IN THE SUPREME COURT OF FLORIDA

PHYLLIS KAYE TANNER, individually, and JAMES R. TANNER, individually and as Personal Representative of the Estate of BABY BOY TANNER, deceased,

Petitioner,

vs.

Case No. 79,390

ELLIE M. HARTOG, M.D., ALBERTO DUBOY, M.D., HARTOG AND DUBOY, P.A., and LAKELAND REGIONAL MEDICAL CENTER,

Respondents.

ANSWER BRIEF OF RESPONDENT LAKELAND REGIONAL MEDICAL CENTER

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

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PREFACE

In this Answer Brief, the Petitioners, who were the appellants below, PHYLLIS KAYE TANNER, individually, and JAMES R. TANNER, individually and as Personal Representative of the Estate of BABY BOY TANNER, deceased, will be referred to as the "Plaintiffs". The Respondent, LAKELAND REGIONAL MEDICAL CENTER, who was an appellee below, will be referred to as the "Defendant". The Respondents will be referred to collectively as the "Defendants".

The following symbols will be used:

"R"	Record on Appeal
"PB"	Petitioners' Initial Brief
"PA"	Appendix to Petitioners' Initial Brief
"AB"	Amicus Curiae Brief of Academy of Florida Trial Lawyers

CITATIONS OF AUTHORITY

STATEMENT OF THE CASE AND OF THE FACTS

The Defendant accepts the statement of the case and of the facts set forth in the Brief of Petitioners with the following corrections, clarifications and additions.

Defendant objects to statements in the Plaintiff's initial brief regarding the opinion of Marvin Krone, M.D. (PB 2, 22, 29), since the record before the trial court contains no support for those statements. Although the Plaintiffs attempted to bring evidence relating to Dr. Krone's opinion before the District Court, the Plaintiffs' attempt was unequivocally rejected by the District Court.

The assertion of the Plaintiffs that the lower court rejected their claim for "injury to the living tissue of the mother" (PB 3) is unsupported by the record, since no claim is made in the Amended Complaint for such an injury (R 23).

Contrary to the Plaintiffs' assertion, the trial court did not recognize that the Plaintiff mother made a claim for her own "actual physical injury, pain and mental suffering" (PB 2). Instead, the trial court simply noted that the Plaintiff mother "may have" asserted a cause of action for any actual physical injury to her own body. A review of the Amended Complaint shows, however, that no such cause of action was in fact stated.

On the contrary, in every count of the Amended Complaint, the Plaintiffs allege that the injuries for which they seek to hold the Defendants liable were injuries that arose directly from the stillbirth of their child. They allege in each count that the mother has "incurred physical damage, personal injury ...

[and] great mental pain and suffering *as a result of the death of her minor child"* (emphasis supplied) (R 23, ¶¶ 12, 21, 31, 42 and 52). They also allege in each count that the negligence *"resulting in the death of the minor"* has caused the father "great mental pain and suffering" (emphasis supplied) (R 23, ¶¶ 13, 22, 32, 43 and 53).

Finally, it should be noted that the record contains no indication that the Plaintiffs sought leave to further amend their pleadings in this case. The Plaintiffs instead chose to rely on the sufficiency of the allegations of their Amended Complaint (R 23).

SUMMARY OF ARGUMENT

The Defendant submits that there is no proper basis for invoking the jurisdiction of this Court in this case. The question certified to be of great public importance is a question which has recently been authoritatively addressed by this Court.

If the Court accepts jurisdiction, the District Court's decision affirming the trial court should be upheld. The trial court's order dismissing the Amended Complaint is supported by two independent grounds. First, the Plaintiffs' claims are barred by the applicable statute of limitations. Second, in seeking to recover for damages arising from the death of their unborn child the Plaintiffs failed to state a cause of action cognizable under Florida Law.

I.

The two-year statute of limitations period for medical malpractice commenced in the instant case when the stillbirth of the Plaintiffs' child occurred. At that time the Plaintiffs unquestionably had notice that they had suffered an injury. Under the recent holdings of this Court in *Barron v. Shapiro*, 565 So.2d 1319 (Fla. 1990), and *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991), such notice of injury is sufficient to trigger the statute of limitations for medical malpractice claims. The Plaintiffs' contention that the limitations period did not commence until they had learned that a negligent act had been committed is directly at variance with the holdings in

Barron and *Bogorff*. The rules suggested by the Academy for "harmonizing" *Bogorff* and *Barron* with other cases cited by the Academy are inconsistent with this Court's clearly established position. None of the cases decided by this Court suggest---as the Academy argues---that notice of injury is sufficient to trigger the running of the statute of limitations only if the injury was obviously the result of negligence.

