087

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 PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

This is a petition for discretionary review of a two-to-one decision of the Second District Court of Appeal which affirmed the dismissal of Plaintiffs/Petitioners' medical malpractice Complaint. While expressing its "regret [for] the harshness of the result," the Second District held that dismissal was proper because "Patry did not give notice of intent to initiate litigation for medical malpractice by certified mail, return receipt requested, as provided in section 766.106[, Fla. Stat. (1991)." The district court went on to note the manner in which the notice of intent had been served: "Instead, actual written notice was delivered to Capps." App. 2. (emphasis added). It is undisputed that the notice of intent, with attached corroborating affidavit from a medical doctor, was hand delivered in a timely fashion on May 30, 1990, as established by the sworn Certificate of Hand Delivery executed by Patricia A. Nicholas. R-77.

On June 15, 1990, the Defendants' insurer acknowledged receipt of the notice letter and commenced informal presuit discovery, without raising any objection to the alleged deficiency in the mode of service of the notice. R-79. Then, on June 29, 1990, an attorney appearing on behalf of Dr. Capps and his P.A. wrote a letter to Plaintiff's counsel noting objection to the service of the notice of intent, "in that it was not sent by certified mail, return receipt requested, as specifically required by F.S. §

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766.106."[1] R-82.

Notwithstanding that stated objection of June 29th, Dr, Capps' attorney actively began pre-suit discovery; on July 2, 1990, he wrote to the Plaintiffs' attorney asking for a copy of a letter providing documentation of the claim and requesting a copy of the hospital chart. R-83. No mention was made in that letter of any alleged defect in the notice of intent. R-83.

One week later, on July 9th, Defendants' attorney again wrote to the Plaintiffs' attorney requesting copies of hospital charts and expressing a sense of urgency in completing Defendants' "pre-suit investigation." R-84. Again, no objection was stated to the service of the notice of intent by hand delivery. Id. Plaintiffs' counsel sent the hospital charts to the Defendants' attorney the next day. R-85.

On July 11, 1990, Defendants' efforts to defend on the merits of the case continued, with a single-sentence letter from Dr. Capps' lawyer to Plaintiffs' lawyer which said: "Enclosed please find a medical authorization that I request you have your client sign and return to me." R-86. No mention was made of a problem with the notice of intent. Id.

On July 27, 1990, Plaintiffs responded to each of Defendants' thirteen enumerated requests[2] for information concerning the

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[1]As noted by Judge Altenbernd in his dissenting opinion, the parties have consistently referred to the later-enacted version of the notice statute, although it appears that § 768.57 should apply instead. See App. 5, n. 2.

[2]The Defendants' request for such information has fourteen numbered paragraphs, but one number was skipped. R-79-80.

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claim. R-88-89. By letter dated August 7, 1990, Plaintiffs' counsel provided additional information concerning the claim, and provided a signed medical authorization form. R-90-93.

The only other pre-suit record mention of the method of service of the notice of intent was in the stipulation to extend the pre-suit screening period signed by the parties' counsel. R-28. By that stipulation, the parties agreed to extend the pre-suit period for thirty days, recognized that the Plaintiff's would have sixty days thereafter to file suit, and stated "that nothing herein shall operate as a waiver of any defenses otherwise available to Dr. Capps . . . [under] F.S. §766.106 et seq. and including . . . the alleged failure to send the 'Notice of Intent' letter to Dr. Capps by certified mail, return receipt requested." R-28 (emphasis added).

The last pre-suit activity reflected in this record is the response to the claim made on September 27, 1990, wherein the Defendants, through their attorney, denied the claim. R-94. That denial did not have anything to do with the sufficiency of service of the notice of intent, and did not mention the notice. Id. Instead, the denial was based solely on Defendants' opinion on the merits of the case; the letter stated: "It is . . . [Defendants' expert, Dr. Hochberg's] opinion that Dr. Capps did not fall below the standard of care owed to Linda Patry and Chad Patry and therefore we are denying the claim." R-94 (emphasis added).

The Complaint was filed in the Hillsborough Circuit Court on October 26, 1990. R-1. In paragraph 2 of the Complaint, Plaintiffs

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stated: "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-2.

Defendants filed no Motion to Dismiss the Complaint, but filed an Answer. R-7-9. Defendants did not with specificity deny the performance of conditions precedent, but stated in their Answer only the following: "Deny, or without knowledge, and therefore deny." R-7. Nowhere in the Answer do the Defendants mention the method of service of the notice of intent by hand delivery, nor did they refer to the notice of intent in any fashion.

Defendants did not plead an affirmative defense based on the statute of limitations in their Answer. A defense was raised which merely stated that "Defendant is entitled . . . to the application of all the provisions of the Medical Malpractice Reform Act of 1976 and the Comprehensive Medical Malpractice Reform Act of 1985." R-8. The only other defenses were those based on the collateral source payments, a purported "limitation on non-economic damages," and a right to set-offs for amounts paid by joint tortfeasors. R-8.

