10-28 OIA 12-9-88

IN THE SUPREME COURT OF FLORIDA

CASE NO. **72,338**

LINDA K. PADDOCK,

Petitioner,

vs.

CHAWALLUR DeVASSY
CHACKO, M.D.,

Respondent.

______________________________________/

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

PETITIONER'S BRIEF ON THE MERITS

NEAL P. PITTS, ESQ.
Post Office Box **512**
Orlando, Fla. **32802**

SPENCE, PAYNE, MASINGTON, GROSSMAN
& NEEDLE, P.A.
Suite **300** Grove Professional Bldg.
2950 S.W. **27th** Avenue
Miami, Fla. **33133**
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
Suite **800,** City National Bank Building
25 West Flagler Street
Miami, Florida **33130**
(305) 358-2800

Attorneys for Petitioner

BY: JOEL D. EATON

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25 WEST FLAGLER STREET · SUITE 800, MIAMI, FLORIDA 33130-1780

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LAW OFFICES, PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN, P.A. - OF COUNSEL. WALTER H. BECKHAM, JR
25 WEST FLAGLER STREET . SUITE 800, MIAMI. FLORIDA 33130-1780

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25 WEST FLAGLER STREET. SUITE 800, MIAMI, FLORIDA 33130-1780

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LAW OFFICES, PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN. P.A. · OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET · SUITE 800, MIAMI, FLORIDA 33130-1780

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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

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25 WEST FLAGLER STREET · SUITE 800, MIAMI, FLORIDA 33130-1780

I. STATEMENT OF THE CASE

On June 26, 1983, Linda Paddock, a 35 year-old wife and mother of a teenage daughter, inflicted superficial cuts on her wrists and set her blouse on fire while suffering from a mental illness described in the record as a "major depressive disorder with psychosis with paranoid delusions" (R. 226, 258, 392, 1241, 1272, 1322). The apparent suicide attempt was unsuccessful, and Mrs. Paddock suffered second and third degree burns over approximately 35% of her body (R. 782-83 [10017-21]).[1] She subsequently brought a medical malpractice action against her treating psychiatrist, Dr. Chawallur DeVassy Chacko, alleging that he was negligent in his care and treatment of her mental illness, and that his negligence was a cause of her injuries (R. 2936, 3061, 3078).

Specifically, the amended complaint (R. 3061) alleged that, despite an urgent telephone request for help by Mrs. Paddock two days earlier, Dr. Chacko had negligently failed to hospitalize her--notwithstanding that she had expressed her willingness to be hospitalized. The complaint also alleged that Dr. Chacko was negligent in, among other things, failing to conduct a face-to-face interview with her, and in prescribing an inadequate dosage of medication. The complaint also alleged alternatively that, even if Dr. Chacko had somehow been dissuaded from hospitalizing Mrs. Paddock, he was negligent in allowing himself to be dissuaded from his medical judgment by a lay person--and further, that, even if hospitalization had been rejected outright, he was negligent in not seeking her involuntary commitment to a hospital under the Baker Act.

Dr. Chacko answered, denied liability, and asserted affirmatively that Mrs. Paddock was comparatively negligent (R. 2947, 3120, 3397). The case was tried to a jury before The Honorable Joseph Baker. After a three-week trial at which eight expert psychiatrists testified on the negligence issues, the trial court denied Dr. Chacko's cursory motion for directed verdict and submitted the issues to the jury for resolution (R. 1444-45, 1943,

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[1] References to evidence contained in depositions which were read into evidence but not retranscribed into the transcript will be to the page of the transcript at which the deposition was read, followed in brackets by the appropriate pages in the record at which the deposition testimony appears.

1957). The jury returned a verdict finding that Dr. Chacko was a negligent cause of Mrs. Paddock's injuries, that **Mrs.** Paddock was not negligent, and that Mrs. Paddock had suffered damages in the amount of **$2,150,000.00** (R. **2190, 9174).**

Following trial, a somewhat sensational newspaper article appeared, in which Dr. Chacko's counsel was quoted several times to the effect that there had been jury tampering and other irregularities upon which he intended to move for a new trial (R. **9213-14).** This article provoked one juror to seek out both Dr. Chacko's counsel and the trial judge and report some misgivings, not about the verdict itself, but about certain aspects of the jury's deliberations (R. **2643-48).** The article also caused "various doctors" to telephone the trial judge to complain (R. **2647).** Shortly thereafter, Dr. Chacko renewed his prior motion for directed verdict, moved for a new trial (on **69** separate grounds), and moved for leave to interview the jury (R. **9193, 9200, 9230).** The trial court granted the latter motion (R. **9430),** and an extensive interview of the six jurors was conducted (over the plaintiff's repeated objections that the jurors were being impermissibly questioned on matters which were "intrinsic" to the verdict) (R. **10459-10697).**

Following this hearing, the trial court entered an order which began with a reference to the current political climate surrounding medical malpractice cases; which stated that it was written so the media could understand it; which granted Dr. Chacko's renewed motion for directed verdict; which held that Dr. Chacko owed **Mrs.** Paddock no duty of care to protect her from injuring herself; and which entered a final judgment in Dr. Chacko's favor (R. **10290).** In the same order, the trial court also alternatively granted Dr. Chacko's motion for new trial on five grounds: **(1)** the evidence did not support the jury's finding that Mrs. Paddock was not negligent; **(2)** the damage award was excessive because unsupported by the evidence; **(3)** the jury was improperly influenced to the prejudice of the defendant by a note left on the foreman's windshield by the alternate juror after her discharge; **(4)** two letters in the plaintiff's hospital chart were impermissibly sent to the jury room during the jury's deliberations; and **(5)** one page of nurses' notes in evidence was not sent to the jury room. By implication, the order rejects all of the numerous additional

grounds advanced by Dr. Chacko for a new trial. (Dr. Chacko did not cross-appeal below, so the only rulings properly in issue here are the six rulings set forth above). A copy of the trial court's "Final Judgment and Alternative Orders on Motions for New Trial" is included in the appendix to this brief (A. 1).

Mrs. Paddock appealed to the District Court of Appeal, Fifth District. The District Court affirmed Dr. Chacko's judgment, and did not reach the merits of the alternative new trial order. ***Paddock v. Chacko,*** **522** So.2d **410** (Fla. 5th DCA 1988). It did not agree with the trial court's broad conclusion that psychiatrists have no duty of care to protect their patients from injuring themselves. Instead (although neither the trial court nor Dr. Chacko had ever suggested such a thing to it), it concluded that it was an "admitted fact that Chacko recommended hospitalization which recommendation was rejected". **522** So.2d at **413.** With that conclusion as a cornerstone, it then proceeded to hold that Dr. Chacko had no duty to ***compel*** Mrs. Paddock's hospitalization ***against her will,*** and that the other acts of negligence proven by the evidence (except one, the inadequate dosage of medication, for which it found inadequate proof on the issue of causation) were essentially moot because Dr. Chacko's recommendation had been rejected. **A** copy of the District Court's decision is also included in the appendix (A. 9).

As the Court is already aware from the highly unconventional nature of our jurisdictional brief, it is our judgment that the pivotal fact upon which the District Court's entire decision turns--the so-called "admitted fact that Chacko recommended hospitalization which recommendation was rejected"--was simply invented by the District Court, to justify a result which could not otherwise have been reached under settled, neutral principles of the law. We will support that regretful charge in due course. We will also expand upon the procedural aspects of the various issues on appeal, as necessary, in the appropriate argument sections of the brief.

II. STATEMENT OF THE FACTS

There are numerous conflicts in the evidence on a number of the issues. Those conflicts have become irrelevant here, however, because the jury's verdict was favorable

to Mrs. Paddock in every respect. As a result, and because the right to a *jury* trial of the facts is of constitutional dimension, it is axiomatic that the evidence must be viewed in a light most favorable to Mrs. Paddock here, with all conflicts resolved and all reasonable inferences drawn in her favor.[2/] We are therefore entitled to disregard the conflicts in the evidence here, and to state the facts in a light most favorable to Mrs. Paddock.

In the early morning hours of June **6, 1983,** Mrs. Paddock attempted to take her life in her home in North Carolina by drinking a mixture of formaldehyde, protocaine, and liquor (R. **933-40, 1244, 1805-12 [5514-17, 55491).** It is undisputed on the record that this was a serious attempt, which would have resulted in her death had she not been discovered by her husband and immediately hospitalized (R. **403, 939, 1805-12 [5552]).**[3/] The physician who treated Mrs. Paddock in North Carolina (who was not a psychiatrist) testified that her suicide attempt had been caused by an episode of paranoid psychosis; that she was mentally ill and a risk for another suicide attempt; that she was in need of hospitalization or psychiatric treatment; that this recommendation was made to Mrs. Paddock's husband; and that Mrs. Paddock's husband had stated that he would seek psychiatric treatment for

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[2/] *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**); *Kolosky v. Winn-Dixie Stores, Inc.,* **472** So.2d **891** (Fla. 4th DCA **1985**), *review denied,* **432** So.2d **350** (Fla. **1986**); *Reams v. Vaughn,* **435** So.2d **879** (Fla. 5th DCA **1983**); *Marks v. Delcastillo,* **386 So.2d 1259** (Fla. **3rd** DCA **1980**), *review denied,* **397** So.2d **778** (Fla. **1981**); **3** Fla. Jur.2d, *Appellate Review,* §§343-45 (and decisions cited therein).

[3/] The defendant adduced a great deal of evidence concerning events which predated this first suicide attempt, including Mrs. Paddock's marital problems, the Paddocks' financial difficulties, and Mrs. Paddock's occasional extramarital affairs. The defendant will no doubt elaborate upon this aspect of the evidence in his answer brief, but we think it has been rendered irrelevant here by the verdict, which reflects that the jury obviously credited several other aspects of the evidence which effectively cancelled the defendant's evidence--such as **(1)** Mrs. Paddock's denial of much of the evidence, and her testimony that none of those things led to her suicide attempts and that she was not even aware that she was attempting suicide on either occasion (R. **1241-1386**); (2) one of the defendant's expert's concession that Mrs. Paddock did not consciously attempt to commit suicide on either occasion (R. **1609-21**); and **(3)** expert testimony that Mrs. Paddock was mentally ill and that her past was irrelevant to the issues of whether Dr. Chacko or Mrs. Paddock were negligent causes of her ultimate injuries (R. **548, 631-33).** We will therefore not burden the Court with a recitation of the evidence of the events predating the first attempt--which was adduced for the most part, in any event, for no purpose other than to discredit Mrs. Paddock's "verdict worthiness" in the eyes of the jury.

her (R. **2120-21, 1805-12 [5521-77]).** Mrs. Paddock was discharged from the North Carolina hospital on June **9,** with instructions to take four milligrams per day of an anti-psychotic drug, Navane (R. **249, 1805-12 [5525, 5546, 55651).**

Mrs. Paddock's mother and father, Mr. and Mrs. Burkhart, drove to North Carolina, picked up their daughter, and brought her to their home in the Orlando area on June **12** (R. **249-50, 1243).** Shortly thereafter, Mr. Burkhart obtained Dr. Chacko's name from his own physician--and on June **15,** Mrs. Paddock called Dr. Chacko's office; told his secretary that she needed a psychiatric evaluation for a recent suicide attempt; and was given an appointment for Wednesday, June **22** (R. **1242-43).** Both Mrs. Paddock and her father attended the June **22** session with Dr. Chacko, which lasted for approximately one hour (R. **251-52, 930-35).** Dr. Chacko diagnosed Mrs. Paddock as suffering from an acute paranoid state in partial remission, concluded that she needed continuing psychiatric care, and increased her dosage of Navane to six milligrams per day (R. **501, 951-63).** Despite this frightening diagnosis, Dr. Chacko told Mrs. Paddock and her father only that she had suffered a "nervous breakdown" (R. **254-55, 1250).** No follow-up appointment was immediately made, because Mrs. Paddock was not yet certain whether she would remain in Florida (R. **309).**

According to expert testimony adduced at trial from both sides, Mrs. Paddock was suffering from a serious mental illness, possibly caused by a biochemical abnormality in her brain; she was both paranoid and psychotic; her thought processes were out of touch with reality and controlled by delusions of a conspiracy against her and her family; and she had no control over her thoughts or feelings (R. **386-92, 404, 499-504, 1467-73, 1627-29, 1864-69, 1872, 1915-16).** She grew more upset and confused on Thursday and Friday, and she telephoned Dr. Chacko on Friday afternoon (R. **258, 261, 339-42, 964-65, 1256-57).** She told him that she was very upset and confused; that she felt there was something she was supposed to do, but did not know what it was; that she did not understand what to do; that she had never been so afraid in her life; and that she needed help (R. **1257-58).** Dr. Chacko responded, "Well, what do you want me to do . . . I have plans to go out of town for

LAW OFFICES, PODHURST ORSECK PARKS JOSEFSEERG EATON MEADOW & OLIN, P A . OF COUNSEL, WALTER H EECKHAM, JR
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

the weekend" (R. **1258**). Dr. Chacko then suggested that possibly she should come to the hospital and Mrs. Paddock responded that she would--that she would do whatever he thought best (R. **1258-59**). Dr. Chacko then stated that he would have to make some arrangements for a hospital bed, and that he would call her back (R. **1260**).

