IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

Case No. SC22-68

v.

LAURIE CARMODY,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT

On review from the District Court of Appeal, First District

Kennan G. Dandar, Esq.
Timothy M. Dandar, Esq.
DANDAR & DANDAR, P.A.
P.O. Box 55444
St. Petersburg, FL 33702
(813) 289-3858
kgd@dandarlaw.net
tmd@dandarlaw.net

Adam Richardson, Esq.
BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Ste. 350
444 West Railroad Avenue
West Palm Beach, FL 33401
pmb@FLAppellateLaw.com
ajr@FLAppellateLaw.com
jrh@FLAppellateLaw.com
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE AND FACTS

A. Respondent's complaint.

Respondent Laurie Carmody filed a medical-malpractice lawsuit against Petitioners University of Florida Board of Trustees and Shands Teaching Hospital and Clinics, Inc., d.b.a. Shands Hospital. (R46.) The causes of action against Petitioners were premised on the malpractice of William Friedman, M.D., the chief of neurosurgery at Shands, and Yolanda Gertsch-Lapcevic, A.R.N.P., who practiced under Dr. Friedman. (R47.)

In the complaint, Respondent alleged that Dr. Friedman performed a cervical disc fusion on her at Shands. (R49.) She experienced pain the next day and continued to experience worsening pain over for over a month. (R49–50.) During this time, she repeatedly complained to Dr. Friedman's office and Nurse Gertsch-Lapcevic about the worsening pain—including now a hard, red, and painful incision and neurological symptoms—during telephone calls and two follow-up visits. (*Id.*) Eventually, Respondent became paralyzed and unable to move from her neck down, and her sister and a friend called 911. (R50.)

It turned out that that Respondent had an abscess on her spine at the site of the surgery that not only damaged the issue but reached the bone. (R51.) Another doctor performed emergency surgery, and later another, on Respondent. (*Id.*) By that time, however, the damage was done. And that damage was significant. (*See* R52–53.) In her complaint, Respondent alleged that Dr. Friedman and Nurse Gertsch-Lapcevic failed to timely diagnose the infection. (R52.) She alleged one count each against Shands and UF's board of trustees.

B. Respondent's presuit materials.

Before filing the complaint, Respondent served notices of intent to initiate medical-malpractice litigation against each Petitioner. (R57, 62.)

As required by Florida Statutes § 766.203(2), Respondent attached the identical corroborating expert affidavit from James B. DeStephens, M.D., to both notices. In the affidavit, Dr. DeStephens attested: "I am a licensed medical doctor specializing in the practice of Internal Medicine, Hospital Medicine, and Cardiology. Attached to this Affidavit is a true and correct copy of my Curriculum Vitae." (R61.)

C. Proceedings on Petitioners' first motions to dismiss.

1. Petitioners' motions to dismiss.

Each Petitioner moved to dismiss the complaint. (R67, 73.) Among other arguments, both Petitioners contended that Respondent failed to provide an expert affidavit that complied with Florida Statutes § 766.102. Relevant here are subsections (5) and (6), in pertinent part:

> (5) 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;
>
> ....
>
> (b) If the health care provider against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness must have devoted professional

> time during the 5 years immediately preceding the date of the occurrence that is the basis for the action to:
>
> 1. The active clinical practice or consultation as a general practitioner;
>
> ....
>
> (c) If the health care provider against whom or on whose behalf the testimony is offered is a health care provider other than a specialist or a general practitioner, the expert witness must have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:
>
> 1. The active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered;
>
> ....
>
> (6) A physician licensed under chapter 458 or chapter 459 who qualifies as an expert witness under subsection (5) and who, by reason of active clinical practice or instruction of students, has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical negligence action with respect to the standard of care of such medical support staff.

To sum up the basics, subsection (5)(a) governs when the healthcare provider is a specialist; subsection (5)(b) when a general practitioner; and subsection (5)(c) when neither. Subsection (6) gov-

erns when a physician offers opinions against medical support staff, imposing requirements in addition to those in subsection (5).

In the motions, Petitioners argued that Dr. DeStephens could not offer an opinion against Dr. Friedman because he failed to satisfy subsection (5)(a), or against Nurse Gertsch-Lapcevic because he failed to satisfy subsection (6). (R69–71, 75–77.) Regarding the latter, Petitioners stated:

> Dr. DeStephens[’] “Affidavit” is completely silent as to any knowledge of the standard of care of an advanced registered nurse practitioner practicing in a neurosurgery practice, and his CV does not indicate that he has any clinical practice related to the teaching of ARNP students, nor does he denote in his “Affidavit” or CV that he has engaged in clinical practice with ARNPs.

(R71, 77.) It was the trial court’s eventual finding relating to Nurse Gertsch-Lapcevic that was the subject of Petitioners’ certiorari petition in the First District Court of Appeal.

2. Respondent’s response and supplemental affidavit.

Respondent filed a response to Petitioners’ motions to dismiss. (R80.) Attached to the response was a supplemental affidavit from Dr. DeStephens. Omitting the formal parts, Dr. DeStephens stated in the supplemental affidavit:

1. I am a duly licensed medical doctor, admitted

to the practice of medicine in the State of Florida.

2. My practice specialty within the field of medicine is International Medicine and Cardiology. I am Board Certified by the American Board of Internal Medicine. My qualifications are set out more fully in my curriculum vitae which is attached hereto as Exhibit A [R91] and incorporated herein by reference.

3. I am a medical expert within the meaning of Florida Statutes §706.202 because I am duly regularly engaged in the practice of Internal Medicine and Cardiology, hold the healthcare professional degree and board certification noted on my curriculum vitae, and by reason of active clinical practice, including being a hospitalist for over 25 years, I have knowledge of the applicable post-surgical standard of care as it would relate to a post-operative wound abscess for physicians (such as Dr. William Friedman), nurses, nurse practitioners (such as Yolanda Maria Gertsch-Lapcevic, ARNP), physician assistants, or other support staff, involved in post-operative treatment of patients like Laurie Carmody.

