IN THE SUPREME COURT OF FLORIDA

HUMANA OF FLORIDA, INC., d/b/a HUMANA HOSPITAL-BENNETT, n/k/a COLUMBIA HOSPITAL	**CASE NO.: SC01-1260**
CORPORATION OF SOUTH BROWARD, d/b/a WESTSIDE REGIONAL MEDICAL CENTER, Defendant/Petitioner, v. JACOB THOMAS TOMLIAN, a minor, by and through his parents and natural guardians, DORA LEE TOMLIAN, and KEVIN JAMES TOMLIAN; and DORA LEE TOMLIAN and KEVIN JAMES TOMLIAN, individually, Plaintiffs/Respondents, v. MARK S. GRENITZ, M.D.; and MARK S. GRENITZ, M.D., P.A.; Defendants/Respondents.	**DISTRICT COURT CASE NO.: 4D00-654**

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Review from The Fourth District Court of Appeal

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PRELIMINARY STATEMENT

In this brief, reference to the record will be designated by the volume number, followed by the letter "R" and the specific page number being cited. Defendant Columbia Hospital Corporation of South Broward, Inc., d/b/a Westside Regional Medical Center (formerly Humana of Florida, Inc., d/b/a Human Hospital-Bennett), will be referred to as the "Hospital." All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The minor plaintiff Jacob Tomlian suffers from cerebral palsy as a result of an injury to his brain. His parents filed this medical malpractice case against the Hospital where he was born and the doctor who delivered him, claiming that the injury to his brain was caused by negligence in connection with Jacob's birth. The defendants contended that there was no negligence. They also contended that Jacob's brain injury occurred in utero long before birth, and was not caused by any actions they took.

The trial of this case lasted almost four weeks and culminated in a jury verdict for the defendants, Mark Grenitz, M.D., Mark Grenitz, M.D., P.A. and the Hospital. (8R 1408-1410). There was never any dispute at trial that Jacob Tomlian had significant brain injury. Instead, the Tomlians' burden of proof at trial turned upon two disputed points, (1) whether the defendants were negligent in connection with Jacob's delivery, and (2) whether any such negligence was the cause of Jacob's injury or whether, in fact, his injury had occurred much earlier during the course of his mother's pregnancy. (see, e.g., 38R 4217).

As the Tomlians' trial counsel acknowledged, these two distinct issues as to negligence and as to timing/causation were "lumped together" in one question on the verdict form.

(8R 1408-1410; 38R 4217). As to each defendant, the verdict form simply asked whether there was any negligence by that defendant that was a legal cause of injury to Jacob or his parents. (8R 1408-1410). Plaintiffs did not request that the trial court employ a verdict form that separated the negligence and timing/causation questions, even though those were hotly contested, separate theories of defense at trial. (38R 4151, 4160).

In determining the elements of (1) negligence and (2) timing/causation, the jury heard testimony during the Tomlians' case-in-chief from Jacob's family, his teachers, his treating physicians, and three retained experts: an obstetrician, a pediatric neurologist, and a neuropsychologist. The defense offered the testimony of the nurse and doctor accused of negligence and the opinions of three defense experts: a nursing expert for the Hospital and two physician experts in obstetrics and pediatric neurology to counter the Tomlians' experts in the same specialties. Unlike the Tomlians, the defense did not have a neuropsychologist.

Dr. Vannucci, a pediatric neurologist who was the defendants' causation expert, testified that the events surrounding the labor and delivery were unrelated to Jacob's neurological problems; rather, these problems were due to oxygen deprivation that took place sometime between twenty-six

and thirty-four weeks into the pregnancy. (see, e.g., 24R 2247, 2295).

Likewise, the defendants' standard of care expert, Dr. Hayashi, an obstetrician with a sub-specialty in maternal-fetal medicine (which focuses on high-risk pregnancies and genetic testing (29R 2922-2923)), conducted a detailed review of the medical records before the jury and concluded that Dr. Grenitz and the Hospital's nurses did not deviate from the standard of care in their treatment of Jacob and his mother. (see, e.g., 29R 2964; 30R 3019). Comparable opinions on the standard of care were provided by the Hospital's nursing expert, Lisa Miller, R.N., with regard to the conduct of the Hospital's nurses attending the delivery. (33R 3530-34R 3739). Nurse Miller did not testify as to timing/causation. (33R 3530-34R 3739).

In sum, Dr. Grenitz and the Hospital had only one expert, a pediatric neurologist, testify as to the causation and timing of Jacob's injury (Dr. Vannucci). On the standard of care issue, they presented both an obstetrician (Dr. Hayashi) to testify as to Dr. Grenitz's care and treatment, and a nursing expert (Lisa Miller) to testify as to the separate standard of care that applied to the Hospital's nurses.

In contrast, all three of plaintiffs' experts, Paul Gatewood, M.D., Lawrence Schneck, M.D. and Barry Crown, Ph.D.,

addressed the issue of timing/causation and opined that Jacob Tomlian was injured during labor and delivery. One expert, Dr. Gatewood, also opined that it was the result of negligence.

Dr. Gatewood, the Tomlians' expert obstetrician, was their first witness. He agreed that Dr. Grenitz's prenatal care was acceptable and above the standard of care. (20R 1776). He testified, however, that Dr. Grenitz and the attending nurse deviated from the standard of care in their treatment of Jacob and his mother during the labor and delivery. (16R 1169-1176).

Dr. Gatewood also stated that the cause of Jacob's injuries was several hours of unnecessary episodes of hypoxia, resulting in decreased oxygenation, because of the failure to perform the caesarean-section at an earlier time. (16R 1067-69, 1169-121l; 19R 1558). Thus, Dr. Gatewood testified about the timing and causation of Jacob's injury, as well as the breaches of the standard of care during the labor and delivery.

After Dr. Gatewood's testimony concluded, the Tomlians called Dr. Schneck, a neurologist who served as another causation expert for plaintiffs and discussed, in detail, all of Jacob's neurological problems, and the tests and procedures utilized by Dr. Schneck to reach his conclusions about Jacob's

condition and its causes. (17R 1280-1293). Dr. Schneck testified that Jacob's injuries were all caused by brain damage, specifically, a perinatal (around the time of birth) hypoxic ischemic event. (17R 1293-1294). Despite conceding that such a brain injury can take place at any time during the later stages of pregnancy, Dr. Schneck nevertheless opined that Jacob's injuries occurred during labor. (17R 1324, 1332; 18R 1370; 19R 1514). Thus, as a causation expert for plaintiffs, Dr. Schneck testified not only about the general cause of Jacob's injuries, but also about what the Tomlians contend is the central issue in the case: the timing of those injuries.

