IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v.

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

Respondents.

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

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

The First District affirmed the dismissal of this wrongful death suit brought by Petitioner Tuyuana L. Morris, as personal representative of the estate of her daughter, Shunteria S. McIntyre, ("Plaintiff") against Respondents Dr. Orlando S. Muniz; Marianna OB/GYN Associates, Inc.; Jackson Hospital; Bay Hospital, Inc., d/b/a Gulf Coast Medical Center ("GCMC"); and Dr. Stephen G. Smith (collectively, "Defendants"). Plaintiff seeks review of the First District majority's decision to (1) apply the abuse of discretion standard to the dismissal based on the trial court's conclusion that Plaintiff's presuit corroborating expert was not qualified under section 766.102, Florida Statutes; (2) affirm that dismissal despite the presuit expert's affidavit and deposition testimony that she was a 30-year board-certified OB/GYN who had actively practiced in the three-year period before Ms. McIntyre's death; and (3) affirm any portion of the dismissal based on Plaintiff's counsel's purported discovery violations.

Factual Allegations of the Complaint

Plaintiff alleged that on October 22, 2008, Ms. McIntyre began seeing Dr. Muniz at Marianna OB/GYN Associates for prenatal care. (R:330.) Just a week later, Ms. McIntyre went to Jackson Hospital's emergency room with complaints of "severe nausea, vomiting, and not being able to 'hold anything down.' " (R:330.) She had a saline IV and was prescribed an anti-nausea drug. (R:330.)

Over the next three months, Ms. McIntyre went to her scheduled appointments with Dr. Muniz and repeatedly returned to Jackson Hospital. (R:330-31.) In that time, she lost 36 pounds, suffered from constant nausea and vomiting, and exhibited other ailments including shortness of breath, weakness, and a urinary tract infection. (R:330-31.) At each hospital admittance, she was put on IVs and prescribed antibiotics and anti-nausea medications, discharged from the hospital within a week, and told to follow up with Dr. Muniz. (R:330-31.)

In mid-January 2009, Dr. Muniz's notes from a follow-up visit stated: "mouth sores and blisters, can't eat, still throwing up, dizzy, can't walk and can't use the restroom, no bowel movement" and "Thrush-Rx Ketoconazole Tabs, Triple Screen Today—Tolerating diet in small amounts." (R:331-32.)

Ms. McIntyre was admitted to GCMC two days later and presented nearly identical complaints, in addition to experiencing hallucinations and "no movement of her unborn baby." (R:332.) Defendant Dr. Smith was her treating physician at GCMC. (R:332.) Three days after she was admitted, Ms. McIntyre gave birth to a stillborn son and soon thereafter underwent a dilation and curettage (D&C) procedure. (R:332.) Within hours of the D&C, Dr. Smith discharged her from the hospital and advised her to return for a follow-up three weeks later. (R:332.)

Three days later, Ms. McIntyre collapsed at home. (R:332.) She was transported to Northwest Florida Community Hospital (not a defendant in this

case). (R:332.) Ms. McIntyre was pronounced dead; she was twenty years old. (R:332.) An autopsy revealed that she died of "Klebsiella Pneumoniae Septicemia" and "Intrauterine fetal demise and Severe Acute Diarrhea." (R:332.)

Plaintiff's Corroborating Presuit Expert's Affidavit and CV Indicated She Practiced as an OB/GYN Until March 2008

Pursuant to section 766.102, Plaintiff corroborated her presuit notices to Defendants with an affidavit from Dr. Margaret Thompson, an OB/GYN—the same specialty as the two defendant doctors—who graduated from Duke University Medical School in 1978. (R:63.) Dr. Thompson was board certified in OB/GYN in 1984 and recertified from 1999 through 2007 and in 2009. (R:63.)

Dr. Thompson averred she practiced full-time patient care up until March 2008 (less than a year before Ms. McIntyre died), when she retired due to arthritis. (R:63.) She delivered over 14,000 babies during the course of her 30-year career and had "been Chief of the OB/GYN department at a large medical center, Chief of Staff at a small women's specialty hospital, and member of hospital-wide peer review committees." (R:63.) She remained licensed to practice medicine in Texas. (R:63.) She also received her Juris Doctor and Masters in Public Affairs from the University of Texas in 2007 and 2008, respectively. (R:63.) Her curriculum vitae ("CV"), which was provided to Defendants in response to their presuit discovery

requests, reflected numerous other accomplishments. (R:1398-1400[1].)

After reviewing Ms. McIntyre's medical records, Dr. Thompson concluded that each of the defendants was negligent in failing to consult with experts regarding Ms. McIntyre's condition, properly diagnose and treat her, hospitalize her, and properly follow up in light of her severe symptoms. (R:63, 65-66, 115-16, 163, 1410-11.) Specific to Jackson Hospital, which is vicariously liable for its nurses and staff who treated Ms. McIntyre while she was admitted, the affidavit noted: "The hospital nursing staff has an independent obligation to take an adequate history and inform the doctor of the patient's condition. By not doing so, the hospital staff violated the standard of care." (R:163.) Dr. Thompson also noted that the GCMC staff had an obligation to initiate a "chain of command" evaluation if Dr. Smith failed to respond appropriately to Ms. McIntyre. (R:66.)

Despite Dr. Thompson's Affidavit and CV, the Trial Court Orders Additional Discovery Limited to Establishing Her Statutory Qualifications

Defendants moved to dismiss on grounds that Plaintiff failed to comply with the presuit requirements under section 766.102. (R:46-47, 101, 143, 1388.) Specifically, they asserted that because Dr. Thompson was enrolled in law and graduate school, she could not have "devoted professional time during the 3 years immediately preceding" Ms. McIntyre's treatment to the "active clinical practice

[1] Citations to record pages 1385-1416 were contained in a supplemental record filed with the First District on January 15, 2015.

of" OB/GYN as required by section 766.102(5)(a)(2). (R:46, 49-51, 103-05, 150-55, 1389.) Additionally, the hospital defendants asserted that nothing in Dr. Thompson's affidavit or CV demonstrated she was qualified under section 766.102(6) or (9) to render an opinion regarding the standard of care applicable to a hospital or ER physician. (R:50-51, 150-54.)

Plaintiff responded, pointing out that Dr. Thompson's affidavit averred she continued to work full-time as an OB/GYN while in law school. (R:235.) Plaintiff also noted section 766.102(9) was inapplicable because she had not brought any claim against ER physicians. (R:235.)

Defendants also asserted that Plaintiff failed to comply with presuit discovery as to Dr. Thompson's qualifications as an expert witness. (R:49, 105, 147.) In response, Plaintiff asserted that she had complied with all discovery requests and had responded to those interrogatories that she was able to, but did not provide redundant information. (R:233; *see* R:173-76, 1396-97.)

The trial court held a hearing on the motions to dismiss. (R:958-1010.) Notwithstanding Dr. Thompson's affirmation in her affidavit that she was "engaged in full-time patient care until March 2008" (R:63), counsel for Dr. Smith wanted Dr. Thompson to state under oath that she was able to both attend law and graduate schools and practice as an OB/GYN. (R:962, 972.) Judge Fishel, who then presided over the case, noted that the statute did not require a presuit expert to

have devoted "substantial" or "all" professional time to practicing. (R:963-64.)

Plaintiff's counsel maintained that Dr. Thompson's affidavits and CV sufficed to meet the requirements of the statute. (R:986-87.) And given that, counsel also argued that Defendants should have to pay for the additional time and expense their discovery requests would cost Dr. Thompson. (R:993-94.)

