IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2087
Lower Tribunal No.: 2D07-233

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 THE MERITS

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I.
STATEMENT OF THE CASE AND FACTS

Our statement of the case and facts will be in two sections. Initially, we will provide the Court with a general overview of the case. The second section will provide the procedural and factual background of the specific issues giving rise to the express and direct conflicts created by the decision under review.

A. A general overview of the case.

The petitioner, Christy Aills, was the plaintiff below in a multi-count action for medical malpractice against Luciano Boemi, M.D. and his P.A.[1] Her Second Amended Complaint (as later amended in part) alleged that Dr. Boemi, a plastic surgeon, performed what was supposed to be a combined mastopexy (or breast lift) and augmentation on her on April 16, 2003, during which he removed nearly a pound of healthy breast tissue from each of her breasts, compromising their blood supply and causing the death of a considerable amount of breast tissue -- resulting in the permanent loss of both nipples and their surrounding tissue; the loss of all sensation in her breasts; the loss of ability to breast feed any children she might have; and requiring numerous surgical procedures in an unsuccessful effort to restore her breasts to an appropriate appearance (R3: 334-50; R4: 417-20).[2] At the

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[1/] For ease of reference hereinafter, both defendants will be referred to in the singular, as the defendant or Dr. Boemi.

[2/] R: Record on Appeal; volume and page number
SR: Supplemental Record on Appeal; volume and page number
T: Separately paginated transcript of trial testimony; volume and page number

time of her surgery, Christy was single, 28 years old, employed as a paralegal -- and she was unmarried at the time of trial (T2: 352; T3: 375; Plaintiff's Exhibit: 1a [dob 3/24/75]).

The complaint contained four counts: negligence, battery, lack of informed consent, and fraud. Compensatory damages were sought for Christy's past and future medical expenses, and for the bodily injury she suffered, including the resulting pain and suffering, disability, disfigurement, mental anguish, and loss of capacity for the enjoyment of life, both in the past and in the future. Dr. Boemi appeared, answered, and denied liability (R3: 374-82; R4: 431-32). The case was tried to a jury before The Honorable Jay B. Rosman over a five-day period in August, 2006, three years and four months after the surgery.

The jury returned a unanimous verdict (R5: 506-08; T6: 1064-66) in which it found that Dr. Boemi was negligent in his care and treatment of Christy, and that his negligence was a legal cause of damage. It exonerated Dr. Boemi of the remaining counts. It awarded Christy past medical expenses of $100,000.00 and future medical expenses of $150,000.00. And for Christy's bodily injury, pain and suffering, disability, disfigurement, mental anguish, and loss of capacity for the enjoyment of life, it awarded $4,000,000.00 in past damages and $4,000,000.00 for her future damages.

After trial, Dr. Boemi and his P.A. filed a "Motion for Judgment in Their Favor or for New Trial and/or for Remittitur" (R6: 1351-72). Following extensive briefing and argument, the trial court entered an order which denied the motion for

judgment; which reduced the award of past medical expenses from $100,000.00 to $81,000.00, with the plaintiff's consent; and which declined to order a remittitur of the jury's award of future medical expenses (R7: 1676-79). The trial court also declared the jury's awards of Christy's past and future intangible damages to be excessive and it ordered a remittitur of roughly 70% of her non-economic damage awards, from $8,000,000.00 to $2,500,000.00 (R7: 1678).

Christy thereafter accepted the remittitur of the damages for past medical expenses, but rejected the remittiturs of the intangible damage awards in favor of a retrial of those damage issues -- and the trial court therefore entered an order granting the defendant's motion for new trial "as to damages only" (R7: 1680). A timely appeal of the new trial order followed (R7: 1750-52). Dr. Boemi cross-appealed (R7: 1753-64).

The facts supporting the jury's finding of liability are straightforward and compelling. At age 27, Christy decided she wanted a simple breast lift, or mastopexy, to reshape her somewhat sagging breasts (T2: 308-10; T3: 383). She contacted Dr. Boemi, who convinced her that to achieve the look she wanted she needed a combined mastopexy and augmentation (T2: 309-13; T3: 385-87). This advice was given notwithstanding that the expert witness that Dr. Boemi relied upon at trial to defend his conduct had written an editorial for the Journal of Plastic and Reconstructive Surgery entitled "Augmentation Mastopexy, Surgeon Beware" -- an editorial that concluded with the following:

> In summary, whereas the complications after either augmentation or mastopexy alone are relatively

> infrequent and usually pretty manageable, the complications after augmentation and mastopexy combined are almost certainly more frequent and potentially disastrous.

(T4: 704-05). Dr. Boemi told Christy that he would need to remove no more than three ounces of breast tissue in each breast to accommodate the implants (T2: 314-15). The surgery was performed on April 16, 2003 (T2: 324-25).

