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 JURISDICTION

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

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STATEMENT OF CASE AND FACTS[1]

Chapter 766 sets forth mandatory presuit requirements for medical malpractice actions. Per Chapter 766, Petitioner sent a Notice of Intent to Initiate Litigation against Respondents/Defendants, Mayo Clinic of Florida and Keith Robinson Oken, M.D. *Oken v. Williams,* 23 So. 3d 140, 141 (Fla. 1st DCA 2009). The Notice alleged Petitioner went to the emergency room with chest pain, was assessed by an emergency room doctor, and then referred to Dr. Oken, a board-certified **cardiologist**, for consultation. *Id.* The Notice alleged Dr. Oken was negligent in treating and diagnosing Petitioner's condition, myocardial infarction. *Id.* at 142.

Under the 2003 amendments to Chapter 766, the Notice now must be accompanied by a corroborating affidavit of a medical expert who **specializes** in the **same specialty** as the defendant or **specializes** in **a similar specialty** that includes the evaluation, diagnosis, or treatment of the medical condition at issue. *Id.* at 146. §§ 766.203(2); 766.202(6); 766.102(5). This is the same standard required for medical experts who testify at trial. § 766.102(5).

[1] Petitioner/Plaintiff, Ted Williams, improperly relies on the dissenting opinion from the decision under review to establish "facts" for jurisdiction. Express and direct conflict cannot be shown from a dissenting opinion. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). These are the facts from the "four corners" of the majority opinion.

Rather than obtaining a corroborating affidavit from a cardiologist or a doctor who specializes in a specialty similar to cardiology — such as cardiovascular surgery, pediatric cardiology, or internal medicine with an emphasis in cardiology — Petitioner's Notice attached a corroborating affidavit from a board-certified **emergency room/family medicine physician**. *Id.* at 142.

Mayo Clinic and Dr. Oken placed Petitioner's counsel on notice that a family and emergency room physician could not corroborate a claim against a cardiologist. *Id.* Petitioner nevertheless filed suit without obtaining a qualified medical expert. Pursuant to Section 766.206, Mayo Clinic and Dr. Oken moved to dismiss, alleging Petitioner's corroborating affidavit was legally insufficient to satisfy the presuit requirements because Petitioner's expert was not a qualified medical expert. *Id.* The trial court denied the motion. *Id.*

Mayo Clinic and Dr. Oken 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. *Id.* at 141. The First District found Petitioner's physician's affidavits facially established that the physician, as an emergency room/family medicine physician, was not statutorily qualified to testify against, or to establish the standard of care owed by, a cardiologist. *Id.* at 141, 145.

The First District further noted: "[T]he courts of this state have uniformly recognized the availability of certiorari review in cases where the presuit notice

requirements of chapter 766 have not been met." *Id.* at 144 (citing cases of all five district courts). The Court specifically distinguished the case Petitioner cites for conflict, *St. Mary's Hospital v. Bell*, 785 So. 2d 1261 (Fla. 4th DCA 2001). The Court said that, unlike *Bell*, the determination here was a legal one made from the face of the documents as to whether Petitioner's emergency room/family medicine physician met the statutory mandates to serve as an expert against a cardiologist — whereas in *Bell*, the district court was asked to second-guess factual findings following an evidentiary hearing on whether the plaintiff conducted the reasonable investigation required by Chapter 766. *Williams*, 23 So. 3d at 145.

The Court cited two definitions from the applicable board-certifying medical association's official Websites to illustrate the distinctions between the expertise of an emergency room/family physician and a cardiologist. In doing so, the First District stated that (1) the citation to those definitions did not change the outcome of its decision, and (2) Petitioner had specifically waived objection to the use of those citations. *Id.* at 148 n.2.

SUMMARY OF ARGUMENT

The First District's decision does not directly or expressly conflict with any decision of this Court or of another district court of appeal. Every district court in Florida has held that a medical malpractice plaintiff or defendant's presuit documents may be evaluated via certiorari review to determine whether a litigant

has met the presuit statutory mandates. Petitioner's asserted conflict case, *St. Mary's Hospital v. Bell,* was specifically distinguished by the First District. *Bell* involved second-guessing factual findings following an evidentiary hearing as to whether a plaintiff conducted the reasonable presuit investigation required by Chapter 766. Here, the Court facially reviewed Petitioner's documents to determine whether, as a matter of law, an emergency room/family medicine physician met the statutory qualifications required to testify against a cardiologist. Since its decision in *Bell,* the Fourth District itself has exercised certiorari jurisdiction to review whether a litigant's presuit corroborating physician met the statutory qualifications required for medical experts.

Likewise, Petitioner's claim of conflict as to the First District's citation to two official Website definitions does not conflict with *Campbell v. State,* 949 So. 2d 1093 (Fla. 3d DCA 2007). *Campbell* held that a non-self-authenticating computer printout regarding the defendant could not be considered absent authentication by a proper records custodian. Unlike *Campbell,* in this case, the First District simply cited definitions from the official, board-certifying medical association's website to illustrate the differences between a board-certified cardiologist and a board-certified emergency room/family medicine physician. The Court emphasized that its decision did not turn on its citation to those definitions and that Petitioner did not object to the use of those definitions.

Both plaintiffs and defendants alike may test whether the opposing party has met the presuit screening requirements. Holding that a trial court's rulings on such requirements cannot be facially tested via certiorari would eviscerate the public policy supporting the medical malpractice presuit screening requirements and burden both the courts and litigants alike.