Mr. Burkhart returned home from work shortly thereafter and was told of Mrs. Paddock's call to Dr. Chacko; he called Dr. Chacko's office, and Dr. Chacko later returned the call (R. **262**). Mr. Burkhart related that Mrs. Paddock was upset, uptight, fearful, hallucinating, and requesting additional help, and that her condition seemed to have worsened since the Wednesday visit to his office (R. **262-63, 346**). According to Mr. Burkhart, although hospitalization was discussed, Dr. Chacko did not recommend it--and if he had made such a recommendation, it would have been willingly followed (R. **263-65, 346-47**). Instead, Dr. Chacko decided to increase Mrs. Paddock's medication to eight milligrams per day, and told Mr. Burkhart that if she grew worse over the weekend, he would consider hospitalizing her on Monday (R. **264, 349-50**).[4/] Dr. Chacko also informed Mr. Burkhart that he would be out of town over the weekend, and that if Mrs. Paddock needed help, she should call his answering service, which would put her in touch with a reputable psychiatrist (R. **265, 351**). It is undisputed that Dr. Chacko had no plans to be out of town

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4/ Dr. Chacko's version of these phone calls was that he insisted that Mrs. Paddock be hospitalized, but Mr. Burkhart refused (R. **975-77**). Dr. Chacko twice admitted on the record that his version of the calls was in stark conflict with the versions to which Mrs. Paddock and her father had testified (R. 977, **998-99**). (It is also undisputed that, after speaking with her father, Dr. Chacko never spoke to Mrs. Paddock again, notwithstanding his promise to call her back.) Dr. Chacko's office records contain notes of the June **24** phone calls, but they are largely supportive of Mr. Burkhart's version of the last call (R. **964-70**). In any event, to the extent that the notes provided any support for Dr. Chacko's version of the calls, the evidence was compelling that the notes were dictated weeks later, and only after Dr. Chacko learned that a malpractice claim was a possibility.

Two witnesses, Mrs. Paddock's husband and her brother-in-law, testified that they accompanied an attorney to Dr. Chacko's office approximately two weeks after the June **26** suicide attempt, presented his secretary with Mrs. Paddock's written authorization for release of the records, and asked for the records. They were shown the file, which they examined; the secretary telephoned Dr. Chacko while they were examining the file, and then informed them that they could not have the file until Dr. Chacko verified the authenticity of the authorization. At the time they first examined the file, it contained only notes of the June **22** office visit, followed by the words "case closed". When they were finally given the file later that day, it contained additional entries concerning the phone calls of June **24** and subsequent events. (R. **1150-78, 1396-1400**).

over the weekend; that he was, in fact, in town the entire weekend entertaining a friend from out of town; and that he was "on call" for himself (R. 911-13, 979-80, 1056).

On Sunday morning, June 26, Mrs. Paddock began experiencing delusions, and felt a compulsion to leave the house (R. 1268-69). She took her purse, and ran from the house to a wooded area near her home (R. 1269-70). She had no intention of committing suicide (R. 1287-88). She thought someone was trying to harm her, and it never occurred to her that she might be trying to harm herself (R. 1309). Acting under this delusion, she took her Swiss army knife from her purse and inflicted some superficial cuts on her wrists (R. 1272). She then took a cigarette lighter from her purse, and set her blouse on fire (R. 1272). She was discovered by a nearby homeowner who had responded to her cries for help, and she was taken to a hospital (R. 210-38). It is undisputed that this second suicide attempt, which occurred 20 days after the first, was a serious attempt--and that Mrs. Paddock would have died had she not received prompt medical attention (R. 1019).

The facts are considerably more extensive and complex than that, of course, especially when the conflicts in the evidence are considered. Those facts are sufficient for our purposes here, however, because the complexities in the evidence are largely irrelevant here--since they are subsumed for the most part in the various expert opinions constructed upon the facts, to which we will now turn. First, we note that several experts (including some of Dr. Chacko's experts) testified that, as a matter of medical ethics, Mrs. Paddock was Dr. Chacko's patient from her initial visit on Wednesday, through her call for help on Friday, and at the time of her second suicide attempt on Sunday (R. 588-89, 650-51, 866, 1905-06). Dr. Chacko himself admitted that Mrs. Paddock was his patient throughout that period (R. 1004-05, 1010-11). That a doctor-patient relationship existed at all relevant times is therefore established without dispute.

Next, we note that *all* of the psychiatrists who testified for both sides in the case testified, in one form or another, essentially as follows: that Mrs. Paddock had a serious mental illness which she was incapable of controlling herself; that the job of a psychiatrist is to diagnose and treat such illnesses, in the same way that other physicians treat physical

illnesses; that pyschiatrists are in the business of treating suicidal patients, and are specially trained for that purpose; and that psychiatrists have a medically recognized responsibility to exercise reasonable care to prevent their mentally ill patients from harming themselves (R. **359, 380, 407-08, 437, 461, 470, 481, 509, 619, 651, 668, 755, 845-55, 954, 1000, 1020, 1467-68, 1496, 1515-21, 1524-26, 1555, 1625, 1649, 1868, 1912-13).** One of the psychiatrists summed all of this up nicely with his observation that "[t]he kind of problem that Linda Paddock had would be the reason why psychiatrists exist" (R. **755).** Dr. Chacko himself admitted that it was his "most serious responsibility" to prevent his mentally ill patients from attempting to take their lives (R. **1047-48).** We will have more to say about this undisputed medical duty, of course, in our first issue on appeal--in which we will challenge the lower courts' rulings that Dr. Chacko owed Mrs. Paddock no legal duty of care to protect her from harming herself.

The disputes in this case were not really over the nature of the duty of care which Dr. Chacko owed Mrs. Paddock, or even its extent. The primary factual dispute was over the substance of the two June **24** telephone calls--whether Mrs. Paddock and her father were telling the truth about them, or whether (as Dr. Chacko contended) hospitalization had been recommended and rejected in them. The primary medical dispute was whether Dr. Chacko had conformed to or departed from reasonable standards of psychiatric care in discharging his conceded duty toward Mrs. Paddock on whatever version of the facts the jury ultimately accepted. On the medical issues, four eminently qualified expert psychiatrists testified on Mrs. Paddock's behalf, essentially as follows:

(1) Mrs. Paddock's "past" was entirely irrelevant to the question of whether Dr. Chacko's care and treatment of her conformed to reasonable standards of psychiatric care (R. **511-12, 522, 547-48, 631-33);**

(2) Mrs. Paddock was suffering from a severe mental illness which required psychiatric intervention (**R. 385-401, 485-88, 501-09, 615-19**);

(3) Mrs. Paddock was at substantial risk for a second suicide attempt in the immediate future (R. **410-12, 487, 512-13, 615-19**);

LAW OFFICES, PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN, P A - OF COUNSEL, WALTER H BECKHAM, JR
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

(4) Dr. Chacko had ample information from the June 22 office visit and the June 24 phone call from which he should have known that a second suicide attempt was foreseeable and that intervention was necessary (R. 412, 485-92);

(5) Dr. Chacko departed from reasonable standards of psychiatric care by prescribing only minimal and inadequate amounts of Navane on both June 22 and June 24; the dosage should have been at least 15 to 20 milligrams per day (which is what Dr. Chacko finally prescribed on June 26) (R. 398-400, 486-87, 514-16, 592-93, 600-01, 640-41, 994-1006);

(6) Dr. Chacko departed from reasonable standards of psychiatric care in not arranging for a face-to-face visit with his patient on June 24, and in attempting to base his treatment of her on a telephone conversation (R. 386, 394-97, 408-09, 441-43, 487-88);

(7) Dr. Chacko departed from reasonable standards of psychiatric care in not hospitalizing Mrs. Paddock on June 24 (which is what Dr. Chacko himself insisted was the proper course of treatment), when Mrs. Paddock had indicated her willingness to be hospitalized (R. 492-93, 513-14, 635, 641-42, 965-66, 976);

(8) Even if Dr. Chacko were telling the truth that Mr. Burkhart rejected hospitalization for Mrs. Paddock on June 24, Mr. Burkhart was not competent to render any opinions on the need for hospitalization (a point which Dr. Chacko conceded at trial), and Dr. Chacko was negligent in allowing himself to be dissuaded from hospitalization by Mr. Burkhart's lay observations, communicated in a brief telephone call (R. 386, 441-43, 451-54, 603, 630-31, 978);

(9) In addition, even if Dr. Chacko were telling the truth that Mr. Burkhart refused hospitalization for Mrs. Paddock, she was an appropriate candidate for involuntary hospitalization under the simple, automatic procedures of Florida's "Baker Act"--§394.451 *et seq.,* Fla. Stat. (1983)--(which Dr. Chacko conceded was designed to protect persons from injuring themselves, and which he also conceded he had utilized many time; before for precisely that purpose), and he had departed from reasonable standards of psychiatric care in not utilizing the Act (R. 488-91, 643-46, 1012-17, 1035);

(10) Dr. Chacko's several departures from reasonable standards of psychiatric care were a cause of Mrs. Paddock's self-inflicted injuries (R. **411-12, 492-93, 647-48)**; and

(11) If Dr. Chacko's care and treatment had conformed to reasonable standards of psychiatric care, the possibility that Mrs. Paddock would have made a second suicide attempt was only "slight", and the probability that she would not have injured herself was therefore substantially greater than 50% (R. **432-33, 443, 492-93, 514, 646-47).**

In short, there was abundant expert opinion evidence that Dr. Chacko's care and treatment of Mrs. Paddock departed from reasonable standards of psychiatric care in several respects (on either of the conflicting versions of the June **24** telephone calls), and that these departures were a legal cause of Mrs. Paddock's injuries.[5] The jury's finding of liability therefore represents little more than a rejection of the defendant's expert testimony and an acceptance of the expert testimony offered by the plaintiff.

The experts also disagreed on the issue of Mrs. Paddock's comparative negligence. According to two of the plaintiff's experts, Mrs. Paddock was psychotic on June **26,** and mentally incompetent as a result--and, because of her illness, she was irrational, incapable of understanding the consequences of her acts, and unable to exercise any care at all for her own safety (R. **390-92, 401-08, 508-09).** One of the defendant's experts also testified that Mrs. Paddock's psychosis distorted her perception of reality; that her suicide attempt was an impulsive attempt to quell the conspiracy which she perceived; and that she did not intend to harm herself (R. **1609-11, 1621, 1627-29).** Mrs. Paddock also testified, as we noted previously, that she had no idea she was attempting suicide; that she thought someone else was trying to harm her; and that it never occurred to her that she was harming herself (R. **1287-88, 1309).** In short, there was abundant evidence from which the jury could properly have determined that Mrs. Paddock was incompetent on June **26;** that she

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5/ Dr. Chacko's four experts testified that his care and treatment of Mrs. Paddock was acceptable under the circumstances (R. **816-23, 1459-64, 1594-98, 1821-33).** Three of these experts were also of the opinion that Mrs. Paddock's June **26** suicide attempt was spontaneous, impulsive, and unforeseeable by Dr. Chacko (R. **1482, 1611-21, 1833-34).** These opinions are irrelevant here in view of the verdict, of course, but we mention them in the interest of completeness.

was therefore incapable of exercising reasonable care for her own safety; and that she was not "negligent" as a result.[6/]

That is only a brief synopsis of the facts and the expert opinion testimony on the liability issues. In view of the District Court's decision, a portion of that evidence--the substance of the two Friday afternoon telephone calls--has become a matter of critical importance here, so we will elaborate upon that aspect of the evidence in our argument under Issue **A.** We will also defer discussion of the evidence concerning the extent of Mrs. Paddock's damages to our argument under Issue C.

III. ISSUES ON APPEAL

The six issues on appeal are stated in the table of contents, as required by Rule 9.210(b)(1). We regret their number. We have no choice, however, because the trial court set aside Mrs. Paddock's verdict for six different reasons, and we must demonstrate the error of each in order to obtain reinstatement of the verdict. We also respectfully urge the Court to resolve each of the six issues, notwithstanding that the District Court resolved only one of them. The reason for this request should be obvious.

We are convinced, and we intend to demonstrate, that the District Court misstated the facts of this case in order to justify a result which could not otherwise have been reached by applying neutral principles of law to a proper view of the evidence. If we are successful in convincing this Court of that, we will necessarily have convinced it that we did not receive the fair, honest, and neutral appellate review to which we were entitled below. It should logically follow that we are not likely to fare any better in this case if the issues not initially decided by the District Court are remanded back to it for initial determination. In addition, of course, the strong charge which we have felt compelled to level at the District Court, as a matter of principle, has placed us in a highly adversarial

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[6/] Two of the defendant's experts were of the opinion that, although Mrs. Paddock was clearly suffering from a serious mental illness on June **26,** she was nevertheless capable of making rational judgments and exercising reasonable care for her own safety (R. **1482-86, 1833-36, 1881).** We think those opinions are internally contradictory, but we need not debate the point because the opinions are irrelevant in view of the verdict, which obviously credited the plaintiff's contrary expert testimony on the issue.

relationship with it at this point in the proceeding. Human nature being what it is, we are not likely to be forgiven for that, even if our position is ultimately vindicated here. In those circumstances, we think it would be best for all concerned--the litigants, their counsel, the District Court, and the judicial process itself--if the entire case were resolved here without further proceedings in the District Court. We therefore respectfully request that the Court decide all the issues on appeal.

IV. SUMMARY OF THE ARGUMENT

Because of the enormous size of the 10,700+-page record in this case, the need to relate additional procedural and factual background to some of the issues, the number of issues on appeal, and the page limitations imposed upon us here, our arguments on the merits will, of necessity, be little more than summaries themselves. We do not believe that a summary of those summary arguments will be particularly helpful to the Court here, *so* we have elected to conserve precious space by turning directly to the merits of the issues. We respectfully request the Court's indulgence in that decision.

V. ARGUMENT

A. THE TRIAL COURT AND THE DISTRICT COURT ERRED IN CONCLUDING THAT THE DEFENDANT WAS ENTITLED TO A JUDGMENT NOTWITHSTANDING THE VERDICT.

The trial court directed a verdict on one ground, and the District court affirmed on an entirely different ground. There are therefore two quite dissimilar analyses of the directed verdict issue to which we must respond, and we obviously must demonstrate the error of both in order to prevail here. We will address the trial court's order first.

1. The trial court's order.

Reduced to its essentials, the trial court's order concedes that Dr. Chacko would have had a duty to exercise reasonable care to protect Mrs. Paddock from injuring herself if she had been in his "custody", but it concludes that Dr. Chacko had no "responsibility" for her safety so long as she was not institutionalized, whether she were willing to be hospitalized or not (and the order makes no mention of the alternative theories of liability

proven to the jury).[7] We do not intend to debate the trial court's reasoning on its own terms, because we think the trial court missed the point. The point is that, as a matter of law, Florida physicians have always owed their patients a general duty to exercise reasonable and ordinary care, according to the specific standards of care recognized as reasonable and prudent by similar health care providers. *Saunders v. Lischkoff,* 137 Fla. 826, 188 So. 815 (1939)[8].

