SUPREME COURT OF FLORIDA

CASE NO.: SC10-92

D. CT. NO.: 1D08-3398

TED WILLIAMS,

Petitioner,

vs.

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

Respondents.
_____/

PETITIONER'S BRIEF ON THE MERITS

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II.
STATEMENT OF THE CASE AND FACTS

This Appeal concerns the District Court's rejection of a pre-suit expert in a medical-malpractice case. Relying in part upon Internet sources, the District Court accepted the case on certiorari, and held, based on the Plaintiff's expert's Affidavits and resume alone, that a certified emergency-room specialist was not qualified to advance a pre-suit opinion about the actions of a cardiologist who was consulted while the patient was in the emergency room. Subsequently, the Second District Court has disagreed with that decision in *Holden v. Bober*, 2010 WL 2507279 (Fla. 2d DCA June 23, 2010) (which addressed the issue on plenary review after issuance of a final order), holding that an emergency-room specialist might be qualified to provide a pre-suit opinion concerning a neurologist who was consulted while the patient was in the emergency room, and remanding for reconsideration on a full record. The Court in *Holden* also disagreed with the District Court's "determination" in the instant case "based on independent information that was obtained outside of the court's appellate record." *Id.*

Many of the relevant facts are stated in the District Court's Opinion. The Plaintiff alleged that while he was in the emergency room at the Mayo Clinic of Florida complaining of chest pain in February of 2005, the emergency-room

treating doctor consulted with Defendant Dr. Keith Oken, a board-certified cardiologist, who allegedly was negligent in his diagnosis and treatment of the Plaintiff while in the emergency room (*see* Opinion at 2; App. 1).[1] In support of his claim, the Plaintiff attached the Affidavit of Dr. John D. Foster, a board-certified emergency and family-medicine physician with extensive experience treating cardiac patients in the emergency room, thereby according him specialty in "the evaluation, diagnosis or treatment of acute chest pain and impending myocardial infarction" (Opinion at 3; *see* App. 2, Ex. 1). A second Affidavit by Dr. Foster attested to his experience in both diagnosing and treating the Plaintiff's condition (App. 3). The trial court denied the Defendants' Motion to Dismiss (App. 4).

[1]"App" refers to the Appendix filed by the Defendants as Petitioners in the District Court.

The District Court accepted certiorari and quashed the trial court's order. The District Court's Opinion states that "[o]utside 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" (Opinion at 3-4). The District Court described Dr. Foster as a "generalist" or "evaluator" of heart-attack patients, without referring to the Record evidence (*infra*) of his diagnosis and treatment of patients like Mr. Williams over many years as an emergency medical specialist. *See infra*. Nor did the Court consider that emergency-room doctors necessarily treat their patients; it is an inherent part of their jobs. Nor did the Court acknowledge that central to the Plaintiff's claim is that Defendant Oken was negligent in his *evaluation* of the Plaintiff (*see* App. 1). The District Court held that as an "evaluator," Dr. Foster's "expertise [only] involves and concerns the initial evaluation of patients with suspected cardiac symptoms," Opinion at 18, and "[t]o allow . . . an emergency medical physician to testify against a cardiologist simply because such physicians evaluate patients with suspected cardiac problems would contradict the Legislature's clear intent . . . ." *Id.* at 14.

The District Court divined that intent from the 2003 amendment to §766.102, Fla. Stat. Prior to the amendment, the Statute had permitted

corroboration by any health-care provider with sufficient training, experience or knowledge in the same or a related field of medicine that included the evaluation, diagnosis, or treatment of the medical condition, whether or not the expert was in a similar specialty. The 2003 amendment added the requirement of a similar specialty, *see* §766.102(5)(a)(1) (Opinion at 10-11).[2] The District Court noted that the phrase "similar specialty" "is not defined within the statutes. Case law also provides little useful guidance" (*id*. at 12). Without itself venturing a definition, as noted, the District Court found that Dr. Foster is a generalist who provides only evaluation, and that he does not practice in a similar specialty as the Defendant cardiologist. The District Court based this conclusion in part on Internet sources

[2]Under §766.102(5)(a) as amended , the expert witness must

> 1. Specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; or specialize 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; and
>
> 2. Have devoted professional time during the 3 years immediately preceding the date of the occurrences that is the basis for the action to:
>
> > (a) The 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[.]

not cited or considered in the trial court, but rather cited for the first time in the Defendants' Reply in Support of Certiorari in the District Court. These Internet sites list the sub-specialties associated with emergency medicine and cardiology (*see* Opinion at 14-17 & n.2). They do not discuss the practical experience of emergency-room doctors.

On that question, the District Court did not acknowledge the uncontradicted facts stated in Dr. Foster's two Affidavits and resume (App. 2, 3), concerning his actual treatment as well as evaluation of cardiac patients like Mr. Williams, as an emergency medical specialist over 20 years. His resume and first Affidavit state that Dr. Foster was engaged in the full time practice of emergency medicine, which obviously includes treatment as well as evaluation, as a board-certified specialist for 20 years (App. 2). The second Affidavit (App. 3) confirms that Dr. Foster specialized in "the treatment" of "acute chest pains and impending myocardial infarction," and had "prior experience" "treating patients similar to Ted Williams." Moreover, the Plaintiff's Complaint charges negligence in evaluation (App. 1). In the course of his treatment of patients with similar symptoms, Dr. Foster had "performed 15,000-20,000 evaluations of chest pain in an emergency room setting" (App. 3).

The District Court did not acknowledge or discuss any of this evidence. Although an emergency-room physician might not have analogous experience or expertise in evaluating or treating other kinds of conditions that present less frequently in the emergency room, Dr. Foster's 20 years of evaluating and treating 15,000-20,000 cases of chest pain in the emergency room evidenced his expertise in this particular area. Given that patients with heart attacks almost always have to go to an emergency room for initial treatment, the condition at issue here--cardiac ischemia and impending myocardial infarction--in the first instance is virtually always the province of emergency-room doctors, who both diagnose and treat.

