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TABLE OF CONTENTS

I. INTRODUCTION

The idea that courts are available to seek redress for injuries for those who have been wronged is fundamental to American jurisprudence. Most attorneys are familiar with the legal axiom, "[f]or every wrong, there is a remedy."[1] This principle, so simply and plainly stated, has long been part of Florida's Constitution. Article I, section 21 states that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[2] "This provision, dating from our 1838 constitution . . . guarantees to every person the right to free access to the courts on claims of redress of injury free of unreasonable burdens and restrictions."[3] However, statutes of limitation and statutes of repose can extinguish a litigant's cause of action before the litigant is even aware that a problem exists.

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1. Swain v. Curry, 595 So. 2d 168, 174 (Fla. 1st Dist. Ct. App.) (quoting Holland v. Mayes, 19 So. 2d 709 (1944)), *review denied*, 601 So. 2d 551 (Fla. 1992).

2. *Id.* (quoting FLA. CONST. art. I, § 21).

3. *Id.*

It is not difficult to envision situations in which a person's injuries or damages do not readily show themselves. The example that most often comes to mind is a disease such as AIDS, which has a long latency period wherein the person does not know he is afflicted.[4] Such situations give rise to constitutional challenges based on the access to courts provision in the Florida Constitution.[5] Where latent injuries or damages are concerned, however, Florida courts have eroded that principle in their more recent pronouncements.[6] This article examines the trend away from free access to the courts and argues that these decisions pose an unfair and unprecedented threat to those whose damages do not manifest themselves in the time required to bring suit.

II. STATUTES OF LIMITATION AND REPOSE

Recently, the majority of decisions from the Florida Supreme Court in this area construed the medical malpractice statute.[7] That statute states the following:

> An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 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 4 years from the date of the incident or occurrence out of which the cause of action accrued . . . . 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 4-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.[8]

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4. Another example could be a building whose design or construction flaws are not apparent until after a limitations period has run. In public construction projects, there is often a one-year statute of limitations for the owner to make a claim on an available bond. *See* FLA. STAT. § 255.05 (1991) ("Little Miller Act").

5. FLA. CONST. art. I, § 21.

6. *See* Whingham v. Shands Teaching Hosp. & Clinics, Inc., 613 So. 2d 110, 113 (Fla. 1st Dist. Ct. App. 1993); *see also infra* notes 29-50 and accompanying text.

7. *See, e.g.*, Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992); *see also infra* notes 9-13 and accompanying text.

8. FLA. STAT. § 95.11(4)(b) (Supp. 1992).

The above statute contains a two-year statute of limitations and a four-year statute of repose.[9] The relationship between statutes of limitation and statutes of repose have often been misunderstood. The Florida Supreme Court has explained their relationship in the following manner:

> 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.[10]

> In contrast to a statute of limitation, a statute of repose precludes a right of action after a specified time which is measured from the incident of malpractice, sale of a product, or completion of improvements, rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued.[11]

When statutes of limitation or repose present a constitutional threat to one's access to courts, courts look to the test enunciated by the Florida Supreme Court in *Kluger v. White*.[12] In *Kluger*, the court devised a test that, in general, prohibits the Legislature from abolishing a person's right of action unless an overpowering public necessity is shown.[13] The court initially used the *Kluger* test liberally to grant relief to those plaintiffs whose injuries were latent and undiscoverable.[14]

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9. *See id.*

10. *Kush*, 616 So. 2d at 418.

11. University of Miami v. Bogorff, 583 So. 2d 1000, 1003 (Fla. 1991).

12. 281 So. 2d 1, 4 (Fla. 1973).

13. *Id.* The court's test in *Kluger* reads as follows:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law . . . pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Id.

14. *See, e.g.*, Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981); *see also infra* notes 23-25, 33 and accompanying text.

