O/a 10-7-87

Orig

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.

Case No. 70,090

DISTRICT COURT OF APPEAL NO. BQ-212

PETITIONER'S BRIEF ON THE MERITS

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

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STATEMENT OF THE CASE

As a preliminary matter, an appendix accompanied petitioner's brief on jurisdiction. References to that appendix, which contains all pertinent pleadings and orders from the courts below, shall be made herein and indicated by the symbol "A", followed first by a designation of the item number of the pleading or order as shown on the tabs of the appendix (A-1 through A-15), and, in some instances, the page number as well (pp. 1 through 55).

Plaintiff in the trial court is Carolyn B. Streeter, as Personal Representative of the Estate of Eric Byron Streeter, deceased. Petitioner, Robert E. Bondurant, M.D., is one of the defendants in this action, and respondent, Nickolas P. Geeker, is the presiding Judge in the trial court. In this brief, the parties will be referred to as they stand in the trial court, by name, or, in some instances, as they stand in this Court.

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 petitioner, Robert E. Bondurant, M.D., as a defendant in this action (A-3).

Petitioner moved to dismiss the action based on plaintiff's failure to abide by the dictates of Fla. Stat. Section 768.57, requiring a 90-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 90-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). Hearing on the amended motion was set for October 2, 1986 (A-7).

The trial court, Nickolas P. Geeker, Judge, denied the amended motion to dismiss (A-8). 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-9,10). Petitioner timely petitioned the First District Court of Appeal for a writ of prohibition (A-11); this petition was denied (A-12), as was petitioner's timely motion for rehearing (A-13, 14, 15). The final order denying rehearing was entered by the First District Court of Appeal on January 23, 1987 (A-15). Petition for discretionary review was then filed by petitioner in this Court, and jurisdiction was accepted on May 13, 1987.

STATEMENT OF THE FACTS

The pertinent facts of this case are simply stated. Plaintiff's decedent, Eric Byron Streeter died on March 13, 1984 (A-1, p.2), and plaintiff's cause of action for wrongful death accrued on that date (A-10). On March 10, 1986, plaintiff served on petitioner, by certified mail, a notice of intent to initiate litigation for medical malpractice in connection with decedent's death, pursuant to Fla. Stat. 768.57(2) (A-5). On March 12, 1986, plaintiff filed her second amended complaint, naming petitioner as a defendant in this action for the first time (A-3). At no time thereafter did plaintiff file or re-file any additional complaint against petitioner.

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 to 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 First District created a conflict between the decision below and the following decisions of other district courts of appeal: Public Health Trust v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986); Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986); Lynn v. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986); and Hellinger v. Fike, 503 So.2d 905 (Fla. 5th DCA 1986).

The trial court lacked jurisdiction over the subject matter because of plaintiff's failure to follow the statutory requirements which are conditions precedent to filing suit. She did not wait 90 days, but only 2 days before filing suit. The statute is analogous to the waiver of sovereign immunity statute, Fla. Stat. 768.28(6), and her complaint against petitioner was null and of no effect. Plaintiff's claim is barred by the statute of limitations because she did not re-file any additional complaint after the 90-day period had expired and before the limitation period was up.

The District Court should have granted either prohibition or certiorari, which were requested in the alternative, to halt the proceedings in the trial court because of its lack of jurisdiction. Finally, Section 768.57 does comply with constitutional requirements for application to claims which accrued before the effective date of the statute. Since the

statute is valid, the District Court erred in not issuing either of the writs sought by petitioner.

ARGUMENT

I. THE TRIAL COURT LACKED JURISDICTION OVER THE SUBJECT MATTER

In 1985, the Florida Legislature enacted the Comprehensive Medical Malpractice Reform Act, Ch. 85-175, Section 55, Laws of Florida. By its terms, Section 768.57, part of the Act, is applicable to all causes of action with respect to which suit had not been filed prior to October 1, 1985. Fla. Stat. Section 768.57(10). Here, plaintiff had not filed suit as to her cause of action against Dr. Bondurant prior to October 1, 1985 (A-3,4), although she had sued the hospital in 1984 (A-1) and had added Dr. Tugwell as a defendant in April, 1985 (A-1).

The new Act requires that a notice of intent to initiate litigation be served on each prospective defendant, prior to filing suit. Fla. Stat. Section 768.57(2). Subsection 3(a) makes it crystal clear that a claimant must then wait: "No suit may be filed for a period of 90 days after notice is served on the prospective defendant... ." This allows the prospective defendant an opportunity to review the claim, and if the defendant or his insurer does not admit or deny liability within that 90 days, the claim is deemed

denied [Subsection 3(b)]. At that point, of course, plaintiff may proceed with a suit.

Subsection (4) of 768.57 provides for a tolling of the statute of limitations (assuming the notice of intent is timely filed) during the 90-day screening period.

Applying these provisions to the case at hand, it appears without dispute that plaintiff failed to comply with the new Act. The notice of intent was served on March 10 (A-5), and instead of waiting 90 days, plaintiff waited two days before filing the second amended complaint (A-3,4). The law specifically prohibited the filing of the complaint at the time it was filed, so defendant moved for dismissal of the premature pleading (A-4).

