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 REPLY BRIEF

Bruce S. Bullock
Bruce S. Bullock, P.A.
5515 Phillips Highway
Suite Two
Jacksonville, Florida 32207-7966
(904) 731-0535 Telephone
(904) 731-0723 Facsimile

Joel S. Perwin P.A.
169 East Flagler Street
Suite 1422
Miami, Florida 33131-1212
(305) 779-6090 Telephone
(305) 779-6095 Facsimile

By: Joel S. Perwin
Fla. Bar No.: 316814

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I.
STATEMENT OF THE CASE AND FACTS

We appreciate the Defendants' thoughtful and academic discussion of the issues. We respectfully disagree with their position.

The Defendants are correct in pointing out (repeatedly) that Defendant Dr. Oken both evaluated Plaintiff Williams while he was still in the Emergency Department, and treated him at a later time after he had been released from the Emergency Department and sent home (*see* Answer Brief at 1, 3, 11, 13, 28, 29). But given that the Plaintiff's burden is "satisfied where . . . the pre-suit requirements were satisfied as to one theory of negligence,"[1] and that the Plaintiff charged negligence in Dr. Oken's evaluation and treatment of Mr. Williams in the Emergency Department, the purpose of this point is unclear. To appraise Dr. Oken's treatment of Mr. Williams in the Emergency Department, which is part of the Plaintiff's claim, the Plaintiff chose a doctor with a similar specialty--treating cardiac patients in the Emergency Department.

II.
STANDARD OF REVIEW

[1] *Columbia/JFK Medical Center Ltd. Partnership v. Brown*, 805 So. 2d 28, 29 (Fla. 4th DCA 2001). *Accord, Bonati v. Allen*, 911 So. 2d 285, 287 (Fla. 2d DCA 2005).

Respectfully, the Defendants are incorrect in asserting (Brief at 12) that the District Court's acceptance of certiorari jurisdiction is reviewable for abuse of discretion. We agree that a district court's determination of irreparable harm and the departure from legal requirements is discretionary. However, as the cases cited by the Defendants--first cited by the Plaintiff (Brief at 6)--themselves make clear, defining the proper jurisdictional parameters of certiorari presents the question of whether the District Court "applied the correct law." *Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). As an example, this Court's decision in *Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995), is a *de novo* jurisdictional decision concerning the proper scope of certiorari. *See Parker, Landerman & Parker, P.A. v. Richards*, 871 So. 2d 1043, 1044 (Fla. 5th DCA 2004). The issue of appellate jurisdiction is a question of law. *Internet Solutions Corp. v. Marshall*, 39 So. 3d 1201, 1205 (Fla. 2010); *Nissen v. Cortez Moreno*, 10 So. 3d 1110, 1111 (Fla. 3d DCA 2009).[2]

III.
ARGUMENT

A. Certiorari Jurisdiction. As we said (Brief at 15 n.3), and as the dissent

[2]Mr. Williams did acknowledge certiorari jurisdiction in the District Court, but the issue of subject matter jurisdiction cannot be waived. *See Cunningham v. Standard Guaranty Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994).

said (Opinion at 24), there is no material difference between an appellate evaluation of the evidence proffered in an expert affidavit, and an appellate evaluation of the evidence proffered in support of a punitive claim (*Globe Newspaper*). In the trial court's evaluation of a punitive claim, only the facial validity of the plaintiff's proffer matters; the defendant is not permitted to traverse with any evidence. Nevertheless, this Court held in *Globe Newspaper* that interlocutory review was inappropriate. The Defendants' attempt to distinguish *Globe Newspaper* (Answer Brief at 22), on the ground that *Globe Newspaper* found certiorari inappropriate "to review an evidentiary determination," is factually incorrect. There was no "evidentiary determination"--only a proffer. The Defendants also attempt to distinguish *Globe Newspaper* (Answer Brief at 22) on the ground that the Court held in *Globe Newspaper* that a trial court's substantive error in allowing a punitive claim to go forward does not rise to the level of irreparable harm. But that holding applies equally here. It was based on the same consideration that applies here--that there is not irreparable harm if the defendant received the procedural safeguards to which he was entitled, as opposed to none at all. The Court held in *Globe Newspaper* that the relevant Statute created an entitlement not to be subject to a punitive claim at all, and with it to financial discovery, unless the trial court has accorded the required procedural safeguards to appraise the facial sufficiency of the

plaintiff's punitive claim. Here the defendant is likewise protected when the trial court administers the appropriate procedures governing the initial assertion of a medical-malpractice claim. No less than in *Globe Newspaper*, when those procedures are ostensibly followed, there is insufficient irreparable harm to warrant immediate review.

