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IN THE SUPREME COURT OF FLORIDA

CASE NO. **72,338**

LINDA K. PADDOCK,

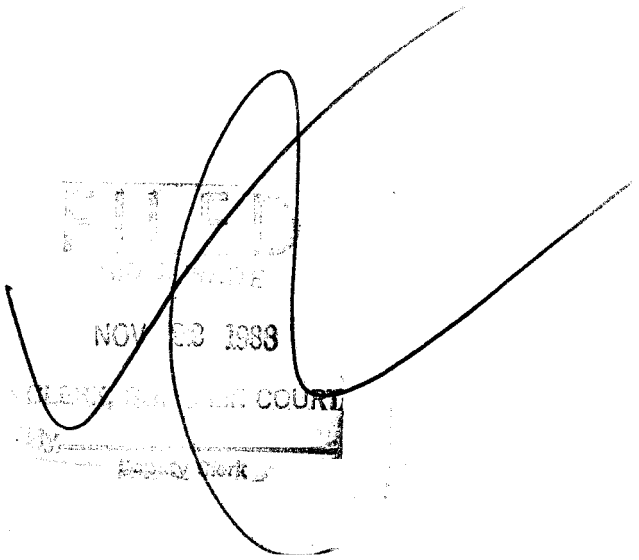
Petitioner,

VS.

CHAWALLUR DeVASSY CHACKO, M.D.,

Respondent.

_____/



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

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

LAW OFFICES, PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW 8 OLIN, P.A.- OF COUNSEL, WALTER H. BECKHAM, JR
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

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

TABLE OF CASES

Page

TABLE OF CASES

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

AUTHORITIES

I. STATEMENT OF THE CASE

Dr. Chacko has not challenged any material aspect of our initial statement of the case. Instead, he has merely elaborated upon the substance of the trial court's order and the District Court's decision. In our judgment, the paraphrases are not entirely accurate. The documents speak clearly enough for themselves, however, so we will simply leave a reading of them to the Court.

II. STATEMENT OF THE FACTS

In the course of his brief, Dr. Chacko states over and over again that the critical fact upon which the District Court exclusively bottomed its decision, the so-called "admitted fact that Chacko recommended hospitalization which recommendation was rejected", is absolutely correct--and he calls **us** at least a dozen ugly names for daring to assert otherwise. The facts are therefore of obvious importance here, so we must respond to Dr. Chacko's restatement of them in detail (and argumentatively as well, since we must necessarily disagree). We note first, however, that Dr. Chacko has conceded what the District Court would not--that we are constitutionally entitled to have the evidence viewed in a light most favorable to the verdict here.[1/] Dr. Chacko also has not challenged the accuracy of even a single word of our statement of the facts--and, because he could not quarrel with our verbatim quotations from the testimony of Mrs. Paddock and her father, he does not deny that our version of the June **24** telephone calls **is** at least supported by the evidence.

[1/] Although the point has been conceded, the significance of it has simply been lost on the defendant. The defendant's misunderstanding of the point is revealed by his argument that the District Court's "finding [of recommendation and rejection] is clearly correct, and supported by the overwhelming evidence in the record to that effect" (Respondent's brief, **p. 24).** In the first place, the issue presented here is not whether the ***District Court's "finding"*** is supported by the evidence; the issue is whether the *jury's* ***finding*** to the contrary is **supported** by the evidence. Secondly, support in the record for the District Court's "finding" would be relevant only if the jury had found ***against*** Mrs. Paddock, and ***she*** were claiming entitlement to a directed verdict here. Support in the record for such a finding simply does not entitle the ***defendant*** to a directed verdict, if there is support in the record for a contrary finding, as there clearly is. With support in the record for ***both*** findings, the issue belonged to the jury, and neither party was entitled to a directed verdict on the issue. *Glass* ***v.*** *Parrish,* **51** So.2d **717** (Fla. **1951**); ***Westerman v.*** *Shell's City, Inc.,* **265** So.2d **43** (Fla. **1972**); ***Marshall v.*** *Johnson,* **392** So.2d **249** (Fla. **1980**). ***See*** **3** Fla. Jur.2d, ***Appellate Review,*** §§343-46 (and *numerous* decisions cited therein).

Neither does he refer the Court to any place in the record at which there is an express admission of the District Court's pivotal, so-called "admitted fact" of recommendation and rejection--and he could not, because no such admission appears in the record.

What he has done instead is argue that the favorable view of the evidence to which Mrs. Paddock is entitled cannot be limited "just [to the] portions selectively recited by her in her brief", however accurate that selective recitation may be--but must be expanded to include "*all* of the evidence", including "undisputed facts and her own admissions" (Respondent's brief, p. 3). We could justifiably quarrel with this legal premise.?' There is no need to do so, however, because each of the purported "undisputed facts and . . . admissions" which Dr. Chacko thereafter musters to support the District Court's so-called "admitted fact" (which the defendant now concedes is at least contradicted by competent evidence to the contrary) is a product of his counsel's invention. As we shall demonstrate, not one of them will survive a fair and honest reading of the record.

Perhaps the most damaging of the so-called "admissions" invented by counsel (damaging, that is, if there had been any truth to it) is the contention that "[t]he nurses at the

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2/ The premise is wrong because a jury is entitled not only to resolve conflicts between different witnesses, but also to resolve conflicts within a single witness's testimony:

> . . . Appellant concedes that there is legally sufficient evidence, in the form of Ms. Williams' testimony, to support his conviction, but that such evidence is not competent since Ms. Williams recanted her earlier incriminating testimony. He argues that a witness cannot be considered credible when giving one story and incredible when giving another. The logical conclusion of appellant's argument is that juries must believe all or none of a particular witness's testimony. The fallacy of this conclusion is self-evident. Obviously, a witness can tell the truth about some matters and lie about others. In this case, to reach a verdict of guilty, the jury had to believe Ms. Williams' original testimony and disbelieve her recantation. It is not this Court's function to reweigh the evidence, but only to ensure its legal sufficiency. [Citation omitted]. The evidence was legally sufficient . . . .

Burr ***v. State***, 466 So.2d 1051, 1053 (Fla. 1985). ***Accord, Marks v. Delcastillo***, 386 So.2d 1259 (Fla. 3rd DCA 1980), ***review denied***, 397 So.2d 778 (Fla. 1981); ***Wynne v. Adside***, 163 So.2d 760 (Fla. 1st DCA 1964). In other words, we are absolutely entitled to "selectively recite" the evidence here, even if the testimony of Mrs. Paddock and her father had been internally inconsistent (which it was not, as we shall demonstrate).

hospital noted that Petitioner admitted she did not follow her physician's advise [sic] to go into the hospital. (Plaintiff's Exhibit **6;** R. 1353)." (Respondent's brief, **p.** 8). Although it will undoubtedly provoke another round of ugly name-calling, we are constrained to respond that this contention is false. In the first place, the record contains a flat denial of this contention by Mrs. Paddock--which, of course, the jury was entitled to believe:

> A. He asked if I was willing to go to the hospital so I said, I indicated yes, I would be willing to do what he thought was best.
>
> **Q.** Have you ever told anyone that you in fact did not take the recommendation of Dr. Chacko to go into the hospital?
>
> A. No, I have not.
>
> ....
>
> **Q.** When you were admitted to Orlando Regional Medical Center you didn't tell any doctors there that you had not followed Dr. Chacko's advice?
>
> A. No, 1 didn't.
>
> **Q.** All right. During your stay at the hospital you did not tell any nurses at Orlando Regional that you had not followed the doctor's advice?
>
> A. No, I didn't.

