IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

CASE NO. SC16-931

v.

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

Respondents.

BRIEF OF AMICUS CURIAE FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF THE RESPONDENTS

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STATEMENT OF IDENTITY AND INTEREST

The Florida Defense Lawyers Association ("FDLA") was founded in 1967 and is currently comprised of more than 1,000 attorneys, although throughout its tenure it has been comprised of many thousands of attorneys, practicing law primarily focused in civil litigation. Among its multiple mission statements, the FDLA strives to promote "fairness and justice" in the law for all parties. http://fdla.org/about.php. The FDLA maintains an active amicus committee consisting of attorneys who volunteer their time, skills and effort to the analysis of important legal issues that impact the administration of justice in matters pending before the state and federal courts.

The drafters of this brief have also devoted their professional careers to the practice of both appellate and medical malpractice law. Kansas Gooden is a Board Certified Appellate attorney with Boyd & Jenerette, who has represented multiple clients before the Florida Supreme Court, the District Courts of Appeal and Florida's Federal Courts. http://www.boydjen.com/attorneys/kansas-r-gooden/. Travase Erickson is a Shareholder with the Saalfield Shad Law Firm, and he has personally dedicated his practice to the representation of hospitals, physicians and other healthcare providers in the circuit courts and the District Courts of Appeal. http://www.saalfieldlaw.com/travase_erickson.html. From its inception in 1989, the Saalfield Shad Law Firm has also been largely focused on the

representation of healthcare providers throughout North and Central Florida, including hospitals and individual practitioners. http://www.saalfieldlaw.com/about.html.

This case has statewide importance and will impact the FDLA members' clients. The FDLA is uniquely situated to provide this Court with input on the far-reaching impact that a decision from the Court could have. The FDLA has a deep and abiding interest in this case, because it addresses two of the most fundamental aspects of the medical malpractice presuit screening process: the necessity that prospective lawsuits be supported in presuit by qualified expert affiants to ensure that they are not merely frivolous and the ability of the litigants to engage in a meaningful exchange of discovery, both during presuit and, where there is a question of presuit non-compliance, in the circuit court. Where, as here, those goals are deliberately obstructed during the presuit process and are then willfully disobeyed, despite a trial court Order, this Court must affirm the authority of the trial court to impose sanctions that are necessary to preserve the integrity and intent of the presuit screening process. §§ 766.106(7), 766.205(2), and 766.206(2), Fla. Stat. A ruling otherwise will render presuit an "empty requirement," reminiscent of the pre-1988 version of these statutes. *See Cohen v. Dauphinee*, 739 So. 2d 68, 70 – 71 (Fla. 1999).

SUMMARY OF THE ARGUMENT

The trial court and the First District rendered decisions consistent with Florida's Medical Malpractice Act ("MMA"), §§ 766.101, *et seq.* If this Court does not simply discharge jurisdiction because of the absence of a conflict, then it should affirm the First District on an abuse of discretion standard of review. *Yocom v. Wuesthoff Health Sys., Inc.*, 880 So. 2d 787, 789 (Fla. 5th DCA 2004) (noting in similar circumstances that "fact finding comes to this court bearing the presumption of correctness"); *Derespina v. N. Broward Hosp. Dist.*, 19 So. 3d 1128, 1130 (Fla. 4th DCA 2009) (writing that "the trial court's conclusion that the investigation of malpractice conducted by the plaintiff did not constitute the reasonable investigation contemplated by the statute was not an abuse of its discretion") (emphasis added); *Ham v. Dunmire*, 891 So.2d 492, 495 (Fla. 2004) ("It is well settled that determining sanctions for discovery violations is committed to the discretion of the trial court, and will not be disturbed . . . absent an abuse of the sound exercise of that discretion.") (emphasis added).

