IN THE SUPREME COURT OF FLORIDA

GERTRUDE PATRICK,
PETITIONER,

Docket No. SC11-1466
First DCA No.: ID10-966

v.
LIONEL GATIEN, D.O., AN INDIVIDUAL, AND THOMAS E. ABBEY, D.O., AN INDIVIDUAL,
RESPONDENT.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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

Jack W. Shaw, Jr.
Florida Bar No.: 124802
Jack W. Shaw, Jr., P.A.
1555 Howell Branch Road, Suite C210
Winter Park, Florida 32789
(407) 648-4333
(407) 649-9772 (facsimile)
jack@jackshawpa.com

J. Alfred Stanley, Jr.
Florida Bar No.: 0808024
Meyers & Stanley
1904 University Blvd. West
Jacksonville, Florida 32217
(904) 367-8747
(904) 367-0650 (facsimile)
astanley@astanleylaw.com

Attorneys for Petitioner

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PRELIMINARY STATEMENT

In this Brief, the parties will generally be referred to by name, Petitioner Gertrude Patrick, Plaintiff in the trial court and Appellant in the District Court of Appeal, as "Ms. Patrick", and Respondents Lionel Gatien and Thomas Abbey, Defendants in the trial court and Appellees in the District Court of Appeal, as "Dr. Gatien" and "Dr. Abbey", respectively, and collectively as "the doctors". References to the Record on Appeal will be by the symbol "R" followed by the relevant Record page number.

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This case arises out of the trial court's entry, affirmed by the First District Court of Appeal, of a summary judgment based on the statute of limitation in this medical malpractice suit. The relevant dates are as follows:

May 4, 2004: Ms. Patrick permanently lost the vision in her left eye.

June 10, 2004: Ms. Patrick began to suspect that her blindness might be the byproduct of a medical mistake and began to request her medical records. (R. 462-465).

March 21, 2006: Ms. Patrick purchased an automatic 90-day extension pursuant to Florida Statutes Section 766.104(2) (2006). (R. 477-479).

August 2, 2006: Dr. Abbey acknowledged receipt of Ms. Patrick's notice of intent, which was dispatched pursuant to Florida Statutes Section 766.106(4). (R. 285). At this point, only 53 days of the aforesaid 90-day extension had been utilized pursuant to the subject extension, leaving 37 days remaining. (R. 657-658).

November 1, 2006: Ms. Patrick received Dr. Abbey's denial of the claim pursuant to Florida Statutes Section 766.106(4) (2006). *(*R. 285).

January 17, 2007: Ms. Patrick filed her medical malpractice action. (R. 001-010).

The trial court initially denied the doctors' motion for summary judgment based on the statute of limitations. Dr. Abbey filed a Petition for a Writ of Certiorari directed to the non-final order denying summary judgment, which was denied by the District Court of Appeal. (R. 585-595). Thereafter, the trial court granted reconsideration, vacated its prior ruling,

and granted the motion for summary judgment. (R. 656-659).

The First District affirmed the lower tribunal, and a timely motion for rehearing was denied. The District Court reasoned that that the thirty-seven remaining days of the purchased 90-day extension ran concurrent with the tolling period provided by Section 766.106(4) once it was activated on November 1, 2006.

Ms. Patrick timely invoked the discretionary jurisdiction of the Court by Notice dated July 22, 2011. This Court accepted jurisdiction by order dated March 26, 2012, and set a briefing schedule.

SUMMARY OF ARGUMENT

The District Court's decision in the instant case is in express and direct conflict with the decisions in Novitsky v. Hards, 589 So. 2d 404 (Fla. 5th DCA 1991), and Hillsborough County Hospital Authority v. Coffaro, 829 So. 2d 862 (Fla. 2002), which both applied the proper method of analysis of the timeliness of a medical malpractice suit under the relevant statutes.

In the instant case, the First District held that the 90-day purchased extension pursuant to Florida Statutes Section 766.104(2) (2006), ran concurrent to and was not to be calculated separate and apart from the 60-day tolling provision provided by Florida Statutes Section 766.106(4)

(2006).

In Hillsborough County Hospital Authority v. Coffaro, supra, this Court made clear that the statutory extension periods were separate and cumulative, not overlapping. In Novitsky v. Hards, supra, the Fifth District held that the automatic 90-day extension of limitations purchased pursuant to and provided by Section 766.104(2) was in addition to the 90 and 60-day tolling periods provided by Section 766.106(4), and that the separate tolling periods could be stacked.

