IN THE SUPREME COURT OF FLORIDA

CASE NO.: 72,338

LINDA K. PADDOCK,

Petitioner,

vs.

CHAWALLUR DeVASSY CHACKO, M.D.,

Respondent.

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

RESPONDENT'S ANSWER **BRIEF** ON MERITS

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I. STATEMENT OF THE CASE

In view of this Court's admonition to litigants not to restate the case and facts where there is no disagreement, Respondent will limit his discussion to those areas either omitted by Petitioner or inaccurate.

An objective reading of the "Judgment Notwithstanding the Verdict" demonstrates that there was a far more detailed and comprehensive analysis by the trial court than Petitioner would have this Court believe.

The trial court ruled, as a matter of law, the Petitioner had no duty to assume custodial care for the Petitioner under the circumstances of this case. The court determined that a psychiatrist is under no duty to assume custodial care for another, especially when there is no right to privately deprive another of his liberty. To adopt, as a matter of legal principle, the idea that a psychiatrist has no discretion and must insure the confinement of a person in institutional custody when the possibility of self-injury exists is fundamentally unsound and unsupportable under Florida law.

The court additionally reasoned that no such duty could exist since the injuries sustained by the Petitioner were not foreseeable by the Respondent. As the trial court stated there was no evidence "adduced during the trial of this case that Dr. Chacko was able to foretell whether, when, where or how Linda Paddock would harm herself." (R.2654).

Further, there was no evidence adduced at trial that demonstrated any objective criteria or standards for evaluating the conduct of the Respondent. Although the experts who testified agreed that psychiatrists are trained to treat persons with suicidal tendencies, no expert established that psychiatrists are any better than others in predicting suicidal acts. They also could not offer any criteria or standards for deciding when to take action to intervene for prevention of suicide or what to do. Each physician had his own beliefs,

but none could describe any recognized professional rules, standards or guidelines to evaluate the danger of self injury in a particular patient.

In the alternative, the trial court ordered a new trial for two very fundamental reasons. First, the jury's verdict was contrary to the manifest weight of the evidence. In particular, the court determined the jury's finding of no comparative negligence on the part of the Petitioner was against the manifest weight of the evidence. The court also found the size of the verdict to be excessive and unsupported by the evidence.

The second ground for granting a new trial was that numerous irregularities that occurred during the jury's deliberations separately and concomitantly placed the validity of the verdict in grave doubt.[1]

The Fifth District Court of Appeal affirmed the trial court's judgement for Respondent. Paddock v. Chacko, 522 So.2d 410 (Fla. 5th DCA 1988). Contrary to Petitioner's assertions, the District Court explicitly agreed With the trial court's conclusion that Respondent was, as a matter of law, under no duty to assume custodial care of Petitioner to prevent her from inflicting injury upon herself. 522 So.2d at 410. The District Court also held there was no evidence that Respondent's failure to arrange for a face-to-face examination or to prescribe proper amounts of an anti-psychotic medication (Navane) was a proximate cause of Petitioner's self-inflicted injuries. Id.

Despite Petitioner's vituperative and, candidly, unprofessional attacks on its character and integrity, the Court's recitation of the facts is both complete, and in a light most favorable to Petitioner. We will address

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[1] Petitioner, in a further attempt to cast aspersions on both Respondent's counsel and the trial court, makes much of the fact a newspaper article was published after the verdict. (R. 9213-14). What Petitioner fails to mention is that her counsel also suggested there had been attempted jury tampering. Further, there is a complete absence of any reference in the record cited by Petitioner that the article "provoked one juror to seek out" Respondent's counsel or the court. (R. 2643-48).

Petitioner's arguments in her Statement of the Case where argument is appropriate, ie., in the Argument section of our Brief.

II. STATEMENT OF THE FACTS

Although Petitioner is entitled to have the evidence viewed in a light most favorable to her, (as it pertains to the Court's judgment in favor of the Respondent), Petitioner is not entitled to simply ignore undisputed facts and her own admissions.[2] The trial court's conclusions are based on all of the evidence presented by Petitioner, not just portions selectively recited by her in her brief.[3]

In order to place this matter in perspective, it is necessary to review undisputed facts predating Petitioner's first self induced injury.[4]

Mr. and Mrs. Paddock had been married approximately fifteen years. **(R.1240).** During their marriage, problems and conflicts arose between them, both financial and personal in nature. (R.1247,1249, 1296-97, **1407, 1410).** Shortly before the

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See e.g., Martin vs. Young, 443 So.2d 293 (Fla. 3rd DCA 1983); Richards vs. Dodge, 150 So.2d 477 (Fla. 2nd DCA 1963); Oceanic Intern Corp. vs Lantana Boatyard, 402 So.2d 507 (Fla. 4th DCA 1981).

[3] Petitioner's position is an insidious one. On the one hand, she contends she was mentally incompetent during this entire period of time. On the other hand, her version of these events is the only version which should be believed, and only the version she **wished** to testify to at trial. In essence, Petitioner is asking this court to disregard her statements to various persons at the times the events occurred, the statements of her own experts, and the statements of the members of her family, and to solely refer to selected portions of her testimony at the time of trial.

[4] Petitioner contends this evidence is irrelevant because she denied any of these matters contributed to the self induced injury. She also denied attempting suicide on either occasion. Petitioner is hardly the person to determine what, if anything, contributed to her mental state. Even her own physicians disagreed with Petitioners position on this point. **(R.** 753-54; **424-**25; 548-49). If, as Petitioner contends, none of these events **led** to Petitioner's self induced injuries, and the second episode itself was unplanned, unthought of and unpredictable, the obvious question is how anyone, other than perhaps a divine entity, could have predicted and/or prevented either incident.

first incident in North Carolina, these problems became more severe, and at a minimum, contributed to Petitioner's mental state. (R.548–55, 557, 753).

Mrs. Paddock had regularly been accompanying her female friends to the Heart of Fayetteville Motel and Bar. (R.1295, 1285–86). She became concerned they were involved in illegal activities, including prostitution and drugs, although she denied personally being involved. (R.1295–96, 1285, 1303, 753–54).

She developed beliefs that there was a conspiracy to implicate her in the prostitution and drug related activities of her friends. (R.754). She telephoned her parents in Orlando, and indicated she wanted to come and stay with them. (R.282). Her mother refused, saying she and her husband should try to work things out in North Carolina. (R.283–84).

Shortly thereafter, on June 6, 1983, Petitioner injured herself for the first time. (R.301). She was hospitalized for two days. (R.1411). At the time of discharge, her physician recomnded that Petitioner be immediately rehospitalized under continued psychiatric care, or *see* a psychiatrist immediately and take her prescribed medication. (R.1414–15). The recommended rehospitalization and continued treatment did not take place, immediate psychiatric consultation did not occur, and Petitioner personally decided to discontinue her medication after only one week. (R.944, 318, 1250, 1332).

Instead of hospitalization, Petitioner's parents, *Mr.* and *Mrs.* Burkhart, drove to North Carolina, picked up their daughter and returned her to their home in Orlando on June 12, 1983. (R.250, 304). At the time, "everyone" thought that a change of environment would be good for her. (R.354–57). Shortly thereafter, Petitioner's father obtained Dr. Chacko's name from his *own* physician, and called Dr. Chacko's office on June 15, 1983, to schedule an appointment. (R.250–51).

The one and only office visit between Petitioner and Dr. Chacko occurred on

Wednesday, June 22, 1983. (R.1242). At the time of this visit, Petitioner made a conscious effort to minimize her problem and mislead Dr. Chacko as to her condition. (R.332-33; 1258; 1314). She told Dr. Chacko about injuring herself, but denied that she was trying to kill herself. (R.1288). She also related that her hospitalization had lasted a mere two days, and that the only recommendation afterwards was that she see a psychiatrist at some point in time, as well as a general physician, for a "check-up". (R.938, 1242, 1322). She told Dr. Chacko that she felt better since she had, on her *own,* stopped taking her medication. (R.944; 1331-32).

During this visit, Petitioner had no suicidal feelings, thoughts or plans (R.940, 1328); she felt guilty about previously injuring herself, and had no intention of doing it again. (R.941, 1328). Petitioner appeared somewhat anxious, tense, and mildly apprehensive, a common Occurrence on an initial visit. (R.950; 1342). She spoke coherently, and had insight into her condition. (R.951, 956, 1343). She was in contact with reality, and believed that the thoughts were only in her mind. (R.956; 1344-45).

After approximately one-half hour, Petitioner selected her father as the parent with whom Dr. Chacko should discuss her condition, and Dr. Chacko spent an additional one-half hour with both Petitioner and her father. (R.252; 1248-49). According to Petitioner, she had a close relationship with her father, and he was a strong authority person in her life. She went on to explain that "whatever he says, I do." (R.1248, 1263, 1333).

Based upon the information given by the Petitioner and her father, and based upon his own evaluation, Dr. Chacko believed the Petitioner was suffering from an acute (of recent origin) paranoid state which was in partial remission. (R.958). To put it in layman's terms, Dr. Chacko told Petitioner she had suffered a serious or severe nervous breakdown. (R.1347, 254). Dr. Chacko

increased her prescription of Navane to six milligrams a day, advised Petitioner to again start taking her medication as prescribed, prescribed Cogentin to counteract any side effects, and recommended psychiatric consultation upon her anticipated immediate return to North Carolina. (R.959-60; 1251-52; 1346).

No expert testified that there was any deviation or negligence on the part of Dr. Chacko during this office visit which contributed to Petitioner's injuries. As far as both Dr. Chacko and Petitioner understood, they would never have any future contact with each other, and no arrangements were made for follow-up, since the patient was expected to be immediately returning to North Carolina following this "check-up". (R.255, 338, 1251-52, 1347).

