Electronically Filed 07/31/2013 06:46:58 PM ET

RECEIVED, 7/31/2013 18:48:44, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC12-1387

CHARLES H. BURNS, as Personal Representative of the ESTATE OF ENRIQUE CASASNOVAS, Deceased, for the benefit of the ESTATE OF ENRIQUE CASASNOVAS,

Petitioner,

-vs-

PALMS WEST HOSPITAL LIMITED PARTNERSHIP, a Foreign Limited Partnership, d/b/a PALMS WEST HOSPITAL f/k/a COLUMBIA PALMS WEST HOSPITAL LIMITED PARTNERSHIP, a Foreign Limited Partnership, d/b/a PALMS WEST HOSPITAL, etc., et al.,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

On appeal from the Fourth District Court of Appeal of the State of Florida

DONALDSON & WESTON, P.A.
335 SE Ocean Blvd.
Stuart, FL 34994
and
BURLINGTON & ROCKENBACH, P.A.
444 West Railroad Avenue/Suite 430
West Palm Beach, FL 33401
(561) 721-0400
Attorneys for Petitioner
aah@FLAppellateLaw.com
jew@FLAppellateLaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Rules

PREFACE

This is Petitioner's request for discretionary review of a decision of the Fourth District Court of Appeal dated November 30, 2011, quashing an Order denying Palms West Hospital Limited Partnership's Motion to Dismiss and remanding the case for further proceedings.

Petitioner, Charles H. Burns, etc., et al., will be referred to as "the decedent" or "the Estate." Respondent, Palms West, etc., et al., will be referred to as "Respondent" or "Palms West." The following designations will be used:

(IB) - Initial Brief on the Merits

(Petition) - Petition for Writ of Certiorari in the Fourth District Court of Appeal

(Response) - Response to Petition for Writ of Certiorari in the Fourth District Court of Appeal

(A) - Appendix to Petition for Writ of Certiorari in the Fourth District Court of Appeal

(AA) - Appendix to Response to Petition for Writ of Certiorari District Court of Appeal

STATEMENT OF THE CASE AND FACTS

This case comes to this Court following the trial court's denial of Palms West's Motion to Dismiss. As such, the Estate states the facts as alleged in the Complaints, in the light most favorable to him, and which courts must accept as true at this procedural stage. See, e.g., Cortez v. Palace Resorts, Inc., 2013 WL 3068147, at *1 (Fla. June 20, 2013).

The Underlying Allegations and Operative Complaint

In 2005, Palms West entered into an agreement with the State of Florida, whereby Palms West promised it would provide 24 hour a day, 7 day a week emergency services and care, in a variety of medical fields (AA1-2). One of these fields was gastroenterology. Palms West employed at least six physicians to provide emergency services and care in this field (A8, pp.238-45). These physicians were on Palms West's medical staff and had an arrangement/contract with Palms West promising to provide emergency services in this field (A8, pp.309-17).

Accordingly, on or about November 25, 2006, a Palms West patient (not the decedent) suffering from a GI bleed was in need of those emergency services and care, for which all six of these physicians were contacted to provide these services, and all six refused (A8, p.241). That patient, without receiving those services,

went into cardiac arrest, was transferred to another facility while unstable, and died while being transported (A8, p.241). There is no indication the refusal had anything to do with that patient's medical condition, and the operative Complaint does not suggest so.

Thus, Palms West was aware of the harmful propensities of their physicians, who had refused to treat any patients in the field of gastroenterology (A8, p.242). Palms West also knew, or should have known, these physicians might refuse to treat other patients such as the decedent (A8, pp.242-43, 311). Palms West refused to terminate these physicians, refused to modify terms of employment, and continued to retain these physicians (A8, pp.242-43, 313-14). Indeed, Palms West's reliance, retention and employment of these physicians ensured that other patients would not receive these emergency services (A8, pp.242-43, 313-14).

There is no indication Palms West advised the state it would no longer fulfill its promise to provide these services 24 hours a day, 7 days a week, even though Palms West knew that its physicians retained to perform those services would refuse to do so -- for any patient. Palms West also continued to accept emergency patients in need of gastroenterological care. The Estate did not allege that the physicians' harmful propensities or Palms West's retention of its employees was connected to the medical competence or medical judgment of the physicians.

The physicians were members of Palms West's medical staff. As members, Palms West also failed to carefully select and review its physicians, and failed to exercise due care in fulfilling the duty to carefully select and review the competence of its physicians (A8, pp.312-14). Again, the Estate did not allege that these failures were connected to the medical judgment or medical competence of Palms West or its physicians.

On or about December 23, 2006, between 7:00 and 10:00 a.m., the decedent was taken to the Palms West emergency room with complaints of abdominal pain, nausea and vomiting blood (A8, p.24). The decedent was examined, treated and seen by agents, servants and employees of Palms West, who determined he was suffering from an emergency medical condition (A8, p.25). Palms West also determined the decedent needed a gastroenterologist (A8, p.25).

By 11:00 a.m., Palms West contacted its six gastroenterologists to provide these services (A8, p.25). To no one's surprise, each physician refused to come to Palms West to provide services to the decedent (A8, p.25). Palms West then contacted at least ten different facilities to provide emergency services and care in the field of gastroenterology (A8, p.26). All declined to accept the decedent. Finally, North Broward Medical Center agreed to accept the decedent at 12:15 p.m., but he was not transferred there until four hours later (A8, p.26). Thereafter,

the decedent suffered a cardiac arrest and anoxic encephalopathy at North Broward (A8, p.26). He died on January 25, 2007 (A8, p.26).

In the operative Complaint, the Third Amended Complaint, the Estate brought a four-count Complaint against Palms West for negligence, vicarious liability, negligent retention of the physicians, and a statutory claim under §766.110, Fla. Stat. (A8).

Palms West filed a Motion to Dismiss and Memorandum of Law, contending, inter alia, that all of the causes of action should be dismissed because the Estate had failed to comply with the pre-suit requirements of Chapter 766, the Medical Malpractice statute (A9-10).

The Estate filed a Response and Memorandum of Law in opposition, and contended, inter alia, that there was no obligation to comply with pre-suit because its claims were not medical malpractice claims (AA183-93).

The trial court held a hearing on Palms West's Motion to Dismiss, and concluded that none of the claims were medical malpractice claims, as pled within the four corners of the operative Complaint (A11-12). This was consistent with the trial court's earlier ruling to the same effect as to the Second Amended Complaint (A7). See infra IB 5-8.

