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SUPREME COURT OF FLORIDA

CASE NO. 85,099

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.

On review from the District Court of Appeal of Florida, Third District

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PETITIONERS' INITIAL BRIEF ON THE MERITS

LAW OFFICES OF JOE N. UNGER, P.A.
2920 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-5302
(305) 374-5500
Fla. Bar No. 082987

Counsel for Petitioners

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PRELIMINARY STATEMENT

This Court has accepted jurisdiction to review a decision of the District Court of Appeal, Third District,[1] which affirms an order of the trial court dismissing petitioners' medical malpractice complaint. The fundamental right of access to the judicial system has been denied by the trial court and district court decisions.

STATEMENT OF THE CASE AND FACTS

Petitioners, Charles and Milly Kukral, sued Dr. George D. Mekras and Doctors' Hospital for medical malpractice. (R.2-12) Eight months after the cause was at issue as to both respondents and the matter had been set and reset for trial (R.13-16; 23-28; 159-160), a motion was filed to determine whether the petitioners had properly complied with statutory pre-suit screening procedures. This motion requested dismissal of petitioners' suit for non-compliance. (R.167-168; 171) After hearings, the trial judge dismissed petitioners' lawsuit for failure to comply with the mandatory pre-suit screening procedures of Sections 766.201, 766.202(4) and 766.203, Florida Statutes (1993). (R.300-303)

The facts necessary to determine whether the trial court erred in dismissing petitioners' medical malpractice action are not in dispute and are summarized in the memorandum of law supporting the motion to dismiss filed by Doctors' Hospital. Substantially identical facts apply to Dr. George Mekras.

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[1] Kukral v. Mekras, 647 So.2d 849 (Fla. 3d DCA 1995). (Appendix A)

On February 21, 1992, the petitioners served on Doctors' Hospital and Dr. Mekras Notices of Intent to Initiate Litigation for Medical Malpractice as required under Section 766.106(2). The notice contained the following statements:

> "The legal basis of this action will be the negligent failure to properly treat CHARLES KUKRAL for genital warts when he came to you for treatment on July 26, 1991.
>
> CHARLES KUKRAL will allege and provide evidence of the following losses and injuries as a proximate result of the above-described professional negligence: CHARLES KUKRAL suffered third degree burns from acid applied to the shaft of his penis. As a result thereof, CHARLES KUKRAL is permanently deformed, emotionally traumatized, and the ability of CHARLES and MILLY KUKRAL to enjoy a normal sexual relationship will be forever diminished." (R.173)

The basis of both the respondents' objections to the notice of intent was the failure to provide a verified written medical expert opinion at the time the notice of intent was mailed, in violation of Section 766.203(2)(b) governing pre-suit investigation of medical negligence claims.[2]

Notwithstanding the absence of a verified written medical opinion attached to the notice of intent to sue, both defendants pursued independent investigations and in May and

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[2]"Corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a verified written medical expert opinion. . .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." Section 766.203(2)(b), Florida Statutes (1993).

June of 1992 sent to the petitioners affidavits denying liability for malpractice of the hospital and doctor respectively. (R.174-179)[3]

On August 14, 1992, along with various medical records and answers to questions propounded by the respondents, counsel for the petitioners enclosed an unverified medical expert opinion corroborating the reasonable grounds for the claim of medical negligence. Respondents were informed that a verification of the opinion would be forwarded shortly. (R.182-184) On September 3, 1992, long prior to expiration of the statute of limitations, respondents were provided with a Verification of Medical Expert Opinion verifying the finding of negligence contained in a letter to plaintiff's counsel dated June 1, 1991. (R.180-181)[4] After receiving verification, both respondents reiterated their denials of negligence.

Petitioners filed their complaint on October 9, 1992, within the limitation period. After pleading, discovery, and

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[3]The letter from Medical Risk Consultant Group on behalf of Dr. Mekras states in part, "We have completed our evaluation and investigation of this claim pursuant to your Letter of Intent dated February 21, 1992. In accordance with Florida Statute 766.106, we have conducted a good faith investigation, inclusive of medical expert review, and it is our position that Dr. Mekras was not negligent in his care and treatment of your client, Charles Kukral. Enclosed please find the Corroboration of Medical Expert Opinion along with our expert's Curriculum Vitae. In view of the above, we respectfully deny liability to your client's claim on behalf of Dr. Mekras." (R.177, emphasis supplied)

[4]The two-year statute of limitations would not run until July 26, 1993.

unsuccessful mediation, the matter was set and then reset for trial. (R.159-160) Thereafter, a motion to determine if petitioners properly complied with pre-suit screening was filed and resulted in the order dismissing the action. An appeal ensued.

The majority decision of the Third District Court of Appeal affirmed the final order dismissing petitioners' complaint because the verified medical opinion was not sent with the notice of intent to initiate litigation and ". . .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 statute requires." (Appendix A)

The dissenting opinion notes that a verified medical opinion was provided within the limitations period and cited two decisions which found the expert's affidavit timely if filed within the limitations period. In addition, the dissent finds the majority decision to directly contravene the stated goal of the statute to prevent baseless litigation. The dissent also discusses that petitioners' counsel did conduct a reasonable investigation considering the obvious nature of the injuries. (Appendix A)

Petitioners' Motion for Rehearing En Banc argued both grounds of Rule 9.331(c)(i), Florida Rules of Appellate Procedure: exceptional importance and necessity to maintain uniformity in the court's decisions. Cited as intradistrict conflict was Stein v. Feingold, 629 So.2d 998 (Fla. 3d DCA

1993)(where affidavit of independent medical expert is filed within applicable limitation period, a complaint should not be dismissed for failure to comply with Chapter 766). By order of September 14, 1994, rehearing en banc was granted.

Oral argument was presented to a ten-member panel of the Third District. Six members of the panel adopted the majority decision as the opinion of the en banc court. Four members of the panel adhered to the views in the dissenting opinion and would have reversed the trial court's order. This Court has accepted jurisdiction to hear the merits of the case presented below.

POINT ON APPEAL

WHETHER THE TRIAL COURT ERRED IN DISMISSING PETITIONERS' MEDICAL MALPRACTICE LAWSUIT FOR FAILING TO PROVIDE A VERIFIED MEDICAL OPINION OF NEGLIGENCE WITH THE NOTICE OF INTENT TO INITIATE LITIGATION WHERE THE FACTS GIVING RISE TO THE INJURY SET FORTH IN THE NOTICE ARE SUFFICIENT TO ESTABLISH THE CLAIM IS NOT FRIVOLOUS, RESPONDENTS UNDERTOOK INVESTIGATION AND DENIED NEGLIGENCE AND A VERIFIED MEDICAL OPINION WAS SUPPLIED PRIOR TO EXPIRATION OF THE STATUTE OF LIMITATIONS.