(R. 1353).3/

Since we are entitled to a favorable view of the evidence here, Mrs. Paddock's denial must be accepted as the truth, even if there is conflicting evidence in the record. There is, however, no conflicting evidence in the record on this point. Counsel's reference to Plaintiff's Exhibit **6** is a reference to Mrs. Paddock's hospital chart. The chart contains a handwritten "Progress Note" by the emergency room physician, Dr. Harold, in which he stated that Mrs. Paddock "was seen once by Dr. Chacko in Orlando who recommended hospitalization which was declined"; and the chart contains Dr. Harold's later

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3/ The Court should note that this categorical denial is on the ***very page*** which respondent's counsel has given as a record reference for his statement to the contrary--a fact which ought to cause the Court considerable concern about the propriety of the tactics which are being employed against us here. Fortunately, the record speaks for itself, and we are therefore not intimidated by the ***ad horninern*** attacks upon our own veracity. As Galileo might have put it, they may call us heretic if they like, but the earth still goes 'round the sun.

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typewritten summary, in which he repeated that Mrs. Paddock "was seen once by Dr. Chacko, here in Orlando, who recommended hospitalization but this was refused by the patient and the family" (PX. **6, pp. 3-4, 13).**

It is important to note that neither of these statements is attributed to Mrs. Paddock. And the reason no such attribution appears in the statements is that Dr. Chacko's own testimony at trial created a compelling inference (which Dr. Chacko stated that "I can't deny") that the information was provided to Dr. Harold **by him,** when the two spoke on the telephone shortly after Mrs. Paddock's admission to the hospital (R. 1110-**12, 1134-36,** 1141-42).[4/] In other words, the record proves in black and white that Mrs. Paddock did not tell anyone at the hospital that Dr. Chacko's advice had been rejected, and it reflects that Dr. Harold's statements that Dr. Chacko's advice had been rejected (which were not even attributed to Mrs. Paddock) most probably were provided by Dr. Chacko himself. Most respectfully, counsel's assertion that Mrs. Paddock "admitted she did not follow her physician's advise [sic] to go into the hospital" is unsupported by the record; it is flatly contradicted by the record; and it is plainly false as a result.[5/]

Counsel's next invented "admission" reads as follows: "Petitioner's own statement written shortly after the second suicide attempt indicated her father told her **and** *Dr.*

[4/] The hospital chart also contains a handwritten Consultation Note in which Dr. Chacko wrote " . . . I advised hospitalization. But her father spoke to me and said he did not think she was that bad and they will keep a close watch over her during the weekend and see how things are on Monday" (PX. **6, 3** unnumbered pages between **p. 2** and **p. 3).** If it is ***this*** (obviously after-the-fact and self-serving) note in the chart to which counsel intended to refer, rather than Dr. Harold's notes, we observe simply that there is no "admission" by Mrs. Paddock in this note either. In addition, of course, this was essentially the version of the June **24** telephone calls to which Dr. Chacko testified at trial, which was flatly contradicted by Mr. Burkhart--and the jury chose to believe Mr. Burkhart. Reliance upon this note as proof of the District Court's so-called "admitted fact" would therefore be badly misplaced.

[5/] We have carefully examined the remainder of the 630+-page chart for any evidence supporting counsel's assertion, and have found none. There is one entry in the **original** chart, in a nurse's note penned approximately three weeks after the incident, which refers to a statement made by Mrs. Paddock's **husband** concerning her parents' feelings concerning hospitalization (R. **1691-93; Ct's.** Exhibit **1, p. 446)** The original chart was not in evidence, however. Only a cleaned-up copy of the chart was placed in evidence, and (because it was inadmissible hearsay) this nurse's note was deleted from the copy of the chart which was given to the jury (PX. **6, p. 446).** The defendant therefore cannot rely upon it here--and, in any event, the note does not reflect that either Mrs. Paddock or her father told the nurse anything on the point.

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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)." (Respondent's brief, p. **7;** emphasis supplied). The only record references given for this assertion which even arguably relate to it are the last two, and when they are examined the Court will learn that Mrs. Paddock's written statement recited: "My father did not tell what was discussed on the phone but said that we could handle the situation ourselves and did not think it necessary to go to the hospital" (R. **1373, 1382).**

There is nothing in this sentence which even arguably supports the assertion (which, we remind the Court, was expressly denied by Mr. Burkhart in any event--R. **347)** that Mr. Burkhart told *Dr. **Chacko*** that he did not feel his daughter needed to be hospitalized. All that the statement reflects is that Mr. Burkhart told his daughter that. But, as we explained in our initial brief (at **pp. 22-23),** Mr. Burkhart's statement to his daughter says nothing whatsoever about whether Dr. Chacko recommended hospitalization or whether Mr. Burkhart rejected the advice, and it is not inconsistent with Mr. Burkhart's version of the June **24** telephone call in any respect. Once again, the record squarely refutes counsel's invented "admission", and it simply must be allowed to speak for itself.

Dr. Chacko's counsel next asserts:

> 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).**

(Respondent's brief, **p. 24).** No other "examples" are given.[6/] There are two very funda-

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[6/] The sentence which follows states that " . . . 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)." **(Id).** Even if this assertion were true, it says nothing about the critical issue of recommendation and rejection--but it is simply not true. An examination of R. **383-84** will reveal that Dr. Klein was merely reciting what Dr. Chacko's office records said--and that, even on Dr. Chacko's version of the facts, he was of the opinion that Dr. Chacko was a negligent cause of Mrs. Paddock's injuries.

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mental things wrong with this assertion.

In the first place, Dr. Targum's "understanding" of the facts was derived solely from his reading of discovery materials provided to him before trial, not from the evidence presented to the jury at trial. At trial, the evidence presented on the point of recommendation and rejection was conflicting, and it was the *jury's* function to resolve those conflicts, not Dr. Targum's. The only relevant question here is whether the jury heard evidence supporting its ultimate resolution of this factual dispute--and if it did, as we insist, then Dr. Targum's contrary "understanding" of the evidence has simply become irrelevant.

In any event, there is a more important point to be made: counsel has only half-quoted Dr. Targum. What Dr. Targum ***actually*** said was this:

> Q. [By Dr. Chacko's counsel] Was it your understanding from the materials which you reviewed which you enumerated earlier that on June 24 Linda Paddock, her mother and her father rejected the recommendion [sic] of Dr. Chacko for hospitalization?
>
> A. With certainty I can state that Mr. Burkhart rejected it. It appears as if Mrs. Paddock and her mother rejected it as well. ***The depositions and the records are somewhat confusing and contradictory on this matter.*** But clearly Dr. Chacko's records indicate that he recommended hospitalization to all of them and that they refused it.

