2020 WL 3552046

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

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District Court of Appeal of Florida, Second District.

William BOYLE, Appellant,
v.
Myles Rubin SAMOTIN, M.D. and
Myles Rubin Samotin, M.D., P.A. d/
b/a Samotin Orthopaedics, Appellees.

Case No. 2D18-2932
|
Opinion filed July 1, 2020.

Synopsis

Background: Patient filed medical negligence action against orthopedics group. Group filed motion for summary judgment. The Circuit Court, 20th Judicial Circuit, Collier County, Lauren L. Brodie, J., granted the motion. Patient appealed.

[Holding:] The District Court of Appeal held that Medical Malpractice Act's four-year statute of repose for presuit notice of intent to initiate litigation was tolled upon receipt of notice of intent.

Affirmed; conflict certified.

Smith, J., specially concurred in result only with opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (6)

[1] Courts Intermediate appellate court

Trial courts are certainly free to express their disagreement with decisions of higher courts, and District Court of Appeal court is not immune from this censure; however, when a point has once been settled by judicial decision it should, in the main, be adhered to, for it forms a precedent to guide the courts in future similar cases.

[2] Courts Intermediate appellate court

While a trial court may follow decisions of other district courts of appeals, it must follow the appellate court in its own district where the issue has previously been decided.

[3] Limitation of Actions Pendency of Action or Other Proceeding

Medical Malpractice Act's four-year statute of repose for presuit notice of intent to initiate litigation was tolled upon receipt of notice of intent, rather than mailing of notice of intent; while patient initiating litigation against orthopedics group placed notice of intent in mail and properly served it in prescribed manner under Act, via certified mail, return receipt requested, within time limits under four-year statute of repose, group did not sign return receipt for notice of intent until after limitations period expired. Fla. Stat. Ann. § 766.106(4).

[4] Health Notice

Service of the presuit notice of medical malpractice suit by certified mail, return receipt requested, simply assures reliable verification of (1) timely service and (2) the date of receipt. Fla. Stat. Ann. § 766.106.

[5] Health Notice

Verification of timely service of notice of medical malpractice suit serves to reduce contention and litigation concerning compliance with the general notice requirement. Fla. Stat. Ann. § 766.106.

[6] **Health** Notice

Verification of the date of receipt of presuit notice of medical malpractice suit serves to reduce disputes concerning compliance with various time periods that begin to run after presuit notice is received. Fla. Stat. Ann. § 766.106.

Appeal from the Circuit Court for Collier County; Lauren L. Brodie, Judge.

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Opinion

PER CURIAM.

***1** William Boyle appeals the final summary judgment rendered in favor of Myles Rubin Samotin, M.D., and Myles Rubin Samotin, M.D., P.A., d/b/a Samotin Orthopaedics (collectively Samotin), in this medical negligence action. The trial court determined Mr. Boyle's complaint was barred by the four-year statute of repose contained in section 95.11(4)(b), Florida Statutes (2018), based upon this court's opinion in Bove v. Naples HMA, LLC, 196 So. 3d 411 (Fla. 2d DCA 2016), because Samotin did not sign for the return receipt of Mr. Boyle's presuit notice of intent to initiate litigation within the applicable limitations period. Mr. Boyle raises two issues on appeal. We affirm without discussion the first issue. In the second issue on appeal, Mr. Boyle essentially asks that we recede from our prior precedent in Bove, where we held that a plaintiff must serve the notice of intent via certified mail, return receipt requested, and 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). Bove, 196 So. 3d at 414-15. We decline to recede from Bove. Accordingly, we affirm the summary judgment based on Bove. However, because our sister courts have specifically held to the contrary—that the mailing of the notice of intent tolls the applicable statute of limitations—we certify conflict with those decisions.

A lengthy dissertation of the facts is unnecessary. In brief, the parties agree the four-year statute of repose for Mr. Boyle's medical negligence claim expired on May 7, 2016—four years after Mr. Boyle's initial foot surgery. On April 20, 2016, prior to the expiration of the four-year statute of repose, Mr. Boyle 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). With the ninety-day purchased extension, Mr. Boyle had until August 5, 2016, to file his medical negligence claim against Samotin. One day before the expiration of the extended limitations period, on August 4, 2016, Mr. Boyle served a notice of intent for medical negligence, via certified mail, return receipt requested, addressed to Samotin pursuant to section 766.106(2)(a) and Florida Rule of Civil Procedure 1.650(b)(1). Samotin signed the return receipt on August 8, 2016—three days after the expiration of the extended limitations period. In a letter dated November 18, 2016, Samotin rejected Mr. Boyle's claim. Mr. Boyle pursued his medical negligence claim and filed the instant lawsuit against Samotin on December 22, 2016—thirty-four days after Samotin's rejection.

