OA 5-4-98

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,

vs.

MICHAEL DAUPHINEE, etc.

Respondent.

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES
CASES

STATUTES

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STATEMENT OF THE CASE AND FACTS

The Academy of Florida Trial Lawyers adopts the Statement of the Case and Facts in the brief of Respondent on the merits filed or to be filed. The Argument section of this brief will contain any record citations necessary to the understanding of the Academy's argument.

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ISSUE PRESENTED FOR REVIEW

DID THE DISTRICT COURT OF APPEAL CORRECTLY RULE THAT SECTION 766.106(5), FLORIDA STATUTES, WHICH INDICATES THAT STATEMENTS, DISCUSSIONS, WRITTEN DOCUMENTS, REPORTS AND OTHER WORK PRODUCT GENERATED BY THE PRE-SUIT SCREENING PROCESS IN MEDICAL NEGLIGENCE CASES ARE NOT DISCOVERABLE OR ADMISSIBLE IN ANY CIVIL ACTION FOR ANY PURPOSE BY THE OPPOSING PARTY, PREVENTED USE OF AN EXPERT'S AFFIDAVIT, PREPARED FOR PRE-SUIT, TO IMPEACH THE EXPERT AT TRIAL?

SUMMARY OF ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY RULED THAT SECTION 766.106(5), FLORIDA STATUTES, WHICH INDICATES THAT STATEMENTS, DISCUSSIONS, WRITTEN DOCUMENTS, REPORTS AND OTHER WORK PRODUCT GENERATED BY THE PRE-SUIT SCREENING PROCESS IN MEDICAL NEGLIGENCE CASES ARE NOT DISCOVERABLE OR ADMISSIBLE IN ANY CIVIL ACTION FOR ANY PURPOSE BY THE OPPOSING PARTY, PREVENTED USE OF AN EXPERT'S AFFIDAVIT, PREPARED FOR PRE-SUIT, TO IMPEACH THE EXPERT AT TRIAL.

The Florida legislature has created an elaborate system of presuit screening in medical negligence actions in an attempt to encourage early resolution of medical negligence claims and to reduce their cost. The statutory scheme contemplates mutual full disclosure in presuit of the parties' respective positions, implemented through a system of unsworn statements, exchanges of relevant records and documents, and physical and mental examinations. Disclosure begins at the outset of presuit, when the claimant serves on each prospective defendant a notice of intent to institute a medical negligence action. The claimant must serve

with the notice of intent, and in any event before the applicable limitations period expires, a verified report or affidavit from a qualified medical expert corroborating the claim of medical negligence in the notice of intent.

In order to encourage the fullest possible exchange of information in presuit, the legislature has provided that materials exchanged in presuit are to be used only for presuit and are not to be discovered or used for any purpose in a later civil action. Section 766.106(5), Florida Statutes (1997), on which the Fifth District Court of Appeal relied in its opinion below, specifically provides that

> 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 ... .
>
> F.S. §766.106(5)(1997).

The Fifth District held that the corroborating expert affidavit or verified report served with the notice of intent was privileged under Section 766.106(5) and therefore could not be used at trial to impeach the plaintiff's expert. It is this ruling which the Petitioners have challenged.

Courts should construe statutes in accordance with their plain meaning. In this case the presuit expert's corroborating report or

affidavit falls within the plain definition of the items privileged under Section 766.106(5). The presuit affidavit is a "report," since it contains the expert's opinions and conclusions. It is a "statement" of the expert, as the Fifth District noted, and is a 'written document." It is generated by the presuit investigation and screening process and indeed is indispensable to it. The corroborating affidavit therefore falls squarely within the class of documents privileged under Section 766.106(5).

Construing Section 766.106(5) so that the presuit affidavit is privileged and can be used only in presuit furthers the purpose of the statutory privilege, encouraging full disclosure at the earliest possible point during presuit. Given the voluminous and multifarious nature of medical records, the possibility of incomplete initial availability of records, and the complexities of medical issues, experts may in good faith have to modify their opinions as a result of what is discovered in presuit or in later discovery in a civil action. Knowledge that the affidavit can be used only in presuit and not in later litigation will encourage the generation of complete and forthright affidavits based on the best knowledge of the expert to the date of the affidavit, even if the expert anticipates having to modify the opinion later.