The trial court did dismiss the negligence and vicarious liability claims on their merits, however (A12). Those claims are not ripe for appellate review, where

the trial court dismissed less than all claims of the operative Complaint. Thus, the remaining claims against Palms West [prior to the Fourth District's ruling] were for negligent retention and the statutory §766.110, Fla. Stat., claim.

Palms West filed a Motion for Reconsideration of the trial court's order as to the operative Complaint, as to the two remaining claims (A13). The trial court denied the motion (A14). Palms West filed a Petition for Writ of Certiorari with the Fourth District.

The Procedural History in this Case

The initial Complaint against Palms West was filed in December 2008, and the Estate filed its First Amended Complaint as of right before there was a responsive pleading on January 26, 2009 (A1). In the First Amended Complaint as to Palms West, the Estate brought a statutory claim pursuant to §395.1041, Fla. Stat., a common-law negligence claim, and a vicarious liability claim (A1). The Estate also sued Palms West's CEO pursuant to §395.1041, Fla. Stat. (AA3-8). The Estate also sued the other Hospitals (and their CEOs) who refused to accept the decedent, as well as Palms West's physicians, and their professional associations (A1).

Palms West and every other defendant filed Motions to Dismiss. Palms West asserted, inter alia, that the Estate's claims were brought in medical

malpractice and, therefore, should be dismissed because the Estate did not complete pre-suit requirements under Chapter 766 (A2, p.2).

The trial court held a hearing on the CEOs' Motions to Dismiss (AA9-82). The trial court granted the Motions to Dismiss, but gave the Estate twenty days to amend (A3, p.6). The trial court stated that it had initially been "under the misapprehension that at least a portion" of the First Amended Complaint "was framed as a medical malpractice claim" (A3, p.1, n.1). Thus, while the Order was limited to the CEO Defendants, the trial court signaled that it did not believe any claims in this case -- including those brought against Palms West -- were medical malpractice claims (A3).

The Estate then filed a Second Amended Complaint (A4). The Estate amended the §395.1041, Fla. Stat. claims against the Hospital CEOs (AA83-95).

As for Palms West and the other Hospital Defendants, the underlying factual allegations were virtually the same within the Second Amended Complaint. The Estate added a claim for negligent retention against Palms West, premised on its' physicians' harmful propensities as demonstrated by their refusal to treat the prior patient one month before the decedent's need for the same gastroenterology care (A4, pp.317-23). Palms West filed a Motion to Dismiss that Complaint, again contending all claims were brought in medical malpractice (A6). The Estate asserted that none of the claims addressed the professional standard of medical

care (AA114-17). All defendants (who had not settled in the interim) also filed Motions to Dismiss. All defendants continued to assert that the Estate's claims were medical malpractice claims.

The trial court held two hearings on the Motions to Dismiss (AA132-82). At the second hearing, all the Hospital defendants were represented by counsel. Two Co-Defendant Hospitals acknowledged that the Estate was permitted to plead and argue that the operative Complaint was not a medical malpractice case (AA160). Defense counsel for a Hospital co-defendant stated that the Estate could proceed outside of medical malpractice, so long as the Estate would not "at any point in this case [allege] that there was medical judgment exercised negligently, then it's not a medical malpractice case and that's fine" (AA160). Defense counsel added that the Estate would have to be "stuck" with proceeding outside of medical malpractice (AA160). Palms West's counsel did not voice any disagreement with these statements.

The trial court concluded that the Estate could bring §395.1041, Fla. Stat., claims against the CEO Defendants (AA170-71). However, the court determined that the Legislature prevented these statutory claims against hospitals (AA171). The trial court also reasoned that because all of the Estate's causes of action against the Hospitals made some reference to §395.1041, Fla. Stat., those claims

would be dismissed -- though without prejudice (AA166). Finally, the trial court decided that no claims were brought in medical malpractice.

The trial court rendered a global Order addressing all Defendants (A7). The Order was consistent with the trial court's rulings at the hearing, and the Estate was given leave to amend the Complaint against the Hospital Defendants (A7, p.3). The trial court concluded (A7, p.3):

> It is further Ordered and Adjudged that none of the Plaintiff's causes of action as pled in the Second Amended Complaint are claims brought in either medical malpractice or medical negligence. The Plaintiff is therefore not required to satisfy the pre-suit requirements of Chapter 766, Fla. Stat.

The Estate then filed the Third Amended Complaint, the operative Complaint (A8).[1] The underlying allegations were virtually identical to the Second Amended Complaint. The sole meaningful difference as to Palms West was that the Estate excised out references to §395.1041, Fla. Stat., pursuant to the trial court's Order. The Estate added a statutory claim against Palms West and the remaining Hospitals, pursuant to §766.110, Fla. Stat., which was premised on the same allegations as the negligent retention claim (A8, pp.309-17).

[1] The Third Amended Complaint omitted the Estate's §395.1041, Fla. Stat., claims against Palms West and the other Hospitals, because of the trial court's ruling these claims could not be brought as a matter of law. Because the trial court dismissed less than all counts of the Estate's Complaint, an appeal was not taken by the Estate. The trial court's ruling on that statutory claim remains ripe for reconsideration by the trial court at any time, or on appeal to this Court at an appropriate time.

The Fourth District's Opinion

The Fourth District found that the Estate's two pending claims against Palms West were claims arising under the Medical Malpractice Act. See Palms West Hosp. Limited P'ship v. Burns, 83 So.3d 785, 788 (Fla. 4th DCA 2011), review granted -- So.3d -- (Fla. June 3, 2013). Regarding the common-law claim, the Fourth District deemed it important that the decedent "*was* treated by Palms West" Id. (emphasis in original). The failure of the on-call doctors to appear, which the Estate alleged caused the decedent's death, "sounds in medical negligence, even if the doctors' motives were purely economic," and even though the Hospital retained physicians who it "knew were making financial decisions to refuse to treat patients lacking insurance." Id.[2] Here, within the Fourth District's initial foray into whether the Estate's claims were medical malpractice claims, the Fourth District focused on causation (83 So.3d at 788 (emphasis added)):

> Palms West's retention of these doctors, who the hospital knew were making financial decisions to refuse to treat patients lacking insurance, is a medical negligence claim where the respondent is claiming that [the decedent's] death resulted from the lack of treatment.

[2] The Fourth District was incorrect in its description of the Estate's allegations. The Estate actually alleges that the physicians were not treating any patients at Palms West, and had decided this long before the decedent arrived at Palms West . The Estate mentioned the lack of insurance as a financial consideration, but did not allege this was an element of the causes of action. The Estate alleged there was a global refusal to treat any patients, without medical judgment being exercised.