Indeed, after the visit, Petitioner was in a ''goodframe of mind" and told her father that she felt better. (R.309, 1347). It was not until Petitioner talked with her husband later that day and he refused to come to get her to return to North Carolina, that she seemed at all upset. (R.311).

The only time Dr. Chacko had any further contact with Petitioner before she again injured herself was on Friday, June 24, 1986. Prior to calling Dr. Chacko, Petitioner and her husband talked on the telephone a number of times. (R.1350-51). She indicated to her husband that she was nervous, tired and confused. (R.1352). When she called Dr. Chacko that afternoon, Petitioner had no thought of self harm or suicide and expressly so advised Dr. Chacko. (R.966, 1288). Because Dr. Chacko felt that she would benefit from hospitalization, since it would change her environment and allow for closer monitoring of medication, he recommended voluntary hospitalization. (R.965-66; 972; 1353, 1358).

Since Petitioner was in her parent's custody, Dr. Chacko spoke with Mrs. Burkhart, Petitioner's mother. (R.1356) Uncontroverted is the fact that Dr. Chacko told Mrs. Burkhart it would be a good idea to hospitalize Petitioner for

a few days to adjust her medication. (R.966). Mrs. Burkhart deferred any decision concerning hospitalization to Petitioner's father, who was still at work, since "he takes care of the business". (R.966, 968, 1356). Petitioner had previously designated her father as the individual Dr. Chacko should consult with concerning her care. (R.932, 1248).

In the interim, Dr. Chacko called the hospital and reserved a bed in the psychiatric section of Orlando Regional Medical Center in the event his recommendation of hospitalization was followed. (R.973; 1200; 1700; 1725). After Mr. Burkhart returned home, he and Dr. Chacko discussed the situation on the telephone. (R.262, 966, 975). Mr. Burkhart indicated to Dr. Chacko that his daughter was a little worse, but he had calmed her down. (R.263, 976, 1372). Dr. Chacko and Mr. Burkhart discussed hospitalization. (R.349, 976). Mr. Burkhart acknowledged from his own observations, he saw no need to hospitalize his daughter. (R.347). Petitioner's own statement written shortly after the second suicide attempt indicated her father told her and Dr. Chacko that he did not feel Petitioner needed to be hospitalized, since she was merely upset at her husband's continued refusal. to assist her in returning to North Carolina and felt "we could handle the situation ourselves." (R.450, 966-67, 1358-59, 1373, 1382).[5]

Dr. Chacko requested the parents closely observe their daughter and call him or his service if she worsened over the weekend. (R.264, 350, 967, 970, 976-78, 993). After the conversation with Mr. Burkhart, Dr. Chacko cancelled the bed he

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[5] Petitioner contends there was "compelling" evidence that Dr. Chacko's notes were dictated weeks after the phone call occurred. Petitioner fails to mention that almost the exact same information was included in Dr. Chacko's consultation report in the hospital chart, recorded the day after Petitioner's second attempt. (R. 993). Additionally, the contents of Dr. Chacko's conversation with Mrs. Burkhart, i.e., that he recommended hospitalization and she demurred saying Mr. Burkhart "takes care of the business", was totally uncontradicted.

had previously reserved for Petitioner. (R.975, 1705). No harm occurred to Petitioner on Friday, and no one even attempted to contact Dr. Chacko about Petitioner until after the subject incident occurred two days later on Sunday, June 26.

Saturday, June 25, Petitioner's condition remained the sane. (R.265, 351). She had no thoughts of suicide or self harm, and engaged in no such conduct. (R.1328). Neither she nor anyone on her behalf ever attempted to contact Dr. Chacko or any other health care provider. (R.1362).

Sunday, June 26, Petitioner unforeseeably, unpredictably, and suddenly decided to again injure herself only moments before actually doing so. (R.1268-72; 1287; 1309). An ambulance was dispatched to the scene. She told one of the ambulance attendants the reasons for her actions were the problems she was having with her husband. (R.238). She was taken to the hospital. The nurses at the hospital noted that Petitioner admitted she did not follow her physician's advise to go into the hospital. (Plaintiff's Exhibit 6; R.1353).

The expert witness testimony produced at trial is obviously central to the issue of proximate cause. In the following section, the testimony of each expert relating to these issues is provided.

PLAINTIFF'S EXPERTS

1. Donald F. Klein: Although he never saw Petitioner, Dr. Klein was of the opinion that, as of the telephone call on June 24, 1983, Petitioner was at risk for attempted suicide in the "near future" (R.410). He admitted that psychiatrists cannot always predict or prevent suicide and that any guess or "estimate" of the likelihood of a suicide attempt may or may not be right within wide parameters. (R.418, 19).

Dr. Klein believed the Petitioner was acting impulsively on June 26, 1983, and almost anything could have triggered a second suicide attempt, including a

television show or a problem with a spouse. (R.426-27). He also believed that it was a "distinct possibility" that Petitioner may again attempt to commit suicide in the future. (R.427).

The crux of Dr. Klein's opinions was that Dr. Chacko was negligent in failing to arrange a face-to-face interview with Petitioner. **(R.386; 394-96).** However, Dr. Klein admitted that without hindsight, i.e., without knowing that Petitioner would attempt suicide two days later, there were insufficient facts to form an opinion as to whether she was a danger to herself as of June **24, 1983. (R.429).** Dr. Klein further stated that if Dr. Chacko had seen her, observed her to be in the condition as described by her father, and thereupon decided not to hospitalize her, there would have been no deviation from acceptable standards of care. (R.430-431).

Dr. Klein also felt that the dosage of Navane was inadequate, but admitted that it takes a period of time for the medication to take effect, especially with this type of antipsychotic medication. **(R.422).**

2. Dr. Steven D. Targum: Dr. Targum agreed suicide is a complex behavioral phenomenon which cannot be attributed to a single precipitating factor. (R.446). It is difficult to predict suicide and there are no adequate objective measures to do so. (R.446). Consequently, a physician must be extremely "cautious and conservative" in making this determination. **(R.446).** In actuality, very few patients who are extremely depressed or express suicidal thoughts actually commit suicide. (R.455). No personal histories, attributes, psychological tests or clinical judgments have been found to predict suicide at useful levels. (R.456).

Based upon his review of the records and testimony, Dr. Targum concluded (and based his opinions on the fact) that Dr. Chacko recommended hospitalization, but that the recommendation was rejected by Mr. Burkhart, as well as Mrs. Burkhart

and Petitioner herself. (R.441;450).

Dr. Targum also conceded that on June 22, the Petitioner was in fact not "suicidal". (R.448-49) Contrary to the Plaintiff's other experts, Dr. Targum did not criticize the dosage of Navane prescribed by Dr. Chacko on June 22, and noted that it was certainly within the range of pharmacologic practice. (R.449).

Dr. Targum criticized Dr. Chacko for not personally seeing Petitioner, but his only opinion on causation was that had she been hospitalized, the risk of a second attempt would have been reduced. (R.443).

3. Dr. Harold C. Morgan: Dr. Morgan agreed the initial incident in North Carolina was "bizarre". (R.485). At the time of the telephone call on June 24, Dr. Morgan felt that Petitioner was in a risk group for "something bad to happen". (R.487).

If Dr. Chacko had personally examined Petitioner and if he had placed her into a hospital, he believed the outcome might have been different. (R.492). This was because statistically, confinement reduces the risk of harm. (R 492-493). If voluntary hospitalization had been refused, than involuntary hospitalization was necessary, since the only methcd of prevention is commitment. (R.488;514).

However, Dr. Morgan acknowledged the importance of a patient's denial of suicidal thoughts. Frequently, a patient with such ideation will admit such feelings. (R.560). He also conceded that there was no evidence Petitioner had any such thoughts when in contact with Dr. Chacko. (R.560).

Dr. Morgan felt that Petitioner never intended nor desired to commit suicide. (R.506, 571). He agreed that it was difficult to tell if a patient like Petitioner was, in fact, suicidal. (R.605). Their condition is constantly changing and anything could trigger an effort at self injury. (R.622).

Finally, he agreed, "you cannot predict which individual is going to commit suicide at which time". (R.636).

Dr. Morgan also conceded that no one knows the cause of paranoia, even though theories abound. (R.511). As far as Navane is concerned, while Dr. Morgan felt that the dosage was inadequate, he admitted that it does not work that quickly, and that its effect takes a long time, much more than three or four days. (R.623-24).

4. Dr. Michael Gilbert: While Dr. Gilbert felt that the prescribed dosage of Navane was inadequate, he testified that there was no guarantee that it would work anyway. (R.641). He felt the Dr. Chacko should have involuntarily committed Petitioner by utilizing the "Baker Act". Despite the dictates of the statute, Dr. Gilbert testified that to invoke it, all it takes is a phone call to the police that the patient is disturbed, the paper work could be done later, and the patient can be forcibly detained for seventy-two hours. (R.643-44). Even while confined, however, some patients still commit suicide. (R.646).

While Dr. Gilbert felt that Dr. Chacko should have taken steps to hospitalize Petitioner, he would not be critical of Dr. Chacko if he was sure "in his own mind" Petitioner's father was in a position and competent to care for her. (R.675). The psychiatrist has to exercise judgment in evaluating the risk of self injury, (R.664). Any psychiatrist who has not had patients commit suicide while under their care is not practicing psychiatry. (R.668). Indeed, this witness was involved in a very similar incident. He had seen a patient only once, and the patient had denied any thoughts of suicide and was planning to return to her family on the West Coast. (R.664). When Dr. Gilbert spoke with her brother he said he would take care of her. (R.665). Dr. Gilbert made the judgment that it would be best to have her return home to a more familiar environment. (R.666). The next day, the patient committed suicide. (R.666).

DEFENDANT'S EXPERTS

1. Dr. Walter Muller: Dr. Walter Muller was a treating psychiatrist and an expert witness who testified on behalf of the Respondent. He treated Petitioner between October 4, 1983 through November 30, 1983. (R.805-806). He also reviewed the various materials in this action and testified that in his opinion, Dr. Chacko's diagnosis, care and treatment of Petitioner was reasonable, and that Petitioner did not meet the criteria for involuntary commitment under the Baker Act. (R.826).

