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In The

SUPREME COURT OF FLORIDA

4TH DCA CASE NO. 91-02334

SUPREME COURT CASE NO. 80,725

JAMES CURTIS BOYD

Appellant

v.

FERDINAND F. BECKER

Appellee

APPELLANT'S AMENDED JURISDICTIONAL BRIEF

Filed by

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206 Osceola Ave.
Ft. Pierce, Fl 34982

ISSUE

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

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SUMMARY OF ARGUMENT

Appellant, James Curtis Boyd, is the claimant in a medical malpractice action against appellee Ferdinand F. Becker, M.D. At issue is the date of termination of the statutorily prescribed presuit period.

In the instant case, appellee chose not to respond to the appellant's Notice of Intent during the presuit period. The question presented is whether this presuit period terminated 90 days after the notice was mailed by appellant, or 90 days after being received by appellee.

In no uncertain terms, section **766.106(3)(c)** expressly contemplates and addresses the specific situation of a physician's failure to respond to a Notice of Intent, as is the exact case here. **(3)(c)** provides precisely how the presuit period ends (implicit rejection), and **when it ends (90 days after receipt)**, in the specific event of a physician's failure to respond. Clearly, it is the legislature's prerogative to establish limitation periods. Pursuant to this absolute plain reading of the specifically provided legislation, "receipt" controls, and appellant's filing is perfectly timely.

Appellant calculated to the exact day following this specifically provided legislation, waiting until the final day for filing based on appellee's request of informal discovery and seemingly genuine promises of claim consideration during the filing period.

Furthermore, in the only known case to address the

mailing vs. receipt question, the 5th DCA held **receipt** as controlling. Once again, if receipt is applied in the instant case, appellant's filing is timely to the exact day.

It is only by both applying a Court rule (which does not even address a nonresponse situation) over a specifically provided statute, and by conflicting with the 5th DCA, that the 4th DCA is able to hold that appellant's complaint was untimely filed.

In the opinion on appeal, the 4th DCA explained that section 766.106(3)(c) "explicitly provides that the doctor has 90 days after his **receipt** in which to reply." The court then explains that despite legislative intent and despite the only case law precedent, it is bound by Rule 1.650, which, in reality, simply does not contemplate the specific event of a nonresponse. Because the 4th DCA did not feel it had authority to apply **receipt**, this appeal to jurisdiction is necessary in order to prevent the ultimately harsh consequence of claim dismissal despite appellant having precisely followed specifically provided legislation and case law in calculating timing for filing.

APPEAL TO SUPREME COURT JURISDICTION

Appellant, James Curtis Boyd, respectfully requests that the Supreme Court of Florida accept jurisdiction to consider the issue presented in the attached opinion of the Florida 4th District Court of Appeals:

> WHETHER, IN THE SPECIFIC EVENT THAT A DOCTOR FAILS TO RESPOND TO A NOTICE OF INTENT, THE 90-DAY PRESUIT PERIOD EXPIRES 90 DAYS AFTER THE NOTICE IS MAILED BY CLAIMANT, OR 90 DAYS AFTER BEING RECEIVED BY THE DOCTOR.

In the opinion on appeal, the 4th DCA holds that, even in the event of a doctor's nonresponse, the presuit period expires 90 days after the notice is mailed. This holding makes Supreme Court jurisdiction appropriate on two grounds. There is a direct statutory invalidation which requires Supreme Court Jurisdiction pursuant to Florida Rule of Civil Procedure 9.030(a)(1)(A)(ii). There is also a direct conflict between Districts, which supports this Court's discretionary acceptance pursuant to Rule 9.030(a)(2)(A)(iv).

STATUTORY INVALIDATION

The holding of the 4th DCA is directly contrary to Florida Statute Section 766.106(3)(c), the legislative provision which specifically provides both how and when the presuit period ends in the precise event of a doctor's nonresponse. Because we are dealing with the specific facts of a doctor's failure to respond in this case, there is no

"choice" to be made between "mailing" and "receipt." Section 766.106(3)(c) specifically contemplates and addresses timing in the explicit event of a doctor's failure to respond. In no uncertain terms, (3)(c) marks the end of this period, **when a doctor does not respond**, with an implicit rejection 90 days after **receipt**. The 4th DCA appropriately uses (3)(c) to find that an implicit rejection occurs in the event of a nonresponse. However, it then inexplicably abandons (3)(c) in mid-sentence to consider when this rejection occurs. Section 766.106(3)(c) leaves absolutely no doubt as to when the rejection occurs, and to replace "receipt" with "mailing" in the specific event of a failure to respond absolutely invalidates the legislatively provided term.

In an honest, good faith effort to allow every chance for claim consideration, which appellee promised after the (3)(c) rejection and during the 60 day filing period, appellant calculated to the exact day for filing using (3)(c) as a guide. It is only by invalidating the expressly on-point terms of this section that appellant's case is subject to dismissal.

The 4th DCA explains that despite legislative intent, and despite being "attracted to the logic" of the 5th DCA, it is bound by Florida Rule of Civil Procedure 1.650 as the Supreme Court's interpretation of presuit timing. The problem here arises from the fact that rule 1.650 bases its calculations of presuit timing on "mailing", without acknowledging that the statutes require that "**receipt**"

controls **when a physician fails to respond**. Rule 1.650 simply does not address a nonresponse situation. If it did so, it would have to use "receipt" as provided by the legislature for that specific situation. As written, sections 766.106(3)(a) and (c) do not conflict. (3)(a) simply provides that no suit may be filed for the first 90 days after mailing. (3)(c) follows by addressing the specific situation of a failure to respond, supplementing (3)(a) by requiring a full 90 after **receipt** before termination **when there is no response**.

