IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 79,390
SECOND DISTRICT APPEAL NO. 91-00057

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

Petitioner,

v.

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

Respondents.

RESPONDENTS ELLIE M. HARTOG, M.D. AND HARTOG & DUBOY, P.A.'S BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this case solely because the Second District Court of Appeal had certified the question herein to be a matter of great public importance.

THE PARTIES

This Brief is filed on behalf of the Defendants/Respondents, ELLIE M. HARTOG, M.D. and HARTOG and DUBOY, M.D., P.A. These Respondents will collectively be referred to herein as "Dr. Hartog". Separate Briefs will also be filed on behalf of Respondents Dr. Duboy and Lakeland Regional Medical Center. The Plaintiffs/Petitioners are Phyllis K. Tanner, individually, and James R. Tanner, and as Personal Representative of the Estate of Baby Boy Tanner, deceased. The Petitioners will be referred to collectively as "The Tanners" or as Plaintiffs. The Academy of Florida Trial Lawyers has filed an Amicus Brief in support of the Petitioners. The Academy of Florida Trial Lawyers will be referred to herein as "the Academy." Unless indicated to the contrary all emphasis has been supplied by counsel.

STATEMENT OF THE CASE AND FACTS

The Petitioners are before this Court because the Second District Court of Appeal has certified the following question to be a matter of great public importance:

> 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 §95.11(4)(b), Florida Statutes (1989).

The District Court's Opinion affirms the trial court's dismissal of the Tanners' cause of action because the allegations in the Tanners' Amended Complaint establish "beyond peradventure" that the Plaintiffs were aware of their injury as of the evening of March 31/April 1, 1988. For purposes of answering the certified question, the brief Statement of the Facts contained in the District Court's Opinion will be repeated here:

> According to the Appellants' Amended Complaint, on March 31, 1988, Mrs. Tanner saw her treating physicians, Drs. Ellie M. Hartog and Alberto Duboy. After examining Mrs. Tanner, the physicians sent her to Lakeland Regional Medical Center. On the following morning the baby was delivered stillborn at the Hospital. The Appellants further alleged:
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> > Not until December 29, 1989, did the Plaintiffs know or should have known that the actions and inactions of the Defendants fell below the standard of care recognized in the community.

TANNER v. HARTOG, 593 So.2d 249, 250 (Fla. 2nd DCA 1992). (Footnote omitted).

Each of the Respondents filed motions to dismiss the Amended Complaint because it was apparent from the face of the Amended Complaint that the Plaintiffs' claims were barred by the statute of limitations. On December 4, 1990, the trial court dismissed the Plaintiffs' amended complaint with prejudice. (R. 78-79) The Second District Court of Appeal affirmed the trial court's dismissal of the Tanners' action.

SUMMARY OF THE ARGUMENTS

In this Brief we will address first the certified question from the District Court of Appeal. For reasons which the District Court's opinion itself makes clear, the question must be answered in the affirmative. As this Court noted over 15 years ago in NARDONE v. REYNOLDS, and recently reaffirmed in BARRON v. SHAPIRO and UNIVERSITY OF MIAMI, INC., v. BOGORFF, the statute of limitations in a medical malpractice action is triggered when the plaintiff has notice of either the injury or the negligent act. Here, it is clear that the Tanners had notice of their injury, i.e., the death of their fetus, on the morning of April 1, 1988. The Tanners' failure to file suit within two years of that date (as extended by virtue of Fla. Stat. §766.104), despite their obvious notice of the injury required the District Court of Appeal to affirm the summary judgment on behalf of the Defendants. Moreover, it is clear that the District Court of Appeal properly interpreted Fla. Stat. §766.104, and ruled that the Plaintiffs failed to timely file their complaint within the statute of limitations (as extended).

We will then address the arguments raised by the Academy in its Amicus Brief. The Academy's argument in a nutshell is this: The only time that notice of an injury triggers the statute of limitations is where the injury is of such a nature that it automatically leads to the conclusion that it is the result of a negligent act. That position is not only a misstatement of the law, it is a subversion of the long settled principle, beginning

with this Court's opinion in NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976), and reaffirmed by this Court's opinions in BARRON v. SHAPIRO, 565 So.2d 1319 (Fla. 1990) and UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d 1000 (Fla. 1991), that a plaintiff need only have notice (or constructive notice) of either the injury or the negligent act in order to trigger the statute of limitations.

In this regard, we will demonstrate that contrary to the Academy's position, there are not six subcategories of statute of limitations cases, and that virtually all of the decisions relied upon by the Academy are in fact cases where the plaintiff was either not on notice of an injury at all, or where the plaintiff was precluded from learning of his or her injury and/or the negligence of his or her physician by virtue of fraudulent concealment.

POINTS ON APPEAL

I. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE, AND THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S OPINION BECAUSE THE PLAINTIFFS' AMENDED COMPLAINT WAS CLEARLY NOT FILED WITHIN THE APPLICABLE TWO YEAR STATUTE OF LIMITATIONS PURSUANT TO FLORIDA STATUTE §95.11(4)(b) (1989).

II. THE DISTRICT COURT CORRECTLY AFFIRMED THE DISMISSAL OF THE PLAINTIFFS' COMPLAINT, BECAUSE PLAINTIFFS FAILED TO FILE THEIR ACTION WITHIN THE STATUTE OF LIMITATIONS, EVEN AS EXTENDED PURSUANT TO §766.106(4).

III. THE TANNERS DO NOT HAVE A CAUSE OF ACTION FOR THE DESTRUCTION OF LIVING TISSUE.

IV. NOTICE OF INJURY IN FACT IS SUFFICIENT TO TRIGGER THE TWO YEAR STATUTE OF LIMITATIONS.

ARGUMENT

I. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE, AND THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S OPINION BECAUSE THE PLAINTIFFS' AMENDED COMPLAINT WAS CLEARLY NOT FILED WITHIN THE APPLICABLE TWO YEAR STATUTE OF LIMITATIONS PURSUANT TO FLORIDA STATUTE §95.11(4)(b) (1989).