The nature and extent of Dr. Chacko's duty to Mrs. Paddock therefore did not turn upon her "custodial" or "non-custodial" status in any way; it depended solely upon the manner in which his legally recognized, general duty of ordinary care had been specifically defined by the psychiatric profession itself. And as we noted in our statement of the facts, the expert testimony on that point was ***unanimous*** that psychiatrists have a medically recognized duty to protect their mentally ill patients from injuring themselves, whether they are in custody or not--indeed, that this is the primary, specialized role of psychiatrists. Even Dr. Chacko conceded as much on the record (R. 1047-48). The trial court was bound by the law of this State to accept that undisputed testimony as a definition of the duty owed to Mrs. Paddock, and it simply had no business defining that duty in a manner contrary to ***all*** the expert testimony in the case.

This general principle of the scope of the duty owed by a physician to his patient is thoroughly settled. This Court long ago observed that neither judges nor juries are competent to determine the specific scope of a physician's general duty of care on a given set of facts: "Obviously, except in rare cases, neither the court nor the jury can or should be

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7/ Because the trial court recognized that Dr. Chacko would have owed Mrs. Paddock a duty if she had been hospitalized, we will not bother the Court with citations to the numerous cases which support that proposition. We would note in passing, however, that the logic of those cases would also seem to apply to the type of circumstances presented here--in which the patient consents to hospitalization at the psychiatrist's suggestion, but the psychiatrist does not follow up on the suggestion.

8/ ***Accord, Hill v. Boughton,*** 146 Fla. 505, 1 So.2d 610, 134 ALR 678 (1941); ***Crovella v. Cochrane,*** 102 So.2d 307 (Fla. 1st DCA 1958); ***Olschefsky v. Fischer,*** 123 So.2d 751 (Fla. 3rd DCA 1960); ***Lab v. Hall, 200*** So.2d 556 (Fla. 4th DCA 1967); and cases cited in fn. 9, *infra.* "This appears to be the universal rule." *Crovella, supra* at 311.

permitted to decide, arbitrarily, what is or is not a proper diagnosis or an acceptable method of treatment of a human ailment." *Atkins v. Humes,* 110 So.2d 663, 666 (Fla. 1959). It logically followed from this early observation that (except in cases where the negligence issue is a matter of common sense and ordinary judgment) the nature and extent of a physician's duty is to be determined solely by expert medical testimony:

> A physician, whether he be a general practitioner or specialist, is under a duty to use ordinary skills, means and methods recognized as necessary and customarily followed in a particular type of case according to the standard of those who are qualified by training and experience to perform similar services in the community. To determine what skills, etc., are necessary and customarily followed in the community normally requires expert testimony by those physicians who perform similar services in the community.

Salinetro v. Nystrom, 341 So.2d 1059, 1061 (Fla. 3rd DCA 1977).[9/]

If there were ever any doubt about that, the doubt was clearly removed by the legislature when it codified the case law with the following unambiguous statute--which indisputably governs the instant case:

> In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 768.50(2)(b), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the accepted standard of care for that health care provider. ***The accepted standard of care for a given health care provider shall be that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances.***

Section 768.45(1), Fla. Stat. (1981) (emphasis supplied).[10/] If the "accepted standard of

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[9/] ***Accord, Gooding v. University Hospital Building, Inc.,*** 445 So.2d 1015 (Fla. 1984); ***Wale v. Barnes,*** 278 So.2d 601 (Fla. 1973); ***Ritz v. Florida Patient's Compensation Fund,*** 436 So.2d 987 (Fla. 5th DCA 1983), ***review denied,*** 450 So.2d 488 (Fla. 1984); ***Pohl v. Witcher,*** 477 So.2d 1015 (Fla. 1st DCA 1985); *Brooks* ***v. Serrano,*** 209 So.2d 279 (Fla. 4th DCA 1968); ***Musachia v. Terry,*** 140 So.2d 605 (Fla. 3rd DCA 1962).

[10/] The definition of "health care provider" in §768.50(2)(b), Fla. Stat. (1981), includes "physicians licensed under Chapter 458". Dr. Chacko is indisputably a physician of medicine required to be licensed under Chapter 458, and the standard of care set forth in §768.45 is just as clearly the standard of care to which he is bound in the instant case. ***See Nesbitt v. Community Health of South Dade, Inc.,*** 467 So.2d 711 (Fla. 3rd DCA 1985) (psychiatrist's duty of care defined by 5768.45); ***Somer v.*** *Johnson,* 704 F.2d 1473 (11th Cir.

care" among psychiatrists testifying in this case included a duty to exercise reasonable care to protect a mentally ill patient from harming herself, whether the patient was in custody or not--and it clearly did, according to *all* the expert testimony, including Dr. Chacko's own testimony--then the trial court clearly erred in concluding otherwise.

Because the specific nature and extent of a physician's duty of care is essentially a question of fact to be proven by expert testimony on a case by case basis, the "specifics" of the decisional law ought to be irrelevant here. It is worth noting, however, that the duty to which the experts testified in this case is implicitly recognized in several Florida appellate court decisions--at least where there is expert testimony to support it.[11/] It is also worth noting that this Court recently held that an educational institution attempting to rehabilitate emotionally disturbed persons owes a duty of reasonable care to prevent them from inflicting harm on others, even where they are not strictly in "custody". ***Nova University, Inc. v. Wagner,*** 491 So.2d 1116 (Fla. 1986). Surely that decision fairly embraces a similar duty to protect disturbed persons who are suicidal, rather than homicidal, from inflicting harm on themselves--at least where a doctor-patient relationship admittedly exists, and especially where *all* of the medical experts who testify acknowledge such a duty.

The duty to which the experts testified in this case is also explicitly recognized in a number of appellate decisions in other jurisdictions, in which the law of medical negligence is similar to Florida law. ***Bellah v. Greenson,*** 81 Cal. App.3d 614, 146 Cal. Rptr. 535, 538, 17 A.L.R.4th 1118 (1978), is representative:[12/]

1983) (§768.45 defines standard of care and overrules all inconsistent case law); Fla. Std. Jury Instn. (Civ.) 4.2a, Comment 1 (same).

11/ ***See, e. g., Nesbitt v. Community Health of South Dade, Inc.,*** 467 So.2d 711 (Fla. 3rd DCA 1985); ***North Miami General Hospital v. Krakower,*** 393 So.2d 57 (Fla. 3rd DCA 1981); ***Dillmann v. Hellman,*** 283 So.2d 388 (Fla. 2nd DCA 1973). ***Cf. Robison v. Faine,*** 525 So.2d 903 (Fla. 3rd DCA 1988); ***Burroughs v. Board of Trustees of Alachua General Hospital,*** 377 So.2d 801 (Fla. 1st DCA 1979).

12/ ***See,*** in addition, ***Stepakoff v. Kantar,*** 393 Mass. 836, 473 N.E.2d 1131 (1985); ***Farrow v. Health Services Corp.,*** 604 P.2d 474 (Utah 1979); ***Runyon v. Reid,*** 510 P.2d 943, 58 A.L.R.3d 814 (Okla. 1973); ***Bell v. New York City Health & Hospitals Corp.,*** 90 App. Div. 270, 456 N.Y.S.2d 787 (1982). ***Cf. Nally v. Grace Community Church of the Valley,*** 194

> Here, the complaint alleged the existence of a psychiatrist-patient relationship between defendant and Tammy, knowledge on the part of the defendant that Tammy was likely to attempt suicide, and a failure by defendant to take appropriate preventive measures. We are satisfied that these allegations are sufficient to state a cause of action for the breach of a psychiatrist's duty of care towards his patient. The nature of the precautionary steps which could or should have been taken by defendant presents a purely factual question to be resolved at a trial on the merits, at which time both sides would be afforded an opportunity to produce expert medical testimony on the subject.

In short, the nature and scope of Dr. Chacko's duty of care on the facts in this case was not for the trial court to decide; it was for the expert psychiatrists to decide. And because the experts were of the unanimous opinion that Dr. Chacko owed Mrs. Paddock a duty of reasonable care to protect her from harming herself, even though she was not in "custody", the trial court simply could not permissibly conclude otherwise.

When all is said and done, the only real areas of dispute among the experts in this case were whether Mrs. Paddock's second suicide attempt was foreseeable by Dr. Chacko; whether Dr. Chacko breached the duty of care he indisputably owed Mrs. Paddock; and whether any breach of that duty of care was a cause of Mrs. Paddock's injuries. Although the trial court's order contains makeweight conclusions that the evidence was wanting in these additional areas as well, those conclusions are clearly indefensible.[13/] It has long

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Cal. App.3d 1147, 195 Cal. App.3d 956A, 240 Cal. Rptr. 215 (1987). ***See generally,*** Annotation, ***Liability of Doctor, Psychiatrist, or Psychologist for Failure to Take Steps to Prevent Patient's Suicide,*** **17** A.L.R.4th **1128** (1982). We have been unable to find any decisions supporting the trial court's contrary conclusion.

[13/] Particularly indefensible is the trial court's conclusion (later echoed in the District Court's decision) that the plaintiff's case was unsound because, even if she had been hospitalized, she might have attempted suicide in the hospital or after her release. Causation depends upon probability--"more likely than not"--not absolute certainty. ***See Gooding v. University Hospital Building, Inc.,*** 445 So.2d 1015 (Fla. 1984). The record is replete with evidence that hospitals are equipped with special units staffed with trained personnel employing rigorous precautions to prevent suicidal patients from taking their lives, and that suicides in such a setting are extremely rare. That, of course, is precisely why the District Court had no difficulty in recognizing that a cause of action ***will*** lie on facts like those in this case where the suicidal patient is in a hospital. It is simply inconsistent to conclude that a cause of action exists for negligent supervision of a ***hospitalized*** mental patient, and then announce in the same breath that an unhospitalized outpatient can never prove causation because she might have attempted suicide in the hospital. It was also absurd for both lower courts to opine that, even if properly treated, Mrs. Paddock might have attempted suicide after her release from a hospital. That proper medical treatment

been the law in this State that expert medical opinions on these issues are ***direct*** evidence sufficient to present a prima facie case on liability, and that courts may ***not*** direct verdicts against medical malpractice plaintiffs when such evidence exists. ***Wale v. Barnes,*** 278 So.2d 601 (Fla. 1973).[14/] There was expert medical opinion testimony supporting each element of a prima facie case of liability in this case, and unless this Court is prepared to overrule ***Wale v. Barnes,*** it seems to us that it has no choice but to declare the trial court's directed verdict order legally erroneous.

2. **The** District Court's decision.

Even the District Court did not agree with the trial court's legal reasoning, so it had to find another way to avoid the verdict. It therefore pretended to analyze the facts. It then accepted Dr. Chacko's version of the June 24 telephone calls as true; declared that version "admitted"; and held that Dr. Chacko had no duty to commit Mrs. Paddock "against her will". The statement of the facts with which we began this brief tells an entirely different story, of course, and if it is accurate, then the District Court's analysis of the facts is simply false--and the District Court violated the Constitution's most fundamental limitation upon its power. That limitation is emphatically explained in ***Helman v. Seaboard Coast Line Railroad Co.,*** 349 So.2d 1187, 1189 (Fla. 1977)--in which this Court reminded a District Court of several "incontrovertible premises of law" by which the courts of this State are bound in determining the propriety of a directed verdict, as follows:

> . . . First, it is not the function of an appellate court to reevaluate the evidence and substitute its judgment for that of the jury. [11 citations omitted]. Second, if there is any competent evidence to support a verdict, that verdict must be sustained

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would have prevented another suicide attempt was emphatically proven by the simple presence of Mrs. Paddock at her own trial, nearly three years later.

14/ See ***Gooding v. University Hospital Building, Inc.,*** 445 So.2d 1015 (Fla. 1984); ***Beisel v. Lazenby,*** 444 So.2d 953 (Fla. 1984) (by implication); ***Pohl v. Witcher,*** 477 So.2d 1015 (Fla. 1st DCA 1985); ***City of Hialeah v. Weatherford,*** 466 So.2d 1127 (Fla. 3rd DCA 1985); ***Singleton v. West Volusia Hospital Authority,*** 442 So.2d 235 (Fla. 5th DCA 1983); ***Hunt v. Palm Springs General Hospital, Inc.,*** 352 So.2d 582 (Fla. 3rd DCA 1977); ***Zack v. Centro Espanol Hospital, Inc.,*** 319 So.2d 34 (Fla. 2nd DCA 1975); ***Maltempo v. Cuthbert,*** 504 F.2d 325 (5th Cir. 1974) (Florida law).

> regardless of the District Court's opinion as to its appropriateness. [4 citations omitted]. Finally, the question of whether defendant's negligence was the proximate cause of the injury is generally one for the jury unless reasonable men could not differ in their determination of that question. [7 citations omitted].

These "incontrovertible premises of law" were repeated (with evident frustration) in *Welfare v. Seaboard Coast Line Railroad Co., 373* So.2d 886, 888 (Fla. 1979), with the added admonition that they constitute "our directions to the appellate courts of this state". The reason for these rules of law is, of course, that the Constitution guarantees to all citizens that factual disputes will be resolved by juries, not by appointed officials of the state--and without these rules, that constitutionally guaranteed right (which has nearly a millennium of history and experience behind it) would be rendered meaningless. *See Saunders v. Lischkoff*, 137 Fla. 826, 188 So. 815 (1939).