[1] [2] Samotin later moved for summary judgment arguing, among other grounds, that Mr. Boyle failed to timely file his lawsuit within the four-year statute of repose.[1] See § 95.11(4)(b). The trial court initially denied summary judgment but later granted it after Samotin moved for reconsideration, acknowledging it was bound by Bove and holding the statute of repose expired prior to Samotin's receipt of the notice of intent. The trial court noted its disagreement with Bove and set forth two other district court opinions in conflict with Bove, which it believed were correctly decided: Baxter v. Northrup, 128 So. 3d 908 (Fla. 5th DCA 2013), and Bay County Board of County Commissioners v. Seeley, 217 So. 3d 228 (Fla. 1st DCA 2017).[2]

***2** We begin our analysis by examining the Medical Malpractice Act. Medical negligence[3] claims are governed by chapter 766, Florida Statutes (2018).[4] The applicable subsections of section 766.106 include the following:

(2) Presuit notice.--

(a) After completion of presuit investigation pursuant to s. 766.203(2) and 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. Notice to each prospective defendant must include, if available, a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, copies of all of the medical records relied upon by the expert in signing the affidavit, and the executed authorization form provided in s. 766.1065.

....

(3) Presuit investigation by prospective defendant.--

(a) No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant. During the 90-day period, the prospective defendant or the defendant's insurer or self-insurer shall conduct a review as provided in s. 766.203(3) to determine the liability of the defendant. ...

(4) Service of presuit notice and tolling.--

(1) The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, 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 such extension. Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

Rule 1.650 was adopted by the Florida Supreme Court to implement the legislative intent of chapter 766 and to address the notice of intent and time requirements of the statute:

(b) Notice

(1) Notice of intent to initiate litigation sent by certified mail to and received by any prospective defendant operates 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.

....

(d) Time Requirements.

(1) *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.* If an extension has been granted under section 766.104(2), Florida Statutes, or by agreement of the parties, the notice shall be served within the extended period.

(2) *The action may not be filed against any defendant until 90 days after the notice of intent to initiate litigation was mailed* to that party. The action may be filed against any party at any time after the notice of intent to initiate litigation has been mailed after the claimant has received a written rejection of the claim from that party.

***3** (3) *To avoid being barred by the applicable statute of limitations, an action must be filed within 60 days or within the remainder of the time of the statute of limitations after the notice of intent to initiate litigation was received*, whichever is longer, after the earliest of the following:

(A) The expiration of 90 days after the date of receipt of the notice of intent to initiate litigation.

(B) The expiration of 180 days after mailing of the notice of intent to initiate litigation if the claim is controlled by section 768.28(6)(a), Florida Statutes.

(C) Receipt by claimant of a written rejection of the claim.

(D) The expiration of any extension of the 90-day presuit screening period stipulated to by the parties in accordance with section 766.106(4), Florida Statutes.

(Emphasis added.)

The facts in Bove are virtually identical to the facts presented in this case. There, Mrs. Bove, as personal representative of her husband's estate, served her notice of intent on the hospital via certified mail, return receipt requested, and as in this case, the notice of intent was served one day before the expiration of the statute of limitations period. Bove, 196 So. 3d at 412. However, the notice of intent was not received by the hospital until seven days after it was served—well

after the statute of limitations period expired. [5] Id. at 412-13. On that basis, the hospital in Bove moved to dismiss the action arguing the statute of limitations period expired before the notice of intent was "received" by the hospital. Id. at 413. Mrs. Bove argued on appeal, among other issues, that because she served her notice of intent prior to the expiration of the statute of limitations period, her complaint was timely served upon mailing. [6] Id. We did not agree. Instead, we held "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." Id. at 415. As support for our holding we relied upon the language in the notice section (b)(1) of rule 1.650: "[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." Id. at 414. We also relied upon the language regarding time requirements in section (d)(1) of rule 1.650: "[t]he 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." Id.

> Our interpretation of the rule is strengthened by case law interpreting section 766.106 which has likewise focused on the receipt of notice. Cf. Hillsborough Cty. Hosp. Auth. v. Coffaro, 829 So. 2d 862, 866 (Fla. 2002) (discussing various tolling and extension periods for statute of limitations purposes in medical malpractice cases and explaining that "[for] purposes of the statutory scheme, the date [that the defendants] received the notice of intent is the date used in computing statutory time requirements"); Boyd v. Becker, 627 So. 2d 481, 483 (Fla. 1993) (analyzing both sections 766.106(3) and 766.106(4), Florida Statutes (1989), to conclude that although subsection (3) referred to a notice being mailed, the reference in subsection (4) to a notice being received meant that the ninety-day investigation period addressed in subsection (3) "should be computed from the date the putative defendant *receives* the notice of intent").