III.
ISSUES ON REVIEW

A. WHETHER THE DISTRICT COURT ERRED OR EXCEEDED ITS CONSTITUTIONAL AUTHORITY IN REVIEWING THE TRIAL COURT'S ORDER ON CERTIORARI.

B. WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE UNCONTRADICTED FACTS PROVIDED BY DR. FOSTER DID NOT SATISFY THE STATUTORY PRESUIT REQUIREMENTS FOR THE CORROBORATING AFFIDAVIT OF A MEDICAL EXPERT.

C. WHETHER THE DISTRICT COURT ERRED IN SUPPORTING ITS DECISION BY REFERENCE TO INTERNET MATERIALS CITED FOR THE FIRST TIME IN THE RESPONDENT'S REPLY BRIEF IN THE DISTRICT COURT.

IV.
STANDARD OF REVIEW

A Petitioner's attempt to demonstrate irreparable injury presents a jurisdictional issue reviewable *de novo*. *See Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 215 (Fla. 1998). A trial court's asserted departure from the requirements of law presents a legal issue reviewable *de novo*. *See Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995); *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983). The propriety of considering factual material for the first time at the appellate level presents a *de novo* issue of law. *See, e.g.*, *Hillsborough County Board of County Commissioners v. Public Employees Relations Comm'n*, 424 So. 2d 132 (Fla. 1st DCA 1982).

V.
SUMMARY OF THE ARGUMENT

The District Court exceeded the proper bounds of certiorari in reviewing not the procedural aspects of the pre-suit investigation in this case, in order to assure ostensible compliance with statutory requirements, but rather the substance of the evidence presented by the Plaintiff in that investigation--specifically, the evidence regarding his expert's qualifications. The District Court's rationale for doing so--that "[f]iling an affidavit that is facially at odds with the statutory policy is

tantamount to the filing of no affidavit" (Opinion at 9)--could apply to any asserted material departure from pre-suit requirements. This Court has made clear that the boundaries of certiorari do not extend to such substantive interlocutory review.

Respectfully, the District Court also was wrong on the merits in ruling on the pleadings and attachments alone (the Affidavits and resume) that an emergency-room doctor cannot be held to practice in a "similar specialty" as a cardiologist accused of mis-diagnosing and mis-treating a patient who was in the emergency room. The District Court's dismissal that Dr. Foster was only an "evaluator" (Opinion at 18) not only is incorrect, but fails to appreciate that Defendant Oken's mis-diagnosis is a critical claim in the Plaintiff's Complaint. Moreover, as Dr. Foster stated in his Affidavit, like any emergency-room doctor, he obviously treats as well as evaluates, and he has seen, diagnosed and treated patients with Plaintiff's Williams' condition for 20 years. As the Second District Court recently held in the *Holden* case, the District Court here was wrong to conclude on Dr. Foster's resume and Affidavits alone that an emergency-room doctor does not practice in a similar specialty as a cardiologist.

Finally, the District Court erred, and took a dangerous path, in reviewing and relying at least in part on Internet sources not cited or considered at the trial level, but rather cited for the first time in the Defendants' Reply in support of their

Petition for Writ of Certiorari. It did so not to explore questions of law or policy, but rather the critical factual issue on review--the expert's qualifications. Doing so not only violated the precepts of due process and fairness, and the rules of evidence, but was unfairly selective--research on only a very narrow aspect of this issue, while foreclosing any opportunity for the Plaintiff to counter with his own research on the broader aspects of an emergency-room practice. This question is increasingly the topic of discussion throughout the country, with a clear consensus that Internet materials, like any other evidence, are subject to the Rules of Evidence.

VI.
ARGUMENT

A. THE DISTRICT COURT ERRED OR EXCEEDED ITS CONSTITUTIONAL AUTHORITY IN REVIEWING THE TRIAL COURT'S ORDER ON CERTIORARI.

The District Court's decision exceeds the proper scope of certiorari review, creating a new category of interlocutory appeal not authorized by Fla. R. App. P. 9.130. The District Court effectively (and erroneously) undertook plenary review of the sufficiency of the Plaintiff's compliance with the presuit requirements of Chapter 766. It re-evaluated the evidence presented, and ruled *de novo,* on the pleadings alone (meaning the expert's Affidavits and resume), and based in part on the District Court's Internet research, that Dr. Foster did not possess sufficient qualifications. This usurpation of the trial court's traditional function of gatekeeper (subject to plenary review) constituted an expansive use of common-law certiorari exceeding the pre-existing scope of the writ, as defined by this Court.

Under Rule 9.130, "[a]ppeals to the district courts of appeal of non-final orders are limited to those" specified. The purpose of the rule is "to restrict the number of appealable nonfinal orders." *Reeves v. Fleetwood Homes of Florida, Inc.*, 889 So. 2d 812, 819 (Fla. 2004). Orders denying motions to dismiss are not

on that list. Only in the rarest cases is certiorari available to review an order denying a motion to dismiss. *See Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987). When this Court has permitted such review, it has been limited to protecting the context and conduct of trial-level decisions--not review of the merits of those decisions. It has been limited to scrutiny of the statutory procedures followed--not the sufficiency of the evidence. *See, e.g., Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995) (certiorari appropriate to insure proper procedure for moving to plead punitive damages, but not to review sufficiency of the evidence).

