IN THE SUPREME COURT OF FLORIDA

Case No.: SC22-0068

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

Petitioners,

v.

LAURIE CARMODY,

Respondent.
_____/

AMICUS BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

KANSAS R. GOODEN	JESSICA N. COCHRAN
Florida Bar No.: 058707 kgooden@boydjen.com BOYD & JENERETTE, PA 11767 S. Dixie Hwy., #274 Miami, FL 33156 Tel: (305) 537-1238 ***Chair of the FDLA's Amicus Committee***	Florida Bar No.: 96304 jcochran@bgrplaw.com BUSH, GRAZIANO, RICE & PLATTER, P.A. 100 S. Ashley Drive, Suite 1400 Tampa, FL 33602-5302 Tel: (813) 228-7000
COUNSEL FOR FLORIDA DEFENSE LAWYERS ASSOCIATION	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes and Laws

Miscellaneous

PRELIMINARY STATEMENT

This amicus curiae brief is submitted by the Florida Defense Lawyers Association ("FDLA") in support of the Petitioners University of Florida Board of Trustees, and Shands Teaching Hospital and Clinics, d/b/a Shands Hospital.

STATEMENT OF IDENTITY AND INTEREST

The FDLA is a statewide organization of defense attorneys formed in 1967, and it has over 1,200 members. The goal of the FDLA is to "support and work for the improvement of the adversary system of jurisprudence in our courts." The FLDA strives to promote "fairness and justice in the law for all parties." The FDLA maintains an active amicus curiae program in which members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice, many of which concern tort, litigation, and insurance issues.

This case has statewide impact and will impact every medical negligence claim. It concerns Florida's statutory presuit requirements for medical negligence claims and the certiorari jurisdiction afforded to the Florida District Courts of Appeal to address disputes concerning compliance

with the presuit requirements of Chapter 766, Florida Statutes. FDLA is uniquely situated to provide this Court with input as its members are those representing defendants in these situations or serving as in-house corporate counsel for these healthcare institutions.

SUMMARY OF THE ARGUMENT

The medical negligence statutory presuit requirements were enacted by the Florida Legislature to prevent the filing of noncompliant or frivolous claims. To ensure a claim has merit, the Legislature created specific and detailed statutes requiring any medical negligence claim be corroborated by a qualified medical expert prior to a plaintiff being permitted to file a claim in the courts of Florida. If a claim does not satisfy the stringent presuit requirements, including the requirement of corroboration by a qualified medical expert, the presuit statutes mandate dismissal of such claim. If a trial court's departure from the law in refusing to dismiss cannot be corrected via certiorari review, a defendant will suffer irreparable harm that cannot be corrected on appeal. It undermines the very purpose of the presuit medical expert requirement. Thus, certiorari review is necessary to review any noncompliance with the presuit statutes, including disputes over a presuit

medical expert's qualifications to provide a corroborating opinion. This Court should quash the First District Court of Appeal's decision.

ARGUMENT

I. CERTIORARI REVIEW IS NECESSARY TO ADDRESS COMPLIANCE WITH PRESUIT REQUIREMENTS, INCLUDING QUALIFICATION OF THE CORROBORATING EXPERT.

A. The Medical Malpractice Presuit Requirements are Intended to Eliminate Meritless Claims and Encourage Early Resolution

The history surrounding the formation of the Medical Malpractice Act, and the subsequent amendments thereto, demonstrates the purpose of the statutorily mandated presuit requirements. It reveals the Legislature's repeated attempts to curtail the filing of meritless medical negligence claims, and to reduce the cost of medical malpractice insurance. The FDLA urges this Court to honor this history, tradition, and the Legislature's express intent set forth in the plain text of Chapter 766, Florida Statutes.

In 1984, Governor Bob Graham, noting the persistence of medical malpractice insurance problems throughout the State, created a Governor's Task Force on Medical Malpractice. The Task Force made numerous recommendations, which included tort reform, alternative dispute resolution, and insurance reform.

