THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1771

WILLIAM COX and MARTHA COX,

Petitioners,

vs.

ST. JOSEPH'S HOSPITAL, ERIC CASTELLUCCI, M.D. and EMERGENCY MEDICAL ASSOCIATES OF FLORIDA, LLC,

Respondents.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT
CASE NOS. 2D07-1471; 2D07-1038 (CONSOLIDATED)

RESPONDENTS, ERIC CASTELLUCCI, M.D. AND EMERGENCY MEDICAL ASSOCIATES OF FLORIDA, LLC'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Petitioners assert that an expert's bare opinion, in and of itself, should be deemed sufficient *prima facie* evidence of causation, and that a court cannot determine whether the opinion was based on pure speculation by examining the facts and data behind it. According to Petitioners, the opinions themselves are competent evidence "even if the record were entirely devoid of the 'facts' upon which the experts based their opinions" and an expert opinion cannot be disregarded, even when "unsupported by sufficient 'facts.'" Alternatively, "the sufficiency of the facts to support an opinion must normally be decided by the expert himself." (Br. pp. 21-22).

To accept Petitioners' view of the law would place the determination of the legal sufficiency of evidence in the sole province of a non-legal expert, who is hired for the purpose of litigation, and permit verdicts to be based on speculation and conjecture.

The facts behind the opinions (which according to Petitioners, the court should not look at) are as follows. Petitioners, the Coxes, obtained a verdict against Dr. Castellucci, an emergency room physician, and St. Joseph's Hospital, for damages resulting from a severe ischemic stroke suffered by Mr. Cox, due to their failure to discover the time of the onset of his stroke. Their theory was that if onset had been learned, then the neurologist (Dr. Berges) would have administered

a drug known as tPA, which would have prevented or reversed the stroke.

However, it was undisputed that Mr. Cox had a prior subdural hematoma (intracranial hemorrhage), and given the increased risk for hemorrhaging associated with tPA, the drug is contraindicated by FDA guidelines for any patient who has previously suffered a subdural hematoma. As Dr. Berges explained, a patient with a prior subdural hematoma has weakened blood vessels in the brain, making the patient more prone to hemorrhage. Dr. Berges testified that he considers the FDA guidelines absolute, and with a history of subdural hematoma, he definitely would not have administered tPA to Mr. Cox. Petitioners' experts agreed that it would be reasonable and within the standard of care for a neurologist to follow the FDA guidelines and not administer tPA to a patient with Mr. Cox's contraindication.

It was also undisputed that the effectiveness of the drug has never been studied in patients with a prior subdural hematoma, and Petitioners' causation expert, Dr. Nancy Futrell, had no experience using the drug on stroke patients with this contraindication. Moreover, the undisputed medical literature demonstrated that in the ideal candidate (patients without prior subdural hematomas), the drug is only effective in 31% of patients who receive it.

Despite these undisputed facts, Petitioners contend they presented a *prima facie* case of causation sufficient to withstand a directed verdict based on (1) an

opinion letter their attorney obtained from Dr. Berges before Dr. Berges was told of the history of subdural hematoma (which was thus not based on the actual facts of the case), stating that he would have treated Mr. Cox with tPA, and more likely than not, Mr. Cox would have benefited, and (2) Dr. Futrell's bare opinion that "to a high degree of medical probability" "more likely than not" Mr. Cox would have had a very good recovery with tPA.

But, Dr. Berges testified that if he had known Mr. Cox had a prior subdural hematoma, he never would have signed the letter written by the Coxes' attorney. That crucial fact was not contained in the records he reviewed when he signed the letter and the attorney did not provide him with that information. (T.1561-63; 1568-69; 1585-87; 1603-04). In short, the initial opinion letter was based on facts which do not exist in this case -- that Mr. Cox did not have a prior subdural hematoma. Moreover, Dr. Berges had no experience treating patients like Mr. Cox (who had a history of subdural hematoma) with tPA, as he had never done so.

Dr. Futrell affirmatively based her opinion on (1) "clinical experience that I have from giving the drug and seeing which patient it works on," and (2) "what we can find in the medical literature." But, on cross-examination she admitted (1) she had no clinical experience treating stroke patients with a history of subdural hematoma with tPA, and (2) there was no medical literature on tPA's effectiveness in patients with this contraindication, as it has never been studied.

