IN THE SUPREME COURT OF FLORIDA

PHYLLIS K. TANNER, ET AL.,

Petitioners,

v. SUPREME COURT CASE NO. 79,390

ELLIE M. HARTOG, M.D., ET AL.,

Respondents,

_____/

CERTIFIED QUESTION FROM DISTRICT COURT OF APPEAL, SECOND DISTRICT

AMICUS CURIAE BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION (IN SUPPORT OF RESPONDENTS)

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PREFACE

The Florida Defense Lawyers Association submits this brief as amicus curiae on behalf of the position advanced by Respondents Ellie M. Hartog, M.D., Alberto Duboy, M.D., Hartog and Duboy, P.A., and Lakeland Regional Medical Center.

The Florida Defense Lawyers Association does not endeavor to answer all of the issues raised in the Brief of Petitioners; instead, this brief addresses the question certified to this Court by the Second District Court of Appeal. Additionally, should this Court find it appropriate for Petitioners to address Issue II in their brief on the merits Amicus also addresses that issue.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Defense Lawyers Association accepts the Statement of the Case and Facts as set forth in the Briefs of Respondents. Briefly, the relevant facts appear succinctly stated in the decision of the District Court of Appeal, Second District, and are as follows. The Amended Complaint for medical malpractice filed by Petitioners on August 1, 1990, alleged that on March 31, 1988, Mrs. Tanner saw her treating physicians, Respondents herein. After examining her, they sent her to Lakeland Regional Medical Center for testing. The following morning, her baby was delivered still-born at the hospital. Their Amended Complaint alleged that it was not until December 29, 1989, that they knew or should have known that the actions and inactions of Respondents fell below the standard of care recognized in the community. Each Respondent filed a motion to dismiss the Amended Complaint on the basis, among others, that the two year medical malpractice statute of limitations had run and Petitioners' lawsuit was therefore barred. The Trial Court granted the motions and dismissed the Amended Complaint with prejudice, reasoning that Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990) applied and that Petitioners had until July 12, 1990, to file this action.

The second district affirmed addressing the dispositive issue of whether, as a matter of law, based upon the pleadings before the trial court, the two year statute of limitations as extended by the tolling period in section 766.106, Florida Statutes (1987), had expired prior to the filing of Petitioners' complaint. Expressly relying upon this Court's most recent decisions in University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991), and Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990), the second district held that it was sufficient for the running of the statute of limitations that Petitioners knew or should have known of the legal injury. The court

held that notice of stillbirth of their child in the hospital constituted notice of injury and that it is clear from the pleadings that Mrs. Tanner knew that the injury occurred in the hospital while she was under the care of health care providers. The second district concluded that this connection between the health care provider and the injury in fact was sufficient to give the Petitioners knowledge of the essential facts (notice) that a timely investigation should commence to discover additional facts needed to support an action against the appropriate health care providers.

The District Court subsequently certified its decision as passing on a question of great public importance, i.e. whether, as a matter of law, the stillbirth of a child is such an obvious injury as to place a plaintiff on notice of the possible invasion of the plaintiff's legal rights to commence the limitations period under section 95.11(4)(b), Florida Statutes. Petitioners then filed a Notice of Review to this Court based upon the District Court's certification of this question.

SUMMARY OF ARGUMENT

Long ago, this Court enunciated a bright-line rule that the statute of limitations in a medical malpractice action will begin to run when a plaintiff knew or should have known that *either* injury *or* negligence had occurred. Because the district courts have been reluctant to follow this rule when the results seemed harsh, this Court has found it necessary to readdress this issue numerous times. Each time, this Court has concluded that knowledge of an injury -- without knowledge of any underlying negligence -- is sufficient to put plaintiffs on notice that their rights may have been violated, and the statute of limitations begins to run. Upon this

notice, it becomes incumbent upon plaintiff to use reasonable diligence to discover in a timely fashion whether any negligence on the part of the health care provider was present.

In the present case, it is uncontroverted that the Tanners knew that their child was stillborn by April 1, 1988, and at that time were on notice of an injury. Under this Court's prior holdings, the statute of limitations on the Tanners' claim began to run on that date. This Court should adhere to these holdings because a bright-line rule is needed in this area so that the statute of limitations will continue to be applied consistently throughout the state.