Only in that limited context have the District Courts accepted certiorari to review an order denying a motion to dismiss for failure to comply with medical-malpractice presuit requirements. One way or another, the prescribed procedures had not been followed in such cases. Some decisions involved plaintiffs who had failed entirely to perform any presuit investigation, contending that theirs were not medical-malpractice claims. *See, e.g., Tenet South Florida Health Systems v. Jackson*, 991 So. 2d 396 (Fla. 3d DCA 2008); *Corbo v. Garcia*, 949 So. 2d 366 (Fla. 2d DCA 2007). Others involved plaintiffs who had failed entirely to comply with the statutory presuit procedure--for example, by not providing a presuit affidavit at all. *See Martin Memorial Medical Center v. Herber*, 984 So. 2d 661

(Fla. 4th DCA 2008)*; Central Florida Regional Hospital v. Hill*, 721 So. 2d 404 (Fla. 5th DCA 1998). None involved interlocutory review of a medical expert's qualifications, or the sufficiency of an expert affidavit, or of a plaintiff's investigation. These decisions, confirming the "extremely rare" propriety of certiorari in such circumstances, Advisory Committee Note, Rule 9.130, Fla. R. App. P., can only underscore the impropriety of certiorari in this case.

In *St. Mary's Hospital v. Bell*, 785 So. 2d 1261, 1262 (Fla. 4th DCA 2001), the Court held that certiorari was not appropriate to evaluate the sufficiency of the evidence presented by the plaintiff in compliance with presuit procedures:

> Certiorari may lie from orders denying motions to dismiss for failure to comply with the presuit requirements of chapter 766 in medical malpractice actions. . . . However, certiorari does not lie for appellate courts to reweigh the evidence presented concerning compliance with the presuit statutory requirements. . . .
>
> * * *
>
> [C]ertiorari is available to review whether a trial judge followed chapter 766 and whether a plaintiff complied with presuit notice and investigation requirements; certiorari is not so broad as to encompass review of the evidence regarding the sufficiency of counsel's presuit investigation.

The First District Court itself reached a similar conclusion in *Abbey v. Patrick*, 16 So. 3d 1051, 1054 (Fla. 1st DCA 2009), declining to review an order "entered in the course of the medical malpractice presuit screening procedure," which denied summary judgment based on the medical-malpractice statute of limitations--specifically, the tolling provisions of §766.106(4), Fla. Stat. The District Court in *Abbey* cited *St. Mary's* in holding that

"certiorari may lie to ensure that a defendant is afforded the presuit screening procedure, but not to review all of the decisions in the course of executing the procedure . . . ." *Id.* at 1055. It said that "certiorari may be an appropriate remedy if the error is one that resulted in the deprivation of the right to the process itself," but it "should never be used to circumvent the rules governing appeals from pretrial orders." *Id.* at 1054, 1053.

The Court in *Abbey* reviewed the cases in which certiorari was appropriate to consider orders concerning medical-malpractice presuit screening, noting that "[t]he common thread running through these cases is that they all involve errors that were so serious that they effectively deprived the doctor or health care provider of the right to have the plaintiff's claim of negligence evaluated before trial." *Id.* at 1054. The Court continued: "Of course, this does not mean that every decision that is made in the course of executing the presuit screening process is reviewable by

certiorari. It is not likely that certiorari would be appropriate if the trial judge has afforded the defendant the statutory procedure but has merely made a mistake of law or fact in the course of carrying it out." *Id.* at 1055. Citing *Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995) (punitive damages), the Court in *Abbey* concluded, 16 So. 3d at 1055:

> If the error results in a deprivation of the presuit screening process guaranteed by the statute, it is not one that can be corrected on appeal. . . . But the 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 entered in the course of the proceeding. In that event, the relief afforded by an appeal from the final judgment will be adequate, and certiorari will not lie even if the error is one that amounts to a departure from the essential requirements of law.

Thus the Court held in *Abbey* that certiorari was unjustified in two ways. First, the trial court had given the petitioner the process he was entitled to under the presuit screening statute. The Petitioner was not deprived of "the right to the process itself." 16 So. 3d at 1054. Second, regardless of the correctness of the trial court's ruling, it was not a violation of a clearly established legal principle that had resulted in a miscarriage of justice.

The District Court in the instant case exceeded the established parameters of certiorari enforced in *Abbey* and *St. Mary's*. The Court frankly acknowledged that it was reviewing "the trial court's legal determination concerning the sufficiency of

the corroborating affidavit." Opinion at 8. It necessarily concluded that the trial court's construction and application of the Statute were erroneous. In contrast, *Abbey* and *St. Mary's* found that the only kind of presuit screening orders appropriate for certiorari alleged errors so serious that they deprived the doctor of the right to have the negligence claim evaluated at all.

Without citing *Abbey*, the District Court attempted to distinguish decisions involving statutes of limitations on the ground that they dealt with an issue of "general" applicability, as opposed to an issue limited to medical-malpractice actions. Opinion at 7-8. But as the dissent pointed out (Opinion at 24), the Statute at issue in *Abbey*--§766.106(4) (statute of limitations)--like the Statute at issue here, applies only to medical-malpractice actions.

The District Court attempted to distinguish *St. Mary's* on the ground that it concerned the propriety of certiorari "to review [the] sufficiency of the evidence presented at an evidentiary hearing to determine the reasonableness of counsel's presuit investigation" (Opinion at 8). It said that in contrast to *St. Mary's* (again, not citing *Abbey*), the District Court here was not reviewing the Plaintiff's evidence, but

> the sufficiency of the corroborating affidavit, which goes to the very core of the presuit notice requirement in medical malpractice actions--that there has been a review and a determination by a physician in the same or similar

> specialty of the malpractice claim (more thoroughly discussed herein). Allowing a corroborating affidavit to be filed by a physician who is only a generalist rather than one in the same or similar specialty to the defendant effectively deprives a malpractice defendant of the statutorily mandated process. Filing an affidavit that is facially at odds with the statutory policy is tantamount to the filing of no affidavit.

