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In The

SUPREME COURT OF FLORIDA

on review from the
Fourth District Court of Appeals

SUPREME COURT CASE NO. 80,725

JAMES CURTIS BOYD

Petitioner

v.

FERDINAND F. BECKER, M.D.

Respondent

PETITIONER'S INITIAL BRIEF ON THE MERITS

Filed by

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ISSUE

WHETHER, IN THE SPECIFIC EVENT OF A PHYSICIAN'S FAILURE TO RESPOND TO A NOTICE OF INTENT, THE IMPLICIT REJECTION OCCURS 90 DAYS AFTER THE NOTICE IS MAILED BY CLAIMANT, OR 90 DAYS AFTER BEING RECEIVED BY PHYSICIAN.

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CITATIONS

STATEMENT OF FACTS

This review concerns the timing of the statutorily prescribed presuit period which preceded the filing of a Complaint for medical malpractice by Petitioner James Curtis Boyd against Respondent Ferdinand F. Becker, M.D. Specifically at issue is the date upon which an implicit rejection occurred as a result of Respondent's failure to reply to Boyd's Notice of Intent to Initiate Litigation.

On June 3, 1988, Dr. Becker performed surgery on Boyd, who was under general anesthesia during the operation. The medical malpractice action is based on a certain procedure performed by Dr. Becker, and the resulting scar. On June 4, 1990 (June 3 being a Sunday), Boyd petitioned for and received an automatic 90 day extension to the statute of limitations pursuant to Section 766.104(2), Florida Statutes, 1989.(R. 21). On August 30, 1990, Boyd mailed a Notice of Intent to Initiate Litigation to Dr. Becker, which was received on September 3, 1990.(R. 22, 39). Respondent chose not to respond. **On December 3, 1990, pursuant to Section 766.106(3)(c), Boyd accepted an implicit rejection of his claim based on Respondent's failure to respond.** Exactly 60 days later, February 1, 1991, Boyd filed his Complaint pursuant to Section 766.106(4).(R. 1) On March 11, 1991, Respondent moved for dismissal, which the trial court granted based on the statute of limitations.(R. 54). The Fourth District subsequently affirmed the dismissal in the Opinion on review.

The specific question before the Court is whether the statutorily prescribed implicit rejection, which follows a physician's failure to respond to a Notice of Intent, occurs 90 days after the Notice is mailed by claimant, or 90 days after being received by physician. Both parties, as well as the Fourth District, agree that if the rejection occurred 90 days after receipt, then the Complaint was timely filed (.p 2 Respondent's Jurisdictional Brief; p. 3 - 4 DCA Opinion).

SUMMARY OF ARGUMENT

The determinative factor as to the timeliness of the Complaint in this action is whether the implicit rejection, resulting from Respondent's failure to respond to Boyd's Notice of Intent, occurred 90 days after the Notice was mailed by Boyd, or 90 days after being received by Respondent. The legislature has expressly contemplated the event of a physician's failure to respond to a Notice of Intent, and has explicitly provided controlling law - such failure to respond "within 90 days after <u>receipt</u> shall be deemed a final rejection of the claim" Section 766.106(3)(c) Florida Statutes, 1989. (emphasis added).

ARGUMENT

In the event that a physician chooses not to respond to a Notice of Intent to Initiate Litigation, when does the statutorily prescribed implicit rejection occur? The answer is a matter of law. The legislature has expressly contemplated, and provided precise timing for, exactly such a nonresponse situation.

LAW

> Section 766.106(3)(c)
>
> Failure of the prospective defendant or insurer or self-insurer to reply to the notice within 90 days after receipt shall be deemed a final rejection of the claim for purposes of this section. (emphasis added)

The legislature enacted Section 766.106(3)(c) to provide **what** results from a failure to respond - an implicit **rejection**. We need only read the rest of the same sentence to realize **when** this rejection occurs - **90 days after receipt**. Boyd relied on this express legislative provision in calculating timing for filing his Complaint.

In considering the question now before the Court, the Fourth District acknowledged the explicit provision of section (3)(c) as setting the rejection 90 days after receipt(Opinion p. 3), but stated that despite legislative intent and prerogative, it was "bound by" Florida Rule of Civil Procedure 1.650 (Opinion p. 6). In actuality, the courts are bound by the plain language of the law. In order for this Rule to accurately apply in the specific

event of a physician's failure to respond, it must be amended, or supplemented, to reflect the express legislative provisions for such scenario. Pursuant to section 766.106(4), our legislature has provided for a 60 day filing period following "notice of termination." In a failure to respond situation, this notice of termination most certainly occurs via an implicit rejection "90 days after **receipt**" pursuant to section 766.106(3)(c). The following time table results from a simple application of the law:

Sept. 3, 1990	Notice of Intent received.
Dec. 3, 1990	Implicit rejection 90 days after **receipt**, pur 766.106(3)(c). Presuit period terminates.
Feb. 1, 1991	Complaint filed, pur 766.106(4), 60 days after termination of presuit period.

