

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL  
CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA  
CIVIL DIVISION

EDWARD JOHN, individually and  
GARY FERNALD as Administrator  
Ad Litem of the Estate of Decedent  
VINESHIA JOHN a/k/a VINISHIA  
MALCOLM, a/k/a GOILENE DAVIS,  
Deceased,  
Plaintiffs,

Case No.: 09-010919CI-07  
UCN: 522009CA010919XXCICI

v.

SCOTT PLANTZ, M.D.,  
Defendant.

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SCOTT H. PLANTZ, M.D.,

Case No.: 11-008767CI-19  
UCN: 522011CA008767XXCICI

v.

EDWARD E. JOHN; and RICHARD  
S. DELLERSON, M.D.,  
Defendants,

**CONSOLIDATED for Discovery  
and Motion Practice Only**

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**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS CASE;  
FINAL JUDGMENT FOR DEFENDANT; SEVERING CASES; DIRECTING  
PARTIES TO PROCEED WITH DISCOVERY ISSUES AND MOTIONS  
IN CASE NO. 11-008767CI-19; DIRECTIONS TO PARTIES;  
DIRECTIONS TO CLERK OF COURT**

**THIS MATTER** came before the Court on Defendant, Scott Plantz, M.D.'s (hereinafter "Dr. Plantz"), "Motion to Dismiss and Motion to Determine Reasonable Basis" filed on September 22, 2009; Dr. Plantz's Supplemental Memorandum of Law Supporting Motion to Dismiss and Motion to Determine Reasonable Basis" filed on May 25, 2011; Dr. Plantz's "Second Supplemental Memorandum of Points and Authorities in Support of Sec. 766.206 Evidentiary Hearing" filed on April 13, 2014; Dr. Plantz's "Third Supplemental Memorandum of Points and Authorities in Support of Sec. 766.206 Evidentiary Hearing" filed on February 26, 2017; Plaintiffs, Edward John, individually

and Gary Fernald as Administrator Ad Litem of the Estate of Decedent Vineshia John a/k/a Vinishia Malcolm, a/k/a Goilene Davis, Deceased's (hereinafter collectively the "Estate"), "Response in Opposition to Defendant Scott Plantz', Motion to Dismiss and Motion to Determine Reasonable Basis" filed on November 2, 2010; the Estate's "Notice of Filing Affidavit of Richard Dellerson, M.D." filed on November 2, 2010, in response to the Motion to Dismiss; and the Estate's Supplemental Response in Opposition to Defendant's Motion to Dismiss and to Determine Reasonable Basis" filed on May 31, 2011.

Also before the Court is Dr. Plantz "Motion for Bifurcation and Addendum" filed on January 18, 2017; the Estate's "Response in Opposition to Defendant Dr. Scott Plantz Motion for Bifurcation filed on January 18, 2017" filed on February 1, 2017; the Estate's "Objections to Evidence and Arguments Submitted by the Defendant During the February 27, 2017, Hearing Regarding the Qualifications of Richard Dellerson, M.D." filed on April 26, 2017; the Estate's "Written Closing Argument to Hearing on Defendant's Motion to Dismiss and Motion to Determine Reasonable Basis" filed on April 26, 2017; Dr. Plantz's "Written Closing Argument on His Ch. 766.206(2) Motion for Dismissal of this Case" with attached Appendix filed on April 27, 2017; and Dr. Plantz's "Notice of Filing Corrected Appendix" filed on May 1, 2017.

A three-hour evidentiary hearing was conducted on February 27, 2017. The transcript of the February 27, 2017, hearing is attached as Exhibit "A." The Court has considered the motions, responses, memoranda, argument of counsels, testimony and evidence submitted, the court file, the written closing arguments, applicable law, and finds as follows:

### **Preliminary Statement**

The purpose of the Chapter 766, Florida Statutes presuit requirements is to alleviate the high cost of medical negligence claims through early determination and prompt resolution of claims. See Holden v. Bober, 39 So. 3d 396, 400 (Fla. 2d DCA 2010)(quoting Weinstock v. Groth, 629 So. 2d 835, 838 (Fla. 1993)). However, "the medical malpractice statutory scheme must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts." Id. (quoting Kukral v. Mekras, 679 So. 2d 278, 284 (Fla. 1996)).

In order to adhere to the policy enunciated behind the presuit notice requirements, in this bifurcated proceeding, this Court has reviewed evidence presented to determine the sufficiency of Dr. Dellerson's qualifications to provide a verified written medical expert opinion under the applicable statutes. This Court does not and has not made any ruling on the merits of the Estate's medical negligence case against Dr. Plantz.

