

ZERIKA WILLIAMS * NO. 2017-C-0607
VERSUS * COURT OF APPEAL
CALVIN E. WILLIAMS, M.D. AND * FOURTH CIRCUIT
CHERYL H. WILLIAMS, M.D. * STATE OF LOUISIANA

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APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2015-08465, DIVISION "I-14"
Honorable Piper D. Griffin, Judge

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JUDGE SANDRA CABRINA JENKINS

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(Court composed of Judge Joy Cossich Lobrano,
Judge Sandra Cabrina Jenkins, and Judge Marion F. Edwards, Pro Tempore)

LOBRANO, J., CONCURS IN THE RESULT.

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WRIT GRANTED; REVERSED; REMANDED

NOVEMBER 29, 2017

In this medical malpractice action, plaintiff Zerika Williams (“Plaintiff”) seeks review of the trial court’s July 17, 2017 judgment sustaining an Exception of Prematurity filed by defendant Cheryl H. Williams, M.D. (“Dr. Cheryl Williams”). For the reasons that follow, we grant the writ application, reverse the trial court’s judgment, and remand this matter for further proceedings.

BACKGROUND

Plaintiff’s medical malpractice claim arose from surgery performed by defendant Calvin E. Williams, M.D. (“Dr. Calvin Williams”) on June 13, 2013, and post-operative care provided thereafter by Dr. Cheryl Williams. On June 4, 2014, Plaintiff filed a complaint for medical malpractice against the two physicians, and requested a medical review panel from the Commissioner of Administration, Patient’s Compensation Fund (the “PCF”).

On June 11, 2014, the PCF sent a letter to Dr. Cheryl Williams, via certified mail, return receipt requested, stating that Plaintiff had filed a request for a medical review panel and had named her as a defendant. The certified letter was sent to Dr. Cheryl Williams at “8030 Crowder Blvd., New Orleans, Louisiana 70127,” which

was her address on file with the Louisiana State Board of Medical Examiners. The letter was delivered, and the return receipt was signed by “Bridget Thompson.”

On June 26, 2014, the PCF sent another letter to Dr. Cheryl Williams, via certified mail, return receipt requested, stating that the PCF had received Plaintiff’s filing fee, and advising that “an attorney chairman must be appointed within one year of filing of the claim” or the claim would be dismissed. The certified letter was sent to Dr. Cheryl Williams at the Crowder Blvd. address, was delivered, and the return receipt was again signed by “Bridget Thompson.”

On March 12, 2015, the PCF sent a letter to Dr. Cheryl Williams, via certified mail, return receipt requested, stating that the request for a medical review panel would be dismissed, pursuant to the medical malpractice statute, if the parties failed to appoint an attorney chairperson within one year from the June 4, 2014 date of the filing of the complaint (the “Nine Month Letter”). The Nine Month Letter was sent to Dr. Cheryl Williams at “775 Taylor St., Pine Prairie, LA 70576.” The letter was returned to the PCF with the notation, “RETURN TO SENDER – NO SUCH NUMBER – UNABLE TO FORWARD.”

On April 28, 2015, the PCF re-sent the Nine Month Letter to Dr. Cheryl Williams via certified mail, return receipt requested, at the Crowder Blvd. address. On May 1, 2015, the U.S. Postal Service (the “USPS”) attempted to deliver the Nine Month Letter to Dr. Cheryl Williams, but the USPS records noted that the “business [was] closed.” According to the USPS records, as of May 21, 2015, the maximum hold time had expired, and the letter was unclaimed. On June 1, 2015, the USPS returned the Nine Month Letter to the PCF with the notation, “RETURN TO SENDER – UNCLAIMED – UNABLE TO FORWARD.” The PCF took no further steps to deliver the Nine Month Letter to Dr. Cheryl Williams.

On June 15, 2015, the PCF sent a letter by certified mail, return receipt requested, to Dr. Cheryl Williams's attorney¹, stating that Plaintiff's request for a medical review panel had been dismissed on June 4, 2015 because of the failure to appoint an attorney chairman within the one-year statutory period. The letter was delivered, and the return receipt was signed by Dr. Cheryl Williams's attorney.

On September 2, 2015, Plaintiff filed a Petition for Damages against the two physicians in Civil District Court for the Parish of Orleans. In response, Dr. Cheryl Williams filed an Exception of Prematurity, arguing that the PCF should not have dismissed the medical review panel because Dr. Cheryl Williams never received the Nine Month Letter.