Opinion at 8-9.

On the premise that a materially deficient affidavit is the same as no affidavit, the District Court then assimilated this case to cases in which a trial court's retention of subject matter jurisdiction assertedly was improper; denial of a motion to dismiss assertedly violated a constitutional right to privacy; a discovery order assertedly violated a privilege; and the denial of qualified immunity subjected a defendant to litigation that the immunity would preclude (*see* Opinion at 5). The District Court also said that this case is like the others in which certiorari was appropriate because they "concern[ed] prerequisites which must be followed prior to proceeding with certain claims" (Opinion at 6). These were decisions reviewing the procedures followed by trial courts in allowing punitive claims, but not the evidence supporting those claims, *see Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995), and those referenced above, in which there was a wholesale failure to comply with pre-suit requirements--for example, no affidavit

at all--analogous to a trial court's failure to follow the procedures required for appraising a claim of punitive damages (Opinion at 6-7).

As noted, the common theme of such cases, which distinguish them from this one, is that none of them purport to evaluate the evidence either proffered or presented--by affidavit or by testimony--in support of the claim in question.[3] Rather, they accepted review by certiorari when the failure to satisfy threshold procedural requirements was so egregious as to be virtually non-existent, thus vitiating the entire purpose of those requirements. Here, unlike the narrow class of cases in which certiorari is appropriate, the expert did submit two Affidavits and his resume, reflecting a good-faith and ostensible compliance with statutory requirements.

The District Court's attempt to assimilate those exceptional cases to the instant case, on the ground that any materially deficient affidavit "is tantamount to the filing of no affidavit" (Opinion at 9), widens the exception so far as to discard the rule. Any material deficiencies in the plaintiff's pre-suit proffer by definition are, in the District Court's words, "facially at odds with the statutory policy . . ."

[3]As the dissent noted, there would seem to be no principled difference between an evaluation of the evidence proffered in an expert affidavit, and either an evaluation of the evidence offered in support of a punitive claim, or as in *Abbey* and *St Mary's*, of the evidence offered in support of a pre-suit opinion.

(*id*.) To appraise on certiorari the sufficiency of such an expert affidavit--of the qualifications or conclusions proffered--is to legitimize interlocutory review of every such affidavit, all qualifications, all conclusions. By analogy, and contrary to *Globe Newspaper Co. v. King*, it necessarily would permit the review of evidentiary proffers in support of punitive damages, because a materially deficient proffer could be said to be no proffer at all. No authority supports the District Court's ruling on this issue, which significantly exceeds the proper scope of certiorari.

B. THE DISTRICT COURT ERRED IN RULING THAT THE UNCONTRADICTED FACTS PROVIDED BY DR. FOSTER DID NOT SATISFY THE STATUTORY PRESUIT REQUIREMENTS FOR THE CORROBORATING AFFIDAVIT OF A MEDICAL EXPERT.

1. The Purpose of Pre-Suit Screening. As the Second District Court recently held in *Holden v. Bober*, 2010 WL 2507279 (Fla. 2d DCA June 23, 2010), the District Court in the instant case employed an erroneous legal standard in applying the facts stated in Dr. Foster's resume and Affidavits about his qualifications to the "similar specialty" language of §766.102(5). The 2003 amendment to §766.102(5)(a)(1) did alter the standard, but the District Court erroneously constricted the new standard, and also ignored the alternative standard

prescribed in §766.102(12). Under the District Court's construction, meritorious claims will be forbidden and uncompensated, denying access to courts. This will hinder--not further--the purposes of presuit screening.

Dismissal of a lawsuit is the most draconian sanction, "justified only in extreme situations."[4] The presuit procedures prescribed in Chapter 766 are "intended to address a legitimate legislative policy decision relating to medical malpractice and establish[] a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding." *Williams v. Campagnulo*, 588 So. 2d 982, 983 (Fla. 1991). *See Patry v. Capps*, 633 So. 2d 9, 11-12 (Fla. 1994)("presuit notice and screening requirements set forth in the statute . . . are 'designed to facilitate the amicable resolution of medical malpractice claims'" and to "promote the settlement of meritorious claims early in the controversy in order to avoid full adversarial proceedings"), *quoting Ingersoll v. Hoffman*, 589 So. 2d 223, 224 (Fla. 1991).

[4] *DeCristo v. Columbia Hospital Palm Beaches, Ltd.*, 896 So. 2d 909, 911 (Fla. 4th DCA 2005). *See McPherson v. Phillips*, 877 So. 2d 755, 758 (Fla. 4th DCA), *review denied*, 888 So. 2d 18 (Fla. 2004); *De La Torre v. Orta ex rel. Orta*, 785 So. 2d 553, 555-56 (Fla. 3d DCA), *review denied*, 805 So. 2d 808 (Fla. 2001); *Wilkinson v. Golden*, 630 So. 2d 1238 (Fla. 2d DCA 1994).

