

IN THE SUPREME COURT OF FLORIDA  
SUPREME COURT CASE NO.: SC08-806  
FIFTH DISTRICT COURT OF APPEAL CASE NO.: 5D06-1117  
NINTH CIRCUIT COURT CASE NO.: CI 03-MP 517

J. LEONARD J. MORILLO, M.D., J.  
LEONARD MORILLO M.D., P.A. and  
DOCTOR'S SURGERY CENTER  
PARTNERSHIP d/b/a DOCTOR'S  
SURGERY CENTER, INC.,

Petitioners,

v.

DANNY RAY JACKSON.

Respondent.

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**AMENDED JURISDICTIONAL ANSWER BRIEF OF RESPONDENT,**  
**DANNY RAY JACKSON**

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ON PETITION FOR DISCRETIONARY REVIEW  
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

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## **I. STATEMENT OF FACTS**

This action involves claims of medical negligence against several health care providers who rendered medical care and treatment to Respondent, DANNY JACKSON, in connection with a traumatic injury to his left eye. On December 7, 2000, DANNY JACKSON was injured at work when an unknown foreign body entered and injured his left eye. (R. 8).

Due to the extreme pain in his eye, and progressively worsening vision, on December 9, 2000, Mr. Jackson went to the emergency room at St. Cloud Hospital (R.8). There, Mr. Jackson was seen and evaluated by an emergency room physician, Gregory Garrison, M.D. Dr. GARRISON, in turn, called and discussed the patient's condition and symptoms with Petitioner, J. LEONARD MORILLO, M.D. (R. 8).

MORILLO is an ophthalmologist who, in addition to maintaining staff privileges at various hospitals, (R. 593; Morillo Dep. p.19,21-23), also "made (himself) available for telephone consultation by other emergency rooms or emergency room physicians within Central Florida." (R. 593; Morillo Dep. p. 25). As MORILLO himself described it, on occasion, he would receive calls from different emergency rooms, including St. Cloud Hospital, and if available, he would take the call or he would accept the patient for transfer to his office. (R. 593;

Morillo Depo. p. 26, 31).

When discussing the care of the patient, MORILLO would either direct the patient be transported to his office for care, or he might direct them to a “more appropriately trained physician.” (R.593; Morillo Dep. p. 28-29). MORILLO claims to have no idea as to why physicians he had never met, and didn’t know, would call him in such situations. (R. 593; Morillo Depo. p. 31). On the other hand, he never discouraged the telephone calls, nor ask that they stop (R.593; Morillo Dep. p. 36).

Here, on Saturday, December 9, 2000, the emergency room physician, Dr. Garrison, called MORILLO because he“... felt that the patient's history and the findings of my examination warranted a *consultation* with an ophthalmologist.” (R. 706; Garrison Depo. p. 35). As he understood it, MORILLO was “accepting referrals from our emergency room and made himself available *for consultation* to the ER staff members.” (R. 706; Garrison Depo. p. 35-36, 83-84). Indeed, MORILLO’s name and contact information was on a printed list at the hospital of ophthalmologists to call for a consultation.(R.706; Garrison Dep. p. 98).

While neither MORILLO nor Garrison recalls the specifics of the conversation, Garrison testified that in the usual course, he would have informed MORILLO of the patient’s history and findings “in detail”. (R. 706; Garrison Depo. at p. 47). Dr. Garrison testified that MORILLO advised him that the patient’s condition would likely require prolonged treatment and a corneal transplant. (R.706; Garrison Dep.at

p.45). Further, MORILLO advised Garrison that hospitalization of the patient was not necessary. (R.706; Garrison Dep. p.46). In addition, MORILLO gave Garrison “directions” to prescribe three specific medications.(R.706; Garrison Dep. p.49).

MORILLO further informed Garrison that patient needed to be seen by a corneal specialist, and recommended a Dr. Lugo. (R. 706; Garrison Depo. p. 46-47). In conclusion, Dr. Garrison testified that he was “relying on Dr. MORILLO and his expertise as an ophthalmologist” to determine the treatment plan for Mr. Jackson. (R.706; Garrison Depo p.97). And, it is exactly that treatment plan which JACKSON contends was negligent and caused him to lose his eye.

After conducting an investigation into the medical care and treatment rendered to him, JACKSON served a Notice of Intent on MORILLO putting him on notice that a claim for medical malpractice was going to be made against him. (R.486) The affidavit of David Lee, M.D., attached thereto, explains that Mr. Jackson was seen in the emergency room on December 9, 2000, and diagnosed by the emergency room physician with a corneal ulcer, and was referred to a corneal specialist. (R.492)

Based on a review of the records, Dr. Lee’s opinion was that the “physicians, nurses, technicians and other related staff of (St. Cloud Hospital)...all deviated from acceptable standards of care by failing to appropriately treat and diagnosed a corneal abrasion/ulcer, allowing the condition to progressively worsen, causing it to become

infected, which went untreated and later mistreated, to the point that Mr. Jackson was forced to undergo removal of his left eye.” (R.495).