The Tomlians then presented their third expert, Dr. Crown, a neuropsychologist. Counsel for Dr. Grenitz and the Hospital objected, in limine, to causation testimony from Dr. Crown for a number of reasons. (21R 1832-1866). First, at the time of this trial in 1998, Florida case law clearly precluded a neuropsychologist, as a non-physician, from testifying as to causation of organic brain injury. (21R 1835-1837, 1842-1844, 1850-1852, 1861).

Second, apart from the governing legal standard, defendants argued the "common sense" point that Dr. Crown did not have the credentials to offer this type of testimony. (21R 1838). Specifically, defendants argued that opining

whether an injury to the brain is consistent with an hypoxic event such as that alleged in this case was outside the expertise even of most medical doctors who are not pediatric neurologists. (21R 1838).

In voir dire examination, Dr. Crown had acknowledged that he was not a medical doctor, had never gone to medical school, and could not prescribe medications in Florida. (21R 1850-51). As a neuropsychologist, his area of expertise centered on "how the brain works, how it functions, and how that relates to behavior." (21R 1868). His testimony on his educational background was limited to a general discussion of his degrees and appointments. Although he testified that his practice included establishing the "etiology," or cause, of a patient's condition, (21R 1879, 1904, 1905-06; 22R 1968), he did not testify that his practice and experience extended to determining the cause of organic brain damage, much less to determining whether such damage occurred in utero at or near the time of birth or earlier. (Id.).

Third, in the light of the causation testimony already presented on plaintiffs' behalf by Drs. Gatewood and Schneck, Dr. Crown's testimony was merely cumulative. (21R 1832-1837, 1861).

Defense counsel did not dispute that Dr. Crown could testify to the extensive testing he had conducted on Jacob and the results of that testing. (21R 1841, 1863-1865). The defense merely sought, on all the grounds noted above, to exclude medical causation testimony from Dr. Crown that Jacob's injuries occurred during labor and delivery, as opposed to earlier in the pregnancy. (21R 1857-1858, 1864-1865).

In response, the Tomlians' trial counsel effectively conceded that this causation testimony was cumulative, by acknowledging that their other experts had already testified "as to the causation of the injury." (21R 1839). He further stated that Dr. Crown's testimony would focus on (1) Jacob's future psychological complications, and (2) Jacob's future psychological needs, and that Dr. Crown would not offer any opinion whether the caesarean-section should have been performed at an earlier time. (21R 1846-1847, 1865).

The trial court ruled only that, "I just don't want him to get into the same things that we have had--not until he's laid a proper predicate and they've had a chance to check any conclusions that he might reach." (21R 1866). Thus, the court did not exclude Dr. Crown's testimony altogether or otherwise limit it at that time, other than to require a proper predicate for particular opinions.

Dr. Crown then proceeded to give the jury a detailed explanation of the testing performed on Jacob and the results of those tests. (21R 1883-1900). He testified, for example, that he looked at Jacob's brain and behavior in order to evaluate his ability to process information and concentrate, and to assess his strengths and weaknesses. (21R 1885). Dr. Crown further opined that he could tell from these various tests, and the "scattered" results, that Jacob's injuries resulted from organic brain damage brought about by an oxygen deprivation. (21R 1902-1903).

Then, counsel proceeded to elicit from Dr. Crown, in front of the jury, exactly the medical causation testimony challenged in defendants' motion in limine:

Q. You mentioned before the term 'etiology'.

A. Yes.

Q. And you mentioned that's something you do in the course of your practice typically?

A. Yes.

Q. And you told us all why?

A. Yes.

Q. Did you form opinions in this case as to the etiology of Jacob's condition?

A. Yes.

Q. Tell us, please.

A: It’s my opinion that that damage that I see neuropsychologically was brought about by an oxygen deprivation experienced at the intrapartum level or in the neonatal period.

Q. An intrapartum means what, sir?

A. At birth.

(21R 1904-05). At this point, the Tomlians’ counsel asked the following question, which was objected to because of Dr. Crown’s lack of qualifications:

Q. How can you tell it didn’t happen some months before.

MS. TALISMAN: Objection.
MR. MAURO: Your Honor, this goes well beyond this gentleman’s qualifications that we argued outside the presence of the jury.
THE COURT: Sustain the objection.

(21R 1905).

The Tomlians’ counsel then asked Dr. Crown a couple questions about the importance of “etiology,” and continued as follows:

Q. How was it that you came to a determination of etiology in this case and ruled out other etiologies?
A. I reviewed records, and in addition, I evaluated this young man, and his pattern and profile from my experience indicates the cluster that he falls within.
Q. What does ‘rule out’ mean?
A. Ruling out something means that you consider something and determine whether, in fact, it fits or it doesn’t, whether it’s true.
Q. And, if you rule it out, what does it mean as to whether it fits or is true?

A. If you rule out a condition, you have considered it and you have discharged it.
Q. And in coming to your conclusion as to the etiology of Jacob's condition, what etiologies did you rule out?

(21R 1906). The defense objected to any attempt by Dr. Crown to give further medical causation testimony. {Id.). At that point, even the Tomlians' trial counsel admitted that Dr. Crown had already offered his opinions on timing and causation, stating, "[h]e's already done that." (21R 1907). The trial court similarly recognized that the causation/timing testimony had already been given to the jury when it stated: "[t]he Court should not have allowed him to testify as to the physical cause or contributions to the cause of damage." (22R 1973-1974). However, this testimony was given, it was never stricken, and it remained before the jury.

Following the completion of Dr. Crown's testimony, the Tomlians proffered the testimony they asserted had not been permitted by the trial court. (22R 1967-1972). In fact, because Dr. Crown had already testified that Jacob's injury resulted from events at the time of his birth, the first part of the proffered testimony largely repeated the testimony actually submitted to the jury, as quoted above, and likewise repeated the testimony of Drs. Gatewood and Schneck. (See 22R 1968-1969).

In the remainder of the proffer, Dr. Crown testified that the injury occurred after the thirty-fourth week of pregnancy, that the injury occurred at the Hospital (i.e., during the labor and delivery), and that his opinion was based on a determination that Jacob's brain as a whole had fully developed. (22R 1970-1972). He also explained that he determined the timing of Jacob's injuries by reviewing the medical records and looking at scores from the tests he conducted. (22R 1969). These last statements were, substantively, the only "additional" part of Dr. Crown's testimony proffered at trial. (22R 1967-1972).

After closing arguments, the trial court instructed the jury (40R 4429-4446), which then began its deliberations. The jury returned a verdict finding no liability on the part of Dr. Grenitz or the Hospital's non-physician personnel. (8R 1408-1410). The jury was not called upon to identify in its verdict whether the "no liability" verdict rested on a finding that (1) the injury did not occur at the time of Jacob's birth and was therefore not caused by any of the complained-of conduct by defendants; or (2) the treatment provided by Dr. Grenitz and the nurses at the time of labor and delivery was above the standard of care, notwithstanding any injury that might have occurred at that time. (8R 1408-1410).

