IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

CIRCUIT COURT CASE NO. 21-CA-010144
DISTRICT COURT OF APPEAL CASE NO: 2D22-2010
Traveling together with 2D-22 2013 and 2D22-2017

SANDRA A. ZIKRY,

Appellant,

vs.

EXODUS WOMEN'S CENTER, INC.; TAMPA OBSTETRICS, P.A.; JILL L. HETCHMAN, M.D.; SOBIAH MALLICK, M.D.; AND GINA WASHINGTON, M.D.,

Appellees.

ANSWER BRIEF OF APPELLEES

LA CAVA JACOBSON & GOODIS, P.A.
Jason M. Azzarone, Esquire
Florida Bar No. 0146020
Louis J. La Cava, Esquire
Florida Bar No. 507880
Attorneys for Appellees
501 East Kennedy Boulevard
12TH Floor
Tampa, Florida 33602
jazzarone@ljglegal.com
mramirez@ljglegal.com
llacava@LJGlegal.com
leddings@LJGlegal.com
Phone: (813) 209-9611
Fax: (813) 209-9511

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

Statutes

Rules

INTRODUCTION

Appellant seeks a review of the trial court's Order granting the Appellees' Motion to Dismiss. Specifically, the trial court held that the experts utilized by the Appellant were not qualified to render opinions against the Appellees. (R. 3004-3006). As the Appellant did not cure this fatal defect prior to the expiration of the statute of limitations or statute of repose, the matter was dismissed with prejudice. (R. 3004-3006). The Appellees submit that all of the trial court's rulings were proper. Accordingly, the Order under appeal should be affirmed.

Appellees EXODUS WOMEN'S CENTER, INC.; TAMPA OBSTETRICS, P.A.; JILL L. HETCHMAN, M.D.; SOBIAH MALLICK, M.D.; and GINA WASHINGTON, M.D., will be referred to herein individually by name or collectively as Appellees. *Pro Se* Appellant SANDRA A. ZIKRY will be referred to as Appellant. References to Appellees' counsel refers to trial counsel.

Citations to the Initial Brief will be designated as (I.B. __). Citations to the Record on Appeal will be designated as (R. __).

ISSUES ON APPEAL

I. **WHETHER THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS**

II. **APPELLANT'S ADDITIONAL ARGUMENTS DO NOT SUPPORT REVERSAL OF THE TRIAL COURT'S ORDER**

STANDARD OF REVIEW

The standard of review on appeal governing the granting of a motion to dismiss for failure to comply with Florida's Medical Malpractice Pre-Suit Screening Requirements, (hereinafter "Pre-Suit"), on the grounds that the corroborating expert affidavit failed to comply with the requirements of the Medical Malpractice Act is *de novo*. *See Oliveros v. Adventist Health Systems/Sunbelt, Inc.,* 45 So.3d 873, 876 (Fla. 2d DCA 2010); *see also Morris v. Muniz*, 252 So.3d 1143, 1154 (Fla. 2108).

STATEMENT OF THE CASE AND FACTS

As the account provided in the Initial Brief does not include significant aspects of what occurred in this case, for completeness, the Appellees add the following.

Appellant's Complaints

The instant Appeal stems from the dismissal of the Fourth

Amended Complaint. Appellant filed her initial Complaint on December 27, 2021. (R. 19-75). Thereafter, on February 23, 2022, Appellant filed her Fourth Amended Complaint. (R. 1072-1162). Therein, Appellant acknowledged that the Appellees Drs. Hechtman, Mallick and Washington practiced in the field of obstetrics and gynecology. (R. 1075-76 at ¶¶9-11).

The care and treatment at issue occurred from July 1, 2017, through July 8, 2017. (R. 1085-99 at ¶¶40-42, 46-47, 49-55, 58-60, 62, 64-68, 70-72, 74-75, 79-87). As to the Appellees, Dr. Hechtman allegedly provided care on July 1, 2017, (R. 1085 at ¶40), and July 3, 2017. (R. 1086 at ¶46). Dr. Washington allegedly provided care on July 3, 2017, (R. 1086 at ¶46), and July 5, 2017. (R. 1087 at ¶¶51, 53, 55, 57-60, 66 & 68). Dr. Mallick on July 5, 2017, (R. 1092 at ¶64). Finally, Exodus is mentioned regarding care and treatment rendered on July 5, 2017. (R. 1086 at ¶47).

The Appellant received an epidural on July 5, 2017, and her child was born on July 6, 2017. (R. 1098 at ¶86). Based on events stemming from the epidural, the Appellant alleged various causes of action against the Appellees, including claims for vicarious liability. (R. 1115-1128 & 1138-1158).

Appellant's Alleged Pre-Suit Compliance - Affidavits

In her Fourth Amended Complaint, Appellant alleged compliance with Pre-Suit. (R. 1080-1084 at ¶¶27-39). As evidence of said compliance, Appellant attached the Affidavit of Robert Ertner, M.D. (R. 160-162). Dr. Ertner is a Board Certified Anesthesiologist who was asked to assess the care and treatment of Dr. Washington. (R. 160 at ¶3). The affidavit provides no opinions as to Dr. Washington's care and treatment. (R. 160-162). Dr. Ertner's affidavit does not state that he is aware of the standard of care applicable to physicians who practice the field of obstetrics and gynecology, or with respect to obtaining informed consent in Florida. (R. 160-162).

The Affidavit concedes that the relevant care and treatment occurred on July 5-6, 2017, (R. 160-161 at ¶4), and states that the Appellant's alleged symptoms began, "at most 5 months after her epidural" and that she sought treatment for back pain in "November 2017." (R. 161 at ¶5). The Affidavit then reflects that the Appellant was diagnosed with adhesive arachnoiditis in September, 2019. (R. 161 at ¶5). Dr. Ertner opined that the delay in diagnosing the condition was due to adhesive arachnoiditis being an "uncommon disorder" that requires, "specialized imaging based on a high index of

suspicion by a provider who has some familiarity with its signs and symptoms." (R. 161 at ¶5).

Dr. Ertner did not opine that the dose contained in the epidural catheter deviated from the standard of care. (R. 161 at ¶6). He also acknowledges that per the medical records, informed consent was obtained. (R. 161 at ¶7). However, based on the analysis of the Appellant's handwriting experts, Dr. Ertner opined that informed consent was not properly obtained. (R. 161-162 at ¶7). Dr. Ertner's Affidavit is executed on September 22, 2021. (R. 1271).

Appellant also provided the Affidavit of Margaret Aranda, M.D., an Anesthesiologist licensed in California. (R. 172). Dr. Aranda never obtained her Florida Expert Witness Certificate. (R. 172-176). By her own admission, she did not practice medicine from 2005-2018. (R. 172 at ¶¶4-6). Dr. Aranda's affidavit does not state that she is aware of the standard of care applicable to physicians who practice the field of obstetrics and gynecology, or with respect to obtaining informed consent in Florida. (R. 172-176).

Dr. Aranda provided a diagnosis of the Appellant's medical condition. (R. 173 at ¶11). She also opined that the relevant dates for the Appellant's medical care was July 5, 2017, through July 9,

2017. (R. 172 at ¶12). Dr. Aranda's Affidavit was signed on February 6, 2020. (R. 176).

Appellees' Motion to Dismiss & Appellant's Response

Appellees filed a Motion to Dismiss the Fourth Amended Complaint. (R. 1351-1367). Therein, Appellees argued that that relevant care and treatment occurred on July 5-6, 2017, and that the Appellant sought the 90-day extension of the pre-suit period on July 5, 2019. (R. 1352 at ¶1; *see* R. 1448-1449). Appellees advised the trial court that the pre-suit period ended on October 3, 2019, yet the Notice of Intent was not sent until February 7, 2020. (R. 1352 at ¶¶2-3; *see* R. 1450-1461). Appellees pointed out that the only affidavit provided at that time was from Dr. Aranda, an anesthesiologist, which was not the same specialty as the Appellees (who were Ob/Gyn providers). (R. 1352 at ¶4). Given this and other deficiencies, the Notice of Intent did not comply with Pre-Suit and was thus void. (R. 1352 at ¶4). Appellees further argued that the failure to provide an executed pre-suit authorization for the release of records rendered the Notice of Intent void. (R. 1352).

The Motion to Dismiss also pointed out that the Appellant was advised of this lack of compliance with Pre-Suit. (R. 1353 at ¶5; *see*

R. 1478-1479). Appellees further argued that Dr. Ertner's affidavit did not comply with Pre-Suit as he, as an anesthesiologist, was also unqualified to render opinions as to the Appellees. (R. 1354-1355 at ¶7; *see* R. 1486-1487 & 1491-1493). Appellees then argued that the Appellant's attempts to cure the defects was untimely. (R. 1354 at ¶7; *see* R. 1486-1487).