### **SUMMARY OF ARGUMENT**

The decision of the Fifth District Court of Appeal does not conflict with any other decisions from any District Court of Appeal. Unlike the decision in *Largie v. Gregorian*, 913 So.2d 635 (Fla. 3<sup>rd</sup> DCA 2005), Respondent here indisputably undertook a reasonable and thorough investigation into the care and treatment rendered by Petitioner prior to filing suit, as required by §766.203(2) and §766.104(1), Fla. Stat., including the review of that care by an appropriately trained medical expert. The mere absence of Respondent’s name from the expert affidavit attached to the Notice of Intent served on Respondent does not violate either the language or intent of Chapter 766.

In addition, there is no conflict with this court’s decision in *Pate v. Threlkel*, 661 So.2d 278 (Fla. 1995). The facts in *Pate* are completely inapposite. The Fifth District’s decision that there is a factual issue or issues regarding the existence and extent of a duty owed by Petitioner to Respondent is correct, especially where the facts indicate that Petitioner’s advice and recommendations regarding the treatment of Mr. Jackson were relied on and followed by the emergency room physician.

### **ARGUMENT**

**I. THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY  
CONFLICT WITH THE *LARGIE* AND *BONATI* DECISIONS**

The decision in *Largie v. Gregorian*, 913 So.2d 635 (Fla. 3<sup>rd</sup> DCA 2005) is distinguishable from the District Court's decision below. In *Largie*, the Plaintiffs served a Notice of Intent and corroborating affidavit on a physician. After filing suit, Plaintiffs served a Notice of Intent on the nurse practitioner who worked in his office. Plaintiffs used the same affidavit, which came from a primary care physician, in the Notice of Intent directed to the nurse, and offered nothing more than what was in the affidavit as evidence that Plaintiffs had conducted a "reasonable investigation" to determine whether there were "reasonable grounds" to believe that the nurse practitioner had acted negligently, as required by §766.203(2) and §766.104(1), Fla. Stat.

The Third District concluded this was insufficient, but relied on the failure to reference the nurse "by name or job description" as only one factor. The *Largie* court also noted that there was no reference to the standard of care applicable to a nurse practitioner, or to any deviation from that standard of care, and there was nothing to suggest that an investigation had taken place with regard to her. The affidavit was also deficient in that it failed to demonstrate that the expert was even qualified to render opinions as to the standard of care of a nurse practitioner.<sup>1</sup>

Here, it is clear that Dr. Lee is not only well qualified to render opinions as to Dr. Morillo, since Dr. Lee is an ophthalmologist, it is glaringly apparent that the care Dr. Morillo “rendered” in treating the infection in Mr. Jackson’s eye while he was at St. Cloud Hospital was investigated, evaluated and deemed insufficient and violative of the standard of care. As Dr. Lee concluded, the physicians who cared for Mr. Jackson on December 9, 2000 deviated from acceptable standards of care, by failing to appropriately treat”...a corneal abrasion/ulcer, allowing the condition to progressively worsen...to the point Mr. Jackson was forced to undergo the removal of his left eye.”

Moreover, it is beyond dispute that Respondent conducted a reasonable investigation before ever serving Petitioners with a Notice of Intent, since not only was the care reviewed by an ophthalmologist, Respondent took the unsworn statement of Dr. Garrison in order to fully explore MORILLO’s role in his care.

Petitioners’ argument is further undercut by the Third District’s subsequent decision in *Michael v. Medical Staffing Network, Inc.*, 947 So.2d 614 (Fla 3<sup>rd</sup> DCA

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<sup>1</sup> The court in *Largie* relied heavily on the 2003 amendments to §766.102 and §766.202 which placed additional restrictions and requirements on the types of experts who could be used in a corroborating affidavit in a Notice of Intent. Those amendments do not apply here, as the presuit process began and ended well before these amendments took effect on November 1, 2003.

2007). There, the Third District explained its decision in *Largie*, and stated that there was no “blanket requirement” that an affidavit contain the “name, job title or job description” of each defendant; rather, *Largie* only stands for the proposition that “...a medical expert affidavit must sufficiently demonstrate that a reasonable investigation into the claim was taken.” 947 So.2d at 620.

Nor does the decision here conflict with *Bonati v. Allen*, 911 So.2d 285 (Fla. 2<sup>nd</sup> DCA 2005). In *Bonati*, the notice of intent was sent only to the employer, Gulf Coast Orthopedic Center - Alfred Bonati, M.D., P.A., and Dr. Bonati’s name appeared nowhere in the Notice nor in the affidavit. In fact, other physicians at that practice were specifically named, but Dr. Bonati’s involvement and care was not even indirectly referred to. Under those limited circumstances, the court found that the affidavit was insufficient. Here, a Notice of Intent was specifically sent to MORILLO, and a full and complete presuit investigation was done.