Discovery ensued, as reflected in the Motion for Leave to File Additional Defenses served on February 26, 1991. R-70. Defendants by that motion sought an amendment to plead the statute of limitations and stated "that additional discovery and research has indicated this defense." R-70. That motion was granted. R-10. The statute of limitations defense as pleaded did not refer to the sufficiency of the service of the notice of intent. See R-70-71.

Almost eleven months after suit was filed and seven months

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after pleading the statute of limitations defense, the Defendants filed their motion for summary judgment, which was based on the ground that "the Notice of Intent to Initiate Litigation for Medical Malpractice was not sent by the statutorily mandated 'certified mail, return receipt requested.'" R-11. Defendants did not allege that they had not received the notice in a timely fashion and did not allege that they had been prejudiced in any way by the personal delivery of the notice of intent. See R-11-12.

The trial court granted the Defendants' motion and entered summary judgment for them, finding that the "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," and finding that the statute of limitations had since expired. R-15-16.

Plaintiffs timely filed a motion for rehearing. R-17. That motion was denied. R-29. A notice of appeal to the Second District was timely filed. R-33. The appeal was briefed and argued.

On March 19, 1993, the Second District issued its original opinion, affirming the judgment below after concluding "that delivery of written notice fails to comply with the statutory requirements." App. 2. The majority decision of the Second District also rejected the argument of Plaintiffs/Appellants that Defendants had waived the objection to the service of notice. Id.

Judge Parker wrote a specially-concurring decision in which he stated his agreement "with the reasoning set forth in Judge Altenbernd's dissent." App. 3. Judge Parker encouraged this Court

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"to clarify its position in Williams[v. Campagnulo, 588 So. 2d 982 (Fla. 1991)] to determine if the certified mail requirement is truly substantive." App. 3. That concurrence went on to state as follows:

> If the undisputed evidence reflects that the notice of intent was placed in the doctor's office within the time permitted by the statute, the purpose for the statute has been satisfied. To dismiss a cause of action with prejudice because the United States Post Office was not involved in the delivery will cause the public to believe the appellate opinions addressing the notice issue have lost touch with reality.

App. 3 (emphasis added).

Judge Altenbernd wrote a vigorous, nine-page dissent, which ended with the following question which he would certify 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.

App. 12.

Plaintiffs/Appellants filed a motion for rehearing, motion for en banc rehearing, motion for certification, and motion for clarification. The Second District denied rehearing, denied en banc rehearing, but held: "The motion for certification is granted to the extent that the members of the panel join in the certified question contained in Judge Altenbernd's initial dissent." App. 13-14. This proceeding ensued.

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SUMMARY OF THE ARGUMENT

This Court should adopt the majority rule of "substantial compliance" which exists outside Florida and which holds that, in determining the sufficiency of service of a statutorily-required notice, timely receipt of that notice acknowledged by the recipient is sufficient under statutes requiring service by certified mail, in the absence of a showing of any prejudice to the recipient resulting from the mode of delivery. The service of the notice of intent by hand delivery in the present case amply satisfied the Legislature's purpose for the notice requirement, which is to notify prospective defendants of medical malpractice claims and to promote the settlement of such claims, when appropriate, and not to function as a trap for medical malpractice claimants.

Secondly, this Court should hold that the defense of alleged insufficient notice was waived by Defendants not having denied the occurrence of conditions precedent with specificity in their Answer. Under either analysis, the decision below should be quashed and the certified question be answered to reflect that this cause be reinstated.

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ARGUMENT

I.

THIS COURT SHOULD FOLLOW THE MAJORITY RULE THAT ADMITTEDLY TIMELY RECEIPT OF A NOTICE IS SUFFICIENT AS SUBSTANTIAL COMPLIANCE WITH A STATUTE PROVIDING FOR NOTICE BY CERTIFIED MAIL, IN THE ABSENCE OF A SHOWING OF PREJUDICE

The decision below should be quashed and the certified question be answered in a manner which follows the majority rule, which is that timely receipt of a notice, acknowledged by the recipient, is sufficient to withstand a challenge to the mode of service under statutes requiring service by certified mail, in the absence of a showing of any prejudice to the recipient resulting from the mode of delivery. In the case at bar there is no issue of prejudice. The only issue is whether some rule of law requires strict adherence to a method of service which is inferior to that method actually used; notwithstanding the fact that actual timely notice was received; notwithstanding the fact that no prejudice resulted to the Defendant; and notwithstanding the fact that undeniable injustice would result to the Plaintiffs from applying such a rule.

