IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. GCG 90-2303
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.

Plaintiffs-Appellants,

verses

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

Defendants-Appellees

Appeal from the Second District Court of Appeal

BRIEF OF APPELLANTS

KENNAN GEORGE DANDAR, ESQ.
DANDAR & DANDAR, P.A..
1009 North O'Brien Street
Post Office Box 24597
Tampa, Florida 33623-4597
813-289-3858
Florida Bar No. 289698

Attorney for Appellants

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

Page

JURISDICTIONAL STATEMENT

The Supreme Court of Florida has jurisdiction in this case on two independent grounds:

(1) Rule 9.030(a)(2)(A)(v), since the Second District Court of Appeal has certified a question to be of great public importance; and

(2) Rule 9.030(a)(2)(A)(iv), since the decision of the Second District Court of Appeal expressly and directly conflicts with decisions of other district courts of appeal and of the Supreme Court on the same question of law.

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal from the Second District Court of Appeal confirming the trial court's order dismissing the Amended Complaint with prejudice on December 4, 1990. The order appealed from the Second District Court of Appeal was rendered on February 19, 1992, and the Order Denying the Motion for Rehearing and Motion for En Banc Consideration was rendered on Janaury 31, 1992. However, the Second District Court of Appeal has certified the following question to this court:

> 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).

Plaintiffs filed a cause of action against the Defendants/Appellees, ELLIE M. HARTOG, M.D., ALBERTO DUBOY, M.D., HARTOG AND DUBOY, P.A., and LAKELAND REGIONAL MEDICAL CENTER, concerning the death of the Plaintiffs' infant son in utero while Plaintiff, PHYLLIS KAYE TANNER, was at LAKELAND REGIONAL MEDICAL CENTER. The Amended Complaint (R. pp.23-45) alleged medical malpractice against all defendants and consisted of Count I, Negligence; Count II, Res Ipsa Loquitur (Negligence); Count III, Wrongful Death (Negligence); Count IV, Res Ipsa Loquitur (Wrongful Death); and Count V, Breach of Contract. (See Appendix A.)

The Defendants filed their Motions to Dismiss the Amended Complaint (R. pp.62-63, pp.72-73) which were essentially based upon the ground that there is no cause of action for

wrongful death of an unborn fetus, the Statute of Limitations, and Motions to Strike Punitive Damage (R. pp.46-55, pp.64-65.)

On March 31, 1988, at LAKELAND REGIONAL MEDICAL CENTER, labor was induced and baby, JAMES TANNER, II, was delivered stillborn. On or about December 26, 1989, the Plaintiffs discovered through the medical opinion of an independently retained expert, MARVIN KRANE, M.D. of Philadelphia, Pennsylvania, that JAMES R. TANNER, II, died, not of natural causes, but rather as a result of the negligence of the treating health care providers, HARTOG, DUBOY and LAKELAND REGIONAL MEDICAL CENTER.

Notice of intent to litigate was served upon the Defendants by letter dated February 12, 1990, and suit was filed on August 1, 1990.

The Amended Complaint alleged in paragraph No. 10 that the Plaintiffs did not know until December 26, 1989, that baby, JAMES R. TANNER, II, died as a result of any negligence of the Defendants and that their actions and inactions fell below the standard of care recognized in the community.

The judge granted the Defendants' Motions to Dismiss originally by order dated November 16, 1990 (R. pp.66-68) (See Appendix B). Therein the judge recognized that the action not only included the claim for wrongful death of the fetus, it also claimed for the actual physical injury, pain and mental suffering of PHYLLIS TANNER. (R.p.57). In that order, the court dismissed the wrongful death action on the basis that the death of a fetus is not a wrongful death claim regardless of viability under Section 768.19, Florida Statutes (1983), since the fetus is not a person.

Also, the court rejected the Plaintiffs' claim for injury to the living tissue of the mother as a disguised claim for wrongful death of the fetus, concluding that PHYLLIS TANNER had no cause of action for any mental suffering caused by the stillbirth of her baby.

Finally, the court concluded that the entire matter should be dismissed because of the Statute of Limitations, basing its opinion upon the case of Barron v. Shapiro, 565 So.2d. 1390 (Fla. 1990), concluding that July 12, 1990, was the expiration of the Statute of Limitations.

On November 26, 1990, Plaintiffs filed a Motion for Rehearing before the lower court. (R. pp.69-71), which subsequently was denied by the court without hearing, and thereafter, the order dismissing the entire action with prejudice was entered by the court (R. pp.74-75), which was timely appealed to the Second District Court of Appeal. (See Appendix C.)

The Second District Court of Appeal held that the stillbirth of the Appellants' child in the hospital constituted notice of injury, i.e., legal injury, and that at the time the Appellants' fetus died in utero, the court concluded that the parents "were on notice of the possible invasion of their legal rights and the limitations began running" as a matter of law. The court further concluded that the "incident or occurrence giving rise to the action was the stillbirth of a child delivered by the physicians in the hospital." *Tanner v. Hartog*, ____ So.2d ____, 17 F.L.W. D173, 174, January 31, 1992, 2d DCA. (See Appendix D.)

The Second District Court of Appeal also stated that the stillbirth was an "injury in fact."

The court also held in reference to causation, that the Appellants knew that an injury occurred in the hospital while the mother was under the care of the health care providers, which is sufficient to give the Appellants knowledge of the essential fact (notice) that a timely investigation should commence to discover additional facts needed to support an action against the appropriate health care providers.