The Fourth District then found that the "standard of care" for treatment "would be based, in part, on Palms West's evaluation of [the decedent's] condition when he was admitted to the emergency room." Id. at 789. The Fourth District did not mention a "medical" standard of care, or describe the standard of care that would guide this case. The Fourth District then concluded that in order to show causation -- that the decedent died as a result of the failure to treat -- the Estate would have to prove the treatment was medically necessary. Id. at 788-89. Thus, while the Fourth District briefly looked at standard of care issues to decide if the claim was medical malpractice, the court then departed into duty and causation. Id.

However, the Fourth District then returned to standard of care. Id. at 789. It stated that "[t]he doctors' alleged conspiracy to not consult with patients sans insurance, and Palms Wests' retention of them, ultimately causing [] death, would likely be proved using the prevailing standard of care of hospitals as in [a Third District decision]. . ." Id. (emphasis added). Again, the Fourth District did not mention that the standard of care would be medical.

Yet, again, the Fourth District moved away from standard of care, this time back to duty. The court stated that "the medical negligence umbrella is wide" and can encompass business decisions that cause patient injuries. Id. at 790. The Estate's claims were based in medical negligence, id.:

> Because in order to prove that Palms West failed to timely obtain a gastroenterology consultation, resulting in [decedent's] death, the [Estate] would have to prove that a consultation was even medically necessary.

As for the allegations of Palms West's policy of not treating any patients, see IB 9 n.2, the Fourth District agreed with Palms West that "the medical negligence umbrella is wide and often encompasses business decisions which result in injury to the patient." Burns, 83 So.3d at 790 (emphasis added) (citing Paulk v. National Medical Enterprises, Inc., 679 So.2d 1289 (Fla. 4th DCA 1996)). Comparing this case to Paulk, a 2-1 decision of the appellate court, the Fourth District concluded below that, "[s]imilarly here, the [Estate] argued in his complaint that [the decedent's] was in need of medical services and was injured because he did not receive them." Burns, 83 So.3d at 790. Thus, the Fourth District concluded its discussion by focusing on the "need" for medical services and the injury caused by the lack of these services, duty and causation issues.

The Fourth District's Opinion does not specifically address the merits of the Estate's statutory claim. The Fourth District's Opinion does not state that there will be a professional standard of medical care in the claims in this case.

The Estate sought this Court's review based on conflict with decisions from this Court and other district courts of appeal. This Court granted review.

SUMMARY OF ARGUMENT

This Court should quash the Fourth District's decision, so that the Estate can proceed in this lawsuit against Palms West. The Estate's cause of action (the allegations must be taken as true at this procedural stage of dismissal) did not plead medical malpractice claim. The claims are administrative or business negligence claims.

Contrary to Palms West's contention of what it believes the "essence" of the Estate's claims are, the essence is that Palms West retained employees who it knew would not fulfill their contractual duties by refusing to show up for work. The Estate's claims do not address any medical judgment or any medical skill. The premise of this case is that Palms West retained physicians who it knew would not, under any circumstances without regard to medical issues, fulfill their obligation to treat patients.

These physicians were unfit not because of their medical competence, but because of their individualized, non-medical decision-making. Just one month before the decedent's death, Palms West's physicians refused to treat another patient for non-medical reasons, and that patient died. Yet, Palms West continued promising the community it would provide services, all the while knowing this was a false promise because these physicians would not show up under any circumstances.

The Fourth District missed the essential -- and only -- inquiry as to whether a claim is a medical malpractice claim: is the standard of care medical? The court primarily focused on duty and causation, but not this essential and narrow inquiry. The decision conflicts with a decision of this Court and other intermediate district courts for this reason. While not a basis for this Court's conflict review, it is notable that a Fourth District decision en banc recognized this essential inquiry.

The Fourth District should have permitted this case to proceed into discovery and a factual inquiry. If it turns out the Estate's claims are those requiring a medical standard of care, Palms West can raise these issues in the trial court. The Estate does not believe this case could or would proceed under the medical standard of care; at this procedural stage, it has not.

This Court should also hold that the Fourth District erred in another aspect of its ruling granting a writ for certiorari. The Fourth District entertained Palms West's Petition for Writ of Certiorari, and Palms West's assertion that the Estate failed to comply with pre-suit is within a district court's certiorari review. But while the jurisdictional threshold for certiorari review existed, the merits threshold did not in this case. The Fourth District does not appear to have analyzed whether the circuit court's order departed from the essential requirements of the law.

This is not merely a formulaic analysis, but one that is critical in the constitutional role of intermediate district courts of appeal. As this Court has

reiterated again over the last few years, certiorari review is not simply a means to correct what district courts believe is mere legal error. This departure from the essential requirements of the law is necessary to grant a writ of certiorari.

Palms West did not and could not direct the Fourth District to controlling case law or specific statutory provisions holding that the Estate's claims and underlying allegations are claims in medical malpractice. The Fourth District panel in this case was the first in this state to do so. Thus, even assuming arguendo the denial of the Motion to Dismiss was error, the trial court could not have departed from the essential requirements of the law. The matter should wait for plenary appeal.

This Court should quash the Fourth District's Writ, and remand for the proceedings against Palms West to continue into a factual inquiry on the merits.

ARGUMENT

POINT I

THE FOURTH DISTRICT ERRED IN CONCLUDING THAT THE ESTATE'S CLAIMS ARE MEDICAL MALPRACTICE CLAIMS, RATHER THAN ADMINISTRATIVE OR BUSINESS NEGLIGENCE CLAIMS.

Standard of Review

It is well-settled that for a petitioner to obtain certiorari relief, the petitioner must show that the order: (1) departed from the essential requirements of law; and (2) will cause a material and irreparable injury that cannot be remedied on final appeal. See, e.g., Rodriguez v. Miami-Dade County, 2013 WL 3214436, at *3; *5 (Fla. June 27, 2013); and Williams v. Oken, 62 So.3d 1129, 1132 (Fla. 2011). This test applies to petitions where a defendant asserts a plaintiff failed to comply with pre-suit medical malpractice requirements. See Oken, 62 So.3d at 1133-34.

This case comes to this Court following a denial of a Motion to Dismiss by the trial court, which was quashed by the Fourth District. This Court should review the dismissal on de novo review. See Wallace v. Dean, 3 So.3d 1035, 1045 (Fla. 2009).

Argument

Because the presuit requirements of the Medical Malpractice Act restrict the constitutional rights of access to the courts, courts must strictly and narrowly

construe these requirements in a manner that favors access. See Weinstrock v. Groth, 629 So.2d 835, 838 (Fla. 1993); and see Acosta v. HealthSpring of Fla., Inc., 2013 WL 3723310, at *2 (Fla. 3d DCA July 17, 2013). The Fourth District did not narrowly construe the presuit requirements of Chapter 766 in granting Palms West's Petition.

