SUPREME COURT OF FLORIDA

Case No. 81,963

JOHN R. PATRY, and LINDA J. PATRY, individually and as parents and next friends of CHAD M. PATRY, a minor child,

Petitioners,

vs.

WILLIAM L. CAPPS, M.D., and WILLIAM L. CAPPS, M.D., P.A.,

Respondents.
_____/

BRIEF OF AMICUS CURIAE,
THE ACADEMY OF FLORIDA TRIAL LAWYERS

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Introduction

The Academy of Florida Trial Lawyers (Academy) submits this brief as amicus curiae in support of the petitioners, John R. Patry and Linda J. Patry, individually and as parents and next friends of Chad M. Patry, a minor child (Patry). The Academy is a statewide association of attorneys specializing in litigation, including personal injury and medical malpractice litigation. The Academy appears as amicus curiae in the instant case because the question certified to be of great public importance, i.e., whether the requirement in a medical malpractice action that notice be given by certified mail, return receipt requested, is (1) a substantive element of the statutory tort, or (2) a procedural requirement that can be disregarded by the trial court when the defendant receives actual written notice in a timely manner that results in no prejudice, is of great interest to the public and of great social significance and should be explored from all points of view. The Academy adopts the brief and arguments of Patry and respectfully urges this Court to quash the district court's decision that the Patrys' hand delivered written notice was insufficient because it was not served by certified mail, return receipt requested.

Preface

For purposes of this appeal, The Academy of Florida Trial Lawyers will be referred to as the "Academy." The petitioners John R. Patry and Linda J. Patry, individually and as parents and next friends of Chad M. Patry, a minor child, will be referred to collectively as "Patry." The respondents, William L. Capps, M.D., and William L. Capps, M.D., P.A. will be referred to as "Capps."

Statement of the Case and of the Facts

The Academy adopts by reference the Statement of the Case and of the Facts presented in the petitioners' initial brief.

Summary of Argument

The statutory requirement in a medical malpractice action that a pre-litigation notice be served by certified mail, return receipt requested is directory only with regard to the method of service. Therefore, actual written notice served by hand delivery, which the defendant acknowledges as received, is sufficient to comply with the statute.

Although the district court, in its certified question, phrases the inquiry in terms of whether the certified mail, return receipt requested method of service requirement is a (1) substantive element of the statutory tort, or (2) a procedural requirement that can be disregarded by the trial court when the defendant receives actual notice in a timely manner that results in no prejudice, the construction of this language is more properly viewed in terms of whether the word "shall" should be given a mandatory or directory connotation. Despite that the word "shall" usually has a mandatory construction, when the context of its usage and the legislative intent and purpose behind the statute indicate otherwise, "shall" should be interpreted as directory only.

In the instant case, the word "shall" as used with regard to the method of service provisions of section 766.106, Florida Statutes (1991), should be construed as directory. The legislature's intent in enacting section 766.106 was to attempt to accomplish medical malpractice reform by providing for a pre-litigation settlement process. Therefore, the pre-litigation

notice requirement itself is mandatory. However, the requirement that service of the notice be made by certified mail, return receipt requested, is directory only. It can be inferred that the legislature intended to provide a mechanism to allow reliable verification of the service of the notice of intent to initiate litigation. Because the timeliness of the service easily can be substantiated by other means, the method of service provision should be construed as directory. Thus, substantial compliance is all that is necessary to satisfy this provision.

Accordingly, the district court's decision that service of a written notice by actual hand delivery, which is acknowledged by the defendant, is insufficient under the statute and therefore requires dismissal should be quashed. Strict compliance is unnecessary when the statute is directory only.

Argument

The statutory requirement in a medical malpractice action that notice be given by certified mail, return receipt requested is directory only with regard to the method of service and, therefore, actual written notice served by hand delivery is sufficient to comply with the statute.

