IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO.: SC08-806
DISTRICT COURT CASE NO.: 5D06-1117
CIRCUIT COURT CASE NO.: CI-03-MP-517

J. LEONARD 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.
_______________________________________/

AMENDED JURISDICTIONAL BRIEF OF PETITIONERS,
J. LEONARD MORILLO, M.D.,
J. LEONARD MORILLO, M.D., P.A., AND
DOCTOR'S SURGERY CENTER PARTNERSHIP
d/b/a DOCTOR'S SURGERY CENTER, INC.

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

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STATEMENT OF THE CASE AND FACTS

Petitioners seek discretionary review of a decision of the Fifth District Court of Appeal that is in express and direct conflict with the decisions of other District Courts of Appeal as to two issues.

On December 9, 2000, Respondent presented to St. Cloud Hospital, where he was diagnosed by the emergency room physician, Dr. Garrison, as having a corneal ulcer. Dr. Garrison telephoned Petitioner, Dr. Morillo, an ophthalmologist not affiliated with those officially on-call for the hospital, to discuss the presentation. (A.2-3). Dr. Morillo informed Dr. Garrison that what had been described to him was not in Dr. Morillo's area of expertise and that Respondent needed to be seen by a corneal specialist. (A.4). Dr. Morillo suggested what he would do were a patient in Respondent's situation to appear in Dr. Morillo's office. Dr. Garrison chose to do the same thing, and discharged Plaintiff with instructions to follow up with a corneal specialist the following Monday. (A.4). Respondent's eye subsequently became worse, and eventually had to be removed. (A.2). The instant case followed with Dr. Morillo named as one of the defendants.

Prior to filing suit, Respondent conducted a presuit investigation pursuant to Section 766.203, Florida Statutes. He thereafter served a Notice of Intent on Dr. Morillo, pursuant to Section 766.106(2). In the notice, Dr. Morillo was named as one of the persons alleged to have deviated from the prevailing professional standard

of care. (A.5). As corroboration, Respondent submitted an affidavit of an ophthalmologist, Dr. Lee. Dr. Lee's affidavit did "not mention Dr. Morillo, by name or otherwise." (A.2).

Petitioners moved for summary judgment on two adequate and independent grounds. On March 6, 2006, the trial court entered summary judgment in favor of Petitioners on each of those grounds. First, the trial court determined as a matter of law that Respondent's affidavit was inadequate, and thus he failed to comply with the medical malpractice presuit screening process. (A.1). Second, the trial court determined as a matter of law that Respondent failed to demonstrate that Dr. Morillo had a duty of care to Mr. Jackson. (A.2). Respondent appealed.

On April 10, 2007, the Fifth District Court of Appeal heard oral argument. On December 7, 2007, that court reversed the trial court's grant of summary judgment. On March 17, 2008, that court denied Petitioners' motion for rehearing, rehearing en banc, or for certification of conflict or questions of great public importance. Petitioners timely filed a notice to seek the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

This Court has jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution because the Fifth District Court of Appeal's decision in the instant case as to the adequacy of the presuit affidavit expressly and directly

conflicts with the opinions of the Third District Court of Appeal and the Second District Court of Appeal as to what constitutes a sufficient presuit affidavit. See Largie v. Gregorian, 913 So. 2d 635 (Fla. 3d DCA 2005); Bonati v. Allen, 911 So. 2d 285 (Fla. 2d DCA 2005). This Court also has jurisdiction because the Fifth District Court of Appeal's decision in the instant case as to whether Petitioners owed a legal duty to Respondent expressly and directly conflicts with a decision of the First District Court of Appeal as to the existence of a legal duty absent a physician-patient relationship. See Vause v. Bay Medical Center, 687 So. 2d 258 (Fla. 1st DCA 1996).

ARGUMENT

I. JURISDICTION EXISTS DUE TO EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF TWO OTHER DISTRICT COURTS OF APPEAL AS TO THE REQUIREMENTS OF THE MEDICAL NEGLIGENCE PRESUIT SCREENING PROCESS

On December 4, 2002, Respondent served a Notice of Intent on Dr. Morillo, pursuant to Section 766.106(2), Florida Statutes. In the notice, Dr. Morillo was named as one of the persons alleged to have deviated from the prevailing professional standard of care. As corroboration, Respondent submitted an affidavit of an ophthalmologist, Dr. Lee. Dr. Lee's affidavit "does not mention Leonard Morillo, M.D., by name or otherwise." (A.1).

When it granted summary judgment, the trial court determined as a matter of law that Respondent failed to comply with the statutory medical malpractice presuit

screening process. Pursuant to Section 766.203(2), Florida Statutes (2003), a medical malpractice claimant must conduct a presuit investigation of the claim, and must provide with the notice of intent to initiate litigation an affidavit from a medical expert corroborating grounds to support the claim. Pursuant to Section 766.202(4), Florida Statutes (2003), "'[i]nvestigation' means that an attorney has reviewed the case against each and every potential defendant and has consulted with a medical expert and has obtained a written opinion from said expert." (Emphasis added).

