SUPREME COURT OF FLORIDA

CASE NO. 76,593

Fourth District Court of Appeal
Case No. 89-1467

GEORGE WILLIAMS, D.D.S.,

Petitioner,

vs.

FRED CAMPAGNULO, a/k/a
FRED CAMP a/k/a FRED CAMPO,

Respondent.

On review from the Fourth District
Court of Appeal, of Florida

BRIEF OF PETITIONER ON THE MERITS AND APPENDIX

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STATEMENT OF THE CASE AND FACTS[1]

This Court has accepted jurisdiction in this case to review the decision of the District Court of Appeal, Fourth District in Campagnulo v. Williams, 563 So.2d 733 (Fla. 4th DCA 1990).

The underlying case proceeded in the Fourth District of Court of Appeal as a "Fast Track" or expedited appeal by stipulation of the parties. The trial court record was provided to the Fourth District, and an Agreed Statement of the Case was filed with the Fourth District. (A. 1-3). The record on appeal and stipulated statement support the following statements.

In November, 1986 plaintiff filed and served a complaint for dental malpractice on Dr. Williams. (A. 1; R. 1-6). The complaint alleged that defendant malpracticed in the treatment of Dr. Williams in 1984.[2] (A. 1; R. 2-3).

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[1] In this proceeding, the petitioner/defendant George Williams, D.D.S. will be referred to as Dr. Williams or defendant. Respondent, Fred Campagnulo will be referred to as Mr. Campagnulo or plaintiff. The symbol "A" stands for appendix, and the letter "R" stands for record on appeal.

[2] The stipulated statement contains the following description of the allegations of the Complaint:

> In the complaint, CAMPAGNULO alleged that he began treatment with DR. WILLIAMS on December 20, 1984 "to endodontically treat a lower molar wherein defendant WILLIAMS filled the root canal and sealed the tooth." Plaintiff further alleged that during the evening of the treatment on December 20, 1984 he "experienced extreme pain necessitating his return to Defendant, WILLIAMS', office the next day where the tooth was extracted." Plaintiff alleged that WILLIAMS was negligent in failing to appropriately diagnose the plaintiff's condition, in failing to follow appropriate dental techniques and procedures in treatment and in failing to advise the plaintiff of the risks, dangers and side effects of the proposed treatment. Plaintiff further alleged that

In January, 1987, defendant moved to dismiss the complaint on the ground that the notice requirement of Section 768.57, Florida Statutes (1985)[3] had not been complied with by plaintiff. (A. 4; R. 8-9). The trial court denied the motion in March, 1987.

In April 1989, almost 2 1/2 years after suit was filed, Dr. Williams moved for summary judgment on the ground that plaintiff failed to comply with the pre-filing notice requirements established by Section 768.57, Florida Statutes." (A. 2; R. 33-35). Defendant Williams filed an affidavit in support of the motion which provided, in pertinent part:

> The affiant would state that he has never received any notice of intent to initiate litigation, nor was he served with any letters, notices or any other information indicating any intent to sue him prior to the date that he was served with a summons on December 9, 1986 in the above-captioned matter, or at any time thereafter.

(A. 2; R. 36-42). At the hearing on the motion, plaintiff's counsel stipulated that he did not serve a notice of intent to initiate litigation for medical malpractice on Williams, D.D.S. (A. 2).

> WILLIAMS knew that he lacked sufficient education, training and experience in undertaking the care of the plaintiff and should have referred the plaintiff to a dentist who had sufficient education, training and experience. Plaintiff claimed serious and permanent bodily injury, pain and suffering, mental anguish, loss of capacity for enjoyment. of life, past and future dental expenses and loss of earnings and earning capacity as a result of the alleged negligence of WILLIAMS. [A.1-2]

[3] See infra, p. 6-7 for pertinent portions of Section 768.57.

On appeal to the Fourth District Court of Appeal, plaintiff raised two issues: (1) Whether §768.57, Florida Statutes applies to dentists, and (2) whether §768.57, Florida Statutes invades the Supreme Court's rule-making power under Article V, Section 2(a), Florida Constitution. At oral argument, the Court ordered the parties to brief two additional issues: "(1) The constitutionality of §768.57 as it relates to substantive or procedural aspects of the statute and retroactive application; and (2) the availability of abatement of a pending lawsuit in order to allow compliance with §768.57 as it relates to the statute of limitations." (A. 5).

