IN THE SUPREME COURT OF FLORIDA

Case No.: SC20-1399

WILLIAM BOYLE,

Petitioner,

v.

MYLES RUBIN SAMOTIN, M.D.,
and MYLES RUBIN SAMOTIN, M.D.
P.A. d/b/a SAMOTIN ORTHOPAEDICS

Respondents.
_____/

AMICUS BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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PRELIMINARY STATEMENT

This amicus curiae brief is submitted by the Florida Defense Lawyers Association ("FDLA") in support of the Respondents, Myles Rubin Samotin, M.D., and Myles Rubin Samotin, M.D., P.A., D/B/A Samotin Orthopaedics.

STATEMENT OF IDENTITY AND INTEREST

The FDLA is a statewide organization of civil defense attorneys formed in 1967, and it has over 1,000 members. Its goal is to "support and work for the improvement of the adversary system of jurisprudence in our courts." To this end, the FDLA maintains an active amicus curiae committee through which members donate their time and skills to submit briefs in cases pending in state and federal appellate courts. The FDLA has actively participated in amicus briefing in numerous cases which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice statewide, many of which have impacted tort, litigation, and insurance issues.

This case carries statewide importance as it addresses the statute of limitations under which a claimant may maintain a medical malpractice action. The FDLA is uniquely situated to address this issue as many of its members defend medical malpractice cases. A decision from this Court will affect the FDLA's members and their cases.

SUMMARY OF ARGUMENT

This Court should adopt the holding reached by the Second District Court of Appeal in this case and reject the opinions in conflict from the Fourth District and the Fifth District. See Baxter v. Northrup, 128 So. 3d 908 (Fla. 5th DCA 2013); Zacker v. Croft, 609 So. 2d 140 (Fla. 4th DCA 1992). A contrary ruling would violate the separation of powers doctrine and would result in a judicially created limitations period at odds with the legislatively enacted statute of limitations in medical malpractice claims and at odds with the legislatively created tolling periods in Chapter 766.

ARGUMENT

I. THE SECOND DISTRICT COURT'S HOLDING APPROPRIATELY PREVENTS JUDICIAL LAWMAKING.

Petitioner, in substance, asks for a judicially created tolling period to the medical malpractice statute of limitations for the time period between the mailing of the notice of intent to initiate litigation by a claimant and the receipt of the notice of intent by a prospective defendant. A decision to supplement the medical malpractice tolling period would constitute judicial encroachment on legislative lawmaking.

A. Separation of Powers Doctrine.

Article II, section 3 of the Florida Constitution provides that the powers of the state government are divided into legislative, executive and judicial branches and that "[no] person belonging to one branch shall exercise any power appertaining to either of the other branches unless expressly provided herein." Art II, § 3, Fla. Const.

Pursuant to this provision, the doctrine of separation of powers has been strictly construed in Florida. Corcoran v. Geffin, 250 So. 3d 779, 783–84 (Fla. 1st DCA 2018). "The Florida Constitution imposes a strict, explicit and textual separation of powers requirement." Id. As the First District noted, "[it] would be hard to compose a more demanding requirement in organic law than [Article II, §3], which not only requires an explicit separation of the legislative, judicial and executive powers, but specifies that no one governmental official is to exercise any power appertaining to either of the other branches." Barati v. State, 198 So. 3d 69, 83 (Fla. 1st DCA 2016). Florida's separation of powers of doctrine is far more constraining than its federal counterpart. Id.

This Court has traditionally applied a "strict separation of powers doctrine." Fla. Dept. of State, Div. of Elections v. Martin, 916 So. 2d 763, 769 (Fla. 2005). This strict application encompasses two fundamental

prohibitions: (i) "no branch may encroach upon the powers of another"; and (ii) "no branch may delegate to another branch its constitutionally assigned power." Id. (citing Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1991)). Under this approach, "[c]ourts construe and interpret the laws, but they do not make them. They should never assume the prerogative of judicially legislating." Hancock v. Bd. of Pub. Instruction of Charlotte County, 158 So. 2d 519, 522 (Fla. 1963).