This case involves the following certified question of great public importance:

> WHETHER THE REQUIREMENT IN A MEDICAL MALPRACTICE ACTION THAT NOTICE BE GIVEN BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, IS (1) A SUBSTANTIVE ELEMENT OF THE STATUTORY TORT, OR (2) A PROCEDURAL REQUIREMENT THAT CAN BE DISREGARDED BY THE TRIAL COURT WHEN THE DEFENDANT RECEIVES ACTUAL NOTICE IN A TIMELY MANNER THAT RESULTS IN NO PREJUDICE.

See Patry v. Capps, 618 So.2d 261, 265-266 (Fla. 2d DCA 1993) (Altenbernd, J., dissenting).[1] The Academy of Florida Trial Lawyers (Academy) respectfully suggests that the certified question should be rephrased as follows:

> Whether the method of service requirement in a medical malpractice action that notice be served by certified mail, return receipt requested, is (1) mandatory and therefore requiring strict compliance, or (2) directory and therefore requiring only substantial compliance.

The Academy urges this Court to hold that the method of service requirement in a medical malpractice action that notice be given by certified mail, return receipt requested is directory and not mandatory. Thus, substantial compliance--not strict

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[1]The Second District Court of Appeal, in its order dated May 25, 1993, granted Patry's motion for certification "to the extent that the members of the panel join in the certified question contained in Judge Altenbernd's initial dissent."

compliance--satisfies the method of service requirement. In contrast, the notice requirement itself is mandatory.

The medical malpractice pre-litigation notice requirement is set forth in section 766.106, Florida Statutes (1991). The pertinent provisions of section 766.106 state that:

> (2) After completion of presuit investigation pursuant to s. 766.203 and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant and, if any prospective defendant is a health care provider licensed under chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466, the Department of Professional Regulation by certified mail, return receipt requested, of intent to initiate litigation for medical malpractice.
>
> * * * *
>
> (3)(a) No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant.
>
> * * * *
>
> (4) The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants.

(Emphasis added.)

In the instant case, the Patrys' child was born on May 30, 1988. He suffers from cerebral palsy and quadriplegia. Because of their child's condition, the Patrys retained an attorney to represent them in a possible medical malpractice against Dr. Capps, who delivered their child by caesarian section.

On May 30, 1990, the Patrys' attorney prepared a written notice of intent to initiate medical malpractice litigation and had it hand delivered to Dr. Capps' office. Dr. Capps has admitted under oath that he actually received the notice on May 31, 1990. However, it is undisputed that the notice was not sent by certified mail, return receipt requested pursuant to section 766.106(2) or its predecessor, section 768.57(2), Florida Statutes (1987).[2]

The trial court granted Dr. Capps motion to dismiss for the Patrys' failure to comply with the method of service requirements of section 766.106(2). The district court affirmed in a 2-1 decision, holding that hand delivery of written notice, which is acknowledged as received by the defendant, failed to comply with the requirement that the notice be served by certified mail, return receipt requested.

1. The proper construction of the method of service requirement set forth in section 766.106 depends upon whether it is a mandatory or directory provision.

The primary focus in the instant case is upon the language of section 766.106 that a medical malpractice claimant "shall notify each prospective defendant . . . by certified mail, return receipt requested, of intent to initiate litigation for medical malpractice." § 766.106(2), Fla. Stat. (1991). The

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[2]§ 768.57(2), Fla. Stat. (1987), states that "[p]rior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical malpractice."

proper construction of this statutory language depends on whether the word "shall," as it relates to the method of service, is considered mandatory or directory.

According to its normal usage, use of the word "shall" in a statute has a mandatory connotation. Drury v. Harding, 461 So.2d 104 (Fla. 1984); Neal v. Bryant, 149 So.2d 529 (Fla. 1962). Thus, when used in a statute, the word "shall" usually is intended to be mandatory rather than directory. Holloway v. State, 342 So.2d 966 (Fla. 1977); Goodson v. State, 392 So.2d 1335 (Fla. 1st DCA 1980). However, in proper cases and particularly so where required to conform to constitutional requirements, "shall" may be given a permissive or directory construction. Belcher Oil Co. v. Dade County, 271 So.2d 118 (Fla. 1972); Palm Springs General Hosp. Inc. v. State Farm Mut. Auto. Ins. Co., 218 So.2d 793 (Fla. 3d DCA 1969). Whether "shall" is mandatory or directory depends upon the context in which it is used and the legislative intent expressed in the statute. S.R. v. State, 346 So.2d 1018 (Fla. 1977).

