

IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

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

v.

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

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner Tuyuana Morris, as Personal Representative of the Estate of Shunteria McIntyre, seeks review of a First District decision affirming the dismissal of her wrongful death complaint “for failure to satisfy statutory presuit requirements for medical malpractice actions.” (Op. 2.) Reviewing only for an abuse of discretion, the majority affirmed the trial court’s conclusion that the corroborating medical expert was not qualified as a presuit expert under the statutory requirements of section 766.102, Florida Statutes. (Op. 2, 6.)

Over a dissent by Judge Swanson, Judge Winokur writing for the majority first reviewed the statutory requirements for medical malpractice actions in presuit. (Op. 2-4.) Noting that “the special qualifications required for presuit medical experts are essential to the Chapter 766 presuit investigation process,” the majority concluded that “the record did not support a finding” that Mrs. Morris’s presuit medical “expert was qualified under the statute.” (Op. 5.)

The majority also reviewed the law regarding presuit discovery. (Op. 3-4.) It noted that dismissal for discovery violations in presuit requires a court to determine “what, if any, prejudice the opposing party has suffered.” (Op. 4.) But without any explanation for what prejudice resulted, it simply agreed with the trial court that Mrs. Morris had failed to “engage in a reasonable presuit investigation of the claim” and that this failure was intended to deprive Defendants “of the

opportunity to meaningfully participate in presuit discovery.” (Op. 5.)

In dissent, Judge Swanson concluded Mrs. Morris complied with the statutory presuit requirements because she provided the affidavit of a qualified medical expert, Dr. Margaret Thompson. (Op. 7.) He explained that since Dr. Thompson’s affidavit showed she met the statutory requirements, that should have been the end of the matter, but it was not:

Instead, appellees filed a motion to dismiss appellant’s complaint and used court-ordered limited discovery to go on a fishing expedition in an attempt to impeach Dr. Thompson’s qualifications. After appellant’s counsel refused to cooperate in this endeavor, the trial court dismissed appellant’s wrongful death action, depriving appellant of her constitutionally guaranteed access to the courts.

(Op. 7.)

Judge Swanson then explained how the expert’s affidavit and curriculum vitae showed she met the statutory requirements for a presuit expert. (Op. 9.) Even though those documents on their “face clearly established that she met all of the statutory requirements,” the trial court permitted Defendants to depose her further and Mrs. Morris made her available. (Op. 9.) During the deposition, Dr. Thompson explained that she had practiced medicine during the relevant time period and how she had managed to attend both graduate and law school during the same time.

(Op. 9.)

Judge Swanson pointed out that the proper standard of review on a dismissal for failure to comply with the presuit requirements is de novo. (Op. 10.)

He continued that if Mrs. Morris violated the limited discovery orders, “it is questionable that appellees had a right to engage in such discovery, particularly where Dr. Thompson’s qualifications were clearly established on the face of the affidavit.” (Op. 10.) Moreover, he noted that the record failed to support the necessary findings to warrant the extreme sanction of dismissal. (Op. 10-11.)

SUMMARY OF ARGUMENT

Conflict exists between the First District’s decision and decisions of the Second, Fourth, and Fifth Districts as to the standard of review. The majority here reviewed the trial court’s determination that plaintiffs’ corroborating presuit expert did not meet the statutory requirements for an abuse of discretion, rather than the de novo standard that other district courts have applied to this legal determination.

Additionally, conflict exists because the First District failed to analyze, in considering purported presuit discovery violations, either the prejudice to Defendants or the factors required under this Court’s opinion in *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993). This failure is at odds with numerous cases requiring such analyses before a case may be dismissed as a sanction.

Conflict having been established, this Court should review this case because it is vitally important to medical malpractice cases across the state. The majority decision transforms the **legal** analysis applicable to whether a presuit expert meets the statutory qualifications into a **discretionary** decision of the trial judge, creating

an effective shield for a trial judge's personal opinion of a case. Here, that discretion operated to deprive Mrs. Morris of her access to the courts. Her case was dismissed despite the fact that she corroborated her presuit notice with a qualified expert, merely because the trial judge was skeptical that an expert could attend law and graduate school while practicing medicine.

The lack of a prejudice finding compounds the constitutional violation. In short, the dismissal of Mrs. Morris's case was affirmed because the trial judge was within his discretion to disbelieve her presuit expert's qualifications, despite the expert's sworn testimony as to how she met the statute and absent any evidence to the contrary. And the purported discovery violations were found to justify the ultimate sanction without any conclusion that they prejudiced Defendants. In either event, this Court should review the conflicts.