SUMMARY OF ARGUMENT

Chapter 766, Medical Malpractice and Related Matters, requires a potential plaintiff to give pre-suit notice of intent to sue all potential defendants and to attach a verified medical opinion to the notice. The purpose of the notice is to notify the defendant or defendants of potential litigation so that pre-suit investigation may resolve the

matter. The verified medical opinion is to prevent frivolous litigation.

A verified medical opinion was not included with the notice of intent to sue this case. The facts contained in the notice establish, without question, that the claim is not frivolous--during a medical procedure undiluted acid was inadvertently applied to the claimant's penis resulting in serious burns. After notification, both potential defendants (doctor and hospital) conducted investigations and denied negligence. A verified medical opinion was given to defendants before the statute of limitations expired and before suit was filed.

Dismissing plaintiffs' complaint for failing to provide a verified medical opinion of negligence with the notice of intent to sue improperly preferred form over substance, violated the expressed and implied intent of the statute and unjustifiably deprived an injured plaintiff of his day in court.

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING PETITIONERS' MEDICAL MALPRACTICE LAWSUIT FOR FAILING TO PROVIDE A VERIFIED MEDICAL OPINION OF NEGLIGENCE WITH THE NOTICE OF INTENT TO INITIATE LITIGATION WHERE THE FACTS GIVING RISE TO THE INJURY SET FORTH IN THE NOTICE ARE SUFFICIENT TO ESTABLISH THE CLAIM IS NOT FRIVOLOUS, RESPONDENTS UNDERTOOK INVESTIGATION AND DENIED NEGLIGENCE AND A VERIFIED MEDICAL OPINION WAS SUPPLIED PRIOR TO EXPIRATION OF THE STATUTE OF LIMITATIONS.

I. THE APPLICABLE STATUTES

Medical malpractice and related matters are the subject of Chapter 766 of the Florida Statutes. Section 766.106(2) provides that after completion of pre-suit investigation and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant of the intent to initiate litigation for medical malpractice.

Section 766.106(3)(a) precludes filing of suit for a period of ninety days after the requisite notice is mailed. During this ninety-day period the prospective defendant's insurer or self-insurer shall conduct a review to determine the liability of the defendant. At or before the end of the ninety-day period, the insurer or self-insurer shall provide the claimant with a response rejecting the claim, making a settlement offer, or making an offer of admission of liability and arbitration on the issue of damages. Section 766.106(3)(b).

Section 766.201 sets forth the legislative intent underlying the statute. Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients. Functional unavailability of malpractice insurance for some physicians has occurred because of the substantial increase in loss payments to claimants. Escalation of the average cost of defending a medical malpractice claim has made it imperative to control costs in the interest of the public need for quality medical service. Escalating defense costs

can be substantially alleviated by requiring early determination of the merit of claims, providing early arbitration of claims and imposing reasonable limitations on damages while preserving the right of jury trial to both parties.

It was the intent of the legislature to provide a plan for prompt resolution of medical negligence claims consisting of two separate components--pre-suit investigation and arbitration. Pre-suit investigation is mandatory and arbitration is voluntary. Pre-suit investigation includes verifiable requirements that reasonable investigation precedes both a malpractice claim and defense in order to eliminate frivolous claims and defenses. Sections 766.201(2) and 766.201(2)(a).

"Investigation" is defined in Section 766.202(4) to mean that an attorney has reviewed the case against each potential defendant, has consulted with a medical expert and has obtained a written opinion from the expert.

Section 766.203(2) requires that prior to issuing notification of intent to initiate medical malpractice litigation a claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe there was negligence in the care and treatment of the claimant and such negligence resulted in injury. Corroboration by submission of a verified written medical expert opinion from a medical expert shall be provided with the notice of intent to initiate litigation. Section 766.203(2)(b).

Subparagraph (3) of Section 766.203 requires the defendant or the defendant's insurer or self-insurer to conduct an investigation to ascertain whether there are reasonable grounds to believe that the defendant was negligent and that such negligence resulted in injury to the claimant. The defendant must present corroboration of a lack of reasonable grounds with any response rejecting a claim by submitting a verified written medical expert opinion at the time the response rejecting the claim is mailed.

Section 766.206(2) provides that if the trial court finds that the notice of intent to initiate litigation mailed by the claimant is not in compliance with reasonable investigation requirements, the court shall dismiss the claim.

II. THE SPIRIT OF THE LAW, THE INTENT OF THE STATUTE AND GENERAL PRINCIPLES OF STATUTORY CONSTRUCTION

What did the legislature intend in enacting the statute governing medical malpractice cases? Does a technical violation of the statute justify dismissing plaintiffs' complaint, precluding plaintiffs from seeking redress for the injuries suffered?

The legislature has clearly stated the intended purpose of pre-suit investigation of medical malpractice claims: To discourage filing frivolous claims and to encourage pre-suit settlement. One section of the statute requires corroboration of reasonable grounds to initiate negligence litigation by submitting a verified written medical expert opinion at the time the notice of intent to initiate litigation is mailed.

The obvious reason for a verified written medical expert opinion is to provide a potential defendant with a reasonable basis for conducting an investigation of alleged negligence.

Mindful of the legislature's general intent to forestall frivolous litigation and to provide potential plaintiffs and defendants with an opportunity to investigate, it is instructive to recall a well-accepted principle of statutory construction before examining those cases dealing specifically with the medical malpractice statute.

> "A statute should be construed to give effect to the evident legislative intent, even if the result seems contradictory to the rules of construction in the strict letter of the statute; the spirit of the law prevails over the letter." Garner v. Ward, 251 So.2d 252, 256 (Fla. 1971), emphasis supplied.

Did the spirit of the medical malpractice statue prevail over the letter of the law here? A verified medical written opinion was not sent with the notice of intent to initiate medical malpractice litigation. Both the doctor and the hospital were informed that Mr. Kukral had suffered burns to his penis when an undiluted acid solution was applied. Is this not enough to put even a simple minded person on notice, even without medical corroboration, that someone might have been negligent? (The trial judge thought it was.) Based on the notice of intent to sue both the doctor and the hospital, respondents conducted separate investigations, resulting in two medical affidavits denying that any negligence had occurred.

Months later, after suit was filed, detailed discovery was conducted, motions to dismiss were denied and the matter was set for trial, petitioners' complaint was dismissed. The dismissal was not on the merits but resulted from the technicality that a verified medical opinion was not attached to the notice of intent to initiate litigation.

Slavish adherence to the letter of the law resulted in depriving a seriously injured man from seeking redress in a court of law before a jury of his peers. Arguably, there was a failure to comply with the strict letter of the pre-suit screening statute. Clearly, failure to comply with the strict letter of the statute had nothing whatever to do with preventing frivolous litigation, pretrial investigation or pretrial settlement--the stated goals of the enactment.

