A-38173-5/nlc
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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.
_____/

ANSWER BRIEF OF RESPONDENT, GEORGE SADOWSKI, M.D.

KURT M. SPENGLER, ESQUIRE
MICHAEL R. D'LUGO, ESQUIRE
WICKER, SMITH, TUTAN, O'HARA, McCOY, GRAHAM, & FORD, P.A.
Attorneys for GEORGE SADOWSKI, M.D.
Post Office Box 2753
Orlando, FL 32802-2753
407-843-3939

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STATEMENT OF CASE AND STATEMENT OF FACTS

Petitioners, PATRICIA ANN HANKEY and DONALD HANKEY (the "Petitioners"), are seeking review of the trial court's decision to dismiss their Complaint with prejudice on the basis of the Petitioners' failure to file their Complaint within the time period permitted by the applicable statute of limitations. This medical negligence claim arises out of the treatment and care provided by the Respondents in this action, defendants below, including George Sadowski, M.D. (the "Respondent", or "Dr. Sadowski"), to Patricia Ann Hankey between November 28, 1994 and December 6, 1994. (R. 1-10). The Petitioners have stipulated that they were on notice of their claim for medical malpractice as of December 6, 1996.

On March 19, 1996, pursuant to *Florida Statute §766.106*, the Petitioners served a Notice of Intent to Initiate Litigation for Medical Malpractice (the "Notice of Intent") on the Respondents. (A-1). The parties to this action filed a Joint Stipulation to extend the ninety (90) day presuit investigation period provided for by *Florida Statute §766.106* by an additional thirty (30) days. Due to this extension, the statutorily mandated presuit period was extended up to and including July 19, 1996. (A-2). On or before July 18, 1996, each of the Respondents sent letters denying the claim raised in the Petitioners' Notice of Intent. On November 20, 1996, the Petitioners filed a Petition for an automatic ninety (90) day extension of the statute of limitations as provided for by *Florida Statute §766.104(2)*. (A-3). The

Petitioners then filed their Complaint against the Respondents with the Circuit Court in and for St. Johns County, Florida, on June 19, 1997. (R. 1-10).

In response to the Petitioners' Complaint, Dr. Sadowski filed an Answer and Affirmative Defenses which raised the statute of limitations as an affirmative defense on October 13, 1997. (R. 15-19). On October 20, 1997, Flagler Hospital, Inc., filed a Motion to Dismiss the Plaintiffs' Complaint. (R. 20-24). On October 22, 1997, Motions to Dismiss were filed on behalf of Nicholas Tuso, M.D., (R.25-30), the Women's Health Care of St. Augustine, P.A. (R. 25-30), Susan Yarian, M.D. (R. 31-36), and Win I. Lin, M.D. (R. 37-42). After hearing argument of counsel on these various motions on December 30, 1997, the Circuit Court in and for St. Johns County granted the Respondents' Motions to Dismiss on the basis of the statute of limitations issue. Subsequently, on January 30, 1998, Dr. Sadowski filed a Motion to Dismiss the Petitioners' Complaint, or in the alternative, a Motion for Judgment on the Pleadings. (R. 54-57). The trial court treated this motion as a Motion to Dismiss, and granted the Respondents' Motion to Dismiss on March 3, 1998. (R. 67-68). The Fifth District Court of Appeal affirmed the trial court orders on October 23, 1998. ***Hankey v. Yarian***, 719 So.2d 987 (Fla. 5th DCA 1998). This petition ensued.

