IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

PAUL ALLEN DUNDORE, AND JACKSONVILLE PATHOLOGY CONSULTANTS, P.A.,

Petitioners,

v.

Case No. 1D11-4148
L.T. No.: 2009-CA-017584

THERESA M. HAMEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MAXIME F. HAMEL, BORELAND-GROVER CLINIC, P.A., AND , DANIEL GERRARD KOHM, M.D.,

Respondents.

RESPONSE OF THERESA M. HAMEL, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MAXIME F. HAMEL, TO PETITION FOR CERTIORARI AND MOTION TO STAY

SPOHRER DODD
Chad S. Roberts
Florida Bar No. 896977
croberts@sdlitigation.com
Robert F. Spohrer
Florida Bar No. 184500
rspohrer@sdlitigation.com
701 West Adams Street
Jacksonville, FL 32202
(904) 309-6500 Telephone
(904) 309-6501 Facsimile

CREED & GOWDY, P.A.
Jessie L. Harrell
Florida Bar No. 0502812
jharrell@appellate-firm.com
Bryan S. Gowdy
Florida Bar No. 0176631
bgowdy@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
(904) 350-0086 facsimile
Attorneys for Hamel

PRELIMINARY STATEMENT

Petitioners, Paul Allen Dundore and Jacksonville Pathology Consultants, P.A., are defendants in the trial court and referred to herein as the "Physician." The plaintiff in the trial court is Theresa M. Hamel ("Mrs. Hamel"), as the personal representative of the estate of Maxime F. Hamel ("Mr. Hamel"). The remaining respondents are the Physician's co-defendants, and though not named in the petition, they are named in the caption of this response. *See* Fla. R. App. P. 9.100(b) ("If the petition seeks review of an order entered by a lower tribunal, all parties to the proceeding in the lower tribunal who are not named as petitioners shall be named as respondents.") The claims against the Physician's co-defendants are not material to the petition; however, the affirmative defenses raised by the co-defendants are relevant to the reasonableness of Mrs. Hamel's conduct.

STATEMENT OF THE CASE AND FACTS

We first discuss the statutory framework for this case. *Infra* part A, at 2-5. We then discuss the particular facts of this case. *Infra* part B, at 6-13.

A. Statutory Background

The Legislature enacted various provisions in Chapter 766, commonly referred to as the Medical Malpractice Act,[1] to "provide a plan for prompt resolution of medical negligence claims." § 766.201(2), Fla. Stat. (2010); *see Walker v. Va. Ins. Reciprocal*, 842 So. 2d 804, 809 (Fla. 2003). Chapter 766, however, was "not intended to deny access to the courts on the basis of technicalities." *E.g., Fort Walton Beach Med. Ctr. v. Dingler*, 697 So. 2d 575, 579 (Fla. 1st DCA 1997); *accord Arch Plaza, Inc. v. Perpall*, 947 So. 2d 476, 479 (Fla. 3d DCA 2006). Therefore, Chapter 766 has been construed "in a manner that favors access to the courts" and "so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts." *Dingler*, 697 So. 2d at 579 (internal quotations omitted); *accord Arch Plaza*, 947 So. 2d at 479.

Chapter 766 requires that the claimant adequately investigate the merits of his claim before filing suit. *See* § 766.203(2), Florida Statutes (2010). During this presuit investigation, the claimant must "ascertain that there are *reasonable grounds* to believe" two elements – first, that the health care provider was "*negligent in the care or treatment* of the claimant" and second, that "[s]uch

[1] This response refers to these statutes (§§ 766.101 to 766.212, Fla. Stat. (2009)) as "Chapter 766," even though Chapter 766 also includes other statutes outside of the Medical Malpractice Act, *see* §§ 766.301 to 766.316, Fla. Stat. (2009) (statutes pertaining to the Florida Birth-Related Neurological Injury Compensation Plan).

negligence *resulted* in injury to the claimant." § 766.203(2), Fla. Stat. (2010) (emphasis added). In other words, the claimant must have "reasonable grounds" (not indisputable proof) to show: (i) a breach of the standard of care and (ii) causation. *See id.*; *Apostolico v. Orlando Reg'l Health Care Sys., Inc.*, 871 So. 2d 283, 286, 288 (Fla. 5th DCA 2004). The claimant must also provide "corroboration of reasonable grounds to initiate medical negligence litigation" by mailing to the physician "a verified written medical expert opinion" along with the notice of intent to initiate litigation. § 766.203(2), Fla. Stat. (2010).

Corroboration is not defined in Chapter 766, but has been interpreted to mean that the expert opinion is supported by facts and is not just a recitation of bare legal conclusions. *Duffy v. Brooker*, 614 So. 2d 539, 546 (Fla. 1st DCA 1993) (the "'corroboration' statements [must] outline the factual basis for the medical experts' opinions"), *abrogated on other grounds*, *Shands Teaching Hosp. v. Miller*, 642 So. 2d 48 (Fla. 1st DCA 1994). Courts have imposed sanctions against parties who provide medical opinions that contain only legal conclusions on the theory that they do not evidence a good faith attempt to determine the relative merits of the claim. *Id.* at 546. However, no Florida court has examined the underlying factual allegations contained in an expert affidavit to determine whether they are sufficiently corroborating. Indeed, so long as the opinion provides *reasonable grounds* to believe medical malpractice resulted in injury to the claimant, it is

sufficient; the trial court cannot conduct a mini-trial to determine whether actual malpractice was committed. *Baptist Med. Ctr. of Beaches, Inc. v. Rhodin*, 40 So. 3d 112, 119 (Fla. 1st DCA 2010).

Similarly, once a claimant has provided notice of the potential claim to the health care provider, that party is required to undertake a good faith investigation to determine if medical negligence has been committed. *See* § 766.203(3), Fla. Stat. (2010). The Legislature believed that the investigation would lead to early resolution of meritorious claims. *Kukral v. Mekras*, 679 So. 2d 278, 280 (Fla. 1996). To facilitate this review, the claimant must provide the physician with *reasonable access* to records and other documents within his or her possession or control. *See* § 766.205(1), Fla. Stat. (2010). Where a claimant *unreasonably* withholds access to records, the trial court has the discretion, but is not required, to dismiss the claimant's action. *See* § 766.205(2), Fla. Stat. (2010); *George A. Morris, III, M.D., P.A. v. Ergos*, 532 So. 2d 1360, 1361 (Fla. 2d DCA 1998) (dismissal for failure to respond to presuit discovery is not mandatory).

After a claimant has initiated litigation and upon the filing of a motion, the circuit court must determine whether the claimant's complaint "rests on a *reasonable basis*." § 766.206(1), Fla. Stat. (2009) (emphasis added); *see Duffy*, 614 So. 2d at 544-45. But this hearing may not "to be converted into some type of summary proceeding to test the sufficiency, legally or factually, of medical

negligence claims." *Wolfsen v. Applegate*, 619 So.2d 1050, 1055 (Fla. 1st DCA 1993); *accord* Thomas D. Sawaya, *Florida Personal Injury and Wrongful Death Actions* § 12:9 nn. 2&3 (2009-10 ed.). The hearing determines only whether the claimant followed the procedures set forth in Chapter 766 and has conducted a good faith investigation into the claim. *Rhodin*, 40 So. 3d at 115.

