IN THE 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.

BRIEF OF PETITIONERS ON JURISDICTION

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

and

LAW OFFICES OF RICHARD L. KATZ
2100 Salzedo Street
Suite 300
Coral Gables, Florida 33134

BY: JOE N. UNGER
Counsel for Petitioners

TOPICAL INDEX TO BRIEF

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS[1]

On February 21, 1992, Charles and Milly Kukral served on Doctors' 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 penis of Charles Kukral resulting in serious burns. The notices of intent were not accompanied by a verified written medical expert opinion.

Both potential defendants sent denials of the claim accompanied by an affidavit of an expert. Subsequently, on September 3, 1992, defendants were provided with a Verification of Medical Expert Opinion, verifying the finding of negligence previously contained in a letter to plaintiff's counsel dated June 1, 1992.[2] Plaintiffs filed their Complaint on October 9, 1992, well within the limitation period.

After the matter had been set for trial, the defendants moved to determine whether the plaintiffs had properly complied with the statutory pre-suit screening procedures. Hearings were held and the trial court entered an order dismissing the plaintiffs' case for failure to comply with various provisions of the mandatory pre-suit screening

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[1]Taken from opinion of District Court of Appeal.

[2]While not expressly stated in the opinion of the District Court of Appeal, the verified medical expert opinion was furnished to the defendants long prior to expiration of the two-year statute of limitations which would have expired on July 26, 1993. Filing of the medical opinion prior to the expiration of the statute of limitations has been conceded by all parties.

procedures set forth in Sections 766.201, et seq., Florida Statutes (1993).

On appeal from the dismissal order, the majority decision of the District Court of Appeal determined that the plaintiffs had sent notices of intent to initiate litigation without including the medical expert opinion as required by Section 766.203, Florida Statutes (1993) and that plaintiffs did not present any evidence indicating that they consulted with a medical expert or that they conducted a good faith and reasonable investigation prior to mailing the notices as the statute requires. Finding that no reasonable investigation was conducted under Section 766.206, Florida Statutes (1993), the majority decision held that the plaintiffs' claim was properly dismissed. The order appealed was affirmed.

One judge dissented, setting forth reasons at length--disagreeing with the affirmance by the majority since plaintiffs provided a verified medical expert opinion within the period of the statute of limitations in a case of obvious injury which belies any argument that the claim is without merit. (Appendix A, opinion of the District Court of Appeal).

Appellants filed a motion for rehearing en banc (Appendix B) which was granted. (Appendix C). Supplemental briefs were filed and the matter was reargued to an en banc panel of the Third District Court of Appeal. That court issued its opinion in which six members of the ten-member panel adopted the majority opinion as the opinion of the en banc court, with

four judges dissenting and adhering to the views expressed in the dissent to the original opinion. (Appendix D).

POINT INVOLVED

WHETHER THE MAJORITY DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT ON THE SAME QUESTION OF LAW IN PATRY V. CAPPS, 633 SO.2D 9 (1994) AND ATKINS V. HUMES, 110 SO.2D 663 (FLA. 1959) AND WITH OTHER DISTRICT COURTS OF APPEAL IN SHANDS TEACHING HOSPITAL V. MILLER, 642 SO.2D 48 (FLA. 1ST DCA 1994); RAGOONANAN V. ASSOCIATES IN OBSTETRICS & GYNECOLOGY, 619 SO.2D 482 (FLA. 2D DCA 1993); AND DUFFY V. BROOKER, 614 SO.2D 539 (FLA. 1ST DCA 1993), THUS CONFERRING JURISDICTION ON THIS COURT UNDER ARTICLE V, SECTION 3(b)(3), FLORIDA CONSTITUTION.

SUMMARY OF ARGUMENT

The majority decision of the district court of appeal denies to petitioners their constitutionally protected guarantee of access to the courts. Petitioners reasonably complied with the statutory pre-suit screening requirements. Reasonable pre-suit investigation was conducted under the blatant facts of this case. A verified medical opinion was filed long prior to the expiration of the statute of limitations. Affirming dismissal of the petitioners' lawsuit expressly and directly conflicts with the cited cases.

ARGUMENT

THE MAJORITY DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT ON THE SAME QUESTION OF LAW IN PATRY V. CAPPS, 633 SO.2D 9 (1994) AND ATKINS V. HUMES, 110 SO.2D 663 (FLA. 1959) AND WITH OTHER DISTRICT COURTS OF APPEAL IN SHANDS TEACHING HOSPITAL V. MILLER, 642 SO.2D 48 (FLA. 1ST DCA 1994); RAGOONANAN V. ASSOCIATES IN OBSTETRICS & GYNECOLOGY, 619 SO.2D 482 (FLA. 2D DCA 1993); AND DUFFY V. BROOKER, 614 SO.2D 539 (FLA 1ST DCA 1993), THUS CONFERRING JURISDICTION ON THIS COURT UNDER ARTICLE V, SECTION 3(b)(3), FLORIDA CONSTITUTION.

Both the treating physician and hospital were charged with negligence in connection with the application of undiluted acid to the penis of Charles Kukral during an operative procedure. Admittedly, the notice of intent to initiate litigation did not include a verified medical expert opinion of negligence. Notwithstanding, both potential defendants conducted their own reasonable investigation and denied liability with accompanying medical affidavits. Before suit was filed and long prior to expiration of the statute of limitations, a verified medical opinion was provided to the defendants. The trial court dismissed the plaintiffs' claim for failure to comply with the pre-suit requirements found in Chapter 766 of the Florida Statutes.

In 1988, Florida's Legislature enacted Section 766.201, et seq. including several provisions providing for pre-suit screening in medical negligence actions. The intent of the legislature, stated in Section 766.201, was to provide a plan for prompt resolution of medical negligence claims consisting

of two components--pre-suit investigation and arbitration.

Subsection (2)(a)1 of Section 766.201 provides that pre-suit investigation shall include verifiable requirements that reasonable investigation precede malpractice claims in order to eliminate frivolous claims. Section 766.202(4) defines "investigation" to mean that an attorney has reviewed the case against each and every potential defendant, has consulted with a medical expert and has obtained a medical opinion from that expert.

Section 766.203(2)(b) requires that corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by submitting a verified written medical expert opinion at the time the notice of intent to initiate litigation is mailed.

It was argued to the trial court, the three judge panel of the District Court of Appeal, and the en banc panel of the District Court of Appeal, that where the notice of intent to initiate litigation states that a person has suffered third degree burns from undiluted acid inadvertently applied to the shaft of his penis, an inescapable inference of negligence arises even for a layperson. The intent of the statute is satisfied by setting forth an unmistakably reasonable basis from which the merits of the claim can be investigated.[3] What the District Court of Appeal affirmed is an overtechnical

[3]Indeed, the merits of the claim were investigated by both defendants prior to receiving a verified medical opinion that negligence had taken place.

reading of the pre-suit screening statute not necessary to fulfill the stated legislative intent which has resulted in denying the Kukrals access to legal redress for the grievous injury sustained.

Conflict With Patry v. Capps, Supra

In Patry v. Capps, supra, this Court restated the principle that, when possible, the pre-suit notice and screening statute should be construed in a manner that favors access to courts. Construing the statute in a manner which favors access to courts requires a determination that because of the obvious negligent cause and serious nature of the claimant's injuries, there was sufficient, reasonable compliance with the stated purpose of the statute to eliminate frivolous claims and to encourage pre-suit investigation by potential defendants.

Construing the pre-suit notice and screening statute in a manner that favors access to courts mandates a finding that the trial judge and the majority of the District Court of Appeal erred when the plaintiffs were denied their day in court because of an asserted failure to conduct a reasonable investigation (obviated by the obvious cause of injury) and failure to include a verified expert opinion with the notice of intent to initiate litigation. The principle announced in Patry v. Capps, has been violated.

Conflict With Atkins v. Humes, Supra

Thirty-five years ago, this Court held that expert testimony is unnecessary to sustain a malpractice action

predicated upon negligent treatment where that treatment is clearly negligent without the aid of expert testimony. Application of undiluted acid to the genital area during an operative procedure is so obviously a negligent treatment by either the doctor or the hospital that to require a verified expert opinion to be attached to the notice of intent to initiate litigation conflicts with the statement of law in Atkins v. Humes. To dismiss a lawsuit because of the absence of the expert medical opinion and\or because no reasonable investigation was conducted prior to filing the notice of intent conflicts with the point of law announced in Atkins v. Humes.

Conflict With Shands Teaching Hospital v. Miller, Supra and Duffy v. Brooker, Supra

The decisions of the First District Court of Appeal in Shands Teaching Hospital v. Miller, supra and Duffy v. Brooker, supra, hold that failure to include a corroborating medical expert opinion with the notice of intent to initiate a medical malpractice action cannot result in a dismissal if the required verified written opinion is provided within the period of the statute of limitations. Unquestionably here the required verified written opinion was provided eleven months before the statute of limitations ran and prior to the time that the plaintiffs filed a complaint against the defendants in this medical malpractice action.

Dismissal of the plaintiffs' case because the verified written medical opinion was not included with the notice of

intention to initiate litigation directly conflicts with not only the cited decisions, but the decision of every district court of appeal that has decided the issue, including the Third District Court of Appeal. For example, see Charles Maldonado v. Emsa Limited Partnership and Cedars Medical Center, Inc., 19 Fla.L.Weekly D2331 (Fla. App. 3d DCA, Nov. 9, 1994).

Conflict with Ragoonanan v. Associates in Obstetrics, Supra

The question in Ragoonanan v. Associates in Obstetrics, supra, was whether the medical malpractice claim made in that case rested on a reasonable basis. It was argued that the potential plaintiffs had failed to make a reasonable pre-suit investigation because of the insufficiency of the corroborative expert opinion included with the notice of intention to initiate litigation. A notarized letter with an illegible signature stated that he conduct of an obstetrical physician represented a breach of prevailing professional standard of care where he had been told during the third month of pregnancy that his patient had a "weak cervix" and that her mother had had two premature deliveries, both of which died. The physician responded and told his patient she had nothing to worry about. No action was taken nor advice given to the patient. The patient's child was born four months premature and while he survived, suffered serious, permanent physical damages associated with prematurity.

The plaintiff's attorney was unable to provide the name and address of the expert. The defendants moved to dismiss

for failure to comply with the pre-suit notice statute. The trial court dismissed the complaint. In reviewing the dismissal, the Second District Court of Appeal stated that in determining whether a party's claim rests on a reasonable basis, the trial court may consider any relevant evidence including inferences to be drawn from the text of the notice of intent to sue. The decision concludes that an inescapable inference of negligence arises even for a layperson from the facts set forth in the notice and the insufficient corroborative expert opinion:[4]

> "Thus, the Ragoonanan's have satisfied the intent of the statute by outlining a factual basis from which the merits of the claim can be determined.***To bar the Ragoonanans 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, supra at page 485.

For precisely the same reason, to bar the Kukrals at this stage in the proceeding from litigating their claim is tantamount to permitting a technicality to deprive them of access to the judicial system. An inescapable inference of negligence arises for a layperson, a doctor or a hospital from the bare facts set forth in the notice of intent to initiate litigation. Dismissal of the complaint in the instant case directly conflicts with the both the letter and spirit of the Ragoonanan decision.

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[4]Here, the unescapable inference of negligence arises from the notice itself.

CONCLUSION

A third grade student reading the notice of intent to sue would promptly conclude that petitioners' claim against respondents was not frivolous. Enforcing the statutory mandate to investigate a claim before sending a notice of intent to initiate litigation cannot be accomplished 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.

To sustain dismissal of petitioners' case against the doctor and hospital for the reasons stated by the District Court of Appeal not only directly and expressly conflicts with the cited cases, but conceptually contradicts every other decision which has interpreted the pre-suit screening statute liberally in favor permitting a litigant to have a day in court. For example, see Weinstock v. Groth, 629 So.2d 835 (Fla. 1993).

The majority decision of the District Court of Appeal directly and expressly conflicts with the decisions of this Court and other district courts of appeal cited above. It is respectfully submitted that the petition should be granted and the cause proceed in this Court on the merits.

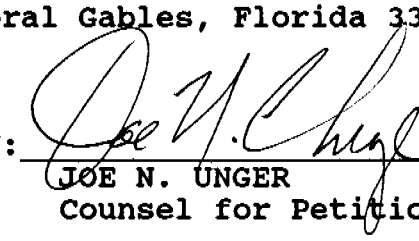
CERTIFICATE OF SERVICE

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 9th day of February, 1995

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

and

LAW OFFICES OF RICHARD L. KATZ
2100 Salzedo Street
Suite 300
Coral Gables, Florida 33134

BY: 
JOE N. UNGER
Counsel for Petitioners

IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,099

CHARLES KUKRAL and MILLY KUKRAL,

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Respondents.

APPENDIX TO BRIEF OF PETITIONERS ON JURISDICTION

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND
IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1994

CHARLES KUKRAL and MILLY KUKRAL, **

Appellants, **

vs. ** CASE NO. 93-2294

GEORGE D. MEKRAS, M.D.; MIAMI UROLOGY INSTITUTE, INC. and DR. JOHN T. McDONALD FOUNDATION d/b/a DOCTORS' HOSPITAL, **

Appellees. **

Opinion filed May 17, 1994.

An Appeal from the Circuit Court of Dade County, Philip Bloom, Judge.

Joe N. Unger and Richard L. Katz, for appellants.

George Hartz Lundeen Flagg & Fulmer; Hicks, Anderson & Blum, Parenti, Falk, Waas & Frazier, Gail Leverett and Bambi G. Blum, for appellees.

Before JORGENSON, COPE and GODERICH, JJ.

PER CURIAM.

APPENDIX A

The plaintiffs, Charles and Milly Kukral, appeal from a final order dismissing their complaint for failure to comply with the pre-suit 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 pre-suit 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., 19 Fla. L. Weekly D689 (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

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[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.

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, ___ (Fla. 1994); 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

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

not been prejudiced by plaintiff's actions. Patry, 633 So. 2d at ___.

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., 19 Fla. L. Weekly D689, 690 (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

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

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.

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[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."

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 93-2294

CHARLES KUKRAL and MILLY KUKRAL,

Appellants,

vs.

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

Appellees.

MOTION FOR REHEARING EN BANC

Appellants, Charles Kukral and Milly Kukral, request rehearing en banc in these proceedings and undersigned counsel submits:

"I express a belief based on a reasoned and studied professional judgment that the panel decision is of exceptional importance; and I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decision of this Court and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court: Stein v. Feingold, 629 So.2d 998 (Fla. 3d DCA 1993)."

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

APPENDIX B

1. The panel decision is of exceptional importance because it takes an overly narrow view of those sections of Chapter 766 of the Florida Statutes governing medical malpractice which require a potential plaintiff to give pre-suit notice of intent to sue all potential defendants. Since the enactment of those statutory provisions governing pre-suit notice and pre-suit procedures there has been a literal avalanche of cases brought under the complex, redundant sections of the statute.[1]

2. Many of these cases have reached the Supreme Court of Florida, most notably Patry v. Capps, 633 SO.2d 9 (Fla. 1994) in which the Supreme Court has made the definitive statement governing all actions seeking to dismiss a medical malpractice plaintiff's claim for failure to comply with the pre-suit notice 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, supra at page 13.

The majority decision of this Court does not construe the statute in a manner that favors access to courts. The notice of intent states clearly, and without the necessity of medical interpretation, that Mr. Kukral suffered an injury to his penis during an operative procedure when undiluted acid was applied. What occurred was so obviously the result of negligence on the part

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[1]All districts courts of appeal have wrestled with the statute. See Duffy v. Brooker, 614 So.2d 539 (Fla. 1st DCA 1993); Patry v. Capps, 618 So.2d 261 (Fla. 2d DCA 1993); Stein v. Feingold, 629 SO.2d 994 (Fla. 3d DCA 1993); Dressler v. Boca Raton Community Hospital, 566 So.2d 571 (Fla. 4th DCA 1990); Stebilla v. Mussallem, 595 So.2d 136 (Fla. 5th DCA 1992).

of either the doctor, the hospital or both that any rational person reading the notice could ascertain that this was not a frivolous complaint. One stated purpose of the statute is to eliminate frivolous claims. See, Wolfsen v. Applegate, 619 So.2d 1050 (Fla. 1st DCA 1993). Both potential defendants, without the benefit of a corroborative verified medical opinion attached to the notice of intent conducted their own investigations and denied any wrongdoing both before and after a verified medical opinion was supplied, all of which occurred prior to suit being filed. Furthermore, in both written motion and statements made to the trial judge, plaintiffs' attorney as an officer of the court, verified that he had sought medical advice prior to filing the notice of intent to sue and under the obvious facts of the case this was reasonable inquiry. Indeed, the trial judge verified that this case was like one in which the wrong foot had been amputated and the injury was so obvious that no further investigation was necessary. Notwithstanding, he felt that technical compliance with the statute was necessary. Not only does this ruling violate the mandate of the Supreme Court in the Patry v. Capps decision, but the affirmance of this decision by the majority decision places technical compliance above the acknowledged intent of the statute to preclude frivolous law suits.

