IN THE FLORIDA SUPREME COURT

MUSCULOSKELETAL INSTITUTE, CHARTERED, d/b/a Florida Orthopaedic Institute, CHESTER E. SUTTERLIN, III, M.D., CHESTER E. SUTTERLIN, III, M.D., P.A., and GENE A. BALIS, M.D., Petitioners, v. JAMES S. PARHAM, Respondent.	Case Nos. 91,966 92,382 92,451

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Review of a Certified Question of Great Public Importance
from the Second District Court of Appeal

Reply Brief of Musculoskeletal Institute Chartered, d/b/a Florida Orthopaedic Institute

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Issue I

The Plaintiff's Medical Malpractice Action was Barred by the Four-Year Absolute Statute of Repose because:

A. A Plaintiff May Not Unilaterally Extend the Statute of Repose by Filing a Petition for an Automatic Extension of the Statute of Limitations Under Section 766.104(2).

B. A Plaintiff May Not Unilaterally Extend the Statute of Repose by Mailing the Defendant a Notice of Intent to Initiate Litigation Under Section 766.106(4).

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Reply Argument

The Plaintiff's Medical Malpractice Action was Barred by the Four-Year Absolute Statute of Repose because:

A. A Plaintiff May Not Unilaterally Extend the Statute of Repose by Filing a Petition for an Automatic Extension of the Statute of Limitations Under Section 766.104(2).

B. A Plaintiff May Not Unilaterally Extend the Statute of Repose by Mailing the Defendant a Notice of Intent to Initiate Litigation Under Section 766.106(4).

1. The Unambiguous Language of the Statute of Repose

In his response brief, Mr. Parham recognized that the issue at hand turns upon the rules of statutory construction. Nonetheless, he did not assert that there is any ambiguity or uncertainty within the statute of repose. Again, the Legislature expressly provided that "**in no event**" shall a medical malpractice action be filed more than four years from the incident. See § 95.11(4)(b), Fla. Stat. True to the language of the statute, this court made clear that the statute of repose "**definitively placed an outer time limit beyond which medical malpractice actions may not be commenced.**" Tanner v. Hartog, 618 So.2d 177, 182 (Fla. 1993). Without any ambiguity in the statute, this court should not recede from its pronouncement in Tanner and essentially redraft the statute of repose.

Aside from the lack of any ambiguity in the statute, the court should continue to enforce the stated four-year repose period and decline to adopt an analysis that would allow plaintiffs to confuse the bright-line nature of the statute of repose. As it currently stands, the four-year statute of repose is easy for trial judges to apply. If this court were to recognize this exception, then what would prevent trial judges from recognizing other exceptions to the statute of repose?

Significantly, aside from the Second District of Appeal, the other district courts have faithfully and consistently enforced the four-year repose period. None of the other courts of appeal have adopted the reasoning of either Moore v. Winter Haven Hospital, 579 So.2d 188 (Fla. 2d DCA), review denied, 589 So.2d 294 (Fla. 1991) or Wood v. Fraser, 677 So.2d 15 (Fla. 2d DCA 1996). Indeed, as can be seen by Judge Fulmer's opinion, there is a considerable amount of disagreement in the Second District about the correctness of the Moore and Wood decisions. The fact that two trial judges entered final orders conflicting with the Moore decision further shows that the Second District's reasoning is not consistent with the manner that judges interpret the operation of a statute of repose.

2. **Knowledge of Injury**

Also, Mr. Parham argues that this case is distinguishable from Kush v. Lloyd, 616 So.2d 415 (Fla. 1992), and University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991), because of the fact that he actually discovered the purported medical malpractice within four years of the incident. His reasoning escapes us. First, discovery of the alleged malpractice is immaterial to the statute of repose. Second, even if discovery did come into play, it seems that a court should be more sympathetic to the claimant who could not discover the malpractice within four years rather than the claimant who does discover the alleged malpractice and waits a year to file a case.

3. **Purpose of Statute**

Last, Mr. Parham takes considerable exception with the statute of repose because it is intended to benefit the defendant. First, we note that the proscription of old and stale claims benefits both defendants and the judiciary. At some point in time, a claim has

to expire otherwise people would live in the constant fear of being sued for conduct that they cannot defend due to the lapse of time and the loss of witnesses and physical evidence. In this instance, the Florida Legislature has decided that four years is the cutoff point for medical malpractice claims. Its pronouncement of the law is clearly stated in the statute and there are no grounds for the courts to read something into the "purpose" of the statute in order to modify the time-barring effect of the four-year statute of repose. In this respect, Mr. Parham's arguments are better addressed to the Legislature.

4. **The Shortening of the Statue of Repose**

Last, Mr. Parham contends that if the court reverses the court of appeal, it will effectively shorten the repose period to three years and 274 days. In making this argument, Mr. Parham overlooked the fact that he filed his claim approximately four years and six months after his incident. Simply put, he needs **both** the automatic extension provision under section 766.104(2) **and** the tolling provision under section 766.106(4) to apply. Although his argument as to section 766.106(4) may seem reasonable, it fails when analyzed under section 766.104(2).

Conclusion

Based on the foregoing, we respectfully request this court to reverse the Second District Court of Appeal.

Respectfully Submitted,

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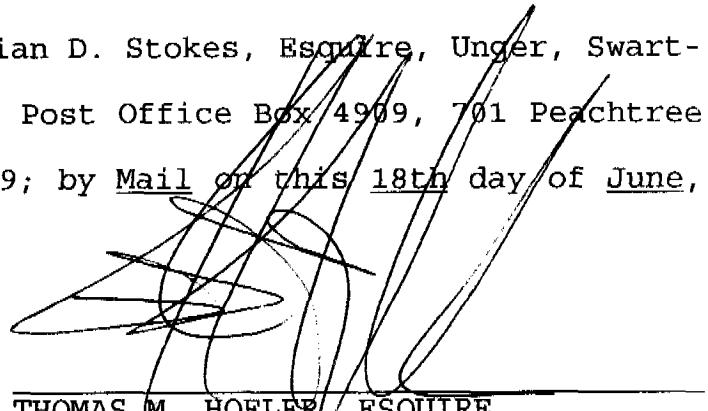
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to William J. Terry, Esquire, Barnett Plaza, Suite 2560, 101 East Kennedy Boulevard, Tampa, FL 33602; Clifford L. Somers, Esquire, 3333 Henderson Boulevard, Suite 110, Tampa, FL 33609; and Martin B. Unger, Esquire, Brian D. Stokes, Esquire, Unger, Swartwood, Latham & Indest, P.A.. Post Office Box 4909, 701 Peachtree Road, Orlando, FL 32802-4909; by Mail on this 18th day of June, 1998.



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