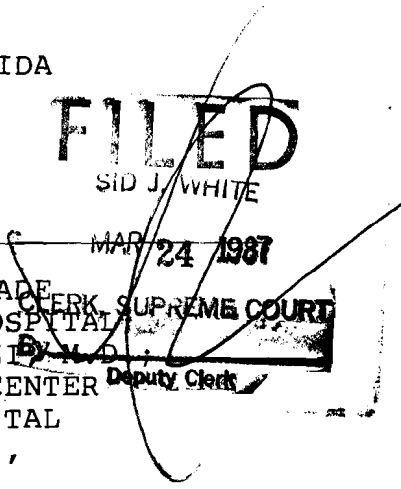
IN THE SUPREME COURT OF FLORIDA

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 THE MERITS (with attached appendix)

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

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INTRODUCTION

This is an appeal from the decision of the Third District Court of Appeal in a medical malpractice action that reversed the trial court's dismissal of the action for lack of prosecution and affirmed, on cross-appeal, the trial court's denial of the defendant, UNIVERSITY OF MIAMI's, Motion for Summary Judgment. This brief addresses this cross-appealed issue only.[1] The defendant, UNIVERSITY OF MIAMI will be referred to as the UNIVERSITY. The plaintiffs will be referred to as DIAZ. Citations to the Record on Appeal will be by the letter "R" with accompanying page numbers. Citations to the Appendix to this brief will be identified by the letter "A" with accompanying page numbers. All emphasis is added unless otherwise indicated.

STATEMENT OF CASE AND FACTS

This is a medical malpractice action pertaining to alleged injuries to Plaintiff/Respondent, DIANA DIAZ, that occurred before, during, and after her birth on April 11th, 1981. DIAZ sued the UNIVERSITY alleging that it was vicariously responsible for the negligent acts committed by its agents/employees in the care and treatment of DIANA DIAZ.

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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. The UNIVERSITY suggests that both briefs should be read together.

Plaintiffs filed their Complaint on April 11th, 1983 (R1-9), the final day before the statute of limitations ran, but did not have process issued until September 26th, 1984. (R20-41) 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 DIAZ's attorney. 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 that stayed entry of the Order of Dismissal for lack of prosecution for thirty (30) days and directed DIAZ to "obtain service on Defendants herein". (R-12) Despite such order, DIAZ requested two additional extensions through September 24, 1984 to obtain service. (R15; R17)[2]

On September 24th, 1984, Plaintiffs presented, for the first time, a Summons to the Clerk of the Court for the 11th Judicial

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2 The stated basis for these requests were the same reasons asserted as "good cause" for the failure to prosecute: continued attempts to locate an expert to testify at trial and repeated efforts to obtain associate counsel to pursue the claim. (R15; R17; R10-11). Interestingly enough, four separate prominent local firms refused to take the case. It is unknown whether this is a reflection of the merits of the case or the result of other considerations. In any event, the failure to have enough evidence to make a case of malpractice well over a year after filing of the complaint supports the trial judge's finding that the initial filing was merely to circumvent the statute of limitations.

Circuit. The summons would not have been issued without this action on the part of DIAZ's counsel. The Clerk subsequently filed an Affidavit confirming the same, which stated that the Summons will not issue automatically pursuant to Florida Rules of Civil Procedure 1.070 (a) until requested and submitted by plaintiffs' counsel. (R-15; A-8) Petitioner, UNIVERSITY, first received knowledge of the instant claim on September 24th, 1984, upon receipt of process, over seventeen (17) months after the applicable statute of limitations would have barred an untimely filed action. Petitioner, UNIVERSITY, timely filed its Answer on October 3rd, 1984. (R42-43) On December 17th, 1984, the UNIVERSITY moved for Summary Final Judgment on the grounds of lack of prosecution and the running of the applicable two year Statute of Limitation. (R-119)

The trial judge entered a final Order of Dismissal on April 24th, 1985, which denied the Motion for Summary Final Judgment on the Statute of Limitation grounds but considered the motion as one for reconsideration of its earlier rulings on lack of prosecution and granted the Motion on that basis. 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). This Court is uncertain as to whether such decision encompassed a delay "in effectuating service" as opposed to an intentional delay in the issuance of process contrary to the admonition of Rule 1.070(a), Florida Rules of Civil Procedure (albeit such admonition appears to be directed to the clerk of court which, as reflected by the record herein, is both contrary to practice and custom). In any event, although uncertain of its freedom pursuant to the foregoing appellate authority to uphold the applicability of the statute of limitations as a bar to the subject claim, as it would otherwise be inclined to do but for the foregoing decision, this Court is of the opinion that the question should be revisited and reconsidered under the facts and circumstances of the subject case as reflected by the record herein.