Relying on *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011), the trial court permitted Defendants "an opportunity to engage in **limited** discovery directed **solely** to Dr. Thompson's qualifications under Sections 766.102 and 766.202." (R:245 (emphases added).) In his order, Judge Fishel concluded that Dr. Thompson's representation that she had been engaged in patient care until 2008 was questionable. (R:243.) Judge Fishel also noted that GCMC and Jackson Hospital questioned whether Dr. Thompson had the requisite knowledge to give an opinion about nursing and other medical support staff or ER physicians. (R:241.) At the conclusion of the limited discovery process, the court would conduct an evidentiary hearing to "make an ultimate determination with respect to Dr. Thompson's qualifications." (R:246.) Additionally, the court ordered Plaintiff to pay Defendants attorneys' fees and costs. (R:242-43, 245.)

Plaintiff moved the trial court to alter or amend its order, or for rehearing of the sanction requiring her to pay for the discovery. (R:247-57.) Plaintiff again argued she had already established her expert's qualifications via affidavit.

(R:252.) Plaintiff also noted that Defendants' interrogatories, which they claimed had gone unanswered, either had been responded to or exceeded the scope of information necessary to determine presuit qualifications. (R:249-50, 256, 260-61.)

The trial court held a hearing on the motion. (R:1013-67.) Plaintiff again noted the claims were not intended to be against any ER physicians. (R:1025-26, 1058-59.)[2] Counsel also noted that Dr. Thompson was qualified to speak to the standard of care for nurses under section 766.102(6) because of her active clinical practice and hospital experience. (R:1020-21.) Counsel distinguished *Oken* (R:1023-24) and asserted that Plaintiff should not be required to pay the costs of deposing Dr. Thompson because the affidavits and CV sufficed (R:1033-34).

Although the court denied Plaintiff's motion, it modified its previous order and reserved ruling on Defendants' entitlement to attorneys' fees and costs. (R:264-67.) The court also clarified that its "ruling does not contemplate the taking of a discovery deposition of Dr. Thompson" as "such a deposition would be premature given Defendants' pending Motions to Dismiss." (R:266-67.)

Dr. Thompson Submits to a Nearly 3-Hour Deposition

Though Judge Fishel limited the scope of discovery, Defendants served an Amended Notice of Taking Video Teleconference Deposition Duces Tecum requesting fourteen items. (R:652-55.) In addition to information concerning Dr.

[2] Plaintiff amended her complaint accordingly. (R:268-69, 340, 344.)

Thompson's medical practice from 2006 through 2009, the notice requested detailed information about the basis for her opinions and the particular documents she reviewed, copies of all of her publications, her law school and graduate program transcripts and detailed information about her courses and schedule, and detailed information about all cases in which she had prepared an expert report, testified as an expert, been a party to a lawsuit, or had a judgment entered against her. (R:653-55.)

On the date of the deposition, Plaintiff's counsel responded, objecting to the production of certain documents. (R:497-501.) The requested documents (1) exceeded the scope of the order, (2) were not in Dr. Thompson's possession, or (3) were identical to materials that already had been produced. (R:498-500.) During her deposition, Dr. Thompson confirmed that she did not have summaries of the information sought. (R:606-07.) On a similar note, Plaintiff's counsel objected to and instructed Dr. Thompson not to answer, citing the court's limited order, questions regarding her current work (including what percentage of her income comes from her expert testimony), her law school's policies regarding working students, whether she filed for disability when she had to retire, the financial success of her medical practice, and details about her opinion as to Defendants' negligence. (R:528-29, 547-48, 558-60, 562-63, 578-80, 587-88, 596-98.)

During the nearly three-hour deposition, Dr. Thompson did, however,

answer questions about her activities in 2006-2009 both as to practicing medicine and her schooling. (R:534-600, 601-12.) She testified she worked greater than 50 hours per week as an OB/GYN at her own practice and at North Austin Medical Center in 2006 and 2007, as well as in January and February 2008. (R:534-36.) She retired in March 2008 because she had developed arthritis that made it difficult for her to perform surgery. (R:556.)

Dr. Thompson testified that she completed her coursework for her J.D. in December 2007 and her master's degree in December 2008. (R:545.) During that time, she took call on weekends or would ask another doctor to cover her call when necessary. (R:542.) She took some classes at night. (R:574-75.)

When counsel for Dr. Smith expressed his concern that it did not seem "humanly possible" to both attend law school and maintain a full-time practice as an OB/GYN, Dr. Thompson explained: "I can tell you it was humanly possible because I did it. If I were working a hundred hours a week and 50 were devoted to my practice, that still leaves me 50 hours for law school." (R:549-50.) When pressed as to whether the school made accommodations, she thoroughly set forth:

> I don't know if you would call it a special arrangement. But I did meet with the dean prior to starting law school. He knew that I was going to continue practicing. UT Law School did not have any special accommodations for part-time or alternative students, but he did allow me to choose the section that the hours of classes would most accommodate my practice schedule. This was for the first year only. After the first year, then I had a lot more flexibility. For the first

> year[3], I picked the section that classed, as I recall, from 8:30 to noon Monday through Thursday. On some mornings I would have a surgery or C-section prior to going to class at 7:00 or 7:30 in the morning. I went directly from my classes at 12:00 and started my practice in the office at 12:30 or 1:00, and worked till about 7:00 in the evening. I went home, I studied for law school if I wasn't on call or did not have patients in labor. If I did, I stayed at the hospital and always had my books ready to study there if I needed to be at the hospital. On weekends—on Friday, when I did not have classes, I usually did my surgeries and any deliveries that might be elective, like inductions. On Saturdays and Sundays I took call and studied. It's pretty easy to get the hours that way. I tell you, after the first year when I had more flexibility, I selected classes that, when possible, met for longer periods, two days a week, like Tuesdays and Thursdays. So I grouped my classes together to minimize the time that I had to be away from the office and the hospital. And I took an extra semester to graduate. The LBJ classes were pretty much part of my law school curriculum. Many of the classes were cross-referenced so that I received credit for both. The LBJ School also gave me credit for having been a mature student and worked for a number of years. And some of the LBJ classes I took in the summer in the evenings. And that's how I did it.

(R:551-52.)

Defendants then turned to the specifics of Plaintiff's claims. (R:552.) Dr. Thompson noted that she was only prepared to answer questions regarding her qualifications and that to the extent the deposition was to cover her opinions on Defendants' negligence, she would like the opportunity to review the medical records before answering; but she noted that she had seen Ms. McIntyre's symptoms in various patients "from a pregnant patient vomiting to a 19-week

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[3] Given that Dr. Thompson took three and a half years to complete her law school program and graduated in December 2007, her first year of law school would have been before the relevant period for this case.

delivery, to a gastrointestinal condition, to infection." (R:595-96, 603.)

Dr. Thompson discussed at length her involvement with nurses both at her office and at hospitals, and confirmed she would be qualified to render an opinion about a nurse's actions in treating a patient with OB/GYN-related symptoms. (R:589-99, 601-05.) At her practice, she employed a nurse practitioner and a midwife. (R:586.) She responded affirmatively to a question as to whether she had "ever been responsible for ensuring that a floor nurse, an OB/GYN floor nurse or an emergency deputy nurse, is in compliance with the hospital's nursing practices and procedures." (R:589.) She also performed peer review and as part of that would speak with nurses about the care required in particular occasions. (R:590-91.) She had the opportunity to instruct nursing students at hospitals at which she practiced, though she never taught any regular nursing courses. (R:591-92.)

Despite Dr. Thompson's Deposition, the Trial Court Dismisses Plaintiff's Case

Following Dr. Thompson's deposition, an additional hearing was held, now with Judge Patterson presiding. (R:1070-1163.) Dr. Smith submitted that Dr. Thompson's testimony that she had both worked and gone to law school was "not credible." (R:1081-82.) Jackson Hospital argued that because birth "takes a long period of time," Dr. Thompson could not have delivered 400 babies in the years she was attending school. (R:1099-1100.) Judge Patterson similarly questioned "how is it reasonably possible that this expert is devoted to full-time practice while

she's in law school and getting a public policy degree at the same time." (R:1118.)

