IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 91,239

MICHAEL J. COHEN, M.D., SAMUEL P. MARTIN, M.D., and VASCULAR SPECIALISTS OF CENTRAL FLORIDA, INC.,

Petitioners,

v.

MICHAEL DAUPHINEE, etc.

Respondent.

PETITIONERS' AMENDED INITIAL BRIEF ON THE MERITS

ON REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

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INTRODUCTION

In order to avoid the use of judicial resources for medical malpractice claims that are either clearly frivolous or clearly meritorious, the Florida Legislature created a pre-suit screening mechanism which potential plaintiffs and potential defendants must utilize. The lynchpin of pre-suit screening under the legislative scheme is the medical affidavit: one to be supplied by the claimant to establish the good faith of his or her suit; and another to be supplied by the potential defendant in order to justify a defense that rejects the claim of malpractice.

In a stunning decision that erodes the very foundation of the pre-suit screening process, the Fifth District Court of Appeal has effectively held that medical affidavits in the pre-suit screening process need not be truthful; or more precisely, that a pre-suit medical affidavit is immune from any charge of falsity. The Fifth District has held that a medical expert witness who testifies in a medical malpractice lawsuit cannot be impeached with fundamentally contradictory statements in his pre-suit affidavit, because a provision in the pre-suit screening statute bars the admissibility of pre-suit "statements." The district court gave no attention to the legislative history of that provision or its context in the pre-suit screening process, both of which identify its purpose as barring only the admission of ***work product***, or to the Florida Evidence Code's guarantee of cross-examination as a means of eliciting truth for the fact-finding process.

The district court's decision, moreover, placed this gloss on the medical malpractice statute despite the absence of any objection by the plaintiff to the use of his expert's pre-suit affidavit for impeachment, and despite the defendants' contention that, even if impeachment was error, at best the error was harmless in light of the mass of "no malpractice," medical testimony and other evidence that was put before the jury over the course of a 10-day trial.

STATEMENT OF THE CASE

Michael Dauphinee sued six physicians, their medical practice groups and a hospital for medical malpractice in connection with the death of his wife, Rosemarie. (R. Vol. I at 1). Two defendants were dismissed on motion, and two others were given directed verdicts at the close of plaintiff's case. (R. Vol. I at 104; Vol. VII at 1050, 1408-09). Dr. Cohen, Dr. Martin, and their medical practice group (collectively referenced as "Drs. Cohen & Martin") received a verdict of "no liability" after a 10-day jury trial (Appendix 1), and judgment was duly entered in accordance with the verdict. (R. 1410-11).

Michael appealed the final judgment, claiming three trial court errors. The Fifth District found no merit and provided no discussion as to two. The court addressed only Michael's contention that it was error for Drs. Cohen and Martin to impeach in cross-examination Michael's expert witness — the physician who provided the pre-suit affidavit which grounded his good faith investigation as a prerequisite to suit — to show a material inconsistency between his testimony at trial and his pre-suit affidavit. *Dauphinee v. Wilstrup,* 696 So. 2d 388 (Fla. 5th DCA 1997). (Appendix 2). Drs. Cohen and Martin argued that the applicable statutory provision applied only to work product, which the pre-suit affidavit was not, and that even if such an affidavit were improperly used in cross-examination the error in doing so was nonetheless harmless in the context of a 10-day trial at which 21 witnesses testified, including an expert who opined that Drs. Cohen and Martin had *not* fallen below the applicable standard of care in treating Rosemarie Dauphinee. (S.R. Vol. 3 at 2568-83).

In the decision brought here for review, the Fifth District Court of Appeal held that the trial court committed *reversible* error by allowing the defendants to ask Michael's expert a brief series of questions which established a material contradiction between his testimony and his pre-suit affidavit, and that a new trial was required. The decision of the court rejects the claim of Drs. Cohen and Martin that the impeachment error was harmless, it ignores the absence of any objection by Michael at the time of trial, and it fails to explain why a new trial

was ordered for Dr. Martin when the affidavit and impeachment evidence dealt only with the care given Rosemarie Dauphinee by Dr. Cohen.

STATEMENT OF THE FACTS[1]

I. Rosemarie Dauphinee's medical incident.

On June 6, 1991,[2] Rosemarie Dauphinee was admitted to the hospital complaining of pain in her abdomen during her fourteenth week of pregnancy. She was diagnosed by Dr. Cohen, a board certified general surgeon, as having appendicitis. (S.R. Vol. 6 at 2942-46). Two days later, Dr. Cohen performed an appendectomy without complications. (S.R. Vol. 6 at 2947-48). After being discharged from the hospital and instructed to call Dr. Cohen if problems arose, Rosemarie received home therapy and was seen by Dr. Cohen in his office on two or three occasions during the following three to four weeks. (S.R. Vol. 6 at 2957-58).

Rosemarie was seen by Dr. Cohen in early August for a lump (also called a "mass") that was discovered in her abdomen, and was directed by Dr. Cohen to a radiologist who drained it of fluids. (S.R. Vol. 6 at 2959-62). Three months passed without incident.

On November 2, Rosemarie was admitted to the hospital for the birth of a daughter. (S.R. Vol. 6 at 2971). At that time, she reported that the mass had redeveloped five weeks earlier (which would have been in late September). (S.R. Vol. 6 at 2973, 3034). Based on her report, Dr. Cohen saw her the next day to evaluate her condition, and after his examination ordered a CAT scan which, it turned out, did not reveal a recurrence of the mass. (R. Vol. III at 334-35; S.R. Vol. 6 at 2977). With this information, and the fact that Rosemarie was stable

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1 The record on appeal has been supplemented with trial transcripts presented to the Fifth District Court of Appeal as appendices to the parties' briefs. These transcripts are designated as "S.R. ___".

2 Respondents have identified only those dates which are significant to the issues on appeal.

and without either pain or fever, she was discharged with her new-born daughter as she requested, and instructed to see Dr. Cohen in eight days. (S.R. Vol. 6 at 2978-79).

Four days after Rosemarie was discharged, on Friday November 6, she called both Dr. Wilstrup, her OB/GYN physician, and Dr. Cohen, to report pain and bleeding. (R. Vol. X at 36; S.R. Vol. 6 at 2982-85). Dr. Cohen saw her at his office, and promptly sent her to the hospital. *Id.* She was admitted at 6 p.m. by a general surgery resident who determined that she did not need emergency surgery. (S.R. Vol. 5 at 2934). She was monitored overnight by another general surgery resident who also did not believe she needed emergency surgery, and who reported by telephone to Dr. Martin, who was on call for the Cohen/Martin practice group for the weekend. (S.R. Vol. 6 at 2992; S.R. Vol. 7 at 3215, 3229). Rosemarie was also monitored by two nurses who recorded their observations of her condition on her medical records. (S.R. Vol. 7 at 3078-81, 3120, 3133).