Finding the causation testimony wholly speculative, the Second District reversed for entry of directed verdict for the defense. This Court accepted jurisdiction based upon Petitioners' assertion of conflict. We respectfully submit that there is no conflict. In any event, as demonstrated below, the district court was correct.

STATEMENT OF THE CASE AND FACTS

Mr. Cox suffered an ischemic stroke, which is caused by a clot in the brain. (T.812). Tissue Plasminogen Activator (tPA) is a "clot busting" drug, which can restore function lost during an ischemic stroke. (T.811-13; 1707; 1798-99). It is a time-sensitive drug, which can only be administered intravenously within three hours of the stroke's onset. (T.812-13; 1564-65).

Although tPA may be effective in treating an acute stroke, it is a dangerous drug, which can cause significant harm. (T.888-89; 1709). Even in an appropriate candidate, the tPA itself may cause another stroke, intracerebral hemorrhage, or even death. (T.888-89; 972-73; 990; 1570-71; 1802). Because of the risks associated with tPA, the drug is contraindicated for, among others, any patient who has previously suffered an intracranial hemorrhage or subdural hematoma. (T.889-91; 1711; 1797-99). As Dr. Berges explained, this is so "[b]ecause if you had had a subdural hematoma, that means there's a weakness of the vessels of the brain and they're more prone to bleed." (T.1581). The contraindication is listed in the

package insert by tPA's manufacturer and in federal Food and Drug Administration (FDA) guidelines for the drug. (T.539-40; 559; 890; 899-900; 988-90; 1127).

It was undisputed that Mr. Cox suffered a subdural hematoma approximately two and a half years before his 2001 stroke. His medical records established this fact, as did testimony from Mr. Cox's prior treating neurologist (T.1633-36; 1638-39; 1643-45) and his wife, who testified, "I knew he had a hematoma, which is a bruise"; "I knew it was a hematoma. A bruise is the word we use, a bruise." (T.1426)

If a patient is an appropriate candidate, the drug is usually administered by a neurologist. (T.477; 887). Dr. Castellucci's role as an emergency room physician was to stabilize Mr. Cox, diagnose stroke, perform certain tests, and gather available information about the onset so that a neurologist could determine whether he was a candidate for tPA. (T.477; 815-16). The on-call neurologist, Dr. Eddy Berges, was not called because Mr. Cox's onset was unknown. (T.477; 484).

The evidence demonstrated that Mr. Cox suffered his stroke while at a friend's car dealership working on a model airplane. (T.1181-82; 1212). At approximately 10:30 a.m., a visitor (Mr. de Villa) spoke with Mr. Cox for approximately ten to fifteen minutes, and Mr. Cox appeared normal during that conversation. (T.1212; 1216-17; 1221-22). Fifteen to twenty minutes later, Mr. de Villa returned to where Mr. Cox was located and found him collapsed, appearing

intoxicated, and unable to speak or walk. (T.1212-15; 1225-26; 1231).

Mr. de Villa called 911 and Tampa Fire and Rescue (TFR) was dispatched to the scene at 11:21 a.m. (T.637). Lieutenant Terry Oliver (Lt. Oliver), the responding paramedic, evaluated Mr. Cox and radioed a "stroke alert" to the hospital dispatch service. (T.632-33). Mr. de Villa told Lt. Oliver what he knew about the onset of Mr. Cox's stroke symptoms. (T.639-40; 1231-32). However, upon arrival to the hospital, Lt. Oliver told the nurses that Mr. Cox's onset was "unknown." (T.665-68; 671-72; 699; 735; 1329-31). He also failed to record the information he received about Mr. Cox's onset in the run report. (T.638-39; 649-50). He had no explanation for his failure to do so. (T.639).[1]

The Coxes claimed that Dr. Castellucci and the nurses should have "sought out" and learned the time of the stroke's onset. Had they done so, the Coxes asserted that Dr. Berges would have administered tPA to Mr. Cox and he would have recovered from his stroke. Their causation evidence came from two sources: testimony from Dr. Futrell and an opinion letter from Dr. Berges that was

[1] Petitioners' brief erroneously contends that "neither the Hospital nor Dr. Castellucci bothered to determine the time of onset." (Br. p. 1). In fact, the evidence demonstrated that Mr. Cox's onset was assessed and documented as unknown at least three times by the triage nurse, Mr. Cox's primary care nurse, and Dr. Castellucci, based upon information they received from Lt. Oliver and Mrs. Cox. (T.533-35; 596-99; 709-10; 712-13; 735; 1329-31). Mrs. Cox testified that she never told anyone at the hospital that there were other people in the waiting room who had information about the onset of Mr. Cox's stroke. (T.1431).

withdrawn prior to trial when Dr. Berges was given the true facts.