But no evidence was presented to undermine Dr. Thompson's unequivocal testimony, a point Plaintiff emphasized. (R:1119.) Plaintiff's counsel explained that he only instructed Dr. Thompson not to answer questions that he felt went beyond the limited discovery order. (R:1121.) He also noted that the documents requested by Defendants did not exist in many cases and nothing in the law or the court's order "said that the expert had to go out and create documents in order to respond to a request for production." (R:1129-30, 1133-34.)

The trial court thereafter expressed concern that Dr. Thompson had not pinpointed during the deposition what particular complications of Ms. McIntyre's pregnancy caused her death. (R:1141.) But Plaintiff's counsel stated that all Dr. Thompson had prepared for was to comply with Judge Fishel's order to testify regarding her presuit qualifications, though he noted that Dr. Thompson had cited the significant findings relevant to that issue in her affidavit. (R:1144-45.)

Following the hearing, the trial court granted the motions to dismiss, concluding Dr. Thompson was not qualified under sections 766.102(5)(a)(2), (6), and (9). (R:742-45.) The trial court noted that the affidavit only offered general qualifications and did not state the level of practice Dr. Thompson engaged in during the three years immediately preceding Ms. McIntyre's death. (R:743.) The trial court "once again querie[d] the feasibility of Dr. Thompson's statement" that

she was engaged in full-time patient care until March 2008. (R:743.)

The court criticized the deposition objections as having "prohibited Defendants' [sic] 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." (R:744.) It concluded that counsel's actions "were purposeful and designed to deprive the Defendants' of the ability to meaningfully participate in pre-suit discovery." (R:744.) The court noted that "Defendants' were unable to meaningfully discover any records of [Dr. Thompson's] academic post graduate education … or her educational, instructional or vocational activities for the years" in question. (R:743.)

The court also concluded, without explanation, that the "verified record does not establish that Dr. Thompson has knowledge of the applicable standard of care for nurses, nurse practitioners or others such that she may render an expert opinion as to the standard of care of such medical support staff members." (R:744.)

The trial court concluded Defendants were entitled to attorney's fees and costs. (R:745.)[4] It entered final judgment. (R:746-47.) Plaintiff moved for rehearing, highlighting all of Dr. Thompson's qualifications and detailing

[4] Because the trial court's order only determined entitlement to attorney's fees and costs and not amount, that issue is not yet ripe for appeal. *E.g.*, *Garcia v. Valladares*, 99 So. 3d 518, 518 (Fla. 3d DCA 2011).

Plaintiff's counsel's good faith compliance with presuit procedures and Judge Fishel's order. (R:751-79.) The trial court quickly denied the motion. (R:953.)

The First District Finds No Abuse of Discretion and Affirms the Dismissal

The First District affirmed. *Morris v. Muniz*, 189 So. 3d 348 (Fla. 1st DCA 2016). The majority concluded that dismissal was warranted because Plaintiff did not provide the required opinion from a medical expert as defined by the statute. *Id.* at 350. Applying the abuse of discretion standard, the majority held: "Here, the record contains ample evidence to support the trial court's conclusions that [Plaintiff] failed to offer sufficient proof of her proffered expert's statutory qualifications, and that [Plaintiff's] lack of cooperation with [Defendants'] attempts to verify the expert's qualifications merited dismissal under sections 766.205(2) and 766.206(2), Florida Statutes." *Id.* at 350-51.

In dissent, Judge Swanson noted that the appropriate review standard was de novo and concluded that "Dr. Thompson's affidavit clearly established her qualifications, [and] that should have been the end of the matter." *Id.* at 351 (Swanson, J. dissenting). But Dr. Thompson further explained her qualifications during her deposition, and Judge Swanson noted that although the trial court questioned the "feasibility" of her explanation, it "was not permitted to make credibility determinations concerning an otherwise unrebutted and facially sufficient affidavit." *Id.* at 352.

Judge Swanson also noted that, putting aside whether permitting discovery as to Dr. Thompson's qualifications was proper, Plaintiff's "counsel was justified in objecting to [Defendants'] misuse of the discovery process to go on a fishing expedition that exceeded what was relevant to determine Dr. Thompson's qualifications as a corroborating presuit expert witness." *Id.* at 353. The subsequent dismissal wrought by Plaintiff's counsel's refusal "to cooperate in this endeavor" deprived Plaintiff "of her constitutionally guaranteed access to the courts." *Id.* at 351. He noted that the trial court's order also failed to contain the necessary findings under *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993). *Morris*, 189 So. 3d at 353.

SUMMARY OF ARGUMENT

Dismissal is the sanction of last resort in litigation, reserved only for those occasions when a plaintiff willfully exhibits the most contumacious behavior, prejudicing the other side's ability to litigate the case. Yet the First District majority endorsed and sanitized the trial court's dismissal of Plaintiff's medical malpractice action here, conflating the underlying grounds for dismissal and ignoring the record along with legal requirements to find that the trial court did not abuse its discretion. In doing so, it perpetuated the denial of Plaintiff's constitutional right to access the courts.

The trial court dismissed this case after concluding that Plaintiff did not

corroborate her presuit notice of intent with the opinion of a qualified expert. That analysis is a legal one, requiring application of the statutory requirements regarding medical experts. Similarly, the trial court's decision that the expert's CV and affidavit did not show she met the terms of the statute and decision to order further discovery on that issue is a legal question also reviewed de novo.

And here, that legal analysis should have been simple and straightforward, given that the expert provided a CV and affidavit that met all of the statutory requirements. Dr. Thompson was a 30-year board-certified OB/GYN who swore in her affidavit that she had seen patients full-time until March 2008—about 9 months before Ms. McIntyre's death. She had served as Chief of an OB/GYN department and Chief of Staff at a women's hospital, requiring her to supervise not just other doctors but also the OB/GYN nurses and medical staff.

But the trial court ordered limited discovery after making a credibility determination that Dr. Thompson could not have practiced medicine and attended graduate school at the same time. In her three-hour deposition, Dr. Thompson confirmed how she managed to attend school and practice medicine, as well as that she was familiar with the standard of care for nurses and medical staff treating OB/GYN patients. Under any review standard, there is no question that Dr. Thompson met the statutory requirements for serving as a corroborating expert.

There were several areas of Defendants' inquisition to which Plaintiff's

counsel refused to permit Dr. Thompson to respond. To the extent those purported discovery failings were the basis for dismissal, the trial court abused its discretion in doing so. To begin with, the seeking and ordering of such discovery was unnecessary in light of Dr. Thompson's affidavit and CV. Even if additional information was necessary, Plaintiff complied with the court's order when Dr. Thompson explained in her deposition how she was able to attend law and graduate school while practicing medicine. Plaintiff's objections to the additional material or testimony Defendants sought were based on counsel's good faith belief that it exceeded the scope of the limited discovery order and the statutory requirements for a presuit expert's qualifications—a position Judge Swanson found Plaintiff was justified in taking against Defendants' "fishing expedition." *Morris*, 189 So. 3d at 353 (Swanson, J., dissenting).

Even if that were not the case, the trial court's failure to analyze the *Kozel* factors, which must be considered before the ultimate sanction of dismissal is imposed for attorney misconduct, requires reversal. There was no record support for any of those factors; the defense was not prejudiced in its ability to defend or deny Plaintiff's claims and no bad conduct on the part of Mrs. Morris herself was ever alleged. Dismissal under these circumstances is wholly unwarranted.

