IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO: **74,563**

DISTRICT COURT CASE NO: **87-2098**

JAIME ALALU, M.D. AND
JAIME ALALU, M.D., P.A.

PETITIONERS,

VS.

KURT LINDBERG AND
MARY LINDBERG,

RESPONDENTS,

PETITIONERS JAIME **ALALU, M.D. &** JAIME **ALALU, M.D.,** P.A. *'S* BRIEF **ON** THE MERITS

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INTRODUCTION

This brief is filed on behalf of Petitioners Jaime Alalu, M.D., and Jaime Alalu, M.D., P.A., Defendants in the trial court medical malpractice action and Appellees in the appeal before the Fourth District Court of Appeal. Respondents are Kurt and Mary Lindberg, Plaintiffs in the trial court action and Appellants in the Fourth District Court. Hospital Corporation of America, Robert K. T. Liem, M.D., Robert K. T. Liem, M.D., P.A., Bernard B. Cheong, M.D., and Bernard B. Cheong, M.D., P.A., were Defendants in the trial court and Appellees before the Fourth District Court of Appeal and are also Petitioners in this matter.

The parties will be referred to as Respondents/Plaintiffs and Petitioners/Defendants as well as by name.

The following symbols will be used for reference purposes:

"R" for references to the record on appeal.

All emphasis has been supplied by counsel unless indicated to the contrary.

STATEMENT OF THE CASE AND STATEMENT OF FACT

On April 4th, 1986, Plaintiffs Kurt and Mary Lindberg sent notices of intent to initiate litigation by certified mail to certain of the defendants. (R1-4) While a notice of intent was sent to Jaime Alalu, M.D., P.A., none was sent to Jaime Alalu, M.D..

The notice stated:

> This letter is to notify you of the above-captioned Plaintiffs' Notice of Intent to sue the Defendants as listed in the above caption.

The caption was:

> Kurt Lindberg and Mary Lindberg, his wife, vs. Hospital Corporation of America, d/b/a Doctors Hospital of Lake Worth, Swie H. The, M.D., P.A., Jaime Alalu, M.D., P.A., Robert K.T. Liem, M.D., P.A., Bernard Cheong, M.D., P.A., and Florida Patient's Compensation Fund.

On that same date, April 4th, 1986, the Plaintiffs filed their complaint for medical malpractice. (R1-11) The complaint named as Defendants Hospital Corporation of America, d/b/a Doctors Hospital of Lake Worth, Swie H. The, M.D. and Swie H. The, M.D., P.A., Jaime Alalu, M.D., and Jaime Alalu, M.D., P.A., Robert K.T. Liem, M.D. and Robert K.T. Liem, M.D., P.A., Bernard Cheong, M.D. and Bernard Cheong, M.D., P.A., and Florida Patient's Compensation Fund. The complaint alleged that Kurt Lindberg's injuries occurred between April 10th, 1984 and May llth, 1984.

The Defendant Hospital filed a motion to dismiss the action, and Defendants Alalu, Liem, and Cheong filed amended motions to dismiss. (R20, 30-31, 74-75) The motions all

alleged that the Plaintiffs had failed to comply with the provisions of Section 768.495(1), Florida Statutes (1985), which require that a medical malpractice claimant serve a notice of intent to initiate litigation for medical malpractice by certified mail on each prospective defendant. That statute also provides that suit may not be filed for ninety days after service of the notice intent to initiate litigation.

The Defendants maintained that the complaint should be dismissed due to the Plaintiffs' failure to allege compliance with the notice requirements of Section 768.495(1), and, more importantly, because the Plaintiffs had filed their complaint prior to compliance with the presuit screening process. Additionally, certain of the motions to dismiss were based on the fact that the complaint did not contain a certificate of counsel to the effect that a reasonable investigation had given rise to a good faith belief that grounds existed for a medical malpractice action against the Defendants, as is required by Section 768.495(1).

A hearing was held upon the motions to dismiss on March 10th, 1987. At the hearing, the Plaintiffs maintained that the Medical Malpractice Reform Act was unconstitutional. The Plaintiffs did not request that the Court abate their action, but only requested that they be permitted to amend their complaint.