Id. at 415. Guided by the Florida Supreme Court's decisions in Boyd v. Becker, 627 So. 2d 481 (Fla. 1993), and Hillsborough County Hospital Authority v. Coffaro, 829 So. 2d 862 (Fla. 2002), and by rule 1.650, we opined that the statute of limitations period is tolled upon the date of *receipt* because this construction gives the defendant the full benefit of the ninety-day investigation period, albeit recognizing:

> [T]he 2013 version of section 766.106(4) applicable in this case does not refer to notice of intent being received. Rather, it refers to notice of intent being served within the time limits of section 95.11. However, the change in the language used in section 766.106(4) does not persuade us that the legislature, in amending section 766.106, or the Florida Supreme Court, in drafting rule 1.650, intended for service of notice of intent to be perfected upon mailing, rather than upon receipt. Using the date of mailing would result in a shortening of the ninety-day investigation period afforded to defendants in medical malpractice actions. See § 766.106(3)(a). And there is no indication that such a result was intended. Rather, the continued requirement of service of the notice of intent through certified mail, return receipt requested, in section 766.106 in addition to the rule's reference to notice being received by a defendant convinces us that it is the date of receipt that begins the tolling period.

Id. at 415 n.6.

***4** **[3]** Here, Mr. Boyle's notice of intent suffers from the same defect as Mrs. Bove's notice of intent; while Mr. Boyle 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, Samotin, like the hospital in Bove, did not sign the return receipt for the notice of intent until *after* the limitations period expired.

Accordingly, based upon the identical fact pattern and issue before us, we are bound by our decision in Bove. See Lee v. Estate of Payne, 148 So. 3d 776, 781 (Fla. 2d DCA 2013) ("We are constrained by precedent unless changed by the supreme court."); Gulf Am. Fire & Cas. Co. v. Singleton, 265 So. 2d 720, 721 (Fla. 2d DCA 1972) (acknowledging "stare decisis demands that we adhere to our ruling on identical facts" in prior cases).

We recognize 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.

The Fourth District first tackled this issue in Zacker v. Croft, 609 So. 2d 140 (Fla. 4th DCA 1992). There, Mr. Zacker mailed the notice of intent via certified mail, return receipt requested, to the last known address for Dr. Croft prior to the expiration of the statute of limitations period. Id. When the notice of intent was returned to Mr. Zacker stamped "return to sender," Mr. Zacker sent a second notice of intent to Dr. Croft's new address but after the statute of limitations expired. Dr. Croft moved for summary judgment, which the trial court granted, concluding "[i]t was incumbent upon [Mr. Zacker] to ... see that [Dr. Croft] *received* a Notice of Intent within the limitation of actions period." Id. at 141. Relying upon Boyd, the Fourth District reversed, holding the ninety-day tolling of the limitations period occurs from the date of mailing of the notice of intent under section 766.106(3)(a) and rule 1.650(d)(2), (3)(A), and reasoning: "The purpose of the notice requirement is to notify prospective defendants of medical malpractice claims to promote the settlement of such claims, when appropriate and not to function as a trap for medical malpractice claimants." Id.

***5** Over a decade after Zacker, the Fifth District in Baxter was presented with the same issue. Mr. Baxter appealed the summary final judgment in favor of the doctor and hospital in his medical negligence case on grounds that material issues of fact existed regarding when he knew or should have known of the possibility of the medical negligence. Baxter, 128 So. 3d at 909. The doctor and hospital sought to charge Mr. Baxter with earlier notice of the negligence suit, thereby arguing that the notice of intent and lawsuit were untimely under the two-year statute of limitations period. Id. In the alternative, the doctor and hospital argued that even if the later date of March 25, 2005, applied, Mr. Baxter's claim was untimely because it was not received until two days after the statute of limitations expired on March 27, 2007; thus the notice of intent did not toll the running of the statute of limitations period. Id. at 912. As to the notice issue, the Fifth District held that the disputed issue was a question for the jury. Id. The Fifth District also rejected the *receipt* argument, citing to rule 1.650(d)(1), as we did in Bove, but reached the opposite conclusion that "the tolling period commence[d] when the notice is served." Id. Contrary to our opinion in Bove, Baxter distinguished the supreme court's holding in Boyd, noting that Boyd

> only addresses the commencement of the period within which suit must be filed following the service of the notice. Boyd resolved a rule conflict and effected a sua sponte amendment to rule 1.650(d)(3), to provide that suit must be filed within a certain period after the notice is "received." No change was made to rule 1.650(d)(1), which merely mandates that **service** of the notice of intent by certified mail must be accomplished before expiration of the statute of limitations.

Id. (citing Boyd, 627 So. 2d 481).

[4] **[5]** **[6]** The issue of service versus receipt was also raised before the First District in Seeley when the Bay County Board of County Commissioners petitioned for writ of certiorari challenging the trial court's ruling as a departure from the essential requirements of law wherein the court ruled Mrs. Seeley's notice of intent was timely served. Seeley, 217 So. 3d at 228 (Makar, J., concurring). In his concurring opinion, Judge Makar addressed whether service of the notice of intent, via certified mail, return receipt requested, one day before the expiration of the statute of limitations, complied with the presuit notice requirements

under section 766.106, even though the notice of intent was not received until two days after the expiration of the limitations period. Id. Judge Makar considered both this court's opinion in Bove and the Fifth District's opinion in Baxter and disagreed with our decision in Bove. Judge Makar concluded the Baxter court's analysis was 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)).