SUMMARY OF ARGUMENT

The trial court was correct in dismissing the Petitioners' Complaint with prejudice on the basis of the Petitioners' failure to comply with the applicable statute of limitations under Florida law. Florida's statutory scheme governing the medical malpractice statute of limitations provides that a claim for medical malpractice must be initiated within two (2) years of the date on which the cause of action accrues. The claim is commenced by the filing of a notice of intent to initiate medical malpractice litigation. The notice of intent must be filed within two (2) years of the accrual of the cause of action. Filing of the notice of intent results in a ninety (90) day tolling period, in which the medical malpractice claimant is barred from filing suit on the medical negligence claim. At the conclusion of this ninety (90) day period, or at the conclusion of any extension to which the parties stipulate, the medical malpractice claimant has a specific period of time in which to initiate a medical malpractice lawsuit by the filing of a complaint. This period of time is either sixty (60) days, or the remainder of the two year statute of limitations, whichever is longer. In the instant action, the Respondents' denials of the Petitioners' notice of intent occurred on or before July 18, 1996. From this date, the Petitioners had until December 6, 1996, the remainder of the statute of limitations, in which to file suit. The Petitioners asked for a ninety (90) day extension of time in which to file suit, which arguably brought the filing deadline for the Complaint

to March 6, 1997. Because the Petitioners did not file their Complaint for medical negligence in this action until June 19, 1997, the trial court properly dismissed the Petitioners' Complaint with prejudice.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN GRANTING THE RESPONDENT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE PLEADINGS, BECAUSE THE STATUTE OF LIMITATIONS ON THE PETITIONERS' CLAIM EXPIRED PRIOR TO THE FILING OF THE PETITIONERS' COMPLAINT.

The Petitioners' Complaint in the instant lawsuit alleges that the various Respondents, including Dr. Sadowski, should be held liable for medical negligence arising out of their treatment and care of the Petitioner Ms. Hankey during her hospitalization of November 28, 1994 through December 6, 1994. Utilizing December 6, 1994 as the triggering date for the commencement of the statute of limitations, as the Petitioners have stipulated, application of Florida case law and Florida statutory guidelines demonstrates that the trial court was correct in dismissing the Petitioners' Complaint with prejudice.

The statute of limitations applicable to a claim for medical malpractice brought in the courts of the State of Florida is governed initially by *Florida Statute §95.11(4)(b)*, which provides that:

> An action for medical malpractice shall be commenced within two (2) years from the time the incident giving rise to the action occurred or within two (2) years from the time the incident is discovered, or should have been discovered with due diligence . . .

Chapter 766, Florida Statutes, provides more specific provisions regarding the medical malpractice statute of limitations in Florida. *Florida Statute §766.106(4)* provides:

> A notice of intent to initiate litigation shall be served within the time limit set forth in *§95.11*. However, during the ninety (90) day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the ninety (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 the extended period, the claimant shall have sixty (60) days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

Florida's statutory scheme requires that prior to the filing of a complaint for medical malpractice, a claimant must engage in a presuit investigation. *Chapter 766* makes clear that a claimant must serve a Notice of Intent within the two (2) year statute of limitations. Once a Notice of Intent is served, the statute of limitations is tolled, meaning that a medical malpractice claimant cannot file a lawsuit based on the claim during the presuit period. At the end of the ninety (90) days, a medical malpractice claimant has a specific period of time in which to file a complaint if the putative defendant responds with a notice of termination of negotiations. That specific time period is either sixty (60) days from the receipt of the notice of termination of negotiations, or the remainder of the two (2) year statute of limitations, whichever is longer.

In addition, a medical malpractice claimant is authorized to "purchase" an additional ninety (90) days in which to conduct a reasonable investigation as required by *Chapter 766*. *Florida Statute §766.104(2)* provides:

> Upon petition to the clerk of the court where the suit will be filed and payment to the clerk of a filing fee, not to

> exceed Twenty-Five ($25.00) Dollars, established by the chief judge, an automatic ninety (90) day extension of the statute of limitations shall be granted to allow the reasonable investigation required by *§(1)*. This period shall be in addition to other tolling periods. No court order is required for the extension to be effective. The provisions of this subsection shall not be deemed to revive a cause of action on which a statute of limitations has run.

