ORIGINAL

IN THE SUPREME COURT OF FLORIDA

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91,239

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

Petitioners,

vs.

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,

Respondent.

_____/

SUPREME COURT CASE NO.:
5DCA CASE NO.: 96-01717

PETITIONERS', MICHAEL J. COHEN, SAMUEL P. MARTIN, M.D. AND VASCULAR SPECIALISTS OF CENTRAL FLORIDA, INC., SECOND AMENDED JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

This Petition arises out of a wrongful death action brought by MICHAEL DAUPHINEE (DAUPHINEE) arising out of the death of ROSEMARIE DAUPHINEE that occurred on November 10, 1991 in Orlando, Orange County, Florida. DAUPHINEE brought suit based upon the medical care rendered to ROSEMARIE DAUPHINEE by DR. MICHAEL COHEN (COHEN), a board certified general and vascular surgeon, and DR. SAMUEL P. MARTIN (MARTIN), a board certified general vascular surgeon, for the care and treatment they rendered to ROSEMARIE DAUPHINEE as part of their practice with VASCULAR SPECIALISTS OF CENTRAL FLORIDA (VASCULAR SPECIALISTS). DAUPHINEE also sued additional Defendants who provided care to Mrs. Dauphinee.

As to Drs. Cohen and Martin, DAUPHINEE presented the expert testimony of Dr. W. Stuart Battle. Dr. Battle opined that Dr. Cohen had met the standard of care with regard to his care and treatment of Mrs. Dauphinee in June of 1991 and on August 8, 1991. Dr. Battle had, however, in his pre-suit August 11, 1993 affidavit, stated under oath that Dr. Cohen had deviated from the standard of care on August 8, 1991, by failing to further investigate a recurrent mass in the right lower quadrant.

The trial court permitted Dr. Battle to be cross-examined with his affidavit, wherein Dr. Battle had alleged that Dr. Cohen had deviated from the standard of care in August of 1991, because he testified at trial that Dr. Cohen had met the standard of care. Dr. Battle claimed that the affidavit contained a typographical error. Dr. Battle further testified at trial that Dr. Cohen had

deviated from the standard of care on November 4, 1991 and that Dr. Martin had deviated from the standard of care on November 8, 1991 by failing to timely perform surgery on ROSEMARIE DAUPHINEE.

Drs. Cohen and Martin presented expert testimony from Dr. Stephen Vogel and Dr. Richard Howard, board certified general surgeons and faculty members at the University of Florida Shands Hospital that Dr. Cohen's care and Dr. Martin's care were within the applicable standard of care and that Mrs. Dauphinee's death was unpreventable as a result of a toxic shock-like syndrome.

The trial began on August 25, 1996 and on May 10, 1996 the jury returned a verdict in favor of all remaining defendants on the issue as to whether any of the Defendants had departed from the acceptable standards of care with regard to their respective care and treatment of Mrs. Dauphinee.[1] On June 10, 1996, Drs. Cohen, Martin and Vascular Specialists, Inc. obtained final judgments against the Plaintiff and the Plaintiff subsequently appealed.

The 5th DCA, by its Opinion dated May 23, 1997 attached as an Appendix to this Brief, reversed the final judgments in favor of Drs. Cohen and Martin and Vascular Specialists on the sole basis that the trial court had erred in allowing the use of Dr. Battle's pre-suit affidavit for impeachment purposes. The 5th DCA reversed and remanded the matter for a new trial as to Drs. Cohen, Martin and Vascular Specialists only. The 5th DCA affirmed the judgments in favor of all of the other Defendants.

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[1] The trial court at the close of plaintiffs' case directed a verdict for Dr. Wilstrup and Ob/Gyn Specialists, Inc. which was affirmed on appeal by the 5th DCA.

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SUMMARY OF ARGUMENT

The Florida Supreme Court has jurisdiction to review the 5th DCA's decision in Dauphinee v. Wilstrup, 22 Fla. L. Weekly D1291 (Fla. 5th DCA May 23, 1997), because of its express and direct conflict with Watkins v. Rosenthal, 637 So. 2d 993 (Fla. 3d DCA 1994); Rub v. Williams, 611 So. 2d 1328 (Fla. 3d DCA 1993); Grimshaw v. Schwegel, 572 So. 2d 12 (Fla. 2d DCA 1990); Adventist Health Systems/ Sunbelt, Inc. v. Watkins, 675 So. 2d 1051 (Fla. 5th DCA 1996); Citron v. Shell, 22 Fla. L. Weekly D776 (Fla. 4th DCA March 26, 1997) and Lowe V. Pugh, 21 Fla. L. Weekly D732 (Fla. 2d DCA March 20, 1996).

