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IN THE SUPREME COURT OF THE STATE OF FLORIDA

HOSPITAL CORPORATION OF AMERICA,
Petitioner,
vs.

KURT LINDBERG, ET UX.
Respondents.

CASE NO. 74,466

JAIME ALALU, M.D., ET AL.,
Petitioners,
vs.

KURT LINDBERG, ET UX.,
Respondents.

CASE NO. 74,563

ROBERT K.T. LIEM, M.D., ET AL.:
Petitioners,
vs.

KURT LINDBERG, ET UX.,
Respondents.

CASE NO. 74,564

INITIAL BRIEF OF PETITIONER HOSPITAL CORPORATION OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
IN AND FOR THE FOURTH DISTRICT OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Respondents KURT and MARY LINDBERG, plaintiffs in the trial court, filed a complaint alleging medical malpractice against the Petitioners on April 4, 1986, shortly before the two year statute of limitations expired.[1] That same day they sent all the defendants, by certified mail, the required notices of intent to initiate litigation required by section 768.57, Fla. Stat. (1985).

Section 768.57 (1985), Fla. Stat.,[2] which undisputedly governs this action, mandates that a medical malpractice claimant must send a notice of intent to initiate litigation to all prospective defendants prior to filing his or her claim. Further, the statute precludes the filing of an actual medical malpractice complaint for ninety (90) days after such notice is sent, with one exception not relevant here.

Some six months later, after the statute of limitations had run, the defendants filed motions to dismiss arguing, inter alia, that the plaintiffs' complaint was deficient since it failed to allege compliance with the pre-suit notice requirement of section 768.57 and the pre-suit investigation requirements of section 768.495, Fla. Stat. (1985). Further, the plaintiffs could not cure their failure because they in fact did not comply

[1] Section 95.11 (4)(b), Florida Statutes. The actions complained of occurred between April 10 and May 11, 1984.

[2] This section now appears as section 766.106, Florida Statutes (1988 supp.).

with those requirements, having sent the notice and complaint the same day, in contravention of the clear terms of the statute. The trial court granted the motions, and dismissed the case with prejudice. Plaintiffs appealed, and the Fourth District Court of Appeal reversed.

The Fourth District ruled that a plaintiff's failure to comply with the pre-suit notice requirement of 768.57 does not deprive the court of subject matter jurisdiction, analogizing the pre-suit notice requirement in medical malpractice cases to the pre-suit notice requirement in sovereign immunity and mechanics' lien cases. The court held that since the notice requirement was not jurisdictional, and since notice was given within the statute of limitations period, the trial court should have dismissed the first complaint without prejudice. This is true, the court reasoned, because filing the notice tolled the statutory limitations period; if the complaint were simply abated for the notice period and deemed filed at its end, the plaintiffs would have complied with the pre-suit requirements of section 768.57, and could then amend their complaint to allege such compliance.

The Fourth District acknowledged, however, that "such a holding strikes at the very heart of the pre-suit screening process," Lindbers v. Hospital Corporation of America, 545 So.2d 1384, 1388 (Fla. 4th DCA 1989), and directly conflicts with Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986), rev. denied, 511 So.2d 299 (Fla. 1987) and Malunnev v. Pearlstein,

539 So.2d 493 (Fla. 2d DCA 1989), rev. denied, ___ So.2d ___ (June 20, 1989), both of which held that the pre-suit notice requirement is jurisdictional. Based on this conflict, and a concomitant recognition that the issue is one of great public importance, the Fourth District certified the following question to this Court:

> IS THE FAILURE TO FOLLOW THE PRE-SUIT SCREENING PROCESS OF SECTION 768.57, FLORIDA STATUTES, A FATAL JURISDICTIONAL DEFECT OR MAY IT BE CORRECTED BY FOLLOWING THE PROCEDURE SUBSEQUENT TO FILING THE COMPLAINT SO LONG AS THE NOTICE OF INTENT TO LITIGATE IS SERVED WITHIN THE STATUTORY LIMITATIONS PERIOD?

SUMMARY OF THE ARGUMENT

The medical malpractice pre-suit notice requirement is jurisdictional, and failure to comply with it is fatal to a claim on which the statute of limitations has run. Allowing the action to be abated, or the complaint amended completely contravenes the clear language of the statute and in such circumstances thwarts the intent of the legislature in enacting it.

