

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
L.T. Case Nos. 1D21-0634
2019-CA-1827

v.

LAURIE CARMODY,

Respondent.

**INITIAL BRIEF OF PETITIONERS UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES AND SHANDS TEACHING HOSPITAL
AND CLINICS, d/b/a SHANDS HOSPITAL**

On Discretionary Review From A Decision
Of The First District Court Of Appeal Certifying Conflict

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TABLE OF CONTENTS

TABLE OF CITATIONS..... iii

STATEMENT OF CASE AND FACTS 1

 A. Plaintiff’s Complaint And Shands’ Motions To Dismiss..... 1

 B. Dr. DeStephens’ Deposition Reveals That, Since May 2013, He Has Exclusively Maintained An Outpatient Practice Involving Telephone Consultations And Anti-Aging Medicine 7

 C. The Trial Court’s Ruling On Rehearing..... 8

 D. Shands’ Petition For Writ Of Certiorari..... 10

 E. At Oral Argument, The First District Questions Its Jurisdiction Over The Certiorari Petition 12

 F. The First District Limits Certiorari Review Of Issues Relating To Compliance With Chapter 766 To Procedural Issues Only 12

SUMMARY OF ARGUMENT 15

STANDARD OF REVIEW..... 18

ARGUMENT 19

 I. THE FIRST DISTRICT MISAPPLIED *WILLIAMS* WHEN IT HELD THAT MEDICAL MALPRACTICE DEFENDANTS ARE NOT IRREPARABLY HARMED WHEN A PLAINTIFF FAILS TO COMPLY WITH PRESUIT 19

 II. *WILLIAMS* DOES NOT BAR CERTIORARI REVIEW OF ORDERS CONSIDERING THE QUALIFICATIONS OF PRESUIT EXPERTS UNDER THE POST-2013

STATUTORY AMENDMENTS	25
A. The <i>Williams v. Oken</i> Decision.....	26
B. <i>Williams</i> ' Analysis Does Not Apply After The 2013 Amendments To The Act.....	29
III. IF <i>WILLIAMS</i> PROHIBITS CERTIORARI REVIEW OF A PLAINTIFF'S FAILURE TO COMPLY WITH PRESUIT FOR FAILING TO HAVE A QUALIFIED PRESUIT EXPERT, THEN IT SHOULD BE OVERTURNED TO AVOID EVISCERATING THE PRESUIT SCREENING REQUIREMENTS.....	32
CONCLUSION	41
CERTIFICATE OF SERVICE.....	42
CERTIFICATE OF COMPLIANCE	43

TABLE OF CITATIONS

Cases

<i>Archer v. Maddux</i> , 645 So. 2d 544 (Fla. 1st DCA 1994)	22-23, 33
<i>Baptist Med. Ctr. of the Beaches, Inc. v. Rhodin</i> , 40 So. 3d 112 (Fla. 1st DCA 2010)	20
<i>Bonati v. Allen</i> , 911 So. 2d 285 (Fla. 2d DCA 2005)	23
<i>Clare v. Lynch</i> , 220 So. 3d 1258 (Fla. 2d DCA 2017)	<i>passim</i>
<i>Correa v. Robertson</i> , 693 So. 2d 619 (Fla. 2d DCA 1997)	38
<i>E.R. Truck Equip. Corp. v. Gomont</i> , 300 So. 3d 1230 (Fla. 3d DCA 2020)	39
<i>Event Depot Corp. v. Frank</i> , 269 So. 3d 559 (Fla. 4th DCA 2019)	40
<i>Fassy v. Crowley</i> , 884 So. 2d 359 (Fla. 2d DCA 2004)	23, 24
<i>Ft. Walton Beach Med. Ctr., Inc. v. Dingler</i> , 697 So. 2d 575 (Fla. 1st DCA 1997)	38
<i>Gessa v. Manor Care of Fla., Inc.</i> , 86 So. 3d 484 (Fla. 2011)	18
<i>Globe Newspaper Co. v. King</i> , 658 So. 2d 518 (Fla. 1995)	35
<i>Holmes Reg'l Med. Ctr., Inc. v. Dumigan</i> , 151 So. 3d 1282 (Fla. 5th DCA 2014)	23

<i>Holmes Reg'l Med. Ctr., Inc. v. Wirth</i> , 49 So. 3d 802 (Fla. 5th DCA 2010)	38
<i>Howell v. Balchunas</i> , 284 So. 3d 1180 (Fla. 1st DCA 2019)	20
<i>In re Amend. to Fla. R. App. P. 9.130</i> , No. SC21-129, 2022 WL 57943 (Fla. Jan. 6, 2022)	38, 40
<i>Kukral v. Mekras</i> , 679 So. 2d 278 (Fla. 1996)	21
<i>Lawrence v. State</i> , 308 So. 3d 544 (Fla. 2020)	33
<i>Levin v. Pritchard</i> , 258 So. 3d 545 (Fla. 3d DCA 2018)	40
<i>Life Care Ctrs. of Am., Inc. v. Croft</i> , 299 So. 3d 588 (Fla. 2d DCA 2020)	39
<i>Martin-Johnson, Inc. v. Savage</i> , 509 So. 2d 1097 (Fla. 1987)	37
<i>Martin Mem'l Med. Ctr., Inc. v. Herber</i> , 984 So. 2d 661 (Fla. 4th DCA 2008)	23
<i>Miami Physical Therapy Assoc., Inc. v. Savage</i> , 632 So. 2d 114 (Fla. 3d DCA 1994)	23
<i>Morris v. Muniz</i> , 252 So. 3d 1143 (Fla. 2018)	16, 31, 37
<i>Musculoskeletal Inst. Chartered v. Parham</i> , 745 So. 2d 946 (Fla. 1999)	20, 22, 36
<i>Oken v. Williams</i> , 23 So. 3d 140 (Fla. 1st DCA 2009)	15, 27, 28

