

IN THE SUPREME COURT OF FLORIDA

TUYUANA MORRIS, as Personal
Representative of the Estate of
SHUNTERIA S. McINTYRE,
deceased,

Petitioner,

CASE NO. SC16-931

v.

ORLANDO S. MUNIZ, M.D., et al. ,

Respondents.

**BRIEF OF AMICUS CURIAE FLORIDA JUSTICE ASSOCIATION
IN SUPPORT OF TUYUANA MORRIS**

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INTRODUCTION

The Florida Justice Association (“the FJA”) is a large, voluntary, and statewide association of more than 3,000 trial lawyers concentrating on litigation in all areas of the law. The members of the FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The lawyer members of the FJA care deeply about the integrity of the legal system and, toward this end, have established an amicus curiae committee.

This case is important to the FJA because the First District’s decision in *Morris v. Muniz*, 189 So.3d 348 (Fla. 1st DCA 2016), jeopardizes the ability of medical-malpractice plaintiffs to get through the courthouse door. Here, the First District affirmed the trial court’s dismissal of petitioner’s medical-malpractice action for an alleged failure to comply with the statutory presuit requirements. In doing so, the court has imposed heightened substantive and procedural standards on the screening requirements that are not supported by the statute, “so as to deprive [petitioner] of her constitutional right of access to the courts.” *Id.* at 353 (Swanson, J., dissenting).

SUMMARY OF THE ARGUMENT

The FJA supports the petitioner's position that the proper standard of review of a trial court's ruling on whether a presuit medical expert meets the statutory qualifications is de novo. In *Muniz*, the First District conflated two separate presuit requirements—(1) a reasonable basis for the claim and (2) a reasonable investigation into the claim. The proper standard for the former is de novo, while the proper standard for the latter is abuse of discretion. The issue of whether an expert is qualified under the presuit statutes is part of the reasonable-basis inquiry and, accordingly, subject to a de novo standard of review. As explained below, this position is supported by the language, structure, and purpose of the medical-malpractice presuit-screening statutes.

ARGUMENT

THE FIRST DISTRICT'S DECISION MISUNDERSTANDS THE ROLE OF THE QUALIFICATIONS OF A MEDICAL EXPERT IN THE COMPLICATED STATUTORY PRESUIT REQUIREMENTS AND, AS A RESULT, APPLIED THE INCORRECT STANDARD OF REVIEW.

Chapter 766 of the Florida Statutes contains Florida's medical-malpractice scheme and includes the presuit-screening requirements. *See* Fla. Stat. §§ 766.201, 766.202, 766.203-.206 (2012). In passing the requirements, the Florida legislature found that “[t]he high cost of medical negligence claims in the state can be substantially alleviated [in part] by requiring early determination of the merit of claims.” Fla. Stat. § 766.201(1)(d). Accordingly, the requirements prescribe a procedure that parties and their attorneys must follow before actually filing a medical-malpractice suit.

But the presuit statutes “are appalling in their lack of definition of critical terms and in their total lack of consistency in the manner of use and apparent meaning of those numerous critical and undefined terms.” *Catron v. Roger Bohn, D.C., P.A.*, 580 So.2d 814, 817 (Fla. 2d DCA 1991). Those problems have remained since the Second District made that observation, making the presuit requirements difficult for litigants.

In *Morris v. Muniz*, the majority applied an abuse-of-discretion standard of review to whether, as the issue was framed by the majority, the petitioner failed to

prove that the medical expert, who created the written corroboration of reasonable grounds of negligence, was qualified:

Here, the record contains ample evidence to support the trial court's conclusions that appellant failed to offer sufficient proof of her proffered expert's statutory qualifications, and that appellant's lack of cooperation with appellees' attempts to verify the expert's qualifications merited dismissal under sections 766.205(2) and 766.206(2), Florida Statutes. Because the court did not abuse its discretion in dismissing the medical malpractice claim, we affirm.

