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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.

RESPONDENT'S AMENDED ANSWER BRIEF ON THE MERITS

ON REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

Respondent, MICHAEL DAUPHINEE, generally accepts the introduction as represented by Petitioners, except that Petitioners raise for the first time during this appeal the absence of any objection by Plaintiff below to the use of Dr. Battle's pre-suit affidavit for impeachment. Neither the answer brief, the oral argument, or the motion for rehearing with the Fifth District Court of Appeal ever raised the issue of an absence of an objection to the use of the pre-suit affidavit for impeachment. It is inappropriate for Petitioners to raise this issue for the first time with this Court. The failure of Petitioners to raise the issue of objection by Respondent below constitutes an abandonment of that issue and should not be an issue before this Court on the merits, nor should it be mentioned in the statement of the case.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal regarding impeachment of an expert with his pre-suit screening affidavit was correct. The Court appropriately opined that the "clear wording of the statute" was such that an affidavit by an expert for pre-suit screening purposes is a sworn statement and, thus, unusable for any purpose in a subsequent civil action.

When interpreting Florida Statutes §766.106(5), all parts of the Statute must be read together in order to achieve a consistent whole. Florida Statutes, Chapter 766 contemplates a three part process. The first part is the pre-suit investigation which includes medical corroboration procedures. If a plaintiff cannot find reasonable grounds after an investigation to determine that a claim exists, then the claim presumably would not be pursued any further. If reasonable grounds are found and a corroborating affidavit is obtained, then the plaintiff moves forward into the second phase of Chapter 766 wherein a notice of intent to initiate litigation, together with a corroborating medical expert opinion, is supplied to each potential defendant. The second phase continues for a period of ninety (90) days, unless continued. The second phase mandates that certain discovery occur, including

unsworn statements, production of documents or things, and the physical and mental examination of the plaintiff. All of this discoverable information is available to all parties without formal discovery.

The third phase of the pre-suit screening process occurs at the time a civil lawsuit is filed. The protections that are granted under Florida Statutes §766.106(5) and 755.205(4) arise during this third phase. A statement, written document or report discovered during the second phase is not discoverable or admissible in any civil action for any purpose by the opposing party.

These statutory sections are clear and unambiguous. Petitioners utilized a pre-suit screening affidavit in the third phase or civil action phase of the process. Florida Statutes §766 created a work product privilege for all of the pre-suit screening process which occurs before the filing of a civil action. This privilege applies to the pre-suit screening affidavit of a plaintiff's expert and constitutes both a discovery and an evidentiary privilege. Previous cases note that the legislature provided a discovery privilege in medical malpractice actions for reports generated during the pre-suit screening process. See *Peck v. Messina*, 523 So.2d 1154 (Fla. 2d DCA 1988) and *Grimshaw v.*

Schlwegel, 572 So.2d 12 (Fla. 2d DCA 1990).

The rule of *ejusdem generis* is inapplicable in this case in that the words of the statute are clear and unambiguous in meaning. There is no ambiguity in the use of the language "statement, written document or report" as it would apply to the sworn statement or report of a plaintiff's corroborating medical expert. Thus, no interpretation is required under the rule of *ejusdem generis*. Furthermore, any purported conflict with the Florida Evidence Code regarding cross-examination of witnesses was conformed or altered by the passage of Florida Statutes §766. If the legislature had intended to carve out an exception for cross-examination in utilizing a pre-suit screening affidavit, it would have done so.

Assuming *arguendo* that the discoverability of the pre-suit screening affidavit during the pre-suit screening process somehow renders that affidavit discoverable in a civil action, it does not render the affidavit to be admissible for any purpose. Florida Statute §766.106(5) is written in the disjunctive with the use of the word "or". The normal use of this word indicates that alternatives were intended by the legislature. Thus, the use of the pre-suit screening affidavit would not be admissible for any purpose in any civil action by the opposing party.

Any failure to object to the use of the pre-suit screening affidavit at trial by Respondent was waived or abandoned by Petitioners. Petitioners never briefed, argued, or raised in the Motion for Rehearing En Banc with the Fifth District Court of Appeal the issue of Respondent's alleged failure to object to the use of the pre-suit screening affidavit at trial. As such, this point is deemed waived or abandoned by Petitioners.

