IN THE SUPREME COURT OF 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

RESPONDENT'S BRIEF ON THE MERITS

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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).

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 will be designated by the letter "R" and references to the supplemental record on appeal before the Third District by "SR."

STATEMENT OF CASE AND FACTS

Respondent has prepared his own Statement of Case and Facts to more accurately reflect and portray the events below.

Dr. Howard Hoffman and Dr. Warren Hoffman practiced dentistry together at the Hoffman Dental Studios. (R. 59). In July, 1984 Ingersoll sought treatment from Dr. Warren Hoffman for temporary denture construction.[1] (R. 10). Both Doctors were insured under the same policy with CNA Insurance Company. (SR.)

This dispute commenced on September 10, 1987, when counsel for the Ingersolls, attorney Ken Liroff, notified Dr. Howard Hoffman that Plaintiffs were about to institute a potential professional negligence claim against Dr. Howard Hoffman. Ingersoll v. Hoffman, 561 So.2d 324, 325 (Fla. 3d DCA 1990). Prior to notifying Dr. Howard Hoffman of a potential claim, Plaintiffs' counsel sent a generic letter to Hoffman Dental Studios requesting Ingersoll's medical records. (SR.)

On September 14, 1989, CNA Insurance Company responded to Plaintiffs' counsel's September 10 letter. Because a notification letter was only sent to Dr. Howard Hoffman, CNA specifically requested that Plaintiffs' counsel send one to Dr. Warren Hoffman:

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[1] Dr. Howard Hoffman had no contact with Ingersoll other than to provide a second opinion. He was ultimately dismissed from the action because no cause of action existed against him. (R. 27).

> Finally, you will need to forward a letter of intent, pursuant to Florida Statute 768.57. If we do not receive this letter, we will assume that you are not pursuing this claim and our file will be closed.
>
> (SR.)

On October 13, 1987, CNA Insurance Company again acknowledged that Plaintiffs had provided a notice of intent to commence malpractice litigation against Dr. Howard Hoffman. Ingersoll, 561 So.2d at 325. Plaintiffs responded on November 30, 1987 acknowledging that no notice of intent had been sent to Dr. Warren Hoffman. In fact, Plaintiffs' November 30, 1987 letter specifically states that it was Plaintiffs' "intention to initiate a medical malpractice action on behalf of John Ingersoll against Howard Hoffman, D.D.S. . . ."

Plaintiffs finally initiated an action solely against Dr. Howard Hoffman. (R. 1). At the same time the Complaint against Dr. Howard Hoffman was filed, Plaintiffs' counsel, pursuant to Section 768.495(1), Florida Statutes, filed a certificate of counsel indicating that a reasonable investigation had given rise to a good faith belief that grounds existed for the action against Dr. Howard Hoffman. (R. 5).

Plaintiffs amended their Complaint to include Dr. Warren Hoffman as a Defendant. (R. 9). No certificate of counsel indicating good faith investigation as to Dr. Warren Hoffman was served or filed with the Amended Complaint. Ingersoll, 561 So.2d at 324.

Defendant answered specifically denying the allegation in Plaintiffs' Amended Complaint that "all conditions precedent to the filing of this Complaint have been observed." (R. 19). Plaintiffs then voluntarily dismissed their claim against Dr. Howard Hoffman. (R. 27).

In Defendant's Pretrial Catalog in the Statement of Defense, sole Defendant Warren Hoffman 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 Warren Hoffman 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 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, Florida Statutes (1987), 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, the 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 by certified mail 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.[2] (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.

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[2] Plaintiffs have initiated a new dental malpractice action against Warren G. Hoffman, D.D.S. and Howard J. Hoffman, D.D.S., P.A., a professional corporation, in the Circuit Court in and for Dade County, Florida, Case No. 89-30505 CA 28. Defendants have moved to abate that action, which Plaintiffs have steadfastly opposed.

The Third District Court of Appeal found 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 court certified to this Court the following question 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 SHOWING OF ESTOPPEL OR WAIVER?

Plaintiffs now seek discretionary review of the certified question of the Third District Court of Appeal.

