>> THE NEXT CASE FOR THE DAY IS
MCCULLA VERSUS RELL.
YOU MAY PROCEED.
>> MAY IT PLEASE THE COURT,
LOUIS THALER ON BEHALF OF THE
PETITIONERS.
THIS IS A, ALSO A MEDICAL
MALPRACTICE CASE INVOLVING
PRESUIT SCREENING.
IN THE CASE YOU JUST HEARD THERE
WAS KNOW MODUS OF INTENT, NO
PROCEDURE FILED BEFORE THE
INSTITUTION OF A LAWSUIT.
THIS CASE PODIATRIC MALPRACTICE
CASE, THE PROCEDURE ESTABLISHED
BY CHAPTER 766 WAS FOLLOWED TO
THE T.
EVERYTHING WAS DONE IN TERMS OF
PRESUIT SCREENING, GETTING THE
MEDICAL RECORDS TOGETHER,
GETTING AN EXPERT RETAINED,
HAVING THE EXPERT LOOK AT THE
RECORDS.
ASKING THE EXPERT GIVE A
VERIFIED OPINION, SENDING A
NOTICE OF INTENT, HAVING A FULL
SCREENING PROCESS TO EXCHANGE
DOCUMENTS, PHOTOGRAPHS,
DIAGNOSTIC FILMS.
AT THE END THE CLAIM WAS DENIED
AND THE LAWSUIT WAS FILED.
>> LET ME ASK YOU THIS.
WHAT DO YOU CONTEND A, THE
AFFIDAVIT FROM THE MEDICAL
EXPERT NEEDS TO SHOW?
BECAUSE AS I UNDERSTAND IT, THE
ALLEGATION IS
THE PLAINTIFF'S DOCTOR IN
PRESUIT NEVER ACTUALLY SAID
THAT, THERE WAS MALPRACTICE.
OR REASONABLE POSSIBILITIES,
THERE WAS A STANDARD, THAT THERE
WAS A REASONABLE POSSIBILITY OF
MALPRACTICE.
>> FIRST OF ALL I THINK, I DON'T
REALLY THINK THAT IS THE
QUESTION BEFORE THE COURT.
WE'RE RELYING HEAVILY ON YOUR
DECISION, WILLIAMS VERSUS OKEN
THAT CAME NOW IN 2011.

JUDGE BROWN DISSENT IN OKEN
VERSUS WILLIAMS.
>> TALKING ABOUT THE CERT ISSUE?
>> THE CERT ISSUE, YES.
>> OKAY.
>> ST. MARY'S VERSUS BELL.
SIMPLY PUT IF THIS COURT IN
2011, WILLIAMS VERSUS OKEN
SAID, THE FIRST DISTRICT CAN NOT
LOOK AT THE CV OR QUALIFICATIONS
OF THE EXPERT ON CERT REVIEW
BECAUSE IT HAS TO WITH
SUBSTANCE, NOT PROCEDURE, THEN,
WE'RE SAYING HERE, THE SECOND
DISTRICT CAN'T LOOK AT THE
VERIFIED OPINION AND PICK APART
AND WEIGH THE EVIDENCE --
>> ON THAT POINT.
>> YES.
>> IS IT YOUR CONTENTION THAT NO
DEFICIENCY IN AN AFFIDAVIT, NO
MATTER HOW GLARING, IS THE FACT
THAT THERE IS SOME AFFIDAVITS
FILED IS ENOUGH TO LET YOU AVOID
GETTING CERT REVIEW?
>> NO.
I THINK THAT, I MAKE THE
ARGUMENT IN MY REPLY BRIEF, IF
AN AFFIDAVIT WHISTLES DIXIE AND
DOESN'T REALLY, JUST, THE BARE,
DOES NOTHING, THEN, WE HAVE TO
TRUST THE TRIAL JUDGES TO GRANT
THAT MOTION TO DISMISS UNLESS
THEY HAD --
>> EVEN IF IT IS JUST WHISTLING
DIXIE CERT WOULD NOT BE AN
APPROPRIATE REMEDY?
>> THAT'S --
>> THAT'S YOUR POSITION?
>> THAT'S, MY POSITION BASED
ON --
>> JUST TRUST THE TRIAL COURT?
>> TRUST THE TRIAL COURT.
>> BUT DIDN'T TRIAL COURT SAY
THAT THIS EXPERT'S OPINION
DIDN'T, WAS INSUFFICIENT TO MEET
THE STANDARDS OF THE PRESUIT
REQUIREMENTS?
>> NO.
HE ACTUALLY SAID, IT WAS HIS

WORDS WERE, IT BARELY MET THE REQUIREMENTS.
HE TOOK LANGUAGE FROM A CASE WHICH HE DID RESEARCH HIMSELF, WILLIAMS VERSUS POWER, WHERE THERE WAS A BARE AFFIDAVIT THAT JUST GAVE THE DEFENDANT WAS NEGLIGENT.
>> MAYBE I MISREAD THAT BUT I THOUGHT THE TRIAL COURT SAID THAT THIS, DID NOT, WAS INSUFFICIENT TO MEET THE STANDARDS.
COVER WITH THE ATTORNEYS INVESTIGATION AND ET CETERA, IT COMPLIED.
>> NO, I THINK THAT THE JUDGE SAID IT BARELY MET THE REQUIREMENTS.
HE DIDN'T SAY IT DID NOT MEET THE REQUIREMENTS.
I CAN FIND THAT, IF YOU LIKE.
BUT WHAT THE SECOND DISTRICT DID WAS, THEY LOOKED FOR MAGIC WORDS IN THE AFFIDAVIT.
NOW WE'RE GOING BACK TO JUSTICE QUINCE'S FIRST QUESTION.
IF YOU LOOK AT THE AFFIDAVIT OF DR. KOPELMAN, OUR EXPERT, HE PUTS IN HIS FIRST AFFIDAVIT, I RECOGNIZE THE PURPOSE OF VERIFIED OPINION IS ALLOW FOR MISSION OF FURTHER INVESTIGATION AND PRESUIT SCREENING PROCESS UNDER FLORIDA LAW.
ACCORDINGLY I RESERVE TO RIGHT TO AMEND THESE OPINIONS WITH NEW OR ANY DIFFERENT INFORMATION WARRANTS SAME.
87 DAYS INTO THE 90 DAY PRESUIT PERIOD I GET A LETTER FROM DEFENSE COUNSEL SAYING, WELL, AFFIDAVIT IS NO GOOD.
WE'VE BEEN CORRESPONDING ALL THROUGH THE 90 DAYS.
>> WHAT DID THE AFFIDAVIT SAY BEFORE THAT PARAGRAPH ABOUT THIS CASE?
>> OH, THE AFFIDAVIT --
>> DID IT SAY IT IS WORTHY OF

