IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v.

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

Respondents.
_____/

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

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

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STATEMENT OF CASE AND FACTS

Petitioner seeks review of a decision from the First District affirming the dismissal of Petitioner's complaint for failure to comply with the statutory presuit requirements for medical malpractice actions based on the particular facts of this case. Consistently applying established Florida law, the First District held that the trial court did not abuse its discretion in dismissing Petitioner's claims because "ample evidence" supported the trial court's conclusions that:

(1) Petitioner failed to provide reasonable access to information during presuit discovery by repeatedly refusing to respond to presuit discovery requests regarding her expert's qualifications, and by intentionally depriving Respondents of the opportunity to gain reasonable access to information during presuit, even after being sanctioned for doing so; and

(2) Based on Petitioner's obstruction of the presuit discovery process, Petitioner failed to offer sufficient proof that her presuit expert was qualified under section 766.102, Florida Statutes.

(Slip Op. at 4-6).

In so holding, the First District applied the explicit requirements of sections 766.205(2) and 766.206(2), which require dismissal of a claim where (1) a plaintiff fails to provide reasonable access to information during presuit, or (2) a plaintiff's

notice of intent does not contain a verified written medical expert opinion by a qualified expert witness as defined under section 766.202. *Id.* at 3-4.

Petitioner spends more time in her Statement of Case and Facts discussing Judge Swanson's dissenting opinion than the majority opinion. (Pet. Br. at 1-3). That dissent, however, is irrelevant to whether a conflict exists to provide this Court with jurisdiction and, thus, should not be considered. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.").

SUMMARY OF ARGUMENT

No conflict exists between the First District's decision and the decisions cited by Petitioner regarding the appropriate standard of review on the issue of whether Petitioner's presuit expert was qualified. In this case, the First District correctly reviewed the trial court's ruling, made after an evidentiary hearing, that Petitioner failed to offer sufficient proof that her presuit expert was qualified. This is wholly different from the cases Petitioner cites for conflict, which involved the purely legal issue of the meaning of certain terms in a presuit statute or the scope of the legal requirements regarding the presuit process.

Furthermore, no conflict exists regarding the First District's holding that Petitioner failed to provide reasonable access to information during presuit. Contrary to Petitioner's contention, not one case she cites requires the appellate

court to specifically explain why it believed Respondents were prejudiced by Petitioner's obstructive conduct during presuit. Instead, the First District consistently applied established law in reviewing the trial court's ruling on that issue for an abuse of discretion.

This Court should not accept review of this case because no express and direct conflict exists.

ARGUMENT

I. NO CONFLICT EXISTS AS TO THE APPROPRIATE STANDARD OF REVIEW.

Petitioner does not dispute that the First District correctly applied the abuse of discretion standard of review to the issue of whether the trial court properly dismissed Petitioner's complaint for obstructing the presuit discovery process. Instead, Petitioner asserts that the First District should not have applied this standard to the determination of whether her presuit expert was qualified. (Pet. Br. at 4-6). No conflict exists on this issue.

Florida law is clear that the resolution of a motion to dismiss following an evidentiary hearing relating to presuit comes to the appellate court clothed with a presumption of correctness and should be upheld if the trial court's findings are supported by competent, substantial evidence. *See Bery v. Fahel*, 143 So. 3d 962, 963 (Fla. 3d DCA 2014) (affirming order finding, after evidentiary hearing, that presuit corroborating expert was not qualified because findings were supported by

competent, substantial evidence); *Yocom v. Wuesthoff Health Sys., Inc.*, 880 So. 2d 787, 790 (Fla. 5th DCA 2004) (same); *Grau v. Wells*, 795 So. 2d 988, 991 (Fla. 4th DCA 2001) (same).

That is precisely the standard the First District applied here when it held that "the record contains ***ample evidence*** to support the trial court's conclusions that appellant failed to offer of her proffered expert's statutory qualifications . . . ." (Slip Op. at 6) (emphasis added).

The cases cited by Petitioner are fundamentally different than this case. Those cases did not involve an evidentiary hearing and disputed facts; they involved purely legal issues involving the construction and application of the presuit statutes. For example, 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 – without an evidentiary hearing – that the presuit expert did not meet the "similar specialty" requirement of section 766.102. Because the issue in that case was the purely legal issue of whether the trial court correctly construed the "similar specialty" requirement of the statute, the court reviewed the trial court's order de novo. *Id.* at 403.

