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.

SUPREME COURT CASE NO.: 91,239

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

Respondent.

AMICUS CURIAE BRIEF OF FLORIDA DEFENSE LAWYERS' ASSOCIATION IN SUPPORT OF PETITIONER

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PRELIMINARY STATEMENT

In this brief, the parties will be referred to by name, Petitioners, Michael J. Cohen, M.D., Samuel P. Martin, M.D. and Vascular Specialists Of Central Florida, Inc., collectively as "Dr. Cohen" and Respondent Michael Dauphinee as Personal Representative as "Dauphinee". All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

We accept the Statement Of The Case And Facts set forth in the Initial Brief of Dr. Cohen. For purposes of this Brief,[1] the relevant facts are as follows: Dr. Stuart W. Battle filed a presuit affidavit in this medical malpractice case, which served as the corroborating verified medical opinion required under Chapter 766, Florida Statutes. In that affidavit, Dr. Battle stated under oath that Dr. Cohen had deviated from the standard of care in August of 1991. Subsequently, when he was deposed and again at trial, Dr. Battle testified that Dr. Cohen had not deviated from the standard of care in August of 1991 (but had deviated from the standard of care at another time). The trial court permitted cross-examination of Dr. Battle with this presuit affidavit, over Dauphinee's objection. The trial resulted in a verdict and judgment for Dr. Cohen. On appeal, the Fifth District Court of Appeal reversed as

[1]The interests of Florida Defense Lawyers Association in the instant case are limited to the single issue of whether a testifying expert witness in a medical malpractice action may be impeached by use of the expert's verified written medical opinion provided to the opposing party in the presuit screening process. We leave all other issues to the parties.

to Dr. Cohen, ruling that the trial court had erred in permitting Dr. Battle to be impeached by use of his presuit affidavit. Review was sought in this Court.

SUMMARY OF ARGUMENT

The provisions of Section 766.106(5), Florida Statutes, do not apply to presuit affidavits which, as here, are the verified written medical opinions accompanying the notice of intent to initiate medical malpractice litigation. Such affidavits must, by statute, be disclosed to the opposing party. Thus, they cannot be work product and this statutory provision only applies to work product from the presuit screening process.

Several rules of statutory construction lead to that conclusion. Every word in a statute must be given effect. The Fifth District's decision makes the statutory reference to "other" work product meaningless. More significantly, the Fifth District's decision likewise renders superfluous four other subsections of the same statute which provide separate protection from discovery or use in evidence of other presuit documents which would be protected under Section 766.106(5) as interpreted by the Fifth District. The Fifth District's decision also contravenes the rule requiring strict construction of statutes in derogation of the common law.

The case law concerning the scope of the statutory provision also confirms that it is limited to presuit work product. Applying it to the required verified written medical opinion would not advance any legislative objective or public policy, but would instead subvert them.

This Court should quash the decision of the District Court and remand with instructions to reinstate the judgment of the trial court.

ARGUMENT

SECTION 766.105(5), FLORIDA STATUTES, DOES NOT PROHIBIT IMPEACHMENT OF A TESTIFYING MEDICAL EXPERT WITNESS BY USE OF HIS OWN VERIFIED MEDICAL OPINION ENCLOSED WITH THE NOTICE OF INTENT TO INITIATE THAT MEDICAL MALPRACTICE LITIGATION.

A trial is, in its very essence, a search for truth. It is for that reason that Section 90.402, Florida Statutes, provides: "All relevant evidence is admissible, except as provided by law." It appears undisputed that the presuit affidavit here in issue is relevant; indeed, it could hardly be argued otherwise, since it was used to attempt to impeach Dr. Battle by introducing statements he had previously made which were inconsistent with his present testimony, as permitted by Section 90.608, Florida Statutes. The question before this Court is whether, as the Fifth District held, Section 766.106(5), Florida Statutes, prohibits its admission in evidence. We submit that it does not.

At common law, a litigant's work product is subject to discovery by the opponent on a showing of compelling necessity to reach the merits of the case. Cavalere v. Graham, 423 So.2d 428 (Fla. 5th DCA 1982), petition after remand, 432 So.2d 756 (Fla. 5th DCA 1983); Travelers Indemnity Co. v. Fields, 262 So.2d 222 (Fla. 1st DCA 1972). A litigant can compel discovery of work product if he can demonstrate that the materials are needed in the preparation of his case, and that he is unable, without undue hardship, to

obtain the substantial equivalent by other means. Dade County School Board v. Soler, 534 So.2d 884 (Fla. 3d DCA 1988); Ruhland v. Gibeault, 495 So.2d 1243 (Fla. 5th DCA 1986). The effect of Section 766.106(5), Florida Statutes, is to expand that common law immunity from discovery by making it absolute as to presuit work product.