A. Dr. Futrell. Dr. Futrell was the only expert at trial who testified on the issue of causation. She opined that Mr. Cox was an appropriate candidate for tPA (T.1052-54) and that had he received the drug, he more likely than not "would have had a very good recovery" with "minimal or no neurologic deficit." (T.1076-77). On direct examination, Dr. Futrell testified that she based her causation opinion on "what we can find in the medical literature and clinical experience that I have from having given the drug and seeing which patient it works on. . . ." (T.1077).

On cross-examination, she conceded that she had never given the drug to a patient with Mr. Cox's contraindication of subdural hematoma, and that tPA has never been studied in stroke patients with this contraindication. (T.1120; 1122-23). She was questioned about the medical literature, namely, a 1995 study (NINDS) which analyzed the effectiveness of tPA in stroke patients and paved the way for FDA approval of the drug. (T.1097-1100). Dr. Futrell concurred in the results of NINDS, which demonstrated that 20% of stroke patients made an almost complete recovery from their stroke without tPA, and 31% made an almost complete recovery when tPA was given. (T.1099-1100). However, NINDS excluded patients with a history of subdural hematoma due to the drug's inherent risk of causing hemorrhaging (T.891; 1097-98; 1123), and Dr. Futrell agreed that tPA had

"never been studied" in patients with this contraindication. (T.1123).[2]

Dr. Futrell was unable to review the CT scans taken after Mr. Cox's prior subdural hematoma because they had long been destroyed, but she agreed that reports from those studies indicated that Mr. Cox had a subdural hematoma which later resolved. (T.1053). Notwithstanding Mr. Cox's undisputed medical record, she questioned whether the subdural hematoma had been "a really significant" one based on her review of the CT scan taken at the time of Mr. Cox's stroke, and opined in any event that it did not expose Mr. Cox to "any increased risk" with the use of tPA. (T.1054). Also based on the CT scan taken on the date of Mr. Cox's stroke, Dr. Futrell opined that Mr. Cox's brain appeared "younger" than his stated age. (T.1055-57).

B. Dr. Berges. Dr. Berges was Mr. Cox's treating neurologist following the stroke. In 2003, he was contacted by the Coxes' attorney and signed a letter prepared by their attorney which stated that: (1) tPA therapy would have been applicable to Mr. Cox; (2) had he been called, he would have administered the drug to Mr. Cox; and (3) Mr. Cox more likely than not would have benefited from the drug. (T.1558-67; 1569-71). Dr. Berges testified that the opinion letter was based solely upon his medical record, which contained only a typewritten consult

[2] All emphasis by underline herein is supplied.

note and an electroencephalogram report dated January 23, 2001. (T.1561-63).

At Dr. Berges's deposition, he was told for the first time that Mr. Cox had sustained a subdural hematoma two and half years before his 2001 stroke. Based upon this information, Dr. Berges unequivocally testified (1) that if he had been consulted within the timeframe to administer tPA, he absolutely would not have given Mr. Cox tPA (T.1567-80), and (2) he never would have signed the Coxes' attorney's letter if he had known this information. (T.1606).

Dr. Berges also testified that tPA would not have been administered to Mr. Cox based solely upon the information contained in the hospital medical record, and that he would have asked Mrs. Cox about her husband's medical history to determine whether Mr. Cox was an appropriate candidate for the drug. (T.1569; 1579-80). This would have included a discussion about the contraindications for the drug, including prior subdural hematoma. (T.1569; 1579-80). It was undisputed that Mrs. Cox was aware of the prior subdural hematoma, and she testified that had she been asked, she would have told the treatment team about this condition. (T.1120-22; 1426-29; 1444-45; 1447).

