IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,338

LINDA K. PADDOCK,

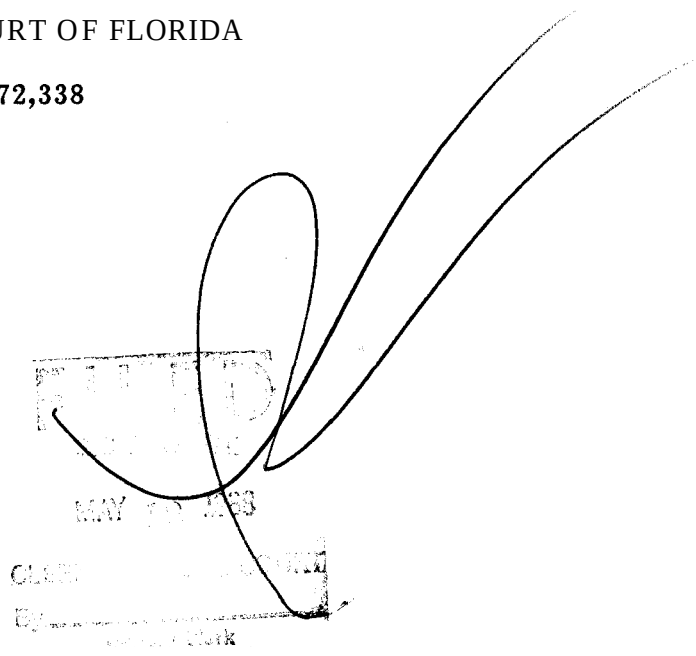
Petitioner,

vs.

CHAWALLUR DeVASSY CHACKO, M.D.,

Respondent.

_____/



ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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B. Whether the district court's decision is in express and direct conflict with **(1)** ***Wale v. Barnes,*** 278 So.2d 601 (Fla. 1973), and similar cases, which hold that a medical expert's opinion on the issue of causation is "direct evidence" which proves a prima facie case on the issue, precluding a court from directing a verdict on the issue; and *(2)* ***Cromarty v. Ford*** *Motor* Co., 341 So.2d 507 (Fla. 1976), and similar cases, which hold that a court may not declare an expert opinion "speculative" unless the opinion has "no basis in evidentiary fact".

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I.
STATEMENT OF THE CASE AND FACTS

This is the most painful brief which undersigned counsel has ever had to prepare and file in any appellate court, in **13** years of appellate practice. It is painful because the district court's decision is utterly dishonest in a pivotal respect, and we cannot avoid saying so. We cannot avoid the charge because the threshold question of this Court's "express and direct conflict" jurisdiction requires that we rely solely on the face of the district court's decision; yet, to rely on that decision would require us to state the case and facts dishonestly to this Court. We simply refuse to do that--and we frankly resent the district court for having placed us in such a position. In addition, there are times when it is necessary to speak from the heart--to be principled rather than politic, at whatever risk--and this is one of those times.

Of course, our demonstration of "express and direct conflict" will be limited to the face of the district court's decision, as it must be. This Court's discretionary jurisdiction is two-pronged, however. We must not only demonstrate conflict; we must also convince the Court that it should exercise its discretion to accept review of the entire case once conflict has been demonstrated.[1/] The decision's dishonesty is relevant to the second step of that process, and we therefore intend to explain our accusation briefly before turning to our demonstration of conflict. Our explanation will render this jurisdictional brief highly unconventional, of course; but the situation in which we have been placed by the district court's decision is unconventional in the extreme--and, since the truth is far more important than mere convention, we do not feel that we have any principled choice.

Although it is impossible to tell from the district court's decision, the central disputed factual issue at trial was the substance of the two Friday afternoon telephone conversations between Dr. Chacko and Mrs. Paddock, and between Dr. Chacko and Mrs.