This Court should quash the decision and conclude the Estate did not have to comply with pre-suit as to either pending claim against Palms West. The Fourth District's ruling has restricted the Estate's access to the courts. The Estate could not have brought a medical malpractice claim, since this case addresses an administrative standard of care.

This Court has made it clear that in order to determine if a claim is a medical malpractice one, the sole focus is standard of care. See, e.g., Integrated Health Care Servs. Inc. v. Lang-Redway, 840 So.2d 974 (Fla. 2003). The sole focus is "whether the plaintiff must rely upon the medical negligence standard of care as set forth in section 766.102(1)." Lang-Redway, 840 So.2d at 980 (nursing home claim is not a medical negligence claim)(emphasis added). As this Court's phrase "must rely upon" makes clear, a defendant -- raising the affirmative defense of presuit -- is required to prove that the plaintiff's claim must utilize the medical negligence standard of care.

Lang-Redway addressed a cause of action brought under Chapter 400, a statutory claim. In a footnote, this Court stated that the "holding" of the case was limited to those cases where a plaintiff has brought his or her cause of action pursuant to §400.022, Fla. Stat.) (840 So.2d 980 n.9).

The claims as alleged and at issue before this Court are a common-law claim and a different statutory claim (negligent retention and pursuant to §766.110, Fla. Stat.). But there is no indication in Lang-Redway that the focus on standard of care (medical vs. non-medical) was related to the type of claim brought by the plaintiff.

Common-law claims, statutory claims, and in short every cause of action focus on standard of care, as to whether a plaintiff must comply with pre-suit. See, e.g., Acosta, supra, 2013 WL 3723310, at *2 (in reversing a dismissal for failing to follow pre-suit, holding that the "central issue" is whether the plaintiffs' claims "required evidence that [defendant's] acts and omissions deviated from accepted standards of medical care"); Galencare, Inc. v. Mosley, 59 So.3d 138, 142-43 (Fla. 2d DCA 2011) ("In addition, the Estate did not allege that the Hospital is liable under the medical negligence standard of care, which is necessary to invoke the presuit notice requirement of section 766.106. See Weinstock [v. Groth], 629 So.2d 838 (Fla. 1993)).

Likewise, the Fourth District's failure to address the medical standard of care also creates decisional conflict with cases such as Liles v. P.I.A. Medfield, Inc., 681 So.2d 711 (Fla. 2d DCA 1995) (test for determining if presuit is required is whether there is liability under a medical standard of care); Fassy v. Crowley, 884 So.2d 359 (Fla. 2d DCA 2004) (same); see also Pierrot v. Osceola Mental Health, Inc., 106 So.3d 491, 493 (Fla. 5th DCA 2013)("The primary test for whether a claim is one for medical malpractice is whether the claim relies on the application of the medical malpractice standard of care") (all emphasis added).

Indeed, the Fourth District's Opinion does not mention there will be a prevailing medical standard of care in this case. See also supra, IB 9-11. In fact, the panel switched through different elements of this case -- duty, causation, and "prevailing" standard of care -- even though as the above cases make clear, only standard of care is relevant. This was erroneous.

In the case below, after briefing was complete, the Estate submitted as supplemental authority Joseph v. University Behavorial, LLC, 71 So.3d 913 (Fla. 5th DCA 2011). The Fourth District then mentioned the Estate's supplemental authority in its Opinion. With this mention, though, the Fourth District demonstrated its misunderstanding of the narrow legal issue, standard of care. The Fourth District stated, Burns, 83 So.3d at 789 (emphasis added):

> The respondent asks that we consider Joseph v. University Behavioral LLC., 71 So.3d 913 (Fla. 5th DCA

> 2011), in support of the idea that not every wrongful act involved in a medical setting necessarily implicates medical negligence. In that case the plaintiff was injured following a physical altercation with a fellow patient at a psychiatric facility. He had previously asked the facility to separate him from the other patient, complaining he was being bullied, yet no action was taken. Joseph filed suit against the facility, asserting negligence. The circuit court dismissed the claim, finding that it alleged medical negligence, and was not brought within the two-year timeframe required under the statute. The Fifth District disagreed because it determined that a decision by the facility to not separate two patients involved no medical assessment.
>
> We find Joseph distinguishable. In order for [the Estate] to show that he died as a result of the Palms West doctors failing to treat him, as alleged in the complaint, he would have to prove that the treatment was medically necessary, unlike the plaintiff in Joseph.

The fact that the decedent in this case had a medical need for a gastroenterologist has nothing to do with the standard of care at issue, and whether it is medical or administrative. Medical necessity goes to whether there was a duty for Palms West to provide medical treatment to the decedent.[3] The Estate had submitted Joseph to the Fourth District simply because the Fifth District in Joseph correctly framed the narrow legal issue before the Court (71 So.3d at 917).

[3] That need is not in dispute, at this procedural stage. The Fourth District prevented this case going through discovery. It is doubtful Palms West would ever clam a lack of need. Palms West contacted at least six physicians and fourteen hospitals precisely because of the medical necessity. The Estate would be unlikely to ever have to present any expert testimony on this issue, which is in any event, not a standard of care issue.

A very recent decision from the Third District further shows the Fourth District's conflict, and erroneous approach. See Acosta, supra. The Third District considered whether the plaintiffs' claims were subject to the medical malpractice statute of limitations and the pre-suit process for medical malpractice claims.

The plaintiff had suffered a stroke and was initially sent to a medical center. HealthSpring provided Medicare health insurance benefits to the plaintiff. The plaintiff, inter alia, brought a breach of contract and negligent performance of a contract claim against HealthSpring in the lawsuit. The lower court dismissed the claims for failing to comply with pre-suit, and the appellate court reversed. The appellate court reasoned that the plaintiff had brought administrative negligence ("ordinary negligence") claims rather than medical malpractice ones.

As the Third District explained in Acosta, 2013 WL 3723310, at *2, "The central issue, therefore, was whether the Acostas' claims against HealthSpring required evidence that HealthSpring's acts and omissions deviated from accepted standards of medical care" The Acostas' allegations were thus, id. at *2 (all emphases added):

> that HealthSpring's administrative personnel—not medical staff—failed to provide contractual authorization for Mr. Acosta to be transported promptly to the University of Miami hospital for an urgent carotid endarterectomy to prevent a second major stroke. Dr. Naqui and North Shore allegedly provided diagnosis and initial care—but HealthSpring's administrative delay in authorizing Mr. Acosta's transfer allegedly resulted in his

> second stroke four days after the first. The Acostas alleged that one or more administrative employees at HealthSpring belatedly authorized transfer to Mercy Hospital instead of the University of Miami Hospital because HealthSpring enjoyed a lower "preferred provider" rate at Mercy Hospital for the services in question.