Dr. Berges testified that he follows FDA guidelines for tPA and views the guidelines as absolute. (T.1592-93). As the guidelines state that tPA is contraindicated for patients with any history of subdural hematoma, Dr. Berges would not have administered tPA to Mr. Cox. (T.1592-93). Dr. Berges has never

knowingly administered tPA to a patient with a prior intracranial hemorrhage (T.1606), and "would not even consider" giving tPA to such a patient. (T.1574).

SUMMARY OF THE ARGUMENT

The district court correctly held Dr. Castellucci was entitled to a directed verdict as the expert opinions on causation were purely speculative. First, the opinions were not grounded on the experts' own experience, medical literature, data or studies, as neither expert had experience using tPA on patients like Mr. Cox, who had a history of subdural hematoma, and tPA has never been studied on patients with this contraindication because it is life threatening. Second, the most the admittedly authoritative medical study would support was a 31% chance of success in an ideal candidate (without a prior subdural hematoma). Mr. Cox would not have been included within this statistic based upon his medical history, but in any event, Dr. Futrell provided no facts to demonstrate that he would have fallen within this slim group of successful patients.

To accept Petitioners' view that expert opinions are sufficient evidence to support a verdict even when "unsupported by sufficient 'facts'" and "the sufficiency of the facts to support an opinion must normally be decided by the expert himself" (Br. pp. 21-22), would place the determination of the legal sufficiency of evidence in the sole province of a non-legal expert, who is hired for the purpose of litigation, and permit verdicts to be based upon speculation and conjecture.

While an expert need not disclose the facts and data upon which the opinion is based prior to giving the opinion, the underlying facts and data which support it must actually exist. When the facts and data the expert gives as support for the opinion do not actually support it, the opinion is nothing more than a statement by a highly credentialed, and thus believable, witness that "it is so because I think it is so." The law does not and should not allow cases to be determined on such conjecture and speculation.

Because the district court correctly determined that the expert opinions were purely speculative and insufficient to support a verdict, it did not reach or address any of Dr. Castellucci's other arguments on appeal. However, Dr. Castellucci was also entitled to a directed verdict based upon Dr. Berges's testimony, which demonstrated that if he had been called, he would have followed FDA guidelines and absolutely would not have given Mr. Cox tPA based upon his medical history. The Coxes' experts agreed that it would be reasonable and within the standard of care for a neurologist to follow FDA guidelines and refuse to administer tPA to a stroke patient with Mr. Cox's contraindication. For this additional reason, the Second District's decision that Dr. Castellucci was entitled to a directed verdict was correct.

Alternatively, to the extent this Court is inclined to reverse the Second District's decision, Dr. Castellucci respectfully requests that the Court consider his

alternative grounds for a new trial, detailed below. First, Dr. Castellucci was improperly precluded from introducing Petitioners' own expert's opinion that the paramedic, Lt. Oliver, was negligent in not communicating his knowledge of the time of onset of the stroke to Dr. Castellucci or the nurses on the ground that Dr. Castellucci had not raised a *Fabre* defense. The law is clear that regardless of whether a jury is entitled to apportion damages among nonparties, a jury is always entitled to consider whether the sole proximate cause of an injury was due to the negligence of a non-party.

Second, the trial court erroneously refused to instruct the jury that a directed verdict had been granted on the Petitioners' negligence claim. The requested instruction was necessary because (1) at the beginning of the case, the trial judge instructed the jury that this was a negligence case and gave the instruction on the standard of professional negligence, and (2) throughout the trial, evidence on the ordinary negligence standard of care was admitted.

ARGUMENT

I. FAILURE TO PROVE LEGAL CAUSATION BY COMPETENT EVIDENCE.

The district court correctly held that Dr. Castellucci was entitled to a directed verdict. The decision was correct for two reasons, either one of which independently supports a directed verdict. First, the expert opinions on causation were purely speculative as they were not grounded in the experts' clinical

experience, medical literature, data or studies. Neither Dr. Futrell nor Dr. Berges had clinical experience using tPA on patients like Mr. Cox, who had a history of subdural hematoma, and tPA has never been studied on patients with this contraindication. As Dr. Berges explained, this is so "[b]ecause if you had had a subdural hematoma, that means there's a weakness of the vessels of the brain and they're more prone to bleed." (T.1581). Because the opinions were not grounded on medical literature and studies involving a patient with a prior subdural hematoma, the evidence was insufficient to satisfy the more likely than not standard in medical malpractice cases.

