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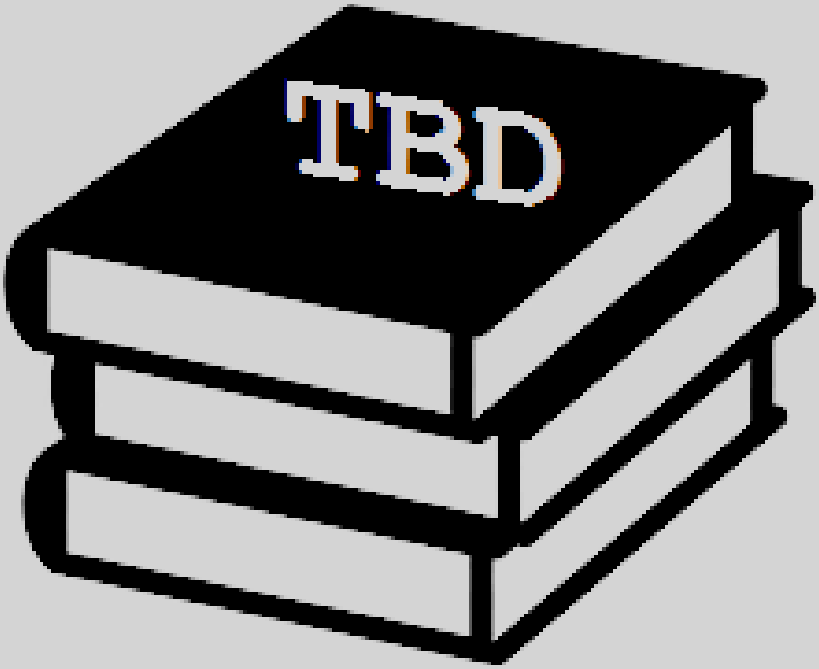


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DIVISION OF ADMINISTRATIVE HEARINGS

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA**
**FIRST DISTRICT**

**CASE NO. 1D16-_____**

PLANTATION GENERAL HOSPITAL Limited Partnership d/b/a PLANTATION GENERAL HOSPITAL; ANDREW AGBI, D.O.; AGBI HEALTHCARE, INC.; and EHRA MEDICAL SERVICES OF FLORIDA,

Defendants/Petitioners,

vs.

BERNARD BELZI, individually and as Personal Representative of the Estate of Patricia Belzi, deceased, and as legal guardian and parent of A.B., minor,

Plaintiff/Respondent.

---

PETITION TO REVIEW A NON-FINAL AGENCY ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT OR IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI OR MANDAMUS FROM STATE OF FLORIDA-DIVISION OF ADMINISTRATIVE HEARINGS CASE NO. CACE 15-3711MA

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# PETITION TO REVIEW A NON-FINAL AGENCY ACTION AND/OR PETITION FOR A WRIT OF CERTIORARI OR MANDAMUS

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## INTRODUCTION

Petitioners/Defendants, Plantation General Hospital, Andrew Agbi, D.O., EHRA Medical Services of Florida, P.A., and Agbi Healthcare, Inc., ("Defendants"), file this Petition to Review a non-final agency action under the Administrative Procedure Act or in the alternative, petition for a writ of certiorari or mandamus.

Defendants contend that the administrative law judge, June C. McKinney ("ALJ"), appointed chief arbitrator in this medical malpractice action proceeding in voluntary binding arbitration under section 766.207, departed from the essential requirements of law by refusing to follow an administrative rule which has deprived the parties who agreed to statutory arbitration from receiving the corresponding benefit of an expedited, cost effective procedure that serves as an incentive for electing and agreeing to statutory arbitration. In addition, the Defendants cannot obtain relief in a final appeal, as it will be too late to restore the intended benefit of the rule, which is to ensure an expedited proceeding following a misarbitration.

## STATEMENT OF THE CASE AND FACTS

This is an action for medical malpractice. The parties elected to resolve Claimant's medical malpractice claims against the Defendants through voluntary

binding arbitration pursuant to section 766.207 of the Florida Statutes. *See* Req. for Arbitration, App. "1".