Appellees argued that dismissal was mandated because the Appellant failed to comply with Pre-Suit by failing to corroborate the claims with a qualified physician. (R. 1356-1360). Dismissal of all counts was sought. (R. 1360-1367). Appellees also joined in the arguments raised by Co-Defendant. (R. 1446-1447). An Amended Motion to Dismiss was thereafter filed to include all three physicians. (R. 1495-1511). Another Amended Motion to Dismiss was then filed to include all Appellees. (R. 1945-1962).

Appellant filed her Response to the Motion to Dismiss, (R. 1370-1424), and an Amended Response. (R. 1978-2057). Appellant acknowledged that her claims for not being provided with medical records was directed at the Co-Defendant hospital. (R. 1980). Appellant acknowledged that for her claims, the statute of repose expired on January 1, 2022, and thus, any deficiencies in the pre-suit

notices needed to be cured by that date. (R. 1993).

Hearing on Motion to Dismiss & Trial Court's Order

A hearing on the Motions to Dismiss was held on May 23. 2022. (R. 3125-3163). The trial court was advised that Appellant's claims arose from the uneventful labor and delivery of her child on July 5 - 6, 2017. (R. 3131). The trial court was told that the First Notice of Intent was sent to Co-Defendant St. Josephs on February 7, 2020. (R. 3132). On or about July 9, 2020, pre-suit was denied, with Appellant's attorney being told of the numerous deficiencies. (R. 3132-3133). The trial court was also advised that the Appellant's Attorney withdrew on October 1, 2021. (R. 3133). The *Pro Se* Appellant filed a Second Notice of Intent on October 1, 2021, citing the same issues as before, but now asserting allegations as to the child. (R. 3133).

The trial court was advised that the Appellant was told that the Second Notice of Intent was deficient and could not be cured as to the Appellant's individual claims. (R. 3134). That said, on December 27, 2021, the Co-Defendant again denied pre-suit. (R. 3134). Significantly, the trial court was told that via her pleadings, the Appellant acknowledged that the applicable Statute of Repose ended

on January 1, 2022. (R. 3137; *see* R. 1993). As of the date of the hearing, the Appellant had not cured the deficiencies in her Notice of Intent. (R. 3137).

The trial court was also advised that Dr. Ertner's Affidavit acknowledged that the Appellant's pain began in (November) 2017. (R. 3139). Finally, counsel argued that the Appellant's case not about fraud or concealment. (R. 3139). Rather, the Appellant's claims stemmed from her assertion that she did not want the epidural. (R. 3140). Notably, Appellant was admittedly feeling pain in 2017, which was long before she requested any medical records which contained the alleged inconsistencies. (R. 3140).

Appellees' counsel joined in the Co-Defendant's arguments. (R. 3140-3141). Appellees' Counsel also argued that pre-suit was deficient because the Appellant failed to obtain a corroborating affidavit from an Ob/Gyn. (R. 3140). In this regard, there was no affidavit from a qualified expert stating that there was a lack of informed consent. (R. 3141). Finally, Appellees' counsel advised the trial court that the statute of limitations expired before the First Notice of Intent was ever sent. (R. 3141).

Counsel for Co-Defendant also explained to the trial court that Dr. Aranda was not qualified to render any opinions because by her own admission, she was not practicing at time of incident. (R. 3142).

Appellant acknowledge that it was the Co-Defendant hospital that allegedly did not provide her with all of the medical records. (R. 3146). She then stated that her case was about lack of consent, fraudulent concealment and forgery. (R. 3149). Importantly, Appellant admitted that there was a discussion with nurses prior to the procedure being performed. (3151-3152). Appellant also admitted that she was diagnosed in with complications stemming from the July, 2017, care and treatment in September 9, 2019. (R. 3152).

Following the hearing, the trial court entered an Order granting the Motion to Dismiss with prejudice. (R. 3004-3006). In doing so, the trial court specifically held that the Appellant filed to comply with Pre-Suit, "by failing to provide the requisite verified written medical expert opinion from a medical expert qualified to corroborate reasonable grounds to support a claim of medical negligence . . ." (R. 3005 at ¶ 2). The trial court further found that all of the causes of action raised in the Fourth Amended Complaint arose out of the rendering and/or failure to render medical care and treatment and

were therefore subject to Pre-Suit. (R. 3005 at ¶ 3). Finally, the trial court found that the Appellant failed to comply with Pre-Suit prior to the expiration of the applicable statute of limitations and statute of repose. (R. 3005 at ¶ 4).

Additional Relevant Events/Dates

In her Motion for Sanctions filed on January 19, 2022, Appellant acknowledges that she first asked for medical records in July, 2019. (R. 742 at ¶2). Therein, Appellant confirmed that her arachnoiditis stemmed from the epidural given in 2017. (R. 742 at ¶2). She also conceded that the pre-suit investigation period was initiated in 2020, with Dr. Aranda's affidavit. (R. 743 at ¶3). Appellant acknowledged that the claims for not being provided medical records was directed to Co-Defendant St. Josephs Women's Hospital. (R. 746 at ¶6, 749-52 at ¶¶8-9 & 765). Finally, Appellant acknowledged that any alleged forgery was by the Co-Defendants and not the Appellees. (R. 759 at ¶14).

Events Regarding Appellees' Motion for Default

On February 21, 2022, Appellant filed a Motion for Extension of Time to serve Exodus Women's Center, Inc.; and Tampa Obstetrics, P.A., with the Complaint. (R. 1070-1071). The trial court permitted

the extension. (R. 1163).

On March 29, 2022, Appellant moved for the entry of a clerk's default, but failed to present any evidence of service. (R. 1515-1516). Notably, Appellant served the Motion for Entry of Clerk's Default on Appellees' counsel (acknowledging her understanding that the parties were represented), but did not provide any notice to Exodus Women's Center, Inc.; or Tampa Obstetrics, P.A., of the fact that she was seeking a clerk's default. (R. 1516).

Clerk's defaults were entered on April 7, 2022, presumably against Exodus Women's Center, Inc.; and Tampa Obstetrics, P.A. (R. 1938-1939). No party is named in the Clerk's Default, and there is nothing on these documents indicating that they were served on Exodus Women's Center, Inc.; or Tampa Obstetrics, P.A. (R. 1938-1939).

On April 8, 2022, Appellees' counsel entered an appearance on behalf of the two entities. (R. 1943-1944). An Amended Motion to Dismiss was filed on that date. (R. 1945-1962). In response, Appellant filed a Motion For Default, (R. 1963-1977), which was sent to Appellees counsel. This again acknowledging the Appellant's understanding that the two entities were represented. (R. 1977).

A Motion to Set Aside the Clerk's Default and Motion to Quash Service of Process was filed on April 12, 2022. (R. 2208-2412). Notably, one of the arguments raised was that the Appellant was aware that Exodus Women's Center, Inc.; and Tampa Obstetrics, P.A., were represented by Appellees' counsel via the litigation and other documents filed. (R. 2209 at ¶ 5).

Appellant filed a Response in Opposition, (R. 2413-2434), as well as an Amended Response in Opposition. (R. 2435-2476). Appellant never noticed the Motion for Default, or the Motion to Set Aside the Clerk's Default and Motion to Quash Service of Process, for hearing.

SUMMARY OF THE ARGUMENT

The trial court was absolutely correct in dismissing the Appellant's Fourth Amended Complaint with prejudice. Appellant failed to comply with Pre-Suit by failing to provide corroboration from qualified physicians that there were reasonable grounds to initiate a medical malpractice claim. The trial court correctly found that Dr. Aranda and Dr. Ertner, as Anesthesiologists, were unqualified to opine as to the actions of the Appellees who practiced in obstetrics and gynecology. The trial court also correctly recognized that Dr. Aranda could not render an opinion against the Appellees as she did

not have an expert certificate pursuant to *Florida Statute* §458.3175 and did not practice medicine for the relevant time period. The trial court also correctly recognized that the Appellant's failure to provide the statutorily required authorization form for release of health care information rendered her Notice of Intent Void.

The trial court was also correct in finding that the Appellant's claims were all subject to Pre-Suit as they all arose out of the rendering and/or failure to render medical care. Even assuming, *arguendo*, that any of the multitude of the improper claims for intentional tort did not, the Appellant filed her Complaint after the expiration of the four year statute of limitations.

The trial court also correctly held that the Appellant not only failed to file her claims timely, but that she failed to cure the deficiencies contained in the Notices of Intent within the applicable statute of limitations and statute of repose. Regardless of whether this Court utilizes July, 2017, or September, 2019, as the date of accrual, it is clear that the Appellant failed to provide the Appellees with her Notice of Intent Timely and/or failed to file her Complaint timely.

The remaining basis for reversal argued in the Initial Brief are

meritless. Initially, the Appellants claims for lack of informed consent required expert corroboration. Contrary to the Appellant's contentions, an evidentiary hearing on the Motion to Dismiss was not required.

