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,
as Personal Representative of the Estate of
Rosemarie P. Dauphinee, et al.,

Respondent.

PETITIONERS' REPLY BRIEF

ON REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

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ARGUMENT

The resolution of this appeal has been vastly simplified by the positions taken in Michael Dauphinee's answer brief. Michael has accepted without challenge the factual background for this proceeding as set forth in the initial brief filed by Drs. Cohen and Martin, and he has agreed with them that the polestar for resolution of this appeal is the legislative intent for the enactment of section 766.106(5). Most importantly, he has agreed with Drs. Cohen and Martin (for the first time in this proceeding) that this provision of Chapter 766 deals exclusively with, and is addressed solely to "work product" materials. *See* Amended Answer Brief (referenced here as "AB") at 10, 12, 15 and 17.[1]

The consequence of Michael's acquiescence on these key points is an effective narrowing of the issue before the Court to the single question of whether a verified pre-suit medical affidavit, which by law is required to be sent to any potential defendant, is "work product." Michael's position is that, because the affidavit is a "statement" and that word appears in the list of work product materials in section 766.106(5), the affidavit must be "work product." AB at 11.[2] He nowhere

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1 Michael's acceptance of the statute as addressing only work product materials makes irrelevant his contention that words within the statute are not subject to an *ejusdem generis* analysis. *See* AB at 16-17, responding to Drs. Cohen and Martin's Amended Initial Brief ("IB") at 13-14.

2 An identical "wording" argument was made and rejected in *Hickman* v. *Taylor*, 329 U.S. 495, 518 (1947) ("It is true that the literal language of the [federal] Rules would admit . . . an interpretation that would sustain the (continued . . .)

endeavors to explain how a document given by one party to the other can possess the incidents of work product material, such that it is neither "discoverable" nor "admissible" in a lawsuit between the parties.

The fact is, by its very nature a verified pre-suit medical affidavit which is placed in the hands of an opposing party is not work product, and the legislative evolution of section 766.106(5) demonstrates why.

I. A pre-suit medical affidavit is not "work product" protected from use at trial by section 766.106(5).

Michael's position before the Court on statutory construction corresponds with that of Drs. Cohen and Martin in two key respects. First, he states that all parts of a statute must be read together. AB at 6. Next, he states that the Court should first look to legislative intent. AB at 7. Drs. Cohen and Martin agree fully, and have in fact said so. IB at 9, 14. The difference between the parties is that Michael's analysis on both points is not consistent with those principles.

Among the provisions enacted as a part of the integrated statutory scheme for Chapter 766 are sections 766.106(7)(a) and 766.206(5)(a). One of these sections becomes meaningless, and the other has diminished value under Michael's position regarding

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(. . . continued)
district court's order . . . . But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them.").

pre-suit medical affidavits. *See* IB at 15-16. Michael offers no explanation for eroding these provisions in the law.

The legislative history of Chapter 766 is even less honored by Michael's position. That history reflects two distinct approaches to medical malpractice reform. The foundation for the present statute was put in place in 1985, with the enactment of provisions requiring an attorney for a medical malpractice claimant to conduct a reasonable investigation as a prerequisite for certification of a good faith basis for the claimant's lawsuit. *See* IB at 10. The statute allowed an attorney to show his good faith by obtaining a written opinion from a medical expert. ***This opinion was not communicated to potential defendants; it was maintained by the attorney in his or her private file. Any such document was classic "work product."*** *Hickman v. Taylor*, 329 U.S. 495, 505 (1947) (establishing the work product privilege for "materials collected by an adverse party's counsel in the course of preparation for possible litigation"); *National Car Rental System, Inc. v. Kosakowski*, 659 So. 2d 455, 456 (Fla. 4th DCA 1995) (applying the privilege to "work product materials from a litigant's file").

The statute at issue in this case – section 766.106(5) – was enacted as a part of the 1985 reform act in order to provide insulation against the discovery or admissibility of the attorney's work product materials. IB at 10. The private, background medical opinion obtained by an attorney to establish his or her good faith for instituting a medical malpractice

lawsuit was precisely the type of "statement" which was contemplated by section 766.106(5) ***at that time***.

