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.
_____/

REPLY 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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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.

Plaintiff agrees that the First District's ruling on the jurisdictional, irreparable harm component of certiorari review in medical malpractice cases was incorrect. The First District's opinion should be quashed on this ground, as inconsistent with decades of established precedent. (IB at 26-24). Under this established precedent, the jurisdictional component of certiorari review was satisfied, and Defendants' petition should not have been dismissed for the failure to demonstrate irreparable harm.

Plaintiff, however, contends the First District reached the right result "even if it got there by taking the wrong path" (AB at 18) since it applied *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011), to reject the certiorari petition. As discussed in the next section, this is incorrect.

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

Plaintiff suggests that the only relevance of the 2013 amendments to section 766.102 is to subsection (5)(a) because subsections (5)(c) and (6) still require the trial court to make a host of factual findings. Not so.

The Legislature did not just amend subsection (5)(a) in 2013; it also removed subsection (14), which contained a catch-all provision giving trial courts the discretion to disqualify or qualify an expert on grounds other than the qualifications set forth in the statute. *See* § 766.102(14), Fla. Stat. (2012). The trial court no longer has any discretion in determining whether an expert is qualified under the statute or not—it simply "constru[es] the statute's requirements and determine[s] whether the expert's qualifications align . . . ." *Morris v. Muniz*, 252 So. 3d 1143, 1156 (Fla. 2018).

This is true for all of the qualifications provisions of section 766.102. There is no **weighing** of evidence; the court is not making credibility determinations, nor is it exercising any discretion. Under section 766.102(5)(c), for example, the trial court looks at the

evidence before it and determines whether the expert "devoted professional time during the 3 years immediately preceding the date of the occurrence" 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 residence 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.

Just like the application of subsection (5)(a), this subsection requires the trial court to simply construe the statute's objective requirements and determine 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 1156. This is no different from a trial court's analysis of a complaint to determine whether factual allegations sound in ordinary or medical negligence. A complaint may assert that it sounds in simple negligence, but the trial court

must consider the actual alleged facts—not the conclusory statements of counsel—to determine whether the claims actually are medical negligence claims, thereby triggering compliance with the presuit screening requirements.

Plaintiff's contention that application of the qualifications requirements in section 766.102 is fact-intensive because even plaintiffs' attorneys "fierce[ly] dispute[]" among themselves whether "same specialty" means same "sub-specialty" (AB at 27) raises a concern that is far beyond the issue before the Court. There is no issue of sub-specialty certificates in this case, *Williams*, or the conflict cases addressing the scope of certiorari review for failing to corroborate a claim in accordance with section 766.102(5) and (6).

Finally, this Court's explanation in *Morris* that appellate courts can review an expert's qualifications on equal footing with the trial court is no less relevant because that case arose from a final judgment dismissing a case for failure to comply with presuit, as opposed to a certiorari petition from an order denying a motion to dismiss for the same reasons. The analysis of the statutory criteria is exactly the same in both instances—courts look at the statutory requirements and then determine whether the expert's

qualifications align.

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 AND PRACTICALLY ELIMINATING PRESUIT FOR MEDICAL NEGLIGENCE LAWSUITS.

To the extent *Williams* is found to preclude all certiorari review from orders denying motions to dismiss because a presuit expert is not statutorily qualified, this case presents the perfect example of why it should no longer be followed. This Court has made clear that "clearly established law" can derive "from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law. Thus, in addition to case law dealing with the same issue of law, an interpretation or application of a statute, or procedural rule, or a constitutional provision may be the basis for granting certiorari review." *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003).

Unlike the issue in *State v. Garcia*, 350 So. 3d 322, 326 (Fla. 2022), which involved a legal issue that courts "have not previously answered," the requirements of the Medical Malpractice Act are crystal clear:

- "No action shall be filed" if the plaintiff has not complied with the statutory presuit requirements, including the requirement that a presuit expert be qualified. § 766.104(1), Fla. Stat.; *see also Musculoskeletal Inst. Chartered v. Parham*, 745 So. 2d 946, 494 (Fla. 1999).
- A presuit investigation must follow statutory "medical corroboration procedures," including the requirement that a claim be corroborated by a statutorily-qualified expert. §§ 766.201(2)(a)2., 766.203(2), Fla. Stat.
- An action "shall" be dismissed when the plaintiff has failed to comply with the Act's presuit requirements. § 766.206(2), Fla. Stat.

Consequently, it cannot be an issue of mere legal error when a trial court excuses a plaintiff from complying with this established law. The immediate dismissal of the suit is expressly required by statute. Allowing a medical malpractice claim to proceed upon the affidavit of an unqualified expert is the same as providing no corroborating expert opinion at all. Thus, it cannot possibly be enough that a plaintiff complied with the "procedure" and provided an affidavit when that affidavit is from an expert that is not

statutorily qualified.

Plaintiff fails to provide any cogent explanation of why this is not true, other than to say that the Court should follow its precedent and that certiorari should be a rare remedy. Defendants generally agree with these broad statements. But, in medical malpractice cases, the law is "clearly established" and the failure to comply with those mandatory requirements indisputably deprives defendants of their statutory rights, thereby constituting a departure from the essential requirements of law. *Cf. Paley v. Maraj*, 910 So. 2d 282, 283 (Fla. 2d DCA 2005)

To conclude that all a plaintiff needs to do is follow "the procedure" set forth in the Act eviscerates the Act's requirements, effectively eliminating the requirement that a presuit expert actually be statutorily qualified. This critical component of presuit would be rendered meaningless because it would make no difference what the affidavit said or who signed it, as long as the "procedure" was followed. That guts the Act.

This, of course, is not an argument that trial judges are "useless," as Plaintiff and her amicus contend. As the decades of precedent in medical malpractice cases make clear, trial judges

sometimes get it wrong, and that is precisely why certiorari review is available in these instances. (*See, e.g.*, cases cited in IB at 23-24).

This Court should thus quash the First District's decision and remand the case to the First District with directions to consider the merits of Shands' petition.

Respectfully submitted,

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I HEREBY CERTIFY that on February 5, 2023, 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:

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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 4,000 words.

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