Over fifteen years ago this Court rejected the proposition that the statute of limitations does not commence to run in a medical malpractice action until the plaintiff actually becomes aware of the negligence of his or her physician. NARDONE v. REYNOLDS, 333 So.2d 25, 32 (Fla. 1976). Instead, this Court held that the statute of limitations begins to run when either the negligent act or the injury which is the consequence of the negligent act is known. 333 So.2d at 32.[1]

Unfortunately, subsequent to this Court's decision in NARDONE and prior to 1990, certain language in this Court's decision in MOORE v. MORRIS, 475 So.2d 666 (Fla. 1985), had been interpreted by various District Courts of Appeal as suggesting that knowledge of physical injury alone does not trigger the statute of limitations. See, e.g., BOGORFF v. KOCH, 547 So.2d 1223 (Fla. 3d DCA 1989) rev'd

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[1] We have emphasized the descriptive phrase "which is the consequence of the negligent act" purposefully. The Tanners and the Academy argue that in order to trigger the Statute of Limitations a plaintiff must know of the injury and also that the injury is a result of negligence. If that were the law, then the above phrase would have to be altered to read that the Statute of Limitations begins to run "when the injury and the fact that the injury is the consequence of the negligent act is known."

sub nom UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d 1000 (Fla. 1991); SHAPIRO v. BARRON, 538 So.2d 1319 (Fla. 4th DCA 1989) rev'd 565 So.2d 1319 (Fla. 1990); SHAFER v. LEHRER, 476 So.2d 781 (Fla.4th DCA 1985); see generally JACKSON v. GEORGOPOLOUS, 552 So.2d 215, 216 (Fla. 2d DCA 1989) (Lehan, J. concurring).

In June of 1990, in BARRON v. SHAPIRO, 565 So.2d 1319 (Fla. 1990), this Court reaffirmed the holding in NARDONE v. REYNOLDS, to the effect that the limitations period for medical malpractice actions commences when the plaintiff should have known of either her injury or the defendant's negligent act. 565 So.2d at 1322; see generally Section 95.11(4)(b), Florida Statutes. Accord, VARGAS v. GLADES GENERAL HOSP., 566 So.2d 282, 285 (Fla. 4th DCA 1990); BABUSH v. AMERICAN HOME PRODUCTS CORP., 589 So.2d 1379 (Fla. 4th DCA 1991) upon which the Tanners mistakenly rely.[2] See also, HARR v. HILLSBOROUGH COMMUNITY MEDICAL HEALTH CENTER, 591 So.2d 1051 (Fla. 2nd DCA 1991); GOODLET v. STECKLER, 586 So.2d 74 (Fla. 2nd DCA 1991); and ROGERS v. RUIZ, 16 FLW D3076 (Fla. 2nd DCA Dec. 13, 1991). This Court reaffirmed BARRON and NARDONE as recently as January of 1991, in UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d 1000 (Fla. 1981). In BOGORFF, as in BARRON, this Court affirmed a summary judgment on behalf of a medical malpractice defendant pursuant to Section 95.11(4)(b).

The Tanners' complaint sought to avoid BARRON and BOGORFF by

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[2]BABUSH will be discussed in-depth later in this brief because it quite nicely lays out the distinction between the facts necessary to trigger the medical malpractice statute of limitations and the facts necessary to trigger the product liability statute of limitations.

arguing that they did not in fact become aware of the Defendants' negligence until such time as they were informed of that alleged negligence by their retained expert physician, Dr. Marvin Krane, in December of 1989, some 19 months after they learned of the death of their fetus.

Here the Tanners argue precisely what Mrs. Shapiro argued in BARRON v. SHAPIRO, i.e., that she had no reason to be aware that she had a cause of action until the doctor's negligence was confirmed by a medical opinion which was tendered by another physician.[3] In BARRON v. SHAPIRO, Ms. Shapiro argued that she had no reason to suspect that her husband's blindness was a result of medical malpractice until she received a report to that effect by Dr. Kunin, a physician who had been retained by her attorney. 565 So.2d at 1320.

In BARRON, this Court rejected Mrs. Shapiro's contention (which is identical to the contention of the Tanners herein) that the statute of limitations did not commence to run until she had reason to know that the injury in question had been negligently inflicted. 565 So.2d at 1321. Finally, this Court concluded that:

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[3] It is important to note at this juncture that we are only concerned with determining whether the Plaintiffs were on notice of a potential claim. The period of limitations does not suggest that a Plaintiff immediately file a claim, merely because there was notice of some unexpected injury, without conducting some reasonable investigation. The Academy's argument that the Tanners had a mere 19 days to determine if they had a cause of action turns the Statute of Limitations analysis on its head. As will be discussed infra, the Tanners actually had 2 years plus 150 days to file their lawsuit,and would have had an additional 90 days had their attorney simply requested the automatic 90-day tolling of the Statute of Limitations prior to July 12, 1990.

> The District Court of appeal misinterpreted MOORE when it said that knowledge of physical injury alone, without knowledge that it resulted from a negligent act, does not trigger the statute of limitations.

Id.

Reverting to the facts of this cause, it offends common sense to suggest that the Tanners were not aware of their injury on March 31/April 1, 1988, the day when their child was delivered stillborn.[4] Thus, in order to pursue their claim, it was incumbent upon the Tanners to file suit within two years of that date (plus 150 days, as extended by virtue of Fla. Stat. §766.106). The Tanners failed to timely file their suit, and it was properly dismissed.

The confusion over the holding in MOORE v. MORRIS, 475 So.2d 666 (Fla. 1985), which was manifested in the district court's opinion in SHAPIRO v. BARRON, supra, is characteristic of the Academy's position in this matter. As this Court's opinion in BARRON v. SHAPIRO notes, the Fourth District Court of Appeal misinterpreted the application of the NARDONE standard to the facts in MOORE. As a result, the Fourth District applied the MOORE decision as though it had announced a standard which differed from NARDONE.

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[4]The Tanners' attempts to distinguish BARRON v. SHAPIRO from their situation is very weak. They suggest that they were not aware of their injury as of March 31, 1988, when their child was stillborn. The fact that the Plaintiffs have alleged that their suspicions of negligence were not confirmed by a physician until December 29, 1989, does not alter the fact that they were aware of the stillbirth of their fetus, i.e., their injury, immediately.

An in-depth analysis of MOORE v. MORRIS reveals that it is simply a case where the parents of the injured child were not aware of the injury upon which they brought suit (mental retardation) until several years after the birth of their child. During birth, the child had suffered certain minor injuries, which were treated at or near the time of birth. The Moores did not sue upon those minor injuries; indeed, they did not file suit until several years later when their child's mental retardation was diagnosed.

In MOORE, the alleged malpractice arose out of complications which had developed during delivery of the baby. These complications had necessitated delivery of the baby by cesarian section. After delivery, the infant was "blue" for a period in excess of 30 minutes, and the doctors attempted to administer oxygen; they were unsuccessful in their treatment and transferred the infant to Jackson Memorial Hospital. Apparently, the doctors informed the father that they did not expect the baby to live. While en route to Jackson, the baby's chest was cut open and a tube was inserted to assist her in breathing.

Based upon these facts, the District Court of Appeal ruled as a matter of law that the parents were on notice of the alleged negligence at the time of delivery. This Court reversed, noting that the baby appeared to have made a speedy and complete discovery subsequent to the traumatic delivery, and was not and could not have been scientifically diagnosed as having brain damage until she was three years old. 475 So.2d at 669.