This was a sea-change in the law, for without this statutory protection a medical expert's confidential report evaluating a malpractice claim, acquired by the plaintiff's attorney prior to suit, would have been available to the defense if the expert was offered by the plaintiff at trial. *Mims v. Casademont*, 464 So. 2d 643 (Fla. 3d DCA 1985); *Peck v. Messina*, 523 So. 2d 1154 (Fla. 2d DCA 1988) (ordering discovery of an expert's report prepared to determine whether there was a medical basis for a malpractice claim, but noting that the result would be different under section 768.57(5) of the 1985 act [now section 766.106(5)]).

In 1988, however, the statutory scheme was changed. A verification requirement was added, and the significance of the requisite pre-suit medical investigation was dramatically altered. In place of the private, optional protection which attorneys could obtain to show their required good faith — putting a medical opinion in their office file — the legislature mandated in newly-enacted section 766.203(2) that every potential defendant ***be given*** a sworn statement from a medical expert.[3] *See* IB at 11-12. This change was accompanied by other provisions placed in the ".200" section of Chapter 766, including a restatement in section 766.205(4) of the discovery and admissibility protections given work product materials. *See* IB

[3] A corresponding obligation was put on defendants who deny the existence of medical malpractice. *See* § 766.203(3), Fla. Stat. (1989).

11-12. With the requirement that pre-suit affidavits be given to opposing parties, that medical opinion lost its work product status. *See Citron v. Shell,* 689 So. 2d 1288, 1290 (Fla. 4th DCA 1997), where the court said:

> We also reject plaintiff's argument that . . . the corroborating opinion from a medical expert is not discoverable . . . . We understand the work product protection in section 766.106 not to apply to the corroborating opinion requirement in section 766.203.

Neither Michael in his answer brief nor the Fifth District in its decision in this case has considered the course and significance of the legislature's development of Chapter 766.[4] Both offer the wholly superficial reading of the word "statement" in section 766.106(5) – the 1985 enactment – as the beginning and the end of their analysis. Neither has taken into account the statutory shift from authorizing an attorney to have in his file a pre-suit medical opinion, to mandating that a sworn statement be obtained and given to every putative defendant.

The history of section 766.106(5) shows why discoverability and admissibility were relevant concepts when attorneys could establish their good faith with privately-obtained medical opinions. The work product privilege immunized those opinions both from traditional "discovery," and from subsequent

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[4] The Fifth District's entire analysis is one sentence, stating

> In view of the clear wording of the statute . . . an affidavit by an expert for pre-suit screening purposes is a sworn statement.

Dauphinee v. Wilstrup, 696 So. 2d 388, 389-90 (Fla. 5th DCA 1997).

admissibility. When the pre-suit process was changed to require an ***exchange*** of medical affidavits – the placing of that information in the hands of opposing counsel – any notion of a work product privilege necessarily went out the window ***as to those documents***. Neither Michael nor the Fifth District endeavored to track the status of pre-suit medical opinions through their transition in the 1985 and 1988 statutes.

By definition, a document given to the opposing party in a lawsuit is not "work product" – that is, "notes, working papers, memoranda or similar materials, prepared by an attorney in anticipation of litigation [and] protected from discovery." BLACK'S LAW DICTIONARY 1107 (6th abr. ed. 1991). Once delivered, such documents have lost any previously-held work product status they once might have enjoyed. *Truly Nolen Exterminating, Inc. v. Thomasson,* 554 So. 2d 5 (Fla. 3d DCA 1989); *Visual Scene, Inc. v. Pilkington Brothers, PLC,* 508 So. 2d 437, 440 (Fla. 3d DCA 1987).

The status of these affidavits is further edified by considering that there is no need whatever for ~~the~~ "discovery" of a medical affidavit delivered to opposing counsel. "Discovery" is "the ascertainment of that which was previously unknown; the disclosure or coming to light of what was previously hidden . . ." BLACK'S LAW DICTIONARY 322 (6th abr. ed. 1991). Drs. Cohen and Martin never sought to "discover" Dr. Battle's affidavit, and didn't have to. It was given to them by Michael's attorney.

