

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JEFFREY WOOD, CRNA,

Petitioner,

v.

Case No. 2D 08-4228

GENEVE A. VIRGO and RADCLIFF O.
VIRGO; SHELDON S. FARCLOUGH,
a minor; KERRIAN O. VIRGO, a minor;
RADCLIFF O. VIRGO, JR., a minor;
HEIDI ARNOLD, M.D.; OBSTETRICS
& GYNECOLOGY ASSOCIATES;
TAMPA BAY WOMEN'S HEALTHCARE
ALLIANCE, L.L.P.; GALENCARE, INC.,
d/b/a BRANDON REGIONAL HOSPITAL;
ROSEMARY BOLLINGER, CRNA; and
STEVE BLICBLUM, M.D., P.A.,

Respondents.

Opinion filed February 20, 2009.

Petition for Writ of Certiorari to the
Circuit Court for Hillsborough County;
Ralph C. Stoddard, Judge.

Mara B. Levy and Andrew R.
McCumber of McCumber, Daniels,
Buntz, Hartig & Puig, P.A., Tampa,
for Petitioner.

Amy S. Farrior and Raymond T. Elligett, Jr., of Buell & Elligett, P.A., Tampa; William E. Hahn, Tampa; and George M. Stark, Tampa, for Respondents Geneve A. Virgo and Radcliff O. Virgo; Sheldon S. Farclough, a minor; Kerrian O. Virgo, a minor; and Radcliff O. Virgo, Jr., a minor.

No appearance for remaining respondents.

Harold R. Mardenborough, Jr., and Matthew S. Scanlan of Carr Allison, Tallahassee, for Amicus Curiae Florida Defense Lawyers' Association.

PER CURIAM.

In this medical malpractice case, the petitioner, Jeffrey Wood, seeks review by common law certiorari of the circuit court's order denying his motion for summary judgment. Mr. Wood moved for summary judgment in the circuit court on the ground that two of the respondents, Geneve A. Virgo and Radcliff O. Virgo (the Virgos), had failed to comply with the presuit notice requirements of section 766.106(2)(a), Florida Statutes (2006). Because the presuit requirements of chapter 766 are at issue here, we have certiorari jurisdiction to review the circuit court's order. See Corbo v. Garcia, 949 So. 2d 366, 368 (Fla. 2d DCA 2007); St. Anthony's Hosp., Inc. v. Lewis, 652 So. 2d 386, 386 (Fla. 2d DCA 1995).

The issue raised by Mr. Wood's motion for summary judgment was whether the written presuit notice of the Virgos' medical malpractice claim provided to

one of the respondents, Steve Blicblum, M.D., P.A., operated as notice to Mr. Wood. The materials before the circuit court on this issue at the hearing on the motion for summary judgment raised genuine issues of material fact. The circuit court was precluded from resolving disputed issues of fact on a motion for summary judgment. See Hervey v. Alfonso, 650 So. 2d 644, 646 (Fla. 2d DCA 1995). "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985) (citing Shaffran v. Holness, 93 So. 2d 94 (Fla. 1957)). Because genuine issues of material fact existed, summary judgment was inappropriate. It follows that the circuit court's order does not depart from the essential requirements of the law. Accordingly, we deny the petition.

Petition denied.

FULMER and KELLY, JJ., Concur.
WALLACE, J., Concur specially.

WALLACE, Judge, Specially concurring.

I concur fully in the court's opinion. I write separately to address a statement made by the circuit judge at the hearing on the motion for summary judgment. After correctly noting that genuine issues of material fact precluded the entry of summary judgment in favor of Mr. Wood on the presuit notice issue, the circuit judge remarked: "I think the specific relationship between [Steve Blicblum, M.D., P.A., and Mr.

Wood] at all times in question is still up for the jury to decide." (Emphasis added.) This statement has understandably caused Mr. Wood some concern.

Florida Rule of Civil Procedure 1.650(b)(3), which is applicable to the procedures prescribed by section 766.106 for presuit screening of medical malpractice claims, provides: "The court shall decide the issue of receipt of notice when raised in a motion to dismiss or to abate an action for medical malpractice." (Emphasis added.) In suggesting that the issue of the Virgos' compliance with the presuit notice requirements of section 766.106(2)(a) as to Mr. Wood was a jury question, the learned circuit judge obviously misspoke. The issue of the Virgos' compliance with the presuit notice requirements is a matter that must be determined by the circuit court upon appropriate motion. See § 766.206(1); Martin Mem'l Med. Ctr., Inc. v. Herber, 984 So. 2d 661, 663 (Fla. 4th DCA 2008); Duffy v. Brooker, 614 So. 2d 539, 544-45 (Fla. 1st DCA 1993), disapproved on other grounds by Archer v. Maddux, 645 So. 2d 544, 547 (Fla. 1st DCA 1994).

Notably, the Virgos do not contend that the presuit notice issue is a jury question. Instead, they observe that Mr. Wood never asked the circuit court to hold an evidentiary hearing on the issue of whether they had met the presuit requirements as to him. Upon appropriate motion made by Mr. Wood after remand, the circuit court should consider and determine this issue at an evidentiary hearing. See, e.g., Yocom v. Wuesthoff Health Sys., Inc., 880 So. 2d 787 (Fla. 5th DCA 2004) (evidentiary hearing on the issue of whether the plaintiff had failed to provide a corroborating medical expert opinion for his medical malpractice claim within the time required); Vincent v. Kaufman, 855 So. 2d 1153 (Fla. 4th DCA 2003) (evidentiary hearing on the issue of whether there was an agreement to extend the presuit period for plaintiff's medical malpractice claim).