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IN THE SUPREME COURT OF FLORIDA

ROBERT E. BONDURANT, M.D.,

Petitioner,

v.

THE HONORABLE NICKOLAS P. GEEKER, Circuit Judge for the First Judicial Circuit in and for Escambia County, Florida,

Respondent.

DCA CASE NO. BQ-212
Supreme Court Docket No.

CLERK, SUPREME COURT

By _____ Deputy Clerk

Handwritten initials and signature

PETITIONER'S BRIEF ON JURISDICTION

**ON DISCRETIONARY REVIEW
OF DECISION OF FIRST DISTRICT
COURT OF APPEAL OF FLORIDA**

DANNY L. KEPNER, of
SHELL, FLEMING, DAVIS & MENGE
Seventh Floor Seville Tower
Post Office Box 1831
Pensacola, Florida 32598
(904) 434-2411
Attorneys for Petitioner

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STATEMENT OF THE CASE

This action was filed in the Circuit Court for Escambia County, Florida on October 8, 1984 seeking money damages against Baptist Hospital for the death of Plaintiff's decedent based on alleged medical malpractice (A-1). In her First Amended Complaint, filed in April of 1985, Plaintiff added an additional Defendant to the lawsuit (A-2). In her Second Amended Complaint, filed in March of 1986, Plaintiff added the Petitioner, ROBERT E. BONDURANT, M.D., as a Defendant in this action (A-3).

Petitioner moved to dismiss the action based on the Plaintiff's failure to abide by the dictates of Fla. Stat. Section 768.57, requiring a ninety-day pre-suit screening period before suit is filed (A-4). Plaintiff served the requisite notice of intent to initiate litigation on the Petitioner, but filed the medical malpractice action against him only two days later (A-5, A-3). After the expiration of the ninety-day screening period, and after the running of the two year statute of limitation, Petitioner filed an Amended Motion to Dismiss, seeking to have the action dismissed both on the grounds of the previous Motion and based on the running of the limitation period (A-6).

The trial court, NICKOLAS P. GEEKER, Judge, denied the Amended Motion to Dismiss (A-7). Upon letter request for reconsideration based on a new case from the Third District Court of Appeal, the trial court again declined to dismiss the action against Petitioner (A-8, A-9). Petitioner timely petitioned the First District Court of Appeal for a Writ of Prohibition (A-10); this Petition was

denied (A-11), as were Petitioner's timely Motion for Rehearing and Motion for Rehearing En Banc (A-12, A-13, A-14). The final order denying rehearing was entered by the First District Court of Appeal on January 23, 1987 (A-14). Petition for Discretionary Review was then filed by Petitioner in this Court.

STATEMENT OF THE FACTS

An appendix accompanies this brief, in accordance with Fla. R. App. P. 9.220. All citations to the Appendix will be indicated by the symbol "A", followed by the appropriate page from the Appendix.

Plaintiff in the trial court is Carolyn B. Streeter, as Personal Representative of the Estate of Eric Byron Streeter, deceased; Petitioner is one of the Defendants; and Respondent is the Judge presiding over the proceedings in the trial court. In this petition the parties will be referred to as they stand in the trial court or by name.

The pertinent facts of this case, for the purpose of this jurisdictional brief, are as follows:

1. Plaintiff's decedent died on March 13, 1984.
2. On October 8, 1984, Plaintiff initiated this wrongful death action against only one Defendant, Baptist Hospital (A-1).
3. On April 26, 1985, Plaintiff filed her First Amended Complaint, adding as a Defendant only one person, C.R. Tugwell, M.D. (A-2).

4. On March 10, 1986, Plaintiff served a Notice of Intent to Initiate Litigation on Petitioner by certified mail, pursuant to Fla. Stat. Section 768.57(2) (A-5).

5. Two days later, on March 12, 1986, Plaintiff filed her Second Amended Complaint, adding the Petitioner as a Defendant for the first time (A-3).

6. On April 30, 1986, Petitioner filed a Motion to Dismiss the Second Amended Complaint (A-4); on July 17, 1986, Petitioner filed an Amended Motion to Dismiss (A-6).

7. On October 9, 1986, the trial court entered its order denying the Amended Motion to Dismiss (A-7).

8. On October 20, 1986, counsel for Petitioner wrote to the trial court, citing a new appellate decision, and requested reconsideration of the Amended Motion to Dismiss (A-8).

9. On November 4, 1986, the trial court entered its order denying the Amended Motion to Dismiss upon reconsideration (A-9).

10. Petitioner filed a Petition for Writ of Prohibition, which was denied by the First District Court of Appeal in an opinion filed on December 22, 1986 (A-10, A-11).

11. Petitioner's timely Motion for Rehearing and Motion for Rehearing En Banc were denied by Order dated January 23, 1987 (A-12, A-13, A-14).

