SUPREME COURT OF FLORIDA

CASE NO. 85,099

CHARLES KUKRAL and MILLY KUKRAL,

Petitioners,

vs.

GEORGE D. MEKRAS, M.D.; MIAMI UROLOGY INSTITUTE, INC. and DR. JOHN T. McDONALD FOUNDATION d/b/a/ DOCTORS' HOSPITAL,

Respondents.

On Review From the District Court of Appeal of Florida,
Third District

PETITIONERS' REPLY BRIEF ON THE MERITS

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ARGUMENT

Respondents, George Mekras, M.D. (Miami Urological Institute) and Doctors' Hospital, have filed separate briefs. The respondents do not agree on the legal basis for dismissing the petitioners' medical malpractice complaint. The hospital relies on the failure of the plaintiffs to obtain a written opinion from an expert prior to mailing the notice of intent to institute medical malpractice action. The hospital argues this was a proper basis for the trial court to determine that a reasonable investigation had not been conducted prior to mailing the notice of intent to the potential defendants. As argued by hospital, "The requirement of prior investigation, verifiable by the written opinion of an expert, is perhaps the most fundamental element of presuit screening, without which the process is rendered little more than a perfunctory exercise." (Brief of Respondents, Dr. John T. McDonald Foundation d/b/a Doctors' Hospital, page 10).

Counsel for a potential medical malpractice claimant must conduct presuit investigation prior to mailing notice of intent to a potential defendant. This is not, however, to say that the absence of a written medical opinion establishes or indicates that there was no presuit investigation.

The brief filed by Dr. Mekras makes a different argument: This case was dismissed because petitioners' counsel did not consult with a medical expert or obtain a written opinion from that expert prior to filing the notice of intention to sue. "The trial court's finding that no reasonable investigation was conducted here is supported by the undisputed evidence in this case." (Brief of Mekras, page 6)

The statute requires only reasonable compliance with the investigation

requirement preceding filing of the notice of intent to initiate litigation. Counsel for petitioners stated unequivocally to the trial judge that he had consulted with medical personnel prior to sending the notice of intent, even though he did not file a verified opinion with the notice. The horrifically obvious facts of this case (compared by the trial judge to amputating the wrong foot) renders the dismissal where a verified medical opinion was furnished prior to the expiration of the statute limitations contradictory to the statement of this Court in Patry v. Capps, 633 So.2d 9, 13 (Fla. 1994): ". . .when possible the pre-suit notice and screening statute should be construed in a manner that favors access to the courts."

Dr. Mekras argues that the brief filed by petitioners conspicuously omits any discussion of the only case in Florida that directly bears on the issue in this case: Archer v. Maddux, 645 So.2d 544 (Fla. 1st DCA 1994). Petitioners did cite Archer v. Maddux, for the proposition which is material to the argument before this Court: Failure to provide a corroborating medical opinion with the notice of intent to initiate a medical malpractice action is not fatal if the limitations period has not run. Since the verified medical opinion in Archer v. Maddux was provided well after the statute of limitations had run, the appellate court affirmed dismissal of the medical malpractice action.

By way of dicta, the decision holds that it is still necessary for a corroborating expert opinion to be obtained even if alleged negligence is negligence per se. Petitioner's argument is not that the obvious nature of the negligence and injury obviate the requirement of a verified medical opinion. Petitioners argue here, as in the trial court and the district court of appeal, that using undiluted acid during an operative procedure is so

blatantly negligent and injurious that a defendant or defendants can readily ascertain from the notice that the claim is not frivolous. Filing the verified medical opinion prior to the expiration of the statute of limitations cured what was, if anything, a harmless error.

The illogical premise of respondents' argument (and the unintended result of the district court decision) is that a defect in the notice cannot be cured. The cases which permit late-filed medical verification (as long as it is prior to expiration of the statute of limitations) refute this assignment.

Both respondents stress strict interpretation of unambiguous statutes,[1] the prerogative of a legislature to enact statutory prerequisites to filing suit, and a possible erosion of the law by permitting the filing of a notice of intent to institute litigation without a verified medical opinion. Assuming all of these principles are correctly applied under appropriate circumstances, strict compliance with the pre-suit notice statute by dismissing Petitioners' lawsuit ignores the unquestioned rationales of the statute--to eliminate frivolous complaints and to permit early resolution of medical malpractice disputes.