<i>Paley v. Maraj</i> , 910 So. 2d 282 (Fla. 4th DCA 2005)	38
<i>Palms West Hosp. Ltd. P’ship v. Burns</i> , 83 So. 3d 785 (Fla. 4th DCA 2011)	23
<i>Pearlstein v. Malunney</i> , 500 So. 2d 585 (Fla. 2d DCA 1986)	24
<i>Phillips v. State</i> , 299 So. 3d 1013 (Fla. 2020)	33
<i>Rell v. McCulla</i> , 101 So. 3d 878 (Fla. 2d DCA 2012)	23
<i>Riggenbach v. Rhodes</i> , 267 So. 3d 551 (Fla. 5th DCA 2019)	14, 15, 23, 31
<i>Sapp v. Oliveros</i> , 288 So. 3d 714 (Fla. 4th DCA 2020)	39
<i>Shepard v. State</i> , 259 So. 3d 701 (Fla. 2018)	33
<i>Simeon, Inc. v. Cox</i> , 671 So. 2d 158 (Fla. 1996)	37
<i>St. Joseph’s Hosp., Inc. v. Doe</i> , 208 So. 3d 1200 (Fla. 2d DCA 2017)	23
<i>St. Mary’s Hosp. v. Bell</i> , 785 So. 2d 1261 (Fla. 4th DCA 2001)	28, 35, 36
<i>State v. Gray</i> , 654 So. 2d 552 (Fla. 1995)	33
<i>State v. Poole</i> , 297 So. 3d 487 (Fla. 2020)	32-33

TRG Desert Inn Venture, Ltd. v. Berezovsky,
194 So. 3d 516 (Fla. 3d DCA 2016) 40

Univ. of Fla. Bd. of Trs. v. Carmody,
331 So. 3d 236 (Fla. 1st DCA 2021) 12, 13

Williams v. Oken,
62 So. 3d 1129 (Fla. 2011) *passim*

Wolfsen v. Applegate,
619 So. 2d 1050 (Fla. 1st DCA 1993) 21

Statutes and Rules

Ch. 766, Fla. Stat. (2019) 12, 27, 33

§ 766.102, Fla. Stat. (2019) 2, 16

§ 766.102(5), Fla. Stat. (2019) 2, 3, 4, 29, 30, 31

§ 766.102(5), Fla. Stat. (2007) 26, 27, 28

§ 766.102(6), Fla. Stat. (2019) 2, 3

§ 766.102(14), Fla. Stat. (2012) 30

§ 766.102(12), Fla. Stat. (2007) 30

§ 766.104, Fla. Stat. (2019) 22

§ 766.201, Fla. Stat. (2019) 20, 21, 36

§ 766.202, Fla. Stat. (2019) 2, 5

§ 766.202(6), Fla. Stat. (2019) 2

§ 766.203, Fla. Stat. (2019) 2

§ 766.203(2), Fla. Stat. (2019) 2, 13, 17, 21

§ 766.206(2), Fla. Stat. (2019)	4, 17, 22
§ 768.72, Fla. Stat. (2019)	35, 36
Fla. R. App. P. 9.045	43
Fla. R. App. P. 9.130	38, 39, 40
Fla. R. App. P. 9.210	43

STATEMENT OF CASE AND FACTS

In this medical negligence action, Respondent-Plaintiff, Laurie Carmody (“Plaintiff”), alleged that Petitioners-Defendants, University of Florida Board of Trustees and Shands Teaching Hospital and Clinics d/b/a Shands Hospital (collectively referred to as “Shands”), through their employees, William Friedman, M.D. and Yolanda Gertsch-Lapcevic, Advanced Registered Nurse Practitioner (“ARNP”), were negligent in their care and treatment of Plaintiff in November and December 2016 by failing to diagnose a post-surgical infection after Dr. Friedman performed a cervical disc fusion on Plaintiff. (R.46-56).

A. Plaintiff’s Complaint And Shands’ Motions To Dismiss.

Plaintiff alleged that Dr. Friedman is a neurosurgeon and Gertsch-Lapcevic is an ARNP who works under Dr. Friedman in his office within the Department of Neurosurgery located inside Shands Hospital. (R.47). To corroborate her claim, Plaintiff submitted a presuit affidavit from Dr. James DeStephens, “a licensed medical doctor specializing in the practice of Internal Medicine, Hospital Medicine, and Cardiology.” (R.47).

Shands moved to dismiss Plaintiff’s complaint for failing to

comply with the presuit requirement of Florida’s Medical Malpractice Act to have a potential medical malpractice claim corroborated by a statutorily qualified presuit expert, as required by sections 766.102, 766.202, and 766.203, Florida Statutes (2019). (R.67-79).

Section 766.203 requires a claimant to conduct a presuit investigation to determine whether there are reasonable grounds to initiate a medical negligence action. As part of that presuit investigation, the claimant must provide “[c]orroboation of reasonable grounds to initiate medical negligence litigation,” including “submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(6)”

§ 766.203(2), Fla. Stat.

Section 766.202(6), in turn, defines a “medical expert” as “a person duly and regularly engaged in the practice of his or her profession who holds a health care professional degree from a university or college and who meets the requirements of an expert witness as set forth in s. 766.102.”

Subsections (5) and (6) of section 766.102 set forth the required qualifications of a presuit expert that are applicable here.

First, a physician attempting to corroborate a claim against a nurse practitioner must be qualified under section 766.102(5). *See* § 766.102(6), Fla. Stat. Second, the physician must, by reason of active clinical practice or instruction of students, have knowledge of the applicable standard of care for nurse practitioners. *Id.*

Under subsection (5), for a presuit expert to offer an opinion against a specialist, the expert 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. Instruction of students in an accredited health professional school or accredited residency or clinical research program in the **same specialty**; or
 - c. A clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the **same specialty**.

§ 766.102(5)(a), Fla. Stat. (emphases added).

For a presuit expert to offer an opinion against a health care provider “other than a specialist or a general practitioner,” the

expert 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;
2. The instruction of students in an accredited health professional school or accredited residency program in the same or similar health profession in which the health care provider against whom or on whose behalf the testimony is offered; or
3. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered.

§ 766.102(5)(c), Fla. Stat. (emphasis added).

If a medical negligence claim is not supported by a qualified presuit expert, the claim “shall” be dismissed. § 766.206(2), Fla. Stat.

Shands asserted that Dr. DeStephens was not qualified to corroborate Plaintiff’s claims under any of these provisions. (R.69-71, 75-77). As to Dr. Friedman’s alleged negligence, Shands explained that Dr. DeStephens does not specialize in the “same

specialty” as Dr. Friedman because he specializes in internal medicine and cardiology and Dr. Friedman is a board certified neurosurgeon. (R.69-70, 75-76). Dr. DeStephens also had not devoted professional time in the three years preceding the alleged events to the active clinical practice of or consulting with respect to neurosurgery. (R.70, 76).

