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w/app

IN THE SUPREME COURT OF FLORIDA

JAMES CURTIS BOYD,

Petitioner,

vs.

FERDINAND F. BECKER, M.D.

Respondent.

Sup. Ct. Case No. : 80,725
DCA Case No. : 91-02334

RESPONDENT'S JURISDICTIONAL BRIEF

On Review from the District Court
of Appeal, 4th District
State of Florida

REED W. KELLNER, ESQ.
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TABLE OF CITATIONS

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STATEMENT OF THE CASE AND FACTS

Respondent, FERDINAND F. BECKER, M.D. ("DR. BECKER"), provides the following Statement of the Case and Facts in view of the failure of Petitioner, JAMES CURTIS BOYD ("BOYD"), to include same in his Amended Jurisdictional Brief.

BOYD's request for review of the district court's decision is properly traced to the trial court's dismissal of his medical malpractice action against DR. BECKER on statute of limitations grounds. BOYD's action was based upon a scar that allegedly resulted from a surgical procedure that DR. BECKER performed upon him on June 3, 1988.

The two-year statutory limitation for medical malpractice actions expired on June 4, 1990. However, on that date, BOYD timely requested and received a ninety-day extension of the limitation period, pursuant to 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(2), which DR. BECKER received on September 3, 1990. This activity resulted in an additional automatic ninety-day toll of the statute of limitations, pursuant to Section 766.106(4). DR. BECKER did not respond to the notice, as he was permitted to do by law. On February 1, 1991, BOYD filed suit.

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[1] As the district court's opinion points out, the request for extension would normally have been due by June 3, 1990, two years after the alleged malpractice period. However, that date fell on a Sunday, thereby making the relevant date June 4, 1990, with respect to Section 766.104(2).

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On March 11, 1991, DR. BECKER moved to dismiss BOYD's Complaint on several grounds, including BOYD's failure to comply with the applicable statute of limitations. Both sides agree that under Chapter 766, BOYD was entitled 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. However, they disagreed as to the date on which the final sixty-day extension period began. BOYD contended that the relevant date was the date DR. BECKER received the Notice of Intent to litigate, pursuant to Section 766.106(3)(c), Fla. Stat.[2] On the other hand, DR. BECKER contended that the relevant date was the date BOYD mailed the notice, pursuant to Section 766.106(3)(a), Fla. Stat.[3] At a June 17, 1991 hearing on DR. BECKER's motion, the trial court agreed with DR. BECKER's position and dismissed BOYD's action as untimely filed, after reviewing memoranda of law submitted by the parties.

On August 12, 1991, BOYD appealed the dismissal, which the Fourth District affirmed after hearing oral argument. On September 28, 1992, the district court denied rehearing and certification.

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[2] Under this view, the ninety day period would have expired on December 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.

[3] 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.

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SUMMARY OF THE ARGUMENT

The district court's decision did not declare invalid a state statutory or constitutional provision. Therefore, there is no basis for mandatory review of this appeal. Further, the district court's decision does not expressly and directly conflict with the decision of the Supreme Court or another district court of appeal on the same point of law. Therefore, there is no basis for discretionary review of this appeal. Even if there is a basis for discretionary review of this appeal, this court should still decline jurisdiction.

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ARGUMENT

STATUTORY INVALIDATION

Initially, BOYD contends that because the district court's decision is "directly contrary" to Section 766.106(3)(c), Florida Statutes, this court cannot refuse to review this appeal. Actually, review is mandatory only for those district court of appeal decisions which declare invalid a state statute or a provision of the state constitution. Art. V, Section (3)(b)(1), Fla. Const. (1980); Fla.R.App.P. 9.030(a)(1)(A)(ii). The district court in this case made absolutely no declaration of invalidity as to Section 766.106(3)(c) or any other state statutory or constitutional provision. Therefore, mandatory jurisdiction does not lie in this case.

Indeed, invalidation of Section 766.106(3)(c) is nowhere evident in the district court's opinion, nor was such invalidation necessary to find that BOYD's filing was untimely. Invalidation of Section 766.106(3)(c) was unnecessary, because that provision in no way prescribes a time as to when the ninety-day tolling of the limitations period occurs. Rather, Section 766.106(3)(c) merely discusses the duty of the doctor or the doctor's insurer to provide a response to the Notice of Intent after investigating the claim. Section 766.106(3)(c) states:

> (3)(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

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> within ninety days after receipt shall be deemed a final rejection of the claim for purposes of this section.

In its opinion, the district court recognized that this section explicitly provides that the doctor has ninety days after his receipt of the Notice of Intent in which to reply.

In the district court, BOYD maintained that Section 766.106(3)(c) specifically provides that in the case of a doctor's nonresponse within ninety days of receipt of the notice of claim, such nonresponse will trigger the ninety day tolling of the limitations. However, it is only through a strained and unreasonable reading of Section 766.106(3)(c) and only by resort to construction and interpretation of the clear and unambiguous language of that section, can one arrive at BOYD's interpretation of that section. The language in subsection (3)(c) to which BOYD refers, merely indicates that the failure by a doctor or that doctor's insurer to reply to the notice within ninety days after receipt, will constitute an implicit rejection of the claim. The language goes no further. Nowhere in subsection (3)(c) has the legislature referenced either the statute of limitations or the calculation of time periods pertinent to avoiding a bar by the applicable statute of limitations. Accordingly, section 766.106(3)(c) was not, and need not have been, invalidated by the district court in its decision.

