01a 10-7-87

IN THE SUPREME COURT OF FLORIDA

ROBERT E. BONDURANT, M.D.,

Petitioner,

v.

Case No. 70,090

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

DISTRICT COURT OF APPEAL NO. BQ-212

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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

M. ROBERT BLANCHARD
RICHARD P. WARFIELD, of
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TABLE OF AUTHORITIES

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NOTE ON REFERENCES

"A-1" through "A-15" refers to tabbed Appendix cited by Petitioner and attached to Petitioner's Brief on Jurisdiction

"Respondent" refers to Plaintiff Streeter

"Bondurant" refers to Petitioner Robert E. Bondurant

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STATEMENT OF THE CASE

Respondent adopts the statement of the case as set forth in petitioner's brief on the merits. Respondent would add only that Bondurant chose to challenge and litigate the sufficiency of the plaintiff's pre-suit notice. (A-6).

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SUMMARY OF THE ARGUMENT

Prohibition. The District Court below properly ruled that prohibition was an inappropriate remedy under English v. McCrary, 348 So.2d 293 (Fla. 1977), although certiorari might have been an appropriate remedy, as in Pearlstein v. Malunney, 500 So.2d 585, 587 (Fla. 2d DCA 1986). The trial court had jurisdiction of the parties and the subject matter, see English, 348 So.2d at 297, and could properly rule on the applicability and operation of Florida Statute 768.57 in the instant case. Any refusal to grant certiorari was a matter within the discretion of the District Court and should be upheld.

Interpretation. Florida Statute 768.57 (1985) should not be interpreted as applying retroactively to the instant plaintiff's claim. Subsection (10) of the statute dictates that the section "shall apply to any cause of action with respect to which suit has not been filed prior to October 1, 1985." Plaintiff had her cause of action prior to that date and suit had been filed "with respect to" that cause of action on October 8, 1984. (A-1). The statute is at least ambiguous in this regard and, therefore, as a matter of statutory construction, the act should not be retroactively applied to

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plaintiff's claim in the absence of clear and unambiguous language that it should apply. Heberle v. P.R.O. Liquidating Co., 186 So.2d 280 (Fla. 1st DCA 1966); Hellinger v. Fike, 503 So.2d 905 (Fla. 5th DCA 1986).

Constitutionality. If Florida Statute 768.57 is interpreted as applying retroactively to the instant cause of action, its operation is unconstitutional. This court held in McCord v. Smith, 43 So.2d 704 (Fla. 1950), that retrospective statutes are constitutionally defective if vested rights are adversely affected or destroyed, if a new obligation or duty is imposed, or an additional disability is established. Although plaintiff complied with the presuit notice requirement of the statute within the limitations period, she was then confronted with a dilemma: should suit be filed within two years or should she assume that the 90-day tolling under 768.57(4) would apply? The ambiguity of Section 768.57(10), as above mentioned, left plaintiff uncertain as to whether she would be entitled to the 90-day tolling of the limitations period provided by the statute. Plaintiff could not be reasonably expected to wait 90 days after filing the notice in a case where the tolling provision might ultimately be found inapplicable and the statute of limitations expired.

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Dismissal. Given the untenable position plaintiff was confronted with by the statute, the trial court should have abated plaintiff's action for 90 days, which would have given Bondurant the benefits provided by the statute, without destroying plaintiff's cause of action. This case is clearly distinguishable from the cases relied upon by Bondurant, in that the pre-suit notice was served within the applicable time limitation. See 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); Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983); Dukanauskas v. Metropolitan Dade County, 378 So.2d 74 (Fla. 3d DCA 1979). Therefore, abatement or dismissal without prejudice would have been appropriate and just. See Lee v. South Broward Hospital District, 473 So.2d 1322 (Fla. 4th DCA 1985).

