IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,963

JOHN R. PATRY and LINDA 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.

ON CERTIFIED QUESTION FROM THE SECOND DISTRICT
COURT OF APPEAL OF THE STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENTS

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INTRODUCTION

This Answer Brief is respectfully submitted by Respondents, William L. Capps, M.D. and William L. Capps, M.D., P.A. ("Capps"). Petitioners will be referred to as "Patry." Amicus Curiae, the Academy of Florida Trial Lawyers, will be referred to as "Amicus." (R. ___) will refer to the Record. The decision sought to be reviewed is Patry v. Capps, 618 So.2d 261 (Fla. 2nd DCA 1993). Following denial of rehearing and rehearing en banc, the Second District Panel certified the following question to this Court:

> 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.

RESTATEMENT OF THE CASE AND FACTS

As noted in Patry's Initial Brief on the merits, since the outset of this appeal the parties have referred to §766.106(2), Florida Statutes (1989). As this action was predicated upon events transpiring and arising on May 30, 1988, technically, the statute as previously codified in §768.57(2), Florida Statues (1987) applies and states in pertinent part:

> Prior 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. (Emphasis added).[1]

[1] This mandatory requirement is carried forward to the present §766.106(2), Fla. Stat. (1991).

The complaint initiating suit was filed on October 26, 1990. (R. 1-6). It is undisputed that Trial Counsel for Patry only hand delivered a letter to the receptionist at Capps' office, at 4:45 p.m., on May 30, 1990. This was accomplished by an employee of Trial Counsel for Patry. (R. 13-14, 77-78).

Capps' insurer initially responded to the letter on June 15, 1990 requesting information, and the matter was forwarded to Counsel for Capps. (R. 79-81). On June 29, 1990, upon receipt and review of the file, and discovery of the defect, Capps' Counsel informed Trial Counsel for Patry that the notice had not been served in accordance with the statute, and reserved all rights with respect to the faulty notice:

> Please be advised that your notice of intent letter was not properly served on Dr. Capps or his professional association in that it was not sent by certified mail, return receipt requested, as specifically required by F.S. §766.106. All rights are specifically reserved with respect thereto. CNA's duty to its insured requires that the subject claim be fully and completely investigated; however, Dr. Capps and his professional association specifically reserves all rights with respect to your faulty notice and nothing that they do in the investigation of this claim shall be construed as a waiver of their rights and liabilities as provided in the medical malpractice acts. (R. 82).

At no time during the pre-suit screening activities, or after filing of the suit, did Trial Counsel for Patry object to this reservation or contend that the reservation was not operative to preserve the issue of the notice. To the contrary, during the pendency of the pre-suit screening period, Trial Counsel for Patry and Capps entered into the following stipulation to extend the

screening period for 30 days prior to its scheduled expiration on September 27, 1990:

> STIPULATION TO EXTEND PRE-SUIT SCREENING PERIOD
>
> STEPHEN H. SEARS and RICHARD A. BOKOR hereby agree pursuant to the provisions of F.S. §766.106 that the pre-suit screening period for the claim of Linda and John Patry, and Chad Patry their son is extended 30 days and shall expire on Thursday, September 27, 1990. The parties further agree, as provided in F.S. §766.106, that the Patry's may have 60 days from thereof within which to file suit provided that nothing herein shall operate as a waiver of any defenses otherwise available to Dr. Capps by virtue of any failure to comply with the requirements of F.S. §766.106 et seq. and including but not limited to the alleged failure to send the "Notice of Intent" letter to Dr. Capps by certified mail, return receipt requested. (R. 28).

Paragraph 2 of the Complaint filed October 26, 1990, against Capps and Humana Hospital of Florida, Inc., specifically alleged compliance with §766.106:

> (2) Pursuant to the provisions of F.S. 766.106, all conditions precedent have been performed or have occurred prior to the bringing of this action. (R. 1).

Capps' answer denied the Complaint's specific representation of compliance with §766.106. The form of this denial also included a denial because of lack of knowledge as to any notice to the hospital:

> Deny, or without knowledge, and therefore denied. (R. 21).

Ultimately, it became clear that the statute of limitations had to have run. On February 27, 1991, the Court granted Patry's Motion to Amend the Answer to allow the assertion of the defense of

statute of limitations. (R. 70-71). Capps' Motion for Summary Judgment was filed September 10, 1991. (R. 11-12).

The Trial Court heard the Motion for Summary Judgment on November 15, 1990 and entered the following Order (R. 15-16):

> ORDER DISMISSING COMPLAINT AGAINST WILLIAM L. CAPPS ,M.D. AND WILLIAM L. CAPPS, M.D., P.A.
>
> This cause came on for hearing on November 15, 1991 on Defendants' WILLIAM L. CAPPS, M.D., AND WILLIAM L. CAPPS, M.D., P.A., Motion for Summary Judgment. The parties agree that a Notice of Intent to Initiate Litigation was hand delivered to Dr. Caps' office on May 30, 1990. The parties agree that Dr. Capps did not personally receive the Notice of Intent to Initiate Letter until May 31, 1991. The parties further agree that neither Dr. Capps nor his Professional Association were provided such Notice by certified mail, return receipt requested.
>
> After having heard extensive argument of counsel for the parties, the Court concludes that the requirements of F.S. §766.106 are substantive and not procedural. Williams v. Campagnulo, 16 FLW S663. The Court further finds that failure to comply with the requirements of F.S. §766.106 requires dismissal of this action. Williams at p. 663. The Court further finds that delivery of the notice by hand does not comply with the substantive and mandatory requirements of F.S. §766.106. See generally, Solimando v. IMC, 544 So.2d 103 (2 DCA 1989) (ordinary mail not sufficient). Nonetheless, while the Court does not have jurisdiction by virtue of the failure to comply with the requirements of F.S. §766.106, the Court does have subject matter jurisdiction of medical malpractice actions generally. Solimando v. IMC, at p. 1033.
>
> It is therefore
>
> ADJUDGED AND ORDERED AS FOLLOWS:
>
> 1. Inasmuch as the Plaintiffs have failed to comply with the substantive and mandatory

provisions of F.S. §766.106, Plaintiffs' Complaint is dismissed as to WILLIAM L. CAPPS, M.D. AND WILLIAM L. CAPPS, M.D., P.A.

2. Plaintiffs shall have leave to file an Amended Complaint against Dr. Capps and his Professional Association after Plaintiffs have complied with the mandatory requirements of F.S. §766.106.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida, this 22nd day of November, 1991.