The Petitioners make several unavailing arguments based on the presence of the phrase "other work product" after the list of privileged items in Section 766.106(5). They argue first that the presuit affidavit cannot be work product within the traditional definition because it is disclosed to the opposing party in presuit. This argument proves too much, however, for the very purpose of presuit is disclosure, as noted above. Limiting the Section 766.106(5) privilege to those documents not disclosed in presuit would render the statute meaningless.

The Petitioners also argue that the doctrine of *ejusdem generis* requires the statutory list of privileged items to be qualified by the following phrase "other work product." The doctrine of *ejusdem generis*, however, works in a manner opposite to that the Petitioners propose. The doctrine requires a court to construe a general term or phrase following a specific list in a statute so that the general phrase includes only items similar in nature to those in the preceding specific list. It does not require a court to construe the preceding specific list by reference to the following general term or phrase. In this case, for example, the doctrine would require the Court to construe the term "work product" in Section 766.106(5) to include only items similar in nature to the preceding specifically listed privileged

items. The proposal by the Petitioners that the Court use the general phrase "work product" to limit the preceding specific list turns the doctrine of *ejusdem generis* on its head.

The existence of another specific statutory privilege for unsworn statements in presuit, codified at Section 766.106(7)(a), Florida Statutes (1997), supports a construction of Section 766.106(5) that includes the expert's corroborating report or affidavit. Since a specific statutory privilege protects unsworn statements from discovery or evidentiary use, the term "statements" in Section 766.106(5) must refer to other statements, such as the expert's corroborating affidavit.

The cases cited by the Petitioners either do not address support their proposed construction of Section 766.106(5) or construe the statute in a manner contrary to its plain meaning and purpose. The court below applied Section 766.106(5) in a manner consistent with its plain meaning and purpose, so this Court should approve its opinion.

ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY RULED THAT SECTION 766.106(5), FLORIDA STATUTES, WHICH INDICATES THAT STATEMENTS, DISCUSSIONS, WRITTEN DOCUMENTS, REPORTS AND OTHER WORK PRODUCT GENERATED BY THE PRE-SUIT SCREENING PROCESS IN MEDICAL NEGLIGENCE CASES ARE NOT DISCOVERABLE OR ADMISSIBLE IN ANY CIVIL ACTION FOR ANY PURPOSE BY THE OPPOSING PARTY, PREVENTED USE OF AN EXPERT'S AFFIDAVIT, PREPARED FOR PRE-SUIT, TO IMPEACH THE EXPERT AT TRIAL.

The Florida legislature has enacted an elaborate system of presuit screening in medical negligence actions. The legislature has created the presuit screening system to alleviate the cost of medical negligence claims through the early determination and resolution of claims. Weinstock v. Groth, 629 So. 2d 835, 838(Fla. 1993). In order to serve their purpose of encouraging presuit resolution of claims, the presuit screening statutes incorporate provisions calling for the fullest possible exchange of information among the parties, balanced by broad privileges to obviate the fear

that presuit disclosure will prejudice the position of the disclosing party in later litigation.

The disclosure begins at the time the presuit proceedings begin. A claimant initiating presuit proceedings must first serve by certified mail a notice of intent to initiate medical negligence on the prospective defendants. F.S. §766.106(2)(1997). The notice of intent should be accompanied by an affidavit or verified written opinion from a qualified medical expert corroborating reasonable grounds supporting the claim. F.S. §766.203(2)(1997). In any event the claimant must serve the verified corroborating opinion before the limitations period expires. Kukral v. Mekras, 679 So. 2d 278, 284 (Fla. 1996). The verified expert report or affidavit must contain an explanation of the manner in which the prospective defendant departed from the applicable standard of care in sufficient detail that the prospective defendant may investigate the claim intelligently. Duffy v. Brooker, 614 So. 2d 539, 545 (Fla. 1st DCA), review denied, 624 So. 2d 267 (Fla. 1993); Watkins v. Rosenthal, 637 So. 2d 993, 994(Fla. 3rd DCA 1994).