In MOORE, it is clear that the parents were not suing the

physicians for the "injuries" sustained at birth which resulted in the need to have their daughter's chest cut open on the way to Jackson Memorial Hospital.[5] Had they been suing for those injuries, they would have had to have initiated suit prior to the time that they learned of their daughter's mental retardation. Conversely, the injury upon which the Moores eventually sued, i.e., mental retardation, was not and could not have been known to them at the time of the birth of their child.

Alternatively, MOORE v. MORRIS is but one of a long line of cases which presented a question of fact which had to be resolved by a jury in light of allegations of <u>fraudulent concealment</u> of the injury or the negligence. This interpretation of MOORE v. MORRIS is confirmed by this Court's opinion in BARRON. In discussing how the Fourth District Court of Appeal's decision in SHAPIRO v. BARRON, 538 So.2d 1319 (Fla. 4th DCA 1989) had misinterpreted MOORE v. MORRIS, this Court made the following observation:

> In resolving [MOORE v. MORRIS], this Court reaffirmed the principle of NARDONE that the Statute begins to run when the plaintiffs knew or should have known that either injury or negligence had occurred. However, the Defendants' summary judgment was reversed because there were genuine issues of material fact with respect to whether the parents were on notice that an injury had

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[5]In NORSWORTHY v. HOLMES REGIONAL MEDICAL CENTER, 17 FLW D868 (Fla. 5th DCA opinion filed April 3, 1992), the court entertained this very prospect, but unfortunately did not follow it to its logical conclusion, i.e., that MOORE is entirely consistent with NARDONE because the parents were not aware of <u>either</u> the injury or the negligence until years later. Instead, the court adopted an analysis which is identical to the Academy's position herein.

> occurred more than 4 years prior to filing a medical malpractice action. The court pointed to the physicians' assurances of the baby's good health and the mother's understanding at the time of the baby's discharge that she had suffered no damage.

BARRON v. SHAPIRO, 565 So.2d at 1321.[6]

FLORIDA'S TWO YEAR PLUS 240 DAY STATUTE OF LIMITATIONS

It is a commonly accepted notion that Florida has a two year statute of limitations for medical malpractice causes of action. Fla. Stat. §95.11(4)(b).[7] However, the various provisions of Section §766.106, Florida Statutes allow a plaintiff additional time (as much as 240 days) in which to further investigate and file his or her cause of action. A brief review of how the statute works is in order.

Utilizing the dates that are involved in this case, it should be clear that the Tanners were injured in fact on April 1, 1988. Thus, the statute of limitations would arguably have run on April 1, 1990. The Tanners therefore had two full years to consider, in retrospect, whether the injury which they sustained on April 1,

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[6]This observation makes sense only if it is conceded that the "damage" or "injury" upon which the Moores brought suit was their child's mental retardation, and not the traumatic but treatable physical injuries associated with the birth of the Moores' child.

[7]And, of course, this Statute also provides for a four year absolute period of repose, which runs from the date of the commission of the negligent act, whether or not the plaintiff has notice of either the injury or the negligent act. See, PUBLIC HEALTH TRUST OF DADE COUNTY v. MENENDEZ, 584 So.2d 567 (Fla. 1991); CARR v. BROWARD COUNTY, 541 So.2d 92 (Fla. 1989). The Statute also provides for an extension of the limitations period for seven years in cases involving fraudulent concealment or intentional misrepresentations of fact.

1988 might possibly have been the result of negligence, rather than natural causes. Provided that they consulted an attorney even one day prior to April 1, 1990, that attorney could have obtained an additional 240 days' time in order to fully investigate the potentional claim, obtain an expert witness and file suit.[8]

If the Tanners had presented themselves to an attorney on April 1, 1990, that attorney could immediately have gone to the Clerk of the Circuit Court and, after payment of a nominal fee, obtained an automatic 90 day extension of the statute of limitations. See, Section §766.104. Thereafter, upon the service of notices of intent, the Tanners could have obtained an additional 90 days extension of the statute of limitations. These two 90 days extensions can be stacked together to provide a 180 day extension of time. See, ANGRAND v. FOX, 552 So.2d 1113 (Fla. 3d DCA 1989); RHOADES v. SOUTHWEST FLORIDA REGIONAL MEDICAL CENTER, 554 So.2d 1188 (Fla. 2d DCA 1989).

In addition to this 180 day extension of the statute of limitations, a plaintiff also has available a safety valve of up to 60 days after the expiration of the 180 days.[9] That is because the plaintiff still has the greater of either 60 days or the number of days which remained on the statute of limitations when the

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[8]Of course, we know that the Tanners had already obtained a medical expert opinion in December of 1989; they had certainly consulted an attorney prior to February 12, 1990, when their notices of intent to sue were served upon the defendants herein.

[9]The Tanners did not have the full 180 days available to them because their counsel did not take advantage of the automatic 90 day extension by filing a request for extension.

notices of intent were served upon the Defendants in which to file suit. In this case, because the notice letters were served 47 days prior to the running of the two year statute of limitations, the Tanners enjoyed the entire 60 day safety valve.

As this analysis demonstrates, once a plaintiff is placed on notice of an injury, the plaintiff has two full years simply to entertain the prospect that the injury might have been caused by negligence, and up to an additional 240 days' time in which to obtain counsel and investigate their concerns (assuming that this has not been done within two years following the injury). As the facts in this case bear out, and as the facts in several other recent decisions from the Second District Court of Appeal bear out, it is the rare case indeed where a plaintiff who is on notice of a particular injury cannot within two years (a) entertain the prospect that the injury might have been caused by negligence and (b) obtain enough information such that an attorney can utilize the provisions of Section §766.104, Florida Statutes and begin the informal discovery process with an eye towards determining whether the plaintiff has a cause of action.

Currently pending before this Court in Case No. 79,266 is the opinion of the Second District Court of Appeal in HARR v. HILLSBOROUGH COMMUNITY MEDICAL HEALTH CENTER, 591 So.2d 1051 (Fla. 2nd DCA 1991). We urge this Court to reverse HARR, although we note that pursuant to the Second District's analysis, an affirmance in HARR would not require a reversal here. That is because, as the District Court noted in its opinion below in this case, the Tanners

were aware of the identity of the health care providers who were involved with the stillbirth of their fetus. Nevertheless, HARR should be reversed because of the inappropriate and unnecessary analysis set forth in that case, and in GOODLET v. STECKLER, 586 So.2d 74 (Fla. 2nd DCA 1991).

Those cases hold that it is not sufficient for a plaintiff simply to know of his or her injury, but that the plaintiff must also know of the specific identity of the physician or hospital involved with his care in order to trigger the statute of limitations. This additional requirement is meaningless. As Judge Lehan noted in his opinion for the majority in ROGERS v. RUIZ, 16 FLW D3076, 3083 n.3, in at least 99 percent of the cases, one having notice of an injury would also have notice that the injury resulted from the medical treatment of a particular defendant. Judge Lehan goes on to note that this might not be the case in a wrongful death situation, where "what the decedent knew is not at all necessarily what the personal representative of the decedent knows." Id. Ironically, however, in wrongful death cases, there can be little doubt that the personal representative is immediately aware of the injury, and therefore has two full years to undertake an investigation which, in almost every conceivable case, would fairly promptly identify the health care provider involved.