/s/ J. Rogers Padgett

Circuit Court Judge

On November 27, 1991, Patry filed a Motion for Rehearing which raised, for the first time, this Court's decision in Ingersoll v. Hoffman, 589 So.2d 223 (Fla. 1991), which had been issued September 26, 1991. (R. 17-20). This was the first attempt by Trial Counsel for Patry to attack the sufficiency of the preservation of the notice issue in the Trial Court. At a hearing held on December 10, 1991 (R. 40-59), the Trial Court denied the motion by Order dated December 12, 1991. (R. 29-30).

Because the statute of limitations had run, the Trial Court had previously entered a Final Judgment on December 9, 1991 (R. 24-25).

FINAL JUDGMENT DISMISSING COMPLAINT AGAINST WILLIAM L. CAPPS, M.D. AND WILLIAM L. CAPPS, M.D., P.A.

This cause came on for hearing on November 15, 1991 on Motion for Summary Judgment filed by Defendant, WILLIAM L. CAPPS, M.D., and WILLIAM L. CAPPS, M.D., P.A. This Court being fully advised in the premises, entered an Order Dismissing Complaint against WILLIAM L. CAPPS, M.D. and WILLIAM L. CAPPS, M.D., P.A. (copy

attached hereto and made a part hereof by reference) in accordance with the applicable law as this Court understands same.

This Court further finds that the Plaintiffs cannot now send a timely Notice of Intent to Initiate Litigation to Defendants at this time because the Statute of Limitations has now expired: therefore, based on the foregoing and based upon the Order Dismissing Complaint against WILLIAM L. CAPPS, M.D. and WILLIAM L. CAPPS, M.D., P.A. entered by this Court on November 22, 1991 and attached hereto; this Court now has no alternative but to enter this Final Judgment of Dismissal With Prejudice for failure to comply with the mandatory requirements of §766.106 which, in this Court's view, demands that Notice of Intent to Initiate Litigation be sent by certified mail to Defendants since this Court has previously found that a Notice of Intent to Initiate Litigation sent by Hand Delivery and received by Dr. Capps' office on May 30, 1990 does not and did not comply with the substantive and mandatory requirements of F.S. 766.106.

DONE AND ORDER in Chambers this 9th day of December, 1991.

/s/ J. Rogers Padgett

CIRCUIT COURT Judge

Because this Final Judgment had been entered on the previous day, the Trial Court, at Counsel for Patry's request, elected to treat the motion for rehearing on the original Order dismissing the Complaint without prejudice as a motion under Florida Rule of Civil Procedure, 1.540. (R. 57-59).

On appeal to the Second District Court of Appeal, only initial and Answer Briefs were filed. Trial Counsel for Patry raised two issues:

I. DOES THE FAILURE BY A MALPRACTICE DEFENDANT TO DENY SPECIFICALLY AND WITH PARTICULARITY PLAINTIFFS' FAILURE TO COMPLY TIMELY WITH THE NOTICE REQUIREMENTS OF F.S. 766.106 WAIVE SUCH DEFENSE?

II. IS HAND DELIVER OF A NOTICE LETTER PURSUANT TO F.S. 766.106 SUFFICIENT COMPLIANCE WHEN THE MALPRACTICE DEFENDANT ADMITS ACTUAL NOTICE AND DELIVERY?

However, at oral argument Trial Counsel for Patry attempted for the first time in the action to orally raise an estoppel based upon the correspondence from Capps' insurer to Trial Counsel for Patry prior to the time the file was delivered to Counsel for Capps (R. 79-80). This was based upon an argument acknowledged but not decided in Ingersoll, 589 So.2d at 224.[2]

Additionally, at oral argument Trial Counsel for Patry admitted that the failure to comply with the statutory mandate was not a mistake or an inadvertence, but was a conscious disregard of the statutory mandate requirement of "certified mail, return receipt requested."

Following issuance of the opinion on March 19, 1993, Patry v. Capps, 618 So.2d 261 (Fla. 2nd DCA 1993), new additional appellate counsel filed extensive motions for rehearing, rehearing en banc and certification to this Court. Again, for the first time, the motion for rehearing attempted to directly attack the efficacy of the Legislature's choice of "certified mail, return receipt requested."

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[2] Similarly, that issue was addressed but not decided in Solimando v. International Medical Centers, H.N.O., 544 So.2d 1041 (Fla. 2nd DCA 1989), pet. dis'md. 549 So.2d 1013 (Fla. 1989).

The Second District denied all motions for rehearing, but the Panel certified the aforementioned issue to this Court.

RESTATEMENT OF THE ISSUES PRESENTED

I. IS THE CLEAR MANDATE OF THE LEGISLATURE REGARDING SERVICE OF PRE-SUIT NOTICE IN A MEDICAL MALPRACTICE ACTION BY "CERTIFIED MAIL, RETURN RECEIPT REQUESTED" TO BE GIVEN ITS NATURAL MEANING AND EFFECT?

II. WAS THE SECOND DISTRICT COURT OF APPEAL CORRECT IN UNANIMOUSLY HOLDING THAT CAPPS DID NOT WAIVE HIS OBJECTION TO THE SERVICE OF THE NOTICE OF INTENT?

SUMMARY OF ARGUMENT

I.

The hand delivery of the Notice of Intent to Initiate Litigation was not in compliance with the mandatory provisions of §768.57(2), Florida Statutes (1987). The statute is a valid, mandatory condition precedent to suit.

Where the language of a Legislative act is clear and unambiguous this Court must give effect to its plain and obvious meaning. The Legislature chose "certified mail, return receipt requested," because of the role of the pre-suit notice in tolling of the statute of limitations, as well as establishing the time from which all subsequent events and actions, including the filing of a complaint, would run. In seeking to minimize litigation over the establishment of this vital date, the Legislature chose a cost efficient and simple procedure to accomplish two vital things: (1) verification of service of the notice (2) by an independent third party.

Trial Counsel for Patry's conscious decision to disregard the statute, as admitted before the Second District, should not serve as a basis for the courts to disregard a valid legislative act which has been emphasized by this Court's adoption of the same provision in Florida Rule of Civil Procedure, 1.650.

II.

There has been no waiver under Ingersoll v. Hoffman, 589 So.2d 223 (Fla. 1991). Trial Counsel for Patry intentionally chose not to comply with the statute. Counsel for Capps, upon receipt of the file from Capps' insurer, immediately notified Trial Counsel for Patry and reserved all rights. Although contending in argument in the Second District that the statute of limitations had not run at time of service of the notice, Trial Counsel for Patry still did nothing to cure the error.

Any waiver entails a voluntary relinquishment of a known right. The actions of Counsel for Capps in notifying Trial Counsel for Patry of the deficiency of the notice, and his subsequent actions, represent the antithesis of any waiver. Unlike Ingersoll, upon the filing of suit, Trial Counsel for Patry specifically alleged compliance with §766.106, Florida Statutes (1989). Counsel for Capps' denial of that specific allegation preserved the issue under the circumstances of this case.

