IN THE SUPREME COURT OF FLORIDA

TUYANA MORRIS, as Personal Representative of the Estate of SHUNTERIA MCINTYRE, deceased,

Petitioner,

v.

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

Respondents.
_____/

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

ANSWER BRIEF OF RESPONDENT BAY HOSPITAL D/B/A GULF COAST MEDICAL CENTER

On Discretionary Review From The First District Court Of Appeal

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PRELIMINARY STATEMENT

Petitioner Tuyuana L. Morris (Plaintiff below) will be referred to as "Plaintiff." Respondent Bay Hospital, Inc. d/b/a Gulf Coast Medical Center (one of several defendants below) will be referred to as "GCMC."

The record on appeal will be referred to as "(Rx:y-z)," with "x" representing the volume number and "y-z" representing the page number(s). Plaintiff's Initial Brief will be referred to as "(IB:y-z)."

STATEMENT OF THE CASE AND FACTS

In this medical malpractice action, Plaintiff seeks review of a decision of the First District, which affirmed the trial court's dismissal of Plaintiff's complaint on two independent grounds: (1) Plaintiff's failure to provide a corroborating affidavit from a presuit expert qualified under chapter 766, Florida Statutes (2009), and (2) Plaintiff's counsel's failure to provide reasonable access to information during the presuit process. This Court's approval of either of these grounds would warrant approval of the dismissal of this case.

As to the first issue, the First District affirmed the trial court's ruling that it could not determine from Plaintiff's presuit affidavit whether Plaintiff's presuit expert was qualified to render an opinion as to the standard of care applicable to GCMC's emergency room nurses because the affidavit contained only limited and generic information and nowhere mentioned that the expert had experience with emergency room nurses or support staff – the only GCMC hospital personnel Plaintiff claims were negligent.

Because the expert's qualifications were unclear from the face of the affidavit, the trial court permitted Defendants to take limited discovery on those qualifications. After that discovery, the court held an evidentiary hearing and concluded that the facts did not demonstrate that the expert was qualified to serve as a presuit expert in this case.

Notwithstanding the fact that Florida's Medical Malpractice Act and the caselaw construing it explicitly permit trial courts to order discovery and hold an evidentiary hearing when a presuit expert's qualifications are in dispute, Plaintiff contends that this Court should review the trial court's decision (and the First District's affirmance) de novo. She also asserts that Plaintiff's expert's affidavit, alone or with her deposition testimony, demonstrated the expert was qualified. The trial court and First District disagreed, and this brief will explain why that decision is correct.

On the second issue, the First District held that the trial court properly dismissed Plaintiff's complaint because Plaintiff's counsel repeatedly and purposefully refused to provide information to Defendants during the presuit process and obstructed Defendants' ability to obtain information during the expert's deposition. This brief will show why that decision is correct as well.

A. <u>Plaintiff's Presuit Notice And Corroborating Affidavit.</u>

As required by section 766.106, Florida Statutes (2009), prior to filing her complaint, Plaintiff served GCMC with a notice of intent to initiate litigation for its alleged medical negligence relating to the treatment and care provided to the decedent, Shunteria McIntyre. (R:75-79). In support of her claim, Plaintiff provided an opinion by Margaret M. Thompson, M.D., J.D., M.P.Aff., whom Plaintiff claimed was a medical expert under section 766.202, Florida Statutes

(2009). (R:63-67).

Dr. Thompson stated in her affidavit that she was a licensed medical doctor in the state of Texas and a board certified obstetrician and gynecologist. (R:63). She, however, retired from practicing medicine in March 2008 – approximately 10 months before the incident in this case – due to arthritis in her hands. *Id.*

During the three years preceding her retirement from medicine, Dr. Thompson was a law student and obtained her Juris Doctor degree in 2007 from the University of Texas School of Law. (R:63). She then obtained her master's degree in public affairs in 2008 from the University of Texas. *Id.*

While Dr. Thompson's affidavit stated generally that she was engaged in full-time "patient care" until March 2008, she did not specify the type of patients to whom she provided care, the type of patient care she provided, the capacity in which her patient care was provided, or where she was providing patient care. *Id.*

Furthermore, Dr. Thompson's affidavit did not provide any information regarding the regularity of her work during the period preceding the care provided by GCMC in this case, as required by sections 766.202(6) and 766.102(5). *Id.* Indeed, it suggested the opposite – that she was a full time law student and graduate student during that time period. *Id.*

With respect to the incident in this case, Dr. Thompson opined that GCMC "and its staff" breached "professional standards of care" by failing to do the

following in a responsible manner:

a. Recognize the severity of McIntyre's condition and treat her appropriately,

b. Make a correct diagnosis,

c. Obtain necessary laboratory studies to diagnose her condition,

d. Recommend consultations by specialists in internal medicine, gastroenterology, and neurology,

e. Correctly treat her condition because of the failure to make an accurate diagnosis,

f. Discharge her at an appropriate time, and

g. Arrange a proper follow-up appointment.

(R:65-66). Dr. Thompson further speculated that, if the "hospital staff" informed Dr. Smith (McIntyre's treating physician) of the need for a different treatment plan and Dr. Smith did not respond appropriately, the staff had an obligation to initiate a "chain of command" evaluation. (R:66).

Dr. Thompson's affidavit nowhere identified the type of hospital "staff" to which she was referring or how she was qualified to render an opinion as to that "staff." (R:63-66). Moreover, the affidavit nowhere indicated that she had any knowledge of the standards of care for hospital staff that were purportedly violated. *Id.* Indeed, the affidavit nowhere indicated that Plaintiff's claim related to only emergency room personnel, as she later clarified after the lawsuit was filed. *Id.*

B. GCMC's Request For Presuit Discovery.

Unable to determine from the face of Dr. Thompson's affidavit the type of "staff" that violated the standard of care or whether Dr. Thompson was qualified under chapter 766 to render an expert opinion as to the conduct of that "staff," GCMC requested presuit discovery, as it is entitled to do by section 766.203(4), Florida Statutes (2009). (R:70-74, 81). GCMC further requested to take the unsworn statements of Plaintiff, as well as McIntyre's aunt and grandmother. (R:73). Plaintiff did not respond to GCMC's presuit discovery requests.

GCMC thereafter contacted Plaintiff by telephone, requesting dates for her unsworn statement, and Plaintiff agreed to provide dates to all Defendants. (R:198). Almost one month later, instead of providing dates to all Defendants, Plaintiff provided one single date to GCMC, and failed to coordinate that date with the other Defendants. (R:238).

GCMC then wrote to Plaintiff, "requesting additional dates for the unsworn statements we previously requested" and explaining that "any date must be coordinated with all defense counsel." (R:81). GCMC also inquired regarding the status of Plaintiff's overdue responses to GCMC's presuit discovery requests. *Id.* GCMC advised Plaintiff that it had concerns regarding Dr. Thompson's qualifications and that it "require[d] the information previously requested in order to evaluate your claims." *Id.* Plaintiff again did not respond.

