IN THE SUPREME COURT OF FLORIDA

GERTRUDE PATRICK,
PETITIONER,

CASE NO. SC11-1466
DCA CASE NO. 1D10-966

v.

LIONEL GATIEN, DO.,
AN INDIVIDUAL, AND
THOMAS E. ABBEY, D.O,
AN INDIVIDUAL,
RESPONDENTS.
_____/

RESPONDENT THOMAS E. ABBEY, D.O.'S ANSWER BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

MARKS GRAY, P.A.

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES: **PAGES**

FLORIDA STATUTES:

OTHER AUTHORITIES:

DESIGNATION OF THE PARTIES AND RECORD

Petitioner, Gertrude Patrick, will be referred as Petitioner or Ms. Patrick. Respondent Thomas E. Abbey, D.O., will be referred to as Respondent, Respondent Abbey, or Dr. Abbey.

References to the Record on Appeal will be made by Page numbers. Any reference to the Record on Appeal will be abbreviated "R., p. _____."

STATEMENT OF THE FACTS

The facts of the instant case are set forth in detail in the opinion of the First District Court of Appeal. The following serves to supplement and/or further explain the facts and the procedural posture of the case. Petitioner filed a medical malpractice action in accordance with Chapter 766, Florida Statutes. Petitioner alleged that Respondent Abbey ("Abbey"), among others, was negligent in the care and treatment of Petitioner, and that said negligence caused and contributed to injuries to Petitioner, specifically, blindness to Petitioner's left eye. (R. pp. 1-10.)

Petitioner served a Notice of Intent to Initiate Litigation on Thomas E. Abbey, D.O., dated July 28, 2006. (Id. p. 345.) The Notice of Intent to Initiate Litigation addressed to Abbey was received by Abbey on August 2, 2006. (Id. p. 350.) Petitioner's claim in the Notice of Intent to Initiate Litigation was denied by Abbey via correspondence sent to Petitioner's counsel dated October 31, 2006. (Id. pp. 350-51.) Abbey's written, pre-suit denial was received by Petitioner on

November 1, 2006. Following the pre-suit denial of Petitioner's claim by Dr. Abbey, Petitioner filed the initial Complaint in this action on January 17, 2007. (Id. pp. 1-10.)

Abbey filed a Motion for Summary Judgment and argued that Plaintiff failed to file her claim against Abbey within the statute of limitations and all applicable extensions to the statute of limitations. (Id. pp 281-357.) The trial court conducted a hearing on Abbey's Motion for Summary Judgment on December 1, 2008. (Id. pp. 488-531.) At the hearing, the parties agreed to all the essential facts, including the triggering date for the statute of limitations. The parties agreed that the statute of limitations began to run on June 10, 2004. (R. p. 496.) The parties agreed on all factual issues relating to the statute of limitations and argued only the legal issue of how to apply all applicable extensions, specifically the extension pursuant to section 766.104(2), Florida Statutes, in calculating the expiration date.

The trial court denied Abbey's Motion for Summary Judgment on the issue of the statute of limitations based on the authority of Hillsborough County Hospital Authority v. Coffaro, 829 So.2d 862 (Fla. 2002) and Cortes v. Williams, 850 So.2d 634 (1st DCA 2003).

Abbey filed a Petition for Certiorari with the First District Court of Appeal seeking an appeal of the trial court's Order denying Abbey's Motion for Summary Judgment. The First District Court of Appeal denied the Petition for Certiorari on

the grounds that Abbey had an adequate remedy on plenary appeal. Prior to filing his Petition for Certiorari, Abbey filed a Motion for Reconsideration of Order Denying Defendant's Motion for Summary Judgment with the trial court asking the trial court to reconsider its ruling based on a misapprehension of the cited case law. A hearing was conducted on Abbey's Motion for Reconsideration of Order Denying Defendant's Motion for Summary Judgment on January 6, 2010. Following the hearing, the trial court granted Abbey's Motion for Reconsideration, vacated its prior Order Denying Abbey's Motion for Summary Judgment and granted summary judgment in favor of Dr. Abbey. A Final Judgment was entered by the trial court in favor of Dr. Abbey on January 22, 2010.

