9-27

IN THE SUPREME COURT OF FLORIDA

BRIAN JONES, and SUZETTE JONES, his wife,

Petitioners,

vs.

ETS OF NEW ORLEANS, INC.,

Respondent(s),

_____/

CASE #: 96,287
(2nd DCA Case #: 98-00625)

PETITIONERS' BRIEF ON JURISDICTION

L. BARRY KEYFETZ, ESQUIRE and
FL Bar #: 042658
KEYFETZ, ASNIS & SREBNICK, P.A.
Attorneys for Petitioners
44 West Flagler Street, Suite 2400
Miami, Florida 33130
Phone: (305) 358-1740

GERALD R. HERMS, ESQUIRE
FL Bar #: 104535
Co-Counsel for Petitioners
200 Pierce Street
Suite 3A
Tampa, Florida 33602
Phone: (813) 229-0173

CERTIFICATE OF TYPE SIZE & STYLE

The type size and style of the Brief is 14 point Times New Roman.

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE

STATEMENT OF THE CASE AND FACTS

This is a Petition for Writ of Certiorari from an order of the Second District Court of Appeal holding the carrier only pays their prorata share of "taxable costs" in connection with the third party recovery, thereby leaving the employee bearing all of the other "expenses" also referred to as "costs of recovery".[1]

Petitioner suffered injuries while working for Respondent and was paid workers' compensation benefits. Petitioner then sued a third party and reached a settlement for $50,000.00. In determining Respondent's lien, the trial court deducted from the gross recovery, in addition to attorney's fees, reasonable and necessary "expenses"("costs of recovery") incurred in securing the recovery, most of which never fall in the limited category of "taxable costs".

The District Court reversed that determination, holding the only costs that are permitted to be deducted from the gross recovery to determine the net recovery are "taxable costs", thereby leaving the employee to bear the full extent of the major reasonable necessary costs of recovery. From that decision Petitioner, Brian Jones, (Appellee below), seeks review by this Court contending said decision is in conflict with decisions of this Court and other District Courts of Appeal.

---

[1]In fact, it is unclear when just taxable costs would ever be borne by either the employee or carrier upon a successful recovery in that "taxable costs" would always be reimbursed by the third party tort feasor.

SUMMARY OF ARGUMENT

The Second District holding that the workers' compensation carrier does not pay prorata share of all of the reasonable and necessary expenses (recovery costs) in connection with a third party recovery is in conflict with this Court's decisions in Nikula v. Michigan Mutual Insurance Company, 521 So.2d 330 (Fla. 1988) and Manfredo v. Employer's Casualty Insurance Company, 560 So.2d 1162 (Fla. 1990).

The Second District holding in that respect also conflicts with multiple other District Court of Appeal decisions which have interpreted the workers' compensation carrier's obligation to include their prorata share of all reasonable and necessary "recovery costs" or expenses in connection with the third party case, to include as well, attorney's fees.

In more than forty years of determining these liens involving similar statutory language insofar as the issue herein, no other District Court has interpreted the carrier's prorata obligation to include only "taxable costs" which would leave solely to the employee responsibility for the bulk, if not all, of the recovery costs.

The holding by the Second District is directly contrary to the policy established by this Court in Nikula, reiterated by multiple other District Courts of Appeal, and thereafter codified by the legislature holding that the workers' compensation carrier receive prorata recovery from the third party to the same extent as the employee has

received same, compared to the full value of the case. That policy compels the carrier to share prorata in all reasonable and necessary recovery costs, not just taxable costs - which taxable costs, in any event, would not seem to be borne by the carrier or employee since they would be reimbursed by the third party.

The Second District Court's decision limiting the carrier's prorata obligation for only taxable costs results in a greatly disproportionate obligation by the employee and in a number of circumstances could even result in little or no recovery to the employee, but substantial recovery to the carrier. This result is contrary to this Court's holding in Nikula, Manfredo, subsequent codification thereof, the other District Court decisions discussed herein and forty years of decisions interpreting similar language contrary to the interpretation now placed thereon by the second district.

