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IN THE SUPREME COURT OF FLORIDA

MUSCULOSKELETAL INSTITUTE CHARTERED, d/b/a FLORIDA ORTHOPAEDIC INSTITUTE, CHESTER E. SUTTERLIN, III, M.D., and CHESTER E. SUTTERLIN, III, M.D., P.A., and GENE A. BALIS, M.D.,

Petitioners,

vs.

JAMES S. PARHAM,

Respondent.

CASE NOS.: 91,966
92,382
92,451
(Consolidated)

ANSWER BRIEF ON THE MERITS OF RESPONDENT JAMES S. PARHAM

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OTHER AUTHORITIES

Section 95.11(4)(b), Florida Statutes (1989)	6, 9, 11, 13, 15, 17, 18

Section 766.104(2), Florida Statutes (1989) 6, 8, 9, 11, 12, 16, 17

Section 766.106(4), Florida Statutes (1989) 8, 9, 11, 12, 15

PRELIMINARY STATEMENT

In this Brief, the Petitioners, Gene A. Balis, M.D., Chester E. Sutterlin, III, M.D., Chester E. Sutterlin, III, M.D., P.A., and Musculoskeletal Institute Chartered, the Defendants in the trial court and the Appellees in the Court of Appeals, will be referred to as either "Petitioners" or, respectively, as "Balis," "Sutterlin," and "Florida Orthopaedic."

The Respondent, James S. Parham, will be referred to as either "Respondent," or as "Parham."

Nancy M. Parham and James S. Parham are no longer married and Nancy M. Parham entered a voluntary dismissal in the trial court. She is not a party to these proceedings.

The Florida Court of Appeals, Second District, will be referred to as "Second District."

The Petitioners Sutterlin and Florida Orthopaedic have filed Appendixes to their Briefs, which are contain an identical sequence of documents to be considered by this court. Rather than again filing the same documents, citations in this Brief will be to those appendixes (App.) by document number.

SUMMARY OF THE ARGUMENT

Respondent contends that the decision of the Second District should be affirmed. The statutory extensions for the limitations period contained in the medical malpractice law which specifically reference §95.11(4)(b) Fla. Stat. (1989) without limitation, should apply equally to all provisions of the statute of limitations, including the repose period contained therein. This court has consistently held that medical malpractice law should not be interpreted to restrict access to the courts. If the Petitioners argument, which has been specifically rejected by the Second District, was accepted by this court, then effectively the limitation period would be shortened by a period of at least ninety days.

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent, James S. Parham, is a member of the Florida Bar, currently disabled and not actively engaged in the practice of law. On April 5, 1990, he was employed as an Assistant State Attorney in Hillsborough County, Florida. On that date he suffered a disabling accident when he slipped and fell, while hurrying back to the courtroom after lunch, on a floor that was wet from mopping. (App. 1)

He underwent a series of surgical procedures under the care of the Petitioner Balis. In two of the procedures, involving surgery to his neck, Parham was also under the care of the Petitioner Sutterlin. Sutterlin was associated with Florida Orthopaedic. The surgeries to his neck were on December 18,1990 and January 29,1991 and were a two part procedure involving removal of one of the vertebral bodies (corpectomy) with bone replacement to attempt bone fusion. The neck surgery also involved the placement of screws generally referred to as pedicle screws, into the vertebras of the cervical neck, to stabilize the neck.

After the surgical procedures, the Respondent did not make a good recovery. He eventually became totally disabled and has been unable to

work.

In mid-December of 1993, while watching a television news documentary program, the Respondent became aware that there were allegations dealing with the use of the so called "pedicle screws," that the devices were experimental, and had not been approved for general use by the FDA, and that he might have a medical malpractice claim.

On December 16, 1994, pro se, Parham filed a Petition For A Ninety Day Automatic Extension of the statute of limitations as allowed by §766.104(2), Florida Statutes. (App. 1, Ex. B) Thereafter, on March 16, 1995, Notice of Intent To Initiate Litigation, as required by §766.106(4), was given to the Petitioners. (App. 1, Ex. C)

After notice to the individual Defendants, all denied liability, and the Plaintiff filed suit within sixty days from the date of the denial, as allowed by §766.106(4), Fla. Stat. (1989).

