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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

HOSPITAL CORPORATION OF AMERICA, etc.,
Petitioner,

v. CASE NO. 74,466

KURT LINDBERG, et ux,
Respondents.

JAIME ALALU, M.D., et al
Petitioners,

v. CASE NO. 74,563

KURT LINDBERG, et ux,
Respondents.

ROBERT K.T. LIEM, M.D., et al,
Petitioners,

v. CASE NO. 74,564

KURT LINDBERG, et ux.,
Respondents.
_____/

CONSOLIDATED ANSWER BRIEF OF RESPONDENTS ON THE MERITS

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CITATIONS OF AUTHORITY

PREFACE

Petitioners were the Defendants and Appellees and Respondents were the Plaintiffs and Appellants in the trial and appellate courts, respectively. In this Brief, the parties will be referred to by their proper names and as they appeared in the trial court. The following symbols will be used:

"R" = Record on Appeal;

"S" = Supplement to Record on Appeal, filed in the Fourth District;

"SR-1" = Supplement to the Record on Appeal, filed by the Clerk of the Circuit Court;

Unless otherwise indicated, all emphasis in this Brief is supplied by Plaintiffs/Respondents.

STATEMENT OF THE CASE AND FACTS

Plaintiffs accept the Statements of the Case and Facts presented in all briefs filed by the various petitioners, to the extent that they present an accurate, non-argumentative recitation of proceedings in the trial and appellate courts, with the following additions and/or clarifications:

The Defendant Hospital filed a Motion to Dismiss the action (R20), and Defendants Alalu, Liem, and Cheong filed Amended Motions to Dismiss (R30-31, 74-75). The allegations which they shared in common were that Plaintiffs had failed to comply with the requirements of §768.57(2)&(3)(a), Fla. Stat. (1985), which required that a medical malpractice claimant serve by certified

mail a notice of intent to initiate litigation for medical malpractice on each prospective defendant, and that suit may not be filed until ninety days after the notice is served upon each defendant. The Defendants also argued in their motions that the complaint should be dismissed for failure to allege compliance with the notice requirements set forth in the statute. Further, Defendants Hospital, Liem, and Cheong (but not Alalu) also moved to dismiss on the basis that the complaint did not contain a certificate of counsel that a reasonable investigation gave rise to a good faith belief that grounds existed for a medical malpractice action against the Defendants, as required by §768.495(1), Fla. Stat. (1985). Defendant Alalu amended his original Motion to Dismiss (R21-22) to include only failure to comply with §768.57(R30-31).

Plaintiffs do not agree with the assertion in the briefs filed by Defendants Liem, Cheong and Alalu that notices of intent to initiate litigation were not served on all Defendants. Moreover, this issue has not been preserved for appellate review, since none of these Defendants raised that issue in their written motions to dismiss, or at the hearing on the motions (R30-31, 74-75) (SR-1 1-10).

SUMMARY OF ARGUMENT

The Opinion of the Fourth District should be approved, and the certified question should be answered consistent with that Opinion. In fact, the district courts whose earlier opinions were relied upon by the trial court in dismissing the complaint have shown in their later opinions that, in all likelihood, were they presented with this case, they would decide it as the Fourth District did. Specifically, the point which separates this case from previous opinions is that, unlike in those cases, here the notices of intent to initiate litigation were served before the statute of limitations expired. The defect in this case is not a time-barring failure to serve notices, but the filing of a premature complaint. As the Fourth District reasoned, the trial court should have denied the motions to dismiss, and should have permitted Plaintiffs to file an amended complaint after a period of abatement to allow the screening process to take place. This result is consistent with decisions by the district courts and this Court regarding the notice requirement in the sovereign immunity statute, and by this Court's most recent opinion in the mechanic's lien context. Here, where the notices were served and the complaint was filed within the statute of limitations, any application of the statute which would render Plaintiffs' lawsuit a nullity would render the statute unconstitutional as applied, in violation of equal protection and Florida's guarantee of access to courts.