2. Dr. Robert L. Sadoff: Dr. Robert Sadoff testified that Respondent complied with the acceptable standards of medical and psychiatric practice when he treated Petitioner. (R.1459). Dr. Sadoff was of the opinion that it was not necessary for Respondent to personally see Petitioner since he had reliable information from her parents that there had been no significant change in her condition. (R.1463). If Petitioner had been in a panic or out of control, it would have been very obvious to those around here. (R.1464).

Petitioner did not fit the criteria for involuntary hospitalization under the Baker Act since she was, to a large extent, in touch with reality: she was able to determine for herself whether an examination was necessary: she was not being neglected, nor refusing to care for herself; there was no reason to believe she was presently suicidal; and she had a willing and able family to help her avoid any harm. (R.1465-1472). Petitioner was not psychotic: she was not severely depressed at the time she saw Dr. Chacko or at the time she telephone him. (R.1473-1474; 1564; 1574-75).

Petitioner was also mentally competent at the time of her second suicide attempt as she had a cognitive intellectual awareness of her actions and the consequences thereof. (R.1484-1485). She called for help afterwards, indicating that her cognitive function was not wholly impaired. (R.1485).

Prediction of suicide is essentially a clinical judgment, and doctors are no better at it than the average lay person. (R.1481-1482). The second suicide attempt itself was impulsive on the part of Petitioner and not predictable as of June 24, 1983. (R.1479; 1481-1482). She was not thinking about suicide on the date of the phone call, and her action two days later was spontaneous and unforeseeable. (R.1482).

3. Dr. John Griest: Dr. John Griest is a "suicidologist", having extensively studied and worked in the area of suicides and the risks and factors associated with suicides for the past thirteen or fourteen years. (R.1590).

Beginning in the early 1970's, Dr. Griest began working on using computers in an attempt to better predict the risk of a suicide attempt. (R.1591). The computer program would "interview" the patients directly, and assess the suicide risk. (R.1592). Two studies were conducted to determine the comparative validity of the computer predictions versus that of expert psychiatrists. In both studies, the computer was significantly better at predicting the actual likelihood of a future suicide attempt, even where the physicians had been actively caring for and observing both the patient and his family. (R.1592-1593).

After reviewing various materials, Dr. Griest was of the opinion that Dr. Chacko's care of Petitioner were above a reasonable standard. (R.1594-1595). There was no need nor any requirement that Dr. Chacko actually physically see Petitioner on June 24, 1983. (R.1597). Over the telephone interviews can actually reveal more than a face to face confrontation. (R.1597) Similarly, patients will reveal more to a computer than they will to a doctor, especially in a face to face interview. (R.1598).

Statistically, there are twenty-five to thirty thousand suicides a year and ten times as many suicide attempts. (R.1599-1600). Of the quarter of a million

people who make such an attempt, three-fourths have been under the care of the physician in the *six* months preceding the attempt. (R.1600). About one-half had seen a physician in the preceding three months. (R.1601). Generally, it is very difficult to predict suicide, but certain factors have been uncovered. Males are more likely to commit suicide than females, but females are more likely to attempt suicide. (R.1601-1602). The risk for females peaks when they are thirty to forty years old, and subsequently declines. (R.1602). Sixty percent of those who commit suicide had made a prior attempt (R.1602) and about eighty percent of those who do commit suicide have been diagnosed as depressed and in a state of hopelessness. (R.1604).

The key element in suicide prediction is the presence of suicidal thoughts. (R.1604) People **who** are at risk virtually always have thoughts of suicide and will usually reveal them to their psychiatrists. (R.1606-1607). If there are no expressions of suicidal thoughts, the risk of suicide is substantially reduced. (R.1605) The nature of the thoughts is also important, because if there is a specific plan as to how the attempt **will** be accomplished, the suicide attempt is not impulsive, but a predictable act. (R.1605). However, even with all these factors, if one were to put them into a "hypothetical" person, the risk of suicide would be only five percent. (R.1608) Although a prior suicide attempt is a factor to be looked at, only ten percent of those who previously made an attempt actually commit suicide. (R.1654).

On June 26, 1983, Petitioner's behavior and attempted suicide was, as she herself testified, totally impulsive and consequently unpredictable. (R.1611). ***As*** of June 24, 1983, it was impossible to predict what Petitioner would **do** on June 26th. (R.1612). Even though often times a person who is at risk for suicide will make a "cry for help", this was not the type of cry for help Petitioner expressed. (R.1652).

Dr. Griest put all the factors and information into the computer program, giving Petitioner the benefit of the doubt on all factual conflicts and the computer predicted that Petitioner would not even have any thoughts of suicide over the next six months, and was a zero percent risk for a serious attempt. (R.1618-1619). Dr. Griest also analyzed Petitioner's risk using a clinical scale developed by another suicidologist, and found that Petitioner was at the lowest possible risk (i.e., one percent). (R.1620).

4. Dr. Leigh Roberts: Dr. Leigh Roberts is a board certified psychiatrist and Professor at the University of Wisconsin Medical School. (R.1816-17). He also helped draft the American Psychiatric Association's official manual of diagnosis, DSM-III. (R.1929).

Dr. Roberts was of the opinion that Dr. Chacko acted reasonably in his care and treatment of Petitioner. He testified that it was not reasonably necessary to do a face to face interview of Petitioner on Friday, June 24, and it is common practice to talk with patients on the telephone. (R.1826).

Petitioner was not suicidal as of June 24, 1983. (R.1830-31). Other than her prior suicide attempt, Petitioner did not possess or exhibit any characteristics indicative of a suicide risk. (R.1833). Petitioner was suffering from a mild paranoid disorder, which, unlike a depressive disorder, is not associated with a risk of suicide. (R.1900-01). She denied any thoughts of suicide, which is one of the best indicators a psychiatrist can use to evaluate the risk of suicide. (R.1923). Thus, her self induced injuries were impulsive, unforeseeable, and unpredictable. (R.1832, 1833-34, 1901).

After her last contact with Dr. Chacko on June 24, Petitioner had a number of other telephone conversations with her husband, increasing her frustration and anxiety. (R.1837-38). One of the primary contributing factors to Petitioner's self induced injuries was this frustration arising from her husband's refusal to

arrange for her return to North Carolina. **(R.1894).**

III. ISSUES ON APPEAL

Even if opposing counsel's "judgment" or "opinions" as to the integrity, character and honesty of the courts who have already reviewed this matter are at all relevant and appropriate for inclusion in what purports to be a brief on the merits, the recitation of such commentary under the guise of a section entitled "Issues on Appeal" is so patently false, and in violation of the rules of this court, as to almost defy comprehension.

It is indeed unfortunate that the use of such inflammatory and baseless accusations appears to have piqued the interest of this court. It has placed an almost impossible burden on the shoulders of Respondent. Not only, it seems, do we have to demonstrate that the Fifth District Court was both legally and factually correct, but that the direct attacks on the court's honesty and integrity are groundless. This is clearly improper, but exemplifies Petitioner's course of conduct throughout this litigation. Instead of addressing the merits, she persistently attacks the character of Respondent, counsel for Respondent, the trial judge and now the District Court.

Quite simply, these bald accusations of the Petitioner are without basis in anyone's version of reality, save the suspect minds of her counsel.

The only issues properly before this court, i.e., those that Petitioner contends warranted the exercise of this Court's discretionary jurisdiction to review cases in "express and direct" conflict With decisions of this court, are, to paraphrase Petitioner:

I. Whether the very existence of a duty between two parties is a question of law for the court to decide, or one of fact, for the jury to decide;

11. Whether a court can find the evidence on the issue of proximate cause so speculative or so lacking as to direct a verdict in favor of the Defendant.

That these issues for purposes of jurisdiction were artificially created

through the admittedly creative manipulation of the District Court's opinion, as well as the decisional law of this state is, we think, amply demonstrated by the fact that so little of Petitioner's "argument" addresses them.

Petitioner has not stopped there. She now seeks to use these delusions that one trial court and three unanimous members of the Fifth District Court of Appeal have some evil "hidden agenda" against her as justification for this court to review not only the District Court's decision, but also each and every other issue which the District Court never even ruled upon.

While Respondent fully appreciates this Court's view that, once it has accepted jurisdiction, the court "may" consider other issues, Respondent would respectfully suggest that the court, in its discretion, refuse to do so here. To do otherwise would be to implicitly approve the unacceptable conduct of Petitioner, as well as lend credence to her accusations.

Of course, Respondent has little choice but to address the issues raised by Petitioner, to avoid any misperception that he is conceding these points. In accordance With Rule 9.210(B)(4), Fla.R.App.P., what follows is a proper *summary* of the argument with respect to each issue.

IV. SUMMARY OF THE ARGUMENT

Initially, there was, as a matter of law, no duty on the part of Respondent, Dr. Chacko, to assume custodial care of the Petitioner. This is unlike an institutional setting, where such a duty has been voluntarily assumed, and the law requires the party to then act reasonably. The court was therefore correct in entering judgment for the Defendant.

The existence of a duty is a question of law for the court to decide, after considering and balancing the competing public and private policy considerations involved. The imposition of a duty on a psychiatrist to assume custody of his patient not only detracts from his ability to treat his patients, but also

forces every psychiatrist to navigate between "Scylla and Charybdis" in deciding whether to hospitalize his patient. Either the psychiatrist forces his patient, voluntarily or involuntarily, into the hospital, exposing himself to liability for having done so precipitously, as well as assuming the duty to protect her from further harm, or the psychiatrist attempts to treat the patient outside the oppressive confines of an institutional setting, thereby subjecting himself to liability should the patient attempt suicide.