Thus, depending upon how a claimant pursues his claim, the statute of limitations for a medical malpractice claim can last for a period of longer than two (2) years. The filing of a Notice of Intent tolls the statute of limitations for ninety (90) days. A claimant has at least sixty (60) days after receiving a notice of termination of negotiations from a health care provider in which to file suit. Finally, the claimant may ask for an automatic ninety (90) day extension to the statute of limitations.[1] Thus, the statute of limitations for bringing a claim for medical malpractice can be as long as two (2) years, plus two hundred forty (240) days from the date that the cause of action accrues. However, even with this extended, flexible statute of limitations, the Petitioners' claim in the instant action must fail, as the Petitioners' Complaint was filed well after the statute of limitations period had expired.

Using December 6, 1994 as a beginning point, and applying the statutory law cited above, as well as the interpretation of these statutes by Florida's Supreme Court, the inescapable conclusion is that the Petitioners' claim in this action is

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[1] As the statute provides, this request for an extension must be filed before the notice of intent is served.

barred by the statute of limitations. *Florida Statute §766.106(4),* as noted above, states in relevant part: "Upon receiving notice of termination of negotiations in the extended period, the claimant shall have sixty (60) days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit."

The two (2) year limitations period ended on December 6, 1996. The Notice of Intent was served on March 19, 1996, well within the statutory time-frame. The service of this Notice of Intent initiated the ninety (90) day period during which a lawsuit could not be filed. During this ninety (90) day period, the parties engaged in an investigation of this claim. The parties agreed to a thirty (30) day extension of the ninety (90) day presuit period, up through and including July 19, 1996. It is undisputed in the record that the Respondents had sent denial letters in response to the Petitioners' Notice of Intent by July 18, 1996.

Therefore, the Petitioners had sixty (60) days from the end of this presuit period, or the remainder of the statute of limitations period, in which to initiate suit for medical malpractice. The sixty (60) day period ran through September 19, 1996, meaning that December 6, 1996 (the remainder of the two [2] year limitations period) was the operative deadline for filing suit. The Petitioners' Complaint was not filed until June 19, 1997, one hundred ninety three (193) days outside of the statutory window, and therefore the trial court was correct in dismissing the Petitioners' claim with prejudice. Even if the ninety (90) day extension provided in

Florida Statute §766.104(2) were applicable, the Petitioners' Complaint would still not be timely.[2] Ninety (90) days would only extend the deadline for filing a Complaint to March 6, 1997, or over one hundred (100) days before the Complaint was actually filed on June 19, 1997.

The Petitioners apply *Chapter 766* in a manner inconsistent with the plain meaning of its provisions. The Petitioners essentially argue that the tolling period should be added to the end of the statute of limitations. This argument has been explicitly addressed and rejected by this Court in ***Tanner v. Hartog***, 618 So.2d 177 (Fla. 1993). ***Tanner*** marked this Court's explanation of how the above-quoted statutory provisions regarding the medical malpractice statute of limitations should be interpreted. ***Tanner*** involved a claim for medical malpractice arising out of the still birth of a child on April 1, 1988. The plaintiff filed a notice of intent to initiate medical malpractice litigation on February 12, 1990. The medical malpractice lawsuit was filed on August 1, 1990. The pivotal issue in ***Tanner*** was the exact date on which the statute of limitations began to run, which is not an issue in the instant litigation. However, the ***Tanner*** court also addressed the propriety of the

[2] It is Dr. Sadowski's belief that this ninety (90) day extension was not available to the Petitioners, in that the statutory provision explicitly provides that the ninety (90) day extension is intended "to allow the reasonable investigation required by *§(1)*." Pursuant to *Florida Statute §766.203(2)*, this reasonable investigation must be conducted before the notice of intent is served. Since the presuit investigation mandated by *§(1)* had already been completed, this ninety (90) day extension of time was not available to the Petitioners in the instant action at the time they requested it. However, even with an extra ninety (90) days in which to file suit, the Petitioners' claim still must fail as a matter of law.

computation employed by the district court in determining when the statute of limitations expired.

