IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,593
Fourth District Case No. 89-1467
Seventeenth Circuit Case No. 86-30259 CI

GEORGE WILLIAMS, D.D.S.,

Petitioner,

vs.

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

Respondents.

On review from the Fourth District
Court of Appeal of Florida

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CITATIONS AND AUTHORITIES

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JURISDICTION

These proceedings are filed to review a decision of the District Court of Appeal, Fourth District in Fred Campagnulo a/k/a Fred Camp a/k/a Fred Campo v. George Williams, D.D.S. (A. 1-6).[1] Jurisdiction vests in this Court pursuant to Article V, Section 3(b)(3), Florida Constitution, because the district court decision conflicts with Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986); Berry, D.D.S. v. Orr, 537 So.2d 1014 (Fla. 3d DCA 1989) Ingersoll v. Hoffman, D.D.S., 561 So.2d 324 (Fla. 3d DCA 1990).

STATEMENT OF THE CASE AND FACTS

The opinion of the Fourth District Court of Appeal states the following facts:

> In November, 1986 appellant commenced an action in circuit court against appellee for dental malpractice. Appellant alleged that the malpractice occurred in December, 1984. Appellee moved to dismiss the complaint in January, 1987 on the grounds that the notice requirement of Section 768.57, Florida Statutes (1985), applied to malpractice actions against dentists and had not been complied with by appellant. The trial court denied appellee's motion to dismiss in March, 1987.

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[1]/ The abbreviation "A" stands for Appendix to Brief of Petitioner. In this brief, appellants will be referred to as Campagnulo or plaintiff.

George Williams, D.D.S. will be referred to as Williams, D.D.S. or defendant.

> In April, 1989, prior to trial, appellee moved for summary judgment on the ground that appellant failed to comply with the pre-filing notice requirements established by Section 768.57. Appellant's trial counsel stipulated that he did not serve notice of intent to file suit. In May, 1989 the trial court granted appellee final summary judgment finding that the appellant did not file notice of intent to file litigation and entered judgment in favor of appellee. [A. 2-3. Emphasis added]

Plaintiff never requested the proceedings be abated at the trial court level to allow amendment to the complaint; plaintiff stipulated that he never served notice of intent to file suit; and the statute of limitations run. Nevertheless, the Fourth District reversed the Final Judgment and 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)(a).[2]

SUMMARY OF THE ARGUMENT

The present Fourth District decision conflicts with Public Health Trust v. Knuck. Knuck stands for the principle that abatement in a medical malpractice action is not permissible when notice could not be filed within the limitations period. In the instant case, plaintiff did not serve the statutory notice throughout the entire trial court proceedings and did not request abatement until the pendency of the Fourth District appeal--

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

well after the expiration of the statute of limitations. The Fourth District decision applied a rule of law to reach a different result than the Third District in Knuck although both cases involve substantially the same controlling facts.

The present Fourth District decision is also in conflict with the Third District decisions Berry, D.D.S. v. Orr and Ingersoll v. Hoffman. In both cases the Third District held that failure to give notice to a dentist under Section 768.57 deprives the court of jurisdiction. The Fourth District case conflicts with the Third District case because on substantially similar facts the Fourth District reinstated the dental malpractice action and instructed the trial court to allow plaintiff to amend his complaint to allege compliance (even though the Fourth District decision notes that no statutory notice was ever given).

ARGUMENT

The instant decisions directly and expressly conflict with the decisions of Public Health Trust of Dade County v. Knuck, Berry, D.D.S. v. Orr; Ingersoll v. Hoffman.

A. PRINCIPLES OF CONFLICT JURISDICTION

The jurisdiction of the Supreme Court of Florida to review decisions of the District Courts of Appeal because of direct conflict is designed to lend stability to the law by resolving embarrassing conflicts between decisions, and is generally invoked where a District Court of Appeal: (a) announces a rule of law which conflicts with a rule previously announced by the

Supreme Court or a District Court of Appeal; or (b) applies a rule of law to produce a different result in a case which involved substantially the same controlling facts as a prior case disposed of by either the Supreme Court or another District Court of Appeal. Article V, Section 3, Florida Constitution; Belcher v. Belcher, 271 So.2d 7 (Fla. 1972); Kincaid v. World Insurance Company, 157 So.2d 517 (Fla. 1963); Neilsen v. City of Sarasota, 1176 So.2d 231 (Fla. 1960).

