IN THE SUPREME COURT OF FLORIDA

Case No.: SC20-1399

WILLIAM BOYLE,

v.

L.T. Case Nos. 2D18-2932
11-2016-CA-002308

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

Respondents.

On Discretionary Review from the District Court of Appeal
Second District of Florida

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE AND FACTS

The trial court's final order granting summary judgment in favor of Respondents should be affirmed on appeal as the record evidence establishes the trial court's factual finding that Petitioner, William Boyle, did not timely serve the Notice of Intent upon Respondents such that it was received by Respondents prior to the expiration of the statute of repose, pursuant to *Bove v. Naples HMA, LLC d/b/a Physicians Regional Medical Center,* 196 So.3d 411 (Fla. 2d DCA 2016).

In addition to the trial court's finding that Petitioner, William Boyle, failed to timely serve the Notice of Intent prior to the expiration of the statute of repose, Petitioner also failed to timely serve the Notice of Intent prior to the expiration of the statute of limitations. Respondents respectfully offer the expiration of the statute of limitations before Petitioner filed his petition for an automatic 90-day extension under § 766.104 as cumulative grounds upon which to affirm the summary judgment of Petitioner's cause of action.

Respondents, Myles Rubin Samotin, M.D., and Myles Rubin Samotin M.D., P.A. d/b/a Samotin Orthopaedics, shall be referred to collectively as "Respondents." Dr. Myles Samotin shall be referred to as "Dr. Samotin." William Boyle shall be referred to as "Petitioner."

The certified conflict issue is whether, under Fla. Stat. 766.106, a medical malpractice claimant seeking to satisfy the limitations periods must only timely serve the notice of intent, or must the claimant also ensure that the prospective defendant actually receives the mailed notice and signs the return receipt before the limitations period expires.

The Second District Court of Appeals followed its holding in *Bove v. Naples HMA, LLC,* 196 So. 3d 411 (Fla. 2d DCA 2016), where the Second District held that a medical malpractice plaintiff must "ensure the prospective defendant receives the notice of intent prior to the expiration of the limitations period under section 95.11(4)(b) in order to trigger the tolling of the statute of limitations under section 766.106(4), Florida Statutes (2018)."

The Second District Court wrote that the facts between this matter and those in *Bove* were indistinguishable. Respondents did not sign the return receipt for the notice of intent until *after* the limitations period expired. (R. 152). Petitioner's brief acknowledged the conflict between *Bove,* cited supra, and *Zacker v. Croft* 609 So. 2d 140 (Fla. 4th DCA 1992) and *Baxter v. Northrup,* 128 So. 3d 908 (Fla. 5th DCA 2013).

On April 10, 2012, Petitioner presented to Respondent, Dr. Samotin, with complaints of right foot and arch pain, pain with every step, and dull achy pain, and requested a surgical evaluation because the pain was so

severe. (R. 160). Petitioner told Dr. Samotin, that “he has seen multiple podiatrists who have done research and seem to know what is wrong and it involves the posterior tibial tendon…[h]e has pain with almost every step and it is dull and achy. The more he is on it the worse it hurts.” (R. 160).

Dr. Samotin, performed a thorough examination of Petitioner and the afflicted foot and foot structures and noted the sagging of the navicular and uncovering of the talar head, the calcaneal tuberosity “in extreme valgus;” weakness in the distribution of the posterior tibial tendon; and tenderness over the posterior tibial tendon from the mortise level down to the midfoot. (R. 160).

Respondent, Dr. Samotin, also obtained x-rays, which confirmed a decreased subtalar joint space, severe decrease in the Meary’s angle with sagging of the navicular on the right and uncovering of the talar head on the right greater than the left, all of which indicate a need for surgery. (R. 160). Dr. Samotin, diagnosed Petitioner with hindfoot collapse and advancing posterior tibial tendinopathy. (R. 160).

