IN THE SUPREME COURT OF FLORIDA

TUYUANA 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
2011-00953-CA

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT JACKSON HOSPITAL

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PRELIMINARY STATEMENT

Petitioner, Tuyuana L. Morris, as Personal Representative of the Estate of Shunteria S. McIntyre, will be referred to as "Plaintiff" or "McIntyre."

Respondent, Jackson Hospital, will be referred to as "Jackson Hospital." Respondent, Orlando S. Muniz, M.D., will be referred to as "Dr. Muniz." Respondent, Marianna OB/GYN Associates, Inc., will be referred to as "Marianna OB/GYN." Respondent, Bay Hospital, Inc., d/b/a Gulf Coast Medical Center, will be referred to as "GCMC." Respondent, Stephen G. Smith, M.D., will be referred to as "Dr. Smith."

Citations to the record will generally be in the format (R:X), with "X" designating the page.

Citations of the supplemental record filed on January 15, 2015, will generally be in the format (R.Supp. X), with "X" designating the page.

STATEMENT OF THE CASE AND FACTS

The Plaintiff seeks review of a decision of the First District affirming dismissal of a medical malpractice action. The dismissal was based two independent grounds: (1) the Plaintiff failed to establish that her corroborating expert, Dr. Thompson, was qualified under section 766.102(5); and (2) the Plaintiff purposefully deprived access to reasonable information as required by section 766.205.

The First District affirmed and agreed with the trial court that the record did not support a finding that Dr. Thompson was qualified because the Plaintiff refused to engage in a reasonable presuit investigation of the claim and provide evidence of her qualifications. *Morris v. Muniz*, 189 So. 3d 348, 350-51 (Fla. 1st DCA 2016). The First District also held that dismissal of the complaint was proper because the Plaintiff refused to engage in a reasonable presuit investigation of the claim with the intent to deprive Jackson Hospital of the opportunity to meaningfully participate in presuit discovery of the claims asserted. *Id.*

The trial court, in ruling on the motion to dismiss, properly recognized that the Plaintiff had the obligation to establish that the presuit expert was qualified under the statute but found that it was not able to make a determination based on the information in Dr. Thompson's affidavit. The trial court ordered that an evidentiary hearing be conducted in accordance with controlling law to determine whether Dr.

Thompson was qualified to render an opinion and permitted the Defendants an opportunity to engage in limited discovery directed to the issue. The Plaintiff did not raise any objection to the evidentiary hearing in the trial court.

In this appeal, the Plaintiff seeks review contending that the First District's decision conflicts with decisions of the Second, Fourth, and Fifth Districts as to the standard of review and based on the First District's purported failure to analyze either the prejudice to the Defendants or the factors required under this Court's opinion in *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993). The Plaintiff contends that this Court's review is de novo and that dismissal was improper because the record established that Dr. Thompson was qualified. The Plaintiff also asserts that it was improper to dismiss the complaint for any failure to participate in presuit discovery, particularly in absence of prejudice.

Factual Background

On October 22, 2008, the decedent began treating with Dr. Muniz, for prenatal care related to her pregnancy. (R:330.) Over the next three months, the decedent was treated at Jackson Hospital, on four separate occasions, totaling approximately ten days. (R:330-31.) Two of the hospitalizations – 10/29/08 and 12/20/08 – only involved care of the decedent in Jackson Hospital's Emergency Department. (*Id.*) The decedent's very last day of any treatment at Jackson Hospital was January 5, 2009. (*Id.*) She was subsequently treated by Dr. Muniz on January 16, 2009; and

she was admitted to GCMC on January 18, 2009, where she was treated by Dr. Smith. (R:331-32.) The decedent delivered a stillborn on January 21, 2009, after which she underwent a dilation and curettage procedure by Dr. Smith and was discharged home. (R:332.) On January 24, 2009 – twenty days after she was last seen at Jackson Hospital – the patient collapsed at home and was later pronounced dead. (*Id.*) An autopsy revealed that the decedent died of "Klebsiella Pneumoniae Septicemia," in addition to "intrauterine fetal demise and severe acute diarrhea." (*Id.*)

Notice of Intent and Presuit Discovery

On April 25, 2011,[1] the Plaintiff served Jackson Hospital with a notice of intent to initiate litigation, along with an affidavit from Margaret M. Thompson, M.D., J.D., M.P.Aff, who was purported to be an expert for purposes of section 766.202, Florida Statutes (2009). (R:158-64.) The affidavit was vague and conclusory, asserted that Jackson Hospital's "staff" breached the standard of care by failing to take the patient's history and inform the doctor of "the patient's condition," failing to "diagnose Ms. McIntyre's condition," and failing to "correctly treat her condition." (R:162-64.) The affidavit did not indicate how, when, or who from Jackson Hospital's staff was negligent during the ten days the decedent was

[1] On January 10, 2011, the Plaintiff filed a Petition for Automatic Extension of the Statute of Limitations, which provided an extra three months to the two year statute of limitations in which to serve her presuit notice of intent.

hospitalized at its facility over four separate admissions or what kind of "condition" the Hospital failed to diagnose or treat. (*Id.*)

The affidavit also purported to establish Dr. Thompson's qualifications as an expert. (R:226.) Specifically, Dr. Thompson stated that she was a licensed medical doctor and a board certified obstetrician and gynecologist licensed to practice medicine in the State of Texas. (*Id.*) The affidavit indicates that in 2007 she graduated with a Juris Doctorate Degree from the University of Texas School of Law and in 2008 graduated with a Master's in Public Affairs also from the University of Texas. (*Id.*) Importantly, although Dr. Thompson's affidavit stated that she was "engaged in full-time patient care until March 2008," no information was provided regarding the type of care that was provided, the setting in which it was provided, or the type of patients she treated. (*Id.*) Dr. Thompson's unsworn CV, which was produced later during presuit discovery, also indicated that she was enrolled in both law school and graduate school during the three years prior to the time of the subject incident. (R.Supp. 1396-1400.) And, although Dr. Thompson was board-certified at the time of her affidavit, her CV indicated that she had retired from the practice of medicine in March 2008, which was approximately seven to nine months before Jackson Hospital's treatment of the decedent. (*Id.*)

Request of Presuit Discovery

On May 12, 2011, Jackson Hospital propounded presuit interrogatories. (R:165-68.) The explicit goal of the second and third interrogatories was to obtain detail regarding Dr. Thompson's vague and conclusory opinions regarding Jackson Hospital's breach of the standard of care. On July 18, 2011, the Plaintiff responded as follows:

> 2. Please describe in detail as specifically as possible each and every act or omission on the part of Jackson Hospital which you contend was negligent and please describe how you contend each act or omission caused or contributed to Ms. McIntyre's death. In other words, with respect to paragraph 5 of your expert's affidavit, please describe **how** and **when** the failures listed in subparagraphs (a)-(c) occurred.
>
> **Response:** See affidavit of Dr. Margaret Thompson; please also see medical records as provided by Jackson Hospital as to treatment provided or the lack thereof.
>
> 3. What condition do you contend the nurses at Jackson Hospital failed to diagnose and correctly treat?
>
> **Response:** Please see response to Interrogatory [#2] *supra*.