The following morning, Dr. Martin came to the hospital, evaluated Rosemarie, and conducted exploratory surgery at about 11 a.m. (S.R. Vol. 7 at 3177-80). He found an enclosed/self-contained mass which had no evidence of infection. He removed the mass in whole without complication, and sent it to pathology. (S.R. Vol. 3 at 2581-83, 2589-91). Rosemarie's condition throughout the evaluation and surgery was stable, but she deteriorated rapidly after surgery and experienced an unprecedented, high count of white blood cells. (S.R. Vol. 4 at 2713, 2716, 2727). After surgery, all supportive measures failed, and approximately twenty-four hours after the surgery Rosemarie died. (R. Vol. X at 72-73).

An examination of the enclosed mass removed from Rosemarie's abdomen by Dr. Martin revealed an aggressive cancer which was so advanced that even if she had survived beyond the day of the surgery, her five-year survival rate would have been only 5 to 25%. (S.R. Vol. 3 at 2597-99; S.R. Vol. 4 at 2736-41). Experts for the defendants opined that Rosemarie had died from an undetectable, unpredictable and rare cause. (S.R. Vol. 3 at 2581-83).

II. Dr. Battle's pre-suit affidavit and trial testimony.

In compliance with the pre-suit screening statute, Michael had provided a pre-suit affidavit to the defendants from Dr. Stuart Battle, a general surgeon. (R. Vol. XI at 4 [Battle's trial testimony]). The affidavit stated that Dr. Cohen had deviated from the medical standard of care by failing to further investigate Rosemarie's abscess "eight weeks post-operatively" — meaning after the June 6 visit and in the time frame of early August. (R. Vol. XI at 91 [Battle's trial testimony]). On the basis of Dr. Battle's affidavit, Michael filed his lawsuit against all of the doctors who treated Rosemarie, their affiliated medical corporations, and the hospital. (R. Vol. I at p. 5, ¶¶ 15-16; p. 23, ¶ 26.c).

When the defendants took Dr. Battle's deposition before trial, he recanted the representation in his affidavit that Dr. Cohen had deviated from the standard of care in August of 1991. (R. Vol. III at 308-15 [Battle's deposition]). He stated, rather, that Dr. Cohen had ***not*** deviated from the standard at that time, but had done so three months later, on November 4, when Rosemarie was allowed to be discharged from the hospital with her new-born daughter. (*Id;* R. Vol. XI at 23 [Battle's trial testimony]).

Pursuant to sections 766.206(5)(a) and (b), which authorize a party to contest the qualifications of a proposed medical expert, Drs. Cohen and Martin sought to disqualify Dr. Battle. The trial court declined to disqualify Dr. Battle, but it also denied Michael's *in limine* contention that the defendants should not be permitted to use his pre-suit affidavit on cross-examination. (R. Vol. XI at 13-18 [4/24/96 Hearing]). The court rejected Michael's argument, stating:

> 766.106 deals specifically with unsworn statements in subparagraph seven and with work product in subparagraph five. Statements, discuss[ions] [sic] written reports or other work product, those are all categories of work product and does [sic] not specifically deal with an affidavit. It'll be my ruling that the affidavit is usable for impeachment in cross-examination to the same extent [as] any other affidavit would be, and subject again to the ordinary rules of evidence.

(R. Vol. XI at 18 [4/24/96 Hearing]). Michael never, at any point in the trial proceeding, re-asserted his challenge to the use of Dr. Battle's pre-suit affidavit for the impeachment of Dr. Battle.

At trial, the jury heard testimony from Dr. Battle that Drs. Cohen and Martin had committed malpractice, and it heard expert witness opinion testimony from Dr. Steven V. Vogel, a board certified general surgeon and faculty member at the University of Florida's Shands Hospital, to the effect that they had not. (R. Vol. XI [Battle's trial testimony]; S.R. Vol. 3 at 2568-83). The jury also heard from three nurses and six other physicians regarding the care, treatment and condition of Rosemarie.

When challenged with the contradiction in dates on which he thought Dr. Cohen had committed malpractice, Dr. Battle explained the discrepancy as a "typo" (R. Vol. XI at 92 [Battle's trial testimony]), and stated that his changed opinion was based on additional information about Dauphinee's medical state that he ascertained after the affidavit had been executed. *Id.* at 90, 92-94.

Dr. Battle's pre-suit affidavit itself was not admitted into evidence. (R. Vol. XI). Michael's counsel, in fact, affirmatively accepted the trial court's earlier ruling that the affidavit could be used for impeachment, stating:

> If she [sic] wants to impeach him on his affidavit, have him look at it and keep out of evidence the things that are inappropriate, and the things that are inappropriate are mentioning Dr. Murrah's name, who's no longer a party in this case, mentioning Dr. Wilstrup . . . .

(R. Vol. XI at 86 [Battle's trial testimony]).

On the issue of *Dr. Martin's* alleged departure from the standard of care, Dr. Battle opined that his mistake was not performing surgery on Rosemarie when she was admitted to the hospital on Friday night, but waiting until 11 a.m. the next morning. (R. Vol. XI at 33, 46 [Battle's trial testimony]). This testimony was contradicted by Dr. Vogel who testified that the timing of surgery was appropriate, and that under one scenario it may be proper not even to

operate. (S.R. Vol. 3 at 2574, 2579). Dr. Battle was not impeached with his pre-suit affidavit as to Dr. Martin.

SUMMARY OF ARGUMENT

The district court erred in construing the word "statement" in section 766.106(5), Florida Statutes (1995), to encompass a medical affidavit given to a potential defendant in a medical malpractice lawsuit as a part of the pre-suit screening process. That section of the law, along with its identical counterpart in section 766.205(4), reflects the legislature's intent to bar the discovery or the admissibility only of items, one of which in the listing is a "statement," which are subject to a work product privilege. The district court gave no attention to the legislative history of section 766.106(5) or its context in the pre-suit screening process, both of which identify its purpose as barring only the admission of ***work product***.

The district court's broad reading of the word "statement" to include a pre-suit affidavit simply because it is a sworn form of "statement," is defective for several reasons. The court has interpreted that word in isolation, and has ignored the doctrine of *ejusdem generis* by which words contained in the phrase joined by the conjunctive words "or other" are to be related in subject matter. The word "statement," along with the other listed items for which immunity from discovery and inadmissibility is granted, is followed by the phrase "*or other work product.*" (Emphasis supplied).

The district court's construction of the word "statement" also contradicts the doctrine which requires a court to harmonize all provisions of a statute so that no term or provision is rendered meaningless. The district court's construction of the word "statement" leaves three separate provisions in the pre-suit screening statute as unnecessary redundancy.

