IN THE SUPREME COURT OF FLORIDA

TUYUANA MORRIS, as Personal Representative of the Estate of SHUNTERIA S. McINTYRE, deceased,

Petitioner,

v.

ORLANDO S. MUNIZ, M.D., et al.,

Respondents.

Case No.: SC16-931
L.T. No.: 1D14-3987
2011-000953-CA

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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REPLY ARGUMENT

Despite the plain language of the statute, the preferred construction "favor[ing] access to courts," *Patry v. Capps*, 633 So. 2d 9, 13 (Fla. 1994), and the evidence Plaintiff alone presented, Defendants still maintain that Dr. Thompson was not qualified to serve as a presuit expert. But they presented no evidence to contradict Dr. Thompson's repeated statements that she, a board-certified 30-year OB/GYN, provided full-time patient care through March 2008. Defendants thus must rely on either the accusation that Dr. Thompson committed perjury in explaining that she practiced medicine while she attended law and graduate school or that section 766.102, Florida Statutes, requires more than it says. Their arguments and the lower courts' adoption of them have deprived Plaintiff of her right to access the courts. Under any review standard, reversal is warranted.

Initially, Defendants make the same arguments for discharging jurisdiction that they argued in their response brief on jurisdiction. Then, as now, they do not demonstrate that the First District's decision was remotely in line with numerous cases regarding the trial court's role in evaluating the unrefuted qualifications of a presuit expert or the longstanding policy that a case should not be dismissed for an attorney's failure to comply with discovery demands absent a finding of prejudice.

Indeed, as to the proper standard of review regarding Dr. Thompson's qualifications, Defendants do not even agree with the First District's application of

abuse of discretion. *Morris v. Muniz*, 189 So. 3d 348, 351 (Fla. 1st DCA 2016). Each defendant contends the standard is competent, substantial evidence. (Drs. Br. 24, GCMC Br. 23, JH Br. 29.)[1] Meanwhile, their amicus states that the abuse of discretion standard should apply. (FDLA Br. 16.)

GCMC again states, as it did in its response brief on jurisdiction, that the First District applied the competent, substantial evidence standard because it noted that "ample" evidence supported the trial court's decision. (GCMC Br. 23.) But that contention is belied by the conclusion of the opinion, where the First District stated "the court did not abuse its discretion" and affirmed the dismissal. *Morris*, 189 So. 3d at 351.

And no defendant cites a case applying either the abuse of discretion standard or the competent, substantial evidence standard where, as here, Defendants rely only on their incredulity at the expert's qualifications to justify dismissal. Instead, the proper review standard where qualifications are unrefuted is de novo. The First District's failure to apply this standard rendered its decision in conflict with *Holden v. Bober*, 39 So. 3d 396, 400 (Fla. 2d DCA 2010), *Edwards v. Sunrise Ophthalmology Associates, Inc.*, 134 So. 3d 1056, 1057 (Fla. 4th DCA

[1] "Drs. Br." refers to the Answer Brief of Drs. Smith and Muniz, and Marianna OB/GYN Assocs. "GCMC Br." refers to the Answer Brief of Bay Hospital D/B/A Gulf Coast Medical Center. "JH Br." refers to the Answer Brief of Jackson Hospital. "FDLA Br." refers to the amicus brief of the Florida Defense Lawyers Ass'n. "FJA Br." refers to the amicus brief of the Florida Justice Ass'n.

2013), and *Apostolico v. Orlando Regional Health Care Systems, Inc.*, 871 So. 2d 283, 285-86 (Fla. 5th DCA 2004).

As to the secondary discovery issues that were raised as a basis for conflict, Defendants again fail to make any argument different from their response brief on jurisdiction. In conflict with every other case on this issue, no one—not the trial court, the district court, or Defendants—has yet indicated what prejudice Defendants suffered due to Plaintiff complying with both the law and the trial court's limited discovery order regarding her expert's qualifications.

