FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-288

DAVID A. HOWELL and N.H., his minor son, through his father and next friend, David A. Howell,

Appellants,

v.

WILLIAM BALCHUNAS, M.D., PENSACOLA RADIOLOGY CONSULTANTS, P.A., d/b/a PENSACOLA RADIOLOGY CONSULTANTS and SACRED HEART HEALTH SYSTEM, INC. d/b/a SACRED HEART HOSPITAL-PENSACOLA,

Appellees.

On appeal from the Circuit Court for Escambia County.
Jan Shackelford, Judge.

December 17, 2019

PER CURIAM.

Appellants, David Howell and N.H., his minor son, appeal the trial court's order dismissing with prejudice their medical malpractice case against Appellee, Sacred Heart Health System,

Inc. Appellants argue that the order should be reversed because Appellee waived the issue of their alleged failure to comply with the presuit requirements of section 766.203(2), Florida Statutes (2015), and that, even if a waiver did not occur, their notice of intent to sue and their corroborating affidavit fully complied with the presuit requirements. Finding no merit in Appellants' waiver argument, we affirm as to that issue without further comment. For the reasons that follow, we reject Appellants' compliance argument and affirm as to that issue as well.

In their Notice of Intent to Initiate Litigation against Appellee and William Balchunas, M.D., Appellants described the alleged negligence of the defendants and Appellant Howell's alleged injuries that resulted therefrom. Attached to the notice was the affidavit of Richard L. Bajakian, M.D. After explaining that he practiced diagnostic radiology, was familiar with the prevailing professional standard of care in his profession and within his specialty, and had reviewed certain reports, charts, and images, Dr. Bajakian "reach[ed] and state[d] the following conclusions with reasonable medical probability and confidence":

> a) That the initial pulmonary CT angiogram of 7/29/2015, was incorrectly interpreted by Dr. William R. Balchunas as negative, when it [sic] fact it clearly and convincingly showed and demonstrated a clot or pulmonary embolus in the left lung circulation.
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> b) In my personal opinion as a practicing Diagnostic Radiologist in south Florida today that there is a reasonable basis to believe that such a reading and interpretation of this study is below the standard of care for a practicing diagnostic radiologist.
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> c) *That there is likewise a reasonable basis to believe that misinterpreting this study of 7/129/2015 [sic] could have led the referring physician and anyone else who relied on this interpretation to miss the correct diagnosis, potentially leading to incorrect, improper, or no treatment of the diagnosable condition. Such actions and inactions could potentially have caused permanent harm to patient David Howell.*

(Emphasis added). Appellee informed Appellants of its belief that Dr. Bajakian's affidavit was insufficient under the presuit requirements. Notwithstanding such, Appellants filed a Complaint against Appellee, Dr. Balchunas, and Pensacola Radiology Consultants, alleging negligence and loss of consortium claims. Appellee moved to dismiss the case against it.

In the order on appeal, the trial court found in part:

> b. Florida Statute § 766.203(2) requires that "the claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe that: (a) Any named defendant in the litigation was negligent in the care or treatment of the claimant; and (b) Such negligence resulted in injury to the claimant." There is no question that the Affidavit from Plaintiffs' presuit expert, Richard Bajakian, M.D., found a reasonable basis that Dr. Balchunas' reading of the radiology study breached of [sic] the standard of care. However, Dr. Bajakian's Affidavit did NOT establish such negligence resulted in injury to the Claimant/Plaintiff . . . . Dr. Bajakian's language in his Affidavit stated that the alleged negligence "could have led"; "potentially leading to incorrect"; and "such actions could have potentially caused permanent harm." These averments do not meet the pre-suit statutory requirements. The Court finds Rell v. McCulla, 101 So.3d 878 (Fla. 2d DCA 2012), which was cited by counsel for Sacred Heart, instructive on the issue.
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> c. The Court finds that the statute of limitations has lapsed such that the deficiency cannot be corrected. Therefore, the cause is dismissed WITH PREJUDICE.

This appeal followed.

Section 766.203(2), Florida Statutes (2015), which is entitled "Presuit investigation by claimant," provides:

> Prior to issuing notification of intent to initiate medical negligence litigation pursuant to s. 766.106, the claimant

> shall conduct an investigation to ascertain that there are reasonable grounds to believe that:
>
> (a) Any named defendant in the litigation was negligent in the care or treatment of the claimant; and
>
> (b) Such negligence resulted in injury to the claimant.
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> Corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(6), at the time the notice of intent to initiate litigation is mailed, which statement shall corroborate reasonable grounds to support the claim of medical negligence.