The HARR decision bears this out, as Mrs. Harr was able to learn virtually all of the facts surrounding her son's suicide, and his involvement with health the care providers who arguably should have prevented his suicide within six months of her son's death,

and with a minimum of effort. Thus, pursuant to this Court's holdings in NARDONE, BARRON and BOGORFF, Mrs. Harr was on notice of her son's injury (i.e., death) within a few days of his death, and the statute of limitations should be held to have been triggered at that point, thus giving Mrs. Harr two years (plus an additional 240 days) in which time to file her complaint. The decisions from the Second District Court of Appeal in GOODLET, HARR and ROGERS v. RUIZ and indeed the very fact that the District Court of Appeal thought it necessary to certify the present case to this Court suggests that this Court needs to once again reaffirm the principle set forth in NARDONE, BARRON and BOGORFF, and to specifically indicate that this principle, i.e., that notice of injury or notice of the negligent act is sufficient to trigger the statute of limitations, is not restricted to the particular factual scenarios of those cases.

II. THE DISTRICT COURT CORRECTLY AFFIRMED THE DISMISSAL OF THE PLAINTIFFS' COMPLAINT, BECAUSE PLAINTIFFS FAILED TO FILE THEIR ACTION WITHIN THE STATUTE OF LIMITATIONS, EVEN AS EXTENDED PURSUANT TO §766.106(4).

The Tanners continue to misconstrue §766.104, Florida Statutes (1989). The irony of the present matter is that the Tanners mailed their letters giving their notice of intent to sue on February 12, 1990, which was shortly before the two year statute of limitations -- which was triggered on April 1, 1988 -- would have expired. Indeed, the letters were mailed only 47 days prior to the running of the statute of limitations. Unfortunately, the Tanners' counsel did not take advantage of an option which was available to him, i.e., he did not obtain an automatic 90 day extension of time by filing a nominal fee with the Clerk of the Circuit Court pursuant to Section §766.104(2) (1989), Florida Statutes.

Therefore, the only extensions which were available to the Tanners were the 90 day extension or tolling of the statute of limitations pursuant to Section §766.106(3)(a), Florida Statutes which is triggered by the mailing of a notice of intent to sue; in addition, as the statute makes clear elsewhere, the Tanners were entitled to the <u>greater</u> of either the number of days remaining on the statute of limitations when the notice letters were mailed (47 days) or 60 days.

Dr. HARTOG cannot explain this point more succinctly and accurately than did the District Court below:

> As noted, the statute of limitations commences running when the Appellants were aware of the

> stillbirth on April 1, 1988. On February 12, 1990, 47 days prior to the running of the Limitations, the Appellants tolled the Statute 90 days by filing a notice of intent to initiate medical malpractice litigation pursuant to §766.104, Florida Statutes. Thereafter, the Appellants were entitled to file suit within 90 days plus the greater of either the remainder of the statute of limitations (47 days) or 60 days. See, RHOADES v. SOUTHWEST FLORIDA REGIONAL MEDICAL CENTER, 554 So.2d 1188 (Fla. 2nd DCA 1989). Since there were fewer than 60 days remaining on the statute of limitations when the notice of intent letters were mailed, the Appellants had 150 days (90 + 60) from February 12, 1990, or until July 12, 1990 to file suit. The Appellants waited until August 1, 1990 to file; therefore, the statute of limitations bars their claims.

The Tanners' analysis of this issue is faulty because the Tanners wish to combine the 47 days that remained on the statute of limitations on February 12, 1990, with the 60 day safety valve which is allowed under the Statute. This they cannot do. See, RHOADES, supra.

III. THE TANNERS DO NOT HAVE A CAUSE OF ACTION FOR THE DESTRUCTION OF LIVING TISSUE.

For the sake of brevity, and because we believe that the court will not find it necessary to address this point, Dr. HARTOG hereby adopts the arguments made on this point by her co-Respondents.

IV. NOTICE OF INJURY IN FACT IS SUFFICIENT TO TRIGGER THE TWO YEAR STATUTE OF LIMITATIONS.

The Academy, at Page 2-3 of its Amicus Brief sets the stage for its argument as follows:

> Fairly read, and considered collectively, the numerous decisions which have construed Section §95.11(4)(b) over the last 15 years stand for the following propositions (1)the word "incident" in Section §95.11(4)(b) means an act of medical malpractice which causes an injury -- i.e., all the elements of a completed tort; (2) the statute of limitations begins to run upon discovery of the "incident" (or, of course, when the "incident" should have been discovered with the exercise of due diligence -- and where the word "discovery" appears in the remainder of this Paragraph, it includes that qualification); (3) discovery of the "incident" need not necessarily await discovery of each element of the tort; (4) knowledge of the negligent act which has caused an injury will start the statute of limitations running; (5) where the plaintiff has knowledge of only an "injury in fact" and the injury is reasonably ambiguous concerning its cause, the statute of limitations begins to run only upon discovery of the larger set of facts constituting the "incident" -- i.e., that the ambiguous injury was actually the consequence of the negligent act rather than some non-negligent act or a natural cause; and (6) when the plaintiff has knowledge of an injury which itself gives facial notice (or "constructive notice") that it was the probable consequence of a negligent act, the plaintiff has discovered the "incident" and the statute of limitations has begun to run.

Despite the clear holdings of NARDONE, BARRON and BOGORFF, the Academy insists upon complicating and obfuscating the message of those cases, i.e., in order to trigger the statute of limitations, the plaintiff need only know of either his or her injury or the negligence of his or her physician, but not both.

The Academy is correct when it points out that quite often it cannot be determined as a matter of law when a plaintiff knows of his or her injury. When that is the case, then the question of when the statute of limitations commenced must necessarily go to a jury. However, the issue of whether notice of the injury is sufficient to trigger the running of the statute of limitations is a factual inquiry, not a legal one. The moment that the Academy's concept of a "legal injury" is accepted as part of this analytical matrix, the holdings of this Court in NARDONE, BARRON and BOGORFF mean nothing.

We favor the adjective "distinct" over the adjective "legal" for purposes of describing when notice of an injury is sufficient to trigger the running of the two year statute of limitations for medical malpractice cases. First, the adjective "distinct" keeps the inquiry factual in nature, as it should be. By focusing on the term "distinct" injury, the "bad knee" cases, such as TILLMAN, upon which the Academy rests its argument, can properly be seen as cases where the plaintiff was not aware at all that he or she had suffered an injury. Obviously, when a plaintiff goes into surgery with a bad knee, and comes out with a bad knee, the plaintiff cannot necessarily be said to be on notice as a matter of law that

he or she has even sustained an injury.