The Fifth District Court of Appeal's finding that the errors committed by the trial Court justified a new trial should be upheld. Petitioners raise no case law, nor any basis for this Court to reverse the ruling of the Fifth District Court of Appeal based upon the harmless error doctrine.

The Fifth District Court of Appeal was correct in rendering its opinion. The clear and plain meaning of the statutes interpreted by the lower Court should be upheld with this Court and the Fifth District Court of Appeal's decision should be affirmed.

ARGUMENT

I. **THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL REGARDING IMPEACHMENT OF AN EXPERT WITH HIS PRE-SUIT SCREENING AFFIDAVIT WAS CORRECT.**

The Fifth District Court of Appeal appropriately held that the improper use of a pre-suit screening affidavit to impeach an expert entitled Respondent to a new trial with respect to the Defendants against whom Dr. Battle's testimony was directed, to-wit: Michael Cohen, M.D.; Samuel Martin, M.D.; and Vascular Specialists of Central, Inc. *Dauphinee v. Wilstrup*, 696 So.2d 388, 390 (Fla. 5th DCA 1997).

The Fifth District Court of Appeal appropriately opined that the "clear wording of the statute" compelled agreement with the argument that an affidavit by an expert for pre-suit screening purposes is a sworn statement, citing Florida Statutes §766.106(5).

A. THE PLAIN MEANING OF §766.106(5) RENDERS A PRE-SUIT SCREENING AFFIDAVIT INADMISSABLE IN ANY CIVIL ACTION FOR ANY PURPOSE BY THE OPPOSING PARTY.

When interpreting Florida Statute §766.106(5) it is axiomatic that all parts of the Statute must

be read together in order to achieve a consistent whole. *T.R. v. State*, 677 So. 2d 270 (Fla. 1996).

> Where possible, Courts must give effect to *all* statutory provisions and construe related statutory provisions in harmony with one another. *Id.* at 271.

One must first look to the legislative findings and intent found in Florida Statutes §766.201. It was the intent of the legislature to provide a plan for prompt resolution of medical negligence claims. Section 766.201(2), Fla. Stat. "Pre-suit investigation shall be mandatory and shall apply to all medical negligence claims and defenses". *Id.* Pre-suit investigation "shall" include medical corroboration procedures. *Id.* The medical corroboration procedures are defined as a "verified written medical expert opinion from a medical expert" which shall corroborate reasonable grounds to support the claim for medical negligence. Section 766.203(2), Fla. Stat. Thus, there is no question that the pre-suit screening affidavit is a document generated solely by the pre-suit investigation process.

The purpose of the pre-suit requirements found in Chapter 766 is to alleviate the high cost of medical negligence claims through early determination and prompt resolution of said claims. *Weinstock v. Groth*, 629 So.2d 835 (Fla. 1933). The requirement that a corroborative opinion be supplied in connection with a pre-filing notice of a medical malpractice claim is designed to prevent the filing of baseless litigation. *Shands Teaching Hospital and Clinics, Inc. v. Barber*, 638 So.2d 570 (Fla. 1st DCA 1994). This stated purpose is also found at Florida Statutes §766.201(1)(d).

Florida Statutes §766 contemplates a three part process. The first part consists of a pre-suit investigation done pursuant to Florida Statutes §766.203. Presumably, if a plaintiff cannot find reasonable grounds after an investigation to determine that a claim exists, then the claim is not pursued any further. In the event the plaintiff concludes that there are reasonable grounds then Chapter 766 contemplates a second phase wherein a notice of intent to initiate litigation in accordance with Florida Statute §766.106, corroborated by a medical expert opinion, is supplied to each potential defendant. Sections 766.205 and 766.106(2), Fla. Stat.