After service of the notice of intent and supporting affidavit, the parties are to engage in presuit discovery procedures and exchange information in order to evaluate the claim. These presuit discovery procedures include requests for production

of documents and things, the taking of unsworn statements, and physical and mental examinations. F.S. §766.106(7)(1997). After evaluation of the claim through presuit discovery and other investigation, each prospective defendant is to respond to the claim either by rejecting the claim, making a settlement offer, or making an offer of admission of liability and arbitration as to the amount of damages. F.S. §766.106(3)(b)(1997). If the case is not resolved in presuit, the claimant may then proceed to file suit.

In order to encourage the free flow of information necessary if the presuit screening process is to serve its intended purpose, the legislature has enacted several statutory privileges for materials generated in presuit, including two broad privileges codified in Sections 766.106(5) and 766.205(4) of the Florida Statutes. The legislature enacted these privileges for the purpose of ensuring the maximal flow of information in presuit. The exchange of information will be greater if confidentiality is assured. Grimshaw v. Schwegel, 572 So. 2d 12, 13 (Fla. 2nd DCA 1990).

Section 766.106(5) states that

> 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 ... .

F.S. §766.106(5)(1997).

Section 766.205(4) states similarly that

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

F.S. §766.205(4)(1997).

Sections 766.106(5) and 766.205(4) are clear and unambiguous. They prevent the use by an opposing party of any statement, discussion, written document, or report generated by the presuit screening or investigation process in any civil action for any purpose.

Where the language of a statute is clear and unambiguous and conveys a clear and definite meaning, the courts must apply the statute in accordance with its plain meaning and its reasonable and obvious implications. Where a statute has a plain meaning, there is no occasion for courts to apply rules of statutory construction to obtain an extended or limited construction, and indeed the courts lack the power to do so. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984).

The Fifth District Court of Appeal in the case below applied the privilege created by Section 766.106(5) to the expert affidavit served with the notice of intent. Dauphinee v. Wilstrup, 696 So. 2d

388, 389-90 (Fla. 5th DCA 1997). It ruled that the presuit affidavit could not be used at trial to impeach the expert generating it. The Fifth District's reading of the statute follows its plain meaning and fulfills its purpose.

The presuit expert's corroborating report or affidavit is a "report," since it contains the expert's opinions and conclusions. It is a "statement" of the expert, as the Fifth District noted, and is a 'written document." It is generated by the presuit investigation and screening process and indeed is indispensable to it. The corroborating affidavit therefore falls squarely within the class of documents privileged under Sections 766.106(5) and 766.205(4).

Applying the statutory privileges to the corroborating affidavit will serve the purpose of encouraging the free flow of information in presuit. Knowledge that the affidavit can be used only in presuit and not in later litigation will encourage the generation of complete and forthright affidavits based on the best knowledge of the expert to the date of the affidavit. Given the voluminous and multifarious nature of medical records, the possibility of incomplete initial availability of records, and the complexities of medical issues, experts may in good faith have to modify their opinions as a result of what is discovered in presuit

or in later discovery in a civil action. Indeed, Dr. Battle in this case testified that he had changed his opinion based on information learned after he had executed the affidavit. (R. Vol. XI at 90, 92-94; Petitioner's Initial Brief on the Merits at 6). The very provision for discovery during presuit implies recognition by the legislature that the claimant may not have complete knowledge of the medical issues involved in the claim until after the presuit process begins. An expert who believes that later testimony in a civil action, developed on the basis of information obtained during presuit or discovery in the civil action, may be impeached with an affidavit developed on the basis of initial incomplete information will have an incentive to produce only the most general and unhelpful affidavit. This will defeat the purpose of encouraging the full exchange of information at the earliest possible time during presuit.

The Petitioners argue that the corroborating affidavit cannot be privileged because it is disclosed to the opposing party in presuit. The Petitioners' argument, if accepted, would lead to an unduly narrow reading of Section 766.106(5) that would interfere with the legislative purpose.

Disclosure of presuit materials during the presuit process cannot lead to waiver of the Section 766.106(5) privilege, since

the very purpose of the presuit process is disclosure. If disclosure during presuit waived the privilege, the statute would be rendered meaningless since discovery materials generated during presuit are supposed to be disclosed to all opposing parties. For example, discovery requests and notices in presuit must be in writing and served on all parties, and copies of documents produced in response to those requests must be served on all parties. F.S. §766.106(8)-(9)(1997). If the Court were to accept the Petitioners' construction of Section 766.106(5), any document exchanged during presuit would lose its privilege because it had been disclosed to the opposing parties. The Petitioners' proposed construction of Section 766.106(5) would discourage rather than encourage disclosure during presuit and hence would directly counter the legislative purpose.

