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 REPLY BRIEF ON THE MERITS

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

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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.

Dr. Abbey attempts to distinguish both Hillsborough County Hospital Authority v. Coffaro, 829 So. 2d 862 (Fla. 2002), and Novitsky v. Hards, 589 So. 2d 404 (Fla. 5th DCA 1991), by repeatedly referring to, and emphasizing, the "original" statute of limitations in those cases. That discussion is confusing at best and in any event is irrelevant to the proper analysis of the issue in this case. The running of the medical malpractice statute of limitations, and whether a particular case was filed within that statute of limitations, is not governed solely by the "original" two-year period, as measured from the date on which the plaintiff had sufficient notice of possible malpractice. Rather, it is significantly affected by the provisions of Florida Statutes Sections 766.104 and 766.106 as applied to the particular facts of any given case.

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.

If, as in the instant case, the plaintiff has purchased that automatic 90 day extension of the statute, the "new" statute of limitations becomes 2 years and 90 days. That period is then further extended under Florida Statutes Section 766.106, dealing with presuit investigation.

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.

Under this statute, the statute of limitations was extended, in the instant case, by an additional 90 days (since defendants used the full 90 day

period before terminating negotiations). Finally, upon termination of negotiations, Florida Statutes Section 766.106(4) provides a final extension of time for timely filing of suit.

Nothing in the case law provides any support for Dr. Abbey's repeated and emphasized reliance on the "original" statute of limitations. Instead, the issue is determined by taking the date on which the statute began to run (in the instant case, the parties are in agreement that this date was June 10, 2004), then applying the two-year statute plus all extensions of that period as established under Florida Statutes Sections 766.104 and 766.106. As set forth in the cases cited in the Initial Brief, those periods are to be calculated consecutively, not concurrently, so as to give full effect to each of the statutory provisions.

We submit that the proper analysis in this case is that set forth in the Initial Brief. Dr. Abbey's attempts to distinguish Hillsborough County Hospital Authority v. Coffaro, 829 So. 2d 862 (Fla. 2002), and Novitsky v. Hards, 589 So. 2d 404 (Fla. 5th DCA 1991), by repeatedly referring to the "original" statute of limitations is unsupported by the case law, and should be rejected by this Court.

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,

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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., 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 4th day of June, 2012.

/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/J. Alfred Stanley, Jr.
Attorney