

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 94,384

PATRICIA ANN HANKEY
and DONALD HANKEY.

Petitioners,

vs.

SUSAN YARIAN, M.D.,
ET AL.,

Respondents.

_____ /

BRIEF OF THE PETITIONERS

ON DISCRETIONARY REVIEW OF A CERTIFICATION
OF CONFLICT FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, FIFTH DISTRICT - No.98-543

CHARLES DANIEL SIKES, P.A.
407 West Georgia Street
Starke, Florida 32091
(904) 964-2020/FAX 964-9400
Florida Bar Number: 0886858

Attorney for Petitioners

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
ISSUE ON APPEAL	4
ISSUE	4
WHETHER THE TRIAL COURT AND THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT ERRED IN CALCULATING THE EXPIRATION OF THE STATUTE OF LIMITATIONS BY FAILING TO RECOGNIZE THE CLEAR TOLLING PROVISIONS ESTABLISHED BY THE FLORIDA LEGISLATURE?	
SUMMARY OF ARGUMENT	5
ARGUMENT	6
ISSUE	6
THE TRIAL COURT AND THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT, ERRED IN CALCULATING THE EXPIRATION OF THE STATUTE OF LIMITATIONS BY FAILING TO RECOGNIZE THE CLEAR TOLLING PROVISIONS ESTABLISHED BY THE FLORIDA LEGISLATURE.	
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Hankey, et. al., v. Yarian, et. al</u> 719 So.2d 987 (Fla. 5th DCA 1998)	3,10
<u>Pergrem v. Horan</u> , 669 So.2d 1150 (Fla. 5th DCA 1996)	8
<u>Rothschild v. NME Hospitals, Inc.</u> 707 So.2d 952 (Fla. 5th DCA 1998)	3,10
<u>Tanner v. Hartoq</u> , 618 So.2d 177 (Fla. 1993)	8,9,10
 <u>STATUTORY AUTHORITY</u>	
Section 95.11, Florida Statutes	6,7,10
Section 766.104(2), Florida Statutes	passim
Section 766.106, Florida Statutes	passim
Section 766.203, Florida Statutes	10
Fla.R.App.P., 9.030(a)(2)(A)(vi)	1
 <u>OTHER AUTHORITY</u>	
BLACK'S LAW DICTIONARY , (6th ed. 1990)	7

JURISDICTIONAL STATEMENT

The Supreme Court of Florida has jurisdiction in this case pursuant to Fla.R.App.P. 9.030(a)(2)(A)(vi) since the District Court of Appeals of Florida, Fifth District has certified that its decision is in direct conflict with decisions of the other District Courts of Appeal on the same question of law.

STATEMENT OF THE CASE AND FACTS

On December 6, 1994 Patricia Hankey was a victim of medical negligence and malpractice which involved SUSAN YARIAN, M.D.; GEORGE SADOWSKI, M.D.; WEN I. LIN, M.D.; NICHOLAS TUSO, M.D.; WOMEN'S HEALTH CARE OF ST. AUGUSTINE; and FLAGLER HOSPITAL, INC.(R.1) On March 19, 1996 the Petitioners filed a Notice of Intent to Initiate Litigation which pursuant to section 766.106 Florida Statutes, should have tolled the Statute of Limitations.(R.52) Pursuant to section 766.106 Florida Statutes, defendants had 90 days to respond. During that 90 day period the filing of the suit was prohibited. On June 26, 1996 a stipulated agreement by all parties to extend the 90 days by an additional 30 days was filed with the Clerk of Courts.(R.52) By July 18, 1996 all potential defendants had responded. Pursuant to section 766.106(4) the Petitioner, Patricia Hankey should have had the balance of her initial 2 years to file suit. Petitioners also filed a petition with the Clerk of the Court for an automatic 90 day extension at the end of the Statute of Limitations pursuant to section 766.104(2) Florida Statutes.(R.52) That action then brought the last day to file a complaint in this case to July 5,

1997. The complaint was filed on June 19, 1997, prior to this deadline.(R.1)

On December 30, 1997 a hearing was convened by the trial court on the Defendants' Motion to Dismiss.(R.52) On January 22, 1998 the lower court granted the Defendants' Motion to Dismiss on the grounds that the Statute of Limitations had expired prior to the Petitioners filing their suit in St. Johns County.(R.52)

On appeal to the District Court of Appeal of Florida, Fifth District, the court affirmed the trial court's calculations of the Statute of Limitations pursuant to section 766.106(4), Florida Statutes and certified a direct conflict with Rothschild v. NME Hospitals, Inc., 707 So.2d 952 (Fla. 4th DCA 1998) which recognized that the notice of intent period is a tolling provision. Hankey, et. al v. Yarian, et.al., 719 So.2d 987(Fla. 5th DCA 1998).

A timely notice of discretionary appeal was filed and this brief follows.

ISSUE ON APPEAL

ISSUE

WHETHER THE TRIAL COURT AND THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT ERRED IN CALCULATING THE EXPIRATION OF THE STATUTE OF LIMITATIONS BY FAILING TO RECOGNIZE THE CLEAR TOLLING PROVISIONS ESTABLISHED BY THE FLORIDA LEGISLATURE?