Although not part of the question certified, the District Court of Appeal, Second District, also correctly decided that the Petitioners had only until July 12, 1990 to file suit. The District Court correctly reasoned that on February 12, 1990, forty-seven days prior to the running of the limitations period, petitioners tolled the statute for ninety days by filing a notice of intent to initiate medical malpractice and that, thereafter, petitioners were entitled to file suit within ninety days plus the greater of either the remainder of the statute of limitation (forty-seven days) or sixty days. Because fewer than sixty days remained on the statute of limitations when the notice of intent letters were mailed, Petitioners had 150 days (90 plus 60) from February 12, 1990, or until July 12, 1990 to file suit. This holding is supported by the language of the controlling statute and by case precedent.

ARGUMENT

I. THE STILLBIRTH OF A CHILD IS AN INJURY; THEREFORE, AS A MATTER OF LAW, IT PLACES A PLAINTIFF ON NOTICE OF THE POSSIBLE INVASION OF THE PLAINTIFF'S LEGAL RIGHTS AND COMMENCES THE LIMITATIONS PERIOD UNDER SECTION 95.11(4)(b), FLORIDA STATUTES.

That the statute of limitations is necessary "to protect defendants against unusually long delays in [the] filing of lawsuits and to prevent [the] unexpected enforcement of stale claims. . . ." has long been recognized in Florida. See e.g., Nardone v. Reynolds, 333 So.2d 25, 36 (Fla. 1976). Consequently, the legislature has concluded that all parties' rights are best protected when a medical malpractice action is commenced no later than two years after the time of the incident giving rise to the action or discovery of the incident should have occurred. See Fla. Stat. § 95.11(4)(b). Although there are certain provisions for the tolling of this statute of limitations, mere ignorance of the facts which constitute a cause of action will generally not postpone its operation. Nardone, 333 So.2d at 34 (citing Franklin Life Ins. Co. v. Tharpe, 131 Fla. 213, 179 So. 406 (1938), and Houston v. Florida Ga. Television Co., 192 So.2d 540 (Fla. 1st DCA 1966)); Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990). In fact, the law imposes on potential plaintiffs a duty to uncover the elements of their action if they are unknown, and parties asking the courts to toll a statute of limitations must demonstrate that they exercised reasonable care and diligence in trying to ascertain these underlying facts. Id. at 35 (citing Morgan v. Koch, 419 F.2d 993 (7th Cir. 1969)).

A. Decisions of this Court have repeatedly established that the statute of limitations starts to run on the date the injury is learned of and no knowledge of any underlying negligence is required.

Because there are provisions for tolling the statute of limitations and because potential plaintiffs have a duty to investigate to determine whether they have a cause of action, the critical question in resolving statute of limitations issues is this: At what point are potential plaintiffs sufficiently cognizant of the fact that their rights may have been violated so that the statute of limitations commences to run and their duty to investigate is imposed. This Court has repeatedly and unambiguously recognized that this point is reached when one learns of the physical injury or of the underlying negligence and that knowledge of both of these facts is **not** necessary. E.g., id. at 32; City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954). Despite this Court's recognition that a bright-line rule is needed in this area, some courts have been reluctant to follow the legislature's and this Court's directive when the results seem harsh.

For instance, in Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671, 674 (4th DCA), review dismissed, 531 So.2d 1353 (1988), quashed sub nom. Smith v. Sitomer, 550 So.2d 461 (Fla. 1989), the district court paid lip service to the holding in Nardone but then concluded that knowledge of an injury without knowledge that it resulted from a negligent medical procedure would not trigger the statute of limitations. Similarly, in Shapiro v. Barron, 538 So.2d 1319 (4th DCA 1989), quashed, 565 So.2d 1319 (Fla. 1990), the fourth district opined that knowledge of physical injury without knowledge that the injury resulted from a negligent act would not trigger the statute of limitations. Surprisingly, many other decisions oddly construed the unambiguous language of Nardone in order to avoid the seemingly harsh conclusion that the statute of limitations had run. See, e.g., Elliot v. Barrow, 526 So.2d 989 (1st DCA), review denied, 536 So.2d 244 (Fla. 1988); Schafer v. Lehrer, 476 So.2d 781 (Fla. 4th DCA 1985); Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (4th DCA

1984), approved in part, quashed in part, 487 So.2d 1032 (Fla. 1986).

