IN THE SUPREME COURT OF FLORIDA

NO. 85,099
(DCA No. 93-2294)

CHARLES KUKRAL and MILLY KUKRAL,

Petitioners,

vs.

GEORGE D. MEKRAS, M.D.; MIAMI UROLOGY INSTITUTE, INC., and DR. JOHN T. MCDONALD FOUNDATION d/b/a DOCTORS HOSPITAL,

Respondents.

RESPONDENTS GEORGE D. MEKRAS, M.D. and MIAMI UROLOGICAL INSTITUTE, INC.'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Petitioners (Kukrals) misstate the issue in this case and gloss over the facts that persuaded the trial court, a majority of the panel of the Third District Court of Appeal, and a majority of the Third District Court sitting en banc, that the Kukrals' cause of action should be dismissed for their refusal to comply with Florida's medical malpractice presuit screening statutes.

The Kukrals claim that their case was dismissed because they did not mail a verified medical expert's corroborating opinion along with their notice of intent to initiate litigation to the defendants (Mekras).[1] This was not, however, the reason the Kukrals' case was dismissed. In fact, the trial court denied Mekras' motion to dismiss the case on this ground. (R. 20-22).[2] Rather, the case was dismissed because the Kukrals deliberately refused to conduct the statutorily required investigation of their claim against Mekras i.e., "that an attorney ... has consulted with a medical expert, and has obtained a written opinion from said expert", before they mailed their notice of intent to initiate litigation. Sections 766.202(4) and 766.203(2), Florida Statutes. (R. 300-303). The Kukrals maintained below as they do here that because "any idiot" could discern from the text of their notice of intent to initiate litigation that something had gone wrong, they

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[1] This brief is filed on behalf of defendants George Mekras, M.D. and his employer, Miami Urological Institute (MUI). These parties will be referred to herein collectively as "Mekras".

[2] References to "R" are to the record on appeal. References to "SR" are to the supplemental record on appeal. All emphasis is supplied unless otherwise indicated.

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surely did not have to hire, consult with and obtain a written opinion from a medical expert to tell them the very same thing. (Br. pp.12, 18-20).

Thus, the Kukrals came to three trial court hearings[3] for the determination of the sufficiency of their presuit investigation with only their lawyer's self-serving opinion that he thought the Kukrals had a case and his uncorroborated statement (elicited after dogged questioning by the trial court) that he had spoken with "doctors" before mailing the notice of intent. (R. 197, 247-248, 273-274; SR. 7 pp.26-28).

The trial court found that:

> Based on the undisputed record in this matter as provided and stipulated to by counsel including pleadings, motions, memoranda and exhibits, plaintiffs' counsel failed to either obtain a written opinion from a medical expert or provide defendants with a written medical expert opinion at the time the notice of intent to initiate litigation was mailed by plaintiff to defendants on February 21, 1992, as required by Section 766.203(2). In fact, plaintiffs failed to obtain a written opinion of a medical expert until after the conclusion of the ninety (90) day pre-suit investigation period. Plaintiffs failed to present any justification for his failure to obtain a written opinion of a medical expert for this period of time.
>
> This court finds, based upon this evidence, that defendants have met their burden of presenting a prima facie case that the plaintiffs did not comply with the reasonable investigation requirements of Sections 766.201-766.212, Florida Statutes (1992).

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[3] These hearings were held pursuant to Section 766.206(1), Florida Statutes on July 27, 1993, August 4, 1993, and August 24, 1993. (R. 243-290; SR. 6, 7).

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> This court finds that the claim of plaintiffs' counsel that he consulted with unidentified medical experts prior to sending the notice of intent to initiate litigation is insufficient, without more to rebut this prima facie showing. Among other things plaintiff failed to specify the expertise of the unidentified medical expert, documents reviewed, the factual basis of the medical expert's opinion, where the medical expert practices medicine or whether any previous opinion by the same medical expert has been disqualified. (R. 300-303).[4]

Based on these findings, the trial court dismissed the Kukrals' case. (R. 300-303).

The Third District Court of Appeal affirmed, upon the holding that:

> The plaintiffs sent notices of intent to initiate litigation without including the medical expert opinion as required by section 766.203, Florida Statutes (1991). Moreover, the plaintiffs did not present any evidence indicating that they consulted with any medical expert or that they conducted a good faith and reasonable investigation prior to mailing the notices as the statutes require. It is the plaintiffs' failure to comply with their duty to conduct an investigation as defined by section 766.202(4), Florida Statutes (1991), that distinguishes this case from the cases relied on by plaintiffs.

Kukral v. Mekras, 647 So. 2d 849, 850 (Fla. 3d DCA 1994). This opinion was adopted as the opinion of the en banc court. Id. at 852-53.

