IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,299

THE PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL; TILO GERHARDT, M.D.; GEORGE BIKAJZI, M.D.; CEDARS OF LEBANON HEALTH CARE CENTER d/b/a CEDARS OF LEBANON HOSPITAL and THE UNIVERSITY OF MIAMI,

Petitioners,

vs.

MANUEL C. DIAZ, individually and as the father of DIANA MARGARITA DIAZ, a minor; MANUEL C. DIAZ and EMILIA BEATRIZ DIAZ-FOX, as trustees and/or legal guardians for DIANA MARGARITA DIAZ, BARBARA DIAZ, individually and as the mother of DIANA MARGARITA DIAZ,

Respondents.

BRIEF OF PETITIONER UNIVERSITY OF MIAMI ON JURISDICTION

ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

T. MICHAEL KENNEDY, ESQ.
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LAW OFFICES OF FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT
A PROFESSIONAL ASSOCIATION, FIFTH FLOOR CITY NATIONAL BANK BUILDING, MIAMI, FLORIDA 33130

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

The instant decision of the Third District directly conflicts with the First District's decision in McArthur v. St. Louis-San Francisco Railway Company, 306 So.2d 575 (Fla. 1st DCA), with respect to whether plaintiff counsel's intentional interference with the issuance of summons and unreasonably delaying service thereof will time bar a claim filed on the last day of an applicable statute of limitation. See also, Szabo v. Essex Chemical Corp., 461 So.2d 128 (Fla. 3rd DCA 1984). The purpose of service of summons is to give proper notice to the Defendant in the case that he is answerable to the claim of the plaintiff. Klosenski v. Flaherty, 116 So.2d 267 (Fla. 1959).

The instant decision also directly conflicts with Judicial Administrative Rule 2.085 as amended and adopted in The Florida Bar Re: Amendement to Rules of Judicial Administration Rule 2.050, 11 FLW 216 (Fla. May 16, 1986), by placing in the hands of a plaintiff's attorney the unilateral right to ignore the Rule, control the initial progress of the case, deter notice to a civil defendant by as much as 20 months, ignore applicable statutes of limitation, and deprive civil defendants of the opportunity to adequately prepare and present their case.

STATEMENT OF CASE AND FACTS

This is a medical malpractice action pertaining to alleged injuries to Plaintiff/Respondent, DIANA DIAZ, before, during and after her birth on April 11th, 1981. Plaintiffs sues UNIVERSITY

alleging that it was vicariously liable for the negligent acts allegedly committed by its agents/employees in the care and treatment of DIANA DIAZ.[1]

Plaintiffs below filed their Complaint on April 11th, 1983, the final day before the statute of limitations ran, but did not have process issued until September 26th, 1984. On April 11th, 1984, the trial court sua sponte filed a Notice of Hearing on Motion for Order of Dismissal. The notice was mailed to attorney for Plaintiffs. In its notice, the trial court advised that the cause would be dismissed for "lack of prosecution" absent a written reply showing "good cause" why it should not be dismissed. Plaintiffs' counsel timely filed a written reply on May 8th, 1984, six days prior to the May 14th, 1984 hearing date. The trial court entered an Order on May 14th, 1984 staying entry of the Order of Dismissal for lack of prosecution for thirty (30) days, and directing Plaintiffs to "obtain service on Defendants herein". Despite such, further extensions were requested and obtained thru September 24, 1984.

On September 24th, 1984, Plaintiffs presented for the first time a Summons for issuance to the Clerk of the Court for the

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1 The UNIVERSITY has also joined Petitioners THE PUBLIC HEALTH TRUST and CEDARS in their brief with respect to the Third District's reversal of the trial court's Order correcting its own interlocutory order and dismissing the case for lack of prosecution, after the trial court was apprised that plaintiffs' counsel erroneously represented to it that good cause had been shown why the cause should not be dismissed. UNIVERSITY suggests that both briefs should be read together.

11th Judicial Circuit. The Clerk subsequently filed an Affidavit confirming same and stating that the Summons will not issue automatically pursuant to Florida Rules of Civil Procedure 1.070 (a) until requested and submitted by plaintiffs' counsel. Petitioner, UNIVERSITY first received knowledge of the instant claim on September 24th, 1984, upon receipt of process, over seventeen (17) months after applicable statute would bar an untimely filed action. Petitioner, UNIVERSITY timely filed its Answer on October 3rd, 1984 and subsequently moved for Summary Final Judgment on December 17th, 1984, on the grounds of lack of prosecution and the applicable two year Statute of Limitation. A final Order of Dismissal in favor of UNIVERSITY was entered for lack of prosecution on April 24th, 1985 pursuant to the trial court granting the motion as one for reconsideration.

