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**IN THE SUPREME COURT**
**STATE OF FLORIDA**

CASE NO.: SC13-2168

L.T. CASE NOS.: 4D12-143
10-40825CACE05

MARIANNE EDWARDS,

Petitioner,

vs.

THE SUNRISE OPHTHALMOLOGY ASC, LLC, d/b/a FOUNDATION FOR ADVANCED EYE CARE; GIL A. EPSTEIN, M.D., and FORT LAUDERDALE EYE INSTITUTE, INC.

Respondents.
_______________________________________/

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# ANSWER BRIEF OF RESPONDENTS, GIL EPSTEIN, M.D., AND FORT LAUDERDALE EYE INSTITUTE, INC.

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## PRELIMINARY STATEMENT

Petitioner/Plaintiff, Marianne Edwards, will be referred to by name, Petitioner or Plaintiff.

Respondent/Defendants, Gil A. Epstein, M.D., and his employer, Fort Lauderdale Eye Institute, Inc., will be referred to jointly as Dr. Epstein, Respondent or Defendant.

The following designations will be used:

(R-x) record on appeal.

(PA-x) petitioner's appendix

(PB-x) petitioner's brief

## STATEMENT OF THE CASE AND FACTS

This proceeding arises from a Petition for Certiorari filed by Petitioner/Plaintiff, Marianne Edwards, seeking review pursuant to Rule 9.030(a)(2)(A)i (district court decision expressly declare valid a state statute) and Rule 9.030(a)(2)(A)ii (district court decision expressly construe a provision of the state or federal constitution) of the Florida Rules of Appellate Procedure of a decision from the Fourth District Court of Appeal affirming the trial courts dismissal of her suit alleging medical negligence against Respondent/Defendant, Dr. Gil A. Epstein, M.D., and his professional association.

## STATEMENT OF FACTS

Marianne Edwards consulted with Dr. Epstein on or about June 11, 1908 to seek cosmetic treatment for her eyelid puffiness. (R- 132). On July 8, 2008, after a proper informed consent, Dr. Epstein performed a four-lid blepharoplasty for Mrs. Edwards. (R- 133) Although Dr. Epstein examined and treated Ms. Edwards on numerous occasions following surgery it was not until September 18, 2008 that he suspected an infection (R-153) and not until October 13, 2008 that a nocardia puris infection was confirmed. (R-156) September 21, 2010 Mrs. Edwards commenced a pre-suit procedure as set forth in Chapter 766 of Florida Statutes, against Dr. Epstein. In support of that notice she provided a conclusory affidavit from an infectious disease doctor, which assumed, based on an infection diagnosed over three months after surgery, that the serious and rare infection diagnosed had occurred during surgery and must have been the result of medical negligence. (R-106-107).

Plaintiff's expert demonstrated no expertise in ophthalmology and no expertise in diagnosing ophthalmological conditions or performing four lid blepharoplasty.

In response to the notice letter and verified opinion served by Ms. Edwards, Dr. Epstein immediately advised Ms. Edwards that her verified

opinion was defective in that her expert was not in the same or similar specialty as Dr. Epstein nor did he have any experience in treating eye conditions, specifically blepharoplasty. (R-97) This objection was re-affirmed in a rejection letter sent at the end of the ninety-day pre-suit procedure which was accompanied by an affidavit from a board certified ophthalmologist with a sub-specialty in oculoplastics. (R-163-164, R-166-167) Although given the opportunity, Ms. Edwards never offered the testimony or affidavit of an ophthalmologist, or supplemented the original filings of her infectious disease expert.

## PROCEDURAL HISTORY

Upon the filing of a medical negligence lawsuit against Dr. Epstein and his professional association Dr. Epstein denied negligence and raised the affirmative defense of failure to comply with Florida Statute §766.106. (R-16-20)

Ms. Edwards denied all affirmative defenses and demanded strict proof, but did not raise any issue as to the constitutionality of Florida Statute 766.106 or any other statute. (R-14-15)

Pursuant to applicable law, Dr. Epstein filed a Motion to Determine Sufficiency of Pre-suit Verified Opinion, as prescribed by Florida Statutes (R- 62-64). Ms. Edwards filed a response but once again did not challenge the constitutionality of the Florida statute.

