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Medical Malpractice: A Review of the Presuit Screening Provisions of the Florida Medical Malpractice Act

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I. INTRODUCTION

In 1985, the Florida Legislature recognized that there was an ongoing "insurance crisis." Accordingly, the Comprehensive Medical Malpractice Reform Act of 1985 ("Act") was enacted for the purpose of ensuring that

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the citizens of Florida have available competent and reasonably priced medical services.[1] The legislation intended to ease the threat to the continued availability of high quality care caused by escalating premium costs for professional liability insurance.[2] The Act requires a medical malpractice plaintiff to put a prospective defendant on notice that a suit asserting professional negligence will be filed against the defendant.[3] The notice of intent is a condition precedent to the filing of a lawsuit.[4] This requirement, along with others in the statute, ostensibly promotes settlement of medical malpractice claims and consequently reduces the overall societal cost of health care.

This article is a detailed analysis of the presuit discovery provisions of the Comprehensive Medical Malpractice Reform Act of 1985 and the interpretation and application of the Act by Florida courts. This analysis provides a procedural guidance for practitioners to anticipate how courts may interpret the provisions of the statute in particular cases.

II. STATUTORY REQUIREMENTS

A. *The Notice of Intent to Initiate Litigation*

The Act applies to those causes of action filed after October 1, 1985[5] and requires a claimant to send to prospective defendants a formal, written "notice of intent to initiate litigation" advising them that a suit will be filed against them.[6] As an additional requirement, the notice of intent must be accompanied by a verified, written opinion of a medical expert.[7] The notice of intent is a condition precedent to the institution of a claim.[8] A copy of the notice of intent must be furnished to the Department of Business

1. Comprehensive Medical Malpractice Reform Act of 1985, ch. 85-175, 1985 Fla. Laws 1183 (codified at FLA. STAT. § 766.106 (1985)). In 1988, the Florida Legislature enacted § 766.201 through § 766.212. Ch. 88-1, §§ 48-59, 1988 Fla. Laws 119, 164-73. That same year, the legislature strengthened § 766.106 of the *Florida Statutes*. *See* 1988 Fla. Laws ch. 88-173; 1988 Fla. Laws ch. 88-277. The changes were enacted with the stated intent of providing a plan for the prompt resolution of medical malpractice claims.

2. Ch. 85-175, 1985 Fla. Laws at 1183.

3. FLA. STAT. § 766.106(2) (Supp. 1994).

4. *Id.*; Hospital Corp. of Am. v. Lindberg, 571 So. 2d 446, 448 (Fla. 1990); Pearlstein v. Malunney, 500 So. 2d 585, 586 (Fla. 2d Dist. Ct. App. 1986).

5. FLA. STAT. § 766.106(13) (Supp. 1994).

6. *Id.* § 766.106(2).

7. *Id.* § 766.203(2) (1993).

8. *Id.* § 766.106(2) (Supp. 1994); *see also* Patry v. Capps, 633 So. 2d 9, 11 (Fla. 1994); Williams v. Campagnulo, 588 So. 2d 982, 983 (Fla. 1991).

and Professional Regulation and must include the full name and address of the claimant and any prospective defendants who are health care providers licensed under chapters 458, 459, 460, 461, or 466 of the *Florida Statutes*.[9] The notice must also include the "date and a summary of the occurrence giving rise to the claim[ ] and a description of the injury to the claimant."[10] Once notice has been given, the claimant cannot file suit for ninety days.[11] The purpose of this ninety-day period is to toll the statute of limitations as to all properly notified defendants.[12] Ninety days after the defendant receives the notice of intent letter, the plaintiff may file suit, and has either sixty days or the remainder of the time left under the statute of limitations to file suit, whichever is greater.[13]

B. *Presuit Investigation by the Parties*

Once the prospective defendant receives the notice, the defendant's insurer or self-insurer must review and evaluate the claim utilizing one of the several methods set forth in the statute.[14] Both the claimant and the prospective defendant are required to cooperate with the insurer during this evaluation process.[15] Furthermore, the claimant may be required to appear before a screening panel or medical review committee, or submit to a physical examination.[16] If a party unreasonably fails to comply with this section, the court is justified in dismissing the claims or defenses.[17]

Sometime before the end of the ninety-day period, the insurer or self-insurer must serve the claimant with a response either admitting liability, rejecting the claim, or offering a settlement.[18] This response must then be evaluated by the claimant's attorney who must utilize the procedures set forth in the statute.[19] Should the recipient of a notice letter respond by denying liability, the denial letter must be accompanied by a verified written medical expert opinion.[20]

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9. FLA. STAT. § 766.106(2) (Supp. 1994).
10. *Id.*
11. *Id.* § 766.106(3)(a).
12. *Id.* § 766.106(4).
13. *Id.*; Boyd v. Becker, 627 So. 2d 481, 482 (Fla. 1993); Tanner v. Hartog, 618 So. 2d 177, 182-84 (Fla. 1993).
14. FLA. STAT. § 766.106(3)(a) (Supp. 1994); *Boyd*, 627 So. 2d at 484.
15. FLA. STAT. § 766.106(3)(a) (Supp. 1994).
16. *Id.*
17. *Id.*
18. *Id.* § 766.106(3)(b).
19. *Id.* § 766.106(3)(d).
20. FLA. STAT. § 766.203(3)(b) (1993).

C. *Presuit Investigation by the Court*

1. Dismissal of the Claims and Defenses

The statute permits the court, upon a request by any party, "to determine whether the opposing party's claim or denial rests on a reasonable basis."[21] Section 766.206(2) clearly states that if:

> the notice of intent to initiate litigation mailed by the claimant is not in compliance with the . . . requirements of [the statute], the court shall dismiss the claim, and the person who mailed [the defective] notice of intent, whether the claimant or the claimant's attorney, shall be *personally* liable for all attorney's fees and costs incurred during the investigation and evaluation of the claim.[22]

Similarly, if the court finds that the defendant's response rejecting the claim fails to comply with the reasonable investigation requirements, the court must strike the defendant's response.[23] Thus, the person who mailed the defective response, whether the defendant or the defendant's insurer or attorney, will be held *personally* liable for all attorney's fees and costs.[24]

2. Disciplinary Action

In addition to dismissal of the claim or defense, noncompliance with the statute could result in the matter being submitted to the Florida Bar for disciplinary review. For example, section 766.206(4) provides that if the court finds that an attorney for the claimant mailed a notice of intent without a reasonable investigation, that the attorney filed a medical negligence claim without first mailing the proper notice of intent, or that the defendant's attorney mailed a response rejecting the claim without a reasonable investigation, the court must submit its findings in the matter to the Florida Bar for disciplinary review.[25] Any attorney reported to the Florida Bar three or more times within a five-year period must be reported to a circuit grievance committee acting under the jurisdiction of the Supreme Court of Florida.[26]

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21. *Id.* § 766.206(1).

22. *Id.* § 766.206(2) (emphasis added). These fees and costs include those incurred by the defendant and the defendant's insurer. *Id.*

23. *Id.* § 766.206(3).

