Filing # 17822141 Electronically Filed 09/03/2014 10:36:38 PM

RECEIVED, 9/3/2014 22:38:57, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO: SC13-2168

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

MARIANNE EDWARDS,

Petitioner,

vs.

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

Respondents.
_____/

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Petitioner/Plaintiff, MARIANNE EDWARDS, is referred to by name.

Respondents/Defendants, GIL A. EPSTEIN, M.D., and his employer, FORT LAUDERDALE EYE INSTITUTE, INC., are referred to jointly as "Dr. Epstein" or "the Defendants".

The Petitioner is e-filing a bookmarked pdf appendix concurrently with this brief, containing the decision appealed from below, and the relevant items from the record cited herein. References thereto are made as "(Pet.'s App., at ___)" followed by page and paragraph number, as appropriate.

The Clerk of the Fourth District Court of Appeal has furnished the Court with a two volume record including the briefs below, which is referenced as "R. Vol. __, Tab __".

Unless otherwise noted, all emphasis in quotations is supplied by the undersigned.

STATEMENT OF THE CASE AND FACTS

This proceeding arises from an order dismissing Petitioner/Plaintiff, Marianne Edwards' medical malpractice complaint against Dr. Epstein upon a determination by the trial court that her presuit expert's corroborating "affidavit is insufficient." (Pet.'s App., at 122) The Fourth District affirmed in a two-to-one decision, holding that Ms. Edwards' expert could not satisfy the requirements of Florida's presuit statutes. (Pet.'s App., at 4)

A. Statement of Facts

On July 8, 2008, eyelid surgery was performed on Marianne Edwards at Foundation for Advanced Eye Care, a surgical facility operated by Respondent, Sunrise Ophthamology Asc., LLC. The surgery was performed by Respondent, Gil A. Epstein, M.D., a board-certified ophthalmologist employed by Respondent, Fort Lauderdale Eye Institute, Inc. (Pet.'s App., at 30-31 ¶¶ 6, 8, 11)

Following the surgery, Ms. Edwards' left eye was diagnosed as suffering from a serious and rare infection, Nocardia Puris. (Pet.'s App., at 31 ¶ 11; 124 ¶ 4)

Upon obtaining a Verified Affidavit from an infectious disease expert, Ms. Edwards commenced the presuit procedure set forth in Chapter 766, Florida Statutes, against the Respondents. Her expert, Brian Currie, M.D., attested under oath that "I am familiar with the prevailing professional standard of care required and applicable

to the facts and circumstances of this case" and opined in his affidavit that:

> reasonable grounds exist to support a claim of medical negligence against the Foundation for Advanced Eye Care eye outpatient surgicenter and/or Dr. Gil Epstein/Fort Lauderdale Eye Institute for failing to use, in the operating room, proper sterile technique and/or proper sterilization technique in order to prevent the contamination of Ms. Edward[s'] surgical site with Nocardia.
>
> As a direct result of the medical negligence, as set forth above, Marianne Edwards has suffered numerous surgical interventions, has required extended use of various antibiotics, has suffered disfigurement and requires ongoing medical care.

(Pet.'s App., at 10 ¶ 2; 11 ¶ 6)

Among many other credentials demonstrating his expertise, Dr. Currie holds a Medical Doctor degree from Albert Einstein College of Medicine, at which he later performed a fellowship in infectious disease, and a Masters Degree in Public Health in Epidemiology from Columbia University. He is licensed to practice medicine in the State of New York, and is board-certified in internal medicine and infectious disease. He is a Professor of Medicine at Albert Einstein College of Medicine, where he is also the Assistant Dean for Clinical Research. And he is or has been the Director of Infection Control at three New York hospitals. (Pet.'s App., at 13-14)

B. Procedural History

Upon the completion of the presuit process, Marianne Edwards filed a malpractice lawsuit against all three Respondents. (Pet.'s App., at 29-41) As to Dr.

Epstein and his vicariously liable employer, she alleged he "breached the prevailing standard of care for proper sterile technique and/or proper sterilization technique in order to prevent the contamination of Ms. Edwards' surgical site with Nocardia Puris." (Pet.'s App., at 32 ¶ 14A; 35-36 ¶ 22A) Dr. Epstein and his employer denied these allegations, and asserted

> [a]s a second affirmative defense, . . . *that plaintiff has failed to comply with the spirit* or the law *embodied by Florida Statute 766.106*, and therefore she cannot maintain this action. Specifically, these defendants claim that plaintiff failed to serve a corroborating written medical expert opinion in compliance with the requirements of F.S. 766.203.(2), F.S. 766.202(6) and F.S. 766.102.