According to the experts who testified on Christy's behalf at trial -- all but one of whom were local physicians who treated Christy after her surgery -- all Christy needed to achieve the look she wanted was a mastopexy (T1: 103-06; T2: 203; T3: 433). Dr. Boemi's expert agreed that a mastopexy alone was a reasonable option for Christy (T4: 700). And there was no dispute that the risks of combining a mastopexy with augmentation were significantly higher than performing the two operations separately (T3: 430-31; T4: 704-04, 710; T5: 839-40). In any event, according to Christy's experts, Dr. Boemi did not perform the combined procedure to which Christy had consented.

Instead, they opined, by removing nearly a pound of healthy breast tissue from each breast and then inserting large 330cc implants, Dr. Boemi actually performed a breast reduction and augmentation -- a combined procedure that was much too risky and entirely unnecessary (T1: 101-09, 113, 151, 156; T2: 201-03; T3: 427-29, 469-71, 477-78; T5: 778, 821, 837, 846, 867).[3] In removing this much

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[3/] Dr. Boemi and his experts disagreed. They opined that Christy received a mastopexy and augmentation, not a reduction and augmentation (T4: 658, 669; T5: 759-65; SR: depo at 1788, p. 20). Because the jury rejected the plaintiff's claim

breast tissue, Dr. Boemi left Christy with an inadequate blood supply to her breasts, and her nipples and areolae became necrotic and died (T1: 114-20; T3: 435-37; SR: depo at 1860, pp. 12-19). Both of Dr. Boemi's experts agreed that the necrosis was most likely caused by a lack of blood supply, and even Dr. Boemi reluctantly agreed that he had "possibly" compromised the blood supply to Christy's breasts (T4: 691, 710-11; T5: 844; SR: depo at 1788, pp. 37, 57-58).

Christy's experts were of the opinion that Dr. Boemi's surgery was badly flawed in both design and execution (T1: 120, 151; T3: 473; T5: 863-867). And they opined that his conduct was certainly negligent, but even worse -- that it "defied common sense," "defie[d] all logic," "made no sense at all," was "reckless," and was "unconscionable" (T1: 100-06, 152, 201-04; T3: 428, 434, 477-78; T5: 867). The results, in the experts' words, were "catastrophic," "devastating," and a "nightmare" (T1: 127, 151; T2: 204; T3: 439).

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that Dr. Boemi failed to obtain her informed consent to a reduction and augmentation, it appears that the jury found that Dr. Boemi performed a mastopexy and augmentation, just as he claimed, but that the surgery was negligently performed. Such a finding would be perfectly consistent with the evidence for two reasons. First, as we will note in a moment, Christy's experts testified that the surgery was flawed, not merely in design, but in execution as well. And second, and just as importantly, Dr. Boemi's design required removal of no more than three ounces of breast tissue in each breast, yet he ended up removing nearly a pound of healthy breast tissue from each breast before he was done.

The fact that Christy gave her informed consent to a mastopexy and augmentation is irrelevant. An informed consent covers only known risks of a procedure performed within the applicable standard of care; it does not relinquish a claim of liability for *negligent* performance of the procedure. *Wax v. Tenet Health System Hospitals, Inc.*, 955 So.2d 1, 10 n. 2 (Fla. 4th DCA 2007).

And, as the jury's verdict reflects, the damages caused by Dr. Boemi's negligence were enormous. Dr. Boemi's counsel conceded as much in his opening statement, when he told the jury at the outset of trial that Christy's surgery had "a horrific outcome" (T1: 62). Because the propriety of the trial court's remittitur order was not reached by the district court and remains for determination upon remand if we are successful in obtaining a quashal of its decision in this Court, we will not elaborate upon Christy's enormous damages here. If it is interested, the Court can find the facts of her several years of excruciating pain and post-surgical treatment, which included 13 subsequent surgical operations under general anesthesia, at pages 7-17 of the initial "Brief of Appellant" filed in the district court -- and in the lengthy series of photographs contained in Plaintiff's Exhibit 3, photographs that the Court should find heartbreaking.

The district court only addressed Dr. Boemi's cross-appeal, in which he contended (among other things) that the trial court had erred in denying his motion for judgment in accordance with prior motion for directed verdict, and that the trial court had abused its discretion in denying his motion for new trial, which asserted that a portion of Christy's counsel's closing argument was improper. The district court rejected the first contention, concluding that the evidence was more than sufficient to support the jury's finding that Dr. Boemi was a negligent cause of Christy's enormous damages. However, it agreed with the second contention and ordered that *all* issues, including the liability issues, be retried. *Aills v. Boemi*, 990 So.2d 540 (Fla.2d DCA 2008). Its explanation for this reversal gives rise to the

claims of express and direct conflict asserted in our jurisdictional brief -- and to the legal errors we will demonstrate here -- in two areas.