Nor is there any material difference between this case and *Abbey v. Patrick*, 16 So. 3d 1051 (Fla. 1st DCA 2009) and *St. Mary's Hospital v. Bell*, 785 So. 2d 1261 (Fla. 4th DCA 2001). The Defendants repeatedly attempt to distinguish *Abbey* and *St. Mary's* because both assertedly refused to review the outcome of a factual dispute, while the District Court here reviewed only the sufficiency of the Plaintiff's proffer. But there is no material difference. Either way, the defendant is asking the court to address substance--not procedure. The court in *St. Mary's* declined review not because the defendant had attempted to counter the plaintiff's evidence concerning compliance with statutory pre-suit requirements, but because the entire subject was not appropriate for interlocutory appellate review. The court said in *St. Mary's* that "certiorari is not so broad as to encompass review of the evidence regarding the sufficiency of counsel's pre-suit investigation." 785 So. 2d at 1262.

Likewise, the court in *Abbey* declined to review a ruling on the medical-

malpractice statute of limitations not because there was a conflict in the underlying evidence, but because certiorari is appropriate only "if the error is one that resulted in the deprivation of the right to the process itself," but not to "circumvent the rules governing appeals from pretrial orders." 16 So. 3d at 1054. Neither decision is based on a makeweight distinction between review of the sufficiency of a proffer on the one hand, and review of a factual dispute on the other. Both found the petitions inappropriate because they addressed the merits.

In contrast, as we said, the medical-malpractice decisions which have accepted certiorari largely fall into two categories--those in which the plaintiffs had failed entirely to perform any pre-suit investigation, contending that their claims were not medical-malpractice claims; and those in which the plaintiffs had failed entirely to comply with the statutory pre-suit requirements--for example, by not providing a pre-suit affidavit at all. The Defendants have cited three decisions in the first category, addressing the issue of whether the plaintiff had filed a medical-malpractice claim that had to be pre-suited.[3] The Defendants have cited four decisions in the second category, in which for various reasons, the defendant

[3]*See* Answer Brief at 14, 21, *citing South Miami Hospital v. Perez*, 38 So. 3d 809 (Fla. 3d DCA 2010); *Dr. Navarro's Vein Centre of Palm Beach, Inc. v. Miller*, 22 So. 3d 776 (Fla. 4th DCA 2009); *Tenet South Florida Health Systems v. Jackson*, 991 So. 2d 396 (Fla. 3d DCA 2008).

asserted that the plaintiffs had not complied with pre-suit requirements at all.[4] The common thread of these decisions is that none of them addressed the merits of the plaintiff's proffer or proof. All of the above-cited cases involved procedural questions about the process.

Only two of the Defendants' citations addressed the merits of the pre-suit showing (Brief at 16)--*Fort Walton Beach Medical Center, Inc. v. Dingler*, 697 So. 2d 575 (Fla. 1st DCA 1997), and *Correa v. Robertson*, 693 So. 2d 619 (Fla. 2d DCA 1997). Both decisions, from 1997, reviewed the sufficiency of the plaintiff's proffer. Neither discussed the propriety of certiorari, and neither plaintiff sought review by this Court. For the reasons stated, we respectfully disagree with these two decisions.[5]

---

[4]*See* Answer Brief at 15-16, 18-19, *citing University of Miami v. Wilson*, 948 So. 2d 774 (Fla. 3d DCA 2006) (question whether the notice of intent was served by a properly-appointed personal representative); *Bonati v. Allen*, 911 So. 2d 285 (Fla. 2d DCA 2005)(no affidavit filed specifically naming the defendant, and the affidavit filed did not describe any conduct ascribed to the defendant); *Paley v. Miraj*, 910 So. 2d 282 (Fla. 4th DCA 2005) (question whether the Statute applies to experts who would not be testifying at trial); *Central Florida Regional Hospital v. Hill*, 721 So. 2d 405 (Fla. 5th DCA 1998) (no expert affidavit filed).

