O/G 10-7-87 orig

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.

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PETITIONER'S REPLY BRIEF ON THE MERITS

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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PREFACE

In the preface to her argument, plaintiff contends that she was in a dilemma when she commenced the proceedings here. She blames the statue and defendant for the difficulty she now faces, but in truth, she has no one to blame but herself. She filed this suit against the hospital in October, 1984, and amended it to include another defendant in April, 1985. The statute in question was enacted during the legislative session in early 1985, and the section involved here reflected an effective date of October 1, 1985. For about one year after filing suit, plaintiff could have amended her complaint to include Dr. Bondurant without being required to wait for any pre-suit screening process. At any time during a period of over two months after the effective date of the statute, she could have served the notice of intent to initiate litigation, waited for 90 days, and then amended the suit to include this doctor before the two-year limitation period ended in March, 1986.

So the problem here is not with the words of the statute or with the unavoidable delay in obtaining a hearing date. The problem is with plaintiff's intentional delay in bringing this defendant into this suit. She had competent counsel, and she has never contended that the limitation period should have been extended, on account of "discovery" problems, as allowed under Section 95.11(4)(b), beyond two

years from her husband's death. She, through her attorneys, made some strategy decisions in this case, deciding to add Dr. Bondurant at the very last moment. She failed to follow the statute that clearly applied when she finally did decide to proceed, and she is now asking this Court to save her from her own errors in carrying out that strategy. She would like to characterize herself as an "innocent plaintiff" but the label simply does not fit.

Even after she had served the "notice of intent" and then filed suit two days later, she made some bad choices. She knew, from Dr. Bondurant's original motion to dismiss, that the validity of her suit against him was under attack because of her failure to wait 90 days (A-4, paras. 4-5). She was on notice; and she could have sought "abatement" or a stay of some kind in the trial court. Then she could have filed a completely separate complaint after the end of the 90-day period (and before the limitation period ended on March 13, 1986). That separate complaint then could have been consolidated with the pending suit. She knew that Dr. Bondurant had not attacked the validity or applicability of the new statute to the case, but that he was specifically relying on it in his motion to dismiss (A-4). Thus, there was no reason, at that time, to fear (as she seems to contend on pp. 8-9 of her brief) that she might not receive the benefit of the 90-day tolling of the statute of limitations. If the new Act was invalid,

arguably she had protected herself by filing the Second Amended Complaint in this suit (A-3); and if the Act was held to be valid, she would have protected herself by filing the separate suit after 90 days. As it was, she only complied with the first action required by the statute (notice) and not the second (waiting 90 days to file suit).

Admittedly, this process would still have deprived defendant of the statutorily required pre-suit screening period for investigation for 90 days without a lawsuit pending; and Dr. Bondurant would still have a right to complain about that. But we need not consider what this Court or the First District would have done with that case, because that is not what happened here. Although apparently uncertain as to her strategy at the start, she ultimately chose to stand or fall on the constitutional validity of the statute, as applied to her. She had plenty of chances to avoid the adverse results of the statute, but chose not to do so. This Court should not come to her rescue now.

I. PROHIBITION OR CERTIORARI SHOULD HAVE BEEN GRANTED

Plaintiff did not attempt to counter defendant's cases in support of the use of prohibition, relying instead on generalized statements of the law from English v. McCrary, 348 So.2d 293 (Fla. 1977). Those general statements do not counter or nullify the rule of law found in Winn-Lovett Tampa, Inc. v. Murphree, 73 So.2d 287 (Fla. 1954), Tobler v.

Beckett, 297 So.2d 59 (Fla. 2d DCA 1974), and Public Health Trust v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986). Prohibition was an appropriate remedy.

But even if prohibition is deemed not to be appropriate, plaintiff concedes that certiorari was an appropriate remedy for the District Court to consider. Plaintiff cites Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982) for the premise that the District Court's discretionary decision not to exercise certiorari jurisdiction should be treated as final and remain undisturbed. Sanchez is inapposite, however, because there the district court's holding on the point in question did not conflict with any decision of this Court or any other district court of appeal. Id., 409 So.2d at 21. Here, the decision below (as to certiorari) directly conflicts with the holding of the Second District in both Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986) and Lynn v. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986). That court held that the trial court's refusal to dismiss a case in this posture departed from the essential requirements of law, and without immediate review by certiorari, material injury would be suffered by the defendants that could not be cured by direct appeal. Compare, Chalfonte Development Corp. v. Beaudoin, 370 So.2d 58 (Fla. 4th DCA 1979).

