

3-29

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 94,384

PATRICIA ANN HANKEY and DONALD HANKEY,

Petitioners,

vs.

SUSAN YARIAN, M.D.; GEORGE SADOWSKI, M.D.,
WEN I. LIN, M.D.; NICHOLAS TUSO, M.D.;
WOMEN'S HEALTH CARE OF ST. AUGUSTINE,
P.A.; and FLAGLER HOSPITAL, INC.,

Respondents.

FILED

SID J. WHITE

MAR 5 1999

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

**ANSWER BRIEF OF RESPONDENTS, SUSAN YARIAN, M.D.
WEN I. LIN, M.D., NICHOLAS TUSO, M.D. and
WOMEN'S HEALTH CARE OF ST. AUGUSTINE, P.A.**

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PREFACE iii

ADOPTION OF BRIEFS OF OTHER APPELLEES iv

CERTIFICATE OF TYPE SIZE AND STYLE v

STATEMENT OF THE CASE AND STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF CITATIONS

CASES:

Hankey v. Yarian,
719 So.2d 987 (Fla.5th DCA 1998) 2

Pergrem v. Horan,
669 So.2d 1150 (Fla. 5th DCA 1996) 6

Rothschild v. NME Hospitals, Inc.,
707 So.2d 9521 (Fla. 4th DCA 1998) 6, 7

Tanner v. Hartog,
618 So.2d 177 (Fla. 1993) 5
618 So.2d at 184 5

STATUTES

§95.11(4)(b) 4

766.104(2) 4, 5

§766.106 1

§766.106(4) 4

PREFACE

References to documents that are provided to the Court in the Appendix to this Answer Brief shall be made as (A.#), where the “#” signifies the indexed document number in the appendix.

ADOPTION OF BRIEFS OF OTHER RESPONDENTS

Respondents, SUSAN YARIAN, M.D., WEN I. LIN, M.D., NICHOLAS TUSO, M.D. and WOMEN'S HEALTH CARE OF ST. AUGUSTINE, P.A., hereby adopt and incorporate by reference the arguments and citations of authorities set forth in the briefs of each of the other Respondents, as though set forth herein.

CERTIFICATE OF TYPE SIZE AND STYLE

Respondents, by and through their undersigned counsel, hereby certify that the type size and style used in this brief is 14 point Times New Roman, which is not proportionately spaced at 10 characters per inch.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Petitioners, PATRICIA ANN HANKEY and DONALD HANKEY (the “Petitioners”), seek review of the dismissal of their complaint for failure to file their medical malpractice complaint within the time allowed by the statute of limitations. Petitioner was treated by Respondents from November 28, 1994, through December 6, 1994. Petitioners have stipulated they were on notice of this claim as of December 6, 1996.

On March 19, 1996, Petitioners sent a Notice of Intent to Initiate Litigation pursuant to Florida Statute §766.106 against Respondents (A1). Respondents had 90 days to respond to the Notice of Intent.

The parties, on June 26, 1996, stipulated to extend the 90 day pre-suit investigation period by an additional 30 days. (A2). By July 18, 1996, all of the Respondents had denied the claim.

Petitioners filed a petition for an automatic 90 day extension of the statute of limitations on November 20, 1996 (A3). Petitioners then filed their complaint against Respondents on June 19, 1997 (A4). In response each Respondent filed a Motion To Dismiss the Complaint on the grounds that the Complaint was not timely filed and was barred by the applicable statute of limitations. (A5)

On December 30, 1997, a hearing was held on the Motion to Dismiss and on January 22, 1998, the trial court granted the Motions to Dismiss on the grounds that the claim was barred by the statute of limitations (A-6).

The Fifth District Court of Appeal affirmed the trial court's decision on October 23, 1998. Hankey v. Yarian, 719 So.2d 987 (Fla.5th DCA 1998).

Petitioners timely filed their notice of appeal.

SUMMARY OF ARGUMENT

The trial court correctly dismissed Petitioners' complaint as being filed after the applicable statute of limitations had expired and the Fifth District Court of Appeal correctly affirmed the trial court's decision. Under Florida law, a claim for medical malpractice must be filed within 2 years from the time the claim accrues. A notice of intent must precede the filing of the claim in circuit court and results in a 90 day tolling period. At the end of the 90 day period or at the end of any extension agreed to by the parties, the claimant has 60 days or the remainder of the 2 year statute, whichever is longer within which to file suit.

Respondent's denials of appellants notice of intent occurred on or before July 18, 1996. Respondents had until December 6, 1996, which was the remainder of the statute of limitations in which to file suit. Respondents requested a 90 day extension in which to file suit which may have extended the time for filing the complaint to March 6, 1997. The complaint was not filed until June 19, 1997, and the trial court correctly dismissed the complaint for being beyond the statute of limitations.

ARGUMENT

Petitioners have stipulated that the statute of limitations in this case began to run on December 6, 1994. Florida Statute §95.11(4)(b) provides that an action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action accrued.