ISSUE PRESENTED

IS THE HOLDING OF THE SECOND DISTRICT COURT OF APPEAL THAT "COSTS" EXPENDED IN THE PROSECUTION OF THE CASE, WHICH ARE DEDUCTIBLE FROM THE GROSS RECOVERY IN DETERMINING NET RECOVERY, DO NOT INCLUDE REASONABLE NECESSARY AND PROPER EXPENSES, BUT ONLY "TAXABLE" COSTS, IN CONFLICT WITH THIS COURT'S DECISION IN NIKULA v. MICHIGAN MUTUAL INSURANCE COMPANY, 521 So.2d 330 (FLA. 1988); THE PRORATA POLICY OF THIS COURT EXPRESSED THEREIN SUBSEQUENTLY CODIFIED BY STATUTE; AND FORTY YEARS OF CONTRARY PRECEDENTS IN THIS COURT AND THE OTHER DISTRICT COURTS OF APPEAL?

In connection with determination of a workers' compensation carrier's participation in the proceeds of a third party recovery, the Second District Court of Appeal has held the carrier pays their prorata share of attorney's fees and only the limited category of taxable costs, leaving to the employee to pay from his share of the proceeds the full amount of all the reasonable and necessary expenses (recovery costs) incident to making the recovery.

In Manfredo v. Employer's Casualty Insurance Company, 560 So.2d 1162 (Fla. 1990) this Court referred to Nikula v. Michigan Mutual Insurance Company, 521 So.2d 330 (Fla. 1988) holding:

> Although Nikula concerned the 1981 version of the statute, in a footnote to that opinion, we stated:

> The statute was amended in 1983 to take into consideration the worker's expenses in pursuing the third party claim. The controlling factor for settlements involving comparative negligence under the amended version is the ratio of net recovery to full damages. Manfredo v. Employer's Cas. Ins. Co., supra, p.1165, (emphasis supplied).

Subsequently, the legislature codified this Court's prorata formula announced in the Nikula case, but dispensing with the need for an initial showing of comparative negligence to trigger the prorata determination. §440.39(3)(a) Florida Statutes (1991); also see City of Hollywood v. Lombardi, 24 FLW D1849 (Fla. 1st DCA 1999) at p.1850.

The Second District opinion indicates their determination is a matter of first impression. However, as noted by this Court in Manfredo and Nikula, the 1983 version and its predecessors all initially utilized terminology "court costs" and later in the statutory language provided for the carrier to pay their prorata share of "costs... incurred by the employee." Every other District Court interpreting that same language approved the carrier's obligation for their prorata share of the reasonable and necessary recovery costs (expenses) in making the recovery - not just "taxable costs". Brandt v. Phillips Petroleum Company, 511 So.2d 1070 (Fla. 3rd DCA 1987)[2] utilizes the

---

[2]Manfredo disapproved of the portion of the opinion pertaining to when the comparative negligence reduction comes into the formula, but adopts the "expenses" or "recovery costs" terminology.

terminology "recovery costs". The opinion refers with approval to Annot., Workman's Compensation; Attorney's Fee or Other Expenses of Litigation Incurred by Employee in Action Against Third Party Tort Feasor as Charge Against Employer's Distributive Share, 74 A.L.R. 3d 854 (1976).

In Williams Heating and Air Conditioning Company v. Williams, 551 So.2d 559 (Fla. 5th DCA 1989) the Fifth District also refers to "costs of recovery" including attorney's fees. Both opinions in allowing deduction of "costs of recovery", as distinguished from taxable costs, discuss the intent of the statute that the "employee's gross recovery is proportional to the total value of the injured employee's claim." Also see similar rationale recently expressed in City of Hollywood v. Lombardi, supra at p.1850.

That, of course, does not occur if the injured employee is called upon to pay all of the other reasonable and necessary "expenses" (costs of recovery) - except taxable costs.