Our primary task is therefore this: to convince this Court that the pivotal fact upon which the District Court's entire decision turns--the so-called "admitted fact that Chacko recommended hospitalization which recommendation was rejected"--was merely Dr. Chacko's version of the June 24 telephone calls; that his version of those telephone calls was not "admitted" at all; that there was a sharp conflict in the evidence concerning the substance of those telephone calls; and that there is competent evidence in the record to support a jury finding that no recommendation for hospitalization was ever rejected by Mrs. Paddock or her father. All that we ask of the Court is a fair and honest reading of the evidence in the written record--viewed in the proper light, as it must be--and we believe that such a reading will leave no doubt concerning the accuracy of our own statement of the facts. If that statement of the facts is ultimately accepted here, the version of the facts upon which the District Court's decision depends must be rejected, and the entire decision will collapse for want of a legitimate foundation.

A fair reading of the record will demonstrate that the substance of the June 24 telephone calls was squarely in dispute, and a central feature of the trial. During opening statements, plaintiff's counsel stated that Mrs. Paddock and her father would testify that Dr. Chacko did not recommend hospitalization (R. 46-48), and that Dr. Chacko's version of

the telephone calls would be entirely different (R. 53, 58-60). Defendant's counsel followed by stating that the evidence would show that hospitalization was recommended and rejected (R. 101-06), but he acknowledged that the plaintiff would present evidence to the contrary and submitted that the jury would find it "not true" (R. 111-14). The dispute was therefore squarely drawn at the very outset of trial.

Thereafter, during presentation of the plaintiff's case-in-chief, the fact that neither a recommendation nor a rejection occured during the June 24 telephone calls was proven by both Mrs. Paddock and her father. Mrs. Paddock testified as follows:

> Q. Did he prescribe any treatment for you at that time on the phone?
>
> A. He said, "well, possibly you should come to the hospital".
>
> Q. What did you say?
>
> A. He said, "would you be willing to come to the hospital?" And I said yes, I would do whatever he thought best.

(R. 1258-59). She also testified that "[r]ecommending and asking if you're willing to go to the hospital is two different things . . ." (R. 1358)--and that Dr. Chacko told her he would call her back after making arrangements for her hospitalization, but never did (R. 1260).

Mr. Burkhart testified as follows:

> Q. All right. Did Dr. Chacko indicate he wanted to put her in the hospital Friday afternoon?
>
> A. No, there was no indication that we would admit her at that time.. . .
>
> . . . .
>
> Q. Did you at any time on that phone that afternoon refuse the medical advice of Dr. Chacko?
>
> A. No, I rejected nothing that he had to offer as far as advice.
>
> . . . .
>
> Q. Well, if Dr. Chacko had asked you about hospitalizing your daughter on June 24, wouldn't your answer have been no?
>
> A. If he had asked me about hospitalizing her?
>
> Q. Yes, sir.

> A. My answer would have been yes.
>
> Q. Your answer would have been yes. You wouldn't have indicated to him that you didn't see any need for it, didn't think there was any need for it?
>
> A. I didn't discuss anything with Dr. Chacko as to what my opinion was, whether I thought that she should or should not be hospitalized to the best of my knowledge, no.

(R. 263-64, 265, 346-47). Dr. Chacko's version of the phone calls was that he insisted that Mrs. Paddock be hospitalized, but Mr. Burkhart refused (R. 975-77). Thereafter, however, Dr. Chacko *twice conceded* on the record what the District Court simply ignored--that there was a considerable conflict between his versions of the telephone calls, and the versions he had heard from Mrs. Paddock and her father (R. 977, 998-99). The full texts of these critical concessions are included in the appendix (A. 18).

Since the Court is obliged as a matter of constitutional law to accept the foregoing evidence as true here, in view of the plaintiff's favorable verdict, there should be no need for us to collect all the remaining evidence bearing on this disputed issue of fact. We do not wish to be accused of distortion by omission or characterization, however, so we have set out in the appendix to this brief *all* of Mrs. Paddock's and Mr. Burkhart's testimony concerning the substance of the June 24 telephone calls (A. 19). We invite the Court to read that testimony. Nowhere in it is there any admission that Dr. Chacko recommended hospitalization or that any such recommendation was refused.

Mrs. Paddock's testimony reflects that, after begging Dr. Chacko for help, he only asked her if she were willing to go to the hospital; that she stated that she was willing; that he said he would make arrangements and call her back; and that he never called her back--so there is clearly no basis for any conclusion that ***she*** rejected a recommendation for hospitalization.[15/] No basis exists for such a conclusion in Mr. Burkhart's testimony

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15/ The jury also heard testimony, elicited by the defendant, from the psychiatrist who was treating Mrs. Paddock at the time of trial. He testified that Mrs. Paddock had emphatically denied to him that Dr. Chacko "had advised her to come in the hospital"; that she had related to him that "[s]he was desperate to come in the hospital. She would have done anything that he told her to do"; and that she had told him that Dr. Chacko "never recommended that she go into the hospital" (R. 769-70).

either. All that he said was that hospitalization was "discussed", not recommended; that Dr. Chacko gave him no indication that he thought hospitalization was necessary; that he would have followed a recommendation for hospitalization if one had been made; that he did not tell Dr. Chacko that he thought his daughter did not need to be hospitalized; and that the conversation got "sidetracked" from the discussion about hospitalization when he inquired about admission without health insurance; and that Dr. Chacko then advised that his daughter's medication should be increased, and that they would talk about hospitalizing her on Monday if the increase in medication did not help.

The District Court did not content itself with merely disregarding the testimony of Mrs. Paddock and her father. It also attempted to shore up its indefensible "admitted fact" by gathering other evidence which it thought probative of its reading of the facts. For example, it stated that "Dr. Chacko recommended hospitalization to the plaintiff's father but his suggestion was rebuffed due to a concern about insurance and because the father did not really believe that his daughter was in need of hospitalization". 522 So.2d at 414. When viewed in the proper light, however, the evidence simply does not support this conclusion. Mr. Burkhart's testimony reflects that the subject of insurance was raised, but that Dr. Chacko alleviated the concern by informing him that public assistance was available. That is *all* that the evidence reflects. It simply will not support the District Court's conclusion that Mr. Burkhart rejected a recommendation for hospitalization because of a concern over insurance. Just as importantly, Mr. Burkhart testified elsewhere in his testimony that the lack of insurance would ***never*** have prevented him from obtaining appropriate medical care for any of his daughters (R. 278-79). And, of course, Mr. Burkhart testified that, if Dr. Chacko had recommended hospitalization, he would have agreed. The far more reasonable inference, which the jury was permitted to draw, was that ***Dr. Chacko*** changed ***his*** mind about the possibility of interrupting his weekend plans to hospitalize Mrs. Paddock, when ***he*** heard that there was no health insurance--and that ***he*** decided to postpone that imposition upon his prior plans by increasing her medication and deferring the problem until Monday morning.

Neither is there any support in Mr. Burkhart's testimony for the District Court's conclusion that he rejected a recommendation for hospitalization because he did not believe that his daughter was in need of hospitalization. It is true that Mr. Burkhart recognized his limitations as a layman and his lack of expertise in diagnosing mental illnesses by admitting candidly to defense counsel that, if Dr. Chacko had asked him, he would have answered that, from his layman's perspective, he did not see any need for hospitalization. However, that was an answer to a hypothetical question posed by defense counsel at trial. That answer was never given to Dr. Chacko, because Dr. Chacko did not ask him the question which counsel asked him at trial. In fact, Mr. Burkhart expressly **denied** telling Dr. Chacko that he saw no need for hospitalization. And nowhere in his testimony did Mr. Burkhart ever state that he rejected any advice of Dr. Chacko because he thought hospitalization was unnecessary. It also makes little sense even to consider his layman's opinion relevant, since Dr. Chacko himself conceded on the record that Mr. Burkhart had no expertise in the matter (R. 978).

In addition, the District Court notes in its opinion that Mrs. Paddock's subsequently prepared written statement recited that, after the conversation with Dr. Chacko, her father told her that they could handle the situation by themselves and he did not think it necessary for her to go to the hospital. That statement says nothing about whether Dr. Chacko recommended hospitalization or whether Mr. Burkhart rejected the advice, of course, and it is not even inconsistent with any of the testimony quoted above or collected in our appendix. Mr. Burkhart did not think his daughter needed to be hospitalized (and Dr. Chacko did not tell him that she needed to be hospitalized)--and for him to tell his daughter exactly that after his conversation with Dr. Chacko would have been a perfectly appropriate thing for him to say for any of several reasons.[16/] But whatever the reason

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[16/] First, he could reasonably have inferred from Dr. Chacko's decision to increase the medication and postpone any decision concerning hospitalization that she did not need to be hospitalized. After all, Dr. Chacko had never revealed his own diagnosis of paranoid psychosis to him, but had told him only that she had had a "nervous breakdown". Mr. Burkhart could also have simply been stating his own layman's opinion--an opinion which is clearly irrelevant to the question of whether *Dr. Chacko's* diagnosis and treatment met the

for the statement, it clearly provides no support whatsoever for the District Court's pivotal conclusion that Dr. Chacko recommended hospitalization and that Mr. Burkhart refused because he thought that it was unnecessary.

There are other statements of fact in the District Court's opinion with which we could take square issue, but space simply does not permit it, and those factual misstatements are not critical to the single, pivotal factual issue presently under discussion.[17/] There is one item of evidence which the District Court simply ignored, however, which is worth highlighting here--Dr. Chacko's own office notes of the June 24 telephone conversations, which we have also reproduced in the appendix **(A. 36).** Curiously, although Dr. Chacko testified at trial to the critical recommendation and rejection upon which the

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standard of care. He may also have simply told his daughter a "white lie" in a fatherly effort to calm her down, and to anticipate her unasked question as to why Dr. Chacko apparently changed his mind.

17/ For example, there is really no evidentiary basis--other than the mere inference which the District Court drew, but which the jury was not required to draw--for the District Court's conclusion that Mrs. Paddock (a 35 year-old adult whom Dr. Chacko should have allowed to have the last word on hospitalization) had committed herself to the "custody" of her parents. An equally reasonable inference to the contrary is available. After all, after Mrs. Paddock begged for help and expressed her willingness to be hospitalized, she did not refer Dr. Chacko to her parents. It was Dr. Chacko who asked to speak to her parents, and then made his decision to increase the medication, not upon diagnosis of his patient, but upon his telephone conversation with her father. (The District Court was simply wrong in stating that it was Mrs. Paddock who suggested that Dr. Chacko should first speak to her parents; Mrs. Paddock testified that it was Dr. Chacko who asked to speak to her parents, and Dr. Chacko's office notes say the same thing **[A. 26, 29, 361.)** If a "custodial" situation was created at all, it was created by Dr. Chacko's insistence on treating the situation that way, rather than meeting his adult patient in person, as the experts testified he was required to do.

In addition, it is *not* undisputed that Dr. Chacko reserved a bed for Mrs. Paddock before talking to Mr. Burkhart, and then cancelled the reservation after talking to him. There was a substantial dispute at trial about whether the nurses who corroborated Dr. Chacko's version of events at that point were even on duty at the time the calls were purportedly made--and the jury could have permissibly inferred that the nurses were confused, and that the purported telephone calls came on Sunday: the first, when Dr. Chacko learned on Sunday afternoon that Mrs. Paddock had disappeared, and instructed her parents to have the sheriff find her and deliver her to the hospital; the second, when Dr. Chacko learned that Mrs. Paddock was already in the hospital, in the burn center (R. **978-79, 1184-1211, 1694-1738).** In any event, even if Dr. Chacko had indisputably reserved a bed on Friday, that would not be conclusive proof that he recommended hospitalization to Mr. Burkhart, and that the recommendation was rejected, because it would be perfectly consistent with the plaintiff's version of the facts. There is therefore no need for us to detail all of the evidence from which the jury could have permissibly concluded that Dr. Chacko did not reserve a bed for Mrs. Paddock on Friday evening.

District Court rested its entire decision, his office notes of the various telephone conversations are ***consistent*** (in all but two minor respects) with Mrs. Paddock's and Mr. Burkhart's versions of the conversations.[18/] Beyond those two inconsistencies, which have to be resolved in the plaintiff's favor, the office notes track the letter of the plaintiff's version of the facts--and the notes do ***not*** state that Dr. Chacko recommended hospitalization to either Mrs. Paddock or Mr. Burkhart (but only to Mrs. Burkhart, who simply deferred), and they do ***not*** state that Mr. Burkhart rejected any such recommendation for any of the reasons to which the District Court attributed that purported rejection. In short, the jury could properly have concluded from Dr. Chacko's office notes alone that neither a recommendation nor a rejection took place.

Finally, we should note that the conflicting versions of the June 24 telephone calls were a central feature of both plaintiff's and defendant's closing arguments (R. 2021-23, 2044-46, 2065-67, 2108, 2122). Given Dr. Chacko's concessions in his opening statement, in his own testimony, and in his closing argument that the evidence was in considerable conflict on the issue of recommendation and rejection, he is clearly in no position here to defend the District Court's pivotal conclusion that it was an "admitted fact that Chacko recommended hospitalization which recommendation was rejected". And, of course, such an attempt would be futile in any event, because there is abundant evidence in the record from which the jury could properly have found the facts to be exactly contrary to the version of the facts upon which the District Court's decision was exclusively bottomed--and we are constitutionally entitled to that version of the facts here.

Once that is recognized, the District Court's lengthy discussion about the social desirability of recognizing a duty to hospitalize a mentally ill patient "against her will" becomes entirely academic, and the error of the defendant's directed verdict becomes

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[18/] The two minor inconsistencies are that the notes say (1) that Mr. Burkhart told him that he did not feel that his daughter needed to be hospitalized, and (2) that Mr. Burkhart attributed his daughter's upset to her husband. However, Mr. Burkhart denied at trial that he made either statement to Dr. Chacko, and the jury was entitled to believe Mr. Burkhart--especially since it could also have found that the notes were constructed two weeks after-the-fact. *See* fn. 4, *supra.*

undeniable. Most respectfully, no reasonable court could ever hold that a psychiatrist has no duty at all to hospitalize a mentally ill patient who needs to be hospitalized, and who has willingly consented to be hospitalized--which is probably why the District Court felt compelled to change the facts to justify its otherwise indefensible result. On the authority of *Helman* and ***Welfare*** alone, the District Court's decision should be quashed, and the defendant's directed verdict declared erroneous.

