

Nova Law Review

Volume 23, Issue 1

1998

Article 8

Recent Deveopments in Florida Medical Malpractice: A Roadmap for Successful Pre-Trial Practice

Jason L. Gunter*

*

Copyright ©1998 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <http://nsuworks.nova.edu/nlr>

Recent Developments in Florida Medical Malpractice: A Roadmap for Successful Pre-Trial Practice

Jason L. Gunter*

TABLE OF CONTENTS

I. INTRODUCTION	406
II. DETERMINING WHEN THE PRESUIT REQUIREMENTS OF THE ACT APPLY	407
A. <i>An Overview of the Act’s Presuit Requirements</i>	407
B. <i>Survey and Legal Analysis of Statutory and Case Law</i>	410
C. <i>What Constitutes a “Claim for Medical Malpractice” for Purposes of Presuit?</i>	410
D. <i>Who is a “Prospective Defendant” for Purposes of Presuit?</i>	420
III. DETERMINING WHEN THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS APPLIES.....	433
A. <i>An Overview of the Medical Malpractice Statute of Limitations</i>	433
B. <i>Survey and Legal Analysis of Statutory and Case Law</i>	438
C. <i>What Constitutes an “Action for Medical Malpractice” for Purposes of the Statute of Limitations?</i>	439
D. <i>Who is a “Health Care Provider” for Purposes of the Medical Malpractice Statute of Limitations?</i>	448
IV. RECOMMENDATIONS AND SUGGESTIONS: CLARITY, CONSISTENCY, AND CONFORMITY.....	451
V. CONCLUSION.....	454

* Jason Gunter is a sole practitioner in Ft. Myers, Florida, where his firm primarily practices medical malpractice and employment law. He is magna cum laude graduate of Nova Southeastern University, Shepard Broad Law Center, where he was a member of the Editorial Board of the *Nova Law Review*. Mr. Gunter regularly lectures throughout the State of Florida on labor and employment law issues, including Title VII and workplace privacy. Mr. Gunter is the author of *Privileges in the Federal Courts: The Supreme Court Recognizes the Psychotherapists-Patient Privileges and Expands the Privilege to Include Social Workers: Jaffe v. Redmond*, 21 Nova L. Rev. 719 (1997) and co-author of *Recent Developments in Employer Liability for Sexual Harassment—Ellerth and Faragher*, Vol. LXXII, No. 9, 72 Fla. B.J. 94 (Oct. 1998).

I. INTRODUCTION

Scholars and practitioners agree that the path to a successful medical malpractice recovery is a thorny and treacherous one. One commentator characterizes the presuit requirements of Florida's Medical Malpractice Reform Act¹ ("the Act") in Shakespearean parlance, as a "labyrinth" where "[m]inotaurs and ugly treasons lurk."² Another warns of the "pitfalls" involved in bringing a claim for medical malpractice.³ Still another scathingly opines that the Act robs innocent victims of redress, while the perpetrators (i.e., the medical profession) are "getting away with 'murder.'"⁴ However, from this writer's viewpoint, if a homicide has occurred, it has been in the metaphorical sense and probably amounts only to involuntary manslaughter, with the Florida Legislature and courts being the perpetrators and the state of the law of medical malpractice personifying the victim.

Since its inception in 1975, there have been numerous revisions and amendments to the Act and a steady and copious stream of judicial decisions interpreting it. Yet, the legislature and the judiciary have failed to articulate a clear line of demarcation between tort claims that fall within the Act's coverage and those falling outside, or to differentiate adequately, between claims subject to the medical malpractice statute of limitations and those which are not. The result is that presently, plaintiffs' attorneys must proceed at their peril (and obviously that of their clients) in a quagmire of ill-defined terms and internal inconsistencies. Unfortunately, clairvoyant powers may be needed to predict how a court will rule on presuit and/or statute of limitations issues in a given case.

The focus of this article will be upon two questions: first, under what circumstances do the presuit requirements⁵ apply to a tort claim? Secondly, when does the medical malpractice statute of limitations⁶ apply? It will

1. See generally FLA. STAT. §§ 766.101–.316 (1997).

2. John A. Grant, *Florida's Presuit Requirements for Medical Malpractice Actions*, 68 FLA. B.J. 12, 12 (Feb. 1994). The complete quotation, which Mr. Grant sets forth under the title to his article, is as follows: "Thou mayst not wander in the labyrinth; There Minotaurs and ugly treasons lurk." *Id.* (quoting WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE SIXTH* act 5, sc. 3).

3. Jeffery L. Blostein, *Judicial Interpretations of Presuit in Florida: How to Avoid the Pitfalls of Bringing or Defending a Claim for Medical Malpractice*, 71 FLA. B.J. 45, 45 (1997).

4. Jessica Fonseca-Nader, *Florida's Comprehensive Medical Malpractice Reform Act: Is it Time for a Change*, 8 ST. THOMAS L. REV. 551, 569 (1995).

5. FLA. STAT. §§ 766.106; .203–.206 (1997). See discussion *infra* Part II.A for an overview of the Act's presuit requirements.

6. FLA. STAT. § 95.11(4)(b) (1997). The statute reads as follows:

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

become apparent to the reader that these two questions are intimately related and to an important extent, inextricably intertwined. Yet, inexplicably, the Florida courts have used conflicting criteria in the resolution of each of these two issues. Moreover, critical terms of art have been defined differently by the Florida Legislature and by the courts, depending on whether it is a coverage issue or a statute of limitations issue being addressed.

Following the introduction, Part II of this article will discuss the definition of a claim for medical malpractice under the Act and how the courts have construed and applied this definition, specifically in the context of whether a claim arising out of an injury sustained in a medical setting is subject to the presuit provisions of the Act. Part III will discuss how the courts have resolved whether a claim is subject to the two-year medical malpractice statute of limitations⁷ or the four-year statute of limitations governing claims for ordinary negligence.⁸ Also, both Parts II and III, will analyze why the current statutory and case law is anomalous, inconsistent, and likely to be confusing to the practitioner. Part IV will conclude with a discussion of how the vagaries and inconsistencies relating to coverage and statute of limitations issues can be eliminated and how, until such reform takes place, prudent attorneys may want to proceed.

II. DETERMINING WHEN THE PRESUIT REQUIREMENTS OF THE ACT APPLY

The focus of this part will be upon how the Florida courts have gone about determining whether a given claim is subject to, *inter alia*, the presuit notice, investigation, and screening requirements of the Act (“Presuit Requirements”).

A. *An Overview of the Act’s Presuit Requirements*

The Act defines a “claim for medical malpractice” as “a claim arising out of the rendering of, or the failure to render, medical care or services.”⁹ Prior to filing a claim for medical malpractice, the claimant must satisfy

the time the incident is discovered, or should have been discovered with the exercise of due diligence. . . . An “action for medical malpractice” is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. 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.

Id.

7. *Id.*

8. *Id.* § 95.11(3)(a).

9. *Id.* § 766.106(1)(a).

certain presuit requirements. First, the claimant must conduct and complete a “presuit investigation” of the claim pursuant to section 766.203 of the *Florida Statutes*.¹⁰ Upon application to the court by the claimant, an automatic ninety-day extension of statute of limitations will be granted to facilitate this presuit investigation.¹¹ The purpose of the presuit investigation is to ascertain that there are reasonable grounds to believe that any party ultimately named as a defendant in the lawsuit was negligent in the care and treatment of the claimant, and that such negligence resulted in injury to the claimant.¹² Under section 766.203(2), corroboration of reasonable grounds to initiate litigation for medical malpractice “shall be provided by the claimant’s submission of a verified written medical expert opinion from a medical expert as defined in section 766.202(5) . . . which statement shall corroborate reasonable grounds to support the claim of medical negligence.”¹³ After completion of the presuit investigation pursuant to section 766.203 and before filing a claim for medical malpractice, the claimant must notify each prospective defendant of an intent to initiate litigation for medical malpractice.¹⁴ The notice must contain the “date and a summary of the occurrence giving rise to the claim and a description of the injury to the claimant.”¹⁵ No suit may then be filed for a period of ninety days after the notice is mailed to any prospective defendant and during this ninety-day period the prospective defendant’s insurer must conduct a review to determine liability of the defendant.¹⁶ During the ninety-day period, which the Act denominates as the “presuit screening period,”¹⁷ the parties conduct an informal, but mandatory discovery process¹⁸ during which each prospective defendant’s insurer or self-insurer must undertake an investigation and review of the claim in good faith, and both the claimant and prospective defendant must cooperate with the insurer in good faith.¹⁹ Failure of a party to comply with the presuit notice requirement of section 766.103, the reasonable investigation requirements of sections 766.201–212, or the informal discovery requirements of section 766.106(6)–(9), constitutes grounds for dismissal by the court of the claims or defenses.²⁰

10. FLA. STAT. § 766.106(2) (1997).

11. *Id.* § 766.104(2).

12. *Id.* § 766.203(2)(a), (b).

13. *Id.* § 766.203(2).

14. *Id.* § 766.106(2) (1997).

15. FLA. STAT. § 766.106(2) (1997).

16. *Id.* § 766.106(3)(a).

17. *Id.* § 766.106.

18. *Id.* § 766.106(6)–(9).

19. *Id.* § 766.106(3)(a).

20. FLA. STAT. §§ 766.106(3)(a), (6); .206(2). *See also* Community Blood Ctrs., Inc. v. Damiano, 697 So. 2d 948, 952 (Fla. 4th Dist. Ct. App. 1997).

Under the Act, the notice of intent to initiate litigation must be served within the time limits set forth in section 95.11(4)(b) of the *Florida Statutes*.²¹ The notice of intent to initiate litigation must be accompanied by the corroborating opinion.²² “[T]he notice of intent to initiate litigation and the corroborating medical expert opinion, taken together, must sufficiently indicate the manner in which the defendant doctor allegedly deviated from the standard of care, and must provide adequate information for the defendants to evaluate the merits of the claim.”²³ During the ninety-day period following receipt of the notice by the prospective defendants, “the statute of limitations is tolled as to all potential defendants.”²⁴ The parties are free to stipulate to an extension of the ninety-day presuit screening period and the statute of limitations will be further tolled during any such extension.²⁵ Upon receiving notice of termination of negotiations in an extended period or even where there has been no extension, but there has been a rejection of the claim, “the claimant shall have 60 [sixty] days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.”²⁶

The foregoing is by no means an exhaustive discussion of presuit requirements; an in-depth analysis of this issue would be beyond the scope of this article.²⁷ However, the above capsulation has been set forth for context, so that the reader may be mindful of the importance of determining early on whether the claimant and the prospective defendants must comply with presuit requirements. Since noncompliance with these requirements can result in sanctions as drastic as dismissal,²⁸ obviously the prudent attorney will want to be correct in assessing whether the contemplated action is subject to presuit requirements and/or to the two-year limitations period prescribed by section 95.11(4)(b).

21. FLA. STAT. § 95.11(4)(b) (1997). *See supra* text accompanying note 6.

22. *See* FLA. STAT. § 766.203(2).

23. *Duffy v. Brooker*, 614 So. 2d 539, 545 (Fla. 1st Dist. Ct. App. 1993).

24. *See* FLA. STAT. § 766.106(4).

25. *Id.*

26. *Id. See also Tanner v. Hartog*, 618 So. 2d 177, 182 (Fla. 1993).

27. There are several recent well researched articles discussing presuit issues comprehensively. *See* Jeffery L. Blostein, *Judicial Interpretations of Presuit in Florida: How to Avoid the Pitfalls of Bringing or Defending a Claim for Medical Malpractice*, 71 FLA. B.J. 45 (1997); John A. Grant, *Florida's Presuit Requirements for Medical Malpractice Actions*, 68 FLA. B.J. 12 (1994).

28. *See* FLA. STAT. §§ 766.106(3)(a), .106(6), .106(4).

B. *Survey and Legal Analysis of Statutory and Case Law*

As noted above, among the most crucial requirements of the Act are the requirements of presuit notice, investigation, and screening. Section 766.106(2) of the Act provides in pertinent part: “[a]fter completion of presuit investigation . . . and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant . . . of intent to initiate litigation.”²⁹ The above quoted section of 766.106(2) gives rise to two crucial questions. First, what constitutes “a claim for medical malpractice?” Second, what is the meaning of the term “prospective defendant?” For if a claim is “a claim for medical malpractice” and it is against one to whom the legislature was referring when it used the term “prospective defendant,” then the plaintiff must conduct a presuit investigation, procure a corroborating opinion, and give notice to the defendant(s) of intent to initiate litigation for malpractice.³⁰

C. *What Constitutes a “Claim for Medical Malpractice” for Purposes of Presuit?*

This first question is only partially answered by the language of section 766.106(1)(a). Section 766.106(1)(a) defines a “claim for medical malpractice” as “a claim arising out of the rendering of, or the failure to render, medical care or services.”³¹ Still, there is the further question of what constitutes the “rendering of, or the failure to render, medical care or services” for purposes of section 766.106?

In *NME Properties, Inc. v. McCullough*,³² the Second District Court of Appeal attempted to answer this question.³³ The court held that because the complaint did not allege that employees or agents of the defendant nursing home rendered medical care or service³⁴ to the plaintiff, the claim was not a claim for medical malpractice.³⁵ At the outset, the court noted that presuit requirements apply only to “claim[s] for medical malpractice” as defined by section 766.106(1)(a) of the *Florida Statutes*.³⁶ The court went on to assert that the “simplest test” for determining whether a particular claim is one for

29. *Id.* § 766.106(2) (emphasis added).

30. *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993) (citing FLA. STAT. § 766.106(2) (1997)).

31. FLA. STAT. § 766.106(1)(a).

32. 590 So. 2d 439 (Fla. 2d Dist. Ct. App. 1991).

33. *Id.* at 441.

34. *See* FLA. STAT. § 766.106(1)(a).

35. *McCullough*, 590 So. 2d at 441.

36. *Id.*

medical malpractice subject to presuit requirements is “whether the professional medical negligence standard of care described in section 766.102, Florida Statutes (1989), applies to the active tortfeasor.”³⁷

However, upon thoughtful analysis, this “test” is not a “simple” test at all, but is complicated and circular. Section 766.102(1) provides in pertinent part that “[t]he prevailing professional standard of care . . . shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.”³⁸ Although it articulates the standard of care that is applicable when a claim arises out of the rendering of, or failure to render, medical care or services, section 766.102(1) does not resolve the threshold question of what constitutes “the rendering of, or failure to render medical, care or services.”³⁹ Thus, it does not really answer the question of what constitutes a claim for medical malpractice subject to presuit requirements. Logic would dictate that only after one has first determined that a particular claim is one for medical malpractice, (i.e., one arising out of the rendering of, or failure to render, medical care or services) should section 766.102(1) then come into play to guide the resolution of whether the particular medical care or services rendered fell below the applicable standard of care and thus, constituted a breach of duty. In this commentator’s view, the *McCullough* court put the proverbial cart before the horse. The court suggested that one can discern whether a claim is one for medical malpractice subject to presuit requirements by determining in the first instance whether the professional standard of care set forth in section 766.102(1) “applies to the active tortfeasor.”⁴⁰ However, the reverse actually makes more sense; that is, there must first be a threshold determination as to whether the claim is “a claim for medical malpractice,” to wit, a claim arising out of the rendering of, or the failure to render, medical care or services. This determination having been made, only then should section 766.102(1) be applied to determine whether the medical care or services rendered comported with or fell below the applicable standard of medical care recited in that section.⁴¹ A much simpler and more workable test would be to

37. *Id.*

38. FLA. STAT. § 766.102(1) (1997).

39. *See id.*

40. *McCullough*, 590 So. 2d at 441.

