Filing # 122303799 E-Filed 03/02/2021 10:25:43 AM

SUPREME COURT OF FLORIDA

CASE NO.: SC20-1399
Lower Tribunal No(s).: 2D18-2932; 112016CA0023080001XX

WILLIAM BOYLE

Petitioner(s)

vs.

MYLES RUBIN SAMOTIN, M.D., ET AL.

Respondent(s)
_____/

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# AMICUS CURIAE BRIEF OF THE FLORIDA HOSPITAL ASSOCIATION and FLORIDA MEDICAL ASSOCIATION

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RECEIVED, 03/02/2021 10:26:29 AM, Clerk, Supreme Court

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## STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Florida Hospital Association (the "FHA") is a Florida nonprofit trade association consisting of 342 hospitals and health systems in Florida. The FHA represents its members on matters of common interest before all three branches of government and regularly appears as *amicus curiae* to address issues affecting its members in the courts of Florida.

Founded in 1874, the Florida Medical Association is a professional association dedicated to the service and assistance of Doctors of Medicine and Doctors of Osteopathic Medicine in Florida. The FMA represents more than 25,000 members on issues of legislation and regulatory affairs, medical economics and education, public health, and ethical and legal issues. FMA advocates for physicians and their patients to promote the public health, ensure the highest standards of medical practice, and to enhance the quality and availability of health care in the Sunshine State.

Florida Hospital Association and Florida Medical Association have a vital interest in the issues presented because altering the notice requirements of Florida's medical malpractice statutes would

materially affect the substantive rights and protections those statutes currently provide their members.

## Summary of the Argument

The Second District Court of Appeals' reliance on *Bove v. Naples HMA, LLC*, 196 So. 3d 411 (Fla. 2016), and determination that tolling of the statute of limitations in medical malpractice actions does not begin until the receipt of the Notice of Intent by a prospective defendant should be affirmed. The interpretation is supported by the prior decision of this Court as the most reasonable interpretation of the notice provisions set forth in Chapter 766 of the Florida Statutes. Further, the statutory scheme enacted by Florida's legislature to toll the statues of limitations and repose while medical malpractice cases are investigated, are substantive rights that should not be altered by the Courts.

## I. The Interpretation of the Notice Provisions in Chapter 766.106 by the Second District Court of Appeal in *Bove v. Naples HMA, LLC* is the Most Reasonable Interpretation of the Statute and Should be Followed

In reaching its determination that the trial court correctly dismissed this matter as being time barred by the statute of limitations, the Second District Court of Appeal correctly relied on the precedent set in *Bove.* The *Bove* Court's interpretation of Section 766.106 and Florida Rule of Civil Procedure 1.650, which was

adopted to implement the legislative intent of the statute follows the plain language of those provisions, produces the most reasonable conclusion and is consistent with previous interpretations by this Court.

In *Bove,* the Court was persuaded that Rule 1.650(b)(1), requiring that the Notice of Intent be "sent by certified mail *and received by"* the prospective defendant was indeed an accurate expression of the legislative intent of Section 766.106. *See Bove,* at 196 So.3d 414-415 (emphasis added). A plain reading of the requirements of the Section 766.106(2)(a) supports the *Bove* Court's conclusion. That section requires that a claimant shall "notify each prospective defendant by certified mail, *return receipt requested*, of its intent to initiate litigation for medical negligence. (Emphasis added). If receipt of the Notice of Intent were of no matter to the tolling of the statute of limitations, the legislature would have not added that to the statutory requirements to trigger tolling.

Further, requiring a prospective defendant receive the Notice of Intent to trigger tolling accomplishes the purpose of allowing a defendant to have a full 90-day period to investigate the claims made and make determinations on how that defendant wishes to proceed.

