To Accrue or not to Accrue? The Hearndon Question.

Joseph R. Gosz
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Introduction

In Florida, a cause of action that is not brought before the relevant limitation period expires is time barred.\textsuperscript{1} In most cases, the limitation period on a claim begins to run when the cause of action accrues.\textsuperscript{2} In Florida, “[a] cause of action accrues when the last element constituting the cause of action occurs.”\textsuperscript{3} The last element of a cause of action is typically either stated as “injury” or “damage(s)” by courts in Florida\textsuperscript{4}, although the legislature has chosen to define the last element of certain causes of action as something other than “injury” or “damage(s).”\textsuperscript{5}

The statute of limitation that typically applies to a cause of action is the statute of limitation in existence when the cause of action accrues.\textsuperscript{6} Changes the legislature makes to statutes of limitations operate only prospectively in the absence of a clearly expressed intention

\footnotesize
\textsuperscript{1} Fla. Stat. § 95.011 (2012) (“A civil action or proceeding... shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere.”)

\textsuperscript{2} Fla. Stat. § 95.031 (2012) (“Except as provided in subsection (2) and in s. 95.051 and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.”)

\textsuperscript{3} Fla. Stat. § 95.031(1) (2012)

\textsuperscript{4} See, \textit{e.g.}, \textit{Penthouse North Assoc., Inc. v. Lombardi}, 461 So.2d 1350, 1352 (Fla. 1985) (A cause of action accrues when someone has been damaged.)

\textsuperscript{5} See, \textit{e.g.}, Fla. Stat. § 95.031(1) (2012) (“[T]he last element constituting a cause of action on an obligation or liability founded on a negotiable or nonnegotiable note payable on demand... is the first written demand for payment, notwithstanding that the endorser, guarantor, or other person secondarily liable has executed a separate writing evidencing such liability.”)

\textsuperscript{6} See \textit{Foley v. Morris}, 339 So.2d 215, 217 (Fla. 1976) (“[R]ights accrued, claims arising, proceedings instituted, orders made under the former law, or judgments rendered before the passage of an amended statute of limitations will not be affected by it, but will be governed by the original statute unless a contrary intention is expressed by the legislature in the new law.”) \textit{quoting}, 51 Am.Jur.2d § 57, Limitation of Actions.
for the statute to apply retroactively. The legislature accomplishes retroactive application of new or amended statutes of limitations by stating specifically that the change is to apply retroactively within what is called a “savings clause.” However, even where the legislature provides for retroactive application of statutes of limitation, such statutes are subject to two limitations: (1) the legislature cannot lengthen a statute of limitation in order to revive previously time barred causes of action, and, (2) while the legislature can shorten an existing statute of limitations and make the new statutory period effective retroactively so that it shortens the limitation period for causes of action which accrued prior to the effective date of the new statute, potential plaintiffs must be left a constitutionally permissible amount of time within which to bring their suits.

An example of the second limitation in practice would be the retroactive shortening of a statute of limitations from 20 years to five years. A potential plaintiff may have a cause of action that accrued 14 years ago. The new statute, as long as the savings clause provides a constitutionally reasonable time within which the potential plaintiff with the 14 year old claim

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7 Id. See also Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239, 241 (Fla. 1977) (“It is a well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively.”)

8 Nash v. Asher, 342 So.2d 1038, 1039 (Fla. 4th DCA 1977) (“Section 95.022, 1975 is a saving clause. The Supreme Court in its decision in Foley held that the legislature has authority to adopt a statute of limitations which retroactively shortens a period of limitation, provided a reasonable time is allowed by statute within which to file suit where there is manifest legislative intent to retrospectively shorten the period.”)

9 See Wiley v. Roof, 641 So.2d 66, 68 (Fla. 1994) (“Once barred, the legislature cannot subsequently declare that ‘we change our mind on this type of claim’ and then resurrect it. Once an action is barred, a property right to be free from a claim has accrued.”)

10 See, e.g., Bauld v. J. A. Jones Const. Co., 357 So.2d 401, 403 (Fla. 1978) (“At the time her injury occurred, the statute of limitations in force provided that she would have four years in which to bring her action. Thus she could sue any time up to July 8, 1976. The intervening revision [effective January 1, 1975] would cut off her right of action against appellee twelve years after its last work on the hospital, or on August 16, 1973. But taking into consideration the savings clause in Section 95.022, she had until January 1, 1976 to bring the action, still about seven months earlier than when she would have been barred under the old statute... The one-year savings period provided for here is a reasonable time.”)
can still bring his action, will shorten the limitation period of this particular potential plaintiff. However, it is the savings clause which will apply to govern the amount of time left within which the potential plaintiff may sue, and not the new statute of limitation period for that cause of action. This is because application of the new five year period would make the cause of action time barred as of 9 years earlier. Savings clause periods of one year are clearly constitutional, and time periods of much less than one year have been held to be constitutional.11

In light of the foregoing, one must first determine when a cause of action accrued in order to determine the statute of limitation applicable to that cause of action in Florida. Pursuant to statute, a cause of action accrues when the last element of the cause of action occurs.12 The last element is generally damage. (For certain causes of action, such as a suit on a demand note, the legislature has stated explicitly when the last element occurs.13) The statute of limitation that was in existence when the cause of action accrued will most likely be the statute of limitation that governs the cause of action. However, one must also look to any statute of limitation that may have replaced the statute that existed when the cause of action accrued in order to determine whether a later statute applies retroactively to govern the cause of action. Florida courts have frequently applied the wrong statutes of limitations in cases by simply utilizing the statute in

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11 For a case explaining a situation similar to the foregoing, see Ruhl v. Perry, 390 So.2d 353 (Fla. 1980).

12 Fla. Stat. § 95.031(1) (2012) (“A cause of action accrues when the last element constituting the cause of action occurs.”)