The District Court in this case held that the 37 days in issue ran concurrently with the 60 day period which followed the defendant's denial of plaintiff's claim. That methodology of allocating the 90-day extension purchased pursuant to Section 766.104(2), was specifically rejected by this Court in Coffaro.

The trial court's entry of summary final judgment and finding that plaintiff's complaint was not timely filed, and the District Court's affirmance of that ruling, were in error, departed from the plain language of Section 766.104(2), departed from the holdings of controlling appellate decisions, and should be reversed and remanded for further proceedings consistent with the methodology and holding of Coffaro.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE INSTANT CASE DEPARTS FROM ESTABLISHED PRECEDENT BY FAILING TO GIVE FULL AND SEPARATE EFFECT TO EACH PROVISION EXTENDING THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS.

The applicable standard of review

The standard of review as to the propriety of a summary judgment is de novo, since it involves a pure question of law. See Volusia County v Aberdeen at Ormond Beach, L.P., 760 So. 2d 126 (Fla. 2000); Poe v IMC Phosphates MP, Inc., 885 So. 2d 397 (Fla. 2nd DCA 2004).

The standard of review as to whether the record discloses the existence of a genuine factual dispute sufficient to preclude summary judgment is that all disputed issues of material fact, and all reasonable inferences, must be construed in favor of plaintiffs, as the non-moving party. See Anderson v Morgan, 172 So.2d 845 (Fla. 3rd DCA 1965); Crepaldi v Wagner, 132 So.2d 222 (Fla. 1st DCA 1961).

If there is any doubt as to the existence or non-existence of a genuine issue of material fact, the doubt raised must be resolved against the party moving for the summary judgment. See Hervey v Alfonso, 650 So. 2d 644

(Fla. 2nd DCA 1995); Booth v. Mary Carter Paint Co., 182 So. 2d 292 (Fla. 2nd DCA 1966). All reasonable inferences must be drawn in favor of the opposing party. See Destiny Construction Company v. Martin K. Eby Construction, 662 So. 2d 388 (Fla. 5th DCA 1995); Craig v. Gate Maritime Properties, Inc., 631 So. 2d 375 (Fla. 1st DCA 1994); Lindsey v. Bill Arflin Bonding Agency, Inc., 645 So. 2d 575, 578 (Fla. 1st DCA 1994).

The statute of limitations issue.

The parties agree that the statute of limitations in this case began to run on June 10, 2004, when Ms. Patrick began to suspect that her blindness might be the byproduct of a medical mistake and began to request her medical records. The medical malpractice limitation period is (with exceptions not applicable here) two years, meaning that the limitation period would have expired on June 9, 2006. Prior to that time, on March 21, 2006, Ms. Patrick purchased an automatic 90 day extension of the limitations. Thus, the new expiration date for the limitations period became September 7, 2006.

Florida Statutes Section 766.104(2) 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 $42, 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. No court order is required for the extension to be effective. The provisions of this subsection shall not be deemed to revive a cause of action on which the statute of limitations has run.

The medical malpractice presuit requirements are set forth in Florida Statutes Section 766.106. On August 2, 2006, Dr. Abbey acknowledged receipt of Ms. Patrick's notice of intent, which was dispatched pursuant to Florida Statutes Section 766.106(4) (2006). That statute provides an additional period of 90 days (again, with exceptions not applicable in the present case) within which the statute of limitations is tolled as to all defendants. The 90 day period is computed from the date the putative defendant receives the Notice of Intent. See Boyd v Becker, 627 So. 2d 481 (Fla. 1993). That tolling period brought the "new" expiration date of the limitations period to December 6, 2006.

On November 1, 2006, Ms. Patrick received Dr. Abbey's denial of the claim, thus bringing into play the final sentence of Florida Statutes Section 766.106(4), which provides an additional 60 days, or the remainder of the period of the statute of limitations, whichever is greater. Since the remaining 37 days of the statute of limitations was less than 60 days, the statute

permitted another 60 days, or until February 4, 2007, to file this suit. On January 17, 2007, Ms. Patrick filed her medical malpractice action. Accordingly, the suit was timely filed and not barred by limitations.

Florida Statutes Section 766.106(4) provides:

> 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. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. 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.