(Pet.'s App., at 44-45 ¶ 39)

Dr. Epstein and his employer then filed a Motion to Determine Sufficiency of Pre-Suit Verified Opinion. (Pet.'s App., at 47-49) Therein they sought dismissal, alleging that an "affidavit signed by a doctor who specializes in infectious disease and epidemiology, criticizing care rendered by a board certified ophthalmologist while performing ophthalmologic surgery, does not meet the requirements of an expert under Florida Statute 766.102." (Pet.'s App., at 48 ¶6) They later filed a Memorandum of Fact and Law with attachments in support of their motion. (Pet.'s App., at 50-115)

Ms. Edwards filed a response to that motion (Pet.'s App., at 116-121), arguing

that the motion was premature, and that the trial court should consider the matter at a summary judgment hearing after Dr. Currie was deposed, so that his qualifications could be fully explored and set before the court. (Pet.'s App., at 116, 120) She also argued that, *inter alia*, Dr. Currie was qualified as an expert under § 766.102(5)(a), Fla. Stat., because he "specialize[d] in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients," and citing *Weiss v. Pratt*, 53 So.3d 395 (Fla. 4th DCA 2011) (emergency medicine physician was in a "similar specialty" and qualified to opine against orthopedist who failed to use a backboard to remove an injured high school football player from the field).[1] (Pet.'s App., at 119) Ms. Edwards explained that she "has not taken issue with Dr. Epstein's ophthalmological surgical technique. Rather, the allegation by the Plaintiff's expert, Dr. Brian Currie, is that the Plaintiff contracted Nocardia Puris at the surgical center during the surgical procedure performed by Dr. Epstein as a result of improper surgical technique on the part of the surgical center and/or the doctor." (Pet.'s App., at 117) She further argued that "Dr. Curie, as an infectious disease doctor, is certainly well versed in the evaluation, diagnosis, and treatment of the medical condition that is the subject of this

[1]Ms. Edwards also argued that "the statutory provisions were not intended to deny a party's access to the courts on the basis of technicalities." (Pet.'s App., at 118-19)

claim–which is the contraction of Norcardia Puris" (Pet.'s App., at 119), and that "[t]he use and necessity for sterile technique in medical procedures is universal and self-evident." (Pet.'s App., at 120)

The hearing on the motion took place on November 17, 2011. No court reporter was present at the hearing. The trial court granted the motion, ruling that the Plaintiff's expert "affidavit is insufficient" without further explanation and dismissed Dr. Epstein and his employer. (Pet.'s App., at 122)

Ms. Edwards moved for rehearing (Pet.'s App., at 123-161), again asserting that a hearing was required where evidence could be considered. (Pet.'s App., at 126) She also noted that at the original hearing the trial court's "focus was on that the Affidavit failed to explain the details of the negligence and how it resulted in Plaintiff's damages" (Pet.'s App., at 124 ¶ 8), and dispelled that as a proper basis for dismissal.[2] Ms. Edwards also explained that under Florida law, to comply with Chapter 766, a plaintiff's corroborating expert need not be in the same specialty as the prospective defendant, again citing *Weiss*, 53 So.3d at 395, and also *Holden v.*

[2]"[T]he court explained that the purpose of pre-suit and the requirement of an expert affidavit to corroborate the claim is not to notify the defendant as to how they were negligent, but rather it is to demonstrate that the claim is legitimate. In explaining this, the court stated, 'the statute requires the expert corroborative opinion to prevent the filing of baseless litigation, not to set forth in protracted detail the plaintiff's theory of the case'" (quoting *Davis v. Orlando Reg. Med. Ctr.*, 654 So.2d 664 (Fla. 5th DCA 1995)). (Pet.'s App., at 125-26)

Bober, 39 So.3d 396 (Fla. 2d DCA 2010) (reversing dismissal and remanding for an evidentiary hearing required on whether plaintiff's expert was in a "similar specialty"). (Pet.'s App., at 124-26)

Dr. Epstein and his employer opposed rehearing, substantively arguing that Dr. Currie was not in the same specialty as Dr. Epstein. (Pet.'s App., at 162-64) That same day, without holding a hearing, the trial court denied rehearing. (Pet.'s App., at 165)

Ms. Edwards then appealed the dismissal to the Fourth District, arguing consistent with her arguments to the trial court. *See* Appellant's Initial Brief before the Fourth District, R. Vol. I, Tab A; Appellant's Reply Brief before the Fourth District, R. Vol. I, Tab C. The Fourth District affirmed, over the dissent of District Judge Levine, *Edwards v. Sunrise Ophthalmology Asc, LLC*, 134 So.3d 1056 (Fla. 4th DCA 2013) (Pet.'s App., at 4-9), and later denied Ms. Edwards' motion for rehearing. (Pet.'s App., at 166-72, 177)

Review was timely sought in this Court, and this Court accepted jurisdiction,[3]

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[3]In addition to the arguments made in the her brief on jurisdiction, the Petitioner would note that this Court also has conflict jurisdiction under Art. V, § 3(b)(3), Fla. Const., because the decision below (dismissing a malpractice suit without holding an evidentiary hearing on whether the claimant's presuit expert was in a "similar specialty" to the prospective defendant) expressly and directly conflicts with this Court's decision in *Williams v. Oken*, 62 So.3d 1129, 1137 (Fla. 2011) (continued...)

dispensing with oral argument.

SUMMARY OF ARGUMENT

The trial court held the Petitioner's presuit expert insufficient to properly bring a malpractice action; the Fourth District affirmed, over a strong dissent, holding that an infectious disease expert is not in a "similar specialty" to an ophthalmologist in a case arising out of the failure to use proper sterile procedure to prevent an infection.