> If the Court is leaning towards an adoption of this particular statute in applying it I would only ask leave of the Court to amend to assert compliance with this statute if you feel its

important.

(In fact, at no time prior to the dismissal of their action did the Plaintiffs ask the Court to abate the action to allow them to comply with the statutorily mandated pre-suit screening process.) (SR1-11) The following day, the Court entered an order granting the motions to dismiss. (R160)

Plaintiffs appealed, and the Fourth District Court of Appeal sua sponte dismissed the appeal due to the lack of a proper order of dismissal, pursuant to **RUSSELL** v. **RUSSELL, 507 So.2d 661** (Fla. 4th DCA **1987).** On July 2nd, **1987,** the trial court entered a final order dismissing the action, and Plaintiffs once again appealed. **(R173-174)**

On appeal, the Plaintiffs did not assert that they had properly complied with the statutory requirements; rather, they argued for the first time that their action should have been abated, rather than dismissed. Plaintiffs also maintained that Section **768.57,** Florida Statutes, was unconstitutional, based upon their contention that the statute improperly denied access to the courts, and otherwise constituted a denial of equal protection of the laws and due process.

On July 12th, **1989,** the Fourth District Court of Appeal issued its opinion, reversing the trial court's dismissal of the action and remanding the case to the trial court for further proceedings. In reaching its decision, the Fourth District Court of Appeal acknowledged direct conflict with PEARLSTEIN v. MULUNNEY, **500** So.2d **585** (Fla. 2nd DCA 1986), rev.

den. 511 So.2d 291 (Fla. 1987). The Court further certified the following question to this Court as being one of great public importance.

> Is the failure to follow the presuit 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?

This appeal has ensued.

POINT ON APPEAL

WHETHER THE FOURTH DISTRICT COURT OF APPEAL HAS INCORRECTLY HELD THAT A PLAINTIFF WHO FAILS TO COMPLY WITH THE REQUIREMENTS OF SECTION 768.57 IS ENTITLED TO HAVE HIS ACTION ABATED, RATHER THAN DISMISSED.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal erred in determining that the trial court should have abated this medical malpractice action rather than simply dismissing it. The Fourth District's decision in that regard was incorrect, for several reasons.

In the first place, even a cursory review of the preamble to the Florida Medical Malpractice Reform Act, will readily reflect that an abatement of an already filed medical malpractice action contravenes the intent of that statute, i.e., to promote resolution of a potential medical malpractice action before it becomes a formal lawsuit. Where a plaintiff is allowed to file a lawsuit before complying with the presuit screening requirements and the court thereafter abates the lawsuit so that the plaintiff can comply with the provisions of Section 768.57, the physician and insurance company incur needless costs and expense. Further, the physician runs the risk of having a portion of his indemnity dollars depleted, to the extent that an attorney must be retained to defend his interests once a lawsuit is filed. That problem will not occur where a case is resolved during the presuit screening process, particularly since the investigating insurance carrier generally does not need to employ counsel to participate in the presuit screening process.

In addition, the filing and ultimate resolution of a lawsuit triggers certain administrative reporting requirements

which might not otherwise come into play where a matter is resolved without the filing of a lawsuit. Thus, for example, where a plaintiff gives appropriate notice of a potential claim against a physician and otherwise engages in the presuit screening process, only to determine during the ninety day presuit screening period that an action against that particular physician is unwarranted, the physician has nothing to report to the Department of Professional Regulation. On the other hand, the reporting requirements are such that the physician must necessarily report resolution of a lawsuit, even if the lawsuit is resolved in his favor. The reporting of that matter may in and of itself trigger certain additional expenses on the part of the physician, i.e., to the extent that he must become involved in the administrative process, and otherwise subjects the physician to the stigma of a regulatory proceeding which could possibly have been avoided had the plaintiff engaged in the presuit screening process.

The abatement procedure which was utilized by the Fourth District is not authorized by the clear dictates of Section ***768.57.*** Further, analogies to Florida's Waiver of Immunity Statute are inappropriate in this instance, given the numerous distinctions between the notice and review requirements that are set forth in these two statutes.

