IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

MICHAEL BONEVENTO and/or any duly appointed Personal Representative and/or Administrator of the Estate of SARA BONEVENTO, Deceased,

Plaintiff,

vs.

CARON RENAISSANCE, CARON FOUNDATION OF FLORIDA, INC., IVONA JANCICKOVA, MELISSA SENEWAY, DAVIDA SCHOENTAG, MARY DAVIS, SUSAN MALEH, PATRIC COOMBE, LAUREN WARNER, RICH CRAIG, JENNIFER LOREY, MICHAEL HERBERT, GARY GRAHAM, VICKI STANBURY, DAWN GOBEO, SUSANNAH GLEESON, R.N. and STANLEY J. EVANS, M.D.

Defendants.
_____/

Case No.: 50-2011-CA-005022

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Defendants' Motion for Summary Judgment is premised on a mischaracterization of the allegations contained in the Amended Complaint and a misunderstanding of when the Statute of Limitation begins, tolls, and expires. As will be explained below, the Amended Complaint alleges ordinary negligence against all Defendants (except Susannah Gleeson, R.N., and Stanley G. Evans, M.D.); therefore the original complaint was filed within the limitation period for the

causes of action alleged. But, even if medical negligence was alleged against all Defendants (which it is not), the Plaintiff's Amended Complaint was still timely filed.

II. THE PLAINTIFF'S AMENDED COMPLAINT ALLEGES ORDINARY NEGLIGENCE, NOT MEDICAL NEGLIGENCE.

Only claims against licensed health care providers, as that term is defined by section 766, are subject to the Medical Malpractice Act. In addition, even claims against licensed health care providers are exempt from the Medical Malpractice Act to the extent that the claims do not involve the diagnosis or treatment of the claimant. Here, Defendant Caron Foundation of Florida, Inc., doing business as Caron Renaissance ("Caron"), is not a licensed health care provider. To be sure, section 766 defines licensed health care providers as follows:

> (4) "Health care provider" means any hospital, ambulatory surgical center, or mobile surgical facility as defined and licensed under chapter 395; a birth center licensed under chapter 383; any person licensed under chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, part I of chapter 464, chapter 466, chapter 467, part XIV of chapter 468, or chapter 486; a clinical lab licensed under chapter 483; a health maintenance organization certificated under part I of chapter 641; a blood bank; a plasma center; an industrial clinic; a renal dialysis facility; or a professional association partnership, corporation, joint venture, or other association for professional activity by health care providers.

As admitted in the Defendants' Motion for Summary Judgment, Caron, is licensed under ***chapter 397***, not 395, 383, 458, 459, 460, 461, 462, 463, Part I of 464, 466, 467, part XIV of 468, 486, 483, or a health maintenance organization certificated under part I of 641. Further, none of the defendants in this case, apart from Dr. Evans and Nurse Gleeson are healthcare providers. (*See* Exhibit "A"). If the legislature desired to classify entities licensed under chapter 397 as health care providers, it would have expressly done so. *Weinstock v. Groth*, 629 So. 2d 835, 836 (Fla. 1993)(holding "the notice requirements of the Act only apply in actions against 'health care providers' as defined in chapter 766, Florida Statutes (1991), and those who are

vicariously liable for the acts of a health care provider."); *accord, Sova Drugs, Inc. v. Barnes*, 661 So. 2d 393, 395 (Fla. 5th DCA 1995) ("Since the statute specifically references those professions which are included, and the chapters under which they are regulated, application of the basic rule of statutory construction leads to the conclusion that the Legislature intended to omit pharmacists and pharmacies from this part of the Medical Malpractice Reform Act.").

The Defendants' argue (without citation to authority) that providers (and their employees) licensed pursuant to section 397 are subject to the Medical Malpractice Act because the legislative history of section 397 provides that substance abuse is a *health problem*. This argument misses the mark. Simply because substance abuse may be a health problem does not mean that that facilities licensed under section 397 are "health care providers" as that term is defined by section 766.

In *Weinstock*, the Florida Supreme Court disapproved of the Second District's opinion in *Pinellas Emergency Mental Health Services, Inc. v. Richardson,* 532 So.2d 60 (Fla. 2d DCA 1988). The Second District had reasoned:

> that an emergency mental health care facility located at a hospital and staffed with emergency intake specialists, who performed mental status assessments to determine whether a patient should be admitted to the hospital, was subject to the provisions of the Act although the facility was not specifically listed as a health care provider.