Appellant also argues that the Appellees were required to demonstrate prejudice for the trial court to dismiss her claims. This is incorrect as Florida Law provides that the failure to provide a corroborating affidavit during pre-suit evidences prejudice.

Finally, the fact that clerk's defaults were entered as to two of the five Appellees does not require reversal. As reflected in the Record on Appeal, the Appellant never set her Motion for Default for hearing. Assuming, *arguendo*, that she had, said defaults would have been vacated for numerous reasons, the most important being the Appellant's knowledge that the Appellees were represented and intended to defend the case on the merits.

Based on the documents contained in the Record on Appeal, there can be no finding that the trial court err in any way. Accordingly, the Order under review should be affirmed in all respects.

ARGUMENT

III. THE TRIAL COURT DID NOT ERR IN GRANTING THE MOTION TO DISMISS

Chapter 766, Florida Statutes, sets out a pre-suit investigation procedure that each party must satisfy prior to a medical malpractice claim being brought. *Kukral v. Mekras*, 679 So.2d 278 (Fla.1996). "The statute was intended to address a legitimate legislative policy decision relating to medical malpractice and established a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding." *Id.*

In *Largie v. Gregorian*, 913 So.2d 635, 638 (Fla. 3d DCA 2005), the Court noted that compliance with Florida's Medical Malpractice Pre-suit Screening Requirements was more than a technicality. Compliance with Pre-Suit provided for in Chapter 766, Florida Statutes, is a condition precedent to filing a cause of action against a health care provider. *Williams v. Campagnulo*, 588 So.2d 982, 983 (Fla. 1991); *Weinstock v. Groth*, 629 So.2d 835, 836 (Fla. 1993); *Ingersol v. Hoffman*, 589 So.2d 223, 224 (Fla. 1991).

In order to maintain a medical malpractice action, Chapter 766, *Florida Statutes*, requires a claimant to provide a corroborating

affidavit from a qualified medical expert prior to the expiration of the statute of limitations. *See Maguire v. Nichols*, 712 So.2d 784 (Fla. 2d DCA 1998); *Correa v. Robertson*, 693 So.2d 619 (Fla. 2d DCA 1997). Pursuant to *Florida Statute* § Section 766.203(2), the expert affidavit must corroborate claimant's contention that the named defendant was negligent in his or her care and treatment of the claimant and that such negligence resulted in injury to the claimant. *See Largie*, *supra* at 637-40 (Fla. 3d DCA 2005); *Rell v. McCulla*, 101 So.3d 878, 879 (Fla. 2d DCA 2012).

As the *Rell* Court expressed:

> 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.
>
> The purpose of the medical expert opinion is to "'assure[] the [d]efendants, and the court, that a medical expert has determined there is justification for the [p]laintiff's claim'"; that is, the purpose is "'not give notice of [the plaintiff's claim],'" but rather to "'corroborate that the claim is legitimate.'" ...

Id. at 881.

Florida Courts have repeatedly held that the unambiguous

language of Chapter 766 must be enforced and that Florida courts are not at liberty of expanding its express requirements. *See, e.g., Clare v. Lynch*, 220 So.3d 1258, 1261 (Fla. 2d DCA 2017) ("while [plaintiff] is correct that the presuit requirements are to be interpreted liberally to provide access to the courts …, courts are not at liberty to ignore the plain language of the statute"); *Jeffrey A. Hunt, D.O., P.A. v. Huppman*, 28 So.3d 989, 992 (Fla. 2d DCA 2010) ("We cannot ignore the unambiguous plain language of the statute in a way that would expand its express requirements. ").

As set forth in *Florida Statute* § 766.203(2),*:*

> 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.

The failure to comply with Pre-Suit precludes the maintenance of a malpractice action and the proper remedy is dismissal of the complaint. *Ingersol, supra* (pre-suit requirements embodied in the Florida Statutes for medical malpractice actions are a condition precedent to filing suit); *Williams, supra* (to ensure consistency with the *Ingersol* and *Lindberg* decisions, the Supreme Court found that

failure to comply with pre-suit statutes requires dismissal of the action); *MacDonald v. Mclver*, 514 So.2d 1151 (Fla. 2d DCA 1987) (failure of plaintiff to comply with pre-suit requirements precludes suit); *NME Hospital Inc., v. Azzariti*, 573 So. 2d 173 (Fla. 2d DCA 1991) (compliance with the statute is a condition precedent to maintaining a suit against a health care provider); *Shands Teaching Hospital v. Miller*, 642 So.2d 48 (Fla. 1st DCA 1994) (in order to avoid dismissal of a complaint with prejudice, the medical malpractice claimant is required to submit a sufficient affidavit of a physician in support of the claim of malpractice in order to satisfy the requirements of the statute); *Oliveros, supra.*

Dr. Aranda Was Not Qualified To Opine
As To The Actions of the Appellees

The trial court's finding that Dr. Aranda was not qualified to render opinions against the Appellees was correct and should not be disturbed on appeal. (R. 3005).

A pre-suit claimant must "provide corroboration of reasonable grounds to initiate medical negligence litigation, including submission of a verified medical expert opinion from a medical expert as defined in § 766.202(6)." *Clare, supra at* 1260 (*quoting* § 766.203(2),

Fla. Stat.); *see also Florida Statute* § 766.202(6) ("'Medical expert' means a person duly and regularly engaged in the practice of his or her profession who holds a health care professional degree from a university or college and who meets the requirements of an expert witness as set forth in s. 766.102."). *Riggenbach v. Rhodes*, 267 So.3d 551, 554 (Fla. 5th DCA 2019) (discussing "same specialty" requirement, prior version of Section 766.102 and legislative intent of revision). "The legislature has clearly indicated its intent to narrow the class of person who is qualified to give medical expert opinions." *Jeffrey A. Hunt, D.O., P.A., supra at* 992.

Florida Statute §766.102(5)(a) provides:

> (5) A person may not give expert testimony concerning the prevailing professional standard of care unless the person is a health care provider who holds an active and valid license and conducts a complete review of the pertinent medical records and meets the following criteria:
>
> (a) If the health care provider against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> 1. Specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; and
>
> 2. Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:

a. The active clinical practice of, or consulting with respect to, the same specialty;

b. Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same specialty; or

c. A clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same specialty.

Herein, Appellant presents absolutely nothing which establishes that Dr. Aranda was qualified to provide opinions regarding the care and treatment rendered by the Appellees. As Appellant recognizes, the Appellees practiced in the field of obstetrics and gynecology. (R. 1075-76 at ¶¶9-11). Dr. Aranda is an Anesthesiologist. (R. 172). Given this, she is unqualified to opine as to the care and treatment rendered by the Appellees, who practice in obstetrics and gynecology, because they are not in the same specialty. For this reason alone, the trial court's Order of dismissal was proper.

The trial court was presented with additional arguments as to why Dr. Aranda was unqualified to render standard of care opinions. Initially, Dr. Aranda did not practice medicine from 2005-2018 as her medical license was on hold during this time. (R. 172 at ¶¶4-6). As

the medical care and treatment at issue herein occurred in 2017, she fails to satisfy the statutory requirements of *Florida Statute* §766.102(5)(a)(2).

Next, Dr. Aranda, as an out of state physician, did not possess an expert witness certificate at the time she executed her affidavit. *Florida Statute* §458.3175 provides that a physician not licensed in Florida may provide an expert opinion in a Florida medical malpractice action provided that the expert has the required certification. Once issued, the certification is valid for two years. The certificate authorizes the out-of-state physician to provide expert testimony about the prevailing professional standard of care in litigation pending against a Florida physician within that two-year time frame. The simple fact that Dr. Aranda did not possess this certificate renders her unqualified to opine as to the care and treatment rendered by the Appellees.

