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

REPLY BRIEF OF PETITIONER HOSPITAL CORPORATION OF AMERICA

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STATEMENT OF THE CASE AND FACTS

Petitioner HOSPITAL CORPORATION OF AMERICA adopts the Statement of the Case and Statement of Facts from its Initial Brief, and incorporates it herein.

CERTIFIED QUESTI

The following question was certified to the Supreme Court from the Fourth District Court of Appeal:

> 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 requirements of section *768.57*, Florida Statutes are jurisdictional, and Plaintiffs' failure to comply with them is fatal to the preservation of their action. Similarly, a complaint which does not allege compliance with the mandates of section *768.57* fails to invoke the jurisdiction of the court, and is subject to dismissal.

Where Plaintiffs' filed their complaint on the same day that they gave their notice of intent to sue, their failure to comply with the statute resulted in more than the filing of a premature complaint. Such non-compliance resulted in a deliberate circumvention of the statutory purpose and intent, as well as the applicable statute of limitations, to the prejudice of this Appellant and the other medical malpractice defendants.

Plaintiffs' proposed remedy of abatement is neither authorized under the statute, nor consistent with its intent. While the statute of limitations had not run prior to the time the plaintiffs filed their complaint and gave notice, the statute had run by the time the action was dismissed for failure to comply with the statute. Further, since the notice was not given prior to the complaint being filed, the complaint was a nullity from its inception, and could not have been amended, nor abated to allow the plaintiffs to comply with the mandates of 768.57.

ARGUMENT

I. THE MEDICAL MALPRACTICE PRE-SUIT NOTICE REQUIREMENT IS JURISDICTIONAL AND FAILURE TO COMPLY WITH THE STATUTORY REQUIREMENTS IS FATAL TO THE MAINTENANCE OF THE ACTION.

In contrast with the Fourth District in the instant case, at least one other District Court has held that failure to comply with the procedures mandated by Section 768.57, Florida Statutes, divests the trial court of jurisdiction to hear the case. Berry v. Orr, 537 So.2d 1014, 1015 (Fla. 3d DCA 1988); Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986). Further, the Second District has declared that where the plaintiff fails to properly allege compliance with the statutory requirements, the complaint fails to invoke the court's jurisdiction. Solimando v. International Medical Centers, 544 So.2d 1031, 1033 (Fla. 2d DCA 1989).

Plaintiffs acknowledge that filing the notice contemporaneously with the complaint is not the correct course of action mandated by section 768.57, and further agree that serving

the notice does not toll the statute of limitations indefinitely. Nevertheless, Plaintiffs claim that their lack of compliance with the pre-suit screening procedures is not a fatal jurisdictional defect, since they filed their notices before the statute of limitations expired. They maintain that by filing their complaint on the same day that they gave notice, the defect was not their failure to provide notice, but rather, their filing of a "premature" complaint which can be cured by abatement. This reasoning is fallacious.

Where, as here, a complaint is filed on the same day that the statutory notice is served, the intent and purpose of the statute has been subverted. The statute specifically provides that "No suit may be filed for a period of 90 days after notice is served. . . ." Section 768.57(3)(a), Florida Statutes (1985). By circumventing the plain language of the statute, the complaint is more than simply "premature;" it is in fact filed without giving these medical negligence defendants the benefit of the required notice and the 90 day pre-suit investigation period which it triggers, both of which the legislature has implemented as an integral part of the scheme for resolving medical negligence claims. The defect is thus more far-reaching than abatement can cure, because these Defendants have essentially been deprived of the pre-suit investigatory process and have had no opportunity to resolve the case before suit was filed, as the legislature intended. The result is that, even if the complaint were abated and the pre-suit process engaged in Plaintiffs would

still be rewarded for purposely violating the clear terms of the statute with the assurance that despite the legislatively envisioned procedures and applicable statute of limitations, their lawsuit would be firmly entrenched. The pre-suit processes would then be reduced to pro forma hurdles to be simply jumped over, rather than a meaningful method of resolving this dispute.

In support of their argument, Plaintiffs rely upon the recent Third District Court of Appeal decision in Anarand v. Fox, 14 F.L.W. 2135 (Fla. 3d DCA, September 22, 1989). Anarand is different factually from the instant case in that there, the plaintiff served the notices of intent almost two months before filing his complaint. The Third District pointed up the significance of the fact that the statutory notices had been filed, and that the only defect was that the complaint was filed about a month too soon thereafter. Id. In the instant case, however, the complaint was not filed after the notices were given, but rather, contemporaneously therewith.