If dismissal of Bondurant from the Second Amended Complaint is found to be warranted by this court, plaintiff should be allowed to amend the complaint to allege compliance with the 90-day waiting requirement. See Commerical Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979); McMahan Construction Company, Inc. v. Carroll's Child Care Center, Inc., 460 So.2d 1001 (Fla. 5th DCA 1984). The

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limitations period for filing suit should be considered tolled for the period of time from the filing of the amended complaint until the time of dismissal, because plaintiff originally filed within the statute of limitations and the pendency of these proceedings has been necessary to determine the applicability of the new malpractice statute. Since Bondurant sought in the court below to attack the sufficiency the pre-suit notice (A-6), it is entirely unreasonable to suggest that plaintiff should have refiled yet another complaint against Bondurant during the pendency of the defendant's motion to dismiss. The motion was to determine not only the applicability of Section 768.57, but also the adequacy of the pre-suit notice itself. If dismissal is required, 90 days should be set aside for compliance with 768.57 and the statute of limitation should be tolled throughout this proceeding and the 90 days, since the pre-suit notice has been found valid (A-8).

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ARGUMENT

Preface

While the position contended by petitioner Bondurant makes for tidy argument, the dictates of its logic can only be followed at the expense of justice. Faced with the prospect that the 90 additional days provided for filing of a lawsuit under 768.57(4) (1985) might not be available in the instant case, plaintiff took a reasonable course of action and filed suit within two years from the date the cause of action accrued. Bondurant would like to capitalize on of plaintiff's dilemma and seek to defeat her claim entirely. It was certainly not the desire of the legislature to destroy the claims of innocent plaintiffs through the requirements imposed by the statute. Plaintiff served notice and filed suit within the limitations period and then simply waited for the first available hearing date (A-10) on defendant's motions to dismiss. Bondurant wishes to take ultimate advantage of the unavoidable delay by declaring plaintiff's filing a nullity.

I. Prohibition Improper.

This court held in Englich v. McCrary, 348 So.2d 293 (Fla. 1977) that prohibition is an extraordinary writ by which a lower court is prevented from acting beyond its jurisdiction. The writ of prohibition is employed with great

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caution and utilized only in emergencies to forestall impending present injury, where the person seeking the writ has no other appropriate and adequate legal remedy. The purpose of prohibition is to prevent the doing of something, and cannot be used to revoke an order already entered. Id.

The trial court had clear jurisdiction over the parties and subject matter below. English v. McCrary, 348 So.2d at 297. Both pre-suit notice and the suit itself were filed within the two-year limitations period. The trial court properly addressed the issues of the sufficiency of the plaintiff's pre-suit notice and the applicability of Florida Statute §768.57 (1985) to the instant case. (A-8, A-10). Bondurant sought to undo the orders of the trial court by seeking writ of prohibition. The District Court below rightly declined to enter the writ, although it might have entertained a writ of certiorari in line with Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986).

Bondurant's petition for rehearing in the District Court suggested that certiorari should have been considered although the original petition requested prohibition. (A-13). However, the District Court's refusal to entertain certiorari on the initial petition and upon the motion for

rehearing was certainly within its discretion. See South Atlantic S.S. Company v. Tutson, 139 Fla. 405, 190 So. 675 (1939). See also 3 Fla.Jur. 2d. App. Rev. §458. Non-final orders, such as the one below are generally not subject to certiorari, unless the order fails to conform to the essential requirements of law and unless proceeding without immediate review would cause material injury throughout the subsequent proceedings. Chalfont Development Corp. v. Beaudoin, 370 So.2d 58 (Fla. 4th DCA 1979).

The trial court order finding the 90-day waiting period inapplicable to the instant case did not depart from the requirements of law. Prohibition was improper and certiorari was unnecessary, the District Court should be upheld without addressing issues outside of the District Court's decision. See Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982).

