

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 HOSPITAL ASSOCIATION, FLORIDA MEDICAL
ASSOCIATION AND THE LITIGATION CENTER OF THE
AMERICAN MEDICAL ASSOCIATION
IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

PRELIMINARY STATEMENT.....5

STATEMENT OF IDENTITY AND INTEREST.....5

SUMMARY OF ARGUMENT.....7

ARGUMENT.....8

CONCLUSION.....19

CERTIFICATE OF
SERVICE.....19

CERTIFICATE OF
COMPLIANCE.....20

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Pages</u> |
|--|---------------------|
| <u>Archer v. Maddux</u> , 645 So. 2d 544, 546-547 (Fla. 1st DCA 1994)..... | 11 |
| <u>Cent. Fla. Reg'l Hosp. v. Hill</u> , 721 So. 2d 404, 405 (Fla. 5 th DCA 1998) | 10 |
| <u>Clare v. Lynch</u> , 220 So. 3d 1258, 1260-61 (Fla. 2d DCA 2017) | 18 |
| <u>Daniels v. Fla. Dep't of Health</u> , 898 So. 2d 61, 64 (Fla. 2005) | 19 |
| <u>Johnson v. State</u> , 336 So. 2d 93, 95 (Fla. 1976) | 12 |
| <u>Kukral v. Mekras</u> , 679 So. 2d. 278, 284, (Fla. 1996) | 11 |
| <u>Musculoskeletal Inst. Chartered v. Parham</u> , 745 So. 2d 946, 949-51 (Fla. 1999) | 15 |
| <u>Myers v. Pasco Cty. Sch. Bd.</u> , 246 So. 3d 1278 (Fla. 1st DCA 2018)..... | 18 |
| <u>Parkway Bank v. Fort Myers Armature Works, Inc.</u> , 658 So. 2d. 646, 649 (Fla. 2 nd DCA 1995) | 10 |
| <u>Pearlstein v. Malunney</u> , 500 So. 2d. 585, 587 (Fla. 2 nd DCA 1986) | 10 |
| <u>Riggenbach v. Rhodes</u> , 267 So. 2d 551, 553-56 (Fla. 5th DCA 2019) | 18 |
| <u>University of Miami v. Echarte</u> , 618 So. 2d. 189 (Fla. 1993) | 9 |

Weiss v. Pratt,
53 So. 3d 395,400 (Fla. 4th DCA 2011)16

Williams v. Oken,
62 So. 3d 1129, 1133 (Fla. 2011).....15

Statutes and Laws

§ 766.102, Fla. Stat......6, 15-17

§ 766.201, Fla. Stat......10

§ 766.206, Fla. Stat......15, 19

Miscellaneous

Academic Task Force for Review of the Insurance and Tort Systems
Preliminary Fact-Finding Report on Medical Malpractice
(Aug. 14, 1987).....9

Aon/ASHRM Hospital and Physician Professional Liability
Benchmark, (September 2022).....13

The Federalist No. 78.....12

Fla. House Select Committee on Medical Liability Insurance
Report.....12

PRELIMINARY STATEMENT

This amicus curiae brief is submitted by the Florida Hospital Association (“FHA”), Florida Medical Association (“FMA”) and the Litigation Center of the American Medical Association (“AMA”) 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 Florida Hospital Association (“FHA”) is a Florida nonprofit trade association consisting of 342 hospitals and health systems in Florida. The FHA represents its members on matters of common interest before all three branches of government and regularly appears as amicus curiae to address issues affecting its members in the courts of Florida.

Founded in 1874, the Florida Medical Association is a professional association dedicated to the service and assistance of Doctors of Medicine and Doctors of Osteopathic Medicine in Florida. The FMA represents more than 25,000 members on issues of legislation and regulatory affairs, medical economics and education, public health, and ethical and legal issues. FMA advocates for physicians and their patients to promote public health, ensure the

highest standards of medical practice, and to enhance the quality and availability of health care in the Sunshine State.

Founded in 1847, the Litigation Center of the American Medical Association (AMA) is the largest and only national association that convenes 190+ state and specialty medical societies and other critical stakeholders. Throughout history, the AMA has always followed its mission: to promote the art and science of medicine and the betterment of public health. The Litigation Center of the American Medical Association and State Medical Societies is the voice of America's medical profession in legal proceedings across the country. The mission of the Litigation Center is to represent the interests of the medical profession in the courts.

