IN THE SUPREME COURT OF FLORIDA

HILLSBOROUGH COUNTY HOSPITAL AUTHORITY d/b/a FAMILY CARE MEDICAL CENTER, MENTAL HEALTH CARE, INC. d/b/a Baylife Centers, ANTHONY PIDALA, JR., M.D., DAVID TULSIAK, M.D., EMERGENCY MEDICAL ASSOCIATES OF TAMPA BAY, P.A., and ST. JOSEPH'S HOSPITAL, INC.,	)	
Petitioners,	)	
v.	)	Appeal No. SC00-665
REBECCA COFFARO,	)	
Respondent.	)	

Appeal of a Certified Question of Great Public Importance
by the Second District Court of Appeal of Florida
Lakeland, Florida

Initial Brief of St. Joseph's Hospital, Inc.

THOMAS M. HOELER, ESQUIRE
Florida Bar No. 0709311
BURTON, SCHULTE, WEEKLEY, HOELER, POE & ROBBINS, P.A.
Post Office Box 1772
100 West Kennedy Boulevard, Suite 800
Tampa, Florida 33601-2378
Telephone: (813) 221-0955
Facsimile: (813) 221-0954
Attorneys for Petitioner St. Joseph's Hospital, Inc.

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Summary of Appeal

The petitioners/defendants, Hillsborough County Hospital Authority d/b/a Family Care Medical Center, Mental Health Care, Inc., d/b/a Baylife Centers, Anthony Pidala, Jr., M.D., David Tulsiak, M.D., Emergency Medical Associates of Tampa Bay, P.A., and St. Joseph's Hospital, Inc., seek review of a question certified by the Second District Court of Appeal to be one of great public importance. The certified question arises from an appeal of the respondent/plaintiff, Rebecca Coffaro from a final summary judgment for Hillsborough County Hospital Authority d/b/a Family Care Medical Center, Mental Health Care, Inc., d/b/a Baylife Centers, Anthony Pidala, Jr., M.D., David Tulsiak, M.D., Emergency Medical Associates of Tampa Bay, P.A., and a partial summary judgment for St. Joseph's Hospital, Inc., based upon the expiration of the two-year statute of limitations for medical malpractice actions.

Statement of the Case and Facts

The plaintiff, Rebecca Coffaro, was diagnosed in early 1995 with major depression and alcohol abuse. R I-46. Thereafter, she was admitted into a drug treatment program at Mental Health Care, Inc. ("MHC"), where she was prescribed antidepressants. R I-46. In May 1995, the plaintiff was prescribed Prozac, which was later increased. R I-46. Two months later, she presented to the Family Care Medical Clinic ("FCMC"), a part of the Hillsborough County Hospital Authority ("HCHA"), with complaints of low back pain and spasms. R I-46. A physician prescribed the plaintiff Parafon Forte and Relafen. R I-46. In August 1995, the plaintiff presented to FCMC with additional complaints of low back pain and was prescribed Darvocet and an increased dosage of Prozac. R I-47.

In August 1995, the plaintiff was taken to the emergency room of St. Joseph's Hospital, Inc. ("SJH"), with an "altered level of consciousness." R I-47. She was "placed under Baker Act for a possible overdose due to a reported history of ingesting three (3) Trazadone (Desyrel) tablets on or about 8/19/95 at 9 P.M., along with a history of depression and alcohol abuse." R I-47-48. The plaintiff was seen by Anthony Pidala, Jr., M.D.. R I-48. Various medical tests were performed on the plaintiff and other medical care was provided. R I-48. Later, after her Baker Act order was rescinded, the plaintiff was discharged and allowed to return to her home. R I-48. On August 21, 1995, the plaintiff once again presented to the emergency room at SJH "with an altered level of consciousness." R I-49. Her family stated that the plaintiff ate a meal, yet an Accucheck and laboratory blood glucose test showed

glucose levels of 20-23. R I-49. The plaintiff was given high concentrations of intravenous dextrose twice as well as a repeat Accucheck. R I-49. About one hour after the dextrose infusions, David Tulsiak, M.D., ordered a fasting glucose test. R I-49. The plaintiff was later discharged. R I-49.