(R. 450; emphasis supplied).[7/] We respectfully submit that, if Dr. Chacko's counsel were at all interested in the truth here, he could at least have inserted the required ellipsis for the qualifying portion of the answer that he chose to conceal from the Court.

These three purported "admissions" are the only "admissions" which Dr. Chacko has mustered in support of the District Court's so-called "admitted fact that Chacko recommended hospitalization which recommendation was rejected"--but, as we have demonstrated, each of them has simply been invented from whole cloth.[8/] Not one of them pro-

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7/ Immediately following this exchange, Dr. Targum explained that the "understanding" of recommendation and rejection which he had earlier expressed in his deposition was based solely on Dr. Chacko's office records (R. 450-51).

8/ Counsel also reiterates the District Court's conclusion that it was "undisputed" that Dr. Chacko reserved a bed for Mrs. Paddock after her call to him, and then cancelled it after the conversation with Mr. Burkhart. As we explained at footnote 17 of our initial brief,

vides any reason whatsoever for this Court to ignore all of the evidence to the contrary, as the District Court did. And that is really all that needs to be said on the critical factual issue which lies at the heart of this proceeding, because the remainder of Dr. Chacko's restatement of the facts is entirely irrelevant to the issues presented here.

It is irrelevant because it is simply a recitation of the evidence in a light most favorable to Dr. Chacko's version of the facts--a version of the facts which the jury clearly rejected. It simply ignores the testimony of Mrs. Paddock and Mr. Burkhart; it ignores the expert opinion testimony spelled out in detail in our initial statement of the facts; it minimizes the remainder of our expert opinion testimony; and it reargues the defendant's expert opinion testimony--opinion testimony which has been rendered entirely irrelevant here by the jury's verdict. Because the remainder of Dr. Chacko's restatement of the facts is simply a renewed jury argument, rather than a demonstration of entitlement to a directed verdict, we will spare the Court our additional quarrels with its accuracy (with one exception)--and we will turn to the legal issues to be decided on the facts accurately stated in our initial brief, not one of which the defendant has directly challenged as inaccurate here.

The exception is counsel's assertion that "no one even attempted to contact Dr. Chacko about Petitioner until after the subject incident occurred two days later on Sunday, June 26"--a statement for which no record reference is provided (Respondent's brief, **p.** 8). This unsupported assertion is untrue. The undisputed evidence (from Dr. Chacko himself) was that, shortly after Mrs. Paddock was discovered missing from her home on Sunday (and before ***anyone*** knew of the "subject incident"), Dr. Chacko was advised by telephone of her disappearance, and his assistance was sought (R. 978; DX. 1 at R. **10191).** And Dr. Chacko's reaction to this telephone call speaks more eloquently to the "foreseeability" issue in this

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however, there was a substantial dispute in the evidence on this point. Of course, the more important point (as we also explained in footnote **17)** is that, even if this evidence were undisputed, it is perfectly consistent with the plaintiff's version of the June 24 telephone calls. Put another way, the cancelled bed is just as susceptible of an inference that Dr. Chacko changed his mind as it is of an inference that Mr. Burkhart rejected hospitalization, so it clearly creates no conclusive "admission" which would justify ignoring all the evidence of the plaintiff's version of the June 24 telephone calls.

case than all of the independent experts' opinions on the point--he told Mrs. Paddock's mother "to contact the Orange County Sheriff's Department. . . [and] to have the sheriff's department, if they find her, to be taken to the Orange County Crisis Stabilization Unit" *(Id).*[9] This response, which came before anyone knew anything at all about the "subject incident", proves in spades that Dr. Chacko foresaw the danger which Mrs. Paddock posed to herself if she were not hospitalized--and his counsel's insistence here that he had no inkling before the event that Mrs. Paddock was in serious danger of harming herself should therefore strain the credulity of this Court to its breaking point.

III. ARGUMENT

A, THE DIRECTED VERDICT,

The defendant's duty (and its breach). Dr. Chacko begins his argument by framing the issue as "[w]hether 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" (Respondent's brief, **p.** 16). He then argues that the duty issue obviously involves a question of law, and that we are simply wrong in arguing that it is a question of fact. It is unfortunate, but the defendant has oversimplified our position, and has misunderstood it in the process. We did not contend, and we do not contend, that the duty issue in this case presents a pure question of fact. The threshold question of whether Dr. Chacko owed Mrs. Paddock a duty of care is clearly a question of law, not a question of fact.

Our point was that this threshold question of law had already been thoroughly settled in this State--and that, as a matter of law, and because of the physician-patient relationship which existed between them, Dr. Chacko owed Mrs. Paddock a general duty to exercise reasonable and ordinary care, according to the specific standard of care recognized as reasonable and prudent by similar health care providers. We cited at least a dozen decisions

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9/ **As** noted previously, the evidence suggested that it was this call--not the June **24** call, as Dr. Chacko insisted--which caused Dr. Chacko to telephone the hospital and reserve a bed (which was later cancelled when he learned that Mrs. Paddock was in the burn unit).

recognizing this general duty,[10] and the defendant has cited none which hold otherwise.[11] In fact, the defendant has expressly ***conceded*** that he "does not dispute the broad and general concept that a physician is under a duty to exercise reasonable care in his treatment of patients" (Respondent's brief, **p. 21).** The threshold legal question of whether a duty of care existed on the facts in this case therefore stands both squarely answered in the decisional law, and expressly conceded by the defendant here.[12]

The problem, of course, is that this settled legal duty is general and requires further definition in any given case, because "reasonable care" is defined as the "accepted standard of care" recognized by similar health care providers. ***See*** §768.45(1), Fla. Stat. **(1981).** ***That*** aspect **of** a physician's duty is therefore essentially a factual question which depends upon expert medical opinion testimony proving the "accepted standard of care". And ***that*** aspect of the duty question in any given case therefore cannot be determined as a matter of law, but simply must be determined as a matter of fact.[13] In legal parlance, the duty issue

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[10] To which we add the following recent decisions: *Moisan v. Kriz,* **531** So.2d **398** (Fla. 2nd DCA **1988); *Lake*** v. ***Clark,*** **13** FLW **2238** (Fla. 5th DCA Sept. **29, 1988).**

[11] The very best that the defendant could do is to argue "by analogy" that no duty of care existed on the facts in this case because "a person is under no duty to rescue a person in distress" unless he has assumed that duty, and because a policeman has "no duty to the public to arrest" until he assumes that duty, at which point he must act reasonably (Respondent's brief, **p.** 22). The defendant's "analogies" are entirely inappropriate, however, for a very simple reason. The reason no duty initially exists in those two types of cases is that there **is** initially no "relationship" between the parties which would support recognition of a duty, and the duty therefore does not arise until the necessary "relationship" is created by the defendant's intervention. In the instant case, however, it was established without dispute (and by concession of the defendant himself) that a "physician-patient relationship" existed at all relevant times. The requisite "relationship" sufficient to support the imposition of a duty of care therefore existed at all relevant times in this case.

