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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 REPLY BRIEF

Rodrigo L. Saavedra, Jr.
RODRIGO L. SAAVEDRA, JR., P.A.
Counsel for the Petitioner,
MARIANNE EDWARDS
3000 North Federal Highway
Building Two, Suite 200
Fort Lauderdale, FL 33306
(654) 564-0503
rsaavedra@rsaavedralaw.com

Lincoln J. Connolly
Fla. Bar No.: 0084719
LINCOLN J. CONNOLLY
TRIALS & APPEALS, P.A.
Co-Counsel for the Petitioner,
MARIANNE EDWARDS
1450 Brickell Avenue
Suite 2600
Miami, FL 33131
(305) 379-1927
Lincoln@ConnollyJustice.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT vi

ARGUMENT 1

I. ARGUMENT IN RESPONSE TO RESPONDENTS' ANSWER BRIEF 1

A. Response to Respondents' Statement of Facts 1

B. This Court Has Express and Direct Conflict Jurisdiction 3

C. The Policy Behind Chapter 766 Does Not Support Dismissal and the Access to Courts Clause Requires Reinstatement of the Claim 5

D. The Respondents Incorrectly Conclude that Dr. Currie Is Not in a "Similar Specialty" and Misapprehend What an Evidentiary Hearing Requires 7

II. ARGUMENT IN RESPONSE TO *AMICUS CURIAE* BRIEF FILED BY THE AMERICAN MEDICAL ASSOCIATION ("AMA") AND THE FLORIDA MEDICAL ASSOCIATION ("FMA") 11

A. The AMA/FMA Brief Improperly Argues Facts Outside the Record 11

B. The *Amici* Confuse Presuit with Trial 12

C. "Expert Shopping" and Alleged Excessive, Costly Malpractice Claims 13

CONCLUSION 15

CERTIFICATE OF SERVICE 16

CERTIFICATE OF COMPLIANCE 17

TABLE OF AUTHORITIES

Cases

Anderson v. Wagner, 955 So.2d 586 (Fla. 2006) 6

Archer v. Maddux, 645 So.2d 544 (Fla. 1st DCA 1994) 6

Bery v. Fahel, 88 So.3d 236 (Fla. 3d DCA 2011) 5, 10, 15

Burns v. State, 676 So.2d 1366 (Fla. 1996) 4

Ciba-Geigy Ltd. v. Fish Peddler, Inc., 683 So.2d 522 (Fla. 4th DCA 1996) 11

Davis v. Orlando Reg. Med. Ctr., 654 So.2d 664 (Fla. 5th DCA 1995) 9

Edwards v. Sunrise Ophth. Asc, LLC, 134 So.3d 1056 (Fla. 4th DCA 2013) 8

Estate of McCall v. U.S., 134 So.3d 894 (Fla. 2014) 15

Gonzalez v. Tracy, 994 So.2d 402 (Fla. 3d DCA 2008) 9

Holden v. Bober, 39 So.3d 396 (Fla. 2d DCA 2010) *passim*

Kukral v. Mekras, 679 So.2d 278 (1996) 7

Laskey v. Martin County Sheriff's Dept., 797 So.2d 1254 (Fla. 2001) 4

Lucante v. Kyker, 122 So.3d 407 (Fla. 1st DCA 2013) 5

Maguire v. Nichols, 712 So.2d 784 (Fla. 2d DCA 1988) 6

Office of State Atty., Fourth Jud. Cir. of Fla. v. Parrotino, 628 So.2d 1097 (Fla. 1993) 3

