IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

NASIM S.KHAN, M.D.; LADIES FIRST: COASTAL WOMEN'S HEALTHCARE,

Petitioners,

Case No. 10-2935
L.T. Case No. 2009-CA 002824

v.

PHYLLIS LEGG, individually AND CHRIS LEGG, her husband, BAPTIST HOSPITAL, INC; MARY JANE BENSON, M.D., and MARY JANE BENSON, M.D., P.A.,

Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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I. CERTIORARI REVIEW SHOULD BE DECLINED

In Baptist Medical Center v. Rhodin, ---So 3d---, 2010 WL 29795380 (Fla. 1st DCA July 16, 2010), this Court addressed the proper basis for Certiorari jurisdiction when confronted with issues regarding compliance with the presuit requirements of Chapter 766, F.S. In the lower tribunal, the Trial Court's Order Denying Petitioners' Motion to Dismiss complied with the procedural requirements of Chapter 766, F.S. In complying with the procedural requirements of the presuit statutes the Trial Court has afforded Petitioners the rights granted under the presuit statutes to a threshold screening that there is a reasonable basis for this claim of medical negligence. It is the Petitioners' burden to demonstrate entitlement to the extraordinary relief sought. As stated in Baptist Medical Center, certiorari is not so broad as to encompass review of the evidence regarding the sufficiency of counsel's pre-suit investigation. See also, Simeon, Inc. v. Cox, 671 So.2d 158, 160 (Fla. 1996). In this case, certiorari review is not appropriate because the Trial Court's order satisfied the mandatory presuit procedures of Chapter 766, F.S. Kukral v. Mekras, 679 So 2d 278, 283 (Fla.1996); Oken v. Williams, 23 So 3d 140 (Fla. 1st DCA 2009); Lakeland Reg'l Med. Ctr. V. Allen, 944 So. 2d 541, 543 (Fla. 2nd DCA 2006); and Parkway Bank v. Fort Myers Armature Works, Inc. 658 So 2d 646, 649 (Fla. 2nd DCA 1995). Once it is

determined that the Trial Court considered all of the evidence presented, including the Notice of Intent, the presuit affidavit, the supplemental affidavit, and all other arguments and allegations in the light most favorable to Respondents, the Petition for Writ of Certiorari must be denied.

In St. Mary's Hospital v. Bell, 785 So. 2d 1261 (Fla.4th DCA 2001), a petition for Writ of Certiorari was dismissed by the Fourth DCA once it was determined that the procedural requirements of Chapter 766, F.S. had been followed by the Trial Court. The Fourth DCA held that certiorari does not lie for appellate courts to reweigh the evidence presented concerning compliance with the presuit statutory requirements. Compliance with the medical malpractice presuit requirements was found to be analogous to the procedural requirements for claiming punitive damages under Section 768.72, F.S. Ortega v. Silva, 712 So 2d 1148 (Fla. 4th DCA 1998). Certiorari jurisdiction is appropriate to review whether the Trial Court has conformed to the procedural requirements but not so broad as to encompass review of the sufficiency of the evidence when the trial judge has followed the procedural requirements of the statute. Simeon, Inc v. Cox, 671 So. 2d 158 (Fla. 1996); St. Mary's Hospital, id.; Abbey v. Patrick, 16 So. 3d 1051 (Fla. 1st DCA 2009); and Baptist Medical Center, id.

Certiorari review is available only in limited circumstances for review of a non-final order. Petitioners seek review of a non-final order denying their Motion

to Dismiss. In order to grant the Writ of Certiorari, this court must determine that the order denying Petitioners' Motion to Dismiss departed from the essential requirements of law and thus caused material injury to the Petitioners, effectively leaving Petitioners with no adequate remedy on appeal. Brooks v. Owen, 97 So. 2d 693(Fla.1957); Kilgore v Bird, 6 So. 2d 541 (Fla. 142).

The Trial Court made a proper ruling based upon the record, thus the denial of Petitioners' Motion to Dismiss was not a departure from the essential requirements of law. The Petition for Writ of Certiorari must be denied because Petitioners have failed to meet their burden of demonstrating that the Trial Court committed error by finding that Respondents' presuit affidavit met the requirements of Section 766.203(2), F.S.

II. ARGUMENT

Assuming arguendo that this Court decides to look beyond the procedural requirements, the Trial Court properly determined that Respondents' presuit expert was a qualified medical expert for this particular case. The Florida Medical Malpractice Act creates certain obligations that must be met by a claimant before filing a complaint for medical malpractice. Section 766.203(2), F.S. requires the submission, with the Notice of Intent to Initiate Litigation, of a verified written medical expert opinion from a medical expert as defined in Section 766.202(6),

F.S. The question presented to the Trial Court below was whether Respondents' presuit affidavit was from a qualified medical expert.