B. The procedural and factual background to the specific issues before the Court.

Reduced to its essentials, the district court reversed the trial court and required a new trial on liability and damages for the following reasons. It concluded that Christy's Second Amended Complaint did not plead negligence in Dr. Boemi's post-operative care with the requisite specificity; that Dr. Boemi's counsel was therefore unaware that this was an issue in the case; that Dr. Boemi was therefore "sandbagged" in closing argument by a "disturbing and inflammatory" argument on this unpled issue -- and notwithstanding that the trial court properly denied Dr. Boemi's motion for directed verdict on the theories of liability that had been pled and tried, because the issue of negligence in post-operative care had not been pled, the "two-issue rule" did not apply to require affirmance of Christy's otherwise fully-supported verdict. Most respectfully, this reasoning is unsupported -- indeed, flatly contradicted -- by the record of what *actually* transpired below.[4]

Christy's Second Amended Complaint alleged that Dr. Boemi's "care and treatment" of her was negligent in, among other things, "failing to insure that proper vascularization remained to support the viability of both nipples and the

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[4] The material that follows was presented to the district court in our motion for rehearing, so it was fully aware of our contention that its version of what happened

surrounding tissue" (R3: 337-38). This allegation was broad enough to include negligence in both the surgery and Dr. Boemi's failure to restore vascularization after the surgery during the seven weeks he treated her post-operatively. But whether the allegation was broad enough to include both theories of liability is not the point. The point is that both Christy's counsel and Dr. Boemi's counsel understood throughout the trial that the allegation included a charge of negligence in Dr. Boemi's *entire* course of treatment, including his post-operative care -- and a careful examination of the record will prove that.

Dr. Boemi's appellate counsel set the stage for the district court's misreading of the record when he asserted at page 34 of his initial brief on cross-appeal that trial counsel had filed an "earlier motion to exclude any evidence or argument on post-operative care (R. 496)." Although we characterized this assertion at page 28, n. 7, of our answer brief on cross-appeal somewhat charitably as "an unacceptable stretch of the truth," the assertion was, in fact, undeniably false.

The reference given for the assertion was to Dr. Boemi's "Motion in Limine II" which read in pertinent part as follows:

> COME NOW the Defendants, LUCIANO BOEMI, M.D. and LUCIANO BOEMI, M.D., P.A., and moves [sic] this Court for an Order prohibiting the following:
>
> 1. Any reference to or evidence concerning criticisms and/or allegations of wrongdoing not contained within

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was flatly contradicted by the record. The motion for rehearing was simply denied without explanation.

> the Plaintiff's Second Amended Complaint. Any reference to a presentation of testimony as evidence regarding any potential wrongdoing by the parties to this matter which are not pled in the Plaintiff's Second Amended Complaint would be overly prejudicial and will lead to trial by ambush. The trial on this matter should be limited to the matters pled.

(R. 496). There is no reference to "post-operative" care in these three redundant, uninformative sentences.

Neither did the discussion of this motion in the pre-trial hearing held on the various motions in limine make any reference to post-operative care. As we noted in our footnote, the transcript of that hearing was not in the record -- and we invited Dr. Boemi's counsel to challenge our assertion if he could, and we offered to supplement the record with the transcript if necessary. There was no challenge to our assertion in counsel's reply brief.

The reason our footnote was not challenged is because, when the trial court asked Dr. Boemi's trial counsel to elaborate on the generalities in these three sentences, the *only* evidence which counsel sought to exclude by the motion was evidence that Dr. Boemi had misrepresented his credentials on his website; that Dr. Boemi had given Christy a "discount"; and that Dr. Boemi and his staff had attended a marketing seminar (transcript of August 14, 2006, hearing, pp. 17, 19-

23). The motion did *not* seek exclusion of "evidence or argument on post-operative care," as appellate counsel had represented to the district court.[5]

In its opinion, the district court concluded that Dr. Boemi's trial counsel "appears to have been unaware of the possibility that Ms. Aills would rely at trial on a theory of post-operative negligence," because he told the jury in opening statement that he did not believe that the evidence would show any criticism of Dr. Boemi's post-operative care. 990 So.2d at 547. Yet the district court failed to note that, in the three pages that followed, he discussed the evidence of post-operative care that he believed the jury would hear (T1: 69-71). Most respectfully, counsel's assertion in opening statement was not an assertion that the issue had not been pled; it was an assertion that the evidence would not support the issue.

[5/] Because Dr. Boemi's counsel did not challenge the assertion in our footnote, and because the absence of any motion to exclude evidence and argument on post-operative care had therefore been conceded by experienced appellate counsel, there was no need for us to trouble the district court and the clerk's office with a motion to supplement the record. It was not until the district court bottomed its reversal on its conclusion that Christy's complaint contained no allegation of negligence in the post-operative care that there was a need to demonstrate the truth of our footnote to the court.

In connection with our motion for rehearing, we therefore filed a motion to supplement the record with the transcript of the August 14, 2006, hearing. Inexplicably, and notwithstanding that Rule 9.200(f), Fla. R. App. P., appears to give a district court no discretion to deny such a motion, the district court denied the motion. So there can be no confusion in *this* Court concerning the absence of any pre-trial objection to the admission of evidence and argument upon the issue of Dr. Boemi's post-operative care, we have filed a motion to supplement the record contemporaneously with this brief, as we are entitled to do under Rule 9.200(f).