24. FLA. STAT. § 766.206(3) (1993).

25. *Id.* § 766.206(4).

26. *Id.*

If the grievance committee finds probable cause to believe that an attorney has violated the presuit investigation requirements, the committee must forward a copy of its findings to the Supreme Court of Florida for review.[27]

The expert who provided the corroborating medical opinion may also be subjected to disciplinary action. The statute provides that if the court finds that the corroborating written medical expert opinion attached to any notice of intent, or to any response rejecting a claim was not based upon reasonable investigation, the court must report the expert to the Division of Medical Quality Assurance.[28] Section 766.206(5)(b) permits the court to refuse to consider the testimony of any expert who has been disqualified three times pursuant to this section.[29]

III. FLORIDA CASE LAW

A. *Presuit Requirements*

There are a number of Florida cases construing the above-mentioned requirements. *Public Health Trust v. Knuck*[30] is the first Florida case that interpreted the Comprehensive Medical Malpractice Reform Act of 1985. In *Knuck*, Blanche Freundlich filed a medical malpractice suit against various defendants, including Public Health Trust of Dade County and Dr. Peritz Scheinberg. The suit was filed on February 10, 1986 as a consequence of allegedly negligent medical care rendered on February 16, 1984. Although Freundlich had provided notice to the hospital prior to filing suit, she failed to give notice to the University of Miami and Dr. Scheinberg. The defendants moved to dismiss the complaint because Freundlich failed to serve the requisite notice of intent to initiate medical malpractice litigation on the University of Miami and Dr. Scheinberg during the

27. *Id.*

28. *Id.* § 766.206(5)(a).

29. FLA. STAT. § 766.206(5)(b) (1993); *see* Faber v. Wrobel, 20 Fla. L. Weekly D1730, D1731 (2d Dist. Ct. App. July 28, 1995) (stating that the standard for disqualification of medical experts is less stringent than the standard for the qualifications required to offer expert testimony at trial). *But see* Winson v. Norman, 658 So. 2d 625, 626 (Fla. 3d Dist. Ct. App. 1995) (holding that a doctor who has not been engaged in the actual practice of medicine for more than ten years and who has limited his professional activities to acting as a professional "litigation expert" was *not* a medical expert qualified to execute a verified medical opinion affidavit as required by the statute).

30. 495 So. 2d 834 (Fla. 3d Dist. Ct. App. 1986).

applicable statute of limitations period.[31] In addition, the plaintiff failed to observe the mandatory ninety-day presuit screening period prior to filing suit,[32] and failed to plead the good faith certificate alleging compliance with statutory requirements.[33]

At the hearing on the motion to dismiss, the plaintiff argued that the filing of the complaint tolled the statute of limitations and requested that the trial court abate the action pending compliance with the neglected statutory requirements. The trial court granted the plaintiff's motion to abate the action pending the necessary compliance with the statute.[34] The defendants filed a petition for writ of prohibition, asking the Third District Court of Appeal to preclude the trial court from reviving the abated action.[35]

The Third District Court of Appeal granted the writ and prohibited the trial court from reviving the action against the University of Miami and Dr. Scheinberg.[36] The court held that the applicable statute of limitations was not tolled because of the plaintiff's failure to serve a notice of intent to initiate litigation according to section 768.57(2) of the *Florida Statutes*.[37] The court denied the writ against Jackson Memorial Hospital since that defendant had received the required notice within the applicable statute of limitations period.[38]

For guidance, the court turned to cases interpreting section 768.28(6), which deals with notice requirements in sovereign immunity cases.[39] The court stated that because the notice of intent to initiate litigation had not been served, the statute of limitations had not been tolled; thus, the limitation period expired soon after the complaint was filed.[40] The court concluded that the statutory period expired before the required notice of intent had been given to the University of Miami and Dr. Scheinberg, and thus, the trial court erred in abating the action as to those defendants.[41]

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31. *Id.* at 835 (citing FLA. STAT. § 768.57(2) (1985)). Under the applicable statute of limitations, an action in negligence must be commenced within four years from the date of the injury. FLA. STAT. § 95.11(4)(b) (1993).

32. *Knuck*, 495 So. 2d at 835 (citing FLA. STAT. § 768.57(3)(a) (1985)).

33. *Id.* (citing FLA. STAT. § 768.495 (1985)).

34. *Id.* at 836.

35. *Id.*

36. *Id.* at 837.

37. *Knuck*, 495 So. 2d at 837.

38. *Id.*

39. *Id.* at 836.

40. *Id.* at 837.

41. *Id.*

The court expressly rejected Freundlich's argument that the notice sent to Jackson Memorial Hospital sufficed as notice to all defendants.[42]

The *Knuck* decision was followed by the Second District Court of Appeal in *Pearlstein v. Malunney*[43] and was cited with approval in *Lynn v. Miller*.[44] In *Pearlstein*, the plaintiff filed a medical malpractice action without complying with the statutory notice provisions of section 768.57 of the *Florida Statutes*.[45] As a result, the defendants filed a motion to dismiss based upon the plaintiff's failure to comply with the mandatory requirements of the statute. The trial court denied the motion, holding that section 768.57 unreasonably discriminates against medical malpractice litigants, deprives litigants of their constitutional right of access to the courts, and is unconstitutionally vague.[46] The trial court ruled that the complaint itself satisfied the notice requirements of the statute and directed the defendants to file an answer to the complaint.[47] The defendants subsequently sought a writ of certiorari in the Second District Court of Appeal.

The Second District Court of Appeal upheld the constitutionality of the prefiling notice requirements.[48] The court recognized that the Act was enacted in response to a perceived crisis in the availability of reasonably priced health care services due to escalating medical malpractice insurance premiums.[49] Further, the court found that a valid legislative purpose exists in ensuring the protection of public health by assuring the availability of adequate medical care.[50] Thus, the district court quashed that portion of the trial court's ruling which directed the defendants to answer the complaint.[51] The court indicated that the notice requirement is a condition precedent to filing suit and held that a complaint filed without notice is "for all intents and purposes, a nonexistent lawsuit."[52]

In *Lynn v. Miller*,[53] the court reiterated that compliance with the requirements of section 768.57 is a condition precedent to maintaining a suit

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42. *Knuck*, 495 So. 2d at 837.
43. 500 So. 2d 585 (Fla. 2d Dist. Ct. App. 1986), *review denied*, 511 So. 2d 299 (Fla. 1987).
44. 498 So. 2d 1011 (Fla. 2d Dist. Ct. App. 1986).
45. *Pearlstein*, 500 So. 2d at 586.
46. *Id.*
47. *Id.* at 586-87.
48. *Id.* at 587.
49. *Id.* at 586.
50. *Pearlstein*, 500 So. 2d at 586.
51. *Id.* at 587.
52. *Id.*
53. 498 So. 2d 1011 (Fla. 2d Dist. Ct. App. 1986).

which must be satisfied within the applicable statute of limitations period.[54] The court explained that if the limitations period has run, a trial court lacks the authority to abate a premature complaint even if, but for the prefiling notice requirements, the complaint would have been timely filed.[55]

