IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22–68

UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES and
SHANDS TEACHING HOSPITAL
AND CLINICS d/b/a SHANDS
HOSPITAL,

Petitioners,

v.

L.T. Nos. 1D21-634;
012019-CA-001827

LAURIE CARMODY,

Respondent.
_____/

On discretionary review from a conflict certified by
the First District Court of Appeal

AMICUS BRIEF OF THE FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF IDENTITY AND INTEREST

The Florida Justice Association (FJA) is a statewide association of more than 3,000 attorneys concentrating on litigation in all areas of the law. FJA members are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the common law, and the right of access to courts.

This case interests the FJA because it concerns the presuit expert-corroboration requirement of the Medical Malpractice Act. FJA members frequently represent plaintiffs in medical malpractice cases and have real-world expertise and experience in the subject matter of this case.

SUMMARY OF ARGUMENT

This Court has properly limited certiorari review, including in the context of this case. Specifically, this Court held in *Williams v. Oken* that whether a trial court erred in finding that an expert was a qualified under the Medical Malpractice Act is insufficient to merit certiorari review. Nothing material has changed since this Court unanimously decided *Williams*.

The Act's presuit requirements are given effect by the trial judges who rule on motions to dismiss and review the record for compliance with the requirements. By arguing that the presuit requirements are useless without expanded certiorari review, Petitioners and their amici are effectively arguing that trial judges are useless.

Amici's retelling of the Act's historical underpinnings is irrelevant because it sheds no light on the propriety of certiorari review in this context. Amici also acknowledge that this history has already been considered at length by this Court. In any event, a plurality of this Court has previously questioned the accuracy of the Act's historical underpinnings.

ARGUMENT

I. This Court has properly limited certiorari review, including in this specific context.

Certiorari review is extraordinary and limited. That was true two centuries ago. *See Basnet v. City of Jacksonville*, 18 Fla. 523, 526–27 (Fla. 1882). And it is still true today. *State v. Garcia*, 47 Fla. L. Weekly S269, 2022 WL 15009452, at *2 (Fla. Oct. 27, 2022).

Certiorari review is equally limited in the specific context of this case. Indeed, this Court has already held—unanimously, no less—that "[w]hether [a] trial court erred in finding that [an expert] was a qualified expert under the statute is an issue of mere legal error that is insufficient to merit certiorari review." *Williams v. Oken*, 62 So. 3d 1129, 1137 (Fla. 2011).

Petitioners and their amici brush aside *Williams* because the underlying statute—section 766.102, Florida Statutes—has since been amended. However, the amendments do not affect the reasoning in *Williams*. This Court concluded that certiorari review was inappropriate because determining whether "an expert is qualified amounts to reviewing the sufficiency of the evidence" and "granting a petition for writ of certiorari to review the sufficiency of the evidence

is inappropriate." *Williams*, 62 So. 3d at 1136. The amendments to section 766.102 do not alter this reasoning. *See* Ch. 2011-233, § 10, at 8–10, Laws of Fla.; Ch. 2013-108, § 2, at 3–4, Laws of Fla.

Of course, an expert must now specialize in the "same" specialty—not just a "similar" specialty—as the defendant to qualify under one portion of the statute. § 766.102(5)(a), Fla. Stat. But the statute does not define the term "specialty." *Id.* Accordingly, as Respondent correctly explains, determining whether two healthcare providers share the same specialty is still a fact-intensive question. Answer Br. 27–29.

Consider the following case: *Patides v. Johns Hopkins All Children's Hospital, Inc.*, No. 19-008484-CI (Fla. 6th Cir. Ct.).[1] The plaintiffs' expert was board certified in the specialty of pediatrics and the subspecialty of pediatric cardiology. Doc. 129, ¶ 3. Several defendants—two doctors and an advanced registered nurse practitioner—moved to dismiss based on the "same specialty" requirement. Doc. 132. They argued that the plaintiffs' expert was

[1] The filings in *Patides* are publicly available on the Pinellas County Clerk of Court's website: https://ccmspa.pinellascounty.org/PublicAccess/. They are cited here by docket number.