ARGUMENT

I.

THE LEGISLATIVE INTENT IS UNAMBIGUOUSLY REVEALED BY THE LANGUAGE OF §768.57(2), FLORIDA STATUTES (1987). THIS INTENT EVIDENCES A VALID LEGISLATIVE POLICY WHICH SHOULD NOT BE CHANGED BY THIS COURT.

Patry asserts that this Court can disregard the unambiguous language of §768.57(2), Florida Statutes (1987) (quoted, supra p. 1; now §766.106(2), Florida Statutes (1989)), by adopting a "substantial compliance" or "actual notice" standard which would nullify the requirement of " . . . certified mail, return receipt requested . . .". Both Patry and Amicus ignore previous decisions by this Court and the majority of the District Courts of Appeal which have rejected concepts of "actual notice," or "substantial compliance," be it written or oral, as a substitute for §768.57(2).

Neither Patry or Amicus argue that there is any ambiguity in the Legislature's mandate. In attempting to ignore the separation of powers doctrine and have this Court substitute another policy for that of the Legislature, Patry and Amicus ignore long-standing fundamental principles reiterated in Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984). In adhering to the Legislature's intent as embodied in the plain wording of §768.40(4), Florida Statutes (1977), regarding the discovery privilege with respect to actions of the credentials committee of a health care provider, this Court stated:

> Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern Legislative intent from ambiguously worded statutes. However,

> [w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for restoring to the rules of statutory interpretation and construction; the statute must be given its plan and obvious meaning.

A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931). See also, Carson v. Miller, 370 So.2d 10 (Fla. 1979); Ross v. Gore, 48 So.2d 412 (Fla. 1950). It has also been accurately stated that courts of this state are

> without power to construe an unambiguous statute in a way which would extend, modify or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.

American Bankers Life Assurance Company of Florida v. Williams, 212 So.2d 777, 778 (Fla. 1st DCA 1968) (Emphasis added). It is also true that a literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion. Johnson v. Presbyterian Homes of Synod of Florida, Inc., 239 So.2d 256 (Fla. 1970). Such a departure from the letter of the statute, however, "is sanctioned by the courts only when there are cogent reasons for believing that the letter [of the law] does not accurately disclose the [legislative] intent." State ex rel. Hanbury v. Tunnicliffe, 98 Fla. 731, 735, 124 So. 279, 281 (1929).

The district court conceded that it was "arguable" that Dr. Auld sued Dr. Holly for a matter that was the subject of review and evaluation by the credentials committee, thus making the discovery privilege of section 768.404(4) applicable. 418 So.2d at 1025. The court went on, however, to reason that the policy in favor of broad discovery compelled a narrow construction of any statute which limited a litigant's right to discovery. Id. There are, however, substantial legislative

> policy reasons to restrict discovery of hospitals' committee proceedings and it is not the court's duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court. See McDonald v. Roland, 65 So.2d 12 (Fla. 1953). (Emphasis added).

Certainly, the mere fact that the Legislature could have chosen another form of service, or that problems might arise with respect to "certified mail, return receipt requested," as they from to time arise with respect to all other methods of service of legal papers, does not suffice to show that honoring the Legislature's intent leads to an unreasonable or ridiculous result. The arguments raised by Patry and Amicus do not present cogent reasons to disregard the plain meaning of the statute as " . . . not accurately disclosed[ing] the [legislative] intent." Holly, supra. They constitute strawman arguments and mere excuses to ignore " . . . clearly expressed legislative intent in order to uphold a policy [which they urge should be] favored by the Court." Holly, supra.

By now it must be recognized that the regulation of medical malpractice actions and the statute of limitations have become primarily matters of Legislative policy as reflected by the statutory enactments. As stated in King v. Pearlstein, 592 So.2d 1176 (Fla. 2nd DCA 1992) in addressing the clear language of §768.595(2), Florida Statutes (1987), absent a compelling reason:

> The words of a statute are to be given a plain and ordinary meaning, since it is assumed that the legislature knew the meaning of words when it chose to include them in the statute.

Again, as recently stated by this Court in Silva v. Southwest

Florida Blood Bank, Inc., 601 So.2d 1184:

> . . . our initial responsibility when construing a statute is to give the words their plain and ordinary meaning.
>
> > In making a judicial effort to ascertain the legislative intent implicit in a statute, the courts are bound by the plain and definite language of the statute and are not authorized to engage in semantic niceties or speculations. If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended.[3]
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> 375 So.2d at 1098-99 (quoting Tropical Coach Line, Inc. v. Carter, 1212 So.2d 779, 782 (Fla. 1960)). A court must not resort to sources outside a statute to interpret clear unambiguous words the legislature chose to employ. Shelby Mut. Ins. Co. v. Smith, 556 So.2d 393, 395 (Fla. 1990).
>
> [601 So.2d at 1186-1187].
>
> * * *
>
> . . . only when a statute is ambiguous will we attempt to divine the legislative intent from sources extrinsic to the statutory language. Having found the statutory language it should be accorded its plain meaning, we need go no further.
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> [601 So.2d at 1188].

Heretofore, this Court and the majority of the District Courts have rejected attempts to avoid the legislative mandates embodied

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[3] Quoting Durden v. American Hospital Supply Corp., 375 So.2d 1096 (Fla. 3rd DCA 1979), cert. denied 386 So.2d 633 (Fla. 1980).

in the plain words of the statute. In so doing, these decisions have recognized the Legislature's prerogative and purpose in placing reasonable, but specific, conditions and requirements upon litigants. E.g., Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3rd DCA 1986); Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2nd DCA 1986), pet. denied 511 So.2d 299 (Fla. 1987); Solimando v. International Medical Centers, H.M.O., 544 So.2d 1031 (Fla. 2nd DCA 1989), pet. dism'd 549 So.2d 1013 (Fla. 1989); Glineck v. Lentz, 524 So.2d 458 (Fla. 5th DCA 1988); Hospital Corporation of America v. Lindberg, 571 So.2d 446 (Fla. 1990); Ingersoll v. Hoffman, 589 So.2d 223 (Fla 1991); Novitsky v. Hards, 589 So.2d 404 (Fla. 5th DCA 1991); Williams v. Campagnulo, 588 So.2d 982 (Fla. 1991).

These decisions, either implicitly or explicitly, recognize that the Comprehensive Medical Malpractice Reform Act of 1985, as amended from time to time, represents a valid exercise of legislative policy infused with the public interest.

