

IN THE SUPREME COURT OF FLORIDA

Case No.: SC20-1399

WILLIAM BOYLE,

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,

Respondents.

_____ /

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

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. Respondents and their amici ignore the plain text of section 766.106(4) and rule 1.650(d)(1), which tolls the limitations periods upon timely service of the notice of intent to initiate litigation.

Respondents and their amici erroneously suggest that Petitioner is asking this Court to somehow violate the separation of powers doctrine. Petitioner is asking this Court to apply the plain text of the statute enacted by the Florida legislature. In enacting section 766.106(4), the Florida legislature required that a claimant’s “notice of intent to initiate litigation *shall be served* within the time limits set forth in s. 95.11.” (Emphasis added.) It did not require that a claimant’s notice “shall be served *and received* within the time limits set forth in s. 95.11.”

This Court, in adopting rule 1.650, respected the legislature’s directive. Rule 1.650(d)(1) requires that the “notice of intent to initiate litigation *shall be served* by certified mail, return receipt requested, prior to the expiration of any applicable statute of limitations or statute of repose.” (Emphasis added.) It does not

require that the notice be served “and received” prior to the expiration of any limitations period.

The only violation of separation of powers is the one committed by the Second District. As Judge Smith recognized in her specially concurring opinion, “[i]mposing the additional requirement of ‘receipt’ as we did in *Bove* requires us to improperly rewrite” the statute and the rule. (R. 160.)

Respondents and their amici largely rest their argument on the fact that section 766.106(4) does not specifically discuss tolling the time before the defendants’ ninety-day investigation period begins. Judge Smith addressed this issue, referring to it as the “limbo period between the time of service of the notice of intent and a defendant’s receipt of such notice.” (R. 169.) She correctly concluded that this limbo period “is not relevant to any statute of limitations period calculation, for the reason that the limitations period is tolled at the point of *service* of the notice of intent.” (*Id.*) She also recognized that the limbo period “does not cut into a defendant’s ninety-day investigatory period, because that time begins upon receipt.” (*Id.*)

The purpose of the “presuit requirements is to alleviate the high cost of medical negligence claims through early determination and

prompt resolution of claims, not to deny access to the courts to plaintiffs such as [Petitioner].” *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993). But for the presuit requirements, claimants could easily comply with the limitations periods by filing suit before those periods expire. Claimants would not also have to ensure that the defendants received the filed lawsuit within the limitations periods. Respondents and their amici nevertheless ask this Court to impose yet another restriction that would serve no purpose but to preclude consideration of otherwise meritorious claims.

Tellingly, Respondents and their amici completely ignore *Patry v. Capps*, 633 So. 2d 9, 12 (Fla. 1994), where this Court acknowledged that service of the notice of intent is “sufficient to toll the statute of limitations, even if the notice was not actually received by the defendant.” This Court also expressly noted that “the statute is tolled as of the date the notice of intent is mailed” *Id.* at 11 n.4.

Rather than address those pertinent statements, Respondents and their amici focus on *Hillsborough County Hospital Authority v. Coffaro*, 829 So. 2d 862 (Fla. 2002), and *Boyd v. Becker*, 627 So. 2d 481 (Fla. 1993). But those decisions addressed a completely different

issue—the claimants’ timing for filing suit *after the defendants’ ninety-day investigation period expired*. Although neither decision addressed the issue before this Court, both recognized that the provisions of the medical malpractice act “should be liberally construed to allow the parties access to courts.” *Coffaro*, 829 So. 2d at 865; *accord Boyd*, 627 So. 2d at 483. Indeed, in both of those cases, this Court concluded that the plaintiffs had timely filed their lawsuits. *Coffaro*, 829 So. 2d at 867; *Boyd*, 627 So. 2d at 483.