The trial court's decision, affirmed by the First District, turns the presuit screening requirements into a mini-trial replete with credibility determinations and

substantive discovery. But presuit requirements "are not intended to be a Daedalean labyrinth that denies a plaintiff access to the courts." *Holmes Reg'l Med. Ctr., Inc. v. Wirth*, 49 So. 3d 802, 805 (Fla. 5th DCA 2010) (citations omitted).

ARGUMENT

Before filing suit for medical malpractice, the prospective plaintiff is required to complete a presuit investigation to determine whether "there are reasonable grounds to believe that" the defendant negligently treated the plaintiff and such negligence resulted in injury. § 766.203(2), Fla. Stat. Corroboration of those findings by a medical expert must be obtained in writing. A medical expert is defined as "a person duly and regularly engaged in the practice of his or her profession who holds a health care professional degree from a university or college and who meets the requirements of" section 766.102. *Id.* § 766.202(6).

In turn, section 766.102(5), Florida Statutes (2011), which was the basis for the dismissal of this case against all four defendants, provides:

> (5) A person may not give expert testimony concerning the prevailing professional standard of care unless the person is a health care provider who holds an active and valid license and conducts a complete review of the pertinent medical records and meets the following criteria:
>
> (a) If the health care provider against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> 1. Specialize in the same specialty as the health care

> provider against whom or on whose behalf the testimony is offered; or specialize in a similar 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;[5] and
>
> 2. Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:
>
> a. 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 the claim and have prior experience treating similar patients[.]

And section 766.102(6), Florida Statutes (2011), which was an additional basis for the dismissal of Plaintiff's claims against the two hospital defendants, requires that a physician opining to the standard of care for support staff meet the requirements of (5) and, "by reason of active clinical practice or instruction of students, has knowledge of the applicable standard of care for nurses, nurse practitioners, … or other medical support staff."

The statutory qualifications seek to ensure that the corroborating presuit expert has sufficient knowledge of current prevailing standards of care such "that the corroborating opinion can form a reasonable basis to support a claim of medical negligence." *Ft. Walton Beach Med. Ctr., Inc. v. Dingler*, 697 So. 2d 575,

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[5] The statute was amended in 2013 to delete the references to "similar specialty" and "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." Ch. 2013-108, § 2, Laws of Fla.

580 (Fla. 1st DCA 1997). This Court explained:

> The expert opinion to be supplied is not one which delineates **how** the defendants were negligent. Section 766.104 refers to a written medical opinion "that there appears to be evidence of medical negligence." Section 766.203(2) provides that the medical expert opinion is for "corroboration of reasonable grounds to initiate medical negligence litigation." And § 766.205(1) specifically provides that the medical opinion need only corroborate that "there exists reasonable grounds for a claim of negligent injury." Obviously, the corroborative medical opinion adds nothing to the Plaintiffs' notice of their claim. It merely assures the Defendants, and the court, that a medical expert has determined that there is justification for the Plaintiffs' claim, i.e., **that it is not a frivolous medical malpractice claim**. The purpose of the medical expert opinion is to corroborate that the claim is legitimate, not to give notice of it.

Kukral v. Mekras, 679 So. 2d 278, 282 (Fla. 1996) (quoting *Stebilla v. Mussallem*, 595 So. 2d 136, 139 (Fla. 5th DCA 1992)). A plaintiff is not required "to establish the defendant's negligence or prove its case during the presuit screening process." *Apostolico v. Orlando Reg'l Health Care Sys., Inc.*, 871 So. 2d 283, 287 (Fla. 5th DCA 2004).

Here, the First District majority failed to assess the statutory requirements in applying the improper review standard to the trial court's conclusion that Plaintiff's presuit expert was not qualified. And, under any review standard, dismissal should be reversed. Dismissal is an appropriate remedy under Florida law when a medical malpractice plaintiff fails to provide a qualified corroborating expert. As detailed in Issue II, if that was the basis for the decisions below, they cannot stand as a matter of law or fact. Similarly, dismissal is not an appropriate

remedy for an attorney's failure to comply with discovery orders unless the trial court makes findings that were lacking as detailed in Issue III.

I. THE PROPER STANDARD OF REVIEW FOR A TRIAL COURT'S DISMISSAL OF A MEDICAL MALPRACTICE ACTION BASED ON A PRESUIT EXPERT'S FAILURE TO MEET THE STATUTORY QUALIFICATIONS IS DE NOVO.

It is hornbook law that "the correct standard of review is typically determined by the 'nature of the adjudication' or the function that the trial court is performing at the time of the alleged error." *Jarrard v. Jarrard*, 157 So. 3d 332, 336 n.3 (Fla. 2d DCA 2015) (citing Philip J. Padovano, *Florida Appellate Practice* § 19.3, at 358-59 (2013 ed.)). The decision as to whether a corroborating presuit medical expert meets the statutory requirements is a legal one, reviewed de novo, as every other district court has concluded. *Holden v. Bober*, 39 So. 3d 396, 400 (Fla. 2d DCA 2010); *Edwards v. Sunrise Ophthalmology Asc, LLC*, 134 So. 3d 1056, 1057 (Fla. 4th DCA 2013); *Apostolico*, 871 So. 2d at 285-86. The Second District explained:

> [T]he trial court's ruling that the appellants' corroborating affidavit failed to comply with the statutory requirements is reviewed de novo. *See Holden*, 39 So. 3d at 400. And because the facts concerning Dr. Sichewski's background and experience are unrefuted, the question of his qualifications as an expert turns on the application of the relevant statutes, which is an issue of law. *See Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) (holding that a question of law arising from undisputed facts is reviewed de novo). In reviewing this issue, we must consider all facts in the light most favorable to the appellants.

Oliveros v. Adventist Health Sys./Sunbelt, Inc., 45 So. 3d 873, 876-77 (Fla. 2d

DCA 2010). In *Oliveros*, as here, "the appellees did not present any evidence to refute" the expert's affidavit or the "discovery deposition wherein he explained and defended his qualifications." *Id.* at 876-77.

A legal assessment as to whether the elements of the statute have been met does not permit further exploration or credibility assessments. *Holden*, 39 So. 3d at 400. It ensures that the "statutory scheme" is "interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts, while at the same time carrying out the legislative policy of screening out frivolous lawsuits and defenses." *Kukral*, 679 So. 2d at 284. To permit more than a facial review when the supporting documentation leaves no question as to whether the presuit expert can meet the statutory requirements will open the floodgates to improper defense discovery in the presuit process. *E.g.*, *Holmes Reg'l Med. Ctr., Inc. v. Wirth*, 49 So. 3d 802, 805 (Fla. 5th DCA 2010).

Here, the dismissal was based on the trial court's adjudication that Plaintiff's corroborating expert was not qualified to render an opinion about any of the defendants under the statutes. *See* (R:745 ("Defendants' respective Motions to Dismiss are each hereby GRANTED, as the record does not support a finding that Dr. Thompson is a qualified expert witness" under the statutes)); *Morris v. Muniz*, 189 So. 3d 348, 349 (Fla. 1st DCA 2016) (affirming the trial court's dismissal "for failure to satisfy statutory presuit requirements for medical malpractice actions").

The trial court concluded Dr. Thompson could not have been engaged in "active clinical practice" in the three years preceding Ms. McIntyre's pregnancy and death because she attended graduate and law school in that same time period. Review of that legal determination should have been de novo. *E.g.*, *Holden*, 39 So. 3d at 400.

Indeed, the threshold question of whether the deposition of Dr. Thompson should have been ordered in the first place is a matter that is indisputably reviewed de novo. *See Devers v. Sunseeker Int'l Ltd.*, 98 So. 3d 1261, 1263 (Fla. 4th DCA 2012) (noting that the determination of whether an evidentiary hearing is required is reviewed de novo). As Plaintiff repeatedly argued at the trial court, Dr. Thompson's qualifications were established by her affidavit and CV. (*E.g.*, R:234, 252, 254, 255, 985-86, 991-92, 1017-18, 1021, 1034.)