SUMMARY OF ARGUMENT

The District Court of Appeal of Florida, Fifth District, erred by failing to recognize the clear tolling provisions established by the Florida Legislature in medical malpractice actions pursuant to Chapter 766, Florida Statutes (1995). This chapter mandates a complex set of procedures that must be followed prior to the filing of a medical malpractice suit. Specifically, section 766.106(2) requires a plaintiff to serve a Notice of Intent to Initiate Litigation on all potential defendants as a condition precedent to filing a complaint. During the 90 day time frame, and any extension of that time frame agreed upon by the parties, the plaintiff cannot lawfully file his or her complaint and the Florida Legislature expressly set forth a tolling provision for this period. Section 766.106(4), Florida Statutes. The District Court of Appeal of Florida, Fifth District erred when it held that the Statute of Limitations was not tolled during this time frame. Such a holding misinterprets this Court's prior rulings, the express terms established by the Florida Legislature, and is in direct conflict with the decisions of the other District Courts of Appeal of Florida. The decision of the District Court of Appeal of Florida, Fifth District, should be reversed and this matter should be remanded to the trial court for further proceedings.

ARGUMENT

ISSUE

THE TRIAL COURT AND THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT, ERRED IN CALCULATING THE EXPIRATION OF THE STATUTE OF LIMITATIONS BY FAILING TO RECOGNIZE THE CLEAR TOLLING PROVISIONS ESTABLISHED BY THE FLORIDA LEGISLATURE.

The dispositive issue presented to this Court is whether, when the Petitioners mailed their Notice of Intent to Initiate Litigation pursuant to section 766.106(2) and(4), Florida Statutes, the two year Statute of Limitations was tolled for ninety days plus a 30 day extension stipulated to by the parties, or not?¹

The Florida Legislature expressly included within section 766.106(4), Florida Statutes, the statement that "the statute of limitations is tolled...." twice. In it's entirety section 766.106(4), Florida Statute reads:

The Notice of Intent to Initiate Litigation shall be served within the time limits set forth in section 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation of 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,

¹The Petitioners additionally filed an automatic extension of the Statute of Limitations pursuant to section 766.104(2), Florida Statutes, which has not been challenged on appeal as being additional to and separate from the tolling provision sought pursuant to section 766.106(4), Florida Statutes.

whichever is greater, within which to file suit. (emphasis added)

The term "tolled" is not specifically defined within Chapter 766, Florida Statutes, probably because of its common usage and general understanding. The term "toll" has been defined by **BLACK'S LAW DICTIONARY**, 1488 (6th ed. 1990) as meaning, "[t]o bar, defeat, or take away....[t]o suspend or stop temporarily as to the statute of limitations during the defendant's absence from the jurisdiction and during the plaintiff's minority." Thus, the time for the running of the Statute of Limitations stops the day a claimant mails the Notice of Intent letter and does not begin to run again until the expiration of the ninety day period, or any extension. Therefore, when a claimant sends a Notice of Intent letter one year, eleven months, and twenty-nine days after the cause of action accrues, the Statute of Limitations is tolled for ninety days. At the conclusion of that time, (or any stipulated extension thereof) if the defendant denies liability, in lieu of the one day of statute of limitations remaining, the statute provides sixty days within which to file suit. In situations as the case at bar, if the Notice of Intent is filed much earlier, the claimant does not need the additional sixty days provided by statute, and has time to file suit within the time remaining of the Statute of Limitations which begins to run again after the claim is denied. During the time tolled for purposes of required negotiations, the claimant is barred from filing suit. See, section 766.106(3)(a), Florida

Statutes. If during this time of required negotiations, the Statute of Limitations is not tolled, the claimant's Statute of Limitations of two years provided by Section 95.11 Florida Statutes (1995) is effectively reduced to one year, nine months (or here one year, eight months) within which to file suit. A reduction of the time of the Statute of Limitations could not reasonably have been the intent of the Florida Legislature.

The District Court of Appeal of Florida, Fifth District has declined this interpretation in both Hankey v. Yarian, 719 So.2d 987 (Fla 5th DCA, 1998) and Pergrem v. Horan, 669 So.2d 1150(Fla 5th DCA 1996).