The District Court misunderstood petitioner's position on this point right from the start. The second sentence of the opinion declares:

> "Petitioner moved to dismiss the complaint on the ground that the statute of limitations period had expired." Bondurant v. Geeker, 499 So.2d 909 (Fla. 1st DCA 1986)(A-12).

But petitioner's original motion to dismiss (A-4), which was incorporated into the amended motion to dismiss (A-6), was grounded on plaintiff's filing of an unauthorized, premature lawsuit, as discussed above.

The statute of limitation defense was raised later, and while petitioner intends to address that issue in this brief, the important point here is that the First District ignored petitioner's first and foremost line of defense:

The trial court had no jurisdiction to entertain or consider plaintiff's complaint because it was filed in direct contravention of the specific terms of the statute. Plaintiff had ignored the 90-day "pre-suit screening period" specified by Section 768.57, and the complaint should have been dismissed as a result. Note, too, that at no time after March 12, 1986, did plaintiff file any new complaint against petitioner.

The District Court never addressed this line of defense, concluding instead that petitioner was merely trying, by the petition for prohibition, to take an unpermitted interlocutory appeal. Had that court applied the same careful scrutiny to petitioner's original motion to dismiss as it purported to apply to the petition for prohibition, it would have been apparent that what was involved here was much more than a simple affirmative defense. The question presented was, and is, this: Did Judge Geeker have the jurisdiction to allow plaintiff's complaint to stand, thus forcing Dr. Bondurant to defend this lawsuit?

This Court has dealt with essentially this same problem in the context of claims brought against the State and its subdivisions under Fla. Stat. §768.28(6), the statutory waiver of sovereign immunity. That statute contains language similar to Section 768.57, in that a notice of the claim must be served on certain designated persons and the claimant must then wait to file suit until the claim has been denied or a specified time period has expired. In the landmark

case of Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), this Court held that compliance with the notice provision is a condition precedent to maintaining a suit, and that a complaint brought against the sovereign must allege such compliance. The complaints of the plaintiffs there failed to allege whether the notice requirements had been complied with, and so this Court ruled that the complaints should have been dismissed with leave to amend to allege compliance.

Early in this proceeding, Judge Geeker recognized that the notice requirements in this law are analogous to those contained in 768.28(6). See his order dated October 9, 1986 (A-8). Applying the principle set out by this Court in Commercial Carrier, this complaint should have been dismissed. It not only failed to allege compliance with the notice requirement, but there was also affirmative proof, in the form of petitioner's sworn motion, that plaintiff had not complied (A-4,5).

This Court has upheld restraints on filing suit imposed by contract. See, Homestead Fire Insurance Co. v. Andion Co., 164 So. 187 (Fla. 1935), which enforced an insurance policy's "no suit" clause prohibiting the filing of suit until 30 days from the service of proof of claim forms. By agreement between the parties, the courts had no jurisdiction to act. In similar fashion, Judge Geeker had no jurisdiction over the instant case.

It is certainly arguable that a dismissal with leave to amend here would not mean much, in light of later events which will be covered shortly. But the trial court, and the appellate court as well, should have recognized this complaint as unauthorized and therefore invalid to bestow jurisdiction on the court. Judge Geeker did declare in his order of November 4, 1986, that, under Fla. Stat. §768.57, the Second Amended Complaint naming Bondurant as a party defendant for the first time was a nullity (A-10, p. 28). This is a correct statement of the law, but, of course, he went on to deny the motion to dismiss on constitutional grounds. The constitutional issue will be addressed later.

The key point to be made here is that, if Section 768.47 is constitutionally valid, the complaint should have been dismissed. The First District should have recognized this fact and should have addressed the constitutionality of the Act, before deciding whether to issue the writ of prohibition we requested. Such a writ is the precise remedy for defendant under these circumstances. See point III below.

II. THE PLAINTIFF'S CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS

For plaintiff here, the timing of the events in question have turned out to be fatal to her case. While the Commercial Carrier decision would have entitled her to a dismissal without prejudice and with leave to amend, later events precluded that.

The statutory scheme of the 90-day pre-suit screening period of Section 768.57 requires the service of a notice of intent to initiate litigation on the prospective defendant. The claimant must then wait 90 days for defendant and his insurer to investigate the claim, before suit can be filed. Applying those provisions to the case at hand, it appears without dispute that plaintiff failed to file a valid suit under the new Act before the two-year statute of limitation, Fla. Stat. Section 95.11(4)(b), had expired.

The notice of intent was served on March 10 (A-5), and instead of waiting 90 days, plaintiff waited only 2 days before filing the Second Amended Complaint (A-3,pp. 6-8). Both of these events took place before the two-year limitation period had expired, Eric Streeter's death having occurred on March 13, 1984 (A-1, p.2). The serving of the notice of intent caused the limitation period to be tolled for 90 days; however, the filing of the Second Amended Complaint had no effect at all on the limitation period. This is because it was not an authorized pleading, as discussed above.