### **Statement of Case**

On June 19, 2009, the Estate filed a Complaint alleging medical malpractice by Dr. Plantz that resulted in the death of Vineshia John on March 24, 2007. Prior to filing the action, on December 28, 2008, Richard Dellerson, M.D. executed a "Verified Written Medical Expert Opinion of RICHARD DELLERSON, M.D." for purposes of a Presuit Notice in accordance with section 766.106(2), Florida Statutes (2008).

Dr. Plantz's "Motion to Dismiss and Motion to Determine Reasonable Basis" (hereinafter motion and supplementary memoranda collectively referred to as "Motion to Dismiss") was filed on September 22, 2009, asserting that Dr. Dellerson was not qualified to render an opinion against Dr. Plantz under section 766.102(9)(a), Florida Statutes (2008), governing actions for damages involving a claim of negligence against a physician "providing emergency medical services in a hospital emergency department." On November 2, 2010, the Estate filed the "Response in Opposition to Defendant Scott Plantz", "Motion to Dismiss and Motion to Determine Reasonable Basis" and in support of the Response filed the "Affidavit of Richard Dellerson, M.D." dated October 29, 2010.

Thereafter, on August 26, 2010, a hearing on the Motion to Dismiss and numerous other motions was scheduled for November 2, 2010, before Judge John A. Schaefer. It appears the Motion to Dismiss was not considered at that hearing as there was no ruling on the motion. On May 10, 2011, the Motion to Dismiss was set for a hearing on June 1, 2011. However, On May 31, 2011, the Estate filed an Objection to the Hearing because a Motion for Sanctions was pending against Dr. Plantz as a result an incident that allegedly occurred between Dr. Plantz and Dr. Dellerson. The Estate complained that if the Motion to Dismiss was granted, the Motion for Sanctions would not be heard. At the June 1, 2011, hearing on the Motion to Dismiss, the Court granted

the Objection and the motion to dismiss was not heard. An order was entered memorizing the ruling on July 21, 2011.

Thereafter, Dr. Plantz filed memoranda in support of the motion to dismiss and the Estate filed responses in opposition as detailed above. On April 11, 2012, the Estate's Motion for Leave to Amend Complaint was granted. On April 23, 2012, the Estate filed a "Notice of Reliance on Previously Filed Motion to Dismiss and Motion to Determine Reasonable Basis" as its Response to the Amended Complaint.

Further, on April 11, 2012, the Court granted the parties' Motion to Consolidate the present case and Plantz v. Dellerson, Case Number 11-008767CI-19, for purposes of discovery and motion practice only.

On February 17, 2017, the Court entered an order on pending motions including a ruling on Dr. Plantz's "Motion For Bifurcation." The order granted bifurcation and limited the scope of the upcoming evidentiary hearing and stated in part:

(c) The scope of the hearing is limited to the issue of whether on December 28, 2008, Dr. Dellerson was qualified under sections 766.202(6), Florida Statutes (2008), and 766.102(9), and/or (12), Florida Statutes (2008), [and whether the Estate has] provided the verified written medical expert opinion required by section 766.206(2);

(d) All evidence, testimony, and argument shall be directed only to the issue of Dr. Dellerson's qualifications on December 28, 2008, under sections 766.202(6), 766.102(9), and/or (12), and the requirements under section 766.206(2), for a verified medical expert opinion;

The Court has taken note of the Estate's "Objections to Evidence and Arguments Submitted by the Defendant During the February 27, 2017, Hearing Regarding the Qualifications of Richard Dellerson, M.D." filed on April 26, 2017. This Court on its own volition has disregarded the evidence and argument presented by Dr. Plantz that the Court itself finds to be collateral, irrelevant, and immaterial to the very narrow and limited issue of whether Dr. Dellerson was qualified under section 766.102 to provide a verified medical expert opinion, the only issue to be determined at this time.

#### **Statutes At Issue**

Prior to issuing a Notification of Intent to Initiate a Medical Negligence Action, a Plaintiff must comply with all statutory requirements for a presuit investigation. Section 766.203, Florida Statutes (2008) states in part:

PRESUIT INVESTIGATION BY CLAIMANT.--Prior to issuing notification of intent to initiate medical negligence litigation pursuant to s. 766.106, the claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe that:

- (a) Any named defendant in the litigation was negligent in the care or treatment of the claimant; and
- (b) Such negligence resulted in injury to the claimant.

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.

(Emphasis added).

Section 766.202(6), Florida Statutes (2008) states:

“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.

(Emphasis added).

Section 766.102, Florida Statutes (2008) states in part:

(5) A person may not give expert testimony concerning the prevailing professional standard of care unless that person is a licensed health care provider and meets the following criteria:

.....

