IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v.

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

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

Respondents.

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

JOINT ANSWER BRIEF OF RESPONDENTS, STEPHEN G. SMITH, M.D.; ORLANDO S. MUNIZ, M.D.; and MARIANNA OB/GYN ASSOCIATES, INC.

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PRELIMINARY STATEMENT

Respondent Stephen G. Smith, M.D., will be referred to in this answer brief as "Dr. Smith." Respondent Orlando S. Muniz, M.D., will be referred to as "Dr. Muniz." Petitioner Tuyuana L. Morris, as Personal Representative of the Estate of Shunteria S. McIntyre, will be referred to as "Morris." References to the record on appeal will be referred to with "R:y-z," with "y-z" representing the page number(s). Plaintiff's Initial Brief will be referred to as "(IB:y-z)." Any emphasis supplied by the undersigned will be noted.

STATEMENT OF THE CASE AND OF THE FACTS

The First District affirmed the dismissal of Morris' medical malpractice suit against Dr. Smith; Dr. Muniz; his employer Marianna OB/GYN Associates, Inc.; Jackson Hospital; and Bay Hospital, Inc., d/b/a Gulf Coast Medical Center. Dr. Smith and Dr. Muniz both practice obstetrics and gynecology.

On June 27, 2014, Jackson County Circuit Judge Christopher Patterson dismissed Morris' complaint pursuant to section 766.102(5)(a)(2), Florida Statutes (2011), ruling that "the record does not support a finding that [Morris' purported medical expert] Dr. Thompson is a qualified expert witness under F.S. 766.102(5)(a)(2)." (R:1191).

Judge Patterson also specifically dismissed Morris' complaint because she had not "complied with the statutory presuit requirements, or allowed reasonable discovery into their [sic] expert's devoted professional time 3 to 5 years immediately preceding the occurrence in this cause," and because various actions of Morris' counsel during presuit discovery were "purposeful and designed to deprive [Respondents] of the ability to meaningfully participate in presuit discovery . . . and as such [were] not in good faith." *Id.* The order of dismissal was rendered after an evidentiary hearing held pursuant to *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011), and mandated by a previous order from Judge John

Fishel, the original trial court judge. (R:1188). The First District affirmed the dismissal. *Morris v. Muniz*, 189 So. 3d 348 (Fla. 1st DCA 2016).

This appeal presents the questions of (1) whether competent substantial evidence supports the trial court conclusion that Morris' purported expert Dr. Margaret Thompson ("Thompson") was not a qualified expert witness pursuant to Florida Statutes Section 766.102(5), and (2) whether the trial court abused its discretion when it separately dismissed Morris' complaint for her counsel's sanctionable behavior before and during suit. This includes the issue of whether the trial court was required to accept (and Dr. Smith and Dr. Muniz were not permitted to contest at all) the assertions in Thompson's presuit affidavit and CV that she was a qualified expert witness.

A. Presuit

After her decedent McIntyre died in January 2009, Morris served Dr. Smith and Dr. Muniz with an April 21, 2011, notice of intent to initiate medical malpractice litigation, informal discovery requests, and the affidavit of Thompson. (R:1401-12).

Thompson's affidavit set forth her purported qualifications as an expert obstetrician/gynecologist. (R:226). Thompson asserted that she was "engaged in full time patient care until March, 2008," but did not specify the types of patients

to whom she provided care, the type of patient care she provided, the capacity in which she provided patient care, or where she provided it. *Id.*

Thompson also stated, however, that she earned a law degree from the University of Texas School of Law in 2007 and a master's degree in public affairs from the University of Texas in 2008, while also serving as an adjunct professor at LBJ School of Public Affairs at the University of Texas. *Id.* This raised a concern in Dr. Smith and Dr. Muniz that perhaps Thompson was not truly a qualified medical expert under section 766.102(5)(a), Florida Statutes (2011), which requires in part that Thompson devote professional time during the three years immediately before the occurrence that is the basis of Morris' action to the active clinical practice of obstetrics.

Therefore, Dr. Smith propounded presuit interrogatories upon Morris designed to discover whether Thompson was truly qualified under section 766.102(5)(a), to validly opine that an obstetrician/gynecologist breached the standard of care. (R:1393-97). Morris responded to Dr. Smith's informal discovery interrogatories in part as follows:

> 8. How many hours per week did Margaret K. Thompson, M.D., J.D., M.P. Aff. devote to the active clinical practice of, or consulting with respect to, the same or similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of this claim during the years 2006-2009?

> **Response**: Unknown to Personal Representative, if you desire these questions to be presented to Dr. Margaret Thompson and to compensate her for her time to respond accordingly, please advise and we will provide you with the cost and pre-payment amount.
>
> 10. Please describe Margaret M. Thompson, M.D., J.D., M.P. Aff.'s prior experience treating patients with similar conditions to Shunteria S. McIntyre.
>
> **Response**: See, response to Request No., 8, Supra.

(R:1396-1400). Thus, when Dr. Smith asked Morris about facts tending to show whether Thompson was statutorily qualified to serve as a medical expert witness, Morris responded that she did not know, and that Dr. Smith would have to pay Thompson to find out.

After receiving those responses, Dr. Smith notified Morris that Dr. Smith was "very concerned" that Thompson was not truly qualified as an expert under Section 766.102(5):

> According to Ms. Thompson's CV, she was enrolled in law school and graduate school during the three years prior to the time Ms. McIntyre was treated by Dr. Smith. Additionally, Dr. Thompson retired from the practice of medicine during March 2008, approximately nine months prior to the time Ms. McIntyre was treated by Dr. Smith. We have serious concerns that Dr. Thompson is not qualified to serve as an expert for the Estate of Shunteria S. McIntyre pursuant to the requirements of §766.102(5)(a), Fla. Stat. (2009)... At this time, we request that you provide us with amended answers to

> Smith & Smith Physicians and Dr. Smith's Pre-Suit Informal Discovery Requests within ten (10) days of the date of this letter... If you fail to provide us with amended answers... we will move for an evidentiary hearing to have Dr. Thompson disqualified as an expert witness... We may also move to have Dr. Thompson disqualified as an expert witness if we find that she does not meet the requirements of §766.102(5)(a), Fla. Stat. (2009).