Weinstock v. Groth, 629 So. 2d 835, 837 (Fla. 1993). The Florida Supreme Court disagreed, explaining:

> [P]sychologists licensed under chapters 490 and 491, Florida Statutes (1991), are not included in the chapter 766 definitions of "health care provider." *See* § 768.50(2), Florida Statutes (1985); §§ 766.101(1)(b), .105(1)(b), Florida Statutes (1991). We agree with the district court below that the exclusion of psychologists from the various definitions of this term indicates a legislative intent that psychologists not be classified as health care providers. *PW Ventures, Inc. v. Nichols,* 533 So.2d 281 (Fla.1988) (express mention of one thing implies the exclusion of another). This limited construction of the term precludes the absurd

> conclusion that clergy and others who provide counseling similar to that provided by Dr. Weinstock, but who also are not expressly defined as health care providers, might be subject to the provisions of the Act

Id.

Here, the Defendants are using the *Pinellas* rationale to support their position, notwithstanding that the *Pinellas* rationale has been specifically disapproved by the Florida Supreme Court.

Further, negligence claims against tortfeasors who are not "health care providers" are, by definition, not malpractice claims. Section 766.102 unequivocally states:

> In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider ***as defined in s. 766.202(4),*** the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

§ 766.102, Fla. Stat. Ann. The Amended Complaint alleges ordinary negligence (e.g., failure to supervise, care for, and/or protect Sara Bonevento from committing suicide) except Susannah Gleeson, R.N., and Stanley Evans, M.D.) as to all Defendants.[1] Accordingly, the original complaint, filed within two years of Sara Bonevento's death, was filed within the limitations period. *Silva v. Sw. Florida Blood Bank, Inc.*, 601 So. 2d 1184, 1188 (Fla. 1992) (holding that four year statute of limitation for ordinary negligence applies in actions against medical services provider not defined as a health care provider pursuant to section 766, because "[t]he statute of limitations does not speak to *all medical services,* but only to '*diagnosis, treatment, or care'* by

a health care provider. Had the legislature intended a broader coverage, it would have used the "medical services" language from the chapter 69–157 preamble.").

Thus, because none of the Defendants in this case, apart from Evans and Gleeson, are health care providers within the meaning of the section 766, and because Evans and Gleeson are not alleged to have committed medical negligence within these counts, the original complaint filed within two years of Sara Bonevento's death was timely filed.

III. EVEN IF THE SUBJECT CLAIMS ARE MEDICAL NEGLIGENCE CLAIMS, THEY WERE TIMELY FILED.

The Defendants make two clever (but faulty) arguments in an attempt to invite this Court to commit reversible error. First, the Defendants argue: "Courts have held that the date of death as opposed to the time it is discovered that the misconduct caused the death starts the running of the statute of limitation." (¶ 41, Motion for Summary Judgment). In medical negligence actions, however, the Florida Supreme Court has held that "knowledge of the injury referred to in the rule as triggering the statute of limitations means not only knowledge of the injury but also knowledge that there is a possibility that the injury was caused by medical malpractice." *Tanner v. Hartog*, 618 So. 2d 177, 181 (Fla. 1993)

Thus, even if Bonevento's claims against all the defendants sounded in medical negligence (which they do not), the material question of fact would be "at what time did Bonevento recognize that Sara's death may be the result of medical negligence of the defendants?" Here, the Defendants have not presented this Court with any evidence to demonstrate when Bonevento realized that their negligence was the cause of Sara's death. Respectfully, Defendants have entirely failed to meet their burden in this regard.

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[1] Nurse Gleeson is sued for both ordinary negligence and for medical negligence. In addition, Carron is sued for ordinary negligence and for being vicariously liable under the theory of

Second, the Defendants argue that serving a Notice of Intent to Fort Lauderdale Hospital does not toll the statute of limitations as to Caron or its employees. (¶ 51, Motion for Summary Judgment). This argument is without merit. *Burbank v. Kero*, 813 So. 2d 292, 294 (Fla. 5th DCA 2002)(holding service of notice of intent tolls statute of limitation as to all potential defendants).

Section 766.106(4), of the Florida Statute provides:

> (4) SERVICE OF PRESUIT NOTICE AND TOLLING.—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***. (emphasis added).

In fact, "[n]o suit may be filed for a period of 90 days after notice is mailed to ***any prospective defendant***. *See id.* at (3)(a). Lastly, the Florida Supreme Court has held that defenses based on limitations are not favored and any "ambiguity if there is any, should be construed in favor of the plaintiffs." *Silva v. Sw. Florida Blood Bank, Inc.*, 601 So. 2d 1184, 1187 (Fla. 1992). With this backdrop in mind, Defendants nonetheless argue that section 766.106(4) does not toll the statute as to "all potential defendants" as the statute explicitly states but, rather, only tolls the statute as to potential defendants who have a legal relationship with the defendant who was served with a Notice of Intent.

