IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2087

CHRISTY AILLS,

Petitioner,
vs.

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

Respondents.
_____/

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

PETITIONER'S BRIEF ON JURISDICTION

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I. STATEMENT OF THE CASE AND FACTS

In February, 2003, Dr. Luciano Boemi performed elective surgery on Christy Aills' breasts.[1/] As Dr. Boemi's counsel conceded in his opening statement, Miss Aills experienced "a horrific outcome." Miss Aills sued Dr. Boemi for, among other things, negligence in the design of his procedures and negligence in execution of his procedures. The issue of Dr. Boemi's negligence was submitted to the jury on a general verdict form to which his counsel had agreed. The jury found Dr. Boemi negligent and awarded Miss Aills damages for her "horrific" injuries in excess of $8,000,000.00. After trial, the trial court denied Dr. Boemi's motion for judgment in accordance with prior motion for directed verdict, and it denied Dr. Boemi's motion for new trial. However, it granted Dr. Boemi's motion for remittitur, ordering a remittitur of roughly 70% of Miss Aills' damage award. Miss Aills rejected the remittitur and appealed the consequent new trial order.

Dr. Boemi cross-appealed. He contended, among other things, that the trial court erred in denying his motion for judgment in accordance with prior motion for directed verdict, and that the trial court abused its discretion in denying his motion for new trial, which had asserted that a portion of Miss Aills' counsel's closing argument was improper. The district court rejected the first contention, concluding that the

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[1/] The statement of the case and facts is taken from the face of the opinion below (A.1-10). *Aills v. Boemi*, 990 So.2d 540 (Fla. 2nd DCA 2008).

evidence was more than sufficient to support the jury's finding that Dr. Boemi was a negligent cause of Miss Aills' enormous damages. However, it agreed with the second contention and ordered that all issues in the case be retried. Its explanation for the this reversal gives rise to our claim of express and direct conflict, in two areas.

As the district court's opinion indicates, Miss Aills' counsel presented some evidence of Dr. Boemi's postoperative treatment, but he presented no expert testimony establishing that Dr. Boemi's postoperative treatment, such as it was, was a departure from the standard of care or that it was a cause of Miss Aills' damages. During his closing argument, Miss Aills' counsel began to argue that Dr. Boemi had failed to provide appropriate care during the postoperative period. Dr. Boemi's counsel then objected "to this line of argument" on the ground that the evidence was insufficient to support a finding "'that the postoperative care was negligent' and 'that it would have made a difference'" (A.5).[1/] This objection was overruled.

Later,

> [C]ounsel informed the jury that there were three separate grounds upon which they could find in favor of Ms. Aills on her negligence claim: (1) the design of the surgical procedures by Dr. Boemi; (2) the manner in which Dr. Boemi had performed the surgery; and (3) "the failure to detect and treat a surgically caused impairment of blood supply," i.e., a deficiency in Dr. Boemi's postoperative care of Ms. Aills. The first two

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[2/] The quoted words are the words of Dr. Boemi's counsel. The words preceding these quoted words in the court's opinion -- "the absence of any basis in the record" -- are the district court's words, not the words of Dr. Boemi's counsel. It is clear from counsel's quoted words that the objection was directed at the insufficiency of the evidence to support the third theory of liability -- not to a failure to plead this theory with specificity in the complaint.

> grounds were alleged in the complaint and supported by expert witness testimony from Dr. Brueck and Dr. Glat, but the third ground was not.

(A.5). Although clearly on notice at this point that counsel was arguing three separate theories of liability, rather than two, and that he considered the third theory unsupported by the evidence, Dr. Boemi's counsel did not request a special interrogatory verdict form separating the three theories of liability -- and he allowed the issue of Dr. Boemi's negligence to be submitted to the jury on a general verdict form.

Given these facts, one of the several arguments we made in defending the trial court's discretionary denial of Dr. Boemi's motion for new trial was that, because the verdict was fully supported by evidence of the two principal theories of liability presented to the jury, the "two issue rule" required affirmance of the jury's liability finding even if error affecting the third theory of liability were found. The district court rejected this argument in a most curious way.