[5]The Defendants have also cited two cases in which the same district court reviewed on certiorari a trial court's decision to sever claims, with no discussion of the propriety of certiorari, *see ACT Services, Inc. v. School Board of Miami Dade County*, 29 So. 3d 450 (Fla. 3d DCA 2010); *Bethany Evangelical Covenant Church of Miami, Florida, Inc. v. Calandra*, 994 So. 2d 478 (Fla. 3d DCA 2008); one decision in which the court reviewed on certiorari the disqualification of a law firm-

The District Court's decision would open the floodgates to appellate analysis of every trial court's decision regarding the sufficiency of a medical-malpractice plaintiff's pre-suit showing--of his notice of intent, of his affidavit, of any additional evidence. The Defendants themselves have told us that what they advocate is "precisely what appellate courts do every day in analyzing the allegations in a complaint . . ." (Brief at 14). The Defendants say that their position is "consistent with legions of other cases outside the medical negligence context" (Brief at 17). We agree that it would open the door to "legions" of interlocutory challenges. This Court and other District Courts have made clear that such review should be limited to the facial provision of prescribed procedural safeguards--not extend to the substance of a proffer of evidence reviewed by the trial court. The District Court did not have certiorari jurisdiction in this case.

*B. The Statutory Pre-suit Requirement***.** We acknowledge that the 2003 amendment to §766.102 has to mean something more than the active devotion of

---

-obviously a harm that cannot be remedied on plenary appeal, *see Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117 (Fla. 3d DCA 2008); and two decisions involving discovery--one the typical assertion of privilege, in which disclosure would preclude any remedy, *Cruz-Govin v. Torres*, 29 So. 3d 393 (Fla. 3d DCA 2010); the other a trial court's order allowing the defendant to test a blood sample, thus implicating the plaintiff's personal integrity, as well as precluding any remedy on appeal. *Wicky v. Oxonian*, 24 So. 3d 571 (Fla. 2d DCA 2009). Although we have some question about review of an order severing claims, the others are classic

time by the individual expert to a practice or teaching in the same or similar specialty, because that requirement was already in §766.102(2)(c)(2), Fla. Stat., at the time of the amendment. Absent a statutory definition, we think the current Statute--requiring that the expert practice in the "same or similar specialty"--adds a requirement to that concerning the expert's personal practice, concerning the nature of his defined specialty. It means that the expert cannot qualify solely by virtue of his own personal experience, resulting in his knowledge of the specialty at issue, but only if his own specialty inherently involves such training and experience. Dr. Foster's specialty qualifies, because emergency medicine is substantially concerned with treating heart conditions in the first instance.

The Defendants' position would mean that there is no medical specialty "similar" to cardiology under §766.102(5), Fla. Stat. The Defendants contend that only a doctor with training in cardiology, including internal medicine "with an emphasis in cardiology," can testify on issues involving cardiac conditions (Answer Brief at 4). As to such conditions, therefore, the Statute as amended would have no meaning. There would only be one "specialty." If an Emergency Department doctor, who is almost always the first line of defense against a heart attack, and who satisfies the rest of the Statute--for example by virtue of 20 years of experience in

---

examples of irreparable harm, which offer no analogy to the instant case.

treating 15,000 to 20,000 chest-pain patients--cannot satisfy the definition of a "similar specialty," then no one can.[6]

Because the Defendants have cited no authority (and we acknowledge that there is very little authority on the meaning of the term "similar specialty"), we can only refer the Court to our initial Brief, and to our discussion of the statutory language and the policies that underlie it (Brief at 16-23). We respectfully disagree with the District Court's conclusion that Dr. Foster is only a "generalist" or "evaluator" of heart attack patients. As the Defendants themselves have pointed out, *see supra* note 6, an Emergency Department doctor not only is specialized, but is so specialized that only another Emergency Department doctor can testify against him under §766.102(9)(a). And §766.102(9)(b)(i) defines the Emergency

