AA-73760-4

CASE NO. SC18-1529

IN THE SUPREME COURT OF FLORIDA

JOSEPH MANZARO,
Petitioner,

vs.

HCA, INC. ET AL.,
Respondents.

On Petition for Review from a Decision of the
Third District Court of Appeal
L.T. Case Nos.: 3D17-1461; 3D17-1462; 3D17-2267

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

a. Introduction

The above captioned matter is a meritless effort by the Petitioner, JOSEPH MANZARO, to petition this Court to accept discretionary conflict jurisdiction based upon the following six opinions: *Wilkinson v. Golden*, 630 So. 2d 1238 (Fla. 2d DCA 1994); *Escobar v. Olortegui, D.D.S.*, 662 So. 2d 1361 (Fla. 4th DCA 1995); *Watson v. Beckman*, 695 So. 2d 436 (Fla. 3d DCA 1997); *Medina v. Public Health Trust*, 743 So. 2d 541 (Fla. 3d DCA 1999); *Otto v. Rodriguez*, 710 So. 2d 1 (Fla. 4th DCA 1998); and *Yocom, D.C. v. Wuesthoff Health Systems, Inc.*, 880 So. 2d 787 (Fla. 5th DCA 2004).

The underlying consolidated appeals arose out of a wrongful death action related to medical care provided to Harmony Thornton ("decedent") in 2012 and 2013. In three orders, the trial court dismissed with prejudice Plaintiff's Amended Complaint due to Plaintiff's failure to comply with the mandatory medical malpractice presuit requirements of Chapter 766, Florida Statutes (2015), within the applicable statute of limitations. The Third District Court of Appeal affirmed the trial court's orders, concluding that "there was no reasonable basis for Mr. Manzaro's claims . . . and there was a failure to comply with the statutory pre-suit requirements for investigation, corroboration, and written notice."

b. Facts; Proceedings in the Circuit Court

Mr. Thornton died on April 23, 2013. The death certificate listed the manner as "natural," and the causes of death as three preexisting medical conditions arising three months, six months, and six years before her death. The autopsy report listed the cause of death as "undetermined."

In April 2015, Mr. Manzaro served notices of intent to initiate litigation for alleged medical negligence on HCA, INC. a/k/a HOSPITAL CORPORATION OF AMERICA, INC., et al. ("HCA Entities"[1]) and Dr. Cohn. No corroborating expert affidavits were attached to the notices of intent ("NOI"). At the conclusion of the presuit periods, the HCA Entities and Dr. Cohn each denied Mr. Manzaro's claim for medical malpractice and wrongful death, attaching the affidavits of their respective presuit experts. Mr. Manzaro never served a NOI on Dr. Manzor.

Mr. Manzaro filed the underlying complaint against *inter alia* the HCA Entities, Dr. Cohn, and Dr. Manzor in 2015 and an Amended Complaint in May 2016. The Amended Complaint contained three counts: Count I for "Wrongful Death from Hospital Homicide," Count II for "Wrongful Death from Attempted Involuntary Euthanasia," and Count III for "Wrongful Death from Negligent Kidney Biopsy." Dr. Manzor and Dr. Cohn appeared only in the case caption; neither

[1] Each HCA Entity is a separate entity and reference to them collectively is not an admission that such separateness has not been maintained.

physician was identified in any count, nor were there any allegations identifying any individual acts or omissions by them.[2]

Each Defendant filed a motion to dismiss based on Mr. Manzaro's failure to comply with Florida's medical malpractice statutory presuit requirements. Mr. Manzaro contended that his requirement to provide a corroborating presuit affidavit was waived because of the HCA Entities' alleged failure to provide the decedent's medical records within ten days. Mr. Manzaro also maintained that the autopsy report listing Ms. Thornton's cause of death as "undetermined," as a corroborating presuit affidavit from a qualified expert against all Defendants.

The trial court conducted a two-hour evidentiary hearing to "afford Mr. Manzaro an opportunity to demonstrate that he conducted a good faith investigation and that he has a reasonable basis for the claims in the Complaint." (Op., p.4). Based on the record, the trial court found that Mr. Manzaro did not comply with the presuit requirements of notice to all prospective defendants, investigation, and corroboration of his claims. Concluding that the applicable two-year statute of

[2] At the hearing on the motions to dismiss in April 2017, counsel for Dr. Manzaro admitted that Dr. Manzor and Dr. Cohn's alleged "negligence or wrongdoing ha[d] not been properly addressed to the point at this time"; he was "still going through thousands of pages of medical records, dissecting them, analyzing what they contain"; and he "believe[d] that the cause of action . . . would clearly show medical negligence on the part of these doctors who have not been previously named [in any count or allegation in the complaint]." (4/25/2017 Hrg. Tr., p.5, 55).

limitations had run, the court dismissed the action with prejudice. The Third District Court of Appeal affirmed, finding:

> The trial court properly concluded that there was no reasonable basis for Mr. Manzaro's claims . . . and that there was a failure to comply with the statutory pre-suit requirements for investigation, corroboration, and written notice.

