IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,333

JOHN INGERSOLL et ux.,

Petitioners,

vs.

WARREN HOFFMAN, D.D.S.,

Respondent.
_____/

On Discretionary Review
From the District Court
of Appeal of Florida,
Third District

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

The Petitioners, John Ingersoll and Kay Ingersoll, seek discretionary review of a certified question of the Third District Court of Appeal in Ingersoll v. Hoffman, 561 So.2d 324 (Fla. 3d DCA 1990). On May 6, 1991 this Court ordered supplemental briefs "on the question of whether Dr. Hoffman's 'unspecific denial' of the allegations of the performance of all conditions precedent constituted a waiver of the Ingersolls' failure to provide notification of intent to initiate litigation for medical malpractice."

The Petitioners, John Ingersoll and Kay Ingersoll, were the Appellants and Plaintiffs below and will be referred to as Petitioners, Plaintiffs or by name.

The Respondent, Dr. Warren Hoffman, was the Appellee and Defendant below and will be referred to as Respondent, Defendant or by name.

References to the record on appeal before the Third District Court of Appeal will be designated by the letter "R".

STATEMENT OF CASE AND FACTS

The material facts are set forth in Respondent's brief on the merits. The facts relevant to the supplemental issue of notice and waiver are set forth here.

By amendment of a previously filed complaint, Plaintiffs initiated a dental malpractice action against Dr. Howard Hoffman. (R. 9). Plaintiffs alleged in paragraph 2 of the amended complaint that "[a]ll conditions precedent to the filing of this Complaint have been observed." (R. 9). No certificate of counsel indicating good faith investigation as to Dr. Warren Hoffman was served or filed with the Amended Complaint. Ingersoll v. Hoffman, 561 So.2d 324 (Fla. 3d DCA 1990). Likewise, the Plaintiff did not send a notice of intent to initiate malpractice litigation to Dr. Hoffman, as required by Section 768.57, Florida Statute (1987).

Defendant answered by denying the material allegations in Plaintiffs' Amended Complaint. (R. 19).

In Defendant's Pretrial Catalog Statement of Defense, stated that "Plaintiffs' claims are barred by the applicable statute of limitations and the failure to comply with Section 768.57 Fla. Stat. which requires that a Notice of Intent have been sent to this Defendant prior to instituting litigation." (R. 31). Additionally, Defendant listed Barbara Minore and Marsha Banfield as witnesses who would testify "concerning the fact that a Section 768.57 Notice was not sent to Warren

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Hoffman, D.D.S., and failure to comply with said statutory provisions." (R. 35).

Defendant then served a motion to dismiss for failure to comply with Section 768.57, Fla. Stat. (1987). (R. 53). On the day of trial, the trial court heard argument on Defendant's motion to dismiss. (R. 59). The Defendant argued that no notice to initiate litigation pursuant to Section 768.57 had been sent to Dr. Warren Hoffman. (R. 59).

Plaintiffs' counsel, in response, conceded that no notice to initiate litigation had been sent by certified mail, return receipt requested, to Dr. Warren Hoffman. Ingersoll, 561 So.2d at 325; (R. 60). However, Plaintiffs' counsel argued that even though the notice had not been complied with, Hoffman's insurer knew that its insured, Dr. Warren Hoffman, would be sued. (R. 60). The trial court took evidentiary testimony from Dr. Warren Hoffman who specifically stated that he had never received a letter which informed him that John Ingersoll intended to initiate a claim for dental malpractice against him. (R. 72).

The trial court granted Defendant's motion to dismiss and Plaintiffs appealed to the Third District Court of Appeal. (R. 54, 55). On appeal, the Plaintiffs contended that, although the notice of intent was addressed to the wrong Hoffman brother, both brothers at the time were practicing dentistry at the same dental clinic and, in addition, the Hoffmans' insurance carrier acknowledged that it had been

notified of the intention to initiate litigation against Howard Hoffman. It was Petitioners' argument that adequate notice was given under Section 768.57 to Defendant Warren Hoffman. Ingersoll, 561 So.2d at 325. The Third District Court of Appeal did not agree with Plaintiffs' contention, found no error, and affirmed the trial court. Id.; (R. 96-102).

The Third District Court of Appeal held that Section 768.57(2) is a specific statute requiring that each prospective defendant be provided with notice and that neither constructive notice, oral notice, notice by publication, or notice by regular mail was sufficient. The court also noted that no certificate in accordance with the provisions of Section 768.495(1) was ever supplied to Dr. Warren Hoffman. Ingersoll, 561 So.2d at 325.

