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FILED
SID J. WHITE
MAY 25 1993
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JAMES CURTIS BOYD,	
Petitioner,	Sup. Ct. Case No. : 80,725
	DCA Case No. : 91-02334
vs.	
FERDINAND F. BECKER, M.D.	
Respondent.	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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

REED W. KELLNER, ESQ.
Florida Bar No.: 330876

and

ANDREA D. MC MILLAN, ESQ.
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TABLE OF CITATIONS

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STATEMENT OF THE CASE AND FACTS

Dr. Becker agrees with the Statement of Facts in the Initial Brief, and clarifies that the surgery performed on Boyd was a septorhinoplasty, or "nose job." Boyd's scar, forming the basis of his lawsuit, resulted from an incision near the neckline in which his nose cartilage was stored for future use for his benefit.

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SUMMARY OF ARGUMENT

In all cases of medical malpractice claim rejection, including a case of non-response, the ninety-day pre-suit period begins upon mailing of the notice rather than on receipt. This conclusion, reached by the Fourth District in this case, is supported by Section 766.106(3)(a), which explicitly states that the date of mailing controls. That being the case, Boyd's filing was untimely.

Boyd's position that the date of receipt should control in a non-response situation finds some support in subsection (3)(c) of Section 766.106. However, Florida Rule of Civil Procedure 1.650, the Medical Malpractice Pre-Suit Screening Rule *also* explicitly provides that the date of mailing controls. It is well-established that rules of procedure adopted by this court will supersede conflicting statutes. Therefore, whatever "mixed signals" might emanate from Section 766 are resolved by Rule 1.650. Boyd should have been aware of Rule 1.650 when he decided to proceed pro se.

Moreover, to allow the date of receipt to control in a non-response situation would create, in some situations, a tolling period longer than the statutorily prescribed ninety days. Therefore, maintenance of a uniform tolling period in all cases is an additional reason why this court should agree with the Fourth District that the date of mailing controls even in non-response situations.

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ARGUMENT

In all cases of medical malpractice claim rejection, including a case of non-response, the ninety-day pre-suit period begins upon *mailing* of the notice rather than on receipt. The Fourth District so properly held in this case and again so held more recently in Zacker v. Croft, 609 So.2d 140 (Fla. 4th DCA 1992). These holdings are amply supported by 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 supplied). In the present case, Dr. Becker promptly investigated, reviewed and evaluated Boyd's claim as required by subsection (a). After the claim was determined to be meritless, it was rejected by non-response. It was entirely appropriate, under the law, for Dr. Becker not to respond to Boyd's claim. The non-response was an implicit rejection.

The following timetable illustrates an application of subsection (3)(a) to this case:

September 3, 1990	Notice of Intent received; claim investigation, review, and evaluation takes place
November 28, 1990	Implicit rejection occurs - - ninety days

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	after Boyd's mailing of notice - - pursuant to Section 766.106(3)(a); Pre-suit period terminates
January 28, 1991	Sixty-day time limit for filing expires
February 1, 1991	Boyd untimely files complaint

Subsection (3)(a) put Boyd on notice that the date of mailing was a significant event that he at least should have considered in determining when to file his complaint. Instead, he only paid attention to the date of receipt and waited until the very last day to file suit. He did so at his own peril because, clearly, Dr. Becker had rejected the claim and did not intend to settle the case.

In support of his argument that the date of receipt should control in this case, Boyd cites to 766.106(3)(c). That subsection states, in part:

> . . . 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.

Boyd claims that he relied upon this subsection in determining when to file suit. The argument is that the legislature specifically tailored this subsection for a non-response situation. This argument might have merit were it not for the existence of Florida Rule of Civil Procedure 1.650, the Medical Malpractice Pre-suit Screening Rule, which provides in part:

> **(d) Time Requirements.**
>
> * * * * *

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> (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). These provisions make it clear that the ninety-day tolling of the limitations period occurs from the date the notice of intent is *mailed*. As to subsection (3)(c), it is well-established that where a statute conflicts with a rule of civil procedure, the rule will supersede the statute. See: Bernhardt v. State, 288 So.2d 490 (Fla. 1974); School Board of Broward County v. Surette, 281 So.2d 481 (Fla. 1973); Biro v. Geiser, 199 So.2d 461 (Fla. 1967). In holding that subsection (3)(c) controlled in Barron v. Crenshaw, 573 So.2d 17 (Fla. 5th DCA 1990), the Fifth District absolutely failed to acknowledge the provisions of Rule 1.650.

The rule cannot be ignored. Whatever "mixed signals" are provided by Section 766.106 are cleared up by Rule 1.650. As a third-year law student electing to pursue his action pro se, Boyd should have thoroughly researched the rules of procedure applicable

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to his case. Had he done so, he would have found Rule 1.650 and recognized its controlling status. A party's self-representation does not relieve that party of the obligation to comply with any appropriate rules of court and rules of procedure or controlling statutes. Carr v. Grace, 321 So.2d 618 (Fla. 3d DCA 1975), cert. denied, 348 So.2d 945 (Fla. 1977). The Fourth District properly recognized that it was bound by the rule, and therefore properly held that the date of mailing controlled.

The Fourth District further recognized that to hold that the date of receipt controls in this situation could result in a tolling of the statute of limitations for a period longer than the statutorily prescribed ninety days. Boyd v. Becker, 603 So.2d 1371, 1373 (Fla. 4th DCA 1992). This result would obtain, of course, because a number of days will usually pass before a mailed notice is received, and this period will vary in each case. The variety would appear to be undesirable and contrary to the goal of having a ninety-day tolling period for *all* medical malpractice cases. Therefore, uniformity is yet another reason for upholding the Fourth District's ruling that the date of *mailing* triggers the pre-suit period even in a non-response situation.

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CONCLUSION

For the foregoing reasons, Dr. Becker respectfully requests that this court affirm the Fourth District's rulings that even in situations of claim rejection by non-response, the date of mailing triggers the ninety-day pre-suit period.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by Federal Express, to JAMES CURTIS BOYD, Pro Se, 206 Osceola Ave., Fort Pierce, FL 34982, this 24 day of May, 1993.

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