ISSUES ON APPEAL

I. WHETHER THE THIRD DISTRICT COURT OF APPEAL CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER DISMISSING THIS DENTAL MALPRACTICE ACTION WHEN THE PLAINTIFFS FAILED TO SERVE A NOTICE OF INTENT TO INITIATE LITIGATION AS REQUIRED BY SECTION 768.57(2), FLORIDA STATUTES (1987), ON THE DEFENDANT, DR. WARREN HOFFMAN.

II. WHETHER THE PLAINTIFFS FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS OF SECTION 768.57 THEREBY DEPRIVING THE COURT OF SUBJECT MATTER JURISDICTION ENABLING THE DEFENDANT TO RAISE THE ISSUE AT ANY TIME.

SUMMARY OF THE ARGUMENT

Prior to filing a claim for dental malpractice, the claimant shall serve a notice of intent to initiate litigation on each prospective defendant. Failure to provide notice results in a dismissal of the action. Plaintiffs failed to provide any notice to Dr. Warren Hoffman. Plaintiffs' notice to a separate Defendant cannot be construed as proper statutory notice to Dr. Warren Hoffman.

The Third District Court of Appeal has explicitly held that notice under Section 768.57 is jurisdictional and that failure to provide notice shall result in dismissal. Notice is not subject to waiver and absence of notice may be raised at any time.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DISMISSING THIS DENTAL MALPRACTICE ACTION WHERE PLAINTIFFS FAILED TO SERVE A NOTICE OF INTENT TO INITIATE LITIGATION AS REQUIRED BY SECTION 768.57(2), FLORIDA STATUTES (1987), ON THE DEFENDANT, DR. WARREN HOFFMAN.

Contrary to Petitioners' belief, this is a case where no notice of intent to initiate litigation was served on Dr. Warren Hoffman. Valid notice went to an independent, distinct and separate defendant, who was ultimately dismissed from the case, but not to Defendant Dr. Warren Hoffman. Ingersoll, 561 So.2d at 325. Plaintiffs failed to comply with the statutory pre-filing notice requirement and the Third District correctly affirmed the trial court's order dismissing this action. Id.

In this case, the Defendant, Dr. Warren Hoffman, never received notice as required by the statute. Notice is more than a mere technicality because of the burdens and benefits offered by the statute to both parties. The purpose behind the statute is to reduce litigation. The Third District's holding that notice is jurisdictional substantially furthers that purpose. It would be blatantly contradictory to allow a plaintiff to file notice after a lawsuit is commenced if the purpose of the pre-suit filing requirement is to reduce litigation or amicably resolve disputes. Both the language of the statute and the Third District's opinion unequivocally

require notice to each prospective defendant. Dr. Warren Hoffman never received a notice of intent to initiate medical malpractice litigation from the Plaintiffs. The Plaintiffs failed to follow the straight-forward requirements of the statute and their claim was properly dismissed.

A. Section 768.57 Requires Notice to be Given to Each Prospective Defendant.

In affirming the trial court's order of dismissal, the Third District Court of Appeal stated that "[s]ection 768.57(2) Florida Statutes (1987) is specific." Ingersoll, 561 So.2d at 324. The Third District emphasized that Section 768.57(2) requires that prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant.

The language of the statute is very specific and "each prospective defendant" must be served. The statute does not allow for generic notice, constructive notice, oral notice, notice by publication or even notice by regular mail. Ingersoll, 561 So.2d at 325. To the contrary, the language is unequivocal and the notice must exactly track that set forth in the statute. Glineck v. Lentz, 524 So.2d 458 (Fla. 5th DCA 1988) (actual oral notice by plaintiff-patient to defendant-doctor insufficient), review denied, 534 So.2d 399 (Fla. 1988); Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986), review denied, 511 So.2d 299 (Fla. 1987) (service of malpractice complaint does not satisfy pre-filing notice

requirement); Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986) (notice under waiver of sovereign immunity statute, §768.28, insufficient for compliance with notice under §768.57).[3] "If notice of an intended medical malpractice action is necessary, and the legislature has directed it, then there is good reason that the form of such notice be such as to eliminate or reduce contention and litigation concerning compliance with such notice requirement." Glineck, 524 So.2d at 458. There is clear legislative direction contained in Section 768.57(2), and strict compliance is mandated. Id.

In Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986), the plaintiff, Freundlich, instituted a medical negligence action against several health care providers. The defendants "moved to dismiss the complaint because Freundlich had failed to serve the requisite notice of intent to initiate medical malpractice litigation , §768.57(2), Fla. Stat. (1985)." Knuck, 495 So.2d at 835. At the hearing on the motion, "the trial court granted Freundlich's ore tenus motion to abate the action to enable her to comply with the neglected provisions" of Section 768. Id. at 836.

On petition for writ of prohibition, the court

> reject[ed] as without merit Freundlich's contention that the notice she sent to

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[3] Unlike Tracey v. Barrett, 550 So.2d 558 (Fla. 2d DCA 1989) (statute does not require "magic words"), the contents of the letter are not in dispute. In this case the dispute is over the existence vel non of any notice letter.

> Jackson Memorial Hospital suffered as notice to all defendants. Section 768.57(2) requires that a claimant "serve upon *each prospective defendant* . . . a notice of intent to initiate litigation for medical malpractice." (emphasis supplied). The legislature removed any doubt as to its intention by stating in subsection 8 of section 768.57 that "[i]f there is more than one prospective defendant, the claimant shall [serve] the notice of claim and follow the procedures in this section *for each defendant*." (emphasis supplied). Freundlich's notice to Jackson Memorial Hospital does not constitute notice to other defendants under section 768.57.

Knuck, 495 So.2d at 837. To properly comply with the legislative mandate of pre-filing notice, each prospective defendant must be served. Section 768.57 does not embrace the maxim "one for all and all for one". Rather, the statute and interpretive case law require separate notice for each prospective defendant. In this case, Plaintiffs failed to serve Dr. Warren Hoffman with notice as prescribed by Section 768.57(2).

In fact, Plaintiffs conceded, and the Third District properly noted, that the notice of intent to institute litigation was contained in the letter of September 10, 1987, of Attorney Liroff, however it mistakenly named Howard Hoffman instead of his brother Warren Hoffman, who was practicing with him and treated the plaintiff. Ingersoll, 561 So.2d at 325. Plaintiffs continue to maintain that their mistake was sufficient notice. To the contrary, both the Florida Legislature and the Florida Courts have held that the only

adequate notice is that clearly stated in the statute. The manner, form and method of notice required by the statute are set forth in detail and in no uncertain terms: "Prior to filing a claim . . . a claimant shall serve upon each prospective defendant by certified mail, return receipt requested, a notice of intent to initiate litigation for medical malpractice." §768.57(2), Fla. Stat. (1987) (emphasis supplied). Dr. Warren Hoffman, one of two Defendants in this action, was never served with such notice.

Interestingly enough, Plaintiffs' counsel, in his own confusion, made no attempt to cure the defect. Plaintiffs never served statutory notice upon Dr. Warren Hoffman, timely or otherwise. Plaintiffs' argue that their confusion over which Hoffman was responsible somehow relieved them of their obligation to serve notice to both. This contention is squarely addressed and rejected by the statute's use of the word "each." "The plain meaning of statutory language is the first consideration of statutory construction." The Shelby Mutual Ins. Co. of Shelby Ohio v. Smith, 556 So.2d 393 (Fla. 1990); St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982). However, there is no need for statutory construction where the plain language of the statute is not doubtful and self-evident in meaning. If Plaintiffs' counsel had doubts as to which doctor was responsible for the alleged negligence then both should have received notice. The mistake of caution would better serve Plaintiffs' counsel, and the

purpose of the statute, than the disapproved mistake of insufficiency.

B. No Certificate of Investigation Indicating a Reasonable Belief for a Medical Malpractice Action was Provided to Dr. Warren Hoffman

Plaintiffs somehow construe their confusion as a virtuous reason for failing to comply with Section 768.495. This renders the "certificate of counsel that such reasonable investigation gave rise to a good faith belief that grounds exist for an action against each named defendant", Section 768.495, Florida Statutes (1987), a sham.

The Third District noted that no certificate in accordance with the statute had been supplied as to Dr. Warren Hoffman. Ingersoll, 561 So.2d at 325. As set forth by Section 768.495(1):

> 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 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.