This case is controlled by the statute at issue, § 766.102, Fla. Stat. (2009), and

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[3](...continued)
(quashing First District's exercise of certiorari jurisdiction over order denying motion to dismiss due to alleged insufficient verified expert opinion and concluding that case should have instead been remanded for an evidentiary hearing on the topic), and the Second District's decision in *Holden v. Bober*, 39 So.3d 396 (Fla. 2d DCA 2010) (liberally interpreting § 766.102(5), Fla. Stat., so as to require an evidentiary hearing on whether presuit expert of different specialty satisfied "similar specialty" requirement and reversing order of dismissal). *See, e.g.*, *Rippy v. Shepard*, 80 So.3d 305 (Fla. 2012) (express and direct conflict jurisdiction existed where district court misapplied prior cases setting forth definitions of dangerous instrumentality); *Wallace v. Dean*, 3 So.3d 1035 (Fla. 2009) (express and direct conflict jurisdiction existed where rule of law announced conflicted with prior decisions and with decision involving substantially similar factual scenario). It also conflicts with this Court's decisions in *Musculoskeletal Inst. Chartered v. Parham*, 745 So.2d 946, 952 (Fla. 1999), *Kukral v. Mekras*, 679 So.2d 278 (Fla. 1996), *Patry v. Capps*, 633 So.2d 9 (Fla. 1994), *Weinstock v. Groth*, 629 So.2d 835 (Fla. 1993) (all holding that Chapter 766's presuit requirements should be liberally construed in favor of access to courts), among other district court decisions properly abiding those cases (*see, e.g.*, cases cited at *infra* note 14). *See, e.g., Wallace*, 3 So.3d at 1035; *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981) (express and direct conflict jurisdiction existed due to district court's apparent failure to apply proper standard in reviewing trial court decision; decision below need not explicitly identify conflicting decisions to give rise to jurisdiction).

the Access to Courts clause of the Florida Constitution.

The plain language of that statute allows a claimant to presuit a case with a verified opinion from an expert in the same specialty as the prospective defendant, or one in a similar specialty with experience in the "evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim." Contrary to prior Second and Fourth District decisions recognizing such "similar specialty" experts can be qualified under the statute based upon the nature of the condition giving rise to the claim, the majority below held that an infectious disease expert cannot be in a "similar specialty" with an ophthalmologist, and further misinterpreted the "medical condition" not as the condition "that is the subject of the claim" but as the condition giving rise to the doctor/patient encounter, regardless of the subject of the claim.

The dissenting opinion below appropriately identified the flaws in the majority's reasoning and stated that it would have reversed, finding the Petitioner's infectious disease expert sufficiently qualified in a "similar specialty" under the circumstances alleged so as to require denial of the motion to dismiss. It further noted that the recent amendments to the subject statute (removing allowance for experts in a "similar specialty") demonstrated that the Petitioner's expert complied with the statute in effect for this claim.

This Court has repeatedly held that in interpreting Florida's malpractice presuit

statutes, the Access to Courts clause requires that they be liberally construed in favor of access to courts, so as to not bar meritorious claims on the basis of technicalities. The majority below overlooked this principle in affirming the dismissal, but the dissent properly embraced it. This Court should restore the proper balance by again upholding a proper interpretation of the presuit provisions so as to not allow patients' rights of access to courts to be denied by restrictive interpretations of these statutes.

Finally, the dissent below stated that it would have found the Petitioner's expert qualified and reversed the dismissal. Should the Court not fully agree with that dissent, it should disapprove the decision below and in the least order that the case be remanded for an evidentiary hearing on the "similar specialty" issue, as it did in *Williams v. Oken*, 62 So.3d 1129, 1137 (Fla. 2011), and as have the Second and Third Districts when confronting issues of whether a presuit expert was sufficiently qualified.

ARGUMENT

I. STANDARD OF REVIEW

The Fourth District appropriately determined that the standard of review here is *de novo*. *Edwards v. Sunrise Ophthamology Asc, LLC*, 134 So.3d 1056, 1057 (Fla. 4th DCA 2013) (citing *Oliveros v. Adventist Health Sys./Sunbelt, Inc.*, 45 So.3d 873, 876–77 (Fla. 2d DCA 2010)). *See also Holden*, 39 So.3d at 400 ("[b]ecause this case concerns the trial court's disposition of a motion to dismiss, our standard of review is *de novo*") (citations omitted). *De novo* is also the appropriate standard because the questions presented herein involve the proper interpretation of § 766.102(5), Fla. Stat., in light of the Access to Courts clause of the Florida Constitution. *See West Fla. Reg. Med. Ctr., Inc. v. See*, 79 So.3d 1, 8 (Fla. 2012) ("[s]tatutory and constitutional construction are questions of law subject to a *de novo* review") (citation omitted).

II. DR. CURRIE QUALIFIES AS A SIMILAR SPECIALIST IN THIS CASE

The outcome of this proceeding is controlled by two aspects of Florida law: first, the language of the statute at issue, and second, this Court's longstanding jurisprudence directing that the presuit requirements of Chapter 766 must be liberally

construed in favor of malpractice victims' constitutional right of access to courts.[4] The lower courts in this case erroneously applied the former, and ignored the latter. The dismissal of Marianne Edwards' complaint should be reversed and her claims against Dr. Epstein and her employer reinstated.

