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' REPLY BRIEF

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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

Respondent makes no effort to argue that he was prejudiced in any way by receipt of the Notice of Intent by hand delivery instead of by certified mail. Nor does he argue that he could have been prejudiced by such service under any imaginable set of facts. Respondent also fails to criticize or otherwise address any of the cases cited in Petitioners' Initial Brief from the courts of other states which dealt with situations similar to the present one and held that service by personal delivery was sufficient.

Instead, Respondent reaches for language from cases which seems to help his position, but which is the product of situations much different from the present one. None of the Respondents' cases dealing with the notice provisions of § 768.57(2) and § 766.106(2), Fla. Stat. are on point.

Pearlstein v. Malunney, 500 So. 2d 585 (Fla. 2d DCA 1986) did not involve a question of the sufficiency of one mode of service of a notice letter over another. Instead, in Pearlstein the trial "court ruled that the complaint itself satisfied the notice requirements of the statute." Id. at 586. In quashing the trial court's decision, the Second District did not discuss one form of service over another, but merely recognized the requirement that



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some form of presuit notice be given: "[W]e must presume that the legislature meant what it said when it distinguished the filing of a complaint from the furnishing of a prefiling notice." Id. at 587.

The decision in Solimando v. International Medical Centers H.M.O., 544 So. 2d 1031 (Fla. 2d DCA), rev. dismissed, 549 So. 2d 1013 (Fla. 1989) is off-point because there is nothing in that decision to indicate that any of the health care provider Defendants actually received the notice letters sent by non-certified mail, and there was evidence to the contrary from others of the Defendants, "some of the appellees having sworn that they did not receive that notice." Id. at 1032. That is totally different from the present case, in which there is no dispute but that the Defendant actually received the notice delivered by hand to his office.

Equally inapposite is the decision in Glineck v. Lentz, 524 So. 2d 458 (Fla. 5th DCA 1988), which involved the insufficiency of oral notice. Notice by word of mouth is susceptible to two types of challenge, one of which is not present here. With oral notice, not only is the mode of delivery one which does not ensure proof of the fact of timely delivery, Defendants also can challenge the form of the notice as one which does not assist in proving the content of the notice, should the sufficiency of the substance of the notice be called into question.

As noted in Petitioners' Initial Brief, a written notice can be read months or years after it is delivered--whether the mode of delivery is by hand or by mail--should a question arise as to the



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sufficiency of the content of the notice. However, the exact content of notification by spoken words would necessarily be more difficult to ascertain, for reasons ranging from fading memories, to the more sinister risk of "selective recall" of the conversation said to constitute the notice.

Respondent next cites this Court's opinion in Ingersoll v. Hoffman, 589 So. 2d 223 (Fla. 1991). Of course there is no authority for the decision below in Ingersoll, because that case has nothing to do with the sufficiency of one mode of delivery of a Notice of Intent over another. The Ingersoll case simply recognizes the well-established principles that notice must be given, and given before suit is filed. If no notice is given, or if it is given at the time of filing suit or later, then the legislature's intent at promoting presuit settlement cannot be furthered.

As observed in the Initial Brief, furthering that legislative intent of promoting settlement before suit surely requires that notice be given prior to the filing of the Complaint. However, that legislative intent is not at all furthered by a blind insistence upon an inferior form of delivery (certified mail) over a superior form of delivery (hand delivery).

Novitsky v. Hards, 589 So. 2d 404 (Fla. 5th DCA 1991) also did not involve the sufficiency of any mode of service of a Notice of Intent. In Novitsky the Defendant argued that correspondence from the Plaintiff's attorney to the Defendant's malpractice insurer was a Notice of Intent which started the statutory tolling period



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running, thereby rendering untimely the lawsuit filed within the tolling period which would have begun upon the service of the letter which the Plaintiff considered the Notice of Intent. The court held that the letter to the insurer--which was never meant to be the Notice of Intent--would not have been sufficient to start the tolling period running, not because it was not sent by certified mail, but because it was not sent to the doctor at all. Id. at 406.

Williams v. Campagnulo, 588 So. 2d 982 (Fla. 1991) does not hold that any method of service of notice is insufficient, only that a malpractice action was properly dismissed "because no notice was filed [sic] within the statute of limitations period." Id. at 983 (emphasis added). The language of this Court therein referring to the statute as "primarily substantive" must then be read in light of that posture of the case (no notice had been served), and not read as authority for the proposition that a negligent doctor is substantively entitled to one method of delivery over another.