Based on the language of her affidavit, Dr. Aranda believes that she is qualified to render opinions because she went to medical school and holds a license to practice medicine in California. (R. 172-176). The mere fact that Dr. Aranda is a physician does not render her an expert as to the applicable standard of care for a physician practicing

in Florida in the field of obstetrics and gynecology. In ruling on challenges to an expert's qualifications pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Federal Courts have stricken experts for this reason. For example, in *Basanti v. Metcalf, M.D.*, 35 F.Supp.3d 1337 (D.Colo. 2014) *aff'd sub nom. Basanti v. United States*, 666 Fed. Appx. 730 (10th Cir. 2016), the Court granted a motion to strike the plaintiff's expert in a medical malpractice action where the plaintiff asserted that the defendant did not obtain an adequate medical history because he failed to utilize a qualified interpreter. Plaintiff claimed that the use of an interpreter would have "allowed for more effective treatment" and "prevented paralysis." *Basanti, 35 F. Supp. 3d at 1341.* The defendant challenged this opinion on the basis that the plaintiff's expert lacked the knowledge and training to diagnose the plaintiff's condition and therefore, had no basis to testify that the use of an interpreter would have affected the overall diagnosis. *Id.*

The *Basanti* Court agreed, noting, "Merely possessing a medical degree is not sufficient to permit a physician to testify regarding any medical-related issue." *Id.* at 1343 [citations omitted.] In striking the expert, the *Basanti* Court stated, "The qualifications necessary to

evaluate whether Defendant appropriately utilized language services are distinct from those necessary to opine as to whether Defendant's use of language servicers would have led to earlier diagnosis or treatment. . ." *Id.* at 1345; *see also Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965 (10th Cir. 2001); *Vigil v. Burlington Northern and Santa Fe Railway Co.*, 521 F.Supp.2d 1185 (U.S.D.C. D. New Mexico 2007) ("The fact that a witness has general experience in a field does not necessarily qualify the witness as an expert."); *Pleasant Valley Biofuels, LLC, v. Sanchez-Medina*, 2014 WL 2855062 (S.D. Fla. 2014)(striking the expert as unqualified because, "his experience is insufficiently related to the subject of his opinions, and does not provide a sufficient basis for those opinions to qualify him as an expert.")

In *Edwards v. Sunrise Ophthalmology ASC, LLC.,* 134 So.3d 1056 (Fla. 4th DCA 2013), the Court addressed a similar issue and importantly, affirmed the dismissal of the plaintiff's case. In *Edwards*, *supra*, the plaintiff filed a complaint against an ophthalmologist, utilizing the affidavit of an infectious disease physician to support her claims. *Id.* at 1057. Similar to the case at bar, during the pre-suit investigation period, defendants advised

plaintiff's counsel of the failure to comply with the requirement that the corroborating affidavit be made by a physician in the same specialty as the defendant. *Id.* At a hearing, the trial court held that infectious disease physician's affidavit was insufficient to satisfy the requirements of *Florida Statute* §766.102(5)(a). *Id.*

The *Edwards* Court agreed and affirmed. In doing so, it noted, "Simply put, the infectious disease doctor is not an eye surgeon nor is the ophthalmologist an infectious disease doctor." *Id.* at 1059. The *Edwards* Court further noted:

> [T] here are some cases that involve allegations of more common medical knowledge and skill that may be possessed by doctors of dissimilar specialties. More likely than not, however, the allegations against a specialist require an expert in the identical specialty with the same or similar expertise to satisfy section 766.102's specialization requirement.

Id.; *see also Rodriguez v. Nicolitz*, 246 So.3d 550 (Fla. 1st DCA 2018). The *Edwards* Court's reasoning and analysis eviscerates the Appellant's position herein while simultaneously establishing the appropriateness of the trial court's rulings.

Finally, while Dr. Aranda states that she has specialized knowledge regarding the "proper standard of care" for the treatment of patients like the Appellant, she fails to attest to her knowledge of

the appropriate standard of care for anthologists who practice in the State of Florida. In *Largie, supra,* the Court opined that the plaintiff's expert's affidavit did not demonstrate that the expert was qualified to opine as to a nurse practitioner. In *Largie, supra*, the plaintiff alleged that she was seen by a registered nurse practitioner at her physician's office. *Id*. at 637. A year later, the plaintiff was diagnosed with cancer. *Id*.

The plaintiff sent a notice of intent with a corroborating expert affidavit, the contents of which are contained in the *Largie* Court's opinion. *Id*. Similar to the affidavit submitted herein, the affidavit addressed by the *Largie* Court did not state that the physician had knowledge of the applicable standard of nursing care. *Id*. The nurse challenged the plaintiff's compliance with Chapter 766, arguing that the plaintiff failed to "provide corroboration of reasonable grounds to support a claim of medical malpractice." *Id*. at 638. The trial court agreed, a decision that was affirmed on appeal. The *Largie* Court ultimately held that the expert's affidavit was insufficient to comply with Pre-Suit, in part because there was no indication that the expert had knowledge of the applicable standard of care. *Id*. at 639.

A plain reading of Dr. Aranda's affidavit establishes that she fails

to attest that she has knowledge of the applicable standard of care for anesthesiologists who practice in the State of Florida. Further, she fails to state that she has knowledge of the applicable standard of care with respect to providing patient consent in the State of Florida. Given this, the Appellant failed to comply with Pre-Suit as a matter of law. *See Doctors Memorial Hosp., Inc., v. Evans*, 543 So.2d 809, 811 (Fla. 1st DCA 1989); *Santa Lucia v. LeVine*, 198 So.3d 803, 810 (Fla. 2d DCA 2016).

The trial court correctly found that Dr. Aranda was not qualified to render the opinion that the Appellees breached the applicable standard of care applicable to physicians who practiced in the field of obstetrics and gynecology or any opinions regarding informed consent. As the trial court did not err in finding that the Appellant failed to satisfy Pre-Suit, the Order of dismissal should be affirmed.

Dr. Ertner Was Not Qualified To Opine
As To The Actions of the Appellees

For similar reasons, utilizing the same case law, the trial court's finding that Dr. Ertner was unqualified was correct. Dr. Ertner is also an Anesthesiologist. (R. 160 at ¶ 3). Therefore, he does not practice

in the same specialty as the Appellees. *See Florida Statute* §766.102(5)(a).

Additionally, Dr. Ertner fails to attest that he has knowledge of the applicable standard of care for physicians who practiced in the field of obstetrics and gynecology who practice in the State of Florida or that he has knowledge of the applicable standard of care with respect to providing patient consent in the State of Florida. Given this, the Appellant failed to comply with Pre-Suit. *See Doctors Memorial Hosp., Inc., supra; Santa Lucia v. LeVine*, *supra*.

Again, the trial court did not err in finding that the Appellant failed to satisfy Pre-Suit and accordingly, the Order of dismissal should be affirmed.

The Appellant's Expert's Affidavits And Pre-Suit Materials Are Insufficient and Therefore, Do Not Satisfy Pre-Suit

Initially, the Affidavits of Drs. Aranda and Ertner fail to satisfy Pre-Suit as they fail to provide specific opinions as to the actions of the individual Appellees and whether said actions caused the alleged injuries. As set for the in the Complaint, Dr. Hechtman allegedly provided care on July 1, 2017, (R. 1085 at ¶40), and July 3, 2017. (R. 1086 at ¶46). Dr. Washington allegedly provided care on July 3, 2017,

(R. 1086 at ¶46), and July 5, 2017. (R. 1087 at ¶¶ 51, 53, 55, 57-60, 66 & 68). Dr. Mallick provided care on July 5, 2017, (R. 1092 at ¶64). Finally, Exodus is mentioned regarding care and treatment rendered on July 5, 2017. (R. 1086 at ¶47). The Appellant received an epidural on July 5, 2017, and her child was born on July 6, 2017. (R. 1098 at ¶ 86).

A plain reading of Dr. Ertner's Affidavit demonstrates that while he was asked to assess the care and treatment of Dr. Washington, (R. 160 at ¶ 3), he provides no opinions as to Dr. Washington's care and treatment. (R. 160-162). Importantly, Dr. Ertner did not opine as to the other Appellees. Further he did not opine that the dose contained in the epidural catheter deviated from the standard of care. (R. 161 at ¶ 6). Dr. Aranda similarly provides no definitive opinions as to the individual Appellees, choosing to lump them together.

The lack of specificity renders the Affidavits non-complaint to Pre-Suit. Florida law supports the Appellees' arguments herein. In *Bonati v. Allen*, 911 So.2d 285 (Fla. 2d DCA 2005), the Court quashed an order denying a motion to dismiss. In *Bonati, supra*, the plaintiff alleged that she consulted with the defendant and thereafter underwent surgery and other care by other physicians. *Id*. at 286. In

the corroborating expert affidavit provided during pre-suit, while other physicians were mentioned, the defendant was not. *Id.* at 286-287. The defendant's motion to dismiss was denied and on appeal, he contended that the "record is devoid of a written medical expert opinion corroborating Allen's claim that he committed any medical negligence which resulted in injury" to the plaintiff. *Id.* at 287. The *Bonati* Court agreed, citing to *Largie, supra*, opining that because the corroborating affidavit did not mention the defendant, it failed to comply with Chapter 766. *Id.*

A comparable result occurred in *Univ. of S. Fla. Bd. of Trustees v. Mann*,, 159 So.3d 283 (Fla. 2d DCA 2015), where the Court opined that the trial court erred in failing to dismiss a complaint against a hospital for alleged deficiencies in care provided by nursing staff. The *Univ. of S. Fla. Bd. of Trustees* Court recognized that, "nothing in the affidavit addresses any deficiencies in the care provided by the nursing staff or supervisors." *Id.* at 284. The *Univ. of S. Fla. Bd. of Trustees* Court held that, "Because the affidavit is plainly insufficient as a statement to corroborate reasonable grounds to support a claim of medical malpractice as to the nurses," the trial erred in denying the motion to dismiss. *Id.* While the *Univ. of S. Fla. Bd. of Trustees* Court

did not rule on the expert's competency to render any opinions, it is clear that the failure to advise how a party breaches the applicable standard of care renders an affidavit insufficient under Chapter 766. *See also Rell, supra* (quashing an order denying motion to dismiss where expert corroborating affidavit failed to state that the physician's actions were negligent and further failed to state the manner in which the physician deviated from the standard of care.)