(R:1401-02 (emphasis added)). Morris did not respond to Dr. Smith's correspondence and did not amend her presuit interrogatory answers.

Dr. Smith informed Morris that if she filed suit he would argue that Morris' notice of intent violated chapter 766 because Thompson was not qualified to serve as an expert under section 766.102(5)(a), and also seek sanctions against Morris for her failure to cooperate during the presuit investigation period. (R:1413). Morris again did not respond to Dr. Smith's correspondence. Instead, Morris filed suit.

B. Motion to Dismiss

Dr. Smith and Dr. Muniz each moved to dismiss Morris' medical malpractice complaint arguing that Morris violated Chapter 766's presuit requirements because (1) Thompson was not qualified as a medical expert under section 766.102(5)(a), and (2) Morris did not act in good faith during the statutory presuit period. Since section 766.102(5) requires that any expert must have devoted professional time during the three years immediately preceding the date of the 2009 occurrence that was the basis of Morris' action to the *active* clinical

practice of, or consulting with respect to, obstetrics, yet Thompson stated she retired from full time patient care in March 2008, and attended both law school and a master's degree program during those three years, Drs. Smith and Muniz challenged whether Thompson was truly qualified to give expert testimony on the standard of care applicable to them. (R:1386-92, 101-42).

A first hearing was held on July 24, 2012 before Circuit Judge John Fishel. (R:956-1009). The major issue posed was whether Thompson truly did devote professional time, during the three years immediately preceding the date of occurrence that was the basis of the action, to the active clinical practice of, or consulting with respect to, obstetrics, as section 766.102(5) requires.

The trial court concluded Morris had the burden to establish that Thompson was qualified as an expert witness and that Morris wrongfully advised Dr. Smith that he must pay Thompson for that information. (R:242-43). Furthermore, the trial court concluded that Dr. Smith "appropriately requested additional information concerning Thompson's qualifications" during the presuit period and that Morris "improperly refused to provide that information through a verified affidavit." (R:243).

However, the trial court held that it could not then determine whether Thompson was qualified as an expert witness since her presuit affidavit only contained "limited and general information." *Id.* Therefore, pursuant to this

Court's decision in *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011) (*Oken II*), the trial court concluded that it must conduct an evidentiary hearing to determine whether Thompson was truly qualified under section 766.102(5)(a). (R:245).

Prior to the evidentiary hearing, the trial court allowed Respondents to conduct limited discovery directed solely to Thompson's qualifications which included interrogatories, requests for production and the deposition of Thompson. *Id.*

The trial court noted that Respondents "clearly and legitimately" requested this information during the presuit process, and that Morris "could have provided this information with minimal effort," but did not. *Id.* Thus, as a sanction for Morris' deliberate failure to provide the requested information during the presuit process, the trial court required Morris to pay Thompson's expert fees (rather than impose them on Respondents) and to reimburse Respondents' attorneys' fees and taxable costs incurred in conducting the upcoming limited discovery. *Id.*

This discovery did not immediately occur because Morris sought rehearing arguing that she should not be required to pay any fees. (R:467-77). A hearing was held. (R:1011-67). In her motion and at the hearing, Morris did not raise *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993), or contest the trial court's findings that her counsel's actions were deliberate and sanctionable. The trial court granted Morris' motion for rehearing in part – it concluded that awarding attorneys' fees

and taxable costs to Respondents for conducting the future limited discovery was premature and elected to rule on the issue after the upcoming *Oken* evidentiary hearing.[1] (R:266).

Morris then filed a Petition for Certiorari with the First District Court of Appeal asserting that the trial court departed from the essential requirements of law by requiring her to pay Thompson's presuit expert fees. (R:270-320). The First District denied Morris' petition *per curiam* and awarded appellate fees and costs to Respondents. (R:416, 419-21, 740-41).

C. Deposition of Margaret Thompson

Pursuant to Judge Fishel's August 2012 order permitting Respondents to serve discovery on Morris and depose Thompson, Dr. Smith filed a Notice of Taking Video Deposition Duces Tecum setting Thompson's deposition for October 7, 2013. (R:652-56). Because section 766.102(5)(a)(2)(a) requires that a medical malpractice expert must have "devoted professional time, during the three years immediately preceding the date of occurrence that is the basis of the action, to the active clinical practice of, or consulting with respect to" the specialty in question, Dr. Smith's duces tecum list was specifically designed to discover information related to Thompson's professional and educational commitments and activities

[1] The remainder of the trial court's order continued in effect, including the requirement that Morris pay Thompson's fees and costs for the discovery violations committed during the presuit process.

during the three years prior to the subject 2009 incident. This included, for example, copies of her academic transcripts, coursework records and class schedules from the law school and her master's program, a summary of how many hours per week she devoted to the active clinical practice of obstetrics, and a summary of her treatment of the medical condition that is the subject of this claim during the years 2006 through 2009. (R:653-54, 245).

Thompson's deposition was held on October 7, 2013. (R:510-600). Although Dr. Smith noticed the deposition a month in advance, Morris waited until 90 minutes before it began to object to Smith's duces tecum list. (R:497-501). Morris claimed that Dr. Smith's requests exceeded the scope of the trial court's August 2, 2012 order. (R:498). Thompson therefore did not bring the requested documents to her deposition but instead brought only her CV (which Respondents already had) and a list of her deposition or trial testimony. (R:516). Dr. Smith and Dr. Muniz were therefore prohibited from obtaining numerous records pertinent to whether Thompson was truly able to engage in the active practice of obstetrics during the three years prior to the alleged 2009 incident of medical negligence. (R:1189-90).

At deposition, Thompson testified that she retired from the practice of medicine in March 2008, which is approximately 10 months before the incident of purported malpractice in this case, due to arthritis. (R:534, 557). Thompson

asserted that she worked at her own practice and at a hospital before retirement, but also that she was a full-time law student during most of the three years before the incident, a master's degree student, and a professor who taught undergraduate students as well. (R:534, 536-37). She admitted that she only worked at the hospital two to three days per month (when she was on call there), and that sometimes she studied while there. (R:536-37, 551).

