IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO.: 94,384

PATRICIA ANN HANKEY
and DONALD HANKEY, L.T. CASE NO.: 98-543

Appellants,

vs.

SUSAN YARIAN, M.D.,
GEORGE SADOWSKI, M.D.,
WEN I. LIN, M.D., NICHOLAS
TUSO, M.D., WOMEN'S HEALTH
CARE OF ST. AUGUSTINE, P.A.,
and FLAGLER HOSPITAL, INC.
_____/

ANSWER BRIEF OF APPELLEE, FLAGLER HOSPITAL, INC.

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL
ON A CERTIFICATION OF CONFLICT WITH THE FOURTH
DISTRICT COURT OF APPEAL

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PREFACE

References to documents that are provided to the Court in the Appendix to this Answer Brief shall be made as (A. #), where the "#" signifies the indexed document number in the Appendix. References to Appellants' Initial Brief shall be made as IB.#, where "#" signifies the page in the Initial Brief.

ADOPTION OF BRIEFS OF OTHER APPELLEES

Appellee, Flagler Hospital, Inc., hereby adopts and incorporates by reference the arguments and citations of authorities set forth in the briefs of each of the other Appellees, as though set forth herein.

CERTIFICATE OF TYPE SIZE AND STYLE

Flagler Hospital, Inc., by and through its undersigned counsel, hereby certifies that the type size and style used in this brief is 14 point Times New Roman, which is not proportionately spaced, at 10 characters per inch.

STATEMENT OF THE CASE AND FACTS

From November 28, 1994 through December 6, 1994, Patricia Hankey was a patient of several health care providers and was hospitalized at Flagler Hospital. On March 19, 1996, Appellants, Patricia and Donald Hankey ("the Hankeys") sent a Notice of Intent to Initiate Litigation ("Notice of Intent") against Flagler Hospital, Inc. ("Flagler") and several doctors. (A.1). The potential defendants then had 90 days to respond to the Notice of Intent pursuant to 766.106, Florida Statutes.

On June 26, 1996, the parties stipulated to extend the time in which Flagler and the other potential defendants could respond to the Notice of Intent, setting the new response date as July 19, 1996. (A.2). By July 18, 1996, all potential defendants had responded to the Notice of Intent by denying liability.

On November 20, 1996, the Hankeys filed a petition with the Clerk of the Court for an automatic 90 day extension to the statutory limitation period, pursuant to §766.104 (2). (A.3). Two hundred-eleven (211) days later, on June 19, 1997, the Hankeys filed a Complaint against Flagler and the other potential-defendants, alleging medical negligence. (A.4).

Each of the Defendants moved to dismiss the Complaint, alleging that the Complaint was untimely and the action barred by the Statute of Limitations.

(A.5). On December 30, 1997, the trial court convened a hearing on the Motions to Dismiss. On January 22, 1998, the trial court granted the Defendants' Motions to Dismiss, holding that the Statute of Limitations had expired prior to the Hankeys' filing of their suit in St. Johns County. A.6.

The Hankeys appealed the trial court's order to the Fifth District Court of Appeal. The appellate court affirmed the trial court's order, holding that the trial court's calculation of the statutory limitation period was correct, and that the method of calculation prescribed in Pergram v. Horan, 669 So. 2d 1150 (Fla. 5th DCA 1996) was appropriate. The appellate court certified direct conflict with the Fourth District Court of Appeal's opinion in Rothschild v. NME Hospitals, Inc., 707 So. 2d 952 (Fla. 4th DCA 1998).

The Hankeys timely filed their Notice of Appeal of the appellate court's decision.

SUMMARY OF ARGUMENT

The issue on appeal is whether the trial court and the Fifth District Court of Appeal have utilized the proper method of calculating the statute of limitations in a medical malpractice action, where the notice of intent was served sufficiently early that the 90 day presuit period expired more than 60 days prior to the lapse of the two year f limitations period. The standard of review is *de novo*.