The Defendants moved in the trial court to dismiss the complaint of the Plaintiff on various grounds[1], one of which involved the statute of limitations,

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There were several matters raised in the trial court associated with the Notice Of Intent To Initiate Litigation, dealing with what party or parties it was directed to, and whether it was technically deficient, etc. (for example, Sutterlin was not sued in the initial complaint, as his insurance carrier had asked for more time to consider the claim). While Petitioners try to make such issues part of their argument, there is nothing involved with the technicalities of the filing of the notices under either statute, that are relevant to the "repose" issue decided by the trial court, and the appellate court.

§95.11(4)(b), Fla. Stat. (1989). The trial court initially denied the motion of the Defendants, but upon a second request by one of the Defendants, the trial judge changed his mind, and decided to grant the motion. (App. 8) The other Defendants quickly filed similar motions. (App. 9) One order from the trial court eventually was agreed upon and entered. (App. 11) The decision of the trial court was that the four year statute of repose barred any consideration of a claim for medical malpractice, despite the statutory extension periods allowed by §766.104(2) and §766.106(4), Fla. Stat. (1989). (App. 8)

The Respondent timely appealed to the Second District, alleging that the decision of the trial conflicted with the Second District decision in Moore v. Winter Haven Hospital, 579 So.2d 188, (Fla. 2d DCA 1991) Cert. den. 589 So.2d 294 (Fla. 1991), and Wood v. Fraser, 677 So.2d 15, (Fla. 2d DCA 1996). The Wood decision was decided immediately after the trial court decision, and the trial court refused to grant reconsideration based upon Wood. (App. 11)

After briefing and oral argument, the Second District, reversed the trial court, relying upon its decisions in Moore and Wood. Its holding was that the malpractice scheme enacted by the Florida legislature allowed an extension of time for the filing of a complaint under either, or both, of the statutory

extensions allowed in the medical malpractice law, and the extension periods extended all limitation periods in the statute of limitations.

The Second District certified its decision as being one of great public importance, and all appellees in the Second District thereafter petitioned this court to take jurisdiction of the matter.

ISSUE ON APPEAL

WHETHER THE EXTENSIONS OF THE STATUTE OF LIMITATIONS FOR THE FILING OF A MEDICAL MALPRACTICE ACTION CONTAINED IN §766.104(2) and §766.106(4) FLA. STAT. (1989), EXTEND THE FOUR YEAR LIMITATION PERIOD OF §95.11(4)(b), FLA. STAT. (1989).

Petitioners, the medical doctor defendants in the proceedings in the trial court, and appellees in the Second District, contend that the four year limitation period of the statute of limitations totally bars the filing of a complaint for medical malpractice four years after the date of the incident giving rise to the claim of medical negligence, even if notice for extension, or notice of intent to initiate litigation, statutory notices extending the limitation period, are served. The specific statutory language in question is in the Florida Statutes, titled "Limitations of Actions," and is as follows:

> (4) WITHIN TWO YEARS. -
>
> . . . (b) an action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred or within two 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 four years from the date of the incident or occurrence out of which the cause of action accrued. §95.11(4)(b), Fla. Stat. (1989).

The Defendants contend that the four year limitation period set forth in the statute is a "statute of repose" which bars any extension of limitations period for filing suit after four years from the time the incident giving rise to the action occurred.

As has been fully briefed by the three Petitioners, there are provisions in the Florida Malpractice Law extending the "statute of limitations." One allows an automatic ninety day extension simply by the filing of a petition with the circuit court §766.104(2) Fla. Stat. (1989), and the second allows a ninety day extension upon notice of claim meeting the statutory requirement being given to a Defendant §766.106(4), Fla. Stat. (1989). If that notice of claim is denied, or not responded to, the party alleging injury then has an additional sixty day period to file suit. Id. These statutes have been held to be concurrent, resulting in a situation where, if the party seeking to file suit has taken appropriate action, the two ninety day periods and the sixty period would be applied sequentially. See Novitsky v. Hards, 589 So.2d 404 (Fla. 5th DCA 1991) and Angrand v. Fox, 552 So.2d 1113, (Fla. 3d DCA 1989).