Faced with a plethora of facially dubious and confusing interpretations of a once bright-line rule, this Court in Barron v. Shapiro, 565 So.2d 1319 (Fla. 1990), once again addressed the issue of when the statute of limitations starts to run. In doing so, this Court refused to carve-out an exception to its holding in Nardone and possibly start an avalanche of exceptions. Favoring a bright-line rule in an area that had so recently become quite clouded, this Court reaffirmed the long-established Nardone rule "that the statute begins to run when the plaintiffs knew or should have known that either injury *or* negligence had occurred." 565 So.2d at 1321 (emphasis added).

Despite this clear mandate from this Court, this Court was constrained to revisit this same issue only one year later in University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991). In Bogorff, this Court once again reaffirmed Nardone and concluded that notice of an injury without any knowledge that it was caused by negligence was sufficient to trigger the running of the statute of limitations. See id. at 1002.

As this Court explained in Nardone, once a person knows of an injury, he may then start investigating the facts surrounding the injury to determine whether a cause of action will lie. See 333 So.2d at 27-35. In fact, it is his duty to do so if he chooses to pursue an action. See id. After all, it would not be fair if a party could take advantage of his own failure to uncover facts which were reasonably discoverable. Id. at 35 (citing 21 Fla.Jur. 2d, Limitation of Actions, § 37). Otherwise, a party who had "*willfully or carelessly slept on his legal rights [would have] an opportunity to enforce an unfresh claim . . . .*" Id. at 36 (quoting Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386 (1868))(emphasis in original).

Despite the fact that this Court has reaffirmed its Nardone holding at least twice in the last two years, Petitioners are once again asking this Court to re-examine the Nardone decision.

B. The statute of limitations started to run against the Tanners when their baby was delivered stillborn.

Applying this Court's decision in Nardone, reiterated in Barron and Bogorff, to the present facts requires an affirmance of the second district's holding which affirms the trial court's dismissal of Petitioners' complaint on the basis that the statute of limitations began to run on the Tanners' claim on April 1, 1988, at the latest. As the now oft restated rule clearly states, the statute of limitations "begins to run when the plaintiffs knew or should have known that . . . injury . . . had occurred." Barron, 565 So.2d at 1321. The evidence is uncontroverted that by April 1, 1988, the Tanners knew that their child was delivered stillborn. See Tanner v. Hartog, 17 Fla. L. Weekly 173 (2d DCA 1992). Thus, they knew that their child had been "injured"; they just did not know that this injury may have resulted from negligence. Consequently, this case is no different than Nardone, Barron, and Bogorff, and the statute of limitations began to run against the Tanners at that time. Thereafter, it was the Tanners' obligation to further investigate the facts surrounding the delivery of their child to see whether those acts supported a charge of negligence. See Nardone, 333 So.2d at 27-35. This investigation and the subsequent filing of this action was not conducted in a timely fashion.

This conclusion is further buttressed by other decisions of the second district which have correctly interpreted Barron v. Shapiro and Nardone v. Reynolds. In Goodlet v. Steckler, 586 So.2d 74, 75 (Fla. 2d DCA 1991), for instance, the court rightly concluded that the statute of limitations began to run when a physician contacted his patient's mother and informed her that

her daughter had died of an apparent cardiac arrest. Although there may be nothing abnormal about death by cardiac arrest, the court reached this decision because the mother "was informed of the type of 'injury' which the supreme court intends as one of the two factors commencing the statute of limitations." Id. Similarly, in Jackson v. Georgopolous, 552 So.2d 215, 216 (Fla. 2d DCA 1989), the court concluded that the statute of limitations started to run when the plaintiffs received decedent's death certificate. Both of these cases stand for the proposition that notice of any injury or death, whether abnormal or not, causes the statute of limitations to begin to run. Thus, the weight of authority, including this Court's most recent decisions, compel a holding that the statute of limitations began to run against the Tanners when they learned of their child's injury -- that it was stillborn.