(R:173-76.)

The Plaintiff's "responses" to Jackson Hospital's presuit interrogatories were completely unresponsive. Accordingly, on July 22, 2011, two months before the

expiration of the presuit period, Jackson Hospital notified the Plaintiff that the responses to presuit interrogatories #2 and #3 were inadequate and provided insufficient facts to perform its presuit investigation. (R:201-02.) The decedent's financial information was also requested so that Jackson Hospital could understand the Estate's purported claim for economic damages. (*Id.*) The Plaintiff never responded to the July 22, 2011 correspondence.

On August 15, 2011, one month before the expiration of the presuit period, Jackson Hospital requested in writing for the Plaintiff to respond to the July 22, 2011 correspondence. (R:207-09.) Additionally, Jackson Hospital raised concerns about the qualifications of Dr. Thompson and included additional interrogatories directed at her qualifications to determine if the requirements of sections 766.102 and 766.202 were met. (*Id.*) The Plaintiff never responded to the August 15, 2011 correspondence.

Instead, the Plaintiff elected to allow the presuit period to expire, as well as the statute of limitations, without ever notifying Jackson Hospital how, when, or which member of its staff was supposedly negligent, what kind of "condition" Jackson Hospital failed to diagnose or treat, how any claimed negligence resulted in injury, or how Dr. Thompson met the requirements of sections 766.202 and 766.102.

Jackson Hospital denied the Plaintiff's notice of intent on September 20, 2011.[2] (R:218.)

Jackson Hospital's requests for information regarding Dr. Thompson were cumulative to those made by Dr. Smith and GCMC. On June 16, 2011, Dr. Smith sent discovery requests to Plaintiff which were focused on Dr. Thompson's qualifications. (R.Supp. 1393-95.) On July 18, 2011, Plaintiff responded, but chose not to provide any additional information regarding Dr. Thompson's qualifications and instead advised that Dr. Smith could request additional details from Dr. Thompson if he paid Dr. Thompson's fee for responding to the additional inquiries. (R.Supp. 1396-97.) In a July 26, 2011 letter, Dr. Smith provided Plaintiff with formal notice of her failure to comply with the statutory presuit requirements of section 766.102, Florida Statutes. (R.Supp. 1401-02.) Plaintiff was specifically advised that Dr. Thompson was not qualified as an "expert" as defined by section 766.102(5), Florida Statutes, and that if Dr. Thompson did not respond to Dr. Smith's presuit discovery requests regarding her qualifications, Dr. Smith would move for an evidentiary hearing to have Dr. Thompson disqualified as an expert. (R.Supp.1401-02.) Plaintiff did not respond to Dr. Smith's July 26, 2011 correspondence.

Dr. Smith denied the Plaintiff's notice of intent on September 15, 2011, and

[2] All parties had agreed to extend presuit until September 20, 2011. (R:198.)

advised Plaintiff that if suit was filed, he would argue that the notice of intent did not comply with the requirements of Chapter 766, Florida Statutes, and would seek to impose sanctions pursuant to section 766.106(7), Florida Statutes for Plaintiff's failure to cooperate during the presuit investigation period. (R.Supp.1413.) Plaintiff again did not respond.

The reasonable inquiries by Jackson Hospital and the other Defendants were made during the presuit investigative period and well prior to the expiration of the statute of limitations in order to provide Defendants a full and fair opportunity to investigate the claim. However, the Plaintiff's willful refusal to clarify and/or cure the issue of Dr. Thompson's expert qualifications, and otherwise cooperate with other presuit interrogatories and requests during the presuit process, prevented a meaningful opportunity to conduct a presuit investigation.

Motion to Dismiss and July 2012 Hearing

On April 4, 2012, Jackson Hospital filed a Motion to Dismiss alleging that Plaintiff had failed to comply with the presuit requirements pursuant to section 766.106, Florida Statutes. (R:143-200; R:201-29.) Jackson Hospital argued that dismissal was proper because (a) the Plaintiff willfully failed to comply in good faith with Jackson Hospital's presuit investigation as required by section 766.205(3), Florida Statutes; and (b) the Plaintiff did not demonstrate that Dr. Thompson

qualified as an expert pursuant to sections 766.102(5), (6) and(9).[3] (R:143-55.)

In response to Jackson Hospital's Motion to Dismiss, the Plaintiff made unverified representations to the court that Dr. Thompson had delivered approximately 30 babies per month and had been working 60 hours per week through the time she retired from the active practice of patient care in March 2008. (R:235.)

A hearing on the motions to dismiss was held on July 24, 2012. (R:956-1009.) The primary issue considered during the hearing was whether Dr. Thompson had devoted 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 the same or similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that was the subject of Plaintiff's claim, and whether Dr. Thompson had prior experience treating similar patients pursuant to section 766.102(5). (R:956-77.) Jackson Hospital also argued that Plaintiff unreasonably failed to comply with presuit discovery by failing to answer Jackson Hospital's reasonable presuit discovery. (R:980-85.)

[3] At that stage in the litigation, Plaintiff was claiming that the emergency physicians at Jackson Hospital were negligent and Jackson Hospital was challenging Dr. Thompson's qualifications as an expert per section 766.102(9), Florida Statutes. The Plaintiff clarified in subsequent pleadings, hearings, and on appeal that she will not be claiming medical negligence on the part of any emergency room physician.

Trial Court's August and November 2012 Orders

By Order dated August 2, 2012, the trial court determined that it was the Plaintiff's obligation to establish the qualifications of her expert witness and it was not the obligation of any of the Defendants to pay Dr. Thompson for that information. (R:242-43.) The trial court concluded that the Defendants had appropriately requested additional information concerning Dr. Thompson's qualifications and the Plaintiff improperly refused to provide that information through a verified Affidavit. (R:243.) However, the trial court determined that it was not in a position at that time to determine Dr. Thompson's qualifications as an expert witness "given the limited and general information set forth in Dr. Thompson's Affidavit." (*Id.*) Pursuant to *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011), the trial court concluded that it would be necessary to conduct an evidentiary hearing to determine whether Dr. Thompson was qualified to render an opinion under sections 766.102. (R:245.)