The Third District Court of Appeal certified to this Court the following question of great public importance:

> DOES THE FAILURE TO COMPLY WITH THE PRE-LITIGATION NOTICE REQUIREMENTS OF SECTION 768.57 DEPRIVE THE TRIAL COURT OF SUBJECT MATTER JURISDICTION OF A DENTAL MALPRACTICE ACTION, OR MAY THE LACK OF SUCH NOTICE BE EXCUSED BY A SHOWING OF ESTOPPEL OR WAIVER?

Plaintiffs first sought rehearing and rehearing en banc in the Third District Court of Appeal which was denied. (R. 103). Plaintiffs then sought discretionary review of the certified question of the Third District Court of Appeal. Briefs on the merits were submitted.

On May 6, 1991, this Court requested that the parties provide supplemental briefs on the question of whether Dr. Hoffman's "non-specific denial" of the allegations of the performance of the conditions precedent constituted a waiver of the Ingersolls' failure to provide notification of intent to initiate litigation for medical malpractice.

SUPPLEMENTAL ISSUE ON APPEAL

WHETHER THE "NON-SPECIFIC DENIAL" OF THE PLAINTIFF'S ALLEGATION OF THE PERFORMANCE OF ALL CONDITIONS PRECEDENT CONSTITUTED A WAIVER OF THE DEFENDANT'S FAILURE TO PROVIDE NOTIFICATION OF INTENT TO INITIATE LITIGATION FOR MEDICAL MALPRACTICE.

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SUMMARY OF THE ARGUMENT

Presuit notice is a condition precedent to bringing an action for medical malpractice. The claim for medical malpractice is based on the statute and the statute sets forth the conditions precedent. Where a plaintiff brings an action based on the statutory claim, it should be obligated to plead compliance with the conditions precedent specifically. Where the statute specifically identifies the conditions precedent, a requirement that a defendant deny general allegations of compliance specifically and with particularity simply means that a plaintiff can end run the statute by not complying with the presuit notice requirements.

ARGUMENT

A DENIAL TO A SPECIFIC ALLEGATION OF COMPLIANCE OF A STATUTORY CONDITION PRECEDENT DOES NOT WAIVE THE MANDATORY OBLIGATION OF COMPLIANCE.

The supplemental issue reveals a theoretical tension between the malpractice statute and the rules of pleading. The malpractice statute has two mandatory presuit requirements. The rules of pleading require a defendant to deny allegations of compliance specifically and with particularity. However, scrutiny of the purpose of the statute's presuit notice provision and certificate of good faith investigation, and scrutiny of the rule on pleading conditions precedent, reveals that theoretical tension to be non-existent.

The presuit requirements of the malpractice statute are designed to reduce litigation and impose benefits and burdens on both parties. The purpose of notice in a malpractice action is to give the parties an opportunity to settle and eliminate the adversarial proceeding. Malunny v. Pearlstein, 539 So.2d 493 (Fla. 2d DCA), review denied, 547 So.2d 1210 (Fla. 1989) (the purpose of the statute is to allow the potential defendant an opportunity to resolve amicably the controversy without the burden of a lawsuit); Castro v. Davis, 527 So.2d 250 (Fla. 2d DCA 1988). Compliance with this statute is mandatory and not subject to disregard in the first instance. NME Hospitals, Inc. v. Azzariti, 573 So.2d 173 (Fla. 2d DCA 1991). Likewise,

the rules of pleading are designed to aid the parties in establishing issues from the outset of a lawsuit. For this Court to create a broad rule that a non-specific denial of a allegation that all conditions precedent have been complied with results in a waiver of the right to receive the benefits of compliance with those conditions precedent, would amount to a substantial injustice and ultimate evisceration of the malpractice statute.

Malpractice claims are governed by statute. Section 768.40-66, Fla. Stat. (1987) (renumbered at Chapter 766 et. seq.). In fact, the claim for medical malpractice is statutorily defined: "A 'claim for medical malpractice' means a claim arising out of the rendering of, or the failure to render, medical care or services." Section 768.57(1)(a). The malpractice statute provides clearly delineated and specifically defined requirements prior to the filing of a claim for malpractice. As set forth in the statute,

> Prior to filing a claim for medical practice, a claimant shall notify each perspective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical malpractice. Section 768.57(2), Fla. Stat. (1987).[1]

Presuit notice is a mandatory requirement imposed by the legislature. It exists by virtue of the statute.