The Petitioners assertion that the statute of limitations should not begin to run until they had reason to suspect negligence on the Doctors' behalf disregards this Court's prior holdings. This Court previously stated that the "contention that the statute of limitations did not commence to run until [the plaintiffs] had reason to know that injury was negligently inflicted *flies directly in the face of* both Nardone and Moore [v. Morris, 475 So.2d 666 (Fla. 1985)]." Barron, 565 So.2d at 1321 (emphasis added). Physical injury alone, without any knowledge that the injury was caused by negligence, is enough to trigger the statute of limitations. E.g., id.

In an effort to make their position appear to be consistent with prior case law, Petitioners assert that tolling the statute of limitations is proper under this Court's holding in Moore. This reliance on Moore is unfounded. Mere perusal of the facts in Moore indicates that it is not, as the Tanners assert, on "all fours" with the present case (Brief of Petitioners, p. 8). Although Moore did involve a doctor's negligence in birthing a child, in that case there was no indication

whatsoever that the newborn was permanently injured, and the parents were not aware that the doctors were negligent. 475 So.2d at 669. In fact, it was impossible to scientifically diagnose **any** brain damage until the child was three years old. Id. Under these facts, this Court concluded that neither prong of the Nardone rule was satisfied and the statute of limitations would not begin to run until the parents knew that the child was injured. See id. at 670.

Comparing the situation in Moore with that faced by the Tanners in the instant case, one sees that their similarities begin and end with the fact that both cases involved allegations of negligence surrounding childbirth. Unlike the parents in Moore, the Tanners were not under the mistaken belief that their child was fine. Instead, the Tanners were painfully aware that their child had suffered an "injury"; they just did not know that the injury resulted from negligence. Consequently, the Tanners' situation presents, once again, the same question repeatedly addressed by this Court in Nardone, Barron, and Bogorff. These cases clearly stated that notice of an injury without any hint of underlying negligence was sufficient to commence the running of the statute of limitations, and this Court should continue to follow this long-established rule. See, e.g., Nardone, 333 So.2d at 32.

Petitioners additionally try to find sanctuary in the Second District's decision in Harr v. Hillsborough Community Mental Health Center, 591 So.2d 1051 (Fla. 2d DCA 1991). This decision cannot be read to support Petitioners' position. The second district in Tanner, 17 Fla. L. Weekly at 174, expressly explained the differences between its decision in the present case and its decision in Harr, which is also presently before this Court for review.

The second district drew the following clear distinction between the facts in the present case and the facts in Harr. The court referred back to its recent decision in Goodlet v. Steckler,

wherein it had suggested seven key factual considerations to weigh in deciding whether a plaintiff had notice that a timely investigation should begin to discover any additional facts needed to support a medical malpractice action. These included the identity of the plaintiff, the existence of a relationship between plaintiff and a health care provider that is sufficient to create a legal duty under a theory of medical negligence, the identity of the health care provider who owes the duty, the standard of care owing under the duty, the facts establishing a breach of the standard of care, proximate causation, and injury. 586 So.2d at 76. The second district in Goodlet and again in the present case acknowledged that this Court's decision in Borgoff held that the running of the statute of limitations was triggered by knowledge of fact which establish either injury or the standard of care owing under the duty and the facts establishing a breach of this standard. In Harr the second district held that, because plaintiff did not have knowledge of the existence of the relationship between the plaintiff and a health care provider that was sufficient to create a legal duty under a theory of medical negligence, the statute of limitations had not run. It certified the question whether the medical malpractice statute of limitations begins to run when the potential plaintiff had notice of the injury in fact, or when the potential plaintiff has additional notice that the injury in fact resulted from an incident involving a health care provider. Harr is completely distinguishable from the present case and is in no way controlling precedent under the present facts. Moreover, this Court, consistent with its decisions in Bogorff, Barron, and Nadone, should determine that Harr was incorrectly decided.

