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 REPLY 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

t will rely on the tement of he s and statement of fact which was in the initial brief on t i.s which was filed on ehalf of Jamie Alalu, M.D and Jamie al M. P.A., n t 12, 1

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.

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 Plaintiffs properly do not attempt to suggest that they acted appropriately and in compliance with Section **768.495(1),** Florida Statute **(1985).** Rather, Plaintiffs simply maintain that this Court should ignore the plain wording of that statute, and allow Plaintiffs to continue with their action. As will be explained, this Court should not allow the Plaintiffs to circumvent the statute in this manner.

The Plaintiffs in this case did not simply serve their notice intent upon the Defendants and then file their complaint at some point prior to the expiration of the ninety day presuit screening period as in ANGRAND v.. FOX, **14** FLW **2135** (Fla. 3rd DCA September 22nd, **1989).** Rather, Plaintiffs filed their complaint on the very same day on which they served their notices of intent to initiate litigation upon certain of the Defendants. The Defendants were thus deprived of even an abbreviated period in which they might conduct a presuit investigation and possibly resolve the action without the necessity of litigation.

If, as Plaintiffs suggest, a plaintiff may simply file his complaint concurrently with serving the notice of intent, and then at some later point in time, request abatement of his action for ninety days so that he may assert compliance with

Section 768.495, then the entire purpose of the statute has been subverted. As Defendants explained in their initial brief, the purpose of the medical malpractice reform act was not only to weed out frivolous claims, but also to encourage the settlement of meritorious claims before suit has been filed. In enacting the statute, the Legislature implicitly recognized that some benefit is to be gained by resolving litigation presuit. The Plaintiffs do their best to ignore this fact. While a plaintiff may lose nothing more than a filing fee by prematurely filing his complaint in a medical malpractice action, the defendant stands to lose much more by virtue of the premature suit. Aside from tarnishing the defendant's reputation, premature lawsuits often entail the unnecessary expenditure of both time and money.

Plaintiffs are similarly suggesting that once they serve their notice of intent to initiate litigation, there is no burden placed upon the plaintiff for the next ninety days, other than to refrain from filing the complaint, and to make discoverable information available on request. While the statute does not explicitly impose additional requirements upon a prospective plaintiff during this time, as a practical matter, a prospective plaintiff is not well served by simply sitting back idly during this time period. Section 768.495 provides that no action for medical malpractice may be filed unless the attorney filing the action has made a reasonable investigation to determine that there are grounds for a good

faith belief that there has been negligence in the care or treatment of the claimant. The complaint must contain a certificate of counsel that such a reasonable investigation gave rise to a good faith belief that grounds exist for an action against each named defendant. While presumably there may be some instances where counsel may determine that there has been negligence in the care and treatment of the claimant solely by obtaining an expert review of the medical records available and speaking with his client, in many instances much more is needed.

The presuit screening period affords the plaintiff an opportunity to take an informal statement from the defendants, as well as to obtain additional information from them in the form of informal requests for production and interrogatories. By providing that no complaint for medical malpractice can be filed until after the ninety day presuit screening period has expired, and that any complaint filed must have a good faith certificate, the Legislature has in effect imposed a duty of investigation upon the plaintiff, and has afforded the plaintiff both the time and means to conduct that investigation by creating the presuit screening period. It is thus reasonable to assume that the Legislature intended that both the serving of the notice and the presuit screening process itself are prerequisites to the filing of a valid complaint for medical malpractice.

The Plaintiffs maintain that the decision of the Second

District Court of Appeal in CASTRO v. DAVIS, 527 So.2d 250 (Fla. 2nd DCA 1988) supports their contention that the only prerequisite imposed by the statute is that the notice of intent be served prior to the expiration of the statute of limitations. The Second District Court of Appeal does not explicitly make that holding, nor can it be implied from the Court's decision. Unlike the instant case, the plaintiff in the CASTRO action completed all of the statutory requirements, notice, the presuit screening period, and the filing of the complaint, prior to the expiration of the statute of limitations, albeit not initially in the correct order. In the instant case, by the time the Plaintiffs asked the court to allow them to amend their complaint (and according to the Plaintiffs to abate the action for ninety days) the statute of limitations had already expired. The Second District Court of Appeal's decision in NASH v. HUMANA SUNBAY COMMUNITY HOSPITAL, INC., 526 So.2d 1026 (Fla. 2nd DCA 1988), rev. den. 531 So.2d 1354 (Fla. 1988), does not give sufficient facts to determine whether the statute of limitations had expired before or after the plaintiff completed all of the statutory requirements.