Additionally, the lack of any objective standards in the "art" of psychiatry, as well as the absence of any evidence that the risk of suicide or attempted suicide is predictable or foreseeable also mandates the conclusion that Respondent was under no duty, as a matter of law, to assume custodial care of Petitioner.

Similarly, there was no proof that the alleged negligence on the part of Dr. Chacko in failing to see Petitioner in person, or in prescribing allegedly inadequate dosages of medication, in any way proximately caused Petitioner's self induced injuries. There was no evidence, but only rank speculation, that had the patient been seen, Dr. Chacko's diagnosis or evaluation of the patient would have changed, the patient would then have hospitalized, and not discharged prior to the second incident. There was absolutely no evidence that any different dose of medication would have had any effect on the likelihood of a second attempt, since both sides' experts agreed that the medication takes a long period of time to take effect.

In the alternative, the trial court was correct in ordering a new trial on all issues. The jury was instructed, correctly, to apply the "reasonable man" standard in determining the comparative negligence of Petitioner. The jury's finding that Petitioner was not comparatively negligent was therefore against the manifest weight to the evidence. A reasonable person in the position of

Petitioner, would or should have appreciated and known of the consequences of slashing herself, and setting herself on fire.

The jury verdict awarding Petitioner $2,150,000.00 was grossly excessive, unconscionable, and shocked the trial court's conscience. The jury was influenced by numerous considerations outside the record, improper argument of counsel, and a juror's personal experiences With his *own* physician. There was also an amazing number of evidentiary "irregularities" which led to certain exhibits being improperly omitted, and others improperly submitted during deliberations. A note from the alternate juror which related the existence of a settlement between Petitioner and her parents which was received after the liability issue had been decided, divided the jury, prejudiced Dr. Chacko, and irreparably tainted. the jury's deliberations. The trial court, with its superior vantage point, acted well within its discretion in granting a new trial.

V. ARGUMENT

A. THE DISTRICT COURT WAS CORRECT IN AFFIRMING THE TRIAL, COURT'S ENTRY OF JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTION FOR DIRECTED VERDICT.

While Petitioner goes to great lengths to distinguish the basis of the District Court's decision from the Trial Court's opinion, the District Court explicitly affirmed the Trial Court's determination that the law does not "...impose a legal duty on a psychiatrist to involuntarily take a patient into his custody ... (and) to take control of her life away from her against her will to protect her from her self-destructive tendencies."

This threshold issue, of whether such a duty exists, is fundamentally a question of law, for the court to decide. Florida Power and Light V. Lively 465 So.2d 270, 273 (Fla. 3rd DCA 1985); see, also, Arenado v. Florida Power and Light, 523 So.2d 629 (Fla. 4th DCA 1988), rev. granted, ___ So.2d ___ (Fla.

1988). This concept has long been firmly established in American jurisprudence. As one commentator has stated, the existence of a duty "is entirely a question of law to be determined by reference to the body of statutes, rules, principles and precedents which make up the law, and it must be determined only by the court." Prosser and Keaton, The Law of Torts, §37 at 236 (5th Ed. 1984). See, also, Restatement (Second) of Torts, §328B(b) (1965).

So fundamental is this concept that this court in Nova University, Inc. v. Warner, 491 So.2d 1116 (Fla. 1986), a case relied upon by Petitioner, did not even bother restating it, In that decision, the court was asked to determine if, as a matter of law, a child care institution, in the business of "taking charge of persons likely to harm others" has a duty to exercise reasonable care to avoid foreseeable attacks by its "charges" upon third persons.

The court held that such a duty exists,[6] but expressed "no view" as to whether the institution breached that duty, or whether that breach proximately caused any injury. Obviously, those issues were, at that point, questions of fact for the jury to determine.

Similarly, in the instant case, the issue of whether a psychiatrist has a duty to "assume custodial care" of a patient is a question of law for the court to decide. If such a duty exists, which Respondent contends it does not, than whether Respondent breached that duty under the circumstances of this case would ordinarily be a question of fact for the jury to decide, with the aid of expert testimony. See, e.g., Salinetro v. Nystrom, 341 So.2d 1059 (Fla. 3rd DCA 1967).

The cases cited by Petitioner are simply not on point. In all of those cases, the courts were not presented with the issue of whether a duty exists, but, whether the duty already assumed to exist was breached by the Defendant.

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[6] Of course, this holding has no applicability here, since the Defendant in that case had already assumed the duty of custodial care of its residents.

That issue, as already noted, is a question of fact for the jury, where there is sufficient expert evidence to support it. Gooding v. University Hospital Building, Inc., 445 So.2d 1015 (Fla. 1984).

For example, in Hunt v. Palm Springs General Hospital, 352 So.2d 582 (Fla. 3rd DCA 1977), a patient was brought to the emergency department of the defendant hospital and seen by his private physician who was told by the hospital that the plaintiff could not be admitted unless he was in "critical condition". The private physician did not find the plaintiff to be "critical". The plaintiff was moved into the hall and after some delay, transferred to another hospital.

While the court in its opinion speaks to the issue of the existence of a duty, the court actually determined a legal duty might exist between the hospital and patient, but whether a relationship existed between the parties which would impose such a legal duty was for the jury to determine.

In other words, the court determined that, depending on the nature of the relationship between the hospital and patient (a factual issue), a legal duty might be required of the hospital. The fact that the patient was not formally admitted to the hospital did not necessarily mean that no such duty **existed.** Similarly, in Wale v. Barnes 278 So.2d 601 (Fla. 1973), there was simply no issue as to existence of a duty between the plaintiff and the defendant. The court presumed that an obstetrician had a duty to deliver the plaintiff's child in accordance with expert testimony regarding the nature and extent of the standard of care required as ultimately determined by the jury.

Respondent does not dispute the broad and general concept that a physician is under a duty to exercise reasonable care in his treatment of patients, no more than it disputes that it can generally be said that each individual in our society owes a duty to exercise reasonable care to prevent injury to others.

This simply does not answer the specific question posed here - does a psychiatrist have a duty to assume custodial care of a patient.

Both the Trial Court and District Court properly concluded that a psychiatrist does not have such a duty. *As* both courts noted, there is absolutely no support in Florida Law for the imposition of such a duty.

While there are no reported Florida decisions on point, a few analogies to other areas amply demonstrate the soundness of the court's ruling on this point. In an emergency situation, the courts have long held that a person is under no duty to rescue a person in distress, but once he has assumed that duty, he has an obligation to act reasonably. See, Prosser, supra, §2 (and cases cited therein); Restatement (Second) of Torts, §§314-21 (1965). Similarly, police officers generally have no duty to the public to arrest certain individuals, but once they have arrested a particular person, they have a duty to act reasonably. See, Everton v. Willard, 468 So.2d 936 (Fla. 1985).

Situations where a person is in an institution and attempts to commit suicide or homicide, or where a person is prematurely released from such an institution are therefore irrelevant. The particular defendant in such a case has voluntarily assumed a duty, which he was not legally obligated to **do,** but the law now demands that he act reasonably in carrying out that duty.

In determining whether a duty exists, the courts look to and attempt to balance the competing public and private interests involved. "Duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection". Rupp v. Bryant, 417 So.2d 658, 667 (Fla. 1982) (quotingW. Prosser, The Law of Torts, §53 at 325-26 (4th Ed. 1971)). See also, Trianon Park Condominium, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985).

In an institutional setting, where the plaintiff is already confined, the

very purpose is to prevent self inflicted or other violent actions, and the appropriate steps to be taken are quite clear. There is no need to engage in speculation as to the likelihood of when, or even if, a patient will make such an attempt as it is presumed that it could happen at any time and steps should be taken to prevent it. This procedure is not only impossible, but inappropriate in any other setting. As the court in Paradies v. Benedictine Hosptial, 431 N.Y.S.2d 175 (N.Y.App.Div. 1980) noted:

> "If liability were imposed on the physician ... each time the prediction of future course of mental disease was wrong, few releases would be made and the hope of recovery and rehabilitation of a vast number of patients would be impeached and frustrated. This is one of the medical and public risks which must be taken on balance even though it may sometimes result in the injury to the patient or others." (Quoting Taig v. State, 241 N.Y.S.2d 495, 496-97 (N.Y.App.Div. 1963).

Similarly, Chapter 394, Fla. Stat., evidences "Florida's strong policy of employing the least restrictive alternative when dealing with persons affected by mental health problems..." Nesbitt v. Community Health of South Dade, 467 So.2d 711, 717 (Fla. 3rd DCA 1985) (Jorgensen J. dissenting).

Conversely, if a psychiatrist could be held liable every time a patient attempts or commits suicide, hospitals and other institutions would be overloaded; patients, ninety-five percent of whom would not make a suicide attempt, would all be deprived of their freedom for no other reason than the prevention of such liability; and, even more disturbing, the psychiatrist would expose himself to liability for violating his patient's civil rights.[7] See e.g., O'Connor v. Donaldson, 422 U.S. 563 (1975) (involving an involuntary commitment prior to Florida's enactment of the "Baker Act"); In re: Ballay, 482 F.2d 648 (DC Cir. 1973) (proof of mental illness and dangerousness or

[7] The Florida Psychiatric Association, Amicus Curiae, explains in great detail the medical and societal reasons why no such duty should be imposed upon psychiatrists. Rather than repeating or rephrasing their argument, Respondent would refer the Court to Section II of the Joint Amicus Brief.

involuntary confinement must, to comport with due process, be beyond a reasonable doubt). Pellegrini v. Winter, 476 So.2d 1363 (Fla. 5th DCA 1985) (holding a defendant may be liable for malicious prosecution for instituting involuntary commitment proceedings).

Rather than addressing this issue for what it is, Petitioner instead wages a war of semantics with the District Court, as well as accusing the court of dishonesty in finding that Dr. Chacko recommended hospitalization, but that his recommendation was rejected. This finding is clearly correct, and supported by the overwhelming evidence in the record to that effect.

