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.; and EMERGENCY MEDICAL ASSOCIATES OF TAMPA BAY, P.A.,

Petitioners, Case No.: SC00-665

vs.

REBECCA COFFARO,

Respondent. /

AMENDED JOINT INITIAL BRIEF ON THE MERITS OF THE PETITIONERS, 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.; AND EMERGENCY MEDICAL ASSOCIATES OF TAMPA BAY, P.A.

On Certified Question from the Second District Court of Appeal

Michael N. Brown, Esq.
Allen, Dell, Frank & Trinkle, P.A.
Attorneys for HCHA d/b/a FCMC
101 E. Kennedy Blvd., Ste. 1240
Tampa, Florida 33602
813-223-5351
Fla. Bar No.: 136180

Marlene S. Reiss, Esq.
Stephens, Lynn, Klein & McNicholas, P.A.
Attorneys for Drs. Pidala, Tulsiak and Emergency Medical Associates
9130 South Dadeland Blvd., PH-2
Miami, Florida 33156
305-670-3700
Fla. Bar No.: 864048

Elaine Seymour, Esq.
Guemmer & Seymour, P.A.
Attorneys for Mental Health Care d/b/a Baylife
3002 West Kennedy Blvd.
Tampa, Florida 33609-3106
813-875-1973
Fla. Bar No.: 56944

TABLE OF CONTENTS

Table of Authorities ii

Certificate of Compliance with Font Requirements 1

Statement of the Case 1

Issue Presented for Review:

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? 2

Statement of the Facts 3

Summary of Argument 6

Argument 7

Conclusion 13

Certificate of Service 14

TABLE OF AUTHORITIES

Englewood Water District v. Tate, 334 So.2d 626 (Fla. App. 2nd DCA 1976) . . 11

Hankey v. Yarian, M.D., 25 Fla.. L. Weekly 203 Supreme Court Case No.; SC 94384 . . . . . 5, 6, 7, 8, 9, 10,11, 13

Novitsky v. Hards, 589 So.2d 404 (Fla. App. 5th DCA 1991) 5

Rothschild v. NME Hospitals, Inc., 707 So.2d 952 (Fla. App. 4th DCA 1998) 1, 5, 6, 7, 8, 9, 10, 13

Tanner v. Hartog, 618 So.2d. 177 (Fla. 1993) 10

Tyson v. Lanier, 156 So.2d 833 (Fla. 1963) 11

WFTV, Inc. v. Wilken, 675 So.2d 674 (Fla. 4th DCA 1996) 11

White v. Florida Birth Related Neurological, 655 So.2d 1292 (Fla. 5th DCA 1995) 11

Section 766.104(2), Florida Statutes (1995) 1, 2, 4, 5, 6, 7, 9, 11, 12, 13

Section 766.106(2), Florida Statutes, (1995) 4

Section 766.106(4), Florida Statutes (1995) 1, 2, 5, 6, 7, 10, 12, 13, 14

CERTIFICATE OF TYPE SIZE AND STYLE

This certifies that the following document is typed in Times New Roman style, 14 point type.

STATEMENT OF THE CASE

This consolidated case[1] is an alleged medical malpractice action alleging personal injuries sustained by the Respondent/Plaintiff, Rebecca Coffaro as a result of the acts of several health care providers, who are the petitioners here. The trial court ruled that the statute of limitations ran prior to Respondent's filing of her lawsuit, based upon its interpretation of the application of Florida Statute §766.104(2) to the "60 days or the remainder of the period of the statute of limitation" language contained in §766.106(4). The trial court relied upon Rothschild v. NME Hospitals, Inc., 707 So.2d 952 (Fla. App. 4th DCA 1998)which held that the Respondent's purchase of an additional 90-day extension of her statute of limitations, as allowed by Florida Statute §766.104(2) was to be used in the mathematical calculations required in §766.106(4). Thus, 60 days was not greater than the newly calculated remainder of the statute of limitations period then existing. As a result, the trial court ruled that the Respondent's suit was filed too

[1] The Respondent filed two separate actions. The first was against Family Care here and the second was against the remaining health care providers. These cases were consolidated.

late and entered summary judgment in favor of Family Care and granted the remaining Petitioner's Motions to Dismiss.