FURTHER INVESTIGATION?
>> HE SAID, HE SAID IT WAS
WORTHY OF FURTHER INVESTIGATION.
>> ISN'T THAT REALLY THE
STRONGEST THING THAT HE SAID?
>> NO.
HE TALKS ABOUT THE MEDICAL
RECORDS WHICH HE REVIEWED SHOW
THAT THERE'S A TEAR OF THE
INTERIOR TIMBALES TENDON.
>> RIGHT.
>> ALSO DESCRIBES THAT THERE WAS
INJECTION GIVEN, MAY BE
CONTRAINDICATED.
YOU GOT TO UNDERSTAND --
>> I UNDERSTAND.
KEEP GOING.
ALL THAT DOESN'T SAY IT WAS
WRONG BECAUSE IT APPEARS TO ME
FROM THE AFFIDAVIT THAT HE CAN
NOT EXPRESS AN OPINION YET
BECAUSE HE DOESN'T HAVE ENOUGH
INFORMATION AND SO THAT IS WHAT
WE'RE TRYING TO CONVERT, AN
AFFIDAVIT THAT CAN NOT SAY THAT
THERE IS A VIOLATION INTO ONE
THAT DOES BECAUSE THERE'S,
THERE'S MORE INFORMATION NEEDED.
>> WELL --
>> HAVE WE EVER UPHELD AN
AFFIDAVIT SUCH AS THAT, BEING
SUFFICIENT TO COMPLY WITH THE
STATUTE?
>> AGAIN YOU'RE GOING INTO
SUBSTANCE VERSUS PROCEDURE.
>> WELL, I JUST WANT AN ANSWER
TO MY QUESTION BECAUSE I MEAN
THIS STATUTE HAS TO WORK AND OUR
CASES FROM TO FLOW AND THE
STATUTE MUST MEAN SOMETHING.
AS TO THE QUESTION, WHISTLING
DIXIE, IF YOU JUST FILE A PIECE
OF PAPER AND IT DOES NOT SAY
WHAT YOU NEED TO SAY, HOW CAN
THAT BE FOLLOWING THE PROCEDURE?
>> WELL, THE SUPPLEMENT THAT
DR. KOPELMAN GAVE --
>> OKAY.
KEEP GOING.
>> SAID, TO THAT AFFIDAVIT,

AFTER THERE WAS ATTACK.
>> RIGHT.
>>7 DAYS INTO THE 90-DAY
PERIOD -- 87.
TO CLARIFY AND ISLY MEANT MY
VERIFIED OPINION OF
MARCH 4TH, 2011, BASED ON
RECORD REVIEW THERE IS
REASONABLE CORROBORATING GROUND
TO FURTHER INVESTIGATE A CLAIM
OF MEDICAL NEGLIGENCE AGAINST
BRIAN RELL AND CAUSATIONAL
DAMAGE TO THE PATIENT DAVID
MCCULLA ANTERIOR TIBIALIS
TENDON.
I CONTINUE TO RESERVE THE RIGHT
TO MODIFY MY RESPONSE BASED
ON ADDITIONAL INFORMATION.
>> RESPECTFULLY, YOU AND I CAN
SIT HERE AND TALKS ALL KINDS OF
LEGALESE, DOESN'T SAY THERE IS
REASON TO CONTINUE TO
INVESTIGATE, ISN'T THAT THE BEST
WE CAN SAY?
>> YES.
>> OKAY.
THE QUESTION WILL COME, THAT
TYPE OF IT MAY HAPPEN ON OTHER
OCCASIONS WHETHER THAT SHOULD BE
SUFFICIENT UNDER THIS STATUTORY
SCHEME TO PROVIDE ACCESS TO THIS
PROCESS WE'VE BEEN TALKING ABOUT
AND SUFFICIENT TO COMPLY?
>> YES.
>> THAT IS WHAT THIS CASE IS
REALLY ABOUT.
>> THE STATUTORY SCHEME IS TO
MAKE SURE THAT THERE IS NOT A
FRIVOLOUS LAWSUIT FILED.
THAT SOMEBODY JUST DOESN'T GO
WILLY-NILLY.
>> YEAH.
>> AND THIS CASE I MADE THE,
ALLEN MADE THE ARGUMENT IN THE
SECOND DISTRICT THERE WAS $3400
FILING FEE.
I SPENT $3,000 ON PRESUIT AND
$400 TO FILE THE LAWSUIT.
SO THE OTHER ISSUE THAT PERVADES
THESE, WHAT WE DID WAS, WAS THE,

WAS THE PATIENT IN GOOD FAITH,
WAS HIS COUNSEL IN GOOD FAITH?
DID I TAKE THE STEPS --
>> I'M WILLING TO ASSUME ALL OF
THAT, I'M WILLING TO ASSUME ALL
OF THAT BUT WHAT PROVISION IN
THE STATUTE DO YOU THINK
SUPPORTS YOUR INTERPRETATION
THAT AN AFFIDAVIT THAT SAYS, YOU
KNOW, THIS IS LEGITIMATE, THIS
IS WORTH LOOKING INTO AND NEEDS
TO BE INVESTIGATED, IS THE SAME
OR SATISFIES THE STATUTE THAT
SAYS THAT YOU NEED TO HAVE
SOMEONE COME IN AND SAY, AS WE
HAVE BEEN INTERPRETING IT, THAT
THIS FELL BELOW THE STANDARD OF
CARE AND CAUSED DAMAGE?
WHAT DO YOU SAY IS, WHERE IN THE
STATUTE?
>> I WOULD LOOK AT 766.104-1,
WHICH STATES FOR PURPOSES OF
THIS SECTION, GOOD FAITH MAY BE
SHOWN TO EXIST AS THE CLAIMANT
OR HIS OR HER COUNSEL HAS
RECEIVED A WRITTEN OPINION WHICH
SHALL NOT BE SUBJECT TO
DISCOVERY BY OPPOSING PARTY OF
AN EXPERT AS DEFINED IN
766.10 THAT THERE APPEARS TO BE
EVIDENCE OF MEDICAL NEGLIGENCE.
-- 102.
THE SECOND DISTRICT'S, IN THEIR
REWEIGHING OF THIS, SPECIFICALLY
SAID THEY WERE LOOKING FOR
DEFINITIVE CORROBORATION WHICH
IS NOT, WHICH CAN'T EVEN OCCUR.
NO EXPERT IS GOING TO SAY,
DEAFLY LOOKING FOR RECORDS AFTER
AN HOUR, NOT HAVING ALL THE
RECORDS, NOT HAVING EXAMINED
PATIENT, NOT HAVING SEEN THE
DEPOSITION OF THE DEFENDANT, NOT
KNOWING IN THIS CASE SOME
ANATOMICAL ANOMALY THAT MADE THE
DOCTOR MISCALCULATE WHERE THE
TENDON WAS, HE WENT RIGHT
THROUGH A HEALTHY TENDON TO GET
TO THE AREA THAT HE WAS
OPERATING ON.

