IN THE SUPREME COURT
STATE OF FLORIDA

TED WILLIAMS,

Petitioner,

vs.

Case No. SC10-92
DCA Case No. 1D08-3398
L.T. Case No. 1D09-3258

KEITH ROBINSON OKEN, M.D., and MAYO CLINIC OF FLORIDA, a Florida Corporation,

Respondents.
_____/

RESPONDENTS' BRIEF ON THE MERITS

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

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STATEMENT OF CASE AND FACTS[1]

The Defendant, Dr. Keith R. Oken, M.D., is a board-certified cardiologist employed by Mayo Clinic Jacksonville.[2] [A1 2; A2 2.] After the Plaintiff, Ted Williams, was assessed by an emergency department physician for chest pains, the emergency department physician ordered "the appropriate consults, including a cardiac consult with [Dr. Oken]." [A2 6.] Dr. Oken then evaluated and treated the Plaintiff in the emergency department as well as on the day after he was released from the hospital. [A1 2-5.] Thereafter, Plaintiff suffered a myocardial infarction and filed suit against Mayo Clinic and Dr. Oken for medical negligence. [A1 1,4.]

To provide for the prompt resolution of medical negligence claims and to prevent physicians from having to defend against frivolous claims, the Legislature has established mandatory presuit investigation requirements. § 766.201(2), Fla. Stat.[3] Before suit is filed, the plaintiff must give the defendant notice of the potential lawsuit. § 766.106(2). Additionally, both the plaintiff and defendant

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[1] Petitioner/Plaintiff, Ted Williams, is referenced as "Plaintiff." Respondents/Defendants, Mayo Clinic of Florida and Keith Robinson Oken, M.D., are referenced as "Mayo Clinic" and "Dr. Oken" or collectively "Defendants." Record references are to the tab and page number of the Appendix filed with the First District Court of Appeal.

[2] In his original complaint, Plaintiff improperly denominated Dr. Oken's employer and co-defendant as Mayo Clinic of Florida. Subsequently, although not part of the record in this proceeding, Plaintiff filed an amended complaint correctly denominating Dr. Oken's employer and co-defendant as Mayo Clinic Jacksonville.

[3] Unless otherwise stated, all statutory references are to the 2007 version of the statutes.

must have the alleged negligence evaluated by a "medical expert" as that term is defined in section 766.202(6). The medical expert must provide a corroborating affidavit as to whether reasonable grounds exist to support the claim of medical negligence. §§ 766.203(2), (3).

The Legislature has determined that presuit evaluation by an appropriate medical expert is so important in eliminating frivolous claims that it requires the lawsuit be dismissed if the plaintiff fails to retain the appropriate expert before the statute of limitations expires. § 766.206(2). *See also Kukral v. Mekras,* 679 So. 2d 278 (Fla. 1996) (although section 766.206(2) requires that proper notice must be given before suit is filed or case is to be dismissed, to withstand constitutional scrutiny, the statute must be read as giving plaintiff until expiration of statute of limitations to cure any defects in the notice). Likewise, to ensure that legitimate claims are settled before suit is filed, if a defendant has not retained an appropriate medical expert to evaluate the plaintiff's claim, the court is required to strike the defendant's pleadings. § 766.206(3).

Chapter 766 provides explicit requirements regarding who may serve as a medical expert in a medical negligence action. §§ 766.202(6), 766.102. Before 2003, <u>any</u> health care provider could provide a presuit corroborating affidavit that the claim was not frivolous—if the health care provider established, to the satisfaction of the court, that he or she possessed sufficient "training, experience,

and knowledge as a result of practice or teaching in the specialty of the defendant or practice or teaching in a related field of medicine." § 766.102(2)(c)(2), Fla. Stat. (2002).

In 2003, the Legislature significantly narrowed the type of health care provider that could serve as the presuit medical expert to evaluate whether a claim is frivolous. The amended statute—which applies here—now requires that presuit medical experts (as well as those who testify at trial) must specialize in the same or similar specialty as the defendant. §§ 766.102(5)(c), 766.202(6), Fla. Stat. (2007). This significantly enhanced the prior requirements for presuit experts. *See* SB 2-D, 2003 Special Session (2003 revisions to medical expert definition have the effect of enhancing the criteria for persons who may provide a corroborating medical expert opinion in the presuit process as to a medical negligence claim). The pre-2003 "training, experience and knowledge" as a result of practicing or teaching in "a related field of medicine" is no longer sufficient; now the expert's specialty itself must be the same specialty or one that is similar to the defendant's specialty.

In this case, before suit, Plaintiff sent a Notice of Intent to Initiate Litigation for Malpractice to Dr. Oken and his employer, Mayo Clinic. [A2 6.] The Notice specifically recognizes that, after the emergency department physician first assessed Plaintiff, a specialist in cardiology was needed to further assess the Plaintiff's condition. The Notice alleged that Plaintiff was assessed by an

emergency department physician who, "ordered the appropriate consults, including a cardiac consult with [Dr. Oken]." [A2 6 (emphasis added.)] The Notice then alleged that Dr. Oken was negligent in diagnosing and treating Plaintiff's condition, myocardial infarction, both in the emergency department and in his follow-up treatment of the Plaintiff the next day. *Id.*

Attached to Plaintiff's Notice was a corroborating affidavit and curriculum vitae from Dr. John D. Foster, M.D. [A2.] Unlike Dr. Oken, Dr. Foster is not a cardiologist. Nor does he specialize in a related specialty—such as cardiovascular surgery, pediatric cardiology, or internal medicine with an emphasis in cardiology. By his own admission, Dr. Foster is trained as "an emergency and family medicine physician." [A2 9.]

After receiving the Notice, Mayo Clinic and Dr. Oken promptly—and well before the statute of limitations deadline expired—requested that Plaintiff furnish any corroboration of the claim from a proper medical expert. [A2 3¶11.] Plaintiff failed to provide any corroboration of his claim from a cardiologist or other physician specializing in diseases of the heart.