B. Facts and Procedural History

The crux of the underlying case on the merits is Mrs. Hamel's allegation that the Physician, a pathologist, failed to diagnose high-grade dysplasia in her late husband's pathology slides. (Pet. App. at 5.) Specifically, the Physician reviewed Mr. Hamel's pathology slides in 2007 and not did not find pre-cancerous indications. (Pet. App. at 11-12.) Roughly one year later, Mr. Hamel was diagnosed with stomach cancer. (Pet. App. at 13.) At that time, Mr. Hamel directed a non-party hospital, Baptist Medical Center (the "Medical Center"), who had possession of his slides, to send the original 2007 pathology slides to M.D. Anderson in Houston, Texas for a second opinion. (Resp. App. at 37-38.) Two doctors at M.D. Anderson identified high-grade dysplasia (a pathological pre-cursor to cancer) on the original pathology slides. (Pet. App. at 16-17.) The Physician had not made that diagnosis. (Pet. App. at 9.) It is this failure to diagnose high-grade dysplasia that allegedly caused or contributed to Mr. Hamel's death. (Pet. App. at 58.)

At all times in the conduct of this action, Mrs. Hamel has been required to balance two legitimate evidentiary imperatives: first, the necessity of safeguarding and protecting the original pathology slides in question, and second, the necessity for other parties (including the co-defendant gastroenterologist) to have reasonable access to the original pathology slides. The trial court specifically found that Mrs. Hamel acted in good faith in her attempt to balance these imperatives. (Resp. App. at 32.)

Chronologically, the instant claim was initiated against the Physician's co-defendant, a gastroenterologist. In his answer, the gastroenterologist raised, as an affirmative defense, the comparative fault of other health care providers involved in Mr. Hamel's care. (Resp. App. at 45-46.) At a discovery deposition, the co-defendant gastroenterologist identified the Physician as the (then) non-party health care provider that the gastroenterologist contended had fallen below the standard of care and caused injury to Mr. Hamel in the form of a delay in diagnosis. (Pet. App. at 7-9.) Upon this allegation, the original pathology slides became important physical evidence in the case, not just for Mrs. Hamel and the Physician, but for the co-defendant gastroenterologist's affirmative defense as well.

After learning about the Physician's misdiagnosis, Mrs. Hamel sent a presuit notice and corroborating affidavit to the Physician. (Pet. App. at 1-10.) In his

petition,[2] however, Physician claims that Mrs. Hamel did not meet the Chapter 766 presuit requirements and that her complaint must therefore be dismissed as a matter of law.

The grounds raised in the petition as alleged deficiencies in presuit procedure address: (1) whether Mrs. Hamel unreasonably refused to grant the Physician physical possession of Mr. Hamel's pathology slides; (2) whether Mrs. Hamel's pathology expert's affidavit is deficient because the expert did not personally review the pathology slides, but instead relied on medical records and other materials commonly referenced by experts in forming their opinions; and (3) whether the affidavit is insufficient because it relies in part on the testimony of a gastroenterologist to corroborate the issue of causation. (Pet. 9-21.)

Looking first at the dispute over access to the pathology slides, the Physician made clear during the hearing that the "access" he sought to the slides was actually physical "possession" so that he could send the original slides to an outside expert. (Pet. App. at 109.) Mrs. Hamel objected to having the slides – which are little pieces of glass and essentially *are* the case – leave the possession of the Medical

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[2] The Physician's petition recites multiple "facts" on the underlying merits concerning the treatment and care of Mr. Hamel preceding his eventual death. (Pet. 3-5.) Mrs. Hamel objects to those "facts" for which no record citations are provided.

Center. (Pet. App. at 118-19.) As Mrs. Hamel's attorney explained to the trial court:

> The third party [Medical Center] custodian's been keeping it for two years now. It's in a safe place. It's going to stay there. My expert has got to come here to see it. His expert has got to come here to see it. We are not going to let this little piece of glass start traveling around the country.

(Pet. App. at 120.) Moreover, Mrs. Hamel told the Physician early-on that she had "no objection to any person examining the pathology specimens while they remain in the possession of" the Medical Center. (Pet. App. at 56.) She then offered to deliver the necessary HIPPA releases to the Medical Center once the Physician proposed dates his expert could be "available to observe the slides at the custodian's location." (*Id.*) What she declined to do, however, was execute a blanket HIPPA release that would allow the Physician to remove the slides from the Medical Center and send them off for examination without any sort of method in place for safekeeping. (*See* Pet. App. at 45.)

While the Physician also proposed that the parties ask the trial court to enter an order dealing with the chain of custody for the slides (pet. app. at 47-51), Mrs. Hamel had objections to the Physician's proposed procedures (pet. app. at 115, 120). Indeed, the chain of custody order actually entered by the trial court differs from the Physician's proposed order in several material respects, including: limiting release of the slides only to a party's attorney as opposed to the attorney,

the party *or* the party's representative; specifying that the slides may not be shipped by commercial carrier and that counsel must maintain possession of them; limiting possession to fifteen-day periods; and specifying that only slides can be removed from the Medical Center and not any of Mr. Hamel's tissue blocks. *Compare* Pet. App. at 48-51 with Addendum to Mt. to Stay App. at 12-17.

Additionally, the record evidence placed before the trial court revealed that Mrs. Hamel had neither actual nor constructive possession of the pathology slides. (*See e.g.*, Resp. App. at 12.) To the contrary, the Physician's co-worker, who is President of Jacksonville Pathology Associates and the Chief of Pathology at the Medical Center,[3] ordered that Mr. Hamel's pathology slides be sequestered by the Medical Center as soon they were returned from M.D. Anderson. (Pet. App. at 53; Resp. App. at 7, 16-17, 20). Sequestering means that the slides are placed somewhere with more limited access and the Medical Center keeps records of who takes the pathology slides and why. (Resp. App. at 21-22.) Furthermore, once the slides were ordered sequestered, only the pathologists, the risk management division of the Medical Center, and the pathology secretary could access the slides. (Resp. App. at 24-25.) The Physician still would have had the ability to view the slides at will. (*Id.* at 25.) Indeed, once M.D. Anderson returned the slides, the

[3] Jacksonville Pathology Associates has a contract with the Medical Center to provide pathology coverage, which includes overseeing the pathology labs and doing pathology reviews. (Resp. App. at 18.)

Physician prepared a supplemental report, which noted the M.D. Anderson findings for Mr. Hamel's patient record at the Medical Center. (*Id.* at 1, 28.) The Physician requested access to the slides during his presuit investigation, however, in order to show them to his retained expert. (Cert. Pet. at 14.)