Petitioners submit that the absurdity of such a result is too great to permit the decision under review to stand, even if there were no other authorities on the point. However, there are many cases from jurisdictions around the nation on factual patterns so closely on point as to be ready authority for Petitioner's position in this case. As will be shown, Florida will be in a very lonely

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minority--if not altogether alone--if this Court should approve the Second District's unjust decision.

Prior to addressing the applicable authorities on the specific issue at bar, it may be useful to review some statements of law on the general subject of statutory construction. A helpful place to start is with a quotation from this Court which recognizes that the goal of achieving the Legislature's purpose is more important than adhering to the specific words of the subject statute: "As the Court often has noted, our obligation is to honor the obvious legislative intent and policy behind an enactment, even where that intent requires an interpretation that exceeds the literal language of the statute." Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099, 1102 (Fla. 1989). As will be shown, the intent of the Legislature was met by the hand delivery of the notice in the present case.

Another statement of law which is directly applicable to the present case is this Court's pronouncement that "[t]he courts . . . are obligated to avoid construing a statute so as to achieve an absurd or unreasonable result." Carawan v. State, 515 So. 2d 161, 167 (Fla. 1987). As will be shown, other courts which have considered the issue at bar agree that it would be wholly unreasonable and absurd to hold that a notice actually received is insufficient merely because the Legislature set forth a provision for service by certified mail.

Another statement of statutory construction is useful to describe the balancing which must occur between fundamental rights

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to due process, equal protection, and access to the courts on the one hand, and the state's power to regulate on the other. Even where no suspect class or fundamental right is affected by a statute, and the State's power to regulate the area "must only be rationally related to a legitimate state interest," it is also true that "a statutory classification cannot be wholly arbitrary." Vildibill v. Johnson, 492 So. 2d 1047, 1050 (Fla. 1986).

This Court in Vildibill went on to hold: "If a statute may reasonably be construed in more than one manner, this Court is obligated to adopt the construction that comports with the dictates of the constitution." Id. The result of the Second District is to separate other litigants and the present Plaintiffs into the following two categories: 1) those who serve their notice of intent by certified mail and who are permitted to proceed to trial; 2) those who serve their notice of intent by a superior means of delivery, but whom are denied access to the courtroom. As will be shown, such a result is an arbitrary classification that bears no rational relationship to any legitimate legislative object.

As a final authority on the topic of statutory construction, Petitioners ask this Court to adopt the reasoning of a Second District decision which apparently was overlooked by that Court in its ruling in this case, as follows: "It is our primary duty to give effect to legislative intent and, if a literal interpretation of a statute leads to unreasonable results, then we should exercise our power to interpret the statute in such a way as to impart reason and logic to it." Catron v. Bohn, 580 So. 2d 814, 818 (Fla.

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2d DCA), rev. denied, 591 So. 2d 183 (Fla. 1991). All that the Petitioners ask of this Court is to "impart reason and logic" to the statute in question and recognize the doctrine of substantial compliance where actual notice has been received and no prejudice has resulted.

There are many useful cases from other jurisdictions on the subject of the sufficiency of notice delivered in a manner other than by statutorily-required certified mail, and on closely analogous points of other defects in the form and service of notices of various types. Petitioners present the following brief overview of several of the significant decisions from other states.

In a case involving a materialman's claim against a contractor and its surety, the actual receipt of notice of the claim was held to satisfy the statutory notice requirement under Massachusetts law, in spite of a statutory provision which normally required notice of the claim to be submitted by registered or certified mail. The court held: "Statutory prescription of registered mail or certified mail notice is to facilitate proof of delivery of notice. If actual timely notice is proved . . . , failure to comply with a registered or certified mail requirement is not a fatal deviation from statutory procedures." Cinder Products Corp. v. Schena Constr. Co., 492 N.E.2d 744, 746 (Mass. App. Ct. 1986).

In Larabee v. Washington, 793 S.W.2d 357 (Mo. Ct. App. 1990), the Missouri court affirmed an award of prejudgment interest in a personal injury case, based on the defendant's refusal of Plaintiff's offer of settlement made before trial. On appeal, the

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Defendant argued that "the trial court erred in awarding plaintiff prejudgment interest because plaintiff did not send the letter [containing the settlement offer] by certified mail as required by RSMo § 408.040(2) but by regular mail." Id. at 361. In rejecting Defendant's argument, the court held:

> Generally, one having actual notice is not prejudiced by and may not complain of the failure to receive statutory notice. . . . Statutes that impose certain technical requirements for notice should not be strictly enforced where the party seeking enforcement had actual notice and cannot show prejudice as a result of the failure to follow the technical requirements.

Id. (citation omitted). See also, Macon-Atlanta State Bank v. Gall, 666 S.W.2d 934 (Mo. Ct. App. 1984)(failure to give notice of foreclosure sale by certified or registered mail did not render sale void where actual notice was received and prejudice not shown).