[12] For what it is worth, we remind the Court that ***every*** expert who testified in this case, including Dr. Chacko himself, testified that the defendant also had a medically-recognized responsibility to exercise reasonable care to prevent Mrs. Paddock from harming herself. Since the duty is medically recognized, it will upset no one's apple cart for the Court to conclude that is legally recognized as well. ***See Schuster v. Altenberg,*** **144** Wis.2d **223, 424** N.W.2d **159 (1988).**

[13] The Court will find analogous authority (in the context of a simple negligence case) in the long line of decisions which hold that, where the legal duty owed is that of "reasonable and ordinary care", it is up to the jury to determine as a matter of fact what is and what is not "reasonable care". ***Weis-Patterson Lumber*** Co. ***v. King,*** **131** Fla. **342, 177** ***So.*** **313 (1937);**

in a medical malpractice case is therefore a "mixed question of law and fact", and the dozen decisions upon which we initially relied say essentially that.[14/]

Once it is understood that the duty issue in a medical malpractice case is a "mixed question of law and fact", the error of the defendant's position should become clear. What the defendant is arguing here is that ***both*** aspects of this mixed question can be decided as a matter of law. Put another way, the defendant is arguing that--notwithstanding that a physician owes a patient a general duty of reasonable care as a matter of law, and notwithstanding that a patient may have proven as a matter of fact that a physician has breached the "accepted standard of care" by which that legal duty has been defined by similar health care providers--a court may nevertheless declare as a matter of law that the defendant owed the plaintiff no duty of care on the facts in the case. That is clearly wrong, however, because factual questions simply cannot be decided as a matter of law. That is why all the decisions upon which we initially relied hold (or, as the defendant would have it, "assume") that physicians owe their patients a general duty of reasonable care as a matter of law, and that the question of whether the physician breached the "accepted standard of care" depends upon expert testimony and belongs to the finder-of-fact.

Most respectfully, the trial court and the District Court were free to decide the *legal* aspect of this "mixed question of law and fact" (although each was bound to follow the settled law on this point), but both courts clearly erred in determining that the factual aspect of this mixed question could be decided as a matter of law, and in a manner contrary to the jury's resolution of that quintessentially factual issue. Any other conclusion will amount to a holding that the defendant had no duty to conform his conduct to the "accepted standard of care" on the facts in this case (which is essentially what the trial court and the

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Orlando Executive Park v. Robbins, 433 So.2d 491 (Fla. 1983); *Acme Electric, Inc. v. Travis,* 218 So.2d 788 (Fla. 1st DCA), *cert. denied,* 225 So.2d 917 (Fla. 1969).

14/ In addition, *see Naidu v. Laird,* 539 A.2d 1064, 1070 (Del. 1988) ("The determination of the existence and scope of a legal duty [in a psychiatric malpractice case] presents mixed questions of law and fact."). For a general explanation of the concept of "mixed question of law and fact", *see United States v. McConney,* 728 F.2d 1195 (9th Cir.) (en banc), *cert denied,* 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed.2d 46 (1984).

District Court held)--but such a holding would be contrary to each of the dozen or so decisions relied upon in our initial brief.

Unless the Court is prepared to overrule that long line of settled authority, we respectfully submit once again that Dr. Chacko owed Mrs. Paddock a duty of "reasonable care" as a matter of law; that there is competent expert opinion testimony in the record proving the factual aspect of that duty--the "accepted standard of care"--as well as competent evidence proving a breach of that standard of care; and that the trial court therefore erred in entering judgment in Dr. Chacko's favor on the ground that he owed Mrs. Paddock no duty of care as a matter of law. In no event should the Court allow itself to be tricked by semantics into confusing the factual aspect of the defendant's duty with its legal aspect, or into holding that Dr. Chacko owed Mrs. Paddock no "duty of care" as a matter of law, when a jury has already declared on competent evidence that he breached the "accepted standard of care" as a matter of fact.~~15~~[15/]

Although that excursion into legal theory should dispose of the "duty" controversy, we

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15/ We should alert the Court that the argument we have just made assumes that the concept of "standard of care" is part and parcel of the concept of "duty of care". Although the two concepts are often treated in that fashion, the late Dean Prosser has suggested that (although the two concepts are "correlative, and one cannot exist without the other") it is conceptually easier "to reserve 'duty' for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other", and to treat "standard of conduct" as part and parcel of the "negligence" element of the tort. Prosser and Keeton, ***The Law*** *of Torts,* §53, **p. 356** (5th Ed. 1984). If the two concepts were to be considered separately in that fashion here, of course, then the duty issue would not present a "mixed question of law and fact", but would present a pure question of law. However, the result which we have urged would be exactly the same.

The result would be the same because the existence of a legal "duty of care" would then turn solely upon the "relation between [the] individuals"--which, in this case, is that of physician and patient--and the law is already thoroughly settled that physicians owe their patients a general duty of "reasonable care". The question of the appropriate "standard of care" would then belong to the jury, in its function as finder-of-fact on the negligence element of the tort, and its determination of that issue would therefore present a purely factual issue which could not be determined by a court as a matter of law. It therefore makes no difference to us whether "standard of care" is treated as part and parcel of "duty of care", or as an issue belonging to the negligence element of the tort. Whichever conceptual approach is utilized, however, it simply must be accepted that the "standard of care" is a factual issue--and that proof of a breach of the "accepted standard of care" recognized by similar health care providers is proof of a breach of the general duty of reasonable care which the law imposes upon the physician-patient relationship.

will address the remainder of the defendant's argument on this issue briefly. We note first that the defendant has all but abandoned the basis upon which he prevailed below--the District Court's conclusion (on its own impermissible and indefensible version of the facts) that the defendant had no duty to hospitalize Mrs. Paddock ***involuntarily,*** against her will and in the face of a rejected recommendation for hospitalization. Instead (for reasons which should be obvious by now), the defendant has retreated to an altogether different position. He now declares "irrelevant" the considerable distinction between "voluntary" hospitalization and "involuntary" hospitalization by baldly asserting that ***both*** types of hospitalization amount to the same thing--taking Mrs. Paddock into "custody" and depriving her of control of her own life--and he then proceeds to argue that no reasonable court could hold that the defendant had a duty "to assume custodial care" of Mrs. Paddock, whether she were willing to be hospitalized or not.