In reference to the computation of the Statute of Limitations with the automatic tolling period, under the 90-day Notice of Intent to Litigate, pursuant to Florida Statute, §766.106(4), the Second District Court of Appeal held that the Notice of Intent to Litigate was served on February 12, 1990, 47 days prior to the running of the limitations period, and concluded that the "Appellants were entitled to file suit within 90 days plus the greater of either the remainder of the Statutes of Limitations (47 days) or 60 days. 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." Since suit was filed on August 1, 1990, the Second District Court of Appeal concluded that the Statute of Limitations had expired and therefore barred their claims.

The Appellate Court declined to address the issue of the alleged wrongful death of the minor child, but did note in Footnote 1 on page D174, that Florida does not recognize a cause of action for the wrongful death of a stillborn fetus.

In a dissenting opinion, Judge Patterson pointed out that a disturbing trend in this area of law, creates a fiction that a normal, but unfortunate, incident of proper medical care and treatment in the eyes of a layperson is in fact a legal notice of possible malpractice.

He further stated that "a party litigant should be given the opportunity to establish by competent evidence that they fall within circumstances defined by the legislature to protect unwary and uneducated persons from the harsh consequences of their ignorance of the pitfalls of medical treatment." pursuant to Florida Statutes, §95.11(4)(b) (1989). He further noted that the well-pled allegations of the Amended Complaint state that the Appellants did not know nor should have known of the possible malpractice until December 26, 1989, and therefore the majority erred in upholding the granting of the Motion to Dismiss with Prejudice the Amended Complaint. *Tanner v. Hartog*, ____ So.2d ____, 17 F.L.W. D173, 174, January 31, 1992 (2d DCA).

After the January 31, 1992 opinion by the Second District Court of Appeal, the Appellants filed a Motion for Hearing En Banc, or in the alternative, Motion to Certify Questions to the Supreme Court of Florida as a Matter of Great Public Importance. The Appellants also filed a Motion for Rehearing and For Clarification, all of which were opposed by the Appellees in their respective responses.

The Second District Court of Appeal in their opinion of January 31, 1992, granted the Appellants' Motion to Certify the Question of Great Public Importance and denied the remaining motions of Appellants. *Tanner v. Hartog*, ___ So.2d ___, 17 F.L.W. D433, February 14, 1992 (2d DCA) (See Appendix E.)

The Appellants filed their timely Notice of Appeal to the Supreme Court on February 12, 1992.

SUMMARY OF ARGUMENT

1. The Second District Court of Appeal affirmed the disposition made by the trial judge in granting the Defendants' Motions to Dismiss on the basis of the Statute of Limitations. In essence, the Second District Court of Appeal erred in holding that as matter of law, a stillbirth is injury in fact so as to trigger the Statute of Limitations under Florida Statute, §95.11(4)(b).

2. The Second District Court of Appeal also erred in concluding that from the pleadings, although the mother-Appellant did not have knowledge of the standard of care, its breach, or the proximate causation between the breach and the injury in fact, it is sufficient only to ascertain from the Amended Complaint that there was an injury occurring in the hospital while under the care of a health care provider which automatically gives the Appellants knowledge of the essential facts (notice) that a timely investigation should commence to discover additional facts needed to support an action against the health care providers.

3. The Second District Court of Appeal also erred in the computation of the Statute of Limitations by holding that the Appellants had 90 days plus the greater of either the remainder of the Statute of Limitations (47 days) or 60 days since Appellants filed their Notice of Intent to Litigate 47 days prior to the running of the 2-year Statute of Limitations. By the plain language of the statute, and other decisions of the District Courts of Appeal, the Statute of Limitations was tolled by 90 days, no matter when the 90-day Notice of Intent to Litigate is served prior to the expiration of the 2-year Statute of Limitations. The Statute of Limitations is extended by an additional 90 days so that in every circumstance, the Statute

of Limitations does not expire until the expiration of 2 years and 90 days. To uphold the Second District Court's computation of the Statute of Limitation will create nothing but confusion, since it is totally against the plain language of Florida Statute, §766.106 (1988).

4. Alternatively, if the Second District's interpretation of Florida Statutes, §766.106(4) is correct, then that statute is unconstitutionally vague.

5. Finally, this court should hold that a viable fetus is either a "person" under the Wrongful Death Statute or the living tissue of the mother subject to damages in tort for its negligent destruction.

POINT I

CERTIFIED QUESTION

THE COURT SHOULD ANSWER IN THE NEGATIVE THE CERTIFIED QUESTION OF WHETHER AS A MATTER OF LAW THE STILLBIRTH OF A CHILD IS SUCH AN OBVIOUS INJURY AS TO PLACE THE PLAINTIFF ON NOTICE OF THE POSSIBLE INVASION OF PLAINTIFF'S LEGAL RIGHTS.

The Second District Court of Appeal has 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 THE PLAINTIFF ON NOTICE OF THE POSSIBLE INVASION OF THE PLAINTIFF'S LEGAL RIGHTS TO COMMENCE LIMITATIONS PERIOD UNDER §95.11(4)(b), FLORIDA STATUTES (1989).

The above question should be answered in the negative since stillbirth is most often the result of natural conditions. There is no discovery in this case to show otherwise. In *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991) and *Barron v. Shapiro*, 565 So.2d 1319 (Fla. 1990), the obviousness of the injury was only determined after discovery was complete. Here, the record is void of any discovery. Therefore, as a matter of law, evidence of a stillbirth with nothing more, is not evidence of an obvious injury.