The exceptional importance of the majority decision is further illustrated by its impact on Florida's longstanding rule that expert evidence is necessary in medical malpractice cases except where negligence is so obvious to be within common

understanding. 36 Fla.Jur.2d Medical Malpractice §26 (1982). This exception has been eliminated by the majority decision here.

The well reasoned dissent based upon cited authority recognizes that no authority is cited for the majority decision. Notwithstanding, precedent is set for technical compliance with the pre-suit notice statute which will affect the multitude of cases being decided everyday on the issue of statutory compliance.

For these reasons, the majority decision of this Court of exceptional importance. It should be reviewed by this Court en banc and the dissenting opinion adopted as the majority decision.

3. The majority decision is contrary to the decision of this Court in Stein v. Feingold, 629 So.2d 998 (Fla. 3d DCA 1993) which holds that where the affidavit of an independent medical expert is filed within the applicable limitation period, a complaint should not be dismissed for failure to comply with the provisions of Chapter 766. Here, plaintiff's injury occurred on July 26, 1991, and a verified medical opinion alleging negligence was provided to the defendants on September 3, 1992, well within the two year statute of limitations for medical malpractice actions and prior to filing of suit. In accordance with the liberal view taken by the decisions governing compliance with Chapter 766, particularly the medical malpractice pre-suit notification sections, dismissing a complaint where a verified medical opinion is filed within the statutory limitations period and prior to suit is in direct conflict with the decision of this Court in Stein v. Feingold, supra. En banc consideration of the majority decision is necessary

to maintain a uniformity of decisions in this district.

For the reasons set forth above and in compliance with the requirements of Rule 9.331(c)(1) and (2), Florida Rules of Appellate Procedure, appellants respectfully request rehearing en banc of the majority decision of this Court filed on May 17, 1994.

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 31st day of May, 1994.

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

and

LAW OFFICES OF RICHARD L. KATZ
2100 Salzedo Street
Suite 300
Coral Gables, Florida 33134

BY: 
JOE N. UNGER
Counsel for Appellants

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1994

SEPTEMBER 14, 1994

CHARLES KUKRAL, et al.,	**	CASE NO. 93-02294
Appellant(s),	**	
vs.	**	
GEORGE D. MEKRAS, M.D., et al.,	**	LOWER TRIBUNAL NO. 92-21870
Appellee(s).	**	

Rehearing en banc is granted. Each party may file a supplemental brief (one original and eleven copies) within thirty (30) days of this order. The briefs may address the pertinence, if any, of the rule that, in certain cases, expert testimony is not required to recover in a medical malpractice action. No reply briefs shall be permitted. The cause is set for oral argument before the court en banc on Tuesday, November 8, 1994 at 10:00 o'clock A.M. Counsel will be allowed fifteen (15) minutes a side for argument.

APPENDIX C

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By: Peggy Pridmore
Deputy Clerk

cc: Joe N. Unger
Charles Michael Hartz
Richard L. Katz
/PL

Glenn P. Falk
Bambi G. Blum

JAN 05 1995

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND
IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 1994

CHARLES KUKRAL and MILLY KUKRAL,	**	
Appellants,	**	
vs.	**	CASE NO. 93-2294
GEORGE D. MEKRAS, M.D.; MIAMI UROLOGY INSTITUTE, INC. and DR. JOHN T. McDONALD FOUNDATION d/b/a DOCTORS' HOSPITAL,	**	
Appellees.	**	

Opinion filed January 4, 1995.

An Appeal from the Circuit Court of Dade County, Phillip Bloom, Judge.

Joe N. Unger and Richard L. Katz, for appellants.

George Hartz Lundeen Flagg & Fulmer; Hicks, Anderson & Blum, and Bambi G. Blum, for appellees Mekras and Miami Urology Institute, Inc.; Parenti, Falk, Waas & Frazier, and Gail Leverett Parenti for appellee Doctors' Hospital.

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

APPENDIX D

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

Affirmed.

HUBBART, NESBITT, COPE, GERSTEN, CODERICH 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.

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verdict and denied
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Regulating The Flori-
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recommends that Rood be found not guilty of the Bar's allegations on that issue.

As aggravating factors, the referee found a dishonest or selfish motive; a pattern of misconduct; multiple offenses in the same case; refusal to acknowledge wrongful nature of conduct; vulnerability of victims; and, substantial experience in the practice of law. We also note that since the referee's report was submitted, Rood has been involved in a separate disciplinary proceeding that resulted in a two-year suspension from the practice of law.[5]

In count two, the Bar alleged that Rood intentionally allowed a letter of credit to expire, made a false promise to pay a judgment, and was held in willful contempt of court in violation of rule 4–8.4 of the Rules Regulating The Florida Bar. We accept the referee's findings of fact and recommendations of guilt on both counts, but we disagree with his recommendation that Rood be disbarred. The nature of the charges against Rood and what he did do not reflect an unfitness to practice law, and thus we do not find that disbarment is warranted.

[1, 2] We agree with the Bar and the referee that the rules of professional conduct require lawyers to abide by specific standards regarding fees for legal services. These standards were created, in part, to ensure that: 1) the public is informed about the fees for which they will be financially obligated; 2) disputes regarding fees are minimized; and, 3) lawyers are paid in proportion to the services they render. By failing to provide the clients with a written fee agreement and failing to itemize the costs in the closing statement, Rood violated the professional standards set forth in rule 4–1.5. Rood argues that when he was representing Mr. Thrower and Mrs. Long in their appellate case, the law entitled him to collect a ten percent fee regardless of the amount of work he did on the appeal. Former Disciplinary Rule 2–106, also in effect at the time Rood assisted in the appeal, prohibited a lawyer from collecting a clearly excessive fee. We are persuaded by the referee's findings that Rood's fee was excessive in light of the fact that the appeal never proceeded past the notice of filing.

As to count two, a lawyer should never mislead the court on a proposed course of action or fail to keep a promise made to the court. There is evidence that Rood did both, even though he may not have intended to do so.

For the above reasons, Edward B. Rood is suspended for one year, to run consecutive to his current two-year suspension. Judgment for costs shall be entered against Rood in an amount to be established in a separate order by this Court.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

John R. PATRY, Petitioner,

v.

William L. CAPPS, M.D., et al., Respondents.

No. 81963.

Supreme Court of Florida.

March 10, 1994.

Medical malpractice action was brought against physician to recover for injury to child allegedly as result of delivery by Caesarean section. The Circuit Court, Hillsborough County, J. Rogers Padgett, J., dismissed action. Parents appealed. The District Court of Appeal, 618 So.2d 261, affirmed. Review was granted. The Supreme Court, Kogan, J., held that physician's acknowledged receipt of timely written notice of intent to initiate medical malpractice action was sufficient, even though plaintiff

5. *The Fla. Bar v. Rood*, 622 So.2d 974 (Fla.1993).

served notice by hand, rather than certified mail.

Decision by District Court of Appeal quashed, and cause remanded.

1. Physicians and Surgeons ⇐18.20

Physician's acknowledged receipt of timely written notice of intent to initiate medical malpractice action was sufficient, even though plaintiff served notice by hand, rather than certified mail, return receipt requested; physician was not prejudiced. West's F.S.A. § 768.57(2) (now § 766.106(2)).

2. Physicians and Surgeons ⇐18.20

Timely written notice of intent to initiate litigation is condition precedent to maintaining medical malpractice action. West's F.S.A. § 768.57(2) (now § 766.106(2)).

3. Physicians and Surgeons ⇐18.20

Strict compliance with statutory mode of service (certified mail, return receipt requested) is unnecessary for notice of intent to file medical malpractice action; mode of service is merely technical matter of form that is designed to facilitate orderly and prompt conduct of screening and settlement process. West's F.S.A. §§ 768.57, 768.57(2), (3)(c), (4, 7) (now §§ 766.106, 766.106(2), (3)(c), (4, 7)).

Roy D. Wasson, Miami, Richard A. Bokor, Tampa, and Mark Lipinski, P.A., Bradenton, for petitioners.

Ted R. Manry, III and Stephen H. Sears of Macfarlane & Ferguson, Tampa, for respondents.

Loren E. Levy, Tallahassee, amicus curiae for The Academy of Florida Trial Lawyers.

KOGAN, Justice.

[1] We have for review *Patry v. Capps*, 618 So.2d 261 (Fla.2d DCA 1993), in which the Second District Court of Appeal certified the following question as being of great public importance:

> WHETHER THE REQUIREMENT IN A MEDICAL MALPRACTICE ACTION THAT NOTICE BE GIVEN BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, IS (1) A SUBSTANTIVE ELEMENT OF THE STATUTORY TORT, OR (2) A PROCEDURAL REQUIREMENT THAT CAN BE DISREGARDED BY THE TRIAL COURT WHEN THE DEFENDANT RECEIVES ACTUAL WRITTEN NOTICE IN A TIMELY MANNER THAT RESULTS IN NO PREJUDICE.

618 So.2d at 265–66 (Altenbernd, J., dissenting); *Patry v. Capps*, No. 91–04193 (Fla.2d DCA Order on Motion for Certification May 25, 1993). We have jurisdiction [1] and answer the question as rephrased below in the affirmative:

> WHETHER THE ACKNOWLEDGED RECEIPT OF TIMELY WRITTEN NOTICE OF INTENT TO INITIATE LITIGATION FOR MEDICAL MALPRACTICE THAT RESULTS IN NO PREJUDICE TO THE DEFENDANT IS SUFFICIENT NOTICE UNDER SECTION 768.57(2), FLORIDA STATUTES (1987) (CURRENT SECTION 766.106(2), FLORIDA STATUTES (1993)).

The Patrys, individually and as mother and father and next friends of Chad M. Patry, a minor, brought a medical malpractice action against Dr. William L. Capps. Chad, who was born in 1988, suffers from cerebral palsy and quadriplegia. The Patrys allege that Chad's condition was caused by Dr. Capps' negligence in delivering the child by Caesarian section. The action against Dr. Capps was dismissed because the Patrys failed to strictly comply with the mode of service provided in section 768.57(2), Florida Statutes (1987).[2] It is undisputed that Dr. Capps was served with the Patrys' intent to initiate litigation by hand delivery rather than by certi-

1. Art. V, § 3(b)(4), Fla. Const.

2. Although the parties and the courts below consistently have referred to section 766.106(2), Florida Statutes (1989), the parties now agree that the notice provision as previously codified in section 768.57(2), Florida Statutes (1987), applies because the action appears to have accrued prior to the effective date of the 1988 amendment. *See* ch. 88-277, § 51, Laws of Fla (act does not apply to actions arising prior to effective date); 618 So.2d at 263 n. 2 (Altenbernd, J., dissenting).

fied mail, return receipt requested, as provided in the statute.

On appeal, the district court recognized the harshness of requiring strict compliance with the mode of service provided by the Legislature but felt compelled by precedent to affirm the dismissal. *See Solimando v. International Med. Centers*, 544 So.2d 1031 (Fla.2d DCA) (notice sent by regular mail insufficient under section 768.57(2)), *review dismissed*, 549 So.2d 1013 (Fla.1989); *Glineck v. Lentz*, 524 So.2d 458 (Fla. 5th DCA) (only written notice by certified mail, return receipt requested, sufficient under section 768.57(2)), *review denied*, 534 So.2d 399 (Fla. 1988). The court below also rejected the Patrys' claim of estoppel or waiver under this Court's decision in *Ingersoll v. Hoffman*, 589 So.2d 223 (Fla.1991). 618 So.2d at 262.

[2] Section 768.57(2), Florida Statutes (1987),[3] provides:

> Prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant *by certified mail, return receipt requested*, of intent to initiate litigation for medical malpractice.

(Emphasis added). Timely written notice of intent to initiate litigation is a condition precedent to maintaining a medical malpractice action. *Williams v. Campagnulo*, 588 So.2d 982, 983 (Fla.1991). Under the statutory scheme, service of presuit notice tolls the statute of limitations during the ninety-day presuit screening period provided for in the statute. The plaintiff then must file suit within ninety days after the receipt was received plus the greater of either sixty days or the remainder of the time left under the statute of limitations.[4] § 768.57(4); *Boyd v. Becker*, 627 So.2d 481 (Fla.1993); *Tanner v. Hartog*, 618 So.2d 177, 182 (Fla.1993).

The parties agree that timely written notice must be given under section 768.57(2) before a medical malpractice action can be maintained. However, they disagree as to whether strict compliance with the mode of service provided in the statute also is mandated.

Dr. Capps takes the position that only service by certified mail, return receipt requested, is sufficient. He bases his argument on the plain language of the statute, this Court's decision in *Williams*, and our adoption of Florida Rule of Civil Procedure 1.650. The Patrys and the Florida Academy of Trial Lawyers, as amicus curiae, maintain substantial compliance with the mode of service portion of the statute is all that is necessary to accomplish the legislative purpose of facilitating the early resolution of medical malpractice claims. Thus, they point out there is no reason to construe the provision in a manner that results in an unreasonable denial of access to courts. *See Weinstock v. Groth*, 629 So.2d 835 (Fla.1993) (purpose of presuit requirements is to alleviate high cost of medical malpractice claims through early determination and prompt resolution, not to deny access to courts).

Dr. Capps correctly points out that as a general rule this Court must give effect to the plain and unambiguous language of a statute. However, it is equally clear that a literal interpretation is not required when such an interpretation would lead to an unreasonable or ridiculous conclusion and there are cogent reasons to believe the letter of the law does not accurately reflect the legislative intent. *See Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984).

[3] Thus, in deciding whether strict compliance with the mode of service provided in section 768.57(2) is mandated, we look to the purpose of the legislation. We begin by reviewing the general purpose of the presuit notice and screening requirements set forth in the statute. These requirements are "designed to facilitate the amicable resolution of medical malpractice claims." *Ingersoll v. Hoffman*, 589 So.2d 223, 224 (Fla.1991). The goal of the legislation is to promote the settlement of meritorious claims early in the controversy in order to avoid full adversarial

3. Current section 766.106(2), Florida Statutes (1993), also provides for service by certified mail, return receipt requested.

4. Although the statute is tolled as of the date the notice of intent is mailed, the tolling period is measured from the date the notice is received by the prospective defendant. *Boyd v. Becker*, 627 So.2d 481 (Fla.1993).

proceedings. *Williams v. Campagnolo*, 588 So.2d 982, 983 (Fla.1991); *see also Boyd v. Becker*, 627 So.2d at 484. To this end, timely service of presuit notice tolls the statute of limitations, thus affording the parties an opportunity to settle their dispute. § 768.57(4). Strict compliance with the mode of service provided in the statute is in no way essential to this legislative goal. Service of the presuit notice by certified mail, return receipt requested, simply assures reliable verification of 1) timely service and 2) the date of receipt. Verification of timely service serves to reduce contention and litigation concerning compliance with the general notice requirement. *See Glineck*, 524 So.2d at 458. Likewise, verification of the date of receipt serves to reduce disputes concerning compliance with various time periods that begin to run after presuit notice is received. *See, e.g.*, § 768.57(3)(c) (time prospective defendant has to reply to presuit notice); § 768.57(4); Fla.R.Civ.P. 1.650(d)(3) (time plaintiff has to file suit after presuit notice is received).

The conclusion that service by certified mail, return receipt requested, was intended as nothing more than a reliable method for verifying service and receipt dates is supported by the fact that two other provisions of section 768.57 provide for service by certified mail. Using language similar to that at issue in this case, subsection (3)(c) provides that the defendant's response "shall be delivered ... by certified mail, return receipt requested" within ninety days after receipt of the notice. Likewise, subsection (7) provides that the plaintiff "shall respond in writing ... by certified mail, return receipt requested" within fifty days after receipt of the defendant's offer to admit liability and submit the damage issue to arbitration. Our review of the statutory scheme as a whole leads us to conclude that the mode of service authorized in these provisions is merely a technical matter of form that was designed to facilitate the orderly and prompt conduct of the screening and settlement process by establishing a method for verifying significant dates in the process. It cannot be seriously argued that this goal is not accomplished where, as here, the defendant acknowledges timely receipt of written notice that results in no prejudice.