Id. at 229. As further support, 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." [7] Id.

***6** However, having considered the arguments raised by Mr. Boyle and the position of our sister courts, we decline to recede from Bove. See Lee, 148 So. 3d at 781 ("We are constrained by precedent unless changed by the supreme court."); Gulf Am. Fire & Cas. Co., 265 So. 2d at 721 (acknowledging "stare decisis demands that we adhere to our ruling on identical facts" in prior cases). Because 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. Accordingly, we affirm the final summary judgment in favor of Samotin. We acknowledge that the Fourth District and Fifth District have held to the contrary, and so we certify conflict with Zacker and Baxter.

Affirmed; conflict certified.

CASANUEVA and LaROSE, JJ., Concur.

SMITH, J., Concurs specially.

SMITH, J., Concurs specially in result only.
I concur with the majority in result but only because we are bound by our prior precedent in Bove. I disagree with Bove's construction of section 766.106(4) and rule 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 the tolling of the limitations period under section 766.106(4). I agree 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—based upon the clear and unambiguous language of section 766.106(3)(a).

Interpretation of the relevant statutes requires that we hold to the cardinal rule of construction and begin with the plain text. Bennett v. St. Vincent's Med. Ctr., Inc., 71 So. 3d 828, 837-38 (Fla. 2011) (noting statutory interpretation begins by examining the actual language in the statute). And in doing so "[we as] courts should assume that the legislature knew the plain and ordinary meaning of words when it chose to include them in a statute." Hankey v. Yarian, 755 So. 2d 93, 96 (Fla. 2000); Sheffield v. Davis, 562 So. 2d 384, 386 (Fla. 2d DCA 1990) (acknowledging courts must not sway outside the statute to change its intended meaning); see also Wheaton v. Wheaton, 261 So. 3d 1236 (Fla. 2019) ("[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation." (citing Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984))).

Our review, thus, should begin with the plain text of section 766.106, and not rule 1.650, as we did in Bove, where these statutes are primarily substantive whereas the rule regulates only procedural matters. See Williams v.

Campagnulo, 588 So. 2d 982, 983 (Fla. 1991) (finding the medical negligence statutes are primarily substantive and are procedurally implemented by the supreme court's rule 1.650); accord Kuhajda v. Borden Dairy Co. of Ala., LLC, 202 So. 3d 391, 396 (Fla. 2016) ("A procedural rule should not be strictly construed to defeat a statute it is designed to implement."); cf. Boyd, 627 So. 2d at 484 (holding district court's reliance upon rule in contradiction of statute was error).

The presuit requirements of chapter 766 were created by the legislature upon its enactment of the Comprehensive Medical Malpractice Reform Act of 1985 (the Act) in response to the rising cost of insurance and medical care costs, creating presuit requirements in line with the Act's purpose—to avoid meritless claims and provide a plan for prompt resolution of meritorious claims. Williams v. Oken, 62 So. 3d 1129, 1133 (Fla. 2011); Hankey, 755 So. 2d at 95 ("The provisions for tolling and extending the limitations period are part of this scheme."). And while the interplay between the tolling and extension statutes for purposes of calculating the statute of limitations period has been described as a daunting mission, the legislature made its intentions very clear in the lengthy findings of the Act. See § 766.201; see also Hillsborough Cty. Hosp. Auth. v. Coffaro, 829 So. 2d 862, 866 (Fla. 2002) (Pariente, J., concurring) ("In attempting to decipher what the Legislature intended, I whole heartedly agree with the Second District that the interplay of the provisions is 'complex and confusing.' Calculating when the statute of limitations actually runs, as demonstrated by both the majority and dissenting opinions in this case, highlights Judge Blue's observations that the 'interrelationship of these tolling extension periods has produced the type of mathematical puzzle that caused many of us to choose law rather than accounting.' ". (citation omitted)).

***7** Section 766.106(4) is titled "Service of presuit notice and tolling" and provides: "The notice of intent to initiate litigation shall be *served* within the time limits set forth in [section] 95.11. However, during the 90-day period, the statute of limitations is *tolled* as to all potential defendants." (Emphasis added.) And if it was not abundantly clear under subsection (4) that the legislature intended for the tolling of the time limits under section 95.11 to begin upon the *mailing* of the notice, section (3)(a) of the statute puts this issue to rest—"No suit may be filed for a period of 90 days *after notice is mailed* to any prospective defendant." § 766.106(3)(a) (emphasis added); see also Hankey, 755 So. 2d at 100 (construing the tolling period under section 766.106(4) as a suspension or "time-out" not to be counted against the statute of limitations period). [8]