If we are correct that the District Court viewed the evidence in entirely the wrong light, and that there is competent evidence supporting our statement of the facts, our primary theory of liability stands proven on the record and there should be no need to examine the District Court's rejection of our remaining theories of liability. We will examine those additional aspects of the District Court's decision briefly, however, to leave no stone unturned. First, we note that the District Court held the evidence insufficient to prove our claim that Dr. Chacko was negligent in failing to arrange for a face-to-face interview with his patient, on two grounds. Initially, it asserted that this negligence could not have been a cause of Mrs. Paddock's injuries because meeting her in person would not have resulted in her hospitalization, since the recommendation for hospitalization had already been rejected. If we are correct that the plaintiff's version of the June 24 telephone calls is supported by competent evidence, this attempted finesse of this alternative claim falls of its own weight.

The District Court also finessed our face-to-face interview claim by declaring our expert opinion testimony on the causation aspect of the claim to be "purely speculative". Most respectfully, there is long line of authority from this Court which simply prohibited the District Court from invading the province of the jury in that fashion. It has long been settled by this Court that expert opinions which are admitted into evidence without objection cannot be declared speculative as a matter of law; that neutral standards of appellate review require that they be accepted as direct evidence of the issue to which they are addressed; and that a jury verdict bottomed upon them cannot be set aside merely because a court may find them less than compelling. ***See Wale v. Barnes,*** 278 So.2d 601 (Fla. 1973);

Golden Hills Turf & Country Club, Inc. v. Buchanan, 273 So.2d 375 (Fla. 1973); *Crornarty v. Ford Motor Co.,* 341 So.2d 507 (Fla. 1976). Since there *was* expert opinion testimony supporting a finding of causation on the "face-to-face interview" claim--testimony which could not permissibly be ignored by the simple expedient of declaring it "speculative"--the directed verdict on this alternative claim was clearly erroneous. *See* cases cited in footnote 14, *supra.*[19]

Second, the District Court dismissed our claim that Dr. Chacko was negligent in prescribing an inadequate dosage of Navane on the ground that "no expert testified that the plaintiff more likely than not would have overcome her suicidal tendencies with a different prescription". 522 So.2d at 417. We will concede that no expert testified in those exact words (and we will even concede that our own experts were in disagreement on this issue), but we must insist that one expert did testify to essentially the same thing. Dr. Harold Morgan testified that Dr. Chacko "failed to live up to the required standard of medical practice . . . [H]e did not give her enough medicine to do her any good"; that this deviation, among others, "did cause" Mrs. Paddock's injuries; and that, "if she had been placed in the hospital under close observation, given an adequate dose of medication, there's a very good chance that she would have responded to this" (R. 486-93). There was no objection to any of this testimony. In view of *Wale, Golden Hills,* and *Crornarty,* as

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[19] In an apparent effort to shore up its position on this causation issue, the District Court dismissed one of the expert's opinions out of hand by noting that, "[o]n cross-examination however, when asked to elaborate on this point, the experts [sic] stated that '[a] lot depends on what conclusions he would have come to under these circumstances when viewed in the context of other information that could be available.'" 522 So.2d at 417. Once again, the District Court had to resort to a less then honest reading of the record to relate this testimony to the issue at hand. The so-called "elaboration" which it quoted 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 (R. 429-30). The expert answered simply that he would have been less critical of Dr. Chacko if he had seen his patient in person, but he might still be of the opinion that Dr. Chacko was negligent, depending upon what Dr. Chacko learned in the hypothetical interview which never occurred. 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 this negligence was a *cause* of the plaintiff's injuries. In fact, the defendant did not ask this expert any questions about his opinion on *causation.*

well as the decisions cited in footnote **14,** ***supra,*** Dr. Morgan's opinion was direct evidence, and it should have been considered as prima facie proof on this issue of causation.

Third, the District Court did not even address the sufficiency of the evidence to support our alternative claim that, even if Dr. Chacko's version of the June **24** telephone calls were accepted by the jury, Dr. Chacko was nevertheless negligent in allowing himself to be dissuaded from his initial determination to hospitalize his willing patient by Mr. Burkhart's inexpert lay observations, communicated in a brief telephone call. There was expert opinion testimony supporting each element of a prima facie case of liability on this alternative claim, and it could not simply be ignored. Once again, if ***Wale v. Barnes*** and its progeny are still good law, this aspect of the evidence also requires a conclusion that the directed verdict was erroneous.

Finally, we must also respectfully disagree with the District Court's rejection of our final alternative claim--that even if Dr. Chacko's version of the June **24** telephone calls were accepted as true, Dr. Chacko was still negligent in not utilizing the Baker Act to compel Mrs. Paddock's hospitalization. As we have already explained at length in the subsection of this argument directed to the trial court's order, physicians in Florida owe their patients a legal duty to exercise the standard of care practiced by similar health care providers, the specific details of which are left for proof by expert testimony. The District Court's decision recognizes on its face that, "from a medical standpoint" at least, we presented a prima facie case that Dr. Chacko's failure to utilize the Baker Act was a negligent cause of her injuries. The decision holds nevertheless that, notwithstanding the existence of expert testimony proving both the prevailing 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 decisions collected in footnotes 8, 9 and **14,** ***supra,*** 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 District Court's announced reason for this conclusion--its unwillingness to "decline to force every psychiatrist to navigate between Scylla and Charybdis, in deciding whether or not to involuntarily detain and examine a patient" (522 So.2d at 415)--has a nice ring to it, but the ring is, in our judgment, merely rhetorical. The Baker Act has been legislated by the people of this State to enable psychiatrists to prevent precisely what occurred in this case, and the psychiatric profession routinely utilizes the Act as a part of the treatment required by its own recognized standard of care. To hold that a jury may never find that the Act should have been used, as the District Court did, effectively nullifies both the Act and the prevailing standard of care. In addition, the duties to treat patients with reasonable care and to avoid "malicious prosecution" of them do not represent a monster and a whirlpool. All of us owe multiple duties of care to others in nearly everything that we do--and, until now at least, no court has ever held that the mere possibility of breaching one duty is legal reason for repealing another, where both duties can be comfortably complied with without breaching either. Most respectfully, psychiatrists can easily comply with both duties at the same time, and they clearly should--and we do not think that Homer would have it otherwise. The principle of ***Wale v. Barnes*** and its progeny--that the standard of care depends upon expert medical opinion testimony--represents a far better solution to the problem, and if those decisions are still the law, this aspect of the District Court's decision must also be declared erroneous.

B. THE TRIAL COURT ERRED IN ORDERING A NEW TRIAL ON THE GROUND THAT THERE WAS NO EVIDENCE SUPPORTING THE JURY'S FINDING THAT THE PLAINTIFF WAS NOT A NEGLIGENT CAUSE OF HER INJURIES.

At the close of all the evidence, the plaintiff moved for a directed verdict in her favor on the issue of her comparative negligence; the trial court responded, "You got clearly conflicting testimony on that", and denied the motion (R. 1958). After the jury resolved the conflicting evidence in Mrs. Paddock's favor, the trial court ordered a new trial of the issue on the following ground: "The evidence simply does not support the jury's conclusion that Linda Paddock was not herself negligent". No further explanation was given. We think the trial court was correct the first time, and that it erred in concluding

after trial that there was no evidence supporting the jury's finding.[20]

We remind the Court that there was abundant evidence from several of the experts that Mrs. Paddock was psychotic and mentally incompetent at the time of her suicide attempt; that she was irrational, and that her mind was controlled by delusional thinking; that she was incapable of understanding the consequences of her acts; and that she was unable to exercise any care at all for her own safety. Mrs. Paddock also testified that she was completely unaware that she was attempting to harm herself, and that she thought she was being harmed by others. We think this evidence fully supports the jury's finding that Mrs. Paddock was not a "negligent" cause of her own injuries.

There are two lines of authority which are relevant to the point. First, it is settled in Florida that a person who suffers a physical incapacitation which causes an accident--such as a heart attack, a stroke, a loss of consciousness, or the like--is not "negligent".[21] There is ample expert evidence in the record that Mrs. Paddock's incapacitating mental illness was just as real as an incapacitating physical illness (R. **953, 1000, 1020, 1496, 1624, 1648-49, 1864-69**)--and no good reason suggests itself why the law should be any different where an incapacitating mental illness (caused by a physical, biochemical abnormality) is concerned. We therefore believe the jury was well within its province in finding that Mrs. Paddock was not "negligent" when she injured herself as a result of an incapacitating mental illness.

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[20] The "sufficiency of the evidence" to support a particular finding of fact presents a legal question, not a discretionary determination (which might have been presented had the trial court found the jury's finding to be "against the manifest weight of the evidence"). *See, e. g.*, ***Tibbs v. State,*** **397** So.2d **1120** (Fla. **1981**); ***Rosenfelt*** v. ***Hall,*** **387** So.2d **544** (Fla. 5th DCA **1980**); ***Connell v. DuBose,*** **403** So.2d **436** (Fla. 2nd DCA **1981**), ***review denied,*** 412 So.2d **464** (Fla. **1982**); ***Hope v. Louisville*** & *N. R.* Co., **389** So.2d **675** (Fla. 1st DCA **1980**), ***review denied,*** **397** So.2d **778** (Fla. **1981**). ***Compare Harper v. City of Tampa,*** **374** So.2d **1385** (Fla. 2nd DCA **1979**). It is therefore our position here that the trial court committed reversible error in ordering a new trial on this ground. ***See Sears Roebuck & Co. v. Jackson,*** **433** So.2d **1319** (Fla. **3rd** DCA **1983**). In an abundance of caution, however, we assert alternatively that, if the trial court had any "discretion" in the matter, it abused its discretion.

[21] ***See, e. g., Baker v. Hausman,*** **68** So.2d **572** (Fla. **1953**); ***Gandy v. Outlay,*** **417** So.2d **1134** (Fla. 5th DCA **1982**); ***Tropical Exterminators, Inc. v. Murray,*** **171** So.2d **432** (Fla. 2nd DCA), ***cert. denied,*** **177** So.2d **475** (Fla. **1965**).

LAW OFFICES, PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H BECKHAM, JR
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

Second, it is also settled in Florida that an act which would ordinarily be considered a negligent act, if committed by an intelligent adult, is not necessarily a negligent act if committed by a person who lacks the mental capacity to appreciate its consequences--and that evidence of the diminished mental capacity of a plaintiff therefore creates a jury question on the issue of contributory negligence.[22/] While these cases involve children, their holdings do not turn upon age; their holdings turn upon diminished mental capacity--so there is no good reason why their principle should not also apply to the diminished mental capacity of Mrs. Paddock. Put another way, if a jury could properly find a child who set her blouse on fire while playing with matches to be not contributorily negligent because of diminished mental capacity (in, say, an action against an adult who gave her the matches), then the jury could properly find that Mrs. Paddock was not contributorily negligent because of her diminished mental capacity.

That, at least, is the majority rule in other jurisdictions.[23/] Indeed, the modern rule elsewhere is that, in an action against a health care provider who has a duty to prevent a patient's suicide attempt, the patient's attempt is, as a matter of law, ***not*** contributory negligence--because to submit such an issue to a jury would allow the defendant to escape the very duty upon which his liability rests. ***See Cowan v. Doering,*** **111** N.J. **451, 545** A.2d **159 (1988).** We commend the reasoning of that decision to the Court.[24/]

22/ ***See, e. g., Idzi v. Hobbs,*** **186** So.2d *20* (Fla. **1966);** ***City of Jacksonville v. Stokes,*** 74 So.2d **278** (Fla. **1954);** ***Isenberg v. Ortona Park Recreational Center, Inc.,*** **160** So.2d **132** (Fla. 1st DCA **1964).**

23/ ***See Mochen v. State,*** **43** App. Div.2d **484, 352** N.Y.S.2d **290 (1974);** ***Warner v. Kiowa County Hospital Authority,*** **551** P.2d **1179** (Okl. App. **1976);** Restatement (Second) of Torts, **§464.** ***See generally,*** Annotation, ***incompetent-Contributory Negligence,*** **91** A.L.R.2d **392 (1963)** (and Later Case Service); **65A C.J.S.,** ***Negligence,*** **§§140-41** (and decisions cited therein).

24/ Although the issue has not been squarely addressed by Florida courts, there is a related line of authority which emphatically holds that a plaintiff's suicide attempt cannot be considered a negligent cause of his injuries in an action against someone who has been asked to provide medical treatment or help as a result of the attempt. ***See, e. g., Vendola v. Southern Bell Telephone & Telegraph Co.,*** **474** So.2d **275** (Fla. **4th** DCA **1985),** ***review denied,*** **486** So.2d **597** (Fla. **1986);** ***Whitehead v. Linkous,*** **404 So.2d 377** (Fla. 1st DCA **1981).** Although not squarely on point, these cases certainly provide analogous support for our contention that a jury may permissibly find an insane person not negligent in an action

In short and in sum, there was abundant evidence from which the jury could properly have found that Mrs. Paddock was incapacitated by mental illness and incapable of exercising reasonable care for her own safety, and that she was therefore not contributorily "negligent". The fact that there was evidence to the contrary is simply irrelevant. It was the jury's function to resolve the conflicts--and, as long as there was evidence supporting the jury's finding, the trial court simply had no authority to set it aside and require an entirely new trial on the issue.[25/]

C. THE TRIAL COURT ERRED IN ORDERING A NEW TRIAL ON THE GROUND THAT THE JURY'S DAMAGE AWARD WAS EXCESSIVE BECAUSE UNSUPPORTED BY THE EVIDENCE.