When considering other statutes that appear to mandate a specific mode of service, several Florida courts have held actual notice by a mode other than that prescribed sufficient. *See, e.g., L & F Partners, LTD. v. Miceli*, 561 So.2d 1227 (Fla. 2d DCA 1990) (statute that provides for delivery of notice by certified or registered mail, return receipt requested, in worthless check action required only some type of personal delivery beyond regular mail); *Bowen v. Merlo*, 353 So.2d 668 (Fla. 1st DCA 1978) (actual delivery of notice by regular mail was sufficient under notice requirement of Mechanics' Lien Law that provided for delivery of notice of claim by certified or registered mail). Most notably, in *Phoenix Ins. Co. v. McCormick*, 542 So.2d 1030 (Fla. 2d DCA 1989), the Second District Court of Appeal held actual notice by a mode other than that authorized in section 627.-426(2)(a), Florida Statutes (1985), sufficient to preserve an insurer's right to assert a coverage defense. Under that statute a liability insurer is precluded from asserting a coverage defense, unless within thirty days of knowledge of the defense written notice is given to the insured by registered or certified mail, or by hand delivery. The *Phoenix* court recognized that the language providing for notice by certified mail, registered mail, or hand delivery eliminates problems in proving timely service: but held that when the insured concedes actual notice, strict compliance is not required. Recognizing that the statute allows an insurer to deny coverage by certified letter sent to the insured's last known address, even if the insured never actually receives the notice, the *Phoenix* court refused to interpret the statute to permit a denial of coverage where notice is never received but to preclude denial when actual notice by regular mail is conceded. 542 So.2d at 1032.

A similar absurdity would result if we were to accept Dr. Capps' construction of section 768.57(2). It appears that notice of intent to initiate litigation sent certified mail, return receipt requested, would be sufficient to toll the statute of limitations, even if the notice was not actually received by the defendant. *Zacker v. Croft*, 609 So.2d 140 (Fla. 4th DCA 1992), *review denied*, 620 So.2d 760 (Fla.

1993). Whereas, under Dr. Capps' interpretation of the notice provision, the statute of limitations would not be tolled when service was by a mode other than that provided in the statute, even if the defendant concedes receipt of timely written notice that caused no prejudice. We do not believe that the Legislature intended such an irrational result.

Moreover, we have recently emphasized that when possible the presuit notice and screening statute should be construed in a manner that favors access to courts. *Weinstock*, 629 So.2d at 838. In this case, it is possible to construe the provision in a manner that favors access without running afoul of the goal of the legislatively authorized mode of service. This is true because tolling the statute of limitations where receipt of written notice and lack of prejudice are conceded avoids the unreasonable result of denying a valid claim where there is no question that the defendant actually received timely notice, the contents of which is evidenced in writing. Moreover, where the defendant concedes actual receipt there should be no problem computing the other time periods that begin to run after the notice is received.

Neither our decision in *Williams* nor our adoption of Florida Rule of Civil Procedure 1.650(d)(1)[5] require a different construction. *Williams* addressed the complete absence of presuit notice. That decision stands for the proposition that timely written notice is a condition precedent to the maintenance of a medical malpractice action; it was not intended to mandate strict compliance with the mode of service provided for in the statute. As noted above, unlike the general notice requirement contained in section 768.57(2), the mode of service authorized in that subsection does not go to the heart of the presuit notice and screening process. Likewise, in adopting rule 1.650, *In re Medical Malpractice Presuit Screening Rules—Civil Rules of Procedure*, 536 So.2d 193 (Fla.1988), we did not speak to the issue of whether service by certified mail was the only acceptable mode of service for presuit notice. We adopted the rule simply "to provide uniform procedures for implementing the medical malpractice pre-suit notice requirements of section 768.57." *In re Amendment to Rules of Civil Procedure—Rule 1.650(d)(2)*, 568 So.2d 1273 (Fla.1990); *see also Boyd v. Becker*, 627 So.2d at 484 (Rule of Civil Procedure 1.650 was adopted to implement legislative intent; thus, rule must be amended when found to be inconsistent with intent of presuit notice and screening statute). Rule 1.650 was not intended to somehow elevate those provisions of the statute that would otherwise be considered technical matters of form, with which strict compliance is unnecessary.

Accordingly, we answer the question as restated above in the affirmative,[6] quash the decision below, and remand the cause for further proceedings consistent with this opinion. We disapprove *Solimando* and *Glineck* to the extent they conflict with this opinion.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES and HARDING, JJ., concur.

Michael BEDFORD, Petitioner,

v.

STATE of Florida, Respondent.

No. 81896.

Supreme Court of Florida.

March 10, 1994.

After defendant's death sentence for first-degree murder was vacated, 589 So.2d

5. Consistent with the statute, Florida Rule of Civil Procedure 1.650(d)(1) provides that service of the notice of intent to initiate litigation shall be by certified mail, return receipt requested.

6. Because of our holding in connection with the mode of service issue, we need not address the Patrys' waiver argument.

adhered to the original rule of excluding irrelevant testimony.

Lovely v. United States, supra, is authority for the rule which we here announce that evidence which has a reasonable tendency to establish the crime laid in the indictment is not inadmissible merely because it points to another crime. The question to be decided is not whether the evidence tends to point to another crime but rather whether it is relevant to the crime charged.

[9] At the risk of submitting an unduly burdensome opinion we have undertaken to point up many of our own precedents in order to support the conclusion which we herewith announce as well as to demonstrate the varied statements of this rule of evidence which has produced some difficulty in application. In the immediate case at bar we think the evidence regarding the Judy Baker incident was clearly admissible because it was relevant to several of the issues involved. It definitely had probative value to establish a plan, scheme or design. It was relevant to meet the anticipated defense of consent. At the time when it was offered in the presentation of the State's main case it had a substantial degree of relevance in order to identify the accused. Finally, it was relevant because it demonstrated a plan or pattern followed by the accused in committing the type of crime laid in the indictment.

In view of our analysis of the precedents and for the future guidance of the bench and bar, the rule which we have applied in affirming this conviction simply is that evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion. This rule we hold applies to relevant similar fact evidence illustrated by that in the case at bar even though it points to the commission of another crime. The matter of relevancy should be carefully and cautiously considered by the trial judge. However, when found relevant within the limits of the stated rule, such evidence should be permitted to go to the jury.

We have thoroughly scrutinized the record and have carefully examined all of the evidence in accord with the requirements of Section 924.32, Florida Statutes, F.S.A., in order to determine whether the ends of justice require a new trial. Finding no error and finding as we do that the ends of justice do not demand a new trial, the judgment under attack is affirmed.

Affirmed.

TERRELL, C. J., and THOMAS, DREW and O'CONNELL, JJ., concur.

Frank B. ATKINS and Rebecca Atkins, an infant, by Frank B. Atkins, her father and next friend, Petitioners,

v.

Karl T. HUMES, Respondent.

Supreme Court of Florida.

April 1, 1959.

Rehearing Denied May 4, 1959.

Malpractice action against physician charged with negligence in treating three year old patient for simple fracture of her elbow, allegedly resulting in permanent injury to her hand known as ischemic paralysis or "Volkmann's contracture". The Circuit Court for Sumter County, T. G. Futch, J., granted summary judgment for defendant, and the plaintiffs appealed. The District Court of Appeal, Second District, Kanner, C. J., 107 So.2d 253, affirmed the summary judgment in favor of the defendant, and the plaintiffs brought certiorari. The Supreme Court, Roberts, J., held that

the pleadings and depositions and affidavits raised substantial fact issues as to whether physician negligently or unskillfully applied cast so as to cause a "pressure sore" on patient's arm that resulted in the Volkmann's contracture and negligently failed to heed the classic warnings of Volkmann's contracture while the cast was on the patient's arm and to bi-valve the cast to remove the pressure, and whether such negligence was the proximate cause of the injury, precluding summary judgment.

Decision of District Court of Appeal quashed with directions.

1. Judgment ⇐185.3(21)

In malpractice action against physician charged with negligence in treating three year old patient for simple fracture of her elbow, allegedly resulting in permanent injury to her hand known as ischemic paralysis or "Volkmann's contracture", the pleadings and depositions and affidavits raised substantial fact issues as to whether physician negligently or unskillfully applied cast so as to cause a "pressure sore" on patient's arm that resulted in the Volkmann's contracture and negligently failed to heed the classic warnings of Volkmann's contracture while the cast was on the patient's arm and to bi-valve the cast to remove the pressure, and whether such negligence was the proximate cause of the injury, precluding summary judgment.

2. Physicians and Surgeons ⇐18(9)

In malpractice action, except in rare cases, neither the court nor the jury can or should be permitted to decide, arbitrarily, what is or is not a proper diagnosis or an acceptable method of treatment of a human ailment.

3. Physicians and Surgeons ⇐18(8)

Jurors of ordinary intelligence, sense and judgment are, in many cases, capable of reaching a conclusion, without the aid of expert testimony, in a malpractice case involving a charge of negligence in the application or administration of an approved medical treatment.

Dayton, Dayton & Luckie and Norma Jean Wagner, Dade City, for petitioner.

P. B. Howell, Bushnell, and Savage & Mills, Ocala, for respondent.

ROBERTS, Justice.

This cause is before the court on certiorari granted to review a decision of the District Court of Appeal, Second District—Atkins v. Humes, Fla.App.1958, 107 So.2d 253, 256—affirming a summary judgment in favor of the defendant, respondent here, entered in the trial court.

[1] The suit was one for malpractice brought by the petitioners, Frank B. Atkins and his three-year-old daughter, Rebecca ("the plaintiffs" hereafter) against the defendant-respondent, Dr. Humes, in which Dr. Humes was charged with negligence in treating Rebecca for a simple fracture of her elbow, allegedly resulting in a permanent injury to her hand known as ischemic paralysis or "Volkmann's contracture." No complaint was made as to the method of treatment adopted by Dr. Humes—the reduction of the fracture, flexion of the arm at a 45-degree angle, and application of a plaster-of-paris cast to the arm. The plaintiffs contended that Dr. Humes was negligent and careless in his actual performance of the treatment in (1) negligently or unskillfully applying the cast so as to cause a "pressure sore" on Rebecca's arm that resulted in the Volkmann's contracture, and (2) negligently failing to heed the classic warnings of Volkmann's contracture while the cast was on the child's arm and to bi-valve the cast to remove the pressure.

The discovery depositions of the defendant, two other physicians, and Rebecca's father and mother were taken by the parties; and upon the basis of the pleadings and these depositions the defendant moved

for summary judgment. The plaintiffs relied also upon these depositions in opposition to the motion and, additionally, upon the affidavits of lay persons—relatives and neighbors of the plaintiffs—and the deposition of another physician. The trial judge concluded that the doctors' depositions proved there was no negligence on the part of Dr. Humes and that this showing was not successfully controverted by plaintiffs. He thereupon entered summary judgment for Dr. Humes.

In affirming the summary judgment the District Court of Appeal relied, in part, on the following rule:

> "The overpowering authority is that generally expert testimony is necessary to sustain a malpractice action against a physician or surgeon. Annotation 141 A.L.R. 6; and Foster v. Thornton, 1936, 125 Fla. 699, 170 So. 459. An exception to this general rule is applied in cases where want of skill or lack of care on the part of the physician or surgeon is so obvious as to be within the understanding of laymen and to necessitate only common knowledge and experience to judge it. In such cases, expert evidence is not required."

Finding that, as to the charges of negligence, the depositions and affidavits did not reveal a situation falling within the exception to the general rule and, in addition, that the plaintiffs did not show any "competent basis" for a jury determination in their favor of the issue of proximate cause, the District Court of Appeal affirmed the summary judgment in favor of Dr. Humes.

The plaintiffs contend that the decision of the appellate court is in direct conflict with the many decisions of this court respecting the propriety of a summary judgment when there are genuine issues of material facts, and with the decision of this court in Dohr v. Smith, Fla.1958, 104 So.2d 29, 32.

In the Dohr case this court reversed a directed verdict and judgment in favor of defendant, an anesthetist, despite the absence of expert testimony that "what happened in [the] case amounted to negligence on the part of the anesthetist." It appeared that the anesthetist made a routine examination of the patient's mouth prior to an operation for the purpose of finding out whether the patient had false teeth. She did not question the patient in this respect, however, because she thought the question would be insulting, and did not discover that the patient had a bridge containing two false teeth. The anesthetist inserted a tube into the patient's windpipe to supply the lungs with oxygen during the operation, using a laryngoscope for the purpose of properly placing the tube. During this process the two false teeth on the patient's bridgework broke off and lodged in the patient's right bronchus. There was expert testimony that it was possible to break teeth when using the laryngoscope "even when the greatest skill and care were exercised", and no evidence that the anesthetist "deviated from approved practice". "But," said this court, "the fact remains that the teeth were broken and lost despite the anesthetist's consciousness of such a contingency as evidenced by the 'routine' examination obviously intended to prevent the very thing that occurred. * * * The jury could have decided from common knowledge and experience, regardless of expert testimony, that the patient needlessly suffered from a condition the anesthetist herself sought to prevent. Montgomery v. Stary, Fla., 84 So.2d 34."

In the cited case, Montgomery v. Stary, supra [84 So.2d 40.], this court affirmed a judgment for plaintiff in a malpractice suit involving an allegedly negligent application of an accepted medical treatment. Expert testimony in support of the plaintiff's theory was attacked by the defendant on the ground that it was not shown that the witnesses, who were Chicago physicians, had practiced in a community similar to the locality in which the defendant physician practiced. In holding that the rule contended for did not necessitate a reversal under the facts of the case this court said:

"Proximate cause does not change with the locality. The jury could have found, as a matter of their own common knowledge and experience, *and independent of expert testimony as to acceptable medical practice,* that the fingers and thumb of a premature infant were needlessly burned off, and that this could not be considered acceptable medical practice in any community." (Emphasis supplied.)

[2, 3] These two decisions are typical of the many malpractice cases involving a charge of negligence based on the careless or unskillful administering of an approved medical treatment—as distinguished from a charge based on an incorrect diagnosis or the adoption of the wrong method of treatment—in which the courts have upheld a judgment for plaintiff or required the submission of the cause to a jury, despite the absence of expert testimony that the acts complained of would amount to bad practice. Obviously, except in rare cases, neither the court nor the jury can or should be permitted to decide, arbitrarily, what is or is not a proper diagnosis or an acceptable method of treatment of a human ailment. *Cf.* Crovella v. Cochrane, Fla.App., 1958, 102 So.2d 307. But jurors of ordinary intelligence, sense and judgment are, in many cases, capable of reaching a conclusion, without the aid of expert testimony, in a malpractice case involving a charge of negligence in the application or administration of an approved medical treatment. For example, in the exercise of only common sense and ordinary judgment, a jury would have the right to conclude that it is negligence to permit a wound to heal superficially with nearly half a yard of gauze deeply imbedded in the flesh, Walker Hospital v. Pulley, 74 Ind. App. 659, 127 N.E. 559, 128 N.E. 933; to fail to sterilize surgical instruments before performing an operation, Lanier v. Trammell, 1944, 207 Ark. 372, 180 S.W.2d 818; to cut off part of a patient's tongue in removing adenoids, Evans v. Roberts, 172 Iowa 653, 154 N.W. 923; to perforate the urethra in performing an operation in which it was necessary to use care not to do so, Goodwin v. Hertzberg, 1952, 91 U.S. App.D.C. 385, 201 F.2d 204. Many other examples are cited in the annotation in 141 A.L.R. at pp. 12 et seq.; and see the cases cited in Montgomery v. Stary, supra, 84 So.2d at page 40.

Even in those cases in which some expert testimony may be required to show causation, the jurors may be authorized to infer from the circumstances that the defendant was negligent in the administration of an approved medical treatment, despite the absence of direct expert testimony to this effect and in the face of expert testimony to the contrary. See the several decisions of this court in Foster v. Thornton, 113 Fla. 600, 152 So. 667, 119 Fla. 49, 160 So. 490, 493, and 125 Fla. 699, 170 So. 459. As is well stated in Goodwin v. Hertzberg, supra, 201 F.2d 204, 205:

"It is immaterial that no expert testified that appellee acted negligently. Malpractice is hard to prove. The physician has all of the advantage of position. * * * What therefore might be slight evidence when there is no such advantage, as in ordinary negligence cases, takes on greater weight in malpractice suits. * * * Generally speaking, direct and positive testimony to specific acts of negligence is not required. * * *" Christie v. Callahan, 75 U.S.App.D.C. 133, 135, 136, 147, 124 F.2d 825, 827, 828, 839."

In Dohr v. Smith, supra, as has been noted, no expert testified that the defendant anesthetist was negligent in the manner in which she undertook to carry out an approved medical procedure—the pre-operative examination of a patient to discover the presence or absence of false teeth. Yet, said this court, "The jury could have decided from common knowledge and experience, regardless of expert testimony, that the patient needlessly suffered from a condition the anesthetist herself sought to prevent." This language is appropriate to

the facts of the instant case. In his deposition Dr. Humes testified that Volkmann's contracture "is a complication of elbow fractures that is borne in mind by all doctors", and that he told the parents to notify him "in case of marked swelling, pain, numbness, or color change to the hand"—all signs of Volkmann's contracture. Another sign is difficulty in flexing the fingers and an undue amount of pain in attempting to extend them. In their depositions the parents testified that the child had all of these symptoms; that they told Dr. Humes about the child's continuous complaint of pain and called his attention to the other signs. Here, as in Dohr v. Smith, the defendant showed by his own testimony that he was conscious of the possibility of Volkmann's contracture and warned the parents to be on the lookout for the classic signs, yet did not observe or heed them himself. Paraphrasing Dohr v. Smith, "The jury could have decided from common knowledge and experience regardless of expert testimony, that the patient needlessly suffered from a condition the [defendant himself] sought to prevent."