The only potentially relevant information GCMC received during this time was Dr. Thompson's curriculum vitae ("CV"), which was provided in response to a presuit discovery request by a co-defendant. (R:1398-1400). That CV, however, shed no further light on Dr. Thompson's qualifications to render an opinion as to "hospital staff." *Id.*

The CV stated that Dr. Thompson had been employed as an adjunct professor at LBJ School of Public Affairs at the University of Texas, and that she worked in private practice at Margaret M. Thompson, M.D., P.A.; Renaissance Women's Group; and North Austin Obstetrics and Gynecology. (R:1398). It further stated that she obtained her Juris Doctor degree in December 2007 and her Master of Public Affairs in December 2008. *Id.* Nothing in that CV said anything about emergency room nurses or staff. (R:1398-1400).

GCMC denied Plaintiff's claim for medical malpractice because her notice of intent "did not comply with the requirements of chapter 766, Florida Statutes, as [Dr. Thompson] is not qualified to serve as an expert. . . ." (R:82). GCMC attached to its denial the affidavit of its own expert, which stated that GCMC did not breach any prevailing standard of care. (R:84-85). Specifically with respect to nurses, GCMC's expert said that they "monitored and assessed Ms. McIntyre appropriately, alerted physicians to changes in Ms. McIntyre's condition, and carried out the physician's orders appropriately." (R:84).

C. Plaintiff Files Her Complaint, And GCMC Moves To Dismiss, Asserting That Dr. Thompson's Affidavit Did Not Demonstrate That She Was Qualified To Serve As A Presuit Expert And That Plaintiff's Counsel Willfully Refused To Provide Information During Presuit.

Plaintiff filed her complaint against GCMC and the four other defendants in November 2011 and a First Amended Complaint in January 2012. (R:1, 23). Except for reference to GCMC's Emergency Department and "hospital personnel," Plaintiff's claim against GCMC did not state which employees – physicians, nurses, or other hospital staff – were allegedly negligent. (R:18-20, 40-43).

GCMC moved to dismiss Plaintiff's First Amended Complaint, asserting that Dr. Thompson did not qualify as a medical expert under section 766.202. (R1:49-53). Specifically, GCMC explained that, to qualify as a presuit medical expert, an individual must be "duly and regularly engaged in the practice of [her] profession," but Dr. Thompson's affidavit did not show that she was regularly engaged in the practice of her profession. (R:49-51). To the contrary, during the three years prior to the incident in this case, Dr. Thompson was enrolled in law school and graduate school. (R:51). And, approximately nine months before the incident, she had retired from the practice of medicine altogether. *Id.*

Finally, GCMC asserted that Dr. Thompson was not qualified to provide an expert opinion on the prevailing standard of care for hospital emergency department physicians, nurses, or other medical staff – specialties in which she never practiced. (R:53). In order for Dr. Thompson to provide an expert opinion

regarding Plaintiff's claims against GCMC, she must demonstrate that she, "by reason of active clinical practice or instruction of students, has knowledge of the applicable standard of care for nurses . . . or other medical support staff . . . ." § 766.102(6), Fla. Stat. (2009). Nothing in Dr. Thompson's affidavit or CV demonstrated any qualifications to provide expert testimony concerning hospital emergency department personnel. (R:51-53).

GCMC also moved to dismiss on the ground that Plaintiff failed to comply in good faith with the presuit investigation requirements based on her repeated refusals to respond to GCMC's presuit discovery requests. (R:49).

D. <u>Plaintiff's Response To Defendants' Motions To Dismiss.</u>

Plaintiff asserted that Dr. Thompson's qualifications were sufficient, stating, without evidentiary support, that Dr. Thompson was engaged in obstetrics because she continued to work 60 hours a week while simultaneously attending law school, and delivered approximately 30 babies per month. (R:235). For the first time, Plaintiff asserted that her claim against GCMC did not include emergency room physicians. *Id.* Plaintiff, however, did not explain how Dr. Thompson's affidavit demonstrated that she had any knowledge regarding the standard of care of emergency room hospital support staff. (R:230-36).

Plaintiff did not respond directly to GCMC's assertion that she had failed to respond to its presuit discovery requests. While not completely clear, her response

suggested that, because she sent GCMC copies of discovery responses to other Defendants, responses to GCMC's presuit requests were unnecessary. (R:233, 235-36) ("Plaintiff did not provide redundant information or documents where copies of prior responses to pre-suit discovery of other Defendant(s)' [sic] as duplicitous production or responses is not required."). Plaintiff also did not acknowledge that many of GCMC's discovery requests sought information regarding Plaintiff's allegations against GCMC, not the other defendants. *Id.*

E. The Trial Court Rules That Dr. Thompson's Affidavit Does Not Demonstrate That She Is Qualified To Render A Presuit Expert Opinion And Allows Defendants To Engage In Limited Discovery Regarding Her Qualifications.

After a hearing, the trial court entered a seven-page order, stating that it would hold Defendants' motions to dismiss in abeyance while Defendants "are permitted to engage in limited pretrial discovery, . . . directed solely to Dr. Thompson's qualifications under Chapter 766." (R:246). The court explained that, while Dr. Thompson's affidavit listed general qualifications, it did "not state specifically the level of practice that she engaged in during the three years immediately preceding the date of the occurrence alleged in Plaintiff's complaint." (R:242). Thus, the court was "not in a position to make a determination at this time given the limited and general information set forth in Dr. Thompson's affidavit." (R:243).

Then, citing this Court's decision in *Williams v. Oken*, 62 So. 3d 1129 (Fla.

2011), the court said that, after discovery, it would be necessary for it to conduct an evidentiary hearing to determine whether Dr. Thompson is qualified to render an opinion under sections 766.102 and 766.202. (R:243-45).

The court also ruled that Plaintiff's counsel improperly refused to provide information to Defendants during the presuit discovery process despite their repeated and legitimate requests. (R:242-43, 245). As a sanction for this misconduct, the court ruled that Plaintiff should be responsible for Dr. Thompson's fees and the attorney's fees and taxable costs incurred by Defendants in engaging in the discovery process. (R:245).

Plaintiff thereafter filed a motion to alter or amend the court's order, asserting, among other things, that Dr. Thompson's affidavit demonstrated that she was qualified to render an opinion as to Defendants' alleged conduct simply because it said she was engaged in "full time patient care until March 2008." (R:255) Plaintiff clarified in this motion that her claims against the hospitals related only to nursing staff and other medical support staff and did not include emergency room physicians. (R:248). Plaintiff also asked the court to reconsider its ruling requiring her to pay fees and costs. (R:251-56).

At a hearing on Plaintiff's motion, the court reiterated that it found Dr. Thompson's affidavit to be facially insufficient as to her qualifications (R:1052), and stood by its prior order to allow limited discovery and hold an evidentiary

hearing. (R:264-67). The court, however, determined that its order sanctioning Plaintiff was premature and modified that order to reserve ruling on Defendants' entitlement to fees and costs until the evidentiary hearing could be held. (R:266).