The first complaint in this case only named Dr. Howard Hoffman as a defendant. Dr. Howard Hoffman did not treat the

Plaintiff. The first amended complaint in this case added Dr. Warren Hoffman, yet no certificate was appended to that complaint. Under the language of Section 768.495(1), Plaintiffs had no authority to file an action against Dr. Warren Hoffman.

It is a paradox to say that a reasonable investigation was made giving rise to a good faith belief that grounds for an action existed against Dr. Howard Hoffman, who received Section 768.57 notice, yet no such certificate was filed when Dr. Warren Hoffman was named, and no Section 768.57 notice was given to him. The Plaintiff is in the best position to tell his counsel who the treating doctor was. Apparently there was no reasonable investigation made -- as to either doctor. It is untenable to allow a plaintiff who filed no certificate of pre-suit investigation and served no notice of intent to initiate litigation to rely on "confusion" or "mistake" when the very purpose of pre-suit investigation is to eliminate meritless suits. A plaintiff cannot foist his errors on a defendant and then attempt to overcome the very specific statutory pre-filing requirements by crying confusion.

C. Defendant Never Received Notice and Defendant's Insurer Never Acknowledged Statutory Notice to Dr. Warren Hoffman.

Petitioners contend that Dr. Warren Hoffman's insurer, acting on defendant's behalf, acknowledged receipt of the

notice of intent and that the Defendant is estopped to deny the sufficiency of the notice. Unfortunately, Petitioners cannot point out any correspondence, or other "evidence", that: a) notice was sent to the Defendant insured; b) proper statutory notice was sent to the insurer; and c) the insurer specifically acknowledged receipt of statutory notice to its insured, Dr. Warren Hoffman.

Both Dr. Warren Hoffman and Dr. Howard Hoffman were insured by CNA Insurance Company under the same insurance policy. The apparent mistake in this case was created and exacerbated by Plaintiffs' counsel who stated "[i]t 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." (SR.)

There is no dispute that Plaintiff's counsel sent Dr. Howard Hoffman a correct notice of intent to initiate litigation. In the September 14, 1987 letter from the insurer to Plaintiff's counsel, however, the insurer specifically asked for a letter of intent pursuant to Section 768.57: "Finally, you will need to forward a letter of intent, pursuant to Florida Statute 768.57." (SR.) The only possible construction of this request is that the insurer asked Plaintiffs' counsel to send the same letter it sent to Dr. Howard Hoffman to Dr. Warren Hoffman. That simple task did not occur. Plaintiffs

were reminded of the pre-filing notice requirement by the insurer yet they simply did not comply. To now argue estoppel is ludicrous in light of the fact that Plaintiffs had previously complied with the statute as to one of the Defendants.

To support its estoppel by content argument, that somehow notice to Dr. Howard Hoffman was sufficient notice to Dr. Warren Hoffman, Plaintiffs cite case law construing the sovereign immunity statute and the mechanics lien statute[4] where the courts held that notice was adequate even though content was questionable. Plaintiffs do not cite any cases where no notice was given or that notice was given to the wrong person. The closest Plaintiffs come is Franklin v. Palm Beach County, 534 So.2d 828 (Fla. 4th DCA 1988), where the sovereign immunity notice named both injured persons in the heading but not in the body of the notice. On its face, Franklin is totally distinguishable because at least some notice was given to the correct individual. No such thing occurred here as Dr. Warren Hoffman was never sent anything remotely complying with the statute. Estoppel based on content is absurd when the Defendant had nothing to review for content.

Simply put, the Plaintiffs did not send statutory notice to Dr. Warren Hoffman. Nothing in the record can be remotely

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[4] The terms of the mechanics lien statute notice, Section 713.06, Fla. Stat. (1987), are more vague and less specific than those of Section 768.57, and are inapplicable by analogy.

construed as complying with the unequivocal requirements of the statute. By not following the statute, the Plaintiffs doomed their own cause of action, obligating the trial court to do what it properly did, dismiss the action.