The Third District continued (id. at *2):

> Mere delay, albeit ultimately-critical delay, in arranging transportation to a different hospital to save money, may have involved negligence by clerical personnel of HealthSpring, not medical personnel.
>
> In the case at hand, the undisputed delay in administration—whether caused by telephone tag in the calls from HealthSpring to the two hospitals to check on rates, mere processing delay because of the volume of similar authorizations needed for other claimants those days, or otherwise—creates a triable issue of fact.

The Acosta Court's reasoning is instructive here -- where the Estate has also alleged administrative negligence claims. Certainly the plaintiff in Acosta will have to prove a "need" for medical treatment, and the delay, i.e., failure to treat, caused injury. These are not standard of care issues.

The Estate's causes of actions do not and will not rely on the medical negligence standard of care. The claims concern the administrative, non-medical decisions implemented by Palms West as to their selection, review, supervision and retention of their staff physicians. Additionally, the negligently retained and improperly supervised physicians did not exercise any medical judgment in

refusing to work for any patients, at any time. The claims in this case, as to standard of care, squarely focus on the business decisions implemented by Palms West administrators long before the decedent arrived at the hospital.

The Opinion on review to this Court states that as pled, the motivation for refusal to provide medical treatment was purely financial. See Burns, 83 So.3d at 788. The Fourth District emphasized that the decedent had been treated. But whether the decedent received some treatment or none at all is immaterial to the only consideration, i.e., the standard of care. It is not the motivation that is critical here, but that there never was any medical judgment exercised in the lack of treatment, failure to treat, or delay in treatment. The Estate does not question anyone's medical care, or anyone's medical judgment. This case will rely on administrative expert testimony as to standard of care, which is not a claim within the medical malpractice umbrella.

Even when the Fourth District's Opinion briefly addresses standard of care, the court's reasoning was erroneous. The Fourth District appears to have placed the burden on the Estate to prove this is not a medical standard of care case. The court reasoned the Estate's claims "would likely be proved using the prevailing standard of care for hospitals." Burns, 83 So.3d at 789 (emphasis added) (citing South Miami Hosp., Inc. v. Perez, 38 So.3d 809, 812 (Fla. 3d DCA 2010), a case where a patient fell off a hospital bed).

This Court has held, again, that a claim is medical malpractice only when it "must rely upon" the medical standard of care. See Lang-Redway, 840 So.2d at 980. The Fourth District's speculation of what it believes is likely to take place in this case, if this case proceeds to trial, has foreclosed the Estate's ability to conduct discovery, obtain testimony, and establish this is an administrative negligence case. The Fourth District's "standard of care" discussion, limited as it was, is also noticeably absent in ever using the phrase standard of "medical" care.

Rather than grant the Writ for what the Fourth District (incorrectly) believed was likely to be proved, the Court should have placed the burden on Palms West at this procedural posture to prove this case cannot proceed as an administrative negligence case, with an administrative standard of care. As noted in the Statement of Facts, two co-defendants stated on the record the Estate could proceed in this fashion (IB 7). Palms West brought the Motion to Dismiss, and the failure to comply with pre-suit is an affirmative defense. Defendants bear the burden to prove all affirmative defenses. See Custer Med. Ctr. v. United Auto Ins. Co., 62 So.3d 1086, 1096 (Fla. 2010); Ellingham v. Fla. Dept. of Children & Family Servs., 896 So.2d 926, 927 (Fla. 1st DCA 2005).

The Fourth District also concluded Palms West will be compared to the prevailing standard of care in other hospitals, but this does not transform this case into a medical malpractice one. The standard of care in this case will examine

health care providers' administrative decisions to retain physicians who have refused to provide any medical care, under any medical circumstances.[4] This is not a failure of medical care case, as to the standard of care.

The Fourth District's misapplication of the law is shown through its citation to St. Anthony's Hosp. v. Lewis, 652 So.2d 386 (Fla. 2d DCA 1995), and Martinez v. Lifemark Hosp. of Fla., Inc., 608 So.2d 855, 857 (Fla. 3d DCA 1992). In those retention cases, the retained doctors improperly performed medical services. The retained physicians in this case did nothing, because they had a pre-existing policy to refuse to provide treatment under any circumstances. This does not involve medical judgment by either administrator or physician.

So, too, the Fourth District's focus on decisions such as Perez, ignores the essence of this case. A patient who is not properly supervised while in bed will be required to establish whether there was an improper application of medical services. Medical judgment must be made to determine whether the patient is capable of being left unrestrained, and how to take care of the patient. The negligent action requires medical judgment and the standard of care is, accordingly, medical in nature.

---

[4] As noted above, the Fourth District's discussion of insurance issues incorrectly suggests the physicians were providing some medical care. See IB 9 n.2. The Estate alleged the retained physicians refused to treat anyone. So, Palms West continued to rely on retained physicians it knew would never exercise any medical judgment and would never appear.

The Fourth District's decision is in conflict with Lynn v. Mount Sinai Med. Ctr., Inc., 692 So.2d 1002 (Fla. 3d DCA 1997), on this point. Consistent with the teachings of this Court, the Third District held that mislabeling a urine specimen by a hospital which resulted in the wrongful termination of the patient's employment did not constitute a claim for medical malpractice.

The Third District focused on the fact that the challenged act did not directly relate to the improper application of medical services and the use of professional medical judgment or skill. This is exactly what was ignored in the instant case. The brief discussion by the Fourth District of standard of care cannot suffice for a prevailing professional standard of medical care.

The Estate is entitled to carefully plead claims that do not depend on addressing medical judgment or medical skill. Cf. GalenCare, supra, 59 So.3d at 144. That the underlying duties were to perform medical treatment does not transform this case into one of medical malpractice. The Fourth District Opinion does not suggest there is a medical standard of care for negligently retaining physicians who go on strike and refuse to treat. The Opinion does not suggest there is a medical standard of care for the administrators in this case who knew physicians would not appear to treat under any medical situation, for any patient.

The Fourth District's analysis does not address the actions before the decedent came to Palms West, but those actions are an aspect of why there is no

standard of medical negligence in this case. Just over one month before the decedent in this case was denied any emergency services and care in gastroenterology, another patient in need of those services and care was denied those services. More significantly, the reason those services were denied is because staff physicians refused to provide those services, i.e., they were derelict in their duties. That patient died as a consequence of being denied emergency services and care.