F. Defendants Take Limited Presuit Discovery.

Consistent with the trial court's order, GCMC served interrogatories on Plaintiff, seeking information regarding Dr. Thompson's qualifications to serve as a presuit corroborating expert. (R:691-95). While Plaintiff answered the interrogatories, the answers were signed by Plaintiff, not Dr. Thompson, and the responses were not provided under oath. (R:696). These answers provided no further information as to how Dr. Thompson was qualified to opine on the standard of care for emergency room nurses. (R:691-95).

Co-Defendant Dr. Smith served on Plaintiff a Notice of Taking Video Teleconference Deposition Duces Tecum of Dr. Thompson, requesting various records. (R:683-87). Although Plaintiff had the deposition notice for more than one month before the deposition was scheduled, Plaintiff filed general objections to the duces tecum request a mere ninety minutes before the deposition was scheduled to begin, and Dr. Thompson, consequently, did not bring any of the requested documents to her deposition. (R:497-500).

During Dr. Thompson's deposition, Plaintiff's counsel repeatedly objected to the questions asked by Defendants in an attempt to learn more about her

qualifications. (*E.g.*, R:531-54, 558-59, 578-80). The limited information GCMC was able to obtain was inconsistent with respect to Dr. Thompson's experience with emergency room nurses.

Dr. Thompson testified that she retired from the practice of medicine in March 2008. (R:534). She said that, even though she was a full time law student in 2006, 2007, and January and February 2008, she was working more than 50 hours per week as an OB/GYN in her office and at North Austin Medical Center delivering babies and taking call (R:534-35), and that she was probably working a total of more than 100 hours per week. (R:550).

In later testimony, Dr. Thompson further called into question the accuracy of her work experience, as the time that she spent as an OB/GYN greatly overlapped with her time as a full time law student and master's degree candidate. Dr. Thompson attempted to explain how this was physically possible by testifying that the only time she was actually required to be working at the hospital was when she was on hospital call, which was 2-3 days per month. (R:536-37). To manage hospital call and law school, she would take call on the weekends or ask other doctors to cover for her while she was attending class. (R:542). She also said that she would study while she was at the hospital. (R:551).

Dr. Thompson said that she was on call for her separate private practice once every third or fourth night or day, and she was not required to spend that time at

the hospital. (R:537-39). Consequently, the number of hours that she was on call for her private practice also necessarily overlapped with her time as a full time law student and a master's degree student. Dr. Thompson testified that she attended law school and master's program classes **while** she was on call. (R:541).

Dr. Thompson testified that during her last year of practice, she was on call 24 hours per day, 7 days per week, demonstrating that much of her time on call was not spent practicing medicine. (R:538-39). Indeed, in addition to being a student and physician in January and February 2008, she also was a professor, teaching a comparative ethics course to undergraduate students. (R:555). She spent her time on call studying for law school and her master's program, explaining, "[i]t's pretty easy to get the hours that way." (R:551).

Dr. Thompson said that her hours at her private practice were "variable and flexible" and that she was able to work in her office in the afternoon by scheduling her classes in the morning. (R:551, 558). She, however, later testified that she took late afternoon classes, and at other times took night classes. (R:574-75).

Dr. Thompson testified that she had suffered from arthritis for 10-15 years. (R:557). She developed "severe" arthritis in the 2 years before she retired from practicing medicine in March 2008 (also when she was a full time law and graduate student). *Id.* When asked whether she filed for disability – which would have required her to prepare a work history as well as to state that she was too

disabled to continue to work – or whether she was granted disability benefits, Plaintiff's counsel instructed her not to answer. (R:558-59).

While in law school, Dr. Thompson hired a "contract physician," Dr. Sebestyn, who took call for her patients. (R:569, 580). Dr. Thompson could not recall how many hours per week Dr. Sebestyn worked for her, but she did know that those hours varied and were usually on nights and weekends. (R:580). Nights and weekends, however, were the same times that Dr. Thompson had said that she took call. (R:551).

Dr. Thompson admitted that her prior statement that she delivered 400 babies per year was an "approximation." (R:572-73). She did not review any schedule or documentation to come up with that number. (R:573). Instead, over the years of her practice, she typically accepted 40 new obstetrical patients per month, so she used a slightly lower number to account for the fact that some patients may have left. *Id.* She further admitted that she may not have actually delivered all of these babies – some of that number could include babies delivered by Dr. Sebestyn. *Id.*

When asked whether she noticed any change in the financial viability of her practice after starting school as compared to before she became a full time law student, she was instructed not to answer. (R:578). When further asked whether she noticed any "change" in her medical practice from the time she started law

school, she likewise was instructed not to answer. (R:578-79).

Dr. Thompson testified inconsistently regarding the location of the business records of her practice, which Defendants sought in order to clarify her work during this period. First, she testified that she did not know who would have the business records for her practice from the three years prior to the incident, then she testified that the person who owns the practice would not have the records, then she testified that she had some of the records from the practice, and finally she testified that some records would have stayed at the practice. (R:570-71). When she was asked for the name of the person who would have maintained the records, she was instructed not to answer. (R:587).

Dr. Thompson was asked how she was able to work the hours that she claimed given that she attended a school accredited by the American Bar Association, and the ABA prohibits students from working outside of law school more than 20 hours per week. (R:546-47). Plaintiff's counsel again instructed Dr. Thompson not to answer. (R:547-48).

Dr. Thompson testified that the dean of her law school was aware that she was going to continue practicing medicine while attending law school, although she did not testify as to whether she was permitted to work "full time." (R:550). Her law school did not have a part-time law program. *Id.*

When asked about any purported experience with emergency room nurses,

Dr. Thompson testified only generally regarding her interactions with nurses and gave no timeframes for those interactions. She explained that, although she gave direction to nurses, she was not a nursing supervisor in the employment context. (R:584-85). She had previously had responsibility for ensuring nurses' compliance with hospital policies when issues would arise regarding whether care provided by a nurse conformed to a hospital's policies. (R:584, 589-90). Typically, however, nursing issues were reported to the attending physician, who would work with the supervising nurse to ensure that a floor nurse was in compliance with policies or procedures. (R:589-90).

Dr. Thompson was not involved in peer review of nurses. (R:590-91). Instead, she was on a "hospitalwide peer review committee that addressed cases where the care came into question," and the committee would intermittently "call in the nurses to talk with them about the care of the patient." (R:591). She could not remember specifically whether she served on any peer review committee during the three years preceding the incident in this case, from 2006-2009. *Id.*

On "occasions," Dr. Thompson would speak to or instruct nursing students in the hospital, and she once gave a talk to nursing students at the University of Texas as part of her public policy education. (R:591-92).

In the end, Dr. Thompson admitted that she was not sure whether she was qualified to render an opinion as to the standard of care applicable to nurses in an

emergency room. (R:604) ("It depends."). She further admitted that she lacked the qualifications to render an opinion for an emergency room nurse treating a patient who was not in her specialty. *Id.*

G. After An Evidentiary Hearing, The Trial Court Dismisses Plaintiff's Complaint Because Dr. Thompson Is Not Qualified To Serve As A Presuit Expert And Because Plaintiff's Counsel Willfully Refused To Provide Information During Presuit.