These two legislative provisions make February 1, 1991 a perfectly timely date for filing.

Boyd calculated timing for filing in strict accordance with the express legislative provisions above. During the 60 day filing period, Respondent requested informal discovery from Boyd, and promised claim consideration. In a most sincere effort to avoid litigation, as is the purpose behind the Presuit Screening Chapter, Boyd relied on Respondent's seemingly genuine promise and waited until the final day to file the Complaint against Respondent.

Respondent has asserted that the word "mailed" in section 766.106(3)(a) sets the date of the implicit rejection:

> (3)(a) "No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant."

Clearly, (3)(a) neither addresses a failure to respond or an implicit rejection. Both are concepts of (3)(c). The plain terms of statutes must be followed. It is the plain terms of (3)(c) which were enacted for the specific event of a physician's failure to respond, and their verbatim application explicitly sets rejection at "90 days after **receipt**".

In addition to the legislature providing section (3)(c) as governing in the specific event of a physician's failure to respond, the Fourth District in its Opinion here on review acknowledged the only known case to consider the "mailing" v. "receipt" question.(Opinion p. 5). In Barron v. Crenshaw, 573 So. 2d 17,18 (Fla. 5th DCA, 1990) the Fifth District held that the 90 day presuit period "begins on the day after a notice of claim is received." "Receipt" was held as controlling in Barron even absent the factual scenario of a physician's failure to respond. The fact that the immediate case involves a physician's failure to respond, and an implicit rejection, goes even further, placing section (3)(c) in an absolutely controlling position.

In the Opinion here on review, the Fourth District acknowledges the "receipt" provision of section 766.106(3)(c) as being "explicit" in setting the date of implicit rejection. The court says, however, that despite legislative intent and being "attracted to the logic" of the presuit period commencing after "receipt," it is bound by Rule 1.650. In fact, however, it is a matter of law that when a physician fails to respond to a notice of intent, the implicit rejection occurs 90 days after **receipt**.

CONCLUSION

The question before the Court is the date on which an implicit rejection occurs. Section 766.106(3)(c) is **the law** which the legislature clearly enacted to govern in the specific event of a nonresponsive physician. The terms of (3)(c) are certain and unambiguous. As a matter of law, Respondent's failure to respond resulted in a rejection "90 days after receipt of notice".

For the above reasons, Boyd respectfully requests the Court reverse the ruling here on review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Federal Express this 4th day of May, 1993, to Mr. Reed Kellner, attorney for Respondent, at Suite 1600 NCNB Tower, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33402.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1992

JAMES CURTIS BOYD,

Appellant,

v. CASE NO. 91-2334.

FERDINAND F. BECKER, M.D.,

Appellee.

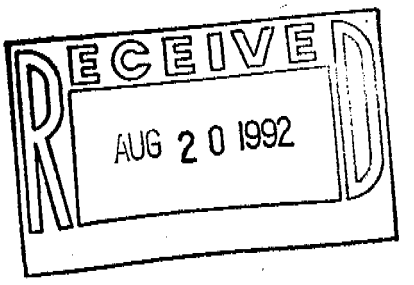
NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed August 19, 1992

Appeal from the Circuit Court for Indian River County; L.B. Vocelle, Judge.

James Curtis Boyd, Fort Pierce, pro se appellant.

Reed Kellner and Diran V. Seropian of Adams, Coogler, Watson & Merkel, P.A., West Palm Beach, for appellee.



ANSTEAD, J.

James Curtis Boyd was the plaintiff in a medical malpractice action. The trial court dismissed the action upon concluding that Boyd's claim was untimely filed. We affirm on all points.

FACTS

The facts pertinent to the dismissal are not in dispute. On June 3, 1988, Ferdinand F. Becker, a physician, performed a surgical procedure on Boyd. The subsequent medical malpractice suit was based on a scar resulting from the operation. On June 4, 1990, the two year statutory limitation

for medical malpractice action expired. However, on that date, Boyd timely requested and received a ninety day extension of the limitation period per section 766.104(2), Florida Statutes (1989).[1] On August 30, 1990, Boyd mailed a notice of intent to initiate litigation pursuant to section 766.104, which was apparently received by the doctor on September 3, 1990. This resulted in an additional automatic ninety day toll of the statute of limitations per section 766.106(4). There was no response from the doctor. On February 1, 1991, Boyd filed his complaint.

There is no dispute between the parties that Boyd was entitled under the provisions of Chapter 766 to the benefit of two successive ninety day periods of extension within which to file his action and an additional sixty days at the end of the second extension. At issue is the date that the final sixty day extension period began.

