IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC08-2087

CHRISTY AILLS,

Petitioner,

v.

LUCIANO BOEMI, M.D., and LUCIANO BOEMI, M.D., P.A.,

Respondents.

RESPONDENTS' BRIEF ON THE MERITS

ON REVIEW FROM A DECISION OF THE
SECOND DISTRICT COURT OF APPEAL

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RECORD REFERENCE ABBREVIATIONS USED IN THIS BRIEF

"IB:__" references Ms. Aills' initial brief.

"R:__" references the record-on-appeal.

"T:__" references the transcript of the trial.

INTRODUCTION

The district court's decision in *Aills v. Boemi*, 990 So. 2d 540 (Fla. 2d DCA 2008), was brought to the Court by Ms. Aills on a contention that it conflicts with other appellate Florida decisions on two issues: a misapplication of the legal principle that issues not presented to the trial court may not be considered on appeal; and a misapplication of the two-issue rule. Her brief on the merits, however, does not demonstrate express or direct conflict on either of these issues, and presents no reason why the Court should accept the case for review.

As regards the first issue brought for review, Ms. Aills has asked the Court to overturn the district court's decision after undertaking a complete record review because the court has disregarded "what the record *actually* reflects."[1] She only asks the Court to re-evaluate the record evidence, and to disagree with the recitations in the district court's decision. She makes no claim that the district court has anywhere within the four corners of its decision expressed any conflict with the principle of appellate review she asserts was misapplied.[2]

Ms. Aills' only stated assertion of express and direct conflict comes on the second last page of her brief, where she claims conflict between the district court's determination that the two-issue rule does not apply when there is *no* evidence to support one of three theories of liability, and one Fourth District decision which

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1 IB at 17, 18, 19, 20, 24, 27, 30 (emphasis in each instance in the original).

2 The Constitution's conflict-constraining term "expressly and directly" are referenced in Ms. Aills' brief only in her Statement of the Case on pages 1 and 6.

holds that the two-issue rule does apply when there is a legal error in one of three theories of liability which are tried. The district court's decision does not conflict with that Fourth District case, though, or bring disharmony into the jurisprudence of the state such as would warrant the Court's exercise of its discretion to grant review.

Dr. Boemi respectfully suggests that the Court should consider, as it has in other cases, whether review has been improvidently granted. *E.g., DiPietro v. Griefer*, 732 So. 2d 323 (Fla. 1999) (holding that "what appeared to express and direct conflict" was not, and "review was improvidently granted").

Should the Court undertake the intensive record review that Ms. Aills seeks, however, it should do so on the basis of the *entire* record that was developed in the trial court and put before the district court. A review of all relevant record facts demonstrates an absence of any evidence on the standard of care which the jury was required to apply in order to find Dr. Boemi negligent. Dr. Boemi was entitled to the directed verdict he requested below on cross-appeal. That issue is now before the Court for consideration because, "once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to the Court on appeal." *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982).

STATEMENT OF THE FACTS

Ms. Aills underwent elective breast surgery with Dr. Boemi on April 16, 2003, and remained in his care for approximately six weeks thereafter. T:309-13,

324-25, 385-87. Beginning on June 2, 2003, she consulted, received extensive treatment, and underwent additional surgical procedures from Dr. Robert Brueck. T:94, 99-102, 120-54, 867.

In her second amended complaint, Ms. Aills asserted separate causes of action against Dr. Boemi for medical negligence, battery, lack of informed consent, and fraud.[3] In her count for medical negligence, she alleged that Dr. Boemi was hired to provide medical treatment and fell below the standard of care for plastic surgeons in (a) failing to warn her of the risk of loss of vascularization, (b) "failing to insure that proper vascularization remained to support the viability of both nipples and the surrounding tissue," and (c) removing too much healthy breast tissue." R:337-38. Nowhere in her allegations is there any mention of post-surgical care or treatment.

On the contested issue of liability, the jury was informed that there are three types of breast surgery procedures: reduction; augmentation; and mastopexy (or breast lift). T:19-20. Ms. Aills relied on two expert witnesses to prove her claim that Dr. Boemi was negligent.[4] The first was Dr. Brueck, who had assumed her post-surgical care and treatment. T:120-54, 867. He testified that Dr. Boemi had

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[3] She later asserted a claim for punitive damages which the jury rejected and was never raised by her as an appellate issue. R:334.

[4] A third expert testified concerning Ms. Aills' postoperative recovery process, but he was never asked about and did not offer testimony on the appropriate standard of care relating to the procedures that Dr. Boemi selected and performed. T:234-67.

performed a combined reduction/augmentation procedure, and not a combined mastopexy/augmentation procedure. T:101, 103, 109.

Dr. Brueck acknowledged that different plastic surgeons both reasonably and appropriately use different techniques to perform the surgical procedures sought by Ms. Aills (T:158), and that any plastic surgeon can experience complications even if he is "practicing reasonable or appropriate medical care." T:160-61. He testified that the reduction/augmentation procedure selected by Dr. Boemi was one which fell within the standard of care for what Ms. Aills had sought (T:156), and that the nipple loss she experienced was always a risk in those procedures even if the treatment as performed falls within the standard of care. T:159-60, 462.