Petitioner filed a Notice of Appeal with the First District Court of Appeal seeking to appeal the trial court's Order granting summary judgment in favor of Dr. Abbey. The First District Court of Appeal affirmed the trial court's order finding that Petitioner's Complaint against Dr. Abbey was filed outside the applicable statute of limitations. Petitioner then filed a Notice of Invoking Discretionary Jurisdiction with this Court and the parties submitted jurisdictional briefs. This Court accepted jurisdiction by Order dated March 26, 2012.

SUMMARY OF THE ARGUMENT

The trial court correctly ruled, and the First District Court of Appeal correctly affirmed, that as a matter of law, that the statute of limitations had

expired prior to the time Petitioner filed her Complaint against Respondent Dr. Abbey, and thus, the decision of the First District Court of Appeal affirming the trial court's order should be affirmed. Section 95.11(4)(b), Florida Statutes, specifically provides for a two-year statute of limitations within which to bring a medical malpractice action. Petitioner failed to file her Complaint against Respondent Abbey prior to the expiration of the two-year statute of limitations, including all applicable extensions, and thus, the trial court correctly granted summary judgment in favor of Respondent Abbey.

Additionally, the First District Court of Appeal correctly applied established precedent in holding that upon the termination of presuit negotiations in the instant medical malpractice action, and pursuant to section 766.106(4), Florida Statutes, Petitioner had the remainder of the statute of limitations or sixty (60) days, whichever was greater, to file suit. The First District Court of Appeal correctly found that the extension purchased by Petitioner under section 766.104(2), Florida Statutes, was to be "tacked on to the end of the statute of limitations period." The First District Court of Appeal's decision is not in "express **and** direct" conflict on a question of law with either Hillsborough County Hospital Authority v. Coffaro, 829 So. 2d 862 (Fla. 2002) or Novitsky v. Hards, 589 So. 2d 404 (Fla. 5th DCA 1991).

For the reasons set forth in this Answer Brief of Respondent Abbey, the decision of the First District Court of Appeal should be affirmed.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

The standard of review of a trial court's order granting a motion for summary judgment that presents a pure question of law is *de novo.* Major League Baseball v. Morsani, 790 So. 2d 1071 (Fla. 2001).

II. THE FIRST DISTRICT COURT OF APPEAL CORRECTLY AFFIRMED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT ABBEY ON THE GROUNDS THAT THE STATUTE OF LIMITATIONS EXPIRED PRIOR TO THE FILING OF THE COMPLAINT.

The First District Court of Appeal correctly affirmed the trial court's order finding, as a matter of law, that the statute of limitations had expired prior to the time Petitioner filed her Complaint against Respondent Abbey. "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 the exercise of due diligence." §95.11(4)(b), Fla. Stat. (2007).

The two-year statute of limitations for a medical negligence action begins to run from the time the claimant has knowledge of the injury and knowledge that there is a reasonable possibility that the injury was caused by medical malpractice.

Tanner v. Hartog, 618 So.2d 177, 181 (Fla. 1993). The statute of limitations begins to run on knowledge of the "possibility" of medical negligence rather than notice of a "probability" of medical malpractice. Id. at footnote 4. To require knowledge of a "probability" of medical negligence "would make the reference to 'knowledge of the negligent act' in the *Nardone* rule redundant and would result in an inordinate extension of the statute." Id. The nature of the injury, standing alone, may be such that it communicates the possibility of medical negligence, in which event the statute of limitations will immediately begin to run upon discovery of the injury itself. Id.

Prior to the expiration of the statute of limitations set forth in §95.11, a medical malpractice claimant must comply with the conditions precedent set forth in Chapter 766, Florida Statutes (2007). "Chapter 766, Florida Statutes, sets out a complex pre-suit investigation procedure that both the claimant and defendant must follow before a medical negligence claim may be brought in court." Kukral v. Mekras, 679 So.2d 278, 280 (Fla. 1996). The first step in this statutory scheme requires a claimant to determine whether reasonable grounds exist to believe that someone acted negligently in the claimant's care or treatment and that this negligence caused the claimant's injury. Id.