The district court's decision also conflicts with case law, both prior to and after the enactment of pre-suit screening mechanisms for medical malpractice lawsuits, which has construed the statute to bar only the discovery and admissibility of work product materials. Relevant decisions of the Florida courts hold that materials which do not have a work product

privilege, such as the pre-suit affidavit, are *not* protected by the statute from either discovery or from use at trial.

As a threshold matter, though, the district court should never have rendered the decision that is now before the Court for review. The materials that were provided to and relied on by the district court establish that Dauphinee never objected to the cross-examination and impeachment which grounds the district court's ruling regarding pre-suit affidavits. In the absence of an objection to the expert's being questioned as to inconsistencies between his trial testimony and his pre-suit affidavit, it was improper for the district court to consider and ground its opinion on any "error" in that colloquy. The trial court, obviously, committed no "error."

Additionally, the district court's decision that a new trial was required cannot be justified. The trial against Drs. Cohen and Martin lasted ten days. Twenty-one witnesses were called, with experts called for both sides to opine as to whether Drs. Cohen and Martin committed medical malpractice. The cross-examination impeachment of Dauphinee's one expert witness with his pre-suit affidavit was not made a feature of the trial, or in any especial way called to the attention of the jury. In the context of the entire trial, even a mistaken series of impeaching questions would constitute harmless error. *See* section 59.041, Florida Statutes (1997).

Finally, there was no justification for the district court to remand for a new trial against Dr. Martin. The impeachment of Michael Dauphinee's expert with the affidavit neither mentioned Dr. Martin nor commented on the care and treatment that he had provided to Rosemarie Dauphinee. There was no reason whatever to disturb the jury's verdict of "no liability" against Dr. Martin based on an improper use of the pre-suit affidavit.

ARGUMENT

I. The decision of the Fifth District regarding impeachment of an expert with his pre-suit screening affidavit contradicts the plain meaning of section 766.106(5), renders the section incompatible with the statutory scheme and the legislative intent, and overrides an important rule found in the Evidence Code.

The district court has held, based on the wording of section 766.106(5), Florida Statutes (1995), that a physician's affidavit prepared for the medical malpractice, pre-suit screening process cannot be used in cross-examination at trial to impeach the physician who provided the affidavit. Based on language in section 766.106(5) to the effect that no "statement" generated in the pre-suit screening process is admissible in a civil action by the opposing party, the district court found reversible error in the use of the affidavit:

> In view of the clear wording of the statute, we must agree with the argument of the appellant that an affidavit by an expert for pre-suit screening purposes is a sworn statement.

696 So. 2d at 389-90.

Drs. Cohen and Martin submit this naked reading of one word in the pre-suit screening statute is not consistent with the context of the other words contained in the very phrase of section 766.106(5) in which the word "statement" appears, with other provisions in the pre-suit screening statute, with the legislative history of section 766.106(5) and its related provisions, and with the rationale for the legislature's immunization of a pre-suit statement. Moreover, this construction of the word "statement" is completely at odds with section 90.608(1), Florida Statutes (1997), which informs the truth-seeking function of trial proceedings by authorizing the impeachment of any witness at trial with prior inconsistent statements.

A. Identification of the legislative history of the pre-suit screening provision which prohibits the discovery or admissibility of any "statement, discussion, written document, report, or other work product."

In 1985, the Florida Legislature responded to the increasing cost of professional liability insurance for Florida physicians, and the attendant threat to the availability and quality of health care services in the state, by enacting the Comprehensive Medical Malpractice Reform Act of 1985.[3] That Act originally appeared in Chapter 768, Florida Statutes, but has now been moved to and codified in Chapter 766, Florida Statutes.

As part of the legislature's reform package, provisions were included to assure the removal of non-meritorious claims from the judicial process by requiring a medical malpractice claimant to provide each prospective defendant with a notice of intent to initiate litigation,[4] and by requiring his or her attorney to make a reasonable investigation and certify "that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant."[5] The statute provided that an attorney's good faith could be shown by obtaining a written opinion from a medical expert that negligence had occurred. The statute shielded any such medical opinion from discovery by an opposing party,[6] and provided:

> No statement, discussion, written document, report, or other work product generated by the presuit screening process is discoverable or admissible in any civil action for any purpose by the opposing party.[7]

This provision, unchanged from its original wording, now appears in section 766.106(5).

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3 Preamble to Ch. 85-175, Laws of Florida.

4 Ch. 85-175, Laws of Florida, § 14, creating section 768.57(2) (now appearing as section 766.106(2)).

5 *Id.* at § 12, creating section 768.495(1).

6 *Ibid.*

7 *Id.* at 14, creating section 768.57(5).

In 1988, the Florida Legislature revisited its concerns about the medical insurance crisis in Florida, and passed another comprehensive statute which again touched on the pre-suit screening process.[8] This statute mandated that a notice of intent to initiate a medical malpractice lawsuit be accompanied with a *verified*, written opinion of a medical expert corroborating "reasonable grounds to initiate medical negligence litigation," and that any rejection of a claim be accompanied with a *verified*, written medical opinion corroborating "lack of reasonable grounds for medical negligence litigation."[9] These provisions now appear in section 766.203. In addition, section 52 of the 1988 enactment reiterated in a new section the precise language quoted above that bars the discovery and the admissibility of statements, discussions, written documents, reports and other work product — a provision which now appears as section 766.205(4).[10]

The bill that became the 1988 law — Committee Substitute for Senate Bill 6-E — had been accompanied in the Senate and in the House of Representatives by committee staff analyses that describe the pre-suit screening provisions of the bill as "merely an expansion of current law," and which identify as prior law those provisions on the subject which are now found in Chapter 766.[11] A detailed analysis of CS for SB 6E had been made by the staff of the House Insurance Committee,[12] which described the bill in relation to then-existing law on a section-by-section basis and stated regarding section 52 of the bill:

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8 Ch. 88-1, Laws of Florida.

9 *Id.* at § 50, entitled "Presuit investigation of medical negligence claims and defenses by prospective parties."

10 *Id.* at § 52, creating a new section of the law entitled "Presuit discovery of medical negligence claims and defenses."

11 A copy of the Senate staff analysis on CS/SB 6E was obtained from the Florida State Archives and is found there in Series 18, Carton 1689. A copy of the House staff analysis was obtained from the same source and is found there in Series 19, Carton 1834.

12 This staff analysis was also obtained from the Archives, and is found there in Series 19, Carton 1834.

> No *work product* generated by the presuit screening process is discoverable or admissible in any civil action by the opposing party.[13]

(Emphasis added). As noted earlier, the provision so described now appears as section 766.205(4) in language identical to the text of section 766.106(5).