>> WELL THAT, LET'S GO TO THE SUBSTANCE, AND AGAIN, I'M SORT OF, SOMEWHAT WITH YOU ON WHAT WE SAID IN WILLIAMS WHICH IS THAT IF THE PROCESS HAS BEEN SATISFIED AS WE LOOK AT IT, WHICH IS THAT THE DEFENDANT KNOWS WHAT THE NATURE OF THE CLAIM IS, HAD HIS OWN EXPERT REVIEW IT, AND DENIES IT, BASED ON SAYING, MY EXPERT SAYS THERE IS NO MEDICAL NEGLIGENCE, BUT THE QUESTION OF WHETHER, IF, YOUR EXPERT HAD SAID, AND THIS IS MEDICAL NEGLIGENCE, WOULDN'T HAVE CHANGED ANYTHING, WE KNOW THAT.
I MEAN WOULD STILL HAVE TO FILE SUIT.
SO NOW THE QUESTION IS, UNDER FIRST ISSUE IS WHETHER UNDER WILLIAMS THE PROCESS HAS BEEN SATISFIED SO THAT THERE'S NOT DEPARTURE.
LET'S GET TO THE ISSUE OF THE AFFIDAVIT BECAUSE THIS CALL CAME UP IN WHAT YOU HAVE TO DO AFTER I CEASED PRACTICING AS A LAWYER.
>> OKAY.
>> IT SAYS THAT THE NOTICE OF INTENT, THE STATEMENT SHALL CORROBORATE REASONABLE GROUND TO SUPPORT THE CLAIM OF MEDICAL NEGLIGENCE.
SO I'M NOT EVEN SURE THAT IT ACTUALLY SAYS THAT THE EXPERT HAS TO SAY, AND THERE'S MEDICAL MALPRACTICE.
WHAT WERE THE REASONABLE GROUNDS IN THE AFFIDAVIT?
AGAIN YOU'RE NOT GOING TO FILE A LAWSUIT WHICH WILL COST YOU WITH YOUR EXPERTS LOTS OF MONEY.
WHAT WERE THE REASONABLE GROUND THAT APPEARS ON THE FACE OF THIS RECORD, WITH THE AFFIDAVIT IN THE RECORDS AT THAT THERE WAS MEDICAL MALPRACTICE?
WHAT WAS IT THAT THE EXPERT SAID IN REVIEWING THE RECORDS, BEFORE

THE PENULTIMATE SENTENCE?
>> OKAY.
THAT HIS REVIEW OF THE
SUBSEQUENT TREATER'S RECORDS,
DR. COTMAN.
WHO I CONFERENCED WITH AS PART
OF PRESUIT CONFERENCE, DID MRI'S
AND FURTHER OPERATION ON THE
PLAINTIFF TO CORRECT THE
PROBLEM, SAID THAT THE,
THAT THE INSTRUMENTATION
USED BY THE PRIOR DOCTOR OPENLY,
HE CALLED IT IRRITATED THE
TENDON.
WHICH MAY OR MAY NOT BE
MALPRACTICE.
>> WHAT IS IT THAT IS GOING
TO -- HOW IS IT THAT YOU DON'T
KNOW AT THAT PRESUIT, AGAIN, THE
IDEA IS YOU'RE NOT JUST SUPPOSED
TO FILE A LAWSUIT AND THEN PUT A
DOCTOR OR A HOSPITAL THROUGH
THIS WITHOUT SOME REASONABLE
GROUNDS.
SO WHAT WAS IT THAT WAS STILL
MISSING THAT COULDN'T HAVE BEEN
SUPPLIED IN THE PRESUIT PROCESS
TO AT LEAST, ALLOW AN EXPERT
COMFORT TO SAY, AND THIS IS
MEDICAL MALPRACTICE?
>> I THINK, I THINK ONE FACTOR
IS, IS THAT THIS, THIS EXPERT,
IN MY PRACTICE I USUALLY USE MY
PRESUIT EXPERT AS THE EXPERT AT
TRIAL, DIDN'T WANT TO BE
IMPEACHED BY, I HAD DISCUSSIONS
WITH HIM.
THEY'RE --
>> YOU CAN'T TALK ABOUT WHAT IS
OFF THE RECORD.
>> SO HE DIDN'T WANT TO BE
IMPEACHED GIVING AN OPINION ON
JUST THE INITIAL RECORDS OF
DEFINITIVE MALPRACTICE.
HE SAID TWICE, IF THERE IS
ANYMORE DOCUMENTATION HIS
OPINIONS ARE SUBJECT TO CHANGE.
>> BUT ISN'T THE PROBLEM HERE,
BASED ON WHAT HE HAD SEEN HE DID
NOT SAY ANYTHING THAT COMES

CLOSE TO SAYING THAT IT APPEARS
THAT THERE WAS MEDICAL
NEGLIGENCE?
>> I THINK --
>> IT JUST, BECAUSE THE BOTTOM
LINE ON EVERYTHING HE SAYS IS
THAT, YOU KNOW, THIS MERITS
FURTHER INVESTIGATION.
>> WHICH IS IF YOU LOOK AT LINE
OF CASES THAT'S THE WHOLE IDEA
OF THE --
>> NO.
I THINK THE, THE WHOLE IDEA IS
THAT YOU GET INVESTIGATION GET
TO THE POINT WHERE IT APPEARS
THAT THERE'S A BASIS FOR FILING
A SUIT.
>> RIGHT.
>> AND IF IT APPEARS THAT NEEDS
FURTHER INVESTIGATION, IT IS NOT
TIME TO FILE THE SUIT.
>> WELL, JUSTICE PARIENTE TALKED
ABOUT THEIR, THE EXPERT, THAT
RETAINED TO DENY THE CLAIM.
AND A COUPLE WEEKS BEFORE THEY
SENT ME THE LETTER ON THE
87TH DAY, THERE IS PROBLEM
WITH DR. KOPELMAN'S AFFIDAVIT,
THAT DOCTOR ALREADY SIGNED AN
AFFIDAVIT AND IN HIS AFFIDAVIT
HE DIDN'T SAY, I'M NOT ON NOTICE
OF WHAT THE PLAINTIFF IS
COMPLAINING OF.
I DON'T KNOW WHAT HAPPENED HERE.
HE SAYS -- STANDARD OF CARE AND
ALSO MAKES THE COMMENT THAT THE
CONCLUSIONS REACHED BY
DR. COTEM, WHO IS SUBSEQUENT
TREATER, WHOSE MEDICAL RECORDS
INDICATE A TEAR OF THE TENDON
AND DR. KOPELMAN WERE UNFOUNDED,
UNPROFESSIONAL AND NOT SUPPORTED
BY FACT.
THEIR OWN EXPERT DIDN'T HAVE ANY
PROBLEM WITH DR. KOPELMAN'S
ANALYSIS OF, IN TERMS OF GETTING
NOTICE WHAT WAS GOING ON.
AND HE USED THE WORD CONCLUSIONS
AND THE CONCLUSIONS WERE, THERE
WAS MALPRACTICE.