Dr. Samotin documented the plan of care discussed with Petitioner and explained that Petitioner’s problem is a progressive problem; doing nothing will allow it to progress and will make walking more painful and difficult. (R. 160). At this time, Dr. Samotin further noted that Petitioner was beginning to

have problems with his right knee and his back because of the right hindfoot collapse. (R. 160). Dr. Samotin and Petitioner discussed options, which ranged from conservative interventions to "salvage surgery." Dr. Samotin advised Petitioner that surgery may not eliminate his pain, but it would generally decrease the pain, increase stability, and arrest the progression of the problem. (R. 160). Petitioner had reported a significant history of prior treatment and non-surgical interventions, none of which helped his problem. Petitioner opted to undergo the option of "salvage surgery."

On May 1, 2012, Petitioner presented to Dr. Samotin for his pre-operative office visit. Dr. Samotin provided and documented informed consent, in which the benefits and risks of the planned surgery were discussed with Petitioner. (R. 160). Petitioner indicated his understanding that there was always a risk for wound infection, wound dehiscence, or failure to solve the problem. Petitioner entered into informed consent for operation/procedure, specifically, "right triple arthrodesis with platelet blood gel."

As corroborated and evidenced by the informed consent, Petitioner was fully informed of alternative methods or treatments for his presenting, long-standing, and progressive foot problems, as well as the risks of the surgery, and that such surgery was a "salvage surgery," but that no

guarantees of result therefrom could be made. (R. 161) Moreover, Petitioner acknowledged in his deposition that he gave his informed consent for the surgery and was aware of the risks and benefits of the operation, including that the surgery could fail, could result in malunion, or that he could develop infection. (R.161)

On May 7, 2012, Petitioner underwent the surgical procedure of “triple arthrodesis” to fuse three bones in the anterior part of his foot, performed by Dr. Samotin. (R. 197). Following surgery, Petitioner continued to treat with Dr. Samotin and his office before seeing Dr. Steven Anthony on November 12, 2014. (R. 363). Petitioner alleged that Dr. Anthony told him that Dr. Samotin fused his foot incorrectly, and that the triple arthrodesis had been “unnecessary and inappropriate” for a patient as young and active as Petitioner. (R. 363).

On March 18, 2014, Petitioner presented to Dr. Jason Reiss for a second opinion, and informed Dr. Reiss of his abnormal gait. Petitioner believed at the time, **and in fact since May of 2013**, that Dr. Samotin, “did something wrong” regarding the surgical procedure. (R. 107, ln. 3-17). In fact, Petitioner stated that “it looked like my heel was fused outside my body.” (R. 106, ln 22-23).

During his April 1, 2014 visit with Dr. Reiss, Petitioner again expressed his long-standing belief that his alleged condition was due to Dr. Samotin doing a "bad job" and "something wrong with regard to the surgical procedure." (R. 107, ln. 18-25).

More than two years later, on April 20, 2016, Petitioner, through counsel, filed a Petition for an Automatic Extension of the Statute of Limitations pursuant to Florida Statute §766.104. (R. 140). On August 4, 2016, Mr. Boyle sent the statutorily required Notice of Intent to Initiate Litigation for Medical Negligence ("Notice of Intent") to Respondents pursuant to §766.106(2)(a), Fla. Stat. and Rule 1.650, Fla. R. Civ. Pro. (R. 146). The Notice of Intent was dated prior to the date that the required corroborating affidavit was signed, raising questions as to the actual date of the mailing of the Notice of Intent. The Notice of Intent was not delivered to or received by Respondents until August 8, 2016. (R. 465-466), after expiration of the Statute of Repose.

Respondents rejected the claim via letter dated November 18, 2016, and Petitioner then filed a Complaint against Respondents on December 22, 2016 – a full four years and seven months since the subject surgery performed by Respondents Dr. Samotin.

At his deposition taken on October 18, 2017, Petitioner testified that his heel became **visibly** misaligned sometime **before May of 2013** as a result of the surgery performed by Respondents Dr. Samotin (R. 105, ln. 18-25). In fact, he testified that the misalignment was so severe that it was visible to his naked eye, and that he attributed the misalignment to Dr. Samotin having done "a bad job" on his surgery. He believed this to be the case before May 2013, within a year after the surgery. (R. 106, ln. 16-25; R.107, ln. 1-2).