Stripped to its essentials, the Academy's analysis suggests two categories of cases concerning discovery of injury. These categories, numbers 5 and 6 above, are a complete fiction on the part of the Academy -- and, it is submitted, wholly inaccurate fictions. As we will soon discover, the overwhelming majority of the cases which the Academy attempts to pigeon-hole into category number 5 are really cases where either the plaintiff's injury or the defendant's negligent act was fraudulently concealed by the defendant.

The Academy would take the clear holdings in NARDONE, BARRON and BOGORFF -- which were not limited to their facts, but which speak to the fashion in which the statute of limitations for medical malpractice actions is intended to be interpreted -- and relegate them to category six, i.e., those cases where knowledge of the injury gives notice that it must have been caused by a negligent act.

We will also demonstrate that the category 6 cases -- the Academy admits of only three (NARDONE, BARRON and BOGORFF) -- do not even fit the pigeon-hole which has been created for them by the Academy. For one thing, the category 6 definition, i.e., injuries which carry with themselves the obvious prospect of negligence, would be impossible to apply. This point is made most eloquently by the divergence of opinion among the various treating physicians in UNIVERSITY OF MIAMI, INC. v. BOGORFF, 583 So.2d 1000, 10003 n.1 (Fla. 1992), which will be set forth in detail, infra.

THE FICTION OF CATEGORY #5

According to the Academy, "the complication [in applying the statute of limitations] arises from the fact that some injuries provide constructive notice of negligence, and some do not." Perhaps so, but the Academy has focused on the wrong inquiry. The appropriate inquiry is whether or not the plaintiff knows that he or she has sustained an injury at all; it is of no consequence whether the injury provides actual or even constructive notice of negligence. The vast majority of the cases which the Academy suggests fall within category number 5, i.e., knowledge of an injury in fact but one which is "ambiguous concerning its cause," are actually cases where it could not be said conclusively that the plaintiff was on notice of an injury at all.

In fact, without belaboring the obvious, the precise purpose of this particular statute is to provide a two year period of inquiry which will allow a lay person (generally through counsel) to conduct the investigation which is necessary to determine if an injury was at least arguably caused by an act of medical malpractice, once there is notice of that injury. No one actually makes that final determination of negligence -- yea or nea -- until a jury resolves any action that is ultimately filed.

We have already made this point with respect to MOORE in Part I of this brief, infra. There, the Moores were not on notice at all that their child had been rendered mentally retarded at the time of birth, nor could they have been, as the condition remained undiagnosable for several years. Exemplary of this line of cases

are the so called "bad knee" cases which the Academy places in category number 5. See, e.g., FLORIDA PATIENTS COMPENSATION FUND v. TILLMAN, 453 So.2d 1376 (Fla. 4th DCA 1984), aff'd 487 So.2d 1032 (Fla. 1986); COHEN v. BAXT, 473 So.2d 1340 (Fla. 4th DCA 1985), aff'd 488 So.2d 56 (Fla. 1986).[10]

This point is made nicely by the very first post-BARRON decision by a district court of appeal in VARGAS v. GLADES GENERAL HOSPITAL, 566 So.2d 282 (Fla. 4th DCA 1990). In 1979, sixteen month old Marisol Vargas was taken to Glades General Hospital because she was having seizures. When the family physician (Dr. Piedra) arrived, he tried unsuccessfully to administer an intravenous anti-convulsant medication. Marisol's father later testified that she turned cyanotic (blue) while in the Glades Hospital Emergency Room. She was transferred first to Hendry General Hospital under the care of Dr. Valiant, and ultimately to Variety Children's Hospital in Miami. She remained in Variety Children's Hospital for two months and went through extensive diagnostic testing. Her parents were told that she had experienced brain damage as a result of the seizures, but that maybe she would

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[10] The Academy's treatment of TILLMAN is superficial to say the least. Not only was the TILLMAN holding premised in part upon Dr. Waxman's fraudulent concealment of the plaintiff's injury, it was also premised in part on a secondary injury which had nothing to do with the mismatched prosthesis. Dr. Waxman's counsel conceded that the plaintiff could not possibly have known of that injury. These factors from the TILLMAN decision (which do not fit the Academy's analysis) heavily influenced the court's opinion in COHEN v. BAXT, 473 So.2d 1340 (Fla. 4th DCA 1985), which was affirmed by this Court without discussion in FLORIDA PATIENTS COMPENSATION FUNDS v. COHEN, 488 So.2d 56 (Fla. 1986).

"outgrow it." 566 So.2d at 283-84. Although Marisol eventually regained her sight, she never learned to walk, talk or feed herself. When her parents filed suit many years after the incidents in question, they claimed that the Statute had not run either because the Hospital had fraudulently concealed material information or because they were not on notice of an injury which was the consequence of a negligent act. 566 So.2d at 284.

The District Court of Appeal first disposed of the fraudulent concealment argument. The court noted that since the Hospital had no contact with Marisol or her parents after the child left the Hospital on the night of October 10, 1979, and because the knowledge which was allegedly concealed (her blue condition) was already known by the parents as a result of their own observations, there had been no fraudulent concealment. 566 So.2d at 285.

In response to an argument which is similar to the argument championed by the Academy on this appeal, i.e., that the parents did not know that the condition was permanent, the court made the following pertinent observations:

> The proper inquiry is whether they were on notice that her condition was an "injury." Thus, we distinguished this case from BROOKS v. CERRATO, 355 So.2d 119 (Fla. 4th DCA 1978), and SWAGEL v. GOLDMAN, 393 So.2d 65 (Fla. 3d DCA 1981), as well as FLORIDA PATIENTS COMPENSATION FUND v. TILLMAN, 453 So.2d 1376 (Fla. 4th DCA 1984) aff'd., 487 So.2d 1032 (Fla. 1986), which dealt with post-surgery symptoms which the respective plaintiffs did not realize were an injury but instead believed and were told by their doctors were normal

> post-operative symptoms which would improve
>
> * * *
>
> In BARRON v. SHAPIRO... the Supreme Court reaffirmed the principle set forth in NARDONE and reaffirmed in MOORE v. MORRIS,... that the statute of limitations begins to run when the plaintiffs knew or should have known either that an injury or negligence had occurred. In doing so it reversed this Court's holding that notice of physical injury alone, without knowledge that it resulted from a negligent act, does not trigger the statute of limitations... Thus, it is clear that the triggering event for the statute of limitations in this case was the Vargas' knowledge of the injury to their child, not the knowledge that the injury was caused by a negligent act.

566 So.2d at 286(citations omitted).[11] [12]

Thus, the Fourth District Court of Appeal has confirmed our point with respect to TILLMAN, and many of the other "category 5" cases relied upon by the Academy. The Academy's suggestion that the Fourth District Court of Appeal has squarely rejected our

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[11]It is incomprehensible that the Academy could argue that this holding is consistent with their position, as they do at Footnote 1, Page 10 of their Amicus Brief. Perhaps the Academy, as Amicus, believes that it enjoys considerable artistic license.