Petitioners rely on Judge Ferguson's dissent to the majority opinion in Ingersoll. The crux of the dissent was that notice is not jurisdictional under the statute but is instead a waivable condition precedent to bringing a medical malpractice action and that the true issue is whether or not notice was adequate. In support of that argument, Judge Ferguson, and Petitioners, rely on Rabinowitz v. Municipality of Bay Harbour Islands, 178 So.2d 9 (Fla. 1965), which involved a tort action against a municipality to recover damages arising out of a collision of an automobile with a partially opened draw bridge owned and operated by the municipality. The town charter required notice within thirty days of injury providing reasonable specification as to time and place and witnesses to enable the town officials to investigate the matter. In Rabinowitz "[t]he Town gave no indication of its insistence upon the notice requirements until the injured parties filed suit." Rabinowitz, 178 So.2d at 11.

The Third District Court of Appeal affirmed the town's summary judgment and the Florida Supreme Court reversed holding that a municipality through its agents which has actual knowledge of an occurrence causing injury, and pursues and investigation which reveals substantially the same information

required by the notice and thereafter follows a course of action which would reasonably lead a claimant to conclude that formal notice was unnecessary, waives entitlement to notice. Rabinowitz, 178 So.2d at 13.

Rabinowitz is distinguishable on several points. First, Rabinowitz acknowledged that a municipality may waive or be estopped to assert the benefit of a claim notice statute. Inherent within that rule of law is a determination that the notice was not based on subject matter jurisdiction but a condition precedent concept. It is well established that subject matter jurisdiction may not be waived or conferred by consent. 13 Fla.Jur.2d Courts and Judges § 105 (1979) (and cases cited therein). The notice provision in the Rabinowitz case was based on a condition precedent concept and not subject matter jurisdiction.

Second, the town in the Rabinowitz decision did not insist upon the notice, as the Defendant's insured did here. These facts clearly establish that the insurer requested Plaintiffs' counsel to provide necessary notice to the proper Defendant. Plaintiffs' counsel's failure to provide notice when he is statutorily obligated to do so does not create a waiver or estoppel on the part of the Defendant.

Third, the Florida Legislature, a definitively higher authority than a municipality, has seen fit to legislate that a plaintiff may not file a medical malpractice action unless statutory notice is provided to each prospective Defendant.

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The Third District Court of Appeal has routinely ruled that the notice goes to the subject matter jurisdiction of the claim and is not subject to waiver. Ingersoll, 561 So.2d at 325; Bendeck v. Berry, 546 So.2d 14 (Fla. 3d DCA 1989); Berry v. Orr, 537 So.2d 1014 (Fla. 3d DCA) review denied, 545 So.2d 1368 (Fla. 1989). The Florida Legislature's requirements of notice do not provide for a condition precedent analysis but are the very first and perhaps most crucial steps in a medical malpractice claim.

Judge Ferguson and the Petitioners' reliance on Rabinowitz is misplaced in light of the language and interpretative case law regarding the notice provision of the medical malpractice statute. Rabinowitz involved a sovereign, which does not have the same strictures of notice a private litigant has in its medical malpractice claim process. The burden to properly and accurately prepare a claim is on the Plaintiff and the Petitioners' reliance on Rabinowitz would suggest an inappropriate shifting of that burden.[5]

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[5] Although not relied upon in their initial brief on the merits in this Court, Petitioners relied on Angrand v. Fox, 552 So.2d 113 (Fla. 3d DCA 1989), in the Third District. In Angrand, the lower court dismissed the plaintiffs medical malpractice complaint because it was brought prior to the expiration of the 90 day screening period of Section 768.57. Plaintiffs had, however, complied with the pre-suit filing notice requirement. Plaintiffs' amended complaint was also dismissed because the statute of limitations had expired. On appeal the Third District court reversed the dismissals. Angrand held that a prematurely filed complaint, when notice had been given, should be abated until expiration of the 90 day screening period. The Court also held that the 90 day tolling provision of Section 768.45(2) and Section 768.52(3)(a) does

(continued...)

II. PLAINTIFFS FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS OF SECTION 768.57 THEREBY DEPRIVING THE COURT OF SUBJECT MATTER JURISDICTION ENABLING THE DEFENDANT TO RAISE THE ISSUE AT ANY TIME.