Pursuant to section 766.206(2), Defendants moved to dismiss the lawsuit based on Plaintiff's failure to provide a corroborating affidavit from a health care provider who specialized in cardiology or a similar specialty. [A2.] Section 766.206(2) provides:

> If the court finds that the notice of intent to initiate litigation mailed by the claimant is not in compliance with the reasonable investigation requirements of ss. 766.201-766.212, including a review of the claim and a verified written medical expert opinion by an expert witness as defined in s. 766.202, the court shall dismiss the claim.

(Emphasis added.)

Again, instead of retaining a medical expert in cardiology in defense of the motion, Plaintiff did nothing more than file a supplemental affidavit regarding Dr. Foster's qualifications. [A3.] Other than the following conclusory statement in the supplemental affidavit, neither Dr. Foster nor the Plaintiff presented anything to establish that the general practices of emergency and family medicine are specialties "similar to" cardiology:

> As part of my training and experience as an Emergency and Family medicine physician, I have specialized in a medical specialty, similar to that specialty practiced by Keith R. Oken M.D., that includes the evaluation, diagnosis or treatment of acute chest pain, and impending myocardial infarction, which conditions are the subject of the claim against Dr. Oken, and I have prior experience treating patients similar to Ted Williams.

[A3 4 (emphasis added.)] Training and experience in a related field was the requirement for qualifying as an expert under the pre-2003 version of section 766.102(5). § 766.102(2)(c)(2), Fla. Stat. (2002). Nothing in this paragraph or elsewhere in Dr. Foster's affidavit or curriculum vitae states that emergency or family medicine are specialties similar to cardiology.

The trial court denied the motion, finding that Dr. Foster's training and experience in the emergency department rendered him a medical expert in a specialty similar to cardiology. [A4.]

Defendants petitioned the First District Court of Appeal for certiorari review, asserting the trial court departed from the essential requirements of law in denying the motion to dismiss. Specifically, Defendants argued that, as a matter of law, Dr. Foster did not meet the statutory definition of "medical expert" for purposes of evaluating a claim against a cardiologist. DCA Pet. Br. at 7. In his response brief to the certiorari petition, Plaintiff conceded that certiorari jurisdiction was appropriate, stating: "The Court has accepted jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(b)(2). We do not oppose this decision." DCA Resp. Br. at 4.

In addition, in his response brief to the certiorari petition, Plaintiff emphasized that Dr. Foster is a physician whose specialties of emergency and family medicine have been certified by two American Boards—which, in addition to his experience—rendered him an expert in cardiology. DCA Resp. Br. at 9. In response, in their reply brief, Defendants quoted the definitions for the general practices of emergency and family medicine and the specialty of cardiology (as taken from the American Boards' official internet websites) to illustrate just how different the general practices of emergency and family medicine are from

cardiology and similar specialties. DCA Reply Br. at 6-8. Plaintiff never objected to the use of those definitions by moving to strike that brief or objecting to them at oral argument.

The First District granted the certiorari petition, finding that, under the explicit, mandatory presuit screening requirements, an emergency and family medicine practitioner does not meet the statutory definition of "medical expert" for purposes of evaluating a claim against a cardiologist. *Oken v. Williams*, 23 So. 3d 140, 141, 145 (Fla. 1st DCA 2009). The court stated that, although the term "similar specialty" is not defined in the statute, Dr. Foster is the classic example of a generalist. *Id.* at 146-49. The court also referenced the definitions from the applicable board-certifying medical associations' official websites contained in the Defendants' brief to illustrate the distinctions between an emergency/family physician and a cardiologist. *Id.* at 148-49. In doing so, the court emphasized that (**1**) "the result would not have been any different without the internet citations," and (**2**) "the [internet] source [was] cited by one of the parties," and Plaintiff "neither moved to strike nor raised any objection to the use of the citations." *Id.* at 148 n.2.

The dissenting judge to the First District's decision *sua sponte* raised two issues, arguing that: (**1**) certiorari could not be used to determine, from a facial review of the record, whether a party has met the presuit screening requirement of

retaining a medical expert who specializes in the same or similar specialty; and (**2**) the majority erred in quoting the official internet definitions of the medical practices at issue to illustrate the distinctions between the general practices of emergency and family medicine and the specialty of cardiology. *Id.* at 151-55 (Browning, J., dissenting).

The Plaintiff petitioned this Court for discretionary review under express and direct conflict jurisdiction, asserting that the First District's decision conflicted with *St. Mary's Hospital v. Bell,* 785 So. 2d 1261 (Fla. 4th DCA 2001), on the issue of certiorari jurisdiction; and *Campbell v. State*, 949 So. 2d 1093 (Fla. 3d DCA 2007), on the issue of citing to the internet definitions.

This Court accepted jurisdiction and directed briefing on the merits.

SUMMARY OF THE ARGUMENT

To the extent this Court exercised discretionary jurisdiction on asserted conflict with either *St. Mary's* or *Campbell,* jurisdiction was improvidently granted. *St. Mary's* was specifically distinguished by the First District. It held that an appellate court cannot review, via certiorari jurisdiction, a trial court's factual finding following an evidentiary hearing that goes to the merits of a medical negligence case, *i.e.,* whether a patient was or was not actually treated at the defendant hospital. Here, the First District did not evaluate a fact going to the merits of the case; it looked at the face of the documents to determine whether Dr.

Foster's stated qualifications, if true, were sufficient to establish him as a medical expert in cardiology.

Campbell did not involve internet citations. It held that a non-self-authenticating computer printout regarding the defendant could not be considered for sentencing purposes absent authentication by a records custodian. Here, by citing to official medical association definitions of the specialties at issue, the First District simply applied long-established principles of statutory construction to define the term "similar specialty."

On the merits, early review to prevent physicians and other health care providers from having to defend against frivolous lawsuits goes to the very heart of the medical negligence presuit screening requirements. To that end, every district court has held that the harm in allowing a medical negligence case to proceed where the plaintiff has not met the presuit screening requirements is irreparable and reviewable by certiorari. And every district court in Florida has held that a plaintiff's presuit notice and affidavit in a medical negligence case may be facially evaluated via certiorari review to determine whether a litigant has met the presuit statutory mandates. Here, the First District simply evaluated Dr. Foster's affidavits to determine whether he specialized in the same or similar specialty as Dr. Oken, a cardiologist. It held that an emergency department and family physician does not specialize in a specialty similar to cardiology.