Voluntary binding arbitration under section 766.207 is governed by chapter 60Q-3 of the Florida Administrative Code. *See* § 766.207(9) (authorizing Division of Administrative Hearings to promulgate rules for arbitration under section 766.207); Fla. Admin. Code R. 60Q-3.001(1) ("These rules shall apply to all voluntary binding arbitration proceedings of medical negligence claims initiated in accordance with Sections 766.201 through 766.212, Florida Statutes, to determine and to allocate the amount of damages.").

Pursuant to section 766.207(4), the parties each selected one arbitrator to serve on the arbitration assessment panel which determines the extent of damages, and the Division of Administrative Hearings appointed the ALJ to preside over the panel as chief arbitrator. The case proceeded to an arbitration assessment hearing on damages. (*See* Notice of Arbitration Hearing, App. "2".)

At the first assessment hearing which took place on February 23-25 of 2016, the ALJ entered an order of misarbitration due to the misconduct of the claimant's arbitrator, and dissolved the panel. (*See* Tr. of the Arbitration Proceedings, Feb. 25, 2016, App. "3".) Two new arbitrators were appointed by the Division of Administrative Hearings from lists provided by the parties. (*See* Order, Mar. 9, 2016, App. "4"; Order Appointing Israel Reyes as Arbitrator for Defs. And Req.

Dates for New Hr'g, Apr. 11, 2016, App. "5"; Order Confirming Arbitrator, Apr. 28, 2016, App. "6".) The ALJ remained as chief arbitrator and the proceedings continued. Following the misarbitration, Claimant produced a new expert witness list with different experts than had been previously used or called by any party in this action. (*See* Claimant's Expert Witness List, App. "7".)

Defendants filed objections to Claimant's new experts under Florida Administrative Code Rule 60Q-3.025(3), which prohibits parties from offering or calling new witnesses following a misarbitration. (*See* Resp't Plantation General Hospital's Objection to Claimant's Expert Witness List, App. "8"; Defs.' Notice of Joinder, App. "9"). Rule 60Q-3.025 provides as follows:

> (1) If no two members of the assessment arbitration panel can agree on an arbitration award, the chief arbitrator shall enter an order of misarbitration.
>
> (2) Within 20 days of an order of misarbitration, the parties shall nominate at least three but no more than five arbitrators other than an arbitrator from the proceeding which resulted in misarbitration by filing the nominees' names, addresses and telephone numbers, along with certificates, in the form set out in subsection 60Q-3.007(2), Florida Administrative Code. The Director shall appoint two nominees as arbitrators, provided that if more than one party complies with this section within 20 days of an order of misarbitration, the Director shall appoint arbitrators nominated by different parties.
>
> (3) At any assessment arbitration hearing following misarbitration, no party may offer exhibits or call witnesses not offered or called at the assessment arbitration hearing preceding misarbitration, provided that the transcript of testimony given at a prior assessment arbitration hearing by a witness who is unavailable at a later hearing may be offered as an exhibit.

Fla. Admin. Code. R. 60q-3.025. Claimant filed a motion in opposition to Defendant's objection which argued rule 60Q-3.025 does not apply, because the ALJ declared a misarbitration pursuant to section 766.21. (*See* Claimant's Mot. In Opp'n of Defs.' Objection to Claimant's Expert Witness List, App. "10")

Defendants jointly responded to Claimant's Motion in Opposition to Defendant's objection to the new witness list. (*See* J. Resp. to Claimant's Mot. In Opp'n., App. "11"). The joint motion in response challenged Claimants assertions on several grounds, including the plain language of rule 60Q-3.025(3) which states that it applies to *any* assessment arbitration hearing following a misarbitration and that the rules contained in chapter 60Q-3 apply to all arbitration proceedings under section 766.207 as provided by rule 60Q-3.001.