THEIR, DR. KOPELMAN'S AFFIDAVIT
AS SAYING --
>> LET ME ASK ANOTHER QUESTION
AS TO JUST ON, IF, SAY THAT THIS
AFFIDAVIT IS INSUFFICIENT
BECAUSE IT, THE DOCTOR, THERE IS
SOME OTHER REASON BUT IT IS NOT
A CERT CASE.
YOU GO THROUGH THE WHOLE TRIAL.
YOU WIN, YOUR EXPERT NOW IS ABLE
TO SAY EVERYTHING.
YOU WIN AND IT COMES UP AND A
COURT FIND, ALTHOUGH IT DIDN'T
MEET CERT REVIEW THERE IS LEGAL
ERROR.
I MEAN YOUR WORSE, YOU'RE WORSE
OFF IN THAT SITUATION BECAUSE,
YOU KNOW, MAYBE THE BOTTOM LINE
ON THIS IS THAT WE NEED THESE,
THIS TO BE A CATEGORY OF
NON-FINAL APPEALABLE ORDER SO
THAT PLAINTIFFS AND DEFENDANTS
AREN'T PUT THROUGH NEEDLESS
INVESTIGATION BUT THAT'S NOT
WHERE WE ARE.
SO JUST TO BE CLEAR --
>> IF IT IS ERROR, JUDGE
DUBINSKY DID HIS OWN RESEARCH AND
DID A HEARING.
WHEN MOVED FOR HEARING DENIED IT
WITH HIS OWN ORDER.
YOU HAVE, TRUST THE TRIAL JUDGE
WHO TWICE, TWICE LOOKED AT THIS.
>> IF IT IS, IF IT IS LEGAL
ERROR, THEN EVEN IF YOU WIN THE
MALPRACTICE CASE YOU COULD END
UP WITH A REVERSAL BECAUSE OF
SOMETHING THAT HAPPENED IN THE
PRESUIT PROCESS.
>> WOULD BE HARMLESS AT THAT
POINT BECAUSE OBVIOUSLY IF I AM
PROCEEDING WITH THE CASE, MY
EXPERT IS GOING TO HAVE TO GIVE
A DEFINITIVE STATEMENT THAT
THERE WAS MALPRACTICE AT A LATER
DATE.
THIS IS JUST, THE GOOD-FAITH
EFFORT TO START THE CASE.
AND --
>> SO IN THIS AFFIDAVIT, THERE'S

A LINE THAT SAYS, IN MY EXPERT OPINION BASED ON RECORDS PROVIDED THERE ARE REASONABLE GROUNDS THAT THE PATIENT'S ANTERIOR TENDON COULD HAVE BEEN WEAKENED OR INJURED BY THE STEROID SHOT GIVEN BY DR. RELL. DR. RELL IS THE TREATING PHYSICIAN, RIGHT?
>> CORRECT.
>> SO IS THAT THE BASIS OF YOUR CONTENTION THAT THIS, THAT HE'S, HE HAD -- DETERMINED THIS WAS MALPRACTICE BUT SAYS BASICALLY THAT THE TENDON WAS WEAKENED OR INJURED --
>> IT WAS CONTRAINDICATED, YES, IT WAS CONTRAINDICATED INJECTION.
>> IS THAT THE EXTENT OF WHAT YOUR EXPERT HAS SAID ABOUT --
>> NO, HE GIVES ADDITIONAL FACTS ABOUT THE SURGERY THAT TORE THE TENDON ALSO.
THERE IS A WEAKENING OF THE TENDON AND MAYBE BY THE SHOT AND THEN HE TORE THE TENDON.
IF YOU LOOK AT THE, THE CASES OUT THERE ONSETTER REVIEW, FOR EXAMPLE, ST. MARY'S VERSUS BELL, THEY GAVE A NOTICE OF INTENT AND THE HOSPITAL'S POSITION WAS THE PATIENT WAS NEVER EVEN A PATIENT BUT THAT CERT REVIEW WAS, WAS DENIED BECAUSE IT HAD TO DO WITH SUBSTANCE.
IT HAD TO DO WITH REWEIGHING THE EVIDENCE.
IF YOU LOOK AT --
>> YOU'RE IN YOUR REBUTTAL TIME.
>> OKAY.
IF YOU LOOK AT PATRICK VERSUS ABBY, I WILL CITE THIS ONE CASE, THEY CITED JAY VERSUS ROYAL, WHERE THERE WAS ORDER STRIKING DEMAND FOR A JURY TRIAL WHICH WAS NOT REVIEWABLE CERT BECAUSE HARM CAUSED BY THE ERROR CAN BE CORRECTED ON APPEAL FROM THE FINAL JUDGEMENT.

AN ORDER FORCING A PARTY TO GIVE
UP A CONSTITUTIONAL RIGHT TO
JURY TRIAL IS NOT REVIEWABLE BY
CERTIORARI IS A POINT SHOULD
GIVE APPELLATE JUDGES CAUSE FOR
AND RESTRAINT FOR USE OF
CERTIORARI IN ANY CASE.
WE HAVE THE SECOND DISTRICT
EXCEEDED ITS CONSTITUTIONAL
AUTHORITY.
REWEIGHED THE EVIDENCE.
ORDER TALKS ABOUT THE FACTS.
THEY PICK APART MY EFFORTS.
THEY PICK APART DR. KOPELMAN'S
EFFORTS AND THEY'RE REWEIGHING
THE EVIDENCE AND THAT IS NOT
PROPER FOR CERT.
THANK YOU.
>> MAY IT PLEASE THE COURT.
DINAH STEIN ON BEHALF OF
DR. RELL AND PROFESSIONAL
ASSOCIATION AND IT IS OUR
POSITION NOT EVERYTHING THAT WAS
REQUIRED UNDER THE PRESUIT
STATUTE WAS DONE HERE.
THE STATUTE HAS A VERY SPECIFIC
REQUIREMENT UNDER 766.203 THAT A
COOPERATING OPINION BY A MEDICAL
EXPERT IS PROVIDED.
THAT CORROBORATES REASONABLE
GROUND TO INITIATE A MEDICAL
NEGLIGENCE ACTION.
>> AGAIN, YOU UNDERSTOOD, BASED
ON THE AFFIDAVIT, JUST TRYING TO
UNDERSTAND WHERE THE PROCESS WAS
VIOLATED FOR DR. RELL.
THEY POINT OUT EXACTLY WHAT IT
WAS THAT WAS THE PROBLEM WITH
WHY, AGAIN I DON'T KNOW WHAT THE
ULTIMATE, I GUESS THE TENDON WAS
DAMAGED AS A RESULT OF ALL OF
THIS?
>> THE ANSWER IS I DON'T
KNOW.
>> OKAY, BUT SOMETHING TO DO
WITH THAT SURGERY, THE
INJECTION, THAT TENDON.
ENOUGH FOR -- YOUR DOCTOR TO
KNOW HE WAS BEING SUED FOR
THIS SPECIFIC ACT WITH HIS