Ms. Aills' other expert witness, Dr. Paul Glat, disagreed with Dr. Brueck as to what procedures Dr. Boemi had actually used (T:434), but he did agree that different plastic surgeons can appropriately use different approaches to achieve a patient's goals. T:458-59. When asked if Dr. Boemi's treatment plan was reasonable, he couldn't "say yes or no a hundred percent, but in *my* practice, I would not do that." T:472-73 (emphasis added). Dr. Glat's testimony was directed almost entirely to Ms. Aills' allegation that she had not given informed consent to the procedures which Dr. Boemi performed, as opposed to whether he was negligent in performing them. T:422, 434, 464-65, 469.

In their direct testimony, neither Dr. Brueck or Dr. Glat testified that Dr. Boemi had departed from the prevailing professional standard of care either in connection with the procedures that were selected or performed, or in his

postoperative treatment of Ms. Aills. In addition, neither testified that Dr. Boemi's treatment of Ms. Aills after her surgery did anything to cause or to exacerbate her postsurgical complications.

At the close of Ms. Aills' case in chief, Dr. Boemi moved for a directed verdict on the issue of negligence based on the failure of Ms. Aills' experts to identify a standard of care that was purportedly breached. T:549-50, 873-76. Ms. Aills' counsel argued that the issue had been adequately addressed with the inquiry as to whether Dr. Boemi's treatment was "reasonable" and "appropriate" (T:558-59), as to which both of her experts had said it was. The trial court denied Dr. Boemi's motion for directed verdict on negligence. T:568, 876.

After Dr. Boemi had rested his defense and his experts were no longer available to testify, Ms. Aills' counsel reconsidered whether a standard of care had been established and requested permission to reopen Ms. Aills' case to "say the magic word standard of care in the event we end up in some sort of appellate process." T:856. Dr. Boemi objected on the ground that his experts had already testified, been discharged, and were no longer available to respond to new testimony. T:858. The trial court granted Ms. Aills' request, however (T:859), and opened the door for the following colloquy from Dr. Brueck:

> Q: Are you familiar with the standard of care for plastic surgeons performing these types of procedures?
>
> A: Yes.
>
> Q: Do you have an opinion as to whether or not Dr. Boemi's care fell below the standard of care for a plastic surgeon performing these types of procedures?

A: In my opinion it did.

Q: And did his care cause her damage?

A: I think the design and execution of the procedures is what caused the damage. Obviously the postop care ended up falling in my hands, so the execution of the procedure did, yes.

T:867.

In his closing argument, Ms. Aills' trial counsel began to argue that Dr. Boemi had failed to provide appropriate care to Ms. Aills during the postoperative period, to which Dr. Boemi's counsel immediately requested a sidebar. T:931. At sidebar, he objected to that line of argument on the ground there was no record basis "that the postoperative care was negligent," or "that it would have made a difference." T:931-32. Ms. Aills' counsel responded that his remarks were "fair comment" because "we have already put on testimony . . . that the entire thing that this doctor did caused her to have her harm." *Id*. The trial court overruled the objection. *Id*.

With the objection overruled, Ms. Aills' counsel returned to alleged postoperative negligence (T:938-46), telling the jury it could find for Ms. Aills on Dr. Boemi's design of the surgical procedures, on the manner in which he had performed the surgery, ***and*** on the basis of negligence in postoperative care. T:949-50.[5] The jury was then given a verdict form with blanks for Ms. Aills'

[5] Ms. Aills contended both in the district court and here that her assertion of postoperative negligence was based *solely* on the allegation in her Second Amended Complaint of a "failure to detect and treat a surgically caused impairment of blood supply."

claims of negligence, battery, lack of informed consent, and fraud. R:506-08. It rendered a verdict for Ms. Aills only on her claim of negligence, and gave defense verdicts on the other three claims. *Id*.

Dr. Boemi moved for the entry of a judgment in accordance with his earlier motions for directed verdict, asserting again that Ms. Aills had failed to establish the requisite standard of care which he was alleged to have breached and citing to *Gooding v. University Hosp. Bldg., Inc.*, 445 So. 2d 1015 (Fla. 1984). R:1351-72. He pointed out that both Dr. Brueck and Dr. Glat had merely expressed their personal disapproval of Dr. Boemi's treatment of Ms. Aills, and that the personal standards under which an individual physician practices are not a basis for a breach of the standard of care in the relevant community. R:1359-60, 1387.

Dr. Boemi's counsel also contended that the trial court had committed error in allowing Ms. Aills' counsel to attempt to "cure" her failure to adduce expert testimony on the standard of care by recalling Dr. Brueck after the defense had rested and its experts were no longer available to respond. R:1388-89, 1390-99. He further pointed out that Dr. Brueck did not in fact cure the omission of evidence with respect to postoperative negligence with testimony that unspecified "types of procedures" fell below the applicable standard of care, since he and Dr. Glat had disagreed as to exactly what procedures had actually been performed. *Id*.

Dr. Boemi also moved for a new trial on liability based on Ms. Aills' counsel's closing argument on the unpled and un-tried claim of postoperative care.