13 Fla. Stat. § 95.031(1) (2012) (“For the purposes of this chapter, the last element constituting a cause of action on an obligation or liability founded on a negotiable or nonnegotiable note payable on demand or after date with no specific maturity date specified in the note, and the last element constituting a cause of action against any endorser, guarantor, or other person secondarily liable on any such obligation or liability founded on any such note, is the first written demand for payment, notwithstanding that the endorser, guarantor, or other person secondarily liable has executed a separate writing evidencing such liability.”)

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existence at the time of the hearing, trial or appeal. Such an approach is clearly incorrect and ignores the rule that statutes of limitation apply only prospectively unless there is an express statement of an intent that the statute apply retroactively.

**What is delayed discovery?**

There are three mechanisms in Florida law which can allow a plaintiff to bring a suit which would otherwise be untimely if the statute of limitations began to run upon accrual of the cause of action and ran continuously. The one that will be discussed herein is the delayed discovery doctrine which appears in §§ 95.031, 95.11, Florida Statutes (2012), and elsewhere

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14 For an example of the use of the wrong version of the statute of limitation, see Wiley v. Roof, 641 So.2d 66, 68 (Fla. 1994), which, although it reached the right result, did not have a problem with the lower court’s utilization of the 1991 statute of limitations (which is when the Complaint and Amended Complaint were filed) instead of the 1973 statute of limitations in existence when the cause of action accrued.

15 See Walker & Laberge, Inc. v. Halligan, 344 So.2d 239, 241 (Fla. 1977) (“It is a well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively.”)

16 The running of the statutes of limitations on certain claims may be delayed for reasons other than “delayed discovery,” but the explanation of “delayed discovery” and its relation to accrual also applies to the other causes of action for which the running of the statute of limitation may be delayed for other reasons. Examples of other causes of action for which the running of the statutes of limitation may be delayed:

FOR INTENTIONAL TORTS BASED ON ABUSE.—An action founded on alleged abuse, as defined in s. 39.01, s. 415.102, or s. 984.03, or incest, as defined in s. 826.04, may be commenced at any time within 7 years after the age of majority, or within 4 years after the injured person leaves the dependency of the abuser, or within 4 years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later. Fla. Stat. § 95.11(7) (2012) [Emphasis added].

An action to enforce a right or obligation arising under this chapter must be commenced within 1 year after the expiration date of the relevant letter of credit or 1 year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. Fla. Stat. § 675.115 (2012) [Emphasis added].

Notwithstanding any other provision of law, a civil action or proceeding under this chapter may be commenced at any time within 5 years after the conduct in violation of a provision of this act terminates or the cause of action accrues. Fla. Stat. § 772.17 (2012) [Emphasis added].

Notwithstanding any other provision of law, a criminal or civil action or proceeding under this act may be commenced at any time within 5 years after the conduct in violation of a provision of this act terminates or the cause of action accrues. Fla. Stat. § 895.05(10) (2012) [Emphasis added].
in the statutes.\textsuperscript{17} The delayed discovery doctrine has been exclusively statutory\textsuperscript{18} since January 1, 1975, when chapter 74-382, General Laws became law as § 95.031, Florida Statutes (Supp. 1974):

\begin{quote}
\textbf{Except as provided in subsection (2)} [fraud and products liability] \textbf{and in s. 95.051}\textsuperscript{19} \textbf{and elsewhere in these statutes}, the
\end{quote}

\textsuperscript{17} The second mechanism for circumventing a statute of limitations, tolling, is also statutory and is contained in Fla. Stat. § 95.051. \textit{See}, n. 19, \textit{infra}. The tolling statute contains an exclusive list of 9 reasons why the running of a statute of limitations will be suspended for a period of time. The legislature, in creating this statute, eliminated “equitable tolling” and/or “common law tolling” in Florida, just as the legislature eliminated common law delayed discovery in Fla. Stat. § 95.031. The statement of exclusivity is extremely clear in § 95.051: “No disability or other reason shall toll the running of any statute of limitations except those specified in this section, s. 95.091, the Florida Probate Code, or the Florida Guardianship Law.”

Before § 95.051 became effective, Florida courts applied the doctrine of “fraudulent concealment” as a tolling doctrine. The case law in this area actually demonstrates that several courts ignored § 95.051 even after it became effective, and these courts continued to toll statutes of limitations based on “fraudulent concealment” of the plaintiff’s cause of action by the defendant. Eventually, the Florida Supreme court recognized that the tolling statute listed the exclusive means for tolling a statute of limitations. In \textit{Major League Baseball v. Morsani}, 790 So.2d 1071 (Fla. 2001), the Florida Supreme Court decided that the third mechanism for allowing a plaintiff to bring an otherwise untimely suit, equitable estoppel, was not the same as tolling, and the doctrine was therefore not eliminated by § 95.051. The Court reasoned that equitable estoppel prevented a defendant, because of its wrongful conduct, from benefiting from a statute of limitations defense in cases in which the defendant caused the plaintiff to be unable to bring a timely suit. \textit{Morsani}, 790 So.2d at 1076. Because equitable estoppel acts on the defendant and not on the statute of limitations, the doctrine was not affected by § 95.051. \textit{Id}.

Equitable estoppel has been applied sparingly by courts in Florida, and most cases discussing the doctrine, including \textit{Morsani}, have spoken of the elements necessary to establish the claim as being similar to the elements of fraud: using words or actions to cause the potential plaintiff to believe in a certain state of things, thereby inducing the potential plaintiff to act in reasonable reliance on the erroneous belief, thereby causing injury. \textit{Morsani}, 790 So.2d 1076. The Florida Supreme explicitly included fraudulent concealment under the umbrella of equitable estoppel in \textit{Fla. Dept. of Health and Rehab. Services v. S.A.P.}, 835 So.2d 1091 (Fla. 2002). As stated above, Florida courts had traditionally viewed fraudulent concealment as a tolling doctrine until the courts universally recognized the authority of § 95.051 on tolling. In \textit{S.A.P.} the Court decided that actions by a defendant that fraudulently conceal the plaintiff’s cause of action can later equitably estop the defendant from relying on the statute of limitations as a defense. \textit{S.A.P.}, 835 So.2d at 1100. This case arguably expanded the categories of conduct that could later subject a defendant to equitable estoppel by not relying on the elements that courts had previously used in applying the doctrine. More importantly, fraudulent concealment gained life as equitable estoppel after losing life as a tolling doctrine.