This second phase continues for a period of ninety (90) days after the notice of suit is filed. Section 766.106(3)(a), Fla. Stat. During this second phase, certain discovery is mandated. This informal discovery begins with the mailing of a notice of intent to initiate litigation corroborated by a medical expert opinion that there exists reasonable grounds for a claim of negligent injury. Section 766.205(1), Fla. Stat. Informal discovery thereafter consists of obtaining unsworn statements, the production of documents or things, and the physical and mental examination of plaintiff. Section 766.106(7), Fla. Stat. The statute contemplates that all parties will make discoverable information available without formal discovery. Section

766.106(6), Fla. Stat. Further, unsworn statements may be recorded electronically, stenographically, or on video-tape. Section 766.106(7)(a), Fla. Stat. Each request for a notice concerning informal pre-suit discovery pursuant to this Section must be in writing and sent to all parties. Section 766.106(8), Fla. Stat. Additionally, copies of any documents produced must be served on all other parties. Section 766.106(9), Fla. Stat. It is apparent that the underlying purpose of this phase of the Pre-Suit Screening Statute is to share information, including the initial corroborating medical expert opinion.

The third phase of the pre-suit screening process occurs at the time a civil lawsuit is filed. No civil lawsuit may be filed for a period of ninety (90) days after the notice is mailed to any prospective defendant. Section 766.106(3)(a), Fla. Stat. At or before the end of the ninety (90) days, the insurer or self-insurer provides the claimant with a response which indicates the direction the case will take. It is in this third phase of the pre-suit screening process that the corroborating affidavit of Dr. Battle was used to impeach his trial testimony.

B. THE PLAIN AND UNAMBIGUOUS MEANING OF §766.106(5) IS THAT THE PRE-SUIT SCREENING AFFIDAVIT IS WORK PRODUCT IN A SUBSEQUENT CIVIL ACTION.

Florida Statutes §766.106(5) states as follows:

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

Furthermore, §766.205(4) similarly states as follows:

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

Sections 766.106(5) and 766.205(4) are clear and unambiguous. In any civil action which follows the pre-suit investigation process or the pre-suit screening process, the use of any statement, written document, report, or other work product is forbidden for any purpose by the opposing party. Obviously, "any purpose" includes the use of the pre-suit screening affidavit to impeach an expert. This logic is supported by the following observations:

A) The pre-suit investigation requires medical corroboration.

B) The medical corroboration consists of a verified written medical expert opinion from a medical expert as defined in

§766.202(5).

C) A verified written medical expert opinion is a sworn statement. Additionally, it is a written document or a report.

D) This sworn statement is work product generated solely by the pre-suit investigation process.

E) While the sworn statement is shared in the pre-suit screening process, like unsworn statements and production, it is not discoverable or admissible in any civil action which follows.

The plain meaning of a statute at issue is the polestar of statutory construction. *Acousta v. Richter*, 671 So.2d 149 (Fla. 1976). Statutory phrases are not to be read in isolation but, must be read within the context of the entire section. *Id.* at 154. Thus, in *Acousta, supra*, the Court determined that Florida Statutes §455.241(2) created a physician-patient privilege where none existed before and prohibited defense counsel from obtaining ex-parte conferences with plaintiff's treating physicians. See also, *Miele v. Prudential-Bache Securities, Inc.*, 656 So.2d 470 (Fla. 1995). Similarly, in *Holly v. Auld*, 450 So.2d 217 (Fla. 1984), the Court interpreted the discovery privilege created by Florida Statutes §768.40(4) to not be limited to medical malpractice actions, but to also include defamation actions which arose from the evaluation and review by hospital credentials' committees.

> Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However, when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is not occasion for resorting to the rules of statutory interpretation and construction: the statute must be given its plain and obvious meaning (citations omitted). *Id.* At 219.

In *Holly v. Auld, supra,* the Court further stated that the construction of an unambiguous statute that would in any way extend, modify or limit its express terms would be an abrogation of legislative power. *Id.* See also *Nicoll v. Baker,* 668 So.2d 989 (Fla. 1996) (where the Court followed the plain and unambiguous language of a statute and presumed that the legislature knew of prior case law in so doing and, as a consequence, held that the former case law had been superseded by the statutory amendment).

The clear and unambiguous language of Florida Statutes §766 is to create a work product privilege for all of the pre-suit screening process which occurs before the filing of a civil action. This includes the pre-suit screening affidavit of a plaintiff's expert. This privilege is both a discovery and an evidentiary privilege.

