IN THE SUPREME COURT OF FLORIDA

PHYLLIS K. TANNER, individually, and JAMES R. TANNER, individually, and as Personal Representative of the Estate of Baby Boy Tanner, deceased,

Petitioners,

vs.

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

Respondents.
_____/

SUPREME COURT CASE NO. 79,390

District Court of Appeal
2d District - No. 91-0057

ANSWER BRIEF OF RESPONDENTS, ALBERTO DuBOY, M.D., and HARTOG AND DuBOY, P.A.

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

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INTRODUCTION

Within this Brief, Plaintiff/Appellants, Phyllis Kaye Tanner, individually, and James R. Tanner, individually and as personal representative of the Estate of Baby Boy Tanner will be collectively referred to as "**Petitioners.**"

Defendants/Appellees, Alberto DuBoy, M.D. ("DuBoy") and Hartog and DuBoy, P.A. (the "P.A.") will be collectively referred to as "**Respondents.**"

The Second District Court of Appeal will be referred to as the "**Second District.**"

The complaint and amended complaint filed by Petitioners will be collectively referred to as the "**Complaint.**"

The Notice of Intent to Initiate Litigation (pursuant to §766.106(4), Fla. Stat. and §768.57(4), Fla. Stat.) will be referred to as the "**Notice.**"

"**R**" refers to the Record on appeal.

JURISDICTIONAL STATEMENT

I. Certified Question

Pursuant to Rule 9.030(a)(2)(A)(v), this Court may exercise its discretionary jurisdiction to review the decision of the Second District that passes upon a question certified to be of great public importance. In its opinion filed January 31, 1992, the Second District certified the following question to this Court as 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 SECTION 95.11(4)(b), FLORIDA STATUTES (1989).

Respondents respectfully request that this Court to rephrase the Certified Question to conform to the allegations contained within the Petitioners' Complaint. In this case, Phyllis Tanner saw her treating obstetricians/gynecologists, Drs. Hartog and Duboy, on March 31, 1988. At that time, Mrs. Tanner was at approximately 41 weeks gestation and the fetus was alive. However, when delivered several hours later, the fetus was dead. Mrs. Tanner was under the care of one or more of the defendant health care providers during the entire intervening period. Certainly, these additional facts bear upon the "obviousness" of the injury. Should this Court accept jurisdiction as to the Certified Question, Respondents respectfully request that it be rephrased as follows to take into account the specific facts of the instant case:

WHETHER, AS A MATTER OF LAW, THE STILLBIRTH OF A CHILD, ***WHICH WAS A FETUS, "ALIVE," WHEN THE MOTHER ENTERED THE CONTINUOUS CARE OF ONE OR MORE OF THE DEFENDANT HEALTH CARE PROVIDERS AND IS THEN STILLBORN,*** IS SUCH AN OBVIOUS INJURY AS TO PLACE A PLAINTIFF ON NOTICE OF THE POSSIBLE INVASION OF THE PLAINTIFF'S LEGAL RIGHTS TO COMMENCE THE LIMITATIONS PERIOD UNDER SECTION 95.11(4)(b), FLORIDA STATUTES (1989).

II. Conflict

Petitioners request that this Court accept jurisdiction over issues II and III of their initial brief in that "the decision of the Second District expressly and directly conflicts with decisions of other district courts of appeal and the Supreme Court on the same question of law." Rule 9.030(a)(2)(A)(iv). First, when seeking to invoke the Supreme Court's discretionary jurisdiction pursuant to the aforementioned rule, Rule 9.120(d) requires that Petitioners file a brief limited "solely to the issue of the Supreme Court's jurisdiction." Petitioners filed no such brief in this case. Petitioners have blatantly disregarded the Florida Rules of Appellate Procedure and have attempted to bring before this Court issues over which jurisdiction is not proper. Furthermore, Petitioners have not adequately demonstrated the existence of an express and direct conflict to invoke this Court's jurisdiction. In fact, a reading of the cases cited by Petitioners only lends credence to the Second District's decision in this case.

STATEMENT OF THE CASE AND FACTS

Respondents accept Petitioners' Statement of the Case and Facts as set forth in Petitioners' Brief at pages 1-5, with the corrections, clarifications and additions set forth below.

1. Petitioners state that baby James Tanner, II was delivered stillborn on March 31, 1988, yet Letters of Administration attached to the Petitioners' Amended Complaint as Exhibit "A" reflects the date of death as April 1, 1988. Although the discrepancy in the date of stillbirth is of no moment, it is raised so as to avoid any confusion. For purposes of this answer brief, in particular the calculation of the limitations period, Respondents have considered April 1, 1988 to be the date of the stillbirth and the commencement of the statute of limitations.

2. Petitioners refer to the medical opinion of Marvin Krane, M.D. as having particular significance in the instant case (Petitioners' Brief, p. 2). Any references to Krane's opinion or affidavit are improper as being outside the record and the references to same on pages 2, 22 and 29 of Petitioners' Brief, should be disregarded.

3. Petitioners state, "Notice of Intent to Litigate was served upon the Defendants by letter dated February 12, 1990." (Petitioners' Brief, p.2). Petitioners failed to notify Hartog and DuBoy, M.D., P.A., in accordance with §766.106, Fla. Stat.

SUMMARY OF THE ARGUMENT

The Petitioners challenge the Second District's decision affirming the trial court's dismissal of Petitioners' Complaint. The trial court ruled that the Petitioners' Complaint was barred by the applicable two-year statute of limitations for medical malpractice actions. §95.11(4), Fla. Stat. (1989). Because the result reached by the Second District is correct under several analyses, this Court should approve the result and the decision in this case.