The Second District is the only district court in Florida that has decided the question of the interplay between the malpractice extension statutory provisions and the statute of limitations. The Second District held that under

circumstances when notice of extension is given prior to four years from the medical incident, the intention of the legislature was to extend the time period for filing suit, and the time period could be extended past the four year "repose" period. The Second District reasoned that the repose provision was a specialized type of statute of limitation that was subsumed in the overall term "statute of limitations."

Respondent agrees that the holdings of this court in a series of decisions including Kush v. Lloyd, 616 So.2d 415 (Fla. 1992), University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991), and their prodigy, bar any action for medical malpractice, if discovered beyond the four year period of repose. Respondent respectfully suggests that the Petitioners' reliance on those decisions "begs the question." The facts in this case are distinguishable from Kush and Bogorff in that Parham had discovered that he had a cause of action, and used the provision of the Florida Statutes allowing an extension of time from the running of the statute of limitations, prior to four years from the date of the "occurrence out of which the cause of action accrued." §95.11(4)(b), Fla. Stat. (1989). This is not a case controlled by Kush and Bogorff, where the claimant did not know that (s)he had a claim, until after the expiration of the four year period and therefore could not avail

themselves of the statutory provisions extending the limitation period. Rather, it is a claim, contemplated by the drafters of the medical malpractice statute, whereby Parham knew that he had a possible claim, and needed extensions of time in order to comply with the onerous requirements of the medical malpractice statute requiring notice to the prospective defendants supported by an affidavit of an independent physician.

It should be pointed out that the notice provisions to the defendant is for the benefit of the prospective defendant(s). The notice provision triggers a series of possible responses from the defendant, one of which allows the defendant(s) to admit liability, request arbitration, and limit damages. These provisions must have been enacted at the request of health care providers, providing to those possible defendants special protective conditions precedent necessary to commence litigation against them. Obviously the time extensions are in the statute to give the health care provider, an opportunity to consider the claim, with due deliberation, without being forced to defend a suit. The respondents, beneficiaries of the special statutory enactments, should not now be allowed to use those statutory enactments to, in effect, further shorten the statute of limitations.

There is no public policy provision that prohibits the legislature from

extending the "repose" period. In fact, based upon the overall statutory scheme of the medical malpractice statutes, and the fact that the repose period is contained in the "limitations" statute, it is reasonable to assume the legislature intended for the extension periods to apply to the "limitation period," whatever it might be.

It is also significant to note that the exact language in question does not use the words "statute of limitations." Rather, in F.S. 766.106(4), the language used is as follows:

> The notice of intent to initiate litigation shall be served <u>within the time limits set forth in s.95.11.</u> (underlining added)

As is pointed out above, <u>the repose period is contained within §95.11.</u>

This Court has consistently held that the provisions of the Florida malpractice statutory scheme " . . . must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts, while at the same time carrying out the legislative policy of screening out frivolous lawsuits and defenses." <u>Kukral v. Mekras</u>, 679 So.2d 278, 284 (Fla. 1996). See also <u>Ragoonanan v. Associates In Obstetrics and Gynecology</u>, 619 So.2d 482, (Fla. 2d DCA 1993), wherein the Second District, in addressing the statutory malpractice scheme, stated the statutes " . . . were

not intended . . . to deny parties access to the court on the basis of technicalities." Id. at 484. In addressing what was intended by the notice provision of §766.104(2), this Court stated "[t]he Statute was intended to address a legitimate legislative policy decision relating to medical malpractice and establish a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding." Williams v. Compagnulo, 588 So.2d 982, 983 (Fla. 1991).

The Petitioners go to great effort to argue that the statute of repose is different than the statute of limitations. Respondent points out that the so called "repose" is contained in Chapter 95 of the Florida Statutes, clearly titled "Limitations of Actions." It is not a separately defined statute of repose, and, in fact, in no place in the statutory language is the word "repose" used. It is not a separate section of the statute, but is in the same paragraph and only one clause of a compound sentence in the section dealing with the overall limitation period for medical malpractice claims.