And Dr. Boemi's counsel was undeniably aware that Dr. Boemi's post-operative care was an issue in the case because, in Christy's counsel's opening statement, which *preceded* the passage relied upon by the district court, he had asserted that it would in fact be an issue in the case:

> She goes to see Dr. Boemi on the 17th and he tells her that she is okay and they go ahead and culture the wound. Now, two of Dr. Boemi's experts in this case will testify that at that date it may well have been possible to detect that the blood supply had been impaired and that something could have been done to fix the problem, releasing the pressure or allowing the venous supply to work, you know, getting more blood back into it. Dr. Boemi told her that she was doing okay and she went home.

(T1: 21).

And for the next several pages, Christy's counsel went over what Dr. Boemi did and did not do on Christy's post-operative visits to him on the 21st, the 23rd, the 25th, the 29th, and the 30th (T1: 21-23). Counsel even mentioned the fact that "Dr. Spear is going to tell you that he has never heard of a plastic surgeon using ultrasound under these circumstances" (T1: 44). There was no objection to any of these statements. Unless Dr. Boemi's counsel was asleep during this opening statement, he was fully aware that Dr. Boemi's post-operative care was an issue in the case. He simply believed that the evidence would not support a finding of liability on the issue -- and those are two entirely different things.

Dr. Boemi's counsel also did not object to the evidence elicited on this subject on the ground that this theory of liability had not been pled. During

Christy's counsel's cross-examination of one of Dr. Boemi's experts, when he began exploring the "options" available to a plastic surgeon if a compromise of blood supply was detected after surgery, Dr. Boemi's counsel made a single, brief objection: "Your Honor, it's outside the scope of direct" (T4: 711-12). This objection was overruled (*id.*).

Christy's counsel then proceeded to establish those options: additional surgery to remove sutures and relieve pressure; removal of the implant; or insertion of a smaller implant (T4: 713-14). The expert even agreed that, had Dr. Boemi detected an impairment to Christy's blood supply after her surgery, he might have been able to do something about it (T4: 715). He also declined to endorse Dr. Boemi's post-surgical use of ultrasound treatments as effective (T4: 716). There was no objection to any of this testimony, much less an objection that the issue of post-operative care and treatment had not been pled.

It is certainly true, as the district court observed, that there was no expert opinion testimony reciting the magic words -- that, within a reasonable medical probability, Dr. Boemi's post-operative care was a departure from the standard of care and caused additional damage to Christy. And if Dr. Boemi's counsel had thought the issue had not been pled or that the evidence was insufficient to support it, he should have moved for a directed verdict on the issue, which would have eliminated the issue from the case altogether before closing argument -- but he did not (T3: 549-68; T5: 873-77). The issue was therefore available for comment in closing argument.

When Christy's counsel began to explore the evidence on this issue in closing argument, the *only* objection that Dr. Boemi's counsel made was that, although there was evidence that something might have been done post-operatively if Dr. Boemi had properly diagnosed inadequate blood supply as the cause of Christy's post-operative condition, there was no evidence that, had something been done, the outcome would, more likely than not, have been different.

So there can be no debate about that, we quote the objection in its entirety:

> MR. MANGAN: Judge, my objection to this line of argument is that there is no expert testimony that more likely than not Ms. Aills' outcome would have been avoided with any care after the surgery. Witnesses commented that maybe they could have tried something different, maybe they would have approached it differently, but not a single witness was asked more likely than not would the outcome have been different. In fact, Dr. Glat said I can't say there would have been a difference. 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. So, my objection is that there is no evidence to support the argument of closing.
>
> . . . .
>
> MR. MANGAN: I think Mr. Garvin has just made my point. He's acknowledged that there's no expert testimony supporting causation on the theory of negligence after the care, there's no evidence of it.
>
> THE COURT: Overrule the objection.

(T6: 931-32).

In short, the objection was that, although there may have been evidence of negligence to support the line of argument, there was no evidence of causation. And implicit in this objection, of course, was an acknowledgment that the issue had been pled and tried, but simply not proven.[6] While counsel's objection might have been an appropriate ground for a motion for directed verdict on the claim of negligence in Dr. Boemi's post-operative treatment, it was not an appropriate objection to the argument because counsel was entitled to argue what the evidence had proven without objection -- and Dr. Boemi's objection was therefore properly overruled.

Christy's counsel then elaborated upon what the evidence had proven without objection -- that because Dr. Boemi did not realize (or perhaps did not want to take action that would amount to an admission) that he had compromised

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[6/] The district court fairly paraphrased the objection in its opinion:

> Dr. Boemi's counsel immediately objected to this line of argument. At a sidebar conference, Dr. Boemi's counsel explained that opposing counsel's remarks were improper because of the absence of any basis in the record "that the postoperative care was negligent" and "that it would have made a difference."

990 So.2d at 544.

But then, curiously, the district court supplied its *own* objection to the line of argument -- an objection that was *not* made by Dr. Boemi's counsel -- that the issue of postoperative care had not been pled with the requisite specificity in the complaint. It was the district court's objection that was subsequently utilized to finesse both Rule 1.190(b), Fla. R. Civ. P., and the "two issue rule" -- not counsel's objection to the insufficiency of the evidence to support argument on the issue.