Before the presuit period commenced against the Physician, Mrs. Hamel's counsel attempted to obtain Mr. Hamel's original pathology. (Pet. App. at 44; Resp. App. at 34-36.) The Medical Center would only agree to provide *recuts* of the pathology to Mrs. Hamel. (Resp. App. at 11.) Absent a court order, the Medical Center would not release the original slides because they had been sequestered. (*Id.* at 12.) Accordingly, even if Mrs. Hamel had signed the HIPPA release (pet. app. at 44), the Medical Center would not have released the pathology slides from sequestration. Furthermore, Mrs. Hamel objected to the Medical Center releasing *possession* of the pathology slides to a third party, but did not object to the Physician *accessing* the slides while they remained at the Medical Center. (Pet. App. at 56.) The Physician maintained that accessing the slides at the Medical Center was insufficient and the only access that would satisfy him was physical possession of the slides. (Pet. App. 109, 152-53.)

It is this disagreement over the protection of the original slides that the Physician claims was unreasonable and that prompted the motion to dismiss. (*Id.* at 32-35.) The Physician does not contend that Mrs. Hamel deprived him of access

to any other discovery, including all of the other documents her expert pathologist, Dr. Manion, reviewed prior to providing his corroborating opinion. (Pet. App. at 1.)

Turning to the sufficiency of the opinions of Mrs Hamel's expert pathologist the Physician does not contest the qualifications of Dr. Manion, a board certified forensic pathologist. (Cert. Pet. at 27, 107, 115.) Rather, the Physician argues that Dr. Manion's opinion is not sufficiently corroborative as required by Chapter 766 for two reasons. (*Id.* at 15-19.) First, the Physician contends that it is "just basic logic" that Dr. Manion had to personally review the pathology slides prior to forming an opinion. (*Id.* at 15; Pet. App. at 107.) Second, the Physician contends that Dr. Manion improperly relied on testimony from a gastroenterologist when forming his opinions. (*Id.* at 16.) Mrs. Hamel showed at the hearing that Dr. Manion reviewed numerous documents, including Mr. Hamel's records from the Boreland Groover Clinic, the pathology reports from M.D. Anderson, the pathology reports from the Medical Center, *and* the deposition of Mr. Hamel's gastroenterologist. (Pet. App. at 5-6.) Based on this review, as well as his education, training and experience, Dr. Manion concluded that reasonable grounds exist to believe that the Physician deviated from the appropriate standards of care and that the deviations caused, or contributed to causing, injury to Mr. Hamel. (Pet. App. at 9.)

Additionally, a review of Dr. Manion's affidavit reveals that he relied on the testimony of Mr. Hamel's gastroenterologist to express an opinion on causation, not to opine that the Physician deviated from the applicable standard of care. (Pet. App. at 5-10.) The gastroenterologist testified in his deposition that had the Physician diagnosed high-grade dysplasia in 2007, he would have sent Mr. Hamel for an immediate surgical consult. (*Id.* at 7.) Dr. Manion had to consider how Mr. Hamel's plan of care would have differed but for the Physician's misdiagnosis when determining that reasonable grounds exist to believe that the Physician's misdiagnosis caused, or contributed to, a delay in Mr. Hamel's cancer treatment. (*Id.* at 9.) When opining on the Physician's standard of care, however, Dr. Manion was able to review the cellular descriptions contained in the M.D. Anderson report (including phrases like "cytoplasmic vaculozation" and "micropapillary architecture within glands") to determine that the slides do, in fact, show high-grade dysplasia that the Physician failed to diagnose. (Pet. App. at 6, 17.) The Physician provided no record evidence to the trial court to support the contention that Dr. Manion's reliance upon textual descriptions of tissue by other pathologists at M.D. Anderson was at variance with established medical protocols.

Based upon these supposed deficiencies in presuit procedure, the Physician moved to dismiss Mrs. Hamel's action. (Pet. App. at 26-43.) Mrs. Hamel filed a written response. (Pet. App. at 84-99.) The trial court held an evidentiary hearing

in excess of fifty minutes. (Pet. App. at 101.) The trial court initially took the matter under advisement, but subsequently denied the motion in a brief written order. (Pet. App. at 139-40, 150.) The Physician timely filed his petition for certiorari in this Court seeking review of this order.

After Physician filed his petition in this Court, he also moved the trial court to stay the proceedings pending review in this Court. (Resp. App. at 29-30.) In denying the Physician's motion to stay, the trial court more thoroughly explained its rationale for denying the Physician's motion to dismiss. (*Id.* at 31-33.) Specifically, the trial court stated:

> [T]he fact that Defendants did not review the pathology slides at issue during the presuit period was the result of a bona fide, good faith dispute among the parties as to the protocol to be followed in providing access to the slides. Under the circumstances, the Court found that Plaintiffs had not completely deprived moving Defendants of access to the requested discovery and that notwithstanding Defendants' legitimate concerns over the restrictions on that production, Plaintiff's conduct of presuit discovery was not such that it warranted a dismissal of her claim, after the applicable statute of limitations has run.

(*Id.* at 32.) The trial court also explained that it had "found that the Plaintiff's expert who signed the presuit affidavit was sufficiently qualified to give the required opinion testimony." (*Id.*)

SUMMARY OF ARGUMENT

"[T]here is an increasingly disturbing trend of prospective defendants attempting to use the statutory requirements as a sword against plaintiffs." *Michael v. Med. Staffing Network, Inc.*, 947 So. 2d 614, 619 (Fla. 3d DCA 2007). This petition falls within that unfortunate trend.

As an initial matter, the Physician's petition fails to acknowledge this Court's limited use of its certiorari powers. While this Court may use certiorari to review orders denying motions to dismiss under Chapter 766, the Court can only consider whether the defendant was afforded the procedural safeguards of the statutes. For instance, the Court could grant a writ of certiorari where the trial court does not require the claimant to serve the defendant with a notice of intent to initiate litigation or a corroborating affidavit. However, certiorari is not an appropriate means to challenge the sufficiency of the claimant's evidence or the trial court's factual findings as part of the motion to dismiss. Both of the Physician's challenges to the order denying his motion to dismiss are an attempt to have this Court improperly invoke its certiorari powers. Moreover, even if certiorari review was appropriate (which it is not), the Physician cannot establish that the trial court departed from the essential requirements of the law when it denied his motion to dismiss.

First, the Physician claims that the trial court departed from the essential requirements of the law when it determined that the case should not be dismissed as a result of a good faith, presuit discovery dispute. While the petition claims that Mrs. Hamel denied the Physician *access* to the slides, what Mrs. Hamel actually objected to was relinquishing unqualified *possession* of the slides. Mrs. Hamel had no objection to the Physician or his expert reviewing the slides while they remained in the possession of a third-party, Baptist Medical Center. All that was required of Mrs. Hamel under § 766.205(1), Florida Statutes, was that she provide the Physician with "reasonable access" to the slides. The statute does not require that she provide "unqualified" access, the "most convenient" access, or the "access requested by the prospective defendant." The trial court found that Mrs. Hamel's offer to provide the Physician with access to the slides at the facility with which he already had a business relationship (the Medical Center) was reasonable given her legitimate concerns about protecting irreplaceable evidence.

Furthermore, even if the trial court had found Mrs. Hamel's position to be unreasonable (which it specifically did not find), a trial court has discretion when deciding whether to dismiss a claim for a claimant's failure to produce documents; dismissal is not mandatory. Therefore, the trial court could not have departed from the essential requirements of the law when it denied the Physician's motion to dismiss based on a good faith presuit discovery dispute.