This appeal arises out of the Petitioners' attempt to avoid the consequences of the failure by Petitioners' counsel to file a Complaint within the time allowed by the applicable two year statute of limitations. §95.11(4), Fla. Stat. (1989). Within two years after the stillbirth, Petitioners contacted legal counsel who mailed a Notice of Intent to Initiate Litigation to certain of the Respondents. It is clear that Petitioners began some degree of investigation within the statute of limitations period. Petitioners' counsel miscalculated the date by which the Complaint was to be filed and then failed to file it within the two year statute of limitations as extended by the applicable tolling provision. The trial court properly dismissed the Petitioners' Complaint; the Second District affirmed. This Court should approve the actions of the lower courts.

This Court has previously held that the statute of limitations for medical malpractice actions commences to run when a plaintiff knew or should have known either of the injury or the

negligent act. At the time the fetus was stillborn in the instant case, Petitioners were on notice of a possible invasion of their legal rights. The statute of limitations which commenced to run at that time, expired prior to the filing of the Complaint.

Petitioners' argument that the Second District erred in the computation of the statute of limitations deadline is wholly without merit. Florida law requires that prior to filing a medical malpractice claim, a plaintiff must mail to all prospective defendants, a notice of intent to initiate litigation. This notice must be mailed within the applicable statute of limitations period, whereupon the statute of limitations is tolled for 90 days. At the conclusion of the 90-day tolling period, the plaintiff must file a Complaint within the period which is the greater of 60 days or the time remaining in the statute of limitations period (in this case, 47 days). In this case, the Petitioners waited more than 60 days to file the Complaint. Petitioners' suggestion that the statute of limitations has somehow been curtailed in the instant case is untenable.

ARGUMENT

I. THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION AFFIRMATIVELY AND DETERMINE THAT A 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 AND TO COMMENCE THE LIMITATIONS PERIOD UNDER SECTION 95.11(4)(b), FLORIDA STATUTES (1989)

The Second District certified the following question as 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 SECTION 95.11(4)(b), FLORIDA STATUTES (1989).

Tanner v. Hartog, 17 F.L.W. D433 (Fla. 2d DCA Jan. 31, 1992)

In obeyance to the doctrine of stare decisis, the Certified Question must be answered in the affirmative consistent with this Court's holdings in University of Miami v. Bogorff, 583 So. 2d 1000 (Fla. 1991), Barron v. Shapiro, 565 So. 2d 1319 (Fla. 1990), and Nardone v. Reynolds, 333 So. 2d 25 (Fla. 1976). These cases establish the parameters of the types of notice which trigger the medical malpractice statute of limitations -- either notice of injury or notice of the negligent act. Upon the delivery of a stillborn fetus at a time and date certain, the mother has notice of injury and thus has notice of a possible invasion of her legal rights. At that time, she has sufficient facts to begin an investigation of whether something may have gone wrong during the delivery.

No matter what analysis this Court decides to employ in this case to answer the Certified Question, the Second District's

decision should be affirmed. The dismissal of the Complaint in this case is consistent with existing precedent regarding the statute of limitations in medical malpractice cases. Likewise, the dismissal of the Complaint is consistent with other slightly varied interpretations of the law pertaining to the commencement of the statute of limitations in such cases. Under any of the theories discussed in this brief, the trial court was correct in dismissing the Complaint.

A. This Court's Holdings in Nardone, Barron and Bogorff Should be Applied in the Instant Case to Uphold the Trial Court's Dismissal of Petitioners' Complaint.

The statute of limitations for medical malpractice actions provides in pertinent part:

> 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.

§ 95.11(4)(b), Fla. Stat. (1989). This Court has long adhered to the well-established principle that the statute of limitations in a medical malpractice action begins to run when the plaintiff has notice of either the injury or the negligent act giving rise to such a claim. Once notice of either element is established, it is clear that the plaintiff should know of a possible invasion of his or her legal rights. Bogorff; Barron; Nardone. See also City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954).

In Nardone, this Court, in answering the question certified affirmatively, held that in a medical malpractice case the period of limitations commences when:

> the parents and legal guardian of the incompetent minor have (i) knowledge of the physical condition and the drastic change therein during the course of medical treatment, but (ii) do not then have (or are not charged with having) knowledge that such physical - mental condition was caused in whole or in part by acts or non-acts of the alleged malpractitioner.

Nardone, 333 So. 2d at 27.

More recently in Barron, this Court again held that the limitations period commences when the plaintiff knew or should have known either of the injury or the negligent act. Barron, 565 So. 2d at 1322 (emphasis added). In that case, Mr. Shapiro underwent surgery on his colon in August 1979. Following the operation, he developed a serious infection which resulted in his loss of sight, some four months later. In January 1982, an independent doctor opined that Mr. Shapiro's blindness was caused by Dr. Barron's negligence. Shortly thereafter, the Shapiros instituted a medical malpractice action against Dr. Barron.

The trial court entered summary judgment for Dr. Barron on the ground that the suit was barred by the two-year statute of limitations. The Fourth District reversed, holding that a genuine issue of material fact existed as to when the Shapiros knew or should have known that Mr. Shapiro's complications were caused by Dr. Barron's negligence. This Court quashed the Fourth District's opinion and remanded with directions to reinstate the summary judgment. Id. at 1322.

The Shapiros maintained that the statute of limitations did not commence until there was reason to know that Mr. Shapiro's injury was negligently inflicted -- that is, in early 1982 when the independent doctor expressed his opinion. This Court clearly rejected that argument noting that the Shapiros were on notice of Mr. Shapiro's "injury" by at least the time he was diagnosed as blind. According to Mrs. Shapiro, "her husband went in for an operation on his colon and came out blind." Id. at 1321. As of the time Mr. Shapiro was diagnosed as blind, it was obvious that something may have gone wrong.

