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 RESPONDENT
DR. JOHN T. McDONALD FOUNDATION
d/b/a DOCTORS' HOSPITAL
ON THE MERITS

PARENTI, FALK, WAAS & FRAZIER
113 Almeria Avenue
Coral Gables, Florida 33134
Telephone: (305) 447-6500

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES . . . . . ii-vi

INTRODUCTION 1

STATEMENT OF CASE AND FACTS 1-8

POINT INVOLVED ON CERTIORARI 9

SUMMARY OF ARGUMENT 9-11

ARGUMENT 12-41

THE TRIAL COURT PROPERLY DISMISSED THE ACTION ON THE GROUNDS THAT PLAINTIFFS FAILED TO CONDUCT A REASONABLE INVESTIGATION AS DEFINED BY SECTION 766.202(4), FLORIDA STATUTES (1991), PRIOR TO MAILING THE NOTICE OF INTENT TO THE DEFENDANTS; THE STATUTES DO NOT PROVIDE FOR ANY EXCEPTION TO THE REQUIREMENT THAT A REASONABLE INVESTIGATION PRECEDE THE MAILING OF A NOTICE OF INTENT TO INITIATE MEDICAL MALPRACTICE.

A. The standard of review 15-16

B. The statutory "investigation requirement 17-20

C. Creating an exception to the "investigation" requirement would constitute an unauthorized abrogation of the legislative function 20-25

D. Creating a judicial exception to the statutory "investigation" requirements based upon a rule concerning the quality of evidence necessary to support a verdict would be inconsistent with the goals of presuit screening 25-35

E. The trial court properly dismissed the plaintiffs' claim 35-41

CONCLUSION 42

CERTIFICATE OF SERVICE 43

PARENTI, FALK, WAAS & FRAZIER, ATTORNEYS AT LAW
113 ALMERIA AVENUE, CORAL GABLES, FLORIDA 33134 • TELEPHONE (305) 447-6500

TABLE OF AUTHORITIES

PAGE NO.

Aetna Casualty & Surety Co. v. Huntington National Bank, 609 So. 2d 1315 (Fla. 1992) 20

American Bankers Life Assurance Co. v. Williams, 212 So. 2d 777 (Fla. 1st DCA 1968) 20

Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979) 14, 15

Archer v. Maddux, 645 So. 2d 544 (Fla. 1st DCA 1994) 19, 29, 33, 36

Atkins v. Humes, 110 So. 2d 663 (Fla. 1959) 1, 19, 25, 29, 40

Baker v. State, 636 So. 2d 1342 (Fla. 1994) 20

Brooks v. Serrano, 209 So. 2d 279 (Fla. 4th DCA 1968) 25, 26, 28, 32

Brown v. Swindal, 121 So. 2d 38 (Fla. 1st DCA 1960) 28

Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981) 30

Crovella v. Cochrane, 102 So. 2d 307 (Fla. 1st DCA 1958) 26

Diaz v. Salabarria, 615 So. 2d 778 (Fla. 3d DCA 1993) 14, 15

Doctors' Memorial Hospital, Inc. v. Evans, 543 So. 2d 809 (Fla. 1st DCA 1989) 28

Dohr v. Smith, 104 So. 2d 29 (Fla. 1958) 27, 30, 32

Dressler v. Boca Raton Community Hospital, 566 So. 2d 571 (Fla. 4th DCA 1990), rev. denied, 581 So. 2d 164 (Fla. 1991) 13, 24

Duffy v. Brooker, 614 So. 2d 539 (Fla. 1st DCA), rev. denied, 624 So. 2d 267 (Fla. 1993) 1, 10, 14, 15, 24, 27, 34, 37-40

Florida Patient's Compensation Fund v. Tillman,
487 So. 2d 1032 (Fla. 1986) 29, 33

Forsythe v. Longboat Key Beach Erosion Control Dist.,
604 So. 2d 452 (Fla. 1992) 21

Furnari v. Lurie,
242 So. 2d 742 (Fla. 4th DCA 1971) 28

Gooding v. University Hospital Building, Inc.,
445 So. 2d 1015 (Fla. 1984) 28

Halifax Hospital District v. Davis,
201 So. 2d 257 (Fla. 1st DCA),
cert. denied, 207 So. 2d 452 (Fla. 1967) 26, 28

Hernandez v. Clinica Pasteur, Inc.,
293 So. 2d 747 (Fla. 3d DCA 1974),
disapproved Gooding v. University Hospital Building, Inc.,
445 So. 2d 1015 (Fla. 1984) 28

Holly v. Auld,
450 So. 2d 217 (Fla. 1984) 20, 22, 23

Hospital Corp. of America v. Lindberg,
571 So. 2d 446 (Fla. 1990) 14

Ingersoll v. Hoffman,
589 So. 2d 223 (Fla. 1991) 18, 22, 24

Jordan v. Boisvert,
632 So. 2d 254 (Fla. 1st DCA 1994) 15

Kukral v. Mekras,
647 So. 2d 849 (Fla. 3d DCA 1995) (*en banc*) . . 1, 4, 8, 14, 38

Levy v. Kirk,
187 So. 2d 401 (Fla. 3d DCA 1966) 28

Maldonado v. EMSA Limited Partnership,
645 So. 2d 86 (Fla. 3d DCA 1994) 19

Malver v. Sheffield Industries, Inc.,
502 So. 2d 75 (Fla. 3d DCA 1987) 15

Marrero v. Goldsmith,
486 So. 2d 530 (Fla. 1986) 33

Merola v. Stang,
130 So. 2d 119 (Fla. 3d DCA 1961) 28

Miami Physical Therapy Associates, Inc. v. Savage,
632 So. 2d 114 (Fla. 3d DCA 1994) 14

Michaels v. Spiers,
144 So. 2d 835 (Fla. 2d DCA 1962) 28

Musachia v. Terry,
140 So. 2d 605 (Fla. 3d DCA 1962) 28

O'Grady v. Wickman,
213 So. 2d 321 (Fla. 4th DCA 1968) 28

Patry v. Capps,
633 So. 2d 9 (Fla. 1994) 1, 18, 24, 40

Pinellas Emergency Mental Health Services, Inc. v. Richardson,
532 So. 2d 60 (Fla. 2d DCA 1988) 13

Public Health Trust of Dade County v. Lopez,
531 So. 2d 946 (Fla. 1988) 19

Ragoonanan v. Associates in Obstetrics & Gynecology,
619 So. 2d 482 (Fla. 2d DCA 1993) 1, 37, 38, 40

Reynolds v. Burt,
359 So. 2d 50 (Fla. 1st DCA 1978) 28

Ritz v. Florida Patient's Compensation Fund,
436 So. 2d 987 (Fla. 5th DCA 1983),
rev. denied, 450 So. 2d 488 (Fla. 1984) 25

Sapp v. Daniels,
520 So. 2d 641 (Fla. 1st DCA 1988) 20

Sarasota Herald-Tribune Co. v. Sarasota County,
632 So. 2d 606 (Fla. 2d DCA 1993) 19

Sasser v. Humana of Florida, Inc.,
404 So. 2d 856 (Fla. 1st DCA 1981) 28

Shands Teaching Hospital v. Miller,
642 So. 2d 48 (Fla. 1st DCA 1994) 1, 14, 36, 40

Sims v. Helms,
345 So. 2d 721 (Fla. 1977) 25, 27

South Miami Hospital v. Sanchez,
386 So. 2d 39 (Fla. 3d DCA 1980) 28

Southern Florida Sanitarium and Hospital, Inc. v. Hodge,
215 So. 2d 753 (Fla. 3d DCA 1968) 33

