SUPREME COURT OF FLORIDA

CASE NO: SC10-92

L.T. Case No: 16-2007-CA-006765

TED WILLIAMS,

Petitioner,

vs.

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

Respondents..
_____/

# PETITIONER'S BRIEF ON JURISDICTION


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## I.
## STATEMENT OF THE CASE AND FACTS

This Petition contends that the District Court created inter-District conflict in ordering on certiorari the dismissal of the Plaintiff's medical-malpractice action for failing to comply with statutory pre-suit requirements, because his supporting Affidavit was not that of a "medical expert" as defined in §766.202, Fla. Stat. The Plaintiff alleged that when he came to the emergency room at the Mayo Clinic of Florida complaining of chest pain in February of 2005, the treating doctor had consulted with Defendant Dr. Keith Oken, a board-certified cardiologist, who allegedly was negligent in his diagnosis and treatment of the Plaintiff (*see* Opinion at 2). In support of his claim, the Plaintiff attached the Affidavits of John D. Foster, M.D., a board-certified emergency physician with extensive experience treating cardiac patients in the emergency room, according him specialty in "the evaluation, diagnosis, or treatment of acute chest pain and impending myocardial infarction" (Opinion at 3).

Based on this information, the trial court found Dr. Foster to be a qualified expert under §766.102(5), which provides in part that the expert witness must

> 1. Specialize in the same specialty as the healthcare 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 [.]

The trial court ruled that Dr. Foster was qualified, because his experience treating cardiac patients in the emergency room qualified as a similar specialty including the evaluation, diagnosis, or treatment of the medical condition at issue (App. 3).

The District Court held that this ruling was reviewable on certiorari because it left the Defendants with no adequate remedy on appeal, because pre-suit evaluation is designed in proper cases to protect a doctor from having to defend at all. The District Court relied upon decisions accepting certiorari jurisdiction where the plaintiff had filed no pre-suit affidavit at all, reasoning that "[f]iling an affidavit that is facially at odds with the statutory policy is tantamount to the filing of no affidavit" (App. 9). *See* App. 4-9.

In evaluating Dr. Foster's Affidavits, the District Court relied in part upon information obtained from Internet sources which had been cited for the first time in the Defendants' Reply Brief (*see* App. 14-17).

The court's ultimate holding was the following (App. 19):

> Allowing an emergency medical physician to comment on the specialized care provided by a cardiologist simply because an emergency medical physician sees patients with cardiac problems in the emergency room would vitiate the public policy underlying the Legislature's 2003 amendments to chapter 766. The effect of the trial court's ruling is to 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 speciality. With its rulings, the trial court altered Dr. Foster's status as a "generalist" and made him a "specialist" in all areas of medicine he encounters in the emergency room. If emergency medical physicians are allowed to testify to the standard of care for the specialized treatment of any type of complaint typically seen in the emergency room (*e.g.*, headache, abdominal pain, shortness of breath), emergency medical physicians will be qualified to testify as to virtually every speciality (*e.g.*, neurology, gastroenterology, pulmonolgy).

In fact, the trial court had considered only Dr. Foster's experience and expertise in treating cardiac patients, and did not consider his experience or expertise in treating any other condition.

A vigorous dissent by Judge Browning argued, among other things, that the case was not appropriate for review by certiorari, and that the District Court had

exceeded its authority in relying upon Internet materials without allowing the Plaintiff to address them (App. 21-33). The dissent contended that certiorari was inappropriate because the majority's opinion involved "the impermissible re-weighing of the evidence presented concerning statutory compliance." Moreover, the Defendants had not shown irreparable harm, because "[i]f we uphold the trial judge and dismiss the petition, we cannot predict whether the trial judge will make the same ruling after an evidentiary hearing on the issue following remand" (App. 23). The dissent also argued that "the use of non-record Internet information violates binding precedent" (*id*. at 25), because "appellate courts are confined to the record compiled below and have no part in the record's composition" (*id*. at 27).