III. *DIAMOND'S* RULING

In the case of *Diamond v. E. R. Squibb & Sons, Inc.*,[15] the supreme court was faced squarely with the constitutionality of depriving a plaintiff of her cause of action when her injuries were undiscoverable.[16] In *Diamond*, the plaintiff alleged that while yet unborn, a drug manufactured by the defendant was administered to her.[17] This drug was later found to be a cause of cancer in those children whose mothers were treated with the drug.[18] The defendant moved for summary judgment based on the statute of repose that existed for products liability suits.[19] That statute, section 95.031(2) of the Florida Statutes, provided that no products liability action could be brought within twelve years after delivery of the product "regardless of the date the defect in the product or the fraud was or should have been discovered."[20] In this case, the effect of the ingestion of the drug did not materialize until after the plaintiff reached puberty.[21] As pointed out in Justice McDonald's concurrence,

> [The plaintiff] had an accrued cause of action but it was not recognizable, through no fault of hers, because the injury had not manifested itself. This is different from a situation where the injury is not inflicted for more than twelve years from the sale of the product. When an injury has occurred but a cause of action cannot be pursued because the results of the injury could not be discovered, a statute of limitation barring the action does, in my judgment, bar access to the courts and is constitutionally impermissive.[22]

The court held that the statute of limitation, as applied in that case, violated the plaintiff's guarantee of access to courts.[23] Although the court did not specifically use the *Kluger* test, it was influenced by an earlier decision that applied the test wherein the plaintiff was allowed to sue a building contractor after the statute of repose had run.[24]

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15. 397 So. 2d at 671.
16. *Id.* at 672.
17. *Id.* at 671.
18. *Id.*
19. *Id.*
20. *Diamond*, 397 So. 2d at 672 (citing FLA. STAT. § 95.031(2) (1977)).
21. *Id.*
22. *Id.* (McDonald, J., concurring).
23. *Id.*
24. *Id.* (citing Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979)); *see* American Liberty Ins. Co. v. West & Conyers, Architects & Eng'rs, 491 So. 2d 573 (Fla. 2d

IV. DELAYED "INJURY" VS. DELAYED "DISCOVERY OF INJURY"

A critical distinction must be drawn between factual situations wherein the plaintiff has, in fact, been injured but her injuries remain undiscovered, and those situations wherein the plaintiff does not become injured until after the statute of limitation or repose has run. The Florida Supreme Court recognized this distinction when it passed on the constitutionality of the products liability statute of repose in *Pullum v. Cincinnati, Inc.*[25] In *Pullum*, the plaintiff was injured while operating a press brake machine in 1977, and subsequently filed suit against the manufacturer in 1988, which was past the statute of repose then governed by Florida Statutes section 95.031(2).[26] In affirming summary judgment for the defendant, the court found that the Legislature, in enacting the statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers.[27] However, in an important footnote, the Florida Supreme Court recognized the critical distinction between the injuries in *Pullum*, and those suffered in *Diamond*. Specifically, the court stated:

> In *Diamond*, we held that the operation of section 95.031(2) operated to bar a cause of action before it accrued and thereby denied the aggrieved plaintiff access to the courts. But *Diamond* presents an entirely different factual context than existed in either *Battilla* or the present case where the product first inflicted injury many years after its sale. In *Diamond*, the defective product, a drug known as diethylstilbestrol produced by Squibb, was ingested during plaintiff mother's pregnancy shortly after purchase of the drug between 1955-1956. The drug's effects, however, did not become manifest until after plaintiff daughter reached puberty. Under these circumstances, if the statute applied, plaintiffs' claim would have been barred even though the injury caused by the product did not become evident until over twelve years

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Dist. Ct. App. 1986). Opponents of the *Diamond* decision would argue that *Overland* applied the *Kluger* test to a statute of repose wherein no strong public interest was specifically expressed. A strong public interest was subsequently expressed in the preamble to the new section 95.11(3)(c), wherein the Legislature specifically found the people's best interest would be served by limiting potential liability to an engineer, architect, or contractor.

