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O.A. 9-393

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 REPLY BRIEF ON THE MERITS

Filed by

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CITATIONS

SUMMARY OF ARGUMENT

Respondent argues that the presuit period terminates 90 days after "mailing" even in the event of a physician's failure to respond to Notice of Intent. The bases asserted by Respondent for this position are contrary to Florida law.

Initially, Respondent argues that the general language of section 766.106(3)(a) controls presuit termination in all events. In actuality, the legislature specifically tailored section (3)(c) to control termination of the particular class of cases which involve a nonresponsive physician. Florida law could be no more clear that statutory provisions pertaining to particular parts of a general subject govern over general terms of the general subject.

Secondly, Respondent asserts that "where a statute conflicts with a rule of civil procedure, the rule will supercede the statute." Respondent's statement is erroneous and misleading, failing to qualify the vital fact that it is strictly limited to matters of court procedure. Where substantive rights are involved, such as statutory filing periods, the express separation of powers doctrine of our State Constitution requires that the judiciary defer to the legislature.

ARGUMENT

In considering the question before the Court, it is important to read and acknowledge the plain language of the relevant statutory sections. The timetables provided by the parties in the Initial and Answer briefs represent the extent to which the respective positions reflect statutory law: Boyd's table places the implicit rejection on December 3, 1990 - 90 days after **receipt** of Notice. Respondent's table marks November 28 as the date of implicit rejection - 90 days after mailing "pursuant to 766.106(3)(a)." In arriving at these dates, Boyd clearly uses the verbatim language of (3)(c) as specifically tailored for a nonresponse situation. In contrast, Respondent attempts to interpret the general language of (3)(a) to find when it **might imply** an implicit rejection. Florida law is definite that when two statutes cover the same subject, the more narrowly drawn statute controls. Moore Intern. Trucks v. Foothill Capital, 560 So.2d 1301 (Fla. 2d DCA 1990). A special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. Adams v. O. Culver, 111 So.2d 665,667 (Fla. 1959). See also Gretz v. Unemployment Appeals Com'n, 572 So.2d 1384 (Fla. 1991), Sheils v. Jack Eckerd Corp., 560 So.2d 361 (Fla.2d DCA 1990). A statute relating to the particular part of a general subject will operate as an exception to or

qualification of the general terms of a more comprehensive statute. Adams, at 667. The legislature could have easily used "mailing" in both sections had it so desired. The use of different terms in different portions of the same statute demonstrates the legislature intended different meanings. Ocasio v. Bureau of Crimes, Etc. 408 So.2d 751 (Fla. 3d DCA 1982). Our legislature acted advisedly in tailoring section (3)(c) and providing the term "receipt" as controlling presuit timing when a physician chooses not to respond.

Actually, there is no need to choose between sections (3)(a) and (3)(c) in this case. The Court has repeatedly held that it is a judicial duty to read related statutory provisions harmoniously whenever possible. Singleton v. State, 554 So.2d 1162 (Fla. 1990); Palm Harbor Special Fire Control Dist. v. Kelly, 516 So.2d 249 (Fla. 1987); State Ex Rel School Board of Martin County v. Dept of Ed., 317 So.2d 68 (Fla. 1975). Nothing in this case prevents sections (3)(a) and (3)(c) from being read harmoniously, thereby preserving the effect of both provisions. (3)(a) provides a minimum time within which no suit may be filed, and (3)(c) then supplements in a nonresponse situation by requiring claimant to wait until the physician has actually been in receipt of the notice for 90 days before deeming the period terminated due to nonresponse. Applying the plain language, these sections in no way infringe upon one another, as (c) does not purport to allow filing during the time within which (a) prevents it.

Secondly, Respondent makes a vitally overbroad and

misleading statement of law in its argument against applying (3)(c). Stating that it is "well established" that court rules of procedure supercede conflicting statutes, Respondent fails to note that such court rule making power is narrowly limited to strictly procedural matters. The authorities cited by Respondent pertain only to court procedure and practice. Courts may not limit or modify rights of any litigant. Graham v. State, 472 So.2d 464 (Fla. 1985).

Where substantive rights are involved, it is uncontradicted that authority belongs to the legislature. The Court's rule making authority is limited to procedural matters and does not extend to substantive rights. Timmons v. Combs, 608 So.2d 1,3 (Fla. 1992). Clearly, statutes of limitations and other filing periods provide substantive rights, and derive their authority from the legislature. They are not judicial in nature. The courts have been clear that substantive statutes such as those providing filing periods supercede procedural rules. S.R. v. State, 346 So. 2d 1018 (Fla. 1977); State v. L.H., 392 So.2d 294 (Fla. 2d DCA 1980); State v G.B.P., 399 So.2d 1123 (Fla. 4th DCA 1981).

If Rule 1.650 is to apply in nonresponse situations, it must be amended to accurately reflect the timing provided by our legislature.

Finally, and of relevance only to correct Respondent's false assertion that Boyd waited until the last day "at his own peril because, clearly, Dr. Becker had rejected the

claim and did not intend to settle the case," Boyd points out that during the 60 day filing period Respondent requested informal discovery from Boyd and expressly promised, in writing, "claim consideration." Boyd provided the requested information and, in a good faith effort to avoid litigation, waited until the last day based on Respondent's seemingly genuine promises.

CONCLUSION

It is clear that the specific language of section (3)(c) controls timing for presuit termination in nonresponse situations. Furthermore, it is certain that filing periods provide substantive rights, and therefore statutes supercede conflicting procedural rules.

For the above reasons, Boyd respectfully requests the Court reverse the opinion 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 furnished by mail this 12th day of June, 1993 to Reed Kellner, Attorney for Respondent, at Suite 1600, Nations Bank Building, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33402.

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