IN THE SUPREME COURT OF FLORIDA

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.: 91,239
5th DCA Case No.: 96-01717



**RESPONDENT'S, MICHAEL DAUPHINEE, ETC. ET AL.**
**REPLY BRIEF TO SECOND AMENDED JURISDICTIONAL BRIEF**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### OTHER CITATIONS

## STATEMENT OF THE CASE AND FACTS

Respondent, Michael Dauphinee, etc., et al., finds that there is not substantial inaccuracies in the Statement of the Case and Facts of Petitioner and adopts those.

## SUMMARY OF THE ARGUMENT

Petitioner attempts to invoke the jurisdiction of this Court based upon its discretion to review matters of express and direct conflict between decisions of the district courts of appeal of the State of Florida. Because the Petitioner has failed to demonstrate any express and direct conflict within any of the cited decisions of other district courts of appeal and the Fifth District Court of Appeal from whence this Petition is brought. No jurisdiction is appropriate in this Court and the Petition should be dismissed.

The cited decisions as to which there is alleged conflict, 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, 689 So. 2d 1288 (Fla. 4th DCA 1997); and Lowe v. Pugh, 682 So. 2d 1104 (Fla. 2d DCA 1996), fail to demonstrate any conflict much less express or direct conflict upon which this Court might properly base an exercise of its discretionary jurisdiction. The most cursory comparison of the facts of the Dauphinee decision with those in Watkins, Rub, Grimshaw, Adventist, Citron and Lowe show no similar facts let alone ones substantially similar facts and a different result reached by the district court of appeal.

The precise decision rendered by the Fifth District Court of Appeal in Dauphinee dealt solely with the question of whether an affidavit created and executed pursuant to Chapter 766 for the purpose of initiating the presuit process in a medical malpractice claim, may be utilized by the party

to whom it is sent for the purposes of impeaching the affiant as an expert witness at trial. Particularly, the Fifth District's opinion deals with the proper construction of §766.106, Florida Statutes as it relates solely to the admissibility of a presuit expert's corroborating affidavit being used for the purpose of cross-examining and impeaching that expert at trial. Accordingly, review by this Court should be denied and this Petition dismissed.

## ARGUMENT

### I. No Express or Direct Conflict with any District Court of Appeal Decision has been shown.

The Petitioner, in attempting to convince this Court that jurisdiction might properly be exercised, attempts to illustrate that there is express and direct conflict with the opinions of other district courts of appeal. Given the procedural history and facts of this case the demonstration of such conflict is the only basis by which this Court might properly exercise its discretion to review the instant Petition. See The Florida Star v. BJF, 530 So. 2d 286 (Fla. 1988)[1].

The first decision characterized by Petitioner as being in conflict with the Fifth District's decision in Dauphinee is that in Citron v. Shell wherein the Fourth DCA dealt with the issue of the statutory requirement for furnishing a corroborating medical opinion with the notice of intent which must be served on potential defendants pursuant to Chapter 766 in order to initiate the presuit screening process. In attempting to characterize the Citron decision as being in conflict with Dauphinee, Petitioner attempts to recharacterize the Citron decision as centering on the characterization of a presuit affidavit as falling within or without the work product privilege under

[1]Petitioner incorrectly cites the reported decision as The Florida Star v. BJF, 537 So. 286 (Fla. 1988).

Chapter 766. The Fourth DCA, while noting that the petitioner in Citron had made the argument that the presuit corroborating medical opinion was not discoverable and should not be required to be served because it was work product, dismissed that argument in light of the specific statutory requirement within Chapter 766 for the service of such a corroborating medical opinion on the opposing party at the time of service of the notice of intent. The issue of the admissibility of such an opinion used at an evidentiary hearing or trial was not reached by the Fourth DCA in Citron. Accordingly, Citron, just as the other cases which are analyzed below fails to meet the standard enunciated by this Court over three decades. In order to meet the standard for demonstration of an express and direct conflict, the petitioner must show that a different result occurred in a case which involved substantially similar facts as the instant case. Mancini v. State, 312 So. 2d 732 (Fla. 1975) Cases which are distinguishable upon their individual facts and issues show no conflict and therefore there is a lack of jurisdiction in this Court. Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983)

The second decision offered by the Petitioner as being in conflict with Dauphinee is Rub v. Williams supra. To the contrary, the Third DCA in Rub held that unsworn statements were privileged against admission in court for impeachment during trial pursuant to §766.106. Rather than being inconsistent or conflicting at all with Dauphinee, Rub is completely consistent because it prohibits the admission at trial of presuit statements and papers prepared in the instant proceeding.