St. Petersburg Bank & Trust Co. v. Hamm,
414 So. 2d 1071 (Fla. 1982) 22

State v. Barnes,
595 So. 2d 22 (Fla. 1992) 20

Stebilla v. Mussallem,
595 So. 2d 136 (Fla. 1st DCA),
rev. den., 604 So. 2d 487 (Fla. 1992) 14, 36

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

Stephien v. Bay Memorial Medical Center,
397 So. 2d 333 (Fla. 1st DCA)
rev. dismissed, 402 So. 2d 607 (Fla. 1981) 28

Storer v. Storer,
353 So. 2d 152 (Fla. 3d DCA 1977),
cert. denied, 360 So. 2d 1250 (Fla. 1978) 15

Suarez v. St. Joseph's Hospital,
634 So. 2d 217 (Fla. 2d DCA 1994) 15, 37

Thomas v. Berrios,
348 So. 2d 905 (Fla. 2d DCA 1977) 25, 28

University of Miami v. Echarte,
618 So. 2d 189 (Fla. 1993),
cert. denied, 114 S.Ct. 304, 126 L.Ed.2d 252 (1993) . . 13, 17

Van Pelt v. Hilliard,
75 Fla. 792, 78 So. 693 (1918) 21, 22

Watkins v. Rosenthal,
637 So. 2d 993 (Fla. 3d DCA 1994) 27

Weber v. Dobbins,
616 So. 2d 956 (Fla. 1993) 22

Williams v. Powers,
619 So. 2d 980 (Fla. 5th DCA 1993) 40, 41

Wolfsen v. Applegate,
619 So. 2d 1050 (Fla. 1st DCA 1993) 35

OTHER AUTHORITIES:

Art. II, § 3, Fla. Const. 22

Fla. Stat. § 766.106 (2) (1991) . . . . . *passim*

Fla. Stat. § 766.201 (1991) . . . . . *passim*

Fla. Stat. § 766.202 (4), (1991) . . . . . *passim*

Fla. Stat. § 766.203 (2), (1991) . . . . . *passim*

Fla. Stat. § 766.206, (1991) . . . . . *passim*

Fla. Stat. §§ 766.201-766.212 (1991) . . . . . *passim*

PARENTI, FALK, WAAS & FRAZIER, ATTORNEYS AT LAW
113 ALMERIA AVENUE, CORAL GABLES, FLORIDA 33134 • TELEPHONE (305) 447-6500

which stated that the expert was familiar with the standard of care for hospitals in filling requests for medications, and that the hospital met the standard of care in the community in treating KUKRAL. [R. 175-176]

c. On June 19, 1992, Dr. MEKRAS denied the claim. [R. 177] MEKRAS' denial specifically stated that the notice of intent was invalid because it did not include a written medical expert opinion.

d. On August 14, 1992, plaintiffs' counsel, Mr. Katz, mailed a letter to counsel for the prospective defendants which was accompanied by a written, although unverified, opinion from an expert, Michael Lilien, M.D. [R. 180-184]

The opinion from Dr. Lilien was dated June 1, 1992, and stated, after summarizing the circumstances of the incident:

> The issue resolves itself down to the fundamental question: who is to be held accountable for the injuries which resulted from the application of the incorrect concentration of acid to the skin of the penis?
>
> With regard to responsibility, there appears to be no question that Dr. Mekras applied the acid.
>
> The pivotal issue is whether the acid solution, presumably prepared by the institution, was improperly labeled as a 5% solution of aceto-acetic acid.
>
> If this is the case it follows, in my opinion, that Dr. Mekras, could not be held negligent in applying the mislabeled solution. The institution and whoever mislabeled the solution would be culpable. If this is not the case, however, Dr. Mekras was clearly at fault. Particularly if the acid solution was properly labeled.

[R. 309-311]

PARENTI, FALK, WAAS & FRAZIER, ATTORNEYS AT LAW
113 ALMERIA AVENUE, CORAL GABLES, FLORIDA 33134 · TELEPHONE (305) 447-6500

Mr. Katz' letter of August 14, 1992, stated:

> In my opinion, Dr. Mekras was negligent in not making a specific request when asking the orderly to bring "acid" to the operating room. The hospital was also negligent in sending an inherently dangerous substance (concentrated acid) which, in its concentrated form, has no suitable application in the operating room. However, the evidence is that the acid was labeled as concentrated . . .

[R. 183][1]

e. On September 3, 1992, counsel for plaintiffs mailed the potential defendants a letter enclosing a verification of Dr. Lilien's opinion. [R. 186] The lawsuit was filed shortly thereafter.

Based upon these facts, DOCTORS' argued below that the action should be dismissed pursuant to section 766.206, Florida Statutes (1991), on the grounds that plaintiffs' failure to mail a verified written opinion of an expert with the notice of intent evidenced a failure to conduct the reasonable investigation required by sections 766.203 (2) and 766.202 (4), Florida Statutes (1991). [R. 209-212; 216-218; 250-252; 266]

---

[1] DOCTORS' respectfully suggests that the dissenting opinion below misinterpreted certain of the facts. The parties did not agree to extend pre-suit investigation until August 14, 1992, when the unverified affidavit was finally sent to defense counsel. Kukral v. Mekras, supra at 851 n.3 (Jorgenson, J., dissenting). The affidavit was not supplied to defense counsel on June 1, 1992, id., but was only dated on that date. Therefore, the affidavit was not even obtained by plaintiffs' counsel until after the hospital had denied the plaintiffs' claim with its own expert affidavit. By the time the affidavit was made available to the defendants, the presuit screening period was over, and the defendants had already been required to exercise one of the options available under Fla. Stat. § 766.106 (3)(b)(1991).

Three hearings were held on defendant's motion. During the second of these hearings, the trial court specifically inquired of the plaintiffs' attorney whether an expert had reviewed the case prior to the notice of intent being mailed:

> THE COURT: We are here to determine -- and you can get a continuance of this if you want, Mr. Katz -- I want to know whether there was a reasonable investigation by a medical person that said that based on what this medical person has seen or read or examined or whatever he or she has done, that there is a basis for your bringing a malpractice suit against whoever you brought a malpractice suit against.
>
> MR. KATZ: All right, judge.
>
> THE COURT: And that was before the Notice of Intent went out.
>
> MR. KATZ: Judge, number one, I disagree with their contention that that is required prior to filing the Notice of Intent. . .
>
> * * *
>
> MR. KATZ: -- I don't know right now whether, in fact, Dr. Lilien reviewed it prior to the filing of the notice of intent or -- or and -- and it may have been -- or whether I had information, other information from other doctors prior to that point, prior to the notice of intent because -- and, frankly, I hadn't looked at that time because I wasn't aware that that was even going to be an issue here today.
>
> THE COURT: Okay. So what you're telling me is you may have some material which indicates you conducted an investigation through other doctors, but you did not rely on them until after the Notice of Intent was sent?
>
> MR. KATZ: No, I'm not -- I'm not saying ---
>
> THE COURT: You're not saying that either?
>
> MR. KATZ: I'm saying that I did a reasonable investigation before filing the notice of intent. The filing of the notice of intent was not

> frivolous; that the basis for the lawsuit was not frivolous, that -- and that the statute was fully complied with prior to the lawsuit being filed.

[R. 229-230] Thereafter, the court noted:

> THE COURT: I mean, I think just by hearing it you'd say it's not frivolous, but again -- then again, it's only your view and only my view, based on what's in this Court, but that may not be what the statute requires.
>
> The thing -- the statute requires something more tangible and something a little more definite than a judge looking at your papers to determine that, and you saying that the lawsuit is not frivolous.