In Knuck, the Third District held that failure to serve the notice prior to the complaint did not meet the strict requirements of the statute and rejected the argument that the filing of the complaint tolled the statute of limitations:

> Furthermore, the statutory scheme of the Medical Malpractice Reform Act illustrates that the legislature envisioned a situation, as in the case before us, where the statute of limitations would expire before the end of the ninety-day "pre-suit screening period." Under those circumstances, the legislature offers protection to plaintiffs who have complied with statutory conditions precedent: the Act authorizes a tolling of the statute of

> limitations during the ninety-day screening period. §768.57(4). In order to toll the statute of limitations, however, a plaintiff must adhere to the mandate of section 768.57(2), and serve a notice of intent to initiate litigation within the limitations period set forth in section 95.11 §768.57(4). The legislative protection is expressly provided to litigants who follow the dictates of section 768.57. Freundlich's complaint, however, did not comply with the statute, and thus did not toll the state of limitations. Because the statute of limitations expired before Freundlich could satisfy the conditions precedent to filing suit against petitioners University of Miami and Dr. Scheinberg, we hold that the Trial Court erred in abating the action as to those petitioners. See Levine; Dukanauskas.
>
> [495 So.2d at 837].

In Pearlstein, supra, the Second District upheld the constitutionality of the Legislature's enactment of the pre-suit notice requirements of §768.57, noting the valid purpose and concerns underlying the Comprehensive Medical Malpractice Reform Act of 1985:

> The Comprehensive Medical Malpractice Reform Act of 1985, Chapter 85-175, Laws of Florida, was enacted in response to a perceived crisis in availability of reasonably-priced health care services, prompted by escalating medical malpractice insurance premiums. We hold, as did the Florida Supreme Court in upholding section 768.50, Florida Statutes (1979), that there exist a valid legislative purpose in insuring the protection of public health by assuring the availability of adequate medical care. Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981). See also, McCarthy v. Mensch, 412 So.2d 343 (Fla. 1982). The burden rests with the challenger to demonstrate that a statutory provision such as section 768.57 is arbitrary or lacks any rational basis. In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980). The respondents have not met that burden in this case.

[500 So.2d at 586].

The Second District also rejected the contention that actual notice provided by the complaint was sufficient. 500 So.2d at 587. Later, in Solimando, supra, the Second District specifically rejected a claim that notice sent by regular mail was sufficient:

> Appellant sent the statutory notice by regular mail more than 90 days prior to the filing of the suit (some of the appellees having sworn that they did not receive that notice). This procedure was insufficient for compliance with the statute. See Glineck v. Lentz, 524 So.2d 458 (Fla. 5th DCA 1988) (prior oral notice insufficient). Nor was there sufficient compliance through the mailing of the notice by certified mail, return receipt requested, after the filing of the suit. See Malunney v. Pearlstein, 539 So.2d 493 (Fla. 2nd DCA 1989) (Pearlstein II); Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986), rev. denied, 511 So.2d 299 (Fla. 1987) (Pearlstein I).
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> [544 So.2d at 1032].

The Fifth District in Glineck, supra, held that actual oral notice was not sufficient. The importance of Glineck lies not only in its rejection of any actual notice standard. The majority rejected arguments by the dissent in that case, similar to those advanced by Patry and Amicus, in its recognition of the proper role of the Legislature in commanding the specific form of the notice:

> An allegation that the plaintiff-patient gave the defendant-doctor actual oral notice of intent to initiate litigation for medical malpractice fails to allege compliance with section 768.57(2), Florida Statutes (1985), which requires such notice of intent be in writing and served by certified mail, return receipt requested.
>
> If notice of an intended medical malpractice action is necessary, and the legislature has

> directed it, then there is good reason that the form of such notice be such as to eliminate or reduce contention and litigation concerning compliance with such notice requirement. We decline to disregard the clear legislative direction contained in the statute and decline to hld that actual notice is sufficient compliance with the statute.

This Court in Lindberg, supra and Ingersoll, supra laid to rest any questions as to whether or not §768.57 was a mandatory condition precedent. In Ingersoll, this Court cited with favor the Second District's decisions in Solimando and Pearlstein, supra and by implication rejected any idea that the complaint would suffice under any concept of "actual notice." 571 So.2d at 448-449.

In Ingersoll, although finding that the issue of the propriety of the notice had not been properly raised under Florida Rule of Civil Procedure, 1.120(c), this Court again made clear that the Legislative will with respect to §768.57 was not to be disregarded:

> The pre-suit notice and screening requirements of section 768.57 represent more than mere technicalities. The legislature has established a comprehensive procedure designed to facilitate the amicable resolution of medical malpractice claims. To suggest that the requirements of the statute may be easily circumvented would be to thwart the Legislative will.
>
> [589 So.2d at 224].

In Novitsky, supra, the Fifth District summarized the state of the law as of the time of its opinion. The Court rejected the contention that a notice, sent certified mail to the insurance carrier for the doctor, was proper notice which would make the filing of the lawsuit postdate any tolled period of time:

> This court, as well as others, has taken the

view that to constitute a notice-of-intent letter under this statute and to obtain the benefit of the tolling effect, the statute must be strictly complied with. See Ingersoll v. Hoffman, 561 So.2d 324 (Fla. 3d DCA 1990) quashed on other grounds, 589 So.2d 223 (Fla. 1991); Glineck v. Lentz, 524 So.2d 458 (Fla. 5th DCA), rev. denied, 534 So.2d 399 (Fla. 1988); Public Health Trust of Dade County v. Knuck, 495 So.2d 834 (Fla. 3d DCA 1986). In Ingersoll, a notice letter mailed to the defendant's brother who was practicing dentistry in the same office as the defendant and who shared the same last name, was not sufficient compliance with the statute.3 In Glineck, we held that actual oral notice of intent to sue did not meet the statute's requirement that notice be written and sent by certified mail. Similarly in Public Health Trust, notice to the defendant hospital was not sufficient where the plaintiff failed to notify the defendant university and defendant physician.4

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3. In Ingersoll v. Hoffman, 589 So.2d 223 (Fla. 1991), the Florida Supreme Court held that the failure to comply with the pre-litigation notice requirements of section 768.57 may be excused by a showing of estoppel or waiver. The court concluded that the defendant had waived the issue of proper notice by failing to timely raise the issue in his pleadings and thus declined to decide whether the exchange of correspondence between the defendant's insurance carrier and the Ingersolls' attorney by itself constituted a waiver or estoppel. The court, however, did note that mere knowledge of a potential claim cannot constitute a waiver or estoppel and that the pre-suit notice and screening requirements of section 768.57 represent more than "mere technicalities."