Petitioner further testified that he believed about a year after the surgery that the surgery caused the misalignment of the heel which he further believed caused issues with his right knee and that these issues were avoidable had Dr. Samotin conducted the surgery properly. (R. 108, ln. 3-21).

On February 2, 2018, Respondents filed a Motion for Summary Judgment (R. 30), asserting that Petitioner's Complaint was untimely filed beyond the 2-year statute of limitations for medical negligence actions provided for by §95.11(4)(b), Florida Statutes.

On May 8, 2018, a hearing was held on Respondents' Motion for Summary Judgment, which resulted in the trial court taking the issues under advisement.

On May 14, 2018, Respondents filed an Amended Motion for Summary Judgment (R. 439), which raised the corollary issue of the medical malpractice statute of repose. (R. 441 at ¶12).

On May 17, 2018, the trial court orally announced its ruling via conference call and denied Respondents' Motion for Summary Judgment. (R. 481).

On May 22, 2018, Respondents filed a Motion for Reconsideration on their Motion for Summary Judgment and cited to numerous supporting and controlling authorities, including *Bove v. Naples HMA, LLC d/b/a Physicians Regional Medical Center,* 196 So.3d 411 (Fla. 2d DCA 2016). (R. 470).

On June 20, 2018, the trial court issued an order granting Respondents' Motion for Reconsideration and found that under *Bove v. Naples HMA d/b/a Physicians Regional Medical Center,* 196 So.3d 411 (Fla. 2d DCA 2016), August 8, 2016 – the date that Respondents received Petitioner's Notice of Intent to Initiate Litigation – was outside of the Statute of Repose. (R. 640). The trial court was affirmed by the Second District Court of Appeals, which also certified conflict with *Zacker v. Croft*, 609 So. 2d 140 (Fla. 4th DCA 1992), and *Baxter v. Northrup*, 128 So. 3d 908 (Fla. 5th DCA 2013), where the courts held that tolling is triggered by service of the presuit

notice and not by a prospective defendant's actual receipt of the notice. (R. 153-54, 156.)

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal properly affirmed the trial court in granting summary judgment in this matter. It is respectfully submitted that the Florida Supreme Court should affirm the Second District Court of Appeal and resolve conflict between *Baxter* and *Bove* consistent with *Bove* and the Second District Court of Appeal' decision in *Boyle. Bove* and *Boyle* both correctly applied the black letter law of Fla. R. Civ. P. 1.650(b)(1), which requires notice through actual receipt of the Notice of Intent, as opposed to simply mailing the Notice like Petitioner contends. Moreover, Petitioner's reliance on *Baxter* and *Zacker* is misguided, as both cases are factually distinguishable from the instant matter.

Fla. R. Civ. P. 1.650(b)(1) is clear that timely receipt tolls the limitations period. The text of the rule states that "[n]otice of intent to initiate litigation ***sent by certified mail to and received by any prospective defendant*** shall operate as notice to the person and any other prospective defendant who bears a legal relationship to the prospective defendant receiving the notice. The notice shall make the recipient a party to the proceeding under this rule." (Emphasis Added). The *Bove* decision and its progeny have

created binding precedent that should be upheld as the facts in *Bove* and this case are identical. Like the claimant in *Bove,* Petitioner in this matter sent a Notice of Intent that failed to comply with the black letter law of Fla. R. Civ. P. 1.650(b)(1). Respondents did not receive notice of Petitioner's claim until *after* the statute of repose and statute of limitations expired.

Bove was correctly decided. Contrary to Petitioner's assertion, the Second District's decisions do not improperly rewrite the text of both the statute and the rule. It certainly does not create an impossible duty for claimants that unduly restricts constitutionally guaranteed access to the courts. Claimants, including Petitioner, must simply ensure that the Notice of Intent is timely served and received by potential defendants within the statute of limitations and statute of repose. Petitioner failed to timely serve the Notice of Intent.

