-changing precedent, see Witt v.

The statute's requirement of knowledge, and the fact that a party who is alleged to have made a negligent misinterpretation of a medical test necessarily lacks that knowledge, distinguish Myklejord and this case from the series of cases plaintiff relies upon in his brief. In Allen v. Orlando Regional Medical Center, 606 So. 2d 665 (Fla. 5<sup>th</sup> DCA 1992), approved, 620 So. 2d 993 (Fla. 1993), for example, the Fifth District Court of Appeal permitted the statute of repose to be extended where there was evidence supporting plaintiff's allegation that the defendant health care providers *knew* but withheld from the plaintiff that the victim had been improperly intubated during forty-five minutes after his birth, that this improper intubation resulted in high concentrations of carbon dioxide in his blood, and that this condition could have caused a brain hemorrhage and, consequently, the victim's cerebral palsy. Id. at 669.

In reversing the trial court's ruling in favor of the health care providers on the statute of repose issue, the Allen court relied significantly on the Third District Court of Appeal's decision in Almengor v. Dade County, 359 So. 2d 892 (Fla. 3<sup>rd</sup> DCA 1978). In Almengor, the plaintiff alleged the defendant health care providers *knew* they had injured her baby during the baby's birth but failed to tell her, leading plaintiff to believe the baby had been born with a congenital defect without any birth trauma. Id. at 894. In addition, plaintiff alleged that a nurse had "actively and successfully misled" plaintiff by stating that the baby was only "slightly retarded" and that plaintiff should not worry about it. Id. at 895. The court concluded that these allegations of concealment, "if true," would toll the statute of repose. Id.

Similarly, in Mangoni v. Temkin, 679 So. 2d 1286 (Fla. 4<sup>th</sup> DCA 1996), rev. dismissed, 686 So. 2d 582 (Fla. 1996), the court permitted tolling of the statute where the defendant health care providers "*knew* of the cyst, an adverse condition, and failed to disclose its existence to Mangoni." Id. at 1288 (emphasis added). The court stated:

Here, the doctor-patient relationship created a duty to disclose the adverse condition but the diagnosis was withheld from the patient. . . . Thus, by their silence, the defendants may have effectively concealed their own neglect of a medical condition that demanded attention.

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State, 387 So. 2d 922, 930 n.31 (Fla. 1980), it did produce persuasive authority. Indeed, the trial court in this case specifically stated that it "agree[d] with Judge Pleus' analysis as set forth in [the Myklejord] opinion," [R10-2145], and the district court affirmed.

Id.; see also Hernandez, 714 So. 2d at 541-42 (permitting tolling of statute of repose where defendants improperly left a laporotomy pad inside plaintiff's abdomen and misrepresented that it had performed an accurate count of pads at the conclusion of surgery).<sup>3</sup>

In all of these cases, the defendants allegedly *had* formed a diagnosis of a condition – or even more egregiously, had allegedly engaged in some wrongdoing to actually cause the plaintiff's condition. In all of these cases, therefore, the defendants had knowledge which should have been provided to the plaintiffs, yet they failed to do so. Here, by contrast, plaintiff alleges that cytotechnologist Lannon *failed* to diagnose Ms. Nehme's condition. Whether or not Lannon's actions constituted negligence, the bottom line is that she had no knowledge of plaintiff's alleged condition at the time she made the diagnosis and certainly did not do anything to cause it. These cases, therefore – contrary to plaintiff's argument – do not conflict at all with the Fifth District Court of Appeal's holding in Myklejord or with an affirmance here.