The record is replete with evidence substantiating that Dr. Chacko's recommendation for hospitalization was rejected. Discussions occurred between Dr. Chacko himself, his patient, Mrs. Burkhart, the patient's mother, Mr. Burkhart, the patient's father, as well as the hospital nursing personnel, regarding hospitalizing the plaintiff. All of this testimony, taken in context, clearly reflects Dr. Chacko's recommendation and efforts to have this patient hospitalized. It is without contradiction that arrangements were made at the hospital for such admission, and that a bed was in fact reserved for her, which was later cancelled, due to Mr. Burkhart's position that his daughter did not need to be hospitalized.

Petitioner's own medical witnesses testified that it was their understanding hospitalization had been rejected, and that understanding formed the very basis of their expert opinions. For example, Dr. Targum testified that:

> "With certainty, I can state that Mr. Burkhart rejected it (hospitalization). It appears as if Mrs. Paddock and her mother rejected it as well." (R.450).

Similarly, Dr. Klein assumed that Petitioner's mother deferred any decision on hospitalization to Mr. Burkhart, and that Mr. Burkhart felt that hospitalization was not necessary. (R.383, 384).

There is similarly no real dispute as to who had the ultimate decision regarding hospitalization. All of the evidence was to the effect that Mr. Burkhart exercised almost total control over his daughter's life while she was staying with him. Mrs. Paddock testified that her father is a "strong authority figure" in her life, and that whatever he says, she does. Thus, when he told her that he did not feel that hospitalization was necessary, and that they could take care of the problem on their own, she acquiesced.

In Respondent's view, this entire discussion over alleged "factual issues" misses the fundamental point of the District Court's analysis. Whether or not voluntary hospitalization was rejected is irrelevant to any inquiry as to whether Dr. Chacko was under a duty to assume custodial care and responsibility for the Petitioner.

In other words, whether voluntary or involuntary, once the patient is hospitalized, the doctor has assumed custodial care of that patient, has taken responsibility upon himself for the patient's actions, and has essentially taken control of the patient's life away from the patient. It is simply inconceivable that the law would impose such a duty upon any person, whether he be a physician or not.

While it is true one of the goals of psychiatry is to attempt to treat patients so they do not inflict harm on members of society or themselves, such a "principle" means nothing more than the general idea that a physician aims to reasonably attempt to heal or cure his patient. The fact that they are sometimes unable to do so does not imply that there has been negligence or a breach of any standard of care, or any duty in the first place. Such a statement does not define or establish the duty, nor does it require the court to, as Petitioner seems to suggest, impose liability anytime the treatment fails. See e.g., Hill v. Boughton, 1 So.2d 610 (Fla. 1941); Potock v. Turek, 227

So.2d 724 (Fla. 3rd DCA 1969); Dillman v. Hellman, 283 So.2d 388 (Fla. 3rd DCA 1973) (physicians are not insurers of results).

Viewed most favorably to Petitioner, her experts testified that because of her prior suicide attempt, and her being mentally ill, Petitioner was "at risk" for another suicide attempt.[8] When Petitioner telephoned on June 24, 1983, Dr. Chacko should have physically seen her, and if, and *only* if, he determined she indeed was suicidal on that date, he should have insisted she be hospitalized, either voluntarily or involuntarily.

Significantly, Petitioner failed to introduce any evidence as to what standards, guidelines or criteria should be applied by psychiatrists in determining if, when, or whether, a patient will attempt suicide. This absence of proof is understandable since all experts testified there were no objective criteria which are particularly useful in predicting the risk of suicide, or when a suicide attempt might take place.

As one judge noted, "a substantial body of literature suggests that the psychiatric field cannot even agree on an appropriate diagnosis, much less recommend a course of treatment". Nesbitt, 467 So.2d at 717 (Jorgensen, J. dissenting).

In a typical medical malpractice case, there is an objective standard of care by which the defendant's conduct is measured. For example, testimony is adduced that certain symptoms indicate a certain diagnosis for which there is a certain treatment. In this case, no expert was able to testify what the objective psychiatric standard of care would be to determine if a patient was suicidal,

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[8] In fact, accepting Petitioner's position that these two factors, her illness and her prior attempt, mandated confinement, she should still and forever continue to be institutionalized. One of Petitioner's *own* experts believes that she is still at risk for suicide and that such an attempt is a "distinct possibility". (R.427)

the degree of risk in a particular patient, or the standard course of treatment. As one author put it:

> "Unlike a physician's diagnosis, which can be verified by x-ray, surgery, etc., the psychiatrist cannot verify his diagnosis, treatment or predicted prognosis except by long term follow-up and reporting." (In other words, hindsight.)

Almy, Psychiatric Testimony: Controlling the "Ultimate Wizardry" in Personal Injury Actions, 19 The Forum 233, 243 (1984); see also, Estate of Roulet 590 P.2d 1, 7 (Cal 1979) (noting "the divergence of expert views ... render(s) the possibility of mistakes significantly greater (in the diagnosis of mental illness) than in the diagnosis of physical illness.")

Certainly, "foreseeability" of the risk is another factor to be examined in determining whether a duty, as a matter of law, exists. Firestone Tire & Rubber Company v. Lippincot, 383 So.2d 1181 (Fla. 5th DCA 1980). As Professor Prosser has stated, "if the defendant could not reasonably foresee any injury as a result of his act, or if his conduct was reasonable in light of what he could anticipate, there is no negligence and no liability." Prosser, supra, §43 at 250; See also, Nesbitt, 467 So.2d at 718 (Jorgensen J., dissenting) ("... the duty owed by a psychiatrist to a patient must be measured by the foreseeability of the risk").

In the abstract, Petitioner would contend the possibility of a second suicide attempt at some point in time was "foreseeable". That, however, misses the point. The real question is whether the incident complained of by Petitioner was reasonably foreseeable two days before her phone call to Dr. Chacko and four days after her only examination by him, where she herself only formed the thought to harm herself literally moments prior to actually doing so.

The opinion of all experts was that her second effort to inflict injury upon herself was "impulsive". Petitioner herself testified repeatedly she had no thoughts of committing suicide and did not intend to commit suicide the day she

set herself on fire. The very nature of her particular illness was its unpredictability. While persons who attempt to commit suicide almost always express such thoughts if asked, Petitioner repeatedly denied any such thoughts or ideation.

Every expert who testified admitted they had patients who attempted or committed suicide while under their care. Perhaps the best evidence of the unpredictable nature of suicide and suicide attempts is the unquestioned and unrefuted testimony by the only true "suicidologist" who testified at trial, Dr. John Griest.

As Dr. Griest noted, over a quarter of a million people attempt suicide each year, three-fourths of whom have been under the care of a physician over the previous six months, and one-half of whom had seen a physician in the previous three months. Placing all the known risk factors into a hypothetical person, including a prior suicide attempt and a depressive disorder, the chances of that hypothetical person committing suicide is only five percent. Although a person who has made a prior attempt is sixty percent "more likely" to commit suicide, only ten percent of that entire group do so. In the only empirical evidence presented at trial, of a total of sixty-three patients studied, twelve attempted suicide, but the psychiatrist treating those twelve patients believed that there was only a thirty-one percent chance that they would make such an attempt.

"Numerous cases underscore the inability of psychiatric experts to predict, with any degree of precision, an individual's propensity to **do** violence to himself or others." Nesbitt, 467 So.2d at 717. *As* the court in People V. Burnick, 535 P.2d 352, 365 (Cal. 1975) noted, "psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession".

Under such circumstances, to ask a human being, even one with psychiatric

training, to predict whether and when such a person will attempt suicide is not only unreasonable, but any error in such a judgment cannot be the basis for the imposition for any liability. See e.g., Dillman, 283 So.2d at 388: Centeno v. City of New York, 369 N.Y.S.2d 710, 711 (N.Y. App.Div. 1975). ("The prediction of a future course of mental illness is a professional judgment ... Disagreement between professional experts does not provide a basis..." for holding the Defendant liable.) Moon v. U.S. 512 F.Supp. 140 (D. Nev. 1981) (Drowning of patient permitted to go on outing not foreseeable: hindsight unavailable to court).

Under the circumstances of this case, we respectfully request this Court to, as the District Court held, refuse to extend or create a duty of custodial supervision and care to an outpatient relationship between a psychiatrist and a patient, and to hold, as a matter of law, that Respondent was under no duty to confine Petitioner in an institution.

B. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A VERDICT IN FAVOR OF THE PETITIONER ON THE ISSUE OF PROXIMATE CAUSE

Clearly separate from the whole issue of "duty" is the Petitioner's contention that Dr. Chacko was negligent in failing to prescribe adequate doses of an antipsychotic medication, Navane, and her contention that Dr. Chacko was negligent for failing to see Petitioner in person after the telephone call of June 24, 1983. The District Court found that Petitioner failed to produce sufficient evidence at trial for the jury to determine that either of these alleged negligent acts proximately caused her injuries.

With respect to the issue of a "face-to-face" contact, Petitioner's case was built on pure speculation and the stacking of one inference on top of another. Petitioner's experts' speculated that had such a contact taken place, the complained of incident would not have occurred. To reach this so-called

conclusion, they infer that had Dr. Chacko seen the patient in person, he would have seen something or heard something different that what was reported to him, he would then have altered his diagnosis, would then have confined the patient or otherwise altered his treatment, the patient would not have harmed herself while confined, she would not have been discharged before **Sunday,** the thought of self-harm would not have come into her mind, and somehow she would not have harmed herself anyway.

The District Court held that such evidence was insufficient and speculative as a matter of law. While Petitioner states that it has "long been settled" that expert opinions admitted into evidence without objection cannot be declared speculative as a matter of law, none of the cases she cites stands for that proposition, or even discusses that issue.