Among other things, Section ***768.28*** does not impose any mandatory screening requirements upon a sovereign entity. On the other hand, Section ***768.57*** contains mandatory screening

requirements and otherwise seeks to promote early resolution of a potential medical malpractice action through the imposition of statutory penalties. Given these notable distinctions between the two statutes, cases which have held that an action against a sovereign entity may be abated pending that entity's opportunity to review the potential claim are simply not analogous. Further, those cases which have allowed abatement so that a plaintiff may comply with the notice requirements of Section **768.28** have nevertheless held that abatement is not appropriate where the statute of limitations ran before the statutory notice was sent.

Even assuming for the sake of argument that abatement can be used in order to allow a plaintiff to comply with the provisions of Section **768.57,** Plaintiffs waived the right to request abatement in this matter to the extent that they did not request that relief before the trial court. Given that fact, the Court of Appeal should not have considered Plaintiffs' belated request for abatement. Further, to the extent that the Plaintiffs also failed to comply with the provisions of Section **768.495,** and did not otherwise allege or certify that the potential medical malpractice claim had been investigated prior to the filing of the complaint, and that there was a good faith belief that grounds existed for the action, the dismissal of this action by the trial court was appropriate in all respects.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL HAS INCORRECTLY HELD THAT A PLAINTIFF WHO FAILS TO COMPLY WITH THE REQUIREMENTS OF SECTION 768.57 IS ENTITLED TO HAVE HIS ACTION ABATED, RATHER THAN DISMISSED.

The Fourth District Court of Appeal has 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?

While this question might be applicable to certain of the Defendants in this action, Petitioner Jaime Alalu would like to point out to this Court that this question is **not** applicable to him.

While a notice of intent to initiate litigation was sent to Dr. Alalu's Professional Association on the same day that the complaint was filed, no notice of intent was ever sent to Dr. Alalu individually. The notice of intent which was sent to the professional association was addressed to Jaime Alalu, M.D., P.A., as was the attached return receipt. The letter itself stated: "This letter is to notify you of the above-captioned plaintiff's notice of intent to sue the defendants as listed in the **above-caption."** The caption referred to listed Jaime Alalu, M.D., P.A., but not Jaime Alalu, M.D.. It affirmatively appears from the record that no notice of intent to initiate litigation was ever served by Respondents upon Dr.

Alalu individually.

Section 768.57 clearly and unequivocally requires service of a notice of intent to initiate litigation upon each defendant. The Fourth District Court of Appeal has recently acknowledged that the procedures which are set forth in Section 768.57 must be followed for each defendant. STOWIK v. SERKER, 522 So.2d 106 (Fla. 4th DCA 1988); see also PUBLIC HEALTH TRUST OF DADE COUNTY v. KNUCK, 495 So.2d 834 (Fla. 3rd DCA 1986). Thus, there is no real argument that can be made to the effect that the notice of intent to initiate litigation which was served upon Dr. Alalu's professional association complied with the requirement that notice be given to Dr. Alalu individually.

While this Court has recently enacted Rule 1.650(b)(1) of the Florida Rules of Civil Procedure, which provides that a notice of intent to initiate litigation which is sent by certified mail to and received by any prospective defendant shall operate as notice to that person and to any other prospective defendant who bears a legal relationship to that prospective defendant, this Rule was not in effect at the time that the notice of intent to initiate litigation was sent in the instant case. Rule 1.650 did not become effective until September 29th, 1988, long after the notice of intent had been sent in the instant case, and long after the expiration of the statute of limitations. Thus, Rule 1.650 offers Respondents no grounds for relief.

The Fourth District Court of Appeal completely overlooked the fact that Dr. Alalu had never been served with a notice of intent to initiate litigation. The Fourth District did not conclude that the notices of intent which had been sent to the various professional associations were sufficient to constitute notice to the individual physicians as well; rather, the Court simply ignored this issue.

This is not an issue which can be or should have been ignored. As no notice of intent to initiate litigation was sent to Dr. Alalu prior to the expiration of the applicable statute of limitations, the dismissal as to Dr. Alalu should be affirmed.

