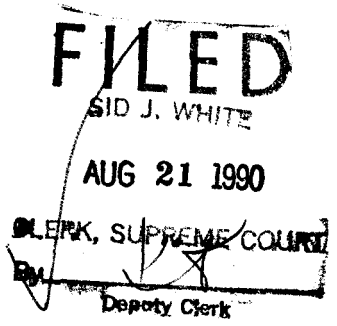
IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 76,333



JOHN INGERSOLL and KAY INGERSOLL, his wife,

Petitioners,

vs.

WARREN HOFFMAN, D.D.S.,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' BRIEF ON MERITS

KENNETH P. LIROFF
201 Southeast 19th Street
Ft. Lauderdale, FL 33316
and
BRIAN HERSH
19 West Flagler Street
Miami, FL 33130
and
LARRY KLEIN, of
KLEIN & WALSH, P.A.
Suite 503 - Flagler Center
501 S. Flagler Drive
West Palm Beach, FL 33401
(407) 659-5455

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONT'D.

PREFACE

Petitioner was the plaintiff in the trial court and respondent was the defendant. The parties will be referred to as plaintiff and defendant or by their proper names. The following symbols will be used:

(R) - Record on Appeal

(Supp. R) - Supplemental Record.

INTRODUCTORY STATEMENT

Two brothers, Warren Hoffman and Howard Hoffman, were practicing dentistry together as the "Hoffman Dental Studio", and Warren negligently treated the plaintiff. Plaintiff's counsel addressed his notice of initiating a professional negligence claim under Section 768.57, Florida Statutes, to Howard Hoffman instead of Warren Hoffman. Warren Hoffman received the notice, however, and sent it to their insurer, and their insurer acknowledged receipt of the notice and identified the insured as the Hoffman Dental Studio/Warren Hoffman. Although the defendant did not raise the sufficiency of notice until trial, the trial court granted defendant's motion to dismiss based on failure to give notice, and the Third District affirmed, certifying the following question as one of great public importance:

> DOES THE FAILURE TO COMPLY WITH THE PRELITIGATION 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?

We respectfully submit that the present factual situation does not involve a failure to give notice, but rather the sufficiency of the notice given, as Judge Ferguson pointed out in his dissent. We therefore submit that the issues should more appropriately be stated as follows:

ISSUE I

WAS THE NOTICE OF INTENT, ALTHOUGH ADDRESSED TO THE WRONG HOFFMAN BROTHER PRACTICING IN THE HOFFMAN DENTAL STUDIO, SUFFICIENT TO COMPLY WITH THE STATUTE, WHERE THE INSURANCE CARRIER DEFENDING THE CLAIM ACKNOWLEDGED RECEIVING THE NOTICE OF INTENT ON BEHALF OF THE RIGHT HOFFMAN BROTHER?

ISSUE II

WAS THE DEFENDANT ESTOPPED FROM CHALLENGING THE SUFFICIENCY OF THE NOTICE OF INTENT, BY ANSWERING THE COMPLAINT AND WAITING UNTIL TRIAL, AFTER THE STATUTE OF LIMITATIONS MAY HAVE RUN, TO MOVE TO DISMISS?

STATEMENT OF THE CASE & FACTS

On August 6, 1987, Attorney Brian Hersh wrote a letter to the "Hoffman Dental Studio" enclosing an authorization for release of medical records signed by plaintiff John Ingersoll, and requesting other information (Supp. R). On September 10, 1987 Attorney Kenneth Liroff, who had then been associated by Hersh, notified Howard Hoffman, D.D.S., at the same address, under Section 768.57, Florida Statutes, of the initiation of a professional negligence claim (Supp. R).

On September 14, 1987, a claims representative of CNA Insurance Companies wrote a letter to Brian Hersh identifying the claimant as Mr. Ingersoll, and identifying the insured as Hoffman Dental Studio/Warren Hoffman, acknowledging receipt of Hersh's letter of August 6, 1987, requesting additional information, and notifying Hersh that he should file a letter of intent pursuant to Section 768.57, Florida Statutes (Supp. R).