Snyder v. Davis, 699 So.2d 999 (Fla. 1997) 3

Sperdute v. Household Realty Corp., 585 So.2d 1168 (Fla. 4th DCA 1991) 10

State v. Stang, 41 So.3d 206 (Fla. 2010) (Lewis, J., concurring) 12

State v. Vickery, 961 So.2d 309 (Fla. 2007) 4

Weinstock v. Groth, 629 So.2d 835 (Fla. 1994) 5, 6

Weiss v. Pratt, 53 So.3d 395 (Fla. 4th DCA 2011) 5

Williams v. Oken, 62 So.3d 1129 (Fla. 2011) *passim*

Constitutional Provisions

Art. I, § 21, Fla. Const. 7, 13

Art. V, § 3(b)(3), Fla. Const. 3, 4

Statutes

§ 766.102(5)(a)1, Fla. Stat. (2009) *passim*

§ 766.203(2), Fla. Stat. (2009) 13

Other Authorities

"Executive Summary," *To Err Is Human: Building a Safer Health System*, Washington, DC: The National Academies Press (2000) (available at http://www.nap.edu/openbook.php?record_id=9728&page=1) 14

Baker, Tom, *The Medical Malpractice Myth*, Chicago, IL: The University of Chicago Press (2005) 14, 15

PRELIMINARY STATEMENT

The Petitioner/Plaintiff, MARIANNE EDWARDS, is referred to as Petitioner or as "Ms. Edwards".

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

The Petitioner's previously-filed appendix containing excerpts from the record on appeal is referred to as "(Pet.'s App., at ___)" followed by page and paragraph number, as appropriate.

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

ARGUMENT

I. ARGUMENT IN RESPONSE TO RESPONDENTS' ANSWER BRIEF

A. Response to Respondents' Statement of Facts

In their Statement of Facts, the Respondents write that "[a]lthough 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)," Respondents' Answer Brief, at 3, as if to suggest that Ms. Edwards had no signs of infection for months after the surgery, and that this is some made-up malpractice case.[1] To the contrary, even Respondent, Dr. Epstein concedes that immediately after the surgery, and in the months thereafter, Ms. Edwards had redness and other symptoms at the surgical sites, including aching, burning, pain and lumps, Deposition of Dr. Epstein, at 64, 66, 88, 90, 94, 95-96, 103, 112, 113 (Pet.'s App., at 87, 88, 94, 95, 96, 97, 100), and he acknowledged that redness and lumps can be a sign of infection.[2] *Id*. at 97, 106, 114-15. (Pet.'s App., at 96, 98, 100)

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[1]*See also* Respondents' Answer Brief, at 13 ("[w]ithout 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").

[2]Dr. Epstein testified that redness and some or all of the other symptoms (continued...)

Dr. Epstein attempted to treat the redness with Diflucan, an anti-fungal medication, because he heard from colleagues at meetings and conferences that it can be helpful in that regard, though he did not know how it treats redness (a rather surprising admission to make after already putting his patient on the medication). *Id*. at 98-99, 102. (Pet.'s App., at 96, 97) He also testified that he discussed her condition with colleagues in an America Online ("AOL") chatroom and/or by email, *id*. at 115-20, 123 (Pet.'s App., at 100-02), posting "[w]ith a woman who had a blepharoplasty so many weeks before and still having lumpiness despite treatment with this, this and this, what would you do[?]" *Id*. at 119. (Pet.'s App., at 101)

So Dr. Epstein's competence to properly recognize, diagnose, prevent, and treat Ms. Edwards' infection will clearly be in play in this case (Pet.'s App, at 32 ¶¶ 14 A & B), and may be appropriately met by an infectious disease specialist such as Dr. Currie, an expert witness who "specialize[s] in a similar specialty that includes the evaluation, diagnosis, or treatment *of the medical condition that is the subject of the*

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[2](...continued)
described above can be expected post-operatively in any surgery. Deposition of Dr. Epstein, at 65, 95-96, 97. (Pet.'s App., at 88, 95, 96) But because at least redness and lumps (and perhaps one or more of the other symptoms, the record is undeveloped on this point) may be a sign of infection, and because it is undisputed that Ms. Edwards was ultimately diagnosed with an infection, the Court should not be accidentally misled that there were no signs of infection for months. Ms. Edwards contends that she had the infection for months, and Dr. Epstein simply failed to timely recognize, diagnose, and treat it, despite her symptoms and complaints.

claim and ha[s] prior experience treating similar patients...." Section 766.102(5)(a)1, Fla. Stat. (2009).