Petitioners acknowledge that a notice of intent to initiate litigation was sent to Dr. Alalu's professional association within the applicable statute of limitations. However, this notice was not sent 90 days prior to the filing of Respondents' complaint; rather, the notice of intent was served on the same day that Respondents filed their complaint. This action in effect circumvented the ninety day pre-suit screening period which is mandated by Section 768.57.

To understand the importance of strict application of Section 768.57, it is important to understand the reasons behind the statutory requirements. As should be obvious from its title, the Comprehensive Medical Malpractice Reform Act of 1985 covered a host of subjects, and was designed to bring about needed reform in many areas which affect the practice of

medicine in the State of Florida. The Act was the Legislature's response to a perceived crisis in the provision of medical services in this state.

> WHEREAS high-risk physicians in this state sometimes pay disproportionate amounts of their income for medical 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 specialists such as obstetricians, cardiovascular surgeons, neurosurgeons, orthopaedic surgeons, and anesthesiologists have become a matter of great public concern, and
>
> WHEREAS, these premium costs are passed on to 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 over-abundance 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 the high insurance premiums, and as older physicians choose premature retirement in lieu of 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 laws/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.

Based upon this discerned crisis in the provision of medical care, the Legislature passed the Comprehensive Medical Malpractice Reform Act of **1985.**

Even a cursory review of this legislative scheme will readily reflect that a massive effort was undertaken both to alleviate existing inequities in the tort system and to otherwise assure the residents of the State of Florida that they will be provided with the best possible medical care by the best available physicians. In other words, this new legislative plan was not meant to give physicians an edge in medical malpractice litigation. To the contrary, the Comprehensive Act imposed some rather tough laws which were clearly designed to bring to light problems in our existing health care system and to screen out physicians who simply should not be practicing in this state, while simultaneously providing for enhanced protection for those physicians who are subjected to questionable claims.

As a part of this latter process, the Legislature enacted Section **768.57,** Florida Statutes, which created the so-called presuit screening process. The intent of that presuit

process is clear -- Section 768.57 allows a medical malpractice insurer or self-insurer to thoroughly evaluate a potential claim for medical malpractice before suit is filed.

Under the previous system, settlement negotiations were rarely undertaken by either party before suit was initiated. Plaintiffs' counsel and insurance industry representatives were often too wary of one another to initiate negotiations. Suspicion ran high, and neither party was willing to divulge even the most rudimentary form of information, let alone work product. As a result, parties to a potential medical malpractice claim were often condemned to litigation, under the old system.

This new statute does not simply allow a potential defendant's insurance company to seek information from a claimant. Rather, Section 768.57 mandates a complete review and evaluation of a potential malpractice claim.

> 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. Section 768.57(3)(a), Florida Statutes.

At the end of the ninety-day period of review, the carrier is obligated to either reject the claim, make a settlement offer or offer to admit liability. Where liability is admitted, the parties may arbitrate the issue of damages.

Where, as here, a complaint is filed at the same time that a notice of intent is served, or where a complaint is

filed without a notice of intent having been served, the parties are deprived of the opportunity to conduct a pre-suit screening review and to endeavor to resolve the case without suit being filed.

While acknowledging the obligation to file a notice of intent, the Plaintiffs nevertheless suggest (and the Fourth District has concluded) that the action can merely be abated where a suit has been filed prematurely, pending completion of the presuit screening process. This "no harm done" argument is entirely at odds with the legislative intent which was clearly expressed in the preamble to he Malpractice Reform Act.

By depriving Petitioners of the opportunity to resolve this claim presuit, Respondents essentially required Petitioners to spend time and money defending this lawsuit which might not otherwise have been required. Responsive pleadings had to be filed and counsel was necessarily retained by the various insurance carriers. There is no question about the fact that those pleadings would not have been necessary had this matter proceeded through the presuit screening process prior to the commencement of litigation. Further, in many instances, the presuit process is handled without the assistance of counsel. In this instance, counsel obviously had to be retained for each and every defendant.