After her discharge, the plaintiff went to the FCMC allegedly shaky and drooling. R I-50. She was taken to Tampa General Hospital where "she was combative and unresponsive." R I-50. Again, the plaintiff was given a high concentration of intravenous dextrose and admitted for a monitoring of her blood glucose. R I-50. As stated within her amended complaint, "on or about September 2, 1995," the plaintiff "became aware of her diagnosis of hypoglycemia, factitious versus induced by medication." R I-50. Thus, as of September 2, 1995, the plaintiff was aware of her injury and her possible claim for medical malpractice against the defendants. The plaintiff was ordered to specify the date of her actual knowledge of her possible cause of action by the trial judge pursuant to his ruling on the defendants' motions to dismiss the original complaint. R I-43.

On July 31, 1997, with 33 days left on the statute of limitations, the plaintiff mailed a notice of intent to initiate litigation a claim for medical malpractice to SJH. R II-227. On August 8, 1997, with 25 days left on the limitations period, SJH received the plaintiff’s notice of intent. R II-223. Pursuant to section 766.106, Florida Statutes, Florida Rule of Civil Procedure 1.650, and Boyd v. Becker, 627 So.2d 481, 483-84 (Fla. 1993), the statute of limitations began to toll for as long as 90 days. Three days

later, on August 11, 1997, the plaintiff filed in the Hillsborough County Circuit Court a petition for an automatic 90-day extension of the statute of limitations pursuant to section 766.104, Florida Statutes, automatically extending the 25 days to 115 days. R I-1. The tolling continued until November 5, 1997, when the plaintiff received from SJH a written response rejecting her claim. R I-59; II-223. When the plaintiff received this notice of rejection, she had 115 days remaining on the statute of limitations. The letter from SJH rejecting her claim recommenced the running of the statute of limitations until it expired on February 28, 1998. Over a month later, on April 3, 1998, the plaintiff filed her complaint. R I-3.

The defendants moved for a dismissal or a summary judgment based on the statute of limitations. R II-207; I-19; I-21; I-25. The trial judge dismissed the complaint without prejudice granted the plaintiff 20 days leave of court to serve an amended complaint identifying the date upon which she knew of her possible cause of action. R I-43. The plaintiff amended her complaint identifying September 2, 1995, as the date upon which she had actual knowledge of her possible claim. R I-44. Again, the defendants moved for a dismissal or a summary judgment. R I-222; I-61; II-219; II-241; II-243. The trial judge granted their motions and ruled that the plaintiff failed to timely file her complaint. R I-196, R II-291, 294, 298. Within his order, the trial judge cited and relied upon Rothschild v. NME Hospitals, Inc., 707 So.2d 952 (Fla. 4th DCA 1998), in support of his interpretation of section 766.106(4).

The plaintiff appealed the orders in favor of the defendants to the Second District Court of Appeal. The Second district Court of Appeal reversed the trial court's orders in a written decision dated February 25, 2000. In so ruling, the Second District failed to discuss the Fourth District's Rothschild in any great detail. It did, however, certify a question of great public importance to this court. The defendants timely filed a notice of appeal.

Summary of Argument

The trial court correctly granted a summary judgment in favor of the defendants based on the expiration of the two-year statute of limitations. Given that the complaint set out the date of when the plaintiff had actual knowledge of a possible cause of action, the calculation of the statute of limitations was a pure question of law based upon the statutes, rules of civil procedure, pre-suit documents, and complaint. After reviewing these items, the trial judge ruled: (1) the filing of the petition for a 90-day automatic extension of the statute of limitations under section 766.104(2) when there was time remaining of the limitations period automatically extended the statute of limitations, and (2) upon receiving the defendants' rejection letters during this extended period, the plaintiff had either "60 days or the remainder of the statute of limitations whichever is greater" under section 766.106(4) to file suit. In deciding that the day for determining when the plaintiff was entitled to 60 days or the remainder of the statute of limitations was the day she received the defendants' rejection letters, the trial judge correctly applied the plain wording and meaning of section 766.106(4), Florida Statutes. This section specifically states that: "Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit."