Another issue raised by MUI, Mekras' employer, and recognized

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[4] Medical expert, as defined in § 766.202(5), is "a person duly and regularly engaged in the practice of his profession who holds a health care professional degree from a university or college and has had special professional training and experience or one possessed of special health care knowledge or skill about the subject upon which he is called to testify or provide an opinion."

by the panel decision adopted by the en banc court, was that MUI was not individually served with a notice of intent and that the notice sent to Dr. Mekras did not indicate that MUI was a prospective defendant. Id. at 850. This issue was never reached by the panel because the panel found that:

> Under Section 766.206, Florida Statutes (1991), since no reasonable investigation was conducted, the plaintiffs' claim was properly dismissed.

Id. at 850-851.

This Court has granted discretionary review of the decision of the Third District Court of Appeal.

POINTS ON APPEAL

It is plain from the foregoing, that the primary issue in this case is not the issue posited by the Kukrals. The issues before this Court are:

I.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE PLAINTIFFS' CAUSE WHERE THEY PROVIDED NO EVIDENCE AT THREE HEARINGS WHICH INDICATED THAT THEY CONDUCTED THE STATUTORILY REQUIRED REASONABLE INVESTIGATION OF THEIR CLAIM PRIOR TO MAILING A NOTICE OF INTENT TO INITIATE LITIGATION AGAINST DEFENDANTS.

II.

WHETHER DISMISSAL OF THE CAUSE AGAINST MUI WAS PROPER, SINCE PLAINTIFFS FAILED TO SERVE A NOTICE OF INTENT TO INITIATE LITIGATION UPON DEFENDANT MUI.

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SUMMARY OF ARGUMENT

It is undisputed here that the Kukrals failed to produce any evidence at three hearings which established that they conducted the statutorily required reasonable investigation of their claim against Mekras i.e., that they consulted with and obtained a written opinion from a medical expert prior to mailing their notice of intent. The Kukrals nonetheless submit that their case should not have been dismissed for these derelictions because the acid burns Mr. Kukral sustained during a procedure for removal of genital warts was "obvious" malpractice for which no expert consultation and opinion is necessary. However, established Florida law holds that courts are without power to construe an unambiguous statute in a way which modifies its express terms and cannot create any exemptions where the legislature has plainly stated there are none. The First District has squarely rejected the argument that no expert affidavit is required in a case involving allegations of negligence per se. *See Archer v. Maddux*, 645 So. 2d 544 (Fla. 1st DCA 1994). The First District held that the statute's requirements must apply even in factual circumstances which the legislature has deemed negligence per se. This holding should apply with even greater force in this case.

The legislature placed investigation requirements in the hands of the medical profession to eliminate frivolous medical malpractice claims and to avoid prosecution of claims based solely on an attorney's subjective opinion of the merits of his client's cause. This requirement is no mere technicality. The *Archer* case correct-

ly recognizes that this statutory requirement serves a valid purpose and is not unduly burdensome even in cases of alleged "obvious" malpractice.

Archer furthermore makes clear that the common law evidentiary rule that no expert testimony is required at trial where the malpractice constitutes negligence per se or is within the common understanding of the jury has no relevance to the presuit requirements imposed by Chapter 766 of the Florida Statutes. Even if it did, which is denied, the statutes control and take precedence over the common law where there are any inconsistencies between them.

Case law holding that dismissal is improper where an affidavit of a medical expert is provided within the statute of limitations is irrelevant. Those cases neither address, nor involve, the sufficiency or reasonableness of the presuit investigation conducted, which is the issue in this case. This case was not dismissed for plaintiffs' technical failure to mail a corroborating affidavit along with their notice of intent -- it was dismissed because they failed to conduct the statutorily required investigation which is an integral part of the statutory scheme.

The trial court's finding that no reasonable investigation was conducted here is supported by the undisputed evidence in this case. The trial court applied the clear mandates of the Florida Statutes when it dismissed the Kukrals' case for this reason. Affirmance of the order of dismissal therefore, is eminently correct.

The trial court's dismissal of the Kukrals' case against MUI

was proper for the additional reason that plaintiffs never served a notice of intent to initiate litigation upon MUI and never indicated that MUI was a prospective defendant in the notice they did send to Dr. Mekras. Florida law is clear that failure to serve a notice of intent to initiate litigation on a party within the statute of limitations requires dismissal of the action.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE PLAINTIFFS' CAUSE WHERE THEY PROVIDED NO EVIDENCE AT THREE HEARINGS WHICH INDICATED THAT THEY CONDUCTED THE STATUTORILY REQUIRED REASONABLE INVESTIGATION OF THEIR CLAIM PRIOR TO MAILING A NOTICE OF INTENT TO INITIATE LITIGATION AGAINST DEFENDANTS.