R:1351-72.[6] He pointed out that Ms. Aills had adduced no evidence whatsoever on the issue of postoperative treatment, and that her own expert, Dr. Brueck, had acknowledged as much when he said in post-trial recall (i) that her damage came from "the design and execution" of the procedures, (ii) that her postoperative care "ended up falling in *my* hands" (T:867, emphasis added), and (iii) that Dr. Boemi's postoperative care had not caused her any harm. R:1361-62, 1391-95.

The trial court denied Dr. Boemi's motions for a directed verdict and for a new trial on liability, but remitted three of the four components of the jury's damages award. *Id*. When Ms. Aills declined to accept $2.5 million for non-economic damages and the trial court ordered a new trial on damages (R:1680), Ms. Aills appealed two of the remittitur orders. *See Aills*, 990 So. 2d at 545-46. Dr. Boemi cross-appealed both the trial court's denial of a directed verdict on liability and his objection to the remarks of Ms. Aills' counsel in closing on an unpled and untried claim of postoperative negligence.

Without explanation, the district court upheld the trial court's denial of Dr. Boemi's motion for a directed verdict on liability, and its admission of twenty gruesome photographs. It did order a new trial, though, based on what it described as the dramatic, vivid, disturbing, and inflammatory remarks made by Ms. Aills' counsel in closing argument concerning a claim of postoperative negligence which had neither been pled nor tried by consent.

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[6] Another ground asserted for a new trial was Ms Aills' introduction of twenty gruesome blow-ups of the postoperative condition of Ms. Aills' breasts. R:365, 1391-92, 1395.

SUMMARY OF ARGUMENT

There is no record basis for Ms. Aills' contention that Dr. Boemi's counsel did not object to a trial on postoperative negligence prior to the verdict being rendered. The district court correctly determined from the record that postoperative negligence had not been raised at the trial level – i.e., neither pled nor tried by consent.

The record fully supports the district court's determination that Dr. Boemi made a timely objection to Ms. Aills' argument that he was liable for postoperative negligence. Ms. Aills has offered the Court her interpretation of one phrase in her Second Amended Complaint, and one phrase in Dr. Boemi's objection to her counsel's argument on postoperative negligence, as the bases to reverse the district court's decision. Neither attempted reconstruction of the record supports her contention that the district court misread the record, however, or justifies her claim that the district court created its own objection to Ms. Aills' counsel's discourse on postoperative negligence.

Ms. Aills has argued that the failure to plead or try an issue submitted to the jury is not fundamental error. It is, however, although that was not an express basis for the district court's decision. Ms. Aills does not deny the district court's characterization of her counsel's remarks in closing as being dramatic, vivid, calculated to elicit an emotional response from the jury, and *not* harmless. The submission of such remarks to a jury to support a theory of liability neither pled or tried by consent denied Dr. Boemi due process of law, and in that way did constitute fundamental error.

Ms. Aills' challenge to the district court's determination that a new trial was required does not present the Court with a decision that expressly and directly conflicts with any other Florida appellate decision, as the Constitution requires for an exercise of the Court's jurisdiction. She has only asked the Court to step into the role performed by the districts courts of appeal in order to provide her a second detailed review of the record. The Court does not sit to provide record review which does not affect the jurisprudence of the state.

Ms. Aills' challenge to the district court's decision not apply to apply the two-issue rule does not conflict with *Chua v. Hilbert*, 846 So. 2d 1179 (Fla. 4th DCA 2003). There is no express or direct conflict. In this case, the court held that the two-issue rule would not be extended to a jury verdict based on an issue never pled, never tried, as to which the defendant was never given notice, and as to which there was no evidence. In *Chua*, the court held that the two-issue rule *does* apply when the jury is asked to find liability on these alternative theories of liability which are fully tried, even though one theory may suffer from legal error. The fundamental difference between the two decisions is evident on the face of the two decisions, and nothing in the district court's decision requires harmonization with *Chua*.

If the Court chooses to review the record in the exercise of an error-correcting function, the Court should also review the record basis for the trial court's refusal to direct a verdict for Dr. Boemi based on an absence of any expert witness testimony establishing the standard of review for liability. During trial, Ms. Aills' experts testified that they personally would not have performed the

medical procedures selected by Dr. Boemi, but they acknowledged that Dr. Boemi's selection of procedures was within the standard of care for the surgery he was asked to perform. They expressed no opinion as to the standard of care that reasonable plastic surgeons in the community would utilize in the performance of the surgery.

Post-trial, after the case had closed and both parties had rested, the trial court allowed Ms. Aills to recall Dr. Brueck in an to attempt to provide the missing testimony for a standard of care. That was legal error, and in any event failed to cure the defect. The testimony elicited from Dr. Brueck still fell short of identifying the standard of care against which the jury could weigh Dr. Boemi's performance of a surgical procedure on Ms. Aills. The trial court abused its discretion in allowing Ms. Aills' case to go to the jury without expert testimony on a standard of care for the actions of Dr. Boemi which she asserted were negligent, and the district court erred in not directing a verdict for Dr. Boemi on liability.