(R296-97; R988-89; A5-6). Despite the trial court's reluctance to follow *Szabo* and its invitation to revisit the opinion, the Third District Court of Appeal affirmed that portion of the trial court's decision related to the summary judgment motion. 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, Fla.R.Civ.P. 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.

Diaz v. Public Health Trust of Dade County, 492 So.2d 1082, 1085 (Fla. 3d DCA 1986) (*r'hg denied August 4, 1986*). (A1-5)

On Petition for Rehearing, the 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 Re: Amendment To The Rules Of Judicial Administration 2.050*, 11 FLW 216 (Fla. May 16, 1986). The District Court, after additional argument, denied the Motion for Rehearing and let stand its prior ruling.

Thereafter, all three defendants filed a joint petition seeking to invoke this Court's discretionary jurisdiction on the issues they addressed below as appellees. Furthermore, the UNIVERSITY filed a separate petition seeking to invoke this Court's discretionary jurisdiction on their cross-appeal issue regarding the summary judgment question. This Court granted those petitions and the matter is in this Court to review the ruling of the District Court below.

SUMMARY OF THE ARGUMENT

The District Court's decision, which relied on its earlier decision in *Szabo* and affirmed the trial court's denial of the UNIVERSITY's Summary Judgment Motion, should be reversed. Although the district courts of the state have interpreted Fla.R.Civ.P. §1.070 to apply only to the clerks and judges of the circuit courts and not to the plaintiffs themselves, it is apparent, at least with respect to Dade County, that the Clerk's Office does not issue summons forthwith absent any activity on the part of the plaintiff's counsel in initiating that process. DIAZ's counsel was fully aware of this procedure and used it to the prejudice of the defendants. As the trial judge found, plaintiff's counsel took full advantage of the opportunity to intentionally stall and delay the clerk's issuance of the summon below. Under the circumstances, this Court should repudiate the case authority that condones such extensive delay in obtaining issuance of the summons and reverse and remand the decision below with instructions to enter a judgment in favor of the UNIVERSITY. In this manner, this Court can clarify the confusing and prejudicial method in which the rules of procedure are applied and can send a strong signal to the bench and bar that such abusive practices will not be tolerated.

Additionally, the continued viability of case authority such as *Pratt, Szabo,* and the *Diaz* opinion entered below will seriously undermine this Court's recent attempts to bring an end to

extensive delays in the trial courts that continue to burden the litigants and the legal system in general. In adopting Rule of Judicial Administration 2.085, this Court has determined that 18 months is more than a reasonable period of time to take a jury action from filing to final disposition. Unfortunately, if allowed to stand, the Third District's opinion in *Diaz* will effectively destroy that standard by allowing an action to linger for 17 months after filing of the Complaint before the summons is issued and the defendant is notified of the action through service of process. Where that delay is occasioned by Plaintiff's counsel's intentional actions, an even stronger reason exists for upholding this Court's mandate by repudiating the prior case authorities and closing the "procedural loophole" which allows such a delay to occur.

ISSUE ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE UNIVERSITY'S SUMMARY JUDGMENT MOTION ON STATUTE OF LIMITATIONS GROUNDS, WHERE THE PLAINTIFF'S FAILURE TO SERVE THE UNIVERSITY FOR SEVENTEEN MONTHS AFTER FILING OF THE COMPLAINT WAS INTENTIONAL AND COMPLETELY UNDERMINES THIS COURT'S REQUIREMENT THAT CASES BE BROUGHT TO CONCLUSION WITHIN EIGHTEEN MONTHS OF FILING.

ARGUMENT

THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE UNIVERSITY'S SUMMARY JUDGMENT MOTION ON STATUTE OF LIMITATIONS GROUNDS, WHERE THE PLAINTIFF'S FAILURE TO SERVE THE UNIVERSITY FOR SEVENTEEN MONTHS AFTER FILING OF THE COMPLAINT WAS INTENTIONAL AND COMPLETELY UNDERMINES THIS COURT'S REQUIREMENT THAT CASES BE BROUGHT TO CONCLUSION WITHIN EIGHTEEN MONTHS OF FILING.