The trial judge denied the Motion for Summary Final Judgment on the Statute of Limitation grounds but granted the Motion based on lack of prosecution. In its Order the Court held, inter alia:

> With respect to the Statute of Limitations argument presented by this Defendant, it appears unto the Court that the Plaintiffs, acting through counsel, have intentionally circumvented the express purpose of the Statute of Limitations by timely filing their Complaint on the final day of the two year Statute of Limitation period but intentionally deferring notice thereof to the Defendant, UNIVERSITY OF MIAMI, for an additional seventeen (17) months, thereby in effect, were this procedure permissible, extending the two year Statute of Limitations by which time a Defendant is entitled to notice to a period of three years and five months. See Lindsey v. Raulerson, 452 So.2d 1087 (Fla. 4th DCA 1984). Although of the opinion that

> this course of conduct violates the statutory right of a Defendant to the protection of the Statue of Limitations, this Court questions its authority to so rule in light of Szabo v. Essex Chemical Corp., 461 So.2d 128 (Fla. 3rd DCA 1984). . . (emphasis added).

The Third District Court of Appeal affirmed that portion of the trial court's decision. On Petition for Rehearing, which the Third District Court of Appeal subsequently denied, UNIVERSITY argued on cross-appeal that the decision conflicted with the Supreme Court "guidelines" for scheduling trials in civil cases, namely eighteen months after filing. The Florida Bar In Re Amendment to Rules of Judicial Administration 2.050, 11 FLW 216 (Fla. May 16, 1986). Despite this Court's pronouncement therein the District Court concluded:

> Szabo v. Essex Chemical Corp., 461 So.2d 128 (Fla. 3rd DCA 1984), which Defendant suggests should be revisited, is controlling. There we held that an action is commenced with the filing of a Complaint, Florida Rule of Civil Procedure, 1.050, which tolled the Statute of Limitations notwithstanding that there was no service of process on the Defendants until some twenty (20) months later. Delayed service of process raises a legal question of due diligence in prosecuting the claim or may raise equitable issues. However, Szabo, by which we are bound, holds that a protracted delay in service of process, where a Complaint is otherwise timely filed, does not raise a Statute of Limitations question.

As such, the direct conflict is clear and this Petition follows pursuant to Florida Rule of Appellate Procedure 9.030.

ARGUMENT

THE DISTRICT COURT'S CONCLUSION THAT A TWENTY (20) MONTH DELAY IN THE SERVICE OF PROCESS DOES NOT TOLL THE STATUTE OF LIMITATIONS WHERE A COMPLAINT IS OTHERWISE TIMELY FILED ON THE LAST DAY PRIOR TO THE RUNNING OF THE STATUTE DIRECTLY CONFLICTS WITH THIS COURT'S DECISION AMENDING THE RULES OF JUDICIAL ADMINISTRATION AND ADOPTING RULE 2.085(d) WHICH STATES THAT CIVIL JURY CASES SHOULD BE COMPLETED IN EIGHTEEN MONTHS FROM FILING TO FINAL DISPOSITION.

The decision under review directly conflicts with the premise of 2.085(a) that processing cases through our courts requires adequate time to resolve those cases in a contemplate, fair and just manner; that the public is ill-served by unwarranted delay, that delay causes litigants expense and anxiety; that judges and lawyers have a professional obligation to terminate litigation as soon as it is reasonably and justly possible to do so; that litigants and counsel shall be afforded a reasonable time to prepare and present their case; and that a trial judge shall take charge of all cases at an early stage and shall control the progress of those cases. 11 FLW 216; see also Fla.R.Jud.Admin. 2.085. As such, the decision of the Third District judicially creates and invites a course of action on the part of Plaintiffs' counsel that places a Defendant in a position of being unaware of and unable to fully and adequately prepare a defense to a claim due to the privilege afforded a plaintiff over which it has absolutely no control. The result is extreme prejudice and obvious injustice (assuming a Defendant is entitled to

at least close to the same opportunity to prepare a defense to a legal action as the Plaintiff has to prepare a claim). Under DIAZ, a Plaintiff in a medical malpractice action has up to two years prior to the running of the Statute in which to gather records, retain experts and otherwise prepare his intended claim against the unsuspecting Defendant. The Plaintiff may then file his lawsuit to toll the Statute of Limitations and then take an additional seventeen (17) months (or possibly more) to continue trial preparation until ultimately notifying the unsuspecting Defendant, who, pursuant to Legislative enactments and applicable case law, was entitled to conclude that he was free of any claims from any sources for the time period in question for a period of seventeen (17) months. As a result all Plaintiffs are invited to unilaterally and intentionally significantly reduce or obviate the time within which a party Defendant might have to prepare a defense to a civil action and completely circumvent any entitlement on the part of a Defendant to fairness and justice in our judicial system. The decision of the Third District in DIAZ and its precursor, Szabo, totally negate the Legislative efforts to afford protection to Defendants pursuant to applicable statutes of limitation and places with the Plaintiff the unilateral right to ignore Rule 2.085 and further determine when to notify a defendant of a pending claim. As noted by this Court in Klosenski v. Flaherty, 116 So.2d 767 (Fla. 1959), "the real purpose of the service of Summons ad respondendum is to give proper notice to the Defendant in the case that he is answerable to the

claim of the Plaintiff . . . 116 So.2d at 767 (emphasis added); see also, Author's Comment, Florida Rules of Civil Procedure, Fla.R.Civ.P. 1.070. DIAZ is in direct conflict with a decision of this Court.