Apparently concluding that an objection to an argument on the ground of insufficiency of the evidence was not enough to avoid application of the "two issue rule," the district court supplied its own objection to the argument -- one that was not raised by Dr. Boemi's counsel at any point prior to verdict -- concluding that the challenged argument was improper because the third theory of liability had not been pled with specificity in the complaint. As we will demonstrate in the argument that follows, this conclusion is in express and direct conflict with a number of decisions holding that an appellate court cannot consider any ground for objection not presented

to the trial court -- that review is limited to the specific grounds raised below.

Then, having concluded that the third theory of liability had not been pled with specificity in the complaint, and that it was "possible" that the jury found Dr. Boemi liable on this theory of liability rather than the two that were properly pled and fully supported by the evidence, the district court announced that it was not bound by the "two issue rule." It was not bound by this rule of appellate review, it announced, because Dr. Boemi's counsel had no "notice," as required by procedural due process, that the third theory of liability would be submitted to the jury for consideration.

As a result, notwithstanding that Miss Aills' verdict was fully supported by evidence of Dr. Boemi's negligence on the principal theories of liability submitted to the jury, Miss Aills has been required to retry the entire case from beginning to end. As we will demonstrate in the argument that follows, the district court's reversal is in express and direct conflict with decisions of this Court and other district courts of appeal applying the "two issue rule" in circumstances legally indistinguishable from those presented in this case.

II. SUMMARY OF THE ARGUMENT

The district court's decision is in express and direct conflict with decisions of this Court and other district courts of appeal (1) holding that an appellate court cannot consider any ground for objection not presented to the trial court; and (2) applying the "two issue rule" in circumstances legally indistinguishable from those presented in this case.

III. ARGUMENT

Although our principal claim of conflict is directed to the district court's failure to apply the "two issue rule," it is worth noting at the outset that, in order to finesse this rule of appellate review, the district court had to formulate an objection that was not made before verdict below. As the district court's opinion reflects, Dr. Boemi's counsel objected to the line of argument that the district court found improper on the ground that, although there was some evidence of Dr. Boemi's postoperative treatment, the evidence was insufficient to support a finding that his postoperative treatment was a negligent cause of Miss Aills' damages. Dr. Boemi did not object to the line of argument on the ground that the third theory of liability had not been pled with specificity in Miss Aills' complaint. The district court simply invented this objection as a foundation for its finesse of the "two issue rule."

The district court's reversal on a ground that was not raised at trial is in express and direct conflict with a number of decisions holding that appellate review is limited to the specific grounds raised below, and that an appellate court cannot consider any ground for objection not presented to the trial court. *E.g., Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved"); *Clock v. Clock*, 649 So. 2d 312, 315 (Fla. 3rd DCA 1995) ("[W]e must affirm this order because an appellate court will not consider any ground for objection not presented to the trial court; review is limited to the specific grounds raised below"); *Lynx Transportation vs. Atkinson*, 720 So. 2d 600, 601 (Fla. 5th DCA 1998)

(same). Most respectfully, it is Miss Aills and the trial judge who were "sandbagged" in the appellate court, not Dr. Boemi in the trial court -- and we respectfully urge the Court to grant review to resolve this conflict.

In any event, the more important point is this: even if the district court could properly supply its own objection to the portion of counsel's closing argument it found improper, its refusal to apply the "two issue rule" is in express and direct conflict with a number of decisions requiring application of the rule in circumstances that are legally indistinguishable from those presented in this case.

The "two issue rule" has its origin in *Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181, 1186 (Fla. 1977):

> The question arises where two or more issues are left to the jury, an[y] of which may be determinative of the case, and a general verdict is returned, making it impossible to ascertain the issue(s) upon which the verdict was founded. One line of authority holds that reversal is improper where no error is found as to one of the issues, as the appellant is unable to establish that he has been prejudiced. . . . This is known in jurisprudence as the "two issue" rule. It is a rule of policy, designed to simplify the work of the trial courts and to limit the scope of proceedings on review. . . .
>
> . . . .
>
> We believe that the "two issue" rule represents the better view. At first thought, it may seem that injustice might result in some cases from adoption of this rule. It should be remembered, however, that the remedy is always in the hands of counsel. Counsel may simply request a special verdict as to each count in the case. . . . Then, there will be no question with respect to the jury's conclusion as to each. . . .
>
> . . .Where the district court determines under these circumstances that

> one of the issues submitted to the jury was free from prejudicial error, it will be presumed that all issues were decided in favor of the prevailing party and the judgment will be affirmed.