As was noted earlier, the preamble to the Medical Malpractice Reform Act expressed concern over the spiraling costs of medical malpractice claims and lawsuits. Clearly, the

cost to both the carrier and the individual insured physician increases automatically where the statutory mandate is not followed, i.e., where the plaintiff files an action in the circuit court, only to thereafter abate the action. And without belaboring the obvious, it should also be clear that the "abatement" which is now being belatedly suggested by the Plaintiffs will only come about upon the appearance of attorneys for the various named Defendants in the litigation, and upon the filing by those attorneys of appropriate motions attacking the premature complaint.

Without question, this colossal waste of time, effort and expense could easily be avoided. A plaintiff need only file the requisite notices of intent to initiate litigation and otherwise allow the full ninety day presuit screening period to run before a lawsuit is filed. The statutory mandate and simple common sense should require no less.

It should also be noted that a physician's deductible may be partially consumed once a lawsuit has been filed by attorney's fees and costs, which are traditionally included as a claims expense, and part of the physician's deductible. This alone may therefore seriously detract from available indemnity dollars -- a problem which the Legislature certainly sought to foreclose through the enactment of the Medical Malpractice Reform Act. On the other hand, expenses that are directly incurred by an insurance carrier during the presuit screening process would not typically be included within a physician's

deductible. For this reason alone, this Court should not accept the abatement procedure which was endorsed by the Fourth District Court of Appeal, or anything short of a strict compliance with the requirements of Section 768.57.

Equally important to a defendant physician is the fact that the filing of a suit against a defendant who has not otherwise been allowed to participate in the presuit screening process may essentially place that physician in the position of having to report a claim to the Department of Professional Regulation, where the physician might not otherwise ever have had to have given notice of that claim to the Department. Thus, the abatement procedure which was suggested by the Plaintiffs in this matter may condemn a physician to bear the stigma of a reported incident which might never have evolved to the point where reporting would have been required, had the presuit process been undertaken in some appropriate fashion.

Section 455.247, Florida Statutes, requires a healthcare provider to report a claim 1) where the claim is not covered by insurance, 2) where the claim results in a final judgment, or 3) where there is a settlement or "final disposition" which does not result in a payment on behalf of the physician. Obviously, from a plain reading of Section 455.247, it is clear that the statutory reporting requirements may not necessarily be triggered where a matter is properly channeled through the presuit screening process.

For example, if a healthcare provider is able to

convince a claimant that the potential claim against that particular physician is baseless during the presuit screening process, and to thus avoid having a suit filed against that physician, then the physician can avoid the reporting requirements of Section **455.247**. On the other hand, once a formal lawsuit is filed, regardless of the manner of disposition of that lawsuit, the claim must necessarily be reported pursuant to the provisions of Section **455.247** once the suit has been resolved.

There is an obvious benefit to the healthcare provider if no formal claim ever materializes which must be reported to the Department of Professional Regulation. Where there is no claim, the healthcare provider can avoid the obvious financial and emotional drain which is otherwise attendant an administrative proceeding, however brief that proceeding may be. Yet where the plaintiff is not required to go through the presuit screening process prior to the filing of a lawsuit, the physician is wholly deprived of any opportunity to convince the plaintiff's attorney not to include the physician in some subsequent lawsuit. Again, therefore, it is obvious that an abatement procedure will negate the otherwise salutary effects of the presuit screening process.

The Fourth District's remedy of abatement is **not** authorized by Section **768.57**; nor is it consistent with the language of the statute. Those other appellate courts which have considered the suggestion that actions be abated rather

than dismissed have properly rejected any such suggestion.

In PEARLSTEIN v. MALUNNEY, 500 So.2d 585 (Fla. 2nd DCA 1986), the plaintiff filed her complaint for medical malpractice without providing the defendants with the required notice of intent. The trial court refused to dismiss the action, holding that Section 768.57 (1) unreasonably discriminated against medical malpractice litigants; (2) deprived them of their constitutional right of access to the courts; and (3) was unconstitutionally vague. The court also found that the filing of the complaint itself satisfied the notice requirements of the statute.

The Second District rejected the trial court's finding that Section 768.57 was unconstitutional. In addition, however, the Court of Appeal expressly rejected the trial court's conclusion that the service of a malpractice complaint would satisfy the statutory notice requirement. The Court also specifically rejected the plaintiff's request that the trial court be directed to abate the complaint for 90 days.