Christy's blood supply, he attributed her condition to infection and did not utilize the options available to him to restore vascularization (T6: 933). There was no objection to this argument.

Counsel then made the argument that the district court found so "disturbing and inflammatory" on an issue that had not been pled that a new trial was required:

> And he [Dr. Boemi] refers Christy to his infectious disease friend. He doesn't open her up. They give her meds and they sit there and watch, in essence, while Christy's breasts rot off. It's just awful. It was a terrible plan from the start, and there was no action taken when the plan failed, and ultimately she develops gangrene.

(T6: 933-34).

Although the district court took considerable umbrage at this argument, Dr. Boemi's trial counsel did not. He did not object to this argument. And the district court's conclusion that this argument was so "disturbing and inflammatory" on an issue that had not been pled with specificity in the complaint was reached notwithstanding that Dr. Boemi's counsel never once contended at any time during the trial that the issue had not been pled, and notwithstanding that he did not object to the argument at all -- much less on the ground that it was "disturbing and inflammatory".

Enter appellate counsel. Working from a trial transcript, he prepared and filed a post-trial motion and memorandum. The motion for new trial nowhere claimed that the issue of post-operative care had not been pled in the complaint, and it did not even mention the argument that the district court found "disturbing

and inflammatory" (R6: 1351-72). Nevertheless, in the lengthy memorandum accompanying the motion, counsel claimed -- for the first time ever in the litigation -- that the argument was improper because it was directed to an issue that had not been pled in the complaint and was so inflammatory that a new trial on liability was required (R6: 1385, 1391-95).

Christy's counsel responded that the issue had in fact been pled; that Dr. Boemi's trial counsel was aware that the issue had been pled and the issue had been explored in all of the depositions taken in the case; that Dr. Boemi's trial counsel had never contended during trial that the issue had not been pled; and that the challenge to the argument on that ground had been improperly raised for the first time only after trial (R6: 1410-12; R8: 1714-15). And because these things were known to be true by the trial court, it declined to order a new trial on liability because of the argument to which no objection had been raised at trial.

The questions which remain are these: whether 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, and (2) in failing to apply the "two-issue rule" to uphold the jury's fully supported verdict on the issue of Dr. Boemi's liability.

II.
ISSUES ON DISCRETIONARY REVIEW

WHETHER 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, AND (2) IN FAILING TO APPLY THE "TWO-ISSUE RULE" TO UPHOLD THE JURY'S FULLY SUPPORTED VERDICT ON THE ISSUE OF DR. BOEMI'S LIABILITY.

III.
SUMMARY OF THE ARGUMENT

A. The district court erred in declaring that the trial court had abused its discretion and in remanding for a new trial on liability, for several reasons. First, there was no objection at all to the argument that the district court found "disturbing and inflammatory" on an issue not pled with specificity in the complaint, so the trial court was reversed for a ruling it never made during trial. The only legitimate way in which the district court could have reversed for the argument was to have declared it violative of this Court's "four-part test" for fundamental error in closing argument, but Dr. Boemi's counsel did not ask it to do so -- and it did not.

Second, even if the district court could properly have concluded that the objection that preceded the argument was sufficient to constitute a standing objection to the entire line of argument that followed, the standing objection was simply that the evidence was insufficient to support a finding of proximate causation -- not that the argument was, in the district court's words, "disturbing

and inflammatory" on an issue not pled with specificity in the complaint. It is thoroughly settled that an objection on one ground below is insufficient to preserve error on a different ground raised on appeal.

Third, the ground upon which the district court reversed was never raised at trial. It was raised for the first time ever in the litigation in the memorandum accompanying Dr. Boemi's motion for new trial -- and Dr. Boemi will be unable to point this Court to any place in the record that demonstrates otherwise. It is thoroughly settled that, absent fundamental error, neither a trial court nor an appellate court can order a new trial on a ground that could have been raised at trial but was raised for the first time only after trial. Most respectfully, the district court plainly erred in reversing the trial court on a ground that was never presented to it before the jury returned its verdict.

B. Once it is understood what the record *actually* reflects -- that Dr. Boemi's trial counsel understood at all times that the quality of Dr. Boemi's post-operative care had been placed in issue by the complaint and was an issue upon which evidence was admissible in the case, the district court's refusal to apply the "two-issue rule" to the verdict returned by the jury because of its misapprehension that Dr. Boemi's counsel had "no notice" that the issue of Dr. Boemi's post-operative care was in play is insupportable.

On the record *actually* made below, it is undeniable that Dr. Boemi's counsel was aware that three separate theories of liability would be submitted to the jury. His only complaint was that the evidence was insufficient to support

submission of the third theory of liability because, although there was evidence that some things might have been done differently after the surgery, there was no evidence that any care instituted after the surgery would have made a difference in the outcome. Having failed to move for a directed verdict on this ground, and fully aware that all three theories of liability would be under consideration by the jury, it was incumbent upon Dr. Boemi's counsel to request a special verdict form requiring separation of these theories for separate findings, or elect to have all three issues submitted to the jury on the general verdict form. He elected the latter.