The unqualified rule of the Third District Court of Appeal is that the pre-filing notice requirement is jurisdictional and not subject to waiver. Ingersoll, 561 So.2d at 325; Bendeck v. Berry, 546 So.2d 14 (Fla. 3d DCA 1989); Berry v. Orr, 537 So.2d 1014 (Fla. 3d DCA), review denied, 545 So.2d 1368 (Fla. 1989); see, Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986). Although some courts have used Section 768.28, by analogy, to conclude that Section 768.57 is not jurisdictional but subject to waiver, no court has held that complete absence of notice can be subject to waiver. Dr. Warren Hoffman never received any notice and under either

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[5] (...continued)
not run concurrently but independently and noncumulatively.

Angrand is only applicable to those cases where the Plaintiff has actually filed a pre-suit notice. The fact that the Angrand plaintiffs actually served notice on each prospective defendant makes it inapposite to this case because Dr. Warren Hoffman never received statutory notice in this case. The Angrand footnote, which suggests that a court should abate a malpractice suit when the notice provision is not complied with, is mere dicta in light of the undisputed fact that the Angrand plaintiffs actually filed a notice of intent to initiate medical malpractice.

Appellants' stretched reading of Angrand does not stand for the proposition that notice is not jurisdictional. The issue in this case was not addressed or disposed of in Angrand because notice had been provided to the defendant doctors.

jurisdictional analysis, as is the rule of this Court, or condition precedent/waiver analysis, the Plaintiffs failed to give notice, which properly resulted in a dismissal of their action.

A. Pre-filing Notice is Jurisdictional and May be Raised at Any Time.

The Third District Court of Appeal has held that failure to give notice pursuant to Section 768.57 deprives the trial court of subject matter jurisdiction to entertain a dental malpractice action. Ingersoll, 561 So.2d at 325; Bendeck v. Berry, 546 So.2d 14 (Fla. 3d DCA 1989); Berry v. Orr, 537 So.2d 1014 (Fla. 3d DCA), review denied, 545 So.2d 1368 (Fla. 1989); see, Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986) (court lacks jurisdiction to hear case if notice not given within statutory limitations period). The issue of whether the court lacks jurisdiction of the subject matter may be made at any time. Rule 1.140(b), Fla.R.Civ.P. In this case, Plaintiffs never sent notice as required by Section 768.57. The Defendant raised the issue of subject matter jurisdiction and failure to comply with Section 768.57 in preliminary correspondence, the answer, the pre-trial catalog and by motion. (SR., R. 15, 31, 53). The trial court found that notice had not been provided, and dismissed the action.

Several District Courts of Appeal have turned to the sovereign immunity statute, Section 768.28(6), for assistance in construing Section 768.57. Lindberg v. Hospital Corp. of America, 545 So.2d 1384 (Fla. 4th DCA 1989); Solimando v. International Medical Centers, H.M.O., 544 So.2d 1031 (Fla. 2d DCA), review dismissed, 549 So.2d 1213 (Fla. 1989); Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986). This Court has held that the language in the state's notice provisions of the sovereign immunity statute is clear and must be strictly construed. Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983). The same strict construction should be applied to Section 768.57(2), because its language is equally clear. See, Glineck v. Lentz, 524 So.2d 458 (Fla. 5th DCA), review denied, 534 So.2d 399 (Fla. 1988).

In comparison, both statutes require written notice of an intent to initiate a claim. §768.28(6)(a), Fla. Stat. (1987); §768.57(2).[6] This is the only truly comparable provision of both statutes. Section 768.28(6)(b) states:

> For purposes of this section, the requirements of notice to the agency and denial of the claim are conditions precedent to maintaining an action but shall not be deemed to be elements of the

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[6] Section 768.57(2) requires notice in writing by certified mail, return receipt requested. Section 768.28(6)(a) does not make that specification.

> cause of action and shall not affect the date on which the cause of action accrues.[7]

Section 768.57(2), has no such condition precedent language nor element of the cause of action language. The two statutes are only superficially analogous, and certainly not analogous for purposes of determining whether the notice provision of Section 768.57 is subject to waiver.

Finally, Section 768.57 has a penalty provision which Section 768.28 does not. "Upon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information available without formal discovery. Failure to do so is grounds for dismissal of claims or defenses ultimately asserted." §768.57(7), Fla. Stat. (1987) (emphasis supplied). A plaintiff who fails to comply with Section 768.57(2) should suffer the penalty of dismissal with prejudice as set forth in Section 768.57(7).