[R. 230-231]

Prior to the final hearing, counsel for plaintiffs filed a written response to defendant's motion which stated:

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

[R. 197]

At the final hearing, the following exchange took place:

> THE COURT: [A]m I to ascertain or to understand from your memorandum that no doctor looked at this situation; that you made that decision, that there was a reasonable basis to bring the lawsuit? Is that what I am hearing or reading here?

PARENTI, FALK, WAAS & FRAZIER, ATTORNEYS AT LAW
113 ALMERIA AVENUE, CORAL GABLES, FLORIDA 33134 • TELEPHONE (305) 447-6500

> MR. KATZ: Well, no. I had spoken with doctors prior to filing the presuit notice. . .

[R. 247-248]

Plaintiffs' counsel admitted that he did not obtain the written opinion of an expert prior to mailing the notice of intent. [R. 251] He argued, however, that the defect was cured by mailing the written corroboration to the defendants before the lawsuit was filed. [R. 257] It was the plaintiffs' position that the investigation required by the presuit screening statutes was not required to precede mailing a notice of intent, and that as long as an investigation was conducted prior to filing the lawsuit, the investigation requirement had been satisfied. [R. 253]

The trial court dismissed the action pursuant to section 766.206(2), Florida Statutes (1991), based upon the express finding that the investigation conducted by the plaintiffs' attorney failed to satisfy the reasonable investigation requirements of sections 766.202(4) and 766.203(2), Florida Statutes (1991).[2] [R. 300-303] The order stated:

> This court finds . . . that defendants have met their burden of presenting a prima facie case that the plaintiffs did not comply with the reasonable investigation requirements of Sections 766.201-766.212, Florida Statutes (1991).

---

[2] The petitioners' repeated assertion that the action was dismissed "because the verified medical opinion was not sent with the notice of intent to initiate litigation" is incorrect. Petitioners' Brief on the Merits, pp. 4, 6, 11. The claim was dismissed because the plaintiffs did not *obtain* a written opinion from a medical expert prior to mailing the notices of intent, and therefore did not comply with the mandatory "investigation" requirement prior to initiating the claim.

PARENTI, FALK, WAAS & FRAZIER, ATTORNEYS AT LAW
113 ALMERIA AVENUE, CORAL GABLES, FLORIDA 33134 · TELEPHONE (305) 447-6500

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

[R. 300-303]

The majority of the court below affirmed the dismissal on the grounds that the "plaintiffs failed to 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." Kukral v. Mekras, supra at 850. The majority concluded: "Under section 766.206, Florida Statutes (1991), since no reasonable investigation was conducted, the plaintiff's claim was properly dismissed." Id.

Upon plaintiffs' motion, the court granted rehearing *en banc*. Thereupon, the majority of the Third District Court of Appeal adopted the panel decision as the decision of the *en banc* court. Id. at 852.

POINT INVOLVED ON CERTIORARI

WHETHER THE TRIAL COURT PROPERLY DISMISSED THE ACTION ON THE GROUNDS THAT PLAINTIFFS FAILED TO CONDUCT A REASONABLE INVESTIGATION AS DEFINED BY SECTION 766.202(4), FLORIDA STATUTES (1991), PRIOR TO MAILING THE NOTICE OF INTENT TO THE DEFENDANTS; THE STATUTES DO NOT PROVIDE FOR ANY EXCEPTION TO THE REQUIREMENT THAT A REASONABLE INVESTIGATION PRECEDE THE MAILING OF A NOTICE OF INTENT TO INITIATE MEDICAL MALPRACTICE.

SUMMARY OF ARGUMENT

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). In this case it is undisputed that the plaintiffs' attorney did not obtain a written opinion from an expert prior to mailing the notices of intent to the defendants.

The failure of the plaintiffs to obtain a written opinion from an expert prior to mailing the notice of intent to the prospective defendants established a *prima facie* showing that the notice of intent was not supported by the statutorily-required investigation. Because the evidence presented by the plaintiffs was insufficient to overcome this *prima facie* showing, the trial court's factual finding that the plaintiffs' notice of intent was not in compliance with the reasonable investigation requirements of the applicable

presuit screening statutes was not clearly erroneous. Duffy v. Brooker, supra.

The judiciary is not authorized to recognize an exception to the statutory "investigation" requirements, based on its own sense of what might be appropriate. The statutory requirements are not ambiguous; therefore, engrafting an exception onto the "investigation" requirements would constitute an inappropriate abrogation of the legislative function. Moreover, the recognition of a judicial exception would run counter to the expressed legislative intent behind the presuit screening process.

Requiring a claimant to obtain a written opinion from a medical expert serves at least two functions in the presuit screening process: (1) corroborating a factual basis for a claim of negligence made against each defendant, permitting the parties to reach the merits of a claim quickly; and (2) providing verification that the required investigation was conducted. The requirement of prior investigation, verifiable by the written opinion of an expert, is perhaps the most fundamental element of presuit screening, without which the process is rendered little more than a perfunctory exercise.

In certain cases, expert testimony may not be required at trial to support a claim of medical malpractice where the court is otherwise satisfied that there is competent evidentiary matter to support a verdict. Satisfaction that there is competent evidentiary matter to support a verdict, however, does not ensure satisfaction of the presuit screening goals of early determination

of the merits of a claim, or verification of compliance with statutory procedures. Therefore, the legal rule which recognizes this exception to the requirement for expert testimony at trial may not properly be applied to pardon a clear failure to conduct an "investigation" as required by the presuit screening statutes.

The legislature's choice of an expert affidavit as the means of facilitating "early determination of the merit of claims," Fla. Stat. § 766.201(1)(d) (1991), may not be lightly disregarded. The district court properly enforced the unambiguous provisions of the presuit screening statutes when it affirmed the dismissal of the plaintiffs' claim on the grounds that no reasonable investigation was conducted prior to mailing the notices of intent to the defendants.

PARENTI, FALK, WAAS & FRAZIER, ATTORNEYS AT LAW
113 ALMERIA AVENUE, CORAL GABLES, FLORIDA 33134 · TELEPHONE (305) 447-6500

ARGUMENT

THE TRIAL COURT PROPERLY DISMISSED THE ACTION ON THE GROUNDS THAT PLAINTIFFS FAILED TO CONDUCT A REASONABLE INVESTIGATION AS DEFINED BY SECTION 766.202(4), FLORIDA STATUTES (1991), PRIOR TO MAILING THE NOTICE OF INTENT TO THE DEFENDANTS; THE STATUTES DO NOT PROVIDE FOR ANY EXCEPTION TO THE REQUIREMENT THAT A REASONABLE INVESTIGATION PRECEDE THE MAILING OF A NOTICE OF INTENT TO INITIATE MEDICAL MALPRACTICE.

The trial court in this case made the express finding that plaintiffs' notice of intent to initiate medical malpractice litigation was not in compliance with the reasonable investigation requirements of sections 766.201-212, Florida Statutes (1991), and pursuant to the authority of section 766.206(2), Florida Statutes (1991),[3] dismissed the action. The trial court's determination that an investigation as defined by section 766.202(4), Florida Statutes (1991), had not been conducted prior to mailing the notices of intent represents a straightforward application of the statutes governing presuit screening, and was properly affirmed by the district court.

---

[3] Section 766.206 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* . . .