A. Statutory requirements.

The legislature's statutory plan for eliminating frivolous medical malpractice claims has, at its heart, a requirement that a claimant conduct an investigation which includes consulting with a medical expert and obtaining a written opinion from such expert before mailing a notice of intent to initiate litigation. The legislature has set forth this reasonable investigation requirement in plain and unambiguous language and has furthermore made clear that it mandatorily applies to all medical negligence claims without exception, at the peril of dismissal.

Section 766.201(2), Florida Statutes, provides:

> presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses.
>
> * * *
>
> (a) Presuit investigation shall include
>
> 1. Verifiable requirements that reasonable investigation precede both malpractice claims and defenses in order

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to eliminate frivolous claims and defenses.

2. Medical corroboration procedures.

Section 766.203(2), Florida Statutes, provides that:

> (2) Prior to issuing notification of intent to initiate medical malpractice litigation pursuant to s. 766.106, the claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe that:
>
> (a) Any named defendant in the litigation was negligent in the care or treatment of the claimant; and
>
> (b) Such negligence resulted in injury to the claimant.
>
> Corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(5), at the time the notice of intent to initiate litigation is mailed, which statement shall corroborate reasonable grounds to support the claim of medical negligence.

"'Investigation' means that an attorney has reviewed the case against each potential defendant and has consulted with a medical expert and has obtained a written opinion from the expert." Section 766.202(4). Section 766.206(1) allows either party to file a motion requesting the court to determine whether the opposing party's claim or denial rests on a reasonable basis. Section 766.206(2) states that when a trial court finds that a claimant has not complied with reasonable investigation requirements, "the court shall dismiss the claim ...."

The statutes at issue here plainly state that a reasonable investigation i.e., consultation with a medical expert and obtaining a written opinion, shall precede the mailing of the notice of

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intent and that presuit investigation mandatorily applies to all medical malpractice claims, without exception. "The leading rule of statutory construction provides that the legislature's intent is found in the plain language of the statute." *Taylor Woodrow Construction Corp. v. Burke Co.*, 606 So. 2d 1154, 1155 (Fla. 1992). Statutes are presumptively valid and constitutional and must be given effect until judicially declared unconstitutional. 49 Fla.Jur.2d *Statutes* § 21 (1984). The trial court and the Third District have simply applied the clear and unambiguous letter of the law and imposed the sanction of dismissal for non-compliance which is clearly set forth in the statutes.

B. Trial court did not abuse its discretion in finding that the Kukrals failed to introduce evidence which established that they met the statute's requirements.

The undisputed evidence adduced below is that the Kukrals did not conduct the statutorily required investigation before mailing their notice of intent to initiate litigation and the trial court correctly so found. The sum total of all of plaintiffs' counsel's (Katz's) efforts before mailing the notice of intent was his own review of the claim and his unsubstantiated statement that he had spoken with "doctors." (R. 197, 273-274). Counsel did not identify this individual, his/her medical specialty, or whether this individual qualified as an expert as defined in the statutes. Furthermore, there was absolutely no clue as to what documents this doctor reviewed and what, if anything, his/her investigation consisted of. The Kukrals have conceded that they did not obtain any written opinion from a medical expert before they mailed their

notice. (R. 251; Br. p.24). The Kukrals agree that this is the only showing they made, and do not take issue with these trial court findings. (Br. pp.24-26). Without a doubt, this "evidence" falls woefully short of that required to meet the statute's reasonable investigation requirements under the leading authority of *Duffy v. Brooker*, 614 So. 2d 539 (Fla. 1st DCA), *rev. denied*, 624 So. 2d 267 (Fla. 1993).

In *Duffy*, the court held that defendant's medical expert Dr. Edgerton's corroborating affidavit which was devoid of factual support for its conclusion of no negligence constituted prima facie evidence of lack of a "reasonable basis" for the denial of the claim which was sufficient to shift the burden to the defendant to show compliance with the "reasonable investigation" requirements and that the denial of the claim did rest on a reasonable basis.