(c) If the health care provider against whom or on whose behalf the testimony is offered is a health care provider other than a specialist or a general practitioner, the expert witness must have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:

1. The active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered;
2. The instruction of students in an accredited health professional school or accredited residency program in the same or similar health profession

in which the health care provider against whom or on whose behalf the testimony is offered; or

3. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered.

....

(9)(a) In any action for damages involving a claim of negligence against a physician licensed under chapter 458, osteopathic physician licensed under chapter 459, podiatric physician licensed under chapter 461, or chiropractic physician licensed under chapter 460 providing emergency medical services in a hospital emergency department, the court shall admit expert medical testimony **only** from physicians, osteopathic physicians, podiatric physicians, and chiropractic physicians who have had substantial professional experience **within the preceding 5 years** while assigned to provide emergency medical services in a hospital emergency department.

(b) For the purposes of this subsection:

1. The term "emergency medical services" means those medical services required for the immediate diagnosis and treatment of medical conditions which, if not immediately diagnosed and treated, could lead to serious physical or mental disability or death.

2. "Substantial professional experience" shall be determined by the custom and practice of the manner in which emergency medical coverage is provided in hospital emergency departments in the same or similar localities where the alleged negligence occurred.

....

(12) This section does not limit the power of the trial court to disqualify or qualify an expert witness on grounds other than the qualifications in this section.

(Emphasis added).

As noted above, the occurrence that is the basis for the action that allegedly resulted in the death of Mrs. John transpired on March 24, 2007. On that date, Dr. Plantz was a Board Certified physician at St. Anthony's Hospital practicing emergency medicine. (Notebook 2, UNSWORN tab, Plantz p. 6-7, 15-16).

Dr. Plantz argues that in order to be qualified as an expert witness, pursuant to section 766.102(5)(c), within the three years prior to March 24, 2007, Dr. Dellerson was

required to have professional time in the active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered. Additionally, Dr. Plantz asserts that because an emergency room doctor is involved, in order to be qualified, Dr. Dellerson also is required to have had substantial professional experience while assigned to provide emergency medical services in a hospital emergency department.

There is disagreement between the parties as to whether the five-year period for emergency room experience under section 766.102(9) extends from the date of the occurrence that is the basis for the action or whether it extends from the date of the execution of the verified written expert opinion. This appears to be an issue of first impression.

### **Applicable Statute**

In Barrio v. Wilson, 779 So. 2d 413 (Fla. 2d DCA 2000), the Second District Court of Appeal held that the specific provision relating to qualifications for emergency medicine experts in section 766.102(9) applies over the general provisions relating to qualifications for a general health care expert in section 766.102(5). Therefore, section 766.102(9) controls in this case.<sup>1</sup> In Oliveros v. Adventist Health Sys./Sunbelt, Inc., 45 So. 3d 873, 878 (Fla. 2d DCA 2010), the Second District Court of Appeal held that the trial court also may consider section 766.102(12)<sup>2</sup> in determining whether a proffered expert in emergency medicine should be qualified as such.

### **Statutory Construction**

There is a well-accepted precept of statutory construction which requires reconciliation among seemingly disparate provisions of a statute so as to give effect to all its parts. Turnberry Court Corp. v. Bellini, 962 So. 2d 1006, 1009 (Fla. 3d DCA

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<sup>1</sup> This Court notes that Dr. Plantz's Resume states that he is Board Certified in Emergency Medicine. (Notebook 2, PLANTZ RESUME tab, p. 2). Dr. Plantz testified that he is Board Certified in Emergency Medicine. (Notebook 2, UNSWORN tab, Plantz p. 15-16). Dr. Plantz has not listed or testified to any other specializations or certifications.

Dr. Dellerson's Curriculum Vitae indicates that he was Board Certified in Emergency Medicine and recertified in 1999. (Notebook 2, PRESUIT AFFIDAVITS tab; attachment to Motion to Dismiss filed 09/22/2009). Additionally, Dr. Dellerson testified he has practiced only as an emergency room physician, and has no other specialty. (Notebook 2, DELLERSON DEPOSITIONS tab, Gibson 2002, p. 5).

<sup>2</sup> Section 766.102(12) was added in 2003. See Ch. 2003-416, § 48, Laws of Fla. In 2011, section 766.102(12) was renumbered as 766.102(14) due to amendments to the statute. See Ch. 2011-233, § 10, Laws of Fla. In 2013, section 766.102(14) was deleted from the statute. See Ch. 2013-108, § 2, Laws of Fla.

2007)(citing Woodgate Dev. Corp. v. Hamilton Inv. Trust, 351 So. 2d 14, 16 (Fla. 1977)).