The dismissal of the plaintiffs' action is consistent with the spirit and the letter of the presuit screening statutes. In University of Miami v. Echarte, 618 So. 2d 189, 192-193 (Fla. 1993), cert. denied, 114 S.Ct. 304, 126 L.Ed.2d 252 (1993), this Court summarized the pertinent provisions of the statutes governing presuit screening which are at issue in this case:

> 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. Sec. 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*. After the claimant has established the reasonable grounds to believe that negligence occurred, the defendant or defendant's insurer is required to conduct a presuit investigation. Sec. 766.203(3), Fla. Stat. (Supp.1988).

Upon the defendant's motion brought pursuant to section 766.206, the trial court determined that the plaintiffs had failed to conduct the required investigation prior to giving notice to the defendants. Accordingly, the action was appropriately dismissed pursuant to section 766.206(2), which provides that upon such a finding, "the court shall dismiss the claim."[4]

---

[4] In light of this unambiguous provision, no lesser sanction is authorized. In this regard, it is noted that the decisions in Pinellas Emergency Mental Health Services, Inc. v. Richardson, 532 So. 2d 60 (Fla. 2d DCA 1988), and Dressler v. Boca Raton Community Hospital, 566 So. 2d 571 (Fla. 4th DCA 1990), rev. denied, 581 So. 2d 164 (Fla. 1991), did not involve the interpretation of section 766.206(2). Rather, those cases

A. The standard of review

The trial court's factual finding that no reasonable investigation had been conducted prior to the mailing of the notices of intent is clothed with a presumption of correctness, and must be affirmed on appeal unless it is clearly erroneous. See Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979); Diaz v. Salabarria, 615 So. 2d 778 (Fla. 3d DCA 1993). See also Duffy v. Brooker, supra at 545 (trial court's finding that defendant's insurer did not conduct reasonable investigation supported by competent substantial evidence).

Unlike a motion to dismiss for failure to comply with the statutory *notice* requirements,[5] a motion brought under section 766.206 is used to test the sufficiency of the *investigation*

---

addressed the sanction to be imposed for a failure to comply with informal discovery under two different provisions of the presuit screening statutes. See Fla. Stat. § 766.106 (3)(a) (1991) ("Unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses."); Fla. Stat. § 766.106 (6) (1991) ("Failure to [comply with informal discovery] is grounds for dismissal of claims or defenses ultimately asserted.")

[5] In ruling on a motion to dismiss for failure to comply with the condition precedent of notice, the trial court must make a legal determination as to whether the plaintiff has, in Judge Jorgenson's terms, "jumped . . . through all of the procedural presuit hoops." Kukral v. Mekras, supra at 852 (Jorgenson, J., dissenting). See, e.g., Miami Physical Therapy Associates, Inc. v. Savage, 632 So. 2d 114 (Fla. 3d DCA 1994). See also Hospital Corp. of America v. Lindberg, 571 So. 2d 446 (Fla. 1990) (complaint filed prior to expiration of 90-day screening period subject to dismissal with leave to amend, as long as notice mailed within limitations period); Shands Teaching Hospital v. Miller, supra (failure to supply verified opinion within limitations period requires dismissal for failure to comply with notice requirements); Stebilla v. Mussallem, 595 So. 2d 136, 139 (Fla. 1st DCA), rev. den., 604 So. 2d 487 (Fla. 1992) (noting that motion challenging failure to send expert affidavit with notice of intent had not been brought under Fla. Stat. § 766.206).

required by section 766.203(2). See, e.g., Duffy v. Brooker, supra. It looks beyond the threshold question whether there has been facial compliance with the presuit notice requirements, 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) ("If there was any doubt as to the sufficiency and intent of the verification of [the expert's] medical opinions, [defendant] could have moved to resolve that issue under section 766.206 (1). . .")

In resolving a motion brought under section 766.206, the trial court must weigh evidence and make factual findings. See, e.g., Duffy v. Brooker, supra. Such findings are clothed with a presumption of correctness, and are not to be disturbed on appeal unless clearly erroneous or totally unsupported by competent substantial evidence. See Applegate v. Barnett Bank of Tallahassee, supra; Jordan v. Boisvert, 632 So. 2d 254 (Fla. 1st DCA 1994); Diaz v. Salabarria, supra; Malver v. Sheffield Industries, Inc., 502 So. 2d 75 (Fla. 3d DCA 1987). See also Storer v. Storer, 353 So. 2d 152 (Fla. 3d DCA 1977), cert. denied, 360 So. 2d 1250 (Fla. 1978).

The facts, of course, are to be viewed in a light most favorable to the judgment; therefore, the availability of inferences which might have supported a finding in plaintiffs' favor -- such as are highlighted in the dissenting opinion below -- cannot render the trial court's factual finding clearly erroneous. The decision of the district court affords the proper deference to

PARENTI, FALK, WAAS & FRAZIER, ATTORNEYS AT LAW
113 ALMERIA AVENUE, CORAL GABLES, FLORIDA 33134 · TELEPHONE (305) 447-6500

the finding of the trial court that the plaintiffs did not conduct a reasonable investigation prior to mailing the notices of intent to the prospective defendants.

B. The statutory "investigation" requirement.

This is not a "form over substance" case. The reasonable investigation requirement is central to the entire presuit screening process. The trial court's finding that the plaintiffs failed to conduct the required "investigation" represents a proper application of the unambiguous provisions of the statutes governing presuit screening. Fla. Stat. §§ 766.201-212 (1991).

The pertinent statutes could not be more clear in expressing what is required by a claimant. Section 766.203(2) provides:

> (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.

In addition, the legislature specifically defined the "investigation" which is required:

> (4) "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.

Fla. Stat. § 766.202(4) (1991). Reading this section together with section 766.203(2), it is patently clear that a claimant must consult with a medical expert, and obtain a written opinion, prior to mailing a notice of intent to a prospective defendant in order to comply with the reasonable investigation requirements of the presuit screening statutes.

Moreover, the statutes clearly provide that the required investigation must precede the mailing of the notice of intent to prospective defendants. Fla. Stat. § 766.106(2) (1991) ("After completion of presuit investigation. . ." claimant to send each defendant notice of intent); Fla. Stat. § 766.203(2) (1991) ("Prior to issuing notification of intent . . . the claimant shall conduct an investigation . . ."). See also Fla. Stat. § 766.201(2)(a) (1991) (presuit investigation to include verifiable requirements that reasonable investigation "precede" malpractice claims); Fla. Stat. § 766.206(4) (1991) ("If the court finds that an attorney for the claimant mailed a notice of intent to initiate litigation without reasonable investigation. . . the court shall submit its finding in the matter to the Florida Bar for disciplinary review of the attorney."); University of Miami v. Echarte, supra at 192-193 (investigation by claimant is "first step" in the presuit process; "medical negligence claim [must] be corroborated by a 'verified

written medical expert opinion' before giving notice to a defendant.")

Clearly, the failure to obtain a written opinion from an expert corroborating reasonable grounds to believe that each prospective defendant was negligent in rendering care to the claimant *before* giving notice to the prospective defendants is more than a "technical" violation of the presuit screening statutes. Cf. Ingersoll v. Hoffman, 589 So. 2d 223 (Fla. 1991) (requirements of presuit screening statutes are more than mere technicalities). Unlike the mode of service issue addressed by this Court in Patry v. Capps, 633 So. 2d 9, 12 (Fla. 1994), 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 "go[es] to the heart of the presuit notice and screening process." Id. at 13.