Precedent clearly establishes that these various provisions are to be applied separately, providing a cumulative number of days added to the end of the limitation period, within which a medical malpractice claim can be timely filed. See, for instance, Porumbescu v Thompson, 987 So. 2d 1275 (Fla. 1st DCA 2008); Kalbach v Day, 589 So. 2d 448 (Fla. 4th DCA 1991), rev. dism'd, 598 So. 2d 76 (Fla. 1992); Angrand v Fox, 552 So. 2d 1113 (Fla. 3rd DCA 1989), rev. den., 563 So. 2d 632 (Fla. 1990).

In Hillsborough County Hospital Authority v. Coffaro, 829 So. 2d 862 (Fla. 2002), this Court specifically held that "the 90-day purchased extension

of time should be added to the end of the statute of limitations, after consideration of all applicable tolling and extensions." Id. at 867. In Coffaro, this Court remanded the case with directions that the 90-day extension of the statute of limitations was to be "added after the 60-day extension period under section 766.106(4)." In so holding, this Court specifically noted that "the medical malpractice statute must be liberally construed in favor of access to the courts." Id. at 864, citing Patry v. Capps, 633 So. 2d 9 (Fla. 1994).

In Coffaro, the trial court ruled that the purchased extension should be applied to the remaining statute of limitations available at the time of purchase. On appeal, Ms. Coffaro argued that the purchased extension was to be tacked on to available tolling provisions of the statute of limitations, specifically in addition to the 60 day period provided under Florida Statutes Section 766.106(4). In agreeing with Ms. Coffaro, this Court specifically noted that "Section 766.104(2) specifically provides that this 90-day period shall be in addition to other tolling provisions". Id. at 865. Citing Novitsky v. Hards, 589 So. 2d 404 (Fla. 5th DCA 1991), this Court observed that

"[t]his automatic extension is separate and additional to any other tolling period." Id.

This Court held that Ms. Coffaro "was entitled to the benefit of the sixty-day period of section 766.106(4)", and thereafter "the 90-day purchased period is added to determine when the plaintiff's medical malpractice complaint must be filed." Id. at 866. This period, the Court instructed, was "added after the 60-day extension period under 766.106(4)." Id. at 863. Therefore, this Court held that in addition to the 60 days following the date Ms. Coffaro received the termination of negotiation letters, she also had the benefit of the purchased extension, which gave her an additional 90 days to file suit.

The message of Coffaro has been specifically recognized by the First District itself in Cortes v. Williams, 857 So.2d 634 (Fla. 1st DCA 2003). In Cortes, the petitioning physician sought to reverse the denial of a summary judgment motion, contending that in Coffaro, the purchased extension did not extend the original two year statute of limitations period as to the filing of a notice of intent. The physician erroneously argued that the extension was to be applied solely at the end of the statute of limitations. In denying

the physician's petition for writ of certiorari, the First District specifically noted that this argument was "contrary to the plain language of Section 766.104(2) and the supreme court's holding in Coffaro". The court went on to observe that "[t]his period shall be in addition to other tolling periods" and that the statute's only restriction is that the extension must be purchased during the original limitations period. Id. at 635.

In the Fifth District, the purchased 90-day extension of the statute is treated as being separate, distinct, and in addition to other tolling periods and can be stacked. In Novitsky v. Hards, 589 So. 2d 404 (Fla. 5th DCA 1991), Ms. Novitsky received dental care from Dr. Hards on January 12, 1987. Dr. Hard inadvertently dropped a crown into Ms. Novitsky's lung, which required hospitalization. Ms. Novitsky sent a notice of intent to initiate litigation on January 10, 1989. On the same date, she filed a petition for an automatic 90-day extension of the statute of limitations pursuant to Florida Statutes Section 768.495. (later renumbered to 766.104(2)). The malpractice lawsuit was filed on July 13, 1989. The trial court entered a summary judgment that the lawsuit was untimely. On appeal, the Fifth District noted that the notice of intent was mailed 2 days prior to the expiration of the two

year statute of limitations, and that in calculating the 90 and 60-day tolling provisions provided under the pre-suit screening statute, the Novitskys would have been required to have filed their lawsuit by June 9, 1989. However, because the Novitskys had also obtained an automatic 90 day extension of the statute of limitations, another 90 days was added to the filing deadline, and thus the revised filing deadline became September 7, 1989.