However, these procedures are not intended to deny access to the courts. *See Correa v. Robertson*, 693 So. 2d 619 (Fla. 2d DCA 1997). To the contrary, "Florida courts are required to construe the Medical Malpractice Act 'so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts, while at the same time carrying out the legislative policy of screening out frivolous lawsuits and defenses,'"*Apostolico v. Orlando Regional Health Care Systems, Inc*., 871 So. 2d 283, 286 (Fla. 5th DCA 2004), *quoting Kukral v. Mekras*, 679 So. 2d 278, 284 (Fla. 1996) ("the medical malpractice statutory scheme must be interpreted liberally").[5]

[5]*Accord, Patry v. Capps*, 633 So. 2d 9, 13 (Fla. 1994); *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993) (a "narrow construction of chapter 766 presuit notice requirement is in accord with the rule that restrictions on access to the courts must be construed in a manner that favors access"); *Holden v. Bober*, 2010 WL 2507279, *3 (Fla. 2d DCA June 23, 2010); *Jackson v. Morillo*, 976 So. 2d 1125, 1128 (Fla. 5th DCA 2007), *review dismissed*, 996 So. 2d 858 (Fla. 2008); *Apostolico v. Orlando Regional Health Care Systems, Inc.*, 871 So. 2d 283, 286 & n.3 (Fla. 5th DCA 2004) ("the statutory medical malpractice scheme must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to courts"); *Fort Walton Beach Medical Center, Inc. v. Dingler*, 697 So. 2d 575, 579 (Fla. 1st DCA 1997) ("the presuit notice and screening statute should be construed in a manner that favors access to courts"); *Melanson v. Agravat*, 675 So. 2d 1032 (Fla. 1st DCA 1996); *Patino v. Einhorn*, 670 So. 2d 1179 (Fla. 3d DCA 1996) ("[t]he provisions of [Chapter 766] are limitations on Article I, Section 21 of the Florida Constitution, and therefore should be strictly construed") (citation omitted); *Maldonado v. EMSA Ltd. Partnership*, 645 So. 2d 86 (Fla. 3d DCA 1994); *Serrill v. Hilderbrand*, 382 So. 2d 316, 317 (Fla. 2d DCA 1979) ("[t]he requirements of [then] Chapter 768 must be strictly complied with, since the statute 'is in derogation of the common law, and is an impediment to the constitutional guarantee of access to the courts'") (citation omitted).

To this end, "[t]he purpose of the statute is to prevent the filing of medical malpractice claims that are not legitimate"--nothing more.[6] The Statutory pre-suit procedures require that the plaintiff can "corroborate reasonable grounds to initiate medical negligence actions"--nothing more.[7] The "expert corroborative opinion is intended to prevent the filing of baseless claims"--nothing more.[8] These procedures "[w]ere not intended to require presuit litigation of all issues in medical negligence claims nor to deny parties access to the court on the basis of technicalities."[9] Contrary to the cited decisions, and contrary to a statutory construction that "favors access to courts," *Ft. Walton, supra* note 5, 697 So. 2d at 579, the District Court adopted the most restrictive possible standard for appraising Dr. Foster's experience in a "similar specialty" under §766.102(5).

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[6]*Columbia/JFK Medical Center Limited Partnership v. Brown*, 805 So. 2d 28, 29 (Fla. 4th DCA 2002). *Accord*, *Davis v. Orlando Regional Medical Center*, 654 So. 2d 664, 665 (Fla. 5th DCA 1995).

[7]*Duffy v. Brooker*, 614 So. 2d 539 (Fla. 1st DCA), *review denied sub nom. Physicians Protective Trust Fund v. Brooker*, 624 So. 2d 267 (Fla. 1993), *and disapproved on other grounds, Archer v. Maddox*, 645 So. 2d 544 (Fla. 1st DCA 1994).

[8]*Apostolico v. Orlando Regional Health Care Systems, Inc.*, 871 So. 2d 283, 286 (Fla. 5th DCA 2004). *Accord, Shands Teaching Hospital & Clinics, Inc. v. Barber*, 638 So. 2d 570, 572 (Fla. 1st DCA 1994).

[9]*Faber v. Wrobel*, 673 So. 2d 871, 873 (Fla. 2d DCA 1995), *review denied*, 675 So. 2d 927, 928, 931 (Fla. 1996). *Accord, Ragoonanan by Ragoonanan v. Associates in Obstetrics & Gynecology*, 619 So. 2d 482, 484 (Fla. 2d DCA 1993).

2. Under the Statute, Dr. Foster Practices in a "Similar" Specialty in Treating Cardiac Patients. The Plaintiff's Complaint alleges that Defendant Oken, a cardiologist, was negligent in his diagnosis and treatment in the course of consulting with a doctor treating Plaintiff Williams in the emergency room at the Mayo Clinic of Florida (App. 1). The District Court's decision failed to acknowledge the uncontradicted evidence that at least in an emergency-room context, Dr. Foster satisfies the statutory criteria, and practices in a "similar specialty" to Dr. Oken. It described Dr. Foster as only a "generalist" or "evaluator" of heart attack patients, overlooking that the Plaintiff's Complaint alleges a mis-diagnosis, and the Record evidence of his actual treatment of patients like Mr. Williams over many years as an emergency medicine specialist. An emergency medical specialist is not a generalist.[10] The Opinion states that "[o]utside 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" (pp. 3-4). Notwithstanding the asserted absence of any Record evidence, the Court then concluded that Dr. Foster

[10]Dr. Foster is board-certified, and §766.102(9)(b)(i) defines emergency medical services as those "required for 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."

is only an "evaluator"--that his "expertise [only] involves and concerns the initial evaluation of patients with suspected cardiac symptoms" (p. 18). And "[t]o allow . . . an emergency medicine physician to testify against a cardiologist simply because such physicians evaluate patients with suspected cardiac problems would contradict the Legislature's clear intent . . ." (p. 14).