B. This Court Has Express and Direct Conflict Jurisdiction

Regardless of the Court's decision with regard to the basis for jurisdiction asserted in Ms. Edwards' jurisdictional brief, this Court does have jurisdiction in this case under Article 5, section 3(b)(3) of the Florida Constitution because the decision below expressly and directly conflicts with decisions of this Court and of other district courts of appeal, as argued as an additional basis for jurisdiction in Ms. Edwards' Initial Brief.[3]

This Court has in the past noted where it has alternate or additional jurisdictional grounds to review a decision[4] and, in dismissing cases after determining that jurisdiction was improvidently granted, has noted that it could not find (and thus

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[3]*See* Initial Brief, at 6-7 n.3; at 24 & n.14.

[4]*See, e.g., Snyder v. Davis*, 699 So.2d 999, 1001 (Fla. 1997) ("[w]e granted review in order to answer the certified question. We note, though, that *we have an additional basis for jurisdiction because this district court opinion expressly and directly conflicts* with *Walker v. Mickler*, 687 So.2d 1328 (Fla. 1st DCA 1997)...."); *Office of State Atty., Fourth Jud. Cir. of Fla. v. Parrotino*, 628 So.2d 1097, 1098 n.1 (Fla. 1993) (case involving questions certified to be of great public importance) (noting that "*Petitioner also has argued an alternative basis of jurisdiction*, that the decision below affects a class of constitutional officers. *We agree that jurisdiction would exist on that basis....*") (citing Art. V, § 3(b)(3), Fla. Const.).

presumably searched for) an alternative basis for jurisdiction.[5] One doubts that this Court would have looked for alterative bases if its jurisdiction was limited to the precise grounds argued in the parties' jurisdictional briefs.

Indeed, in *State v. Vickery*, 961 So.2d 309 (Fla. 2007), the Fourth and Fifth Districts acknowledged, but did not certify, conflict with a decision of the First District, and the petitioners apparently petitioned for review based upon certified conflict jurisdiction. *Id*. at 311. This Court noted that despite this failing, "this does not mean that we lose all jurisdiction to review the case.... [J]urisdiction may nevertheless exist under our 'express and direct conflict' jurisdiction . . . or on some other basis," *id*. at 311-12 (citing art. V, § 3(b)(3), Fla. Const.), and maintained jurisdiction, granting the petitions for review on the merits. *Id*. at 312.

Notably, Article 5, section 3 of the Florida Constitution only sets forth the bases for this Court's discretionary review jurisdiction, without requiring that they be explicitly raised by petitioners at any particular point in the review process. Thus, there is no constitutional impediment to this Court exercising its conflict of decisions jurisdiction in this matter, as this Court recognized in *Vickery*. And consistent with

[5]*See, e.g., Laskey v. Martin County Sheriff's Dept.*, 797 So.2d 1254 (Fla. 2001) (in case in which jurisdiction was asserted based upon apparent conflict of decisions, "we have determined that jurisdiction was granted improvidently. Accordingly, because *we find no alternative basis for jurisdiction*, this cause is dismissed"); *Burns v. State*, 676 So.2d 1366 (Fla. 1996) (same).

Vickery and this Court's past practice of evaluating other bases for its jurisdiction after it is either already apparent or found to be lacking after the jurisdictional briefing stage, this Court should retain jurisdiction to decide this case and to resolve the express and direct conflict with the decisions cited in Ms. Edwards' Initial Brief. *See* Initial Brief, at 6-7 n.3; at 24 & n.14.

Moreover, this case is not unique. How courts should interpret the "similar specialty" language of the subject statute is a recurring issue in the State of Florida.[6] This Court has and should maintain jurisdiction to review the decision below, and to provide guidance to the district courts and trial courts of this State.