1/ In fact, the "pink sheet" which this Court sends to counsel in connection with discretionary review proceedings encourages counsel "to include a short statement of why the Supreme Court should exercise its discretion and entertain the case on the merits if it finds it does have jurisdiction".

Paddock's father. Mrs. Paddock testified that, after she had implored Dr. Chacko to help her, he asked if she were willing to be hospitalized, and she willingly consented. Mrs. Paddock's father testified that, although hospitalization was discussed in the follow-up call, Dr. Chacko did not recommend it--and that, if he had made such a recommendation, it would have been willingly followed. Dr. Chacko testified oppositely--that he recommended hospitalization, and that the recommendation was rejected. He explicitly acknowledged twice at trial that his version of the conversations was in stark conflict with the versions to which Mrs. Paddock and her father had testified.

The testimony creating these conflicts is quoted in full in the motion for rehearing which we filed in the district court. We have included a copy of that motion in our appendix to this brief, so the Court can satisfy itself that the testimony will admit of no other reading than what we have set out above.[2/] The jury resolved these conflicts in the evidence in Mrs. Paddock's favor by its verdict, of course, so the district court was required by law to accept the fact that hospitalization was neither recommended nor rejected.[3/] The district court obviously disagreed with the verdict, however, and apparently because it could think of no other way to avoid the verdict, it accepted Dr. Chacko's version of the facts as true, and then declared that version to be "admitted"--and it then bottomed its entire decision on that single pivotal declaration--"the admitted fact that Chacko recommended hospitalization which recommendation was rejected" (slip opinion, p. **4).**

The result of this declaration (indeed, the apparent purpose of it) was to change the central issue in the case from a perfectly legitimate and defensible one--whether Dr.

[2/] The appendix contains the district court's decision **(A. 1),** our motion for rehearing **(A. 13),** and the order denying our motion for rehearing **(A. 44).** Since the timeliness of our invocation of this Court's jurisdiction has been placed in issue by the respondent below (and may ultimately be placed in issue here), these three documents are the "documents necessary to reflect jurisdiction"--which, according to this Court's "pink sheet", are appropriate items for inclusion in the appendix.

[3/] *See, e. g., Helman* v. ***Seaboard Coast Line Railroad Co.,*** **349** So.2d **1187** (Fla. **1977);** ***Welfare*** v. ***Seaboard Coast Line Railroad Co.,*** **373** So.2d ***886*** (Fla. **1979).**

Chacko was negligent in failing to recommend and ensure that Mrs. Paddock was hospitalized, when she was willing to be hospitalized--to an altogether indefensible one: whether, as the District Court ultimately framed the issue upon its initially-postulated "admitted fact", Dr. Chacko had any "legal duty or legal authority to non-consensually take a patient into his custody and compel her hospitalization" (slip opinion, p. 4).[4/] Most respectfully, we are unable to believe that this complete revision of the plaintiff's lawsuit was simply a mistake.

The plaintiff's version of the critical telephone calls was stated in the proper light in our initial brief. We also set out all the conflicting testimony verbatim in our motion for rehearing, so that there could be no doubt about its existence. Since the conflicting evidence was called to the district court's attention in no uncertain terms, we can only believe that its ultimate refusal to correct the single pivotal declaration upon which its entire decision turned represents a purposeful decision to override a jury verdict with which it disagreed, rather than a fair and honest appraisal of the record within the constraints of the law. That is the strongest charge we have ever had to direct at any court in 13 years of practicing here (and we hope we never have to do it again). We assure the Court that we would not have lodged the accusation here if we were not absolutely certain that the record proved it beyond any reasonable doubt--and we stand ready to prove the accusation here, if the Court will only give us that opportunity.