In order to determine whether the medical expert utilized by Respondents met the statutory qualifications, it is necessary to look to Section 766.202(6), F.S. for the definition of "Medical expert". That definition states as follows:

> 766.202(6), F.S.- "Medical expert" means a person duly and regularly engaged in the practice of his or her profession who holds a health care professional degree from a university or college and meets the requirements of an expert witness as set fort in Section 766.102.

In order to determine whether Respondent's presuit affidavit was obtained from a qualified medical expert, the trial Court ultimately considered Section 766.102(5)(a), F.S. which provides as follows:

Section 766.102, F.S.-

> (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;***
> (emphasis added)

The Trial Court had indicated that it was unable to determine from the face of the presuit affidavit whether Respondents' medical expert was a similar specialist to the defendant who dealt with the evaluation, diagnosis, or treatment of the medical condition that is the subject of the particular claim asserted. A supplemental affidavit was obtained, which clearly demonstrates that Respondents' presuit expert meets the statutory requirements. The Trial Court relied upon all of the evidence presented to determine that the requirements of Chapter 766, F.S. were followed regarding the preliminary investigation by Respondents.

This Court has recently addressed this very issue in Oken, M.D. v. Williams, 23 So. 3d 140 (Fla. 1st DCA 2009). In Oken, it was held that a family medicine physician or emergency medicine physician was not a similar specialist to the Defendant cardiologist. This Court looked to the specific subspecialties of the plaintiff's expert and concluded that the specialties of family medicine and emergency medicine provided no focused training in cardiology. Indeed, this Court concluded that a family medicine physician is the classic example of a generalist. Furthermore, this Court specifically found that the defendant demonstrated a higher level of competency by receiving the specialty certification in cardiology. In fact, in Oken, it was the lack of specific focused education,

training, and experience to provide the specialized diagnosis and treatment needed by patients suffering from cardiac complaints which failed to qualify the presuit expert for the specific allegations in that case. This Court did recognize that the presuit expert would be qualified and the affidavit would be appropriate if the allegations concerned improper consultation or failure to consult a cardiologist, because that is what the presuit expert was qualified to address. Thus an expert may be qualified with regard to certain allegations, but not qualified as to other allegations.

In the case at bar, Respondents' presuit expert is a Colon-Rectal specialist. The allegations of negligence against the Petitioner involve the failure to properly diagnose and treat "C. diff. colitis". It is alleged that the defendant ordered a specific test, which revealed a positive result for C. diff. In spite of the positive finding on the test ordered by the Defendant, the patient was ordered by the Defendant to be discharged from the hospital. The diagnosis and treatment of C. diff. colitis is addressed by both OB-GYNs and Colon-Rectal specialists. Unlike Oken, Respondents are not utilizing a presuit expert who is a generalist to substantiate the claim against a specialist. In fact, Respondents' presuit expert has a focused clinical practice in which he specifically diagnoses and treats patients with C. diff. colitis.

The Trial Court below conducted an appropriate inquiry into the specific allegations against the Defendant, determined the specific specialty practiced by the Defendant, considered the medical condition involved herein, assessed the background, training, education and experience of Respondents' presuit expert and made an appropriate determination that Respondents' presuit expert specialized in a similar specialty that included the evaluation, diagnosis or treatment of the medical condition that is the subject of this claim. The Trial Court correctly concluded that Respondents' presuit expert met all of the statutory requirements pursuant to Section 766.102(5)(a), F.S.

Respondents do not suggest that all Colon-Rectal specialists are qualified to render expert opinions regarding all medical conditions involving claims of medical negligence against OB-GYNs. Indeed, Gynecologists are also qualified to assess patients with breast lumps, by way of example. Respondents would not utilize a Colon-Rectal specialist for review of a claim against a Gynecologist involving allegations of failure to diagnose and treat a lump in the breast which was determined to be breast cancer. There would certainly be other specialists; such as Oncology, that are not Board Certified in OB-GYN, who would be qualified to give the requisite opinion in such a claim involving breast cancer, but likely not a Colon-Rectal specialist. In order to determine whether a particular presuit affidavit meets the statutory requirements of Section 766.203(2), F.S. the

Trial Court must necessarily conduct a certain level of inquiry. The Trial Court must allow for an evidentiary hearing if the qualifications of the presuit expert are brought into question. The submission of a supplemental affidavit does not negate the fact that the Notice of Intent with the corroborating affidavit was served timely. Petitioners' argument that there was a second affidavit that was served after the expiration of the Statute of limitations is without merit. Respondents could have filed a deposition transcript of Respondents' presuit expert or presented live testimony at an evidentiary hearing from Respondents' presuit expert, Dr. Stephen Cohen, to substantiate the fact that he is a Colon-Rectal specialist, which is a similar specialty to the defendant and that his similar specialty includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and that he has prior experience treating similar patients.