In our judgment, this attempted reformulation of the issue is both desperate and silly. When a patient seeks medical treatment for an illness from her physician, and her physician recommends hospitalization, and she consents to be hospitalized for treatment and checks into the hospital, she has simply been ***hospitalized.*** She most certainly has not been taken into "custody". If Dr. Chacko had followed up on his initial suggestion and hospitalized his willing patient, Mrs. Paddock would no more have been in "custody" than a patient who goes into a hospital for an appendectomy, a bypass operation, radiation therapy, or to deliver a baby. Hospitals are places where particular medical treatments are available; they are not penitentiaries; and to argue that the issue presented here is whether Dr. Chacko had a duty to take Mrs. Paddock into "custody" is to badly miss the point. Most respectfully, the issue is whether Dr. Chacko owed his patient a duty of "reasonable care", according to the "accepted standard of care" recognized by similar health care providers--and changing the issue to the non-issue of "custody" simply cannot avoid the dozen or so decisions cited in our initial brief which clearly hold that he did.

The defendant next argues that he was entitled to a directed verdict because we proved no "objective standards" by which his conduct could be permissibly judged. A fair

reading of our experts' testimony will disprove that contention, but we will not belabor that lengthy testimony in the limited pages allotted us here. There is no need to belabor it in any event, because there is simply no requirement in the law that "objective standards" be proven (which is why the defendant has cited no authority for his assertion). The law requires only that we prove a breach of the "accepted standard of care" by expert medical testimony--and we did that four times over. ***See*** **§768.45(1),** Fla. Stat. **(1981).**

Next, the defendant (and his amici) argue generally that the prediction of suicide in the general population is difficult; that psychiatrists should not be held liable every time one of their patients attempts to commit suicide; and that the mere fact that a patient attempts suicide is insufficient to imply negligence. We do not disagree with any of these assertions. They are irrelevant here, however, for two very important reasons. First, the issue presented here does not turn on the predictability of suicide in the general population. It turns upon the predictability of suicide by a particular patient with a particular history and particular symptoms requiring particular treatment--and if the evidence shows, as it does, that ***Mrs. Paddock's*** second suicide attempt was reasonably predictable, then the difficulty of predicting suicide in the general population ought to be irrelevant to the issue of whether a duty of care was owed to ***her*** on the ***particular*** facts of this case.[16/]

Second, the law upon which we rely is already rigorously designed to prevent a physician from being held liable for medical malpractice merely because one of his patients

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16/ Moreover, the legislature has already recognized that incidents like the one in suit are sufficiently predictable to justify consideration of expert medical opinions on predictability--since (in the Baker Act) it has authorized the involuntary commitment of a mentally ill patient where a psychiatrist is of the opinion that he presents a predictable danger to himself or others. In our judgment, it would be entirely inconsistent for this Court to conclude that, although a risk of suicide is sufficiently predictable to justify involuntary commitment upon the opinion of a psychiatrist, it is not sufficiently predictable to justify imposition of a duty of care upon a psychiatrist. ***See Schuster v. Altenberg,*** **144** Wis.2d 223, 424 N.W.2d **159 (1988).**

We should also note that the highest court in the land has squarely rejected the argument made by the defendant and his amici here, and has held that psychiatric predictions of a person's future "dangerousness" are sufficiently reliable that they are admissible in evidence on the issue of "predictability" or "foreseeability". ***Barefoot v. Estelle,*** **463 U.S. 880, 77** L. Ed.2d **1090, 103 S.** Ct. **3383 (1983).**

suffers an injury in a problematical context. That design is effected by the law's stringent requirement that a jury finding of negligence must be based upon expert medical testimony that the defendant's conduct was, in fact, a departure from the accepted standard of medical care. Four eminently qualified expert psychiatrists testified to that fact in this case, and the jury's finding of negligence therefore rests squarely upon a solid foundation of expert medical testimony--not upon mere speculation or possibility, as the defendant insists.

Other than these curious and indefensible arguments, the defendant has offered this Court no authority whatsoever to justify the lower courts' conclusions that Dr. Chacko owed Mrs. Paddock no duty of care on the facts in this case. When all is said and done, it should be perfectly clear that the trial court directed a verdict in favor of the defendant in the face of expert medical testimony from at least eight different psychiatrists (and Dr. Chacko himself) that Dr. Chacko had a duty to exercise reasonable care to prevent Mrs. Paddock from harming herself, and in the face of expert medical testimony from four eminently qualified psychiatrists that he breached the accepted standard of psychiatric care on the facts in this case. As a matter of law, that ruling was indisputably erroneous--and it was the District Court's sworn duty to say so, no matter how it might have decided the facts if it had been the jury below.

Finally, we alert the Court to a recent decision of the Wisconsin Supreme Court, in which it held that a psychiatrist does have a duty to exercise reasonable care to prevent a patient from harming himself or others--a duty which embraces a duty to hospitalize a willing patient, and even to obtain the involuntary commitment of an unwilling patient, if compliance with the "accepted standard of care" would result in such a treatment. *Schuster* v. *Altenberg*, **144** Wis.2d **223, 424** N.W.2d 159 **(1988).** The court's opinion contains a thoughtful and scholarly analysis of the very issue presented here, and it carefully examines and rejects the various "public policy" arguments made by the defendant and his amici (and by the District Court below). Unfortunately, space does not permit a lengthy analysis of it, so we simply urge the Court to read it--and we commend it as a solid cornerstone for the

construction of the similar decision which we seek from this Court.[17]

2. **Poreseeability.** The defendant next argues that the directed verdict was justified on the additional ground that Mrs. Paddock's attempted suicide was not reasonably foreseeable as matter of law. There are two things wrong with this argument--one legal, and one factual. First, the defendant is simply wrong that we were required to prove that it was foreseeable that Mrs. Paddock would attempt suicide in the manner she did on the day she did. The contrary is thoroughly settled:

> In order for injuries to be a foreseeable consequence of a negligent act, it is not necessary that the initial tortfeasor be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur. Rather, all that is necessary in order for liability to arise is that the tortfeasor be able to foresee that ***some*** injury will likely result in ***some*** manner as a consequence of his negligent acts.

Crislip v. Holland, 401 So.2d 1115, 1117 (Fla. 4th DCA), ***review denied,*** 411 So.2d 380 (Fla. 1981).[18] In short, the issue was not predictability; it was preventability.

Second, there was abundant evidence from which the jury could properly have concluded that Mrs. Paddock's second suicide attempt was reasonably foreseeable to Dr. Chacko. Much of that evidence came from Dr. Chacko himself, since he initially insisted on the Friday preceding the suicide attempt that Mrs. Paddock should be hospitalized that afternoon (R. 965-77, 1258-59); since he claims he initially reserved a bed for her in the suicide prevention wing of the psychiatric unit of a nearby hospital that Friday afternoon, with orders to place her under close observation and check on her every 15 minutes (R. 973, 1026-29, 1117-18, 1129-33, 1196-1201, 1701-09); and since, upon being advised by telephone on Sunday that Mrs. Paddock had disappeared from the house, and before he knew anything

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17/ The Court will also find a recent decision of the Delaware Supreme Court both helpful in its analysis and supportive of our position here: ***Naidu v. Laird,*** 539 A.2d 1064 (Del. 1988).