C. The Policy Behind Chapter 766 Does Not Support Dismissal and the Access to Courts Clause Requires Reinstatement of the Claim

In their Answer Brief, the Respondents argue that Chapter 766's presuit statutes are justified "to alleviate the high cost of medical negligence claims thought early determination and prompt resolution of claims," citing *Weinstock v. Groth*, 629 So.2d 835 (Fla. 1994). They argue that verified opinions are required to promote

[6] *See Williams v. Oken*, 62 So.3d 1129 (Fla. 2011), *quashing Oken v. Williams*, 23 So.3d 140 (Fla. 1st DCA 2009) (emergency medicine physician and cardiologist); *Weiss v. Pratt*, 53 So.3d 395 (Fla. 4th DCA 2011) (emergency medicine physician and orthopedic surgeon); *Holden v. Bober*, 39 So.3d 396 (Fla. 2d DCA 2010) (emergency medicine physician and neurologist); *Lucante v. Kyker*, 122 So.3d 407 (Fla. 1st DCA 2013) (specialities not mentioned, case decided on other grounds); *Bery v. Fahel*, 88 So.3d 236 (Fla. 3d DCA 2011) (emergency medicine physician and family physician, remanded for evidentiary hearing).

settlement of meritorious claims without the need for a trial, citing *Archer v. Maddux*, 645 So.2d 544 (Fla. 1st DCA 1994). They argue that while they agree that the presuit statutes were not intended to deny malpractice victims access to courts on the basis of technicalities, the presuit statutes themselves are not technicalities, and the failure to comply with them mandates dismissal of cases, citing *Anderson v. Wagner*, 955 So.2d 586 (Fla. 2006), and *Maguire v. Nichols*, 712 So.2d 784 (Fla. 2d DCA 1988). *See* Respondents' Answer Brief, at 9-10.

None of those cases support dismissal of this case or the majority decision below affirming it, however. *Weinstock* held that, because the presuit statutes did not define "health care provider" to include psychologists, dismissal of that plaintiff's claim was error, thereby properly protecting patients' right of access to courts. *Archer* and *Anderson* involved a plaintiff's total failure to supply a verified opinion, and *Maguire* involved the plaintiffs' failure to have their expert's opinion be signed under oath. Here Ms. Edwards supplied a verified opinion of an unquestionably qualified expert on infectious diseases and infection control, who specialized in "the medical condition that is the subject of the claim" and had "prior experience treating similar patients...." Section 766.102(5)(a)1, Fla. Stat. (2009).

This is not a case where a plaintiff filed a malpractice suit willy-nilly without an expert validating the basis for the claim under oath. This is not a case based upon

an expert being rejected at trial after being subjected to a vigorous voir dire before testifying, or a case challenging a directed verdict entered after an expert later deemed unqualified has testified in support of a claim. "[T]he medical malpractice statutory scheme . . . '[was] 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.'" *Kukral v. Mekras*, 679 So.2d 278, 284 (1996) (quoting *Ragoonanan v. Associates in Obstetrics & Gynecology*, 619 So.2d 482, 484 (Fla. 2d DCA 1993)). "The courts *shall be open* to *every person* for redress *of any injury*...." Art. I, § 21, Fla. Const. This Court should conclude that, at this stage, Ms. Edwards has supplied a verified opinion from an expert in a "similar specialty" with experience with Nocardia Puris sufficient to unlock the courthouse doors at the outset of her claim, as the Access to Courts clause plainly requires.

D. The Respondents Incorrectly Conclude that Dr. Currie Is not in a "Similar Specialty" and Misapprehend What an Evidentiary Hearing Requires

Like the majority below, in their Answer Brief, the Respondents basically assert that, because Dr. Currie is not an ophthalmologist, he is not in a "similar specialty" to Dr. Epstein, falling victim to the same faulty reasoning employed by the

majority below.[7] The Respondents' basis for doing this demonstrates the error of their ways in claiming that an evidentiary hearing *was* conducted below. They argue

> [n]either *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.

Respondents' Answer Brief, at 12. They assert that "the evidence reviewed included *the proffered affidavit* of an infectious disease doctor *clearly not of the same medical specialty as defendant*," *id.*, that "both the trial court and the court below considered *Dr. Currie's affidavit, which was conclusory at best*," *id.* at 13, and that "Dr. Currie . . . *did not explain* how he could credibly comment on the standard of care of a Board Certified Ophthalmologist performing care within his own specialty." *Id.* at 14.