In addition, misapplication of law is a recognized ground for the exercise of direct conflict jurisdiction. When a district court expressly relies on a prior decision as controlling precedent, although the facts of the case being reviewed vary materially from those of the case relied on, such reliance creates a misapplication of law which vests conflict certiorari jurisdiction in the Supreme Court to resolve the conflict and harmonize the decision law of Florida. Eastern Shores Sales Co. v. City of North Miami Beach, 363 So.2d 321 (Fla. 1978); Lubell v. Roman Spa, Inc., 362 So.2d 922 (Fla. 1978); St. Louis & San Francisco Railroad Co. v. Wilson, 338 So.2d 192, 193 (Fla. 1976); Wale v. Barnes, 278 So.2d 601, 604 (Fla. 1973); Spivey v. Battaglia, 258 So.2d 815, 816 (Fla. 1972). It is also established that direct conflict exists when a decision relies on an earlier decision attributing thereto an erroneous principle of law beyond its holding. E.g., Wood v. Camp, 284 So.2d 691 (Fla. 1973); and Pinkerton-Hays Lumber Company v. Pope, 127 So.2d 441 (Fla. 1961).

B. CONFLICT WITH PUBLIC HEALTH TRUST OF DADE COUNTY V. KNUCK

In the present case, the Fourth District applied a rule of law to produce a different result than the Third District decision in Knuck although both cases involve substantially the same controlling facts. In Knuck, as in this case, defendant, moved to dismiss the complaint because plaintiff failed to serve the requisite notice of intent to initiate medical malpractice litigation required by Section 768.57. In Knuck, the trial court granted an ore tenus motion to abate the action to enable plaintiff to comply with Section 768.57. On appeal the Third District held that "[b]ecause the statute of limitations expired before ... [plaintiff] could satisfy the conditions precedent to filing suit against [defendants] , ... we hold that the trial court erred in abating the action ..." Id at 837. The Third District expressly rejected plaintiffs argument that the filing of the complaint tolled the statute of limitations notwithstanding her noncompliance with statutory prerequisites. Id at 836.

The decision of the Fourth District, in the present case, correctly notes that Knuck stands for the proposition that abatement is not permissible when notice could not be filed within the limitations period. The Fourth District then adds:

> In the instant case, notice could have been filed within the limitations period, but for the fact that the motion to dismiss was not heard until after the period of limitations had run.

In this sentence, the Fourth District seemed to be stating that if the hearing on the motion to dismiss had been held sooner, the plaintiff could have cured the defect within the statute of limitations. However, as the opinion expressly states, no statutory notice was **ever** given, and the statute of limitations has clearly run. No motion to abate was ever filed before the expiration of the statute of limitations.[3] Therefore, the Fourth District Campagnulo decision is in direct conflict with Knuck where on substantially identical facts the Third District prohibited the bringing of the action.

C. CONFLICT WITH BERRY, D.D.S. V. ORR AND INGERSOLL V. HOFFMAN, D.D.S.

The unqualified rule of the Third District is that failure to give notice to a dentist under Section 768.57 deprives the court of jurisdiction.[4] Berry, D.D.S. v. Orr, 537 So.2d 1014 (Fla. 3d DCA 1988); Ingersoll v. Hoffman, D.D.S., 561 So.2d 324

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[3]/ Additionally, as the opinion notes, the underlying complaint was filed in November, 1986, one month before the expiration of the statute of limitations. As the decision further notes, the motion to dismiss was filed in January, 1987-- one month after the statute of limitations had expired. Therefore, even if the court would have entertained the motion the day it was filed, the statute of limitations would have already expired.

[4]/ Both the Second and Third Districts have certified the issue of whether 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 notice be excused by a showing of Estoppel and Waiver. Ingersoll v. Hoffman, supra; Solimando v. International Medical Centers, 544 So.2d 1031 (Fla. 2d DCA 1989); Bendeck v. Berry, 546 So.2d 14 (Fla. 3d DCA 1989).

(Fla. 3d DCA 1990) (wherein the Third District stated: "Because this court has held that the notice requirement of Section 768.57 is jurisdictional, failure to provide adequate notice shall result in dismissal").

In Berry, D.D.S. v. Orr, the Third District directed the trial court to dismiss plaintiffs' dental malpractice action where plaintiffs failed to comply with the statutory notice requirement prior to filing the dental malpractice action. The court held that the court lacked jurisdiction to entertain the action where plaintiffs' failed to comply with the notice requirement of Section 768.57, Florida Statutes. The Berry decision directly and expressly conflicts with the present case; on substantially similar facts the Fourth District reinstated the dental malpractice action and instructed the trial court to allow plaintiff to amend his complaint to allege compliance (even though the Fourth District decision notes that no statutory notice had ever been given).