I. THE PARTIES FUNDAMENTALLY DISAGREE ABOUT WHAT THE STATUTE REQUIRES OF A PRESUIT EXPERT.

Plaintiff explained at length why de novo review is required in her initial brief, and it was not due to the fact that this is an appeal of an order granting a motion to dismiss. Instead, it is the "nature of the adjudication" and the fact that Dr. Thompson's qualifications were unrefuted. (Init. Br. 21-26.) Similarly, FDLA's amicus brief notes that "[i]f the qualifications of the presuit affiant are not in doubt, then the exercise is simply one of statutory construction and interpretation based on a clear record." (FDLA Br. 13.)

Even in the case relied on by Defendants, the Fifth District determined that the trial court's conclusion that a presuit expert was not qualified was correct as to the "law governing corroborating affidavits." *Yocom v. Wuesthoff Health Sys., Inc.*, 880 So. 2d 787, 790 (Fla. 5th DCA 2004). The competent, substantial evidence

standard applied not to the qualified expert determination, but rather as to whether the defense in that case waived the affidavit requirement. *Id.*; (Init. Br. 24-25).

As noted next, Defendants cannot identify any evidence that shows Dr. Thompson is unqualified. Consequently, their dispute with Plaintiff's argument must lie in one of two conclusions. First, their assertion may be based on a strained interpretation that would read into the statute a requirement that "active clinical practice," § 766.102(5)(a)2.a., Fla. Stat (2011), means a devotion of substantial time at some level greater than 50 hours per week. Alternatively, they must conclude that Dr. Thompson is lying about or completely misremembering her activities from the three years before the incidents here. But their speculation is not proof that would refute Plaintiff's sworn evidence or create a fact question.

II. ALL THE EVIDENCE SHOWED DR. THOMPSON MET THE REQUIREMENTS TO SERVE AS A PRESUIT EXPERT ON OB/GYN CARE UNDER SECTION 766.102.

For a presuit expert in the same specialty as the defendant doctor, the plain language of section 766.102(5)(a)2.a., requires only that the expert "devote[] professional time" to "active clinical practice" in the three years preceding the medical malpractice. It does not say "substantial," *cf.* § 766.102(9)(a), Fla. Stat., nor does it set forth any minimum requirements for what "professional time" or "active" practice means.

The Legislature has sought to draw a line that ensures medical malpractice

suits are corroborated by an expert with current knowledge of the particular practice at issue. Someone who practiced only long before or only long after an incident cannot be a reliable source of what the standard of care was, and the Legislature is charged with drawing the appropriate line. If Dr. Thompson had retired 2 years and 364 days before the incident, practicing as an OB/GYN only one day in the period, she would meet the Legislature's terms. But had she retired 3 years and 1 day before the incident, never seeing another patient again, she would not. Defendants, however, have offered no basis in the plain language of the statute or a tenet of statutory construction to support their reading that the statute requires an expert to have practiced around the clock or to have no activities outside of the medical practice.

A. There is no question that in her affidavit, Dr. Thompson made clear that she was seeing patients full-time and was a board-certified OB/GYN. (*E.g.*, R:63.) Contrast these circumstances to the affidavit in *Bery v. Fahel*, 88 So. 3d 236, 237 (Fla. 3d DCA 2011), where it was evident from the face of the affidavit that a board certified emergency room doctor sought to serve as an expert regarding a different specialty (family practice).

Moreover, in her CV, Dr. Thompson noted that she had been President at "North Austin Obstetrics and Gynecology" from 2003 till the present and had stopped active practice in March 2008. (R:313.) Yet somehow, Defendants want

this Court to doubt what specialty Dr. Thompson was practicing, as if she suddenly was practicing dermatology only in her final years at her OB/GYN practice.

But all the doubts Defendants strive to inject into this case about Dr. Thompson's practice never demonstrate that she does not meet the statutory terms. It does not matter that she retired nine months before Ms. McIntyre's death—even the trial court recognized that debate to be "a legal issue." (R:964.) The undisputed facts show only that she practiced as an OB/GYN while attending law and graduate school in the three years before the medical malpractice in this case.

One defendant argues that Dr. Thompson's CV cannot be relied on because it was not verified. (GCMC Br. 35.) But only the medical expert's written opinion must be verified under the statute. § 766.203(2), Fla. Stat. (2011). Nothing requires verification of the expert's qualifications.