Plaintiffs admittedly did not obtain a written opinion from a medical expert prior to mailing the notices of intent to the defendants.[6] [R. 252] Since, by definition, an "investigation" requires the claimant's attorney to consult with and obtain a written opinion from a medical expert, the trial court's finding that no such investigation was conducted in this case cannot be found to have been clearly erroneous unless this Court determines that an unwritten exception exists which obviates, *as a matter of law*, the statutory investigation requirement, including the mandate

---

[6] That there was a failure to comply with the letter of the presuit screening statutes is not "arguable;" it is undeniable. Petitioners' Initial Brief on the Merits, p. 11.

that the claimant's attorney obtain an expert affidavit prior to mailing a notice of intent.

Plaintiffs argue that this Court should recognize an "obvious injury" exception to the statutory requirement of obtaining an expert affidavit prior to mailing a notice of intent. It is respectfully submitted that this Court is not authorized to create an exception to the unambiguous requirements of the applicable statutes, and that such an exception would be antithetical to the goals of presuit screening. As a result, the decision of this Court in Atkins v. Humes, 110 So. 2d 663 (Fla. 1959), has no applicability to a motion brought under section 766.206(2), to determine whether a claimant's notice of intent is "in compliance with the reasonable investigation requirements of ss. 766.201-766.212."

C. Creating an exception to the "investigation" requirement would constitute an unauthorized abrogation of the legislative function.

Because the statutes at issue in this case are not ambiguous, this Court lacks the power to engraft onto the "investigation" requirement an exception which is not contained within the statutes themselves. See Archer v. Maddux, 645 So. 2d 544 (Fla. 1st DCA 1994); Maldonado v. EMSA Limited Partnership, 645 So. 2d 86 (Fla. 3d DCA 1994). Cf. Public Health Trust of Dade County v. Lopez, 531 So. 2d 946, 949 (Fla. 1988) (Court could not engraft onto constitutional amendment "something that is not there."); Sarasota Herald-Tribune Co. v. Sarasota County, 632 So. 2d 606, 607 (Fla. 2d

DCA 1993) ("Courts are not authorized to embellish legislative requirements with their own notions of what might be appropriate.")

In Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984), this Court stated:

> the courts of this state are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power."

quoting American Bankers Life Assurance Co. v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968). Accord Baker v. State, 636 So.2d 1342 (Fla. 1994); Aetna Casualty & Surety Co. v. Huntington National Bank, 609 So. 2d 1315 (Fla. 1992); State v. Barnes, 595 So. 2d 22 (Fla. 1992).

There is no ambiguity in the relevant 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," this Court is powerless to find that anything less satisfies the "investigation" requirement. See Baker v. State, supra at 1344 ("Where the legislature has used particular words to define a term, the courts do not have the authority to redefine it."); Sapp v. Daniels, 520 So. 2d 641, 642 (Fla. 1st DCA 1988) (where the legislature provides statutory definitions, such definitions prevail). Accordingly, the *only* conclusion which can be reached in this case is that the notices of intent mailed by the

plaintiffs were "not in compliance with the reasonable investigation requirements of ss. 766.201-766.212. . ." Fla. Stat. § 766.206(2) (1991).

The principles which compel this result have been repeatedly applied by this Court. In Van Pelt v. Hilliard, 75 Fla. 792, 798-799, 78 So. 693, 694-695 (1918), this Court stated:

> The Legislature must be understood to mean what it has plainly expressed and this excludes construction. The Legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. Cases cannot be included or excluded merely because there is intrinsically no reason against it. *Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.* If a Legislative enactment violates no constitutional provision or principle it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage. Courts have then no power to set it aside or evade its operation by forced and unreasonable construction. If it has been passed improvidently the responsibility is with the Legislature and not the courts. Whether the law be expressed in general or limited terms, the Legislature should be held to mean what they have plainly expressed, and consequently no room is left for construction, but if from a view of the whole law, or from other laws in pari materia the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature.

See also Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454-455 (Fla. 1992), and cases cited therein.

As recently explained in Weber v. Dobbins, 616 So. 2d 956, 959 (Fla. 1993), these principles are firmly rooted in the separation of powers doctrine[7]:

> The reason for the rule that courts must give statutes their plain and ordinary meaning is that only one branch of government may write laws. See Holly v. Auld, [supra]. *Just as a governor who chooses to veto a bill may not substitute a preferable enactment in its place, courts may not twist the plain wording of statutes in order to achieve particular results.* Even when courts believe the legislature intended a result different from that compelled by the unambiguous wording of a statute, they must enforce the law according to its terms. St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982). A legislature must be presumed to mean what it has plainly expressed, Van Pelt v. Hilliard, [supra], and if an error in interpretation is made, it is up to the legislature to rewrite the statute to accurately reflect legislative intent.
>
> In order for a court to ignore the plain meaning of statutory language, the result reached by the literal interpretation must be unreasonable or ridiculous, Holly, [supra] at 219, or there must be overwhelming evidence of contrary legislative intent. Hamm, 414 So.2d at 1073.

In this circumstance, the legislative intent does not support, much less require, recognition of an exception to the unambiguous investigation requirements. As noted by this Court in Ingersoll v. Hoffman, supra at 224:

> 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.*

---

[7] Art. II, § 3, Fla. Const.

In light of the clear expression of legislative intent, there is no justification for engrafting a judicial exception onto the statutes which themselves provide for no exceptions. Holly v. Auld, supra.

Sections 766.201[8] and 766.203[9], Florida Statutes (1991), expressly provide that the requirement of presuit investigation applies to "all medical negligence claims." The legislature did not say that the presuit investigation requirements shall apply to all cases, except those presenting an "obvious" case of negligence. It said all, and it clearly meant that investigation is mandatory for all cases.

Section 766.201 further expresses the legislative intent that presuit investigation "shall include: 1. Verifiable requirements that reasonable investigation precede . . . malpractice claims" and

---

[8] Section 766.201(2), Florida Statutes (1991), provides:

> It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, presuit investigation and arbitration. Presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses. . . .
>
> (a) Presuit investigation shall include:
>
> 1. Verifiable requirements that reasonable investigation precede both malpractice claims and defenses in order to eliminate frivolous claims and defenses.
>
> 2. Medical corroboration procedures.

[9] Section 766.203, Florida Statutes (1991), provides:

> (1) Presuit investigation of medical negligence claims and defenses pursuant to this section and ss. 766.204-766.206 shall apply to all medical negligence . . . claims and defenses.

"2. Medical corroboration procedures." The requirement of a written expert opinion supplies the verification contemplated in section 766.201(2)(a) that the mandatory investigation was indeed undertaken. See Duffy v. Brooker, supra at 544 (presuit investigation "must be 'verifiable'"). Cf. Patry v. Capps, supra at 12 (verification serves to "reduce contention and litigation" concerning compliance with various presuit screening requirements).

Finally, and most significantly, the most fundamental purpose of presuit investigation is "requiring early determination of the merit of claims." Fla. Stat. § 766.201(1)(d) (1991). The legislature clearly intended to establish a procedure which would "permit early evaluation of the merit of claims and defenses and, thereby, to encourage meaningful presuit negotiations." Duffy v. Brooker, supra at 543. See also Ingersoll v. Hoffman, supra at 224; Dressler v. Boca Raton Community Hospital, supra.

Consulting with and obtaining a written opinion from a medical expert serves the goals of presuit screening by (a) facilitating early determination of the merits of a claim by corroborating a basis for a claim of negligence against each defendant, and (b) providing verification that the required investigation has been conducted to facilitate enforcement of the statutory requirements.

Eliminating the requirement of "investigation" in any case is antithetical to each of these goals. Because the failure to conduct the required investigation prior to mailing a notice of intent bespeaks a substantive lack of compliance with the statutory procedures, it is not possible, as it was in Patry v. Capps, supra,

"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.