The Tomlians appealed to the Fourth District Court of Appeal. (8R 1502-1509). On appeal, the Tomlians argued that the trial court erred in precluding Dr. Crown from further explaining why he believed Jacob's brain damage occurred during birth, rather than earlier in the pregnancy as contended by defendants. See Tomlian v. Grenitz, 782 So. 2d 905, 906 (Fla. 4th DCA 2001).

The Fourth District reversed the jury verdict for defendants and remanded the case for a new trial. The district court acknowledged that Florida law at the time of the trial, as established by its own earlier decision in Executive Car & Truck Leasing, Inc. v. DeSerio, 468 So. 2d 1027 (Fla. 1985), precluded psychologists such as Dr. Crown from testifying as to the cause of brain damage. Id. However, after the trial but before the decision on appeal in this case, the Fourth District receded from DeSerio, and held that psychologists are not precluded from testifying as to the cause of brain injury. Id. (citing Broward County School Bd. v. Cruz, 761 So. 2d 388 (Fla. 4th DCA 2000), approved on other grounds, 26 Fla. L. Weekly S571 (Fla. Nov. 1, 2001)).[1]

[1] The only issues presented to this Court in Cruz were whether filial consortium should be limited to the minority years, whether the trial court had abused its discretion in refusing a defense request to have a neurologist examine the plaintiff and the scope of any new trial. The Fourth District's departure from DeSerio was not an issue raised on review by the parties in Cruz, and this Court's opinion in

The defendants argued on appeal that reversal based on any claimed error in excluding portions of Dr. Crown's testimony was precluded by the two issue rule. Two issues, negligence and causation, had been submitted to the jury, but it could not be determined from the general verdict form whether the jury found no negligence, or, if there was negligence, found it did not cause Jacob's injury (which defendants argued had occurred earlier in the pregnancy). 782 So. 2d at 907. The Fourth District rejected that argument, holding that "the two-issue rule applies only to actions brought on two theories of liability" and "does not apply where there is only one cause of action." Id.

The defendants had also argued to the Fourth District that any error by the trial court was harmless. Defendants pointed out that Dr. Crown had in fact testified to his opinion, based on his review of the medical records and evaluation of Jacob, that Jacob's brain injury resulted from oxygen deprivation at the time of birth. (see, e.g., Hospital 4th DCA Ans. Br. at 7-9).

Defendants also asserted that the excluded testimony was purely cumulative. Even before Dr. Crown took the stand, Drs. Gatewood and Schneck--both medical doctors--had already

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that case does not mention that issue.

testified at length on their opinion that a hypoxic injury occurred during birth and did not occur earlier. Accordingly, defendants argued that the exclusion of the additional testimony proffered by Dr. Crown was not prejudicial in the light of all the evidence on causation that did come not only from Dr. Crown but also the Tomlians' medical experts. (see, e.g., Hospital 4th DCA Ans. Br. at 9-10).

The Fourth District, however, rejected these arguments as well, stating that the "specific" testimony Dr. Crown proffered as to why, based on the facts, Jacob's injury could not have happened before birth was not cumulative of the testimony of plaintiffs' other experts. 782 So. 2d at 907.

Defendants moved for rehearing. They pointed out that under this Court's opinion in Barth v. Khubani, 748 So. 2d 260 (Fla. 1999), the two issue rule analysis in defense-verdict cases must focus on the existence of multiple theories of defense. (see, e.g., Hospital 4th DCA Rehearing Motion at 7). The district court's decision, however, had refused to apply the two issue rule to uphold the defense verdict in this case, on the stated ground that only one theory of liability had been presented to the jury. Thus, defendants urged that the district court had employed precisely the misdirected focus disapproved by this Court in Barth. (see, e.g., Hospital 4th DCA Rehearing Motion at 10-11).

Defendants also pointed out that the evidence they had presented to the jury had gone beyond simply denying that any negligence on their part had caused Jacob's injury. (Id. at 3-6). Defendants had presented affirmative evidence of an alternative mechanism of causation occurring in utero long before the delivery. This evidence was presented in accordance with the Hospital's affirmative defense that "any injury to the Plaintiffs . . . was caused by maternal/paternal factors . . and other such factors over which this answering defendant had no control." (Hospital 4th DCA Rehearing Motion at 3; 1R 32, ¶ 11).

Moreover, evidence was presented by all defendants of a harmful fetal condition known as periventricular leukomalacia (PVL)--damage to the white matter of a developing fetal brain (Hospital 4th DCA Rehearing Motion at 3; 23R 2181, 2201). The PVL was shown by MRI prenatally, and was the most common cause of the symptoms of palsy (or spastic periparesis or diplegia) that Jacob Tomlian exhibited. (Hospital 4th DCA Rehearing Motion at 3; 23R 2163, 2175-76, 2185; see also 18R 1401-02).

The plaintiffs in response argued that this evidence and argument did not represent an "affirmative" defense, but was in effect merely a denial of the existence of causation, and noted that the defendants did not ask that the jury be charged on this issue as an affirmative defense. Plaintiffs argued

that it accordingly could not be a basis for application of the two issue rule. The Fourth District denied rehearing, without explanation.

This Court granted review based upon the conflict created by the Fourth District's decision with the Second District's decision in GIW Southern Valve Co. v. Smith, 471 So. 2d 81 (Fla. 2d DCA 1985) and the First District's decision in Bishop v. Baldwin Acoustical & Drywall, 696 So. 2d 507 (Fla. 1st DCA 1997), and other cases.

SUMMARY OF THE ARGUMENT

The Fourth District overturned a jury verdict reached after almost four weeks of trial on the ground that the trial court improperly excluded certain testimony by a neuropsychologist on the medical cause of the injury to the minor plaintiff's brain. The district court reversed based upon the Fourth District's prior en banc decision receding from the previously-established bright-line rule precluding such testimony, thereby bringing the Fourth District into conflict with the law as set forth in decisions of the First and Second Districts.

This Court should resolve this conflict by quashing the decision of the Fourth District and reaffirming the previously-established rule precluding such testimony.

First, in reaching its earlier decision to depart from that rule, the Fourth District followed case law in other jurisdictions rejecting a bright-line rule in favor of a more flexible, case-by-case approach seen as more consistent with the provisions of the applicable rule of evidence governing expert testimony. This Court, however, has previously declined to follow other jurisdictions in adopting such an approach to the admissibility of scientific evidence in general, choosing instead to adhere to the Frye requirement of

general acceptance in the relevant scientific community, in order to ensure that testimony reaching the jury be reliable. Here, too, the bright-line rule previously established should be adhered to, and for the same reasons.

Second, the Fourth District had also pointed to the language of the statute defining the "practice of psychology" for licensing purposes. The statute, however, does not provide psychologists with the ability to address the medical cause of organic brain damage, and the statutory language is in fact perfectly consistent with the bright-line rule precluding such testimony.