The following was Dr. Duffy's evidence that a reasonable investigation was conducted by his insurer's claims adjuster, Ms. Burney:

> Burney identified Dr. Edgerton's February 1991 sworn statement. She testified that she has twelve years experience reviewing medical malpractice claims and that in her opinion there was a good-faith review done on this claim, and a good-faith determination by PPTF that there was no negligence on the part of Dr. Duffy. On redirect examination, Burney again admitted that she had no on-hand involvement with the review of the claim.
>
> Burney was recalled to testify that as the supervisor, it is her duty to determine whether a reasonable investigation has been completed, and that she determined that "a good-faith investigation was conducted on behalf of Dr. Duffy in this case." She testified that Dr. Edgerton was a board certified

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> gastroenterologist and internist, a health care provider similar to Dr. Duffy, and that Dr. Edgerton's corroboration statement is "very standard" in the industry and is a standard form used by PPTF. She described the usual "claims view and consultation session" between the claims adjustor and the expert reviewer, "during which the entire medical record is discussed and further discussion is centered around the allegations put forth by the attorney representing the patient or patient's estate," and testified that such a meeting had been conducted in this case and that the investigation "was handled as all investigations are handled throughout the state."
>
> On cross-examination, Burney testified that PPTF prepares the form "corroboration" statement and that the reviewing physician completes it. She stated that the claims review and consultation session in this case was held on December 11, 1990, and that the delay in the claims review process was caused by the illegible copies of the hospital records. She did not know how long Dr. Edgerton had spent reviewing the records.

Id. at 541-42.

Notwithstanding, the First District held:

> We agree that the defendants' response, including Dr. Edgerton's statement, constituted prima facie evidence of lack of a "reasonable basis" for the denial of the claim which was sufficient to shift the burden to the defendant to show compliance with the "reasonable investigation" requirements and that the denial of the claim did rest on a reasonable basis. Having carefully reviewed the record in this case, we find that competent, substantial evidence supports the trial judge's finding that the greater weight of the evidence established that PPTF's response rejecting the claim was not in compliance with the "reasonable investigation" requirements of the statute and did not res "on a reasonable basis."
>
> * * *
>
> When the claimant resorted to the procedure outlined in section 766.206 to have the trial court determine whether, in fact, a reasonable

> investigation had been made, the insurer's cryptic response and form "corroboration" statement satisfied the claimant's burden of going forward. Dr. Duffy and his insurer failed to present sufficient competent evidence to outweigh the claimant's prima facie showing that they had not conducted a reasonable investigation and that their denial of the claim did not rest on a reasonable basis.

Id. at 545-546. Consequently, Dr. Duffy's denial of the claim was stricken and his insurer was sanctioned.

Duffy makes clear that compliance with the statutes is not optional and sanctions are warranted even where the case has progressed beyond the presuit screening period and no apparent prejudice has been wrought.

The court in *Duffy* did not impose these sanctions simply because the expert's corroborating affidavit was inadequate. Likewise, here, the trial court did not dismiss the cause for the Kukrals' mere failure to mail their expert's affidavit with the notice of intent. Indeed, Mekras' motions to dismiss the cause on this ground were denied.

Mekras' burden of going forward was satisfied by the fact that no expert affidavit accompanied the Kukrals' notice of intent and that the expert affidavit was provided two months after the presuit screening period ended. When Mekras resorted to the procedure outlined in section 766.206 to have the trial court determine whether a reasonable investigation had been made, it was incumbent upon the Kukrals to present <u>sufficient competent evidence</u> to outweigh Mekras' prima facie showing. The sum total of the "evidence" the Kukrals presented -- their attorney's unsupported statement that he

had spoken with "doctors" before mailing the notice -- falls woefully short of the evidence that the court held was inadequate in *Duffy, supra*. To this day, the Kukrals still have not produced one shred of evidence showing what, if any, investigation they made before mailing the notice of intent, nor have they even attempted to explain why they never timely provided an expert affidavit. And, their expert's tardy affidavit sheds no light on what (if anything) was done before the notice of intent was mailed, since it was obtained after the presuit period was over. (R. 300-303).

The trial court's findings are clothed with a presumption of correctness and should not be disturbed on appeal unless clearly erroneous or totally unsupported by competent substantial evidence. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979). The trial court was eminently correct in dismissing the Kukrals' complaint on this record and under the mandate of Florida law and the Third District correctly so held.

C. <u>Kukrals' arguments without merit</u>.

The Kukrals argue that they need not comply with the statutes' requirements for expert consultation and a written opinion before mailing a notice of intent because "any idiot" a "third grade student" or "neophyte lawyer" can deduce from the face of their notice of intent that Mr. Kukral's injury is obvious malpractice. Kukrals furthermore argue that Mekras' presuit investigation was not hindered by their failure to comply with statutory requirements and that the rulings of the trial court and Third District have denied him access to the courts. These arguments cannot prosper.

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The legislature, in its efforts to control costs of litigation in the interests of the public need for quality medical services,[5] can surely impose statutory presuit investigation requirements. *See* 49 Fla. Jur.2d *Statutes* § 21 (1984).

