IN THE SUPREME COURT OF FLORIDA

CASE NO.: 94,384

PATRICIA ANN HANKEY
and DONALD HANKEY.

Petitioners,

vs.

SUSAN YARIAN, M.D.,
ET AL.,

Respondents.
_____/

REPLY BRIEF OF THE PETITIONERS

ON DISCRETIONARY REVIEW OF A CERTIFICATION
OF CONFLICT FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, FIFTH DISTRICT - No.98-543

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REPLY ARGUMENT

Respondants urge that the unambiguous terms of section 766.106(4), Florida Statutes, should be read in such a fashion that no tolling provision occurs unless the Notice of Intent to Initiate Litigation is filed late within the Statute of Limitations. In essence, Respondents argue that this Court should, by judicial caveat, excise the word "toll" used twice within the plain terms of the statute when a Notice of Intent to Initiate Litigation is filed early during the Statute of Limitations period and reinsert this word if such a notice is filed in the latter portion of the Statute of Limitations. Therefore, Respondents interpret section 766.106(4) in a fashion of, "now it tolls, now it does not," which abrogates the clear terms set forth by the Florida Legislature and well established judicial precedent.

This Court has consistantly held that it, "is a fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation." Forsyth v. Longboat Key Beach Erosion Control District, 604 So.2d 452,454 (Fla. 1992). In Forsyth, at 454, this Court reiterated its position, "set forth more than 70 years ago in Van Pelt v. Hilliard [75 Fla.792, 798-99, 78 So.693, 694-95 (1918)]:"

> The Legislature must be understood to mean what it has plainly expressed and this excludes construction. The Legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain and unambiguous, the courts have only the simple and obvious duty to

> enforce the law according to its terms. Cases cannot be included or excluded merely because there is intrinsically no reason against it. Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity. If a Legislative enactment violates no constitutional provision or principle it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage. Courts have then no power to set it aside or evade its operation by forced and unreasonable construction. If it has been passed improvidently the responsibility is with the Legislature and not the courts. Whether the law be expressed in general or limited terms, the Legislature should be held to mean what they have plainly expressed, and consequently no room is left for construction, but if from a view of the whole law, or from other laws in pari materia the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature. 2 Sutherland's Statutory Construction, Sec. 366, p. 701.

See also, Streeter v. Sullivan, 509 So.2d 268, 271 (Fla. 1987); Coon v. Continental Ins. Co., 511 So.2d 971, 973 (Fla. 1987); Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984), Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879, 882 (Fla. 1983); Citizens v. Public Serv. Comm'n, 425 So.2d 534, 542 (Fla. 1982); St. Petersburg Bank & Trust Co. V. Hamm, 414 So.2d 1071, 1073 (Fla. 1982); Carson v. Miller, 370 So.2d 10, 11 (Fla. 1979); Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); and McDonald v. Roland, 65 So.2d 12, 14 (Fla. 1953).

Therefore, either the Statute of Limitations is tolled pursuant to an unambiguous statute during mandated presuit settlement negotiations, or it is not. Pursuant to the plain terms of section

766.106(4), Florida Statutes, established by the Florida Legislature, the Statute of Limitations should be tolled.

CONCLUSION

Based upon the foregoing reasons, those arguments previously asserted in the Initial Brief of the Petitioners, and citations of authority, the Petitioners respectfully urge this Honorable Court to reverse the lower District Court of Appeal and trial Court and remand this case for further proceedings.

Respectfully Submitted:

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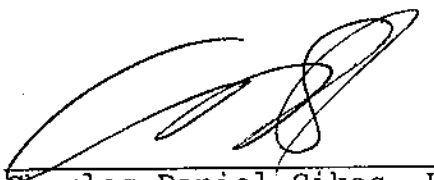
CERTIFICATE OF FONT

The Petitioners, PATRICIA ANN HANKEY and DONALD HANKEY, by and through their undersigned counsel, does hereby certify that the font used in preparation of the Reply Brief of the Petitioners was 12 point Courier, a font that is not proportionately spaced, at 10 characters per inch.



Charles Daniel Sikes, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: **KIM E. BOUCK, ESQ.** SMITH, SCHODER, BOUCK & RODDENBERRY, P.A., 605 South Ridgewood Avenue, Daytona Beach, Florida 32114, Attorneys for Drs. Tuso, Lin and Yarian; **TERESE M. LATHAM, ESQ.** UNGER, CACCIATORE & SWARTWOOD, P.A., Post Office Box 4909, Orlando, Florida 32802-4909; Attorneys for Flagler Hospital, Inc., and **KURT M. SPENGLER, ESQ.** WICKER, SMITH, TUTAM et al., Post Office Box 2753, Orlando, Florida 32802-2753, Attorneys for Dr. Sadowski, on this 25 day of January, 1999.

Charles Daniel Sikes, P.A.