The court also ruled that the Defendants would be permitted to engage in limited discovery directed to Dr. Thompson's qualifications under sections 766.102 and 766.202, which included interrogatories, requests for production and the telephonic or video conference deposition of Dr. Thompson. (*Id.*) According to the Order, "[w]hen the [Defendants] have completed this discovery process, the parties are instructed to schedule an evidentiary hearing with the Court at which time the

Court will be in a position to make a final determination with respect to Dr. Thompson's qualifications and ultimately whether the defendant's Motions to Dismiss shall be granted or denied." (R:245.) As a sanction for Plaintiff's unreasonable failure to provide the requested information during the presuit process, the court ordered Plaintiff to be responsible for all of Dr. Thompson's fees as well as the attorneys' fees and taxable costs incurred by Defendants in engaging in this discovery process. (*Id.*)

The Plaintiff filed a Motion to Amend or Alter Order on Motions to Dismiss or in the Alternative Motion for Rehearing on August 13, 2012, asserting that Dr. Thompson's affidavit demonstrated that she was qualified simply by thee statement that she was engaged in "full-time patient care until March 2008." (R:225.) The Plaintiff also requested the court to reconsider its ruling requiring her to be responsible for all of Dr. Thompson's fees and the attorneys' fees and taxable costs incurred by Defendants in engaging in the limited discovery process. (*Id.*) At the hearing on the motion, the court reiterated its finding that Dr. Thompson's affidavit was facially insufficient to establish that she was qualified. (R:1052.) However, the court modified its order awarding attorneys' fees and taxable costs for conducting the presuit discovery finding that it was premature and reserved ruling on the issue until after the evidentiary hearing. (R:458.)

Deposition of Dr. Margaret Thompson

Dr. Smith filed a notice of taking video deposition duces tecum, setting Dr. Thompson's deposition for October 7, 2013 (the notice was amended as to location on October 3, 2013). (R:652-56.) This discovery specifically sought to discover information related to Dr. Thompson's professional and educational commitments and activities during the three years prior to the incident during which she was allegedly practicing as an OB/GYN, *e.g.*, copies of her coursework records and schedule from the University of Texas Law School and University of Texas Lyndon Johnson School of Public Policy. (R:653-54; 245.)

Even though the Plaintiff had the notice duces tecum for over one month, the Plaintiff waited until just 90 minutes prior to the commencement of Dr. Thompson's deposition to assert general objections to the duces tecum, claiming that the requests exceeded the scope of the Court's November 5, 2012 Order. (R:497-501.) Dr. Thompson failed to bring related documents to her deposition as requested, other than her CV (which Defendants already had), and a list of cases where she had given deposition or trial testimony. (R:516.) Accordingly, Defendants were unable to meaningfully discover and review numerous records related to Dr. Thompson's qualifications as an expert witness – and specifically those which would reveal whether Dr. Thompson simultaneously engaged in the active practice of obstetrics while she was obtaining both a Juris Doctor and Masters of Public Affairs during the

three years prior to the incident. (R:1189-90.)

During the deposition, Defendants inquired into several areas related to Dr. Thompson's qualifications, including but not limited to: (a) her post graduate education at the University of Texas Law School and Lyndon B. Johnson School of Public Policy for the years 2006-2009; (b) how many hours a week Dr. Thompson devoted to active clinical practice from 2006-2009 while in law school or seeking her Master's degree; (c) ABA accreditation rules which applied to the University of Texas and restricted its law students to no more than 20 hours a week of work while attending law school; (d) whether Dr. Thompson had applied for Social Security disability benefits due to arthritis which required her to retire in March 2008; and (e) the financial viability of her practice after she started law school. (R:531-54, 558-59, 576-78.) Plaintiff repeatedly rendered objections to these areas of inquiry and advised Dr. Thompson not to answer certain questions. (*Id.*) Plaintiff's repeated, purposeful objections and intentional obstruction prevented the Defendants from determining how Dr. Thompson could possibly have simultaneously attended and graduated from both law school and graduate school while working as a full-time on-call obstetrician treating "tens of thousands" of female patients and personally delivering close to 1,000 babies from 2006 through February 2008 (R:544, 558), while teaching an undergraduate course at UT and serving as an adjunct professor at LBJ School of Public Affairs (R:555-56), while

serving as an expert for the Texas Medical Board (R:556), and while allegedly suffering from such bad arthritis in her hands that she was forced into retirement in March 2008 (R:556-60). Dr. Thompson attempted to provide an explanation by testifying that she actually was only required to work at the hospital 2-3 days per month when she was on call. (R:536, 537.) She would take call on the weekends or ask other doctors to cover for her so she could attend class. (R:542.) She also testified that she attended classes while she was on call. (R:541.)

June 2014 Evidentiary Hearing and Hearing on Motions to Dismiss

The Defendants' Motions to Dismiss were heard on June 17, 2014, at an evidentiary hearing to determine the qualifications of Dr. Thompson pursuant to the court's August 2, 2012 Order. The issues before the court were (1) insufficient corroboration of presuit notice of intent due to Dr. Thompson not being properly qualified as an expert witness (R:1075-86, 1091-94, 1098-1100, 1159-61); and (2) Plaintiff's failure to comply with the presuit discovery process (R:1094-97, 1100-01). The court made it clear that it was taking evidence on Dr. Thompson as well as considering the Defendants' Motions to Dismiss. (R:1107.)

During the course of the hearing, the court repeatedly inquired of the Plaintiff as to the evidence that would permit the court to determine whether Plaintiff had complied with the August 2012 Order and whether Dr. Thompson was qualified as an expert under Chapter 766. (R:1106-07, 1117, 1119-20, 1125-26, 1134, 1146.)

The only two items of evidence presented by the Plaintiff were Dr. Thompson's affidavit and deposition transcript. (*Id.)* Dr. Thompson did not appear at the hearing.

June 2014 Order Granting Dismissal

Following the hearing, 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 staff members. (R:742-43.) This was despite the fact that twenty-three months had passed during which "scant additional information about the specific qualifications of Dr. Thompson" was revealed in the record. In its order, the court explained that section 766.205(2)'s provision that "the failure to provide reasonable access to pre-suit discovery information shall be grounds for dismissal of any applicable claim." (R:742.) The court then questioned the record evidence presented on Dr. Thompson's qualifications as an expert:

> The Court 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:743.) The court determined that Dr. Thompson's deposition testimony was equally unhelpful in making a determination regarding her qualifications. (*Id.*)

The court concluded that the Plaintiff had obstructed Defendants' attempts to obtain meaningful discovery from Dr. Thompson regarding her qualifications as ordered by unreasonably objecting to Defendants' request for documents and prohibiting purposeful testimony from Dr. Thompson during her deposition. (R:743-44.) Further, the Defendants were "thwarted from learning whether the deponent had applied for disability assistance upon her retirement March 2008, and during the same period of time preceding this suit." (R:744.) The court recognized that reasonable inquiries as to whether Dr. Thompson was qualified to render expert opinions against nurses and other ancillary staff per Florida Statute 766.102(6) remained unanswered due to the restrictions imposed by Plaintiff during the limited discovery process. (*Id.*) Accordingly, the court determined that the record did not establish that Dr. Thompson had knowledge of the applicable standard of care for nurses, nurse practitioners or others such that she could render expert testimony against them. (*Id.*)

Recognizing that the statutory provisions are not intended to deny access to the courts on the basis of technicalities, the court determined that the actions of Plaintiff rose above mere technicalities and ruled that "the actions of Plaintiff's counsel were purposeful and designed to deprive the Defendants 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:745.) The court found that the

Plaintiff had "not complied with the statutory pre suit requirements, or allowed reasonable discovery into their expert's devoted professional time 3 to 5 years immediately preceding the occurrence in this cause." (*Id.*) As the applicable statute of limitations had long since expired, the court ruled that Plaintiff could not remedy this issue with another expert and dismissed the case pursuant to sections 766.205(2) and 766.206(2), Florida Statutes. (*Id.*)

The First District Affirms the Trial Court's Final Judgment

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 because the Plaintiff failed to perform a reasonable investigation of the claim, and affirmed on that ground. *Id.* at 350-51.