The Respondent appealed the trial court's judgment to the Second District Court of Appeals.

The Second District Court of Appeals reversed the trial court's judgment, but certified a question to this Court as one of great public importance.

The question certified by the Second District was:

> 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 Second District answered that question in the negative, we believe erroneously. For that reason, Petitioners, together with the co-Defendants/Petitioner St. Joseph's Hospital, Inc.[2] filed a Joint Notice to Invoke Discretionary Jurisdiction. This Court has postponed its decision on jurisdiction and ordered Petitioners to serve their initial brief on the merits on or before April 24, 2000.

---

[2] Petitioner St. Joseph's Hospital, Inc. will be filing its own brief on the merits separately.

STATEMENT OF THE FACTS

For ease in reference to the parties, Petitioner Hillsborough County Hospital Authority d/b/a Family Care Medical Center will be referred to as - "Family Care". Petitioner Mental Health Care, Inc. d/b/a Baylife Centers will be referred to as - "Baylife Centers". Petitioner Anthony Pidala, Jr., M.D. will be referred to as - "Dr. Pidala", Petitioner David Tulsiak, M.D. will be referred to as - "Dr. Tulsiak". Petitioner Emergency Medical Associates of Tampa Bay will be referred to as - "Emergency Doctors" and, Petitioner St. Joseph's Hospital, Inc. will be referred to as - "St. Joseph's Hospital". The Respondent Rebecca Coffaro will be referred to as "Coffaro".

Reference to the record on appeal will be made by the symbol "R".

The letter "T" refers to the transcript of proceedings.

The letter "A" refers to the appendix.

Coffaro alleges that she developed a low blood sugar condition in the summer of 1995 and sought medical attention from the various health care providers listed above. (A-113-119) Coffaro last went to Family Care on August 21, 1995. (R.50). She was last seen at Baylife on August 10, 1995. She eventually was admitted to Tampa General Hospital (not a party to this litigation) where she was diagnosed as having hypoglycemia, factitious versus induced by

medication on September 25, 1995 (R.50). This is the date that all of the parties agree that her statute of limitations begins to run.

On July 31, 1997, Coffaro sent her notice of intent to sue all Petitioners as required by section 766.106(2), Florida Statutes, (1995). (R.67) leaving her with thirty-three days remaining of her Statute of Limitations.

That notice was received by Family Care on August 5, 1997 (R.27)and by Baylife on August 4, 1997 (R.2 at 295). Family Care denied Coffaro's claim on November 26, 1997 (T-10). Drs. Pidala, Tulsiak, and Emergency Medical denied it on November 7, 1997and Baylife denied it on November 14, 1997 (R-2 at 295), therefore, these above dates are the dates Coffaro's Statute of Limitations resumed. However, Coffaro petitioned the Court for an automatic ninety-day extension of her statute of limitations on August 11, 1997 pursuant to Section 766.104(2), Florida Statutes (1995) (R.1).

Dr. Anthony Pidala, Jr., M.D., David Tulsiak, M.D. and Emergency Medical Associates of Tampa Bay, P.A., also received Respondent Coffaro's notice of intent (NOI) to initiate litigation on or about August 5, 1997. After conducting a thorough investigation of the underlying facts, Drs. Tulsiak and Pidala and Emergency Medical Associates mailed Coffaro a letter of termination of negotiations thereby rejecting the claim. Coffaro received this letter of termination

on November 7, 1997.

On April 3, 1998 (R. 3-18), Coffaro filed her complaint against Family Care, Drs. Tulsiak and Pidala and Emergency Medical Associates; 923 days after the statute of limitations originally commenced.