But there is more than "a conclusory statement" in this Record, and Dr. Foster is more than a "generalist" and "evaluator." The District Court overlooked the facts stated in Dr. Foster's two Affidavits and resume, concerning his actual treatment--not mere evaluation--of cardiac patients like Mr. Williams, as an emergency medicine specialist over 20 years. The resume and first Affidavit show that Dr. Foster was engaged in the full-time practice--not merely screening--of emergency medicine as a board certified specialist for 20 years (App. 2, Ex. 1). In his second Affidavit (App. 3), he affirmed that he specialized in "the treatment"--not merely evaluation--of "acute chest pains and impending myocardial infarction," and had prior experience "treating patients similar to Ted Williams." In the course of Dr. Foster's extensive experience in treating patients with symptoms like those the Defendant misdiagnosed, he "performed 15,000-20,000 evaluations of chest pain in an emergency room setting." *Id.* The alleged

negligence of Defendant Oken took place "in an emergency room setting." And it included a failure in evaluating the Plaintiff's condition.[11]

The District Court's Opinion did not acknowledge this uncontradicted evidence, which was sufficient to satisfy the "similar specialty" requirement of §766.102(5). The acceptance of such evidence does not, as the District Court said, "elevate emergency medical physicians (and other generalists) to the level of an expert not only in their own field of medicine *but in every field and specialty*" (emphasis in original); or make Dr. Foster "a 'specialist' in all areas of medicine he encounters in the emergency room"--"virtually every specialty (e.g., neurology, gastroenterology, pulmonology)"; or permit him to address "the standard of care of all specialists" (Opinion at 19). These statements by the District Court are unsupported on this Record; they depart from the evidence offered in this case; and they are counter-intuitive.

There are conditions that emergency-room doctors treat all the time. There are other conditions that they treat only sporadically, whose treatment would not qualify them as experts. To say that emergency-room doctors profess to be, or

[11]The statutory purpose of preventing illegitimate lawsuits "has been satisfied where, as here, the presuit requirements were satisfied as to one theory of negligence against the [healthcare provider]." *Columbia/JFK Medical Center Limited Partnership v. Brown*, 805 So. 2d 28, 29 (Fla. 4th DCA (2001). Therefore, the expert's affirmation of misdiagnosis alone is sufficient.

would qualify as, experts in all specialties is a significant overstatement. However, there are conditions that they treat regularly, acquiring specialized skills, and thereby assuming similar specialties, by virtue of their experience.

The effect of the District Court's sweeping rejection is significant. Patients with chest pains or heart attacks typically have to go to an emergency room first. The condition here--cardiac ischemia and impending myocardial infarction--in the first instance is virtually the exclusive province of emergency-room doctors. If an emergency specialist with years of experience treating heart-attack patients like Dr. Foster is not a "similar" specialist for purposes of the Statute, then a significant group of qualified experts--indeed, those with the most immediate and perhaps extensive practical experience--will be excluded from testifying. If the Legislature had intended that only a cardiologist could offer an expert affidavit about another cardiologist's evaluation, diagnosis and treatment of a heart-attack patient, it would have limited this statutory provision to the "same specialty" as the health-care provider--not a "similar specialty."

3. The District Court Also Overlooked § 766.102(12). Even if Dr. Foster had not practiced in a "similar specialty," the District Court ignored the alternative qualifying language of subsection (12) of § 766.102: "This section does not limit the power of the trial court to disqualify or qualify an expert witness on grounds

other than the qualifications in this section." Contrary to the District Court's suggestion (Opinion at 14), this provision was not displanted by the 2003 amendment to §766.102(2)(c)(1). The trial court's Order should have been affirmed on this basis alone. The Defendants did not demonstrate that the trial court abused its discretion in qualifying Dr. Foster based on his experience.

C. THE DISTRICT COURT ERRED IN SUPPORTING ITS DECISION BY REFERENCE TO INTERNET MATERIALS CITED FOR THE FIRST TIME IN THE RESPONDENT'S REPLY BRIEF IN THE DISTRICT COURT.

As noted, the Court in *Holden v. Bober*, 2010 WL 2507279, *3 (Fla. 2d DCA June 23, 2010), disagreed with the District Court's decision in the instant case, in part because it "was based on independent information that was obtained outside the court's appellate record." It is settled that an appellate court must base its decision on the Record before the trial court. *See Fine v. Carney Bank of Broward County*, 508 So. 2d 558, 559 (Fla. 4th DCA 1987); *Finchum v. Vogel*, 194 So. 2d 49, 51 (Fla. 4th DCA 1966).[12] It is equally settled--in contexts too

[12]This principle complements the trial-level requirement that the factfinder's verdict must be based only on the evidence. *See Keene Bros. Trucking, Inc. v. Pennell*, 614 So. 2d 1083 (Fla. 1993); *Smith v. State*, 95 So. 2d 525, 528 (Fla. 1957); *Greenfield v. State*, 739 So. 2d 1197 (Fla. 2d DCA 1999); *Duchainey v. State*, 736 So. 2d 38, 39-40 (Fla. 4th DCA 1999); *Hollywood Corporate Circle Associates v. Amato*, 604 So. 2d 888, 891 (Fla. 4th DCA 1992); *Bickel v. State Farm Mutual Automobile Ins. Co.*, 557 So. 2d 674 (Fla. 2d DCA 1990); *Snook v. Firestone Tire & Rubber Co.*, 485 So. 2d 496 (Fla. 5th DCA 1986); *Grissinger v.*

numerous to mention--that due process requires notice and an opportunity for both sides to be heard.[13] Yet the District Court here considered Internet research materials concerning not questions of law or policy, but rather the critical factual issue on review--materials that had not been addressed by the parties at trial, or considered by the trial court, but rather were cited by the Respondents for the first time in their Reply in the District Court. Doing so conflicted with many decisions holding that parties may not rely upon--and an appellate court may not consider--factual matters presented for the first time on appeal:

> It is fundamental that an appellate court reviews determinations of lower tribunals based on the records established in the lower tribunals. As we said in *Hillsborough County Board of County Commissioners v. PERC*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982):
>
> > An appeal has never been an evidentiary proceeding; it is a proceeding to review a judgment or order of a lower

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Griffin, 186 So. 2d 58 (Fla. 4th DCA 1966). The same is true of rulings and decisions made by trial judges, whether based on their personal knowledge, *see Kelley v. Kelley*, 75 So. 2d 191 (Fla. 1954), or their own research or review of records from related court files. *See Atlas Land Corp. v. Norman*, 116 Fla. 800, 802, 156 So. 885, 886 (1934); *Abichandani v. Related Homes of Tampa, Inc.*, 696 So. 2d 802, 803 (Fla. 2d DCA 1997); *In re Simpkins' Estate*, 195 So. 2d 590, 592, 590 (Fla. 1st DCA 1967). ain *See also* Comment to Canon 3(C)(7) of the Florida Code of Judicial Conduct ("[a] judge must not independently investigate facts in a case and must consider only the evidence presented").