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

SUMMARY OF THE ARGUMENT

The decision of the First District does not directly and expressly conflict with the decisions form other districts. The decision also does not present any direct and express conflict because *Kozel* factors were not analyzed in affirming the trial court's exercise of discretion in dismissing the complaint pursuant to section 766.205(2). Jurisdiction should be discharged.

Should the Court reach the merits of this appeal, it should affirm the dismissal of the Plaintiff's complaint because (1) the record does not support a finding that Dr. Thompson was a qualified medical expert due to the Plaintiff's failure to engage in a reasonable presuit investigation of the claim; and (2) the trial court did not abuse its discretion in dismissing the complaint based on the Plaintiff's willful deprivation of Jackson Hospital's ability to meaningfully participate in presuit discovery.

The trial court's dismissal of the complaint pursuant to section 766.206(2) is not subject to de novo review. The trial court properly ordered an evidentiary hearing to determine whether Plaintiff complied with the reasonable investigation requirements by corroborating the notice of intent with a verified written opinion of a qualified medical expert given the conclusory and nonspecific affidavit from Dr. Thompson. The trial court properly concluded that the record did not support a finding that Dr. Thompson was qualified and dismissed the complaint pursuant to section 766.206(2). The trial court's decision involved a factual determination baed

on an evidentiary hearing and therefore subject to a substantial competent evidence standard of review. The First District applied the proper standard of review in affirming the trial court because "ample evidence" supported the trial court's conclusions.

The trial court did not abuse its discretion in dismissing the complaint pursuant to section 766.205(2) due to the Plaintiff's willful misconduct that was intended to deprive the Defendants of the opportunity to meaningfully participate in presuit discovery of the claims. In determining that dismissal was reasonable, there was no explicit finding of prejudice required nor a requirement that the issue be evaluated under the *Kozel* factors. Further, the Plaintiff did not argue below that the *Kozel* factors applied, and therefore the issue has been waived on appeal.

ARGUMENT

I. NO CONFLICT EXISTS AND THIS COURT SHOULD DISCHARGE JURISDICTION

The Plaintiff sought jurisdiction based on two claims of conflict: (1) the First District applied the wrong standard of review in dismissing pursuant to section 766.206(2); and (2) the First District did not consider *Kozel* factors in exercising discretion in dismissing pursuant to section 766.205(2). This Court should discharge jurisdiction because no conflict exists.

No conflict exists with the decisions cited by Plaintiff regarding the appropriate standard of review on the issue of non-compliance with the reasonable investigation requirements due to the lack of a qualified corroborating medical expert. The First District correctly reviewed the trial court's ruling, made after an evidentiary hearing, that Plaintiff failed to offer sufficient proof that her presuit expert was qualified. The cases Plaintiff cites for conflict all involve the purely legal issue of the meaning of certain terms in the presuit statute or the scope of the legal requirements regarding the presuit process. No express and direct conflict exists to provide a basis for jurisdiction for this Court to review the issue. *See Dep't of Health & Rehab. Servs. v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla 1986) (an inherent or implied conflict between decisions allegedly resulting from the decisions under review cannot serve as a basis for jurisdiction).

The First District correctly acknowledged that section 766.206(2) requires dismissal of the claim where the court finds that the notice of intent is not corroborated by a verified written medical expert opinion by a qualified expert. § 766.202(2), Fla. Stat. (2009) ("If the court finds that the notice of intent . . . is not in compliance with the reasonable investigation requirements of §§ 766.201-766.212, including . . . a verified written medical expert opinion by an expert witness as defined in § 766.202, the court **shall** dismiss the claim . . . .") The First District agreed with the trial court's conclusion that the record did not support a finding that Dr. Thompson was qualified under the statute and determined that "the record contains ample evidence to support the trial court's conclusions . . . ." *Morris*, 189 So. 3d at 351.

The cases relied upon by the Plaintiff from the Second, Fourth, and Fifth Districts to demonstrate a purported conflict do not involve a dismissal following an evidentiary hearing to determine reasonable compliance with the presuit requirement of providing a verified expert opinion by a qualified expert witness. In *Holden v. Bober,* 39 So. 3d 396 (Fla. 2d DCA 2010), the trial court summarily dismissed the plaintiff s complaint based on its conclusion that the presuit expert did not meet the "similar specialty" requirement of section 766.102. The issue in that case was purely legal and concerned whether the trial court correctly construed the "similar specialty" requirement of the statute. The court reviewed the trial

court's order de novo, but remanded for the circuit court to conduct an evidentiary hearing to determine whether the affidavit complied with the similar specialty requirement of section 766.102(5). *Id.* at 403.

Likewise, in *Edwards v. Sunrise Ophthalmology ASC, LLC*, 134 So. 3d 1056, 1057 (Fla. 4th DCA 2013), the issue involved whether an infectious disease physician who supplied an affidavit during presuit was an expert that specialized in the same specialty as the defendant ophthalmologist as required by section 766.102. The trial court determined that the expert was not and dismissed for failure to comply with section 766.102. *Id.* Because the issue on appeal required the court to interpret section 766.102, which is a question of law, the Fourth District reviewed the order de novo. The court determined that an infectious disease doctor and an ophthalmologist did not specialize in the same specialty for purposes of the statute and affirmed. *Id.* at 1059.

In *Apostolico v. Orlando Reg'l Health Care Sys., Inc.*, 871 So. 2d 283 (Fla. 5th DCA 2004), the Fifth District reviewed de novo a dismissal based on the trial court's ruling that the plaintiff's presuit expert was not qualified. The court interpreted the definition of "medical expert" in the 2002 version of section 766.202 and found that the trial court applied the statute too narrowly. *Id.* at 287. The court concluded that a "plain reading" of section 766.202(5) permitted the expert to be qualified to corroborate the claim of medical negligence. *Id.* This determination

required an interpretation of the statute, which was a purely legal issue subject to de novo review. Indeed, the court explicitly said that the "trial court did not use *the correct legal principles*" in determining that the expert was not a qualified medical expert. *Id.* at 289 (emphasis added).