At the outset of the hearing resulting in dismissal of the Kukrals' malpractice action, their counsel conceded that he did not attach a written opinion of an expert to the notice of intent.[5] (Page 8) Counsel argued that while ideally the notice of intent should contain the corroborative written medical opinion (page 11), this defect was cured by providing that corroboration prior to filing the lawsuit. The defendants investigated and evaluated the claim. Both potential defendants denied negligence before and after receiving the written verification required by the statute. (Page 14)

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[5]All references to a transcript are to the hearing of August 24, 1993, R.242-290.

The trial judge made several noteworthy comments during the hearing:

> "Well, let me say this to you. Mr. Katz [plaintiffs' counsel] makes a very important point in his memorandum. He said any idiot could determine that something has gone wrong here, like amputating the wrong foot. It's the same thing here, so I think that, viscerally, is behind all of my thinking, but I guess he still has to comply with the statute in every respect." (Pages 19-20)

Later on in the hearing, the trial judge stated,

> ". . .[B]ut to me, if the solution is applied to a genital area and makes holes in the genital, I don't think we can say that that's, I won't say the word, malpractice, because I don't know that, I can't say it, that doesn't put someone on notice that there is a medical problem that exists." (Pages 23-24)

The trial judge was seriously concerned with the ramifications of defendants' argument regarding dismissal of plaintiffs' case--a case that was filed ten months previously and was ready to be tried. He asked plaintiffs' counsel whether he had consulted with a medical person before sending the notice of intent even though that person had not written a verified opinion. Counsel responded in the affirmative. (Page 31, see argument under Evidence of Pre-Suit Investigation, supra).

When the trial judge decided to rule against the petitioners and dismiss their case, he made the following significant statement:

> "This is one case I hope that I'm reversed on. . . .but I feel I'm applying the law as it exists now <u>and</u>

> following the mandate of the legislature ***I have made my decision. I think its the correct decision. I am very unhappy about it, but nevertheless, I'm making it because I feel that's the status of the law and my job is to interpret the law not to make law. . . ." (Page 45, emphasis supplied).

General principles very recently enunciated by this Court dictate the outcome of this case. Because dismissal is the ultimate sanction of the adversarial system, it should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result. Kozel v. Ostendorf, 629 So.2d 817 (Fla. 1993). Despite expressed reservations, the trial judge did impose the ultimate sanction in the adversarial system under circumstances where it was not necessary to comply with the stated intent of the governing statute.

Boyd v. Becker, 629 So.2d 481 (Fla. 1993) illustrates that Florida courts should not rely on statutory technicalities but should permit litigants to proceed with their claims and defenses in a court of law before a jury of their peers. Various sections of Chapter 766 as well as Rule of Civil Procedure 1.650 conflicted as to when the ninety day tolling period during which a suit cannot be filed commences. The statute was construed to permit a plaintiff to proceed. The Rule was modified in order allow a claim to be considered on its merits ". . .rather than barred by a judicial construction that applies the more limiting statutory provision." (Boyd v. Becker, supra at page 483).

III. THE CASE LAW

The statute places reciprocal responsibilities on claimants and respondents to preclude asserting a frivolous claim or a frivolous denial of a valid claim. The cases which deal with the failure to file a verified written medical opinion by either claimant or respondent can be cited interchangeably for the principles which they espouse, since the statutory responsibilities of both parties are identical.

The first case of note to deal with a motion to dismiss for failure to provide corroborating expert opinion with the notice of intent to sue is Stebilla v. Mussallem, 595 So.2d 136 (Fla. 5th DCA 1992), rev. den., 604 So.2d 487 (Fla. 1992). The precise issue stated by the court was whether a medical malpractice complaint must be dismissed as a matter of law if the corroborating expert opinion was not furnished to the defendants prior to the expiration of the two-year statute of limitations governing the medical malpractice action.[6] The facts of Stebilla are not pertinent since the question had to do with a change in the statute which required corroborating medical opinion to be provided when the notice of intent to

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[6]The corroborating expert opinion required by the statute in this case was furnished to defendants well prior to the expiration of the two-year statute of limitations. Since Stebilla, many cases have held that failing to attach a verified medical opinion to the Notice of Intent to Initiate Litigation is not a fatal defect if the verified medical opinion is provided prior to expiration of the applicable statute of limitations. For example, see Stein v. Feingold, 629 So.2d 998 (Fla. 3d DCA 1993); Suarez v. St. Joseph's Hospital, Inc., 634 So.2d 217 (Fla. 2d DCA 1994); Shands Teaching Hospital v. Miller, 642 So.2d 48 (Fla. 1st DCA 1994). See also Archer v. Maddux, 645 So.2d 544 (Fla. 1st DCA 1994).

sue was filed rather than when the notice of intent was mailed, as under the current statute. The reasoning of the court in reversing the order of dismissal is, however, highly persuasive. Commenting upon the failure to attach written medical corroboration to the notice filed by a claimant, the court comments, ". . .although statutorily required to be provided at the same time as the actual filing of the notice of intent. . .[it] is not part of that notice for jurisdictional purposes." Stebilla v. Mussallem, supra at page 138.

The court supports this statement with the additional reasoning that the language of the statute does not make the corroborative medical opinion part of the notice of intent to sue, but the notice of intent is to be "corroborated by" a medical expert opinion. "Nothing in the statute makes the opinion an integral part of the notice." Stebilla v. Mussallem, supra at page 138.

Stebilla then discusses the disparate purposes underlying the requirement of serving a notice of intent to sue and the requirement of providing a verified written medical expert opinion corroborating reasonable grounds to support the claim of medical negligence. The purpose of the notice is to make a potential defendant aware of an incident of alleged malpractice in order to allow investigation of the matter which could promote pre-suit settlement. The expert corroborative opinion is designed, on the other hand, to prevent filing of baseless litigation.

Here, the potential defendants certainly had notice of a horrendous incident which motivated them to immediately institute their own investigation. This prompt investigation by the doctor and hospital (as well as the horrific nature of Mr. Kukral's injury) belie any thought that the claimant was making a frivolous claim.[7]

The simple facts of this case described in the notice of intent to sue and developed by investigation in the pre-suit phase were that undiluted rather than diluted acid was applied to Mr. Kukral's penis during an operative procedure, causing both physical impairment and extreme mental anguish. Whatever the ultimate outcome of this case before a jury, frivolous litigation it was not! A neophyte lawyer or a first year law student would readily understand that such a thing does not occur in the absence of negligence by either the doctor, the hospital or both. Res Ipsa Loquitur!