"not trained or experienced in the subspecialties of pediatric neonatology or pediatric interventional cardiology." *Id.* ¶ 7.

The plaintiffs responded that a "specialty" is not equivalent to a "subspecialty." Doc. 139 at 4. After all, the legislature has distinguished those terms.[2] What's more, the purported subspecialty in "pediatric interventional cardiology" does not exist. The American Board of Medical Specialties—which catalogs a list of specialty and subspecialty certificates—does not list a subspecialty certificate for pediatric interventional cardiology.[3] The plaintiffs therefore asked the trial court to hold an evidentiary hearing and find as a matter of fact what the relevant specialty was. *Id.* at 8–9. After holding a hearing, the court denied the defendants' motion to dismiss. Doc. 169.

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[2] *Compare* § 39.03(2)(a)–(b), Fla. Stat. (referring to a "subspecialty"), *with id.* § 39.03(5)(b)–(c) (referring to a "specialty"). *See also* §§ 395.4025(3)(d), (16)(f); 409.909(2)(a), (5); 409.9131(2)(b)–(c); 456.44(1)(b), (d); 458.311(1)(f)3.c.; 459.021(1); 774.203(6)—(7), (9), Fla. Stat.

[3] American Board of Medical Specialties, *Specialty and Subspecialty Certificates*, https://www.abms.org/member-boards/specialty-subspecialty-certificates/ (last visited Dec. 16, 2022); *see also Murciano v. State*, 208 So. 3d 130, 134 n.4 (Fla. 3d DCA 2016) (citing this website to determine what is a specialty or subspecialty).

Another example is *Donteneni v. Sanderson*, 346 So. 3d 169 (Fla. 5th DCA 2022). The plaintiff's expert was board certified in internal medicine, as was the defendant doctor. *Id.* at 170–71. Nevertheless, the defendant claimed they did not share the same specialty because, unlike him, the plaintiff's expert was not a "hospitalist"—that is, someone who examines patients in a hospital as opposed to an outpatient setting. *Id.* at 171. Although the Fifth District did not "reach the issue of whether a hospitalist is a 'specialty' under section 766.102(5)(a)1," it noted that the trial court had to make "express findings" on the issue. *Id.*

In a different case, by contrast, the defendant argued that being a "hospitalist" was not a specialty but instead was akin to being a general practitioner. Defendants' Motion for Summary Final Judgment at 7, *Foster v. Quintero*, No. 15-0587 CA (Fla. 20th Cir. Ct. July 1, 2016), 2016 WL 11687313 ("The only difference between a general practitioner and a hospitalist is that one works in the outpatient setting and one works at the hospital. Both are generalists, versus specialists . . . .").

Yet another example is *Devine v. Anga*, No. 19-001781-CI (Fla. 6th Cir. Ct.).[4] The defendant doctor was board certified in family practice. Doc. 167 ¶ 2. The plaintiff argued that the defendant's expert was not qualified to offer expert testimony in the case because he was specialized in internal medicine. *Id.* ¶ 6. After holding a hearing, the trial court found that "[t]he education and practice of Internal Medicine and Family Medicine regarding adults are so similar that [the expert], as an internist, would be qualified to offer expert testimony on the standard of care of a family medicine physician." Doc. 221 ¶ 2.

These cases show that determining whether two healthcare providers share the same specialty is still a fact-intensive question after the post-*Williams* amendments to section 766.102. Moreover, the "same specialty" requirement is just *one* of the requirements for an expert to qualify under the statute. *See* § 766.102(5)–(6). There are several other requirements, each of which involves a host of factual questions. Answer Br. 25–27.

[4] The filings in *Devine* are also available online and cited here by docket number. *Supra* at 4 n.1.

Morris v. Muniz, 252 So. 3d 1143 (Fla. 2018), is not to the contrary. *Morris* merely recognized that "where the facts regarding the presuit expert's qualifications are *unrefuted*, the trial court has not resolved any factual disputes." 252 So. 3d at 1155 (emphasis added). That makes sense: "Obviously there need be no fact findings where facts are not in issue." *Thomas v. Peyser*, 118 F.2d 369, 374 (D.C. Cir. 1941) (Rutledge, J.). This Court recognized, however, that where the facts are disputed, the trial court must make findings of fact. *See Morris*, 252 So. 3d at 1156 ("We recognize that there may be cases where the trial court must reconcile factual disputes regarding a presuit expert witness's qualifications.").