Defendants have not identified any case applying the abuse of discretion standard to the question of whether a presuit expert is sufficiently qualified under section 766.102, nor did the First District cite any case for its application here. The abuse of discretion standard used by the First District is the appropriate standard when a case is dismissed for discovery abuse. *DeCristo v. Columbia Hosp. Palm Beaches, Ltd.*, 896 So. 2d 909, 911 (Fla. 4th DCA 2005).

To the extent that standard was applied because the trial court permitted Defendants to "engage in limited pretrial discovery … directed solely to Dr. Thompson's qualifications under Chapter 766" (R:266), the First District ignored

the issue actually decided by the trial court and affirmed in its own majority opinion. *See* Padovano, § 19:4 ("Identifying the correct standard depends more on the issue decided by the lower tribunal than it does on the procedural vehicle for presenting the issue."). The trial court dismissed this case, after finding Dr. Thompson could not have been engaged in actual clinical practice because she was also attending school, because "the applicable statute of limitations has long since expired, and Plaintiff cannot remedy this issue with another expert." (R:745.)

Plaintiff concedes that Judge Patterson documented how he felt Plaintiff was offered the chance, but failed, to cure the court's concerns about Dr. Thompson's qualifications. (R:745 ("Plaintiff has not complied with the statutory presuit requirements, or allowed reasonable discovery into their expert's devoted professional time 3 to 5[6] years immediately preceding the occurrence in this cause").) Admittedly, the trial court cited both sections 766.205(2), which requires dismissal when a plaintiff fails to permit reasonable access to information that allows a party to evaluate a claim, and 766.206(2), which requires dismissal when a presuit notice is not accompanied by the verified written opinion of a qualified medical expert. But the order focuses only on information related to Dr. Thompson's qualifications. If the standard for determining whether a presuit expert

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[6] Of course, the statutes only require that the active clinical practice occur in the **three** years preceding the occurrence.

meets the qualifications is a matter of law, then, in the absence of any evidence to the contrary, it should remain a legal question even if more information is submitted to demonstrate that the expert meets the standard.

At the First District and in its brief on jurisdiction, GCMC argued that the competent, substantial evidence standard applied. The cases relied upon for that argument, however, did not involve the evaluation of whether the presuit expert was qualified under the law, but instead involved conflicting factual assertions and evidence in need of resolution. In *Bery v. Fahel*, 143 So. 3d 962, 963 (Fla. 3d DCA 2014), the competent, substantial evidence standard was applied to the trial court's dismissal. That standard was applied after the Third District had remanded the case for an evidentiary hearing when the expert "attempt[ed] to withdraw his [corroborating] affidavit because he felt he was not qualified to act as an expert witness." *Bery v. Fahel*, 88 So. 3d 236, 236 (Fla. 3d DCA 2011).

In another case, the district court affirmed the trial court's conclusion that plaintiff's presuit expert did not meet the statutory requirements because the expert was not of the same specialty as the defendants and did not have knowledge of the standard of care for a urological procedure. *Yocom v. Wuesthoff Health Sys., Inc.*, 880 So. 2d 787, 790 (Fla. 5th DCA 2004). In doing so, the Fifth District affirmed the trial court's conclusion that the expert was not qualified as "correct in its understanding of the law governing corroborating affidavits." *Id.* The portion of

the trial court's decision it deemed to be a "fact finding … bearing the presumption of correctness" was the trial court's conclusion that the defendant had not waived the affidavit requirement. *Id.* And in *Grau v. Wells*, 795 So. 2d 988, 989-90 (Fla. 4th DCA 2001), the Fourth District affirmed the trial court's conclusion that the defense's presuit expert, the defendant's business partner who rendered his opinion before any presuit discovery was even obtained, was biased and had not conducted a "reasonable presuit investigation."

The proper standard of review is determined not by looking to particular words like discovery or evidentiary hearing, but by examining the nature of the trial court's adjudication. Determining whether a corroborating expert meets the statutory qualifications, where the evidence regarding his or her qualifications is unrebutted, is a legal analysis properly reviewed de novo.

II. DISMISSAL WAS IMPROPER UNDER ANY REVIEW STANDARD BECAUSE DR. THOMPSON MET THE STATUTORY REQUIREMENTS FOR A PRESUIT EXPERT.

Standard of Review. As stated, this Court reviews a trial court's conclusion that a corroborating presuit expert fails to meet the statutory requirements under a de novo standard of review. *Holden v. Bober*, 39 So. 3d 396, 400 (Fla. 2d DCA 2010). Whether an evidentiary hearing is required is also a legal issue reviewed de novo. *Devers v. Sunseeker Int'l Ltd.*, 98 So. 3d 1261, 1263 (Fla. 4th DCA 2012).

The statutory requirement that a plaintiff obtain corroboration from a

qualified medical expert serves to prevent frivolous and expensive medical malpractice litigation when no basis for a claim exists. *Shands Teaching Hosp. & Clinics, Inc. v. Barber*, 638 So. 2d 570, 572 (Fla. 1st DCA 1994). But screening frivolous lawsuits cannot come at the expense of a citizen's constitutional right to access the courts. *Kukral v. Mekras*, 679 So. 2d 278, 284 (Fla. 1996); *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993). Here, the trial court did not consider Plaintiff's right at all and instead imposed requirements for expert witness qualifications that exceed those set out in the statutes.

A. Dr. Thompson's CV and affidavits established that she practiced as an OB/GYN until March 2008.

First, Dr. Thompson's affidavits and CV should have sufficed at the presuit stage and, as such, Judge Fishel erred as a matter of law in requiring further information be presented on her qualifications at all. Dr. Thompson's affidavits and her CV reflect that she specialized in OB/GYN, just like Drs. Smith and Muniz, and that she had "devoted professional time" in the three years prior to Ms. McIntyre's death to the active clinical practice as an OB/GYN, meeting the requirements of section 766.102(5)(a)(1) and (5)(a)(2). (R:63-67, 313-15.) Indeed, Dr. Thompson averred that she "was engaged in full-time patient care until March 2008." (R:63, 113, 162, 313, 1398, 1409.)

An affidavit and CV, so long as they contain the necessary information to meet the statutory qualifications, are sufficient evidence to qualify a corroborating

expert. Relying on just a nursing expert's CV, the First District denied a certiorari petition in *Baptist Medical Center of Beaches, Inc. v. Rhodin*, 40 So. 3d 112, 118 (Fla. 1st DCA 2010), where the defendant argued the nursing expert was not duly and regularly engaged in the practice of nursing and was an operating nurse. The First District recognized that the expert's CV indicated "considerable nursing training and experience." *Id*.

Further information is required only when an affidavit and CV do not establish the statutory requirements as a matter of law. In *Oken v. Williams*, 23 So. 3d 140 (Fla. 1st DCA 2009) (*Oken I*), for instance, the expert's CV intimated that he was board certified in family and emergency medicine, and the First District determined he was not qualified as an expert in a case against a cardiologist. *Id*. at 142, 146. But this Court quashed the First District's decision and determined that instead of outright dismissal, the case should have been remanded for an evidentiary hearing to determine whether the expert still could have met the statutory terms under the "similar specialty" provision. *Williams v. Oken*, 62 So. 3d 1129, 1137 (Fla. 2011) (*Oken II*); *see also Jeffrey A. Hunt, D.O., P.A. v. Huppman*, 28 So. 3d 989, 991-92 (Fla. 2d DCA 2010) (holding that CV was not enough to qualify an expert because it "does not reflect that [the purported expert] is licensed to provide health care" or that she even had a health care degree and the plaintiff conceded that the expert was not licensed).