> Instead, we must presume that the legislature meant what it said when it distinguished the filing of a complaint from the furnishing of a pre-filing notice. In this case, we might question whether any useful purpose would be served by requiring on remand that respondents supply petitioners with an additional written notice. Be that as it may, and even though petitioners now have actual notice of respondents' intentions, we cannot authorize revival of the complaint because, as petitioners point out, it fails to satisfy the requirements of Section 768.495, Florida Statutes (1985), and is subject to timely challenge on these grounds. Accordingly, we cannot simply abate what is, for all intents and purposes, a non-existent lawsuit;

> therefore, we quash that portion of the trial court's order which directs petitioners to answer the complaint. ***500*** So.2d at ***587.***

In so ruling, the Second District joined the Third District Court of Appeal in holding that dismissal is the proper remedy for noncompliance with Section ***768.57,*** not abatement.

In PUBLIC HEALTH TRUST OF DADE COUNTY v. KNUCK, supra, the defendants moved to dismiss the complaint because the plaintiff had 1) failed to serve the requisite notice of intent within the applicable statute of limitations period, 2) failed to observe the mandatory 90 day pre-suit screening period prior to filing suit and 3) omitted from her pleadings a certificate alleging good faith compliance with the statutory requirements. Rather than dismissing the action, the trial court granted the plaintiff's ore tenus motion to abate the action to enable the plaintiff to comply with the statute.

On appeal, the Third District determined that dismissal of the action was proper, and not abatement, as to certain of the defendants, the University of Miami and Dr. Sheinberg. The Court reached a different result as to another defendant, Jackson Memorial Hospital, and allowed abatement, as the statute of limitations had not run as to that defendant. In reaching this result, the Court analogized the provisions of Section ***768.57*** to the notice requirements of Section ***768.28,*** Florida Statutes.

It is well established under the waiver of immunity statute that once the limitations period has expired, the trial

court lacks the authority to abate the action. An action may be abated only where the cause of action is not extinguished, and is thus capable of revival. DUKANAUSKAS v. METROPOLITAN DADE COUNTY, 378 So.2d 74 (Fla. 3rd DCA 1979).

In KNUCK, the University of Miami and Dr. Scheinberg were subject to a two year statute of limitations, which had expired by the time that the plaintiff requested abatement of the action. However, as a sovereign entity, Jackson Memorial Hospital was subject to a four year statute of limitations, which had not yet expired. Thus, it was still possible for the plaintiff to fulfil the requirements of Section 768.57 prior to the expiration of the statute of limitations.

In the instant case, the statute of limitations against all Defendants had expired prior to the hearing on the motions to dismiss, which is when Respondents maintain that they requested an abatement. As the statute of limitations had expired, it obviously would not have been possible for Respondents to comply with the prerequisites of Section 768.57 prior to the expiration of the statute of limitations. And where the statute of limitations had expired, the trial court lacked the authority or the jurisdiction to abate the action; thus, the court had no option but to dismiss the case.

Respondents have maintained that cases applying the waiver of immunity statute support their contention that the case should have been abated rather than dismissed. The Fourth District Court of Appeal agreed with that position. While the

medical malpractice statute is similar to the waiver of immunity statute, in that each notes that the service of a notice of intent to initiate litigation is a condition precedent to maintaining suit, significant differences do exist between the two statutes. Petitioners would therefore submit that cases interpreting Section ***768.28*** are not appropriate for application here.

For example, the waiver of immunity statute does **not** mandate a presuit screening process, as does Section ***768.57.*** The plaintiff in a suit against a sovereign entity is simply required to wait six months after serving the notice of intent before suit may be filed so that the sovereign entity may investigate the claim if it chooses to do so. Nevertheless, there is no mandatory investigatory process imposed upon the sovereign entity.

Potential defendants in a medical malpractice action must comply with the pre-suit screening process; if they do not, they are subject to having their defenses stricken. Just as there is no equivalent obligation upon a sovereign defendant to perform a pre-suit review in actions pursuant to Section ***768.28,*** there is no equivalent penaltv.