INSURANCE COMPANY TO GET --
HAVE AN EXPERT REVIEW IT, AND
KNOW BASED ON EVERYTHING THAT
THEY FELT THERE WAS NO
MEDICAL NEGLIGENCE.
NOW, I GUESS MY QUESTION, IN
TRYING TO UNDERSTAND WHAT THE
PRESUIT PROCESS IS TO NOT
ALLOW A CATEGORY CASE WHERE
THERE IS NO BASIS TO THINK
THERE'S A CLAIM TO REQUIRE A
PLAINTIFF TO HIRE AN EXPERT
TO GET THE RECORDS TO, YOU
KNOW, DO ALL OF THIS
SCREENING, WHICH THEY
PROBABLY WANT TO DO ANYWAY,
SINCE THESE ARE VERY COSTLY
CASES.
SO THE QUESTION REALLY IS, IF
DR.†EXPERT SAID AND THERE IS
REASONABLE GROUNDS TO FILE A
MALPRACTICE CASE, HOW WOULD
THAT -- WHERE IS YOUR -- HOW
WOULD THAT CHANGE ANYTHING
FOR DR.†RELL AND THE
INSURANCE COMPANY?
BECAUSE WE'RE HERE ON CERT,
I'M TRYING TO UNDERSTAND
WHERE DEPARTURE FROM THE
ESSENTIAL REQUIREMENTS OF LAW
WOULD BE, YOU KNOW, CAUSE
HARM TO THE REST OF THE CASE?
>> UNDERSTOOD.
AND WHAT, YOUR HONOR, JUST
DESCRIBED, OF COURSE, IS
NOTICE, PUTTING THE POTENTIAL
DEFENDANT ON NOTICE THAT
THERE IS AN ADVERSE RESULT
AND WE'RE GOING TO BRING
LITIGATION.
THAT IS ONE VERY IMPORTANT
REQUIREMENT OF THE PRESUIT
STATUTES, WHICH WE DON'T
NECESSARILY TAKE ISSUE WITH
HERE.
THERE'S A SECOND RELATED
REQUIREMENT THAT IS SEPARATE,
AND THAT IS UNDER 2766203,
IT'S NOT ENOUGH TO PROVIDE
NOTICE, AND YOU MUST TO OPEN

THE COURTHOUSE DOORS HAVE
SOMEBODY QUALIFIED WHO IS
WILLING TO SAY IN A VERIFIED
OPINION, I BELIEVE THERE ARE
GROUNDS TO INITIATE A CLAIM.
AND I THINK IT'S FAIR TO SAY
ANY TIME THERE'S AN ADVERSE
RESULT, THERE ARE REASONABLE
GROUNDS TO INVESTIGATE A
CLAIM FOR MEDICAL NEGLIGENCE.
I THINK ANYONE CAN FIGURE
THAT OUT, AND CERTAINLY
DR.†KOPELMAN REPEATED THAT.
>> HOW MUCH MORE CAN YOU DO?
AGAIN, YOU CAN'T TAKE THE
DEPOSITIONS OF THE DOCTOR IN
THIS 90-DAY PERIOD AND
CONTRACTED TO 83 DAYS, YOU
CAN'T TAKE THE DEPOSITION.
IT'S THE GOOD FAITH.
SOMETIMES I'M THINKING IT
WOULD BE ALMOST TO MAKE AN
EXPERT SAY AND THIS IS
MEDICAL NEGLIGENCE, YOU MAY
BE GOING FARTHER THAN YOU CAN
GO AT THAT POINT BEFORE YOU
FILE A LAWSUIT.
YOU CAN ONLY KNOW SO MUCH.
>> AND JUSTICE, I AGREE WITH
YOU TO AN EXTENT.
WE'RE NOT SAYING THAT THE
EXPERT HAS TO DEFINITIVELY
SAY THERE WAS NEGLIGENCE.
>> WHAT IF IT WAS THE
FLIPSIDE?
WHAT IF THE EXPERT SAID I
HAVE LOOKED AT ALL THE
RECORDS AND THERE IS
REASONABLE GROUNDS TO FIND
THERE IS MEDICAL NEGLIGENCE,
WITHOUT DISCUSSING WHAT
DR.†RELL DID, SAY HE TREATED
THIS GUY FOR FIVE YEARS TO
FIGURE OUT WHAT IT WAS.
THAT WOULD BE THE HARM, THE
REAL PROBLEM, SO YOU CAN HAVE
MAGIC WORDS, BUT WHERE WOULD
BE THE ABILITY TO INVESTIGATE
INTELLIGENTLY, EITHER SETTLE
THE CASE OR DENY THE CLAIM?

>> THAT GOES INTO THE GROUNDS WHERE YOU HAVE A FACIALLY SUFFICIENT AFFIDAVIT THAT COMPLIES WITH THE STATUTE, BUT THERE'S A FEAR OR CONCERN THERE WAS NO REASONABLE INVESTIGATION.
>> THAT'S WHAT THE TRIAL JUDGE DOES THEN.
IN OTHER WORDS, IF THE PLAINTIFFS, AND WE TALKED ABOUT THIS IN A CASE A FEW MONTHS AGO.
IF THE PLAINTIFF DOESN'T DO THE REASONABLE INVESTIGATION, THE TRIAL JUDGE, ON THE MOTION OF THE DEFENDANT, CAN FIND THAT THE PLAINTIFF'S ATTORNEY ACTED IN A FRIVOLOUS MANNER WITHOUT IMPOSED SANCTIONS, RIGHT, AND DISMISSED THE CASE.
>> CORRECT.
>> IF I'M A PLAINTIFF'S LAWYER, THAT'S WHAT I DON'T WANT TO HAVE HAPPEN, I DON'T WANT TO INITIATE A FRIVOLOUS LAWSUIT.
BUT THAT'S NOT WHAT WE HAVE HERE AND AGAIN, I'M STRUGGLING WITH THIS TOO, I AGREE WITH WHAT WAS SAID ON DIRECT THAT THIS AFFIDAVIT DOESN'T HAVE WHAT THE SECOND DISTRICT SAID IT SHOULD HAVE, THE QUESTION IS WHETHER IT'S APPROPRIATE FOR CERT REVIEW WHEN WE DON'T HAVE REVIEW OF NONFINAL ORDERS IN THESE CASES?
>> OKAY, AND LET ME TRY TO, AGAIN, HONE IN ON YOUR HONOR'S CONCERNS.
FIRST OF ALL, THE LEGISLATURE HAS A VERY SPECIFIC DEFINITION FOR FRIVOLOUS.
NOT DEFINITION BUT AS THE COURTS RECOGNIZED A THRESHOLD REQUIREMENT.
IT'S NOT A GOOD FAITH, YOU

EITHER HAVE AN EXPERT WILLING
TO SAY THERE IS POTENTIAL
GROUNDS FOR A CASE OR NOT.
SO THAT'S THE FIRST
THRESHOLD.
>> LET ME ASK YOU ON THAT
ONE, IF THE SECOND THAT
LAWSUIT IS FILED, THEY SAY I
WANT TO TAKE THE DEPOSITION
OF THIS EXPERT, BECAUSE THIS
EXPERT DID NOT SAY IT, AND
THE EXPERT SAYS, NO, I CAN'T
SAY IT NOW AT ALL.
YOU KNOW, I CAN'T SAY IT.
AND I TOLD THE LAWYER I
COULDN'T SAY IT.
WHAT HAPPENS THEN?
>> THAT'S UNDER SECTION
76206, SOMEONE CHALLENGED THE
EXPERT'S REASONABLENESS, WE
GO THROUGH THE EVIDENTIARY
PORTION AND THE TRIAL COURT
MAKES A DETERMINATION AS TO
WHETHER THERE IS A REASONABLE
INVESTIGATION.
THAT IS SIMILAR TO THE CASES
THAT THE PLAINTIFF CITED SUCH
AS THE WOLFMAN CASE, THE
WILLIAMS V. POWERS AND
DUNPHY.
>> ISN'T THAT FAIL SAFE?
ISN'T THAT THE THING THAT THE
LEGISLATURE WANTED TO ENSURE,
THAT THERE WAS A REASONABLE
INVESTIGATION?
>> I'D LIKE TO ADDRESS THAT.
I DO THINK THIS IS
FUNDAMENTALLY DIFFERENT HERE
AND THIS IS WHY WE'RE IN THE
SMALL CATEGORY OF CASES AFTER
OKIN THAT CAN GO UP ON CERT.
IN THOSE THREE CASES, THE
PLAINTIFF OR THE PARTY WHO
DID THE AFFIDAVIT DID COMPLY
WITH THE STATUTE IN THAT IF
YOU HELD THE VERIFIED OPINION
NEXT TO THE STATUTE, IT SAID
I BELIEVE THERE ARE
REASONABLE GROUNDS FOR X, AND
SO FACIALLY, THEY APPLIED --