4. The opinions expressed within my pre-suit affidavit (attached hereto as Exhibit B) concerns the post-operative care and treatment of Laurie Carmody and, thus, were within my area of practice and expertise.

(R89–90.) Pointing to paragraph 3 of the supplemental affidavit, Respondent argued in her response that, as to Nurse Gertsch-Lapcevic, Dr. DeStephens was qualified under § 766.102(6). (R84–85.) She also noted that his opinions concerned the standard of care after surgery. (R84.)

3. Hearing and trial court's order granting dismissal without prejudice.

The trial court held a hearing on Petitioners' motions. (R92.) Respondent conceded that Dr. DeStephens was not of the same specialty as Dr. Friedman. (R116.) She suggested that, if it was necessary to further explore whether Dr. DeStephens was qualified as to Nurse Gertsch-Lapcevic, the trial court could conduct an evidentiary hearing. (R115–16.)

However, the trial court granted the motions to dismiss based on other grounds raised in those motions without prejudice to filing an amended complaint clarifying those issues. (R120–21, 124.)

D. Proceedings on Petitioners' second motion to dismiss.

1. Petitioners' second motion to dismiss and Respondent's response.

Respondent filed an amended complaint (R126), which drew another motion to dismiss from Petitioners (R141). In the motion, Petitioners made the same arguments regarding Dr. DeStephens' qualifications as before. Respondent filed a response making the same arguments she did in her prior response. (R107.)

2. Trial court's order granting dismissal with prejudice.

Following a hearing, the trial court entered an order on Petitioners' motion. (R157.) The court noted that Respondent conceded at the hearing, as she did at the earlier hearing, that Dr. DeStephens' was not qualified to render standard-of-care opinions against Dr. Friedman. (R159.) As for Nurse Gertsch-Lapcevic, the court ruled:

> Plaintiff's presuit expert, James B. DeStephens, M.D.[,] is not qualified pursuant to §766.102(6), Fla. Stat.[,] to be an expert as to Yolanda Gertsch-Lapcevic, ARNP[,] and to provide a presuit verified written medical expert opinion as to any care or treatment by her as Dr. DeStephens does not meet the criteria required in §766.102(6), Fla. Stat., to be an expert witness under the provisions of §766.102(5).

(R159.) The court, therefore, dismissed Respondent's complaint with prejudice.

E. Proceedings on Respondent's motion for rehearing.

1. Motion, hearing, and order granting an evidentiary hearing.

Respondent filed a motion for rehearing of the dismissal with prejudice (R161), which Petitioners filed a response to (R169).

The trial court held a hearing. (R176.) Respondent reargued the issue of whether Dr. DeStephens was qualified to render opin-

ions against Nurse Gertsch-Lapcevic. The argument, in a nutshell, was that Dr. DeStephens "does qualify for the purposes of rendering an opinion for an ARNP pertaining to her post-op care of Plaintiff when she was a patient." (R182–83.) In their argument, Petitioners referred to subsection (5)(c)—applying when the healthcare provider is neither a specialist nor a general practitioner—and said Dr. DeStephens' affidavits did not address the three-year requirement in that subsection. (R185–86; § 766.102(5)(c) ("the expert witness must have devoted professional time during the 3 years immediately preceding the date of the occurrence").) Again, Respondent suggested an evidentiary hearing:

> [I]f Defense has any challenge towards whether or not Dr. DeStephens was qualified to render an opinion pertaining to the ARNP, then a simple evidentiary hearing could be held and—you know, that would—you know, Plaintiff would argue that that would be the proper method without—would be the proper method to deal with that matter instead of not getting to the substance of it.

(R189.) The court reserved ruling and asked parties to submit case law regarding Respondent's request for an evidentiary hearing. (R191–92.)

Petitioners submitted a memorandum of law objecting to an evidentiary hearing. (R194.)

The trial court entered an order denying Respondent's rehearing motion on matters the court already ruled on but granted the request for an evidentiary hearing. (R201.) The court instructed the parties to schedule an evidentiary hearing to address whether Dr. DeStephens was "an appropriately qualified expert to provide corroboration of reasonable grounds to initiate medical malpractice litigation to comply with the pre-suit requirements of Chapter 766." (*Id.*)

The parties took the deposition of Dr. DeStephens. (R204.)

After that, Petitioners filed a memorandum of law in response to Respondent's rehearing motion. (R255.) They argued that Dr. DeStephens was not qualified to render opinions against Nurse Gertsch-Lapcevic under § 766.102(5)(c) because he had not devoted professional time to the active clinical practice of or consulting with respect to the same or similar health profession as the nurse—"neurosurgery or post-operative neurosurgical infections"—within the three years immediately preceding the malpractice. (R260–61.) Petitioners further argued that Dr. DeStephens did not satisfy subsection (6) because he had never supervised an ARNP treating a patient who had undergone the exact same surgery as Respondent, or

a neurosurgery-trained ARNP who treated neurosurgical patients with post-operative wounds. (R257, 260.)

The court held the evidentiary hearing. (R262.) Dr. DeStephens testified. (R268.) The court reserved ruling. (R299.)

2. Trial court's order on rehearing.

The trial court ultimately entered a four-page order finding that Dr. DeStephens was qualified to render standard-of-care opinions against Nurse Gertsch-Lapcevic. (R310.)