[6]When the legislature wants to limit testimony to only one specialty, it knows how to do so. The reason that only an Emergency Department doctor can testify against another Emergency Department doctor under §766.102(9)(a) (*see* Answer Brief at 27-28) is that the legislature has made the decision that having a similar medical specialty is not enough in this context--not that there can be no similar specialty to an Emergency Department doctor in proper cases. As the Defendants put it, the Statute provides that only an Emergency Department doctor can testify against another "even if the injury being assessed and treated by the emergency department physician falls within another particular specialty" (*id*.). We agree. The Statute reflects a legislative policy determination--not a determination that there can be no other specialty comparable to what an Emergency Department doctor does--for example, treating a cardiac patient. If the legislature had wanted to apply that rule across the board, it would not have included the "similar specialty" language in §766.102(5).

Department doctor as a specialist in "the immediate diagnosis and treatment of medical conditions" that could lead to serious disability or death without immediate treatment. An Emergency Department doctor is anything but an "evaluator" or "generalist." Not only does the Plaintiff's Complaint allege a mis-diagnosis, and thus implicate "evaluation," but the Record establishes Dr. Foster's *treatment* of patients like Mr. Williams over many years as an emergency medical specialist.

Obviously Emergency Department doctors treat as well as evaluate. And Dr. Foster's Affidavits attest to his 20 years of practice treating as well as evaluating (App. 2, Ex. 1); they verify that like all Emergency Department doctors, he specializes in "the treatment"--not merely evaluation--of "acute chest pains and the impending myocardial infarction"; and they attest to prior experience "treating"--not merely evaluating--"patients similar to Ted Williams" (App. 3).

We also disagree with the District Court that the recognition of Dr. Foster's proficiency in a "similar specialty" would "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 Department"--"virtually every specialty (e.g., neurology, gastroenterology, pulmonology)"; or permit him to address "the standard of care of all specialists"

(Opinion at 19). As we said, not only are these statements unsupported on the Record, but they are not a logical extension of the Plaintiffs' argument. We do not contend, nor could we, that Emergency Department doctors are specialists in everything. But that does not mean that they are not specialists in anything. There are certain conditions that they treat so often as to acquire specialty by experience. Heart attacks are among them. There are others that they do not treat frequently enough to become specialists. The Defendants have not attempted to defend the District Court on this point.

All of this was the conclusion of the Second District Court in *Holden v. Bober*, 39 So. 3d 396 (Fla. 2d DCA 2010). Given that the court in *Holden* expressly disagreed with the District Court's decision in the instant case, the Defendants' attempt to distinguish *Holden* (Answer Brief at 29-32) is strained at best. The Defendants first find *Holden* inapplicable because they say that there was no allegation in *Holden* that the defendant doctor had also treated the patient after he had been released from the Emergency Department. Here, after Plaintiff Williams was released from the Emergency Department and from the hospital, Dr. Oken treated him at a later time. But the Plaintiff's Complaint also alleges negligence by the cardiologist while the Plaintiff *was still in the Emergency Department*--indeed, negligence in failing to admit Plaintiff Williams to the

hospital--and *Holden* specifically disagrees with the District Court's holding in the instant case *on that point*--its holding that an Emergency Department physician cannot testify even about the cardiologist's negligence *in the Emergency Department*.

The Defendants also say that there is a distinction because the *Holden* opinion does not reveal "what qualifications were set forth in the medical expert's affidavit" (Answer Brief at 31). That is a significant concession--that in proper cases an Emergency Department doctor may well practice in a similar specialty as a neurologist--or in this case, as a cardiologist. The holding of *Holden* is that "in 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." The Defendants' attempt to distinguish *Holden* is essentially an abandonment of their entire position. It implicitly acknowledges that in proper cases, an Emergency Department doctor *can* practice in a specialty similar to that of a cardiologist in treating a heart attack. This is simply common sense, and it is the only way to give the Statute any meaning, as against the Defendants' contention that only a cardiologist can testify on this subject.