After holding an evidentiary hearing, the trial court entered an order dismissing Plaintiff's complaint. The court explained that the purpose of the evidentiary hearing was to determine whether Dr. Thompson was qualified as an expert under sections 766.102 and 766.202 and that the only evidence presented during the hearing in support of her qualifications was her deposition and affidavit. (R:742-43; *see also* R:1106-07, 1117-20, 1134, 1145-46).

After considering all of the evidence, the court ruled that the record "does not establish that Dr. Thompson has knowledge of the applicable standard of care for nurses, nurse practitioners, or others such that she may render an expert opinion as to the standard of care of such medical support staff members." (R:744). Rather, even though twenty-three months had passed since the initial hearing, the record established "scant additional information about the specific qualifications of Dr. Thompson." (R:745). The court thus granted Defendants' motions to dismiss, explicitly ruling that the record did not support a finding that Dr. Thompson was a qualified expert witness under the various statutes raised by Defendants. *Id*.

The court also found that "the actions of Plaintiff's counsel were purposeful and designed to deprive the Defendants' [sic] of the ability to meaningfully participate in pre-suit discovery of the medical negligence claims against them, and as such was not in good faith." (R:744). Under section 766.205(2), the failure of a party to comply with presuit discovery is grounds for dismissal. (R:744-45).

The court explained that, because Plaintiff objected to Defendants' request for documents to be produced at Dr. Thompson's deposition a mere 90 minutes before the deposition was scheduled to begin and failed to bring those documents to her deposition, Defendants "were unable to meaningfully discover any records of [Dr. Thompson's] academic post graduate education" or records of "her educational, instructional or vocational activities for the years 2006 thru 2009." (R:743).

The court emphasized that Plaintiff's counsel "repeatedly objected to questions about how many hours a week Dr. Thompson may have devoted to an active clinical practice from 2006 to 2009," refused to allow Dr. Thompson to answer questions regarding rules restricting outside work during law school, and prohibited Defendants from obtaining any meaningful response as to how Dr. Thompson could attend a dual postgraduate program and work full time from 2006 through February 2008. (R:743-44).

The court acknowledged that Plaintiff's counsel claimed that his repeated

objections and instructions to Dr. Thompson not to answer questions were based on compound or confusing questions and to prohibit Defendants a second bite at the discovery apple. (R:744). The court nonetheless found that the actions of Plaintiff's counsel were "not in good faith." *Id.*

Recognizing that "the salient statutory provisions are not intended to deny parties' access to Courts on the basis of technicalities," the court concluded that the actions of Plaintiff's counsel in this case "rise above mere technicalities" because Plaintiff did not comply with the statutory presuit requirements, or allow reasonable discovery into Dr. Thompson's devoted professional time in the 3 to 5 years immediately preceding the occurrence in this case. Consequently, dismissal was warranted on this ground as well. *Id.*

Final judgment was subsequently entered, and Plaintiff's motion for rehearing was denied. (R:746-47).

H. <u>The First District Affirms The Trial Court's Final Judgment.</u>

The First District affirmed the trial court's judgment dismissing Plaintiff's complaint. *Morris v. Muniz*, 189 So. 3d 348 (Fla. 1st DCA 2016). The court held that "ample evidence" supported the trial court's conclusions that Plaintiff failed to offer sufficient proof of her expert's statutory qualifications, and affirmed the trial court's judgment on that ground. *Id.* at 351.

The court also affirmed the trial court's dismissal based on Plaintiff's

counsel's failure to provide reasonable access to information during presuit, explaining:

> [Plaintiff] in this case repeatedly ignored requests for presuit discovery regarding her presuit expert's statutory qualifications. Despite the parties agreeing to extend the ninety-day presuit period and [Defendants] sending several letters to [Plaintiff] expressing their concerns regarding the expert's qualifications, [Plaintiff] filed the medical negligence action without sufficiently responding to [Defendants'] requests for information. Even after the trial judge imposed sanctions, [Plaintiff] continued to obstruct the presuit process by failing to timely respond to the subpoena duces tecum concerning her expert's background and opinions and by failing to comply with the court's limited discovery order. The court held that because appellant declined to engage in a reasonable presuit investigation of the claim, the record did not support a finding that the expert was qualified under the statute. It further held that appellant's actions were intended to deprive appellees of the opportunity to meaningfully participate in presuit discovery of the medical negligence claims against them. We agree.

Id. at 350-51.

SUMMARY OF ARGUMENT

This Court should discharge jurisdiction because, as the briefing now demonstrates, no conflict exists between the First District's decision and the decisions cited by Plaintiff for conflict. In affirming the trial court, the First District consistently applied established law, holding that (1) the trial court's ruling, after discovery and an evidentiary hearing, that Plaintiff's presuit expert was not qualified is supported by competent, substantial evidence, and (2) the trial court did not abuse its discretion in dismissing the complaint because of Plaintiff's

repeated obstruction of the presuit process.

If jurisdiction is not discharged, the First District's opinion should be approved. First, the trial court correctly determined that Dr. Thompson's affidavit did not demonstrate that she was qualified to testify regarding the standard of care of emergency room nurses. The affidavit nowhere said that Dr. Thompson was actually rendering an opinion on the standard of care applicable to emergency room nurses in a rural hospital, nor did it demonstrate any basis whatsoever for concluding Dr. Thompson was qualified to render such an opinion.

Given the facial insufficiency of the affidavit, the trial court's decision to order limited discovery and hold an evidentiary hearing on Dr. Thompson's qualifications was explicitly authorized – indeed mandated – by chapter 766 and the caselaw construing it. Florida law is clear that a trial court's decision to permit discovery and to hold an evidentiary hearing is reviewed for an abuse of discretion, and no discretion was abused here given that Dr. Thompson's qualifications were highly disputed.

Further, Florida law is clear that a trial court's ruling – after an evidentiary hearing – should be upheld if supported by competent, substantial evidence. Unlike the cases Plaintiff relies on, this case does not involve the legal construction of a statutory term or the scope of the legal requirements of the presuit statutes.

Finally, regardless of the standard of review, the First District properly

affirmed the trial court's ruling that Dr. Thompson was not qualified to testify as to the standard of care applicable to emergency room nurses. The evidence demonstrated that Dr. Thompson was not duly and regularly engaged in the practice of her profession and that, based on her active clinical practice, she did not have knowledge of the standard of care applicable to nurses or other hospital support staff.

The First District also correctly held that the trial court did not abuse its discretion in dismissing Plaintiff's complaint because of Plaintiff's counsel's willful and repeated obstruction of the presuit discovery process. Plaintiff admitted that she never responded to GCMC's presuit discovery requests, and the record evidence fully supports the trial court's factual findings regarding Plaintiff's counsel's misconduct.

ARGUMENT

I. THIS COURT SHOULD DISCHARGE JURISDICTION BECAUSE NO CONFLICT EXISTS.

Plaintiff sought jurisdiction based on two areas of supposed conflict, but the briefing now confirms that none exists. This Court should, accordingly, discharge its jurisdiction.

As her first basis for jurisdiction, Plaintiff asserted that the First District applied an incorrect standard of review to the issue of whether the trial court – after allowing limited discovery and holding an evidentiary hearing – properly

dismissed her complaint for failure to provide a corroborating affidavit from a qualified presuit expert. The First District upheld the trial court's dismissal because "ample evidence" supported the trial court's findings as to Dr. Thompson's qualifications.