The same is true for the other cases cited by Petitioner. *See Edwards v. Sunrise Ophthalmology Asc, LLC*, 134 So. 3d 1056 (Fla. 4th DCA 2013); *Apostolico v. Orlando Reg'l Health Care Sys., Inc.*, 871 So. 2d 283 (Fla. 5th DCA

2004). *Edwards* involved the same issue as *Holden* – the definition of "similar specialty" under the statute, which was a purely legal issue.

In *Apostolico*, the Fifth District reversed the trial court's ruling that the plaintiff's presuit expert was not qualified because that ruling required the plaintiff to prove more than the statute actually required – a purely legal issue. 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 288 (emphasis added).

Here, in stark contrast, the First District upheld the trial court's ruling, made after an evidentiary hearing, that it could not determine from the presuit expert affidavit submitted by Petitioner whether the expert was qualified under chapter 766. This case does not involve the legal construction of a term in a presuit statute or the scope of the legal requirements of the presuit statutes. No conflict exists.

II. NO CONFLICT EXISTS REGARDING THE FIRST DISTRICT'S HOLDING THAT PETITIONER FAILED TO PROVIDE REASONABLE ACCESS TO INFORMATION DURING PRESUIT DISCOVERY.

Contrary to Petitioner's contention, the First District applied the explicit requirements of section 766.205(2) in affirming the trial court. As the court recognized, that statute ***requires*** a case be dismissed when a plaintiff fails to provide reasonable access to information during presuit. (Slip Op. at 3).

Applying this law, the First District affirmed the trial court's dismissal of the

case because Petitioner "repeatedly ignored requests for presuit discovery regarding her presuit expert's statutory qualifications." *Id.* at 4. As the court explained, "[d]espite the parties agreeing to extend the ninety-day presuit period and [Respondents] sending several letters to [Petitioner] expressing their concerns regarding the expert's qualifications, [Petitioner] filed the medical negligence action without sufficiently responding to [Respondents'] requests for information." *Id.* at 4. Indeed, "[e]ven after the trial judge imposed sanctions, [Petitioner] 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.* at 4-5.

Even though the First District explicitly recognized that the dismissal of a case for failing to provide reasonable access to information should only occur where the opposing party has suffered prejudice and that Respondents were denied the opportunity to meaningfully participate in presuit discovery by Petitioner's intentional conduct, Petitioner asserts conflict exists because the First District did not specifically explain in additional detail the prejudice it believed Petitioner suffered. Not one case cited by Petitioner, 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 Petitioner 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).

As mentioned, each of these purported conflict cases were decided on their particular facts. Not one of these cases 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, Petitioner'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 Petitioner –

applying sanctions in medical malpractice cases without citing or explicitly considering the *Kozel* factors. *See, e.g.*, *Vincent*, 855 So. 2d 553 (not citing *Kozel*); *De La Torre*, 785 So. 2d at 555-56 (citing *Kozel* for general proposition that courts should consider whether lesser sanction than dismissal is appropriate, but not explicitly applying *Kozel* factors in reaching its decision regarding sanction). *Bennett v. Tenet St. Mary's, Inc.*, 67 So. 3d 422 (Fla. 4th DCA 2011), holds that the ***trial court*** should consider the *Kozel* factors before dismissing a case as a sanction, but it nowhere holds – as Petitioner asserts – that the ***appellate court*** has the obligation to expressly do so in its opinion. No conflict exists between the cases cited by Petitioner and the majority opinion in this case.

III. THE FIRST DISTRICT'S DECISION DOES NOT DENY ACCESS TO COURTS.

Relying heavily on Judge Swanson's dissenting opinion, Petitioner asserts this Court should accept jurisdiction because the First District's opinion prevents "medical malpractice plaintiffs from getting their case even in the courthouse doors." (Pet. Br. at 8). The First District's decision does no such thing. To the contrary, the First District considered the specific facts of this case based on the evidence in the record and held that the trial court's ruling was proper. Petitioner's obstructive conduct prevents her from continuing with this case; it has absolutely no impact on any other medical malpractice plaintiff's ability to do so.

Moreover, although Petitioner does not assert that Judge Swanson's dissent

creates conflict among decisions, she relies heavily on it to claim a purported "injustice." (Pet. Br. at 8-9). As this Court recognized in *Reaves*, however, the dissenting opinion is but one judge's view of the evidence in the case. 485 So. 2d at 830. This one view does not establish any injustice on either Petitioner in this case or any other future medical malpractice plaintiff.

CONCLUSION

This Court should deny review of this case because no express and direct conflict exists.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following via electronic mail this 1st day of July, 2016:

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CERTIFICATE OF FONT COMPLIANCE

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

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