In Harr, the evidence was uncontroverted that on October 6, 1986, Mrs. Harr received official notification of her son's death. 591 So.2d at 1053. Consequently, Mrs. Harr was aware of the injury on that date and according to this Court's previous holdings, the statute of

limitations began to run from that date. That is, according to this Court's holding in Nardone, after October 6, 1986, Mrs. Harr had a duty to further investigate the facts surrounding the death of her son. Instead of applying this long-established rule, however, the court in Harr tolled the statute of limitations because Mrs. Harr may not have known that she had a cause of action for negligence within the two-year period because she did not have knowledge of the relationship between her son and a health car provider. By employing this approach, the court ignored the fact that Nardone announced an "either/or" test -- "that the statute begins to run when the plaintiffs knew or should have known that *either* injury *or* negligence had occurred." Barron, 565 So.2d at 1321 (emphasis added). The second district in Harr imposed an additional element for the commencement of the running of the statute of limitations not required by Nardone, Barron, and Borgoff. Because a cursory glance at the Harr opinion reveals that the court did not apply the proper rule enunciated by this Court, the Harr decision should be disapproved. In either event, Harr does not serve as controlling or even persuasive authority for the present position being asserted by Petitioners.

The Academy of Florida Trial Lawyers ("the Academy") has also filed a brief in this matter as an amicus curiae. Although the Academy cites a multitude of cases on behalf of Petitioners, these cases do little to forward their position. The cornerstone of the Academy's position is that the statute of limitations does not begin to run until one knows that an underlying injury was caused by negligence, e.g., Brief of the Academy, pp. 21-22, but this blind assertion fails to recognize that this Court has already directly addressed this issue and stated that the "contention that the statute of limitations did not commence to run until [the plaintiffs] had reason to know that injury was negligently inflicted *flies directly in the face of* both Nardone and

Moore." Barron, 565 So.2d at 1321 (emphasis added). That is, physical injury alone, without any knowledge that the injury was caused by negligence, is enough to trigger the statute of limitations. E.g., id.

Although the Academy cites Moore v. Morris, 475 So.2d 666 (Fla. 1985), Cohen v. Baxt, 473 So.2d 1340 (4th DCA 1985), approved in part, disapproved in part, 488 So.2d 56 (Fla. 1986), and Florida Patient's Compensation Fund v. Tillman, 524 So.2d 1376 (4th DCA 1984), approved in part, quashed in part, 487 So.2d 1032 (Fla. 1986), for the proposition that this Court adheres to the belief that the statute of limitations will not run until some evidence of negligence exists, these cases neither say nor intimate that this conclusion is proper under the facts of the case sub judice. These cases merely recognize that Nardone embraces an "either/or" test under which the inquiry of whether a plaintiff knew of any negligent conduct on defendant's behalf becomes relevant only if the plaintiff did not know that he sustained an injury. See Barron, 565 So.2d at 1321.

Because in Moore there was no evidence of any injury to the newborn when she left the hospital, this Court found it necessary to turn to the other prong of the Nardone decision and reach the issue of plaintiffs' knowledge of underlying negligence. 475 So.2d at 669. Similarly, in Cohen and Tillman there was no evidence of injury at the time of each plaintiff's treatment. In those cases, plaintiffs went into treatment with a "bad knee" and left with a "bad knee" -- knowing that their treatments were unsuccessful but not knowing that they had sustained "injury." Cohen, 473 So.2d at 1343 (plaintiff began treatment for a knee injury and did not develop blood clot problems until the next month); Tillman, 453 So.2d at 1379 (plaintiff knew that the wrong prosthetic had been inserted but was told that everything would be fine and

believed that "no harm had been done"). Because in those cases there was no indication that there was a change in the status quo and that an injury had been sustained, this Court found it necessary to turn to the alternate prong of the Nardone holding as it had in Moore. In the case sub judice, however, Petitioners were indisputably aware that their child had suffered an injury as soon as they learned that it was stillborn; consequently, this matter falls under the first prong of Nardone and the analysis employed in Moore, Cohen, and Tillman is inapplicable to the disposition of this case.

C. Public policy requires that the date of injury, bright-line rule be reaffirmed by this Court once again so that the statute of limitations can be consistently applied throughout the state of Florida.

In Nardone, this Court enunciated a bright-line interpretation of the medical malpractice statute of limitations that could be easily applied by Florida's courts. Although this interpretation is not totally free from ambiguity, in most instances the date of injury is readily determinable, and this statutory interpretation can be consistently applied throughout Florida. The fact that Nardone interprets the medical malpractice statute of limitations in such a manner as to create a bright-line rule that can be consistently applied throughout Florida is one of the chief benefits of that decision. Petitioners now petition this Court to replace the Nardone rule with an amorphous one in an effort to avoid a harsh result that necessarily accompanies all bright-line rules. If this Court decides to retreat from Nardone and its progeny by reversing the second district's decision in Tanner, Floridians will be uncertain of their rights under the medical malpractice statute of limitations, and the courts will be inundated with questions concerning its application, thereby generating a new plethora of conflicts between the districts.