In Wale v. Barnes, 278 So.2d 601 (Fla. 1973), the court held that where there was direct evidence that the injury resulted from a definite negligent act or cause, the fact that the plaintiffs did not eliminate non-negligent causes provided an insufficient basis to direct a verdict in favor **of** the defendants. In Golden Hills Turf & Country Club, Inc. v. Buchanan, 273 So.2d 375 (Fla. 1973), the court held that the District Court was in error in finding that the suggested methods by an expert to solve a problem were so "unpractical" that the trial court should have rejected the testimony.

If anything, the decision in Cromartie v. Ford Motor Company, **341** So.2d 507 (Fla. 1976) supports the District Court's decision here, since this Court agreed that "verdicts should not be based upon speculative and conjectural expert testimony with no basis and evidentiary fact." While the Court there found the expert opinion was not based upon speculation and conjecture, it did not hold, as Petitioner suggests, that such grounds, if properly found, were an insufficient basis to require a judgment for the defendants.

Perhaps the best example of this principle is Husky Industries, Inc. v. Black, 434 So.2d 988 (Fla. 4th DCA 1983). In a products liability action, the trial court there denied defendant's motion for directed verdict, as well as its motion notwithstanding the verdict, finding that the evidence was sufficient to prove a defect in the product.

The Fourth District Court of Appeal reversed, finding that the plaintiff's experts at trial were not only unqualified, but that their opinions were based upon insufficient facts and data, as well as "pure speculation and guesswork." Id. at 995. The court was therefore compelled to conclude that the record was totally devoid of any evidence from which a jury could find the product defective.

In this case, the only testimony on causation presented by petitioner is that if she had been confined, the chances that she would have been able to inflict injury upon herself would have been lessened, since, statistically, there is less ability to commit such an act while institutionalized. No expert testified that simply by seeing petitioner in person, the plaintiff's injuries, more likely than not, would have been avoided.

Dr. Kline, Petitioner's own expert, conceded candidly but probably unintentionally, that without hindsight and without knowing that she would attempt suicide two days after the phone call, he had insufficient facts to form an opinion as to whether Petitioner was at risk for suicide as of June 24, 1983. (R.429). Dr. Kline went even further and clearly demonstrated the speculative nature of any opinion on causation, when he stated if Respondent had seen the patient, and based upon his observations at that time, decided not to hospitalize her, Dr. Chacko would have committed no deviation from acceptable standards of care. (R.430-31).

Certainly, this latter testimony was directed to the issue of "standard of

care". It points out however, the speculative nature of these experts' opinions. The only basis for their opinions is the presumption and speculation that somehow Dr. Chacko would have discovered something new about the patient's condition which would have led him to "insist" on same different form of treatment. Based on the information on the record, Dr. Kline could not even state what that information would have been, or whether in fact Petitioner was at risk for suicide at that time. Clearly, the District Court was correct in holding that Petitioner's evidence on this issue was insufficient and speculative as a matter of law, warranting judgment in favor of the Defendant.

Similarly, in Nieves v. City of New York, 458 N.Y.S.2d 548 (N.Y. App.Div. 1983), the Plaintiff alleged that he had been negligently discharged from a mental hospital. The court found that the plaintiff failed to prove that any negligence was a proximate cause of the suicide. Though plaintiff's expert testified that it was possible that had the decedent received treatment, he would not have taken his own life, the court found that such testimony on causation was based on "mere speculation" and reversed a verdict for the plaintiff. See also, Paradies, 431 N.Y.S.2d at 175.

With respect to the issue of Navane, there is simply no evidence, speculative or otherwise, that the alleged inadequate dose prescribed by Dr. Chacko in any way caused or contributed to cause Petitioner's injuries. Not one single expert testified that a different dose, standing alone, would have, more likely than not, caused the plaintiff not to inflict injuries upon herself.

Two of Petitioner's experts explained the reason no expert could render such an opinion. Both Dr. Morgan and Dr. Kline testified that psychiatric medications take a period of time to work, especially with Navane and other antipsychotic medications. While Petitioner attempts to creatively reconstruct Dr. Morgan's testimony, Dr. Morgan affirmatively stated that even if

Petitioner had been on a higher dose, she still could have gone out on June 26, 1983, and done precisely the same act. (R.623). He also stated that the medication "does not work that quickly" and "its effect takes a long time". (R.623). Taken orally, Dr. Morgan stated that it takes longer than three or four days to take effect. And, Dr. Gilbert, testified that while he felt the dosage was inadequate, there was no "guarantee the medication was going to work anyway". (R.641).

Thus, there was not even any disagreement among the Petitioner's experts on this issue, and the Petitioner's evidence on causation was wholly insufficient as a matter of law. The District Court was therefore correct in holding Respondent was entitled to judgment as a matter of law.

C. THE TRIAL COURT WAS CORRECT IN ORDERING A NEW TRIAL ON THE GROUNDS THAT THE JURY'S FINDING THAT THE PLAINTIFF WAS NOT NEGLIGENT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The trial court, after finding that Respondent was entitled to judgment as a matter of law, ruled, in the alternative, that the defendant was entitled to a new trial "because the verdict is contrary to the evidence". The court found that the evidence simply did not support the jury's conclusion that Petitioner herself was not negligent, since, to accept that verdict would be to say, by analogy, that "the Petitioner's part must be forgotten in evaluating the play, even though she was the only performer on stage at all critical times." (R.10295).

Clearly then, the appropriate standard to be applied by this Court is whether or not a trial judge, in ordering a new trial, "abused his discretion". Keith v. Russell T. Bundy & Associates, Inc., 495 So.2d 1223, 1225 (Fla. 5th DCA 1986). Thus, "if reasonable men could differ as to the propriety of the action taken by the trial court, then there is no abuse of discretion." Id.; See also, Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981). While the trial court is

not to serve as a seventh juror, it has a duty "...to grant a new trial where either the verdict is against the manifest weight of the evidence, the jury has been deceived as to the force and credibility of the evidence, or the jury has been influenced by considerations outside the record." Papcun V. Piggyback Discount Souveniers Food & Gas Corn, 472 So.2d 880, 881 (Fla. 5th DCA 1985).

Since the trial court did not invoke the "magic incantation" that this verdict was "against the manifest weight of the evidence", Petitioner contends that this court should use a different standard of review, and find that this issue presents a clearly legal question, not a discretionary act, only reversible upon showing of an abuse of that discretion. This is purely a game of semantics, and completely inaccurate.

Under Florida law the test for a directed verdict is whether the court concludes that "the jury could not reasonably differ as to the existence of a material fact or a material inference, and that the movant is entitled to judgment as a matter of law." Ligman v. Tardiff, 466 So.2d 1125, 1126 (Fla. 3rd DCA 1985). Had the trial court believed, and ruled, that the evidence was insufficient to support the jury's verdict on the issue of comparative negligence it would have directed a verdict in favor of the respondent, instead of ordering a new trial.

The failure to use exactly those words as quoted by the appellate courts of this state is simply not fatal to the trial court's ruling nor does it justify the imposition of a different, and wholly inappropriate standard. In Wackenhut Corp. v. Canty, 359 So.2d 430, 435 (Fla. 1978) this court specifically stated that an order for a new trial "need not incant language to the effect that the verdict is against the manifest weight of the evidence" in order to be affirmed. All that is required is that the order give reasons which will

support this conclusion so that it will be susceptible to appellate review.[9]

This record is replete with support that the verdict was against the manifest weight of the evidence, and that the jury was influenced by considerations outside the record on both the issue of damages, and the issue of negligence and comparative negligence.

Petitioner contends there was ample evidence that she was "insane" or "incompetent" at the time of her second suicide attempt, and therefore the jury could have found that she was not responsible for her actions. In other words, petitioner's position is that her conduct should have been gauged by a subjective standard of "reasonableness" in light of her particular state of mind, rather than the objective reasonable man standard normally used in evaluating any person's conduct.

Disregarding for the moment whether this position is correct, the problem is that the jury was not so instructed. The jury was instructed that negligence is the failure to use reasonable care. (R.2134). There was no special instruction given or requested that would allow the jury to consider Petitioner's subjective state of mind in evaluating her negligence. On an objective standard, it is clearly against the manifest weight of the evidence to conclude Petitioner was not comparatively negligent in setting herself on fire after slashing her

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[9] It should be noted that if the court's reasoning is found to be insufficient, the remedy is relinquishment of jurisdiction to the trial court for entry of an order specifying the grounds, and not the automatic rejection and reversal of the trial court's order. 1.530(f), Fla.R.Civ.P.; Prime Motor Inns v. Waltman, 480 So.2d 88 (Fla. 1985); Keith v. Russell T. Bundy & Associates, Inc, 495 So.2d 1223 (Fla. 5th DCA 1986).

arms.[10]

Certainly, Petitioner should have foreseen the consequences of her actions of cutting herself with a knife and setting her blouse on fire. A reasonable person in the position of the Petitioner would, or should have, known the likely result of such action, Petitioner, while not complaining of any error in the instructions, now wishes to speculate as to why the jury reached the verdict it did, a result which clearly violated the law as given by the Trial Court.

If Petitioner's position is found to be correct by this Court, and a subjective standard should have been applied, the jury should have been so instructed, just as it would have been if Petitioner were a minor. See, Florida Standard Jury Instruction 4.4. *As* it was, the jury was not instructed that any different standard should have been applied. It is improper to speculate as to the basis for the jury's determination, and we must assume that they would follow the law as instructed and not the law Petitioner now deems appropriate. See, Burris v. Bowe's Funeral Home, Ltd., 204 So.2d 257 (Fla. 2nd DCA 1967). (Although instruction of future damage was improperly omitted, where error not preserved, the Court was correct in ordering a new trial where verdict contrary to instructions as given.)