Florida law allows a claimant who is unable to complete the required pre-suit period investigation within the two-year statute of limitations, the option to

petition for an extension of the statute of limitations. §766.104(2), Fla. Stat. (2007); Cortes, 850 So.2d at 635. Section 766.104(2), Florida Statutes (2007), 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 $25, . . . an automatic 90-day extension of the statute of limitations shall be granted to allow the reasonable investigation required by subsection (1). This period shall be in addition to other tolling periods ….

Under §766.104(2), Florida Statutes, "once the extension is purchased, the statute of limitations becomes two years plus ninety days." Cortes, 850 So.2d at 635 (citing Hankey v. Yarian, 755 So.2d 93 (Fla. 2000); Burbank v. Kero, 813 So.2d 292 (Fla. 5th DCA 2002); Rothschild v. NME Hospitals, Inc., 707 So.2d 952 (Fla. 4th DCA 1998)).

After completing the pre-suit investigation pursuant to §766.203 and prior to filing a claim for medical malpractice, "the claimant must notify each prospective defendant of intent to initiate litigation for medical malpractice." Kukral, 679 So. 2d at 280. "The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants." §766.106(4), Fla. Stat. (2007). "Notice of intent to initiate litigation sent by certified mail to and received by any prospective defendant shall operate as notice to the person and any other prospective defendant who bears a legal relationship to the prospective defendant

receiving the notice." Fla.R.Civ.P. 1.650(b)(1). Upon receipt of the notice of intent, the prospective defendant has ninety days to conduct its own pre-suit investigation and suit cannot be filed during the ninety day period. Kukral, 679 So. 2d at 280.

"At or before the end of the ninety days, the prospective defendant. . . shall provide the claimant with a response: 1. Rejecting the claim; 2. Making a settlement offer; or 3. Making an offer to arbitrate. . . ." §766.106(3)(b), Florida Statutes (2007). "To avoid being barred by the applicable statute of limitations, an action must be filed within sixty (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) . . .

(B) . . .

(C) Receipt by the claimant of a written rejection of the claim. . . ." Fla.R.Civ.P., 1.650(d)(3). Further, section 766.106(4), Florida Statutes (2007), provides that after the ninety-day pre-suit period expires or "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." (emphasis added.) §766.106(4), Fla. Stat.(2007); Cortes, 850 So. 2d 634.

In the instant case, the statute of limitations began to run when Petitioner first became suspicious that there may have been a misdiagnosis of her pains, making her aware of the reasonable possibility of medical negligence.[1] Petitioner conceded at the hearing before the trial court on Respondent's motion for summary judgment that she had knowledge of the injury and knowledge of a reasonable possibility that the injury was caused by medical malpractice when she became suspicious that there may have been a misdiagnosis of her pains and she began her investigation into the care and treatment rendered by Abbey on June 10, 2004. (R. p. 496, lines 7-17.) Specifically, Petitioner's counsel conceded during the hearing on Respondent's motion for summary judgment that "[w]e think that what the evidence shows, or at least all the inferences favorable to the plaintiff or even cognizable to the Court, June 10 [2004] is the date with which [sp] the statute would run." (Id. at lines 13 - 17.)

Using the date of June 10, 2004 as the date the statute of limitations began to run, the two-year statute of limitations would have expired on June 10, 2006. Petitioner petitioned the clerk of court for an automatic 90-day extension to the statute of limitations pursuant to section 766.104(2), Florida Statutes (2007). Accordingly, Petitioner had two (2) years and ninety (90) days within which to

[1] The parties agree that the statute of limitations began to run in the instant case on June 10, 2001. Petitioner's Initial Brief, p. 6.

comply with the presuit requirements set forth in Chapter 766 and to file her Complaint for medical malpractice, or until September 8, 2006.

