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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

**REPLY BRIEF OF PETITIONER
ON THE MERITS**

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STATEMENT OF THE CASE AND FACTS[1]

In response to the Brief of Respondent on Merits, petitioner adds the following facts:

1) Defendant raised the issue of plaintiff's non-compliance with the notice requirement of Section 768.57, Florida Statutes (1985) by motion to dismiss and supporting memorandum of law and later by motion for summary judgment (A. 2; 4-5; R. 10-18, 33-42).

2) Defendant also raised as an affirmative defense:

> Plaintiff's complaint fails to state facts sufficient to constitute a cause of action against these responding defendants.

(R. 20-21).

3) At no time before the trial court or Fourth District Court of Appeal did plaintiff ever raise the issue that defendant waived the issue of plaintiff's non-compliance with Section 768.57, Florida Statutes. Indeed, plaintiff did not assert any waiver issue in the parties' agreed statement of the facts (which included the issues on appeal) filed with the Fourth District; plaintiff did not raise the issue in his briefs filed in the Fourth District.

1/ 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" refers to the appendix attached to the (initial) Brief of Petitioner on the Merits.

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.

Plaintiff concedes in his brief that the statute of limitations had already run by the time the trial court ruled on defendant's motion to dismiss in March, 1987 for plaintiff's failure to comply with the Section 768.57, Florida Statutes (1985) notice requirements. Brief of Respondent on the Merits, page 4.

Plaintiff argues that even though the statute of limitations has run and there was no notice of intent served which would toll the operation of the statute of limitations, that the action should have been abated to allow plaintiff to comply with the statute. Petitioner's initial brief on the merits contains a thorough discussion of Florida case law on this issue which is adopted herein (Brief of Petitioner on the Merits, pages 10-13).

Florida courts have consistently held that judgment for the defendant health care provider is required where no statutory notice is given within the statute of limitations. Lindberg v. Hospital Corporation of America, 545 So.2d 1384 (Fla. 4th DCA 1989), approved Hospital Corporation of America v. Lindberg, 571 So.2d 446, 448 (Fla. 1990); Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986); 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). Abatement of the proceeding

therefore is not proper when no notice of intent was served within the statute of limitations. See Dukanauskas v. Metropolitan Dade County, 378 So.2d 74, 76 (Fla. 3d DCA 1979)(wherein the district court, in reviewing analogous Section 768.28(6)(1975), held that a court is without power to abate to allow plaintiffs to allege compliance with a condition precedent where the time for performance has expired).

Next, plaintiff asserts that Section 768.57 "is unconstitutional as procedural." As discussed more fully below, section 768.57 is substantive and was enacted as part of the legislature's police power to respond to the public health crisis in Florida. Section 768.57 is not a legislative invasion on the Supreme Court's constitutional power under Article V, Section 2(a), Florida Constitution, to make rules for the practice and procedure in state courts.

In determining the constitutionality of a statute, the Supreme Court of Florida has consistently stated that all doubts as to the validity of the law should be resolved in favor of constitutionality. See, e.g., VanBibber v. Hartford Accident & Indemnity Ins. Co., 439 So.2d 880, 883 (Fla. 1983); Brown v. State, 358 So.2d 16, 20 (Fla. 1978). Florida courts have already rejected several constitutional challenges to section 768.57. Lindberg v. Hospital Corp. of America, 545 So.2d 1384 (Fla. 4th DCA 1989); Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986).

In Pearlstein, the district court held that section 768.57 does not violate the "access to courts" provision in Article I, Section 21, Florida Constitution and is not unconstitutionally vague. The district court also rejected any argument that the statute denies plaintiff's due process rights or violates equal protection of the law.

More recently, in Lindberg v. Hospital Corp. of America, supra, the Fourth District upheld the constitutionality of section 768.57, Florida Statutes (1985), adopted the reasoning of the Second District in Pearlstein and stated:

> In passing the comprehensive medical malpractice reform act of 1985, Chapter 85-175, Laws of Florida, the legislature had a valid purpose in insuring the protection of the public, and this statute is neither arbitrary nor lacking any rational basis nor do its restrictions on filing actions violate the "access to courts" provision of Article I, Section 21 of the Florida Constitution. ... [Id. at 1386].

The decision of the Fourth District was subsequently approved by this Court. Hospital Corporation of America, at 449.

In resolving the issue of whether a statute violates the rule-making power of the Supreme Court, this Court reviews the challenged statute and determines whether the statute lays down a procedural rule or whether the statute governs a substantive right or part of a substantive right. If the statute sets the bounds of a substantive right or governs a substantive right, then the statute is within the power of the legislature and therefore constitutional. See, e.g., School Board of Broward County v.

Price, 362 So.2d 1337, 1339 (Fla. 1978); Van Bibber v. Hartford Accident & Indemnity Co., supra. "A substantive right creates, defines and regulates rights as opposed to procedural or remedial law which prescribes a method of enforcing or obtaining redress for their invasion." Richardson v. Honda Motor Co., Ltd., 686 F. Supp. 303, 304 (M.D. Fla. 1988).

In the present case, section 768.57 governs, defines and regulates a substantive right. Florida courts have consistently held that the notice requirement established by section 768.27 is a condition precedent. Hospital Corporation of America, supra at 448; MacDonald v. McIver, 514 So.2d 1151, 1154 (Fla. 2d DCA 1987); Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1976). A complaint cannot be filed until 90 days after the notice is sent. An allegation of compliance with the notice requirement is essential to state a cause of action for medical malpractice. Solimando v. International Medical Centers, HMO, 544 So.2d 1031, 1033 (Fla. 2d DCA 1989). The statute is clearly substantive because it created a condition precedent to filing a medical malpractice action which must be pled to state a cause of action.