After summarizing Dr. DeStephens' hearing testimony and his affidavits, the court found, first, that Dr. DeStephens was qualified under § 766.102(5)(c). It applied that subsection because, it found, Nurse Gertsch-Lapcevic was neither a general practitioner nor a specialist. (R311–12.) The court found further: "… Dr. DeStephens has devoted professional time during the three years immediately preceding the date of the occurrence that is the basis for the instant action in the same or similar health profession in that he provides postsurgical care to patients." (R312.) Earlier in the order, the court had summarized Dr. Stephens' testimony to be that "[h]e last served as a hospitalist in locum five years ago, i.e., in 2015." (R311.) As Petitioners note, this is not a correct recitation of the testimony; the

correct time was May 2013. (IB at 9 n.1.) However, at the hearing Dr. DeStephens testified that, even after May 2013, he continued to treat post-surgery patients, which included examining incisions, in his medical office. (R284, 295.) That is the testimony the court was referring to in its finding.

Turning to § 766.102(6), the court found: "Based on the evidence presented, Dr. DeStephens is qualified to attest to the negligence of the ARNP in post-surgical care pursuant to §766.102(6), Fla. Stat.[,] due to his decades long experience in post-surgical care and his knowledge of the applicable standard of care for nurse practitioners." (R312; *see also* R311 (summarizing that testimony).)

Having found that Dr. DeStephens was qualified under § 766.102(6) to offer standard-of-care opinions against Nurse Gertsch-Lapcevic, it vacated the order dismissing the case with prejudice "only as to the claims related to the conduct of Yolanda Gertsh-Lapceuk [sic], ARNP." (R313.)

F. Certiorari proceedings in the First District Court of Appeal.

Petitioners filed a certiorari petition in the First District asking the district court to quash the trial court's order. (R4.) They assert-

ed that the district court had jurisdiction. (R10–11.) Then they argued that the trial court's order departed from the essential requirements of the law because Dr. DeStephens was not qualified to render opinions against Nurse Gertsch-Lapcevic. (R27.) Petitioners argued that Dr. DeStephens did not satisfy either § 766.102(5)(a) or (c), nor subsection (6). (R28–35.)

It is clear from the petition that they were asking the First District to reweigh the evidence in front of the trial court. (*See, e.g.*, 33–34.) Petitioners made this even clearer in their reply: "In her response, Plaintiff makes no attempt to discuss the ***overwhelming evidence*** demonstrating Dr. DeStephens' lack of qualifications to serve as a presuit expert." (R340 (emphasis added).) It is also clear from their summary of the petition in the initial brief. (*See* IB at 10–11.)

In her response, Respondent was silent on jurisdiction and instead made the same arguments about Dr. DeStephens' qualifications that she did in the trial court. (R322.)

Following oral argument, the First District issued an opinion dismissing the petition for lack of jurisdiction because Petitioners had not established irreparable harm. *Univ. of Fla. Bd. of Trustees v.*

Carmody, 331 So. 3d 236 (Fla. 1st DCA 2021). Its conclusion was based on this Court's decision in *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011), where the Court held that certiorari review was available to ensure compliance with the presuit statutes' procedural requirements, but unavailable to review a trial court's finding that an expert was qualified.

The First District stated that "Respondent complied with the presuit procedural steps necessary to go forward with her medical negligence claim, including filing a corroborating medical expert opinion under § 766.203(2)." *Id.* at 238. The district court also found that "the trial court complied with the procedural requirements of the law." *Id.*

As for the argument Petitioners made—that Dr. DeStephens was not qualified—the district court said:

> Now on certiorari review, Petitioners don't argue that a process-related deficiency occurred, but that the court erred and should have dismissed the case because the corroborating expert wasn't qualified. *Williams* applies directly to certiorari petitions making this argument. And it concluded that certiorari review is not available to review arguably erroneous rulings on the qualifications of medical-expert affiants under chapter 766 (as opposed to reviewable process-compliance issues). *Williams*, 62 So. 3d at 1137. Seeing no light between the analysis in *Williams* and the situation presented here, we

must dismiss the petition.

Id. The court rejected Petitioners' argument that the legislature's amendment in 2013 to § 766.102(5) somehow affected the *Williams* decision. *Id.* at 238–39. But the court certified conflict with two post-*Williams* decisions from other districts, *Clare v. Lynch*, 220 So. 3d 1258 (Fla. 2d DCA 2017), and *Riggenbach v. Rhodes*, 267 So. 3d 551 (Fla. 5th DCA 2019) (on motion for rehearing), where the courts granted certiorari relief from trial courts' rulings on expert qualifications. *Id.* at 239.

Petitioners filed motions seeking rehearing, rehearing en banc, and certification of a question of great public importance. (R357.) The First District denied the motions. (R389.)

They then sought review of the certified conflict in this Court (R390), which the Court granted (R395).

STANDARD OF REVIEW

Respondent agrees with Petitioners that this case presents legal issues subject to de novo review in the sense that it concerns the interpretation of an opinion of this Court. However, it is worth noting also that "[a] common-law writ of certiorari rests in the sound discretion of the court to which the application was made, and thus, a court's grant [or denial] of certiorari is subject to an abuse of discretion standard of review. *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011) (citing *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 528 (Fla. 1995)).

SUMMARY OF THE ARGUMENT

The resolution of this case is simple. It is true that the First District misinterpreted *Williams v. Oken*, since that decision was not about jurisdiction, but departure from the essential requirements of the law. Nonetheless, the First District reached the right result because the result is consistent with *Williams*' overall point that a trial court's ruling that a plaintiff's presuit expert is qualified is not reviewable by certiorari. Next, the legislature's amendment to one part of Florida Statutes § 766.102, namely subsection (5)(a), does not undermine *Williams*, which was based on the law of common-law certiorari. Finally, the recent, unanimous *Williams* decision is not clearly erroneous. Thus, the Court should reject Petitioner's invitation to recede from *Williams*.

ARGUMENT

THE RESULT OF THE DECISION UNDER REVIEW IS CORRECT, THE COURT SHOULD APPROVE THE RESULT BUT NOT THE REASONING AND DISAPPROVE THE CONFLICT CASES, AND THE COURT SHOULD NOT RECEDE FROM *WILLIAMS V. OKEN*.