Unlike *Oken* and *Hunt*, this is not a case in which the corroborating expert's CV and affidavit lacks information or creates doubt about whether she meets the statutory requirements. To the contrary, the very face of Dr. Thompson's CV and her affidavits provide the necessary information. (R:63, 313-15.)

The trial court doubted Dr. Thompson's affirmations. But its incredulity is not reason to conclude her unequivocal, unrebutted sworn statements were false. The court should not make credibility or reasonableness determinations concerning an unrebutted affidavit at this stage of the case. *Cf. Nero v. Cont'l Country Club R.O., Inc.*, 979 So. 2d 263, 267 (Fla. 5th DCA 2007) (at dismissal stage, the trial court should not be making merit determinations about the complaint); *Payne v. Poynter*, 707 So. 2d 768, 769 (Fla. 2d DCA 1998) (reversing order granting motion to dismiss for failure to serve complaint where unrebutted affidavit showed agreement to waive service requirement between parties). Though graduate and professional school while engaged in full-time work creates a tremendous workload, they are not mutually exclusive endeavors such that a trial court can disregard an expert's sworn affidavit and CV indicating that she accomplished both.

This Court in *Oken II* suggested that the trial court should have conducted an evidentiary hearing to determine information **lacking from the face** of the medical expert's CV regarding specialty areas outside of her own, but nothing in that case

suggests that a court should or even can order an evidentiary hearing to search for evidence to **contradict** the facially sufficient affidavit of a corroborating medical expert. *Oken II*, 62 So. 3d at 1129. *Oken II* should not be applied to this dissimilar situation, lest it risks turning determination of a presuit expert's qualifications into a mini-trial and ignoring the concerns expressed in *Kukral*.

In dismissing, the trial court here determined the affidavit did not suffice because it "does not state specifically the level of practice [Dr. Thompson] engaged in during the years immediately preceding the date of occurrence" (R:743), a specificity requirement that exists nowhere in the statute. The active clinical practice requirement exists only to ensure that the expert's knowledge is "sufficiently current" so that his or her opinion provides a "reasonable basis to support a claim of medical negligence." *Ft. Walton Beach Med. Ctr., Inc. v. Dingler*, 697 So. 2d 575, 580 (Fla. 1st DCA 1997); *see also Archer v. Maddux*, 645 So. 2d 544, 547 (Fla. 1st DCA 1994) (requirement seeks to ensure that a "competent witness" has supported the allegations of malpractice prior to the trial process). There is no requirement that the practice be full time, that a physician see a minimum number of patients, or that the physician have done anything other than actively practiced at some point in the three year period.

And it is important to note that section 766.102(5) only requires the expert to have "devoted professional time" to clinical practice in the preceding three years; it

does not use the term "substantial" like section 766.102(9). *See Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) ("When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded."). Consequently, even if the trial court found it difficult to fathom that Dr. Thompson could have worked full-time and attended school, that was not reason to find that she had not "devoted professional time" within the meaning of section 766.102(5), particularly when she swore she had. In short, if an expert's CV and affidavit facially establish that the corroborating medical expert meets the requirements of the statute, the court should not scrutinize those facially sufficient documents to merely allow a case through the court's doors. *See Michael v. Med. Staffing Network, Inc.*, 947 So. 2d 614, 619 (Fla. 2d DCA 2007) ("However, there is an increasingly disturbing trend of prospective defendants attempting to use the statutory requirements as a sword against plaintiffs.").

B. Even if a deposition was proper, Dr. Thompson fully answered the trial court's concerns and testified that she practiced OB/GYN in the relevant time period.

In any event, Dr. Thompson's three-hour deposition surely confirmed that she met the statutory qualifications. January 2006 to January 2009 was the relevant three-year period before Ms. McIntyre's death. Dr. Thompson testified that she worked greater than 50 hours per week as an OB/GYN in 2006 through her

retirement in March 2008. (R:534-35.) During that time, she handled call for her own and other OB/GYN patients that came through the ER at North Austin Medical Center. (R:535-36, 554, 566, 588.)

Not only did Dr. Thompson reiterate that she practiced as an OB/GYN full-time until March 2008, she explained how she managed to obtain her law and master's degrees at the same time. She would take call on weekends or ask another doctor to cover her call if necessary and took night classes when possible. (R:542, 574-75.) After her first year, she had flexibility in selecting her schedule to group her classes together to minimize the time she was out of the office and hospital. (R:551-52.) She studied while at the hospital and on call and scheduled her patients around her classes. (R:551-52.) She took an extra semester to finish. (R:551-52.)

But the trial court, Judge Patterson now presiding, was not satisfied, despite Dr. Thompson having sworn under oath twice that she was engaged in active clinical practice until March 2008. The court simply did not believe it was feasible for a person to practice medicine and attend law and graduate schools, despite her full explanation. (R:743.) Again, however, lacking any contrary evidence at the presuit stage, the court is not supposed to be making credibility determinations.

Additionally, Defendants failed to provide any evidence contrary to Dr. Thompson's statements. Thus, the dismissal is based solely on the trial court's assessment that an expert cannot meet the statutory requirements and attend

school, points that are plainly without support in the law. (R:743.) Even under the strictest of review standards, reversal is warranted. *See Faber v. Wrobel*, 673 So. 2d 871, 872-73 (Fla. 2d DCA 1995) (concluding that reversal required under competent, substantial evidence where trial court concluded expert was not regularly engaged in practice but no evidence supported that finding).

C. Dr. Thompson was qualified to serve as a presuit expert against the hospital defendants.

The trial court similarly erred in dismissing the claims against the hospital defendants because it found that Dr. Thompson failed to qualify as an expert under section 766.102(6).[7] (R:743, 744.) That subsection permits a physician to serve as an expert on nurses or support staff provided he or she meets the requirements of section 766.102(5) and "has knowledge of the applicable standard of care for nurses … or other medical support staff." § 766.102(6), Fla. Stat. As with subsection (5), there are no particular words required of the expert's affidavit.

Dr. Thompson's affidavit revealed that she had been Chief of the OB/GYN department at a large medical center, Chief of Staff at a women's specialty

[7] The trial court also concluded that Dr. Thompson did not meet the section 766.102(9)(a) requirements to render an opinion regarding the standard of care for ER physicians, something Plaintiff has repeatedly clarified she was not intending to meet. (R:235, 268-69, 340-41, 344-45, 992-93, 1025, 1061.) The First District included that provision as a basis for affirmance. *Morris*, 189 So. 3d at 349. While Plaintiff still does not contend that Dr. Thompson is qualified to render an opinion about ER physicians, she objects to that failure being a basis for dismissal since she makes no claims against any ER physician.

hospital, and a member of the hospital-wide peer review committee. (R:63, 162.) She stated in each of her affidavits how hospital staff violated professional standards of care in her opinion. (R:64-66, 163.)

The statute does not require any additional information. Indeed, the two hospital defendants had to provide their own corroborating experts in denying Plaintiff's malpractice claim, § 766.203(3), Fla. Stat., and neither of them provided detail as to their expertise regarding nurses and medical staff in their affidavits. (R:84-100, 219-24.) Only Jackson Hospital's expert mentioned a nursing standard of care, and did so by briefly noting that as a practicing OB/GYN with hospital privileges—i.e., just like Dr. Thompson—he has "knowledge of the applicable standard of care for obstetricians as well as nurses who are providing care for obstetric patients in a hospital setting, including in the ER." (R:219; *see also* R:84 (GCMC's expert never mentioned nurses or medical staff).)