In *Boyd v. Becker*, 627 So. 2d 481 (Fla. 1993) the Court analyzed the very question presented in the present matter in interpreting the conflicting language in 766.106(3) and 766.106(4), Florida Statutes (1989). Subsection (3) referred to a notice "being mailed," and subsection (4) to a notice "being received." The Court concluded the tolling period, "should be computed from the date the putative defendant receives the notice of intent." *See Id.* at 483-484. In reaching this conclusion the Court stated,

> "The purpose of chapter 766 is to facilitate the resolution of medical malpractice claims before the matter goes to trial. We believe the legislature intended that the statute provide a full ninety-day period during which the prospective defendant and the insurer can objectively review the merits of the claim and then carefully determine whether the claim should be settled and for what amount. To facilitate this process, the defendant and insurer may, among other actions, request informal discovery, require the plaintiff to submit to a physical examination, and convene a medical review committee. Although these activities could take a much longer period of time to complete, the legislature has determined that a period of ninety days provides the proper balance between the needs of the defendant and insurer, on the one hand, and the plaintiff's desire to bring suit as soon as possible, on the other hand." *Id.*

In *Cf. Hillsborough Cty. Hosp. Auth. v. Coffaro*, 829 So. 2d 862, 866 (Fla. 2002) this Court analyzed various tolling and extension periods for statute of limitations period in medical malpractice cases.

Relying on the holding in *Boyd,* this Court noted that "[f]or purposes of the statutory scheme, the date [that the defendants] received the Notice of Intent is the date used in computing statutory time requirements.

Using the date of mailing will always result in a shortening of the 90-day investigation period afforded to defendants in medical malpractice actions. See § 766.106(3)(a). Not requiring receipt of the notice could lead to defendants essentially being denied the protections of the pre-suit investigation process altogether in cases where the time of receipt provides insufficient time to complete discovery. Likewise, if prospective defendants are limited in the time they are afforded analyze exposure and collect information on the alleged economic damages likely to be alleged by a claimant, they may be denied the ability to intelligently decide whether to elect voluntary binding arbitration and cap their damages “within the 90-day pre-suit period” as the statute requires. See Florida Statutes 766.207(2). In cases where the defendant never actually received the notice a Claimant could initiate a lawsuit without the defendant ever having had the opportunity to even begin an investigation.

The legislature intended to provide a framework for the investigation and possible early resolution of medical malpractice claims in their passage of Section 766.106. Rule of Civil Procedure 1.650 correctly recognized that the intent of the statute cannot be accomplished without a requirement of receipt of the notice by the prospective defendant. Allowing the date of mailing to serve as the event that tolls the statute of limitations, and begins the pre-suit period for the prospective defendant, frustrates the purpose of the statute and is in direct contradiction to the rules promulgated by this Court.

## II. The Statutory Scheme that Controls Medical Malpractice Cases is Substantive and Expresses Legitimate Legislative Concern

The Petitioner urges this Court to depart from the intent of the notice provisions found section 766.106, and rule that the requirement of receipt by a prospective defendant of a Notice of Intent, prior to the expiration of the statute of limitations or repose, is an unconstitutionally burdensome requirement. However, this asks the Court to engage in a prohibited re-writing of a statutory scheme that confers substantive rights on potential medical malpractice defendants. 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. *Boyd v. Becker*, 627 So. 2d 481, 483-484 (Fla. 1993); Art. V, § 2(a), Fla. Const.; *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992); *Benyard v. Wainwright*, 322 So. 2d 473 (Fla. 1975). The legislative branch has sole power to appropriate and enact substantive policy. *Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976); The Federalist No. 78, ("The legislature ... prescribes the rules by which the duties and rights of every citizen are to be regulated."). The judiciary is limited to enforcing the substantive law unless it is found to be unconstitutional. *Johnson*, 336 So. 2d at 95. This Court has asserted that when a statute is clearly substantive and operates in an area of legitimate legislative concern, it will not be deemed an unconstitutional encroachment on the judicial branch. *See Massey v. David*, 979 So.2d 931, 936, 937 (Fla.2008).