Thompson testified that she was on call for her private practice only once every three or four days, was not required to be at the hospital during that time, and that she attended law school and her master's program classes while on call there. (R:537-39, 541). She claimed that she took classes in the morning and worked at her office in the afternoon, but also testified that she took afternoon classes. (R:551, 558, 574-75). Thompson also hired a contract physician who took call for her patients. She could not say how many hours per week that physician did so, but testified this occurred on nights and weekends, which were also when Thompson said she herself took call. (R. 569, 580, 551).

Thompson admitted that she approximated when she claimed to deliver 400 babies per year, reviewed no documentation before reaching that estimate, and admitted that number could include babies delivered by her contract physician and not her. (R:572-73). She also gave inconsistent testimony on the whereabouts of

her business records, and Morris' counsel instructed her not to identify the person who maintained them. (R:570-71, 587).

Thompson testified that the arthritis which caused her retirement was severe for the final two years of her work, but Morris' counsel instructed her not to say whether she had filed for disability benefits, which would have illustrated whether Thompson represented that she was too disabled to work. (R:557, 558). Morris' counsel instructed Thompson not to answer the question of how she purportedly worked more than 20 hours per week when the American Bar Association prohibits law students at accredited schools from doing so. (R:546-48). Morris' counsel even instructed Thompson not to say whether she noticed any change in her medical practice while she was in law school. (R:578-79).

When Morris' counsel *did* allow Thompson to respond to Respondents' inquiries, more questions than answers arose regarding her qualifications as an expert witness. For example, when asked to describe the condition that caused the decedent's death and whether she had treated that condition in the three years before providing her presuit opinion, Thompson could not give a specific answer "without reviewing the medical records." (R:592-603). The best answer Thompson could provide (when allowed to answer) was that McIntyre had "a complication" which resulted in early delivery and death. (R:600-01).

D. June 2014 Evidentiary Hearing and Order of Dismissal

The *Oken* hearing originally ordered by Judge Fishel in August 2012 eventually occurred before Judge Christopher N. Patterson.

During the hearing, Judge Patterson repeatedly inquired as to what precise record evidence was before the court on the question of whether Thompson was qualified as an expert under section 766.102(5)(a). (R:1106-07, 1117, 1119-20, 1125-26, 1134, 1146). Morris did not call Thompson as a witness at the evidentiary hearing and never filed an amended affidavit. Therefore, the only two items of record evidence presented to the trial court regarding Thompson's qualifications were her original presuit affidavit and her deposition transcript. *Id.*

After the hearing, by order dated June 27, 2014, the trial court questioned the record evidence presented on Thompson's qualifications as an expert, beginning with her affidavit:

> The Court had previously determined the Affidavit as offered by Plaintiff reflects general qualifications and does not state specifically the level of practice she engaged in during the three years immediately preceding the date of occurrence (Jan. 24, 2009) as alleged in Plaintiff's Complaint filed November 18, 2011 and Amended Complaint filed January 13, 2012. The Court once again queries the feasibility of Dr. Thompson's statement in same that "I was engaged in full time patient care until March, 2008", given her affidavit.

(R:1189).

The trial court also found that Thompson's deposition testimony was equally unhelpful in determining whether Thompson was statutorily qualified as an expert witness in this case, in part because Morris' counsel repeatedly objected to Respondents' questions and prohibited Thompson from giving any purposeful response to them. *Id.* The trial court reiterated that section 766.205(2) states that "the failure to provide reasonable access to pre-suit discovery information shall be grounds for dismissal of any applicable claim" (R:1188), and made the factual finding that Morris' counsel obstructed Respondents' attempts to obtain relevant discovery by unreasonably objecting to Dr. Smith's duces tecum list and obstructing Respondents' deposition questioning:

> 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, while she was seeking a law degree (Dec. 2007), or a master's degree in public affairs (Dec. 2008). Plaintiff's Counsel refused to allow the deponent to answer questions whether she was aware of the ABA accreditation rules restricting students to no more than 20 hours a week of work while attending University of Texas Law School. Plaintiff's Counsel's repeated objections prohibited Defendants' any purposeful response from the deponent as to how she could attend post graduate schools, graduate from both, and work as a full-time on-call physician treating female patients with emergent complications of pregnancy for the years 2006 and 2007 and January and February 2008. The defendants' were thwarted from learning whether the deponent had applied for disability assistance upon her retirement in March 2008, and during the same period of time preceding this suit.

(R:1189-90 (emphasis added)).

The trial court considered that access to courts should not be denied on the basis of technicalities: it found the actions of Morris' counsel rose above mere technicalities and instead that "the actions of Plaintiff's counsel were purposeful and designed to deprive the Defendants of the ability to meaningfully participate in presuit discovery of the medical negligence claims against them, and as such was not in good faith." (R:1191). The trial court found that Morris violated Chapter 766's statutory presuit requirements by disallowing reasonable discovery into Thompson's purported qualifications. (R:1191).

The trial court then granted Respondents' motion to dismiss because the record did not support a finding that Dr. Thompson was a qualified expert witness under section 766.102(5)(a) and also because Morris' counsel obstructed the discovery process. *Id.* As the applicable statute of limitations had since expired, Morris could not remedy this issue and the dismissal was therefore effectively with prejudice. *Id.*

Morris then filed a motion for rehearing. She again failed to raise *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla.1993). (R:751-79). The trial court denied the motion and Morris appealed to the First District. (R:951).

E. The First District Court of Appeal Affirms the Dismissal

The First District affirmed. *Morris v. Muniz*, 189 So. 3d 348 (Fla. 1st DCA 2016). In the majority opinion, the court concluded that "ample evidence" supported the trial court's conclusions that Morris failed to offer sufficient proof of Thompson's statutory qualifications under section 766.102(5)(a), and affirmed the trial court dismissal on that ground.

