IN THE SUPREME COURT OF FLORIDA

GERTRUDE PATRICK,
PETITIONER,

Docket No. _____
DCA CASE NO.: ID10-966

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

PETITIONER'S JURISDICTIONAL BRIEF

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

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STATEMENT OF THE CASE AND FACTS

In this Brief, the facts are as set forth in the opinion of the First District Court of Appeal.

On May 4, 2004, Petitioner Gertrude Patrick, (hereinafter "Ms. Patrick") unexpectedly and permanently lost the vision in her left eye while under the care of Respondent Dr. Abbey (hereinafter, "Dr. Abbey"). On or about 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. On March 21, 2006, Ms. Patrick purchased an automatic 90-day extension pursuant to Section 766.104(2), Fla. Stat. (2006). On August 2, 2006, Dr. Abbey acknowledged receipt of Ms. Patrick's notice of intent, which was dispatched pursuant to Section 766.106(4), Fla. Stat. (2006). Upon receipt of the subject notice of intent, only 53 days of the purchased 90-day extension had been utilized and, accordingly, 37 days remained as to the purchased extension of time. On November 1, 2006, Ms. Patrick received Dr. Abbey's denial of the claim pursuant to Section 766.106(4), Fla. Stat. (2006). Thereafter, on January 17, 2007, Ms. Patrick filed her medical malpractice action.

Dr. Abbey filed a motion for summary judgment contending that Ms.

Patrick's complaint was not timely filed and that the statute of limitations expired on December 31, 2006. Dr. Abbey's motion for summary judgment was originally denied by the trial court, based upon the authority of Hillsborough County Hospital Authority v. Coffaro, 829 So. 2d 862 (Fla. 2002), and Cortes v. Williams, 857 So. 2d 634 (Fla. 1st DCA 2003). Thereafter, Dr. Abbey filed a petition for a writ of certiorari as to this non-final order. Dr. Abbey's petition was denied by the First District Court of Appeal.

Notwithstanding the above, Dr. Abbey moved the trial court for reconsideration of the motion for summary judgment. The trial court granted Dr. Abbey's motion for reconsideration, vacated and set aside the previous order denying the summary judgment, ruled that the complaint filed on January 17, 2007, was not timely filed, and entered summary judgment in favor of Dr. Abbey.

In the proceedings below, Ms. Patrick repeatedly contended that the plain language of Section 766.104(2) specifically provides that the subject 90-day extension is separate and in addition to any other tolling periods provided by Chapter 766, as dictated by the most recent holdings of the Florida Supreme Court. Dr. Abbey contended that the remaining 37 days of

the extension that had not been previously utilized by Ms. Patrick were subsumed into, and not to be added to, the 60-day tolling provisions provided under Section 766.106(4). In granting summary final judgment, the trial court refused to afford Ms. Patrick the benefit of the full 90-day extension by failing to calculate and apply the 37 days separate and in addition to all other applicable tolling periods or provisions. An appeal to the First District followed

The First District Court of Appeal affirmed, holding that the thirty-seven days remaining as to the purchased 90-day extension ran concurrent with the tolling period provided by Section 766.106(4) once it was activated on or about November 1, 2006.

Ms. Patrick timely invoked this Court's discretionary jurisdiction by filing the appropriate Notice on July 22, 2011.

SUMMARY OF ARGUMENT

This Court has jurisdiction to review the District Court's decision in the instant case under Article V, Section 3 (b)(3), Fla. Const., since the decision 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).

In the instant case, the First District Court of Appeal held that the 90-day purchased extension pursuant to Section 766.104(2), Fla. Stat. (2006), ran concurrent to and was not to be calculated separate and apart from the 60-day tolling provision provided by Section 766.106(4), Fla. Stat. (2006). 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 other 90 and 60-day tolling periods provided by Section 766.106(4), and that the separate tolling periods could be stacked.

In reaching the decision below, the First District also misapplied the law as set forth by this Court in Hillsborough v. Coffaro, supra, in which this Court 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 tollings and extensions. By misapplying Coffaro to the facts of the instant case, the First District placed itself in express and direct conflict with the decision of this Court which required that the 90-day extension is to be added after the 60-day extension provided under Section 766.106(4). Accordingly, this Court has jurisdiction to review the District Court's decision in the instant case.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS IN EXPRESS AND 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 COURT OF APPEAL IN NOVITSKY V HARDS, 589 SO. 2D 404 (FLA. 5TH DCA 1991).

In the instant case, the First District Court of Appeal 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 Section 766.106(4), Fla. Stat. (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 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 Section 766.104(2).

In the Fifth District, in contrast, 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 and removal. 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 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 filed an automatic 90 day petition to extend 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 to 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 Ingram v. Fox, 522 So. 2d 1113 (Fla. 3rd DCA 1989), review denied, 563 So. 2d 632 (Fla. 1990), that the subject time periods of these 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.

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.

Additionally, the First District's decision in the instant case misapplies and is in express and direct conflict with the law established by this Court in Hillsborough County Hospital Authority v. Coffaro, 829 So. 2d 862 (Fla. 2002). This Court in that case 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." In Coffaro, this Court remanded the case to the trial court 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 allocation of the purchased extension was not to be calculated as of the time of purchase, but was to be tacked on to available tolling provisions of the statute of limitations, and specifically in addition to the 60 day period provided under 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 stated 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. 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.

In the instant case, in contrast, the remainder of the purchased 90-day extension was not added onto the 60-day tolling period provided by 766.106(4). Rather, the First District stated that the remaining portion of the 90-day purchased extension began to run again, and run concurrently with, the 60-day period once Section 766.106(4) was activated. The decision in Coffaro has been misapplied here and the instant decision is, in fact, in express and direct conflict with Coffaro's holding.

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.

Accordingly, this Court has jurisdiction to review this matter under Article V, Section 3(b)(3), Fla. Const. This Court should exercise that jurisdiction to harmonize the law of Florida and to avoid conflicting rules of law being applied to essentially the same factual situation in different appellate districts of the state.

Respectfully submitted,

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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., Attorney 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 1st day of August, 2011.

/s/ J. ALFRED STANLEY, JR.

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CERTIFICATE OF FONT SIZE

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

/S/ J. ALFRED STANLEY, JR.

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