A. The First District arrived at the right result even if it got there by taking the wrong path.

"Before a court may grant certiorari relief from the denial of a motion to dismiss, the petitioner must establish the following three elements: (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011) (cleaned up).

The first element is the standard of review of the merits, whereas the last two are the jurisdictional elements, often referred to together as "irreparable harm."

In the decision under review, the First District held that it lacked jurisdiction to review the trial court's ruling that Respondent's presuit expert was qualified under Florida Statutes § 766.102(6) "because Petitioners have not demonstrated irreparable harm." *Univ. of Fla. Bd. of Trustees v. Carmody*, 331 So. 3d 236,

237 (Fla. 1st DCA 2021). As noted, the district court concluded so based on this Court's decision in *Williams v. Oken* and certified conflict with two cases from other district courts, *Clare v. Lynch*, 220 So. 3d 1258 (Fla. 2d DCA 2017), and *Riggenbach v. Rhodes*, 267 So. 3d 551 (Fla. 5th DCA 2019) (on motion for rehearing), where the courts granted certiorari relief on the same issue.

The first question before the Court is whether the First District misapplied *Williams* when it said that it lacked jurisdiction. The answer is, sort of. The Court held in *Williams* that a trial court's finding that a plaintiff's presuit expert is qualified is not the type of error subject to certiorari review—that it does not depart from the essential requirements of the law resulting in a miscarriage of justice. Of course, it is difficult to see what benefit Petitioners get from that answer because, for them, *Williams* compels the same result: no certiorari review.

In *Williams*, the Court considered whether the First District erred when it granted certiorari to review the trial court's ruling that a plaintiff's presuit expert met the statutory presuit requirements, specifically the requirement in § 766.102(5)(a) (2005) that, if the defendant was a specialist, an expert must specialize in the "same

specialty" or a "similar specialty." (Though the subsection is left unidentified in the opinion, it is clear which was at issue. Respondent specifies the subsections implicated in the decisions because those facts are relevant to Petitioners' second argument.)

The Court held that the district court "exceeded its authority by granting certiorari to review whether [plaintiff's] expert met those qualifications." *Id.* at 1137. More specifically, the Court determined that the trial court did not depart from the essential requirements of the law resulting in a miscarriage of justice. *See id.* at 1132–33 ("In the instant case, we concern ourselves with the first element—whether the trial court departed from the essential requirements of the law."); *id.* at 1137 ("Whether the trial court erred in finding that Dr. Foster was a qualified expert under the statute [i.e., § 766.102] is an issue of mere legal error that is insufficient to merit certiorari review. Here, … the trial judge's ruling does not amount to a violation of a clearly established principle of law resulting in a miscarriage of justice.").

But the Court also spoke in the language of jurisdiction, so the First District's confusion on what precisely *Williams* stands for is understandable. *See id.* at 1136–37 (discussing *Globe Newspaper*

Co. v. King, 658 So. 2d 518 (Fla. 1995)); *id.* at 1137 (quoting *Abbey v. Patrick*, 16 So. 3d 1051, 1055 (Fla. 1st DCA 2009); *id.* (stating "the First District should have dismissed the petition").

The upshot is that, under *Williams*, the First District reached the right result even if its reasoning was erroneous, in that it correctly determined certiorari relief was not available to Petitioners.

So what about the conflict cases?

In *Clare v. Lynch*, the trial court ruled that the plaintiff's presuit expert was qualified under § 766.102(5)(a) (2015), which had by that point been amended to eliminate the "similar specialty" option to qualifying an expert to testify against a specialist. 220 So. 3d at 1259. The Second District correctly determined that it had certiorari jurisdiction. *Id.* However, after quoting a case standing for the proposition that it had jurisdiction, it proceeded to state:

> Here, FOI asserts that the trial court's ruling departs from the essential requirements of the law because it operates to effectively excuse Lynch from the presuit requirements of chapter 766. Therefore, we may properly review the trial court's ruling by certiorari.

Id. at 1260. That was the entirety of the district court's discussion of why certiorari review was appropriate. The court failed to cite *Wil-*

liams, which compelled the opposite conclusion, anywhere in its opinion.

In *Riggenbach v. Rhodes*, which also involved expert qualification under § 766.102(5)(a), the Fifth District barely acknowledged the Court's decision in *Williams*:

Availability of Certiorari Review

> "Although orders denying motions to dismiss are generally not reviewable by writ of certiorari, Florida courts have created an exception and permit certiorari review when the presuit requirements of the [Florida Medical Malpractice Act] are at issue." *Holmes Reg'l Med. Ctr., Inc. v. Dumigan*, 151 So. 3d 1282, 1284 (Fla. 5th DCA 2014); *accord Rell v. McCulla*, 101 So. 3d 878, 879–83 (Fla. 2d DCA 2012); *Oken v. Williams*, 23 So. 3d 140, 144 (Fla. 1st DCA 2009) ("[T]he courts of this state have uniformly recognized the availability of certiorari review in cases where the presuit notice requirements of chapter 766 have not been met."), *quashed on other grounds by Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011). A nonfinal order allowing a plaintiff to proceed with litigation when the plaintiff has not complied with the presuit statutes results in material injury to the defendant that cannot be cured on appeal. *See Cent. Fla. Reg'l Hosp. v. Hill*, 721 So. 2d 404, 405 (Fla. 5th DCA 1998). Therefore, the order on rehearing denying Petitioners' motion to dismiss based on non-compliance with presuit requirements is appropriate for certiorari review.