At the heart of the MMA and its "reasonable investigation" mandate rests the necessity of a prospective plaintiff to secure a verified written opinion supporting the allegations of medical negligence from a "medical expert" as defined in §§ 766.102 and 766.202(6), Fla. Stat. §§ 766.102(5)(a), 766.202(6), and

766.203(2), Fla. Stat.; *Cohen v. Dauphinee*, 739 So. 2d 68, 71 (Fla. 1999), 739 So. 2d at 71 ("At the heart of the presuit investigation amendments was the requirement that an expert's affidavit be obtained."). The requirement of a verified written opinion from a qualified medical expert accomplishes "one of the primary thrusts of Florida's statutory medical malpractice scheme[, which] is to 'weed out' cases which are not, even prima facie, supported by some reliable independent indication of their merits." *Winson v. Norman*, 658 So. 2d 625, 626 (Fla. 3d DCA 1995) (citing *Ingersoll*, 589 So.2d 223).

When the qualifications of a presuit affiant are called into doubt, the MMA enables the litigants and the trial court to engage in discovery of and, when necessary, to test the sufficiency of the affiant's qualifications. §§ 766.106(6), 766.203(4), 766.205(1), 766.206(1) – (3), Fla. Stat. If the trial court determines within its broad discretion that there were discovery violations or finds insufficient evidence to substantiate that an affiant meets the prerequisites of §§ 766.102 and 766.202(6), Fla. Stat., then it may exercise the broad authority granted to it under §§ 766.106(7), 766.205(2) and 766.206(2), Fla. Stat. §§ 766.106(7), 766.205(2) and 766.206(2), Fla. Stat.

In this case, the trial court rightly found upon holding an evidentiary hearing that the Petitioner first delayed and then repeatedly obstructed discovery regarding her affiant's credentials, and, as a result, that there was insufficient evidence to

corroborate that a "reasonable investigation" had been performed to confirm that there was a good faith basis for the claims of alleged medical negligence. §§ 766.205(2) and 766.206(2), Fla. Stat.; *see, e.g.*, *Wolford v. Boone*, 874 So. 2d 1207, 1210 (Fla. 5th DCA 2004) (noting that it is the uncooperative party that has the "burden . . . to demonstrate how its failure to comply with the statute's pre-suit requirements did not frustrate the statute's goals or prejudice the opposing party") (emphasis added). Under these circumstances, the trial court appropriately exercised its authority under §§ 766.106(7), 766.205(2) and 766.206(2), Fla. Stat., and the First District rightly affirmed the order on appeal. If this Court elects to continue with this appeal, then it should do the same, and reaffirm that the MMA is not merely a set of "empty requirement[s]." *Cohen*, 739 So. 2d at 71.

ARGUMENT

THE TRIAL COURT'S ORDER AND THE FIRST DISTRICT COURT OF APPEAL'S DECISION PRESERVED THE INTEGRITY OF THE MEDICAL MALPRACTICE PRESUIT SCREENING PROCESS:

SCREENING OUT CLAIMS THAT LACK EXPERT CORROBORATION AND PREVENTING A LITIGANT FROM OBSTRUCTING DISCOVERY AND INTENTIONALLY FRUSTRATING THE PRESUIT OBLIGATION TO ENGAGE IN A FREE AND OPEN EXCHANGE OF INFORMATION

I. The Medical Malpractice Presuit Statutes And Their History

In 1985, the Legislature first ratified the predecessor statutes that eventually formed the basis of the Medical Malpractice Act ("MMA"). *Cohen v. Dauphinee*, 739 So. 2d 68, 70 (Fla. 1999). These statutes were "enacted because the Florida Legislature recognized that large medical malpractice recoveries had caused medical malpractice liability insurance premiums to rise, thereby causing medical care costs to patients to increase and making medical malpractice liability insurance unavailable to some doctors." *Michael v. Med. Staffing Network, Inc.*, 947 So. 2d 614, 618 (Fla. 3d DCA 2007).