Reference should be made to the District Court's citing, apparently with approval, the following quotation from 41 Am.Jur., Physicians and Surgeons, Section 131 p. 244:

> "The opinion of lay witnesses as to the appearance of an injured member of the plaintiff's body, based upon a casual examination, raises no conflict with the opinions of expert medical witnesses who made a careful examination of the actual conditions to determine the proper treatment to be administered."

In the only case cited in support of the statement, Jackovach v. Yocom, 1931, 212 Iowa 914, 237 N.W. 444, 447, 76 A.L.R. 551, the court was concerned with whether the trial judge erred in refusing to submit to the jury the issue of the defendant physician's alleged negligence in operating on plaintiff's arm without first X-raying it. The three physicians who examined the arm immediately prior to the operation testified that the mangled, crushed, and shattered condition of the elbow of the arm was plainly apparent by sight and feeling without the use of any X-ray device. The Iowa court accordingly held that "the opinion of the plaintiff and his young companion, based solely upon a mere casual examination of the outward appearances, though without even a close examination of the condition of the arm, raises no conflict as against the positive expert evidence of those skilled in the science of examining and determining conditions of the character such as obtain in this case, who made careful examinations to ascertain the actual conditions."

We have no quarrel with the quoted rule as applied in the circumstances of and as to the issue raised in the Jackovach case. But it is obvious that no specialized knowledge is needed to observe that a child's hand is swollen or cold or discolored or that she has difficulty in moving her fingers, nor to report that a child constantly complains of pain in her arm. The fact that Dr. Humes and one other physician, a medical doctor, who examined the child while the cast was still on her arm "could discern no signs of nor did they discover the developing of the contracture until removal of the cast," as stated by the District Court of Appeal in its opinion, is not, in our opinion, conclusive of the question of whether such signs were actually present and *should have* been discerned and heeded by Dr. Humes, even though the evidence thereof was given by the parents and other laymen. Cf. Gruginski v. Lane, 1934, 177 Wash. 121, 30 P.2d 970; Bartholomew v. Butts, 1942, 232 Iowa 776, 5 N.W.2d 7; Baird v. National Health Foundation, 1940, 235 Mo.App. 594, 144 S.W.2d 850; Van Der Bie v. Kools, 1933, 264 Mich. 468, 250 N.W. 268.

Moreover, the record is not devoid of expert testimony as to the condition of the child's hand while the cast was still on her arm. A third physician—a pedia-

trician to whom the child was taken on December 28th, eleven days after the date of the fracture and reduction thereof by Dr. Humes, for treatment of a stomach ailment—was sufficiently impressed with the poor condition of the child's hand to refer her to the medical doctor mentioned above for examination regarding the fracture, since Dr. Humes was away on vacation. The pediatrician testified that he had no personal recollection of the case, but his clinical record contains the notation, "Will not flex fingers in left hand which was fractured about ten days ago." This is significantly in contrast with the testimony of the medical doctor, who examined the child's hand on the same date, December 28th, yet testified that he did not notice that the child had any difficulty in flexing her fingers.

Nor was there a lack of expert testimony tending to prove the issue of negligence in failing to heed the classic warnings of Volkmann's contracture, even though there was no direct testimony to this effect. One physician testified that, if notified of pain in this type of case, he would examine the patient and look for a tight cast, and "in the presence of a tight cast, the cast should be bi-valved * * to examine the arm in the area of the fracture and to also release any pressure, if the pressure is present." Another physician testified that if there was difficulty in flexing the fingers and an undue amount of pain in attempting to extend them, he "would begin looking around a bit more. If the cast was circular, I would bi-valve it, or as you deem necessary" for the purpose of relieving the apparent pressure. We think there can be no doubt that, in the circumstances here, a jury issue was made as to Dr. Humes' negligence in this respect. Cf. Bartholomew v. Butts, supra, 5 N.W.2d 7; Gruginski v. Lane, supra, 30 P.2d 970; Priestley v. Stafford, 1916, 30 Cal.App. 523, 158 P. 776.

The finding of the District Court of Appeal that there was an insufficient showing to make out a jury question on the issue of "proximate cause" is also in direct conflict with previous decisions of this court. In Saunders v. Lischkoff, 1939, 137 Fla. 826, 188 So. 815, 820, a malpractice case, this court said:

> "If the evidence is conflicting or will permit of different reasonable inferences, or if there is evidence tending to prove the issues, it should be submitted to a jury as a question of fact to be determined by it, and not taken from the jury and passed upon by the Court as a question of law."

The fact that "[n]o expert testified that the sore and contracture resulted from improper treatment", as stated by the District Court of Appeal in its opinion, is not decisive; in fact, many courts hold that it is improper for an expert to testify that the alleged malpractice *did* occasion the result complained of, as distinguished from expert testimony that the alleged malpractice *could* occasion the result. See DeGroot v. Winter, 261 Mich. 660, 247 N.W. 69, in which the court said: "* * * when a result could have been occasioned by one of two or more causes, the ultimate fact of which cause occasioned the result is for determination by the jury, and a medical expert may not, in case of conflicting evidence, invade the province of the jury and testify that the result was in fact occasioned by one cause only." Cf. North v. State, Fla. 1953, 65 So.2d 77.

It was undisputed, and the District Court of Appeal so found in its opinion, that the sore on the child's arm was the cause of the contracture. There was ample expert testimony to support a conclusion by the jury that the sore was a "pressure sore" as distinguished from a fracture blister. One physician testified that the sore on the child's arm "could be a pressure point caused by the cast." Another, the orthopedic surgeon who operated on the child's arm in an attempt to cure the contracture, said that the sore was, in his opinion, a pressure sore

rather than a fracture blister. This same physician testified that he had the impression that the contracture "was one of these that gradually developed with the maturing of the scar in the arm about the muscles and contracted the arm down, the muscles down, rather than a thing that came on immediately after reduction of the fracture." He ruled out damage to the median nerve or injury to the blood vessel as a cause of eskemia in the case. It was shown that the sore on the child's arm developed immediately beneath a place in the cast on which there were three indentations, apparently finger marks; and a witness who was present at the time Dr. Humes applied the cast testified that Dr. Humes observed these indentations and remarked, "I don't like this cast worth a damn", but stated further that the elbow was so well set that he did not wish to disturb the cast.

Since medicine is not an exact science, it is difficult, if not impossible, in malpractice cases to arrive at a conviction to moral certainty as to the cause of a pathological condition of a person. See Foster v. Thornton, supra, 160 So. at page 497. As stated in Dimock v. Miller, 202 Cal. 668, 262 P. 311, 312:

> "If * * * it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science."

Here, it obviously cannot be said that the evidence demonstrated conclusively that the sore was caused by the indentations on the cast; but because of the location of the sore in the area immediately beneath such indentations, it is reasonable and logical to infer that they were a probable and not merely possible factor in the development of the pressure sore. Whether the jury would have the right to hold the defendant liable for the child's injury on the basis of the alleged negligence in applying the cast, alone, need not be decided, however, since there remains the additional factor arising out of his alleged negligence in failing to bi-valve the cast and relieve the pressure. And, in all the circumstances here, we think that there was sufficient evidence tending to prove the issue of proximate cause to require the submission of the case to the jury. Cf. Saunders v. Lischkoff, supra, 188 So. 815; Montgomery v. Stary, supra, 84 So.2d 34.

Accordingly, the decision of the District Court of Appeal is quashed with directions to reverse the judgment of the trial court and remand the cause to that court for further proceedings.

It is so ordered.

TERRELL, C. J., and DREW, THORNAL and O'CONNELL, JJ., concur.

Charles W. CLOUD, Petitioner,

v.

Donald FALLIS, Respondent.

Supreme Court of Florida.

April 10, 1959.

Action to recover for wrongful death of plaintiff's three-year-old son alleged to have been caused by negligence of motorist. After jury returned verdict for motorist, the Circuit Court for Hillsborough County, Harry C. Tillman, J., entered order granting new trial and motorist appealed. The District Court of Appeal, Second District, 107 So.2d 264, affirmed and Supreme Court granted certiorari. The Supreme Court, Thomas, J., held that when a motion for new trial is made it is directed to sound, broad discretion of the trial judge and the ruling should not be disturbed in absence

SHANDS TEACHING HOSPITAL, Stephen B. Vogel, M.D., and Gordon L. Gibbey, M.D., Petitioners,

v.

William G. MILLER, Jr. and Jacqueline Miller, Respondents.

No. 94-1489.

District Court of Appeal of Florida. First District.

Aug. 22, 1994.

Petition for writ of certiorari was made to District Court of Appeal, following trial court's denial of motion to dismiss complaint. The Court of Appeal, Barfield, J., held that medical malpractice claimant was required to submit corroborating medical expert opinion in support of claim prior to expiration of statute of limitations.

Petition granted; trial order quashed; case remanded with instructions.

Physicians and Surgeons ⇐18.20

In order to avoid dismissal of complaint with prejudice, medical malpractice claimant is required to submit affidavit of physician in support of claimed malpractice prior to expiration of statute of limitations. West's F.S.A. § 766.203(2).

Toby S. Monaco of Monaco, Monaco & Birder, P.A., Gainesville, for petitioners.

Marie A. Mattox of Marie A. Mattox, P.A., Tallahassee, for respondents.

BARFIELD, Judge.

Petitioners, defendants in a medical malpractice action, seek certiorari review of an order denying their motion to dismiss the complaint for failure to comply with the presuit requirements of chapter 766, Florida Statutes (1991). Finding that the trial court departed from the essential requirements of law, we grant the petition, quash the order, and remand for entry of an order dismissing the cause with prejudice.

The parties agree that the statute of limitations began to run on January 17, 1991. A notice of intent to initiate litigation was mailed to the defendants on January 13, 1993, at which time the plaintiffs/respondents filed a "Petition for Extension of Statute of Limitations" for 90 days to allow for a reasonable investigation under section 766.106, Florida Statutes. The complaint was filed on April 13, 1993, alleging that the defendants "either negligently performed spinal anesthetic with complications resulting thereafter or negligently performed the colectomy and ileoanal anastomosis." No corroborating medical expert opinion was submitted to the defendants at the time the notice of intent was mailed, as required by section 766.203(2), nor was one submitted prior to the running of the statute of limitations.

The issue is whether the failure to provide a corroborating medical expert opinion with the notice of intent to initiate a medical malpractice action is a fatal omission in the presuit requirements of chapter 766. The case law indicates that it is not fatal if the required verified, written opinion is provided within the statute of limitations period, but that it is fatal if the limitations period has run (i.e., if the limitations period has not run, the action should be dismissed without prejudice; if the statute has run, the action should be dismissed with prejudice). *See Suarez v. St. Joseph's Hospital, Inc.*, 634 So.2d 217 (Fla. 2d DCA 1994); *Miami Physical Therapy Assoc., Inc. v. Savage*, 632 So.2d 114 (Fla. 3d DCA 1994). *See also Weinstock v. Groth*, 629 So.2d 835 (Fla.1993); *Williams v. Campagnulo*, 588 So.2d 982 (Fla.1991); *Ingersoll v. Hoffman*, 589 So.2d 223 (Fla.1991); *Hospital Corp. of America v. Lindberg*, 571 So.2d 446 (Fla.1990); *Bruce H. Lynn, M.D., P.A. v. Miller*, 498 So.2d 1011 (Fla. 2d DCA 1986); *Public Health Trust v. Knuck*, 495 So.2d 834 (Fla. 3d DCA 1986). *But see Kukral v. Mekras*, 19 Fla. Law Weekly D1108, —— So.2d —— (Fla. 3d DCA May 17, 1994). In the instant case, the limitations period had run, and the trial court therefore departed from the essential requirements of law when it denied the motion to dismiss.

Stebilla v. Mussallem, 595 So.2d 136 (Fla. 5th DCA), *rev. denied, Mussallem v. Stebilla*,

604 So.2d 487 (Fla.1992) d
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MINER and MICKLE

John D. TOWNSEND
Townsend, his wife,

v.

WESTSIDE DODGE, INC.
poration; M & L Mote
Florida Corporation;
sonville, a municipal
State of Florida, Appe

No. 93-35

District Court of App
First Distr

Aug. 22,

Purchaser of automo
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604 So.2d 487 (Fla.1992) does not apply here, because that case arose within the period between the effective date of the amendment requiring submission of a corroborating affidavit "at the time the notice of intent to initiate litigation is *filed*" and the effective date of the correction to require submission of the affidavit when the notice of intent is *mailed*. Unfortunately, we incorrectly noted the holding in *Stebilla* as the law with respect to malpractice suits arising after this "glitch" period in *Duffy v. Brooker*, 614 So.2d 539, 544 n. 2 (Fla. 1st DCA), *rev. denied*, *Physicians Protective Trust Fund v. Brooker*, 624 So.2d 267 (Fla.1993). This was not the holding in *Duffy*, however, and we acknowledge the misstatement.

The petition is GRANTED, the trial court's order is QUASHED, and the cause is REMANDED for entry of an order dismissing the cause with prejudice.

MINER and MICKLE, JJ., concur.

John D. TOWNSEND and Mary D. Townsend, his wife, Appellants,

v.

WESTSIDE DODGE, INC., a Florida Corporation; M & L Motors of Jax, Inc., a Florida Corporation; and City of Jacksonville, a municipal corporation of the State of Florida, Appellees.

No. 93-382.

District Court of Appeal of Florida, First District.

Aug. 22, 1994.

Purchaser of automobile sued seller, alleging false arrest. The Circuit Court, Duval County, Virginia L. Beverly, J., entered summary judgment for seller and appeal was taken. The District Court of Appeal, Ervin, J., held that material issues of fact, precluding summary judgment, existed as to whether seller's alleged negligent handling of license plate had set in motion course of events culminating in police arrest of buyer who had plates in question on her vehicle.

Reversed and remanded.

1. Negligence ⇐62(1)

Intervening cause relieving tort-feasor from liability must be completely independent of, and not in any way set in motion by, tort-feasor's negligence.

2. Negligence ⇐62(1), 136(25)

Intervening cause, sufficient to cut off tort-feasor's liability, must be unforeseeable, and issue of foreseeability is typically for trier of fact to decide.

3. Negligence ⇐62(1)

In order for intervening cause to cut off liability of initial tort-feasor, it is not necessary for initial tort-feasor to foresee exact nature of ensuing injury or precise manner in which it occurs, as long as he or she is able to foresee that some injury is likely to result in some manner as consequence of negligent act.

4. Judgment ⇐181(33)

Material issues of fact, precluding summary judgment for automobile dealership on false arrest claim brought by purchaser of automobile who had been stopped and arrested for having allegedly stolen license plate, existed as to whether dealer had negligently mishandled plate, even though dealer claimed that arrest by police was an intervening cause over which it had no control: if proved, dealer's negligent handling of plate would be act that set in motion course of events culminating in police arrest, and dealer would be liable for such acts.

Tyrie A. Boyer of Boyer, Tanzler & Boyer, P.A., Jacksonville, for appellants.

Carle A. Felton, Jr. of Boyd & Jenerette, P.A., Brent Shore of Tromberg, Shore, Harrison & Safer, Jacksonville, for Westside Dodge, Inc.

en credit against the deficiency for the full amount of the profits. We agree.

[1–3] In a deficiency proceeding, the mortgagor is entitled to full credit for the accumulated cash and receivables that accrued during a period of receivership. *Mariner/Tampa, Ltd. v. Wells Fargo Realty Advisors Funding, Inc.*, 546 So.2d 757 (Fla. 2d DCA 1989). Mortgaged property remains the property of the mortgagor until he is divested of ownership, normally by the order confirming the sale of the mortgaged property. *Tymber Scan Properties Ltd. v. Lutheran Mut. Life Ins. Co. of Waverly, Iowa*, 358 So.2d 1370, 1373 (Fla. 2d DCA 1978). As in *Tymber Scan*, the notice of sale and certificate of title here described only the real property. As a result, the purchaser "secured no ownership interest in the rentals except those accruing subsequent to securing the title to the rental property." 358 So.2d at 1372.