As the above facts make clear, and unlike the cases Plaintiff cited for conflict (which are the same cases Plaintiff relies on in her Initial Brief), this case does not involve the legal construction of a term in a presuit statute or the scope of the legal requirements of the presuit statutes. Instead, applying established law, the First District held that resolution of a motion to dismiss **following an evidentiary hearing** comes to the appellate court clothed with a presumption of correctness and should be upheld if the trial court's findings are supported by competent, substantial evidence. *See Bery v. Fahel*, 143 So. 3d 962, 963 (Fla. 3d DCA 2014) (affirming order finding, after evidentiary hearing, that presuit corroborating expert was not qualified because findings were supported by competent, substantial evidence); *Grau v. Wells*, 795 So. 2d 988, 991 (Fla. 4th DCA 2001) (same); *see also Yocom v. Wuesthoff Health Sys., Inc.*, 880 So. 2d 787, 790 (Fla. 5th DCA 2004) (court's fact finding after evidentiary hearing bears presumption of correctness). No conflict exists on this ground.

As her second basis for jurisdiction, Plaintiff contended that the First District's decision to affirm the trial court's dismissal based on Plaintiff's

counsel's repeated and improper refusal to provide access to information during presuit conflicts with cases requiring a court to make explicit findings that the Defendants were prejudiced by Plaintiff's counsel's conduct.

As the briefing now demonstrates, the First District explicitly recognized that the dismissal of a case for failing to provide reasonable access to information should only occur where the opposing party has suffered prejudice. It then held, **based on the record evidence**, that Defendants were denied the opportunity to meaningfully participate in presuit discovery by Plaintiff's counsel's intentional conduct. Not one case cited by Plaintiff requires an appellate court, in affirming a trial court's order, to explicitly describe in its opinion the prejudice incurred by an opposing party.

Contrary to Petitioner's assertion, the First District applied the explicit requirements of sections 766.205(2) and 766.206(2), in affirming the trial court. As the court recognized, these statutes require dismissal when a plaintiff fails to provide reasonable access to information during presuit or fails to provide a corroborating opinion from a qualified expert. *Muniz*, 189 So. 3d at 350.

Moreover, in each case Plaintiff cited for conflict, the appellate courts reversed the trial court's dismissal of the plaintiff's complaint or the striking of the defendant's defenses because, **based on the particular facts of those cases**, the record did not establish that the party seeking sanctions was prejudiced by the

opposing party's conduct. *See Vincent v. Kaufman*, 855 So. 2d 1153, 1157 (Fla. 4th DCA 2003) (dismissal not justified because defendant was not prejudiced by responding to presuit discovery a mere five days late); *De La Torre v. Orta ex rel Orta*, 785 So. 2d 553, 556 (Fla. 3d DCA 2001) (appellate court not justified in striking defendant's pleadings "under the facts of this case" where defendant did not respond to presuit discovery requests and notice of intent because he incorrectly assumed the claim was barred by the statute of limitations); *George A. Morris, III, M.D., P.A. v. Ergos*, 532 So. 2d 1360, 1361 (Fla. 2d DCA 1988) (striking defendant's pleadings for untimely responding to presuit discovery too harsh because plaintiffs' conduct showed time was not of the essence to them).

As mentioned, each of these purported conflict cases was decided on its particular facts, and not one holds that the appellate court is required to specifically address in its opinion the prejudice suffered by the party seeking sanctions. No conflict exists for this reason as well, and this Court should discharge jurisdiction of this case.

Finally, Plaintiff's contention that the First District was required to explicitly consider the factors set forth in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993), is belied by the many cases – including two cases cited by Plaintiff – applying sanctions in medical malpractice cases without citing or explicitly considering the *Kozel* factors. *See, e.g., Vincent*, 855 So. 2d 553 (not citing *Kozel*); *De La Torre*,

785 So. 2d at 555-56 (citing *Kozel* for general proposition that courts should consider whether lesser sanction than dismissal is appropriate, but not explicitly applying *Kozel* factors in reaching its decision regarding sanction).

Consequently, when this Court reviews the merits briefing in this case, it should become clear that none of the asserted jurisdictional bases exist. This Court thus should discharge its jurisdiction.

II. THE PROPER STANDARD OF REVIEW, GIVEN THE FACTS OF THIS CASE, IS WHETHER THE TRIAL COURT'S RULING IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

A. The Trial Court Properly Allowed Limited Discovery Into Dr. Thompson's Disputed Qualifications, And Its Ruling, After An Evidentiary Hearing, Should Be Upheld If Supported By Competent, Substantial Evidence.

In determining the appropriate standard of review, this Court cannot ignore what happened in the trial court, particularly the fact that the dismissal occurred after an evidentiary hearing where the court considered inconsistencies in the facts. Contrary to Plaintiff's assertion, the facts relating to Dr. Thompson's qualifications **were** disputed.

1. The Trial Court Properly Ordered Statutorily-Authorized Discovery As To Dr. Thompson's Qualifications.

The trial court ruled that it could not determine from the face of Dr. Thompson's affidavit whether she was qualified under section 766.202 to testify as a presuit expert and ordered limited discovery on her qualifications, as explicitly

authorized by section 766.203(4). This decision is reviewed for an abuse of discretion. *See Chavez v. State*, 12 So. 3d 199, 205 (Fla. 2009) ("It is within the court's discretion to determine the qualifications of a witness to express an expert opinion, and this determination will not be reversed absent a clear showing of error."); *Chambliss v. White Motor Corp.*, 481 So. 2d 6, 8 (Fla. 1st DCA 1985) ("The trial judge has broad discretion in passing upon the qualifications of an expert witness and the range of subjects upon which he may be allowed to testify, and his rulings in this regard will not be disturbed on appeal absent a clear showing of abuse of discretion.").

The court did not abuse its discretion in ordering limited discovery regarding Dr. Thompson's qualifications. As to GCMC, Dr. Thompson opined that GCMC's "staff" breached their professional standards of care. (R:64-66). But, nothing in the affidavit identified the type of "staff" she was referring to or how she was qualified to render an opinion as to the standard of care for "staff."

Dr. Thompson's affidavit also did not demonstrate that she was "duly and regularly" engaged in the practice of her profession, as required to be qualified as an expert under section 766.202. Dr. Thompson's affidavit stated that she had retired from medical practice in March 2008, approximately 10 months before the occurrence in this case, because of arthritis in her hands. (R:63). Even before that retirement, she was a law student and graduate student, graduating from law school

in 2007 and from her master's program in 2008. *Id.*

Moreover, while Dr. Thompson stated in her affidavit that she was "engaged in full-time patient care until March 2008," she did not explain what that meant. *Id.* She did **not** say that she was duly and regularly engaged in the practice of obstetrics and gynecology, or any other profession from 2006-2009, the three years preceding the incident in this case. She did not provide any statement as to the regularity of her work as an OB/GYN during the years preceding her retirement at all.

