

**IN THE SUPREME COURT OF FLORIDA**

WILLIAM BOYLE,

CASE NO. SC20-1399

Petitioner,

L.T. Case Nos.: 2D18-2932  
11-2016-CA-002308-0001-XX

v.

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

Appellees.

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ON REVIEW FROM THE DISTRICT COURT OF APPEAL  
SECOND DISTRICT OF FLORIDA

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**PETITIONER'S JURISDICTIONAL BRIEF**

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## STATEMENT OF THE CASE AND FACTS

The certified conflict issue presented by this case involves the presuit notice and tolling provisions of the Medical Malpractice Act, as set forth in section 766.106, Florida Statutes (2018). The issue is whether a medical malpractice plaintiff who seeks to toll the limitations period by timely serving (by certified mail, return receipt requested) a notice of intent to initiate litigation must also ensure that the prospective defendant actually receives the mailed notice and signs the return receipt before the limitations period expires.

In the decision below, the Second District held that it was “constrained by the doctrine of stare decisis to apply” its prior decision in *Bove v. Naples HMA, LLC*, 196 So. 3d 411, 414-15 (Fla. 2d DCA 2016), where the court 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). (A. 2, 12.) The Second District 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). (A. 12.) In those cases, the courts held that tolling is triggered by proper service of the presuit notice and not by a prospective defendant’s actual receipt of the notice. (A. 9-10.)

The facts pertinent to the certified conflict issue are not in dispute. “[T]he

parties agree the four-year statute of repose for Petitioner’s medical negligence claim expired on May 7, 2016—four years after [Petitioner’s] initial foot surgery.” (A. 2.) On April 20, 2016, Petitioner “purchased a ninety-day extension of the statute of limitations period by filing a petition for an automatic extension pursuant to section 766.104(2).” (A. 2.) Thus, Petitioner “had until August 5, 2016, to file his medical negligence claim against [Respondents].” (A.2.) On August 4, 2016, Petitioner served a notice of intent for medical negligence, via certified mail, return receipt requested, addressed to Respondents. (A. 2-3.) Respondents signed the return receipt on August 8, 2016. (A. 2-3.) Respondents later rejected the claim, and Petitioner filed suit. (A. 3.)

Respondents moved for summary judgment, arguing that Petitioner failed to timely file his lawsuit. (A. 3.) The trial court granted the motion based on *Bove*. (A. 3.) The trial court also noted its “disagreement with *Bove*” and identified opinions from other district courts of appeal that “it believed were correctly decided.” (A. 3.)

The Second District affirmed “based on *Bove*.” (A. 2.) The court stated that “while [Petitioner] placed the notice of intent in the mail and properly served it in the prescribed manner under section 766.106(4), via certified mail, return receipt requested, within the time limits under the four-year statute of repose,” Respondents “did not sign the return receipt for the notice of intent until *after* the limitations

period expired.” (A. 8.) The court concluded that “[b]ecause the facts presented in the instant case are indistinguishable from those in *Bove*, we are constrained by the doctrine of stare decisis to apply *Bove*.” (A. 12.)

The court recognized that “other district courts have resolved the same issue and arrived at the opposite conclusion—that the statute of limitations period is tolled upon *mailing* of the notice of intent—based upon identical facts as presented here, where the plaintiff serves the notice of intent prior to the expiration of the applicable time limitations but the notice of intent is not received until after the time limitations period has lapsed.” (A. 8-9.) The court then discussed the Fourth District’s decision in *Zacker v. Croft*, 609 So. 2d 140 (Fla. 4th DCA 1992), and the Fifth District’s decision in *Baxter v. Northrup*, 128 So. 3d 908 (Fla. 5th DCA 2013), both of which held that the tolling period commenced when the notice was served; not received. (A. 9-10.)

The Second District also noted that in *Bay County Board of County Commissioners v. Seeley*, 217 So. 3d 228 (Fla. 1st DCA 2017), Judge Makar issued a concurring opinion that expressed his disagreement with *Bove*. (A. 10-11.) Judge Makar found the *Baxter* court’s analysis more persuasive, reasoning:

As our supreme court explained long ago:

Service of the presuit notice by certified mail, return receipt requested, simply assures reliable verification of 1) timely service and 2) the date of receipt. Verification of

timely service serves to reduce contention and litigation concerning compliance with the general notice requirement. . . . Likewise, verification of the date of receipt serves to reduce disputes concerning compliance with various time periods that begin to run after presuit notice is received.