There was abundant evidence supporting submission to the jury of the first two theories of liability, and the district court recognized as much in concluding that the trial court did not err in denying Dr. Boemi's motion for judgment. The jury found Dr. Boemi negligent, and because its verdict did not differentiate between the three theories of liability tried to it during the trial, it is impossible to know which theory or theories of liability the jury accepted, or which theory or theories it may have rejected. In that circumstance, the district court could not legitimately assume that the verdict "possibly" rested upon the single theory of liability affected by the perceived error, and that the other two theories of liability must therefore be retried. Rather, it was required by the "two-issue rule" to assume that the verdict rested upon one or both of the two theories of liability that were proven, and it could not upset the jury's finding of liability merely because a third theory of liability may not have been supported by sufficient evidence.

In a concluding section of its opinion, and because of its misapprehension that the issue of Dr. Boemi's post-operative care was neither pled nor tried, the district court finessed the "two-issue rule" because, in its words, application of it "would violate the requirements of procedural due process." 990 So.2d at 550. Most respectfully, because the district court misapprehended what the record *actually* reflects and reversed the trial court for a ruling it never made during trial on a ground that was never raised until after the trial was concluded, it was Christy who was "sandbagged" in the district court -- not Dr. Boemi.

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 (a complaint that Dr. Boemi's counsel *never* asserted prior to verdict), the "two-issue rule" contains no exception for circumstances of that sort. Surely, if the concept of "procedural due process" means anything at all, it means that appeals must be decided on the record *actually* made below, not upon an erroneous version of the record advanced by appellate counsel, or upon an objection supplied on appeal by the district court itself -- and we respectfully submit that Christy did not receive procedural due process in the district court's disposition of Dr. Boemi's cross-appeal. We urge this Court to review the record carefully in light of what we have called to its attention above; to quash the district court's decision; and to remand the case to the district court for consideration of the issue raised in Christy's appeal of the new trial order.

IV.
ARGUMENT

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, AND (2) IN FAILING TO APPLY THE "TWO-ISSUE RULE" TO UPHOLD THE JURY'S FULLY SUPPORTED VERDICT ON THE ISSUE OF DR. BOEMI'S LIABILITY.

A. The impropriety in reversing on a ground raised for the first time after trial.

On the record *actually* made below, the district court's decision is legally insupportable -- for several reasons. First, because there was no objection to the argument itself, the only way the district court could legitimately have concluded that the trial court abused its discretion in not ordering a new trial on liability would be for it to have declared the argument violative of this Court's "four-part test" for "fundamental error" in *Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010 (Fla. 2000) -- which Dr. Boemi's appellate counsel did not even ask it to do, and which it did not do. And given the extremely rigorous showing required to demonstrate fundamental error in a closing argument to which no objection has been made, that avenue was not available to the district court.

Surely, the single unobjected-to argument (which we believe was a fair comment on the unobjected-to evidence) does not rise to the level of this Court's recent test for fundamental error: Among other things, "To justify granting a motion for a new trial based on unobjected-to improper argument, the trial court

must find that the improper argument is of such a nature as to reach into the validity of the trial itself to the extent that the verdict could not have been obtained but for such comments." *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1271 (Fla. 2006), *quoting Murphy v. International Robotic Systems, Inc.*, *supra*. In addition, *see Mercury Ins. Co. of Fla. v. Moreta*, 957 So.2d 1242 (Fla. 2d DCA 2007); *Platz v. Auto Recycling & Repair, Inc.*, 795 So.2d 1025 (Fla. 2d DCA 2001).

Second, even if the district court could properly have concluded that the objection that preceded the argument was sufficient to constitute a standing objection to the entire line of argument that followed, the standing objection was simply that the evidence was insufficient to support a finding of proximate causation -- not that the argument was, in the district court's words, "disturbing and inflammatory" on an issue not pled with specificity in the complaint. It is, of course, thoroughly settled that an objection on one ground below is insufficient to preserve error on a different ground raised on appeal.

The cases are legion; the following are representative: *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"); *Castor v. State*, 365 So.2d 701, 703 (Fla. 1978) ("To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal"); *City of Orlando v.*

Birmingham, 539 So.2d 1133, 1134-35 (Fla. 1989) (similar); *W. R. Grace & Co.-Conn. v. Dougherty*, 636 So.2d 746, 749 (Fla. 2d DCA 1994) ("As recognized by other appellate courts in this state, an appellate court may consider objections . . . only on grounds specifically stated at trial, and when the appellant raises a different ground on appeal, the point is not preserved"); *Clock v. Clock*, 649 So.2d 312, 315 (Fla. 3d DCA 1995) ("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"). There are numerous other decisions that say the same thing, but the point is too well settled to need belaboring. Most respectfully, the district court could not permissibly supply its *own* objection to the closing argument. Because a district court must apply neutral principles of appellate review, it is limited in its review of a trial court's ruling to the grounds stated for an objection below, and it was therefore impermissible for the district court to declare that the argument constituted reversible error on the ground that it was "disturbing and inflammatory" on an issue not pled with specificity in the complaint.