II.

The trial court correctly applied the tolling provisions of Section 766.106, Florida Statutes, in determining that the Plaintiffs' claim was barred. This Court need not, however, consider this issue since the Plaintiffs failed to preserve the issue for review by failing to raise it in their briefs submitted to the District Court.

III.

In addition, the Amended Complaint failed to state a cause of action cognizable under Florida law. It has long been established that there is no cause of action for the wrongful death of an unborn child. *Stokes v. Liberty Mutual Insurance Company*, 213 So.2d 695 (Fla. 1968), and *Stern v. Miller*, 348 So.2d 303 (Fla. 1977). Accordingly, the Amended Complaint, which in each count sought to recover for damages arising from the death of the Plaintiffs' unborn child was properly dismissed by the trial court.

The recent District Court decisions which appear to go

beyond the other pertinent authorities to allow claims for injury to "the living tissue of the body of the mother" or for the "loss of a fetus," should be rejected by this Court as permitting recovery by subterfuge for the wrongful death of a fetus. But even if they are accepted, they provide no support for the position of the Plaintiffs. The Amended Complaint nowhere seeks to recover for injury to the living tissue of the mother or for the loss of the fetus. Instead, it consistently seeks to recover for the "death" of a "minor child." Allowing a recovery on such a claim would be directly inconsistent with the decision of this Court in *Stokes*.

ARGUMENT

The Defendant submits to the Court that in the instant case there is no proper basis for invoking the discretionary jurisdiction of the Court under Article V, Section 3(b)(2), Florida Constitution, and Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure. The question certified to be of "great public importance" is a question which must necessarily be answered affirmatively in light of the unambiguous rules governing application of the statute of limitations to medical malpractice claims which have been recently reaffirmed by this Court. Since the law in this area has been authoritatively addressed by this Court, a proper basis for invoking this Court's jurisdiction is lacking. In such circumstances, this Court need not answer the certified question. *See State v. Burgess*, 326 So.2d 441 (Fla. 1976).

Indeed, accepting jurisdiction of a case like the instant case will tend to encourage the District Courts to certify questions involving issues which have already been fully addressed by this Court. This Court should not countenance such an abuse of the constitutional and rule provisions providing for the review of cases involving questions of great public importance.

If this Court accepts jurisdiction of this case and elects to answer the certified question, the question is easily resolved on the basis of this Court's recent decisions regarding application of the statute of limitations for medical malpractice

claims. Those decisions, which are discussed in the first part of the argument following, clearly support affirmance of the District Court's decision in favor of the Defendants, and an affirmative answer to the certified question.

The decision below also finds independent support in the case law concerning claims arising from the death of unborn children. In light of that case law, even if the Plaintiffs' claims had not been barred by the statute of limitations, the District Court's affirmance of the trial court's dismissal of the Plaintiffs' claims should be upheld because the Plaintiffs failed to state any cause of action cognizable under Florida law.

I. THE STILLBIRTH OF THE PLAINTIFFS' CHILD AT THE HOSPITAL FACILITY OPERATED BY THE DEFENDANT CONSTITUTED AN INJURY WHICH GAVE THE PLAINTIFFS NOTICE OF THE POSSIBLE INVASION OF THEIR LEGAL RIGHTS AND THUS TRIGGERED THE RUNNING OF THE STATUTE OF LIMITATIONS.

The Plaintiffs concede in their Brief that the death of their unborn child occurred by April 1, 1988, that they provided notice of intent to file a medical malpractice action to the Defendant on February 12, 1990, and that their original Complaint was not filed until August 1, 1990 (PB 2).

All of the claims asserted by the Plaintiffs are claims arising from alleged acts of medical malpractice. Consequently, the two year statute of limitations period under Section 95.11(4)(b), Florida Statutes, is applicable. On the basis of the pertinent statutory provisions and the facts appearing on the face of the Amended Complaint, the trial court determined that the statute of limitations on the Plaintiffs' claims expired on

July 12, 1990. Since the Plaintiffs' original complaint was not filed until August 1, 1990, the trial court held that the Plaintiffs' claims were barred by the statute of limitations and accordingly dismissed their complaint. The District Court affirmed the decision of the trial court, but certified the question concerning application of the statute of limitations that is now before this Court.