Respondents also offer the expiration of the statute of limitations before Petitioner filed his petition for an automatic 90-day extension under §766.104 as cumulative grounds upon which to affirm the dismissal of Petitioner's cause of action. Specifically, as the statute of limitations expired before Petitioner filed his Petition for an Automatic 90-day extension, under Fla. Stat. § 766.104(2), Petitioner should not have been permitted to revive his cause of action as the statute of limitations had expired. Since the record

on appeal contains competent, substantial evidence to support the trial court's ruling, the Order granting Respondents' Motion for Summary Judgment must be affirmed on Appeal.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT PETITIONER, WILLIAM BOYLE, DID NOT TIMELY SERVE HIS NOTICE OF INTENT TO INITIATE A CLAIM FOR MEDICAL MALPRACTICE WITHIN THE 4-YEAR STATUTE OF REPOSE FOR MEDICAL MALPRACTICE ACTIONS SUCH THAT IT WAS RECEIVED BY RESPONDENTS BEFORE THE STATUTE OF REPOSE EXPIRED.

The record contains competent, substantial evidence that Petitioner, William Boyle, did not timely serve his Notice of Intent to Initiate a Claim for Medical Malpractice within the 4-year statute of repose for medical malpractice actions such that it was received by Respondents before the statute expired.

Under Florida Statute §95.11, the statute of repose for medical malpractice is 4 years from the time the incident giving rise to the action occurred. Under Florida Rule of Civil Procedure 1.650(3)(1), "the notice of intent to initiate litigation shall be served…prior to the expiration of any applicable statute of limitations or statute of repose."

Petitioner contends in his Initial Brief that the statute of repose began to run on May 7, 2012, the date of Petitioner William Boyle's surgery, and

Respondents agree. Petitioner therefore had until May 7, 2016 for Respondents to receive his Notice of Intent to Initiate a Claim for Medical Malpractice.

On April 20, 2016, Petitioner filed a petition for an automatic 90-day extension of the statute of limitations. Florida District Courts have held that "a statute of repose is a form of a statute of limitations and the terms are often used interchangeably," and that a 90-day extension to the statute of limitations purchased applies also to the statute of repose. *Moore v. Winter Haven Hospital,* 579 So.2d 188 (Fla. 2d DCA 1991). This would have then added 90 days to May 7, 2016 and given Petitioner until Friday, August 5, 2016 to serve Respondents with a Notice of Intent.

Nevertheless, the Notice of Intent was not received by Respondents until August 8, 2016. It should be noted that the Notice of Intent was dated August 2, 2016, but it is impossible that the Notice of Intent was sent on said represented date. Specifically, the required corroborating affidavit of Dr. DeGroot, which was represented as being included with the Notice of Intent, was not even signed until August 3, 2016.

A. The trial court correctly determined that it is the date the Notice of Intent is received, not the date it is mailed, which should control for purposes of tolling the statute of repose.

In *Bove,* the trial Court and Second District Court of Appeal unambiguously held that a Notice of Intent to Initiate Litigation for Medical Malpractice was untimely, as it was not received by any of the defendants prior to the expiration of the statute of limitations, as required by 1.650(b)(1), Fla. R. Civ. Pro. In the instant case, as in *Bove,* Fla. R. Civ. Pro. 1.650(b)(1) controls, and provides that "[n]otices of intent to initiate litigation *sent by certified mail to and received by* any prospective defendant shall operate as notice to the person and any other prospective defendant who bears a legal relationship to the prospective defendant receiving the notice." *Id.* (emphasis added).