A hearing on the exception was held on June 23, 2017. On July 17, 2017, the trial court signed a judgment sustaining the Exception of Prematurity "on the showing made," and staying the proceedings against Dr. Cheryl Williams only. Plaintiff filed a Notice of Intention to Apply for Supervisory Writ.²

DISCUSSION

Under the Louisiana Medical Malpractice Act ("MMA"), all malpractice claims against qualified health care providers shall be reviewed by a state medical review panel, and no action may be commenced in any court before the claim has been presented to the panel. *Price v. Med. Ctr. Of Louisiana at New Orleans*, 08-0037, p. 5 (La. App. 4 Cir. 11/5/08), 999 So.2d 29, 32. A dilatory exception of

¹ By letter dated March 17, 2015, Dr. Cheryl Williams's attorney, Tracy Curtis, notified the PCF that she would be representing Dr. Cheryl Williams in the malpractice action.

² If a dilatory exception pleading prematurity is sustained, the premature action, claim, demand, issue or theory "shall be dismissed," which results in a final judgment. La. C.C.P. art. 933; *In re Med. Review Malpractice Claim of Scardina*, 07-1091, p. 3 (La. App. 4 Cir. 3/12/08), 981 So.2d 692, 694. The trial court, however, did not dismiss Plaintiff's malpractice claim against Dr. Cheryl Williams. Accordingly, we review this matter under our supervisory jurisdiction. *See Bolden v. FedEx Ground Package Sys., Inc.*, 10-0940, pp. 3-4 (La. App. 4 Cir. 2/16/11), 60 So.3d 679, 682.

prematurity is the proper procedural vehicle for a qualified health care provider to invoke when a medical malpractice plaintiff has failed to submit the claim for consideration by a medical review panel before filing suit against the provider. *Id.*, 08-0037, p. 3, 999 So.2d at 31.

La. R.S. 40:1231.8 governs a claimant's initial request for a medical review panel. La. R.S. 40:1231.8(A)(2)(c) (formerly La. R.S. 40:1299.47(A)(2)(c))³ provides as follows:

An attorney chairman for the medical review panel shall be appointed within one year from the date the request for review of the claim was filed. Upon appointment of the attorney chairman, the parties shall notify the board of the name and address of the attorney chairman. If the board has not received notice of the appointment of an attorney chairman within nine months from the date the request for review of the claim was filed, **then the board shall send notice to the parties by certified or registered mail that the claim will be dismissed in ninety days unless an attorney chairman is appointed within one year from the date the request for review of the claim was filed.** If the board has not received notice of the appointment of an attorney chairman within one year from the date the request for review of the claim was filed, then the board shall promptly send notice to the parties by certified or registered mail that the claim has been dismissed for failure to appoint an attorney chairman and the parties shall be deemed to have waived the use of the medical review panel. The filing of a request for a medical review panel shall suspend the time within which suit must be filed until ninety days after the claim has been dismissed in accordance with this Section. (Emphasis added.)

Under this provision, the parties have one year from the date of the request for a medical review panel to appoint an attorney chairman. Failure to timely appoint an attorney chairman results in dismissal of the claim, giving the claimant 90 days to file suit. La. R.S. 40:1231.8(A)(2)(c)

³ The MMA in effect at the time of the alleged malpractice was La. R.S. 40:1299.47. Pursuant to House Concurrent Resolution No. 84 of the 2015 legislative session, Title 40 was recodified in its entirety and "LSA-R.S. 40:1299.47 was redesignated as LSA-R.S. 40:1231.8. . . . [N]o substantive changes [were] made to former LSA-R.S. 40:1299.47 since 2012 La. Acts, No. 802." *In re Tillman*, 15-1114, p. 1, n.1 (La. 3/15/16), 187 So.3d 445, 447. Accordingly, we refer to the statutes herein by their current designations, as did the *Tillman* Court.

Plaintiff argues that La. R.S. 40:1231.8(A)(2)(c) does not require actual receipt of the Nine Month Letter, nor does it require that the PCF take any further steps if the letter is returned unclaimed.⁴ Dr. Cheryl Williams contends that the statute requires actual receipt of the Nine Month Letter, either by certified mail or by some other means that ensures delivery. We agree with the Plaintiff.