ARGUMENT

THE FAILURE TO FOLLOW THE PRE-SUIT SCREENING PROCESS OF S768.57, FLA. STAT. (1985), IS NOT A FATAL JURISDICTIONAL DEFECT, BUT MAY BE CORRECTED BY FOLLOWING THE PROCEDURE AFTER FILING THE COMPLAINT SO LONG AS THE NOTICE OF INTENT TO LITIGATE IS SERVED WITHIN THE STATUTORY LIMITATIONS PERIOD.

The Fourth District correctly concluded that the failure to comply with the ninety-day pre-suit screening process mandated by S768.57 Fla. Stat. (1985), is not fatal so long as the notice of intent to litigate has been served within the statute of limitations period. LINDBERG v. HOSPITAL CORP. OF AMERICA, 454 So.2d 1384 (Fla. 4th DCA 1989). The pivotal factual distinction which sets this case apart from cases which had been decided in other districts before the instant case is that in the instant case the notices were served before the statute of limitations expired.

Previously, in PUBLIC HEALTH TRUST OF DADE COUNTY v. KNUCK, 495 So.2d 834 (Fla. 3d DCA 1986), the Third District had held that in order to toll the statute of limitations, a plaintiff must serve a notice of intent to initiate litigation within the limitations period. 495 So.2d at 837. Because the plaintiff in that case had filed a complaint but had served a notice on only one of the defendants in that case within the limitations period, that defect was fatal with respect to the defendants who had not been served notice. The Second District followed the KNUCK holding in BRUCE H. LYNN, M.D., P.A. v. MILLER, 498 So.2d 1011 (Fla. 2d DCA 1986), where the plaintiffs also filed their complaint without first filing a notice of intent. The court

held that compliance with the requirements of the statute is a condition precedent to maintaining suit which must be satisfied within the applicable statute of limitations. If limitations has expired without the filing of a notice, the trial court cannot abate a premature complaint to allow compliance with the notice requirement, even if the complaint would otherwise have been timely. 498 So.2d at 1012.

In the instant case, notices were served on each of the Defendants by certified mail on the same day on which the complaint was filed (SR-1-4). Thus, Plaintiffs argued, and the Fourth District agreed, that the defect here was not the failure to provide notice, but the filing of the complaint before the expiration of the ninety-day period set forth in the statute, so that the issue here was not a time-barring lack of notice, but the filing of a premature complaint. The Second District today would also apparently agree, for as the Fourth District pointed out in its opinion, in two later cases the Second District held that notices of intent to initiate litigation served after the filing of a first complaint, which was subsequently dismissed, satisfied the notice requirement with respect to a later-filed second complaint because the notices were served within the statute of limitations. See NASH v. HUMANA SUN BAY COMMUNITY HOSPITAL, INC., 426 So.2d 1036 (Fla. 2d DCA), rev. denied, 531 So.2d 1354 (Fla. 1988); CASTRO v. DAVIS, 527 So.2d 250 (Fla. 2d DCA 1988).

Although the factual scenarios of NASH and CASTRO differ from the factual posture of the instant case, they support the

Fourth District's decision because in the instant case, since the notices were served and the complaints were filed within the statute of limitations, the requirements of §768.57(2) can be satisfied by permitting Plaintiffs to file an amended complaint. In CASTRO and NASH, the statute was satisfied when a second complaint was filed after service of the notices. The procedural defect here can be cured just as it was in CASTRO and NASH, but no cure was possible in KNUCK and MILLER, because limitations had expired without the service of any notice.