A. The Plain Language of Section 766.102(5)(a), Fla. Stat., Requires Reversal

The Fourth District majority initially summarized the case as involving Ms. Edwards' "fail[ure] to obtain a written opinion from an expert–as defined by section 766.102, Florida Statutes (2009)–to support the negligence claim." *Edwards*, 134 So.3d at 1057. To support its conclusion, the majority observed that "[s]imply put, the infectious disease doctor is not an eye surgeon nor is the ophthalmologist an infectious disease doctor." Ms. Edwards has no quibble with that tautology, but it is beside the point. For the statute in effect at the time of this incident[5] does not require that a patient's expert be of the same specialty as the prospective defendant–it allows for experts in similar specialties who are experienced with the condition sued upon, as follows:

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[4]Art I, § 21, Fla. Const. ("[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay").

[5]As further discussed *infra*, the Legislature amended this subsection in 2013 to remove the allowance for experts practicing in similar specialties who are experienced with the same medical condition.

> (5) A person may not give expert testimony concerning the prevailing professional standard of care unless that person is a licensed health care provider and meets the following criteria:
>
> (a) If the health care provider against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> 1. Specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; *or specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients*....

Section 766.102, Fla. Stat. (2009).[6]

In construing a statute, of course, courts are to look "first to the actual language used in the statute and its plain meaning." *Delva v. Continental Group, Inc.*, 137 So.3d 371, 374 (Fla. 2014) (quoting *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So.3d 433, 439 (Fla. 2013)). The plain language of this statute deems an expert who specializes in one specialty qualified to testify as to the standard of care in a similar specialty where both specialties evaluate, diagnose, and treat the medical condition at issue in the case. It does not require "the same specialty" in all cases.

The statute itself does not define "similar specialty." In a prior case, the Fourth

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[6]Section 766.203(2), Fla. Stat., requires that a malpractice claimant obtain a "verified written medical expert opinion from a medical expert as defined in s. 766.202(6)" to corroborate that his or her claim has reasonable grounds; section 766.202(6) in turn defines a medical expert in part as one meeting the requirements of section 766.102.

District recognized that "[t]he statute as written allows for sufficient expertise to ensure fairness. It does that by requiring *either* the same specialty *or an expert with sufficient experience to testify*." *Weiss v. Pratt*, 53 So.3d 395, 401 (Fla. 4th DCA 2011).[7] In that case, the Fourth District held that under this statute, an emergency medicine expert was qualified to testify against an orthopedic surgeon in a case charging the surgeon with negligence in failing to place the plaintiff upon a backboard before removing him from a football field.

> The emergency room expert was not an orthopedic surgeon, but *he had the expertise of what to do in such a circumstance*. Had the allegations concerned some aspect of orthopedic surgery requiring a specific level of specialization, the emergency room physician may not have been qualified to render an expert opinion. Our decision is based upon the specific facts of this case. We find no error in the trial court's admission of the emergency room physician's expert testimony.

Id.

Similarly, in *Holden v. Bober*, 39 So.3d 396 (Fla. 2d DCA 2010), Dr. Gru was a neurologist, who provided a telephone consult to the emergency room physician treating Holden. Holden presuited Dr. Gru with a verified opinion from an emergency medicine expert; Dr. Gru and his employer later moved to dismiss the action against them, arguing the expert's affidavit was not valid as he was not in the

[7]For subsequent unrelated history, *see Pratt v. Weiss*, 92 So.3d 851 (Fla. 4th DCA 2012) (regarding award of attorneys' fees under offer of judgment), *rev. granted*, 122 So.3d 868 (Fla. 2013) (No. SC12-1783).

same specialty as Dr. Gru. The trial court granted the motion and dismissed the complaint as to those defendants.

On appeal, the Second District liberally construed the term "similar specialty" and reversed for an evidentiary hearing, ruling "we can envision an scenario where an emergency department physician could be considered an expert witness specializing in a 'similar specialty' to that of a specialist treating a patient in an emergency department capacity." *Id*. at 402.

Previously, in *Oken v. Williams*, 23 So.3d 140 (Fla. 1st DCA 2009), the First District granted certiorari to quash an order denying a motion to dismiss where a plaintiff had provided a verified opinion from an emergency medicine expert against a cardiology defendant, holding the emergency medicine expert did not practice in a "similar specialty." This Court, however, quashed the decision, holding that the district court erred in exercising certiorari jurisdiction to evaluate the trial court's ruling on the sufficiency of the plaintiff's expert's qualifications. *Williams v. Oken*, 62 So.3d 1129 (Fla. 2011).

Notably, the Second District in *Holden*, 39 So.3d at 402, disagreed with the First District's conclusion in *Oken* (prior to this Court quashing that decision). The Fourth District in *Weiss* noted that disagreement without taking sides, noting the case law provided "mixed signals," 53 So.3d at 400, yet ultimately adopted an analysis

similar to *Holden*.

In its opinion in this case below, the majority wrote that it found its earlier ruling in *Weiss* distinguishable, without logically distinguishing it (and without referencing *Holden* at all). It asserted that in *Weiss* "[w]e specifically indicated that *our holding was limited to the facts of the case*"[8] and that "had the area of testimony concerned more specialized medical knowledge, the outcome may have been different." *Edwards*, 134 So.3d at 1058 (citing *Weiss*, 53 So.3d at 401). But it did not explain how the fact that two doctors should have sufficient experience and expertise to know to immobilize a football player who was symptomatic after a violent collision renders them in a similar specialty, but a surgeon and an infectious disease specialist would not have sufficient experience and expertise regarding the need for a sterile operative environment such that one is prevented from testifying against the other on that general medical topic.[9] All it reasoned was that allowing an

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[8]In *Weiss*, the Fourth District actually stated that its "decision is *based upon* [not limited to] the specific facts of this case." 53 So.3d at 401.