As we have explained, medical malpractice plaintiffs do not have the same common law rights as victims of other types of negligence. *Baptist Med. Ctr. of the Beaches, Inc. v. Rhodin*, 40 So. 3d 112, 115 (Fla. 1st DCA 2010) (citing section 766.201(1)(a), Florida Statutes (2009), wherein the Legislature noted the dramatic increase in medical malpractice liability insurance premiums resulting in increased medical care costs for most patients and the functional unavailability of malpractice insurance for some physicians). The purpose of the medical malpractice presuit investigation is to "'facilitate evaluation of the claim.'" *Morris v. Muniz*, 252 So. 3d 1143, 1146 (Fla. 2018) (quoting section 766.205(1), Florida Statutes (2011)). In other words, the presuit process was created to "'facilitate the expedient, and preferably amicable, resolution of medical malpractice claims.'" *Id.* (quoting *Williams v. Oken*, 62 So. 3d 1129, 1133 n.1 (Fla. 2011)). Courts must construe the medical malpractice presuit screening requirements "'in a manner that favors access to courts.'" *Id.* (quoting *Patry v. Capps*, 633 So. 2d 9, 13 (Fla. 1994)); *see also Pierrot v. Osceola Mental Health, Inc.*, 106 So. 3d 491, 493 (Fla. 5th DCA 2013) (noting that because the presuit requirements of Florida's Medical Malpractice Act restrict plaintiffs' constitutional right of access to courts, the requirements' applicability must be construed narrowly in favor of access). The ultimate question of whether a claimant has satisfied the threshold requirements of the presuit notice investigation,

warranting denial of the defendant's motion to dismiss, presents an issue of law. *Rhodin*, 40 So. 3d at 116; *see also Oliveros v. Adventist Health Systems/Sunbelt, Inc.*, 45 So. 3d 873, 876 (Fla. 2d DCA 2010) (noting that while generally a dismissal of a medical malpractice action for failure to comply with the presuit requirements is reviewed for an abuse of discretion, a trial court's ruling that a party's corroborating affidavit failed to comply with the statutory requirements is reviewed de novo).

Appellants contend that they fully complied with the presuit requirements and that Dr. Bajakian's affidavit was sufficient on the issue of causation. As did the trial court, we disagree. In *Archer v. Maddux*, 645 So. 2d 544, 544 (Fla. 1st DCA 1994), we affirmed a judgment dismissing the appellant's medical malpractice complaint for failure to furnish prospective (later actual) defendants a corroborating, verified medical expert opinion until well after the statute of limitations had run. The appellant argued that section 766.203(2) did not require a written medical expert opinion in support for her claim because the Legislature had already determined that the defendant's alleged conduct was negligence per se. *Id.* at 546. In interpreting section 766.203(2), we set forth, "The statute calls for medical corroboration not only of negligence but also of injury in consequence." *Id.* We further set forth, "[W]ithout corroboration that '[s]uch negligence resulted in injury to the claimant,' section 766.203(2)(b), Florida Statutes (1993), the statutory requirements have not been met."* *Id.* More recently in *Rhodin*, we cited *Archer* for the proposition that section 766.203(2) calls for medical corroboration of not only negligence but also injury in consequence. 40 So. 3d at 115.

Turning to the facts of this case, there is no dispute that Dr. Bajakian opined in his affidavit that there was a reasonable basis to believe that Dr. Balchunas's incorrect interpretation of the angiogram at issue fell below the standard of care for a practicing diagnostic radiologist. The question this case presents is whether Dr. Bajakian's opinions regarding causation were sufficient for the case to proceed. On that issue, Dr. Bajakian found a reasonable

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* The 1993 version of section 766.203(2) is virtually identical to the 2015 version.

basis to believe that Dr. Balchunas's incorrect interpretation "could have led" the referring physician and anyone else who relied on the interpretation to miss the correct diagnosis, "potentially leading" to incorrect, improper, or no treatment, and that such actions and inactions "could potentially" have caused permanent harm to Appellant Howell. We agree with the trial court that these opinions did not satisfy the standard provided for in section 766.203(2)(b), as interpreted in both *Archer* and *Rhodin*. An injury that "could have" been caused by a medical professional's action or an action falling below the standard of care that "potentially" could have led to an injury does not, in our opinion, provide corroboration of reasonable grounds to believe that the claimed negligence "resulted in injury to the claimant." *See Rell v. McCulla*, 101 So. 3d 878, 882-83 (Fla. 2d DCA 2012) (finding that "there was never any definitive corroboration that the McCullas' claims were legitimate, i.e., that Dr. Rell provided negligent care and treatment . . . and that such negligence resulted in an injury to Mr. McCulla"). *Cf. Herber v. Martin Mem'l Med. Ctr.*, 76 So. 3d 1, 3 (Fla. 4th DCA 2011) (finding that an expert's opinion that "there were reasonable grounds to believe" that the appellee hospital "was negligent in the treatment of [the appellant], which caused her injury" satisfied the reasonable investigation requirement in chapter 766); *Maldonado v. EMSA Ltd. P'ship*, 645 So. 2d 86, 89 (Fla. 3d DCA 1994) ("Here, the notice of intent and the affidavit satisfied the presuit notice and investigation requirements by informing defendants that, after a review of the records, the expert opined that the amputation of [the appellant's] right leg resulted from defendants' negligent care and treatment . . . .").

Accordingly, we affirm.

AFFIRMED.

RAY, C.J., and LEWIS and BILBREY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Gary W. Roberts and Fred Cohen, M.D., of Gary Roberts & Associates, P.A., West Palm Beach; Tracy S. Carlin and Celene H. Humphries of Brannock & Humphries, Tampa, for Appellants.

Joseph A. Wilson of Wilson, Harrell, Farrington, Ford, Wilson, Spain & Parsons, P.A., Pensacola, for Appellees.