This is exactly what appellate courts routinely do in these and other types of cases on certiorari review. For instance, following the denial of a motion to dismiss, appellate courts regularly analyze allegations in a medical negligence complaint to determine whether the factual allegations for a stated cause of action constitute simple negligence or medical negligence, the latter of which requires compliance with the presuit screening requirements.

If this Court holds that the First District had no authority to issue a writ of certiorari under the facts of this case, this Court's ruling will have far-reaching consequences. Not only would such a decision wholly undermine the Legislature's intent that physicians not have to defend against unwarranted lawsuits; it also would impact numerous other types of cases involving certiorari review, effectively eviscerating decades of certiorari jurisprudence.

Additionally, the First District properly found Dr. Foster did not meet the definition of a medical expert qualified to opine as to the alleged negligence of a cardiologist. As mandated by chapter 766—no party in a medical negligence case can be called on to defend at trial against allegations no competent witness can be found to support. Section 766.102 explicitly states that—because of "the changing trends and techniques for the delivery of health care in this state and the discretion that is inherent in the diagnosis, care, and treatment of patients by <u>different</u> health care providers"—only those who specialize in the same or similar specialty as that

of the defendant can serve as an expert against that defendant. In this case, the mandatory medical expert cannot opine on any purported negligence of an emergency department physician, because no allegation of negligence on the part of the emergency department physician was asserted—the only allegation of negligence was against Dr. Oken, a cardiologist. As such, the medical expert must opine as to the alleged negligence of a cardiologist, which requires application of the prevailing professional standard of care required for a cardiologist; not for an emergency department physician. This is especially true here given that the Plaintiff was assessed and treated by Dr. Oken after Plaintiff already had been assessed by an emergency department physician as well as on the day after he was released from the emergency department. By the very nature of their practice, emergency department physicians are trained to respond to emergencies and know when to call in a specialist. This is exactly what the emergency department physician did in this case. After initially assessing the Plaintiff, the emergency department physician called in Dr. Oken for a cardiac consult—a decision the Plaintiff noted in his Notice of Intent as being "appropriate." Allowing an emergency department or family medicine physician to testify against a cardiologist would elevate such physicians and other generalists to the level of an expert not only in their own field of medicine but in every field and specialty.

Finally, the use of official medical association specialty definitions taken from the internet was appropriate under the narrow circumstances of this case. In any event, as the First District itself concluded, its citation to those definitions was irrelevant to the outcome of this case and Plaintiff never objected to their use when referenced earlier in the appeal—so that issue is not cognizable here.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED ITS CERTIORARI JURISDICTION TO REVIEW WHETHER THE SPECIALTIES OF EMERGENCY AND FAMILY MEDICINE ARE THE SAME AS OR SIMILAR TO THE SPECIALTY OF CARDIOLOGY.

Standard of Review.

The First District's exercise of certiorari jurisdiction is reviewed under an abuse of discretion standard. *Haines City Comm. Develop. v. Heggs*, 658 So. 2d 523, 528 (Fla. 1995) ("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") (quoting *Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983)).

Argument.

1. No conflict exists with *St. Mary's*.

To the extent this Court exercised discretionary jurisdiction on asserted conflict with *St. Mary's Hospital v. Bell*, jurisdiction was improvidently granted.

St. Mary's was specifically distinguished by the First District and actually supports the First District's decision here. The Second District's decision in *Holden v. Bober*, 39 So. 3d 396 (Fla. 2d DCA 2010), repeatedly cited by Plaintiff in his initial brief, is irrelevant to this issue because it was a direct appeal, not a certiorari proceeding. *See id.* at 399 ("This case is properly reviewed as an appeal, not a petition for writ of certiorari."). *Holden* is only relevant to defining the term "similar specialty," which is addressed hereinafter in Issue II.

St. Mary's stands for the proposition that, in a certiorari review proceeding in a medical negligence case, the appellate court will not look beyond the face of the documents to determine whether an asserted fact that goes to the merits of the case is true. In *St. Mary's*, the plaintiff's presuit documents facially met the presuit screening requirements, so the Fourth District found that the trial court properly denied the motion to dismiss. 785 So. 2d at 1262. However, the defendant hospital also asked the appellate court to look further than the face of the documents. The defendant asked the appellate court to second-guess the trial court's finding—made following an evidentiary hearing—to determine whether a key fact contained in the affidavit going to the merits of the case was correct, *i.e.*, whether the patient had been treated at the defendant hospital (a fact the hospital disputed). *Id*. at 1261-62. This would be like asking here whether Dr. Oken, in treating the Plaintiff the day after he was released from the emergency department,

actually told the Plaintiff to take Maalox. Dr. Oken certainly disputes this fact, but that fact goes to the merits of the case and would require an evidentiary determination.

Here, the First District simply looked at the face of the documents to determine whether Dr. Foster's asserted qualifications, if true, were sufficient to establish that he specialized in a specialty similar to cardiology. *Oken*, 23 So. 3d at 145. It then concluded, as a matter of law, that Dr. Foster's stated qualifications as an emergency department and family medicine physician were insufficient to meet the statutory definition of a "medical expert" for purposes of this case, which requires that he practice in a specialty similar to cardiology. *Id.* at 145-50.

This is precisely what appellate courts do every day in analyzing the allegations in a complaint to determine whether the factual allegations for a stated cause of action constitute simple negligence or medical negligence, the latter of which requires compliance with the medical negligence presuit screening requirements. *See, e.g., S. Miami Hosp. v. Perez*, 38 So. 3d 809, 811 (Fla. 3d DCA 2010) (determining on certiorari review from order denying motion to dismiss that plaintiff's argument that he was a business invitee under the facts as alleged and not a patient "flies in the face of logic"); *Dr. Navarro's Vein Centre v. Miller*, 22 So. 3d 776 (Fla. 4th DCA 2009) (determining on certiorari review from order denying motion to dismiss that injury arising from cosmetic electrolysis by

physician sounded in medical negligence, not ordinary negligence); *Corbo v. Garcia,* 949 So. 2d 366 (Fla. 2d DCA 2007) (determining on certiorari review from order denying motion to dismiss that claim arising from burns from physical therapy equipment sounded in medical negligence, not ordinary negligence). A complaint may say it sounds in simple negligence, but the facts, taken as true, must be evaluated to determine whether the case actually sounds in medical negligence, thus triggering the presuit screening requirements. Likewise, Dr. Foster may say he is a specialist in a field similar to cardiology, but his qualifications, taken as true, must be evaluated to determine whether he does in fact specialize in a specialty similar to cardiology.