The 5th DCA's decision in Dauphinee is irreconcilable with the decisions relied upon by the 5th DCA in its opinion. None of the decisions relied upon by the 5th DCA support a finding that the pre-suit affidavit signed by Dr. Battle, in which he offered an opinion under oath contrary to his opinion testimony under oath in deposition and trial, could not be used for impeachment purposes. Rather, the appellate decisions relied upon by the 5th DCA simply maintained the integrity of the expressed privileges contained within Chapter 766, none of which address the privileged nature of the pre-suit expert affidavit.

The decisions in Watkins, Rub and Grimshaw all protect either work product, which is privileged under Section 766.106(5), or unsworn statements which are protected under Florida Statute Section 766.106(7). Contrary to the rationale set forth in the 5th DCA's opinion in Dauphinee, none of those cases interpreted Florida

Statute Section 766.106(5) to provide a privilege for the pre-suit affidavit. To the contrary, Florida courts have consistently held that Florida Statute Section 766.106(5) protects only work product and not a pre-suit affidavit. The pre-suit affidavit is clearly not work product since it is provided to other counsel and is never intended to be work product at the time that it is prepared. For those reasons, the 5th DCA's decision in Dauphinee expressly and directly conflicts with the decisions from the 2d, 3d and 4th DCAs.

In addition, Dauphinee conflicts with the 4th DCA's decision in Citron and the 2d DCA's decision in Lowe wherein those courts found §766.106(5) not to create a privilege for the notice of intent and the pre-suit affidavit. Finally, Adventist Health permits the use, for impeachment purposes, of an expert's affidavit prepared to initiate pre-suit in another case against that expert whereas Dauphinee would not allow the use of an expert's sworn affidavit to be used to cross-examine that expert in the very case in which the expert has signed the affidavit. This is a non-sensical result which should not be condoned by the courts of Florida. This result is contrary to the public policy expressed by the legislature within Chapter 766 to reduce meritless claims. The expert, whose affidavit is necessary to commence the medical negligence litigation process, must be held accountable for that opinion to fulfill the statutory intent of ensuring that a reasonable investigation has been completed before suit is instituted.

ARGUMENT

I. THE FLORIDA SUPREME COURT HAS JURISDICTION PURSUANT TO FLORIDA RULES OF APPELLATE PROCEDURE RULE 9.030(a)(2)(A)(IV)

Petitioner, pursuant to Florida Rules of Appellate Procedure Rule 9.120, petitions this Court to invoke its discretionary jurisdiction described by Florida Rules of Appellate Procedure Rule 9.030(a)(2)(A)(IV). This Court has jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution based on an express and direct conflict with opinions of other district courts. See The Florida Star v. BJF, 537 So. 2d 286 (Fla. 1988).

The 5th DCA's decision in Dauphinee conflicts with the 4th DCA's decision in Citron wherein the 4th DCA addressed the applicability of the privilege under Florida Statute Section 766.106(5) to the corroborating expert opinion required by Florida Statute Section 766.203(2). The 4th DCA, in reaching its decision, interpreted Section 766.106(5) (the specific sub-section relied upon by DAUPHINEE and by the 5th DCA in its decision) noting that the Plaintiff in Citron had relied upon that specific sub-section to argue that the pre-suit affidavit was work product. The 4th DCA disagreed, specifically stating that the work product protection in Section 766.106 did not apply to the corroborating expert opinion, required by Section 766.203. The 5th DCA in Dauphinee held to the contrary and its opinion is in direct conflict and irreconcilable with the 4th DCA's decision in Citron. The 5th DCA, in Dauphinee, held that Section 766.106(5) creates a privilege for the pre-suit affidavit, but only for the case in which the affidavit was

created. Inconsistently, the 5th DCA does not recognize a privilege for affidavits prepared by the same expert in other cases (see the discussion of Adventist Health at pg. 10 infra.)

As interpreted by the 4th DCA in Citron, Section 766.106(5) only creates a specific privilege for work product. Florida Statute Section 766.106(5) provides:

> 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 ... Fla. Stat. § 766.106(5).

In this case, Dauphinee never argued that the affidavit was work product but attempted to expand the privilege created under Section 766.106(5) to "everything" included within the pre-suit process.[2] This interpretation is inconsistent with the 4th DCA's decision in Citron as well as a reasonable, logical interpretation of Section 766.106(5).