The Third District, and other District Courts of Appeal, have held that the pre-suit notice requirement of Section 768.28(6) could be waived by the conduct of the defendant. Meli v. Dade County School Board, 490 So.2d 120 (Fla. 3d DCA), review denied, 500 So.2d 543 (Fla. 1986);[8] McSwain v. Dussia,

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[7] But see, Menendez v. North Broward Hosp. Dist., 537 So.2d 89, 91 (Fla. 1988) ("[O]ur ruling [in Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983)] . . . clearly indicates that notice to the Department is an essential element of the cause of action.").

[8] Judge Nesbitt dissented to the majority opinion because the plaintiff failed to fully comply with the pre-filing notice requirement of Section 768.26. Meli v. Dade County School

(continued...)

499 So.2d 868 (Fla. 1st DCA 1986), review denied, 511 So.2d 298 (Fla. 1987). The rationale for that holding is derived "from the terms of the statute, as Section 768.28 describes its pre-suit notice requirement as a condition precedent, §768.28(6)(b) (1985), and a condition precedent can by definition be waived." Bendeck v. Berry, 546 So.2d 14, 15 (Fla. 3d DCA 1989) (Cope, J. concurring). However, that rationale is inapplicable to Section 768.57 because no such condition precedent language exists in the statute. The language and application of the two statutes is vastly different, and the underlying rationale for comparison is unsupportable because of those distinctions.

B. No Court Has Held That Complete Absence of Notice May be Waived or That a Defendant's Conduct Can Estop Him From Asserting Lack of Notice.

Although the Third District Court of Appeal has held that the pre-filing notice requirement notice is jurisdictional, Bendeck, 546 So.2d at 14; Orr, 537 So.2d at 1014, the Fourth and Second District Courts of Appeal have not. Lindberg, 545 So.2d at 1386; Solimando, 544 So.2d at 1034.

Lindberg is distinguishable because notice was served, albeit on the same day the complaint was filed. Likewise, in Solimando notice was sent, albeit by regular mail. The

[8] (...continued)
Board, 490 So.2d 120, 122 (Fla. 3d DCA) (Nesbitt, J. dissenting), review denied, 500 So.2d 543 (Fla. 1986).

critical distinction between those cases and this case is that no notice, timely or by regular mail, was sent to Dr. Warren Hoffman.

The Second District Court of Appeal has held that failure to file a notice of intent prior to the filing of the complaint must result in dismissal with prejudice. Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986), review denied, 511 So.2d 299 (Fla. 1987); Malunney v. Pearlstein, 539 So.2d 493 (Fla. 2d DCA), review denied, 547 So.2d 1210 (Fla. 1989). In Lindberg, the Fourth District Court of Appeal stated the holding of the two Pearlstein opinions, and then opined that on the facts of Lindberg it would have to dismiss the Lindberg complaint with prejudice because the plaintiff failed to serve a notice until it served the complaint. In not reaching that conclusion, however, the court recognized express conflict with the Second District and certified the following question to the Florida Supreme 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?

Lindberg, 545 So.2d at 1388. The issue is presently before this Court in Case Nos. 74,466, 74,563, 74,564.

Plaintiffs' argument that Defendant waived his right to contest the Plaintiff's failure to provide notice is incorrect

under Third District Court of Appeal case law. In the Third District, failure to provide notice is jurisdictional and therefore not subject to waiver. The Defendant raised the issue of notice in the answer by specifically denying Plaintiffs' allegation that all "conditions precedent" have been satisfied.[9] Defendant again brought the issue of lack of notice to the Court's attention and Plaintiffs' attention in the pre-trial catalog. (R. 31). Finally, Defendant filed a motion to dismiss on the same ground. (R. 53). If any party is estopped, it should be Plaintiffs because of the continuous warning -- beginning with a specific request from the insurer for notice to Dr. Warren Hoffman -- provided to them that no notice had been supplied to Dr. Warren Hoffman. Because subject matter jurisdiction can be raised at any time, Plaintiffs' argument is without merit pursuant to Bendeck and Orr.