While dealing with the form of a notice of claim rather than its mode of delivery, the court in a Michigan case indicated that strict adherence to technical requirements is not required when the notice effectuates the purpose of the applicable statute, holding: "As a matter of judicial policy, courts favor a liberal construction of notice requirements and have not denied relief when the notice may be reasonably interpreted as in substantial compliance with the applicable statute." Dreslinski v. City of Detroit, 194 N.W.2d 551, 551 (Mich. Ct. App. 1971).

The doctrine of "substantial compliance" with statutory notice provisions has been accepted by the Michigan Supreme Court to

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permit prosecution of valid claims notwithstanding technical defects in the notice, where the defendant has not been misled by the defect. See Meredith v. City of Melvindale, 165 N.W.2d 7 (Mich. 1969).

Illinois follows very similar rules of statutory construction to those of Florida outlined above. "In construing statutory requirements as to notice, the courts must look to substance rather than merely to form in seeking the true intention of the General Assembly." Gutierrez v. Board of Review, 341 N.E.2d 115, 118 (Ill. App. Ct. 1975).

The courts of Illinois follow a rule that actual receipt of a notice in substantial compliance with the form required by statute is sufficient, in the absence of a showing of prejudice by the recipient from the failure of the form of the notice to strictly comply with technical requirements of the statute. "Recent court cases in other matters have held that statutes imposing certain technical requirements for notice may not be strictly enforced if the parties seeking enforcement had actual notice and cannot show prejudice as a result of the opposing party's failure to comply with technical requirements." Prairie Vista, Inc. v. Central Illinois Light Co., 346 N.E.2d 72, 74 (Ill. App. Ct. 1976).

Indiana also follows this majority rule of substantial compliance with statutory notice provisions:

> Indiana courts have held that if legal notice is required by statute, there may be compliance if the action intended to provide notice substantially satisfies the requirements of the statute. . . . If the notice which the party receives achieves the purpose for which the

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> statute was intended, the courts will find substantial compliance with the statute.

Salem Community School Corp. v. Richman, 406 N.E.2d 269, 272 (Ind. Ct. App. 1980)(citations omitted). Accord., Houchins v. Kittle's Home Furnishings, 589 N.E.2d 1190 (Ind. Ct. App. 1992).

A case somewhat close to the facts of the case at bar was decided more than thirty years ago by the Supreme Court of Montana (when technical rules were more readily applied to bar meritorious claims than they are at the present time in our judicial history): Anton v. Greyhound Post Houses, Inc., 362 P.2d 546 (Mont. 1961). The Anton case involved the question of the sufficiency of service of a notice of appeal. The district court had granted a motion to dismiss the appeal on the ground "that the statute . . . provides that [a] copy of the notice of appeal should be mailed, whereas here it was personally served upon the attorneys who executed an admission of its receipt . . . ." Id. at 547. In remanding the case to the district court with directions to vacate its order of dismissal, the high court of Montana noted that the purpose of statutes which require service of notices upon adversaries' attorneys "is to give notice that they may take such steps as may be necessary to protect the rights of their client," then held as follows on the same question involved in the present case: "Where a statute, such as section 92-834, R.C.M. 1947, provides that a copy of the notice of appeal should be mailed there can exist no reason why personal service does not fully comply with the purpose of the law, that of giving notice." Id. at 548 (emphasis added).

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In a case involving a challenge to the sufficiency of the content of a notice of claim under Nebraska's Political Subdivision Tort Claim Act, the Supreme Court of that state rejected a call for strict compliance with statutory requirements, accepting the substantial compliance rule and holding as follows:

> We hold, therefore, that the notice requirements for a claim filed pursuant to the Political Subdivision Tort Claim Act are liberally construed so that one with a meritorious claim may not be denied relief as the result of some technical noncompliance with the formal prescriptions of the act. . . . Therefore, substantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice . . . when the lack of compliance has caused no prejudice to the political subdivision.

Chicago Lumber Co. v. School Dist. No. 71, 417 N.W.2d 757, 766 (Neb. 1988).

The Supreme Court of New Hampshire has held that a statutory requirement that notice be served by registered mail, return receipt requested, was satisfied by service using ordinary first class mail, so long as receipt of the notice was admitted:

> The function of a requirement that notice be delivered by registered or certified mail is to assure delivery and to provide a means of resolving disputes between the parties as to whether the notice is duly received. In the face of actual receipt of notice, the mode of transmission becomes unimportant since the purpose of the statute is satisfied.

Town of Newport v. State, 345 A.2d 402, 403 (N.H. 1975)(emphasis added).