On May 25, 2016, the ALJ entered an order granting Claimant's Motion in Opposition to Defendant's Objection to Claimant's Expert Witness List. (*See* Order on Mot. In Opp'n., App. "12").

## JURISDICTIONAL STATEMENT

This Court has jurisdiction to review a preliminary, procedural, or intermediate order of an administrative law judge of the Division of Administrative Hearings under section 120.68(1) of the Florida Statutes. *See* § 120.68(1), Fla. Stat. ("A preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is

immediately reviewable if review of the final agency decision would not provide an adequate remedy."). "Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law." § 120.68(2)(a), Fla. Stat. The Division of Administrative Hearings maintains its headquarters in Tallahassee, Florida which is under the jurisdiction of this Court.

Alternatively, this Court has jurisdiction to issue a writ of mandamus or common law certiorari under Article V, section 4(b)(3) of the Florida Constitution, and Rule 9.030(b)(3) of the Florida Rules of Appellate Procedure. *See* Fla. R. App. P. 9.030(b)(3). This Court may grant certiorari review where there has been a departure from the essential requirements of law or a failure to afford procedural process. *See Act Servs., Inc. v. Sch. Bd. of Miami-Dade County*, 29 So. 3d 450, 452 (Fla. 3d DCA 2010); *Vasques v. Mercury Cas. Co.*, 947 So. 2d 1265, 1267 (Fla. 5th DCA 2007) ("A district court may exercise its discretion to grant certiorari review when procedural due process has not been afforded or there has been a violation of a clearly established principle of law resulting in a miscarriage of justice."). *See also Williams v. Oken*, 62 So. 3d 1129, 1134 (Fla. 2011) ("...in numerous cases, Florida courts have permitted certiorari review to determine whether the defendant was afforded the proper process through procedural compliance with the statutory requirements.").

Here, Defendants submit that jurisdiction lies because the ALJ departed from the essential requirements of law and failed to afford procedural due process by failing to enforce Administrative Rule 60Q-3.025(3), which required the ALJ to prohibit the claimants from listing new witnesses following a misarbitration. This will result in a clear miscarriage of justice because it denies Defendants the very purpose of the rule, which is to ensure an expedited procedure even in the event of a misarbitration.

## NATURE OF RELIEF SOUGHT

Defendants seek relief from the procedural and intermediate order of the ALJ pursuant to section 120.68(1), and request that this Court quash and reverse the ALJ's order permitting Claimant to call new witnesses and providing additional time for depositions. Defendants request that this court remand the case for an assessment hearing consistent with rule 60Q-3.025, where the parties are limited to the witness they called at the hearing which a misarbitration was declared. Defendants submit that allowing Claimant to call new witnesses in violation of rule 60Q-3.025 deprives them of the expedited proceeding provided under the Chapter 766 arbitration framework, which the Legislature provided for the express purpose of earlier resolution of claims, reduction in delay, reduction in litigation costs, and a reduction in attorney's fees.

## ARGUMENT

### I. The ALJ's order is a manifest violation of Florida Administrative Code Rule 60Q-3.025 and requires this Court's immediate review if Defendants are to have any remedy.

The ALJ's order permitting new witnesses fails to follow and otherwise is in violation of rule 60Q-3.025, promulgated by the Division of Administrative Hearings for voluntary binding arbitration under section 766.207, Fla. Stat. Administrative Rule 60Q-3.025 expressly prohibits parties from calling new witnesses following a misarbitration. The ALJ's order permits Claimant to call new witnesses following a misarbitration in violation of rule 60Q-3.025.

Section 120.68(1), Fla. Stat., provides for immediate review of an order of an ALJ if review of the final agency decision would not provide an adequate remedy. Under subsection section 120.68(7), Fla. Stat., a District Court of Appeal "shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that": the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure; the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or the agency's exercise of discretion was inconsistent with an agency rule.