The Plaintiffs contend that the trial court erred in determining that the statute of limitations began to run when the stillbirth of the Plaintiffs' child occurred. They argue that the statutory period commenced instead in December, 1989 when they learned that the Defendants had committed medical malpractice. In support of their argument, the Plaintiffs rely on the allegation in paragraph 10 of the Amended Complaint that not until December, 1989, "did the Plaintiffs know or should have known [sic] that the actions and inactions of the Defendants fell below the standard of care recognized in the community" (R 25). The Plaintiffs' position on this point is totally at odds with the clearly articulated position of this Court governing application of the statute of limitations for medical malpractice actions.

Within the last two years, this Court has twice addressed the specific issue of when the statute of limitations for medical malpractice begins to run. In both *Barron v. Shapiro,* supra, and *University of Miami v. Bogorff, supra,* this Court made clear that the limitations period commences when the plaintiff should have known either of the injury or the negligent act. Thus, to

establish that the limitations period has begun to run it is not necessary to show that the plaintiff knew or should have known that the act of the defendant which caused the injury was tortious. It will suffice to show that the plaintiff knew or should have known merely that an injury had been suffered.

In *Barron* this Court reaffirmed the holding of *Nardone v. Reynolds*, 333 So.2d 25 (Fla. 1976), where it had stated:

> ...[T]he statute of limitations in a malpractice suit commences either when the plaintiff has notice of the negligent acts giving rise to the cause of action or when the plaintiff has notice of the physical injury which is the consequence of the negligent act ... Sub judice, the plaintiffs were on actual notice of the decerebrate state of their son, that he had suffered irreversible brain damage, and ... the *statute of limitations began to run when the injury was known.* (emphasis supplied)

333 So.2d at 32. The court in *Barron* went on to apply the reasoning of *Nardone* to the facts before it, and to reject the conclusion of the lower court that "knowledge of physical injury alone, without the knowledge that it resulted from a negligent act, does not trigger the statute of limitations." 565 So.2d 1320.

In *Barron*, after surgery for removal of malignant polyps in his colon, the plaintiff developed a serious infection. During the course of his continued hospitalization the plaintiff became blind. More than two years after the plaintiff was diagnosed as blind, a physician expressed the opinion that the plaintiff's blindness was caused by the defendant physician's failure to administer antibiotics before the surgery was performed. Shortly thereafter the Plaintiff filed suit for medical malpractice.

The Court concluded that the plaintiff in *Barron* had notice of his injury when his blindness developed and that the statute of limitations began to run then. The court directly rejected the claim by the plaintiff that the statute of limitations period did not commence until the plaintiff had reason to know that the injury was negligently inflicted, and succinctly stated the rule governing commencement of the statute of limitations period for medical malpractice claims:

> [T]he limitation period commences when the plaintiff should have known *either* of the injury *or* the negligent act. (emphasis supplied)

565 So.2d at 1322.

This rule was applied even more recently in *Bogorff*, where the plaintiffs' child developed slurred speech, headaches, nausea, impaired motor skills and lethargy after receiving medication and other therapy to treat leukemia. The plaintiffs' child subsequently suffered convulsions and lapsed into a coma. Although he emerged from the coma, the child ultimately became a severely brain-damaged quadriplegic. All of this occurred in the first seven months of 1972, but the plaintiffs in *Bogorff* did not file suit until 1982.

On the basis of the *Nardone* rule as reaffirmed in *Barron*, the court in *Bogorff* once more "expressly rejected the argument that knowledge of a physical injury, without knowledge that it resulted from a negligent act, failed to trigger the statute of limitation." 583 So.2d at 1002. Noting that it was undisputed that the injury to the child occurred no later than July, 1972, the court held that "the triggering event for the limitation

period was the [Plaintiffs'] notice of injury to their child."

> [The child] received treatments to maintain the remission of his leukemia; three months after the last treatment he became comatose and, soon thereafter, completely disabled. As a matter of law, the [plaintiffs] were on notice of the possible invasion of their legal rights and the limitation period began running.