It is telling that there was no confusion on the part of the Defendant as to what the claims were. Here, the affidavit of the Defendant’s own expert, used to corroborate the denial of the claim, specifically stated that the “telephone consultation” by MORILLO and the medications he “ordered” were both appropriate. Moreover, at no time during the presuit did MORILLO question the sufficiency of the notice, or DR. LEE’s Affidavit.

To suggest the decision below would allow a plaintiff to use a presuit affidavit attesting to the negligence of one provider which would then suffice against multiple other health care providers irrespective of whether the care of one provider had anything to do with the care of the others is simply hyperbole. And, to further suggest that the District Court's opinion "strips" a plaintiff's obligation to investigate claims ignores not only the clear language of the District Court's decision, but also the undisputed facts and circumstances presented here.

**II. THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION IN *PATE v. THRELKEL***

This court's decision in *Pate v. Threlkel*, 661 So.2d 278 (Fla. 1995) is simply inapplicable to the facts here. The question in *Pate* was whether a physician "owe(s) a duty of care to the children of a patient." In other words, the *Pate* decision addressed whether a physician's duty of care would extend beyond the patient, to third parties. That is not the issue here. If anything, the *Pate* decision supports the District Court's opinion below, as it holds that strict "privity" is not required to impose a duty of care on a physician.

The question here, in part, is whether as a factual matter, a physician-patient relationship existed between MORILLO and JACKSON. Petitioners claim that various facts are "undisputed", and yet provides no record support for those facts.

Petitioners claim that it is undisputed that MORILLO specifically informed the emergency room physician that he was “not qualified” to treat Mr. Jackson’s condition, and that therefore, Dr. Morillo could not reasonably have foreseen that the emergency room physician would have “relied in any way” upon the “discussion” between the two. These are self-serving interpretations of the facts, not the “undisputed facts” contained in this record.

As recited by the District Court, Dr. Garrison called Morillo to ask for his “professional advice”, as he felt that patient’s condition warranted an ophthalmological consultation. Rather than telling Dr. Garrison he was not “qualified” to treat Mr. Jackson, the best (for Petitioners) the facts would show is that Morillo told Dr. Garrison he would not be accepting Mr. Jackson as a patient, and that the patient should be referred to a corneal specialist. Left out of Petitioners recitation of “undisputed” facts is that it was Dr. Morillo who prescribed the course of treatment to be followed by Dr. Garrison in treating Mr. Jackson: no immediate hospitalization, no prompt ophthalmological evaluation, but simply prescriptions for some medication with instructions to the patient to see a corneal specialist in a couple of days. It is, in fact, undisputed that Dr. Garrison relied on and explicitly followed the professional advice given to him in this telephone consultation with Morillo in his treatment of Mr. Jackson.

These facts form the basis of the factual issue of whether MORILLO breached the standard of care. Do these facts, and the inferences to be drawn therefrom, support the conclusion that a physician-patient or other “special” relationship existed between MORILLO, Dr. Garrison and JACKSON? Certainly, it is not necessary that MORILLO actually see JACKSON for him to owe him a duty of care, nor is it necessary that he charge for his advice and directions. It is certainly enough that he undertook to diagnose the JACKSON’s condition, and prescribe the course of treatment for that condition.

The District Court’s decision is a direct application of the principles in *Pate*. As the Court in *Pate* noted, “...the standard of care is determined by consideration of expert testimony.” *Id.* at 281. When the standard of care “...creates a duty that is obviously for the benefit of certain identified third parties and the physician knows of the existence of those third parties, then the physician’s duty runs to those third parties.” *Id.* There can be no question that even if his relationship with JACKSON was not a direct physician-patient relationship, MORILLO, knew his duty of care was for the benefit of JACKSON, and he obviously knew of JACKSON’s existence.

### **CONCLUSION**

For the foregoing reasons, this Court should decline jurisdiction.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of July, 2008, to: Larry Townsend, Esquire, P.O. Box 2854, Orlando, FL 32802; Vance Dawson, Esquire, 201 E. Pine Street, 15<sup>th</sup> Floor Orlando, FL 32801; Paul Nugent, Esquire, First Sanford Tower, 312 West First Street, Suite 600, Sanford, FL 32771; and Scott A. Tackill, The Unger Law Group, P.L. 701 Peachtree Road, Orlando, FL 32804.

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**CERTIFICATE OF COMPLIANCE**

Respondent, DANNY RAY JACKSON, hereby certifies that this Brief

complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. Pro., and is typed using Times New Roman 14- point font.

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J. SCOTT MURPHY, ESQUIRE

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