What Dr. Currie did assert in his verified opinion, however, was more than sufficient to commence the presuit process. He averred that "I am familiar with the prevailing professional standard of care required and applicable to the facts and circumstances of this case" (Pet.'s App., at 10 ¶ 2) and that

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[7]"Simply put, the infectious disease doctor is not an eye surgeon nor is the ophthalmologist an infectious disease doctor," *Edwards v. Sunrise Ophth. Asc, LLC*, 134 So.3d 1056, 1059 (Fla. 4th DCA 2013), and "[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." *Id.*

> 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*.

(Pet.'s App., at 11 ¶ 6) Such is all that is required to be set forth in a verified opinion.[8] Although Ms. Edwards rightly contends (as the dissent below concluded) that Dr. Currie's verified opinion and curriculum vitae satisfied the requirement to demonstrate that he was in a similar specialty with regard to a claim arising out of the failure to prevent an infectious disease, for the trial court to rule otherwise, in the least an evidentiary hearing was required. *Williams v. Oken*, 62 So.3d 1129 (Fla. 2011); *Holden v. Bober*, 39 So.3d 396 (Fla. 2d DCA 2010).

An evidentiary hearing did not take place below. Ms. Edwards' counsel argued that a summary judgment-type or evidentiary hearing was required to take place *after* Dr. Currie's deposition was taken and could be presented to the Court (Pet.'s App., at 116, 120, 126), relying in part on *Holden*, correctly describing that case as stating "that the trial court failed to consider via an evidentiary hearing whether the

[8] *See, e.g.,* Gonzalez v. Tracy, 994 So.2d 402 (Fla. 3d DCA 2008) (minor arguable deficiency in expert's verified opinion as to his qualifications insufficient to justify dismissal in light of access to court's clause) (citations omitted); *Davis v. Orlando Reg. Med. Ctr.*, 654 So.2d 664, 655 (Fla. 5th DCA 1995) ("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").

plaintiff's claim rested on a reasonable basis...." (Pet.'s App., at 126) Certainly at the hearing requested, Dr. Currie's sworn testimony would be presented. (Pet.'s App., at 120, 126) So it rings hollow for the Respondents to claim that Dr. Currie's mere affidavit and curriculum vitae (which were prepared to attend the notice of intent, not to be the sole evidence of his qualifications and experience in a "similar specialty" in the litigation to follow) were all that could and should be considered at the non-evidentiary hearing on their a motion to dismiss challenging his expertise.

"Obviously, an evidentiary hearing involves taking evidence. *Neither the submission of affidavits nor argument of counsel* is sufficient to constitute an evidentiary hearing." *Sperdute v. Household Realty Corp.*, 585 So.2d 1168, 1169 (Fla. 4th DCA 1991). Ms. Edwards requested a hearing where evidence could be presented, including the Dr. Currie's deposition, the trial court denied it, and the decision below affirmed. Such rulings conflict with this Court's decision in *Williams*, 62 So.3d at 1137, the Second District's decision in *Holden*, 39 So.3d at 403, and the Third District's decision in *Bery v. Fahel*, 88 So.3d 236 (Fla. 3d DCA 2011).

Respectfully, the Respondents' arguments should be rejected and this Court should either conclude that Dr. Currie "specialize[d] in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim [Nocardia Puris]" as required by § 766.102(5)(a)1, Fla. Stat.

(2009), or quash the decision below with instructions to remand for a proper evidentiary hearing on that subject.

II. ARGUMENT IN RESPONSE TO *AMICUS CURIAE* BRIEF FILED BY THE AMERICAN MEDICAL ASSOCIATION ("AMA") AND THE FLORIDA MEDICAL ASSOCIATION ("FMA")

The AMA and the FMA have filed a brief as *amici* in support of the Respondents (hereafter "AMA/FMA Brief") which apparently assumes that allowing Ms. Edwards' lawsuit to go forward, supported in presuit by Dr. Currie's verified opinion, would place our healthcare system in peril. Ms. Edwards suggests that the AMA/FMA Brief goes beyond the proper purpose of such a brief, offering facts from outside the record and wild overstatements. Nonetheless, we shall briefly respond to the assertions therein, to the extent not already addressed by Ms. Edwards.