The doctor and hospital conducted their own investigations based upon the serious allegations contained in the notice, examined medical records and, for whatever reasons, came up with their own expert opinions that no negligence had occurred. From there the matter proceeded to suit, and only after the matter was ready to be presented to a jury did the trial judge determine that the petitioners' cause of action was barred from being determined on the

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[7]"Clearly, if defendant did not have sufficient information to evaluate the merits of the claim it would have been unable to provide a responding affidavit." Maldonado v. EMSA Limited Partnership, 645 So.2d 86, 89 (Fla. 3d DCA 1994).

merits. When the trial judge expressed his reluctance to rule for the then-defendants based upon a technical violation of the statute, what clearly was on his mind was a violation of the Kukrals' constitutional right to procedural due process.

In Ragoonanan v. Associates in Obstetrics & Gynecology, 619 So.2d 482 (Fla. 2d DCA 1993), plaintiffs in an action for medical negligence appealed orders dismissing their complaint based upon a failure to comply with the pre-suit requirements of Chapter 766 because of a failure to provide the name of the medical expert whose corroborative expert opinion was attached to the notice of intent to initiate litigation. The corroborative medical statement, on which the signature was illegible and there was no identifying letterhead, stated that the claimant had told her obstetrician in the third month of pregnancy of certain problems which might lead to premature delivery, to which the physician responded that she had nothing to worry about. Claimant's child was born several months premature and suffered serious permanent physical damage of the type associated with prematurity.

In fact, the name and address of the expert were not provided to the defendant physicians and hospital prior to the hearing on the motion to dismiss. On appeal, the precise issue with which the court dealt was whether or not the claim made in the pre-suit investigation proceedings rested on a reasonable basis. The decision, quoting from Duffy v. Brooker, 614 So.2d 539 (Fla. 1st DCA 1993), states that the failure to provide an adequate verified written medical expert

opinion is not necessarily dispositive.

The bottom line inquiry in all such cases, based upon the acknowledged purpose of the medical malpractice statutory scheme, is to determine whether a claim rests on a reasonable basis. In determining whether a party's claim rests on a reasonable basis, a trial court may consider any relevant evidence, including the inferences to be drawn from the text of the notice of intent to sue or response and its corroborating expert medical opinion. Where, as here, the facts set forth in the notice received by the potential defendants are so clear and uncomplicated, "An inescapable inference of negligence arises even for the lay person. . . ." A claimant has satisfied the intent of the statute by reasonably outlining a factual basis from which the merits of the claim can be determined. "To bar [claimants] at this stage of the proceedings from litigating their claim would be tantamount to permitting a technicality to deprive them of access to the court." Ragoonanan v. Associates in Obstetrics & Gynecology, supra at page 485.

As the trial judge acknowledged here, if the notice of intent states that a doctor amputated the wrong leg, can it be said that a reasonable investigation of possible negligence has not taken place and a claimant is barred from suing for negligence because an expert opinion was not attached to the notice of intent to litigate? Where the notice of intent to initiate litigation states that a claimant suffered third degree burns from undiluted acid inadvertently applied to the

shaft of his penis, doesn't an inescapable inference of negligence arise even for a lay person so that the intent of the statute is satisfied by outlining a reasonable basis from which the merits of the claim can be investigated?[8]

The Duffy decision determined that a written medical expert opinion is not dispositive. The court held that the medical malpractice statute must not be allowed to impinge on a plaintiff's right of access to the courts and must be construed as imposing only reasonable and limited duties for a limited time. The reasonable basis for a suit should be the focus of any hearing on whether noncompliance with the statute justifies dismissal. Here, the medical malpractice statute was allowed to needlessly impinge on a plaintiff's right of access to the courts.

Another decision discusses whether the sufficiency or insufficiency of a medical affidavit attached to a notice of intent to initiate litigation justifies dismissing a medical negligence claim. The court reverses the dismissal of the plaintiff's action, emphasizing that if the provisions of Chapter 766 are not to be allowed to impinge upon the right of access to the courts, these sections must be construed as imposing only reasonable duties on a potential plaintiff. The

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[8]Before ruling against the claimants for failure to attach the verified medical opinion to the notice of intent, the trial judge came to this precise conclusion when he stated that to him if the wrong solution is applied to a genital area and makes holes in the genital he certainly couldn't say that wouldn't put someone on notice that a medical problem exists. (Pages 23-24)

only purpose of the statute is to insure that a claim has been preceded by reasonable investigation and rests on a reasonable basis to eliminate frivolous claims. The concluding words of the decision are, "We do not believe that Wolfsen's claims against appellees can be characterized as 'frivolous.'" Wolfsen v. Applegate, 619 So.2d 1050, 1055 (Fla. 1st DCA 1993). See also, Williams v. Powers, 619 So.2d 980 (Fla. 1st DCA 1993).

A third grade student reading the notice of intent to initiate litigation in this case would promptly conclude that petitioners' claim against the appellees was not frivolous. Once this test was met, the statute could not be used as a basis for depriving petitioners of their right to have the negligence determined in the pending lawsuit.

The trial judge noted that the language of the statute, including the word "shall" in referring to dismissal of the cause of action for failure to comply with the statute, mandated dismissal of the complaint. The decisions in 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) indicate otherwise. In Pinellas, the court points out that while the statutory language (in the predecessor statute to present Chapter 766) implies mandatory compliance, by including the word "unreasonable," it is intent that the mandate be exercised in a reasonable manner and every act of noncompliance does not mean that a claim must be dismissed as

a matter of law. "Rather, dismissal is subject to the discretion of a trial court after considering whether the perspective [party] acted unreasonably. . . ." Pinellas Emergency Mental Health Services, Inc. v. Richardson, supra at page 63.

In both the Pinellas and Dressler cases, the focus of the trial court's inquiry in a motion to dismiss is whether the claimants acted unreasonably in failing to attach a verified medical opinion to the notice of intent. Under the circumstances of this case, where the notice of intent and other documentation supplied during the pre-suit investigation period were sufficient to provide the potential defendants with a basis for investigation, there was no unreasonable violation of the statutory terms to justify dismissing plaintiffs' complaint.[9]

The governing judicial philosophy, which mandates the quashal of the district court decision in this case and reversal of the trial court's dismissal of petitioner's lawsuit, is as follows:

> "The provisions of sections 766.201-.212, Florida Statutes, are not to be allowed to impinge upon plaintiffs' right of access to the courts and must be

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[9]See also Ingersoll v. Hoffman, 589 So.2d 223 (Fla. 1991) (Compliance with the medical malpractice pre-suit requirements can not only be waived but can also be cured by rectifying the omitted act); Hospital Corp of America v. Lindberg, 571 So.2d 446 (Fla. 1990)(Failure to serve notice of intent to sue can be cured after suit is filed if within limitations period); Salimando v. International Medical Centers, H.M.D., 571 So.2d 446 (Fla. 2d DCA 1989), rev. dism., 549 So.2d 1073 (Fla. 1989), 550 So.2d 467 (Fla. 1989), 557 So.2d 866 (Fla. 1990).