The Supreme Court of Florida addressed the issue of whether the legislature encroached on the Supreme Court's rule-making power in a case involving analogous facts in VanBibber v. Hartford Accident & Indemnity Ins. Co., supra. In that case, the court reviewed section 627.7232, Florida Statutes which required as a

condition precedent to having a third-party interest in an insurance policy the vesting of that interest by judgment. The Supreme Court found that the statute operated in an "area of legitimate legislative concern" and is substantive.

Likewise, the present statute operates in an "area of legitimate legislative concern." The Fourth District found that the legislature had a valid purpose in enacting the medical malpractice reform act of 1985 in upholding the constitutionality of section 768.57 in Lindberg, supra. The statute was "intended to encourage settlement of meritorious claims without requiring the expense of full-blown litigation." MacDonald, supra at 1152. The present statute is also substantive because it conditions the bringing of the medical malpractice action on plaintiff's compliance with the notice provisions.

In another analogous case, this Court reviewed the issue of whether a statutory provision in section 230.23(9)(d)(2) prohibiting the mention of insurance in actions brought against the school board was an invasion of the rule-making power of the Supreme Court. School Board of Broward County v. Price, supra. In reaching its decision, the Supreme Court noted that while references to insurance or insurers during trial is a procedural matter, the challenged statute was constitutional because the statute conditioned the viability of the sovereign immunity waiver in school board cases on a prohibition against mentioning insurance coverage to the jury. The court found that the statute set the bounds of the substantive right to sue because "it conditions the

waiver." Id. at 1339. Similarly in this case, section 768.57 conditions the bringing of a medical malpractice action on plaintiff's compliance with the notice requirements of the statute; the statute regulates the substantive right to bring a medical malpractice action.

Contrary to plaintiff's assertion, pre-suit screening rule 1.650, Florida Rules of Civil Procedure was adopted by the Supreme Court to implement section 768.57 and not to replace the statute. In re: Medical Malpractice Pre-Suit Screening Rules--Civil Rules of Procedure, 536 So.2d 193 (Fla. 1988); In re Amendment to Rules of Civil Procedure, Rule 1.650 (a)(2), 568 So.2d 1273 (Fla. 1990).[2] Among other things, the rule sets forth methods and procedures for giving notice, conducting presuit screening discovery, and establishes certain time requirements.

The present statute operates in an area of recognized legislative concern. As in Van Bibber and Price the statute is substantive and is therefore constitutional.

Plaintiff's reliance on the case of Watson v. First Florida Leasing, Inc., 537 So.2d 1370 (Fla. 1989) is misplaced. That case involved failure to file with the probate division a notice of independent action pursuant to section 733.705(3), Florida Statutes

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[2]/ Although of no import to this appeal, Rule 1.650(d)(2) was subsequently amended to conform the rule to Section 768.57, Florida Statutes (3)(a) (renumbered as section 766.106, Florida Statutes (Supp. 1988). The amendment reduced the notice requirement for bringing a medical malpractice action against a state agency from 180 days to 90 days. In re: Amendment to Rules of Civil Procedure, Rule 1.650(d)(2), supra.

(1985). The purpose of such notice is to "give notice to all persons interested in or potentially affected by the suit." Id. at 1371. The notice in no way affects the substantive rights on which the independent action against the estate are based. In contrast, the notice required by Section 768.57, Florida Statutes is a condition precedent to the filing of a medical malpractice action. The notice requirement is similar in nature to the notice requirement embodied in section 768.28(6), Florida Statutes, which is clearly substantive in nature. The Watson case, based on a notice provision of a substantially different nature, is completely inapposite.

Finally, plaintiff asserts that defendant waived his right to assert plaintiff's failure to meet the notice requirement arguing that defendant failed to include the plaintiff's non-compliance with Section 768.57 as an affirmative defense. This argument is without merit.

First, the waiver issue raised by plaintiff was never raised in the trial court or the Fourth District Court of Appeal; the courts below therefore had no opportunity to rule on the issue and this Court should reject this argument. Hospital Corporation of America v. Lindberg, supra at 449 (wherein this Court rejected an argument of one of the parties because it was not raised in the lower court).

The record, however, shows no waiver by defendant to assert plaintiff's failure to comply with the notice requirements. Defendant preliminarily raised the issue in his motion to dismiss and supportive memorandum of law (A. 2, 4-5; R. 10-18).

In its answer, defendant affirmatively asserted that plaintiff's complaint "failed to allege sufficient facts to constitute a cause of action against these responding defendants." An allegation of compliance with the notice requirement is essential to state a cause of action for medical malpractice. Solimando, supra at 1033. Therefore, since plaintiff failed to allege compliance with the statute, defendant's broad affirmative defense raised the issue. Furthermore, shortly before trial defendant reasserted the plaintiff's failure to comply with the statutory requirement in his motion for summary judgment.

In Miami Valley Broadcasting Corp. v. Lang, 429 So.2d 1333, 1336 (Fla. 4th DCA 1983) the district court rejected an argument that an unpled affirmative defense was waived. The district court of appeal found there was no waiver of the unpled affirmative defense where the issue had been argued by defendant in a motion for summary judgment and thereafter in the case and plaintiff failed to raise the issue that defendant failed to sufficiently plead the affirmative defense. Likewise, in the present case, plaintiff never objected below to the statutory notice defense asserted by defendant, and the issue was therefore litigated with the implied consent of the plaintiff.

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
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on the Merits was mailed this 12th 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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