One could argue that the decision below does not conflict with Pearlstein and Lynn because the opinion dealt only with prohibition and those cases specifically dealt

only with certiorari. But Fla. R. App. P. 9.040(c) has been held to allow the appellate court, on its own motion, to treat a petition or pleading as if it prayed for the proper relief.

The First District failed to do this, and rejected defendant's petition because it prayed for prohibition, which that court felt was the wrong relief. Note, too that in both Pearlstein and Lynn, the Public Health Trust v. Knuck case was cited as authority for dismissal of a prematurely filed complaint. This Court should quash the decision below, for all of the reasons stated in Pearlstein and Public Health Trust.

II. SECTION 768.57 IS CONSTITUTIONALLY VALID AS APPLIED TO PLAINTIFF

Plaintiff contends that she was misled or confused because she had already filed a suit before October 1, 1985, and could not ascertain whether the 1985 statute applied to the action against Dr. Bondurant, which she decided to file after October 1, 1985. This argument has already been addressed, in part, in the "Preface" earlier in this brief. Plaintiff had procedural tools available to assist her in preserving her rights whether the Act was held applicable (valid) or not.

But when one examines this argument carefully, it must be characterized as frivolous. Plaintiff's attorneys are well acquainted with definitions of legal terms and general

principles of due process. There is no merit whatsoever to the contention that plaintiff might have been deprived somehow of the benefit of the statute's 90-day tolling period merely because she had already sued someone else before the statute's effective date. The term "cause of action" in Subsection 10 is so well defined in the decisional law of this state that it does not even require defining in a new statute. It is a particular legal right of plaintiff against defendant involving some violation or invasion of that right with resulting damage. Luckie v. McCall Manufacturing Co., 153 So.2d 311 (Fla. 1st DCA 1963). Plaintiff knew, through her attorneys, that she had not filed a "cause of action" as to Dr. Bondurant before October 1, 1985. Her claim against him (A-3) was distinct and separate from those she brought against Baptist Hospital (A-1) and Dr. Tugwell (A-2), each of which was separate and distinct from each other. East separate claim must stand on its own and plaintiff must ultimately bear the burden of proof as to each claim, if tried. It matters not that each separate claim relates to the same death.

Dr. Bondurant was not a party to the suit that was pending against the hospital and Tugwell when the notice of intent was served on him on March 10, 1986 (A-4, p.3). Nothing that happened therein could serve to improve or diminish plaintiff's rights or obligations as to Dr. Bondurant. The pending suit was wholly irrelevant to her cause of

action against, or procedures she had to follow regarding Dr. Bondurant. Nothing that happened in that suit, to which Dr. Bondurant was not a party, could serve to deprive him of his newly-enacted right to pre-suit screening of claims for 90 days.

Plaintiff goes further with her frivolous argument and posits uncertainty because Fla. R. Civ. P. 1.190(c) might cause the second amended complaint to "relate back" to the original filing date of the action against the hospital, which preceded the enactment of the malpractice reform Act. The principles set forth in the case of Garrido v. Markus, Winter & Spitale Law Firm, 358 So.2d 577 (Fla. 3d DCA 1978) and numerous other cases of like effect, clearly demonstrate that, where a limitation defense was involved, there could be no "relation back" of an amended pleading that added a person as a party defendant to a suit for the very first time. Puleston v. Alderman, 148 Fla. 353, 4 So.2d 704 (1942); Johnson v. Taylor Rental Center, Inc., 458 So.2d 845 (Fla. 2d DCA 1984). The Garrido case speaks clearly of a new "cause of action" being introduced when a new party is added; that is why no relation back is allowed. See, 358 So.2d at 580 (fn. 2), 581.