Waiver is also discussed in \textit{Morsani}, but waiver differs from the other three mechanisms above in that waiver is the voluntary and intentional relinquishment of a known right, or conduct that implies such relinquishment. Absent an express waiver, a defendant waives the statute of limitation by not raising it as a defense when able to do so. \textit{See}, \textit{Kissimmee Util. Auth. V. Better Plastics, Inc.}, 526 So.2d 46, 48 (Fla. 1988).

\textsuperscript{18} Unfortunately, that the delayed discovery doctrine has properly been exclusively the province of the legislature is a controversial statement, as will be explained later in this article.

\textsuperscript{19} Fla. Stat. § 95.051 (2012) reads as follows:

\textbf{95.051 When limitations tolled.--}

(1) The running of the time under any statute of limitations except ss. 95.281, 95.35, and 95.36 is tolled by:

(a) Absence from the state of the person to be sued.
time within which an action shall be begun under any statute of
limitations runs from the time the cause of action accrues.

Id.  [Emphasis added].  Stated another way, if the statutes do not provide a different starting
point for the statute of limitation, then the statute of limitation for a given cause of action begins
to run upon accrual of the cause of action.  This means that the different starting point is then not
the same point in time as accrual of the cause of action, otherwise the statute would not state,
“Except as provided in…these statutes,” the statute of limitation begins to run when a cause of
action accrues.  

(b) Use by the person to be sued of a false name that is unknown to the person entitled to sue so that
process cannot be served on the person to be sued.

c) Concealment in the state of the person to be sued so that process cannot be served on him or her.

d) The adjudicated incapacity, before the cause of action accrued, of the person entitled to sue.  In any
event, the action must be begun within 7 years after the act, event, or occurrence giving rise to the
cause of action.

e) Voluntary payments by the alleged father of the child in paternity actions during the time of the
payments.

(f) The payment of any part of the principal or interest of any obligation or liability founded on a written
instrument.

(g) The pendency of any arbitral proceeding pertaining to a dispute that is the subject of the action.

(h) The period of an intervening bankruptcy tolls the expiration period of a tax certificate under
s. 197.482 and any proceeding or process under chapter 197.

(i) The minority or previously adjudicated incapacity of the person entitled to sue during any period of
time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to the
minor or incapacitated person, or is adjudicated to be incapacitated to sue; except with respect to the
statute of limitations for a claim for medical malpractice as provided in s. 95.11.  In any event, the
action must be begun within 7 years after the act, event, or occurrence giving rise to the cause of
action.

Paragraphs (a)-(c) shall not apply if service of process or service by publication can be made in a manner
sufficient to confer jurisdiction to grant the relief sought.  This section shall not be construed to limit the ability
of any person to initiate an action within 30 days of the lifting of an automatic stay issued in a bankruptcy
action as is provided in 11 U.S.C. s. 108(c).

(2) No disability or other reason shall toll the running of any statute of limitations except those specified in this
section, s. 95.091, the Florida Probate Code, or the Florida Guardianship Law.

20 In what is perhaps the only example of its kind, the legislature appears to have confused accrual with the start of
the limitation period in Fla. Stat. § 490.910(11):

409.910 Responsibility for payments on behalf of Medicaid-eligible persons when other parties are liable.—

(2) This section may be cited as the “Medicaid Third-Party Liability Act.”

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(11) (h) Except as otherwise provided in this section, actions to enforce the rights of the agency under this section
shall be commenced within 5 years after the date a cause of action accrues, with the period running from the later of
the date of discovery by the agency of a case filed by a recipient or his or her legal representative, or of discovery of
any judgment, award, or settlement contemplated in this section, or of discovery of facts giving rise to a cause of

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The delayed discovery doctrine provides that the statute of limitations for certain enumerated claims begins to run “from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence.” The exact language of what must be discovered varies among the different causes of action to which the doctrine applies, but the concept remains similar to quoted language above from § 95.031(2)(a). The doctrine applies to fraud, products liability, actions founded on the design, planning, or construction of an improvement to real property which results in a latent defect, professional malpractice other than medical malpractice, medical malpractice, violation of securities transactions laws, personal injury caused by contact with or exposure to phenoxy herbicides while serving either as a civilian or as a member of the Armed Forces of the United States during the period January 1, 1962, through May 7, 1975, and intentional torts based on abuse. Any other cause of action to which the doctrine applies must be listed “elsewhere in [the] statutes.”

action under this section. Nothing in this paragraph affects or prevents a proceeding to enforce a lien during the existence of the lien as set forth in subparagraph (6)(c).

The language appears to state that the cause of action to which it refers accrues at the latest of 3 different points in time, which is also when the statute of limitation begins to run. The accrual of the cause of action based on any one of 3 distinct occurrences cannot be reconciled with § 95.031 because the last element of the cause of action could not be any one of 3 different elements. For that reason, the author believes that this statute must be changed so that it can be reconciled with § 95.031.

Before discussing delayed discovery in more detail, it is important to understand why it is what it is. To do that, this article will explain the history of the doctrine in Florida.

**The History of the Delayed Discovery Doctrine**

Common law delayed discovery appeared in Florida in *City of Miami v. Brooks*, 70 So.2d 306 (Fla. 1954), which relied on *Urie v. Thompson*, 337 U.S. 163 (1949) and adopted its discussion of “blameless ignorance.” In *Brooks*, a patient at a hospital run by the City of Miami received x-ray therapy for the removal of plantar warts from her heal on April 22, 1944. The plaintiff had no reason to think the therapy had caused her any injury until May of 1949, when an ulcer appeared on her heel. She sued the city in May of 1950, and the city argued unsuccessfully that the statute of limitations barred her claim, which the city argued had accrued on April 22, 1944. The city appealed, and the Florida Supreme Court created the delayed discovery doctrine in Florida in affirming the trial court:

In the instant case, at the time of the x-ray treatment there was nothing to indicate any injury or to put the plaintiff on notice of such, or that there had been an invasion of her legal rights. It is the testimony of one of the expert witnesses that injury from treatment of this kind may develop anywhere within one to ten years after the treatment, so that the statute must be held to attach when the plaintiff was first put upon notice or had reason to believe that her right of action had accrued. To hold otherwise, under circumstances of this kind, would indeed be a harsh rule and prevent relief to an injured party who was without notice during the statutory period of any negligent act that might cause injury.  