This Court's jurisdiction to review a non-final agency action under section 120.68 of the Administrative Procedure Act is "analogous" to certiorari jurisdiction. *See Eight Hundred, Inc. v. Florida Dep't of Revenue*, 837 So. 2d 574, 575 (Fla. 1st DCA 2003) ("Our jurisdiction is invoked by filing '[a] petition to review non-final agency action under the Administrative Procedure Act,' as specified in Florida Rule of Appellate Procedure 9.100(c)(3). We have previously said that our scope of review in such a matter 'is analogous to and no broader than the right of review by common law writ of certiorari.").

Certiorari should be granted when there is, (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case and (3) that cannot be corrected on postjudgment appeal. *See Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011). These factors are similar to a failure to afford procedural process, which is also a basis for certiorari review. *See* id. at 1134; *Act Servs., Inc. v. Sch. Bd. of Miami-Dade County*, 29 So. 3d 450, 452 (Fla. 3d DCA 2010); *Vasques v. Mercury Cas. Co.*, 947 So. 2d 1265, 1267 (Fla. 5th DCA 2007).

In the instant case, immediate review under section 120.68 or certiorari should be granted, because the ALJ departed from the essential requirements of law and failed to afford procedural due process, causing harm that cannot be remedied by reviewing the arbitration award following a final agency decision.

### A. The ALJ's order departed from the essential requirements of law

The ALJ departed from the essential requirements of the law by refusing to enforce or follow rule 60Q-3.025, Fla. Admin. Code. The Supreme Court has held that the essential requirements of law include procedural rules. *See Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003) ("These cases illustrate that 'clearly established law' can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law. Thus, in addition to case law dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review.").

The Division of Administrative Hearings was empowered by the Legislature to promulgate procedural rules for voluntary binding arbitrations. *See* § 766.207(9) ("The Division of Administrative Hearings is authorized to promulgate rules to effect the orderly and efficient processing of the arbitration procedures of ss. 766.201-766.212."); *see also Tallahassee Memorial Regional Medical Center, Inc., v. Kinsey*, 655 So. 2d 1191 (Fla. 1st DCA 1995) ("In fact, the Division of Administrative Hearings has adopted an entire chapter of detailed rules for arbitration pursuant to sections 766.207 through 766.212. Ch. 60Q-3, Fla. Admin. Code.").

The rules promulgated by the Division of Administrative Hearings are found in Chapter 60Q-3 of the Florida Administrative Code. These administrative rules were created pursuant to a delegation of legislative authority and thus have the force of law. *See Sw. Florida Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 598 (Fla. 1st DCA 2000) ("An administrative rule is valid only if adopted under a proper delegation of legislative authority."); *Whiley v. Scott*, 79 So. 3d 702, 710 (Fla. 2011) ("Accordingly, when an agency promulgates a rule having the force of law, it acts in place of the legislature.").

Rule 60Q-3.025(3) expressly prohibits parties from calling new witnesses at *any* assessment arbitration following a misarbitration. The language of rule 60Q-3.025(3) is not discretionary, and the ALJ is bound to follow it. Subdivision (3) of the rule provides as follows:

> (3) At any assessment arbitration hearing following misarbitration, no party may offer exhibits or call witnesses not offered or called at the assessment arbitration hearing preceding misarbitration, provided that the transcript of testimony given at a prior assessment arbitration hearing by a witness who is unavailable at a later hearing may be offered as an exhibit.

Fla. Admin. Code R. 60Q-3.025 (emphasis added). Defendants seek to enforce their procedural right to advance this case without the delay caused by Claimant calling new expert witnesses.

Claimant incorrectly contended below that rule 60Q-3.025 did not apply because the ALJ declared a misarbitration pursuant to section 766.21, Fla. Stat.

(*See* App. "D"). Claimant's argument is a distinction without a difference, because the statute and rule provide the same grounds for declaring an assessment misarbitration.[1]

Section 766.21(1) provides as follows:

> (1) At any time during the course of voluntary binding arbitration of a medical negligence claim pursuant to s. 766.207, the administrative law judge serving as chief arbitrator on the arbitration panel, if he or she determines that agreement cannot be reached, shall be authorized to dissolve the arbitration panel and request the director of the Division of Administrative Hearings to appoint two new arbitrators from lists of three to five names timely provided by each party to the arbitration. Not more than one arbitrator shall be appointed from the list provided by any party, unless only one list is timely filed.