The error of the 5th DCA's interpretation of 766.106(5) is further evidenced by reliance upon Rub v. Williams, supra. In Rub, the 3d DCA held that unsworn statements were privileged under Florida Statute Section 766.106 and Rule 1.650, Florida Rules of Civil Procedure. The Rub decision specifically involved an unsworn statement which enjoys a specific privilege under Florida Statute Section 766.106(7)(A). There is no question that the legislature

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[2] It should also be noted that the affidavit is not created during the pre-suit process, nor is it generated by a "participant" in the pre-suit process, but rather it is part of the notice of intent which begins the pre-suit process. See the 5th DCA's discussion of this point in Adventist Health at pg. 11.

created an absolute privilege for unsworn statements in sub-section (7)(A). Unfortunately, the 5th DCA's decision in Dauphinee conflicts with that in Rub in that the 5th DCA's interpretation creates an absolute privilege for every statement under Section 766.106(5) regardless of whether it is work product or an unsworn statement. Such an interpretation makes Florida Statute Section 766.106(7)(A) superfilous. If everything was privileged under Section 766.106(5) as the 5th DCA and DAUPHINEE assert, there would be no need for Section 766.106(7)(A) since the unsworn statement would already be privileged under Section 766.106(5).

The 5th DCA's decision conflicts with Grimshaw v. Schwegel. Specifically, Grimshaw supports an interpretation of Florida Statute Section 766.106(5) that only work product expert reports generated by the pre-suit process are privileged. In Grimshaw, the expert's work product report was work product generated by the pre-suit process and therefore privileged under Section 766.106(5). The expert report was never given to opposing counsel and clearly constituted work product. Grimshaw did not address whether an affidavit which is not work product is privileged. Grimshaw does not support the 5th DCA's decision and, in fact, supports an interpretation of Section 766.106(5) that only work product is protected by that sub-section.

Finally, the 5th DCA's decision in Dauphinee is irreconcilable with the 5th DCA's decision in Adventist Health, supra. In Adventist Health, the 5th DCA affirmed the use of an expert's pre-suit affidavit from another case to cross-examine that

expert when he testified in Adventist Health. In essence, the 5th DCA's decision in Adventist Health allows a party to cross-examine an expert with an affidavit from an unrelated case but Dauphinee would not permit that expert to be cross-examined with an affidavit he signed to allow the very litigation, in which the expert is testifying, to begin.

The ruling in Dauphinee allows an expert to offer an opinion to start a case that cannot be challenged even though the facts forming the basis of that opinion consist of the facts being tried. Adventist Health, however, allows cross-examination with an affidavit about facts not before the court, not investigated through discovery and could conceivably create a mini-trial regarding a collateral, unrelated medical negligence action.

Further, the 5th DCA in Adventist Health disagreed that the affidavit was privileged under Section 766.106(5) (a finding opposite of the 5th DCA in Dauphinee) and rather found that the affidavit could not be considered "work product generated by the pre-suit screening process" of the case. The 5th DCA went on to note that the affidavit could not be considered "work product" generated by a "participant" in the pre-suit process. Adventist Health at 1052. Thus, two different panels of judges within the 5th DCA have rendered irreconcilable opinions.

Finally, the 5th DCA's reliance upon the 3d DCA's decision in Watkins v. Rosenthal, supra, again exhibits the conflict between the Dauphinee decision and the decision from the 3d DCA. In Watkins, the Petitioner's corroborating medical expert opinion was

attached to the Notice of Intent. The Respondent sought to depose the expert in investigation of their claim under Section 766.206(1) that the Petitioner's claim did not rest on a reasonable basis. The 3d DCA noted that the deposition of that expert would necessarily include "statements, discussions and references to work product generated solely by the pre-suit investigation process." Id. at 994[3]. Contrary to Dauphinee, the 3d DCA did not find the provisions of §766.205(4) to protect "every statement" as part of pre-suit as privilege; only those which were work product.

Finally, Dauphinee also conflicts with Lowe, supra, wherein the 2d DCA found that a notice of intent was not protected by the privilege under §766.106(5). Lowe held that only work product was privileged under §766.106(5) and the notice of intent, which was provided to opposing counsel, could not constitute work product. For purposes of interpreting whether §766.106(5) affords a privilege for the notice of intent or the expert affidavit, the decision in Dauphinee and Lowe are analyzing the same issue. They both address whether §766.106(5) creates a privilege for something other than work product with Dauphinee finding it does and Lowe limiting §766.106(5) to work product.

[3] Watkins actually involved interpretation of 766.205(4) which is similar in wording to Section 766.106(5).

CONCLUSION

For the reasons stated above, this Court has jurisdiction pursuant to Florida Rules of Appellate Procedure Rule 9.030(a)(2)(A)(iv) and this Court should exercise its discretionary jurisdiction to clarify the express and direct conflict between the 5th DCA's decision in Dauphinee, and the decisions of the 2d, 3d and 4th DCAs in Citron, Watkins, Rub, Grimshaw and Lowe, as well as the 5th DCA's opinion in Adventist Health.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail this 25th day of September, 1997 to: WILLIAM G. OSBORNE, ESQUIRE, 538 E. Washington Street, Orlando, FL 32801 and TERRY L. MCCOLLOUGH, ESQUIRE, 538 E. Washington Street, Orlando, FL 32801.

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