As to ARNP Gertsch-Lapcevic’s alleged negligence, Shands asserted that Dr. DeStephens’ affidavit was silent as to any knowledge of the standard of care for an ARNP (much less a neurosurgical ARNP, such as Gertsch-Lapcevic) or as to whether he had engaged in any clinical practice with ARNPs. (R.70-71, 76-77).

On the day of the hearing on the motion to dismiss, Plaintiff filed a second affidavit from Dr. DeStephens. (R.89-90). This time, Dr. DeStephens stated:

I am a medical expert within the meaning of Florida Statute § 766.202 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), physicians assistants, or

other medical support staff, involved in post-operative treatment of patients like [Plaintiff].

(R.89-90). He then readopted the opinions expressed in his original presuit affidavit. (R.90).

The trial court initially agreed that Dr. DeStephens was not qualified to corroborate a claim against Dr. Friedman or ARNP Gertsch-Lapcevic and dismissed Plaintiff's complaint with prejudice. (R.157-59).

Plaintiff moved for rehearing. (R.161). At a hearing on Plaintiff's motion, Plaintiff maintained—without raising any new or different argument than that previously raised and rejected—that Dr. DeStephens was qualified to corroborate her claim against ARNP Gertsch-Lapcevic. (R.181-82). Plaintiff then, for the first time, suggested that the court hold an evidentiary hearing as to whether Dr. DeStephens is qualified to render an opinion as to the standard of care of APRN Gertsch-Lapcevic. (R.188-89).

The Court denied Plaintiff's motion for rehearing “as to the allegations that the Court previously ruled on” but granted Plaintiff's request for an evidentiary hearing. (R.201-02).

B. Dr. DeStephens' Deposition Reveals That, Since May 2013, He Has Exclusively Maintained An Outpatient Practice Involving Telephone Consultations And Anti-Aging Medicine.

The parties thereafter took the deposition of Dr. DeStephens. (R.203). Dr. DeStephens testified that he is an internal medicine specialist and also practices non-invasive cardiology. (R.209-10). He had previously worked on rotation at a hospital as a hospitalist but stopped doing that work in May 2013. (R.210, 226).

Since 2013, Dr. DeStephens has exclusively maintained an outpatient practice that involves telephone consultations and antiaging medicine. (R.210, 221, 226). If one of his patients has an infection, he refers them to another specialist. (R.227-28). He has never performed any sort of surgery that requires general anesthesia. (R.228). If anything he does is "surgical," it is minor, such as mole removals. (R.228).

Dr. DeStephens is not board-certified in neurosurgery and has no neurosurgery training. (R.229-30). He has never supervised a neurosurgery-trained ARNP or entered into a statutorily-required supervisory protocol with an ARNP of any kind. (R.230-31). He has no experience with the procedure Plaintiff underwent here. (R.230).

In the three years preceding Plaintiff's injury (November 2013-2016), Dr. DeStephens had not seen or treated any post-operative patients who had undergone a cervical discectomy and fusion; he had not supervised any ARNP treating a post-operative patient who had undergone a cervical discectomy and fusion; and he had not supervised an ARNP in an office or clinical setting for neurosurgical patients with post-operative wounds. (R.233-35).

Dr. DeStephens explained that ARNPs operate at the behest of the physicians they work under, and it is the responsibility of the physician—here the neurosurgeon—to teach the neurosurgical ARNP how to provide proper post-operative wound care after neurosurgery. (R.233-34). He said the standard of care for an ARNP is what the surgeon chooses it to be. (R.245). Dr. DeStephens has never had an ARNP, much less a neurosurgical ARNP, work under him in any hospital. (R.247)

C. The Trial Court's Ruling On Rehearing.

After the deposition, Defendants filed a memorandum of law, explaining how Dr. DeStephens' deposition demonstrated that he was not qualified to testify regarding a neurosurgical ARNP's standard of care because he made clear that he did not specialize in

the same or similar health profession as Gertsch-Lapcevic, and he had never supervised or instructed a neurosurgical ARNP treating a patient who had undergone the surgery Plaintiff had here. (R.255-61). Moreover, Dr. DeStephens had not done any of these things within the three years preceding Plaintiff's incident. (R.260-61).

After an evidentiary hearing during which Dr. DeStephens testified consistently with his deposition, the trial court reversed course and granted Plaintiff's motion for rehearing, stating that Dr. DeStephens was qualified to corroborate a claim against ARNP Gertsch-Lapcevic because he "last served as a hospitalist in locum five years ago, i.e., in 2015"¹ and he "currently treats patients post-operatively in his private practice," which includes complaints of "incisional pain or swelling or redness," which were some of the symptoms exhibited by Plaintiff. (R.310-13).

¹ The court's conclusion was inconsistent with Dr. DeStephens' testimony during his deposition (R.226), and his testimony during the evidentiary hearing, confirming that he had last worked part-time as a hospitalist under a *locum tenens* relationship in May 2013, more than 3 years before the incident at issue. (R.286).

D. Shands' Petition For Writ Of Certiorari.

Shands filed a petition for writ of certiorari in the First District, asking the court to quash the trial court's order denying its motion to dismiss based on Plaintiff's failure to comply with the presuit requirements. (R.4). Among other things, Shands asserted:

- Dr. DeStephens does not practice in the same or similar health profession as ARNP Gertsch-Lapcevic. Gertsch-Lapcevic is an ARNP with a specialty in neurosurgery. Her "health profession" thus is neurosurgical in nature or, at the very least, surgical in nature, unlike any of Dr. DeStephens' experience. (R.28-29).
- Dr. DeStephens' testimony makes his lack of qualifications clear. As he testified, an ARNP (such as Gertsch-Lapcevic) is the "right arm of the surgeon" (here, the neurosurgeon) and the standard of care for an ARNP in a neurosurgery practice is to follow the instruction of the neurosurgeon. (R.28-29).
- Dr. DeStephens has no experience whatsoever with neurosurgery, or even surgery in general. To the extent he has performed any procedure that could be considered "surgical," it is minor, such as mole removals. He has no

experience with the surgery Plaintiff underwent here or with the follow-up treatment required after such a surgery.

(R.29).