A hearing on defendant's motion took place November 17, 2011 at which time the trial court had available for review the sworn testimony of Dr. Epstein (R- 24-160) the affidavit of Dr. Currie along with his curriculum vitae (R-106-123) and the affidavit of defense expert, Myron Tanenbaum, M.D., a board certified ophthalmologist (R-165-167).

At the conclusion of the hearing the trial court granted the Motion and dismissed Dr. Epstein and his professional association.

Ms. Edwards moved for a rehearing but once again did not cite any constitutional issue. (R-169-207).

Ms. Edwards timely appealed the dismissal to the 4th District Court of Appeal which affirmed the trial court. Ms. Edwards later filed a Motion for a Rehearing which was also denied. Neither the appeal nor the petition for rehearing ever raised as an issue that the trial court or the District Court of Appeal ever expressly declared valid a state statute or expressly construed a provision of the state or federal constitution.

## ISSUES ON APPEAL

i. WHETHER THE DISTRICT COURT OF APPEAL EXPRESSLY DECLARED VALID A STATE STATUTE.

ii. WHETHER THE DISTRICT COURT OF APPEAL EXPRESSLY CONSTRUED A PROVISION OF THE STATE OR FEDERAL CONSTITUTION.

## STANDARD OF REVIEW

Standard of review is *de novo* for this Court to determine whether or not the appealed decision (i) expressly declared valid a state statute or (ii) expressly construed a provision of the state or federal constitution.

## SUMMARY OF ARGUMENT

The 4th District in affirming the trial court's finding that petitioner's infectious disease doctor did not qualify as an expert against a board certified ophthalmologist under the facts of this case was proper pursuant to Florida Statute 766.102. The 4th District's affirmance did not in any way: 1) expressly declare valid a state statute or; 2) expressly construe a provision of the state or federal constitution. The decision did demonstrate a careful consideration of the facts of this case and a reasonable interpretation of the plain language of the statute finding, on the facts of this case that the infectious disease expert did not qualify as a similar specialty with the ophthalmologist. Pursuant to the clear language of Florida Statute §766.102, it was reasonable and proper to find that Plaintiff's proffered expert: 1) did not specialize in the same specialty as the health care provider against whom the testimony was offered, and 1) did not specialize in a similar specialty that included the evaluation of puffy eyes, 2) diagnosis of blepharitis, or 3) performance of the ophthalmologic surgical procedure known as blepharoplasty.

## ARGUMENT

Petitioner is seeking review of a District Court of Appeal decision on the claimed basis that it:

(i) expressly declares valid a state statute; or

(ii) expressly construes a provision of the state or federal Constitution.

The case below on both the trial and appellate level hinged on the interpretation of Florida Statute §766.102 (formerly 766.45). This statute was found constitutional by this court in *Chenoweth v. Kemp, M.D.*, 396 So.2d 1122 (Fla. 1981). The validity or invalidity of the statute was never an issue in the court below. In addition, the court below was never requested to construe a provision of the state or federal constitution.

The case below involved whether or not the petitioner complied with Florida Statutes governing medical negligence claims.

The goal of the medical malpractice statutory and pre-suit rules is to alleviate the high cost of medical negligence claims through early determination and prompt resolution of claims. *Weinstock v. Groth*, 629 So.2d 825 (Fla. 1993). The statutes requiring corroboration by a medical expert were instituted to establish a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a

full adversarial proceeding. *Archer v. Maddux*, 645 So.2d 544 (Fla. 1st DCA 1994). The medical negligence statutory provisions were not intended to deny parties access to the court on the basis of technicalities, but on the other hand the pre-suit notice and screening requirements represent more than mere technicalities. The failure to comply with the applicable statutes mandates dismissal of the suit, *Anderson v. Wagner, DPM*, 955 So.2d 586 (Fla. 1st DCA 2006); *Maguire v. Nichols*, 712 So.2d 784 (Fla. 2nd DCA 1998).

All parties agree that the plain language of Florida Statute §766.102(5) allows expert testimony to come only from a physician who specializes in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; or specializes in a similar specialty that includes the evaluation, diagnosis or treatment of the medical condition that is the subject of the claim and has prior experience treating similar patients. The statute did not include an exception for health care providers who evaluate, diagnose or treat post-operative conditions which form the basis of damages alleged to be the result of medical negligence.