COMPLIED WITH THE STATUTE.
IN ALL OF THE CASES THE OTHER SIDE CHALLENGE THE REASONABLENESS, WHICH IS ALLOWED UNDER 766206 AND THE COURT IS ALLOWED TO MAKE FACTUAL FINDINGS.
THAT IS NOT WHAT WE HAVE HERE WHEN WE CAN TAKE THE VERIFIED OPINION, PUT IT NEXT TO THE STATUTE AND SAY THERE IS A DISCONNECT.
YOU DIDN'T DO THE THRESHOLD REQUIREMENT HAVING AN EXPERT SAY I BELIEVE THERE ARE GROUNDS FOR MEDICAL NEGLIGENCE, AND JUSTICE, I ALSO LIKE TO ADD THIS TO THAT THOUGHT.
IN THOSE THREE CASES, WE HAVE A VERSION OF SECTION 766206 ONCE SOMEONE CHALLENGES REASONABLENESS, THE TRIAL COURT MUST DISMISS IF THE NOTICE OF INTENT DOESN'T COMPLY WITH THE REASONABLE INVESTIGATION, PERIOD.
IT WAS FOR THE TRIAL COURT TO DETERMINE IF THERE WAS A REASONABLE INVESTIGATION.
IN 2003, THE LEGISLATURE ADDED WORDS TO QUALIFY REASONABLE INVESTIGATION AND SAID INCLUDING AN INVESTIGATION OF THE NEGLIGENCE AND AN EXPERT OPINION AS DEFINED UNDER SECTION 766202.
SO THE LEGISLATURE WAS VERY SPECIFIC IN SAYING THERE ARE TWO FACTORS THAT GET YOU THROUGH THE COURTHOUSE DOOR.
YOU HAVE TO HAVE THE REASONABLE INVESTIGATION WHICH ARGUABLY IS NOT REVIEWABLE BY CERT BECAUSE THAT DEPENDS WHAT EXPERTS AND ATTORNEYS SAY, BUT THERE'S THE SECOND WHOLE STAR WHICH IS THE AFFIDAVIT.

IF YOU DON'T HAVE THE
AFFIDAVIT THAT COMPLIES WITH
THE STATUTE AND GIVES ONE
EXPERT'S OPINION -- YES, YOUR
HONOR?
>> WHAT IS WRONG WITH THE
STATEMENT IN THE AFFIDAVIT
WHERE, THE EXPERT STARTS OUT
WITH, IN MY EXPERT OPINION,
HE GOES ONTO SAY THERE ARE
REASONABLE GROUNDS THAT THE
INJECTION, BASICALLY HE'S
SAYING THAT THE INJECTION BY
DR.†RELL WEAKENED OR INJURED
THE TENDON.
THAT DOESN'T SATISFY THE
REASONABLE POSSIBILITY
STANDARD?
>> NO, YOUR HONOR.
>> WHY NOT?
>> THE REASON WE HAVE TAKEN
THAT POSITION AND THE SECOND
DISTRICT GREED, HE'S
SPECULATING WHAT COULD HAVE
GONE WRONG, HE DOESN'T SAY
WHY HE THINKS THAT THE
INJECTION MAY HAVE BEEN
WRONG, WHAT HE'S MISSING FROM
THE RECORDS, AND THIS TO ME
IS NO DIFFERENT THAN AN
EXPERT SAYING, AGAIN, WE GO
BACK TO TAKING THIS TO
SOMEONE WITH ADVERSE RESULT,
AND IF THE EXPERT SAID SURE,
I BELIEVE ALL OF THESE COULD
HAVE GONE WRONG.
>> IF HE ADDED THE LANGUAGE
OF AND THIS WAS MEDICAL
MALPRACTICE, WE WOULDN'T BE
HERE, AND YET, HE SEEMS TO
SAY THAT HE HAS REASONABLE
GROUNDS TO BELIEVE THAT THIS
INJECTION INJURED THIS MAN'S
TENDON?
>> IT'S NOT MAGIC LANGUAGE,
IT'S LANGUAGE THAT WE CONTEND
IS IN THE STATUTE, AND I
THINK IT'S VERY IMPORTANT,
AGAIN, HE'S SPECULATING AS TO
WHAT COULD HAVE HAPPENED, HE

NEVER SAYS I THINK THIS
HAPPENED, IT DIDN'T APPEAR IN
DR.†COTTON'S RECORDS AS FAR
AS WE CAN SEE, BUT WHAT THE
LEGISLATURE WANTS HIM TO DO
IS TAKE THAT STEP AND SAY
BASED ON MY FINDINGS, THERE
ARE REASONABLE GROUNDS TO
INITIATE A MEDICAL NEGLIGENCE
CLAIM, AND IF HE'S NOT
WILLING TO DO THAT BASED ON
HIS SPECULATIVE, WHAT HE
THINKS HE'D LIKE TO
INVESTIGATE, THEN THE
LEGISLATURE SAYS THE
COURTHOUSE DOORS STAY CLOSED.
>> IS THAT -- ABOUT THE
TIMING OF THIS, AND THERE WAS
THIS AFFIDAVIT WAS FILED IN
MARCH, CORRECT?
>> CORRECT.
>> AND IS OPPOSING COUNSEL
CORRECT THAT IT WAS ONLY 87
DAYS LATER THAT IT WAS
POINTED OUT THAT THERE WAS A
PROBLEM WITH THE AFFIDAVIT,
BAD.
AND TWO, IN OTHER WORDS, CAN
YOU HAVE NOT SAID ANYTHING,
LET IT GO, SAY WE'RE DENYING
THE CLAIM BECAUSE WE DON'T
FIND MEDICAL NEGLIGENCE, NOT
BECAUSE WE DON'T KNOW WHAT
YOU'RE TALKING ABOUT, AND
THEN AFTER THE LAWSUIT IS
INITIATED TO GO GOTCHA.
HOW DOES THAT WORK?
>> THE WAY IT WORKS, IT
DOESN'T MATTER UNDER THE
STATS BECAUSE WE DID TELL HIM
WITHIN THE STATUTE OF
LIMITATIONS.
>> THREE DAYS BEFORE?
>> BEFORE THE END OF WHAT HE
WAS SAYING WAS THE 90 DAY
SETTLEMENT PERIOD, SO WAS
IT†--
>>†IF IT'S SO OBVIOUS, WHY
ISN'T AS SOON AS IT'S FILED,
WHY ISN'T THERE, LOOK, THIS