In order to address these issues, the MMA was designed to "eliminate frivolous claims," *Barlow v. N. Okaloosa Med. Ctr.*, 877 So. 2d 655, 657 (Fla. 2004), and to "establish 'a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding.'" *Archer v. Maddux*, 645 So. 2d 544, 546 (Fla. 1st DCA 1994) (citing and quoting *Williams v. Campagnulo*, 588 So.2d 982, 983 (Fla.1991) and *Ingersoll*

v. Hoffman, 589 So.2d 223 (Fla.1991)); *see also Walker v. Virginia Ins. Reciprocal*, 842 So. 2d 804, 809 (Fla. 2003) (remarking that "the legislative intent of both statutes is to avoid lengthy litigation of claims and the associated costs of such litigation" and parenthetically "explaining that the notice requirement in section 766.106(2) 'established a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding'") (citing and quoting *Kukral v. Mekras*, 679 So.2d 278, 280 (Fla.1996)).

When it was first enacted, the MMA required that prospective defendants receive advance notice of the intent to sue, but that plaintiffs merely "certify in their complaints that they had conducted a reasonable investigation resulting in a good faith belief that sufficient grounds existed to support the filing of the action." *Cohen*, 739 So. 2d at 70. Plaintiffs were permitted to substantiate their "good faith" beliefs simply by obtaining a "written opinion from an expert that sufficient grounds existed to support the filing of the action." *Cohen*, 739 So. 2d at 70. However, a written opinion was <u>not</u> required. *Id.* Moreover, the plaintiff was not obliged to engage in presuit discovery or to provide the prospective defendants with the "good faith" foundation for the claims of negligence. *Id.*

"Responding to complaints that [<u>these were</u>] <u>empty requirement</u>[<u>s</u>]," the Legislature amended the MMA in 1988 and adopted formal "presuit investigation"

procedures. *Id.* at 71 (emphasis added). In the three decades that have followed, and in the midst of multiple amendments and a great many opinions issued by this Court and the District Courts regarding the application, scope and effect of the MMA, the core responsibilities of a prospective plaintiff under the presuit provisions in the MMA have remained largely consistent:

1. Before serving a notice of intent to a prospective defendant, conduct a reasonable investigation to establish a good faith belief that sufficient grounds existed to support a claim for medical negligence; and

2. In conjunction with serving a notice of intent on a prospective defendant, provide to the prospective defendant "a written opinion from an expert" that substantiates the "good faith belief" that there was medical negligence.

Cohen, 739 So. 2d at 70. "Florida courts have consistently affirmed the importance of an appropriate verified medical expert opinion as a prerequisite to file suit for medical malpractice." *Oken v. Williams*, 23 So. 3d 140, 147 (Fla. 1st DCA 2009), *decision quashed on procedural but not substantive grounds*, 62 So. 3d 1129 (Fla. 2011). In the *Oken* decision, the First District reinforced a well-recognized principle of the MMA, writing that:

> One clear purpose of requiring corroboration is to spare all parties (not to mention the judiciary) the time and expense of litigating spurious clams. The expert opinion requirement is designed "to prevent the filing of baseless litigation . . . [and] to corroborate that the claim is legitimate." No party should be called on to defend at trial against allegations no competent witness can be found to support.

Id. (emphasis added and citing and quoting *Archer*, 645 So.2d at 546 – 47. Of course, prospective defendants have reciprocal and equal responsibilities under the MMA to conduct a reasonable, good faith investigation to confirm that there does not appear to have been medical negligence causing injuries and to support the conclusions of that investigation with the verified opinion of an expert affiant. § 766.203(3), Fla. Stat.