Regardless of how analyzed, Plaintiffs failed to provide notice. Under the statute, notice is jurisdictional and the parties cannot confer jurisdiction on the court by consent or

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[9] Respondent vigorously asserts that the notice required under Section 768.57 is jurisdictional, but also points out that under jurisdictional analysis or condition precedent analysis, Plaintiffs never gave notice in any form to Dr. Warren Hoffman. No court has held that complete absence of notice can be waived by conduct. See Lindberg, 545 So.2d at 1384 (notice sent same day as complaint filed); Solimando, 544 So.2d at 1032 (notice sent by regular mail). Without any notice, there is no conduct which can give rise to waiver or estoppel. There is no evidence in the record that Dr. Warren Hoffman received any notice.

waiver. Without notice, a plaintiff may not initiate his malpractice action. The trial court had any one of several theories to support its correct decision to dismiss this case.

C. Petitioners' Reliance on Judge Ferguson's Dissent is Misplaced.

Petitioners rely on Judge Ferguson's dissent in the Third District Court of Appeal to support their argument that the Defendant is estopped from challenging the sufficiency of the notice. The argument fails in light of several facts and legal arguments which clearly establish that the issue was raised well prior to trial and that estoppel has nothing to do with this case.

First, Petitioners argue that estoppel and waiver are applicable to Section 768.57. However, no court in this state has held that estoppel and waiver apply to the express and specific language of Section 768.57. To the contrary, the estoppel and waiver argument has been applied only to the sovereign immunity statute which, as fully developed above, is substantially different and not applicable to Section 768.57. Section 768.57 does not have condition precedent language nor does it have provisions for estoppel and waiver. Section 768.57 is specific in its requirements, unlike Section 768.28.

Petitioners and Judge Ferguson conveniently ignore the numerous times that Defendant raised the issue and the well-settled principle that subject matter jurisdiction may be

raised at any time. The issue of failure to provide notice was raised in correspondence, the answer, the pretrial catalogues and by motion to dismiss. Petitioners have only their neglect and failure to comply with the statute to support their argument. It is the obligation of the Plaintiff to properly prepare its case and the language of Section 768.57 specifically requires prelitigation notice. The Defendant raised the issue on numerous occasions, however, in light of the settled principle that subject matter jurisdiction is raiseable at any point, Defendant had no obligation to raise the issue at the earliest possible time when in fact the burden of providing notice is on the Plaintiff. Judge Ferguson's dissent attempts to argue, contrary to the Florida Rules of Civil Procedure and established Florida law, that subject matter jurisdiction may not be raised at any time. It is not "gamesmanship" or "ambush tactics" to raise the issue of subject matter jurisdiction in the answer. The convenient overlooking of this fact by the Petitioners, and Judge Ferguson, cannot provide support for Petitioners' estoppel argument.

Contrary to Petitioners and Judge Ferguson's dissent, failure to follow the specific requirements of the statute's pre-filing notice requirement can work a substantial harm to a dentist or other medical professional. 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.

Plaintiffs' first complaint, which did not name Dr. Warren Hoffman as a Defendant, did not allege compliance with Section 768.57. The lower court dismissed the action based on Plaintiffs' failure to comply with Section 768.57. Plaintiffs amended their complaint to include a count against Warren Hoffman. Defendant Warren Hoffman answered by denying that all "condition precedent" had been complied with. Defendant

asserted in its pretrial catalogue that Plaintiffs had not complied with Section 768.57 and that no notice had been served on Dr. Warren Hoffman. The issue was raised well before trial and resolved on the first day of trial, resulting in the dismissal which forms the basis for this appeal. The jurisdictional issue was raised early on in the formation of this case and Plaintiffs simply never complied with the statute.

This Court's decision reaffirms the unequivocal language of the statute and this Court's prior holdings that failure to provide notice under Section 768.57 shall result in dismissal. The statute requires that each prospective defendant be served with notice, without qualification or reservation. The Plaintiffs failed to comply with the statute and the lower court properly dismissed the action. Dismissal is the result of the Plaintiffs' own error in not complying with the express language of the statute.

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.

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GEOFFREY B. MARKS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10th day of September, 1990 to: KENNETH P. LIROFF, ESQ., 201 Southeast 19th Street, Fort Lauderdale, Florida 33316 and LARRY KLEIN, ESQ., Klein, Beranek & Walsh, P.A., Suite 505, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401.

GEOFFREY B. MARKS

GBM/dlc