As the trial court herein correctly held, the Affidavits provided by the Appellant completely fail to satisfy Pre-Suit. Accordingly, the trial court's Order should be affirmed.

The Trial Court Correctly Held that Appellants' Claims Sounded in Medical Malpractice

The trial court also correctly held that all of the Appellant's claims arose out of the rendering and/or failure to render medical care, thus requiring compliance with Pre-Suit. (R. 3005). "The nature and character of a pleading must be determined, not by its title, but by its contents and by the actual issues in dispute." *Scarfone v. Marin*, 442 So.2d 282, 283 (Fla. 2d DCA 1983). As applicable herein, while the Appellant alleged various causes of action against the Appellees, the trial court correctly held that because the essence of

the claims raised sound in medical malpractice, compliance with Pre-Suit was required.

Florida law conclusively provides, "the term 'claim for medical malpractice' is defined to mean 'a claim arising out of the rendering of, or the failure to render, medical care or services." *Paulk v. National Medical Enterprises, Inc.*, 679 So.2d 1289, 1289-1290 (Fla. 4th DCA 1996) *quoting Florida Statute* § 766.106(1)(a) (1995.) The issue presented is whether the Appellant's actions, as alleged, arose out of the rendering of medical care or treatment, thus requiring compliance with Pre-Suit. *See Silva v. Southwest Florida Blood Bank, Inc.*, 601 So.2d 1184 (Fla. 1992); *see also J.B. v. Sacred Heart Hospital of Pensacola*, 635 So.2d 945 (Fla. 1994). In *Silva*, the Florida Supreme Court noted that these terms were unambiguous, and the average person would understand diagnosis, treatment, or care to mean "ascertaining a patient's medical condition through examination and testing, prescribing and administering a course of action to effect a cure, and meeting the patient's daily needs during the illness." *Silva*, 601 So.2d at 1187.

As noted by the Court in *Shands Teaching Hospital and Clinics, Inc. v. Estate of Lawson ex. rel. Lawson*, 175 So.3d 327, 31 (Fla. 1st

DCA 2015), "simply labeling allegations as 'ordinary negligence' is not dispositive" of the question of whether pre-suit screening is mandated. "Courts must look beyond the legal labels urged by plaintiffs and 'must[ ] apply the law to the well-pleaded factual allegations and decide the legal issue of whether the complaint sounds in simple or medical negligence.'" *Id. quoting Dr. Navarro's Vein Ctr. of Palm Beach, Inc. v. Miller*, 22 So.3d 776, 778 (Fla. 4th DCA 2009).

In *Paulk, supra,* the Court addressed an issue in a claim that asserted that a hospital engaged in a criminal enterprise to defraud patients by extending hospital stays without medical necessity to obtain insurance money. In *Paulk, supra*, the Court noted:

> Plaintiffs sued several hospitals for damages on the theory that the hospitals had operated their hospitals as a criminal enterprise. They alleged that the defendants defrauded their patients by extending their hospitalization, without medical necessity, so that they could exhaust available insurance coverage.

Paulk, 679 So.2d at 1289. The trial court dismissed the complaint for failure to comply with Pre-Suit. *Id.*

The *Paulk* Court affirmed, noting that it had, "no difficulty in deciding that fraudulent rendering of unnecessary medical care and

services is encompassed by the term 'arising out of the rendering of ... medical care or services.'" *Id.* at 1290 *quoting Florida Statute* § 766.106(1)(a) (1995). In doing so, the *Paulk* Court stated, "we don't think it much matters whether the plaintiffs' claim is framed as an intentional tort or instead as negligence." *Id.* at 1290.

Significantly, the *Paulk* Court recognized, "Rather plaintiffs simply allege that medical services were rendered as part of a scheme to collect more than the medical condition required." *Id.* Rejecting the contention that the claims raised were not, "predicated on the professional standards of care", the *Paulk* Court held, "the conclusion that the cause of action sounds in medical malpractice is inescapable." *Id.* at 1291.

In *Goldman v. Halifax Medical Center, Inc.*, 662 So.2d 367 (Fla. 5th DCA 1995), the Court affirmed the lower court's order granting the defendant's motion to dismiss for failure to comply with Pre-Suit. In *Goldman*, *supra*, respondent alleged that the hospital's technician "negligently applied excessive pressure" during a mammogram, thus causing one of her silicone breasts implants to rupture. *Id.* at 368. The *Goldman* Court held that the plaintiff's claims arose out of the

rendering of medical care "because the patient was injured as a direct result of receiving medical care or treatment. . . ." *Id.*

In *Puentes v. Tenet Hialeah Health System*, 843 So.2d 356 (Fla. 3d DCA 2003), the Court affirmed the dismissal of the respondent's negligence complaint for failure to comply with Pre-Suit where the respondent alleged that the diet provided by the hospital's dieticians and kitchen employees was contrary to the diet prescribed by her physician, resulting in injuries. *Id.* at 357-358. The *Puentes* Court concluded, "that Puentes' diet was part of her medical treatment because her medical condition . . ." was what caused the physician to order the special diet. *Id.* at 358. Significantly, the *Puentes* Court held that because the respondent's negligence claim arose only in the context of her medical condition, her claim was one for medical malpractice. *Id.* Other Courts have held that pre-suit compliance was required in matters where the plaintiff's alleged medical malpractice under the guise of a general negligence allegation. *See Cruz v. Carroll*, 2019 WL 10058710 (S.D. Fla. 2019); *Gamez v. Brevard County, Florida*, 2006 WL 2789047 (M.D. Fla. 2006); *Smith v. Brevard County, Florida*, 2006 WL 2355583 (M.D. Fla. 2006).

Based upon the facts contained in the Fourth Amended

Complaint, the trial court's ruling was correct because it recognized that all of the claims arose out of the rendering of medical care, requiring compliance with Pre-Suit. For example, the Appellant alleges that she received an epidural prior to child birth and sustained damages from that treatment. (R. 1098 at ¶ 86; R. 1115-1128 & 1138-1158). Undeniably, each of the allegations calls into question the Appellees' care and treatment as well as the Appellees' medical judgment. This includes the claims stemming from lack of informed consent. (R. 1139).

It is worth noting that the Appellant's failure to provide a proper authorization form pursuant to Florida Statute § 766.1065 was fatal to her attempts to comply with Pre-Suit. (R. 1352). A plain reading of the authorization demonstrates that it does not provide the names of the health care providers that can release records; state the categories of persons authorized to obtain the records; provide for any time limitations for record production or authorize the records to be being provided to consulting experts. (R. 1474).

The Trial Court Correctly Found that the Appellant Failed to Cure the Deficiencies Within the Statute of Limitations and Statute of Repose

The trial court also correctly found that the Appellant failed to

comply with Pre-Suit prior to the expiration of the applicable statute of limitations and statute of repose stemming from the July 5, 2017, care and treatment. (R. 3005). To assist the Court with respect to the Appellees' arguments, the following is a timeline of relevant events:

- July 5-6, 2017: Appellant receives care and treatment. (R. 1085-99);
- November, 2017: Appellant's alleged symptoms begin. (R. 161 at ¶5);
- July 5, 2019: Appellant sought 90-day extension of the medical malpractice pre-suit period. (R. 1448-1449);
- July, 2019: Appellant requests medical records. (R. 742 at ¶2);
- September 9, 2019: Appellant was diagnosed with adhesive arachnoiditis stemming from July, 2017, epidural. (R. 161 at ¶5 & R. 742 at ¶2);
- October 3, 2019: 90-day extension expires. (R. 1352 at ¶¶2-3);
- February 6, 2020: Affidavit of Appellant's first Expert, Dr. Aranda, is executed. (R. 176);
- February 7, 2020: First Notice of Intent sent. (R. 1450-1461);
- July 9, 2020: Appellees' deny pre-suit stemming from First Notice of Intent. (R. 1480-1481);

- October 9, 2020: statutory time for filing Complaint after denial of Pre-Suit expires;

- September 22, 2021: Affidavit of Appellant's second Expert, Dr. Ertner, is executed. (R. 1271);

- September 27, 2021: Second Notice of Intent is sent. (R. 1230-1319);

- December 27, 2021: Appellees deny pre-suit stemming from Second Notice of Intent. (R. 1491-1493);

- Initial Complaint filed on December 27, 2021. (R. 19-75).