Further support for the Fourth District's decision here is found in the recent decision by the Third District in ANGRAND v. FOX, 14 F.L.W. 2135 (Fla. 3d DCA September 22, 1989). In ANGRAND, the notice was served within the statute of limitations, but the complaint was filed less than ninety days thereafter. The trial court dismissed because the action had been commenced prior to the conclusion of the ninety-day period, and the Third District reversed, reasoning as follows:

> We first hold that ANGRAND I, which was at worst filed prematurely, was not for that reason a nullity and could not properly have been dismissed. It is important to note that prior to its filing on September 8, 1987, due notice had been given to the defendants as required by section 768.57(3)(a); moreover, there is not even a claim that, at that point, the limitations period had run. Thus, the only alleged defect in the complaint was that it was brought too soon. Mere prematurity, which is by definition curable simply by the passage of time is, however, not a proper basis for the outright dismissal of an action. Such a determination has no other effect than to require a refiling which benefits only the clerk by the payment of additional fees. Instead, the proper remedy is an abatement or stay of the claim for the

> period necessary for its maturation under the law.

Id. at 2135-2136 (footnotes omitted). In a footnote, the court further reasoned that the ninety-day period before commencement of an action is intended to permit the parties to learn each other's position and to engage in reasonable settlement negotiations. The court concluded that there "is no reason why this process should be affected by the fact that a complaint has been filed in the interim." 14 F.L.W. at 2137 n.8. Here, the complaint was also filed prematurely, and as in ANGRAND, "there is not even a claim that, at that point, the limitations period had run." Id. Thus, abatement was the proper remedy here, as in ANGRAND.

However, the Fourth District found express conflict with the Second District's earlier opinion in PEARLSTEIN v. MALUNNEY, 500 So.2d 585 (Fla. 2d DCA 1986), rev. denied, 511 So.2d 299 (Fla. 1987)(PEARLSTEIN I), in light of the further facts related about that case in MALUNNEY v. PEARLSTEIN, 539 So.2d 493 (Fla.2d DCA 1989)(PEARLSTEIN II). In PEARLSTEIN I the plaintiffs filed their complaint without serving a notice of intent to initiate litigation. The Second District held that the legislature meant what it said when it distinguished the filing of a complaint from the furnishing of a pre-filing notice, and since no notice had been served, the trial court could not abate "what is, for all intents and purposes, a nonexistent lawsuit...." 500 So.2d at 587. In PEARLSTEIN 11, the Second District clarified that in "PEARLSTEIN I we rejected the notion that mere filing of the

complaint satisfied the statutory notice requirement." 539 So.2d at 495.

In PEARLSTEIN II, the court elaborated further on the facts Of that case. As it happens, just over a month after filing the initial complaint, the plaintiffs in PEARLSTEIN mailed a notice Of intent to litigate in February 1986, and after losing the first appeal in PEARLSTEIN I, they filed a second complaint, reciting the service of the February 1986 notice, and alleging a different trigger date for the statute of limitations. This time, the Second District reversed the dismissal by the trial court because "a second complaint embodying the essential notice element was filed." 539 So.2d at 495. The court stated that it was not the intent of the statute "to oust a plaintiff from the ability to pursue a new or subsequent action for the alleged malpractice." Id. at 496.

Thus, as Plaintiffs read the cases, PEARLSTEIN II ended differently than PEARLSTEIN I because in PEARLSTEIN II, a notice of intent had been filed within the statutory period, as in the instant case. Plaintiffs respectfully suggest that, contrary to the Fourth District's conclusion, there is no conflict between the decision in the instant case and PEARLSTEIN I. The Fourth District read that case as affirming dismissal of the complaint because the notice was filed within the statute of limitations but after the complaint. Plaintiffs maintain that nowhere in PEARLSTEIN I does the Second District recite that a notice was ever filed, and that that fact emerges only after having read PEARLSTEIN II. Thus, when so read, PEARLSTEIN I simply stands

for the same proposition as KNUCK and MILLER, supra, that is, that the failure to serve any notice of intent to initiate litigation within the statute of limitations period is a fatal defect. At any rate, PEARLSTEIN II supports the Fourth District's decision in the same manner as do the NASH and CASTRO cases.