The trial court thus properly found Dr. Thompson's affidavit to be insufficient on its face because it could not determine whether Dr. Thompson was qualified to serve as a presuit expert, and it did not abuse its discretion in allowing limited discovery to that effect.

2. The Trial Court Properly Held An Evidentiary Hearing As To Dr. Thompson's Qualifications.

The trial court's decision to hold an evidentiary hearing on Dr. Thompson's qualifications was also appropriate. When a motion to dismiss demonstrates a factual question as to whether a presuit expert is qualified, the plaintiff bears the burden of producing evidence on those qualifications at an evidentiary hearing. *See Duffy v. Brooker*, 614 So. 2d 539, 542 (Fla. 1st DCA 1993), *abrogated on other grounds, Shands Teaching Hosp. v. Miller*, 642 So. 2d 48 (Fla. 1st DCA 1994); *see also Oken v. Williams*, 23 So. 3d 140, 147 (Fla. 1st DCA 2009), *quashed on other*

grounds, 62 So. 3d 1129 (Fla. 2011) (holding that "it is the claimant's burden to demonstrate by facts, rather than conclusions in the affidavit, that the person executing the affidavit meets the statutory requirement").

This follows from more general law, which has repeatedly held that a court's decision to hold an evidentiary hearing is reviewed for an abuse of discretion. *See, e.g.*, *Corkidi v. Franco Inv., LLC*, 201 So. 3d 52, 54-55 (Fla. 3d DCA 2015) (no abuse of discretion in holding evidentiary hearing on whether party received notice of trial and affirmatively chose not to appear); *Schuman v. Int'l Consumer Corp.*, 50 So. 3d 75, 77 (Fla. 4th DCA 2010) (trial court abused its discretion by failing to hold an evidentiary hearing on motion for relief from judgment).

As discussed above, and contrary to Plaintiff's conclusory assertion, there were many factual questions as to Dr. Thompson's qualifications on the face of her affidavit. Consequently, the trial court did not abuse its discretion in deciding to hold an evidentiary hearing on Dr. Thompson's qualifications after the limited discovery was complete.

Devers v. Sunseeker International, Ltd., 98 So. 3d 1261 (Fla. 4th DCA 2012), cited by Plaintiff, does not hold that all decisions to conduct an evidentiary hearing are reviewed de novo. Rather, in that case – the only one cited by Plaintiff for this proposition – the court said that it reviewed de novo the issue of whether to hold an evidentiary hearing on personal jurisdiction. *Id.* at 1263. In so holding,

the court relied on another, more limited case that held only that **issues of law** are reviewed de novo, and which did not involve an evidentiary hearing at all. *Id.* (citing *Robin Roshkind, P.A. v. Machiela*, 45 So. 3d 480, 481 (Fla. 4th DCA 2010)).

3. The Trial Court's Ruling, After Evidentiary Hearing, Should Be Affirmed If Supported By Competent, Substantial Evidence.

Finally, contrary to Plaintiff's assertion, the facts **were** in dispute as to Dr. Thompson's qualifications. The trial court's ultimate ruling on that issue – that Dr. Thompson was not qualified to render an opinion as to the standard of care for emergency room nurses – was made after the evidentiary hearing and should be upheld if supported by competent, substantial evidence. The *Bery* cases make the point.

In *Bery v. Fahel*, 88 So. 3d 236 (Fla. 3d DCA 2011), the plaintiff sued the family physician who treated the decedent. Plaintiff's notice of intent contained an affidavit from a board certified emergency physician. *Id.* at 237. Shortly after the expert executed his affidavit, he contacted the plaintiff's counsel to withdraw it because he did not believe he was qualified. *Id.* The plaintiff nonetheless used the affidavit to provide a reasonable basis for the lawsuit. *Id.*

Not yet knowing that the plaintiff's expert sought to withdraw his affidavit, the defendant moved to dismiss the plaintiff's complaint, asserting that the expert's

affidavit was insufficient because he did not practice in the same or similar specialty as the defendant, as required by section 766.202. *Id.* Even though the affidavit was procedurally correct, the trial court ordered an evidentiary hearing to determine the expert's qualifications. *Id.* However, before that hearing could be held, the trial court discovered that the expert wanted to withdraw his opinion and dismissed the case. *Id.* at 237-38.

On appeal, the Third District held that the trial court should have held an evidentiary hearing to determine whether the expert was qualified, since it was not clear from the face of the affidavit. *Id.* at 238. After holding that evidentiary hearing on remand, the trial court dismissed the complaint, finding the expert was not qualified. *Bery v. Fahel*, 143 So. 3d 962 (Fla. 3d DCA 2014). The Third District affirmed that decision because the trial court's conclusion was supported by competent, substantial evidence. *Id.*

The plaintiff in *Bery* sought review in this Court, asserting that the decision conflicted on the standard of review with a case heavily relied on by Plaintiff here – *Oliveros v. Adventist Health Systems/Sunbelt, Inc.*, 45 So. 3d 873 (Fla. 2d DCA 2010). This Court declined to review the case. *See* SC14-1652 (order dated Dec. 15, 2014).

Plaintiff attempts to distinguish *Bery* from this case simply because the expert there attempted to withdraw his opinion. That is not relevant here. In both

cases, the court was looking at the expert's qualifications, and neither *Bery* opinion focused solely on the fact that the expert wanted to withdraw his opinion.

Other cases also support the use of the competent, substantial evidence standard here. *See, e.g.*, *St. Vincent's Med. Ctr., Inc. v. Mem'l Healthcare Group, Inc.*, 928 So. 2d 430, 434 (Fla. 1st DCA 2006) (court reviews factual findings after evidentiary hearing for competent, substantial evidence); *Yocom*, 880 So. 2d at 790 ("fact finding comes to this court bearing the presumption of correctness"); *Grau*, 795 So. 2d at 991 (trial court's findings as to plaintiff's lack of good faith and reasonable investigation are clothed with a presumption of correctness and were supported by competent, substantial evidence).

Accordingly, the First District applied the proper standard of review in affirming the trial court's ruling because "ample evidence" supported that ruling.

B. Contrary To Plaintiff's Assertion, Dr. Thompson's Affidavit, CV, And Deposition Raised Many Questions As To Whether She Was A Qualified Presuit Expert.

Plaintiff begins by asserting that all district courts have held that the decision as to whether a medical expert meets the statutory requirements is a legal one, reviewed de novo. (IB:21). None of the cases she cites for that proposition, however, apply here.

In *Holden v. Bober*, 39 So. 3d 396, 399 (Fla. 2d DCA 2010), the trial court summarily dismissed the plaintiff's complaint based on its conclusion – without an

evidentiary hearing – that the presuit expert did not meet the "similar specialty" requirement of section 766.102. Because the issue in that case was whether the trial court correctly construed the "similar specialty" requirement of the statute, the court reviewed the trial court's order de novo. *Id.* at 400. Importantly, however, even though the only evidence before the court was the expert's affidavit, the Second District remanded the case and directed the trial court to **hold an evidentiary hearing** to determine whether the plaintiff's affiant qualified as a medical expert. *Id.* at 403.

