NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

TIMOTHY N. BRUNDAGE, M.D., and BAY SOUND INPATIENT SERVICES, LLC, Petitioners, v. DAVID EVANS, as personal representative of the Estate of ETTA EVANS, deceased, and GALEN OF FLORIDA, INC. d/b/a ST. PETERSBURG GENERAL HOSPITAL, Respondents.	)	Case No. 2D19-1441

Opinion filed March 18, 2020.

Petition for Writ of Certiorari to the Circuit Court for Pinellas County; Thomas H. Minkoff, Judge.

Ronald E. Bush and Jessica N. Cochran of Bush Graziano Rice & Platter, P.A., Tampa, for Petitioners.

Raymond T. Elligett, Jr., and Amy S. Farrior of Buell & Elligett, P.A., Tampa; Frank F. Fernandez, III, and Jennifer Gentry Fernandez of The Fernandez Firm, Tampa, for Respondent David Evans.

No appearance for Respondent Galen of Florida, Inc.

ATKINSON, Judge.

Timothy N. Brundage, M.D. (Dr. Brundage) and Bay Sound Inpatient Services, LLC (Bay Sound) (collectively Defendants) petition this court for a writ of certiorari to review the trial court's nonfinal order denying their motion to dismiss the complaint filed by David Evans, as personal representative of the Estate of Etta Evans (Plaintiff) for failing to follow the medical malpractice presuit screening requirements of chapter 766. We grant the petition.

On May 1, 2014, Etta Evans was admitted to St. Petersburg General Hospital (the Hospital) to undergo elective colostomy reversal surgery. Dr. Brundage examined her. The next day, Mrs. Evans underwent a second surgery after a CT scan showed a severe abdominal infection. She never recovered from the infection and ultimately died on June 26, 2014.

On November 20, 2014, Plaintiff filed a petition for an automatic extension to the statute of limitations pursuant to section 766.104(2), Florida Statutes (2014). Plaintiff also sent a written request to the Hospital to provide all medical records regarding Mrs. Evans, which stated the following in pertinent part:

> Pursuant to Section 766.204(1), Florida Statutes, within ten (10) business days, we hereby request that you please furnish our office with complete single sided copies of any and all inpatient and outpatient medical records . . . .
>
> The law applicable to this matter requires that copies of your records be provided at a reasonable charge within ten (10) business days of this request. Failure to provide the records within ten (10) days shall constitute evidence of your failure to comply with the good faith discovery requirements of the Florida Statutes, thereby waiving the requirement of written medical corroboration.

The Hospital never responded. Plaintiff sent additional written requests in December 2014 and September 2015. On October 7, 2015, the Hospital provided Plaintiff a CD containing some but not all of the medical records. On February 15, 2016, Plaintiff sent

a notice of intent to initiate litigation to the Hospital. On April 4, 2016, Plaintiff received all of Mrs. Evans' medical records from the Hospital.

On September 23, 2016, Plaintiff sent a notice of intent to initiate litigation to Dr. Brundage (that he received on October 6, 2016), which stated the following in pertinent part:

> WAIVER OF REQUIREMENT FOR CORROBORATING AFFIDAVIT
>
> On November 20, 2014, request was made to the St. Petersburg General Hospital [where] you worked . . . to provide all records and billing regarding Etta Evans. The records were due in our office on or before December 4, 2014. St. Petersburg General Hospital failed to timely provide medical records within 10 days, as required by law. . . . Accordingly, pursuant to Section 766.204(2), Florida Statute[s], the requirement of a corroborating affidavit for this Notice of Intent to Initiate Litigation is waived.
>
> § 766.106(6) INFORMAL DISCOVERY REQUESTS
>
> Section 766.106(6), Florida Statutes, provides for informal discovery of documents, unsworn statements of any prospective party and written questions to any prospective party. In that regard, below please find our informal discovery requests. We would ask that you timely respond[] as required by Florida law.
>
> . . . .
>
> 3. Please provide a complete copy of all medical records, written notes, x-rays, bills, photographs and any other pertinent document or report concerning your treatment of Etta Evans.

That same day, Plaintiff filed a complaint against Dr. Brundage and others for medical negligence. The complaint alleged that Bay Sound was vicariously liable for Dr. Brundage's negligence as his employer. On September 28, 2016, Plaintiff obtained an expert opinion from Dr. Kenneth Scissors that there appeared to be evidence of medical negligence but failed to provide it to Dr. Brundage.