The 90-day screening period, which began on March 10, 1986, expired on June 8, 1986. At that point, the tolling of the limitation period came to an end, and the clock began to run again. Only 3 days remained, and the limitation period then expired for good on June 11, 1986. No additional complaint was filed against Dr. Bondurant, though, after the unauthorized Second Amended Complaint of March 12.

The hearing on petitioner's amended motion to dismiss was held before Judge Geeker on October 2, 1986, the first date available (A-10, pp. 26-27); and he denied the motion on October 9 (A-8). By the time of the hearing, of course, the statute of limitation had expired, and it was impossible for plaintiff to amend alleging compliance with the statute in a timely manner. This was exactly the same situation which was presented to this Court, in a sovereign immunity context, in Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983). Plaintiff there filed suit under Section 768.28(6), but had to admit that he had not served a notice of his claim to the Florida Department of Insurance, as required by the statute. Rejecting plaintiff's argument and proof that the Department of Insurance had no interest in, or concern about the claim, this Court held that dismissal was correct because the time for serving notice on the Department (three years from the date of the incident) had expired:

> "Where the time for such notice has expired so that it is apparent that the plaintiff cannot fulfill the requirement, the trial court has no alternative but to dismiss the complaint with prejudice." Id., 442 So.2d at 213.

The Court cited with approval the decision of the Third District Court of Appeal in Dukanauskas v. Metropolitan Dade County, 378 So.2d 74 (Fla. 3d DCA 1979), where summary final judgment was affirmed because plaintiff had failed to serve the notice of claim required by the statute.

The similarity between these expressions of legislative intent should not be ignored. When the Act under scrutiny here was adopted, it must be presumed that the Legislature intended to impose the same stringent necessity to comply with the pre-suit notice and waiting period as was specified in the sovereign immunity statute and this Court's construction of it.

This was exactly the conclusion drawn by the Third District in Public Health Trust v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986), and by the Second District in Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986) and Lynn v. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986). Judge Geeker certainly accepted that analysis of the statute, but concluded that its application to plaintiff violated the Constitution (A-10).

In the Public Health Trust case, plaintiff filed suit, but did not serve any notice of intent to initiate litigation beforehand. Defendants moved to dismiss and before the hearing, the two-year limitation period expired. At the hearing, plaintiff asked the trial court to "abate" the proceedings while she complied with the notice requirement. The trial judge granted this motion, but upon defendants' petition, the Third District granted a writ of prohibition to prohibit revival of the action as to the private defendants.

The Third District Court pointed out that the new Act offers protection to plaintiffs for whom the limitations

period would expire during the 90-day "presuit screening period": i.e., the statute of limitations is tolled during that time. In order to toll the statute of limitations, however, plaintiff must adhere to the mandate of Section 768.57(2) and timely serve the notice of intent to initiate litigation. One who does not follow the dictates of Section 768.57, the Court concluded, does not receive the benefit of tolling the limitation period. Because the limitation period expired before plaintiff even attempted to satisfy the notice requirements of the Act, the court held that the action was barred as to the private defendants.

There is a distinction between the Public Health Trust case and the instant action. Here, plaintiff did serve a notice of intent before the statute of limitations expired (A-5). However, this distinction does not compel a different result. Mrs. Streeter received the benefit of the tolling of the limitation statute during the next 90 days, until June 8, 1986. But, she did nothing thereafter. The clock started running again, and she did not file anything. She lost her chance to do so, even before the hearing on October 2. She is in essentially the same position as the plaintiff in Public Health Trust.

But plaintiff will argue that the filing of the second amended complaint should serve to toll the statute of limitations, since it was filed before the end of the two years. However, that complaint must be treated just

as the Third District treated the complaint in Public Health Trust. It was unauthorized under the Act because it was filed 88 days too early. The statute says literally, that no suit is authorized until 90 days from service of the notice of intent; the second amended complaint was filed only two days after such service. The second amended complaint is therefore a nullity because it "did not comply with the statute, and thus did not toll the statute of limitations." Public Health Trust of Dade County v. Knuck, supra, 495 So.2d at 837.

The Second District case of Lynn v. Miller, supra, arrived at essentially the same result, on apparently identical facts, the court there declaring:

> "If the limitations period has expired the trial court lacks the authority to abate a premature complaint, even if, but for the prefiling notice requirements, that complaint would otherwise have been timely." Lynn v. Miller, 498 So.2d 1011, 1012 (Fla 2d DCA 1986).

And, although not involving a limitation issue, the case of Pearlstein v. Malunney, 500 So.2d 585,587 (Fla 2d DCA 1986), concludes that a prefiling notice, under Section 768.57, is distinguished from, and must be served as a condition precedent to filing, a complaint in a medical malpractice lawsuit.

Judge Geeker's order of November 4, expresses our position perfectly on the application of the statute to plaintiff's case. The complaint "is a nullity and ... the time has expired for the plaintiff to file another amended

complaint or a new complaint against the defendant, Bondurant... ." (A-28).