Rather, in determining that BOYD's action was untimely filed, the district court correctly applied Section 766.106(3)(a) to the present case. That section 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 supplied)

Unlike subsection (3)(c), subsection (3)(a) plainly references the calculation of time for filing purposes by specifically providing for a 90-day tolling period to be measured the mailing of the Notice of Intent. Recognizing the direct applicability of subsection (3)(a) to the facts in the present case, the district court applied that subsection in reaching its determination.

The district court further recognized that its reading of subsection (3)(a) is consistent with the Medical Malpractice Pre-Suit Screening Rule, Fla.R.Civ.P. 1.650. That rule 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 statute of limitations after the Notice of Intent to Initiate Litigation was mailed, whichever is longer, after the earliest of the following:

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(A) The expiration of 90 days after the date of mailing of the Notice of Intent to Initiate Litigation. . . .

(Emphasis supplied). As the district court noted, Section 766.106(3)(a) and the Rule both clearly indicate that it is the date upon which the Notice of Intent was mailed, rather than the date that such notice was received, which is the operative date for purposes of calculating the date upon which the action must be timely filed. Accordingly, the district court was able to rule in DR. BECKER's favor without invalidating Section 766.106(3)(c). Certainly, in this case no such invalidation is apparent in the district court's decision. Invalidation being absent, BOYD is not entitled to mandatory Supreme Court review of this decision.

EXPRESS AND DIRECT CONFLICT

BOYD also contends that discretionary review of the Fourth District court's decision is proper because the decision conflicts with the Fifth District's decision in Barron v. Crenshaw, 573 So.2d 17 (Fla. 5th DCA 1990). However, discretionary review should only be exercised in the district court's decision expressly and directly conflicts with the decision of the Supreme Court or another district court of appeal on the same point of law. Article V, Section (3)(b)(3), Florida Constitution 1990; Florida Rules of Appellate Procedure 9.030(a)(2)(a)(4). Barron is factually distinguishable from the instant case and is actually decided on a different point of law from this case. There is no express and direct conflict between Barron and the district court's decision.

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Therefore, discretionary review of the Fourth District's decision would be inappropriate.

The Fifth District in Barron stated that the narrow issue presented in that decision was the precise calculation of the 90-day period within which a doctor or the doctor's insurer had to respond to a notice of claim for medical malpractice under Section 766.106, Florida Statute 1987. The Crenshaws mailed their Notice of Claim on December 12, 1989, and Barron received it on December 13, 1989. On March 13, 1990, Barron mailed by certified mail, return receipt requested, a response as permitted by Sections 766.106(3)(b) and (c), Florida Statutes. The written response included an offer of admission of liability and a request for arbitration on the issue of damages. The written response was also faxed to and received by the Crenshaws on March 13, 1990. Thereafter, the Crenshaws ignored the response and filed a complaint in the trial court the following week. Barron filed motions to dismiss and to strike the complaint and moved for sanctions, presumably based upon the Crenshaws' ignoring of his response, as well as the provisions of Chapter 766 relative to an admission of liability and request for arbitration on the issue of damages.

The Fifth District observed what it termed as "mixed signals" as to the precise calculation of the time periods contemplated by the legislature. The court observed that Section 766.106(3)(a) calculates a 90-day period after the notice of claim is mailed; that Section 766.106(3)(b) discusses the time at which the doctor

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or the doctor's insurer shall provide the claimant with a response to the notice of claim; and that Section 766.106(3)(c) requires the doctor or the doctor's insurer to reply by certified mail within 90 days after receipt of the notice of claim. The court interpreted; "the words single 'provide' in paragraph b and 'reply' in paragraph c, to mean the date of mailing by certified mail, and that the 90-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." Barron v. Crenshaw, 573 So.2d at 18.

Thus, Barron speaks to the narrow issue of calculating the time in which a written response is to be provided by the doctor or the doctor's insurer. The Fifth District's holding, namely that "the 90-day period for mailing a response under Section 766.106(3)(c) does not begin until receipt of a notice of claim," Id. at 19, has nothing to do with the calculation of time periods under Chapter 766 of the Florida Statutes and Florida Rule of Civil Procedure 1.650 necessary to avoid being barred by the applicable statute of limitations. There being no express and direct conflict between Barron and the Fourth District's decision in this case, DR. BECKER submits that its discretionary jurisdiction of this appeal would be inappropriate. Even if this court does find express and direct conflict between Barron and the Fourth District's decision, DR. BECKER respectfully requests that this court exercise its discretion to decline jurisdiction.

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CONCLUSION

Because there is neither a basis for either mandatory or discretionary review of this appeal, DR. BECKER respectfully requests that the Supreme Court decline jurisdiction.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief has been furnished, by mail, to JAMES CURTIS BOYD, Pro Se, 206 Osceola Ave., Fort Pierce, FL 34982, this 17th day of December, 1992.

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