The Petitioners argue that the doctrine of *ejusdem generis* requires the Court to qualify the terms "statement," "discussion," "written document," and "report" in Section 766.106(5) by reference to the following general phrase "other work product." The doctrine of *ejusdem generis* in this case, however, has an effect converse to that the Petitioners argue. The doctrine states that, where a statute lists specific items followed by a more general, inclusive term or phrase, a court should construe the concluding general term

by reference to the preceding specific list. The general term is deemed to refer only to items of the same nature as those specifically listed. E.g., Green v. State, 604 So. 2d 471, 473 (Fla. 1992). In Green, for example, this Court construed a statutory definition of burglary tools as a "tool, machine or implement." F.S. 810.06 (1989). The Court reasoned that, under the doctrine of *ejusdem generis*, the general term "implement" included only implements of the same nature as the preceding more specific terms "tool" and "machine" and therefore did not include gloves, which were similar neither to tools nor machines. Green, 604 So. 2d at 473.

In this case, application of the *ejusdem generis* doctrine would require the Court to construe the general phrase "other work product" in Section 766.106(5) by reference to the preceding specific list of privileged items. Thus, the "other work product" privileged under Section 766.106(5) would include only that work product similar in nature to the specifically privileged statements, discussions, reports, and written documents. Construing the specifically listed items by reference to the following general term "other work product" would turn the doctrine of *ejusdem generis* on its head.

In a related argument, the Petitioners argue that use of the phrase "other work product" in Section 766.106(5) means that the preceding specifically listed items are privileged only if they are otherwise "work product." An equally plausible interpretation, however, and one that better fulfills the statutory purpose, is that the specifically listed statements, reports, discussions, and written documents are to be deemed privileged work product for purposes of the statute whether or not they would meet other definitions of the term "work product."

As the Petitioners and amicus Florida Defense Lawyers' Association point out, Section 766.106 contains specific confidentiality provisions for unsworn statements taken in presuit, reports of physical examinations in presuit, and rejected offers to admit liability. F.S. §§766.106(7)(a)(unsworn statements); 766.106(7)(c)(reports of examinations);766.106(10)(a)(rejected offers to admit liability); see Rub v. Williams, 611 So. 2d 1328, 1329 (Fla. 3rd DCA 1993)(unsworn statements taken during presuit may not be used for impeachment in later civil action). The existence of these specific privileges is a further indication that the terms "statement" and "report" in Section 766.106(5) do include the expert's corroborating report or affidavit. Since specific privileges exist for unsworn statements and reports of physical or

mental examinations, the terms "statement" and "report" in Section 766.106(5) must refer to statements other than the unsworn statement and reports other than the examination reports. The expert's corroborating report is just such a report and statement. The cases cited by the Petitioners either do not support their proposed construction of the statute or construe Section 766.106(5) in a manner contrary to its plain meaning and purpose.

In Adventist Health System v. Watkins, 675 So. 2d 1051, 1052 (Fla. 5th DCA 1996), the court held that an affidavit Adventist Health System's expert had prepared in a prior, unrelated case was not privileged under Section 766.106(5). The statute only protected presuit materials from use in civil litigation by the "opposing party." Since Watkins had not been the opposing party of Adventist Health System during the presuit proceedings for which the expert had prepared the affidavit, the statutory privilege did not prevent Watkins from using the affidavit. The court in Adventist Health did not suggest that Watkins would have been able to use at trial an expert affidavit prepared for the presuit in his case.

In Peck v. Messina, 523 So. 2d 1154 (Fla. 2nd DCA 1988), the Second District Court of Appeal addressed the discoverability of a report the plaintiff's expert had prepared in order to determine

whether there was a medical basis for the malpractice action. The same expert who had prepared the report was expected to testify at trial. The court noted that, under the law concerning the work product privilege in general, reports prepared by experts expected to testify at trial were not work product and were discoverable. The court noted, however, that the legislature had then recently enacted a discovery privilege for work product generated by the presuit screening process. This was the privilege then codified at Section 768.57(5), Florida Statutes (1985) and now codified at Section 766.106(5). The court specifically stated that

> We do note 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.
>
> Peck, 523 So. 2d at 1154.

