IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

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

Petitioners,

vs.

Case No. GCG 90-2303
Appeal No. 91-00057

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

Respondents.
_____/

APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA
APPEAL NO. 91-00057

AMENDED REPLY BRIEF OF PETITIONERS, PHYLLIS K. TANNER and JAMES R. TANNER, TO ANSWER BRIEF OF RESPONDENTS, ELLIE M. HARTOG, M.D., ALBERTO DUBOY, M.D., DUBOY AND HARTOG, P.A., LAKELAND REGIONAL MEDICAL CENTER AND FLORIDA DEFENSE LAWYERS ASSOCIATION

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ARGUMENT

POINT I

RESPONDENT FAILED TO PUT FORTH ANY AUTHORITY TO SUGGEST THAT A STILLBIRTH IS EVIDENCE OF AN OBVIOUS INJURY, THEREFORE THE CERTIFIED QUESTION MUST BE ANSWERED IN THE NEGATIVE

The Respondents misquote the holding of *Barron v. Shapiro*, 565 So.2d 1319 (Fla. 1990), and *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991), by stating that the Statute of Limitations is triggered where the Petitioners had notice of injury or notice of a negligent act. The cases of *Barron*, *Bogorff*, *Moore v. Morris*, 475 So.3d 666 (Fla. 1985), and *Nardone v. Reynolds*, 333 So.2d 35 (Fla. 1976), all hold that the Statute of Limitation is triggered when there is notice of the negligent act or when there is notice of the injury which is the consequence of the negligent act. If an injury or a condition is such that it is evidence of an obvious injury, then it meets the second prong test that it is an injury which is a consequence of a negligent act.

However, if a physical condition or injury is one that is associated with a natural condition or occurrence, then it is not the type of injury which automatically triggers the Statute of Limitations. *Barron*, *Bogorff*, *Moore*, and *Nardone*. These four decisions of this court all involved cases with substantial discovery which showed that the injury was obvious, that the physical condition was drastic thus evidencing the obvious injury, such as blindness or brain damage. All of that is lacking in the instance case.

The court did not overturn its decision in *Moore* and that case is the only case that is directly on point with the TANNER case. A stillbirth does not inescapably lead to a

conclusion that it is the result of an injury associated with a negligent act. Therefore, Respondent's arguments are totally frivolous.

In an attempt to make something of their worthless argument, Respondent, LAKELAND REGIONAL MEDICAL CENTER, asserts that the Petitioners, TANNERS, concede the date of death and the date the notice of intent to litigate was sent. This is not a confession by the TANNERS, but rather, since it is not an issue, it is simply a statement of the facts of the case. By attempting to say that the TANNERS conceded these two elements shows that LAKELAND's arguments are without substance.

It is quite amusing to read the Amicus Curiae Brief of the Florida Defense Lawyers Association (hereinafter referred to as FDLA). The Amicus repeatedly states that the decisions of this court in reference to when the Statute of Limitations is triggered is a "bright line rule" but is "not free from ambiguity." The Statute of Limitations is triggered by either notice of medical negligence or notice of an injury which is a consequence of a negligent act. No new definition on when the statute is triggered is needed. The TANNERS are not asking the court to make a new announcement in this situation. However, based upon the Answer Briefs filed herein, the court needs to make a clarification. From reading the decisions of *Moore v. Morris*, 475 So.3d 666 (Fla. 1985); *Nardone v. Reynolds*, 333 So.2d 35 (Fla. 1976); *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991) and *Barron v. Shapiro*, 565 So.2d 1319 (Fla. 1990), it is clear to the TANNERS that the Statute of Limitations is triggered when there is notice of medical negligence or notice of a legal injury, i.e., an injury which is a consequence of the negligent act. It is the

second prong that appears to give the FDLA and the other Respondents the most difficult situation.

Respondents misrepresent TANNER's position in reference to what type of notice of injury is required to trigger the Statute of Limitations. Respondent states that the TANNERS are arguing that one needs notice of an injury and a obvious linkage between the injury and a particular act of negligence. That is precisely what the two bills introduced in the legislature attempted to do, however, it is not what the TANNERS are attempting to do. The TANNERS are simply reasserting the decisions in *Barron*, *Bogorff*, *Moore*, and *Nardone* by stating that the second prong of the test is notice of injury, which is the consequence of a negligent act. It is not necessary to identify the particular negligent act or health care provider to trigger the statute. All that is necessary is that the injury is of such a nature that it is obviously a consequence of a negligent act rather than a natural condition. Since a stillbirth is normally associated with a natural condition and therefore does not meet this notice requirement in these cases, the certified question must be answered in the negative.

