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.

RESPONDENT'S, DR. JOHN T. McDONALD FOUNDATION d/b/a DOCTORS' HOSPITAL BRIEF ON JURISDICTION

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STATEMENT OF CASE AND FACTS

Respondent accepts the Petitioners' Statement of the Case and Facts. It is undisputed that the petitioners did not obtain the written opinion of a medical expert prior to mailing notices of intent to initiate medical malpractice litigation to the prospective defendants.[1]

POINT INVOLVED ON CERTIORARI

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL *EN BANC* IS IN DIRECT CONFLICT WITH THE DECISION FROM THIS COURT IN PATRY V. CAPPS, 633 SO. 2D 9 (FLA. 1994); ATKINS V. HUMES, 110 SO. 2D 663 (FLA. 1959); OR 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); OR DUFFY V. BROOKER, 614 SO. 2D 539 (FLA. 1ST DCA 1993)?

SUMMARY OF THE ARGUMENT

Petitioner seeks to invoke this Court's jurisdiction on the basis of alleged conflict with decisions from this Court, and from the First and Second District Courts of Appeal. The decision of the Third District Court of Appeal *en banc* is not in express and direct conflict with any of the cited decisions.

This case deals with a dismissal pursuant to section 766.206, Florida Statutes (1991), for failure to conduct the statutorily-required investigation prior to mailing a notice of intent to initiate medical malpractice litigation. The Third District's decision holding that an investigation as defined by section 766.202(4), Florida Statutes (1991), had not been conducted prior

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[1] In this brief, the symbol "A" will designate the Appendix to the Petitioner's Brief on Jurisdiction, which consists of the opinion of the Third District Court of Appeal in this case.

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to mailing the notices of intent represents a straightforward application of the statutes governing presuit screening.

The *en banc* decision of the Third District is not in conflict with this Court's decision in Patry v. Capps, 633 So. 2d 9 (Fla. 1994), because the dismissal was not based upon a technical deficiency in plaintiffs' compliance with the presuit screening requirements. The failure to conduct an investigation as that term is defined by section 766.202 (4), Florida Statutes (1991), is a substantive failure, and one which goes to the heart of presuit screening.

The *en banc* decision of the Third District is not in conflict with this Court's decision in Atkins v. Humes, 110 So. 2d 663 (Fla. 1959). That case relates to the exception to the rule requiring expert testimony to support a claim of medical malpractice where the court is satisfied that there is competent evidentiary matter to support a verdict. Neither that rule, nor its exception, are applicable to the statutory requirement that a claimant consult with a medical expert and obtain a written opinion prior to mailing a notice of intent to initiate medical malpractice litigation.

The *en banc* decision of the Third District is not in conflict with the decision of the First District Court of Appeal in Shands Teaching Hospital v. Miller, 642 So. 2d 48 (Fla. 1st DCA 1994). That case did not involve dismissal under section 766.206, Florida Statutes (1991), for failure to comply with the statutory investigation requirement prior to mailing a notice of intent.

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The *en banc* decision of the Third District is not in conflict with the decision of the Second District Court of Appeal in Ragoonanan v. Associates in Obstetrics & Gynecology, 619 So. 2d 482 (Fla. 2d DCA 1993). As explained by the Third District in the *en banc* decision, the facts in Ragoonanan v. Associates in Obstetrics & Gynecology, supra, are materially different than the facts in the underlying case. The plaintiffs in Ragoonanan actually obtained the required written opinion from a medical expert prior to mailing their notice of intent, unlike the plaintiffs here.

The *en banc* decision of the Third District is not in conflict with the decision of the First District Court of Appeal in Duffy v. Brooker, 614 So. 2d 539 (Fla. 1st DCA), rev. denied, 624 So. 2d 267 (Fla. 1993). Rather, the decision of the Third District is consistent with the holding in Duffy, and with that court's application of section 766.206, Florida Statutes (1991).

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL *EN BANC* IS NOT IN DIRECT CONFLICT WITH THE DECISIONS FROM THIS COURT IN PATRY V. CAPPS, 633 SO. 2D 9 (FLA. 1994); ATKINS V. HUMES, 110 SO. 2D 663 (FLA. 1959); OR WITH THE DECISIONS OF THE 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); OR DUFFY V. BROOKER, 614 SO. 2D 539 (FLA. 1ST DCA 1993)

Petitioner seeks to invoke this Court's "conflict law jurisdiction." This Court's discretionary review is restricted to decisions of the district court that

> expressly and directly conflict[] with a decision of another district court of appeal or of the supreme court on the same question of law.

Art. V, § 3(b)(3), Fla. Const. See also Fla. R. App. P. 9.030 (a)(2)(A)(iv).