The Court well knows the concept and scope of "work product." A work product privilege emerged from *Hickman v. Taylor*, 329 U.S. 495 (1947), and was quickly adopted in Florida. *Atlantic Coast Line R.R. v. Allen*, 40 So. 2d 115 (Fla. 1949). The release or distribution of work product material beyond the privileged party and counsel invalidates any privilege that may have originally attached to the material. *Visual Scene, Inc. v. Pilkington Brothers, PLC,* 508 So. 2d 437, 442 (Fla. 3d DCA 1987) (citation omitted). It is certainly no coincidence that the four categories of items enumerated in the immunity statute — statements, discussions, written documents and reports — are the very types of materials that traditionally command work product protection. *See National Car Rental System, Inc. v. Kosakowski,* 659 So. 2d 455, 456 (Fla. 4th DCA 1995) ("statement" held to hold a work product privilege); *Rose v. State,* 591 So. 2d 195, 197 (Fla. 4th DCA 1991) ("discussion" held to hold a work product privilege); *Surf Drugs, Inc. v. Vermette,* 236 So. 2d 108 (Fla. 1970) ("written document" held to hold a work product privilege); *Barnett Bank of Polk County v. Dottie-G Development Corp.,* 645 So. 2d 573, 574 (Fla. 2d DCA 1994) ("report" held to hold a work product privilege). A pre-suit screening affidavit provided to an opposing party in a proposed lawsuit, by its very nature, cannot be work product.[14]

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[13] *Id.* at p. 13.

[14] The private notes made by an expert in the course of preparing a pre-suit affidavit, in contrast, are precisely the form of work product that the pre-suit screening statute protects. *See, Whealton v. Marshall,* 631 So. 2d 323 (Fla. 4th DCA 1994) (holding that the expert's notes are protected by section 766.205(4)).

B. The statutory bar in section 766.106(5) to the discovery or admissibility in medical malpractice lawsuits of a "statement" does not extend to pre-suit affidavits provided by persons contemplating suit to potential defendants, nor can it be extended to pre-suit affidavits provided by potential defendants to putative plaintiffs.

The district court's construction of the term "statement" in section 766.106(5) provides neither a necessary nor proper gloss on the pre-suit screening process. Rather, it subverts the very purpose for which the legislature created a pre-suit screening process, and in doing so erodes both the constitutional right of a party to confront a witness and the statutory right of a party to cross-examine a witness with a prior inconsistent statement. The court's decision fails to apply statutory construction principles pertaining to words contained in any unbroken series rather than in isolation, and those pertaining to the evaluation of statutes as a whole rather than piecemeal. It also fails to draw from well-documented legislative history.

1. Applicable doctrines of statutory construction establish that the legislature intended to bar the discovery and admissibility of "work product" materials.

The word "statement" in section 766.106(5) was not placed in the law in isolation. It was incorporated into a phrase that extended immunity to discussions, to written documents, to reports, and to "***other work products***." A natural reading of that phrase would suggest that the word "other" connotes a context both for the term it modifies directly, "work product," and for the preceding listing of items found in the statute. The logic of that grammatical construction finds expression in the doctrine of *ejusdem generis* — a doctrine with roots in Florida that date from at least *Ex Parte Amos*, 93 Fla. 5, 112 So. 289 (1927).

In *Amos*, the Court adopted a legal relationship to link specific terms listed in a statute with any trailing, catch-all expression of general application:

> Where an author makes use first of terms each evidently confined and limited to a particular class of a known species of things, and then after such specific enumeration subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import . . . embraces only things ejusdem generis; that is, of the same kind of species with those comprehended by the preceding limited and confined terms.

> The maxim . . . means that general and specific words which are capable of an analogous meaning being associated together take color from each other . . . .

93 Fla. at 15, 112 So. at 293. The doctrine of *ejusdem generis* has repeatedly been applied over the years to provide a legal nexus to items enumerated and those following which are introduced with the modifying adjective "other." *See,* for example, *Dunham v. State,* 192 So. 324 (1939), where the phrase "or any other person" in an embezzlement statute was held to be related to and limited by a preceding enumeration of several forms of businesses that involved bailments.

The legislative history of the 1988 statute established that its provisions were intended as an "expansion" of the 1985 law, with no indication that the reiteration of section 766.106(5) in section 766.205(4) would not also protect from trial disclosure those things from the pre-suit screening process, whatever they may be, which constitute "work product."[15] The Fifth District failed to put the word "statement" in its natural context, to apply the doctrine of *ejusdem generis*, or to consider the legislative history of the provision it was asked to construe.

Another well-recognized and long-entrenched principle of statutory construction mandates that courts give effect to every clause and every part of a statute, and avoid to the fullest extent possible leaving any part of the statute as meaningless surplusage. *E.g., Goode v. State,* 50 Fla. 45, 39 So. 461 (1905); *Snively Groves, Inc. v. Mayo*, 135 Fla. 300, 184 So. 839 (1938). The salient purpose for that doctrine is to assure that the courts carry out the intent of the legislature. *State ex rel. Finlayson v. Amos,* 76 Fla. 26, 79 So. 433 (1918); *Florida Police Benevolent Ass'n v. Department of Agriculture and Consumer Services,* 574 So. 2d 120 (Fla. 1991).

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[15] The expansion of the pre-suit screening process was accomplished, among other ways, by requiring verified corroboration of a good faith investigation, and by creating reciprocal *verified* corroboration obligations for defenses.

There are three features of the pre-suit screening statutes enacted in 1985 and 1988 which reflect the legislature's unmistakable intent to shield from discovery and use at trial only those enumerated and "other" items which constitute work product.

1. In and of itself, section 766.106(5) throws a cloak of protection not only around the admission into evidence of pre-suit items, but also around their discoverability. The statute states that items within the ambit of this provision are shielded from being "discoverable or admissible in any civil action for any purpose by the opposing party." Since the statute provides no means to distinguish between discoverability and admissibility, the legislature necessarily intended both prohibitions to apply to everything it deemed appropriate for the statutory protection. These two protections cannot possibly pertain to a pre-suit affidavit, whose entire *reason d'être* is to convey information to persons on the other side of the potential lawsuit. *See* sections 766.203(2) and (3).

2. The legislature created a special subsection within section 766.106 to facilitate the screening function, by allowing the parties to obtain "unsworn statements" which are neither discoverable nor admissible in a civil action for any purpose. *See* section 766.106(7)(a). Creation of that specific privilege connotes a belief by the legislature that unsworn statements, or at least some forms of unsworn statements, were not encompassed within the term "statement" in section 766.106(5), for if they were then section 766.106(7)(a) would have been unnecessary. If, however, section 766.106(5) was thought by the legislature to provide protections only for work product, then section 766.106(7)(a) was indeed necessary to protect unsworn statements which were ***not*** work product materials.