Allied Fidelity Ins. Co. v. State, 415 So.2d 109, 111 (Fla. 3d DCA 1982), perhaps best summarized case law involving the differing connotations of the word "shall" when it stated that:

> Thus, for example, where "shall" refers to some required action preceding a possible deprivation of a substantive right, S.R. v. State, supra; Neal v. Bryant, supra; Gilliam v. Saunders, 200 So.2d 588 (Fla. 1st DCA 1967), or the imposition of a legislatively-intended penalty, White v. Means, 280 So.2d 20 (Fla. 1st DCA 1973), or action to be taken

> for the public benefit, Gillespie v. County of Bay, 112 Fla. 687, 151 So. 10 (1933), it is held to be mandatory. And, by the same reasoning, the permissive word "may" will be deemed to obligatory "[w]here a statute directs the doing of a thing for the sake of justice. . . ." Mitchell v. Duncan, 7 Fla. 13 (1857). But where no rights are at stake, Reid v. Southern Development Co., 52 Fla. 595, 42 So. 206 (1906), and only a non-essential mode of proceeding is prescribed, Fraser v. Willey, 2 Fla. 116 (1848), the word "shall" is said to be advisory or directory only.

Allied Fidelity involved a bail bond surety and the proper construction of section 903.26(2), Florida Statutes (1979), which provided that "[i]f there is a breach of the bond, the court shall declare the bond and any bonds or money deposited as bail forfeited and shall notify the surety agent and surety company in writing within 72 hours of said forfeiture. The forfeiture shall be paid within 30 days." (Emphasis added.) Written notices advising Allied of the forfeitures were sent but after the expiration of the 72-hour time period.

Allied argued that the word "shall" should be construed as mandatory. Thus, because the statutory procedure had not been followed, Allied argued that judgments could not be entered upon the forfeitures.

The district court rejected Allied's argument. After examining the statutory provision in the context of the entirety of Chapter 903 relating to bail, the court held that the legislature intended the 72-hour notice provision to accomplish the orderly and prompt conduct of the court's business. Therefore, the district court held that the word "shall" was

directory only and that the failure to deliver the written notice within the time period did not prevent judgments from being entered on the forfeitures.

Likewise, a statutory requirement that the Public Service Commission shall hold a hearing within 180 days from the date a public utility filed a notice of proposed changes in rates was found directory only in Lomelo v. Mayo, 204 So.2d 550 (Fla. 1st DCA 1967). There, the public utility's position was that, because the Public Service Commission had failed to hold a hearing within the 180-day time period, the commission lacked jurisdiction to further consider the proposed changes or take any action thereon.

The district court rejected the public utility's construction of the statute. In reaching its decision, the court observed that, when the word "shall" was used in statutes which specified procedures which were required to be followed before the persons directly affected could be deprived of their property or right to employment, it should be construed as mandatory. E.g. Neal v. Bryant; Gilliam v. Saunders, 200 So.2d 588 (Fla. 1st DCA 1967). On the other hand, when "a particular provision of a statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of a statute are given with a view to the proper, orderly, and prompt conduct of business merely, the provision may generally be regarded as directory." Lomelo, 204 So.2d at 553 (emphasis added).

The tests set forth in Lomelo and Allied Fidelity follow that set forth in 82 C.J.S. Statutes § 376 (1953). There, it is stated that:

> Whether a statute is mandatory or directory depends on whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form, and what is a matter of essence can often be determined only by judicial construction. Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition; and a statute is regarded as directory where no substantial rights depend on it, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than that prescribed, with substantially the same results.