Florida Statute §§ 766.106 and 766.203 provide that before instituting an action for medical negligence, Appellant was obligated to conduct a pre-suit investigation sufficient to give rise to a good faith belief that the prospective defendants deviated from the accepted standard of care and that such deviation caused damages. *Florida Statute* § 766.203(2). Upon completion of the pre-suit investigation, and prior to the expiration of the two year statute of limitations, the Appellant was required to provide the Appellees with a "Notice of Intent to Initiate Litigation" accompanied by a "Verified Written Medical Opinion" from a qualified health care provider attesting to the fact that there are reasonable grounds for believing that the prospective defendants were negligent and that such negligence

caused or contributed to the injuries or damages about which Plaintiff complains. *Florida Statute* § 766.203(2).

Florida Statute § 766.106(4), provides, "[t]he notice of intent to initiate litigation shall be served within the time limits set forth in § 95.11." In order to maintain a cause of action for medical negligence under Florida law, the action must be filed within the time limitations set forth in *Florida Statute* § 95.11, which provides:

> (b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued, except that this 4-year period shall not bar an action brought on behalf of a minor on or before the child's eighth birthday. . . . The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred . . .

Herein, Appellant sent her Notice of Intent and affidavits in support of her claims after the expiration of the statute of limitations.

Therefore, her delay in timely beginning the pre-suit investigation period is fatal to her claims.

As acknowledged, the events at issue occurred on July 5-6, 2017. (R. 1085-99; R. 3005). Appellant's alleged symptoms began in November, 2017. (R. 161 at ¶ 5). Without question, the Appellant was aware of the possibility of medical negligence stemming from her receiving the July, 2017, epidural by November, 2017. Given this, the applicable two-year statute of limitations would have expired in July, 2019.

Appellant recognized this and obtained the 90-day extension of the medical malpractice pre-suit period on July 5, 2019. (R. 1448-1449; I.B. at pg. 11). This tolled the expiration of the two-year statute of limitations for the filing of a medical malpractice claim to October 3, 2019, unless the Appellant provided the Appellees with a Notice of Intent (thus beginning the 90-day investigation period). (R. 1352). Appellant's first Notice of Intent, containing Dr. Aranda's affidavit, was provided to the Appellees on February 7, 2020, (R. 1450-1461), approximately one hundred and twenty-seven (127) days after the October 3, 2019, expiration date. Appellant's claims expired prior to her filing of an untimely Notice of Intent.

Despite the fact that the pre-suit investigation period was commenced late, Appellees took part and denied the claims on July 9, 2020. (R. 1480-1481). Therein, Appellant was advised of the deficiencies in the Expert's Affidavits. Significantly, pursuant to Florida Statute § 766.106(4), "Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit." Appellant had until August 9, 2020, in which to file her Complaint.

Rather than file her Complaint, Appellant sent a second Notice of Intent over a year later on September 22, 2021. (R. 1230-1319). This second Notice of Intent was filed well after the 90-day extension and was untimely. That said, the Appellant did not file her initial Complaint until December 27, 2021, well after the expiration of the statute of limitations. (R. 19-75). Given this, the trial court's Order was absolutely correct.

While the Appellees agree with the trial court's determination that the two-year statute of limitations began in July, 2017, utilizing September 9, 2019, as the date of accrual does not change the analysis or appropriateness of the dismissal. Appellant acknowledges

that she was diagnosed on September 9, 2019, with adhesive arachnoiditis stemming from the epidural given in July, 2017. (R. 161 at ¶ 5 & R. 742 at ¶ 2). Utilizing September 9, 2019, as the accrual date, Appellant was required to either file her Complaint or provide a Notice of Intent by September 9, 2021. The second Notice of Intent sent on September 27, 2021, was untimely. (R. 1230-1319). Notably, Appellant did not file a request for a 90-day extension of the pre-suit period in this regard.

Utilizing her February, 2020, Notice of Intent for this analysis, said Notice was provided timely. However, as she did not file her Complaint within 60-days of the July 9, 2020, denial, the December, 2021, Complaint was untimely.

Florida law supports the Order under review. Numerous Courts have held that the statute of limitations begins to run when a plaintiff is put on notice of the reasonable possibility that there has been malpractice. *See Barron v. Shapiro*, 565 So.2d 1319 (Fla. 1990); *Tanner v. Hartog*, 618 So.2d 179 (Fla. 1993); *Townes v. National Deaf Academy*, LLC., 197 So.3d 1130 (Fla. 5th DCA 2016); *Germ v. St. Luke's Hospital Assoc.*, 993 So.2d 576 (Fla. 1st DCA 2008); *Gumbs v. Guerra, M.D.*, 820 So.2d 336 (Fla. 3d DCA 2002).

As Appellant had ample opportunity to cure the deficiencies, but failed to do so, the trial court's holding that the deficiencies could not be cured was legally sound and should be affirmed. *See Southern Neurosurgical Associates, P.A. v. Fine*, 591 So.2d 252, 255 (Fla. 4th DCA 1991); *Cohen v. West Boca Medical Center, Inc.*, 854 So.2d 276 (Fla. 4th DCA 2003).

The Appellants' claims of fraud do not, contrary to her assertions, toll the applicable statutes of limitations to the extent necessary to deem the trial court's finding as erroneous. Initially, Appellant's claims that the delay in discovering her medical condition was due to fraud was contradicted by Dr. Ertner, who opined that the delay in diagnosing adhesive arachnoiditis was because it was an "uncommon disorder" that requires, "specialized imaging based on a high index of suspicion by a provider who has some familiarity with its signs and symptoms." (R. 161 at ¶5).

That said, Appellant acknowledges that she obtained the extension of the statute of limitations by obtaining the 90- day extension. (R. 1448-1449; I.B. at pg. 11). In that 90-day extension period, she requested and obtained the medical records in July, 2019, and thereafter, discovered the alleged forgery in August, 2019. (I.B.

at pg. 11). She also acknowledges that in September, 2019, she was diagnosed with adhesive arachnoiditis stemming from epidural given in July, 2017. (R. 161 at ¶ 5 & R. 742 at ¶ 2). Even assuming, *arguendo*, that the medical records were forged as alleged, the Appellant was aware of the events and the potential for malpractice in 2019, within the extended statute of limitations period. Given this, the alleged fraud did not preclude her from filing her Complaint timely.

While the Appellees have made numerous arguments supporting the trial court's ruling, it should not be forgotten that none of the claims of forgery are directed to the Appellees. As set forth in the Initial Brief, the allegations of forgery are directed towards Nurse Valiquette and Dr. Vann. (I.B. at pg. 12). As there are no allegations regarding the Appellees in this regard, the arguments for extending the statute of limitations is futile.

Although Plaintiff's allegations for intentional tort (as set forth in Count 13) are meritless, to the extent that said are not subject to the 2-year statute of limitations applicable to medical malpractice matters, the trial court's dismissal was nevertheless appropriate. As acknowledged, the events at issue occurred on July 5-6, 2017. (R.

1085-99; R. 3005). Appellant's alleged symptoms began in November, 2017. (R. 161 at ¶5). Without question, the Appellant was aware of the possibility of negligent conduct stemming from her receiving the July, 2017, epidural by November, 2017.

Florida law provides that actions for intentional torts must be filed within four years. See *Garcia v. Psychiatric Insts. of Am., Inc.*, 638 So. 2d 567, 567 (Fla. 5th DCA 1994); *see also Florida Statute* § 95.11(3)(o) (2017). In light of the admission that the cause of action accrued on July 5, 2017, the four-year statute of limitations expired on July 5, 2021. Appellant's December, 2021, Complaint was untimely filed as a matter of law.

IV. APPELLANT'S ADDITIONAL ARGUMENTS DO NOT SUPPORT REVERSAL OF THE TRIAL COURT'S ORDER

Appellant's Claims Require Expert Corroboration

Appellant argues that she was never required to have an expert corroborate her claims regarding consent (even though both of her experts attempted to opine on the issue). (I.B. at pg. 15). Given this, the trial court could not have dismissed her claims for failure to comply with Pre-Suit. The Appellant' argument is simply incorrect.

Based on events stemming from the epidural, the Appellant

alleged various causes of action against the Appellees. (R. 1115-1128 & 1138-1158). The Appellant admits that the claims raised are for medical malpractice and vicarious liability stemming from medical malpractice. (I.B. at pg. 15). Importantly, Appellant admitted that there was a discussion with nurses prior to the procedure being performed. (3151-3152). (I.B at pg. 11). Further, Dr. Ertner acknowledges that per the medical records, informed consent was obtained. (R. 161 at ¶ 7). However, based on the analysis of the Appellant's handwriting experts, Dr. Ertner opined that informed consent was not properly obtained. (R. 161-162 at ¶ 7).