Petitioner's Notice of Intent was received by Respondent on August 6, 2006. (R. p. 345.) At the time Respondent received the Notice of Intent, the initial two-year limitations period had expired and Petitioner was relying on the 706.104(2), Florida Statutes, purchased 90-day extension. Pursuant to section 766.106(4), Florida Statutes (2007), Respondent's receipt of the Notice of Intent tolled the running of the statute of limitations for a period of ninety (90) days or until Petitioner received a written rejection of the claim. At the time the statute of limitations was tolled by the receipt by Respondent of the notice of intent to initiate litigation, there were thirty-seven (37) days remaining in the extended statute of limitations period.

Respondent's written pre-suit rejection of Petitioner's claims was received by Petitioner on November 1, 2006. Petitioner's receipt of the rejection stopped the tolling of the limitations period. Under section 766.106(4), Florida Statutes (2007) and Rule 1.650(d)(3), Florida Rules of Civil Procedure, Petitioner had the greater of the remainder of the statute of limitations period **or** sixty (60) days within which to file her action. Since there were only thirty-seven (37) days remaining in the extended statute of limitations period, Petitioner had sixty (60)

days from receipt of Respondent's written rejection, or until December 31, 2006, within which to file suit.

Petitioner filed her Complaint against Respondent on January 17, 2007. Petitioner filed her Complaint against Respondent after the expiration of the statute of limitations and therefore, her claims against Respondent were time barred and summary judgment was properly entered by the trial court and affirmed by the First District Court of Appeal.

II. THE FIRST DISTRICT COURT OF APPEAL'S DECISION DOES NOT DEPART FROM ESTABLISHED PRECEDENT.

The First District Court of Appeal's decision does not expressly and directly in conflict with this Court's decision in Hillsborough County Hospital Authority v. Coffaro, 829 So. 2d 862 (Fla. 2002). Petitioner relies on the case of Hillsborough County Hospital Authority v. Coffaro, 829 So.2d 862 (Fla. 2002) for her contention that she is entitled to the 60-day period provided by Section 766.106(4), Florida Statutes, plus the remaining 37 days in the extended statute of limitations. The First District Court of Appeal correctly found that Petitioner's position was not supported by Coffaro. Patrick v. Gatien, 65 So. 3d 42, 44 (Fla. 1st DCA 2011).

In Coffaro, this Court was asked to review the issue of how to calculate the statute of limitations in a case where the plaintiff purchased the extension under 766.104(2) during the presuit tolling period and after serving notices of intent.

Coffaro, 829 So. 2d 862. In Coffaro, the plaintiff sent notice of intent to litigate to several prospective defendants. Id. As of the date the notices of intent were received, "fewer than sixty days remained in [plaintiff's] limitations period." Id. at 866. After the notices were received and while the statute of limitations period was tolled for ninety days, the plaintiff purchased a ninety-day extension of the statute of limitations as authorized by section 766.104(2), Florida Statutes. Id. In Coffaro, this Court noted, citing Hankey, that "the 'extension' provided for under section 766.104(2) is a genuine extension of time to be added to the limitations period, rather than a tolling (suspension) as provided for under section 766.106(4)." Coffaro, 829 So. 2d at 866

In Coffaro, at the time negotiations between the parties were terminated, "the plaintiff had one month left on the original two-year statute of limitations period." Id. at 866. This Court reasoned that since plaintiff still had one month left of the "original" limitations period, the 90-day extension purchased under 766.104(2) is added to the 60-day period of 766.106(4). Id.

This Court in Coffaro importantly noted that "[b]ecause fewer than sixty days remained in [plaintiff's] original limitations period **when the notices of intent were received**, she had sixty days to file suit from the dates she received the termination of negotiation letters." Id. at 866. (emphasis added.)

The First District Court of Appeal correctly found that Coffaro did not support Petitioner's argument. Patrick, 65 So. 3d at 5. The instant case is easily distinguishable from Coffaro. In the instant case when negotiations terminated, Petitioner had **no** days remaining on the original two-year statute of limitations. Petitioner was forced to use her 90-day purchased extension beginning on June 10, 2006, when the original two-year statute of limitations period expired. Consistent with Coffaro, the purchased extension in this case was "tacked" on to the end of the statute of limitations period since Petitioner had not yet served her notice of intent nor filed her cause of action.