Moreover, the Third District's disposition of the notice issue with respect to one of the parties in KNUCK, supra, also supports the Fourth District's decision. In KNUCK, the trial court had abated the action against defendants Jackson Memorial Hospital, the University of Miami, and Dr. Scheinberg, and those defendants sought a writ of prohibition to preclude the trial court from reviving the action. The writ was granted as to the University and Dr. Scheinberg, who had not been served with a notice of intent to initiate litigation within the statute of limitations period, but the writ was denied as to Jackson Memorial Hospital, which had been served notice. Defendants Liem and Cheong and Alalu have argued that Jackson was treated differently because the statute of limitations which applied to it was four years, while the two-year statute applied to the other two Defendants. 495 So.2d at 837. Their explanation cannot be correct, and they have apparently overlooked the precise action by the Third District.

In KNUCK, with respect to Jackson Memorial, the Third District denied prohibition and allowed the trial court to revive the action. However, the trial court could not revive the action if it had not been properly initiated. Thus, as to Jackson

Memorial, since both a notice of intent and a complaint had been served and filed, respectively, within the statutory period, the Third District obviously believed that, unlike the other two defendants against whom the statute had run without service of a notice of intent, Jackson Memorial was properly in the suit, and the trial court had the power to revive the action against it. A close analysis of that case shows that the length of the respective statutes of limitations which applied to the defendants was not the pivotal point; the fact that Jackson Memorial had received the notice of intent was. Moreover, this reading of KNUCK is confirmed by the Third District's summary of the holding of that case in ANGRAND, supra, where it summarized the KNUCK holding with the following squib: "abatement not permissible when notice could not be filed within limitations." 14 F.L.W. at 2136.

This analysis is consistent with what this Court has done in the past regarding the notice requirement governing the sovereign immunity statute, as the Fourth District also discussed in its opinion. 554 So.2d at 1387-1388. In LEE v. SOUTH BROWARD HOSPITAL DISTRICT, 473 So.2d 1322 (Fla. 4th DCA 1985), relying on this Court's opinion in COMMERCIAL CARRIER CORP. v. INDIAN RIVER COUNTY, 371 So.2d 1010, 1022-1023 (Fla. 1979), the Fourth District determined that the failure to file a notice of intent to litigate required by S768.28, Fla. Stat. (Supp. 1980), of the sovereign immunity statute did not justify dismissal with prejudice where the notice had been served after the complaint, but within the statute of limitations. The Fifth District

reached essentially the same conclusion in ASKEW v. VOLUSIA COUNTY, 450 So.2d 233 (Fla. 5th DCA 1984), and the First District ruled likewise in WEMETT v. DWAL COUNTY, 485 So.2d 892 (Fla. 1st DCA 1986). Thus, the sovereign immunity cases also support the decision under review here.

All Defendants argue that cases construing the notice requirement in the sovereign immunity statute are inapposite because that statute provides no reciprocal obligations on the public agency, no pre-suit screening process, and no mandatory investigatory process. However, the relevant portion of that statute, §768.28(6), Fla. Stat. (Supp. 1980), provided that no action could be instituted on a claim against the state or one of its agencies unless the claim had been presented first in writing, and then denied in writing. The statute also provided that the "failure of the Department of Insurance or the appropriate agency to make final disposition of a claim within six months after it is filed shall be deemed a final denial of the claim for purposes of this section." Obviously, even though that statute did not delineate the precise procedures to be followed by the prospective defendant, it comprehended that there would be investigation and effort towards both evaluation of the claim and final disposition (i.e., settlement) during the six-month period. The fact that the statute at issue here does delineate the procedures to be followed by prospective defendants does not require that a procedural failure with respect to the notice requirement should have draconian results here, any more than it did in cases such as LEE v. SOUTH BROWARD HOSPITAL

DISTRICT, supra, *so* long as the notice has been served within the statutory period. The substantive distinction which all of the Defendants portray between the sovereign immunity statute and the malpractice format, on close inspection, is not there.