> These provisions were enacted to establish "a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding." *Williams v. Campagnulo*, 588 So. 2d 982, 983 (Fla. 1991); *see Ingersoll v. Hoffman*, 589 So. 2d 223 (Fla. 1991); *Duffy v. Brooker*, 614 So. 2d 539 (Fla. 1st DCA 1993) *review denied sub nom. Physicians Protective Trust Fund v. Brooker*, 624 So. 2d 267 (Fla. 1993); *Chandler v. Novak*, 596 So. 2d 749 (Fla. 3d DCA 1992); *Stebilla v. Mussallem*, 595 So. 2d 136 (Fla. 5th DCA 1992), *review denied, Mussallem v. Stebilla*, 604 So. 2d 487 (Fla. 1992).
>
> The medical negligence statutory "provisions were not intended to ... deny parties access to the court on the basis of technicalities." *Wilkinson v. Golden*, 630 So. 2d 1238, 1239 (Fla. 2d DCA 1994), *citing Ragoonanan v. Associates in Obstetrics*, 619 So. 2d 482, 484 (Fla. 2d DCA 1993); *see Patry v. Capps*, 633 So. 2d 9 (Fla. 1994). On the other hand, the "presuit notice and screening requirements ... represent more than mere technicalities. The legislature has established a comprehensive procedure designed to facilitate the amicable resolution of medical malpractice claims." *Ingersoll*, 589 So. 2d at 224.

Archer v. Maddux, 645 So. 2d 544, 545 (Fla. 1st DCA 1994). The statutory scheme requires a reasonable investigation; a notice of intent containing sufficient facts; and an expert's affidavit. Sections 766.203; 766.205(1). The courts are not empowered to create any exemptions from the statutory scheme for "obvious" cases of medical malpractice.

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[5] Section 766.201(c), Florida Statutes.

> It is well settled that where the language of a statute is clear and unambiguous, courts may not resort to rules of statutory construction. Rather, the statute must be given its plain and ordinary meaning. Further, courts are 'without power to construe an unambiguous statute in a way which would modify, extend, or limit its express terms or its reasonable and obvious implications.'

Steinbrecher v. Better Construction Co., 587 So. 2d 492, 493 (Fla. 1st DCA 1991) (citations omitted). In addition:

> [N]o court is entitled to disregard the plain language of a statute in favor of what it deems to be a more reasonable construction.

Horizon Hospital v. Williams, 610 So. 2d 692, 693 (Fla. 2d DCA 1992) (trial court's expressed concern that unreasonable result might occur if statute was construed according to its plain terms could not override statutory language.). There is no contention in this case that the statutes are ambiguous.

"Questions as to wisdom, need or appropriateness are for the Legislature." *State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977). Thus, it is the legislature's domain to determine the scope of a statute's exemptions, and this statute does not exempt anyone from its presuit investigation requirements. The Fourth District in an analogous case stated that:

> ... just as the legislature had the option of restricting the exemption to "wages due laboring men," so did it have the option to extend the exemption to wages once received. It is the prerogative of the legislature to extend or restrict such exemptions. This court cannot extend the effect of the statute beyond the unambiguous language chosen by the legislature

Holmes v. Blazer Financial Services, Inc., 369 So. 2d 987, 990

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(Fla. 4th DCA 1979). *See Wilson Insurance Services v. West American Insurance Co.*, 608 So. 2d 857 (Fla. 4th DCA 1992) (*en banc*) (where language of section 768.79 was clear that attorneys fees are awardable where plaintiff obtained judgment in case, statute could not be expanded to include cases not within its provisions, i.e., cases where a judgment of no liability was entered); *Bryant v. Shands Teaching Hospital and Clinics*, 479 So. 2d 165 (Fla. 1st DCA 1985) (a court is not free to identify additional statutory modifications of the at-will doctrine unless the legislature renders a clear statement of its intent to do so). Therefore, the courts have no authority to modify these statutes or create exemptions from their provisions, when the statute mandatorily applies to <u>all</u> claims for medical negligence.[6]

The legislature's requirement that plaintiffs and defendants consult with a medical expert and obtain a medical expert opinion is an integral part of the legislature's plan to curb frivolous medical malpractice litigation. Indeed, this legislative design does not impose any unreasonable burden upon or any impediment to access to the courts for victims of an alleged obvious malpractice. It should be relatively easy and inexpensive for such plaintiffs to