In addition to focusing on the wrong cases, Respondents focus on the wrong part of rule 1.650, making the same mistake that the *Bove* court made. Respondents argue that “[rule] 1.650(b)(1) is clear that timely receipt tolls the limitations period.” (Resp’ts’ Br. at 9.) But that part of the rule does not even mention tolling or the limitations periods. It instead addresses when prospective defendants are deemed to have received notice of the claimant’s notice of intent to initiate litigation. Once the prospective defendants are deemed to have received notice, they have “a full ninety days in which to evaluate a plaintiff’s claim.” *Boyd*, 627 So. 2d at 484. That, in turn, eliminates any concerns about restricting the time that defendants have to evaluate the merits of the claim. *Id.*

Despite the settled law on that issue, Respondents and their amici suggest that tolling the limitations periods upon service will somehow shorten the defendants' ninety-day investigation period. It won't, and Petitioner has never suggested that it should. Although the limitations periods are tolled by service of the notice of intent (as required by statute's plain text), the defendant's ninety-day presuit investigation period runs from the date the notice was received. *See id.* Thus, tolling the limitations periods for claimants does not in any way affect the amount of investigation time afforded to defendants.

While Respondents and their amici zealously guard the defendants' ninety-day investigation period, they see no problem with shortening the statutory limitations periods for claimants. Respondents openly argue that claimants are "not constricted from mailing the Notice of Intent in such a manner as to shorten the statute of limitations." (Resp'ts' Br. at 21.)

While that may be true, claimants should not be forced to "shorten" the statutory limitations periods to accommodate for potential mailing delays or unscrupulous defendants who are actively avoiding delivery. Requiring it would impose yet another restriction on claimants' access to the courts. As Judge Smith put it: "The

unintended result by imposing the additional requirement of receipt would be to 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).” (R. 167.)

In sum, the plain text of section 766.106(4) and rule 1.650(d)(1) requires only that the notice of intent be served within the limitations periods. The text does not also require receipt by the prospective defendants. The Second District's decisions improperly rewrite the text, creating an impossible duty for claimants that unduly restricts their constitutionally guaranteed right to access the courts. If there is any ambiguity in the statute, it must be “resolved in a manner that allows a claim to be considered on its merits, rather than barred by a judicial construction that applies the more limiting statutory provision.” *Boyd*, 627 So. 2d at 484.

II. This Court should decline to address Respondents' cumulative statute of limitations argument, which is beyond the scope of the certified conflict issue.

Although this Court has the discretionary authority to address “issues other than those upon which jurisdiction is based,” it does

not exercise that discretion lightly. *Savona v. Prudential Ins. Co. of Am.*, 648 So. 2d 705, 707 (Fla. 1995). Instead, “[a]s a rule, [this Court] eschew[s] addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution.” *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1080 n.26 (Fla. 2001). This Court therefore routinely declines to address issues that are “beyond the scope of the conflict on which [it] granted review.” *DK Arena, Inc. v. EB Acquisitions I, LLC*, 112 So. 3d 85, 97 (Fla. 2013).

There is no good reason to address Respondents’ statute of limitations argument. In the decision below, the court refused to address the issue because it was “not properly before [the court].” (R. 147 n.1.) Respondents did not appeal the trial court’s express denial of their motion for summary judgment on that issue. (*Id.*) And this Court has specifically declined to address issues “that were either not directly addressed by the district court . . . or were merely implied or cursory, at best.” *McEnderfer v. Keefe*, 921 So. 2d 597, 597 n.1 (Fla. 2006).