Second, although the Physician purports to challenge the corroborating expert opinion as not complying with the procedural requirements of Chapter 766, he actually challenges the evidence supporting the expert's opinion. Again, this type of challenge is not susceptible to certiorari review. Moreover, the trial court did not depart from the essential requirements of law in determining that the expert's opinion was legally sufficient. The affidavit strictly complied with all Chapter 766 presuit requirements and provided "reasonable grounds to believe" that the Physician's negligence caused or contributed to Mr. Hamel's early death. The affidavit is not legally insufficient either because the expert considered testimony from a doctor in another specialty when opining on causation or because he reviewed Mr. Hamel's medical records rather than his original pathology slides. Nothing in chapter 766 requires an expert opinion to be based on the expert's first hand observation of operative facts, where such facts are otherwise memorialized in competent medical records.

Accordingly, this Court should deny the Physician's petition for a writ of certiorari.

ARGUMENT

I. THE PHYSICIAN DOES NOT MEET THE STANDARDS FOR OBTAINING A WRIT OF CERTIORARI.

This Court may issue a writ of certiorari only if the trial court's order: (i) departs from the essential requirements of law, and (ii) results in material injury for

the remainder of the case (iii) that cannot be corrected on an appeal from a final judgment. *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011). A writ of certiorari is an extraordinary, common-law remedy that must meet "strict prerequisites," that should be employed only in "very limited circumstances," and that is "not available as a matter of right." *Baptist Med. Ctr. of Beaches, Inc. v. Rhodin*, 40 So. 3d 112, 114 (Fla. 1st DCA 2010) (citing *Abbey v. Patrick*, 16 So. 3d 1051, 1053-54 (Fla. 1st DCA 2009)). While an appellate court may determine on certiorari review "whether a court has conducted the evidentiary inquiry required," it may not "review the sufficiency of the evidence considered in that inquiry." *Williams*, 62 So. 3d at 1133. Certiorari "'was never intended to redress mere legal error.'" *Id.* (quoting *Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001)). Stated another way, "certiorari does not lie for appellate courts to reweigh the evidence presented concerning compliance with the presuit statutory requirements." *St. Mary's Hosp. v. Bell*, 785 So. 2d 1261, 1262 (Fla. 4th DCA 2001). It is only appropriate if the trial court's alleged error deprived the Physician of the right to the presuit screening process in the first instance. *Abbey*, 16 So. 3d at 1054.

Examples of instances where a district court has used its certiorari powers to ensure compliance with the procedural requirements of Chapter 766 include: the trial court did not require a claimant to provide presuit notice to all of the health

care providers named in the complaint (*Goldfarb v. Urciuoli*, 858 So. 2d 397, 399 (Fla. 1st DCA 2003); the trial court failed to determine at a hearing whether the plaintiff had conducted a presuit investigation in good faith (*Martin Mem. Med. Ctr. v. Herber*, 984 So. 2d 661 (Fla. 4th DCA 2008); and the claimant failed to provide any presuit affidavit (*Shands Teaching Hosp. v. Miller*, 642 So. 2d 48 (Fla. 1st DCA 1994). "The common thread running through these cases is that they all involve errors that were so serious that they effectively deprived the doctor or health care provider of the right to have the plaintiff's claim of negligence evaluated before trial." *Abbey*, 16 So. 3d at 1054.

In contrast, the Physician's challenge in this case falls into the category of challenges for which certiorari is *not* appropriate. The issues in this case are: (1) whether the parties' good faith disagreement over how best to protect critical evidence meant that Mrs. Hamel violated Chapter 766's presuit discovery requirements to the extent that her case must be dismissed as a matter of law; and (2) whether Mrs. Hamel's medical expert affidavit is insufficient as a matter of law because of the types of evidence the expert relied upon to render his opinion. In answering these questions, the trial court made factual findings that Mrs. Hamel had not acted unreasonably in the way she conducted presuit discovery and that Mrs. Hamel's expert was sufficiently qualified to give the opinion rendered in his

affidavit. (Resp. App. at 32.) These factual findings are not subject to the extraordinary remedy of certiorari review.

The Supreme Court's decision in *Williams v. Oken* illustrates why the Physician may not invoke certiorari jurisdiction to challenge the trial court's factual findings. 62 So. 3d at 1134-36. There, a doctor challenged a factual finding that an expert witness was qualified to give the corroborating affidavit. *Id.* at 1131. The Court first noted that the doctor "cannot demonstrate material harm required for certiorari review" because the trial court's finding that the expert was qualified did not deprive him of any statutorily guaranteed process. *Id.* at 1135-36. The Court also held that district courts could not grant certiorari to review the sufficiency of the plaintiff's evidence, which is what the doctor's petition seeking review of the trial court order was attempting. *Id.* at 1136. Thus, while a district court may grant certiorari review to determine whether a plaintiff complied with the procedural requirements of chapter 766 (*e.g.*, submitting a corroborating affidavit), the court may not review the sufficiency of the evidence considered by the trial court. *Id.; see also Abbey*, 16 So. 3d at 1055 (certiorari is inappropriate if the trial court "has afforded the defendant the statutory procedure but has merely made a mistake of law or fact in the course of carrying it out."). Thus, the Supreme Court recognized the fundamental concept that Chapter 766 does not

override the general rule that certiorari is unavailable to review evidentiary rulings in civil cases.

In this case, the Physician contends that Mrs. Hamel failed to abide by the presuit discovery and corroboration procedures in Chapter 766. The petition for certiorari makes clear, however, that the Physician's actual complaint is that the trial court made a mistake in its factual findings in the course of the Chapter 766 proceeding below. (Cert. Pet at 10.)

First, the Physician contends that the trial court's order "fails to recognize that [Mrs. Hamel's] refusal to provide authorized access to the pathology slides was a direct violation of the procedural requirements of Chapter 766, Florida Statutes." (*Id.*) Yet, the trial court found that the parties simply had a "bona fide, good faith dispute" about the protocol to be followed in balancing the necessity to *protect* the pathology slides with providing reasonable *access* to those slides. (Resp. App. at 32.) Even assuming the trial court's finding was erroneous, this Court may not review by certiorari mere legal error. 62 So. 3d at 1137.

Second, the Physician complains that the Order "fails to recognize that [Mrs. Hamel] did not provide a corroborating statement based on personal knowledge." (Cert. Pet. at 10.) Significantly, the Physician failed to present any record evidence to the trial court in support of his "just basic logic" argument that pathologists can not rely on textual descriptions such as "unusual cytoplasmic vacuolization" and

"micropapillary architecture within the glands" to form their judgments and opinions. Moreover, the trial court's factual finding that the affidavit was sufficient did not deprive the Physician of any procedural process due under chapter 766. Indeed, the Physician received the affidavit and had the opportunity to be heard on his motion to dismiss in the trial court. *See Williams*, 62 So. 3d at 1136 (doctor was afforded process because he received the notice of intent and affidavit). This was all the process he was entitled to and this Court may not review by certiorari the purported mistake of law or fact concerning the sufficiency of the evidence underlying Dr. Manion's opinion. *See Abbey*, 16 So. 3d at 1055; *accord Bell*, 785 So. 2d at 1262 (holding that "certiorari is available to review whether a trial judge followed chapter 766 and whether a plaintiff complied with presuit notice and investigation requirements; certiorari is not so broad as to encompass review of the evidence regarding the sufficiency of counsel's presuit investigation."). Later, on a fully-developed record and after an evidentiary hearing or trial, the Physician presumably will raise this same challenge on a plenary appeal. Indeed, this is the very type of challenge that is better left for a plenary appeal on a fully-developed record and not permitted by way of certiorari review because of the judicial policy against "piecemeal review" of pretrial orders. *See Abbey*, 16 So. 3d at 1053-55.

