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.
_____/

PETITIONERS, HILLSBOROUGH COUNTY HOSPITAL AUTHORITY d/b/a FAMILY CARE MEDICAL CENTER, ANTHONY PIDALA, J.R., M.D.; DAVID TULSIAK, M.D. AND EMERGENCY MEDICAL ASSOCIATES OF TAMPA BAY, P.A. REPLY BRIEF

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CERTIFICATE OF TYPE SIZE AND STYLE

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REBUTTAL ARGUMENT

Coffaro's argument made in her answer brief misses the pont of Petitioners Family Care, Baylife Centers, Dr. Pidala, Dr. Tulsiak and Emergency Doctors argument. In fact, much of what Coffaro states is accurate and to which we have no argument. For instance, we agree that the ninety-day tolling provision provided for in section 766.106(4) Florida Statutes and the automatic extension of an additional ninety-days are, indeed, separate and distinct and should be calculated separately so that they do not run simultaneously. Petitioners have never argued otherwise.

Under the Petitioners calculation of the time provisions, Coffaro gets the benefit of both ninety-day provisions. Under Petitioners' calculations, the two ninety-day additions do not run concurrent.

Coffaro had already tolled or suspended the statute of limitations period by filing/serving her notice of intent on or about July 31, 1997.[1] The ninety-day period provided for in section 766.106(4) continued to run unabated, except for some individual extensions agreed to by the parties. About a week later, Coffaro purchased her automatic extension of the statute of limitations. That ninety-day extension did not run concurrently with the tolling provision. Neither Family Care, Drs. Pidala, Tulsiak, Baylife Centers or the Emergency Doctors have ever argued that they did. In fact, the purchased extension did not run at all until *after* the notice of intent and its extensions had been terminated by the Defendants' rejection

[1] Coffaro disputes the date the notice of intent was served, but agrees that the several notices were received by Family Care, Dr. Pidala, Dr. Tulsiak and Emergency Doctors on August 5, 1997 (see page 4 of Answer Brief)

letters during November, 1997. [2]

It is the Petitioners' argument that it is the date that the Claimant receives the Defendants' termination letter that the Court should look to see whether there are "sixty days or greater in its determination of whether to apply sixty days or the remainder of the limitations period left for the Plaintiff to file suit. In this instance, since Coffaro chose to purchase her extension when she did, the remainder was greater because the 33 days left in her original limitation period was automatically increased by 90 days at the time of her purchase.

The facts in Hankey v. Yarian, M.D., 25 Fla. L. Weekly 203 Supreme Court Case No.; SC 94384, opinion filed March 16, 2000 are different than those present here. In Hankey, when they sent out their notices of intent, there were 263 days left on the original statute of limitations (March 19, 1996 - December 6, 1996). When the Defendants denied the Hankey's claim, there were still 263 days left on the statute of limitations and since the Hankeys had not yet purchased their automatic extension, the calculation was easy. 263 is greater than 60 and therefore the Hankeys had the greater number of days to file suit. However, less than a month before the statute of limitations was to expire, the Hankeys purchased another 90 day extension. The resulting statute of limitations deadline was July 18, 1996 (the date of denial), plus 263 days of the original statute of limitations, plus the purchased 90 day extension equals 353 days or July 5, 1997. Since the Hankeys filed suit on June 19, 1997, their suit was timely.

Here, Coffaro purchased her extension *during* the tolling period and *before* the denials of the Defendants. Section 766.106(4), Florida Statutes provides that it

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[2] The rejection letters were received by Coffaro on November 5, 1997 from St. Joseph's Hospital, November 7 from Drs. Pidala, Tulsiak and Emergency Doctors, November 14th from Baylife Centers and November 26th from Family Care. (see p. 5 of Answer Brief).

is "[u]pon 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." The statute says that the "60 days or greater" comes into play upon the receipt of the notice of termination. When Coffaro received her notices of termination, she had already purchased her automatic extension.

Clearly, the legislature knew what the meaning of the word "upon" meant when they used it. According to the statute, it is when the claimant receives the termination letter of the defendant that the one looks to see if there is "60 days or greater" left on the limitations period. Admittedly, in most cases, it would not make a difference whether one took the date that the claimant mailed out her notices of intent to initiate litigation pursuant to section 766.106(3)(a), the date that the potential defendants received the notice, or the date that the defendants responded to the notice. In most cases, the claimant would have either purchased her 90-day extension pursuant to section 766.104(2), Florida Statutes before she sends out her notice of intent or after she receives the responses to her notice. It is submitted that it is a very rare occasion when the claimant purchases her extension during the tolling period. That is why there are no cases reported dealing with our precise issue and why this Court has not had the opportunity to speak on this precise subject.