*Patry v. Capps*, 633 So. 2d 9, 12 (Fla. 1994) (citation omitted); *see also Hillsborough Cty. Hosp. Auth. v. Coffaro*, 829 So. 2d 862, 866 (Fla. 2002) (holding that the date a defendant receives a notice of intent starts the tolling of the limitations period (citing *Boyd v. Becker*, 627 So. 2d 481, 483-84 (Fla. 1993) (limitations period tolled when defendant receives notice of intent, rather than time it was mailed)).

(A. 11 (quoting *Seeley*, 217 So. 3d at 229 (Makar, J., concurring) (omission in original)).) Further, “Judge Makar stated ‘our supreme court has repeatedly said the presuit statute, even with its contradictions, must be interpreted in a way that allows plaintiffs access to courts and allows defendants sufficient time upon receipt of a notice of intent to evaluate it.’” (A. 11 (quoting *Seeley*, 217 So. 3d at 229 (Makar, J., concurring)).)

The Second District did not challenge the reasoning of *Zacker*, *Baxter*, or Judge Makar’s concurring opinion in *Seeley*. It instead “decline[d] to recede from *Bove*,” citing decisions requiring it to follow precedent unless changed by this Court. (A. 12.) It also “certif[ied] conflict with *Zacker* and *Baxter*.” (A. 12.)

In a lengthy separate opinion, Judge Andrea Teves Smith concurred “in result but only because we are bound by our prior precedent in *Bove*.” (A. 13.) She

explained her disagreement “with *Bove*’s construction of section 766.106(4) and [Florida Rule of Civil Procedure] 1.650—that the prospective defendant must receive, or in essence sign for, the notice of intent within the time limits of section 95.11(4)(b) in order to trigger tolling of the limitations period under section 766.106(4).” (A. 13.) Based on the “clear and unambiguous language of section 766.106(3)(a),” Judge Smith agreed “with *Zacker, Baxter*, and Judge Makar’s concurring opinion in *Seeley* that the time limits of section 95.11(4)(b) are tolled upon service of the notice of intent—when the notice of intent is mailed . . . .” (A. 13.)

Judge Smith then detailed the reasons why *Bove* was wrongly decided. (A. 13-26.) Being “guided by the well-established principles of statutory interpretation together with legislative intent of chapter 766 and the supreme court’s repeated directive that these statutes be construed in a manner that favors access to the courts,” Judge Smith stated that she “would hold that the plain and clear language of section 766.106(4) and rule 1.650(d)(1) require only that *service* of the notice of intent be accomplished before the expiration of the statute of limitations or repose in order to toll time limits under 95.11(4)(b).” (A. 26.)

Judge Smith recognized that imposing the additional requirement of “receipt” essentially required the court to “improperly rewrite section 766.106(3) and (4), as well as rule 1.650 . . . .” (A. 16-17.) She noted that while the legislature and this

Court could have written the statute and rule that way, neither did. (A. 17.) “[T]here is simply no language in the statute or rule placing the onus on the plaintiff to ensure that the prospective defendant accepts and signs the return receipt for the notice of intent within the time limits of section 95.11(4)(b).” (A. 17.)

Judge Smith stated that obligating a plaintiff “to ensure a defendant’s receipt of the notice of intent prior to the expiration of the limitations period” would “significantly reduce a plaintiff’s statute of limitations period.” (A. 22.) That, in turn, would “further restrict a party’s constitutional right of access to courts by placing yet another obligation on the plaintiff before being permitted to file suit—to ensure that a prospective defendant receives, and signs for, the notice of intent within the time limits of section 95.11(4)(b).” (A. 23.) That obligation, she stated, “is an impossible duty well beyond any plaintiff’s control.” (A. 23.)