In Bogorff, this Court again addressed the propriety of the trial court's granting of summary judgment in favor of defendants in a medical malpractice action. Bogorff involved the treatment of a young child for leukemia. In 1971, the Bogorffs' child became a patient of Dr. Koch, who provided treatment to maintain the remission of the leukemia. In February 1972, approximately one month after the final treatment, the Bogorffs noticed changes in their child's condition, including slurred speech, headaches, nausea and lethargy. In April of that year, the child suffered convulsions and slipped into a coma. Although the child came out of the coma, he was a quadriplegic and severely brain damaged. Id. at 1001.

After consulting legal counsel five years later in 1979, the parents were advised that there was no cause of action for medical malpractice or products liability. In 1982, the parents obtained the child's complete medical records. Upon a review of

the records, it was discovered that the treatment performed by Dr. Koch may have been a possible cause of the child's condition. In December 1982, the parents filed a malpractice action against Dr. Koch and others.

The trial court granted summary judgment for the defendants on the ground that the statute of limitations had expired. The Third District reversed and held that if, when the child slipped into a coma, the parents knew that something was wrong it did not necessarily follow that the parents "knew or should have known that the child's condition was caused by medical negligence." Id. at 1002. In so holding, the district court required that in order to begin the running of the limitations period, the parents must have knowledge of both (i) the child's physical injury, and (ii) that a negligent act caused the injury. Id. at 1002.

This Court expressly rejected the Third District holding and ruled that it was an inaccurate interpretation of the law. In so doing, this Court once again held that the triggering event for the commencement of the running of the limitations period was the parents' notice of injury to their child; not, additional notice that negligence caused the injury. This Court focused upon the fact that three months after the last treatment, the child became comatose and eventually, completely disabled. At that time, the parents "were on notice of the possible invasion of their legal rights and the limitation period began running." Id. (emphasis added).

The principles that this Court applied in Bogorff, Barron, and Nardone, apply with equal or greater force to this case. Mrs. Tanner went to the hospital to deliver a baby, but unfortunately her fetus was stillborn. The death of a fetus is a tragic event and cannot be likened to an unusual rash that might go away on its own. From the perspective of many, death is the ultimate injury. At the time of this stillbirth, it was clearly apparent that something may have gone wrong. See Jackson v. Georgopolous, 552 So. 2d 215 (Fla. 2d DCA 1989).

In their Complaint, the Petitioners alleged that Mrs. Tanner "incurred physical damage, personal injury . . . as a result of the death of her minor child". (R. 26, 29, 32, 35, 38) (emphasis added). Thus, the Petitioners were clearly placed on notice of a possible invasion of their legal rights at that time. Accordingly, the limitations period commenced at that moment, not one year and nine months later when the Petitioners consulted with a retained medical expert who opined that the death of the fetus may have been caused by someone's negligence. (Petitioners' Brief, p. 2).

In accordance with well-established principles of law, this Court should continue to hold that notice of injury is sufficient to commence of the statute of limitations, especially under the circumstances presented here where the plaintiff was under the continuous care of a defendant health care provider at the material time. To require notice of additional facts in this case such as that the defendant's treatment resulted in injury

would in effect require notice of the negligent act. This Court has repeatedly rejected the interpretation that both notice of injury and notice of the negligent act are required to commence the running of the statute of limitations. If this view of the statute is not in accordance with legislative intent, the legislature will amend the statute. Until such a time, this Court should adhere to the doctrine of stare decisis and follow its previous decisions.

Under the strong public policy principles which are ingrained in the doctrine of stare decisis, courts will apply and adhere to their prior decisions in order to provide private citizens and trial judges the certainty of decision making. Morgrane v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 25 L. Ed. 2d 339 (1970). "Stare decisis is a fundamental principle of Florida law." State v. Dwyer, 332 So. 2d 333 (Fla. 1976). Only when there is great social upheaval or a clear misinterpretation of a statutory provision should this Court alter its previously announced rule of law. See generally Walt Disney World Co. v. Wood, 515 So. 2d 198 (Fla. 1987). This applies with greater force where the legislature has specifically considered amending the previously announced rule of law and expressly declined to do so. See Walt Disney World. See also argument set forth in I(C) of this Brief.

By adhering to the essence of its prior decisions in Bogorff, Barron, and Nardone, this Court will provide Floridians and trial judges the necessary certainty for them to make

decisions. Those precedents provide a clear and very workable test for claimants, attorneys, and trial judges, to correctly determine the statute of limitations period. While this Court may clarify those decisions to take into account different factual situations, it should not overrule them after so short a period.

B. The Dismissal of Petitioners' Complaint Should be Upheld Even Under the Seven Factor Approach Suggested by the Second District in Goodlet.

After affirming the dismissal of Petitioners' Complaint on the basis of Bogorff and Barron, the Second District then analyzed it based on the seven-factor analysis suggested by Judge Altenbernd in Goodlet v. Steckler, 586 So. 2d 74 (Fla. 2d DCA 1991) (mother who received telephone call from daughter's treating physician informing her of daughter's death, received the minimum factual information necessary to commence the statute of limitations). This analysis has been relied upon on two other occasions by the Second District. Rogers v. Ruiz, 593 So. 2d 249 (Fla. 2d DCA 1992) (running of the statutory period had been triggered at the time plaintiff was informed of her husband's death from the surgery by defendant physician at defendant hospital); and Harr v. Hillsborough Community Medical Health Center, 591 So. 2d 1051 (Fla. 2d DCA 1991) (question of whether two-year limitations period for actions against health care providers commences when potential plaintiff has notice of injury in fact or when potential plaintiff has additional notice that

injury in fact resulted from incident involving health care provider was certified to this Court as matter of great public importance). Based upon the seven-factor analysis, the Second District concluded that the dismissal of the Complaint was proper in the instant case.