3. The legislature enhanced the pre-suit screening mechanism in 1988 in order to establish a more effective means for weeding out frivolous malpractice claims and indefensible defenses. *See Winson v. Norman*, 658 So. 2d 625, 626 (Fla. 3d DCA 1995). Verification of

pre-suit positions was the cornerstone of the legislative scheme,[16] with strong consequences put in place to hold accountable a claimant or attorney who submits an expert's corroborating written opinion that lacked reasonable investigation. Section 766.206(2) holds out the prospect of having the claimant's claim dismissed, or having personal liability imposed on the claimant or the attorney for an opponent's attorney's fees and costs.

The legislature also sought to assure that affidavits by any corroborating expert would be truthful. Section 766.206(5)(a) provides that an expert who fails to make a reasonable investigation will be referred to the state's licensing authority or its counterpart in another jurisdiction.

These drastic consequences for assuring the rectitude of the pre-suit screening affidavit reflect an intention to put teeth into the corroborative requirements for pre-suit screening. It is counter-intuitive to that intent to conclude, as the Fifth District has done in this case, that the legislature protected untruthful corroborative affidavits from cross-examination at trial.

2. Case law is fully consistent with a construction of section 766.106(5) that defines all covered material as "work product".

The district courts of Florida, including the Fifth District prior to the decision in this case, have applied section 766.106(5) with a recognition that it pertains to work product materials.

In *Rub v. Williams,* 611 So. 2d 1328 (Fla. 3d DCA 1993), the court held that an unsworn statement taken during the pre-suit screening process could not be used for impeachment purposes, citing to section 766.106. The opinion does not indicate whether the court was applying section 766.106(7)(a) or section 766.106(5), but it seems apparent from the

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[16] Section 766.201(2)(a)1, Florida Statutes (1995), specifies that the legislature intended to create:

> Verifiable requirements that reasonable investigation precede both malpractice claims and defenses in order to eliminate frivolous claims and defenses.

opinion that the statement at issue was of a nature that it would be protected by a work product privilege.

In *Grimshaw v. Schwegel,* 572 So. 2d 12 (Fla. 2d DCA 1990), the court held that the plaintiffs in a malpractice suit could not discover an expert's letter to an insurer which was prepared during the pre-suit screening process. The court applied the bar to discovery that was contained in section 766.106(5)'s predecessor — a decision consistent with the court's view of the report as being work product made and preserved for internal use only. To the same effect is *Watkins v. Rosenthal,* 637 So. 2d 993, 994 (Fla. 3d DCA 1994), which construed section 766.205(4) to bar the deposition of the plaintiff's corroborating medical expert because a deposition "would, of necessity, include statements, discussions, and references to *work product* generated solely by the pre-suit investigation process." (Emphasis added).

In *Adventist Health System/Sunbelt, Inc. v. Watkins,* 675 So. 2d 1051 (Fla. 5th DCA 1996), the court held that an expert's pre-suit affidavit prepared for use in a prior malpractice lawsuit could properly be used to impeach the expert when called to testify in a later, unrelated lawsuit. Construing section 766.106(5) exactly as the *Watkins* court had construed section 766.205(4), the court held an affidavit from another lawsuit was not, as the statute stated, "work product generated by the present screening process." *Id.* at 1052.

In *Citron v. Shell,* 689 So. 2d 1288 (Fla. 4th DCA 1997), the court upheld the trial court's refusal to dismiss a complaint which failed to comply with the pre-suit screening requirement of corroboration with an expert opinion, stating:

> We understand the *work product protection* in section 766.106 not to apply to the corroborating opinion requirement in section 766.203.

Id. at 1290 (emphasis supplied). In *Lowe ex rel. v. Pugh,* 682 So. 2d 1104 (Fla. 2d DCA 1996), the court held under section 766.106(5) that pre-suit notices sent to the initial defendants were not documents protected from discovery by a defendant who was subsequently added to the lawsuit. The court held that notices mailed to an opposing party are not "documents protected by section 5." *Id.* at 1105. The mailing requirements for notices are

identical to the mailing requirements for corroborating expert affidavits. Section 766.203(2)(a), Florida Statutes (1995).

Perhaps best illustrating the effect and purpose of the 1985 statute which created the pre-suit screening process, and which brought into the law the corollary bar to discovery and admissibility for work product materials, is the decision in *Peck v. Messina,* 523 So. 2d 1154 (Fla. 2d DCA 1988). In that case, which pre-dated the enactment of section 766.106(5), the court held that there was ***no*** work product privilege for a report generated by the plaintiff's expert in order to determine if there had been medical malpractice. The court noted the 1985 enactment, however, and observed with respect to the bar to discovery and admissibility that

> the legislature has recently provided a discovery privilege in medical malpractice actions for *work product,* such as the report here, generated by the presuit screening process. See § 768.57(5), Fla. Stat. (1985).

Id. (emphasis supplied).

It was obvious to the court in *Peck*, as it should have been obvious to the Fifth District in this case, that section 766.106(5) addresses work product materials only.

3. The Florida Constitution and the Florida Evidence Code establish a right of confrontation that allows impeachment of an expert witness with non-work product, inconsistent statements.

The decision of the Fifth District paid no attention to sections 9 and 22 of Article I of the Florida Constitution,[17] or to section 90.608(1) of the Evidence Code.[18] Both ensure that litigation remains a process whose goals are truth and justice. Cross-examination, and the impeachment of a witness with a prior inconsistent statement, is a means to those ends.

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[17] Section 9 guarantees due process of law, and section 22 guarantees the right to trial by jury.

[18] This statute provides that a party may attack the credibility of a witness by "introducing statements of the witness which are inconsistent with the witness's present testimony."

> Justice is served by ascertaining the truth. Truth is ascertained from evidence. Cross-examination is the greatest invention the judicial process has ever devised for the ascertainment of truth.

Hoctor ex rel. v. Tucker, 432 So. 2d 1352, 1356 (Fla. 5th DCA 1983) (Cowart, J., *dissenting*).

Article I, section 16, of the Florida Constitution explicitly affords an accused the right to confront adverse witnesses at trial.[19] The right of confrontation via cross-examination includes the right to examine a witness as to matters affecting his or her credibility, *Engle v. State,* 438 So. 2d 803, 814 (Fla. 1983), *cert. denied*, 465 U.S. 1074 (1984), and the determination of credibility by the jury is not one for which an appellate court can substitute its judgment. *Carter v. State*, 560 So. 2d 1166 (Fla. 1990); *Langston v. King,* 410 So. 2d 179 (Fla. 4th DCA 1982); 24A Fla. Jur.2d, *Evidence and Witnesses* § 1052 (1995). In cases like this, a prohibition against the use of the affidavit would necessarily implicate concerns which are analogous to those at issue in criminal prosecutions.