583 So.2d at 1002.

The *Bogorff* court was also careful to acknowledge that the effects of the allegedly negligent treatment of the child "might not have been easily distinguishable from the effects of leukemia on his system." 583 So.2d at 1004. The Court determined, however, that this circumstance did not prevent the commencement of the limitations period.[1]

In the instant case each of the claims made by the Plaintiffs directly arises from the death of the Plaintiffs' unborn child. Any injury suffered by the Plaintiffs undoubtedly occurred at the time of the death of their unborn child. The Plaintiffs' contention that there is nothing in the record "to indicate that the Plaintiffs knew that there was an injury at the time of death..." (AB 5) borders on the nonsensical. If knowledge of blindness (as in *Barron*) or knowledge of a coma and quadriplegia (as in *Bogorff*) constitutes notice of injury, much more should notice of the stillbirth of a child.

The stillbirth of a child---like the death of a person after birth---constitutes the clearest and most obvious notice to the survivors of the possible invasion of their legal rights. What

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[1]The Court went on to hold that even though the Plaintiffs asserted that fraudulent concealment had occurred, their claims were still barred by the applicable statute of repose.

more compelling evidence of the failure---whether negligent or not---of medical care could exist than that inherent in a stillbirth or death that occurs within in the confines of a hospital? What greater harm or damage could befall an unborn child than to be stillborn? If that circumstance does not constitute notice of injury, what circumstance would?

The Plaintiff's position on this issue does not in fact rest on an argument that there was no notice of injury. Instead, the Plaintiffs are in effect arguing that they had no notice of any *negligently caused* injury. Such a position is directly at variance with the holdings in *Barron* and *Bogorff*. It was accordingly rejected by both the trial court and the District Court and should likewise be rejected by this Court.

The reliance of the Plaintiffs on the decision in *Moore v. Morris*, 475 So.2d 666 (Fla. 1985), is entirely misplaced. In that case, although difficulties were experienced in the course of delivery, the child survived and "physically appeared to have made a speedy and complete recovery." The child's mother "was not aware of any damage to the [the child] when she was discharged." 475 So.2d at 669. The injury---brain damage---for which suit was subsequently brought did not manifest itself until the child was three years old. Thus at the time of birth, the injury which gave rise to the claim was not apparent. There simply was no notice of injury until much later. The facts of the instant case are far removed from this situation. Here the injury suffered by the Plaintiffs was manifest at the time the child was stillborn.

The Academy of Florida Trial Lawyers presents an argument in support of the Plaintiffs' position regarding commencement of the statute of limitations. In its argument, the Academy seeks to "harmonize" the decisions in *Nardone, Barron* and *Bogorff* with other decisions which the Academy contends require notice of negligence---albeit constructive notice---to trigger the running of the statute of limitations for medical malpractice. The thrust of the Academy's argument is that knowledge of an injury does not start the running of the statute of limitations if the injury "does not itself give fair notice that it was the *probable* consequence of a negligent act" (emphasis supplied). Thus, the Academy contends that where an injury "is *reasonably ambiguous* concerning its cause, the statute of limitations begins to run only upon discovery that the ambiguous 'injury' was actually the consequence of a negligent act rather than a non-negligent act or a natural cause" (emphasis supplied) (AB 20).

In support of this theory, the Academy asserts that in *Nardone, Barron* and *Bogorff*, it was "obvious" that the injuries suffered by the patients were the consequence of a particular act of negligence. This assertion cannot withstand serious scrutiny. A review of the facts in each of those cases indicates that although it was clear in each case that an injury had been suffered, the cause of the injury was at least "reasonably ambiguous."

In *Nardone*, the Court stated that the "severe nature of [the child's] injury was readily apparent" when he had been discharged from the hospital more than five years before suit was brought.

333 So.2d at 33. No mention was made of any connection between a supposed act of negligence and the obvious injury. The Court's focus was clearly on the severe nature of the child's condition and the notice that condition gave of injury---not on any supposedly "obvious" connection between an act of negligence and the condition of the child.

Similarly, in both *Barron* and *Bogorff*, no mention is made of an "obvious" linkage between the injuries suffered by the plaintiff and particular acts of negligence. Indeed, in both those cases the connection between the particular injury in question and the alleged act of negligence is far from clear or obvious. The connection in *Barron* between the performance of routine colon surgery and the patient's blindness four months later may be real, but it is hardly "obvious." In the same way, it might be reasonable to suspect that the treatment given to the child in *Bogorff* for leukemia could have caused him to become a severely brain damaged quadriplegic within seven months, but that linkage is by no means "obvious." In short, the contention that the cause of the injuries suffered in *Barron* and *Bogorff* was not "reasonably ambiguous" is singularly unpersuasive.