Holding that trial court rulings on these issues could not be reviewed at the motion to dismiss stage of the litigation would undermine the very essence of the presuit screening requirements, making physicians and other health care providers defend against protracted litigation for years before presuit screening compliance could be evaluated on appeal. To that end, every district court in Florida has held that a medical negligence plaintiff's or defendant's presuit notice and affidavit may be facially evaluated via certiorari review to determine whether a litigant has met the presuit statutory mandates. *See, e.g., Univ. of Miami v. Wilson*, 948 So. 2d 774, 781 (Fla. 3d DCA 2006) (denying certiorari after determining that personal representatives were qualified to file notice of intent to initiate medical negligence

action); *Mirza v. Trombley*, 946 So. 2d 1096, 1100-01 (Fla. 5th DCA 2006) (denying certiorari after determining allegations of affidavit were sufficient to place defendant on notice of malpractice); *Bonati v. Allen*, 911 So. 2d 285, 288 (Fla. 2d DCA 2005) (granting certiorari after determining allegations in expert's affidavit were insufficient to place physician on notice of alleged malpractice); *Paley v. Maraj*, 910 So. 2d 282, 283 (Fla. 4th DCA 2005) (granting certiorari because trial court wrongly found obstetrician-gynecologist ("OB/GYN") met statutory expert requirements to corroborate claim against emergency department physician); *Ft. Walton Beach Med. Ctr., Inc. v. Dingler*, 697 So. 2d 575, 580 (Fla. 1st DCA 1997) (denying certiorari petition after determining, under pre-2003 version of section 766.102, that the expert met statutory requirements); *Correa v. Robertson*, 693 So. 2d 619, 621 (Fla. 2d DCA 1997) (granting certiorari after determining hospital administrator did not meet the definition of "medical expert" in section 766.202). Notably, Plaintiff's initial brief completely omits any reference to these cases as they pertain to certiorari review.

Importantly, subsequent to its decision in *St. Mary's* and the 2003 amendments to section 766.102, the Fourth District itself has confirmed that certiorari is appropriate to review a trial court's decision regarding a presuit medical expert's qualifications under section 766.102. *Paley*, 910 So. 2d at 283. In *Paley*, the court found that an OB/GYN could not testify against an emergency

department physician who allegedly misdiagnosed a pregnancy problem. *Id*. Section 766.102(9)(a), the subsection at issue in *Paley*, governs who may testify against emergency department physicians. It requires that any physician retained to testify against an emergency department physician must have "substantial professional experience within the preceding five years" as an emergency department physician. The Fourth District found that, because the OB/GYN's affidavits did not establish "substantial" emergency department experience as required by section 766.102(9), the OB/GYN was unqualified to serve as a medical expert even though it was a pregnancy problem that was allegedly misdiagnosed. *Paley*, 910 So. 2d at 283. Just as the OB/GYN in *Paley* could not serve as an expert against an emergency department physician because he did not have substantial emergency department experience as required by section 766.102(9), Dr. Foster, as an emergency department physician, could not serve as an expert against Dr. Oken, because Dr. Foster is not a specialist in cardiology or any similar specialty as required by section 766.102(5)(a).

2. The First District has not created a new category of interlocutory appeal.

Plaintiff erroneously asserts that the First District has created a new category of interlocutory appeal. The First District's exercise of certiorari jurisdiction in this case is consistent with legions of other cases outside the medical negligence context.

For certiorari jurisdiction of a trial court's non-final order to exist, three elements must be satisfied: "(1) a departure from the essential requirements of law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004) (quoting *Bd. of Regents v. Snyder*, 826 So. 2d 382, 387 (Fla. 2d DCA 2002)). In this case, only the first prong, departure from the essential requirements of law, is at issue. Courts have consistently concluded that the second two prongs are always present when a court refuses to dismiss a medical negligence claim for failure to meet the presuit screening requirements. *See, e.g., Abbey v. Patrick*, 16 So. 2d 1051, 1055 (Fla. 1st DCA 2009) ("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"); *Central Fla. Reg. Hosp. v. Hill*, 721 So. 2d 404, 405 (Fla. 5th DCA 1998). This is because, without immediate review, a defendant will never have the benefit of receiving the protections afforded by those screening requirements—and physicians would potentially have to engage in protracted litigation for years to defend frivolous lawsuits. Alternatively, they would be forced to settle frivolous lawsuits simply to avoid such protracted litigation. The Legislature has made a public policy determination that this limited category of litigation warrants immediate review to avoid such harmful results.

In *Hill*, the Fifth District emphasized why certiorari review is so important in reviewing orders denying motions to dismiss in medical negligence cases:

> Certiorari is appropriate to review an order denying a motion to dismiss which claims the pre-suit requirements of Chapter 766 have not been met. The justification for this exception to the general rule that orders denying motions to dismiss are not reviewable by certiorari is that interlocutory review is necessary to promote the statutory purpose of the Medical Malpractice Reform Act to encourage settlement. To require that the malpractice action be fully litigated without resort to presuit procedures before review would frustrate that purpose and the resulting harm could not be remedied on appeal.

Id. at 405 (emphasis added; citations omitted). Thus, the issue here only involves the first prong for certiorari review, *i.e.*, whether the trial court's ruling in denying the Defendants' motion to dismiss constituted a departure from the essential requirements of law resulting in a deprivation of the presuit screening process.

This Court has recognized that "it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law," so "the district courts must be allowed a large degree of discretion so that they may judge each case individually." *Heggs,* 658 So. 2d at 528 (quoting *Combs,* 436 So. 2d at 95-96). In this case, the First District did not abuse its discretion in issuing the writ of certiorari because—as explained hereinafter in Issue II—the trial court departed from the essential requirements of law by finding, based on the face of the documents, that Dr. Foster was a specialist in a specialty similar to cardiology. As the First District stated, if the face of the documents

establish that the medical provider signing the affidavit does not meet the statutory requirements, then the effect is the same as having no affidavit at all—because, contrary to the statute's mandates, the Plaintiff has failed to provide the requisite presuit corroborating affidavit.