The Second District Court of Appeal, however, found that the commencement of a malpractice suit must be distinguished from the existence of a cause of action. For example, in *Malunney v. Pearlstein*,[56] the court found that the purpose of section 768.57 is wholly procedural because it provides potential defendants "with an opportunity to resolve amicably the controversy without the burden of a lawsuit."[57] The court held that section 768.57 has no effect upon the continuing existence of a cause of action.[58] Accordingly, where the initial complaint is dismissed because the plaintiff fails to allege that a notice of intent to initiate litigation was sent to potential defendants, the filing of a new lawsuit properly alleging notice will not be barred by the doctrine of res judicata.[59]

There are a number of other significant cases addressing the required statutory notice. For example, in *Glineck v. Lentz*,[60] the court held that oral notice of intent to initiate medical malpractice litigation is insufficient compliance with the statute.[61] In *Wilkenson v. Golden*,[62] the court held that a patient's letter to a dentist's insurance carrier did not constitute a "notice of intent" where the letter was not sent by certified mail, nor was it accompanied by a corroborating medical report.[63] The statute does not allow for constructive notice, oral notice, or notice by publication.[64] However, there is no need to give a separate notice of intent to a physician by a spouse of the injured person in a loss of consortium claim.[65] This is

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54. *Id.* at 1012.

55. *Id.*

56. 539 So. 2d 493 (Fla. 2d Dist. Ct. App. 1989).

57. *Id.* at 495; *see also* Castro v. Davis, 527 So. 2d 250, 251 (Fla. 2d Dist. Ct. App. 1988).

58. *Malunney*, 539 So. 2d at 496.

59. *Id.* at 495.

60. 524 So. 2d 458 (Fla. 5th Dist. Ct. App.), *review denied*, 534 So. 2d 399 (Fla. 1988).

61. *Id.* at 458.

62. 630 So. 2d 1238 (Fla. 2d Dist. Ct. App. 1994).

63. *Id.* at 1241.

64. FLA. STAT. § 766.106 (Supp. 1994); *see* Ingersoll v. Hoffman, 561 So. 2d 324, 325 (Fla. 3d Dist. Ct. App. 1990), *quashed on other grounds*, 589 So. 2d 223 (Fla. 1991).

65. Chandler v. Novak, 596 So. 2d 749, 751 (Fla. 3d Dist. Ct. App. 1992). *But see* Scarlett v. Public Health Trust, 584 So. 2d 75, 75 (Fla. 3d Dist. Ct. App. 1991) (dismissing the spouse's claim for loss of consortium because the notice only referred to one spouse), *overruled sub nom. Chandler*, 596 So. 2d at 750.

because a derivative action is not a separate and distinct action; it is completely dependent upon the original action filed by the injured spouse.

In *Solimando v. International Medical Centers*,[66] the Second District Court of Appeal addressed the issue of whether a notice of intent sent by regular United States mail, rather than the statutorily specified certified mail, sufficiently complied with the Act. The plaintiff had filed a medical malpractice suit against a number of health care providers. However, the plaintiff's attorney sent the notice of intent to initiate litigation by regular mail rather than by certified mail. As a result, the defendants filed a motion to dismiss the complaint on the ground that the court lacked subject matter jurisdiction. They argued that the plaintiff failed to comply with the mailing provisions of sections 768.57(2) and 768.57(3)(a) which require that the notice of intent be sent by certified mail.[67]

At the hearing on the motion to dismiss, the plaintiff argued that some of the health care providers waived the statutory requirements that the notice be sent by certified mail because the insurance carriers of the health care providers acknowledged receipt of the notice. Furthermore, the carriers had responded with letters indicating that they were reviewing the case to determine whether there was any liability. Thus, the plaintiff argued that the defendants should be estopped from asserting that notice sent by regular mail is insufficient. Although the trial court did not address the issue of waiver or estoppel, it ruled that the court did not have jurisdiction to hear the case.[68] The court only had jurisdiction to grant the motion to dismiss for lack of subject matter jurisdiction due to the plaintiff's failure to comply with the procedure for mailing notice.[69]

On appeal, the Second District Court of Appeal rejected the trial court's ruling in holding that the notice requirements are not jurisdictional and are subject to waiver.[70] The court indicated that the failure to comply with the prelitigation notice requirements of section 768.57 does not deprive the trial court of subject matter jurisdiction.[71] Thus, trial courts may consider the principles of estoppel and waiver in deciding whether to excuse a party for noncompliance.[72] Nevertheless, the court did warn that it is essential for the

66. 544 So. 2d 1031 (Fla. 2d Dist. Ct. App.), *review denied*, 549 So. 2d 1013 (Fla. 1989).

67. *Id.* at 1032.

68. *Id.*

69. *Id.*

70. *Id.* at 1033-34.

71. *Solimando*, 544 So. 2d at 1034-35.

72. *Id.* at 1035.

complaint to allege compliance with the statute.[73] However, in recognizing the difficulty facing a plaintiff who may not be able to frame a complaint invoking the jurisdiction of the court, the court adopted and approved the view that a complaint setting forth factual allegations concerning waiver of the notice requirements of section 768.28(6) satisfies the presuit notice requirements of the statute.[74] Accordingly, a medical malpractice plaintiff's failure to comply with pre-litigation notice requirements does not necessarily deprive a trial court of subject matter jurisdiction. Furthermore, a trial judge may consider principles of estoppel and waiver in deciding whether to excuse the plaintiff for noncompliance.[75]

B. *Amending the Complaint*

The issue of whether a trial court in a medical malpractice action could permit amendment of a complaint so as to allege compliance with the presuit requirements was first addressed in *Lindberg v. Hospital Corp.*[76] In *Lindberg*, the plaintiffs, Kurt and Mary Lindberg, filed a medical malpractice action on April 4, 1986 against the Hospital Corporation of America, Dr. Jamie Alalu, Dr. Robert Liem, and Dr. Bernard Cheong, alleging negligent care and treatment of Kurt Lindberg in April and May of 1984. On the same day the complaint was filed, the plaintiffs sent notices of intent to initiate litigation to each defendant by certified mail. The defendants, however, filed a motion to dismiss the plaintiffs' complaint because the plaintiffs failed to comply with conditions precedent to filing a complaint. Specifically, the defendants alleged that the plaintiffs failed to notify the defendants of their intent to sue within the statute of limitations period. The motion alleged further that the plaintiffs' failure divested the court of its subject matter jurisdiction to hear the case, thus requiring dismissal.[77] At the hearing on the defendants' motion to dismiss, the plaintiffs requested leave to amend their complaint to allege that the notice requirement had been satisfied. The trial court dismissed the cause of action, and refused to grant the plaintiffs' leave to amend.[78] The plaintiffs appealed.

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73. *Id.*

74. *Id.* (citing Bryant v. Duval County Hosp. Auth., 502 So. 2d 459, 462-63 (Fla. 1st Dist. Ct. App. 1986), *review denied*, 511 So. 2d 998 (Fla. 1987)).

75. *Bryant*, 502 So. 2d at 462.

76. 545 So. 2d 1384 (Fla. 4th Dist. Ct. App. 1989).

77. *Id.* at 1384-85.