The very terms of the statutes differ. The medical malpractice pre-suit notice statute was created for a different purpose and has a different legislative intent than either the sovereign immunity or the mechanics' lien statutes. The sovereign immunity statute specifically states that the pre-suit notice requirement is a condition precedent, and shall not be deemed an element of the cause of action, while the medical malpractice statute expressly provides for the dismissal of any

claim for failure to comply with the requirements of that statute.

This Court should rule in agreement with the Third District that failure to give the statutorily prescribed notice before instigating a medical malpractice suit is fatal to the action where the statute of limitations has run, and since this requirement is jurisdictional, the action cannot be abated, nor can the complaint be amended if the statute of limitations has expired.

ARGUMENT

I. THE MEDICAL MALPRACTICE PRE-SUIT NOTICE REQUIREMENT IS JURISDICTIONAL

By its plain language, section 768.57 unequivocally imposes a series of mutual responsibilities on claimants and potential defendants. The language of the statute is mandatory:

> Prior to filing a claim for medical malpractice, a claimant shall serve upon each prospective defendant by certified mail, return receipt requested, a notice of intent to initiate litigation for medical malpractice.

Section 768.57(2), Fla. Stat. (1985) (emphasis added).

The ninety day hiatus before a complaint can be filed is clear:

> No suit may be filed for a period of 90 days after notice is served . . . .

Section 768.57(3)(a), Fla. Stat. (1985) (emphasis added).[3]

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[3] Notice must be served within the two year statute of limitations period, section 95.11, Fla. Stat., but once notice is given, the statute is tolled to allow a suit to be filed later if necessary. The statute applies to all causes of action which

The reasons for the mandatory hiatus between filing the notice and filing the complaint are obvious. Section **768.495,** Fla. Stat., requires a claimant's attorney, prior to filing suit, to make a reasonable investigation as to the potential claim, and certify in his initial pleading that the investigation gave rise to a good faith belief in the merits of the action.

Perhaps even more significantly, the medical malpractice pre-suit notice requirement provides detailed procedures which a prospective defendant or his insurer must follow in the ninety days following notice. The defendant's insurer must conduct a review to determine the defendant's liability, and is charged with investigating in good faith all aspects of the potential claim. The claimant must cooperate with the insurer in good faith, including, if the insurer requires, appearing before a pretrial screening panel or a medical review committee, and possibly submitting to a physical examination.

At the end of the ninety day period, the insurer must submit a response to the claimant, and either reject the claim, make a settlement offer, or admit liability and offer to arbitrate the issue of damages. The burden then shifts to the prospective claimant's attorney, who has thirty days in which to advise his client of the response, giving the legal and financial consequences and an evaluation of the time and likelihood of prevailing on the merits, should the case go to trial,

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have not been filed as of October 1, **1985.**

including an estimation of the costs and attorney fees which would be incurred.

Although the reasons for the ninety day waiting period are clear and compelling on the face of the statute, the intent of the legislature in promulgating it may aid the Court in deciding that such requirement would be none other than jurisdictional.

The Comprehensive Medical Malpractice Reform Act of 1985[4] was enacted to combat some of the serious problems facing Florida's medical profession. In passing this Act, the legislature recognized the medical malpractice crisis in the state, and the threat it posed to quality health care. As noted in the Staff Analysis prepared by the House of Representatives Committee on Health Care and Insurance on April 5, 1985, "A central aim of the comprehensive bill is to save costs to the health care system by lowering the incidence of malpractice." House of Representatives Committee on Health Care & Insurance Staff Analysis, April 8, 1985, at 9.

The House of Representatives Committee noted that the pre-suit screening procedure "should save litigation costs through earlier resolution of meritorious claims." Id. Indeed, a review of the preamble to the Act demonstrates that improving claim settlement practices and reducing the number of lawsuits was a primary goal of the Act:

> WHEREAS, high-risk physicians in this state

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4 Chapter 85-175, 1985 Fla. Laws 1180.

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 specialties such as obstetricians, cardiovascular surgeons, neurosurgeons, orthopedic surgeons, and anesthesiologists have become a matter of great public concern, and

WHEREAS, these premiums costs are passed on 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, . . .

The Fourth District Court of Appeal's holding that the requirements of section 768.57, Fla Stat., are not jurisdictional not only flies in the face of the clear statutory language and the expressed intent of the legislature in promulgating it, but also contravenes, as the court itself acknowledged, the holdings of other courts of appeals which have considered this issue. For example, in Berry v. Orr, 537 So.2d 1014, 1015 (Fla. 3d DCA 1988), the Third District held that since the plaintiffs did not comply with the statutory notice requirement prior to filing a dental malpractice complaint, the trial court lacked jurisdiction to hear the case. See also Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986) (court lacks jurisdiction to hear case if notice is not given within statutory limitations period).