In the instant case, Respondent sought to corroborate his claims against Dr. Morillo with an affidavit that never referred in any way to Dr. Morillo. The trial court, following Largie v. Gregorian, 913 So.2d 635 (Fla. 3d DCA 2005) and Bonati v. Allen, 911 So.2d 285 (Fla. 2d DCA 2005), ruled that Respondent had failed to satisfy his presuit obligation as to Dr. Morillo. Accordingly, it ruled that Dr. Morillo was entitled to summary judgment in his favor. The Fifth District Court of Appeal reversed, explaining its reasoning as follows:

> In Mirza v. Trombley, 946 So. 2d 1096 (Fla. 5th DCA 2006) we held that the statute was satisfied when the plaintiffs conducted the required investigation, resulting in an expert medical opinion that they had a legitimate basis to pursue a malpractice claim. Id. at 1101. The statute's plain language, the purpose of the statutory requirement, and the rule requiring that the malpractice presuit requirements be construed in a manner that protects citizens' constitutionally guaranteed access to the courts support our decision to reject a narrow construction of section 766.203 that would compel plaintiffs to individually name each future defendant in the investigatory affidavit. Id. at 1100. The statutory purpose behind the affidavit requirement is the elimination of frivolous claims. Id.

> Here, Dr. Lee's affidavit demonstrated that he examined all of Jackson's medical records from his treatment at a family medical center, St. Cloud Hospital, eye clinics, and Shands Hospital, and his statement corroborated reasonable grounds to support the claim of medical negligence. The affidavit satisfied the purpose of the pre-suit notice statute to corroborate that the claim is legitimate and to demonstrate that a proper review determined the defendants' actions were negligent.

A.7.[1]

Petitioners respectfully submit that the holding in the instant case conflicts with the holdings in Largie v. Gregorian, 913 So. 2d 635 (Fla. 3d DCA 2005), and Bonati v. Allen, 911 So. 2d 285 (Fla. 2d DCA 2005).

The Largie court upheld a summary judgment in favor of a prospective defendant, a nurse, who worked in the office of another prospective defendant, a physician. While the presuit affidavit in that case did mention the physician by name, it did not mention the nurse. The Third DCA held that the plaintiff failed to comply with the presuit investigation requirement as to the nurse and that summary judgment was properly granted as to claims against her.

In Bonati, the Notice of Intent included Dr. Bonati. The presuit affidavit, however, referred to the negligence of several health care providers, but did not mention Dr. Bonati. Dr. Bonati therefore moved to dismiss the complaint against

[1] Although the majority opinion failed to mention either Largie or Bonati, this Court has jurisdiction based on the conflict with those cases because the legal principles articulated in the opinion demonstrate the conflict. See Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981).

him for failure to comply with the statutory presuit screening requirements. The plaintiff argued that the purpose of the presuit screening requirements

> is to ensure the legitimacy of medical malpractice claims, not to ensure notice to defendants of exactly how they were negligent. She asserts that the notice of intent was sufficient to give notice to Dr. Bonati that she intended to pursue a claim against him. Furthermore, the fact that the expert opinion did not name Dr. Bonati, she contends, is not determinative because the purpose of the affidavit is simply to ensure the claim was not frivolous.

Bonati, 911 So. 2d at 287.

The Bonati court acknowledged that the corroborating expert's opinion need not give notice of every possible instance of medical negligence. However, the Second DCA concluded that the issue before it was different. The issue in Bonati – and the one before this the Fifth DCA in the instant case – was whether the statutory presuit screening requirements are satisfied by a corroborating affidavit which corroborates negligence only by someone other than the health care provider challenging the sufficiency of the investigation. The Bonati court held that such an affidavit did not satisfy the statutory requirements, and Dr. Bonati was therefore entitled to dismissal of the complaint.

In the instant case, the Fifth DCA held in essence that an individual defendant is not entitled to corroboration as to that individual defendant's negligence. Instead, the Fifth DCA found it sufficient that the affidavit corroborated the claim as to other defendants. This is in express and direct conflict with both the decisions of

the Third DCA and Second DCA in Largie and Bonati. It is undisputed in the instant case that the presuit affidavit submitted on behalf of Respondent did not refer in any way to Dr. Morillo. Not only did it not refer to him by name, it failed to refer to him by job description or role in the treatment of Respondent. Nonetheless, the Fifth DCA excused that deficiency in Respondent's affidavit by construing the statutory presuit screening process as requiring only that the affidavit "corroborate that the claim is legitimate and . . . demonstrate that a proper review determined the defendants' actions were negligent." (A.7). The Fifth DCA's holding conflicts with the holdings in Bonati and Largie, and represents a significant and unauthorized relaxation of the presuit affidavit requirement. Pursuant to Section 766.203(2), and Section 766.202(4), Florida Statutes, a presuit affidavit must reflect an investigation of the alleged negligence of "each and every potential defendant." The Fifth DCA's opinion shifts the role of the affidavit from one where it serves to lessen the risk of a frivolous lawsuit faced by "each and every defendant," to one where it serves to lessen the risk of frivolous lawsuits against *some* of the defendants in the case. The others are left without the protection of the statutory presuit screening process.