Plaintiff seems to forget that we are before this Court because she did, in fact, file her second amended complaint before the limitation period expired. If the new Act is invalid, as applied to her, she had every right

to file that pleading when she did. But she could have completely eliminated even the slightest concern for the "relation back" issue by filing a separate suit altogether against Dr. Bondurant. New suits do not "relate back;" they stand on their own as to filing dates, and as to procedural requirements which may be effective at the time of such filing. Perhaps plaintiff's counsel knew her claim of uncertainty and confusion would be seen as a sham, if the suit against Dr. Bondurant had been filed separately.

In truth and in fact, there was no dilemma and no confusion or uncertainty. Plaintiff either had to comply with Section 768.57 and give the doctor 90 days' notice before filing suit, or she had to challenge the Act as unconstitutional. She obviously did not comply and she is left with her claim of unconstitutionality. It is wholly without merit.

Contrary to plaintiff's contention, this statute does not unconstitutionally limit, burden, or destroy her right to file suit. As pointed out in petitioner's initial brief (pp. 25-35), merely adding a procedural requirement to be fulfilled before suit is filed, is not unconstitutional.

But plaintiff goes on to argue that the statute does not pass the test of being consitutionally valid in its practical application, citing Aldana v. Holub, 381 So.2d 231 (Fla. 1980). Aldana simply does not support this contention. In Aldana, there was a 5-year history of the

courts trying to make the medical mediation statute work in a myriad set of circumstances apparently unforeseen by the Legislature when the bill was enacted. Problems with the time constraints, beyond the control of the litigants, had led to extremely inequitable results. There is nothing of that nature here. The mere fact that a few plaintiffs, able to avert disaster by their own acts, failed to follow the requirements of the statute, certainly does not justify a wholesale scrapping of the law.

This Act is valid, both facially and in application, and is worthy of this Court's declaration to that effect. We urge the Court to so hold.

III. ABATEMENT OR DISMISSAL WITHOUT PREJUDICE WAS NOT APPROPRIATE

In the final section of her brief, plaintiff asks this Court to approve a procedure which would completely emasculate the pre-suit screening period set up in Section 768.57. The trial court, she argues, should have been simply abated or dismissed the second amended complaint for a period of time sufficient to allow plaintiff to comply with the notice and 90-day waiting period. There are a number of reasons why this Court should reject this argument.

It is true that, in response to Dr. Bondurant's initial motion to dismiss (A-4), the trial court could have abated the action, because the term "abatement" means

an entire overthrow or destruction of the suit so that it is quashed and ended. Black's Law Dictionary, p. 4 (West, 5th Ed. 1979). Abatement is proper when a defendant pleads some matter which defeats the action for the time being, and it necessitates the bringing of a new action, providing that a cause of action remains. 1 Fla. Jur. 2d, Actions §63 (1977). Had a hearing been held before Judge Geeker on the original motion to dismiss within the 90-day period after notice of intent was served, abatement - the equivalent of dismissal without prejudice - would have been correct.

But there was no hearing during that 90-day period (while the statute of limitation was tolled), and there was no hearing during the next three days thereafter (while the remainder of the limitation period was running out). By the time Judge Geeker heard the motion to dismiss, the limitation period had expired and the motion had been amended to include the statute of limitation defense (A-6). None of the authorities cited by plaintiff supports the idea of abatement ("stay"?) to delay the proceedings once the action is barred by the statute of limitation. At that point, plaintiff was unable to correct, by amendment, a defect in her pleadings, as this Court contemplated in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). Plaintiff was in a situation similar to that found in Levine v. Dade County School Board, 442

So.2d 210 (Fla. 1983). She could not amend to allege that her suit was filed within the limitation period.

Judge Geeker recognized that he could not grant plaintiff any relief and that dismissal would be necessary, if Section 768.57 were deemed validly applied to her case:

> "[I]f Section 768.57, Florida Statutes, is applicable to the plaintiff's cause of action against the defendant, Bondurant ... the second amended complaint naming Bondurant as a defendant for the first time is a nullity and ... time has expired for plaintiff to file another amended complaint or a new complaint against the defendant, Bondurant ..." (A-10, p.3).