Statutory interpretation necessarily begins with the plain language of the statute itself. *State in Interest of M.J.*, 14-0622, p. 15 (La. App. 4 Cir. 2/4/15), 160 So.3d 1040, 1050. The specific provision at issue here, La. R.S. 40:1231.8(A)(2)(c), requires that the PCF “send notice to the parties by certified or registered mail” that the request for a medical review panel will be dismissed in ninety days unless an attorney chairman is appointed within one year from the date of the filing of the request for review. The Supreme Court has found that the term “send” (like the term “forward”) does not include the concept of “delivery” or “receipt.” *Hunter v. Morton’s Seafood Rest. & Catering*, 08-1667, pp. 5, 8 (La. 3/17/09), 6 So.3d 152, 155, 157 (citing Black’s Law Dictionary).⁵ It is undisputed that the PCF sent the Nine Month Letter to Dr. Cheryl Williams, at the proper address,⁶ by certified mail. We find that La. R.S. 40:1231.8(A)(2)(c) does not require actual receipt of the Nine Month Letter

Dr. Cheryl Williams contends that when the Nine Month Letter was returned to the PCF unclaimed, the PCF was required to take additional steps to ensure that she received actual notice before dismissing the complaint and the request for a

⁴ Plaintiff also argues that the trial court erred in *sua sponte* ordering a stay of the proceeding. Because this argument was not briefed, we consider it abandoned. See Uniform Rules-Courts of Appeal, Rule 2-12.4(B)(4).

⁵ According to Black’s Law dictionary, “send” means to “deposit in the mail or deliver for transmission.” BLACK’S LAW DICTIONARY, p. 1361 (Sixth ed. 1990).

⁶ Dr. Cheryl Williams does not assert that the Crowder Blvd. address was not her correct mailing address.

medical review panel. She relies on *Munden v. State of Louisiana Div. of Admin. Med. Review Panel*, 01-2326 (La. App. 1 Cir. 5/9/03), 849 So.3d 639.

In *Munden*, the PCF sent a nine month letter to the claimant's attorney's former address. Because the attorney had moved his office 20 months earlier, the letter was returned with the notation that the attorney had moved, and that the postal forwarding order had expired. The First Circuit concluded that the statute “**inherently** require[d] that the [PCF] take reasonable additional steps to give the claimant or the claimant's attorney the required notice.” *Munden*, 01-2326, p. 5, 849 So.2d at 642 (emphasis added). We are not bound by *Munden* and decline to follow its result because it is contrary to the plain language of the statute, and cannot be reconciled with other notice provisions of La. R.S. 40:1231.8.

As an initial matter, we note that there is no language in La. R.S. 40:1231.8(A)(2)(c) that requires the PCF to take additional steps when a nine month letter sent by certified mail is returned unclaimed.

Furthermore, a statute cannot be interpreted by review of select portions of the statutory scheme. *City of New Orleans v. Louisiana Assessors' Retirement & Relief Fund*, 05-2548, p. 22 (La. 10/1/07), 986 So.2d 1, 18. As the Supreme Court has repeatedly cautioned, “the meaning and intent of the law must be determined by a consideration of the law in its entirety.” *Id.* In other words,

[w]here it is possible to do so, it is the duty of the courts in interpretation of laws to adopt a construction of the provision in question which harmonizes and reconciles it with other provisions. A construction of a law which creates inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the law and will carry out the intention of the lawmaker.

Rodriquez v. Walters, 12-0959, p. 13 (La. App. 4 Cir. 2/5/14), 136 So.3d 871, 883.

We must, therefore, reconcile and harmonize the provision at issue here with other provisions of La. R.S. 40:1231.8, two of which expressly require that the PCF take further action when a notice sent by certified mail is returned unclaimed.

La. R.S. 40:1231.8(A)(3) requires the PCF to notify the claimant and the defendants of the filing of the medical malpractice complaint:

(3) It shall be the duty of the board within fifteen days of the receipt of the claim by the board to: (a) Confirm to the claimant by **certified mail, return receipt requested**, that the filing has been officially received and whether or not the named defendant or defendants have qualified under this Part. . . . (c) Notify all named defendants by **certified mail, return receipt requested**. . . that a filing has been made against them and request made for the formation of a medical review panel and forward a copy of the proposed complaint to each named defendant at his last and usual place or residence.

La. R.S. 40:1231.8(A)(3) (emphasis added).

In addition, La. R.S. 40:1231.8(A)(4) governs the PCF's mandatory notice to the parties with respect to the claimant's payment of the filing fee:

(4) The Board shall notify the claimant and all named defendants by **certified mail, return receipt requested**, of any of the following information:

(a) The date of receipt of the filing fee.