It is interesting to note that the trial court recognized that its decision was "in conflict with the opinion expressed in Novitsky v. Hards, 589 So.2d 404 (Fla. App. 5th DCA 1991) relied upon by Plaintiff, however, the Court is of the opinion that the better view is that held by the Fourth District Court of Appeal in Rothschild v. NME Hospitals, Inc., 707 So.2d 952 (Fla. App. 4th DCA 1998) ." (R. 197) (A -3).

The Second District Court of Appeal in the instant case held that the purchased 90-day extension provided for under section 766.104(2), Florida Statutes is not included when computing the time remaining under section 766.106(4) for filing suit, in essence, not applying Rothschild. To be fair, the Second District did not have the benefit of this Court's decision as announced in Hankey v. Yarian, M.D., 25 Fla. L. Weekly 203 Supreme Court Case No.; SC 94384, opinion filed March 16, 2000. There, this Court approved the Rothschild case, quoting the 5th District's holding in Hankey v. Yarian, 719 So.2d 987 (Fla. 5th DCA 1998).

SUMMARY OF ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL MISAPPLIED THE COMPUTATION REQUIREMENTS OF SECTION 766.106(4), FLORIDA STATUTES (1995) BY FAILING TO INCLUDE THE 90-DAY EXTENSION PURCHASED BY COFFARO IN SECTION 766.104(2) FLORIDA STATUTES

The Second District Court of Appeals failed to correctly apply the holding of the Fourth District Court of Appeals in Rothschild v. NME Hospitals, Inc. (supra). This Court has recently approved the holding of Rothschild in its opinion announced in Hankey v. Yarian, M.D. (supra). Coffaro's statute of limitations "clock" was tolled/suspended and stopped running against her when she served her notice of intent as required by Florida Statute 766.106(4). Her "clock" did not begin again until the Defendant/Petitioners rejected her claim. During the interim, Coffaro extended her limitation period by purchasing an extension as authorized by Section 766.104(2), Florida Statutes (1995).

The Second District ignored the teachings of Hankey by failing to give the language used by the legislature in Section 766.104(2) its "plain and obvious" meaning. The language of the statute clearly says that the extension is automatic. It infers that it is simultaneous and instant, not dependent on some future act.

The trial court's application of that statute was to give its language its plain

and obvious meaning. The trial court held that Coffaro received her extension automatically upon the filing of her petition. It then extended Coffaro's statute of limitations automatically by 90 days as of the day she filed her petition. When applying the language found in Section 766.106(4), Florida Statutes (1995), Coffaro's statute of limitations was greater than the "60 days or greater" language provided i.e., 123 days.

By utilizing the Defendants/Petitioners' method of calculations, the trial court gave Coffaro credit for the full 90 days provided for in her notice of intent (Section 766.106(4)), the full 90 days provided for in Section 766.104(2), all while tolling/suspending her original statute of limitations during the initial 90-day period (plus extensions) and gave her the benefit of the remainder of her original statute of limitation, in keeping with Rothschild and this court's holding in Hankey.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL MISAPPLIED THE COMPUTATION REQUIREMENTS OF SECTION 766.106(4), FLORIDA STATUTES (1995) BY FAILING TO INCLUDE THE 90-DAY EXTENSION PURCHASED BY COFFARO IN SECTION 766.104(2) FLORIDA STATUTES

Although the Second District did not specifically choose not to follow Rothschild v. NME Hospitals Inc., (supra) that is the practical effect of their

opinion. Here, Coffaro filed her notice of intent on July 31, 1997 (R.27) (A-78) and at that time there were 33 days left in her original limitations period (July 31, 1997 - September 2, 1997). On August 11, 1997 Coffaro "purchased an additional automatic 90 day extension (R.1) (A-151 & 152). There is no question that when Coffaro served her notice of intent to the health care providers, her statute of limitations period was tolled (or suspended as recognized by this Court in its recent Hankey v. Yarian decision) and this "tolling provision interrupts the running of the statutory limitations period, the statutory time is not counted against the claimant during that ninety day period. In essence, the clock stops until the tolling period expires and then begins to run again.". (this Court citing Rothschild, 707 So.2d. 953) (25 Fla. Law Weekly at p. S204).

