IN THE SUPREME COURT OF FLORIDA

BECKY S. TORREY, Duly Appointed
Personal Representative of the Estate
of HELEN ROSE WOODARD, Deceased,

CASE NO. 95,841
FIFTH DCA CASE NO. 98-02024
L.T. CASE NO. 97-2313 CA

Plaintiff-Appellant,

vs.

LEESBURG REGIONAL MEDICAL CENTER,
KENNETH KUPKE, M.D., and ROBERT
HUX, M.D., Jointly and Severally,

Defendants-Appellees.

_____/

APPENDIX TO DEFENDANT/APPELLEE/RESPONDENT'S, LEESBURG REGIONAL MEDICAL CENTER, ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

The instant action was brought by Plaintiff/Appellant/Petitioner, BECKY S. TORREY, duly appointed personal representative of the Estate of HELEN ROSE WOODARD, deceased (hereinafter "Appellant") against Defendants/Appellees/Respondents, LEESBURG REGIONAL MEDICAL CENTER (hereinafter "Leesburg"); KENNETH KUPKE, M.D. (hereinafter "Kupke"); and ROBERT HUX, M.D. (hereinafter "Hux") for damages allegedly sustained as a result of the death of HELEN ROSE WOODARD. Leesburg has a material disagreement with Appellant's Statement of the Case and Facts.

On February 17, 1997, Leesburg received Appellant's notice of intent to initiate litigation dated February 6, 1997, without a verified written medical expert opinion. (R. 77). By way of letter dated March 5, 1997, Leesburg advised Appellant that the notice of intent did not contain a verified written medical expert opinion as required by Florida Statutes §766.203. (R. 37-38). At no time during the ninety (90) day pre-suit period did Appellant provide a verified written medical expert opinion stating the reasonable grounds to support the Appellant's allegations of medical negligence against Leesburg. (R. 77). Moreover, despite Leesburg's repeated requests for information from Appellant, she categorically refused to provide Leesburg with any pre-suit discovery information. (R. 78).

On September 16, 1997, Appellant filed her Complaint. (R. 1-9). The claim was for wrongful death as a result of the alleged medical negligence on the part of Leesburg, Kupke, and Hux. (R. 1-9). The Complaint was not personally signed by Appellant as a party to this action. (R. 6). Instead, the Complaint was signed by McHenry as attorney for Plaintiffs, 19390 West Ten Mile Road, South Field, Michigan, 48075. (R. 6). According to the membership records of The Florida Bar, McHenry is not a member of The Florida Bar. (R. 106). On November 5, 1997, Leesburg filed a Motion to Dismiss Appellant's complaint for failure to comply with Florida's medical malpractice pre-suit requirements. (R. 29-43). On November 7, 1997, Kupke, M.D., filed a Motion to Disqualify Appellant's counsel. (R. 26-28). As a result of Kupke's Motion to Disqualify and Leesburg's Motion to Dismiss, arguments were heard in front of Circuit Court Judge G. Richard Singletary on January 29, 1998. (R. 112). At the hearing, Kupke revised his Motion to Disqualify counsel to a Motion to Dismiss, which was adopted by Leesburg. (R. 112). At the hearing, Roger E. Craig made his first appearance as co-counsel on behalf of Appellant. (HT. 12). After hearing argument, Judge Singletary entered an Order on June 22, 1998, dismissing Appellees' action without prejudice. (R. 112-113a). Moreover, Judge Singletary entered an order denying Appellees' motions to dismiss Appellant's Complaint for failure to comply with Florida's medical malpractice pre-suit requirements. (R. 110-111). As a result of this Order dismissing Appellant's complaint,

this appeal followed. On July 31, 1998, Hux filed a notice of cross-appeal with respect to the Order denying the Motion to Dismiss for failure to comply with Florida's medical malpractice pre-suit requirements. (R. 119-121). On August 3, 1998, Kupke filed a similar notice of cross-appeal. (R. 122-127). On August 5, 1998, Leesburg filed a joinder of notice of cross-appeal of Kupke and Hux. (R. 129-130).

On February 2, 1999, arguments were heard in front of the Fifth District Court of Appeal regarding the above referenced matter. On April 1st, 1999, the Fifth District Court of Appeal in Torrey v. Leesburg Regional Medical Center, 731 So.2d 748 (Fla. 5th DCA 1999) affirmed the trial court's decision to dismiss the action without prejudice due to the fact the Complaint was not signed by an attorney admitted to The Florida Bar. The Fifth District Court of Appeal construed the signature of an unauthorized person as no signature at all. Id. at 749. The Fifth District concluded that the trial court's decision to dismiss the action was consistent with Rule 2.060(d), Florida Rules of Judicial Administration, in that such pleading "may be stricken and the action may proceed as though the pleading or other paper had not been served." Id. As a result of the Fifth District's opinion, this appeal followed. This Court accepted jurisdiction of this matter on October 29, 1999, pursuant to Art. V, § 3(b)(3) of the Florida Constitution.