This case involves an issue not previously addressed by this Court or directly addressed by any of the district courts: whether the filing of a complaint two days before the running of the statute of limitations will toll the statute where the plaintiff intentionally delays procuring the issuance of the summons and the service of process on defendants for 17 months. This case also gives this Court an opportunity to revisit the district court opinions and the rules of procedure in light of this Court's recent amendment to the Florida Rule of Judicial Administration 2.085.

The decision under review upholds a procedure whereby the plaintiff can file a complaint in order to toll the statute of limitations and thereafter withhold knowledge of such filing from the defendant(s) by assuring that process is not issued for an extended period. In so doing, plaintiff's counsel creates a real danger that evidence will be lost or destroyed, witnesses will be unavailable, and the defendant will be precluded from fully utilizing its constitutional right to defend itself. These actions can result in material prejudice to a defendant whether inten-

tional or unintentional. Where, as in the instant action, such course of action is intentional, however, the prior decisions of the District courts that uphold such a procedure are not applicable. Furthermore, this Court's recent pronouncements, which require jury cases to be brought to a conclusion within 18 months of filing, evidences a concern on the part of this Court that actions be brought to issue in a timely manner. This principle runs contrary to the manner in which DIAZ's counsel took advantage of the rules of procedure, the practice of the clerk's office in applying those rules, and the case law interpreting them. The paragraphs that follow will address the District Courts' prior decisions on the necessary time in which summons must be issued and served with the complaint after filing, their applicability to the instant action, and their lack of viability in light of this Court's recent pronouncements regarding control of the trial court's dockets.

A. The District Court's Decision Denied The University's Statutory Right To Notice Of Suit Within Two Years Of The Date That The Cause Of Action Accrued.

In its Final Order of Dismissal, the trial court found that the plaintiffs, acting through their counsel, intentionally circumvented the express purpose of the statute of limitations by filing their Complaint on the final day and then intentionally deferred notifying the UNIVERSITY, for 17 months. The Trial Judge recognized that by so doing, plaintiffs effectively gave themselves the benefit of a three year and five month statute of

limitations. In light of the Third District's *Szabo* opinion, however, the trial judge felt constrained to deny the summary judgment motion although he believed that the matter should be revisited. On cross-appeal, the Third District declined to reverse itself, however, and found its *Szabo* opinion dispositive of the issue. This action effectively permits a plaintiff to intentionally withhold from a defendant the protection otherwise available through the statute of limitation; an awareness within a time certain of any pending liability claim. Nevertheless, this Court can remedy the grave prejudice that the trial court recognized arose from the application of the Third District's *Szabo* to this case. In so doing, this Court can clarify the law with respect to the interaction between the statute of limitations, the rules of procedure regarding the filing of complaints, issuance of summons, and service of process and the effect of these rules, as interpreted by the District Courts, upon the administration of justice in this state.[3]

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[3] Although this case can be overturned based upon interpretation of the existing rules alone, this Court can, if it desires, modify the rules to comport with actual practice. This Court has overall control over the rule-making process in the State of Florida. Furthermore, although there are ordinary procedures to amend rules, this Court can on an emergency basis at the instance of any justice, amend or adopt rules on its own motion. Supreme Court Operating Procedures Manual §II.f.1. Petitioners respectfully suggest that this case presents an opportunity for this Court to clarify the law in Florida on this subject and if necessary to adopt, on an emergency basis, rules of procedure which will further effectuate this Court's policy of eliminating intentional delays in litigation.

The UNIVERSITY is mindful that courts have interpreted the provision of Fla.R.Civ.P. 1.070(a), requiring that process "shall be issued forthwith," as a direction to the clerk or the court. *See Pratt v. Durkop*, 356 So.2d 1278 (Fla. 2d DCA 1978). Notwithstanding this admonition, however, that time limitation is disregarded by *Szabo*. The clerk and court also disregarded this admonition and will not issue process until requested to do so by plaintiffs' counsel. (R120; A8) As such, not only do plaintiff's attorneys prevent notification to civil defendants by refusing to present summons to the clerk, but in addition the clerk compounds this error by failing to have summons or process issued "forthwith" as mandated by the rule. Rule 1.070(a), was never intended to promote abusive practices by plaintiff attorneys or to ratify, condone or provide the means to sidestep safeguards designed to protect the rights of civil defendants. The reason is simple, "the real purpose of the service of summons . . . is to give proper notice to the defendant." *Klosenski v. Flaherty*, 116 So.2d 767 (Fla. 1959). *Szabo*, which is arguably correct in other respects, has outlived its usefulness on the narrow issue of whether a statute of limitation may act as a bar where a plaintiff fails to exercise due diligence or intentionally causes an unreasonable delay in the issuance of summons and resulting notification to a civil defendant. Accordingly, this Court should repudiate *Szabo* as it affects this narrow issue.