LAW

Section 766.106(4), states:

> (4) The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60

[1] The request for extension would normally have been due by June 3, 1990, two years after the alleged malpractice. However, June 3rd was on a Sunday, whereby June 4th became the relevant date for section 766.104(2).

> days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

(Emphasis added). See also Rhoades v. Southwest Florida Regional Medical Center, 554 So.2d 1188 (Fla. 2d DCA 1989). In this case the sixty days is the longer period contemplated by the statute, since no time remained under the two year limitation period for filing suit. Both parties agree that the notice provided the doctor ninety days to reply and that the doctor's failure to respond after the ninety days constituted a rejection of the claim, and triggered the final sixty day extension for Boyd to file a complaint. The parties differ, however, as to the basis for measuring the preceding ninety days.

According to Boyd, the ninety day presuit period should be computed based on section 766.106(3)(c) which states:

> (c) The response shall be delivered to the claimant if not represented by counsel or to the claimant's attorney, by certified mail, return receipt requested. Failure of the prospective defendant or insurer or self-insurer to reply to the notice within 90 days after receipt shall be deemed a final rejection of the claim for purposes of this section.

(Emphasis added). This section explicitly provides that the doctor has ninety days after his receipt of the notice of intent in which to reply. The date of receipt would have been September 3, 1990, at the earliest, according to proof submitted by Boyd.[2] Under this view the ninety period would have expired on December

[2] The basis for September 3, 1990 as the date of earliest possible receipt is a postal trace. The doctor does not challenge this proof, but rather relies on his legal argument as to the controlling provisions of the statute for computing time.

3, 1990. The sixty day period, measured from December 3rd would end on February 1, 1991. Accordingly, Boyd's filing on February 1, 1991 would have been timely.

However, according to the doctor, the ninety day presuit period, should be measured based upon the provisions of section 766.106(3)(a), which provides in part:

> (3)(a) No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant. 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.

(Emphasis added). This section appears to provide for a ninety day tolling period measured by the mailing of the notice of intent. Under this view, the implicit rejection would occur on November 28, 1990, ninety days after Boyd's mailing of the notice of intent. The sixty day time limit for Boyd to file, then, would end on January 28, 1991. Consequently, Boyd's February 1, 1991, filing would be untimely.

Consistent with this interpretation is Florida Rule of Civil Procedure 1.650, the Medical Malpractice Presuit Screening Rule, which provides in part:

> (d) **Time Requirements.**
>
> * * *
>
> (2) The action may not be filed against any defendant until 90 days after the Notice of Intent to Initiate Litigation was mailed to that party . . . .
>
> (3) To avoid being barred by the applicable statute of limitations, an action must be

> filed within 60 days or within the remainder of the time of the statute of limitations after the Notice of Intent to Initiate Litigation was mailed, whichever is longer, after the earliest of the following:
>
> (A) The expiration of 90 days after the date of mailing of the Notice of Intent to Initiate Litigation . . . .

(Emphasis added). Under these provisions the ninety day tolling of the limitations period occurs from the date the notice of intent was mailed.

The only case cited which has discussed this issue is Barron v. Crenhaw, 573 So.2d 17 (Fla. 5th DCA 1990). In that case, realizing the potential ambiguities between section 766.106(3)(a) ("mailed"), and (c) ("receipt"), the Fifth District stated:

> [T]hat the ninety-day period within which the response to a notice of claim is to be made under section 766.106 begins on the day after a notice of claim is received.

Id. at 18 (emphasis added). This construction adopts 766.106(3)(c) as the trigger in which the ninety day clock begins. The logic of this view is predicated on the fact that section 766.106(3)(c) states specifically and explicitly that a non-response by defendant within ninety days of receipt of the notice of claim, constitutes a rejection by defendant. It is the "rejection" by the defendant that triggers the final sixty day period.

Under this construction, since the statute requires the notice to be mailed by certified mail "return receipt requested," the date of receipt can easily be determined, and

the defendant receives the benefit of a full ninety day period in which to investigate and decide how to respond. However, this construction may actually result in a tolling for a longer period than ninety days, since a number of days will usually pass before a mailed notice is received. This period will vary in each case.

Both of the constructions argued by the parties find support in the statutory provisions set out above. These statutory provisions are obviously at odds and require clarification. We are concerned that the mixed signals will result in important filing deadlines being missed, just as has occurred here.

While we are attracted to the logic of the interpretation of these provisions set out in Barron, we are bound by our supreme court's interpretation of these provisions contained in rule 1.650, which supports the trial court's ruling. Because it is within the legislature's perogative to establish limitation periods, we would ordinarily be bound to follow legislative intent as we perceive it from the statutory provisions discussed above. However, here our supreme court has obviously construed these same statutory provisions in enacting rble 1.650. We must follow that construction even though our interpretation conflicts with that set out in Barron.

Accordingly, we affirm the decision of the trial court.

HERSEY, J., and ALDERMAN, JAMES E., Senior Justice, concur.