82 C.J.S. Statutes § 376 (1953)(emphasis added).

Accordingly, in determining whether strict compliance with the method of service provisions in section 766.106 is statutorily mandated, a court should examine whether the provision is mandatory or directory. Often times the word "shall" may have a permissive or directory connotation depending upon the context and legislative intent in enacting the particular provision. If "shall" refers to a possible deprivation of rights, imposition of a penalty, action to be taken for public benefit, or the protection of the public, it should be construed as mandatory. In contrast, if "shall" refers to the proper, orderly, and prompt conduct of business where the

legislature's purpose can be accomplished in a manner other than that prescribed with substantially the same results, it should be construed as directory only.

2. Directory statutes require only substantial compliance, not strict compliance.

When a court construes a statutory provision to be directory, substantial compliance with the provision, and not strict compliance, is all that is needed to be sufficient. Schneider v. Gustafson Indus., Inc., 139 So.2d 423 (Fla. 1962); Wilson v. School Bd., 424 So.2d 16 (Fla. 5th DCA 1982), review denied, 434 So.2d 888 (Fla. 1983); see also 82 C.J.S. Statutes § 374 (1953)("A mandatory provision in a statute is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding."). As the district court in Wilson aptly stated "[w]hether or not a provision is mandatory or directory, whether almost is going to be good enough, depends on the court's analysis of the history and subject matter of the statute not complied with." 424 So.2d at 19 (emphasis added).

Wilson involved a class action challenge by affected taxpayers to the validity of the Marion County School Board's levy of a discretionary two mil tax. The taxpayers claimed that the tax was invalid because of numerous defects in the statutorily-required notice provisions, including defects in the size and number of newspaper advertisements notifying the public

of the intended tax increase and defects in the content of the advertisements. The school board responded by arguing that the statutory provisions were directory, that any defects were not material, and that it had substantially complied with the basic format and requirements of the statutes.

The district court rejected the school board's arguments, holding that certain of the statutory provisions were mandatory. The court noted that "[i]f the provision not complied with was intended for the protection of the taxpayer, or to prevent a sacrifice of his property, courts construe such statutes as requiring strict compliance even though the language used is not particularly mandatory." Wilson, 424 So.2d at 19. Because of the school board's failure to follow the notice and content requirements, therefore, the court struck down the tax as invalid.

Importantly, however, the district court observed that certain of the defects would not be considered mandatory but rather directory. Indeed, the court opined that statutory provisions (1) requiring that a public meeting "shall" be within 75 days of certification but not sooner than 60 days and (2) requiring the school board meeting take place in the office of the superintendent of a room nearby designated unless due public notice was given "were technical and they did not strike at the essence of the process involved in making this extraordinary levy." Wilson, 424 So.2d at 20.

Thus, if a statutory provision is construed to be mandatory, strict compliance is required to satisfy the provision. Conversely, if a statutory provision is construed to be directory, substantial compliance is all that is required to satisfy the provision. It should be noted that a statute can have both mandatory and directory language. Belcher Oil Co.; Wilson.

3. The provision of section 766.106 requiring notice of intent to initiate medical malpractice litigation to be served by certified mail, return receipt requested is directory and, therefore, substantial compliance is all that is necessary to satisfy the provision.

When the notice, and method of service of that notice, provisions of section 766.106 are examined in light of the legislative history, intent, and purpose in enacting those provisions, the following statutory construction is required. To begin with, it is obvious that the notice requirement itself is mandatory. Thus, failure to provide notice within the statutory limitation period requires dismissal of the action. See Williams v. Campagnulo, 588 So.2d 982 (Fla. 1991); § 766.106(4), Fla. Stat. (1991); § 95.11(4)(b), Fla. Stat (1991).

On the other hand, the method of service provision should be construed as directory only. Thus, the failure to strictly comply with its requirements does not require dismissal of the action. Angrand v. Fox, 552 So.2d 1113 (Fla. 3d DCA 1989); see Phoenix Ins. Co. v. McCormick, 542 So.2d 1030 (Fla. 2d DCA 1989). Accordingly, where service of written notice is made

by hand delivery instead of certified mail, return receipt requested, and the defendant has acknowledged receipt of the notice, the claimant has sufficiently complied with the statute.