The decision of the Fifth District in this case, if allowed to stand, will frustrate the search for truth in medical malpractice litigation, and will contradict the pre-suit statutory goal of requiring "verification" of the parties' positions in furtherance of the legislative policy. The decision invites an absence of diligence in the pre-suit investigative process, by removing any fear that false or careless evaluations will be exposed. There is neither a need nor purpose to be served by the district court's construction of the statute.

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[19] This provision applies only to criminal prosecutions, of course, but the impeachment of a witness in a civil proceeding is the identical form of confrontation, and justifies the reference to this cherished right by analogy. *E.g., Kelly v. State,* 425 So. 2d 81 (Fla. 2d DCA 1982), *review denied*, 434 So. 2d 889 (Fla. 1983).

II. The district court's interpretation of the medical malpractice statute erroneously passed on an issue that was neither objected to at trial nor preserved for appellate review, and which in the context of a 10-day trial would in all events constitute harmless error.

The Court accepted this case for review based on a conflict between the district court's decision here and other Florida appellate court decisions. It is appropriate for the court to review the entire case pursuant to *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 531 (Fla. 1985) ("Once we take jurisdiction because of conflict on one issue, we may decide all issues."); *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977) ("If conflict appears and this Court acquires jurisdiction, we then proceed to consider the entire cause on the merits."); and *Jacobson v. State*, 476 So. 2d 1282, 1285 (Fla. 1985) (Court decided to "dispose of case on a ground other than the conflict ground."). The unfortunate statutory gloss placed on the pre-suit screening process by the Fifth District should never have been articulated, since the impeachment of Dr. Battle was never objected to by his sponsor, and the brief cross-examination where that occurred was non-prejudicial and harmless in the scope of the trial proceeding.

A. Pre-suit affidavit impeachment was neither raised below nor preserved for appellate review.

The issue of whether a pre-suit affidavit is admissible for impeachment was not properly before the district court for consideration. A construction of the medical malpractice statute as important as this one should never have been undertaken by the court.

It is fundamental to appellate review that a trial court cannot commit error if the alleged error is never objected to and the trial court has never been asked to rule on the matter. *McGurn v. Scott,* 596 So. 2d 1043, n.2 (Fla. 1992); *Cowart v. City of West Palm Beach*, 255 So. 2d 673 (Fla. 1971); *Mariani v. Schleman*, 94 So. 2d 829 (Fla. 1957); *Jones v. Neibergall,* 47 So. 2d 605 (Fla. 1950); *Margolis v. Klein*, 184 So. 2d 205 (Fla. 3d DCA), *cert. denied*, 189 So. 2d 634 (Fla. 1966). Michael never objected to an impeachment of his expert witness with the pre-suit affidavit. For that reason alone, the decision of the district court should be

reversed and vacated. *Norton v. State,* 23 Fla. L. Weekly S12, S14 (Fla. Dec. 24, 1997); *Steinhorst v. Wainwright,* 477 So. 2d 537, 539 (Fla. 1985); *see also Cross v. Aby,* 55 Fla. 311, 314, 45 So. 820 (Fla. 1908) (only the specific objections made at trial can be considered on appeal).

Drs. Cohen and Martin acknowledge that this challenge to consideration of the affidavit issue was not made as such in the district court. Nonetheless, the court was aware from the record before it that no objection was made to the impeaching questions as they were posed, and the court was made aware that the only ruling on the issue came before trial when the defendants attempted to disqualify Dr. Battle. The law is clear that a pre-trial ruling of that nature is alone insufficient to preserve an issue for appellate review. *Madsen, Sapp, Mena, Rodriguez & Co., P.A. v. Leaman,* 686 So. 2d 780, 782 (Fla. 4th DCA 1997); *Coffee v. State,* 699 So. 2d 299 (Fla. 2d DCA 1997); *Rindfleisch v. Carnival Cruise Lines, Inc.,* 498 So. 2d 488 (Fla. 3d DCA 1986), *review denied,* 508 So. 2d 15 (Fla. 1987); *O'Brien v. Ortiz,* 467 So. 2d 1056 (Fla. 3d DCA 1985); *Swan v. Florida Farm Bureau,* 404 So. 2d 802 (Fla. 5th DCA 1981). These deficiencies should have been ascertained from the court's own independent review of the record. *See, Castlewood International Corp. v. LaFleur,* 322 So. 2d 520, 522 (Fla. 1975) (noting that the Court's independent review of the record disclosed no basis to reverse the district court).

Where the record indicates an absence of a motion or objection, and the trial court had no opportunity to pass on the matter at issue, there can be no erroneous "ruling" of the lower court. *Sierra v. Public Health Trust of Dade County,* 661 So. 2d 1296, 1297-98 (Fla. 3d DCA 1995); *McGurn v. Scott,* 596 So. 2d 1042 (Fla. 1992); *e.g.*, 3 Fla. Jur.2d, *Appellate Review,* § 92 (1978). An appellate court has a duty not to disturb a jury verdict on an issue which has never been presented to the trial court for consideration, since

> allowing a party to present a new claim after the jury has ruled against him would amount to an impermissible sandbagging of his theretofore successful opponent and the trial judge as well.

Diaz v. Rodriguez, 384 So. 2d 906, 907 (Fla. 3d DCA 1980); *see also Monlyn v. State,* 22 Fla. L. Weekly S631, S632 (Fla. Oct. 9, 1997) (argument that admission of testimony was error was not preserved for review by objection at trial); *Weise v. REPA Film International,* 683 So. 2d 1128 (Fla. 4th DCA 1996) (argument that counsel made an improper remark was not preserved for review by motion for mistrial).

B. Harmless error.

Even if the impeachment of Dr. Battle with his pre-suit affidavit were to be considered improper, reversal for a new trial was improper. Errors at trial are to be considered harmless until determined otherwise after a review of the overall case. Section 59.041, Fla. Stat. (1997).

In this case, over the course of a 10-day jury trial, the impeachment of Dr. Battle was but a minute and fleeting part of the trial, with no especial attention called to the inconsistency between Dr. Battle's testimony and his pre-suit affidavit. There was, moreover, substantial testimony that there had been no deviation of care by Dr. Cohen at *any* time, and that Rosemarie's unfortunate death was the result of an unpredictable, unavoidable and largely unexplainable medical cause described as "bizarre and so rare." (S.R. Vol. 3 at 2581-83). It cannot be said that, but for the impeachment of Dr. Battle, the jury would have returned a verdict finding Drs. Cohen and Martin liable for medical malpractice. The jury had more than ample evidence of no liability, as well as *other* valid reasons to reject Dr. Battle's opinion as not being credible.[20]

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[20] Aside from the demonstration through cross-examination that Dr. Battle's opinion was not medically sound (R. Vol. XI at 84-94 [Battle's trial testimony]), it was shown that Dr. Battle testifies as an expert across the country predominantly on behalf of plaintiffs (*Id.* at 59-61), that he has never testified in a manner favoring a general surgeon in a Florida case despite his numerous Florida court appearances (*Id.* at 59, 65), that he derives between $30,000 and $130,000 per year as income for testifying as an expert witness (*Id.* at 76, 113), that there had been four medical malpractice actions against him, that he did not know his own schedule for the week, and that he had an office manager who ran his surgical practice rather than a nurse. *Id.* at 81, 114-15.