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[6] The same exemption would necessarily apply to "obviously meritorious <u>defenses</u>," since defendants are similarly required by the presuit statutes to obtain a medical expert opinion prior to denying a claim for medical negligence. Section 766.203(3). The determination of what constitutes "obvious malpractice" or "obviously meritorious defenses," when left to the lawyers, is entirely subjective. The legislative requirements for consultation with a medical expert and for medical expert opinion ensures that claims and defenses are evaluated by medical experts and are not prosecuted based solely on an attorney's personal opinion of his client's case.

consult with and obtain a written medical expert's opinion that a negligent injury occurred before mailing a notice of intent to initiate litigation. This statute imposes only a reasonable and limited duty upon plaintiffs before allowing them to file suit. *See Shands Teaching Hospital and Clinics, Inc. v. Barber*, 638 So. 2d 570 (Fla. 1st DCA 1994). Significantly, the Kukrals did not challenge the constitutionality of the statute at trial. They contended only that they need not comply. There simply is no compelling reason to exempt these parties from the statutes' mandate. And, the Kukrals offered no reason whatsoever for why they did not comply with the statutes' simple, plain and unambiguous requirements at the peril of dismissal of their case -- other than that they believed they didn't have to.

The Kukrals' brief conspicuously omits any discussion of the only case in Florida that directly bears on the issue in this case: *Archer v. Maddux*, 645 So. 2d 544 (Fla. 1st DCA 1994). *Archer* shoots gaping holes in every one of the Kukrals' arguments.

Bonnie Archer's complaint alleged that she suffered injury when Dr. Maddux permitted a portion of tube to remain inside her body after surgery:

> [T]he defendant negligently performed his professional services by permitting a foreign object to-wit: a portion of a tube, to remain in the incision after the operation was performed, and by failing to properly manage and control the follow up care given to the plaintiff which continued through to-wit: November 18, 1988, at or about which time the plaintiff learned that the cause of her continuing problems was the fact that the foregoing body was left in the incision made by the said defendant. Id. at 545.

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Archer did not provide any corroborating, verified medical expert opinion along with her notice of intent to initiate litigation or at any time before the statute of limitations ran. Archer's complaint was dismissed for this reason.

Archer argued on appeal that her initial failure to supply a corroborating medical opinion was immaterial because the complaint gave rise to a presumption of negligence under section 766.102(4), which provides:

> The existence of a medical injury shall not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. However, the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures shall be prima facie evidence of negligence on the part of the health care provider. Id. at 546.

Archer maintained that section 766.203(2)(b) does not require a written medical expert opinion as support for her claim because the legislature has already determined that Dr. Maddux's alleged conduct is negligence per se. The First District disagreed:

> We find no such exception to the statutory requirement that medical malpractice claims be corroborated by verified, written medical opinions. The statute calls for medical corroboration not only of negligence but also of injury in consequence. Even on appellant's *res ipsa loquitur* theory -- which we reject, as inapplicable to presuit investigation requirements -- medical opinion is presumably a necessary predicate to show that a foreign body has indeed been left at a surgical site. Without this predicate and without corroboration that "[s]uch negligence resulted in inju-

> ry to the claimant," section 766.203(2) (b), Florida Statutes (1993), the statutory requirements have not been met. Id.

This rationale is even more compelling where, as here, the Kukrals are not relying upon the legislature's determination of what constitutes negligence per se for arguing their exemption, but rather on the subjective opinion of their own counsel. The *Archer* opinion directly supports Mekras' position that the legislature's requirement for consultation with a medical expert and for a written opinion serves a valid purpose even in cases allegedly involving obvious malpractice to corroborate that the alleged negligence caused the injuries complained of and to confirm the existence of the injury. Expert investigation and corroboration requirements also serve a valid purpose where a plaintiff names several health care providers who rendered any care and treatment in the lawsuit to establish which party is negligent and whether a party's negligence was the proximate cause of plaintiffs' injury, i.e., who is a proper defendant in the case. "Obvious" malpractice does not necessarily mean that the culpable party has been sued.

Additionally, determinations of malpractice made by laypersons seriously erode the principle, now codified, that an inference of negligence cannot arise from the fact of an injury. Section 766.102(4), Fla. Stat. The plaintiff has the burden of proof that the alleged actions of a health care provider constitute a breach of the prevailing professional standard of care. Section 766.102(1). The fact that a plaintiff suffers an injury during the course of medical treatment does not necessarily establish that the

doctor fell below the applicable standard of care.[7] Placing investigation and corroboration requirements squarely in the hands of the medical profession -- even in so-called "obvious" cases -- avoids these pitfalls. The legislature's plan for deterring frivolous medical malpractice claims and defenses cannot be undermined by judicially created exemptions for so-called obvious cases of negligence.