(Op., p.6).

ARGUMENT SUMMARY

This Court should deny Mr. Manzaro's Petition to Invoke this Court's Discretionary Conflict Jurisdiction because there is no principle of law announced in the Third District's opinion that is irreconcilable with the cited cases.

LEGAL ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH CASES CITED BY MR. MANZARO

Mr. Manzaro, without merit, argues that the Third District Court of Appeal's opinion at issue here conflicts with four decisions from other Florida District Courts of Appeal and two decisions from the Third District Court of Appeal. (Pet. Jurisdictional Brief, pp.8-10). An examination of each case cited in Mr. Manzaro's jurisdictional brief leads to the inescapable conclusion that there is not any express or direct conflict between the Third District's opinion and the opinions cited. Where a lower court opinion establishes no point of law contrary to a decision of the Florida Supreme Court or of another district court of appeal, the Supreme Court review

based on conflict is unavailable. *First Union National Bank v. Turney*, 832 So. 2d 768, 770 (Fla. 1st DCA 2002) (emphasis added). The Third District Court of Appeal's decision here is not irreconcilable with *Wilkinson*; *Escobar*; *Medina; Watson*; *Otto*; or *Yocom*.

a. The Third District Court of Appeal's Decision Does Not Conflict With the Second District Court of Appeal's Decision in *Wilkinson v. Golden*, 630 So. 2d 1238 (Fla. 2d DCA 1994)

In *Wilkinson*, the trial court dismissed the plaintiff's action as a sanction for the plaintiff's failure to respond to the defendant's presuit discovery requests, which were sent by the defendant prior to the service of the notice of intent. The Second District Court of Appeal reversed, in part, on the following basis:

> [A] claimant is not obligated to engage in informal discovery before the 'notice of intent to initiate medical malpractice litigation' is mailed . . . Because claimants do not have a statutory obligation to participate in informal discovery before the notice of intent is mailed, the sanction of dismissal was not warranted.

Id. at 1240-41. The legal principle examined in *Wilkinson* was whether parties have an obligation to participate in presuit discovery prior to the service of the notice of intent on a prospective defendant. The Second District held that the prospective defendant's receipt of the notice of intent "is the event precipitating informal discovery" under Chapter 766. *Id*. at 1241.

There is no irreconcilable principle of law posed by the *Wilkinson* opinion. In fact, *Wilkinson* is consistent with the Third District's finding here that Mr. Manzaro

did not comply with the mandatory presuit requirement of notice to prospective defendants. The Third District noted that Mr. Manzaro failed to provide notice of the claim to Dr. Manzor; *Wilkinson* shows that Dr. Manzor had no obligation to engage in presuit discovery or investigate a claim about which he had no notice. As to the HCA Entities and Dr. Cohn, *Wilkinson* was irrelevant to the Third District Court's decision.

This Court should deny Mr. Manzaro's petition to invoke this Court's discretionary conflict jurisdiction based on *Wilkinson*.

b. The Third District Court of Appeal's Decision Does Not Conflict With the Fourth District Court of Appeal's Decision in *Escobar v. Olortegui, D.D.S.*, 662 So. 2d 1361 (Fla. 4th DCA 1995), or the Third District Court of Appeal's Decisions in *Medina v. Public Health Trust*, 743 So. 2d 541 (Fla. 3d DCA 1999) and *Watson v. Beckman*, 695 So. 2d 436 (Fla. 3d DCA 1997)

The Third District Court of Appeal's decision does not conflict with *Escobar*, *Medina*, or *Watson*, which concerned an issue that was neither the sole nor the primary basis of the Third District's determination here: a defendant's waiver of the corroborating presuit affidavit requirement when a defendant does not provide medical records to the prospective plaintiff during the presuit period.

In *Escobar*, despite plaintiff's presuit request for her dental records, the defendant "never responded or forwarded [plaintiff's] dental records . . . ." *Id.* at 1362. Thereafter, the plaintiff sent a notice of intent to the defendant wherein the plaintiff indicated that she would not be providing a corroborating affidavit due to

the defendant's failure to provide her dental records. *Id.* After the plaintiff commenced suit, the defendant moved to dismiss, arguing the plaintiff's failure to provide a corroborating affidavit warranted dismissal of the action. *Id.* at 1363. The trial court denied the motion to dismiss but ordered the defendant to provide the dental records and the plaintiff to furnish a corroborating affidavit. *Id.*

The plaintiff petitioned for writ of certiorari on the limited issue of whether the trial court could compel her to provide a corroborating affidavit. *Id.* In remanding the action, the Fourth District Court of Appeal found:

> Because respondent failed to provide copies of [plaintiff's] actual records, as required, the necessity of corroborating affidavit was waived as provided in subsection (2) of section 766.204. We grant the petition and quash that part of the trial court's order requiring petitioner to furnish the corroborating expert affidavit.