In *Szabo*, plaintiffs appealed an adverse summary judgment that dismissed their complaint on statute of limitation grounds. The trial court found that the service of process on the defendant, Essex Chemical Corporation, effected 20 months after the filing of the complaint, impaired the sufficiency of process, failed to toll the statute of limitation, and did not relate back to the date of filing of the complaint. The Third District reversed and said that "[w]hile there are numerous Federal cases which hold to this proposition, such is not the law of Florida," 461 So.2d at 129 (citing *Professional Medical Specialties, Inc. v. Renfroe*, 362 So.2d 397 (Fla. 4th DCA 1978)). In reaching its decision the court noted that:

> [N]o time limitations for issuance and service of process, whether a fixed time or requirement of due diligence, are contained in our rules.
>
> * * * *
>
> We are not unmindful, however, of the court's inherent power to dismiss a cause which is not being prosecuted with reasonable diligence . . . or, on its own motion or by motion of an interested party, to dismiss a cause for failure prosecute, pursuant to Rule 1.420(e). (citations omitted).

461 So.2d at 129; A10. It is clear, however, that these alternatives do not cure the prejudice arising from the intentional circumvention of the applicable statute of limitations and an intentional delay of notification to a defendant of a pending claim, as was accomplished in the instant case. The *Szabo* court noted only that the circumstances of <u>that</u>

case did not require dismissal under either of the three alternatives listed above. There are certainly no facts contained in the opinion which suggest that the same rules should apply to intentional conduct on behalf of a plaintiff's attorney who intentionally chose not to alert known defendants by causing process to be issued "forthwith." Such would totally circumvent the statutory protection provided defendants by the Florida legislature and at the same time promote future abuse.

Permitting intentional delay on the part of a plaintiff in the issuance and service of summons creates the opportunity to commit a multitude of sins, all of which circumvent the letter and spirit of statutes of limitation. Plaintiffs can file their complaints at the "twelfth hour," intentionally delay presenting the summons for issuance and service of process, and, thereafter, commence sufficient record or non-record activity to defeat Rule 1.420(e) motions to dismiss for lack of prosecution. Defendants are unable to intervene because they have never been notified of the claim through service of the complaint. They will not attempt to locate witnesses and will have no incentive to obtain medical records (which are often destroyed), gather evidence, or to otherwise prepare their case for trial on a timely basis. Plaintiffs, at their leisure, are then able to prepare their entire cases without the defendant ever knowing about the lawsuit. Permitting plaintiff attorneys to continue to intentionally sidestep the applicable statute of limitation, as was accomplished here, reduces the statute to a nullity. The result is

contrary to the intent of the statute[4] and is contrary to the intent of Rule 1.070.

The history of Rule 1.070 is further evidence that a time limitation based on due diligence was envisioned for issuance of summons and process since the rule does not contain a fixed time limit as does F.R.C.P. 4.[5] *See* Fla.R.Civ.P. 1.070. Rule 1.3 of the 1954 Florida Rules of Civil Procedure, which was the precursor to the current rule, provided in subsection (i), "It shall be the duty of the plaintiff to furnish the person making service, or mailing notice of suit, with such copy, or copies, as may be necessary." The Author's Comment to the Annotated Florida Statutes, which follows the amendment history, observes in relevant part:

> Rule 1.070 is patterned after former Rule 1.3, 1954 Rules of Civil Procedure as amended. Federal Rule 4 is the federal counterpart to the rule.
>
> A true and correct copy of the complaint must be served. The reason for this is the cutting down of time between pleadings. . .