The decision of the Fourth District is in direct conflict with Knuck for another reason. In allowing plaintiff to amend its complaint after the statute of limitations has run because the malpractice complaint itself was timely filed,[5] the opinion conflicts with the following announced rule of law in Knuck;

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[5]/ The present Fourth District decision erroneously relied on Angrand v. Fox, D.O., 552 So.2d 1113 n.7 (Fla. 3d DCA 1989) which allowed plaintiff to abate the action where plaintiff prematurely filed suit but, unlike the present case, had given timely statutory notice under Section 768.57.

> [W]e are compelled to reject [plaintiff's] ... argument that the filing of her complained tolled the statute of limitations notwithstanding her noncompliance with statutory prerequisites.

This court should exercise its discretionary jurisdiction to resolve these conflicts.

D. SUPPORT FOR EXERCISE OF DISCRETION IN CONFLICT IS FOUND

If this court finds it has jurisdiction, then this court should exercise its discretion in favor of entertaining this case on the merits. By entertaining the case on the merits, this court could work to resolve the embarrassing conflicts which have arisen among the districts on the issues of whether failure to file the notice of intent is jurisdictional and whether the case can be abated to allow compliance even after the statute of limitations has run. The instant decision of the Fourth District serves to further compound the confusion in the law by allowing amendment when the statute of limitations had clearly run before the summary judgment motion was filed and heard and the notice requirements had not been met. A decision by this court on the merits of the instant case would be of assistance to litigants, trial courts and the district courts in clarifying the principles of law governing failures to comply with the pre-suit notice requirement in Section 768.57.

CONCLUSION

Based on the foregoing, it is submitted that the Fourth District's decision directly and expressly conflict with earlier

decisions of the Third District Court of Appeal. The conflicts are serious ones.

This Court is respectfully requested to exercise its jurisdiction to address the merits of the decision.

Respectfully requested,

BY: Betsy E. Gallagher
BETSY E. GALLAGHER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction was mailed this 10th day of September, 1990 to: THOMAS D. LARDIN, ESQ., Post Office Box 14663, Fort Lauderdale, Florida 33302.

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PETITIONER'S APPENDIX TO BRIEF ON JURISDICTION

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I N D E X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1990

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

Appellant,

v.

GEORGE WILLIAMS, D.D.S. and RICHARD E. TRIPPENSEE, D.D.S.,

Appellees.

CASE NO. 89-1467.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed June 6, 1990

Appeal from the Circuit Court for Broward County; Arthur M. Birken, Judge.

Thomas D. Lardin of Thomas D. Lardin, P.A., Fort Lauderdale, for appellant.

J. Robert Miertschin, Jr., of Law Offices of J. Robert Miertschin, Jr., Hollywood, and Betsy E. Gallagher of Kubicki, Draper, Gallagher & McGrane, P.A., Miami, for Appellee-George Williams, D.D.S.

POLEN, J.

In November 1986 appellant commenced an action in circuit court against appellee for dental malpractice. Appellant alleged that the malpractice occurred in December 1984. Appellee moved to dismiss the complaint in January 1987 on the grounds that the notice requirement of section 768.57, Florida Statutes (1985), applied to malpractice actions against dentists and had not been

complied with by appellant. The trial court denied appellee's motion to dismiss in March 1987.

In April 1989, prior to trial, appellee moved for summary judgment on the ground that appellant failed to comply with the pre-filing notice requirements established by section 768.57. Appellant's trial counsel stipulated that he did not serve notice of intent to file suit. In May 1989 the trial court granted appellee final summary judgment finding that the appellant did not file notice of intent to file litigation and entered judgment in favor of appellee.

After oral argument, this court ordered the parties to brief two additional issues concerning the constitutionality of section 768.57, its retroactive application and the availability of abatement in order to allow compliance with that statute. After careful review of the arguments presented, we now affirm in part and reverse and remand in part.

In Lindberg v. Hospital Corp. of America, 545 So.2d 1384 (Fla. 4th DCA 1989), this court upheld the constitutionality of section 768.57, Florida Statutes (1985). We wrote: "In passing the comprehensive medical malpractice reform act of 1985 . . . the legislature had a valid purpose in insuring the protection of the public. . . ." Id. at 1386.

We further concluded that the statute did not violate the "access to the courts" provision of Article I, Section 21, Florida Constitution.