Beginning on page 23 of the Answer Brief, Respondent reveals the lack of any logical support for the asserted legislative intent of mandating certified mail over hand delivery. Respondent therein asserts (without any citation to authority) that "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." However, Respondent does not in any way attempt to refute the simple truth discussed by the Petitioners in the Initial Brief: that "certified mail, return



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receipt requested" does not provide any third party verification of when a letter is mailed!

As reflected in the instructions on the certified mail receipt filed with Petitioner's Appendix, the sender of a certified letter may or may not choose to have the post office postmark the receipt. A sender may decide to have the receipt postmarked, but that decision is the option of the sender. The instructions on the receipt state in pertinent part: "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 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 blank on the receipt that is retained by the sender that she or he wants to. The postage is the same whether the receipt is postmarked or not, and a letter which is sent without obtaining a postmark still is "certified" according to the Postal Service.

Therefore, there is nothing about certified mail which necessarily 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 would a certified letter with the unsworn, unsigned date written on a certified receipt.



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While Respondent, on page 25 of his Brief, clings to the assertion that certified mail somehow "accomplish[es] verification of the service of the notice by an independent third party," there is no assertion that unpostmarked certified mail is insufficient notice under the statute. The absence of such an assertion reveals that Respondent is caught between the proverbial "rock and the hard place" in urging the strict and literal application of the statute.

On the one hand, Respondent tacitly acknowledges the absence of any statutory requirement of a postmark or other actual "third party" verification of service. If, however, Respondent were to expressly concede that unpostmarked certified mail receipts could be accepted as sufficient proof of service--but sworn affidavits of hand delivery are not sufficient--then Respondent seemingly would have to concede the absurdity of the result. If unpostmarked certified mail is a sufficient method of service, but personal delivery evidenced by sworn affidavit is not, it would necessarily follow that legislative insistence upon service by certified mail is not be rationally related to a legitimate legislative objective.

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'



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Certificate of Hand Delivery filed in this case.

In making his unconvincing argument that the subject statute is not a trap for the unwary, Respondent unfairly reaches outside the record, to characterize what Petitioners' counsel said at oral argument before the Second District as: "that he was aware of the mandate of the statute [before service of the Notice of Intent] and chose not to follow it." Answer Brief at 27. On page 33 of the Answer Brief Respondents assert that at oral argument "Trial Counsel for Patry stated that he was aware of and simply disregarded the mandatory requirement of the statute." (emphasis in original). It is one thing to go outside the record, it is something else to do it inaccurately.

Petitioners disagree that Respondent has fairly characterized the remarks made by Petitioners' counsel at oral argument before the Second District. Counsel for Petitioners did not "disregard" the statute in selecting the method of delivery of the Notice, nor did he state that he had. Instead, Plaintiffs' counsel chose hand delivery as superior to service by certified mail in at least three respects.

First, the fact of timely dispatch was established by the sworn certificate of Ms. Nicholas, while no affidavit of dispatch would be required if certified mail were used. Second, the fact of actual delivery of the Notice to the Defendant's office was established by the sworn certificate of Ms. Nicholas, while the simple return of a certified mail receipt would show only that something was delivered there, not what was delivered. Third, the



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receipt of the Notice by the Defendant was quicker because it was delivered by hand than if it had been mailed; not only was the Notice dispatched prior to the expiration of the limitations period, it was actually received within that time because it was personally delivered.

Other than the purported advantage of certified mail (shown above to be nonexistent) of "verification of the service of the notice by an independent third party," Defendant does not attempt to argue that there is a single aspect of service by certified mail which is equal or superior to that which Plaintiffs employed here. There is no basis in law or in logic for the unjust result of dismissal of Plaintiffs' claims. Petitioners respectfully urge this Court to restore some common sense and justice to the law and to quash the decision below.

## 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

While the Petitioners do not agree that there is merit to the Respondent's arguments concerning the waiver issue, the two sides of the matter have been fully addressed in the principal briefs. Therefore, Petitioners adopt and incorporate their arguments heretofore made on this issue and respectfully request the Court to quash the decision below on this ground as well.



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## CONCLUSION

WHEREFORE, there being actual timely service of a written Notice of Intent which fully satisfied the legislative intent of promoting presuit settlement, serving being evidenced more fully than if certified mail had been used, and there being no prejudice alleged or shown by the Respondent, this Court should adopt the substantial compliance test that is the universal rule outside Florida and quash the decision below, and;

WHEREFORE, the defense of failure to comply with conditions precedent having been waived as not being pleaded with specificity, the decision below should be quashed with instructions to remand this cause for trial on the merits.

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 upon Loren E. Levy, Esq., Attorney for Amicus Curiae, P.O. Box 10583, Tallahassee, FL 32302, on this, the 1st day of October, 1993.

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