Filing # 144709653 E-Filed 02/28/2022 11:45:24 AM

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

LAURIE CARMODY,

Respondent.
_____/

Case No. SC22-68
L.T. Case Nos. 1D21-0634
2019-CA-1827

RECEIVED, 02/28/2022 11:46:25 AM, Clerk, Supreme Court

PETITIONERS' BRIEF ON JURISDICTION

On Review From A Decision Of The
First District Court of Appeal

Christine R. Davis
DAVIS APPEALS, PLLC
1400 Village Square Blvd., Suite 3-181
Tallahassee, FL 32312
Telephone: (850) 739-0448
Email: cdavis@davisappeals.com

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS..... ii

STATEMENT OF THE ISSUES iv

STATEMENT OF CASE AND FACTS 1

ARGUMENT 3

I. THIS COURT HAS JURISDICTION TO REVIEW THE UNDERLYING DECISION 3

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE UNDERLYING DECISION..... 3

CONCLUSION 10

CERTIFICATE OF SERVICE..... 11

CERTIFICATE OF COMPLIANCE 12

TABLE OF CITATIONS

Cases

Bonati v. Allen,
911 So. 2d 285 (Fla. 2d DCA 2005) 9

Clare v. Lynch,
220 So. 3d 1258 (Fla. 2d DCA 2017) 2, 4, 5, 9

Davis v. Karr,
264 So. 3d 279 (Fla. 5th DCA 2019) 5

Fassy v. Crowley,
884 So. 2d 359 (Fla. 2d DCA 2004) 9, 10

Holmes Reg'l Med. Ctr., Inc. v. Dumigan,
151 So. 3d 1282 (Fla. 5th DCA 2014) 9

Kukral v. Mekras,
679 So. 2d 278 (Fla. 1996) 8

Martin Mem'l Med. Ctr., Inc. v. Herber,
984 So. 2d 661 (Fla. 4th DCA 2008) 9

Musculoskeletal Inst. Chartered v. Parham,
745 So. 2d 946 (Fla. 1999) 6-7, 8

Palms West Hosp. Ltd. P'ship v. Burns,
83 So. 3d 785 (Fla. 4th DCA 2011) 9

Rell v. McCulla,
101 So. 3d 878 (Fla. 2d DCA 2012) 9

Riggenbach v. Rhodes,
267 So. 2d 551 (Fla. 5th DCA 2019) 2, 4, 5, 9

St. Joseph's Hosp., Inc. v. Doe,
208 So. 3d 1200 (Fla. 2d DCA 2017) 9

State v. Betz,
815 So. 2d 627 (Fla. 2002) 6

State v. Vickery,
961 So. 2d 309 (Fla. 2007) 3

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

Wolfsen v. Applegate,
619 So. 2d 1050 (Fla. 1st DCA 1993) 8

Constitution, Statutes, and Rules

Art. V, § 3, Fla. Const. 3

§ 766.102, Fla. Stat. ..... *passim*

§ 766.104, Fla. Stat. 8

§ 766.106, Fla. Stat. 7

§ 766.201, Fla. Stat. 6

§ 766.202, Fla. Stat. 8

§ 766.203, Fla. Stat. 1, 7, 10

Fla. R. App. P. 9.045 12

Fla. R. App. P. 9.210 12

STATEMENT OF THE ISSUES

The issue over which jurisdiction is invoked is whether certiorari review of orders denying motions to dismiss for failure to comply with the presuit requirements of Florida's Medical Malpractice Act is limited solely to procedural defects in the presuit process and not available to a trial court's determination of a claimant's actual, legal compliance with the statutorily required condition precedents prior to filing a medical negligence lawsuit, such as a plaintiff's failure to comply with the mandatory presuit requirement of corroborating a medical malpractice claim with an opinion from an expert who is statutorily qualified under the Act.