On October 13, 1987, the same claims representative of CNA Insurance Companies wrote Attorney Liroff referring to the insured as Hoffman Dental Studio/Warren Hoffman, D.D.S. That letter stated in part:

> Please be advised that CNA Insurance Companies represent Hoffman Dental Studio/Warren Hoffman. I am the claims representative who will be handling this case on behalf of our insured.
>
> It is my understanding that Brian Hersh has referred this claim over to you and that you are working in conjunction with Mr. Hersh. To that end, I would appreciate information from you so that we can set up this claim file and investigate this matter so that we can resolve this case amiably.
>
> It is my understanding that you forwarded a letter of intent to my insured dated September 10, 1987. In that regard, and pursuant to Florida Statute 768.57, I respectfully request that you make discoverable information available to us in order that we might evaluate the merits of your client's claim. Please document any allegations of malpractice with evidence of an injury sustained, bills documenting any necessary further treatment and your expert's report regarding the insured's treatment (Supp. R).

The date of loss reflected in the letter was October 1, 1985.

On November 30, 1987, Attorney Liroff wrote the CNA claims representative, stating in part:

> In your letter you state that CNA Insurance Company represents Hoffman Dental Studio/Warren Hoffman. The letter that you referred to, dated September 10, 1987, sent by my office, was to Howard Hoffman, D.D.S. The letter of intent sent by Mr. Hersh was to Warren Hoffman, D.D.S.
>
> From your letter, I cannot determine whether you are responding on behalf of Warren Hoffman or Howard Hoffman. It is my intention to initiate a medical malpractice action on behalf of John Ingersoll against Howard Hoffman, D.D.S., inasmuch as the information that I have been given is that Howard Hoffman is the only dentist who performed treatment at the Hoffman offices.
>
> If your letter is in response to my notice of intent letter to Howard Hoffman, I would appreciate your advising me with specificity precisely the information you desire.
>
> I stand ready to assist you in your investigation but require your input and a specific list of your requirements (Supp. R).

On December 10, 1987, the CNA claims representative called Attorney Liroff and left the following message which was written down:

> "Warren Hoffman is the treating dentist for John Ingersoll." (Supp. R).

On December 9, 1987, suit was filed against Howard Hoffman (R 1), and one day later, as a result of the telephone message, an amended complaint was filed against both Howard Hoffman and Warren Hoffman (R 9). Defendants answered on February 16, 1987 (R 15). The complaint alleged compliance with all conditions precedent, which defendants denied. Neither the complaint nor the answer referred to the statutorily required notice of intent. In January of 1989 plaintiffs voluntarily dismissed their claim against Howard Hoffman.

On March 20, 1989, which was the first day of trial, defendant Warren Hoffman filed a motion to dismiss, for the first time specifically alleging that he had not been served with a notice of intent to initiate litigation for medical malpractice as required by Section 768.57, Florida Statutes. In response to the motion plaintiffs filed with the court the letters and notices referred to above. Defendant Warren Hoffman testified that he had not received a letter informing him that plaintiff intended to initiate a claim for dental malpractice against him. Defendant Hoffman further testified:

> Q. Mr. Hersh's letter of August 6, 1987--I would hand that to you, Doctor--when this was received at your facility, did you in response to that, respond to CNA Insurance Company?
>
> A. The Dental Studio responded to it.
>
> Q. The Dental Studio, the corporation responded to it?
>
> A. The corporation responded.

Q. Through whom, an officer of the corporation or an employee or an associate of the corporation?

A. I don't know who did it, who made the response, whether it was myself or my brother.

Q. You say it is the dental corporation that made the response; who are the officers of Howard Hoffman, D.D.S., P.A.?

A. Howard Hoffman.

Q. You are an associate of Howard Hoffman, D.D.S., P.A.?

A. I was.

Q. Were you able to act on behalf of Howard Hoffman, D.D.S., P.A.?

A. In what respect?

Q. In any respect.

A. I'm not sure.

Q. Did you treat patients on behalf of the P.A.?

A. Yes. (R 72-73).

* * *

Q. Did you have such a conversation with CNA, Barbara Namorey (phonetic), Marsha Banfield (phonetic) or Barbara Weinfield (phonetic)?

A. I spoke with Barbara Namorey.

Q. Did she give you a copy of the records? Did she ask you to prepare a narrative report?

A. Yes.

Q. Did she tell you she was setting up a claim file?

A. Yes. (R 74).

* * *

Q. The question was: You did all those things, calling CNA, speaking with the adjuster, sending the records and preparing a narrative, handwritten or typewritten summary of the events surrounding the treatment of John Ingersoll in response to the August 6th letter by Mr. Hersh concerning Ingersoll addressed to you, Hoffman Dental Studio?