Following closing arguments in which plaintiff's counsel requested an award of **$3,000,000.00** (R. **2032**), and in which defendant's counsel conceded that the plaintiff had suffered "significant injuries" (R. **2050**) and had "significant scars" (R. **2104**) and offered no figure at all for the jury's consideration, and following standard jury instructions on the damage issues (R. **2135-36**), the jury returned a verdict awarding the plaintiff **$2,150,000.00.** Following the verdict, the trial court ordered a new trial of the damage issues on the following ground: "An additional ground for setting aside the jury verdict is that it is excessive. There is not sufficient evidence to support a verdict of that size." No further explanation was given. We think the trial court committed reversible error in concluding that the evidence was insufficient to support the jury's damage award.[26/]

As noted previously, Mrs. Paddock received second and third degree burns over approximately **35%** of her body, and would have died without immediate medical care (R.

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against someone who has been asked to treat a pre-existing medical condition to prevent a second suicide attempt. *See Cowan v. Doering, supra.*

25/ *Harper v.* City *of Tampa,* **374** So.2d **1385** (Fla. 2nd **DCA 1979**). *See Lopez v. Cohen,* **406 So.2d 1253** (Fla. 4th **DCA 1981**); *John Sessa Bulldozing, Inc. v. Papadopoulos,* **485** So.2d **1383** (Fla. 4th **DCA 1986**); *St. Pierre v.* Public *Gas Co.,* **423** So.2d **949** (Fla. 3rd **DCA 1982**).

26/ Once again, the "sufficiency of the evidence" to support a given damage award presents a legal question, not a discretionary determination. *See* decisions cited in fn. **20,** ***supra.*** In an abundance of caution, however, we assert alternatively that, if the trial court had any "discretion" in the matter, it abused its discretion in finding the damage award excessive on the evidence.

1019). Dr. Chacko himself conceded that her burns were "horrible" (R. 1019). Mrs. Paddock spent approximately 10 weeks in the burn unit at Orlando Regional Medical Center, where she underwent four separate surgical operations to implant skin grafts over approximately 30% of her body (R. 782-83 [10019-52], 1274). It is undeniable that she suffered excruciating physical pain and mental anguish throughout that period of time (R. 1273-74). Her medical bills totalled approximately $100,000.00 (R. 2030, 2103; PX. 22). The photographs in evidence (PX. 12-18) reveal what the jury was able to observe personally (R. 1277)--that Mrs. Paddock was horribly scarred by her burns over a substantial portion of her upper body; that she was further scarred at the donor sites for her skin grafts; that her breasts and ears were scarred and deformed; and that her scars have created contractures which limit her motion and cause her persistent pain every day (R. 782-83 [10027-52], 1276). Dr. Chacko's counsel was clearly justified in conceding to the jury that her injuries were "significant" in every respect.

According to the psychiatrist who began treating Mrs. Paddock several months after the June 26 suicide attempt, Mrs. Paddock's burns left her deformed and ugly, feeling horrible and worthless and crying every day, and the burns caused a major depressive disorder which required a subsequent seven-week hospitalization to prevent her from a third suicide attempt (R. 738-50). Because Mrs. Paddock had been an exceptionally beautiful woman before her tragedy (*see* PX. 3), the horrible scarring was particularly difficult for her to handle, and she will probably have a major depressive disorder requiring continuing psychiatric care for the rest of her life (R. 749-52). Absent extensive restorative plastic surgery, her prognosis is poor (R. 751). According to Mrs. Paddock, the scars cause her great emotional pain, and she is so embarrassed by them that she is unable to obtain gainful employment (R. 1278-80).

Because the jury returned only a lump-sum award on a general verdict form (to which the defendant agreed--R. 1975-79), it is impossible to determine exactly how the jury allocated the total damages among the several elements of past and future damage which Mrs. Paddock was entitled to recover. We think it is not unreasonable to assume

that the jury awarded $100,000.00 for the undisputed past medical bills, and perhaps $50,000.00 for the needed future psychiatric care to which her treating psychiatrist testified. Of the remaining $2,000,000.00, we think the evidence of Mrs. Paddock's horrible burns over 35% of her body, 10 weeks of hospitalization, four skin graft surgeries, and the undeniable physical pain and mental anguish suffered during that period easily supports a past damage award of several hundred thousand dollars--say $500,000.00--which leaves the sum of $1,500,000.00 to compensate Mrs. Paddock for the remaining 44.6 years of her future life expectancy (R. 1392).

That amounts to an award of approximately $33,630.00 per year, or approximately $92.00 per day to compensate her in the future. When that $92.00 per day is divided among the six elements of intangible damage which Mrs. Paddock was entitled to recover--bodily injury, pain and suffering, disability, disfigurement, mental anguish, and loss of capacity for the enjoyment of life--the award represents approximately **$15.00** per day for each element of damage.[27/] The verdict in this case was not nominal, to be sure, but these figures clearly demonstrate that it was not so "excessive" that it could properly be vetoed by the trial court in two conclusory sentences, without any explanation.

In the final analysis, of course, the question of whether a verdict is "excessive" does not readily lend itself to mathematical calculation, and the question has therefore always been a troublesome one. In 1972, this Court held that the measurement of intangible damages could not be reduced to a formula, and that it belonged to the "*sound* discretion" of the jury. *Seaboard Coast Line Railroad Co. v. McKelvey,* 270 So.2d 705, 706 (Fla. 1972). This principle was elaborated upon in *Bould v. Touchette,* 349 So.2d 1181, 1184-85 (Fla. 1977) (emphasis supplied), which is controlling here:

27/ To the anticipated criticism of the defendant that our proposed allocation involves some speculation, we note simply that it would have been unnecessary for us to propose any arithmetic at all if the trial court had offered us some explanation of why it found the verdict "excessive". In the absence of any explanation at all, we have no choice but to propose what we consider to be a reasonable version of what the verdict represents, and we invite the defendant to do a better job of it if he can. We also remind the Court that the jury could have reasoned precisely as we have, and the evidence must be viewed in a light most favorable to the verdict.

> Where recovery is sought for a personal tort.. . we cannot apply fixed rules to a given set of facts and say that a verdict is for more than would be allowable under a correct computation. In tort cases, damages are to be measured by the jury's discretion. The court should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed. The verdict should not be disturbed unless it is so ***inordinately*** large as ***obviously*** to exceed the ***maximum*** limit of a ***reasonable*** range within which the jury may properly operate.

The emphasized words in this passage were obviously purposefully chosen, and they are just as obviously meant to prohibit a trial court from vetoing a jury's verdict--except where a jury has committed an obvious and extraordinary abuse of discretion.

The problem next confronted this Court in ***Wackenhut Corp. v. Canty,*** 359 So.2d 430 (Fla. 1978), in which it added that "[i]n its movement toward constancy of principle, the law must permit a reasonable latitude for inconstancy of result in the performance of juries"--and that a verdict cannot be declared excessive by speculating upon matters which may have influenced it, but only if the record "affirmatively show[s] the impropriety of the verdict". 359 So.2d at 430, 435. The combination of ***McKelvey, Bould,*** and ***Wackenhut*** has clearly placed a great deal of discretion within the jury's domain, and severely limited the ability of a trial court or an appellate court to interfere with that discretion. The result has been, as this Court is well aware, that very few recent jury awards have been found excessive as a matter of law.[28]

This Court's most recent foray into this field fully confirms its past pronouncements--and, in our judgment, simply compels a reversal of the new trial order in issue

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28/ ***See, e. g., St. Mary's Hospital, Inc. v. Sanchioni,*** 511 So.2d 617 (Fla. 4th DCA 1987) (upholding $5,200,000.00 award to brain damaged child); ***Walt Disney World*** Co. ***v. Goode,*** 501 So.2d 622 (Fla. 5th DCA 1986), ***review dismissed,*** 520 So.2d 270 (Fla. 1988) (upholding $2,000,000.00 pain and suffering award to parents in action for wrongful death of child); ***Good Samaritan Hospital Association, Inc. v. Saylor,*** 495 So.2d 782 (Fla. 4th DCA 1986) (upholding $4,000,000.00 wrongful death award); ***City of Tamarac v. Garchar,*** 398 So.2d 889 (Fla. 4th DCA 1981) (upholding $6,000,000.00 award for quadriplegia); ***Connell v. DuBose,*** 403 So.2d 436 (Fla. 2nd DCA 1981), ***review denied,*** 412 So.2d 464 (Fla. 1982) (reversing new trial order finding $2,000,000.00 excessive for brain-damaged child); ***Stresscon International, Inc. v. Helms,*** 390 So.2d 139 (Fla. 3rd DCA 1980) (upholding $2,100,000.00 wrongful death award); ***Talcott v. Holl,*** 224 So.2d 420 (Fla. 3rd DCA), ***cert. denied, 232*** So.2d 181 (Fla. 1969) (upholding $1,500,000.00 award [in 1969 dollars] for brain-damaged woman).

here. In ***Ashcroft v. Calder Race Course, Inc.***, 492 So.2d 1309 (Fla. 1986), a jury had awarded a quadriplegic $10,000,000.00. The trial court ordered a remittitur of half the award on the ground that $5,000,000.00 would be "adequate compensation". Beyond that, the order contained "no reasons . . . to support the notion that the verdict was against the manifest weight of the evidence or that the jury was influenced by matters outside the record". 492 So.2d at 1313. "Instead, the judge appears to have simply reached different conclusions than the jury on whether [plaintiff, who the jury found was not negligent] was negligent and on the amount of damages to be awarded." Id. at 1313-14. That description of the new trial order in ***Ashcroft*** fits the new trial order at issue here like a glove. Thereafter, this Court quoted the paragraph from ***Bould v. Touchette, supra,*** which we quoted above, and ordered reinstatement of the verdict.

Mrs. Paddock is not quadriplegic, to be sure, but neither did the jury award her $10,000,000.00. It awarded her only approximately $2,000,000.00 for her excruciating pain, horrible permanent scarring over nearly half her body, and a lifelong major depressive illness--which, while it does not equate to quadriplegia, is certainly no less crippling an injury from Mrs. Paddock's perspective. The jury's award in this case was clearly not "so ***inordinately*** large as ***obviously*** to exceed the ***maximum*** limit of a ***reasonable*** range" on the evidence in this case--and we respectfully submit that the trial court's two-sentence, unexplained declaration of "excessiveness" deserves the same summary reversal which the trial court's unexplained remittitur order received in ***Ashcroft.***

D. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A NEW TRIAL ON THE GROUND THAT THE JURY WAS IMPROPERLY INFLUENCED TO THE PREJUDICE OF THE DEFENDANT BY A NOTE LEFT ON THE FOREMAN'S WINDSHIELD BY THE ALTERNATE JUROR.

1. The procedural and factual background.

Prior to trial, plaintiff's counsel moved in limine to prevent the introduction of evidence that Mrs. Paddock had received a $100,000.00 settlement from her parents on a claim made against them under their homeowner's policy (R. 2591-92). Defendant's counsel responded that the details of the settlement might become admissible in certain cir-

cumstances, and that he should be able to prove at least that a claim had been made against Mrs. Paddock's parents, because that would tend to prove that someone other than Dr. Chacko was the cause of Mrs. Paddock's injuries (R. 2592-2605). Based on this Court's recent observation in *Ed Ricke & Sons, Inc. v. Green*, 468 So.2d 908 (Fla. 1985), that such evidence and argument is improper and highly prejudicial to a settling plaintiff, the trial court granted the motion in limine (R. 2600-05).

During the course of the trial, plaintiff's counsel placed Mrs. Paddock's entire hospital record into evidence, without objection by the defendant (R. 772). After the plaintiff rested, plaintiff's counsel advised the trial court that the nurses' notes in the hospital chart contained several references to the claim against Mrs. Paddock's parents, and asked for leave to delete the references in accordance with the ruling on the motion in limine (R. 1443). Defendant's counsel objected, insisting that the plaintiff put the notes into evidence, and that she should therefore be stuck with them at this point (R. 1443). The trial court allowed the deletion (R. 1443).

After closing arguments, the alternate juror was discharged and the jury deliberated for an entire day without announcing a verdict (R. 2143-48). The next morning, before the jury reassembled, the foreman of the jury gave the trial court a note advising the court that the alternate juror had left a note on his windshield the night before, which read: "I hope you did not give her anything. They sued her parents a couple of months ago and got $100,000.00. Call me." (R. 2152). The foreman's note also advised the trial court that the liability questions on the verdict form had already been answered by the jury before he received the note (R. 2152). Notwithstanding that defendant's counsel had previously wanted the fact of the settlement to be brought to the jury's attention, and obviously only because the foreman had disclosed that a verdict had been reached adverse to the defendant, defendant's counsel moved for a mistrial (R. 2152).

The trial court then interviewed the foreman, who stated that he had disclosed the note to no one, that the note made no difference to him, and that the note would not affect his deliberations in any way (R. 2153-55). Defendant's counsel renewed the motion

for mistrial, but the trial court observed that it was he who had wanted the settlement in evidence, and that it was he who had argued that Mrs. Paddock's injuries were her parents' fault--and that the alternate juror's note could only prejudice Mrs. Paddock, not Dr. Chacko (R. **2156-60).** Defendant's counsel then proposed that the entire jury be told about the settlement, to which the trial court responded, "Aha. So here we have the real desire" (R. **2160).** The trial court thereafter denied both the request that the jury be advised of the settlement and the motion for mistrial (R. **2161).** The jurors were then called into the courtroom and questioned as to whether anyone had received "any undue communications with you about this case" (R. **2162-64).** When all of the jurors responded in the negative, the trial court sent the jury out to resume its deliberations (R. **2164).**

Later that day, the jury announced that it had reached a verdict (R. **2188).** Before the verdict was read, the trial court asked the foreman if his experience that morning had played any part in the discussions with the jury, and if he had advised any of the jurors of the note--to which the foreman replied in the negative (R. **2188).** The trial court then asked the remaining jurors if any of them had any problems with the case, or if anything unusual or untoward had happened during their deliberations--and each juror responded in the negative (R. **2188-89).** The verdict was thereafter read, the jury was polled, and every juror indicated assent to the verdict (R. **2190-91).**

Thereafter, with all six jurors present, the foreman once again reaffirmed that the jury had already resolved the issues of Dr. Chacko's negligence and Mrs. Paddock's comparative negligence before he received the note; that the note had not been discussed with anyone during the jury's deliberations; and that the note had been disclosed to the jury only after it had announced to the bailiff that a verdict had been reached, and immediately before the verdict was read in open court (R. **2192-94).** Each juror then affirmed to the trial court that the foreman's recitation of the facts was correct (R. **2194-95).** The jury was thereafter discharged (R. **2195-97).** At that point in the proceeding at least, we think it was obvious to everyone concerned that the irregularity had been properly handled, that it had had no effect whatsoever upon the jury's deliberations, and that the defendant had

not been prejudiced in the slightest by the note.[29]

Although, in our judgment, the matter should have ended there, the trial court authorized a post-trial interview of the jurors on the subject (and numerous other subjects which have become irrelevant here by their purposeful exclusion from the new trial order). The jury interview generally confirmed everything which had already been stated in open court--including the fact that the alternate's note had not been disclosed to anyone before the final verdict was reached. The interview added one or two things, however, which the trial court apparently found significant enough to require a new trial. According to some of the jurors, after the foreman had had a discussion with the trial court on the morning of their second day of deliberations, the foreman returned to the jury room and told him that he could not tell them what the discussion had been about, but that they would all feel better when they found out (R. **10547-51).** None of the jurors had any idea what this comment meant, however (Id.).