41. *See also* *Broadway v. Bay Hosp., Inc.*, 638 So. 2d 176 (Fla. 1st Dist. Ct. App. 1994). In *Broadway*, the first district noted that “[t]he test for determining whether a defendant is entitled to the benefit of the presuit screening requirements of section 766.106, Florida Statutes, is whether the defendant is directly or vicariously liable under the medical negligence standard of care set forth in section 766.102(1), Florida Statutes.” *Id.* at 177. Again, framing the test in such terms is circular and begs the question. We must first know whether the claim is one which arises out of “the rendering, of or failure to render, medical care or services” and thus, whether it is “a claim for

examine whether the alleged incidents giving rise to the claim involved the professional skill or judgment of the defendant. The *McCullough* court hinted strongly that if the plaintiff had alleged facts indicating negligence in the exercise of medical skill or judgment, then the action would have been deemed a claim for malpractice.⁴² Implicitly, the court equated claims arising out of the exercise of professional skill and judgment with claims arising out of the rendering of, or failure to render, medical services or care, when it noted that the plaintiff failed to allege that the incident involved the defendant's professional skill or judgment.⁴³

In any event, we are still left with the question of how to determine whether a claim is one for medical malpractice for purposes of presuit. To phrase it another way, how can an attorney figure out, with any degree of certainty, when his client's claim "arise[s] out of the rendering of, or failure to render, medical care or services?"⁴⁴ An exploration of some recent case law may help to provide the answer.

In *J.B. v. Sacred Heart Hospital*,⁴⁵ the Supreme Court of Florida addressed the question of when an action constitutes a claim for medical malpractice for purposes of whether presuit notice is required under section 766.106(2).⁴⁶ As the court in *McCullough* had done, the supreme court examined the definition of "a claim for medical malpractice" set forth under section 766.106(1)(a) of the *Florida Statutes*.⁴⁷ However, the *J.B.* court concluded that because the plaintiff's claim did not arise out of the rendering of, or failure to render, medical care or services, presuit notice and screening requirements did not apply.⁴⁸ The gravamen of the plaintiff's claim was that the defendant hospital had asked the plaintiff to transport his brother, a patient at the hospital, to another hospital without telling the plaintiff that his brother had AIDS and without warning him that he could become HIV positive if he came into contact with his brother's wounds.⁴⁹ The court observed that:

According to the allegations in J.B.'s complaint, the Hospital was negligent in using J.B. as a transporter. The complaint does not

medical malpractice." FLA. STAT. § 766.106(1)(A) (1997). Only then can we determine whether a defendant was negligent in the rendering of those medical services by applying the section 766.102(1) professional standard of care to the conduct of the defendant.

42. *McCullough*, 590 So. 2d at 441.

43. *Id.*

44. See FLA. STAT. § 766.106(1)(a).

45. 635 So. 2d 945 (Fla. 1994).

46. *Id.* at 947.

47. *Id.* at 948-49; see also *McCullough*, 590 So. 2d at 441.

48. *J.B.*, 635 So. 2d at 949.

49. *Id.* at 946-47.

allege that the Hospital was negligent in any way in the rendering of, or the failure to render, medical care or services to *J.B.* Accordingly, the complaint does not state a medical malpractice claim for chapter 766 purposes, and the notice and presuit screening requirements are inapplicable.⁵⁰

The court's reasoning in *J.B.* does help to elucidate the meaning of the term "rendering of, or failure to render, medical care or services" and serves to illustrate that not every claim which arises in a medical setting is one for medical malpractice. *J.B.* was not a patient, and he apparently had no injuries, disease, or other condition; he did not in any way either seek or receive professional care or services from the hospital.⁵¹ Arguably, the failure of the hospital to warn *J.B.* that there was a risk of AIDS transmission if he came into contact with his brother's wounds was a very serious lapse in *medical* judgment. However, what appears to have been key to the court's decision was the fact that the hospital's negligence did not occur in the course of rendering medical services to the plaintiff, that is, to *J.B.*⁵² Conversely, if *J.B.* had been a patient of the hospital and he contracted AIDS through, say, an improperly sterilized instrument or needle, then his claim would undoubtedly have been one for malpractice. In such a case, the claim would clearly have arisen out of the rendering of medical services to *J.B.*

Another case dealing with the distinction between claims subject to presuit requirements and those which are not, is the recent decision of *Feifer v. Galen of Florida, Inc.*⁵³ In *Feifer*, the plaintiff, an elderly man, presented himself at the defendant hospital after being directed to do so by his physician.⁵⁴ The plaintiff's hands were obviously shaking, he walked with slow shuffling steps with his hand on his hip, and he openly complained to the hospital about his weakness.⁵⁵ In his complaint, the plaintiff alleged that hospital's admission employees told him that he would have to walk under his own power to the various areas of the building, down long corridors with hard floors, no handrails, no benches or chairs for sitting or resting, and with neither a wheelchair nor escort having been provided.⁵⁶ The plaintiff further alleged that the conditions of the corridor, as described above, constituted an "unsafe passageway" and a "dangerously negligent condition" of which the hospital knew or should have known.⁵⁷ Allegedly, the plaintiff then suddenly

50. *Id.* at 949 (emphasis added).

51. *Id.* at 948.

52. *Id.* at 949.

53. 685 So. 2d 882 (Fla. 2d Dist. Ct. App. 1996).

54. *Id.* at 883.

55. *Id.*

56. *Id.*

57. *Id.* at 883-84.

fell to the floor after walking to various areas of the hospital, resulting in a broken hip and other permanent and painful bodily injuries which required emergency surgery.⁵⁸ The hospital moved for a dismissal of Feifer's complaint for negligence on the ground that he had failed to comply with the presuit notice and screening requirements of chapter 766.⁵⁹ The trial court granted the motion, but the Second District Court of Appeal reversed, holding that the plaintiff had effectively alleged a cause of action for premises liability based on the breach of the hospital's duty to exercise reasonable care in the maintenance of its premises.⁶⁰ The court pointed out that this was not a case of the hospital's negligence in the rendering of "medical care" as contemplated by the Act.⁶¹ Therefore, the court reasoned it was not a claim for medical malpractice.⁶² Rather, it was negligence in the broader sense, a breach of the duty to exercise reasonable care in the maintenance of property, a duty which is incumbent upon any prudent person who owns or occupies premises.⁶³

The *Feifer* court appears to have made somewhat of a subtle distinction in arriving at its holding. Mr. Feifer's injury occurred while he was at the hospital seeking medical care and services; he was clearly in a medical setting when he fell in the hospital corridor and when the injury from the fall occurred.⁶⁴ However, the injury allegedly occurred from the way in which the hospital maintained the property—or more precisely—failed to maintain it.⁶⁵ The court characterized the negligence as being outside the sphere of the rendering of, or failure to render, medical care or services.⁶⁶

However, upon closer analysis, the reasoning of *Feifer* is somewhat questionable. Arguably, because of its specialized knowledge and

58. *Feifer*, 685 So. 2d at 884.

59. *Id.* at 883.

60. *Id.*

61. *Id.* at 885.

62. *Id.*

63. *Feifer*, 685 So. 2d at 884. See also *Hicks v. Baptist Hosp., Inc.*, 676 So. 2d 1019, 1019 (Fla. 1st Dist. Ct. App. 1996) (holding that action against hospital to recover for injuries sustained by claimant when another patient, who was allegedly inebriated but allowed to keep a cigarette lighter, set fire to his bed, was a claim for premises liability and not subject to presuit requirements); *Palm Springs Gen. Hosp., Inc. v. Perez*, 661 So. 2d 1222, 1223 (Fla. 3d Dist. Ct. App. 1995) (holding that action wherein patient sued hospital for negligently placing her in room with second patient who committed homosexual attack on patient was an action for ordinary negligence/premises liability rather than medical malpractice and therefore was not subject to presuit screening requirements); *Broadway v. Bay Hosp., Inc.*, 638 So. 2d 176, 177 (Fla. 1st Dist. Ct. App. 1994) (holding that a suit based upon the collapse of claimant's hospital bed was not a claim for medical malpractice and hence not subject to presuit requirements).

64. *Feifer*, 685 So. 2d at 883–84.

65. *Id.* at 884.

66. *Id.* at 885.

experience, a hospital, unlike other property owners, is uniquely situated to foresee the dangers which could befall elderly people like Mr. Feifer. Its staff has the expertise to recognize that a patient's age or condition might render a particular patient susceptible to dangers which might not necessarily be foreseen by a layman property owner. The moment Mr. Feifer walked through the door, he entrusted himself to the hospital's care. The hospital staff directed Mr. Feifer to walk down the long corridors and provided no escort, wheelchair, handrails, or benches for resting despite his obvious frailty. In light of what it knew or should have known of the vulnerabilities of an elderly person like Mr. Feifer, who exhibited cognizable symptoms of physical illness and who complained of weakness, Galen Hospital arguably committed *medical negligence*. Arguably, at the heart of the hospital's omissions was a lapse of professional skill and judgment.⁶⁷ However, if the *Feifer* court was at all torn between ordinary negligence and medical malpractice, it should not be surprising that the court resolved the issue in favor of Mr. Feifer in finding ordinary negligence.⁶⁸ The *Feifer* court quoted the statement of policy articulated by the Supreme Court of Florida in *J.B. v. Sacred Heart Hospital* that "[i]f there is doubt as to the applicability of such a statute, the question is generally resolved in favor of the claimant."⁶⁹ Although the supreme court in *J.B.* was referring specifically to section 95.11(4)(b), the two-year medical malpractice statute of limitations, and the *Feifer* court was referring to the Act's presuit requirements, the unifying theme is that in the arena of medical malpractice, the courts have consistently

67. The distinction between medical care and ordinary or reasonable care can be somewhat amorphous and elusive. The gist of Mr. Feifer's position that his claim was for ordinary as opposed to medical negligence is captured in the following excerpt from his memorandum in opposition to the hospital's motion to dismiss in the trial court:

[D]efendant's . . . argue that, because the word "care" was used in the text of the Complaint, and because the defendant corporate entity is generally considered a health care provider, that plaintiffs' [sic] cannot pursue their claim herein under an ordinary negligence cause of action but, rather, must pursue it as a medical malpractice action with all the attendant statutory conditions precedent to the filing of such a cause of action; defendant's argument is a misconstruance of the word "care" into the context of "medical care," a construction more favorable to the defendant, when the plain meaning of the word "care" in the context used was such reasonable care as any ordinary prudent person may be required by law to take to avoid injury to others, in the classic definition of the tort of negligence.

Id. at 884 (quoting Response Brief for Appellant).

68. *Id.* at 885.

69. *Id.* (quoting *J.B. v. Sacred Heart Hosp.*, 635 So. 2d 945, 947 (Fla. 1994)).

construed statutes restricting access to the courts in a manner which favors access.⁷⁰

In light of *Feifer*, it would seem that claims arising out of a hospital's negligence when a patient is awaiting or enroute to or from receiving medical services must be distinguished from injuries which occur from the administering of the care or services themselves. Only claims based on the latter are subject to presuit requirements under the reasoning of *Feifer*.⁷¹ However, *Feifer* is not definitive because one can imagine situations where the line between the rendering of medical care or services and negligent maintenance of property could be quite blurry. It would be much harder to criticize the *Feifer* court's reasoning if, for example, Mr. Feifer had slipped on a patch of soapy water. Such a scenario would be more of a garden variety type of negligence, a failure of reasonable care in the maintenance of property; the consequence of which could befall anyone, of any age, in any type of building which has a hallway or corridor.⁷² However, because of the hospital's specialized knowledge of the frailties of the sick, elderly, and infirm, what actually happened in *Feifer* could have justifiably been considered a lapse of professional judgment which occurred in the course of rendering medical service to a patient.

To illustrate this point, assume that a patient goes to a chiropractor for treatment of a bad back. An interesting quandary would be presented if, for example, while the chiropractor was treating the patient, the treatment table collapsed. From the standpoint of time, the resultant injury occurred "during" the rendering of medical services, but the question is, did it arise out of the rendering of services from a conceptual standpoint? On one hand, one could argue that the injury did not arise out of the rendering of medical

70. See *Kukral v. Mekras*, 679 So. 2d 278 (Fla. 1996); *Patry v. Capps*, 633 So. 2d 9 (Fla. 1994); *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993); *Community Blood Ctrs., Inc. v. Damiano*, 697 So. 2d 948 (Fla. 4th Dist. Ct. App. 1997); *Melanson v. Agravat*, 675 So. 2d 1032 (Fla. 1st Dist. Ct. App. 1996). See also FLA. CONST. art. I, § 21 which provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." *Id.*

71. See *Feifer*, 685 So. 2d at 885.

72. But see *Neilinger v. Baptist Hosp., Inc.*, 460 So. 2d 564 (Fla. 3d Dist. Ct. App. 1984). In *Neilinger*, the plaintiff, a maternity patient, alleged that she slipped and fell on a pool of amniotic fluid while descending from an examination table under the direction and care of hospital employees. *Id.* at 566. The *Neilinger* court held that the complaint, on its face, alleged breach of a professional duty and that the action was therefore one for medical malpractice as opposed to ordinary negligence. *Id.* One might argue that *Neilinger* is distinguishable from *Feifer* in that in *Neilinger* the plaintiff slipped and fell while descending from the table at the direction and supervision of hospital employees. *Id.* However, if the negligent assistance of hospital employees in *Neilinger* was classified as medical negligence, it would seem that the allegation of a total lack of assistance by hospital employees alleged by a frail and elderly Mr. Feifer could support a finding of medical negligence in that case.

services because it was a defect in the physical object upon which the patient was being treated, rather than a defect in the treatment or care itself. On the other hand, it can be argued that the table is a tool, in effect an "instrument" of the chiropractor, and therefore in utilizing a substandard "instrument" and/or in failing to maintain it in a safe condition, the chiropractor was negligent in the rendering of medical services. In view of the policy favoring access to the courts,⁷³ most courts would probably find the patient's claim to be for premises liability as opposed to medical malpractice, if such a finding would result in dismissal of the claim.

To further illustrate the possibilities, let us consider an example of two patients, both of whom are in the hospital. Patient A is injured as a result of a nurse's failure to raise and secure the bed rails, while patient B is injured due to the patient's bed collapsing. There is a respectable argument that patient A's claim against the nurse and/or the hospital⁷⁴ is a claim for medical malpractice. We can safely assume that it is part of a nurse's professional duties to see that the bed rails are raised for the protection of the patient—if not the nurse, who else? In the author's view, a claim based on the nurse's neglect to raise and secure the bed rails and the resultant injury to the patient arises out of the rendering of or failure to render medical care or services. It is a claim calling into account the exercise of her professional skill and judgment.⁷⁵ Undoubtedly, nurses are trained in many facets of bedside care of patients. A nurse must know how to put in and take out intravenous needles, wash and assist patients in excretory functions, help them in and out of bed, and even know how to make a bed with a patient still in it. Their training most likely includes the raising and securing of bed rails. We can rest assured that the risk management division of the hospital will insist upon such prophylactic measures. Indeed, the Florida courts have recognized that one of the primary professional duties of a nurse is the supervision of patients.⁷⁶ The raising of bed rails is arguably a component of

73. See, e.g., *Weinstock*, 629 So. 2d at 838.

74. Even though a hospital may not itself be directly liable, a hospital can be held vicariously liable for the negligent acts of its agents or employees. See *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365, 368–69 (Fla. 1981); *Reed v. Good Samaritan Hosp. Ass'n, Inc.*, 453 So. 2d 229, 230 (Fla. 4th Dist. Ct. App. 1984). It should be noted that a hospital may also be found vicariously liable on an apparent agency theory. See *Orlando Executive Park, Inc. v. Robbins*, 433 So. 2d 491 (Fla. 1983). In *Orlando Executive Park*, the Supreme Court of Florida approved the requisites necessary to establish apparent agency: "(1) a representation by the principal; (2) reliance on that representation by a third person; and (3) a change of position by the third person in reliance upon such representation to his detriment." *Id.* at 494 (quoting *Orlando Executive Park, Inc. v. P.D.R.*, 402 So. 2d 442, 449 (Fla. 5th Dist. Ct. App. 1981)).