267 So. 3d at 553.

In the above discussion, the Fifth District failed to understand that, while district courts have certiorari jurisdiction over the issue

of whether a plaintiff failed to satisfy the procedural requirements of the presuit statutes, it nonetheless is not appropriate to review, as was the case in *Riggenbach*, a ruling on the qualification of a presuit expert—something the Court made clear in *Williams*.[1]

Like the Second District in *Clare*, the Fifth District in *Riggenbach* got it wrong. Resolution of the conflict between those cases and *Carmody* is easy because of this Court's prior decision in *Williams*. Indeed, the conflict cases also conflict with *Williams*. The only reason the issue is back before the Court is that two district courts ignored the decision.[2] As the First District rightly said in the decision under review, "These opinions do not wrestle with *Wil-*

---

[1] *See, e.g.*, *Williams*, 62 So. 3d at 1135 ("[I]n numerous cases, Florida courts have permitted certiorari review to determine whether the defendant was afforded the proper process through procedural compliance with the statutory requirements." (citations omitted)); *id.* at 1136–37 (holding that certiorari review of compliance with the presuit statutes is limited to "the procedural statutory requirements" and certiorari is inappropriate when "the parties have been afforded the essential process guaranteed by law and the judge has merely made a mistake in an order or ruling entered in the course of the proceeding" (quoting *Abbey*, 16 So. 3d at 1055)); *id.* at 1137 ("Florida courts have permitted certiorari review solely to ensure that the procedural aspects of the presuit requirements are met.").

[2] Something the Court should not tolerate. The Court could approve *Carmody* and disapprove *Clare* and *Riggenbach* if only to enforce its own precedents.

liams.…" *Carmody*, 331 So. 3d at 239. The *Williams* decision definitively resolves the conflicts. The Court should approve the result in *Carmody* (but not the reasoning) and disapprove the Second District's *Clare* and the Fifth District's *Riggenbach*.

B. The 2013 amendment of Florida Statutes § 766.102(5)(a) did not undermine *Williams*.

Petitioners argue that *Williams* has been undermined by the legislature's 2013 amendment of § 766.102(5)(a) to eliminate the "similar specialty" option in that subsection. It has not.

To begin with, the holding in *Williams* was broader than whether a district court can review a finding of qualification under subsection (5)(a). Rather than being tied to any particular subsection of the statute concerning the requirements for expert qualification, the Court's holding was based on the law of common-law certiorari. The Court said:

> While ensuring that an expert meets the statutory presuit requirements is clearly an important consideration in medical malpractice cases, the First District exceeded its authority by granting certiorari to review whether Williams' expert met those qualifications.

Williams, 62 So. 3d at 1137. The Court explained that the district courts can review only whether the plaintiff has satisfied the procedural requirements of the presuit statutes.

The legislature's amendment of one way to qualification cannot alter the broad holding of *Williams*. The First District correctly concluded:

> We understand Petitioners' argument that *Williams* was issued prior to the current version of the statute that sets more restrictive medical qualification standards for persons giving expert testimony about the applicable standard of care. *Compare* § 766.102(5), Fla. Stat. (2011)[,] *with* § 766.102(5), Fla. Stat. (2016). But these qualification changes did not displace the certiorari principles set forth in *Williams* restricting appellate courts from reviewing the expert-qualification decisions of trial courts on certiorari. Irrespective of whether past or current qualification standards are at play, the core issue remains that appellate courts lack certiorari jurisdiction to address non-procedural disputes concerning the qualifications of claim-corroborating experts.

Carmody, 331 So. 3d at 238–39. Thus, the 2013 amendment to § 766.102(5)(a) did not undermine *Williams*.

Accepting for the moment Petitioners' argument that trial courts no longer need to weigh evidence in making the "same specialty" determination, the effect of the amendment would be limited to only findings of "same specialty" under subsection (5)(a).

Consider subsections (5)(c) and (6), as they are the ones the trial court relied on in this case. Subsection (5)(c) requires a trial court to make a host of factual findings. Is the provider neither "a specialist" nor "a general practitioner"? Has the expert "devoted professional time" within the three-year period to, for example, "[t]he active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider"? Subsection (6) likewise requires the court to make factual determinations. Has an expert conducted "active clinical practice or instruction of students"? Does he have the requisite "knowledge"?

Qualification under these subsections, then, necessarily involves the weighing of evidence—just what the Court said in *Williams* precluded certiorari review. The reasoning underlying *Williams* remains as true today for subsections not amended in 2013 as it did the day *Williams* was decided:

> A review of *Globe* [*Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995),] supports Williams' arguments and demonstrates three things: (1) that a defendant cannot demonstrate material harm required for certiorari review concerning whether a punitive damages claim is viable, or by analogy, an expert is qualified, because those things do not deprive the defendant of the statutorily guaranteed process, (2) utilizing certiorari to review the trial court's findings regarding whether a claim for punitive damages

> exists, or, by analogy, whether an expert is qualified amounts to reviewing the sufficiency of the evidence, and (3) that granting a petition for writ of certiorari to review the sufficiency of the evidence is inappropriate. *Id.* at 519–20.

Williams, 62 So. 3d at 1135–36. The 2013 amendment would not affect *Williams*' application to findings under subsections other than (5)(a) because those subsections require the weighing of evidence. Those findings would continue to not be reviewable by certiorari.

But the 2013 amendment to subsection (5)(a) did not undermine *Williams* to even that limited extent; Petitioners overstate the amendment's effect. They contend that determining whether an expert is of the "same specialty" as the defendant requires "no more weighing of the evidence or guesswork related to whether a presuit expert specializes in a same 'or similar specialty […]' as the defendant." (IB at 29; *see also* Amicus Br. of FDLA at 13–15; Amicus Br. of FHA et al. at 14–18.)

Anyone who handles medical-malpractice cases knows it is not so simple. There are fierce disputes, even among plaintiff attorneys, over whether doctors practice within the "same specialty," a term the legislature unfortunately did not define. Although "specialty" could mean board certification and nothing more, most boards offer

subspecialty certificates, *see* Am. Bd. Med. Specialties, Specialty and Subspecialty Certificates, https://www.abms.org/member-boards/specialty-subspecialty-certificates/—leading to the problem Judge Melanie May foresaw in a 2011 case:

> It would certainly be easier to require the precise area of specialization, but then that requirement might devolve into sub-specialty, sub-sub-specialty until there was no one with the same sub-sub-sub-specialty.