The case law is also consistent with the ruling of the Fifth District Court of Appeal. In *Peck v. Messina, supra,* the Court reviewed an interlocutory order which directed plaintiff to produce

the report of an expert witness who was expected to testify for plaintiff at trial in her action against defendants for medical malpractice. The expert's report was prepared at the plaintiff's request to determine whether there was a medical basis for a medical action. This purpose is identical to the corroboration required by verified written medical expert opinion as found in Florida Statutes §766.203(2). The Court in *Peck, supra,* allowed the report to be discovered relying upon pre-existing case law holding that reports prepared by experts expected to testify at trial are not protected by the work product privilege and are discoverable. *Id.* at 1154. The Court went on to opine as follows:

> 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 pre-suit screening process. See Section 766.57(5), Fla. Stat. (1985). *Id.* (emphasis supplied)

The *Peck* case is on point here. The Pre-Suit Screening Statute created a discovery privilege in the civil lawsuit such that an expert report that is generated by the pre-suit screening process is not discoverable in the civil action.

Petitioners argue that a pre-suit screening affidavit should be evaluated solely based upon traditional work product principles. Thus, the application of this argument renders Chapter 766

redundant or meaningless. Why would the legislature create a statutory privilege regarding documents generated in the pre-suit screening process if it intended to apply traditional work product principles? Thus, Petitioner argues that regardless of the statutory language, when an expert's corroborating opinion is provided to a defendant in pre-suit screening, it is admissible or usable for cross-examination.

Unsworn statements taken during medical malpractice pre-suit screening processes are also privileged and cannot be used for impeachment purposes. *Rub v. Williams*, 611 So.2d 1328 (Fla. 3rd DCA 1993). In *Grimshaw, supra*, the defendants in a malpractice action were not allowed to discover an expert report, in the form of a letter, that the expert had written during the pre-suit screening period. *Id.* at 13.

> The legislature did not provide an exception to the discovery privilege for certain documents created during this pre-suit screening process when such documents are relied upon by experts who are expected to testify at trial . . . . (emphasis supplied).

In so doing, it is apparent that the legislature considered that the exchange of information during the pre-suit screening process would be greater if confidentiality were assured. Obviously, the legislature determined that this policy outweighed

the need for civil litigants to obtain certain discovery generated by the pre-suit screening process. *Id.* at 13. See also *Watkins v. Rosenthal*, 637 So.2d 993 (Fla. 3rd DCA 1994)(where the Court denied defendant the opportunity to depose a medical expert to determine the basis for preparing a corroborating medical expert opinion pursuant to Florida Statutes §766.206(1).

The Fifth District Court of Appeal properly relied upon its prior decision of *Adventist Health System/Sunbelt, Inc. v. Watkins*, 675 So.2d 1051 (Fla. 5th DCA 1996). In *Watkins, supra*, the affidavit that was used to impeach the expert was one prepared by the expert in an unrelated matter which had been used in a pre-suit screening process for an earlier similar incident at another hospital involving a different patient. Given the fact that this statement was not being used by the opposing party or a participant in the subject civil action, the Court appropriately held that the affidavit was not work product generated by the pre-suit screening process in that case. *Id.* at 1052. In the instant case however, the statement was being used by the opposing party and, as such, the affidavit was "work product" created by a "participant" in the party's pre-suit screening process.

Petitioners' reliance upon *Citron v. Shell*, 689 So.2d 1288 (Fla. 4th DCA 1997) is misplaced. In *Citron, supra*, the pro se

plaintiff failed to comply with the corroborating affidavit requirement all together. Any language contained in that opinion regarding the use of a pre-suit screening affidavit as evidence or impeachment was merely dicta and, as such, should not be relied upon.

The Fifth District Court of Appeal was correct in finding that the clear wording of the statute (§766.106(5), Fla. Stat.) was such that an affidavit by an expert for pre-suit screening purposes is a sworn statement and, as such, is inadmissible in any civil action for any purpose by the opposing party.

C. THE RULE OF EJUSDEM GENERIS IS INAPPLICABLE WHERE THE WORDS OF THE STATUTE ARE CLEAR IN MEANING.

Petitioners place much stock in applying the statutory construction doctrine of ejusdem generis. At no time do Petitioners state that the language utilized in Florida Statutes §766.106(5) is ambiguous or vague. A "statement, written document, report, or other work product generated by the pre-suit screening process" is unambiguous. It is further undisputed that a statement can be sworn or unsworn. Petitioners cannot argue that the doctor's corroborating medical opinion is not a report.