STATEMENT OF CASE AND FACTS

Petitioners, University of Florida Board of Trustees and Shands Teaching Hospital and Clinics (collectively, "UFBOT") filed a petition for writ of certiorari in the First District, asking the court to quash an order of the trial court denying their motion to dismiss based on Plaintiff's failure to comply with the presuit requirements of Florida's Medical Malpractice Act. (A.3). Specifically, UFBOT asserted that certiorari was warranted because Plaintiff failed to corroborate reasonable grounds to support her medical negligence claim with an affidavit from a qualified presuit expert, as required by sections 766.203(2)(b) and 766.102(5) and (6), Florida Statutes. (A.3, 5).

Citing *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011), the First District dismissed UFBOT's petition for lack of jurisdiction "because Petitioners have not demonstrated irreparable harm." (A.4-6). The court 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 with an opinion from a statutorily-qualified presuit expert. (A.4).

Consequently, the court ruled, certiorari is not available to

determine as a matter of law whether a plaintiff's presuit expert practiced in the "same specialty" as the physician against whom the expert was opining, as required by section 766.102. (A.5-6). Because Plaintiff attempted (albeit erroneously) to comply with the presuit procedural steps of going forward with her medical negligence claim—by filing a presuit affidavit from a medical expert who practiced in a different specialty than the alleged neurosurgery tortfeasor—certiorari review was unavailable. (A.5-6).

The court, however, recognized that the Medical Malpractice Act has been amended since this Court's decision in *Williams* and that its decision conflicts with the course taken in more recent cases from the Second and Fifth District Courts of Appeal, which evaluated the merits of medical expert-qualification rulings on certiorari and granted relief. (A.5-6).

The court thus certified conflict with those decisions. (A.6) (certifying conflict with *Clare v. Lynch*, 220 So. 3d 1258 (Fla. 2d DCA 2017), and *Riggenbach v. Rhodes*, 267 So. 3d 551 (Fla. 5th DCA 2019)).

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE UNDERLYING DECISION.

This Court has jurisdiction to review the underlying decision because the First District certified conflict with decisions from other district courts of appeal on the same question of law. *See* Art. V, § 3(b)(4), Fla. Const. This certification provides the Court with "jurisdiction per se." *See State v. Vickery*, 961 So. 2d 309, 312 (Fla. 2007).

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE UNDERLYING DECISION.

This Court should exercise its discretion to review the First District's decision and resolve the conflict among the district courts of appeal because, absent this Court's direction, identically-situated litigants throughout the state will be treated differently on identical issues depending on which district court of appeal they happen to be in.

In the underlying case, UFBOT moved to dismiss Plaintiff's complaint for failure to comply with the mandatory presuit requirements of Florida's Medical Malpractice Act because Plaintiff did not corroborate her medical negligence claim with an opinion

from an expert that satisfied the statutory qualifications required by section 766.102(5) and (6), Florida Statutes. Specifically, UFBOT contended that Plaintiff's presuit internal medicine/cardiology expert did not practice in the same specialty as the neurosurgery provider against whom the expert was offering his opinion.

The trial court denied UFBOT's motion and UFBOT sought review via a petition for writ of certiorari in the First District. Citing *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011), the First District held that certiorari is limited to review of orders denying a motion to dismiss for a plaintiff's failure to comply with the **procedural** requirements set forth in Florida's Medical Malpractice Act.

Consequently, in the First District, certiorari is no longer appropriate to seek review of an order denying a motion to dismiss for failure to comply with the presuit requirements of the Medical Malpractice Act when the issue is whether the presuit expert is statutorily qualified based on whether he or she practices within the same medical specialty as the defendant physician.

This is directly contrary to the holdings of the Second and Fifth Districts in *Clare v. Lynch*, 220 So. 3d 1258 (Fla. 2d DCA 2017), and *Riggenbach v. Rhodes*, 267 So. 3d 551 (Fla. 5th DCA 2019). In those

cases, the courts held that certiorari **is** available to review an order denying a motion to dismiss on the grounds that the plaintiff did not have a statutorily qualified presuit expert. *See Riggenbach*, 267 So. 2d at 553; *Clare*, 220 So. 3d at 1259-60; *see also Davis v. Karr*, 264 So. 3d 279, 281-82 (Fla. 5th DCA 2019).