Accordingly, this Court should dismiss the petition as it lacks jurisdiction to consider the Physician's factual and evidentiary challenges by way of certiorari review.

II. MRS. HAMEL DID NOT UNREASONABLY DENY THE PHYSICIAN'S REQUEST TO TAKE POSSESSION OF HER LATE HUSBAND'S PATHOLOGY SLIDES AND THE PHYSICIAN WAS NOT PREJUDICED.

Even *if* this Court may review the trial court's order by way of its certiorari jurisdiction, *but see supra* Argument I., at 16-21, it should still deny the Physician's petition because the trial court did not depart from the essential requirements of law. The trial court correctly exercised its discretion to determine that Mrs. Hamel acted reasonably when she refused to allow the Physician to take physical *possession* of (as opposed to mere *access* to) her late husband's pathology slides from a third party. (Resp. App. at 32.)

The Physician contends that Mrs. Hamel failed to provide access to Mr. Hamel's pathology slides, in violation of sections 766.205 and 766.106, Florida Statutes, as well as Florida Rule of Civil Procedure 1.650. (Cert. Pet. at 11.) Section 766.205(1), Florida Statutes, specifically provides that a party "shall provide to the other party *reasonable access* to information within its possession or control…." (emphasis added). Notably, the statute does not require the parties to provide "unqualified" access, the "most convenient" access, or even the "requested" access. Mrs. Hamel offered to sign the necessary HIPPA releases to

allow the Physician's expert to examine the slides while they remained in the custody of the Medical Center. (Pet. App. at 56.) Given Mrs. Hamel's legitimate concerns over the handling of these irreplaceable, tiny pieces of glass, allowing the Physician's expert to review the slides at the Medical Center was all the "reasonable access" required by the statute.

In a similar vein, section 766.106, Florida Statutes, mandates that the parties exchange information in good faith and further provides that "[u]nreasonable failure of any party to comply with this section justifies dismissal of claims or defenses." *Id.* When interpreting this section, courts have concluded that the word "unreasonable" means that "trial courts have discretion to determine whether a party, who has refused to comply with presuit discovery, 'acted *unreasonably* in fulfilling the statutory duty to cooperate with the insurer's presuit investigation in good faith.'" *Dressler v. Boca Raton Comm. Hosp.*, 566 So. 2d 571, 573 (Fla. 4th DCA 1990) (quoting *Pinellas Emergency Mental Health Servs., Inc. v. Richardson*, 532 So. 2d 60, 63 (Fla. 2d DCA 1987) (emphasis original)).[4]

Similarly, in subsection (6)(a), the statute provides that "[u]pon receipt by a prospective defendant of notice of a claim, the parties shall make discoverable information available without formal discovery. Failure to do so is grounds for

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[4] These cases refer to § 768.57, Florida Statutes, which was renumbered in 1988 as § 766.106, Florida Statutes.

dismissal of claims or defenses ultimately asserted." § 766.106(6)(a), Fla. Stat. (2010); *see also* Rule 1.650(c)(1), Fla. R. Civ. P. ("the parties shall make discoverable information available without formal discovery. Evidence of failure to comply with this rule may be grounds for dismissal of claims or defenses ultimately asserted."); § 766.205(2) and (3), Fla. Stat. (2010) (failure of a party to provide reasonable access to information can be grounds to dismiss a claim and it relieves the requesting party of the obligation to provide a corroborating affidavit).[5] However, a claimant's failure to comply with presuit discovery does not mean that the only appropriate sanction is to dismiss his claim. *McPherson v. Phillips*, 877 So. 2d 755, 758 (Fla. 4th DCA 2004). "[T]he law does not support such an automatic, draconian response to every Chapter 766 noncompliance." *Id.* Indeed, "[i]t is well recognized in Florida law that dismissal of claims or defenses is an extreme sanction which should be used sparingly." *De La Torre v. Orta*, 785 So. 2d 553 (Fla. 3d DCA 2001).

Here, the trial court specifically found that Mrs. Hamel "had not completely deprived moving Defendants of access to the requested discovery and that notwithstanding Defendants' legitimate concerns over the restrictions on that production, Plaintiff's conduct of presuit discovery was not such that it warranted a

[5] Notably, the Physician unilaterally availed himself of § 766.205(3), Florida Statutes, and opted not to obtain an expert's opinion that he did not commit medical negligence. (Pet. App. at 153.)

dismissal of her claim, after the applicable statute of limitations has run." (Resp. App. at 32.) Consistent with this finding is the law from this Court, which notes that if a claimant has a "reasonable explanation" for not providing the requested presuit discovery, "the claim would not be dismissed." *Melanson v. Agravat*, 675 So. 2d 1032, 1034 (Fla. 1st DCA 1996).[6] Accordingly, because presuit discovery relating exclusively to the pathology slides was held up as a result of a good faith dispute, the Physician cannot show that dismissal was warranted, much less mandated, such that denying the motion to dismiss amounted to a departure from the essential requirements of the law.

Furthermore, the Physician was not prejudiced by Mrs. Hamel's refusal to release unqualified physical possession of the slides. Under Supreme Court precedent, dismissal of a party's pleadings for failing to engage in presuit discovery is too harsh a sanction unless the opposing party has been prejudiced. *Kukral v. Mekras*, 697 So. 2d 278, 284 (Fla. 1996); *see also Robinson v. Scott*, 974

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[6] *See also Preferred Med. Plan, Inc. v. Ramos*, 742 So. 2d 322, 323 (Fla. 3d DCA 1999) (where physician did not completely fail to investigate claim, only failed to respond to some presuit discovery requests, trial court order was "tantamount to denying [the doctor] access to the courts and was *not* a measured response to the failure to comply with presuit discovery.") (emphasis original); *Ergos*, 532 So. 2d at 1361 ("even when a party's conduct in response to discovery requests is 'laggard and slothful,' dismissal of a suit is not necessarily warranted. Rather, dismissal is justified 'only in extreme situations for flagrant or aggravated cases of disobedience.'"); *Wilkinson v. Golden*, 630 So. 2d 1238, 1239 (Fla. 2d DCA 1994) ("only unreasonable conduct justified the severe sanction of dismissing a claim. And even then, dismissal would not be mandatory.")