Further, the Second District Court of Appeal is in conflict with this Court's announced policy in Nikula and Manfredo as well as conflicting with similar expressions in the other District Courts of Appeal. It is suggested this Court did not, through inadvertence or inability to utilize correct terminology, use the terminology "expenses", nor did the other District Courts act inadvertently in also using "expenses"

or "costs of recovery" rather than the terminology "taxable costs". Rather, as announced by this Court and the other District Courts of Appeal, it was intended that the carrier receive reimbursement on a prorata basis exactly proportional to what the claimant receives compared to his overall recovery. The third party suit is, in effect, a joint venture between the carrier and the employee with both intended to prorata share in all reasonable and necessary attorney's fees and all reasonable and necessary costs of the recovery.

For the foregoing reasons, it is requested this Court accept jurisdiction and resolve the existing conflict in the case law as to whether pursuant to §440.39(3)(a) the carrier pays their prorata share of recovery costs (expenses) in connection with the third party litigation or only "taxable costs"?[3]

CONCLUSION

For the foregoing reasons, it is submitted this Court has jurisdiction to resolve the conflict between the Second District Court of Appeal decision herein and this Court's decisions in Nikula, Manfredo, the other District Courts' decisions in Brandt, Williams Heating and Air Conditioning Company, and forty years of decisions

[3]Since taxable costs are, in any event, paid by the losing party, if the legislature intended that the carrier only pay their prorata share of that category of costs, as distinguished from all the reasonable and necessary costs of recovery, then it would seem to be meaningless to so provide - there is nothing to prorata pay by either the carrier or claimant where taxable costs are reimbursed by the losing party.

reaching contrary interpretations as to whether the carrier pays their prorata share of recovery costs (expenses) or only taxable costs. Where substantial recovery costs are involved or contemplated, the Second District Court of Appeal decision will hinder resolution possibly compelling plaintiff to just "roll the dice". The issue is one of great importance in connection with the foregoing, and to allow consistent resolution of these lien issues. It accordingly is requested this Court exercise its jurisdiction to resolve the conflict.

Respectfully submitted,

By:_____
L. BARRY KEYFETZ, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of September, 1999 to: M. MITCHELL NEWMAN, ESQUIRE, ROBERT A. LeVINE, ESQUIRE, Newman, LeVine, Metzler & Shankman, P.A., Attorneys for Appellants/Respondents, 400 N. Tampa Street, Suite 2900, Tampa, Florida 33602; GERALD R. HERMS, ESQUIRE, Attorney (co-counsel) for Appellees/Petitioners, Suite 3-A, 200 Pierce Street, Tampa, Florida 33602.

KEYFETZ, ASNIS & SREBNICK, P.A.
Attorneys for Petitioners
44 West Flagler Street, Suite 2400
Miami, Florida 33130
Phone: (305) 358-1740

BY:_____
L. BARRY KEYFETZ, ESQUIRE
FL. Bar #: 042658

IN THE SUPREME COURT OF FLORIDA

BRIAN JONES, and SUZETTE JONES, his wife,

Petitioners,

vs.

ETS OF NEW ORLEANS, INC.,

Respondent(s),
_____/

CASE #: 96,287
(2nd DCA Case #: 98-00625)

APPENDIX OF PETITIONERS
Brian Jones and Suzette Jones

L. BARRY KEYFETZ, ESQUIRE
FL Bar #: 042658
KEYFETZ, ASNIS & SREBNICK, P.A.
Attorneys for Petitioners
44 West Flagler Street, Suite 2400
Miami, Florida 33130
Phone: (305) 358-1740

and

GERALD R. HERMS, ESQUIRE
FL Bar #: 104535
Co-Counsel for Petitioners
200 Pierce Street
Suite 3A
Tampa, Florida 33602
Phone: (813) 229-0173