Finally (Brief at 23-24), we said that the trial court's ruling can be approved

under §766.102(12), which provides that the Statute "does not limit the power of the trial court to disqualify or qualify an expert witness on grounds other than the qualifications of this section." Although the Defendants dismiss this argument on the ground that the Plaintiff never raised it, the District Court did address §766.102(12), but on the erroneous ground that §766.102(12) was abolished by the 2003 Amendment to §766.102(2)(c)(1) (*see* Opinion at 14). As we said, this statement is incorrect; §766.102(12) is alive and well. This Court's and the District Court's review are *de novo*, and the ruling of the trial court can be affirmed on any basis.[7] The District Court did acknowledge the Statute, and it is available as a basis for affirming the trial court's decision.

C. Internet Materials. The Defendants' entire argument (Brief at 33-38) is that courts have discretion to look to sources outside the Record in order to define "the ordinary meaning of [statutory] terms" (Answer Brief at 33). The Defendants then cite seven decisions in which the court referred to a dictionary in order to define a statutory term, or in one case the language in a rule. We acknowledge that

[7]The Defendants have cited only two decisions. In both the appellate court refused to consider an argument raised for the first time on rehearing. *See* Answer Brief at 32, *citing Board of Regents of State of Florida v. Athey By and Through Athey*, 694 So. 2d 46, 51 n.2 (Fla. 1st DCA), *approved*, 699 So. 2d 1350 (Fla. 1997); *Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983), *review dismissed*, 451 So. 2d 848 (Fla. 1984).

it might be permissible, as the District Court said (Opinion at 15 n.2), to offer an extrinsic citation for "generally known knowledge . . . capable of accurate and ready determination from sources whose accuracy cannot reasonably be questioned . . . ." *See, e.g., United States v. Bari*, 599 F.3d 176 (2d Cir. 2010) ("matters of common knowledge"). But as we said, the reference here was far more than the ascertainment of a definition. It was a highly selective reference to the formal credentials necessary for board certification, as prescribed by certain medical associations on their websites. At the same time, the District Court did not look to any alternative ways of defining a similar specialty--for example, by virtue of the specialty's common experience in treating the identical medical condition as that treated by a certified specialist. The Internet reference was not for purposes of definition; it was to support a one-sided perspective on the controlling substantive issue. To make that point, we identified a handful of Internet sources that do qualify Emergency Department doctors by virtue of their specialty acquired through experience.

Contrary to the Defendants' generalization (Brief at 34), which in fact mentions only two cases, the decisions that we cited on this point are analogous. The extrinsic materials in question in other cases may have been different, but the principle was the same--that the court could not go outside the record. This was not only because some of the materials referenced could not be authenticated. As a general proposition, the principle that a court can base its decisions only on the record is "so elemental that there is no excuse for any attorney to attempt to bring

such matters before the court." *Altchiler v. State, Department of Professional Regulation, Division of Professions, Board of Dentistry*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983). Thus in *Whitley v. State*, 1 So. 3d 414 (Fla. 1st DCA 2009), the court held that print-out from the web page of the State of Florida, whose authenticity was not questioned, could not be referred to for the first time. *See G.M.H. v. State*, 18 So. 3d 728 (Fla. 2d DCA 2009) (Internet research regarding repair of dirt bike); *Padin v. Travis*, 990 So. 2d 1255, 1256-57 (Fla. 4th DCA 2008) (research from website).

Even judicial reference to self-authenticating information, as opposed to a mere definition, deprives the opposing party of the opportunity not only to examine such information for completeness or qualification, but also to secure competing information. That is the essence of due process. The District Court erred in invoking professional definitions of specialty without permitting the Plaintiff the opportunity both to examine those definitions, and to examine alternative means of addressing the same issue.

IV.
CONCLUSION

It is respectfully submitted that the Opinion of the District Court should be disapproved.

Respectfully submitted,

Bruce S. Bullock, P.A.
5515 Phillips Highway
Suite Two
Jacksonville, Florida 32207-7966
(904) 731-0535 Telephone
(904) 731-0723 Facsimile

Joel S. Perwin P.A.
169 East Flagler Street
Suite 1422
Miami, Florida 33131-1212
(305) 779-6090 Telephone
(305) 779-6095 Facsimile

By:_____
Joel S. Perwin
Fla. Bar No.: 316814

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 23rd day of September, 2010.

By: _____

Joel S. Perwin
Florida Bar No. 316814

CERTIFICATE OF COMPLIANCE

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

By:_____
Joel S. Perwin
Fla. Bar No: 316814