In Goodlet, the trial court imposed summary judgment for the defendant in a medical malpractice action based on the expiration of the statute of limitations. The Second District affirmed, holding that the plaintiff was provided with at least the minimum factual information necessary to commence the running of the statute of limitations. The court stated:

> The critical question is what minimum facts are essential to give the plaintiff *notice* that a timely investigation should begin in order to discover any additional facts needed to support a medical negligence action.

Goodlet, 586 So. 2d at 75.

In an effort to resolve this question, the Goodlet Court proposes that a medical negligence cause of action involves at least seven important factual considerations: 1) the identity of the plaintiff; 2) the existence of a relationship between the plaintiff and a health care provider that is sufficient to create a legal duty under a theory of medical negligence; 3) the identity of the health care provider who owes the duty; 4) the standard of care owing under the duty; 5) the facts establishing a breach of the standard of care; 6) proximate causation; and 7) injury. Goodlet, 586 So. 2d at 76. The Goodlet Court simply suggested factors to be considered but did not conclude which

factors are essential to commence the running of the statute of limitations.

The Goodlet Court interpreted Bogorff as requiring knowledge of facts establishing either Factor 7 (injury) or Factors 4 and 5 (standard of care owing under a duty and breach of the standard). "We are uncertain what knowledge, if any, the Supreme Court intends to require concerning factors 1 through 3." Goodlet, 586 So. 2d at 76. The plaintiff in Goodlet had information regarding factors 1, 2, 3 and 7. This, the court held, was sufficient information to commence the running of the limitations period.

The Second District also applied the seven factor analysis in Harr, the facts of which are distinguishable from the facts of the instant case. In Harr, the plaintiff received a phone call informing her of her son's death. At or about that time she learned that her son had been taken to a "crisis center" due to depression which prompted his suicide. Not until three and one-half months later did she learn that the Hillsborough Community Mental Health Center was the "crisis center" where her son had been treated. Harr, 591 So. 2d at 1053. Prior to receiving notice of "injury" (i.e. death) it does not appear that the plaintiff had any knowledge of a health care provider's involvement in treating her son.

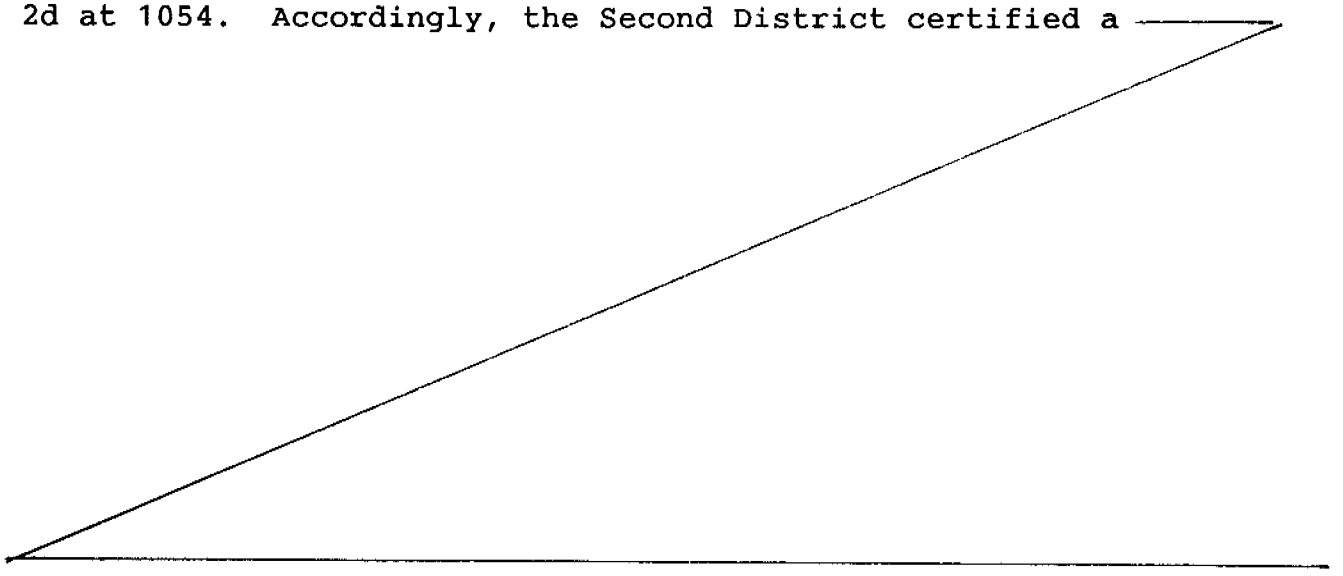
Before the trial court, the defendants argued that the statute of limitations commenced running at the time plaintiff was notified of her son's death. The trial court agreed and granted the defendants' motion for summary judgment. The Second

District reversed, holding that notice of more than the fact of injury to or death of a person is required to trigger the running of the statute of limitations against health care providers. Notice of a possible legal injury, that is, notice of a possible invasion of one's legal rights, is necessary before it can be determined that one should have discovered the incident giving rise to the action. Id. at 1054.

The Harr Court recognized that:

> To trigger the running of the statute, it is necessary that the plaintiff have knowledge of the minimum facts essential to give notice that a timely investigation should commence to discover additional facts needed to support an action against a health care provider.

Id. Moreover, according to Harr this Court does not intend for factor 7 (injury) alone to be sufficient to commence the running of the statute of limitations; but rather notice of injury and of an incident involving defendant health care providers resulting in an injury (i.e. Goodlet factors 2, 3, 6 and 7). Harr, 591 So. 2d at 1054. Accordingly, the Second District certified a



question to this court as a matter of great public importance.[1]

Applying the Goodlet factors in the instant case the Second District determined that Mrs. Tanner had notice of factors 1, 2, 3, and 7. This information, according to Goodlet, is at least the minimum information necessary to start the statute of limitations running.

