QA 9-6-91

047

SUPREME COURT OF FLORIDA

CASE NO. 76,593

Fourth District Court of Appeal
Case No. 89-1467

FILED
SID J. WHITE
MAY 28 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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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

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**BRIEF OF RESPONDENT**
**ON THE MERITS**

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## TABLE OF AUTHORITIES

## STATEMENT OF THE CASE AND FACTS

Plaintiff would accept the Statement of the Case and Facts, with brief additions, as set forth by Defendant. Plaintiff would also adopt the Appendix of Defendant as filed. The parties will be referred to as in Defendant's Brief and as they were in the trial court as Plaintiff and Defendant.

Subsequent to the Order denying Defendant's Motion to Dismiss (R-19), Defendant filed an Answer and Affirmative Defenses. (R-20, 13321) Defendant did affirmatively state that Plaintiff failed to comply with Florida Statute 768.57 in its Answer and Affirmative Defenses.

## ISSUE INVOLVED ON REVIEW

WHETHER OR NOT THE FOURTH DISTRICT COURT OF APPEALS REVERSAL OF THE TRIAL COURT SHOULD BE AFFIRMED WHERE SUIT WAS TIMELY FILED BUT FAILED TO ALLEGE COMPLIANCE WITH FLORIDA STATUTE 768.57 AND WHERE NO AFFIRMATIVE DEFENSE RAISING THE ISSUE WAS INCLUDED IN DEFENDANT'S ANSWER.

## SUMMARY OF THE ARGUMENT

The Fourth District held, in Lindberg vs. Hospital Corporation of America, 545 So2d 1384 (Fla. 4th DCA 1989) that the requirements of Florida Statute 768.57 are not jurisdictional. A lawsuit filed without an allegation of compliance could therefore be abated to allow an amendment alleging compliance. This Court agreed with that position in Hospital Corporation of America vs. Lindberg, 571 So2d 446 (Fla. 1990).

The purpose of the notice statute is to allow a potential defendant an opportunity to resolve a dispute amicably without a lawsuit. With the exception of a Complaint and a filing fee, the abatement of a timely filed lawsuit serves the same purpose and same interests of justice.

The notice requirements of Florida Statute 768.57 are wholly procedural. As a result, the enactment by the legislature of rules of procedure applicable before the courts of this state constitutes an unconstitutional trespass into the exclusive jurisdiction of this Court.

Finally, as it is now absolutely decided that the notice requirement under Florida Statue 768.57 is not jurisdictional, it legally follows that compliance with that notice statute may be waived by the party entitled to such notice. The failure of Defendant to assert affirmatively non compliance in his Answer constitutes a waiver of that issue.

## ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEALS TO REVERSE THE TRIAL COURT WHERE SUIT WAS TIMELY FILED BUT FAILED TO ALLEGE COMPLIANCE WITH FLORIDA STATUTE 768.57 AND WHEN NO AFFIRMATIVE DEFENSE RAISING THE ISSUE WAS INCLUDED IN DEFENDANT'S ANSWER WAS CORRECT.

It has now been firmly established that the notice requirement of Florida Statute 768.57 is not jurisdictional. Hospital Corporation of America vs. Lindberg, 571 So2d 446 (Fla. 1990) Since not jurisdictional, the Court certainly has the jurisdiction to abate. The question here, different from all other cases considered by this Court is whether abatement is appropriate where the matter of notice is first presented to the Court after the statute of limitations has expired but where the lawsuit was filed within the statutory time limit.

In Lindberg, the notice of intent was filed the same day as the Complaint. The notice, filed within the statute of limitations, had the effect of tolling the statute of limitations. There was, in reality, no down side to the dismissal of Lindberg's Complaint other than another filing fee and service of process fee would be required since the time for filing the new lawsuit would have been tolled by the notice of intent.

In our case, had the trial court ruled, at the time of the ruling on the Motion to Dismiss, that Plaintiff failed to comply and dismissed, even without prejudice, the lawsuit would be at a permanent end because the statute of limitations had expired and there was no notice of intent to toll the operation of the

limitations period. Surely an abatement under these circumstances so that a claim can be presented on its merits makes more sense and serves the needs of justice greater than an abatement where the only object or goal is the saving of a filing fee. The logic behind an abatement as expressed by this Court in Lindberg has even greater application here.

The Fourth District, in its opinion in this case, rejected Plaintiff's argument that the statute in question is unconstitutional as procedural. The Fourth District would have been correct as a matter of law had it ruled otherwise. This Court has cited, with approval, the cases of Solimando vs. International Medical Center, 544 So2d 1031 (Fla. 2nd DCA 1989) and Malunney vs. Pearlstein, 539 So2d 493 (Fla. 2nd DCA 1989) which both state, at pages 1034 and 495 respectively, the following:

> "The purpose of Section 768.57 is wholly procedural and, as we noted in Castro vs. Davis, 527 So2d 25 (Fla. 2nd DCA 1988) (footnote omitted) simply provides the potential Defendant with an opportunity to resolve amicably the controversy without the burden of a lawsuit."

This Court has previously ruled that a probate statute, Florida Statute 733.705 (3), which required a written notice of action was procedural and therefore unconstitutional. Watson vs. First Florida Leasing, Inc. 537 So2d 1370 (Fla. 1989) The statute in this case, Florida Statute 768.57, is unconstitutional for the same reason as it is solely procedural and therefore trespasses on this Court's exclusive rule making authority. The dilemma, as in Watson, was subsequently corrected by this Court by the adoption of Rule 1.650 (Florida Rules of Civil Procedure) in In Re: Medical

Malpractice Presuit Screening Rules - Civil Rules of Procedure, 531 So 2d 958 (Fla. 1988)

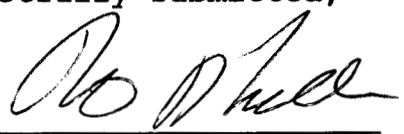
Finally, the notice requirement as indicated above is not jurisdictional and like the notice requirement of Florida Statute 768.28 is not an essential element of a cause of action for malpractice. Since neither jurisdictional nor an essential element, failure to give such notice can be waived. McSwain v. Dussia 499 So2d 868 (Fla. 1st DCA 1986) Further since notice is not jurisdictional, the Court has the power to determine if a waiver has occurred. Solimando, supra.

In this case Defendant filed a Motion to Dismiss raising the lack of notice (R-8, 9) The Court denied the motion. (R-19) Defendant then filed an Answer and Affirmative Defenses which did not include as an affirmative defense the non compliance with Florida Statute 768.57. (R-20, 21) Affirmative defenses must be raised or are waived Gause v. First Bank of Marianna 457 So2d 582 (Fla 1st DCA 1984) The issue of non compliance has not been preserved as waived by Defendant. McSwain, supra, Bryant v. Duval County Hospital Authority 502 So2d 459 (Fla. 1st DCA 1986).

## CONCLUSION

The Fourth District's decision in this case is correct and should be affirmed. It makes legal and logical common sense for the Court to abate the action for a non jurisdictional defect. Further the notice statute in question constitutes an unconstitutional trespass upon this Court's exclusive rule making authority. Finally, as a non jurisdictional defense, Defendant was obligated to affirmatively set forth non compliance in its Answer and its failure to do so constituted a waiver.

Respectfully submitted,

By: 

THOMAS D. LARDIN

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: J. ROBERT MIERTSCHIN, JR., 4000 Hollywood Boulevard, Suite 465 S, Hollywood, Florida 33021 and BETSY E. GALLAGHER, 25 West Flagler Street, Penthouse, Miami, Florida 33130 on this 23rd day of May, 1991.

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