Weiss v. Pratt, 53 So. 3d 395, 401 (Fla. 4th DCA 2011). J. Clancey Bounds explored this problem at length in his recent article, *What the @#%! is the Same Specialty? Florida Statute Section 766.102(5)*, J. of Fla. Justice Ass'n, Mar./Apr. 2021, at 30, *available at* https://mydigitalpublication.com/publication/?m=44235&i=699519&p=30&ver=html5.

The 2013 amendment requiring "same specialty" has not eliminated the need for the trial court to weigh evidence to determine whether, in fact, an expert specializes in the "same specialty" as the defendant. *See* Sarah Lahlou-Amine & Gabrielle Osborne, *Same, Similar, and Everything in Between: Appellate Courts' Review of the Same-Specialty Requirement for Presuit Experts in Medical Malpractice Cases*, Fla. Bar J., May 2018, at 43, 44 ("***In theory***, the 2013

same-specialty amendment should limit the need for fact-based inquiries like that at issue in *Williams*, facilitating a defendant's ability to obtain certiorari review." (emphasis added) (citation omitted)).

To avoid this conclusion, Petitioners quote *Morris v. Muniz*, 252 So. 3d 1143, 1155–56 (Fla. 2018). But that case concerned the standard of review from a final order of dismissal, as the Court said at the beginning of the opinion: "[W]here the facts regarding the presuit expert's qualifications are unrefuted, the proper standard of review of a trial court's ***dismissal*** of a medical malpractice action based on its determination that the plaintiff's presuit expert witness was not qualified is de novo." *Id.* at 1146 (emphasis added). *Morris* has nothing to do with certiorari review.

In sum, the legislature's 2013 amendment to § 766.102(5)(a) did not undermine *Williams*' broad holding that district courts do not have the authority to review a trial court's ruling that a plaintiff's presuit expert is qualified under § 766.102.

C. The Court should not recede from *Williams*.

The only remaining question for the Court to answer is whether to reconsider and recede from its recent, unanimous decision in *Williams v. Oken*.

A few years ago, the Court addressed stare decisis and receding from precedent. In *State v. Poole*, 297 So. 3d 487, 506 (Fla. 2020), the Court explained that adhering to precedent provides stability to the law, even though it does not command blind allegiance to precedent when there has been an error in legal analysis. The Court continued:

> It is no small matter for one Court to conclude that a predecessor Court has clearly erred. The later Court must approach precedent presuming that the earlier Court faithfully and competently carried out its duty. A conclusion that the earlier Court erred must be based on a searching inquiry, conducted with minds open to the possibility of reasonable differences of opinion. There is room for honest disagreement, even as we endeavor to find the correct answer.

Id. (cleaned up). After reassessing its precedent on stare decisis, the Court announced the standard for stare decisis it would apply going forward:

> We believe that the proper approach to stare decisis is much more straightforward. In a case where we are bound by a higher legal authority—whether it be a constitutional provision, a statute, or a decision of the Supreme Court—our job is to apply that law correctly to the case before us. When we are convinced that a precedent ***clearly conflicts*** with the law we are sworn to uphold, precedent normally must yield.

State v. Poole, 297 So. 3d 487, 507 (Fla. 2020) (emphasis added); *see also id.* ("But once we have chosen to reassess a precedent and have come to the conclusion that it is ***clearly erroneous***, the proper question becomes whether there is a valid reason ***why not*** to recede from that precedent." (first emphasis added)).

In a post-*Poole* case, the Court wrote, "We simply do not have a ***definite and firm conviction*** that this Court's prior interpretation of the offer of judgment statute and the terms 'judgment,' 'judgment obtained,' and 'net judgment' is wrong." *CCM Condo. Ass'n v. Petri Positive Pest Control*, 330 So. 3d 1, 5 (Fla. 2021) (emphasis added); *see also Thompson v. DeSantis*, 301 So. 3d 180, 184 (Fla. 2020) ("In this case, to justify departing from the principle of stare decisis, we would have to conclude that our relevant precedents ***clearly erred*** in their understanding of the 'judicial power' vested in Florida's courts by article V, section 1." (emphasis added)).

In *Williams*, the Court did nothing more than apply settled Florida law on common-law certiorari. Petitioners do not discuss this law. They do not even cite the Court's primary decisions on departure from the essential requirements of the law, *Combs v. State*, 436 So. 2d 93 (Fla. 1983), and *Haines City Community Development*

v. Heggs, 658 So. 2d 523 (Fla. 1995), that the *Williams* Court block-quoted. *See Williams*, 62 So. 3d at 1133 (quoting *Haines*, in turn quoting *Combs*). Instead, Petitioners assert that adhering to *Williams* will destroy the statutory presuit procedure, and they fixate on the *Williams* Court's analogy of the presuit process to punitive damages. (IB at 35–40.)

"Time and again, Florida courts have reiterated that certiorari relief is an 'extremely rare' remedy that will be provided in 'very few cases.'" *Bd. of Trustees of Internal Improvement Tr. Fund v. Am. Educ. Enters.*, 99 So. 3d 450, 455 (Fla. 2012) (quoting *Martin-Johnson Inc. v. Savage*, 509 So. 2d 1097, 1098–99 (Fla. 1987)). Just last month, the Court reiterated the point. *State v. Garcia*, No. SC20-1419, 2022 WL 15009452 (Fla. Oct. 27, 2022).