Drs. Hartog and DuBoy admitted Mrs. Tanner to the hospital for the delivery of her baby. It is undisputed that the Petitioners were aware that their baby was stillborn while Mrs. Tanner was a patient at Lakeland Regional Medical Center. Thus, the identity of the plaintiffs is known, the relationship between the Tanners and health care providers is known, and the identity of the health care providers is known. While the health care providers were treating Mrs. Tanner, she delivered a stillborn fetus. Thus, there can be no doubt about the existence of factors 1, 2, 3 and 7. Although the facts establishing proximate causation (factor 6) may not have been apparent at that time, the Second District recognized that from the pleadings it was clear that Mrs. Tanner knew that the injury occurred in the hospital

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[1] The following question was certified by the Second District:

DOES THE STATUTE OF LIMITATIONS IN SECTION 95.11(4)(b) COMMENCE:

(A) WHEN THE POTENTIAL PLAINTIFF HAS NOTICE OF AN INJURY IN FACT; OR

(B) WHEN THE POTENTIAL PLAINTIFF HAS ADDITIONAL NOTICE THAT THE INJURY IN FACT RESULTED FROM AN INCIDENT INVOLVING A HEALTH CARE PROVIDER?

Harr, 591 So. 2d at 1055.

while she was under the care of her known health care providers. Tanner v. Hartog, 593 So. 2d 249, 252 (2d DCA) question certified, reh'g denied, 17 F.L.W. D433 (Fla. 2d DCA January 31, 1992).

Accordingly, if this Court determines that more than notice of injury in fact is necessary to commence the running of the statute of limitations, this Court should construe "notice of injury" to include notice of the incident involving the defendant resulting in the injury (in most cases, notice of both elements will be concurrent). This construction would provide a necessary measure of predictability of the consequences of one's conduct. There must be a reconciliation of the recent case law pertaining to the issue of when a plaintiff has notice that a timely investigation should begin in order to discover additional facts needed to support a claim based upon medical malpractice.

In the event this Court should construe "notice of injury" in this manner; or if this Court should clarify its opinions in Nardone, Barron, and Bogorff, the result in the instant case should not be impacted. At the time of the stillbirth, Petitioners had the basic information necessary to begin an investigation. The trial court's dismissal of Petitioners' Complaint was proper and should be upheld.

C. The Legislature has Recently Approved this Court's Interpretations of § 95.11(4)(b), Florida Statutes (1989).

In the 1992 legislative session, several bills pertaining to the statute of limitations in medical malpractice actions were

introduced. Committee Substitute for House Bill 625 sought to add the following language to §95.11(4)(b), Florida Statutes (1991).

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

Committee Substitute for Senate Bill 784 sought to amend section 95.11(4)(b), Florida Statutes (1991) as follows:

> (b) An action for medical malpractice shall be commenced within 2 years from the time the malpractice is discovered, or should have been discovered with the exercise of due diligence . . . . Discovery of a physical or mental injury without knowledge that the injury resulted from malpractice does not constitute knowledge of the malpractice.

Both bills were rejected.

The Florida Legislature's recent rejection of the amendments is unequivocal evidence that the Legislature disapproves of the interpretation of the statute suggested by the dissent in Barron. That view suggested that notice of the negligent act was necessary to trigger the commencement of the statute of limitations in a medical malpractice action. Had the Legislature agreed with the dissent's view in Barron, it would have corrected the interpretation by adopting either of these bills. While there may have been some legitimate doubts concerning the interpretation of this difficult statute in the past, those doubts have now been erased.

D. The Authorities Relied Upon by Petitioners and Amicus Curiae in support of Petitioners do not Dictate a Result Contrary to that Reached by the Trial Court.

The Petitioners maintain that because a stillbirth may often times results from natural conditions, it is not an injury. (Petitioners' Brief, p. 8). In support of this assertion, they rely upon Babush v. American Home Products Corp., 589 So. 2d 1379 (Fla. 4th DCA 1991), review denied, 1992 Fla. Lexis 1084 (Fla. June 2, 1992), a products liability case. Their reliance upon Babush is misplaced and does not support a reversal in this case. The issue in Babush was when does the statute of limitations commence to run on a products liability claim. Appellees in that case suggested that the analysis is the same as in a medical malpractice suit. The Fourth District disagreed. That case carries no weight in the evaluation of this case.

Assuming that the Petitioners reliance on Babush was justified, the Petitioners assert that in order to qualify as an "obvious injury," the stillbirth must have been an "injury distinct in some way from conditions naturally to be expected from the plaintiff's condition." In this case, Mrs. Tanner who was under the continuous care of her doctors during the course of her pregnancy expected to deliver a live and healthy baby. Pregnant women do not enter a hospital expecting to have a stillborn baby. When that occurred in this case, the Petitioners were placed on notice of a possible invasion of their legal rights.

The Petitioners also rely on Moore v. Morris, 475 So. 2d 666 (Fla. 1985), stating that it is "essentially on all fours" and mandates that the Certified Question be answered in the negative. The facts of that case are clearly distinguishable from the facts of the case at hand. In Moore, the parents brought a medical malpractice action for injuries sustained by their daughter at her birth. The trial court entered summary judgment finding that the action was barred by the statute of limitations. The Third District Court of Appeal affirmed. This Court quashed the decision, finding summary judgment inappropriate where there existed questions of fact as to whether, within two years of the baby's birth, parents had or should have had notice of injury or notice of a negligent act. Id. at 667.