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31 *Brooks*, 70 So.2d at 307.

32 *Id.*

33 *Id.* at 307-8.

34 *Id.* at 309.
The Florida Supreme Court reiterated the delayed discovery doctrine in *Creviston v. General Motors Corp.*, 225 So.2d 331 (Fla. 1969), where it stated,

> From the standpoint of legal principles, the holdings in the cases above discussed appear to crystallize in favor of application of the blameless ignorance doctrine in those instances where the injured plaintiff was unaware or had no reason to know that an invasion of his legal rights has occurred. In reality, such a doctrine is merely a recognition of the fundamental principle that regardless of the underlying nature of a cause of action, the accrual of the same must coincide with the aggrieved party's discovery or duty to discover the act constituting an invasion of his legal rights.35

After *Brooks*, courts applied the delayed discovery doctrine to various causes of action, thereby ensuring that there would be no certainty when analyzing the commencement of limitations periods.36 The legislature seemed to think uncertainty ensued eventually, because it enacted chapter 74-382, General Laws, which became law on January 1, 1975 as Fla. Stat. § 95.031 (Supp. 1974). The legislature took exclusive control of delayed discovery in Florida by creating § 95.031, which stated in part, “Except as provided in subsection (2) and in s. 95.051 and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.” [Emphasis added]. From

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35 *Id.* at 334.

36 See, e.g., *Vilord v. Jenkins*, 226 So.2d 245 (Fla. Dist. Ct. App. 1969) (“As to the negligence count, the law in this state is that a statute of limitations begins to run when there has been Notice of invasion of the legal rights of the plaintiff, i.e., when he has been put on notice of his right of action.”); *Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd.*, 450 So.2d 1157, 1163 (Fla. Dist. Ct. App. 1984) (“We conclude, therefore, that the discovery rule applied to the Trust Company's action for conversion and that there was substantial evidence to support a jury's determination, under proper instructions, that the Trust Company neither discovered nor should have discovered the conversion, even assuming such conversion occurred in 1975, until, at the earliest, 1978.”); *Meehan v. Celotex Corp.*, 466 So.2d 1100, 1102 (Fla. Dist. Ct. App. 1985) (“It being clear that "the accrual [of a cause of action] must coincide with the aggrieved party's discovery or duty to discover the act constituting an invasion of his legal rights[,]" a cause of action in tort arises when the plaintiff knew or should have known of the existence of the cause of action or the invasion of his legal rights.” [internal citations omitted]); *Johnson v. Deluxe Tire Service, Inc.*, 544 So.2d 1158, 1159 (Fla. Dist. Ct. App. 1989) (“[I]t is without dispute that she was aware, at the time of the accident, that she had been injured and that her legal rights had been invaded. Such knowledge determines when the cause of action accrues for limitation purposes.”).
January 1, 1975 on, if a statute did not provide for delayed discovery for a certain cause of action, delayed discovery did not apply to that cause of action.

The newly created § 95.031 did more than just explicitly state that delayed discovery existed exclusively within the Florida Statutes. Among other things, it created a uniform definition of accrual for the first time in Florida: “A cause of action accrues when the last element constituting the cause of action occurs.”37 According to the plain language of the new statute, the delayed discovery doctrine could no longer be applied by stating that the accrual of the cause of action was delayed until discovery, unless discovery was the last element of the particular cause of action at issue. However, in Florida, the last element of a cause of action, including those to which delayed discovery applies, is almost always damage.38

By changing the definition of “accrual,” § 95.031 abrogated the common law, which was inconsistent with the statute with respect to accrual of causes of action and the start of the statute of limitations. There is a presumption against legislative abrogation of existing common law: “[u]nless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.”39 However, the express definition of “accrual” in § 95.031 clearly cannot coexist with common law that defines accrual as occurring at a point in time other than when the last

38 See, n. 4, supra.
39 Thornber v. City of Fort Walton Beach, 568 So.2d 914, 918 (Fla. 1990).
element of the cause of action occurs. For this reason, § 95.031 abrogates the common law of delayed accrual.40

Many courts in Florida took note of the statutory changes and applied them according to their plain language. These courts properly recognized that delayed discovery does not delay accrual. In *Putnam Berkley Group, Inc. v. Dinin*, 734 So.2d 532 (Fla. Dist. Ct. App. 1999), the Fourth District expressly considered whether the delayed discovery doctrine delayed accrual of a cause of action:

In section 95.031 the legislature has clearly said that “the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.” The legislature has provided only a few exceptions from this broad rule. For example, subsection (2) of section 95.031 expressly begins the limitations period in product liability and fraud cases from the time of discovery rather than the accrual of the cause of action.

Id. at 535 (boldface type added). The Third District Court of Appeal has also recognized that delayed discovery delays the start of the statute of limitations based on delayed knowledge of the right to sue, not based on a delay in the right to sue. In *Birnholz v. Blake*, 399 So.2d 375 (Fla. Dist. Ct. App. 1981), the Third District interpreted the delayed discovery provision in Fla. Stat. § 95.11(4)(a) (1975):41

This provision has been uniformly construed to mean that “the event which triggers the running of the statute of limitations is notice to or knowledge by the injured party that a cause of action has accrued in his favor...”

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40 See, *Sebring Airport Authority v. McIntyre*, 783 So.2d 238, 244-245 (Fla. 2001), citing, *City of Jacksonville v. Bowden*, 64 So. 769, 772 (Fla. 1914); see also, *State v. Elder*, 382 So.2d 687, 690 (Fla. 1980) (“[Courts cannot] abandon judicial restraint and invade the province of the legislature by rewriting its terms.”).