ISSUE ON APPEAL

WHETHER THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY RULED THAT THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S COMPLAINT BECAUSE THE COMPLAINT FILED WAS SIGNED BY A FOREIGN ATTORNEY WHO WAS NOT ADMITTED TO PRACTICE IN THE STATE OF FLORIDA

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's opinion *sub judice* should be affirmed because the trial court did not err by dismissing Appellant's complaint because the complaint filed was signed by a foreign attorney who was not admitted to practice in the State of Florida. In sum, Florida case law and the Florida Rules of Judicial Administration indicate that in order for an attorney to sign a complaint, that attorney must be a member of The Florida Bar. In the alternative, a foreign attorney must file a motion *pro hac vice* in order to appear. In the instant case, neither requirement was met. In sum, the compliant filed by Appellant was a nullity because it was signed by a Michigan attorney who was not admitted to practice in Florida. Rule 2.060(d), Florida Rules of Judicial Administration, provides that, "If a pleading is not signed, such pleading may be stricken and the action may proceed though the pleading or other paper had not served." Therefore, the Trial Court properly struck Appellant's complaint as a nullity. Additionally, Appellant has failed to show any evidence of excusable neglect which would save her case. Finally, Appellant has misconstrued an inapplicable Third District opinion to support her cause. In sum, the Fifth District Court of Appeal in the matter *sub judice* properly affirmed the Trial Court's ruling.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY RULED THAT THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S COMPLAINT BECAUSE THE COMPLAINT FILED WAS SIGNED BY A FOREIGN ATTORNEY WHO WAS NOT ADMITTED TO PRACTICE IN THE STATE OF FLORIDA

In the instant case, the Complaint filed by Appellant was a nullity because it was signed by a Michigan attorney who was not admitted to practice in Florida. Lincoln American Life Ins. Co. v. Parris, 390 So.2d 148 (Fla. 1st DCA 1980). See also Fla. R. Jud. Admin. 2.060(b). The complaint in question was not signed by a member of The Florida Bar, or by a foreign attorney admitted to practice *pro hac vice*. (R. 106). Moreover, the Complaint was not signed by Appellant as a party to the action. (R. 6). As such, the Complaint did not constitute an authorized pleading for the Trial Court. See e.g., Gelkop v. Gelkop, 384 So.2d 195 (Fla. 3d DCA 1980).

It is Appellant's contention that the underlying Fifth District Court's opinion was wrongly decided. It is Appellant's argument that a defective complaint may be saved if there is evidence of excusable neglect. In the alternative, Appellant argues that a complaint signed by an attorney not licensed to practice in this state is merely defective and can be saved by corrective amendment. Unfortunately for Appellant, her position is contrary to the Florida Rules of Judicial Administration and earlier rulings by this Court.

A. NULLITY

According to Florida Rules of Judicial Administration 2.060(b), if a foreign attorney wishes to practice before a Florida Court *pro hac vice*, that attorney must submit a motion for permission to do so with or before the attorney's initial personal appearance, paper, motion, or pleading. See also Pasco County v. Quail Hollow Properties, Inc., 693 So.2d 82, 83 (Fla. 2d DCA 1997). See also Huff v. State, 569 So.2d 1247 (Fla. 1990) (holding that a foreign attorney must first file a Motion to Admit *pro hac vice* before a Court may consider pending motions). Florida Rule of Judicial Administration 2.060(d) mandates that every pleading of a party represented by an attorney be signed by an attorney who is licensed to practice law in the State of Florida or by an attorney who has received permission by a court to appear.

In the case at bar, in affirming the trial court's decision, the Fifth District Court of Appeal noted that its opinion was consistent with earlier Fifth District decisions. See, e.g,. Quinn v. Housing Authority of Orlando, 385 So.2d 1167 (Fla. 5th DCA 1980). In Quinn, the Fifth District earlier held that a filing by a non attorney employee was void and that the action could be dismissed without prejudice. Likewise, the Fifth District opined that it had ruled in substantially the same manner in Daytona Migi Corp. v. Daytona Automotive Fiberglass, Inc., 417 So.2d 272 (Fla. 5th DCA 1982) (filing of a notice of appeal by a non lawyer was a nullity and the appeal must be dismissed). In Daytona Migi, the Fifth District cited with approval the Second District Court of

Appeal's decision in Nicholson Supply Co. v. First Federal Sav. & Loan Ass'n of Hardee County, 184 So.2d 438 (Fla. 2d DCA 1966).

