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Sid White
Clerk of the Supreme Court
Tallahassee, Florida 33399-1927

Dear Mr. White:

I am writing to object to the pre-suit screening rules drafted by Mr. Lattimer's committee. In my opinion, these rules attempt to re-write 768.57. For instance, nowhere in 768.57 is a plaintiff entitled to pre-suit discovery from the defense. Nonetheless, the proposed rules provide for this type of discovery. Also, nowhere in 768.57 is a plaintiff entitled to sixty (60) additional days to file suit unless the ninety (90) day period has been previously extended. Nonetheless, the proposed rules grant an additional sixty (60) days under all circumstances. The bottom line is that the proposed rules simply usurp a legislative function and re-write the subject statutory provisions. This is improper and should not be permitted.

My knowledge of the "abuses" that occurred in drafting these pre-suit screening rules comes from actual participation in the drafting process. See enclosed correspondence from me to subcommittee chairman Ted Babbitt dated February 9, 1987. You will note that I objected in paragraph two of the letter to my own rules.

In sum, while we can assume that Mr. Lattimer's committee has the best possible intentions, it simply cannot be permitted to re-write statutes. And that is exactly what has occurred.

Very truly yours,

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P. A.

William Rutger

WR:smt
Enclosure

February 9, 1987

Theodore Babbitt, Esq.
P. O. Drawer 024426
West Palm Beach, Florida 33402-4426

Dear Ted:

You asked me to draft Rules 3 and 4. I thought Rule 3 could be broken down into two separate rules, so enclosed is my draft of Rules 3, 4 and 5. Rules 3 and 4 do not refer expressly to Presuit Screening, because I think it will be obvious that these are all presuit screening rules, and this would simply be redundancy.

I have to object to the concept that the parties themselves are entitled to anything in presuit screening. Again, I think the whole statute envisions an insurance company as the only party authorized to investigate the claim during this presuit period.

As to Rule 3, I left out any requirement that parties other than the requesting party be notified of production. I think such notification would be too cumbersome in the short period of time permitted for the presuit process. I think this information would be readily available through the grapevine, and as a practical matter I think every party should be assumed to be smart enough to fend for itself.

Likewise, Rule 4 does not require someone requesting an examination or statement to serve all the other possible parties with a notice of this request. Again, I think this information is going to be communicated through the grapevine, so to speak. The presuit period is simply too short to permit too much in the way of formality.

Rule 5 is simply a clarification of the definition of "work product" which attempts to define it as including only those matters which originate in the presuit process, which would dis-

tinguish those materials from records, testimony, statements, etc., which pre-exist the process. I struggled with this for a long time, and I think this may be the best way to achieve what you are looking for. The statute seems to use the generic term "work product" to refer to any information "generated" by the presuit process. Work product can take many forms. Rule 5 attempts to limit the privilege accorded this type of work product to original documents created in the presuit process. Therefore, there would be no authority whatsoever for anyone to argue that, say, documents such as medical records, etc., would be accorded any privilege since they are obviously not the original product of the presuit screening process.

I am inclined to object to Rule 5 because it involves some interpretation on my part in the drafting. I am not sure that this is the appropriate subject for a rule. Frankly, I think the statute is clear enough for everyday use. I don't see how anybody could ever interpret it as standing for the proposition that hospital records, for instance, could not be admitted into evidence because somebody already talked about them in the presuit phase.

Please let me know if you have any questions, comments or suggestions for additional workup on this matter prior to the upcoming meeting of the full committee.

Very truly yours,

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.

William Rutger

WR:smt

(2)

RULE 3: Copies of any documents produced in response to the request of any party shall be served upon any other party requesting the same documents upon payment of reasonable copying charges. The party serving the documents or his attorney shall prepare a notice of service to accompany the originally produced documents and all documents produced in response to subsequent requests which shall identify the name and address of the person to whom the documents were served, the date of service, the manner of service, and the identity of the documents served.

RULE 4: All requests for physical examinations or notices of unsworn statements shall be in writing and shall bear a certificate of service identifying the name and address of the person to whom the request or notice is ~~sent~~ served, the date of the request or notice and the manner of serving same.