(b) That no filing fee was due because the claimant timely provided the affidavit set forth in Item (1)(d)(i) of this Section.

(c) That the claimant has timely complied with the provisions of Item (1)(d)(ii) of this Subsection.

(d) That the required filing fee was not timely paid pursuant to Subparagraph (1)(c) of this Subsection.

La. R.S. 40:1231.8(A)(4) (emphasis added).

Importantly for this case, La. R.S. 40:1231.8(A)(5) has a provision that governs in those instances listed above in which the PCF's certified letter is unclaimed or is returned undeliverable:

(5) In the event that any notification by certified mail, return receipt requested, provided for in Paragraphs (3) and (4) of this Subsection, is not claimed or is returned undeliverable, **the board shall provide such notification by regular first class mail**, which date of mailing shall have the effect of receipt of notice by certified mail.

La. R.S. 40:1231.8(A)(5) (emphasis added).⁷

In La. R.S. 40:1231.8(A)(5), the legislature expressly requires that the PCF take additional action to give notice if the original notification is returned unclaimed or undeliverable. In such cases, the PCF must send the notification by regular first class mail, which shall constitute receipt of notice.

Had the legislature intended to require the PCF to follow up on an unclaimed or unreturned nine month letter by sending out notice via regular mail (or taking any other additional step), the legislature certainly could have done so. It did not. We find that La. R.S. 40:1231.8(A)(2)(c) does not require the PCF to take further action when a properly addressed nine month letter sent by certified mail is returned unclaimed.

Dr. Cheryl Williams also contends that she was deprived of due process because she did not actually receive notice that she could lose the right to review by a medical review panel. We disagree.

Due process does not demand that a party actually receive the notice, but rather that the method of service be reasonably calculated to give actual notice. *State v. \$1,480.00 in U.S. Currency*, 92-2808 (La. App. 4 Cir. 5/26/94), 637 So.2d 1255, 1256. Notice sent via certified mail to a correct address is reasonably calculated to give actual notice and satisfies due process. *Id.*

⁷ This provision was revised in La. Acts 2016, No. 275, § 1, after the medical malpractice complaint was filed. The revision does not change our analysis.

In any event, we find that Dr. Cheryl Williams received actual notice that she could be deprived of her right to a medical review panel if she did not timely act. On June 26, 2014, -- nearly one year before the PCF dismissed the medical review panel -- the PCF sent a letter to Dr. Cheryl Williams, via certified mail, return receipt requested, notifying her of the statutory requirement that the parties timely appoint an attorney chairman of the medical review panel:

You should now coordinate your efforts with parties involved or their counsel to select a chairman for the panel. Please notify this office immediately upon selection of the attorney chairman so that we may send an official notice of the appointment. If no amicable agreement can be reached, please advise this office immediately so that we may request a random listing of five attorney names from the Louisiana Supreme Court. **Please note that pursuant to R.S. 40:1299.47(A)(2)(c), an attorney chairman must be appointed within one year of filing of the request for review. Failure to timely appoint an attorney chairman will result in dismissal of the claim.** (Emphasis added.)

On June 30, 2014, the certified letter was delivered to Dr. Cheryl Williams's 8030 Crowder Blvd. address, and the return receipt was signed by "Bridgette Thompson." The record, therefore, establishes that Dr. Cheryl Williams had actual notice that the request for a medical review panel would be dismissed if the parties failed to timely appoint an attorney chairman. We find no violation of due process.

In sum, we conclude that the PCF properly dismissed the request for a medical review panel when the parties failed to timely appoint an attorney chairman. Accordingly, the trial court erred in sustaining the Exception of Prematurity filed by Dr. Cheryl Williams.

CONCLUSION

For the foregoing reasons, we reverse the trial court's July 17, 2017 judgment sustaining the Exception of Prematurity, and remand this matter for further proceedings consistent herewith.⁸

WRIT GRANTED; REVERSED; REMANDED

⁸ The Louisiana Patient's Compensation Fund Oversight Board (the "Oversight Board"), which intervened in this matter after the trial court's judgment, filed a "Response Brief" urging this court to reverse the trial court's judgment and remand the matter for the sole purpose of giving the Oversight Board "its day in court" on whether the trial court improperly ordered it to "re-open" the medical review panel. Because the Oversight Board did not file a supervisory writ application, we do not address its contention. *See Bryant v. United Servs. Auto. Ass'n*, 03-3491, p. 19 (La. 9/9/04), 881 So.2d 1214, 1225.