Whatever the effect on Dr. Cohen of Dr. Battle's impeachment with his pre-suit affidavit, it certainly had no possible bearing on the jury's verdict of "no liability" for Dr. Martin. The impeachment testimony, made no mention of Dr. Martin at all. Dr. Battle's sole attack on Dr. Martin was that the surgery performed on Saturday morning was done too late, and should have been performed hours earlier. (R. Vol. XI at 54-55, 107-09 [Battle's trial testimony]). This opinion testimony was totally unrelated to the cross-examination of Dr. Battle about the timing of ***Dr. Cohen's*** alleged failure to use due care. *Id.* at 84-93.

The district court held that Michael "is entitled to a new trial in respect to the defendants against whom Dr. Battles' testimony was directed: Michael Cohen, M.D.; *Samuel Martin, M.D. . . .*" 696 So. 2d at 390 (emphasis added). There was no reason whatever for the court to order a new trial as to Dr. Martin.

CONCLUSION

The district court went far afield from the record and from the law in protecting a pre-suit affidavit from any inquiry as to its truth. The untenable gloss placed on the pre-suit screening process by the district court's decision is inimical to the truth-seeking function of the courts as embodied in the Evidence Code, and erosive of the legislative scheme for removing both non-meritorious and non-defensible lawsuits from the courts.

The decision of the district court should be reversed and vacated, with directions to reinstate the jury's verdict of no liability.

Respectfully submitted,

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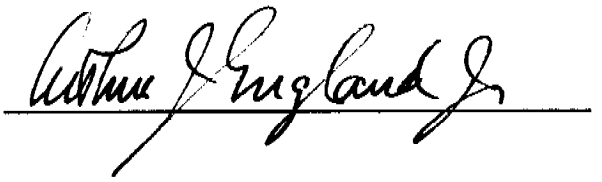

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APPENDICES

Appendix Part 1

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

MICHAEL DAUPHINEE, as Personal Representative of the Estate of ROSEMARIE P. DAUPHINEE, and on behalf of KOLLEEN CHRISTIAN DAUPHINEE and KRISTINA NICOLE DAUPHINEE, survivors of ROSEMARIE P. DAUPHINEE,

Plaintiff,

vs.

CASE NO.: CI 94-678

MICHAEL J. COHEN, M.D., VASCULAR SPECIALISTS OF CENTRAL FLORIDA, INC., a Florida corporation, PAMELA ROBERTS, M.D., SAMUEL P. MARTIN, M.D., and ORLANDO REGIONAL HEALTHCARE SYSTEMS, INC., f/k/a ORLANDO REGIONAL MEDICAL CENTER, a Florida Not-for-Profit Corporation,

Defendants.

VERDICT FORM

1. Was there negligence on the part of any of the following in their diagnosis, care and treatment of Rosemarie Dauphinee on the following dates?

Michael J. Cohen, M.D.
on November 3, 1991 or November 4, 1991 — YES ____ NO ✓

Pamela Roberts, M.D.
on November 8, 1991 — YES ____ NO ✓

Samuel P. Martin, M.D.
on November 8, 1991 or November 9, 1991 — YES ____ NO ✓

Orlando Regional Healthcare Systems, Inc.,
f/k/a Orlando Regional Medical Center
through Arthur DeBaise, M.D. on
November 8, 1991 or November 9, 1991 — YES ____ NO ✓

If you answered "no" for each and every defendant, then your verdict is for all defendants and you should proceed no further except to date and sign this Verdict Form, and return it to the courtroom.

If you answered "yes" for any defendant, please answer question 2.

2. Did the negligence on the part of any of the following legally cause the death of Rosemarie Dauphinee?

Michael J. Cohen, M.D.
on November 3, 1991 or November 4, 1991 YES ____ NO ____

Pamela Roberts, M.D.
on November 8, 1991 YES ____ NO ____

Samuel P. Martin, M.D.
on November 8, 1991 or November 9, 1991 YES ____ NO ____

Orlando Regional Healthcare Systems, Inc.,
f/k/a Orlando Regional Medical Center
for Arthur DeBaise, M.D.
on November 8, 1991 or November 9, 1991 YES ____ NO ____

For any party that you answered "No" to in Question No. 1, you should also answer "No" to question No. 2. If you answered "No" for each and every defendant to question No. 2, then your verdict is for all defendants and you should proceed no further except to date and sign this verdict form and return it to the courtroom.

If you answered "Yes" for any defendant, then please answer question No. 3.

3. State the percentage of any negligence that you charge to:

Michael J. Cohen, M.D. _____%

Pamela Roberts, M.D. _____%

Samuel Martin, M.D. _____%

Orlando Regional Healthcare Systems, Inc.
f/k/a Orlando Regional Medical Center
through Arthur DeBaise, M.D. _____%

Your answer to question no. 3 must total 100% and should include a zero for any party you answered "No" for in response to questions No. 1 or 2.

4. What is the amount of net accumulations to the Estate resulting from Rosemarie Dauphinee's death?

a. From the date of death to the present $_____

b. In the future? $_____

c. What is the number of years over which those future damages are intended to provide compensation? _____ years

d. What is the present value of those future damages? $_____

5. What is the amount of any funeral expenses resulting from Rosemarie Dauphinee's death paid by Michael Dauphinee?

$_____

6. What is the amount of any loss by Michael Dauphinee of the decedent's support and services?

a. From the date of death to the present $_____

b. In the future? $_____

c. What is the number of years over which those future damages are intended to provide compensation? _____ years

d. What is the present value of those future damages? $_____

7. What is the amount of any loss by Kolleen Christian Dauphinee of the decedent's support and services?

a. From the date of death to the present $_____

b. In the future? $_____

c. What is the number of years over which those future damages are intended to provide compensation? _____ years

d. What is the present value of those future damages? $_____

8. What is the amount of any loss by Kristina Nicole Dauphinee of the decedent's support and services?

a. From the date of death to the present $_____

b. In the future? $_____

c. What is the number of years over which those future damages are intended to provide compensation? _____ years

d. What is the present value of those future damages? $_____

9. What is the amount of any damages sustained by Michael Dauphinee in the loss of his wife's companionship and protection and in pain and suffering as a result of the decedent's injury and death?

a. In the past? $_____

b. In the future? $_____

10. What is the amount of any damages sustained by Kolleen Christian Dauphinee in the loss of her mother's companionship, instruction and guidance and protection and in the child's pain and suffering as a result of the decedent's injury and death?

a. In the past? $_____

b. In the future? $_____

11. What is the amount of any damages sustained by Kristina Nicole Dauphinee in the loss of her mother's companionship, instruction and guidance and protection and in the child's pain and suffering as a result of the decedent's injury and death?

a. In the past? $_____

b. In the future? $_____

SO SAY WE ALL this 10 day of May, 1996.