The statute of limitations requires that medical malpractice actions be brought within 2 years of when the claimant knows or should know of the alleged negligence. Chapter 766, Florida Statutes sets forth a presuit investigation process to which the parties must adhere before a claimant may file suit for medical malpractice. Part of this comprehensive statutory scheme is the requirement that the claimant serve a notice of intent to initiate litigation, after which the claimant is barred from filing suit for 90 days. The 90 day bar was enacted by the Legislature to afford prospective defendants the opportunity to assess liability and damages, and to ascertain whether settlement is possible before litigation ensues. Upon completion of the presuit period, the claimant has 60 days or the remainder of the limitations period, whichever is greater, in which to file suit.

The Hankeys argue that the 90 day presuit period enlarges the statutory limitation period in all cases, because a provision of chapter 766 provides that the statute of limitations is "tolled" during the presuit period. However, the tolling language only applies when the notice of intent is sent shortly before the expiration of the limitations period. This is so that the presuit requirements enacted by the Legislature do not shorten the time in which a claimant may bring suit. However, when the notice of intent is served sufficiently early that the

presuit requirements do not interfere with the ability to file suit within the two year limitations period, the claimant must adhere to the statutorily mandated two years.

The legislative intent of the statute of limitations and the provisions of chapter 766 is to protect prospective defendants. Such protections should not be prejudiced by enlargement of the statute of limitations where such enlargement is only for the purpose of providing claimants with a windfall of time, and do not serve to protect some countervailing right of the claimant.

Although the Hankeys argue that their two year limitation period would be shortened if the 90 day presuit period were not tacked on in all cases, such argument is without merit. The Legislature has determined that 60 days is required for negotiation of a settlement after a declination of liability by the defendants. No purpose is served by extending the limitations period where the claimant has already completed his presuit investigation and more than 60 days are available for negotiation of a settlement. In such cases, the claimant still has the ability to file suit on the last day of the two year limitations period prescribed by the Legislature. Moreover, any prejudice that a claimant might suffer by not being permitted to file suit during the 90 day investigation period is mitigated by the claimant's ability to buy a 90 day automatic extension, pursuant to another

provision of chapter 766. If, in fact, the presuit period did deprive the claimant of 90 days, the automatic extension would enable the claimant to buy that time back.

The Fifth District Court of Appeal's interpretation of chapter 766's effect on the statute of limitations is the proper interpretation. The Fourth District Court of Appeal's interpretation does not comport with the legislative intent of Chapter 766 and the statute of limitations. Therefore, this Court should adopt the interpretation set forth by the Fifth District Court of Appeal, and should AFFIRM the decision of the trial court and the Fifth District Court of Appeal.

ARGUMENT

The issue on appeal is whether the trial court and the Fifth District Court of Appeal have utilized the proper method of calculating the statute of limitations in a medical malpractice action, where the notice of intent was served sufficiently early that the 90 day presuit period expired more than 60 days prior to the lapse of the two year limitations period. The proper standard of review on appeal is *de novo*.

Actions for medical malpractice shall be commenced within two (2) years from the time the incident giving rise to the action occurred, or within two (2) years from the time the incident is discovered or should have been discovered with the exercise of due diligence. 95.11 (4)(b), Fla. Stat. There is no real dispute as to

when the statute of limitations commenced running in the instant case. Patricia Hankey was hospitalized at Flagler between November 28, 1994 and December 6, 1994. The Hankeys have stipulated that the two year limitations period commenced running on December 6, 1994. See IB.11.

Based on a start date of December 6, 1994, the two year Statute of Limitations would run on December 6, 1996. With the 90 day automatic extension provided by 766.104 (2), the Statute of Limitations would run on March 6, 1997. Because the Complaint was not filed until June 19, 1997, the Complaint was untimely and time-barred.