If this Court holds that the First District had no authority to issue a writ of certiorari under the facts of this case, this Court's ruling will have far-reaching consequences—effectively eviscerating decades of certiorari jurisprudence. Appellate courts routinely issue writs of certiorari to quash trial court orders denying motions to dismiss in a host of areas where irreparable harm has been established and the issue is whether, based on a facial review of the pleadings, the facts—taken as true—establish that the trial court departed from the essential requirements of law.

For instance, appellate courts, under certiorari review, routinely look to nothing more than the allegations of the complaint to determine whether the trial court correctly denied a motion to dismiss based on the defendant's asserted immunity.[4] Appellate courts also issue writs of certiorari to vacate orders severing

[4] *See, e.g., City of Stuart v. Monds*, 10 So. 3d 1134 (Fla. 4th DCA 2009) (allegations of complaint revealed that acts and statements at issue occurred within the context of defendants' employment with city); *Crowder v. Barbati*, 987 So. 2d 166, 168 (Fla. 4th DCA 2008) (determining that trial court did not interpret "scope of duty" broadly enough, and the acts of the sheriff were within his scope of duty).

claims,[5] denying disqualification of a law firm,[6] and granting discovery[7]—all based solely on a facial review of the facts alleged in the pleadings.

Likewise, as noted above, in the medical negligence context, courts routinely grant writs of certiorari to vacate orders denying motions to dismiss where the trial court has wrongly determined that the claims asserted do not constitute claims for medical negligence (and the plaintiffs thus did not have to meet the presuit screening requirements). In these cases, the appellate courts compare the factual allegations of the complaint to the definition of medical negligence to determine if the cases are medical negligence cases, which require compliance with the presuit requirements. *See Perez*, 38 So. 3d at 811; *Dr. Navarro's Vein Centre*, 22 So. 2d at 778; *Tenet S. Fla. Health Sys. v. Jackson*, 991 So. 2d 396, 399-400 (Fla. 3d DCA

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[5] *Act Services, Inc. v. Sch. Bd. of Miami Dade*, 29 So. 3d 450, 453 (Fla. 3d DCA 2010) (vacating order severing claims by school board against contractor and its surety); *Bethany Evangelical Covenant Church of Miami, Fla., Inc. v. Calandra*, 994 So. 2d 478, 479 (Fla. 3d DCA 2008) (vacating order severing claims against regional church from claims against national church).

[6] *Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117, 1118 (Fla. 3d DCA 2008) (trial court disqualified one attorney but not his entire firm; on certiorari review, the appellate court applied the facts to the case law and disqualified the entire firm).

[7] *Cruz-Govin v. Torres*, 29 So. 3d 393, 396 (Fla. 3d DCA 2010) (determining on certiorari review that the requested documents did not fall under one of the three exceptions to the psychotherapist-patient privilege); *Wicky v. Oxonian*, 24 So. 3d 571, 573 (Fla. 2d DCA 2009) (determining on certiorari review that party did not meet burden to require opposing party to submit to examination).

2008) (failure to provide adequate nursing care was medical negligence); *Corbo*, 949 So. 2d at 370.

As with all of these cases, here, the First District properly issued a writ of certiorari after determining, from the factual allegations taken from the face of the documents, that Dr. Foster's stated qualifications as an emergency department and family medicine physician were insufficient as a matter of law to establish that he specializes in a specialty similar to cardiology.

This Court's decision in *Globe Newspaper Co. v. King,* 658 So. 2d 518 (Fla. 1995)—on which Plaintiff relies to establish that certiorari review was inappropriate—actually supports certiorari review in this case. In fact, the First District specifically relied on *Globe Newspaper* in finding that certiorari was proper. In *Globe Newspaper,* this Court held that certiorari review is appropriate to review an order permitting a plaintiff to amend a complaint to include punitive damages under section 768.72—to determine whether the statute's procedural requirements were followed. 658 So. 2d at 520. This Court held, however, that certiorari is not available to review an evidentiary determination as to whether a reasonable basis exists for the actual recovery of such damages. *Id.*

Here, as permitted in *Globe Newspaper*, the First District determined that the statutory procedures had not been followed because Plaintiff failed to retain a physician who met the statutory definition of the required medical expert. The

court evaluated the face of the documents to determine whether Dr. Foster was a specialist similar to a cardiologist. It concluded Dr. Foster did not meet the statutory definition of similar specialist, so the procedural requirements were not met. As the First District stated, providing an affidavit by someone who fails to meet the definition of "medical expert" as required by law is the equivalent of having no expert at all. *Oken*, 23 So. 3d at 145.

Moreover, this Court's reasoning in *Globe Newspaper*—as to why it would be inappropriate to review the sufficiency of the proffered evidence to determine whether a reasonable showing has been made for a recovery of punitive damages—is inapplicable here. In *Globe Newspaper*, this Court stated that failure to provide such evidence did not rise to the level of irreparable harm needed for certiorari review. 658 So. 2d at 520. Here, however, as discussed above, Florida courts have repeatedly determined that allowing a medical negligence lawsuit to proceed where a party has failed to obtain the requisite medical expert does rise to level of irreparable required for certiorari review. *See, e.g., Hill*, 721 So. 2d at 405; *Dr. Navarro's Vein Cen.*, 22 So. 3d at 778-79. The First District properly exercised its jurisdiction to issue the writ of certiorari in this case.

II. THE DISTRICT COURT PROPERLY HELD THAT PLAINTIFF'S EMERGENCY DEPARTMENT AND FAMILY MEDICINE PHYSICIAN DID NOT SPECIALIZE IN THE SAME OR SIMILAR SPECIALTY AS A CARDIOLOGIST.

Standard of Review.

Review of the First District's decision that Dr. Foster, an emergency department and family medicine physician, was not a similar specialist as required under section 766.102(5)(a) to evaluate the claims against Dr. Oken, a cardiologist, is *de novo*. *Kephart v. Hadi*, 932 So. 2d 1086, 1089 (Fla. 2006).

Argument.