A. I did it at the request of Barbara Namorey.

Q. Which was in response to you calling them and initiating the letter?

A. She asked me to do it based on the facts of the letter, but I told her that the claim was against Howard Hoffman and he was not the doctor that treated him. (R 75).

* * *

Q. A letter was sent to Mr. Howard Hoffman on September 10th; did you ever see that letter; it concerned John Ingersoll's treatment?

A. Yes. (R 76).

* * *

Q. Did there ever come a point in time before the lawsuit was filed where you had to clarify to the CNA adjuster that you were the primary treating doctor and that Howard wasn't?

A. When this arrived, I believe we clarified to CNA that Howard Hoffman was not the treating doctor. I wrote a letter to Barbara Namorey dated November 30th, in which I set forth my belief that I understood that Howard Hoffman- (R 77).

The court granted defendant's motion to dismiss and entered a final judgment of dismissal. Plaintiffs appealed and the Third District affirmed with a dissenting opinion, and certified the question as one of great public importance.

SUMMARY OF ARGUMENT

The notice of intent to institute litigation was addressed to the wrong Hoffman brother. Both brothers, however, were practicing dentistry in the "Hoffman Dental Studio", and CNA Insurance Company wrote the lawyer who sent the notice of intent, acknowledging that the insured was Hoffman Dental Studio/Warren Hoffman (the right defendant), that the claimant was John Ingersoll, and the date of loss. This notice of intent was sufficient to comply with the statutes and/or the defendant was estopped to deny the sufficiency of the notice of intent, since its carrier, acting on defendant's behalf, acknowledged receipt of the notice of intent.

Even if the notice of intent was not sufficient, defendant, by initially failing to raise this in its motion to dismiss the complaint, when it could have been corrected and waiting until trial, after the statute of limitations may well have run,[1] was estopped from challenging the sufficiency of the notice of intent.

ARGUMENT

CERTIFIED QUESTION

DOES THE FAILURE TO COMPLY WITH THE PRELITIGATION 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?

---

[1] It appears the two year statute of limitations has run, however the record is not entirely clear and plaintiffs have filed another lawsuit. The date of loss reflected in the letter from the insurer to plaintiffs' counsel was October 1, 1985.

ISSUE I

WAS THE NOTICE OF INTENT, ALTHOUGH ADDRESSED TO THE WRONG HOFFMAN BROTHER PRACTICING IN THE HOFFMAN DENTAL STUDIO, SUFFICIENT TO COMPLY WITH THE STATUTE, WHERE THE INSURANCE CARRIER DEFENDING THE CLAIM ACKNOWLEDGED RECEIVING THE NOTICE OF INTENT ON BEHALF OF THE RIGHT HOFFMAN BROTHER?

The Third District held in the present case that there was a failure to give notice which was jurisdictional, which required dismissal under two of its prior decisions, Berry v. Orr, 537 So.2d 1014 (Fla. 3d DCA 1988), and Bendeck v. Berry, 546 So.2d 14 (Fla. 3d DCA 1989).[2]

Judge Ferguson dissented, pointing out that the real issue was not whether notice was given, but whether the notice given was adequate. He concluded that the notice was sufficient, and that the defendant's failure to challenge the sufficiency of the notice until the trial waived that defense.

The landmark case in this state on sufficiency of notice is Rabinowitz v. Town of Bay Harbor Islands, 178 So.2d 9 (Fla. 1965), which involved the sufficiency of notice of an action for damages for personal injuries to a municipality. No written notice was given although it was required by the town charter. This court

---

[2] The Third District stated on page 3 of its opinion in this case that it had previously certified this issue in Bendeck v. Berry, supra, however review in this court was not sought in Bendeck v. Berry.

held that because the town was aware of the accident, and had investigated it and conducted settlement negotiations with the plaintiff, there was a waiver or estoppel as to the requirement of written notice, stating on pages 12 and 13:

> The sum of the holdings in recent years has been that when responsible agents or officials of a city have actual knowledge of the occurrence which causes injury and they pursue an investigation which reveals substantially the same information that the required notice would provide, and they thereafter follow a course of action which would reasonably lead a claimant to conclude that a formal notice would be unnecessary, then the filing of such a notice may be said to be waived. If the claimant, as a result of such municipal conduct, in good faith fails to act, or acts thereon to his disadvantage, then an estoppel against the requirement of the notice may be said to arise.