Texas likewise follows the mainstream rule that a party challenging the sufficiency of notice sent other than by certified

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mail must show either non-receipt or prejudice. "The requirement of [Texas Rule of Civil Procedure] rule 21a that notice be sent by registered or certified mail is waived if the person to be notified actually receives the notice and is not prejudiced by the failure to follow the strict requirement of the rule." Jones v. Stayman, 732 S.W.2d 437, 438 n.5 (Tex. Ct. App. 1987). See also, e.g., Hill v. W.E. Brittain, Inc., 405 S.W.2d 803 (Tex. Ct. App. 1966), in which the court rejected a challenge to the sufficiency of a notice of hearing sent by regular mail instead of pursuant to the required certified or registered mail, holding: "There is nothing in this record to suggest that appellants could or would have made a better showing or presented a stronger case had they received notice by registered or certified mail rather than by regular mail." Id. at 807.

New York decisions have long applied a rule which emphasizes the actual receipt of notice instead of strict compliance with statutory requirements. Appeal Printing Co. v. Sherman, 91 N.Y.S. 178 (A.D. 1904) was a case which involved the sufficiency of service of a pleading sent by mail, but with insufficient postage, under a New York statute permitting service of pleadings "by mail by depositing them, properly inclosed in a post-paid wrapper, in the post office, directed to the person to be served at his address." Id. at 179. In enunciating its no-nonsense test of substantial compliance with the statute, the court held: "The test in determining whether the service by mail in particular cases suffices is whether or not the papers actually came into the hands

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of the attorney for the adverse party." Id. (emphasis added). Accord., e.g., In re Hart's Estate, 279 N.Y.S. 119 (Sur. Ct. 1967).

Petitioners will close this review of the cases from other jurisdictions applying the substantial compliance test with a persuasive decision from Oregon. Where a notice of claim was served upon a governmental entity in a tort case by ordinary mail instead of by certified mail or personal delivery as required by the Oregon Tort Claims Act, the Supreme Court of Oregon, sitting en banc, held "that where the notice required by . . . [the statute] is actually received by the statutorily designated official, the statute has been substantially complied with and the notice of claim is valid." Brown v. Portland School Dist. No. 1, 628 P.2d 1183, 1186 (Ore. 1981). That holding was rendered notwithstanding an express provision in the notice statute that "'[a] notice of claim . . . which is presented in any other manner than herein provided[] is invalid.'" Id. at 1185 (quoting Ore. Rev. Stat. § 30.275(1)(1977)).

The en banc Oregon Court reached that decision by analyzing the purpose of the notice statute and the purpose of the provision requiring service "either personally or by certified mail," and held that the legislative intent was satisfied by actual receipt of the notice, as follows:

> There is no suggestion that the proponents [of the amendment] or the legislature intended to preclude recovery or escape liability by draconian enforcement of technical requirements or to preclude [sic] compliance where notice proper in form and content was actually received by the statutorily designated official.

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* * *

> Where the notice required by ORS 30.275(1) is actually received in the requisite time period by the statutorily designated official, the statutory purpose is satisfied. To automatically require that the notice be sent by certified mail under these circumstances would be to ignore the purpose of the statute and make it a mere trap for the deserving but unwary claimant.

628 P.2d at 1186 (emphasis added). Likewise, in the present case, the question of the sufficiency of hand delivery instead of certified mail must be analyzed in light of the substantive purpose of the statute's notice requirement.

Turning now to Florida law, the substantial compliance rule was effectively accepted by the Third District in Angrand v. Fox, 552 So. 2d 1113 (Fla. 3d DCA 1989), rev. denied, 563 So. 2d 632 (Fla. 1990). In Angrand, the Third District reversed dismissal of the Plaintiffs' Complaint, holding that the notice condition of section 768.57 had been fully met by service of Notice of Intent letters to two of the Defendants by non-certified mail, as follows:

> 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.

552 So. 2d at 1114 n.2. The reversal of the dismissal in Angrand was necessarily predicated on a finding of the adequacy of a form of service which was much less susceptible to verification of timely dispatch than the actual hand delivery to the Defendants'

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office by Ms. Nicholas in the present case. Thus, there is ample authority in and out of Florida which recognizes the soundness of this principle of law, and simple justice requires that the substantial compliance rule be adopted in this case.

This Court's decision in Williams v. Campagnulo, 588 So. 2d 982 (Fla. 1991) should be no barrier to a decision that the substantial compliance rule will be recognized in determining the sufficiency of a notice of intent. In Williams, this Court noted "that the statute is primarily substantive." 588 So. 2d at 983 (emphasis added). However, that statement cannot be read in a vacuum, but must be read in the context of the decision. In Williams, the Plaintiff "never served [a] notice of intent to initiate litigation on [the Defendant] Williams." Id. (emphasis added). Therefore, the only issue before the Court on the substantive/procedural question was whether the absolute failure to serve any notice by any means of delivery was substantive, not whether one form of delivery over another was a substantive right of the Defendant.