[4–6] At the time of the sale, therefore, the rental profits of $66,737.62 in the hands of the receiver belonged to Rhoden. However, if a deficiency exists after the sale, the mortgagee is entitled to apply such profits to the deficiency. *Tymber Scan*, 358 So.2d at 1373. The FDIC argues that this is exactly what the trial court did: it applied 100% of the profits to Rhoden's obligations, 21.1% to the recourse obligation and 78.9% to the nonrecourse, $935,000.00 note. The FDIC's argument confuses the terms "deficiency" and "obligation." While Rhoden was obligated under the $935,000.00 note, that note could not and did not support the deficiency judgment because it was nonrecourse. When a loan contains a nonrecourse provision, a mortgagee is not entitled to a deficiency judgment against the mortgagor for any sums over and above the amount that a sale of the property brings. *Heim v. Kirkland*, 356 So.2d 850, 851 (Fla. 4th DCA 1978).[1] The rental profits, which were Rhoden's property, could not be applied to the $935,000.00 note. The trial court, therefore, erred in allocating 78.9% of the profits to Rhoden's nonrecourse obligation; [illegible] should have been credited against [illegible] amount of the deficiency owed.

We affirm the entry of the deficiency judgment against Rhoden. We reverse the amount of deficiency awarded and remand to the trial court with instructions to offset the deficiency owed by the entire amount of the rental profits that the apartments earned during the receivership. We approve the trial court's use of the pro rata formula to allocate the costs under the February 27, 1990 judgment and the interest, late charges and attorney's fees under the April 26, 1990 judgment between the two loans.

Affirmed in part, reversed in part and remanded to the trial court with instructions.

CAMPBELL and PATTERSON, JJ., concur.

1. We note that the entire amount the FDIC realized on the sale of its interest in the notes and mortgages was applied to the nonrecourse note; it was not pro rated between the two obligations.

David Nicholas RAGOONANAN, a minor child, By his parents, David RAGOONANAN and Karen E. Ragoonanan, and David Ragoonanan and Karen E. Ragoonanan, individually, Appellants.

v.

ASSOCIATES IN OBSTETRICS & GYNECOLOGY; K.K. Yankopolus, M.D.; Philip F. Waterman, II, M.D.; Randall P. Cowdin, M.D., Stuart Don Levy, M.D.; and Hospital Board of Directors of Lee County d/b/a Lee Memorial Hospital, Appellees.

No. 92–02176.

District Court of Appeal of Florida, Second District.

June 11, 1993.

Claimants brought action against physicians and hospital for medical negligence

The Circuit Court, Lee County, R. Wallace Pack, J., granted physicians' and hospital's motions to dismiss for failure to cooperate in good faith with pre-suit discovery and failure to establish a reasonable basis for claim. The Court of Appeal, Threadgill, J., held that: (1) claimants' conduct did not constitute an unreasonable failure to cooperate in good faith with pre-suit discovery, and (2) claimant established reasonable basis for medical negligence claim despite their failure to provide name of medical expert.

Reversed.

1. **Physicians and Surgeons** ⇐18.20

Intent of statutory sections setting forth pre-suit requirements for medical negligence claims was to alleviate high cost of such claims by early determination of claims' merits and to provide for their prompt resolution, and these provisions were not intended to require pre-suit litigation of all issues in medical negligence claims nor to deny parties access to court on basis of technicalities. West's F.S.A. §§ 766.201–766.212.

2. **Pretrial Procedure** ⇐46

Failure to comply with pre-suit discovery does not mandate dismissal of claim, as dismissal is justified only where failure to cooperate is unreasonable, and even unreasonable conduct may not justify ultimate sanction of dismissal. West's F.S.A. § 766.205.

3. **Physicians and Surgeons** ⇐18.20

Claimants' conduct in medical negligence action did not constitute an unreasonable failure to cooperate in good faith with pre-suit discovery where claimants answered interrogatories propounded by hospital, appeared before three-member screening panel appointed by hospital, and supplied hospital with documents requested which were not already in hospital's possession, and where only deficiency in claimants' performance was their failure to provide name and address of their medical expert. West's F.S.A. § 766.205.

4. **Physicians and Surgeons** ⇐18.20

Purpose of requirement of providing expert corroborative opinion in medical negligence action is to prevent filing of baseless litigation.

5. **Physicians and Surgeons** ⇐18.20

Claimants in medical negligence action established reasonable factual basis for their claim, despite their failure to provide name and address of their medical expert, where their notice of intent to initiate litigation alleged that physicians were advised of claimants' family medical history of premature deliveries yet took no precautions against it, that claimants' child was born premature, and that child suffered serious permanent injuries including blindness as a result of premature birth. West's F.S.A. §§ 766.203(2), 766.206.

6. **Pretrial Procedure** ⇐531

Motions to dismiss are not favored methods of terminating litigation.

Roger E. Craig of Craig, Ryan & Mast, Naples, for appellants.

William E. Partridge of Lutz, Webb, Partridge, Bobo & Baitty, P.A., Sarasota, for appellees Associates in Obstetrics and Gynecology; K.K. Yankopolus, M.D.; Philip F. Waterman, II, M.D.; Randall P. Cowdin, M.D.; and Stuart Don Levy, M.D.

Robert C. McCurdy, Fort Myers, for appellee Hosp. Bd. of Directors of Lee County d/b/a Lee Memorial Hosp.

THREADGILL, Judge.

The Ragoonanans appeal orders dismissing their complaint for medical negligence. We reverse.

The Ragoonanans filed an action for medical negligence against the physicians and hospital from which Mrs. Ragoonanan received care during her pregnancy. The physicians and hospital filed motions to dismiss the complaint alleging that the Ragoonanans had failed to comply with the pre-suit requirements of chapter 766, Florida Statutes (1989). The physicians asked the trial court to determine, as provided by section 766.206, Florida Statutes (1989),

whether the Ragoonanans' claim rests on a reasonable basis and to determine whether the physicians are entitled to sovereign immunity under section 768.28(9)(a), Florida Statutes (1989). After hearing argument of counsel, the trial court granted these motions and dismissed the complaint without comment. The Ragoonanans filed this timely appeal.

[1] The intent of sections 766.201 through 766.212, Florida Statutes (1989), setting forth presuit requirements for medical negligence claims, is to alleviate the high cost of such claims by early determination of the claims' merits and to provide for their prompt resolution. § 766.201, Fla.Stat. (1989). These provisions were not intended to require presuit litigation of all the issues in medical negligence claims nor to deny parties access to the court on the basis of technicalities. Although the Ragoonanans' 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.

At the outset, we note that there is insufficient evidence in the record at this stage of the proceedings to determine the issue of sovereign immunity. *See Testa v. Pfaff*, 464 So.2d 220 (Fla. 1st DCA 1985). Thus, dismissal on that basis was premature.

[2, 3] We also reject as a ground for dismissal the hospital's claim that the Ragoonanans failed to cooperate in good faith with presuit discovery, as required by section 766.205, Florida Statutes. Failure to comply with presuit discovery does not mandate dismissal of a claim. *Wainscott v. Rindley*, 610 So.2d 649 (Fla. 3d DCA 1992). Dismissal is justified only where the failure to cooperate is unreasonable, and even unreasonable conduct may not justify the ultimate sanction of dismissal. *Id.* at 650. The only deficiency in the Ragoonanans' performance appearing in the record was their failure to provide the name of their medical expert. The Ragoonanans answered interrogatories propounded by the hospital, appeared before a three-member screening panel appointed by the hospital, and supplied the hospital with documents requested which were not already in the hospital's possession. Such conduct does not constitute an unreasonable failure to cooperate.

There remains the issue of whether the Ragoonanans' claim rests on a reasonable basis. Section 766.203(2) requires that

> Prior to issuing notification of intent to initiate medical malpractice litigation ... 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 ... which statement shall corroborate reasonable grounds to support the claim of medical negligence.

After completion of the presuit investigation, any party may request the court to determine whether the opposing party's claim rests on a reasonable basis. § 766.206, Fla.Stat. (1989). If the court finds the notice of intent to initiate litigation is not in compliance with the reasonable investigation requirements, the court shall dismiss the claim. *Id.*

[4] The purpose of the requirement of providing an expert corroborative opinion is to prevent the filing of baseless litigation. *Stebilla v. Mussallem*, 595 So.2d 136 (Fla. 5th DCA 1992). "[T]he notice of intent to initiate litigation and the corroborating medical expert opinion, taken together, must sufficiently indicate the manner in which the defendant doctor allegedly deviated from the standard of care, and must provide adequate information for the defendants to evaluate the merits of the claim." *Duffy v. Brooker*, 614 So.2d 539, 545 (Fla. 1st DCA 1993).

The physicians and hospital argue that the Ragoonanans' failed to make a reasonable presuit investigation of their claim be-

cause their corroborative expert opinion does not identify the purported expert nor specify the manner in which the physicians and hospital deviated from the standard of care. The opinion consists of a notarized letter which the notice of intent to initiate litigation identifies as the sworn statement of a " 'medical expert' as that term is defined in Florida Statute 766.202(5)." The signature on the notarized letter is illegible and there is no identifying letterhead. The letter provides as follows:

> I have been advised that your client, Karen Ragoonanan in the third month of her pregnancy told the physicians providing her prenatal care that, like her mother, she had a "weak cervix". At the time she also told them that her mother "had two premature deliveries before me and both died."
>
> The physician who responded told her she had nothing to worry about and no action was taken or advice given regarding the "weak cervix" information.
>
> Although the child was not due until approximately October 24, 1989, he was born June 27, 1989 and, although he survived, he suffered serious, permanent physical damage of a type associated with prematurity.
>
> Assuming the aforesaid account to be true and without significant mitigation, it is my professional opinion that the conduct of the physicians in question represented a breach of the prevailing professional standard of care expected of physicians in this country. No previous expert opinion I have expressed has been judicially disqualified.

The Ragoonanan's attorney was unable to provide the name and address of their expert to the physicians and hospital prior to the hearing on the motions to dismiss, but had identified the expert as a "board certified practicing OB/GYN." [1]

[5] In determining whether a party's claim rests on a reasonable basis, the 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 medical expert opinion. However, the failure to provide an adequate verified written medical expert opinion is not dispositive. If the greater weight of the evidence establishes that the non-moving party did conduct a 'reasonable investigation' and that its notice of intent to sue or response rejecting the claim 'rests on a reasonable basis,' the motion will be denied.

614 So.2d at 545.

An inescapable inference of negligence arises even for the lay person from the facts set forth in the notice of intent to initiate litigation and the corroborative expert opinion. Taking the facts in the notice as true, the physicians were advised of Mrs. Ragoonanan's family medical history yet took no precautions against a repetition of her mother's experiences. Indeed, like two of the children born to her mother, Mrs. Ragoonanan's child was born premature. As a result, the child suffered serious permanent injuries including blindness. Thus, the Ragoonanans have satisfied the intent of the statute by outlining a factual basis from which the merits of the claim can be determined. *See* 614 So.2d at 546. To bar the Ragoonanans 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.

[6] Motions to dismiss are not favored methods of terminating litigation. *Bd. of County Commissioners v. Aetna Cas. & Sur.*, 604 So.2d 850, 851 (Fla. 2d DCA 1992). Because the greater weight of the evidence suggests that the Ragoonanans conducted a reasonable investigation, dismissal was an abuse of discretion. *See* 614 So.2d at 545.

620

1. Section 766.202(5) defines medical expert as "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."

We have considered the Ragoonanans' remaining points on appeal and find them to be without merit. Accordingly, we reverse and remand for reinstatement of the complaint.

Reversed.

CAMPBELL, A.C.J., and BLUE, J., concur.

Andrew J. CHARNESKI, Appellant,

v.

STATE of Florida, Appellee.

No. 92-1089.

District Court of Appeal of Florida, Fifth District.

June 11, 1993.

Defendant was convicted of aggravated battery and simple battery following trial in Circuit Court, Volusia County, John V. Doyle, J., and he appealed. The District Court of Appeal, Cobb, J., held that testimony that defendant had heard and believed that victim, who had allegedly seized defendant's truck keys at bar, had recently gotten out of prison was relevant.

Reversed and remanded for new trial.

Criminal Law ⇐390

In prosecution for aggravated battery in which defendant contended that incident was precipitated by victim's seizure of defendant's truck keys, causing him concern about valuable tools in the truck, defendant's testimony that he had heard and believed that victim had recently been released from prison was relevant and admissible in relation to defendant's concern about his truck keys.

James B. Gibson, Public Defender, and Brynn Newton, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Barbara C. Davis and Belle B. Turner, Asst. Attys. Gen., Daytona Beach, for appellee.

COBB, Judge.

The appellant, Andrew Charneski, was convicted of aggravated battery on one David Cripanuk and simple battery on the latter's father, Peter Cripanuk. The charges arose from a fracas that originated between Charneski and David Cripanuk at a bar and culminated in a physical altercation some distance down the road within and beside Peter Cripanuk's truck. The Cripanuks' version of the altercation was that they were the victims of an unprovoked attack by an aggressive and inebriated Charneski; the latter's version was that the incident was precipitated by David's seizure of his (Charneski's) truck keys at the bar and running off with them, causing him concern because of valuable tools in the truck and his knowledge that David Cripanuk had recently been released from prison.

During the course of the defendant's direct testimony, the following colloquy occurred:

[DEFENSE COUNSEL]:

Q. Is there anything that they had ever done or said prior to this incident that played any part in your decision to act in the way that you did?

[PROSECUTOR]: Objection. Relevancy.

THE WITNESS: Dave just got out of jail.

[PROSECUTOR]: Objection. Relevancy to other acts, other prior acts are not related to this incident.

THE COURT: Restate the question.

[DEFENSE COUNSEL]: Was there anything that they had ever done or said prior to this incident that played any part in your decision to strike back in the manner that you did?

THE COURT: Overruled.

v. State, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); Charles Ehrhardt, *Florida Evidence* § 608.6 (2d ed. 1984). (b) The trial court did not, as urged, commit reversible error in restricting the cross-examination of a state witness by sustaining an objection to a question as to whether the victim's telephone had been disconnected. Even if error, the error was entirely harmless because the witness stated she did not recall whether this was true. *See Lambrix v. State*, 494 So.2d 1143 (Fla.1986); *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

[6] Finally, we find no reversible sentencing scoresheet error as to the defendant Brad Ruland. The thirty-six points scored for severe victim injury in this case is fully established by the evidence adduced below. As to the other claimed fifteen-point scoring error, even if the disputed offense was scored as a misdemeanor, rather than a second-degree felony, the sentencing guidelines range would remain the same, and any error here was harmless. *Davis v. State*, 565 So.2d 826 (Fla. 5th DCA 1990); *Vandeneynden v. State*, 478 So.2d 429 (Fla. 5th DCA 1985); *see Peeples v. State*, 575 So.2d 316 (Fla. 2d DCA 1991); *Pire v. State*, 575 So.2d 299 (Fla. 4th DCA 1991).

Affirmed.

KEY NUMBER SYSTEM

Patrick M. DUFFY, M.D., and Physicians Protective Trust Fund, Appellants,

v.

Betty BROOKER, as Personal Representative of the Estate of Ronald Brooker, Deceased, Appellee.

Nos. 91-3847, 91-3877.

District Court of Appeal of Florida, First District.

Jan. 21, 1993.

Physician and his medical malpractice insurer appealed from order of the Circuit Court, Clay County, Peter D. Webster, J., imposing sanctions upon insurer in medical malpractice action. The District Court of Appeal, Barfield, J., held that: (1) insurer's cryptic response and form "corroboration" statements satisfied patient's burden of going forward, and (2) physician and insurer failed to present sufficient competent evidence to outweigh patient's prima facie showing that they had not conducted a reasonable investigation and that their denial of claim did not rest on reasonable basis.

Affirmed.

Booth, J., concurred in result, with statement.

1. Physicians and Surgeons ⇐18.20

Medical malpractice claimant's failure to produce corroborating medical expert opinion prior to running of statute of limitations will not result in dismissal of complaint as matter of law, but may subject claimant to sanctions. West's F.S.A. §§ 766.106(6), 766.206(2).

2. Physicians and Surgeons ⇐18.60

Physician's response, including gastroenterologist's supporting statement, constituted prima facie evidence of lack of reasonable basis for denial of medical malpractice claim, which was sufficient to shift burden to physician to show compliance with "reasonable investigation" requirements of Medical Malpractice Act, and that denial of claim did rest on reasonable basis. West's F.S.A. §§ 766.203(3), 766.206(1).

3. Physicians and Surgeons ⇐18.20

Physician's medical malpractice insurer's cryptic response rejecting medical malpractice claim did not rest on reasonable basis; corroborating medical expert opinion was conclusory and did not indicate that reasonable investigation had been conducted prior to issuance of insurer's response. West's F.S.A. § 766.203(3).

4. Physicians and Surgeons ⇐18.20

Notice of intent to initiate litigation and corroborating medical expert opinion

required by Medical Malpractice Act, taken together, must sufficiently indicate manner in which defendant physician allegedly deviated from standard of care, and must provide adequate information for defendants to evaluate merits of the claim; reciprocally, defendant physician's response and corroborating statement must contain additional or supplemental information which strengthens conclusions offered by medical expert, and not merely a reiteration of statement to be corroborated. West's F.S.A. § 766.203(2, 3).