Accordingly, the interpretive scheme which the Academy seeks to impose on *Barron* and *Bogorff* ultimately fails. It is a scheme fundamentally at odds with the facts of those two cases.

This Court's decisions in *Cohen v. Baxt*, 488 So.2d 56 (Fla. 1986); *Moore v. Morris, supra; Florida Patient's Compensation Fund v. Tillman*, 487 So.2d 1032 (Fla. 1986); and *Ash v. Stella*, 457 So.2d 1377 (Fla. 1984), are also fundamentally inconsistent

with the Academy's argument. Those cases are not about an ambiguity in the connection between an injury and the act of negligence which was its cause. Instead, the focus of these cases is on whether there was in fact *notice of any injury* at all. This is not---as the Academy would have it---a "niggling distinction" (AB 36). On the contrary, it is a distinction which is fundamental to understanding the holdings of this Court in each of the cases cited by the Academy.

Moore v. Morris has already been discussed above. Suffice it to say here that in *Moore* although the delivery of the child was difficult, the injury which gave rise to the subsequent claim was not apparent. In *Moore* this Court quashed the decision of the Third District Court of Appeal which had upheld the trial court's granting a Final Summary Judgment. The proper focus of the case is aptly summed up in Chief Judge Swartz's dissent to the District Court's opinion:

> While it is of course true, as the majority states, that [the child's] parents were immediately aware that there had been an extremely difficult delivery, I think that this fact is essentially irrelevant. This is because there is surely a genuine issue---indeed, the evidence is overwhelming to this effect---that neither the [plaintiffs] nor any of the medical professionals knew or could have known that the baby had sustained any significant injury, and specifically permanent brain damage, until it was scientifically ascertained shortly before suit was filed.

429 So.2d at 1210. The decision in *Moore* thus is clearly about whether the Plaintiffs had notice of any injury, not whether they had notice of negligently caused injury.[2]

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[2]The decision in *Moore v. Morris* admittedly does contain dicta which could be used to support an argument that knowledge of a physical injury alone, without knowledge that it resulted

The same is true of the decisions in *Cohen* and *Florida Patient's Compensation Fund*. In both those cases patients with knee trouble had sought treatment. After receiving treatment, their knee troubles continued. In both cases, it was reasonable for each patient to conclude that he was simply suffering from the continuing effects of his original condition---not from any new injuries suffered during the course of medical treatment, or from a negligent act committed by the health care providers.

The decision in *Ash* also involved a fact pattern in which the Plaintiff did not receive notice of any injury, and the statute of limitations accordingly was not triggered. In *Ash* the injury, if any, arose from the physician's failure to diagnose a malignancy. There could, of course, be no notice of such an injury until the Plaintiff subsequently learned both of the existence of the malignancy and that the malignancy had been the cause of the problems with which she presented to the defendant physician.

What all these cases have in common is that in the absence of *notice of any injury*, the statute of limitations was not triggered. In each of them the claimant had no notice that anything significant had gone wrong. These cases are easily distinguishable from the instant case. Here the Plaintiff mother went to the hospital to give birth to her child, but things drastically went wrong. Unlike the claimants in *Ash, Cohen,*

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from a negligent act, is not sufficient to trigger the statute of limitations. That reading of *Moore v. Morris* was, however, unequivocally rejected by this Court in *Barron*. 565 So.2d at 1321.

Florida Patient's Compensation Fund, and *Moore*, the Plaintiffs here had unambiguous notice of injury.

Accordingly, the decisions of the trial court and the District Court are consistent with *Ash*, *Cohen*, *Florida Patient's Compensation Fund*, and *Moore*. Moreover, application of the statute of limitations to bar the Plaintiffs' claims in mandated by *Barron* and *Bogorff*.

II. THE TRIAL COURT AND THE DISTRICT COURT PROPERLY APPLIED THE PROVISIONS OF CHAPTER 766, FLORIDA STATUTES, IN CALCULATING THE DATE ON WHICH THE STATUTE OF LIMITATIONS EXPIRED.

The Plaintiffs assert that the trial court and the District Court improperly applied the tolling provisions of Chapter 766, Florida Statutes. Argument on this point is found nowhere in either the initial brief or the reply brief submitted by the Plaintiffs to the District Court.