It is well settled that that statutes of limitation provide substantive rights. *S.R. v. State*, 346 So. 2d 1018 (Fla. 1977). Further there is little doubt that the underpinnings of Chapter 766 are expressions of legitimate areas of legislative concern. Florida's statutory scheme for medical malpractice claims is the result of

arduous research and hours of collection of testimony regarding the impact of lawsuits on medical providers throughout the state. When considering the need for the requirements set for the in what is now Chapter 766, the Legislature convened a task force to review the impacts of medical malpractice litigation on Florida's medical system. *See University of Miami v. Echarte,* 618 So. 2d 189 (Fla. 1993); Academic Task Force for Review of the Insurance and Tort Systems Preliminary Fact-Finding Report on Medical Malpractice (Aug. 14, 1987). The findings of the task force provided startling examples of skyrocketing insurance premiums and a crippling tort environment for medical providers in Florida. Among its many findings, the Task Force found that: 1) a family physician who performed no surgery and practiced outside Dade and Broward Counties saw a 229% increase in medical malpractice insurance premiums for the period of 1983 to July 1, 1987; and 2) a family physician who performed no surgery and practiced in Dade or Broward County saw a 300% increase in medical malpractice insurance premiums for the same period. Furthermore, the Task Force found that rates for specialties also increased sharply. For example, the rates for obstetricians

increased by 444% in Dade and Broward Counties, as compared to 304% in the rest of the state.

Out of legislative concern that Florida needed a pre-suit process in which medical malpractice claims could be investigated, analyzed, and potentially resolved to help control an ongoing crisis, Chapter 766 was born. While Florida Rule of Civil Procedure 1.650 is procedural, the Rule was adopted by the Court, "to implement the legislative intent of chapter 766." *Boyd v. Becker*, 627 So. 2d 481 (Fla. 1993). Because this statute confers substantive rights and is an expression of legitimate legislative concern, the statue and Rule 1.650, which should be viewed as expression of the legislature's intent, are Constitutional and should not be re-interpreted or disturbed.

## III. Allowing for Additional Tolling of the Statutes of Limitations and Repose are Inconsistent with Established Law and Risks Making the Statute of Limitations Inoperative

Petitioner essentially argues for additional tolling provisions to apply based on events such as delays by the postal service in delivering certified mail. Moving the triggering event for tolling of the statute of limitations to the date of mailing a notice of intent, would

most certainly result in longer tolling of the statute of limitations and repose. Florida's health care providers would face additional uncertainty as to when their exposure related to any incident is finally eliminated.

The statute of limitations is already subject to extensions based on delayed discovery of the injury. Mere knowledge of an injury is not enough to trigger the running of the statute of limitations; rather, a plaintiff must also have "knowledge that there is a reasonable possibility that the injury was caused by medical malpractice." *Tanner v. Hartog*, 618 So. 2d 177, 181 (Fla. 1993) (footnote omitted).

However, it is well settled that outside Chapter 766, Section 95.051 delineates an *exclusive* list of events that can prevent the running of the statute of limitations. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1075 (Fla. 2001) (emphasis added). A potential plaintiff waiting until a mere delay in the mail could extinguish his or her claim is not among them.

In fact, the delays in mailing described by the Petitioner are one of the reasons this Court has previously concluded that the date of receipt of the notice is "the most reasonable interpretation" of the legislative intent of the 90-day tolling period. *See Boyd at* 627 So. 2d

483-484. In reaching its conclusion, this Court pronounced the critical importance of giving a prospective defendant the full 90-day tolling period to investigate the claim and make decisions as to how to proceed. *Id.* at 484. Specifically, this Court noted,

> "If the ninety-day investigation period were measured from the date the plaintiff mailed the notice of intent to initiate litigation, the defendant would never receive a full ninety days in which to investigate. Delays in mail delivery could significantly reduce this time period and could force the defendant and insurer to make critical settlement decisions before gathering all the facts. In a case where there are codefendants, the analysis proposed by [the Claimant] could result in differing amounts of investigation time for each defendant, depending on how quickly each receives the mail. Certainly, the legislature could not have intended this inconsistency. I*d.*

The Petitioner likewise urges the Court use the mailing date of the NOI as a tolling event to avoid hypothetical scenario of a defendant who intentionally avoids acceptance of certified mail. It is unnecessary to consider this scenario when analyzing the case at bar, because there is no allegation that the provider intentionally avoided receipt of the notice. However, even in an instance where an unscrupulous defendant may attempt this tactic, altering the substantive protections of the statute of limitations, for an entire class of defendants, is far too drastic a measure. Florida law already allows for relief from such actions in the form of equitable estoppel.