Gary A. Shipman and Richard B. Collins, of Collins, Dennis & Truett, Tallahassee, and Bambi G. Blum and Mark Hicks, of Hicks, Anderson & Blum, P.A., Miami, for appellants.

Samuel Hankin and Phil C. Beverly, Jr., of Hankin & Beverly, P.A., Gainesville, for appellee.

Peter S. Branning, P.A. and Susan J. Silverman, Sarasota, for Amicus Curiae, Academy of Florida Trial Lawyers.

BARFIELD, Judge.

Dr. Duffy and his medical malpractice insurer appeal a final order imposing sanctions upon the insurer under section 766.206, Florida Statutes (1989). We affirm.

In August 1990, pursuant to section 766.106, Mrs. Brooker filed a notice of intent to initiate malpractice litigation against Dr. Duffy for the death of her husband. Pursuant to section 766.203(2), the notice was accompanied by the four page affidavit of Dr. Stahl, a board certified gastroenterologist and internist, which stated that, within a reasonable degree of medical probability, there are reasonable grounds to believe that Dr. Duffy was negligent in the care or treatment of Brooker and that such negligence resulted in injury to him. The affidavit outlined the documents Dr. Stahl reviewed and the grounds for the claim of negligent injury. Dr. Stahl concluded that, in not considering an alternate diagnosis and pursuing the appropriate studies, Dr. Duffy fell below acceptable medical standards of care.

In December 1990, Daniel Stephens, a claims adjustor for Physicians Protective Trust Fund (PPTF), Duffy's insurer, responded with a letter which stated:

> After a thorough review of this matter, we find no basis to support a claim of negligent injury against Dr. Patrick Duffy. Thereby your client's claim is hereby denied. Enclosed is a copy of the required corroborating affidavit to support our position.

Attached was the following unnotarized statement of Dr. Edgerton:

> I hereby state the following:
>
> 1. That I am a medical expert as defined by Florida Statute 766.202(5);
>
> 2. That my medical opinion based upon review of the claim made by RONALD BROOKER, DECEASED, against PATRICK A. DUFFY, M.D. corroborates reasonable grounds for lack of negligent injury pursuant to Florida Statute 766.203(3);
>
> 3. That I have not rendered any previous medical opinion which has been disqualified pursuant to Florida Statute 766.203(4);
>
> I HEREBY CERTIFY THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND ABILITY.

Mrs. Brooker filed her complaint against Dr. Duffy in February 1991. Thereafter, she filed a "Motion Requesting Determination as to Whether Defendant's Denial of Claim Rests on a Reasonable Basis Pursuant to § 766.206(1), F.S." Dr. Duffy's attorney filed a response to the motion, attaching a notarized sworn statement from Edgerton similar to the first, except with this added paragraph:

> 4. That I have previously rendered said medical opinion on December 11, 1990, and that said expert opinion was inadvertently not sworn and attested to. My opinions have not deviated or changed any from the opinion rendered on December 11, 1990.

At the hearing on the motion, the trial judge instructed the parties that there were two issues (whether Edgerton's state-

ment complied with section 766.203(3), and whether a reasonable investigation was made by the insurance company and/or by Edgerton) and that Brooker had the burden of making out a prima facie case under the statute, at which time the burden of going forward would shift to the defendant. The only witness on the merits was Catherine Burney, the present adjustor (Stephens had left PPTF six months before).

Burney testified that she had not participated in the presuit screening. The file indicated that the case was turned over to PPTF on September 10, 1990, and that they acknowledged by letter on September 14, 1990. Burney testified that the first medical review would have been performed by Stephens, who is a registered nurse, and that the records were also sent to Dr. Edgerton, a board certified gastroenterologist.

The file indicated that Stephens asked for an extension of the statutory 90-day period in order to forward additional records sent to PPTF on November 15, 1990. Burney testified that PPTF sent Brooker's attorneys a copy of the medical records on September 27, 1990, some of which were illegible. Stephens wrote on October 4, 1990, that he was a victim of the hospital as to the quality of the records. On November 15, 1990, Brooker's attorneys forwarded legible copies of the records. Burney testified that she did not know when Dr. Edgerton first looked at the records, and that PPTF's attorney was involved only to the extent that he appeared at an unsworn statement.[1]

On cross-examination, 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 had no on-hand involvement with the review of the claim.

Defense counsel moved for a directed judgment on the motion, citing *Damus v. Parvez*, 556 So.2d 1136 (Fla. 3d DCA 1989), for the proposition that the verified corroborating statement was timely produced before the hearing. The trial judge asked defense counsel, assuming that the verification requirement had been met, how they had complied with the requirement of "reasonable grounds for lack of negligent injury." He expressed concern that Dr. Edgerton's statement contained no grounds for his conclusion, noting "to me, corroborate means provide some factual basis for the conclusion that's reached."

Claimant's counsel cited *Dressler v. Boca Raton Community Hospital*, 566 So.2d 571 (Fla. 4th DCA 1990), *rev. den.*, 581 So.2d 164 (Fla.1991), arguing that PPTF's response did not indicate what kind of doctor Edgerton was, what he had reviewed, or "what aspect of our alleged negligence he was refuting." He also cited *Farmers Insurance Exchange v. Colton*, 264 Or. 210, 504 P.2d 1041 (1972), defining "corroboration" as "something which leads an impartial and reasonable mind to believe that material testimony is true, testimony of some substantial fact or circumstances independent of a statement of a witness." The trial judge observed: "It's a simple question of what did the legislature intend when they adopted this statute."

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 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 review and consultation session" between the claims adjustor and the expert reviewer, "during which the entire medical record

1. Under section 766.106(7), either party may take the unsworn statement of the other for the purpose of presuit screening only. PPTF asserts in its brief that Dr. Duffy's unsworn statement was taken.

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.

The trial judge issued a twelve page order granting Brooker's motion, striking PPTF's response, and holding PPTF "personally responsible to plaintiff" for reasonable attorney fees and costs incurred during the investigation and evaluation of the claim. Having outlined the statutory framework and the relevant facts, the judge observed that certain propositions were clear from the "presuit investigation" provisions of chapter 766.

He found that the presuit investigation provisions are an integral part of "a plan for prompt resolution of medical negligence claims" designed to "facilitate amicable resolution" of such claims. He found that the provisions apply to all medical negligence claims and defenses, and were intended to facilitate "early determination of the merit of claims" and to allow the parties to "verify" that a "reasonable investigation" has preceded the making of both claims and defenses in medical negligence actions. He found that any party may request that the court determine whether an opposing party's claim or denial "rests on a reasonable basis," and that if the court finds that the response rejecting the claim "is not in compliance with the reasonable investigation requirements," it must impose the sanctions set out in section 766.206(3).

He observed that under section 766.206 the burden of persuasion and the initial burden of going forward rest on the moving party and that the burden of persuasion never shifts, but that once the moving party presents a prima facie case that the opposing party's claim or denial does not rest "on a reasonable basis," the burden of going forward shifts to the opposing party to present evidence that it complied with the "reasonable investigation" requirements and that its claim or denial does rest "on a reasonable basis." He found that Brooker had presented a prima facie case to establish that PPTF's response rejecting the claim was not in compliance with the "reasonable investigation" requirements of the statute and did not rest on a reasonable basis, noting:

> There is no factual information of any nature whatsoever in either the letter of December 13, 1990, from Stephens to plaintiff's attorney or the "CORROBORATION OF MEDICAL EXPERT OPINION" signed by Dr. Edgerton by which one might "verify" that a "reasonable investigation" had preceded denial by Physicians of the claim. In particular, the Court notes that, in its opinion, Dr. Edgerton's statement consists of nothing more than a series of legal conclusions. It identifies neither the medical records which Dr. Edgerton reviewed nor the factual bases upon which his ultimate legal conclusion rests. It does not set forth Dr. Edgerton's professional qualifications, so that one might attempt to "verify" whether Dr. Edgerton qualifies as a "medical expert," as that term is defined in Section 766.202(5). In fact, it does not even indicate where Dr. Edgerton practices. Moreover, because of these deficiencies, it is impossible to determine intelligently whether or not Dr. Edgerton made a "reasonable investigation" (or, for that matter, whether he made *any* investigation). *See* § 766.206(5)(a), Fla.Stat. (1989).

He did not consider significant the question of whether the medical opinion had originally been notarized.

He found that in response to the claimant's case, PPTF had presented only Bur-

ney, who testified that she had not participated in any of the presuit investigation. He found:

> Other than the obviously biased (in the legal sense) conclusory testimony that Physicians performed "a good-faith review" and that the determination that Dr. Duffy had not been negligent had, likewise, been made "in good faith," Burney was unable to offer any specific insight into the nature of the "investigations" (if any) performed by either Stephens or Dr. Edgerton.

He concluded 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 rest "on a reasonable basis," noting:

> The Court is convinced that a contrary conclusion would fly in the face of the clearly expressed legislative intent behind the "presuit investigation" requirements—*i.e.*, to permit early evaluation of the merit of claims and defenses and, thereby, to encourage meaningful presuit negotiations. *See generally Dressler v. Boca Raton Community Hospital*, 566 So.2d 571 (Fla. 4th DCA1990).

We affirm the trial court's order, but we consider that this case merits discussion. Some of the pertinent provisions of chapter 766 are ambiguous and confusing, but read *in pari materia*, they constitute a plan for prompt resolution of medical negligence claims which requires the parties to provide each other with adequate information to evaluate the claims and defenses, and which encourages meaningful presuit settlement negotiations. None of the cases cited by the parties are on point, but they do give some indication of the legislative intent behind the statutory scheme for presuit investigation and evaluation of medical malpractice claims.

Section 766.104(1) provides that no medical negligence action shall be filed "unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant." It also provides that "good faith" may be shown if the claimant or his counsel has received a written opinion of an expert "that there appears to be evidence of medical negligence." Attorney fees and costs are awardable against the claimant's counsel if the court finds that the attorney did not act in good faith and "that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery." Section 766.104(2) provides for a 90–day extension of the statute of limitations "to allow the reasonable investigation required by subsection (1)."

Section 766.106(2) requires the claimant, after completing the presuit investigation pursuant to section 766.203 and prior to filing a claim for medical malpractice, to notify each prospective defendant "of intent to initiate litigation for medical malpractice." Section 766.106(3)(a) provides that no suit may be filed for a period of 90 days after the notice is mailed, and requires the insurer to "conduct a review to determine the liability of the defendant" during that period. It also provides that each insurer "shall have a procedure for the prompt investigation, review, and evaluation of claims during the 90–day period" and offers four alternative suggestions, including: 1) internal review by a "duly qualified claims adjustor"; 2) creation of a panel consisting of the adjustor, an attorney, and a medical expert; 3) a contractual agreement with a medical society which has a medical review committee; and 4) "any other similar procedure which fairly and promptly evaluates the pending claim."

Section 766.106(3)(b) provides:

> At or before the end of the 90 days, the insurer or self-insurer shall provide the claimant with a response:
>
> 1. Rejecting the claim;
> 2. Making a settlement offer; or
> 3. Making an offer of admission of liability and for arbitration on the issue of damages. This offer may be made contingent upon a limit of general damages.

Section 766.106(3)(c) requires that the response be provided by certified mail, and provides that failure to reply to the notice

within the 90–day period "shall be deemed a final rejection of the claim for purposes of this section."

Section 766.203(2) requires the claimant to conduct an investigation prior to issuing the notice of intent to initiate litigation,

> to ascertain that there are reasonable grounds to believe that:
>
> (a) Any named defendant in the litigation was negligent in the care and treatment of the claimant; and
>
> (b) Such negligence resulted in injury to the claimant.

Section 766.203(3) requires the defendant or the insurer to conduct an investigation prior to issuing its response,

> to ascertain whether there are reasonable grounds to believe that:
>
> (a) The defendant was negligent in the care or treatment of the claimant; and
>
> (b) Such negligence resulted in injury to the claimant.

Section 766.202(4) defines "investigation" to mean "that an attorney has reviewed the case against each and every potential defendant and has consulted with a medical expert and has obtained a written opinion from said expert." The presuit investigations must be "verifiable," section 766.201(2)(a).

[1] Section 766.203(2) also requires the claimant to provide "corroboration of reasonable grounds to initiate medical negligence litigation" by submission of "a verified written medical expert opinion" at the time the notice of intent to sue is mailed, "which statement shall corroborate reasonable grounds to support the claim of medical negligence." [2] Section 766.203(3) requires that "corroboration of lack of reasonable grounds for medical negligence litigation" be provided with any response rejecting the claim, by submission of "a verified written medical expert opinion" at the time the response is mailed, "which statement shall corroborate reasonable grounds for lack of negligent injury sufficient to support the response denying negligent injury." [3]

Sections 766.106(5)–766.106(9) and 766.204–766.205 provide for informal presuit discovery and require each party to provide the other with "reasonable access to information within its possession or control in order to facilitate evaluation of the claim."

Section 766.206(1) provides that after completion of presuit investigation and any informal discovery, "any party may file a motion in the circuit court requesting the court to determine whether the opposing party's claim or denial rests on a reasonable basis."

Section 766.206(3) provides that if the court finds "that the response mailed by the defendant rejecting the claim is not in compliance with the reasonable investigation requirements," it "shall strike the defendant's response, and the person who mailed such response, whether the defendant, the defendant's insurer, or the defendant's attorney, shall be personally liable for all attorney's fees and costs incurred during the investigation and evaluation of the claim, including the reasonable attorney's fees and costs of the claimant." Section 766.206(2) is a similar provision aimed at the claimant's compliance with the reasonable investigation requirements.

When one of the parties files a motion under section 766.206, the trial court must determine whether the opposing party's claim or denial "rests on a reasonable basis" and whether the notice of intent to sue

2. 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). *Stebilla v. Mussallem*, 595 So.2d 136 (Fla. 5th DCA), *rev. den., Mussallem v. Stebilla*, 604 So.2d 487 (Fla.1992).

3. If no written response rejecting the claim is sent within the 90–day period, the claim is deemed rejected by operation of section 766.106(3)(c). If no written response rejecting the claim is sent, the "corroboration" requirement of section 766.203(3) is not activated. However, this does not excuse the requirement that the defendant conduct a "reasonable investigation" and determine in good faith whether to reject the claim, failure of which may subject the defendant to sanctions under section 766.206(3) and/or section 766.106(6). *Stebilla; Damus v. Parvez*, 556 So.2d 1136 (Fla. 3d DCA1989).

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or the response rejecting the claim is "in compliance with the reasonable investigation requirements of ss. 766.201–766.212." If the greater weight of the evidence establishes that the non-moving party did not conduct a "reasonable investigation" and that its notice of intent to sue or response rejecting the claim does not "rest on a reasonable basis," the motion will be granted.

In making this determination, the 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 medical expert opinion. However, the failure to provide an adequate verified written medical expert opinion is not dispositive. If the greater weight of the evidence establishes that the non-moving party did conduct a "reasonable investigation" and that its notice of intent to sue or response rejecting the claim "rests on a reasonable basis," the motion will be denied.

Section 766.206(5)(a) provides that if the court finds "that the corroborating written medical expert opinion attached to any notice of claim or intent or to any response rejecting a claim lacked reasonable investigation," it shall report the medical expert to the Division of Medical Quality Assurance or its designee. Section 766.206(4) provides for discipline of an attorney acting without reasonable investigation.

[2, 3] We find that the trial judge's rulings regarding the burden of persuasion and the burden of going forward under section 766.206 were correct. We agree that the defendant's 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 rest "on a reasonable basis."

[4] The Academy of Florida Trial Lawyers, appearing as amicus curiae in this case on the side of appellee, argue that "corroborate" has a plain, ordinary, and obvious meaning, citing The American Heritage Desk Dictionary (1981) and Black's Law Dictionary, Fifth Edition (1979). It contends that section 766.203(3) requires that the medical expert's "corroborating" statement contain "additional or supplemental information which strengthens the conclusions offered by the medical expert." It asserts that Dr. Edgerton's statement did not comply with the requirements of section 766.203(3) because it contained no additional facts or circumstances to confirm his "conclusory allegations."

We agree that the Florida Legislature contemplated the type of "corroboration" urged by the Academy when it attempted to reform the Medical Malpractice Act, and not merely a reiteration of the statement to be corroborated. In order to comply with the spirit and intent of the statute, to promote "fruitful negotiation" as noted in *Dressler*, the notice of intent to initiate litigation and the corroborating medical expert opinion, taken together, must sufficiently indicate the manner in which the defendant doctor allegedly deviated from the standard of care, and must provide adequate information for the defendants to evaluate the merits of the claim. Since the statutory provisions are reciprocal, the response and the corroborating medical expert opinion, taken together, must sufficiently indicate that the defendant doctor did not deviate from the standard of care, or that the defendant doctor was not liable for the claimant's injury, or that the claimant suffered no injury.