Furthermore, the Second District implicitly acknowledged in *Oliveros v. Adventist Health Sys./Sunbelt, Inc.*, 45 So. 3d 873, 876 (Fla. 2d DCA 2010) that a de novo standard of review would not apply to a trial court's determination of a presuit expert's qualifications where facts were in dispute. The court explained that dismissal for the failure to comply with the statutory presuit requirements is reviewed for abuse of discretion, though the question of the expert's qualifications is an issue of law where the facts are not in dispute. *Id.*

This case does not involve the legal construction of a term in the presuit statutes or the scope of the legal requirements of the statutes. Rather, the issue here concerns whether the trial court properly dismissed the complaint upon making a factual determination at an evidentiary hearing that the Plaintiff failed to satisfy its obligation to establish the qualifications of the presuit medical expert pursuant to section 766.206(2). *Oken v. Williams*, 23 So. 3d 140, 147 (Fla. 1st DCA 2009), *quashed on other grounds*, 62 So. 3d 1129 (Fla. 2011) (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 of a "medical expert").

Because the affidavit of Dr. Thompson did not establish whether she was a medical expert under the statute, the trial court was required to conduct an evidentiary hearing to determine whether the expert met the requirements of section 766.102(5)(a). *Williams v. Oken*, 62 So. 3d 1129, 1137 (Fla. 2011). Based on the evidentiary hearing, the trial court determined that the Plaintiff failed to comply with the reasonable investigation presuit requirements because the record did not establish that Dr. Thompson was qualified and that the Plaintiff purposefully prevented the Defendants from discovering this information in bad faith. (R:744-45.) The First District agreed that the record did not support a finding that the expert was qualified and applied the appropriate standard of review in deciding that the trial court's conclusions were supported by ample evidence. *Morris*, 189 So. 3d at 350-51. This decision is not in conflict with those relied upon by the Plaintiff and jurisdiction should be discharged.

As additional grounds for review, Plaintiff contends that an explicit finding of prejudice was necessary to support dismissal of the complaint. However, the express requirements of the statute requires a case to be dismissed when a plaintiff fails to provide reasonable access to information during presuit. *Morris*, 189 So. 3d at 350. The First District affirmed the trial court's dismissal, in part, because Plaintiff "repeatedly ignored requests for presuit discovery regarding her presuit expert's statutory qualifications." *Id.* at 350. As the court explained, "[d]espite

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." *Id*. Indeed, "[e]ven 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." *Id.*

The law does not require an explicit finding of prejudice under 766.205 or 766.206 for a dismissal to be proper. Even though the First District explicitly recognized that the degree of prejudice, as well as the circumstances of the case, impacts whether dismissal is warranted for failing to provide reasonable access to information, and that Defendants were denied the opportunity to meaningfully participate in presuit discovery by Plaintiff's intentional bad faith conduct, Plaintiff asserts that a conflict exists because the First District did not specifically explain in additional detail the prejudice suffered. Not one case cited by Plaintiff, however, requires an appellate court, in affirming a trial court's order, to explicitly describe in its opinion the prejudice incurred by an opposing party.

To the contrary, in each case cited by Plaintiff 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 (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 (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 (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).

Each of these purported conflict cases were decided on their particular facts, and not one holds that the appellate court is required to specifically address in its opinion the prejudice suffered to the party seeking sanctions. No conflict exists.

Similarly, 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 at 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). No conflict exists between the cases cited by Plaintiff and the First District's majority opinion.

II. DISMISSAL WAS REQUIRED BY SECTION 766.206(2) BECAUSE PLAINTIFF FAILED TO COMPLY WITH THE REASONABLE INVESTIGATION REQUIREMENTS

A. Standard of Review – Competent Substantial Evidence

The appropriate standard of review is not de novo as the Plaintiff contends, because the dismissal was based on a factual determination following an evidentiary hearing rather than a question of law. The complaint was dismissed pursuant to sections 766.205(2) and 766.206(2). Section 766.206(2) requires dismissal of the claim if the trial court finds that the claimant failed to comply with the reasonable investigation requirements of sections 766.201-766.202, including providing a verified written medical expert opinion by an expert witness defined in section 766.202. Whether a reasonable investigation was conducted is a factual matter, which is reviewed on appeal for competent substantial evidence. *Herber v. Martin Memorial Medical Center, Inc.*, 76 So. 3d 1 (Fla. 4th DCA 2011) (the reasonableness of an investigation under section 766.206(2) is a factual matter, which is reviewed on appeal for competent, substantial evidence); *see also Bery v. Fahel*, 143 So. 3d

962 (Fla. 3d DCA 2014) (competent substantial evidence supported trial court's dismissal after conducting evidentiary hearing on whether or not a physician was qualified as an expert witness); *Yocom v. Wuesthoff Health Systems, 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 the appellate court bearing the presumption of correctness); *Grau v. Wells*, 795 So. 2d 988 (Fla. 4th DCA 2001) (trial court's determination of a lack of a reasonable investigation is clothed with a presumption of correctness and will be upheld if supported by competent substantial evidence).

B. The Trial Court's Ruling is Supported by Competent Substantial Evidence and Should be Affirmed

In arguing that the appropriate standard of review is de novo, the Plaintiff contends that the trial court's dismissal was based on an "adjudication that [Dr. Thompson] was not qualified to render an opinion" under the statutes. The dismissal was based on the recognition that the verified record failed to establish that (1) "Dr. Thompson had 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 the hospitals' medical staff or (2) she devoted professional time during the three years immediately preceding the Defendants' treatment to active clinical practice of the same or similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and has prior

experience treating similar patients. (R:744-45); *see* §§ 766.102(5)(2), (6), Fla. Stat. (2009). The trial court correctly concluded that it was the Plaintiff's burden to establish that her presuit expert was qualified but the purposeful actions of Plaintiff's counsel taken in bad faith deprived the Defendants of the ability to meaningfully ascertain this information. Based on these finding, the trial court ruled that dismissal was warranted.

On appeal, the First District agreed that because the Plaintiff declined to engage in a reasonable presuit investigation, the record did not support a finding that Dr. Thompson was qualified under the statute, and that this was intentionally done to deprive the Defendants of the opportunity to reasonably investigate the claims. *Morris*, 189 So. 3d at 350-51.

It is evident from the trial court's order and the First District's opinion that the dismissal was based on a factual determination that the Plaintiff failed to comply with the reasonable investigation requirements of the statute. That determination **required** that the claim be dismissed by the express terms of the statute. § 766.206(2), Fla. Stat. (2009); *see Bery*, 194 So. 3d at 1101. The reasonable investigation requirement includes an investigation to ascertain that there are reasonable grounds that the defendant was negligent in the care and treatment of the claimant and such negligence resulted in injury. § 766.203(2), Fla. Stat. (2009). It also requires that the grounds for the claim be corroborated by a verified written

opinion by a qualified medical expert as defined in section 766.202(6). *Id.* The Plaintiff had the obligation of establishing that the medical expert satisfies the requirements of the statute. *Oken v. Williams*, 23 So. 3d 140, 147 (Fla. 1st DCA 2009), *quashed on other grounds*, 62 So. 3d 1129 (Fla. 2011) (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 of a "medical expert").