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4. See also, Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986), rev. denied, 511 So.2d 299 (Fla. 1987). In that case, the second district overturned the lower court's order declaring that the pre-filing notice requirements in section 768.57 were

> unconstitutional. The second district also rejected the trial court's finding that service of the malpractice complaint satisfies the statutory pre-filing notice requirement.
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> [589 So.2d at 406].

Finally, in Williams v. Campagnulo, supra, relied upon by the majority opinion in the Second District and the Trial Court in this case, this Court reviewed Campagnulo v. Williams, 563 So.2d 733 (Fla. 4th DCA 1990) which had held that a malpractice complaint brought within the statute of limitations may be maintained even though notice was not filed within the limitation period. This Court found conflict with Ingersoll and Lindberg:

> We made it clear in Ingersoll and in Lindberg that compliance with the prefiling notice requirement of section 768.57 was a condition precedent to maintaining an action for malpractice and, although it may be complied with after the filing of the complaint, the notice must be given within the statute of limitations period. It is evident that the Legislature intended to distinguish the furnishing of a prefiling notice from the filing of a complaint. To approve the district court's decision would require us to rewrite the statute and effectively eliminate the notice requirement as a condition precedent to maintaining this type of action. We find that, because no notice was filed within the statute of limitations period, this cause must be dismissed.
>
> We reject the contention that the notice requirement of section 768.57 is procedural and, as such, is an unconstitutional invasion of our exclusive rule-making authority. The statute was intended to address a legitimate legislative policy decision relating to medical malpractice and established a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding. A major factor in this process if the provision that tolls the statute of

> limitations to afford the parties an opportunity to attempt to settle their dispute. We find that the statute is primarily substantive and that it has been procedurally implemented by our rule 1.650, Florida Rules of Civil Procedure. (Emphasis added).
>
> [588 So.2d at 983].

In rejecting any contention that the notice requirement of the statute was procedural rather than substantive, this Court appears to have implicitly agreed with the Fourth District's opinion in this regard:

> If a statute governs a substantive right or sets the bounds of a substantive right, then the statute is within the power of the legislature and therefore constitutional. VanBibber v. Hartford Accident and Indemnity Insurance Co., 439 So.2d 880 (Fla. 1983). In VanBibber, the supreme court determined that section 627.7262. Florida Statutes (Supp. 1982), is substantive because it conditions the arising of a cause of action. The courts have consistently held that the pre-suit notice pursuant to section 768.57 is a condition precedent, which must be pled in order to state a cause of action. Lindberg; Solimando v. International Medical Centers, 544 So.2d 1031 (Fla. 2d DCA 19890), review dismissed, 549 So.2d 1013 (Fla. 1989). Thus, the pre-suit notice similarly governs the arising of a cause of action and is substantive. Therefore it was within the power of the legislature and therefore constitutional.
>
> [563 So.2d at 734].

The present situation parallels that addressed by this Court in VanBibber v. Hartford Accident & Indemnity Insurance Company, 439 So.2d 880 (Fla. 1983), which upheld the validity of §627.7262, Florida Statutes (Supp. 1982), regarding non-joinder of insurers, and which legislatively abrogated Shingleton v. Bussey, 223 So.2d

1713 (Fla. 1969). The legislative concerns involved in regulating malpractice suits within the Comprehensive Medical Malpractice Reform Act parallel the regulation and supervision of insurance by the Legislature, which this Court recognized shifted to the Legislature the primary power and right to determine public policy:

> The regulation and supervision of insurance is a field in which the legislature has historically been deeply involved. See chs. 624-632, Fla. Stat. While this Court may determine public policy in the absence of a legislative pronouncement, such a policy decision must yield to a valid, contrary legislative pronouncement. In Shingleton we found that public policy authorized an action against an insurance company by a third-party beneficiary prior to judgment. The legislature has now determined otherwise. Our public policy reason for allowing the simultaneous joinder of liability carrier espoused in Shingleton, therefore, can no longer prevail.
>
> [439 So.2d at 883].

Both the dissent in the Second District and Patry (Patry Initial Brief, p. 19) seek to find solace in this Court's statement in Williams v. Campagnulo, 588 So.2d at 993 (quoted completely and in context, supra p. 19), that: ". . . the statute is primarily substantive." Of course, this Court's opinion continued " . . . and that it has been procedurally implemented by our rule 1.650, Florida Rules of Civil Procedure."

In addition to this Court's opinion in Williams v. Campagnulo, acknowledging the substantive nature of the statute, in adopting and approving Florida Rule of Civil Procedure, 1.650, this Court also has mandated "certified mail, return receipt requested." In re Medical Malpractice Pre-suit Screening Rules - Civil Rules of

Procedure, Rule 1.650, 536 So.2d 193 (Fla. 1988). As adopted, Rule 1.650 states in pertinent part:

> RULE 1.650. MEDICAL MALPRACTICE PRESUIT SCREENING RULE
>
> (a) Scope of Rule. This rule applies only to the procedures prescribed by Section 768.57, Florida Statutes, for presuit screening of claims for medical malpractice.
>
> (b) Notice.
>
> (1) Notice of intent to initiate litigation sent by certified mail to and received by any prospective defendant shall operate as notice to the person and any other prospective defendant who bears a legal relationship to the prospective defendant receiving the notice. The notice shall make the recipient a party to the proceeding under this rule. (Emphasis added).
>
> * * *
>
> (d) Time Requirements.
>
> (1) The Notice of Intent to Initiate Litigation shall be served by certified mail, return receipt requested, prior to the expiration of any applicable statute of limitations. If an extension has been granted under Section 768.495(2), Florida Statutes, or by an agreement of the parties, the notice shall be served within the extended period. (Emphasis added).

In a subsequent amendment to the Rule, not otherwise pertinent here, In re Amendment to Rules of Civil Procedure - Rule 1.650(d)(2), 568 So.2d 1273 (Fla. 1990), this Court recognized that the Rule's purpose was to enact procedures identical to the pre-suit notice requirements of the statute:

> The existing rule 1.650 was adopted by this Court to provide uniform procedures for implementing the medical malpractice pre-suit notice requirements of section 768.57, Florida

Statutes (Supp. 1986) (renumbered as section 766.106, Florida Statutes (Supp. 1988)). In re Medical Malpractice Presuit Screening Rules - Civil Rules of Procedure, 536 So.2d 193 (Fla. 1988).

Are Patry and Amicus now to argue that this Court's adoption of the same requirement in Rule 1.650 was not actually intended, and was to be ignored?

As noted in Glineck v. Lentz, quoted, supra p. 16-17, the Legislature's purpose in mandating the manner of the notice was " . . . to eliminate or reduce contention in litigation concerning compliance with the notice requirement." In light of this, as it has in other instances, the Legislature prescribed the United States Mail as a neutral "third party" and "certified mail, return receipt requested" as a reasonable and rational means to verify service.[4] This is clearly a proper matter for legislative action which should not be second guessed by this Court.