A related argument is the Defendants' contention that a mandatory prerequisite to filing the complaint is not only the service of the notice, but the pre-suit screening process itself. Obviously, all of the Defendants recognized that they needed this argument in the original appeal because, unlike the cases which had been decided to that point, here the notices had been timely served. However, the Fourth District properly rejected that argument.

First, the argument fails under the plain language of the statute itself. After the notice is served, the only responsibility placed on the plaintiff is to hold off filing the complaint for ninety days, §768.57(3)(a), and to make discoverable information available, obviously on request. §768.57(6). Otherwise, the ball is in the court of a prospective defendant's insurer or self-insurer. Specifically, under §768.57(3)(a)-(c), it is the responsibility of the defendant's insurer or self-insurer to initiate a review to determine liability of the defendant in the manner specified by the statute. The duty to investigate is theirs, as is the duty to provide a response to the claim within ninety days of service of the notice. Aside from being available to discovery requests, the claimant or claimant's attorney has no responsibility

regarding screening or settlement until after the ninety days, unless a response has been received before then. §768.57(d).

Significantly, none of the Defendants in this case has ever alleged that it did anything whatsoever between the time the notices were received and the complaints were served, despite the burden which the statute places on them to begin the screening process. It is apparent that they all sat back and waited to see if the procedural snafu by Plaintiffs would result in the windfall of dismissal. None of them explain why the procedures outlined in the statute cannot now be fulfilled. See ANGRAND, supra, at 2137 n.8. Certainly, it is neither the usual course which the statute comprehends, nor a technically correct course under the statute, but Plaintiffs still maintain that the failure to wait ninety days before filing the complaint is not a jurisdictional defect which should completely defeat their case.

Furthermore, the logical extension of the argument that notices and screening are both conditions precedent to suit is that any defect in the conduct of the pre-suit screening process which could be attributed to a plaintiff would also render the notice meaningless, so that the statute of limitations was never tolled. In such cases, the courts would have to scrutinize the screening process itself to determine whether there had been sufficient compliance with it to toll the statute. While the defense might argue that this argument is far-fetched, it is no more far-fetched than the position taken by defendants in other cases where they have unsuccessfully argued that the complaint must be filed within ninety days of the service of the notice,

even though the statute of limitations has not expired. See NASH v. HUMANA SUN BAY COMMUNITY HOSPITAL, INC., supra; CASTRO v. DAVIS, supra. The only workable interpretation of the statute is that service of the notice of intent tolls the statute of limitations, as the Third District stated in KNUCK, where it explained that in

> order to toll the statute of limitations...a plaintiff must adhere to the mandate of Section 768.57(2), and serve a notice of intent to initiate litigation within the limitations period set forth in Section 95.11.

495 So.2d at 837.

The Defendants also argue that Plaintiffs' lawsuit is dead because the statute of limitations expired before the hearing on the motions to dismiss, even including the ninety-day period. They point out correctly that service of the notice does not toll the limitations period indefinitely. However, that argument is not fatal to Plaintiffs' position. While cases such as PEARLSTEIN I and KNUCK held that a complaint filed without service of a notice is a nullity, and therefore there could be no abatement since the statute of limitations expired before any notice was served, here, the notice was served and the complaint was filed within the statute of limitations. In such a case as this, the complaint is premature, but it is not a nullity. Since the complaint in the instant case was unquestionably filed within the statute of limitations period, under settled law an amended complaint which carries the necessary recital of fulfillment of the notice requirement and a certificate of good faith will

relate back to the filing of the initial complaints. See **HENRION** v. SHOOK, 490 So.2d 1283 (Fla. 4th DCA 1986).[1]

Defendant Alalu argues that Plaintiffs did not preserve this issue for appeal because they did not request abatement of the action before the trial court. It is certainly true that Plaintiffs did not use the word "abatement." However, at the hearing, after arguing that the statute was unconstitutional and should not be applied retroactively in this case, Plaintiffs' counsel requested that, if the court felt that the statute did apply, Plaintiffs be given leave of court "to amend to assert compliance with this statute if you feel it's important." (SR-1 8). Obviously, there would be no point to amending to assert compliance without time to comply. The Fourth District agreed with Plaintiffs that abatement was implicit in their request made to the trial court, and did not find the need to address the issue in the opinion. Rejecting an argument sub silentio does not mean that it was ignored or undecided.