There really is no other conclusion one can draw. If the second amended complaint is deemed valid to toll the statute of limitations, then the entire presuit screening procedure set out in Section 768.57 is rendered totally meaningless, its purpose completely thwarted. A claimant could simply file suit, then serve the notice (or vice-versa), and so long as both are done within the limitation period, he could just wait for 90 days before actively pursuing the lawsuit. No 90-day presuit period would be available to defendant -- instead he would have to answer a public lawsuit immediately. The oportunity for defendant to review the claim and explore "possible settlement short of litigation" (A-19) would simply cease to exist. Judge Geeker recognized this problem, as did the Third District, in Public Health Trust and the Second District in Lynn v. Miller. The First District refused to even consider the merits of our position. This action is time barred and should have been dismissed.

It is important to note in the instant case that, early on -- in April, 1986 -- plaintiff was put on notice that the second amended complaint was invalid and prohibited by the clear terms of the new statute, which were quoted verbatim in the motion (A-9,10). She had ample time then to follow the statutory scheme, to wait out the 90 days, and even then to refile the second amended complaint (including

a new allegation that Section 768.57 had been complied with) or a new complaint in a new lawsuit. She chose not to do this, deciding instead to try to amend the statute to omit the 90-day screening period by filing the second amended complaint. This Court should hold her to that decision, erroneous though it turned out to be.

III. THE DISTRICT COURT SHOULD HAVE GRANTED PROHIBITION OR CERTIORARI

The First District expressly disagreed with the Third District's use of a writ of prohibition in the context of this case (A-12, pp. 50-51). Since the court also denied petitioner's motion for rehearing, in which we asked that the pleading be treated alternatively as a petition for writ of certiorari (A-13), presumably the First District also disagreed with the Second District in its use of certiorari in the Pearlstein and Lynn cases.

A. Prohibition Is The Appropriate Remedy.

This Court has defined prohibition as:

> "That process by which a superior court prevents an inferior court... from exceeding its jurisdiction in matters over which it has cognizance or usurping jurisdiction over matters not within its jurisdiction to hear and determine." State ex rel. Turner v. Earle, 295 So.2d 609, 611 (Fla. 1974).

While it is difficult to lay down hard and fast rules as to when prohibition will or will not lie, the best guidance available must be the decisional law of the courts in dealing

with specific cases. See, "Writ of Prohibition In Florida Since 1951," 29 U.Fla.L.Rev. 241 (1974).

Prohibition has been granted by this Court to prevent a trial court from proceeding further with a personal injury suit brought by an employee against his employer, because of the bar to such suits created by the Workmen's Compensation Act. Winn-Lovett Tampa, Inc. v. Murphree, 73 So.2d 287 (Fla. 1954). The Second District has declared that the remedy is available to prevent a court from acting in a case if, while the case is pending, the Legislature abolishes the court. Tobler v. Beckett, 297 So.2d 59,61 (Fla. 2d DCA 1974).

The consistent teaching of these cases is that, when the Legislature has adopted an act which removes a particular kind of case from the purview or power of a particular court, then prohibition will lie to prevent such a court from attempting to exercise jurisdiction in such a case. Here, the Florida Legislature adopted Section 768.57, which specifically declared that:

> "No suit may be filed for a period of 90 days after notice is served on the prospective defendant..."

Because of this statute, Judge Geeker had no authority, power, or jurisdiction to entertain plaintiff's Second Amended Complaint as it related to Dr. Bondurant. It was filed only two days after the notice was served. Like the Workmen's Compensaton Act in the Winn-Lovett case, the statute barred the suit. Admittedly, the bar here was only temporary - 90 days - but the legal principle was

and is the same. The circuit court was deprived of power to act, which is the essential definition of "jurisdiction."

It is important to note that Judge Geeker recognized that application of Section 768.57 would render the Second Amended Complaint ineffective to toll the statute of limitations. It would be a legal "nullity" (A-10, p. 28). The District Court's opinion did not take issue with that part of the trial court's order, mentioning it twice without criticism (A-12, pp. 49,51). But the District Court then went astray because it felt that petitioner was only trying to take an unpermitted interlocutory appeal.

The First District relied upon this Court's decision in English v. McCrary, 348 So.2d 293 (Fla. 1977) for its conclusion that a writ of prohibition was not justified in this case (A-12). The focal point of the District Court's error is found on Page 2 of the opinion, where it is stated:

> "The challenged order was entered in a proceeding in which the trial court had both subject matter and personal jurisdiction." (A-12, p. 50)

It is our position that the trial court did not have subject matter jurisdiction over this case. The Florida Legislature had taken it away, as discussed in point I above.

Subsection (3)(a) of 768.57 can only mean what it says -- that a medical malpractice claim is not allowed into a court of law until the 90 days has expired. The statute goes on to say that, if defendant offers to admit liability and to have the case arbitrated on the issue

of damages, claimant can reject the offer and then file suit. Subsection (7). Presumably, in this fashion, the 90-day period could be shortened. At that point, of course, the purposes of the statute to encourage investigation, informal discovery and a careful evaluation of the case by the accused doctor, would have been fulfilled.