1. The Purpose of Pre-Suit Screening.

This Court has held that "no action under Chapter 766 may 'commence' by filing a complaint in the courts of Florida without compliance with these stringent statutory predicates…[under which] commencing an action in the circuit court is inextricably linked to the performance of [the reasonable investigation and notice provisions in Chapter 766]." *Musculoskeletal Inst. Chrt'd v. Parham*, 745 So. 2d 946, 950-51 (Fla. 1999) (emphasis added). "[T]o allow a party to fully litigate a suit where the proper presuit requirements were not met would frustrate the purpose of the Medical Malpractice Reform Act." *Goldfarb v. Urciuoli*, 858 So. 2d 397, 398 (Fla. 1st DCA 2003) (citing *Sova Drugs, Inc. v. Barnes*, 661 So. 2d 393, 394 (Fla. 5th DCA 1995)).

Both the claimant and prospective defendant must follow chapter 766's explicit presuit requirements before a medical negligence lawsuit may be filed in trial court. While the procedures in chapter 766 are not intended to deny access to courts, they are "more than mere technicalities." *Largie v. Gregorian*, 913 So. 2d 635, 638 (Fla. 3d DCA 2005) (*quoting Correa v. Robertson*, 693 So. 2d 619, 621 (Fla. 2d DCA 1997)). They were expressly enacted to ensure prompt settlement of legitimate claims and to eliminate frivolous claims and defenses. §§ 766.201(1), (2). Otherwise, physicians and other health care providers could spend years defending frivolous claims. The Legislature has made the explicit public policy determination that this particular category of cases must be reviewed before suit goes forward. Because of these important policy concerns, stringent statutory predicates must be satisfied.

If the statutory predicates are not satisfied, Florida law requires the court to dismiss the claim. *See* § 766.206(2) (If the court finds that the notice of intent fails to meet these requirements, "the court shall dismiss the claim") (emphasis added). To ensure access to courts, this Court and other Florida appellate courts have liberally interpreted this provision to allow a plaintiff to correct any deficiencies in the presuit requirements; but only if the deficiencies are corrected before the statute of limitations deadline has passed. *Kukral v. Mekras*, 679 So. 2d 278 (Fla. 1996); *Williams v. Campagnulo*, 588 So. 2d 982 (Fla. 1991); *Cohen v. West Boca*

Med. Center, Inc., 854 So. 2d 276 (Fla. 4th DCA 2003); *Archer v. Maddux*, 645 So. 2d 544 (Fla. 1st DCA 1994). As mandated by chapter 766—no party in a medical negligence case can be called on to defend a lawsuit that no competent witness can be found support. Requiring a physician to defend against such a claim would gut the entire public policy underlying the medical negligence presuit screening requirements.

2. As a matter of law, Dr. Foster, an emergency department and family medicine physician, fails to meet the statutory definition of "medical expert" for purposes of evaluating a claim against Dr. Oken, a cardiologist.

Section 766.203(2) provides that "[c]orroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(6), at the time the notice of intent to initiate litigation is mailed . . . ." § 766.203(2) (emphasis added).

Section 766.202(6) defines a "medical expert" as "a person duly and regularly engaged in the practice of his or her profession . . . and who meets the requirements of an expert witness as set forth in s. 766.102." § 766.202(6)(emphasis added).

Section 766.102, which section 766.202(6) specifically incorporates by reference, governs the standards of recovery and expert witnesses in medical negligence lawsuits. To recover damages in such an action, the plaintiff must

establish by the greater weight of the evidence that the alleged actions of the health care provider defendant "represented a breach of the prevailing professional standard of care for that health care provider." § 766.102(1) (emphasis added). It is the prevailing professional standard of care "recognized as acceptable and appropriate by reasonably prudent similar health care providers." *Id.* (emphasis added)."

To that end, only the same or similar type of specialist may serve as an expert against a specialist defendant; and only the same or similar type of general practitioner may testify against a general practitioner defendant. *Compare* § 766.102(5)(a) *with* § 766.102(5)(b). As to specialists, section 766.102(5)(a) provides that the expert witness must have devoted professional time during the three years immediately preceding the date of the occurrence that is the basis for the action to: "[t]he active clinical practice of, or consulting with respect to, the same or 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." § 766.102(5)(a)2.a. (emphasis added).

These requirements for medical experts are so strict that, if the defendant is an emergency department physician, only another emergency department physician can testify against the defendant. § 766.102(9)(a). This is true even if the injury being assessed and treated by the emergency department physician falls within

another particular specialty. *See, e.g.*, *Paley*, 910 So. 2d at 283 (OB/GYN was unqualified to serve as medical expert against emergency department physician who was allegedly negligent in treating pregnancy problem because OB/GYN did not have requisite emergency department experience as required by section 766.102(9)(a)). This is because emergency department services only involve the "immediate diagnosis and treatment of medical conditions which, if not immediately diagnosed and treated, could lead to serious physical or mental disability or death." § 766.102(9)(b)1.

By the very nature of their practice, emergency department physicians are trained to respond to emergencies and know when a specialty consult is required—as was done here. Although they may, over the course of their career, see thousands of patients with chest pain, it is simply a matter of common sense that they are not specialists in the field of cardiology—they only see patients who complaint of chest pain in the emergency department. At the moment the emergency department physician suspects that a complaint of chest pain may be due to a cardiac condition, the standard of care requires that the emergency department physician consult a cardiologist.

In addition, emergency department physicians are not, as here, called in to provide specialized consultation in a particular area of medicine and continue treatment after the patient has been released from the emergency department.

Thus, if Plaintiff in this case had alleged negligence by the emergency department physician who initially assessed Plaintiff, Plaintiff's expert would have to be an emergency department physician even though the condition at issue is a myocardial infarction. But Plaintiff did not allege negligence against the emergency department physician. Plaintiff concedes that the emergency department physician—after assessing Plaintiff on an emergency basis—acted appropriately in calling in Dr. Oken for a subsequent cardiac consult and follow-up care. Dr. Oken then assessed and treated Plaintiff both in the emergency room as well as on the next day after Plaintiff was released from the emergency room. The applicable prevailing professional standard of care in this case is not the standard of care applicable to an emergency department physician; it is the standard of care applicable to a cardiologist, and the medical expert must be a specialist in cardiology or a similar specialty.