ARGUMENT

I. The district court properly held that a new trial was required in light of closing argument on a cause of action which was neither pled nor tried, and for which no evidence was introduced.

The district court ordered on a new trial because Ms. Aills' counsel's remarks about postoperative negligence during closing argument were addressed to a cause of action which was neither pled nor tried by consent. The court found from scrutinizing the record that Dr. Boemi's counsel had no occasion to offer evidence to rebut such a theory, and no opportunity to request a separate

interrogatory verdict on that issue. The court observed that pleading requirements in medical malpractice cases are not merely academic exercises, and that a failure to plead under the circumstances cannot be considered harmless. *Aills*, 990 So. 2d at 547.

A. The district court properly determined that postoperative negligence was neither pled nor tried.

Ms. Aills includes in her Statement of the Case and Facts a number of statements from which she argues that the issue of postoperative negligence was both pled in her Second Amended Complaint and understood by Dr. Boemi's counsel to be an issue being tried. In the Statement of the Case and Facts in her brief, Ms. Aills states that postoperative negligence was pled by the allegation that Dr. Boemi was negligent for "failing to insure that proper vascularization remained to support the viability of both nipples and the surrounding tissue," and that this phrase "was broad enough to include negligence . . . postoperatively." IB 7-8. Immediately thereafter, however, she states that the breadth of that allegation "is not the point," because Dr. Boemi's counsel "understood throughout the trial" that postoperative care was included in the charge of negligence." *Id*.

In the Argument section of her brief, however, she does not argue as an issue before the Court that postoperative negligence was pled and tried by consent. The only issue she has presented to the Court is whether, prior to the verdict, Dr. Boemi's counsel presented a proper objection to the trial court on postoperative negligence. She defines the issue for review as being: "The District Court of Appeal Erred (1) In Ordering a New Trial of All Issues on a Ground That Was Not

Presented to The Trial Court at Any Time Prior to Verdict." IB 17.[7] To put the objection in context requires a brief recap of the record evidence and procedure.

The Medical Negligence count in Mr. Aills' Second Amended Complaint did not contain a claim of postoperative negligence. That count sets out three consecutive acts of negligence which run from a mistake made prior to surgery (a failure to warn of a possible loss of blood flow), to two actions taken during surgery (the failure to staunch blood flow and the removal of too much tissue). R:337-38. Contrary to Ms. Aills' suggestion that the failure to warn of blood loss "was broad enough" to include negligence during Dr. Boemi's postoperative care,[8] there is no possible way to read that recitation, which precedes another alleged mistake *during* surgery, as putting Dr. Boemi on notice that she was alleging a claim of postoperative negligence.

Nor did Ms. Aills' counsel signal during his opening argument that any such issue was going to be tried. In his opening, Ms. Aills' counsel summarized her case as first involving failure to inform, and then criticizing the performance of unnecessary and risky surgical procedures.

> The evidence in this case is going to show that Dr. Boemi induced [Ms. Aills] to have three procedures at once, instead of performing the simple procedure that she came in to see him for and what she requested.
>
> * * *

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7 This formulation of the issue brought to the Court is reiterated at IB 20, 23-34.

8 IB 7-8.

> [T]he evidence is going to show that he never told her about the third procedure that he was going to perform which, in fact, was a reduction. . . . And the evidence is going to show that the surgeries that she had were not necessary, she only needed a breast lift, that she wasn't told about the reduction, the risks of the reduction were much greater, and that Dr. Boemi contemplated in essence doing a reduction right from the start and never told her. . . . *Now, those are the basic elements of the case*.

T:5-7 (emphasis added). Counsel's summary of the testimony of her experts similarly made no mention of negligence for postoperative care. T:37-40.

Ms. Aills' counsel also included in his opening argument a graphic description of painful post-surgical treatments during his opening statement. Being argument and not evidence, of course, there was need or reason for Dr. Boemi's counsel to interrupt with an objection. Dr. Boemi's counsel did respond, however, and told the jury that the evidence would *not* show "that there is any criticism of the care of Dr. Boemi after the surgery. In other words, that there was any care – any criticism of his care after the surgery that caused additional harm to [Ms.] Aills." T:69. His prognostication was exactly correct.

The issue of postoperative negligence first surfaced in the closing argument by Ms. Aills' counsel. Ms. Aills would have the Court reverse the district court because Dr. Boemi made no proper objection to her counsel's argument on postoperative negligence. She first says there was *no* objection to her counsel's closing argument (IB 16, 20), but then says there really was an objection but it was addressed to the absence of proximate cause rather than a failure to plead postoperative negligence. IB 17, 21-22. From these assertions, Ms. Aills contends that the district court misread the record and impermissibly supplied "its *own*

objection to the closing argument." IB 22 (emphasis in the original). The record, however, establishes a firm foundation for the district court's decision.

Ms. Aills argues that Dr. Boemi's objection during closing argument was "insufficient to preserve error on a different ground raised on appeal." IB 21. It was, however. In closing, Ms. Aills' counsel had launched into an argument on postoperative negligence, and Dr. Boemi's counsel immediately requested a sidebar where he objected to "this line of argument" and stated:

> To argue that the postoperative care was negligent and that there was evidence to support that it would have made a difference, *there's no basis in the record*."