It is rather plain that the legislative intent was to keep these cases out of court, out of the public eye, and out of the structured, adversarial mode for long enough for the prospective defendant and, more importantly perhaps, his insurance carrier, to thoroughly investigate and evaluate the claim. The courts would be usurping that plan if the words of the statute were ignored and claimants could simply file suit whenever they chose. It is certainly no comfort to the doctors and other health care providers and their insurers to tell them that, if suit is filed prematurely, you can seek reversal after a full trial, <u>but</u>, only if you lose that trial. If you win it, with all of the attendant expenses of time and money involved in a case like this, you have no remedy. Going a step further, if defendant loses the civil trial, and has no absolute legal defense like the statute of limitations, it will be impossible to show that he was wronged by the court allowing a premature case to proceed. Plaintiff would be able to argue "harmless error" and defendant would just be out of luck, without a remedy. His rights, granted by this statute, will have

been trampled by the courts and opposing litigants. He will not have the benefit of an informal investigation period, the opportunity to explore settlement or arbitration in a non-adversarial setting. This result cannot be justified in light of the Legislature's obvious intent.

Conceptually, this legislative scheme cannot be distinguished from the Workmen's Compensation Act addressed in the Winn-Lovett case cited above. As Justice England wrote in his concurring opinion in Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), dealing with the medical mediation panels:

> "I have no problem in concluding that the Legislature quite reasonably approached the public health crises in Florida by seeking to remove from the court system of the state those medical malpractice cases that are patently frivolous or clearly meritorious, and those which are subject to settlement after the parties have been brought together with a disinterested mediator." Id., 335 So.2d at 807 (Emphasis added).

The 1985 Act approaches the problem with a different procedure than the 1975 Act, but it is very similar in its effect of removing all cases from the court system, at least for a 90-day period. Hopefully, the new Act will accomplish the purpose of permanently removing the clearly frivolous and meritorious claims, but it cannot do so if the courts ignore its plain provisions.

English v. McCrary, 348 So.2d 293 (Fla. 1977) teaches that, in any case, the trial court has jurisdiction, or judicial power, to hear and determine the question of its

own jurisdiction in the case, both as to parties and to subject matter. Clearly, Judge Geeker had the authority to "examine the grounds of [his] jurisdiction before proceeding further" when petitioner's amended motion to dismiss was brought before him. Id., 348 So. 2d at 298. Once he determined that plaintiff's Second Amended Complaint was a "nullity" under the new statute, he was giving recognition to the very principle on which we are relying. If the statute is valid, he had no authority to act, because the court simply had no jurisdiction over plaintiff's complaint. Obviously, he would have dismissed the case if he had not been persuaded that the Act was unconstitutional as applied. If Judge Geeker is correct on that point, then he does have jurisdiction.

Our complaint here is that the District Court did not even address the constitutional issue. It concluded that the trial court had jurisdiction of the subject matter without even attempting to analyze the effect of the statute, if it were found to be valid. English v. McCrary contains strong language limiting the use of prohibition, but it did not overrule Winn-Lovett Tampa, Inc., v. Murphree, 73 So.2d 287 (Fla. 1954), and it did not deal with a case in which the Legislature had adopted a statute precluding use of the courts' powers over a certain type of case. Thus, the District Court erred in its reliance on that case to deny prohibition.

The Fifth District case of Hellinger v. Fike, 503 So.2d 905 (Fla 5th DCA 1986) reflects the approach that the First District should have taken here. The trial court there had denied defendant's motion for summary judgment, declaring a statute of repose to be unconstitutional. As a result, the Fifth District reasoned, the trial court was exercising jurisdiction in a case where it would have no jurisdiction if the statute were constitutionally valid. The appellate court then treated the petition for certiorari as a petition for prohibition and proceeded to consider the constitutional question.

The merit of this approach to the problem, is that the appellate court, if it finds the statute in question to be valid, can then issue the writ of prohibition to preclude the trial court from acting in excess of its jurisdiction or usurping jurisdiction where it has none. State ex rel Turner v. Earle, 295 So.2d 609, 611 (Fla. 1974). This is what the First District should have done in the instant case.

We recognize that Hellinger v. Fike, supra, relied on Brogan v. Mullins, 452 So.2d 940 (Fla. 5th DCA 1984) for this procedure because in Brogan a writ of prohibition was issued to preclude the bringing of a civil claim that was barred by the statute of limitations. The First District's opinion in this case mentioned Brogan and declined to follow it. Your petitioner is aware that Brogan has arguably gone beyond the limits on prohibition declared in English v.

McCrary. Thus, while we point out the facial conflict between Brogan and the decision below, we do not rely strongly on the reasoning of Brogan for reversal here.