The Fourth District's decision in this case should be quashed for another, independent reason, as well. The defendants presented at least two separate defenses: (1) that no conduct on their part fell below the applicable standard of care, and (2) that Jacob's injuries were caused, not by anything defendants did, but by events that took place in utero long before the complained-of conduct. The jury could have found for the defendants on either of these issues, but the verdict form used at the trial did not distinguish between them. There was no error with respect to the first issue, which independently supports the jury's verdict, and affirmance was therefore required under the two issue rule.

The Fourth District declined to apply the two issue rule based upon a misreading of this Court's controlling decision in Barth v. Khubani, 748 So. 2d 260 (Fla. 1999). The Fourth District's analysis mistakenly focused upon the existence of multiple theories of liability, rather than multiple defenses, as required by Barth as the predicate for application of the two issue rule. As a result, it reached a decision that is inconsistent with Barth, and with the very logic of the two issue rule.

Both issues discussed above--the proper scope of testimony by psychologists and the operation of the two issue rule--raise important questions of law and policy. This Court should resolve both of these issues on a statewide basis and quash the decision of the district court.

ARGUMENT

I. STANDARD OF REVIEW.

The Fourth District reversed the trial court's ruling based upon a changed rule of law in that district since the trial had occurred. Whether that change in the rule of law is appropriate is purely a question of law. As well, the application of the two issue rule is also a pure question of law. Pure questions of law are reviewed de novo. See Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000); Rittman v. Allstate Ins. Co., 727 So. 2d 391 (Fla. 1st DCA 1999)("The standard of review of a trial court ruling on a pure issue of law is de novo, i.e., an appellate court need not defer to the trial court on matters of law."); Dixon v. City of Jacksonville, 774 So. 2d 763 (Fla. 1st DCA 2000)("It is well established that the construction of statutes, ordinances, contracts, or other written instruments is a question of law that is reviewable de novo, unless their meaning is ambiguous."). Thus, both points on review should be analyzed de novo by this Court.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING PROFFERED TESTIMONY BY PSYCHOLOGIST BARRY CROWN ON MEDICAL CAUSATION.

For the past 15 years, Florida's courts considering proposed testimony by psychologists on the subject of organic brain damage have followed the bright-line rule first established by the Fourth District's decision in Executive Car & Truck Leasing, Inc. v. DeSerio, 468 So. 2d 1027 (Fla. 4th DCA 1985) and subsequently followed by other district courts. This rule recognized a critical distinction between the types of testimony a psychologist could be permitted to give relating to causation, and those that require a medical doctor or other similar expert. Specifically, DeSerio held that while a psychologist could testify that an individual's psychological or mental symptoms resulted from the existence of organic brain damage, the psychologist could not go beyond that point and testify concerning the physical cause of such organic damage.

DeSerio was subsequently followed by the First District and Second District Courts of Appeal. See GIW Southern Valve Co. v. Smith, 471 So. 2d 81 (Fla. 2d DCA 1985); Bishop v. Baldwin Acoustical & Drywall, 696 So. 2d 507 (Fla. 1st DCA 1997); Haas v. Seekell, 538 So. 2d 1333 (Fla. 1st DCA 1989).

As the Second District explained in GIW, there is "no doubt" that the cause of existing brain damage is a medical issue, and a witness who is a psychologist and not a medical doctor lacks the qualifications to determine what could be expected to happen to the brain as a result of a particular incident. 471 So. 2d at 82.

Recently, however, the Fourth District receded from DeSerio. In Cruz, a parent sued the Broward County School Board on behalf of her minor son for head injuries he suffered when he was slammed to the ground head first in an altercation on school property. Although an initial EEG appeared normal, subsequent tests revealed abnormalities in the boy's brain, and about two months after the incident he began to exhibit marked changes in behavior. Over a defense objection, the trial court allowed expert testimony by a neuropsychologist that the boy's symptoms resulted from the injuries received in the incident. The witness testified that there was nothing in the record other than the head injury suffered in the incident to account for the boy's marked change in behavior. 761 So. 2d at 392-93.

On appeal, the Fourth District (en banc) affirmed the trial court's ruling admitting this testimony, and departed from the bright-line rule of DeSerio in favor of a case-by-case analysis. The court based its decision on case law from other

jurisdictions and a statutory change in Florida subsequent to DeSerio with respect to the definition of the "practice of psychology" for licensure purposes. None of these matters, however, justifies a holding that a psychologist is qualified to testify on the medical cause of organic brain damage, as the Fourth District allowed here.

First, with respect to the law in other jurisdictions, the Cruz court stated that the approach established by DeSerio "now represents the minority view." 761 So. 2d at 394 (citing Huntoon v. T.C.I. Cablevision of Colorado, Inc., 969 P.2d 681 (Colo. 1998) (en banc) and Hutchison v. American Family Mut. Ins. Co., 514 N.W.2d 882 (Iowa 1994)). Both of the out-of-state cases held that no general rule should be imposed precluding psychologists from addressing the causation of organic brain injury. In their view, trial courts should analyze the admissibility of such expert testimony by psychologists under the applicable rules of evidence (i.e., the provisions in their state evidence codes analogous to section 90.702, Florida Statutes).

Notably, both cases specifically recognized a split among the jurisdictions that had considered the matter. Moreover, the Iowa court in Hutchison acknowledged the specific limitations placed on such expert testimony by some states, including Florida's decision in DeSerio, and conceded that

those restrictions were not "fundamentally unsound." 514 N.W.2d at 887. The Hutchison court also recognized the legitimate concern that expert testimony regarding the causes of personal injuries not be allowed to fall into the realm of speculation. Id. at 888. Nevertheless, the court opined that the basic requirements of the evidence code (specifically, Iowa's analog to section 90.702 of the Florida Evidence Code), if enforced by the trial courts, were sufficient to guarantee the reliability of expert testimony by psychologists. Id.

This approach, however, is completely contrary to the judicial view this Court has historically followed in determining issues of expert evidence. Consistent with its prior jurisprudence, this Court should reject the invitation to abandon settled limitations on the admissibility of expert testimony, based on developments in the law of other jurisdictions. This Court did exactly that in 1993 in addressing the standard for admissibility of novel scientific evidence.

In that year, the United States Supreme Court abandoned the longstanding requirement established in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), that scientific testimony be based on a theory or technique that is generally accepted in the relevant scientific community. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Similar to the

reasoning of the Colorado and Iowa courts noted above on the issue of the admissibility of psychologists' testimony, the Court reasoned in Daubert that Rule 702 of the Federal Rules of Evidence, which governs expert testimony, did not expressly require that the expert's theory or technique be "generally accepted" in order to be admissible. Instead, Rule 702 only required that the proffered opinions constitute scientific "knowledge" and that they be relevant to the case at hand.