The trial court was required to conduct an evidentiary hearing because the affidavit of Dr. Thompson was insufficient to establish that she met the qualifications of an expert as required by sections 766.102(5) and (6), Florida Statutes. *Wiliams v. Oken*, 62 So. 3d 1129, 1137 (Fla. 2011); *Duffy v. Brooker*, 614 So. 2d 539, 545 (Fla. 1st DCA 1993) (the affidavit must sufficiently indicate the manner in which the defendant allegedly deviated from the standard of care and must provide adequate information to evaluate the merits of the claim). Because the trial court had to conduct a factual determination to decide whether dismissal was appropriate, the factual conclusions are cloaked in the presumption of correctness. *Yocom,* 880 So. 2d at 787; *Grau*, 795 So. 2d at 991. There is substantial competent evidence in the record to support dismissal of Plaintiff's complaint due to lack of corroboration of the malpractice claim by a verified written medical expert opinion

from a qualified expert as defined by Florida Statute sections 766.202(6) and 766.102(5) and (6).

According to Dr. Thompson's unverified CV, she was enrolled in both law school and graduate school during the three years prior to the decedent's death and she stopped active clinical practice in March 2008. Dr. Thompson's affidavit indicated that she received her Juris Doctorate in 2007, her Master's in Public Affairs in 2008, and also retired in 2008 due to arthritis in her hands. While her CV and affidavit indicated that she was engaged in "full-time patient care" until her March 2008 retirement, neither shed light on whether: (a) Dr. Thompson devoted professional time during the three years prior to decedent's death, or (b) whether she was actively engaged in an OB/GYN clinical practice as required by section 766.102(5)(a)2.a., or (c) whether Dr. Thompson had evaluated, diagnosed, and treated conditions similar to the decedent's.

In fact, her CV and affidavit actually called into doubt whether she could have been engaged in her medical profession very much at all during the three years prior to the decedent's death. Moreover, Dr. Thompson's CV and affidavit were completely silent as to whether or not, by reason of active clinical practice or instruction of students, Dr. Thompson had knowledge of the applicable standard of care for nurses, nurse practitioners, nurse anesthetists, midwives, physician assistants, or other hospital support staff. The affidavit completely neglected to

identify any negligence from any nursing or support staff; neither Jackson Hospital nor the trial court were able to identify who was negligent (a nurse, anesthetist, midwife, etc.) in order to determine if Dr. Thompson was qualified to render testimony against that particular type of support staff. Further, the CV and affidavit were similarly silent on whether or not Dr. Thompson had substantial experience within the preceding five years while assigned to provide emergency medical services in a hospital emergency department as required by section 766.102(9). (At that time, the Plaintiff was contending that those in the Jackson Hospital Emergency Department breached the standard of care.)

C. The Trial Court Properly Allowed Additional Presuit Discovery and an Evidentiary Hearing on Dr. Thompson's Qualifications

Because Dr. Thompson's CV and affidavit simply did not contain the necessary information to indicate whether she met the statutory qualifications set forth in section 766.102(5), (6), and (9), the trial court was authorized to permit presuit discovery and hold an evidentiary hearing to determine if Dr. Thompson was properly qualified as an expert. To the extent the Plaintiff attempts to assign error to this ruling, the Plaintiff never raised any specific objection to the trial court's decision and never obtained a ruling on the issue. Consequently, the Plaintiff has waived any such argument on appeal. *See Rhodes v. State*, 986 So. 2d 501, 503 (Fla. 2008) ("To be preserved, an issue or legal argument must be raised and ruled on by

the trial court.") The additional discovery and evidentiary hearing were ordered because additional evidence was necessary for the trial court to render a determination on whether Dr. Thompson was qualified.

Florida's statutory scheme specifically permits presuit discovery and requires the parties to provide reasonable access to information. *See* §§ 766.106(6), 766.205, Fla. Stat. (2009). Further, section 766.203(4) explicitly provides that "medical expert opinions required by this section are subject to discovery." Taken as a whole, the presuit discovery provisions found in Chapter 766 indicate that the Legislature did not intend to require the parties to simply accept an expert's qualifications on the face of a CV or affidavit alone, particularly where such information is deficient. *Williams v. Oken*, 62 So. 3d at 1129 (concluding that appellate court should have remanded for an evidentiary hearing to determine whether a physician, whose CV indicated that he was board certified in family and emergency medicine, was qualified to provide an expert opinion against a cardiologist); *Bery v. Fahel*, 88 So. 3d 236, 238 (Fla. 3d DCA 2011) (evidentiary hearing required to determine expert's qualifications before ruling on motion to dismiss pursuant to § 766.206).

D. Competent Substantial Evidence Supports the Finding that the Plaintiff did not Establish that Dr. Thompson was Qualified as a Medical Expert Pursuant to Section 766.102(5), Florida Statutes

Plaintiff's counsel prevented Dr. Thompson from answering several pertinent questions directed to information about her activities during 2006-2009. For

instance, Dr. Thompson was precluded from responding to questions regarding whether or not she had applied for disability related to her retirement due to arthritis which was probative of her ability to have actively practiced medicine in the years immediately prior to her 2008 retirement. Dr. Thompson was also precluded from answering questions regarding whether there was a change in the financial viability of her OB/GYN practice after she started law school which was probative of the extent to which she devoted professional time to active clinical practice after she started law school.

Dr. Thompson rendered absolutely no testimony during her deposition regarding the condition that Defendants allegedly failed to evaluate, diagnose, and treat. This information was probative of whether she had evaluated, diagnosed, and treated similar conditions as required by the statute. Thus, Plaintiff presented no evidence whatsoever from which the trial court could determine whether or not Dr. Thompson had engaged in active clinical practice of the same or similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim, as required by section 766.102(5)(a).

After reviewing Dr. Thompson's deposition and considering argument made at the hearing, the trial court made a determination as to whether the record demonstrated that the Plaintiff complied with the reasonable investigation requirement of corroborating the claim with a verified written opinion by a qualified

expert. The court determined that it did not and there is competent substantial evidence in the record to support the decision. Dr. Thompson's complete failure to indicate what condition was negligently misdiagnosed and mistreated is competent substantial evidence that the Plaintiff did not establish that Dr. Thompson was qualified, as without any evidence of the condition that was negligently misdiagnosed and mistreated, the court was unable to determine if Dr. Thompson had evaluated, treated, or diagnosed the same condition in similar patients. Likewise, Dr. Thompson's refusal to answer pertinent questions regarding her activities in 2006-2009 meant that it was not established that she devoted professional time during the immediate three years prior to Jackson Hospital's treatment to active clinical practice.