189 So. 3d at 351.

Judge Swanson, dissenting, would have subjected the issue to de novo review:

Dr. Thompson's affidavit on its face clearly established that she met all of the statutory requirements. ... Although the trial court questioned the "feasibility" of Dr. Thompson's statement that she was engaged in full-time patient care while pursuing her master's and law degrees, the trial court was not permitted to make credibility determinations concerning an otherwise un rebutted and facially sufficient affidavit. On a motion to dismiss challenging a plaintiff's compliance with the statutory presuit requirements in a medical malpractice action, this court applies the de novo standard of review and must consider all factual allegations in a light most favorable to the plaintiff. *Oliveros v. Adventist Health Sys./Sunbelt, Inc.*, 45 So.3d 873, 876–77 (Fla. 2d DCA 2010); *Holden v. Bober*, 39 So.3d 396, 400 (Fla. 2d DCA 2010). Because the trial court did not apply the correct principles in determining that Dr. Thompson was not a qualified medical expert, I would reverse the trial court's order dismissing appellant's wrongful death action. See *Apostolico v. Orlando Reg'l Health Care Sys., Inc.*, 871 So.2d 283 (Fla. 5th DCA 2004).

Id. at 352-53 (Swanson, J., dissenting).

Our amicus brief focuses on this little-remarked-upon problem: judicial review of the reasonable-basis and reasonable-investigation requirements.¹

A. Interpreting statutes.

Determining what the presuit requirements require is a function of statutory interpretation. “The plain meaning of the statute is always the starting point in statutory interpretation,” the goal of which is to ascertain and give effect to the drafters’ intent. *GTC, Inc. v. Edgar*, 967 So.2d 781, 785 (Fla. 2007). When the statute is clear and unambiguous, courts will not look behind the statute’s plain language or resort to rules of construction. *See Daniels v. Fla. Dep’t of Health*, 898 So.2d 61, 64 (Fla. 2005). And, where possible, a court must give full effect to all statutory provisions and construe related provisions in harmony with one another. *See Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 455 (Fla. 1992).

B. An overview of Florida’s medical-malpractice act.

By enacting Chapter 766, the legislature intended “to provide a plan for prompt resolution of medical negligence claims” by requiring, among other things, a presuit investigation aimed at “eliminat[ing] frivolous claims and defenses.” Fla. Stat. § 766.201(2). The chapter “sets out a complex presuit investigation

¹ The amicus brief is adapted from an article written by one of the undersigned lawyers for the FJA’s journal: Adam Richardson, *Florida’s Medical Malpractice Presuit Requirements: Speed Bumps and Roadblocks on the Road to the Courthouse*, FJA JOURNAL, Dec. 2012, at 25.

procedure that both the claimant and defendant must follow before a medical negligence claim may be brought in court.” *Kukral v. Mekras*, 679 So.2d 278, 280 (Fla. 1996).

“The first step in this statutory scheme requires a claimant to determine whether reasonable grounds exist to believe that someone acted negligently and that this negligence caused the claimant’s injury.” *Id.* This is accomplished by means of a reasonable investigation. *See* Fla. Stat. § 766.106(2) (“After completion of a presuit investigation pursuant to s. 766.203 and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant ... of intent to initiate litigation for medical malpractice.”); Fla. Stat. § 766.201(2)(a)1. (“Presuit investigation shall include: ... Verifiable requirements that reasonable investigation precede both malpractice claims and defenses....”). An investigation is generally defined as “mean[ing] that an attorney has reviewed the case against each and every potential defendant and has consulted with a medical expert and has obtained a written opinion from said expert.” Fla. Stat. § 766.202(4). There are, accordingly, three requirements for a reasonable investigation: (1) review; (2) consultation; and (3) a medical opinion.

Before sending a defendant a notice of intent to initiate litigation, per Fla. Stat. § 766.106(2), the claimant “shall conduct an investigation to ascertain that there are reasonable grounds to believe that ... [a]ny named defendant in the

litigation was negligent in the care and treatment of the claimant,” and that “[s]uch negligence resulted in injury to the claimant.” Fla. Stat. § 766.203(1).

Fla. Stat. § 766.203(2) further provides that corroboration of reasonable grounds requires a verified medical-expert opinion:

Corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant’s submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(6), at the time the notice of intent to initiate litigation is mailed, which statement shall corroborate reasonable grounds to support the claim of medical negligence.