[13]*See, e.g., L.M.B. v. Department of Children and Families*, 28 So. 3d 217, 218 (Fla. 4th DCA 2010); *Stephens v. Bay Medical Center*, 839 So. 2d 858 (Fla. 1st DCA 2003); *Tri Star Investments, Inc. v. Miele*, 407 So. 2d 292 (Fla. 2d DCA 1981); *Musachia v. Terry*, 140 So. 2d 605 (Fla. 3d DCA 1962).

> tribunal based upon the record made before the lower tribunal. An appellate court will not consider evidence that was not presented to the lower tribunal. . . .
>
> When a party includes in an appendix material or matters outside the record, or refers to such material or matters in its brief, it is proper for the court to strike the same. *See, e.g., Gilman v. Dozier*, 388 So. 2d 294 (Fla. 1st DCA 1980); *Finchum v. Vogel*, 194 So. 2d 49 (Fla. 4th DCA 1966); *Sheldon v. Tiernan*, 147 So. 2d 593 (Fla. 2nd DCA 1962). That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court. *See Mann v. State Road Dept.*, 223 So. 2d 383 (Fla. 1st DCA 1969).

Altchiler v. State, Dept. of Professional Regulation, Division of Professions, Board of Dentistry, 442 So. 2d 349, 350 (Fla. 1st DCA 1983).[14]

This precept--at the trial or appellate level--applies no less to Internet materials, especially given the open market for both reliable and unreliable material that the Internet provides. As the court held in *Campbell v. State*, 949 So. 2d 1093, 1094 (Fla. 3d DCA 2007):

> At the sentencing hearing, the State offered a paper print-out of several pages on the Florida Department of Corrections website relating to the Defendant. . . .

[14]*Accord, Gray v. State*, 910 So. 2d 867, 869 (Fla. 1st DCA), *review denied*, 920 So. 2d 628 (Fla. 2005) (sealed and certified letter from a Records Management Analyst at the Department of Corrections concerning the defendant's release date was inadmissible because it did not qualify as a business record or official public record). The *Gray* Court distinguished properly-certified "computer printouts" which "are admissible if the custodian or other qualified witness is available to testify as to manner of preparation, reliability and trustworthiness of the product." 910 So. 2d at 869 (citation omitted).

> The defense objected that the print-out was hearsay and not self-authenticating. The court overruled the objection. . . .
>
> We conclude that the hearsay objection to the print-out should have been sustained. The First District has said:
>
> > Computer print-outs, like business cards are admissible *if* the custodian or other qualified witness is available to testify as to manner of preparation, reliability and trustworthiness of the product. *Cofield v. State*, 474 So. 2d 849, 851 (Fla. 1st DCA 1985) (adopting rule as stated in *Pickrell v. State*, 301 So. 2d 473, 474 (Fla. 2d DCA 1974)), [, *cert. denied*, 314 So. 2d 585 (Fla. 1975)]; *see Desue v. State*, 908 So. 2d 1116 (Fla. 1st DCA 2005) [, *review denied*, 920 So. 2d 626 (Fla. 2005)].

Accord, G.M.H. v. State, 18 So.3d 728 (Fla. 2d DCA 2009) (trial court erred in admitting printouts of victim's internet research regarding prices of dirtbike repairs); *Whitley v. State*, 1 So. 3d 414 (Fla. 1st DCA 2009) (printout from the webpage of the State of Florida inadmissible); *Padin v. Travis*, 990 So. 2d 1255, 1256, 1257 (Fla. 4th DCA 2008) ("the printout of the internet search from Geico's website was hearsay," and fell "far short of . . . testimony and evidence" required to support a mere change of venue) (citation omitted); Rule 2.9(c), Comment b, ABA Model Code of Judicial Conduct (Feb. 2007) ("[t]he prohibition against a

judge investigating the facts in a matter extends to information available in all mediums, including electronic").

As the dissent in this case pointed out (Opinion at 26), the same reasoning is found in non-Florida cases, such as in *N.Y.C. Medical & Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 798 N.Y.S. 2d 309, 313 (N.Y. App. Div. 2004):

> In conducting its own independent factual research, the [lower] court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality.

The dissent also cited a recent article on the same point (Opinion at 27-28):

> Are Judges prohibited under canons of judicial conduct from independently accessing the Internet? Not expressly. The Code of Conduct for United States Judges does not address Internet searches by judges, and neither does the American Bar Association's Model Code of Judicial Conduct, which has been adopted by New York. The Model Code does, however, contain a relevant comment in Canon 3 ("A judge shall perform the duties of judicial office impartially and diligently"). The commentary to that canon states, "A judge must not independently investigate facts in a case and must consider only the evidence presented."
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> * * * * * * * * * *
>
> The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct has recently proposed a revision to the Model Code that more specifically restricts judges from accessing the Internet. The Commission's 2004

> draft of the Model Code states within its rule 2.09 that "a judge shall not independently investigate facts in a case." The commentary to that rule provides as follows: "The prohibition against a judge investigating the facts of a case independently or through a member of the judge's staff extends to information available in all mediums including electronic access." The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics and Committee on Government Ethics jointly responded positively to the Joint Commission's draft: "Because facts obtained on the Internet and in other electronic media are often incomplete or incorrect, we support this important principle.