Over the years there have been several opinions accepting the qualifications of a similar specialist to testify at trial on the standard of care of the particular defendant. A board-certified general surgeon has been held to be qualified to testify against a board-certified OB-GYN on issues involving surgical consent. Loadholtz v. Andrews, 855 So.2d 1241 (Fla 1st DCA 2003). A pediatrician has been deemed qualified to testify against a pediatric neurosurgeon regarding a spinal tap. Myron v. S. Broward Hosp. Dist., 703 So. 2d 527 (Fla. 4th DCA 1997). A gynecologist has been accepted as an expert for standard of care testimony

against a surgeon with regard to abdominal hysterectomy. Wright v. Schulte, 441 So. 2d 660 (Fla. 2nd DCA 1983). A pediatrician was permitted to testify regarding the applicable standard of care for a gastroenterologist. Bratt v. Laskas, 845 So. 2d 964 (Fla 4th DCA 2003). A critical care and trauma specialist was qualified as an expert against an Emergency Department physician. Fuentes v. Spirer, 766 So 2d 1081 (Fla 3rd DCA 2000). An oncologist was qualified to testify as a similar health care provider to a surgeon. Meyer v. Caruso, 731 So. 2d 118 (Fla 4th DCA 1999). An Internal Medicine physician who specialized in medical oncology was held to be qualified as an expert against a Family Practice physician in a claim involving misdiagnosis of colon cancer. Padgett v. Sims, 701 So. 2d 357 (Fla 1st DCA 1997). In each of these cases the Trial Court had to determine if the particular expert was qualified under the specific circumstances and allegations presented. In considering whether the presuit expert is a similar specialist to the prospective defendant, it should be the burden of the moving party to demonstrate that the presuit expert does not qualify as a similar specialist. But even if that burden is placed on the non-movant, there must be an opportunity to demonstrate that the presuit expert qualifies as a similar health care provider for the specific medical condition involved. Basic principles of due process mandate a procedure that permits the trial court to be furnished with evidence to substantiate the similarities between the presuit expert and the defendant. Such evidence should relate back to

the timely served Notice of Intent and corroborating affidavit. To hold otherwise would deny Respondents their constitutionally guaranteed access to the Courts. The legislature certainly did not impose such a strict pleading requirement in the presuit statutes. The Courts must not interpret these presuit statutes in a restrictive manner, but rather must apply a liberal interpretation that permits claims to be addressed on their merits, while filtering out any frivolous claims. Fort Walton Beach Medical Center v. Dingler, 697 So. 2d 574 (Fla. 1st DCA 1997)

While it is true that the presuit requirements are conditions precedent to malpractice action, the presuit statutes are not intended to deny access to the courts on the basis of technicalities. Arcker v. Maddux, 645 So. 2d 544(Fla. 1st DCA 1994). The medical malpractice presuit statutes must be construed in a manner that favors access to courts. Patry v. Capps, 633 So. 2d 9, 13 (Fla. 1994)

The presuit statutes are not meant to be used as preemptive swords that deny access to the Courts. Kukral v. Mekrus, 679 So 2d 278(Fla. 1896); Michael v. Med. Staffing Network, Inc., 947 So. 2d 614 (Fla. 3d DCA 2007). It is illogical to suggest that the presuit affidavit must meet certain rigid pleading requirements without any opportunity to demonstrate that the presuit expert meets the qualifications necessary if called into question. The supplemental affidavit filed by Respondents clearly demonstrated that Respondents conducted the requisite preliminary investigation as required by Section 766.203(2), F.S. That is the

purpose of providing a corroborating affidavit from a qualified expert with the Notice of Intent. Petitioners suggest that the presuit affidavit is legally insufficient because it did not spell out each and every criteria enunciated in Section 766. 102(5)(a), F.S. Such a strict reading of this statutory provision is not in keeping with the Legislative intent underlying the presuit statutes. The strict interpretation proposed by Petitioners is tantamount to a denial of access to the Courts and a denial of Respondents' constitutional rights to due process.