Once the parties have completed presuit investigation and any informal discovery, “any party may file a motion in the circuit court requesting the court to determine whether the opposing party’s claim or denial rests on a reasonable basis.” Fla. Stat. § 766.206(1). The trial court must dismiss the claim and award attorney’s fees against “the person who mailed such notice of intent, whether the claimant or the claimant’s attorney,” “[i]f the court finds that the notice of intent to initiate litigation mailed by the claimant is not in compliance with the reasonable investigation requirements of ss. 766.201-766.212.” Fla. Stat. § 766.206(2). By the same token, the court must strike the defendant’s response “rejecting the claim” if it “is not in compliance with the reasonable investigation requirements.” Fla. Stat. § 766.206(3).

C. Judicial review of a reasonable basis and reasonable investigation.

The statutory language and structure have created ambiguities with regard to the requirement of a reasonable basis and a reasonable investigation. It is important to resolve this confusion because it affects how a court reviews these two items under Fla. Stat. § 766.206 and, thus, whether it will dismiss the plaintiff's claim *and* award attorney's fees. It also affects what level of deference is owed the trial court's ruling. A careful reading of the statute and cases suggests two primary problems: First, are these—the basis and investigation—two separate requirements? Second, what standard applies?

First, if a court determines a party lacks a reasonable basis for the claim, that does not necessarily mean there was no reasonable investigation. An interpretation to the contrary conflates two separate inquiries in Fla. Stat. § 766.206 and is wrong, as evidenced by other terms of the statute.

Subsection (1) allows any party “to file a motion in the circuit court requesting the court to determine whether the opposing party's claim or denial rests on a reasonable basis.” Presumably, if the claim or denial does not, then the court would dismiss the claim or strike the denial. Subsection (2) provides that “[i]f the court finds that the notice of intent to initiate litigation mailed by the claimant is not in compliance with the reasonable investigation requirements ... , the court shall dismiss the claim” (emphasis added), *and* hold whomever mailed the notice “personally liable for all attorney's fees and costs incurred” by the

defendant. Subsection (3) is basically the same as subsection (2), but it applies to a defendant's response in rejecting a claim. The statutory language thus indicates that a court can find that there is no reasonable basis and dismiss a claim without also finding a lack of reasonable investigation.

Though not the better reading of the statute, the First District has indicated that a trial court must conduct both inquiries, remarking that the “only purpose” of “[t]he procedure for judicial review set out in section 766.206” “is to ensure that a claim or denial has been preceded by a ‘reasonable investigation’ *and* that it ‘rests on a reasonable basis’—i.e., ‘to eliminate *frivolous* claims and defenses.’ ” *Wolfsen v. Applegate*, 619 So.2d 1050, 1055 (Fla. 1st DCA 1993) (first emphasis ours) (citation omitted); *see also Duffy v. Brooker*, 614 So.2d 539, 544-45 (Fla. 1st DCA 1993) (“When one of the parties files a motion under section 766.206, the trial court must determine whether the opposing party's claim or denial ‘rests on a reasonable basis’ *and* whether the notice of intent to sue or the response rejecting the claim is ‘in compliance with the reasonable investigation requirements of ss. 766.201-766.212.’ ” (emphasis added)), *abrogated on other grounds by Shands Teaching Hosp. v. Miller*, 642 So.2d 48, 49 (Fla. 1st DCA 1994).

But that does not appear to be the more careful reading of the statute. While subsection (1) seems more concerned with the sufficiency of the claim—a reasonable basis “to believe that ... [a]ny named defendant in the litigation was

negligent in the care or treatment of the claimant” and that “[s]uch negligence resulted in injury to the claimant,” Fla. Stat. § 766.203(2)—subsections (2) and (3) seem more concerned with sanctioning misconduct. This interpretation is supported by subsection (4), which requires a court to report to The Florida Bar an attorney who has sent a notice of intent that was not preceded by a reasonable investigation, and subsection (5), which requires a court to report to the state a medical expert whose opinion lacked a reasonable investigation.