18/ ***Accord, Spivey v. Battaglia,*** 258 So.2d 815 (Fla. 1972); ***Pinkerton-Hays Lumber Co. v. Pope,*** 127 So.2d 441 (Fla. 1961); ***Railway Express Agency v. Brabham,*** 62 So.2d 713 (Fla. 1952); ***Goode v. Walt Disney World Co.,*** 425 So.2d 1151 (Fla. 5th DCA 1982), ***review denied,*** 436 So.2d 101 (Fla. 1983); ***Tieder v. Little,*** 502 So.2d 923 (Fla. 3rd DCA), ***review denied,*** 511 So.2d 298, 300 (Fla. 1987).

at all of her subsequent suicide attempt, he told her mother that she should have the police pick her up and deliver her to a nearby suicide prevention center (R. **978-80;** DX. **1** at R. 10191).[19/] Moreover, just as there was on every other ultimate issue of fact which we were required to prove below, there was expert medical testimony in the record, based upon ***"reasonable medical probability",*** that Mrs. Paddock's suicide attempt was reasonably foreseeable to Dr. Chacko (R. **412).** Given this evidence, a jury question was clearly presented on the foreseeability of Mrs. Paddock's second suicide attempt, and the defendant's directed verdict simply cannot be salvaged on this clearly indefensible ground.

Proximate causation. In any event, the issue of "foreseeability" is subsumed in the larger issue of proximate causation itself, so we turn to the defendant's next contention that the evidence was also insufficient to present a jury question on the issue of proximate causation. The defendant is wrong on this point as well. As we noted in our initial brief (at page 10), there is expert medical testimony in the record from four different psychiatrists that Dr. Chacko's several departures from accepted standards of care were a cause of Mrs. Paddock's self-inflicted injuries, and if Dr. Chacko's care and treatment had conformed to accepted standards of care, the possibility that she would have made a second suicide attempt was only "slight", and the probability that she would not have injured herself was therefore substantially greater than **50%.** This testimony clearly met the requirements for proof of proximate causation in a medical malpractice action in every respect. ***See Gooding v. University Hospital Building, Inc.,*** **445** So.2d **1015** (Fla. **1984).**

It is also thoroughly settled that expert medical testimony that a defendant-physician's negligence was a cause of the plaintiff's damages is ***direct evidence*** on the issue of proximate causation, and that the existence of such an opinion in the record absolutely precludes the direction of a verdict on the issue of proximate causation. ***Wale v. Barnes,***

19/ This latter evidence proves not only that Dr. Chacko reasonably anticipated a suicide attempt on Sunday, but that he also felt that Mrs. Paddock was an appropriate candidate for the "Baker Act", since his authority for the request that the police intervene and deliver her to the hospital is found only in the "Baker Act".

278 So.2d 601 (Fla. 1973).[20] In addition, as we also explained in our initial brief, expert medical opinions which (1) have a "basis in evidentiary fact", (2) are based upon "reasonable medical probability", and (3) have been admitted into evidence without objection--and all of our expert opinion testimony meets these criteria--simply cannot be declared "speculative" as a matter of law by a court. Given the expert medical testimony on the issue of causation in this record, this sub-issue is clearly not even close.

In short and in sum, the defendant's entire response to our first issue on appeal is little more than inappropriate reargument of the facts. There is expert medical testimony in the record supporting each and every element of the plaintiff's cause of action, and the trial court was therefore required by the Constitution and the law of this State to submit the ultimate issues of fact to the jury for resolution, not arrogate that function to itself. Its conclusion that Dr. Chacko was entitled to judgment as a matter of law, notwithstanding the abundant medical opinion testimony that he was not entitled to judgment as a matter of fact, is legally indefensible. We urge the Court once again to apply neutral standards of appellate review, and to enforce the law of this State by quashing the District Court's decision and ordering reinstatement of the plaintiff's amply supported jury verdict.

B. THE PLAINTIFF'S NEGLIGENCE.

In our initial brief, we pointed out that there was abundant evidence that Mrs. Paddock was mentally incapacitated and incapable of exercising reasonable care for her own safety--and we argued that this evidence fully supported the jury's determination that Mrs. Paddock was not negligent, and that the trial court therefore erred in concluding otherwise. The defendant does not deny the existence of the evidence of mental incapacitation.=' Instead, he attempts to change the standard of review governing this issue by

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20/ And decisions cited at footnote 14 of our initial brief.

21/ This statement requires a qualification. The defendant does challenge our assertion that Mrs. Paddock was suffering from a physical, biochemical abnormality, and he contends that "there is no evidence in the record to support such a contention" (Respondent's brief, p. 38, n. 11). The defendant is simply wrong. One of the defendant's own experts testified on two separate occasions that paranoid disorders are caused by abnormal biochemical processes in the brain (R. 1872, 1915-16).

positing that the trial court found the jury's finding to be against the manifest weight of the evidence--and not merely unsupported by the evidence, as we contended. The defendant is simply wrong. The trial court's order states unequivocally that "[t]he evidence simply ***does*** *not* support the jury's conclusion that Linda Paddock was not herself negligent" (emphasis supplied). There is no way in which that conclusion can be converted into a conclusion that the jury's finding was against the manifest weight of the evidence.[22]/

In any event, the defendant's effort to obtain a more comfortable standard of review here is only half-clever, because even if the trial court had concluded that the verdict was against the manifest weight of the evidence, the issue presented here would remain a legal one. It would remain a legal issue because the ***reason*** offered by the defendant for the revised conclusion is that the jury was required to apply an objective "reasonable man" standard, and could not consider Mrs. Paddock's mental incapacitation as relevant to the question of her negligence.[23]/ We, of course, contend to the contrary--and, in order to answer the question presented by those opposing positions the Court will have to make a legal ruling. The issue presented here is therefore a legal one from whatever angle it is viewed, and the trial court's "discretion" is simply irrelevant here as a result.

On the single legal issue presented here, we continue to insist that the mental

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[22]/ The defendant contends that the conclusion simply ***has*** to be considered as a "manifest weight" conclusion because the trial court ordered a ***new trial*** on the issue, rather than a directed verdict. This contention might be arguable in some contexts, but it is a ***non sequitur*** in the context presented here. Because the issue on which the trial court found an insufficiency of evidence to support the verdict was a ***comparative negligence defense,*** the trial court's conclusion that the defendant was entitled to a favorable finding on the defense could not be implemented by a judgment notwithstanding the verdict. The ***only*** available remedy was a new trial--since a jury would have to determine the percentages of fault attributable to each party.