In doing so the court improperly interpreted Tanner v. Hartog, 618 So.2d 177 (Fla. 1993), as holding that there is no tolling pursuant to section 766.106(4), if the Notice of Intent to Initiate Litigation is filed well before the expiration of the Statute of Limitations. Based upon that interpretation and applied to the case at hand, the District Court of Appeal held in Hankey at 989:

In this case, the two year statute of limitations commenced on December 6, 1994, and was set to expire on December 6, 1996. The plaintiffs filed their notice of intent on March 19, 1996, but under Pergrem, enjoyed no extension under section 766.106(4) since the ninety day period (plus thirty days stipulated extension) plus sixty day period ended on or about September 19, 1996, well before the December 6, 1996, expiration of the Statute of Limitations. The 90 day automatic extension purchased by the plaintiffs under section 766.104(2) extended the limitations period to March 6, 1997, but the Plaintiff's did not

file suit until June 19, 1997, beyond the limitations period.(emphasis added)

The lower District Court of Appeal relied on the following statement from Tanner: "The time remaining must be computed from the date of notice of intent was filed, rather than simply adding on the extra time to the limitations period, so as to implement the intent of the statute and avoid an unreasonable windfall to the plaintiff who files a notice of intent soon after the malpractice is discovered." Tanner at 184. The Fifth District failed to account for footnote 6 from that sentence which illustrated this Court's ruling as follows:

The weakness in the Tanner's position is exemplified in a hypothetical which assumes that they had filed their notice of Intent on May 1, 1988, one month after the limitations period commenced. Under the Tanners' theory, they would have had ninety days tacked on to April 1, 1990, plus the greater of either the time remaining when the Notice was filed (twenty-three months), or sixty days. Thus they would have had until May 30, 1992, to file this claim, or over four years after discovery of the incident. This could not have been what the legislature intended and would be contrary to the plain language of the statute providing that upon termination of negotiations the claimant shall have sixty days or the remainder of the limitations period, whichever is greater, within such to file suit. Tanner at 184 (emphasis added)

Therefore, this Court in Tanner was specifically addressing the doubling up of limitations time in that case which is not at issue here. The lower appellate court interpreted Tanner, to actually reduce the Statute of Limitations by finding no tolling

provisions under section 766.106(4), during a time of required negotiations when the Petitioners were barred from filing suit. This effectively reduced the Statute of Limitations to one year and eight months for the Petitioners to file suit. There was no explanation given as to how the statute was interpreted to arrive at that conclusion. Here the Petitioners' encourage the plain, ordinary reading of the statute inclusive of the generally understood term of "tolling" regarding the time of negotiations and extensions.

The Petitioners urge this Court that the interpretation of section 766.106(4), Florida Statutes and Tanner by the District Court of Appeal of Florida, Fourth District in Rothschild v. NME Hospitals, Inc., 707 So.2d 952 (Fla 4th DCA 1998) is the correct holding. Rothschild held:

Pursuant to section 95.11 (4)(b), Florida Statutes (1995), a plaintiff must file a medical malpractice action within two years from the time the incident giving rise to the action occurred or the date it was discovered. However, Chapter 766, Florida Statutes (1995), provides a complex set of procedural requirements that both the claimant and the defendant must satisfy before bringing a medical malpractice suit into court. Section 766.106(2) requires that a claimant serve a notice of intent to initiate litigation on all potential defendants prior to filing the action. Upon receipt of this notice, a defendant must conduct his or her own presuit investigation and respond to the notice within ninety days. See sections 766.106(3)(a), 766.203(3), Florida Statutes (1995). During this ninety-day period, the statute of limitations is tolled. See section 766.106(4). Since a tolling provision

interrupts the running of the statutory limitations period, the statutory time is not counted against the claimant during the ninety day period. In essence, the clock stops until the tolling period expires and then begins to run again. This period may be shortened if the defendant sends a notice of termination of negotiation. Id. at 953. (emphasis added)

This common sense interpretation of Tanner and section 766.106(4), Florida Statutes, recognizes the effect of tolling on the calculation of the Statute of Limitations. Applying this analysis to the case at hand would mean that the Petitioners' complaint was timely filed. The initial expiration of the Statute of Limitations was December 6, 1996. The Notice of Intent letters under section 766.106(2), and (4), Florida Statutes, automatically extended the limitations by ninety days to March 6, 1997 with a further extension of thirty days until April 6, 1997. The filing of the Petition to Extend the Statute of Limitations moved this date back an additional ninety days with a final expiration of Statute of Limitations on July 5, 1997. Therefore the Petitioners' complaint filed June 19, 1997 was well within the Statute of Limitations.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the Petitioners respectfully urge this Honorable Court to reverse

the lower District Court of Appeal and trial court and remand this case for further proceedings.

Respectfully submitted:

By: _____
CHARLES DANIEL SIKES, P.A.
407 West Georgia Street
Starke, Florida 32091
(904) 964-2020/FAX 964-9400
Attorney for Petitioners'
Florida Bar Number: 0886858

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been delivered by U.S. Mail to **KIM E. BOUCK, ESQ.** SMITH, SCHODER, BOUCK & RODDENBERRY, P.A., 605 South Ridgewood Avenue, Daytona Beach, Florida 32114, Attorneys for Drs. Tusso, Lin and Yarian; **TERESE M. LATHAM, ESQ.** UNGER, CACCIATORE & SWARTWOOD, P.A., Post Office Box 4909, Orlando, Florida 32802-4909; Attorneys for Flagler Hospital, Inc., and **KURT M. SPENGLER, ESQ.** WICKER, SMITH, TUTAM et al., Post Office Box 2753, Orlando, Florida 32802-2753, Attorneys for Dr. Sadowski, on this _____ day of December, 1998.

Charles Daniel Sikes, P.A.