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4 *See generally*, Whaley v. Wotring, 225 So.2d 177, 181 (Fla. 1st DCA 1969) ([s]tatutes of limitations ... are designed to prevent undue delay in bringing suits on claims and to suppress fraudulent and stale claims asserted when all proper vouchers and evidence are lost and after the facts have become obscure from the lapse of time, defective memory, or death or removal of witnesses; ....); Foremost Properties v. Gladman, 100 So.2d 669 (Fla. 1st DCA 1958) (same).

5 Federal Rule of Civil Procedure 4 places the burden upon the plaintiff to assure service of the summons and complaint on the defendant within 120 days of filing or be subject to dismissal of the action.

> As soon as the complaint is filed, it becomes the duty of the clerk to issue a summons forthwith. The normal practice is for counsel to see that the summons gets into the hands of the proper sheriff. . .

Fla.R.Civ.P. 1.070, Author's Comment. The plain language of the Comment expresses the clear intent to have the summons issued as soon as the complaint is filed, not, as has been suggested in prior opinions, as soon as summons is presented to the clerk. *See Pratt v. Durkop*, 356 So.2d 1278 (Fla. 2d DCA 1978). The clerk or judge cannot forthwith issue a summons "as soon as the complaint is filed," because they have no knowledge of defendant's whereabouts until they are presented with the summons. Presenting the summons to the clerk for issuance 17 months after the date of filing of the complaint is by no means "as soon as the complaint is filed." There is no better interpretation as to what Rule 1.070 requires except that due diligence must be exercised by the plaintiff's attorney to make sure that the clerk or judge is presented with the summons so that it may be issued "forthwith." At the very least, plaintiff should not be allowed to intentionally delay service without valid reason. The case law relied upon by this Court in *Szabo* as well as that relied upon by Second District in *Pratt* is not to the contrary.

In *Szabo* the Third District relied upon this Court's opinion in *Klosenski v. Flaherty*, 116 So.2d 767 (Fla. 1959), and the First District's opinion in *McArthur v. St. Louis-San Francisco Railway Co.*, 306 So.2d 575 (Fla. 1st DCA), *cert. den.*, 316 So.2d

293 (Fla. 1975). The Third District also relied on *Pratt*, which relies on both *Klosenski* and *McArthur*. Nevertheless, *Klosenski* and *McArthur* have been misconstrued.

In *Klosenski*, plaintiff filed an action to recover damages for injuries sustained in a car collision. The original summons was issued by the clerk and actually served upon the defendant before the expiration of the return date, but was lost and could not be returned to the court for filing. On the basis that the record reflected no proper proof of service, the trial judge quashed the purported service. The District Court held this action to be proper and the Supreme Court reversed, holding that it is the fact of valid or invalid service of summons "that is controlling insofar as the question of jurisdiction over the person of the defendant is concerned, and not the officer's return of the writ." 116 So.2d at 769. Significantly, the Court also noted:

> [T]he 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 plaintiff and, therefore, to vest jurisdiction in the court entertaining the controversy. . . .

116 So.2d at 767.

Thus, it is clear that the defendant in *Klosenski* had been actually served and had notice of the suit. Since proper service and not its return was the threshold issue, there was no issue as to whether service after the statute of limitation deadline would relate back to the date of filing of the complaint before the

statute of limitation had run. Similarly, there was no issue as to whether due diligence in effectuating service is required to toll the statute of limitations or whether intentional delay would affect same. *McArthur* is even more to the point.

In *McArthur*, plaintiff filed a wrongful death action on behalf of plaintiff's decedent as a result of a collision between a car and a train. The accident causing the death occurred on April 12, 1970 and the complaint was filed on April 11, 1972. Service of process was effected upon the defendant some two weeks later. 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. The First District affirmed the trial court's ruling. In reaching its decision the court noted that:

> [T]he present rule [1.070] specifically provides that the summons be issued by the clerk or judge without praecipe. We can conceive of many valid reasons for the delay in the issuance of the summons and numerous other valid reasons for delaying the placing thereof into the hands of the sheriff for service. . . .
>
> 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 affect upon the running of a statute of limitations we will decide when such facts are presented for our consideration . . . .