Clearly here, Coffaro's clock did, indeed, stop running against her on July 31, 1997. No further time was taken from her until she received Drs. Tulsiak and Pidala's and Emergency Medical Associates' rejection letter on November 7, 1997 and Family Care's rejection letter on November 26, 1997, (T-10), Baylife's rejection letter on November 14, 1997.

However, during the interim, on August 11, 1997 Coffaro purchased an additional 90-day extension pursuant to Section 766.104(2) Florida Statutes (1995) (R.1, A-151 & 152) which provides in pertinent part . . .

> "*Upon petition,* to the clerk of the Court where the suit will be filed and payment to the clerk of a filing fee ... an *automatic* 90-day extension of the statute of limitations shall be granted . . . " (emphasis supplied)

As this Court made clear in its Hankey decision, "statutes must be given their plain and obvious meaning . . . " The plain and obvious meaning of the above quoted statutory provision is that it is upon the petition to the Court and payment of the filing fee that the extension is given effect. The extension is automatic. It is not delayed until some future event takes place. It is respectfully submitted that when Coffaro purchased her 90-day extension, the extension was automatically granted to her, by operation of law, and her 33-day statute of limitations period became 123 days. The statute of limitations "clock" still did not begin to run. When Coffaro received her respective rejection letters that triggered the clock to begin running again. As recognized by the Rothschild Court, the 90-day notice of intent period may be shortened by a defendant sending a "notice of termination of negotiations" or it can be extended by consent of the parties. Thus, the suspension is capable of coming to a premature end by the potential Defendant serving a notice of termination of negotiations.

As of the "filing" by Coffaro of her notice of intent, there were 33 days left in the statute of limitations. Prior to the expiration of the notice of intent 90-day period, Coffaro purchased an additional extension of her statute of limitations.

Upon the *petition* , her statute of limitations period became 33 plus 90 or 123 days. This circumstance of purchasing an extension prior to the expiration of the 90-day period provided for in section 766.106(4) was not present in either Hankey, Rothschild or Tanner v. Hartog , 618 So.2d., 177 (Fla. 1993). It is the Plaintiff who controls when he or she mails her notice of intent, purchases an extension, and files suit. Those elements are out of the control of the potential Defendants.

Without specifically holding as such, the Second District appears to reason that the 60 days provided for in section 766.106(4) is a tolling provision also. However, that reasoning ignores the fact that Family Care rejected the Coffaro claim early on November 26, 1997 as well as Baylife rejecting it on November 14, 1997 and Drs. Pidala, Tulsiak and Emergency Medical rejected the claim on November 7,1997 thus starting the clock. The Second District's opinion also goes on to say that, if not a tolling period, Coffaro would nevertheless be able to have the 60 day period (because 33 was less than 60) if she had waited until after she received the rejection letters (November 14, 26 & 7) before she purchased her extension. That statement is correct, but the facts of the case are that she did not wait to do so, she instead purchased the extension on August 11, 1997.

Here, the Second District should have given the "plain and obvious" meaning to Section 766.104(2), Florida Statutes (1995). The legislature's intent in

enacting section 766.104(2) is the primary factor of importance in construing statutes (Tyson v. Lanier, 156 So.2d 833 (Fla. 1963)). If the intent of the legislature is clear and unmistakable from the language used, it is the Court's duty to give effect to that intent. Englewood Water District v. Tate, 334 So.2d 626 (Fla. App. 2nd DCA 1976). The plain meaning of a statute will not be disturbed in the absence of ambiguity or conflict. See generally White v. Florida Birth Related Neurological, 655 So.2d 1292 (Fla. 5th DCA 1995) when the language of a statute is clear and unambiguous and conveys clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation and construction beyond the plain meaning rule. That rule provides that the statute itself must be given its plain and obvious meaning. See WFTV, Inc. v. Wilken, 675 So.2d 674 (Fla. 4th DCA 1996). Also see this Court's opinion in Hankey v. Yarian, Fla. L. Weekly p. S204.