In *Tillman v. State*, 471 So.2d 32, at 35 (Fla. 1985), this Court stated:

> In order to be preserved for further review by a higher court, an issue must be presented to the lower court and *the specific legal argument or ground* to be argued on appeal or review must be part of that presentation if it is to be considered preserved. (emphasis supplied)

See also Moorehead v. State, 383 So.2d 629 (Fla. 1980) (holding that Supreme Court will not address point which was not raised in the Court below); and *Hospital Corporation of America v. Lindberg*, 571 So.2d 446 (Fla. 1990) (rejecting claim raised by petitioner on ground that claim was not raised below).

Here the Plaintiffs totally failed to present the "specific legal argument or ground" concerning the tolling provisions of Chapter 766, Florida Statutes, in the briefs submitted to the District Court.[3] By that failure, the Plaintiffs waived their right to raise the point and to rely on it in support of their position before this Court.[4]

Even if the point advanced by the Plaintiffs had been properly preserved for review, an examination of the argument now presented by the Plaintiffs reveals that the Plaintiffs' position is without merit. The Defendant will not attempt to unravel all the threads of the argument spun by the Plaintiff on this issue. Taken as a whole, that argument represents either an attempt at obfuscation or a perpetuation of the error which originally resulted in the failure to timely file suit.

In short, the Plaintiffs contend that after filing their notice of intent pursuant to Section 766.106, Florida Statutes (Supp. 1988), they were entitled to an additional 47 days (representing the time then remaining before expiration of the statute) *plus* 90 days, *plus* an additional 60 days. This contention is directly inconsistent with the pertinent statutory provisions.

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[3]The fact that the point was broached by the plaintiffs at oral argument was not sufficient to preserve the point for review by either this Court or the District Court. It is axiomatic that an issue cannot be raised for the first time at oral argument. *Buckley Towers Condominium, Inc. v. Buchwold*, 340 So.2d 1206 (Fla. 3rd DCA 1976). *See also McDonald v. Pickens*, 544 So.2d 261 (Fla. 1st DCA 1989) (holding that argument not included in appellant's brief is not cognizable on appeal).

[4]The Plaintiffs were similarly precluded from raising this issue in the District Court because they had failed to present it to the trial court.

Under Section 766.106(4), Florida Statutes (Supp. 1988), the statute of limitations is "tolled" during the 90-day period after mailing of the notice of intent to initiate litigation. That section further provides that on termination of negotiations---which would occur either upon receipt of notice of such termination or upon expiration of the 90-day period without any response from the prospective defendant to the notice of intent---the "claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit."

Accordingly, the statute of limitations in the instant case was tolled for 90 days from the date the notice of intent was filed (February 12, 1990). Since only 47 days remained to run under the statute of limitations, the Plaintiffs were entitled to an additional 60 days. That gave them a total of 150 days (90 plus 60) from the date of the notice of intent within which to file their complaint. Thus the final day of the statutory period was July 12, 1990, and the complaint filed on August 1, 1990, was barred by the statute of limitations.

The Plaintiffs' position on this point contradicts the plain language of the statute. The statute is very clear that after the 90-day period, the statute will be extended by the greater of *either* 60 days, *or* the number of days that remained to run under the statute when the notice of intent was filed. The Plaintiffs clearly are *not* entitled to 60 days *plus* the 47 days remaining to run under the statute.

None of the cases cited by the Plaintiffs support their construction of the tolling provisions of the statute. Indeed,

the only decided cases which are relevant to this issue support the District Court's application of the statutory tolling provisions. *See Novitsky v. Hards*, 589 So.2d 404, at 407 (Fla. 5th DCA 1991); and *Rhoades v. Southwest Florida Regional Medical Center*, 554 So.2d 1188 (Fla. 2d DCA 1989).

III. THE DECISION OF THE DISTRICT COURT AFFIRMING THE DISMISSAL OF THE PLAINTIFFS' CLAIMS SHOULD BE UPHELD BECAUSE FLORIDA LAW RECOGNIZES NO CAUSE OF ACTION FOR INJURIES ARISING FROM THE DEATH OF AN UNBORN CHILD.

The Plaintiffs contend that in the Amended Complaint they stated a "valid" cause of action for the wrongful death of a viable fetus, and for the "destruction of the living tissue" of the mother. A review of the specific allegations of the Amended Complaint in light of the pertinent case law shows that contrary to the Plaintiffs' argument the facts alleged are not sufficient to state any cause of action cognizable under Florida law.