41 Fla. Stat. § 95.11(4)(a) (1975) provided “that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence.” Fla. Stat. § 95.11(4)(a) (1975).
Id. at 376. The Third District thereby recognized that the right to sue — accrual — existed before, and independently of, knowledge of the right to sue, which would trigger the running of the statute of limitations.

Other courts have also recognized that Florida’s statutory delayed discovery does not delay accrual. In *Young v. Ball*, 835 So.2d 385, 386 (Fla. Dist. Ct. App. 2003), the Court, in determining that delayed discovery does not act upon a claim for civil conspiracy, stated that “the statute of limitations began to run when [plaintiff’s] cause of action accrued [rather than from a later point in time: discovery].” Additionally, the Florida Supreme Court, in *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1993), accurately observed that “[a] statute of limitations 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.”

Unfortunately, some Florida courts continued to assert in their opinions that common law delayed discovery still existed after 1975. The Florida Supreme Court eventually recognized that the legislature terminated any common law delayed discovery that may have existed prior to 1975. Many of the common law delayed discovery cases relied on *Brooks* and *Creviston*, but

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42 Id. at 418. See also, *Dade County v. Ferro*, 384 So.2d 1283, 1286 (Fla. 1980) (“Where a statute of limitations is measured by an occurrence rather than accrual of a cause of action it must be assumed that...” the cause of action previously accrued upon the occurrence of the event causing injury); but see, *Hearndon*, 767 So.2d at 1185 (erroneously relying on an unpublished Florida Law Revision Council report drafted before § 95.031 became law and mistakenly defining delayed discovery as an accrual doctrine).

43 See, n. 36 supra.

44 See, *Davis v. Monahan*, 832 So.2d 708, 711 (Fla. 2002) (recognizing that the delayed doctrine is exclusively within the province of the legislature). Any cases which held that actual or constructive knowledge was the last element of a cause of action were clearly overruled by *Monahan*, which properly recognized that the legislature has provided for delayed discovery only in specified cases. Id. at 711. Including actual or constructive knowledge as the last element of a cause of action would have the effect of creating a delayed discovery provision for that cause of action, a result recognized as improper by *Monahan* because such a result would conflict with valid legislative enactments in violation of Fla. Const. art. II, § 3 (separation of powers).
each of those cases pre-dated the change in the law by the legislature. Both of those pre-1975 cases have been interpreted as holding that a cause of action accrues upon actual or constructive discovery of the cause of action, but both decisions pre-date § 95.031, which became effective in 1975.45 Section 95.031, in defining accrual, superseded the common law and prohibited all Florida courts from placing the moment of accrual beyond the occurrence of the last element of the cause of action.46

The Florida Supreme Court’s Current Interpretation of Delayed Discovery

Before the Florida Supreme Court decided Monahan in 2002, it had already answered the following rephrased certified question in Hearndon v. Graham in 2000:

WHERE A PLAINTIFF IN A TORT ACTION BASED ON CHILDHOOD SEXUAL ABUSE ALLEGES THAT SHE SUFFERED FROM TRAUMATIC AMNESIA CAUSED BY THE ABUSE, DOES THE DELAYED DISCOVERY DOCTRINE POSTPONE ACCRUAL OF THE CAUSE OF ACTION?47

Hearndon answered the question in the affirmative, thereby resurrecting delayed discovery by delayed accrual – something that was and is specifically prohibited by the legislature.48 When one considers what the legislature did in defining accrual and exclusively providing the causes of

45 Brooks did not define accrual as occurring upon discovery of the cause of action. Rather, Brooks recognized that accrual occurred when the right to sue arose, but the statute of limitations may not run until the plaintiff has knowledge of the right to sue: “In other words, the statute [of limitations] attaches when there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action.” Brooks, 70 So.2d at 309.

46 Monahan, 832 So.2d at 711.

47 Hearndon v. Graham, 767 So.2d 1179, 1181 (Fla. 2000).

48 Fla. Stat. § 95.031 (Supp. 1974) (“A cause of action accrues when the last element constituting the cause of action occurs.”)
action to which delayed discovery applies, Hearndon becomes very problematic, and ends up being clearly unconstitutional.

**Hearndon Problem No. 1: The Concept of “Delayed Accrual” Violates Article II, Section 3 of the Florida Constitution**

Although Section 95.031 clearly demonstrates that delayed discovery does not delay accrual of a cause of action, Hearndon held that the delayed discovery doctrine applied to delay the accrual of a cause of action (rather than merely delaying the running of the statute of limitations) based on a claim of childhood sexual abuse accompanied by traumatic amnesia. The childhood sexual abuse in Hearndon allegedly occurred between 1968 and 1975, and the plaintiff allegedly recalled the abuse in 1988. Proceeding under either definition of “accrual” (that contained in § 95.031 or the one that this article concludes is unconstitutional as enunciated in Hearndon), it is clear that the plaintiff’s claim did not fall under the statutory delayed discovery for childhood sexual abuse contained in § 95.11(7), which became effective in 1992. The Hearndon Court also recognized that “[t]he 1992 enactment of the delayed discovery doctrine to be employed in cases of childhood sexual abuse does not apply in the instant case.”49 Moreover, it is equally clear that in the absence of a statutory delayed discovery provision for the tort of childhood sexual abuse, there could be no delayed discovery doctrine applied to the cause of action if it arose prior to the effective date of § 95.11(7) (as Monahan held). Delayed discovery has been exclusively statutory since 1975.50 Pursuant to statute, the only exceptions to running the statute of limitations upon accrual of a cause of action are statutory, and all causes of action accrue when the last element occurs. Including actual or constructive knowledge as the last

49 Hearndon, 767 So.2d at 1186.

The element of a cause of action would have the effect of creating a delayed discovery provision for that cause of action, a result properly recognized as improper by Monahan because such a result would conflict with valid legislative enactments in violation of Article II, section 3 of the Florida Constitution (separation of powers).\textsuperscript{51}