The baby who suffered fetal distress was delivered by emergency Cesarean Section. At that time, the child's father was told the baby might not live. The baby recovered, apparently healthy. When the child was three years old, it was determined that she was brain damaged. Until that time, the parents were repeatedly told that the child was fine and not neurologically impaired. Id. at 669. There was no evidence in the Moore case that remotely suggested to the Moores that they should start an investigation earlier than they did. Had their child died, like the fetus in the instant case, then the Moores would have been placed on notice that something might have gone wrong at the time of birth. Cases which involve apparent recoveries require a

different analysis than cases which involve obvious injuries from which there is no recovery.

For three years after the child's birth, the parents were assured by the child's physicians that the child was fine. Until the diagnosis of brain damage, the parents had no reason to begin investigating possible malpractice; they had no reason to know that the child's legal rights were possibly invaded; they had no reason to ask "could something have gone wrong?" In the instant case, the stillbirth was the injury and the event which triggered the Petitioners' duty to investigate.

At the time of the stillbirth, Petitioners were vested with sufficient facts to be aware of a possible invasion of their legal rights. The statute of limitations commenced running at that time. The notice of injury in this case encompassed knowledge of the defendant health care provider's involvement with the delivery. The Second District has opined that knowledge of this additional information is necessary before the statute of limitations commences to run. There is no basis in the instant case to find that the statute of limitations commenced running at a time other than at the time of the stillbirth.

Moreover, the analysis in the Amicus Curiae Brief in Support of Petitioners (the "Amicus Brief"), is convoluted, confusing and also leads to the erroneous conclusion that in a case such as the instant case, the plaintiff must have knowledge of the malpractice or the negligent act to commence the running of the statute of limitations. There are three reasons why the argument

proposed by Petitioners' Amicus Curiae should not be adopted by this Court. First, it misapprehends the level of information which is necessary to commence the statute of limitations. Second, it contravenes the intent of the Florida legislature. Finally, it proposes a solution which is unrealistic, impractical and would serve only to confuse trial judges.

Petitioners' Amicus Curiae would have this Court adopt an analysis which, in a case such as this, requires the plaintiff to have knowledge of the malpractice or negligent act. As stated by Judge Altenbernd, and noted by Judge Scheb, both of the Second District,

> To trigger the running of the statute, it is necessary that the plaintiff have knowledge of the minimum facts essential to give notice that a timely investigation should commence to discover additional facts needed to support an action against a health care provider. (emphasis added).

Goodlet, 586 So. 2d at 75; Harr, 591 So.2d at 1054. Consistent with this rule of law, a woman who carried a fetus beyond full term, which fetus was living just prior to delivery, yet delivered stillborn, is expected to be on notice that "something" may have gone wrong and an investigation should commence. There is no event, short of knowledge of the malpractice, which would occur subsequent to the event of the stillbirth which would provide a plaintiff with additional information necessary to commence an investigation.

Florida law provides mechanisms to a plaintiff that tolls the statute of limitations so as to give the plaintiff sufficient

time to discover information necessary to frame a cause of action and commence a lawsuit. See § 766.104(2), .106(4), Fla. Stat.

Clearly, knowledge of malpractice or knowledge of the negligent act are not required to commence the running of the statute of limitations in medical malpractice actions. This is evidenced by the Florida Legislature's decision to reject both Committee Substitute for House Bill 625 and Committee Substitute of Senate Bill 784. See Appendix A. Each of the proposed bills would have amended the statute of limitations for medical malpractice actions to expressly require (i) more than knowledge of injury or (ii) knowledge of malpractice. The rejection of both bills should signal this Court that its holdings in Barron and Bogorff were correct and that notice of injury or notice of the negligent act is sufficient to commence the running of the statute of limitations.

II. THE TRIAL COURT PROPERLY CALCULATED THE DATE BY WHICH PETITIONERS' COMPLAINT WAS TO BE FILED

In the instant case, the stillbirth occurred on April 1, 1988. The statute of limitations would expire two years later on April 1, 1990. In medical malpractice actions, as required by §766.106 (formerly §768.57(4)) Fla. Stat. and Fla. R. Civ. P. 1.650, a notice of intent to initiate litigation is a prerequisite to filing a claim. The Notice must be served on each prospective defendant within two years. On February 12, 1990, before the expiration of the applicable two-year statute of limitations, a Notice was mailed to all parties, as required by the statute, except to Hartog and DuBoy, M.D., P.A. Upon mailing the Notice on February 12, 1990, the statute of limitations was tolled for 90 days, that is, through May 13, 1990. At the time the Notice was mailed, 47 days remained in the two-year statute of limitations.

As provided in (i) Rhoades v. Southwest Florida Regional Medical Center, 554 So. 2d 1188 (Fla. 2d DCA 1990) (construing §768.57(4), Fla. Stat. (now §766.106(4)) and (ii) Fla. R. Civ. P. 1.650, "to avoid being barred by the applicable statute of limitations, an action must be filed within 60 days or within the remainder of the time of the statute of limitations after the Notice of Intent to Initiate Litigation was mailed, whichever is longer, after . . . the expiration of 90 days after the date of the mailing of the Notice of Intent to Initiate Litigation . . ." Fla. R. Civ. P. 1.650 (emphasis added). In the instant case,

following the expiration of the 90 day period, on May 13, 1990, Petitioners had 60 days within which to file their Complaint, i.e., by July 12, 1990. The Complaint was not filed until August 1, 1990, after the statute of limitations had run.

Petitioners argue that the two year statute of limitations should have been extended for 90 days. (Petitioners' Brief, pages 6, 7, 20, 29). It was. All in all Petitioners had two years, plus 90 days, plus 13 days (the difference between 60 days and 47 days, the time remaining in the two year statute of limitations at the time the Notice was mailed) within which to commence their medical malpractice action.