The Hankeys contend that the Statute of Limitations expired on June 28, 1997. This date is reached by adding not only the 90 day automatic extension, but also the 90 day presuit period and the 30 day stipulated extension for presuit, onto the two year statutory period. In support of this theory, the Hankeys cite to §766.106 (4), which provides:

> The notice of intent to initiate litigation shall be served within the time limits set forth in §95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

The Hankeys read this provision as providing a window of time during the presuit period that does not count toward the running of the Statute of Limitations, essentially tacking onto the two-year statutory period an additional period of 90 days plus stipulated extensions. The Hankeys quote §766.106 (4) in support of their argument that the statute of limitations is "tolled," and thereby extended. This reading is consistent with that of the Fourth District Court of Appeal, as stated in Rothschild v. NME Hospitals, Inc., 707 So. 2d 952 (Fla. 4th DCA 1998); but it is contrary to the dictates of this Court and the Fifth District Court of Appeal, and does not comport with the legislative intent of chapter 766 and §95.11, Florida Statutes.

For the purposes of this appeal, it is essential to recognize that §766.106 must be read in the context of the entire medical malpractice presuit process and the statute of limitations, and the Legislature's intent in enacting those laws. See Ferguson v. State, 377 So. 2d 709 (Fla. 1979)(holding that the Court must construe a statute in conjunction with other statutes pertaining to the same subject matter); State v. Allen, 22 Fla. L. Weekly D2155 (Fla. 1st DCA 1997) (a statute "does not exist in isolation, but rather it is a part of the overall statutory procedure" for establishing rights and duties).

Section 766.106 is not intended to provide a windfall extension of time for claimants who are aware of their cause of action. Rather, it is intended to assure that certain presuit investigation is conducted so as to facilitate settlements and reduce the number of malpractice actions filed in the Courts. See Boyd v. Becker, 627 So. 2d 481, 484 (Fla. 1993)(the purpose of §766.106 is to permit potential defendants the opportunity to fully evaluate claims against them so as to facilitate resolution without litigation). Section 766.106 (4) was enacted as a mere sub-section of the Medical Malpractice Reform Act of 1985, a comprehensive statutory procedure for the conduct of medical negligence actions. It must be read as part of that statutory scheme, and with a view toward the statute of limitations that is purportedly affected by operation of §766.106.

The Legislature expressly stated the purpose of enacting the Medical Malpractice Reform Act, and the attendant medical malpractice presuit requirements, writing:

> It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, presuit investigation and arbitration. Presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses.. . . Presuit investigation shall include:
>
> 1. Verifiable requirements that reasonable investigation precede both malpractice claims and defenses in order to eliminate frivolous claims and defenses.

2. Medical corroboration procedures.

§766.201 (2), Fla. Stat. In order to satisfy these objectives, the Legislature mandated that "[p]resuit investigation of medical negligence claims and defenses. . .shall apply to all medical negligence, including dental negligence, claims and defenses. §766.203 (1), Fla. Stat. Prior to issuing notification of intent to initiate medical malpractice litigation pursuant to §766.106, the claimant must conduct an investigation to ascertain that there are reasonable grounds for the claim. §766.203 (2), Fla. Stat.

After completion of the presuit investigation and prior to filing a claim for medical malpractice, a claimant must notify each prospective defendant of intent to initiate litigation for medical malpractice. §766.106 (2), Fla. Stat. No suit may then be filed for 90 days, so as to provide each prospective defendant and its insurer the opportunity to conduct a full review of the claims and defenses, so as to determine the liability of the prospective defendant. §766.106 (3)(a), Fla. Stat. Section 766.106 sets forth specific criteria for the investigation that each prospective defendant and its insurer must conduct. See §766.106 (3)(a), Fla. Stat. At or before the end of the 90 day presuit period, the prospective defendant or its insurer must provide the claimant with a response either rejecting the claim,

making a settlement offer, or making an admission of liability with a demand for arbitration on the issue of damages. §766.106 (3)(b).

In light of the legislative intent of chapter 766, (i.e. to "facilitate the amicable resolution of medical malpractice claims" and to "promote the settlement of meritorious claims early in the controversy in order to avoid full adversarial proceedings"), there does not seem to be any cogent reason to believe that the legislature intended to extend the statute of limitations by 90 days in all medical malpractice cases. See Patry v. Capps, 633 So. 2d 9, 11 (Fla. 1994)(this Court's statement of legislative intent). The Hankeys argue that the tolling provision in §766.106 (4) effectively adds 90 days to the 2 year statutory limitation period in every malpractice action. This interpretation would do nothing to further the legislative intent of the statute, and would merely result in a windfall for claimants.