Unfortunately, since the district court's decision does not acknowledge the conflicting testimony, we cannot rely upon this dishonest aspect of the decision for conflict here. It provides ample reason for this Court to accept jurisdiction if we can make the requisite demonstration of conflict, however, and we therefore turn to that task. Our demonstration of conflict will be limited to the face of the decision (such as it

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4/ By changing both the facts and the issue in that manner, of course, the District Court turned a perfectly legitimate lawsuit into an absurd non ***sequitur*** which probably would never have been filed in the first place--which was terribly unfair to the plaintiff, her able trial counsel, and the eminently qualified psychiatrists who testified on her behalf that Dr. Chacko's negligence was a cause of her injuries.

is), to which the Court is referred for the remainder of our statement of the case and facts.

II.
SUMMARY OF THE ARGUMENT

ISSUE A. The district court's determination--that Dr. Chacko owed the plaintiff no duty of care as a matter of law, notwithstanding the existence of expert medical opinion testimony proving his breach of the prevailing standard of care as a matter of fact--is in express and direct conflict with ***Wale v. Barnes,*** 278 So.2d 601 (Fla. 1973), and similar cases, which hold that the nature and extent of a physician's duty of care is essentially a question of fact to be determined upon expert testimony, and that the existence of expert testimony that a defendant has breached the prevailing standard of care precludes a directed verdict for the defendant.

ISSUE B. The district court's determination--that the plaintiff's expert opinion testimony on the issue of causation was "speculative" as a matter of law, and that the plaintiff's verdict was therefore unsupported by any competent evidence on that issue--is in express and direct conflict with (1) ***Wale v. Barnes,*** 278 So.2d 601 (Fla. 1973), and similar cases, which hold that a medical expert's opinion on the issue of causation is "direct evidence" which proves a prima facie case on the issue, precluding a court from directing a verdict on the issue; and (2) ***Cromarty v. Ford Motor*** Co., 341 So.2d 507 (Fla. 1976), and similar cases, which hold that a court may not declare an expert opinion "speculative" unless the opinion has "no basis in evidentiary fact".

III.
ARGUMENT

ISSUE A. The district court not only changed both the facts and the central issue to avoid the plaintiff's verdict; it also failed to apply settled principles of Florida law to the so-called "admitted fact" upon which it ultimately rested its decision. It is settled in Florida that physicians owe their patients a duty to comport with the prevailing standard of care exercised by similar health care providers; that the nature and extent of that duty is therefore essentially a question of fact, to be determined upon expert testimony;

and that the existence of expert testimony that a physician has breached the prevailing standard of care presents a jury question on the duty issue, precluding a court from directing a verdict on that issue.5/

Perhaps the leading decision is this Court's decision in ***Wale* v. *Barnes*,** 278 So.2d 601, 603 (Fla. 1973), which speaks quite clearly on the point for itself:

> The key issue for us in this malpractice case concerns the propriety of the trial court's directed verdict in favor of defendants (doctors) and the subsequent affirmance by the district court. These lower court rulings mean that the plaintiffs did not present a prima facie case of medical malpractice. In other words, plaintiffs did not satisfy their burden of establishing (1) a standard of care owed by defendants to plaintiffs, (2) a breach of that standard, and (3) that said breach proximately caused the damages claimed. See Hunt v. Gerber, 166 So.2d 720 (Fla. App.3d 1964).
>
> Our careful review, however, leads us to the opposite conclusion. The record in this cause contains sufficient evidence on these three prerequisites outlined above to make a prima facie case of medical malpractice which necessarily precludes a directed verdict for the defendants on the issue of liability.
>
> The first two elements of a prima facie case of malpractice as set forth above are a standard of care and a breach of that standard. The evidence on these two elements is found in the testimony of Dr. Kahn. According to Dr. Kahn the use of Tucker-McLane forceps on Gary's "molded" head during a mid-forceps delivery constitutes a departure from the accepted medical standard of care in Dade County, Florida. . . .