Recognizing that chapter 766 of the Florida Statutes “already restricts a plaintiff’s access to the courts,” Judge Smith referenced this Court’s holdings that the medical negligence statutes are to be interpreted liberally in a manner that favors access to courts. (A. 23-24.) Accordingly, “guided by the well-established principles of statutory interpretation together with the legislative intent of chapter 766 and the supreme court’s repeated directive that these statutes be construed in a manner that favors access to the courts,” Judge Smith concluded that she “would hold that the plain and clear language of section 766.106(4) and rule 1.650(d)(1)

require only that *service* of the notice of intent be accomplished before the expiration of the statute of limitations or repose in order to toll time limits under 95.11(4)(b).” (A. 26.) She also concluded that Petitioner’s lawsuit “was timely filed” and that “he should be entitled to proceed on the merits of his claim.” (A. 26.)

After the Second District issues its decision, Petitioner moved for rehearing en banc. The court denied that motion, and Petitioner then timely invoked this Court’s discretionary jurisdiction based on the certified conflict.

### **SUMMARY OF ARGUMENT**

This Court has discretionary jurisdiction to review the decision below because the Second District certified its decision to be in direct conflict with the decisions of the Fourth and Fifth Districts. This Court should exercise its discretion to decide this important issue, which is having a disparate impact on similarly situated litigants across the state. As it currently stands, medical malpractice plaintiffs seeking to toll a limitations period in the Second District must not only timely serve by certified mail, with return receipt requested, the notice of intent to initiate litigation to prospective defendants, they must also ensure that those defendants have received the notice and signed the return receipt within the time limits of section 95.11(4)(b). In contrast, medical malpractice plaintiffs in the First, Fourth, and Fifth District just have to timely and properly serve the notice of intent to initiate litigation.

This is an important issue because the law is being inconsistently applied in a

way that denies certain litigants their constitutional right of access to the courts. Given the certification of interdistrict conflict, this case presents the perfect vehicle for this Court to resolve this important question of Florida law and to ensure consistent treatment of litigants throughout the state.

## ARGUMENT

**I. Because the Second District certified its decision to be in direct conflict with decisions of other district courts of appeal, this Court has discretionary jurisdiction.**

Under article V, section 3(b)(4), of the Florida Constitution, this Court has discretionary jurisdiction to review “any decision of a district court of appeal . . . that is certified by it to be in direct conflict with a decision of another district court of appeal.” In the decision below, the Second District certified its decision to be in direct 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). This Court therefore has discretionary jurisdiction to review the decision below.

**II. This Court should exercise its discretion to decide this important issue, which is having a disparate impact on similarly situated litigants across the state.**

This case raises an important issue regarding a medical malpractice plaintiff’s ability to toll the statute of limitations and access the courts. As detailed in the decision below and in Judge Smith’s specially concurring opinion, the law regarding tolling limitations periods for medical malpractice claims is not being uniformly

applied in Florida. Medical malpractice plaintiffs in the First, Fourth, and Fifth Districts can toll limitations periods by properly mailing the notice to initiate litigation to prospective defendants within the time limits of section 95.11(4)(b). But in the Second District, medical malpractice plaintiffs must also ensure that all prospective defendants receive the notice and sign the return receipt within those time limits.

Medical malpractice plaintiffs in Florida (and their attorneys) deserve to know whether they must meet this additional obligation to preserve both their claims and their constitutional right to access the courts. This inconsistent treatment of litigants is simply not the way the law should work.

The Second District's imposition of what Judge Smith described as "an impossible duty well beyond any plaintiff's control" is having and will have an adverse effect on the administration of justice in Florida. (A. 23.) Currently, Petitioner's medical negligence claims have been ruled to be time barred because Respondents received the certified mail and signed the return receipt a few days after it was timely mailed. For other medical malpractice plaintiffs in the Second District, it is not clear how they are supposed to ensure that all prospective defendants will receive the notice and sign the return receipt within the time limits of section 95.11(4)(b). Certainly, plaintiffs will have to mail the notice well before the limitations period runs to account for potential problems, such as lost or undelivered

mail. As Judge Smith recognized, there is an inherent unreliability of mail delivery that should not be used to bar a claimant's suit. (A. 21.)

### **CONCLUSION**

This Court should exercise its discretionary jurisdiction to resolve the certified conflict issue presented by this case.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was furnished by e-mail, pursuant to the amendments of Rule 2.516, Fla. R. Jud. Admin., this 30th day of September, 2020, to:

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, as it has been prepared in Times New Roman 14-point font.

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