See also, City of Pembroke Pines v. Atlas, 474 So.2d 237 (Fla. 4th DCA 1985), rev. denied, 486 So.2d 595 (Fla. 1986); City of Jacksonville Beach v. Duncan, 392 So.2d 25 (Fla. 1st DCA 1980), rev. denied, 399 So.2d 1141 (Fla. 1981); Hutchins v. Mills, 363 So.2d 818 (Fla. 1st DCA 1978), cert. denied, 368 So.2d 1368 (Fla. 1979).

In the present case, although the notice was addressed to the wrong defendant, the right defendant received it, and sent it to his insurer. The insurer wrote the plaintiff and acknowledged receipt of the notice of intent on behalf of the right dentist, and

further correspondence ensued. The facts thus fall squarely within this court's holding in Rabinowitz.

The opinion of the Third District in the present case is also in conflict with other district courts which have been confronted with similar issues. In Franklin v. Palm Beach County, 534 So.2d 828 (Fla. 4th DCA 1988), two people were injured in an accident. The notice of claim sent pursuant to Section 768.28(6)(a), Florida Statutes, named both injured persons in the heading, however the body of the notice only referred to the claim of one person. The trial court dismissed the complaint and the Fourth District reversed, stating on page 829:

> The failure to include Franklin's name at that point was an oversight. However, the purpose of the notice had been fulfilled. The agencies were on notice of an accident, its time and location and that injuries were suffered and a claim was being made. Thus, no prejudice could be asserted from the oversight regarding Franklin.
>
> The County relies upon Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983), for the proposition that the requirements of this statute, being a part of the statutory waiver of sovereign immunity, must be strictly construed. While we honor that admonition, we believe it inapplicable to the facts of this case. The Levine court was dealing with a failure of notice to the Department of Insurance as required. We are dealing here with the adequacy of the notice as given and find it adequate under the circumstances.

In Tracey v. Barrett, 550 So.2d 558 (Fla. 2d DCA 1989), which came out after the filing of our initial brief and is noted by

appellee in a footnote on page 9, plaintiff sent a letter to the physician stating that he thought the physician had made a mistake in his treatment and requesting that the physician contact his insurance company so that they could "try and work this problem out without getting involved with courts, etc." The trial court dismissed the complaint because of the absence of language in the letter of intent stating that the plaintiff intended to file suit. The Second District reversed, stating on page 560:

> Any manner of written notice which describes the occurrence underlying the claim should suffice. [cit.om.]
>
> ...Moreover, the appellee treated the letter as a notice of intent. His forwarding of the letter to his insurance company and the claims adjuster's investigation triggered the process contemplated by the statute. Because the purpose of the statutory notice provision was fulfilled, we conclude that the trial court erred in dismissing the appellant's complaint with prejudice.

In Whitney v. Marion County Hosp. Dist., 416 So.2d 500 (Fla. 5th DCA 1982), the notice under Section 768.28(6) was not given in a medical malpractice claim against a hospital which was a state agency. The Fifth District held, however, that the demand for medical mediation sent pursuant to other statutes sufficed, stating on page 502:

> Since section 768.28(6) does not specify the form or manner of submitting the claim, except that it be in writing, it follows that any manner of submitting a written notice of the claim to the agency involved that sufficiently describes or identifies the occurrence so that the agency may investigate it, satisfies the statute.

In Solimando v. International Medical Centers, H.M.O., 544 So.2d 1031 (Fla. 2d DCA), rev. dismissed, 549 So.2d 1013 (Fla. 1989), it was held that the failure to give notice was not jurisdictional and that principles of estoppel and waiver did apply to the same statute as is involved in the present case. The Second District certified the issue as one of great public importance, however that appeal has been dismissed in this court, International Medical Centers, H.M.O. v. Solimando, 549 So.2d 1013 (Fla. 1989).

In Lindberg v. Hospital Corp. of America, 545 So.2d 1384 (Fla. 4th DCA 1989), the Fourth District certified the issue as to whether the failure to file the notice prior to instituting suit was jurisdictional. The Fourth District held it was not jurisdictional, and that case is presently pending in this court.