[9]*Cf. also Chenoweth v. Kemp*, 396 So.2d 1122, 1125 (Fla. 1981) ("[w]hile it is clear that the proffered witnesses would not have been competent to testify on certain acts performed by the appellees, such as the hysterectomy performed by Kemp or the anesthetizing performed by Szmukler, it is not at all clear that the two neurosurgeons were not qualified under the statute to testify concerning the positioning of the patient on the operating table and the effect of that positioning. The standard of care for this portion of the procedure may well be, as claimed by one of the neurosurgeons, the (continued...)

infectious disease specialist to opine as to an ophthalmologist here would impose one specialty's expertise upon the other. *Edwards*, 134 So.3d at 1059. That conclusion is a stretch of logic too far, however. For the same reasoning would apply to the emergency medicine expert/neurology defendant in *Holden*, or the emergency medicine expert/orthopedic surgeon defendant in *Weiss*. Yet in both of those cases, based upon the medical condition/circumstance at issue which both specialties were qualified to diagnose and treat, the district courts held that the experts were or could be found to be in a similar specialty to the defendant physicians for purposes of § 766.102(5)(a), Fla. Stat.

This Court should hold that for purposes of corroborating expert opinions in presuit, where the "medical condition that is the subject of the claim" is a condition that two or more specialties evaluate, diagnose, or treat, those specialties constitute "similar specialties," as did the Fourth District previously as to experts testifying at trial in *Weiss*, 53 So.3d at 401 (expert qualified as being in a similar specialty where he had "sufficient experience to testify" and "the expertise of what to do in such a circumstance").

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[9](...continued)
same for all surgeons relative to protection of the ulnar nerve from compression or other injury"), *receded from on other grounds, Sheffield v. Superior Ins. Co.*, 800 So.2d 197 (Fla. 2001).

Further constricting its analysis, the majority below interpreted "the medical condition that is the subject of the claim" to be the *procedure* which created the doctor/patient relationship (an eye lift), 134 So.3d at 1059, not the medical *condition* that is the actual subject of the claim, a Nocardia Puris infection. Such is error, because that interpretation is contrary to the actual language of the statute (that the condition be the subject of the claim) and the plain meaning of those words. *Delva v. Continental Group, Inc.*, 137 So.3d 371, 374 (Fla. 2014) (citation omitted).

The majority below then concluded by basically re-writing the "similar specialty" language out of the statute for most cases, announcing that "[m]ore likely than not, . . . the allegations against a specialist require an expert *in the identical specialty* with the same or similar expertise to satisfy section 766.102's specialization requirement." *Edwards*, 134 So.3d at 1059.

As noted, Judge Levine dissented, offering "I would reverse the trial court and find that the plaintiff did satisfy the requirements of the applicable statute that governed expert witness pre-suit affidavits in medical malpractice actions in effect at the time of suit." *Id*. (Levine, J., dissenting). After detailing Dr. Currie's credentials and experience, *id*. at 1060-61, Judge Levine concluded that Ms. Edwards'

> expert was, as recognized in *Weiss*, 'an expert with sufficient experience

> to testify' about how the plaintiff contracted the infectious disease due to the alleged failure of the defendants to use proper sterilization techniques. The plaintiff's expert satisfied the statutory requirement that the expert's specialty include 'the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim.' Who better than an expert in epidemiology and infectious disease could testify about the medical condition of Nocardia and how it could be contracted?

Id. at 1061 (citing *Weiss*, 53 So.3d at 401; § 766.102(5)(a)1., Fla. Stat. (2009)).

Finally in this area, Judge Levine referenced the 2013 amendments to the subject statute, wherein the Legislature removed the language allowing for an expert to practice in a "similar specialty" with experience in evaluating, diagnosing, or treating the medical condition at issue in the case in order to "limit the class of individuals who may offer expert testimony against a defendant specialist" by requiring that they "specialize in the same, rather than [a] similar, medical specialty...." *Id*. (quoting Fla. Comm. on Judiciary, SB 1792 (2013), Staff Analysis 1 (Mar. 29, 2013)). He noted that in *Capella v. City of Gainesville*, 377 So.2d 658, 660 (Fla. 1979), this Court held that "[w]hen the legislature amends a statute by omitting words, we presume it intends the statute to have a different meaning than that accorded it before the amendment." *Edwards*, 134 So.3d at 1061 (Levine, J., dissenting) (quoting *Capella*) (other citations omitted). He concluded,

> [t]hus, we can presume that the recent amendment by the legislature signifies a change in the law as it relates to who may file a medical expert affidavit. In this case, the pre-amendment statutory language

> supports the conclusion that the affidavit of the plaintiff's medical expert satisfied the requirements of the statute in effect at the time of suit.
>
> In summary, I would reverse the dismissal of the trial court, and I would find the plaintiff's expert affidavit compliant with the law applicable at the time of suit.

Id. at 1061-62.