Here, it is obvious the legislature understood the intended result where it specifically used the term "mailed" in section 766.106(3)(a) to start the tolling period upon service of the notice of intent and thereafter used the term "receiving" in section 766.106(4) to end the tolling period upon the plaintiff's receipt of the termination notice from the defendants, which in turn restarts the running of the clock as to the remaining limitations period. Cf. Coffaro, 829 So. 2d at 862-63 (specifying that for purposes of the purchased ninety-day extension under section 766.104(2) and the additional sixty-days to file suit after receipt of the prospective defendant's rejection of the notice of intent under 766.106(4), the date petitioners received the notice of intent is the date used in computing statutory time requirements); Hankey, 755 So. 2d at 100 ("[A]ny additional times added under section 766.106(4) if the notice of intent is filed [9] by the claimant with less than sixty days remaining in the *original* statute of limitations, or under the automatic ninety-day extension pursuant to section 766.104(2), are actually statutorily granted additions to the initial two years allotted by the statute"); Boyd, 627 So. 2d at 484 (addressing the commencement of the period within which suit must be filed following the service of the notice).

Imposing the additional requirement of "receipt" as we did in Bove requires us to improperly rewrite section 766.106(3) and (4), as well as rule 1.650, as follows with the underlined language added:

> **Section 766.106**
>
> **(3) Presuit investigation by prospective defendant.--**(a) No suit may be filed for a period of 90 days after notice is ~~mailed~~ to received by any prospective defendant. ...
>
> **(4) Service of presuit notice and tolling.--**

(1) The notice of intent to initiate litigation shall be served and received by any prospective defendant within the time limits set forth in s. 95.11....

Rule 1.650

(d) Time Requirements.

(1) The notice of intent to initiate litigation shall be served by certified mail, return receipt requested, and received by any prospective defendant prior to the expiration of any applicable statute of limitations or statute of repose. ...

***8** This is an option the legislature and the supreme court certainly had at their disposal when the statute was enacted and the rule was promulgated, as revised by Boyd. However, as it stands, there is simply no language in the statute or the 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).

Bove places too much emphasis on the language of rule 1.650 over the text of section 766.106—a practice the supreme court expressly denounced in Boyd. Boyd, 627 So. 2d at 484 ("We have previously stated that statutes of limitation provide substantive rights and supersede our procedural rules." (citing S.R. v. State, 346 So. 2d 1018 (Fla. 1977))). In Bove, we considered:

> Section 766.106(4) provides that during the ninety days following service of a notice of intent, the statute of limitations is tolled as to all potential defendants. However, rule 1.650(b)(1), which deals with medical malpractice presuit screening requirements, provides in relevant part 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 ...." (Emphasis added.) And rule 1.650(d)(1) provides in relevant part that "[t]he 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." (Emphasis added.) Thus, we conclude that because the rule refers to the receipt of notice and requires that the notice be sent by certified mail, it is the date 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.

Bove, 196 So. 3d at 414-15. The "received by any prospective defendant" language in rule 1.650(b)(1), relied upon in Bove, is a *notice provision*, charging a prospective defendant with notice upon receipt. Patry v. Capps, 633 So. 2d 9, 12 (Fla. 1994) (explaining the actual receipt of the notice of intent by the prospective defendant charges the defendant with notice of the notice of intent so that a defendant cannot later claim prejudice). Notably, this "received" language is absent from the service and tolling provision of rule 1.650(d)(1). Bove fails to address either subsection (d)(2) of rule 1.650 or section 766.106(3)(a), both of which expressly prohibit a plaintiff from filing suit for ninety days after the notice of intent is *mailed*.

In my opinion, Bove improperly focused upon receipt, and in doing so only addressed the rights of a prospective defendant. Specifically, in Bove our court considered the notice provisions of rule 1.650, which require notice of a potential medical negligence suit to prospective defendants and provides a ninety-day investigation period following that notice. Bove, 196 So. 3d at 414-15. However, neither of these issues were controverted in Bove. The receipt argument raised in Bove is simply a red herring. The doctor and hospital properly received notice by way of the notice of intent in the manner prescribed by rule 1.650(d)(1). Id. at 412. They were also given the full ninety days to investigate Mrs. Bove's claim. Id. at 415-16. By focusing on receipt, Bove failed to consider a claimant's clear right to bring a medical negligence action after complying with the presuit requirements of chapter 766, one of which requires only that a claimant serve the notice of intent within the time limits of section 95.11(4)(b).