B. Similarly, the only doubts Defendants raise about the deposition testimony again go to the question of what the statute requires, not what Dr. Thompson's qualifications were. Whether the fact that Dr. Thompson took call only 2-3 times per month and often studied when she was not tending to patients is not in dispute. Defendants concede this, but contend that because her call "overlapped with her time as a full time law student" (GCMC Br. 13) or that "sometimes she studied while" at the hospital (Drs. Br. 11), she was somehow disqualified. That contention is unsupported by the statute.

Other arguments are completely belied by the actual testimony, as when Defendants claim there were internal inconsistencies in the deposition as to whether Dr. Thompson took afternoon classes at law school. But she explained, on the very pages cited by Defendants no less, that she took only morning classes in her first year of law; her afternoon and evening classes thus must have been in the final two and a half years she was in law school. (R:551, 558, 574-75.) And even had she misspoke about when her classes took place, that has nothing to do with whether she was actively practicing medicine too.

Further, Defendants insinuate that Dr. Thompson must not have actively taken part in her call responsibilities, since she contracted with Dr. Sebestyn to cover some of her nights. But Dr. Thompson stated that she was only on call 2-3 times a month for "unassigned patients who showed up at the hospital emergency room," while she saw and was on call for her own patients on multiple days a month. (R:580-82; *see also* R:536.) Dr. Sebestyn was contracted to help with the latter group. (R:578.)

Similarly, Dr. Thompson never stated her arthritis made it impossible for her to work in her final years of medical practice, but that "it only started getting severe enough that [she] was having problems in the two years or so before [she] retired." (R:557.) That says nothing of her ability to see patients or take call for OB patients in the emergency room during that time, which she unequivocally

confirmed she did. Finally, her work as an OB/GYN expert for the Texas Medical Board did not begin until 2009, after she had stopped practicing. (R:556.)

Lacking any evidence to contradict Dr. Thompson's multiple statements, what Defendants seek is to have this Court impose requirements on a plaintiff's presuit expert that are not present in the statute. (FJA Br. 3.) This the Court cannot do. *See Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 512 (Fla. 2008) ("It is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature.") (internal quotation marks and citation omitted). For example, GCMC argues that the statute required Dr. Thompson to provide information "regarding the regularity of her work," when the statute says nothing of the sort. (GCMC Br. 3.)

One defendant continues to assert Plaintiff failed to object to the hearing (JH Br. 3, 34), but the record shows otherwise, as Plaintiff's counsel repeatedly stated that Dr. Thompson's qualifications were established by her affidavit and CV. (*E.g.*, R:234, 252, 254, 255, 985-86, 991-92, 1017-18, 1021, 1034.) As for whether holding a hearing in this case was proper in the first place, that depends on whether the affidavit and CV sufficed to show Dr. Thompson's qualifications. That decision is reviewed de novo, *Oliveros v. Adventist Health Sys./Sunbelt, Inc.*, 45 So. 3d 873, 876-77 (Fla. 2d DCA 2010), in contrast to the unrelated case law another defendant cites in arguing for an abuse of discretion standard. (GCMC Br.

29.) The deposition of Dr. Thompson was neither supported nor contemplated by Chapter 766, Florida Statutes, or Florida Rule of Civil Procedure 1.650 given that the affidavit on its face showed Dr. Thompson's qualifications.

Two of the defendants also assert that Dr. Thompson failed to show she was qualified to render an opinion because she failed to show she had evaluated, diagnosed, or treated conditions similar to those suffered by Ms. McIntyre. (JH Br. 33, 37; Drs. Br. 26-30.) But the portion of the statute that required that information only made it a requirement for **similar** specialties; no such showing is required of an expert in the **same** specialty as the defendant. § 766.102(5)(a)1., Fla. Stat. (2011). In fact, all portions of the statute permitting a similar specialty doctor to serve as an expert have since been deleted by the Legislature, along with the requirement that experts show that they evaluated, diagnosed, or treated the same claim. Ch. 2013-108, § 2, Laws of Fla. The deletion of both demonstrates that this additional requirement applied only to doctors in similar, and not the same, practices. *See Leftwich v. Fla. Dep't of Corr.*, 148 So. 3d 79, 83 (Fla. 2014) ("a statutory amendment may be relevant to a determination of the intent behind the previous statute"). And this reading is in accord with the plain language, specifically the use of a semicolon in (a)(1) and the disjunctive "or" in both (a)(1) and (a)(2), which demarcated a difference between same versus similar. In any event, Dr. Thompson showed she met the requirement. (R:595-96, 603.)