position that Hunter was not the plaintiff, Countrywide was; and that Hunter was only a third party agent who had no standing to file the objection. Circuit Judge Richard A. Luce was inclined to agree with this position because, despite the caption "Plaintiff's Objection . . .," the motion began "Comes now the third party agent . . . ." Mr. Barnard also agreed, stating that the caption was a typographical error and it should have read "Third Party's Objection . . . ." Judge Luce correctly observed that Hunter was not a party to the litigation because no motion to intervene was ever filed or granted; therefore, Hunter did not possess a legal interest sufficient to confer standing upon it. Countrywide's counsel made no comment or objection to Mr. Barnard's correction of the caption nor to a later comment by the appellants' counsel that the plaintiff, Countrywide, had filed no motion. Because Judge Luce realized that more time would be necessary to resolve the motion than had been scheduled, he continued the hearing with the date to be reset later. During the hearing Countrywide never adopted or claimed Hunter's motion as its own, nor did it challenge the judge's or Mr. Barnard's characterization of Hunter's relationship to the proceedings.

Five days after this hearing, on October 13, 1997, Countrywide filed a "Corrected Plaintiff's Objection to Sale and/or Motion to Rescind Sale," signed by Mr. Barnard as co-counsel for Countrywide. Ultimately, a successor judge held the rescheduled hearing and granted Countrywide's motion to set aside the judicial sale. The successor judge found that Countryside's motion related back to the motion originally filed by Hunter. This appeal followed.

When a party timely objects to a judicial sale, the trial judge becomes authorized to exercise his or her discretion to set it aside. *See United Cos. Lending Corp. v. Abercrombie*, 713 So. 2d 1017 (Fla. 2d DCA 1998). However, as a matter of law, the circumstances of this case cannot sustain the conclusion that Countrywide's motion was timely filed.

Section 45.031, Florida Statutes (1997), requires that objections to a judicial sale be filed within ten days following the sale. Countrywide's motion, not Hunter's, was filed on October 13, 1997, approximately sixty days following the sale, and, therefore, was not timely. To avoid this time bar, Countrywide contends that it is entitled to claim Hunter's motion, and its timely filing date, as its own. Countrywide argues that it may relate back to that date pursuant to Florida Rule of Civil Procedure 1.190. This rule allows a pleading to relate back if it arose out of the occurrence set forth in the original pleading. What Hunter and Countrywide each filed was a motion, not a pleading. Thus, it cannot relate back under this rule. Moreover, Countrywide and Hunter are not an identical party so that one may act for the other in a legal proceeding. The trial judge erred in holding that Countrywide's motion could relate back to Hunter's motion.

We find distinguishable Countrywide's supplemental authority, *Bauer v. Hardy*, 667 So. 2d 251 (Fla. 1st DCA 1995), filed after oral argument in this case. In *Bauer*, the successful appellant, on remand, had filed an untimely motion to tax appellate fees against an individual attorney; the First District allowed this untimely motion to relate back to a similar, timely-filed motion against the attorney's firm. The First District found the situation before it to be analogous to an amendment to pleadings to correct a misnomer that relates back to the date the original pleading was filed. We decline to find *Bauer* comparable to our case because the motion in *Bauer* was filed by a person properly before the court, a party to the proceedings. There were also additional equities to consider in *Bauer* because the individual attorney may have precipitated the misnomer.

Accordingly, because Countrywide did not file a timely motion challenging the judicial sale and because the motion it did file could not relate back to a timely date, the trial court was without authority to set aside the sale. Countrywide's failure "to take the required steps necessary to protect its own interest, cannot, standing alone, be grounds to vacate judicially authorized acts to the detriment of other innocent parties. The law requires certain diligence of those subject to it, and this diligence cannot be lightly excused." *See Wells Fargo Credit Corp. v. Martin*, 605 So. 2d 531 (Fla. 2d DCA 1992) (citing *John Crescent, Inc. v. Schwartz*, 382 So. 2d 383, 385 (Fla. 4th DCA 1980)). Therefore, although this result, allowing the appellants to acquire property that has a fair market value of $75,000 for $100, is arguably harsh, it must stand due to Countrywide's lack of proper diligence in timely filing its own objection to the sale.