Similarly, being outside the scope of section 766.106(5), Dr. Battle's affidavit did not partake of that statute's

insulation against admissibility. Drs. Cohen and Martin were free of any statutory restraint on using Dr. Battle's sworn statement to question him regarding his prior inconsistent statement. In point of fact, a use of the pre-suit affidavit for cross-examination is wholly consistent with the legislature's intention that only well thought-out and *verified* claims of medical malpractice can launch a lawsuit. *See* IB at 11, 15-16. Michael's position subverts that intent by insulating false and haphazard pre-suit affidavits from exposure. The court will note that the medical community at large supports the careful preparation of pre-suit affidavits, and supports subjecting the affiant physician to cross examination with their pre-suit declarations.[5]

Without a statutory bar to admissibility, there is no policy or rule of evidence which precludes the cross-examination of a testifying physician with contradictory statements made in a pre-suit affidavit. This case exemplifies the need for that exposure. Here, Dr. Battle made Michael's lawsuit possible by asserting under oath that Dr. Cohen was negligent by not investigating Rosemarie's condition *in August*. He then came into

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[5] An *amicus curiae* brief in support of Drs. Cohen and Martin has been filed by the Florida Medical Association, the Florida Surgeons Forum, the Florida Society of Thoracic and Cardiovascular Surgeons, and the Florida Society of Internal Medicine, adopting the position that "the physician who provides a pre-suit affidavit should be held responsible for the contents of that affidavit." An opposite view is held by the community of plaintiffs' trial lawyers, as reflected in the *amicus curiae* brief filed by the Academy of Florida Trial Lawyers in support of Michael Dauphinee's positions.

court to tell the jury that Dr. Cohen's breach of the applicable standard of care was allowing her to be discharged from the hospital *on November 4.* If trials are the crucible for distilling the truth, that jury was surely entitled to hear and evaluate whether Dr. Battle had been careless, irresponsible, or merely in need of more information when he set the wheels of justice in motion against Dr. Cohen.

In light of the legislature's desire to assure a *verifiable* evaluation of potential malpractice claims, it would be unconscionable to let physicians avoid any challenge to their credibility when they toss off one theory of malpractice in order to launch a lawsuit, and then say something entirely different when the trial rolls around. The affidavit, given to the defendant as the predicate for suit, should be given no different treatment than any other prior inconsistent statement made by a witness who offers testimony at trial. If there has been a change of position, the trial provides the forum and occasion for explaining it.

Because the verified affidavit is not work product, it cannot partake of the legislative protection against discovery and admissibility which is contained in section 766.106(5). Because the affidavit lacks the protection of the statute, there is no reason that it cannot be used during cross-examination to impeach the physician affiant. Because the trial court permitted impeachment with the affidavit, there was no error in the trial. Because there was no error, the Fifth District was mistaken in

reversing a final judgment for Drs. Cohen and Martin which was based on a jury verdict of "no liability."

Courts have an obligation to give meaning and force to every provision in a legislative enactment, let alone one as far-reaching and comprehensive as Chapter 766. *Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District*, 274 So. 2d 522, 524-25 (Fla. 1973); *Snively Groves, Inc. v. Mayo*, 135 Fla. 300, 305, 184 So. 839, 841 (Fla. 1938), *citing to State ex rel. Finlayson v. Amos*, 76 Fla. 26, 79 So. 433 (Fla. 1918). Only by treating a pre-suit medical affidavit in the manner proposed by Drs. Cohen and Martin is both meaning and force given to the words "or other work product" in the statute, to the legislative intent for the 1985 and 1988 enactments, to each and every provision in Chapter 766, to the policy that the legislature sought to foster, and to the truth-seeking function which is advanced by prior inconsistent statement legislation — section 90.608(1), Florida Statutes (1997).