It has been Florida law for decades that, "Ordinarily, orders on motions to strike or dismiss claims do not qualify for review by certiorari." *Martin-Johnson*, 509 So. 2d at 1099 (cited in *Williams*, 62 So. 3d at 1134) (citing *Gordons Jewelry Co. of Fla. v. Feldman*, 351 So. 2d 1117 (Fla. 4th DCA 1977); *Allstate Ins. Co. v. Shupack*, 335 So. 2d 620 (Fla. 3d DCA 1976); *Hotel Roosevelt Co. v. Hill*, 196 So. 2d 233 (Fla. 1st DCA 1967)). As far back as 1967, the First District,

in *Hotel Roosevelt*, characterized case law disallowing certiorari review of an order denying a motion to dismiss as an "unbroken line of appellate decisions." 196 So. 2d at 233.

Petitioners complain that denying certiorari review of a trial court's order that (allegedly) erroneously denied a motion to dismiss arguing that the plaintiff's presuit expert was not qualified would eviscerate the statutory presuit procedure.

But Florida's courts have already given medical-malpractice defendants something ordinary litigants do not get: immediate, albeit limited, review of orders denying motions to dismiss. This Court described the legislature's intent in *Williams*:

> The statutory presuit screening provisions were intended by the legislature to facilitate the expedient, and preferably amicable, resolution of medical malpractice claims. The legislative purpose is described at length in the statutes. Perhaps the greatest impact of this rule is the establishment of a "presuit investigation phase," through a notice procedure. The rule anticipates that during the presuit investigation phase, the defendant will investigate the medical malpractice claims to determine the extent of liability, if any. This process is intended to sort out meritless claims and encourage the resolution of meritorious claims through settlement. Ultimately, the process is intended to alleviate the associated costs with such litigation.

62 So. 3d at 1134 n.1 (citations omitted). Allowing immediate but limited review acknowledges the privileged position the legislature has placed medical-malpractice defendants in. *See Pearlstein v. Malunney*, 500 So. 2d 585, 587–88 (Fla. 2d DCA 1986); *Miami Physical Therapy Assocs. v. Savage*, 632 So. 2d 114, 115–16 (Fla. 3d DCA 1994). Other litigants do not get certiorari review to avoid the expense of unnecessary litigation.[3] Philip J. Padovano, *Appellate Prac-*

---

[3] Notably, in *Martin-Johnson*, the Court said:

> [T]o permit interlocutory appeals by certiorari in this instance would result in unwarranted harm to our system of procedure. The rationale employed in this case could as easily be applied to the erroneous denial of a motion for summary judgment or a motion to join or dismiss a party. ***For example***, a defendant in a medical malpractice case could claim "irreparable harm" to reputation and needless cost of litigation flowing from an erroneous denial of a motion for summary judgment. Litigation of a non-issue will always be inconvenient and entail considerable expense of time and money for all parties in the case. The authorities are clear that this type of harm is not sufficient to permit certiorari review.

Martin-Johnson, 509 So. 2d at 1100 (emphasis added) (citation omitted). The Court decided *Martin-Johnson* in 1987, a year before the legislature implemented the presuit-investigation requirement, *see Cohen v. Dauphinee*, 739 So. 2d 68, 70–71 (Fla. 1999); Edward J. Carbone, *Presuit Nuts 'N Bolts*, 27 Trial Advoc. Q. 27 (2007), which altered the certiorari landscape.

tice § 30:5 n.9 (2022 ed.) ("The expense of litigation is not irreparable harm." (citations omitted)).

At the same time, the review is consistent with certiorari law as a whole. What the legislature guaranteed defendants was a process. *See Williams v. Campagnulo*, 588 So. 2d 982, 983 (Fla. 1991) ("The statute was intended to address a legitimate legislative policy decision relating to medical malpractice and established a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding."); *Kukral v. Mekras*, 679 So. 2d 278, 280 (Fla. 1996) ("Chapter 766, Florida Statutes (1995), 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."); *Cohen v. Dauphinee*, 739 So. 2d 68, 71 (Fla. 1999) ("[T]he legislature, in 1988, adopted procedures for what was termed 'presuit investigation.'" (citation omitted)); *Morris v. Muniz*, 252 So. 3d 1143, 1151 (Fla. 2018) ("Florida's medical malpractice statutory scheme, codified in chapter 766, Florida Statutes, contains an elaborate presuit process for prospective medical malpractice plaintiffs, including a presuit investigation component." (citation omitted)); *Abbey*, 16 So.

3d at 1055 ("If the error results in a deprivation of the presuit screening process guaranteed by the statute, it is not one that can be corrected on appeal."); Thomas D. Sawaya, *Florida Personal Injury Law and Practice* § 12:5. (2022-2023 ed.) ("The Medical Malpractice Act incorporates a complex presuit investigation procedure that the claimant and the defendants must comply with before a medical malpractice suit may be brought in court, and before a defendant may defend himself against the allegations of improper conduct." (footnote omitted)). The steps in that process, like the provision of an affidavit, are the essential requirements imposed by the presuit statutes. Certiorari review is appropriate to ensure compliance with those basic elements.

Yet Petitioners want ***more***. They want the Court to authorize district courts to conduct a plenary review, on certiorari, of the merits of a trial court's finding that a plaintiff's presuit expert is qualified under § 766.102. That would collapse one of the fundamental distinctions between appeals and certiorari: While appeals afford plenary review, certiorari cannot be used to correct mere legal error. The Court elaborated on this point in *Haines*, quoting *Combs*:

> [T]he phrase "departure from the essential requirements of law" should not be narrowly construed so as to apply only to violations which effectively deny appellate review or which pertain to the regularity of procedure. ***In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error.*** Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been ***a violation of clearly established principle of law resulting in a miscarriage of justice***.
>
> It is this discretion which is the essential distinction between review by appeal and review by common-law certiorari. A district court may refuse to grant a petition for common-law certiorari even though there may have been a departure from the essential requirements of law. ***The district courts should use this discretion cautiously so as to avert the possibility of common-law certiorari being used as a vehicle to obtain a second appeal***.