***9** Since the enactment of the medical negligence statutes, Florida courts, including our court, have long held that that *service*, and *service* alone, of the notice of intent tolls the statute of limitations period. See Patry, 633 So. 2d at 10-11 ("[T]imely service of presuit notice tolls the statute of limitations. ..."); Tanner v. Hartog, 618 So. 2d 177, 183 (Fla. 1993) ("From the date the notice of intent is filed, the plaintiff has ninety days (the amount of the tolling) plus either sixty days or the time that was remaining in the limitations period, whichever is greater, to file suit."); Hosp. Corp. of Am. v. Lindberg, 571 So. 2d 446, 448 (Fla. 1990) ("[T]he statute of limitations was tolled, in accordance with the

express provisions of the statute, when the [plaintiffs] sent the required notices."); Parham v. Balis, 704 So. 2d 623, 624 (Fla. 2d DCA 1997) (noting the service of the notice of intent tolled the statute of limitations period, which included the ninety-day extension purchased under section 766.104(2)); Wilder v. Hillsborough Cty. Hosp. Auth., 686 So. 2d 617 (Fla. 2d DCA 1996) ("When read together ... section 766.106 and rule 1.650 provide that once Wilder timely filed her notice of intent to initiate litigation, the statute of limitations was tolled as to any potential defendant for a period of ninety days after the defendant's receipt of Wilder's notice of intent."); Wood v. Fraser, 677 So. 2d 15, 16-17 (Fla. 2d DCA 1996) (explaining that where the legislature has continued to enact section 768.57(4), legislative enaction can be taken as acceptance of the court's prior construction of the statute); Moore v. Winter Haven Hosp., 579 So. 2d 188, 190 (Fla. 2d DCA 1991) (holding the notice of intent *served* on a potential defendant pursuant to section 768.57(4) [now section 766.106(4)] tolled the four-year statute of repose, in addition to the two-year medical negligence limitation period); Rhoades v. Sw. Fla. Reg'l Med. Ctr., 554 So. 2d 1188, 1190-91 (Fla. 2d DCA 1989) (explaining that as to plaintiff who served notice of intent one day prior to the expiration of the statute of limitations period, "upon the expiration of the 90-day tolling of the statute of limitations provided in section 769.57(4), [now 766.106(4)], or a stipulated extension of that time, the claimant has 60 days or the remainder of the period of the statute of limitations, which is greater, within which to file suit," so as not to discourage parties from settling claims and not to disturb the legislative intent); [10] Cora Health Servs., Inc. v. Steinbronn, 867 So. 2d 587, 589 (Fla. 5th DCA 2004) (noting that service of notice of intent to initiate litigation upon any prospective defendant tolls the statute of limitations as to all defendants); Kalbach v. Day, 589 So. 2d 448, 449 (Fla. 4th DCA 1991) ("[U]pon service of a notice of intent to initiate litigation, an automatic 90-day tolling of the two year limitations period occurs.").

Where a statute prescribes the method of service by mail, the general rule is that service by mail is considered complete upon mailing. See Fla. R. Civ. P. 1.080(b); Fla. R. Jud. Admin. 2.516(b)(2); Harper v. Geico Gen. Ins. Co., 272 So. 3d 448 (Fla. 2d DCA 2019) (noting service was complete upon mailing of the civil remedy notice under section 624.155); Hernandez v. G & L Tire Fleet Serv., 163 So. 3d 1224, 1227 (Fla. 2d DCA 2015) ("[T]he law presumes, absent a contrary showing, 'that mail properly addressed, stamped and mailed was received by the addressee.' " (citing Brown v. Giffen Indus., Inc., 281 So. 2d 897, 900 (Fla. 1973))); Johnson v. State, 200 So. 3d 802, 804 (Fla. 1st DCA 2016) (explaining service of copy of dissolution petition on department of revenue was timely because it was complete upon mailing, despite the department's receipt of the petition after the required twenty-day period); Columbia/JFK Med'l Ctr. Ltd. v. Sangounchitte, 977 So. 2d 639, 642-43 (Fla. 4th DCA 2008) (holding service of notice of intent to initiate litigation was complete upon mailing so that party requesting arbitration under section 766.206 was required to serve request within ninety days of mailing of the notice by the claimant); Mr. Martinez of Miami, Inc. v. Ponce De Leon Fed. Sav. & Loan Ass'n, 558 So. 2d 153, 154 (Fla. 3d DCA 1990) ("[S]ervice by mail is considered complete on mailing even though a copy has not been received by either the clerk or the opposing party." (citing Gavin v. Gavin, 456 So. 2d 535, 537 (Fla. 1st DCA 1984))).

***10** The time period between mailing and receipt should not operate to bar a claimant's suit. The inherent unreliability of mail was highlighted by the facts in Boyd, wherein the supreme court disapproved the district court's reliance upon rule 1.650 for calculation of the defendant's ninety-day investigatory period from the date of mailing of the notice of intent. Boyd, 627 So. 2d at 484. Instead the supreme court held the defendant's ninety-day investigation period should be calculated from the date of receipt so as to allow Mr. Boyd's claim to proceed on the merits. Id. The supreme court reasoned:

> 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 Dr. Becker 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.