[12]Like BROOKS, SWAGEL and TILLMAN, SEWELL v. FLYNN, 459 So.2d 372 (Fla. 1st DCA 1984), involves post-surgery symptoms where the plaintiff did not realize that there was a distinct injury. See also, ASH v. STELLA, 457 So.2d 1377 (Fla. 1984)(plaintiff not on notice that her cancerous condition existed at the time that she was examined by prior physician simply because subsequent physician made a tentative diagnosis at a later date; moreover, claim filed within two years of date upon which diagnosis (notice of injury) was confirmed).

reading of BARRON and BOGORFF in a post BARRON decision, e.g., SOUTHERN NEUROSURGICAL ASSOC., P.A. v. FINE, 591 So.2d 252, 256 (Fla. 4th DCA 1991), is itself refuted by VARGAS. In fact, the Fourth District Court of Appeal's opinion in FINE does not even present sufficient factual information to determine whether or not it is consistent with the Academy's reading of BARRON and BOGORFF.

Virtually all of the cases which fall within the Academy's category 5 are cases wherein the health care provider fraudulently concealed either the injury or the negligence. In addition to MOORE v. MORRIS, the following cases involved allegations of fraudulent concealment which, perforce, preclude any determination as a matter of law as to when the statute of limitations began to run: NORSWORTHY v. HOLMES REGIONAL MEDICAL CENTER, 17 FLW D868 (Fla. 5th DCA, opinion filed April 3, 1992) (subsequent treating physician told Mrs. Norsworthy that defendant physician had not deviated from the standard of care); FLORIDA PATIENTS COMPENSATION FUND v. TILLMAN, 487 So.2d 1032 (Fla. 1986) (defendant doctor continuously assured plaintiff that he was improving); SHAFER v. LEHRER, 476 So.2d 791 (Fla. 4th DCA 1985) (plaintiff's reasonable efforts to obtain the medical records from physicians were thwarted and the true facts concealed from her); FLORIDA PATIENTS COMPENSATION FUND v. SITOMER, 524 So.2d 671 (Fla. 4th DCA), rev'd dismissed, 531 So.2d 1353 (Fla. 1988), and quashed in part on other grounds, 550 So.2d 461 (Fla. 1989) (doctor assured plaintiff that breast implants were not being rejected, that she did not have an infection, and that she should not worry); ELLIOTT v. BARROW, 526

So.2d 989 (Fla. 1st DCA 1988) (defendant assured the plaintiff that no harm had resulted from the defendant's treatment of the plaintiff); PHILLIPS v. MEASE HOSPITAL AND CLINIC, 445 So.2d 1058 (Fla. 2nd DCA 1984) rev'd denied, 453 So.2d 44 (Fla. 1984) (physicians concealed the cause of plaintiff's problems and continued to treat the plaintiff and to intentionally misrepresent to her that her problems were normal and not due to negligent care), BROOKS v. CERRATO, 355 So.2d 119 (Fla. 4th DCA), cert. denied 361 so.2d 831 (Fla. 1978) (some indication in the record of affirmative misrepresentation by surgeon as to damaged nerve during surgery which patient assumed was temporary post operative symptom) SWAGEL v. GOLDMAN, 393 So.2d 65 (Fla. 3d DCA 1981) (surgeon informed plaintiff that post surgical incontinence would resolve itself); ALMENGOR v. DADE COUNTY, 359 So.2d 892 (Fla. 3d DCA 1978) (nurse actively and successfully mislead plaintiffs as to baby's true physical condition).

THE FICTION OF CATEGORY 6

The Academy relies heavily upon the recent decision of the Fifth District Court of Appeal in NORSWORTHY v. HOLMES REGIONAL MEDICAL CENTER, INC., 17 FLW D868 (Fla. 5th DCA opinion filed April 3, 1992) which virtually parrots the brief of the Academy in this case.[13] The opinion in NORSWORTHY runs afoul of this Court's decisions in NARDONE, BARRON and BOGORFF for the same reason that

[13]This Court should take note that the Norsworthys were represented before the Fifth District Court of Appeal by the same attorney who filed the brief on behalf of the Academy in this matter.

the Academy's position in this case must fail. However, the result in NORSWORTHY could be affirmed alternatively because there are allegations of fraudulent concealment on the part of health care providers. 17 FLW D868.

The Fifth District Court of Appeal's analysis of BOGORFF and BARRON cannot be rationally reconciled with those decisions. Consistent with the Academy's position in its Amicus Brief, the Fifth District Court of Appeal noted in NORSWORTHY that:

> Perhaps we read BOGORFF and BARRON too optimistically, but we believe those cases simply stand for the proposition that when the nature of the bodily damage that occurs during medical treatment is such that, in and of itself, it communicates the possibility of medical negligence, then the statute of limitations begins to run. On the other hand, if there is nothing about an injury that would communicate to a reasonable lay person that the injury is more likely a result of some failure of medical care than a natural occurrence that can arise in the absence of medical negligence, the knowledge of the injury itself does not necessarily trigger the running of the statute of limitations.

17 FLW at D869. Thus, the Fifth District Court of Appeal interpreted BOGORFF and BARRON as narrowly as the Academy does before this Court. Thereafter, the Fifth District honored this Court's opinion in BARRON in the breach by noting that:

> In discussing MOORE v. MORRIS in the BARRON case, the Supreme Court did say:
>
> > The District Court of Appeal misinterpreted

> MOORE [v. MORRIS] when it said that knowledge of physical injury alone, without knowledge that it resulted from a negligent act does not trigger the statute of limitations.
>
> BARRON, 565 So.2d at 1321. We do not believe the Supreme Court intended by this statement that knowledge of physical injury alone will always trigger the statute of limitations; merely that it is erroneous to suppose that knowledge of injury alone cannot trigger the statute. Some injuries, as in NARDONE, BARRON and BOGORFF, speak for themselves and supply notice of a possible invasion of legal rights.

17 FLW at D869.

The Fifth District's analysis and treatment of this Court's opinions in NARDONE, BARRON And BOGORFF is the mirror image of the position taken by the Academy. But the entire creation -- and a creation it is -- of category 6 for what are inarguably this Court's three most important statute of limitations decisions is pure folly.

First, the Academy would have NARDONE, BARRON and BOGORFF restricted to such an extent that the rule of law set forth in NARDONE and reiterated in BARRON and BOGORFF applies only to the factual scenario presented in those three cases! The Academy's analysis of these cases collapses upon itself. Why would this Court make the pronouncement -- three separate times -- that the knowledge that is necessary to trigger the running of the statute of limitations is knowledge of <u>either</u> the injury <u>or</u> the negligence,

if that rule of law holds up only where knowledge of injury is tantamount to knowledge of negligence?