306 So.2d at 577; *see also Professional Medical Specialties v. Renfroe*, 362 So.2d 397 (Fla. 4th DCA 1978). Thus, *McArthur* reasonably stands for the proposition that where valid reason exists

for a reasonable delay in either the issuance of summons or the presentment of summons to the clerk or judge, such delay will not affect the running of a statute of limitation. The court did not want to impute any delay on the part of the clerk to the parties. Where, however, the facts and circumstances of the case demonstrate that the plaintiff intentionally interfered with the issuance of summons or service, or where the plaintiff failed to exercise due diligence and caused an unreasonable delay in the issuance of summons, then the applicable statute of limitation may act as a bar to recovery. *McArthur*, 306 So.2d 575. *Szabo* is not inapposite.

In the instant case, the trial court specifically found:

> [T]he 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 months, thereby in effect, were this procedure permissible, extending the two year statute of limitations by which time a defendant is entitled to a period of three years and five months.

(A8). In so doing the trial court has placed this case in an entirely different category than either *Szabo* or *Pratt*.[6] DIAZ

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6 The Second District Court in Pratt recognized that in practice the plaintiff's attorney prepares the summons and obtains its issuance by the clerk. It noted that "the clerk does not, as a rule initiate the procedure for issuance of the process . . . . Thus delay, if any, will usually be attributable to plaintiff's counsel" 56 So.2d at 1280. Nevertheless, the court relied on the general desire of

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failed to show "good cause" why the cause should not be dismissed for lack of prosecution and they intentionally chose not to serve UNIVERSITY, whose whereabouts is beyond question. As such, the Third District erred when it affirmed the denial of the UNIVERSITY'S Motion for Summary Judgment on the basis that the action was not barred by the applicable two year statute of limitation.

It is indeed apparent from the trial court's Final Order of Dismissal that the trial judge was reluctant to deny the UNIVERSITY's Motion for Summary Judgment but did so in light of the opinion in *Szabo*. Although the trial judge was uncertain of his freedom to uphold the applicability of the statute of limitations as a bar, it is fitting that the judge was of the opinion "that the question should be revisited and reconsidered under the facts and circumstances of the subject case as reflected by the Record herein." (R296-97; R988-89; A5-6). This case presents this Court with a timely opportunity to revisit the issue and answer the question left open by *McArthur*.

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plaintiffs to prosecute their case to assure timely service where, that presumption is incorrect and plaintiff intentionally delays the issuance of summons then a different result should be reached. This Court can and should clarify the law in this area.

B. **The District Court's Decision Seriously Undermines This Court's Requirement For The Prompt Disposition Of Cases Pending Before The Circuit Court.**

In approving Florida Rule of Judicial Administration 2.085, dealing with time standards in the trial and appellate courts of the state, this Court recognized the profound effect the judicial process in this state has upon the litigant. This Court stated:

> We recognize, however, that the judicial process necessarily affects many aspects of the lives of our citizens. Enterprises are suspended and important personal and professional decisions must be deferred while litigation is pending. The courts must be deliberative, but the public is ill-served by unwarranted delay. This concern impels the adoption of the rule we announced today.

The Florida Bar Re: Amendment To The Rules Of Judicial Administration Rule 2.050, 11 F.L.W. 216 (Fla. May 14, 1986). In order to alleviate this burden upon litigants, the rule states as follows:

> (a) Purpose. Delay causes litigants expense and anxiety. Judges and lawyers have a professional obligation to terminate litigation as soon as it is reasonably and justly possible to do so. However, litigants and counsel should be afforded a reasonable time to prepare and present their case.
>
> (b) Case Control. The trial judge shall take charge of all cases at an early stage in the litigation and shall control the progress of the case thereafter until the case is determined. The trial judge shall take specific steps and monitor and control the pace of litigation, including the following:
>
> (1) Assuming early and continuous control of the court calendar;
>
> * * * *

Florida Rule of Judicial Administration 2.085.

In addition to establishing the guidelines under which the courts in the state should operate, this Court also adopted within the aforementioned rule time standards that are deemed to be presumptively reasonable for the completion of cases in the trial and appellate courts. With respect to jury cases in civil actions, which is applicable to DIAZ's claim, the rule requires that these cases take only 18 months from filing to final disposition. In the instant action, a delay of 17 months would put the defendant in a situation in which they would presumably receive an order scheduling trial one month hence almost simultaneous with the filing of an answer. Although there are no studies or concrete data to suggest that this is a widespread practice, it is apparent that in an effort to comply with these requirements, numerous judges, at least in Dade County, are strictly complying with these 18 months requirements and setting cases for trial prematurely. These actions sometimes occur *sua sponte* without a notice of trial even being filed. The inequities that have and will arise as a result of such pressure on defendants will only be compounded by the Third District's decision. By unilaterally and intentionally reducing the time within which the defendant has an opportunity to prepare a defense to a civil action, plaintiffs can circumvent both the statute of limitations as a defense and defendant's entitlement to a fair trial by denying a reasonable time period within which to prepare.