T:931 (emphasis added).

Ms. Aills now asserts that this was really an argument on causation. IB 13.[9] Her position seems to be that the phrase "no basis in the record" could only have meant an insufficiency of the evidence on causation. In the context of the time, place, circumstance, and need for brevity which defines a sidebar objection conference during trial, however, the district court quite properly understood the phrase "no basis in the record" to be a short-hand reference to the absence of a pleading, notice that the issue was being tried, proof, or expert testimony on the standard of care for postoperative negligence – *i.e.*, the absence of *any* basis in the

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[9] At trial, Ms. Aills' counsel sought to justify his argument on postoperative negligence by asserting that it was fair comment on the testimony that was presented to the jury. T:932.

record.[10] Further support for the contextual reading of the objection is found later in the trial when no issue of postoperative negligence was included in the jury instruction on negligence which her counsel approved for submission to the jury. T:1033-34.

The district court quite properly evaluated counsel's objection in the context of the record, and both fairly and appropriately set out its conclusion in a reasoned, lengthy, and detailed opinion.[11] The court correctly concluded from the record that Dr. Boemi had properly and timely objected to the jury being asked to find Dr.

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[10] At no place in the record will the court find the required expert testimony as to the standard of care for Dr. Boemi's postoperative treatment of Ms. Aills. *Sims v. Helms*, 345 So. 2d 721, 723 (Fla. 1977) ("without the assistance of expert medical testimony a lay jury could not have determined, except by pure speculation, whether petitioner chose the correct method of treatment or whether he deviated from accepted medical practice") (citing *Bourgeois v. Dade County*, 99 So. 2d 575 (Fla. 1956), *Hill v. Boughton*, 1 So. 2d 610 (Fla. 1941), and *Anderson v. Gordon*, 334 So. 2d 107 (Fla. 3d DCA 1976)). *See also Posner v. Walker*, 930 So. 2d 659, 667 (Fla. 3d DCA), *review denied*, 944 So. 2d 348 (Fla. 2006), reversing a medical malpractice verdict in part because the jury was permitted to consider a theory of negligence unsupported by expert testimony regarding an applicable standard of care, citing to this court's decisions in *Moisan v. Frank K. Kriz, Jr., M.D., P.A.*, 531 So. 2d 398, 399 (Fla. 2d DCA 1988), and *Marsh v. City of St. Petersburg*, 106 So. 2d 567 (Fla. 2d DCA 1958). *And see DeFreitas v. State*, 701 So. 2d 593, 604 (Fla. 4th DCA 1997) (Gunther, J., concurring).

[11] The district court's observation that Ms. Aills' counsel used "dramatic and vivid rhetoric" regarding Ms. Aills' post-surgical condition "to elicit an emotional response from the jury" (990 So. 2d at 548-49) is, if anything, understated. Her verbal appeal to emotion was even more dramatically and vividly displayed in the excessive number of disturbing, inflammatory, and grotesque photographs of Ms. Aills' breasts which the trial court allowed her counsel to show to the jury over Dr. Boemi's objection. T:135.

Boemi liable for postoperative negligence – "a theory of medical negligence that was not within the issues presented at trial." *Aills*, 990 So. 2d at 542.[12]

The other obvious flaw in what Ms. Aills is asking of the Court is the lack of anything in the district court's decision that *expressly* addresses the notion that Dr. Boemi's counsel failed to raise a proper and timely objection to the trial of a cause of action which was neither pled nor tried. The four corners of the court's decision provides chapter and verse of just the opposite. It is impossible to discern from the face of the court's decision any express or direct conflict with the line of cases Ms. Aills has cited with respect of the contemporaneous objection rule.

B. The district court did not address and misapply the doctrine of fundamental error.

Ms. Aills argues at some length that the error created by her counsel coming her counsel's error was not fundamental. IB 20-21, 23-24. The district court did not say that the closing argument on an issue not pled or tried was fundamental error. Its decision thus presents no occasion for the Court to address this issue.

Were the Court to consider the issue, however, it would be quite appropriate to describe the argument made by Ms. Aills' counsel in closing as "fundamental error." In *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1128 (Fla. 1985), the Court held that liability cannot be based on a theory the defendant "never had

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[12] Notably, Ms. Aills does not challenge to the district court's determination that the error of allowing the jury to find negligence on a claim that was neither pled nor tried was *not* harmless. Issues not presented in argument on appeal are deemed abandoned. *E.g., Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990).

an opportunity to rebut at trial." Other courts have reached the same conclusion using the word "fundamental." *E.g., B.D.M. Fin. Corp. v. Department of Bus. & Prof. Reg.*, 698 So. 2d 1359, 1363 (Fla. 1st DCA 1997) (an award of damages not supported by allegations of the complaint constitute fundamental error); *Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1235 (Fla. 1st DCA 1995) ("Adequate notice is a fundamental element of the right to due process. . . . [T]he litigant should be entitled to anticipate the consequences that reasonably flow from the allegations of the complaint."). The absence of due process, whether in the form of a failure to plead or a denial of notice, is a classic form of fundamental error.

