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 BRIEF IN OPPOSITION TO DISCRETIONARY JURISDICTION

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

MARKS GRAY, P.A.

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STATEMENT OF THE FACTS

The facts of the instant are set forth 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 (Plaintiff below) filed a medical malpractice action in accordance with Chapter 766, Florida Statutes. Plaintiff alleged that Respondent Abbey ("Abbey"), among others, was negligent in the care and treatment of Plaintiff, and that said negligence caused and contributed to injuries to Plaintiff, specifically, blindness to Plaintiff's left eye.

Plaintiff served a Notice of Intent to Initiate Litigation on Thomas E. Abbey, D.O., dated July 28, 2006. The Notice of Intent to Initiate Litigation addressed to Abbey was received by Abbey on August 2, 2006. Plaintiff's claim in the Notice of Intent to Initiate Litigation was denied by Abbey via correspondence sent to Plaintiff's counsel dated October 31, 2006. Abbey's written, pre-suit denial was received by Plaintiff on November 1, 2006. Following the pre-suit denial of Plaintiff's claim by Dr. Abbey, Plaintiff filed the initial Complaint in this action on January 17, 2007.

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. The lower court conducted a hearing on Abbey's Motion for Summary Judgment on December 1, 2008. At the hearing, the

parties agreed to all the essential facts, including the triggering date for the statute of limitations. 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.

Plaintiff filed a Notice of Appeal with the First DCA 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 Plaintiff's Complaint against Dr. Abbey was filed outside the applicable statute of limitations. Plaintiff then filed a Notice of Invoking Discretionary Jurisdiction with this Court.

SUMMARY OF THE ARGUMENT

Petitioner seeks to invoke the jurisdiction of this Court under Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(2)(A)(iv) based on a purported conflict with a prior decision of this Court as well as a prior decision of the Fifth District Court of Appeal. 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 reminder of the statute of limitations or sixty (60) days, whichever is 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." Petitioner's jurisdictional brief fails to articulate and set forth exactly how the First District

Court of Appeals decision is 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).

ARGUMENT AND AUTHORITIES

II. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS CONSISTENT WITH THE PLAIN LANGUAGE OF SECTION 766.106(4), FLORIDA STATUTES AND IS NOT IN EXRESS AND DIRECT CONFLICT WITH ANY DECISIONS OF ANY OTHER DISTRICT COURTS OR THIS COURT ON A QUESTION OF LAW.

Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(2)(A)(iv) provides for discretionary jurisdiction by this Court to review decisions of district courts of appeal that "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." The First District Court of Appeal's decision in the instant case does not "expressly and directly" conflict with the two cases cited in Petitioner's jurisdictional brief on a question of law. The cases cited by Petitioner and the instant case all consistently state that the purchased extension under section 766.104(2), Florida Statutes, is added to the end of the two-year statute of limitations, thus there is no conflict on a question of law. The differences in the cited cases and the instant case are factual, not legal. Thus, the decision does not conflict on a question of law and discretionary jurisdiction should be denied.

Contrary to Petitioner's assertions in her jurisdictional brief, the First District Court of Appeal did not hold in the instant case that the remaining portion of the purchased 90-day extension ran simultaneous to and concurrent with the 60-day tolling provision provided in section 766.106(4), Florida Statutes (2006). Instead, the First District Court of Appeal, consistent with prior decisions from this Court and numerous Florida Courts of Appeal, relied on the plain language of sections 766.104 and 766.106 and determined that Petitioner's 90-day purchased extension was tacked onto the end of the original two year statute of limitations period and that the "remainder of the period of the statute of limitations" was less than 60 days and as such, Petitioner had 60 days from November 1, 2006, in which to file her complaint. Patrick v. Gatien, et al., Case No. 1D10-0966, at page 6.

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); Coffaro, 829 So. 2d 864-65 (Fla. 2002). 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)).

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); Coffaro, 850 So. 2d 865.

The First District Court of Appeal's decision consistently applies the law set forth in Florida Statutes and established precedent as evidenced from the lower court's written opinion. The factual differences between the instant case and the cases cited by Petitioner warranted an outcome different from the cases cited by Petitioner but did not render the decision expressly and directly in conflict on a question of law.

The First District Court of Appeal's decision is 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, et al., Case No. 1D10-0966, at page 5.

In Coffaro, the court was asked to review the issue of calculating the statute of limitations in a case where the plaintiff purchased the extension under 766.104(2), but did not have to use it before serving notices of intent. Coffaro, 829 So. 2d 862. 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. The 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.

The First District Court of Appeal correctly found that Coffaro did not support Petitioner's argument. Patrick, page 5. In the instant case when negotiations terminated, Petitioner had **no** time remaining on the original two-year statute of limitations. Unlike the plaintiff in Coffaro, 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. Petitioner made a contradictory argument to the First District Court of Appeal 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). 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. 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 is otherwise time barred. Petitioner's position would create a result that then would have been in express and direct conflict with established precedent.

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. The First District Court of Appeal noted that Petitioner purchased a 90-day extension under 766.104(2), Florida Statutes, and her statute of limitations was set to expire 2 years and 90 days from June 10, 2004. Consistent with the statute and

Coffaro, Petitioner was provided all tolling provisions and following the termination of pre-suit 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 asked the trial court and the First District Court of Appeal to add additional days contrary to the plain language of the statute. The First District Court of Appeals decision is consistent with this Court's analysis in Coffaro.

The First District Court of Appeal's decision is likewise not in express and direct conflict with the Fifth District Court of Appeal's 1991 decision in Novitsky v. Hards, 589 So. 2d 404 (Fla. 5th DCA 1991). In Novitsky, the court noted that at the time the plaintiff's notice of intent was mailed to the prospective defendant, there were two (2) days remaining on the original two-year statute of limitations. Id. at 407. The court noted that the plaintiff would have the 90 days during the presuit period under 768.28, Florida Statutes (renumbered to 766.106), and since there were 2 days left on the two-year statute of limitations, plaintiff also had an additional 60 days to file suit under 768.57, Florida Statutes (renumbered to 766.106(4)). Id. Petitioner highlights the fact that the court also granted the plaintiff the benefit of the full 90 day purchased extension under section 768.495, Florida Statutes (renumbered to 766.104(2). However, Petitioner attempts to create a conflict by ignoring the factual differences.

The First District Court of Appeal's decision in the instant case is consistent with both Novitsky and Coffaro. At the time the notice of intent was received by the defendants in Novitsky and Coffaro, there was time remaining on the original two-year statute of limitations period. The 90 day extensions purchased by the respective plaintiffs had not been used at the time the court was calculating the time left within which to file suit. However, again, the instant case is factually different from Novitsky and Coffaro, in that Petitioner's two-year statute of limitations period had already expired at the time the notice of intent was received by Respondent and the 90-day purchased extension was more than half gone.

CONCLUSION

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 does not have jurisdiction to review the decision of the First District Court of Appeal and should decline to accept the instant case.

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 Brach 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 18th day of August, 2011.

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

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ATTORNEY