II. Florida Statute 768.57 Should Not Be Interpreted To Apply Retroactively In This Case.

Uncertainty confronted plaintiff in attempting to comply with the requirements of the new malpractice statute. The act attempts to apply retroactively to "any cause of

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action with respect to which suit has not been filed prior to October 1, 1985." Fla. Stat. §768.57(10) (1985). Plaintiff's "suit" had been filed prior to that time but the particular "claim", if you will, against Dr. Bondurant had not yet been included in that suit. The same death and essentially the same sequence of events which led to the claims against the other defendants also gave rise to the claim against Dr. Bondurant. Plaintiff's cause of action for wrongful death existed prior to October 1, 1985 and suit was filed "with respect to" this cause of action. There was certainly reason to question whether, under the ambiguous language of this subsection, the statute would apply so that plaintiff would have benefit of the 90-day tolling of the statute of limitations. Fla. Stat. §768.57(4).

This uncertainty was compounded by the dictate of Florida Rule of Civil Procedure 1.190(c), which provides for the relation back of amended pleadings. Although it was clear that the amended complaint would not relate back for the purpose of statute of limitations on Bondurant, Garrido v. Markus, Winter & Spitale Law Firm, 358 So.2d 577 (Fla. 3d DCA 1978), it was not so clear whether a relation back of amended pleadings would apply for the purpose of rendering the new

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malpractice act inapplicable. The statute does not clarify whether the relation back of amended pleadings has any affect on a "cause of action with respect to which suit has not been filed prior to October 1, 1985." Plaintiff could not be certain that the court would apply prior law to the other defendants in the case and the new law to the claim against Bondurant, when the entire action arose out of a single death.

It is a general rule of statutory construction that all statutes are intended to be prospective in application. If the legislature intends retroactive application, it must do so in clear, unambiguous language. Heberle v. P.R.O. Liquidating Co., 186 So.2d 280 (Fla. 1st DCA 1966). See also Hellinger v. Fike, 503 So.2d 905 (Fla. 5th DCA 1986). Nowhere should this rule of statutory construction be more stringently applied than in a case where a plaintiff's vested right to bring suit can be completely undermined by statutory action. The issues of this case may be first addressed as a matter of statutory construction and the constitutionality of the statute need not even be questioned. The statute simply does not address cases filed prior to October 1, 1985 wherein amended pleadings add parties subsequent to that date. Consequently, the statute should not be interpreted as applying retroactively to plaintiff's cause of action.

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III. If Retroactively Applied In This Case, Florida Statute 768.57 Is Unconstitutional.

Plaintiff had a vested right to bring suit against petitioner Bondurant prior to the enactment of the 1985 Malpractice Act. With the statute's pre-suit notice requirements, the act certainly imposes additional burdens and disabilities on plaintiff's vested right. Indeed, Bondurant's hypertechnical arguments would have the statute destory the plaintiff's claim altogether.

Retroactive legislation is usually invalid if it impairs a vested right. Talmadge v. District School Board of Lake County, 406 So.2d 1127, 1128 (Fla. 5th DCA 1981). The right to bring suit is a vested right. See Department of Transportation v. Knowles, 402 So.2d 155 (Fla. 1981). Retroactive legislation is invalid where vested rights are adversely affected or destroyed, or where a new duty or obligation is created or imposed, or an additional disability is established. McCord v. Smith, 43 So.2d 704 (Fla. 1949). The pre-suit notice requirements of the act impose a new obligation, a condition precedent, to bringing suit and do not affect merely matters of procedure as contended by Bondurant.

The legislature attempted to alleviate the disability imposed by the pre-suit filing requirements by providing a 90-day tolling of the statute of limitations upon filing the notice of claim. Fla. Stat. 768.57(4). However, while the act may, on its face, meet constitutional muster, it has failed to do so in practical application. See Aldana v. Holub, 381 So.2d 231 (Fla. 1980). At least two trial courts have found it appropriate to declare the statute unconstitutional in some aspect; the trial court below and the trial court in Lynn v. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986) and Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986).

The statutory ambiguity which confronted the instant plaintiff could have been easily avoided if the statute had been written to apply to causes of actions which accrued on or after a particular date. It is generally clear when a cause of action accrues and there is extensive caselaw to assist the determination of that issue. However, the legislature chose to make these additional burdens on the plaintiff applicable to "causes of actions with respect to which suit has not been filed prior to October 1, 1985" and in doing so has unconstitutionally impaired the instant plaintiff's vested right to bring suit.