§ 766.21(1), Fla. Stat. Similarly, rule 60Q-3.025, titled "Assessment Misarbitration" provides:

> (1) If no two members of the assessment arbitration panel can agree on an arbitration award, the chief arbitrator shall enter an order of misarbitration.
>
> (2) Within 20 days of an order of misarbitration, the parties shall nominate at least three but no more than five arbitrators other than an arbitrator from the proceeding which resulted in misarbitration by filing the nominees' names, addresses and telephone numbers, along with certificates, in the form set out in subsection 60Q-3.007(2), Florida Administrative Code. The Director shall appoint two nominees as arbitrators, provided that if more than one party complies

[1] "Assessment" is the phase of voluntary binding arbitration used to determine damages. The ALJ declared a misarbitration during the assessment phase in this case. After damages are determined and when there is more than one defendant, voluntary binding arbitrations enter a second allocation phase to apportion damages among defendants pursuant to section 766.208, Fla. Stat.

with this section within 20 days of an order of misarbitration, the Director shall appoint arbitrators nominated by different parties.

Rule 60Q-3.025 and section 766.21 both authorize the chief arbitrator to dissolve an arbitration panel during the assessment phase of arbitration when an agreement cannot be reached. Both provide that the Division of Administrative Hearings will then appoint two new arbitrators from lists supplied by the parties. Rule 60Q-3.025 implements the law in section 766.21 and supplies greater procedural detail for declaring assessment misarbitration under section 766.21. *See* Fla. Admin. Code R. 60Q-3.0025 ("**Credits** . . . Authority: 766.207(9), (10) FS. Law Implemented 766.201-212 FS.").

Rule 60Q-3.025 applies to any misarbitration declared during the assessment phase. Accordingly, since the ALJ entered a misarbitration under section 766.207 during the assessment phase the ALJ is also bound to follow rule 60Q-3.025 which provides more detailed procedures for dissolving the panel and resuming arbitration. However, even if section 766.21 and rule 60Q-3.025 provided different grounds for declaring an assessment misarbitration, rule 60Q-3.025(3) unambiguously applies to *any* assessment arbitration following misarbitration.

Accordingly, rule 60Q-3.025 applies in this proceeding, and the ALJ's order departed from the essential requirements of law by permitting Claimant to call new witnesses in violation of rule 60Q-3.025.

### B. The ALJ's order has resulted in material injury to the Defendants

The Defendants have suffered a material injury as a result of the ALJ's refusal to apply Rule 60Q-3.025, because they have been deprived of the expedited nature of the proceedings that parties to a statutory arbitration enjoy.

The ALJ's order permitting new witnesses causes delay, additional costs, and undermines the legislative purpose of voluntary binding arbitration under section 766.207 resulting in material harm to the Defendants.

Certiorari review of a trial court's denial of a motion to dismiss for failing to comply with medical malpractice presuit requirements may be granted when it is necessary to ensure that that the procedural aspects of the presuit notice requirements are met. *See Williams*, 62 So. 3d at 1137 ("Florida courts have permitted certiorari review solely to ensure that the procedural aspects of the presuit requirements are met."). Certiorari in this context is an exception to the general rule that certiorari is not available to review a trial court's motion to dismiss, and the rationale for this exception is "premised on the purposes of the Medical Malpractice Reform Act." *Id.* at 1133-34.

