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' REPLY BRIEF ON MERITS

KENNETH P. LIROFF
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and
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STATEMENT OF FACTS

Defendant has made several misrepresentations in his statement of facts. On page two of his brief, defendant makes reference to plaintiffs' counsel's letter of September 10, 1987, which set forth plaintiffs' intention to initiate a malpractice suit, and then states:

> On September 14, 1989 (sic), 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:

The CNA letter of September 14, 1987 (Supp. R., copy attached to this brief), did not specifically request that a notice of intent be sent to Dr. Warren Hoffman. That letter was not in response to plaintiffs' counsel's September 10th letter. It is obvious from a reading of that letter that CNA had not yet received the September 10, 1987, letter from plaintiffs' counsel. CNA's September 14, 1987, letter was obviously in response to plaintiffs' counsel's letter of August 6, 1987.

On page three of his brief, defendant states:

> 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.

On the contrary, this letter (Supp. R., copy attached), referenced the insured as Warren Hoffman and stated:

> 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 any injury sustained, bills documenting any necessary further treatment and your expert's report regarding the insured's treatment.

It was thus undisputed at this point that although the notice of intent had named the wrong brother, the insurer had acknowledged receiving the notice of intent on behalf of the right brother, and had instituted the discovery procedures authorized under the very statute which required the notice.

On page five of his brief, defendant says that he testified that he had never received a letter informing him that plaintiff "intended to initiate a claim for dental malpractice against him." The defendant did testify that he saw the letter of September 10th, which contained the notice of intent, addressed to Howard Hoffman, that he discussed the case with their insurer, sent the dental records of the plaintiff to the insurer, and informed the insurer that it was he and not his brother Howard who had treated the plaintiff (R 72-76).

ARGUMENT

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?

In order for the defendant to prevail on this appeal, this court must first conclude that a failure to file a notice of intent deprives the trial court of subject matter jurisdiction, a principle which has been adopted only by the Third District Court of Appeal, and which creates conflict with decisions of other district courts of appeal. 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), rev. dismissed, 549 So.2d 1013 (Fla. 1989). In fact, even the Third District has not adhered to this position. In Angrand v. Fox, 552 So.2d 1113 (Fla. 3d DCA 1989), rev. denied, 563 So.2d 632 (Fla. 1990), the Third District stated in footnote 7:

> It should be noted that the recent, and we think correctly decided cases, hold that a malpractice complaint brought within the statute of limitations is maintainable upon proper amendment even when no notice has been given prior to its commencement and should be abated pending the notice and procedures provided by section 768.57(3)(a). See Lindberg v. Hospital Corp. of America, 545 So.2d 1384 (Fla. 4th DCA 1989); Solimando v. International Medical Centers, 544 So.2d 1031 (Fla. 2d DCA 1989). ...

There is no authority in Florida to support the jurisdictional argument advanced by the defendant except for the Third District cases. Analogous cases involving our sovereign immunity statutes have not made the giving of notice jurisdictional. Even the Third District has applied the doctrine of estoppel where notice was insufficient to the Department of Insurance. Martin v. Monroe County, 518 So.2d 934 (Fla. 3d DCA 1987), rev. denied, 528 So.2d 1182 (Fla. 1988).

Even if this court determines that these notices are jurisdictional, the defendant in the present case still does not prevail unless this court concludes that there was no notice given in the present case. Defendant's entire argument is based on the assumption that no notice whatsoever was given in the present case, when in fact, the notice was proper in every respect except with regard to the first name of the defendant. Even the defendant states on page 16 of his brief:

> There is no dispute that Plaintiff's counsel sent Dr. Howard Hoffman a correct notice of intent to initiate litigation.

Moreover, it is undisputed from Warren Hoffman's testimony, quoted on pages five through seven of our initial brief, that Warren (who treated plaintiff) received and read the notice, discussed it with the insurer, and gave the insurer full information so that the insurer could handle the claim. It is further undisputed that the insurer wrote counsel for plaintiff, referencing Warren as the

treating dentist, and the insured, and acknowledging that plaintiffs' counsel had forwarded a notice of intent.

If the facts in the present case do not constitute sufficient notice to give a court jurisdiction, medical malpractice litigation will become far more technical than the legislature ever intended. A secretarial error could be fatal.

As soon as Warren received the notice of intent in this case, he and his insurer immediately knew everything they needed to know and proceeded under the statute with discovery. When the lawsuit was subsequently filed the defendant did not move to dismiss based on lack of notice, at a point in time when plaintiff could have filed a corrected notice prior to the running of the statute of limitations. Instead defendant waited until the statute of limitations had run to attack the sufficiency of the notice. It is ironic that this type of lawyering would be sanctioned by the Third District, which stated in Salcedo v. Asociacion Cubana, Inc., 368 So.2d 1337 (Fla. 3d DCA), cert. denied, 378 So.2d 342 (Fla. 1979), on page 1339:

> In earlier times, the rule we apply in this case was said to reflect the feeling that a party may not "mend his hold," Ohio & M.R. Co. v. McCarthy, 96 U.S. 258, 268, 24 L.Ed. 693 (1878), or "blow hot and cold at the same time" or "have his cake and eat it too." See Federated Mutual Implement & Hardware Co. v. Griffin, supra, at 237 So.2d 42; State v. Board of Commissioners of Clinton County, 166 Ind. 162, 76 N.E. 986, 1001 (1906). Today, we might say that the courts will not allow the practice of the "Catch-22" or "gotcha!" school of

> litigation to succeed. However it may be characterized, the estoppel doctrine means in this case that, having successfully claimed that mediation was a required condition precedent to the filing of this action, the defendant may not now be heard to say that the delay specifically caused by the pendency of that very proceeding has resulted in the running of the statute of limitations.

In the present case Warren and his insurer, after receiving the notice of intent addressed to Howard, took full advantage of the statutory procedure under which notice was given to obtain discovery of the facts surrounding the claim. To subsequently obtain dismissal of the lawsuit based on the failure to give notice is precisely the type of practice which the Third District was condemning in Salcedo.

In Cabot v. Clearwater Construction Company, 89 So.2d 662 (Fla. 1956), this court stated on page 664:

> No longer are we concerned with the "tricks and technicalities of the trade". The trial of a lawsuit should be a sincere effort to arrive at the truth. It is no longer a game of chess in which the technique of the maneuver captures the prize.

CONCLUSION

The opinion of the Third District should be reversed.

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By 
LARRY KLEIN
Florida Bar No. 043381

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 17th day of September, 1990, to: G. BART BILLBROUGH, One Biscayne Tower, Suite. 2500, 2 South Biscayne Boulevard, Miami, FL 33130.

By 
LARRY KLEIN
Florida Bar No. 043381