12. There is no dispute that Plaintiff filed no complaint against Petitioner after March 12, 1986, the date of the Second Amended Complaint.

SUMMARY OF ARGUMENT

Petitioner, a defendant in a medical malpractice action, moved to have the complaint against him dismissed based on the Plaintiff's failure to comply with the requirements of the Comprehensive Medical Malpractice Reform Act and the subsequent expiration of the statute of limitation. The trial court denied the motion, and Petitioner petitioned for a Writ of Prohibition in the First District Court of Appeal. The First District declined to speak to the merits of the petition, instead choosing to deny the writ on procedural grounds, finding that prohibition is not an appropriate remedy in this situation.

In so ruling, the lower court's decision conflicts with the following cases: (1) Public Health Trust of Dade County et al v. Knuck, 11 FLW 2123 (Fla 3d DCA 10/7/86), which held, on virtually identical facts, that filing a complaint does not toll the statute of limitation where the Plaintiff has not complied with the statutory prerequisites of serving the notice of intent to initiate litigation and waiting ninety (90) days before filing suit; a writ of prohibition was granted prohibiting further proceedings; (2) Pearlstein v. Malunney, 11 FLW 2641 (Fla 2d DCA 12/10/86), which also held, on very similar facts, that compliance with the notice requirements of the Malpractice Act is a condition precedent to maintaining suit, and that the statute is not unconstitutional as applied; (3) Lynn v. Miller, 11 FLW 2650 (Fla 2d DCA 12/10/86), decided the same date as the Pearlstein case, supra,

and on the authority of the Knuck case, supra, holding that the application of Fla. Stat. Section 768.57 to a very similar fact situation is constitutional, and that the trial court does not have the jurisdiction to abate or revive an action in which the statute of limitation had expired; and (4) Brogan v. Mullins, 452 So. 2d 940 (Fla 5th DCA 1984), which held that a writ of prohibition is a proper remedy in a civil case where a trial court rejects an affirmative defense based upon a statute of limitation.

ARGUMENT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, AND FIFTH DISTRICTS REGARDING THE PROPER USE OF THE WRIT OF PROHIBITION AS IT RELATES TO A DEFENSE BASED ON A STATUTE OF LIMITATION

In ruling on Petitioner's Petition for Writ of Prohibition, the First District chose not to address the issue that confronted it, namely, whether the application of the notice requirements under the Comprehensive Medical Malpractice Reform Act was unconstitutional, as held by the trial court. Instead, the Court characterized the appeal as an unauthorized attempt at interlocutory review, and denied the petition on the grounds that prohibition was the improper vehicle for appeal. Bondurant v. Geeker, 12 FLW 19 (Fla 1st DCA 12/22/86) (A-11). In so ruling, the First District has expressly disagreed with Public Health Trust of Dade County v. Knuck, supra.

In Knuck, as in the instant case, the Defendants in a medical malpractice action sought a writ of prohibition precluding further proceedings against them due to expiration of the applicable statute of limitation. The Plaintiff had failed to file the required notice of intent to initiate litigation under Fla. Stat. Section 768.57(2), and did not abide by the mandatory ninety-day "presuit screening period" prior to filing suit against the Defendants. When the trial court, during the hearing on the motion to dismiss, granted Plaintiff's motion to abate the action so that she could correct her omissions, the petitioners moved for a writ of prohibition to preclude revival of the action because the limitation period had expired in the meantime.

In granting the writ and prohibiting further proceedings against the petitioners, the Third District held that the statute of limitation had expired before the Plaintiff satisfied the requirements of Section 768.57, which would have tolled the statute. By not adhering to the "mandate" of the malpractice statute and serving the notice of intent to initiate litigation, the Plaintiff lost the protection of the statute. Consequently, the trial court acted in excess of its jurisdiction in abating the action because of the expiration of the limitation period, and was prohibited from reviving the action, Id. at 2124. Although the Court did not expressly address the propriety of the remedy of prohibition, it granted the writ and implicitly approved its use.

There are only two real distinctions between Knuck and the case at bar. In Knuck, no notice of intent to initiate litigation

was ever served; in the instant case it was served, but the Plaintiff waited only two days before filing the action against Petitioner, rather than waiting the required ninety (90) days. This difference has no bearing on the situation, for in both cases the complaint was a nullity due to Plaintiff's failure to comply with the requirement of waiting ninety (90) days before filing suit. The second difference is that the act complained of in Knuck was the trial court's granting of a motion to abate, while in the instant case it is the trial court's denial of the motion to dismiss. In either event, the result is the same: the trial court exercised jurisdiction where it had none.