The Legislature expressed its findings and intentions regarding the Medical Malpractice Reform Act in section 766.201. *See William*, 62 So. 3d at 1133, n.1 ("The legislative purpose is described at length in the statutes. *See* § 766.201, Fla. Stat (2005)"). The Legislature intended to "provide a plan for prompt resolution of

medical negligence claims." *See* § 766.201(2). The plan consists of "two separate components, presuit investigation and arbitration." *Id.* Arbitration shall provide: "Substantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay." *Id.* Arbitration also places limitations on noneconomic damages which are intended to facilitate early resolution of medical negligence claims. *Id.* Voluntary binding arbitration under section 766.207 is intended to achieve the goals of reducing litigation costs by resolving claims quickly, i.e. reducing delay and facilitating early resolution. The mechanism for accomplishing these goals is procedural.

The Third District has explained that although the expense and inconvenience of additional litigation resulting from an error is not normally sufficient to grant certiorari, an exception may be made for actions under chapter 766. The Third District reasoned as follows:

> Certiorari review generally does not lie to review the denial of a motion to dismiss. Moreover, the mere expense and inconvenience of litigation does not constitute harm sufficient to permit certiorari review, even if the order departs from the essential requirements of the law. However, the Second District has held that certiorari is the proper method to test an order denying a motion to dismiss for failure to comply with the presuit notice requirement of section 766.106. The court reasoned in *Pearlstein* that where a trial court erred in failing to dismiss a medical malpractice complaint for failure to comply with presuit notice requirements, the error complained of could not be adequately remedied on appeal. Early intervention was necessary, in its view, to comply with the legislature's "perception of urgency" in enacting medical malpractice reform. We join the Second District and hold that, in this narrow context, we have certiorari jurisdiction to

> review the denial of a motion to dismiss for failure to comply with the presuit conditions of section 766.106.

*Miami Physical Therapy Associates, Inc. v. Savage*, 632 So. 2d 114, 115-16 (Fla. 3d DCA 1994) (internal citations omitted). More recently, the Supreme Court explained that the certiorari exception for the chapter 766 presuit requirements is premised on the purpose of the Medical Malpractice Act, which is ultimately intended to alleviate the costs of litigation and to encourage the resolution of meritorious claims through settlement. *See Williams*, 62 So. 3d at 1133 n.1.

The ALJ's order causes the same harm as that which occurs when a trial court improperly fails to dismiss a medical malpractice action for failure to comply with presuit. The order undermines the purposes of section 766.207 which is to reduce delay, litigation costs, and attorney's fees. Moreover, the procedural concerns that exist in the presuit context are heightened in the arbitration context, because under section 766.207 a defendant concedes liability and agrees to arbitration for the procedural benefits as described in section 766.201(2), earlier resolution of claims, reduction in delay, reduction in litigation costs, reduction in attorney's fees, and a cap on non-economic damages. *See St. Mary's Hosp., Inc. v. Phillipe*, 769 So. 2d 961, 962 (Fla. 2000) ("These are medical malpractice wrongful death cases in which the defendants conceded liability. The parties voluntarily chose to use a statutorily created binding arbitration process as an alternative to litigation to provide a faster, more efficient, and less costly means of

resolving the issue of damages."). Error of this kind, if permitted to go unchecked by immediate review discourages Defendants from resolving claims through arbitration under section 766.207 as there are no guarantees they will receive the procedural benefits in exchange for conceding liability.

In the trial context, courts have rejected the argument that the expense of continuing litigation is a sufficient basis for intermediate review, because the party may ultimately prevail on the issue of liability and render the point moot. *See Duncan v. United Auto. Ins. Co.*, 49 So. 3d 312, 314 (Fla. 3d DCA 2010) ("Instead, petitioner basically argues that we should grant the extraordinary and discretionary writ of certiorari to resolve a matter in which she may ultimately prevail without our interference. We decline to do so."). However, in section 766.207 arbitrations, procedural errors will not be rendered moot without intervention by a court, because defendants cannot ultimately prevail on the issue of liability. § 766.207, Fla. Stat.

