IN THE SUPREME COURT OF FLORIDA

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

CHARLES KUKRAL and MILLY KUKRAL,

Petitioners,

vs.

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

Respondents.

RESPONDENTS GEORGE D. MEKRAS, M.D.
and
MIAMI UROLOGIC INSTITUTE, INC.'S

BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

A majority of the en banc panel of the Third District Court of Appeal adopted the following holding of the majority's opinion as the opinion of the en banc court:

> 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).[1] Moreover, the plaintiffs did not present any evidence

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[1] This section, 766.203, provides in pertinent part:

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

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> 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.[2] 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., 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),[3] since no reasonable investigation was conducted, the plaintiffs' claim was properly dismissed. The order appealed from is hereby affirmed. (emphasis supplied)

In sum, the Third District found that dismissal was warranted because plaintiffs did not conduct the statutorily mandated presuit investigation i.e., consult with a medical expert or obtain the

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[2] "Investigation," as defined in 766.202(4), "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."

[3] This section provides:

> (1) After the completion of presuit investigation by the parties pursuant to s. 766.203 and any informal discovery pursuant to s. 766.106, 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.
>
> (2) If the court finds that the notice of intent to initiate litigation mailed by the claimant is not in compliance with the reasonable investigation requirements of ss. 766.201-766.212, the court shall dismiss the claim, . . .

necessary corroborating medical opinion prior to mailing a notice of intent to initiate litigation. It is this holding that plaintiffs, petitioners contend is contrary to decisions of this Court and other districts.

POINT INVOLVED

THE MAJORITY DECISION OF THE DISTRICT COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH PATRY V. CAPPS; ATKINS V. HUMES; SHANDS V. MILLER; RANGOONANAN V. ASSOCIATES IN OBSTETRICS AND GYNECOLOGY OR DUFFY V. BROOKER.

SUMMARY OF ARGUMENT

The instant decision is in accord with the plain terms of the Florida presuit screening statutes which define what a presuit investigation shall consist of and mandates when it must be done at the peril of dismissal. No case cited by petitioners conflicts with the holding here that dismissal is warranted when a party does not comply with these requirements simply because he believes his injury is too obvious to require compliance.

ARGUMENT

THE MAJORITY DECISION OF THE DISTRICT COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH PATRY V. CAPPS; ATKINS V. HUMES; SHANDS V. MILLER; RANGOONANAN V. ASSOCIATES IN OBSTETRICS AND GYNECOLOGY OR DUFFY V. BROOKER.

A. NO CONFLICT WITH PATRY V. CAPPS, 633 SO. 2D 9 (FLA. 1994).

Plaintiffs do not dispute that sections 766.203(2) and 766.202(4) plainly require a showing that they consulted with a medical expert and obtained a written opinion from the expert before mailing a notice of intent to initiate litigation to defendants. In fact, plaintiffs also concede that they never met

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these statutory requirements in this case. Plaintiffs maintain, however, that they nonetheless conducted a reasonable investigation because the facts here give rise to an "inescapable inference of negligence . . . even for a layperson", and that the Third District's literal adherence to the statute's mandate conflicts with Patry. However, Patry bears absolutely no resemblance to this case.

In Patry, a plaintiff's case was dismissed where the defendant had actually and timely received a notice of intent by hand-delivery instead of by the statute's requirement of certified mail. This Court held that the acknowledged receipt of a timely written notice of intent to initiate litigation that results in no prejudice to the defendant is sufficient notice under the statute. The Court stated:

> 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.
>
> * * *
>
> Strict compliance with the mode of service provided in the statute is in no way essential to this legislative goal. . . .
>
> * * *
>
> Service by certified mail, return receipt requested, was intended as nothing more than a reliance method for verifying service and receipt dates . . .

Id. at 11,12.

To the contrary, in the present case, the letter of the law requiring consultation with and a written opinion from a medical expert prior to mailing the notice is an essential part of the

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legislature's plan for eliminating frivolous medical malpractice claims and not a mere technicality. In University of Miami v. Echarte, 618 So. 2d 192 (Fla. 1993), cert. denied, 114 S.Ct. 304, 126 L.Ed.2d 252 (U.S. 1993) this Court explained:

> Sections 766.203-206 set out the presuit investigation procedure that both the claimant and defendant must follow before a medical negligence claim may be brought in court. The first step in the presuit investigation is for the claimant to determine whether reasonable grounds exist to believe that a defendant acted negligently in the claimant's care or treatment, and that this negligence caused the claimant's injury. § 766.203(2), Fla. Stat. (Supp. 1988). Section 766.203(2) also requires that the medical negligence claim be corroborated by a "verified written medical expert opinion" before giving notice to a defendant.

(emphasis supplied). Moreover, in Ingersoll v. Hoffman, 589 So. 2d 223, 224 (Fla. 1991), this Court stated:

> The presuit notice and screening requirements . . . represent more than mere technicalities. The legislature has established a comprehensive procedure designed to facilitate the amicable resolution of medical malpractice claims. To suggest that the requirements of the statute may be easily circumvented would be to thwart the legislative will.

The legislature has furthermore determined that presuit investigation mandatorily applies to all medical negligence claims without exception. Section 766.201(2). It simply cannot be said that a claimant's or his attorney's personal opinion that there is a meritorious medical negligence claim satisfies the legislature's intent or is an adequate substitute for a medical expert's opinion.