78. *Id.* at 1385.

In reversing the trial court's dismissal of the complaint, the Fourth District Court of Appeal held that the statute of limitations had been tolled because notice had been given within the statutory period.[79] Thus, the trial court should have permitted the plaintiff to amend the complaint so as to allege compliance with the statutory prerequisites.[80]

In reaching this conclusion, the court relied on *Holding Electric, Inc. v. Roberts*,[81] which held that under section 713.06(3)(d)(1), delivery of a contractor's affidavit is not jurisdictional, although it is a prerequisite to maintaining the action and must be completed within the statutory limitation period.[82] Therefore, the trial court has authority to allow the plaintiffs to amend the complaint provided that the notice is given within the appropriate statute of limitations period.[83] However, because the Fourth District Court of Appeal acknowledged that its holding directly conflicts with *Pearlstein*[84] and *Malunney*[85] it certified the following question to the Supreme Court of Florida:

> IS THE FAILURE TO FOLLOW THE PRE-SUIT SCREENING PROCESS OF SECTION 768.57, FLORIDA STATUTES, A FATAL JURISDICTIONAL DEFECT OR MAY IT BE CORRECTED BY FOLLOWING THE PROCEDURE SUBSEQUENT TO FILING THE COMPLAINT SO LONG AS THE NOTICE OF INTENT TO LITIGATE IS SERVED WITHIN THE STATUTORY LIMITATIONS PERIOD?[86]

The supreme court answered the certified question in *Hospital Corp. of America v. Lindberg*.[87] The court held that "in medical malpractice actions, if a presuit notice is served at the same time [the] complaint is filed, the complaint is subject to dismissal with leave to amend."[88] The court held further that "[t]he plaintiff may subsequently file an amended complaint asserting compliance with the presuit notice and screening requirements of

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79. *Id.* at 1388.
80. *Id.*
81. 530 So. 2d 301 (Fla. 1988).
82. *Lindberg*, 545 So. 2d at 1388 (citing *Roberts*, 530 So. 2d at 303).
83. *Id.*
84. 500 So. 2d 585 (Fla. 2d Dist. Ct. App. 1986), *review denied*, 511 So. 2d 299 (Fla. 1987).
85. 539 So. 2d 493 (Fla. 2d Dist. Ct. App.), *review denied*, 547 So. 2d 1210 (Fla. 1989).
86. *Lindberg*, 545 So. 2d at 1388.
87. 571 So. 2d 446 (Fla. 1990).
88. *Id.* at 449.

section 768.57 and the presuit investigation and certification requirements of section 768.495(1)."[89] However, practitioners in the field of medical malpractice should note that failure to timely file the presuit notice within the statute of limitations period will require dismissal of the complaint.[90]

In *Southern Neurosurgical Associates, P.A., v. Fine*,[91] the court held that where the limitation period has not yet run, a presuit notice served simultaneously with the filing of the complaint will cause the complaint to be dismissed with leave to amend.[92] The plaintiff may then file an amended complaint alleging compliance with presuit notice and screening requirements.[93] However, if the statutory period for initiating the suit has run before the plaintiff satisfies the presuit notice or screening requirements, the trial court will be divested of subject matter jurisdiction.[94]

C. *The Mode of Service*

The Supreme Court of Florida, in *Patry v. Capps*,[95] answered a certified question regarding whether the certified mail requirement for the notice of intent letter is a substantive element of the statute or a procedural one which can be disregarded by the trial court once the defendant receives actual written notice in a timely manner that does not result in any prejudice.[96] In *Patry*, a medical malpractice action was filed against Dr. William Capps for negligence in delivering the Patrys' child by caesarean section. The trial court dismissed the action because the plaintiffs failed to comply with the mode of service required in the statutes.[97] Dr. Capps was served with the Patrys' intent to initiate litigation by hand delivery rather than by certified mail. The district court relied on *Solimando* and *Glineck* in affirming the trial court's dismissal.[98]

In deciding whether strict compliance with the mode of service is mandated, the Supreme Court of Florida reviewed the purpose behind the

89. *Id.*

90. *See* Miami Physical Therapy Assocs. v. Savage, 632 So. 2d 114 (Fla. 3d Dist. Ct. App. 1994).

91. 591 So. 2d 252 (Fla. 4th Dist. Ct. App. 1991).

92. *Id.* at 254-55.

93. *Id.* at 255.

94. *Id.*; *see also* Berry v. Orr, 537 So. 2d 1014, 1015 (Fla. 3d Dist. Ct. App. 1988), *review denied*, 545 So. 2d 1368 (Fla. 1989).

95. 633 So. 2d 9 (Fla. 1994).

96. *Id.* at 10.

97. *Id.*

98. *Id.* at 13.

legislation.[99] The court recognized that the purpose of the Act is to promote the resolution of medical malpractice claims early in the claim process so as to avoid a full, adversarial proceeding.[100] The court concluded that the statutory requirements regarding the mode of service were "merely a technical matter of form that was designed to facilitate the orderly and prompt conduct of the screening and settlement process by establishing a method for verifying significant dates in the process."[101] In this case, because Dr. Capps acknowledged timely receipt of the written notice and was not prejudiced by the method of delivery, the supreme court held that strict compliance with the statute was not required.[102] However, the court emphasized that unlike the general notice requirement in section 768.57(2), the mode of service authorized in the statute does not go to the heart of the presuit notice and screening process.[103] The court disapproved *Solimando* and *Glineck* because they conflicted with the court's opinion.[104]

D. *Health Care Practitioners*

The purpose of the notice provision is not to deny access to the courts,[105] or function as a trap for medical malpractice claimants.[106] Instead, it is designed to resolve claims amicably.[107] In *Weinstock v. Groth*,[108] the Supreme Court of Florida was faced with the issue of whether a clinical psychologist is a "health care provider" for purposes of determining whether a plaintiff must comply with the notice requirements of section 766.106(2). The court held that prospective defendants in medical negligence actions are "health care providers" as defined in section

99. *Id.* at 11.

100. *Patry*, 633 So. 2d at 11-12; *see* Ingersoll v. Hoffman, 589 So. 2d 223, 224 (Fla. 1991) (holding that the Act purports to aid in amicably resolving medical malpractice claims); *see also* Boyd v. Becker, 627 So. 2d 481, 484 (Fla. 1993) (stating that the purpose of the Act is to facilitate the resolution of claims prior to trial); Williams v. Campagnulo, 588 So. 2d 982, 983 (Fla. 1991) (stating that the Act promotes settlement at an early stage).

101. *Patry*, 633 So. 2d at 12.

102. *Id.* at 13.

103. *Id.*

104. *Id.*

105. Weinstock v. Groth, 629 So. 2d 835, 838 (Fla. 1993).

106. Zacker v. Croft, 609 So. 2d 140, 142 (Fla. 4th Dist. Ct. App. 1992), *review denied*, 620 So. 2d 760 (Fla. 1993).

107. Moore v. Winterhaven Hosp., 579 So. 2d 188, 189 (Fla. 2d Dist. Ct. App.) (citing Castro v. Davis, 527 So. 2d 250 (Fla. 2d Dist. Ct. App. 1988)), *review denied*, 589 So. 2d 294 (Fla. 1991).