This Court adopted April 1, 1988, as the date on which the statute of limitations began to run. The Tanner's argument went as follows: the notice of intent to initiate litigation was filed on February 12, 1990. This filing extended the two (2) year statute of limitation period by ninety (90) days, to June 30, 1990. Then, the statute was further extended for an additional sixty (60) days under the language of the statute, to August 29, 1990. Therefore, their complaint, which was filed on August 1, 1990, was timely filed.

This Court disagreed with the Tanner's interpretation of the applicable medical malpractice statute of limitations provisions and, instead, adopted the formulation of the district court. The calculation which the district court made was as follows:

> The statute of limitations commenced running when the appellants were aware of the still birth on April 1, 1988. On February 12, 1990, forty-seven (47) days prior to the running of the limitations period, the appellants tolled the statute ninety (90) days by filing a notice of intent to initiate medical malpractice litigation pursuant to *§766.104, Florida Statute.* Thereafter, the appellants were entitled to file suit within ninety (90) days plus the greater of either the remainder of the statute of limitations (forty-seven [47] days) or sixty (60) days. Since there were fewer than sixty (60) days remaining on the statute of limitations when the notice of intent letters were mailed, the appellant had one hundred and fifty (150) days (ninety [90] plus sixty [60]) from February 12, 1990, or until July 12, 1990, to file suit.

Tanner, 593 So.2d 249 (Fla. 2nd DCA 1992).

In response to this analysis, this Court held: "We approve of the method employed by the court below in determining when the limitations period would expire." ***Tanner*** at 183. This Court's explanation of how the calculation is made was as follows: "From the date the notice of intent is filed, the plaintiff has ninety (90) days (the amount of the tolling) plus either sixty (60) days or the time that ***was*** remaining in the limitations period, whichever is greater, to file suit." ***Id.*** at 183-184. (Emphasis added.)

As this language makes clear, the appropriate analysis requires taking the ninety (90) day presuit period, and then adding either sixty (60) days or the time which was remaining (i.e., at the time the notice of intent was filed) in the limitations period. As the language of this Court's ***Tanner*** opinion makes clear, there is no new date on which the limitations period expires simply because a notice of intent is filed. Rather, it is the same statute of limitations deadline that exists from the moment the cause of action originally accrues.

The ***Tanner*** court went on to interpret the application of the statute as follows:

> We believe the language of *§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 (90) days in which to try to negotiate a settlement and provides an additional sixty (60) 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.

Id. at 184. (Footnote omitted.) (Emphasis added.)

The ***Tanner*** court approved of the district court's analysis which provided: "since there were fewer than sixty (60) days remaining on the statute of limitations when the notice of intent letters were mailed, the appellants had one hundred and fifty (150) days (ninety [90] plus sixty [60]) from February 12, 1990 [the date of the filing of the notice of intent], or until July 12, 1990, to file suit." ***Tanner***, at 252-253. When the parties to the instant litigation emerged from the presuit period on July 18, 1996, more than sixty (60) days remained before the expiration of the statute of limitations. Therefore, it is the original statute of limitations expiration date of December 6, 1996, which continued to serve as the end date of the limitations period.

The Fifth District Court of Appeal revisited the issue of the application of the limitations provisions in medical malpractice actions in light of this Court's opinion in ***Tanner***. In ***Pergrem v. Horan***, 669 So.2d 1150 (Fla. 5th DCA 1996), the Fifth District Court of Appeal 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. (Emphasis in original.)

This is precisely the situation which exists in the instant action. Here, the Petitioners filed their Notice of Intent more than eight (8) months prior to the expiration of the statute of limitations. Even with a stipulation to extend the presuit investigation period by thirty (30) days, the Petitioners still had more than sixty (60) days at the end of this period before the expiration of the statute of limitations on December 6, 1996. As ***Pergrem*** makes clear, the statutory provisions are designed to protect a claimant who files a notice of intent close to the expiration of the limitations period, not one who files such a notice early and then inexplicably waits to file the lawsuit. The Petitioners here fall into the latter category, having filed their Complaint 455 days after their Notice of Intent.[3] A statute of limitations is designed to prevent an unreasonable delay in the enforcement of legal rights, to encourage the prompt resolution of controversies, and to bring finality to potential liability. ***Hawkins v. Barnes***, 661 So.2d 1271 (Fla. 5th DCA 1995). Allowing the Petitioners' claim to survive would be contrary to these fundamental reasons for having a limitations period.