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[1] A second statutory condition precedent exists requiring a certificate by counsel that a reasonable investigation and good faith belief of negligent treatment. § 768.495(1), Fla. Stat. (1987).

Recently, this Court has analogized the presuit notice requirement in the malpractice statute to "the presuit notice which must be served when an agency is sued as required by Section 768.28(6), Florida Statutes (1989)." Hospital Corp. of America v. Lindberg, 571 So.2d 446, 448 (Fla. 1990).[2] As conditions precedent to filing a malpractice claim, the Plaintiff must (1) provide statutory notice of an intent to initiate a claim and (2) the Plaintiff's attorney must make a reasonable investigation that there are grounds for a good faith belief that there has been negligence in the care or treatment of the Claimant. § 768.57; § 768.495(1), Fla. Stat.

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[2] The issue of whether presuit notice is a condition precedent or, as the Third District Court of Appeal held, jurisdictional, is the heart of this appeal.

Respondent stands by its arguments raised in the brief on the merits. The sovereign immunity statute notice provisions are not analogous to the malpractice notice provisions, and Respondent does not abandon that position. The only true comparison between the two statutes is the requirement of written notice of an intent to initiate a claim. The sovereign immunity statute specifically incorporates language of condition precedent, has different technical requirements in the service or sending of notice, the malpractice statute has a penalty provision unlike the sovereign immunity statute, and perhaps most importantly, the long recognized doctrine that the sovereign is immune and only subject to suit in those situations where it gives up the immunity. On the contrary, the malpractice statute is a creation of the Legislature and one created by the Legislature for the public and not protected by sovereign immunity status. The Lindberg decision does not address the legislative distinctions between the two statutes. For these reasons, Respondent urges this Court to revisit its recent decision in Lindberg, and does not abandoned its argument that the notice provision of the malpractice statute is jurisdictional, unlike that of the sovereign immunity statute.

(1987);[3] See, Nash v. Human Sun Bay Community Hospital, Inc., 526 So.2d 1036, 1038 (Fla. 2d DCA), review denied, 531 So.2d 1354 (Fla. 1988) (investigation required by Section 768.495(1) is clearly a condition precedent to filing a medical malpractice action). There are no other statutory conditions precedent to the filing of a malpractice action.

A plaintiff who seeks to bring a malpractice claim must be charged with knowledge of the statute's presuit requirements. Akins v. Bethea, 160 Fla. 99, 33 So.2d 638 (1948) ("every citizen is charged with knowledge of the law of his jurisdiction"); see also 23 Fla.Jur.2d, Evidence and Witnesses

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[3] Section 768.495(1) states in pertinent part:

> 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 a good faith belief that there has been negligence in the care and 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. . . . If the court determines that such certificate of counsel is not made in good faith and that no justiciable issue was presented against the health care provider and fully cooperated in providing informal discovery, the court shall award attorney's fees and taxable cost against claimant's counsel, and shall submit the matter to The Florida Bar for disciplinary review of the attorney.

§ 100. The statute's presuit requirements are not convoluted, complex or hidden. Nor is compliance with them a chore or burden and pleading compliance should be a relatively simple pleading task. Simply put, a plaintiff who desires to bring a malpractice claim is charged with knowledge of the presuit requirements. Compliance with those requirements is a straightforward and uncomplicated procedure laid out by statute. Pleading compliance is even more simple. Pleading compliance is not an onerous or burdensome chore, as pleading compliance with conditions precedent can be in an action based on contract.

Florida Rule of Civil Procedure 1.120(c) states that:

> In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

To best understand the rule it is necessary to review why the rule was enacted. Prior to adoption of the Rules of Civil Procedure, the common law required the detailed pleading of performances of conditions precedent. Fidelity & Casualty Co. of N.Y. v. Tiedtke, 207 So.2d 40, 42 (Fla. 4th DCA 1968), quashed on other grounds, 222 So.2d 206 (Fla. 1969) ("The rule is intended to facilitate pleading in cases involving conditions precedent by relieving the claimant of the onerous chore of alleging and proving the satisfaction of each and every condition while at the same time preventing a general