D. Creating a judicial exception to the statutory "investigation" requirements based upon a rule concerning the quality of evidence necessary to support a verdict would be inconsistent with the goals of presuit screening.

It is well-settled that expert testimony is generally required to support a claim of medical malpractice. The exception to this general rule was succinctly stated in Brooks v. Serrano, 209 So. 2d 279, 280 (Fla. 4th DCA 1968):

> To determine what skills, means and methods are recognized as necessary and customarily followed in the community with respect to any given case normally requires expert testimony, *except where the duty and its breach are so obvious as to be apparent to persons of common experience.*

See Atkins v. Humes, supra. This exception may not properly be relied upon as the basis for a judicially-created exception to the statutory "investigation" requirements.

Initially, 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 is generally required to support a claim of medical malpractice in order to ensure that verdicts are not based on speculation and surmise. See Sims v. Helms, 345 So. 2d 721 (Fla. 1977); Ritz v. Florida Patient's Compensation Fund, 436 So. 2d 987 (Fla. 5th DCA 1983), rev. denied, 450 So. 2d 488 (Fla. 1984); Thomas v. Berrios, 348 So. 2d 905 (Fla. 2d DCA 1977). Without testimony regarding the details

of the treatment methods normally followed by other qualified physicians in the community, jurors can only "apply [their] own conception as to the standard of care which the law imposes on the defendant." Brooks v. Serrano, supra at 281. See also Crovella v. Cochrane, 102 So. 2d 307, 310 (Fla. 1st DCA 1958).

In short, 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, in order to encourage prompt resolution of claims. From a practical standpoint, the single most effective way to reach the merits of a claim is to consult with a medical expert, and obtain a written opinion which can be supplied to the opposing party at the outset outlining the factual basis for the claim of negligence.

Obtaining a written opinion also supplies the element of verification which facilitates enforcement of the statutory mandates. See Fla. Stat. § 766.206 (1991). Without such verification, the bare contention by a plaintiff's attorney that he or she had "investigated" a claim would be virtually impossible to

refute, thereby thwarting effective enforcement of the statutory requirements.

Requiring a written opinion is probably the only workable means of verifying that the mandatory investigation was conducted. See, e.g., Watkins v. Rosenthal, 637 So. 2d 993 (Fla. 3d DCA 1994) (defendant not entitled to depose expert to determine whether "investigation" had been conducted); Duffy v. Brooker, supra (insufficient affidavit constitutes *prima facie* evidence that required investigation was not carried out). An expert affidavit which is complete on its face -- i.e., containing the expert's opinions and the grounds for such opinions -- constitutes self-verification that the required investigation was carried out, thereby obviating the need for resort to the enforcement measures in section 766.206. This is clearly the result intended by the legislature.

An exception to the "investigation" requirements based upon the rule that expert testimony is not required in all cases would not satisfy the goals of verification and promoting prompt resolution of claims. Instead, application of the rule to presuit screening would increase contention and litigation, a result which would be directly contrary to the goals of the statutory scheme.

The question whether expert testimony is required to establish medical negligence under the circumstances of a particular case has been the subject of frequent litigation. See, e.g., Sims v. Helms, supra (expert testimony required); Dohr v. Smith, 104 So. 2d 29 (Fla. 1958) (expert testimony required to support claim against

surgeon, but not anesthetist); Doctors Memorial Hospital, Inc. v. Evans, 543 So. 2d 809 (Fla. 1st DCA 1989) (expert testimony required); Sasser v. Humana of Florida, Inc., 404 So. 2d 856 (Fla. 1st DCA 1981) (expert testimony required); Stephien v. Bay Memorial Medical Center, 397 So. 2d 333 (Fla. 1st DCA) rev. dismissed, 402 So. 2d 607 (Fla. 1981) (expert testimony not required); South Miami Hospital v. Sanchez, 386 So. 2d 39 (Fla. 3d DCA 1980) (expert testimony not required); Reynolds v. Burt, 359 So. 2d 50 (Fla. 1st DCA 1978) (expert testimony required); Thomas v. Berrios, supra (expert testimony required); Hernandez v. Clinica Pasteur, Inc., 293 So. 2d 747 (Fla. 3d DCA 1974), disapproved Gooding v. University Hospital Building, Inc., 445 So. 2d 1015 (Fla. 1984) (expert testimony not required); Brooks v. Serrano, supra (expert testimony required); O'Grady v. Wickman, 213 So. 2d 321 (Fla. 4th DCA 1968) (expert testimony required); Halifax Hospital District v. Davis, supra (expert testimony required); Levy v. Kirk, 187 So. 2d 401 (Fla. 3d DCA 1966) (expert testimony not required); Michaels v. Spiers, 144 So. 2d 835 (Fla. 2d DCA 1962) (expert testimony not required); Musachia v. Terry, 140 So. 2d 605 (Fla. 3d DCA 1962) (expert testimony required); Merola v. Stang, 130 So. 2d 119 (Fla. 3d DCA 1961) (expert testimony not required); Brown v. Swindal, 121 So. 2d 38 (Fla. 1st DCA 1960) (expert testimony required).

In Furnari v. Lurie, 242 So. 2d 742 (Fla. 4th DCA 1971), the court stated of the rule: "The difficulty arises in determining whether the facts in a specific case are such as to bring that case within the principle." See also Halifax Hospital District v.

Davis, supra at 258 (noting that the decisions regarding the issue are "difficult to reconcile"). The determination whether expert testimony is required to support a claim of negligence in a given case is necessarily fact-specific. Application of the rule in Atkins v. Humes, supra, to the presuit screening process would threaten to undermine the simplicity of its procedures. Injecting an element of legal uncertainty into presuit screening detracts from its proper focus, which is educating both sides about the merits of the claim in an expedited fashion, so that informed decisions may be reached regarding whether the claim should be settled, arbitrated, or litigated.

The statutory requirement for a written opinion encompasses three distinct components: the opinion must corroborate (1) a departure from the standard of care and (2) causation as to (3) each prospective defendant. Fla. Stat. § 766.203 (2) (1991). See also Archer v. Maddux, supra. The ambiguities inherent in the application of the judicial rule which obviates the need for expert testimony in some cases to the presuit screening process may be seen by analyzing the cases interpreting the rule in light of these three components.

In certain cases, even though expert testimony is not required to establish the standard of care, such testimony may nevertheless be required on the issue of causation. See Atkins v. Humes, supra. See also Florida Patient's Compensation Fund v. Tillman, 487 So. 2d 1032 (Fla. 1986) (mismatched prosthesis; expert testimony presented

to establish causation; evidence that hospital breached its own standard of care sufficient to support finding of negligence).

In other cases, causation may be "obvious," but the deviation from the standard of care is not. Thus, the fact that expert testimony may not be necessary to establish one issue would not automatically obviate the need for expert testimony on the other issue. In order for an exception to the statutory mandate to at all serve the goals of presuit screening, expert testimony would have to be unnecessary as a matter of law on *both* a breach of the standard of care *and* causation.

Moreover, application of the rule could produce inconsistent results in the same case, for even in the presence of an "obvious injury," expert testimony is often necessary to define the universe of potentially liable defendants. Cf. Chenoweth v. Kemp, 396 So. 2d 1122, 1125 (Fla. 1981) (for *res ipsa loquitur* to apply, circumstances must establish that the injury would likely not have occurred in the absence of negligence, and that the "defendant is the probable actor"). The requirement in section 766.203(2) that medical corroboration be submitted regarding "each defendant" serves an important purpose in meaningful presuit screening.