- The most Dr. DeStephens could actually say was that he “understands” post-operative wounds and could identify an infection if the skin was red and swollen. He does not, however, treat an actual infection. Instead, if one of his patients has an infection, he refers them to another subspecialist. (R.29-30).
- Dr. DeStephens did not devote professional time during the three years immediately preceding the incident to the same or similar health profession as neurosurgical ARNP Gertsch-Lapcevic. (R.33-34).

Shands thus asserted that the trial court’s ruling finding Dr. DeStephens qualified elevates an internal medicine physician to the level of expert not only in his own field but in every field and specialty that involves some sort of post-operative care, regardless of whether they are in an inpatient or outpatient setting. (R.32).

E. At Oral Argument, The First District Questions Its Jurisdiction Over The Certiorari Petition.

In the certiorari briefing, no party questioned the First District’s jurisdiction over the certiorari petition based on decades of precedent holding that certiorari is available when the requirements of chapter 766 are at issue.

At oral argument, however, the First District questioned whether this Court’s decision in *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011), precluded certiorari review of orders that relate to anything other than whether the presuit “process” was followed, regardless of whether it was followed in accordance with the statutory requirements.

F. The First District Limits Certiorari Review Of Issues Relating To Compliance With Chapter 766 To Procedural Issues Only.

The First District thereafter issued an opinion dismissing Shands’ petition for lack of jurisdiction “because Petitioners have not demonstrated irreparable harm.” *Univ. of Fla. Bd. of Trustees v. Carmody*, 331 So. 3d 236, 237-38 (Fla. 1st DCA 2021). The court then held that *Williams* limited certiorari relief to **procedural** omissions during the presuit process and that it is not available to

review an order denying a motion to dismiss when the plaintiff fails to corroborate her claim from a statutorily-qualified presuit expert.

Id.

Under the court’s reasoning, because Plaintiff partially 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),” certiorari was unavailable to review the trial court’s order. *Carmody*, 331 So. 3d at 238. The court thus limited certiorari review to only “process-related deficiencies.” *Id.*

The First District acknowledged the argument Shands had asserted at oral argument that *Williams* no longer applies because the statute governing presuit expert qualifications was amended in 2013 to set more restrictive medical qualifications standards for persons giving expert testimony about the applicable standard of care and to remove any discretion a trial court had in determining whether an expert was qualified. *Id.* The court however, concluded that “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.” *Id.* The “core issue remains that appellate courts lack certiorari jurisdiction to address non-procedural disputes concerning the qualifications of claim-corroborating experts.” *Id.*

The court recognized that its decision conflicts with decisions of other district courts of appeal that have not construed *Williams* the same way and have held that certiorari jurisdiction does exist to review whether a presuit expert was statutorily qualified, thereby not limiting certiorari review only to whether the presuit requirements have been procedurally satisfied.

Specifically, in *Clare v. Lynch*, 220 So. 3d 1258, 1259-60 (Fla. 2d DCA 2017), the Second District expressly recognized it had certiorari jurisdiction to review an order denying a motion to dismiss when the issue is whether a presuit expert is statutorily qualified because an unqualified presuit expert would “operate[] to effectively excuse [plaintiff] from the presuit requirements of chapter 766.”

In *Riggenbach v. Rhodes*, 267 So. 3d 551, 553 (Fla. 5th DCA 2019), the Fifth District similarly held that it had certiorari jurisdiction to determine whether the plaintiff’s presuit expert was statutorily qualified. The court cited several cases in support of its

jurisdiction, including the First District's decision in *Oken v. Williams*, 23 So. 3d 140 (Fla. 1st DCA 2009), noting that this Court's decision in *Williams v. Oken* quashed *Oken* on other grounds. *Riggenbach*, 267 So. 3d at 553.

The First District thus certified conflict with *Clare* and *Riggenbach*, and this Court accepted review.

SUMMARY OF ARGUMENT

This Court should quash the First District's decision. First, *Williams* was not decided on the irreparable harm jurisdictional element of certiorari review. Instead, this Court held that the district court had exceeded its scope of jurisdiction by departing from the essential requirements of law. The jurisdictional premise upon which the First District's decision was based thus was incorrect. The irreparable harm resulting from a plaintiff's failure to comply with the presuit requirements has long been established under Florida law and *Williams* did not change it.

Further, to the extent *Williams* held that certiorari is unavailable to review erroneous trial court rulings denying motions to dismiss when the plaintiff has failed to comply with the Medical Malpractice Act's presuit screening requirements—including the

requirement to have a statutorily qualified expert corroborate the plaintiff's claim—the decision should no longer apply because the legislature amended the Act in 2013 to remove the discretion trial courts used to have in determining whether a presuit expert is qualified.

As this Court recently recognized, “[t]he inquiry of whether a presuit expert is qualified “requires simply construing the statute’s requirements and determining whether the expert’s qualifications align, which the appellate court is on equal footing with the trial court to do.” *Morris v. Muniz*, 252 So. 3d 1143, 1155-56 (Fla. 2018).

Under the First District’s decision, however, certiorari is no longer appropriate to seek review of an order denying a motion to dismiss for failure to comply with the presuit requirements when the issue is whether the presuit expert is qualified under section 766.102 to corroborate a medical negligence claim.

Thus, for example, under the First District’s decision, a potential plaintiff can corroborate a purported medical negligence claim against a cardiothoracic surgeon with an affidavit from a psychiatrist. Even though the two physicians indisputably do not practice in the “same specialty,” as required by statute, the

defendant is entitled to no immediate relief because the plaintiff followed the “procedure” in the Act and submitted an affidavit, albeit an affidavit attested to by someone statutorily unqualified to render an opinion regarding the medical negligence claim, as required by section 766.203(2).

This is directly contrary to the plain language of Florida’s Medical Malpractice Act, which requires that a complaint “shall” be dismissed when a medical malpractice plaintiff fails to comply with the extensive presuit screening procedures set forth by the legislature. *See* § 766.206(2), Fla. Stat. It obliterates the mandatory presuit procedures put in place by the legislature so that healthcare providers can avoid being subjected to frivolous claims. This results in a deprivation of the presuit screening process guaranteed by statute.

Finally, if *Williams* has any applicability to certiorari review after the 2013 amendments to the Medical Malpractice Act, this Court should reconsider that decision because its application to bar certain categories of certiorari proceedings denies defendants the process to which the legislature has unambiguously entitled them. Moreover, the reasoning underlying the Court’s decision

disregarded long-standing precedent and was based on an inapposite analogy to punitive damages.