Argument

Certified Question

IS A 90-DAY EXTENSION PURCHASED UNDER SECTION 766.104(2), FLORIDA STATUTES (1995), INCLUDED IN

THE LIMITATIONS PERIOD WHEN CALCULATING WHETHER A PLAINTIFF IS ENTITLED TO AN ADDITIONAL 60 DAYS UNDER SECTION 766.106(4) FOR FILING SUIT.

The issue in this appeal is when do the statutes provide a plaintiff the additional 60 days or the remainder of the statute of limitations to file suit in a situation when the plaintiff filed a petition for an automatic 90-day extension of the statute of limitations under section 766.104(2). Within its decision, the Second District stated that even though two district courts "have discussed the interplay of these sections, they have not addressed the issue on appeal in this case." Coffaro v. Hillsborough County Hospital Authority, Slip Opinion fn.3 at p. 4. In fact, it seems that the appellate courts have used different dates in different situations even though it appears that none of them have addressed this precise situation. Nonetheless, as the trial judge correctly ruled, the Florida Statues, Florida Rule of Civil Procedure 1.650, and the Fourth District's Rothschild decision make clear that the correct date to employ for determining when a claimant has 60 days or the remainder of the statute of limitations to file suit is the day that the claimant receives a notice of termination pursuant to section 766.106.

1. Section 766.106(4), Florida Statutes

Section 766.106(4), Florida Statutes, addresses this question directly and clearly. Indeed, the trial judge expressly relied on section and this cited it in his order when he entered his ruling. This section specifically states that "Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute

of limitations, whichever is greater, within which to file suit." § 766.106(4), Fla. Stat. (1995). The language of this statute is clear and unequivocal. Thus, courts must give effect to its plain and obvious meaning and may not read anything into it that would undermine its plain and obvious meaning. Aetna Cas. & Surety Co. v. Huntington Nat'l Bank, 609 So.2d 1315 (Fla. 1992). It is significant that the section says that "Upon receiving notice" rather than "after receiving notice" or "subsequent to receiving notice." Accordingly, the statute dictates that the day to be employed for determining when the claimant has 60 days or the remainder of the statute of limitations to file suit is the day when the claimant receives notice of termination of negotiations.

2. Florida Rule of Civil Procedure 1.650

In addition to the plain and obvious meaning of the statute, Florida Rule of Civil Procedure aptly supports the trial judge's ruling that the day to be used for determining when the claimant has 60 days or the remainder of the statute of limitations to file suit is the day when the claimant receives notice of termination of negotiations. Rule 1.650 states in relevant part:

(d) Time Requirements.

* * *

> (3) To avoid being barred by the applicable statute of limitations, an action must be filed within 60 days or within the remainder of the statute of limitations after the notice of intent to initiate litigation was received, whichever is longer, after the earliest of the following:
>
> (A) The expiration of 90 days after the date of receipt of the notice of intent to initiate litigation.
>
> (B) The expiration of 180 days after mailing of the notice of intent to initiate litigation if the claim

is controlled by section 768.28(6)(a), Florida Statutes.

(C) Receipt by claimant of a written rejection of the claim.

(D) The expiration of any extension of the 90-day presuit screening period stipulated to by the parties in accordance with section 768.57(4), Florida Statutes.

Fla.R.Civ.P. 1.650.