Even consummate advocates for the doctor and the hospital would be hard put to argue that the claim asserted on behalf of Mr. Kukral was frivolous. As for early resolution of the claim, both doctor and hospital instituted their own investigation and denied negligence before the verified medical opinion was received and prior to suit being filed. What possible justification can exist for dismissal of petitioners' claim? The statute

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[1]Is the requirement of reasonable investigation unambiguous?

was permitted to impinge upon a plaintiff's right of access to the courts and impose unreasonable obligations before allowing suit to be filed. Shands Teaching Hospital and Clinics, Inc. v. Barber, 638 So.2d 570 (Fla. 1st DCA 1994).

No rational purpose is served by interpreting the reasonable investigation provision of the statute to require dismissal of petitioners' case. The trial court erred as a matter of law. The District Court of Appeal, in both the decision of the three judge panel and on rehearing en banc, also erred. The Kukrals should be permitted to prove their case in a court of law, as guaranteed by the Constitutions of the United States and the State of Florida.[2]

Respondents Mekras and Miami Urological Institute also argue that dismissal of the case against the Institute was proper since there was a failure to serve the notice of intent upon this potential defendant. It is argued that the plaintiffs never mailed a separate notice of intent to Miami Urological Institute[3] or otherwise indicated in the notice sent to Dr. Mekras that the Institute was a prospective defendant.

The Notice of Intent to Initiate Litigation for Medical Malpractice was sent to:

> "Dr. George D. Mekras, M.D.
> Miami Urological Institute." (Appendix A to this brief).

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[2]It is interesting to note that Mekras and Miami Urological Institute omit any mention in their brief of this Court's decision in Patry v. Capps, supra, which requires construing the presuit notice and screening statute in a manner that favors access to the courts.

[3]This party is referred to as Miami Urology Institute, Inc. in the caption of the case.

The body of the notice states that Charles and Milly Kukral ". . .intend to file suit against you for the damages resulting from the personal injury of CHARLES KUKRAL" Miami Urological is the employer of George Mekras, M.D. (See, footnote 1, page 1, Brief of Respondents Mekras and Miami Urological Institute on the Merits).

Rule 1.650, Florida Rules of Civil Procedure, which governs medical malpractice presuit screening provides in subparagraph (b)(1):

> "Notice of intent to initiate litigation sent by certified mail to and received by any prospective defendant shall operate as notice to the person and any other prospective defendant who bears a legal relationship to the prospective defendant receiving the notice. The notice shall make the recipient a party to the proceeding under this rule." [Emphasis supplied].

Subparagraph (2) provides: "The notice shall include the names and addresses of all other parties and shall be sent to each party."

A fair reading of subsection (2) is that a separate notice shall be sent to all other parties than those designated in subparagraph (b)(1). If sperate notices were necessary for prospective defendants who bear a legal relationship to the prospective defendant receiving the notice, the provisions of subparagraph (1) would be rendered a nullity.

This Court determined in Ingersoll v. Hoffman, 589 so.2d 223 (Fla. 1991) that a party can be estopped from asserting failure to receive notice under the medical malpractice pre-suit screening statute by failing to timely raise the issue as an affirmative defense in a responsive pleading. There was no such affirmative defense raised here. The Ingersoll rule would apply here, even if separate notice were required--which it is not under Rule 1.650(b)(1), Florida Rules of Civil Procedure.

CONCLUSION

For the reasons and under the authorities set forth above and in the Initial Brief of Petitioners on the Merits, it is respectfully submitted that the decision of the District Court of Appeal, Third District, should be quashed and the order of the trial court dismissing petitioners' case should be reversed and the cause remanded with directions for the lawsuit to continue on the merits.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Parenti, Falk & Waas, 113 Almeria Avenue, Coral Gables, Florida 33134; George, Hartz, Lundeen, Flagg & Fulmer, 4800 LeJeune Road, Coral Gables, Florida 33146; and upon Hicks, Anderson & Blum, New World Tower, Suite 2402, 100 N. Biscayne Boulevard, Miami, Florida 33132, this 6th day of June, 1995.

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APPENDIX