Reversed and remanded. (PARKER, C.J. and WHATLEY, J., concur.)

* * *

Torts—Workers' compensation carrier's lien on recovery from tortfeasor—In determining pro rata share of recovery to be received by carrier, court improperly allowed offset of all costs incurred by injured employee in tort action rather than only taxable costs

ETS OF NEW ORLEANS, INC., Appellant, v. BRIAN JONES and SUZETTE JONES, his wife, Appellees. 2nd District. Case No. 98-00625. Opinion filed May 12, 1999. Appeal from the Circuit Court for Hillsborough County; James S. Moody, Jr., Judge. Counsel: Robert A. LeVine and M. Mitchell Newman of Newman, LeVine, Metzler & Shankman, Tampa, for Appellant. Gerald R. Herms, Tampa, for Appellees.

(CASANUEVA, Judge.) This is an appeal from the equitable distribution, pursuant to section 440.39, Florida Statutes (1997), of the proceeds from a negligence suit on which the worker's compensation insurance carrier, the appellant, ETS of New Orleans, Inc. (ETS), had asserted a worker's compensation lien. ETS contends that the trial court committed three errors. First, it claims that the court improperly permitted counsel for the defendant in the underlying tort suit to testify as an expert on the value of that tort claim, and, second, that the court improperly determined the full value of the tort claim. We hold that the record supports the trial court's rulings on these two issues and affirm them without further discussion. ETS's third contention is that the trial court improperly included in its final order of equitable distribution all costs incurred by the injured worker instead of just taxable costs. ETS's third contention is meritorious and we reverse only as to that issue.

The appellee, Brian Jones, was employed by Ed Smith Steel Erectors, Inc. ETS provided the workers' compensation insurance to Mr. Jones' employer at the time of the accident in 1994. While on the jobsite, Mr. Jones had to walk along the eight-inch wide top of a partially constructed concrete block wall, through which a four-foot high segment of PVC pipe protruded. The pipe had been installed by Lawhorn Plumbing, another subcontractor on the project. Mr. Jones grabbed the two-inch diameter pipe in an effort to swing around it; unfortunately, it broke and he fell 18 feet to the concrete floor below. As a result of the fall, Mr. Jones suffered compression fractures of the first, second, and third lumbar vertebrae as well as a broken ankle. His permanent injuries resulted in a whole person disability rating of 22 percent. ETS eventually paid him $124,460.12 in worker's compensation benefits.

Subsequently, Mr. Jones sued Lawhorn Plumbing for damages allegedly resulting from its negligence, and ETS filed a worker's compensation lien in the suit as allowed under Chapter 440. Ultimately, Mr. Jones and Lawhorn Plumbing settled for $50,000. Mr. Jones then petitioned for equitable distribution of the settlement proceeds in order to satisfy ETS' worker's compensation lien. Following an evidentiary hearing, the trial court awarded ETS only $5,102.86. In this appeal ETS asserts that the trial court, as part of the equitable distribution calculation, overstated the amount of costs Mr. Jones was entitled to subtract from his settlement before determining the pro rata share of the award ETS would receive.

The relevant statute, section 440.39(3)(a), provides, in pertinent part:

> Upon suit being filed, the . . . insurance carrier . . . may file in the suit a notice of payment of compensation and medical benefits to the employee or his dependents, which notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid or to be paid under the provisions of this law, less their pro rata share of all court costs expended by the plaintiff in the prosecution of the suit including reasonable attorney's fees for the plaintiff's attorney. In determining the employer's or carrier's pro rata share of those costs and attorney's fees, the employer or carrier shall have deducted from its recovery a percentage amount equal to the percentage of the judgment or settlement which is for costs and attorney's fees. Subject to this deduction, the employer or carrier shall recover from the judgment or settlement, after costs and attorney's fees incurred by the employee . . . in that suit have been deducted, 100 pe cent of what it has paid and future benefits to be paid.