The Second District Court's analysis in *Goodlet v. Steckler*, 586 So.2d 74 (Fla. 2d DCA 1991), if correct, warrants that the certified question be answered in the negative. In the TANNER case, out of the seven *Goodlet* factors, No. 5, facts establishing a breach of the standard of care; No. 6, proximate cause; and No. 7, injury, are missing.

The Second District Court failed to distinguish its decision in *Harr v. Hillsborough Community Mental Health Center*, 591 So.2d 1051 (Fla. 2d DCA 1991), with its TANNER decision evidencing its own confusion as to this court's rule on the triggering of the Statute

of Limitations. In *Harr*, the court held that the suicide was not enough to trigger notice of injury. Certainly a suicide is not the result of a natural condition, but then it is also not the result of an obvious injury inflicted by someone else. The notice of injury which this court has announced in *Nardone*, *Moore*, *Borgorff* and *Barron*, is the notice of a legal injury, i.e., the possible invasion of one's rights and therefore calls for the notice that a tort has been committed resulting in injury. Neither the TANNERS nor these cases hold that one needs notice of injury and the identity of a negligent health care provider. These cases hold that one needs notice of injury associated with some as of yet unidentified negligence.

Respondents, ALBERTO DuBOY, M.D., and HARTOG & DuBOY, P.A., mistakenly rely upon *Jackson v. Georgopolous*, 552 So.2d 215 (Fla. 2d DCA 1989) which is a fraudulent concealment case invoking the Statute of Limitations. There the decedent died after the defendant performed surgery. The court held that the notice of injury, i.e., injury during surgery and resulting death, was apparent, thus triggering the Statute of Limitations. The obviousness of the injury in the TANNER matter is nonexistent. Further, in *Jackson*, the court held that the plaintiff did have notice of the physical injury which is the consequence of the negligent act.

Contrary to Respondents' assertions, this court does not need to announce any new rule in answering in the negative the certified question. This court merely needs to state that a stillbirth does not inescapably lead to the conclusion that it resulted in medical negligence. A stillbirth is accepted as a result of a natural condition and therefore, is not the type of notice of legal injury, i.e., injury that is so obvious that as a matter of law, it is a consequence of a negligent act.

POINT II

THE TOLLING EFFECT OF THE 90-DAY NOTICE OF INTENT TO LITIGATE, PER FLORIDA STATUTE §766.106 TOLLS THE STATUTE OF LIMITATIONS FOR A COMBINED LIMITATION PERIOD OF TWO YEARS AND NINETY DAYS WITH A REASONABLE TIME THEREAFTER TO FILE A COMPLAINT FOR MEDICAL MALPRACTICE.

Respondent, LAKELAND, unbelievably states in Footnote No. 4 of its Answer Brief that TANNER was precluded from arguing the computation of the Statute of Limitations as tolled by the 90-day notice of intent to litigate per Florida Statute §766.106 before the Second District. This is simply untrue. There was indeed argument of the computation on the statute of limitations and the tolling effect of the 90-day notice during oral argument before the Second District Court of Appeal. The argument was presented by Petitioners' counsel, as well as Respondents' counsel. This argument was also raised in the Brief filed by Respondent, LAKELAND, as pointed out in TANNERS' Memorandum of Law in Opposition to the Motions to Dismiss filed by Respondents' in this appeal. Most importantly, it formed the basis of the Second District's decision on appeal.

Buckley Towers Condominium, Inc. v. Buchweld, 340 So.2d 1206 (Fla. 3rd DCA 1977) is cited in support of an estoppel argument. That case is totally distinguishable from the instant action. There, the appellant attempted for the first time during oral argument to raise an issue which was not part of anyone's brief nor assigned as error, totally distinguishable from the instance action. Here, the decision in *Rhoades Southwest Regional Medical Center*, 554 So.2d 1188 (Fla. 2d DCA 1990) was briefed, argued and made a substantial part of the Second District Court's opinion. Also the case of *McDonald v.*

Pickens, 544 So.2d 261 (Fla. 1st DCA 1989) is not applicable because the argument was not included in any of the briefs, unlike the instant matter.