The case of *Moore v. Morris*, 475 So.2d 666 (Fla. 1985), which is essentially on all fours, mandates that this question be answered in the negative. In *Moore*, while the mother was in labor, the husband was told that there was an emergency and a c-section needed to be performed. There is no question in that case that the father was on notice that the infant was blue and the health care providers were administering oxygen and that the baby was not expected to live. The parents were told on the date of birth that the child had swallowed

something in the womb. This court held in *Moore* that these facts do not establish the obviousness of injury so as to place the parents on notice of the possible invasion of their legal rights.

> There is nothing about these facts which leads conclusively and inescapably to only one conclusion--that there was negligence or injury caused by negligence. To the contrary, these facts are totally consistent with the serious or life-threatening situation which arose through natural causes during an operation. Serious medical circumstances arise daily in the practice of medicine and because they are so common in experience they cannot, without more, be deemed to impute notice of negligence or injury caused by negligence.

Moore, at 668.

The court further held that the medical circumstances, a cesarean section, while not a natural way to give birth, are "so common in our society they are accepted as normal and they are not associated with negligence or injury." *Moore*, at 668-669.

Similarly, in the instant action, a stillbirth is also "so common in our society that they are accepted as normal and they are not associated with negligence or injury." Following *Moore*, a stillbirth simply does not lead "conclusively and inescapably to only one conclusion--negligence or injury cause by negligence."

As in *Moore*, there is nothing in the instant case which shows that any of the physicians talked with the parent concerning the baby's fetal distress. As in *Moore*, the baby suffered from fetal distress. In *Moore*, the baby lived, developed and later developed signs of brain damage, while in the instant case, the baby was stillborn.

Based on *Moore v. Morris*, there is no need to look any further but to conclude that the certified question should be answered in the negative since stillbirths are an every day

occurrence from natural causes not associated automatically as a matter of law with negligence or injury.

Looking further, in the case of *Southern Neurosurgical Associates v. Fine*, 591 So.2d 252 (Fla. 4th DCA 1991), the complaint alleged that the Plaintiffs did not learn of malpractice until December 18, 1988, similar to the allegations in the instant Amended Complaint. In *Fine*, the court recited the well-founded principle of law that for purposes of passing on a Motion to Dismiss a complaint, the court must assume that all facts alleged in the Complaint are true. *Fine*, at 256 citing *Hammonds v. Buckeye Cellulose Corporation*,m 285 So.2d 7, 11 (Fla. 1973). The court went on to cite the case of *Moore v. Morris* and held that :

> Knowledge that one suffered injury during or subsequent to an operation, which could be supposed to have arisen out of natural causes, may not constitute notice of negligence or injury caused by negligence.

Fine, at 256.

In *Babush v. American Home Products Corp.*, 589 So.2d 1379 (Fla. 4th DCA 1991), although a products liability case, the Fourth District Court in following *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991) and *Nardone v. Reynolds*, 333 So.2d 25 (Fla. 1976), interpreted the *Bogorff* test in conjunction with *Nardone* as having two essential ingredients:

> An injury distinct in someway from conditions naturally to be expected from the Plaintiff's condition, or exposure to the product in question.

Badush, at 1381.

The court in *Babush*, held that in order for the Statute of Limitations period to commence, the Plaintiff must know or should have known of a causal connection between the injury **distinct in some way from natural conditions.** In the instant action, there is not

even a medical opinion that the stillbirth was an unnatural or natural occurrence, but it certainly can be deemed from judicial notice that stillbirth is more often than not a natural occurrence and therefore not distinct in some way from natural conditions.

Finally, the opinion by the Second District Court in this action directly conflicts with its own opinion in *Harr v. Hillsborough Community Mental Health Center*, 591 So.2d 1051 (Fla. 2d DCA 1991), even though the Second District attempted to distinguish that decision from its decision in the instant action.

In *Harr*, the claimant's son committed suicide on October 4, 1986. The claimant, the son's mother, was notified of the suicide on October 6, 1986, and given extensive details by the deputy sheriff surrounding the death on October 7, 1986. The Notice of Intent to Litigate was served after the 2-year statute had run on October 20, 1988, and suit was filed four months later on February 15, 1989. There the defendants argued that the Statute of Limitations began on the date of death, identical to the Defendants' argument in the instant action.

The Second District Court of Appeal held that the plaintiff's mother knew of the death as of October 6, 1986, as a matter of law. In the instant action, there was no question that the TANNERS knew of the death of their baby when it was stillborn.

However, directly in conflict with the Second District's opinion in this case, the court held in *Harr*, as follows:

> Notice of more than the fact of injury to 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, i.e., 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.

Harr, at 1053-1054

Consequently, the court in *Harr* held that there was no evidence to conclude that she knew or should have known of the legal negligent act or injury before October 20, 1988. This is quite surprising since the date of October 20, 1988, is the date that the Notice of Intent to Litigate was served on the health care providers, even though the court determined that the plaintiff's mother had discovered all of the medical records as of January 20, 1987. Certainly, there must have been a medical opinion rendered prior to the Notice of Intent to Litigate was served on October 20, 1988. The court's conclusion in *Harr* directly conflicts with its decision rendered in the instant action. If a stillbirth is a legal injury as the Second District concluded in this case, then following the Second District decision in *Harr*, something more than the fact of injury of a person is required to trigger the running of the Statute of Limitations against a health care provider.