The acts committed by these physicians -- on both dates -- do not involve medical decision-making. There are no allegations that a physician was contacted, heard the decedent's medical condition, and decided on a patient-specific basis that services were not needed. There are no allegations that anyone misdiagnosed the decedent's condition. There are no allegations these physicians were unavailable because they were treating other patients or otherwise medically unavailable.

All of those types claims would reflect medical judgment by the facility and physicians. This case is a limited scenario where physicians make non-medical decisions to abdicate their obligations to show up for work. The physicians' refusal to accept the assignment was apparently part of an ongoing business-decision dispute between the physician groups. Palms West made an administrative decision to do nothing.

The Fourth District's focus on causation was also misdirected. The Court stated this "is a medical negligence claim when [the Estate] is claiming that [the decedent's] death resulted from the lack of treatment. Burns, 83 So.3d at 788. This is not a medical standard of care analysis; see also id. at 790 (emphasizing that the Estate has alleged the decedent was in need of medical services and that the failure to receive the services caused his death).

The fact medical expert testimony on causation may be needed does not make this a medical malpractice case. No expert testimony is relevant to whether a hospital should terminate the services of a physician who is unfit because he or she will not appear for work. No medical expert testimony is relevant as to the administrative decisions by Palms West to retain these physicians.

This causation analysis is no different than in an automobile accident. The plaintiff must present medical testimony to prove the defendant's negligent driving caused the injury claimed. The plaintiff must present medical testimony to prove that a subsequent surgery was causally related to the car accident. Those do not raise medical malpractice issues, of course. Those issues and testimony do not go to the standard of care in the case.

The only case with business theory of allegations cited by the Fourth District was one of its own. See Burns, 83 So.3d at 790 (citing Paulk v. Nat'l Med. Enter.,

Inc., 679 So.2d 1289 (Fla. 4th DCA 1996)).[5] Patients sued several hospitals for extending their stays, which the patients alleged were done for financial motivation in order to exhaust insurance payments.

In a 2-1 decision, the court held the claims were medical malpractice claims. The majority concluded that the "fraudulent rendering of unnecessary medical care and services is encompassed by the term 'arising out of the rendering of . . . medical care or services' " Id. at 1280 (quoting §766.202, Fla. Stat.).

The earlier decision of the Fourth District went too broad in trying to assess whether a claim falls within medical malpractice. As this Court subsequently noted in Lang-Redway, and district courts have held, the only issue that matters is whether the standard of care is medical (IB 16-18).

Paulk, even if correctly decided, is also distinguishable. The majority stated (679 So.2d at 1290 n.3):

> It seems to us that the intent expressed in the text [of chapter 766] is to extend the statute whenever the medical judgment of the provider is being challenged.

The Estate in the instant case does not question the medical judgment of the provider. In Paulk, the plaintiffs did have to prove they lacked continuing medical

[5] The Fourth District's application of Paulk to the instant case was limited to duty and causation, further demonstrating misapplication of Lang-Redway. See Burns, 83 So.3d at 790 (addressing the decedent's need for treatment and that he died as a result of the lack of that treatment).

justification for treatment. The facility claimed it exercised proper medical judgment with its treatment. Medical experts were vital to this issue. The Fourth District majority appears to have reasoned this was a medical standard of care case, something unaddressed in this case.

The Fourth District's dissent in Paulk was also correct on the merits. The dissent noted the procedural stage of the case, at a motion to dismiss (679 So.2d at 1291 (Stone, J., dissenting)). The plaintiff had alleged that decisions were made by the facility without regard to the patients' conditions or need for services. Id. The plaintiff was not actually alleging there was a departure from the medical standard of care.

Of note, although not the basis for decisional conflict, it is uncertain whether Paulk is still good law, in light of a subsequent decision from the Fourth District. The subsequent decision, at the very least, correctly emphasizes standard of care only. In O'Shea v. Phillips, 746 So.2d 1105 (Fla. 4th DCA 1999), a patient sued a neurologist and health care clinic, alleging negligent supervision and retention of the independent contractor neurologist who sexually assaulted the patient. The sexual assault occurred in a clinic examination room, where the patient had gone for medical treatment. The trial court dismissed the case for failure to comply with the medical malpractice pre-suit requirements of Chapter 766.

In affirming this decision, the Fourth District concluded that the presuit requirements of Chapter 766 were "mandatory where [the patient's] cause of action is based on a health care facility's failure to exercise due care in fulfilling the duties imposed by §766.110, Fla. Stat.; the claim that a facility has improperly supervised or retained an employee who has committed sexual abuse on a patient arises 'out of the rendering of . . . medical care or services'" (746 So.2d at 1108 (citations omitted)).

In dismissing the case, the Fourth District recognized that "[w]here the nub of the plaintiff's claim is a theory of negligence apart from medical malpractice, there is no obligation to comply with Chapter 766 notice and screening requirements." Id. (emphasis added). Yet, the court held that the ongoing duty to "review and evaluate medical staff at issue in this case is part of the delivery of medical services to the public," and dismissed the case. Id. at 1109. The O'Shea Court cited favorably to Paulk, supra.

Six years later, the Fourth District receded from O'Shea. See Burke v. Snyder, 899 So.2d 336 (Fla. 4th DCA 2005) (en banc). A patient there was similarly sexually assaulted in a medical examination and sued the physician and treatment center/clinic where the examination and assault occurred. Claims for negligent hiring, supervision, and retention against the clinic were dismissed for failing to comply with medical malpractice pre-suit requirements.

The en banc court revisited and receded from O'Shea, and held that the claims of sexual misconduct during a medical examination did not arise out of the rendering of medical services. Thus, the claim against the health care facility for negligent supervision and retention was reinstated. The nub of this claim was not medical negligence, as no medical decisions were being challenged.

Although the plaintiff in Burke did not bring a §766.110, Fla. Stat., claim, it seems apparent that the Fourth District determined that had that claim been brought, it too would not have been a medical malpractice claim. The court noted that it is "the nature of the underlying conduct [that] determines whether the health care facility's liability under §766.110, Fla. Stat., should be considered medical negligence liability" (899 So.2d at 340).

The en banc court also recognized that claims of "administrative negligence" are not claims arising out of medical negligence. Id. at 339. The court distinguished an earlier case from the Second District, Lewis, supra. As the en banc decision in Burke noted, however, "the underlying conduct complained of [in Lewis] was actually medical in nature. The plaintiff had alleged that the physician negligently performed spinal surgery that left her debilitated. . . .[T]he negligent medical treatment 'is both necessary to the claims against the hospital and inextricably connected to them . . . ." Burke, 899 So.2d at 340 (citations omitted) (emphasis added).