The First District also affirmed the trial court's dismissal based on Morris' failure to provide reasonable access to information during presuit investigation pursuant to section 766.205(2), Florida Statutes (2011). *Id.* at 350-51. In so ruling, the First District found "ample evidence" that Morris (1) "repeatedly ignored requests for presuit discovery regarding her expert's statutory qualifications," (2) filed her medical malpractice lawsuit "without sufficiently responding to [Respondents'] requests for information," (3) "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", and (4) took these actions "intending to deprive [Respondents] of the opportunity to meaningfully participate in presuit discovery of the medical negligence claims against them." *Id.*

SUMMARY OF ARGUMENT

As a preliminary matter, the Court should discharge jurisdiction because no conflict exists.

However, if the Court should reach the merits of this appeal, it should affirm the dismissal of Morris' complaint because (1) competent substantial evidence supports the trial court's determination that Morris did not establish that Thompson was qualified as an expert witness under section 766.102(5)(a), and (2) the trial court did not abuse it discretion in dismissing Morris' action based on the repeated misconduct of her counsel.

The trial court correctly ruled that Thompson's qualifications to serve as an expert witness were subject to presuit discovery. Medical malpractice defendants are not bound to baldly accept the expert's purported qualifications purely on the face of their presuit affidavit. This is particularly true where, as here, Thompson's affidavit was general and conclusory, and her CV raised significant questions about whether she truly met the statute's requirements to serve as an expert. The trial court therefore appropriately permitted a limited discovery period before conducting an *Oken* evidentiary hearing.

After the hearing, the trial court properly concluded that Morris had not established that Thompson was qualified as an expert under section 766.102(5)(a). There was competent substantial evidence from which this conclusion could be

reached, and section 766.206(2) requires a trial court to dismiss a medical malpractice complaint when the plaintiff's presuit expert is not statutorily qualified.

In addition, the trial court also acted within its discretion when it dismissed Morris' complaint as a sanction for her counsel's deliberate obstruction of the discovery process both before and after suit was filed. Morris' counsel deliberately and willfully refused to answer presuit discovery about whether Thompson was statutorily qualified to serve as a medical expert in this case, purposefully obstructed Respondents' attempts to obtain discoverable documents on that point at deposition once suit was filed, and purposefully instructed Thompson to not answer relevant questions at deposition directed to whether she met section 766.102(5)(a)'s requirements.

Finally, Morris did not preserve her argument that the trial court should have analyzed the *Kozel* factors before dismissing her lawsuit. Morris failed to raise *Kozel* at any time in the lower court and therefore did not preserve this argument, *Bank of New York Mellon v. Sandhill*, 202 So. 3d 944 (Fla. 5th DCA 2016), which ought to fail on its merits if reached.

ARGUMENT

I. THE COURT SHOULD DISCHARGE JURISDICTION BECAUSE NO CONFLICT EXISTS

Dr. Smith and Dr. Muniz respectfully adopt the argument made in the Answer Brief of Respondent Bay Hospital d/b/a Gulf Coast Medical Center on this point.

II. THE TRIAL COURT CORRECTLY RULED THAT THOMPSON'S QUALIFICATIONS WERE SUBJECT TO PRESUIT DISCOVERY

The trial court correctly ruled that Thompson's qualifications were subject to presuit discovery. The policy underlying the medical malpractice presuit scheme includes a statutory directive that parties engage in meaningful presuit discovery to screen out frivolous lawsuits and defenses and encourage the early determination and prompt resolution of claims. *Shands Teaching Hosp. & Clinics, Inc. v. Barber*, 638 So. 2d 570, 572 (Fla. 1st DCA 1994).

Consistent with this policy, section 766.106(6)(a) and (b), Florida Statutes, provide that the parties shall make discoverable information available to each other without formal discovery (and that failure to do so is grounds for dismissal of a claim).[2] Additionally, section 766.205 requires that each party shall provide reasonable access to information within its possession or control to facilitate

[2] Section 766.106(7) also provides that "failure to cooperate on the part of any party during the presuit investigation may be grounds to strike any claim made by such party in suit."

evaluation of the claim, and shall do so without formal discovery. Finally, section 766.203(4) provides that "the medical opinions required by this section are subject to discovery."

Taken as a whole, these statutes establish that presuit discovery is acceptable, and that presuit medical expert opinions are subject to that discovery. This too only makes common sense, as the entire purpose of the medical malpractice presuit regime is to conduct meaningful presuit discovery to screen out frivolous claims. And therefore one topic which naturally may be discovered during the presuit process is whether an expert is truly qualified to render the opinion she purports to give.

Section 766.102(5)(a) establishes the qualifications that an expert must hold in order to render an opinion in a medical malpractice case against specialists like Dr. Smith and Dr. Muniz. Under that statute, Thompson was required to hold an active and valid license, conduct a complete review of the pertinent medical records, specialize in the same specialty as Dr. Muniz and Dr. Smith, and "have devoted professional time during the three years immediately preceding the date of the purported malpractice to the active clinical practice of, or consultation with respect to . . . the same specialty that includes the evaluation, diagnosis or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients." *Fla.Stat. § 766.102(5)(a).* This last quoted

portion was at issue here, and there must be some way to investigate, during the presuit process and before expensive litigation has begun, whether an expert is truly qualified under that statute to opine.[3]

Here, Thompson's presuit affidavit was general and conclusory; it did not facially establish that Thompson was truly qualified under section 766.102(5)(a). Faced with the burden to provide expert testimony from someone who, among other things, devoted professional time during the three years immediately preceding the date of the purported malpractice to the active clinical practice of obstetrics and gynecology, Morris produced someone whose affidavit and CV raised in the eyes of the trial court (and Respondents) a question of whether she truly did precisely that.

Based on the above, Respondents were well within their rights to request information regarding Thompson's qualifications during the presuit process (which Morris was statutorily obligated to provide but did not), and the trial court was well within its authority to order discovery on the topic once suit was filed. There is no language in Chapter 766 which requires bald acceptance of an expert's presuit assertion that she is statutorily qualified, particularly when other information

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[3] If there were not, the entire purpose of the presuit process – to screen out frivolous claims – would be frustrated. After all, unqualified experts could then state their facial compliance with the qualification requirements, nothing further could be done, and an unsupported lawsuit would follow.

makes this assertion suspect, and various provisions throughout Chapter 766 illustrate that presuit discovery on this topic is normal and permissible.[4]

In *Oken v. Williams*, 23 So. 3d 140 (Fla. 1st DCA 2009), the First District granted certiorari and determined that a physician, whose CV indicated that he was board certified in family and emergency medicine, was not qualified to provide an expert opinion against a cardiologist. (*Id.* at 142, 146). This Court, quashed the First District's decision and ruled that the case should have been remanded to the trial court for an evidentiary hearing to determine whether the purported expert was actually qualified. *Oken II*, 62 So. 3d at 1137.