IS NOT COMPLYING, I GUESS THE QUESTION IS, SEEMS LIKE IT GOES ONE WAY, WHICH IS THE PLAINTIFF HAS TO GO THROUGH ALL THE HOOPS, THE DEFENDANT CAN SIT BACK AND REALLY NOT DO ANYTHING AND NOT SUFFER CONSEQUENCE?
>> THERE'S CASE LAW SAYING THAT A DEFENDANT CAN BE STOPPED FROM RAISING THE DEFENSES IF THEY LET THE STATUTE OF LIMITATIONS GO BY AND PREJUDICE THE PLAINTIFF. THERE WAS NOTHING IN THE RECORD IT SHOW THERE WAS ANY ATTEMPT BY THE DEFENDANT. THE DEFENDANT WROTE I BELIEVE A SERIES OF LETTERS THAT WENT BACK AND FORTH.
>> AND THE SERIES WAS ABOUT THE SUBSTANCE OF THE CLAIM. I MEAN, THAT'S WHAT I THINK IS REFLECTED IN THE RECORD IS THAT IT WASN'T ABOUT I DON'T KNOW -- YOU'RE ONLY SAYING THAT THIS WAS AN UNTOWARD RESULT, BUT I DON'T SEE WHERE THE NEGLIGENCE IS.
IT SOUNDED LIKE UP TO THE END IT WAS A VERY GOOD-FAITH EXCHANGE OF INFORMATION, YOU KNOW, EVERYBODY WAS ACTING IN GOOD FAITH WITH THIS INFORMATION.
AND ALL OF A SUDDEN, I DON'T BLAME THE DOCTOR, YOU'RE ENTITLED TO CERT WHICH YOU BELIEVE ARE THE STATUTORY RIGHTS, BUT THAT'S WHERE IT SEEMS LIKE THE PURPOSE OF THE INVESTIGATION IS AT ODDS WITHIN GOTCHA, YOU'RE OUT OF COURT.
>> AND AGAIN WE HAVE THE DICHOTOMY BETWEEN THE NOTICE PROVISIONS AND WE DON'T DENY THERE WAS A NOTICE OF INTENT, THOUGH IT DIDN'T GIVE MUCH INFORMATION, THERE WAS A

NOTICE.
WE DON'T DENY THE DOCTOR WAS ON NOTICE OF A CLAIM, BUT THERE'S A SEPARATE STATUTE THAT HAS A THRESHOLD REQUIREMENT, AND I DON'T KNOW THAT IT EVEN MATTERS, CERTAINLY WE WEREN'T PLAYING GOTCHA HERE, WE DIDN'T DO IT. I DON'T KNOW THAT IT MATTERS OR WE WERE OBLIGATED TO TELL THEM AT THE BEGINNING OF THE INVESTIGATION WHEN THERE'S A STATUTE THAT THE PLAINTIFF CAN FOLLOW AND DO THIS.
>> IF YOU TAKE THE DEPOSITION OF THE EXPERT SAYING WE DECIDE CERT WAS WRONG AND THE EXPERT CANNOT SAY, LISTEN, I CANNOT SAY THERE'S MEDICAL NEGLIGENCE, IS THE NEXT STEP YOU MOVE FOR SUMMARY JUDGMENT?
IN OTHER WORDS, THEY GOT TO HAVE AN EXPERT TO SAY IT'S MEDICAL NEGLIGENCE, AN EXPERT IN THE SAME AREA, IS THAT CORRECT?
>>†THAT'S CORRECT.
>> THAT WOULD BE THE OTHER -- THAT'S THE WAY YOU SOLVE THE PROBLEM OF IF IT'S NOT AN ADEQUATE AFFIDAVIT.
>> THEN IT'S UNREVIEWABLE UNDER THOSE FACTS IF IT'S DENIED.
>> RIGHT.
>> I'LL GO BACK TO THIS BECAUSE THE AFFIDAVIT, OUR POSITION IS, THE FACIAL SUFFICIENCY OF THE AFFIDAVIT, WE DIDN'T CHALLENGE THE REASONABLENESS OF THE COUNSEL'S INVESTIGATION, THE COUNSEL DESCRIBED THE INVESTIGATION DURING THE HEARING, AND I DON'T TAKE ISSUE WITH MR.†THALER'S GOOD FAITH IN THE INVESTIGATION, IT WENT DOWN TO THE AFFIDAVIT

AND OUR POSITION HAS BEEN ALL ALONG THAT THE INVESTIGATION COULD HAVE BEEN WONDERFUL AND CERTAINLY DR.†KOPELMAN DID SEEM TO LOOK AT THE RECORDS.
IF HE'S NOT WILLING TO SAY IN A VERIFIED OPINION HE BELIEVES THERE IS GROUNDS FOR MEDICAL NEGLIGENCE, YOU DON'T LOOK AT THE REST.
IT DOESN'T MATTER BECAUSE THE STATUTE WASN'T COMPLIED WITH.
THE PROCEDURAL STATUTES OF PRESUIT WEREN'T COMPLIED WITH AND THE SAME THING WITH THE AFFIDAVIT THAT WHISTLES DIXIE, IT DOESN'T COMPLY WITH THE STATUTES.
>> I'M LOOKING AT THE AFFIDAVIT SAYS SHALL CORROBORATE REASONABLE GROUNDS TO SUPPORT THE CLAIM OF MEDICAL NEGLIGENCE, IS THAT WHAT THE STATUTE CURRENTLY SAYS?
I'M TRYING TO FIGURE DOES IT ACTUALLY SAY THAT YOU NEED TO MAKE THE†--
>>†IT SAYS CORROBORATION --
I'M READING FROM SUBSECTION 2 OF 203.
CORROBORATION OF REASONABLE GROUNDS TO INITIATE MEDICAL NEGLIGENCE LITIGATION SHALL BE PROVIDED.
>> OKAY.
>> SO†--
>>†AGAIN, IN ANSWER, IT DOESN'T SAY AND THE AFFIDAVIT SHALL STATE†--
>>†I DON'T THINK ANY EXPERT CAN STATE DEFINITIVELY AT THAT STAGE THEY BELIEVE THERE'S NEGLIGENCE.
THEY HAVE TO BE ABLE TO TAKE THAT STEP AND SAY†--
>>†INSTEAD OF HIM SAYING IT NEEDS TO BE INVESTIGATED FURTHER, INSTEAD OF INVESTIGATE, INITIATE