On November 3, 2016, counsel for Dr. Brundage advised Plaintiff that the notice of intent was deficient because it failed to include the expert opinion. On November 15, 2016, counsel for Dr. Brundage responded to the informal discovery requests, indicating that Dr. Brundage was not in possession of the medical records. Thereafter, Defendants moved to dismiss the complaint for failing to provide the expert opinion prior to the expiration of the statute of limitations. On August 23, 2017, at a hearing on the motion to dismiss, counsel for Plaintiff provided the expert opinion of Dr. Scissors to Defendants. Counsel for Plaintiff claimed that he was "under the impression" that Defendants "had this affidavit."

The trial court denied the motion to dismiss:

> The Court next finds that although [Plaintiff] improperly claims, in both his response and within the body of his notice of intent to litigate served on [Defendants], that the medical expert affidavit was previously waived by [the Hospital] even as the requirement applies to [Defendants], the Court finds that this requirement was eventually waived. . . . However, the Court finds that within [Plaintiff's] notice to [Defendants] he makes a request for medical records pursuant to Florida Statutes § 766.106(6)(b)(2) which refers back to § 766.204. As such, the Court finds [Plaintiff] properly filed notice and then requested the records. . . . The Court further finds that no response was sent regarding this request until November 15, 2016, well beyond the 10 business days contemplated in Florida Statutes § 766.204 and also beyond the 20 days contemplated in § 766.106, even if calculated from the date of receipt rather than the date of mailing of the notice. As such, the Court finds that this constituted a waiver as discussed in § 766.204(2). Accordingly, the Court further finds that it then becomes irrelevant that [Plaintiff] filed a medical affidavit beyond the expiration of the statute of limitations because there was no defect for [Plaintiff] to cure.

To obtain a writ of certiorari, the "petitioner must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal." Parkway

Bank v. Fort Myers Armature Works, Inc., 658 So. 2d 646, 648 (Fla. 2d DCA 1995). We have jurisdiction because the deficiencies in the presuit notice requirements asserted by Defendants in this case constitute the type of irreparable harm for which certiorari lies. See Fassy v. Crowley, 884 So. 2d 359, 363 (Fla. 2d DCA 2004) ("Certiorari jurisdiction may lie when chapter 766 presuit requirements are at issue."); Parkway, 658 So. 2d at 649 ("Such statutes cannot be meaningfully enforced postjudgment because the purpose of the presuit screening is to avoid the filing of the lawsuit in the first instance."); see also Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 721 (Fla. 2012) (explaining that a court must first examine the second and third prongs of the test for certiorari, often referred to as "irreparable harm," to determine whether it has jurisdiction to hear the petition).

Plaintiff contends, as the trial court concluded, that Dr. Brundage's subsequent failure to timely respond to an informal discovery request under section 766.106 constituted a waiver of the requirement in section 766.204 to mail the notice of intent with an expert opinion that Plaintiff had already failed to provide. Neither logic nor the language of the relevant statutes supports that conclusion. A defendant's failure to provide informal discovery requested after the complaint has been filed cannot cure the omission of a prerequisite to maintaining the cause of action in the first place. While it is possible to conceive of a statutory scheme that does allow for retroactive waiver of a condition precedent to filing suit based on a subsequent discovery violation, it is not chapter 766. "Chapter 766, Florida Statutes . . . sets out a complex presuit investigation procedure that both the claimant and defendant must follow before a medical negligence claim may be brought in court." See Kukral v. Mekras, 679 So. 2d 278, 280

(Fla. 1996). Importantly, the procedures set forth in chapter 766 are meticulous in their chronology.

First, before filing an action of medical negligence, an attorney must make "a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant." § 766.104(1). "Investigation" means that an attorney has "consulted with a medical expert and has obtained a written opinion from said expert." § 766.202(5). A claimant or his or her counsel may show "good faith" by obtaining a medical expert's written opinion "that there appears to be evidence of medical negligence." § 766.104(1).

After completing the presuit investigation and prior to filing a complaint for medical negligence, a claimant must give notice to each prospective defendant "of intent to initiate litigation for medical negligence." § 766.106(2)(a). This notice of intent must contain "a verified written medical expert opinion" that reasonable grounds exist "to support the claim of medical negligence." § 766.203(2). After mailing the notice of intent, a claimant may not file suit for ninety days, which gives the prospective defendant an opportunity to conduct its own presuit investigation. § 766.106(3)(a) ("No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant." (emphasis added)); § 766.203(3) (requiring a prospective defendant to conduct a presuit investigation to determine whether reasonable grounds exist to support the claim). The prospective defendant must then issue its response to the claimant's notice of intent with "a verified written medical expert opinion" corroborating a lack of reasonable grounds for medical negligence. § 766.203(3).