The Florida Supreme Court has recently reaffirmed that "[t]o discern legislative intent, a court must look first and foremost at the actual language used in the statute. Moreover, a statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts. When reconciling statutes that may appear to conflict, the rules of statutory construction provide that a specific statute will control over a general statute . . . ." Marchman v. St. Anthony's Hosp., Inc., 152 So. 3d 830, 832 (Fla. 2d DCA 2014)(emphasis in original; quoting Fla. Virtual Sch. v. K12, Inc., 148 So. 3d 97, 101–02 (Fla. 2014)).

As noted above, the provisions in section 766.102(5) are applicable to non-emergency room doctors. For each category of health care provider identified, subsection 5 indicates that the doctor must have devoted professional time during the specified number of "years immediately preceding the date of the occurrence that is the basis of the action." This language was added to the statute (formerly section 768.45(2)(c)2), in 1985. However, a few years later, in 1988 when subsection 9 (formerly section 768.45(6)), applicable to emergency room doctors was added to the statute, reference to the "date of the occurrence" was not included. Instead, subsection 9 broadly states that the Court shall admit expert testimony **only** from physicians with "substantial professional experience within the preceding 5 years while assigned to provide emergency medical services in a hospital emergency room." The Legislature did not specifically explain why it did not mirror the wording of subsection 5 in subsection 9. However, case law states that when "the legislature includes wording in one section of a statute and not in another, it is presumed to have been intentionally excluded." Florida Carry, Inc. v. Univ. of N. Florida, 133 So. 3d 966, 971 (Fla. 1st DCA 2013)(en banc). In reviewing a statute, a trial court cannot extend the terms of an unambiguous statute beyond its express terms or reasonable and obvious implications. See Id. (citing Davila v. State, 75 So. 3d 192, 196 (Fla. 2011)).

It should be noted that section 766.102(5), (9), and (12) concerning the criteria necessary for a physician to be qualified as an expert witness to provide testimony in a medical negligence case is not limited to the preliminary investigation. The qualification

requirements are the same for all expert witness testimony, presuit and provided during the course of the lawsuit, through trial. See Paley v. Maraj, 910 So. 2d 282, 283 (Fla. 4th DCA 2005)("[S]ection 766.202(6), which was enacted in 2003, has eliminated the distinction between an expert for presuit purposes and for testifying at trial.")(citing Yocom v. Wuesthoff Health Sys., Inc., 880 So.2d 787, 790 n.2 (Fla. 5th DCA 2004)).

In section 766.102(4), the statute states in part: "The Legislature is cognizant of the changing trends and techniques for the delivery of health care in this state and the discretion that is inherent in the diagnosis, care, and treatment of patients by different health care providers."<sup>3</sup> By adding new subsection 766.102(9) in 1988 directed solely to emergency room physicians, the Legislature further acknowledged the dynamic and unique working conditions faced when practicing emergency medicine and the specialized knowledge and experience that must be possessed by an emergency room physician as compared to other specializations. It can be deduced that due to this difference, the Legislature required the emergency medicine expert witness to have the required experience in the five years immediately preceding the date of testifying in court or providing a presuit expert witness opinion, rather than merely the three years or five years immediately preceding the date of the occurrence that is the basis of the lawsuit, as required for other physicians under section 766.102(5).

In Barrio, the Second District Court of Appeal held that the trial court erred when at trial it improperly admitted the testimony of an unqualified expert witness as to the standard of care for emergency room physicians. The court found that the doctor was not an emergency room physician and had not served on the staff in an emergency room for fifteen years. Further, "[a]lthough Dr. Fulkerson frequently consulted on emergency room cases and saw patients in that setting, he had not been assigned to provide emergency medical services in a hospital emergency department within the previous five years. Therefore, under the plain terms of the statute he did not qualify to testify on the standard of care for emergency room physicians." Barrio, 779 So 2d at 414.

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<sup>3</sup> Subsection 766.102(4) was created in 1985 when former section 768.45(5), Florida Statutes was enacted. See Ch. 85-175, § 10, Laws of Fla.

Dr. Dellerson's qualifications under section 766.102(9) shall be evaluated for the five years before the execution of the December 28, 2008, verified written medical expert opinion. Therefore, in order to be qualified under section 766.102(9), on or after December 28, 2003, Dr. Dellerson was required to have substantial professional experience while assigned to provide emergency medical services (defined as those medical services required for the immediate diagnosis and treatment of medical conditions which, if not immediately diagnosed and treated, could lead to serious physical or mental disability or death) in a hospital emergency department.

#### **Review Standard**

In reviewing a motion challenging the reasonableness of a presuit investigation in the context of a motion to dismiss, the standard as to whether a reasonable basis has been shown is similar to that is applied to determine whether a complaint states a cause of action. Therefore, all of the factual allegations raised by the non-movant, the plaintiff, are considered to be true and must be construed in the light most favorable to the plaintiff. Holden v. Bober, 39 So. 3d 396, 400 (Fla. 2d DCA 2010).