Secondly, in response to some horrendously leading questions from defendant's counsel, one of the jurors initially stated that she had wanted to reopen the deliberations on the issue of the defendant's liability, but that someone had "refused" (R. **10525).** The matter was later clarified as follows: two of the female jurors were apparently confused on the issue of Mrs. Paddock's comparative negligence, and suggested that the deliberations be reopened on that issue so that they could reexplore the evidence with which the defendant had attempted to tarnish Mrs. Paddock's character--but the two male jurors insisted that that evidence had nothing to do with the two issues they had decided the day

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29/ The record does not pin down who disclosed the details of the settlement to the alternate juror. The record does reflect that only two persons discussed the subject with her, however--a bailiff and defendant's counsel (R. **2182-84).** The bailiff stated at trial and testified under oath in a post-trial deposition that he had told the alternate that Mrs. Paddock had received a settlement on a claim against her parents, but denied telling her of the amount of the settlement (R. **2182-84, 9633-34).** Defendant's counsel, who had spoken with the alternate after the bailiff, as the alternate was leaving the courthouse for the evening, stated on the record that "the defense" did not tell the alternate the details of the settlement (R. **2182).** The alternate invoked the Fifth Amendment, and refused to discuss the matter post-trial (R. **9663-68).** There is no evidence anywhere linking the plaintiff or her counsel to the untoward event.

LAW OFFICES, PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN, P.A.- OF COUNSEL, WALTER H. BECKHAM, JR
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

before; that they did not want to go over that issue again; and that they wanted to finish their job by arriving at a complete verdict (R. **10491-96, 10525-34).** Only two of the jurors wanted to reopen deliberations on the issue, however; the remaining female jurors joined the two male jurors, and the other two women therefore apparently acquiesced and joined in the deliberations on the damage issues (R. **10491-96, 10534-35).**

There are some conflicts in the jurors' recollections of these things, but we think that represents a fair synopsis of the jury interview, taken in a light most favorable to the defendant here. We think it is important for the Court to note that the two women who wanted to reopen the prior day's conclusions conceded their acquiescence in the majority's vote to move on, and neither of them withdrew the assent to the verdict which they had previously announced in open court. It is also important for the Court to note that, after the interview, the trial court stated on the record several times that it did not see how the alternate's note could have prejudiced the defendant in any way (R. **10664-71).**

It was against this background that the trial court ordered a new trial, explaining:

> First of all, there is the note left on the windshield of the foreman, Mr. Hardin. It is evident that this note affected Mr. Hardin during deliberations. The note contained clearly inadmissible evidence, and it probably affected the course of deliberations of other jurors because Mr. Hardin was the foreman and did not want to revisit the issue of the defendant's liability when deliberations were resumed on the last day of trial. It is the unavoidable conclusion from this evidence that Mr. Hardin's attitude at that point, which was unquestionably well-intended, significantly affected the jury in its deliberations. From Mr. Hardin's remarks it is clear he construed the note as favoring plaintiff. I think this irregularity alone is sufficient to justify a new trial.

It will be our position in the argument which follows (among other things) that this conclusion has no support in the record (which we have fairly summarized above)--indeed, that it tortures the record beyond recognition in order to construct a basis for a new trial which does not otherwise exist--and that it is therefore an abuse of discretion.

2. The trial court's abuse of discretion.

The alternate juror's note was clearly improper, and we have no quarrel with the trial court's conclusion to that effect. By itself, however, the mere existence of the note provided no basis for setting aside the verdict in this case. Before the note could provide

any basis for requiring a retrial, it was clearly necessary for the defendant to demonstrate with competent proof that the note improperly influenced the jury in a manner prejudicial to him.[30] Both the defendant and the trial court recognized this settled principle below, so we merely advance it as legal background here.

The record clearly demonstrates that the alternate juror's note had no ***direct*** influence upon the jury. It is undisputed on the record that the jury had already resolved the two liability issues before the foreman received the note. It is also undisputed that five of the jurors knew nothing about the note until after their complete verdict was announced. It is also undisputed that the foreman assured the trial court immediately after he received the note that he would not be influenced by it, and that he assured the court after trial that he was not influenced by it in any way. The trial court was required by the decisions cited in footnote 30, ***supra,*** to accept the foreman's word on that point. If there were no other reason in the record for setting aside the jury's verdict, it would clearly have been improper to order a new trial on this undisputed evidence--as the trial court itself implicitly recognized in its new trial order.

The trial court purported to find another reason in the record, however, which it expressed in three interdependent parts. It concluded (1) that the foreman "construed the note as favoring plaintiff"; (2) that the note "affected [the foreman] during deliberations"; and (3) that the note therefore indirectly affected the other jurors during the deliberations because the foreman "did not want to revisit the issue of the defendant's liability when deliberations were resumed on the last day of trial". These three findings provide the only rationale for the trial court's conclusion that the verdict was impermissibly tainted by the alternate's note, and because each is constructed on and dependent upon the one that precedes it, if any of the three findings are unsupported by the record or legally impermis-

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30/ ***See First National Bank in Tarpon Springs*** v. ***Bliss,*** **56** So.2d **922** (Fla. **1952**); ***South*** v. ***Palm Bay Club, Inc.,*** **486** So.2d 31 (Fla. 3rd **DCA 1986**); ***Concord Shopping Center, Inc.*** v. ***Bookbinder,*** **227** So.2d **888** (Fla. 3rd **DCA 1969**); ***Ace Cab Co.*** v. ***Garcia,*** **140** So.2d 338 (Fla. 3rd **DCA**), ***cert. denied,*** **146** So.2d 375 (Fla. **1962**). ***Cf. Anderson*** v. *Watson,* **504** So.2d 32 (Fla. 2nd **DCA 1987**).

sible, the conclusion bottomed upon them falls for lack of support. We believe that the first finding is unsupported by the record and defies common sense; that the second finding is flatly contradicted by the record; and that the third finding is both unsupported by the record and a legally impermissible finding based upon an inquiry of the jury which was prohibited by law. We will explain each of these positions in turn.

a. First, the trial court apparently concluded that "it is clear [the foreman] construed the note as favoring plaintiff" because of his comment to the other jurors that they would feel better when they found out about it. In our judgment, the foreman's comment is far from "clear" on the point. In the absence of any knowledge as to what had been discussed by the jurors the day before, the comment is enigmatic in the extreme--and just as susceptible of a construction which would have been entirely neutral to the parties. For example, it is entirely possible that the jury had decided that Mrs. Paddock's parents were also guilty of negligence, and that they had expressed some frustration that they could not return such a finding in their verdict. If this were the case, knowledge that the parents had paid a share of the damages would certainly make the jury "feel better" once it were disclosed. We therefore think the trial court may well have attributed a perception to the foreman which simply did not exist, and that the foreman's comment therefore provides an entirely insufficient basis for ordering a completely new trial.[31/]

We also think the trial court's conclusion concerning the impact of the note upon the foreman defies common sense. There is a long line of authority in this State which holds that the fact of a settlement with a non-party is inadmissible because it prejudices the settling party--which in this case was the *plaintiff,* not the defendant.[32/] The alternate's

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31/ *See Washington v. Cooper,* 416 So.2d 1265, 1266 (Fla. 5th DCA 1982) (improper to order new trial for improper comment of bailiff where comment "was not disproportionally harmful to either party and there was no showing made that it was harmful in fact to either party").

32/ *See, e. g., Ed Ricke & Sons, Inc. v. Green,* 468 So.2d 908 (Fla. 1985); *City of Coral Gables v. Jordan,* 186 So.2d 60 (Fla. 3rd DCA), *aff'd,* 191 So.2d 38 (Fla. 1966); *Henry v. Beacon Ambulance Service, Inc.,* 424 So.2d 914 (Fla. 4th DCA 1982), *review denied,* 436 So.2d 97 (Fla. 1983); *Taylor Imported Motors, Inc. v. Armstrong,* 391 So.2d 786 (Fla. 4th DCA 1980). *Cf. Webb v. Priest,* 413 So.2d 43 (Fla. 3rd DCA 1982).

note, after all, implored the jury not to award the plaintiff anything because of the settlement with her parents--a request which no reasonable person could properly find prejudicial to the ***defendant.*** Indeed, that is precisely what the defendant would have argued to the jury if he had succeeded in getting the fact of the settlement before the jury, as he attempted on three separate occasions during the trial. The trial court recognized on each of those three occasions that the evidence would prejudice the *plaintiff*, and prohibited its introduction for that reason. In light of the defendant's consistent position during trial, we respectfully suggest that his post-hoc flip-flop and claim of prejudice--which was made for the first time only upon learning that the jury had decided the liability issue against him--was feigned. We also submit that the trial court's post-trial findings that the note prejudiced the defendant (which was itself a flip-flop from what it had announced on the record after the jury interview), and that the foreman construed the note in that fashion, are equally contrived.

b. Second, the trial court found that "it is evident that [the] note affected [the foreman] during deliberations". That finding is also contrived, because there is no evidence in the record which would make such a conclusion "evident" to anyone. In fact, the evidence in the record is exactly to the contrary, since the foreman stated several times that the note would not and did not affect his deliberations in any way. The finding also ignores the fact that the foreman--indeed, the entire jury--had already decided the liability issues before the foreman ever saw the note. The trial court's second finding has therefore simply been invented from thin air.

c. Third, the trial court found that the other jurors were indirectly influenced by the note because the foreman "did not want to revisit the issue of the defendant's liability when deliberations were resumed on the last day of trial". We have three separate problems with this critical--indeed, pivotal--finding. In the first place, as we read the jury interviews, it was the plaintiff's comparative negligence which the two jurors wanted to revisit, not the issue of the defendant's liability. Second, the record does not support a conclusion that the note itself provided any reason for the foreman's desire not to reopen

LAW OFFICES. PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN, P.A. · OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET · SUITE 800, MIAMI, FLORIDA 33130-1780

the deliberations. The record reflects, at most, that the foreman simply wanted to get on with the business at hand and decide the only issue left to decide.

More importantly, the record reflects that only two of the jurors wanted to review what the jury had unanimously decided the day before, and that all four of the remaining jurors--not merely the foreman--did not want to go back over the already thoroughly plowed ground. And just as importantly, the two jurors who suggested redeliberation clearly made no issue of the majority's determination (which each could have done simply by withdrawing her assent), but actually acquiesced in it--and then assented to the verdict upon being polled in open court. On those facts, we respectfully submit that no reasonable person could properly conclude that the foreman's mere knowledge of the note prevented any of the jurors from voting their consciences on any issue in the case.

The third problem we have with the trial court's pivotal third finding is that it depends in its entirety upon evidence obtained in a legally impermissible inquiry. Although we think the jury interview was unnecessary in view of the inquiries previously made at trial, we have no quarrel with it to the extent that it was designed to ascertain who knew about the note, when anyone learned of it, whether it was ever discussed, and the like. The irregularity represented by the note itself was clearly a matter which was "extrinsic" to the jury's deliberations, and therefore a permissible scope of inquiry. However, it was not permissible for the trial court to allow inquiry into the nature of the deliberations themselves--as it did when it allowed the defendant to develop evidence of the two jurors' request that the deliberations be reopened, the reasons for the request, the discussion which occurred, the reasons why the remaining jurors stuck to their guns, the reasons why the requesting jurors went along with the majority, and the like. These were clearly matters which the law labels as "intrinsic"--and into which the law just as clearly prohibits inquiry in order to impeach a verdict to which all have assented in open court. The leading decision is ***Marks v. State Road Department,*** **69** So.2d 771 (Fla. 1954), to which the Court is referred in lieu of extended argument. There are numerous additional decisions which

make the same ***thoroughly*** settled point.[33]

When a trial court orders a new trial based upon information obtained from an impermissible inquiry into a matter "intrinsic" to a jury's deliberations and verdict, the remedy is to disregard the information and reverse the new trial order for lack of support. ***Dover Corp. v. Dean,*** **473** So.2d **710, 712** (Fla. 4th **DCA),** ***review denied,*** **475** So.2d **693** (Fla. **1985)** ("Lucking up on a good ground" during an impermissible jury interview cannot support a new trial order). ***Accord, Kirkland v. Robbins,*** **385** So.2d **694** (Fla. 5th **DCA 1980),** ***review denied,*** **397** So.2d **779** (Fla. **1981).** Since the new trial order in issue here similarly rests upon a legally impermissible inquiry into the deliberative process of the jury, it too should be reversed.