The legislative purpose of the pre-suit notice statute was met in the present case. "The purpose of the notice requirement is to notify prospective defendants of medical malpractice claims to promote the settlement of such claims, when appropriate, and not to function as a trap for medical malpractice claimants." Zacker v. Croft, 609 So. 2d 140, 141-42 (Fla. 4th DCA 1992).

In Zacker, the notice of intent letter was first sent by certified mail to the Defendant at the wrong address because,

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unbeknownst to the Plaintiff, the doctor had moved to another suite in that building. That notice letter was returned undelivered and another notice was not served to the correct suite until after the two-year statute of limitations had expired. Because the Plaintiff did not have knowledge of the new address at the time of service of the notice, the first effort at service was held to have been sufficient to toll the statute of limitations.

In the case at bar, the actual delivery of the notice of intent to Dr. Capps' at his office within the limitations period was much more likely to accomplish the Legislature's purpose behind the notice statute--promoting early settlement--than was the undelivered notice letter in the Zacker case. An undelivered letter cannot even begin to effectuate the statute's substantive purpose of promoting early settlement. To hold that an undelivered letter is sufficient notice to toll the statute of limitations--but that a hand-delivered and timely notice is not--would be nothing but arbitrary and capricious.

Any form of delivery of written[3] notice should satisfy the substantive purpose of promoting early settlement. In these days of nationwide courier services and electronic transmission of documents, the range of satisfactory methods of delivery should range from Federal Express delivery to telecopied facsimile ("fax")

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[3]Petitioners do not herein address the question whether oral notice should be sufficient, and note only that a written Notice of Intent can be read months or years after it is delivered, should a question arise as to whether its contents comported with the substantive purpose of informing the Defendant of the incident and promoting settlement, whereas the exact words spoken in an oral notice would be more difficult to recall.

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transmission; from United Parcel Service to fiber-optics; from bicycle-riding courier to computerized modem or other electronic mail. Each and every one of those forms of transmission, if successful in reaching the intended addressee, will be equally likely to result in presuit settlement of a malpractice claim.

Therefore, when viewing only the ultimate legislative goal of promoting early settlements, there is no reason to treat one method of delivery any differently from another. The source of problems is not in cases like this one--where an honorable physician tells the truth as to when a notice was delivered to his office--but is in the cases in which a Defendant will deny having received a notice of intent.

Even if this Court should be unwilling to recognize the liberal rule of substantial compliance in all cases where there is actual written notice and no prejudice--such as in cases involving service by ordinary mail--Petitioners submit that the circumstances of this case warrant application of the substantial compliance rule still. At the very least where the Defendant admits receipt of actual hand-delivered written notice in a timely fashion (such as this case), the substantial compliance rule should be applicable.

Petitioners can imagine no intent of the Legislature in prescribing certified mail other than to provide a means for reliable verification of timely dispatch of a notice of intent, using a method which could be expected to be delivered to the prospective Defendant in due course. The hand delivery in the present case better satisfied that assumed Legislative intent than

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would "certified mail, return receipt requested."

Certified mail is a form of delivery which may or may not in a given case provide as much evidence of when something was sent to an addressee--and when something was received by that addressee--than other forms of delivery. There is no possible way that certified mail could provide better evidence of timely dispatch than exists in the present case.

Service simply by "certified mail, return receipt requested," as the subject statute provides, without any other safeguards, does not necessarily generate better evidence of the date of mailing, and does not provide any evidence of what was mailed. A perfectly proper certified mail receipt does not inherently provide reliable verification of timely dispatch, and a validly executed return receipt is absolutely no evidence of what was received by certified mail. In its best form, a certified mailing cannot furnish more reliable proof of what was sent (and when) than did the certificate of hand-delivery in the case at bar. Therefore, to deny the efficacy of a form of service which provides better proof of the date of dispatch and proof of the nature of what was received, is not just to elevate form over substance, but is to pursue an arbitrary and capricious course that denies due process and equal protection.

To start with, there is nothing inherent about certified mail that more reliably reflects the date a certified letter is mailed (or "served") than even first class mail, much less than hand-delivery. A certified letter is not necessarily postmarked on the

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date it is mailed, and there is nothing in the subject statute which requires the certified mailing to be postmarked within two years of the malpractice to be timely.

It is a common misperception that mail--in order to be "certified" mail--must be clocked-in by the post office when received and a postmark be placed on the receipt. As can been seen by looking at any Receipt for Certified Mail available at a Post Office, an example of which is provided in the Appendix, there is no need for the receipt to be dated by the postal authorities. The largest blank on the side with the certified number toward the bottom has the legend: "Postmark or Date." As reflected in instructions number 1 and 2 on the other side, the sender may or may not choose to have the post office postmark the letter in that blank. Instead, the sender can just place the letter into the mail box and it will be postmarked like a regular letter when the post office gets around to it. Instruction No. 2 on the receipt states: "If you do not want this receipt postmarked, stick the gummed stub to the right of the return address of the article, date, detach and retain the receipt, and mail the article." (emphasis added).