108. 629 So. 2d 835 (Fla. 1993).

768.50(2)(b) of the *Florida Statutes*.[109] The court also recognized that the clear purpose of the Act is to promote settlement of medical malpractice claims in order to reduce the overall societal cost of health care and *not* to deny access to the courts.[110] Accordingly, the court held that "the proper test for determining whether a defendant is entitled to notice under section 766.106(2) is whether the defendant is directly or vicariously liable under the medical negligence standard of care set forth in section 766.102(1)."[111] Thus, because psychologists are not included in the definition of a "health care provider" in section 766.50(2)(b), the plaintiff was not required to comply with the notice requirement of section 768.106(2).

On the other hand, a potential defendant who does not fall within the definition of a "health care provider" may nevertheless be entitled to statutory notice if the defendant is vicariously liable for the acts of the health care provider.[112] Therefore, the employer of a health care provider may also be a prospective defendant even though the employer does not fall within the statutory definition of a health care provider.[113] Such an employer "may be vicariously liable under the professional medical negligence standard of care . . . when its agent or employee, who is a health care provider, negligently renders medical care or services."[114] For example, in *NME Properties, Inc. v. McCullough*,[115] the court held that a nursing home, which is not defined as a health care provider under the statutes, is entitled to statutory notice of a negligence action against it because the nursing home is vicariously liable for nurses who are both employees and health care providers.[116]

E. *Statute of Limitations*

In *Zacker v. Croft*,[117] a patient who suffered a heart attack after being treated for chest pains brought a medical malpractice suit against his physician. The patient mailed a notice of intent to initiate litigation to the

109. *Id.* at 837.

110. *Id.* at 838 (citing Ragoonanan v. Associates in Obstetrics & Gynecology, 619 So. 2d 482 (Fla. 2d Dist. Ct. App. 1993)).

111. *Id.*

112. *Id.*

113. *Weinstock*, 629 So. 2d at 838.

114. *Id.* (citing NME Properties, Inc. v. McCullough, 590 So. 2d 439 (Fla. 2d Dist. Ct. App. 1991)).

115. 590 So. 2d 439 (Fla. 2d Dist. Ct. App. 1991).

116. *Id.* at 441.

117. 609 So. 2d 140 (Fla. 4th Dist. Ct. App. 1992).

physician's last known address. The issue before the court was whether the patient tolled the statute of limitations by mailing the notice of intent to an incorrect address.[118] The court stated that insofar as the claimants exercised reasonable care and diligence to determine the correct address, the statute of limitations was tolled.[119] The court upheld the tolling of the limitations period in order to comply with the purpose of the notice requirements which is to promote the settlement of medical malpractice claims and not to be used as a trap for medical malpractice plaintiffs.[120]

It is important to note here that, although certain information must be contained in the notice, the statute does not require any particular form or specific wording.[121] The Fifth District Court of Appeal, in *Shands Teaching Hospital & Clinic, Inc. v. Barber*,[122] held that the notice only needs to describe the occurrence of the underlying claim and include "the expert corroborative opinion [which] is designed to prevent the filing of baseless litigation."[123] The court held that the notice of intent letter, coupled with the corroborating affidavit, adequately described the incident which gave rise to the negligence claim.[124] Therefore, the purpose of the statutory notice provision had been fulfilled.[125]

F. *The Ninety-Day Extension*

Another significant aspect of the Act is the provision for an extension of the ninety-day presuit screening period.[126] Under the statute, the plaintiff must conduct a reasonable investigation to determine whether there is a good faith belief that the defendant was negligent in the care and treatment of the plaintiff.[127] The notice of intent must then be served upon prospective defendants within the statutory period prescribed in section 95.11 of the *Florida Statutes*. However, section 766.104 permits an automatic ninety-day extension of the statute of limitations for those who petition the clerk of the court where the suit will be filed and who pay the

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118. *Id.* at 141.
119. *Id.* at 142.
120. *Id.*
121. *See* Tracey v. Barrett, 550 So. 2d 558, 560 (Fla. 2d Dist. Ct. App. 1989).
122. 638 So. 2d 570 (Fla. 5th Dist. Ct. App. 1994) (citing Stebilla v. Musallem, 595 So. 2d 136, 138 (Fla. 5th Dist. Ct. App.), *review denied*, 604 So. 2d 486 (Fla. 1992)).
123. *Id.* at 572.
124. *Id.*
125. *Id.*
126. FLA. STAT. § 766.104(2) (1993).
127. *Id.* § 766.104(1).

filing fee.[128] In *Kalbach v. Day*,[129] the court examined the ninety-day extension for filing medical malpractice actions and determined that it is "in addition to other tolling periods."[130] The court held that the extension begins to run *after* the ninety-day tolling provision under section 766.106 which commences after the notice of intent to initiate litigation has been mailed.[131]

Computation of the ninety-day screening period was addressed by the Supreme Court of Florida in *Boyd v. Becker*.[132] The court reviewed the appellate court's opinion which noted a conflict between *Barron v. Crenshaw*,[133] sections 766.106(3)(c) and 766.106(3)(a) of the *Florida Statutes*, and rule 1.650 of the *Florida Rules of Civil Procedure*.[134]

The court analyzed the statutory provisions involved and adopted the Fifth District Court of Appeal's decision which modified rule 1.650 of the *Florida Rules of Civil Procedure*.[135] In *Boyd*, the defendant, Dr. Becker, performed an operation on Mr. Boyd on June 3, 1988 which resulted in an unexpected scar on Mr. Boyd's neck. On June 2, 1990, Mr. Boyd applied for and received an automatic extension of the statute of limitations pursuant to section 766.104(2). On August 30, 1990, before the expiration of the ninety-day extension period, Mr. Boyd mailed to Dr. Becker a notice of intent to initiate litigation. The notice of intent was received by Dr. Becker on September 3, 1990. On February 1, 1991, Mr. Boyd filed suit against Dr. Becker. However, February 1st was the last day of Mr. Boyd's final extension which was computed from the date that the notice of intent was

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128. *Id.* § 766.104(2). Section 766.104(2) provides that:

> Upon petition to the clerk of the court where the suit will be filed and payment to the clerk of the filing fee, not to exceed $25, established by the chief judge, an automatic 90-day extension of the statute of limitations shall be granted to allow the reasonable investigation required by subsection (1). This period shall be in addition to other tolling periods. No court order is required for the extension to be effective. The provisions of this subsection shall not be deemed to revive a cause of action on which the statute of limitations has run.

Id.

129. 589 So. 2d 448 (Fla. 4th Dist. Ct. App. 1991), *dismissed sub nom.* Frei v. Kalbach, 598 So. 2d 76 (Fla. 1992).

130. *Id.* at 449 (quoting FLA. STAT. § 766.104(2) (1989)).

131. *Id.* at 450.

132. 627 So. 2d 481 (Fla. 1993).

133. 573 So. 2d 17 (Fla. 5th Dist. Ct. App. 1990).

134. *Boyd*, 627 So. 2d at 482.