Explaining the operation of the statute, this Court indicated that the reasonable basis and reasonable investigation inquiries were distinct:

After completion of presuit investigation and any informal discovery, and even before the actual filing of a medical negligence claim, “any party may file a motion in the circuit court requesting the court to determine whether the opposing party’s claim or denial rests on a reasonable basis.” *Id.* § 766.206(1). **If** the court finds the claimant’s notice of intent to initiate litigation is not in compliance with the reasonable investigation requirements of sections 766.201-.212, the court may dismiss the claim **or** impose other sanctions, including costs and attorney’s fees. *Id.* § 766.206(2).

Kukral, 679 So.2d at 281 (emphasis added; footnote omitted).

Other courts have treated dismissal and an award of fees and costs under subsections (2) and (3) as sanctions for misconduct rather than the legal insufficiency of a claim. *See, e.g., Paranzino v. Berger*, 755 So.2d 655 (Fla. 4th DCA 1998) (reversing and holding that, following dismissal of the plaintiff’s claim, the trial court needed to hold an evidentiary hearing on the reasonableness of the investigation to award sanctions under Fla. Stat. § 766.206(2)); *Karr v.*

Sellers, 668 So.2d 629, 630 (Fla. 4th DCA 1996) (reversing a trial court's order striking a defendant's pleadings under Fla. Stat. § 766.203(3) for failure to file a corroborating affidavit when they rejected the claim, and holding that the failure was, in and of itself, insufficient to grant sanctions for failure to conduct a reasonable investigation; instructed trial court to hold an evidentiary hearing).

The Fourth District also seems to have implicitly addressed this issue. *See Herber v. Martin Mem. Med. Ctr. (Herber II)*, 76 So.3d 1, 2-3 (Fla. 4th DCA 2011) (treating the two as separate inquiries). However, in *Herber II*, the court found that there was both a reasonable basis and a reasonable investigation; thus, it did not have the occasion to squarely answer the question.

Nonetheless, treating reasonable basis and reasonable investigation as separate inquiries appears to be the better reading of the statute. This is because, where possible, a court must give full effect to all statutory provisions, and not read any word or provision out of the statute. *Forsythe*, 604 So.2d at 455.

Subsection (1) and subsection (2) (and likewise subsection (3)) are separate subsections. If courts read the statute to mean that a lack of a reasonable basis is the same thing as a lack of a reasonable investigation, they would be reading subsection (1) out of the statute. A trial court would not be able to dismiss a claim that lacked a reasonable basis without awarding attorney's fees, even where the plaintiff's investigation was indeed reasonable. This is despite the clear statutory

language that a party may file a motion asking only for a determination of whether a claim rests on a reasonable basis, and the somewhat punitive nature of the other subsections as discussed above.

The above conclusion has an effect on the resolution of the second question, which is what standards apply, both in the trial court and the appellate court, to the reasonable-basis and reasonable-investigation inquiries. Each is governed by a different standard.

Generally, the standard that typically applies to a motion to dismiss for failure to state a cause of action applies to the reasonableness of a claim's basis, since both involve the legal sufficiency of a claim. The Second District came to this conclusion in *Holden v. Bober*, 39 So.3d 396, 400 (Fla. 2d DCA 2010), where it stated: “[B]ecause the circuit court is reviewing a pleading challenging the reasonableness of a presuit investigation in the context of a motion to dismiss, the standard as to whether a reasonable basis has been shown should be similar to the standard that is applied to determine whether a complaint states a cause of action.” (Citations omitted.) The Fourth District followed *Holden* in *Herber II*, 76 So.3d at 2.² Thus, in reviewing such a motion, the trial court must view the claimant's

² See also *Baptist Med. Ctr. of Beaches v. Rhodin*, 40 So.3d 112, 116 (Fla. 1st DCA 2010) (“The ultimate question of whether a claimant has satisfied the threshold requirements of the presuit notice investigation, warranting denial of the defendant's motion to dismiss, presents an issue of law.” (citation omitted)). Cf.

allegations as true and make all reasonable inferences in her favor; the ruling is reviewed by the appellate court de novo.