B. Time Limitations on Actions Is a Legislative Function.

Barring an assertion for equitable relief, the limitations period for the maintenance of a cause of action is a legislative prerogative. As this Court has explained, "[a]t common law, there were no fixed time limits for filing lawsuits. Rather, fixed limitations on actions are predicated on public policy and are a product of modern legislative, rather than judicial, processes." Major League Baseball v. Morsani, 790 So. 2d 1071, 1074 (Fla. 2001).[1] As it pertains to claims brought pursuant to the Medical Malpractice Act, this

[1] Morsani did acknowledge that some equitable remedies to the statute of limitation remain, provided the equitable remedy is not prohibited by statute or is not so repugnant to the statute as to bar the equitable remedy. Id. at 1078.

Court has expressed its opinion that tolling periods and the statute of limitations address substantive rights and are the purview of the legislature:

> While the Florida Constitution grants this Court exclusive rule-making authority, this power is limited to rules governing procedural matters and does not extend to substantive rights. Art. V, § 2(a), Fla. Const.; *Timmons v. Combs,* 608 So. 2d 1 (Fla. 1992); *Benyard v. Wainwright,* 322 So. 2d 473 (Fla. 1975). We have previously stated that statutes of limitation provide substantive rights and supersede our procedural rules. *S.R. v. State,* 346 So. 2d 1018 (Fla. 1977). In this instance, our Rule of Civil Procedure 1.650, which was adopted to implement the legislative intent of chapter 766, does not absolutely control which of the two statutory provisions applies.

Boyd v. Becker, 627 So. 2d 481, 484 (Fla. 1993).

C. Relief Sought by Petitioner is Judicial Lawmaking.

Despite this Court's strict adherence to the separation of powers doctrine and the acknowledgement that the statute of limitations for medical malpractice actions is a legislative prerogative, Petitioner's desired relief in this appeal would have the effect of adding a judicially created tolling period to the medical malpractice statute of limitations.

To understand this point, it is worth reviewing the statutory provisions that control the time frame in which a medical malpractice action must be

initiated. The first provision is section 95.11, Florida Statutes, which creates a four-year statute of repose[2] of medical malpractice claims:

> However, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued. . . .

§ 95.11(4)(b) Fla. Stat. In addition to the statute of repose, there are several statutory provisions that either toll or extend that statute of repose.

Section 766.104(2), Florida Statutes, permits a claimant to purchase an automatic 90-day extension to the statute of repose. Assuming the four years (statute of repose) and 90 days (automatic extension) have not expired, a claimant is permitted to serve a notice of intent to initiate litigation ("NOI") on a prospective defendant via certified mail, return receipt requested. § 766.106(2), Fla. Stat.

Once a claimant mails a notice of intent to initiate litigation to a prospective defendant and the prospective defendant is in receipt of the NOI, the statute of limitations is tolled for another 90 days to permit the parties engage in the presuit screening process:

> **(4) Service of presuit notice and tolling.--**The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However,

[2] Respondents also challenge Petitioner's claim under the two-year statute of limitation of section 95.11(4)(b). This brief does not address the statute of limitations arguments.

> 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.

§ 766.106(4), Fla. Stat. Finally, after the expiration of the 90-days or the rejection of the presuit claim by prospective defendant, a claimant will have 60-days or the remainder of the statute of repose, whichever is longer, to file a complaint.

Read together, the statutory provisions provide clear, non-overlapping lines of demarcation between the running of the statute of the repose and the suspension of the running of the statute of repose by operation of the tolling provision. Thus, the statute of repose (and automatic extension) continues to run until the statute of repose is halted by receipt of the NOI by a prospective defendant. The moment the prospective defendant receives the NOI, the statute of repose stops running and the 90-day tolling (presuit screening) period starts to run. Finally, at the moment the 90-day presuit screening (tolling) period ends, the statute of repose starts to run again. The claimant at that point would have the remainder of the statute of repose or 60-days, whichever is greater, to file a complaint. § 766.106(4), Fla. Stat.

This clear statutory framework leaves no room for common law rules of tolling. See generally Antonin Scalia & Bryan A. Garner, *Reading Law:*

The Interpretation of Legal Texts 96 (2012) ("When, however, the statute purports to provide a comprehensive treatment of the issue it addresses, judicial lawmaking is implicitly excluded.").