135. *Id.* at 484 (adopting the holding in *Barron*, 573 So. 2d at 19).

received by Dr. Becker, rather than the date the notice of intent was mailed.[136]

Dr. Becker moved for dismissal arguing that Mr. Boyd's claim was barred by the statute of limitations. In support of his position, Dr. Becker "relied on the language in section 766.106(3)(a) that states: 'No suit may be filed for a period of 90 days after notice [of intent to initiate litigation] is *mailed* to any prospective defendant.'"[137] Dr. Becker argued that because the notice letter was mailed on August 30, 1990, the tolling of the statute of limitations began on that date and ended ninety days later on November 28, 1990. It was submitted that the claim should have been filed on or before January 28, 1991 which includes the sixty-day extension authorized under section 766.106(4). The defense asserted that on November 28, 1990, there was an implicit rejection of plaintiff's claim which triggered the countdown for the sixty-day extension.[138]

In response, however, Mr. Boyd argued that the ninety-day presuit period should be calculated based on the language in section 766.106(3)(c) which states that "[f]ailure of the prospective defendant [or insurer or self-insurer] to reply to the notice within 90 days after *receipt* shall be deemed a final rejection of the claim [for purposes of this section]."[139] Accordingly, Mr. Boyd argued that because the final sixty-day period began on December 3, 1990, ninety days after Dr. Becker received the notice, the lawsuit was timely filed on February 1, 1991.[140]

The court recognized that section 766.106(3)(a) conflicts with section 766.106(3)(c) because the latter provision computes the time period when the notice is *mailed* and the former from the date it is *received*.[141] The court held that the conflict should be resolved in a way that allows the claim

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136. *Id.* at 482-83.

137. *Id.* at 483 (quoting FLA. STAT. § 766.106(3)(a) (1989)) (alteration in original).

138. *Id.* Section 766.106(4) reads as follows:

> The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

FLA. STAT. § 766.106(4) (Supp. 1994).

139. *Boyd*, 627 So. 2d at 483 (quoting FLA. STAT. § 766.106(3)(c) (1989)) (alteration in original).

140. *Id.*

141. *Id* at 483.

to be considered on its merits.[142] To hold otherwise would effectively limit the time the defendant would have to evaluate the merits of the claim, which in turn would defeat the legislative intent of allowing each defendant a full ninety days to evaluate the merits of the claim.[143] The court then modified rule 1.650(d)(2) of the *Florida Rules of Civil Procedure* to conform with the Fifth District Court of Appeal's ruling in *Barron v. Crenshaw*.[144] The *Barron* court ruled that the ninety-day period for filing a response is computed from the date the notice is received.[145] To reconcile the difference, the court deleted the word "mailed" and inserted the word "received."[146]

In *Mason v. Bisogno*,[147] the court determined when the sixty-day provision of the statute begins to run. The court held that rule 1.650(d)(2) is clear and unambiguous in providing that the statute of limitations commences on the *earliest* of several events.[148] For example, commencement of the limitations period would include the claimant's receipt of a written rejection of the claim or the expiration of an extension of the ninety-day presuit period.[149] Therefore, in order to avoid an action from being time barred, the lawsuit must be filed before the earlier of either receipt of a written rejection or the expiration of the ninety-day extension period.

Additionally, the ninety-day period may be extended upon stipulation by the parties, thus tolling the statute of limitations during any such extension.[150] However, practitioners should note that an extension of the ninety-day presuit screening period as to some of the defendants *does not* toll the statute of limitations as to all defendants involved in the medical malpractice action.

G. *Pretrial Settlement*

Included among its many objectives, the Act is also designed to encourage pretrial settlement of meritorious claims in order to avoid

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142. *Id.*

143. *Id.* at 484.

144. *Boyd*, 627 So. 2d at 484; *see* Barron v. Crenshaw, 573 So. 2d 17, 19 (Fla. 5th Dist. Ct. App. 1990).

145. *Barron*, 573 So. 2d at 19.

146. *Boyd*, 627 So. 2d at 484.

147. 633 So. 2d 464 (Fla. 5th Dist. Ct. App.), *review denied*, 641 So. 2d 1345 (Fla. 1994).

148. *Id.* at 467.

149. *Id.*

150. *Id.* (citing FLA. STAT. § 766.104(4) (1991)).

expensive litigation and to anticipate further increases in medical malpractice insurance premiums.[151] The Act requires potential parties to assist an insurer or self-insurer in its investigation of potential claims.[152] The Act also requires potential parties to engage in informal discovery during the presuit investigation period in order to promote and expedite discovery.[153] Section 766.106(6) states that "[u]pon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information available without formal discovery. *Failure to do so is grounds for dismissal of claims or defenses ultimately asserted.*"[154]

In *Morris v. Ergos*,[155] the defendant physician appealed an order striking his defenses for failure to timely respond to presuit discovery requests. In reversing the trial court's order, the Second District Court of Appeal held that the striking of the physician's defenses was too excessive a remedy.[156] The court reasoned that "[w]hile the physician's failure to respond to the discovery questions until after suit was filed was clearly neglectful and it is questionable whether under the circumstances . . . the neglect was excusable, we conclude that the striking of his defenses was too harsh a remedy."[157] The court further stated that "even when a party's conduct in response to discovery requests is 'laggard and slothful,' dismissal of a suit is not necessarily warranted."[158] Thus, dismissal is justified "only in extreme situations for flagrant or aggravated cases of disobedience."[159]

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151. MacDonald v. McIver, 514 So. 2d 1151, 1152 (Fla. 2d Dist. Ct. App. 1987).

152. FLA. STAT. § 766.106(3)(a) (Supp. 1994). The section provides that:

> Each insurer or self-insurer shall investigate the claim in good faith, and both the claimant and prospective defendant shall cooperate with the insurer in good faith. If the insurer requires, a claimant shall appear before a pretrial screening panel or before a medical review committee and shall submit to a physical examination, if required. *Unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses.*

Id. (emphasis added).

153. *Id.* § 766.106(6).

154. *Id.* (emphasis added). These provisions of the Act were tested and upheld in the following cases: Duffy v. Brooker, 614 So. 2d 539 (Fla. 1st Dist. Ct. App.), *review denied*, 624 So. 2d 267 (Fla. 1993); Pinellas Emergency Mental Health Servs. Inc. v. Richardson, 532 So. 2d 60 (Fla. 2d Dist. Ct. App. 1988); and Morris v. Ergos, 532 So. 2d 1360 (Fla. 2d Dist. Ct. App. 1988).

155. 532 So. 2d 1360 (Fla. 2d Dist. Ct. App. 1988).

156. *Id.* at 1361.

157. *Id.*

158. *Id.* (quoting Summit Chase Condominium Ass'n v. Protean Investors, Inc., 421 So. 2d 562, 564 (Fla. 3d Dist. Ct. App. 1982)).

159. *Id.* (quoting *Summit Chase Condominium Ass'n*, 421 So. 2d at 564).