The opinion of the Third District in the present case also appears to conflict with its prior opinion in Martin v. Monroe County, 518 So.2d 934 (Fla. 3d DCA 1987), rev. denied, 528 So.2d 1182 (Fla. 1988), wherein the court stated on page 935:

> We hold that when the Department of Insurance Division of Risk Management acknowledges that within the statute of limitations, an accident report of a claim was filed pursuant to Section 768.28(6), Florida Statutes (1979), it is thereafter estopped after the expiration of the statute of limitations to deny receipt of the claim. Rabinowitz v. Town of Bay Harbour Islands, 178 So.2d 9 (Fla. 1965); Franklin v. Department of Health and Rehabilitative Services, 493 So.2d 17 (Fla. 5th DCA 1986).

The notice in the present case was sufficient. If the notice itself was insufficient, then the acknowledgement of receipt of the notice by the insurer, which provided the insurer all the information contemplated by the statute, created an estoppel or waiver under Rabinowitz, supra, and its progeny.

ISSUE II

WAS THE DEFENDANT ESTOPPED FROM CHALLENGING THE SUFFICIENCY OF THE NOTICE OF INTENT, BY ANSWERING THE COMPLAINT AND WAITING UNTIL TRIAL, AFTER THE STATUTE OF LIMITATIONS MAY HAVE RUN, TO MOVE TO DISMISS?

The estoppel or waiver argued under this issue involves more than the defendant and the insurer receiving notice, as is argued above. This estoppel and waiver is based on the fact that the defendant and insurer never contested the sufficiency of notice until the trial of this case, which precluded plaintiff from correcting the problem in order to avoid the statute of limitations, which has most probably run. In McSwain v. Dussia, 499 So.2d 868 (Fla. 1st DCA 1986), rev. denied, 511 So.2d 298 (Fla. 1987), an identical factual situation was presented, the only difference being that McSwain involved the notice to the Department of Insurance as required by Section 768.28(6), Florida Statutes. In that case the defendant answered, and two years later, after the statute of limitations had run, moved to dismiss based on lack of notice. Just as in the present case, if the defendant had raised the issue earlier, the notice could have been timely given. The

trial court held that failure to give notice could not be waived, and the First District reversed, holding that notice was not jurisdictional and can be waived, citing Meli v. Dade County School Board, 490 So.2d 120 (Fla. 3d DCA), rev. denied, 500 So.2d 543 (Fla. 1986). In Meli the Third District held that the notice required under Section 768.28(6), Florida Statutes, could be waived where the defendant led plaintiff to believe the case would be settled.

Judge Ferguson dissented in the present case, stating on page four:

> This case presents ambush-tactic litigation in its most amateurish form, which we should condemn. In disposing of the case on a technicality, the trial court gave gamesmanship a stamp of approval.

Judge Ferguson further stated on page seven:

> No claim is made by the defendant that he was prejudiced by the plaintiff's actions. Second, by virtue of the insurer's acknowledgment of receipt of the notice and failure to challenge the sufficiency of the notice until the time of trial, the defense of inadequate notice was waived. Finally, having successfully urged the plaintiffs to amend the complaint to name him as a defendant, the defendant is estopped to assert--now that the statute of limitations would bar a refiling of the action--that he had inadequate statutory notice of an intent to litigate. It has been the position of this court, consistently, that a "gotcha" school of litigation cannot succeed. Salcedo v. Asociacion Cubana, Inc., 368 So.2d 1337 (Fla. 3d DCA), cert. denied, 378 So.2d 342 (Fla. 1979).
>
> I would reverse the order of dismissal and remand the case for a trial on the merits.

CONCLUSION

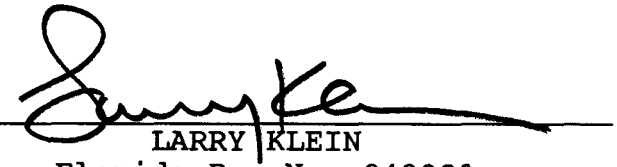
The opinion in the present case should be reversed and this case remanded so that it can be tried on its merits.

KENNETH P. LIROFF
201 Southeast 19th Street
Ft. Lauderdale, FL 33316
and
BRIAN HERSH
19 West Flagler Street
Miami, FL 33130
and
LARRY KLEIN, of
KLEIN & WALSH, P.A.
Suite 503 - Flagler Center
501 S. Flagler Drive
West Palm Beach, FL 33401
(407) 659-5455

By 
LARRY KLEIN
Florida Bar No. 043381

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 20th day of August, 1990, to: G. BART BILLBROUGH, One Biscayne Tower, Suite. 2500, 2 South Biscayne Boulevard, Miami, FL 33130.

By 
LARRY KLEIN
Florida Bar No. 043381