The following year, the Florida Legislature enacted Comprehensive Medical Malpractice Reform Act of 1985, the predecessor to our current Medical Malpractice Act. Ch. 85- 175, § 14, at 1199-1200, Laws of Fla.; Cohen v. Dauphinee, 739 So. 2d 68, 70 (Fla. 1999). This early version of the presuit notice and investigation obligations merely required that a plaintiff certify that he or she conducted a reasonable investigation and in good faith believed there were grounds to file the action. Id. These provisions were upheld by this Court. See, e.g., Williams v. Campagnulo, 588 So. 2d 982 (Fla. 1991).

In 1986, the Legislature identified a financial crisis with the insurance market, which included malpractice liability insurance. This resulted in the Tort Reform and Insurance Act of 1986. See Ch. 86-160, Laws of Fla.; Smith v. Dep't of Ins., 507 So. 2d 1080, 1085 (Fla. 1987). See generally Pamela B. Fort, Theodore G. Granger, Ricky L. Polston, & Sheri L. Wilkes, Florida's Tort Reform: Response to a Persistent Problem, 14 Fla. St. U. L. Rev. 505 (1986).

However, criticism began to grow as to the ineffectiveness and futility of the early presuit medical negligence provisions. In 1988, the Legislature responded. Cohen, 739 So. 2d at 71; Ch. 88-1, §§ 48-53, at 164-68, Laws of Fla. The Legislature expressly recognized that large medical malpractice

recoveries had caused medical malpractice liability insurance premiums to skyrocket, thereby causing medical care costs to patients to increase, and making medical malpractice liability insurance unavailable to some doctors. § 766.201(1), Fla. Stat. (1988); Michael v. Med. Staffing Network, Inc., 947 So. 2d 614, 618 (Fla. 3d DCA 2007). In other words, this was a response to the healthcare crisis of increased cost, or outright unavailability, of medical malpractice insurance—especially to those in high-risk specialties. § 766.201(1), Fla. Stat. (1988).

At that time, the Legislature implemented a mandatory presuit investigation for all medical negligence claims. § 766.201(2), Fla. Stat. (1988); Kukral v. Mekras, 679 So. 2d 278, 280 (Fla. 1996) (explaining Chapter 766 sets out "a complex presuit investigation procedure that both the claimant and defendant *must* follow before a medical negligence claim may be brought in court"). These reforms have been discussed at length by this Court. See University of Miami v. Echarte, 618 So. 2d 189, 191-92 (Fla. 1993); St. Mary's Hosp., Inc. v. Phillipe, 769 So. 2d 961, 968-70 (Fla. 2000); Barlow v. North Okaloosa Med. Ctr., 877 So. 2d 655, 657 (Fla. 2004).

The 1988 amendment required that the claimant corroborate his or her medical malpractice claim with a "verified medical expert opinion." § 766.203(2), Fla. Stat. (1988). This corroborating expert, however, was

merely required to have specialized training, experience, or knowledge or be a similar healthcare care provider. § 766.102, Fla. Stat. (1988). There was also a provision under which a trial court could consider other factors not set forth in the statute. Under this scheme, trial courts were forced to undergo a substantive and subjective analysis to determine an expert's qualifications.

In April 2002, the American Medical Association declared that Florida was in the midst of a medical insurance crisis. Estate of McCall v. United States, 663 F. Supp. 2d 1276, 1300 n.38 (N.D. Fla. 2009). A few short months later, Governor Jeb Bush created a Select Task Force to examine the crisis and make recommendations. Id.; Executive Order No. 02-041. "The Task Force made findings and recommendations, among which was its finding that absent corrective action, 'this crisis will lead to the continued deterioration of patient access to medical care.'" Estate of McCall, 663 F. Supp. 2d at 1300 n.38. Notably, the Governor's Task Force identified a fairness problem with allowing a trial judge to decide who qualifies as an expert as it would produce varying, case-by-case results because of the subjective nature of the analysis. Governor's Select Task Force on Healthcare Professional Liability Insurance, Final Report and Recommendations, at 237-38 (Jan. 20, 2003). The Florida House convened their own special task force and issued a lengthy report. See Fla. House

Select Committee on Medical Liability Insurance Report, Final Report (March 2003).