Despite plaintiff's stipulation at the hearing on the motion for summary judgment (almost two and one-half years after the complaint was filed) that no statutory notice had been served on Dr. Williams and the fact that the statute of limitations had run, the Fourth District Court of Appeal reversed the summary judgment. (A. 2, 4-9). The Fourth District remanded the case to the trial court with instructions to allow plaintiff to amend his complaint in order to allege compliance with Section 768.57(3)(1).[4] (A. 8).

Petitioner's/appellee's timely motion for rehearing and motion for certification and motion for rehearing en banc were denied on August 2, 1990. The notice to invoke this Court's discretionary jurisdiction was timely filed on August 29, 1990.

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[4]/ The Fourth District rejected plaintiff's constitutional challenge and his contention that the notice requirements of §768.57 do not apply to dentists.

ISSUE INVOLVED ON REVIEW

WHETHER THE OPINION OF THE FOURTH DISTRICT SHOULD BE QUASHED AND THE TRIAL COURT'S SUMMARY JUDGMENT FOR THE DEFENDANT BE AFFIRMED WHERE NO NOTICE OF INTENT TO FILE THE MEDICAL MALPRACTICE SUIT WAS SERVED ON THE DEFENDANT WITHIN THE STATUTE OF LIMITATIONS.

SUMMARY OF THE ARGUMENT

The Fourth District's decision should be quashed, and the trial court's summary judgment for the defendant should be affirmed when the statutory notice requirement of the Medical Malpractice Act, Section 768.57, Florida Statutes (1985) was not met within the statute of limitations. Section 768.57 contains a mandatory pre-suit screening process which both the plaintiff and prospective defendant must comply before filing a medical malpractice suit. The screening process includes the requirement that before filing a claim for medical malpractice, a claimant must serve upon each prospective defendant, by certified mail return receipt requested, a notice of intent to initiate litigation for medical malpractice.

Here, no notice was served on the defendant, and the statute of limitations has run. This Court has held that the pre-filing notice requirement in the Medical Malpractice Act is a condition precedent to suit which "is necessary in order to maintain a cause of action ..." Hospital Corporation of America v. Lindberg, 571 So.2d 446, 448 (Fla. 1990). Judgment for the defendant health care provider must be entered where no statutory notice is given within the statute of limitations. See, e.g., Lindberg v. Hospital Corporation of America, 545 So.2d 1384 (Fla. 4th DCA 1989); Lynn v. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986); Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986).

In this case, plaintiff filed a medical malpractice action in November, 1984. Defendant filed a motion for summary judgment almost 2 and 1/2 years later, based on plaintiff's failure to

comply with the notice requirements. At the hearing on the motion, plaintiff's counsel conceded that he had never served the statutory notice of Section 768.57 on the defendant Dr. Williams. Since over two years passed from the filing of the complaint and plaintiff's counsel's admission that no notice was served, the record shows as a matter of law that the statute of limitations in a medical malpractice action has run. Since no notice of claimant's intent to initiate litigation was served on defendant, the trial court was correct in entering summary judgment for the defendant. The Fourth District decision below should be quashed.

A R G U M E N T

THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL SHOULD BE QUASHED AND THE TRIAL COURT'S SUMMARY JUDGMENT FOR THE DEFENDANT SHOULD BE AFFIRMED WHERE NO NOTICE OF INTENT TO FILE THE MEDICAL MALPRACTICE SUIT WAS SERVED ON THE DEFENDANT WITHIN THE STATUTE OF LIMITATIONS.