Plaintiff places significant emphasis on *Holden v. Bober*, 39 So. 3d 396 (Fla. 2d DCA 2010). That decision, which was issued after the decision under review here, has become final and the parties in that case did not seek review in this Court. In *Holden*, the Second District held that the trial court erred in dismissing the case without first determining whether the plaintiff had complied with the "reasonable presuit investigation requirements of chapter 766." *Id*. at 398. The plaintiff in that suit presented himself at the emergency department after he suffered an acute

ischemic stroke. Subsequently, plaintiff filed suit against several physicians who treated him in the emergency department, including Dr. Qin Gu, a neurologist. Notably, unlike here, no allegation exists that Dr. Gu treated the plaintiff after he was released from the emergency department. Plaintiff subsequently filed suit against Dr. Gu and others. *Id*.

Dr. Gu moved to dismiss the lawsuit asserting that the expert's presuit corroborating affidavit was facially insufficient because the expert incorrectly identified Dr. Gu as an emergency department physician rather than a neurologist and only provided the applicable standard of care for emergency department physicians. The trial court granted the motion to dismiss. *Id*.

On appeal, the defendants argued the case was properly dismissed because an emergency department physician is not a specialist in the field of neurology. In rejecting this argument, the Second District stated: "[Defendants'] assertions as to [the emergency department expert's] qualifications are mere inconsistencies in the corroborating affidavit that cannot be resolved in [defendants'] favor from either the face of the record or under the reasonableness requirements of chapter 766." *Id*. at *5. In addition, the court stated: "[I]n contrast to *Oken*, we can envision a scenario where an emergency department physician could be considered an expert witness specializing in a 'similar specialty' to that of a specialist treating a patient in an emergency department capacity." *Id*. The court further held that an

evidentiary hearing was required to determine whether an emergency department physician could testify against a specialist in neurology. *Id*. at *6.

Because the defendants in *Holden* did not seek review in this Court, it is impossible to know what qualifications were set forth in the medical expert's affidavit in that case and constituted "mere inconsistencies." What is clear is that Dr. Foster's qualifications were set forth in the opinion at issue, establishing that an evidentiary hearing was not required to determine Dr. Foster did not meet section 766.102(5)(a)'s requirements. Accordingly, no conflict exists with *Holden* given these factual distinctions.

Moreover, even if *Holden* could be read to conflict with the instant decision, the *Holden* decision was wrongly decided. As discussed extensively above, the type of services rendered is not the issue. The issue is whether the proposed medical expert's specialty is the same or similar to the defendant's specialty. The prevailing professional standard of care for a generalist or emergency department physician will necessarily be different from the prevailing professional standard of care for a specialist—even if they are both evaluating and treating the same condition. The Legislature has specifically mandated that only like specialists can serve as medical experts in evaluating the actions of other specialists. The standard of care applied to the defendant is not the standard of care applied to all doctors generally; it is the standard of care "for that health care provider."

§ 766.102(1) (emphasis added). It is the standard recognized as "acceptable and appropriate by reasonably prudent similar health care providers." *Id.* (emphasis added). Any contrary holding would eviscerate the public policy underlying the Legislature's 2003 amendments to chapter 766, which require the merits of medical negligence cases to be evaluated before healthcare providers are forced to defend against unwarranted lawsuits. It also would elevate emergency medicine physicians and other generalists to the level of an expert not only in their own field of medicine but in every field and specialty.

3. The First District did not "overlook" section 766.102(12)—Plaintiff never argued the applicability of that statute and is barred from doing so now.

Plaintiff argues that the "alternative qualifying language" in section 766.102(12) permits a judge to qualify a medical expert on whatever grounds the judge sees fit. Plaintiff never asked the trial court to qualify his expert on this basis and never raised the issue in his briefs or at oral argument before the First District. Nor was it raised in the *Oken* majority or dissenting opinions. Arguments not raised by counsel, whether intentionally or unintentionally, are deemed waived or abandoned on appeal. *Bd. of Regents v. Athey*, 694 So. 2d 46, 51 n.2 (Fla. 1st DCA 1997); *Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983).

Further, the trial court did not rely on section 766.102(12) in reaching its ruling; its application is irrelevant, and Plaintiff reads this provision too broadly.

Given the Legislature's 2003 explicit narrowing of who may testify against whom, section 766.102(12) can only mean that, where a physician has extraordinary qualifications sufficient to render the physician a medical expert, the trial court may allow such an expert to testify. Dr. Foster did not aver that he possessed any such extraordinary qualifications for this case, and it would have been an abuse of discretion for the trial court to have relied on section 766.102(12) to find that Dr. Foster could serve as a medical expert in this case. Reading section 766.102(12) as Plaintiff suggests would expand rather than restrict who may testify as a corroborating expert, contrary to the evident intent of the Legislature.

III. THE DISTRICT COURT PROPERLY CITED TO INTERNET DEFINITIONS AND SPECIFICALLY NOTED THAT THOSE CITATIONS WERE NOT THE BASIS FOR ITS DECISION.

Standard of Review.

Although interpretation of a statute is subject to *de novo* review, in ascertaining the meaning of a statutory term, courts have discretion to look to sources containing the ordinary meaning of those terms. *See, e.g., Sanders v. State,* 35 So. 3d 864 (Fla. 2010); *Grohs v. State,* 944 So. 2d 450 (Fla. 4th DCA 2006). Thus, the First District's use of commonly known definitions for the specialties at issue, taken from the medical associations' official websites, is reviewed under the abuse of discretion standard.

Argument.

1. No conflict exists with *Campbell*.

To the extent this Court exercised its discretionary jurisdiction in this case on asserted conflict with *Campbell v. State*, 949 So. 2d 1093, jurisdiction was improvidently granted. The First District's use of official website definitions does not establish conflict with *Campbell*, *Holden*, or any other case. *Campbell* had nothing to do with the use of definitions in construing statutes. It held that a non-self-authenticating computer printout regarding the defendant could not be considered absent authentication by a records custodian. 949 So. 2d at 1094. Although the Second District in *Holden*—issued after this Court accepted jurisdiction in this case—criticized the First District's reference to the internet definitions, *Holden* did not address Plaintiff's waiver of any objection to the use of those definitions or the fact Dr. Foster himself referenced the certifying organizations in attempting to show he was qualified. As explained hereinafter, the First District properly cited to the internet definitions here, and no conflict exists with any case based on the narrow factual circumstances in which this issue was presented.