In the instant action, the Second District seems to conclude that injury at the time the health care provider renders the services is enough, however, this still conflicts with its decision in *Harr*. The Second District in *Harr* did not decide that the Statute of Limitations began running on January 20, 1987, when the mother knew not only of the death and also had discovered all the medical records and the identities of the health care providers, but rather, the period commenced only when she was notified of medical negligence.

Therefore, in conclusion, the certified question must be answered in the negative and hold that a stillbirth is not an injury as a matter of law.

POINT II

THE COURT ERRED IN CONCLUDING THAT THE STATUTE OF LIMITATIONS BARRED THE INSTANT ACTION BY FAILING TO EXTEND THE 2-YEAR STATUTE BY 90 DAYS PURSUANT TO §766.106(4) FLORIDA STATUTES, AND IF NOT, THEN FLORIDA STATUTES, §766.106(4) IS UNCONSTITUTIONALLY VAGUE.

The instant decision of the Second District Court directly conflicts with the decision of this court in *Hospital Corporation of America v. Lindberg*, 571 So.2d 446 (Fla. 1990), which cites with approval the position of the Fourth District and that of the Second Distict case of *Nash v. Humana Sunbay Community Hospital, Inc.*, 526 So.2d 1036, 1038 (Fla. 2d DCA 1988), rev. denied. 531 So.2d 1354 (Fla. 1988). It also directly conflicts with the decisions of the Third, Fourth and Fifth Districts. *Angrand v. Fox*, 552 So.2d 1113 (Fla. 3rd DCA 1989); *De Young v. Bierfeld*, 581 So.2d 629 (Fla. 3rd DCA 1991); *Campagnulo v. Williams*, 563 So.2d 733 (Fla. 4th DCA 1990), quashed on other grounds 588 So.2d 982 (Fla. 1991); *Kalbach v. Day*, 589 So.2d 448 (Fla. 4th DCA 1991) and *Novitsky v. Hards*, 589 So.2d 404 (Fla. 5th DCA 1991).

In the Second District's own decision in *Nash*, the court held, "clearly, the serving of a Notice of Intent to Initiate Litigation does not shorten the regular Statute of Limitations." At 1038. But this is precisely what the instant decision does.

In *Angrand*, the court held that §766.104, the 90-day Intent to Litigate notice, extends the 2-year statute by 90 days. In *Angrand*, the pertinent facts are as follows:

(a) the patient's death occurred on June 19, 1985;
(b) eight days before the 2-year statute expired, the automatic 90-day extension is filed pursuant to Florida Statute, §768.495(2);
(c) the 90-day Notice of Intent to Litigate per Florida Statute, §766.104, is filed on July 7, 1987;

(d) Suit I is filed on September 8, 1987;
(e) Suit II is filed December 16, 1987;

The court held that the Statute of Limitations expired on December 19, 1987, pursuant to the two extensions.

As can be seen above, the court did not begin the automatic 90-day extension from the date it was filed, eight days prior to the expiration of the 2-year Statute of Limitations. Rather, it added the 90 days on at the end of the 2-year statute. The automatic 90-day extension extended the statute 90 days to September 19, 1987, and the Notice of Intent to Litigate pursuant to Florida Statute, §766.104, extended it another 90 days to December 18, 1987.

In the instant action, since the 90-day Notice of Intent to Litigate was filed on February 12, 1990, 47 days prior to the running of the 2-year Statute of Limitations, the court deducted 47 days from the 2-year statute and added on 60 days giving the TANNERS only 90 days plus 60 days or until July 12, 1990 to file suit. This was clear error on the part of the Second District Court of Appeal in determining the effect of the 90-day Notice of Intent to Litigate with the 2-year Statute of Limitations. The above computation assumes that the notice of injury commenced on the date of the stillbirth of April 1, 1988, which is also error.

Since the TANNERS were not on notice of injury due to the fact that a stillbirth is not an obvious injury as matter of law placing the appellants on notice of a possible invasion of their legal rights, the initial 2-year Statute of Limitations would not commence until December 26, 1989, when the TANNERS first learned that the actions of the Defendant health care providers fell below the standard of care pursuant to ¶10 of the Amended

Complaint. Therefore, taking the facts alleged in the Amended Complaint as true, the Statute of Limitations would be computed as follows:

(a) April 1, 1988, stillbirth
(b) December 29, 1989, TANNERS first learned of the medical negligence;
(c) February 12, 1990, TANNERS filed their 90-day Notice of Intent to Litigate pursuant to Florida Statute, §766.106;
(d) August 1, 1990, Complaint filed;
(e) December 26, 1991, the initial 2-year statute expired;
(f) March 29, 1991, the extended 2-year plus 90-day Statute of Limitations expired.

As can be seen in the above computation, the Complaint was filed well in advance of the expiration of the original 2-year Statute of Limitations, let alone the extended 2-year statute pursuant to §766.106 (1988), formerly §768.57.

Assuming the Certified Question is answered in the affirmative, that the TANNERS knew of the injury on the date of the stillbirth, the Complaint was still timely filed:

(a) April 1, 1988, stillbirth;
(b) February 12, 1989, TANNERS filed their 90-day Notice of Intent to Litigate pursuant to Florida Statute, §766.106;
(c) April 1, 1990, initial 2-year Statute of Limitations expires;
(d) July 1, 1990, the extended 2-year plus 90-day Statute of Limitations expired;
(e) August 1, 1990, Complaint filed;
(f) September 1, 1990, 60-day period pursuant to §766.106(4) expires.

"Florida Statute, §766.106(3)(a) (1988) provides that no suit may be filed for a period of 90 days after notice is mailed to any prospective defendant..." Further, Subsection 4 of the statute provides as follows:

> 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, which ever is greater, in which to file suit."