It is readily apparent that the Respondents are unable to distinguish the cases which compute the Statute of Limitations as being two years plus 90 days under the notice of intent to litigate due to the inescapable conclusion that these cases: *Angrund v. Fox*, 552 So. 2d 1113, (Fla. 3rd DCA 1989, review denied 563 So.3d 632 (Fla. 1990); *Deyoung v. Bierfeld*, 581 So.2d 629 (Fla. 3rd DCA) review denied 591 So.2d 180 (Fla. 1991); *Babush v. American Home Products Corp.*, 589 So.2d 448 (Fla. 4th DCA 1991) dismissed Lexis 411 (Fla. 1992); *Novitsky v. Hards*, 589 So.2d 404 (Fla. 5th DCA 1991); *Hospital Corporation of America v Lindberg*, 571 So.2d 446 (Fla. 1990) all contradict the results reached by the Second District Court in the TANNER decision.

The intent to initiate litigation for medical malpractice is first noted in Florida Statute §766.106(2). ¶(3)a states that no suit may be filed for a period of 90 days after notice is mailed to any prospective defendant. Thereafter, §766.106(4) states that this notice of intent must be served within the time limits set forth in §95.11, which is two years.

The Respondents totally ignore the next sentence of ¶4 of this statute which states "However, during the 90-day period, the statute of limitations is tolled as to all potential defendants." The Appellants' Brief specifically points out that the only mention of a 60-day period is found in §766.106(4) which is only triggered "upon receiving notice of termination of negotiations in an extended period." The legislature was absolutely silent as to what period of time the claimant has to file a malpractice action when the notice of intent period of 90 days expires without an extension. It can be surmised that the 60-day requirement was

placed in §766.106(4) since the parties were free to extend the Statute of Limitations for any period of time agreed upon.

From a reading of the cases concerning the Statute of Limitations, it is then apparent that the claimant has a "reasonable period of time" to file the complaint after the expiration of the Statute of Limitations as extended by the notice of intent to litigate. *Castro v. Davis*, 527 So.2d 250 (Fla. 2d DCA 1988).

Therefore, the lower court was incorrect on several counts in holding that the Statute of Limitations had expired on July 12, 1990, when it used the last sentence of §766.106(4) and the *Rhoades v. Southwest Florida Regional Medical Center*, 554 So.2d 1188 (Fla. 2d DCA 1990) decision in holding that the TANNERS had 60 days or the remainder of the period of the Statute of Limitations, whichever is greater within which to file suit. Quite to the contrary, the TANNERS had the original two-year Statute of Limitations, plus the 90-day tolling period per §766.106(2), (3)(a) and (4). Since no suit can be filed during the 90-day period, then the TANNERS had a "reasonable period of time" in which to file suit after the expiration of the 90-day period. If a reasonable period of time is 60 days (so that there is some consistency in the statute), then the TANNERS met the filing requirements within Florida Statute §766.106.

The case of *Novitsky v. Hards*, 589 So.2d 404 (Fla. 5th DCA 1991) follows the case of *Angrand v. Fox*, 552 So.2d 1113 (Fla. 3rd DCA 1989) reviewed denied 563 So.2d 632 (Fla. 1990) by adding the 90-day pre-suit notice on to the two-year Statute of Limitations even though the court referred to *Rhoades v. Southwest Florida Regional Medical Center*, 554 So.2d 1188 (Fla. 2d DCA 1989) n.6, at 407. However, the court in *Novitsky* improperly included

the 60-day period available under Subsection 4, since there was no stipulated extended period beyond the 90-day notice of intent period. Therefore, since no action can be filed until the expiration of the investigative period, and since the 60-day filing period only applies to an extended period, a claimant should then have a reasonable time to file suit after the investigative period when no extension is sought.

The language of §766.106(4) where it states that there is 60 days or the remainder of the period of Statute of Limitations, whichever is greater within which to file suit, only applies to an extended period stipulated by the parties following the expiration of the 90-day period automatically coming with the notice of intent to initiate litigation. It is quite clear from the statute, as well as the above case law, that the Statute of Limitations in a medical malpractice case is two years plus 90 days. Thereafter, the statute is not clear and therefore perhaps unconstitutionally vague as to what period of time the claimant has to file the suit following the expiration of the 90-day period. It is either 60 days, which appears nowhere within §766.106 except after the expiration of an extended period, or is "a reasonable period of time." *Castro v. Davis*, 527 So.2d 250 (Fla. 2d DCA 1988).