The above Record Evidence demonstrates that the Appellant alleged that there was a discussion regarding the epidural and the complications stemming from same. Given this, Appellant's claims are not for the failure to obtain consent or the failure to provide consent, but rather, the failure to obtain informed consent.

Florida law provides that where there is no discussion regarding the risks of a medical procedure, expert testimony may not be required. *Gouveia v. Phillips*, 823 So.2d 215, 228 (Fla. 4th DCA 2002). However, where a discussion with a medical provider takes place, the question becomes what information was provided, how the

information was provided and what steps should be taken when questions are asked. As these events all require the answers to questions regarding medical judgment and skill, expert testimony is absolutely required to corroborate there has been medical malpractice. *Gouveia, supra; Santa Lucia, supra.*

Given the factual allegations, the Appellant was required to have an expert corroborate her claims. As noted, *supra*, her attempts to do so failed. Her alternate argument that expert corroboration was unnecessary is meritless and should not be considered by this Court.

A Finding of Prejudice Was Not Required

Appellant also argues that the Appellees were required to demonstrate prejudice as a pre-requisite to dismissal of the Complaint. (I.B. at 21). This argument was squarely rejected by the Court in *Cohen, supra,* where it affirmed the dismissal of a medical malpractice for the failure to comply with the statutory pre-suit procedures. Specifically, the *Cohen* Court opined that where a plaintiff fails to provide a corroborating medical expert opinion, absent a "reasonable explanation" for the non-compliance, prejudice is demonstrated and dismissal is proper. *Id. citing Tapia–Ruano v. Alvarez,* 765 So.2d 942 (Fla. 3d DCA 2000).

Assuming, *arguendo*, that this Court determines that a showing of prejudice is required, that showing has been met. The prejudice was simply this … the failure to provide the Appellees with the required corroborating affidavit and authorization deprived the Appellees of being able to fully address the issues prior to denying the claim.

Appellant's reliance on *Morris v. Muniz*, 252 So. 3d 1143 (Fla. 2018) is misplaced. In *Morris, supra*, the Florida Supreme Court addressed the issue of prejudice in the context of a party's failure to comply with the informal pre-suit discovery process as required by *Florida Statute* 766.205. *Id.* at 1146. As the Florida Supreme Court noted, "dismissing an action for a plaintiff's failure to comply with discovery, where the trial court fails to make a finding of prejudice to the defendant, constitutes an abuse of discretion." Id. at 1159. As this case does not involve the Appellant's failure to comply with pre-suit discovery, the *Morris* Court's opinion fails to support her argument for reversal.

An Evidentiary Hearing Was Not Required

Appellant argues that the trial court was required to conduct an evidentiary hearing with respect to the Motion to Dismiss. (I.B. at 16).

There is no absolute requirement that an evidentiary hearing be held with respect to determining whether an expert satisfies the similar specialty requirement. The *Morris* Court's use of the word "should" indicates that conducting such a hearing is permissive. *Morris, supra* at pg. 1158. (I.B. at pg. 9).

That said, in *Nieves v. Viera*, 150 So.3d 1236 (Fla. 3d DCA 2014), the Court expressed:

> In the first place, there is no automatic requirement that there be an evidentiary hearing on pre-suit motions to dismiss. Some cases are quite clear an evidentiary hearing is not necessary. E*dwards v. Sunrise Ophthalmology Asc, LLC*, 134 So.3d 1056, 1059 (Fla. 4th DCA 2013) (holding, without remanding for an evidentiary hearing, that an infectious disease doctor does not specialize in the same or similar specialty as an ophthalmologist); *Yocom v. Wuesthoff Health Sys., Inc.*, 880 So.2d 787, 790 (Fla. 5th DCA 2004) (finding the trial court was correct in suggesting that a doctor of chiropractic medicine could not provide a qualifying affidavit against a urologist).

Id. at 1238.

As noted in the *Nieves* Court's opinion, the defendant moved to dismiss the plaintiff's medical malpractice complaint on the basis that the plaintiff's expert did not practice in the same or similar specialty. *Id*. at 1237. The trial court denied the motion to dismiss and on appeal, the defendant argued that the trial court failed to conduct an

evidentiary hearing on the motion to dismiss. *Id.*

The *Nieves* Court refused to find that a trial court was required to hold an evidentiary hearing, "on a motion to dismiss a medical malpractice complaint on the ground the pre-suit conditions of filing have not been satisfied . . ." *Id.* at 1238. As the *Nieves* Court opined, "The case law falls far short of the establishment of an unremitting principle that an evidentiary hearing must always be conducted or called for sua sponte by a trial judge before ruling upon a motion to dismiss a medical malpractice action based upon the plaintiff's failure to meet pre-suit requirements." *Id.* at 1239. For these reasons, the Appellant's arguments for reversal herein fail.

The Events Regarding the Default Do Not Require Reversal

Appellant contests that because a clerk's default was entered, the trial court could not rule upon the Appellees' Motion to Dismiss. Appellant's position is incorrect.

Undeniably, Appellant and Appellees' counsel communicated long before the Complaint was filed. Despite her knowledge that the Appellees were represented, Appellant moved for the entry of a clerk's default based on the failure of the Appellees to file an Answer to the Complaint. (R. 1515-1516). As the Court in *ACE Funding Source,*

LLC, v. A1 Transportation Network, Inc., 314 So.3d 726 (Fla. 3d DCA 2021) recently explained:

> Rule 1.500 provides that a clerk's default is only appropriate if the defendant "has failed to file or serve any document in the action." *Fla. R. Civ. P.* 1.500(a). As this Court recently instructed, "For purposes of construing the right to enter a default under rule 1.500(a), the term 'paper' is construed liberally and includes any written communication that informs the plaintiff of the defendant's intent to contest the claim." *Contreras v. Stambul, LLC*, 306 So.3d 1143, 1145 (Fla. 3d DCA 2020).

[citations omitted].

Appellant exchanged multiple letters with Appellees' counsel during the pre-suit investigations. (R. 1478-1481). Additionally, the Motion for Entry of Clerk's Default was served on Appellees' counsel, and not the Appellees. (R. 1515-1516). Each of these documents evidences Appellant's understanding that the Appellees were represented. Importantly, the Appellant was well aware of the fact that the Appellees intended to defend the matter on the merits. (R. 1480-1481 & 1491-1493). Given this, the clerk's default should never have been entered and is void as a matter of law. *See Green Solutions Intern., Inc., v. Gilligan*, 807 So.2d 693, 696 (Fla. 5th DCA 2002)(holding that once a plaintiff is placed on notice that the action will be defended, a clerk's default is void).

As the Appellant never advised the Clerk of the communications between she and Appellees' counsel, the Clerk's defaults were entered on April 7, 2022. (R. 1938-1939). April 8, 2022, Appellees' counsel entered an appearance on behalf of Exodus Women's Center, Inc.; and Tampa Obstetrics, P.A., (R. 1943-1944), and an Amended Motion to Dismiss. (R. 1945-1962).

Despite these events, Appellant filed a Motion For Default which was again sent to Appellees counsel (and not the Appellees), again acknowledging the Appellant's understanding that Exodus Women's Center, Inc.; and Tampa Obstetrics, P.A., were represented. (R. 1963-1977). Appellees were forced to file a Motion to Set Aside the Clerk's Default and Motion to Quash Service of Process was filed on April 12, 2022. (R. 2208-2412). Significantly, Appellant never noticed her Motion for Default (or Appellees' Motion to Set Aside the Clerk's Default and Motion to Quash Service of Process) for hearing. Rather, the Parties proceeded to the hearing on the Motion to Dismiss. At that hearing, Appellant did not raise the issue of the clerk's defaults or her request for default judgments.

Appellant now submits that the trial court could not entertain the Appellees' Motion to Dismiss because the clerk's default was

entered. Appellant provides no support for this proposition. That said, it is undeniable that had the Motion to set Aside Clerk's Default been addressed by the trial court, it would have been set aside.

To have a default set aside, the moving party must demonstrate excusable neglect, a meritorious defense and due diligence in seeking relief. *Johnson v. Johnson*, 845 So.2d 217, 220 (Fla. 2d DCA 2003). "Due consideration shall also be given to the public policy favoring liberality in setting aside defaults so that suits may be decided on their merits." *Id. at* 220 [citations omitted]; *see Minda v. Minda*, 190 So.3d 1126 (Fla. 2d DCA 2016). "Any reasonable doubt should be resolved in favor of granting the motion to set aside default so that a case may be tried on its merits." *Gibraltar Service Corp. v. Lone and Associates, Inc.*, 488 So.2d 585 (Fla. 4th DCA 1986). Additionally, where a party will not be prejudiced, a motion to set aside should be granted. *Finkel Outdoor Products, Inc. v. Lasky*, 529 So.2d 317, 319 (Fla. 2d DCA 1988).