To allow the parties to conduct a presuit investigation of medical negligence claims and defenses, section 766.204 requires that medical records be made available to the requesting party:

> (1) Copies of any medical record relevant to any litigation of a medical negligence claim or defense shall be provided to a claimant or a defendant, or to the attorney thereof, at a reasonable charge within 10 business days of a request for copies . . . .
>
> (2) Failure to provide copies of such medical records, or failure to make the charge for copies a reasonable charge, shall constitute evidence of failure of that party to comply with good faith requirements and shall waive the requirement of written medical corroboration by the requesting party.

Following a prospective defendant's receipt of the claimant's notice of intent, the statutes provide for informal discovery, which may be used by a party to obtain the production of documents or things, to include medical records:

> Any party may request discovery of documents or things. The documents or things must be produced, at the expense of the requesting party, within 20 days after the date of receipt of the request. A party is required to produce discoverable documents or things within that party's possession or control. Medical records shall be produced as provided in s. 766.204.

§ 766.106(6)(b)2.

After the presuit investigation and informal discovery is completed, "any party may file a motion in the circuit court requesting the court to determine whether the opposing party's claim or denial rests on a reasonable basis." § 766.206(1). If the court finds that the claimant's notice of intent does not comply with the statutory investigation requirements, "including a review of the claim and a verified written medical expert opinion by an expert witness[,] . . . the court shall dismiss the claim." § 766.206(2) (emphasis added).

Even though Plaintiff failed to include an expert opinion in its notice of intent, the trial court declined to dismiss Plaintiff's claim based on the erroneous conclusion that Plaintiff's failure became "irrelevant" upon Dr. Brundage's subsequent failure to timely respond to an informal discovery request under subsection 766.106(6).[1] There are a number of problems with this analysis.

First, informal discovery is not even required until after a plaintiff has complied with the requirement to file a notice of intent. See § 766.106(6) ("Upon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information available without formal discovery." (emphasis added)). At the time of Dr. Brundage's failure to timely respond to Plaintiff's informal discovery request, Plaintiff had not yet filed a notice of intent that satisfied the statutory requirement of a verified written medical expert opinion.

Second, the provision that allows for waiver of a claimant's obligation to include an expert opinion appears in section 766.204(2), not section 766.106, and applies to a failure to provide medical records for the presuit investigation that precedes the filing of the notice of intent. Section 766.106(6)—which governs the informal discovery that takes place after completion of the presuit investigation and the filing of the notice of intent—does not provide for a waiver of the expert opinion requirement.

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[1]The trial court was correct in holding that the Hospital's failure to provide Plaintiff the medical records did not waive the verified written medical expert opinion as it relates to Dr. Brundage. See § 766.204(2) ("Failure to provide copies of such medical records . . . shall constitute evidence of failure of that party to comply with the good faith discovery requirements and shall waive the requirement of written medical corroboration by the requesting party." (emphasis added)); Tapia-Ruano v. Alvarez, 765 So. 2d 942, 943-44 (Fla. 3d DCA 2000) (holding that the failure by a hospital to provide medical records could not be imputed to a doctor).

Plaintiff never requested medical records from Dr. Brundage pursuant to section 766.204. As to Dr. Brundage, Plaintiff essentially bypassed the presuit investigation and skipped to the next phase of the statutory procedure by serving an informal discovery request under section 766.106 simultaneously with his deficient notice of intent.[2] Plaintiff now asks this court to consider his section 766.106 informal discovery request as the section 766.204 medical records request he never made to Dr. Brundage in order to impose the sanction contained in the latter statute for a violation of the former. The language and structure of the presuit process set forth in chapter 766 do not permit us to do so.

The inclusion of medical records among the other "documents" and "things" sought by Plaintiff in his section 766.106 informal discovery request does not transform it into a section 766.204 medical records request. See § 766.106(6)(b)2. (providing for informal discovery of "document or things"). Yet, Plaintiff and the trial court erroneously attempt to import the waiver provision of 766.204 into section 766.106, based on the admonition in section 766.106(6)(b)2. that "[m]edical records shall be produced as provided in s. 766.204." That admonition refers to the manner in which those records are provided. See § 766.204(1) (providing parameters for the provision of medical records "at a reasonable charge," including a deadline of ten business days of a request); cf. § 766.106(6)(b)2. (requiring production of documents or things at the expense of the requesting party within twenty days after receipt of the request).