Previously, the Second District held that "clearly, the serving of a Notice of Intent to Initiate Litigation does not shorten the regular Statute of Limitations." *Nash v. Humana Sunbay Community Hospital, Inc.*, and *Castro v. Davis*, 527 So.2d 250 (Fla. 2d DCA 1988).

Apparently the Second District Court of Appeal forgot its own decision in *Sheffield v. Davis*, 562 So.2d 384 (Fla. 2d DCA 1990), in interpreting the tolling effect of §766.106(4). In *Sheffield*, the facts were as follows:

> (a) medical negligence occurs: January 31, 1986;
> (b) 90-day intent notice filed: September 19, 1986;
> (c) Automatic 90-day Extension filed: December 18, 1986;
> (d) Complaint filed: April 25, 1988.

The Second District Court held in *Sheffield*, that at the end of the 180-day investigative period, the plaintiff still had more than 10 months in which to file suit. Similar to the instant action, the Defendant health care providers in *Sheffield* argued that the statutory period of limitations is extended by the 90 or the 180 days, whichever applies, only if the notice is filed within 90 days or less of the end of the statutory period so that the provision of this time for investigation and settlement of the claim does not result in the plaintiff losing the cause of action because of the expiration of the limitations.

The court rejected that argument, as it should in the instant action, and held that:

> **Whether the action is filed at the beginning or the end of the 2-year limitations, §768.57(4) [renumbered in 1988 as 766.016(4)] demands that the limitations statute be tolled, during the 90 or 180 days of investigation, thus rejecting the health care providers argument.**

Sheffield at 387 (emphasis added).

The Second District Court finally concluded as follows:

> Therefore, according 'tolled' a plain and uniform meaning, we hold that in every instance the limitations statute for medical malpractice claims will be extended beyond the 2-years by the applicable pre-suit investigation.

For unexplained reasons, after *Sheffield*, the Second District changed its position in the case of *Rhoades v. Southwest Florida Regional Medical Center*, 554 So.2d 1188 (Fla. 2d DCA 1990), wherein the court rejected the Third District Court's interpretation of the statute in *Angrand v. Fox* (where the Third District held that the 90-day period is stacked on to the 2-year statute of limitations) and held that at the expiration of the 90-day tolling of the Statute of Limitations provided in §769.57(4), Florida Statutes (1988) or a stipulated extension of that time, the claimant has 60 days or the remainder of the period of the Statute of Limitations, whichever is greater within which to file suit. *Rhoades* at 1191.

This interpretation by the Second District not only conflicts with *Sheffield* and *Angrand*, but is totally against the plain and obvious meaning of the statute. To permit the *Rhoades* decision to stand, which apparently defeats the TANNERS case in the instant action, violates TANNERS due process rights under the federal and state constitutions. No reasonable person could interpret the tolling effect of the notice provision under §766.106(4) as the court has done in this case and in the *Rhoades* case. Both cases are an aberration of the clear and distinct legislative intent, otherwise, the statute is unconstitutionally vague.

The pertinent facts in *Rhoades* are as follows:

(a) the negligent act occurs on January 4, 1986;
(b) the Notice of Intent is served December 15, 1987 on all defendants except one which is served January 4, 1988;
(c) the Complaint is filed May 23, 1988;

Even with the holding in *Rhoades*, the court reinstated the complaint and declined to rule that the complaint was filed untimely, under the Second District's newly announced interpretation of Florida Statutes, §766.106(4), even though by looking at the facts announced in the decision it definitely appears that the Complaint was untimely filed pursuant to the *Rhoades* formula.

This quagmire concerning the effect of the tolling provision in §766.106(4) must be resolved by this court. It definitely appears that the *Rhoades* decision, as well as the decision in the instant action by the Second District does not comport with fairness and the notice requirements under the state and federal constitutions, and clearly does not follow the legislative intent. If indeed the legislative intent and the statute are being correctly interpreted by the Second District in *Rhoades* and in the instant action, then the statute is clearly unconstitutional.

The Second District Court in *Castro v. Davis*, 527 So.2d 251 (Fla. 2d DCA 1988), held as follows:

> We find nothing in the statutory scheme, however, requiring Castro, as is contended by Davis, to file his complaint immediately upon the 'conclusion of the 90-day period' rather than 19 days later. The statute operates merely to insulate the prospective defendant from a civil action for 90 days... thus, upon or after the expiration of 90 days from October 10, Castro was empowered to commence the malpractice action. He did so on January 27th, well within the limitations period of 2 years from December 28, 1984, with an enlargement of 90 days in accordance with §768.57(4).

Castro at 251.

The pertinent facts in *Castro* are as follows:

(a) negligent surgery: July 20, 1984
(b) on December 28, 1984, the patient is told by another doctor that negligence occurred during the first operation;
(c) Complaint filed: July 1986
(d) Notice of Intent to Litigate served: October 10, 1986
(e) January 27, 1987, after a voluntary dismissal of the first action, a second complaint is filed.

As can be seen, the 2-year Statute of Limitations was extended an additional 90 days by the notice under §766.106(4). In *Castro*, the Notice of Intent to Litigate was filed almost 74 days before the 2-year statute expired. The Second District Court did not subtract this amount of time as it has done in the instant case. Rather, it simply extended the statute by 90 days from the expiration of the 2-year period of December 28, 1984 to the extended period of March 28, 1987, and therefore, the filing of the suit on January 27, 1987 was timely.