II. THE SECOND DISTRICT CORRECTLY CONCLUDED THAT THE TOLLING OF THE STATUTE OF LIMITATIONS AS PROVIDED FOR IN SECTION 766.106(4), FLORIDA STATUTES, BEGAN TO RUN ON THE DATE THE STATEMENT OF INTENT TO INITIATE MEDICAL MALPRACTICE LITIGATION WAS FILED, AND PETITIONERS ONLY HAD UNTIL JULY 12, 1990, TO FILE THEIR SUIT.

Because Petitioners neither raised this question at the appellate nor the trial level, this Court should not address Issue II in Petitioners' brief. Issues not raised in the court below are waived and should not be addressed by this Court. See, e.g., Moorehead v. State, 383 So.2d 629, 631 (Fla. 1980). That is, this Court should decline to hear questions that are raised for the first time in this Court because these questions have not been fully and adequately considered below. In re Beverly, 342 So.2d 481, 489 (Fla. 1977). It is not the function of appellate courts to entertain for the first time issues which could and should have been raised at a lower level. See, e.g., Abrams v. Paul, 453 So.2d 826, 827 (Fla. 1st DCA 1984). Consequently, it is inappropriate as a general rule for a party to raise an issue for the first time on appeal. E.g., Dober v. Worrell, 401 So.2d 1322 (Fla. 1981); Sparta State Bank v. Pape, 477 So.2d 3, 4 (Fla. 5th DCA 1985). This rule clearly applies to the raising of new theories. See, e.g., Hospital Corporation of America v. Lindberg, 571 So.2d 446, 449 (Fla. 1990) (refusing to address a theory that was not raised below); Perkins v. Scott, 554 So.2d 1220 (Fla. 2d DCA 1990) (where the court concluded that failure to present an argument as a ground for summary judgment at the trial level waived that argument from appellate review). Because Petitioners neither addressed this tolling of the statute of limitations issue in the trial court nor their district court briefs, this Court should deem this issue waived and not address it in the instant case.

Even if this Court does exercise its discretion to hear this issue, Petitioners' claim is still

barred by the statute of limitations. As mandated by this Court's prior decisions, the statute of limitations began to run on April 1, 1988, because Petitioners were aware at that time of the stillbirth of their child. The statute of limitations for a medical malpractice action is two years. Fla. Stat. § 95.11(4)(b). On February 12, 1990, 47-days before this statute of limitations had run, Petitioners filed a notice of intent to initiate medical malpractice litigation. Tanner, 17 Fla. L. Weekly at 174. Thereafter, they had 90-days plus the greater of either the remainder of the statute of limitations 47-days, or 60-days to commence their action. *See §766.106(4), Fla. Stat.; Rhoades v. Southwest Fla. Regional Medical Center, 554 So.2d 1188 (Fla. 2d DCA 1989). That is, Petitioners had 150-days from February 12, 1990, or until July 12, 1990, to file their suit. Because they waited until August 1, 1990, to file their claim, it was barred by the statute of limitations, and the second district correctly affirmed the trial court's dismissal of the amended complaint.

Petitioners argue that the 90-day tolling of the statute of limitations pursuant to section 766.106(4), Florida Statutes, should result in the 90-days being added to the two-year statute of limitations. (Brief of Petitioners, p. 15). That is, Petitioners assert that the 90-day period should not have begun to run on the date that the notice of intent was filed, February 12, 1990, but that it should have commenced when the two-year statute of limitations expired on April 1, 1990. Id. This position is contrary to the clear language of section 766.106(4), Florida Statutes - a statute which Petitioners acknowledge as controlling. See id.

Although Chapter 766, Florida Statutes, does not define what the legislature meant when it used the term "tolled," the plain language of section 766.106(4), Florida Statutes, indicates that the legislature intended the 90-days to start running as soon as the notice of intent was filed.