In *Bove,* the Second DCA concluded that "because the rule refers to the receipt of notice and requires that the notice be sent by certified mail, it is the date that the notice is received – rather than the date that the notice is mailed – that is relevant for purposes of determining whether the statute of limitations has been tolled," and Respondents respectfully assert that the same applies in the instant case. *Id.*

Further, in *Hillsborough Cty. Hosp. Auth. v. Coffaro,* 829 So.2d 862, 866 (Fla. 2002), the Florida Supreme Court held 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." *See also Boyd v. Becker,* 627 So.2d 481, 483 (Fla. 1993) (holding that the statute of limitations is tolled from the time the defendant receives the notice of intent, not from the time the claimant mails it.)

In asking this Honorable Court to hold that it is the date the Notice of Intent is mailed, and not the date of its receipt, that should control for purposes of tolling the statute of repose, Petitioner asks this court to quash *Bove* and also disregard binding precedent from both *Coffaro* and *Boyd.* Petitioner cites two cases from other District Courts of Appeal, *Zacker v. Croft,* 609 So.2d 140 (Fla. 4th DCA 1992) and *Baxter v. Northrup,* 128 So.3d 908 (Fla. 5th DCA 2013). It is of important note that *Zacker* was ruled upon by the 4th District Court of Appeal before the Florida Supreme Court's holding in *Boyd.*

In *Boyd v. Becker,* 603 So.2d 1371 (Fla. 4th DCA 1992), the district court held that the ninety-day presuit period in a medical malpractice action commenced upon the mailing of the notice of intent, rather than the receipt of the notice of intent. This decision was then quashed by the Florida Supreme Court in *Boyd v. Becker,* 627 So.2d 481 (Fla. 1993), providing

direct guidance on this issue and refuting Petitioner's claim that the Florida Supreme Court has not directly ruled on this issue.

Petitioner's reliance on *Baxter* is also misplaced, as the dispositive issue in *Baxter* concerned when a plaintiff knew or should have known of the possibility of medical negligence so as to trigger the statute of limitations. At the end of its opinion in *Baxter,* the Fifth District Court of Appeal considered the Respondents' argument that because the notice of intent was received two days late, summary judgment was proper, even though this was not the basis that the trial court used in granting summary judgment. The Fifth DCA rejected this argument, but cited to *Boyd v. Becker,* 627 So.2d 401 (Fla. 1993) in ruling that it is when a notice is *served*, i.e., received by a potential defendant, which begins the tolling of the statute of limitations. *Baxter* at 912.

II. CUMULATIVE SUPPORT FOR DISMISSAL OF PETITIONER, WILLIAM BOYLE'S, CAUSE OF ACTION

Under Fla. Stat. §95.11(4)(b), "[a]n action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence…" Fla. Stat. §95.11(4)(b) then goes on to provide the statue of repose for Medical Malpractice claims as no later "than 4 years from the date of the incident or occurrence out of which the cause of action accrued." The statute of

limitations and necessary pre-suit investigation period required by Fla. Stat. § 766.104(1) have been interpreted by The Supreme Court of Florida to mean that "[a]fter the completion of [a] presuit investigation, and during the two-year period provided for in § 95.11(4)(b), the claimant must serve a notice of intent to initiate litigation as to each prospective defendant."

§766.104(2), Florida Statutes provides that "…an automatic 90 day extension of the statute of limitations shall be granted to allow [a] reasonable investigation," but that "the provisions of this subsection shall not be deemed to revive a cause of action on which the statute of limitations has run.

A. By Petitioner's Own Admission, he became aware of his allegedly misaligned heel and the reasonable possibility that the injury was caused by medical malpractice no later than one year after surgery, May of 2013.

Under Florida Law, the two-year statute of limitations begins to run from the time the claimant not only has knowledge of the injury, "but also 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). At his deposition, Petitioner testified that his heel became visibly misaligned sometime before May of 2013 (R. 105, ln. 18-25). In fact, he testified that the misalignment was so severe that it was visible to his naked eye, and that he attributed the misalignment to Dr. Samotin having done "a bad job" on his surgery. (R. 106, ln. 16-25; R.107, ln. 1-2).