As a result, the presuit requirements were heightened in 2003.[1] The Legislature narrowed the class of individuals who could provide valid, verified medical opinions. See Jeffrey A. Hunt, D.O., PA v. Huppman, 28 So. 3d 989, 992 (Fla. 2d DCA 2010). Under the heightened requirements, claimants bore the burden of proving that the defendant healthcare provider departed from the standard of care applicable to "that health care provider." § 766.102(1), Fla. Stat. (2003). The corroborating expert was to be in the same or similar specialty to that of the provider accused of medical malpractice. In other words, the statute required a direct and equivalent link between the qualifications of the corroborating expert and the health care provider accused of malpractice. Id.

In 2013—two years after this Court's decision in Williams v. Oken, 62 So. 3d 1129 (Fla. 2011)—the Legislature again amended section 766.102, Florida Statutes. See Ch. 2013-108, Laws of Fla. This amendment removed the "similar specialty" option. It also eliminated the subsection that allowed a trial court to determine whether an expert was qualified on grounds other

[1] In addition to the reports, the Legislature received a tremendous amount of evidence, including numerous days of testimony and over 1,600 sworn affidavits from Florida physicians.

than those specified in the statute. The statute now requires the corroborating expert to specialize in *the same specialty* as the potential defendant physician. § 766.102(5), Fla. Stat. (2013).

Importantly, the 2013 amendments eliminated any discretion that the trial court had. The trial court no longer has to weigh evidence and to perform any substantive analysis or determination of an expert's qualifications. A trial court need only determine whether the corroborating expert practices within "*the same specialty*" as the potential defendant. For instance, if the potential defendant is a vascular surgeon, is the corroborating expert also a vascular surgeon? See Morris v. Muniz, 252 So. 3d 1143, 1155-56 (Fla. 2018) (the inquiry of whether a presuit expert is qualified "requires simply construing the statute's requirements and determining whether the expert's qualifications align"); Riggenbach v. Rhodes, 267 So. 3d 551 (Fla. 5th DCA 2019) (noting the "same specialty" is to be taken literally and is not synonymous with physicians with different specialties providing similar treatment to the same areas of the body); Clare v. Lynch, 220 So. 3d 1258, 1261-62 (Fla. 2d DCA 2017) (finding a podiatrist was not statutorily qualified to provide expert opinions regarding the care and treatment provided by the defendant, who was an orthopedic surgeon); Davis v. Karr, 264 So. 3d 279 (Fla. 5th DCA 2019) (because defendant was an orthopedic surgeon, the plain language of

§766.102 required plaintiff to submit a presuit expert affidavit from an orthopedic surgeon).

The 2013 amendment underscores the importance of the corroborating expert affidavit. It provides and ensures justification by a qualified expert for the claim so as to avoid frivolous lawsuits. For example, if a gastroenterologist provides a presuit corroborating expert affidavit against a hematologist, opining the hematologist breached the standard of care, the potential defendant hematologist would not be assured "that there is justification for the Plaintiff's claim." Kukral, 679 So. 2d at 282. This is because a gastroenterologist does not have sufficient knowledge of the practice of hematology to provide such a standard of care opinion. Thus, unless a medical expert is qualified to provide the opinion, the affidavit cannot serve its purpose—to assure a potential defendant that the claim was preceded by a reasonable, good faith investigation and that there is justification for the claim. A claimant's presuit affidavit from an unqualified expert serves no purpose and would be just as if the claimant provided no affidavit at all. Clare, 220 So. 3d at 1259-60 (a presuit affidavit from an unqualified medical expert would "operate to effectively excuse [claimant] from the presuit requirements of chapter 766").

Simply put, the 2013 amendments made the issue one of simple statutory compliance. See Clare, 220 So. 3d at 1261.