The importance of the Legislature's mandate is further underscored by Rule 1.650(d). As noted In re Amendment to Rules of

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[4] Under 768.57(3)(a) it is clear that the serving period runs from the time the prescribed notice is mailed: "[N]o suit may be filed for a period of 90 days after notice is mailed to the prospective defendant." (Emphasis added). (Now §766.106(3)(a), Florida Statutes (1991)). Furthermore, §768.57(4) emphasizes service as the key and not receipt " . . . shall be served within the limits set forth in s.95.11." (Emphasis added). (Now, §766.106(4), Florida Statutes (1991)). The statute follows long-standing Florida precedent. So long as the mailing is in accordance with the substantive requirement of "certified mail, return receipt requested," placing the letter in the mail, properly addressed and with proper postage is sufficient. In the absence of specific statutory language to the contrary, Florida follows a general rule that service of a notice is complete upon mailing. C.f., Insurance Company of N. America v. Sunrise Catering, 447 So.2d 431 (Fla. 1st DCA 1984); Fla.R.Civ.P., 1.080: " . . . Service by mail shall be complete upon mailing . . . ".

Civil Procedure, Rule 1.650(d)(2), supra, this Court has amended the Rule to maintain consistency between the statute and the Rule with respect to time requirements. A reasonable, inexpensive method for independent verification of service of the notice is vital because, as the Rule reflects, all other actions and events, including the right to file suit and the tolling of the statute of limitations and the expiration of the pre-suit screening period are governed by the date of the service of pre-suit notice.

Patry's Initial Brief goes to great lengths to convince this Court that the Legislature's choice of "certified mail, return receipt requested" may not provide sufficient evidence in all cases. Certainly, there are no reported decisions that the undersigned has been able to find which involve any of the speculative problems[5] which Patry's Initial Brief attempts to portray. Acknowledgment that no system or mode is perfect does not provide any basis for this Court to substitute an "actual notice" or "actual written notice" requirement. Certainly, had the Legislature's intent been simply "actual notice," rather than the unambiguous requirement of "certified mail, return receipt requested," the Legislature would have written the statute in that

[5] Of course, in raising this argument for the first time on rehearing below, Patry has pretermitted any ability to test his fact specific arguments. In any event, the legal profession undoubtedly has familiarity with "certified mail, return receipt requested." Any plaintiff's attorney, to guard against any potential problems, would certainly postmark or validly date and postmark the letter and receipt. Patry's arguments are merely strawmen which should be disregarded as untimely raised in any event. See, e.g., Morales v. Sperry Rand Corporation, 601 So.2d 538, 540 (Fla. 1992).

manner.

Because of the importance of the presuit notice in tolling the statute of limitations and establishing the time from which governs all subsequent actions, including the filing of any complaint, the Legislature's choice of "certified mail, return receipt requested," to accomplish verification of service of the notice by an independent third party, should not be allowed to be easily avoided. Notwithstanding receipt and acknowledgment of the notice, Trial Counsel for Patry's conscious decision to disregard the statute and deliver the notice by hand, through an interested office employee, should not be condoned.

In choosing "certified mail, return receipt requested," it is obvious that the Legislature sought the most expeditious and least burdensome method of assuring adequate and verifiable notice which would hopefully reduce litigation over this most important and controlling date from the standpoint of initiating a medical malpractice case. In this regard, it is apparent that the Legislature has been successful. The cases which have arisen have, for the most part, stemmed from the failure to counsel to read or follow a clearly worded statute.

It was this total legislative intent and purpose which was recognized by this Court in Ingersoll, 589 So.2d at 224 (quoted, supra p. 17, the Fifth District in Novitsky, (quoted, supra pp. 17-18) and the Second District in Solimando. Thus, Patry's plea that because notice was sent and received resulting in no "actual prejudice" to Capps, this Court should ignore the statutory mandate

simply invites this Court to manufacture an exception which would have the effect of "swallowing the rule" so to speak with respect to all future cases. The legislative purpose to reduce litigation by providing a simple verifiable means of service will have been thwarted.

Both Patry and Amicus expend much energy in seeking to convince this Court, contrary to its previous pronouncement in Ingersoll, supra, that the statutory mandate is a "mere technicality" which should be viewed only as "directory." Both cite decisions from courts of this State and elsewhere interpreting the word "shall" in various circumstances and contexts. As demonstrated above, and as recognized by the Fourth District in Campagnulo v. Williams, quoted, supra p. 20, from a substantive standpoint suffice it to say that the statute cannot be so interpreted in light of the plain meaning of the words used to reflect the Legislature's total intent with respect to the purposes to be accomplished. Holly v. Auld, quoted, supra pp. 9-10.

Similarly, Amicus's citation of Allied Fidelity Insurance Company v. State, 415 So.2d 109 (Fla. 3rd DCA 1982), in an attempt to convince this Court that the statute's mandate is " . . . a non-essential mode of proceeding . . ." (quoted, Amicus Intial Brief, pp. 8-9) is both factually and otherwise inapplicable. As with the deprivation of a substantive right or the imposition of a legislatively intended penalty referenced in Allied, the substantive statutory mandate in this case controls and establishes the tolling of the statute of limitations, which would otherwise

prevent a plaintiff bring an action for malpractice, as well as other substantive requirements thereafter, to and including the filing of suit.[6]

Both Patry and Amicus cite Zacker v. Croft, 609 So.2d 140 (Fla. 4th DCA 1992), for the proposition that the statute operates as a "trap." While Zacker has no factual application to the issue at bar, and was correctly decided because plaintiff's counsel in that case complied with the statute (thus validly effectuating service, notwithstanding the fact that Defendant had recently moved from his last known address, see, n. 4, supra p. 23), the statute certainly did not act as any trap for Trial Counsel for Patry. Any such contention is factitious where Trial Counsel for Patry: (1) Admitted before the District Court that he was aware of the mandate of the statute and chose not to follow it; and (2) was of the opinion that the statute of limitations had not run at the time of the service of the notice, but took no action to avoid any problem when advised by Capps' Counsel, upon receipt of the notice from Capps' insurer, that he would challenge the service of the notice.