The Trial Court considered all of the information and evidence presented below and properly concluded that Respondents' presuit expert was a similar medical specialist for the involved medical condition. If there is ever a similar medical specialist to an OB-GYN that is qualified to give an opinion to substantiate a reasonable basis for a claim of medical negligence it is a Colon-Rectal specialist speaking to the issues of diagnosis and treatment of C. diff. colitis.

Section 766.203(2), F.S. establishes a "reasonable" standard for initiating an action for medical negligence. The presuit expert must meet the same qualifications as an expert who will testify at trial, but the opinion for presuit corroboration is purely to demonstrate that the claimant has conducted an investigation which has revealed reasonable grounds to believe the prospective defendant was negligent. The presuit statutes should not be used as a procedural

maze to frustrate access to the Courts, but rather the presuit statutes were intended to promote resolution of claims at an early stage without the necessity of full adversarial proceeding. Unfortunately, the specific legislature intent to reduce the costs associated with medical malpractice claims has been thwarted by the seemingly rigorous requirements of the presuit statutes. The presuit statutes should be interpreted in a way that demonstrates that both claimant and defendant conducted a reasonable investigation in order to eliminate frivolous claims and defenses. Section 766.201(2)(a), F.S. The corroborating affidavit is one method by which the claimant and defendant can provide verification that a reasonable investigation was conducted. In Holden v. Bober, MD, 35 Fla. L. Weekly D1405 (Fla.2nd DCA June 23, 2010) the Second DCA held that the standard for review of a Motion to Dismiss based on non-compliance with the presuit requirements should be similar to the standard that is applied to determine whether a complaint states a cause of action. Accordingly, all factual allegations raised by the claimant are considered to be true and must be construed in the light most favorable to the claimant. The Second DCA contrasted its decision in Holden to this Court's decision in Oken by relying upon the Florida Supreme Court's liberal interpretation of the medical malpractice statutory scheme. This liberal interpretation requires that the evidence and allegations be viewed in a light most favorable to the non-movant to ensure that the procedural requirements for presuit

do not unduly restrict the constitutionally guaranteed access to the courts. See Kukral v. Mekras, 679 So. 2d 278, 284 (Fla. 1996).

Respondents conducted the statutorily mandated preliminary investigation that resulted in a finding that there was a reasonable basis to believe the Petitioners committed medical negligence. There is no evidence to the contrary. The corroborating affidavit was obtained from a Colon-Rectal specialist which is a similar specialty as it pertained to the specific medical condition known as C. diff. colitis. Again there is no evidence to the contrary. The Trial Court properly considered all of the evidence and appropriately concluded that the presuit expert utilized by Respondents met the requirements of Section 766.102(5), F.S.; Section 766.202(6), F.S. and Section 766.203(2), F.S. It is interesting to note that the Petitioners argument would fail if this very true issue had been presented by Motion For Summary Judgment. Wood v. Virgo, 3 So. 3d 430 (Fla. 2nd DCA 2009). Petitioners Motion to Dismiss was brought pursuant to Section 766.206 (1), F.S., which failed to enunciate a standard for review. Therefore, the Court must apply a standard for review that complies with both the legislative intent underlying the presuit statutes and the liberal policy enunciated by The Florida Supreme Court in Kukral.

Petitioners are advocating a stricter pleading standard for the presuit affidavit than what is required. Such a strict pleading standard is not supported by

either the stated legislative intent of Chapter 766, F.S. nor by the Florida Supreme Court. Petitioners admit that Chapter 766 does not define "similar specialty". Accordingly, the Trial Court must determine if the presuit expert is in a similar specialty to the prospective defendant on a case-by-case basis. It is at this point that a reasonable standard must be followed. Petitioners argument that the affidavit itself must recite facts sufficient to establish that the presuit expert is in a similar specialty is not a requirement of the presuit statutes and fails to adhere to the policy enunciated by the Florida Supreme Court in Kukral as well as the legislative intent stated in Section 766.201, F.S.

III. CONCLUSION

The Trial Court must be afforded the opportunity to conduct an evidentiary hearing, taking into consideration all evidence in the light most favorable to the non-movant, in determining whether the presuit expert meets the statutory requirements. In this case, a Colon-Rectal specialist is a similar specialist to an OB-GYN because the medical condition involved is C. diff. colitis, which is commonly treated by both. The standard of care for treating a patient with C. diff. colitis is the same for both specialties. Accordingly, the Trial Court properly accepted Respondents' presuit expert as being a qualified medical expert under the circumstances of the case presented herein. In properly considering all of the evidence and allegations in the light most favorable to Respondents, the Trial

Court did not depart from the essential requirements of the law, thus the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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RONALD S. GILBERT