STANDARD OF REVIEW

All of the issues before the Court are purely legal, as they involve whether the First District misapplied this Court's precedent, whether Florida's district courts of appeal have certiorari jurisdiction to review orders denying motions to dismiss because a medical malpractice plaintiff has not corroborated his or her claim with an expert who is qualified under the strict and mandatory requirements of the Medical Malpractice Act, and whether the Court should adhere to its decision in *Williams* to the extent it is construed to limit certiorari review when the requirements of the Medical Malpractice Act are at issue. These legal issues are reviewed de novo. See *Gessa v. Manor Care of Fla., Inc.*, 86 So. 3d 484, 490 (Fla. 2011) (pure issues of law are reviewed de novo).

ARGUMENT

I. THE FIRST DISTRICT MISAPPLIED *WILLIAMS* WHEN IT HELD THAT MEDICAL MALPRACTICE DEFENDANTS ARE NOT IRREPARABLY HARMED WHEN A PLAINTIFF FAILS TO COMPLY WITH PRESUIT.

The First District erred and misconstrued *Williams* when it held that, under *Williams*, Shands had not demonstrated the jurisdictional certiorari element of irreparable harm. *Williams* did not hold that certiorari was not available to review the qualifications of a presuit expert because it did not result in irreparable harm to the petitioner. Instead, the Court very clearly stated that the issue before it was whether the trial court departed from the essential requirements of law. *See Williams*, 62 So. 3d 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.”).

Contrary to the First District’s holding, the irreparable harm that results from a plaintiff’s failure to comply with presuit is well-established by the statutory scheme enacted by the legislature and decisions from every district court of appeal construing it. *Williams* did not impact that law.

It has long been recognized in Florida that the legislature has decided that medical malpractice cases are different. *See Howell v. Balchunas*, 284 So. 3d 1180, 1182 (Fla. 1st DCA 2019) (citing cases). The presuit requirements of the Medical Malpractice Act derived from findings made by the Florida Legislature in 1988 requiring tightened rules governing recovery in medical malpractice cases because a dramatic increase in medical malpractice liability insurance premiums had resulted “in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians.” *Baptist Med. Ctr. of the Beaches, Inc. v. Rhodin*, 40 So. 3d 112, 115 (Fla. 1st DCA 2010); *see also* § 766.201, Fla. Stat.

The legislature thus made clear through the express language of the statute that the Act “provide[s] a plan for prompt resolution of medical negligence claims,” which includes compliance with the Act’s presuit requirements. § 766.201(2), Fla. Stat. (“Presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses.”); *see also Musculoskeletal Inst. Chartered v. Parham*, 745 So. 2d 946, 949 (Fla. 1999) (“**Stringent presuit investigatory requirements** are the hallmark of this

framework.”) (emphasis added).

A presuit investigation thus must include “[v]erifiable requirements that reasonable investigation precede both malpractice claims and defenses in order to eliminate frivolous claims and defenses.” § 766.201(2)(a)1., Fla. Stat. It also must include “[m]edical corroboration procedures.” *Id.* at (2)(a)2.

The requirement to corroborate reasonable grounds for a claim through the affidavit of a qualified expert of the same specialty is the salient factor in assessing the reasonableness of the grounds to initiate a cause of action for medical negligence. *See* § 766.203(2), Fla. Stat. An unqualified expert cannot legally or logically corroborate reasonable grounds to initiate a lawsuit where the unqualified expert’s affidavit is used in a vain attempt to render adverse standard of care opinions against a physician in another specialty. The verified expert opinion assures potential defendants that the claim was preceded by a reasonable investigation and “that there is justification for the Plaintiff’s claim” *Kukral v. Mekras*, 679 So. 2d 278, 282 (Fla. 1996); *see also Wolfsen v. Applegate*, 619 So. 2d 1050, 1054-55 (Fla. 1st DCA 1993).

The legislature enforces these mandatory presuit procedures by directing that:

No action shall be filed for personal injury or wrongful death arising out of medical negligence, whether in tort or in contract, unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant.

§ 766.104(1), Fla. Stat. (emphasis added); *see also Musculoskeletal Inst.*, 745 So. 2d at 950-51 (“[N]o action under chapter 766 may ‘commence’ by filing a complaint in the courts of Florida without compliance with these stringent statutory predicates.”).

And, when an action is filed but the plaintiff has failed to comply with the Act’s presuit requirements, including the requirement to have qualified presuit expert, the claim “shall” be dismissed. § 766.206(2), Fla. Stat. As the First District aptly explained decades ago:

One clear purpose of requiring corroboration is to spare all parties (not to mention the judiciary) the time and expense of litigating spurious claims. The expert 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.**

Archer v. Maddux, 645 So. 2d 544, 546-47 (Fla. 1st DCA 1994)
(emphasis added; internal citation omitted).

Because “no action shall be filed” if presuit is not complied with, early intervention is necessary to comply with the legislature’s urgency in enacting medical malpractice reform. *Miami Physical Therapy Assoc., Inc. v. Savage*, 632 So. 2d 114, 115-16 (Fla. 3d DCA 1994).

Florida courts thus have uniformly held that “the statutes requiring presuit notice and screening cannot be meaningfully enforced postjudgment because the purpose of the presuit screening is to avoid the filing of the lawsuit in the first instance.” *St. Joseph’s Hosp., Inc. v. Doe*, 208 So. 3d 1200, 1201-02 (Fla. 2d DCA 2017) (cleaned up); *see also Riggerbach v. Rhodes*, 267 So. 2d 551, 553-56 (Fla. 5th DCA 2019); *Clare v. Lynch*, 220 So. 3d 1258, 1260-61 (Fla. 2d DCA 2017); *Holmes Reg’l Med. Ctr., Inc. v. Dumigan*, 151 So. 3d 1282, 1284-85 (Fla. 5th DCA 2014); *Rell v. McCulla*, 101 So. 3d 878, 880-81 (Fla. 2d DCA 2012); *Palms West Hosp. Ltd. P’ship v. Burns*, 83 So. 3d 785, 788 (Fla. 4th DCA 2011); *Martin Mem’l Med. Ctr., Inc. v. Herber*, 984 So. 2d 661, 662 (Fla. 4th DCA 2008); *Bonati v. Allen*, 911 So. 2d 285 (Fla. 2d DCA 2005);

Fassy v. Crowley, 884 So. 2d 359, 363 (Fla. 2d DCA 2004).