So. 2d 1090 (Fla. 3d DCA 2007); *Ragoonanan v. Assocs. in Obstetrics & Gynecology*, 619 So. 2d 482, 484 (Fla. 2d DCA 1993) ("Dismissal is justified only where the failure to cooperate is unreasonable, and even unreasonable conduct may not justify the ultimate sanction of dismissal"). Here, the Physician was not prejudiced by not having unqualified physical possession of the slides for a number of reasons.

First, the Physician supplemented Mr. Hamel's medical record *after* learning that M.D. Anderson had reached a different diagnosis when reviewing the pathology slides. (Resp. App. at 1.) Presumably, the Physician either did or could have reviewed the pathology slides at that time. Despite whatever opinion an expert might render, the Physician himself knew or should have known what the pathology slides showed and whether or not he misread those slides.

Second, Mrs. Hamel made perfectly clear that she would sign a release authorizing the Physician's access to the pathology slides. (Pet. App. at 56.) The Physician steadfastly claimed that access at the Medical Center was not sufficient, never attempting to have an expert view the slides while they remained in the possession of the Medical Center. (Pet. App. at 55, 152, 153.) While Mrs. Hamel concedes that the Physician had to seek the opinion of an unbiased expert for his own presuit investigation (*Derespina v. N. Broward Hosp. Dist.*, 19 So. 3d 1128, 1129 (Fla. 4th DCA 2009)), she maintains that the Physician's position on where

that unbiased expert should conduct his inquiry – and what evidence he needed to render an opinion – is evidence of either a good faith discovery dispute at best, or a lack of good faith by the Physician at worst.[7]

Third, any expert retained by the Physician could have reviewed "most, if not all, of the same documents utilized" by Mrs. Hamel's expert when rendering his opinion. *Robinson*, 974 So. 2d at 1093. The documents were all included with Mrs. Hamel's notice of intent. (Pet. App. at 1.) Thus, just as in *Robinson*, there is no evidence that Mrs. Hamel's conduct during presuit discovery prevented the Physician "from investigating the claim, assessing potential liability and choosing whether or not to enter into settlement negotiations or admit liability and submit to arbitration on damages." *Id.; see also Ragoonanan*, 619 So. 2d at 484 (claimant refused to identify their medical expert, but did provide the doctor with interrogatory responses, supplied all medical records, and appeared before the hospital's three-member panel; this was not an unreasonable failure to cooperate justifying dismissal). As explained in footnote 7, the Physician's expert could have reviewed Mr. Hamel's medical records, which contain detailed descriptions of the pathology slides (Pet. App. at 6), and opined on whether or not the Physician

[7] Indeed, the fact that Dr. Manion was able to review the cellular descriptions in Mr. Hamel's medical records and opine that reasonable grounds exist to believe that the Physician misread Mr. Hamel's pathology slides (Pet. App. at 6-9), is evidence that the Physician's expert could have conducted the same analysis without reviewing the actual slides.

was negligent. The Physician produced no record evidence that a medical records review would be insufficient, instead arguing that it was "basic logic" that his expert needed to see the actual slides. (Pet. App. at 107.)

Finally, dismissal would have been an abuse of discretion in this case because Mrs. Hamel did not have possession or control of the slides and therefore could not have violated chapter 766. *See* § 766.205(1), Fla. Stat. (2010) ("each party shall provide to the other part reasonable access to information *within its possession or control…*")(emphasis added). The slides remained in the possession and control of the Medical Center once sequestered. (Resp. App. at 23-24) (once sequestered, the Medical Center would not release original slides absent court order). Thus, the trial court could not issue the sanction of dismissal against Mrs. Hamel because she did not violate any statute. *See Wilkinson*, 630 So. 2d at 1239.

Accordingly, this Court should deny the Physician's petition for certiorari because Mrs. Hamel's conduct of presuit discovery did not run afoul of chapter 766, and certainly did not justify dismissal of her case.

III. THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW IN DETERMINING THAT MRS. HAMEL'S EXPERT WAS SUFFICIENTLY QUALIFIED TO RENDER HIS OPINION.

The Physician's petition asks this Court to look beyond the facts in Dr. Manion's affidavit and determine whether the evidence on which he relied was legally sufficient. (Cert. Pet. 10.) Specifically, the Physician claims that Dr.

Manion's opinion is flawed because: (1) it relies, in part, on testimony from a doctor outside the specialty of pathology, and; (2) it is not based on Dr. Manion having personally reviewed the pathology slides. (*Id.*) However, this Court has rejected attempts, like this one, to create a mini-trial when reviewing the affidavit for presuit compliance. *Rhodin*, 40 So. 3d at 119. All the claimant must show is that he has "reasonable grounds" to *believe* that the doctor was negligent, not proof after a mini-trial that the doctor *actually* was negligent. *Id.* Given this standard, neither this Court nor the trial court may weigh or reject the evidence on which Dr. Manion relied in forming his opinions.

Even if this Court could reweigh the evidence, Dr. Manion was allowed to consider the testimony of Mr. Hamel's gastroenterologist. The gastroenterologist testified that, if the Physician made the same diagnosis as M.D. Anderson, the gastroenterologist then would have referred Mr. Hamel to a surgeon immediately instead of waiting another year to conduct additional tests. (Pet. App. at 7.) This testimony is directly relevant to causation. *See* § 766.203(2), Fla. Stat. (2010) (claimant must determine that "negligence resulted in injury to the claimant"). Thus, Dr. Manion necessarily had to consider the gastroenterologist's testimony before he could opine that the Physician's misdiagnosis caused harm to Mr. Hamel.

Moreover, Dr. Manion did not have to have "personal knowledge" of Mr. Hamel's pathology as a result of viewing the slides. Dr. Manion had personal knowledge by virtue of reviewing the cellular descriptions observed in the M.D. Anderson report, *to wit*: "separate gastric mucosa with marked reactive gastropathy and a background of mild active chronic gastritis. No Helicobacter pylori organism are identified. … there is unusual cytoplasmic vacuolization, and a micropapillary architecture within the glands," and thereafter applying his knowledge, training, and experience. (Pet. App. at 6; *cf.* Cert. Pet. at 17.) The Physician offered no record evidence at the hearing to suggest that pathologists do not rely on written descriptions in medical records when rendering opinions.

Chapter 766 simply requires that the affidavit confirm that there are "reasonable grounds to initiate medical negligence litigation." *See* § 766.203(2), Fla. Stat. (2010). The purpose of this affidavit is to ensure that physicians do not have to answer claims that no expert witness would ever support. *Archer v. Maddux*, 645 So. 2d 544, 547 (Fla. 1st DCA 1994). Corroboration means the expert opinion is based on underlying facts and is more than a bare legal conclusion. *Maldonado v. EMSA Ltd. P'ship*, 645 So. 2d 86, 89 (Fla. 3d DCA 1994) ("The corroboration statement must outline the factual basis for the opinion.") (citations omitted). Here, Dr. Manion's opinion is based on facts, including Mr. Hamel's medical records from the Physician, from another medical

facility, and from the deposition of Mr. Hamel's gastroenterologist. (Pet. App. at 5-6.) The expert's opinion is also based on his education, training and experience. (Pet. App. at 9.) Thus, the opinion satisfies the statutory purpose of ensuring that an independent expert would support Mrs. Hamel's claim of medical negligence.