RULE 5: Work products "generated" by the presuit screening process is limited to communications, verbal or written, which originate pursuant to the presuit screening process.

768.48 Itemized verdict.—[Repealed by s. 68, ch. 86-160.]

768.49 Remittitur and additur.—[Repealed by s. 68, ch. 86-160.]

768.495 Pleading in medical negligence cases; claim for punitive damages.—

(1) No action shall be filed for personal injury or wrongful death arising out of medical negligence, whether in tort or in contract, unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint or initial pleading shall contain a certificate of counsel that such reasonable investigation gave rise to a good faith belief that grounds exist for an action against each named defendant. For purposes of this section, good faith may be shown to exist if the claimant or his counsel has received a written opinion, which shall not be subject to discovery by an opposing party, of an expert as defined in s. 768.45 that there appears to be evidence of medical negligence. If the court determines that such certificate of counsel was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court shall award attorney's fees and taxable costs against claimant's counsel, and shall submit the matter to The Florida Bar for disciplinary review of the attorney.

(2) Upon petition to the clerk of the court where the suit will be filed and payment to the clerk of a filing fee, not to exceed $25, established by the chief judge, an automatic 90-day extension of the statute of limitations shall be granted to allow the reasonable investigation required by subsection (1). This period shall be in addition to other tolling periods. No court order is required for the extension to be effective. The provisions of this subsection shall not be deemed to revive a cause of action on which the statute of limitations has run.

History.—s. 12, ch. 85-175; s. 68, ch. 86-160; s. 8, ch. 86-287.

cf.—s. 95.11 Limitation of actions with respect to "action for medical malpractice," as defined.

768.50 Collateral sources of indemnity.—[Repealed by s. 68, ch. 86-160.]

768.51 Alternative methods of payment of damage awards.—[Repealed by s. 68, ch. 86-160.]

768.57 Notice before filing action for medical malpractice; presuit screening period; offers for admission of liability and for arbitration; review.—

(1) As used in this section:

(a) "Claim for medical malpractice" means a claim arising out of the rendering of, or the failure to render, medical care or services.

(b) "Self-insurer" means any self-insurer authorized under s. 627.357 or any uninsured prospective defendant.

(c) "Insurer" includes the Joint Underwriting Association.

(2) Prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical malpractice.

(3)(a) No suit may be filed for a period of 90 days after notice is mailed to the prospective defendant, except that this period shall be 180 days if controlled by s. 768.28(6)(a). Reference to the 90-day period includes such extended period. During the 90-day period, the prospective defendant's insurer or self-insurer shall conduct a review to determine the liability of the defendant. Each insurer or self-insurer shall have a procedure for the prompt investigation, review, and evaluation of claims during the 90-day period. This procedure shall include one or more of the following:

1. Internal review by a duly qualified claims adjuster;

2. Creation of a panel comprised of an attorney knowledgeable in the prosecution or defense of medical malpractice actions, a health care provider trained in the same or similar medical specialty as the prospective defendant, and a duly qualified claims adjuster;

3. A contractual agreement with a state or local professional society of health care providers, which maintains a medical review committee;

4. Any other similar procedure which fairly and promptly evaluates the pending claim.

Each insurer or self-insurer shall investigate the claim in good faith, and both the claimant and prospective defendant shall cooperate with the insurer in good faith. If the insurer requires, a claimant shall appear before a pretrial screening panel or before a medical review committee and shall submit to a physical examination, if required. Unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses. There shall be no civil liability for participation in a pretrial screening procedure if done without intentional fraud.

(b) At or before the end of the 90 days, the insurer or self-insurer shall provide the claimant with a response:

1. Rejecting the claim;

2. Making a settlement offer; or

3. Making an offer of admission of liability and for arbitration on the issue of damages. This offer may be made contingent upon a limit of general damages.

(c) The response shall be delivered to the claimant if not represented by counsel or to the claimant's attorney, by certified mail, return receipt requested. Failure of the prospective defendant or insurer or self-insurer to reply to the notice within 90 days after receipt shall be deemed a final rejection of the claim for purposes of this section.