662 So. 3d at 1364.

In *Medina*, the defendant failed to provide the plaintiff with copies of her medical records within ten days of her request for such records. The Third District held that trial court incorrectly dismissed the plaintiff's action for her failure to provide a corroborating affidavit.

Similarly, in *Watson*, the plaintiff appealed an order dismissing her action premised on the failure to timely provide a corroborating affidavit. The Third District Court of Appeal reversed and found:

> That requirement was waived by [defendant's] failure to comply with [plaintiff's] request for copies of her dental records . . . Furthermore,

> [plaintiff] provided [defendant] with the requisite opinion within the statute of limitations period.

Id. at 437.

In this case, the Third District's opinion affirmed the trial court's finding that that Mr. Manzaro failed to conduct reasonable presuit investigation, failed to comply with other presuit requirements, and lacked a reasonable bases to bring his claims. The Third District opinion was not based solely on Mr. Manzaro's failure to obtain a corroborating affidavit. Therefore, the *Escobar*, *Medina*, and *Watson* decisions, based on the single issue of the affidavit, do not present a conflict.[3]

c. The Third District Court of Appeal's Decision Does Not Conflict With the Fourth District Court of Appeal's Decision in *Otto v. Rodriguez*, 710 So. 2d 1 (Fla. 4th DCA 1998)

Otto is consistent with and entirely supports the Third District Court of Appeal's decision in this case. The Fourth District Court of Appeal affirmed dismissal where the plaintiff failed to provide both presuit notice of intent and a corroborating affidavit prior to filing a medical malpractice lawsuit against the defendant. In *Otto*, the Fourth District found that any failure on the defendant's part to provide copies of plaintiff's medical records "is only a waiver of the plaintiff's

[3] Notably, unlike in this case, the record in *Watson* revealed the that plaintiff conducted a thorough presuit investigation and obtained a verified corroborating expert opinion before filing her complaint. *Id.* The plaintiff's presuit expert reviewed plaintiff's records from other dentists and conducted his own examination of the plaintiff. *Id.* The expert's opinion was provided to the defendant within the applicable statute of limitations period. *Id.*

duty to furnish corroboration of medical claims." *Id.* at 2. *Otto* teaches that neither requirements of notice to a defendant, conducting a reasonable presuit investigation, nor determining a reasonable basis to bring suit can be waived by an alleged failure to provide medical records within ten days. *See* 701 So. 2d at 2. [4]

Thus, whether or not there was a wavier of Mr. Manzaro's obligation to furnish the HCA Entities with a presuit affidavit due an alleged failure to provide medical records within ten days, and despite his unfounded beliefs otherwise, Mr. Manzaro was not excused from his statutory obligations of providing notice to all prospective defendants, conducting a reasonable investigation, or establishing a reasonable basis to bring suit. *See id.*

Here, the trial court found, and the Third District Court of Appeal agreed, that in addition to failing to provide a corroborating affidavit, Mr. Manzaro failed to provide presuit notice of the claim (as to Dr. Manzor), failed to conduct a reasonable presuit investigation (as to all Defendants), and failed establish a reasonable basis to bring suit (as to all Defendants). There is no conflict with *Otto*.

[4] Moreover, from the trial level through present, as it applies to Dr. Cohn and Dr. Manzor, Mr. Manzaro ignores *Tapia-Ruano v. Alvarez*, 765 So. 2d 942 (Fla. 3d DCA 2000), in which the Third District held that an alleged "failure by the [co-defendant] hospital to provide medical records cannot be imputed to [an individual physician defendant]." *Id*. at 943.

d. The Third District Court of Appeal's Decision Does Not Conflict With the Fifth District Court of Appeal's Decision in *Yocom, D.C. v. Wuesthoff Health Systems, Inc.*, 880 So. 2d 787 (Fla. 5th DCA 2004)

There is no legal principle in the First District's opinion in *Yocom* that could possibly lead to the conclusion that there is an express and direct conflict with the Third District opinion at issue here. In *Yocom*, the Fifth District affirmed dismissal of the plaintiff's action where the plaintiff failed to provide a verified written medical expert opinion from a qualified expert in support of the claim of malpractice. Even though the defendant did not timely provide the plaintiff with copies of his medical records, the appellate court approved the trial court's factual finding that "any delay in receiving the requested medical records was caused by Plaintiff's own errors, refusal to comply with instructions given to him, and lack of diligence." 880 So. 2d at 790. *Yocom* is consistent with and supports the Third District Court of Appeal's decision in this case. There is no conflict with *Yocom*, and the Petition to Invoke the Discretionary Conflict Jurisdiction of this Court should be denied.

CONCLUSION

WHEREFORE, for the reasons stated above, Respondents respectfully request that this Court deny Mr. Manzaro's Petition to Invoke the Discretionary Conflict Jurisdiction of this Court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy hereof has been filed and electronically served via Florida ePortal on this 8th day of October 2018, to all counsel on the attached service list.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this document complies with the requirements of Fla. R. App. P. 9.210(a)(2). This document is being submitted in Times New Roman 14-point font.

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