Therefore, the Trial Court was eminently correct in granting Respondent's Motion for New Trial on this ground. There certainly was no abuse of discretion, where the overwhelming weight of the evidence was that a reasonable person would, or should have, foreseen the consequences of setting herself on

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[10] The jury's confusion as to the standard to be applied to Petitioner's conduct is amply demonstrated by the question from the jury as to the "legality" of Petitioner's conduct, as opposed to it's "reasonableness", as well as comments by the jurors during deliberations and post trial interviews. For example, one juror indicated that she did not understand the question of "was Linda negligent legally". (R.10555). See e.g., Ford v. Natham, 166 So.2d 185 (Fla. 1st DCA 1964) (where the jury expresses clear misunderstanding of the law on contributory negligence, new trial is proper).

fire and such actions clearly demonstrated a lack of reasonable care. See, Keith, 495 So.2d at 1223. Simply put, a person exercising reasonable care would not have set their clothes on fire.

Further, the objective "reasonable man" standard was the appropriate standard to apply to Petitioner's conduct. While no Florida court has addressed this precise issue, Florida law has long held an insane person liable for his own negligent acts. See e.g., Jolley v. Powell, 299 So.2d 647 (Fla. 2nd DCA 1974). The various policy rationales underlying this rule are succinctly set out by the Restatement (Second) of Torts, §283B, Comment (b) (1965):

> "(1) The difficulty of drawing any satisfactory line between mental deficiency and those variations of temperament, intellect and emotional balance which can not as a practical matter be taken into account in imposing liability for damage done:
>
> (2) The unsatisfactory character of the evidence of mental deficiency in many cases, together with the ease with which it can be feigned, the difficulties which the trier of fact must encounter in determining its existence, nature, degree and effect and some fear of introducing into the law of torts the confusion which has surrounded such a defense in the criminal law ...;
>
> (3) The feeling that if mental defectives are to live in the world they should pay for the damage they do ...:
>
> (4) The belief that their liability will mean that those who have charge of them or their estates will be stimulated to look after them, keep them in order and see that they do not do harm."

By and large, these same considerations should also mandate that a mental deficiency should not relieve a plaintiff of liability for her own comparative negligence. By analogy, if on the day in question, Petitioner had negligently operated a vehicle and injured a third party, her mental state would not, and should not operate to relieve her of responsibility for the injuries to a third party, or for her own injuries.

While Petitioner asserts a mental illness should be taken into account in determining a Plaintiff's comparative negligence, she espouses no standards or criteria for the jury to use in making that determination. With a physical

incapacitation or limitation such as age or sudden loss of consciousness, the physical evidence is clear and indeed, frequently presents a question of law for the court to decide.[11] See, Baker v. Housman, 68 So.2d 572 (Fla. 1953); Gandy v. Outlay, 417 So.2d 1134 (Fla. 5th DCA 1982).

With a mental illness, there are no clear cut guidelines and the issue is complex, involving gradations on a continuum. Where is a court or a jury to draw the line between the person who is to be gauged by an objective standard, as opposed to the one whose mental status should indeed be taken into account through some form of a subjective standard?

There is simply no magical point or dividing line which can objectively be used to determine which standard to apply. Should then the jury always be instructed that they may take the mental status of the plaintiff into account? If so, we have completely abrogated the reasonable man standard for comparative negligence, and are gauging the plaintiff's and defendant's conduct differently whenever a plaintiff might contend that she was not fully possessed of her mental faculties. A plaintiff who is depressed at the loss of a loved one, for example, would now be allowed to escape the responsibility for her resultant action in negligently walking in front of a speeding car, or failure to protect herself from bodily harm in some other manner.

Persons who wish to live in society should *bear* the consequences of their *own* actions, and be adjudged the same as the intoxicated, the careless, the inattentive, or the drugged. Perhaps, in those jurisdictions where contributory negligence is always, or at times, a complete defense to a tort action, the Plaintiff's mental state should be considered before barring any recovery

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[11] While Petitioner states that her condition was "caused by a physical biochemical abnormality", there is no evidence in the record to support such a contention. Every expert agreed that the cause of paranoid disorders is unknown, although theories abound.

whatsoever, as in the cases cited by Petitioner, Warner v. Kiowa County Hospital Authority, 551 P.2d 1179 (Okla Ct.App. 1976), Mochan v. State, 352 N.Y.S.2d 290 (N.Y. App.Div. 1974) and Cowan v. Doering, 545 A.2d 159 (N.J. 1988). However, where comparative negligence is the rule, it is both unreasonable, unsound and unfair to not apportion the negligence between the parties utilizing the same standard of care.[12]

The Trial Court was correct in finding that the jury's verdict of no comparative negligence was against the manifest weight of the evidence. Its discretion in granting the Defendant a new trial should not be disturbed on appeal.[13]

D. THE TRIAL COURT WAS CORRECT IN ORDERING A NEW TRIAL ON THE GROUNDS THAT THE VERDICT WAS EXCESSIVE

Respondent politely declines Petitioner's "invitation"[14] to do a "better job" of allocating the verdict, since there is no allocation which either makes sense

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[12] It should be noted that the Restatement "expresses no opinion as to whether insane persons are or are not required to conform for their *own* protection to the standard of conduct which society **demands** of sane persons". Restatement (Second) of Torts, §464 (1965). The institute does note that "mental deficiency which falls short of insanity however does not excuse conduct which is otherwise contributory negligence". Id. at Comment (g).

[13] Petitioner's reliance upon Cowan V. Doering, 545 A.2d 159 (N.J. 1988), Vendola v. Southern Bell Telephone and Telegraph, 474 So.2d 275 (Fla. 4th DCA 1985) and Whitehead v. Linkous, 404 So.2d 377 (Fla. 1st DCA 1981) is misplaced. First, if Petitioner is now contending that comparative negligence was not a defense, as a matter of law, it is inappropriate to raise this new argument at this stage of the litigation. Petitioner never objected to the Court giving the instruction on comparative negligence, nor did Petitioner raise this as a point on appeal before the Fifth District. Secondly, the New Jersey decision is **based** primarily on an analogy to New Jersey law on the issue of comparative negligence and strict liability cases. New Jersey holds to the view that comparative negligence is no defense to an action for strict liability based upon a manufacturing defect. Florida law is exactly the opposite. See e.g., West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976); Alburn Machine Works Company, Inc. v. Jones, 366 So.2d 1167 (Fla. 1979); Hethcoat v. Chevron Oil Company, 383 So.2d 931 (Fla. 1st DCA 1980).

[14] See Petitioner's Brief at Note 27.

or justifies the size of the jury's award.

Although Plaintiff's counsel suggested an award of $3,000,000.00 during his closing argument, he did not even attempt to support such a figure other than referring the jury to the pictures of the Petitioner and, telling the jury, in essence, they should use their own experiences of pain in evaluating her suffering. Clearly, the jury's award was excessive, against the manifest weight of the evidence and, influenced by consideration of matters outside the record and by improper closing argument.

It is easy to suggest that the judge merely disagreed with the size of the verdict, but the record in this case reveals far more. This trial represents a classic example of the reason why trial judges are vested with discretionary power to grant a new trial, i.e., "...because of his direct and superior vantage point." Baptist Memorial Hospital v. Bell, 384 So.2d 145, **146** (Fla. 1980).

While not delineated in the order, the trial court was faced with a record replete with irregularities in various evidentiary matters and in the jury deliberations as well. Only the trial court was properly equipped, by virtue of presiding over the entire proceedings, to make a determination of whether a new trial should be ordered.

The improper influences on the jury included the fact that Petitioner's counsel invoked the "Golden Rule" in closing argument. He stated, shortly after suggesting an award of $3,000,000.00, "...you folks who know something about **pain,** I presume everyone there seated has had pain in their life and everyone who is seated there, I presume, perhaps you haven't, but most people have suffered some kind of embarrassment..." (R.2033)

This was certainly improper argument by Plaintiff's counsel as it in effect asks the jury to put itself in the place of the plaintiff in evaluating the plaintiff's injuries, pain and suffering. Klein v. Herring, 347 So.2d 681 (Fla.

3rd DCA 1977).

Additionally, the jury was allowed to review very emotional and sympathy provoking letters from Petitioner's husband regarding the "unbelievable emotional and financial trauma" to himself and his family as a result of the incident, which even Petitioner admits were inadmissible.

Most importantly, the record reveals that at least one juror brought up a very emotional, personal experience during the course of deliberations. Mr. Love related his experiences with his daughter who became seriously ill and died, apparently from spinal meningitis. (R.10505-6). Although denied by Mr. Love, other jurors explained that Mr. Love had told them that he called his doctor on the phone and the doctor told him it was just a cold. Later that night, the child got worse and was rushed to the hospital.. (R.10540-41). While he was telling the story, Mr. Love began crying and the emotional impact was sufficient to bring tears to the eyes to the other jurors. (R.10543). Mr Love further stated that he could have sued the doctor for that. (R.10544). The parallel of this story, especially the telephone diagnosis by his physician, to the facts of the instant case *is* unmistakable. This revelation by the other jurors is especially disturbing in light of Mr. Love's response during voir dire to the effect he never had a bad experience with a physician. **(R.171).**

This is clearly improper as the jury is required to confine its consideration to the facts in evidence. They are not to act on special or independent knowledge gained from facts not in evidence. Edlestein v. Roskin, 356 So.2d 38 (Fla. 3rd DCA 1978).

There were a number *of* other indications in the record that the jury was influenced by outside considerations, including a desire to pay for the college expenses of Petitioner's daughter, the note left by the alternate, allegedly known only to the foreman who assured the jury that they would "feel better"

about the verdict once they were told of its contents and the frank admission by one juror that they were so confused that they did not know what they were doing. (R.10530).

While Petitioner may disagree with the effect of these considerations on the jury, that is not the standard by which to gauge the court's decision. If reasonable men can differ as to the propriety of the new trial order then there is no abuse of discretion. Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145, 146 (Fla. 1980); Ashcroft v. Calder Race Course, 492 So.2d 1309 (Fla. 1986).