The Petitioners' arguments in favor of a reinterpretation of this Court's ***Tanner*** decision are not convincing. As a preliminary matter, the Petitioners

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[3] Significantly, the Petitioners cannot claim that they were the victims of an unfair surprise interpretation of the limitations provisions, as the ***Pergrem*** opinion was filed on March 22, 1996, merely three (3) days after the Petitioners served their Notice of Intent.

incorrectly point out in their initial brief that the application of *Florida Statute §766.104(2)*, which provides for the automatic ninety (90) day extension of the statute of limitations, has not been challenged on appeal. In fact, the Respondent argued at the district court level that this ninety (90) day extension was not available to the Petitioners, because the statutory provision explicitly provides that the ninety (90) day extension is intended "to allow the reasonable investigation required by *§(1)*." The Respondent indicated to the district court, and reemphasizes before this Court, that because the presuit investigation which is mandated by *Florida Statute §766.106(1)* had already been completed, this ninety (90) day extension of time was not available to the Petitioners at the time they requested it. However, even if this Court were to deem this ninety (90) day extension to be available after the presuit investigation had been completed, interpreting the facts of this case according to this Court's prior pronouncement in ***Tanner*** still requires an affirmance of the trial court's dismissal of the Petitioners' claim.

Next, the Petitioners point to the fact that the medical malpractice statute of limitations provision in *Chapter 766* specifically provides that during the ninety (90) day presuit period, "the statute of limitations is tolled." The Petitioners find significant the fact that the word "tolled," not defined anywhere in the statute, is defined in *Black's Law Dictionary* to mean "to bar, defeat, or take away . . . to suspend or stop temporarily as to the statute of limitations during the defendant's

absence from the jurisdiction and during the plaintiff's minority." The Petitioners interpret this definition to mean that the ninety (90) day presuit period should be tacked on to the back end of the statute of limitations. This is an improper analysis of this Court's ***Tanner*** opinion, and even of the *Black's Law Dictionary* definition itself.

First, the Petitioners choose the fifth (5th) definition of "toll," rather than the first definition, which is "to bar." Under the first definition, the fact that the statute of limitations is "tolled" during the ninety (90) day presuit period simply means that a medical malpractice claimant cannot file a lawsuit during this ninety (90) day period. Further, the definition of "toll" on which the Petitioners rely is specifically qualified in the definition to a situation which is not applicable in the instant action. The statute of limitations is suspended when a defendant is absent from the jurisdiction or before a plaintiff has reached the age of majority. Neither is applicable here. Thus, based upon the definition which the Petitioners themselves have furnished, the term "tolled" simply reflects the fact that no medical malpractice lawsuit can be filed during the ninety (90) day presuit period.

During the course of the Petitioners' argument, the Petitioners correctly point out that:

> When a claimant sends a notice of intent letter one (1) year, eleven (11) months, twenty-nine (29) days after the cause of action accrues, the statute of limitations is tolled for ninety (90) days. At the conclusion of that time, (or any stipulated extension thereof) if

> the defendant denies liability, in lieu of the one (1) day of statute of limitations remaining, the statute provides sixty (60) days within which to file suit.

This analysis is correct only because the hypothetical situation which the Petitioners have created left a period of time less than sixty (60) days remaining in the statute of limitations when the notice of intent was served. Under the facts of the instant litigation, because the notice of intent was served almost nine (9) months prior to the expiration of the statute of limitations, the Petitioners' hypothetical situation does not apply.