Defendants Alalu, Liem and Cheong argue that the notices were defective with respect to them personally, because they were sent only to their P.A.s. Defendant Alalu complained that the

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[1] Defendant Alalu's argument at page 24 of his brief that abatement would only have been permitted had it been requested before the expiration of the statute of limitations misunderstands abatement. Abatement refers to a stay of the action, once the action has been properly initiated within the limitations period. Defendant Alalu appears to confuse abatement of an action with tolling of the statute of limitations, two distinct matters. Defendant Hospital appears to have confused the two as well in its argument at pages 14-15 of its brief.

Fourth District ignored this issue. However, the Fourth District had a very good reason to reject this issue on appeal, since it was not preserved in the trial court. An examination of the motions filed by these Defendants (R30-31, 74-75), as well as the hearing on the motions (SR-1 1-10) will show that the issue was never raised in the trial court, nor mentioned by counsel for any Defendant at the hearing. Having failed to preserve the issue, these Defendants cannot complain that the Fourth District did not decide it in their favor.

Moreover, the notices (SR) were addressed to "Bernard Cheong, M.D., P.A.," "Robert K. T. Liem, M.D., P.A.," and "Jaime Alalu, M.D., P.A.," and were addressed "Dear Dr. Cheong:", "Dear Dr. Liem:", and "Dear Dr. Alalu:". The body of the letters notified the doctors that Plaintiffs intended to sue for personal injuries sustained by Kurt Lindberg during the course of care, "by the above Defendants for the period of April 10, 1984 and continuing through his period of hospitalization of May 11, 1984." Obviously, the letters were sufficient to place both the M.D.s and the P.A.s on notice, since the P.A.s act only through the M.D.s. It must be remembered that, as the court in PEARLSTEIN I noted, the statute does not specify any particular form of the notice beyond the requirement that it be in writing. 500 So.2d at 587.

Further, Defendant Alalu incorrectly argues that Fla.R.Civ.P. 1.650(b)(1) does not apply here, because it was enacted after the notices in this case were served. That rule provides that a notice of intent received by any prospective

defendant shall operate as notice to the person and any other prospective defendant who bears a legal relationship to the prospective defendant receiving the notice. Plaintiffs maintain that that rule does answer the issue here, because decisional law and rules in effect at the time an appeal is decided govern the case even if there has been a change since the time the matter was heard in the trial court. See LOWE V. PRICE, **437** So.2d **142, 144** (Fla. **1983).** This is not a case like STOWIK V. SIRKER, **522** So.2d **107** (Fla. 4th DCA **1988),** where the appellate court determined that the extension of the pre-suit screening period for negotiation with some defendants did not toll the statute of limitations as to all the defendants, nor it is a case like GLINECK V. LENTZ, **524** So.2d **458** (Fla. 5th DCA **1988),** where notice of intent was only given orally. Of course, there is no contention here of any misnomer of any Defendant in the complaint. Thus, Plaintiffs maintain that this issue was not preserved for appellate review, is governed by the new procedural rule and the intent expressed therein, and is otherwise without merit.

As for the argument (raised by all Defendants but Alalu in the trial court) that dismissal was justified because the complaint failed to allege compliance with the notice requirement and did not contain the certificate of counsel required by **§768.495(1),** Fla. Stat. **(1985),** in NASH V. HUMANA **SUN** BAY COMMUNITY HOSPITAL, INC., supra, at **1038-1039,** the Second District held that the trial court should have allowed amendment of the complaint to allege these matters, since the requirement

of the certificate is neither jurisdictional nor an essential element of the cause of action. In the sovereign immunity context, this Court rejected the argument that failure to allege compliance with the notice requirement in the complaint is grounds for dismissal. In COMMERCIAL CARRIER CORP., supra, where the issue was the failure to plead compliance with the notice requirement of §768.28(6) Fla. Stat. (1975), the Court stated that compliance with the notice subsection of the statute was a condition precedent to maintaining suit, the performance of which should be alleged in the complaint under Fla.R.Civ.P. 1.120(c), but that "failure of the pleading in this regard does not call for dismissal with prejudice." 371 So.2d at 1022-1023. Plaintiffs maintain that the same analysis applies here.