Any case that has applied delayed discovery to delay accrual since § 95.031 became effective in 1975 has unconstitutionally usurped legislative authority in violation of the Separation of Powers clause in Article II, section 3 of the Florida Constitution.\textsuperscript{52} The Florida legislature has constitutionally enacted statutes relating to accrual of a cause of action and the running of the statute of limitations.\textsuperscript{53} This legislative action is not subject to judicial review, in that Florida courts have long recognized as a constitutional principle that when the legislature constitutionally acts in a given area by enacting a law, the legislative will is supreme, and its policy is not subject to judicial review.\textsuperscript{54} Therefore, courts must apply § 95.031 in accordance with its own terms as the law of accrual and the start of the statute of limitations. These terms clearly state that the statute of limitations begins to run upon accrual unless the legislature defines a different point from which the statute of limitations will begin to run.

\begin{itemize}
\item \textsuperscript{51} Fla. Const. art. II, § 3, Fla. Const. ("Branches of government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.")
\item \textsuperscript{52} Because courts cannot limit or abrogate constitutonally legislative enactments, courts must “enforce the policy of the law as expressed in valid enactments.” Bowden, 64 So.2d at 772; see also, Comptech International, Inc. v. Milam Commerce Park, Ltd., 753 So.2d 1219, 1222 (Fla. 1999) (recognizing that if courts limit or abrogate valid statutes, tension must be resolved in favor of the legislature). In enforcing valid enactments, courts must give words in the statute their plain and ordinary meaning even if a court is convinced that the legislature really intended something else. See, Florida Dept. Of Revenue v. Florida Municipal Power Agency, 789 So.2d 320, 323 (Fla. 2001); Silva v. Southwest Florida Blood Bank, Inc., 601 So.2d 1184, 1186 (Fla. 1992).
\item \textsuperscript{53} Fla. Stat. § 95.031 (2012).
\item \textsuperscript{54} See, Sebring Airport Authority v. McIntyre, 783 So.2d 238, 244-245 (Fla. 2001), citing, City of Jacksonville v. Bowden, 64 So. 769, 772 (Fla. 1914); see also, State v. Elder, 382 So.2d 687, 690 (Fla. 1980) ("[Courts cannot] abandon judicial restraint and invade the province of the legislature by rewriting its terms.").
\end{itemize}
The Florida legislature has in many instances exercised its exclusive authority under § 95.031 to define a point other than accrual from which the statute of limitations begins to run. The legislature has been unambiguous with respect to where it has applied and not applied the delayed discovery doctrine. For example, Fla. Stat. § 95.031 provides that the limitations periods for actions founded upon fraud or products liability runs from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence instead of running from the accrual of the action. Likewise, the limitations periods for causes of action for professional and/or medical malpractice and actions founded on a latent defect due to the design, planning, or construction of an improvement to real property begin to run from the time certain facts are discovered or should have been discovered with the exercise of due diligence. In what may be the most clear example of measuring a limitations period from a moment other than accrual, the legislature created a statute of limitations for intentional torts based on abuse wherein the limitations period is measured according to whichever of the following three periods affords the potential plaintiff the most time to bring a lawsuit: seven years measured from the age of majority, four years measured from the date the injured person leaves the dependency of the abuser, or four years from the time of discovery by the injured person of the injury and its causal connection to the abuse.

55 See, Dade County v. Ferro, 384 So.2d 1283, 1286 (Fla. 1980) (“Where a statute of limitations is measured by occurrence rather than accrual of a cause of action it must be assumed that some claim arose upon the occurrence of the event causing injury.”) [Emphasis added].


58 The full text of the section:

(7) For intentional torts based on abuse.—An action founded on alleged abuse, as defined in s. 39.01, s. 415.102, or s. 984.03, or incest, as defined in s. 826.04, may be commenced at any time within 7 years after
Clearly the legislature, after having definitively defined “accrual” in § 95.031, did not intend to create three possible moments at which a cause of action for an intentional tort based on abuse accrues. The only logical conclusion is that the plaintiff has the right to sue upon the occurrence of injury, but the limitations period does not begin to run until the occurrence of another event defined by the legislature. Therefore, in each example cited, the cause of action accrues when the last element of the cause of action, damage, occurs. However, the limitations period does not begin to run upon accrual, but rather upon the occurrence of another event, as provided by the statute. The commencement of the statute of limitations is therefore an “either-or” proposition: either the statute begins to run upon accrual of the cause of action, or the statute begins to run at another point defined by the legislature.

*Hearndon* unconstitutionally misinterprets both the definition of accrual and the start of the statute of limitations. With respect to the definition of accrual, *Hearndon* states accrual “is generally determined by the date ‘when the last element constituting the cause of action occurs.’ § 95.031, Fla. Stat. (1987).” [Emphasis added]. Ignoring the legislature’s definition of “accrual” also allowed the *Hearndon* court to reach the conclusion that “[t]he Florida Statutes do not impede, however, the delay of the accrual of the cause of action.” *Id.* at 1185. This statement of the definition of “accrual” is patently incorrect in that the legislature defines the age of majority, or within 4 years after the injured person leaves the dependency of the abuser, or within 4 years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later.

*Fla. Stat. § 95.11(7) (2012).*

59 *Hearndon*, 767 So.2d at 1184-1185 [Emphasis added]. Ignoring the legislature’s absolute definition of “accrual” also allowed the *Hearndon* court to erroneously reach the conclusion that “[t]he Florida Statutes do not impede, however, the delay of the accrual of the cause of action.” *Id.* at 1185.
“accrual” without providing for any possible exceptions in which a cause of action will accrue at any time other than when the last element of the cause of action occurs.