Accord Barth v. Khubani, 748 So. 2d 260, 261 (Fla. 1999); *Food Lion, L.L.C. v. Henderson*, 895 So. 2d 1207 (Fla. 5th DCA 2005); *Zimmer, Inc. v. Birnbaum*, 758 So. 2d 714 (Fla. 4th DCA 2000).

Having supplied its own post-trial objection to counsel's closing argument, the district court declined to apply the "two issue rule" because, it concluded, Dr. Boemi's counsel had no "notice" prior to or during trial that a third theory of liability existed in the case. But if the district court had limited its review to the objection actually made below, it could not have reached this conclusion. Counsel's objection to the closing argument was that the evidence was insufficient to support a finding of liability on this third theory of liability -- a tacit admission that the issue existed and a contention that it had simply not been proven.

Surely, counsel was on notice throughout the trial that the issue existed, and he was not surprised by it because he was prepared to respond with an objection to it when it was broached in closing argument. And even if he were not, he was certainly on notice that the third theory of liability was an issue in the case when the trial court overruled his objection to "this line of argument" and the argument proceeded to the specifics. There was time to request a special interrogatory verdict form before the jury was instructed, and counsel's failure to do so should have resulted in application and enforcement of the "two issue rule."

And even if the district court was correct that Dr. Boemi's counsel had no "notice" that a third theory of liability existed in the case and was unfairly surprised by it during trial, the Fourth District has decided that the "two issue rule" does apply in that circumstance, and the two decisions are therefore in express and direct conflict. *Chua v. Hilbert*, 846 So. 2d 1179 (Fla. 4th DCA 2003), was a medical malpractice case in which three separate theories of liability were submitted to the jury on a general verdict form. The defendant received an adverse verdict. On appeal, the defendant contended that he had been unfairly surprised at trial when the plaintiff's liability expert was permitted over objection to give an opinion of which the defendant had no advance notice because it was different than the opinion the expert gave during his pre-trial deposition.

The district court observed that the alleged error affected only the second of the three theories of liability that had been presented to the jury -- and that the "two issue rule" therefore foreclosed the argument:

> Because surgeon is unable to show error in the jury's general determination of liability in the face of three alternative theories, as to which only one is involved in this argument, there is no error shown in the trial court's refusal to bar the expert from testifying as to an opinion at trial different than he gave during pre-trial deposition.

846 So. 2d at 1182. The plaintiff's judgment was therefore affirmed. Most respectfully, the decision sought to be reviewed here cannot be reconciled with the opposite conclusion reached on legally indistinguishable facts in *Chua*.

We respectfully urge the Court to grant review to resolve this conflict; to

enforce the "two issue rule"; and to restore the jury's finding of liability on the two theories of liability that were fully supported by abundant evidence of Dr. Boemi's negligence. Given the "horrific" injuries Miss Aills received because of that proven negligence, she should not have to go through the torture of the full-blown retrial that the district court has ordered -- and which the "two issue rule" was purposely designed to prevent.

IV. CONCLUSION

This Court has jurisdiction, and review should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 7th day of November, 2008, to: Richard B. Mangan, Jr., Esq. and Edward M. Copeland, IV, Esq., Rissman, Weisberg, et al., 1 North Dale Mabry Highway, 11th Floor, Tampa, FL 33609, Attorney for Respondents; William R. Clayton, Esq., Greenberg, Traurig, P.A., 401 East Las Olas Blvd., Suite #2000, Fort Lauderdale, FL 33301, Co-Counsel for Respondents; and to Arthur J. England, Jr., Esq., and Edward G. Guedes, Esq., Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131, Co-counsel for Respondents.

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