75. *NME Properties, Inc. v. McCullough*, 590 So. 2d 439, 440 (Fla. 2d Dist. Ct. App. 1991).

76. See *Evenson v. Miami Med. Ctr., Inc.*, 128 So. 2d 626 (Fla. 3d Dist. Ct. App. 1961).

a nurse's supervisory duties, which duties are, in turn, a constituent of the care rendered by a nurse. Thus, the practitioner should be cautioned that presuit requirements could apply in such a situation.⁷⁷

However, patient B's claim, if any, falls into more of a gray area. On one hand, the hospital could be said to have been negligent in the rendering of "medical" care or services because the provision of a bed to patients would seem to be an integral part of the services rendered by the hospital. Nevertheless, on the other hand, we must ask, does the provision of a bed by a hospital equate to the rendering of "medical" care or services? The maintenance of a bed in good mechanical working order is not something that involves medical skill or judgment. So even though in the broad sense, patient B's injuries occurred in the course of the hospital's rendering of medical care and services, it is doubtful B's claim would be construed by a court to be one for medical malpractice. In fact, in *Broadway v. Bay Hospital, Inc.*,⁷⁸ the court held that a plaintiff's claim for injuries she sustained when her hospital bed collapsed was a claim for ordinary negligence.⁷⁹ The court noted that the plaintiff's allegations that the hospital had failed to properly maintain a piece of equipment, or to warn of a dangerous condition made the claim one for negligent maintenance of the premises as opposed to medical malpractice.⁸⁰

Another thought-provoking example might be that of two patients who are injured by virtue of food they are served while in the hospital. Patient A contracts salmonella as a result of ingesting undercooked chicken contaminated with the salmonella virus while patient B, whom the hospital knows to be a diabetic, develops complications as a result of being served a diet too high in sugars. What distinguishes A's claim from B's is the fact that the breach of duty to patient A does not involve a lack of medical expertise. In the same vein as the hospital's food service staff, a chef in a restaurant, or even a social host, could be deemed negligent for causing salmonella by undercooking chicken as it is common knowledge. However, as regards patient B, because of its specialized medical knowledge and expertise, the hospital is or should be uniquely able to foresee the serious medical repercussions which could befall a patient with a disease requiring a special diet. Thus, in the case of patient B, it would seem reasonable to conclude that the hospital was negligent in the rendering of or failure to render "medical" care.

77. As we shall see and discuss in the next section of this article, the fact that a claim arises out of the rendering of or the failure to render medical care or services and is therefore a claim for medical malpractice, does not mean in and of itself, that presuit requirements apply; for the prospective defendant must also be a "health care provider." See *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993).

78. 638 So. 2d 176 (Fla. 1st Dist. Ct. App. 1994).

79. *Id.* at 177.

80. *Id.*

Consider one final example, that of a doctor, who, out of affection for a patient, brings a vase of flowers to her bedside, but injures her when he carelessly drops the vase upon her. Contrast that scenario to the doctor poking that same patient in the eye with a sharp medical instrument in the course of examining or treating her. While the former mishap exemplifies a lack of ordinary care for which any layperson could be culpable, the latter clearly involves neglect or a failure of skill in the rendering of a medical service.

Although the determination of when an action will be deemed a claim for medical malpractice for purposes of presuit is an inexact science, a review of several other Florida cases should help the practitioner to determine where the courts are likely to draw the line between actions which constitute claims for medical malpractice and those which do not.

One such case is that of *Palm Springs General Hospital, Inc. v. Perez*.⁸¹ In *Perez*, the Third District Court of Appeal upheld the denial of a hospital's motion to dismiss, holding that the plaintiff had no obligation to comply with presuit screening provisions where the hospital was allegedly negligent in placing the plaintiff in a room with another patient who attacked her.⁸² The *Perez* decision was well-reasoned in that it was not a medical risk to which the patient was exposed, but rather the risk that another might harm her because of known criminal propensities.⁸³

In *Jackson v. Biscayne Medical Center, Inc.*,⁸⁴ the plaintiff was a patient who had allegedly been wrongfully removed from the defendant hospital without medical authorization.⁸⁵ The plaintiff alleged that he was then assaulted, battered, falsely arrested, slandered, and ultimately maliciously prosecuted for trespassing at the hospital.⁸⁶ The Third District Court of Appeal reversed a dismissal of these claims notwithstanding that they arose from the same transaction as other counts which were based upon malpractice and which were properly dismissed for failure to comply with presuit requirements.⁸⁷ Although the *Jackson* decision appears to be sound,

81. 661 So. 2d 1222 (Fla. 3d Dist. Ct. App. 1995).

82. *Id.* at 1223.

83. See also *Hicks v. Baptist Hosp., Inc.*, 676 So. 2d 1019 (Fla. 1st Dist. Ct. App. 1996). In *Hicks*, an inebriated patient at the hospital set a fire resulting in another patient's death. *Id.* The court concluded that the claim did not sound in medical malpractice but rather premises liability and therefore the claim was not subject to the presuit requirements of the Act. *Id.* at 1019. Other recent decisions have held that certain claims against hospitals or other medical care facilities can be grounded in premises liability as opposed to medical malpractice. See, e.g., *Robinson v. West Fla. Reg'l Med. Ctr.*, 675 So. 2d 226 (Fla. 1st Dist. Ct. App. 1996).

84. 347 So. 2d 721 (Fla. 3d Dist. Ct. App. 1977).

85. *Id.* at 722.

86. *Id.*

87. *Id.*

it is still somewhat questionable in that what precipitated the assault, battery, false imprisonment, etc. was the wrongful discharge from the hospital without medical authorization.⁸⁸ If a patient is discharged from the hospital before it is medically sound to do so, then arguably there has been a breach of duty arising out of the rendering of, or more precisely, the failure to render medical care or services. However, the intentionally tortious behavior, which occurred following that wrongful discharge, is distinguishable from the medical repercussions one might ordinarily expect, such as a relapse or worsening of the underlying medical condition. In that the tortious conduct in question was quite attenuated and remote from the expected consequence of a wrongful discharge of a patient, the *Jackson* decision is justifiable. If, on the other hand, the battery claim of the plaintiff were to have been based on the failure of a surgeon to disclose risks and obtain informed consent, the situation would have been altogether different, and the claim would properly have been deemed one for medical malpractice.⁸⁹

D. *Who is a "Prospective Defendant" for Purposes of Presuit?*

Section 766.106(2) of the *Florida Statutes* provides in relevant part that "[a]fter completion of presuit investigation pursuant to § 766.203 and prior to filing a claim for medical malpractice, a claimant shall notify each *prospective defendant* . . . of intent to initiate litigation for medical malpractice."⁹⁰ Since the Florida Legislature has not defined what it means by the cryptic term "prospective defendant," the question arises as to exactly who was intended to be included within this category of "prospective defendants" for purposes of section 766.106(2).

A leading case addressing this question is the Supreme Court of Florida's decision in *Weinstock v. Groth*.⁹¹ In *Weinstock*, the plaintiff filed an action against a licensed clinical psychologist.⁹² The gravamen of the complaint was that in 1985, the plaintiff, Suzanne Groth, began receiving psychotherapy and marriage counseling from the defendant psychologist, Dr. Ronda Weinstock, and that subsequently, Dr. Weinstock had entered into an affair with the plaintiff's husband who had attended several of the therapy sessions.⁹³ The complaint charged Dr. Weinstock with negligence and the intentional infliction of emotional distress.⁹⁴ Weinstock then filed a motion

88. *Id.*

89. FLA. STAT. § 766.103(3) (1997). *See also* Gassman v. United States, 589 F. Supp. 1534, 1544-45 (M.D. Fla. 1984).

90. FLA. STAT. § 766.106(2) (emphasis added).

91. 629 So. 2d 835 (Fla. 1993).

92. *Id.* at 836.

93. *Id.*

94. *Id.*

to dismiss the complaint because it failed to allege that the plaintiff had complied with the presuit notice requirements set forth in section 766.106(2) of the Act.⁹⁵ The trial court granted the defendant's motion to dismiss, but the Fifth District Court of Appeal reversed on the ground that Dr. Weinstock was not a "health care provider" under the Act and therefore the presuit notice requirements did not apply.⁹⁶ The Supreme Court of Florida noted that section 766.106(2) does not define the "prospective defendants" to whom notice must be given.⁹⁷ The court explained "[h]owever, it is only logical that the term refers to defendants in a medical malpractice action who are health care providers as defined in chapter 766 or who, although not expressly included within that class, are vicariously liable for the acts of a health care provider."⁹⁸ The court further asserted that "[i]t is clear that under § 766.102(1) 'prospective defendants' in medical negligence actions are 'health care providers as defined in [section] 768.50(2)(b).'"⁹⁹ The *Weinstock* court did not adequately explain why it was so "logical" and "clear" that the term "prospective defendants" used in section 766.106(2) was synonymous with the term "health care provider" utilized in section 766.102(1). However, the court's unspoken reasoning was likely to have been that section 766.102(1) sets forth the applicable standard of care in actions based on "the negligence of a health care provider as defined in [section] 768.50(2)(b),"¹⁰⁰ which by implication, means actions for medical malpractice.¹⁰¹ Therefore, the "prospective defendants" in an action for medical malpractice, to which section 766.106(1) refers, must mean the "health care providers" subject to the medical or professional standard of care set forth under section 766.102(1). Having posited the principle that the presuit notice requirement must be satisfied in claims against health care providers, the court then observed that if Dr. Weinstock was a "health care provider," then the plaintiff's complaint was properly dismissed because notice had not been given.¹⁰²

95. *Id.* (citing FLA. STAT. § 766.106(2)).

96. *Weinstock*, 629 So. 2d at 836.

97. *Id.*

98. *Id.* at 837–38.

99. *Id.* at 838 (quoting FLA. STAT. § 766.102(1)).

100. FLA. STAT. § 766.102(1). *See infra* text accompanying note 108.

101. The only alternative to this interpretation would be that in section 766.102(1), the legislature was referring to actions for ordinary negligence when it used the term "negligence of a health care provider." However, this reading would not make any sense in view of the fact that it is the prevailing "professional" standard of care which expressly applies under section 766.102(1). *See infra* text accompanying note 108.

102. *Weinstock*, 629 So. 2d at 836.

Was Dr. Weinstock a “health care provider?” The Supreme Court of Florida answered this question in the negative and its reasoning was as follows:

[A]s both the trial and district courts below noted, psychologists licensed under chapters 490 and 491, Florida Statutes (1991), are not included in the chapter 766 definitions of “health care provider.” We agree with the district court below that the exclusion of psychologists from the various definitions of this term indicates a legislative intent that psychologists not be classified as health care providers. This limited construction of the term precludes the absurd conclusion that clergy and others who provide counseling similar to that provided by Dr. Weinstock, but who also are not expressly defined as health care providers, might be subject to the provisions of the Act.¹⁰³

The *Weinstock* court pointed to three different sections of the Act, each of which contained a definition of the term “health care provider:”¹⁰⁴ 1) section 766.101(1)(b),¹⁰⁵ 2) section 766.105(1)(b),¹⁰⁶ and 3) section 766.102(1),¹⁰⁷ which, in turn, incorporates the definition of health care

103. *Id.* at 836–37.

104. *Id.* at 836.

105. FLA. STAT. § 766.101(1)(b) (1997) defines “health care providers” as “physicians licensed under chapter 458, osteopathic physicians licensed under chapter 459, podiatrists licensed under chapter 461, optometrists licensed under chapter 463, dentists licensed under chapter 466, chiropractors licensed under chapter 460, pharmacists licensed under chapter 465, or hospitals or ambulatory surgical centers licensed under chapter 395.” *Id.*

106. FLA. STAT. § 766.105(1)(b) states that :

[t]he term “health care provider” means any: 1) hospital licensed under chapter 395; 2) physician licensed, or physician assistant certified, under chapter 458; 3) osteopathic physician licensed under chapter 459; 4) Podiatrist licensed under chapter 461; 5) health maintenance organization certificated under part I of chapter 641; 6) ambulatory surgical center licensed under chapter 395; 7) “[o]ther medical facility” as defined in paragraph (c); 8) professional association, partnership, corporation, joint venture, or other association by the individuals set forth in subparagraphs 2., 3., and 4. for professional activity.

Id.

107. *Id.* § 766.102(1) provides:

In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider *as defined in s. 768.50(2)(b)*, the claimant shall have the burden of proving by the greater weight of evidence

provider set forth in section 768.50(2)(b).¹⁰⁸ All of these sections contain, in some cases overlapping and in some respects inconsistent, definitions of the term “health care provider.” For example, section 766.101(1)(b) defines health care providers to mean “physicians licensed under chapter 458, osteopathic physicians licensed under chapter 459, podiatrists licensed under chapter 461, optometrists licensed under chapter 463, dentists licensed under chapter 466, chiropractors licensed under chapter 460, pharmacists licensed under chapter 465, or hospitals or ambulatory surgical centers licensed under chapter 395.”¹⁰⁹ However, section 766.101 deals only with the narrow subject of immunity from liability of those serving on medical review committees and with exclusion from discovery of matters arising out of review performed by such committees.¹¹⁰

The *Weinstock* court further noted that psychologists were not included within the section 766.105(1)(b) definition of health care provider either.¹¹¹ The absence of psychologists from the section 766.105(1)(b) definition buttressed the court’s conviction that psychologists were not health care providers entitled to presuit notice.¹¹² Unlike any of the other sections the

that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider.

Id. § 766.102(1) (1997) (emphasis added).

108. Interestingly, section 766.102(1) of the *Florida Statutes* incorporates by express reference the definition of “health care provider” set forth under now-repealed FLA. STAT. § 768.50(2)(b) (1985) which has the most comprehensive definitions of what a “health care provider” is:

“Health care provider” means hospitals licensed under chapter 395; physicians licensed under chapter 458; osteopaths licensed under chapter 459; podiatrists licensed under chapter 461; dentists licensed under chapter 466; chiropractors licensed under chapter 460; naturopaths licensed under chapter 462; nurses licensed under chapter 464; clinical laboratories registered under chapter 483; physicians’ assistants certified under chapter 458; physical therapists and physical therapist assistants licensed under chapter 486; health maintenance organizations certificated under part II of chapter 641; ambulatory surgical centers . . . ; blood banks . . . ; or . . . associations for professional activity by health care providers.

Id. § 768.50(2)(b) (1985). The *Weinstock* court noted that section 768.50 had been repealed “except to the extent that it is incorporated by reference into section 766.102(1).” See *Weinstock*, 629 So. 2d at 836 n.1.

109. FLA. STAT. § 766.101(1)(b).

110. *Id.*

111. *Weinstock*, 629 So. 2d at 836.