Morris interprets *Oken II* to suggest that a trial court should only conduct an evidentiary hearing to obtain information that may happen to be lacking from the face of the medical expert's CV regarding specialty areas outside of her own, but not to consider evidence which may contradict the expert's affidavit. Morris fears that interpreting *Oken II* any other way turns expert qualification into a mini-trial.

Here, it is important to emphasize that the limited discovery period authorized by the trial court, though acceptable in all instances, was actually a creation of Morris' own making. The limited discovery period was only ordered

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[4] Indeed, the fact that section 766.203(4) permits discovery of expert opinions alone confirms that the legislature did not intend that trial courts (and potential defendants) in medical malpractice cases must blindly accept qualifications present on the face of an expert's presuit affidavit or CV.

after specific findings by the trial court that Thompson's CV and affidavit were *insufficient* to determine her qualifications and that Morris violated Chapter 766's presuit discovery requirements. Had Morris provided a satisfactory affidavit and complied with presuit requirements, there may have been no need for the limited discovery period. However, the very affidavit and CV which Morris chose to provide raised serious questions about Thompson's true qualifications, which Morris then deliberately failed to answer, so the trial court was left with no choice but to order limited discovery pursuant to *Oken II*. There was no error in that decision.

III. SUBSTANTIAL COMPENTENT EVIDENCE SUPPORTS THE TRIAL COURT'S RULING THAT THOMPSON DID NOT MEET THE REQUIREMENTS OF SECTION 766.102(5)(a)

Substantial competent evidence supports the trial court's determination that Thompson did not meet the expert qualification requirements of section 766.102(5)(a).

Dr. Smith and Dr. Muniz must first address the applicable standard of review – Morris contends that, because this case was technically decided on a motion to dismiss, the proper standard of review is *de novo*. (IB:21-26). This is incorrect. Following an *evidentiary* hearing, the trial court made the *factual* determination that Thompson was not truly qualified as an expert under section 766.102(5)(a).

A trial court's dismissal of a medical malpractice complaint after conducting an evidentiary hearing to determine whether the plaintiff obtained a verified written medical expert opinion to corroborate the alleged malpractice is reviewed under a competent substantial evidence standard. *Grau v. Wells*, 795 So. 2d 988 (Fla. 4th DCA 2001). This only makes common sense because whether a person is qualified under section 766.102(5)(a) is a question of fact.

In *Grau*, after conducting an evidentiary hearing, the trial court struck the defendant physician's pleadings for failure to reasonably investigate the patient's claim because the physician used an affidavit from a business partner, demonstrating bias and lack of reasonable basis to deny the claim. The appellate court affirmed, stating: "[b]ecause the trial court's findings as to [the physician's] lack of good faith and reasonable investigation come to this court clothed with a presumption of correctness, and because there is competent substantial evidence in the record to support these findings, we hold that under section 766.106(3)(a), the trial court was authorized to strike [the physician's] pleadings." *Id.* at 991; *see also Bery v. Fahel*, 143 So. 3d 962 (Fla. 3rd DCA 2014) (competent substantial evidence supported trial court's dismissal after conducting evidentiary hearing on whether a physician was qualified as an expert witness); *Herber v. Martin Mem. Med. Ctr., Inc.*, 76 So. 3d 1 (Fla. 4th DCA 2012) (the reasonableness of an investigation under Section 766.206(2) is a factual matter, reviewed on appeal for

competent substantial evidence); *Yocom v. Wuesthoff Health Sys., Inc.*, 880 So. 2d 787 (Fla. 5th DCA 2004) (fact finding made by trial court after evidentiary hearing on requirement for corroborating medical expert affidavit comes to appellate court bearing presumption of correctness).

Morris' reliance on *Holden v. Bober,* 39 So. 3d 396 (Fla. 2d DCA 2010), is misplaced. In *Holden*, the Second District simply held that a trial court erred by dismissing a medical malpractice claim without conducting an evidentiary hearing to consider the facts surrounding the expert's qualifications. Here, on the other hand, Judge Patterson dismissed Morris' complaint *after* holding such an evidentiary hearing.

Substantial competent evidence supports the trial court's determination that Thompson did not meet the expert qualification requirements of section 766.102(5)(a). To qualify as an expert witness in a matter involving a specialist such as an OB/GYN, an expert must satisfy all the elements of that subsection. Thus, Morris was required to show that Thompson:

1. held an active and valid license;

2. conducted a complete review of all pertinent medical records;

3. specialized as an OB/GYN; and

4. devoted professional time during the three years immediately preceding the date of the occurrence that is the basis for [Morris'] action to the

active clinical practice of . . . [obstetrics and gynecology] that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and [has] prior experience treating such patients. *Fla.Stat. § 766.102(5)(a).*

The dispute in this case centered on the fourth element. This fourth element itself has two parts – Morris was required to show that Thompson (1) devoted professional time during the three years immediately preceding 2009 to the *active* clinical practice of obstetrics, and also (2) that this active practice included evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and that Thompson had experience treating similar patients. *Id.* Armed only with her affidavit and obstructed deposition testimony, Morris failed in *both* regards, and the trial court properly dismissed her complaint.

On the first point – whether Thompson devoted professional time during the three years immediately preceding 2009 to the active clinical practice of obstetrics– Thompson's "general" affidavit stated that she was engaged in full time patient care until March 2008, but not that she was engaged in the *active* practice *of obstetrics* during the three years before the subject incident, as section 766.102(5)(a) requires. And her deposition testimony did not establish proof of this topic either.

At deposition, Thompson testified that she retired from the practice of medicine in March 2008, which is approximately 10 months before the incident of purported malpractice in this case, due to arthritis. Thompson asserted that she worked at her own practice and at a hospital before retirement, but also that she was a full-time law student during most of the three years before the incident, a master's degree student, and a lecturer who taught undergraduate students as well. She admitted that she only worked at the hospital two to three days per month (when she was on call there), and that sometimes she studied at the hospital too.