#### **Affidavits**

After completing the presuit investigation pursuant to section 766.203 and prior to filing a claim for medical malpractice, the claimant must notify each prospective defendant of intent to initiate litigation for medical malpractice. Kukral v. Mekras, 679 So. 2d 278, 280 (Fla. 1996); § 766.106(2), Fla. Stat. The claim shall be corroborated by a "verified written medical expert opinion" which must be furnished to the defendant. § 766.203(2), Fla. Stat.

Compliance with the presuit requirements is a condition precedent to filing a medical malpractice action. However, failure to comply does not divest the court of subject matter jurisdiction. Florida Hosp. Waterman v. Stoll, 855 So. 2d 271, 276 (Fla. 5th DCA 2003)(citing Hosp. Corp. of Am. v. Lindberg, 571 So. 2d 446 (Fla. 1990)). The failure to comply with the presuit requirements of reasonable investigation is not fatal to a plaintiff's claim so long as compliance is accomplished within the statute of limitations period. Id. (citing Kukral).

The occurrence that is the subject of this action happened on March 24, 2007. The "Verified Written Medical Expert Opinion of RICHARD DELLERSON, M.D."

(hereinafter the "Presuit Affidavit"), was executed on December 28, 2008. In paragraph 40 of the Motion to Dismiss Dr. Plantz indicates that the Notice of Intent to sue directed to Dr. Plantz was served on or about February 18, 2009. In Paragraph 41 of the Motion to Dismiss, Dr. Plantz states that the presuit deadline was extended by the parties to May 27, 2009. The statute of limitations was tolled during that extended time period. See § 766.106(4), Fla. Stat. ("However, during the 90-day [presuit discovery] period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension.")

In a letter dated April 21, 2009, directed to the Estate's counsel, Dr. Plantz outlined the alleged deficiencies in Plaintiff's verified medical opinion and questioned Dr. Dellerson's qualifications to execute a verified medical expert opinion with regard to an emergency room physician. Specifically, the correspondence noted that Dr. Dellerson had been an "administrator" for emergency services and a Medical Director for rescue departments, not a physician who has actively practiced emergency medicine in the same capacity as Dr. Plantz. Further, it was opined that even if Dr. Dellerson had been actively practicing emergency medicine, "since 2001 his practice has been limited to the treatment of children and not the treatment of the wide variety of patients Dr. Plantz has seen at a facility like St. Anthony's Hospital." (Emphasis in original). Counsel for Dr. Plantz stated that because Dr. Dellerson was not qualified to render an opinion against Dr. Plantz, the affidavit cannot support the Notice of Intent. (Notebook 2, DOCUMENTS, Davis Letters to Florin, April 21, 2009).

The Estate does not deny that Dr. Plantz informed it prior to the expiration of the statute of limitations of his that position that the December 28, 2008, "Verified Written Medical Expert Opinion of RICHARD DELLERSON, M.D." was deficient. The Estate has not raised the issue of waiver due to any alleged failure of Dr. Plantz to notify it of alleged deficiencies in Dr. Dellerson's Affidavit prior to the expiration of the statute of limitations. See e.g., Lucante v. Kyker, 122 So. 3d 407, 408 (Fla. 1st DCA 2013)(holding failure to deny satisfaction of 766.102 preconditions specifically and with particularity waived the right to later assert that a condition precedent had not been met).

This Court also has considered Dr. Dellerson's Affidavit dated October 29, 2010, filed in response to the Motion to Dismiss in which he undertakes addressing the arguments in the motion to dismiss concerning his qualifications to present a presuit medical expert opinion under section 766.102.

**December 28, 2008, Presuit Affidavit**

With regard to his qualifications, Dr. Dellerson makes the following statements in his Affidavit:

1. "During the three years immediately preceding the date of the occurrence which is the basis of this action, I have had an active clinical practice."

This statement is designed to meet the minimum requirement under section 766.102(5) for specialists. This statement does not address the requirements under section 766.102(9) or (12).

2. "I am experienced and familiar with the prevailing professional standard of care applicable to Emergency Room physicians in diagnosing and treating acute neurologic conditions. I have experience caring for patients similar to **Vineshia John** ("**John**", also called **Vineshia Malcolm** in the medical records).

This statement of experience is vague and does not address the requirements under section 766.102(9) or (12). Mrs. John was not suffering from an "acute neurologic condition."