After stating that the statute of limitations would be tolled for 90-days, the legislature granted a claimant "[60-]days *or the remainder of the period of the statute of limitations*, whichever is greater, within which to file suit." Fla. Stat. § 766.106(4) (emphasis added). Because the legislature referred to the "remainder of the . . . statute of limitations," the legislature intended for the 90-days to start running when the notice of intent is filed. Id. After all, if the 90-days did not begin to run until the statute of limitations had already expired, as Petitioners assert, then it would be impossible for there to be a "remainder of the . . . statute of limitations" after the ninety (90) days as the statute contemplates. Id. The legislative intent is clear.

This conclusion was reached in Rhoades, 554 So.2d at 1191, and relied upon by the second district in Tanner, 17 Fla. L. Weekly at 174. But the decisions in Rhoades and Tanner are not the sole authority for this conclusion. In Novitsky v. Hards, 589 So.2d 404, 407 (Fla. 5th DCA 1991), the fifth district concluded that the 90-days, plus 60-days, began to run on the date that the notice of intent was mailed.

Although Petitioners cite a multitude of cases allegedly in furtherance of their position, a close review of them reveals that they are inapposite. Most of the cases do not deal with when the 90-day period begins, but instead deal with the situation in which a complaint is prematurely filed -- before the 90-days pursuant to the notice has run. See Hospital Corp. of America v. Lindberg, 571 So.2d 446 (Fla. 1990); Kalbach v. Day, 589 So.2d 448 (Fla. 4th DCA 1991); Campagnulo v. Williams, 563 So.2d 733 (4th DCA 1990), quashed, 588 So.2d 982 (Fla. 1991); Nash v. Humana Sun Bay Community Hosp., Inc., 526 So.2d 1036 (2d DCA), review denied, 531 So.2d 1354 (Fla. 1988). Thus these cases do not furnish any basis for conflict with the instant decision of the second district and do not provide authority for Petitioners' position.

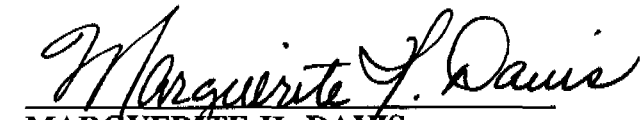
The remaining cases cited by Petitioners, i.e., Sheffield v. Davis, 562 So.2d 384 (Fla. 2d DCA 1990); Angrand v. Fox, 552 So.2d 1113 (3d DCA 1989), review denied, 563 So.2d 632 (Fla. 1990); Castro v. Davis, 527 So.2d 250 (Fla. 2d DCA 1988), are not inconsistent with the present decision of the Second District.

This Court should not replace the intent of the legislature expressed in clear language. Because the legislature stated that after the ninety-day tolling of the statute of limitations the claimant had "[sixty (60)] days *or the remainder of the period of the statute of limitations*, whichever is greater, within which to file suit[,]" it clearly contemplated the running of the ninety-day tolling provision from the date the notice was filed. See Fla. Stat. § 766.106(4) (emphasis added). Thus, because the notice of intent to litigate was filed on February 12, 1990, the tolling began to run from that date, and pursuant to section 766.106(4), Florida Statutes, the tolled statute of limitations expired on Petitioners' action on July 12, 1990. Because Petitioners did not file their complaint until August 1, 1990, their claim is barred, and the second district properly affirmed the trial court's dismissal of Petitioners' amended complaint.

CONCLUSION

The certified question should be answered in the affirmative, and the decision of the District Court of Appeal, Second District should be approved.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Kennan George Dandar of Dandar & Dandar, P.A., 4830 W. Kennedy Boulevard, Suite 447, Tampa, Florida 33609; Marilyn Drivas and Jerry L. Newman of Shear, Newman, Hahn & Rosenkranz, P.A., 201 E. Kennedy Boulevard, Suite 1000, Tampa, Florida 33601; Philip Dixon Parrish and Robert M. Klein of Stephens, Lynn, Klein & McNicholas, P.A., 9100 S. Dadeland Boulevard, Suite 1500, Miami, FL 33156, and Robert L. Trohn and Charles T. Canady of Lane, Trohn, Clarke, Bertrand & Williams, P.A., 202 E. Walnut Street, Lakeland, Florida 33801, this 14th day of July, 1992.

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