The affidavit in issue in this case is the corroborating verified written medical expert opinion required by Section 766.203(2), Florida Statutes, to be submitted at the time a notice of intent to initial medical malpractice litigation is mailed. Pursuant to that statute, the affidavit must be (and was) provided to Dr. Cohen before plaintiff could file the present suit. It is the fact that such affidavits must be disclosed to the opposing party which is key to understanding why Section 766.106(5), Florida Statutes, does not apply to such an affidavit.

Section 766.106(5), Florida Statutes, provides:

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

Thus, Section 766.106(5), Florida Statutes, provides an immunity from discovery or admission into evidence only as to work product. Several accepted rules of statutory construction demonstrate that this is the case.

Perhaps most obviously, the statutory reference to "other work product" demonstrates that the statements, documents, etc., referred to earlier in the statutory sentence refer to work products. Otherwise, there would be no point in referring to "other" work product. If the statute were intended to apply to all statements, all written documents, etc., the word "other" would be irrelevant and unnecessary, and could be entirely omitted from the statute.

A statute must be so construed as to give meaning to every word and phrase, giving effect to all provisions of the enactment and not treating any portion as mere surplusage. State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977); Stein v. Biscayne Kennel Club, Inc., 145 Fla. 306, 199 So. 364 (1940); State v. Zimmerman, 370 So.2d 1179 (Fla. 4th DCA 1979). Thus, some meaning must be given to the Legislature's use of the word "other." The only rational explanation for the use of the word "other" in this statutory context is that the preceding items were likewise items which were "work product."

Words of common usage must be given their plain and ordinary meaning when found in a statute. Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So.2d 1351 (Fla. 1984); Citizens of State of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982) Caloosa Property Owners Assoc., Inc. v. Board of County Commissioners, 429 So.2d 1260 (Fla. 1st DCA 1983). It is presumed that the Legislature has a working knowledge of the English language, and that it knows the ordinary rules of grammar

and the meaning of words. State ex rel Florida Jai Alai, Inc. v. State Racing Commission, 112 So.2d 825 (Fla. 1959); Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958); Allstate Mortgage Corp. v. Strasser, 277 So.2d 843 (Fla. 3d DCA 1973), affirmed, 286 So.2d 201 (Fla. 1973).

The above-noted rule that all portions of the statute must be given effect, and none treated as mere surplusage, demonstrates in still another way that Section 766.106(5), Florida Statutes, applies only to work product documents. If, as the Fifth District held, that statutory subsection applied to all statements, all written documents, etc., generated by the presuit screening process, there would be no need to have any other provision in the same statute providing for the non-discoverability or inadmissibility of any other type of presuit document. Yet Section 766.106(7)(a) provides that unsworn statements taken in the presuit "may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party." Similarly, Section 766.106(7)(c) provides that reports of physical or mental examinations in the presuit "may be provided only to parties and their attorneys and may be used only for the purpose of presuit screening." Section 766.106(10)(a), Florida Statutes, provides that any rejected offer to admit liability and for arbitration on damages "is not admissible in any subsequent litigation". Finally, Section 766.106(11) provides that where there is more than one prospective defendant "[n]o offer by any

prospective defendant to admit liability and for arbitration is admissible in any civil action."

If Section 766.106(5), Florida Statutes, were not limited to work product, there would be no need for separate discovery and evidentiary protections, in the same statute, for unsworn statements, for reports of physical or mental examinations, or for offers to admit liability. Clearly, therefore, the statute is not as broad as claimed. Rather, this particular statutory subsection deals only with protection of work product generated in the presuit (for instance, the attorney's written advice to the claimant concerning the response by a prospective defendant, required by Section 766.106(3)(d), Florida Statutes).

Statutes in derogation of the common law must be strictly construed, and not interpreted to displace the common law further than is clearly necessary. Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1977); Allstate Mortgage Corp. v. Strasser, supra. Limiting the scope of this provision to work product documents does precisely that, while applying it to all presuit documents, whether or not they are work product, violates that settled rule of statutory construction.