The application of the rule of ejusdem generis in the interpretation of statutes is not applicable in the case where the

words of the statute are clear in meaning and require no interpretation. *Reynolds v. Reynolds*, 152 So. 200 (Fla. 1933); see also *City of Panama City v. State, et al.*, 60 So.2d 658 (Fla. 1952).

It is clear and unambiguous in Florida Statutes §766.106(5) that statements, written documents, or reports that are generated by the pre-suit screening process are considered to be work product. It is further clear that the corroborating written medical expert opinion is a statement, written document or report generated by the pre-suit screening process. In the absence of any ambiguity or vagueness as to the meaning of these terms, the doctrine of ejusdem generis is inapplicable.

D. ANY PURPORTED CONFLICT WITH THE FLORIDA EVIDENCE CODE IS SUPERSEDED BY FLORIDA STATUTE §766.106(5).

Petitioners argue that Florida Statutes §766.106(5) is in conflict with Florida Statutes §90.608(1) of the Evidence Code. This section of the Evidence Code provides that a party may attack the credibility of a witness "introducing statements of the witness which are inconsistent with the witnesses' present testimony." Any prior sworn statement which is not barred by a statutory privilege obviously would be available to impeach any expert in a medical malpractice civil action. However, Florida Statutes §766.106(5)

created a statutory discovery and evidentiary privilege which supersedes Florida Statutes §90.608(1) of the Evidence Code.

This section of the Evidence Code is not abrogated. It is merely conformed to the evidentiary privilege as it pertains to a particular statutorily created sworn statement. Thus, these statutes are not hopelessly inconsistent. Even if the two statutes were in irreconcilable conflict, a general provision of the Florida Evidence Code which precedes Florida Statutes §766.106(5) would be superseded. In *Starr Tyme, Inc. v. Cohen*, 659 So.2d 1064 (Fla. 1995), the Court held that even if two statutes were in irreconcilable conflict that a general provision of the Florida Evidence Code that was enacted in 1976 would be superseded by a later enactment that specifically addresses the issue at hand. *Id.* at 1068. When two statutes, whether general or specific are hopelessly in conflict, the more recent prevails. *Id.* Finally, the Court opined that if the legislature intended any exception to the later statutory enactment that it would have expressly carved out such an exception. *Id.* Similarly, in the instant case, if the legislature intended to carve out an exception for cross-examination utilizing a pre-suit screening affidavit it would have done so. No such exception exists. Respondent believes that Florida Statutes §766.106(5) does not abrogate Florida Statutes

§90.608(1) of the Evidence Code. Rather, it creates an exception such that sworn statements created by the pre-suit screening process are privileged and not available for any purpose in a civil action that occurs subsequent to the pre-suit screening process.

E. THE DISCOVERABILITY OR ADMISSIBILITY OF THE PRE-SUIT SCREENING AFFIDAVIT IS WRITTEN IN THE DISJUNCTIVE.

Assuming *arguendo* that the Court accepts Petitioners' position that any work product that relates to the pre-suit screening affidavit is waived because the affidavit is discoverable, the Court then needs to construe the context under which the discoverability is mentioned in Florida Statutes §766.106(5).

> No statement, discussion, written document, report, or other work product generated by the pre-suit screening process is discoverable or admissible in any civil action for any purpose by the opposing party. (emphasis supplied).

The word "or" is generally construed in the disjunctive when used in a statute or rule. *Sparkman v. McClure*, 498 So.2d 892 (Fla. 1986).

> The use of this particular disjunctive word in a statute or rule normally indicates that alternatives were intended. *Id.* at 895.

In *NICA v. Division of Administrative Hearings*, 686 So.2d 1349 (Fla. 1997), the Court opined that the word "and" is to be read in the conjunctive and the word "or" is to be read in the

disjunctive. The Court concluded since the statute in question Section 766.302(2) was written in the conjunctive that it could only be interpreted to require permanent and substantial impairment that has both physical and mental elements. *Id.* at 1356.

Similarly, in the instant case, the plain and ordinary meaning of the word "or" as found in Florida Statutes §766.106(5) is such that "discoverable" or "admissible" is written in the disjunctive. As such, even if the pre-suit screening affidavit is discoverable, it is not admissible in any civil action for any purpose by the opposing party.