Defendants presented no evidence about Dr. Thompson's qualifications or clinical practice. So even if the Court resolves the conflict issue regarding the appropriate standard of review in Defendants' favor, reversal is warranted because there is no competent, substantial evidence that supports Defendants' necessary position that Dr. Thompson lied about practicing in the relevant years. All agree on what Dr. Thompson averred her experience to be; Defendants put forth only that her additional schooling "called into doubt whether she could have engaged in her medical profession very much at all during the three years prior to the decedent's death." (JH Br. 33.) Contrary to their contentions, therefore, and consistent with the facts in *Oliveros*, Plaintiff's "expert's background and experience were unrefuted." (GCMC Br. 33.)

C. As for Dr. Thompson's qualifications to opine on the standard of care for nurses and hospital staff, Defendants cite no additional case law on this issue. The statutory constraints only require that a physician meet the requirements of section 766.102(5) and have "knowledge of the applicable standard of care for nurses … or other medical support staff." § 766.102(6), Fla. Stat.

The hospitals' claim that the facts cited by Dr. Thompson's affidavit were not enough to show her knowledge lacks support. (GCMC Br. 35.) The statute does not require any particular magic words. Their reliance on *Largie v. Gregorian*, 913 So. 2d 635, 639 (Fla. 3d DCA 2005), is misplaced—there, multiple

defendants were covered by one affidavit, with no reference at all to the nurse practitioner. Indeed, the nurse practitioner was not even served initially with the notice of intent or corroborating affidavit. *Id.* at 637. The Third District distinguished cases that concern "whether a defendant named in both the notice and the affidavit received sufficient information to respond" from the more egregious failings before it. *Id.* at 640 (citing *Maldonado v. EMSA Ltd. P'ship*, 645 So. 2d 86, 89 (Fla. 3d DCA 1994)); *see also Davis v. Orlando Reg'l Med. Ctr.*, 654 So. 2d 664, 665-66 (Fla. 5th DCA 1995) ("In many cases it would be virtually impossible for a medical malpractice plaintiff to identify every possible instance of medical negligence at the pre-suit stage.").

Here, separate affidavits detailing the failings of each defendant hospital's staff were filed, stating that hospital staff "deviated from the prevailing professional standard of care in the community for a similarly trained hospital and staff." (R:66, 163.) But more importantly, the question decided by the trial court was not whether the claims stated a basis for relief, but whether Dr. Thompson had knowledge sufficient to qualify her as an expert on the standard of care for hospital staff dealing with an OB patient. *See, e.g., Baptist Med. Ctr. of the Beaches, Inc. v. Rhodin*, 40 So. 3d 112 (Fla. 1st DCA 2010) (corroborating affidavit shows reasonable grounds for pursuing action, "not proof after a mini-trial of actual malpractice on the facts presented"); (FJA Br. 8-12 (detailing oft-conflated but

separate requirements of reasonable basis and reasonable investigation)).

In addition to her affidavit and CV, Dr. Thompson's deposition left no doubt that she was knowledgeable about the standard of care for hospital staff treating an OB patient. One of the defendants confusingly suggests that Dr. Thompson did not meet the requirements because she had "no direct supervisory role over hospital nurses in the ER or on the OB floor **other than** general supervision while working with them together on a patient." (JH Br. 38 (emphasis added).) The other hospital defendant claims that Dr. Thompson never stated that she had knowledge of the standard of care (GCMC Br. 37), but that is inaccurate. Dr. Thompson stated that she was qualified to render an opinion on the standard of care for an emergency room nurse treating a pregnant patient like Ms. McIntyre. (R:604-05.)

III. THE RECORD REFLECTS PLAINTIFF COMPLIED WITH REASONABLE DISCOVERY DEMANDS AND THAT NO PREJUDICE RESULTED FROM ANY ALLEGED FAILURE.

First, this Court should not reach this issue at all, because Dr. Thompson's affidavit and CV sufficed as a matter of law to show she was qualified to render an opinion about the defendants in this case. Thus, there was never a need for discovery or a deposition to further establish her qualifications.