25. 476 So. 2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986), *superceded by statute as provided in* Smith v. Sturm, 510 So. 2d 343, 345 (Fla. 2d Dist. Ct. App. 1987).

26. *Id.* at 658; *see supra* notes 19-20 and accompanying text. Later cases decided by the District Courts of Appeal specifically recognized that section 95.031(2) superseded *Pullum*. *See, e.g.*, *Sturm*, 510 So. 2d at 345.

27. *Pullum*, 476 So. 2d at 659.

> after the product had been ingested. The legislature, no doubt, did not contemplate the application of this statute to the facts in *Diamond.* Were it applicable, there certainly would have been a denial of access to the courts.[28]

Despite the *Diamond* decision and the *Pullum* footnote, the court in recent decisions dealing with the medical malpractice statute of limitation and repose has apparently ignored, or overlooked, the distinction to be drawn by these cases.

V. RECENT DECISIONS

The Florida Supreme Court upheld the constitutionality of the medical malpractice statute of repose in *Carr v. Broward County.*[29] In *Carr*, the parents of a brain-damaged newborn child brought suit after the statute of repose had run.[30] Plaintiffs alleged that, despite due diligence, they were unable to discover the circumstances surrounding the prenatal and obstetrical care rendered during birth.[31] The court upheld the defendant's motion to dismiss based on the statute of repose and specifically ruled that the statute was constitutional under the *Kluger* test.[32] The court cited the extensive preamble to the Medical Malpractice Reform Act of 1975 wherein the requisite public necessity was expressed.[33]

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28. *Id.* at n.*.

29. 541 So. 2d 92 (Fla. 1989). *Contra* Public Health Trust v. Menendez, 584 So. 2d 567 (Fla. 1991).

30. *Carr*, 541 So. 2d at 93.

31. *Id.*

32. *Id.* at 94.

33. *Id.* A portion of the preamble states:

> WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and
>
> WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
>
> WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida; and
>
> WHEREAS, the problem has reached crisis proportion in Florida, NOW THEREFORE . . . .

Id. (quoting Medical Malpractice Reform Act of 1975, ch. 75-79, § 7, 1975 Fla. Laws 13, 20 (codified at FLA. STAT. § 95.11(4)(b))).

Most recently, the Florida Supreme Court passed on the constitutionality of the statute of repose in *Kush v. Lloyd*.[34] In *Kush*, the parents of a deformed child were referred by their physician for genetic testing.[35] The parents were subsequently assured that they possessed no genetic abnormalities and that their first son's impairment was an accident of nature, not a genetic defect. However, the results of an important study were never transmitted, and the parents eventually had another deformed child.[36] The parents filed suit after the statute of repose had run.[37] The court held that the statute of repose begins to run from the date of the negligence, not from the date of birth.[38]

More important, neither the *Kush* decision nor the *Carr* decision involved injuries that were latent. In both cases, the injuries were readily apparent and the issue involved the time of discovering negligence, as opposed to the time of discovering the injuries.[39] Therefore, neither the *Kush* nor the *Carr* decision overruled or even confronted the *Diamond* decision.[40] Nevertheless, recent decisions in the district courts have relied on the *Kush* and *Carr* decisions in precluding from suit those plaintiffs who did not realize they were injured during the period of repose.

In *Whigham v. Shands Teaching Hospital & Clinics, Inc.*,[41] the plaintiff received AIDS tainted blood during a transfusion administered by the defendant. After the four-year medical malpractice statute of repose had run, the plaintiff discovered that he had been infected with the AIDS virus.[42] The plaintiff was completely asymptomatic until that point.[43] The First District Court of Appeal affirmed the trial court's dismissal of the action, based on the statute of repose.[44] The court relied on *Carr*, *Kush*, and other recent Florida Supreme Court decisions upholding the constitutionality of the medical malpractice statute of repose.[45] The supreme court's *Diamond* decision was specifically not followed, as the court was