denial from being sufficient to put compliance with such conditions at issue. See Fla.R.Civ.P. 1.120, Author's Comment (1967) ("As to pleading conditions precedent, this rule alters the common law rule which required the detailed pleading of performance of conditions precedent.");[4] see, 2A J. Moore Federal Practice, § 9.04 (2d Ed. 1987) ("At common law, the performance or occurrence of conditions precedent to defendant's liability had to be set out with particularity in order to lay a basis for the adverse party's duty."). The common law rule was abandoned because of the burdensomeness of the requirement "especially in insurance cases where the conditions were numerous . . . ." Moore's supra. See Tiedtke, supra. "With the advent of complex commercial insurance contracts, the burden imposed by the common law rule and the risk of technical default became sufficiently heavy to outweigh the minimal information value provided by an enumeration of the conditions precedent that had been complied with by the pleader." 5 Wright & Miller Federal Practice and Procedure, § 1302 (2d Ed. 1990).[5] The rule was enacted to alleviate the

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[4] Rule 1.120(c) is identical to Federal Rule of Civil Procedure 9(c).

[5] Wright and Miller argue that "it seems doubtful that even the usually perfunctory allegation of performance or occurrence called for by Rule 9(c) serves any significantly useful function." 5 Wright & Miller Federal Practice and Procedure § 1302 (2d Ed. 1990). At the very least this argument makes sense when a plaintiff, as in this case, alleges compliance but in fact did not comply with the statutory notice requirement. To allege that which is patently untrue should not be condoned by allowing a waiver argument.

burden of specifically pleading numerous conditions precedent. The rule also gives effect to Rule 1.110(b)'s liberal requirement of a short and plain statement of the ultimate facts showing the pleader is entitled to relief. The original basis for adoption of the rule was well-founded and designed to facilitate pleading and practice.

Rule 1.120(c)'s requirement of specific denial should not be applied to statutory conditions precedent. The First District Court of Appeal noted the general rule of specific denial, yet held that "if the cause of action is created by a statute, the pleader relying upon the statutory cause of action, must allege compliance with its prerequisites." San Marco Contracting Co. v. Department of Transportation, 386 So.2d 615, 617 (Fla. 1st DCA 1980). Compare Weir v. United States, 310 F.2d 149 (8th Cir. 1962).[6] However, recent application of the rule to statutory actions has created a tension between the purpose of the rule and the intention of the statutory conditions precedent.

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[6] The Plaintiffs' reliance on Jackson v. Seaboard Coast Line R. Co., 678 F.2d 992 (11th Cir. 1982), for the proposition that a general denial of an allegation of compliance with Title VIII claim conditions precedent waives the right to raise noncompliance, is misplaced. The Jackson court was wrangling with whether Title VII presuit requirements were jurisdictional. In this case, at the time Defendant answered Plaintiffs' complaint, notice, in the Third District Court of Appeal, was jurisdictional and not subject to Rule 1.120(c). Accordingly, Defendant should be penalized with waiver of a mandatory statutory requirement when failure to comply with that requirement represented a jurisdictional defect.

Recently the Second District Court of Appeal has held that the pleading of non-performance of a condition precedent without specificity and particularity in a mechanic's lien action waived the defendant's entitlement to raise the argument. Houdusa Corp. v. Abray Construction Co., 546 So.2d 1099 (Fla. 2d DCA 1989). In mechanic's lien actions, the plaintiff is required to furnish an affidavit which is a condition precedent to bringing the action. § 713.05, Fla. Stat. The Houdusa decision is flawed in light of the historical context of Rule 1.120(c). Where the original purpose of the rule was to relieve the claimant of the onerous chore of alleging and proving the satisfaction of each and every condition, and preventing a general denial from being sufficient to put compliance with such conditions at issue, the Second District's conclusion of waiver is at odds with the rule. A plaintiff's claim brought under a statute that specifically sets forth conditions precedent is unlike a claim based on a contract or insurance policy with numerous conditions precedent. The statute delineates the presuit requirements, or conditions precedent with specificity and particularity so that a plaintiff should be fully aware of what it must do to perfect a claim. The original purpose of Rule 1.120(c) is not served by its application to statutory actions with conditions precedent. Where the Legislature mandates that a plaintiff must do something before bringing a claim, the failure to do that which is statutorily required should not be

subject to waiver under Rule 1.120(c) because the onerous burden of pleading numerous conditions precedent does not exist.