By contrast, the issue of the reasonableness of an investigation is a factual matter. For example, in *Duffy*, 614 So. 2d at 542, the trial court struck the defendant's denial of the claim and awarded attorney's fees, concluding the defendant did not conduct a reasonable investigation. The First District affirmed the finding as supported by competent, substantial evidence and articulated a detailed evidentiary burden-shifting framework. *Id.* at 542-43, 544-45. The Fourth District followed this approach in *Herber II*, 76 So.3d at 2.

There are cases that, at first blush, support the view that the abuse-of-discretion standard is broadly applicable to both reasonable basis and reasonable investigation analyses. But on a careful reading, those cases are distinguishable; they involve dismissals as sanctions for failing to comply with other parts of the statute. For example, *DeCristo v. Columbia Hospital Palm Beaches*, 896 So.2d 909 (Fla. 4th DCA 2005), involved the striking of an expert's affidavits and

Ragoonanan v. Assocs. in Obstetrics & Gynecology, 619 So.2d 482, 485 (Fla. 2d DCA 1993) (invoking abuse of discretion and greater weight of the evidence, but actually conducting a de novo review of the facts in the notice and opinion, and taking those facts as true).

dismissing the related claim as a sanction under Fla. Stat. § 766.203(4), which requires experts to report disqualifications.³

The application of the standards as explained above makes sense. A motion challenging the reasonableness of a party's claim would be a question of law, reviewed de novo, which would afford it the treatment traditionally given motions attacking the sufficiency of a claim. On the other hand, the reasonableness of an investigation would be a question of fact; it involves historical events, the parties may present conflicting evidence, and the trial court will have a privileged vantage point in making its determination.

That said, it is important to note that a trial court's inquiry into reasonable basis "cannot be converted into some type of summary proceeding to test the sufficiency, legally or factually, of medical negligence claims." *Wolfsen*, 619 So.2d at 1055. Indeed, "[w]hile section 766.203(2) directs the claimant to conduct an investigation to ascertain that there are reasonable grounds to believe that the defendant was negligent, it does not require the claimant to establish the defendant's negligence or prove its case during the presuit screening process." *Apostolico v. Orlando Reg. Health Care Sys.*, 871 So.2d 283, 287 (Fla. 3d DCA

³ Other cases also concern sanctions under other parts of the statute. See *Vincent v. Kaufman*, 855 So. 2d 1153 (Fla. 4th DCA 2003); *Grau v. Wells*, 795 So. 2d 988 (Fla. 4th DCA 2001); *Popps v. Foltz*, 806 So. 2d 583 (Fla. 4th DCA 2002); *Bartley v. Ross*, 559 So. 2d 701 (Fla. 4th DCA 1990); *Dressler v. Boca Raton Cmty. Hosp.*, 566 So. 2d 571, 574 (Fla. 4th DCA 1990).

2004) (citation omitted). The theory underlying the standards that apply to pretrial, involuntary dismissals or judgments is that it should be easier to survive such an attempt the earlier in the litigation the parties are. Accordingly, while the standard that governs whether a reasonable basis exists should be similar to whether a complaint states a cause of action, trial courts should be even more cautious in dismissing claims at this stage than they are in dismissing complaints.

D. The First District's decision.

So how should the issue presented in *Morris v. Muniz* be evaluated? At its core the issue there was whether the medical expert who created the written corroboration was qualified. *See Morris*, 189 So.3d at 349 (“... and that, based on this failure, the record did not support a finding that her medical expert was qualified under sections 766.102(5)(a)2., (6) and (9), Florida Statutes (2011).”).

Whether the expert is qualified does not involve a searching inquiry into the actions taken by the claimant and the claimant's attorney in investigating the claim before filing suit. The statutory scheme supports this conclusion. As stated above, a reasonable investigation is made up of (1) an attorney's review of the case, (2) the attorney's consultation with a medical expert, and (3) the attorney's procurement of a written medical opinion. Certainly the historical circumstances surrounding those three elements are considered in whether the claimant conducted a reasonable investigation. But the qualifications of the witness are not encompassed in any of those three elements.