The Comprehensive Medical Malpractice Reform Act of 1985, Chapter 85-175 Laws of Florida, was enacted to address the medical malpractice insurance crisis and the deleterious effect the crisis had on the provision of adequate health services in the State of Florida. Pearlstein, M.D. v. Malunney, 500 So.2d 585, 586 (Fla. 2d DCA 1986). Section 768.57[5] implemented a mandatory pre-suit screening process which both a plaintiff and prospective defendant must comply before filing a medical malpractice suit. The statute provides, in part:

> (2) Prior to filing a claim for medical malpractice, a claimant shall serve upon each prospective defendant by certified mail, return receipt requested, a notice of intent to initiate litigation for medical malpractice.
>
> (3)(a) No suit may be filed for a period of 90 days after notice is served upon the prospective defendant, except that this period shall be 180 days if controlled by s.768.28(6)(a). Reference to the 90-day period includes such extended period. During the 90-day period, the prospective defendant's insurer or self-insurer shall conduct a review to determine the liability of the defendant. Each insurer or self-insurer shall have a procedure for the prompt investigation, review, and evaluation of claims during the 90-day period. This procedure shall include

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[5]/ Now renumbered section 766.106, Florida Statutes.

> one or more of the following:
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> 1. Internal review by a duly qualified claims adjuster;
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> 2. Creation of a panel comprised of an attorney knowledgeable in the prosecution or defense of medical malpractice actions, a health care provider trained in the same or similar medical specialty as the prospective defendant, and a duly qualified claims adjuster;
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> 3. A contractual agreement with a state or local professional society of health care providers, which maintains a medical review committee;
>
> 4. Any other similar procedure which fairly and promptly evaluates the pending claim.
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> Each insurer or self-insurer shall investigate the claim in good faith, and both the claimant and prospective defendant shall cooperate with the insurer in good faith. If the insurer requires, a claimant shall appear before a pre-screening panel or before a medical review committee, and shall submit to a physical examination, if required. Unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses. There shall be no civil liability for participation in a pretrial screening procedure if done without intentional fraud.

§768.57(2)(3)(a), Fla. Stat. (1985).

The pre-filing notice requirements established by section 768.57 are applicable to dental malpractice actions. Each district court of appeal which has been presented with this issue has ruled that section 768.57 does apply to dentists. Campagnulo v. Williams, D.D.S., supra at 735; Berry v. Orr, 537 So.2d 1014 (Fla. 3d DCA), review denied, 545 So.2d 1368 (Fla. 1989), appeal after remand, 546 So.2d 14 (Fla. 3d DCA 1989); MacDonald v. McIver, 514

So.2d 1151 (Fla. 2d DCA 1987). As noted in the MacDonald opinion, Section 768.57 applies to dental practice because "medical malpractice" is defined in Section 768.57(1)(a) as 'a claim arising out of ... medical care or services.'" As Petitioner MacDonald further reasoned, the definition of dentistry in Section 466.003, Florida Statutes "recognizes the medical nature of dentistry;" Section 95.11(4)[6] defines medical malpractice as including dentists. In reaching its MacDonald decision, the Second District stated:

> Dentists are included in the definition of "health care providers" in Section 768.40(1)(b), Florida Statutes (1987), and this phrase reappears frequently throughout sections dealing with medical malpractice, including the section requiring notice before the filing of a complaint.

Indeed, it is well recognized that dentists are health care

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[6] Section 446.003, Florida Statutes (1985), states, in part:

> (3) "Dentistry" means the healing art which is concerned with the examination, diagnosis, treatment, planning, and care of conditions within the human oral cavity and its adjacent tissues and structures and includes the performance or attempted performance of any dental operation, or oral or oral-maxillofacial surgery, including physical evaluation directly related to such operations or surgery pursuant to hospital rules and regulations, ... or diagnosing, prescribing, or treat disease, pain, deformity, deficiency, injury, or physical condition of the human teeth or jaws or oral maxillofacial region; or extracting or attempting to extract human teeth; or correcting or attempting to correct malformations of teeth or of jaws; or repairing or attempting to repair cavities in the human teeth.

providers and part of the medical profession. Furthermore, the term health care provider is defined in both section 768.40(1)(b) and section 768.57(2)(b) of the Medical Malpractice Act to include dentists. Section 768.57, governing the pre-suit notice, does include the term "health care provider."[7] Both the Fourth District and the trial court correctly concluded that the pre-suit notice requirements applied to Dr. Williams.

The opinion of the Fourth District Court of Appeal should be quashed and the trial court's summary judgment affirmed because no notice of intent to file the medical malpractice suit was served on the defendant within the statute of limitations. The trial court properly entered summary judgment in favor of Dr. Williams due to plaintiff's failure to comply with the notice requirement.