Since their introduction, the presuit requirements evidenced the Legislature's policy and intent to eliminate frivolous claims. Barlow, 877 So. 2d at 657; Echarte, 618 So. 2d at 192. Eliminating frivolous claims necessarily means that any claims that do not comply with the presuit statutory requirements are barred. Barring such claims at an early stage is what the text mandates. It satisfies the policy to keep healthcare providers practicing fully within the State of Florida. It helps reduce the cost of defense, and in turn the cost of insurance, for those frivolous claims.

The requirement of the corroborating medical expert opinion is arguably the most important presuit requirement enacted to eliminate frivolous claims. See Kukral, 679 So. 2d at 282 (requiring written expert opinion from a qualified expert assures potential defendants "that there is justification for the Plaintiff's claim, i.e., that it is not a frivolous medical malpractice claim . . . that the claim is legitimate"); Wolfsen v. Applegate, 619 So. 2d 1050, 1054-55 (Fla. 1st DCA 1993) (the purpose of reviewing a corroborating affidavit is "to ensure that a claim or denial has been preceded by a reasonable investigation, and that it rests on a reasonable basis – i.e., to eliminate frivolous claims and defenses"); Archer v. Maddux, 645 So. 2d

544, 546-547 (Fla. 1st DCA 1994) ("[E]xpert opinion requirement is designed 'to prevent the filing of baseless litigation . . . [and] to corroborate that the claim is legitimate' . . . No party should be called on to defend at trial against allegations no competent witness can be found to support") (citing to Stebilla v. Musallem, 595 So. 2d 136, 139 (Fla. 5th DCA 1992)).

B. Dismissal is Required for Any Noncompliance with Presuit Statutes

Should a plaintiff fail to comply with the mandatory presuit requirements prior to filing suit, a trial court is required to dismiss plaintiff's Complaint. § 766.206(2), Fla. Stat. (2013) ("the court *shall* dismiss the claim") (emphasis added). Full compliance with the statutory requirements are mandated. See § 766.104(1), Fla. Stat. (2013) ("*No action shall be filed . . .*); see also Musculoskeletal Inst. v. Parham, 745 So. 2d 946, 950-51 (Fla. 1999) ("[N]o action under chapter 766 may 'commence' by filing a complaint in the courts of Florida without compliance with these stringent statutory predicates.").

Dismissal is the only means to avoid these frivolous claims that do not comply with the statute. It spares the healthcare providers from having to defend such claims, and spares the public the increased costs and reduced availability of healthcare resulting from the costly litigation of such claims. See St. Mary's Hosp., Inc., 769 So. 2d at 969-70.

C. Early Intervention is Required to Avoid Irreparable Harm

Early appellate intervention via a petition for writ certiorari is necessary and appropriate to review *any* issue pertaining to compliance with the presuit procedures. See Pearlstein v. Malunney, 500 So. 2d 585, 587-88 (Fla. 2d DCA 1986) ("[F]or petitioners to receive the benefits conferred upon them . . . by [the medical malpractice presuit statutes], it is necessary and appropriate for us to intervene at this juncture"). Without early intervention to correct a trial court's departure from the law by failing to dismiss a noncompliant lawsuit, the defendant would suffer irreparable harm that cannot be remedied on plenary appeal. The defendant loses its benefits bestowed upon it by the Medical Malpractice Act—its right to be free from frivolous claims, to evaluate reasonable claims, and to settle legitimate claims. See, e.g., Holmes Reg'l Med. Ctr., Inc. v. Dumigan, 151 So. 3d 1282 (Fla. 5th DCA 2014); Cent. Fla. Reg'l Hosp. v. Hill, 721 So. 2d 404 (Fla. 5th DCA 1988).

Indeed, the entire purpose of the presuit requirements are to screen lawsuits and claims—to separate the wheat from the chaff. Parkway Bank v. Fort Myers Armature Works, Inc., 658 So. 2d 646, 649 (Fla. 2d DCA 1995). Without immediate review, the presuit requirements are meaningless. See generally Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 456 (Fla. 1992) ("It is a cardinal rule of statutory interpretation that

courts should avoid readings that would render part of a statute meaningless."); State v. Goode, 830 So. 2d 817, 824 (Fla. 2002) ("[A] basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless."). As noted above, an insufficient affidavit is indistinguishable from no affidavit.