Accordingly, the Daubert Court held that district courts should employ a flexible case-by-case approach to ensure that the proffered testimony be relevant and reliable, and that "general acceptance" in the relevant field was only one factor for the district courts to consider in deciding whether to admit expert testimony.

Despite the United States Supreme Court's abandonment of the general acceptance test in favor of this more flexible case-by-case approach, this Court in Flanagan v. State, 625 So. 2d 827 (Fla. 1993) and subsequent cases, declined to depart from its bright-line general acceptance test. Instead, the Court re-affirmed Florida's adherence to the long-settled Frye test as the means of ensuring reliability, despite the lack of an explicit basis for the test in the language of the rules of evidence. See Flanagan, 625 So. 2d at 829 n.2 (noting the United States Supreme Court's decision in Daubert, but

affirming Florida's adherence to the Frye general acceptance standard).

In the same vein, this Court subsequently held inadmissible testimony by a child psychologist based upon the application of Frye. Hadden v. State, 690 So. 2d 573 (Fla. 1997). The psychologist's testimony at issue there included the opinion that a child exhibited symptoms of sexual abuse consistent with profiles of such victims developed in published studies. In holding the testimony inadmissible, this Court noted a number of decisions of district courts which, like Daubert, had held that since the Frye standard is not mentioned in the evidence code, it should be deemed abandoned in favor of a more flexible relevancy standard. Id. at 577. This Court rejected this approach in favor, once again, of the bright-line test of Frye as the more practical way of guaranteeing the reliability of expert scientific testimony. Id.

The approach taken by the Hutchison and Huntoon courts, which permits a case-by-case analysis of the admissibility of expert testimony, is similar in approach to that adopted by the federal courts in Daubert, but rejected in Florida. In fact, the Hutchison court recognized this parallel, stating that despite concerns with ensuring the reliability of expert testimony, "we agree with the Daubert Court that the trial court in its discretion and the jury in its deliberation

provide the most effective determination of the admissibility and weight of expert psychological testimony." 514 N.W.2d at 888. Indeed, both Colorado and Iowa have departed from the Frye test for evaluating expert scientific testimony. See People v. Shreck, 22 P.3d 68, 78 (Colo. 2001); Carolan v. Hill, 553 N.W.2d 882, 888 (Iowa 1996).

For all the same reasons that this Court adhered to the Frye test when considering the substance of proffered expert testimony rather than the more lenient Daubert standard, this Court should adhere to the line drawn in DeSerio when considering the qualification of psychologists to testify as expert witnesses on medical causation issues.

In the first place, the DeSerio rule is manifestly easier for a trial judge to apply than the case-by-case approach allowed by the Cruz decision. Cf. Berry v. CSX Transportation, Inc., 709 So. 2d 552, 556 n.4 (Fla. 1st DCA 1998) (recognizing that Frye general acceptance test is easier to apply than the flexible approach mandated by Daubert, which requires the trial judge engage in an assessment of the merits of the scientific research at issue).

Second, the DeSerio rule provides an important measure of certainty and predictability that the case-by-case approach taken in Cruz does not. See Silvestrone v. Edell, 721 So. 2d 1173, 1176 (Fla. 1998) (resolving a conflict between districts

by creating a bright-line rule and stating: "[t]his bright line rule will provide certainty . . . ."). The rule places all parties on notice that questions of the medical cause of physical injury or illness of the brain will require expert testimony from a qualified medical doctor, and they can govern their trial preparation accordingly. It is wholly within the control of the parties to ensure they have experts qualified to address each necessary aspect of their case.

Third, and most importantly, the same interest in reliability that was central to this Court's adherence to Frye, Hadden, 690 So. 2d at 578 ("Reliability is fundamental to issues involved in the admissibility of evidence"), will best be served by requiring that witnesses offering opinions in the specific area of causation of physical damage to the brain be medical doctors, rather than psychologists. As the Second District explained in GIW, there is "no doubt" that the cause of existing brain damage is a medical subject. Accordingly, a witness who is a medical doctor will be more likely to have the requisite expertise to determine what could be expected to happen physically to the brain as a result of a particular incident. GIW, 471 So. 2d at 82.[2]

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[2] The concern with reliability is particularly important in a case like this one. Unlike the situation in Cruz, where the minor plaintiff's injury resulted from undisputed head trauma inflicted when he was slammed to the ground, and the neuropsychologist opined that the subsequent changes in

Significantly, this interest in reliability is fully consistent with the Florida statutes defining the "practice of psychology." Contrary to the Fourth District's decision in Cruz, the conclusion that psychologists are not qualified to opine on the medical cause of organic brain damage is supported-–not undermined--by the statute governing the practice of psychology in this state.

Section 490.003(4), Florida Statutes, defines the "practice of psychology" as concerning mental and behavioral events, not the physical causes of injuries such as organic brain damage. The statute provides as follows:

> (4) "Practice of psychology" means the observations, description, evaluation, interpretation, and modification of human behavior, by the use of scientific and applied psychological principles, methods, and procedures, for the purpose of describing, preventing, alleviating, or eliminating symptomatic, maladaptive, or undesired behavior and of enhancing interpersonal behavioral health and mental or psychological health. The ethical practice of psychology includes, but is not limited to, psychological testing and the evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning, including evaluation of mental competency to manage one's affairs and to participate in legal proceedings; counseling, psychoanalysis, all forms of psychotherapy, sex therapy, hypnosis,

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behavior could not be explained by anything else in the record, Cruz, 761 So. 2d at 393, in this case, there was no such undisputed trauma, the cause of the brain injury is itself the very issue to be determined, and there was substantial evidence presented of an alternative medical cause for the injury.

> biofeedback, and behavioral analysis and therapy; psychoeducational evaluation, therapy, remediation, and consultation; and use of psychological methods to diagnose and treat mental, nervous, psychological, marital, or emotional disorders, illness, or disability, alcoholism and substance abuse, and disorders of habit or conduct, as well as the psychological aspects of physical illness, accident, injury, or disability, including neuropsychological evaluation, diagnosis, prognosis, etiology, and treatment.

As this statutory language makes clear, the practice of psychology in Florida involves the use of "psychological methods" to study and treat mental and behavioral disorders, including "the psychological aspects of physical illness [or] injury . . .." Nowhere in this statutory definition of the "practice of psychology" has the Legislature suggested that psychologists are qualified to diagnose the medical cause of organic brain injury or to treat it. As such, this statute does not establish that they are qualified to testify in court on this subject.

The Fourth District nonetheless concluded that the statute's use of the term "etiology"[3] contemplates "psychologists who are not doctors . . . increasingly becoming involved in areas which were traditionally considered to be purely medical," 761 So. 2d at 388, such as the diagnosis and treatment of

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[3] "Etiology" simply means "cause" or "origin" of any disease or abnormal condition. Webster's New Collegiate Dictionary (1981) at 390.

organic brain injuries. That is an incorrect reading of the statute.