The Petitioner also offers as a conflicting decision that of Grimshaw v. Schwegel. The Petitioner mischaracterizes the Grimshaw decision as an interpretation that only expert reports generated during the presuit process are work product and therefore privileged. In Grimshaw, the only question before the court was the discoverability of reports prepared by an expert which was

never provided to opposing counsel and was clearly work product under the applicable statutory scheme. Grimshaw did not address the issue of whether or not an affidavit is work product because no affidavit was at issue. Nor did it address the admissibility of any presuit document.

The Petitioner even argues that the Fifth DCA's decision in Dauphinee is at conflict with its own decision in Adventist Health Systems/Sunbelt v. Watkins. Once again, on the contrary, the Adventist Health decision is both consistent with and to the extent that conflict is argued, distinguishable on the facts from the Dauphinee decision. In Adventist Health, the issue was the admissibility of an expert's presuit affidavit from a completely different case to impeach him on a factual issue at trial. Significantly, in the Adventist Health case, the parties to the dispute in which the subject affidavit was given, were totally dissimilar from those parties in the instant case. Not only was the hospital a completely different entity, but the plaintiff and all physicians involved were different as well.

The Petitioner also offers as alleged conflict, the decision of the Third DCA in Watkins v. Rosenthal. In Watkins the issue was not the discoverability or admissibility of a presuit affidavit at all. Rather, the issue was the ability of the putative defendant to take the deposition of the presuit expert for the purposes of an evidentiary proceeding to determine whether or not the medical malpractice plaintiff in that case had a reasonable basis for serving the notice of intent. Admissibility or use of the presuit affidavit *vel non* was not even considered by the Third DCA. Indeed, albeit in a footnote, the Petitioner in this case even concedes that the Watkins court decision dealt with a completely different statute, §766.205(4) instead of §766.106(5).

Lastly, and incredibly, Petitioner contends that the Fifth District's opinion in Dauphinee conflict with that of the Second DCA in Lowe v. Pugh. In Lowe, a medical malpractice plaintiff had

served notices of intent to initiate litigation on several putative defendants. Subsequently, an additional putative defendant, Dr. Pugh, was also served a separate notice of intent. Dr. Pugh, subsequent to the actual initiation of litigation, requested production of the letters giving notice of intent to the original defendants. An objection to said production was made and overruled by the trial court. The Second DCA affirmed the trial court's decision based upon that portion of the presuit screening process that requires that notices of intent be served upon all putative defendants during the initiation of the presuit process. Rule 1.650(b)(2), Fla. R. Civ. P. Any inference that the Lowe decision even remotely relates to, let alone conflicts with the Dauphinee decision, is ridiculous.

The Petition filed herein fails to illustrate the most remote conflict let alone a direct and express conflict between the Fifth District's decision in Dauphinee with any other district court of appeal decision or with any decision of this Court. Instead, Petitioners seek to have this Court simply revisit the analysis which has been properly undertaken and completed by the Fifth District. It should be noted that prior to the filing of this Petition, Petitioners sought rehearing and rehearing *en banc* in the Fifth District Court of Appeals which were denied. Significantly, every decision of any district court which has been offered as a basis for direct or express conflict in this case was argued by Petitioner to the Fifth District as supporting an affirmation of the trial court's judgment. No other district court of appeal has even visited the question of the admissibility of a presuit corroborating affidavit for admission and impeachment of that expert at the trial of the matter in which it was given. The only decisions which reach the question of the use of presuit screening materials regarding their admissibility in the case in which they are prepared are completely consistent with the Fifth District's decision in Dauphinee. Accordingly, the Petition should be

denied and the instant appeal dismissed.

## CONCLUSION

On the analysis set forth above, no express or direct conflict exists between the decision of the Fifth District Court of Appeal in the instant case and the cited decisions. This Court should decline to exercise its discretionary jurisdiction and dismiss the Petition.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 15th day of October, 1997 to Richard B. Mangan, Jr., Esquire and Jennings L. Hurt, Esquire, 201 E. Pine Street, 15th Floor, Orlando, Florida, 32801-2728.

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