In Tanner v. Hartog, 618 So. 2d 177 (Fla. 1993), this Court expressly rejected an argument similar to that of the Hankeys. The Court wrote:

> We believe the language of section 766.106 (4) was intended to provide extra time to a plaintiff who files a notice of intent shortly before the limitations period expires. This permits the plaintiff to have the full ninety days in which to try to negotiate a settlement and provides an additional sixty days to file a complaint if a settlement cannot be accomplished. However, the time remaining must be computed from the date the notice of intent was filed, ***rather than simply adding on the extra time to the end of the limitations period***,

> so as to implement the intent of the statute ***and avoid an unreasonable windfall to the plaintiff*** who files a notice of intent soon after the malpractice is discovered.

Tanner, 618 So. 2d at 184 [emphasis added]. As this Court recognized, the Legislature created an "extra hoop" through which claimants must jump before filing a malpractice action. While performing this additional condition precedent to filing suit, the claimant is barred from filing suit against the prospective defendants, so as to give the prospective defendants ample time to conduct their own investigation. See Ingersoll v. Hoffman, 589 So. 2d 223 (Fla. 1991) (holding that the presuit requirements of chapter 766 [formerly chapter 768] are conditions precedent to maintaining an action for medical malpractice). Where a claimant serves the notice of intent shortly before the expiration of the two year limitations period, the 90 day presuit period could materially affect the rights of claimants if some provision were not made for extending the period. That is, if a claimant serves the notice of intent 50 days before the two year period lapses, but he is barred from filing suit for 90 days, the limitations period must be extended in order not to shorten the two year period by 50 days. The claimant would be barred from filing suit during the last 50 days of the limitations period because of the 90 day presuit period, and then would be barred from filing suit after the presuit period lapsed because the statute of limitations would have run. Thus, the

extension of the limitations period would be necessary to prevent claimants from being denied access to the courts prior to the lapse of two years.

However, the purpose of an extension is not served where the claimant serves the notice of intent a considerable period of time before the lapse of the two year limitation period. Where, as in the instant case, the claimant serves the notice of intent 254 days before the two year limitations period ends, the 90 day presuit period does not interfere with the claimant's access to the courts. After the 90 days pass, the claimant still has 164 days in which to file suit. This 164 day period exceeds the 60 days that the Legislature defined as a minimum necessary negotiation period after rejection of a claim. See §766.106 (4), Fla. Stat.[1] Therefore, the statute of limitations remains fixed at the two years intended and codified by the Legislature in §95.11 (4), Florida Statutes.

Adopting the Hankeys' reading of §766.106 (4) would actually be inconsistent with §95.11 (4), Florida Statutes. That section requires that a medical negligence action be filed within two years of the time a claimant knew or should have known of the alleged negligence. See §95.11 (4)(b). Because the presuit

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[1] "Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit." §766.106 (4), Fla. Stat. This 60 day or remainder period is intended to give the parties a window in which to negotiate a settlement after all investigation has been completed. See Tanner, 18 So. 2d at 183-184.

investigation must be conducted in all medical negligence cases, the Hankeys' reading of §766.106 would effectively change the statute of limitations in all medical negligence cases to two years and 90 days. If such were the intent of the Legislature, it could have simply enacted a two year and 90 day statute of limitations for medical negligence actions, without any provision whatsoever for tolling the statute during presuit. Presumably, this was not done because the Legislature deemed two years to be the appropriate limitations period, with a tolling of that period when the presuit requirements would interfere with that two year deadline.