The Physician does not cite to a single case standing for the extraordinary proposition that a corroborating affidavit must be based on "personal knowledge," which he suggests means first-hand observation of the pathology samples. (Cert. Pet. at 10.) Taken to its logical conclusion, the Physician's argument would mean that no doctors other than those already involved with the patient's treatment could offer an opinion on whether probable malpractice occurred. However, case law indicates that nearly all, if not all, corroborating affidavits will be based on the physician's review of the patient's medical records and/or the medical history as related by the patient or his family. *See e.g., Rhodin*, 40 So. 3d at 114 (expert relied on medical records and her own training and experience); *Jackson v. Morillo*, 976 So. 2d 1125, 1126-27 (Fla. 5th DCA 2007) (affidavit based on review of patient's medical records); *Bell*, 785 So. 2d at 1262 (affidavit based on facts as related by mother; no medical records were reviewed); *Maldonado*, 645 So. 2d at 89 (opinion following records review satisfied the statute); *Wolfsen*, 619 So. 2d at 1051 (expert reviewed medical records prior to rendering opinion). Corroborating experts can never have first-hand knowledge of the underlying facts because they

were not involved in the patient's treatment. The fact that the expert in this case *could have* reviewed the pathology slides, in addition to all of the other medical records he did review, does not change the presuit requirement that Mrs. Hamel simply had to have an expert verify that she had reasonable grounds to initiate medical negligence litigation.[8] § 766.203(2), Fla. Stat. (2010).

The Physician's argument in his petition focuses on cases that are inapposite because they deal with the issue of whether a party conducted a reasonable presuit investigation, which is not a challenge the Physician raises here. (See Cert. Pet. at 17.) For example, in *Grau v. Wells*, the trial court struck a defendant's answer because the only expert he consulted was his business partner. 795 So. 2d 988, 989 (Fla. 4th DCA 2001). The appellate court found that the biased consultation did not amount to a reasonable investigation of the plaintiff's claim. Similarly, in *Estevez v. Montero*, the appellate court agreed that the doctor had not conducted a reasonable investigation because he did not seek out his own expert or provide records to any of the doctors with whom he informally consulted. 662 So. 2d 1268, 1269 (Fla. 3d DCA 1995). In contrast, the Physician here does not claim that Mrs. Hamel did not undertake a good faith investigation. Rather, he claims

[8] The Physician's insistence on a personal review of the pathology slides is also ironic considering the president of the Physician's medical group is the one who ordered sequestration of the slides so that Mrs. Hamel could only obtain re-cuts and not the original slides reviewed by the Physician. (Resp. App. at 11).

that the investigation was not based on evidence he feels is superior to Mr. Hamel's medical records. (Cert. Pet. at 16-18.) If the Physician continues to believe that Dr. Manion's opinion is legally insufficient, he will be free to raise the issue again at a pre-trial hearing on his motion *in limine* and at trial. That evidentiary decision of the trial court will be reviewable on plenary appeal. However, the trial court did not depart from the essential requirements of law in determining that Dr. Manion was qualified to render his corroborating opinion and therefore denying the Physician's motion to dismiss. (Resp. App. at 32.)

CONCLUSION

For the foregoing reasons, this Court should deny the Physician's petition for writ of certiorari.

RESPONSE TO PETITIONERS' MOTION TO STAY PENDING CERTIORARI REVIEW

Pursuant to Rule 9.310 of the Florida Rules of Appellate Procedure, Mrs. Hamel opposes the Motion for Stay Pending Certiorari review ("Motion to Stay") and the supplemental Addendum served by Petitioners, Paul Allen Dundore and Jacksonville Pathology Consultants, P.A. (collectively, the "Physician") on September 27, 2011 and October 3, 2011, respectively. Mrs. Hamel incorporates the facts recited on pages 5 through 13 of her response to the Physician's petition to certiorari.

In his Motion to Stay, the Physician asks this Court to stay the underlying case pending this Court's decision on the merits of his certiorari petition. (Mot. for Stay at 1.) However, what the Physician should have asked this Court to do, in accordance with Florida Rules of Appellate Procedure, is review the order entered by the trial court denying the Physician's motion to stay filed in the lower tribunal. Rule 9.310(a) explains that a party seeking a stay pending appellate or certiorari review must so move in the lower tribunal, which has discretion to grant or deny relief. Rule 9.310(f) then provides that "[r]eview of orders entered by lower tribunals under this rule shall be by the court on motion." *See also Thames v. Melvin*, 370 So. 2d 439, 440 (Fla. 1st DCA 1979) ("If for any reason the stay is denied by a lower tribunal, this court has jurisdiction, upon appropriate motion, to review *the denial of the stay.*") (emphasis added).

This Court does not consider the Physician's Motion to Stay *de novo* or as if a motion to stay had never been made – and denied – in the trial court. Rather, this Court reviews the trial court's order denying the Physician's original motion to stay under an abuse of discretion standard of review. *See Mariner Health Care, Inc. v. Baker*, 739 So. 2d 608, 609 (Fla. 1st DCA 1999); *see also* Fla. R. App. P. 9.130(a) (noting trial court has jurisdiction, "in its discretion," to grant, modify, or deny a staying pending review). The Physician's Motion for Stay does not even

argue, much less demonstrate, that the trial court here abused its discretion in denying the motion for a stay.

Additionally, the Physician never mentions in the Motion to Stay that there are factors the trial court had to consider when exercising its discretion to issue or deny a stay. The two primary factors are: (1) the moving party's likelihood of success on the merits; and (2) the likelihood of harm should a stay not be granted. *Perez v. Perez*, 769 So. 2d 389, 391 (Fla. 3d DCA 1999). The trial court may also consider whether the court where review is sought will assume jurisdiction. *See State ex. Rel. v. McCord*, 380 So. 2d 1037, 1039 (Fla. 1980). None of these factors warranted a stay here.

Likelihood of Success on the Merits and that this Court Has Jurisdiction

The factors of the likelihood of success on the merits and whether this Court will assume jurisdiction are intertwined with the merits of the Physician's certiorari petition. As explained in Section I, pages 16-21, *supra*, the Physician is unlikely to prevail because this Court should not assume jurisdiction. The Physician asks this Court to review the trial court's discretionary findings that Mrs. Hamel's corroborating affidavit was legally sufficient and that Mrs. Hamel did not act unreasonably – but in good faith – when declining to grant the Physician physical possession of (as opposed to access to) Mr. Hamel's pathology slides. As the Supreme Court of Florida has explained, certiorari may not be used to review a

trial court finding where review requires the district court to inquire into the sufficiency of the evidence presented below. *See Williams v. Oken*, 62 So. 3d 1129, 1135-36 (Fla. 2011). Accordingly, this Court should not review the trial court's discretionary determinations that Mrs. Hamel acted reasonably and that Dr. Manion's corroborating affidavit was legal sufficient.