A. The AMA/FMA Brief Improperly Argues Facts Outside the Record

While *amici* briefs can undoubtedly be helpful to courts considering matters that "are of general public interest" or present "difficult issues," *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So.2d 522, 523 (Fla. 4th DCA 1996) (citation omitted)), the AMA/FMA Brief here goes beyond what should be allowed. As the Fourth District recognized, "amicus briefs should not argue the facts in issue." *Id.* (citation omitted).

Respondents' *amici* add facts outside the record which purportedly support the Respondents' position and the rulings below, by describing the standards for board

certification for ophthalmologists, AMA/FMA Brief, at 3-4, and infectious disease specialists, *id*. at 6, and how those standards support the decision below. To serve as any basis for decision, however, those standards should have been filed in the trial court, or should be placed in the record at the evidentiary hearing Ms. Edwards contends is required on remand. As one Justice of this Court has stated,

> [i]t is a well established principle of law that appellate review is limited to the record on appeal.... The matters relied on by the dissent were first introduced to these proceedings through an improper appendix to an amicus curiae brief (which violated appellate rules by attempting to generate new issues) filed with this Court, well after the decision of the Second District was final.

State v. Stang, 41 So.3d 206, 206-07 (Fla. 2010) (Lewis, J., concurring) (citations omitted). As such, Ms. Edwards objects to the consideration of these improperly injected standards and their late inclusion in this proceeding by Respondents' *amici*.

B. The *Amici* Confuse Presuit with Trial

Respondents' *amici* argue that

> Allowing such testimony to be the basis for liability, even when the treating physician has met his or her standard of care, contradicts the statutory requirement the injury be caused "by a breach of the prevailing professional standard of care." *See* § 766.102(2)(b), Fla. Stat. (2009). The courtroom . . . should reflect the reality of the education and training involved in the practice of specialized medicine....

AMA/FMA Brief, at 9-10. This argument puts the cart before the horse, presupposing that "the treating physician has met his or her standard of care," *id*. at

9, before anyone has had their day in court or trial by jury.

The issue in this case is whether Dr. Currie, an undisputed expert on infectious disease and infection control, was qualified to verify, under oath, that there were "reasonable grounds" to support a claim that Dr. Epstein departed from the standard of care, § 766.203(2), Fla. Stat. (2009), with regard to the "*condition* that is the subject of the claim"[9] in order to commence the presuit process and then file a lawsuit. § 766.102(5)(a)1, Fla. Stat. (2009). This case does not present the question about whether a trial court will ultimately find an expert qualified to testify before the jury. A ruling that a physician who is or has been the Director of Infection Control at three hospitals is never in a "similar specialty" and is always unqualified to opine as to proper sterile techniques in the surgical theater for purposes of a presuit verified opinion, without even allowing his credentials and experience (for example, in setting or approving sterilization protocols or facility policies and procedures applicable to all surgeries) to be fully laid before a court in an evidentiary hearing, surely offends Florida's constitutional right of access to courts. Art. I, § 21, Fla. Const.

C. "Expert Shopping" and Alleged Excessive, Costly Malpractice Claims

Finally, Respondents' *amici* label plaintiffs' experts as "hired guns",

[9]Contrary to Respondents' *amici*'s argument, the statute does not state that the expert must be experienced in the "service" provided that led to the malpractice claim. *See* AMA/FMA Brief, at 7-8.

AMA/FMA Brief, at 10, evidently believing malpractice defendants have cornered the market on truthful expert testimony, and that the very financial biases they assail never exist in defense experts. Apparently they believe that Dr. Currie was bought after Ms. Edwards' counsel went "expert shopping", *id*. at 10-11, though the AMA itself apparently uses him as an Ad Hoc Reviewer in its own medical journal (Pet.'s App., at 15), and thus has presumably satisfied itself with his credentials and credibility. They argue that according to a study (done by the AMA itself), "nearly two-thirds of medical negligence claims" that are brought are never fully pursued, and the average cost of defending a claim is $50,000. AMA/FMA Brief, at 16-17.