766.106(3)(a) No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant.

766.106(3)(c) Failure of the defendant to reply to the notice within 90 days after **receipt** shall be deemed a final rejection of the claim.

(relevant language cited)

Applying the plain language of these sections makes it perfectly clear at what point termination occurs in the event of a failure to respond - 90 days after "receipt." This situation presents a textbook opportunity to apply the basic procedures of reading statutes harmoniously and applying specific over general. (3)(c) specifically contemplates and addresses a failure to respond, exactly as in the instant case. Not applying the specifically provided legislation has resulted in a dismissal despite appellant having precisely followed both legislation and case law in calculating timing.

Florida Statute Section 766.106(3)(c) was written specifically for the situation of a doctor's failure to respond. If "receipt" is not applied when a doctor fails to

respond, that provision of (3)(c) is invalidated and its enactment has no meaning. If applied as provided by our legislature, appellant's Complaint is timely, and no invalidation, DCA conflict, or dismissal occurs.

DCA CONFLICT

Appellant also requests that this Court accept jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv) based on a conflict between District Courts of Appeal regarding the "mailing" / "receipt" question. As acknowledged by the 4th District in the opinion on appeal, the only known precedent to this issue is Barron v. Crenshaw, 573 So.2d 17 (Fla. 5th DCA 1990). In Barron, the 5th DCA specifically held that the date of the doctor's **receipt** triggered the timing of the presuit period. In the opinion here on appeal, the 4th DCA explains that it is attracted to the logic of the 5th DCA in Barron (Opinion p.6), acknowledges the conflict (p.5,6) and the "explicit" provision of 766.106(3)(c) (p.3,5), but says it is bound by Rule 1.650.

In Barron, deciding whether mailing or receipt controls timing of the presuit period, the 5th DCA held that receipt controls. At the very close of its Opinion, the 4th DCA acknowledges the conflict presented by its holding. In the instant case, the circumstance of appellee's failure to respond should provide even further basis for holding "receipt" controlling and thereby harmonizing with the Barron decision. **In the specific event of a nonresponse, the legislature has expressly provided that the presuit**

period ends in a rejection 90 days after "receipt." Appellee's failure to respond places (3)(c) "receipt" directly on-point. There is no valid basis for conflicting with Barron.

Although (3)(c) expressly provides "**receipt**" as controlling **in a nonresponse situation** and (3)(a) says nothing on the issue, the 4th DCA explained the sections as being at odds. Appellant strongly disagrees with this view, as a plain reading of both sections makes it clear that the legislature has contemplated the exlicit event of a nonresponse, and provided therefore by enacting (3)(c). If the Supreme Court also considers these sections as being at odds **in a nonresponse situation**, then appellant requests the Court excercise its authority to apply the long standing and well established practice of applying ambiguous statutes so as to avoid harsh consequences, ie dismissal of appellant's meritorious claim.

The opinion of the 4th DCA goes directly against Florida Statute Section 766.106(3)(c). Additionally, it conflicts with the only case on-point. Appellant requests that this Court accept jurisdiction in order to prevent the ultimately harsh consequence of dismissal, which will otherwise occur, despite appellant having precisely followed both legislation and case law in calculating timing for filing after appellee chose not to respond to the Notice of Intent.

DCA CONFLICT

Should the Supreme Court choose not to accept jurisdiction in order to apply specifically provided legislation, appellant requests the Court consider, or remand for consideration, the following. Appellant's primary argument, as set out above, is based on the statute of limitations having commenced on the date of the initial surgery. However, as consistently maintained by appellant at all times prior to this appeal, a question of fact is presented as to the actual commencement, based on appellee's assurances after the initial surgery that there was nothing unusual about the procedure which is being complained of, and assurances that the incision at issue would not result in any scarring. This issue was appropriately presented at the trial court level, and in appellant's initial and reply briefs to the 4th DCA. At oral argument, the court suggested that appellant need not address this issue due to the precisely on-point language of section 766.106(3)(c) controlling in a nonresponse situation which would make appellant's filing timely even if the statute of limitations commenced on the initial date of surgery. Apparently, the Court subsequently considered itself bound by rule 1.650, and this second issue received no consideration in the court's Opinion. This can only be taken as a conflict with the 3rd DCA case of Swagel v. Goldman, 393 So.2d 65 (Fla. 3rd DCA 1981) which holds that such assurances raise a genuine issue of fact as to when the statute of limitations commences. Accordingly, appellant requests that this

argument be granted consideration in the event that jurisdiction is not accepted to consider the "mailing" vs. "receipt" issue presented above.

Finally, appellant again urges the Court to recognize that the legislature has provided that "receipt" controls termination of the presuit period in the specific event of a physician's failure to respond, and accordingly accept jurisdiction to prevent a misapplication of law fatal to appellant's claim.

For the above reasons, appellant respectfully requests the Supreme Court of Florida accept jurisdiction to consider this matter.

Respectfully Submitted,

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APPENDIX:

Boyd v. Becker, 4th DCA case no. 91-02334
Opinion for which review is requested.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 23rd day of November, 1992, to Reed Kellner, attorney for appellee, at Suite 1600, NCNB Tower, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33402.

James Curtis Boyd

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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.

FERDINAND F. BECKER, M.D.,

Appellee.

CASE NO. 91-2334.

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

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[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.