If this court were to reverse the Second District, and find that James Parham's claim is barred by the four year repose period, then what this court will have done is shorten the repose period in medical malpractice claims from four years, to three years and 274 days. That is because the notice

provision to the prospective defendants required by §766.104(2) requires that the defendants have ninety days within which to consider the plaintiff's claim. The defendants are not required to take any action. If the plaintiff files suit on the first day after the ninety day period, it would still take ninety one days to comply with the statutory condition precedent. Therefore, under such circumstances, the effective period of repose is reduced to four years minus ninety one days, or three years and 274 days.

Respondent respectfully suggests that all Petitioners have failed to address this issue, and that is the real issue involved, and that is whether their proposed interpretation would effectively shorten the period of repose by ninety (90) days. That would mean that a reading of §95.11(4)(b) would not be textually correct. This Court would have to rewrite that statute to specify that the period of repose is four years from the date of medical negligence, if the prospective Plaintiffs have given notice to the Defendants as required by the Statute.

Respondent again suggests to this Court that the District Court of Appeal, Second District, was correct in holding in Moore v. Winter Haven Hospital, 579 So.2d 118, (Fla. 2d DCA 1991), that the Statute of Repose was subsumed in the Statute of Limitations. There is nothing in the medical

malpractice statute that indicates the statutory provisions allowing a lengthening of limitations period are inapplicable to the repose period. As is addressed above, the so called “statute of repose” actually is enacted, categorized and contained under the “Limitations of Action” provisions of the Florida Statutes. Why then is §95.11(4)(b) not in the broad sense, a “statute of limitation”?

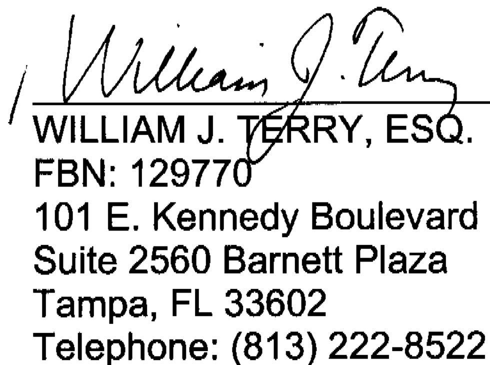
The holding of the Second District, is that the legislature, in requiring claimants to give notice to Defendants as a condition precedent to filing suit, which extends the period for filing suit, and allowing claimants, upon the filing of a petition for same, an additional ninety days to investigate claims, prior to giving notice of same to the Defendants, again extending the period of limitations, should also apply to the four year repose period. If not, then the law in Florida is that there is a two year Statute of Limitations from the time the claimant knew, or reasonably should have known of the act of medical negligence giving rise to the claim, but in no event can the claim be asserted for a period of less than three years and nine months, from the date medical negligence.

CONCLUSION

The reasoning of the Second District, is based upon a reasonable interpretation of the statutory scheme, considering the intent of the legislature to extend time periods when the plaintiff knew of a possible claim, and yet was facing time problems in complying with the statutory conditions precedent required in order to file suit. Since Parham filed notices to extend the statute of limitations, the factual basis for this case is markably different, as recognized by the Second District, from the factual basis of Kush and Bogorff. The decision of the Second District is reasonable, rational, and just, and should be affirmed by this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Martin B. Unger, Esq., and Brian D. Stokes, Esq., Unger, Swartwood, Latham & Indest, P.A., Attorneys for Petitioners, Chester E. Sutterlin, III, M.D., and Chester E. Sutterlin, III, M.D., P.A., Post Office Box 4909, Orlando, FL 32802-4909 and to Glenn M. Burton, Esq., and Thomas M. Hoeler, Esq., Shear, Newman, Hahn & Rosenkranz, P.A., Post Office Box 2378, Tampa, FL33601, and to Clifford L. Somers, Esq., 3242 Henderson Blvd., Suite 301, Tampa, FL 33609, this 14th day of May, 1998.



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