112. *Id.* at 836–37. Note that in *P.W. Ventures, Inc. v. Nichols*, 533 So. 2d 281 (Fla. 1988), the Supreme Court of Florida declared that express mention of one thing in a statute implies exclusion of another. *Id.* *Nichols* was cited by *Weinstock* for this very proposition. *Weinstock*, 629 So. 2d at 837. Thus, since the various definitions of health care provider set forth in chapter 766 expressly mention other health care professionals in their definitions of health care provider

Weinstock court reviewed, section 766.105(1)(b) includes: 1) health maintenance organizations; 2) professional associations; 3) partnerships, corporations; 4) joint ventures; and 5) “other medical facilit[ies]” within the definition of health care providers.¹¹³ However, section 766.105 deals with coverage under the “Florida Patient’s Compensation Fund,” a topic far afield from presuit requirements or the applicable standard of care.¹¹⁴

Finally, the court reviewed section 766.102(1), which incorporates the definition of health care provider set forth under section 768.50(2)(b).¹¹⁵ Psychologists, the court stated, were not included in the section 768.50(2)(b) definition of “health care provider” either.¹¹⁶ Therefore, the *Weinstock* court concluded, the legislature simply could not have intended psychologists to be health care providers for purposes of entitlement to presuit notice under section 766.106 in view of their absence from the various definitions of health care provider set forth in sections 766.101(1)(b), 766.105(1)(b), and 766.102(1).¹¹⁷ Clearly, the most crucial of the three sections examined by the court was section 766.102(1)¹¹⁸ because the court stated outright that in medical malpractice actions, the term “prospective defendants” means health care providers as defined in section 768.50(2)(b).¹¹⁹

but psychologists are not included, this is strong evidence that the Florida Legislature did not intend psychologists to be considered health care providers for any purpose under chapter 766. *See id.*

113. FLA. STAT. § 766.105(1)(b). *See supra* text accompanying note 106.

114. *See* FLA. STAT. § 766.105(1)(b). The statute is entitled “Florida Patient’s Compensation Fund.” *Id.* The only relationship between section 766.105 and the presuit provisions set forth in section 766.106 would seem to be that both statutes are part of the Act.

115. *Weinstock*, 629 So. 2d at 837. *See supra* text accompanying note 108. Again, as noted earlier, the court observed that section 768.50(2)(b) had been “repealed except to the extent that it is incorporated by reference into section 766.102(1).” *Weinstock*, 629 So. 2d at 836 n.1.

116. *Id.* at 836 (citing FLA. STAT. § 768.50(2)(b) (1985)).

117. *Id.* By negative implication, it could be argued that if psychologists were listed as health care providers under any of the three sections the *Weinstock* court examined, they would be entitled to presuit notice. This very argument was advanced quite recently in *Community Blood Ctr., Inc. v. Damiano*, 697 So. 2d 948, 951 (Fla. 4th Dist. Ct. App. 1997) and rejected by the Fourth District Court of Appeal as follows:

The blood bank argues that although the medical malpractice statute of limitations does not apply to actions against blood banks, plaintiffs nevertheless were bound to comply with the presuit requirements of chapter 766, including subsection 766.106(2). This subsection requires notice to the defendant in a medical malpractice action after completion of presuit screening, “prior to filing a claim for medical malpractice.”

Id. at 951.

118. Which incorporates section 766.50(2)(b)’s definition of “health care provider.” *See supra* text accompanying note 108.

119. *Weinstock*, 629 So. 2d at 838.

Therefore, under *Weinstock*, we can conclude that if one is included in the section 768.50(2)(b) definition of “health care provider,” then one is a health care provider and hence a “prospective defendant” for purposes of entitlement to presuit notice. However in the recent case of *Community Blood Centers v. Damiano*,¹²⁰ the Fourth District Court of Appeal did not reach that conclusion.¹²¹ In *Damiano*, the defendant, a blood bank, moved to dismiss the complaint on the ground that plaintiffs, who allegedly contracted AIDS through HIV tainted blood supplied by the blood bank, had failed to provide presuit notice to the defendant under section 766.106(2) of the *Florida Statutes*.¹²² However, the trial court denied the defendant blood bank’s motion to dismiss.¹²³ In affirming the trial court’s decision, the Fourth District Court of Appeal rejected the blood bank’s contention that it was a health care provider for purposes of presuit.¹²⁴ The defendant pointed out that blood banks were included in the section 768.50(2)(b) definition of health care provider and argued that, under *Weinstock*, it was therefore a “prospective defendant” entitled to presuit notice under section 766.106(2).¹²⁵ The appellate court responded to this argument as follows: “defendant points out that blood banks are defined as a health care provider under subsection 768.50(2)(b). While that is true, blood banks are listed nowhere else within the statutory definition of chapter 766; e.g., subsections 766.101(b) and 766.105(1)(b).”¹²⁶ This statement shows that the *Damiano* court may have misread *Weinstock*. The *Weinstock* court did indeed examine three different subsections of chapter 766.¹²⁷ Moreover, the Supreme Court of Florida did conclude in *Weinstock* that the absence of psychologists from any of the various statutory definitions of health care provider showed that the legislature could not have intended psychologists to occupy the status of health care provider.¹²⁸ However, the *Weinstock* court never indicated that one who is defined as a health care provider under section 768.50(2)(b) must also fall within the section 766.105(1)(b) and/or section 766.101(1)(b) definition(s) of that term, before one can be considered a prospective defendant for purposes of presuit notice. In fact, the court in *Weinstock* indicated just the opposite in stating unequivocally, “[i]t is clear that . . .

120. 697 So. 2d 948 (Fla. 4th Dist. Ct. App. 1997).

121. *Id.* at 949.

122. *Id.*

123. *Id.*

124. *Id.* at 952.

125. *Damiano*, 697 So. 2d at 951.

126. *Id.*

127. *Weinstock*, 629 So. 2d at 838 (examining FLA. STAT. §§ 766.101(1)(b); .102 (1), .105(1)(b) which expressly incorporates section 768.50(2)(b). *See also supra* text accompanying notes 105–08.

128. *Weinstock*, 629 So. 2d at 837.

'prospective defendants' in medical negligence actions are 'health care providers as defined in [section] 768.50(2)(b).'¹²⁹

However, even if the fourth district rendered an unduly restrictive reading of *Weinstock's* test for whether one is a health care provider, it had benevolent motives for doing so. First of all, the majority in *Damiano* observed that it was not until June 18, 1996, over four years after plaintiffs had filed the action, that the blood bank filed its motion to dismiss based on the plaintiffs' noncompliance with section 766.106(2), presuit requirements.¹³⁰ As Judge Pariente pointed out in his concurring opinion, due to the defendant's four-year delay in filing the motion to dismiss, it was too late for plaintiffs to comply with the presuit notice requirements and "plaintiffs now have no opportunity to cure the defect."¹³¹ Secondly, aside from this issue of basic fairness, the *Damiano* court, citing *Weinstock*, reiterated the principle that statutes should be construed in a manner which minimize their effect on the constitutionally protected right of access to the courts under Article I, Section 21 of the *Florida Constitution*.¹³² In any event, because the court held that the blood bank had not rendered treatment or care to plaintiffs and thus the claim was not one for medical malpractice, it would have made no difference in the outcome even if the court had deemed the blood bank to be a health care provider.¹³³ From a logical standpoint, it seems nonsensical to require, as *Damiano* seems to suggest, that one must not only be listed in section 768.50(2)(b) in order to be deemed a health care provider for presuit purposes, but also must be included in one or both of the definitions of that term set forth in section 766.105(1)(b), and 766.101(1)(b).¹³⁴

As the Fifth District Court of Appeal recently noted in *Sova Drugs, Inc. v. Barnes*,¹³⁵ in determining whether "pharmacists" were health care providers for purposes of the presuit investigation and notice requirements of section 766.106(2) of the Act:

Other parts of Chapter 766 include pharmacists in the list of "health care providers" . . . [h]owever, their inclusion in this section [766.101(b)] is for the purpose of providing them immunity when serving on medical review committees or providing information in the scope of such a committee function. This

129. *Id.* at 838 (emphasis added).

130. *Damiano*, 697 So. 2d at 951.

131. *Id.* at 952 (Pariente, J., concurring).

132. *Id.* (citing *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993)).

133. *Id.* at 949. See also *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184 (Fla. 1992) (holding that an action against a blood bank as a supplier of blood was not a medical malpractice action for statute of limitations purposes).

134. See *Damiano*, 697 So. 2d at 951.

135. 661 So. 2d 393 (Fla. 5th Dist. Ct. App. 1995).

provision has little or nothing to do with filing medical malpractice actions in civil courts.¹³⁶

The *Barnes* court admonished that “[t]he only sensible approach in interpreting this Chapter [766], is to limit the applicability of each section to its own definition of ‘health care provider’ if there is one provided.”¹³⁷

If the legislature did intend the term “prospective defendants” used in section 766.106(2) to mean “health care providers,” its failure to say so or to define the terms “prospective defendant” and “health care provider” for purposes of section 766.106(2) has resulted in a lot of confusion. Indeed, troubled by this confusion, the Second District Court of Appeal was prompted to observe in *NME Properties v. McCullough*¹³⁸ that “[w]e have . . . lamented the difficulty of interpreting chapter 766 because the chapter lacks comprehensive definitions. This case presents similar difficulties.”¹³⁹ In *McCullough*, the plaintiff alleged that she entered the defendant nursing home to recuperate after surgery on her fractured elbow and that agents or employees of the home negligently treated or handled the plaintiff causing her to suffer further severe injury to her previously fractured elbow.¹⁴⁰ The nursing home moved to dismiss because the plaintiff had failed to comply and plead compliance with the presuit requirements set forth in sections 766.104, 766.106, and 766.203–06.¹⁴¹ The trial court denied the motion and the appellate court affirmed the denial, noting that nursing homes were not included in the definitions of health care provider set forth in sections 768.50(2)(b), 766.101(1)(b), or 766.105(1)(b) of the *Florida Statutes*.¹⁴² Moreover, the court explained, the plaintiff had not alleged that the agents or employees of the nursing home, to whom she ascribed her negligent treatment or handling, were health care providers.¹⁴³ The court noted that the agents or employees might merely be orderlies or other employees without professional status.¹⁴⁴ Since presuit requirements can attach only when the defendant is a health care provider or alleged to be vicariously liable for the acts of a health care provider and neither situation

136. *Id.* at 395.

137. *Id.*

138. 590 So. 2d 439 (Fla. 2d Dist. Ct. App. 1991).

139. *Id.* at 440 n.1 (citing *Catron v. Roger Bohn, D.C., P.A.*, 580 So. 2d 814 (Fla. 2d Dist. Ct. App. 1991)).

140. *Id.* at 440.

141. *Id.*

142. *Id.*

143. *McCullough*, 590 So. 2d at 440.

144. *Id.*

was obtained in this case, the court reasoned that the defendant's motion to dismiss for noncompliance with presuit requirements was properly denied.¹⁴⁵

What is perplexing is that the *McCullough* court suggested that presuit requirements would have been applicable if the plaintiff had alleged that the harm was caused by a nurse employed by the nursing home.¹⁴⁶ However, nurses are not included in the definitions of health care provider set forth in sections 766.101(1)(b) or 766.105(1)(b) but only in the section 768.50(2)(b) definition.¹⁴⁷ Therefore, under *McCullough*, it would appear that inclusion of a defendant in the section 768.50(2)(b) definition of a health care provider would suffice in and of itself to confer health care provider status upon a defendant for purposes of presuit.¹⁴⁸ This view is directly at odds with the approach taken by the Fourth District Court of Appeal in *Damiano*, which holds that inclusion in the section 768.50(2)(b) definition is not enough by itself to cloak a party with the status of health care provider for purposes of presuit.¹⁴⁹

In *Goldman v. Halifax Medical Center, Inc.*,¹⁵⁰ a unique issue was raised and resolved by the Fifth District Court of Appeal.¹⁵¹ In *Goldman*, the plaintiff alleged that a hospital was vicariously liable for the negligence of its employee, a radiologic technologist.¹⁵² The plaintiff alleged that the technologist negligently applied excessive pressure and caused one of her silicone breast implants to rupture.¹⁵³ The plaintiff contended that compliance with the presuit notice requirements of chapter 766 is not necessary where the active tortfeasor is not a health care provider under any of the statutory definitions.¹⁵⁴ Does the requirement of presuit notice apply to a claim against a hospital based on the negligence of the hospital's employee who was not a health care provider? The *Goldman* court's answer to this question was "yes."¹⁵⁵ At first blush, this holding seems surprising in light of the supreme court's proclamation in *Weinstock* stating, "we conclude that the notice requirements of the Act only apply in actions against 'health care providers' as defined in chapter 766, Florida Statutes (1991), and those

145. *Id.* at 440–41.

146. *Id.* at 440.

147. *See* FLA. STAT. §§ 766.101(1)(b); .105(1)(b); 768.50(2)(b). *See supra* text accompanying notes 105–08.

148. *McCullough*, 590 So. 2d at 440.

149. *Damiano*, 697 So. 2d at 951.

150. 662 So. 2d 367 (Fla. 5th Dist. Ct. App. 1995).

151. *Id.* at 368.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Goldman*, 662 So. 2d at 368.

who are vicariously liable for the acts of a health care provider.”¹⁵⁶ Without explicitly saying so, this language suggests that there are only two situations in which presuit notice is required: 1) in a direct action against a health care provider based on the provider’s own negligence; and 2) in an action against a party (health care provider or not) based on vicarious liability for the acts of the defendant’s employee or agent who is a health care provider.

However, Goldman’s suit against the hospital was grounded in vicarious liability based upon its employee’s alleged negligence in performing a mammogram.¹⁵⁷ The employee, a radiographic technician, was not included in any of the chapter 766 definitions of health care provider.¹⁵⁸ Nevertheless, *Goldman* held that presuit notice requirements applied to the vicarious liability claim against the hospital.¹⁵⁹ Arguably, this holding flies in the face of the apparent restriction imposed by *Weinstock* that medical negligence suits founded upon vicarious liability are subject to presuit only when the underlying employee or agent is a health care provider.¹⁶⁰ However, the above quoted language from *Weinstock* is ambiguous. Again, the *Weinstock* court stated that presuit requirements “only apply in actions against ‘health care providers’ and those who are vicariously liable for the acts of a health care provider.”¹⁶¹

As the court noted in *Goldman*, the hospital was defined as a health care provider under sections 766.101(1)(b),¹⁶² 766.105(1)(b),¹⁶³ and 766.102(1) vis-a-vis 768.50(2)(b).¹⁶⁴ The *Goldman* case clearly involved an action against a health care provider; therefore, it was argued that presuit notice requirements should apply. At the same time, the *Goldman* case was predicated on vicarious liability based on the negligence of a non-health care provider. Thus, one could argue that presuit requirements were inapplicable if the language “vicariously liable, for the acts of a health care provider” was read to mean that in cases of vicarious liability presuit notice requirements apply only in instances where the underlying employee or agent is a health care provider. However, the *Goldman* court all but ignored the time-honored edict underscored in the *Weinstock*, *Damiano*, and *McCullough* cases, that

156. *Weinstock*, 629 So. 2d at 835–36.

157. *Goldman*, 662 So. 2d at 368.

158. *Id.* Just as its predecessors in *Weinstock*, *Damiano*, and *McCullough* had done, the *Goldman* court specifically examined the definitions of health care provider set forth under sections 766.101(1)(b); 766.105(1)(b); and 766.102(1) (which incorporates § 768.50(2)(b)’s definition of health care provider). *Id.* at 369. *See supra* text accompanying notes 105–08.

159. *Goldman*, 662 So. 2d at 370.

160. *Weinstock*, 629 So. 2d at 835–36.

161. *Id.*

162. *Goldman*, 662 So. 2d at 369. *See supra* text accompanying note 105.

163. *Goldman*, 662 So. 2d at 369. *See supra* text accompanying note 106.