II. The district court properly applied the two-issue rule.

Ms. Aills argues that the district court erred in failing to apply the two-issue rule once it is understood that postoperative care had been pled and was an issue for which evidence was admissible. IB 24. The predicate for her argument, however, is that three separate theories of liability were submitted to the jury (IB 25, and again at 26, 27, 28 and 29), consisting of (1) an unnecessary procedure Dr. Boemi performed, (2) flawed execution of the surgery, and (3) a failure "to detect and treat a surgically caused impairment of blood supply." IB 25-26. This last, of course, is a reprise of her misstated contention that postoperative negligence was pled in her Second Amended Complaint.

As demonstrated earlier, the record establishes that postoperative negligence was in fact *not* submitted to the jury in a pleading, with evidence, or in a jury

instruction. This was not, as Ms. Aills would have the Court believe, simply a situation where the evidence may have been insufficient to support a finding of negligence on a theory of liability that was pled and tried but nonetheless submitted to the jury.

The district court fully understood the operation of the two-issue rule, and the principle established by this Court in *Colonial Stores, Inc. v. Scarbrough*,[13] *Barth v. Khubani*,[14] *Whitman v. Castlewood Int'l Corp.*,[15] and *First Interstate Dev. Corp. v. Ablanedo*.[16] In applying that understanding, the court correctly held that the rule does not apply when one theory of liability was never presented to the jury, and that a finding of liability on a theory neither pled nor tried contradicts well-established precedent.[17] *See, e.g., Goldschmidt v. Holman*, 571 So. 2d 422, 423-24 (Fla. 1990); *Tamiami Trail Tours, Inc. v. Cotton, supra*. Ms. Aills' argument here is flawed by her unwillingness to accept what the record actually reflects, as opposed to her fanciful description of she believes the district court did not understand.

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13 *Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181 (Fla. 1977).

14 *Barth v. Khubani*, 748 So. 2d 260 (Fla. 1999).

15 *Whitman v. Castlewood Int'l Corp.*, 383 So. 2d 618 (Fla. 1980).

16 *First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987).

17 This is precisely the rule in Ohio that pertains where the Court has previously looked to formulate the two-issue rule. *See Barth*, 748 So. 2d at 262. *And see, e.g., Ricks v. Jackson*, 159 N.E.2d 225 (Ohio 1959); *Sapp v. Stoney Ridge Truck Tire*, 619 N.E.2d 1172, 1180 (Ohio Ct. App. 1993); *Avila v. Questor Juvenile Furniture Co.*, 599 N.E.2d 771, 775 n.1 (Ohio Ct. App. 1991).

At the tail end of her argument on the two-issue rule, Ms. Aills argues that even if the district court was correct in holding that there was no third theory of liability in the case, its decision conflicts with *Chua*. IB 29-30. There is no such conflict expressed or detectable on the face of the district court's decision, however.

Chua was a medical malpractice case in which the two-issue rule was applied because the patient went to trial on three theories of liability that were pled and tried. The *Chua* court made a point of saying that the "patient went to trial on multiple theories of liability" and presented "three, separate causes of action" regarding the negligence of the defendant surgeon. 846 So. 2d at 1181. The district court in this case refused to apply the two-issue rule where Dr. Boemi was "found liable on a theory of liability that neither he nor his counsel had any inkling would be submitted to the jury . . . ." *Aills*, 990 So. 2d at 549.

There is obviously a world of difference between a legal error in one of three issues pled and tried, on the one hand, and a jury finding of liability on an issue never presented to it for consideration by a pleading or evidence, on the other. The facial difference between the two situations presents no disharmony in the law. The district court thoughtfully articulated a the basis for its decision which is not found in any other Florida appellate decision.

III. The trial court erred in denying a directed verdict on liability for Ms. Aills' failure to establish the standard of care applicable to Dr. Boemi's performance of surgical procedures.

Both at the close of Ms. Aills' case and at the close of the evidence, Dr. Boemi moved for a directed verdict on liability based on her failure to establish an applicable standard of care for the liability she sought to impose. The trial court denied those motions, and Dr. Boemi presented those denials as reversible error in the district court by way of cross-appeal. Without any explanation, the court held that the trial court did not commit error. *Aills*, 990 So. 2d at 546.

Ms. Aills' failure of proof was fully briefed in the district court, and dispositive of the case. The Court's review of the issue is appropriate in order to avoid needless steps and piecemeal determinations of a cause, and to promote the efficient and speedy administration of justice. *Savoie v. State*, 422 So. 2d at 312.[18] This issue should be considered by the Court if it is going to consider on the merits Ms. Aills' request for conflict review.