The trial court, in determining the final amount, allowed Mr. Jones to offset all his costs instead of just the taxable costs. The question before us is whether, within the context of this section, "court costs" means "taxable costs" or "all costs" incurred on behalf of the employee. We hold that the former definition applies.

A prevailing party may generally recover only taxable costs. *See* § 57.041, Fla. Stat. (1997); *see also In Re: Statewide Unif. Guidelines for Taxation of Costs in Civil Actions, Admin. Order, Fla. Sup. Ct.*, 7 Fla. L. Weekly S517 (Fla. Oct. 28, 1981), *reprinted in Florida Rules of Court* 1575 (West 1998). The First District Court of Appeal applied this rule to an assessment of costs in a worker's compensation context in *McArthur Farms v. Peterson*, 586 So. 2d 1273 (Fla. 1st DCA 1991) (generally, prevailing parties, including those in workers' compensation cases, may collect only taxable costs, rather than all costs). Although the First District was interpreting a stipulated agreement as to the word "costs" with no qualifying adjective, its reasoning and its discussion of the general meaning of "costs" are just as applicable here.

Accordingly, we affirm in part, reverse in part, and remand for further proceedings. (NORTHCUTT, A.C.J., and QUINCE, PEGGY A., ASSOCIATE JUDGE, Concur.)

* * *

Criminal law—Search and seizure—Vehicle stop—Stop was illegal where uncorroborated anonymous tip did not give rise to reasonable suspicion of criminal activity—Error to deny motion to suppress

ANTONIO BERNARD WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 97-03696. Opinion filed May 12, 1999. Appeal from the Circuit Court for Hillsborough County; Jack Espinosa, Jr., Judge. Counsel: James Marion Moorman, Public Defender, and William L. Sharwell, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Deborah F. Hogge, Assistant Attorney General, Tampa, for Appellee.

(NORTHCUTT, Judge.) Antonio Williams pleaded nolo contendere to two drug possession charges. He reserved his right to appeal the denial of his dispositive motion to suppress evidence seized by a police officer who stopped Williams's car based on an anonymous tip.

All participants in this appeal—Williams, the State, and this court—are unanimous in the view that the uncorroborated tip did not give rise to a reasonable suspicion of criminal activity. Therefore, the stop was illegal, and all evidence seized as a result of it should have been excluded. *See J.L. v. State*, 23 Fla. L. Weekly S626 (Fla. Dec. 17, 1998). Accordingly, we reverse and remand with directions to discharge Williams. (PATTERSON, A.C.J., and BLUE, J., Concur.)

* * *

Torts—Medical malpractice—Dismissal—Where plaintiff had obtained a written corroboration of reasonable grounds to initiate medical negligence litigation, but refused to provide a copy with her notice of intent because she claimed that defendant had not provided adequate presuit discovery, trial court properly dismissed complaint without leave to amend—Because it is impossible from complaint to tell when statute of limitations may expire, court should have dismissed without leave to amend but not with prejudice

ELIZABETH L. DIMICK-RUSSELL & JOHN RUSSELL, Appellant, v. MANUEL FRANKEL, D.D.S., Appellee. 5th District. Case No. 98-2214. Opinion filed May 14, 1999. Appeal from the Circuit Court for Volusia County, David A. Monaco, Judge. Counsel: Sharon M. Sabel of the DentaLaw Group and Kenneth P. Liroff, D.D.S., P.A., Fort Lauderdale, for Appellant. Jamie Billotte Moses & Philip Turner King, Jr., of Fisher, Rushmer, Werrenrath, Dickson, Talley & Dunlap, P.A., Orlando, for Appellee.

(HARRIS, J.) While we affirm the court's dismissal herein, we hold that it should not be "with prejudice." We agree, however, that plaintiff should not be permitted to amend.