ARGUMENT

I. APPLICATION OF THE ABUSE OF DISCRETION STANDARD TO THE TRIAL COURT'S CONCLUSION THAT THE PRESUIT EXPERT WAS NOT QUALIFIED CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS.

This Court has jurisdiction because the majority decision expressly and directly conflicts with decisions of other district courts of appeal. Art. V, § 3(b)(3), Fla. Const. In the first sentence of its opinion, the majority notes: "The trial court dismissed appellant's wrongful death complaint for failure to satisfy statutory presuit requirements for medical malpractice actions." (Op. 2.) The majority

explained that the record did not show that the corroborating expert was qualified under section 766.102, the statutory presuit requirements. (Op. 2.) Yet, the majority affirmed the dismissal because the trial court did not abuse its discretion. (Op. 6.)

The majority's application of the abuse of discretion standard to this legal analysis conflicts with the Second District's decision in *Holden v. Bober*, 39 So. 3d 396, 400 (Fla. 2d DCA 2010). There, just as is the case here, the court explained that it was to review the expert's qualifications and corroborating affidavit to determine if the expert met the statutory requirements, and "[b]ecause this case concerns the trial court's disposition of a motion to dismiss, our standard of review is de novo." *Id.*¹ The majority opinion here also conflicts with the Fourth and Fifth Districts' identical conclusions that de novo review applies. *See Edwards v. Sunrise Ophthalmology Assoc., Inc.*, 134 So. 3d 1056, 1057 (Fla. 4th DCA 2013) (applying de novo review to dismissal for presuit expert's failure to meet statutory qualifications); *Apostolico v. Orlando Reg'l Health Care Sys., Inc.*, 871 So. 2d

¹ This conflict with the Second District is further evident in another case: "the trial court's ruling that the appellants' corroborating affidavit failed to comply with the statutory presuit requirements is reviewed de novo." *Oliveros v. Adventist Health Sys./Sunbelt, Inc.*, 45 So. 3d 873, 876 (Fla. 2d DCA 2010). There, however, the court noted that a plaintiff's failure to comply with presuit requirements is "generally" reviewed for an abuse of discretion, citing a decision dealing with discovery failings. *Id.* Clarifying what standard applies to the determination of a presuit expert's qualifications thus will also resolve any confusion as to the distinction made in *Oliveros*.

283, 285-86 (Fla. 5th DCA 2004) (same).

Although the majority opinion identifies the main issue before it (i.e., the qualification of the presuit expert) in a few sentences, it spends the thrust of its opinion discussing the law on presuit discovery. Still, it cannot mask the real issue in play and identified in the first paragraph of the opinion. (Op. 2.) And in any event, conflict exists in the discovery analysis too.

II. THE MAJORITY DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS BECAUSE IT AFFIRMS THE DISMISSAL WITHOUT FINDING PREJUDICE.

The majority opinion recognizes that the law requires a finding of prejudice to dismiss for discovery violations, but affirms the dismissal with no analysis of the prejudice Defendants suffered here. (Op. 4 (citing *Robinson v. Scott*, 974 So. 2d 1090 (Fla. 3d DCA 2007)).) In failing to address prejudice, the majority opinion expressly and directly conflicts with decisions of other district courts, which require prejudice be shown before a violation of the presuit requirements may result in dismissal. *See Vincent v. Kaufman*, 855 So. 2d 1153, 1156-57 (Fla. 4th DCA 2003) (concluding that dismissal of medical malpractice action due to failure to comply with presuit requests “was not warranted where there was no prejudice to the defendant doctor”); *De La Torre v Orta ex rel. Orta*, 785 So. 2d 553, 556 (Fla. 3d DCA 2001) (holding that striking defendant doctor’s defenses for failing to respond to presuit notices “goes too far” without showing of prejudice); *George*

A. Morris, III, M.D., P.A. v. Ergos, 532 So. 2d 1360, 1361 (Fla. 2d DCA 1988) (reversing striking of defenses because defendant’s failure to respond to discovery questions in presuit was not shown to prejudice medical malpractice plaintiff).

Also, this Court held in *Kukral v. Mekras*, 679 So. 2d 278, 284 (Fla. 1996), that prejudice is required before a party may be sanctioned for presuit discovery violations. See *Medina v. Pub. Health Trust*, 744 So. 2d 1142, 1144 (Fla. 3d DCA 1999) (Cope, J., dissenting) (“In *Kukral* the court ruled in substance that sanctions cannot be imposed under the medical malpractice screening act absent a showing of prejudice.”).