2. The First District's use of internet definitions was proper.

The Plaintiff had the burden to prove Dr. Foster specialized in a specialty "similar to" cardiology. Dr. Foster's affidavit was facially insufficient to establish

any such specialization. As the First District stated: "Outside of a conclusory statement in the affidavit, there are no facts set out demonstrating how the general practice areas of family and emergency medicine are or could be a specialty similar to cardiology." *Oken*, 23 So. 3d at 142. Thus, the First District found Plaintiff failed to carry his burden of proof that his expert was qualified. To illustrate this point, the First District cited to internet definitions of the practice areas at issue, which established the distinctions between the specialties of emergency and family medicine and cardiology—but, as the First District itself concluded, its citation to those definitions was irrelevant to the outcome of this case: "[T]he result would not have been any different without the internet citations." *Id*. at 148 n.2.

Second, despite ample opportunity, Plaintiff never objected to Defendants' citation to the internet definitions, which were included in the Defendants' reply brief. Plaintiff never moved to strike that brief, and Plaintiff made no objection to those definitions at oral argument. Contrary to Plaintiff's characterization, the issue here is not one of due process. Plaintiff had numerous opportunities to challenge the definitions at issue but failed to do so. As the First District held, Plaintiff waived the right to contest the use of such citations because he "neither moved to strike nor raised any objection to the use of the citations." *Id.*

Third, contrary to Plaintiff's contentions, the First District's citations to official definitions of specific medical specialties in this case are not evidence.

The First District simply applied long-established principles of statutory construction to define the term "similar specialty," which is undefined in the statute. Obviously, the court could have referenced a dictionary to define this term. *Barco v. School Bd. of Pinellas County*, 975 So. 2d 1116, 1122 (Fla. 2008). When, as here, a dictionary definition cannot be found, a court can look to other reliable sources to define the statutory term. "The use of generally-known knowledge . . . which is capable of accurate and ready determination from sources whose accuracy cannot reasonably be questioned" is appropriate. *Oken*, 23 So. 2d at 148 n.2 (citing Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 Rev. Litig. 131 (Fall 2008)). *See, e.g., IMC Phosphates Co. v. Prater*, 895 So. 2d 1263, 1270 (Fla. 1st DCA 2005) (using medical dictionary to define term and affirm ALJ's finding of fact); *State v. Campbell*, 664 So. 2d 1085, 1087-88 (Fla. 5th DCA 1995) (granting certiorari and quashing order determining statute was unconstitutionally vague due to definitional defect; appeals court used medical dictionaries, reference materials, and case law to apply constitutional interpretation to applicable statute).

Looking to other sources is exactly what this Court did in *Reform Party of Florida v. Black*, 885 So. 2d 303 (Fla. 2004)—under statutory construction circumstances almost identical to those at issue here. In *Black*, this Court addressed whether a candidate was qualified under section 103.021(4)(a) by

claiming to be a “minor political party that is affiliated with a national party holding a national convention to nominate candidates for President and Vice President.” *Id.* at 311 (emphasis added). The Court stated that the issue of qualification turned on the definition of the term "national party." Neither the statute nor the dictionary defined the term. This Court held that, in the absence of any such authority, it could properly rely on textbooks and legal authority from other jurisdictions to define the term. *Id.* at 312-13. The Court emphasized that its inquiry did not involve a factual determination based on evidence; rather, defining the term was a legal determination. *Id.* at 311.

Just as in *Black*, the term "similar specialty" is not defined in Chapter 766. Plaintiff's physician, Dr. Foster, submitted an affidavit claiming he specialized in a "similar specialty" as that term is used in the statute. Dr. Foster based this claim in part on his certification as a board certified specialist in emergency and family medicine and—it was Dr. Foster himself who referenced the "certifying organizations" in support of his credentials. The First District simply stated—based on the very information Dr. Foster provided in his own affidavit—that the definitions for the specialties provided by those organizations did not support his claimed specialization. *Oken*, 23 So. 3d at 148-50. No analytical distinction exists between the use of a dictionary or treatise (in hard copy or online) and the use of an organization's official internet website to define a term, especially when an

individual—like Dr. Foster here—has relied on that organization in defining his own credentials.

Moreover, on facts strikingly similar to those at issue here, in *J.B. v. Sacred Heart Hospital of Pensacola*, 635 So. 2d 945 (Fla. 1994), this Court relied on dictionary definitions to decide whether certain alleged conduct constituted a medical negligence claim subject to the presuit screening requirements. In that case, this Court referred to Websters' Third International Dictionary's definitions for the terms "diagnosis," "treatment," and "care," to determine whether the alleged conduct arose out of any "medical, dental, or surgical diagnosis, treatment or care" as those terms were used in the statute. *Id*. at 948. Just as this Court did in *J.B.*, here the First District referenced the certifying organizations' definitions of the specialties and general practices at issue in looking at whether Dr. Foster, as an emergency department physician, practiced in a specialty similar to Dr. Oken's specialty, which is cardiology. Under the facts of this case, the First District's use of internet definitions was proper.

CONCLUSION

Because the First District's decision does not expressly and directly conflict with either *St. Mary's* or *Campbell*, this Court should dismiss this case, holding that jurisdiction was improvidently granted. Alternatively, this Court should approve the First District's decision and hold that (**1**) the First District properly

exercised its certiorari jurisdiction to review whether, as a matter of law, Plaintiff's emergency and family medicine physician specialized in a specialty similar to cardiology; (**2**) the First District properly found that an emergency and family medicine physician does not specialize in a specialty similar to cardiology; and (**3**) the First District did not err in quoting definitions of the various medical specialties from the medical certification internet websites.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this ____ day of September, 2010, to: Joel S. Perwin, 169 East Flagler Street, Suite 1422, Miami, FL 33131, and Bruce S. Bullock, 5515-2 Philips Highway, Jacksonville, Florida, 32207 (counsel for Plaintiff).

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

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