What is ambiguous or unclear about the language used in Section 766.104(2), Florida Statutes (1995)? Nothing. Even the Second District observed that there is no time restriction as to when a Plaintiff may purchase this extension, but they ignored the plain and obvious language used in the statute ("*upon Petition*" and "*automatic*") when they held that the extension was not to be included when computing the time remaining under Section 766.106(4) for filing

suit. "To hold otherwise would treat plaintiffs differently depending on when they purchased the 90-day extension." Petitioners submit that it is entirely within the Plaintiff's control when or if they purchase their extension. It is not within the Defendant's control and it should not be within the Court's control to disregard the plain meaning of the statute, i.e., ignore the provision when calculating the time periods remaining on the statute of limitations.

766.104(2) tells the Plaintiff when the extension is effective : "Upon petition to the clerk of the Court". It tells how it becomes effective: "Automatic" and "no Court order is required".

The word "upon" as defined by the American Heritage Dictionary of the English Language (1981 edition) means "on". That dictionary also defines "automatic" as acting or operating in a manner essentially independent of external influence or control; self-moving." It also lists as a synonym the word "spontaneous". Thus, when given its plain and obvious meaning the statute says "on the filing of the petition for extension, the extension is effective spontaneously". As applied to this case, when Coffaro purchased her extension on August 11, 1997, she spontaneously extended her limitations period by 90 days. When she received her notices of termination of negotiations letters from the various defendants, she had 123 days left in her limitations period, not 33 days and

since 123 days is greater than 60, that was how long she had to file suit.

Remember, using the Petitioners' method of calculation, Coffaro receives the benefit of every tolling provision provided for and the extension provided for by statute. She receives the full compliment of her 90 days tolling by virtue of her notice of intent. She also received the full 90 days provided to her by virtue of her purchased 90-day extension, and she received her balance of the statute of limitations. This method of computation period does no violence to sections 766.106(4), 766.104(2) or the overall medical malpractice scheme envisioned by the legislature. It is consistent with Rothschild, and Hankey.

CONCLUSION

The question certified by the Second District Court of Appeal should be answered in the affirmative in order to give section 766.104(2), Florida Statutes (1995) its plain and obvious meaning and give the parties and the bar a consistent interpretation of the rules relating to the statute of limitations calculation methods. The Second District Court of Appeals misapplied the computation of the Plaintiff's statute of limitations period by ignoring Plaintiff's purchased extension when computing the "60 days or remainder" period provided for in Section 766.106(4). Accordingly, the trial court's summary judgment in favor of Family Care and

dismissals of Plaintiff's complaint as to remaining Petitioners should be reinstated, and the Second District Court of Appeals' opinion should be reversed.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished this ____ day of April, 2000 to the following: Supreme Court of Florida, Office of the Clerk, 500 S. Duval St., Supreme Court Bldg., Tallahassee, FL 32399-1927, Donna L. Hwalek, 7217 Wareham Dr., Tampa, FL 33647, Thomas Hoeler, P.O. Box 2378, Tampa, FL 33601, Marlene S. Reiss, 9130 S. Dadeland Blvd., PH-2, Miami, FL 33156 and Elaine Seymour, 3002 W. Kennedy Blvd., Tampa, FL 33609.

Michael N. Brown, Esq.
Allen, Dell, Frank & Trinkle, P.A.
Attorneys for HCHA d/b/a FCMC
101 E. Kennedy Blvd., Ste. 1240
Tampa, Florida 33602
813-223-5351
Fla. Bar No.: 136180

Marlene S. Reiss, Esq.
Stephens, Lynn, Klein & McNicholas, P.A.
Attorneys for Drs. Pidala, Tulsiak and Emergency Medical Associates
9130 South Dadeland Blvd., PH-2
Miami, Florida 33156
305-670-3700
Fla. Bar No.: 864048

and

Elaine Seymour, Esq.
Guemmer & Seymour, P.A.
Attorneys for Mental Health Care d/b/a Baylife
3002 West Kennedy Blvd.
Tampa, Florida 33609-3106
813-875-1973
Fla. Bar No.: 56944