Thompson testified that she was on call for her private practice only once every three or four days, and that she attended law school and her master's program classes while on call. Thompson studied while on call. She claimed that she took classes in the morning and worked at her office in the afternoon, but also testified that she took afternoon classes. Thompson also hired a contract physician who took call for her patients. She could not say how many hours per week that physician did so.

Thompson admitted that she approximated when she claimed to deliver 400 babies per year, reviewed no documentation before reaching that estimate, and admitted that number could include babies delivered by her contract physician and not her. She also gave inconsistent testimony on the whereabouts of her business

records, and Morris' counsel instructed her not to identify the person who maintained them.

Thompson testified that the arthritis which caused her retirement was "severe" for the final two years of her work, but Morris' counsel instructed her not to say whether she had filed for disability benefits, which would have illustrated whether Thompson represented that she was too disabled to work. Morris' counsel instructed Thompson not to answer the question of how she purportedly worked more than 20 hours per week when the American Bar Association prohibits law students at accredited schools from doing so. Morris' counsel instructed Thompson not to say whether she noticed any change in her medical practice while she was in law school. This is obstruction, but it is also a lack of proof.

As the trial court found, this is indeed "scant additional information about the specific qualifications of Dr. Thompson" and "her ability to devote professional time" to the active practice of obstetrics in the three years before the incident involved in this case. (R:1191). Upon Thompson's general and unhelpful affidavit and her deposition testimony, which is all Morris gave the trial court to consider, there existed ample evidence that Thompson was not truly qualified under section 766.102(5)(a) – Thompson retired 10 months before the subject incident due to severe arthritis, earned a law degree and a master's degree during the three years preceding it, worked at a hospital two to three days per month and

sometimes studied while there, was on call at her own practice only three or four days per month, and hired another doctor to take some of that call for her (but could not say how often that doctor did so).

The Court should therefore affirm the dismissal of Morris' complaint and there is no need to proceed further. After all, since competent substantial evidence supports the trial court's determination that Morris did not establish that Thompson devoted professional time to the active practice of obstetrics during the three years preceding the 2009 incident, Thompson is unqualified as an expert for that reason alone, and the trial court properly dismissed the action. No further inquiry is necessary.

Morris also failed in her burden on the second point – whether Thompson's active practice of obstetrics and gynecology, if it existed, included evaluation, diagnosis, or treatment of the medical condition that is the subject of this medical malpractice claim and whether Thompson had experience treating similar patients. This is an important component of section 766.102(5)(a); it requires a medical expert to have experience in evaluating, diagnosing or treating *the very condition that is the subject of the medical malpractice claim* and also to have direct experience treating patients with *that condition*.

However, when Dr. Smith's counsel asked Thompson what condition was the subject of the claim and whether Thompson had ever treated that same

condition, Thompson could not provide a specific answer "without reviewing the medical records." (R:592-603). In other words, Thompson *did not know* whether she had ever treated the condition that decedent McIntyre developed. She could not say what the condition was. The best answer Thompson could provide was that McIntyre had "a complication" which resulted in early delivery and death. (R:600-01). How possibly could Morris have established that Thompson evaluated, diagnosed or treated the very medical condition that is the subject of Morris' medical malpractice claim against Dr. Smith and Dr. Muniz when Thompson's only testimony is that the decedent had some unnamed "complication" that caused her death?

Therefore, Morris failed on this necessary element of proof as well. In fact, it is entirely missing. This too is reason by itself that Morris' complaint required dismissal– Morris did not show that Thompson's active practice of obstetrics and gynecology, if it existed, included evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and that Thompson had experience treating similar patients. Every medical malpractice plaintiff proceeding under section 766.102(5)(a) must make this showing, and Morris failed.

Thus, Morris failed in two separate fashions to show that Thompson was statutorily qualified to serve as a medical expert, and each of those reasons is alone

sufficient to justify dismissal of Morris' action. The proper remedy for this failure was indeed dismissal. Section 766.206(2) states:

> If the court finds that the notice of intent to initiate litigation mailed by the claimant does not comply with the reasonable investigation requirements of ss. 766.201-766.212, including a review of the claim and a verified written medical expert opinion by an expert witness as defined in s. 766.202, or that the authorization accompanying the notice of intent required under s. 766.1065 is not completed in good faith by the claimant, **the court shall dismiss the claim** . . . .

(R:245). This statute plainly states that courts *shall* dismiss a medical malpractice complaint if the notice of intent to initiate litigation did not comply with the requirements of sections 766.201-.212, including its support by a verified written medical expert opinion by a medical expert "as defined in section 766.202." Section 766.202, in turn, defines "medical expert" as one who meets the requirements of Section 766.102. *§ 766.202(6), Fla. Stat. (2011).*

Few bright line conclusions can be ascertained in sanctions cases related to Chapter 766, but one is crystal clear. If a claimant fails to produce a verified opinion from a qualified medical expert before the statute of limitations has expired, the claim shall be dismissed. *Fla.Stat. § 766.206(2)*; *Kukral v. Mekras*, 679 So. 2d 278 (Fla. 1996); *Cohen v. West Boca Med. Ctr., Inc.* 854 So. 2d 276 (Fla. 4th DCA 2003); *Goradesky v. Hickox*, 721 So. 2d 418 (Fla. 4th DCA 1998).

And the language of section 766.206(2) is clear and unambiguous. Simply put, ***shall dismiss*** means ***shall dismiss***. Legislative intent guides statutory analysis, and to discern that intent a court must first look to the language of the statute and its plain meaning. *Florida Dep't of Children & Family Servs. v. P.E.*, 14 So. 3d 228, 234 (Fla. 2009). Courts are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). Thus, if the meaning of the statute is clear then a court's task goes no further than applying the plain language of the statute. *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007). A trial court therefore must dismiss a medical malpractice complaint if the plaintiff's expert is not qualified under section 766.102 because section 766.203(2) says it shall.