However, in this case, it did not appear that the plaintiffs in *Morris* were prejudiced by the delay or that time was of the essence because they did not file suit for nearly five months after the expiration of the ninety-day period.[160] Therefore, the court reversed and remanded the action for further proceedings.[161]

In *Pinellas Emergency Mental Health Services, Inc. v. Richardson*,[162] the court vacated the trial court's order dismissing the defendant's answer and defenses in a medical malpractice action.[163] A notice of intent to initiate litigation was sent to the defendant, Pinellas Emergency Mental Health Service ("PEMHS"), with an accompanying discovery request, including a series of interrogatories and a request for production. The notice informed PEMHS that either the center or its medical malpractice insurance company was required by law to conduct a good faith investigation of the claim and serve a response to the claimant's attorney within ninety days. However, no response was furnished. The claimant's attorney sent a second discovery request which was also ignored by PEMHS. Suit was subsequently filed against PEMHS and several other defendants. The trial court entered a default judgment against PEMHS for failing to respond to the complaint.[164] The default was ultimately set aside and the court allowed PEMHS to file an answer and affirmative defenses to the complaint.[165] Thereafter, the plaintiffs filed a motion to dismiss the PEMHS's answer and defenses on the basis of the health service's failure to respond to the discovery requests and to follow the procedures contained in the Act. The trial court entered an order dismissing PEMHS's answer and defenses on the basis that, as a matter of law, the court did not have any discretion to disregard the defendant's failure to comply with the statute.[166]

The Second District Court of Appeal reversed the trial court's order.[167] The court stated that the trial court should have exercised its discretion to determine whether PEMHS's failure to make discoverable information available was unreasonable under the statute.[168] The court explained that although the statutory language in section 768.57(3)(a)

160. *Morris*, 532 So. 2d at 1361.
161. *Id.*
162. 532 So. 2d 60 (Fla. 2d Dist. Ct. App. 1988).
163. *Id.* at 61.
164. *Id.*
165. *Id.*
166. *Id.* at 62.
167. *Richardson*, 532 So. 2d at 63.
168. *Id.*

implies mandatory compliance, the legislature, by including the word "unreasonable," intended that compliance be exercised in a *reasonable* manner.[169] Therefore, "subsection (3)(a) should not be interpreted to mean that in every instance where a party does not cooperate with the insurer or self-insured in good faith, the party's claim or defenses must be dismissed *as a matter of law*."[170] Instead, dismissal is available subject to the exercise of discretion by the trial court, after it considers whether the prospective defendant acted unreasonably in failing to perform the statutory duty to cooperate with the presuit investigation.[171]

H. *Reasonable Investigation*

Duffy v. Brooker[172] provides an excellent discussion of the requirements of the statute regarding reasonable investigation. To comply with the intent of the medical malpractice statutes, the notice of intent and the corroborating medical expert opinion, taken together, must provide sufficient information indicating the manner in which the defendant doctor allegedly deviated from the standard of care.[173] Sufficient information is necessary for the defendants to evaluate the merits of the claim. Additionally, the response and the corroborating medical expert opinion must also provide sufficient information to the claimant as to why the defendant doctor did not purportedly commit malpractice.[174]

In *Duffy*, the First District Court of Appeal affirmed the trial court's order imposing sanctions against the defendants for failing to comply with the reasonable investigations provisions of the presuit screening process contained in section 766.106.[175] The plaintiff served a notice of intent

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169. *Id.*

170. *Id.*

171. *Id.*

172. 614 So. 2d 539 (Fla. 1st Dist. Ct. App.), *review denied*, 624 So. 2d 267 (Fla. 1993).

173. *Id.* at 545.

174. *Id.*

175. *Id.* at 546. Section 766.106(1)-(3) provides in relevant part:

> (1) As used in this section:
>
> (a) "Claim for medical malpractice" means a claim arising out of the rendering of, or the failure to render medical care or services.
>
> (b) "Self-insurer" means any self-insurer authorized under s. 627.357 or any uninsured prospective defendant.
>
> (c) "Insurer" includes the Joint Underwriting Association.
>
> (2) After completion of presuit investigation pursuant to s. 766.203 and prior to filing a claim for medical malpractice, a claimant shall notify each

prospective defendant and, if any prospective defendant is a health care provider licensed under chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466, the Department of Business and Professional Regulation by certified mail, return receipt requested, of intent to initiate litigation for medical malpractice. Notice to the Department of Business and Professional Regulation must include the full name and address of the claimant; the full names and any known addresses of any health care providers licensed under chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466 who are prospective defendants identified at the time; the date and a summary of the occurrence giving rise to the claim; and a description of the injury to the claimant. The requirement for notice to the Department of Business and Professional Regulation does not impair the claimant's legal rights or ability to seek relief for his claim, and the notice provided to the department is not discoverable or admissible in any civil or administrative action. The Department of Business and Professional Regulation shall review each incident and determine whether it involved conduct by a licensee which is potentially subject to disciplinary action, in which case the provisions of s. 455.225 apply.

(3)(a) No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant. During the 90-day period, the prospective defendant's insurer or self-insurer shall conduct a review to determine the liability of the defendant. Each insurer or self-insurer shall have a procedure for the prompt investigation, review, and evaluation of claims during the 90-day period. This procedure shall include one or more of the following:

1. Internal review by a duly qualified claims adjuster;

2. Creation of a panel comprised of an attorney knowledgeable in the prosecution or defense of medical malpractice actions, a health care provider trained in the same or similar medical specialty as the prospective defendant, and a duly qualified claims adjuster;

3. A contractual agreement with the state or local professional society of health care providers, which maintains a medical review committee;

4. Any other similar procedure which fairly and promptly evaluates the pending claim.

Each insurer or self-insurer shall investigate the claim in good faith, and both the claimant and prospective defendant shall cooperate with the insurer in good faith. If the insurer requires, a claimant shall appear before a pretrial screening panel or before a medical review committee and shall submit to a physical examination, if required. Unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses. There shall be no civil liability for participation in a pretrial screening procedure if done without intentional fraud.

(b) At or before the end of the 90 days, the insurer or self-insurer shall provide the claimant with a response:

1. Rejecting the claim;

2. Making a settlement offer; or

letter on the defendant alleging that the defendant's negligence caused her husband's death. The notice letter attached a four-page affidavit of a board certified gastroenterologist and internist. The affidavit stated that there were reasonable grounds to believe that the defendant committed malpractice in his care and treatment of the decedent which resulted in his demise. The affidavit described the documents that were reviewed during the investigation and the grounds supporting the opinion.[176] In response to the notice of intent to initiate litigation, Mr. Daniel Stephens, a claims adjuster for the defendant's insurance carrier, sent a letter stating that "[a]fter a thorough review of this matter, we find no basis to support a claim of negligent injury against Dr. Patrick Duffy. Thereby your client's claim is hereby denied. Enclosed is a copy of the required corroborating affidavit to support our position."[177]

Thereafter, the plaintiff filed a complaint against the defendant doctor and filed a Motion Requesting Determination as to Whether [the] Defendant's Denial of Claims Rests on a Reasonable Basis according to section 766.206(1) of the *Florida Statutes*.[178] Prior to the hearing, the defense attorney filed a response to the motion and attached to it a sworn statement

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3. Making an offer of admission of liability and for arbitration on the issue of damages. This offer may be made contingent upon a limit of general damages.