The point is not that the hospitals' experts were unqualified, it is that their affidavits reflected the same qualifications shown by Dr. Thompson. Dr. Thompson could not have overseen, reviewed, and managed nurses and staff in her roles as Chief of an OB/GYN department and as Chief of Staff of a hospital without an understanding of the standards of care applied to them. The case law on this issue is sparse and in the absence of a particular statutory qualification on point, the trial court erred as a matter of law in concluding Dr. Thompson's

affidavit was lacking.

But even if the affidavit and CV showing Dr. Thompson's experience working in and running the OB/GYN departments at hospitals was not enough, she plainly provided the magic words Defendants wanted at her deposition. She testified that she met the statutory requirements, as she supervised emergency room nurses in OB/GYN cases while on call at the hospital throughout her 30-year career and employed a nurse practitioner as well as other support staff in her clinical practice. (R:584-86, 589.) She stated that she was familiar with her hospital's practices and procedures for nurses and that she was qualified to speak to the standard of care for a nurse treating an OB/GYN patient. (R:604-05.) There was no evidence to the contrary and no explanation for doubting the veracity of Dr. Thompson's statements.

In the only cases undersigned counsel found addressing this issue, the expert doctors provided no details as to either (1) whether the expert had investigated reasonable grounds for claims against the nurses or (2) their experience with supervising nurses or other medical staff. *See Largie v. Gregorian*, 913 So. 2d 635, 639 (Fla. 3d DCA 2005) (corroborating affidavit did not at all mention nurse defendant or what about her actions led to the injury); *Young v. Bd. of Hosp. Dirs. of Lee Cty.*, 426 So. 2d 1080, 1081 (Fla. 2d DCA 1983) ("[t]he record supports the trial court's dissatisfaction with the psychiatrist's experience and knowledge

relevant to the standard of care in issue, including, for example, the psychiatrist's lack of familiarity with the day-to-day practices of a psychiatric nurse"). Here, the basis for dismissal was that Dr. Thompson lacked the necessary qualifications, though she offered substantial information supporting her expertise in this regard in her affidavit, CV, and deposition.

III. ANY PERCEIVED DISCOVERY VIOLATIONS WERE NOT A PROPER BASIS FOR DISMISSAL OF PLAINTIFF'S CASE, PARTICULARLY IN THE ABSENCE OF ANY PREJUDICE.

Standard of Review. A trial court's dismissal of a medical malpractice complaint for failure to comply with presuit discovery is reviewed for abuse of discretion. *Robinson v. Scott*, 974 So. 2d 1090, 1092 (Fla. 3d DCA 2007).

Based on the plain language of the trial court's order, Plaintiff maintains that this case was dismissed because the trial court determined her expert did not meet the statutory requirements for a corroborating presuit expert. But she concedes that the order detailed Judge Patterson's frustration that the information he desired had not been presented after the "limited discovery" Judge Fishel had permitted. In the event this Court concludes that the trial court's dismissal decision was based in whole or in part on its conclusion that Plaintiff's counsel refused to comply with court-ordered discovery, the Court should still quash the First District's decision because (a) such discovery is not permitted when there is no facial conflict or evidence to the contrary regarding a presuit expert's qualifications; (b) Plaintiff's

counsel complied with the limited scope of the discovery ordered by Judge Fishel; and (c) the required factors unexamined by the trial court show dismissal is too harsh a remedy at this stage.

A. Additional discovery was unwarranted.

The First District majority noted that the "presuit medical expert **opinion** is subject to discovery," citing section 766.203(4), Florida Statutes. *Morris*, 189 So. 3d at 350 (emphasis added). But the statute says nothing about whether the expert's qualifications and other personal information are discoverable.

This brief has already detailed why further discovery of a facially consistent, unrebutted affidavit and CV of a corroborating presuit expert is not and should not be subject to further inquiry. Judge Fishel's mere distrust that a physician could practice medicine while attending graduate school was not a basis to turn the presuit requirements into a fishing expedition, and he abused his discretion in doing so.

B. Plaintiff complied with the scope of Judge Fishel's discovery order.

Even if Judge Fishel's orders requiring additional information were proper, Plaintiff complied with their limited scope. (R:246.) Dr. Thompson submitted to a three-hour deposition and responded to all questions regarding her qualifications. She detailed the time she spent on call with the hospital (R:536-38) and in her own private practice (R:538-40), as well as how she balanced that time with her class

schedule (R:541, 549-550, 551). She testified about the number of patients she received monthly from 2006-08 (R:573), how many babies she delivered during that same period (R:572-73), and that she also treated OB patients in the emergency room (R:554-55, 582).

Plaintiff's counsel did direct Dr. Thompson to not answer several questions on topics that were outside the scope of Judge Fishel's limited deposition order. The basis for the objections is reflected in the directions Plaintiff's counsel gave at the deposition. (R:517-520, 527, 529, 558-560, 578-79, 583, 587, 588, 596-97, 599-600.) The topics included Dr. Thompson's most recent work as an attorney (done well outside the time period and subject matter relevant to section 766.102) (R:528-29, 587-88), the University of Texas School of Law's compliance with ABA requirements (R:547-48, 550), whether she had filed for disability with regard to her arthritis (R:558-60), the percentage of her income derived from her expert testimony (R:562-63), whether a particular doctor had bought Dr. Thompson's practice in Austin (R:569-70), how she came to be an expert witness in this case (R:575), the financial viability of her medical practice after she started law school (R:578-80), whether she was paid separately for being on call (R:583), and the name of the employee who would have maintained her billing and insurance records (R:587). And though Plaintiff maintains that any questions regarding the specifics of Ms. McIntyre's death were inappropriate, Dr. Thompson

answered the questions posed on that front, simply responding that she would need to review the medical records before testifying extensively about the condition and death of Ms. McIntyre, but explaining the symptoms she had before treated. (R:594-95, 599-601.)

Relatedly, the items sought by Defendants in their subpoena duces tecum did not exist or were duplicative of items already provided in discovery. (R:265, 653-55.) For example, Ms. McIntyre's medical records had already been submitted to Defendants along with the notices of intent, which would have been the same records Dr. Thompson relied on in formulating her opinions. Additionally, Plaintiff had already submitted a list of cases in which Dr. Thompson had served as an expert in response to requests for interrogatories, and there were no changes to the list previously submitted. (R:525.) A number of the requests sought summaries on a variety of subjects; such summaries had not been prepared by Dr. Thompson and the information requested was either provided in another manner or irrelevant.

More importantly, the overwhelming majority of the material requested had little or nothing to do with the limited scope of the trial court's order and was well beyond what is necessary at this early stage of the litigation. *See Morris*, 189 So. 3d at 353 (Swanson, J., dissenting) ("Even if such discovery was available, appellant's counsel was justified in objecting to appellees' misuse of the discovery process to go on a fishing expedition that exceeded what was relevant to determine

Dr. Thompson's qualifications as a corroborating presuit expert witness."). For instance, any information going to the specifics of Dr. Thompson's opinion about the negligence in this case was not only beyond the scope of the trial court's order, but has also been deemed unnecessary for presuit. *Michael*, 947 So. 2d at 620 ("While the statute requires a claimant to investigate the claims against each defendant, it does not require the affidavit to attest to the legitimacy of each claim against each defendant.").

If Defendants wanted more details about the claims against them, the remedy did not lie in challenging Dr. Thompson's qualifications. *See Largie v. Gregorian*, 913 So. 2d 635, 640 (Fla. 3d DCA 2005) (noting that the notice of intent and corroborating affidavit "serve distinct purposes": "[o]ne advises of an event, the other corroborates legitimacy of a claim following investigation"); *see also Kukral*, 679 So. 2d at 282 (same). Specifics as to the claims are not the point of the expert affidavit, and interpreting the statute in such a manner violates plaintiffs' right of access to the courts, requiring them to prove their case before they get into the courthouse. *Michael*, 947 So. 2d at 620-21 (citing *Mirza v. Trombley*, 946 So. 2d 1096, 1098-1101 (Fla. 5th DCA 2006)).