Equally-important to the initial investigation and corroboration of the claims made is the responsibility of the parties to engage during the presuit process in meaningful discovery. § 766.205(1), Fla. Stat. ("[E]ach party shall provide to the other party reasonable access to information within its possession or control in order to facilitate evaluation of the claim.") (emphasis added). Importantly, that includes discovery not only set forth in § 766.106(6), Fla. Stat., but also answering questions about the presuit expert affiant's opinions. *See* §§ 766.106(6) and 766.203(4), Fla. Stat. ("The medical expert opinions required by this section are subject to discovery.").

More than twenty years ago, this Court similarly recognized that one of the pillars in enacting the MMA was "requiring the parties to engage in meaningful presuit investigation, discovery and negotiations." *Kukral*, 679 So. 2d at 284. Failing and refusing to do so is grounds for sanctions, including dismissal. §§ 766.106(7), Fla. Stat. ("Failure to cooperate on the part of any party during the

presuit investigation may be grounds to strike any claim made, or defense raised, by such party in suit."); and 766.205(2), Fla. Stat. ("[F]ailure to so provide [discovery] shall be grounds for dismissal of any applicable claim or defense ultimately asserted.").

Nearly thirty years after the MMA was first enacted, some of its successes are readily quantifiable when the litigants engage in meaningful compliance with the MMA's investigation and reciprocal discovery procedures. For example, the Division of Administrative Hearings catalogues every matter in which a claim for medical malpractice has resulted in an admission of liability under § 766.106(3), Fla. Stat., and an agreement to voluntarily arbitrate under § 766.207, Fla. Stat. Division of Admin. Hearings, https://www.doah.state.fl.us/ALJ/searchDOAH/ (last visited on June 18, 2017). At the time that this brief was drafted, there were 327 catalogued medical malpractice arbitrations with the Division of Administrative Hearings. *Id.* Each one of those matters will have resolved without the need for the filing of a complaint, the litigation of protracted motion practice, the retention and depositions of standard of care and causation experts, and potentially the setting of and/or the actual trial of the case, among a great many other costs and expenses that would have been necessarily avoided by voluntary arbitration. *Id.*

Although less quantifiable, but anecdotally verifiable, the MMA presuit processes have also resulted many times in presuit negotiated settlements and, at

times, the outright abandonment of a claim by a prospective plaintiff who freely exchanged discovery with a prospective defendant, as the MMA contemplates, and found on further review that the claim was lacking. *Cohen*, 739 So. 2d at 72 ("This policy is best served by the free and open exchange of information during the presuit screening process.").

While the MMA provides important benefits to the litigants that comply and cooperate, the proverbial "carrots" of the MMA would be meaningless in the absence of the also-necessary "stick" to enforce the law. The Legislature has established a means of addressing potential concerns that the litigants may have failed in their duties under the MMA. § 766.206, Fla. Stat. Section 766.206, Fla. Stat., is titled "Presuit investigation of medical negligence claims and defenses by court." *Id.* (emphasis added).

It states in subsection (1) that "[a]fter the completion of presuit investigation by the parties . . . , any party may file a motion in the circuit court requesting the court to determine whether the opposing party's claim or denial rests on a reasonable basis." § 766.206(1), Fla. Stat. The circuit court is then charged with the responsibility to analyze these concerns, and, if the presuit investigation and corroboration is found lacking by either party, to protect the integrity and intent of the MMA. §§ 766.206(2) – (3), Fla. Stat. ("If the court finds that the notice of intent to initiate litigation mailed by the claimant does not comply with the

reasonable investigation requirements . . . , including a review of the claim and a verified written medical expert opinion by an expert witness as defined in s. 766.202, the court shall dismiss the claim . . . .). It is this enforcement statute, in the light of the purpose of the MMA, that forms the appeal now before this Court.

II. Statutory Construction Requires Enforcing the Plain Language of the Law And Must Not Be Read to Reach Absurd Results

Strained readings of very straightforward statutes should not be encouraged. Indeed, this Court has often repeated that "'[w]hen the statute is clear and unambiguous,' we look no further than the statute's plain language." *Patrick v. Hess*, 212 So. 3d 1039, 1041–42 (Fla. 2017). Moreover, courts do not "abandon either . . . common sense or principles of logic in statutory interpretation." *Sch. Bd. of Palm Beach Cty. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1235 (Fla. 2009).