Respondents’ cumulative argument is also without merit. The trial court correctly denied Respondents’ motion for summary

judgment on that issue, finding that it presented an issue of fact for the jury. (TR. 640.)¹

Despite not appealing that ruling, Respondents argue that they were entitled to summary judgment on that issue because Petitioner saw that his heel was “visibly misaligned.” (Resp’ts’ Br. at 16.). They also suggest that, at some unspecified point in time, he attributed the misalignment to Dr. Samotin having done “a bad job.” (*Id.*)

Those facts, even if accepted as true, do not conclusively establish that Petitioner knew by May of 2013 that he was injured and that “there [was] a reasonable possibility that the injury was caused by medical malpractice.” *Tanner v. Hartog*, 618 So. 2d 177, 181 (Fla. 1993). “Simply suspecting wrongdoing is not enough.” *Thomas v. Lopez*, 982 So. 2d 64, 68 (Fla. 5th DCA 2008). And “the fact that a plaintiff becomes aware of a medical condition ‘is not the same thing as knowledge that there was a reasonable possibility’ that the plaintiff was injured through the malpractice of a doctor.” *Cohen v. Cooper*, 20 So. 3d 453, 455 (Fla. 4th DCA 2009) (quoting *Cunningham v. Lowery*, 724 So. 2d 176, 178 (Fla. 5th DCA 1999)).

¹ “TR” refers to the trial court’s record on appeal.

The record evidence presented below showed that, after Dr. Samotin performed the surgery, although Petitioner's foot looked "wrong" to Petitioner as a layperson, Dr. Samotin repeatedly reassured him—in 2012, 2013, and 2014—that his foot was fused in "perfect position" and that the surgery had gone perfectly." (TR. 363). Dr. Samotin testified that he did it that way on purpose.

Petitioner testified that he "[u]ltimately" concluded that Dr. Samotin did a bad job with his surgery. (TR. 107.) But nothing in the record pages that Respondents cite establishes that Petitioner reached that conclusion by May 2013. To the contrary, Petitioner averred in an affidavit that it was not until November 10, 2014, when Petitioner saw another orthopedic surgeon, that Petitioner came to believe that Dr. Samotin had committed medical malpractice. (TR. 363.)

Petitioner's observation that his heel was "misaligned" does not conclusively establish that Petitioner knew he had been injured or that he had been injured by medical malpractice. Dr. Samotin has admitted that he intentionally fused Petitioner's foot in this "wrong position," claiming that it was medically appropriate. And he

repeatedly made those assurances to Petitioner. (TR. 363.) Petitioner reasonably relied on the assurances of the physician.

Thus, the record evidence presented below did not in any way conclusively establish that Petitioner knew, by May 2013, that he had been injured and that there was a reasonable possibility that the injury was caused by medical malpractice. At best, the record evidence created a factual issue for the jury. “Courts throughout the state have held that the determination of timeliness under the statute of limitations is fact-specific and within the province of the jury, not the trial judge.” *Cohen*, 20 So. 3d at 456.

The trial court therefore correctly denied Respondents’ motion for summary judgment on that issue. *See Beck v. Holloway*, 933 So. 2d 4, 7 (Fla. 1st DCA 2006). In *Beck*, the plaintiff sued a doctor more than four years after the alleged malpractice. *Id.* at 6. The plaintiff had gone to a lawyer shortly after the doctor operated. *Id.* The lawyer, and a physician consulted by the lawyer, concluded that the problems were not a result of malpractice. *Id.*

About two years later, another doctor told the plaintiff that the defendant doctor made holes in the plaintiff’s sinuses that caused his adverse health issues. *Id.* The First District affirmed the trial court’s

denial of the defendant's motion for summary judgment on the statute of limitations issue, stating that the plaintiff was not on notice about the reasonable possibility of malpractice until he met with the second doctor. *Id.* at 7.

The same is true here. The evidence in this case shows that Petitioner filed his lawsuit within two years of when he knew or should have known of the reasonable possibility of malpractice, which was, at the earliest, when he consulted with another orthopedic surgeon in November of 2014. As a result, his lawsuit was timely filed, and the trial correctly denied Respondents' motion for summary judgment on that issue.

CONCLUSION

This Court should quash the decision below and remand for further proceedings. This Court should also disapprove the Second District's decision in *Bove* and approve the Fourth and Fifth District's respective decisions in *Zacker* and *Baxter*.

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished by e-mail on March 24, 2021, to:

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the applicable font and word count limit requirements.

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