Prior to the 1980 amendment to Article V of the Florida Constitution, this Court construed the "conflict of law" provision to require one of two events at the district court level:

> (1) "Announcement" of a rule of law conflicting with a rule previously announced by this Court or district; or
>
> (2) The application of a rule of law to produce a substantially different result in a case which involves "substantially the same facts" as a prior case.

Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975); Nielson v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960).

This Court has no jurisdiction to review the instant decision of the Third District *en banc* because the decision neither announces a conflicting rule of law, nor applies the rule of law to produce a substantially different result in a case involving substantially similar facts. No conflict arises by virtue of "misapplication of law" because the Third District Court of Appeal did not "rely on a decision which involves a situation materially at variance with the one under review," see Gibson v. Avis Rent-A-Car System, Inc., 386 So. 2d 520 (Fla. 1980), nor did it misinterpret or misapply any rule announced by this Court. See Arab Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039 (Fla. 1982).

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A. The decision of the Third District Court of Appeal is not in conflict with the decision of this Court in Patry v. Capps, 633 So. 2d 9 (Fla. 1994)

Petitioners base their claim of conflict with the decision of this Court in Patry v. Capps, supra, on the statement in that case that "when possible the presuit notice and screening statute should be construed in a manner that favors access to courts." Id. at 13.

Petitioners' argument is insufficient to invoke this Court's discretionary jurisdiction because, unlike the mode of service issue addressed by this Court in Patry, obtaining a written opinion from an expert is not "merely a technical matter of form." Rather, consulting with and obtaining a written opinion from a medical expert prior to initiating the 90-day presuit screening period "go[es] to the heart of the presuit notice and screening process." Id. at 13.

The requirement that a reasonable investigation be conducted prior to initiating a claim is an essential component of the presuit screening process. Fla. Stat. §§ 766.201, 766.202(4), 766.203(2) (1991). The "investigation" which is required to precede the mailing of a notice of intent includes, by definition, consulting with and obtaining a written opinion from an expert. Fla. Stat. § 766.202(4) (1991).

Because the failure to conduct the required investigation prior to mailing the notices of intent to the defendants represents a substantive lack of compliance with the statutory procedures, it is not possible -- as it was in Patry -- "to construe the provision in a manner that favors access to courts without running afoul of

the goal of the legislatively [mandated requirements.]" Id. at 13. Accordingly, there is no conflict between the *en banc* decision of the Third District and this Court's decision in Patry v. Capps, supra.

B. The decision of the Third District Court of Appeal is not in conflict with the decision of this Court in Atkins v. Humes, 110 So. 2d (Fla. 1959)

Petitioners' contention that the decision of the Third District is in conflict with this Court's decision in Atkins v. Humes, supra, fails because the exception to the rule that expert testimony is required to support a claim of medical negligence has no applicability in construing the presuit screening scheme. The exception recognized by this Court in Atkins may not properly be relied upon as the basis for a judicially-created exception to the statutory "investigation" requirements. The failure of the Third District to apply the Atkins exception to the statutory requirement that a claimant's attorney obtain a written expert opinion as a part of the investigation required to precede mailing of a notice of intent represents neither a misapplication of law, nor the announcement of a conflicting rule of law.

There is no ambiguity in the pertinent statutes. A claimant must conduct an investigation prior to mailing a notice of intent to a defendant. Moreover, the legislature specifically defined "investigation" to include both consulting with and obtaining a written opinion from a medical expert. Fla. Stat. § 766.202(4) (1991). Since the legislature has provided a clear and unambiguous

definition of "investigation," the courts are powerless to find that anything less satisfies the "investigation" requirement.

Moreover, the requirement for expert testimony to support a verdict and the requirement of obtaining a written opinion from a medical expert as the first step in the presuit screening process serve totally different purposes. Expert testimony at trial serves the purpose of ensuring that there is "competent evidentiary matter upon which a jury could reach a decision" that medical malpractice has occurred. Halifax Hospital District v. Davis, 201 So. 2d 257, 260 (Fla. 1st DCA), cert. denied, 207 So. 2d 452 (Fla. 1967).

A written opinion from an expert supplied in the presuit investigation process, however, has less to do with the quality of evidence upon which a jury's verdict will be based than it does with furthering the public policy goal of allowing the parties to make early, informed decisions regarding the merit of medical malpractice claims. Fla. Stat. § 766.201 (1)(d) (1991). Obtaining a written opinion also supplies the element of verification which facilitates enforcement of the statutory mandates. See Fla. Stat. §§ 766.201, 766.206 (1991).

The decision of the Third District is plainly not in conflict with this Court's decision in Atkins v. Humes, supra.