In this appeal, Campagnulo argues that section 768.57(3)(a), Florida Statutes (1985), is unconstitutional since

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it is procedural and does not affect substantive malpractice in any way other than how the matter is brought to trial. Thus, he claims this statute impinges upon the rulemaking authority of the supreme court. We disagree.

If a statute governs a substantive right or sets the bounds of a substantive right, then the statute is within the power of the legislature and therefore constitutional. VanBibber v. Hartford Accident and Indemnity Insurance Co., 439 So.2d 880 (Fla. 1983). In VanBibber, the supreme court determined that section 627.7262, Florida Statutes (Supp. 1982), is substantive because it conditions the arising of a cause of action. The courts have consistently held that the pre-suit notice pursuant to section 768.57 is a condition precedent, which must be pled in order to state a cause of action. Lindberg; Solimando v. International Medical Centers, 544 So.2d 1031 (Fla. 2d DCA 1989), review dismissed, 549 So.2d 1013 (Fla. 1989). Thus, the pre-suit notice similarly governs the arising of a cause of action and is substantive. Therefore it was within the power of the legislature and therefore constitutional.

We also conclude that the appellant's vested rights are not affected by the pre-suit requirements of the statute and therefore not subject to retroactive impairment. See, e.g., In Re Will of Martell, 457 So.2d 1064 (Fla. 2d DCA 1984) (right must be more than a mere expectancy for it to be vested and not subject to retroactive impairment). The notice requirement did not affect appellant's right to bring a malpractice action or the value of that action if brought. Section 768.57(3)(a) simply

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required appellant to file notice ninety days prior to the institution of a malpractice action.

In MacRae v. Cessna Aircraft Co., 457 So.2d 1093 (Fla. 1st DCA 1984), review denied, 467 So.2d 1000 (Fla. 1985), the district court addressed the constitutionality of a statute of limitations which retroactively shortened the time allowed by statute within which to file suit. The court upheld the constitutionality of the statute because there was reasonable and ample time within which the plaintiff could bring suit.

We find MacRae dispositive since appellant had over fourteen months from the effective date of the statute within which to comply with section 768.57(3)(a) and bring suit. Accordingly, we affirm Point I on appeal.

Appellant's second point on appeal has merit. In his supplemental brief, Campagnulo contends that this court's decision in Lindberg mandates that the trial court must allow him to amend his complaint to allege compliance even though there was no compliance at the time the lawsuit was filed.

Appellee responds citing Public Health Trust of Dade Co. v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986), and Lynn v. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986), for the proposition that abatement is not permissible after the statute of limitations has run. Appellee cites Lindberg for the same support.

On one hand, appellant reads the Lindberg decision too broadly. On the other hand, a close reading of Knuck indicates that it stands for the proposition that abatement is not permissible when notice could not be filed within the limitations

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period. In the instant case, notice could have been filed within the limitations period but for the fact that the motion to dismiss was not heard until after the period of limitations had run.

Recently, the Third District agreed with this court's Lindberg decision in Angrand v. Fox, D.O., 552 So.2d 1113 n.7 (Fla. 3d DCA 1989). Angrand involved a case where plaintiff filed his suit prematurely prior to the running of the ninety day notice period. The court stated:

> 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 notice and procedures provided by section 768.57(3)(a). (Citations omitted.)

Id. at 1115.

It is clear that if the trial court abated the action and allowed appellant to allege compliance, then the statute of limitations would have been tolled for ninety days in order to encourage the resolution of the claim. Moreover, if the parties extended the ninety day period, as provided by the statute, they could have extended the statute of limitations by 180 days. Rhodes v. S.W. Florida Regional Medical Center, 554 So.2d 1188 (Fla. 2d DCA 1989); Nash v. Humana Sun Bay Hospital, Inc., 526 So.2d 1036 (Fla. 2d DCA 1988), review denied, 531 So.2d 1354 (Fla. 1988). Therefore, on remand the trial court should allow appellant to amend his complaint in order to allege compliance with section 768.57(3)(a). If appellant unreasonably fails to comply with the statute, the trial court may either dismiss appellant's claims or defenses.

Finally, we reject appellant's argument that section 768.57, Florida Statutes (1985), does not apply to dentists. 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); McDonald v. McIver, 514 So.2d 1151 (Fla. 2d DCA 1987).

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

DELL and WALDEN, JJ., concur.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Appendix to Brief on Jurisdiction was mailed this 10 day of September, 1990 to: THOMAS D. LARDIN, ESQ., Post Office Box 14663, Fort Lauderdale, Florida 33302.

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