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[2]And because he filed his complaint along with it, his lawsuit was premature. See § 766.106(3)(a) ("No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant."); see also Fla. R. Civ. P. 1.650(d)(2) ("The action may not be filed against any defendant until 90 days after the notice of intent to initiate litigation was mailed to that party.").

The reference in section 766.106 to section 766.204 does not alter the fact that the two statutes describe two separate types of requests to which different sanctions apply: Section 766.204 requires production of "medical records for presuit investigation" and provides for a waiver of the written medical corroboration for a failure to provide "such" records; section 766.106 provides for "[i]nformal discovery" of "documents or things," and provides that failure to make such discoverable information available "is grounds for dismissal of claims or defenses ultimately asserted."

The trial court mistakenly relied on Otto v. Rodriguez, 710 So. 2d 1 (Fla. 4th DCA 1998), as support for its conclusion that Dr. Brundage's failure to timely respond to Plaintiff's informal discovery request for medical records pursuant to section 766.106 waived Plaintiff's failure to include the verified medical opinion in its already-filed notice of intent. But what happened in this case is not what happened in Otto.

In that case, the Fourth District affirmed the dismissal of the complaint because, after the physician failed to provide full and complete medical records, the plaintiffs filed a medical malpractice complaint without providing the physician with a notice of intent as required by section 766.106 and without providing the expert opinion as required by section 766.204. The court opined in dicta that the plaintiffs "could have filed notice and then requested the [medical] records" and the "corroborating medical opinion requirement would then be waived upon [the physician's] failure to comply." Otto, 710 So. 2d at 2. However, unlike this case, the plaintiffs in Otto had already made a request for medical records pursuant to section 766.204. The court held that the physician's failure to provide medical records pursuant to section 766.204 would have waived the requirement of the written medical expert opinion in a presuit notice but did not waive a complete failure to file the presuit notice itself. See id. at 2–3.

In other words, because the physician in Otto had already waived the written medical expert opinion requirement by failing to respond to a section 766.204 medical records request, the plaintiffs could have filed a notice of intent without such an expert opinion. Here, Plaintiff never made a request to Dr. Brundage for medical records pursuant to section 766.204 before filing its notice of intent. Thus, the inapposite Otto opinion does not support a post hoc waiver of the expert opinion based on Dr. Brundage's subsequent failure to timely respond to informal discovery.

A fair reading of the provisions setting forth the presuit framework in chapter 766 does not permit the conclusion that Dr. Brundage's failure to timely respond to Plaintiff's informal discovery request under section 766.106 had the waiver effect of a failure to respond to a request for medical records for presuit investigation under section 766.204 that Plaintiff never sent. As such, Dr. Brundage's failure to timely fulfill the informal discovery request did not waive the requirement that Plaintiff provide an expert opinion in its notice of intent.[3]

By applying the waiver provision in section 766.204 as a cure for the failure of a condition precedent to Plaintiff's cause of action, the trial court departed from

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[3]Although Plaintiff obtained the expert opinion from Dr. Scissors on September 28, 2016, Plaintiff did not provide it to Defendants to cure the defect until after the statute of limitations expired. See Kukral, 679 So. 2d at 283 ("[F]ailure to comply with the presuit requirements of the statute is not necessarily fatal to a plaintiff's claim so long as compliance is accomplished within the two-year limitations period provided for filing suit." (citing Stebilla v. Mussallem, 595 So. 2d 136, 139 (Fla. 5th DCA 1992))); Suarez v. St. Joseph's Hosp., Inc., 634 So. 2d 217, 219 (Fla. 2d DCA 1994) ("While the medical opinion was not verified at the time the Notice of Intent to Initiate Litigation and the complaint were filed, that, in itself, is not fatal if compliance is secured prior to the expiration of the appropriate statute of limitation."); see also Tapia-Ruano, 765 So. 2d at 944 ("When Estanillo finally attempted to cure the defect . . . the statute of limitations had expired six months prior.").

the essential requirements of the law when it denied Defendants' motion to dismiss. We therefore grant the petition and quash the order.

Petition granted; order quashed.

LaROSE and BLACK, JJ., Concur.