The reference to "etiology" must be read in context. See Jones v. ETS of New Orleans, Inc., 793 So. 2d 912 (Fla. 2001) (single words or phrases may not be read in isolation, but in the context of the entire section). When that is done, the reference to "etiology" necessarily relates to the use of "psychological methods" to diagnose and treat mental and behavioral disorders, and "psychological aspects of physical illness, accident, injury or disability . . . ." It is simply a part of and subsumed within that specific statutory language. It cannot be read to stand independently of those controlling parts of the statute, as the Fourth District does.

Simply put, the "including" provision cannot be read to expand the practice of psychology to permit not only diagnosis, etiology and treatment of "psychological aspects" of physical injury, as the statute expressly provides, but also diagnosis, etiology and treatment of medical aspects of such injuries. To do so would violate settled principles of statutory construction and lead to the absurd result that psychologists in their practice would be permitted as a result of this "including" provision to now do everything medical doctors could do. That would be utterly inconsistent with the

comprehensive regulatory scheme controlling the practice of medicine and limiting it to medical doctors.

Thus, contrary to the Fourth District's construction, this statutory provision does not establish a fundamental change in the scope of psychological practice. Instead, the language of the statute is perfectly consistent with the limitation imposed on psychologists' courtroom testimony by DeSerio and GIW. Those cases allowed testimony by psychologists concerning the "etiology" of mental, emotional or behavioral conditions, and tracing such conditions to the existence of organic brain damage. The limitation placed on testimony by psychologists by those cases is that they not go beyond such opinions and invade the purely medical realm by offering opinions concerning the medical cause of organic brain damage.

Because the language of the statute is consistent with that limitation, it should not be read as an abrogation of the rule established in those cases. The statutory definition of the "practice of psychology" was enacted in 1989, four years after the Fourth District's decision in DeSerio and the Second District's decision in GIW. See Chapter 89-70, § 2, Laws of Florida (1989). Had the Legislature intended to change the common law on this issue as established in those cases, it would have done so in clear, unequivocal terms. See Carlile v. Game and Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla.

1977) (presumption is no change in common law is intended unless there is a clear expression of that intent in the statute); Ellis v. Brown, 77 So. 2d 845, 847 (Fla. 1955) ("The law . . . infers that the [statute] did not intend to make any alteration [in the common law] other than what is specified, and besides what has been plainly pronounced . . . ").[4]

Nothing in this statute suggests that it was "introductory of a new law," Ellis, 77 So. 2d at 847, when it was enacted in 1989. To the contrary, the statute is on its face "affirmative of the common law," id., as expressed in DeSerio. Moreover, the First District handed down its decision in Bishop (applying the DeSerio rule) in 1997, some eight years after the addition of the statutory definition of the "practice of psychology." The Legislature has not acted to overturn Bishop by any further amendments to the statute. It therefore should not be interpreted to effect the significant expansion of the "practice of psychology" found by the Fourth District in Cruz.

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[4] See also Martin v. Michell, 188 So. 2d 684, 688 (Fla. 4th DCA 1966) (statutes are not construed as impliedly changing the common law unless it is clearly required to give full force to statute's express provisions); American States Inc. Co. v. Kelley, 446 So. 2d 1085, 1086 (Fla. 4th DCA 1984) (where statute did not expressly state that it was changing the existing case law, Legislature did not intend to abolish that case law).

For all these reasons, this Court should reverse the decision of the panel in this case, and approve the bright-line rule stated in DeSerio, GIW and Bishop as the uniform law applicable to testimony by psychologists in Florida with respect to the medical cause of organic brain damage. That is consistent with the statutory schemes delineating the proper roles of medical doctors as opposed to psychologists, as well as with the Court's prior jurisprudence regarding the need for reliability of expert evidence. Any other holding could also have enormous ramifications in criminal as well as civil cases and undermine the bright-line Frye rule this Court has assiduously maintained.[5]

At a minimum, however, if this Court does not reaffirm the bright-line test of DeSerio, it should make clear that

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[5] Among other things, permitting psychologists to testify on the medical cause of organic brain damage presents the danger of confusion over the identity of the relevant scientific community against which the expert's methodology is to be tested for general acceptance under Frye. Here, for example, Dr. Crown, although a psychologist, sought to testify how he "ruled out" other medical causes of Jacob's injury, thereby engaging in "differential diagnosis," which is "a process whereby medical doctors experienced in diagnostic techniques provide testimony countering other possible causes" of the patient's injuries. U.S. Sugar Corp. v. Henson, 787 So. 2d 3, 19 (Fla. 1st DCA 2000), review granted, 797 So. 2d 590 (Fla. 2001). As the First District observed in Henson, this technique has been found to have "widespread acceptance in the medical community . . . " Id. But here, Crown is not a medical doctor and should not be allowed to give this type of medical testimony.

there is no bright-line rule requiring that such testimony by psychologists must always be admitted. The Fourth District appears to have made such a bright-line determination in this case at the same time it decried the DeSerio bright-line test. In reversing, it stated that the neuropsychologist's testimony should have been admitted below. Yet, even under the district court's logic, the most that can be said is that the trial court should make the admissibility determination on a case-by-case basis, instead of simply relying upon the DeSerio rule.

In a new trial, the trial court should not be faced with a bright-line ruling from the district court that the neuropsychologist's opinion must be admitted. Even under the district court's new rule, the trial court must be given great discretion in whether to admit expert testimony or not. See e.g. Gold, Vann & White, P.A. v. DeBerry, 639 So. 2d 47, 56 (Fla. 4th DCA 1994) (affirming trial court's order striking expert witness and citing to Carpenter v. Alonso, 587 So. 2d 572 (Fla. 3d DCA 1991)) for proposition that court can limit parties to one expert per side in medical malpractice cases). At the very least, this Court should make that clear to avoid any confusion that there is now a bright-line rule that the testimony of psychologists on issues of causation of organic brain injury must be admitted.

III. THE VERDICT FOR THE HOSPITAL SHOULD BE AFFIRMED UNDER THE TWO ISSUE RULE.[6]

On appeal to the Fourth District, defendants argued that, even if the court were to hold that Dr. Crown's proffered causation testimony should have been allowed, the judgment for the defendants should nevertheless be affirmed under the two issue rule. The defense presented to the jury was predicated on two separate and distinct grounds, (1) the absence of negligence, and (2) the absence of any causal connection between any alleged negligence and Jacob Tomlian's condition. The portion of Dr. Crown's testimony excluded by the trial court was directed to the second of these two grounds--causation. Based on the evidence, however, the jury could have found for the defendants on the first issue, i.e., that there was no negligence in the first instance, and therefore never reached the issue of causation.