In support of this argument, Defendants cite to Rule 1.650(1), of the Florida Rules of Civil Procedure. This rule of procedure, however, relates to the manner of giving notice, not the tolling provisions provided by section 766.106(4). *See* Rule 1.650(1) ("Notice of intent to initiate litigation sent by certified mail to and received by any prospective defendant shall operate as notice to the person and any other prospective defendant who bears a legal relationship to the prospective defendant receiving the notice.").

Simply put, Defendants confuse the concept of notice with that of tolling of the statute of

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medical negligence.

limitation—two independent and distinct legal concepts. Accordingly, the notice provision provided by Rule 1.650(1) does not abrogate (or conflict with) the tolling provision of section 766.106(4), which explicitly states that service of the intent to initiate litigation tolls the statute of limitations as to all potential defendants *without limitation*:

> 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.

Here, the Statute of Limitation commenced (at the earliest, if taken from the date of Sara Bonevento's death) on April 4, 2009, and would have expired on April 4, 2011. However, on March 22, 2011, a 90-day purchased extension was obtained. Thus, the statute of limitations would not have expired until July 12, 2011.

On July 1, 2011 a Notice of Intent was served on Ft. Lauderdale Hospital, and others. This Notice of Intent tolled the statute of limitations as to "all potential defendants" for a period of 90 days. *See* Section 766.106(4), Fla. Stat. ("However, during the 90-day period [referenced by section 766.106(3)(a)], the statute of limitations is tolled as to all potential defendants."). Indeed, Bonevento was statutorily precluded from filing suit against any defendant within 90 days of the notice to Ft. Lauderdale. *See* Section 766.106(3)(a) Fla. Stat. ("No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant.). Thus, Bonevento could not possibly have filed a medical negligence action against Ft. Lauderdale until October 1, 2011.

On September 20, 2011 Notice of Intent was served on Caron, again tolling the medical negligence statute of limitation for 90 days. Well within that period, on September 30, 2011 a Notice of Intent was served on Nurse Gleeson and Dr. Evans, tolling the statute of limitation for an additional 90 days, to December 29, 2011. On this day, Gleeson and Evans sent Bonevento their denial letters, demonstrating an end to any potential negotiation during the presuit period.

Thus, pursuant to Section 766.106(4), Bonevento had 60 days—until February 27, 2012—within which to file his medical negligence claims. *See* Section 766.106(4)("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."); *Tanner v. Hartog*, 618 So. 2d 177, 183-84 (Fla. 1993)("From the date the notice of intent is filed, the plaintiff has ninety days (the amount of the tolling) plus either sixty days or the time that was remaining in the limitations period, whichever is greater, to file suit. We believe the language of section 766.106(4) was intended to provide extra time to a plaintiff who files a notice of intent shortly before the limitations period expires. This permits the plaintiff to have the full ninety days in which to try to negotiate a settlement and provides an additional sixty days to file a complaint if a settlement cannot be accomplished.").

On February 23, 2011—four days before the expiration of the statute of limitation—the Amended Complaint alleging the only medical negligence count (against Gleeson and Evans) was timely filed.

Defendants' argument that the Amended Complaint was filed after the Statute of Limitations had run is contrary to the plain language of section 766.106(4), of the Florida Statutes. The Notice of Intent served on Ft. Lauderdale Hospital, *et al*., tolled the Statute of Limitations as to "all potential defendants" which includes Caron, Nurse Gleeson and Dr. Evans. These defendants were then timely served with their respective Notices of Intent and suit was accordingly filed within the limitation period as well.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court DENY Defendants' Motion for Summary Judgment and permit this case to proceed to trial on the merits.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Mail to: Adam W. Rhys, Esq., arhys@wickersmith.com; on this 15th day of March, 2013.

Respectfully Submitted,

SILVERSTEIN, SILVERSTEIN & SILVERSTEIN, P.A.
20801 Biscayne Blvd Suite 504
Aventura, Florida 33180
T. 305-935-2500
F. 305-935-3214

-AND-
THE POWELL LAW FIRM, P.A.
18001 Old Cutler Rd. Suite 325
Palmetto Bay, FL 33157
Brett@powellappeals.com
T: 305-232-0131
F: 305-232-0191

BY: _____
BRETT C. POWELL
Fla. Bar No.: 610917
P. BRANDON PERKINS
Fla. Bar No.: 568635