It is well-established law that a medical malpractice plaintiff must come forward with affirmative expert evidence establishing an applicable standard of care and a breach of that standard. *Gooding*, 445 So. 2d at 1018. In the event of a failure to establish either of these elements, "it becomes the duty of the court to

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[18] The Court has often reviewed all issues in a case brought for review when they are dispositive or will provide guidance going forward, even in cases brought on a narrow certified question. *E.g.*, *Feller v. State*, 637 So. 2d 911, 914 (Fla. 1994); *Fulton County Adm'r v. Sullivan*, 753 So. 2d 549, 553 n.3 (Fla. 1999).

direct a verdict for the defendant." *Id.* (quoting Prosser, *Law of Torts* § 41 (4th ed. 1971)). Indeed, the failure to establish the *Gooding* elements "entitles" the defendant to a directed verdict, *Elder v. Farulla*, 768 So. 2d 1152, 1155 (Fla. 2d DCA 2000). *See also, Wroy v. North Miami Med. Ctr., Ltd.*, 937 So. 2d 1116, 1118 (Fla. 3d DCA 2006).

The requirement for establishing a standard of care is essential because a physician is not an insurer of the results of a procedure, and cannot be held liable for honest errors of judgment made while pursuing procedures which are recognized as acceptable by their profession. *Dillmann v. Hellman*, 283 So. 2d 388, 389 (Fla. 2d DCA 1973). Negligence "cannot be inferred from the fact that the surgery was unsuccessful or terminated in unfortunate results." *Sims v. Helms*, 345 So. 2d at 723. In *Sims*, the Court rejected a line of cases which allowed an "inference" of negligence from the application of an approved treatment, such as performing an operation with unsterilized surgical instruments as had occurred in *Atkins v. Humes*, 110 So. 2d 663 (Fla. 1959).[19]

Ms. Aills failed to establish a standard of care by which the jury was to evaluate Dr. Boemi's performance of surgery. The standard of care for medical malpractice must be based on the standard in the physician's community, and

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[19] There are cases which suggest that that an inference of negligence is sufficient to withstand summary judgment, such as *Edwards v. Simon*, 961 So. 2d 973 (Fla. 4th DCA 2007), where "the record discloses a triable issue of fact as to the standard of care." Those decisions obviously offer no guidance here, where a trial in fact took place.

established by those qualified by training and experience to perform similar services in that community. *Sweet v. Sheehan*, 932 So. 2d 365, 368 (Fla. 2d DCA), *review denied*, 944 So. 2d 987 (Fla. 2006). These requirements are spelled out in section 766.102(10), Fla. Stat. (2008), which provides that a claimant asserting medical malpractice must establish that the alleged actions "represented a breach of the prevailing professional standard of care for that health provider," which is specifically defined to mean "that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."

Ms. Aills' conceded that Dr. Boemi was not negligent in his selection of procedures for breast surgery, but asserted negligence in his *performance* of those procedures. R:336-39. Ms. Aills, however, adduced no expert testimony that the procedures used by Dr. Boemi violated the applicable standard of care for breast surgery by comparable health care providers in the community.

In her case-in-chief, two experts for Ms. Aills criticized Dr. Boemi's selection of the procedures performed on Ms. Aills. They did not agree on what procedures had been performed (T:101, 103, 109, 434), and they acknowledged that different physicians might perform the same procedure using different techniques. T:158, 463-64. Each of them testified to what *they* would have done and observed that Dr. Boemi's procedures did not make sense to them. T:100-02, 105, 472-73. Their personal standards for the performance of the same procedures, however, did not establish the acceptable standard for a reasonably prudent physician in the community. *E.g., Doctors Mem'l Hosp., Inc. v. Evans*, 543 So. 2d

809, 812 (Fla. 1st DCA 1989) (radiologist's testimony as to his own usual custom and practice did not establish the reasonable medical standard of care).[20]

Neither of Ms. Aills' experts testified during their direct testimony that Dr. Boemi's selection of the procedures violated the community standard of care.[21] During the trial, Dr. Brueck bore the burden on defining the standard of care. He expressed his opinion that the procedure used by Dr. Boemi – the removal of breast tissue and the installation of implants – was improper because it had greater risks than other procedures. T:100-16.[22] He never mentioned what standard of care the jury should apply to determine whether the manner in which Dr. Boemi performed those procedures were negligent.

The absence of testimony on the applicable standard of care prompted Dr. Boemi to move for directed verdict at the close of Ms. Aills' case-in-chief. T:549-50. In response to another motion for a directed verdict on future medical

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[20] The reason for this rule is self-evident. The fact that a particular testifying physician chooses to perform additional, even unnecessary tests, or to follow overly cautious procedures, does not establish the standard of care for others in the same profession and community.

[21] Dr. Glat's testimony was primarily directed to the issue of informed consent that the jury rejected. T:434 ("the procedures that were done were riskier than what Ms. Aills understood them to be . . . she really wasn't given the full informed consent."), 469 (the "real issue" was a failure to obtain informed consent).

[22] The jury rejected Dr. Brueck's disagreement with Dr. Boemi's selection of procedures – the removal of tissue and installation of breast implants – when it denied an award for Ms. Aills' alleged failure to consent to those procedures.

damages due the absence of any evidence on that issue (T:551-53), Ms. Aills' counsel conceded the evidence on those damages was deficient and requested the opportunity to reopen the case at some later time to address that one point. T:559-60. He claimed to have met the *Gooding* requirements for the standard of care in the performance of the procedures used by Dr. Boemi, though, and did *not* ask to reopen the case to present evidence of that issue. T:565-66.