Here, the trial. court determined the verdict was contrary to the evidence. While this decision is to *some* extent subjective, because the trial court was on the spot and had the ability to measure not only the tangible evidence but also the intangible, his decision is to be given great deference. Ford v. Robinson, 403 So.2d 1379 (Fla. 4th DCA 1981). The trial court was uniquely qualified as the judicial officer on the scene to evaluate the inflammatory and prejudicial effect of these considerations in making the determination that a new trial was required. LaReina Pharmacy, Inc. v. Lopez, 453 So.2d *882* (Fla. 3rd DCA 1984). There being no abuse of discretion demonstrated, the trial court's order should be affirmed. Blancher v. Metropolitan, 436 So.2d 1077 (Fla. 3rd DCA 1983); Staib v. Ferrari, Inc., 391 So.2d 295 (Fla. 3rd DCA 1980).

E. THE TRIAL, COURT WAS CORRECT IN ORDERING A NEW TRIAL BECAUSE OF IRREGULARITIES IN THE JURY DELIBERATIONS

Despite the trial. court's admonition to the contrary, Petitioner seeks to analyze each of the irregularities separately. The trial court's decision however was based on the fact that "the combined effect of the **problems** is clearly too great to allow this verdict to stand.'' Despite the Petitioner's innuendo of misconduct and bias on the part of the trial judge, the court made every effort to avoid blaming any party or the jurors for the irregularities,

and reluctantly concluded that to be fair, just and equitable to all parties, a new trial on all issues was required in the event the judgment for Dr. Chacko is not affirmed. Here, the trial court was faced with an amazing number of irregularities which placed the integrity of the jury deliberations in grave doubt. Once again, the trial court having the knowledge and familiarity With the entire proceedings, the "personality" if you will, of the trial, is in a far better position to evaluate the need for a new trial than those who must rely solely on a *dry* record.

The note from the alternate juror to the jury foreman was improper and prejudicial.[15] The note divided the jury - the foreman who knew about it and the rest who did not. Of course, the foreman denied the note had any effect on his decision. Only the trial court however was in the position of evaluating his credibility and the effect of his "superior knowledge" on the rest of the jury and their deliberations.[16]

Clearly, Mr. Hardin understood the note as being favorable to the plaintiff. He frankly admitted after the verdict was reached that he did not say anything about it to any of the other jurors "...knowing that it could cause, maybe sway them one way or the other..." (R.2192) And, before the verdict, he assured the

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[15] It should be noted that the alternate juror was allowed to sit by the door to the jury room, with the door open, so that she could "listen in" on the deliberations. This was clearly improper, and warranted a new trial by itself. Berry v. State, 298 So.2d 491 (Fla. 4th DCA 1974). After the jury retires to deliberate, alternates are strangers to the deliberations. As a result of this occurrence, the alternate was apparently prompted to leave a note to the foreman, since the jury did not complete its deliberations that first day.

Petitioner's position that this inquiry involved matters which were "intrinsic" to the verdict has a somehow hollow ring, in view of her contention the note did not prejudice the jury. In order to evaluate the effect of any extrinsic influence, it is obviously necessary to inquire into the deliberative process of the jury. The decision in Dover Corp. v. Dean, 473 So.2d 710 (Fla. 4th DCA 1985) is inapposite, since even Petitioner concedes there were proper grounds to conduct a jury interview. Unlike the situation in Dover, Respondent did not "luck into" finding improper influences on the jury.

other jurors that "we will all be more comfortable with the verdict and...what we have done" after they learned of the contents of the note allegedly known only to him. (R.10485).

It is ironic indeed that Petitioner now claims that this is unclear and can be construed in a number of ways. First, Petitioner's counsel objected to and effectively prohibited any further inquiry into the meaning of those statements. (R.10486). Secondly, such ambiguity, if it exists, serves only to buttress the court's discretion since only the judge, sitting there listening to the jurors and having been present during the entire proceedings, is appropriately qualified to measure the effect and meaning of these statements.

Although denied by Mr. Hardin, Mrs. Gettings clearly states Mr. Hardin refused to reopen the question of the Defendant's liability on the second day of deliberations after the note was received by him. (R.10524, 10533). The import of this refusal was readily apparent. Mr. Hardin apparently thought that because of his representations to the court that the "first question" had already been answered, and his perception regarding the effect of the note, he could not allow a return to the question of liability without causing problems with the verdict.

The other jurors knew something was going on. They saw Mr. Hardin writing a note to the judge and knew that he had gone out to speak with the court. (R.10546). They had no idea what it was about, but Mr. Hardin came back from speaking with the court and told them that he could not tell them about his note, but "...if everything went the right way" they would feel better. (R. 10547-48). Once again, Mr. Hardin denied making this comment, but the testimony of the other four jurors was overwhelming.

In effect, the note and the resultant comments invested Mr. Hardin with what can only be termed a position of superiority to the remaining members of the

panel. Only he knew what was going on, only he had talked with the judge, and therefore his decisions and comments were entitled to a greater weight. While Respondent would like to take Mr. Hardin at his word, the numerous contradictions between his testimony and the rest of the jurors, his post verdict contact with Respondent's counsel "for a drink" and the suspicion of at least one juror that he told Mr. Love about the note (R.9326-28, 2644) all lead to the inescapable conclusion that he was indeed affected by the note and the jury deliberations were irreparably tainted.

The problem with the exhibits during trial and specifically the records from Orlando Regional Medical Center is more serious and severe than the Petitioner would have this Court believe. It is undisputed that the letters from Mr. Paddock were inadmissible. They were obviously irrelevant and immaterial, but they were not, as Petitioner contains, innocuous. They were self serving, sympathy provoking letters about Mr. Paddock's alleged emotional response to the incident and included information concerning the state of their financial distress as a result of the alleged incident.

With respect to the missing records, Petitioner wishes to focus on only one side of one sheet of the nursing notes. Petitioner however admits that the other side of the sheet was omitted, allegedly, through inadvertence, which the Defendants relied heavily on at the trial of this action. While Petitioner would minimize the effect of this omission, the fact of the matter is documentary evidence which the jury is allowed to review during its deliberations can have a much greater impact than their assumed recollection of oral testimony during a three week trial. This is at least implicitly recognized in the rule which prohibits the taking of depositions into the jury room during deliberations. Gills v. Angelis, 312 So.2d 536 (Fla. 2nd DCA 1975); Schoeppl v. Akolowitz, 133 So.2d 124 (Fla. 3rd DCA 1961).

After the admission of what had been represented by Petitioner's counsel to be the "entire" hospital chart, counsel for the Petitioner went "through" the records and requested permission to white out or delete certain references to the claim by Petitioner against her parents. (R.1443). The court granted permission to delete these references, but when Dr. Chacko's counsel had the opportunity to review these references, he noted this supposedly complete chart now had various pages missing, documents included that should not have been, including correspondence, and, after a hearing, some items were removed. (R.1688-93).

Contrary to the representations to opposing counsel and the court, Petitioner's counsel also deleted references to the fact that Mr. Paddock had stated that the parents decided she need not be admitted to the hospital prior to her second suicide attempt. (R.1692). These problems were supposedly worked out prior to the jury returning to deliberate but Petitioner's counsel did not leave well enough alone.

Although Petitioner's counsel initially denied it, at one point, Without leave of Court or notice to Respondent's counsel, they took the entire set of records out of the courtroom in order to "copy" them although they had complete copies. (R.2169). In addition, immediately prior to the exhibits going back to the jury, Petitioner's counsel took the exhibits to the back of the courtroom outside the view of the clerk which they once again initially denied. (R.2168-69). This was also done without permission of the trial judge or notice to Respondent's counsel. This was not discovered until the next morning and attempts were made again to correct the records. A number of pages were identified as having been omitted and the letters from Mr. Paddock were found to have again been inserted. (R.2172, 2173, 2175). Thus, the jury had already deliberated, and at least indicated a decision on the liability issue, without

having certain pages and having others that were clearly inadmissible. Again, attempts were made to correct the problems, but at that point, the damage had been done.

To avoid casting aspersions on any party, the court itself took responsibility for what it termed the "evidentiary confusion". (R.2654). Despite the innuendo, and outright insults directed by the Petitioner to the trial judge, a review of the record demonstrates the court took great pains to avoid name calling, accusations or any semblance of bias towards any party. The court unnecessarily and unjustifiably blamed itself for the confusion which resulted and found itself faced with not just a simple question of prejudice, but overwhelming evidence that the exhibits had been tampered with without its permission or knowledge. This was further compounded by indications during the jury interview of irregularities during deliberations in regard to allowing jurors to review exhibits.

It is impossible and inappropriate to attempt to sort out and separately analyze each and every irregularity which occurred during the trial. The judge was there, recognized the various problems and identified three specific items amongst the many, and because of his superior advantage point, his decision to grant a new trial should be affirmed. Under these new circumstances a new trial was mandated because of the threat to the integrity of and confidence in jury trials. See, Snelling v. Florida Eastcoast Railway, 236 So.2d 465 (Fla. 1st DCA 1970) and Wood v. Florida Eastcoast Railway, 237 So.2d **801** (Fla. 1st DCA 1970).

VI. CONCLUSION

It is respectfully submitted that the District Court was correct in affirming the Trial Court's Order granting Respondent's Renewed Motion for Directed Verdict, and its judgment in favor of the Respondent.

If the District Court's decision is reversed, then this Court should affirm

the Trial Court's appropriate exercise of its discretion in ordering a new trial on all issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to JOEL D. EATON, ESQ., 25 West Flagler Street, Suite 800, Miami, Florida 33130 and J.B. SPENCE, ESQ., Suite 300, Grove Professional Building, 2950 Southwest 27th Avenue, Miami, Fl 33133 this 28th day of October, 1988.

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