**October 29, 2010, Affidavit (after the expiration of the statute of limitations)**

With regard to his qualifications, Dr. Dellerson makes the following statements in his Affidavit filed in response to the Motion to Dismiss:

1. "I have had substantial professional experience within the preceding five (5) years while assigned to provide emergency medical services in a hospital emergency department: I was assigned to provide emergency medical services at Miami Children's Hospital from 2001 until December 31, 2006."

2. "The affidavits of [Deise Granado-Villar, M.D. and Lou Ellen Romig, M.D.] are accurate in that I did not have admitting privileges at Miami Children[']s Hospital; however I never asserted in any testimony o[r] affidavit that I did have these privileges."

3. "My responsibilities at [Miami Children's Hospital] entailed an administrative and a clinical perspective and included the supervision of the clinical performance of the physicians in the Emergency Room Department, which required input and oversight into the clinical decision making of these physicians, assuring that clinical policies and procedures and pathways were followed. In some instances, this required working directly with the physician(s) on a particular case."

4. "I have traveled to Haiti on two (2) separate tours since the January 2010 earthquake where I performed direct hands on examination and treatment of anywhere from 60 to 70 patients per day. Over these two tours I personally and directly examined and treated over 600 patients."

**Evidence with regard to Dr. Dellerson's qualifications  
under section 766.102(9)**

The relevant time period for the determination as to whether Dr. Dellerson meets the requirements to be a qualified medical expert under section 766.102(9) is on or after December 28, 2003, through December 28, 2008, the date of the Dr. Dellerson's Presuit Affidavit. Therefore, evidence concerning Dr. Dellerson's activities on or after January 2010, including the July 10, 2013, settlement agreement with the State of Florida Department of Health in DOH Case No. 2011.01435, are irrelevant to the determination of whether he was a qualified medical expert under section 766.102(9) in 2008. All of the factual allegations raised by the Estate have been taken as true and construed in the light most favorable to the Estate. Holden, 39 So. 3d at 400.

At the hearing and in the documentation presented to the Court, Dr. Plantz presents evidence concerning whether Dr. Dellerson acted in "good faith" in executing the Presuit Affidavit. Such argument is not relevant to the Court's inquiry as to whether Dr. Dellerson was qualified pursuant to section 766.102(9) to execute the Presuit Affidavit. Such information has not been considered by the Court.

This Court has considered all the testimony concerning the "last hands-on emergency room shift" provided by Dr. Dellerson in the numerous excerpts of depositions and excerpts of hearing transcripts provided by Dr. Plantz. Dr. Dellerson testified repeatedly in many depositions that the last time he worked a shift as an assigned emergency room physician working with patients was at Broward General Hospital doing "relief ER shifts" ending in 2001 or early in 2002 (See e.g., Video Depo. Vol. 1., 02/29/2012, p. 93-94; filed 03/27/2014: "It was pretty close to the cusp. Say 2001, anyway."). However, in a October 14, 2002, deposition he stated that he continued to see patients at Broward General Hospital at that late date in 2002, (see Notebook 1, Tab 8; Notebook 1, Tab 11; Notebook 2, Dellerson Depositions, Gibson 2002, p. 7. 30. See also Notebook 1, Tab 18 ["late of 2002"]), and in other deposition

testimony, Dr. Dellerson vaguely stated that he had last worked in an emergency room giving patient care in early 2003. (See Notebook 1, Tab 15). In the deposition in the Koslasky case, taken December 19, 2005, Dr. Dellerson stated he had last seen a patient "[a]bout two and a half years ago." (See Notebook 2, Dellerson Depositions, Koslasky 2005, p. 5).

However, on February 27, 2017, at the three-hour hearing before this Court, Dr. Dellerson was questioned directly by co-counsel for the Estate, Eric P. Czelusta, Esq., concerning his employment at Broward General Hospital. Dr. Dellerson testified as follows:

Q. Before I get there, when did you finish working at Broward General?

A. Sometime in 2001.

Q. Okay

A. I was – at the time I had already started at Miami Children's Hospital and I – it was really just too much for me to – to do. You know, continue with both positions working part-time at Broward General and – and full time at Miami Children's.

Q. Okay. So now all this time period from 1970 all the way through to 2001 were you caring for patients, directly hands-on?

A. Was –

Q. Were you treating patients directly and hand-on?

A. Yes.

(Transcript 02/27/2017 hearing, p. 81).

Under the applicable standard of review, this Court is to take all of Dr. Dellerson's statements as true. See Holden, 39 So. 3d at 400. However, the Court finds the statement made by Dr. Dellerson on February 27, 2017, in which he directly testified under oath before this Court that he stopped working at Broward Memorial Hospital in 2001 to be an important admission.<sup>4</sup> However, even if Dr. Dellerson last worked at

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<sup>4</sup> The Court notes that the Presuit Affidavit in the present case and Dr. Dellerson's statements contained in the depositions and hearings contained in the court file and in Plantz hearing notebooks, took place prior to the filing of

Broward General Hospital in "early" 2003, that work history is insufficient to meet the requirement of section 766.102(9) that Dr. Dellerson have had substantial professional experience within the five years preceding the execution of the December 28, 2008, Presuit Affidavit "while assigned to provide emergency medical services in a hospital emergency department."