Second, if the Court disagrees, it is clear that the only discovery relevant to the trial court's dismissal was that related to Dr. Thompson's qualifications. (R:745 ("the record establishes scant additional information about the specific

qualifications of Dr. Thompson"); *Morris*, 189 So. 3d at 351 ("appellant's lack of cooperation with appellees' attempts to **verify the expert's qualifications** merited dismissal") (emphasis added). Thus, much of the material Defendants claimed to have sought and failed to obtain is not properly considered here. (GCMC acknowledged this at the First District. (SCR Tab E at 29-30.)) Whether Plaintiff complied with requests regarding the deposition of Ms. McIntyre's grandmother (GCMC Br. 5) or sent information about Ms. McIntyre's financial information (JH Br. 7, 43), is irrelevant to whether Dr. Thompson was a qualified pre-suit expert.

And Plaintiff did comply with many discovery requests. She documented those good faith efforts in her motion for rehearing, including providing interrogatory responses when possible, providing numerous medical authorizations, agreeing to permit unsworn statements of the medical examiner, and even making Ms. McIntyre's grandmother available for unsworn testimony. (R:754-64, 774-76.) As to requests regarding Dr. Thompson's qualifications, many would have required Dr. Thompson to expend substantial time researching old files, documents, and records. (R:758-59.) Even though Dr. Thompson's affidavit and CV showed she was qualified, Plaintiff's counsel responded to the requests, but explained that he believed under Florida Rule of Civil Procedure 1.650(c)(2)B, the requesting party should bear the expense of such detailed discovery. (R:776.) Plaintiff did not receive confirmation that Defendants would bear that expense.

As to materials sought at the deposition, the initial brief explains that Plaintiff had provided Ms. McIntyre's medical records and a list of cases in which Dr. Thompson had served as an expert in response to requests for interrogatories, rendering those repeat requests duplicative. (Init. Br. 39.) Additionally, questions regarding "whether petitioner's claim rests on a reasonable basis" were beyond the permissible scope of discovery at this stage under both the trial court's limited order and the law. *Watkins v. Rosenthal*, 637 So. 2d 993, 994 (Fla. 3d DCA 1994). Such depositions threaten to violate the principle that no work product, document, or report generated during presuit is discoverable. § 766.205(4), Fla. Stat. (2011).

Thus, if the Court reaches the question of whether Plaintiff's actions were reasonable and in good faith, the record shows that they were. Defendants assert that Plaintiff failed to contest the trial court's findings. (Drs. Br. 8.) But that argument is belied by Plaintiff's stance throughout the proceedings, culminating in her argument on rehearing: "Dismissal of the Plaintiff's case after her good faith participation in presuit and meeting all the statutory requirements, including serving a fully verified corroborating medical expert opinion in support of her claim does not further the legislative intent of the medical malpractice statute." (R:776.) She also noted that she planned to retain appellate counsel and file an amended motion for rehearing (R:778), but the trial court denied her motion just three business days later (R:953).

Even though her rehearing motion did not cite *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993), and if this Court agrees that a trial court can dismiss without considering those factors if the plaintiff does not ask explicitly, that procedural issue should not detract from the improper dismissal. Plaintiff's rehearing motion showed she complied with reasonable discovery requests. She argued that dismissal was too harsh a remedy, threatening to deprive her of access to the courts. (R:776.) Her conduct in following the directions of the law and the trial court's limited order does not come close to the serious violations that have warranted dismissal. *See Bartley v. Ross*, 559 So. 2d 701, 702 (Fla. 4th DCA 1990) (citing "complete failure to comply with pre-suit discovery procedures").

Finally, no prejudice other than delay of this case has ever been explained by Defendants. The sufficiency of the information provided by Plaintiff "is demonstrated by [Defendants'] response to the notice with an affidavit stating that [they were] not negligent. Clearly, if [Defendants] did not have sufficient information to evaluate the merits of the claim[s, they] would have been unable to provide a responding affidavit." *Maldonado*, 645 So. 2d at 89. Most of the delay in this case at this point has been wrought by having to litigate the straightforward legal issue of Dr. Thompson's unrefuted qualifications. And that is an issue that never should have been a blockade to this case's entry to the courthouse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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