Archer furthermore makes clear that the common law evidentiary rule that no expert testimony is required at trial to recover in a malpractice action where the alleged malpractice is negligence per se or within the common understanding of the jury has no relevance whatever to the presuit investigation requirements imposed by Chapter 766 of the Florida Statutes.[8] In any event, it is settled law that the

> statutes of Florida control and take precedence over the common law where there are any inconsistencies between them. Thus, the common law may be modified, directly or indirectly, by the enactment of a statute that is in-

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[7] *See, e.g., Perry v. Langstaff*, 383 So. 2d 1104 (Fla. 5th DCA), *rev. denied*, 392 So. 2d 1377 (Fla. 1980) (affirming summary judgment for surgeon who severed iliac artery during surgery to remove kidney stones from ureter since expert testimony indicated this type of injury is recurrent even with most careful urologic surgeons and can also occur in cases where there is excessive scar tissue formation).

[8] It is not altogether clear that this rule, even if relevant, which is denied, would apply in this case. The plaintiffs' complaint alleges in part that Dr. Mekras failed to establish and maintain a standing order for provision of diluted acid and negligently failed to direct the hospital to provide diluted acid. (R. 5). Notably, plaintiffs listed an expert to testify at trial regarding such protocol. (R. 115-116). Thus, it was not so "obvious" to plaintiffs that there was no need for expert testimony in this case.

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> consistent with it, even if it limits or restricts, substantially changes, or entirely abrogates a rule of the common law.

49 Fla.Jur.2d *Statutes* § 8 (1984).

The *Archer* decision also rejects Kukrals' argument that Mekras' undertaking of his own statutory presuit investigation obligations somehow excuses their failure to comply with presuit requirements:

> We do not believe the defendants' own investigation, presumably conducted in a good faith effort to comply with section 766.106(3), Florida Statutes (1993), can fairly be construed as a waiver of their right to a corroborating medical opinion. If Ms. Archer's timely-filed notice of intent to litigate fulfilled a purpose of the presuit requirements by giving Dr. Maddux sufficient notice to evaluate Archer's claim with an eye toward disposition out of court, so much the better.
>
> But this does not excuse the lack of a verified written medical expert opinion.

In addition, this record is replete with evidence that the Kukrals' presuit failures to timely respond to defendants' requests for information, medical bills, claim information and medical records hindered defendants' presuit investigation. (SR. 2 p.4, 8, 11-12, 15, 24; SR. 4).

D. <u>Case law relied on by Kukrals inapposite</u>.

The Kukrals' reliance on *Stebilla v. Mussalem*, 595 So. 2d 136 (Fla. 5th DCA), *rev. denied*, 604 So. 2d 487 (Fla. 1992) and *Ragoonanan v. Associates In Obstetrics & Gynecology*, 619 So. 2d 482 (Fla. 2d DCA 1993) is misplaced. The Third District expressly distinguished those cases from the instant:

> It is the plaintiffs failure to comply with

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> their duty to conduct an investigation as defined by section 766.202(4), Florida Statutes (1991), that distinguishes this case from the cases relied on by plaintiffs. In *Stebilla v. Mussalem*, 595 So. 2d 136 (Fla. 5th DCA), *rev. denied*, 604 So. 2d 487 (Fla. 1992) and *Ragoonanan v. Associates In Obstetrics & Gynecology*, 619 So. 2d 482 (Fla. 2d DCA 1993), and in *Suarez v. St. Joseph's Hosp., Inc.*, 634 So. 2d 217 (Fla. 2d DCA 1994), the plaintiffs obtained the necessary medical opinion before filing their notices.

Stebilla v. Mussallem, 595 So. 2d 136 (Fla. 5th DCA), *rev. denied*, 604 So. 2d 487 (Fla. 1992) holds only that the claimant's failure to produce the corroborating medical expert opinion prior to the running of the statute of limitations will not result in dismissal of the complaint as a matter of law, but it may subject the plaintiff to sanctions under section 766.106(6) and/or section 766.206(2).

Case law holding that a medical malpractice case should not be dismissed where a medical expert's affidavit is provided within the statute of limitations has no application to the issue in this case -- whether the Kukrals' conducted the investigation mandated by the statutes. The statutes require both an investigation and an expert's verified, corroborating opinion. Section 766.201(2)(a). Simply because no dismissal is wrought when an affidavit is untimely but served within the statute of limitations does not likewise exempt the Kukrals from conducting the required investigation by submitting their case to an expert for consultation and written opinion before the notice of intent is mailed. Kukrals' mid-suit compliance with these investigation requirements totally undermines the statutory scheme. Exempting a party from the statute's inves-

tigation requirements as well as the timely affidavit requirements guts the statute completely.