(d) Within 30 days of receipt of a response by a prospective defendant, insurer, or self-insurer to a claimant represented by an attorney, the attorney shall advise the claimant in writing of the response, including:

1. The exact nature of the response under paragraph (b).

2. The exact terms of any settlement offer, or admission of liability and offer of arbitration on damages.

3. The legal and financial consequences of acceptance or rejection of any settlement offer, or admission of liability, including the provisions of this section.

4. An evaluation of the time and likelihood of ultimate success at trial on the merits of the claimant's action.

5. An estimation of the costs and attorney's fees of proceeding through trial.

[1](4) The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

(5) No statement, discussion, written document, report, or other work product generated by the presuit screening process is discoverable or admissible in any civil action for any purpose by the opposing party. All participants, including, but not limited to, physicians, investigators, witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit screening process.

(6) Upon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information available without formal discovery. Failure to do so is grounds for dismissal of claims or defenses ultimately asserted.

(7) If a prospective defendant makes an offer to admit liability and for arbitration on the issue of damages, the claimant has 50 days from the date of receipt of the offer to accept or reject it. The claimant shall respond in writing to the insurer or self-insurer by certified mail, return receipt requested. If the claimant rejects the offer, he may then file suit. Acceptance of the offer of admission of liability and for arbitration waives recourse to any other remedy by the parties, and the claimant's written acceptance of the offer shall so state.

(a) If rejected, the offer to admit liability and for arbitration on damages is not admissible in any subsequent litigation. Upon rejection of the offer to admit liability and for arbitration, the claimant has 60 days or the remainder of the period of the statute of limitations, whichever period is greater, in which to file suit.

(b) If the offer to admit liability and for arbitration on damages is accepted, the parties have 30 days from the date of acceptance to settle the amount of damages. If the parties have not reached agreement after 30 days, they shall proceed to binding arbitration to determine the amount of damages as follows:

1. Each party shall identify his arbitrator to the opposing party not later than 35 days after the date of acceptance.

2. The two arbitrators shall, within 1 week after they are notified of their appointment, agree upon a third arbitrator. If they cannot agree on a third arbitrator, selection of the third arbitrator shall be in accordance with chapter 682.

3. Not later than 30 days after the selection of a third arbitrator, the parties shall file written arguments with each arbitrator and with each other indicating total damages.

4. Unless otherwise determined by the arbitration panel, within 10 days after the receipt of such arguments, unless the parties have agreed to a settlement, there shall be a 1-day hearing, at which formal rules of evidence and the rules of civil procedure shall not apply, during which each party shall present evidence as to damages. Each party shall identify the total dollar amount which he feels should be awarded.

5. No later than 2 weeks after the hearing, the arbitrators shall notify the parties of their determination of the total award. The court shall have jurisdiction to enforce any award or agreement for periodic payment of future damages.

(8) If there is more than one prospective defendant, the claimant shall provide the notice of claim and follow the procedures in this section for each defendant. If an offer to admit liability and for arbitration is accepted, the procedures shall be initiated separately for each defendant, unless multiple offers are made by more than one prospective defendant and are accepted and the parties agree to consolidated arbitration. Any agreement for consolidated arbitration shall be filed with the court. No offer by any prospective defendant to admit liability and for arbitration is admissible in any civil action.

(9) To the extent not inconsistent with this part, the provisions of chapter 682, the Florida Arbitration Code, shall be applicable to such proceedings.

(10) This section shall apply to any cause of action with respect to which suit has not been filed prior to October 1, 1985.

History.—s. 14, ch. 85-175; s. 9, ch. 86-287.

[1]**Note.**—As amended by s. 9, ch. 86-287; s. 16, ch. 86-287, provides in pertinent part that "the amendment to s. 768.57(4) . . . provided in this act shall operate retroactively to October 1, 1985."

[1]768.575 Court-ordered arbitration.—

(1) In an action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 768.50(2), the court may require, upon motion by either party, that the claim be submitted to nonbinding arbitration. Within 10 days after the court determines the matter will be submitted to arbitration, the court shall submit