Recently, in Hospital Corporation of America v. Lindberg, 571 So.2d 446, 448 (Fla. 1990), this Court held that the pre-filing notice requirement in the Medical Malpractice Act is a condition precedent to suit which "is necessary in order to maintain a cause of action ..." In the lower court decision of Lindberg v. Hospital Corporation of America, 545 So.2d 1384 (Fla. 4th DCA 1989), the Fourth District held that the trial court should permit amendment to a complaint for medical malpractice where plaintiff failed to follow the pre-suit notice requirement, but did give the statutory notice after suit was filed but before the statute of limitations ran. In its opinion, the Fourth District certified the following

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[7] 768.57(3)(a) 2. & 3.

question to the Supreme Court as being one of great public importance:

> 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?

545 So.2d at 1388. The Supreme Court subsequently approved the Fourth District's Lindberg decision. Hospital Corporation of America v. Lindberg at 447.

The instant case presents facts which are the reverse of those in Lindberg. Here, plaintiff filed the medical practice action in November, 1984 without complying with the pre-filing notice requirement. Almost 2 1/2 years later at the April, 1987 hearing on the defendant's Motion for Summary Judgment, plaintiff's counsel conceded that he had never served the statutory notice of section 768.57 on the defendant Dr. Williams. Since over two years passed from the filing of the complaint and plaintiff's counsel's admission that no notice was served, the record shows as a matter of law that the statute of limitations has run.[8]

Judgment for the defendant health care provider is required where no statutory notice is given within the statute of limitations. Lindberg v. Hospital Corp. of America at 1387; Public

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[8] Section 95.11(4)(b), Florida Statutes (1985) provides that an action for medical malpractice "must be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered or should have been discovered with the exercise of due diligence ..."

Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986) (wherein the plaintiff filed one complaint but served notice on only one of the defendants within the statute of limitations, resulting in dismissal with prejudice of the defendants not receiving timely notice); Lynn v. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986). Cf., Levine v. Dade County School Board, 442 So.2d 210, 213 (Fla. 1983).

In Miller, the Second District held that "if the limitations period has expired, the trial court lacks the authority to abate a premature complaint even if, but for the pre-filing notice requirements, that complaint would otherwise have been timely." Id. at 1012. Likewise, in the present case, the Fourth District erred in reversing the summary judgment and remanding the case to the trial court with instructions to allow plaintiff to amend his complaint where no notice was served on the defendant within the statute of limitations.

This Court has recently held that the pre-suit notice requirement in medical malpractice actions is analogous to the pre-suit notice requirements in section 768.28)6), Florida Statutes (1989). Hospital Corporation of America v. Lindberg at 448. In Levine v. Dade County School Board, 442 So.2d 210, 213 (Fla. 1983), this Court held that where the statutory notice required by 768.28(6) has not been given and the time has expired for giving notice and plaintiff cannot fulfill the requirement, "the trial court has no alternative but to dismiss the complaint with prejudice."

In the present case, the Fourth District erroneously ruled that the plaintiff should be allowed to amend his complaint to allege compliance with the notice requirement. At no time during the trial court proceeding did plaintiff serve the required notice or request abatement of the proceeding. Therefore, the Fourth District decision erroneously ordered the trial court on remand to allow plaintiff to amend the complaint to allege compliance.

This Court should quash the Fourth District decision.

CONCLUSION

The Fourth District's decision is in conflict with this Court's decision in Hospital Corporation of America v. Lindberg as well as many district court decisions including Lindberg v. Hospital Corp. of America, supra, Lynn v. Miller, supra, Public Health Trust of Dade County v. Knuck. The present Fourth District decision erroneously reversed the Final Judgment entered in favor of defendant because no statutory notice was served on Dr. Williams within the statute of limitations. This Court is respectfully requested to quash the Fourth District decision with directions to the Fourth District to vacate its opinion and to affirm the Final Judgment entered by the trial court in favor of Dr. Williams.

Respectfully submitted,

BY: Betsy E. Gallagher
BETSY H. GALLAGHER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on the Merits was mailed this 13th day of June, 1991 to: THOMAS D. LARDIN, P.A., Attorney for Respondent, 1901 West Cypress Creek Road, Suite #100, Fort Lauderdale, FL 33309.

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