Furthermore, on the merits of each allegation, the Physician also does not have a likelihood of success on appeal (something not even alleged, much less argued, by the Physician in his Motion to Stay). As explained in Sections II and III, pages 17 through 31, *supra*, the trial court, having heard all the evidence and argument of counsel, was in the best position to determine that Mrs. Hamel's presuit discovery conduct was reasonable and that her expert affidavit was sufficient. Thus, the Physician is not entitled to certiorari relief because he cannot establish that the trial court departed from the essential requirements of the law when, based upon its factual findings, it exercised its discretion to deny the Physician's motion to dismiss.

Harm if a Stay is Not Granted

The purported harm that the Physician will suffer without a stay is that he will have to endure "expensive, costly litigation." (Mot. for Stay ¶ 9.) This is the same harm the Physician alleges as a basis for seeking certiorari review of the order denying his motion to dismiss. (Cert. Pet. at 19-20.) While true that medical

providers should not have to fully litigate a claim where presuit requirements have not been met (*see Goldfarb v. Urciuoli*, 858 So. 2d 397, 398 (Fla. 1st DCA 2003)), there is no similar danger of irreparable harm in continuing to litigate where the trial court's purported error involves supposedly erroneous factual findings and discretionary decisions. Indeed, district courts routinely deny petitions for certiorari where the error is one that can be remedied on plenary appeal. *See e.g., Abbey*, 16 So. 3d at 1055-56. The harm in "forcing" the Physician to litigate is not irreparable under Chapter 766 because the Physician received the benefit of all the presuit procedures due him. *See id.*; *see also AVCO Corp. v. Neff*, 30 So. 3d 597, 601 (Fla. 1st DCA 2010) ("fact that a petitioner will incur litigation expenses is normally not enough to meet the irreparable harm test. We have repeatedly declined to grant certiorari review to orders that petitioners claim will cause irreparable harm due to payment of unnecessary litigation and defense expenses.").[9]

Just as important, the Physician claims that Mrs. Hamel's "cause of action will not be harmed by granting a stay." (Mot. for Stay ¶ 10.) This is incorrect and the trial court recognized the harm in its order. Specifically, the trial court stated:

> The moving Defendants will be involved in pre-trial discovery as witnesses, whether or not they remain as parties in the litigation.

[9] The harm of which the Physician complains can be remedied in other ways. For example, he could file a motion to expedite, but has not done so. *See* Fla. R. Civ. P. 9.300(d)(9).

> These Defendants have acknowledged their willingness to participate in depositions as required by the remaining parties in the event that the prosecution of the civil action against them is stayed. If the certiorari petition is not successful, the discovery relating to the moving Defendants, including the taking of their depositions, would have to be repeated.

(Resp. App. at 32.) Thus, while the Physician claims he should not have to endure "costly litigation" while this Court considers the merits of his certiorari petition, he would have the remaining parties in the lawsuit continue with "costly litigation," and perhaps even unnecessarily repeat parts of that litigation. The trial court did not abuse its discretion when it concluded that the balance of the facts for and against a stay, "including convenience of the parties and judicial economy," did not weigh in favor of staying the proceedings. (*Id.* at 32-33.)

Moreover, while the Physician claims the March 2012 trial might not be delayed as a result of a stay (Mt. for Stay ¶ 6), this contention is also misplaced. The Third Amended Order Setting Case for Jury Trial and for Pretrial Conference and Requiring Matters to be Completed Prior to the Pretrial Conference ("Trial Set Order"), states that the pretrial conference will be held on February 23, 2012 and that the defendants must submit their expert witness disclosures no later than 120 days prior to the pretrial conference, which equates to October 26, 2011. (Resp. App. at 39, 41 ¶¶ 2, 6.) As the Physician noted in his Addendum, Mrs. Hamel has already served her expert witness disclosures, pursuant to the Trial Set Order, on September 29, 2011. (Addendum at ¶ 4.) A stay would permit the Physician to

delay in providing his disclosures for an excessive period of time, depriving Mrs. Hamel of time to conduct discovery and likely necessitating a continuance. If all the Physician requires is additional time to prepare his expert disclosures, then he can easily move for that relief in the trial court without staying the entire litigation. *See e.g., Baker v. Mathew*, 518 So. 2d 290 (Fla. 5th DCA 1987) (trial court abuses discretion where it does not allow party to reopen expert disclosures well in advance of trial).

Likewise, the Trial Set Order also directs the parties to engage in mediation prior to the pretrial conference. (Resp. App. at 41 ¶ 10.) However, a stay as to the Physician could not only frustrate settlement negotiations between Mrs. Hamel and other defendants in the case, but could force a continuance of the trial if the Physician is unable to mediate prior to the pretrial conference once the stay is lifted.

Other Grounds to Affirm Trial Court's Denial of Motion to Stay

The present Motion to Stay is also inadequate because the Physician indicated that there was a hearing on its motion below (Mot. for Stay at ¶ 4), but he has not provided this Court with a transcript of the hearing. *But see* Philip J. Padovano, *Florida Appellate Practice*, § 12.7, at 244 (2007 ed.) ("[T]he party seeking review of the stay order should attach relevant parts of the record as an appendix to the motion for review.") Nor has the Physician argued that a transcript

is unnecessary. *But see Applegate v. Barnett Bank of Tallahassee*, 377 So. 1150, 1152 (Fla. 1979) (noting general rule that a trial court's order is presumed to be correct and will be affirmed if the party seeking review has presented an inadequate record). Accordingly, this Court should not overturn the trial court's order denying the Physician's underlying motion to stay because the order is presumed correct and the Physician has not provided the Court with an adequate record. *Id.* ("Without a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory.")

WHEREFORE, Respondent, Theresa M. Hamel, as the personal representative of the Estate of Maxime F. Hamel, respectfully requests that this Court deny the Motion for Stay by ruling that the trial court did not abuse its discretion when it denied the motion to stay filed in the lower tribunal.

Respectfully submitted,

SPOHRER DODD
Chad S. Roberts
Florida Bar No. 896977
croberts@sdlitigation.com
Robert F. Spohrer
Florida Bar No. 184500
rspohrer@sdlitigation.com
701 West Adams Street
Jacksonville, FL 32202
(904) 309-6500 Telephone
(904) 309-6501 Facsimile

CREED & GOWDY, P.A.

_*/s/ Jessie L. Harrell*_____________
Jessie L. Harrell
Florida Bar No. 0502812
jharrell@appellate-firm.com
Bryan S. Gowdy
Florida Bar No. 0176631
bgowdy@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
(904) 350-0086 facsimile

Attorneys for Hamel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October 2011, a copy hereof has been furnished by electronic mail to:

W. Douglas Childs [dchilds@childsreed.com] and **Ann W. Licandro, Esq. [**alicandro@childsreed.com], counsel for Petitioner;

John R. Saalfield, Esq., [jack.saalfield@saalfieldlaw.com] and **Duke Regan, Esq.** [duke.regan@saalfieldlaw.com] counsel for Boreland-Groover Clinic and Dr. Kohm;

and **Chad S. Roberts, Esq.**, [CRoberts@sdlitigation.com], trial counsel for Plaintiff.

_____*/s/ Jessie L. Harrell* _______
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

____*/s/ Jessie L. Harrell* __________
Attorney