Sections 766.206(1) and (2), Fla. Stat., are not vague. §§ 766.206(1) and (2), Fla. Stat. Section 766.206(1), Fla. Stat., allows either party to move the trial court for a determination of whether there was presuit compliance. § 766.206(1), Fla. Stat. Section 766.206(2), Fla. Stat., states that when the defense moves for that determination, the trial court will evaluate whether there was a reasonable investigation by the plaintiff, including whether the investigation complied with the duty to obtain "a verified written medical expert opinion **by** an expert witness **as defined** in s. 766.202." § 766.206(2), Fla. Stat. (emphasis added). It could not

be any clearer in the plain and unambiguous mandate of the statute that the trial court possesses the necessary ability to undertake a fact-finding mission, when necessary, to determine whether the presuit affidavit was verified by an affiant who is an "expert witness as defined in s. 766.202." *Id.*

If 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. *See Oliveros v. Adventist Health Sys./Sunbelt, Inc.*, 45 So. 3d 873, 877 (Fla. 2d DCA 2010) (writing that "because the facts concerning [the expert affiant's] background and experience [were] unrefuted, the question of his qualifications as an expert turn[ed] on the application of the relevant statutes, which is an issue of law") (citing *Ailles v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) ("holding that a question of law arising from undisputed facts is reviewed de novo")). On the other hand, where an affiant's qualifications as a "medical expert" are – as they were in this case – the subject of considerable doubt, and the trial court engages in a necessary fact-finding analysis under § 766.206(2), Fla. Stat., then the trial court's findings arrive at the appellate courts clothed in a presumption of correctness. *Yocom v. Wuesthoff Health Sys., Inc.*, 880 So. 2d 787, 789 (Fla. 5th DCA 2004) (noting in similar circumstances that "fact finding comes to this court bearing the presumption of correctness").

III. The Statutory Qualifications of Expert Witnesses Required to Substantiate the Presuit Investigation Are No Different than the Qualifications of Expert Witnesses Required to Testify at Trial

At one time, the qualifications necessary to serve as a presuit expert affiant were considered less stringent than the criteria for offering testimony as a trial expert. That distinction ended in 2003. *Paley v. Maraj*, 910 So. 2d 282, 283 (Fla. 4th DCA 2005) (noting that § "766.202(6), which was enacted in 2003, has eliminated the distinction between an expert for presuit purposes and for testifying at trial") (citing *Yocom*, 880 So. 2d 787). It bears repeating that "[t]he purpose of a corroborating medical opinion is to assure the legitimacy of the claim and to prevent the filing of baseless claims." *Yocom* 880 So. 2d at 789.

Section 766.203(2), Fla. Stat., states that an expert's verified written opinion corroborating the grounds for medical negligence must accompany the service of the notice of intent to initiate litigation. § 766.203(2), Fla. Stat. The affiant relied on must meet the definition of a "medical expert" in § 766.202(6), Fla. Stat., which is a section that cross-references the statutory prerequisites for medical experts in § 766.102, Fla. Stat. §§ 766.102 and 766.202(6), Fla. Stat. Pertinent to the appeal before this Court, § 766.102(5)(a), Fla. Stat., defines the necessary prerequisites for an expert offering testimony against a "specialist," such as an obstetrician. § 766.102(5)(a), Fla. Stat. Reading § 766.202(6), Fla. Stat., in conjunction with § 766.102(5)(a), Fla. Stat., a presuit expert affiant must:

1. be "duly and regularly engaged in the practice of his or her profession";

2. "hold[ ] a healthcare professional degree from a university or college";

3. hold an "an active and valid license";

4. "[s]pecialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered"; and

5. "[h]ave devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:"

    a. "[t]he active clinical practice of, or consulting with respect to, the same specialty";

    b. "[i]nstruction of students in an accredited health professional school or accredited residency or clinical research program in the same specialty"; or

    c. "[a] clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same specialty."