What it is extremely vague about §766.106(4), is that although it states that the suit cannot be filed within the 90-day period following the service of the Notice of Intent to Litigate, nowhere does it mention when the Complaint must be filed after the 90-day period. The Second District and other districts have held that the claimant has 60 days after the extended tolling period in which to file suit. However, a close reading of §766.106(4) clearly shows that the extended 60-day period only applies after the claimant has received notice of termination of negotiations and the extended period. The statute is silent as to how much time the claimant has if there is not an extended period. For this reason, the statute should be declared unconstitutional as being vague. Even in the case of *Castro v. Davis*, the Second District Court held that filing the suit 19 days after the extended period is permissible.

> It is well established that a limitations defense is not favored...and that therefore, any substantial doubt on the question should be resolved by choosing the longer rather than the shorter possible statutory period.

Angrand v. Fox, 552 So.2d 1113, 1116 (Fla. 3rd DCA 1989)

In conclusion, if the court is inclined to hold that the stillbirth is an obvious injury as a matter of law, placing the TANNERS on notice of the possible invasion of their legal rights, then the Second District erred in its computation and effect of the tolling provision of §766.106(4). By the very nature of the term "tolling," the 2-year statute of limitations should be extended by an additional 90 days once the Notice of Intent to Litigate is served under §766.106(4) thus giving a total statute of limitations of 2 years and 90 days. Thereafter, the complaint should be filed by the claimant. Under the plain language of §766.106(4), it still remains unclear as to whether or not the complaint should be filed within 60 days after 2 years and 90 days, or within any reasonable time thereafter. If in fact, the court should determine that the suit should be filed within 60 days after 2 years and 90 days, then clearly, the complaint in the instant action filed on August 1, 1990, was filed well before the end of the 60-day period of September 1, 1990. Therefore, the court should reverse the Second District Court of Appeal and reinstate the Amended Complaint with remand for further proceedings before the trial court.

POINT III

THIS COURT SHOULD RECOGNIZE THAT IN THE EVENT THAT MEDICAL NEGLIGENCE RESULTS IN A STILLBIRTH OF A VIABLE FETUS, THE PARENTS DO HAVE A CAUSE OF ACTION EITHER FOR THE DESTRUCTION OF LIVING TISSUE OR WRONGFUL DEATH.[1]

The Amended Complaint was presented in such a way as to claim the destruction of the living tissue, the viable fetus, or as a claim for the wrongful death of the full term viable fetus, a person. The Second District noted at Footnote 1 that there is no recognized caused of action for wrongful death of a stillborn fetus in Florida, citing the case of *Stern v. Miller*, 348 So.2d 303 (1977); *Stokes v. Liberty Mutual Insurance Co.*, 213 So.2d 695 (Fla. 1968); and *Duncan v. Flynn*, 358 So.2d 178 (Fla. 2d DCA 1978). However, the negligent treatment of PHYLLIS TANNER resulting in the stillbirth of her child, must have a remedy. It is therefore a cause of action for the destruction of her living tissue or wrongful death of her child.

The Second District and the Fifth District have recognized such a cause of action for the destruction of the living tissue of the mother in the cases of *McGheehan v. Parke-Davis*, 573 So.2d 376 (Fla. 2d DCA 1991) rev. den. 583 So.2d 1036 (1991) and *Singleton v. Rands*, 534 So.2d 847 (Fla. 5th DCA 1988). These decisions do conflict with the First District in the case of *Henderson v. North*, 545 So.2d 46 (Fla. 1st DCA 1989).

In *Stern v. Miller*, 348 So.2d 303, (Fla. 1977), the court was faced with a seven-month fetus who was stillborn. This was the first time that the question was presented to the Supreme Court as to whether or not a death claim of a fetus could be brought under the

---

[1]An opinion by this court is requested regardless of the outcome of the court's determination on the Statute of Limitations.

former Wrongful Death of Minors Act, Florida Statutes, Section 718.101. The court opened the door to such a cause of action by saying that "conceivably this would be possible if they could (1) establish a stillborn fetus as any person under the statute and (2) have someone appointed administrator of the so-called "person." Id. at 305.

In the instant action, probate was established and the father, JAMES TANNER, was appointed the administrator of the "person" of BABY BOY TANNER aka JAMES R. TANNER, II. (R. pp.1-22, Exhibit A). TANNERS' retained expert, MARVIN A. KRANE, M.D., can establish that JAMES TANNER, II, was, in medical terms, a "person" under the current Florida's Wrongful Death Act.

It is the position of the Appellants that the court cannot invade the province of medical science by imposing a definition of "person" that even medical science does not recognize. It is time for the court to follow the majority jurisdictions and recognize that a viable fetus is indeed a "person" under the recent medical advancements and should be accorded all legal protection, whether inside or outside the womb. If not, the court should at least recognize that it is a cause of action for destruction of the mother's living tissue. *McGeehan* and *Singleton*.

Recently, the Supreme Court of North Carolina took a similar step and decided not to wait for the legislature to act in defining whether or not a viable fetus is a person under its wrongful death act, and **held that a viable fetus is a person** under the Wrongful Death Act in North Carolina, reversing all precedent established in North Carolina.

> It is unlikely that the legislature would want to preclude recovery for the death of a fetus when recovery for a fetal injury not resulting in death is permitted. The unborn child's parents are the real parties in interest here, and they seek

> compensation for the complete loss of, rather than mere injury to, their offspring. Surely the legislature would find their claim as compelling as that of a child who seeks to recover for a prenatally inflicted but nonfatal injury, the consequences of which could vary from moderate to severe.
>
> ...A viable fetus, whatever its legal status might be, is undeniably alive and undeniably human. It is, by definition, capable of life independent of its mother. A viable fetus is genetically complete and can be taxonomically distinguished from non-human forms. Again, this is some evidence that a viable fetus is a person under the wrongful death statute.