Instead, we direct the Court's attention to Public Health Trust v. Knuck, 495 So.2d 834 (Fla 3d DCA 1986), which relied on the cases of Levine v. Dade County School Board and Dukanauskas v. Metropolitan Dade County, as discussed earlier. The Public Health Trust case properly applied the remedy of prohibition to a case in which the trial court intended to proceed with a medical malpractice suit after granting plaintiff a stay of sorts (described as "abatement" by the court) so that she could serve a notice of intent to sue. The complaint was filed before the limitation period expired, but later it did expire before any effort was made to serve the notice of intent. A writ of prohibition was issued by the Third District because the trial court had no jurisdiction to hear the case. The initial complaint was ineffective to toll the limitation period, and because that period had expired, it was literally impossible for plaintiff to provide the omitted requirements. The action was extinguished and not capable of being revived.

The Third District's use of prohibition in the context of this statute is consistent with this Court's teachings in Earle, Winn-Lovett and English. When a trial court lacks jurisdiction, the writ should issue. Petitioner urges this Court to apply the reasoning of the Public Health

Trust case to the instant case, quash the opinion below and direct the District Court to issue a writ of prohibition to Judge Geeker precluding further consideration of this case.

B. Certiorari Is A Viable Alternative.

Recognizing that this Court may prefer, in light of the limiting approach followed in the English v. McCrary case, to decline to issue prohibition, petitioner urges that a common-law writ of certiorari should be granted as an alternative.

The Second District issued that writ in the two cases cited earlier involving Fla. Stat. Section 768.57. Pearlstein v. Malunney, 500 So.2d 585 (Fla 2d DCA 1986), and Lynn v. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986). In both of these cases, plaintiffs in a medical malpractice setting failed to serve the required notice of intent to initiate litigation. The trial court, in each instance, denied the motion, holding Section 768.57 to be unconstitutional, as Judge Geeker did here. In the Pearlstein decision, the Second District thoroughly analyzed plaintiff's contentions, rejecting each one. It concluded that certiorari was the appropriate remedy because (a) without intervention at this point, petitioners would suffer harm that could not be cured by direct appeal, and (b) a number of other cases likely exist in which identical legal issues are involved. The writ was issued because the trial court's order was a departure from the essential requirements of law since

it effectively excused plaintiffs from complying with the Act. Pearlstein, 500 So.2d at 587.

The Lynn case followed Pearlstein, and as was true in the Public Health Trust case, the statute of limitations expired after the complaint had been filed, but before any notice of intent was served. To prevent the trial court from further consideration of a barred claim, a writ of certiorari was issued. The First District Court's refusal to issue that writ under almost identical facts creates a conflict. The Second District decision is correct.

IV. SECTION 768.57 IS CONSTITUTIONALLY VALID AS APPLIED TO PLAINTIFF

The District Court of Appeal declined to deal with the trial court's holding that Section 768.57, if applied to plaintiff's case, would be unconstitutional because her cause of action accrued before the effective date of the enactment (A-10, p.28; A-12, p.50). Plaintiff had argued in the trial court, that to require her to comply with the pre-suit 90-day waiting period would be to improperly deprive her of the pre-existing right to file suit without such a waiting period. Neither plaintiff's argument nor Judge Geeker's decision can withstand close analysis; and the First District should have addressed that issue and declared the statute to be valid.

At the outset, we recognize that this Court may decline to deal with the constitutionality issue altogether.

But if the Court agrees with petitioner's position argued thus far in this brief, then the constitutional issue will need to be addressed. Otherwise, petitioner's problem will not be resolved, and the trial court will not be prevented from moving forward on the plaintiff's case against petitioner. This Court has pointed out many times that, once "conflict" jurisdiction has been accepted, this Court will "proceed to consider the entire cause on the merits." Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977). To do otherwise would force Dr. Bondurant to undergo a full trial on the merits, and, if unsuccessful, to pursue another appeal. Efficient use of judicial energy certainly weighs in favor of considering the constitutionality question now.

There is no dispute that a statute duly enacted in the State of Florida is presumed to be valid and enforceable. Green v. City of Pensacola, 108 So2d 847 (Fla. 1st DCA 1959). Unconstitutionality must be proven "beyond all reasonable doubt" before a statute can be declared ineffective. Bonvento v. Board of Public Instruction, 194 So.2d 605 (Fla. 1967); Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981). All doubts must be resolved in favor of its validity. Horsemen's Benevolent and Protective Ass'n. v. Division of Pari-Mutual Betting, 397 So.2d 692 (Fla. 1981).

In light of plaintiff's argument that the statute here places certain pre-suit burdens on her, the question

is whether, under the above standard of review, the addition of those requirements violates the Florida Constitution.

The Constitution does not prohibit the passage of retrospective legislation. In this context, such legislation is therefore valid unless its application either impairs vested rights, creates a new obligation or duty, or establishes a new disability with respect to transactions previously had. McCord v. Smith, 43 So.2d 704 (Fla. 1949). An example of this principal is found in Talmadge v. District School Board, 406 So.2d 1127 (Fla. 5th DCA 1981), where an amendment to Section 768.57, enacted after a plaintiff's cause of action accrued, served to completely bar his right to sue a state employee as an individual. The Fifth District held that such an application would be unconstitutional because it retroactively impaired a vested right. See also, Meli v. Admiral Insurance Co., 413 So.2d 135 (Fla. 3d DCA 1982).