Id. As a result of Boyd, the supreme court amended rule 1.650(d)(3) to provide that the date of receipt was the date from which to calculate the defendant's ninety-day investigatory period for purposes of calculating when a plaintiff must file suit in order to avoid being barred by the applicable statute of limitations period. See Fla. R. Civ. P. 1.650(d)(3) (providing an action must be filed within sixty days or within the remainder of the time of the statute of limitations after the notice of intent to initiate litigation was received, whichever is longer, following either the expiration of ninety days after receipt of the notice of intent, the expiration of 180 days after the mailing of the notice of intent, receipt of a written rejection of the claim, or the expiration of any extension of the ninety-day investigation period as stipulated by the parties).

While the supreme court revised section (d)(3) of rule 1.650, it left intact the tolling language in (d)(2), which provides that "[t]he action may not be filed against any defendant until 90 days after the notice of intent to initiate litigation was *mailed* to that party." This language mirrors the text of section 766.106(3)(a).

The reasoning behind the court's decision in Boyd should not fall on deaf ears simply because the holding dealt with (d)(3) of rule 1.650 and not (d)(1) or (d)(2). Equally in this case, unreliable mail delivery would significantly reduce a plaintiff's statute of limitations period if a plaintiff were obligated to ensure a defendant's receipt of the notice of intent prior to the expiration of the limitations period. As a result, a plaintiff would be left at the mercy of the mail service and to the defendant's willingness to accept and sign for the certified package. This would no doubt shorten a plaintiff's statutory limitations period if a plaintiff were to have the additional obligation of ensuring receipt by a defendant, forcing claimants to prematurely serve the notice of intent, as well as discourage parties from continuing their discussions to settle claims—an inconsistent result the legislature equally could not have intended. See Tanner, 618 So. 2d at 183.

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). This is an impossible duty well beyond any plaintiff's control.

Article I, section 21, of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Chapter 766 already restricts a plaintiff's access to the courts by requiring the following conditions precedent to filing suit: (1) a claimant must conduct "a reasonable investigation" under section 766.104(1) and (2) a claimant must notify a prospective defendant in advance of a lawsuit by serving the prospective defendant with the notice of intent pursuant to section 766.106(4). Furthermore, under section 766.106(3)(a) a plaintiff is precluded from filing suit for ninety days, not after a prospective defendant's receipt of the notice of intent, but after *mailing* the notice of intent. See Patry, 633 So. 2d at 11. Because of these restrictions the Florida Supreme Court has held that the medical negligence statutes are to be interpreted liberally in favor of affording a "Florida citizen's constitutionally guaranteed access to the courts, while at the same time carrying out the legislative policy of screening out frivolous lawsuits and defenses." Kukral v. Mekras, 679 So. 2d 278, 284 (Fla. 1996); see also Coffaro, 829 So. 2d at 865 (interpreting the ninety-day purchased extension under section 766.104(2) "in keeping with the purpose of the medical negligence statute and the principle that its provisions should be liberally construed to allow the parties access to courts"); Patry, 633 So. 2d at 13 (emphasizing that the medical negligence statute "should be construed in a manner that favors access to courts"); Hankey, 755 So. 2d at 97 (construing the word "tolling" under section 766.106 to mean a suspension of the statute of limitations period, because "to construe the statute otherwise would effectively reduce the ... limitations period since a claimant cannot lawfully file an action during the period of suspensive and, hence, is deprived of that time to file suit"); Boyd, 627 So. 2d at 483 (resolving statutory conflict in favor of resolution of the claim on its merits); Ragoonanan v. Assocs. in Obstetrics & Gynecology, 619 So. 2d 482, 484 (Fla. 2d DCA 1993) (explaining the medical negligence statutes were neither intended to require "presuit litigation of all issues ... nor to deny parties access to the court

on the basis of technicalities"). For "[i]ndeed, the prevailing policy of this state relative to medical malpractice actions is to encourage the early settlement of meritorious claims and to screen out frivolous claims." Cohen v. Dauphinee, 739 So. 2d 68, 70 (Fla. 1999) (citing Williams, 588 So. 2d at 983). Therefore, to the extent that the statute and rule are ambiguous, I would heed the supreme court's repeated instruction that the medical negligence statutes "should be construed in a manner that favors access to courts," together with a plain reading of the statutes and rules, in their entirety, I believe the statute of limitations is tolled for ninety days upon mailing of the notice of intent.