BOGORFF DOES NOT FIT THE PATTERN

Unlike the Academy and the Fifth District Court of Appeal, we do not believe that it is an easy matter to determine precisely what constitutes a "category 6" injury. Who is to decide that an injury is so obvious that it "smacks" of negligence? The Academy suggests that the injury in BOGORFF obviously pointed to negligence on the part of Dr. Koch; but a review of the medical record in that case reveals a great deal of uncertainty about the cause of the injury. The alleged negligence in BOGORFF was the administration of an intraspinal injection of a drug known as methotrexate, as a treatment regimen for Adam Bogorff's leukemia. 583 So.2d at 1001. Within three months of the administration of the drug, Adam suffered convulsions and lapsed into a coma. Within one year, he was a quadriplegic and has suffered severe brain damage. Id.

According to the Academy, these injuries were so severe, abrupt and inconsistent with a non-negligent explanation that they are one of only three instances in the last fifteen years of Florida jurisprudence where it can be said that notice of the injury was in and of itself notice of negligence. Yet these injuries -- which the Academy argues were "obviously" caused by negligence -- were a matter of much dispute among Adam Bogorff's physicians.

Dr. Giesecke, a neurologist, wrote a letter to Dr. Koch (the defendant), and offered three possibilities as to the type of brain

damage: localized leukemic implant, multi-focal leuko-encephalopathy, or subcortical demyelination. Dr. Cullen, who had roused Adam from his coma, attributed his condition to "some type of peculiar encephalopathy, either related to his leukemia, radiation, or perhaps related to a folic acid deficiency accompanying use of methotrexate. Finally, Dr. Winick, in yet another letter to Dr. Koch, noted that "whether this whole business is secondary to mexothotrexate is difficult to ascertain." See generally, UNIVERSITY OF MIAMI v. BOGORFF, 583 So.2d at 1002-03 n.1.

As this Court noted in BOGORFF (addressing the issue of fraudulent concealment):

> Differing expert opinions generally do not amount to fraudulent concealment or misrepresentation when there are other equally, or more likely causes of a patient's condition.

Clearly, neither the physicians who followed Adam Bogorff's condition nor this Court were prepared to state that Adam Bogorff's injuries fell within what the Academy argues is an unequivocal category 6 injury, i.e., an injury that obviously had to have been caused by an act of negligence. Of course, it would never have occurred to this Court to make such a distinction; according to this Court's opinions in NARDONE, BARRON and BOGORFF, it is not necessary that an injury carry with it notice of any negligence in order to trigger the statute of limitations.

The Academy has failed to cite to this Court the decision in HUMBER v. ROSS, 509 So.2d 356 (Fla. 4th DCA 1987), presumably

because it also does not fit within the Academy's analysis. In that case, Mr. Humber fell out of his hospital bed (allegedly as a result of negligence in the physician's prescription of drugs, and the hospital's negligence in failing to adequately monitor the patient). The fall caused Mr. Humber to break his hip, an injury which was in fact made known to him and to his wife immediately. Nevertheless, he failed to file suit within two years. 509 So.2d at 357.

The Fourth District Court of Appeal relied upon this Court's decision in NARDONE as follows:

> NARDONE states also that the limitation period commences when the plaintiffs have knowledge of the physical condition and drastic change therein but do not know of the causal connection of the defendant's acts or failure to act.

509 So.2d at 359. We believe that the Fourth District Court of Appeal's use of the adjective "drastic" was meant to do nothing more than to suggest that in situations where the plaintiff already suffers from some type of condition, the plaintiff must be made aware of a further injury in order to trigger the statute of limitations. This analysis is consistent with our view of those category 5 cases where the plaintiff was not on notice of an injury at all. Nevertheless, the injury need not be of such a nature that it leads ineluctably to the conclusion that it was caused by negligence. All that is necessary is notice of a separate and distinct injury, i.e., something that is different in kind from the condition which is being treated by the physician. That is the

holding in NARDONE, BARRON, BOGORFF, VARGAS and HUMBER v. ROSS.[14]

In this case, Mrs. Tanner was admitted to the hospital with the expectation that she would deliver a happy and healthy baby. The following morning, when she was informed that her child had been stillborn, she most certainly was on notice of a distinct injury. Whether or not she should have immediately realized or even suspected that this injury was caused by negligence is not the issue here.

The Academy's position that the medical malpractice statute of limitations is not triggered until the plaintiff has notice of an injury which because of its nature suggests that it was caused by negligence is nothing more than an attempt to engraft the standard for determining when a products liability cause of action must be commenced onto the analysis which is appropriate for determining when a medical malpractice cause of action must be filed. Yet these tests and the relevant statutes are distinct. See, UNIVERSITY OF MIAMI, INC. v. BOGORFF, 583 So.2d 1000 (Fla. 1991); BABUSH v. AMERICAN HOME PRODUCTS CORP., 589 So.2d 1379 (Fla. 4th DCA 1991). The Academy's position is a reprise of the requirement in a product liability action that the statute of limitations begins to run only when both the "moment of trauma" and the "moment of realization" have occurred. See STEINER v. CIBA-GEIGY CORP.,

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[14]The HARR, ROGERS, and GOODLET decisions from the Second District follow a modified version of BARRON and BOGORFF which requires notice of injury and notice of the fact that the injury occurred in the context of medical treatment or intervention. Those decisions, however, do not require the plaintiff to have notice, constructive or otherwise, that the injury actually resulted from negligence.

364 So.2d 47, 53 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 461 (Fla. 1979).

In this regard, a review of how the Third District Court of Appeal interpreted STEINER in its opinion in BOGORFF v. KOCH, 547 So.2d 1223, 1228 (Fla. 3d DCA 1989) is important:

> Although at times the moment of trauma and the moment of realization may coincide, there are instances in which the trauma is not of a type which would give rise to the realization that it was caused by negligence.

547 So.2d at 1228 (quoting STEINER v. CIBA-GEIGY, supra, 364 So.2d at 53). If the word "injury" is substituted in the above quotation for the word "trauma," then the above quotation is identical to the position of the Academy in this case. Of course, this Court revised the Third District in BOGORFF. As the Fourth District Court of Appeal noted in BABUSH v. AMERICAN HOME PRODUCTS, CORP., supra, the difference is that in a medical malpractice cause of action, notice of either the injury or the negligence is sufficient to trigger the statute of limitations, whereas in a product liability action, there must be notice of both the injury and a causal connection to the use of the product. 589 So.2d at 1381.

THE ACADEMY AS LOBBYIST

It should be obvious by now that the Academy is simply trying to convince this Court to modify it decisions in NARDONE, BARRON and BOGORFF virtually out of existence. The Academy has been busy elsewhere as well. Attached as an Appendix hereto is a copy of House Bill Number 625 which was introduced during this spring's

legislative session, but not adopted. This House Bill, if passed, would have inserted into Florida Statute §95.11(4)(b) the following language:

> Knowledge of an injury without knowledge that the injury resulted from malpractice does not constitute discovery of the incident.