In Nicholson, the Second District Court of Appeal ruled that a complaint filed by a corporation which did not bear the signature of an attorney was a nullity and the trial court correctly struck the complaint. Id. at 442. The Nicholson court also noted that since the complaint was a nullity, then the petition to amend by striking a signature and inserting the name of a new attorney after the time had elapsed for closing a lien, was also improper. Id. As such, the Fifth District's opinion *sub judice* was a well reasoned opinion backed by long standing Fifth District case law and a Second District opinion.

In the case at bar, Appellant had three alternatives with respect to the filing of her Complaint. First, Appellant could have had a member of The Florida Bar sign the Complaint. Secondly, Appellant could have had a foreign attorney, such as McHenry, file a motion for permission to appear *pro hac vice* before the attorney's initial appearance. Finally, Appellant could have signed the Complaint herself. See Gelkop, 384 So.2d at 202. In the instant case, Appellant did none of the above. Therefore, the Trial Court properly struck Appellant's Complaint as a nullity. Appellant never had any standing before the Trial Court and, as such, made no appearance in this case. Thus, she did not submit herself personally to the jurisdiction of the Trial Court and the Complaint was void. Id. see also Nicholson Supply Co., 184 So.2d at 442 (Fla. 2d DCA 1966).

Moreover, the Fifth District's opinion in this case comports with earlier rulings by this Court.

There is no question that conduct which constitutes the practice of law is subject to this Court's constitutional responsibility to protect the public from the unauthorized practice of law. See The Florida Bar v. Moses, 380 So.2d 412, 417 (Fla. 1980). As further stated by this Court in Moses:

> The single most important concern in the court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation . . . it is in the furtherance of this purpose that this court maintain strict standards of competent and ethical responsibility to be reached prior to admission to practice law in Florida.

Id. at 417. The Fifth District's opinion advances this Court's concerns and purposes in maintaining strict standards of competence and ethical responsibility for the representation of parties in the State of Florida. Therefore, the ruling of the Fifth District Court of Appeal as well as the line of reasoning exemplified by the Second District Court of Appeal decision in Nicholson, should be affirmed as the law of the State of Florida.

The Fifth District also noted that the cross-appeal concerning Appellants total lack of compliance with the statutory presuit screening requirement, even after a second notice to do so, was of interest only because it pointed out the wisdom of Rule 2.060(d), Fla. R. Jud. Admin., which provides: " Attorneys of other states shall not engage in a general practice in Florida unless they are members of The Florida Bar in good standing."

Despite several requests to do so, McHenry failed to respond to any of the Appellants' presuit discovery requests. McHenry either had a disdain for or was completely ignorant of Florida's presuit requirements. If McHenry's actions were validated by this Court, it would send a message to out-of-state attorneys (as well as in-state-attorneys) that Florida's statutory presuit screening requirements are unnecessary. Rule 2.060(d) was enacted so that attorneys would be knowledgeable about the area of law they were practicing in. The best way to protect future litigants from attorneys who have either a disdain for or an ignorance of Florida law is to affirm the Fifth District's opinion *sub judice*.

B. EXCUSABLE NEGLECT

Appellant advocates that an excusable neglect standard, as represented by the First District in the Lincoln American Life Ins. Co. v. Parris, 397 So.2d 148 (Fla. 1st DCA 1980), should be adopted by this Court. Unfortunately for Appellants, they have failed to show any evidence of excusable neglect pursuant to the standard enunciated in Lincoln.

In Lincoln, a default was entered against a Defendant because the answer filed was signed by a Memphis, Tennessee attorney who was not admitted to practice in the State of Florida. From there, the trial court denied the Defendant's motion to set aside the default judgment. Id. at 149. The First District Court of Appeal reversed and held that,

due to the shortness of time available to arrange for Florida counsel to serve a timely answer and due to counsel's apparent intention to secure Florida counsel for further appearances, the default should be considered the result of excusable neglect. Id.