In sum, there is competent substantial evidence in the record to support the trial court's presumptively correct determination that the Plaintiff did not demonstrate that Dr. Thompson qualified as an expert under section 766.102(5), based on the evidence before the court and the Plaintiff's counsel's failure to allow meaningful discovery into Dr. Thompson's qualifications.

E. Competent Substantial Evidence Supports the Trial Court's Determination that the Plaintiff did not Establish that Dr. Thompson was Qualified as an Expert Pursuant to Section766.102(6), Florida Statutes

Moreover, there is substantial competent evidence in the record to support the trial court's determination that the evidence before the court did not establish that

Dr. Thompson was qualified as an expert under section 766.102(6), Florida Statutes. First, the court recognized that there was insufficient evidence to conclude that Dr. Thompson qualified as an expert under section 766.102(5), which is a pre-requisite for an expert to be qualified to render opinions against nurses under subsection (6). Second, the court determined that the evidence did not establish that Dr. Thompson had substantial knowledge by virtue of her training and experience concerning the applicable standard of care for nurses, physician assistants, or any other medical support staff. Those determinations are presumed correct and they are supported by competent substantial evidence. Dr. Thompson's testimony indicated that she had no direct supervisory role over hospital nurses in the ER or on the OB floor other than general supervision while working with them together on a patient; she has not served on a formal peer review committee dedicated to review of nursing care; she had not instructed nurses in a school-type setting; and she had never given any type of regular coursework to any nurses at a school. Dr. Thompson was even unsure if she was qualified to render an opinion as to the standard of care applicable to the hospital staff or an emergency department. However, she acknowledged that she was not qualified to render an opinion as to the hospital staff treating a patient who was not in her specialty. (R:604-05.)

Numerous cases have affirmed dismissal where the corroborating affidavit was not provided from an expert who met the requirements of section 766.102(5).

In *Edwards v. Sunrise Opthamology*, 134 So. 3d 1056 (Fla. 4th DCA 2013), dismissal was affirmed because the plaintiff's expert did not comply with section 766.102's requirement of specialization. In *Winson v. Norman,* 658 So. 2d 625, 626 (Fla. 3d DCA 1995), dismissal was affirmed because the corroborating affidavit came from a physician who was not regularly engaged in the practice of his profession and the statute of limitations had run. Citing to *Ingersoll v. Hoffman*, 589 So. 2d 223 (Fla. 1991), the court noted that "one of the primary thrusts of Florida's statutory medical malpractice scheme is to weed out cases which are not, even prima facie, supported by some reliable independent indication of their merits," and found that the trial court had properly struck the affidavit and dismissed the case since the statute of limitations had run.

While Chapter 766's presuit requirements are not meant to deny access to courts, the presuit notice and screening requirements represent more than mere technicalities and Plaintiff's willful non-compliance with the presuit screening process properly results in dismissal. *Archer v. Maddux*, 645 So. 2d 544, 546 (Fla. 1st DCA 1994), *citing Ingersoll v. Hoffman*, 589 So. 2d 223 (Fla. 1991).

III. DISMISSAL WAS APPROPRIATE BECAUSE PLAINTIFF FAILED TO PROVIDE JACKSON HOSPITAL WITH REASONABLE ACCESS TO INFORMATION DURING PRESUIT

A. Standard of Review – Abuse of Discretion

The trial court also dismissed Plaintiff's Amended Complaint as a sanction

pursuant to section 766.205(2), for bad faith failure to provide reasonable access to presuit discovery information. Dismissal of a medical malpractice action as a sanction for failure to comply with the presuit requirements is reviewed for abuse of discretion. *DeCristo v. Columbia Hosp. Palm Beaches, Ltd.*, 896 So. 2d 909 (Fla. 4th DCA 2005); *Vincent v. Kaufman*, 855 So. 2d 1153 (Fla. 4th DCA 2003); *Popps v. Foltz*, 806 So. 2d 583 (Fla. 4th DCA 2002). "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness." *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).

B. The First District Properly Held the Dismissal Under Section 766.205 for Failure to Comply with Presuit Discovery was Within the Trial Court's Discretion

The policy underlying Florida's medical malpractice statutory scheme includes the requirement 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. and Clinics, Inc. v. Barber,* 638 So. 2d 570, 572 (Fla. 1st DCA 1994). Consequently, a prospective medical malpractice plaintiff is required to provide the prospective defendants with reasonable access to information in order to facilitate evaluation of the claim without formal discovery. §§ 766.106(6)(a), 766.205(1),(2), Fla. Stat. Failure of any party

to provide access or information shall constitute evidence of failure of that party to comply with good faith discovery requirements and shall be grounds for dismissal. §§ 766.205(2), (3), Fla. Stat.

Here, two separate "rounds" of presuit discovery occurred. The "first round" took place during the 90-day presuit period prior to the Defendants' denials of the Plaintiff's claim and involved written presuit discovery requests. The "second round," which was necessitated only by Plaintiff's willful failure to respond to Defendants' presuit discovery requests made during the "first round," was conducted pursuant to the court's orders permitting limited discovery into the qualifications of Dr. Thompson.

The Plaintiff completely and willfully ignored Jackson Hospital's informal presuit discovery requests made during the "first round" which were specifically designed to assist Jackson Hospital in its presuit investigation of the Plaintiff's claims. And, during the "second round," Plaintiff precluded any meaningful discovery of Dr. Thompson's qualifications as an expert. Accordingly, the trial court did not abuse its discretion in dismissing the Plaintiff's Amended Complaint pursuant to section 766.205(2), Florida Statutes, for failure to comply with presuit discovery.

1. Plaintiff Willfully Failed to Respond to "First Round" of Presuit Discovery

The decedent was treated by numerous medical staff at Jackson Hospital on

four different occasions totaling approximately ten days. The last day of decedent's treatment at Jackson Hospital occurred three weeks prior to her death. Two of the hospitalizations were limited to treatment in Jackson Hospital's Emergency Department. The affidavit submitted by Dr. Thompson was vague and conclusory, asserting that Jackson Hospital's "staff" breached the standard of care by failing to take the patient's history and inform the doctor of "the patient's condition," failing to "diagnose Ms. McIntyre's condition," and failing to "correctly treat her condition." The affidavit did not indicate how, when, or who from Jackson Hospital was supposedly negligent during the ten days of hospitalization or what kind of "condition" the Hospital failed to diagnose or treat. Jackson Hospital was unable to ascertain if the alleged nursing negligence stemmed from failure to execute tests ordered by the physician, the provision of wrong medications or wrong dosages, failure to monitor the patient and communicate changes to the physician, failure to properly discharge the patient, or a myriad of other possibilities.