Second, as the district court noted, the undisputed medical literature demonstrated that the best known rate for medical success in an ideal candidate for tPA (without a prior subdural hematoma), is 31%. After agreeing with the 31% statistic, Dr. Futrell failed to compare any aspects of Mr. Cox's physical condition (prior subdural hematoma) to those of patients who had successful interventions in order to suggest that he, as opposed to 69% of all patients, was predisposed to a positive outcome. Although the court distinguished certain cases relied upon by the Coxes on the ground that in those cases, "the plaintiff's expert testimony on causation was not constrained by statistical evidence revealing success rates of less than fifty percent, as in this case," the Second District did not hold that there can never be a cause of action for loss of the opportunity to receive tPA simply because

the NINDS study only proved the efficacy of the drug at 31%, as Petitioners contend. To the contrary, the district court held that the evidence in this case was insufficient to establish causation because there was no evidence that Mr. Cox would have benefited in light of his prior subdural hematoma, and Dr. Futrell provided no facts to demonstrate that he would have fallen within that slim group of successful patients. *St. Joseph's Hosp. v. Cox*, 14 So. 3d 1124, 1127-28 (Fla. 2d DCA 2009).

Petitioners ask this Court to hold that an expert's bare opinion that includes the magic words "to a high degree of medical probability" and "more likely than not" is, in and of itself, sufficient *prima facie* evidence of causation, and that a court cannot determine whether the opinion was based upon pure speculation by examining the facts and data behind it.

The facts of this case cogently demonstrate why such a rule should be soundly rejected. Cross-examination demonstrated that Dr. Futrell based her "more likely than not" opinion on clinical experience she did not have and medical literature that did not exist. Additionally, the Petitioners' attorney obtained the initial opinion letter from Dr. Berges without advising him of the critical fact that the patient had a history of subdural hematoma. That letter was thus based on facts that did not exist, and not the actual facts of the case. Such speculation and conjecture have never been, and should not be, deemed sufficient to support a

verdict.

Under clear principles of Florida law, once an expert has stated the basis for an opinion, that basis must be sufficient. If the underlying facts or data are not established, the opinion is speculative. *See, e.g., Posner v. Walker*, 930 So. 2d 659, 664-67 (Fla. 3d DCA 2006). Florida law is equally clear that an expert's opinion cannot be utilized to supply the facts necessary to support that opinion. *See, e.g., Harris v. Josephs of Greater Miami, Inc.*, 122 So. 2d 561, 562 (Fla. 1960); *Arkin Const. Co. v. Simpkins*, 99 So. 2d 557, 561 (Fla. 1957).

It is, of course, the proper function of the court to ensure that all evidence, including expert testimony, amounts to more than just conjecture and speculation. It has long been established by this Court that expert testimony must be legally reliable. *See Ramirez v. State*, 810 So. 2d 836, 842-43 (Fla. 2001). A bare opinion which cannot be supported by the expert's clinical experience, medical literature, data or studies is nothing but conjecture and insufficient to establish a *prima facie* case. *See, e.g., Cromarty v. Ford Motor Co.*, 341 So. 2d 507, 508-09 (Fla. 1976),

In *Ramirez*, this Court recognized, in a different context, that expert testimony can be prejudicial on the jury. *Id.* at 844. This is why it is the proper and necessary role of the courts to "bar[] from the jury's purview evidence that is unduly prejudicial, misleading, or confusing – i.e., evidence that is 'legally unreliable.'" *Id.* at 843.

Courts around the nation have echoed this Court's legitimate concern about the prejudicial and misleading impact on the jury of speculative expert opinions in light of the widespread use of expert witnesses in litigation. For instance, in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), the Texas Supreme Court, reviewing and citing numerous cases around the nation, explained:

> Professional expert witnesses are available to render an opinion on almost any theory, regardless of its merits. ... While many of these experts undoubtedly hold reliable opinions which are of invaluable assistance to the jury, there are some experts who 'are more than willing to proffer opinions of dubious value for the proper fee.' ...
>
> Expert witnesses can have an extremely prejudicial impact on the jury, in part because of the way in which the jury perceives a witness labeled as an expert. "[T]o the jury an 'expert' is just an unbridled authority figure, and as such he or she is more believable." ... A witness who has been admitted by the trial court as an expert often appears inherently more credible to the jury than does a lay witness. ... Consequently, a jury more readily accepts the opinion of an expert witness as true simply because of his or her designation as an expert.