But in the case at bar, the new statute did not serve to bar plaintiff's action at all -- in fact her rights to bring suit against Dr. Bondurant were preserved in every respect. All she had to do is comply with the statute by serving notice before the limitation period expired -- which she did -- then wait 90 days before filing suit -- which she did not. The First District has stated the principle thusly:

> "There is generally no vested right in any particular remedy or method of procedure." Heberle v. P.R.O. Liquidating Co., 186 So.2d 280, 282 (Fla. 1st DCA 1966).

Procedure is the machinery for carrying on the suit, including pleading, process, evidence and practice; and the means of acquiring jurisdiction is part of this machinery. Id. Remedial statues, or statutes relating to remedies or modes of procedure, which do not create new rights, or take away vested rights, but only operate in furtherance of the remedy already existing, are not invalid when applied retroactively. Id.; Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978).

In the Heberle case, the newly adopted statute in question allowed plaintiff to serve a foreign corporation doing business in Florida, by serving the summons and complaint on the Secretary of State. It was not in effect when the sale transaction in question took place, but was adopted before plaintiff filed suit. In that context, this Court concluded that the statute was a remedial or procedural act adopted in furtherance of a remedy already existing and therefore not invalid in its retroactive application. However, the statute was deemed unconstitutional as applied to defendant because it did not appear that defendant had conducted any business in Florida after the new law was enacted. It could not be said that defendant by implication consented to the new method of securing constructive service of process.

The statute here was adopted in furtherance of a remedy already existing -- plaintiff's right to sue and

recover damages against an allegedly negligent health care provider. A new procedure was added, with the idea in mind of encouraging, but not requiring, resolution of potential claims by mutual agreement, rather than suit. The statute gives both sides the opportunity to conduct informal discovery, which could serve to benefit plaintiff in any later suit, at least as much and possible even more than the defendant. The limitation period is held intact by the tolling provisions of 768.57(4); and if no settlement results from this screening process, plaintiff has full and unfettered right to file suit after the 90 days have passed.

Note that this statute was enacted in early 1985, effective October 1, 1985. Had Mrs. Streeter chosen to, she could have added Dr. Bondurant as a defendant in 1984 when she first filed, or at any time in 1985 before October 1. She chose instead to "sit on" her rights -- even after she knew the law had changed. Her complaint of unconstitutionality has a very hollow ring to it.

In contrast to the defendant in Heberle, plaintiff here clearly recognized that the new law applied to her; otherwise, she would not have served the notice of intent before filing suit (A-5). She had certainly sought the assistance of Florida courts, having been appointed personal representative by the probate court, then pursuing the instant suit as to the other defendants. This statute being a mere change in the process of getting her case

concluded, is not violative of the Constitution, under the Heberle standard. Moreover, it can certainly be said that plaintiff waived her constitutional claim, or that she is at least estopped to argue it, because she did, in fact, through her attorney, serve the notice of intent. Her attorney even went so far as to enclose a copy of Section 768.57. This certainly does not sound like a person who finds the statute to be offensive or constitutionally infirm. Having started this whole process with that notice, she chose her remedy. Filing suit two days later was inconsistent with that first choice, which required a 90-day wait before she could file. Whether one categorizes her behavior as waiver, estoppel, or an election of her remedy, her claim of unconstitutionality should be summarily rejected.

The Village of El Portal case, cited above, is directly on point. It involved the immediate application of a new remedial or procedural statute -- the Uniform Constribution Among Tortfeasors Act -- to a pending case, which this Court approved:

> "The statute simply changes the form of the remedy without impairing substantial rights." Village of El Portal v. City of Miami Shores, 362 So.2d 275, 278 (Fla. 1978).

In the instant case, the statute simply delays plaintiff's enforcement of her pre-existing right to sue, for a period of 90 days. She loses nothing by waiting, since the statute of limitations is tolled, and may actually gain information through informal discovery. Fla. Stat. Section 768.57(6). She may

also receive an offer to settle the case because the potential defendant or his insurer must, in good faith, investigate the claim. Fla. Stat. Sections 768.57(3)(1)4 and (3)(b).

The question as to when a retroactively applied statute violates the due process requirements of the constitution was the subject of a thorough analysis by Justice England, writing for the majority of this Court in the case of State v. Knowles, 402 So.2d 1155 (Fla. 1981). Three considerations are applicable, he wrote:

> "[T]he strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected." Id., 402 So.2d at 1158.

When one applies these factors to the case at hand, it is apparent that the balancing favors application of the statute to plaintiff here.