The FHA, FMA, and AMA have a vital interest in the issues presented. The requirement under Florida Statute §766.102, that a claimant obtain a supporting affidavit from a medical expert in the “same specialty” as a prospective defendant before filing a medical malpractice lawsuit, helps protect healthcare providers from frivolous claims. The decision of the Court in this case will have statewide impact on medical malpractice litigation.

SUMMARY OF ARGUMENT

The pre-suit investigation process of medical malpractice claims was created by the Legislature in response to a litigation crisis facing Florida's healthcare providers. It was built to serve as a framework to investigate potential lawsuits before they were filed, so that frivolous claims could be prevented. One of the key components of the statutory scheme is to have the matter reviewed by a qualified medical expert that practices in the same specialty as the prospective defendant. A Plaintiff's failure to comply with the pre-suit requirements requires dismissal of their claim.

Certiorari review of the sufficiency of a Plaintiff's expert, before a defendant is forced into costly litigation, is essential to uphold the Legislative purpose behind the pre-suit statutes. Receding from the stringent requirements for corroborating experts under the statutes will serve to promote unsupported claims at a time when Florida's doctors and hospitals are subject to losses associated with medical malpractice lawsuits that are well above national averages. This Court should quash the decision of the First District to avoid subjecting the Petitioner to irreparable harm and rendering the pre-suit statutes a dead letter.

ARGUMENT

I. Certiorari Review of a Plaintiff's Compliance with Florida's Mandatory Pre-Suit Screening Statute for Medical Malpractice Actions is Essential to Protect Healthcare Providers from Frivolous Claims

The First District's decision to deny Shand's petition for certiorari review based on a finding that irreparable harm had not been shown, was in error and should be quashed. Allowing this decision to stand would serve to render the pre-suit screening requirements for medical malpractice claims in Florida useless. Further, such a decision could serve as the basis to deprive Florida healthcare providers of the protections and substantive rights conferred upon them by the Legislature.

Chapter 766 of the Florida Statutes was born out of concern that Florida needed a pre-suit process in which medical malpractice claims could be investigated, analyzed, and potentially resolved to help control an ongoing crisis. The statutes were the result of arduous research and hours of testimony regarding the impact of lawsuits on medical providers throughout the state. When considering the need for the requirements set for the in what is now Chapter 766, the

Legislature convened a task force to review the impacts of medical malpractice litigation on Florida's medical system. See *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993); *Academic Task Force for Review of the Insurance and Tort Systems Preliminary Fact-Finding Report on Medical Malpractice* (Aug. 14, 1987). The findings of the task force provided startling examples of skyrocketing insurance premiums and a crippling tort environment for medical providers in Florida. Among its many findings, the Task Force found that: 1) a family physician who performed no surgery and practiced outside Dade and Broward Counties saw a 229% increase in medical malpractice insurance premiums over an approximately four the period and 2) a family physician who performed no surgery and practiced in Dade or Broward County saw a 300% increase in medical malpractice insurance premiums for the same period. Furthermore, the Task Force found that rates for specialties also increased sharply. For example, the rates for obstetricians increased by 444% in Dade and Broward Counties, as compared to 304% in the rest of the state. Simply put, the Legislature recognized that Florida's healthcare providers needed protection from the onslaught of medical malpractice lawsuits and created a statutory scheme to provide it. § 766.201(1), Fla. Stat. (1988).

Any order allowing a plaintiff to proceed with litigation when the plaintiff has not complied with the pre-suit screening statutes results in material injury to the defendant See *Cent. Fla. Reg'l Hosp. v. Hill*, 721 So. 2d 404, 405 (Fla. 5th DCA 1998). If providers are forced to defend lawsuits when Plaintiffs have failed to produce a competent witness to support the case, there is no way to cure the harm that occurs because the purpose of the requirement is “to avoid the filing of the lawsuit in the first instance.” *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 649 (Fla. 2d DCA 1995). Suggesting that a healthcare provider must wait until they suffer an adverse outcome of an unsupported case to seek appellate relief would be no relief at all. *Pearlstein v. Malunney*, 500 So. 2d 585, 587 (Fla. 2d DCA 1986).