The medical malpractice statutory scheme further provides that a notice of intent shall be served within the two year period, tolling the statute of limitations for 90 days. At the conclusion of the 90 day period, the claimant then has 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit. Florida Statute §766.106(4).

Florida Statute §766.104(2) further allows a claimant to obtain an additional 90 days in which to conduct a reasonable pre-suit investigation.

The two year statute of limitations ended on December 6, 1996, and the Notice of Intent was served on March 19, 1996. Denial letters were sent by Respondents by July 18, 1996, thereby giving Petitioners 60 days from the end of the pre-suit period or the remainder of the statute of limitations period in which to initiate their claim. The 60 day period ended on September 19, 1996. Therefore, Appellants had until December 6, 1996, the remainder of the statute of limitations, to file suit. The complaint, however, was not filed until June 19, 1997. The complaint was not timely

filed even adding on the 90 day extension pursuant to Florida Statute §766.104(2).

This 90 day extension would extend the deadline only until March 6, 1997, more than three months before the complaint was actually filed on June 19, 1997.

Petitioners argue that the tolling period should be added to the end of the statute of limitations. In Tanner v. Hartog, 618 So.2d 177 (Fla. 1993), this Court rejected such an argument. The Court stated:

We believe the language of section 766.106(4) was intended to provide extra time to a plaintiff who files a notice of intent shortly before the limitations period expires. This permits the plaintiff to have the full ninety days in which to try to negotiate a settlement and provides an additional sixty days to file a complaint if a settlement cannot be accomplished. However, the time remaining must be computed from the date the notice of intent was filed, *rather than simply adding on the extra time to the end of the limitations period*, so as to implement the intent of the statute *and avoid an unreasonable windfall to the plaintiff* who files a notice of intent soon after the malpractice is discovered.

Tanner, 618 So.2d at 184. (emphasis added).

Tanner makes it clear that the manner of computing the applicable time for filing suit is to take the 90 day pre-suit period and add 60 days on the remainder of the time remaining in the statute of limitations.

This issue was addressed by the Fifth District Court of Appeal subsequent to Tanner in the case of Pergrem v. Horan, 669 So.2d 1150 (Fla. 5th DCA 1996) wherein that Court stated:

If notice is filed *shortly before* the statute has run, the plaintiff has ninety (90) days to negotiate, and sixty (60) days if the claim cannot be settled, within which to file suit. But if the notice of intent is mailed well in advance of the end of the statute of limitations period, so that the ninety (90) days and sixty (60) days fall within it, the claimant must file suit before the statute of limitations runs.

Id. at 1151.

This is exactly the situation in the instant action. Petitioners filed their Notice of Intent more than eight months before the statute of limitations expired. Pergrem clearly indicates that the statutory scheme is designed to protect a claimant whose notice of intent is filed shortly before the statute of limitations is about to expire.

Petitioner's argument that the 90 day pre-suit period should be tacked on the end of the 2 year statute of limitation period is clearly contrary to the statutory scheme. Such an analysis would make the statute of limitation 2 years and 90 days in every case. If the legislature had intended such a result, they could have clearly specified that in Florida Statute §95.11(4)(b).

Petitioners rely upon Rothschild v. NME Hospitals, Inc. 707 So.2d 952 (Fla. 4th DCA. 1998). Rothschild, however, is not consistent with this Court's opinion in

Tanner. The Fourth District Court of Appeal simply tacked the 90 days to the end of the limitations period. This analysis should be rejected.

This Court should affirm the decisions of the trial court and the Fifth District Court of Appeal and reject the interpretation of the Fourth District Court of Appeal in Rothschild v. NME Hospitals, Inc.

More specifically, this Court should hold that the 90 day pre-suit period provided by §766.106(4) does not extend the statute of limitations beyond two years in situations where a claimant serves the notice of intent so that the 90 day pre-suit period expires more than 60 days before the two year statute of limitations ends.

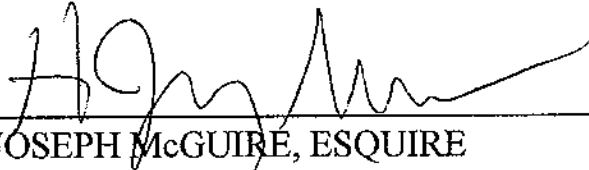
CONCLUSION

The decision of the trial court and the Fifth District Court of Appeal in the instant case should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent U.S. Mail this 4th day of March, 1999, to: **Charles Daniel Sikes, Esquire**, CHARLES DANIEL SIKES, P.A., 407 West Georgia Street, Starke, FL 32091; **Lee W. Marcus, Esquire**, UNGER, SWARTWOOD, LATHAM & INDEST, P.A., Post Office Box 4909, Orlando, FL 32802-4909; and **Kurt M. Spengler, Esquire**, WICKER, SMITH, TUTAN, O'HARA, McCOY, GRAHAM & FORD, P.A., Post Office Box 2753, Orlando, FL 32802-2753.

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