Since the verdict form employed did not provide for separate answers on these two discrete issues, plaintiffs

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[6] It is well established that once this Court has accepted jurisdiction based on an express and direct conflict between district courts on one issue, this Court may also address any other issue appearing in the record. See Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 531 (Fla. 1985)(the act of accepting review based on conflict vests the Court with power to hear every issue in the case); Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982)(same); see also Ocean Trail Unit Owners Ass'n, Inc. v. Mead, 650 So. 2d 4, 5 (Fla. 1994) ("Having accepted jurisdiction to answer the certified question, we may review the entire record for error.").

could not demonstrate that the jury decided the case based on the issue of causation, rather than on the lack of negligence by defendants in the first instance. Plaintiffs are therefore unable to demonstrate that the exclusion of a portion of Dr. Crown's causation testimony, even if erroneous, was prejudicial. Under the two issue rule, plaintiffs could not obtain reversal of the jury verdict.

The Fourth District, however, refused to apply the two issue rule under these circumstances. Despite recognizing the existence of contrary authority in the Third as well as the Fourth District, the court reasoned that this Court's decision in First Interstate Development Corp. v. Ablenedo, 511 So. 2d 536 (Fla. 1987), held that the two issue rule applies only in actions brought on "two theories of liability." Tomlian, 782 So. 2d at 907. The court also stated that this Court's more recent decision in Barth v. Khubani, 748 So. 2d 260 (Fla. 1999), held that the two issue rule "'does not apply where there is only one cause of action.'" Id. (citing Barth, 748 So. 2d at 262 n.7).

The Fourth District further elaborated on its view of Barth by stating that Barth "cit[ed] with approval" the Fourth District's earlier decision in Lobue v. Travelers Ins. Co., 388 So. 2d 1349 (Fla. 4th DCA 1980), and that the "specific holding" in Barth was that the two issue rule could apply in a

case involving two separate affirmative defenses, and the error occurred only in regard to one of the affirmative defenses. Id. at 907 and n.2.

As shown below, however, the Fourth District's holding on the two issue rule represents a fundamental misreading of this Court's controlling decision in Barth, and reaches a result in this case that is flatly inconsistent with the express language, as well as the fundamental logic, of the Barth analysis.

In Barth, the plaintiff sued on a breach-of-contract theory. The defendants offered three different theories of defense: (1) failure of the plaintiff to prove the alleged contract existed, (2) failure of a condition precedent and (3) the statute of frauds. A general verdict form was used, and the jury returned a verdict for the defendant.

On appeal, the Third District held that the plaintiff was precluded from asserting error with respect to the statute of frauds, because it was unclear from the general verdict form whether the jury found the underlying contract to be unenforceable because it was barred by the statute of frauds, or because plaintiff had failed to perform conditions precedent, or because no valid contract existed. Accordingly, since error was claimed as to only one of these three

theories, the statute of frauds, the plaintiff was unable to show prejudice.

This Court affirmed the Third District's application of the two issue rule. The Court explained that this rule is "based on the principle that reversal is improper where no error is found as to one of the issues that can independently support the jury's verdict." Id. at 261. It limits appellate review to issues that actually affect the case, and litigants may avoid application of the rule "by simply requesting a special verdict that would illuminate the jury's decision making process and the effect of any alleged error . . . ." Id.

Most importantly for purposes of this case, this Court explained a crucial difference between the way the two issue rule is applied in the case of (1) general verdicts for the plaintiff, as opposed to (2) general verdicts for the defense. Where a general verdict for the plaintiff is being reviewed, the rule is applied by focusing on the theories of liability asserted by the plaintiff. Hence, where more than one theory of liability is presented to the jury, an alleged error as to only one of those multiple theories cannot be the basis for reversal.

In contrast, where the jury returns a general verdict for the defendant, the two issue rule is applied by focusing on

the defenses; where two or more defense theories are presented to the jury and it returns a verdict for the defense, a claimed error as to one defense theory will not result in reversal "since the verdict may stand based on another theory." Id. at 261-62. As the Court explained, "The focus on the winning party's actions or defenses, as the case may be, is logical given that the opposing party has the burden of establishing prejudice on appeal." Id. at 262.

In so holding, the Court approved the Third District's decision and disapproved a number of cases that conflicted with it to the extent they employed, in the context of a general defense verdict, a "misdirected focus" on the existence of multiple theories of liability asserted by the plaintiff, as opposed to distinct theories of nonliability, as required by Barth. Id. at 262 & n.7. The cases that conflicted in that regard included the Fourth District's decision in Lobue, relied on by the Fourth District in this case in reversing the trial court. Id. These cases were not disapproved, however, "to the extent they hold or explain that the [two issue] rule does not apply where there is only one cause of action or one separate and distinct defense theory." Id. at 262 n.7.

Applying the two issue rule to the case before it, the Barth Court stated that the defendants had asserted three

theories of nonliability, but error was alleged as to only one of them, and a general verdict form was used. Accordingly, the Third District had properly applied the two issue rule to preclude review of the alleged error.

Although the Fourth District's decision below pays lip service to Barth, it misreads and misapplies it. In the first place, the Fourth District incorrectly states that Barth "cite[d] with approval this court's decision in Lobue, in which this court refused to apply the two-issue rule to a case involving one theory of recovery, negligence." 782 So. 2d at 907. As shown above, this Court expressly disapproved Lobue in Barth precisely because of its focus on the existence of multiple theories of recovery as a predicate for application of the two issue rule. See Barth, 748 So. 2d at 260 n.1 & 262 n.7.[7]

Second, the Fourth District quotes only a portion of this Court's holding in Barth. The Fourth District states that, in

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[7] Barth quoted parenthetically Lobue's statement that the rule does not "'require a claimant to specifically demonstrate the precise element of the cause of action the jury found lacking.'" Id. at 262 n.7 (quoting Lobue, 388 So. 2d at 1351 n.3). This isolated reference, however, cannot mean that denials of separate elements of a plaintiff's cause of action cannot be distinct defenses under the two issue rule. Where, as here, distinct defenses are asserted that (1) the injury was not caused by defendants' conduct, but by matters outside their control, and (2) defendants' conduct did not fall below the standard of care, either of which defenses could independently support the jury's verdict, the two issue rule should apply. To hold otherwise would conflict with the remainder of the Court's opinion, discussed in the text.

Barth, "the Florida Supreme Court reiterated that the two-issue rule 'does not apply where there is only one cause of action.'" Id. (quoting in part from Barth, 748 So. 2d at 262 n.7). In fact, this Court's full statement in Barth was that the two issue rule "does not apply where there is only one cause of action or one separate and distinct defense theory." Barth, 748 So. 2d at 262 n.7 (emphasis added).