At the outset it is important to note that in each of the five counts of the Amended Complaint the Plaintiffs seek under various theories to recover for injuries that they allege to be the result of the death of their unborn child (R 23, ¶¶ 12, 13, 21, 22, 31, 32, 42, 43, 52, and 53). In seeking to recover for damages arising from the "death" of their "minor child", the Plaintiffs consistently track the language of the Florida Wrongful Death Act, Sections 768.16 - 768.27, Florida Statutes (1987). The death of the unborn child is the gravamen of all the Plaintiffs' claims; the whole complaint is predicated on that single fact.

In each count of the Complaint the Plaintiffs alleged that the mother has "incurred physical damage, personal injury...[and]

great mental pain and suffering *as a result of the death of her minor child"* (emphasis supplied) (R 23, ¶¶ 12, 21, 31, 42 and 52). The Plaintiffs consistently link the injury they have suffered with the death of their unborn child.

Pleadings framed in such a manner can only be construed as seeking to recover for the wrongful death of an unborn child. Under Florida law, it has long been established that no cause of action for the wrongful death of an unborn child is cognizable. *Stokes v. Liberty Mutual Insurance Co.,* supra. *See also Stern v. Miller, supra.* It is also well established that an *indirect* recovery for the death of an unborn child is no more permissible than the *direct* recovery proscribed in *Stokes.* In *Styles v. Y.D. Taxi Corp, Inc.*, 426 So.2d 1144 (Fla. 3d DCA 1983); *Abdelaziz v. A.M.I.S.U.B. of Florida, Inc., 515 So.2d 269 (Fla. 3rd DCA 1987),* and *Henderson v. North*, 545 So.2d 486 (Fla. 1st DCA 1989), the courts applied the principle established in *Stokes* to prevent an "indirect" or "thinly disguised" recovery for wrongful death of an unborn child.

In *Styles* the plaintiff attempted to establish that she had suffered a "permanent injury" for purposes of the Florida Motor Vehicle No-Fault Law by proving the death of a fetus. The Court adopted the trial court's order which, after noting that the loss of a fetus is not covered by the Florida Wrongful Death Statute, stated:

> If a [would-be] mother cannot recover *directly* for the death of an unborn fetus, it would appear that she should not be able to recover indirectly for such death as a "permanent injury" to her absent a showing of some objective signs of injury resulting from the loss of the fetus. (emphasis supplied)

426 So.2d at 1145. Thus, the Court made a distinction between

injuries suffered by the mother evidenced by "some objective signs" and injuries consisting in the death of a fetus.

In *Abdelaziz*, the Plaintiffs alleged that the Plaintiff mother had suffered physical injuries and emotional distress because of the stillbirth of her eight-month-old fetus. The Plaintiffs conceded that the plaintiff mother had "sustained no physical injuries *to herself*" and that their sole claim was for mental pain and suffering arising from the death of the fetus. The court rejected the Plaintiffs' claim and stated:

> ...[W]e must reject it because the claim for negligent infliction of mental distress...is, in essence, a claim for the wrongful death of the fetus and the plaintiffs' mental suffering associated therewith. Such a claim is clearly not cognizable under the wrongful death statute, and should not, we conclude, be indirectly recoverable under a simple negligence claim....

515 So.2d at 272. The court's holding was based on a distinction between claims for physical injuries sustained directly by the mother (e.g. injury to the uterus) and claims arising or derived from the death of the unborn child. While the former are cognizable under Florida law, the latter will be rejected regardless of the specific manner in which they are framed.

A similar result was reached in *Henderson*. In that case the Plaintiffs had made a claim for negligence based on an allegedly erroneous diagnosis which resulted in physical pain, mental anguish, and the expense of hospitalization, admission tests, and unnecessary surgical procedures. The court reversed the summary judgment against the Plaintiffs on that claim on the ground that it contained "no claim for any injury or damage resulting from the death of the fetus." 545 So.2d at 488. The Plaintiffs also asserted claims that the alleged acts of negligence resulted in

the death of the unborn child and in "great physical, emotional and mental pain and suffering" by the Plaintiffs. The summary judgment against the Plaintiffs on these claims was affirmed on the basis of the holding in *Abdelaziz*:

> The trial judge correctly found that [each such claim] was a thinly disguised claim for the wrongful death of the fetus and plaintiffs' mental pain and suffering associated therewith and granted final summary judgment as Florida does not recognize a cause of action for the wrongful death of the fetus.