There are two other provisions, in addition to the 90-day tolling provision set forth in §766.106(4), Fla. Stat., which operate to "enlarge" the prescribed statute of limitations in a case similar to the one at hand. First, §766.106(4), Fla. Stat., permits the parties to stipulate to an extension of the 90-day period. Second, §766.104(2) (formerly §768.495(2)), Fla. Stat. provides that "upon petition to the clerk of the court . . . an automatic 90-day extension of the statute of limitations shall be granted . . . This period shall be in addition to other tolling periods." §766.104(2), Fla. Stat. Neither provision applies to this case.

The law relied upon by Petitioners in support of Point II of their brief does not impact the Second District's conclusion with respect to the determination of the date by which the Complaint in the instant case should have been filed. Petitioners rely on

case law pertaining to the application of the 90-day tolling provision (§766.106(4), Fla. Stat.) in conjunction with the "automatic extension" (§766.104(2), Fla. Stat.). Florida courts have concluded that the two periods run consecutively, rather than concurrently, and operate to toll the statute of limitations for a total of 180 days. See Angrund v. Fox, 552 So. 2d 1113 (3d DCA 1989), review denied, 563 So. 2d 632 (Fla. 1990); DeYoung v. Bierfeld, 581 So. 2d 629 (3d DCA), review denied, 591 So. 2d 180 (Fla. 1991); Kalbach v. Day, 589 So. 2d 448 (Fla. 4th DCA 1991) dismissed, 1992 Fla. Lexis 411 (Fla. 1992); Novitsky v. Hards, 589 So. 2d 404 (Fla. 5th DCA 1991). Petitioners do not allege that the "automatic extension" applied in the instant case.

Petitioners also cite case law regarding a party's failure to follow the pre-suit screening process set forth in §766.106 (4), Fla. Stat. See e.g. Hospital Corporation of America v. Lindberg, 571 So. 2d 446 (Fla. 1990); Castro v. Davis, 527 So. 2d 250 (Fla. 2d DCA 1988). These cases are not determinative of the issues in this case.

Assuming the statute of limitations commenced running at the time of the stillbirth, on April 1, 1988, the trial court's dismissal of the Complaint, on the grounds that it was filed after the expiration of the statute of limitations and the Second District's opinion with respect to the calculation of the statute of limitations are precisely in accord with the Florida Statutes and the case law interpreting such statutes cited by Petitioners

in their brief. Petitioners' suggestion that the statute of limitations has somehow been curtailed is inconceivable.

III. THERE IS NO CAUSE OF ACTION UNDER FLORIDA LAW FOR THE WRONGFUL DEATH OF A FETUS OR FOR INJURY TO THE MOTHER'S LIVING TISSUE WHEN SUCH CAUSE OF ACTION IS SIMPLY A DISGUISED CLAIM FOR WRONGFUL DEATH OF A FETUS

The law in Florida is abundantly clear that there is no cause of action for the wrongful death of a fetus -- regardless of viability. See Stern v. Miller, 348 So. 2d 303 (Fla. 1977) (legislature did not intend to include a stillborn fetus within the term "person" as used in the Wrongful Death Act); Stokes v. Liberty Mutual Insurance Company, 213 So. 2d 695 (Fla. 1968); Duncan v. Flynn, 358 So. 2d 178 (Fla. 1978); Henderson v. North, 545 So. 2d 486 (Fla. 1st DCA 1989); Singleton v. Ranz, 534 So. 2d 847 (5th DCA 1988), review denied, 542 So. 2d 1334 (Fla. 1989); Abdelaziz v. A.M.I.S.U.B. of Florida, Inc., 515 So. 2d 269 (3d DCA 1987), review denied, 525 So. 2d 876 (Fla. 1988). To argue the merits of the question of viability is superfluous in this case.

Petitioners suggest that advancements in medical science mandate that the term "person" be construed to encompass a viable fetus. To the contrary, any changes in such a complex and controversial area of law should be made by legislative action rather than judicial decision. See State v. McCall, 458 So. 2d 875 (Fla. 2d DCA 1984). Based upon the premise set forth in the previous sentence, in connection with the stillbirth of a viable fetus, the Second District would not recede from the traditional definition of "human being" (i.e., one who has been born alive) for purposes of certain homicide statutes.

Petitioners' suggestion that this Court construe the term "person" is inappropriate. It is not in the province of this Court to determine that a fetus is a "person" under Florida's Wrongful Death Act, §§768.16-768.27, Fla. Stat. (the "Act"). In addressing the respondents' argument that the status of a viable fetus as a "person" is consistent with the objectives of the Act, this Court in Stern v. Miller noted:

> As compelling as these arguments may be, however, we are not at liberty to decide what is wise, appropriate, or necessary in terms of legislation. We are confined to a determination of the legislature's intent.

Stern, 348 So. 2d at 307. Accordingly, until the legislature acts, this Court should remain guided by existing Florida precedent which holds that there is no cause of action for the wrongful death of a fetus -- regardless of viability.

Petitioners attempt to persuade this Court with a survey of case law from various jurisdictions which recognize a cause of action for the wrongful death of a fetus. Such discussion is clearly misdirected. This Court has taken a clear stand from which it should not now recede.

Petitioners also assert that Phyllis Tanner has a cause of action for the destruction of her living tissue. Traditionally, Florida courts have failed to recognize claims for physical injury to a mother arising out of the loss or stillbirth of a fetus. Henderson v. North, 545 So. 2d 486 (Fla. 1st DCA 1989); Abdelaziz v. A.M.I.S.U.B. of Florida, Inc., 515 So. 2d 269 (3d DCA 1987), review denied, 525 So. 2d 876 (Fla. 1988). Typically,

such claims are plead in a manner so closely akin to wrongful death claims that to recognize such a claim would circumvent the well-established law that there is no cause of action in Florida for the wrongful death of a fetus. See, Abdelaziz, 515 So. 2d 269 (where plaintiff alleged that she suffered physical injuries and emotional distress due to the stillbirth of her fetus, the court rejected such claim as not cognizable under the wrongful death statute; and, therefore, not indirectly recoverable under a simple negligence claim).