It is axiomatic that a "right without a remedy is no right at all". The legislature has determined that medical malpractice defendants within this state have a legal right to expect that actions will not be filed after two years from the date of the incident or knowledge of the injury. Because this Court has sole authority over procedural matters, and not the legislature, it is imperative that the rules of procedure as applied and interpreted by the courts of this state lend substance to the rights of defendants. The Third District by its opinion herein has rejected that obligation. Although the rule as drafted with respect to service of summons seems to have as its intent the protection of these rights, as do the amendments to the rules of judicial administration, it is clear that this intent was not followed in the instant action. The Third District's opinion and its precedents condone an intentional delay on the part of plaintiffs that will often run afoul of this Court's presumptive time limits for trials. Under the circumstances, this Court must overturn these decisions that deny the trial judge the power to redress actions that undermine the procedures designed to protect the rights of defendants and reduce delay.

As noted by Justice Overton in his concurring opinion on the adoption of the new rules of judicial administration, the principle that the judiciary should control its cases is not a new one. He noted:

> To enable just and efficient resolution of cases, the court, not the lawyers or litigants, should control the pace of litigation. A strong judicial commitment is essential to reducing delay and, once true, maintaining a current docket
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> * * * *
>
> Erradicating delay depends on adherence to this one axiom: The court must take the initiative to eliminate the causes of delay. Since the American Bar Association enunciated this conclusion in its 1976 Trial Courts' Standards, a sizeable body of research is established that the leading cause of delay has been the failure of judges to maintain control over the pace of litigation.

The Florida Bar Re: Amendments To The Rules Of Judicial Administration 2.050, 11 F.L.W. at 218 *(Overton, J, concurring, specially) quoting* Standard 2.50, ABA's Standards Relating to Trial Courts.

To promote this laudable goal, this Court adopted the aforementioned rules and vested within the trial judges, that powerful tool which they already possessed but had little or no guidelines to base its use upon. Now this Court has conclusively presumed that 18 months is more than a reasonable period of time within which jury trials can go from filing to final disposition. In more complicated cases this may not be so. Nevertheless, it is clear that in the instant action this presumptively reasonable period of time has been completely circumvented in that the initial service of the complaint was not effectuated until a full 17 months after filing of the complaint and nearly three and a half years after the statute of limitation period commenced. To

deny a trial court under these circumstances an opportunity to exercise that judicial control in essence puts the power not in the hands of the judges as noted in the ABA guidelines, but rather in the hands of the litigants or their attorneys. It is inconceivable that this Court meant to condone such an activity and it is solely within this Court's power to remedy that situation. Allowing the decision of the district court to stand (thereby sending a message to the plaintiffs of this state that they may with impunity circumvent the statute of limitations defense otherwise available to a defendant and intentionally wait an inordinate amount of time before notifying the defendant of the pendency of the case) while at the same time informing litigants and judges that they are expected to have their cases tried within 18 months, is completely contradictory and runs contrary to this Court's purpose in promulgating the rules of judicial administration.

CONCLUSION

WHEREFORE, the Petitioner, UNIVERSITY OF MIAMI, respectfully requests that this Court reverse the Order of the District Court that affirmed the trial court's denial of its summary judgment motion and remand the case with instructions to have the trial court enter judgment in favor of the University. In addition, Petitioner respectfully requests that this Court consider the adoption of reasonable standards of conduct on the part of either the plaintiffs or the clerks of the courts of the state ensuring

the prompt issuance and service of summons upon the defendants after filing of a Complaint in light of the new rules of Judicial Administration.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of March, 1987, to: Christopher Lynch, Esquire, Adams Hunter Angones Adams Adams & McClure, 66 West Flagler Street, Miami, Florida 33130; Kathleen M. O'Connor, Esquire Thornton David & Murray, P.A., 2950 S.W. 27th Avenue, Suite 100, Miami, Florida 33133; and Emilia Diaz-Fox, Esquire, Suite 424, 200 S.E. First Street, Miami, Florida 33131.

By: _____
STEVEN E. STARK