> construed as imposing upon plaintiffs only a reasonable and limited duty before allowing them to file a suit." Shands Teaching Hospital and Clinics, Inc. v. Barber, 638 So.2d 570, 571 (Fla. 1st DCA 1994).

IV. EVIDENCE OF PRE-SUIT INVESTIGATION

The majority decision affirming dismissal states as one basis for affirming dismissal of petitioners' medical malpractice suit that petitioners did not present any evidence indicating that they consulted with a medical expert or conducted a reasonable investigation prior to making the statutory pre-suit notices. Respectfully, this statement is contradicted by the record.

As the cases point out, a claimant satisfies the intent of the statute by reasonably outlining a factual basis from which the merits of a claim can be determined. See Ragoonanan v. Associates in Obstetrics & Gynecology, 619 So.2d 482 (Fla. 2d DCA 1993). The bottom line of all cases involving the question of reasonable investigation is to eliminate frivolous claims. See Wolfsen v. Applegate, 619 So.2d 1050 (Fla. 1st DCA 1993). In determining whether a claim rests on a reasonable basis, a trial court must consider any relevant evidence, including the inferences to be drawn from the text of the notice of intent to sue.

Section 766.203(2), Florida Statutes (1993), requires a claimant to conduct an investigation to ascertain that there are reasonable grounds to believe there was negligence in the care and treat of claimant and that such negligence resulted

in injury. Corroboration by medical affidavit is a separate requirement.

Interpreting this statutory mandate to investigate cannot be done in a vacuum. The facts of the individual case must be taken into account. Rationally there must be a distinction between a case in which there is a subtle or medically complex cause of injury and the classic "amputating the wrong leg" situation. This case clearly falls in the latter category as recognized by the trial judge on repeated occasions at the August 24, 1993 hearing.

The Notice of Intent informed the potential defendants that Mr. Kukral had suffered burns to his penis when an acid solution was applied. The Second Response to Defendants' Motion to Dismiss for Failure to Comply With Pre-Suit Screening filed by claimants' counsel includes the following statement regarding pre-notice investigation:

> "The information that Plaintiffs had in their possession when they mailed the notice of intent, besides those of the injury, included that the doctor applied the ascetic [sic] acid to Mr. Kukral's penis despite the fact that the bottle said 'concentrated acetic acid.' In addition, Plaintiff's counsel researched the properties and applications of acetic acid as well as its use for medical purposes. After seeing the injuries suffered by the Plaintiff, the potency of concentrated ascetic [sic] acid and reviewing numerous articles, Plaintiff's counsel had a good faith belief that there had been negligence on part of the Defendants and mailed the notice of intent to initiate litigation." (R.197)

This "good faith belief" on the part of counsel was not

the only investigation done by counsel. At the hearing of August 24, 1993, counsel for the claimants was specifically asked by the trial judge whether he (the judge) was to understand that no doctor looked at the situation and that counsel, on his own, decided that there was a reasonable basis to bring the lawsuit. To this counsel responded "I had spoken with doctors prior to filing the presuit notice." (Pages 4-5). Subsequently, the trial judge reviewing the statute asked the following question:

> "Does this say that, 'reasonable investigation means that the attorney has reviewed the case against each and every potential defendant,' which you say you have done, and that, 'you have consulted with a medical expert,' which you say you of [sic] done, and then it says, 'And has obtained a written opinion from said expert.'
>
> Did you do that?"

Counsel for the claimants answered by stating he did not have the written opinion prior to sending of the Notice of Intent. (Page 8).

Later on in the hearing, the trial judge again returned to the question of medical consultation prior to sending the Notice of Intent. The trial judge recognized that counsel had stated he had consulted with a doctor prior to sending the Notice of Intent. When opposing counsel argued that there was nothing in the record to indicate that, the trial judge stated:

> "Well, he's a very reliable lawyer. I'm listening to him and that's what he says.

> If he were put under oath, that's what he's telling me; isn't that correct?
>
> MR. KATZ [Claimant's Counsel]: That it was the same doctor?
>
> THE COURT: No, that you consulted with a medical person before you sent your notice of intent, even though you may not have had the person write a verified opinion.
>
> MR. KATZ: Oh, yes, yes. Absolutely, Your Honor." (Pages 30-31).[10]

Commenting on the nature of the claimant's injuries as it bears on the reasonable investigation provision of the statute, the trial judge commented:

> "Mr. Katz [petitioners' counsel] makes a very important point in his memorandum. He said any idiot could determine that something has gone wrong, like amputating the wrong foot. It's the same thing here, so I think that, viscerally, it is behind all of my thinking, <u>but I guess he still has to comply with the statute in every respect</u>." (Pages 19-20, emphasis supplied).

The court again refers to the "amputating the wrong foot" analogy when he refers to ". . .a case which is almost on its face, seems to cry out for assistance, because the wrong foot, if you will, the wrong leg was amputated after--even though this is not an amputation case--." (Page 22).

The trial judge commented yet another time that in his opinion if the wrong solution is applied to a genital area,

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[10]Notwithstanding, the majority of the district court three-judge panel determined that plaintiffs did not present any evidence indicating that they consulted with a medical expert or conducted a reasonable investigation prior to mailing the notices of intention to initiate litigation.

while he couldn't say that it constituted malpractice, he still couldn't say that it wouldn't put someone on notice that there was a medical problem that existed. (Page 23-24). Notwithstanding all of the above, the trial court obviously accepted the argument of defense counsel that the intent of the legislature was for a trial court to strictly construe the statute, even resulting in dismissal of a case.

V. UNNECESSARY EXPERT TESTIMONY

In the order of the District Court of Appeal granting rehearing en banc, counsel was invited to address the pertinence, if any, of the rule that expert testimony is not required to recover in all medical malpractice cases.

Florida's courts have consistently followed the principle enunciated in Atkins v. Humes, 110 So.2d 663 (Fla. 1959) that expert testimony is not always required to prove a case of negligent treatment as contrasted to incorrect diagnosis or using the wrong method of treatment. The reasoning in Atkins, which involved application of a cast which was too tight, was that certain instances of negligent treatment are so obvious that expert opinion is unnecessary.

The application of undiluted acid to petitioner's penis clearly falls into the "obvious category" which obviates the necessity for expert opinion at either the time the pre-suit notice was sent, or at trial. Where a case involves a charge of negligence based on careless administration of approved medical treatment, the trier of fact would not need expert testimony to reach a conclusion. South Miami Hospital v.