Haines, 658 So. 2d 523, 528 (Fla. 1995) (quoting *Combs*, 436 So. 2d at 95–96) (first and second emphasis in *Haines*; third added); *see also Broward Cnty. v. G.B.V. Int'l*, 787 So. 2d 838, 842 (Fla. 2001) ("The writ never was intended to redress mere legal error, for common law certiorari—above all—is an extraordinary remedy, not a second appeal." (in a footnote, citing *Haines* and *Combs*)); *Abbey*, 16 So. 3d at 1054 ("Appellate courts do not issue writs of certiorari

merely to correct an erroneous application of the law, as would be the case in a plenary appeal.").

Aside from torturing the law of certiorari, Petitioners fail to offer a limiting principle to the holding they want the Court to adopt. The closest they get is:

> A trial court's legal determination concerning the qualifications of an expert goes to the very core of the presuit notice requirements in medical malpractice actions. Allowing a corroborating affidavit to be filed by a physician who is not qualified under the statute effectively deprives the defendant of its statutorily mandated process because the filing [of] an affidavit from an unqualified expert is tantamount to filing no affidavit at all. "No party should be called on to defend at trial against allegations no competent witness can be found to support." *Archer* [*v. Maddux*], 645 So. 2d [544,] 546–47 [(Fla. 1st DCA 1994)] …

(IB at 33 (emphasis removed); *see also* Amicus Br. of FDLA at 16.)

In other words, Petitioners might say, the sufficiency of an expert's qualifications is different than the plaintiff's satisfaction of other nonprocedural requirements of the presuit process. For example, whether the plaintiff satisfied the requirement that the notice of intent to initiate litigation must include a list of certain healthcare providers seen by the plaintiff, § 766.106(2)(c); the requirement that the notice be accompanied by an executed authori-

zation for the release of protected health information in the form prescribed by the statute, §§ 766.106(2)(c), 766.1065; the provisions for informal discovery, § 766.106(6); or the requirement to make medical records and other information available, §§ 766.204, 766.205. But the rationale that would allow the holding Petitioners seek would logically extend to rulings on the satisfaction of any of presuit's nonprocedural requirements, each a block in the presuit wall built by the legislature, transforming each into an essential requirement of the law. *Cf. Ingersoll v. Hoffman*, 589 So. 2d 223, 224 (Fla. 1991) ("The presuit notice and screening requirements of section 768.57 represent more than mere technicalities."). Petitioners appear to admit this when they complain that a certiorari review "limited solely to whether 'the procedure was followed'" would destroy the statutory presuit procedure. (IB at 34; *see also* Amicus Br. of FDLA at 17; Amicus Br. of FHA et al. at 10.) It is also worth observing that, in *Archer*, the plaintiff failed to provide any affidavit until after the limitation period ran. Of course, in that circumstance, certiorari review would be appropriate.

Finally, Petitioners posit a "simple example" they say makes their point: a plaintiff putting up a psychiatrist against a cardiotho-

racic surgeon. (IB at 34.) A plaintiff may indeed try that. But it betrays a lack of faith in the trial judges of our state to believe they would go along with the attempt.[4] Unrealistic fears like those harbored by Petitioners should not lead to the abandonment of decades of jurisprudence on the limitations of common-law certiorari to make a special exception for medical-malpractice defendants, who already receive special treatment. Instead, recognizing that even the most unlikely events can occur, the Court could clarify that, when confronted with an error as profound as that posited by Petitioners, the district court may exercise its discretion to grant certiorari relief to correct the miscarriage of justice. But certiorari review would still not be available in the mine run of cases, like this one.

Respectfully, Respondent believes that, after the above discussion, there should not be a definite and firm conviction that *Williams* is wrong. Not only did the Court not clearly err in *Williams*, however: The Court clearly got it right.

[4] Assuming § 766.102(8) does not apply.

CONCLUSION

The First District did not err when it held that it could not review, on certiorari, the trial court's ruling that Petitioner's presuit expert was qualified, even if its specific reasoning—it lacked jurisdiction—was erroneous. The result, though not the reasoning, is consistent with the Court's decision in *Williams*. The decisions of the Second and Fifth Districts are not. The 2013 amendment to Florida Statutes § 766.102(5)(a) did nothing to undermine *Williams*. The Court should not recede from *Williams*.

Accordingly, Respondent asks the Court to approve the result of the decision under review while disapproving its reasoning and disapprove the decisions of the Second District in *Clare v. Lynch* and the Fifth District in *Riggenbach v. Rhodes*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to FRANCIS E. PIERCE, III, ESQ. (fpierce@mateerharbert.com; lit-pleadings@mateerharbert.com), 225 E. Robinson Street, Suite 600, Orlando, FL 32801; and CHRISTINE R. DAVIS, ESQ. (cda-vis@davisappeals.com; eservice@davisappeals.com), 1400 Village Square Blvd., Suite 3-181, Tallahassee, FL 32312, via the Florida Courts E-Filing Portal on November 30, 2022.

Kennan G. Dandar, Esq.
Timothy M. Dandar, Esq.
DANDAR & DANDAR, P.A.
P.O. Box 55444
St. Petersburg, FL 33702
(813) 289-3858
kgd@dandarlaw.net
tmd@dandarlaw.net
and
BURLINGTON & ROCKENBACH, P.A.
444 West Railroad Avenue/Suite 350
West Palm Beach, FL 33401
(561) 721-0400
ajr@FLAppellateLaw.com
jrh@FLAppellateLaw.com
Attorneys for Respondent

By: s/Adam Richardson
ADAM RICHARDSON
Florida Bar No. 94886

/jrh

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045(e) and 9.210(a)(2)(B), Respondent hereby certifies that the type size and style of the Answer Brief of Respondent is Bookman Old Style 14pt and that the word count is 8,066.

By: s/Adam Richardson
ADAM RICHARDSON
Florida Bar No. 94886