Patry's citation of Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986), as usual is a late attempt to inferentially raise a specious due process and equal protection argument which is totally without

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[6] The dicta relied upon by Patry and Amicus in Angrand v. Fox, 552 So.2d 1113, 1114 n. 4 (Fla. 3rd DCA 1989), pet. denied 563 So.2d 632 (Fla. 1990), involving premature filing prior to expiration of 90 day investigation period, is the Second District's decision in Solimando. Phoenix Insurance Company v. McCormick, 542 So.2d 1030 (Fla. 2nd DCA 1989) although involving only contractual relations, was probably wrongly decided.

merit in any event. Vildibill is neither factually nor legally applicable to the present statute in any way. The statutory mandate at issue does not in any way create a classification which is purely arbitrary or totally unrelated to any state interest, as previously demonstrated. It operates equally upon all medical malpractice plaintiffs and defendants. As stated in Carter v. Sparkman, 335 So.2d 802, 805 (Fla. 1976):

> Although Courts are generally opposed to any burden being placed on rights of aggrieved persons to enter courts because of constitutional guarantee of access, there may be reasonable restrictions placed by law. Typical examples are the fixing of a time within which suit must be brought, payment of reasonable court costs, pursuit of certain administrative relief such as zoning matters or workmans compensation claims, or the requirement that newspapers be given the right of retraction before an action for libel may be filed.

The citation of Vildibill, and other rules of "statutory construction," and the assertion of both Patry and Amicus that the present statute leads to "absurd results," are also simply without merit. As previously stated, the fact that the Legislature could have chosen another manner of verifiable service, or that other manners exist, or the fact that problems might arise with respect to the manner chosen by the Legislature, does not support any argument that the legislative choice is unreasonable or leads to ridiculous results. Neither Patry nor Amicus cite any ambiguity in the statute which needs construction. They cite no conflict with any other statute which would require construction beyond the plain meaning of the statutory words chosen. Rather, they present mere

hollow excuses to ignore the primary rule of statutory construction set forth in Holly v. Auld, quoted, supra pp. 9-10.[7]

II.

THERE HAS BEEN NO WAIVER BY FAILURE TO RAISE NON-COMPLIANCE WITH THE STATUTORY MANDATE.

Patry's Initial Brief again attempts to rely upon Ingersoll v. Hoffman, supra, to argue that Capps' Counsel waived objection to the hand delivered notice by failure to specifically raise the issue in his answer. This issue was raised for the first time on rehearing in the Trial Court. (R. 17-20). This Court's decision in Ingersoll had been issued September 26, 1991, 16 FLW S626, prior to the original November 15, 1991 hearing on the motion for summary judgment. (R. 15-16).

In rejecting any reliance upon Ingersoll, the Second District's opinion states:

> Additionally, Patry seeks relief on authority of Ingersoll v. Hoffman, 589 So.2d 223 (Fla. 1991). The facts in the record before us do not provide a basis for estoppel or waiver as set forth in Ingersoll. Accordingly, we affirm.
>
> [618 So.2d at 262].

At page 29 of Patry's Initial Brief, present primary Counsel for Patry erroneously takes the position, also asserted in the

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[7] As with Patry's speculative litany of problems which could arise under certified mail, but apparently have not yet arisen in any reported case, the Amicus's Initial Brief, at pp. 19-20, raises questions with respect to other mandatory provisions of §766.106, which are not before the Court at this time. It is sufficient to note that the courts of Florida are certainly able to adequately deal with any such issues should they arise.

motion for rehearing in the Second District, that:

> [T]he second district's decision reflects confusion and misunderstanding about Appellants' waiver argument in that court, where it holds that '[T]he facts in the record before us do not provide a basis for estoppel or waiver as set forth in Ingersoll.'

The balance of that paragraph on page 29 of the Initial Brief points out, correctly, that Ingersoll involved both the procedural waiver issue, and:

> . . . the Plaintiff in Ingersoll argued that the Defendant was estopped by his conduct which was inconsistent with the defense, to the Plaintiff's detriment. Therefore, the Supreme Court needed to address both doctrines in its decision.

However, present appellate Counsel for Patry, who authored the motion for rehearing in the Second District, was obviously not then aware that Trial Counsel for Patry had attempted to raise, for the first time at oral argument, an Ingersoll estoppel theory based upon the carrier's correspondence to Trial Counsel for Patry. Ingersoll did not decide this issue, notwithstanding its statement that:

> [w]hile it is clear that Warren Hoffman and his insurance carrier were aware of that the Ingersolls were making a claim against him, mere knowledge of a potential claim cannot constitute a waiver or estoppel.
>
> [589 So.2d at 224].

Notwithstanding the fact that the estoppel argument based upon the correspondence had clearly been waived by failure to timely raise it, the Second District's decision evidences no "confusion and misunderstanding about the Appellant's waiver argument." The

opinion's wording simply reflects rejection of the late raised estoppel theory as well as the waiver assertion.

Patry's continued assertion that there was a pleading waiver in this case ignores all of the relevant facts. The full Record reveals that there was certainly no waiver of statutory compliance by Capps. There are substantial differences between this case and Ingersoll with regard to any waiver, which makes it understandable that the issue was not raised until rehearing in the Trial Court.

In Ingersoll, there was time remaining under the statute of limitation, and the defense attempted to "sandbag" the plaintiff during the running of the limitation period by failing in any way to challenge compliance with the statute. Unlike the present case, no notice of the defect was given during pre-suit screening. There was no compliance with Florida Rule of Civil Procedure, 1.120(c), which provides:

> The answer contained no reference to the Ingersolls' failure to comply with section 768.57. Florida Rule of Civil Procedure 1.120(c) provides:
>
> > (c) Conditions Precedent. In leading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.
>
> A general denial is not one 'made specifically and with particularity.'
>
> [589 So.2d at 224].

This Court's finding of a waiver was certainly influenced by the

tactic employed in springing the issue upon the Plaintiffs on the eve of trial after the Defendants knew that the statute of limitations had run.

Unlike Ingersoll, there was no attempt to surprise Trial Counsel for Patry. Upon receipt of the file from the insurer, Capps' Counsel immediately wrote Trial Counsel for Patry, and noted the failure to comply with the statute and without objection, reserved any rights flowing from the defect. (R. 82; quoted, supra p. 2).

It should not be forgotten that the notice in this case was attempted to be delivered exactly two years from the date of the birth of Chad Patry and the events detailed in the complaint. (R. 1-6). Thus, on the surface, it initially appeared that Trial Counsel for Patry waited until the last moment to attempt to give notice and toll the statute of limitations. At the time of the service of the Answer Brief below, there had been no explanation by Trial Counsel for Patry as to " . . . [w]hy Patry waited until virtually the last minute to attempt to give notice and toll the statute of limitations." (Answer Brief, Second District, p. 11).