A defendant would be forced to litigate lengthy and expensive lawsuits that should not be in Court in the first instance. While the cost of litigation usually is not considered irreparable harm, the Fifth District has explained that "general principle presupposes the existence of otherwise proper litigation." Paine, Webber, Jackson & Curtis v. Lucas, 411 So. 2d 1369, 1370-71 (Fla. 5th DCA 1982). See also Palms W. Hosp. Ltd. P'ship v. Burns, 83 So. 3d 785, 788 (Fla. 4th DCA 2011) (holding that "irreparable harm can be shown where a court incorrectly denies a motion to dismiss for failure to follow pre-suit requirements, as doing so would eliminate the cost-saving features the Act was intended to create."). To allow this case to continue to move forward completely undermines the express language of the Medical Malpractice Act and renders it meaningless as the entire purpose will be defeated. The First District's decision flies in the face of the repeated emphasis and importance the Legislature has placed on the corroborating

expert affidavit. Indeed, it encourages parties to not comply with the plain text of the statute and ignore the rule of law.

CONCLUSION

Medical malpractice claims are some of the most costly lawsuits to litigate and are the subject of frequent attention by the Florida Legislature. The Legislature has made its intent in creating, and amending, the medical negligence presuit requirements very clear—to bar, at an early stage, any noncompliant or frivolous claims so as to keep healthcare providers practicing within the State of Florida. The gravity and urgency of any error involving medical malpractice presuit requirements mandates the availability of certiorari review to correct such errors. This Court should quash the First District Court of Appeal's opinion below.

WHEREFORE, FLORIDA DEFENSE LAWYERS ASSOCIATION respectfully requests this Court to quash the First District Court of Appeal's decision.

/s/ Kansas R. Gooden **KANSAS R. GOODEN** Florida Bar No.: 058707 kgooden@boydjen.com BOYD & JENERETTE, PA 11767 S. Dixie Hwy., #274 Miami, FL 33156 Tel: (305) 537-1238 ***Chair of the FDLA's Amicus Committee***	***/s/ Jessica N. Cochran*** **JESSICA N. COCHRAN** Florida Bar No.: 96304 jcochran@bgrplaw.com BUSH, GRAZIANO, RICE & PLATTER, P.A. 100 S. Ashley Drive, Suite 1400 Tampa, FL 33602-5302 Tel: (813) 228-7000
COUNSEL FOR FLORIDA DEFENSE LAWYERS ASSOCIATION	

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been served via e-mail to **Christine R. Davis, Esq.,** David Appeals, PLLC, 1400 Village Square Blvd., Suite 3-181, Tallahassee, FL 32312; (cdavis@davidappeals.com; eservice@davidappeals.com), **Frances E. Pierce, III, Esq.,** Mateer & Harbert, 225 E. Robinson St., Suite 600, Orlando, FL 32801 (litpleadings@mateerharbert.com; fpierce@mateerharbert.com),; **Kennan G. Dandar, Esq.**, Dandar & Dandar,P.A., PO Box 55444, St. Petersburg, FL 33702 (kgd@dandarlaw.net; tmd@dandarlaw.net; dmw@dandarlaw.net); **Adam Richardson, Esq**., Burlington & Rockenbach, P.A., 444 West Railroad Avenue, Suite 350, West Palm Beach, FL 33401 (ajr@flappellatelaw.com; jrh@flappellatelaw.com) on this 12th day of September, 2022.

/s/ Kansas R. Gooden
KANSAS R. GOODEN

CERTIFICATION OF COMPLIANCE

WE HEREBY CERTIFY that this Amicus Brief has been typed using the 14-point Ariel font and contains less than 5,000 words as required by Florida Rules of Appellate Procedure 9.045 and 9.370(b).

/s/ Kansas R. Gooden
KANSAS R. GOODEN