The Court has considered all the testimony concerning Dr. Dellerson's responsibilities at Miami Children's Hospital from 2001 to December 31, 2006, as presented by Dr. Dellerson in live testimony to this Court on February 27, 2017, and in the numerous excerpts of depositions and excerpts of hearing transcripts provided by Dr. Plantz. Further, the Court has considered the numerous affidavits from physicians who worked with Dr. Dellerson at Miami Children's Hospital who testified concerning Dr. Dellerson's responsibilities with regard to the pediatric emergency room and his administrative duties there.

This Court concludes, based on the evidence, that the duties performed by Dr. Dellerson at Miami Children's Hospital do not amount to "emergency medical services" as he did not provide those medical services required "for the immediate diagnosis and treatment of medical conditions which, if not immediately diagnosed and treated, could lead to serious physical or mental disability or death" as required by section 766.102(9).

Even assuming arguendo that Dr. Dellerson had provided "emergency medical services" at Miami Children's Hospital within the preceding five years; upon review of the testimony and evidence presented, the Court has compared the pediatric emergency room at Miami Children's Hospital, in Miami, Florida, with the adult

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the Administrative Complaint by the State of Florida, Department of Health in DOH Case No. 2011-01435. (See documents in Notebook 2, SANCTIONS tab).

In the Administrative Complaint, the Department of Health alleged that in two 2010 Verified Written Expert Medical Opinions, Dr. Dellerson made "misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession." Specifically, Dr. Dellerson stated that he was Board Certified on June 1, 2010, and on August 20, 2010, when he was not. Although on June 13, 2013, the Department of Health revoked Dr. Dellerson's medical license, the parties reached a settlement on July 10, 2013, in which Dr. Dellerson neither admitted nor denied the allegations in the Administrative Complaint, retained his medical license, but agreed that he "shall not perform expert review or testimony for as long as he holds any form of license to practice medicine in the State of Florida."

At the February 27, 2017, hearing, Dr. Dellerson explained that he did not admit to lying in the Verified Written Expert Medical Opinions, but that he had been careless, without an intent to deceive. (See Transcript 02/27/2017 hearing, p. 118-119; see also Notebook 2, HEARINGS tab, Medical Board Sanctions June 6, 2013). The Court is of the opinion that at the February 27, 2017, hearing, due to the sanction imposed on Dr. Dellerson in June 2013 and the settlement in July 2013, he was more careful and precise in his statements and representations in or related to the his practice of medicine.

emergency room at St. Anthony's Hospital in St. Petersburg, Florida. Based on the evidence, the Court finds that Dr. Dellerson did not have "substantial professional experience" when comparing the two emergency rooms, as he did not practice in a hospital emergency department "in the same or similar localities" where the alleged negligence occurred. See Franklin v. Pub. Health Trust of Dade County, 759 So. 2d 703, 705 (Fla. 3d DCA 2000). Therefore, arguendo, Dr. Dellerson would not be found to be qualified under sections 766.102(9)(a) and 766.102(9)(b)2.

**Evidence with regard to Dr. Dellerson's qualifications  
under section 766.102(12)**

Section 766.102(12), that was in effect at the time Dr. Dellerson gave his Verified Written Expert Opinion on December 28, 2008, does not limit the power of the trial court to disqualify or qualify an expert witness on grounds other than the qualifications set forth in the statute. See Oliveros, 45 So. 3d at 878. This Court has taken all of Dr. Dellerson's statements as true. See Holden, 39 So. 3d at 400. All the documentary evidence presented in the court file and at the three-hour evidentiary hearing on February 27, 2017; including Dr. Dellerson's testimony concerning his experience has been considered by the Court. The Court finds and concludes that under section 766.102(12), the evidence does not support finding that Dr. Dellerson was otherwise qualified to execute the "Verified Written Medical Expert Opinion of RICHARD DELLERSON, M.D." for purposes of a Presuit Notice in accordance with section 766.106(2) and 766.203.

**Conclusion**

As noted at the inception of this order, the Chapter 766 presuit requirements are designed to "alleviate the high cost of medical negligence claims through early determination and prompt resolution of claims." Holden, 39 So. 3d at 400; see Winson v. Norman, 658 So. 2d 625, 626 (Fla. 3d DCA 1995)(holding "one of the primary thrusts of Florida's statutory medical malpractice scheme is to 'weed out' cases which are not, even *prima facie*, supported by some reliable independent indication of their merits"). Compliance with the presuit requirements is a condition precedent to filing a medical malpractice action. Florida Hosp. Waterman v. Stoll, 855 So. 2d 271, 276 (Fla. 5th DCA 2003).