Rangoonanan v. Associates in Obstetrics, 619 So. 2d 482 (Fla. 2d DCA 1993) is similarly no salvation for plaintiffs. There, the only deficiency in the Rangoonanans' performance was their failure to provide the name of their medical expert. They obtained an expert's corroborating opinion and mailed it with their notice of intent which, when read together, satisfied the statute's "reasonable investigation" requirement. The court held:

> Although the Rangoonanans' good faith attempt to comply with statutory presuit requirements may have fallen short of statutory technicalities, it established a reasonable basis for their claim and should have survived a motion to dismiss.

Id. at 484.

In *Wolfsen v. Applegate*, 619 So. 2d 1050 (Fla. 1st DCA 1993), the appellate court found that the trial court erred in concluding that the expert affidavits submitted by the plaintiff were insufficient to corroborate reasonable grounds to support her claims of negligence and in failing to consider proffered evidence at the hearing which furthermore established the reasonableness of the investigation conducted. Here there was no expert affidavit mailed along with the notice of intent and no evidence that a reasonable investigation had been conducted.

As stated earlier, plaintiffs' claim here was not dismissed for failure to timely provide an expert affidavit. Rather, plaintiffs' case was dismissed because they failed to produce any evidence at three hearings which established that they conducted a

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reasonable investigation of the claim prior to sending their notice.

The Kukrals' reliance on *Pinellas Emergency Mental Health Services, Inc. v. Richardson*, 532 So. 2d 60 (Fla. 2d DCA 1988) and *Dressler v. Boca Raton Community Hospital*, 566 So. 2d 571 (Fla. 4th DCA 1990), *rev. denied*, 581 So. 2d 164 (Fla. 1991) is also misplaced. These cases involve dismissals of claims for failure to make discoverable information available to the opposing side pursuant to the following statutory provisions:

> Upon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information available without formal discovery. Failure to do so is grounds for dismissal of claims or defenses ultimately asserted.

The courts in *Dressler* and *Pinellas* interpreted this statute -- which is not at issue in this case -- as conferring upon a trial court discretion to dismiss a case after considering whether the party acted unreasonably in fulfilling the statutory duty to cooperate with the presuit investigation. To the contrary, in this case, the relevant statutes define what a reasonable presuit investigation must include, and provide that if trial court finds that there has been no compliance with these reasonable investigation requirements, the claim shall be dismissed.

II. DISMISSAL OF THE CAUSE AGAINST MUI WAS PROPER, SINCE PLAINTIFFS FAILED TO SERVE A NOTICE OF INTENT TO INITIATE LITIGATION UPON DEFENDANT MUI.

The trial court's order dismissing plaintiffs' cause against defendant MUI was proper for the additional reason that plaintiffs

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failed to serve any notice of intent to initiate litigation upon MUI.

Florida Statutes section 766.106(2) provides:

> After completion of presuit investigation ... and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant and, ... the Department of Professional Regulation by certified mail...

Florida courts uniformly hold that a failure to serve a notice of intent to initiate litigation on a party within the statute of limitations requires dismissal of the action. *Ingersoll v. Hoffman*, 589 So. 2d 223 (Fla. 1991); *Williams v. Campagnulo*, 588 So. 2d 982 (Fla. 1991). In *Williams*, the Florida Supreme Court held that compliance with the requirement that notice be given of the intention to file a malpractice action prior to commencement of suit is a condition precedent to maintaining the action for malpractice and, although it may be complied with after filing the complaint, the notice must be given within the statute of limitations period.

Here the plaintiffs never mailed a notice of intent to MUI or otherwise indicated in the notice sent to Dr. Mekras that MUI was a prospective defendant. MUI moved to dismiss the plaintiffs' complaint, asserting this ground, (R. 20-22). Nothing in the record suggests that plaintiffs should be relieved of the effect of their non-compliance.[9] Accordingly, the trial court's dismissal of

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[9] While we recognize that R.C.P. 1.650(b)(1) states that notice received by any prospective defendant shall operate as notice to any other prospective defendant who bears a legal relationship to the recipient, subsection (2) of the same rule requires that

> the notice shall include the names and addresses of all other parties and shall be sent

MUI is proper on this record.

CONCLUSION

Based on the foregoing reasoning and authorities, defendants Mekras respectfully submit that the decision of the Third District Court of Appeal be affirmed.

Respectfully submitted,

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to each party.

Therefore, plaintiffs should have indicated in their notice to Dr. Mekras that MUI was a prospective defendant and furthermore should have sent a separate notice to MUI. It is undisputed that this was not done.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents George D. Mekras, M.D. and Miami Urological Institute, Inc.'s Answer Brief On The Merits was mailed this 12th day of May, 1995 to:

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