Despite repeated attempts, Appellants have failed to show any evidence of excusable neglect. On March 25, 1998, the Trial Court sent a letter to Appellant allowing her an opportunity to submit evidence of any exigent circumstances which may have made the filing of the Complaint by an attorney not authorized to practice law in Florida the result of excusable neglect. (A. 1.) The Court, in its letter, cited to Lincoln American Life Ins. Co. v. Parris, 390 So.2d 148 (Fla. 1st DCA 1980).

In response to the Court's March 25, 1998, letter, McHenry submitted an affidavit to the Court on April 21, 1998. (R. 107-109). In McHenry's affidavit, he stated that he had no choice but to sign the Complaint under his firm's name and file it on September 16, 1997, because he believed the Statute of Limitations would expire on October 3, 1997, and he did not yet have local Florida counsel. Id. Furthermore, the affidavit stated that his employer, Geoffry N. Feiger, was admitted to practice law in the State of Florida. Id.

The reasons cited in McHenry's affidavit are not sufficient to constitute excusable neglect under the Lincoln standard. In Lincoln, the court noted that the Memphis, Tennessee lawyer was not admitted to practice in Florida, though others in his Memphis firm were so admitted. Id. at 149. The appellate court agreed with the trial court that the

Memphis, Tennessee lawyer's casual practice of appearing in a Florida court without permission deserved rebuke. Id. Thus, although Geoffry N. Feiger, Esquire, was admitted to practice in the State of Florida, Mr. Feiger's name and Florida Bar number do not appear anywhere on Appellant's complaint. (R.1-6). As such, it is completely irrelevant to the instant case that Geoffry N. Feiger is a member of The Florida Bar.

The implicit ruling in Lincoln is that simply because other members of the law firm are members of The Florida Bar, it does not mean that non members of The Florida Bar may be allowed to practice in the State of Florida without permission. Id.. Moreover, in Lincoln, the only reason the answer to a complaint was allowed to stand was the court of appeal believed the obvious violation was sufficiently mitigated by the shortness of time available to arrange for Florida counsel to serve a timely answer, and by counsel's apparent intention to secure Florida counsel for further appearances. Id. Additionally, the appellate court strongly suggested that the Memphis, Tennessee lawyer quickly develop other more appropriate means to protect his client's interest in such situations. Id. As such, the court reasoned that the default judgment entered should be considered the result of excusable neglect. Id.

In the instant case, McHenry served on Leesburg a notice of intent pursuant to Florida Statutes §766.106(2) dated February 7th, 1997. (R. 37). As such, the ninety (90) day pre-suit period expired on May 7th, 1997. Thus, McHenry had three months in which

to secure Florida counsel to prosecute Appellant's claim. Moreover, McHenry had between May 7th, 1997 and October 3rd, 1997 (the date admitted by McHenry in his affidavit that the statute of limitations would expire), to continue to seek Florida counsel to prosecute Appellant's claim. (R. 108). In sum, McHenry had a total of nearly eight months in which to seek Florida counsel to prosecute Appellant's claim. Instead, McHenry did not bother to seek Florida counsel until the hearings on the Motions to Dismiss (HT. 12). That was nearly one year after the claim was initiated by service of Appellant's notice of intent. In Lincoln , one of the factors the appellate court considered in reaching its decision was the fact that there was a shortness of time available to arrange for in-state counsel prior to the expiration of the time to file a timely answer. In the instant case, McHenry had ample time (nearly eight months) to obtain local counsel prior to the expiration of any applicable limitations period.

Furthermore, the Lincoln court considered counsel's apparent intention to secure Florida counsel for further appearances. McHenry's actions do not show an apparent intention to secure Florida counsel for further appearances. If McHenry had intended to secure Florida counsel for further appearances, he would have obtained the services of local counsel shortly after initiating the notice of intent. However, local counsel did not enter a notice of appearance until the date the Appellees' Motions to Dismiss were heard

in this case - four months after the complaint was filed, and nearly one year after the notice of intent was filed. (R. 37; HT. 12).

In the case at bar, Appellant has failed to show any evidence which would constitute excusable neglect under the standard enunciated in Lincoln. Thus, even if this Court were to reject the standard enunciated by the Second District in Nicholson Supply Co., and the Fifth District's opinion *sub judice* in favor of an excusable neglect standard, the Appellant has failed to show evidence of excusable neglect in the instant case. As such, the ruling of the Fifth District Court of Appeal should be affirmed.