In the case at hand, SJH rejected the plaintiff's claim with a written letter of rejection. This event was the earliest of the four events listed under Rule 1.650(d)(3) and was the triggering event for the filing of suit. Under thus rule, once the plaintiff received from SJH the written letter rejecting her claim, her suit was required to "be filed within 60 days or within the remainder of the statute of limitations." As with the statute, the language of this rule is clear and unequivocal. Unless this court is going to amend its own rule and apply it retroactively, the decision of the district court should be reversed and the ruling of the trial judge should be reinstated.

3. Rothschild v. NME Hospitals, Inc.

In one of its decisions, the Fourth District Court of Appeal applied the date of the plaintiff's receipt of the written letter rejecting the plaintiff's medical malpractice claim as the date on which the statute of limitations should recommence. Rothschild. It stated: "the remaining period of the statute of limitations, **as of the service of the notice of termination on November 17, 1995,** exceeded the sixty day period." Rothschild, 707 So.2d at 954 (emphasis added). Thus, at least implicitly, one district court has

held that the date to be employed for deciding when the plaintiff must file suit is the day the plaintiff receives the notice of the termination of negotiations.

4. <u>This Case</u>

In this case, the claimant received from SJH a written rejection of her claim on November 5, 1997. Under section 766.106(4), the claimant had "60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit." § 766.106(4), Fla. Stat. (1995). Under Rule 1.650(d)(3), "to avoid being barred by the applicable statute of limitations, an action must be filed within 60 days or within the remainder of the time of the statute of limitations after the notice of intent to initiate litigation was received, whichever is longer, after the earliest of the following: . . . (C) Receipt by claimant of a written rejection of the claim." Fla.R.Civ.P. 1.650(d). Because the amount of time remaining on her statute of limitations against SJH (115 days) was greater than the additional grace time provided to claimants by statute (60 days), she plaintiff had 115 days from the day she received the SJH letter denying her claim to file her complaint. Clearly, regardless of whether the court relies upon section 766.106 or Rule 1.650, the plaintiff had no more than 115 days to file suit to avoid being time barred. The 115-day period expired on February 28, 1998, and the plaintiff did not file suit until April 3, 1998. Based upon these undisputed facts, the trial judge correctly entered a partial summary judgment for SJH.

5. <u>The Mistake in the Second District’s Analysis</u>

The mistake in the Second District Court of Appeal's analysis is two-fold. First, it used the day when the plaintiff mailed her notice of intent to initiate litigation her claim for medical mal-practice to the defendants as the day of when the plaintiff has 60 days or the remainder of the statute of limitations to file suit. Next, and this may be the same argument in from a different view, the Second District essentially added the automatic 90-day exten-sion under section 766.104(2) to the 60-day grace period provided in section 766.106(4) instead of the statute of limitations. This is patently incorrect because the automatic 90-day extension under section 766.104 applies only to the statute of limitations and not to any periods or extensions under section 766.106.

In reality, and as this court recognized in Hankey v. Yarian, 25 Fla.L.Weekly S203 (Fla. Mar. 16, 2000), "the wording of section 766.106(4) makes it appear that the '60 days or the remainder of the period of the statute of limitations' language only applies when the parties have stipulated to an extension of the ninety-day tolling provision." Hankey, 25 Fla.L.Weekly at S205, fn. 2. See Rhoades v. Southwest Florida Regional Medical Ctr., 554 So.2d 1188 (Fla. 2d DCA 1989). Nonetheless, the courts have graciously given claimants an additional 60 days as a grace period on the basis of encouraging settlements. Rhoades. No court, however, has gone so far as to expressly hold that the automatic 90-day extension of the statute of limitations under section 766.104(2) may be added to the 60-day grace period under section 766.106(4).

While the appellate courts' interpretation of section 766.106 and application of the 60-day grace period to the 90-day tolling

provision is somewhat stretched, it was premised upon a desire to give parties an opportunity to settle dispute where the plaintiff mailed his or her notice of intent with just a few days remaining on the statute of limitations. Rhoades. In the case at hand, the plaintiff had 115 days remaining on the statute of limitations as to SJH when she received its rejection letter. Thus, the purpose that was served in the Rhoades case is not present in the case at hand. Simply stated, given that the plaintiff had 115 days to file suit after she received her rejection letter from SJH, she did not need another 60 days in addition to 115 days that she already had to settle the case or file suit.