The case law dealing with discovery and admission of presuit documents leads to the same conclusion. In Watkins v. Rosenthal, 637 So.2d 993 (Fla. 3d DCA 1994), the Third District granted certiorari and quashed an order granting defendants leave to depose plaintiff's corroborating medical expert, based on the provisions of Section 766.205(4), Florida Statute (1993), which are virtually

identical to the provisions of 766.106(5), Florida Statutes. The Court observed that such a deposition would of necessity include references to work product and would therefore violate the statute. Had the statute applied to all presuit documents, rather than just work product, that statement would have been unnecessary.

In Grimshaw v. Schwegel, 572 So.2d 12 (Fla. 2d DCA 1990), the District Court granted certiorari to quash an order compelling defendants in a wrongful death/medical malpractice action to produce a letter a defense expert witness had written to defendant's insurer during the presuit screening period. The District Court, referring to Section 766.106(5), Florida Statutes, indicated that it applied to "certain documents," implying that it did not apply to other presuit documents. More significantly, the court stated (at 13):

> In so doing, it is apparent that the legislature considered that the exchange of information during the presuit 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 presuit screening process.

There is absolutely no confidentiality as to the affidavit here in question. It was the corroborating verified written medical opinion which permitted the plaintiff to file a notice of intent to initiate this litigation.[2] Section 766.203(2), Florida

[2]Indeed, it can well be argued that this Affidavit was not "generated by the presuit screening process," but rather that it was the document which generated the presuit screening process.

Statutes, requires that the affidavit be provided to the opposing party. There is nothing confidential about it. Therefore, no legislative interest in promoting confidentiality would be promoted by making it undiscoverable and inadmissible.

In Lowe v. Pugh, 682 So.2d 1104 (Fla. 2d DCA 1996), plaintiffs sought certiorari review of an order requiring them to produce to additional defendants the notices of intent to initiate litigation which they had earlier mailed to the initial defendants. In denying certiorari, the District Court held (at 1105):

> We agree with the trial court that the statutory notices of intent to initiate litigation that were mailed to an opposing party are not documents protected by subsection 5.

For precisely the same reasons, the verified written medical opinion, which must also be mailed to the opposing party with the notice of intent, is not protected by subsection 5.

Another instructive case is the Fourth District's decision in Citron v. Shell, 689 So.2d 1288 (Fla. 4th DCA 1997). In that case, a pro se plaintiff failed to comply with the applicable presuit screening requirements for a medical malpractice action, and the trial court refused to dismiss the action with prejudice. Defendant sought certiorari review. Properly addressing the jurisdictional issue first, the District Court noted that plaintiff contended that the doctor had failed to demonstrate irreparable harm in having to answer and defend the complaint, and that the required corroborating medical opinion was not discoverable. The court rejected that argument, which it noted was based on Section

766.106(5), Florida Statutes. The court pointed out that Plaintiff had failed to consider the effect of Section 766.203(2), Florida Statutes, which requires that the corroborating opinion be provided to the opposing party. In words extremely apt to the instant case, the court said (at 1290):

> We understand the work product protection in Section 766.106 not to apply to the corroborating opinion requirement in section 766.203. Accordingly, we conclude that the defendant has satisfied the requirement of irreparable harm necessary to our common law certiorari jurisdiction.

Finally, in Adventist Health System/Sunbelt, Inc. v. Watkins, 675 So.2d 1051 (Fla. 5th DCA 1996), the Fifth District held that Section 766.106(5), Florida Statutes, did not provide any protection from discovery or from use in evidence of a physician's verified medical opinion which had been attached to the notice of intent in litigation involving parties other than those before the court. Accordingly, it affirmed the trial court's ruling that a defendant's expert witness could be cross-examined using the affidavit he had prepared for the presuit screening in connection with an earlier incident at another hospital. The court concluded that the affidavit could not be considered a "work product generated by the presuit screening process" of the case before it.

In the instant case, however, the Fifth District, faced with a trial court ruling which permitted an expert witness for the plaintiff to be cross-examined using the presuit affidavit he had prepared in the same case, concluded that such use was improper.

It distinguished its prior decision in Adventist on the basis that Section 766.106(5), Florida Statutes, only prohibited use of presuit screening documents in the same case, not their use in other cases. Since that issue is not presently before the Court, we will not address it further.