"When construing a statute, the Court attempts to give effect to the Legislature's intent, looking first to the actual language used in the statute and its plain meaning." *Delva v. Continental Group, Inc.*, 137 So.3d 371

(Fla. 2014) (see quoting, *Trinidad v. Florida Peninsula Insurance, Co.*, 121 So.3d 433, 439 (Fla. 2013).

Since Florida Statute §766.102(5) did not define the term, "similar specialties" the entire matter became fact dependent and the courts below were required to review the facts presented, apply them to the plain language of the statute and come to a decision. In the case below the 4th District Court of Appeal did just that. The court in its opinion noted,

"the myriad of factual scenarios giving rise to medical negligence claims has caused different outcomes in cases attempting to apply the term 'similar specialty.'

*Weiss v. Pratt*, 53 So.3d 395 (Fla. 4th DCA 2011) (emergency room physician qualified to testify against orthopedic surgeon); *Barrio v. Wilson*, 799 So.2d 413 (Fla. 2nd DCA 2000), (pulmonologist not qualified to testify against emergency room physician). As we have previously noted; [w]hat is clear is that nothing is clear about similar specialty. *Weiss*, 53 So.3d at 400)." (PA-006)

Dr. Epstein was a board certified ophthalmologist. Ms. Edwards came under his care for evaluation of an ophthalmologic condition described in layman's terms as sagging eyelids. Dr. Epstein diagnosed that condition. The treatment for said ophthalmologic condition was a surgical procedure

known as a blepharoplasty which Dr. Epstein offered and Ms. Edwards accepted. Blepharoplasty was performed on July 8, 2008.

Neither Dr. Currie's sworn affidavit, nor his curriculum vitae or any other piece of evidence or argument advanced by petitioner established that Dr. Currie ever 1) evaluated a patient with sagging eyelids; 2) diagnosed a condition involving sagging eyelids; 3) recommended treatment for a patient with sagging eyelids; or 4) performed a surgical procedure known as a blepharoplasty.

Petitioner understandably prefers the dissent to the majority decision in the underlying case and implies that the majority did not logically distinguish its ruling in the instant case with its decision in *Weiss, supra.* He also characterizes the opinion as being "restrictive" (PB-19) and further opines that the court reached the decision based on an unreasonable approach.

The record in this case indicates otherwise.

At the trial court level, on a motion to determine sufficiency of expert, the record shows, at an unrecorded hearing, the evidence reviewed included the proffered affidavit of an infectious disease doctor clearly not of the same medical specialty as defendant. The question therefore was, did Dr. Currie practice in a "similar specialty"? In determining the answer to that

question, both the trial court and the court below considered Dr. Currie's affidavit, which was conclusory at best.

Dr. Currie did not claim any knowledge as to the standard of care of an ophthalmologist nor did he aver that Dr. Epstein departed from that standard of care. His opinion that someone must have been negligent since Ms. Edwards developed a rare infection following surgery, does not meet any legal test for expert testimony or a verified opinion. The blepharoplasty in question was performed July 8, 2008. The rare infection was not diagnosed until October 13, 2008. The assumption that the infection was due to an unsterile operative environment is unsupported by any record evidence. The existence of a medical injury does not create any inference or presumption of negligence against a health care provider. F.S. §766.102(3)(a)(b). In Florida the opinion of an expert cannot constitute proof or the existence of facts necessary to the support of the opinion. *Schindler Elevator Corporation v. Carvalho*, 895 So.2d 1103 (Fla. 4th DCA 2005). Without the unsupported assumption that the rare infection diagnosed ninety seven days after surgery occurred in the operating room, there is no basis for the opinion that the ophthalmologist was negligent. Without the inference or presumption of negligence based on a medical injury there is no basis for the opinion that the ophthalmologist was

negligent. This is in addition to the fact that Dr. Currie, an expert in the field of infectious disease, did not explain how he could credibly comment on the standard of care of a Board Certified Ophthalmologist performing care within his own specialty.

There was also no indication that the decision in the case below was intended to be restrictive. It clearly shows a logical interpretation of the statute in question, applied to the facts of the specific case.

There is no quarrel that the statute in question should be liberally construed in favor of access to courts, but on the other hand, if there was no reasonable explanation for plaintiff's failure to correct the defect she was advised of during the first correspondence following submission of her notice of intent, then her failure to comply with the pre-suit requirements made dismissal proper. *Cohen v. West Boca Medical Center, Inc.*, 854 So.2d 276 (Fla. 4th DCA 2003).