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<sup>3</sup> The Hernandez court also based its decision extending the statute of limitations on defendants' "concealment" of the fact that they had left the pad in plaintiff's abdomen. On this issue, the court specifically stated that "there was no need for Hernandez to prove that the Hospital or its employees had actual knowledge that a pad had been left inside Hernandez' abdomen, in order for Hernandez' claim to succeed." 714 So. 2d at 541. QDCL contends that this statement is limited to the specific problem involved in the case – concealment of foreign object in a patient's body following surgery – and does not support plaintiff's argument that a failure to diagnose is "fraud, concealment" pursuant to Fla. Stat. § 95.11(4)(b). Moreover, the Hernandez court was clearly troubled by the fact that, because the Hospital's operating room technician testified that she would sign off on pad counts without actually conducting them and that she must not have visually inspected the pads in this case, "[t]here was *more* than mere negligence here." Id. at 542 (emphasis added); see also id. at 541 (stating that misrepresentation may be shown by "carelessness or recklessness"). Here, by contrast, all plaintiff has alleged is mere negligence. Hernandez, therefore, is clearly distinguishable from this case.

b. **“Policy Considerations” Do Not Weigh in Favor of Upholding Plaintiff’s Claim.**

Petitioner tries to convince this Court that “policy considerations” should persuade it to rule in his favor. [Petitioner’s Brief on the Merits at 22]. Specifically, plaintiff argues that the purpose of the tolling provision is to prevent a defendant from taking advantage of his or her own wrongful conduct. Plaintiff borrows this “purpose” from a passage of this Court’s opinion in Proctor v. Schomberg, 63 So. 2d 68 (Fla. 1953). This passage, however, clearly was inspired by, and is therefore limited to, concealment that is *fraudulent* in nature: “[U]nder this rule, one who *wrongfully conceals* material facts and thereby prevents discovery of his wrong or the fact that a cause of action has accrued against him is not permitted to assert the statute of limitations as a bar to an action against him, thus taking advantage of his own wrong . . . .” Id. at 71-72 (quoting 34 Am. Jur. p. 188, sec. 231). Plaintiff does not claim cytotechnologist Lannon engaged in fraudulent concealment, just that she negligently failed to diagnose Ms. Nehme’s condition. Indeed, had Lannon *not* allegedly failed to diagnose Ms. Nehme’s condition, there would not even have been a wrong to conceal or a cause of action to accrue. Therefore, this purpose is not applicable to this case.

Moreover, QDCL recognizes that statutes of limitations and repose, by their nature, can be unforgiving, such as when they operate to extinguish a claim before it is discovered or even exists. See Kush v. Lloyd, 616 So. 2d at 418 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 30, at 168 (5<sup>th</sup> ed. 1984)). But this is not such a case. Ms. Nehme was diagnosed on February 21, 1997. At that time, almost a year and a half remained before the statute was set to expire on June 3, 1998. When she died on December 9, 1997, six months remained. Plaintiff simply cannot use the argument that statutes of repose can have harsh consequences to support his position because the consequence for him is harsh only because of his own failure to file his claim in a timely fashion.

And finally, even if this were such a case in which a timely filing was beyond plaintiff’s control, it should not matter to the Court’s interpretation of the statute. As the Court stated in Kush:

[T]he medical malpractice statute of repose represents a legislative determination that there must be an outer limit beyond which medical malpractice suits may not be instituted. In creating a statute of repose which was longer than the two-year statute of limitation, the legislature attempted to balance the rights of injured persons against the exposure of health care

providers to liability for endless periods of time. Once we determined that the statute was constitutional, our review of its merits was complete. This Court is not authorized to second-guess the legislature's judgment.

616 So. 2d at 421-22.

c. **The Nardone Qualification Does Not Apply Here.**

Plaintiff devotes a large portion of his brief to a discussion of this Court's opinion in Nardone v. Reynolds, 333 So. 2d 25 (Fla. 1976). Nardone's relevance to this case, however, is limited. The Court in Nardone was interpreting the "equitable principle of fraudulent concealment," rather than § 95.11(4)(b), Fla. Stat., since the tolling provision based on "fraud, concealment, or intentional misrepresentation" in § 95.11(4)(b) had not yet been passed at the time the litigation involved in Nardone began. 333 So. 2d at 37.