The decisions in *Clare* and *Riggenbach* appear to be based on the fact that section 766.102 was amended in 2013, after this Court's decision in *Williams.* Now, 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.

Thus, through the 2013 amendments, the legislature "**eliminated any discretion in the matter the trial court may have previously had.**" *Id.* (emphasis added). 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. The concern this Court had when deciding *Williams* no longer exists.

This is precisely the type of case in which this Court should resolve a conflict among the district courts and provide uniform guidance throughout the state. *See State v. Betz*, 815 So. 2d 627, 630 (Fla. 2002) (jurisdiction should be exercised where it is eminently clear two holdings cannot be reconciled).

Further, in addition to the fact that the rights of identically-situated litigants will differ depending on what district they are in, the conflict issue is one of exceptional importance to Florida's medical malpractice jurisprudence. In enacting the Medical Malpractice Act, the legislature made its intent clear through the express language of the statute—to "provide 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).

The requirement to corroborate reasonable grounds for a claim through the affidavit of a qualified expert of the same specialty is the salient, critical factor in assessing the reasonableness of the grounds to initiate a complex, multi-year cause of action for medical negligence. *See* § 766.203(b), Fla. Stat. An unqualified expert cannot legally or logically corroborate reasonable grounds to initiate a lawsuit against a healthcare provider—which also requires that provider's license be reviewed by the Department of Health, *see* § 766.106(2)(b), Fla. Stat.—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.

As the legislature acknowledged in enacting these requirements, medical negligence litigation rises or falls on the opinions of medical experts who opine about prevailing professional standards of care and causation. Through the mandatory presuit requirements, the legislature ensured that the presuit investigation and attendant procedural and substantive requirements not serve as

a mere ticket punch to file suit. 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. § 766.202(2), Fla. Stat.

Because "no action shall be filed" if presuit is not complied with, Florida courts 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 Riggenbach v. Rhodes*, 267 So. 2d 551, 553-56 (Fla. 5th DCA 2019); *Davis v. Karr*, 264 So. 3d 279, 281 (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. 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).

An appellate remedy at the end of the case for the 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." *Fassy*, 884 So. 2d at 363. "[T]he purposes of these cost-saving presuit procedures would be thwarted, and the

appellate remedy would serve no useful purpose." *Id.* (cleaned up).

Under the First District's decision, however, 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 would not be entitled to immediate relief merely 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 contrary to the plain and unambiguous provisions of Florida's Medical Malpractice Act.

CONCLUSION

This Court should accept review to resolve the clear conflict among the district courts and provide uniform guidance on this very important issue.

Respectfully submitted,

/s/ Christine R. Davis

Christine R. Davis
Florida Bar No. 569372
DAVIS APPEALS, PLLC
1400 Village Square Blvd., Suite 3-181
Tallahassee, FL 32312
Telephone: (850) 739-0448
Email: cdavis@davisappeals.com
eservice@davisappeals.com

Counsel for Petitioners University of Florida Board of Trustees and Shands Teaching Hospital and Clinics, d/b/a Shands Hospital

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 28, 2022, a true and correct copy of the foregoing was furnished via the Florida Courts E-Portal System and a copy was served electronically upon the following counsel of record:

Trial Counsel for Petitioner:
Francis E. Pierce, III
Mateer & Harbert
225 E. Robinson St., Suite 600
Orlando, FL 32801
litpleadings@mateerharbert.com
fpierce@mateerharbert.com

Counsel for Respondent:
Kennan G. Dandar
P.O. Box 254597
Tampa, FL 33623-4597

kgd@dandarlaw.net
tmd@dandarlaw.net
dmw@dandarlaw.net

/s/ Christine R. Davis
Attorney

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 set forth in 9.210(a)(2)(A) because it does not exceed 2,500 words.

/s/ Christine R. Davis
Attorney