This case and Patry are not remotely analogous. The Supreme Court's statement in Patry "that whenever possible the presuit

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notice and screening statute should be construed in a manner that favors access to courts" must be read in context. That statement is not applicable here.

B. NO CONFLICT EXISTS WITH ATKINS V. HUMES, 110 SO. 2D 663 (FLA. 1959).

Atkins' holding does not expressly and directly conflict with this case either. The common law evidentiary rule stated in Atkins that no expert testimony is required at trial to recover in a malpractice action where the malpractice is within the common understanding of the jury simply has no relevance to the presuit investigation requirements imposed by Chapter 766 of the Florida Statutes.[3] The legislature, in its efforts to control costs of litigation in the interests of the public need for quality medical services, can surely impose statutory presuit investigation requirements. See 49 Fla. Jur.2d Statutes § 21 (1984). Statutes are presumptively valid and constitutional and must be given effect until judicially declared unconstitutional. Id. at 595. Indeed, the Kukrals have never challenged the constitutionality of the requirement for expert review and written opinion in this case -- they have contended only that they need not comply.

In any event,

> statutes of Florida control and take

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

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> precedence over the common law where there are any inconsistencies between them. Thus, the common law may be modified, directly or indirectly, by the enactment of a statute that is inconsistent with it, even if it limits or restricts, substantially changes, or entirely abrogates a rule of the common law.

49 Fla. Jur.2d Statutes § 8 (1984).

Therefore, no conflict can possibly exist between this case and Atkins.

C. NO CONFLICT WITH 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 (FLA. 1993).

Shands is totally irrelevant. In Shands, the court dismissed the plaintiffs' case because plaintiffs failed to submit a medical expert corroborating opinion before the statute of limitations had run. The instant case did not turn upon whether the affidavit was timely submitted, but rather turned on the fact that the plaintiffs failed to comply with their statutory duty to conduct a reasonable presuit investigation.[4] The Shands opinion does not address whether or not the plaintiffs there in fact conducted a reasonable investigation prior to initiating their lawsuit nor does it appear on the face of the opinion that either party requested an evidentiary hearing pursuant to section 766.206 to determine whether a reasonable investigation was made, as was done in this case. Therefore, Shands has nothing to do with the determination of whether a reasonable investigation was made and is therefore

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[4] Indeed in the instant case, the defendants' motion to dismiss this cause based upon the plaintiffs' failure to timely submit an expert affidavit was denied.

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totally irrelevant to this case.

Plaintiffs also miscite the Duffy holding as a basis for conflict jurisdiction. In Duffy there was no issue as to the timeliness of the expert's affidavit -- only as to its sufficiency. This alone is a critical distinction that destroys any inference of conflict. In any event, this case is in accord with Duffy. The court in Duffy held that the defendant's medical expert's affidavit, which was devoid of factual support for its conclusion of no negligence, constituted prima facie evidence of a lack of a reasonable basis for denying the claim and shifted the burden to defendant to show compliance with "reasonable investigation" requirements of the statute. The court found that the evidence offered by defendant at the evidentiary hearing pursuant to section 766.206, consisting of the testimony of his insurer's claims adjuster outlining what the investigation consisted of, did not meet this burden, struck the defendant's denial of the claim and sanctioned his insurer.

The court in Duffy did not impose these sanctions simply because the expert opinion was inadequate. Likewise, the trial court here did not dismiss the cause for plaintiffs' failure to mail the expert affidavit with the notice of intent. Here too, when the defendants resorted to the procedure outlined in section 766.206 to have the trial court determine whether a reasonable investigation had been made, it was incumbent on plaintiffs to present sufficient competent evidence to prove that they met reasonable investigation requirements. Plaintiffs did not consult

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with a medical expert or obtain a written opinion before mailing their notice. They simply took the position they take here, i.e. that "a third grade student reading the notice of intent to sue would promptly conclude that petitioners' claim against respondents was not frivolous." (Br. p.10). This "evidence" falls woefully short of the evidence the court found inadequate in Duffy. Duffy supports this case; it does not conflict with it.

D. NO CONFLICT WITH RANGOONANAN V. ASSOCIATES IN OBSTETRICS & GYNECOLOGY, 619 SO. 2D 482 (FLA. 2D DCA 1993).

Rangoonanan v. Associates in Obstetrics, 619 So. 2d 482 (Fla. 2d DCA 1993), also does not conflict with this case. As the Third District's opinion noted, Rangoonanan is distinguishable because plaintiffs obtained the necessary medical opinion before filing their notices of intent. The only deficiency in the Rangoonanans' performance was their failure to provide the name of their medical expert. They obtained an expert's corroborating opinion and mailed it with their notice of intent which, when read together, satisfied the statute's "reasonable investigation" requirement. The court held:

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

Id. at 484.

As stated earlier, this case does not involve plaintiffs' failure to meet a mere technicality and plaintiffs' claim here was not dismissed for failure to timely provide an expert affidavit.

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Rather, as the Third District found, plaintiffs' case was dismissed because they failed to produce any evidence at three hearings which established that they conducted the statutorily mandated investigation of the claim prior to sending their notice.

CONCLUSION

WHEREFORE, Respondents, George D. Mekras, M.D. and Miami Urology Institute, respectfully request that this Court decline to exercise jurisdiction over this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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