Nor is this a situation where Defendant's statutory benefits will be preserved up through the time for plenary final review. Although courts generally will not find the expense of litigation a ground for irreparable harm, *see Dep't of Educ. v. Roe*, 679 So. 2d 756, 759 (Fla. 1996) ("In addition, although the state will have to bear the expense of continuing the litigation, the benefit of immunity from liability, should the state ultimately prevail on the sovereign immunity issue, will not be lost

simply because review must wait until after final judgment."), such rationale does not apply to voluntary binding arbitrations under section 766.207, because the Defendants have conceded liability in exchange for a reduction in delay and litigation costs. § 766.207, Fla. Stat. Accordingly, the statutory benefits to Defendants will be lost if the Court does not provide intermediate review. Thus, in the unique context of voluntary binding arbitration under section 766.207, additional litigation, additional attorney's fees, and delay are sufficient to warrant intermediate review, because the harm cannot be remedied by a review of the final agency action or arbitration award.

### C. The harm cannot be remedied on review of the arbitration award or appeal

Rule 60Q-3.025 is procedural and confers procedural benefits that will be forever lost if immediate review is not granted. Immediate review under section 120.68 or certiorari review is appropriate to protect the procedural rights of a party.

The Florida Supreme Court has held that certiorari review should be available to protect the procedural rights of a party in several contexts. *See Williams*, 62 So. 3d at 1134 (explaining that Florida courts have permitted certiorari review in the medical malpractice context in numerous cases, to "determine whether the defendant was afforded the proper process through procedural compliance with the statutory requirements"); *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 529-30 (Fla. 1995) (holding that in the context of

administrative law "a district court, upon review of a circuit court's judgment, determines whether the circuit court afforded procedural due process and applied the correct law"); *Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995) (holding certiorari should be granted when a trial court's ruling has failed to conform to the procedures established by section 768.72 for punitive damages).

In this case, the ALJ's order permitting Claimant to call new expert witnesses deviated from the required procedure for arbitration and deprived the Defendants of their procedural rights and the benefits of section 766.207. This cannot be corrected on plenary review.

The ALJ departed from the essential requirements of law by permitting Claimant to call new expert witnesses. The ALJ's order undermines the purposes of section 766.207 by causing delay, adding to litigation costs and attorney's fees. These harms will not be remedied upon review of the arbitration award. Therefore, this Court should grant review to protect Defendants' procedural rights under rule 60Q-3.025 and to ensure Defendants receive the benefits for which liability was conceded.

## II. Alternatively this Court should issue a writ of mandamus to compel the ALJ or Division of Administrative Hearings to enforce rule 60Q-3.025 and Defendant's procedural rights under the rule.

If the Court finds that there is no remedy available to Defendants under section 120.68 or as a writ of certiorari because relief will be afforded by review of

the arbitration award, then a writ of mandamus is appropriate to compel the ALJ to take immediate action. *See Agency for Health Care Admin. v. Mount Sinai Med. Ctr. of Greater Miami*, 690 So. 2d 689, 692 (Fla. 1st DCA 1997) (holding that a writ of mandamus was not improper to compel an ALJ to act, but that a writ of mandamus is improper when there is another adequate remedy under section 120.68); *see also State v. Murciano*, 163 So. 3d 662, 664 (Fla. 1st DCA 2015) ("In a procedurally similar case, this court found a petition for writ of mandamus challenging an ALJ's refusal to conduct a formal hearing was improper because a writ of mandamus should not be issued where there is an adequate legal remedy, and section 120.68(1) provides such a remedy.").

A writ of mandamus is appropriate to require an agency to enforce its own administrative rules. *See Putnam Cnty. Envtl. Council v. Johns River Water Mgmt. Dist.*, 168 So. 3d 296 (Fla. 1st DCA 2015) (noting that a writ of mandamus is used to compel an administrative agency or public officer to follow its own rules); *Young v. Lamar*, 115 So. 3d 1132 (Fla. 1st DCA 2013) (granting a petition for writ of mandamus to compel the executive director of an agency to follow Florida Administrative Code Rule 34-5.002). Accordingly, Defendants seek a writ of mandamus compelling the Division of Administrative Hearings to enforce rule 60Q-3.025, a rule which it promulgated.