34. 616 So. 2d 415 (Fla. 1992).
35. *Id.* at 417.
36. *Id.*
37. *Id.*
38. *Id.* at 418.
39. *See supra* notes 30-39 and accompanying text.
40. *See supra* notes 30-39 and accompanying text.
41. 613 So. 2d 110 (Fla. 1st Dist. Ct. App.), *review granted*, 623 So. 2d 496 (Fla. 1993).
42. *Id.* at 111.
43. *Id.*
44. *Id.* at 114.
45. *Id.* at 112-13.

more inclined to follow the "more recent pronouncements from the Supreme Court."[46]

Under a similar fact situation, *Doe v. Shands Teaching Hospital & Clinics, Inc.*, the First District Court of Appeal again ruled that the plaintiff was not denied constitutional access to courts.[47] In *Doe*, the First District Court of Appeal considered the applicability of *Diamond* to the case.[48] The court reasoned that *Diamond* was inapplicable as the statute of repose in that case was not effective at the time the plaintiff ingested the drug.[49] The court reasoned that *Kush* had the opportunity to address *Diamond* but did not and, therefore, *Diamond* might be limited to its facts.[50]

The district court overlooked the more likely reason that *Diamond* was not confronted in the latest Florida Supreme Court cases, namely, the fact that *Kush* is factually distinguishable from *Diamond*. As Justice Kogan observed in his dissent of the *Kush* decision, prior decisions have failed to focus adequately on the distinction between delayed discovery and delayed injury.[51] In *Kush*, the injury was delayed until after the repose period had run.[52] In *Diamond*, the injuries were immediate, but discovery of the injuries was delayed until after the repose period had run.[53] *Diamond* is the only Florida Supreme Court decision with facts which are similar to those presented in *Whigham* and *Doe*.[54] The First District Court's reliance on cases that are factually distinguishable is misplaced, thus resulting in decisions which are unprecedented.[55] Furthermore, in his dissent in *Doe*, Judge Ervin felt that a judicial determination of overpowering public necessity could not be made under the factual situation wherein a plaintiff neither knows nor was able to know of the injury until after the repose period had elapsed.[56]

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46. *Whigham*, 613 So. 2d at 113.
47. 614 So. 2d 1170 (Fla. 1st Dist. Ct. App.), *review denied*, __ So. 2d __ (Fla. 1993).
48. *Id.*
49. *Id.* at 1171.
50. *Id.*
51. *Kush*, 616 So. 2d at 426 (Kogan, J., dissenting).
52. *See supra* notes 35-37 and accompanying text.
53. *See supra* notes 15-21 and accompanying text.
54. *See supra* notes 15-24 and accompanying text.
55. *Doe*, 614 So. 2d at 1172 (Ervin, J., dissenting).
56. *Id.* at 1177.

VI. CONCLUSION

In *Diamond v. E.R. Squibb & Sons, Inc.*, a statute of repose that barred a cause of action to a plaintiff who was unaware of his injury prior to the expiration of the repose period was held to be unconstitutional by the Florida Supreme Court.[57] Despite the fact that no subsequent supreme court decision has receded from *Diamond*, recent district court opinions have mistakenly found that persons with latent injuries, discovered after the statute of repose has expired, have not been denied their access to the courts. These decisions rely on supreme court cases that are factually distinguishable from *Diamond*. Although the public necessity for a repose period in the medical malpractice context may be shown, the Legislature has not expressed an overpowering public necessity as it relates to people with latent or undiscoverable injuries. As the supreme court has stated, "[t]he legislature, no doubt, did not contemplate the application of this statute to the facts in *Diamond*."[58] Until the Florida Supreme Court decides differently, district courts should follow the ruling in *Diamond* and allow these litigants to pursue their claims as guaranteed by the Florida Constitution.

57. *Diamond*, 397 So. 2d at 672.

58. Pullum v. Cincinnati, Inc., 476 So. 2d 657, 659 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986), *superceded by statute as provided in* Smith v. Sturm, 510 So. 2d 343, 345 (Fla. 2d Dist. Ct. App. 1987).