The court went on to hold that, since the action had been filed before the effective date of Section 768.57(5), the statutory privilege did not apply and the general rules requiring disclosure of reports of trial experts applied. The court acknowledged, however, that the report was "work product" within the meaning of Section 768.57(5) and that if the statute had been in effect at the time the action was filed the report would have been privileged. The court in Peck thus recognized that reports prepared to

determine whether there is a basis for a medical malpractice action would be privileged under the presuit materials privilege now codified at Section 766.106(5). This would include the corroborating report or affidavit prepared by the plaintiff's expert in preparation for presuit.

In Lowe v. Pugh, 682 So. 2d 1104 (Fla. 2nd DCA 1996), the plaintiff Lowe added an additional defendant in an amended complaint. The court ruled that Lowe had to serve copies of the notices of intent served on the original defendants on the newly added defendant. The court required Lowe to serve the new defendant with the notices of intent because the new defendant, if he had been a party in presuit with the original defendants, would have had to receive copies of the notice. The court in Lowe did not consider the differences between presuit proceedings, in which disclosure of the notice is required, and the later civil action, in which Section 766.106(5) prohibits disclosure. The court also mentioned only the notice of intent, not the corroborating expert report accompanying the notice. To the extent the decision in Lowe suggests that a corroborating expert report or affidavit generated for presuit may be used as evidence or for impeachment in a later civil action, it is inconsistent with the plain meaning and purpose of Section 766.106(5) as discussed above.

The court in Citron v. Shell, 689 So. 2d 1288, 1290 (Fla. 4th DCA 1997), stated that Section 766.106(5) did not apply to the corroborating presuit affidavit. This language was dicta, however, since Shell, a pro se plaintiff, had failed to comply with the corroborating affidavit requirement altogether. The issues in Citron were whether the trial court had departed from the essential requirements of law in failing to dismiss Shell's amended complaint and whether the appellate court could review that failure by certiorari. The Citron court did not have to consider whether a corroborating affidavit, once obtained and disclosed in presuit, could be used in later civil litigation. To the extent that the court in Citron implied that the corroborating affidavit could be used as evidence or for impeachment in later civil litigation, its construction of Section 766.106(5) contradicted the plain meaning of the statute and eroded its purpose.

Section 766.106(5) plainly indicates that statements, reports, and written documents generated during the presuit process may not be discovered or introduced in evidence in a later civil action. The corroborating expert report or affidavit served with the notice of intent falls within the class of materials Section 766.106(5) protects and is privileged. The court below applied Section

766.106(5) in a manner consistent with its plain meaning and purpose, so this Court should approve its opinion.

CONCLUSION

For the reasons argued above, the Court should approve the decision of the Fifth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail on March 25, 1998 on: ARTHUR J. ENGLAND, JR., ESQ. and BRENDA K. SUPPLE, ESQ., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Co-counsel for Petitioners, 1221 Brickell Avenue, Miami, Florida 33131; JENNINGS L. HURT, ESQ. and RICHARD B. MANGAN, JR. ESQ., Rissman, Weisberg, Barrett, Hurt, Donahue & McLain, P.A., Co-counsel for Petitioners, 201 East Pine Street, 15th Floor, Orlando, Florida 32801; TERRY L. McCOLLOUGH, ESQ., Terry L. McCollough, P.A., and WILLIAM G. OSBORNE, ESQ., William G. Osborne, P.A., Co-counsel for Respondent, 538 Washington Street, Orlando, Florida 32801; JACK SHAW, ESQ., Brown, Obringer, Shaw, Beardsley & DeCandio, Counsel for Florida Defense Lawyers Association, 12 East Bay Street, Jacksonville, Florida 32202; JEFFREY M. SCOTT, ESQ., Counsel for Florida Medical Association, 123 South Adams Street, Tallahassee, Florida 32303; CHRISTOPHER L. NULAND, ESQ., Law Offices of Christopher L. Nuland, Counsel for Florida Medical Association, Florida Surgeons Forum, Florida Society of Thoracic and Cardiovascular Surgeons, and Florida

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