This Court has stated that while the medical malpractice statutory scheme must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts, it must still *be interpreted in a manner that carries out the legislative policy of screening out frivolous lawsuits.* *Kukral v. Mekras*, 679 So. 2d 278, 284 (Fla. 1996) (emphasis added). There is perhaps no more important feature of the pre-suit screening process than having a qualified expert render an opinion as to whether a

reasonable basis for bringing the suit exists. The First District's ruling in this matter would entirely frustrate that legislative policy by permitting prospective plaintiffs to bring cases based upon unqualified opinions. Meanwhile, Florida's healthcare providers would have no meaningful ability to avail themselves to the protections granted to them by the Legislature. *See Archer v. Maddux*, 645 So. 2d 544, 546-547 (Fla. 1st DCA 1994) (" . . . No party should be called on to defend at trial against allegations no competent witness can be found to support") Unquestionably, pre-suit screening of medical malpractice cases without certiorari review, renders Chapter 766 a nullity.

II. Healthcare Providers in Florida Remain at the Center of a System in Crisis and Require the Protections of the Pre-suit Screening Process to be Meaningfully Enforced

A concerning refrain from opponents of the Legislative protections for healthcare providers, is to suggest that the medical malpractice crisis either never existed, or that it has somehow passed.

However, any proposed departure or recession from the existing statutory scheme would ask the Court to improperly interject itself

into the Legislative function. The legislative branch has sole power to appropriate and enact substantive policy. *Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976); *The Federalist No. 78*, ("The legislature ... prescribes the rules by which the duties and rights of every citizen are to be regulated."). The above noted concerns of the Legislature when passing the pre-suit screening statutes are well documented. *See Fla. House Select Committee on Medical Liability Insurance Report, Final Report* (March 2003). To ignore the work of the Legislature would be an impermissible encroachment on the separation of powers.

This position also runs contrary to data from across the country and in the state of Florida regarding the current impact of medical malpractice litigation. In the most recent Aon/ASHRM Hospital and Physician Professional Liability Benchmark, an analysis of claim data by Beazley plc., was included, which represents more than 50% of all U.S. hospital beds and more than 1 million unique claims. For the coming year, Beazley predicts a 5% annual inflationary increase in the cost of medical malpractice claims, citing "higher jury awards, together with evidence of runaway verdict values, driving increased expectations on behalf of the plaintiffs' bar as well as increased downside risk (i.e., larger realistic worst-case outcomes) for

defendant hospitals, culminating in increased settlement values” being responsible for this troubling surge. *Aon/ASHRM Hospital and Physician Professional Liability Benchmark*, September 2022.

Unfortunately, Florida healthcare providers are at the center of this troubling national trend. Loss rates for Florida medical malpractice claims have increased each year but one since 2008. *Id.* Florida has experienced the highest annual trend rate in the nation among states analyzed, with most years being between 2.4 and 2.8 times the national average. *Id.* Claim severity (the amount of money required to resolve medical malpractice claims) has also increased sharply and projected annual trends are well above the national average. *Id.* The average indemnity payment has risen from \$235,500.00 in 2011 to \$371,300.00 in 2021 for all areas of the State excluding South Florida. In South Florida, the average indemnity payment has skyrocketed to \$474,000. *Id.* Claim frequency has also steadily increased at a higher rate than the national average. *Id.* Based on review of the entire country, the state projected to have the most expensive loss rates for medical malpractice claims in 2022 is Florida. South Florida is calculated to incur a \$10,460 loss rate per occupied bed equivalent (a standard measure of overall hospital professional liability risk including weighted contribution from 11

hospital volume metrics) and the rest of the state a \$6,910 loss per occupied bed equivalent. *Id.* These projections ensure that Florida will continue to be the nation’s leader in total costs related to medical malpractice claims. *Id.* Eroding the effectiveness of the pre-suit screening process, to possibly allow *more* claims to be filed, is a counterintuitive step in the wrong direction considering the burgeoning costs of lawsuits against those who provide medical care for Florida’s citizens.

III. The Plain Language of Florida Statute §766.102(5)
Requires Dismissal of Cases that are Unsupported by a
Qualified Expert

The Legislature clearly stated that the Court “shall dismiss the claim,” when a Plaintiff fails to comply with the pre-suit investigation process. § 766.206(2), Fla. Stat. (2013). This Court has likewise recognized the importance of the condition precedent, holding that “stringent pre-suit investigatory requirements are the hallmark” of the pre-suit framework in medical malpractice cases. *Musculoskeletal Inst. Chartered v. Parham*, 745 So. 2d 946, 949 (Fla. 1999). A review of the evolution of the current version of §766.102(5), provides important insight into the failure of Respondent to meet those

investigatory requirements, and why this matter requires dismissal by the Court.