The case of Dohr v. Smith, supra, illustrates this point. In Dohr, the plaintiff sued an anesthetist, a surgeon and a hospital, and presented no expert testimony to support the claim against any of the defendants. This Court held that expert testimony was not required to support a finding against the anesthetist, and reversed the directed verdict which had been entered in her favor. This

Court held that the jury should have been allowed to determine whether the anesthetist was negligent in light of the fact that the plaintiff suffered from an adverse result which the anesthetist herself had sought to prevent when she examined the plaintiff's mouth before administering anesthesia.

This Court went on to affirm the directed verdict against the surgeon, however, on the grounds that "the facts surrounding the surgeon's conduct were certainly not so simple or obvious that he should be placed in the same category as the anesthetist." Id. at 33. The directed verdict entered in favor of the hospital was also affirmed, with little discussion, based on the dearth of *any* evidence to support a finding in the plaintiff's favor.

Presently, multi-party litigation is the rule rather than the exception in medical malpractice cases. As a result, the requirement of an expert affidavit serves an important purpose in ensuring that no defendant is sued without basis. While the obvious nature and extent of an injury may suggest that *someone* was negligent, an affidavit from an expert serves to corroborate that reasonable grounds exist to believe that *each defendant* being put on notice was negligent. Even where it is obvious that malpractice has occurred, a claim of negligence against a given health care provider may nonetheless be frivolous, depending upon the circumstances of that defendant's participation in the treatment. A written opinion from a medical expert serves the purpose of corroborating that the defendants put on notice are reasonably within the universe of potentially liable parties.

Any judicial abrogation of the "investigation" requirement would have to take into account the fact that while a claim may be "obvious" as to one health care provider, it may not be "obvious" as to another. See, e.g., Dohr v. Smith, supra. As a result, abrogation would have to be considered on a case-by-case, issue-by-issue, and defendant-by-defendant basis.

The ambiguities outlined above may not be dismissed as a parade of imagined horribles, for they are present in this case. For example, it simply cannot be said that the standard of care for dispensing acids for use in a hospital operating room is simple or obvious. Similarly, the properties and uses of concentrated acid are not "so obvious as to be apparent to persons of common experience." Brooks v. Serrano, supra. The nature and extent of KUKRAL's injury simply does not suggest that the hospital did anything contrary to the standard practice in the community. See Dohr v. Smith, supra.

In light of the confusion which application of the rule obviating the need for expert testimony in certain cases generates, it is respectfully submitted that such a rule is entirely antithetical to the presuit screening process. The injection of this rule -- the application of which to a specific case is admittedly difficult -- into the presuit screening process would not reduce disputes, it would invite them. Introducing an element of legal ambiguity into a process which was designed to be streamlined will not further the goal of facilitating the prompt resolution of claims.

While it is conceivable that in the context of full-blown discovery sufficient collateral evidence may be discovered which would support sending a case to the jury without expert testimony, see, e.g., Florida Patient's Compensation Fund v. Tillman, supra, the goal of presuit screening is "*early* determination of the merit of claims." Fla. Stat. § 766.201(1)(d) (1991). The choice of an expert affidavit as the means of reaching that goal was completely within the prerogative of the legislature, and may not be lightly disregarded.

Even in cases where application of the *res ipsa loquitur* doctrine is appropriate, expert testimony may be required to establish that the injury suffered by the plaintiff is one which ordinarily does not occur in the absence of negligence. See Marrero v. Goldsmith, 486 So. 2d 530 (Fla. 1986); Southern Florida Sanitarium and Hospital, Inc. v. Hodge, 215 So. 2d 753 (Fla. 3d DCA 1968). The "investigation" required by the presuit screening statutes requires no less *as a bare minimum*. See Archer v. Maddux, supra (written corroboration required to accompany notice of intent even if doctrine of *res ipsa loquitur* is applicable to facts).

The requirement for expert testimony to support a claim of medical malpractice relates solely to the quality of evidence required to support a verdict against a defendant. Where a court is satisfied that there is competent evidentiary matter to support a verdict, the reason for the rule ceases to exist. However, satisfaction that there is competent evidentiary matter to support a verdict does not ensure satisfaction of the presuit screening

goals of early determination of the merits of a claim, or verification of compliance with statutory procedures.

The goals of presuit screening are driven by concerns of public policy, not quality of evidence. Even if expert testimony is not required for a claim of medical malpractice to reach a jury, there is simply no excuse for not consulting with an expert and obtaining a written opinion corroborating reasonable grounds to believe that a defendant was negligent prior to mailing notices of intent. If the negligence at issue is so obvious, requiring claimants to obtain an expert affidavit before initiating a claim by giving notice to the defendants imposes no great barrier to their access to courts.

E. The trial court properly dismissed the plaintiffs' claim.

The trial court in this case applied the analytical framework set forth in Duffy v. Brooker, supra, for determining a motion filed pursuant to section 766.206. After hearing the evidence, the trial court expressly found that the plaintiffs' notice of intent was "not in compliance with the reasonable investigation requirements of Sections 766.201-766.212, Florida Statutes (1992)."

Following the Duffy paradigm[10], the trial court found that (a)

---

[10] In Duffy v. Brooker, supra at 542, the court approved the reasoning of the trial court in that case:

> [T]he burden of persuasion and the initial burden of going forward rest on the moving party and . . . the burden of persuasion never shifts, but . . . 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

the failure to submit an expert affidavit at the time the notice of intent was mailed established a *prima facie* showing that the plaintiffs had failed to conduct a reasonable investigation prior to mailing the notice of intent, and (b) the plaintiffs' evidence was insufficient to rebut this prima facie showing. Accordingly, the trial court ruled that the greater weight of the evidence showed that plaintiffs had not complied with the mandatory investigation requirements of the presuit screening statutes, and dismissed the case pursuant to section 766.206(2).

In this case, the sole evidence submitted by plaintiffs' counsel with respect to the issue of consultation with a medical expert was that he had "spoken with doctors"[11] prior to mailing the notices of intent.[12] The trial court's finding that such evidence was insufficient to rebut the defendant's *prima facie* showing that the notice of intent was not supported by a reasonable investigation was not clearly erroneous.

The fact that the defendants participated in presuit screening during the statutory 90-day period, investigated the claim, and obtained expert affidavits to support denial of the claim is irrelevant. A prospective defendant is not required to wager that

---

> "reasonable investigation" requirements and that its claim or denial does rest "on a reasonable basis."

[11] [R. 247-248]

[12] Compare the showing made by plaintiff in Wolfsen v. Applegate, 619 So. 2d 1050 (Fla. 1st DCA 1993), which was held sufficient to support a finding that a reasonable investigation had been conducted.

a claimant's notice of intent will be found deficient, and forego compliance with its statutory obligations in order to preserve a challenge to the plaintiff's compliance with presuit screening once litigation ensues. Cf. Stebilla v. Mussallem, supra (noting that defendants' defenses were subject to being dismissed because they wrongly refused to provide informal discovery on the grounds that plaintiff's notice failed to comply with presuit screening statutes). Here, the issue is whether the plaintiffs complied with their duty to conduct an investigation prior to mailing the notices of intent. The defendants' compliance with their statutory duties cannot remedy the plaintiffs' antecedent failure to conduct an investigation. Archer v. Maddux, supra at 546.

Because the holding in Stebilla v. Mussallem, supra, related to notice and not investigation, it is inapposite.[13] In Stebilla, the plaintiffs actually obtained the necessary expert affidavit.[14] They simply did not mail it. Moreover, the court in Stebilla specifically noted that the parties had not sought a ruling from the trial court under section 766.206(2), as was done in this case. Id. at 139.