In discussing the equitable principle of fraudulent concealment, the Nardone Court stated that generally, "plaintiff must show both successful concealment of the cause of action and fraudulent means to achieve that concealment" in order to reap the benefit of the tolling provision. Id. at 37. Plaintiff does not even try to meet that standard. Instead, he relies on a qualification of the general rule added by the Nardone Court applicable in cases brought by patients against their physicians. Based on the "*fiduciary, confidential relationship of physician-patient*," "[w]here an adverse condition is known to the doctor or readily available to him through efficient diagnosis, he has a duty to disclose and his failure to do so amounts to a fraudulent withholding of the facts, sufficient to toll the running of the statute." Id. at 39.

Plaintiff seeks to use that language to hold QDCL liable for its alleged "[in]efficient" analysis. But, for two reasons, the Nardone qualification does not apply here. First, the Nardone Court was interpreting the equitable principle of fraudulent concealment, not the "fraud, concealment" language of § 95.11(4)(b). As discussed above, that language requires the defendant, at the very least, to have knowledge of the injury it is concealing.

Second, QDCL is not a physician, let alone Ms. Nehme's physician. It was not in a "fiduciary, confidential relationship" with her. QDCL is merely a company that contracts with doctors to interpret screening tests such as Pap smears. The purpose of the Nardone qualification is to encourage doctors to inform their patients of known facts regarding their condition. Plaintiff makes this very point himself by quoting from Nardone: "[W]e . . . recognize the fiduciary, confidential

relationship of physician-patient imposing on the physician a duty to disclose; but, this is a duty to disclose known facts and not conjecture and speculation as to possibilities.” [Petitioner’s Brief on the Merits at 13 (quoting Nardone, 333 So. 2d at 39)].

Indeed, that the facts of Nardone itself are so distinguishable from this case is further support that the Nardone qualification is not relevant here. In Nardone, the medical provider defendants performed a procedure on a minor patient which arguably worsened his condition. Although the boy’s parents knew of his worsened condition, they were never informed that the procedure had been done. Ultimately, the Court decided that unless it was clear that the defendants knew that the cause of the patient’s worsened condition was the procedure, they would not be deemed to have had a duty to disclose it to the parents, and their failure to do so would not toll the statute of limitations. See id. at 40. Here, by contrast, because QDCL’s relationship with Ms. Nehme was at arms’ length, nothing that it did could have caused her condition. QDCL’s only failure was its alleged misinterpretation of the Pap smear.

The purpose underlying the Nardone Court’s reflections is not at issue here. Because the basis for the qualification does not exist, the qualification itself cannot be deemed to apply.

Should the Court reach this issue, QDCL respectfully requests that it answer the Fifth District Court of Appeal’s certified question in the negative: the term concealment as used in Section 95.11(4)(b), Florida Statutes, does *not* encompass negligent diagnosis by a medical provider. Because QDCL had no knowledge of plaintiff’s alleged injury, it could not conceal that information from plaintiff, and because QDCL not engage in concealment, plaintiff is not entitled to an extension of the statute of repose.

### **CONCLUSION**

Florida Statute § 95.11(4)(b) is clear: “in *no event* shall [a medical malpractice] action be commenced later than four years from the date the incident or occurrence out of which the cause of action accrued.” Despite that unequivocal language, plaintiff waited more than four years from the date of QDCL’s alleged negligent act to file his claim.

No basis exists to permit the extension of the four-year statute of repose. Under the 1993 Version of § 95.11(4)(b) which QDCL contends is applicable, the tolling provision does not apply because plaintiff discovered the alleged injury within the four-year period following its occurrence. And even under the 1996 Version of § 95.11(4)(b) which plaintiff contends is applicable, the tolling provision

does not apply because the term “concealment” does not encompass negligent diagnosis by a medical provider.

Therefore, for the reasons stated above, QDCL requests the Court to affirm the ruling of the Fifth District Court of Appeal and uphold the Final Summary Judgment in its favor.

Respectfully submitted this \_\_\_ day of November, 2002.