Petitioner is not seeking a liberal construction of §766.102(5)(a) Fla.Stat, but is faulting the Fourth District for not re-writing the statute to include in the definition of similar specialty an expert who treats conditions which result from alleged malpractice and form the basis for alleged damages. The legislature did not include such language and respondent submits it did not intend to and it would have been error for the trial or

appellate court to have added it. Contrary to Petitioners assertion (PB-17) that the majority re-wrote the "similar specialty" language out of the statute, it is clear that the majority, after a logical analysis, properly adhered to the plain language of the statute.

Petitioner's back-up position is to request this Court, if they do not agree that based on the record that Dr. Currie qualifies as an expert in a "similar specialty" they should reverse the decision below and remand for an evidentiary hearing on the issue. Petitioner is invited to review that record. It clearly shows that Ms. Edwards had an evidentiary hearing in the trial court. Affidavits were considered; request for admissions were considered; the deposition of Dr. Epstein was considered. It will also be noted that no affidavit or proffer of evidence was rejected by the Court and although plaintiff's lawyer in his motion for rehearing at the trial level (R-173) stated that "Plaintiff will be supplementing this motion for rehearing", no supplemental filing was ever received and there is no order in the record denying any motion filed by Plaintiff to supplement the record with additional affidavits or testimony.

Although petitioner did not seek this court's discretionary jurisdiction based on an express and direct conflict with a decision of another district court of appeal, almost as an afterthought in its Conclusion (PB-28), there is

a claim, raised for the first time, that the decision below conflicts with *Holden v. Bober*, 39 So.3d 396 (Fla. 2nd DCA 2010). That case involved different specialties than this case and of more importance, it involved a review of an order that did not come out of an evidentiary hearing. *Holden, supra* did not define or interpret §766.102(5) or conflict with the decision before this court.

## CONCLUSION

Based on the totality of the record it is clear that the majority opinion below reflects a careful and proper analysis of Florida law leading to a reasonable interpretation and conclusion as to the issues presented. The decision below does not expressly declare valid a state statute and does not expressly construe a provision of the state or federal constitution. It does not expressly and directly conflict with the decision of another District Court of Appeal or this Court the same question of law and the decision below should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was served through the Florida Courts e-Portal on **September 24, 2014** to: **Rodrigo L. Saavedra, Jr., Esquire, counsel for Petitioner, Marianne Edwards,** 3000 No. Federal Highway, Bldg., Two, Suite 200, Ft. Lauderdale, FL 33306 (rsaavedra@rsaaveralaw.com); **Lincoln J. Connolly, Esquire**, co-counsel for Petitioner, PO Box 330644, Miami, FL 33233 (Lincoln@ConnollyJustice.com; Michelle@ConnollyJustice.com); **Kevin Vannatta, Esquire**, attorney for Sunrise Ophthalmology, 200 SW 1st Avenue, Suite 910, Ft. Lauderdale, FL 33301 (vannatta@lbbslaw.com; ddouglas@lbbslaw.com; mbarbuscia@lbbslaw.com); and **John D. Kelner, Esquire**, co-counsel for Epstein and Ft. Lauderdale Eye Institute, 4000 Hollywood Blvd., Suite 455-S, Hollywood, FL 33021 (john@jkelnerlaw.com; andrea@jkelnerlaw.com).

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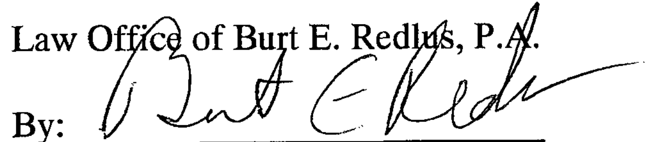
**CERTIFICATE OF COMPLIANCE PURSUANT TO Fla.R.App.P. 9.210(a)(2); 9.1000(1)**

Counsel for the Appellee, Gil Epstein, M.D., and Fort Lauderdale Eye Institute, Inc., certifies the following:

Pursuant to Fla. R. App. P. 9.210(a)(2); 9.100(1), the attached brief for Appellee is printed using a proportionally spaced 14 point Times New Roman typeface.

Dated: September 24, 2014.

Law Office of Burt E. Redlus, P.A.



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