IN THE SUPREME COURT OF FLORIDA

ROBERT E. BONDURANT, M.D.,

Petitioner,

v.

DCA CASE NO. BQ-212
Supreme Court Docket No. 70090

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

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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

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TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF THE ARGUMENT

The decision in the First District Court of Appeal below does not directly and expressly conflict with the decisions of other circuits cited by the petitioner. Compare Bondurant v. Geeker, 499 So.2d 909 (Fla. 1st DCA 1986) with Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3rd DCA 1986); Lynn v. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986); Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986); Brogan v. Mullins, 452 So.2d 940 (Fla. 5th DCA 1984); Ridenour v. Bryson, 380 So.2d 468 (Fla. 2d DCA 1980); and Carcaise v. Durden, 382 So.2d 1236 (Fla. 5th DCA 1980).

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ARGUMENT

This brief only addresses this court's jurisdiction. No arguments are presented here regarding other issues raised, including:

(1) Whether the DCA properly denied the request for writ of prohibition, or the later request for rehearing in certiorari, on procedural grounds;

(2) Whether Florida Statute 768.57 should be retroactively applied in the instant case;

(3) Whether time periods were tolled during the pendency of proceedings to determine the appropriateness of the prefiling notice; or

(4) Whether this court will decide the substantive issues raised in the trial court or merely remand such review to the DCA if petitioner prevails.

Jurisdiction is asserted on the grounds that the decision below directly and expressly conflicted with other district courts of appeal in ruling that prohibition was an unavailable remedy. To begin, there is no express conflict with Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986), because that decision did not deal with the propriety of prohibition as a remedy under

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circumstances as here presented. The Knuck case "should not be cited as authority for the propriety of the remedy because it is only an example where the remedy was used and the propriety of the remedy was not explicitly considered by the court". See Brogan v. Mullins, 452 So.2d 940, 943 (Fla. 5th DCA 1984). The Knuck decision is simply "another example of the court considering a substantive of issue of law without specifically and adequately considering the procedural propriety of the remedy presenting that issue" and, thus, should not be used to maintain direct and express conflict with the decision of the court below. Cf. Id. (dissenting opinion).

The decisions of Lynn v. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986) and Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986), similarly do not provide direct and express conflict with the decision below. Both Lynn and Pearlstein granted certiorari and did not discuss prohibition. To the extent that the DCA's opinion below acted to deny petitioner's later request for certiorari, (on motion for rehearing), the ruling below was simply an exercise of the DCA's discretion.

The decision below clearly does not conflict with the decisions in Ridenour v. Bryson, 380 So.2d 468 (Fla. 2d

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DCA 1980) and Carcaise v. Durden, 382 So.2d 1236 (Fla. 5th DCA 1980). Both of these decisions involved writs of prohibition where a statute of limitations had run on a criminal case. The decision below expressly considered cases such as these and specifically distinguished them as not involving the fundamental rights existing in criminal cases. See Bondurant, 499 So.2d at 910. Since such cases were properly distinguished by the court below, there is no express and direct conflict with the decisions in these cases.

It must be conceded that the decision below, in distinguishing civil cases from criminal cases, does conflict with the decision in Brogan v. Mullins, 452 So.2d 940 (Fla. 5th DCA 1984), which held there is no logical distinction in regard to jurisdiction between a civil court and a criminal court after expiration of an applicable statute of limitations. Id. at 942. However, a very important factual distinction exists between the instant case and Brogan. In the instant case, the trial court clearly and undeniably had jurisdiction of the case when the plaintiff's complaint was filed within the statute of limitiations period. The trial court therefore had jurisdiction to decide the applicability of the prefiling requirements of Florida Statute 768.5 and the merits of petitioner's statute of limitations defense.

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Accordingly, whatever conflict might be found between the dicta of these two cases, this court should not exercise jurisdiction. Given the clear factual distinctions between the two cases, this court could not properly resolve any conflict existing in the language of the two decisions. In Brogan, the action was filed clearly outside the statute of limitations period and therefore it could have been, perhaps rightly, said that the court was without jurisdiction to entertain the claims. Such cannot be said in the instant case and this is an adequate distinction between the two case decisions such that conflict jurisdiction should not be asserted.

Respectfully submitted,

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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 Governmental Center, Pensacola, Florida; Donald H. Partington, Esq., Clark, Partington, Hart, Larry, Bond & Stackhouse, Suite 800, 125 West Romana Street, Pensacola, Florida; J. Nixon Daniel, III, Esq., Beggs & Lane, 3 West Garden Street, Pensacola, Florida and Danny L. Kepner, Esq., Shell, Fleming, Davis & Menge, Seventh Floor, Seville Tower, 226 South Palafox Street, Pensacola, Florida, this 18th day of March, 1987.

M. ROBERT BLANCHARD

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