Each of these mandated elements was addressed in the Appellees' Motion to Set Aside. Regarding the requirement that the Appellees diligently seek relief, upon learning of the Clerk's defaults, the Appellees filed a Notice of Appearance and Motion to Dismiss. (R.

1943-1962 & 2210). The filing of the Motion to Dismiss also demonstrated that the Appellees had a meritorious defense to the claims. Regarding excusable neglect, as reflected in the Appellees' Motion to Set Aside, Appellees argued that the Complaint was not properly served. (R. 2213-2216).

Appellees respectfully submit that as reflected in the Record on Appeal, it satisfied all requirements for setting aside the clerk's default. Had the matter been brought before the trial court, it undeniably would have granted the Appellees' Motion to Set Aside Default and would have ultimately addressed the Motion to Dismiss.

Florida law supports Appellees' position. In *M.W. v. SPCP Group V, LLC.*, 163 So.3d 518 (Fla. 3d DCA 2015), the Court affirmed an order granting a motion to vacate under circumstances similar to those presented herein. In *M.W., supra*, plaintiff's counsel wrote letters to the defendant prior to suit being filed demanding policy limits. *Id.* at 519. Plaintiff's counsel received a letter from an attorney representing the defendant and thereafter, the two engaged in telephone discussions. *Id.* As the *M.W.* Court noted, "From these contacts, the plaintiff's attorney learned that the defendant was represented by counsel and intended to defend the suit on the merits."

Id.

At some point, "the plaintiff's attorney found the defendant's attorney to be uncooperative. As he explained, "given [the defendant's attorney's] lack of cooperation, I did not attempt to contact him again." *Id.* Thereafter, plaintiff filed a complaint and obtained ex parte defaults against the defendant despite knowing that defendant was represented and intended to defend the case. *Id.* When defense counsel called plaintiff's counsel to inquire about the status of the case (having no knowledge of the defaults), based on plaintiff's own affidavit, plaintiff's counsel, "instructed his assistant to tell [the defendant's attorney] to contact his insurance company. We don't know what they are doing or not.'" *Id.* The plaintiff then tried the matter on uncontested damages and received a verdict in excess of one million dollars. *Id.* After learning of the jury award, defendant's counsel filed a motion to vacate which was granted by the trial court. *Id.*

In affirming, the *M.W.* Court recognized that the, "Florida Supreme Court has emphasized that if there is 'any reasonable doubt in the matter [of vacating a default], it should be resolved in favor of granting the application and allowing a trial upon the merits of the

case.'" *M.W., supra* at 520. [citations omitted]. The *M.W.* Court also recognized that affirmance of the trial court's order vacating the defaults was necessary because plaintiff's counsel recognized that the defendant was represented by counsel and intended to defend the matter on the merits, citing to *Apple Premium Finance Service Co. v. Teachers Insurance & Annuity Association of America*, 727 So.2d 1089 (Fla. 3d DCA 1999). *M.W., supra* at 520. Significantly, the *M.W.* Court found that plaintiff's counsel knew that the matter would be defended from pre-suit contacts. *M.W., supra* at 520. In the concurring opinion, Judge Emas highlighted the number of contacts addressed in *Apple*, supra, including correspondence exchanged between the attorneys and taking part in a presuit settlement conference. *M.W., supra* at 524; *Apple, supra* at 1090.

Appellees recognize that in *M.W., supra*, the issue presented was whether the defendant was provided with notice of the upcoming default hearings. That said, it is clear that the *M.W.* Court based its decision on the fact that plaintiff's counsel was aware that the defendant intended to present a meritorious defense based on pre-suit communications. In this case, a similar situation is presented. For over four years, Appellant took part in the pre-suit investigation

process and engaged in multiple communications with Appellees' counsel regarding this case, including receiving the letters denying pre-suit. Based on the entirety of these communications, Appellant was more than aware that the case would be defended if suit was filed.

A similar decision was reached in *OLE, Inc., v. Yariv*, 566 So.2d 812 (Fla. 3d DCA 1990), where the Court held that a default and default judgment should be set aside, again based in part on plaintiff's counsel's knowledge that the defendant intended to present a meritorious defense. As noted by the *OLE, Inc.,* Court, the defendant received the complaint, provided it to the proper persons and was advised that the documents had been forwarded to the insurance company. *Id.* Thereafter, the insurance company contacted plaintiff's counsel both before and after suit was filed, once requesting addition time to have counsel assigned. *Id.* When counsel did not appear for the defendant, plaintiff obtained defaults. *Id.*

The *OLE, Inc.,* Court held that the default should have been set aside for two reasons, one of which was based on the contacts between plaintiff's counsel and the defendant's insurer. *Id.* at 814. As noted by the *OLE, Inc.*, Court, "Plaintiffs' counsel did not know why there was no appearance by counsel for Ole, but plaintiffs knew that

Ole intended to defend the lawsuit." *Id.* Again, a similar situation is presented herein in that Appellant, based on years of communications, should have known that the matter would be defended.

Given the similar rulings, the common link in the cases is the plaintiff's attorney's knowledge that the matter would be defended based on presuit discussions which is exactly what occurred in this case. Given Appellants' knowledge that the case would be defended, the Motion to Set Aside Default would have been granted.

The Alleged Inappropriate Statements Do Not Constitute Grounds for Reversal

Appellant finally seeks reversal based upon comments made by the trial court at the hearing on the Motion to Dismiss. (I.B. at pg. 28). The first comment was made by the trial court to the court reporter. (R. 3415). The second occurred during an exchange with counsel regarding the need for expert witness certificates. (R. 3444). The Appellant argues that these comments demonstrate judicial bias and prejudice. (I.B. at pg. 28).

Initially, Appellant raised very similar arguments in her Writ of Prohibition filed with this Court, being Case No. 2D22-1806. This

Court entered an Order denying the Writ of Prohibition on June 9, 2022.

That said, the comments themselves fail to rise to any level that would require reversal. The comments were unrelated to any of the trial court's findings as set forth in its Order. Given this, the comments in this regard should be considered "extraneous judicial musings" in light of the clear and definite statement that the motion for new trial was denied. *See Fisher v. Smithson*, 839 So.2d 788 (Fla. 4th DCA 2003); *see also Hutto v. Hutto*, 842 So.2d 994 (Fla. 2d DCA 2003), *quoting Shore Mariner Condo. Ass'n v. Antonious*, 772 So.2d 247, 248 (Fla. 2d DCA 1988).

CONCLUSION

For the reasons set forth herein, Appellee respectfully requests that this Court uphold and affirm the trial court's Order granting the Motion to Dismiss.

LA CAVA, JACOBSON & GOODIS, P.A.

Appellate Attorneys Appellees
501 East Kennedy Blvd.
12th Floor
Tampa, Florida 33602
Telephone: (813) 209-9611

By: */s/ Jason M. Azzarone*
Jason M. Azzarone, Esquire
Florida Bar No. 0146020
jazzarone@ljglegal.com
mramirez@ljglegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been filed through the Florida Court's E-Portal this 10th day of May, 2023, and furnished electronically to: Sandra Zikry at lionlakestar@gmail.com *(Appellant);* Mindy P. McLaughlin, Esquire, Carissa W. Brumby, Esquire, Beytin, McLaughlin, McLaughlin, O'Hara, Kinman, Bocchino, P.A. at mm@law-fla.com; Nichole M. Koford, Esquire, Wicker Smith O'Hara McCoy & Ford, P.A., at

TPAcrtpleadings@wickersmith.com, nkoford@wickersmith.com; Dinah Stein, Esquire, Hicks, Porter, Ebenfeld & Stein, P.A. at dstein@mhickslaw.com, eclerk@mhickslaw.com *(Counsel for Baycare Health Systems, Inc. d/b/a St. Joseph's Hospital, Inc. d/b/a St. Joseph's Women's Hospital, Pamela Taylor, R.N. and Sandra Valiquette, R.N.,);* Alyssa M. Reiter, Esquire, Wicker Smith O'Hara McCoy & Ford, P.A., 515 E. Las Olas Boulevard, SunTrust Center, Suite 1400, Ft. Lauderdale, Florida 33301, areiter@wickersmith.com, sprice@wickersmith.com *(Counsel for David Vann, Jr., M.D., Leah Dilone, A.A., P.C. and American Anesthesiology of Florida, Inc.).*

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Answer Brief has been computer generated in Bookman Old-Style 14-point font, contains 11,858 words, and otherwise complies with the requirements of Fla.R.App.P. 9.210(a).

By: /s/ *Jason M. Azzarone*
Jason M. Azzarone, Esquire
Florida Bar No. 0146020
jazzarone@ljglegal.com
mramirez@ljglegal.com