Of course, as between 1) the Fourth District's earlier decision in *Weiss*, the Second District's decision in *Holden*, and Judge Levine's dissent below, and 2) the majority opinion below,[10] the Petitioner would submit that based upon the language of the subject statute, the former supply the better reasoned approach. The majority opinion below is hostile to the notion that there can be what the statute allows: an expert in a similar specialty experienced in treating patients for the same medical condition sued upon. And "Florida courts should uniformly apply the plain language of . . . statutes enacted by the Legislature." *Brown v. Nagelhout*, 84 So.3d 304, 306 (Fla. 2012). The majority opinion contradicts the actual language and plain meaning of the statute, and should be disapproved by this Court.

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[10]With this Court's quashal of *Oken*, the majority opinion below stands alone in its restrictive interpretation of what is a "similar specialty" under § 766.102(5). Other cases in which that issue was raised but not reached on appeal include *Lucante v. Kyker*, 122 So.3d 407 (Fla. 1st DCA 2013); *Bery v. Fahel*, 88 So.3d 236 (Fla. 3d DCA 2011); and *Gonzalez v. Tracy*, 994 So.2d 402 (Fla. 3d DCA 2008).

B. Chapter 766 Must Be Liberally Construed in Favor of Access to Courts

The Respondents apparently labor under the misapprehension that because the Legislature has enacted sometimes stringent presuit requirements on patients bringing medical malpractice claims, there is a presumption that the law is skewed against such claims.[11] In their second affirmative defense, they speak of the "spirit" of Chapter 766 in alleging that Ms. Edwards' expert is unqualified. (Pet.'s App., at 44) And the majority below stated that "[m]ore likely than not" in malpractice cases, "the allegations against a specialist *require* an expert *in the identical specialty*," *Edwards*, 124 So.3d at 1059, seemingly implying agreement with the notion of such a strict anti-claimant "spirt" in Chapter 766. As shown above, however, the plain language of § 766.102(5)(a)1 says no such thing. A malpractice plaintiff may either utilize an expert in the same specialty, or she may utilize an expert in a "similar specialty" who has sufficient experience with the "medical condition" at issue in the case.

The purpose of the expert corroboration statutory requirements is to screen out frivolous claims, not to dismiss facially meritorious claims at the outset on

[11]As stated by one district court, "there is an increasingly disturbing trend of prospective defendants attempting to use the statutory requirements as a sword against plaintiffs." *Michael v. Medical Staffing Network, Inc.*, 947 So.2d 614, 619 (Fla. 3d DCA 2007).

technicalities.[12] And here, Marianne Edwards has supplied the sworn opinion of an expert in evaluating, diagnosing, and treating the medical condition that is the subject of the claim, attesting to reasonable grounds to believe that the defendants violated the standard of care by not using proper sterile or sterilization techniques to prevent the infection at issue. There should be no doubt that based upon Dr. Currie's verified affidavit, a reasonable investigation was conducted and this claim is not frivolous.

But if there is any doubt about the meaning and application of this statute, this Court has repeatedly announced that in interpreting Chapter 766, courts must liberally construe its requirements in favor of malpractice victims' access to courts.[13]

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[12]*See, e.g.*, *Kukral v. Mekras*, 679 So.2d 278, 284 ("the medical malpractice statutory scheme must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts, while at the same time carrying out the legislative policy of screening out *frivolous* lawsuits and defenses.... [The provisions of Chapter 766] 'were not intended to require presuit litigation of all the issues in medical negligence claims nor to deny parties access to the court on the basis of technicalities'") (quoting *Ragoonanan v. Associates in Obstetrics & Gynecology*, 619 So.2d 482, 484 (Fla. 2d DCA 1993)).

[13]Although not raised as an issue in this case, the corroborating opinion requirements (and presuit arbitration scheme) are no longer be justified by the "crisis" originally claimed to support them at the time of their adoption in 1988, and as amended in the years hence. *See* § 766.201, Fla. Stat. (legislative "findings" supporting the 1988 amendments); *Estate of McCall v. United States*, 134 So.3d 894, 909, 913 (Fla. 2014) ("the finding by the Legislature [fifteen years later, in 2003, to support the noneconomic damage caps in § 766.118, Fla. Stat.] and the Task Force that Florida was in the midst of a bona fide medical malpractice crisis, threatening the access of Floridians to health care, is dubious and questionable at the very best"; "[a] (continued...)

For example, in *Weinstock v. Groth*, 629 So.2d 835 (Fla. 1993), this Court held that the presuit notice requirements do not apply to claims against psychologists, as they were not defined as health care providers under Chapter 766, even though section 766.106(2) "does not define 'prospective defendants' to whom notice must be given." *Id*. at 837. This Court explained that

> [t]his narrow construction of the chapter 766 presuit notice requirement is in accord with the rule that restrictions on access to the courts must be construed in a manner that favors access. Moreover, the purpose of the chapter 766 presuit notice requirements is to alleviate the high cost of medical negligence claims though early determination and prompt resolution of claims, not to deny access to the courts to plaintiffs such as Groth.

Id. at 838 (citations omitted).