Finally, the majority’s failure to consider any factor beyond purported failings by Plaintiff’s counsel also flies in the face of *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993). As this Court noted, a “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.” *Id.* This Court established a list of factors to determine whether dismissal with prejudice is warranted in such cases, including the client’s involvement in the conduct and the prejudice caused to the opposing side. *Id.*

But the majority opinion here did not consider these factors, focusing instead in one paragraph on how counsel ignored discovery requests and failed to “sufficiently” respond to Defendants’ “requests for information.” (Op. 4-5.)

Therefore, the majority opinion conflicts with *Kozel*. It also conflicts with a other district court decisions reversing for failure to analyze the *Kozel* factors prior to dismissing a medical malpractice action. *E.g.*, *Bennett ex rel. Bennett v. Tenet St. Mary's, Inc.*, 67 So. 3d 422, 426-27 (Fla. 4th DCA 2011).

III. THE DECISION DENIES MEDICAL MALPRACTICE PLAINTIFFS THEIR CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS.

This Court should review this case to resolve the above conflicts. The proper standard of review to be applied to dismissal of an action based on the statutory qualifications of a presuit expert is critical to medical malpractice actions across the state. The abuse of discretion standard applied here permits a trial court's unduly restrictive or insupportable interpretation of the presuit requirements to escape meaningful review. That, in turn, prevents medical malpractice plaintiffs from getting their case even in the courthouse doors.

While the majority opinion is sparse with details about this case, the dissent makes clear the injustice the abuse of discretion standard worked here. Mrs. Morris corroborated her presuit notice with the affidavit of a qualified expert. (Op. 7.) Yet Defendants obtained dismissal based on their sheer speculation that Dr. Thompson, a board-certified OB/GYN with 30 years of experience, was not qualified to testify about the negligence in the decedent's prenatal care because she attended law and graduate school while practicing medicine full-time in the relevant period. (Op. 9.) She simply accomplished more than Defendants or the trial court could believe,

even after explaining how she did it at a deposition. (Op. 9.) Plaintiff's counsel continued to object to and refused to provide further discovery regarding requests that exceeded the scope of the expert's statutory qualifications. (Op. 9-10.)

Though these details are not relevant to whether conflict exists, they surely support why this Court should review the case given the conflict. Whether the corroborating expert in presuit meets the statutory qualifications and dismissal is required on that basis cannot be analysed subject to the discretion of the trial judge. Instead, they are legal analyses and should be subject to the higher de novo standard before a plaintiff may be deprived of access to the courts.² Judicial discretion is the "power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980) (citation omitted). In determining an expert's qualifications under the presuit statutes, a trial judge's personal judgment should have no bearing; the judge has no "superior vantage point," *id.* at 1203, in reviewing an expert's affidavit or interpreting the presuit statutory requirements.

Furthermore, the discovery analysis, which muddies but does not mask the

² The majority even affirmed the trial court's conclusion that Dr. Thompson did not meet the statutory requirements for a provision Mrs. Morris has repeatedly stated she made no claims under. (Op. 2); §766.102(9), Fla. Stat.; Init. Br., No. 1D14-3987, at 37-38 (filed Feb. 16, 2015).

basis for dismissal, further compels this Court's review.³ If plaintiffs must submit to any and all discovery requests in presuit, those requests will turn presuit into a series of "mini-trials," a full-on adversarial testing of the corroborating expert's qualifications (or, worse yet, a fishing expedition into irrelevant information about the expert or the basis for her opinions), and the very "Daedalean labyrinth that denies a plaintiff access to the courts" that it was never meant to be. *Holmes Reg'l Med. Ctr. v. Wirth*, 49 So. 3d 802, 805 (Fla. 5th DCA 2010) (citations omitted). Essentially, the First District has sanctioned a blueprint for medical malpractice defendants seeking to keep even legitimate claims out of court. And it has done so without seeing fit to explain how the expert in this case was not qualified or whether Defendants were prejudiced.

The majority's analysis cannot be what this Court envisioned in requiring the liberal construction of the presuit qualification statutes in *Kukral*. Instead, as Judge Swanson noted, it deprives Mrs. Morris and similarly situated litigants of their access to the courts, in direct contravention of Florida's Constitution.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for review.

³ Though the record is not a basis for conflict, among the reasons this Court should review this case is the bad precedent set by application of the abuse of discretion standard to the plain statement in the trial court's order that the motions to dismiss were granted because "the record does not support a finding that Dr. Thompson is a qualified expert witness" under the statutes. (R:745.)

Respectfully submitted,
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