Recently, the Second District recognized a cause of action for bodily injury to the plaintiff resulting from the loss of her fetus in an abortion. McGeehan v. Parke-Davis, 573 So. 2d 376 (2d DCA), review denied, 583 So. 2d 1036 (Fla. 1991) (plaintiff's abortion was brought about by the risk of birth defects from medication taken by her due to a negligently erroneous diagnosis). Petitioners rely on McGeehan in support of their position. For two apparent reasons, McGeehan should not govern the instant case: first, the plaintiff in that case did not allege a cause of action under the wrongful death statute; second, the plaintiff "specifically alleged" bodily injury to the plaintiff herself.

In the instant case, Petitioners seek to recover for injuries which allegedly are the result of the death of their minor child. (R.23, ¶¶ 12, 13, 21, 22, 31, 32, 42, 43, 52, 53). In each of the aforementioned paragraphs, Petitioners' references to "death" of the "minor" or their "minor child," consistently

track the language of the Florida Wrongful Death Act. §§768.16-768.27, Fla. Stat. The death of the unborn child is the gravamen of all Petitioners' claims. The manner in which Petitioners stated their claims is clearly distinguishable from the manner in which the claims were alleged in McGeehan. McGeehan should not govern the instant case.

Moreover, the plaintiff in McGeehan "specifically alleged" bodily injury to herself and her mental suffering associated therewith. In the instant case, the mention of physical damage and personal injury to Phyllis Tanner is inextricably tied to the "death of her minor child." (R.23, ¶¶ 12, 21, 31, 42, 52). The First District Court of Appeal in Henderson v. North, 545 So. 2d 486 (Fla. 1st DCA 1989) affirmed a summary judgment in favor of the defendants, doctor and hospital, on counts strikingly similar to the counts in the instant case. The court in Henderson found that such counts were "thinly disguised" claims for the wrongful death of a fetus and the plaintiffs' mental pain and suffering associated therewith. Id. at 488.

In reaching the decision in McGeehan, the Second District noted that "Henderson . . . may be similarly distinguished on the basis that no bodily injury to plaintiff was alleged in . . . [Henderson], only 'physical pain' (and various nonphysical consequences) suffered from the 'death of her unborn child.'" McGeehan, 573 So. 2d at 377 (citing Henderson v. North, 545 So. 2d at 487-488).

McGeehan is factually distinguishable. The instant case, which is akin to Henderson, should be distinguished from McGeehan in the same manner that Henderson was distinguished from McGeehan.

Despite the Second District's recent holding that the wrongfully caused loss of a fetus is a legally cognizable bodily injury to the woman whose body suffers the loss, such an action must be properly plead as an independent claim, and not as a disguised claim for the wrongful death of a fetus which is clearly impermissible in Florida. Moreover, any such claims are barred by the statute of limitations in this case.

CONCLUSION

For the reasons set forth herein, this Court should affirm the Second District's affirmance of the trial court's dismissal of Petitioners' Complaint. The instant case is governed by the holdings of Nardone, Barron, and Bogorff. These cases provide that either notice of injury or notice of the negligent act is sufficient to put a plaintiff on notice of the possible invasion of the plaintiff's legal rights and commence the running of the statute of limitations. This rule should not be changed.

If this Court determines that more than notice of injury is necessary to trigger the statute of limitations, the Court should adopt the Second District's view that notice of injury entails notice of the defendant health care providers' involvement in the incident resulting in the injury.

Petitioners' arguments regarding the statute of limitations tolling provision, wrongful death of a fetus and the destruction of the mother's living tissue are without merit and do not change the result in the instant case. Petitioners' Complaint was properly dismissed.

Respectfully submitted,

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CERTIFICATION

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail this 14 day of July, 1992 to Kennan George Dandar, Esq., Dandar & Dandar, P.A., 1009 North O'Brien Street, P.O. Box 24597, Tampa, FL 33623-4597; Philip D. Parrish, Esq., Stephens, Lynn, Klein & McNicholas, P.A., 9100 S. Dadeland Blvd., Suite 1500, Miami, FL 33156; and Charles T. Canady, Esq., Lane, Trohn, Clarke, Bertrand & Williams, P.A., 202 E. Walnut Street, Lakeland, FL 338012; Marguerite H. "Ditti" Davis, Esq., Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, P.O. Box 1877, Tallahassee, FL 32302-1877; Joel S. Perwin, Esq., Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 W. Flagler St., Suite 800, Miami, FL 33130.

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Doc.69167

APPENDIX A

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.

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FLORIDA SENATE - 1992 CS FOR SB 784

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

300-1903-92

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:

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.--

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

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

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

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.--

(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).

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).

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

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN COMMITTEE SUBSTITUTE FOR Senate Bill 784

Amends paragraph 95.11(4)(a), F.S., relating to professional (nonmedical) malpractice, to provide a 2-year extension period beyond the 2-year statute of limitations for malpractice actions against attorneys when fraud, concealment, or intentional misrepresentation prevented a claimant from discovering his injury was due to his attorney's malpractice. An absolute maximum of 7 years from the date the incident giving rise to the injury occurred is allowed for initiation of a malpractice action against an attorney.

Deletes a 1-year extension of the statute of limitations for purposes of allowing a claimant to join additional parties to a medical malpractice lawsuit.