II. Cross-examination of Dr. Battle was harmless error in the context of the 10-day trial.

Michael has not addressed, and obviously has not overcome, petitioners' demonstration that defense counsel's fleeting colloquy with Dr. Battle regarding inconsistencies in his pre-suit affidavit constituted harmless error in the context of the 10-day trial. IB at 20-23. The doctrine of harmless error, of course, is stated as a presumption in section 59.041, Fla. Stat. (1997), and is routinely applied by the courts to avoid unnecessary retrials that exhaust judicial resources. *See for*

example, Tallahassee Memorial Regional Medical Center, Inc. v. *Meeks,* 560 So. 2d 778 (Fla. 1990), where the Court found the impeachment of a witness with a statutorily privileged incident report to be harmless. Under the circumstances of this case, the Court should reverse the Fifth District's remand for a new trial.[6]

In any event, there is no basis whatever to order a new trial against Dr. Martin. The cross-examination of Dr. Battle on the basis of his pre-suit affidavit was confined to the treatment and care given Rosemarie by Dr. Cohen. That was the only feature of the trial which was raised by Michael in his appeal to the Fifth District regarding these doctors. Yet without explanation the Fifth District award Michael a new trial against Dr. Martin. Michael's justification for that action demonstrates the force of the "harmless error" doctrine in the context of this case.

Michael asserts that a new trial is needed as to Dr. Martin because the cross examination of Dr. Battle was "extremely prejudicial" to his credibility. AB at 22-23. He suggests that, because Dr. Battle testified about Dr. Martin as well as Dr.

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[6] There is no impediment to the Court's determining that the trial court had not ruled on the impeachment of Dr. Battle because Michael made no objection to that line of questioning. *See* IB at 20-22. *Cf. Kmart Corp.* v. *Hayes,* 23 Fla. L. Weekly D852 (Fla. 3d DCA April 1, 1998), holding that it constitutes an abuse of discretion for a court to act post-trial on a witness' change of testimony when there has been a failure to preserve the alleged error with a timely objection or an in-trial motion.

Cohen, the overall prejudice to his expert had an impact on the jury's deliberations regarding Dr. Martin.

Let there be no mistake about what Michael is saying. By arguing that the Court should consider everything that Dr. Battle said at trial, rather than just what he said about Dr. Cohen, Michael is asking the Court to consider and weigh *the entirety* of Dr. Battle's testimony in the context of the trial. Were the Court to do that, though, it could not justify a failure to consider and weigh ***other*** evidence in the proceeding from which it could determine whether that one chink in Dr. Battle's credibility made any difference overall: that is, whether the cross examination on his affidavit was harmless in light of other direct challenges to his credibility (such as his propensity to testify for and be paid handsomely on behalf of plaintiffs, IB 22, n.20), and in light of challenges to the soundness of his opinions from another expert and witnesses who contradicted his conclusions.[7]

In short, Michael's invitation for the Court to review *all* of Dr. Battle's testimony, in order to justify a new trial for Dr. Martin, is an implicit recognition that the jury heard evidence other than the few short questions posed to Dr. Battle concerning the disparity between his testimony at trial and his pre-suit affidavit. That recognition constitutes an

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7 Indeed, in its evaluation the Court would be obliged to consider the testimony of Michael himself, who testified that he detected no change in Rosemarie's appearance between the night before and the morning after her surgery. (S.R. Vol. 5 at 2877-79).

acknowledgement that defense counsel's impeachment of Dr. Battle was made in the context of the 10-day trial, and in turn, that recognition coincides with the Court's obligation to decide the one alleged error was harmless.

CONCLUSION

The Court is respectfully requested to reverse the decision of the district court, which sets a precedent inimical to the legislative policy for Chapter 766. Whether on that basis or on the basis of the harmless error doctrine, the Court should vacate the decision of the district court with directions to reinstate the judgment of "no liability" in favor of Dr. Cohen, Dr. Martin and Vascular Specialists of Central Florida, Inc.

Respectfully submitted,

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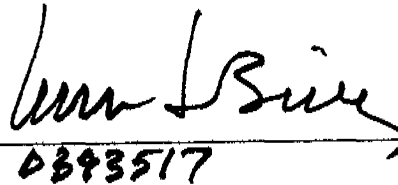

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