Prior to 2013, prospective Plaintiffs were required to provide an affidavit from a corroborating expert that was, “in the same or similar specialty to that of the provider accused of medical malpractice.” §766.102(1), Fla. Stat. (2003). Unfortunately, “similar specialty” was not defined within the statutes. Moreover, under this version of the statute, trial courts were tasked with considering evidence concerning a proposed expert’s qualifications and deciding to accept or reject that expert’s opinions based on that evidence. *See*, §766.102(14), Florida Statutes (2012); §766.102(12), Florida Statutes (2007). As a result, case law interpreting the phrase was inconsistent. *See, Weiss v. Pratt*, 53 So. 3d 395,400 (Fla. 4th DCA 2011) (“What is clear is that nothing is clear about “similar specialty.”)

The former version of the statute also raised questions over when and whether certiorari review was available to a defendant subjected to a claim unsupported by truly qualified expert. The issue was highlighted by this Court in *Williams v. Oken*, 62 So. 3d 1129, 1133 (Fla. 2011), when it ruled that certiorari review was unavailable to “re-weigh” the sufficiency of evidence as to whether two experts

were “similar enough” to comply with the statute. The issues in these cases and others cried out for Legislative clarification.

In 2013, the legislature responded, amending the statutory definition of "medical expert" to require the corroborating affidavit to be from a provider that practices in the "same specialty" as the defendant health care provider. The statute provides in pertinent part:

“A person may not give expert testimony concerning the prevailing professional standard of care unless the person is a health care provider who holds an active and valid license and conducts a complete review of the pertinent medical records and meets the following criteria:

(a) If the health care provider against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

1. Specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; and

2. Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:

a. The active clinical practice of, or consulting with respect to, the same specialty;”

§ 766.102(5), Fla. Stat. (2014).

Because the amended statute strictly limited the qualifications of corroborating experts to only the “same specialty,” the need for judicial interpretation of evidence needed under the previous version was likewise eliminated.

The term "same specialty" is now to be read literally and the term should not be considered synonymous with physicians with different specialties, even when they provide similar treatment to the same areas of the body. *Riggenbach v. Rhodes*, 267 So. 3d 551, 555 (Fla. 5th DCA 2019). In *Clare v. Lynch*, 220 So. 3d 1258 (Fla. 2d DCA 2017), the Second District provided a guiding example of the clarity offered by the 2013 amendment. The Court held that a board-certified podiatrist was not qualified to provide a pre-suit medical malpractice expert affidavit, adverse to a board-certified orthopedic surgeon who performed foot surgery on the plaintiff. *Id.* at 1261-62. The Court explained, “while both doctors' practices focus primarily on foot and ankle surgery, these two doctors have different training and practice in different specialties." *Id.* at 1260-61.

In *Myers v. Pasco Cty. Sch. Bd.*, 246 So. 3d 1278 (Fla. 1st DCA 2018) the First District analyzed the phrase “same specialty” in the context of a workers' compensation claim. In that case the First District was asked to consider whether an Administrative Law Judge’s decision allowing a neurosurgeon to be substituted for an orthopedic surgeon under a provision that allows a claimant to request a change in their treating physician. In reversing the decision of the lower tribunal, the First District stated, “[a] physician who provides similar services in a different specialty does not qualify as a doctor in the 'same specialty' because—quite simply—'same' is different than 'similar.'" *Id.*

Since the 2013 amendments, the statutory language governing expert affidavits in the medical malpractice pre-suit process is now clear. When a prospective plaintiff offers anything other than an affidavit from an expert who practices in the exact same specialty, the case must be dismissed. See § 766.206(2), Fla. Stat. (2013); *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) (“We endeavor to construe statutes to effectuate the intent of the Legislature...when the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or

resort to rules of statutory construction to ascertain intent.”)(quoting *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005)).

CONCLUSION

For the foregoing reasons, this Court should quash the First District Court of Appeal’s opinion below.

WHEREFORE, FLORIDA HOSPITAL ASSOCIATION, FLORIDA MEDICAL ASSOCIATION, and the LITIGATION CENTER OF THE AMERICAN MEDICAL ASSOCIATION respectfully requests this Court to quash the First District Court of Appeal’s decision.

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I HEREBY CERTIFY that this Amicus Brief has been typed using
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