David H. Tennant & Laurie M. Seal, "Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?" 16 *Professional Lawyer* 2, 16 (2005).

The District Court discussed this issue in a footnote (Opinion at 15-16 n.2), citing decisions which for the most part referenced Internet sources to fill in definitions, terminology, and largely uncontroverted background facts. Indeed, the District Court acknowledged that these decisions concern "generally-known knowledge . . . capable of accurate and ready determination from sources whose accuracy cannot reasonably be questioned . . ." (Opinion at 15 n.2). *See., e.g.*, *United States v. Bari*, 599 F.3d 176 (2d Cir. 2010) (approving reference to Internet materials only to confirm "matters of common knowledge"). The District Court sought to assimilate its own Internet citations to such "generally-known

knowledge," because they came from the websites of respected medical Boards, and merely listed the "areas of practice included in a particular specialty" (*id*.).

The short answer is that due process and fundamental fairness require an opportunity to be heard--not a post-facto consideration of whether their denial caused any harm. The harm is inherent. Moreover, there was harm here. Even if the isolated information gleaned from these cites is unassailable, the District Court's independent research was narrowly circumscribed and entirely result-oriented. It focused only on the Defendant's and the expert's formal credentials, in support of the District Court's observation that board certification in emergency medicine involves sub-specialties that do not require "any specifically focused training in cardiology" (Opinion at 17). Likewise, it noted, family medicine encompasses all patients of all ages suffering every condition (*id*.). In contrast, the District Court pointed out, citing additional Internet materials, certification in cardiology requires specialized training and knowledge (*id*. at 17-18).

However, the District Court undertook no Internet or other research to determine the extent to which a certified emergency-room physician regularly engages in a similar sub-specialty by virtue of repeated treatment of and training concerning heart conditions. If the Internet materials in question had been presented at the trial level, thus providing fair notice in a trial setting, the Plaintiff

could have attempted to balance such one-sided analysis with additional factual materials concerning the education, experience and abilities of emergency-room doctors. This might include the frequency of chest pain and related conditions as an occasion for emergency-room treatment; the expertise that such frequent treatment occasions over time; additional expertise provided by continuing medical education in this area; and the success of such treatments by emergency-room doctors. *See, e.g.*, Kaul & Abbott, "Evaluation of Chest Pain in the Emergency Room Department," 121 *Annals of Internal Medicine* No. 12, Dec. 15, 1994 (found through an Internet search).[15] The absence of a complete Record at the trial level deprived the Plaintiff of the opportunity to counter the District Court's focus on formal requirements of specialization with the practical attributes of a "similar" specialty. The District Court's unannounced venture into a selective portion of the universe of Internet material prevented that more balanced approach.

[15]We are citing a few Internet sources here not to invite this Court to compound the District Court's error, but to provide an abbreviated illustration that both sides can find support in the Internet. It is for that reason that selective inquiry, without the safeguards of an adversary system, is inappropriate.

Doing so also collided with the Rules of Evidence. It might be an overstatement to call the results of Internet searches "voodoo information,"[16] but we still have Rules of Evidence. Unless subject to a hearsay exception, "the content [of Internet sources] cannot be offered for the truth of the matter asserted." Levine & Swatski-Lebson, *Are Social Networking Sites Discoverable*? (Nov. 13, 2008) (available at www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202425974937).[17]

Internet materials also have to be authenticated. *See Daniel v. State*, 296 Ga. App. 513 (2009). They have to be "evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity." *People v. Crespi*, 155 P.3d 570, 574 (Colo. App. 2006), *cert. denied*, 2007 WL 1040685 (Colo. 2007), *citing In re Interest of F.P.*, 878 A.2d 91 (Pa. Super. Ct. 2005). *See generally* Collier, *Informal Internet Research: Need, Reliability, and Admissiblity*, 38 Colo. Lawyer 111 (Aug.

[16]Leavitt & Rosch, *"Computer Counselor: Making Internet Searches Part of Due Diligence,"* 29 Los Angeles Lawyer 46, 46-47 (Feb. 2007), *citing St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999).

[17]*See Maldonado v. Municipality of Barceloneta*, 2009 WL 636016 (D. Puerto Rico, March 11, 2009); *Deiulemar Compagnia Di Navigazione SpA v. Dabkomar Bulk Carriers Ltd.*, 2006 Wl 317241 (S.D.N.Y. Feb. 10, 2006).

2009). All of these safeguards are discarded when an appellate court does it own Internet research.

It is respectfully submitted that consideration of such materials is inconsistent with the Rules of Evidence and the spirit, letter, and policies motivating the rules prohibiting parties, jurors, and judges from relying upon material extrinsic to the evidence of record in a case. As the dissent stated, "[t]he record should contain only evidence that has been tested in our adversarial process, and not by unsupervised judges and staffs" Opinion at 28. Respectfully, allowing otherwise is inconsistent with the fundamental fairness of a judicial proceeding.

VII.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Opinion of the District Court should be disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were served by U.S. Mail upon Earl Googe, Smith Hulsey & Busey, Counsel for Oken and Mayo Clinic, 225 Water Street, Suite 1800, Jacksonville, FL 32202 and Marjorie C. Allen, Counsel for Oken and Mayo Clinic 4500 San Pablo Road, Stabile Building, Suite 116A, Jacksonville, FL 32224, and Katherine E. Giddings, Esq., Akerman Senterfitt, 106 E. College Avenue, Suite 1200, Tallahassee, FL 32301 on this the 9th day of July, 2010.

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CERTIFICATE OF COMPLIANCE

We hereby certify that this response complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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