164. *Goldman*, 662 So. 2d at 369. *See supra* text accompanying notes 107–08.

statutes restricting access to the courts must be construed in such a manner that favor access.¹⁶⁵

In essence, the court in *Goldman* read *Weinstock* to say that presuit requirements apply in *three* different scenarios: 1) where a health care provider is alleged to have been directly negligent in the rendering of medical care or services; 2) where a defendant (whether or not a health care provider) is alleged to be vicariously liable for the acts of a health care provider employee or agent; and 3) where a health care provider is alleged to be vicariously liable for the negligence of a non-health care provider employee or agent.¹⁶⁶ If scenario three is encompassed in what the *Weinstock* court had in mind when it articulated when presuit notice requirements apply, the following question might arise: If a non-health care provider is negligent in maintaining the premises, thereby resulting in a vicarious liability claim against the hospital, would the hospital then be entitled to presuit notice? Under *Goldman*, the answer to this question is “no,” because the *Goldman* court qualified its holding by restricting the application of presuit requirements in cases of vicarious liability to instances where the defendant’s employee or agent was negligent in the “rendering of medical care or services.”¹⁶⁷ Because the technician employed by the hospital in *Goldman* was engaged in the rendering of medical care or services when the injury occurred, presuit requirements were held to apply notwithstanding the fact that the technician was not a health care provider.¹⁶⁸

The problem is that the *Weinstock* court’s elocution of when a defendant is entitled to presuit notice was imprecise and misleading.¹⁶⁹ As a result, the *Goldman* court may have had too much leeway to indulge in its own interpretation of the legislative intent underlying section 766.106, the presuit notice statute, an interpretation which was somewhat speculative and which countermanded Florida’s strong policy in favor of access to the courts.¹⁷⁰ To complicate matters further, the *Goldman* holding, to the extent it embraces claims for vicarious liability based on the negligence of a non-health care

165. *Weinstock*, 629 So. 2d at 835–36; *Damiano*, 697 So. 2d at 951; *McCullough*, 590 So. 2d at 440. See also FLA. CONST. art. I, sec. 21.

166. *Goldman*, 662 So. 2d at 369-70.

167. *Id.* at 371.

168. *Id.*

169. See *infra* Part IV for a recommendation of how, inter alia, the courts and/or Florida Legislature can clear up this problem.

170. See FLA. CONST. art. I, sec. 21. The *Goldman* court believed that Mrs. Goldman’s case was more akin to the claim made in *Neilinger* where “the court held that a hospital was [engaged in] performing medical services when a patient slipped and fell on a pool of amniotic fluid while descending from an examination table under the direction and care of the hospital employees.” See *Goldman*, 662 So. 2d at 370–71 (citing *Neilinger v. Baptist Hosp., Inc.*, 460 So. 2d 564 (Fla. 3d Dist. Ct. App. 1984)).

provider within the sphere of presuit, appears to be out-of-sync with the crucial language of section 766.102(1). The *Weinstock*, *Damiano*, *McCullough*, and *Goldman* decisions all seem to suggest that the simplest test for when presuit requirements apply is “whether the defendant is directly or vicariously liable” under the medical negligence standard of care set forth in section 766.102(1) of the *Florida Statutes*.¹⁷¹ However, turning to section 766.102(1), it states that “the prevailing professional standard of care for a given health care provider shall be that level of care, . . . which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.”¹⁷² This suggests that the crux of a malpractice claim is based upon whether a *health care provider* comported with an acceptable level of care, skill, and treatment of other reasonably prudent *health care providers*. In *Goldman*, the case was not predicated upon whether a health care provider comported with the level of care, skill, and treatment that would be exercised by other reasonably prudent health care providers.¹⁷³ The employee technician was *not* a health care provider at all. The standard set forth in section 766.102(1) is incongruent and thus calls into question whether the claim was one for medical malpractice for presuit purposes. There could be no “similar health care provider” to the technician in *Goldman*; this would be a nonsequitur since the technician himself was not a health care provider.¹⁷⁴

171. See *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993); *Community Blood Ctr. of S. Fla. v. Damiano*, 697 So. 2d 948, 951 (Fla. 4th Dist. Ct. App. 1997); *Goldman v. Halifax Med. Ctr.*, 662 So. 2d 367, 369 (Fla. 5th Dist. Ct. App. 1995); *NME Properties, Inc. v. McCullough*, 590 So. 2d 439, 440 (Fla. 2d Dist. Ct. App. 1991).

172. FLA. STAT. § 766.102(1) (1997) (emphasis added).

173. *Goldman*, 662 So. 2d at 369.

174. The *Goldman* court compared the situation before it to the decision of *Broadway v. Baptist Hosp., Inc.*, 638 So. 2d 176 (Fla. 1st Dist. Ct. App. 1994) and *Neilinger v. Baptist Hosp., Inc.*, 460 So. 2d 564 (Fla. 3d Dist. Ct. App. 1984), discussed earlier in this article. *Goldman*, 662 So. 2d at 370–71. The court distinguished *Broadway* by noting that the underlying negligence in that case was not *medical* negligence. *Id.* at 370. That is, the plaintiff’s claim in *Broadway*, that she was injured when her bed collapsed, was found to be based upon ordinary negligence, to wit, premises liability, rather than upon the negligent rendering of medical care or services. *Id.* However, the claim in *Goldman*, in contradistinction to *Broadway*, was based upon the negligent rendering of *medical* services by the hospital’s radiographic technician. *Id.* The *Goldman* court also noted that “Goldman’s claim, that an improperly calibrated machine that was used on her partly caused her injury, is not unlike a claim that one was injured when a doctor used an unclean scalpel, a claim which would clearly fall within the realm of providing medical care.” *Id.*

The *Goldman* court believed that Mrs. Goldman’s case was more akin to the claim made in *Neilinger* where “the court held that a hospital was [engaged in] performing medical services when a patient slipped and fell on a pool of amniotic fluid while descending from an examination table under the direction and care of the hospital employees.” *Goldman*, 662 So. 2d at 370, 370–71 (citing *Neilinger v. Baptist Hosp., Inc.*, 460 So. 2d 564 (Fla. 3d Dist. Ct. App. 1984)).

To summarize Part II, the following observations can be made. First, for the presuit requirements of the Act to apply, the action must be a “[c]laim for medical malpractice.”¹⁷⁵ This means the claim must arise out of “the rendering of, or the failure to render, medical care or services.”¹⁷⁶ Discerning when a claim does arise out of the rendering of, or failure to render, medical care or services can be a tricky endeavor for attorneys. However, the Supreme Court of Florida and the district courts of appeal seem to be in general agreement that a claim arises out of the rendering of, or failure to render, medical care or services, when the acts or omissions of a health care provider that caused the injury to the claimant, allegedly fell below the level of care and treatment that would be considered acceptable and appropriate by reasonably prudent similar health care providers.¹⁷⁷

Second, the prospective defendants in a medical malpractice action to which section 766.106(2) refers, and who, under that section, are entitled to presuit notice of intent to initiate litigation, are those defined as health care providers under section 768.50(2)(b).¹⁷⁸ Reading *Weinstock* in conjunction with section 766.106(2), one can conclude that a two-prong test should be used in determining whether presuit requirements apply: 1) the claim must be “a claim for medical malpractice;” and 2) the defendant is a “health care provider” or vicariously liable for the acts of a health care provider.¹⁷⁹

Finally, since section 766.106(2) is a statute tending to restrict access to the courts, if there is doubt as to its application, it must be construed in a manner which favors access.¹⁸⁰ We now turn to part three and an exploration into when the two-year medical malpractice statute of limitations set forth under section 95.11(4)(b)¹⁸¹ applies to a claim.

175. FLA. STAT. § 766.106(1)(a) (1997).

176. *Id.*

177. *See generally* J.B. v. Sacred Heart Hosp., 635 So. 2d 945 (Fla. 1994); Feifer v. Galen of Florida, Inc., 685 So. 2d 882 (Fla. 2d Dist. Ct. App. 1996); Broadway v. Bay Hosp., Inc., 638 So. 2d 176 (Fla. 1st Dist. Ct. App. 1994); NME Properties, Inc. v. McCullough, 590 So. 2d 439 (Fla. 2d Dist. Ct. App. 1991).

178. *See supra* text accompanying note 108. *See also* *Weinstock*, 629 So. 2d at 836. It should be noted that in the *Damiano* court’s view, inclusion of one in the section 768.50(2)(b) definition of “health care provider” is not enough in and of itself to conclude that one is a prospective defendant for purposes of presuit. *Damiano*, 697 So. 2d at 951.

179. *See Weinstock*, 629 So. 2d at 838. *See also* FLA. STAT. § 766.106(2) (1997). The *Goldman* court would modify the second prong of this test by using words to the effect of: the defendant is a health care provider or vicariously liable for the acts of an agent or employee who was negligent in the rendering of medical care or services, regardless of whether or not the agent or employee is himself a health care provider. *See generally Goldman*, 662 So. 2d at 370.

180. *See Weinstock*, 629 So. 2d at 835; FLA. CONST. art. I, § 21.

181. *See supra* text accompanying note 6.

III. DETERMINING WHEN THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS APPLIES

A. *An Overview of the Medical Malpractice Statute of Limitations*

The statute of limitations governing claims for medical malpractice is set forth in section 95.11(4)(b) of the *Florida Statutes* and provides: "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 . . ." ¹⁸² The leading case construing the language of section 95.11(4)(b) is *Tanner v. Hartog*. ¹⁸³ In *Tanner*, the parents of a stillborn child sued two doctors and a hospital for medical malpractice. ¹⁸⁴ The complaint alleged that on March 31, 1988, the doctors examined Mrs. Tanner and then sent her to the hospital for testing and that the following morning the baby was delivered stillborn. ¹⁸⁵ The Tanners alleged further that "in light of the testing and Mrs. Tanner's condition, the doctors and the medical staff at the hospital were negligent in failing to promptly perform a delivery by caesarian section at a time when the child could have been saved." ¹⁸⁶ Finally, it was alleged that until December 29, 1989, the plaintiffs neither knew nor should have known that the conduct of the defendants fell below the applicable medical standard of care. ¹⁸⁷

The trial court dismissed the lawsuit on the ground that it had not been filed within the two-year statute of limitations. ¹⁸⁸ On appeal, the Second District Court of Appeal affirmed the lower court's dismissal on the basis that the Tanners' claim was time-barred. ¹⁸⁹ The pivotal question presented to the Supreme Court of Florida was, when does the statute of limitations begin to run? ¹⁹⁰ The supreme court began its decision by recognizing the lack of clarity in the language of section 95.11(4)(b) and the need for definitive judicial construction. ¹⁹¹ The court then revisited its earlier proclamation in *Nardone v. Reynolds*, ¹⁹² which had been controlling for almost two decades

182. FLA. STAT. § 95.11(4)(b) (1997). See *supra* text accompanying note 6.

183. 618 So. 2d 177 (Fla. 1993).

184. *Id.* at 178.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Tanner*, 618 So. 2d at 178.

189. *Id.*

190. *Id.*

191. *Id.* at 178-79.

192. 333 So. 2d 25 (Fla. 1976).

on the issue of what triggers section 95.11(4)(b).¹⁹³ The *Tanner* court noted that *Nardone* held the statute of limitations in a medical malpractice suit begins to run either when the plaintiff has notice of the negligent act or omission giving rise to the cause of action or when the plaintiff has notice of the physical injury.¹⁹⁴ However, in *Tanner*, the supreme court placed an interpretation on the *Nardone* rule intending to ameliorate the harsh results which can sometimes occur by strict application of the rule.¹⁹⁵

We hold that the knowledge of the injury as referred to in the [*Nardone*] rule as triggering the statute of limitations means not only knowledge of the injury but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice. The nature of the injury, standing alone, may be such that it communicates the possibility of medical negligence, in which event the statute of limitations will immediately begin to run upon discovery of the injury itself. On the other hand, if the injury is such that it is likely to have occurred from natural causes, the statute will not begin to run until such time as there is reason to believe that medical malpractice may possibly have occurred.¹⁹⁶

The court reasoned that “[m]ere knowledge of a stillbirth, without more, would not suggest the possibility of medical negligence” since stillbirths often occur even in the absence of negligence.¹⁹⁷ Therefore, the supreme court reversed the dismissal of the *Tanner*’s claim, which was predicated on the assumption that the *Tanner*’s knowledge of the stillbirth alone triggered the statute.¹⁹⁸

While the *Tanner* court’s updated interpretation of the *Nardone* rule is unquestionably more equitable than its former strict application, it is far from definitive. The term “reasonable possibility” that an injury was caused by medical malpractice is a term of art woefully in need of, but perhaps incapable of, precise definition. At what point does a layman become aware of a reasonable possibility that his injury was the product of medical malpractice? Laymen rarely, if ever, read medical journals. A treating physician or surgeon is quite unlikely to refer a patient to another doctor for the purpose of ascertaining whether he made mistakes, particularly in view of

193. *Tanner*, 618 So. 2d at 179 (citing *Nardone v. Reynolds*, 333 So. 2d 25 (Fla. 1976)).

194. *Id.* (citing *Nardone v. Reynolds*, 333 So. 2d 25 (Fla. 1976)). This was commonly known as the “*Nardone* rule” and/or the “discovery rule.” See also *Barron v. Shapiro*, 565 So. 2d 1319 (Fla. 1990) (reaffirming the *Nardone* rule).

195. *Tanner*, 618 So. 2d at 181.

196. *Id.* at 181–82 (footnotes omitted).

197. *Id.* at 182.

198. *Id.* at 184.

the fear of being sued for malpractice and the modern prevalence of health management organizations which foster a reluctance to make referrals of any kind. The *Tanner* court was mindful of the difficulties involved when it observed:

We recognize that our holding will make it harder to decide as a matter of law when the statute begins to run and may often require a fact-finder to make that determination . . . [t]he point at which the statute [begins] to run can only be determined after the pertinent facts have been developed.¹⁹⁹

Since they “neither knew nor should have known ‘that the actions and inactions of the defendants fell below the standard of care recognized in the community’ until December 29, 1989” (almost two years after the stillbirth), it is reasonable to assume that some doctor(s) made the Tanners aware of the reasonable possibility that the stillbirth was the consequence of malpractice.²⁰⁰ Realistically, how else could they have achieved such awareness?

Obviously, an attorney cannot even begin to investigate or assess the viability of a potential malpractice claim until a client shows up at the attorney’s office (or at least calls) and informs the attorney that he or she has suffered an injury. It would seem logical that by that time, the client has at least an inkling of a suspicion that the injury or condition was caused by medical malpractice, but not necessarily so. For example, the client may have been in, say, an automobile accident and is merely consulting a lawyer to determine his legal rights vis-à-vis other drivers involved in the collision and their insurers. However, perhaps unbeknownst to the client, his injury may have been diagnosed incorrectly or he may have been mistreated, leading to aggravated or still further injury. Still, in such an instance, it would appear that the statute has not commenced, unless a reasonable person would be aware of the possibility of malpractice purely from the nature of the injury.²⁰¹

In any event, the most prudent course of action for a plaintiffs’ attorney (whether or not the client actually believes himself to have been the victim of malpractice) is to maintain a healthy suspicion that medical malpractice may have been at least partially responsible for the client’s injury. Hence, if the attorney believes the client was blind to what a reasonable person (albeit not this particular client) may have believed to be malpractice, the attorney can make a relatively accurate determination of when the statute began to run and

199. *Id.* at 182.

200. *Tanner*, 618 So. 2d at 178.

201. *See id.*

act accordingly. The event that triggers the statute is awareness of a “reasonable possibility” of medical malpractice²⁰² which appears to be an objective standard and counsel should not assume that his client does or does not have the awareness that a “reasonable person” would have under the same circumstances. Good faith ignorance will not erase the disastrous results of unreasonableness when it comes to malpractice statute of limitations.