At oral argument, Brooker's counsel argued that section 766.203(3) requires the corroborating statement to affirm that the medical expert has reviewed the medical records and has concluded that the defendant doctor did not practice below the medical standard of care, or that the defendant doctor did not cause the claimant's injury.

Later, he conceded that the specific language of section 766.203 requires only that the verified written corroborating statement attest that there exist reasonable grounds to believe that the defendant doctor was not negligent. We interpret sections 766.203(2) and 766.203(3) to require that the "corroboration" statements outline the factual basis for the medical experts' opinions, in keeping with the legislative purpose to permit early evaluation of the merit of claims and defenses and thereby encourage meaningful presuit negotiations.

Dr. Edgerton's statement clearly did not satisfy the requirements of section 766.203(3), and did not indicate that a reasonable investigation had been conducted prior to issuance of the response denying the claim. While section 766.206(3) provides sanctions for failure to conduct a reasonable investigation prior to filing the response, we find no statutory sanction for providing an inadequate corroboration, or no corroboration, with the response rejecting the claim, and no statutory sanction for failing to reply at all to the notice of intent to initiate litigation, notwithstanding that all such failures to comply with the statutory scheme are plainly at cross-purposes to the spirit and intent of the legislature in enacting the medical malpractice reforms. We make this observation considering that the Florida Legislature may wish to provide such sanctions as an incentive to the parties to comply with its "plan for prompt resolution of medical negligence claims." Section 766.201(2), Florida Statutes (1989).

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.

The trial court's order is AFFIRMED.

MINER, J., concurs.

BOOTH, J., specially concurs with opinion.

BOOTH, Judge, specially concurring.

I concur in the result of this opinion.

Patrick M. DUFFY, M.D., and Physicians Protective Trust Fund, Appellants,

v.

Betty BROOKER, as Personal Representative of the Estate of Ronald Brooker, Deceased, Appellee.

Nos. 91-3847, 91-3877.

District Court of Appeal of Florida, First District.

March 10, 1993.

Upon entry of judgment in the Circuit Court, Clay County, Peter D. Webster, J., medical malpractice plaintiff sought award of appellate attorney fees. The District Court of Appeal denied plaintiff's motion, and plaintiff sought reconsideration. The District Court of Appeal, Barfield, J., held that plaintiff was not entitled to award of attorney fees under statute imposing liability upon party whose presuit response to malpractice claim fails to comply with statutory reasonable investigation requirements for attorney fees and costs of claimant incurred during investigation and evaluation of claim.

Motion denied.

Costs ⇐252

Medical malpractice plaintiff was not entitled to award of appellate attorney fees under statute imposing limited sanctions upon party whose response rejecting medical malpractice claim is not in compliance with statutory reasonable investigation re-

§ 12, Laws of Fla.

[2]Under the Act:

(a) "Agency" means any state, regional, county, local, or municipal government entity, whether executive, judicial, or legislative; any official, officer, department, division, bureau, commission, authority, or political subdivision therein; or any public school, community college, or state university.

§ 112.3187(3)(a), Fla. Stat. (1991).

[4]Prudential argues that under the wording of the statute, the only violation which would qualify would be one which threatens the health, safety, or welfare of the public at large. If the statute were given that interpretation, it would defeat the remedial purpose since there would be few, if any, situations to which the statute would apply. We do not think that the legislature intended any such interpretation.

[5]For a general discussion of this statute see *Walsh v. Arrow Air, Inc.*, 629 So. 2d 144 (Fla. 3d DCA 1993), *review granted*, 639 So. 2d 975 (Fla. May 13, 1994). The present case does not involve the retroactivity issue contained in *Walsh*.

* * *

Torts—Medical malpractice—Presuit requirements—Medical malpractice action alleging negligent misdiagnosis of injury during visits to hospital emergency room—Physician's affidavit in support of notice of intent to initiate litigation was not deficient by being executed by expert who was not emergency room physician—Notice of intent and affidavit satisfied presuit requirements by informing defendants that, after review of records, expert opined that amputation of plaintiff's leg resulted from defendants' negligent care and treatment during his visits to the emergency room—Judgments for defendants based on inadequacy of notice and affidavit reversed

CHARLES MALDONADO, Appellant, v. EMSA LIMITED PARTNERSHIP; and CEDARS MEDICAL CENTER, INC., Appellees. 3rd District. Case Nos. 93-1001, 93-527. Opinion filed November 9, 1994. Appeals from the Circuit Court for Dade County, James C. Henderson, Judge. Counsel: James C. Blecke, for appellant. Holland & Knight and Daniel S. Pearson and Lucinda A. Hofmann; Adams & Adams and Mai-Ling E. Castillo and R. Wade Adams, for appellees.

(Before BASKIN, LEVY and GERSTEN, JJ.)

(PER CURIAM.) Charles Maldonado appeals from final summary judgments entered in favor of Cedars Medical Center, Inc., and EMSA Limited Partnership in a medical malpractice case. We reverse the judgments.

On July 29 and August 1, 1990, Maldonado went to Cedars' emergency room complaining of foot pain. On both occasions EMSA's emergency room physicians diagnosed Maldonado's problem as an ankle sprain. On August 8, Maldonado returned to Cedars complaining of foot pain and was admitted to Cedars. Diagnosed as having ischemia, Maldonado underwent an unsuccessful aortic thrombectomy on his leg. He then underwent a below-the-knee amputation of his right leg on or about August 31, 1990.

In November 1991, Maldonado mailed Cedars a notice of intent to initiate litigation and the supporting affidavit of a general surgeon. Maldonado sent EMSA a notice and affidavit in January 1992.[1] In February, Cedars denied liability and sent Maldonado the affidavit of a physician stating that Cedars was not negligent.[2] In April, EMSA responded to the notice, denied liability, and submitted the affidavit of a general surgeon stating that EMSA was not negligent.[3] In July, Maldonado filed a medical malpractice action against EMSA and Cedars[4] alleging that he suffered the amputation of his right leg as a result of the negligent treatment and care by defendants' staff. Maldonado contended that defendants failed to discern the absence of a pulse in his leg during his initial visits to Cedars misdiagnosing of Maldonado's injury. EMSA answered and raised the defense that Maldonado submitted an expert's affidavit "which does not on its face corroborate reasonable grounds to properly support the claims against this Defendant." In its answer, Cedars made a general denial of Maldonado's presuit compliance allegation. The parties proceeded to engage in discovery.

In October 1992, EMSA filed a motion for summary judgment contending, in pertinent part, that Maldonado's expert was unqualified to render an opinion.[5] The trial court granted EMSA's motion. After the statute of limitations had run, in March 1993, Cedars sought summary judgment based on the previous judgment entered in favor of EMSA and Maldonado's failure to provide a corroborating opinion that sets forth the grounds for Cedars' negligence.[6] The court did not conduct an evidentiary hearing on defendants' motions and entered final summary judgments in favor of defendants without providing the basis of its rulings. Maldonado seeks reversal of the judgments. Holding that the trial court erred in entering judgments in favor of defendants that resulted in denial of Maldonado's access to the courts, we reverse.

In *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993), the Florida Supreme Court stated that "[the] narrow construction of the chapter 766 presuit notice requirements is in accord with the rule that restrictions on access to the courts must be construed in a manner that favors access." *Patry v. Capps*, 633 So. 2d 9, 13 (Fla. 1994) ("when possible the presuit notice and screening statute should be construed in a manner that favors access to courts"); *Boyd v. Becker*, 627 So. 2d 481, 483 (Fla. 1993). Such construction must not deviate from the goals of the chapter 766 presuit requirements "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. The judgments under review run counter to this rule of construction.

The record shows that Maldonado's expert was qualified to render an opinion as to defendants' negligence in compliance with the requirements of section 766.202(5) defining "medical expert." Contrary to defendants' contention, section 766.102(6), Florida Statutes (1989), does not delineate the requisite qualifications of the expert offering the presuit affidavit.[7] Section 766.203(2) provides, in pertinent part, that "[c]orroboration 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)* . . . ." (e.s.). Section 766.202(5) provides that "[a]s used in ss. 766.201-766.212, the term 'medical expert' means 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." Section 766.202(5), which defines medical expert as expressly applicable to section 766.203, provides a less stringent standard than the section delineating the standard for admission of expert testimony in an action involving emergency medical services. The less stringent standard of section 766.202(5) is in keeping with the legislative aim of preventing frivolous lawsuits without denying a claimant's access to court.

Section 766.203(2) directs claimant to conduct an investigation to ascertain that there are reasonable grounds to believe that defendant was negligent. It does not require that claimant establish defendant's negligence or prove its case during the presuit screening process.

> [If] the provisions of sections 766.201-212 are 'not to be allowed to impinge upon plaintiffs' right of access to the courts, [those sections] must be construed as imposing on plaintiffs only reasonable and limited duties, for a limited time, before allowing them to file suit in courts of this state.'

Wolfsen v. Applegate, 619 So. 2d 1050, 1055 (Fla. 1st DCA 1993) (quoting *Williams v. Powers*, 619 So. 2d 980, 983 (Fla. 5th DCA 1993)) (citations omitted); *Shands Teaching Hosp. & Clinics, Inc. v. Barber*, 638 So. 2d 570 (Fla. 1st DCA 1994); *Ragoonanan v. Associates in Obstetrics & Gynecology*, 619 So. 2d 482, 484 (Fla. 2d DCA 1993); *Stebilla v. Mussallem*, 595 So. 2d 136 (Fla. 5th DCA), *review denied*, 604 So. 2d 487 (Fla. 1992). Section 766.102(6) concerning the admissibility of expert testimony in cases involving emergency medical services need

217, 219 (Fla. 2d DCA 1994) (cause remanded so that plaintiff may remove any deficiency with regard to physician's verification: "Dismissal without leave to amend after the statute of limitation had expired was too severe a remedy.").

* * *

Civil procedure—Service of process—Judgment against limited partnership was void where, although plaintiff accomplished service of process on corporation which was general partner of the limited partnership, the partnership itself was never served—Stipulation for settlement which listed limited partnership as a party and which expressly waived service did not validly bring partnership within court's jurisdiction because stipulation was executed by president of partnership's corporate general partner, who was not an attorney, and who therefore could not appear in trial court on behalf of the corporation in its capacity as general partner

PHARMAFAX, INC., a Florida corporation, and PHARMAFAX, LTD., a limited partnership, Appellants, v. MIKE SEGAL, P.A., Appellee. 3rd District. Case No. 94-1882. Opinion filed November 9, 1994. An Appeal from the Circuit Court for Dade County, Eleanor Schockett, Judge. Counsel: Lionel Barnet, for appellants. Rumberger, Kirk & Caldwell and F. Laurens Brock and Joshua D. Lerner, for appellee.

(Before HUBBART, LEVY, and GREEN, JJ.)

(PER CURIAM.) In this appeal from the denial of motions for relief from judgment, we affirm in part, reverse in part, and remand.

Mike Segal, P.A. (Segal) filed suit against Pharmafax Incorporated for $32,037.98 in unpaid legal fees. The complaint named Pharmafax Incorporated as a defendant, but did not name as a defendant Pharmafax Limited, a limited partnership of which Pharmafax Incorporated is the general partner. Segal obtained service of process on Pharmafax Incorporated by serving its president, Jose Regalado, in his capacity as president of Pharmafax Incorporated. Pharmafax Incorporated did not answer the complaint, and Segal's attorney later prepared a settlement stipulation to settle the suit. This stipulation listed not only Pharmafax Incorporated, but also Pharmafax Limited, as parties to the suit. Regalado signed the stipulation on May 3, 1990, on behalf of both entities, and the stipulation was filed with and approved by the trial court. Significantly, neither Pharmafax Incorporated nor Pharmafax Limited were represented by counsel at that time.

Pharmafax Incorporated later breached the settlement agreement by failing to make a required payment which was due on February 1, 1991. Consequently, on March 5, 1991, Segal obtained an ex parte final judgment against Pharmafax Incorporated and Pharmafax Limited. The judgment was for the outstanding balance owed ($7,911.78), plus attorney's fees ($1,000), and was obtained pursuant to the terms of the settlement stipulation, which provided for the entry of a final judgment for the outstanding balance upon a missed payment.

On August 6, 1991, Pharmafax Incorporated and Pharmafax Limited each filed Florida Rule of Civil Procedure 1.540 motions to set aside the judgment, and to set aside the court-approved settlement stipulation. The trial court denied the motions, and both Pharmafax Incorporated and Pharmafax Limited now appeal.

We have considered the arguments made by Pharmafax Incorporated, and conclude that because it demonstrated no basis for relief, the trial court properly denied its motion.

However, we cannot reach the same conclusion with respect to Pharmafax Limited. There was no service of process upon Pharmafax Limited at any time during the course of this lawsuit.[1] Consequently, the judgment against it was void, and was properly subject to being set aside at any time by way of a motion for relief from judgment. *See* Fla. R. Civ. P. 1.540(b)(4); *Shields v. Flinn*, 528 So. 2d 967, 968 (Fla. 3d DCA 1988) (a judgment entered without notice is void and merits relief under Rule 1.540(b)(4) regardless of the timeliness of the motion); *Kennedy v. Richmond*, 512 So. 2d 1129, 1130 (Fla. 4th DCA 1987) (a judgment entered without service of process is void, and will be set aside by way of a Rule 1.540(b)(4) motion); *Falkner v. Amerifirst Fed. Savs. and Loan Ass'n*, 489 So. 2d 758, 759 (Fla. 3d DCA 1986) ("A judgment entered without due service of process is void", and may be set aside at any time pursuant to Rule 1.540(b)(4)); *Knight v. Global Contact Lens, Inc.*, 319 So. 2d 622, 623 (Fla. 3d DCA 1975) (a judgment may not be entered against a party who has not been served with process or otherwise properly made a party to the lawsuit), *cert. denied*, 336 So. 2d 1182 (Fla. 1976).

Nevertheless, Segal contends that service of process upon Pharmafax Limited was not necessary because service was expressly waived and jurisdiction was consented to in the stipulation for settlement which was executed by Regalado, and filed with the trial court. We disagree. Regalado was not an attorney, and therefore could not appear in the trial court on behalf of Pharmafax Incorporated, in its capacity as the general partner of Pharmafax Limited. *See Castle Club Corp. v. Liberty Int'l, Inc.*, 598 So. 2d 263, 264 (Fla. 3d DCA 1992) (a corporation cannot appear in court except through an attorney); *Punta Gorda Pines Dev., Inc. v. Slack Excavating, Inc.*, 468 So. 2d 438, 439 (Fla. 2d DCA 1985) (a corporation may only file pleadings through an attorney); *Hub Fin. Corp. v. Olmetti*, 465 So. 2d 618, 619 (Fla. 4th DCA 1985) (a corporation cannot represent itself at trial); *Daytona Migi Corp. v. Daytona Automotive Fiberglass Inc.*, 417 So. 2d 272, 274 (Fla. 5th DCA 1982) (a notice of appeal filed by a corporation's officer, who was not an attorney, was a nullity); *cf. Summit Pool Supplies, Inc. v. Price*, 461 So. 2d 272, 274 (Fla. 5th DCA 1985) (a corporation need not use an attorney to file a claim against a decedent's estate because the filing of a claim is not a court appearance or a pleading). Because the stipulation for settlement contained a waiver of service and a submission to jurisdiction, the filing of the stipulation constituted a general appearance on behalf of Pharmafax Limited. *See Sternberg v. Sternberg*, 139 Fla. 219, 225, 190 So. 486, 488 (1939) (a party makes a general appearance by doing an act which amounts to a submission to the court's jurisdiction); *Hatton v. Barnett Bank of Palm Beach County*, 550 So. 2d 65, 66 (Fla. 2d DCA 1989) (acts which acknowledge a court's jurisdiction constitute a general appearance); *Meyer v. Roesel*, 482 So. 2d 444, 448 (Fla. 2d DCA) (the filing of a stipulation with a court constitutes an acceptance of the court's jurisdiction), *rev. denied*, 492 So. 2d 1334 (Fla. 1986); *see also* 6 C.J.S. *Appearances* § 31 (1975) ("Stipulations or agreements entered into between the parties or their counsel with reference to a pending suit are usually regarded as amounting to a general appearance . . . ."). However, this general appearance could only be made by an attorney, not by Pharmafax Incorporated's non-lawyer president. Accordingly, the stipulation for settlement did not validly bring Pharmafax Limited within the court's jurisdiction, and was not a proper basis upon which to enter a judgment against Pharmafax Limited.[2]

The denial of relief to Pharmafax Incorporated is affirmed. The denial of relief to Pharmafax Limited is reversed, and this case is remanded to the trial court for entry of an order setting aside the judgment against Pharmafax Limited, and rescinding the trial court's approval of the stipulation as to Pharmafax Limited.

Affirmed in part, reversed in part, and remanded with directions.