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IV. The Appropriate Remedy For The Petitioner Bondurant In The Trial Court Was Abatement Or Dismissal Without Prejudice.

In cases similar, but not identical, to the instant case, abatement has been found inappropriate where the plaintiff cannot cure the defect in the original complaint because the time has lapsed for filing of a presuit notice of claim. See 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); Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983); Dukanauskas v. Metropolitan Dade County, 378 So.2d 74 (Fla. 3d DCA 1979). In the instant case however, notice of claim had been served on Bondurant within the applicable limitations. Therefore, plaintiff could, if the new act was found applicable, have filed the amended complaint in compliance with the notice and waiting requirements, such as was allowed in Commerical Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979).

This case is not unlike Lee v. South Broward Hospital District, 473 So.2d 1322 (Fla. 4th DCA 1985). In that case, the plaintiff filed suit prior to serving required notice on the Hospital District pursuant to Florida Statute 768.28. The

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notice was filed after the complaint, but within the three-year limitations period. The trial court dismissed with prejudice the amended complaint. The District Court reversed, however, in line with Commerical Carrier, and distinguished Levine v. Dade County School Board, 422 So.2d 210 (Fla. 1983) on the same basis here contended by plaintiff, to-wit: pre-suit notice was timely filed. See also State of Florida v. Alvarez, 11 FLW 1496 (July 8, 1986, 3d DCA); Askew v. County of Volusia, 450 So.2d 233 (Fla. 5th DCA 1984).

Similarly, in McMahan Construction Company, Inc. v. Carroll's Child Care Center, Inc., 460 So.2d 1001 (Fla. 5th DCA 1984), the applicable lien statute required that a contractor's affidavit must be served more than five days before filing of a complaint, but the affidavit had not been filed at all before the original complaint. The contractor's affidavit was subsequently filed and an amended complaint was allowed to be filed five days thereafter to comply with the lien statute. There is no reason why, in the interest of justice, a similar procedure should not be applicable in the instant case.

Abatement is proper where an action is commenced prematurely. See Homestead Fire Insurance Co. v. Andian Corporation, 121 Fla. 356, 164 So. 187 (1935). Please note

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the trial court, at least, in Knuck found abatement appropriate, even though time for filing the notice had lapsed. Trial courts, it seems, are not insensitive to the often harsh consequences of the new act in practical application. The Court in Dukanauskas, 378 So.2d at 78, held that abatement is only appropriate "where the cause of action is not extinguished and thus capable of revival." Plaintiff's instant claim was not extinguished, since notice and suit had been filed within the limitations period, so abatement would be proper.

Abatement would meet the ends of the statute, while plaintiff's filing of the complaint within two years satisfied the purpose of the statute of limitations. This is not a case where plaintiff has been dilatory. If complete dismissal of the complaint is required, it should be held that the pendency of these proceedings has stayed the statute of limitations so that plaintiff might refile suit within the appropriate time.

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CONCLUSION

The Plaintiff should not be denied a remedy in the case. Reasonable action was taken to comply both with new malpractice statute and the statute of limitations. Bondurant has shown no prejudice in alleged premature filing of the complaint and the good purposes of malpractice act will not be defeated by denying his petition. Therefore, the relief sought by petitioner Bondurant should be denied.

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CERTIFICATE OF SERVICE

I HERBY CERTIFY that a copy of the foregoing has been 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 32501; Donald H. Partington, Esq., Clark, Partington, Hart, Larry, Bond & Stackhouse, Suite 800, 125 West Romana Street, Pensacola, Florida 32501; J. Nixon Daniel, III, Esq., Beggs & Lane, 3 West Garden Street, Pensacola, Florida 32501 and Danny L. Kepner, Esq., Shell, Fleming, Davis & Menge, Seventh Floor, Seville Tower, 226 South Palafox Street, Pensacola, Florida 32501, this 26th day of June, 1987.

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