We recognize that a trial court has "discretion" in determining whether an irregularity in a trial justifies a new trial, and we would not have the rule otherwise. Discretion may not be exercised fancifully or arbitrarily, however; it must be bottomed upon and supported by the record of the proceedings, and exercised within the constraints of the law. ***See Wackenhut Corp. v. Canty,*** **359** So.2d **430** (Fla. **1978). As** a result, appellate courts retain the right--indeed, they have the ***obligation*** in view of the constitutional right to a jury trial--to reverse new trial orders where the reasons given in them are legally invalid or are unsupported by the record.[34] Most respectfully, it is this Court's function to ensure that the trial courts which it supervises toe the line when entertaining demands that a jury's verdict be set aside--by exercising their discretion within the constraints of

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33/ *E. g.,* ***Mitchell v. State,*** **527** So.2d **179** (Fla. **1988);** ***Kirkland*** v. ***Robbins,*** **385** So.2d **694** (Fla. 5th **DCA 1980),** ***review denied,*** **397** So.2d **779** (Fla. **1981);** ***Dover Corp. v. Dean,*** **473** So.2d **710** (Fla. **4th DCA),** ***review denied,*** **475** So.2d **693** (Fla. **1985);** ***Fitzell v. Rama Industries, Inc.,*** **416** So.2d **1246** (Fla. 4th **DCA 1982);** ***Cummings*** v. ***Sine,*** **404** So.2d **147** (Fla. 2nd **DCA 1981);** ***National Indemnity Co.*** v. ***Andrews,*** **354** So.2d **454** (Fla. 2nd **DCA),** ***cert. denied,*** **359** So.2d **210** (Fla. **1978);** ***Velsor v. Allstate Insurance Co.,*** **329** So.2d **391** (Fla. 2nd **DCA),** ***cert. dismissed,*** **336** So.2d **1179** (Fla. **1976).**

34/ ***See, e. g., Ashcroft v. Calder Race Course, Inc.,*** **492** So.2d **1309** (Fla. **1986);** ***Walt Disney World Co. v. Althouse,*** **427** So.2d **1135** (Fla. 5th **DCA 1983);** ***Cox v. Shelley Tractor & Equipment, Inc.,*** **495** So.2d **841** (Fla. 3rd **DCA 1986);** ***Eley* v.** *Moris,* **478** So.2d **1100** (Fla. **3rd DCA 1985);** ***Lopez* v. *Cohen,*** **406** So.2d **1253** (Fla. 4th **DCA 1981);** ***International Insurance Co. v. Ballon,*** **403** So.2d **1071** (Fla. 4th **DCA 1981),** ***review denied,*** **412** So.2d **463** (Fla. **1982).**

the law and basing their rulings upon the record of the proceedings. For all of the foregoing reasons, the aspect of the new trial order under discussion here steps well beyond that line, and we respectfully submit that it should be reversed.

E. THE TRIAL COURT ERRED (OR ABUSED ITS DISCRETION) IN ORDERING A NEW TRIAL ON THE GROUND THAT TWO LETTERS IN THE PLAINTIFF'S HOSPITAL CHART WERE IMPERMISSIBLY SENT TO THE JURY ROOM.

Mrs. Paddock's entire hospital chart was initially admitted into evidence, without objection by the defendant (R. 772). The chart contained approximately 630 pages (R. 2172). Later, the defendant claimed that the chart contained a number of inadmissible matters and requested leave to remove about 50 pages from the exhibit; plaintiff's counsel indicated his willingness to allow the defendant to clean up the exhibit in any manner he wished, and the specifics were deferred for later resolution (R. 1688-93). The matter was discussed again at the time the defendant rested his case; the defendant objected on the record to several specific items in the chart, and the trial court ruled upon the objections (R. 1939-42). At no time did the defendant ever object, on the record at least, to inclusion of Mrs. Paddock's husband's letters of October 27 and 28, 1983. Therefore, so far as the record reflects, those letters were in evidence without objection. The remainder of the defendant's objections were left to counsel to work out off the record. Counsel were also given an opportunity to go through all the exhibits and ensure their correctness before the exhibits were delivered to the jury room (R. 2168, 2173-74).

The cleaned-up version of the chart was thereafter delivered to the jury, which deliberated an entire day without announcing a verdict. The next morning, as we have discussed at length in the prior issue on appeal, the foreman advised the trial court of the alternate juror's note, and the fact that the jury had decided the liability issues. It was at this point--after defendant's counsel learned that the liability issue had been decided against him, and after the trial court had denied his motion for mistrial predicated upon the alternate's note--that he requested leave to examine the exhibits (R. 2161-62). After a lengthy delay, defendant's counsel announced that the 630-page hospital chart contained two of Mr. Paddock's letters which were supposed to have been removed (R. 2164, 2172-

73). Plaintiff's counsel stated that he had no recollection of whether defendant's counsel had previously sought removal of the letters, but that the defendant could withdraw them from the exhibit at this time if he wished (R. 2180-81). The two letters were removed from the chart (R. 2181), and the chart was later given to the jury with an explanation that some correspondence had been removed from it (R. 2186-87).

Following trial, the trial court ordered a new trial on the following ground:

> Secondly, letters of the plaintiff's husband, Bill Paddock, dated October 27 and 28, 1983, were delivered to the jury during deliberations. They were not in evidence, and they were clearly inadmissible and prejudicial to defendant. To some extent these letters discussed the mental condition of plaintiff, and also the financial plight of the Paddocks.

We believe this ruling was legally erroneous. It was erroneous because the ***record*** reflects that the two letters were initially admitted into evidence as part of the hospital chart ***without objection,*** and the record nowhere reflects that the defendant ever objected thereafter to inclusion of the two letters in the exhibit. If any objection were ever made to the letters, it clearly occurred off the record--and, of course, the trial court never ruled upon it. In short, the record squarely refutes the trial court's essential conclusion that the letters "were not in evidence".[35] And because new trial orders which have no support in the record must be reversed as a matter of law, this aspect of the new trial order simply cannot survive scrutiny here.

Just as importantly, the record is undisputed that defendant's counsel had the opportunity to examine the exhibits for completeness and accuracy before they were sent to the jury room, and that he availed himself of that opportunity. The purpose of providing that opportunity, of course, was to prevent precisely what occurred. It seems to us to be a simple matter of common sense that any objection to the form of the exhibits had to be made at that time, or waived--and that defendant's counsel could not store up his objec-

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35/ We do not contend that the letters were "admissible" over a proper objection; we conceded on the record post-trial that the letters could have been properly excluded if the defendant had requested their exclusion. Our point here is that the record contains no objection to admission of the letters, and that they were therefore in evidence even though they could properly have been excluded.

tions for a rainy day, so to speak, and advance them for the first time only after he learned that the jury had found the defendant negligent. That, however, is precisely what the trial court allowed him to do--and that, just as clearly, was legally erroneous. *See Walt Disney World* Co. *v. Althouse,* 427 So.2d 1135, 1136 (Fla. 5th DCA 1983).[36]

Alternatively, even if the new trial order were not legally erroneous, it would still be a clear abuse of discretion, because no reasonable person could properly have concluded that the letters unfairly prejudiced the defendant. Copies of the letters are included in the appendix (A. 37), and (although we suggest that it is improbable that the jury even discovered them in the 630-page exhibit) we invite the Court to read them. The letters contain only two things which could have had any even arguable bearing upon resolution of the issues in the case--Mrs. Paddock's post-June 26 depression and suicidal ideation, and the Paddocks' financial problems--and these are the only two things which the trial court's order identifies as prejudicial to the defendant. It is simply impossible that these two things prejudiced the defendant, however, because both things were proven over and over again by other evidence and were simply not in dispute.[37] The law is thoroughly settled

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36/ *See,* in addition, *Papcun v. Piggy Bag Discount Souvenirs, Food & Gas Corp.,* 472 So.2d *880* (Fla. 5th DCA 1985); *Murray-Ohio Mfg.* Co. *v. Patterson,* 385 So.2d 1035 (Fla. 5th DCA 1980); *Sears Roebuck & Co. v. Jackson,* 433 So.2d 1319 (Fla. 3rd DCA 1983); *Honda Motor* Co., *Ltd. v. Marcus,* 440 So.2d 373 (Fla. 3rd DCA 1983), *review dismissed,* 447 So.2d 886 (Fla. 1984); *Wasden v. Seaboard Coast Line Railroad* Co., 474 So.2d 825 (Fla. 2nd DCA 1985), *review denied,* 484 So.2d 9 (Fla. 1986); *Nelson v. Reliance Insurance* Co., 368 So.2d 361 (Fla. 4th DCA 1978).

37/ As we noted in our brief recitation of the facts on the damage issues, Mrs. Paddock's current treating psychiatrist testified without dispute that she had developed a major depressive disorder from her burns, and that she had to be hospitalized because of her suicidal ideation (R. 735-52). A psychologist who had examined Mrs. Paddock also testified to her post-June 26 depression, testifying that she was more depressed because of her pain and burns then 99% of the women in the United States (R. 1216-17 [8317-58]). Mrs. Paddock's post-June 26 depression and suicidal ideation is also reflected over and over again in other pages of the hospital chart to which the defendant did not object. And, of course, there is the fact that Dr. Chacko himself treated Mrs. Paddock for her post-June 26 depression for 23 days, until he was discharged (R. 994-1011, 1708-09). The Paddocks' financial problems were also in evidence numerous times--and the evidence was placed there by the defendant himself (for the apparent purpose of convincing the jury that this was one of the reasons she had attempted suicide) (R. 289, 549, 765, 807, 1297, 1805-12 [5516]). Having placed this evidence in the record himself over and over again, the defendant is clearly in no position to complain that he was prejudiced by the fact that it went to the jury one more time.

that the erroneous admission of inadmissible evidence must be deemed harmless, when essentially the same evidence is in the record without objection elsewhere.[38] Most respectfully, the trial court committed legal error (or clearly abused its discretion) in bottoming its new trial order on this additionally contrived ground.

F. THE TRIAL COURT ERRED (OR ABUSED ITS DISCRETION) IN ORDERING A NEW TRIAL ON THE GROUND THAT ONE PAGE OF NURSES' NOTES WAS NOT INITIALLY SENT TO THE JURY ROOM.

If we are to comply with Rule 9.210's requirement that this 10,700+-page record, and all of our arguments on the six issues which simply have to be briefed here, be squeezed into no more than 50 pages, there is simply no space available to argue this final issue at an appropriate length. The issue does not really need to be argued in any event, because the trial court's brief conclusion that "the exclusion of page 374 of the nurse's [sic] notes is not all that important by itself, but it is a factor in light of the other problems" states on its face that it is a mere throwaway. If we have prevailed on our prior issues on appeal, then the Court can simply take the trial court at its word, and declare that the exclusion of page 374 of the nurses' notes, by itself, is insufficient to require an entirely new trial.

We do not wish to leave the Court entirely in the dark, of course, so we have included page 374 of the nurses' notes in the appendix (A. 40). Since it is unreadable, we have also included a typewritten translation of it in the appendix, which we invite the Court to read (A. 41). Since there is absolutely nothing on this illegible page of nurses' notes which even arguably bears on any of the disputed issues in the case, and since everything on the page is in evidence over and over again elsewhere, it will be perfectly obvious to the Court that this final throwaway ground for setting aside the jury's verdict is simply a makeweight. For good measure, we have also included in the appendix the short argu-

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[38] *See, e. g., Nodzak v. Brinson,* 490 So.2d 1310 (Fla. 4th DCA), *review denied,* 501 So.2d 1283 (Fla. 1986); *Quinn v. Millard,* 358 So.2d 1378 (Fla. 3rd DCA 1978); *National Car Rental System, Inc. v. Holland,* 269 So.2d 407 (Fla. 4th DCA 1972), *cert. denied,* 273 So.2d 768 (Fla. 1973); *Delta Rent-A-Car, Inc. v. Rihl,* 218 So.2d 469 (Fla. 4th DCA), *cert. denied,* 225 So.2d 535 (Fla. 1969); *Seaboard Coast Line Railroad Co. v. Hill,* 250 So.2d 311 (Fla. 4th DCA 1971), *cert. discharged,* 270 So.2d 359 (Fla. 1973); *Myers v. Korbly,* 103 So.2d 215 (Fla. 2nd DCA 1958).

ment which we made on this issue in our brief in the District Court, in which we demonstrate that the so-called "exclusion of page 374" never happened, because page 374 was never offered into evidence in the first place (A. 42). If the Court has any doubt at all on this final issue, we refer it to that argument. We will elaborate, if necessary, in our reply brief.

VI. CONCLUSION

It is respectfully submitted that the District Court erred in affirming the defendant's final judgment. It is also respectfully submitted that the trial court committed reversible error, or abused its discretion, in alternatively ordering a new trial on all issues. The District Court's decision should be quashed, and the case remanded to it with directions to reverse the "Final Judgment and Alternative Orders on Motions for New Trial", and to order the entry of judgment upon the verdict--with interest from the date of the verdict, as Rule 9.340(c), Fla. R. App. P. requires.[39]

VII. CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 3rd day of October, 1988, to: Harry K. Anderson, Esq., One South Orange Avenue, Suite 650, Orlando, Florida 32801 and to E. Clay Parker, Esq., Parker, Johnson, Owen, McGuire & Michaud, 108 East Hillcrest Street, Orlando, Fla. 32802.

Respectfully submitted,

NEAL PITTS, ESQ.
Post Office Box 512
Orlando, Fla. 32802

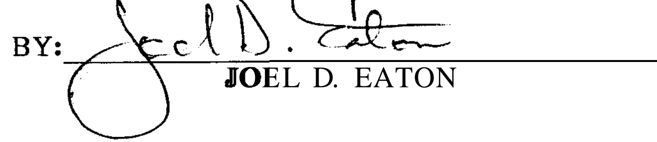
SPENCE, PAYNE, MASINGTON GROSSMAN
& NEEDLE, P.A.
Suite 300 Grove Professional Bldg.
2950 S.W. 27th Avenue
Miami, Fla. 33133

-and-

39/ If any aspect of the new trial order should survive our challenges here, we respectfully submit that any new trial should be limited to the issue affected by the ground or grounds upheld here, rather than retrying all issues.

PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

Attorneys for Petitioner



BY: ______________________
JOEL D. EATON