(c) The response shall be delivered to the claimant if not represented by counsel or to the claimant's attorney, by certified mail, return receipt requested. Failure of the prospective defendant or insurer or self-insurer to reply to the notice within 90 days after receipt shall be deemed a final rejection of the claim for purposes of this section.

(d) Within 30 days of receipt of a response by a prospective defendant, insurer, or self-insurer to a claimant represented by an attorney, the attorney shall advise the claimant in writing of the response, including:

1. The exact nature of the response under paragraph (b).

2. The exact terms of any settlement offer, or admission of liability and offer of arbitration on damages.

3. The legal and financial consequences of acceptance or rejection of any settlement offer, or admission of liability, including the provisions of this section.

4. An evaluation of the time and likelihood of ultimate success at trial on the merits of the claimant's action.

5. An estimation of the costs and attorney's fees of proceeding through trial. . . .

FLA. STAT. § 766.106(1)-(3) (Supp. 1994).

176. *Duffy*, 614 So. 2d at 540.

177. *Id.*

178. *Id.*

by an expert. The sworn statement was identical to the statement in the initial response letter, but added the following paragraph that "I have previously rendered said medical opinion on December 11, 1990, and that said expert opinion was inadvertently not sworn and attested to. My opinions have not deviated or changed any from the opinion rendered on December 11, 1990."[179]

The issues presented at the hearing included whether the expert's statement complied with section 766.203(3) and whether a reasonable investigation was performed by the insurance company and the expert.[180] The plaintiff had the burden of establishing a prima facie case that she had complied with the statute, thus shifting the burden to the defendant.[181] At the hearing, the claims adjustor testified that while she did not have any "on-hand" involvement with the review of the claim, she believed that there was a good faith review and determination by the company that the defendant was not negligent.[182]

After listening to the arguments, the trial judge rejected the defense's argument and struck the insurance company's response.[183] The court held the insurance company "personally responsible to the plaintiff" for reasonable attorney's fees and costs incurred during the investigation of the claim.[184] The trial court concluded that the insurance company's response

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179. *Id.*

180. *Id.* at 540-41.

181. *Duffy*, 614 So. 2d at 541.

182. *Id.* The claims adjuster who testified at trial was the successor adjuster. She was not the same person who evaluated the claim upon receipt of plaintiff's notice of intent to initiate litigation. *Id.*

183. *Id.* at 542.

184. *Id.* The trial judge stated:

> There is no factual information of any nature whatsoever in either the letter of December 13, 1990, from Stephens to plaintiff's attorney or the "CORROBORATION OF MEDICAL EXPERT OPINION" signed by Dr. Edgerton by which one might "verify" that a "reasonable investigation" had preceded denial by Physicians of the claim. In particular, the Court notes that, in its opinion, Dr. Edgerton's statement consists of nothing more than a series of legal conclusions. It identifies neither the medical records which Dr. Edgerton reviewed nor the factual bases upon which his ultimate legal conclusion rests. It does not set forth Dr. Edgerton's professional qualifications, so that one might attempt to "verify" whether Dr. Edgerton qualifies as a "medical expert," as that term is defined in § 766.202(5). In fact, it does not even indicate where Dr. Edgerton practices. Moreover, because of these deficiencies, it is impossible to determine intelligently whether or not Dr. Edgerton made a "reasonable investigation" (or, for that matter, whether he made *any* investigation).

Duffy, 614 So. 2d at 542 (citing FLA. STAT. § 766.205(5)(a) (1989)).

rejecting the claim "was not in compliance with the 'reasonable investigation' requirements of the statute and did not rest 'on a reasonable basis.'"[185] To hold otherwise "would fly in the face of the clearly expressed legislative intent."[186]

In affirming the trial court's order, the appellate court reiterated the purpose of the medical malpractice suit which is to require defendant's to conduct reasonable investigations in good faith.[187] Because the insurance company failed to comply with the statutory requirements of conducting a good faith investigation of the allegations set forth by the claimant, the court properly imposed sanctions against the insurance company.[188] In contrast, *Dressler v. Boca Raton Community Hospital*[189] illustrates the importance of complying with the intent of the medical malpractice statutes from the plaintiffs' perspective. The appellate court upheld the trial court's dismissal of plaintiff's complaint where the plaintiff failed to provide any information regarding the manner in which the defendants had allegedly deviated from the standard of care.[190] As a result, the stated purpose of the Act was thwarted and, thus, the court's dismissal of the complaint was proper.[191]

However, nothing in the Act requires the corroborating expert opinion to identify every possible instance of medical negligence. For example, in *Davis v. Orlando Regional Medical Center*,[192] the corroborating affidavit alleged several acts of negligence against the defendant hospital in causing injury to the patient.[193] Although the affidavit did not mention any post-surgical negligence, it was revealed during discovery that post-surgical negligence was in fact an issue. Thus, the hospital sought to exclude that evidence on the basis that the affidavit failed to mention it.[194] The court rejected the hospital's position holding that the purpose of the corroborating opinion is *not* to require a protracted detail of the plaintiff's theory of the case.[195] The corroborating opinion simply provides justification for the plaintiff's claim and demonstrates that it is not frivolous.

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185. *Id.* at 543.
186. *Id.*
187. *Id.*
188. *Id.* at 546.
189. 566 So. 2d 571 (Fla. 4th Dist. Ct. App. 1990), *review denied*, 581 So. 2d 164 (Fla. 1991).
190. *Id.* at 574.
191. *Id.*
192. 654 So. 2d 664 (Fla. 5th Dist. Ct. App. 1995).
193. *Id.* at 665.
194. *Id.*
195. *Id.*

In *Damus v. Parvez*,[196] the court was faced with the issue of whether a physician is obligated to produce a verified medical report where the physician did not issue a response rejecting the medical malpractice claim. The defendant doctor did not send the plaintiff a response denying liability. Instead, the defendant denied liability in his answer to the complaint. The plaintiff argued that the medical report should be produced in order to ensure that the denial was made "in good faith." The court held that in order to comply with the good faith requirement of section 766.206(3), the report need not be produced prior to an evidentiary hearing where there was *no* response rejecting the claim.[197] However, this subjects the physician to the risk of being sanctioned by the trial court's striking the physician's pleadings and assessing attorney's fees and costs pursuant to section 766.206(3) *if* the court finds that good faith was lacking.[198]

IV. CONCLUSION

The foregoing is a sampling of the cases decided since the enactment of the Comprehensive Medical Malpractice Reform Act of 1985. Practitioners in this field of law would be well-advised to strictly follow the precise requirements of the Act. With careful attention to details and the specific procedures required by the Act, potential difficulties and loss of rights may be avoided in handling medical malpractice claims or defenses. Of course, whether the Act will actually accomplish the goals of the Florida Legislature still remains to be seen.

196. 556 So. 2d 1136 (Fla. 3d Dist. Ct. App. 1989).
197. *Id.* at 1137-38.
198. *Id.* at 1138.