Consequently:

[C]ertiorari is the appropriate remedy [when the requirements of chapter 766 are at issue] because without this relief petitioners will suffer irreparable harm that cannot be remedied on direct appeal. Conceivably, if respondents were to prevail in this proceeding, they might prevail at trial and obtain a judgment against petitioners. On appeal if that judgment was determined to be the product of a fundamentally fair trial, an argument could be made that no useful purpose would be served in remanding the case because the cost-saving pretrial procedures were not followed. **Therefore, for petitioners to receive the benefits conferred upon them (and, in the estimation of the legislature, upon the citizens of Florida) by the statute, it is necessary and appropriate for us to intervene at this juncture.** We recognize, of course, that the mere expense of an unnecessary trial ordinarily would not warrant our issuance of a writ of certiorari. This rule of law, however, generally comes into play where the error complained of can be remedied by direct appeal. **As we have said, relief by direct appeal would be no relief at all in this case.**

Pearlstein v. Malunney, 500 So. 2d 585, 587 (Fla. 2d DCA 1986)

(internal citations omitted); *see also Fassy*, 884 So. 2d at 363

(appellate remedy at the end of case for failure to comply with

presuit “would be inadequate to correct the error of subjecting

[defendants] to the very trial that presuit procedures were intended

to prevent [T]he purposes of these cost-saving presuit

procedures would be thwarted, and the appellate remedy would

serve no useful purpose.”) (cleaned up).

This established irreparable harm resulting from a plaintiff’s failure to comply with presuit provides Florida’s district courts of appeal with jurisdiction over certiorari petitions challenging orders denying motions to dismiss for failing to comply with presuit.

Williams did not impact that irreparable harm analysis. *See also Clare*, 220 So. 3d at 1260 (recognizing failure to comply with presuit requirements is a departure from the essential requirements of law).

The First District thus erred in removing a critical presuit requirement from certiorari review—the requirement to have a claim corroborated by a **statutorily qualified** expert—and that decision should be reversed.

II. WILLIAMS DOES NOT BAR CERTIORARI REVIEW OF ORDERS CONSIDERING THE QUALIFICATIONS OF PRESUIT EXPERTS UNDER THE POST-2013 STATUTORY AMENDMENTS.

The First District further erred in holding *Williams* precludes certiorari relief under the circumstances presented here. To demonstrate *Williams*’ inapplicability, this section first provides the background of that case and then demonstrates why the decision

does not apply after the 2013 amendments to the Act.

A. The *Williams v. Oken* Decision.

In *Williams*, this Court reviewed the First District's decision granting a certiorari petition and quashing the trial court's order denying the defendant's motion to dismiss for failure to comply with the statutory presuit requirements. 62 So. 3d at 1131. The issue in that case was whether the plaintiff's presuit expert specialized in the same **or similar** specialty as the physician against whom his opinion was offered, as was then required by section 766.102(5), Florida Statutes (2007). *Williams*, 62 So. 3d at 1131-32.

Under the pre-2013 version of section 766.102(5) that was applicable in *Williams*, this analysis could be fact-intensive.

In 2005, the plaintiff, Ted Williams ("Williams"), went to an emergency room complaining of chest pain and was evaluated by an emergency room physician. The emergency room physician ordered consultation with the defendant, Dr. Oken, a board certified cardiologist. Williams alleged that he suffered a heart attack because of Dr. Oken's negligence and sued Dr. Oken for medical negligence. *Williams*, 62 So. 3d at 1131.

To corroborate his claim, Williams provided a presuit affidavit

from Dr. Foster, an emergency room physician. According to Dr. Foster's affidavit, he was familiar with the appropriate work up and treatment of suspected cardiac patients in the emergency room, as well as the standard of care of reasonably careful physicians in diagnosing and treating impending heart attacks under the same or similar circumstances as those presented by Williams. *Id.* at 1131-32.

Dr. Oken moved to dismiss Williams' complaint for failing to comply with the presuit requirements of chapter 766. As relevant here, under the statute applicable at that time, a presuit expert was qualified to corroborate a claim against a physician if the expert:

Specialize[d] in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; **or specialize[d] in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition** that is the subject of the claim and have prior experience treating similar patients

Oken v. Williams, 23 So. 3d 140, 146 (Fla. 1st DCA 2009) (quoting § 766.102(5), Fla. Stat. (2007)) (emphasis added).

The trial court denied Williams' motion to dismiss, and Dr. Oken filed a petition for writ of certiorari in the First District. The First District granted the petition, quashed the trial court's order,

and remanded with directions to dismiss the case with prejudice because Williams failed to comply with the statutory requirement that his presuit expert specialize in the same or similar specialty as Dr. Oken. *Oken*, 23 So. 3d at 149-50. No party challenged the court's jurisdiction over the certiorari petition in the First District.

Williams sought review of *Oken* in this Court, based on conflict with *St. Mary's Hospital v. Bell*, 785 So. 2d 1261 (Fla. 4th DCA 2001). In *St. Mary's*, the plaintiff sued the hospital for the death of his child. The hospital moved to dismiss the complaint because the plaintiff could not produce a hospital record supporting his assertion that the child had been a patient of the hospital. After an evidentiary hearing, the trial court denied the hospital's motion to dismiss. The Fourth District held that certiorari was not available to **reweigh the sufficiency of the evidence** presented concerning the disputed merits issue of whether the decedent was actually a patient of the hospital. *Id.* at 1262.

Applying the same reasoning as *St. Mary's*, this Court in *Williams* held that certiorari is not available to **reweigh the sufficiency of the evidence** as to whether Dr. Oken and Dr. Foster's specialties were **similar enough** to comply with section

766.102(5). See 62 So. 3d at 1133 (stating certiorari is not so broad to encompass a review of the sufficiency of the evidence). Instead, analogizing the review of presuit compliance with the review of an order allowing a plaintiff to assert a punitive damages claim, the court stated that certiorari was limited only to whether the procedural requirements of the presuit statute were complied with because “justification for issuing a writ of certiorari is diminished greatly if the parties have been afforded the essential process guaranteed by law and the judge has merely made a mistake in an order or ruling” *Williams*, 62 So. 3d at 1136-37.

The Court did, however, conclude that, on remand, the trial court should hold an evidentiary hearing on the presuit expert’s qualifications. *Williams*, 62 So. 3d at 1137.