## II.
## ISSUES FOR REVIEW

**A. WHETHER THE DISTRICT COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL ON THE SCOPE OF REVIEW BY CERTIORARI.**

**B. WHETHER THE DISTRICT COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL ON A DISTRICT COURT'S CONSIDERATION OF INTERNET MATERIAL NOT SUBJECT TO REVIEW BY THE PLAINTIFF.**

## III.

## SUMMARY OF THE ARGUMENT

The District Court's evaluation of the sufficiency of the Plaintiff's corroborating Affidavits exceeded the proper boundaries of review by certiorari, conflicting with decisions of other District Courts and of this Court. The District Court's reliance upon Internet materials that the Plaintiff was not given the opportunity to evaluate also conflicts with decisions of other District Courts and this Court.

## IV.

## ARGUMENT

### A. THE DISTRICT COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL ON THE SCOPE OF REVIEW BY CERTIORARI.

The District Court Opinion exceeds the proper scope of certiorari review, creating a new category of interlocutory appeal not authorized by Fla. R. App. P. 9.130. Instead of limited review to determine whether the trial court departed from the essential requirements of law, causing harm for which there is no remedy on appeal, the panel undertook full plenary review of the sufficiency (not the fact) of the Plaintiff's compliance with all of the presuit steps required by Chapter 766. It re-evaluated the evidence, and ruled *de novo*, on the pleadings, and based in part on the panel's Internet research, that Dr. Foster did not possess sufficient

qualifications. This usurpation at the threshold of the trial court's traditional function reflects an expansive use of common-law certiorari exceeding the permissible scope of the writ, as defined by this Court and other District Courts of Appeal.

Rule 9.130 extends a right to interlocutory appellate review of only limited categories of non-final orders: "Appeals 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 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) (proper procedure for pleading punitive damages, but not sufficiency of the evidence). And only in that context have the District Courts of Appeal found certiorari appropriate to review an order denying a motion to dismiss for failure to comply with medical-malpractice presuit requirements. Some 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 failed entirely to comply with the statutory presuit procedure, by not providing a presuit affidavit. *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 review of a medical expert's qualifications, which would be outside the proper scope of certiorari.

That was the ruling of the Fourth District Court in *St. Mary's Hospital v. Bell*, 785 So. 2d 1261, 1262 (Fla. 4th DCA 2001)--that certiorari is not an appropriate vehicle for evaluating 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 panel decision directly and expressly conflicts with *St. Mary's*.

### B. THE DISTRICT COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL ON A DISTRICT COURT'S CONSIDERATION OF INTERNET MATERIAL NOT SUBJECT TO REVIEW BY THE PLAINTIFF.

Without notice to the Plaintiff, the District Court relied upon Internet sources, cited for the first time in the Defendants' Reply Brief, which addressed not questions of law, but questions of fact. They concerned the functions and definitions of emergency medical and family medicine specialties (App. 14-18).

It is settled that an appellate court cannot go outside the record in deciding a case. *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). This principle complements the trial-level requirement that the factfinder's verdict must be based only on the evidence of record.[1] The same is true of rulings and decisions

[1]*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.

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). *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").

These rules apply 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), relying in part upon a First District decision:

> 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. . . .
>
> 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:

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2d DCA 1990); *Snook v. Firestone Tire & Rubber Co.*, 485 So. 2d 496 (Fla. 5th DCA 1986); *Grissinger v. Griffin*, 186 So. 2d 58 (Fla. 4th DCA 1966)

> Computer print-outs, like business records 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)].

As *Campbell* holds, Internet materials would not be admissible even at the trial level without adequate authentication. They certainly were not properly relied upon at the appellate level, where they were outside the Record, unauthenticated, and cited without any opportunity to respond.

## V.
## CONCLUSION

It is respectfully submitted that the decision of the District Court directly and expressly conflicts with decisions of this Court or other District Courts of Appeal, and that discretionary review is appropriate.

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 on this the ___ day of January, 2010.

By: _____
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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).

By:_____
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