§ 766.106(5)(a) and 766.202(6), Fla. Stat.

The suggestion before this Court is that an affiant's qualifications as stated in an affidavit should and must be accepted at face value without question. Not only is the suggestion patently illogical in civil litigation, if the Court were to endorse that conclusion, it would revert the law to a time when the MMA was nothing more than a set of "empty requirement[s]." *Cohen*, 739 So. 2d at 70.

The responsibility of the litigants to engage in a good faith, meaningful exchange of discovery and the criteria in the MMA for serving as a "medical expert" likewise do not deprive litigants of their access to the courts. Indeed, this

Court has long-recognized that the courthouse doors are not barred for those who willingly participate, cooperate and comply with the provisions of the MMA. *Kukral*, 679 So. 2d at 284 ("This decision is also consistent with our prior holdings favoring access to the courts, while still carrying out the legislative policy of requiring the parties to engage in meaningful presuit investigation, discovery and negotiations.") (emphasis added). While there are certainly other cases in which trial and appellate courts will prevent for good reason an unsubstantiated claim for alleged medical negligence from continuing, in this case where there was both intentional delay and then direct disobedience of a court Order, the only hands that closed the courthouse doors were the Petitioner's. *See, e.g., Wolford v. Boone*, 874 So. 2d 1207, 1210 (Fla. 5th DCA 2004) (noting that it is the uncooperative party that has the "burden . . . to demonstrate how its failure to comply with the statute's pre-suit requirements did not frustrate the statute's goals or prejudice the opposing party").

IV. An Evidentiary Analysis of a Presuit Affiant's Qualifications Should Be Measured by an Abuse of Discretion Standard And Findings by a Trial Court of a Failure to Cooperate in Presuit Discovery Can Only Be Measured by an Abuse of Discretion Standard

Multiple decisions from the District Courts of Appeal support the conclusion that under circumstances such as these, in which the trial court appropriately engaged in an evidentiary hearing and made findings of fact about a presuit affiant's qualifications, an abuse of discretion standard should apply on review.

Yocom, 880 So. 2d at 789 (noting in similar circumstances that "fact finding comes to this court bearing the presumption of correctness"). In an analogous situation, the Fourth District affirmed dismissal of a medical malpractice lawsuit on an abuse of discretion standard in a case where the credibility of the presuit affiant was called into question. *Derespina v. N. Broward Hosp. Dist.*, 19 So. 3d 1128, 1130 (Fla. 4th DCA 2009) (writing that "the trial court's conclusion that the investigation of malpractice conducted by the plaintiff did not constitute the reasonable investigation contemplated by the statute was not an abuse of its discretion") (emphasis added).

It is also important to note that the trial court not only determined that there was insufficient information to find that the presuit affiant was qualified, but that the insufficiency of the information was the direct result of the plaintiff's failure to cooperate in presuit discovery and with a court Order. *Morris v. Muniz*, 189 So. 3d 348, 349 (Fla. 1st DCA 2016). Obstinate behavior is clearly sanctionable. §§ 766.106(7), Fla. Stat. ("Failure to cooperate on the part of any party during the presuit investigation may be grounds to strike any claim made, or defense raised, by such party in suit."); and 766.205(2), Fla. Stat. ("[F]ailure to so provide [discovery] shall be grounds for dismissal of any applicable claim or defense ultimately asserted."). And there is no question that the imposition of sanctions are precisely the type of act that is left to the sound discretion of the trial courts. *See*,

e.g., *Ham v. Dunmire*, 891 So.2d 492, 495 (Fla. 2004) ("It is well settled that determining sanctions for discovery violations is committed to the discretion of the trial court, and will not be disturbed . . . absent an abuse of the sound exercise of that discretion.").