B. *Williams’* Analysis Does Not Apply After The 2013 Amendments To The Act.

After *Williams*, the legislature amended section 766.102(5). Now, there is no more weighing of the evidence or guesswork related to whether a presuit expert specializes in a same “or similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim” as the defendant.

Instead, when the healthcare provider against whom the presuit expert's testimony is offered is a specialist, the presuit expert must "[s]pecialize in the **same specialty** as the health care provider against whom . . . the testimony is offered."

§ 766.102(5)(a)1., Fla. Stat. (emphasis added); *see also Clare*, 220 So. 3d at 1261. By making these amendments, the legislature expressed its "indisputable intent" to preclude experts with "similar" specialties from corroborating a medical negligence claim against a defendant specialist who practices in a different specialty. *Clare*, 220 So. 3d at 1261.

The legislature "**also eliminated any discretion in the matter the trial court may have previously had**" by deleting section 766.102(14), Florida Statutes (2012)² which previously gave a trial court broad discretion to consider evidence concerning a proposed expert's qualifications and either to accept or reject that expert's opinions based on that evidence.

The post-2013 same specialty requirement "is to be taken literally and is not synonymous with physicians with different

² Under the 2007 version of the section 766.102 at issue in *Williams*, this provision was found in subsection (12).

specialties providing similar treatment to the same areas of the body.” *Riggenbach*, 267 So. 3d at 555.

Consequently, as this Court recognized in *Morris v. Muniz*, 252 So. 3d 1143, 1156 (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, which the appellate court is on equal footing with the trial court to do.” This is so even when the trial court has held an evidentiary hearing on the expert’s qualifications. *Id.* at 1155.

Under the plain language of the version of section 766.102(5) applicable here, then, the inquiry of whether a presuit expert is qualified is no longer fact-intensive and does not require reweighing evidence. Now, the trial court has no discretion other than to determine whether the presuit expert and the specialist against whom he or she is offering the opinion practice in the same specialty or health profession. The concern in *Williams*—that certiorari should not be used to reweigh evidence—no longer exists in this context.

Thus, as the courts in *Clare* and *Riggenbach* held, certiorari is indeed appropriate to review an order denying a defendant’s motion

to dismiss for failure to provide a presuit affidavit from a qualified expert. *Williams* should not bar certiorari review under the current version of the statute, and the First District's holding to the contrary should be quashed and the case remanded to the First District with directions that the Court consider Shands' petition on its merits.

III. IF WILLIAMS PROHIBITS CERTIORARI REVIEW OF A PLAINTIFF'S FAILURE TO COMPLY WITH PRESUIT FOR FAILING TO HAVE A QUALIFIED PRESUIT EXPERT, THEN IT SHOULD BE OVERTURNED TO AVOID EVISCERATING THE PRESUIT SCREENING REQUIREMENTS.

To the extent this Court believes that, notwithstanding the 2013 amendments to the Medical Malpractice Act, *Williams* prohibits certiorari review of an order denying a motion to dismiss because a plaintiff's presuit expert was not qualified under the statute, that decision should be overturned.

This Court has not hesitated to reconsider and recede from prior precedent when "blind allegiance" would "perpetuat[e] an error in legal thinking":

Stare decisis provides stability to the law and to the society governed by that law. Yet *stare decisis* does not command blind allegiance to precedent. "Perpetuating an error in legal thinking under the guise of *stare decisis* serves no one well and only undermines the integrity and credibility

of the court.”

State v. Poole, 297 So. 3d 487, 506 (Fla. 2020) (quoting *Shepard v. State*, 259 So. 3d 701, 707 (Fla. 2018); *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995)); see also *Lawrence v. State*, 308 So. 3d 544, 551 (Fla. 2020); *Phillips v. State*, 299 So. 3d 1013, 1023 (Fla. 2020).

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 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*, 645 So. 2d at 546-47; see also *Clare*, 220 So. 3d at 1259-60 (if a presuit expert is unqualified, the plaintiff has been excused from the presuit requirements of chapter 766 and certiorari is warranted).

This is true even where the trial court’s determination regarding an expert’s qualifications involves an application of the evidence regarding the expert’s qualifications to the unambiguous

legal requirements of the Act. If certiorari review in medical malpractice cases involving compliance with presuit is limited solely to whether “the procedure was followed,” the extensive, mandatory, statutory presuit procedure established by the legislature to sort out meritless claims and encourage the resolution of meritorious claims through settlement are effectively eviscerated, rendering the statutory protections meaningless.

A simple example makes the point. If the question on review in medical malpractice certiorari petitions is limited to whether the statutory procedure was followed, then a defendant is subjected to the very trial the presuit procedures are designed to prevent, as long as a plaintiff has “complied with the process,” albeit wholly inadequately.

A potential plaintiff could corroborate a claim against a cardiothoracic surgeon with a presuit affidavit from a psychiatrist, yet since the plaintiff (insufficiently) followed the statutory procedure and filed an affidavit, the defendant is without a remedy and subject to protracted litigation on what could be a frivolous claim. The plaintiff is effectively excused from the presuit requirements of the Act. *Cf. Clare*, 220 So. 3d at 1260.

That construction of the law turns the Act on its head and should not be allowed to stand.

Moreover, a driving force behind the Court's decision in *Williams* was its approval of *St. Mary's* (the source of the Court's conflict jurisdiction) and its analogy of the issue to certiorari review of a punitive damages claim, which has long been limited to a determination of whether the trial court followed the procedural requirements of section 768.72, Florida Statutes, and does not extend to reviewing the sufficiency of the evidence presented to establish a claim for punitive damages. *See Williams*, 62 So. 3d at 1135-36 (discussing *Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995)).

None of these reasons justifies preclusion of certiorari review of a presuit expert's qualifications.

First, *St. Mary's* did not involve a determination of whether the plaintiff's claim was corroborated by a qualified expert. The defendant in that case moved to dismiss the plaintiff's complaint because it had no records that the decedent had ever been admitted to its hospital. That contention was disputed by plaintiff with an affidavit from the decedent's treating physician that the decedent

had, in fact, been taken to the hospital. The court held that certiorari was unavailable to weigh the **disputed evidentiary issue** of whether the decedent had been a patient at the hospital. That is not the same as whether a medical malpractice claim has been properly corroborated by a qualified expert. *St. Mary's*, 785 So. 2d at 1261-62.