Unlike Anarand, then, the issue here is not simply the filing of a "premature complaint," but rather, the filing of a complaint without first providing the statutorily prescribed notice. In such a case, contrary to Ansrand, the complaint is a nullity, and abatement or even amendment is not possible. Pearlstein v. Malunney, 500 So.2d at 585, 586 (Fla. 2d DCA 1986), rev. denied, 511 So.2d 299 (Fla. 1987); Public Health Trust of Dade County v. Knuck, 495 So.2d at 834 (Fla. 3d DCA 1986); MacDonald v. McIver, 514 So.2d 1151 (Fla. 2d DCA 1987); Bruce H.

Lynn, M.D., P.A. V. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986). As the Second District stated:

> [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.

Plaintiffs' assertion that "the logical extension of the argument that notice and screening are both conditions precedent 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@@ is thus a non-sequitur. Section 768.57 mandates that the plaintiff give notice prior to filing suit. The only other affirmative action required by the plaintiff during the pre-suit screening process is to cooperate with the defendants in their investigation, including, if requested, appearing before a pre-trial screening panel or medical review committee, and submitting to a physical examination. Section 768.57(3)(a)4, Florida Statutes (1983). Once the notice is filed, the statute of limitations is automatically tolled. There is no need for the courts to scrutinize the plaintiff's behavior during the pre-trial screening procedure to determine whether there was sufficient compliance to toll the statute. All the plaintiff is required to do is serve the notice and the statute is tolled. If the plaintiff does not comply with the require-

ments of the pre-suit screening procedures, the statute itself provides for sanctions, including dismissal of the suit.

Under the statute, then, the only thing which tolls the statute of limitations is the filing of the notice. Here, Plaintiffs gave notice on the same day that they filed the complaint. Therefore, the statute was tolled for ninety days. Plaintiffs accordingly had approximately four and one half months, or until August 11, 1986, in which to file their complaint. Thus, even if the complaint could have been amended, or the action abated, it would have had to be done before August 11, 1986, for Plaintiffs to fall within the statute of limitations. The remedies which Plaintiffs now seek constitute circumvention of the legislative scheme which subverts the intent and purpose of the statute,[1] and rewards them for their intransigence with an end run around the statute of limitations. This Court should not condone such a blatant scuttling of the applicable statutes.

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1 Plaintiffs' assertion that the Second District's recent opinion in Nash v. Humana Sun Bay Community Hospital, Inc., 426 So.2d 1036 (Fla. 2d DCA 1988), rev. denied, 531 So.2d 1354 (Fla. 1988), Castro v. Davis, 527 So.2d 250 (Fla. 2d DCA 1988), and Malunney v. Pearlstein, 545 So.2d 493 (Fla. 2d DCA rev. denied, 547 So.2d 1210 (Fla. 1989) (Pearlstein 11), suggests that that court would decide the instant case as the Fourth District did is incorrect. Indeed, Castro, Nash and Pearlstein II are inappropriate since in those cases the plaintiff filed a defective complaint, then gave notice. The first complaint in each case was dismissed (in Castro and Nash voluntarily), then a second complaint was filed. In each of those cases, the Second District held that the notice which was filed between the two complaints satisfied the statutory requirements. In the instant case, Plaintiffs filed a defective complaint and gave notice on the same day. Plaintiffs did not and could not dismiss the defective complaint, since it was too late to file a second one, and thus could not cure their procedural defect in that manner.

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, Florida Statute, 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.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of November, 1989 to: WILLIAM deFOREST THOMPSON, ESQUIRE, Law Offices of Thompson and O'Brien, Attorneys for Plaintiffs, 888 Southeast Third Avenue, Suite 300, Fort Lauderdale, FL 33316, RUSSELL S. BOHN, ESQUIRE, Edna L. Caruso, P.A., Appellate Attorneys for Lindberg, 1615 Forum Place, Suite 4-B Barristers Building, West Palm Beach, FL 33401; SCOTT H. MICHAUD, ESQUIRE, Parker, Johnson, Owen & McGuire, P.A., Attorneys for Liem and Cheong, 600 West Hillsboro Boulevard, Suite 660,

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