C. CURABLE DEFECT

In the alternative, Appellant is seeking to have this Court adopt a line of case law seemingly enunciated by the Third District ruling in Szteinbaum v. Kaes Inversions y Valores, 476 So.2d 247 (Fla. 3d DCA 1985). It is Appellant's contention that Szteinbaum stands for the proposition that a complaint signed by an out-of-state attorney is merely defective and can be saved by an amendment adding an authorized attorney's signature. Simply put, Appellants have misconstrued the Szteinbaum decision. In Szteinbaum, the plaintiff corporation, Kaes Inversions y Valores, sued Szteinbaum. The initial complaint and summons was personally served on the defendant. Id. From there, the defendant moved to quash service of process and dismiss the complaint on the grounds that it did not appear from the complaint that the corporate plaintiff was

represented by an attorney. Id. The trial court granted a motion to dismiss with leave to amend. From there, the corporate plaintiff filed an amended complaint signed by an attorney and served it on Szteinbaum's attorney by mail. Once again, Szteinbaum moved to dismiss contending now that because the original complaint was a nullity, it was necessary that the amended complaint be personally served upon him. Id. at 248.

The Third District ruled that the representation of the plaintiff corporation, confined as it was to the filing of the complaint, was brief, minimal and essentially innocuous. Id. at 250. As such, the court went on to rule the unauthorized practice of law was adequately curtailed by the trial judge's decision to allow an attorney to appear for the corporation and amend the complaint. Id. In reaching its conclusion, the Third District noted that there was no indication that the complaint prejudiced the defendant in any way so that the plaintiff corporation acted with knowledge that it was improper for it, without counsel, to prepare and file the initial complaint. Id. at 252. Moreover, the Third District specifically noted that there was a strong indication that the plaintiff corporation acted with diligence by immediately obtaining counsel after being given leave to do so. Id.

Despite Appellant's assertions to the contrary, the Szteinbaum decision is not applicable to the case at bar. For starters, the Third District noted that the plaintiff corporation acted with diligence in immediately obtaining new counsel. As discussed *infra*, that is not the case here. Moreover, unlike the situation in Szteinbaum, the

appellants were, indeed, prejudiced. In the instant case, Leesburg was unaware of the basis of Appellant's claim until suit was filed. As such, Leesburg was never afforded the opportunity to determine in what manner it supposedly deviated from the standard of care. Therefore, Leesburg's defense of this matter was gravely prejudiced by Appellant's failure to comply with Florida statutory presuit requirements. Likewise, Appellee on numerous occasions reminded Appellant that it was improper for her to commence with her claim without properly proceeding through Florida's statutory presuit screening requirements. Thus, unlike in Szteinbaum, Appellant acted with knowledge that it was improper for her, without proper counsel, to prepare and file the initial Complaint.

Additionally, it should be noted that the Szteinbaum decision involved a complaint being signed by a non attorney on behalf of a corporation. In sum, Szteinbaum is inapplicable to the case at bar. In the instant case, Appellant is a natural person who could have signed the Complaint on her own behalf. Furthermore, the Szteinbaum decision represents a decision regarding the representation of a corporation. As such, Szteinbaum is limited to the facts of that case. If Szteinbaum were not limited to its facts, the decision would be contrary to Fla. R. Jud. Admin. 2.060 as well as this Court's decision in The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980).

Therefore, this Court should affirm the Fifth District's opinion *sub judice*. Moreover, this Court should refuse to adopt a curable defect standard which would be contrary to the Florida Rules of Judicial Administration and long standing case law.

CONCLUSION

The ruling of the Fifth District's opinion *sub judice* should be affirmed. The Appellant has failed to show any exigent circumstances which would constitute excusable neglect under Florida case law. Additionally, the position set forth by Appellant is contrary to case law established by this Court. Moreover, the Fifth District's opinion is consistent with Rule 2.060(d) which provides that if a pleading is not signed, such pleading "may be stricken and the action may proceed as though the pleading or other paper had not been served." Therefore, the decision of the Fifth District Court of Appeal should be affirmed.

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 U.S. mail this _____ day of December, 1999 to **ROGER E. CRAIG, ESQUIRE,** Roger E. Craig & Associates, 1250 North Tamiani Trail, Suite 201, Naples, Florida 34102, **WILLIAM J. McHENRY, ESQUIRE,** Fieger, Fieger & Schwartz, 19390 West Ten Mile Road, Southfield, Michigan 48075-2463, **RAFAEL E. MARTINEZ, ESQUIRE/RUTH OSBORN, ESQUIRE**, Sanders, McEwan, Martinez, Luff & Dukes, P.A., Post Office Box 753, Orlando, Florida 32802-0753 and **G. FRANKLIN BISHOP, III, ESQUIRE**, John Bussey and Associates, P.A., Post Office Box 531086, Orlando, Florida 32853-1086.

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