But plaintiff argues that, since she did serve her notice of intent before the limitation period expired, this case is different from Levine and more like Lee v. South Broward Hospital District, 473 So.2d 1322 (Fla. 4th DCA 1985). The plaintiff in Lee, pursuing an action against a governmental subdivision, filed an unauthorized suit because no pre-suit notice had been given, as required by the waiver of sovereign immunity statute, Fla. Stat. §768.28. The Fourth District took this Court's reasoning in Commercial Carrier and extended it far beyond the rule of law in that case, effectively emasculating one very important provision of the statute.

Section 768.28 requires that a notice of claim be given by the claimant to the governmental entity, and the Department of Insurance, and that "an action shall not be instituted" on the claim until it has been denied or six months has passed. Plaintiff Lee could not allege compliance with such pre-suit notice, because he had given none before

filing suit. The Fourth District, citing Commercial Carrier, held that the failure to give notice before suit was not a fatal defect to plaintiff's case.

It is very important to note that, by the time Lee amended his pleadings to allege that he had met the notice requirements, the statute of limitations had run out on his claim. The Lee case is a perfect example of a lower court totally distorting an earlier precedent and writing right out of the statute an essential, clearly stated pre-suit requirement.

Commercial Carrier allowed dismissal with leave to amend, simply to allow plaintiffs to add a necessary statement of fact: that the conditions precedent to filing the suit had been met. If one of the plaintiffs there had not served the notice and had not waited for six months (or until the claim was denied), then he or she could not truthfully allege that compliance. This Court never said that the plaintiffs in Commercial Carrier were excused from the pre-suit notice requirement. In fact, in Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983), decided some four years later, this Court clearly confirmed:

> "Under Section 768.28(6), not only must the notice be given before a suit may be maintained; but also the complaint must contain an allegation of such notice." Id, 442 So.2d at 213 (Emphasis added).

The Fourth District in Lee attempted to distinguish Levine, but it totally ignored the above-quoted language, and the

plain wording of the statute itself in doing so.

The Lee case has been followed by the Third District in State v. Alvarez, 490 So.2d 1068 (Fla. 3d DCA 1986), but with another twist. There, the court apparently concluded that service of the complaint in the lawsuit itself somehow fulfilled the statutory requirements of notice. It is not at all clear whether the suit remained pending during the 6-month waiting period. But if that is what happened in Alvarez, that decision conflicts with the earlier Third District case of Dukanauskas v. Metropolitan Dade County, 378 So.2d 74 (Fla. 3d DCA 1979), which was cited with approval by this Court in Levine v. Dade County School Board.

The First and Second Districts have cited the Lee case in recent decisions, but have recognized that compliance with the notice provision is a condition precedent that must be fulfilled if one wishes to proceed under the waiver of sovereign immunity statute. See, Wemett v. Duval County, 485 So.2d 892 (Fla. 1st DCA 1986) (dismissal without prejudice is proper where plaintiff still had time to comply with the notice requirements and refile his complaint before the statute of limitation expired); and Hardcastle v. Mohr, 483 So.2d 874 (Fla. 2d DCA 1986) (plaintiff who tried his case in the face of an affirmative defense that he failed to comply with the notice provisions, cannot, after resting his case, amend to allege compliance; no prima facie case

made out and res judicata precluded further litigation of the same claim against the same defendant).

It is clear from reviewing these cases that Lee v. South Broward Hospital District, 473 So.2d 1322 (Fla. 4th DCA 1985) is not good law. The requirements of this type of claim - notice statute must be literally complied with, and plaintiff here failed to do so . A new complaint was required to be filed after the statutory pre-suit waiting period had passed, Wemett, and plaintiff failed to do so. It is too late to allege compliance now because the limitation period has expired.

On the authority of Commercial Carrier, Levine, Wemett, and Dukanauskas, no abatement or further amendment should be allowed now. The time for plaintiff to re-file this suit has long-since passed. Her second amended complaint was a nullity, insofar as the statute of limitations is concerned. 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). This being so, it should have been dismissed with prejudice.

CONCLUSION

This Court should quash the decision below and direct the First District to issue a writ of prohibition, or alternatively, certiorari, to preclude Judge Geeker from entertaining plaintiff's case against Dr. Bondurant.