As the Supreme Court of Florida pointed out in *Tanner*, there are certain injuries, the nature of which, standing alone, communicate the possibility of medical negligence in which case the statute begins to run immediately upon discovery of the injury itself.²⁰³ Since the term “reasonable possibility” is intrinsically nebulous, it is hard to predict what a fact-finder will conclude. Pointed questions in the client interview will help greatly in flushing out the possibility of malpractice. If the client reveals to the attorney that he has already been advised by a doctor that some other health care provider may have erred in diagnosing, treating, or caring for the client, then under *Tanner*, the statute would have commenced when the client acquired such knowledge.²⁰⁴ Since the hour glass has been turned, so to speak, the attorney should then act quickly to ensure the claim is filed in a timely fashion, if that is still possible.²⁰⁵ Recall that the plaintiff may petition the clerk of the court for an automatic ninety-day extension of the statute of limitations in order that before filing suit, he may conduct a reasonable investigation, obtain a corroborating opinion and prepare the notice of intent to initiate litigation for medical malpractice.²⁰⁶

In order to help illustrate how section 95.11(4)(b) will be interpreted under *Tanner*, consider the following hypothetical. Assume that on February

202. *Id.*

203. *Id.* at 180.

204. *Id.* at 178. Since the cases offer no clear-cut definition of what constitutes awareness of a reasonable possibility of malpractice, the practitioner should assume that the client has developed such awareness if there is any doubt whatsoever.

205. If however, nothing indicates that a client has knowledge, or reasonably should have knowledge of a possibility of malpractice, but is consulting a lawyer for some unrelated reason, such as an accident or food poisoning, the client should still be thoroughly interviewed regarding any medical services received to date. If it appears to the attorney that malpractice might have transpired, the attorney would be well advised to send the client to board certified specialists for the purposes of flushing out possible medical malpractice. If the consulting specialist(s) then that determines there is a reasonable possibility of malpractice, the attorney will not only have knowledge that there is a viable claim for malpractice, but an expert witness to support the claim. Most importantly, the attorney will be able to document the point in time at which the client became aware of the existence of a claim and will be in a good position to refute defense contentions that the statute began to run at an earlier date.

206. *See supra* Part II.A for a discussion on the filing of the notice of intent which will toll the statute for an additional ninety days.

15, 1995, a client consulted a chiropractor for back pain and that the chiropractor diagnosed his condition as "sciatica."²⁰⁷ Unbeknownst to the client, this diagnosis was erroneous and the client's back pain was actually due to a benign tumor which the chiropractor failed to diagnose even though a simple x-ray would have revealed the tumor. Assume that the client had no reason to know of the misdiagnosis until December 30, 1995, when she was informed by a specialist of the tumor which now required surgery due to the delay in diagnosing it. Assume further that surgery was then performed to remove the tumor on January 15, 1996, but on the day following the surgery, the client learned that the surgeon left a sponge in the client's body which, in turn, caused immediate complications.

Under *Tanner*, the statute of limitations would not have started to run on the client's misdiagnosis claim against the chiropractor until December 30, 1995. That was the day the client learned that his back pain was due to an undiagnosed tumor rather than sciatica and that because the tumor had gone undiagnosed, surgery was required. In other words, on December 30, 1995, the client became aware of his injury and of a reasonable possibility that the injury was caused by medical malpractice.²⁰⁸ However, the injury resulting from the sponge in the client's body is a different matter. This injury was of a nature, standing alone, as the *Tanner* court put it, "that it communicates the

207. Defined as "[p]ain in the lower back and hip radiating down the back of the thigh into the leg, initially attributed to sciatic nerve dysfunction." See *STEDMAN'S MEDICAL DICTIONARY* 1580 (26th ed. 1995).

208. See *Tanner*, 618 So. 2d at 180. See also *Higgs v. Florida Dept. of Corrections*, 654 So. 2d 624, 626-27 (1st Dist. Ct. App. 1995). In *Higgs*, the First District Court of Appeal applied the *Tanner* rule to a claim for malpractice based on misdiagnosis and observed:

There has been some confusion concerning what constitutes discovery of the incident under the statute. In *Barron v. Shapiro*, 565 So. 2d 1319 (Fla. 1990), the supreme court reaffirmed a principle originally stated in *Nardone v. Reynolds*, 333 So. 2d 25 (Fla. 1976), that the "limitation period commences when the plaintiff should have known *either* of the injury *or* the negligent act." That interpretation of *Nardone*, however, could lead to some unjust results. In *Tanner*, the supreme court further clarified the *Nardone* rule, and held that "the knowledge of the injury as referred to in the [Nardone] rule as triggering the statute of limitations means not only knowledge of the injury but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice."

Higgs, 654 So. 2d at 626-27 (quoting *Tanner v. Hartog*, 618 So. 2d. 177 (Fla. 1993) (footnotes and citations omitted)). The *Higgs* court added that "[i]t, thus, appears that the position of this court is that a misdiagnosis will constitute evidence that a plaintiff did not have knowledge that the injury was caused by negligence until the plaintiff received a correct diagnosis." *Id.* at 627.

possibility of medical negligence, in which event the statute of limitations will immediately begin to run upon discovery of the injury itself.”²⁰⁹

No matter how promising a claim for medical malpractice might be, all will be lost if the claim is dismissed for failure to meet the requirements of the applicable statute of limitations. In most civil litigation this simply means that the plaintiff must file the complaint before the limitations period expires. However, in the arena of medical malpractice it means something more. Section 766.106(4) of the *Florida Statutes* provides in pertinent part that “[t]he notice of intent to initiate litigation shall be served within the time limits set forth in [section] 95.11.”²¹⁰ Therefore, the plaintiff must not only have his complaint on file before the statute runs but also must serve the notice of intent prior to the running of the statute.²¹¹ Compliance with presuit notice requirements is a condition precedent to filing a complaint and failure to comply with the notice requirements within the limitations period justifies dismissal of the complaint with prejudice even if the complaint was otherwise timely filed.²¹² Therefore, attorneys should serve the notice of intent and the accompanying corroborating opinion prior to filing the complaint.

We now turn to the critical question of under what circumstances does the two-year statute of limitations apply to a claim. That question will be addressed through an exploration and analysis of relevant statutory and case law.

B. *Survey and Legal Analysis of Statutory and Case Law*

Under section 95.11(4)(b) of the *Florida Statutes*, there is a two-part test for determining whether an action for medical malpractice exists and thus, whether that claim is subject to the two-year statute of limitations of section 95.11(4)(b): 1) whether the action arises out of “medical . . . diagnosis, treatment, or care;” and 2) whether such diagnosis, treatment, or care was rendered by a “provider of health care.”²¹³ Two relatively recent supreme

209. *Tanner*, 618 So. 2d at 181–82.

210. FLA. STAT. § 766.106(4) (1997).

211. *Tanner*, 618 So. 2d at 181.

212. *See Williams v. Campagnulo*, 588 So. 2d 982 (Fla. 1991); *Lynn v. Miller*, 498 So. 2d 1011 (Fla. 2d Dist. Ct. App. 1986).

213. *See* FLA. STAT. § 95.11(4)(b) (1997). *See also supra* text accompanying note 6. It should be noted that a cause of action against one who is not a health care provider would fall within the ambit of medical malpractice if the defendant is in privity with a health care provider who has rendered tortious medical diagnosis, treatment, or care. § 95.11(4)(b). Thus, the two-year statute of limitations and presuit requirements would also be applicable to claims against the non-health care provider in privity with a health care provider. § 95.11(4)(b).

court decisions, *Silva v. Southwest Florida Blood Bank*²¹⁴ and *Kelley v. Rice*²¹⁵ make it clear that both prongs of the test must be met before a claim may properly be considered as one for medical malpractice for purposes of the two-year statute of limitations set forth in section 95.11(4)(b) of the *Florida Statutes*.²¹⁶

C. What Constitutes an “Action for Medical Malpractice” for Purposes of the Statute of Limitations?

In *Silva v. Southwest Florida Blood Bank, Inc.*,²¹⁷ the plaintiff sued a blood bank for supplying HIV tainted blood for transfusions administered to his wife while she was in the hospital.²¹⁸ Plaintiff’s wife subsequently contracted the HIV virus and died of AIDS as a result of the transfusion.²¹⁹ The blood bank argued that the suit was one sounding in medical malpractice and that it was therefore subject to the two-year statute of limitations, which had already expired.²²⁰ The Supreme Court of Florida disagreed.²²¹ First, the court concluded that under the plain and unambiguous language of section 95.11(4)(b) of the *Florida Statutes*, the blood bank had not rendered diagnosis, treatment, or care of plaintiff’s decedent.²²² That is to say, the blood bank had not engaged in ascertaining the decedent’s “medical condition through examination and testing” (diagnosis),²²³ “prescribing and administering a course of action to affect a cure” (treatment),²²⁴ or “meeting the patient’s daily needs during the illness” (care).²²⁵ Indeed, the court noted

214. 601 So. 2d 1184 (Fla. 1992).

215. 670 So. 2d 1094 (Fla. 2d Dist. Ct. App. 1996).

216. See *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184 (Fla. 1992); *Kelley v. Rice*, 670 So. 2d 1094 (Fla. 2d Dist. Ct. App. 1996).

217. *Silva*, 601 So. 2d at 1184 (Fla. 1992).

218. *Id.* at 1186.

219. *Id.*

220. *Id.* at 1187–89.

221. *Id.* at 1189.

222. *Silva*, 601 So. 2d at 1189.

223. *Id.* at 1187.

224. *Id.*

225. *Id.* The *Silva* court also utilized alternative definitions for the terms diagnosis, treatment, or care, borrowing from Webster’s Third International Dictionary (1981), which defines “diagnosis” as “the art or act of identifying a disease from its signs and symptoms,” “treatment” as “the action or manner of treating a patient medically or surgically,” and “care” as “to provide for or attend to needs or perform necessary personal services . . .” *Id.* (quoting WEBSTER’S THIRD INTERNATIONAL DICTIONARY (1981)). The *Silva* court further stated that in medical terms, “diagnosis” means “[t]he determination of the nature of a disease;” “treatment” means “[m]edical or surgical management of a patient;” and “care” means “the application of knowledge to the

that the blood bank had not dealt with the recipient patient at all and, in reality, was nothing more than a supplier of a product.²²⁶ As such, the claim against the blood bank fell outside the definition of an action for medical malpractice under section 95.11(4)(b) and hence was not subject to section 95.11(4)(b)'s two-year limitations period.²²⁷ This section of the *Silva* court's opinion was clear, understandable, and well-reasoned.

Another recent case, *Kelley v. Rice*,²²⁸ underscores the distinction for statute of limitations purposes between claims based upon ordinary negligence and claims for medical negligence.²²⁹ In *Kelley*, the plaintiff was a former inmate of the Pinellas County Jail.²³⁰ She alleged that on June 14, 1990, she was taken into custody by the Pinellas County Sheriff, Everitt Rice, after having received emergency treatment for a leg laceration at a local hospital.²³¹ Kelley set forth two separate counts of negligence against Sheriff Rice in her complaint.²³² In Count I, Kelley alleged that Rice was vicariously liable for the medical negligence of his agent, ARA Health Services, Incorporated ("ARA").²³³ Kelley alleged that ARA and Rice had a joint venture agreement whereby ARA was to provide medical services to inmates of the jail and that ARA was negligent in its diagnosis, treatment, and care of the condition from which Kelley was suffering, to wit, infection and necrotizing fasciitis,²³⁴ resulting in injury to inmate Kelley.²³⁵

The gravamen of Count II of Kelley's complaint was that, at all material times, the plaintiff was in custody of the defendant Sheriff Rice.²³⁶ Kelley alleged that her detention was such that she was unable to care for her own well-being relative to the need for medical care and that her ability to obtain medical care was at the sole discretion of her custodian, Sheriff Rice.²³⁷ Kelley further alleged in Count II that Rice had a duty to use reasonable care in providing her access to necessary medical care, but he breached this duty

benefit of . . . [an] individual." *Silva*, 601 So. 2d at 1187 (quoting *STEDMAN'S MEDICAL DICTIONARY* 428 (25th ed. 1990)).

226. *Id.*

227. *Id.* at 1188–89; FLA. STAT. § 95.11(4)(b) (1997); *see also* *Community Blood Ctrs. of S. Fla., Inc. v. Damiano*, 697 So. 2d 948, 949–50 (Fla. 4th Dist. Ct. App. 1997) (holding that a blood bank was not a health care provider for purposes of the Medical Malpractice Reform Act).

228. 670 So. 2d 1094 (Fla. 2d Dist. Ct. App. 1996).

229. *Id.* at 1095.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Kelley*, 670 So. 2d at 1095.

234. Defined as tissue death such as that associated with group A streptococcus infection.

See *STEDMAN'S MEDICAL DICTIONARY* 632 (26th ed. 1996).

235. *Kelley*, 670 So. 2d at 1095.

236. *Id.*

237. *Id.*

by keeping her detained, thus denying her the opportunity to receive such care.²³⁸ The trial court granted the defendant's motion to dismiss the complaint on the ground that her claims were barred by the statute of limitations governing medical malpractice.²³⁹ The Second District Court of Appeal affirmed in part and reversed in part, holding that while Count I of Kelley's complaint was clearly a claim for medical malpractice which had not been timely filed within the two-year statutory period, Count II was based upon a breach of Defendant Rice's custodial duties and was consequently subject to the four-year statute of limitations applying to claims of ordinary negligence, which had not yet expired.²⁴⁰ The *Kelley* court reasoned as follows:

[w]e conclude that paragraphs sixteen through eighteen, twenty-one and twenty-two C. allege facts that sufficiently bring into question appellee Rice's proper performance of his custodial obligations to appellant outside of any vicarious obligations arising from the medical care he contracted to be provided by ARA. In the performance of his custodial duties, appellee was not necessarily providing "diagnosis, treatment, or care" as contemplated by the medical malpractice statute of limitations, section 95.11(4)(b). We further conclude that under the reasoning of *Silva*, the essential allegations of appellant's Count II relating to appellee's alleged simple negligence do not bring appellee within the two-pronged test of the medical malpractice statute of limitations. Those allegations of Count II do not seek relief from appellee as a "health care provider," nor do they seek relief from injuries that arise out of appellee's medical, dental or surgical diagnosis, treatment or care.²⁴¹

238. *Id.*

239. *Id.*; see FLA. STAT. § 95.11(4)(b) (1997).

240. *Kelley*, 670 So. 2d at 1096-97.

241. *Id.* at 1096-97 (citing *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184 (Fla. 1992)). The *Kelley* court noted that it found the reasoning of its prior decision in *NME Properties, Inc. v. McCullough*, 590 So. 2d 439, 440 (Fla. 2d Dist. Ct. App. 1991) controlling. *Kelley*, 670 So. 2d at 1097. In *NME Properties*, the court made the following distinction:

[a]lthough a nursing home is not itself a health care provider for purposes of section 766.102, it may be vicariously liable under that higher standard of care for the acts of some of its agents or employees. For example, East Manor probably employs nurses who are licensed under chapter 464. Under *respondeat superior*, East Manor may be liable under the higher professional standard of care when its agent, who is actively involved in the incident, is a health care provider rendering medical care or service. On the other hand,

The teaching of decisions like *Silva* and *Kelley* is that although injury may occur in a medical setting, a health care provider may nevertheless wear two different hats: one being that of a health care provider who has rendered negligent diagnosis, treatment, or care; the other being that of one who happens to be a health care provider, but who has breached a duty to exercise reasonable care independent of his duty to render diagnosis, treatment, or care in accordance with the applicable medical standard of care.²⁴² Of course, if there are distinct and severable claims, as was the case in *Kelley*, each claim can be pursued with the medical standard of care applying to one and an ordinary negligence standard applying to the other.²⁴³ Ultimately, the complaint will either be tested by a defense motion to dismiss one or both claims, or the plaintiff may have to make an election at trial and present proof in accordance with the appropriate legal standard.²⁴⁴

For example, very recently in *Lynn v. Mount Sinai Medical Center, Inc.*,²⁴⁵ the Third District Court of Appeal held that a hospital's mislabeling of a urine sample used to screen for drugs did not constitute medical malpractice for purposes of section 95.11(4)(b).²⁴⁶ The court noted that the labeling of a urine sample under a detailed collection protocol supplied by Dade County did not constitute the rendering of "medical diagnosis, treatment, or care."²⁴⁷ The *Lynn* court reasoned as follows:

East Manor may be liable under an ordinary negligence standard of care when other nonprofessional employees commit alleged negligence, or when an incident does not involve medical care.