In the instant case, the Fourth District did not discuss Burke, a case addressed in the briefs before the Court. The Fourth District may have believed that since there were sexual assault claims in Burke and O'Shea, the cases were not analogous. The Estate contends, though, that it is the reasoning which is relevant. The "underlying conduct complained of" in this case is not medical in nature, and no medical decisions were made which caused injury to the decedent. Palms West made business, administrative decisions to not have medical personnel. The nub of the Estate's claims are theories of negligence apart from medical malpractice.

The civil conduct in this case is not factually equivalent to the conduct in Burke. Yet, the physicians in this case were no more engaged in medical decisions than physicians who sexually assault their patients. A patient was receiving medical services when the physician engaged in misconduct outside the scope of employment, outside the job skills of the employee, and outside the job the employee was hired to perform. The administrators in each case were also the focus of standard of care.

As noted above, the Estate has two pending claims, a common-law claim and a statutory claim. The Fourth District's Opinion cites the statutory claim only once in passing, without analysis, to note the Estate brought this statutory claim. See Burns, 83 So.3d at 787 (mentioning the allegations under §766.110, Fla. Stat.). Although the Estate's claims center on similar allegations, they are distinct claims.

While the statutory claim appears within Chapter 766, this does not mean it is a medical negligence claim. It is not.

Under this particular provision, Palms West was required to adopt procedures for selection and review of the medical care and treatment that its medical staff was rendering to patients. Palms West was required to supervise that medical staff to ensure that its risk management processes were being diligently carried out. Plus, the Legislature created a private cause of action when a hospital failed to exercise due care in fulfilling any of the duties when the failure is a proximate cause of a patient's injury (§766.110, Fla. Stat.).

The Estate's allegations fit precisely within these elements. The medical staff had decided it would not appear under any circumstances. For business reasons, the Palms West administrators ensured someone such as the decedent could not receive medical care. While there are §766.110, Fla. Stat., claims which are medical malpractice ones, nothing within the statutory language encompasses all claims in a medical setting within the medical malpractice umbrella. See Burke, 899 So.2d at 340 ("As mentioned above, we held in O'Shea that the nature of the underlying conduct determines whether the health care facility's liability under Fla. Stat. 766.110 should be considered medical negligence liability").

In preventing the Estate from conducting discovery in this case, the Fourth District also prevented the Estate from establishing it could not have secured an

expert on a medical standard of care. A medical expert in the field of gastroenterology could not opine that medical personnel did anything medically wrong, because (a) the physicians retained and supervised did not make medical decisions; (b) the personnel within the facility did a competent job, and indeed likely the best job they could do; and (c) a medical expert is not qualified to opine on how a hospital should administratively operate its facility.

The Fourth District's decision, if upheld, would deny the Estate's access to courts. See Kukral v. Mekras, 679 So.2d 278 (Fla. 1996) (Chapter 766 must be broadly construed in favor of patients so as to not unduly restrict constitutionally guaranteed access to courts). This Court should quash the Fourth District's Writ, and allow this case to proceed on the merits.

POINT II

THE FOURTH DISTRICT ERRED IN FAILING TO ADDRESS WHETHER THE TRIAL COURT'S ORDER DETERMINING THAT THE CLAIMS ARE NOT MEDICAL NEGLIGENCE CLAIMS HAD CONSTITUTED A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF THE LAW, AND THE TRIAL COURT'S ORDER DOES NOT CONSTITUTE SUCH A DEPARTURE.

Standard of Review

The same Standard of Review as Point I should apply here (IB 15).

Argument

Once accepting jurisdiction, this Court has jurisdiction to resolve all issues in this case. See Murray v. Regier, 872 So.2d 217, 223 n.5 (Fla. 2002). The Fourth District's decision is also in conflict on another issue, and the decision was also erroneous on the merits. The Estate requests that this Court exercise its discretion to consider and rule on this Point-on-Appeal. The Estate's argument, if accepted by this Court, "are dispositive of the case." Murray, 872 So.2d at 223 n.5. The Estate's arguments demonstrate the Fourth District should not have granted the Writ in the instant case.

The Fourth District's decision correctly sets forth the test for whether a party is entitled to certiorari relief. See Burns, 83 So.3d at 787. However, the court did not address one of these required elements, being that the lower court's order must depart from the essential requirements of the law (IB 15). The crux of the Estate's

causes of action show there could be no departure. Any lower court ruling that these claims fell outside medical malpractice is not one that departed from the essential requirements of the law.

It appears Palms West believed that any time a plaintiff failed to comply with pre-suit, and was required to do so, there was an immediate appellate review. This is only partially correct, and is jurisdictional only. But as this Court has noted, mere legal error is not sufficient on the merits. See, e.g., Citizens Prop. Ins. Corp. v. San Perdido Assoc., Inc., 104 So.3d 344, 351 (Fla. 2012). Assuming arguendo there was legal error [something the Estate disagrees with], Palms West did not demonstrate there was something beyond legal error.

Subsequent to the Fourth District's Opinion, this Court issued San Perdido, supra. In that case, a Citizens insured brought a bad-faith action against Citizens, arising from the insurer's handing of the insured's claim. The lower court denied Citizens' motion to dismiss on the ground of sovereign immunity. Citizens sought a writ of certiorari (and prohibition). The First District denied this relief. This Court agreed that Citizens could not bring an immediate appeal of the denial of its motion to dismiss.

As to certiorari, this Court concluded that the lower court order rejecting the claim of sovereign immunity, not addressed within Fla.R.App.P. 9.130, was also not the type of order subject to the extraordinary writ of certiorari. This Court

noted the well-settled three-part test that the petitioner must establish in order for the district court to grant certiorari relief from the denial of a motion to dismiss. See San Perdido, 104 So.3d at 351.

As this Court explained, assuming the threshold jurisdictional questions are met, the moving party must still demonstrate this departure. Id. The district court of appeal "must [] determine" whether this departure occurred. Id. There is no indication the Fourth District engaged in this determination in this case. This departure must be "something more than just a legal error." Id. (citing Oken, 62 So.3d at 1133). Not only is there an absence of any indication the Fourth District engaged in this evaluation, the circuit court's order in this case could not have been more than mere legal error.

As this Court explained in San Perdido and prior cases (104 So.3d at 351):

> In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error.