In fact, the statutory definition of “investigation” makes it clear exactly what the elements of an investigation include: “‘Investigation’ means that an attorney has reviewed the case against each and every potential defendant and has consulted with a medical expert and *has obtained* a written opinion from said expert.” Fla. Stat. § 766.202(5) (emphasis added). Because the statutory definition of “investigation” focuses on the actions of the attorney, whether there was a reasonable investigation on the attorney’s part would not be controlled by the much narrower question of whether the expert is qualified.

There are some cases where it will be obvious that the expert is not qualified to provide a written opinion in the case. At that point the expert’s qualifications may become indirectly relevant to the determination of a reasonable investigation. For example, in most cases a podiatrist would not be qualified, under the present statute, to render a written opinion in a case against an OB/GYN. If the podiatrist was not so qualified, the reasonable-investigation analysis would consider the attorney’s actions in selecting an expert of those qualifications. But the qualifications themselves would not be the sole consideration in the analysis. In such a case, then, the expert’s qualifications would be relevant to the reasonable-basis and reasonable-investigation analyses in different ways. But in other cases, it very well may be that the expert was not qualified even though the attorney reasonably selected the expert.

Notably, even the majority in *Morris* implicitly acknowledged that the presuit expert requirements are inextricably linked with the reasonable-basis analysis:

[C]ourts have consistently noted the significance of the presuit expert requirements in determining a claim's legitimacy. *See Columbia/JFK Med. Ctr. Ltd. P'ship v. Brown*, 805 So.2d 28, 29 (Fla. 4th DCA 2001) (“[T]he purpose of the presuit notice and the requirement of an expert's affidavit to corroborate the claim is ... to demonstrate that the claim is legitimate.”); *Largie*, 913 So.2d at 639 (“Requiring a written expert opinion as part of the presuit investigation assures the defendant that the claim was preceded by a reasonable investigation; ‘that there is justification for the Plaintiffs’ claim[.]’ ”) (*quoting Kukral*, 679 So.2d at 282); *Wolfsen v. Applegate*, 619 So.2d 1050, 1054-55 (Fla. 1st DCA 1993) (stating that the purpose of reviewing a corroborating affidavit is “to ensure that a claim or denial has been preceded by a ‘reasonable investigation,’ and that it ‘rests on a reasonable basis’ ”).

189 So.3d at 351.

Because the expert's credentials are a part of the reasonable basis, that issue should be subject to a de novo standard of review. Many district courts that have considered the issue have done so. *See Edwards v. Sunrise Ophthalmology Assocs.*, 134 So.3d 1056 (Fla. 4th DCA 2013); *Oliveros v. Adventist Health Sys./Sunbelt*, 45 So.3d 873 (Fla. 2d DCA 2010); *Holden v. Bober*, 39 So.3d 396 (Fla. 2d DCA 2010); *Apostolico v. Orlando Reg. Health Care Sys.*, 871 So.2d 283 (Fla. 5th DCA 2004). Other district courts, while not specifically identifying the standard of review, have effectively conducted de novo review of an expert's qualifications. *See Holmes Reg. Med. Ctr. v. Wirth*, 49 So.3d 802 (Fla. 5th DCA

2010); *Paley v. Maraj*, 910 So.2d 282 (Fla. 4th DCA 2005); *Fort Walton Beach Med. Ctr. v. Dingler*, 697 So.2d 575 (Fla. 1st DCA 1997).

CONCLUSION

The majority in *Morris v. Muniz* erred in subjecting a threshold legal issue—the qualifications of a medical expert who provides a written opinion—to an abuse-of-discretion standard of review. The proper standard of review for that issue is de novo. Therefore, the Court should adopt the approach of Judge Swanson in his dissent, where he applied that standard of review. For the above reasons, the FJA supports the petitioner’s position and asks that the Court quash the First District’s decision in *Morris v. Muniz*.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing has been furnished to all counsel on the attached service list by e-mail on April 10, 2017.

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Morris v. Muniz

Case No. SC16-931

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