Wale v. Barnes is still clearly the law:

> To prevail in a medical malpractice case a plaintiff must establish the following: the standard of care owed by the defendant, the defendant's breach of the standard of care, and that said breach proximately caused the damages claimed. ***Wale v. Barnes*, 278 So.2d 601, 603** (Fla. 1973). In this case, Dr. Bailey's testimony established the standard of care and the hospital's breach of that standard. . . .

Gooding v. ***University Hospital Building, Inc.*, 445** So.2d **1015, 1018** (Fla. 1984). ***Accord,*** *Pohl* v. ***Witcher*, 477** So.2d **1015, 1017-18** (Fla. 1st DCA **1985)** (repeating above language

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5/ While we must rely upon the decisional law to demonstrate conflict here, it is worth noting that our brief synopsis of the law governing the duty issue is also codified by §768.45(1), Fla. Stat. (1981), which was applicable to the instant case, and which unambiguously provided a cause of action for "breach of the accepted standard of care" proven to the jury's satisfaction by expert opinion testimony.

from *Gooding*, and holding that conflicting expert opinion testimony on whether defendant "deviated from the accepted standard of care" was sufficient to require submission of the "duty" issue to the jury). And finally, the essential point--that the duty issue in a medical malpractice case is essentially a question of fact, not a question of law--is succinctly stated in ***Hunt v. Palm Springs General Hospital, Inc.***, 352 So.2d 582, 585 (Fla. 3rd **DCA** 1977), as follows: "We hold that the question . . . of whether [defendant-hospital] owed [plaintiff] a duty of care. . . [was] for the jury to determine" (emphasis supplied).

In contrast to these four decisions (and there are numerous others which make the same essential point, with which we will not trouble the Court), the district court's decision acknowledges on its face that "[f]our psychiatrists testified on plaintiff's behalf, essentially stating. . . that Chacko's failure to hospitalize the plaintiff was a departure from the acceptable standard of care" (slip opinion, p. 4)--but then, after "[a]ccepting this conclusion from a medical standpoint" ***(id.)***, the decision declares nevertheless "that the existence of a legal duty was a question of law for the court and not for the jury" (*id.*, p. 2). In short, the decision holds that, notwithstanding the existence of expert testimony proving both the standard of care and its breach, the defendant owed the plaintiff no duty of care as a matter of law.

Most respectfully, as ***Wale v. Barnes*** and the other cited decisions clearly hold, the nature and extent of Dr. Chacko's duty to Mrs. Paddock depended entirely upon the expert evidence establishing his duty of care from the "medical standpoint", not upon the opinion of three judges with no medical expertise whatsoever as to whether such a duty should be recognized from a "legal standpoint". The conflict is undeniable; it is both express and direct, and it is precisely the type of conflict for which this Court's discretionary review jurisdiction was created--and we respectfully urge the Court to grant review of the district court's decision in order to resolve the undeniable conflict.[6/]

[6/] We cannot predict what the defendant's response to this contention will be, although it is probable that he will respond as he did in his response to our motion for rehearing

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ISSUE B. The face of the decision sought to be reviewed reveals an additional basis for the jury's verdict which was also fully supported by expert opinion testimony--that Dr. Chacko "was negligent for failing to arrange for a face-to-face examination of his patient", and that this negligence also "caused the plaintiff's injuries" (slip opinion, p. 11). To override the verdict to the extent that it was supported by this evidence, the district court turned to a different element of the prima facie case which the plaintiff had proven. It declared the experts' opinions on causation "speculative", and then concluded that the verdict was therefore unsupported by any competent medical evidence on the issue of causation.[7] This conclusion creates "express and direct conflict" with at least two related lines of authority emanating from this Court.