There is nothing in § 768.57 which by its terms requires the sender of a notice of intent to have the post office postmark either the receipt or the letter, and the sender can put any date in the large blank on the receipt that is retained by the sender that he or she wants to. The postage is the same whether the receipt is postmarked or not, and a letter which is sent using Instruction No. 2 quoted above is still "certified" within the

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meaning of § 768.57, Fla. Stat. Therefore, there is nothing inherent about certified mail which provides better evidence of timely dispatch than in the certificate of service a lawyer signs on a pleading, or in a later-filed affidavit of mailing. To the contrary, a letter which is mailed by ordinary first class mail or delivered by hand would have better evidence of the date of mailing if a notarized certificate established that fact, than the unsigned date placed in a certified receipt under Instruction No. 2.

If the Legislature intended to create a substantive statutory requirement that the only method of establishing the date of dispatch of a Notice of Intent was the date on the Certified Receipt, such a requirement must be rejected under due process grounds as arbitrary and capricious, because that date--if written-in by the sender in an unsigned fashion--is no better proof of dispatch than any other form of proof, and not nearly as reliable as would be a certificate of mailing, or as was Ms. Nicholas' Certificate of Hand Delivery filed in this case.

If the Legislature intended to require a method of service which provided for <u>third-party</u> verification of timely dispatch by a reliable delivery method, it did not express that intent because a Notice which is not postmarked on the certified receipt neither is confirmed by a third party nor is any evidence of the date of dispatch beyond the word of the sender, the Plaintiff or her attorney. However, that type of non-postmarked certified mail is perfectly acceptable within the simplistic application of the express statutory language. At least with regard to the assumed

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legislative intent to establish by a third party the date of dispatch, the certificate of Ms. Nicholas in the present case (and the admission of the Defendant as to the date of delivery) better satisfies that intent than would mere certified mail.

Turning now to the question whether the statute can be read as requiring certified mail because certified mail provides evidence of the fact of receipt (as opposed to dispatch) of a letter, that question too leads to a similar misperception as to the value of certified mail. The green cardboard return receipt which is returned after a certified letter is delivered at best will provide some evidence that something was received by the addressee or by someone on the addressee's behalf on a certain date. While blank 4a on a return receipt is entitled "Article Number," that information is primarily meaningless. Assumedly, the "Article Number" is important to establish that the item which was received was the item which the sender placed in the envelope to which the sender affixed the stub of the Receipt for Certified Mail discussed above. However, there is nothing about either receipt which tends to establish what was inside that envelope. In short, anything could have been mailed to a prospective Defendant, even an empty envelope, and the return receipt itself does not tend to establish what the Defendant received on a given date.

Those who use certified mail and are careful have learned that it might help to prove what was sent by typing the Article Number on the certified letter itself, in the reference line or elsewhere. The sender then would have three things with the same number on it:

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the Receipt for Certified Mail, the Return Receipt, and a copy of the letter itself. However, there is nothing inherent in the process of certified mailing which requires the contents of any certified letter to be identified, and there is nothing in the statute in question which requires that a notice of intent reflect the certified article number. Therefore, under the statute, a notice of intent which did not bear the article number would need extrinsic proof to establish the fact of receipt: proof that the contents of the envelope which was delivered per the Return Receipt was the notice of intent.

In the present case those elements were more than amply satisfied. Ms. Nicholas' certificate is better proof of timely dispatch of the notice than would be a simple green certified mail receipt, because it describes what was contained in the delivery to the doctor. A green card from the post office is neither sworn to nor is any evidence of the contents of the envelope.

Whomever has read the Second District's decision construing the applicable statute must surely agree that it is unjust and flies in the face of common sense. For that reason alone, the decision should be quashed under the reasoning of Carawan v. State, 515 So. 2d 161, 167 (Fla. 1987). More than unjust however, the decision is at odds with any imaginable legislative purpose in providing for evidence of the date of dispatch or the fact of receipt of a notice of intent.

If it could be theorized that the Legislature provided that certified mail be used--not for any perceived advantage in proving

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the date of dispatch or the fact of receipt--but solely because of some legislative intent to require uniformity without regard to practicality, then that legislative intent was not directed at any legitimate governmental object and was arbitrary and capricious. Therefore, the decision should be quashed under the reasoning that "a statutory classification cannot be wholly arbitrary." Vildibill v. Johnson, 492 So. 2d 1047, 1050 (Fla. 1986).

II.