DiDonato v. Wortman, 358 S.E.2d 489 (N.C. 1987).

Federal courts have likewise recognized the emerging trend and majority rule among the courts in favor of the inclusion of a viable fetus within the meaning of a "person" under a wrongful death statute.

For example, in *Todd v. Sandidge Construction Co.*, 341 F.2d 75 (4th Cir. 1964), the Fourth Circuit reversed the district court's conclusion and held that the death of an unborn, viable child as a result of a tortious injury to her mother gives rise to a cause of action under the Wrongful Death Act of South Carolina. In that case, the fetus was eight months old when the child's mother was injured when the car in which she was a passenger plunged into an opening in a highway left unguarded through the negligence of the defendant. The fetus died in utero and was delivered stillborn by Caesarean section.

The South Carolina wrongful death statute in *Todd* was very similar to the Florida statute in the present case. The Fourth Circuit noted that if recovery for the wrongful death of a viable fetus were denied under the statute, the following illogical and unjust result would occur: if the trauma were severe enough to kill the child, then recovery would be denied, but if the trauma were less serious and the child survived, then recovery might be

had. Further, if the fatality were immediate, the action could not be maintained, but if the death were protracted by a few hours, or even a few minutes, beyond birth, the claim might succeed. Practically, this would mean that the graver the harm, the better the chance of immunity on the part of the tortfeasor. Consequently, the Fourth Circuit held that the complaint of the administrator of the estate of the deceased viable fetus stated a cause of action under South Carolina's wrongful death statute.

The Third Circuit reached a similar conclusion in *Gullbord v. Rizzo*, 331 F.2d 557 (3d Cir. 1964). In that case, the court noted the weight of authority existing in 1964 that an action may be maintained under wrongful death statutes for prenatal injuries sustained by a viable fetus which is stillborn. The court went on to hold that the jury's verdict of $5,000 in damages for the wrongful death of the viable fetus was not excessive, and that the court's conscience was not shocked by the award.

The weight of authority among the courts that existed in 1964 when the Third Circuit decided *Gullbord* is even greater in light of the cases decided subsequent to that decision. For example, in *In re: Air Crash Disaster at Detroit Metropolitan Airport on August 16, 1987*, 737 F.Supp. 427 (E.D. Mich. 1989), the husband of an airline employee who died in the crash of Flight 255 at the Detroit airport brought a wrongful death action under Michigan's wrongful death statute for the death of his unborn fetus who also died in the crash. Citing a long line of Michigan cases, the court held that a wrongful death action can be maintained if the fetus was viable at the time of the negligence that resulted in his death. Because the fetus had been at most only 22.8 weeks old at the time of the accident, however, the court

held that it had not been viable at the time of the accident and that therefore the plaintiff could not maintain the wrongful death action.

In *Denham v. Burlington Northern Railroad*, 699 F.Supp. 1253 (N.D. Ill. 1988), the court held that the father and brother of a seven-month-old fetus could recover damages for the death of the fetus under Illinois' wrongful death statute. Although the issue of whether a wrongful death cause of action exits for the wrongful death of a viable fetus was not before the court, the court's holding that the fetus' father and brother could recover under the relevant rules, and that the fetus' grandparents, aunts, and cousin could not recover, implicitly recognized such a cause of action.

Citing the "modern trend" and "weight of authority," the United States District Court for the District of Colorado held that a wrongful death action may be maintained for the death of a viable fetus, particularly a full-term fetus. The court so held in *Espadero v. Feld*, 649 F.Supp. 1480 (D. Colo. 1986), an action brought by the husband of a pregnant woman who was killed while a passenger in an automobile that was struck by a drunk driver. At the time of the woman's death she was nine months pregnant. Her full-term male child was also killed in the crash. The plaintiff, who sued along with the driver of the automobile that was struck, alleged that immediately prior to the accident, the defendant negligently served alcoholic drinks to the drunk driver when he was visibly and severely intoxicated.

The plaintiff-husband sought damages pursuant to Colorado's wrongful death statute for the wrongful death of his full-term, unborn son. Citing the illogical and inequitable results discussed by the Fourth Circuit and set forth above, the district court concluded that to deny recovery would reward the tortfeasor for employing greater violence. The court

found "no rational justification" for the application of one rule to a baby's death immediately before birth and a different rule to a death immediately after birth. Id. at 1484. At the time the court issued its opinion, at least 25 jurisdictions allowed a wrongful death action for the death of a viable fetus. Only nine states precluded such an action. Consequently, the court held that under Colorado's statute, a wrongful death action could be maintained. The court continued as follows:

> A full-term, viable unborn child's right to be born alive is entitled to as much protection under the Colorado Wrongful Death Statute as a newborn child's right to live. If, as the result of tortious injury to a mother bearing viable twins, one were born alive with fatal injuries caused by the tortfeasor, but the other was killed before birth, the law should recognize a tort remedy for each death. To the extent that modern medical developments have established that a fetus, once it has attained a certain stage of development is able to survive outside the mother's womb, reasoning based on contrary medical views of earlier times is no longer relevant.

Id.