The court's ruling ignores the rationale behind the medical malpractice statute, which the Second District has discussed in MacDonald v. McIver, 514 So.2d 1151 (Fla. 2d DCA 1987). There, the court said that the Medical Malpractice Act was designed to encourage the settlement of claims without putting the parties through the expense of a full-blown lawsuit. The filing of a complaint is seen as a last resort. In Castro v. Davis, 527 So.2d 250 (Fla. 2d DCA 1988), the court said that the purpose of the ninety day period is to insure that the potential defendant has an opportunity to pursue the mandated

steps which may result in an amicable resolution of the suit. See also Georse A. Morris 111, M.D., P.A. v. Ergos, 532 So.2d 1360 (Fla. 2d DCA 1988) (purpose of pre-suit notice requirement is to allow parties to pursue settlement prior to suit being filed).

In holding that the pre-suit notice requirement is not jurisdictional, the Fourth District accepted the reasoning of the Second District in Solimando v. International Medical Centers, 544 So.2d 1031 (Fla. 2d DCA 1989). Lindberg, 545 So.2d at 1386. In Solimando, the claimant sent the required statutory notice more than ninety days before filing the suit, but sent it regular mail, instead of certified, as the statute requires. The plaintiff further did not send the notice by certified mail after the suit was filed. The trial court refused to consider whether some of the defendants waived the pre-suit notice requirement, and instead ruled that it had no jurisdiction to hear the case due to lack of subject matter jurisdiction. Solimando, 544 So.2d at 1032. The Second District discussed the meaning of the term "jurisdiction" and held that a trial court obtains jurisdiction over a case by filing a well plead complaint which states a cause of action. The complaint must include allegations of compliance with the statutory requirements. Failure to do this results in the failure of the complaint to invoke the jurisdiction of the court, but does not deprive the court of subject matter jurisdiction. Id. at 1033.

The Second District, like the Fourth District, equated this situation with that of the sovereign immunity statute, and concluded that the legislative intent was the same for both, that is, to reduce the number of lawsuits by giving prospective defendants the opportunity to investigate claims and make a settlement offer prior to the lawsuit being filed. Id. at 1033-34. The Second District pointed out that the requirements of the sovereign immunity statute are not jurisdictional, and can be waived. See, e.g., Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979); City of Pembroke Pines v. Atlas, 474 So.2d 237 (Fla. 4th DCA 1985). The Second District stated that the legislature would not have given a substantial jurisdictional defense to a private sector of the community (the medical profession), while denying that same defense to a sovereign. Solimando, 544 So.2d at 1034. See also Bendeck v. Berry, 546 So.2d 14 (Fla. 3d DCA 1989), rev. denied, 545 So.2d 1368 (Fla. 1989) (Cope, J., concurring) (both provisions of section 768 should be construed as conditions precedent).[5]

In equating the medical malpractice statute with the sovereign immunity and mechanics' lien statutes, however, the Fourth District, like the Second District in Solimando, has overlooked the fundamental differences between these statutes.

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5 The issue in Bendeck, however, was one of waiver, and the Third District equated the situation in Bendeck with that of Meli v. Dade County School Board, 490 So.2d 120 (Fla. 3d DCA), rev. denied, 500 So.2d 543 (Fla. 1986). There, the court held that the pre-suit notice requirements of 768.28 could be waived by the conduct of the defendant. Waiver is not an issue in this case.

While all three contain a pre-suit notice requirement, only the medical malpractice statute contains exact, unequivocal requirements tied to reciprocal obligations of both potential parties, which demonstrate the different legislative intent behind the medical malpractice statute.

The sovereign immunity statute places no reciprocal obligations on the state agency and, as a practical matter, the Department of Insurance takes no action on these notices. See Levine v. Dade County School Board, 442 So.2d 210, 211 (Fla. 1983). Under section 768.28(6)(a), Fla. Stat. (1985), a claimant is merely required to present his claim in writing to the appropriate agency and the Department of Insurance within three years after the claim accrues. Likewise, the mechanics' lien statute places no reciprocal obligation on prospective defendants.