The Petitioners erroneously argue in their Initial Brief that, under the Respondents' analysis, the statute of limitations is effectively reduced to one (1) year, nine (9) months. In fact, it is the Petitioners who are advocating a statute of limitations regime contrary to the plain language of the statute, in which they seek to have the ninety (90) day presuit period tacked on to the end of the two (2) year statute of limitations, resulting in a two (2) year, three (3) month statute of limitations. Looking at the analysis of the instant facts provided above, the statute of limitations' expiration date remained December 6, 1996, two years after the cause of action accrued. While there was a ninety (90) day period during the two (2) years during which a lawsuit could not be filed, the statute of limitations did not run until two (2) years after the date the cause of action accrued.

The Petitioners' next argument is that the Fifth District Court of Appeal, in the instant action as well as in ***Pergrem***, misinterpreted the ***Tanner*** opinion because ***Tanner*** was supposedly only addressing the argument that *Chapter 766* allows for a "doubling up" of limitations time which, under the right circumstances, would allow a medical malpractice claimant nearly four (4) years from the accrual of the cause of action in which to file a lawsuit. Contrary to the Petitioners' assertions in their Initial Brief, this Court's ***Tanner*** opinion cannot be read only to constitute a rejection of the "doubling up" analysis which the petitioner in ***Tanner*** put forth. Rather, the ***Tanner*** opinion has broad application which the Fifth District Court of Appeal interpreted correctly both in ***Pergrem*** and in the instant litigation.

Finally, the Petitioners point to the decision of the Fourth District Court of Appeal in ***Rothschild v. NME Hosp., Inc.***, 707 So.2d 952 (Fla. 4th DCA 1998), as supporting their argument that the complaint in the instant lawsuit was timely filed. However, the ***Rothschild*** opinion ignores the analysis which this Court provided in ***Tanner***, in spite of the fact that the Fourth District asserted that it was following ***Tanner's*** dictates. The ***Rothschild*** court essentially adopted the argument of the Petitioners here, finding that the notice of intent to initiate litigation was served one hundred and sixty-one (161) days before the statute of limitations was to expire, and that those same one hundred and sixty-one (161) days in which to file suit remained after the ninety (90) day presuit period had been completed. ***Rothschild*** at 953.

Thus, the Fourth District Court of Appeal has simply tacked the ninety (90) days to the end of the limitations period. This analysis is contrary to this Court's conclusion in ***Tanner***.

A common sense interpretation of ***Tanner*** and the statutory provisions at issue makes it clear that the Fifth District Court of Appeal in the instant litigation and in ***Pergrem*** arrived at the correct conclusion. Under the Petitioners' analysis, the ninety (90) day tolling period should be tacked on to the end of the statute of limitations. The statute itself provides that the plaintiff has sixty (60) days or the remainder of the statute of limitations in which to file suit. If the ninety (90) day period is tacked on to the end of the statute of limitations, then the time which the medical malpractice claimant has in which to file a lawsuit could never be less than sixty (60) days. If this were the case, then the language of *Florida Statute §766.106(4)*, providing that a claimant has sixty (60) days or the remainder of the period of the statute of limitations, whichever is greater, in which to file suit, would be meaningless. Ninety (90) days is always longer than sixty (60) days, and so the phrase "whichever is greater" would serve no purpose. Courts should interpret statutes in such a way as to give effect to all parts of the statute, and this Court should not reach a conclusion which renders pointless a portion of a statute. ***Unruh v. State***, 669 So.2d 242, 245 (Fla. 1996)("As a fundamental rule of statutory interpretation, courts should avoid readings that would render part of a statute

meaningless. . . . Furthermore, whenever possible courts must give effect to *all* statutory provisions and construe related statutory provisions in harmony with one another.") (Quotations and citations omitted. Emphasis in original.) That is precisely what would result from the Petitioners' argument, by forcing courts to ignore this plain provision of *Florida Statute §766.106(4).* Because such a result could not have been intended by Florida's legislature, the Petitioners' argument must be rejected, and the decisions of the trial court and the Fifth District Court of Appeal must be affirmed.