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[1]We note that service on Pharmafax Limited would normally have been obtained by serving its general partner, Pharmafax Incorporated. *See* § 48.061(2), Fla. Stat. (1989). However, the summons and return of service indicate that Pharmafax Incorporated was served only in its corporate capacity, and not in its capacity as the general partner of Pharmafax Limited. This precludes any argument that Pharmafax Limited was in fact served. *See Bay City Management, Inc. v. Henderson*, 531 So. 2d 1013, 1014 n.1 (Fla. 1st DCA 1988); *Touche Ross & Co. v. Canaveral Int'l Corp.*, 369 So. 2d 441, 442 (Fla. 3d DCA 1979).

[2]By way of contrast, the stipulation was not a general appearance for

not be read in pari materia with sections 766.202(5), and 766.203(2). "[O]nly when a statute is ambiguous will we attempt to divine legislative intent from sources extrinsic to the statutory language." *Silva v. Southwest Florida Blood Bank*, 601 So. 2d 1184, 1188 (Fla. 1992). *Compare Duffy v. Brooker*, 614 So. 2d 539, 543 (Fla. 1st DCA), *review denied*, 624 So. 2d 267 (Fla. 1993). The plain words of section 766.203(2) require a corroborating opinion from a medical expert as defined in section 766.202(5); it does not require that claimant submit an affidavit from an expert as described in sections 766.102(6)(a) and (b). An opinion from an expert who is a practicing health care professional with special training and experience or knowledge and skill about the subject upon which he is called to provide an opinion is sufficient to meet the presuit screening requirements. The expert need not be an emergency room physician. *See Weinstock*, 629 So. 2d at 835 (express mention of one thing implies exclusion of another maxim applied where court found that exclusion of psychologists from Chapter 766 definitions of health care provider evidences a legislative intent that psychologists not be classified as health care providers).

Moreover, we may not engraft the more stringent requirements of section 766.102(6) onto sections 766.202(5) and 766.203(2) in contravention of the express language of the statute. *See Foreman v. E.F. Hutton & Co., Inc.*, 568 So. 2d 531 (Fla. 3d DCA 1990). Such construction necessitates an impermissible statutory revision. *See Williams v. Campagnulo*, 588 So. 2d 982, 983 (Fla. 1991) (district court may not rewrite statute to eliminate notice requirement). Here, Maldonado's expert's affidavit asserts that the physician is a board-certified surgeon who concluded that based on his experience and a review of the hospital records, he has reasonable grounds to believe defendants' negligent care and treatment caused the amputation of Maldonado's right leg. Those qualifications do not render him incompetent to give an expert opinion pursuant to the presuit screening statutes as to defendants' alleged negligence including the failure to conduct proper tests or to discern the absence of a pulse in Maldonado's leg. Thus, the trial court erred in entering judgment in favor of EMSA on that basis.[8]

In addition, the trial court erred in granting Cedars' motion for summary judgment based on the affiant's failure to set forth facts describing the alleged negligence in the affidavit or notice of intent. Here, the notice of intent and the affidavit satisfied the presuit notice and investigation requirements by informing defendants that, after a review of the records, the expert opined that the amputation of Maldonado's right leg resulted from defendants' negligent care and treatment during his visits to Cedars' emergency room. "The corroboration statement must outline the factual basis for the opinion. Taken together, 'the notice of intent to initiate and the corroborating medical expert opinion . . . must *sufficiently* indicate the manner in which the defendant doctor allegedly deviated from the standard of care, and must provide *adequate* information for the defendant[ ] to evaluate the merits of the claim.'" *Watkins v. Rosenthal*, 637 So. 2d 993, 994 (Fla. 3d DCA 1994) (quoting *Duffy*, 614 So. 2d at 545) (e.s.). The absence of any additional facts is not dispositive when as here, the provided information satisfied the statutory purpose. The sufficiency of the information is demonstrated by defendant's response to the notice with an affidavit stating that defendant was not negligent. 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. Furthermore, the statute provides a vehicle for informal discovery so that defendants may obtain further information to evaluate the claim. *See* §§ 766.106(5)-(9); .204; 205, Fla. Stat. (1989); *Williams*, 619 So 2d at 980; *Wolfsen*, 619 So. 2d at 1050. The record does not reveal that defendant requested additional information during the presuit period.

The medical malpractice claimant must conduct an investigation to ascertain whether reasonable grounds exist to believe that defendants negligently treated claimant and that such negligence resulted in injury to the claimant. § 766.203(2)(a) and (b), Fla. Stat. (1989). Section 766.202(4) states that " 'investigation' means that an attorney has reviewed the case against each and every potential defendant and has consulted with a medical expert and has obtained a written opinion from said expert." Maldonado's attorney has conducted a reasonable investigation and the claim is not frivolous. The attorney apparently reviewed the case, consulted with the expert and obtained a written expert opinion. The expert stated that Mr. Maldonado suffered a below-the-knee amputation of his right leg as a result of defendants' alleged failure to diagnose correctly his foot pain.

We believe that Mr. Maldonado has complied with the presuit requirements and should not be denied access to the court. Therefore, the trial court erred in entering the judgments based on the inadequacy of the notice and affidavit. *Barber*, 638 So. 2d at 571-572. For these reasons, we reverse the judgments.[9]

Reversed and remanded.

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[1]Maldonado's affiant is a board certified general surgeon who described the records that he reviewed and stated that:

> 5. Based on my experience and review of the records, I have reasonable grounds to believe that the care and treatment rendered to Mr. Maldonado by the Emergency Room Physicians . . . and other health care providers at Cedars was negligent.
>
> 6. Based on my experience and review of the records, I have reasonable grounds to believe that this negligence caused Mr. Maldonado damages and injuries, including a below the knee amputation of the right extremity.

[2]Cedars' affiant stated, in pertinent part:

> 1. That I am a medical expert as defined by Florida Statute § 766.202(5);
>
> 2. That I have reviewed available medical records, office records, pathology reports, and operative procedures performed on Charles Maldonado while a patient at Cedars Medical Center, Inc. My review indicates that there is a lack of reasonable grounds for medical negligence in the claim raised by Charles Maldonado against Cedars Medical Center, Inc. pursuant to Florida Statute § 766.203(3)[.]

[3]EMSA's affiant, a board-certified surgeon, stated, in pertinent part, that

> [i]t is my opinion, based on a reasonable degree of medical probability, that Emergency Medical Services Associates, Inc., and/or EMSA Limited Partnership . . . did not breach prevailing professional standards of care when affording treatment to Charles Maldonado on or about July 27, 1990 and August 1, 1990. I believe that Emergency Medical Services, and/or EMSA Limited Partnership . . . at all times fell within and comported with the accepted and prevailing professional standards for such health care providers.

[4]Maldonado alleged that Cedars was vicariously responsible for the negligence of its nursing staff and for the negligence of EMSA's physicians.

[5]Although EMSA's motion is titled "Motion for Summary Judgment," it requested dismissal of the complaint.

[6]Although the record reveals that Cedars appears to have waived the issue of Maldonado's presuit compliance by failing to raise timely the issue, *Ingersoll v. Hoffman*, 589 So. 2d 223 (Fla. 1991), it is unnecessary to resolve that issue because Maldonado has not raised that issue on appeal.

[7]Section 766.102(6)(a) requires that the testifying medical expert in a case involving emergency medical services must "have had substantial professional experience within the preceding 5 years while assigned to provide emergency medical services in a hospital emergency department." We express no opinion whether the expert rendering the opinion at trial must be qualified under section 766.102(6).

[8]EMSA contends that the Good Samaritan Act, § 768.13, Fla. Stat. (1989), applies to this case. The presuit screening statutes "were not intended to require presuit litigation of all the issues in medical negligence claims . . . ." *Ragoonanan*, 619 So. 2d at 484. At this early point in the litigation, there is insufficient record basis demonstrating that the Act pertains to this case. Maldonado's treatment in an emergency room does not render the Act automatically applicable. The statute contains exceptions to its application. *See* §§ 768.13(3)(b)1; .13(2)(a), Fla. Stat. (1989). Therefore, any determination on that issue is premature. *Ragoonanan*.

[9]Contrary to defendants' contention, *Williams v. Campagnulo*, 588 So. 2d 982 (Fla. 1991), does not mandate affirmance. In *Patry v. Capps*, 633 So. 2d 9, 13 (Fla. 1994), the court stated that "*Williams* addressed the complete absence of presuit notice. That decision stands for the proposition that timely written notice is a condition precedent to the maintenance of a medical malpractice action . . . ." Clearly, this case does not involve the "complete absence of presuit notice." *E.g., Shands Teaching Hosp. v. Miller*, 642 So. 2d 48 (Fla. 1st DCA 1994); *Miami Physical Therapy Assoc., Inc. v. Savage*, 632 So. 2d 114 (Fla. 3d DCA 1994); *Southern Neurological Assoc., P.A. v. Fine*, 591 So. 2d 252 (Fla. 4th DCA 1991). *Cf. Suarez v. St. Joseph's Hosp., Inc.*, 624 So. 2d

7, 219 (Fla. 2d DCA 1994) (cause remanded so that plaintiff may remove any deficiency with regard to physician's verification: "Dismissal without leave to amend after the statute of limitation had expired was too severe a remedy.").

* * *

Civil procedure—Service of process—Judgment against limited partnership was void where, although plaintiff accomplished service of process on corporation which was general partner of the limited partnership, the partnership itself was never served—Stipulation for settlement which listed limited partnership as a party and which expressly waived service did not validly bring partnership within court's jurisdiction because stipulation was executed by president of partnership's corporate general partner, who was not an attorney, and who therefore could not appear in trial court on behalf of the corporation in its capacity as general partner

PHARMAFAX, INC., a Florida corporation, and PHARMAFAX, LTD., a limited partnership, Appellants, v. MIKE SEGAL, P.A., Appellee. 3rd District. Case No. 94-1882. Opinion filed November 9, 1994. An Appeal from the Circuit Court for Dade County, Eleanor Schockett, Judge. Counsel: Lionel Barnet, for appellants. Rumberger, Kirk & Caldwell and F. Laurens Brock and Joshua D. Lerner, for appellee.

(Before HUBBART, LEVY, and GREEN, JJ.)

(PER CURIAM.) In this appeal from the denial of motions for relief from judgment, we affirm in part, reverse in part, and remand.

Mike Segal, P.A. (Segal) filed suit against Pharmafax Incorporated for $32,037.98 in unpaid legal fees. The complaint named Pharmafax Incorporated as a defendant, but did not name as a defendant Pharmafax Limited, a limited partnership of which Pharmafax Incorporated is the general partner. Segal obtained service of process on Pharmafax Incorporated by serving its president, Jose Regalado, in his capacity as president of Pharmafax Incorporated. Pharmafax Incorporated did not answer the complaint, and Segal's attorney later prepared a settlement stipulation to settle the suit. This stipulation listed not only Pharmafax Incorporated, but also Pharmafax Limited, as parties to the suit. Regalado signed the stipulation on May 3, 1990, on behalf of both entities, and the stipulation was filed with and approved by the trial court. Significantly, neither Pharmafax Incorporated nor Pharmafax Limited were represented by counsel at that time.

Pharmafax Incorporated later breached the settlement agreement by failing to make a required payment which was due on February 1, 1991. Consequently, on March 5, 1991, Segal obtained an ex parte final judgment against Pharmafax Incorporated and Pharmafax Limited. The judgment was for the outstanding balance owed ($7,911.78), plus attorney's fees ($1,000), and was obtained pursuant to the terms of the settlement stipulation, which provided for the entry of a final judgment for the outstanding balance upon a missed payment.

On August 6, 1991, Pharmafax Incorporated and Pharmafax Limited each filed Florida Rule of Civil Procedure 1.540 motions to set aside the judgment, and to set aside the court-approved settlement stipulation. The trial court denied the motions, and both Pharmafax Incorporated and Pharmafax Limited now appeal.

We have considered the arguments made by Pharmafax Incorporated, and conclude that because it demonstrated no basis for relief, the trial court properly denied its motion.

However, we cannot reach the same conclusion with respect to Pharmafax Limited. There was no service of process upon Pharmafax Limited at any time during the course of this lawsuit.[1] Consequently, the judgment against it was void, and was properly subject to being set aside at any time by way of a motion for relief from judgment. *See* Fla. R. Civ. P. 1.540(b)(4); *Shields v. Flinn*, 528 So. 2d 967, 968 (Fla. 3d DCA 1988) (a judgment entered without notice is void and merits relief under Rule 1.540(b)(4) regardless of the timeliness of the motion); *Kennedy v. Richmond*, 512 So. 2d 1129, 1130 (Fla. 4th DCA 1987) (a judgment entered without service of process is void, and will be set aside by way of a Rule 1.540(b)(4) motion); *Falkner v. Amerifirst Fed. Savs. and Loan Ass'n*, 489 So. 2d 758, 759 (Fla. 3d DCA 1986) ("A judgment entered without due service of process is void", and may be set aside at any time pursuant to Rule 1.540(b)(4)); *Knight v. Global Contact Lens, Inc.*, 319 So. 2d 622, 623 (Fla. 3d DCA 1975) (a judgment may not be entered against a party who has not been served with process or otherwise properly made a party to the lawsuit), *cert. denied*, 336 So. 2d 1182 (Fla. 1976).

Nevertheless, Segal contends that service of process upon Pharmafax Limited was not necessary because service was expressly waived and jurisdiction was consented to in the stipulation for settlement which was executed by Regalado, and filed with the trial court. We disagree. Regalado was not an attorney, and therefore could not appear in the trial court on behalf of Pharmafax Incorporated, in its capacity as the general partner of Pharmafax Limited. *See Castle Club Corp. v. Liberty Int'l, Inc.*, 598 So. 2d 263, 264 (Fla. 3d DCA 1992) (a corporation cannot appear in court except through an attorney); *Punta Gorda Pines Dev., Inc. v. Slack Excavating, Inc.*, 468 So. 2d 438, 439 (Fla. 2d DCA 1985) (a corporation may only file pleadings through an attorney); *Hub Fin. Corp. v. Olmetti*, 465 So. 2d 618, 619 (Fla. 4th DCA 1985) (a corporation cannot represent itself at trial); *Daytona Migi Corp. v. Daytona Automotive Fiberglass Inc.*, 417 So. 2d 272, 274 (Fla. 5th DCA 1982) (a notice of appeal filed by a corporation's officer, who was not an attorney, was a nullity); *cf. Summit Pool Supplies, Inc. v. Price*, 461 So. 2d 272, 274 (Fla. 5th DCA 1985) (a corporation need not use an attorney to file a claim against a decedent's estate because the filing of a claim is not a court appearance or a pleading). Because the stipulation for settlement contained a waiver of service and a submission to jurisdiction, the filing of the stipulation constituted a general appearance on behalf of Pharmafax Limited. *See Sternberg v. Sternberg*, 139 Fla. 219, 225, 190 So. 486, 488 (1939) (a party makes a general appearance by doing an act which amounts to a submission to the court's jurisdiction); *Hatton v. Barnett Bank of Palm Beach County*, 550 So. 2d 65, 66 (Fla. 2d DCA 1989) (acts which acknowledge a court's jurisdiction constitute a general appearance); *Meyer v. Roesel*, 482 So. 2d 444, 448 (Fla. 2d DCA) (the filing of a stipulation with a court constitutes an acceptance of the court's jurisdiction), *rev. denied*, 492 So. 2d 1334 (Fla. 1986); *see also* 6 C.J.S. *Appearances* § 31 (1975) ("Stipulations or agreements entered into between the parties or their counsel with reference to a pending suit are usually regarded as amounting to a general appearance . . . ."). However, this general appearance could only be made by an attorney, not by Pharmafax Incorporated's non-lawyer president. Accordingly, the stipulation for settlement did not validly bring Pharmafax Limited within the court's jurisdiction, and was not a proper basis upon which to enter a judgment against Pharmafax Limited.[2]

The denial of relief to Pharmafax Incorporated is affirmed. The denial of relief to Pharmafax Limited is reversed, and this case is remanded to the trial court for entry of an order setting aside the judgment against Pharmafax Limited, and rescinding the trial court's approval of the stipulation as to Pharmafax Limited.

Affirmed in part, reversed in part, and remanded with directions.

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[1]We note that service on Pharmafax Limited would normally have been obtained by serving its general partner, Pharmafax Incorporated. *See* § 48.061(2), Fla. Stat. (1989). However, the summons and return of service indicate that Pharmafax Incorporated was served only in its corporate capacity, and not in its capacity as the general partner of Pharmafax Limited. This precludes any argument that Pharmafax Limited was in fact served. *See Bay City Management, Inc. v. Henderson*, 531 So. 2d 1013, 1014 n.1 (Fla. 1st DCA 1988); *Touche Ross & Co. v. Canaveral Int'l Corp.*, 369 So. 2d 441, 442 (Fla. 3d DCA 1979).

[2]By way of contrast, the stipulation was not a general appearance for