The first line of authority is represented by ***Wale v. Barnes,*** 278 So.2d 601 (Fla. 1973). In that case, a medical expert had given an opinion on the issue of causation, and the Third District thereafter declared the opinion insufficient to support a jury finding on the issue of causation. This Court quashed that decision, holding that, as a matter of

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below. In that response, he argued (without citation of any authority whatsoever) that "duty" and "standard of care" are separate and distinct concepts, and that courts are free to determine as a matter of law in medical malpractice cases whether a "duty" exists, notwithstanding that the medical evidence may well prove a breach of the prevailing "standard of care". We are convinced that "duty" and "standard of care" are essentially the same things in the context presented here, since it is thoroughly established that the duty owed by a physician to a patient is to conform to the prevailing standard of care. If we are wrong about that, however, so was the Third District when it announced in ***Hunt v. Palm Springs General Hospital, supra,*** that "the question . . . of whether [defendant] owed [plaintiff] a ***duty*** of care . . . [was] for the jury to determine". 352 So.2d at 585 (emphasis supplied). The district court's decision is therefore clearly in conflict with ***Hunt,*** at least, even if the defendant is correct that "duty" and "standard of care" are separate and distinct concepts.

7/ Once again, the district court had to resort to a less than honest reading of the record to reach this conclusion. The so-called "elaboration" which it quoted from the cross-examination of one of the plaintiff's experts was not an elaboration on the issue of ***causation;*** it was given in response to a hypothetical question on the issue of ***negligence,*** when the expert was asked if he would still have been of the opinion that Dr. Chacko was negligent if he ***had*** conducted a face-to-face interview. Nowhere did the expert modify his opinion that Dr. Chacko was negligent for the undisputed fact that he did ***not*** meet his patient--and the expert most certainly did not qualify his opinion that that negligence was a ***cause*** of the plaintiff's injuries. We brought this point to the district court's attention in our motion for rehearing ***(see*** **A.** 38-41), but this aspect of our motion was ignored as well.

law, an expert's opinion on the issue of causation is "direct evidence" on the issue, and that such evidence, by itself, "creates a prima facie case on the question of ***causation***". ***Id.*** at 604. This Court thereafter elaborated as follows ***(id.*** at 605):

> The pertinent portion of Dr. Kaplan's testimony is as follows:
>
> ....
>
> "A. In my opinion, the cause--within reasonable medical probability, ***the cause of the chronic subdural hematomas was the traumatic*** *or* ***injurious forceps delivery*** *of* ***this child*** in ***which the head was injured.***" (Emphasis added).
>
> ....
>
> Succinctly stated, Dr. Kaplan opined that the use of forceps caused Gary's subdural hematomas. Even though there is contrary medical evidence in the record indicating that the subdural hematomas may have been caused by trauma or a troublesome trip down the birth channel (non-negligent acts) the above-quoted testimony of Dr. Kaplan makes a prima facie case on the issue of causation. ...
>
> Inasmuch as the testimony of Dr. Kaplan in and of itself makes a prima facie case relating to causation, we need not reach the issue of whether there is circumstantial evidence pertaining to causation; the direct testimony of Dr. Kaplan is sufficient in these circumstances.

Since ***Wale*** v. ***Barnes,*** of course, there are numerous medical malpractice decisions holding that the existence of expert opinion testimony on the issue of causation is "direct evidence" which proves a prima facie case on the issue, requiring its submission to the jury and precluding a court from directing a verdict on the issue. ***See, e.*** g., ***Maltempo v. Cuthbert,*** 504 F.2d 325, 327 (5th Cir. 1974) ("under Florida law, where there is direct medical evidence attributing the injury to the negligence, a prima facie case of causation is established and it becomes a jury question. Wale v. Barnes, *supra.*"); ***Zack v. Centro Espanol Hospital, Inc.,*** 319 So.2d 34 (Fla. 2nd DCA 1975); *Hunt* v. ***Palm Springs General Hospital, Inc.,*** 352 So.2d 582 (Fla. 3rd DCA 1977); ***City of Hialeah v. Weatherford,*** 466 So.2d 1127 (Fla. 3rd DCA 1985); *Pohl* v. ***Witcher,*** 477 So.2d 1015 (Fla. 1st DCA 1985). In the instant case, the district court held that the expert opinion testimony on the issue of causation did not present a prima facie case, and that the trial court could properly

direct a verdict on the issue notwithstanding the existence of the expert opinion testimony. We think the conflict with ***Wale v. Barnes*** and its progeny is indisputable.