Equitable estoppel differs from other legal theories that may operate to deflect the statute of limitations, such as accrual, tolling, equitable tolling, and waiver. *See Major League Baseball v. Morsani*, 790 So. 2d at 1076-1077. Equitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct. *Id*. The doctrine bars the wrongdoer from asserting that shortcoming and profiting from his or her own misconduct. Equitable estoppel thus functions as a shield, not a sword, and operates against the wrongdoer, not the victim. *Id*. The Court has applied the doctrine of equitable estoppel for more than 170 years, and it would fairly meet the concerns of any instance of avoidance of service of a notice of intent by a potential defendant.

Recognizing non-enumerated exceptions to the statutes of limitations and repose is an invitation for Florida's courts to render the statutes a dead letter. If a Claimant is permitted to wait until the day of expiration of the four-year statute of repose to toll the statute related to their claim, it is not difficult to envision any number of additional scenarios created during the process of creating and mailing the notice of intent that might be argued to further toll the statutes. In the present matter, there is no dispute that the date of

the subject surgery is the date the statute of repose began to run in this matter. (R. 146). The Petitioner secured an additional 90 days in which to serve a notice of intent by purchasing an automatic extension of the statute of limitations/repose as permitted by Florida Statute 766.104(2). *Id.* Thus, the Petitioner had *four years and ninety days* in which to have his claim reviewed by an attorney and medical expert and achieve service by certified mail as required by Florida Rule of Civil Procedure 1.650(b)(1). The briefs do not reveal the reasons why Petitioner did not act sooner on his claim. In fact, the record states that Petitioner believed since May of 2013, that Dr. Samotin, "did something wrong" regarding the surgical procedure. (R. 107, ln. 3-17) This timeline serves to highlight the balancing that must be done by the Legislature in determining the amount of time a potential defendant may be exposed to liability without action by the potential plaintiff. Some who have valid claims, and discover them much closer in time to the expiration of the statute of limitations or repose may have their otherwise valid claim extinguished. This result has long been considered by Florida Courts, as unfortunate, but acceptable when balancing the rights of plaintiffs and defendants. "All statutes of limitations, which by their very

nature destroy otherwise just causes merely because of the passage of time, are inherently harsh. Harsh results represent a trade-off which the Legislature has decided it is willing to make in exchange for the burying of stale claims. *International Brotherhood of Carpenters & Joiners v. United Asso. of Journeymen & Apprentices of Plumbing & Pipefitting Industry*, 341 So. 2d 1005 (Fla. 4th DCA 1976). Altering the time in which a Plaintiff can successfully toll the statute of limitations or repose, and thereby add uncertainty to the risk of exposure from aged claims is contrary to current law and should not be entertained.

**CONCLUSION**

For the foregoing reasons, the Florida Hospital Association and Florida Medical Association respectfully request this Court affirm the opinion of the Second District Court of Appeals and confirm that the date a defendant receives the Notice of Intent is the date used in computing statutory time requirements.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via the Florida Courts E-Filing Portal to: J. Scott Murphy, Esq. and Landis Curry, III, Esq. at scott@pkblawfirm.com, lance@pkblawfirm.com, leslie@pkblawfirm.com, vielka@pkblawfirm.com; and Kirsten Ullman, Esq. at kullman@ublawoffices.com, jlevine@ublawoffices.com, jsantos@ublawoffices.com, jcleaves@ublawoffices.com and courtmail@ublawoffices.com and to Kansas R. Gooden, Esq. at kgooden@boydjen.com on March 2, 2021.

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## CERTIFICATION OF COMPLIANCE

I HEREBY CERTIFY that this Amicus Brief has been typed used the 14-point Bookman Old Style font and contains less than 5,000

words as required by the Florida Rules of Appellate Procedure 9.045 and 9.370(b).

*/s/ Andrew S. Bolin, Esq., BCS*
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