Jackson Hospital propounded presuit interrogatories on May 12, 2011, to resolve the vagueness of Dr. Thompson's assertions and identify the condition supposedly misdiagnosed and treated. The only response received by Jackson Hospital to the presuit interrogatories was to "see affidavit of Dr. Margaret Thompson" and the "medical records as provided by Jackson Hospital." That response was completely non-responsive. On July 22, 2011, two months prior to

close of pre-suit period, Jackson Hospital notified the Plaintiff that the responses were inadequate and precluded Jackson Hospital from performing a meaningful and efficient presuit investigation. Jackson Hospital did not have enough information to determine the care of which nurses, respiratory therapists, physicians' assistants or other medical providers may be at issue so that their conduct could be evaluated during the presuit period or what conditions and treatments to explore with the providers or have these matters reviewed by an appropriately qualified expert. The decedent's financial account information was also requested to obtain an understanding of the Estate's claim for economic damages. The Plaintiff completely ignored the July 22, 2011 request.

On August 15, 2011, one month before the expiration of presuit, Jackson Hospital again requested the information outlining concerns regarding Dr. Thompson's qualifications as an expert. Additional presuit interrogatories were propounded solely directed to the qualifications of Dr. Thompson. The Plaintiff again completely ignored the Hospital's correspondence.

Instead of making any attempt to respond to Jackson Hospital's repeated requests for presuit information, Plaintiff elected to allow the presuit and statute of limitations periods to expire. Plaintiff's decision to ignore reasonable and good faith presuit discovery attempts completely prevented Jackson Hospital from having a full and fair opportunity to investigate the claim as contemplated by Chapter 766's

presuit process prior to the lawsuit.

2. Plaintiff Willfully Failed to Participate in "Second Round" of Presuit Discovery as Ordered by the Trial Court

During the "second round" of discovery, Plaintiff continued to willfully prevent the Defendants from obtaining meaningful information from Dr. Thompson. During Dr. Thompson's deposition, Plaintiff intentionally refused access to information which was directly relevant to the issue of whether or not Dr. Thompson actively practiced as an OB/GYN during the three years prior to the decedent's January 2009 death, as required of an expert by section 766.102(5) and (6), Florida Statutes: (a) Dr. Thompson's coursework and schedule in law school and graduate school from 2006-2008, which would demonstrate how much professional time Dr. Thompson was committing to her education as opposed to her obstetrical practice; (b) Dr. Thompson's ability to devote professional time to active clinical practice prior to her March 2008 retirement due to arthritis; (c) her understanding of University of Texas Law School's compliance with the ABA's prohibition on law students from working more than 20 hours per week; (d) whether or not Dr. Thompson sold her practice to another physician during the 2006-2008 timeframe such that she was no longer actively involved in the practice; (e) substantive information regarding the condition which Jackson Hospital allegedly failed to treat to determine if Dr. Thompson had evaluated, diagnosed, and treated similar

conditions during the 2006-2008 timeframe as required by section 766.102(5); and (f) whether Dr. Thompson's medical practice had financially suffered as a result of her commitment to her two substantial graduate programs. There was absolutely no harm to the Plaintiff by allowing inquiry into the relevant areas broached during Dr. Thompson's deposition or by the production of documents sought in the Duces Tecum.

3. Dismissal of Plaintiff's Amended Complaint was Proper

There is no dispute that Chapter 766 should be liberally construed in favor of access to courts. But, on the other hand, if there is no reasonable explanation for a prospective plaintiff's failure to respond to reasonable informal presuit discovery requests, correct the presuit defects of which they are advised by defendants well prior to the expiration of presuit and the statute of limitations, or allow specific presuit discovery as ordered by the trial court into the qualifications of her presuit expert, then the plaintiff's failure to comply with the presuit discovery warrants dismissal. *Cohen v. West Boca Medical Center, Inc.*, 854 So. 2d 276 (Fla. 4th DCA 2003) (medical malpractice action is properly dismissed when a claimant's eventual compliance with Chapter 766 presuit requirements occurs outside of the statute of limitations period); *Melanson v. Agravat*, 675 So. 2d 1032 (Fla. 1st DCA 1996) (presuit notice and screening requirements represent more than mere technicalities and that willful non-compliance with the presuit screening process can result in

dismissal).

As noted by the trial court, the Plaintiff's conduct during both "rounds" of presuit demonstrates that Plaintiff unreasonably acted in bad faith in failing to comply with presuit discovery and thus ruled appropriately in dismissing the Plaintiff's claims.

IV. TRIAL COURT WAS NOT REQUIRED TO APPLY *KOZEL* FACTORS

Plaintiff argues that the trial court erred by dismissing the Complaint without application of the six factors enumerated in *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993) (noting that a trial court should use a sanction less severe than dismissal if a viable alternative exists). The Plaintiff did not raise this issue below and therefore has waived the argument on appeal. *Rhodes*, 986 So. 2d at 503.

Plaintiff's reliance on *Kozel* is misplaced. Medical malpractice presuit proceedings are governed by Chapter 766. Section 766.206(2) provides that if a notice of intent does is not corroborated by a verified written medical expert opinion by an expert witness defined in section 766.202(2) the court is required to dismiss the claim. Section 766.205(2) similarly provides that failure of a prospective plaintiff to provide reasonable access to information to facilitate the prospective defendants' investigation of a claim shall be grounds for dismissal of claims ultimately asserted. Finally, section 766.106(6)(a), Florida Statutes, provides that the failure of parties to make discoverable information available without formal

discovery is grounds for dismissal of claims ultimately asserted. The Legislature made absolutely no provisions within Chapter 766 requiring a court to consider the *Kozel* factors prior to the mandatory dismissal required in the above provisions. Nor does Florida case law require consideration of *Kozel* factors prior to dismissal under the facts of this case.

Furthermore, the trial court's determination that dismissal was warranted is consistent with the *Kozel* factors. The court concluded based on the record that Plaintiff's counsel's "disobedience" was willful, deliberate, and in bad faith. Further, Plaintiff's counsel had previously been sanctioned by the court for the presuit violations prior to entering the dismissal. The Plaintiff's actions have prejudiced Jackson Hospital because it has resulted in a four-year delay without Jackson Hospital being informed of the basis of the claim. Finally, no reasonable justification has been offered for the Plaintiff's non-compliance. Thus, almost all of the *Kozel* factors are present here and support the dismissal.

CONCLUSION

Based on the record, the trial court correctly dismissed the Plaintiffs' complaint pursuant to section 766.206(2), and the First District's opinion affirming the dismissal on this ground should be approved. The trial court also acted properly in dismissing the complaint pursuant to section 766.205(2), based on the Plaintiff's willful and inappropriate conduct in refusing to provide information. The First

District's decision affirming the dismissal should be approved because there was no abuse of discretion.

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I CERTIFY that a copy of the foregoing has been furnished by E-Mail on June 8, 2017, to:

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CERTIFICATE OF COMPLIANCE

I certify that the Initial Brief complies with the font requirements of Florida Rule of Appellate Procedures 9.210.

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