In unconstitutionally misconstruing § 95.031, the Hearndon court thereby allowed itself to apply delayed discovery to delay the accrual of a cause of action as an “exception” to the definition of accrual. Evidence of the flaws in the Court’s conclusion that delayed discovery delays accrual of a cause of action can be seen in the Court’s reliance on an unpublished Florida Law Revision Council report from 1972 that allegedly supports the Court’s conclusion. The fatal flaw with the Court’s citation to a 1972 report is that the delayed discovery doctrine did in fact delay accrual in 1972. However, as of the effective date of § 95.031, a cause of action for medical malpractice or fraud no longer accrued upon discovery, but the statute of limitations began to run upon discovery. Both statutes reflected the legislature’s unification of the concept of accrual for consistency in the law. The statutory scheme was drastically altered pursuant to the legislature’s enactment of chapter 74-382 of the Laws of Florida, and “delayed accrual” ceased to exist.

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60 *Hearndon*, 767 So.2d at 1185, n. 3.

61 Fla. Stat. § 95.11(6) (1972), the statute of limitation for medical malpractice in 1972, provided that a cause of action for medical malpractice does not accrue until the plaintiff discovers, or through the use of reasonable care should have discovered, the injury. This statute of limitations changed contemporaneously with the enactment of § 95.031 and the definition of accrual. Effective January 1, 1975, § 95.11(6) was amended by 95.11(4)(a), Florida Statutes (Supp. 1974). Section 95.11(4)(a), the then new medical malpractice statute of limitations, no longer independently defined accrual.

62 Likewise, a cause of action for fraud followed the same pattern: pre-1975 (Fla. Stat. § 95.11(5)(d) (1972)), a cause of action for fraud accrued upon discovery, but post-1975 the statute of limitation for fraud no longer independently defined accrual (Fla. Stat. § 95.031(2) (1975)).

63 With respect to the statutory changes embodied in chapter 74-382 that became effective on January 1, 1975, the Florida Supreme stated, “[a]ccrual under [§ 95.11(6), Florida Statutes (1973)] was expressly linked to discovery of the injury or ability to discover the injury through reasonable care.” *Dade County v. Ferro*, 384 So.2d 1283, 1285 (Fla. 1980) (emphasis added). The Court also pointed out that “[t]he two year limitation period for medical malpractice was brought forward, but the ‘accrual’ language of the former section” was eliminated. *Id.* at 1285.
In conclusion, *Hearndon* and all other “delayed accrual” cases since 1975 violate Article II, section 3 of the Florida Constitution in that they offer a definition of accrual that is different from the definition provided in § 95.031.\(^{64}\) Such cases also create confusion because one now has to choose the authority upon which to rely in determining the point of accrual of a cause of action subject to delayed discovery and the applicable statute of limitations. On the one hand are the Florida Constitution and the statutes – on the other hand is the Florida Supreme Court. The conflict is a serious one, but it should not arise too frequently because the only causes of action to which delayed discovery applies are the causes of action listed in the statutes.

**Hearndon Problem No. 2: Application of Delayed Accrual to Claims that Accrued pursuant to § 95.031 and Later Became Time-barred Violates Article I, Section 9 of the Florida Constitution**\(^{65}\)

The dissent in *Hearndon* deals with another aspect of the case that involves a second constitutional problem. Because the plaintiff’s claim in *Hearndon* accrued (pursuant to the statutory definition of accrual) when the last element of the cause of action, damage, occurred in

\(^{64}\) Florida courts continue to rely on *Hearndon* and agree with the Florida Supreme Court that delayed discovery delays accrual. *See, e.g.*, *Brooks Tropicals, Inc. v. Acosta*, 959 So.2d 288, 296 (Fla. Dist. Ct. App. 2007) (“An exception [to accrual upon the occurrence of the last element of a cause of action] is made for claims of fraud and products liability in which the accrual of the causes of action is delayed until the plaintiff either knows or should know that the last element of the cause of action occurred.”); *Butler University v. Bahssin*, 892 So.2d 1087, 1091 (Fla. Dist. Ct. App. 2004) (Same); *First Union National Bank v. Turney*, 839 So.2d 774, 777 (Fla. Dist. Ct. App. 2003) (“[T]he date of the accrual of a cause of action may differ, depending on whether one is seeking to apply the statute of limitations or an attorney's fee statute.”); *Fuss v. Gross*, 82 So.3d 1082, 1083, n.2 (Fla. Dist. Ct. App. 2012) (“This is not a case involving ‘delayed discovery,’ where the tort is deemed not to have accrued until the later date.”); *GLK, L.P. v. Four Seasons Hotel Limited*, 22 So.2d 635, 637 (Fla. Dist. Ct. App. 2009) (“Moreover, it is well settled that the delayed discovery doctrine postpones the accrual of a cause of action…”); *Huff Groves Trust v. Caulkins Indiantown Citrus Co.*, 829 So.2d 923, 925 (Fla. Dist. Ct. App. 2002) (“The ‘delayed discovery’ doctrine ‘provides that a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action.’”); *Patten v. Winderman*, 965 So.2d 1222, 1224 (Fla. Dist. Ct. App. 2007) (Same); *Yusuf Mohamad Excav. Inc. v. Ringhaver Equip. Co.*, 793 So.2d 1127, 1127, n. 1 (Fla. Dist. Ct. App. 2001) (Same); *Thomas v. Lopez*, 982 So.2d 64, 67 (Fla. Dist. Ct. App. 2008) (“The discovery rule delays the accrual of a cause of action until the happening of an event likely to put the plaintiff on notice of the existence of a cause of action.”)

\(^{65}\) *Due process.*—No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.” Fla. Const. art. I, § 9.
1975, and there was no delayed discovery applicable to such a claim at that time, the plaintiff’s claims became time barred in 1979 pursuant to the 4 year statute of limitations for intentional torts in § 95.11(3)(o), Florida Statutes (1975). It is well settled Florida law that upon expiration of the statute of limitations, a potential defendant acquires a constitutionally protected property right to be free from a plaintiff’s potential claims.\(^{66}\) According to the Florida Supreme Court, “once a claim is extinguished by the statute of limitations, it cannot be revived as a result of a subsequent court decision, or as a result of legislative action.”\(^{67}\) Based on the foregoing, no subsequent legislative or judicial actions can revive dead claims or deprive a potential defendant of his right to be free from potential claims.