By: \_\_\_\_\_

Andrew T. Bayman  
KING & SPALDING  
191 Peachtree Street  
Atlanta, Georgia 30303-1763  
Tel: 404/572-4600  
Fax: 404/572-5100

-and-

Mercer K. Clarke  
Florida Bar No. 131322  
Spencer T. Kuvin  
Florida Bar No. 089737  
CLARKE SILVERGATE  
WILLIAMS & MONTGOMERY  
799 Brickell Plaza  
Miami, Florida 33131  
Tel: 305/377-0700

Fax: 305/377-3001

ATTORNEYS FOR RESPONDENT QUEST DIAGNOSTICS CLINICAL  
LABORATORIES, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this date served a copy of the foregoing **ANSWER BRIEF OF RESPONDENT SMITHKLINE BEECHAM CLINICAL LABORATORIES, INC.** by depositing a copy of the same in the United States mail in a properly addressed envelope with sufficient postage affixed thereto to the following:

Earl L. Denney, Esq.  
Searcy Denney Scarola  
Barnhart & Shipley, P.A.  
P.O. Drawer 3626  
West Palm Beach, FL 33402-3626

Philip M. Burlington, Esq.  
Caruso, Burlington, Bohn  
& Compiani, P.A.  
Suite 3A/Barristers Bldg.  
1615 Forum Place  
West Palm Beach, FL 33401

Robert A. Hannah, Esq.  
Christopher C. Curry, Esq.  
Hannah, Estes & Ingram, P.A.  
P.O. Box 4974  
Orlando, FL 32802-4974

Jennings L. Hurt, III, Esq.  
John P. Daly, Esq.  
Rissman, Weisberg, Barrett,  
Hurt, Donahue & McCain, P.A.  
P.O. Box 4940  
Orlando, FL 32802-4940

Arthur J. England, Jr., Esq.  
Julissa Rodriguez, Esq.  
Greenberg Traurig, P.A.  
1221 Brickell Ave.  
Miami, FL 33131

Hal B. Anderson, Esq.  
Billing Cochran Heath Lyles & Mauro, PA  
888 S.E. Third Avenue, Suite 301  
The Legal Center Building  
Fort Lauderdale, Florida 33316

This \_\_\_ day of November, 2002.

\_\_\_\_\_  
Andrew T. Bayman

## CERTIFICATE OF TYPE SIZE AND STYLE

Respondent hereby certifies that the type size and style of the Answer Brief of Respondent Smithkline Beecham Clinical Laboratores, Inc. is Times New Roman 14 point.

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Andrew T. Bayman

<sup>1.</sup> Previously, on January 27, 1999, plaintiff had filed a petition for a 90-day extension of the statu of limitations, and on May 11, 1999, a pre-suit notice of intent to initiate litigation.

<sup>2.</sup> In Tanner v. Hartog, this Court clarified that “the knowledge of the injury as referred to in the rule as triggering the statute of limitations means not only knowledge of the injury but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice.” 618 So. 2d 177, 181 (Fla. 1993). In this case, plaintiff admitted he began to suspect malpractice soon after his wife was diagnosed in February 1997. [R2-436-38 (Naji Nehme admitting during his deposition that he thought someone had done “something wrong” shortly after he learned of his wife’s diagnosis); R2-437-38 (Nehme stating that within the next three to four months he hired an attorney because he thought “an attorney would be able to find out more than I” and started to do his own research on the internet to learn more about his wife’s cancer)].

<sup>3.</sup> Indeed, the two statutes plaintiff relies upon for his argument that the “legislature clearly knows how to express a scienter requirement” specifically reference the acts of “fraudulent concealment” and taking “affirmative steps to conceal the defect” despite having “actual knowledge that the product was defective.” [Petitioner’s Brief at 20 (quoting § 400.4296(3), Fla. Stat., and § 95.031(2)(d), Fla. Stat., respectively)]. QDCL does not contend that § 95.11(4)(b) requires that level of intentional, or even wrongful, conduct. Rather, it merely insists that the statute requires knowledge. By using the term, “concealment,” the legislature clearly intended the statute of repose to be tolled only where the medical malpractice defendant had knowledge of a medical condition yet, for whatever reason, failed to share this knowledge with the plaintiff. [See discussion at pp. 15-18].