Petitioner now makes a contradictory argument by relying on Coffaro and suggesting that the 90-day purchased extension should be added after the 60-day period provided in section 766.106(4) as it was in Coffaro. However, Petitioner's argument is flawed in that it fails to acknowledge the critical factual difference that in Coffaro, the original two-year limitations period had not yet expired and the plaintiff in Coffaro had not yet purchased an extension, while in the instant case, not only had the two-year limitations period expired, more than half of the period had been used. The purchased extension cannot be placed both at the end of the original two-year statute of limitations when Petitioner needed it because her action had not yet been filed, and at the same time placed at the end of the 60-day period provided under 766.106(4). Petitioner wants to use the purchased extension

at two (2) different times in her calculations in an attempt to revive a claim that is otherwise time barred.

Further, as this Court noted in Coffaro, the analysis focuses on how much time remained on the original limitations period **when the notices of intent were received.** In Coffaro, there was a month remaining on the original limitations period at the time the notices of intent were received; the extension under 766.104(2), Florida Statutes had not been purchased when the notices of intent were received. Unlike Coffaro, in the instant case, Petitioner purchased the 90-day extension under 766.104(2), Florida Statutes, and in fact was forced to use more than half of the extension, prior to the receipt by Respondent of the notice of intent. This is critical to the analysis because in the instant case, at the time the notice of intent was received by Respondent, there was no time remaining on the **original** limitations period but the 90-day extension was tacked on to the end of the original period and there were 37 days remaining on the extended limitations period when the notice of intent was received. But for the purchased extension being "tacked" on to the end of the original two-year limitations period, Petitioner's claims would have been barred because she had neither completed the presuit requirements nor filed her complaint, as all required under Chapter 766. Since fewer than 60 days remained in Petitioner's limitations period when the notice of intent was received, Petitioner had 60 days to file suit from the date she received Respondent's written

denial. Respondent received the written denial on November 1, 2006, thus Respondent had 60 days, or until December 31, 2006 to file suit; Petitioner did not file until January 17, 2007.

The First District Court of Appeal's decision is not in conflict, expressly or otherwise, with Coffaro as the cases are factually distinguishable. The First District Court of Appeal correctly rejected Petitioner's argument finding: that Petitioner's 90-day purchased extension was tacked on to the end of the original statute of limitations; that Petitioner needed the purchased extension to be added to the original two year period as she had not yet served her Notice of Intent when the original statute of limitations period expired; and that at the time Petitioner received notice of Dr. Abbey's termination of negotiations, there were only 37 days remaining on the extended statute of limitations and thus, under 766.106(4), Florida Statutes, Petitioner had 60 days to file her complaint. Patrick, 68 So. 3d 42. Petitioner essentially requested the First District Court of Appeal to allow her to use the purchased extension at two (2) different times in her calculations in an attempt to revive a claim that was otherwise time barred. Petitioner's position would create a result that then would have been in express and direct conflict with established precedent.

Based on the provisions in Chapter 766, Florida Statutes, and the rule of law from Coffaro, Plaintiff was required to investigate her claim and provide Dr.

Abbey with notice of her intent to initiate litigation within the statute of limitations and all allowable extensions. Not only was Plaintiff required to serve her notice of intent within the statute of limitations, she was also required to file her action within two (2) years from the time the incident was discovered or should have been discovered with the exercise of due diligence.