Given the state of the record at the close of Ms. Aills' case-in-chief with respect to both an applicable standard of care for Dr. Boemi's choice and performance of procedures, the trial court should have granted Dr. Boemi's motion for a directed verdict on liability. It did not. The court denied Dr. Boemi's motion for a directed verdict on medical negligence. T:568.

Dr. Boemi then presented his defense to Ms. Aills' claims, and rested. At that juncture, Ms. Aills' counsel requested leave of court to reopen her case. T:856. Dr. Boemi objected, noting that his experts had been dismissed and were no longer available to offer rebuttal testimony, and pointing out that the court's earlier denial of a directed verdict constituted a ruling that sufficient evidence of the standard of care had already been adduced. T:857-58. The trial court granted Ms. Aills' motion to reopen her case (T:859), however, and Ms. Aills recalled Dr. Brueck to state that he had "an opinion as to whether or not Dr. Boemi's care fell below the standard of care for a plastic surgeon performing these types of procedures." T:867 (emphasis added). He said that in his opinion "it did." *Id*.

Dr. Boemi recognizes that a trial court has discretion to reopen a case to allow additional evidence.[23] The exercise of the discretion to reopen a case, however, can be an abuse of discretion when it causes an injustice in the presentation of the defendant's case. *Silber v. Cn'R Indus. of Jacksonville, Inc.*, 526 So. 2d 974, 978 (Fla. 1st DCA 1988) ("[T]rial court's discretion is not unlimited, for it may allow reopening only 'where this can be done without injustice to the other party'") (quoting *Buckingham v. Buckingham*, 492 So. 2d 858, 861 (Fla. 1st DCA 1986)); *Robinson v. Weiland*, 936 So. 2d 777, 781 (Fla. 5th DCA 2006); *Amador v. Amador*, 796 So. 2d 1212, 1213 (Fla. 3d DCA 2001); *Hernandez v. Cacciamani Dev. Co.*, 698 So. 2d 927, 928-29 (Fla. 3d DCA 1997). The trial court abused its discretion in this case.

Ms. Aills' counsel had specifically chosen to stand on the record when Dr. Boemi asked for a directed verdict at the close of Ms. Aills' case-in chief. This allowed Dr. Boemi to present his case in response to the record testimony of Drs. Brueck and Glat. It was only after Dr. Boemi had rested, and his experts were no longer available, that Ms. Aills secured permission to shore up her case with testimony on the standard of care that was missing from the case. In doing so, the trial court prejudiced his case to the point of injustice.

During his direct examination at trial, Dr. Brueck testified that only a breast lift or mastopexy was appropriate for Ms. Aills, and that Dr. Boemi had not

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[23] *Thrifty Super Market, Inc. v. Kitchener*, 227 So. 2d 500, 502 (Fla. 3d DCA 1969).

performed such a procedure. T:101-04, 109. Dr. Glat had opined that he performed a different combination of procedures. T:434. On recall to the stand post-trial, but without any predicate description of the procedures Dr. Boemi had used, Dr. Brueck testified that Dr. Boemi's performance of surgery for "these types of procedures" fell below the standard of care. He was never asked, and he never indicated, *what* procedures he was referencing. Given the disagreement among experts as to what procedure was performed, the jury had no point of reference for applying a standard of care. Dr. Brueck's testimony could have been a reference to breast reduction, to a combination of breast reduction and augmentation, or to the mastopexy that Dr. Glat opined had been performed. T:101, 103, 109.

All the jury knew was that Dr. Brueck believed Dr. Boemi's performance fell below some standard of care for some unspecified procedure or procedures mentioned during the five-day trial. Yet, specificity is required for the standard of care a jury is being asked to apply to a physician charged with medical malpractice. A case in point is *Lawrinson v. Bartruff*, 600 So. 2d 22 (Fla. 2d DCA 1992), where the court approved the following standard of care question on a delayed surgical treatment:

> [D]o you have an opinion within reasonable medical probability as to whether or not the delay in receiving treatment from Doctor Chiarello and Doctor Barudi from the time period of the initial diagnosis of Merkel cell tumor in May of 1986 until the surgical procedure done in the end of July of 1986 caused any loss, injury or damage to Mr. Lawrinson?

Id. at 23. Dr. Brueck's testimony did not rise to the level of specificity the law requires. Ms. Aills' attempt to supply the missing standard of care on the selection

and performance of procedures through the post-trial testimony of Dr. Brueck fell short of providing the jury with a specific standard of care it was asserted Dr. Boemi failed to meet.

The trial court had three opportunities to apply the *Gooding* requirements for a standard of care: at the close of Ms. Aills' case-in-chief; at the close of the case after Dr. Boemi had rested; and after her post-trial attempted rehabilitation with Dr. Brueck. Singly and certainly in combination, the trial court's errors were an abuse of discretion which resulted in an injustice to Dr. Boemi. The Court should direct the entry of a judgment of liability for Dr. Boemi.

CONCLUSION

In the trial of this proceeding, Ms. Aills did not pled, prove, or introduce any evidence of post-operative negligence. The decision of the district court should be affirmed. The Court is also requested to determine from the record that a directed verdict on liability should have been entered for Dr. Boemi.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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