Third, the ground upon which the district court reversed -- that the argument was "disturbing and inflammatory" on an issue not pled in the complaint -- was never raised at trial. It was raised for the first time ever in the litigation in the memorandum accompanying Dr. Boemi's motion for new trial -- and we challenge Dr. Boemi's counsel to point to some place, any place, in the record that demonstrates otherwise. We challenged Dr. Boemi's counsel to demonstrate

otherwise below, and he did not -- so we are comfortable that no contradiction will be forthcoming here. Hopefully, the truth will win out in the end.

It is thoroughly settled that, absent fundamental error, neither a trial court nor an appellate court can order a new trial on a ground that could have been raised at trial but was raised for the first time only after trial. *See, e. g., Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010, 1031 (Fla. 2000) (defining a "four-part test" establishing the parameters for a finding of fundamental error in closing argument); *White Construction Co., Inc. v. Dupont*, 455 So.2d 1026, 1030 (Fla. 1984); *County of Volusia v. Niles*, 445 So.2d 1043, 1047 (Fla. 5th DCA 1984); *Honda Motor Co., Ltd. v. Marcus*, 440 So.2d 373, 376 (Fla. 3d DCA 1983); *Sears Roebuck & Co. v. Jackson*, 433 So.2d 1319, 1322-23 (Fla. 3d DCA 1983); *Murray v. Moore*, 541 So.2d 694, 695 (Fla. 1st DCA 1989); *Nissan Motor Corp. in U.S.A. v. Padilla*, 545 So.2d 274, 276 (Fla. 3d DCA 1989).

Indeed, the Second District has been a vocal supporter of this rule of appellate review, at least until its decision in this case. *See, e. g., Wasden v. Seaboard Coast Line Railroad Co.*, 474 So.2d 825 (Fla. 2d DCA 1985); *Gregory v. Seaboard System Railroad, Inc.*, 484 So.2d 35 (Fla. 2d DCA 1986); *Hargrove v. CSX Transportation, Inc.*, 631 So.2d 345 (Fla. 2d DCA 1994); *Eichelkraut v. Kash N' Karry Food Stores, Inc.*, 644 So.2d 90 (Fla. 2d DCA 1994); *Hagan v. Sun Bank*

of Mid-Florida, N.A., 666 So.2d 580 (Fla. 2d DCA 1996); *Millar Elevator Service Co. v. McGowan*, 819 So.2d 145 (Fla. 2d DCA 2002).[7]

Yet, because of its misapprehension of the record, that is what the district court did: it ordered a retrial of this entire case on a ground that was not raised at trial, but was raised for the first time by Dr. Boemi's appellate counsel, well after the trial was concluded. Most respectfully, once it is understood what the record *actually* reflects, the district court plainly erred in reversing the trial court on a ground that was never presented to it before the jury returned its verdict.

B. The impropriety in declining to apply the "two-issue rule."

Once it is understood what the record *actually* reflects -- that Dr. Boemi's trial counsel understood at all times that the quality of Dr. Boemi's post-operative care had been placed in issue by the complaint and was an issue upon which evidence was admissible in the case -- the district court's refusal to apply the "two-issue rule" to the verdict returned by the jury because of its misapprehension that Dr. Boemi's counsel had "no notice" of the issue is insupportable.[8]

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[7] *Hagan, Eichelkraut, Wasden*, and *Sears Roebuck* were recently disapproved by this Court, but only to the extent that they "stand for the proposition that a trial court's grant of a new trial based on unobjected-to closing argument should be subject to a de novo standard of review on appeal." *Murphy v. International Robotics, Inc.*, 766 So.2d 1010, 1031 n. 24 (Fla. 2000). This limited disapproval does not affect the cases for the point they have been cited above.

[8] It is also worth noting that the district court finessed Rule 1.190(b), Fla. R. Civ. P., by concluding that, in the absence of expert testimony reciting the magic words, the evidence of Dr. Boemi's post-operative care was insufficient to support

There can be no question that Dr. Boemi's counsel was aware that three separate theories of liability would be submitted to the jury -- for at least two reasons. First, the trial court had overruled his objection to "this line of argument" and the argument had proceeded to its specifics -- a fair indication that the issue of post-operative care was in play. Second, and perhaps more importantly, Christy's counsel told the jury exactly that. In closing argument, Christy's counsel identified three separate theories of liability for the jury's consideration: (1) that Christy only needed a mastopexy, and the augumentation that compromised her blood supply was entirely unnecessary; (2) that the surgery itself was flawed in execution; and (3) that Dr. Boemi failed "to detect and treat a surgically caused impairment of

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submission of the issue to the jury. But whether sufficient or not -- a point not tested by a motion for directed verdict -- the fact remains that evidence on the issue was admitted without objection. In that circumstance, even if the allegations of the complaint had not been broad enough to include that claim, an objection to the evidence of post-operative care on that ground was required -- and because no such objection was made, the complaint was automatically amended to include that issue by operation of Rule 1.190(b) (whenever evidence on "nonissues" has been admitted without objection, the pleadings are amended automatically to raise those issues). *See Ford Motor Co. v. Hill*, 381 So.2d 249 (Fla. 4th DCA 1979), *approved*, 404 So.2d 1049 (Fla. 1981); *Beefy Trail, Inc. v. Beefy King Int'l, Inc.*, 267 So.2d 853 (Fla. 4th DCA 1972).