Interestingly, the Court did say in Rothschild v. NME Hospitals, Inc., 707 So.2d 952 (Fla.App. 4th DCA 1998):

> "In the instant case, 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 . . . "
> (p. 954) (emphasis supplied).

The Rothschild Court did look to the date of the Defendants' termination letters, rather than the date of the date of the notice of intent. This is consistent with the language of the statute.

> "While legislative intent controls construction of statutes in Florida, that intent is determined primarily from the language of the statute. The plain meaning of the statutory language is the first consideration." (See Okaloosa County v. Custer, 697 So.2d 1297, (Fla. App. 1st DCA 1997); (p.1300) - citing State, Department of Revenue v. Central Dade Malpractice Trust Fund, 673 So.2d 899, 900 (Fla. App. 1st DCA 1996) et al.

That same language is used in Section 766.104(2), Florida Statutes. That section provides:

> "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 . . . No court order is required for the extension to be effective . . . "

Where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense. See M.C. v. The State of Florida, 695 So.2d 477, (Fla. App. 3rd DCA 1997); Zuckerman v. Alter, 615 So.2d 661, 663 (Fla. 1993); and Zopf v. Singletary, 686 So.2d. 680 (Fla. App. 1st DCA 1997).

Contrary to Coffaro's assertions, we do not disagree with the proposition that the purchased extension is separate and additional to any other tolling provision. We quite agree with that statement. The calculations that the Petitioners urge take into account that the time period afforded by section

766.104(2) is separate and distinct from that afforded by section 766.106(4). Our method of calculation does not suggest that any other time period is running during the "time-out" provided by the notice of intent toling period, except the 90-day tolling period itself.

We also have no dispute with Coffaro's statement that "more than likely, 'automatic' means 'operating by itself' . . . " Under the plain language of the statute, when Coffaro purchased her extension, it operated by itself, meaning she extended her statute then and there, at the time of her purchase. Why she purchased her extension during the tolling is known only to Coffaro. But, the fact is that she chose to purchase it when she did and that is, of course, entirely beyond the control of the Defendants.

As suggested by Coffaro, we do submit that the word "automatic" is a synonym for the word "spontaneous". As mentioned in our initial brief, it is not only our belief that the two words are synonymous. It is that of the American Heritage Dictionary (1981 edition) as well.

Contrary to Coffaro assertions, the calculations of the health care providers do not limit the legislative intent of the statute. The St. Joseph's Hospital limitations period gave Coffaro 115 days to file suit after she was notified that negotiations were terminated and the remaining Defendants' termination gave her 123 days to file suit. She failed to do so. The legislative intent of providing sixty days, was not to toll the statute of limitations further, it was to enable a reasonable amount of time to file suit after she was advised by the Defendants that her claim was denied. See Okaloosa County (supra) at page 1299. Certainly, if 60 days was deemed reasonable, 115 days or 123 days are both reasonable as well.

Conclusion

In conclusion, Coffaro's argument defies the plain and obvious meaning of the statutory language used by the legislature in sections 766.104(2) and 766.106(4), Florida Statutes. According to the statutory language utilized, the purchased extension of the statute of limitations is "automatic" or as we submit, "spontaneous". The date when the Courts should look to see whether there are 60 days or greater remaining in the limitation period, is when the claimant receives the potential Defendants rejection/termination letters. In this case, when Coffaro received the termination letters from the Defendants, she had already automatically extended her statute of limitations period by an additional 90 days. The original statute of limitations period had been tolled until the Defendants' terminated negotiations. At that time the Coffaro clock began to run again, but had been automatically extended by 90 days. When the trial court looked to see which was greater, it correctly concluded that 123 days were greater than 60. Since Coffaro took longer than 123 days to file suit, it was not filed timely and the Court was correct in granting Family Care's summary judgment and the remaining Defendants' motions to dismiss.

It is submitted that this is the last issue which has not yet been decided by this Court, i.e., when does the automatic purchase take effect. Is it spontaneous or at some other, later, unannounced time? We believe the trial court was correct when it held it was automatic and that is what the legislature intended.

The opinion of the Second District Court of Appeal ought to be reversed with directions to reinstate the orders of the trial court.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished this 26th day of May, 2000 to the following: Donna L. Hwalek, 7217 Wareham Dr., Tampa, FL 33647, Thomas Hoeler, 100 W. Kennedy Blvd., Ste. 800, 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.

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