Sanchez, 386 So.2d 39 (Fla. 3d DCA 1980). See also, Thomas v. Berrios, 348 So.2d 905 (Fla. 2d DCA 1977).

Those "certain cases" of negligent treatment which are so obvious that expert opinion is unnecessary (as this case) are within the rationale of Section 766.206(2), Florida Statutes (1993)--A court shall dismiss a claim where the notice of intent to initiate litigation is not in compliance with reasonable investigation requirements. The parameters of reasonable investigation requirements are found in Atkins v.Humes, supra, and its common-law progeny. Expert opinion testimony in this case of open and obvious negligent treatment by either doctor, hospital staff or both, was not necessary as a reasonable investigation requirement. The trial judge erred in finding otherwise and dismissing petitioners' suit. The district court compounded this error by affirming the dismissal.

CONCLUSION

Recently, this Court expressed current judicial thinking in cases involving dismissal of a suit for alleged violations of the pre-suit investigation statute: "Moreover, we have recently emphasized that when possible the pre-suit notice and screening statute should be construed in a manner that favors access to courts." Patry v. Capps, 633 So.2d 9, 13 (Fla. 1994).

The Patry decision refers to the prior decision in Weinstock v. Groth, 629 So.2d 835 (Fla. 1993). Weinstock asked whether a plaintiff in a negligence action against a specified category of health care provider (licensed clinical psychologist) must comply with the pre-suit notice requirements as in the case of other health care providers. In determining that the potential plaintiff was not required to give notice prior to filing the action because the defendant was not a health care provider under the terms of the pre-suit notice statute, the decision notes that restrictions on access to the courts must be construed in a manner that favors access. The purpose of the statute is to alleviate the high cost of medical negligence claims through early determination and prompt resolution of claims, not to close the courts to potential plaintiffs.

If the pre-suit notice and screening statute is construed in a manner that favors access to courts, dismissal of petitioners' claims under the facts of this case simply makes no sense. Mr. Kukral suffered an injury that was so obviously

the result of negligence on the part of the doctor, the hospital, or both that it didn't take a "brain surgeon" to ascertain that this was not a frivolous complaint. All defendants were given an opportunity to investigate the notice of claim both before and after written verification by way of medical affidavit was received. Both the doctor and the hospital denied negligence prior to receiving the verified medical statement as well as after receiving the medical affidavit and other discovery documents. All of this occurred prior expiration of the statute of limitations and prior to suit being filed.

What purpose is served by applying a strict reading of "reasonable investigation" and denying plaintiffs their access to the judicial system? No case requires this result. Patry v. Capps, supra, fully supports a finding of error on the part of the trial judge in dismissing petitioners' claim. Moreover, if the trial court's dismissal of the petitioners' claims is approved, this Court will be declaring that a failure to include a verified medical opinion with the pre-suit notice is always fatal and incurable, even when the verified opinion is provided prior to expiration of the statute of limitations and suit being filed. Clearly, the trial court's strict interpretation of Chapter 766 results in an unreasonable barrier to a claimant's access to the courts not intended by the legislature.

Affirmance by the district court of the dismissal of petitioners' lawsuit ". . .since no reasonable investigation

was conducted. . . ." is wrong as a matter of fact and a matter of law.

For the reasons and under the authorities set forth above, it is respectfully submitted that the trial court erred in dismissing plaintiffs' lawsuit. Dismissal was not required by the expressed intent of the applicable statute. The district court was in error in affirming the dismissal. The district court decision should be quashed with directions to reinstate petitioners' lawsuit.

LAW OFFICES OF JOE N. UNGER, P.A.
200 South Biscayne Boulevard
Suite 2920
Miami, Florida 33131-5302
(305) 374-5500
Fla. Bar No. 082987

BY: _____
JOE N. UNGER
Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Parenti, Falk & Waas, 113 Almeria Avenue, Coral Gables, 33134; George, Hartz, Lundeen, Flagg & Fulmer, 4800 LeJeune Road, Coral Gables, Florida 33146; and upon Hicks, Anderson & Blum, New World Tower, Suite 2402, 100 N. Biscayne Boulevard, Miami, Florida 33132, this 18th day of April, 1995.

_____

SUPREME COURT OF FLORIDA

CASE NO. 85,099

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.

On review from the District Court of Appeal of Florida, Third District

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APPENDIX TO PETITIONERS' INITIAL BRIEF ON THE MERITS

INDEX

1

J.B., a juvenile, Appellant,

v.

The STATE of Florida, Appellee.

No. 94–669.

District Court of Appeal of Florida, Third District.

May 3, 1994.

An Appeal from the Circuit Court for Monroe County; J. Jefferson Overby, Judge.

Bennett H. Brummer, Public Defender, and Julie M. Levitt, Sp. Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Angelica D. Zayas, Asst. Atty. Gen., for appellee.

Before NESBITT, COPE and GERSTEN, JJ.

CONFESSION OF ERROR

PER CURIAM.

Appellant, J.B., was represented by counsel when he entered a plea of nolo contendere to charges of trespass and petit theft. However, at the disposition hearing, appellant waived his right to counsel prior to being adjudicated delinquent.

During a brief colloquy the court offered appellant a lawyer free of charge and informed him of the difficulties of appealing from any judgment or sentence. However, appellant was not advised of the disadvantages of self-representation and the possible sentencing dispositions which spanned from a withhold of adjudication to secure detention.

Appellant asserts that the trial court failed to advise him of the disadvantages of self-representation before accepting his waiver of counsel at the disposition hearing and the possible disposition alternatives the court could impose including the fact that he could be adjudicated delinquent and placed in secure detention. *Moore v. State*, 615 So.2d 874 (Fla. 1st DCA 1993); *Taylor v. State*, 610 So.2d 576 (Fla. 1st DCA 1992); *Smith v. State*, 549 So.2d 1147 (Fla. 3d DCA 1989); *see also K.M. v. State*, 448 So.2d 1124, 1125 (Fla. 2d DCA 1984). Failure to conduct a proper inquiry is not subject to harmless error analysis. *State v. Young*, 626 So.2d 655, 657 (Fla.1993).

Based upon the State's proper confession of error, we reverse and remand for a new disposition hearing. Upon remand, appellant can waive counsel upon knowledge of the disadvantages of self-representation and the possible dispositions or proceed with appointed counsel. Accordingly, it is unnecessary to address the other issues raised by appellant.

Reversed and remanded.

2

Charles KUKRAL and Milly Kukral, Appellants,

v.

George D. MEKRAS, M.D.; Miami Urology Institute, Inc. and Dr. John T. McDonald Foundation d/b/a Doctors' Hospital, Appellees.

No. 93–2294.

District Court of Appeal of Florida, Third District.

May 17, 1994.