Reference must first be made to the legislative history, intent, and purpose in enacting section 766.106. The applicable language of section 766.106 initially was set forth in section 768.57. Section 768.57 was enacted as a part of a comprehensive attempt at medical malpractice tort "reform." See Ch. 85-175 (1985) Fla. Laws 1180. The legislature intended the statute to establish a process to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding. The pre-litigation notice requirement, which tolls the statute of limitations to afford the parties an opportunity to settle their dispute, has been viewed as a major factor in the settlement process. Campagnulo, 588 So.2d at 983.

The provisions of section 768.57 were amended to create section 766.106 in 1988. See Ch. 88-277 (1988) Laws of Fla. 1422. Chapter 88-277 was another comprehensive attempt at medical malpractice reform. The only pertinent changes to the original language of section 768.57 was the addition of a requirement of presuit investigation and a requirement that notice be sent to the Department of Professional Regulation. The requirement that the claimant serve notice by certified mail, return receipt requested remained unchanged.

Notably, there are two other provisions requiring notification of responses to be served by certified mail, return receipt requested in section 766.106. In addition to the method of service of the pre-litigation notice specified in section 766.106(2), subsection (3)(c) provides that the defendant's response to the plaintiff's claim "shall be delivered . . . by certified mail, return receipt requested." § 766.106(3)(c), Fla. Stat. (1991). And subsection (10) provides that the plaintiff "shall respond in writing . . . by certified mail, return receipt requested" to the defendant's offer to admit liability and submit the damages issue to arbitration. § 766.106(10), Fla. Stat. (1991). It can be inferred from these three references to a method of service that the legislature wished to permit reliable verification of timely service. The question remains, however, as to whether the statutorily-required method of service is essential to accomplish the legislative purpose of medical malpractice reform by establishing a pre-litigation settlement process or whether it is a matter of form used to facilitate the orderly and prompt conduct of the settlement process by establishing a method to verify service.

Such a distinction is crucial in determining a proper construction of whether the method of service provisions are mandatory or directory. Referring to the tests set forth in Allied Fidelity, Lomelo, and Wilson, the method of service provisions do not involve an action preceding a substantive right or right to employment, the imposition of a legislatively-

intended penalty, the doing of an action for the sake of justice, the protection of a taxpayer, or an action to be taken for the public benefit.

Thus, the method of service provisions do not appear to be mandatory. Instead, the method of service provisions can more appropriately be considered to concern the proper, orderly, and prompt conduct of the medical malpractice pre-suit settlement process. As such, the provisions are directory only. Therefore, strict compliance is not required to satisfy the service provision.

Such a conclusion is demonstrated by the harsh and absurd results that would occur if the method of service provisions were determined to be mandatory and, thus, requiring strict compliance. A cardinal maxim of statutory construction is that no literal interpretation should be given a statute which leads to an unreasonable or ridiculous conclusion, or a result that does not accurately reflect legislative intent. Holly v. Auld, 450 So.2d 217 (Fla. 1984); Palm Springs General Hosp.

If the three separate method of service provisions were construed to be mandatory and, therefore, requiring strict compliance, the following methods of service would be ineffective.

1. Service of process by a qualified process server.
2. Service of process by the county sheriff.
3. Service by certified mail but no return receipt requested.
4. Registered mail.

5. Actual hand delivery of written notice, receipt acknowledged by the defendant or plaintiff.

6. Service by regular mail, receipt acknowledged by the defendant or plaintiff.

7. Service by Federal Express, United Parcel Service, or some other overnight service, receipt acknowledged by the defendant or plaintiff.