This Court is sympathetic to Plaintiffs, Edward John, individually and Gary Fernald as Administrator Ad Litem of the Estate of Decedent Vineshia John a/k/a Vinishia Malcolm, a/k/a Goilene Davis, Deceased, whereby noncompliance with the statutory requirements has precluded review of the merits of this negligence claim as the statute of limitations expired in 2009. The Estate did not lack the capability to comply with the statutory requirements “but rather, [it] simply failed to follow the procedure set forth in the statute. Therefore, it was human failure, not the presuit requirements which barred [it] entry to the courthouse.” See Correa v. Robertson, 693 So. 2d 619, 621 (Fla. 2d DCA 1997)(quoting Royle v. Florida Hosp.-E. Orlando, 679 So. 2d 1209, 1212 (Fla. 5th DCA 1996)). The dismissal of this action based on the failure to comply with a condition precedent to bringing the action, and is not imposed as a sanction.

This Court has made no ruling and no has made no determination as to the merits of the medical negligence case against Dr. Plantz, but merely follows the law concerning the medical negligence presuit conditions precedent as mandated by the Legislature.

Accordingly, it is

**ORDERED AND ADJUDGED** that Defendant, Dr. Scott Plantz’s, Motion to Dismiss is **granted with prejudice** based on Plaintiff’s failure to comply with the medical negligence presuit requirements of section 766.106(2).

**IT IS FURTHER ORDERED AND ADJUDGED** that **judgment is entered** for Defendant, Dr. Scott Plantz, **and against** Plaintiffs, Edward John, individually and Gary Fernald as Administrator Ad Litem of the Estate of Decedent Vineshia John a/k/a Vinishia Malcolm, a/k/a Goilene Davis, Deceased, who shall take nothing by this action. Defendant, Dr. Scott Plantz, **shall go hence without day**.

**IT IS FURTHER ORDERED AND ADJUDGED** that the Court reserves jurisdiction to consider a motion for attorney’s fees and costs, if timely filed, and further reserves jurisdiction for any and all other matters.

**IT IS FURTHER ORDERED AND ADJUDGED** that pursuant to section 766.206(5)(a), Florida Statutes (2017), this Court has supplied a copy of this Order to the Florida Division of Medical Quality Assurance.

**IT IS FURTHER ORDERED AND ADJUDGED** that this Court **SEVERES** case number 09-010919CI-07 from Plantz v. Dellerson, Case Number 11-008767CI-19.

**IT IS FURTHER ORDERED AND ADJUDGED** that Plaintiffs, Edward John, individually and Gary Fernald as Administrator Ad Litem of the Estate of Decedent Vineshia John a/k/a Vinishia Malcolm, a/k/a Goilene Davis, Deceased; and Defendant, Scott H. Plantz, M.D., are hereby directed to only file motions in case number 09-010919CI-07 relating to the action pending before Division 7.

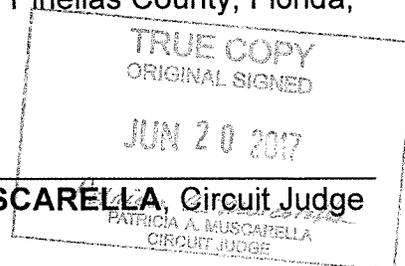
**IT IS FURTHER ORDERED AND ADJUDGED** that Scott H. Plantz, M.D.; Richard S. Dellerson, M.D.; and Edward E. John are directed that the case style in case number 11-008767CI-19 shall be Scott H. Plantz, M.D. v. Richard S. Dellerson, M.D. and Edward E. John, with no reference to case 09-010919CI-07.

**IT IS FURTHER ORDERED AND ADJUDGED** that Scott H. Plantz, M.D.; Richard S. Dellerson, M.D.; and Edward E. John are directed to proceed with all discovery issues and motions in Plantz v. Dellerson, Case Number 11-008767CI-19 and to file all documents therein relating to that case.

**IT IS FURTHER ORDERED AND ADJUDGED** that the **Clerk of Court is directed** to edit the Clerk's Docket to reflect that case number 09-010919CI-07 and Plantz v. Dellerson, Case Number 11-008767CI-19, are severed and are no longer consolidated for discovery and motions practice.

**DONE AND ORDERED** in Chambers, in Clearwater, Pinellas County, Florida, this \_\_\_\_ day of June, 2017.

**PATRICIA A. MUSCARELLA, Circuit Judge**



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