The statute of limitations, then, began to run in May of 2013 at the latest, consistent with Petitioner's testimony that he became aware of misalignment in his heel and that he believed it was caused by Dr. Samotin's having done "a bad job" with his surgery within a year of his May 7, 2012 surgery. This would have provided Petitioner until May of **2015** to initiate a claim for medical malpractice against Respondents. Petitioner did not file his petition for an automatic 90-day extension of the statute of limitations, however, until April 20, **2016** – nearly a year after the two-year statute of limitations had expired.

B. Petitioner's Petition for an Automatic 90-day Extension of the statute of limitations was filed after the expiration of the statute of limitations and thus no cause of action should have been revived.

Petitioner's petition for an automatic 90-day extension of the statute of limitations filed on April 20, 2016, then, was nearly two years after the expiration of the statute of limitations and is therefore invalid. §766.104 (2) Florida Statutes provides that "…an automatic 90-day extension of the statute of limitations shall be granted to allow [a] reasonable investigation," but that "the provisions of this subsection shall not be deemed to revive a cause of action on which the statute of limitations has run."

Under the statute, once a 90-day extension is purchased, the statute of limitations becomes two years plus ninety days. *Cortes v. Williams*, 850 So.2d 634 (5th DCA 2003). After the completion of the presuit investigation, and during the two-year period provided for in §95.11(4)(b), the claimant must serve a notice of intent to initiate litigation to each prospective defendant. *Hankey v. Yarian*, 755 So.2d 93, 95 (Fla. 2000).

Failure to timely file a notice of intent as required by Chapters 95 and 766 of the Florida Statutes, or a lawsuit following the tolling period of the statute of limitations, requires a dismissal of the action. *Williams v. Campagnulo*, 588. So. 2d 982 (Fla. 1991). The record is clear that Petitioner Boyle failed to comply with both the statute of repose and the statute of limitations requirements and, thus, summary judgment was appropriate and should be affirmed.

C. The Second District's Decision Does Not Impose an Impossible Duty and the Doctrine of Separation of Powers Favors Constitutional Upholding of Legislation

It is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional. *See Van Bibber v. Hartford Accident & Indem. Ins. Co.*, 439 So.2d 880, 883 (Fla.1983). In fact, this Court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is

consistent with the federal and state constitutions as well as with the legislative intent." *State v. Stalder*, 630 So.2d 1072, 1076 (Fla.1994)(quoting *State v. Elder*, 382 So.2d 687, 690 (Fla.1980)). *St. Mary's Hosp., Inc. v. Phillipe*, 769 So. 2d 961, 972 (Fla. 2000)

The principles underlying the governmental separation of powers antedate our Florida Constitution and were collectively adopted by the union of states in our federal constitution. *See Mistretta v. United States*, 488 U.S. 361, 380, 109 S.Ct. 647, 658–59, 102 L.Ed.2d 714 (1989). The fundamental concern of keeping the individual branches separate is that the fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty. E.g., Ponder v. Graham, 4 Fla. 23, 42–43 (1851); s*ee The Federalist No. 47 (James Madison), No. 51 (Alexander Hamilton or James Madison).* As Montesquieu succinctly noted:

There would be an end of everything, were the same ... body ... to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals. *Charles de Montesquieu, L'Esprit des Lois 70 (Robert M. Hutchins ed., William Benton 1952) (1748).*

The separation of powers doctrine is expressly codified in the Florida Constitution in article II, section 3: The powers of the state government shall

be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The doctrine encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. *See, e.g., Pepper v. Pepper*, 66 So.2d 280, 284 (Fla.1953). The second is that no branch may delegate to another branch its constitutionally assigned power. *See, e.g., Smith v. State*, 537 So.2d 982, 987 (Fla.1989).

Article II, section 3 of the Florida Constitution provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." As this Court has explained, "[g]enerally, the Legislature is empowered to enact substantive law while [the judicial branch] has the authority to enact procedural law." *Massey v. David*, 979 So.2d 931, 936 (Fla.2008).