Up to the time of the contrary assertion at oral argument below, Counsel for Capps were under the misconception that Trial Counsel for Patry had simply overlooked the both statutory mandate and the fact that in order to be timely, the notice simply needed to be placed in the mail, certified mail, return receipt requested, before the two year statute of limitations in §95.11(4)(b), Florida Statutes (1987) had run. Supra, p. 23, n. 4. Because no Reply

Brief was filed in the Second District, it was not until oral argument that Trial Counsel for Patry stated that he was aware of and simply disregarded the mandatory requirement of the statute.

Furthermore, if time restraints were a problem, Trial Counsel for Patry could have easily invoked the procedure outlined in §768.495(2), Florida Statutes (1987) (now §766.104, Fla. Stat. (1989)), to unilaterally extend the statute of limitations:

> (2) Upon petition to the clerk of the court where the suit will be filed and payment to the clerk of a filing fee, not to exceed $25, established by the chief judge, an automatic 90-day extension of the statute of limitations shall be granted to allow the reasonable investigation required by subsection (1). This period shall be in addition to other tolling periods. No court order is required for the extension to be effective. The provisions of this subsection shall not be deemed to revive a cause of action on which the statute of limitations has run.

However, at oral argument, Trial Counsel for Patry contended that, although the events giving rise to the action occurred exactly two years before he attempted to give notice, the statute of limitations had not then run. Because of the nature of the injuries there was insufficient knowledge, as of May 30, 1988, of the reasonable possibility that the injuries were in fact caused by medical malpractice. E.g., Tanner v. Hartog, 618 So.2d 177 (Fla. 1993); Hillsborough County Mental Health Center v. Harr, 618 So.2d 187 (Fla. 1993).[8] Beyond this, Trial Counsel for Patry did not

[8] Capps' Counsel amended his answer to assert the limitations defenses on February 27, 1991, in the belief that the statute had to have run by that time. (R. 70-71). It was certain that the statute had run by the time of the original hearing in the Trial Court on November 15, 1991, as reflected in the Final Judgment

explain why he failed to remedy the defect and resolve any problems after he was advised of Counsel for Capps' position following receipt of the notice from Capps' insurer. (R. 82; quoted, supra p. 2).

Any consideration of waiver must take into consideration all of the facts including the following: (1) Once the hand delivery was forwarded to Capps' Counsel, he immediately informed Trial Counsel for Patry of his error and reserved all available rights, to which there was no objection by Patry (R. 82);[9] (2) The parties stipulated to extending the pre-suit screening period, and Trial Counsel for Patry acquiesced in Counsel for Capps' again reserving his right to object, which was all he could do because suit had not been filed (R. 28; quoted, supra p. 3); (3) Trial Counsel for Patry's admission at oral argument that failure to comply with the statute was intentional and not merely an oversight; and (4) Trial Counsel for Patry's failure to take any action upon receiving notice of Counsel for Capps' intention to challenge the pre-suit notice, even though he contended (undoubtedly correctly) that time remained under the statute of limitations.

Notwithstanding the fact that nothing said or done by or on behalf of Capps affected Patry's failure to properly and timely act, contrary to the facts in Ingersoll, the complaint and answer here are completely different than the pleadings in Ingersoll.

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entered by the Trial Court on December 9, 1991. (R. 24-25; quoted, supra pp. 5-6).

[9] Under Ingersoll, this was not required and Capps' Counsel could have awaited any filing of suit and then attack the notice.

Again, in Ingersoll, there was no mention of the relevant statute in either of the pleadings, and the Defendants waited until the eve of trial to spring the notice issue after the statute of limitations had run. The Complaint in Ingersoll only generally stated that conditions precedent had been met, and there was only a general denial.

Contrary to Patry's Initial Brief, Capps' denial, for the standpoint of waiver, was clearly more sufficient than the denial in Ingersoll.

Patry's complaint specifically invoked §766.106 in Paragraph 2 (R. 1; quoted, supra p. 3) under circumstances where Trial Counsel for Patry had clearly previously acquiesced in Counsel for Capps' preservation of the issue of the efficacy of the notice.

Although the answer denied compliance, it was not a "general denial" by any means. Counsel for Capps' denial was a specific denial of allegation of the compliance with §766.106. To have stated something such as: "Plaintiff has not complied with §766.106" would have added nothing to the Plaintiff's knowledge in this case or to the pleadings. Where the complaint, as here, alleges a specific compliance with a condition precedent, the answer need only deny that fact as plead in order to comply with Rule 1.120(c). Mariner Village, Ltd. v. American States Insurance Co., 344 So.2d 1337, 1339 (Fla. 2nd DCA 1977).

In this case there has been no waiver as in Ingersoll. This Court clearly described the situation in Ingersoll to be a waiver. Under long-held definition, waiver requires a " . . . voluntary or

intentional abandonment or relinquishment of a known right." E.g., Firemans Fund Insurance Company v. Vogel, 195 So.2d 20 (Fla. 2nd DCA 1967); 27 Fla. Jur 2d, Estoppel and Waiver. §89. Counsel for Capps' actions and reservation of rights throughout the pre-screening period were contrary to any motion waiver.

In finding a waiver under Rule 1.120(c) in Ingersoll, this Court made the following cogent comment which has an ironic impact when applied to Trial Counsel for Patry's actions:

> We do not suggest that under appropriate circumstances a defendant could not amend the answer so as to specifically deny the performance of a condition precedent. The test as to whether an amendment to a pleading should be allowed is whether the amendment will prejudice the other side. Horacio O. Ferrea N. Am. Div., Inc. v. Moroso Performance Prods., Inc., 553 So.2d 336 (Fla. 4th DCA 1989); Lasar Mfg. Co. v. Bachanov, 436 So.2d 236 (Fla. 3d DCA 1983). Had Hoffman timely raised the defense of failure to follow the requirements of section 768.57, the Ingersolls could have attempted to comply with the statute within the period of the statute of limitations. An amendment to Hoffman's pleadings after the statute of limitations had run would have unfairly prejudiced the Ingersolls.
>
> [589 So.2d at 225].

Simply stated, any prejudice in this case stems from Counsel for Patry's conscious decision not to follow the statute's requirement and subsequent inaction after having been notified by the June 29th letter.

Patry's Initial Brief also takes issue with the language utilized in the answer because it stated: "Deny, or without knowledge and therefore denied." (R. 7). The "without knowledge"

language certainly was not equivocal, as the Initial Brief claims. Patry's Complaint (R. 1-6), in Paragraph 2, was addressed both to Capps and to Humana Hospital, not a party to this appeal. Therefore, the language used was necessary and appropriate as to knowledge of any notice served on Humana (" . . . or without knowledge, and therefore denied") as well as the specific allegation of compliance with the statute as applied to Capps ("deny").

CONCLUSION

For the foregoing reasons, the opinion of the Second District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 9th day of September 1993 to the following persons:

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