Neither the sovereign immunity statute nor the mechanics' lien statute mandate any pre-suit screening procedures, nor do they contain a detailed schedule of responsibility, as the medical malpractice statute does. Under section 713.06(2)(a), Fla. Stat., a lienor is required to serve notice upon the owner setting forth the lienor's name and address.[6] It must contain a description sufficient to identify the real property, as well as

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[6] Notice must be given either "before commencing or no later than forty-five days from commencing, to furnish his services or materials, but in any event, before the date of the owner's disbursement of the final payment after the contractor has furnished the affidavit under subparagraph (3)(d)1, or abandonment, whichever shall occur first."

the nature of the services or materials furnished or to be furnished. Further, there is no evidence that the mechanic's lien statute was enacted in response to any real or perceived crisis, as was the medical malpractice statute. In fact, this Court discussed the intent of this statute in Holding Electric, Inc. v. Roberts, 530 So.2d 301, 303 (Fla. 1988), and stated,

> The clear purpose of section 713.06(3)(d)1 is to protect the owner against the risk of having to pay for the same services or materials more than once, and to allow the owner an opportunity to make proper payment before suit is filed.

Likewise, there is no evidence that the legislative intent for either the sovereign immunity statute or the mechanic's lien statute was to reduce the number of lawsuits in either of those two areas. The medical malpractice statute was clearly passed in response to the medical malpractice crisis, and its intent to reduce the number of unnecessary lawsuits, and thus the cost of medical malpractice insurance, is obvious.

More important, section 768.57(3)(a) specifically provides for the dismissal of any claims or defenses for failure to comply with the requirements of this section. The medical malpractice statute also does not contain any abatement provisions or lesser sanctions for failure to comply. In contrast, the sovereign immunity statute provides that the notice requirement is a condition precedent, and shall not be deemed an element of the cause of action. Section 768.28(6)(b), Fla. Stat. The mechanics' lien statute states that failure to serve notice shall be a complete defense to enforcement of a lien.

Section 713.06(2)(a), Fla. Stat. If the legislature truly intended that these three statutes be construed the same, it would have included identical or even similar langauge. By not providing a similar provision in the medical malpractice statute, and by substituting a provision allowing the dismissal of claims for failure to comply, the legislature was demonstrating its desire that the medical malpractice statute be considered jurisdictional.

III. FAILURE TO COMPLY WITHIN THE STATUTORY LIMITATION PERIOD IS FATAL AND CANNOT BE CORRECTED BY ABATING THE ACTION OR AMENDING THE COMPLAINT

Since the statute is jurisdictional, allowing the action to be abated when the complaint has been prematurely filed defeats the purpose of the statute. As discussed in Section I, supra, one of the primary purposes of the Medical Malpractice Reform Act was to avoid the expense of a lawsuit by providing potential defendants with advance notice, in the hopes that a settlement can be reached before the lawsuit is actually filed. In order to implement this goal, the legislature created a mandatory, pre-suit screening procedure which has to be followed prior to the instigation of any medical malpractice lawsuit in Florida.

The rationality of such an intent is obvious in a situation such as one involving the corporate defendant Hospital in this case. A claim that culminates in a lawsuit is stigmatizing and financially burdensome in a way that a non-litigated claim is not. A corporate defendant such as the Hospital here can

conduct the pre-suit screening procedures internally, without incurring the expense of retaining counsel. In contrast, once a lawsuit is filed, the medical malpractice defendant is forced to retain counsel to appear in his behalf, incurring additional costs, which thwarts the purpose of the statute.

Additionally, the Act was expressly designed to toll **the** statute of limitations while the pre-suit investigation procedures are being executed. As long as the notice is given within the statutory limitation period, the statute of limitations is tolled for ninety days, while the pre-suit investigation procedures are being followed. Once the ninety screening period is over, the statute of limitations begins to run anew. Thus, the Act serves to toll the limitations period, not eliminate it. Allowing an action to be abated while the plaintiff complies with the pre-suit requirement would effectively eliminate the statute of limitations in situations like that in the instant case. A plaintiff could file a lawsuit right before the statute **is** due to expire, as in this case, then, in derogation of ***768.57***, subsequently send the notice. The action would then be abated, not just for the ninety day screening period, but until the plaintiff complies with the mandates of section ***768.57.***

Allowing a complaint to be amended would have the same undesirable result. An action filed right before the statute of limitations was to expire could be kept alive for months in a situation where, as here, the parties did not even file their motions to dismiss until four months after the complaint was

filed, and the notices served. Thus, by the time the motions are heard, and the court rules to allow a complaint to be amended, the ninety day tolling period has long since elapsed, and the statute of limitations has expired.