Plaintiffs argue that conditions precedent must be denied specifically and with particularity. However, this rule is applicable only to a general allegation of the performance of the conditions precedent; where there are allegations of specific facts a response by way of a simple denial is permissible. Mariner Village, Ltd. v. American States Ins. Co., 344 So.2d 1337 (Fla. 2d DCA 1977); 40 Fla.Jur.2d Pleadings § 41. To impose a broad holding of waiver would contradict the holding of Mariner Village. If a plaintiff pleads notice with specificity, then a defendant should not have to answer specifically and with particularity.

Plaintiff invites the Court to hold that a condition precedent should be subject to waiver as affirmative defenses can be. That invitation should be soundly rejected because the two are legally distinct. A condition precedent calls for the performance of some act prior to the commencement of a lawsuit upon the performance of which the bringing of the action is made to depend. Compliance with a condition precedent rests solely with the plaintiff. An affirmative defense, however, is a matter that avoids the action, and that, under applicable law, the plaintiff is not bound to prove initially but that the defendant must affirmatively establish. Langford v. McCormick, 552 So.2d 964 (Fla. 1st DCA 1989), review denied, 562 So.2d 346

(Fla. 1990); 40 Fla.Jur.2d Pleadings § 159 (1987). This Court has held that malpractice pre-suit notice is a condition precedent, not an affirmative defense. Lindberg, supra. Compliance and proof of pre-suit notice is part of a plaintiff's pleading and proof burdens, not a defendant's. Therefore, the Plaintiff has the burden of truthfully pleading that all conditions precedent have been complied with. Fla.R.Civ.P. 1.120. See also Plowden & Roberts, Inc. v. Conway, 192 So.2d 528, 531 (Fla. 4th DCA 1966) (in discussing Rule 1.120(c)'s predecessor the rule that "a denial of performance or occurrence shall be made specifically and with particularity does not make the failure of performance or occurrence of conditions precedent an affirmative defense.")

There is no authority, and Petitioners cite none, for their argument that pre-suit notice is an affirmative defense which must be raised and proved by a defendant. On the contrary, the Legislature and this Court have specifically stated that malpractice notice is a condition precedent to bringing a malpractice action.

Contrary to Plaintiffs' assertion, notice is more than "technical". First, failure to comply with the notice requirement results in a dismissal of a plaintiff's complaint. Second, failure to follow the specific requirements of the statute's pre-filing notice requirement can work a substantial harm on medical professionals. Section 466.028(6), Florida

Statutes (1987), obligates the Department of Professional Regulation, upon

> receipt from the Department of Insurance of the name of . . . any dentist having three or more claims for dental malpractice within the previous 5-year period which resulted in indemnity being paid, the Department shall investigate the occurrence upon which the claims were based to determine if action by the Department against the dentist is warranted.

The pre-suit filing requirement places an obligation on the Plaintiff and his attorney to verify that the claim is not frivolous. § 768.495, Fla. Stat. (1987). If the pre-suit filing requirement is not adhered to, then a "claim" is already made, which may subject the dentist to the DPR reporting requirement of Section 466.028. A substantial harm is suffered by the dentist because of the administrative investigation process. If the potential claim proves to be frivolous during the investigation period then the litigation process is avoided along with the potential administrative claim. If the notice provisions are not followed then harm results because both parties have not fulfilled their statutory obligations to obtain their statutory benefits. The statute acts as a shield for both parties.

This Court should not apply Rule 1.120(c)'s requirement of specific denial to statutory actions. Where the statute sets forth conditions precedent, the plaintiff must be charged with knowledge of their existence and ultimately their compliance. Where the Legislature has seen fit to delineate conditions

precedent in statutory actions, the Plaintiff should have a minimal burden of specifically pleading their compliance. Otherwise, a strict adherence to Rule 1.120(c) would eviscerate the malpractice statute and permit a plaintiff to plead compliance and end run the statute's mandatory requirement of presuit notice. The statute requires presuit notice, not post-suit notice. A defendant is entitled to the benefit of presuit notice to effectuate the purpose of the statute -- resolution of disputes amicably and without resorting to the judicial process.

Any broad rule of waiver of this Court would frustrate the presuit requirements of the statute. Furthermore, the historical basis for the rule is not supported by its present application to statutory conditions precedent. A defendant is entitled to presuit notice, and a spurious allegation of compliance, should not at a later date, entitle a plaintiff to invoke a waiver argument.

CONCLUSION

Based on the foregoing argument and authority cited therein, Respondent respectfully requests that this Court affirm the Third District Court of Appeal's opinion affirming the dismissal of this action. Respondent also requests that this Court answer the supplemental issue by holding that statutory notice is not subject to waiver.

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