The Court's analogy of the issue to certiorari review of orders allowing a plaintiff to amend its complaint to allege punitive damages also should be reconsidered. First, the process required to be permitted to assert a claim for punitive damages, as well as the trial court's determination of whether a plaintiff has followed that process, is not similar to legislature's clearly expressed "plan for prompt resolution of medical negligence claims" through "stringent presuit investigatory requirements." § 766.201(2), Fla. Stat.; *see also Musculoskeletal Inst.*, 745 So. 2d at 949.

Under section 768.72(1), a claim for punitive damages is not permitted "unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages." This determination necessarily involves some discretion by the trial court in weighing

the evidence to determine whether it is sufficient to allow a punitive damages claim.

One of the primary reasons for this evidentiary requirement is to prevent a defendant from being subjected to invasive financial worth discovery until the trial court determines there is a reasonable evidentiary basis to do so. *See Simeon, Inc. v. Cox*, 671 So. 2d 158, 160 (Fla. 1996). This Court, however, did not believe the harm that may result from discovery of a litigant's finances is the type of irreparable harm contemplated by the standard of review for certiorari. *See Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987).

That is not the case for determining whether a presuit expert is qualified because, as set forth above, any discretion of the trial court has been removed. The determination "requires simply construing the statute's requirements and determining whether the expert's qualifications align, which the appellate court is on equal footing with the trial court to do." *Morris*, 252 So. 3d at 1155-56.

More importantly, though, the irreparable harm arising from being subjected to a medical malpractice trial when a claim has not been properly corroborated is entrenched in our law, unlike in

punitive damages cases. Consequently, even before *Williams*, district courts of appeal routinely held they had certiorari jurisdiction to review the qualifications of a presuit expert or the sufficiency of a presuit investigation and did not limit themselves to procedural errors. See, e.g., *Holmes Reg'l Med. Ctr. v. Wirth*, 49 So. 3d 802 (Fla. 5th DCA 2010); *Paley v. Maraj*, 910 So. 2d 282 (Fla. 4th DCA 2005); *Ft. Walton Beach Med. Ctr., Inc. v. Dingler*, 697 So. 2d 575 (Fla. 1st DCA 1997); *Correa v. Robertson*, 693 So. 2d 619 (Fla. 2d DCA 1997).

This Court in *Williams* did not acknowledge these cases, choosing instead to focus on the punitive damages analogy.

Finally, just this year, this Court reversed course on the issue of punitive damages by amending Florida Rule of Appellate Procedure 9.130 to allow for an interlocutory appeal from an order granting or denying leave to amend a complaint to assert a claim for punitive damages. *In re: Amend. to Fla. R. App. P. 9.130*, No. SC21-129, 2022 WL 57943 (Fla. Jan. 6, 2022).

This rule amendment was spawned by decisions from our district courts of appeal, as well as individual judges on those courts, expressing concerns about the impracticality and

ineffectiveness of the limited nature certiorari review of orders permitting punitive damages claims.

Citing the “game-changing” nature of an order allowing a punitive damages claim in litigation and a punitive damages claim’s significant, multi-faceted impacts on litigation and litigants, these opinions and judges questioned whether rule 9.130 should be amended to allow an appeal from a non-final order granting or denying a party’s motion to amend a complaint to add a claim for punitive damages. The opinions suggest that the narrow, exacting standard afforded by certiorari proceedings does nothing to mitigate the impacts of allowing a punitive damages claim to proceed.

Instead, these courts and judges believed that an immediate appeal from an order allowing a punitive damages claim should be permitted so that the appellate court can review the sufficiency of the evidence purporting to support a punitive damages claim early on in the litigation, as opposed to after a full trial on the claim. See *Life Care Ctrs. of Am., Inc. v. Croft*, 299 So. 3d 588, 591-92 (Fla. 2d DCA 2020); *E.R. Truck Equip. Corp. v. Gomont*, 300 So. 3d 1230, 1231-32 (Fla. 3d DCA 2020) (Scales, J., concurring and Gordo, J., concurring specially); *Sapp v. Olivares*, 288 So. 3d 714, 716 n.1

(Fla. 4th DCA 2020); *Event Depot Corp. v. Frank*, 269 So. 3d 559, 563-64 (Fla. 4th DCA 2019) (Kuntz, J., concurring specially); *Levin v. Pritchard*, 258 So. 3d 545, 548 n.4 (Fla. 3d DCA 2018); *TRG Desert Inn Venture, Ltd. v. Berezovsky*, 194 So. 3d 516, 520 n.5 (Fla. 3d DCA 2016).

This Court agreed and amended rule 9.130, now (as of April 1, 2022) authorizing non-final appeals from orders granting or denying leave to assert a punitive damages claim and thereby allowing the sufficiency of the evidence on punitive damages to be considered on interlocutory appeal. *In re: Amend. to Fla. R. App. P. 9.130*, No. SC21-129, 2022 WL 57943 (Fla. Jan. 6, 2022).

The need for immediate review of orders determining whether a presuit expert is qualified—and, hence, whether the medical malpractice claim has been corroborated—applies with even more force than the punitive damages issue, for all of the reasons requiring strict compliance with the presuit requirements already discussed.

As this Court recognized in *Williams*, the purpose of presuit is to sort out meritless claims. 62 So. 3d at 1133 n.1. But if an expert is not qualified to evaluate the claim, then whether a claim is

meritless has not been sorted out and, because of the irreparable harm that results from subjecting a defendant to a medical malpractice claim when the presuit requirements have not been followed, should be permitted to be reviewed immediately through certiorari.

Consequently, to the extent *Williams* applies under current law to bar certiorari review of whether a plaintiff has corroborated a claim with a statutorily qualified presuit expert, this Court should recede from it.

CONCLUSION

This Court should quash the First District's decision, hold that certiorari review is available to review whether a plaintiff has complied with the mandatory, statutory presuit process by corroborating a claim with a qualified expert. An unqualified expert deprives the defendant of its right to have the plaintiff's claim of negligence evaluated before trial, as expressly required by the legislature. This Court thus should remand the case to the First District with directions to consider the merits of Shands' petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY FURTHER CERTIFY that the foregoing complies with the font and typeface requirements set forth in Florida Rule of Appellate Procedure 9.045 and complies with the word count limit requirements of rule 9.210(a)(2) because it does not exceed 13,000 words.

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