In *Patry v. Capps*, 633 So.2d 9 (Fla. 1994), this Court rejected the argument that acknowledged receipt by hand delivery of a notice of intent justified dismissal

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[13](...continued)
past crisis does not forever render a law valid") (plurality opinion of Lewis, J.) (citation omitted); *id*. at 921 ("[t]here is no evidence of a continuing medical malpractice crisis....") (Pariente, J., concurring in result). *See also* § 766.102(12), Fla. Stat. (2013) (requiring malpractice experts to be licensed in Florida or to obtain a Florida expert witness certificate); *Stebilla v. Mussallem*, 595 So.2d 136, 139-40 (Fla. 5th DCA) ("it is difficult to understand how a statute can be constitutional which purports to close the courts of Florida to a tort victim unless that victim can produce a supporting opinion from a medical expert, who is then threatened (statutorily) by reprisal from a bureaucratic agency. No such onerous burden is imposed upon any other prospective tort claimant in Florida") (citing § 766.206(5)(a) (1991)), *rev. denied*, 604 So.2d 486 (Fla. 1992).

for failure to serve same by certified mail, return receipt requested. This Court again stressed that "when possible the presuit notice and screening statute should be construed in a manner that favors access to courts. In this case, it is possible to construe the provision in a manner that favors access without running afoul of the legislatively authorized mode of service." *Id*. at 13 (citing *Weinstock*, 629 So.2d at 838).

And in *Kukral*, this Court disapproved a district court decision affirming a dismissal for not furnishing verified opinion with notice of intent where same was provided before statute of limitations expired, stating that the dismissal and affirmance were "inconsistent with our prior construction of the statutory scheme," 679 So.2d at 282, and holding that "the medical malpractice statutory scheme *must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts*...." *Id*. at 284. *See also Musculoskeletal Inst. Chartered v. Parham*, 745 So.2d 946, 952 (Fla. 1999) ("our decision is in accord with our repeated interpretations of this unique statutory framework so as to effectuate its intended salutary presuit investigation and screening of claims without unconstitutionally impeding a citizen's access to the courts guaranteed by article I, section 21 of the Florida Constitution"). Florida's district courts have appropriately

followed the Court's lead in this regard on many occasions.[14]

And indeed, in proper deference to these pronouncements, the Second District in *Holden v. Bober*, 39 So.3d 396, 402 (Fla. 2d DCA 2010), citing *Kukral*, reached a more liberal construction of the term "similar specialty" in section 766.102(5) than had the First District in *Oken*.[15]

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[14]*See, e.g., Robinson v. Scott*, 974 So.2d 1090, 1092-93 (Fla. 3d DCA 2007) (citing *Kukral* in reversing dismissal for failure to produce presuit discovery where no prejudice was shown); *Pavolini v. Bird*, 769 So.2d 410, 414 (Fla. 5th DCA 2000) (reversing dismissal of consortium claims not mentioned in medical malpractice notice of intent, noting "we are compelled to liberally interpret and apply this unique statutory framework in a manner that comports with the repeated decisions of the courts that have interpreted the Act in a way that protects a citizen's constitutional right to access to the courts without inhibiting the salutary purpose of investigating and screening out frivolous medical malpractice suits") (citing *Parham*, 745 So.2d at 946), *rev. denied*, 790 So.2d 1102 (Fla. 2001); *see also id*. at 412 (citing *Kukral*, *Parham*, and other decisions); *Fort Walton Beach Med. Ctr., Inc. v. Dingler*, 697 So.2d 575, 579 (Fla. 1st DCA 1997) (holding family practice physician qualified to opine in presuit verified opinion against podiatrist where he was familiar with the subject surgical procedures under prior version of presuit expert statutes) (citing *Kurkal* and *Patry*). *Cf. Swain v. Curry*, 595 So.2d 168, 174 (Fla. 1st DCA 1992) (in malpractice case not involving Chapter 766's statutory requirements, "[j]udicial construction, in cases where ambiguities exist, should be in favor of, and not in restriction of, access to the courts") (citation omitted), *rev. denied*, 601 So.2d 551 (Fla. 1992).

[15]*Cf. also Gonzalez v. Tracy*, 994 So.2d 402 (Fla. 3d DCA 2008) (reversing dismissal of malpractice claim because, *inter alia*, "minor deficiency in the corroborating affidavit does not warrant the dismissal of a medical malpractice action") (citing *Michael v. Med. Staffing Network, Inc.*, 947 So.2d 614, 620 (Fla. 3d DCA 2007) (citing *Kukral*)); *Apostolico v. Orlando Reg. Health Care Sys., Inc.*, 871 So.2d 283, 286 (Fla. 5th DCA 2004) (holding nurse qualified to opine on causation (continued...)

The majority below never acknowledged the role the Access to Courts clause should play here, nor in its constrictive analysis of "similar specialty" did it mention this Court's policy of liberally interpreting Chapter 766's requirements in light of that constitutional provision. Those decisions of this Court properly guided the dissent, however, further demonstrating that it was the better reasoned decision below. *Edwards*, 134 So.3d at 1060 (Levine, J., dissenting).