Despite the clear interplay between the statutory provisions, Petitioner has taken the position that this Court should create a separate, additional tolling period. Specifically, Petitioner contends that the statute of limitations should be tolled when a claimant mails a notice of intent and prior to prospective defendant receiving the mailing. This is a tolling period not contemplated by Chapter 766. This is an extra-statutory tolling period that would go beyond the single 90-day tolling period permitted for presuit screening. Creating this additional extra-statutory tolling period by an opinion of this Court would be a violation of the separation of powers doctrine. See Iselin v. United States, 270 U.S. 245, 251 (1926) ("To supply omissions transcends the judicial function.").

As a final point, Petitioner contends that requiring a claimant to ensure receipt of the notice of intent by a prospective defendant would "impose an impossible duty well beyond any plaintiff's control." (Initial Brief, P. 20). However, this argument seeks to absolve claimants of their dereliction in timely serving a notice of intent. A medical malpractice claimant under the

statute of repose has 4 years and 90 days[3] to ensure a prospective defendant receives a notice of intent. Given that time frame, a claimant's burden can hardly be described as impossible. A claimant that makes the decision to wait 4 years and 89 days to mail a NOI cannot say he or she lacked a sufficient amount of time to ensure prospective defendant's receipt of the NOI. See Caduceus Properties, LLC v. Graney, 137 So. 3d 987, 992 (Fla. 2014) ("Statutes of limitations are designed to protect defendants from unusually long delays in the filing of lawsuits and to prevent prejudice to defendants from the unexpected enforcement of stale claims."); Arvelo v. Park Fin. of Broward, Inc., 15 So. 3d 660, 663 (Fla. 3d DCA 2009) ("Statutes of limitation are intended to encourage the enforcement of legal remedies before time dilutes memories, witnesses move to greener pastures, and parties pitch out [or 'delete,' in the electronic age] old records.")

Furthermore, even if there was agreement that requiring receipt of the NOI by a prospective defendant was burdensome, the remedy would be legislative, not judicial. "Courts have then no power to set it aside or evade [a law's] operation." Baker v. State, 636 So. 2d 1342, 1343 (Fla. 1994) ("If [a law] has been passed improvidently the responsibility is with the

[3] This assumes claimant purchased the automatic 90-day extension via section 766.104(2), Florida Statutes.

Legislature and not with the courts. The proper remedy for a harsh law will not be found through construction or interpretation; it rests only in amendment or repeal.”).

CONCLUSION

Therefore, this Court should affirm and approve the Second District Court of Appeal’s decision and hold that the statute of limitations is tolled, per section 766.106(4), only after prospective defendant is in receipt of a claimant’s notice of intent. It should decline any invitation to judicially create a separate and additional tolling period.

WHEREFORE, FLORIDA DEFENSE LAWYERS ASSOCIATION respectfully requests this Court to affirm and approve the Second District Court of Appeal’s decision.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was served through the EPORTAL to: **J. Scott Murphy, Esq. & Landis V. Curry III, Esq.** (scott@pkblawfirm.com; lance@pkblawfirm.com; leslie@pkblawfirm.com; vielka@pkblawfirm.com); Paul Knoff Bigger, PLLC, 840 South Denning Drive, Suite 200, Winter Park, FL 32789; **Kirsten K. Ullman, Esq.** (kullman@ublawoffices.com; courtmail@ublawoffices.com; ssamhoury@ublawoffices.com); Ullman Bursa Law, 3812 Coconut Palm Drive, Suite 200, Tampa, FL 33619; **Wilbert Vancol, Esq.**, (wvancol@mmdorl.com); McEwan, Martinez & Dukes, PA, 108 E Central Blvd, Orlando, FL 32801, **Andrew S. Bolin, Esq.** (sab@bolin-law.com; zgj@bolin-law.com; jec@bolin-law.com); Bolin Law Group, 1905 E. 7th Avenue, Tampa, FL 33605; this 1st day of March, 2021.

/s/ Kansas R. Gooden

CERTIFICATION OF COMPLIANCE

WE HEREBY CERTIFY that this Amicus Brief has been typed using the 14-point Ariel font and contains less than 5,000 words as required by Florida Rules of Appellate Procedure 9.045 and 9.370(b).

/s/ Kansas R. Gooden