Summaries of and records from Dr. Thompson's schooling or her prior experience testifying as an expert are similarly irrelevant and beyond the scope of the trial court's order, as well as what Defendants had stated on the record was

required. (R:962, 972.) Finally, the summaries Defendants requested that were arguably relevant to Dr. Thompson's qualifications (*e.g.*, hours devoted to clinical practice) were more appropriately addressed at the deposition. Indeed, Dr. Thompson was asked and answered a number of questions on these points. (R:534-36, 542, 549-50.) Requiring her to also prepare summaries of points easily addressed by the deposition would have been unduly burdensome and duplicative.

Despite the limited scope of the discovery order and Dr. Thompson's testimony, Judge Patterson concluded that 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." (R:744.) Committing another error of law, it concluded that Plaintiff should have "allowed reasonable discovery into [her] expert's devoted professional time 3 **to 5** years immediately preceding the occurrence in this cause." (R:745 (emphasis added).) Inexplicably, the trial court lamented things like Defendants' inability to discover whether Dr. Thompson had applied for disability assistance upon her retirement. (R:744.)

Plaintiff's counsel's understanding of the extent of the order was supported by the trial court's statement that it did not contemplate a discovery deposition. (R:266-67.) Nothing in these exchanges shows a willful, deliberate, or bad faith refusal to comply; if Plaintiff's counsel was incorrect to conclude these questions

exceeded the scope, there were less severe sanctions to deal with that confusion. *See A Aable Bail Bond, Inc. v. Able Bail Bond, Inc.*, 626 So. 2d 1105, 1106 (Fla. 3d DCA 1993) ("We find that, under the circumstances of this case, counsel for Aable acted in good faith and attempted to comply with the lower court's order but was confused as to how to do so."); *see also Zayres Dep't Stores v. Fingerhut*, 383 So. 2d 262, 266 (Fla. 3d DCA 1980) (finding abuse of discretion in striking of defense where counsel asserted his good faith effort to comply with court's order and confusion as to details therein).

C. The *Kozel* factors were never analyzed and do not support dismissal here.

Even if the Court concludes Plaintiff should have provided all of the information Defendants sought, counsel's refusal to do so still did not justify the ultimate sanction of dismissal. *See Preferred Med. Plan, Inc. v. Ramos*, 742 So. 2d 322, 323 (Fla. 3d DCA 1999) ("Additionally, we note that failure to comply with presuit discovery does not automatically mandate dismissal of a claim as a matter of law."); *see also Hanna v. Indus. Labor Serv., Inc.*, 636 So. 2d 773, 777 (Fla. 1st DCA 1994) ("Dismissal is a 'drastic remedy' that should be used only in 'extreme situations.' " (quoting *Carr v. Dean Steel Bldgs., Inc.*, 619 So. 2d 392, 394 (Fla. 1st DCA 1993)). Particularly in medical malpractice cases, dismissal is a "last resort." *Swidzinska v. Cejas*, 702 So. 2d 630, 631 (Fla. 5th DCA 1997).

A trial court's "decision to dismiss the case based solely on the attorney's

neglect unduly punishes the litigant and espouses a policy that this Court does not wish to promote." *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993). Thus, "even in the face of severe negligence on the part of the attorney," dismissal is not the favored sanction. *Woodall v. Hillsborough Cty. Hosp. Auth.*, 778 So. 2d 320, 321 (Fla. 2d DCA 2000).

Thus, before a trial court can dismiss due to counsel's actions, it must consider:

> 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration.

Kozel, 629 So. 2d at 818. Notably, a trial court's failure to **expressly** set forth these factors mandates reversal so that the findings can be made. *Bennett ex rel. Bennett v. Tenet St. Mary's, Inc.*, 67 So. 3d 422, 424 (Fla. 4th DCA 2011); *see Woodall*, 778 So. 2d at 321 (applying *Kozel* to dismissal for presuit discovery violations).

The trial court never addressed the *Kozel* factors, nor was there record support had such findings been made. There is no evidence or indication in the record that counsel had previously been sanctioned or that the client had anything to do with purported procedural stumbles. *See Ham v. Dunmire*, 891 So. 2d 492, 497 (Fla. 2004) ("We reiterate that the interests of justice in this state will not

tolerate the imposition of sanctions that punish litigants too harshly for the failures of counsel."). As for whether the delay caused prejudice to Defendants or created problems of judicial administration, to the extent Defendants were correct that it did, the proper remedy lies with a sanction against the attorneys, not Mrs. Morris. *See Kozel*, 629 So. 2d at 818 ("a fine, public reprimand, or contempt order may often be the appropriate sanction to impose on an attorney in those situations where the attorney, and not the client, is responsible for the error"); *Woodall*, 778 So. 2d at 322 (even where "there is no acceptable excuse" for an attorney's action, the party "still gets the benefit of the case law endorsing the concept of punishing the attorney, not the client").

The one item the trial court expressly noted was that Plaintiff's counsel's discovery violations were "purposeful." (R:744.) But that conclusion is unreasonable, lacking any basis in the record given that counsel iterated several times that their objection to the additional discovery was borne out of their understanding of the limited scope of Judge Fishel's order. *See Santini v. Cleveland Clinic Fla.*, 65 So. 3d 22, 35 (Fla. 4th DCA 2011) (finding abuse of discretion in imposing sanctions in part because it was unreasonable "to find that there was not a good faith factual and legal basis" for counsel's claim). Counsel's misunderstanding of the scope of the discovery order should not be a basis for dismissal. *See King v. Macaleer*, 774 So. 2d 68, 68 (Fla. 2d DCA 2000) (reversing

dismissal order where "record reveals that much of the problem resulted from a disagreement between the parties' attorneys over the technical requirements necessary to comply with discovery, rather than simply a case of ignoring the requests"). Or, as the Fifth District explained under similar circumstances:

> In saying that failing twice to respond to presuit discovery requests must be deemed willful and must result in dismissal because the legislature wants the adjudication of medical malpractice cases to be fast and cheap, the prior panel may have said too little about the legislature's other goals—to determine which claims do have merit and to preserve the right to trial by jury.

Wolford v. Boone, 874 So. 2d 1207, 1210 (Fla. 5th DCA 2004).

The First District did not address the *Kozel* factors in its majority opinion, instead stating the "determination of the sanction to impose depends both on the circumstances of the case and what, if any, prejudice the opposing party has suffered." *Morris*, 189 So. 3d at 350 (citing *Robinson*, 974 So. 2d at 1093). But it did not identify any prejudice resulting from the purported discovery failures either. For, what could the prejudice be of Plaintiff failing to provide further documentation as to the business dealings and law school studies of her presuit expert? In no way has the lack of that information ever hindered Defendants from investigating or denying the claims in this case.

Perhaps had the *Kozel* factors been expressed, it would have become apparent that dismissal was too harsh a sanction in this case. *See Kozel*, 629 So. 2d at 818 ("Because dismissal is the ultimate sanction in the adversarial system, it

should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result."); *De La Torre v. Orta*, 785 So. 2d 553, 555 (Fla. 3d DCA 2001) ("It is well recognized in Florida law that dismissal of claims or defenses is an extreme sanction which should be used sparingly."). But the failure to make such findings, particularly where the record establishes that dismissal was too harsh a sanction, requires that the First District's decision be quashed and the dismissal order reversed.

CONCLUSION

The district court's opinion should be quashed and the case remanded to the trial court for reinstatement of Plaintiff's case with instructions to proceed to the merits of Plaintiff's claims.

Respectfully submitted,

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

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