Florida's District Courts of Appeal have issued numerous opinions construing the statutory provisions governing the limitations period for a medical malpractice claim. What has been conspicuously absent from these opinions has been a concise statement of a rule of law which would accurately set forth how the limitations period should be calculated, in a way that health care providers and medical malpractice claimants can easily understand. Taking into consideration *Florida Statute §95.11* and *§766.106(4),* as well as Florida courts' construction of these statutes, the Respondent proposes the following formulation of the limitations period in a medical malpractice claim: When a notice of intent to initiate medical malpractice litigation is served on a health care provider within one hundred fifty (150) days of the expiration of the two (2) year statute of limitations (or longer if the parties stipulate to an extension of the presuit period), the claimant must file the

lawsuit within one hundred fifty (150) days, with the proviso that the lawsuit cannot be filed during the first ninety (90) days. If the notice of intent is served more than one hundred fifty (150) days before the expiration of the two (2) year limitations period, then the limitations period expires two (2) years after the cause of action accrues.

This method of calculation accurately reflects the statutory provisions, while also effectuating the intent of Florida's Legislature in enacting these provisions. The medical malpractice presuit procedure was designed to insure that parties to a potential claim had the opportunity to investigate fully the merits of that claim, while also providing an enhanced opportunity for an amicable resolution of the claim before the emotionally and financially draining process of prosecuting the claim commenced. ("The high cost of medical malpractice claims in the state can be substantially alleviated by requiring early determination of the merit of claims,..." *Florida Statute §766.201(1)(d).* "It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, presuit investigation and arbitration." *Florida Statute §766.201(2)*). While *Chapter 766* mandates that a good faith investigation must be completed, the procedure also protects those claimants who serve their notice of intent near the end of the limitations period, by extending the deadline for filing a lawsuit. However, a claimant who serves the notice of intent well in advance of the

expiration of the statute of limitations does not need the protection of an extended period of time in which to file a lawsuit, because the filing of the notice of intent constitutes an implicit statement by the claimant that he has already completed a good faith investigation into the claim. The statute is designed to protect those who initiate the claim process near the deadline; it is not designed to provide unnecessary relief to those who complete their investigation early and then idly wait to initiate a lawsuit.

Applying this formulation to the facts of this case, the inescapable conclusion is that the trial court and the Fifth District Court of Appeal came to the proper conclusion in dismissing the Petitioners' Complaint. The Notice of Intent was served on March 19, 1996, over one hundred eighty (180) days (taking into account the parties' stipulation to extend the presuit period) before the expiration of the limitations period on December 6, 1996. Therefore, December 6, 1996 remained the deadline for filing a claim. The lawsuit was not filed until June 19, 1997, well after the limitations period had expired. Therefore, the decisions of the trial court and the Fifth District Court of Appeal must be affirmed.

CONCLUSION

The trial court was correct in granting Dr. Sadowski's Motion to Dismiss or, in the alternative, Motion for Judgment on the Pleadings, and therefore, Dr. Sadowski requests that this Court affirm the Decision of the trial court in all respects.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this _____ day of January, 1999, to: Charles Daniel Sikes, Esquire, CHARLES DANIEL SIKES, P.A., 407 West Georgia Street, Starke, FL 32091; M. Kathleen Roddenberry, Esquire, SMITH, SCHODER, BOUCK & RODDENBERRY, P.A., 605 S. Ridgewood Avenue, Daytona Beach, FL 32134; Terese M. Latham, Attorney, UNGER, SWARTWOOD, LATHAM & INDEST, P.A., Post Office Box 4909, Orlando, FL 32802-4909.

WICKER, SMITH, TUTAN, O'HARA,
McCOY, GRAHAM, & FORD, P.A.
Attorneys for GEORGE SADOWSKI, M.D.
Post Office Box 2753
Orlando, FL 32802-2753
407-843-3939

By:_____
KURT M. SPENGLER
Florida Bar No. 0717665
MICHAEL R. D'LUGO
Florida Bar No. 0040710