The district court's reliance upon *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So.2d 561 (Fla. 1989), and similar cases, for a contrary conclusion was misplaced. In *Arky, Freed*, Rule 1.190(b) did not operate to effect an amendment of the pleadings because a timely objection to the admission of evidence on an unpled theory of liability had been made.

blood supply" (T6: 949-50). There was no objection to this outline of the three theories of liability to be submitted to the jury for determination.

Dr. Boemi's counsel simply responded to it in his own closing argument by pointing out that, although there was evidence that some things might have been done differently after the surgery, there was no evidence that any care instituted after the surgery would have made a difference in the outcome -- the same objection he had made to "this line of argument" before (T6: 1005). Having failed to move for a directed verdict on this ground, having made this responsive argument, and therefore fully aware that all three theories of liability would be under consideration by the jury, it was incumbent upon Dr. Boemi's counsel to request a special verdict form requiring separation of these theories for separate findings, or elect to have all three issues submitted to the jury on a general verdict form. He elected the latter. This was a tactical decision that could have paid off handsomely if the jury had returned a verdict in Dr. Boemi's favor -- but it was a tactical decision with consequences if the result were otherwise.

There was abundant evidence supporting submission to the jury of the first two theories of liability -- that the augmentation surgery was entirely unnecessary and that it was flawed in execution as well -- and the district court recognized as much in concluding that the trial court did not err in denying Dr. Boemi's motion for judgment. And the fact that the evidence may have been insufficient to support a finding of negligence on the third theory of liability pled and tried is irrelevant -- because Dr. Boemi elected to have all three issues submitted to the jury on a

general verdict form. The jury found Dr. Boemi negligent, and because its verdict did not differentiate between the three theories of liability tried to it during the trial, it is impossible to know which theory or theories of liability the jury accepted, or which theory or theories it may have rejected.

In that circumstance, the district court could not assume, as it did in its opinion, that the verdict "possibly" rested upon the single theory of liability affected by the perceived error, and that the other two theories of liability must therefore be retried. Rather, it was required to assume that the verdict rested upon one or both of the two theories of liability that were proven, and it could not upset the jury's finding of liability merely because a third theory of liability may not have been supported by the evidence.

Most respectfully, once it is understood what the record *actually* reflects, the "two-issue rule" plainly applies where, as here, a plaintiff has tried multiple theories of liability and the claimed error, if any, affects only one of those theories. 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).

In the instant case, the district court found no error affecting the jury's finding of liability on two of the three negligence issues submitted and argued to the jury, but reversed the jury's finding of liability because, in its words, "there was no evidence of post-operative negligence." 990 So.2d at 549. That, however, is what the Fourth District had done in a decision that this Court later quashed:

> The district court held improper a general verdict under circumstances where two alternative theories of liability were presented to the jury and the evidence was not sufficient to support one of the theories. We quash the decision of the district court and remand for reconsideration in light of *Colonial Stores*.

Whitman v. Castlewood International Corp., 383 So.2d 618, 619 (Fla. 1980). *Whitman* should have required a different result in the instant case.

In a concluding section of its opinion, and because of its misapprehension that the issue of Dr. Boemi's post-operative care was neither pled nor tried, the district court finessed *Colonial Stores* and *Whitman* and declined to apply the "two-issue rule" because it "would violate the requirements of procedural due process." 990 So.2d at 550. Most respectfully, because the district court misapprehended what the record *actually* reflects and reversed the trial court for a ruling it never made during trial on grounds that were never raised until after the trial was concluded, it was Christy Aills who was "sandbagged" in the district court -- not Dr. Boemi.

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 (a complaint that Dr. Boemi's counsel *never* asserted), neither *Colonial Stores* nor *Whitman* contains an exception for circumstances of that sort -- and the Fourth District has decided that the "two-issue rule" *does* apply in that circumstance. *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 notice* because it was entirely 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. The district court's disposition of the instant case cannot be reconciled with the opposite conclusion reached on legally indistinguishable facts in *Chua*.

Most respectfully, if the concept of "procedural due process" means anything at all, it means that appeals must be decided on the record *actually* made below, not up on an erroneous version of the record advanced by appellate counsel, or upon an objection supplied on appeal by the district court itself -- and we respectfully submit that Christy did not receive procedural due process in the district court's disposition of Dr. Boemi's cross-appeal. We urge the Court to review the record carefully in light of what we have called to its attention above; to quash the district court's decision; and to remand the case to the district court for consideration of the issues raised in Christy's appeal of the new trial order.

V.
CONCLUSION

The district court's decision should be quashed, and the case should be remanded to the district court with directions to uphold the jury's finding of liability and for consideration of the issues raised in Christy's appeal of the new trial order.

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.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 15th day of June, 2009, 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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