As statutory delayed discovery provisions do not affect when a cause of action accrues, but rather affect the time from which the statute of limitations runs, such a statute has no relevance to claims which accrued and expired prior to the effective date of the delayed discovery provision. The Florida Supreme Court has considered this constitutional issue numerous times, and each time the Court has found that reviving a previously barred claim violates the due process guarantee in Article I, Section 9 of the Florida Constitution. The leading case is Wiley, wherein the Court declared unconstitutional the savings clause enacted with § 95.11(7), which attempted to extend the statute of limitations for any previously barred claims for abuse or incest. According to the Court, once an action is barred, “the legislature cannot subsequently declare that ‘we change our mind on this type of claim’ and then resurrect it.”\(^{68}\)

\(^{66}\) See, Wiley, 641 So.2d at 68 (Fla. 1994) (“Once an action is barred, a property right to be free from a claim has accrued”); Mason v. Salinas, 643 So.2d 1077, 1078 (Fla. 1994) (“Once an action is barred, a property right to be free from a claim has accrued, and the legislature cannot subsequently resurrect it.”)

\(^{67}\) Wood v. Eli Lilly & Co., 701 So.2d 344, 346 (Fla. 1997) (citations omitted).

\(^{68}\) Wiley, 641 So.2d at 68.
Rather, “[o]nce an action is barred, a property right to be free from a claim has accrued.” In *Hearndon*, the defendant’s property interest to be free from the plaintiff’s sexual abuse claims also “accrued long before [Plaintiff’s] lawsuit was filed,” as the claims expired no later than 1979. The dissent in *Hearndon* concluded that the majority unconstitutionally revived a dead claim in violation of Article I, section 9 of the Florida Constitution:

I conclude that the legislature recognized Florida law barred this type of cause of action, as stated by the majority in the Third District’s case of *Lindabury v. Lindabury*, 552 So.2d 1117 (Fla. 3d DCA 1989), and for that reason adopted the amendment to the statute of limitations of section 95.11(7), Florida Statutes, in 1992. However, this Court held in *Wiley* that this 1992 amendment did not revive barred causes of action.

*Tobin v. Damian*, 772 So.2d 13 (Fla. 4th DCA 2000), applied these constitutional principles to a claim for sexual abuse as follows:

“Although the legislature possesses the power to extend the limitations period for an existing cause of action, it lacks the authority to breathe life into a claim that is lifeless as a result of a pre-existing statute.” [*Boyce v. Cluett*, 672 So.2d 858, 860 (Fla. 4th DCA 1996)]; see also *Mason v. Salinas*, 643 So.2d 1077, 1077 (Fla. 1994) (“[O]nce the action is barred [by statute], a property right to be free from a claim has attached, and the legislature cannot subsequently resurrect it.”); [*Wiley v. Roof*], 641 So.2d 66, 67 (Fla. 1994). Since appellant’s claims from 1965 to April 8, 1988 accrued and became time barred under section 95.11(3)(o), Florida Statutes, we hold the trial court did not err in granting appellee’s motion for partial summary judgment.

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69 *Id.*

70 *Id.*

71 See also, *Mason v. Salinas*, 643 So.2d 1077, 1078 (Fla. 1994) (“Once an action is barred, a property right to be free from a claim has accrued, and the legislature cannot subsequently resurrect it.”)

72 *Hearndon*, 767 So.2d at 1187 (Wells, C.J., dissenting).

73 *Id.* at 15.
Even if the Florida Supreme Court could constitutionally re-define accrual and actually did so in *Hearndon* (a proposition that violates the separation of powers clause of the Florida Constitution), the Court would not be able to do so retroactively and thereby resurrect dead claims in that such an action would violate Article I, section 9 of the Florida Constitution in the same manner as the legislative act declared unconstitutional in *Wiley*. The revived claim would have accrued under pre-existing law at the time the last element of the cause of action occurred. Therefore, upon expiration of the potential claims pursuant to pre-existing law, the defendant would have a constitutionally protected property right in the expiration of the statute of limitations based on the same principles in *Wiley*. To redefine “accrual” and thereby postpone accrual until after the statute of limitations has expired under the old definition of accrual violates the constitution in the same way as retroactively extending the statute of limitations to revive dead claims. On this basis as well, *Hearndon* is unconstitutional in that it violates Article I, section 9 of the Florida Constitution if it is applied to claims that accrued pursuant to 95.031 and became time barred before *Hearndon* purportedly changed the definition of accrual.

**The Effects of *Hearndon* and *Monahan***

The application of *Hearndon* and its progeny has the potential to affect the definition of “retroactive” as it relates to statutes of limitation. This is so because *Hearndon* unconstitutionally delays accrual, and accrual is the determinative point in time when considering the application of a statute of limitation to a cause of action – even for the purposes of determining retroactivity. For instance, if we change the facts in *Hearndon* so that the plaintiff recalled the abuse in 1993, the problem becomes crystal clear. § 95.11(7) became effective in 1992, so it would have applied prospectively pursuant to the holding of *Hearndon*. 
However, pursuant to the statutes, such a scenario would clearly be retroactive application because the cause of action would have accrued in 1975, when the injury was suffered. Not only would application of the statute be retroactive, it would be unconstitutional because it would revive a dead claim – the claim would have died no later than 1979. This is the real world problem that Hearndon created – relying on Hearndon, a court can now prospectively apply a statute of limitation that is in actuality a retroactive application (and, in some instances, one that could be unconstitutional). The Florida Supreme Court thus potentially removed a constitutional property right from certain potential defendants who commit acts that give rise to causes of action to which delayed discovery applies.

In order to avoid the potential problems created by Hearndon, the legislature should step in and legislatively overrule the decision. While that will do nothing to right the wrongs that have occurred as a result of courts’ applying Hearndon, it will prevent the unconstitutional holding of Hearndon from affecting future cases in a negative way.