Finally, as the Second District pointed out, since the pre-suit notice requirement is jurisdictional, a complaint which is filed in derogation of section 768.57 is a non-existent lawsuit. A court cannot abate or allow an amendment in such a situation. The potential action is already "abated" for ninety days while the pre-suit screening procedures are being carried out, and allowing it to be abated for more than the statutorily allowed ninety days would circumvent the purpose of the statute Of limitations. Further, since the wrongfully filed complaint is a nullity, once the ninety day tolling period expires and the statute of limitations begins to run, allowing an amendment would extend the statute way beyond the statutorily prescribed time.

There is no indication that the legislature intended section 768.57 to circumvent the statute of limitations in such a manner. By providing a ninety day tolling period while the pre-suit procedures are being complied with, the legislature demonstrated its intent that the statute of limitations be extended for that amount, but no longer. To allow the non-existent lawsuit to be abated, or the non-existent complaint to be amended is to allow medical malpractice claimants a right which is far beyond that which the legislature contemplated.

The plaintiffs' proposed remedy of abatement has already been rejected as inconsistent with the intent of the statute. Pearlstein v. Malunney, 500 So.2d 585, 586 (Fla. 2d DCA 1986) (Pearlstein I). In Pearlstein, the plaintiff filed his complaint without first complying with the notice provisions of section 768.57. The plaintiff asked the court to allow the case to be abated until he could satisfy the statutory notice requirement, and the Second District refused, stating,

> [W]e must presume that the legislature meant what it said when it distinguished the filing of a complaint from the furnishing of a prefiling notice. . . . [W]e cannot simply abate what is, for all intents and purposes, a nonexistent lawsuit . . . .

Pearlstein, 500 So.2d at 587.

In Malunney v. Pearlstein, 539 So.2d 493 (Fla. 2d DCA 1989) (Pearlstein II), after the initial complaint was dismissed, the plaintiff was able to file a second complaint within the statutory limitations period. The court held that the notice which was given after the first complaint was filed, and before the second complaint, was sufficient, and the second complaint should not have been dismissed. The Second District discussed its earlier ruling in Pearlstein I by stating that it continued "to adhere to the view that revival of the initial complaint cannot be achieved through the belated service of the statutory notice." Malunney, 539 So.2d at 495. It explained that in Pearlstein II, the issue was not the resuscitation of a properly dismissed complaint, since notice was given prior to the second complaint being filed. However, since the defendant

did not have the opportunity to take advantage of the ninety day screening period, the court allowed the matter to be abated so that defendant could utilize the pre-suit investigation procedures authorized in the statute. The court distinguished this from the situation in Pearlstein I by explaining that in Pearlstein I, abatement could not be authorized because the complaint was fatally defective, in that notice was not given prior to the complaint being filed. In contrast, in Pearlstein 11, the new complaint was valid, since the notice provisions had been met. Malunney, 539 So.2d at 496.

The Second District has ruled to this effect in other cases. **See** Bruce H. Lynn, M.D., P.A. v. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986). There, the plaintiffs filed their complaint without first complying with the notice provisions of 768.57. The Second District held that "[i]f 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 have otherwise been timely." **Id.** at 1012. See also MacDonald v. McIver, 514 So.2d 1151, 1152 (Fla. 2d DCA 1987) (adopting the ruling in Pearlstein I that a complaint filed without prior notice is a non-existent lawsuit).

The Third District is in accord. In Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986), the plaintiff filed her complaint without serving the requisite notice, and the trial court granted defendants' motions to dismiss. However, the trial court allowed the plaintiff to

abate the action so that she could comply with the statutory provisions. Id. at 836. The Third District rejected this course of action, stating, "[A]n action may be abated 'only where the cause of action is not extinguished and thus capable of revival.'" Id. (citations omitted).

Thus, since the pre-suit notice requirements are jurisdictional, a complaint which fails to allege that plaintiffs complied with the statutory requirements of the section 768.57, Fla. Stat. (1985), is a nullity, and cannot be amended once the statute of limitations has expired. Further, because such an action constitutes a non-existent lawsuit, the case cannot be abated to allow compliance once the statute has run.

CONCLUSION

For the above stated reasons, Petitioner HOSPITAL CORPORATION OF AMERICA respectfully requests this Court answer the Certified Question in the affirmative and hold that the failure to follow the pre-suit screening process of section 768.57, Fla. Stat., is a fatal jurisdictional defect, and cannot be corrected by following the procedure subsequent to filing the complaint, even if the notice of intent is served within the statutory limitations period. Petitioner also requests this Court remand this case for further proceedings consistent with this Opinion.

Respectfully submitted,

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