Similarly, the United State District Court for the District of Columbia, in *Simmons v. Howard University*, 323 F.Supp. 529 (D.D.C. 1971), addressed the question of whether the plaintiff could recover under the District's wrongful death statute for the death of his unborn child. Answering the question in the affirmative, the court noted that "increasing weight of authority" in support of the proposition that a viable unborn child, which would have been born alive but for the negligence of the defendant, is a "person" within the meaning of the wrongful death statutes. Id. In the case before the court, the mother had died in childbirth at full term, and the conduct alleged to be negligent with respect to the child was "precisely"

the failure to deliver it alive. Id. Consequently, the court ordered that the plaintiff's wrongful death action proceed accordingly.

A federal court in West Virginia held that a viable fetus was a person within the meaning of West Virginia's wrongful death statute, In *Panagopoulous v. Martin*, 295 F.Supp. 220 (S.D. W.Va. 1969), the fetus was eight months old when her mother was injured in an automobile accident due to the negligence of the defendants. The fetus was stillborn the day of the accident, and her death was established to be the proximate result of the defendants' negligence. Again, the wrongful death statute there was very similar to the Florida Statute in the present case.

The district court noted that in determining whether a cause of action for wrongful death should be permitted in the case of a stillborn viable fetus, logic and common sense required the court to accord considerable weight to the fact that a cause of action is permitted for recovery of personal injuries inflicted while the child is in the mother's womb. Upon reaching that determination, the court was compelled to hold that an unborn viable fetus is also a person in the context of a wrongful death statute. The court based its conclusion upon the fact that a viable fetus is capable of independent life apart from its mother, and the fact that a viable fetus is accorded the status of a distinct being, capable of sustaining a legal wrong in the form of prenatal injuries. A logical extension of these acts, according to the court, was its holding that a viable fetus is a person under the wrongful death statute.

At least two federal courts have held that a wrongful death action may not be maintained for the death of a nonviable fetus. The holdings of these courts indicate that

the distinction with regard to viability is significant, and that such an action may be maintained in the case of the wrongful death of a viable fetus. See *Aki v. Listwa*, 741 F.Supp. 555 (E.D. Pa. 1990) (holding that no wrongful death action could be maintained for the death of an eight-week-old fetus because the fetus, at the time of the defendants' negligence and at the time of its death, was not viable; the court did not recognize decisions from the Pennsylvania state courts and the great majority of jurisdictions that permitted a wrongful death action for the death of a viable fetus); *Estate of Baby Foy v. Morningstar Beach Resort*, 635 F.Supp. 741 (D.V.I. 1986) (holding that a fetus between 16 and 18 weeks old is not a person within the meaning of the wrongful death statute; the court recognized, and did not disapprove, those cases holding that a wrongful death action could be maintained for the death of a viable fetus.)

The foregoing decisions indicate that the clear majority of jurisdictions have recognized that a viable fetus, particularly a full-term viable fetus, is entitled to the same protection under a wrongful death statute to which a newborn child is entitled. In both instances, the child is a viable being, capable of life independent of its mother, and is accordingly entitled to the same protection under the statutes. As several courts have recognized, to deny recovery for the death of the viable fetus would be to, in essence, reward a tortfeasor for inflicting greater damage and killing a fetus rather than "merely" injuring it. Logic, reason, and equity dictate that this result should not and cannot, in all fairness continue.

The court should not permit the rights of the viable fetus to be the topic of political debate, but rather, the rights of the viable fetus should be accorded with all due legal

respect in recognizing his or her rights as a person under the laws and constitution of this state.

In conclusion, this Court should hold that the Amended Complaint either stated a valid cause of action for the destruction of the living tissue of the mother or that a viable fetus, dependent upon medical definitions, is a person under Florida's Wrongful Death Statute, §768.19.[2]

CONCLUSION

Pursuant to the authorities cited herein, this court should enter its opinion as follows:

(1) That a stillbirth is not an obvious injury as a matter of law, answering the Certified Question in the negative;

(2) That the 2-year Statute of Limitations, Florida Statute §95.11(4)(b) in a medical malpractice case is extended by 90 days for a total of two (2) years and 90 days once a Notice of Intent to Litigate letter is mailed within the 2-year period pursuant to Florida Statutes, §766.106(4), and that the claimant has 60 days to file suit after the end of the extended period; and

---

[2]Appellants previously attempted to file the affidavit of Marvin Krane, M.D. who had the opinion that there is no difference between the fetus in this action at the time of death or had it lived, shortly after birth. Since the affidavit was not considered by the trial court, the affidavit was stricken. This is the precise nature of the advancement in medical science that should be considered by the court before systematically dismissing any cause of action for wrongful death. The definition should not be left up to the political whims of the legislature.

(3) That a full term viable fetus is a "person" under Florida Statutes, §768.19, or alternatively, that the destruction of a mother's fetus is the destruction of her living tissue, entitling her to assert a cause of action in tort for damages.

Respectfully submitted,

KENNAN GEORGE DANDAR, ESQ.
DANDAR & DANDAR, P.A..
1009 North O'Brien Street
Post Office Box 24597
Tampa, Florida 33623-4597
813-289-3858
Florida Bar No. 289698

Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail this 19 day of March, 1992, to JERRY L. NEWMAN, ESQ., Post Office Box 2378, Tampa, Florida 33601; LEONARD MILCOWITZ, ESQ., 4200 West Cypress Street, #820, Tampa, Florida 33607; and ROBERT L. TROHN, ESQ., Post Office Box 3, Lakeland, Florida 33802-0003.

KENNAN GEORGE DANDAR, ESQ.