C. The decision of the Third District Court of Appeal is not in conflict with the decisions of the First District Court of Appeal in Shands Teaching Hospital v. Miller, 642 So. 2d 48 (Fla. 1st DCA 1994) and Duffy v. Brooker, 614 So. 2d 539 (Fla. 1st DCA), rev. denied, 624 So. 2d 267 (Fla. 1993)

Petitioners' contention that the decision of the Third District conflicts with the decisions in Shands Teaching Hospital

v. Miller, supra, and Duffy v. Brooker, supra, is based upon an erroneous factual predicate. The plaintiffs' case was not dismissed "because the verified written medical opinion was not included with the notice of intention to initiate litigation." Their case was dismissed pursuant to section 766.206, Florida Statutes (1991), because they failed to conduct the statutorily-required investigation prior to mailing notices of intent to the defendants.

The cases regarding the effect of a claimant's failure to mail an expert affidavit with the notice of intent do not form a basis for conflict jurisdiction because they involve the interpretation of different elements of the presuit screening scheme than this case which deals with the failure to obtain the required affidavit.

Unlike a motion to dismiss for failure to comply with the statutory condition precedent, a motion brought under section 766.206 is used to test the sufficiency of the investigation required by section 766.203 (2). See, e.g., Duffy v. Brooker, supra.[2] It looks beyond whether there has been facial compliance with the requirements of presuit screening, and reaches the question whether the notice of intent was supported by the required investigation at the time it was mailed. See Suarez v. St. Joseph's Hospital, 634 So. 2d 217, 219 (Fla. 2d DCA 1994) (wherein the court stated: "If there was any doubt as to the sufficiency and intent of the verification of [the expert's] medical opinions, [the

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[2] Not only is there no conflict with the decision in Duffy v. Brooker, supra, the decision of the Third District is perfectly consistent with the holding in Duffy.

defendant] could have moved to resolve that issue under section 766.206 (1). . ."

The decision in Shands Teaching Hospital v. Miller, supra, arose in the context of a motion to dismiss for failure to mail the written corroboration with the notice of intent, or otherwise provide it within the statute of limitations. Fla. Stat. § 766.203 (2) (1991). It did not involve consideration of the separate question of whether the notice of intent was supported by a reasonable "investigation" at the time it was mailed. Fla. Stat. § 766.206 (2) (1991).

Neither Duffy v. Brooker, supra, nor Shands Teaching Hospital v. Miller, supra, address the propriety of dismissal pursuant to section 766.206 when there has been an admitted failure to obtain a written opinion from a medical expert prior to mailing the notices of intent. Accordingly, the cited decisions do not form the basis for conflict jurisdiction.

D. The decision of the Third District Court of Appeal is not in conflict with the decision of the Second District Court of Appeal in Ragoonanan v. Associates in Obstetrics & Gynecology, 619 So. 2d 482 (Fla. 2d DCA 1993)

Petitioners' argument that the Third District decision is in conflict with Ragoonanan v. Associates in Obstetrics & Gynecology, supra, is similarly misdirected. In Ragoonanan, the court was concerned with the sufficiency of the plaintiffs' investigation. In this case, the plaintiffs' case was dismissed because they did not conduct an "investigation" as that term is defined by section 766.202 (4), Florida Statutes (1991), because they did not obtain a written opinion from an expert.

As stated by the majority of the Third District:

> 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 . . . Ragoonanan v. Associates in Obstetrics & Gynecology, [supra], . . . the plaintiffs obtained the necessary medical opinion before filing their notices.

(A. 3).

There is no conflict between the decision of the Third District *en banc* and Ragoonanan v. Associates in Obstetrics & Gynecology, supra.

CONCLUSION

The instant decision of the Third District Court of Appeal *en banc* does not conflict with decisions relied upon by petitioners as a basis for the exercise of this Court's discretionary jurisdiction. The arguments raised in support of jurisdiction amount to a challenge to the correctness of the district court's decision, without demonstrating that conflict exists.

The Supreme Court of Florida was never intended to be the final court of final appellate jurisdiction to review district court decisions which do not expressly and directly conflict with other appellate court decisions.

This Court should not exercise its discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of February, 1995, to: JOE N. UNGER, ESQUIRE, 200 South Biscayne Boulevard, Suite 2920, Miami, FL 33131-5302; LAW OFFICES OF RICHARD L. KATZ, 2100 Salzedo Street, Suite 300, Coral Gables, FL 33134; and BAMBI BLUM, ESQUIRE, Hicks, Anderson & Blum, New World Tower, Suite 2402, 100 N. Biscayne Boulevard, Miami, FL 33132.

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