6. Hankey v. Yarian

The recent decision in Hankey v. Yarian, 25 Fla.L.Weekly S203 (Fla. Mar. 16, 2000), of this court does not require an affirmance of the Second District Court of Appeal. In fact, given that the trial judge specifically cited and relied upon Rothschild and that this court approved Rothschild in Hankey, the Hankey decision may arguably support an affirmance of the trial judge. In Hankey, the primary question that was before the court was the meaning of and application of the term "toll." The plaintiff, Ms. Hankey, argued initially that the use of word "tolled" within section 766.106(4) meant that the two-year statute of limitations was suspended during the ninety-day presuit period and during any other agreed extension. Hankey, 25 Fla.L.Weekly at S204.

The defense, on the contrary, argued that the word "toll" means only to "bar," or in the alternative, urged the court to find that the state has only the limited application discussed in

Pergrem v. Horan, 669 So.2d 1150 (Fla. 5th DCA 1996). Hankey, 25 Fla.L.Weekly at S204. After reviewing the history of section 766.106, this court concluded "that the two-year limitations period is suspended temporarily and begins to run again under section 766.106(4) at the expiration of the stated time period or when the defendant responds to the notice of intent." Hankey, 25 Fla.L.Weekly at S204.

This is exactly what the trial judge did in this case when he calculated the statute of limitations. The trial judge gave the plaintiff the full benefit of the ninety-day tolling period under section 766.106 as well as the ninety-day extension under section 766.104 in calculating the statute of limitations. Thus, Hankey does not mandate an affirmance of the district court.

Conclusion

Based upon the foregoing, the court should quash the decision of the Second District Court of Appeal and reinstate the judgments of the trial court.

Respectfully Submitted,

THOMAS M. HOELER, ESQUIRE
Florida Bar No. 0709311

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above was served to: Donna L. Hwalek, Esquire, Post Office Box 151681, Tampa, FL 33684-1681, Michael N. Brown, Esquire, Allen, Dell, Frank & Trinkle, P.A., 101 East Kennedy Blvd., Suite 1240, Tampa, FL 33602; Elaine Seymour, Esquire, Carson, Guemmer & Nicholson, P.A., 3002 West Kennedy Blvd., Tampa, FL 33609-3106; and Marlene Reiss, Esquire, Stephens, Lynn, Klein & McNicholas, P.A., 2 Datran Center, 9130 South Dadeland Blvd., PH 2, Miami, FL 33156; by U.S. Mail on this 8th day of May, 2000.

THOMAS M. HOELER, ESQUIRE
Florida Bar No. 0709311
BURTON, SCHULTE, WEEKLEY, HOELER, POE & ROBBINS, P.A.
Post Office Box 1772
100 West Kennedy Blvd., Suite 800
Tampa, Florida 33601-1771
Telephone: (813) 221-0955
Facsimile: (813) 221-0954
Attorneys for Petitioner
St. Joseph's Hospital, Inc.

Donna L. Hwalek, Esquire
Post Office Box 151681
Tampa, FL 33684-1681

Michael N. Brown, Esquire
Allen, Dell, Frank & Trinkle, P.A.
101 East Kennedy Blvd., Suite 1240
Tampa, FL 33602

Elaine Seymour, Esquire
Guemmer & Seymour, P.A.
3002 West Kennedy Blvd.
Tampa, FL 33609-3106

Marlene S. Reiss, Esquire
Stephens, Lynn, Klein & McNicholas, P.A.
2 Datran Center
9130 South Dadeland Blvd., PH 2
Miami, FL 33156

Debbie Causseaux, Acting Clerk
Supreme Court of Floirda
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1927