8. Service by facsimile, receipt acknowledged by the defendant or plaintiff.

However, service by certified mail, return receipt requested that is not even received by the defendant or plaintiff would comply with the notice provisions. Zacker v. Croft, 609 So.2d 140 (Fla. 1992). The legislature could not have possibly intended such an absurd and unreasonable construction of the method of service provisions. The purpose of the notice requirement is to notify prospective defendants of medical malpractice claims to promote settlement of such claims, when appropriate, and not to function as a trap for medical malpractice claimants. Zacker.

In fact, each of the abovementioned eight methods of service would satisfy the need to provide a process for reliable verification of timely service. As previously noted, where the legislative purpose can be accomplished in a manner other than that prescribed, with substantially the same results, it is generally regarded as directory. See 82 C.J.S. § 376 (1953). It follows that any of these eight methods, which substantially comply with the statute and accomplish the same purpose as service by certified mail, return receipt requested, would satisfy the method of service provision set forth in section 766.106(2).

In addition, it should be remembered that the method of service provisions appear in three separate locations within section 766.106. Assuming arguendo that the service provisions were mandatory, strict compliance would be required. Thus, if strict compliance is required when the claimant serves her notice, strict compliance also is required when the defendant serves his response. Accordingly, if the defendant's response was not served by certified mail, return receipt requested, a strong argument can be made that the defendant would lose his right to present defenses in the case. See § 766.106(3)(a), Fla. Stat. (1991)("Unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses.") At the very least, the defendant's failure to strictly comply with the method of service provisions would be deemed a final rejection of the plaintiff's claim. Any settlement efforts could then be nullified. Such a result would further contradict the legislature's intent of encouraging pre-litigation settlement of medical malpractice cases.

Similarly, if the plaintiff fails to respond by certified mail, return receipt requested to the defendant's offer to admit liability and submit the matter of damages to arbitration, a question is raised as to whether the plaintiff can bring suit, whether the statute of limitations is tolled for another 60 days, or whether the plaintiff has waived recourse to any other remedy. See §§ 766.106(10), (a), (b), Fla. Stat. (1991). Such a quandary would result despite the plaintiff's

unequivocal response served upon the defendant in some other fashion because substantial compliance would be ineffective given a mandatory construction of the statutory language.

Therefore, to avoid absurd and unreasonable results, a directory rather than mandatory construction should be given to the method of service provisions of section 766.106. Service by certified mail, return receipt requested is not essential to the legislature's purpose of reducing medical malpractice costs by providing for a less adversarial, pre-litigation settlement process. In contrast, the method of service provisions relate to the form and procedure of the settlement process and can be satisfied by use of several different methods of service that provide reliable verification of timely service.

Although without discussing the distinction between mandatory and directory statutes, Agrand reached the same result. There, the plaintiffs served several doctors, some by certified mail, return receipt requested and others by regular mail. The district court held that service by regular mail was not fatal to the plaintiffs' claims against the other doctors, stating that:

> While service was made on Drs. Fox and Key by certified mail, return receipt requested, as provided in section 768.57(2), Dr. Harari and the Diskin-Porter partnership were served, if at all, only by ordinary mail. It seems clear that a deviation from the mode of service specified in the statute is not fatal to the plaintiff's claim, so long as the defendants in question actually receive the notice. See Phoenix Ins. Co. v. McCormick, 542 So.2d 1030 (Fla. 2d DCA 1989). Any dispute on that issue must be resolved after remand.

Agrand, 552 So.2d at 1114, n.4.

In addition, Phoenix Ins. examined a similar provision and determined that strict compliance was unnecessary. In reaching its decision, the court stated that:

> While an insured could easily be prejudiced by an insurance carrier's delay in determining its duty of defense, no prejudice results from a notice actually delivered by one method rather than another. The statutory language concerning notice by certified mail, registered mail, or hand delivery eliminates problems in proving that the insured received actual notice. When the insured admits actual notice, however, strict compliance is not required. The statute would allow an insurance carrier to properly deny coverage by certified letter sent to the last known address of the insured, even it the insured did not actually receive the notice. We will not interpret the statute to permit a denial of coverage upon constructive notice and to preclude such a denial on actual notice.