MALPRACTICE CASE, THAT WOULD
HAVE BEEN ENOUGH?
>> IF HE HAD SAID I BELIEVE
THERE IS ENOUGH IN THE
RECORDS TO INITIATE MEDICAL
MALPRACTICE LITIGATION, THAT
WOULD HAVE BEEN ENOUGH.
BUT TO SAY INVESTIGATE JUST
MEANS THERE WAS AN ADVERSE
RESULT.
>> WE DON'T KNOW.
BUT AS JUSTICE QUINCE WAS
SAYING HERE, GOES THROUGH A
LOT OF INFORMATION IN THE
AFFIDAVIT, SO HE COMES TO --
THIS IS NOT A CONCLUSORY
AFFIDAVIT.
>> IT BEGS THE QUESTION WHY
ISN'T HE WILLING TO TAKE THAT
STEP NOW AND INSTEAD OF JUST
REPEATING DR.†COTTON'S
OBSERVATIONS, WHICH NO ONE
SAID INDICATED NEGLIGENCE, HE
JUST SAYS, AND I THINK
THERE'S FURTHER GROUNDS TO
INVESTIGATE.
>> IF AN EXPERT CAN'T,
WITHOUT KNOWING WHAT THE
DOCTOR IS GOING TO SAY HE DID
DURING THE SURGERY†--
>>†I'M SORRY?
>> IF THE DOCTOR CANNOT MAKE
FURTHER STATEMENTS UNTIL THE
DEPOSITION OF THE DEFENDANT
DOCTOR IS TAKEN TO SAY,
PLEASE, I NEED TO KNOW WHAT
OCCURRED DURING SURGERY.
THERE ARE ALL KINDS OF CASES
WHERE NOT WHAT IS IN THE
SURGICAL RECORD IS GOING TO
TELL YOU THE ANSWER.
DELIVERY OF A BABY, DID YOU
GO IN THIS WAY OR THAT WAY?
IF YOU DON'T HAVE THAT, YOU
CAN'T TAKE THAT DEPOSITION
UNTIL AFTER YOU FILE SUIT.
HOW DOES THE -- ARE YOU AT A
COURT IF YOUR DOCTOR CAN'T
SAY, I NEED TO BE ABLE TO
HAVE TO YOU INVESTIGATE THIS

BEFORE, AND YOU SAY I CAN'T
TAKE THAT DEPOSITION UNTIL
AFTER?
>> I'LL GIVE AN EXAMPLE.
THE WOLFSON CASE IF THE
EXPERT SAID THE FACTS ARE
LIKE I BELIEVE THEM TO BE,
THERE ARE GROUNDS TO BE
MEDICAL NEGLIGENCE, THEY CAN
TAKE A POSITION LIKE THAT
THAT SAYS I UNDERSTAND IT TO
BE LIKE THIS, AND, YES, THAT
WOULD BE NEGLIGENCE.
THAT WOULD BE SUFFICIENT.
BECAUSE CERTAINLY I AGREE
THAT YOU CAN'T -- YOU'RE AT A
STAGE WHERE YOU'RE NOT TAKING
DEPOSITIONS BUT HE DOES HAVE
A LOT.
HE REPRESENTS THE PLAINTIFF,
AND IT HAS ALL OF THE RECORDS
AT HIS DISPOSAL AND IS ABLE
TO TALK TO DR.†COTTON.
THIS IS THE ACTUAL SURGEON
WHO DID THE SUBSEQUENT
SURGERY AND IS WILLING TO SAY
I BELIEVE THERE IS
NEGLIGENCE.
AGAIN, YOU DON'T HAVE TO BE
DEFINITIVE.
WE'VE NEVER TAKEN THE
POSITION YOU HAVE TO SAY
THERE IS NEGLIGENCE BUT THE
LEGISLATURE MADE A VERY
SPECIFIC REQUIREMENT IN THAT
SOMEBODY, IN ORDER FOR US LAY
PEOPLE, ATTORNEYS, COURTS, TO
KNOW THAT THIS IS NOT JUST
THE PLAINTIFF'S COUNSEL
BRINGING A CLAIM, YOU HAVE TO
DO THAT THRESHOLD, AND IT
WASN'T DONE HERE, AND THAT'S
A VERY BASIC PROCEDURAL
REQUIREMENT OF THE PRESUIT
STATUTES, AND SO GOING BACK
TO JUST THE WHOLE
JURISDICTIONAL PROCEDURAL,
THIS IS TO ME THE SAME THING
AS EITHER A BLANK AFFIDAVIT,
NO AFFIDAVIT, IF YOU CAN HOLD

IT UP NEXT TO THE STATUTE AND SAY IT'S NOT IN COMPLIANCE, THEN YOU DIDN'T SATISFY THE PROCEDURAL REQUIREMENTS OF PRESUIT.
SO THE SECOND DISTRICT OBVIOUSLY AGREED WITH THAT POSITION AND GRANTED CERT IN THIS CASE.
UNLESS YOUR HONORS DON'T HAVE ADDITIONAL QUESTIONS, I APPRECIATE YOUR TIME, THANK YOU.
>> THANK YOU, REBUTTAL?
>> THANK YOU.
THE SECOND DISTRICT ACTUALLY, THOSE ARE THE ONES I TAKE ISSUE WAS THE LAST PAGE OF THE OPINION, THUS, THERE WAS NEVER DEFINITIVE CORROBORATION.
>> BUT THE SECOND AFFIDAVIT SAYS THE FURTHER INVESTIGATIVE CLAIM OF MEDICAL NEGLIGENCE.
>> YES.
>> IF HE SAID TO SUPPORT THE INITIATION OF A CLAIM OF MEDICAL NEGLIGENCE.
>> HE ACTUALLY SAID THAT IN THE FIRST AFFIDAVIT.
I RECOGNIZE THE PURPOSE OF THE INITIATION OF FURTHER INVESTIGATION AND PRESUIT SCREENING PROCESS.
HE KNOWS WHAT IT'S FOR, HE WROTE THIS HIMSELF.
MOST OF THE TIMES LAWYERS WRITE THESE THINGS.
>> WELL, NEXT TIME, MAYBE.
>> THE THING ABOUT THE 87 DAYS, YOUR HONOR, SO YOU KNOW IS THAT WE AGREED THE PRESUIT ENDS JUNE 16TH.
ON JUNE 13TH I WAS MAILED A LETTER BY CERTIFIED MAIL SAYING THERE IS A PROBLEM WITH DR.†KOPELMAN'S AFFIDAVIT.
I REPLY, THEY SENT A LETTER

ON JUNE 16TH DENYING THE
CLAIM.
THEY HAD NO INTEREST IN
SEEING WHAT I HAD TO SAY
ABOUT DR.†KOPELMAN'S
AFFIDAVIT OR TRYING TO CURE
IT.
THEIR AFFIDAVIT WAS DATED TWO
WEEKS BEFORE THEY DENIED THE
CLAIM.
>> IS THERE EVIDENCE IN THE
RECORD THAT THE EXPERT WOULD
SAY DEFINITIVELY THERE IS
MEDICAL NEGLIGENCE?
IS THERE ANYTHING IN THIS
RECORD BEFORE US THAT YOUR
EXPERT IS PREPARING TO SAY
THERE'S MEDICAL NEGLIGENCE?
>> I'D HAVE TO TALK TO HIM†--
>>†NO, NO.
>> HE ALWAYS WANTED TO SEE
WHAT DR.†RELL HAD TO SAY
ABOUT THE SURGERY.
THAT WAS HIS POSITION.
THANK YOU FOR YOUR ARGUMENTS.
>> COURT IS NOW IN RECESS FOR
10 MINUTES.
>>†ALL RISE.
>> NOT A BAD IDEA.
[LAUGHTER]