II. **ANY FAILURE TO OBJECT TO THE USE OF THE PRE-SUIT SCREENING AFFIDAVIT AT TRIAL WAS WAIVED OR ABANDONED BY PETITIONERS.**

Petitioners argue that the Fifth District should never have reached their opinion because the impeachment of Dr. Battle with his pre-suit screening affidavit was never objected to by Respondent. Unfortunately for Petitioners, they hoist themselves on their own petard. Petitioners never objected to the failure of Respondent to object to the use of the pre-suit screening affidavit on cross-examination of Dr. Battle.

The issue of the failure to object at the trial to the use of the pre-suit screening affidavit is raised for the first time in this brief on the merits before this Court. It was never briefed

by Appellees below, nor was it raised in the Motion for Rehearing in En Banc filed by Petitioners. It is improperly raised for the first time in this appeal. Thus, all of the authorities presented by Petitioners on this point in their brief apply to Petitioners as well. Florida Appellate Rule 9.210 requires that all alleged errors committed by the lower Court be specified as issues in the briefs. *Ratner v. Miami Beach First National Bank*, 362 So.2d 273 (Fla. 1978). Good practice further compels that a brief state the points relied upon for reversal and that specific assignments of error be so stated. If no point is made in the briefs, it is deemed abandoned. *Saxton v. Miller*, 230 So.2d 685 (Fla. 4th DCA 1969). See also *Cohen v. American Legion*, 546 So.2d 46 (Fla. 4th DCA 1989) (where a party's brief completely omits discussion of the alleged error, the assignment of error is deemed abandoned) and the *Department of Health and Rehabilitative Services v. Petty-Eifert*, 443 So.2d 266 (Fla. 1st DCA 1983).

Any defense that Petitioners may have had below in the appeal was waived by Defendants' failure to brief or argue this issue. *Morris v. Connecticut General Life Insurance Company*, 346 So.2d 589 (Fla. 3rd DCA 1977). Petitioners had the duty below to prepare appellate briefs so as to acquaint the Lower Court with the material facts, the points of law involved and the legal arguments

supporting their positions. *Polyglycoat Corporation v. Hirsch Distributors, Inc.*, 442 So.2d 958 (Fla. 4th DCA 1983). When points or positions are omitted from the brief, a Court is entitled to believe that these points are waived, abandoned or deemed by counsel to be unworthy. *Id.* at 960. Thus, matters not previously urged to the Court may not be raised for the first time on a motion for rehearing. *Id.* at 960. Indeed, points that were never briefed, argued, or raised on a motion for rehearing with the Fifth District Court of Appeal cannot be raised for the first time with the Florida Supreme Court. This issue should be deemed to have been waived or abandoned by the Petitioners below.

III. **THE ERROR BELOW WAS HARMFUL.**

Petitioners globally assert that any errors committed by the Trial Court were harmless. The substance of their argument on this point is to reiterate the evidence offered at trial and the prior argument made to the Fifth District Court of Appeal. The Fifth District Court of Appeal appropriately found that the error in allowing Dr. Battle to be cross-examined by his pre-suit screening affidavit was one that applied to all Defendants to which his testimony was directed. To now argue that somehow Dr. Martin should be extracted from the impact of the cross-examination is

ludicrious. Petitioners have no basis within which to speculate as to how the jury's verdict of no liability for Dr. Martin arose. Clearly, the cross-examination as set forth in the briefs to the Fifth District Court of Appeal was extremely prejudicial to Dr. Battle's testimony. Dr. Battle was the only surgeon offered as an expert against Dr. Martin, Dr. Cohen, and their professional association.

It is not this Court's place to second guess the Fifth District Court of Appeal as to whether this error was harmless.

CONCLUSION

The Fifth District Court of Appeal was correct in rendering its opinion. The Lower Court's opinion tracked the clear and plain meaning of the statutes in question. The District Court of Appeal's decision should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail delivery to ARTHUR J. ENGLAND, JR., ESQUIRE/BRENDA K. SUPPLE, ESQUIRE, 1221 Brickell Avenue, Miami, Florida 33133 and JENNINGS L. HURT, ESQUIRE/RICHARD B. MANGAN, JR., ESQUIRE, 201 E. Pine Street, 15th Floor, Orlando, FL 32801-2728 this 17th day of April, 1998.

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