In *Edwards v. Sunrise Ophthalmology ASC, LLC*, 134 So. 3d 1056 (Fla. 4th DCA 2013), the court determined that the expert did not practice in a "similar specialty" to the defendant's. Nothing in that opinion indicates that an evidentiary hearing was held. And, in *Apostolico v. Orlando Regional Health Care Systems, Inc.*, 871 So. 2d 283 (Fla. 5th DCA 2004), the issue was whether the trial court applied the correct legal principles in dismissing the plaintiff's case, which is not the issue here.

Finally, as mentioned, Plaintiff relies heavily on *Oliveros*, but that case does not hold that **all** determinations made at an evidentiary hearing regarding a medical expert's qualifications must be reviewed de novo. Instead, the court in *Oliveros* was presented with a unique situation where the facts concerning the plaintiff's expert's background and experience were **unrefuted**. Under those particular

circumstances, the expert's qualification was an issue of law that turned on application of the relevant statutes. *Oliveros*, 45 So. 3d at 876-78.

Here, as demonstrated, Dr. Thompson's qualifications **were** refuted.

III. REGARDLESS OF THE STANDARD OF REVIEW, THE LOWER COURTS CORRECTLY HELD THAT DR. THOMPSON WAS NOT QUALIFIED TO RENDER AN EXPERT OPINION AS TO GCMC'S EMERGENCY ROOM NURSES.

The evidence in this case demonstrated that Dr. Thompson was not qualified to serve as a corroborating presuit expert because, just like Dr. Thompson's presuit affidavit, the evidence did not demonstrate that (1) by reason of active clinical practice or instruction of students, Dr. Thompson has knowledge of the applicable standard of care for emergency room nurses, nurse practitioners, or other medical support staff, or (2) she was "duly and regularly" engaged in the practice of her profession. § 766.202(6), Fla. Stat.

A. The Evidence Did Not Show That Dr. Thompson Had Knowledge Of The Standard Of Care For Emergency Room Nurses Or Support Staff.

Plaintiff failed to provide any evidence demonstrating that Dr. Thompson was qualified to testify regarding the applicable standard of care for emergency room nurses or other medical support staff – qualifications necessary to serve as an expert for Plaintiff's claims against GCMC. While Plaintiff points to Dr. Thompson's statement in her affidavit that she had been chief of the OB/GYN department at a medical center, chief of staff at a women's specialty hospital, and a

member of a peer review committee (IB:34), these positions do not demonstrate that Dr. Thompson had any knowledge of any standard of care for emergency room nurses, particularly those who were not OB/GYN nurses, or that she obtained any such knowledge "by reason of active clinical practice." It cannot be concluded from these facts alone that she satisfied the statutory requirements for qualification as a presuit expert.

It likewise cannot be determined from Dr. Thompson's CV that she was qualified to opine on the standard of care for emergency room nurses. To begin with, Dr. Thompson's CV was not authenticated or verified. Courts are not required to consider unauthenticated or unverified documents in considering a motion. *See Smith v. Buffalo's Original Wings & Rings II of Tallahassee, Inc*., 765 So. 2d 983, 984 (Fla. 1st DCA 2000); *cf. Booker v. Sarasota, Inc*., 707 So. 2d 886, 889 (Fla. 1st DCA 1998) (court may not consider unauthenticated document in ruling on motion for summary judgment, even where it appears that such document, if properly authenticated, may have been dispositive). Because the CV was unauthenticated and unverified, it cannot support Plaintiff's argument that Dr. Thompson was qualified.

In all events, however, the CV did not demonstrate that Dr. Thompson was qualified to testify as to the standard of care of emergency room nurses. (R:1398-1400). While it contains general background information, little of the information

was dated and it fails to demonstrate which, if any, of the described activities were recent ones or were regular ones.

The only additional information in the CV regarding the years preceding the occurrence in this case was that, under the label "Employment," the document said Dr. Thompson was President of North Austin Obstetrics and Gynecology from 2003 to present. *Id.* at 1398. The CV also stated "(stopped active practice March, 2008)," but did not state what Dr. Thompson's job entailed. *Id.* Simply put, Dr. Thompson's CV, like her affidavit, is facially deficient as to Dr. Thompson's qualifications to testify as an expert in this case.

Nor did Dr. Thompson's deposition testimony establish that she was qualified to opine on the standard of care of emergency room nurses. Her testimony regarding peer review does not establish any knowledge regarding emergency room nursing or other support staff standards of care. When asked whether she peer reviewed nurses, Dr. Thompson testified that she was not involved in peer review specifically of nurses, but instead she was involved in a "hospitalwide peer review committee that addressed cases where the care came into question." (R:591). Any review the committee conducted involving nursing care was more intermittent. As she explained, "on those cases, we did at times call in the nurses to talk with them about the care of the patient." *Id.* Ultimately, her testimony regarding peer review did not establish that she had knowledge

regarding the standard of care relating to nurses or any other support staff, or that she obtained any knowledge "by reason of active clinical practice."

Plaintiff's contention that Dr. Thompson "could not have overseen, reviewed, and managed nurses and staff in her roles as Chief of an OB/GYN department and as chief of staff of a hospital without an understanding of the standards of care applied to them" (IB:34) is nothing more than speculation and is, indeed, belied by Dr. Thompson's own deposition testimony. While Dr. Thompson did testify that she "supervised" emergency room nurses in the sense that she gave nurses direction, Dr. Thompson explicitly admitted that she was not a nursing supervisor in the employment context. (R:584-85).

Furthermore, while she testified that she was involved in issues relating to nurses' noncompliance with a hospital's policies and procedures, which would have been directed to her where she was the attending physician, Dr. Thompson "oftentimes" addressed those issues with the assistance of the supervising nurse. (R:589-90). She never expressly testified that she had knowledge of the standard of care for emergency room nurses or other support staff.

Also, although she was familiar with hospital policies generally, Dr. Thompson did not testify that the policies and procedures at the particular hospital in question were similar to the standard of care for nurses or any other support staff. Policies and procedures do not establish standards of care. Standards of care

are established by the custom and practice of similar heath care providers in the same or similar localities where the alleged negligence occurred. *See Oliveros*, 45 So. 3d at 877 n.4; *see also Warren ex rel. Brassell v. K-Mart Corp.*, 765 So. 2d 235, 237 (Fla. 1st DCA 2000) (standard of care is set by community, rather than internal, procedures). Familiarity with a particular Texas hospital's policies and procedures does not necessarily correspond with knowledge regarding the standard of care in a rural Florida hospital in a different context.

To the extent Dr. Thompson testified that her private practice employed a nurse midwife or a nurse practitioner, she did not testify that that relationship meant that she had knowledge of the standard of care for those individuals' particular areas of expertise. Nor does it follow that the standard of care for a nurse midwife or a nurse practitioner in a private practice is the same as the standard of care for those same positions in a hospital emergency room setting. Consequently, this testimony also does not establish Dr. Thompson's knowledge of the standard of care for emergency room nurse practitioners or nurse midwives at GCMC.