ARGUMENT

Standard of Review. For jurisdiction to exist, the First District's decision must "expressly and directly" conflict with a decision of this Court or another district court on the same question of law. Art. V, § 3(b)(3), Fla. Const.; *Persaud v. State*, 838 So. 2d 529, 532-33 (Fla. 2003); *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). No conflict with the asserted conflict cases appears "within the four corners" of the First District's decision; those cases address different facts and issues. *Persaud*, 838 So. 2d at 532-33.

I. AS THE DISTRICT COURT EXPRESSLY FOUND IN DISTINGUISHING *BELL*, WHICH INVOLVED FACTUAL FINDINGS FOLLOWING AN EVIDENTIARY HEARING, CERTIORARI IS PROPER TO FACIALLY REVIEW A PARTY'S DOCUMENTS TO DETERMINE THE LEGAL QUESTION OF WHETHER A PARTY'S EXPERT MEETS THE PRESUIT REQUIREMENTS.

Under the mandatory presuit screening requirements for medical malpractice actions, both the plaintiff and defendant must retain a presuit corroborating medical expert to opine via affidavit whether the case has merit. §§ 766.202(6);

766.102(5). If the defendant specializes in a particular type of medicine, the medical expert must actively practice in the **same or similar specialty** as the defendant. § 766.102(5).

Petitioner was repeatedly warned that his corroborating physician (an emergency room/family medicine specialist) was not qualified to serve as a presuit expert because he did not practice in the same or similar specialty as Dr. Oken, the cardiologist defendant. Petitioner nevertheless chose to take the risk and go forward using an unqualified physician.

The First District held, via certiorari review, that Petitioner's documents facially established that Petitioner's emergency room/family medicine physician did not practice in the same or similar specialty as a cardiologist. The Court noted that the district courts of this state have uniformly recognized the availability of certiorari review of cases where the presuit requirements of Chapter 766 have not been met. *E.g.*, *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") was

qualified to corroborate claim against emergency room 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, expert's qualifications were sufficient); *Correa v. Robertson*, 693 So. 2d 619, 621 (Fla. 2d DCA 1997) (granting certiorari after determining hospital administrator was not qualified to be a medical expert).

The First District specifically distinguished *St. Mary's Hospital v. Bell*. The Court stated that the determination here was a legal one made from the face of the documents; whereas in *Bell*, the district court was asked to second-guess — via certiorari review — factual findings following an evidentiary hearing as to whether the plaintiff conducted the reasonable investigation required by Chapter 766. *Williams*, 23 So. 3d at 145.

Importantly, subsequent to its decision in *Bell* and the 2003 amendments to Section 766.102, the Fourth District itself has confirmed 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 room physician who allegedly misdiagnosed a pregnancy problem. The Court found that, because the OB/GYN's affidavits did not establish "substantial" emergency room experience as required by Section 766.102(9), the OB/GYN was unqualified. Just as an OB/GYN could not

serve as an expert against an emergency room physician in *Paley*, an emergency room physician could not serve as an expert against the cardiologist here.

As the Fifth District emphasized in *Central Florida Regional Hospital v. Hill*, 721 So. 2d 404, 405 (Fla. 5th DCA 1998):

> 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.

(Emphasis added; citations omitted).

> The Medical Malpractice Reform Act was designed to provide cost-saving pretrial procedures as a response to the medical malpractice crisis. To allow [a] case to proceed to a possible judgment, only to be reversed would eliminate the very cost-saving procedures for which the Act was created . . . [R]elief by direct appeal would be no relief at all.

Dr. Navarro's Vein Centre v. Miller, 22 So. 3d 776 (Fla. 4th DCA 2009) (emphasis added). Accepting Petitioner's arguments in this case would mean that no party could ever challenge a denial of a motion to dismiss — even if the expert was not a similar specialist or a specialist at all (which was the case in several decisions cited above where certiorari was granted to review whether the expert was qualified). This would eviscerate the mandatory presuit requirements in Chapter 766 and deprive Defendants of "the right of the process itself."

II. THE COURT'S USE OF DEFINITIONS FROM AN OFFICIAL WEBSITE TO SHOW DISTINCTIONS BETWEEN MEDICAL SPECIALTIES DOES NOT CREATE CONFLICT JURISDICTION.

The First District's use of official Website definitions does not establish conflict with *Campbell* or any other case. First, unlike *Campbell*, the First District stated its decision did not turn on its reference to those definitions. Second, the Court found Petitioner failed to object to the use of the definitions, which were included in the parties' briefs. Third, *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.

In this case, the First District applied long-established principles of statutory construction to define the term "similar specialty" in Section 766.102(5) to determine whether the physician was qualified under Section 766.102(5). In doing so, it cited to two definitions from the board-certifying medical association's Official Website to illustrate the difference between the specialties at issue. Obviously, the District Court could have referenced a dictionary to interpret the undefined statutory term at issue if the dictionary contained such a definition. *Barco v. Sch. 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 a statutory term. *E.g., Reform Party of Fla. v. Black*, 885 So. 2d

303 (Fla. 2004) (a court can look to textbooks to define the term "national party" to determine whether candidate was qualified under the statute when neither the statute nor the dictionary defined the term).

Petitioner's physician submitted an affidavit claiming he specialized in a "similar specialty" as defendant, supporting that claim by referencing the "certifying organizations." The First District determined, based on the physician's own affidavit, that he was not qualified. *Williams,* 23 So. 3d at 141, 148 n.2. No analytical distinction exists between the use of a dictionary (in hard copy or online) and the use of an organization's official website to define a term, especially when an individual relied on his board certification from that organization in defining his own credentials.

CONCLUSION

Because the decision of the First District Court of Appeal does not expressly and directly conflict with any decision of this Court or any other District Court of Appeal, discretionary review is inappropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 17th day of February, 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 Petitioners).

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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).

KATHERINE E. GIDDINGS