Order Adopting Opinion after Grant of En Banc Rehearing Jan. 4, 1995.

Patient's medical malpractice action was dismissed in the Circuit Court, Dade County, Philip Bloom, J., for failure to comply with presuit screening requirements. Patient appealed. The District Court of Appeal, en banc, held that patient failed to comply with presuit screening requirements.

Affirmed.

Jorgenson, J., filed opinion dissenting.

Physicians and Surgeons ⇐18.20

Patient's medical malpractice suit was properly dismissed for failure to comply with presuit screening requirements, where patient sent notices of intent to initiate litigation without including medical expert opinion as required by statute, and patient did not present any evidence indicating that he consulted with any medical expert or that he conducted good faith and reasonable investigation prior to mailing notices as statutes required. F.S.1991, §§ 766.202(4), 766.203, 766.206.

Joe N. Unger, Miami, and Richard L. Katz, Coral Gables, for appellants.

George Hartz Lundeen Flagg & Fulmer, Hicks, Anderson & Blum, and Bambi G. Blum, Miami, for appellees Mekras and Miami Urology Institute, Inc.

Parenti, Falk, Waas & Frazier, Gail Leverett Parenti, Miami, for appellees Doctors' Hosp.

Before JORGENSON, COPE and GODERICH, JJ.

PER CURIAM.

The plaintiffs, Charles and Milly Kukral, appeal from a final order dismissing their complaint for failure to comply with the presuit screening requirements. We affirm.

On February 21, 1992, the plaintiffs served on Doctor's Hospital and Dr. George D. Mekras notices of intent to initiate litigation for medical malpractice. The notices stated that during a medical procedure to remove genital warts undiluted acid was applied to the plaintiff's penis resulting in serious burns. These notices of intent were not accompanied by a verified written medical expert opinion when they were mailed. Miami Urology Institute, Inc. [MUI], Dr. Mekras' employer, alleges that it 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.

Doctor's Hospital sent a denial of the claim to the plaintiffs accompanied by an affidavit of an expert. On August 14, 1992, the plaintiffs sent out an unverified medical expert opinion corroborating the claim of medical negligence. On September 3, 1992, the plaintiffs sent out a verification of medical expert opinion alleging negligence. Then, on October 9, 1992, the plaintiffs filed their complaint against Doctor's Hospital, Dr. Mekras, and MUI [collectively referred to as defendants] for medical malpractice. After the matter had been set for trial, the defendants filed a motion to determine whether the plaintiffs had properly complied with the statutory pre-suit screening procedures. After hearings, the trial court entered the appealed order dismissing the plaintiffs' case for failure to comply with the mandatory presuit screening procedures.

The plaintiffs contend that the trial court erred in dismissing their lawsuit for failing to provide a verified medical opinion of negligence with the notice of intent to initiate litigation where the facts giving rise to the injury set forth in the notice are sufficient to establish that the claim is not frivolous, where the defendants conducted their own investigation and denied negligence, and where a verified medical opinion was supplied prior to suit being filed. We disagree.

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. In *Stebilla v. Mussallem*, 595 So.2d 136 (Fla. 5th DCA), *rev. denied*, 604 So.2d 487 (Fla.1992) and *Ragoonanan v. Assocs. 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.

Under section 766.206, Florida Statutes (1991), since no reasonable investigation was

conducted, the plaintiffs' claim was properly dismissed. The order appealed from is hereby affirmed.

COPE and GODERICH, JJ., concur.

JORGENSON, Judge, dissenting.

I dissent. By its affirmance today, the court revalidates Mr. Bumble's proposition [1] and denies Mr. Kukral his constitutionally protected guarantee of access to the courts to seek redress for the excruciating injuries that he suffered at the hands of health care professionals. The record in this case unequivocally shows that the plaintiff complied with the statutory preconditions for a medical malpractice case. Within the limitations period, plaintiff served defendants with a notice of intent to sue, conducted a reasonable presuit investigation, and provided the defendants with a verified expert medical opinion.

On July 26, 1991, plaintiff underwent surgery for the removal of genital warts.[2] Concentrated, not dilute, acetic acid was inadvertently applied, causing third degree, full-thickness chemical burns to the shaft and glans of his penis. Treatment for the burns required hyperbaric oxygen therapy, wound debridement, a cystostomy, by which a catheter was inserted through the abdominal wall into the bladder, bypassing the urethra, and a further surgical procedure by which skin from the plaintiff's thigh was grafted onto the damaged areas of his penis. Not surprisingly, the incident led to significant physical and psychological injury.

On February 21, 1992, plaintiff's counsel forwarded a Notice of Intent to Initiate Litigation for Medical Malpractice to the urologist and the hospital where the surgery was performed. The notice detailed the date of the injury and the reason why plaintiff had sought medical treatment, and described the injury suffered. Plaintiff did not include with the notice a corroborating expert medical opinion that medical malpractice had occurred. The defendants responded and conducted their own investigation, but took the position that the notice of intent was defective, as it did not include the corroborating opinion. On June 1, 1992, plaintiff's attorney provided defendants with a written expert opinion by a urologist. The expert detailed the cause, nature, and extent of plaintiff's injuries. The expert concluded that whether the physician was negligent in applying the wrong concentration of acid, or whether the hospital was negligent in labeling the solution, "this is a clear instance of medical mismanagement resulting in immediate significant physical and emotional injury to Mr. Kukral and, in my opinion, with probable long term psycho-sexual sequelae." The expert's written opinion was not verified, however, until August 18, 1992, when the doctor submitted an affidavit averring that his letter of June 1, 1992 accurately stated his opinion in this matter, and that he had not rendered any previous medical opinion that had been disqualified.[3]

The defendants rejected the claim; plaintiff filed his malpractice complaint on October 9, 1992. Defendants moved to dismiss on November 4, 1992, alleging that plaintiff had not complied with the presuit notice requirements. The trial court denied those motions, and the case proceeded for nine months through discovery and various pretrial motions. The cause was set for the three week trial period beginning on August 30, 1993. On July 20, 1993, six days before the statute of limitations was to run, defendants filed a "Motion to Determine if Plaintiff Properly Complied with Presuit Screening." The trial court granted that motion and dismissed the action, finding that plaintiff had failed to provide a corroborating expert medical opinion with the Notice of Intent, and had failed to conduct a reasonable investigation.

The Florida Supreme Court has emphasized that "when possible the presuit notice and screening statute should be construed in a manner that favors access to the courts." *Patry v. Capps*, 633 So.2d 9, 13 (Fla.1994);

1. "If the law supposes that, the law is a ass—a idiot." Charles Dickens, *Oliver Twist*, Ch. 51.

2. Unfortunately there is no genteel way to describe plaintiff's injuries. Were we to spare the reader's sensibilities by glossing over the details, we would do plaintiff a grave disservice by masking the nature and degree of his claim.