McCullough, 590 So. 2d at 441.

242. See generally FLA. STAT. § 766.102 (1997).

243. See *Kelley*, 670 So. 2d at 1095.

244. In *Feifer v. Galen of Fla., Inc.*, 685 So. 2d 882 (Fla. 2d Dist. Ct. App. 1996), the court made the following admonition:

[w]e would caution plaintiffs in those actions where they allege that a medical care provider has committed an act of ordinary negligence that they will not be allowed, in presenting their case, to slide back and forth between the standards of care and proof required to show ordinary negligence as opposed to medical negligence.

Id. at 885. This pronouncement strongly suggests that plaintiffs will have to elect between two inconsistent theories and that plaintiffs will not be permitted to attribute the knowledge and skill that a health care provider should have in assessing whether the defendant breached his duty under ordinary negligence standards. The problem with proceeding on two different theories arising out of the same identical set of facts is that the jury would have to apply two diametrically opposed standards of care. This would hopelessly blur the distinction between ordinary negligence and medical negligence and render absurd results under Florida's Medical Malpractice Reform Act.

245. 92 So. 2d 1002 (Fla. 3d Dist. Ct. App. 1997).

246. *Id.* at 1002; see FLA. STAT. § 95.11(4)(b) (1997).

247. *Lynn*, 692 So. 2d at 1004.

Merely because a wrongful act occurs in a medical setting does not necessarily mean that it involves medical malpractice. The wrongful act must be directly related to the improper application of medical services, and the use of professional judgment or skill.²⁴⁸

Mt. Sinai did not engage in any medical skill or judgment by collecting and shipping out urine specimens to an independent laboratory, because it only functioned as an intermediary following the strict guidelines set by the County. Moreover, Mt. Sinai did not even test the samples they collected. Additionally, a “diagnosis” under the statute [§ 95.11(4)(b)] is interpreted as “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.” This applies to patients submitting to tests in order to diagnose illnesses. By contrast, the urine samples were not analyzed at all, but only screened for drugs as per the hospitals agreement with the county.

Consequently, as no professional skill or judgment was performed by Mt. Sinai, the collection of the urine sample was not a medical service as defined by the statute . . . Therefore, the liability of the hospital stems from a breach of the duty of ordinary care in not following the protocol required by Dade County.²⁴⁹

The *Lynn* court’s reasoning is sound. The court noted that in *Silva*, the supreme court defined “diagnosis” to mean “ascertaining a patient’s medical condition through examination and testing.”²⁵⁰ The court noted that Mt. Sinai collected Ms. Lynn’s urine and then capped, labeled, and sealed the specimen.²⁵¹ In merely collecting the samples and sending them off to an independent laboratory for testing, Mt. Sinai performed no diagnosis, treatment, or care under section 95.11(4)(b) or *Silva*.²⁵² However, using this rationale, if Mt. Sinai had performed the test on the sample of urine it collected from the plaintiff and made an error in analyzing it, which then led to her loss of employment, the claim should clearly be deemed one for medical malpractice. Testing and analyzing urine for the presence of drugs is

248. *Id.* at 1003.

249. *Id.* at 1004 (citations and parentheticals omitted).

250. *Id.* (quoting *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184, 1187 (Fla. 1992)).

251. *Id.* at 1003.

252. *Id.* at 1004; see *Silva*, 601 So. 2d at 1184 (Fla. 1992); see also FLA. STAT. § 95.11(4)(b) (1997).

a diagnostic process in that its end goal is the ascertainment of the testee's condition.

J.B. v. Sacred Heart Hospital,²⁵³ which was discussed in Part II of this article in reference to the applicability of presuit requirements, also provides an excellent example of a claim which falls outside the ambit of a claim for medical malpractice for purposes of the medical malpractice statute of limitations.²⁵⁴ In *J.B.*, it was alleged that a hospital requested the plaintiff to transport his brother, a patient of the hospital, to another medical facility.²⁵⁵ Unknown to the plaintiff, his brother had AIDS, and the hospital failed to warn the plaintiff that if he came into contact with his brother's open wounds he could become HIV positive.²⁵⁶ The plaintiff's hands, which had cuts on them, then came into contact with his brother's wound and consequently, the plaintiff became HIV positive.²⁵⁷ The *J.B.* court addressed, inter alia, the issue of whether the two year statute of limitations for medical malpractice set forth in section 95.11(4)(b) barred the plaintiff's claim for negligence against the hospital.²⁵⁸ The court began its analysis by noting that, to be subject to section 95.11(4)(b), a claim must constitute "an action for medical malpractice."²⁵⁹ The court then took note of the definition of an action for medical malpractice set forth in section 95.11(4)(b), which provides: "[a]n 'action for medical malpractice' is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care."²⁶⁰

The "key inquiry" for the court was whether the plaintiff's action "ar[ose] out of any medical, dental, or surgical diagnosis, treatment, or care."²⁶¹ Noting that it had recently addressed the issue of whether a suit constituted medical malpractice for statute of limitations purposes in *Silva*, the *J.B.* court reiterated the definition of the terms "diagnosis," "treatment," and "care" that it had articulated in *Silva*.²⁶²

First, there is no ambiguity to clarify in the words "diagnosis," "treatment," or "care," and we find that these words should be

253. 635 So. 2d 945 (Fla. 1994).

254. *Id.* at 946.

255. *Id.*

256. *Id.*

257. *Id.* at 947

258. *J.B.*, 635 So. 2d at 946.

259. *Id.* at 947 (citing FLA. STAT. § 95.11(4)(b) (1997)).

260. *Id.* (quoting FLA. STAT. § 95.11(4)(b) (1997)).

261. *Id.*

262. *Id.* at 948 (citing *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184, 1184 (Fla. 1992)).

accorded their plain and unambiguous meaning. In ordinary, common parlance, 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. This parallels the dictionary definitions of those terms. According to *Webster’s Third International Dictionary* (1981) “diagnosis” means “the art or act of identifying a disease from its signs or symptoms.” “Treatment” means “the action or manner of treating a patient medically or surgically.” “Care” means “provide for or attend to needs or perform necessary personal services” Likewise, in medical terms, “diagnosis” means “[t]he determination of the nature of a disease.” “Treatment” means “[m]edical or surgical management of a patient.” And “care” means “the application of knowledge to the benefit of . . . [an] individual.”²⁶³

Finding *Silva* to be “dispositive,” the *J.B.* court held that just as the blood bank in *Silva* had rendered no diagnosis, treatment, or care to the plaintiffs there, Sacred Heart Hospital had rendered no diagnosis, treatment, or care to J.B., who was the injured party in the case before it.²⁶⁴

The *J.B.* decision places an important limitation on the definition of diagnosis, treatment, or care. After all, in the broad sense, the injury in *J.B.* did arise out of the treatment, diagnosis, and care of *someone*. However, that “someone” was J.B.’s brother, who was the hospital’s patient, not J.B. The hospital diagnosed J.B.’s brother’s condition to the extent it had ascertained that he had the condition of AIDS and determined that he would need to be sent to another hospital. Sacred Heart treated J.B.’s brother by dressing and putting a heparin lock on his wounds.²⁶⁵ Arguably, Sacred Heart was engaged in care even in the very process of transferring J.B.’s brother to another hospital. The hospital gave J.B. instructions on how to handle the heparin lock covering his brother’s infectious wounds,²⁶⁶ and in a sense, it made J.B. its proxy for the rendering of care. Arguably, but for the diagnosis, treatment, and/or care rendered by the hospital to J.B.’s brother, J.B. would not have been in a car in close contact with his brother during the transfer. Nevertheless, the crux of the *J.B.* holding is that the hospital had simply not rendered diagnosis, treatment, or care to J.B.²⁶⁷ Therefore, J.B.’s

263. See *J.B.*, 635 So. 2d at 948 (quoting *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184, 1187 (Fla. 1992)) (citations omitted).

264. *Id.*

265. *Id.* at 946.

266. *Id.* at 947.

267. *Id.* at 948.

claim was not “an action for medical malpractice” that would be barred under section 95.11(4)(b).²⁶⁸

One of the most interesting legal aspects of the *J.B.* decision is that it also addressed the issue of whether *J.B.*'s claim was a “claim for medical malpractice” for purposes of whether the presuit notice requirements of section 766.106 of the *Florida Statutes* applied to *J.B.*'s claim.²⁶⁹ In so doing, the court utilized not the definition of “an action for medical malpractice” set forth in section 95.11(4)(b),²⁷⁰ but the definition of “a claim for medical malpractice” embodied in section 766.106(1)(a).²⁷¹ The latter section defines “a claim for medical malpractice” as “a claim arising out of the rendering of, or the failure to render, medical care or services.”²⁷² The *J.B.* court's resolution of this issue was perfunctory. As noted earlier, in Part II of this article, the court observed that the complaint did not allege that Sacred Heart Hospital was negligent in any way in the rendering of, or the failure to render, medical care, or services.²⁷³ Accordingly, the court went on to conclude that “the complaint does not state a medical malpractice claim for chapter 766 purposes, and the notice and presuit screening requirements are inapplicable.”²⁷⁴

In light of *J.B.*, several questions come to mind. First, is there any difference between an “action” for medical malpractice as per the section 95.11(4)(b)²⁷⁵ definition, and a “claim” for medical malpractice, the term used in the section 766.106(1)(a)²⁷⁶ definition? Although there is a legal distinction between the two terms, it does not appear to be a material one. Is there any reason for this subtle terminology? Generally, an “action” in its usual legal sense means a “lawsuit brought in court” wherein one or more claims can be asserted, while a claim is one particular “cause of action” alleged in an action.²⁷⁷ While a claim is then a subset of an action in which potentially there could be many claims asserted, there is nothing in the legislative history of section 95.11(4)(b) and 766.106(1)(a) or the case law to explain why (if indeed there was any reason) the legislature chose to phrase the respective definitions as it did.

268. *J.B.*, 635 So. 2d at 947; see FLA. STAT. § 95.11(4)(b) (1997).

269. *J.B.*, 635 So. 2d at 948–49.

270. FLA. STAT. § 95.11(4)(b)(1997). See *supra* text accompanying note 6.

271. *J.B.*, 635 So. 2d at 948 (citing FLA. STAT. § 766.106(1)(a) (1997)).

272. *Id.* (quoting FLA. STAT. § 766.106(1)(a) (1997)). See *supra* Part II.A for a comprehensive discussion of this definition and its application.

273. *Id.*

274. *Id.* at 949. See § 766.106(1)(a).

275. See FLA. STAT. § 95.11(4)(b). See *supra* text accompanying note 6.

276. See *id.* § 766.106(1)(a).

277. BLACK'S LAW DICTIONARY 28, 247 (6th ed. 1990).

Second, assuming for purposes of a comparative discussion, the terms “claim” and “action” are synonymous, there is no apparent reason why a claim for medical malpractice under section 766.106(1)(a) should be defined in different terms than it is under section 95.11(4)(b). The question is, if a claim arises out of “the rendering of, or failure to render medical care or services,”²⁷⁸ does it arise out of “medical, dental, or surgical diagnosis, treatment, or care by any provider of health care?”²⁷⁹ While at times, the answer to this question would surely have to be “yes,”²⁸⁰ this question has never been addressed, no less definitively resolved. Under section 95.11(4)(b), it appears that a claim for malpractice cannot arise out of negligent diagnosis, treatment, or care of one who is *not* a health care provider.²⁸¹ Thus, under the holding of *Lynn*, for purposes of section 766.106’s presuit provisions, the negligence of a radiographic technician (who was clearly not a health care provide under any chapter 766 definition) can serve as the predicate of a claim for medical malpractice against the hospital for whom he worked.²⁸² However, for purposes of section 95.11(4)(b), the medical malpractice statute of limitations, a claim based upon the technician’s negligence might not be considered an action for medical malpractice because the action did not arise out of the negligent diagnosis, treatment, or care of a “health care provider” as mandated by the section 95.11(4)(b) definition.²⁸³ Is there any rational basis for a distinction whereby a claim could be characterized as one for “medical malpractice” for purposes of presuit requirements, but not for statute of limitations purposes? Not in this writer’s view. To add to the confusion, we know that under both subsections (sections 95.11(4)(b) and 766.106(1)(b)), neither presuit requirements nor the malpractice statute of limitations apply unless the claim is against a “health care provider” (or in the case of presuit, one who is vicariously liable for the acts of a “health care provider”). Yet, as will become apparent in the following subsection of this article, the definition of “health care provider” is radically different for purposes of determining whether presuit requirements apply than it is in cases where the issue is whether the medical malpractice statute of limitations applies. Indeed, we shall see that there is currently nothing to indicate, either in the *Florida Statutes*, the underlying legislative history, or the case law precisely who

278. See FLA. STAT. § 766.106(a)(1).

279. See FLA. STAT. § 95.11(4)(b). See *supra* text accompanying note 6.

280. For example, when a physician negligently misdiagnosis a patient resulting in injury to the patient, “diagnosis” is clearly a type of “medical service.”

281. See FLA. STAT. § 95.11(4)(b) (1997). See *supra* text accompanying note 6.

282. *Lynn v. Mount Sinai Med. Ctr., Inc.*, 629 So. 2d 1002, 1003 (Fla. 3d Dist. Ct. App. 1997).

283. FLA. STAT. § 95.11(4)(b). See *supra* text accompanying note 6.

and/or what is considered to be a health care provider for purposes of section 95.11(4)(b).

One thing we can glean from the case law is that unless a claim arises out of negligence in the exercise of professional judgment and skill it will not be considered one for medical malpractice either within the meaning of section 766.106(1)(a) or 95.11(4)(b).²⁸⁴ Still, the fact that practitioners may, at times, be able to clearly identify when a claim is *not* a claim for medical malpractice does not alleviate the need to know when a claim *is* one for medical malpractice. Under section 95.11(4)(b) and *Silva*, before a claim is subject to the medical malpractice statute of limitations it must satisfy a two prong test: 1) it must arise out of “medical diagnosis, treatment, or care;” and 2) “whether such diagnosis, treatment, or care was rendered by a ‘provider of health care.’”²⁸⁵ Accordingly, we shall now turn to the subject of the second prong of the test, to wit, what is the meaning of the term “health care provider” for purposes of section 95.11(4)(b) of the *Florida Statutes*?