In summary, as the First District held, "the record contains ample evidence to support the trial court's conclusions that appellant failed to offer sufficient proof of her proffered expert's statutory qualifications." Since there was competent substantial evidence to support this conclusion, the Court should affirm the dismissal of Morris' complaint.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED MORRIS' AMENDED COMPLAINT AS A SANCTION FOR HER COUNSEL'S MISCONDUCT

The trial court also dismissed Morris' complaint as a sanction for her counsel's misconduct during the presuit discovery process. This was not an abuse of discretion.

A trial court's decision to dismiss a pleading as a sanction for the misconduct of counsel is reviewed for abuse of discretion. *Vincent v. Kaufman*, 855 So. 2d 1153 (Fla. 4th DCA 2003); *Popps v. Foltz*, 806 So. 2d 583 (Fla. 4th DCA 2002). "Discretion is abused when judicial action is arbitrary, fanciful or unreasonable, which is another way of saying discretion is abused only when no reasonable man would take the view adopted by the trial court." *Canakaris v. Canakaris*, 382 So.2d 1197, 1202 (Fla. 1980). In other words, discretion is abused when only an unreasonable trial judge could have made the rulings made below. *Id.*

The legislature intended compliance with the presuit statutes from both defendants and claimants. Sanctions for noncompliance include dismissing claims, striking pleadings, imposing reasonable fines, precluding the requirement of a verified opinion, and awarding attorneys' fees. *McPhearson v. Phillips*, 877 So. 2d 755 (Fla. 4th DCA 2004). Every plaintiff must comply with sections 766.203 to 766.206 as a condition precedent to maintaining an action for medical negligence.

Fla.Stat. § 766.203(1). This naturally includes section 766.205, which governs presuit discovery.

Although Florida's medical malpractice presuit requirements should be narrowly construed so as not to unduly restrict access to courts, the presuit requirements are more than mere technicalities and willful noncompliance properly results in dismissal. *Melanson v. Agravat*, 675 So. 2d 1032 (Fla. 1st DCA 1996). While the medical malpractice statutory scheme must be interpreted so as not to restrict a citizen's access to courts, trial courts are still vested with the responsibility of carrying out the legislative policy of requiring the parties to engage in meaningful presuit investigation and discovery. *Kukral*, 679 So. 2d at 279. When a party fails to meaningfully engage in presuit investigation and discovery, it does so at its own peril. *Correa v. Robertson*, 693 So. 2d 619, 621 (Fla. 2nd DCA 1997).

Section 766.106(3)(a), Florida Statutes, requires a good faith investigation and good faith cooperation between litigants and states that the "unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses." The failure of claimants to comply with Chapter 766's presuit *discovery* requirements can also result in the dismissal of their claims. *Bartley v. Ross*, 559 So. 2d 701 (Fla. 4th DCA 1990). Dismissal is certainly justified in aggravated cases of disobedience. *Wolford v. Boone*, 874 So. 2d 1207 (Fla. 5th

DCA 2004). Before dismissing a complaint for failure to comply with presuit discovery requirements, the court must find prejudice or harm. *Robinson v. Scott*, 974 So. 2d 1090 (Fla. 3rd DCA 2007).

The record shows that Dr. Smith and Dr. Muniz clearly invoked their right to conduct presuit discovery, but Morris then willfully and repeatedly refused to comply during the process in violation of Chapter 766. (R:1393-95, 1401-02).

Dr. Smith propounded presuit interrogatories to resolve the vagueness of Thompson's affidavit and identify the condition supposedly misdiagnosed and treated. This is a common practice in medical malpractice litigation, is entirely permissible, and is part of establishing that a medical expert is qualified under section 766.102(5)(a). This presented Morris with an opportunity to quickly and easily address part of Dr. Smith's concern that Thompson was not statutorily qualified. Rather than doing so, Morris informed Dr. Smith that Thompson would provide additional details only if Smith paid Thompson's fee for responding. (R:1396-97.) This absurd response was completely nonresponsive. Parties answer interrogatories, even presuit interrogatories; they do not refuse to provide answers until their experts are paid by the opposition to do so.

Morris then chose to ignore Dr. Smith's requests for this standard information, so Dr. Smith advised Morris that Thompson was not a medical expert qualified under section 766.102(5)(a) because it did not appear that she "devoted

professional time during the three years immediately preceding the date of the occurrence that is the basis of Morris' action to the active clinical practice of . . . [obstetrics]":

> According to Ms. Thompson's CV, she was enrolled in law school and graduate school during the three years prior to the time Ms. McIntyre was treated by Dr. Smith. Additionally, Dr. Thompson retired from the practice of medicine during March 2008, approximately nine months prior to the time Ms. McIntyre was treated by Dr. Smith. We have serious concerns that Dr. Thompson is not qualified to serve as an expert for the Estate of Shunteria S. McIntyre pursuant to the requirements of §766.102(5)(a), Fla. Stat. (2009).

Id. Morris again did not respond.

Prior to entering dismissal, the trial court in *Melanson* noted,

> ... this was not a case in which the discovery was provided two or three months late, or the information provided was insufficient; rather, in this case no information was provided in response to the discovery request... failure to respond precluded any possibility of fruitful negotiation and frustrated the spirit of the statute.

Melanson, 675 So. 2d at 1033. Just as the spirit of the statute was frustrated in *Melanson* by a failure to provide discovery responses, so also it was frustrated here. The trial court determined that Morris willfully and deliberately chose not to provide any additional information regarding Thompson's qualifications during the presuit discovery process. (R:242-43, 245). The trial court found that the information requested by Respondents was legitimately discoverable during the

presuit period and could have been provided with minimal effort. (R:245). The trial court properly sanctioned Morris for not cooperating during the presuit process (and permitted the Respondents to engage in a limited discovery process, including the deposition of Thompson pursuant to *Oken II*). *Id.*

Morris' refusal to participate meaningfully in presuit written discovery corrupted the process and did not allow Respondents to gain the necessary information needed to perform a reasonable investigation into whether Thompson was qualified as an expert witness. Morris did not *lack the capability* to comply with the statutory presuit requirements "but rather, she failed to follow the procedure set forth in the statute. Therefore, it was human failure, not the presuit requirements which barred [her] entry to the courthouse." *Royle v. Florida Hospital-E. Orlando*, 679 So. 2d 1209, 1212 (Fla. 5th DCA 1996). Here, that human failure was purposeful. Where a plaintiff acts unreasonably in refusing to supply requested information, precluding the possibility of fruitful pretrial negotiations, or willfully fails to comply with presuit discovery, dismissal of her medical malpractice action may be proper. *Dressler v. Boca Raton Community Hosp.*, 566 So. 2d 571 (Fla. 4th DCA 1990); *see also Goradesky v. Hickox*, 721 So. 2d 419 (Fla. 4th DCA 1998).