The proof is in the pudding with respect to this attempt to amend the statute of limitations. There would be no need to amend the statute to add the above quoted language if NARDONE, BARRON and BOGORFF are to be interpreted as the Academy interprets them. Suffice it to say, the Academy's position is simply wrong. Neither Florida Statute §95.11(4)(b), nor this Court's decisions in NARDONE, BARRON and BOGORFF require the plaintiff to have knowledge that the injury resulted from malpractice before the limitations period begins to run.

CONCLUSION

For the reasons set forth in this brief, Dr. Hartog respectfully requests this Court to answer the certified question in the affirmative, and to issue an opinion consistent with NARDONE, BARRON, BOGORFF which specifically rejects the arguments fostered by the Academy in their amicus brief.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 14th day of July, 1992 to: Kennan Dandar, Esquire, Dandar & Dandar, P.A., PO Box 24597, 1009 No. O'Brien Street, Tampa, FL 33623-4597; Marilyn Drivas, Esquire, PO Box 2378, Tampa, FL, Charles Canady, Esquire, PO Box 3, Lakeland, FL 33802-0003.

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By: _____
ROBERT M. KLEIN, ESQ.

IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 79,390
SECOND DISTRICT APPEAL NO. 91-00057

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

Petitioner,

v.

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

Respondents.

APPENDIX TO RESPONDENTS ELLIE M. HARTOG, M.D. AND HARTOG & DUBOY, P.A.'S BRIEF

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TABLE OF CONTENTS TO APPENDIX

introduced Jan. 14, 1992
last action March 11, 1992

Florida House of Representatives - 1992 **CS/HB 625***

By the Committee on Judiciary and Representative Burke

A bill to be entitled

An act relating to limitations of actions; amending s. 95.11, F.S.; extending the period for bringing a malpractice claim against attorneys when fraud, concealment, or intentional misrepresentation prevents filing within the 2-year limitation period; specifying action which triggers statute of limitations in medical malpractice cases and providing for extension for certain purposes; reenacting ss. 95.051(1)(h), 766.106(4), and 768.28(12), F.S., relating to when limitations are tolled, notice of intent to initiate medical malpractice litigation, and sovereign immunity waiver in medical malpractice actions, to incorporate said amendment in references thereto; creating s. 766.317, F.S.; providing that the provisions of ch. 766, F.S., do not apply to prisoners in state, county, or municipal detention facilities; providing an effective date and providing retroactive applicability.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraphs (a) and (b) of subsection (4) of section 95.11, Florida Statutes, are amended to read:

95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

(4) WITHIN TWO YEARS.--

CODING: Words stricken are deletions; words underlined are additions.

(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; 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. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional. However, for an attorney authorized to practice law under rules adopted by the Florida Supreme Court, in an action covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 2-year period, the period of limitations is extended until 4 years after the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event more than 7 years after the date the incident giving rise to the injury occurred.

(b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued. Knowledge of an injury without knowledge that the injury resulted from malpractice does not constitute discovery of the incident. An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. The limitation of

actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the incident injury within the 4-year period, the period of limitations is extended forward 2 years from the time that the incident injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred.

Section 2. For the purpose of incorporating the amendment to section 95.11, Florida Statutes, in reference thereto, the subdivisions of Florida Statutes set forth below are reenacted to read:

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:

(h) 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).

766.106 Notice before filing action for medical malpractice; presuit screening period; offers for admission of liability and for arbitration; informal discovery; review.--

(4) The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations in an extended period, 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.

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.--

(12) Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues, except that an action for contribution must be commenced within the limitations provided in s. 768.31(4), and an action for damages arising from medical malpractice must be commenced within the limitations for such an action in s. 95.11(4).

CODING: Words stricken are deletions; words underlined are additions.

Section 3. Section 766.317, Florida Statutes, is created to read:

766.317 Inapplicability to prisoners.--The provisions of this chapter may not be used by an inmate or prisoner who is incarcerated within the state correctional system or within a county or municipal detention facility or who has previously been incarcerated within the state correctional system or county or municipal detention facility for purposes of filing a claim arising out of circumstances that occurred during the period of incarceration.

Section 4. This act shall take effect upon becoming a law, and shall apply retroactively to pending causes of action.

This publication was produced at an average cost of 1.12 cents per single page in compliance with the Rules and for the information of members of the Legislature and the public.

CODING: Words stricken are deletions; words underlined are additions.

BY the Committee on Health and Rehabilitative Services, and Senator Langley

Introduced Jan. 14, 1992
Last action Feb. 25, 1992

300-1983-92

A bill to be entitled

An act relating to limitations of actions; amending s. 95.11, F.S.; extending the period for bringing a malpractice claim against attorneys when fraud, concealment, or intentional misrepresentation prevents filing within the 2-year limitation period; specifying action which triggers statute of limitations in medical malpractice cases and providing for extension for certain purposes; reenacting ss. 95.051(1)(h), 768.28(12), F.S., relating to when limitations are tolled and sovereign immunity waiver in medical malpractice actions, to incorporate said amendment in references thereto; amending s. 766.106, F.S.; providing for the period in which to file suit in medical malpractice actions after receipt of notice of termination of negotiations; providing an effective date and providing retroactive applicability.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraphs (a) and (b) of subsection (4) of section 95.11, Florida Statutes, are amended to read:

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(4) WITHIN TWO YEARS.--

(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort;

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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. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional. However, for an attorney authorized to practice law under rules adopted by the Florida Supreme Court, in an action covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 2-year period, the period of limitations is extended until 4 years after the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event more than 7 years after the date the incident giving rise to the injury occurred.

(b) An action for medical malpractice shall be commenced within 2 years from the time the malpractice ~~incident giving rise to the action occurred or within 2 years from the time the incident is~~ discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued. Discovery of a physical or mental injury without knowledge that the injury resulted from malpractice does not constitute knowledge of the malpractice. An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. The limitation of actions within this subsection shall be limited to the health care provider and persons in

CODING: Words stricken are deletions; words underlined are additions.

privity with the provider of health care. In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the malpractice ~~injury within the 4-year period~~, the period of limitations is extended forward 2 years from the time that the malpractice injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred.

Section 2. Subsection (4) of section 766.106, Florida Statutes, is amended to read:

766.106 Notice before filing action for medical malpractice; presuit screening period; offers for admission of liability and for arbitration; informal discovery; review.—

(4) The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations ~~in an extended~~ period, 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.

Section 3. For the purpose of incorporating the amendment to section 95.11, Florida Statutes, in reference thereto, the subdivisions of Florida Statutes set forth below are reenacted to read:

95.051 When limitations tolled.--

CODING: Words stricken are deletions; words underlined are additions.