D. *Who is a “Health Care Provider” for Purposes of the Medical Malpractice Statute of Limitations?*

Although the *Silva* court deemed the finding that the blood bank had not rendered medical diagnosis, treatment, or care to the plaintiff to be dispositive, it seized the opportunity to address and reject the blood bank’s contention that it was a “provider of health care” within the meaning of section 95.11(4)(b).²⁸⁶ The defendant argued that it was a health care provider because section 768.50(2)(b) expressly characterized blood banks as such.²⁸⁷ However, the court concluded that the blood bank was not a “health care provider,” reasoning that the plaintiffs’ claim was not governed by the Act or the accompanying two-year statute of limitations.²⁸⁸ Instead, the court held, the four-year statute governing claims for ordinary negligence applied.²⁸⁹

What is most interesting is that in *Silva*, the Supreme Court of Florida had eschewed the section 768.50(2)(b) definition of “health care provider,” that it embraced in *Weinstock* two years later, noting that section 768.50(2)(b) pertained only to collateral sources of indemnity and had been

284. See §§ 95.11(4)(b), 766.106.

285. *Silva v. Southwest Fla. Blood Bank Inc.*, 601 So. 2d 1184, 1186 (Fla. 1992); FLA. STAT. § 95.11(4)(b).

286. *Silva*, 601 So. 2d at 1188.

287. *Id.*

288. *Id.*

289. *Id.* (citing FLA. STAT. § 95.11(3)(a) (1989)).

repealed in 1986.²⁹⁰ The *Silva* court held that for purposes of whether an action is governed by the section 95.11(4)(b) statute of limitations for claims of medical malpractice, the legislature could not have intended the section 768.50(2)(b) definition of health care provider to apply because that section did not exist when section 95.11(4)(b) was promulgated.²⁹¹

How, if at all, can the holdings of *Silva* and *Weinstock*, neither of which has been disapproved by the court, be reconciled? Reading between the lines, the answer, while somewhat cryptic, if not totally anomalous, would appear to be that, for purposes of the issue of whether a claim is subject to the presuit requirements of the Act, the section 768.50(2)(b) definition of health care provider is still relevant, while for purposes of whether the two-year statute of limitations for medical malpractice of section 95.11(4)(b) applies, the section 768.50(2)(b) is inapplicable.²⁹² The only thing that emerges as clear is that both the statutory scheme and the court's interpretation of it are sadly in need of legislative overhaul and clarification. While telling us the section 768.50(2)(b) is inapposite in the determination of who is a "health care provider" for purposes of section 95.11(4)(b), *Silva* gives us no clue whatsoever as to what section of the Act to look to or what the legislature (or indeed the *Silva* court itself) meant when it required that in order for section 95.11(4)(b) to apply, the diagnosis, treatment, or care be rendered by a "provider of health care."²⁹³ We only know that one may not look to the section 768.50(2)(b) definition in order to determine whether a given defendant is a health care provider for statute of limitations purposes.

It is true, as *Silva* points out, that section 768.50(2)(b) had been repealed and originally dealt with collateral sources, a topic not germane to the issues of health care providers or the rendering of diagnosis, treatment, or care.²⁹⁴ However, the *Weinstock* court noted that section 768.50(2)(b) had survived to the extent that it supplied the definition of health care provider for purposes of section 766.102(1), a section which sets forth the applicable medical standard of care as it pertains to health care providers.²⁹⁵ Thus, the *Silva* court's rejection of section 768.50(2)(b) as a source of the definition of health care provider for purposes of the medical malpractice statute of limitations seems illogical and ill-conceived.²⁹⁶ Therefore, as Justice Grimes

290. *Id.* at 1188–99.

291. *Silva*, 601 So. 2d at 1189.

292. *Id.*; see also *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993).

293. See FLA. STAT. § 95.11(4)(b); see also *Silva*, 601 So. 2d at 1188.

294. *Silva*, 601 So. 2d at 1189.

295. *Weinstock v. Groth*, 629 So. 2d 835, 836 (Fla. 1993) (citing FLA. STAT. §§ 766.102(1) (1997), 768.50(2)(b) (1997)).

296. As pointed out in the preface to the official 1989 *Florida Statutes*: specific cross-references to a statute are unaffected by later repeal of that statute. *Preface to the Florida Statutes*, FLA. STAT. (1997). See also *Silva*, 601 So. 2d at 1189 (Grimes, J., dissenting).

pointed out in his dissent in *Silva*, “[t]he fact that section 768.50 was repealed in 1986 does not invalidate the reference to that statute because as noted by the 1989 statutory reviser to section 766.102 ‘generally a specific cross-reference is unaffected by subsequent amendments to or repeal of the statute.’”²⁹⁷ This point is particularly compelling in light of the fact that no section of the Act is as intimately involved with the subject of medical malpractice claims against health care providers as section 766.102(1), which in turn, expressly incorporates the section 768.50(2)(b) definition of that term.

Since the supreme court has not modified, clarified, amplified, or overruled *Silva* since it was decided in 1992, practitioners are left with very little guidance in resolving the vital issue of whether their clients’ claims are against health care providers for purposes of whether section 95.11(4)(b) applies to those claims. The best one can do is to look to other definitions of health care provider set forth in various sections of chapter 766.²⁹⁸ However, undeniably, those sections bear no more relevancy to this issue of who is a health care provider for statute of limitations purposes than section 768.50(2)(b), which the *Silva* court noted deals with collateral sources of indemnity.²⁹⁹ In fact, the section 768.50(2)(b) definition is far more relevant to the issue of the rendering of diagnosis, treatment, or care by health care providers because its definition of health care provider is expressly incorporated into section 766.102(1) which sets forth the medical standard of care for *health care providers* and uses the term “health care provider(s)” fully five times in one short paragraph.³⁰⁰ The one thing that the *Silva* decision does share in common with *Weinstock* is the view that statutes restricting access to the courts (which a statute of limitations obviously qualifies as) must be strictly construed so as not to deprive litigants of their causes of action.³⁰¹ Aside from that commonality, however, the two decisions are inconsistent and hopelessly irreconcilable at the present time. In this writer’s opinion, the time for change is now.

297. *Silva*, 601 So. 2d at 1190 (Grimes, J., dissenting).

298. See *supra* text accompanying notes 105–08.

299. *Silva*, 601 So. 2d at 1189.

300. See generally FLA. STAT. § 766.102 (1997).

301. See *Silva*, 601 So. 2d at 1187. See also *Baskerville Donovan Eng’rs, Inc. v. Pensacola Executive House Condominium Ass’n, Inc.*, 581 So. 2d 1301 (Fla. 1991). The *Baskerville* court stated, “[w]here a statute of limitations shortens the existing period of time the statute is generally construed strictly, and where there is reasonable doubt as to legislative intent, the preference is to allow the longer period of time.” *Id.* at 1303.

IV. RECOMMENDATIONS AND SUGGESTIONS: CLARITY, CONSISTENCY, AND CONFORMITY

From the foregoing, it will come as no surprise that the law relating to the applicability of presuit requirements and to the medical malpractice statute of limitations needs to be reformed. The key elements for which the Florida Legislature and/or courts should strive are clarity, consistency, and conformity. The good news is that this can be achieved with a modicum of thought and effort.

First, in the area of presuit, the legislature should clearly define exactly what it means by the term “prospective defendants” in section 766.106(2) of the *Florida Statutes*.³⁰² If the term is intended to be synonymous with “health care provider” as *Weinstock* suggests,³⁰³ the legislature should clearly state as much. Furthermore, the legislature could precisely define the term(s) “prospective defendant” and/or “health care provider” in the body of section 766.102(2). The Florida Legislature did take the trouble to state under what circumstances the claimant must notify, by certified mail, the Department of Business and Professional Regulation of his intent to initiate litigation.³⁰⁴ Therefore, there is no good reason why the legislature could not specifically identify the precise individuals and/or entities who are entitled to presuit notice under 766.106(2) in claims for medical malpractice. This would obviate the need for courts to speculate or to jump from one subsection of chapter 766 (none of which relate to presuit), to another in the vain hope of determining who the legislature was referring to when it used the term “prospective defendant” in section 766.106(2).

Second, the legislature and/or Supreme Court of Florida should clarify the meaning of the phrase, “the rendering of, or the failure to render, medical care or services.”³⁰⁵ If that term is intended to mean instances where medical skill and judgment is required, the legislature should not only say so, but to the extent possible, define what types of negligence fall within the sphere of medical skill and judgment and what types do not, perhaps even setting forth

302. FLA. STAT. § 766.106(2).

303. *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993).

304. Section 766.106(2) of the Florida Statutes provides:

After completion of presuit pursuant to s. 766.203 and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant and, if any prospective defendant is a health care provider licensed under chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466, the Department of Business and Professional Regulation by certified mail, return receipt requested, of intent to initiate litigation for malpractice.

Id.

305. FLA. STAT. § 766.106(1)(a).

examples. The distinction between an obstetric patient who slips on amniotic fluid while getting off a treatment table³⁰⁶ versus a frail and elderly patient who slips and falls in a hospital corridor due to a failure to provide a wheelchair, handrails, or supervisory attendants³⁰⁷ is tenuous at best. The writer does not believe that the case law interpreting the term “the rendering of, or the failure to render, medical care or services”³⁰⁸ to mean instances where the conduct in question fell below the standard of care set forth in section 766.102³⁰⁹ is logical or practical. The threshold question here should be, did the act or omission resulting in injury to the claimant constitute a lapse in professional/medical skill and judgment or only a lapse in the ordinary care any layman would be duty-bound to exercise in the same or similar circumstances. Only then, for purposes of determining liability, not coverage, does it make sense to inquire further whether the rendering or failure to render medical care or services fell below what reasonably prudent professionals would deem acceptable or appropriate in such a circumstance.³¹⁰ The definition of “an action for medical malpractice” set forth in section 95.11(4)(b)³¹¹ is more precise and workable than the more general definition of a “claim for medical malpractice” set forth in section 766.106(1)(a)³¹² because it pinpoints the three specific areas out of which culpability for medical malpractice can have its genesis (i.e. “diagnosis,” “treatment,” and “care”).

Furthermore, the Supreme Court of Florida has at least defined those terms with a reasonable degree of precision, thereby facilitating their application.³¹³ Why not synchronize the two definitions by making the section 766.106(1)(a) definition identical to the definition set forth in section 95.11(4)(b)? This would go a long way toward fostering clarity, consistency, and conformity in the statutory scheme.

Third, concerning the issue of what constitutes “an action for medical malpractice” for purposes of section 95.11(4)(b), the scope of the language “by any provider of health care” following the language “medical, dental or surgical diagnosis, treatment, or care . . .”³¹⁴ is undefined and unclear. If a

306. See *Neilinger v. Baptist Hosp. of Miami, Inc.*, 460 So. 2d 564, 565 (Fla. 3d Dist. Ct. App. 1984) (holding defendant’s conduct gave rise to a claim for medical malpractice).

307. See *Feifer v. Galen of Fla, Inc.*, 685 So. 2d 882, 838 (Fla. 2d Dist. Ct. App. 1996) (holding defendant’s conduct give rise to a claim sounding solely in ordinary negligence).

308. FLA. STAT. § 766.106(1)(a) (1997).

309. FLA. STAT. § 766.102.

310. *Id.*

311. FLA. STAT. § 95.11(4)(b) (1997).

312. *Id.* § 766.106(1)(a).

313. *Silva v. Florida Blood Bank*, 601 So. 2d 1184, 1187 (Fla. 1992) (borrowing from the medical definitions of “diagnosis” “treatment” and “care”).

314. See FLA. STAT. § 95.11(4)(b).

non-health care provider, like the employee/technician in *Lynn*,³¹⁵ is negligent, then on one hand, it could be argued that neither the resultant suit against the technician or against the hospital is “an action for medical malpractice” within the meaning of section 95.11(4)(b) because the culpable acts were not committed by a “health care provider,” nor in that instance, would either of the claims be against one who is vicariously liable for the acts of a health care provider. On the other hand, it is axiomatic in tort law that the acts of the employee or agent are deemed to be the acts of the employer or principal respectively.³¹⁶ Therefore, one could argue that the claim against the hospital indeed arose out of medical treatment by a health care provider, to wit, the hospital, because the culpable acts of the hospital’s employee in the rendering of treatment are tantamount to the acts of the hospital. The potential confusion could be eliminated if 95.11(4)(b) were to clearly state whether or not the acts and omissions of an employee non-health care provider in rendering diagnosis, treatment, or care are deemed to be the acts and omissions of the health care provider employer or principal for purposes of section 95.11(4)(b).

Finally, it is the utter lack of any definition of the term “health care provider” as it is used in section 95.11(4)(b) that is most troubling, particularly in view of how *Silva* handled this issue and the conflicting manner in which the court has defined the term “health care provider” for purposes of section 766.106(2) and section 95.11(4)(b) respectively. In *Weinstock*, the court expressly stated that for purposes of presuit, the term “health care provider” means those individuals and entities listed as health care providers under section 768.50(2)(b),³¹⁷ while in *Silva* the court expressly rejected section 768.50(2)(b) as a source of the definition of health care provider for purposes of 95.11(4)(b), the medical malpractice statute of limitations.³¹⁸ Not only does this seem arbitrary and inexplicably inconsistent, but there remains a big gap in the fabric of section 95.11(4)(b), because although the supreme court has told us which subsections *cannot* be used to define the term “health care provider” for purposes of section 95.11(4)(b),³¹⁹ we are left clueless as to what that term means. This problem could easily be solved if the legislature (preferably right in section 95.11(4)(b)) or the court, simply told us exactly who is a health care provider for purposes of section 95.11(4)(b). Furthermore, there is no apparent reason

315. *Lynn v. Mount Sinai Med. Ctr., Inc.*, 629 So. 2d 1002, 1003 (Fla. 3d Dist. Ct. App. 1997).

316. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, 499–501 (5th ed. 1984).

317. See *Weinstock v. Groth*, 629 So. 2d 835, 836 (Fla. 1993). See also *supra* text accompanying note 108.

318. *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184, 1189 (Fla. 1992).

319. *Id.*

why the definition of health care provider should be any different for purposes of who is entitled to presuit notice under section 766.106(2) from the definition of health care provider for purposes of section 95.11(4)(b). Again, clarity, consistency, and conformity are the keys to a statutory scheme which would be more comprehensible and easier to apply.

In the meantime, it is recommended that attorneys who have made a determination regarding the status of their clients' claims file a lawsuit as early on as possible. If, for example, an attorney concludes as best he or she can that a given claim is for ordinary negligence, he should try to have at least a bare-bones complaint on file well within the date the client discovered or should have discovered the claim.³²⁰ That way, in the event the attorney's assessment may have been wrong, this would, in all likelihood, be flushed out by a responsive pleading seeking dismissal for failure to satisfy presuit requirements. Then, even if the motion is granted, there will still be time to prepare, serve, and file a notice of intent and accompanying corroborating opinion. Indeed, as long as the two-year statute has not run, the plaintiff can obtain an automatic extension in order to buy time and conduct the required presuit investigation and also, as discussed earlier, enjoy the benefit of the automatic ninety-day tolling period that engages upon service of the notice of intent.

V. CONCLUSION

One can only hope that the Florida Legislature and/or the courts resolve the vagarite and inconsistencies brought to light in this article. Until then, practitioners must wander into that "labyrinth" of the Medical Malpractice Reform Act and the medical malpractice statute of limitations and do their best to avoid the "minotaurs" and "ugly treasons" lurking therein.³²¹ Badly needed revision and clarification in the areas of coverage and the malpractice statute of limitations by the legislature and/or the courts will result in a clear and consistent set of rules and guidelines for practitioners and their clients to rely upon and will greatly serve the ends of justice in the arena of medical malpractice.

320. *Tanner v. Hartog*, 618 So. 2d 177, 181 (Fla. 1993).

321. See John A. Grant, *Florida's Presuit Requirements for Medical Malpractice Actions*, 68 FLA. B.J. 12, 12 (Feb. 1994).