/s/
Foreperson

Appendix Part 2

Michael DAUPHINEE, etc., Appellant,
v.
Mark A. WILSTRUP, M.D., OB & GYN Specialists, P.A., et al., Appellees.

No. 96-1717.

District Court of Appeal of Florida, Fifth District.

May 23, 1997.

Rehearing Denied July 10, 1997.

Administrator of estate of deceased patient brought medical malpractice action against multiple defendants. The Circuit Court, Orange County, John H. Adams, Sr., J., directed verdict for clinic and obstetrician, and entered judgment on jury verdict for remaining defendants. Plaintiff appealed, and the Court of Appeal, Cobb, J., held that: (1) expert affidavit prepared by one of plaintiff's experts for presuit screening purposes could not be used for impeachment, and (2) error in allowing impeachment required new trial with respect to defendants against whom expert's testimony had been admitted.

Affirmed in part, reversed in part, and remanded for new trial.

[1] EVIDENCE ⚖560
157k560
Expert affidavit prepared for presuit screening purposes by one of expert witnesses for plaintiff in medical malpractice action could not be used to impeach expert during malpractice action. West's F.S.A. § 766.106(5).

[2] PRETRIAL PROCEDURE ⚖384.1
307Ak384.1
Affidavit prepared by expert for presuit screening purposes in medical malpractice action is sworn statement and is not discoverable or admissible by opposing party. West's F.S.A. § 766.106(5).

[3] APPEAL AND ERROR ⚖1048(7)
30k1048(7)
Error by trial court in allowing expert witness for plaintiff in medical malpractice action to be impeached by affidavit which expert had prepared for presuit screening purposes required reversal with respect to defendants against whom expert's testimony had been directed. West's F.S.A. § 766.106(5).

*389 William G. Osborne of William G. Osborne, P.A., and Terry L. McCollough of Terry L. McCollough, P.A., Orlando, for Appellant.

Bradley P. Blystone and Richard L. Allen, Jr. of Mateer & Harbert, P.A., Orlando, for Appellees Orlando Regional Healthcare System, Inc. f/k/a Orlando Regional Medical Center and Pamela Roberts, M.D.

Jennings L. Hurt, III and Richard B. Mangan, Jr. of Rissman, Weisberg, Barrett, Hurt, Donahue & McLain, P.A., Orlando, for Appellees Michael J. Cohen, Samuel P. Martin, M.D. and Vascular Specialists of Central Florida, Inc.

Hector A. More and Patrick H. Telan of Taraska, Grower & Ketcham, Orlando, for Appellees Mark A. Wilstrup, M.D. and OB & GYN Specialists, P.A.

COBB, Judge.

The appellant, Michael Dauphinee, as personal representative of the estate of Rosemarie P. Dauphinee, was the plaintiff below in a medical malpractice action for wrongful death filed against several defendants. He contended that the treating physician of Rosemarie Dauphinee failed to timely diagnose a massive infection in the right lower abdomen, which resulted in toxic shock and sepsis associated with a perforated abscess. The trial court directed a verdict for the defendants Wilstrup and OB & GYN Specialists, P.A. The jury found in favor of the remaining defendants, and this appeal ensued.

[1][2][3] The appellant raises three issues. We find no reversible error in the first two, but agree with him on the third, i.e., the trial court erred in allowing the use of a pre-suit affidavit by one of the plaintiff's experts, Dr. Battle, for impeachment purposes. Unlike the situation in Adventist Health System/ Sunbelt, Inc. v. Watkins, 675 So.2d 1051 (Fla. 5th DCA 1996), the doctor's affidavit in this case was prepared during the pre-suit screening process and therefore was inadmissable for any purpose pursuant to the express provisions of section 766.106(5), Florida Statutes:

> No statement, discussion, written document, report, or other work product generated by the presuit screening process is discoverable or admissible in any civil action for any purpose by the opposing party. All participants, including but not limited to,

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physicians, investigators, witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit screening process.

In view of the clear wording of the statute, we must agree with the argument of the ***390** appellant that an affidavit by an expert for pre-suit screening purposes is a sworn statement. See Watkins v. Rosenthal, 637 So.2d 993 (Fla. 3d DCA 1994); Rub v. Williams, 611 So.2d 1328 (Fla. 3d DCA 1993); and Grimshaw v. Schwegel, 572 So.2d 12 (Fla. 2d DCA 1990). Accordingly, the appellant is entitled to a new trial in respect to the defendants against whom Dr. Battles' testimony was directed: Michael Cohen, M.D.; Samuel Martin, M.D.; and Vascular Specialists of Central Florida, Inc. We affirm the final judgment in favor of the other defendants.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.

W. SHARP and GRIFFIN, JJ., concur.

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OA 3-4-98

FILED
SID J. WHITE
FEB 26 1998
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February 25, 1998

VIA OVERNIGHT DELIVERY

Sid J. White, Clerk
The Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: *Michael Cohen, et al. v. Dauphinee*
Florida Supreme Court Case No. 91,239

Dear Sid:

In the interest of assuring that the parties will have submitted all briefs in this proceeding to the Court well in advance of the May 4 oral argument, we are sending the Court with this letter, and sending to respondent's counsel, petitioners' initial brief in its present form. We have not enclosed for the Court the additional copies of the brief that are required by Rule 9.210(g)(3), however, since the brief does not contain record citations to a supplemental appendix which the clerk of the circuit court has not yet transmitted, and as to which the clerk has not yet prepared a correct index. Otherwise, this brief is complete, and the enclosed version does contain citations to record materials that are already familiar to and in the hands of both parties. This version of the brief will be replaced by petitioners with a corrected version, when the supplemental record index is provided by the clerk of the circuit court.

The purpose of serving respondent with this preliminary version of the brief is to facilitate the prompt preparation of an answer brief, rather than requiring respondent to wait for a final version of the brief following receipt of the supplemental index. We regret the necessity of proceeding in this fashion, but we did not want to rely on the clerk's record preparation for a timely briefing of the case for the Court.

Sincerely,

Arthur England

AJE/ct
Enclosure
cc: All counsel of record (w/ enc.)

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