Importantly, the Second District also held that in evaluating the qualifications of a corroborating expert in the context of a motion to dismiss (as here), courts "must consider all facts in the light most favorable to [the plantiff/patient]." *Holden*, 39 So.3d at 400.[16] In this case, Marianne Edwards has supplied a sworn affidavit of an obviously qualified infectious disease specialist. Taking his affidavit in a light most favorable to Ms. Edwards, Dr. Currie is experienced with Nocardia Puris and with evaluating, diagnosing, or treating it ("the medical condition that is the subject of the claim"), as well as the methods to protect against infection from it by utilizing proper

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[15](...continued)
for purposes of Chapter 766 presuit under prior version of § 766.202(5), Fla. Stat., in light of mandate to liberally interpret these statutes in favor of access to courts, reversing dismissal) (citing *Kukral* and similar decisions)).

[16]*See also Herber v. Martin Mem. Med. Ctr., Inc.*, 76 So.3d 1, 2 (Fla. 4th DCA 2011); *Oliveros v. Adventist Health Systems/Sunbelt, Inc.*, 45 So.3d 873, 876-77 (Fla. 2d DCA 2010) (both citing *Holden* on this point).

sterile techniques in surgery. As Judge Levine concluded in his dissent, the foregoing meets the requirements of corroboration of reasonable grounds to pursue the malpractice claims pressed in this case. *Id.* at 1061-62.

Applying a liberal construction to § 766.102(5)(a)1 as required by the Access to Courts clause, and taking the facts in a light most favorable to Marianne Edwards, this Court should hold that Dr. Currie qualifies as a "similar specialist" under that statute and disapprove the decision below, remanding so that Ms. Edwards' case can proceed with her case as she could with any other tort claim.

III. ALTERNATIVELY, THE FOURTH DISTRICT SHOULD HAVE REVERSED AND REMANDED FOR AN EVIDENTIARY HEARING

Should this Court not conclude based upon the language of § 766.102(5)(a), Fla. Stat. (2009), and upon the appellate record that Dr. Currie qualifies as an expert in a "similar specialty," it should reverse the decision below and remand for an evidentiary hearing on the issue, where the full breadth of Dr. Currie's qualifications and experience may be properly considered by the trial court before leaving Ms. Edwards without her day in court.[17]

Such was the conclusion in *Williams v. Oken*, 62 So.3d 1129 (Fla. 2011), where after quashing the First District's decision on the merits as not satisfying certiorari

[17]The statute of limitations has expired on her claim, so the trial court's dismissal was in effect with prejudice.

jurisdiction, this Court ruled that the district court "should have instead dismissed the petition and remanded the case to the trial court for an evidentiary hearing on whether Dr. Foster was qualified as an expert." *Id*. at 1137. *See also Holden*, 39 So.3d at 403 ("[u]pon remand, the circuit court shall consider at an evidentiary hearing whether Mr. Holden's corroborating affidavit from an emergency department physician reasonably complied with the 'similar specialty' requirement of an expert witness under section 766.102(5)). *Cf. Oliveros*, 45 So.3d at 878 ("[i]f the appellees had not waived the right to challenge Dr. Sichewski's qualifications [as an expert witness], we would remand this matter for a new hearing"); *Bery v. Fahel*, 88 So.3d 236 (Fla. 3d DCA 2011) (reversing trial court's summary dismissal and remanding for an evidentiary hearing on whether emergency medicine physician qualifies as being in a "similar specialty" to a family practice physician defendant in malpractice action arising out of a bacterial infection) (citing *Williams*, 62 So.3d at 1137).

CONCLUSION

The majority opinion below minimizes the fact that § 766.102(5)(a), Fla. Stat., allows a malpractice victim to corroborate the reasonable grounds for her case through an expert of a similar specialty to the prospective defendant, where both evaluate, diagnose, or treat "the medical condition that is the subject of the claim." It fails to credit a plaintiff's rights under the Access to Courts clause, and this Court's

many decisions requiring a liberal interpretation of the requirements of Chapter 766 that might otherwise deny citizens their day in court for redress of their injuries.

By so doing, the decision below denies Marianne Edwards her right of access to courts, and conflicts with this Court's decisions in *Parham*, *Kukral*, *Patry*, and *Weinstock*, and the many district court decisions properly abiding their holdings. The decision below also expressly and directly conflicts with the Second District's decision in *Holden* (as well as with the Fourth District's own earlier decision in *Weiss*), was originally preceded by the First District's similar restrictive decision in *Oken*, and the issue presented is one that has been raised but not reached in at least three other appellate proceedings. *See supra* note 10. Given that this issue continues to arise, the Court should clarify the law in this area, and once again affirm citizens' rights of access to courts by liberally interpreting this presuit statute.

Judge Levine's dissent persuasively resolves the issues presented on appeal, and properly concludes that Marianne Edwards' expert satisfied the "similar specialty" requirement of § 766.102(5)(a), Fla. Stat. (2009). Respectfully, this Court should disapprove the majority opinion below, adopt Judge Levine's reasoning, and reverse and remand for the Petitioner's action to proceed forward in the trial court. In the alternative, the Petitioner would respectfully request that the Court disapprove the decision below, with instructions that the case in the least be remanded to the trial

court to hold an evidentiary hearing on Dr. Currie's qualifications as an expert in a "similar specialty" under the statute in accordance with this Court's decision in *Williams v. Oken*, 62 So.3d 1129, 1137 (Fla. 2011), and the Second and Third Districts' decisions in *Holden* and *Bery*.

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 ePortal on September 3, 2014 on:

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing was printed in 14-point Times New Roman and thus complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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