After suit was filed, Morris' non-compliance continued through Thompson's deposition. Approximately 90 minutes prior to the deposition, Morris objected to

documents requested in Dr. Smith's *duces tecum* notice filed a month earlier. (R:497-501). Thompson thus did not bring to the deposition documents that were clearly relevant to whether she was qualified as an expert witness. (R:516). Morris' counsel then objected and/or instructed Thompson not to answer the questions concerning (a) Thompson's post-graduate education at the University of Texas Law School or Lyndon B. Johnson School of Public Policy for the years 2006-2009; (b) the number of hours per week Thompson devoted to active clinical practice from 2006-2009 while in law school or seeking her Master's degree; (c) American Bar Association accreditation rules which restrict law students to no more than 20 hours a week of outside work, (d) whether Thompson applied for Social Security disability benefits which would have affected her ability to engage in active clinical obstetrics; and (e) whether Thompson noticed a change in the financial viability of her medical practice after she started law school. He even instructed Thompson not to identify the individual who maintained her business records.

Under these facts, it is not an abuse of discretion to dismiss a medical malpractice lawsuit for deliberate, sanctionable conduct by a plaintiff's counsel. Morris' counsel served Thompson's general and conclusory expert affidavit and then deliberately and willfully refused to answer presuit discovery about whether Thompson was statutorily qualified to serve as a medical expert in this case,

purposefully obstructed Respondents' attempts to obtain discoverable documents on that point, and purposefully instructed Thompson to not answer relevant questions at deposition directed to whether she met section 766.102(5)(a)'s requirements. These willful violations began at the very beginning of the presuit process with the notice of intent and continued through the end of the litigation process with Thompson's deposition, all designed to obstruct written discovery, document production, and deposition testimony pertinent to whether Thompson was a statutorily qualified expert witness.

The trial court found these actions to be "purposeful," "designed to deprive [Respondents] of the ability to meaningfully [investigate] the medical negligence claims against them," and "not in good faith," and that is what they were. This was an aggravated case of disobedience. A reasonable trial judge could find that dismissal is warranted under these circumstances. It is certainly not fanciful or arbitrary to do so. *Canakaris*, 382 So. 2d at 1202. Thus, the trial court did not abuse its discretion when it dismissed Morris' action for her counsel's sanctionable behavior, and the Court ought to affirm that ruling.

V. MORRIS' *KOZEL* ARGUMENT WAS NOT PROPERLY PRESERVED AT THE TRIAL COURT

In a last ditch effort to escape her counsel's sanctionable conduct, Morris relies on *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993), to assert that her lawyer's

conduct can only possibly justify a sanction less severe than dismissal. This argument comes both a day late and a dollar short.

Morris did not ask the trial court to analyze the *Kozel* factors at any time and therefore did not preserve this purported error. *Mathieu v. Mathieu*, 877 So. 2d 740, 741 (Fla. 5th DCA 2004) ("[W]e will treat the lack of adequate findings as an unpreserved error unless previously brought to the trial court's attention"). To preserve as error the failure of the trial court to conduct a *Kozel* analysis, Morris was obligated to file a timely motion for rehearing (or clarification) specifically requesting inclusion of the *Kozel* analysis in an amended order. *Bank of N.Y. Mellon v. Sandhill*, 202 So. 3d 944 (Fla. 5th DCA 2016). While Morris *did* file a motion for rehearing after the trial court entered its dismissal, she *did not* request the trial court to conduct a *Kozel* analysis. Therefore, Morris' *Kozel* argument was not properly preserved and the Court should not address it.

Even if the Court were to consider the *Kozel* factors, Morris' argument still fails. Medical malpractice presuit proceedings are governed by Florida Statutes Chapter 766. The legislature made no provision within Chapter 766 allowing a court to consider the *Kozel* factors prior to the mandatory dismissal required in the numerous statutes outlined supra. Nor does Florida case law provide for consideration of the *Kozel* factors prior to dismissal pursuant to Chapter 766's

mandatory provisions. Finally, even if *Kozel* were to apply, Morris has not argued that the factors merit reversal in this case.

Woodall v. Hillsborough Hospital Authority, 778 So. 2d 320 (Fla. 2nd DCA 2000), is distinguishable. *Woodall* held that dismissal of a medical malpractice action was not an appropriate sanction for failure of a patient's attorney to respond to presuit discovery requests. *Woodall*, 778 So. 2d at 322. There a plaintiff's counsel alleged that his staff caused his failure to respond to one of several defendants' presuit discovery requests. The court found that only one *Kozel* factor supported the hospital's motion to dismiss (the attorney failed to offer reasonable justification for his non-compliance), which was not enough to justify punishing the plaintiff with dismissal. *Id.*

Here, on the other hand, Morris' counsel intentionally cherry-picked which presuit discovery he would respond to and which he would not, even after being advised by Respondents that this was improper. That was the first strike. Morris also did not respond to Respondents' presuit request for information about Thompson's qualifications, even after she was advised of Respondents' concerns regarding her qualifications. That was the second strike. Finally, Morris obstructed Respondents' legitimate requests for meaningful discovery from Thompson through document production and her deposition, which were specifically permitted by the trial court. That was the third strike. In sum, this is

not a case like *Woodall* where a plaintiff's attorney accidentally dropped the ball once. Rather, this was a case of intentional and purposeful obstruction. If ever there was a case where willful non-compliance with chapter 766 warranted dismissal, this is it.

CONCLUSION

For the foregoing reasons, the district court's opinion should be affirmed.

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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I HEREBY 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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