The First District Court of Appeal's decision is likewise not in express and direct conflict with the case of Novitsky v. Hards, 589 So. 2d 404 (Fla. 5th DCA 1991), as asserted by Petitioner. In Novitsky, like Coffaro, the Fifth District Court of Appeal was presented with a scenario where there was time remaining on the **original** statute of limitations period at the time the notice of intent was received. Id. The Fifth District Court of Appeal noted that "[s]ince the letter of intent was mailed . . . two days before the expiration of the two-year statute of limitations, [plaintiff] had ninety days under [766.106(3)], plus sixty days, under subsection (4), in which to file the lawsuit."[2] Id. at 407. Again, the instant case is factually distinguishable from Novitsky because here, there was no time remaining on the **original** limitations period, but because the 90-day extension was "tacked" on to the end of the original period, there were 37 days remaining on the extended limitations period when the notice of intent was received by Respondent. Since

[2] The Fifth District Court of Appeal's opinion in Novitsky references the date the notice of intent was "mailed" despite the fact that this Court has held that the date of "receipt" of the notice of intent is the date that controls the analysis. Boyd v. Becker, 627 So. 2d 481, 483-84 (Fla. 1993).

fewer than 60 days remained in Petitioner's limitations period when the notice of intent was received, pursuant to section 766.106(4), Florida Statutes, Petitioner had 60 days to file suit from the date she received Respondent's written denial.

The analysis set forth in Respondent's motion for summary judgment presented to the lower court directly followed the rule of law from Coffaro and demonstrated that Petitioner's Complaint was filed outside of the statute of limitations. (R. pp. 281-329.)

The trial court, and subsequently the First District Court of Appeal, correctly followed the law set forth in section 766.106(4), Florida Statutes (2007), Rule 1.650(d)(3) and Coffaro. The trial court correctly found that Respondent's motion for summary judgment should be granted as Petitioner's claims against Abbey are barred by the statute of limitations.

The plain language of section 766.104(2), Florida Statutes, states that "an automatic extension of the statute of limitations shall be granted. . . ." The purchased 90-day extension is added to the original two-year statute of limitations and the statute of limitations becomes 2 years plus 90 days. Cortes, 850 So. 2d at 634. Since Petitioner purchased a 90-day extension under 766.104(2), Florida Statutes, her statute of limitations was set to expire 2 years and 90 days from June 10, 2004. Petitioner was provided all tolling provisions and following the termination of negotiations, Petitioner had 37 days left on the statute of limitations.

Thus, under 766.106(4), Petitioner had 60 days to file her complaint. Petitioner did not file her Complaint within the 60 days and now wants to add additional days contrary to the plain language of the statute. Petitioner's Complaint was not timely filed and as such, her claims against Respondent Abbey are barred by the statute of limitations.

CONCLUSION

In conclusion, the record before the trial court established that Plaintiff's claims against Respondent were filed after the running of the statute of limitations. When Respondent received Petitioner's notice of intent to initiate litigation, there were only 37 days remaining the extended statute of limitations period. Accordingly, pursuant to the law governing the calculation of the statute of limitations in medical malpractice actions, Petitioner had 60 days from the date she received Respondent's written denial of her claim (November 1, 2006) within which to file suit. Petitioner failed to file suit within that 60-day period and the trial court granted summary judgment. The First District Court of Appeal correct affirmed the trial court's order consistent with the express provisions of Florida Statutes and established precedent. The decision of the First District Court of Appeal is not in direct and express conflict with either Hillsborough County Hospital Authority v. Coffaro, 829 So. 2d 862 (Fla. 2002) or Novitsky v. Hards,

589 So. 2d 404 (Fla. 5th DCA 1991) on a question of law. Accordingly, this Court should affirm the decision of the First District Court of Appeal.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **J. Alfred Stanley, Esq.**, Meyers, Stanley & Waters, 1904 University Blvd., West, Jacksonville, FL 32217 and **Jack W. Shaw, Jr., Esq.,** 1555 Howell Branch Road, Suite 210, Winter Park, FL 32789, *Attorneys for Petitioner*; and **John Saalfield, Esq.**, *Attorney for Lionel Gatien, D.O.*, 50 North Laura Street, Suite 2950, Jacksonville, FL 32202 by U.S. Mail this 9th day of June, 2012.

/s/ Michael D. Kendall
ATTORNEY

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.100(l), Petitioner certifies compliance with Rule 9.100(1), in that this Petition for Certiorari was prepared using Times New Roman 14 point type, a type that is proportionately spaced and is in compliance with the font requirements set forth in said Rule.

s/Michael D. Kendall
_____
ATTORNEY