However, the Fifth District's ruling in the instant case, when combined with its prior ruling in Adventist, creates a most remarkable situation. Under Adventist, a party may impeach his opponent's expert witnesses by use of their presuit affidavits in any other case in which such an affidavit accompanied a notice of intent to initiate litigation (and, presumably, would be entitled to discover all such presuit affidavits, since the same sentence of Section 766.106(5), Florida Statutes, precludes both discovery and admissibility). Yet, under its decision in the instant case, a party could not attempt to impeach his opponent's expert witness by use of the very affidavit which the witness prepared in the case being tried.[3] The Fifth District's rulings in these two cases make the presuit affidavit usable in every case except the one it is most directly pertinent to.

Such a bizarre result can only be justified if the statutory language requires it or if it is necessary to promote some other

[3]Perhaps such a ruling could be philosophically justified as to a defendant's expert witness who had prepared a presuit verified written medical opinion, given the restricted time available to defendants, their limited access to claimant's medical records, and their inability to consult privately with claimant's treating physicians. But medical experts retained by plaintiff to provide a presuit affidavit do not labor under any of these difficulties.

public policy. Neither is true here. The statutory language does not require it, but rather, as demonstrated above, provides discovery and evidentiary protection only as to work product documents. Since the verified written medical opinion must be furnished to the opposing party, it clearly cannot be work product.

Certainly, holding such affidavits inadmissible and not usable for impeachment purposes in connection with the very case for which they were originally prepared advances no public policy. The legislative interest in confidentiality of the presuit screening process is not affected, since the affidavit was not confidential in the first place, and the parties are statutorily required to provide such affidavits to each other as part of the presuit process. No other public policy suggests itself as one which would be promoted by prohibiting impeachment of an expert witness with his own prior affidavit in the same case.

If anything, public policy concerns would call for precisely the opposite conclusion. It is the expert's verified written medical opinion which permits medical malpractice litigation to be initiated in the first place; without it, plaintiff cannot even commence the presuit process. If that same expert, in sworn testimony in the ensuing litigation, testifies to something inconsistent with the presuit affidavit, there may be legitimate concern as to whether there was valid cause to initiate the litigation in the first instance. When the doctor's sworn trial testimony is at variance with his sworn affidavit in the same case, it is wholly legitimate to raise that inconsistency before the

jury. The doctor should be entitled to explain, as best he can, those inconsistencies (just as Dr. Battle was permitted to do here). The jurors can then assess those explanations in evaluating the credibility of the doctor's testimony. In some cases, jurors will conclude that new and additional information, not available at the time of the presuit affidavit, has led the doctor to conclude that his initial opinion was erroneous (as Dr. Battle testified in the instant case). In others, the jury may conclude that a particular doctor is nothing more than a "hired gun" who sells his opinion to the highest bidder, and accordingly give little or no weight to his testimony. But that is a decision the jury should make based on all the available information.

The District Court erred in concluding that Section 766.106(5), Florida Statutes, precluded the use of Dr. Battle's presuit affidavit for impeachment in this case. That statutory provision applies only to "work product", and the presuit affidavit, which by statute must be disclosed in order to begin the presuit process, is simply not work product. No public policy considerations support precluding such use of a presuit affidavit, and public policy supports its use for impeachment in appropriate cases.

A trial is a search for truth. Absent some compelling reason to withhold it, any evidence which might shed light on where the truth lies should be available. No compelling reason exists to prohibit using an expert witness's presuit affidavit as impeachment in the very case which commenced with the mailing of that affidavit

and a notice of intent. The Fifth District's ruling to the contrary was erroneous, and should be reversed by this Court.

CONCLUSION

For all the reasons set forth above, this Court should quash the decision of the Fifth District Court of Appeal insofar as it held that an expert witness could not be impeached by the use of his presuit affidavit in the very litigation which was initiated by that affidavit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Richard B. Mangan, Jr., Esquire and Jennings L. Hurt, Esquire, 201 E. Pine Street, 15th Floor, Orlando, Florida 32801-2728, **Attorneys for Petitioners**, and to Terry L. McCollough, Esquire, and William G. Osborne, Esquire, 538 East Washington Street, Orlando, Florida 32801 **Attorneys for Respondent**, this 20th day of January, 1998.

Respectfully submitted,

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