Furthermore, a writ of mandamus may be issued to enforce a party's rights under the Florida Administrative Code. *See Tweed v. Sistrunk*, 697 So. 2d 888 (Fla. 5th DCA 1997) (issuing an alternative writ of mandamus to enforce a prisoner's right to property under Title 33 of the Florida Administrative Code); *Williams v. James*, 684 So. 2d 868 (Fla. 2d DCA 1996) (granting a writ of mandamus to enforce Florida Administrative Code Rule 33-22.007 regarding calling witnesses). Thus, Defendants alternatively seek a writ of mandamus to protect their procedural rights under the Florida Administrative Code.

## CONCLUSION

WHEREFORE, Petitioners/Defendants, Plantation General Hospital, Andrew Agbi, D.O., EHRA Medical Services of Florida, P.A., and Agbi Healthcare, Inc., respectfully request that the Court exercise its jurisdiction to provide immediate review of an ALJ's order under section 120.68, or its certiorari jurisdiction, or to issue a writ of mandamus, and quash the order entered by the ALJ below remanding the case and compelling enforcement of rule 60Q-3.025.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **24th** day of **June, 2016**, the foregoing was filed using Florida's E-Filing Portal and a true and correct copy was served by **e-mail** on: Bonnie Navin, Esq., Kelley Uustal, PLC, 700 S.E. 3rd Avenue, Suite 3300, Ft. Lauderdale, FL 33316, ban@kulaw.com; Carol Glasgow, Esq., Billing, Cochrane, Lyles, Mauro & Ramsey, P.A., 515 E. Las Olas Blvd., 6th Floor, Ft. Lauderdale, FL 33301, cjg@bclmr.com and via Federal Express on: Judge June C.

Mckinney, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060.

By: s/ Dinah Stein
DINAH STEIN
Florida Bar No. 98272

## CERTIFICATE OF COMPLIANCE

This petition complies with the font requirements. It is typed in Times New Roman 14 point, proportionately spaced type.

By: s/ Dinah Stein
DINAH STEIN
Florida Bar No. 98272

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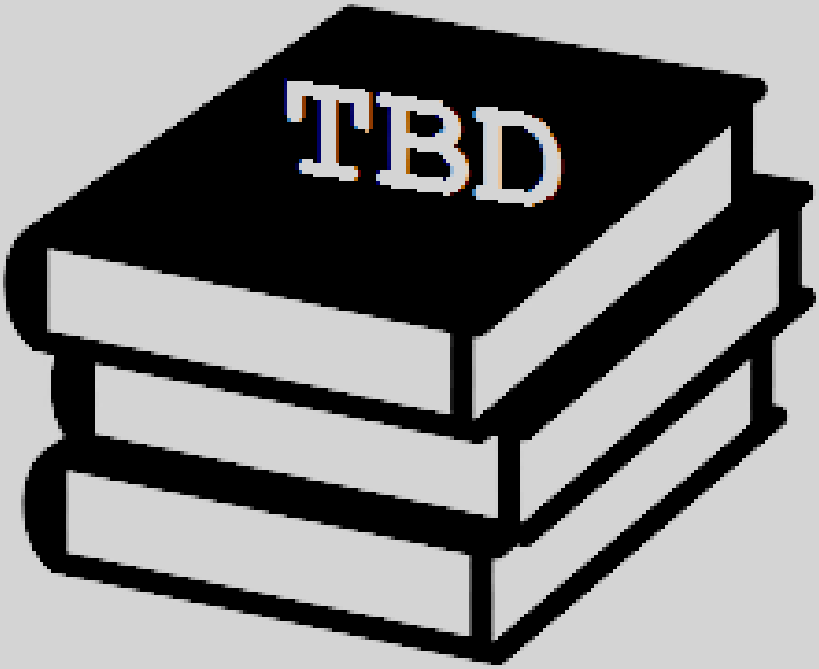


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