The nature and significance of the conflict between the decision in the instant case and the Largie and Bonati decisions is illustrated with a simple example: Medical malpractice cases against multiple defendants are commonplace. If the

decision in the instant case stands, it will be acceptable in the jurisdiction of the Fifth District Court of Appeal – and in that jurisdiction only – to bring a medical malpractice action against multiple health care providers so long as the prospective plaintiff obtained a presuit affidavit from an expert attesting to the negligence of *one* of those providers. According to the Fifth DCA's reasoning, the affidavit would then corroborate "the claim," and satisfy the presuit statutes. Depending upon how one reads the district court's decision, it might be necessary for the expert to include a blanket assertion that he or she has reviewed "all" the plaintiff's medical records, but that provides no meaningful protection. The Fifth DCA's decision essentially strips prospective plaintiffs in multiparty cases of their statutory obligation to investigate "each and every prospective defendant" and corroborate negligence by that prospective defendant.

Petitioners respectfully submit that this Court should accept jurisdiction over the instant case due to the conflict between the decision in the instant case and the decisions in Bonati v. Allen, 911 So.2d 285 (Fla. 2d DCA 2005), and Largie v. Gregorian, 913 So.2d 635 (Fla. 3d DCA 2005).

II. JURISDICTION EXISTS DUE TO EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL AS TO THE EXISTENCE OF A LEGAL DUTY ABSENT A PHYSICIAN-PATIENT RELATIONSHIP

The undisputed facts as articulated in the Fifth DCA's opinion indicate that Dr. Morillo and Respondent never met. Respondent's attempt to impose liability

upon Petitioners is predicated entirely on a single phone conversation between Dr. Morillo and a co-defendant below, Dr. Garrison. Dr. Garrison phoned Dr. Morillo to discuss Mr. Jackson's presentation at the emergency room. During that conversation, the two physicians discussed Mr. Jackson, and Dr. Morillo stated what he would do if such a patient presented to him.

It is undisputed that Dr. Morillo did not accept Mr. Jackson as a patient. Moreover, it is undisputed that Dr. Morillo informed Dr. Garrison, that Mr. Jackson's condition was outside Dr. Morillo's area of expertise, and that he (Dr. Morillo) was not qualified to provide medical advice. Dr. Morillo made suggestions as to care and suggested that Dr. Garrison refer Mr. Jackson to an appropriate specialist, and even provided the name of such a specialist. In granting summary judgment, the trial court determined as a matter of law that Respondent failed to demonstrate that Dr. Morillo had a duty of care to Mr. Jackson.

The Fifth District Court of Appeal reversed, holding that the trial court had embraced a "restrictive interpretation" of this Court's opinion in Pate v. Threlkel, 661 So. 2d 278 (Fla. 1995). (A.7). Specifically, the Fifth DCA rejected the trial court's view that Pate is properly read to find no duty as a matter of law when a physician not in privity with a patient gives advice to another physician, but explicitly refuses to accept the patient in question. (A.4-5). Instead, the Fifth DCA held that there remained a "factual question" which precluded summary

judgment. (A.8). The Fifth DCA's interpretation of Pate conflicts with that of the First District Court of Appeal in Vause v. Bay Medical Center, 687 So. 2d 258 (Fla. 1st DCA 1996). In Vause, the First DCA declined to extend liability to a physician not in privity with a plaintiff absent a "showing of a special relationship which would result in extending liability. . . ." Id. at 264. Specifically, plaintiff would have to establish that there was a "doctor-patient" relationship. Id.

In the instant case, the Fifth DCA acknowledged that "Dr. Morillo . . . specifically told Dr. Garrison that he was not accepting [Respondent] as a patient." (A.4). Nonetheless, it indicated that there remained a "factual question" (A.8) as to whether Dr. Morillo had a duty to Respondent. In effect, the Fifth DCA's opinion in the instant case dispenses with the requirement that a physician not in privity with a patient have a "special relationship" (Vause, 687 So. 2d at 264) with the patient and broadly extends the scope of a physician's duty. Petitioners respectfully submit that this Court should accept jurisdiction over the instant case due to the conflict between the decision in the instant case and the decision in Vause v. Bay Medical Center, 687 So. 2d 258 (Fla. 1st DCA 1996).

CONCLUSION

This Court should accept jurisdiction based upon the two grounds discussed above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via United States Mail this 16th day of May, 2008, to the parties listed on the attached Service List.

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I HEREBY CERTIFY that this Brief complies with the font requirement of Rule 9.210(a)(2), Florida Rules of Appellate Procedure, as it is a computer generated brief submitted in Times New Roman 14-Point font.

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MORILLO, ET AL. v. JACKSON

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