The Defendants take issue with the Plaintiffs' interpretation of PEARLSTEIN v. MALUNNEY, 500 So.2d 585 (Fla. 2nd DCA 1986), rev. den. 511 So.2d 299 (Fla. 1987) (PEARLSTEIN I) and MALUNNEY v. PEARLSTEIN, 539 So.2d 493 (Fla. 2nd DCA 1989) (PEARLSTEIN 11). In PEARLSTEIN II the Court properly found that the complaint should not have been dismissed, as the

plaintiff had served a notice of intent to initiate litigation, allowed more than the statutorily mandated ninety days to pass before filing the complaint, and then filed the complaint for medical malpractice, all prior to the expiration of the statute of limitations. PEARLSTEIN is not a situation where, as here, the plaintiff filed the complaint contemporaneously with serving the notice of intent to initiate litigation, and then waited until long after the statute of limitations had expired before allegedly requesting that the action be abated to allow the ninety days to elapse. Accordingly, the decision of the Fourth District Court of Appeal in the instant case still conflicts with PEARLSTEIN decisions of the Second District Court of Appeal.

It is apparent the Plaintiffs, and not Defendants have misunderstood the holding of the Third District Court of Appeal in PUBLIC HEALTH TRUST OF DADE COUNTY v. KNUCK, **495** So.2d 834 (Fla. 3rd DCA 1986). The Plaintiffs have interpreted the KNUCK decision as holding, "Thus, as to Jackson Memorial, since both a notice of intent and the 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 the notice of intent, Jackson Memorial was properly in the suit, and the trial court had the power to revive the action against it." (Respondents' brief, pages 9 and 10)

A close reading of the KNUCK decision reveals that Ms.

Freundlich had not served a notice of intent to initiate litigation pursuant to Section 768.57 upon Jackson Memorial. The notice served by Ms. Freundlich was pursuant to the requirements of the sovereign immunity statute. "In any event, Freundlich asserts, the notice she provided to Jackson Memorial Hospital on June 12th, 1985, pursuant to Section 768.28(6)(a), Florida Statutes, (Supp. 1984), satisfied the requirements of Section 768.57. We disagree." 495 So.2d at 836. As the statute of limitations had not expired as to Jackson Memorial, Ms. Freundlich could still serve the requisite notice of intent pursuant to Section 768.57, engage in the presuit screening process, and subsequently file her complaint. Accordingly, the Third District properly concluded that the action should be abated as to Jackson Memorial rather than dismissed.

The Defendants dispute the Plaintiffs' contention that the requirements of Section 768.57 are sufficiently analogous to the requirements of Section 768.28(6), Florida Statutes (Supp. 1980), so as to allow the cases governing the sovereign immunity statute to be dispositive of the instant case. Section 768.57 imposes obligations upon the parties as well as a mandatory screening process and investigatory process, whereas Section 768.28(6) imposes no such obligations on the public entity. The Plaintiffs maintain that while the statute does not delineate the precise procedures to be followed by the prospective defendant pursuant to Section 768.28, it is comprehended that there would be an investigation and effort

towards both evaluation and settlement of the claim. This supposition is not well founded.

In the majority of instances, the Department of Insurance plays no active role whatsoever in those actions in which it receives the mandated notice. In LEVINE v. DADE COUNTY SCHOOL BOARD, 442 So.2d 210 (Fla. 1983), the claimant filed an affidavit of an official of the Department of Insurance, attesting that the Department of Insurance had no financial interest in the outcome of the suit, and no role or function in the defense of claims against the School District. The affidavit explained that the Department's role in cases such as that was limited to gathering information and keeping records about the claims and reporting the information to Legislature from time to time. Given the difference between the burdens imposed by the two statutes, there is no legitimate basis for Plaintiffs' argument that Section 768.57 and Section 768.28 are sufficient analogous in cases involving one statute are applicable to cases involving another.

As was noted in Defendants' initial brief, notices of intent were not sent to the individual physicians.[1] Plaintiffs maintain that Rule 1.650(b)(1) of the Florida Rules of Civil Procedure applies in this instance. Florida Rule of Procedure

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[1] The fact that the letters sent to the professional associations contains the salutation "Dear Dr." rather than "Dear Professional Association" does not have the effect of rendering the notices effective as to both the individual physician and the professional association, where the notices were addressed only to the professional association.

1.650(b)(1) was not enacted until long after the notices of intent has been sent in the instant case, and long after the expiration of the Statute of Limitations. Contrary to Plaintiffs' contention, Rule 1.650(1) does not have retrospective application. Florida rules of court have prospective effect only absent an expressed statement to the contrary. STATE v. GREEN, 473 So.2d 823 (Fla. 2nd DCA 1985); JACKSON v. GREEN, 402 So.2d 553 (Fla. 1st DCA 1981); BAMBRICK v. BAMBRICK, 165 SO.2d 449 (Fla. 2nd DCA 1964). Rule 1.650 does not contain a provision expressing any intent that it be applied retroactively. IN RE: MEDICAL MALPRACTICE P. SCREEN. R., 536 So.2d 193 (Fla. 1988). According, Rule 1.650(b)(1) does not have retroactive application; and does not apply to the instant suit. The notices sent by the Plaintiffs to the Defendants' professional associations therefore cannot be imputed to the individual Defendant Physicians.

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 13th day of December, 1989 to all counsel of record on attached service list.

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