The First District has held that a writ of prohibition is only available to prevent a lower court from "acting in excess of its jurisdiction," not to "prevent an erroneous exercise of jurisdiction..." Bondurant, (A-11), relying on the rule stated in English v. McCrary 348 So. 2d 293 (Fla 1977). The Third District in Knuck does not disagree with that proposition of law; in fact, it cites English v. McCrary in support of its use of prohibition, Knuck, p. 2123. In essence, the Third District held that the trial court no longer had jurisdiction over the case due to the expiration of the limitation period; therefore, prohibition was the proper remedy according to English v. McCrary. Thus, while the First District has correctly stated the rule on prohibition, it has failed to apply it properly. As such, the holding expressly and directly conflicts with the Knuck decision.

The ruling of the lower court also conflicts with two Second District cases that followed Knuck: Pearlstein v. Malunney, 11 FLW 2641 (Fla 2d DCA 12/10/86) and Lynn v. Miller, 11 FLW 2650 (Fla 2d DCA 12/10/86). In both cases, the Plaintiffs failed to serve the required notice of intent to initiate litigation. The trial courts denied the respective motions to dismiss, holding that the application of Section 768.57 was unconstitutional, as in the instant case. In Lynn, as in the case below, the statute of limitation expired because it was not tolled by service of a notice of intent to initiate litigation. Both cases held that the statute was constitutionally valid, and that the trial court lacked the authority to abate complaints which were, "for all intents and purposes, nonexistent lawsuit(s)." Pearlstein, p. 2642.

Petitioner has not overlooked the fact that both Lynn and Pearlstein involved petitions for certiorari rather than prohibition. In spite of this distinction, the reasoning of these decisions still directly conflicts with the holding at issue, in that both of these cases found that the trial court was without jurisdiction to continue the proceedings against the defendants, upon facts nearly identical to those below. Further, in Petitioner's Motion for Rehearing on the decision of the First District, Petitioner requested that the petition be treated as a petition for certiorari, under Fla. R. App. P. 9.040(c), authorizing the Court to treat the petition as a petition for the proper relief (A-12). The Court's denial of this motion only accentuates the conflict between these cases.

The decision of the First District also conflicts with the decision of the Fifth District Court of Appeal in Brogan v. Mullins, 452 So. 2d 940 (Fla 5th DCA 1984), which held that prohibition is the proper remedy when a trial court orders that a defendant must stand trial in a case in which the statute of limitation has expired.

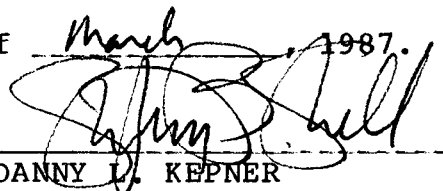
A final case which supports the position of the Petitioner and conflicts with the reasoning of the First District is Hellinger v. Fike, 11 FLW 2333 (Fla 5th DCA 11/6/86). In this case, the trial court in a medical malpractice action denied a defendant's motion for summary judgment based on a statute of repose, declaring the statute unconstitutional. The plaintiff petitioned for a writ of prohibition to preclude further proceedings against him. The Fifth District decided to hear the petition, reasoning that because the trial court declared the statute of repose unconstitutional, it was forced "to exercise jurisdiction in a case where it would have no jurisdiction if the statute were constitutionally valid." Id. Likewise, in the case at bar, the trial court declared the application of the medical malpractice statute unconstitutional, even though it recognized that, if the statute did apply, the complaint against the Petitioner was a nullity and the statute of limitation had indeed expired. By declaring the statute unconstitutional, the court was allowing itself to proceed where it otherwise would have been without jurisdiction.

CONCLUSION

The First District has held that prohibition is an inappropriate remedy in a situation which the remedy has been applied by three other districts. In effect the First District has characterized as an "erroneous" exercise of jurisdiction what the other decisions have viewed as actions in "excess" of jurisdiction, and it is upon this distinction that the conflicts arise. For the foregoing reasons, this Court should take discretionary jurisdiction to resolve the conflicts created in the law by the decision below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were furnished to The Honorable Nickolas P. Geeker, Circuit Judge for the First Judicial Circuit in and for Escambia County, Florida, 190 West Government Street, Pensacola, Florida; R.P. Warfield, Esquire, Levin, Warfield, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, 226 South Palafox Street, Pensacola, Florida; Donald H. Partington, Esquire, Clark, Partington, Hart, Larry, Bond & Stackhouse, Suite 800, 125 West Romana Street, Pensacola, Florida; and to J. Nixon Daniel, III, Esquire, Beggs & Lane, 3 West Garden Street, Pensacola, Florida, this 6th day of March, 1987.


DANNY I. KEPNER
SHELL, FLEMING, DAVIS & MENGE
Seventh Floor Seville Tower
Post Office Box 1831
Pensacola, Florida 32598
(904) 434-2411
Attorneys for Petitioner