Apparently, the district court calculated that it could finesse ***Wale v. Barnes*** by simply declaring the experts' opinions "speculative" as a matter of law. In doing so, however, the district court placed itself in conflict with a second line of authority emanating from this Court. Perhaps the closest case on point is ***Crornarty v. Ford Motor Co.,*** **341** So.2d **507** (Fla. **1976).** In that case, the trial court had granted a motion for judgment notwithstanding a plaintiff's verdict, and the district court had "affirmed the action of the trial court on the theory that the testimony by the experts was so speculative and so filled with conjecture that it was not sufficient to constitute a basis for rendering the judgment". ***Id.*** at **508.** Relying on ***Wale v. Barnes,*** and observing that "[w]e are of the view that expert opinions, when supported by scientific and factual data, must be relied upon in reaching the ends of justice and that the need for such reliance continues as a society becomes more complex", this Court held that a district court may not declare an expert opinion on causation "speculative" as a matter of law, except in the single instance where the opinion has "no basis in evidentiary fact". ***Id.*** at **508-09.**

A similar conclusion was reached by this Court in ***Golden Hills Turf & Country Club, Inc. v. Buchanan,*** **273** So.2d **375, 376** (Fla. **1973),** in which a district court had declared unchallenged expert opinion testimony "so unpractical that the trial court should have rejected such testimony". This Court disapproved the decision, observing as follows ***(id.):***

> . . . The inherent danger of this approach, of course, is that it weakens the appellate process by suggesting that deviation from neutral standards of appellate review is permissible if the appellate court is offended by evidence and testimony unchallenged by the litigants within the adversary process, and accepted by the [finder of fact]. . . .

In the instant case, the district court did not conclude, as required by ***Crornarty,*** that the experts' opinions on causation had "no basis in evidentiary fact"; it simply declared them "speculative" as a matter of law. That was ***precisely*** the ruling quashed by

this Court in ***Cromarty*** and the conflict with ***Crornarty*** is therefore simply undeniable. Neither did the district court apply a "neutral standard of appellate review". It simply decided for itself that Dr. Chacko's negligence in failing to arrange for a personal examination of his patient was not a cause of her injuries, notwithstanding that the jury had accepted several unchallenged expert opinions to the contrary. The conflict with ***Golden Hills*** is therefore also simply undeniable.

IV.
CONCLUSION

The long and the short of all that we have said here is that the district court did not agree with the jury's verdict, notwithstanding that it was fully supported in every respect by the testimony of Mrs. Paddock and her father, and by the expert testimony of four eminently qualified psychiatrists--and it simply arrogated the power to decide the facts to itself, notwithstanding that (for cogent reasons which have nearly a millennium of history behind them) that power is reserved exclusively to juries in our system of justice. In doing so, however, the district court necessarily failed to follow the law, and its decision therefore created several "express and direct conflicts" as a result. Those conflicts create jurisdiction in this Court--and if the constitutional right to a jury trial of the facts means anything at all to this Court, that jurisdiction simply must be exercised in this case. We respectfully implore the Court to grant review so that our complaints can be presented in a forum which can both discipline the lower court and restore our client's rights--rather than be remitted to a forum which can only discipline.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 9th day of May, 1988, to: Harry K. Anderson, Esq., One South Orange Avenue, Suite **650,** Orlando, Florida **32801;** to E. Clay Parker, Esq., Parker, Johnson, Owen & McGuire, **108** East Hillcrest Street, Post Office **Box 2867,** Orlando, Fla. **32802;** and to Neal P. Pitts, Post Office Box **512,** Orlando, Fla. **32802.**

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