It is important, when considering the issue on appeal, to emphasize the purpose of the statute of limitations. The statute of limitations was not enacted by the Legislature for the purpose of causing harm or bestowing rights upon claimants. Rather, the purpose of the statute of limitations is "to protect defendants against unusually long delays in filing of lawsuits." Nardone v. Reynolds, 333 So. 2d 25, 36 (Fla. 1976). Limitations statutes "are designed as shields to protect defendants." Allie v. Ionata, 503 So. 2d 1237, 1240 (Fla. 1987). In light of this purpose for the statute of limitations, the rights of the defendants should not be impinged upon without the presence of some overriding necessity for protection of the rights of the claimants. That is, if the plaintiff's right of

access to the courts will be limited by a shortening of the statute of limitations, then extension of the limitation period is appropriate and warranted. However, if the claimant has the ability to satisfy the presuit requirements, and still has a significant amount of time in which to file suit within the two year limitation period, then the right of the defendants to be free from the potential for suit should be protected and enforced. The Hankeys' interpretation of §766.106 would violate the defendants' right of protection, merely for the purpose of providing claimants with an unwarranted and unnecessary windfall. Clearly, this is not what was contemplated by the Legislature.

The Hankeys argue in their initial brief that failure to extend the statute of limitations by 90 days would, in effect, shorten the statute of limitations. IB.7-8. This argument is without merit. During the 90 day presuit period, the Hankeys were barred from filing suit, but there still remained significant time (164 days) in which to file a complaint after the lapse of the 90 days. The two year deadline for filing suit was still obtainable, and should have been met. In circumstances where the notice of intent is served shortly before the lapse of the two years, the 90 day bar from filing suit would prevent a claimant from filing suit on the last possible day (or the two year anniversary of the accrual of the claim). However, in the instant case, even after the presuit investigation (90 days) and any settlement

negotiations were unsuccessful (164 more days), nothing would have prevented the Hankeys from filing suit on the two year anniversary of the accrual of their claim.

Moreover, it is notable that the statute of limitations for medical negligence may be unilaterally extended by a claimant, by the mere payment of a fee to the clerk of court. This is a feature that is unique to medical malpractice actions. Presumably, the Legislature recognized that by placing an intricate and complex presuit procedure in place for claimants to satisfy, there might occasionally be a need for additional time to comply with those requirements. Therefore, the Legislature included in the Medical Malpractice Reform Act a provision that "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. . .an automatic 90-day extension of the statute of limitations shall be granted to allow the reasonable investigation required by subsection (1) [of §766.104]." §766.104 (2), Fla. Stat. The Hankeys availed themselves of this extension, despite their having already completed the investigation required by §766.104 (1).[2] This automatic extension serves to

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[2] Arguably, the Hankeys were not entitled to the 90 day automatic extension authorized by §766.104 (2), as that extension is only available "to allow the reasonable investigation required by subsection (1)." As the investigation required by subsection (1) necessarily must have been completed before sending the notice of intent and verified medical expert corroboration, the 90 day automatic extension should not have been available to the Hankeys. (Cont.)

mitigate any prejudice that the claimants might suffer by the 90 day presuit period. The Hankeys argue that the 90 day presuit period reduces the limitations period to one year and nine months under the interpretation of the lower tribunals, but such argument is misplaced where the claimants still have the opportunity to file suit up until the last day of the two year two year limitations period, as prescribed by the Legislature in §95.11 (4). However, even if the inability to file suit during the 90 day presuit period somehow prejudiced the claimants, such prejudice would be alleviated by the claimants' unique ability to unilaterally extend the limitations period by 90 days by purchasing the automatic extension authorized by §766.104.

The Hankeys maintain that despite these clear manifestations of legislative intent, the language of §766.106 mandates an extension of the limitations period because the word "tolled" is used in subsection (4). See IB.6-7. While it is true that plain and unambiguous language in a statute must be given effect, it is also true that a literal interpretation of statutory language need not be given when to do so would lead to an unreasonable or ridiculous conclusion. Patry v. Capps, 633 So. 2d 9, 11 (Fla. 1994); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). Furthermore, where there are cogent reasons for believing that the letter of the law does not accurately disclose the legislative intent, the courts are authorized to

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However, even with the 90 day automatic extension, the Hankeys' complaint still was filed untimely.