The facts in this case are extraordinary. Even though plaintiff had obtained a written corroboration of reasonable grounds to initiate medical negligence litigation, she refused to provide a copy with her notice of intent to initiate a claim because she determined that the doctor against whom the claim was directed had failed to provide adequate presuit discovery. She then filed her malpractice action without providing the corroborative statement. When the doctor moved to dismiss because plaintiff had refused (plaintiff made it clear in her notice that she had the corroborative statement but refused to provide it to the doctor) to comply with the *presuit* investigation requirements of section 766.203(2), Florida Statutes (1991), she persevered in her insistence that the doctor was not entitled to the statement. Even when the court required an evidentiary hearing on the motion (although she offered to permit the court to examine the statement in camera), she refused to deliver it to the doctor.

The trial court found that the doctor had complied with his obligation to provide discovery. The court found that some of the information insisted on by plaintiff had previously been delivered, at her request, to another doctor and that defendant had provided all the information in his files. Because plaintiff herself had not complied with the presuit discovery requirements, the court dismissed the action and, since the judge believed the statute of limitations had run, dismissed it with prejudice.

The supreme court has held that the corroborative statement may be filed late so long as it is filed within the statute of limitations period. *See Kukral v. Mekras*, 679 So. 2d 278, 283 (Fla. 1996) ("[T]his Court has held that the failure to comply with the presuit requirements of the statute is not necessarily fatal to a plaintiff's claim so long as compliance is accomplished within the two-year limitations period provided for filing suite."). It appears that the statutory limitations period is chosen as the final date the statement may be provided because if the complaint is not filed within that period, then the corroborative statement becomes meaningless. While it is reasonable not to require, on pain of subsequent dismissal, that the corroborative statement accompany the notice of intent, to permit the filing of a lawsuit without first establishing a reasonable basis for the action and furnishing the statement to a prospective defendant seems to gut the entire statutory plan. Therefore, although serving the corroborative statement *with the notice of intent* has been determined not to be jurisdictional, furnishing the statement still appears to be a condition precedent to maintaining suit. If it is not a condition precedent to the filing of the action (and we believe it is), certainly it is necessary to maintain the action once a motion to dismiss on grounds of failure to supply such statement is brought before the court because the plaintiff is then at a "put up or shut up" stage in the proceeding.

The judge was entirely correct in finding that since plaintiff had unjustifiably refused to comply with the legislative requirements of the statute, her action should be dismissed without leave to amend. However, the court's ruling was not on the merits. Further, it is impossible from the complaint to tell when the statute of limitations may expire. For that reason, the court should have dismissed without leave to amend but not with prejudice. If plaintiff now has time to comply with the requirements of the statute and still file (or if she has since complied and filed a separate action), the dismissal herein should not bar her action. *See Malunney v. Pearlstein*, 539 So. 2d 493 (Fla. 2d DCA 1989) (dismissal of lawsuit in medical malpractice action for failure to give required notice was not bar to filing a second action based on the same cause), *rev. denied*, 547 So. 2d 1210 (Fla. 1989).

AFFIRM. (DAUKSCH and THOMPSON, JJ., concur.)

* * *

Arbitration—Securities—Attorney's fees—Where investor filed claim with National Association of Securities Dealers charging violation of NASD Rules of Fair Practice, Florida Securities Investors Protection Act, and unspecified federal and state regulations, arbitration panel awarded damages to investor without specifying theory on which investor had prevailed, and panel stated that dealer would be liable to investor for attorney's fees in amount to be determined by court, court properly awarded fees under Florida Securities Investors Protection Act— Error to award fees in excess of fee agreement with attorney

JOSEPHTHAL LYON & ROSS, INC., Appellant, v. BARBARA L. DURHAM, et al., Appellee. 5th District. Case No. 98-682. Opinion filed May 14, 1999. Appeal from the Circuit Court for Marion County, Victor J. Musleh, Judge. Counsel: Robbie D. Lake Mayer and Ronald Shindler of Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., Miami, for Appellant. Stephen D. Spivey,