In sum, there has been no material change since *Williams*. By arguing they are entitled to certiorari review any time a court rules against them on the issue of expert qualification, Petitioners and their amici are effectively seeking a broad, permanent exception to the interlocutory appeal rule. As this Court has repeatedly said, certiorari review "should not be used to circumvent the interlocutory appeal rule." *Bd. of Trs. of the Internal Improvement Tr. Fund v. Am. Educ. Enters.*, 99 So. 3d 450, 454 (Fla. 2012) (citation omitted).

II. Petitioners and their amici are effectively arguing that trial judges are useless.

Petitioners and their amici claim that the presuit requirements are "useless" without expanded certiorari review. FHA Br. 8; *accord* FDLA Br. 19; Initial Br. 33–34. However, they ignore that they receive judicial review in the trial court. Every time a defendant moves to dismiss for failure to comply with the presuit requirements, a trial judge reviews the record to ensure those requirements are met—just like the trial judge did here. By arguing that the requirements are "useless" without expanded certiorari review, Petitioners and their amici are effectively arguing that trial judges are useless.

Petitioners' "example" illustrates the point: they speculate that a plaintiff might try to "corroborate a claim against a cardiothoracic surgeon with a presuit affidavit from a psychiatrist." Initial Br. 23. Besides giving no credit to plaintiffs, this farfetched hypothetical shows just how little faith Petitioners have in trial judges. Do they really think a trial judge would accept such an affidavit? Obviously the judge would not.

This Court should not indulge Petitioners' extreme hypothetical. *See Marozsan v. United States*, 852 F.2d 1469, 1498 (7th Cir. 1988)

(Easterbrook, J., dissenting) ("The terror of extreme hypotheticals produces much bad law."). Trial court review gives effect to the presuit requirements. If this Court were to hold otherwise, then why stop at certiorari review in the district courts? Just as Petitioners claim the presuit requirements are meaningless without expanded certiorari review, one could equally argue that the requirements are meaningless without a second layer of review in this Court.

III. Amici's historical retelling is irrelevant and questionable.

"The FDLA urges this Court to honor [the] history, tradition, and the Legislature's express intent" behind the Medical Malpractice Act. FDLA Br. 9. To that end, it offers a lengthy retelling of the Act's historical underpinnings. *Id.* at 9–14. The FHA does the same. *See* FHA Br. 8–11.

The Act's history is irrelevant because it sheds no light on the issue at hand: whether it is proper to allow certiorari review of a judge's finding that an expert is qualified under the Act. Nowhere in their historical accounts do amici address that issue. Instead, they discuss reforms that, as amici acknowledge, "have been discussed at length by this Court" and are "well documented." FDLA Br. 11; FHA Br. 12. Nothing is gained by repeating that here.

Even if it were relevant, amici's historical retelling is questionable. A plurality of this Court previously determined that "the conclusions reached by the Florida Legislature as to the existence of a medical malpractice crisis are not fully supported by available data." *Estate of McCall v. United States*, 134 So. 3d 894, 906 (Fla. 2014).

CONCLUSION

This Court should approve the First District's decision and disapprove the decisions of the Second and Fifth Districts to the extent they conflict with the First District's decision. *See Clare v. Lynch*, 220 So. 3d 1258 (Fla. 2d DCA 2017); *Riggenbach v. Rhodes*, 267 So. 3d 551 (Fla. 5th DCA 2019).

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I CERTIFY that a true and correct copy of this document has been electronically filed via the Florida Courts E-Filing Portal on December 16, 2022, which will serve an electronic copy of the document to the following counsel of record:

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I CERTIFY that this document complies with the word-count limit of Florida Rule of Appellate Procedure 9.370(b) because it contains 1,931 words, not including parts excluded by rule 9.045(e). This document also complies with the line-spacing, type-size, and typeface requirements of rule 9.045(b).

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