3. The parties had agreed to extend the presuit notice investigative period.

see also Weinstock v. Groth, 629 So.2d 835, 838 (Fla.1993) ("[R]estrictions on access to the courts must be construed in a manner that favors access.") (citations omitted). This is particularly so when, as here, defendants have not been prejudiced by plaintiff's actions. *Patry*, 633 So.2d at 13.

Plaintiff provided a written corroborating medical expert opinion within the period of the statute of limitations, and then verified that opinion within the limitations period; he complied with the presuit notice requirements and should not be subject to the ultimate sanction—dismissal of his claim. *See Suarez v. St. Joseph's Hosp.*, 634 So.2d 217 (Fla. 2d DCA March 23, 1994) (failure to verify medical opinion "not fatal if compliance is secured prior to the expiration of the appropriate statute of limitations."); *Stein v. Feingold*, 629 So.2d 998 (Fla. 3d DCA 1993) (affidavit of expert witness timely filed when filed within statute of limitations period). The judicial gloss that the majority applies to section 766.202(4) controls only when the plaintiff has failed to satisfy the presuit requirements prior to the end of the limitations period. It is then, and only then, that the malpractice complaint may be dismissed for failure to comply with the statute.[4]

Medical malpractice plaintiffs are required to provide an expert opinion "to prevent the filing of baseless litigation." *Ragoonanan v. Assocs. in Obstetrics & Gynecology*, 619 So.2d 482, 485 (Fla. 2d DCA 1993) (citation omitted). The requirement, however, "must be construed as imposing on plaintiffs only reasonable and limited duties." *Williams v. Powers*, 619 So.2d 980, 983 (Fla. 5th DCA 1993). "[F]ailure to provide an adequate affidavit is not dispositive." *Id.* The presuit requirements of chapter 766 were designed "to alleviate the high cost of medical negligence claims through early determination and prompt resolution of claims, not to deny access to the courts to plaintiffs." *Weinstock*, 629 So.2d at 838 (citation omitted). The result reached by the court today is in direct contravention of that stated goal, and of Mr. Kukral's constitutionally guaranteed right of access to the courts.

Even if we were to assume that the expert's affidavit was inadequate or untimely, the trial court should consider "any relevant evidence" to determine whether a reasonable investigation was made. *Wolfsen v. Applegate*, 619 So.2d 1050, 1053–54 (Fla. 1st DCA 1993); *Williams*, 619 So.2d at 983. It is clear from the record that plaintiff's counsel did conduct a reasonable investigation of his client's claim and jumped, albeit somewhat clumsily, through all of the procedural presuit hoops. The legislature has not required that during the presuit notice period plaintiffs prove their claims or prove *which* of several defendants is responsible for the negligence. "The procedure for judicial review set out in section 766.206 cannot be converted into some type of summary proceeding to test the sufficiency, legally or factually, of medical malpractice claims." *Wolfsen*, 619 So.2d at 1055. A plaintiff must only demonstrate that his claim is not frivolous. The obvious nature and the extent of plaintiff's injuries belie any argument that his claim is without merit.[5] It is of no import at this stage of the litigation that he has not pinpointed which defendant was responsible, or precisely how the wrong concentration of acid was applied.

I would reverse.

Before SCHWARTZ, C.J., and HUBBART, NESBITT, BASKIN, JORGENSON, COPE, LEVY, GERSTEN, GODERICH and GREEN, JJ.

ON MOTION FOR REHEARING EN BANC GRANTED

PER CURIAM.

The Kukrals moved for rehearing en banc. We granted rehearing en banc and now adopt the majority's opinion as the opinion of

4. The court does not cite even one case that supports the result reached today.

5. Plaintiff's attorney aptly described the alleged negligence in this case in his response to defendants' motion to dismiss: "There is no complex medical judgment which must be made as in the case where the effectiveness of one treatment program versus another is called into question. The negligence in this case is akin to the kind of negligence associated with amputating a wrong leg."

the en banc court. Accordingly, the dismissal of the plaintiffs' complaint is affirmed.

Affirmed.

HUBBART, NESBITT, COPE, GERSTEN, GODERICH and GREEN, JJ., concur.

JORGENSON, J. (dissenting).

I adhere to the views expressed in my prior dissent.

SCHWARTZ, C.J., and BASKIN and LEVY, JJ., concur.

Leon GILBERT, Appellant,

v.

STATE of Florida, Appellee.

No. 93-00497.

District Court of Appeal of Florida, Second District.

May 18, 1994.

Defendant was convicted in the Circuit Court, Manatee County, Paul E. Logan, J., of driving while license suspended, tampering with evidence, and possession of marijuana, and conditions of probation were imposed. Defendant appealed. The District Court of Appeal, Ryder, Acting C.J., held that: (1) police had constructive possession of marijuana from time of seizure to recovery, thus supporting conviction for tampering with evidence by removing marijuana from vehicle, but (2) probation conditions forbidding possession of weapons and firearms and forbidding defendant from using intoxicants were improperly imposed because they were not announced in open court.

Reversed and remanded for resentencing.

1. Obstructing Justice ⇐16

From time of seizure to recovery of marijuana, police had constructive possession of contraband, and thus evidence established defendant's possession of contraband so as to support conviction for tampering with evidence by removing marijuana from vehicle, where police had gained physical custody of baggie of marijuana with hole in bottom during consensual search of vehicle but were required to pursue passenger fleeing from scene, defendant was seen reentering vehicle and in rear seat searching for something, and marijuana was not in vehicle when officer returned but, after brief search, baggie with hole was found across road ten feet away.

2. Criminal Law ⇐982.6(4)

In defendant's sentence for driving while licensed suspended, tampering with evidence and possession of marijuana, probation condition forbidding defendant from possessing weapons and firearms without first obtaining permission from his probation officer, and condition forbidding defendant from using intoxicants to excess and visiting places where they were unlawfully used or dispensed, were improperly imposed because they were not announced in open court.

James Marion Moorman, Public Defender, and John S. Lynch, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Ron Napolitano, Asst. Atty. Gen., Tampa, for appellee.

RYDER, Acting Chief Judge.

Leon Gilbert appeals from his conviction and the probation conditions imposed for driving while license suspended, tampering with evidence and possession of marijuana. We affirm the convictions, but because the trial judge failed to orally pronounce conditions of probation, we reverse and remand to strike probation conditions (4) and (7).

[1] Gilbert first argues that the trial court erred in denying his motion to dismiss the charge of tampering with evidence because no prima facie case was shown that he removed the contraband from the vehicle. The state filed a demurrer in response. The police had gained physical custody of a baggie of marijuana during a consensual search of the vehicle when the 5:00 a.m. investiga-