The Florida Legislature, in its preamble to the Comprehensive Medical Malpractice Reform Act of 1985, declared the public interest concerns applicable here:

> "WHEREAS, high-risk physicians in this state sometimes pay disproportionate amounts of their income for malpractice insurance, and
>
> WHEREAS, professional liability insurance premiums for Florida physicians have continued to rise and, according to the best available projections, will continue to rise at a dramatic rate, and
>
> WHEREAS, the maximum rates for essential medical specialists such as obstetricians, cardiovascular surgeons, neurosurgeons, orthopedic surgeons, and anesthesiologists have become a matter of great public concern, and

WHEREAS, these premium costs are passed on to the consuming public through higher costs for health care services in addition to the heavy and costly burden of "defensive medicine" as physicians are forced to practice with an overabundance of caution to avoid potential litigation, and

WHEREAS, this situation threatens the quality of health care services in Florida as physicians become increasingly wary of high-risk procedures and are forced to downgrade their specialties to obtain relief from oppressive insurance rates, and

WHEREAS, this situation also poses a dire threat to the continuing availability of health care in our state as new young physicians decide to practice elsewhere because they cannot afford high insurance premiums and as older physicians choose premature retirement in lieu of a continuing diminution of their assets by spiraling insurance rates, and

WHEREAS, our present tort law/liability insurance system for medical malpractice will eventually break down and costs will continue to rise above acceptable levels, unless fundamental reforms of said tort law/liability insurance system are undertaken, and

WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action, and

WHEREAS, medical injuries can often be prevented through comprehensive risk management programs and monitoring of physician quality, and

WHEREAS, it is in the public interest to encourage health care providers to practice in Florida, NOW, THEREFORE, Be It Enacted by the Legislature of the State of Florida:"

Given that these matters of public interest are intended to be served by the enactment of the statute, this Court should give considerable weight, in the balance, on the side of validity of the Act.

The second factor has been discussed already: Plaintiff's rights have not been abrogated, since she retains full right to sue if the case is not resolved to her satisfaction during the 90-day screening period. Delay is not "abrogation," which, by definition, means to repeal or make void. Plaintiff's pre-existing right to file suit was not abrogated at all. Again, the balancing process on this point is not favorable to plaintiff's position.

The third factor, the nature of the right affected, certainly weighs against plaintiff. The right involved here is being able to proceed with her lawsuit against Dr. Bondurant without going through the pre-suit screening process. As pointed out earlier, there is no "vested right" in any particular court procedure which precludes the Legislature from changing it. Heberle v. P.R.O. Liquidating Co., 186 So.2d 280, 282 (Fla. 1st DCA 1966). A change in the method by which a claim may be presented is procedural only and remedial in character. McCord v. Smith, 43 So.2d 704, 709 (Fla. 1949). Since the Legislature could have imposed this different method of claim in the first instance, there is no impediment to doing so now. See, 10 Fla. Jur. 2d, Constitutional Law Section 300.

An example of a pre-suit procedure that was approved by this Court in medical malpractice cases, was the submission of such cases to mediation panels. This procedure was adopted by the Legislature in 1975. That statute involved

a wait for six months and the absolute necessity for plaintiff to participate in mediation before filing suit. This Court held the procedure, on its face, to be a valid limit on the injured party's "access to court." Carter v. Sparkman, 335 So.2d 802 (Fla. 1976). See also, Pearlstein v. Malunney, 500 So.2d 585, 586-7 (Fla. 2d DCA 1986).

Four years after Carter v. Sparkman, after innumerable problems with the mediation procedure had flooded the courts with litigation, much of it focussing on the constraints and problems of the time limits involved, this Court held the mediation statute to be unconstitutional in its practical operation and effect. Aldana v. Holub, 381 So.2d 231 (Fla. 1980). The decision in Aldana, however, specifically preserved and reaffirmed the wisdom of Carter v. Sparkman. See, Aldana v. Holub, supra, 381 So.2d at 237-8. The time limit problems with the 1975 statute are not present here because, under the 1986 statute, there is no basis for, or reason to impose, an extension of the 90-day waiting period, unless both sides stipulate to an extension. Fla. Stat. §768.57(4) (1985). Aldana v. Holub, therefore, does not provide authority for invalidating the new statute.

The Carter v. Sparkman case provides an interesting insight into the "retroactive" argument made by plaintiff here. There, Ms. Sparkman filed her suit only 18 days after the statute became effective on July 1, 1975. Although

not mentioned in the court's opinion, no doubt her cause of action accrued well before the July 1 date. Nevertheless, this Court found no constitutional infirmity, and held that she would be required to comply with the mediation statute. A similar result is called for in Mrs. Streeter's case.

Thus, under the general principles relating to retroactive statutes in Florida, and also under the analysis required by State v. Knowles, supra, the application of this statute, Fla. Stat. Section 768.57, to plaintiff is not unconstitutional. When the trial court erroneously concluded that it was unconstitutional in its application, it undertook to exercise jurisdiction where it had none. The First District, therefore, erred in refusing to issue the writ of prohibition.

CONCLUSION

In view of the conflict between the decision of the First District below and those of the Third District in Public Health Trust v. Knuck and the Second District in Pearlstein v. Malunney and Lynn v. Miller, this Court should quash the decision below and direct the First District to issue a writ of prohibition or certiorari to preclude Judge Geeker from entertaining plaintiff's case against petitioner.

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, by hand delivery this 8th day of June, 1987.

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