545 So.2d at 488.

The claims made by the Plaintiffs in the instant case are similar to the claims that were rejected in *Henderson, Abdelaziz* and *Styles*. As in those cases the Plaintiffs here make claims for injury or damages resulting from the death of the unborn child. Although the claims do not explicitly purport to be made pursuant to the Florida Wrongful Death Act, they are "in essence" wrongful death claims.

The Defendant concedes that the decisions in *Singleton v. Ranz*, 534 So.2d 847 (Fla. 4th DCA 1988), and *McGeehan v. Parke-Davis*, 573 So.2d 376 (Fla. 2d DCA 1991), appear to go beyond the holdings in *Henderson, Abdelaziz* and *Styles* to allow the assertion of claims for injury to "the living tissue of the body of the mother" or for the "loss of a fetus." In doing so these cases are inconsistent with this Court's holdings in *Stokes* and *Stern*, which unequivocally preclude any recovery for the wrongful death of a fetus. *Singleton* and *McGeehan* accordingly should be rejected by this Court as countenancing recovery by subterfuge for the wrongful death of a fetus.

But even if *Singleton* and *McGeehan* were to be accepted, they nevertheless do not provide support for the position of the

Plaintiffs in the instant case. In their Amended Complaint the Plaintiffs repeatedly make claims for the "death" of the Plaintiffs' unborn child, who is identified throughout the Amended Complaint as "James R. Tanner, II" and the "minor child." Nowhere do the Plaintiffs assert a claim for "the loss of a fetus" or for injury to "the living tissue of the mother." As noted above, the Amended Complaint consistently frames its claims using terms drawn directly from the Florida Wrongful Death Act, and in its entirety "sounds in wrongful death." See *Plant v. Decker*, 486 So.2d 37 (Fla. 2d DCA 1986). Its allegations are therefore insufficient to state a cause of action not only under *Abdelaziz, Henderson* and *Styles*, but also under *Singleton and McGeehan*.

Finally, the Plaintiffs' argument that the trial court erred in dismissing the wrongful death claim of a viable fetus is flawed both factually and legally. First, at no place in the Amended Complaint do the Plaintiffs allege that their unborn child was viable. Secondly and more importantly, Florida law is very clear that there is no cause of action for the wrongful death of an unborn child, even if the child was viable at the time of death. In *Stokes v. Liberty Mutual Insurance Company, supra,* at 700, this Court addressed this issue unequivocally:

> ...[W]e hold that a right of action for wrongful death can arise only after the live birth and subsequent death of the child....[I]n our view of the Florida [Wrongful Death] Statute, the prior existence of viability does not affect the legal status of the stillborn fetus.

See also Stern v. Miller, supra.[5]

In view of these authorities, even if the Court determines that the Plaintiffs' claims are not barred by the statute of limitations, the decision of the District Court should nonetheless be affirmed because the Plaintiffs' Amended Complaint fails to state a cause of action cognizable under Florida law.

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[5]The extended discussion in the Plaintiffs' Brief of the decisions in other jurisdictions is at best irrelevant to this issue which has been authoritatively addressed by this Court.

CONCLUSION

This Court should decline to accept jurisdiction of this case because cases recently decided by this Court are clearly controlling on the question presented for review. If jurisdiction is accepted, the certified question should be answered in the affirmative, and the decision of the District Court affirmed. Moreover, even if the certified question is answered negatively, the decision of the District Court should nonetheless be affirmed because the Plaintiffs' Amended Complaint failed to state any cause of action cognizable under Florida law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 14th day of July, 1992 to: KENNAN G. DANDAR, ESQUIRE, One Urban Centre, Suite 447, 4830 W. Kennedy Boulevard, Tampa, Florida 33609-2517; MARILYN DRIVAS, ESQUIRE and JERRY L. NEWMAN, ESQUIRE, Post Office Box 2378, Tampa, Florida 33601; and LEONARD MILCOWITZ, ESQUIRE, 4200 W. Cypress Street, #820, Tampa, Florida 33607; ROBERT M. KLEIN, ESQUIRE and PHILIP D. PARRISH, ESQUIRE, 9100 S. Dadeland Blvd., Ste. 1500, Miami, FL 33156; MARGUERITE H. DAVIS, ESQUIRE, P.O. BOX 1877, Tallahassee, FL 32302; JOEL D. EATON, ESQUIRE and JOEL S. PERWIN, ESQUIRE, 25 W. Flagler St., Ste. 800, Miami, FL 33130.

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