Quoting Williams, 62 So.3d at 1133 (quotation therein omitted). This Court noted that Citizens did not assert a departure from the essential requirements of law. See San Perdido, 104 So.3d at 355. Rather, Citizens asserted error only in the interpretation of a statute, and whether the Legislature had granted sovereign immunity to Citizens. Id. As this Court emphasized, id. at 355:

> There is an important difference between a departure from the essential requirements of law where there has been a violation of a clearly established principle of law and a case that involves an issue of law where the law is not yet settled. See Ivey v. Allstate Ins. Co., 774 So.2d 679, 682 (Fla.2000) ("Unfortunately, there is no Florida case squarely discussing [this legal question]. *356 Without such controlling precedent, we cannot conclude that either court violated a 'clearly established principle of law.' " (quoting Stilson v. Allstate Ins. Co., 692 So.2d 979, 982–83 (Fla. 2d DCA 1997))). We would improperly expand certiorari jurisdiction by applying it to all cases where a party asserts only that the trial court erred regarding an issue of statutory interpretation without regard to the higher threshold of whether the ruling departed from the essential requirements of law.

A review of Palms West's Petition for Writ of Certiorari reflects that it asserted the lower court had departed from the essential requirements of the law in the Standard of Review section as to jurisdiction. This element of certiorari review is not a jurisdictional element. Moreover, a review of the body of Palms West's Petition shows it never did adequately point to controlling precedent, as the administrative negligence claims in this case, that the claims must comply with presuit.

There is no single district court of appeal decision that appears to have addressed the type of claims that are pending before this Court. There are claims that fit within the rubric of alleged business/administrative negligence and fraud, but no claims resemble those in the instant case. As emphasized above, the Estate

has not questioned any medical decisions or medical judgment by facility, administrator, or physician.

Merely pointing to Chapter 766 subsections or cases involving presuit compliance in medical settings goes to whether Palms West could show beyond mere legal error. The writ of certiorari is not about mere legal error, of course. The Fourth District stated that the claims arose from initial medical treatment, that there was a necessity for medical care, and that the decedent was injured because he did not receive medical care. This does not focus on the exclusive issue of this case: is there a standard of care that is medical as to the allegations of this case? For that, the Fourth District did not point to prior controlling precedent, because none existed.

Last month, in Rodriguez, this Court held that the Third District could not grant a writ of certiorari of another type of order denying a claim of sovereign immunity, in that instance, a police officer's claim of civil immunity. This Court concluded that the police officer could not meet the jurisdictional threshold for a writ, i.e., irreparable harm that could not be remedied on plenary appeal. See Rodriguez, 2013 WL at *3-4. However, this Court also commented that:

> In this case, the Third District did not analyze whether the error it discussed amounted to a departure from the essential requirements of law. It is unclear whether the district court considered this prong, particularly in light of its statement that "[i]t is the imminent threat or

> existence of irreparable harm that gives us jurisdiction in this case." Rodriguez, 67 So.3d at 1220 n. 4.

Like the district court in Rodriguez, the Fourth District decision in this case was rendered before San Perdido. But like the district court in Rodriguez, the Fourth District in this case does not appear to have engaged in this "departure from the essential requirements" analysis. See also Burns, 83 So.3d at 790 (after finding the circuit court erred, concluding that "We therefore find that the trial court departed from the essential requirements of the law when it failed to dismiss the [Estate's] remaining claims").

Palms West could not meet this test in this case, on these facts and under prior case law, or the applicable statutes. See also Oken, 62 So.3d at 1133 (reiterating that certiorari "was never intended to redress mere legal error," and allows a court to reach down and halt a miscarriage of justice where no other remedy exists." Oken, 62 So.3d at 1133 (citation omitted); see also Rodriguez, 2013 WL 3214436, at *8 (reasoning that the Third District incorrectly granted the Writ because the District Court could not find that the trial court's order departed from the essential requirements of the law; the legal issue "remains ill-defined in the Florida case law…. [t]here is no "clearly established principle of law" that would require application of the emergency exception to a factual situation like the one presented by this case. Id. Accordingly, the decision of the Third District should be quashed")(Canady, J., and Polston, C.J., concurring).

In a prior case, the Fifth District denied a petition for writ of certiorari even though the lower court may have erred. As the Fifth District commented, Wolf Creek Land Development, Inc. v. Masterpiece Homes, Inc., 942 So.2d 995, 997 (Fla. 5th DCA 2006) (emphasis added):

> As explained in Allstate Ins. Co. v. Kaklamanos, 843 So.2d 885, 890 (Fla.2003), the clearly established law which if violated by an inferior court authorizes a district court of appeal to grant certiorari review, can derive from a variety of legal sources including case law dealing with the same issue, an interpretation or application of a statute, a procedural rule, or a constitutional provision.
>
> The statutory issue raised by Wolf Creek in the present case is certainly debatable, but there appears to be no case law on the matter that has been pointed out by either side or that has been disclosed by our own independent research. As the order is not the subject of a clearly established principle of law, certiorari is not available to review it. Instead, it will have to wait for resolution when and if a plenary appeal is brought. See Stilson v. Allstate Ins. Co., 692 So.2d 979, 982 (Fla. 2d DCA 1997).

In this case, the issues--and causes of action--appear to be of first impression, and may be debatable. Certiorari relief should not have been granted under these circumstances. The Fourth District erred in not examining whether the circuit court's Order departed from the essential requirements of the law. The Order did not.

CONCLUSION

For the reasons stated above, this Court should quash the Fourth District's grant of a Petition for Writ of Certiorari to Palms West. This case should proceed in discovery in the circuit court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to BRUCE RAMSEY, ESQ., and DONNA M. KRUSBE, ESQ. (wpb-pleadings@bclmr.com), 1601 Forum Place., Ste. 400, West Palm Beach, FL 33401; MARK HICKS, ESQ. (mhicks@mhickslaw.com, jvanderklok@mhickslaw.com, eclerk@mhickslaw.com) 799 Brickell Plaza, 9th Floor, Miami, FL 33131, by email, on July 31, 2013.

Scott Donaldson, Esq.
DONALDSON & WESTON, P.A.
335 SE Ocean Blvd.
Stuart, FL 34994
sdonaldson@dwinjurylaw.com
ncope@dwinjurylaw.com
and
BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 430
444 West Railroad Avenue
West Palm Beach, FL 33401
(561) 721-0400
Attorneys for Petitioner
aah@FLAppellateLaw.com
jew@FLAppellateLaw.com

By: /s/ Andrew A. Harris
ANDREW A. HARRIS
Florida Bar No. 10061

CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Initial Brief of Petitioner on the Merits is Times New Roman 14pt.

_/s/ Andrew A. Harris_____
ANDREW A. HARRIS
Florida Bar No. 10061