Defendant Alalu's arguments at pages 17-20 of his brief regarding the expenditure of a physician's deductible and the possibility that a physician may have to report a claim to the Department of Professional Regulation were never raised anywhere in this case before, and cannot be raised at this stage of appellate review. Further, the Defendant Hospital's argument that a corporate defendant could conduct pre-suit procedures internally, without counsel, is unrealistic, unless a defendant is satisfied to assess its legal position in a prospective lawsuit without the benefit of legal advice. Surely, that is not what the statute comprehends. In fact, at §768.57(3)(a)2, the statute proposes that a prospective defendant create a panel comprised of, among others, an attorney knowledgeable in the

prosecution or defense of medical malpractice claims to evaluate the claim during the ninety-day period.

Finally, Plaintiffs respectfully maintain that the district courts of appeal whose earliest opinions on this statute were cited to the trial court as authority for dismissal, and were found not applicable by the Fourth District, have themselves moved in the direction of the Fourth District's disposition of the case. While the Fourth District acknowledged conflict with the Second District's earliest opinion in the area, PEARLSTEIN I, the Second District's more recent opinions in PEARLSTEIN 11, CASTRO, NASH, and SOLIMANDO v. INTERNATIONAL MEDICAL CENTERS, H.M.O., **544** So.2d **1031** (Fla. 2d DCA **1989),** suggest that had the Second District been presented with the facts of this case, it would probably have decided it as did the Fourth District.

Similarly, the Third District appears to have stepped back from its earliest opinion in KNUCK, and in fact has expressly approved the Fourth District's opinion in the instant case. See ANGRAND, supra, **14** F.L.W. at **2137** n.7. The Fourth District's decision is consistent with this Court's approach to similar issues in the sovereign immunity context, COMMERCIAL CARRIER, supra, and in the mechanics' lien context, HOLDING ELECTRIC, INC. v. ROBERTS, **530** So.2d **301** (Fla. **1988).** While Plaintiffs raised several constitutional arguments in the trial and appellate courts, at this point the only constitutional argument which they will assert is that if, in light of the construction of similar statutes and now-extant decisional law on this statute, **§768.57** is construed to nullify the instant action where both the notices

and the complaint were served and filed within the statute of limitations, then the statute is unconstitutional as applied, violative of both equal protection and Florida's access to courts guarantee.

However, Plaintiffs anticipate no such result in this case. Rather, they urge this Court to approve the Fourth District's Opinion. In their briefs, the Defendants raise a number of policy arguments regarding the intent of the statute. For the most part, Plaintiffs have no quarrel with those arguments, to the extent that the statute is intended to ferret out unfounded claims, and facilitate the rapid disposition of valid claims. However, public policy does not require dismissal under the facts of this case. If anything, public policy requires the opposite, so that the statute does not degenerate into a virtual playground for the defense bar.

CONCLUSION

Based on the foregoing argument, Respondents respectfully request that the Fourth District Court of Appeal's Opinion of July 12, **1989,** be approved, and that the certified question be answered in a manner consistent with the Fourth District's Opinion.

I HEREBY CERTIFY THAT a true and correct copy of the foregoing was served by U.S. mail this 6th day of November, **1989,** to STEPHANIE ARMA KRAFT, ESQ., P.O. Box **14723, 633** S. Federal Hwy., Ft. Lauderdale, FL **33302,** DEBRA J. **SNOW,** ESQ. and ROBERT

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