The Third District's decision in DIAZ also directly conflicts with the First District on the same Rule of law. In McArthur v. St. Louis/San Francisco Railway Company, 306 So.2d 575 (Fla. 1st DCA), cert. denied, 316 So.2d 293 (Fla. 1975), a wrongful death action arising out a collision between a car and a train was filed on April 11th, 1972. The accident occurred on April 12th, 1970. Service of process was effected upon the Defendants some two weeks after the Complaint was filed. The Defendant/ Appellee cross appealed the denial by the trial judge of its Motion for Summary Judgment based upon its claim that the Statute of Limitation barred the action. Although the First District affirmed the trial court's ruling pointing out that it could conceive of many valid reasons for the two week delay in the issuance of the Summons as well as for delaying the placing thereof into the hands of the Sheriff for service, it specifically declined to address the issue of intentional interference with the issue of Summons until such time as those facts and circumstances were brought before it for consideration. In pertinent part the Court wrote:

> We are not here concerned with a case wherein the Plaintiff intentionally interfered with the issuance of summons or service thereof. Whether such circumstances would have any effect upon the running of a statute of limi-

> tations we will decide when such facts are presented for our consideration . . . .

306 So.2d at 577. As such, the First District has specifically stated that when it is presented with circumstances such as those presented in the instant case it will decide the issue. Under DIAZ, the Third District declines to do so and neither a trial court nor the Third District has further authority to dismiss a claim on statute of limitation grounds where a Plaintiff's lawyer intentionally delays service on a Defendant for an unreasonable length of time. Moreover, even though this Court in Klosenski has said that the real purpose of service of summons is to give proper notice to the Defendant, a seventeen (17) month delay in service is not only approved of by the Third District in DIAZ but also extended to as much as twenty (20) months because the DIAZ Court specifically relies on Szabo.

STATEMENT OF WHY REVIEW SHOULD BE GRANTED

The Third District Court of Appeals' decision will not only cause confusion and uncertainty among practitioners but it will also cause confusion among trial court judges. Judicial confusion will arise because the First District will decide the question of whether an intentional interference with the issuance of summons and subsequent delay of notice thereof to the Defendant will have an effect upon the running of a statute of limitations. The Third District will not. The trial judge, however, is bound by both decisions, but must consider both within the context of Rule 2.085. As such, if a trial judge sitting within

the appellate jurisdiction of the Third District relies upon McArthur and dismisses the case on statute of limitations grounds because the delay is intentional and unreasonable, as it was here, he will be reversed by the Third District Court of Appeal despite the fact that such decision was legally correct under Rule 2.085 as well as both McArthur and Klosenski. On the other hand, if the trial judge granted a continuance even though it was not due to a reasonable delay then he must ignore his professional obligation to terminate litigation as soon as it was reasonably and justly possible to do so under the authorities just mentioned.[2] An anomaly is created because the new judicial guidelines under Rule 2.085 clearly reposit with the trial judge the sole authority to take charge of all cases at an early stage and control the progress of the cases. In the Third District under DIAZ that power is left entirely with the Plaintiff's lawyer after the Complaint is filed.

CONCLUSION

The Third District's decision in DIAZ directly conflicts with a decision of this, with a decision of a sister Court of Appeal on the same rule of law, and with a newly adopted Rule of Judicial Administration. As such, jurisdiction is proper before the Court under Fla.R.App.P. 9.030 and should be accepted.

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[2] Certainly, if the trial judge denies a continuance even though service is intentionally delayed for seventeen (17) months, Rule 2.085 is completely ignored and a defendant has absolutely no opportunity to prepare and present his case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of September, 1986 to: CHRISTOPHER LYNCH, ESQUIRE, Adams, Hunter, Angones, Adams, Adams & McClure, Attorneys for Cedars, 66 West Flagler Street, Miami, FL 33130; KATHLEEN M. O'CONNOR, ESQUIRE, Thornton, David & Murray, P.A., Attorneys for Petitioner, Public Health Trust, 2950 S.W. 27th Avenue, Suite 100, Miami, FL 33133; and EMILIA DIAZ-FOX, ESQUIRE, Suite 424, 200 S.E. 1st Street, Miami, FL 33131.

By: T. Michael Kennedy
T. MICHAEL KENNEDY