THE SECOND DISTRICT'S DECISION SHOULD BE QUASHED BECAUSE THE DEFENDANT WAIVED OBJECTION TO THE METHOD OF SERVICE OF THE NOTICE OF INTENT TO INITIATE LITIGATION

Even assuming, arguendo, that there were some supportable legislative purpose behind permitting a prospective Defendant to insist on a means of service which was slower and less reliable and which provided less reliable evidence of the date of dispatch and the fact of receipt than the means the Appellants used, the defense was waived by Dr. Capps' failure to frame it in his Answer. This Court expressly held that the defense had to be adequately framed by the pleadings or it was waived in Ingersoll v. Hoffman, 589 So. 2d 223 (Fla. 1991).

In the Plaintiffs' Complaint filed in this case at paragraph 2 it is stated: "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. 2). Defendants in their Answer did not with specificity deny the performance of any conditions

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response to that paragraph only the following: "Deny, or without knowledge, and therefore deny." R-7.

The Defendants' response to the Plaintiffs' allegation of compliance with conditions precedent in Ingersoll was somewhat more specific that the general denial of Dr. Capps below, but this Court held that the issue still had not been sufficiently framed by the pleadings to support dismissal for noncompliance with the presuit notice requirement, noting as follows:

> The amended complaint contained a specific allegation that the Ingersolls had complied with all conditions precedent to the filing of the suit. . . . In his answer, Warren Hoffman made only a general denial of the allegations of compliance with all conditions precedent. The answer contained no reference to the Ingersolls' failure to comply with section 768.57.

589 So. 2d at 224. Citing the provision of Fla. R. Civ. P. 1.120(c) which requires that "[a] denial of performance or occurrence [of conditions precedent] shall be made specifically and with particularity," this Court held: "[W]e conclude that Warren Hoffman waived the Ingersolls' failure to comply with section 768.57 by failing to timely raise the issue in his pleadings." Id. (emphasis added).

In the case at bar, the denial was much less specific and particular than was that of the Defendant in Ingersoll, because Dr. Capps' general denial was not unequivocal, as the one in Ingersoll appears to have been. Instead, Dr. Capps pleaded lack of knowledge of the correct facts as forcefully as he pleaded that vague denial, where he stated: "Deny, or without knowledge, and therefore deny."

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R-7 (emphasis added). That response did not mention any particular manner in which the Plaintiffs allegedly did not comply with presuit conditions, and certainly did not plead "specifically and with particularity" that service of the Notice of Intent by hand delivery was improper.

The 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." App. 2 (emphasis added). In Ingersoll, supra, both the estoppel and waiver issues were before the Court. The Defendant in Ingersoll, as here, waived the defense of noncompliance with conditions by failing to frame that issue in the pleadings. However, in addition to the waiver argument, 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 is decision.

Petitioners do not assert that the Defendants were estopped from relying upon the alleged failure of conditions precedent, only that the Defendants waived that defense by failing to frame in their Answer and by litigating this case on the merits for a substantial time before raising the issue. The elements of the two doctrines are not the same, and Appellant did not need to demonstrate any facts in the record which would support an estoppel argument. "The doctrines of waiver and estoppel are frequently

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confused and sometimes are incorrectly regarded as synonymous. But there is a well-recognized distinction between the two; one may exist without or apart from the other." 22 Fla. Jur. 2d, Estoppel and Waiver § 28 (1980). Accord., e.g., Thomas N. Carlton Estate v. Keller, 52 So. 2d 131 at 132-33 (Fla. 1951).

Estoppel always requires a showing of some form of detrimental reliance by the party asserting the doctrine, and wrongful conduct by the other party which will result in unfairness of result unless the doctrine is applied. Waiver, on the other hand, does not require any evidence of either wrongful conduct or detrimental reliance. "Waiver carries no implication of fraud and does not necessarily imply that the person asserting it has been misled to his prejudice or into an altered position. The act or conduct of only one of the parties is involved." 22 Fla. Jur. 2d, Estoppel and Waiver § 28 (1980).

Appellants in the case at bar did not make any estoppel argument, but relied instead only on the doctrine of waiver. Therefore, there did not need to be any showing of facts in the record which would support a finding of estoppel such as existed in the Ingersoll case. Defendants' having failed to frame the defense in question in their Answer, the defense was waived.

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CONCLUSION

WHEREFORE, this Court should adopt the majority rule which recognizes the doctrine of substantial compliance under notice statutes, should hold that actual notice and the absence of prejudice is sufficient compliance with the subject statute under the present circumstances, should hold that the defense of insufficient notice was waived, should quash the decision under review, and should answer the certified question to instruct that notice was sufficient and instruct that this cause be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true copies hereof were served by mail, upon Ted R. Manry, Esq. and Stephen H. Sears, Esq., MacFARLANE, FERGUSON, ALLISON & KELLY, Attorneys for Respondents, P.O. Box 1531, Tampa, FL 33601; and Loren E. Levy, Esq., Attorney for Amicus Curiae, Academy of Florida Trial Lawyers, P.O. Box 10583, Tallahassee, FL 32302, on this, the 29th day of July, 1993.

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