Therefore, "[i]f a statute is clearly substantive and operates in an area of legitimate legislative concern, this Court will not hold that it constitutes an unconstitutional encroachment on the judicial branch." *Id.* at 937. Based on the longstanding precedent of this Court, the Second District's interpretation

of the statute and requirements of 1.650(b)(1) as valid, this Court should likewise enact the substantive law of the legislature.

Plaintiff's contention that the Second District's ruling imposes an impossible duty on relies on examples pertaining to mailing the Notice of Intent to prospective defendants is misguided. In Part, Petitioner states "[d]elivery of certified mail can vary based on a number of factors, including the distance to the destination, the weather, the time of year, and the diligence of postal employees involved. Delivery can also be impacted by the unavailability of the addressee. Unscrupulous prospective defendants may even actively avoid delivery or refuse to sign the return receipt in hopes that the limitations periods will expire. When addressees are unavailable, postal employees will typically leave a note asking the addressee to pick up the certified mail at the post office, where it is held for fifteen business days."

None of the aforementioned issues the Petitioner relies on in his brief to this Court apply to this matter. Moreover, if Petitioner was aware of such delays, he should have mailed the Notice of Intent sooner than he did. Petitioner argues that such delays and mishaps are outside the control of claimants, which may be true. However, the Petitioner is not constricted from mailing the Notice of Intent in such a manner as to shorten the statute of limitations. Respondents and Petitioner both have 90 days in the presuit

period. Petitioner must simply complete his investigation and mail the Notice of Intent within the statute of limitations and statute of repose.

Rule 1.010 of the Florida Rules of Civil Procedure describes the scope of the rules, which says (among other things) that the "form, content, procedure, and time for pleadings in all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide otherwise." Section 766.106(2)(a) states that "prior to filing a complaint for medical negligence, a claimant **'shall notify'** each prospective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical negligence." (Emphasis added). Similarly, Rule 1.650(b)(1) states that "notice of intent to initiate litigation sent by certified mail to **'AND RECEIVED'** by any prospective defendant shall operate as notice to the person and any prospective defendant..." (Emphasis added). Both the statute and rule convey the same plain language requirement that the prospective defendant actually "receive" the notice of intent (not merely for the claimant to deposit the notice of intent in the mail). The statute uses the word "notify." A prospective defendant cannot be "notified," unless she/he actually "receives" the notice. The rule unequivocally states that the notice of intent shall be mailed "and received" by the prospective defendant. Petitioner asks this Court to go against the plain language of both the rule

and the statute, which as noted requires “actual” notification. A prospective defendant cannot be “notified” without actually “receiving” the notice. It is manifestly absurd to suggest that simply depositing the notice of intent in the mail is sufficient.

Furthermore, prospective defendants may change addresses, retire, or move out of state. Petitioner would have this Court conclude that simply placing the notice of intent in a mailbox will satisfy the requirement of actual notice contained in the statue and the rule. Such a non-sensical conclusion has no place in Florida law. It is the purview of the Legislature to make such a quantum leap from the plain language of the statute (especially when read in conjunction with the rule). To do otherwise is to violate the centuries old doctrine of separation of powers, which is precisely what Petitioner is requesting that this Court do.

CONCLUSION

Petitioner’s action was not timely. The language of Section 766.106 and rule 1.650(b)(1) require that the notice of intent be served within the limitations period and received by the prospective defendants before the statute of repose expires. The Second District’s decision in *Bove* does not rewrite the text or create an impossible duty for claimants as alleged by Petitioner. The Second District Court correctly applied *Bove* to this case.

Moreover, Petitioner's reliance on *Baxter* and *Zacker* is misguided, as both cases are factually distinguishable from this case. This Honorable Court should affirm the decision below and disapprove the holdings in *Zacker* and *Baxter.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Florida e-portal and by electronic mail to J. Scott Murphy, Esq., of PAUL KNOPF BIGGER, primary e-mail address: scott@pkblawfirm.com and secondary e-mail address: leslie@pkblawfirm.com on this 18th day of February, 2021.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the Florida Rules of Appellate Procedure 9.210.

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