Phoenix Ins., 542 So.2d at 1032; accord Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F.Supp. 1541 (S.D. Fla. 1987); Lazzara Oil Co. v. Columbia Casualty Co., 683 F.Supp. 777 (M.D. Fla. 1988).

Furthermore, cases involving the mechanic's lien statutes have reached a similar conclusion. In Bowen v. Merlo, 353 So.2d 668 (Fla. 1st DCA 1978), the court held that service of a claim of lien by regular mail instead of certified or registered mail sufficiently complied with the provisions of section 713.18(1)(c), Florida Statutes (1977). The court observed that notice was the important element of the statute and that the defendant actually had received the notice of claim.

Thus, the notice provision was satisfied. See also Blosam Contractors, Inc. v. Joyce, 451 So.2d 545 (Fla. 2d DCA 1984)(mailing of notice of mechanics lien to a corporation instead of an officer, director, managing agent, or business agent as required by statute substantially complied with the required service of notice).

The legislature's purpose in enacting section 766.106 was to provide for medical malpractice reform by encouraging pre-litigation settlement negotiations. The requirement that the notice of intent to initiate medical malpractice litigation be served by certified mail, return receipt requested, is not essential to this purpose. Rather, as previously discussed, it can be inferred that the legislature's intent in enacting a method of service requirement was to provide for reliable verification of timely service. As previously discussed, the legislature's intent can be accomplished through a variety of methods in addition to that set forth in section 766.106(2). Accordingly, use of the word "shall," as it relates to the method of service requirements in section 766.106(2), should be considered as directory only. Thus, strict compliance is not necessary to satisfy this provision.

Such a construction of the method of service requirements of section 766.106 would indicate that Solimando v. International Med. Centers, 544 So.2d 1031 (Fla. 2d DCA 1989), was incorrectly decided. There, the district court held that statutory notice by regular mail, which was acknowledged as

received by some defendants, was insufficient for failing to strictly comply with section 766.106(2). Regular mail, which would have a postage stamp indicating the date of mailing, could provide reliable verification of the service date of the pre-litigation notice in certain circumstances.[3]

Accordingly, where service of written notice has been accomplished by hand delivery and receipt has been acknowledged by the defendants, the Patrys have sufficiently complied with the requirements of section 766.106(2). Therefore, the district court's decision that the Patrys' action should be dismissed for failure to strictly comply with the method of service provisions set forth in section 766.106(2) should be quashed.

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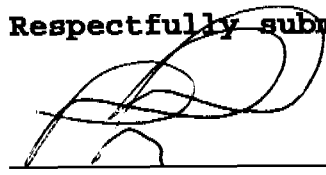
[3]Glineck v. Lentz, 524 So.2d 458 (Fla. 5th DCA 1988), involved actual oral notice of intent to initiate medical malpractice litigation. There, the court held that oral notice did not sufficiently comply with § 766.106, Fla. Stat. (1991). It is questionable whether the oral notice would satisfy the method of service requirements set forth in section 766.106. Although the oral notice in this case apparently triggered the presuit settlement and discovery processes, it is doubtful that the oral notice would substantially comply with the written notice requirement.

Conclusion

Based upon the aforementioned arguments and authorities, the Academy joins in with the petitioners and respectfully urges this Court to quash the district court's decision that the Patrys' hand delivered written notice, which was acknowledged as received by the defendants, was insufficient because it was not served by certified mail, return receipt requested.

Respectfully submitted,



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Lawyers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **TED R. MANRY, III, ESQUIRE** and **STEPHEN H. SEARS, ESQUIRE**, Macfarlane, Ferguson, Post Office Box 1531, Tampa, Florida 33601; **RICHARD A. BOKOR, ESQUIRE**, 230 East Davis Boulevard, Tampa, Florida 33601; **MARK LIPINSKY, P.A.**, 518 12th Street West, Bradenton, Florida 34205; and **ROY D. WASSON, ESQUIRE**, Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130 on this the 30th day of July, 1993.

Loren E. Levy