POINT III

THE TANNERS DID PLEAD WRONGFUL DEATH OR THE DESTRUCTION OF THE LIVING TISSUE OF THE MOTHER IN THE AMENDED COMPLAINT.

Respondents recognize that there is indeed a direct conflict among the districts as to whether or not the death of a viable fetus in the womb is the destruction of living tissue. To support its position, Respondents request the court to reject the decisions of *Singleton v. Rand*, 534 So.2d 847 (Fla. 5th DCA 1988), and *McGheehan v. Parke-Davis*, 573 So.2d 376

(Fla. 2d DCA 1991) review denied 583 So.2d 1036 (1991), which specifically held that the destruction of a fetus is the destruction of living tissue of the mother entitling the mother to damages in tort. Since these damages would be totally different than damages claimed in a Wrongful Death Act, the death of a person, then the claim for the destruction of the living tissue of the mother is totally distinct from a Wrongful Death Claim and is not merely a disguised claim for Wrongful Death. Therefore, this court should reject the decisions of *Henderson v. North*, 545 So.2d 46 (Fla. 1st DCA 1989) and *Abdolezi v. AMISUB of Florida, Inc.* 515 So.2d 269 (Fla. 3rd DCA 1987) and adopt the common sense decisions of *Singleton* and *McGheehan*.

The TANNERS pled in their Amended Complaint a separate cause of action for Wrongful Death of their child and then in another count pled physical injury to the mother, which the trial court recognized was well pled.[1] The physical injury to the mother is in reference to the destruction of her living tissue under the *Singleton*, and *McGheehan* decisions.

Therefore, as in any other cause of action claiming physical damage, the death of this fetus, whether considered living tissue or a child, needs to have a remedy. Those cases which deny the right to a remedy should be rejected.

Respondents pass the buck by arguing that the definition of a "person" as the term is used in the Wrongful Death Act should be defined by the legislature. Unfortunately, the legislature has never given a definition for a "person" under this statute. The only definition

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[1]The Respondents have waived their right to argue this point since they did not appeal to the Second District that position of the trial court's order.

is one given by the court and the court can change that definition, as the North Carolina Supreme Court did in *DiDonato v. Wortman*, 358 S.E.2d 489 (N.C. 1987). This is precisely what the TANNERS desire for the court to do either now or after an evidentiary hearing with the introduction of medical testimony.

CONCLUSION

The Petitioners, PHYLLIS KAYE TANNER and JAMES R. TANNER, respectfully request this court to: (1) answer in the negative the certified question in reliance upon *Barron v. Shapiro*, 565 So.2d 1319 (Fla. 1990), *Moore v. Morris*, 475 So.3d 666 (Fla. 1985), *Nardone v. Reynolds*, 333 So.2d 35 (Fla. 1976), and *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991); (2) distinctly state that the notice of intent to litigate per Florida Statute §766.106 extends the statute for a total of two years and 90 days, no matter when the notice of intent is filed within the two-year limitation period and thereafter, the claimant has 60 days or "a reasonable period of time" in which to file the complaint and therefore, the TANNERS timely filed their complaint in the instant action; and (3) the court will permit an evidentiary hearing concerning medical testimony as to whether or not the TANNERS fetus was viable and therefore a person under the Wrongful Death Act, or if the court chooses again to let the question go unanswered, at least, the death of a fetus, is indeed the destruction or damage of the living tissue of the mother entitling the parents to a cause of action for tort damages as they would have if any other part of the body of the parent was destroyed by the negligent actions of the physicians or other tortfeasor.

Respectfully submitted,

KENNAN GEORGE DANDAR, ESQ.
DANDAR & DANDAR, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 24th day of August, 1992, to JERRY L. NEWMAN, ESQ., Post Office Box 2378, Tampa, Florida 33601; CHARLES CANADY, ESQ., and ROBERT L. TROHN, ESQ., Post Office Box 3, Lakeland, Florida 33802-0003 and PHILLIP D. PARRISH, ESQ., ROBERT M. KLEIN, ESQ., One Datran Center, Suite 1500, 1100 South Dixieland Boulevard, Miami, Florida 33156; JOEL D. EATON, ESQ., and JOEL S. PERWIN, ESQ., 25 West Flagler Street, Suite 800, Miami, Florida 33130; and MARGUERITE H. DAVIS, ESQ., Highpoint Center, Suite 1200, 106 East College Avenue, Tallahassee, Floriea 32301.

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