V. The Trial Court Made the Correct Decision And the First District Rightly Affirmed the Order on Appeal

It is clear that the Petitioner's misconduct wholly frustrated the purpose of presuit and left the trial court with no alternative but to exercise its broad authority under §§ 766.106(7), 766.205(2) and 766.206(2), Fla. Stat. If this Court elects to issue a ruling, instead of discharging jurisdiction, then it should affirm the First District.

"[O]ne of the primary thrusts of Florida's statutory medical malpractice scheme is to 'weed out' cases which are not, even prima facie, supported by some reliable independent indication of their merits." *Winson v. Norman*, 658 So. 2d 625, 626 (Fla. 3d DCA 1995) (citing *Ingersoll*, 589 So.2d 223). Moreover, the "sufficiency of the corroborating affidavit . . . goes to the very core" of the presuit framework. *Oken*, 23 So. 3d at 145, *decision quashed on procedural but not substantive grounds*, 62 So. 3d 1129 (Fla. 2011); *see also Cohen*, 739 So. 2d at 71 ("At the heart of the presuit investigation amendments was the requirement that an expert's affidavit be obtained."). "The purpose of the medical expert opinion is to assure the defendants, and the court, that a medical expert has determined that

there is justification for the plaintiff's claim; that is, the purpose is . . . to corroborate that the claim is legitimate." *Rell v. McCulla*, 101 So. 3d 878, 881 (Fla. 2d DCA 2012) (internal citations and punctuation omitted). When taken together, the notice of intent and the affiant's written verified opinions "must sufficiently indicate the manner in which the defendant doctor allegedly deviated from the standard of care[,] and must provide adequate information for the defendants to evaluate the merits of the claim." *Id.* "Evaluation" requires discovery, which is precisely what is afforded by §§ 766.106(6) and 766.203(4), Fla. Stat., and permitted under the authority of §§ 766.206(1) and (2), Fla. Stat.

The Petitioner in this case had multiple opportunities to substantiate that her presuit affiant was a qualified "medical expert" under §§ 766.102(5)(a) and 766.202(6), Fla. Stat. Instead of cooperation, which is contemplated by the presuit process, the Petitioner instead first delayed and then repeatedly obstructed discovery. These are precisely the types of circumstances where the punishment fit the proverbial crime.

This Court was faced many years ago with the argument that in the absence of an ability to cross-examine expert affiants at trial with their presuit affidavits, that the law would be "protecting possibly untruthful corroborative affidavits." *Cohen*, 739 So. 2d at 72. The Court disagreed. *Id.* Instead, it assured the litigants that "sections 766.206(2) and (3), Florida Statutes (1995), provide that a claim will

be dismissed and a defense stricken if the notice of intent to initiate litigation or the response thereto does not comply with the reasonable investigation requirements." ***Id.*** at fn.7. Undoubtedly, the Court recognized that a trial court faced with circumstances such as those presented in this case must be permitted to take appropriate action and impose clearly-warranted sanctions. The First District decision should be affirmed.

CONCLUSION

The First District applied the correct standard of review in its opinion, affirming that the trial court did not abuse its discretion in its decision to impose sanctions for discovery abuses and in its fact-finding efforts to determine whether the plaintiff's presuit affiant had the requisite qualifications to serve as "medical expert" under §§ 766.102(5)(a) and 766.202(6), Fla. Stat. This Court should discharge jurisdiction and not render a written decision, but if it does so, then its decision should be to affirm the First District. For the reasons stated herein, the FDLA supports the positions taken by the Respondents.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record by e-mail on June 19, 2017.

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CERTIFICATE OF TYPE SIZE & STYLE

Amicus Curiae Florida Defense Lawyers Association certifies that the type size and style of the Amicus Curiae Brief is Times New Roman 14 pt.

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