Given the significant differences between the two statutes, those cases interpreting Section ***768.28*** cannot be considered as controlling, either legally or logically, where a case has been brought pursuant to Section ***768.57.*** While abatement might be appropriate under Section ***768.28,*** it is **not**

authorized under Section 768.57. Further, even under Section 768.28, abatement is not permissible where the statutory notice requirement has not been satisfied prior to the expiration of the statute of limitations.

Thus, even under the cases interpreting Section 768.28, Respondents would not have been entitled to have their action abated in order to permit them to send the requisite statutory notice to the individual physicians, as there had been no request to abate the action prior to the expiration of the statute of limitations. Abatement would only have been permitted had there been ample time remaining on the statute of limitations for the plaintiff to comply with the statutory presuit requirements.

In addition, Petitioners believe that Respondents waived any right to request abatement of the action by failing to request this relief from the trial court. At no time did Respondents request abatement, or even suggest that abatement was the proper procedure. Rather, they simply asked to be allowed to amend their complaint in order to allege compliance with Section 768.495 (1985). As Respondents did not raise the abatement issue below, they should not be allowed to raise this issue for the first time before this Court.

It is well established in Florida law that an appellate court is not at liberty to grant a remedy that was not sought before the trial court. COMBS V. ST. JOE PAPERMAKERS FEDERAL CREDIT UNION, 383 So.2d 298 (Fla. 1st DCA 1980).

> [I]n the absence of jurisdictional or fundamental error, it is axiomatic that it is the function of appellate courts to review errors allegedly committed by the trial court, not to entertain for the first time on appeal the issues which the complaining party could have, and should have, but did not, present to the trial court. ABRAMS v. PAUL, 453 So.2d 826, 827 (Fla. 1st DCA 1983).

The underlying reason for requiring appropriate presentation of a litigant's position below is to preclude the litigant from securing just that relief on a post-bellum, post-defeat claim, which, if timely raised, could have been corrected the first time around. WAGNER v. NOTHINGHAM ASSOCIATES, 464 So.2d 166, 170 (Fla. 3rd DCA 1985).

Here, Respondents did not request that the trial court abate the action, so that the parties could participate in the required pre-suit screening process. Had Respondents requested abatement before the trial court, and had the trial court denied such relief, the issue would properly be before this Court. However, as the issue was not raised before the trial court, the Fourth District should not have entertained Respondents' belated suggestion that the action should have been abated, rather than dismissed.

Once again, the Fourth District did not address this procedural issue; the Court either overlooked it or ignored it. As the abatement issue was not properly raised before the trial court, the Fourth District Court of Appeal erred in considering that issue, and determining that abatement was the proper remedy.

In addition to their failure to comply with Section

768.57, Respondents also failed to comply with Section **768.495,** Florida Statutes.

Section **768.495** provides:

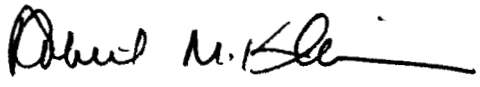
> No action shall be filed for personal injury or wrongful death arising out of medical negligence, whether in tort or in contract, unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for good faith believe that 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.

Respondents' complaint contained neither the requisite allegations nor the required certificate. For this additional reason, the Fourth District should not have permitted Respondents to amend their complaint to add the necessary allegations and certificate, for the very same reason which underlies Petitioners' suggestion that the action should not have been abated -- the statute of limitations had long since expired. Respondents simply did not -- and could not -- comply with the requirements of Section **768.495** within the applicable period of limitations.

CONCLUSION

For the aforementioned reasons, Petitioners Jaime Alalu, M.D. and Jaime Alalu, M.D., P.A., respectfully request that this Court quash the decision of the Fourth District Court of Appeal, and affirm the dismissal of the Respondents' complaint.

Respectfully submitted,



DEBRA J. SNOW
ROBERT M. KLEIN

CERTIFICATION OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 12th day of September, 1989 to all counsel of record on attached service list.

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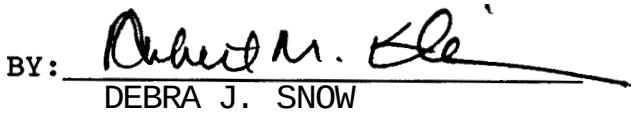
BY: 

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