Respondents' *amici* overlook that according to the National Academies, medical malpractice is a substantial problem in our society, resulting in between 44,000 and 98,000 deaths per year, at a cost estimated to be between $17 billion and $29 billion nationally.[10] Yet studies show that only between 3 percent and 20 percent of malpractice victims bring claims[11] (meaning 80 to 97 percent of malpractice goes unlitigated and uncompensated). As concluded by one author and law professor,

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[10]"Executive Summary," *To Err Is Human: Building a Safer Health System*, Washington, DC: The National Academies Press (2000) at 1-2 (citation omitted) (available at http://www.nap.edu/openbook.php?record_id=9728&page=1).

[11]Baker, Tom, *The Medical Malpractice Myth*, Chicago, IL: The University of Chicago Press (2005), at 69 (discussing various studies).

"[w]e have an epidemic of malpractice, not an epidemic of malpractice litigation. *The vast majority of eligible patients do not sue*."[12] And of course this Court recently examined the conflicting claims that there is a never-ending malpractice crisis in this State. *Estate of McCall v. U.S.*, 134 So.3d 894 (Fla. 2014). So we respectfully submit that, in light of the language of the statute at issue, arguments that the alleged cost and prevalence of malpractice claims justify denying Ms. Edwards her day in court just because her presuit expert is not an ophthalmologist cannot carry the day.

CONCLUSION

Respectfully, this Court should disapprove the decision below and remand for the Petitioner's action to proceed forward in the trial court. In the alternative, the Petitioner respectfully requests that the Court disapprove the decision below, with instructions that the case 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 v. Bober*, 39 So.3d 396 (Fla. 2d DCA 2010), and *Bery v. Fahel*, 88 So.3d 236 (Fla. 3d DCA 2011).

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[12] *Id*. at 70.

Respectfully submitted,

LINCOLN J. CONNOLLY
TRIALS & APPEALS, P.A.
Co-Counsel for the Petitioner,
MARIANNE EDWARDS
P.O. Box 330644
Miami, FL 33233-0644
(305) 798-5515
Lincoln@ConnollyJustice.com
Michelle@ConnollyJustice.com

By: s/Lincoln J. Connolly
Lincoln J. Connolly
Fla. Bar No.: 0084719

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served through the Florida Courts ePortal on October 20, 2014 on:

1. Rodrigo L. Saavedra, Jr., Esq., RODRIGO L. SAAVEDRA, JR., P.A., Counsel for the Petitioner, Marianne Edwards, 3000 North Federal Highway, Building Two, Suite 200, Fort Lauderdale, FL 33306 (rsaavedra@rsaavedralaw.com; nancy@rsaavedralaw.com);

2. Burt E. Redlus, Esq., LAW OFFICES OF BURT E. REDLUS, P.A., Co-Counsel for Defendants, Epstein and Fort Lauderdale Eye Institute, 19 West Flagler Street, #711, Miami, FL 33130 (ber@redluspa.com; nr@redluspa.com);

3. John D. Kelner, Esq., Co-Counsel for Defendants, Epstein and Fort Lauderdale Eye Institute, 4000 Hollywood Boulevard, #455-S, Hollywood, FL 33021 (john@jkelnerlaw.com; andrea@jkelnerlaw.com);

4. Kevin M. Vannatta, Esq., LEWIS BRISBOIS BISGAARD & SMITH LLP, Counsel for Sunrise Ophthalmology, 110 S.E. 6th Street, Suite 2600, Fort Lauderdale, FL 33301 (vannatta@lbbslaw.com; ddouglas@lbbslaw.com; mbarbuscia@lbbslaw.com); and

5. Iain Kennedy, Esq, SHOOK HARDY & BACON L.L.P., Counsel for Respondents' *Amici Curiae*, AMA and FMA, 201 South Biscayne Boulevard, Miami, FL 33131 (ikennedy@shb.com).

s/Lincoln J. Connolly
Lincoln J. Connolly
Fla. Bar No.: 0084719

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).

s/Lincoln J. Connolly
Lincoln J. Connolly
Fla. Bar No.: 0084719