***11** Finally, to hold that *service* of the notice of intent tolls the time limits of section 95.11(4)(b) in no way extends a plaintiff's statute of limitations or statute of repose period, for a plaintiff must still timely serve a defendant with the notice of intent within the appropriate limitations period. § 766.106(4). In other words, the tolling is not effective unless a plaintiff can show service via certified mail, return receipt requested. That limbo period between the time of service of the notice of intent and a defendant's receipt of such notice adds nothing in terms of days and 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. § 766.106(4). This limbo period likewise does not shorten the statute of limitations period because the clock stops running during this time and does not restart until either a defendant rejects the notice of intent or the ninety-day investigatory period expires. See Fla. R. Civ. P. 1.650(d)(3); Coffaro, 829 So. 2d at 865-66. Moreover, this limbo period does not cut into a defendant's ninety-day investigatory period, because that time begins upon receipt. Boyd, 627 So. 2d at 483-84. It is simply a period of limbo. [11]

In the instant case, Mr. Boyle's notice of intent was timely served on August 4, 2016, and one day remained under the four-year statute of repose, as extended by the ninety-day purchased extension. For this reason, Mr. Boyle was entitled to the benefit of the additional sixty days under section 766.106(4). See Coffaro, 829 So. 2d at 865-66. Calculating the sixty-day time period from the date of the termination letter from Samotin on November 18, 2016, Mr. Boyle had until January 17, 2017, to file his lawsuit. [12] Mr. Boyle filed his complaint on December 22, 2016, and so it follows that his lawsuit was timely filed, and he should be entitled to proceed on the merits of his claim—consistent with the legislative intent of the statute promoting access to courts.

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, I 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).

All Citations

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Footnotes

1 Samotin also argued at the summary judgment hearing that Mr. Boyle's medical negligence action expired well before August 5, 2016, where Mr. Boyle's cause of action accrued soon after his first surgery with Samotin and after the two-year statute of limitations period expired in 2014. While Samotin asks that we also affirm on these alternate grounds, Samotin did not appeal the trial court's denial of summary judgment on that issue, and so the issue is not properly before us.

2 Trial courts are certainly free to express their disagreement with decisions of higher courts, and our court is not immune from this censure. See Hernandez v. Garwood, 390 So. 2d 357, 359 (Fla. 1980); Wood v. Fraser, 677 So. 2d 15, 19 (Fla. 2d DCA 1996). However, "[w]hen a point has once been settled by judicial decision it should, in the main, be adhered to, for it forms a precedent to guide the courts in future similar

cases." In re Seaton's Estate, 154 Fla. 446, 18 So. 2d 20, 22 (1944) (explaining the opinion of the district court establishes a precedent to guide the courts in resolving future similar cases). And while a trial court may follow decisions of other district courts, it must follow the appellate court in its own district where the issue has previously been decided. Chapman v. Pinellas County, 423 So. 2d 578, 580 (Fla. 2d DCA 1982).

3 Chapter 766 refers to the terms "medical negligence" and "medical malpractice" interchangeably.

4 Section 768.57, Florida Statutes (1987), was revised and transferred to section 766.106, Florida Statutes (Supp.1988). Former section 768.57(4) (now section 766.106(4)) was maintained intact in the revision.

5 Mrs. Bove also served two doctors with notices of intent, but it was determined that those notices were not served until after the expiration of the statute of limitation period on February 26, 2014.

6 In Bove, we held Mrs. Bove was bound by her attorney's statement contained in the notice of intent that the two-year statute of limitations began to run upon the decedent's death. 196 So. 3d at 414.

7 For these reasons, Judge Makar believed "certifying conflict with the Second District in Bove is appropriate." Seeley, 217 So. 3d at 229 (Makar, J., concurring). But see Stallworth v. Moore, 827 So. 2d 974, 977 (Fla. 2002) (explaining the supreme court "lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court" (quoting Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980))).

8 The point of this ninety-day time period is to allow a prospective defendant time to conduct their own presuit investigation. Brundage v. Evans, Case No. 2D19-1441, 2020 WL 1280794 (Fla. 2d DCA Mar. 18, 2020).

9 When the statute was originally enacted in 1985, it provided that the presuit notice of intent was to be "filed" within the time period provided in section 95.11. § 768.57(4), Fla. Stat. (1985). A year later the legislature amended the statute to require that the notice of intent be "served" within the time limitations set forth in section 95.11. § 768.57(4), Fla. Stat. (1986). While the amendment was to operate retroactively to October 1, 1985, when the statute was originally enacted, some of the older supreme court cases refer to the "filing" of the notice of intent. See Tanner v. Hartog, 618 So. 2d 177, 183 (Fla. 1993); Hosp. Corp. of Am. v. Lindberg, 571 So. 2d 446, 448 (Fla. 1990).

10 Our interpretation of the tolling periods and expiration of the statute of limitations in Rhoades, 554 So. 2d 1188, was approved in Tanner, 618 So. 2d at 183-84, and Hankey, 755 So. 2d at 95 n.2.

11 The Cambridge Dictionary defines "limbo" as "an uncertain situation that you cannot control and in which there is no progress or improvement." Cambridge Dictionary Online, https://dictionary.cambridge.org/us/dictionary/english/limbo (last visited April 6, 2020).

12 Section 766.106(4) and Coffaro require that the sixty-day time period be calculated from the date of Mr. Boyle's receipt of the rejection letter; however the limited record did not provide this date, but this does not change the result where Mr. Boyle filed suit thirty-four days after the date of the rejection letter.