In so holding, the Fifth District specifically rejected Dr. Hards' argument that the Novitskys should not be entitled to "still another tolling period following the 90 and 60-day periods provided under Section 768.57(4)" (later renumbered 766.106(4)). In rejecting Dr. Hards' argument, the Fifth District specifically noted that the purchased 90-day period is "in addition to other tolling periods." The Fifth District stated that the subject provisions are different statutes and thus contain different tolling periods. The Fifth District agreed with Angrand v. Fox, 522 So. 2d 1113 (Fla. 3rd DCA 1989), rev. den., 563 So. 2d 632 (Fla. 1990), that the time periods of these two statutes can be stacked. Accordingly, the final

summary judgment was reversed and remanded for further proceedings.

Thus, the Fifth District calculates the automatic 90-day extension of the limitations period entirely differently than the methodology prescribed by the First District in the instant case.

Applying the Fifth District's calculation in the instant case, the statute of limitations would have originally expired on June 10, 2006. The statute was extended by 90 days pursuant to Section 766.104(2), then by an additional 90 days under Section 766.106(4), plus an additional 60 days (since the time remaining on the statute was less than 60 days) under that same statute. So computed, the suit in this case was timely filed.

The First District, however, in direct conflict with the decisions of this Court in Hillsborough County Hospital Authority v. Coffaro, 829 So. 2d 862 (Fla. 2002), and of the Fifth District in Novitsky v. Hards, 589 So. 2d 404 (Fla. 5th DCA 1991), held that the remaining portion of the purchased 90-day extension (37 days) ran simultaneous to and concurrent with the 60-day tolling provision provided by Florida Statutes Section 766.106(4) (2006). Specifically, the First District held that the statute of limitations period began to run again on November 1, 2010, by virtue of the activation of the

60-day tolling period provided by Florida Statutes Section 766.106(4). In so holding, the First District eliminated the remaining 37 days of the 90-day extension purchased by Ms. Patrick by not considering it to be in addition to all other tolling provisions, as specifically provided by Florida Statutes Section 766.104(2).

Given that the parties have stipulated that Ms. Patrick's statute of limitations began to run on June 10, 2004, the Coffaro analysis would dictate that the statute of limitations would not expire until February 4, 2007 (90 + 90 + 60). That analysis affords Ms. Patrick the full benefit of the 90-day extension that she purchased. The First District erred in ruling to the contrary.

CONCLUSION

The decision of the District Court of Appeal in the instant case is in express and direct conflict with the decisions in Hillsborough County Hospital Authority v. Coffaro, supra, and in Novitsky v. Hards, supra, which properly apply the relevant statutory provisions. The entry of a summary final judgment was error, since Ms. Patrick was not given the full benefit of the purchased 90-day extension as required by Florida Statutes Section 766.104(2) and this Court's holding in Coffaro. The decision below should be reversed and the case remanded for further proceedings consistent therewith.

Respectfully submitted,

_____
J. Alfred Stanley, Jr.
Florida Bar No.: 0808024
MEYERS & STANLEY
1904 University Blvd. West

Jacksonville, Florida 32217
(904) 367-8747
(904) 367-0650 (facsimile)
astanley@astanleylaw.com

/s/ Jack W. Shaw, Jr.
Jack W. Shaw, Jr.
Florida Bar No.: 124802
Jack W. Shaw, Jr., P.A.
1555 Howell Branch Road,
Suite C210
Winter Park, Florida 32789
(407) 648-4333
(407) 649-9772 (facsimile)
jack@jackshawpa.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed and a copy has been furnished to Mary Bland Love/Michael D Kendall, Esq., Attorneys for Thomas E. Abbey, D.O., 1200 Riverplace Blvd., Ste. 800. Jacksonville, FL 32207, and to John R. Saalfield, Esq., Attorney for Lionel Gatien, D.O., 50 N. Laura Street, Ste. 2950, Jacksonville, FL 32202, by U. S. Mail, this 20th day of April, 2012.

/s/ Jack W. Shaw, Jr.
Attorney

/s/ J. Alfred Stanley, Jr.
Attorney

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this Brief has been prepared in Times New Roman 14 point font.

/s/ Jack W. Shaw, Jr.
Attorney

/s/ J. Alfred Stanley, Jr.
Attorney