---

[13] For the same reason, the holding in Shands Teaching Hospital v. Miller, supra, is likewise inapposite. As in Stebilla, the decision in Shands arose in the context of a motion to dismiss for failure to mail the written corroboration with the notice of intent pursuant to section 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).

[14] "Indeed, it has been represented to us on appeal that the plaintiffs actually acquired the requisite corroborative opinion, although they admittedly did not furnish it to the defendants." Id. at 139.

Unlike the failure to timely mail the corroborative expert opinion (a notice defect), the failure to obtain such an affidavit before filing a notice of intent strikes at the heart of the investigation requirement. See Fla. Stat. § 766.202 (4) (1991). The failure to conduct the investigation which is required to precede mailing of a notice of intent simply cannot be cured after the fact by obtaining an affidavit after the 90-day presuit screening period is over, and the defendants have already been required to exercise one of the available options.

While the fact that an affidavit was submitted prior to the expiration of the statute of limitations may suggest that the action was not subject to dismissal for failure to comply with the statutory notice requirements, it does not mean that the trial court could not have properly determined under section 766.206 that a reasonable investigation was not conducted as required by the applicable statutes. See Suarez v. St. Joseph's Hospital, Inc., supra at 219; Duffy v. Brooker, supra at 544 n.2. See also n.5, supra. Although the applicable statutes do not make the expert opinion an integral part of the notice of intent, section 766.202(4) does make the written opinion of an expert an integral part of the investigation required to pre-date mailing of a notice of intent.

Plaintiffs' reliance upon Ragoonanan v. Associates in Obstetrics & Gynecology, 619 So. 2d 482 (Fla. 2d DCA 1993), is similarly misplaced. 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.

Kukral v. Mekras, supra at 850.

In the final analysis, the plaintiffs would have this Court determine that the assessment of the plaintiffs' counsel alone is sufficient to comply with the requirement that a "reasonable investigation" precede the mailing of a notice of intent to initiate medical malpractice litigation, despite the unambiguous terms of section 766.202(4). In this case, the allegations of the complaint against the hospital were not supported by the corroboration of an expert *even at the time the complaint was filed*, but only the opinion of plaintiffs' counsel himself.[15] Although plaintiffs' counsel asserted that in his opinion, the

---

[15] Dr. Lilien's opinion was that the hospital was negligent if the acid was mislabeled. [R. 309-311]. By the time the written opinion was submitted, however, it was clear that such was not the case. The August 14, 1992 letter that accompanied the opinion acknowledged: "[T]he evidence is that the acid was labeled as concentrated." [R. 183]. See Duffy v. Brooker, supra at 545 (notice of intent and corroborating opinion, taken together, must sufficiently indicate the manner in which the defendant departed from the standard of care, and provide adequate information for the defendant to evaluate the merits of the claim).

hospital was negligent "in sending an inherently dangerous substance (concentrated acid) which, in its concentrated form, has no suitable application in the operating room" [R. 183], this "opinion" was unsupported by expert corroboration that the applicable standards in the medical community require the hospital to do anything different than what was done in this case.

Plainly, the subjective assessment of the claimant's counsel alone cannot satisfy the reasonable investigation requirement, and cannot form the basis for a trial court's finding that the claim is not frivolous when confronted with a motion brought under section 766.206(2). If it were, the reasonable investigation requirement would be meaningless, for every attorney would certainly testify that his client's claim is not frivolous in his or her estimation. It is for this reason that the requirements of verification and corroboration are integral, essential elements of the presuit screening process. Without a written opinion from a medical expert, there is no meaningful, workable way for a trial court to verify that a reasonable investigation was conducted in accordance with the requirements of the applicable statutes.

In the instant case, the trial court properly determined that the absence of a written corroborating opinion from a medical expert shifted the burden to plaintiffs to go forward with evidence to prove that a reasonable investigation had been conducted prior to sending the notices of intent to the defendants. Duffy v. Brooker, supra. Here, there was no corroborating medical expert opinion to support the notice of intent; therefore, it was

imperative for the plaintiffs to come forward with proof by competent substantial evidence that a reasonable investigation had been conducted. See Williams v. Powers, 619 So. 2d 980, 983 (Fla. 5th DCA 1993) (with "barely adequate" corroborative expert opinion, critical for plaintiffs to "come forward with proof of steps they took to reasonably investigate their claim, and the existence of a reasonable basis therefor.") This they did not do.

The trial court's finding that the plaintiffs' evidence was insufficient to rebut the *prima facie* showing of a lack of a reasonable investigation created by the failure to obtain the written opinion of an expert was not clearly erroneous and was properly affirmed by the *en banc* court below.

It is respectfully submitted that jurisdiction in this case was improvidently accepted because a careful review of the decisions cited as a basis for jurisdiction reveals that no conflict exists between the decision of the Third District Court of Appeal *en banc* and the decisions in Patry v. Capps, supra; Atkins v. Humes, supra; Shands Teaching Hospital v. Miller, supra; Ragoonanan v. Associates in Obstetrics & Gynecology, supra; or Duffy v. Brooker, supra.

CONCLUSION

The failure to obtain the required written opinion from an expert is a substantive, not technical, failure of plaintiffs' investigation. The dismissal of the complaint was thus consistent with both the spirit and the letter of the presuit screening statutes.

In light of the plaintiffs' admitted failure to obtain the statutorily-required verified opinion from a medical expert, the trial court's ruling that the notices of intent were not supported by the "investigation" required by sections 766.202(4) and 766.203(2) cannot be found to have been clearly erroneous. The so-called "obvious" nature of Mr. KUKRAL's injury does not excuse compliance with the applicable statutes which are unambiguous in expressing what is required of a claimant.

The statutes which require an "investigation" to precede mailing of a notice of intent leave no room for interpretation or construction. As a result, the rule which excuses the absence of expert testimony in some cases may not properly be engrafted onto the presuit screening statutes to excuse the absence of a statutorily-required "investigation."

This Court is respectfully requested to approve the decision of the Third District Court of Appeal *en banc*, or alternatively to discharge certiorari as having been improvidently granted.

Respectfully submitted,

BY: Gail Parenti

Gail Leverett Parenti

PARENTI, FALK, WAAS & FRAZIER, ATTORNEYS AT LAW
113 ALMERIA AVENUE, CORAL GABLES, FLORIDA 33134 · TELEPHONE (305) 447-6500

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 12th day of May, 1995, to: JOE N. UNGER, ESQUIRE, (Counsel for Petitioners), 200 South Biscayne Boulevard, Suite 2920, Miami, FL 33131-5302; DAVID J. HALBERG, ESQUIRE, (Counsel for Plaintiffs), Carroll, Halberg, Jones & Abadin, P.A., 5th Fl., Coconut Grove Bank Bldg., 2701 So. Bayshore Drive, Miami, FL 33133-5387; BAMBI BLUM, ESQUIRE, (Counsel for Respondents Dr. Mekras and Miami Urologic Institute) Hicks, Anderson & Blum, New World Tower, Suite 2402, 100 N. Biscayne Boulevard, Miami, FL 33132; and CHARLES HARTZ, ESQUIRE, (Counsel for Defendants Dr. Mekras and Miami Urologic Institute), George, Hartz, Lundeen, Flagg & Fulmer, P.A., 4800 LeJeune Road, Coral Gables, FL 33146.

PARENTI, FALK, WAAS & FRAZIER
113 Almeria Avenue
Coral Gables, Florida 33134
Telephone: (305) 447-6500

By: Gail Parenti
Gail Leverett Parenti
Fla. Bar No. 380164