Ultimately, Dr. Thompson admitted that she did not know whether she was qualified to render an opinion as to the standard of care applicable to nurses in an emergency room, saying, "[i]t depends." And she conceded that she lacked the qualifications to render an opinion for an emergency room nurse treating a patient who was not in her specialty. (R:604-05).

Finally, Dr. Thompson's lack of qualifications relating to an emergency room nursing standard of care is demonstrated by the fact that all of her opinions with regard to GCMC relate to a **physician** standard of care, not to a failure by any nurse in this case. Specifically, Dr. Thompson opined in her affidavit that GCMC and its staff "failed to recognize the severity of [McIntyre's] condition" and "treat[] her appropriately," failed to make a "correct diagnosis," failed to "obtain necessary laboratory studies," failed "to recommend consultation," failed to "correctly treat her condition," "dismiss[ed McIntyre] from the hospital prematurely," and "failed to arrange proper follow-up." (R:65-66). These opinions regarding GCMC pertain to a **physician's** standard of care. None pertain to a nursing standard of care, much less an emergency room nursing standard of care. *See generally* § 464.003(3)(a)-(b), (e)-(f), Fla Stat. (2009).

The cases cited by Plaintiff in support of her argument in this regard actually support the trial court's ruling. For example, in *Largie v. Gregorian*, 913 So. 2d 635 (Fla. 3d DCA 2005), the plaintiff sued doctors and a nurse practitioner for medical negligence. The Third District affirmed summary judgment in favor of the nurse practitioner because the plaintiff's presuit expert affidavit made no mention of the nurse practitioner by name or job description, contained no grounds to support a claim against her, and mentioned no standard of care applicable to her. *Id.* at 639; *see also Young v. Bd. of Hosp. Dirs. of Lee Cty.*, 426 So. 2d 1080, 1081

(Fla. 2d DCA 1983) (affirming trial court's ruling disallowing a practicing psychiatrist to testify about standard of care of psychiatric nurse because of psychiatrist's lack of familiarity with day-to-day activities of psychiatric nurse).

The same can be said of Dr. Thompson. She never identified the type of emergency room hospital staff to whom her opinion applied or how she was qualified to testify as to the standard of care of such staff. The First District's decision affirming the trial court's order finding that she was not a medical expert in that regard should be approved.

B. The Evidence Did Not Show That Dr. Thompson Was "Duly And Regularly" Engaged In The Practice Of Her Profession.

The evidence also failed to demonstrate that Dr. Thompson was "duly and regularly engaged" in her profession as an OB/GYN. Just the opposite. It showed that Dr. Thompson was **not** duly and regularly engaged as an OB/GYN prior to the occurrence in this case in January 2009 because:

- Dr. Thompson was enrolled in a full time dual law school and master's degree program, which she began in approximately September of 2004. (R:545, 550-53) (testifying that she was in the law program for 7 semesters and graduated from law school in December of 2007 and from her master's program in December of 2008).

- She suffered from "severe" arthritis since March of 2006, which caused her to retire from medical practice. (R:557).

- She retired from medical practice 10 months before the occurrence, in March of 2008. (R:534).

- She was a professor, teaching comparative ethics to undergraduate

students beginning in January of 2008. (R:555).

Furthermore, Dr. Thompson did not review any records to confirm her work schedule during this time period. She had hired a contract physician to take care of her patients at the same times that she testified to taking call, but could not remember how much the contract physician worked, or whether that physician's work overlapped with the work she identified as being hers.

Taken as a whole, the evidence did not demonstrate that Dr. Thompson was qualified as a presuit expert under chapter 766. Dr. Thompson was not duly and regularly engaged as an OB/GYN, but rather was a full-time law and graduate student and part-time professor, who was transitioning her practice to another physician.

The First District's opinion should be approved.

IV. THE FIRST DISTRICT CORRECTLY UPHELD DISMISSAL FOR PLAINTIFF'S COUNSEL'S FAILURE TO PROVIDE REASONABLE ACCESS TO INFORMATION DURING THE PRESUIT DISCOVERY PROCESS.

A. Standard Of Review.

The standard of review of an order of dismissal for failure to comply with presuit procedures is abuse of discretion. *See Derespina v. N. Broward Hosp. Dist.*, 19 So. 3d 1128, 1130 (Fla. 4th DCA 2009).

B. The First District Properly Held That The Trial Court Acted Within Its Discretion In Dismissing Plaintiff's Complaint Under Section 766.205, Florida Statutes.

As mentioned at the outset of this brief, to the extent the trial court dismissed Plaintiff's complaint for failing to comply with presuit procedures, that was a separate ground for dismissal. Accordingly, if this Court affirms the dismissal based on Dr. Thompson's lack of qualifications, it need not reach this issue.

To the extent the Court considers this issue, however, it should be approved because, based on the facts of this case, the trial court did not abuse its discretion in dismissing this case based on Plaintiff's counsel's conduct.

Plaintiff concedes that she did not respond to GCMC's discovery requests in presuit. (R:1051) ("must have been an oversight"). Plaintiff never coordinated a date for her unsworn statement, despite repeated requests. (R:73, 198, 238). Plaintiff also repeatedly created obstacles to discovery with regard to Dr. Thompson's qualifications, despite the fact that the discovery was court ordered. *See supra,* at 5-6, 11, 14-15.

Moreover, this case is unlike those in which courts have held that dismissal was too severe a sanction because, in those cases, the party essentially cured its behavior by ultimately responding to presuit discovery. *See, e.g., DeCristo v. Columbia Hosp. Palm Beaches, Ltd.*, 896 So. 2d 909, 911 (Fla. 4th DCA 2005) (reversing dismissal because parties were mistaken regarding whether presuit

expert had previously been disqualified as an expert); *Vincent*, 855 So. 2d at 1155 (reversing dismissal because plaintiff provided requested presuit information five days after presuit discovery period ended).

Here, in contrast, Plaintiff's counsel maintained his obstructive behavior from the beginning of this case to the end, notwithstanding repeated directions from the court to comply. This type of behavior is precisely what section 766.205 contemplates as a ground for dismissal. *See Cohen v. W. Boca Med. Ctr., Inc.*, 854 So. 2d 276, 278 (Fla. 4th DCA 2003) (affirming dismissal for plaintiff's failure to provide presuit discovery with no reasonable explanation); *Melanson v. Agravat*, 675 So. 2d 1032, 1033-34 (Fla. 1st DCA 1996) (affirming dismissal of complaint where plaintiff failed to respond to presuit discovery despite repeated requests and plaintiff's reason for non-compliance was unreasonable).

For these reasons, and for the reasons set forth by the other Respondents, which are adopted herein, the trial court's order fell within its discretion.

CONCLUSION

Based on the evidence before it, the trial court correctly ruled that Dr. Thompson was not qualified under chapter 766 to serve as a corroborating presuit expert with respect to the claims against GCMC, and the First District's opinion affirming on this ground should be approved.

To the extent the trial court's order can be read as dismissing Plaintiff's

complaint for failure to comply with presuit procedures, the First District's decision affirming that ruling should be approved because, based on Plaintiff's counsel's willful and inappropriate conduct, dismissal was not an abuse of discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following via electronic mail this 8th day of June, 2017:

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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