[23]/ The defendant insists that we are locked in here on this point because the trial court gave a "reasonable man" instruction below to which we did not object. We disagree. The ***only*** instruction given on the issue was this: "Negligence is the failure to use reasonable care" (R. **2134).** Although "reasonable care on the part of a physician" was defined thereafter, "reasonable care" on the part of Mrs. Paddock was not ***(Id.).*** The single sentence given to the jury certainly allowed it to conclude what plaintiff's counsel thereafter argued to it without objection--that Mrs. Paddock could not be found negligent for failing to use reasonable care when she was mentally incapacitated and therefore incapable of using any care at all.

incapacitation of an adult should be treated the same way that Florida law treats the physical incapacitation of an adult and the mental incapacitation of a minor--as it is treated in every other jurisdiction which has considered the issue. The defendant has cited no case law to the contrary. Instead, he has relied exclusively upon a ***different*** line of authority which holds that an insane person is responsible for damages which ***he*** causes to ***another*** by a tortious act, notwithstanding his diminished mental capacity. However, that rule is not based upon traditional tort concepts of fault; it is based solely upon public policy considerations supporting compensation for victims. ***See Preferred Risk Mutual Insurance*** Co. ***v. Saboda,*** 489 So.2d 768, 770 (Fla. 5th **DCA)** (en banc), ***review denied,*** 501 So.2d 1283 (Fla. 1986) ("The liability for compensatory damages of insane persons for their acts or omissions is based on public policy rather than traditional tort concepts of fault . . .").[24/]

Because the different rule upon which the defendant relies is bottomed upon policy considerations supporting compensation rather than traditional tort concepts of fault, it is limited to cases in which the insane person has caused damage to another, and inapplicable to cases in which the insane person has been charged with contributory negligence for an injury inflicted upon himself. It would make no sense to apply such a rule in cases like this one, because its only effect would be to reduce compensation to the insane (and, under traditional tort principles, therefore blameless) victim of the negligent tortfeasor, simply because the plaintiff was blameless. It is for that reason, we suspect, that the two lines of authority exist independently, and that the rule in the context presented here is that an insane person is not held to a "reasonable man" standard where his contributory negligence is in issue, and that his or her diminished mental capacity may be taken into account by the finder-of-fact. We therefore urge the Court once again to hold that a jury may properly consider a plaintiff's mental incapacitation in determining whether she was contributorily negligent--and that the trial court erred in concluding that the evidence did not support the

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24/ ***Accord, Jolley v. Powell,*** 299 So.2d 647 (Fla. 2nd **DCA** 1974), ***cert. denied,*** 309 So.2d 7 (Fla. 1975); ***Kaczer v. Marrero,*** 324 So.2d 717 (Fla. 3rd **DCA** 1976).

jury's finding in this case that, because of her mental incapacitation, Mrs. Paddock was not a ***negligent*** cause of her injuries.

C. THE DAMAGE AWARD.

In response to our contention that the evidence fully supported the jury's damage award and that the trial court therefore committed reversible error in concluding otherwise, the defendant has done another curious thing. He has "politely declined" to make any argument at all in justification of the single ground stated in the trial court's order, and has argued instead that a new trial on damages was required for two other reasons urged in his motion for new trial, both of which were ***rejected*** by the trial court.[25/] This implicit ***concession*** that the verdict was not excessive speaks very well for itself, of course. It was also well advised in view of ***Ashcroft v. Calder Race Course, Inc.,*** 492 So.2d 1309 (Fla. 1986). The resort to other reasons ***rejected*** by the trial court was not well advised, however, because the reasons collected by the defendant to shore up the trial court's otherwise impermissible ruling are wholly without merit.

The defendant first claims that plaintiff's counsel made an inappropriate "Golden Rule" argument to the jury. In context, the argument was not a "Golden Rule" argument. It told the jurors, in effect, that the amount of Mrs. Paddock's damages could not be computed with any mathematica precision, and that the jurors would therefore have to rely upon their own experience with pain and embarrassment in analyzing the extent of Mrs. Paddock's damages; it did not ask the jurors to place themselves in Mrs. Paddock's shoes and award her an amount of damages which they themselves would like to receive (R. 2033).[26/] We need not press the point at any length, however, because the defendant has failed to advise the Court that his objection was sustained; that he asked for no further

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[25/] Two of the four reasons advanced by the defendant here--the inclusion of Mr. Paddock's letters and the alternate juror's note--are separately stated in the new trial order, and they are the subject of separate issues on appeal. We will respond to the defendant's contentions concerning those items under the appropriate issue on appeal.

[26/] ***See City of Belle Glade v. Means,*** 374 So.2d 1110 (Fla. 4th **DCA** 1979); ***Bew v. Williams,*** 373 So.2d 446 (Fla. 2nd **DCA** 1979).

relief; and that plaintiff's counsel immediately cured whatever ambiguity his argument may have contained by making clear to the jury what he had intended (R. 2033).[27/]

It is axiomatic that when a trial court sustains an objection, the objecting party must thereafter move for a mistrial; if he does not, the objection is waived and cannot be relied upon after trial.[28/] The trial court therefore could not properly order a new trial on the waived objection unless counsel's argument amounted to "fundamental error".[29/] It is settled, however, that a "Golden Rule" argument is not "fundamental error".[30/] In any event, whatever ambiguity there may have been in the argument was immediately cured by plaintiff's counsel, and it was certainly within the trial court's discretion to conclude that no prejudice was caused as a result. In short, the trial court's ***rejection*** of this ground for a new trial was required as a matter of law, or at the very worst, was not an abuse of discretion--and this ground will therefore not serve to sustain the trial court's otherwise impermissible conclusion that the damage award was excessive.

The defendant also argues that a new trial on damages was required because one of

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[27/] A copy of the page containing the argument, the objection, the ruling, and the clarification is included in the appendix to this brief, together with a copy of an affidavit which corrects the transcript by attributing the words "It did sound like Golden Rule" to the trial court. The documents are in the record at R. 9453-55.

[28/] *See Simpson v. State*, 418 So.2d 984 (Fla. 1982), *cert. denied*, 459 U.S. 1156, 103 S. Ct. 801, 74 L. Ed.2d 1004 (1983); *Cameron v. Sconiers*, 393 So.2d 11 (Fla. 5th DCA 1981); *Saunders v. Smith*, 382 So.2d 1254 (Fla. 4th DCA), *cert. dismissed*, 389 So.2d 1114 (Fla. 1980). The result will be the same if the transcript is accepted in its original form (without the correcting affidavit), or if the words "It did sound like Golden Rule" do not amount to a ruling sustaining the objection--because then the defendant failed to obtain a ruling on the objection, which also waived it. *See Richardson v. State*, 437 So.2d 1091 (Fla. 1983); *Schreidell v. Shoter*, 500 So.2d 228 (Fla. 3rd DCA 1986), *review denied*, 511 So.2d 299 (Fla. 1987); *LeRetilley v. Harris*, 354 So.2d 1213 (Fla. 4th DCA), *cert. denied*, 359 So.2d 1216 (Fla. 1978).

[29/] *See White Construction Co., Inc. v. DuPont*, 455 So.2d 1026 (Fla. 1984); *Schreidell v. Shoter, supra; Sears Roebuck & Co. v. Jackson*, 433 So.2d 1319 (Fla. 3rd DCA 1983); *Wasden v. Seaboard Coast Line Railroad Co.*, 474 So.2d 825 (Fla. 2nd DCA 1985), *review denied*, 484 So.2d 9 (Fla. 1986).