depart from the letter of the statute and resort to statutory construction. Patry, 633 So. 2d at 11; Holly, 450 So. 2d at 219. As discussed *supra*, the interpretation of the Hankeys, and that of the Fourth District Court of Appeal in Rothschild v. NME Hospitals, Inc., 707 So. 2d 952 (Fla. 4th DCA 1998)(interpreting the tolling language of §766.106 as effectively tacking on 90 days to every medical negligence limitations period) is "unreasonable," "ridiculous," and contrary to the clear legislative intent of the Medical Malpractice Act of 1985 (chapter 766, Florida Statutes) and the statute of limitations (§95.11, Florida Statutes). The only effect of such an interpretation would be to provide claimants with a windfall, to the detriment of the rights of the health care providers that chapter 766 and §95.11 (4) are intended to protect. Claimants who serve their notices of intent long in advance of the lapse of the two year limitation period are not prejudiced, and have the unique ability to mitigate any prejudice they perceive by unilaterally extending the limitations period by the same 90 day period designated for the presuit investigation.

Alternatively, the interpretation of the Fifth District Court of Appeal in Pergram v. Horan, 669 So. 2d 1150 (Fla. 5th DCA 1996) and Hankey v. Yarian, 719 So. 2d 987 (Fla. 5th DCA 1998) comports with the legislative intent of chapter 766, enforces the statutory limitation period designated by the Legislature in

§95.11 (4), and protects the rights of health care providers who are the intended protected class under those statutes. The Fifth District's interpretation also gives reasonable and meaningful effect to the tolling language of §766.106, as it grants additional time to claimants who need it and would otherwise be prejudiced by having to satisfy the presuit requirements; without granting windfalls to those who merely "sleep on their rights." See Allie, 503 So. 2d at 1240 *citing* Hoagland v. Railway Express Agency, 75 So. 2d 822, 827 (Fla. 1954)(stating that the statute of limitations "cuts of the remedy of the party who has slept on his rights").

Accordingly, this Court should adopt the reasoning of the Fifth District Court of Appeal in Hankey v. Yarian and Pergram v. Horan, and reject the interpretation of the Fourth District Court of Appeal in Rothschild v. NME Hospitals, Inc. In turn, this Court should affirm the decisions of the trial court and the Fifth District Court of Appeal.

CONCLUSION

Based on the foregoing arguments and authority, this Court should adopt the reasoning of the Fifth District Court of Appeal in Hankey v. Yarian and Pergram v. Horan, and reject the interpretation of the Fourth District Court of Appeal in Rothschild v. NME Hospitals, Inc. Specifically, this Court should hold:

(1) that the 90 day presuit period provided by §766.106 (4) does not extend the statute of limitations for medical malpractice beyond two years, nor prevent the statute of limitations from running, when a claimant serves the notice of intent in sufficient time that the 90 day presuit period expires more than 60 days before the two year limitations period lapses;

(2) that the legislative intent of chapter 766 and §95.11, Florida Statutes, dictates that the method of calculation described by the Fifth District Court of Appeal in Pergram and Hankey be utilized when calculating the expiration of the statute of limitations in medical malpractice actions;

(3) that the decision of the trial court and the Fifth District Court of Appeal in the instant case is, and should be, AFFIRMED.

Respectfully submitted,

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by and through its counsel,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief for Appellee, Flagler Hospital, Inc., has been furnished via United States Mail, on this 8th day of January 1999, to Charles D. Sikes, Esq. of Charles Daniel Sikes, P.A., 407 West Georgia Street, Starke, FL 32091; Kim E. Bouck, Esq. and M. Kathleen Roddenberry, Esq. of Smith, Schoder, Bouck & Roddenberry, P.A., 605 South Ridgewood Avenue, Daytona Beach, FL 32114; and Kurt M. Spengler, Esq. and Michael R. D'Lugo, Esq. of Wicker, Smith, Tutam, O'Hara, McCoy, Graham & Ford, P.A., Post Office Box 2753, Orlando, FL 32802-2753.

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