The omitted portion underlined in the quotation from Barth goes to the very heart of the Court's opinion in Barth, and the basis on which it disapproved of the Fourth District's earlier opinion in Lobue. The Fourth District's omission of this language referring to theories of defense as if it were irrelevant, when in fact it is central to any case such as this one, where a defense verdict is under review, as well as the court's conclusion that the two issue rule was not applicable here because "there was only one theory of liability, negligence," 782 So. 2d at 907, flies in the face of this Court's holding in Barth.

For this same reason, the Fourth District's reliance on First Interstate, supra, as requiring that there be more than one theory of liability is clearly misplaced. First Interstate involved an appeal of a verdict for the plaintiff, not the defendant. And, as Barth later made clear, the focus

in defense verdict cases must be on the existence of multiple defense theories, rather than multiple theories of liability.

The Fourth District's opinion also incorrectly states that "the specific holding of Barth was that the two-issue rule could apply where there was no special verdict in a case involving two separate affirmative defenses, and the error occurred only in regard to one of the affirmative defenses." 762 So. 2d at 907 n.2. Neither the language nor the logic of Barth supports this notion that more than one "affirmative" defense is required in order for the two issue rule to apply in the context of a defense verdict.

In fact, in unsuccessfully moving for rehearing on the two issue rule, the Hospital addressed the relevance of affirmative defenses by arguing, based on case law from other jurisdictions, that even a single affirmative defense, coupled with a denial of one or more elements of plaintiff's claims, should support affirmance under the two issue rule. The Hospital argued that its presentation of evidence of an alternate theory of the timing and causation of Jacob Tomlian's injury constituted an affirmative defense. The plaintiffs argued in response that this did not constitute a true affirmative defense, but simply a denial of one of the elements of plaintiffs' claim.

But even if this Court were to accept plaintiffs' argument that the Hospital's theory did not truly constitute an "affirmative" defense, the result is the same. Barth says nothing about a requirement of "two separate affirmative defenses," nor does it require the pleading and proof of even one "affirmative" defense as a predicate for the application of the two issue rule. To the contrary, Barth requires only that there be more than one distinct defense theory that could independently support the jury's verdict.

In fact, the Court characterized as three distinct defense theories, and thus three separate issues for purposes of the two issue rule, the defenses of (1) failure to prove the alleged contract existed, (2) failure to perform conditions precedent and (3) the statute of frauds. The first two of these issues-- the existence of a contract and performance of conditions precedent--are not affirmative defenses at all, but elements of the plaintiff's claim. See, e.g., Knowles v. CIT Corp., 346 So. 2d 1042, 1043 (Fla. 1st DCA 1977) (plaintiff must prove existence of contract, breach and damages); Cooke v. Ins. Co. of North America, 652 So. 2d 1154, 1156 (Fla. 2d DCA 1995) (plaintiff may plead performance of conditions generally; defendant may only demand proof from plaintiff if it has denied performance with particularity). Thus, the Fourth District's assertion that Barth's holding is

limited to cases involving “affirmative defenses” is contrary to the express language of the opinion.

Such a characterization of Barth also contradicts the very basis for the two issue rule in the first place. As the Court stated in Barth, the foundation for the two issue rule is the requirement that the party complaining of error on appeal demonstrate that the error was harmful. Therefore, “reversal is improper where no error is found as to one of the issues that can independently support the jury’s verdict”. Id. at 261.

Thus, when a general verdict is returned for the plaintiff, and there is only one cause of action or theory of liability asserted, if the defendant is able on appeal to establish error as to even one of the critical elements of that theory, then the plaintiff cannot use the two issue rule to preclude review. Such an error as to one element cannot be harmless to the defendant’s case, because the plaintiff must establish all the elements of the cause of action in order to prevail.

In the context of a plaintiff’s verdict, then, the plaintiff who asserted a single theory of recovery may not use the two issue rule simply because that theory involves proof of multiple elements, some of which are without error. Where the

court is reviewing a verdict for the defendant, however, the rationale for the two issue rule dictates a different result.

Unlike the plaintiff, the defense may prevail at trial by establishing the non-existence of any one of the critical elements of the plaintiff's theory of recovery, or by prevailing on an affirmative defense. Accordingly, even apart from any affirmative defenses, where a defendant presents evidence and argument at trial from which the jury could properly have concluded that the plaintiff failed to prove more than one discrete element of the plaintiff's claim, and a general verdict is returned for the defense, the two issue rule precludes review as long as no error is found as to any one of those discrete elements.

The reason for this conclusion is plain: a defense victory on any one of those elements "can independently support the jury's verdict." Barth, 748 So. 2d at 261. Therefore, the rationale for the two issue rule applies with full force, since the plaintiff cannot on appeal establish that the error as to one element of its case was harmful.

In this case, the Hospital pleaded as an affirmative defense that "any injury to the Plaintiffs . . . was caused by maternal/paternal factors . . and other such factors over which this answering defendant had no control." (1R 32, ¶ 11). At trial, evidence was presented by all defendants

establishing that Jacob Tomlian's symptoms resulted from a condition known as PVL, or damage to the white matter of a developing fetal brain, a condition which developed long before and independently of the complained-of conduct by the defendants.

Although the plaintiffs argued to the Fourth District in response to defendants' motion for rehearing that this was not a true affirmative defense, it is clear from the express language and rationale of Barth that this makes no difference. For purposes of the two issue rule, the question is not whether a defense is "affirmative" or a "mere denial." The question is whether an issue was presented to the jury free from error which could "independently support the jury's verdict" for the defense.

In this case, the answer to that question is undeniably yes. Notwithstanding Judge Farmer's cryptic concurring statement that "we can tell from the defense verdict that the error [in excluding portions of Dr. Crown's proffered testimony] was prejudicial," 782 So. 2d at 908, that is simply not true. In fact, exactly the opposite is true.

Negligence and causation are two separate issues, both of which are necessary to recovery, and either of which may therefore support a defense verdict if decided adversely to plaintiff. The jury in this case may well have found based on

the evidence defendants presented that, even apart from the question of causation, the defendants' conduct in connection with Jacob's delivery did not fall below the applicable standard of care. Because the jury could have decided the case on that basis alone, this is a classic case for application of the two issue rule. Affirmance of the jury's verdict was accordingly required.

CONCLUSION

For all the foregoing reasons, the judgment of the Fourth District should be quashed. At the very least, this Court should clarify that there is no bright-line rule requiring that such testimony by psychologists must always be admitted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished to Todd R. Schwartz, Esquire, GINSBURG & SCHWARTZ, 66 West Flagler Street, Suite 410, Miami, Florida 33130, and to Debra Potter Klauber, HALICZER, PETTIS, & WHITE, 101 N.E. Third Avenue, Sixth Floor, Fort Lauderdale, FL 33301, by United States Mail this 2nd day of January, 2002.

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