[30/] *See LeRetilley v. Harris*, 354 So.2d 1213 (Fla. 4th DCA), *cert. denied*, 359 So.2d 1216 (Fla. 1978); *Tieso v. Metropolitan Dade County*, 426 So.2d 1156 (Fla. 3rd DCA), *review denied*, 440 So.2d 353 (Fla. 1983).

the jurors related a story concerning his daughter's death during the jury's deliberations. There are two very good reasons why the trial court ***rejected*** this aspect of the defendant's motion for new trial. In the first place, this was a matter which was clearly ***intrinsic*** to the jury's deliberations, and it would therefore have been legally impermissible for the trial court to have ordered a new trial on this ground.[31/] More importantly, each and every juror testified during the jury interview that the story did not have any effect whatsoever on their verdict--a point which the trial court expressly recognized on the record as mooting the defendant's complaint about the story (R. **10477-84, 10505-11, 10539-46, 10589-92).** This ***undisputed*** evidence certainly supports the trial court's determination that the juror's story was not a sufficient reason for ordering a new trial, and that ruling certainly cannot be declared an abuse of discretion here.

In short and in sum, the defendant has offered no justification whatsoever for the trial court's conclusion that the jury's damage award was unsupported by the evidence, and he has offered no legitimate alternative justification even arguably supporting a conclusion of "excessiveness" here. The plaintiff's damage award clearly was not "excessive", and this aspect of the new trial order must therefore be reversed.

D. THE ALTERNATE JUROR'S NOTE.

Our initial argument on this issue was detailed and thorough. The defendant has responded by simply parroting the trial court's order--and by offering a number of vague and highly speculative generalizations about how the alternate juror's note ***might*** have affected the jury in ways ***other*** than the manner speculated upon by the trial court.[32/] It is apodic-

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[31/] ***See*** the decisions cited and discussed at pages **43-44** of our initial brief.

[32/] We fail altogether to see the relevance of the defendant's observation that plaintiff's counsel had a cup of coffee with the foreman ***after*** the verdict had been returned. Certainly, that contact could not have affected the jury's ***prior*** deliberations in any way (unlike defendant's counsel's inappropriate communication with the alternate juror ***during*** the break in the jury's deliberations). It is also entirely irrelevant at this point that the alternate juror was allowed to sit outside the jury room (and, as we read the transcript, listen through a closed door--not an open door, as the defendant claims without reference to the record) (R. **2140-44).** No party objected to the trial court's determination to allow this, so the defendant is clearly in no position to justify the new trial order on this ground.

tic, however, that the new trial order must stand or fall on its own terms, and that if the specific reasons given by the trial court are unsupported by the record or are legally impermissible, the order must be reversed. We continue to insist that the trial court's conclusion that the foreman "construed the note as favoring plaintiff" is totally unsupported by the record and absolutely defies common sense. We would also note that the defendant has not even bothered to explain how the note (which contained information which the defendant ***wanted*** the jury to know about, and which asked the jury to find in ***favor of the defendant)*** could have been construed by any reasonable person as prejudicing the ***defendant.*** We also continue to insist that the trial court's conclusion that the note "affected [the foreman] during deliberations" is flatly contradicted by undisputed testimony to the contrary. We also continue to insist that the trial court's final, pivotal conclusion that the note therefore indirectly affected the other jurors during the deliberations because the foreman "did not want to revisit the issue of the defendant's liability when deliberations were resumed on the last day of trial" is both unsupported by the record and a legally impermissible finding based upon an inquiry of the jury which was prohibited by law. We stand on our initial argument.

E. MR. PADDOCK'S LETTERS.

On this issue, the defendant's argument is non-responsive. Except to parrot the trial court's naked conclusion that Mr. Paddock's letters were prejudicial to the defendant, the defendant does not explain how he could possibly have been prejudiced by the mere repetition of evidence which was ***undisputed*** and in the record over and over again (because the defendant put most of it there himself). Neither does he explain how it could even arguably have been proper for him to examine the exhibit before it went to the jury room, approve its submission to the jury, and then raise his objection to it for the first time only after learning that the jury had resolved the liability issue against him. Neither does he point to any place in the record where he ever objected to the letters and sought their removal from the plaintiff's hospital chart (which was clearly the source of the letters--see R. 9783-88), or to any ruling on any such request. It should be perfectly clear here that the letters were

in evidence without objection; that any objection which the defendant may have had to them was waived when he allowed them to go to the jury; that the substance of the letters could not have prejudiced him in any conceivable manner; and that there was therefore no basis whatsoever for ordering a new trial because the jury may have seen them.

Rather than respond to our argument, the defendant has attempted to distract this Court from its obvious duty to reverse this aspect of the new trial order by arguing something which the trial court did ***not*** state as a ground for the new trial order--that plaintiff's counsel tampered with the exhibit before it was delivered to the jury, by inserting the letters after they had been removed. The record references provided for this desperate charge are to defendant's counsel's ***accusation*** to that effect, but there is nothing in the record to support the accusation, and there is sworn testimony and affidavit evidence in the record from all concerned that no such thing happened--which is why the trial court did ***not*** order a new trial on this ground.[33/] We stand on our initial argument.

F. THE MISSING PAGE OF NURSES' NOTES.

On this issue, the defendant's argument is also non-responsive. He does not point the Court to any place in the record where the "missing" page of nurses' notes was actually ever placed into evidence before the jury retired; he does not explain how he could properly have allowed the exhibit to go to the jury room and then complain only after the fact that it was incomplete; and he makes no effort at all to demonstrate how he was prejudiced by omission

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33/ The sworn evidence in the record reflects that **(1)** the hospital chart was taken out of the courtroom by plaintiff's counsel early in the trial, copied, and returned; (2) defendant's counsel thereafter spent a considerable amount of time with the chart for the purpose of removing items from it which he found objectionable; **(3)** plaintiff's counsel and an investigator examined the chart in the courtroom within the view of the clerk on the morning the jury was to begin its deliberations to ensure its accuracy, as all counsel had been instructed to do by the trial court; **(4)** defendant's counsel also examined the chart prior to its submission to the jury, and raised no objection to its accuracy; and **(5)** neither plaintiff's counsel nor their investigator ever removed or added any pages to the chart (R. **2170-72, 9316-21).**

The defendant is also wrong in claiming that more than one page was discovered to have been omitted from the chart when initially submitted to the jury. That is what defendant's counsel ***claimed*** at trial (R. **2172-75),** but when the matter was gone over in detail at a subsequent hearing, all of the claims proved to be erroneous--except for the single page of nurse's notes which is the subject of the next issue on appeal (R. **2658-2720).**

of the one page of notes in issue. All that he has argued here is that the ***other side*** of the missing page (the side which was read into evidence at trial) should also have gone to the jury since it would have had more "impact" than the oral reading of it alone. The trial court ***rejected*** this position as a ground for a new trial, however--and given the fact that the page of which the defendant now complains was in evidence in another form, the ***rejection*** of the defendant's position on that point was clearly not an abuse of discretion. We therefore stand on our initial argument on this issue as well.

IV. CONCLUSION

We respectfully submit that we are entitled to the relief requested in our initial brief.

Respectfully submitted,

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