Id. at 553.

Therefore, like this Court did in *Ramirez*, the Texas Supreme Court concluded that "[i]n light of the increased use of expert witnesses and the likely prejudicial impact of their testimony, trial judges have a heightened responsibility to ensure that expert testimony show some indicia of reliability." *Robinson*, 923 S.W.2d at 553.

The task of determining whether an expert opinion is speculative cannot be left to the purview and discretion of the expert-for-hire himself, as Petitioners

suggest. As the Texas Supreme Court aptly noted, "a person with a degree should not be allowed to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system." *Id.* at 558.

It is particularly the role of the court to weed out subjective belief and unsupported speculation. Courts have been doing so from time immemorial, and are not only equipped for that task, but charged with the duty to ensure that cases are not decided on subjective belief or unsupported speculation. Expert opinion testimony which is not supported by the facts and data the expert bases it on is nothing but pure speculation.

A. An Expert Opinion Must Not Be Speculative.

Under *Gooding v. University Hospital Building, Inc.*, 445 So. 2d 1015 (Fla. 1984), Petitioners were required to demonstrate that what Dr. Castellucci failed to do (learn the time of onset) probably would have affected the outcome. *Id.* at 1020. Application of the *Gooding* standard to this case required Petitioners to prove that if Dr. Castellucci had determined the onset of Mr. Cox's stroke, then Mr. Cox (1) more likely than not would have received tPA, and (2) more likely than not would have benefited from the drug.[3]

[3] As demonstrated in Section II., infra, Dr. Castellucci was entitled to a directed verdict based upon the Coxes' failure to satisfy the first prong. However, as the Second District correctly concluded below, he was also entitled to a directed verdict based upon their failure to satisfy the second prong.

Petitioners do not dispute this burden. Rather, they argue that under *Gooding*, and *Wale v. Barnes*, 278 So. 2d 601 (Fla. 1973) and it progeny, the mere incantation by an expert witness of the phrases "to a high degree of medical probability" and "more likely than not" is sufficient to create a jury question on the issue of causation, even where the remainder of the testimony demonstrates that the causation opinion is wholly speculative.

None of these cases support the view that an expert's use of the magic words "more likely than not" is dispositive where the opinion is not based on clinical experience or medical data. In *Wale*, the Court explained that the expert's testimony "precisely and exactly attribute[d] [the plaintiff]'s subdural hematomas to 'the traumatic or injurious forceps delivery of this child in which the head was injured,'" and further noted that the expert's testimony established that the forceps used were the wrong ones based upon the circumstances, and were no longer recognized as proper forceps in deliveries involving a molded or elongated head, as in that case. 278 So. 2d at 605.

Cromarty v. Ford Motor Co., 341 So. 2d 507 (Fla. 1976), further illustrates this point. In that case, the Court affirmed the controlling law in *Wale* that "an expert opinion may support a jury verdict, so long as it is grounded in fact." *Id.* at 509. "[V]erdicts should not be based upon speculative and conjectural expert testimony with no basis in evidentiary fact." *Id.* at 508. *Cromarty* explained that in

Wale, the "court saw error in taking the decision as to liability away from the jury when an expert had testified that the hematomas were caused by the defendant and that opinion was grounded on the fact that the defendant had used the wrong type of forceps." *Cromarty*, 341 So. 2d at 509.

The remaining cases Petitioners cite on this point likewise involve expert opinions that were based in fact.[4] While Petitioners also claim that the Second District's decision conflicts with cases from within that district, this is not a basis for express and direct conflict review. *See* art. V, § 3(b)(4), Fla. Const. In any event, those cases involved competent non-speculative expert testimony.[5]

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[4] *See Harris v. Gandy*, 18 So. 3d 569 (Fla. 1st DCA 2009) (opinion that aspiration as a result of mask anesthesia caused death was based on evidence that deceased was suffering symptomatic reflux, rendering use of mask anesthesia inappropriate); *Olsten Health Servs., Inc. v. Cody*, 979 So. 2d 1221 (Fla. 3d DCA 2008) (opinion that nurse's failure to act caused deterioration in pressure ulcers was based on numerous medical records and depositions); *Hancock v. Schorr*, 941 So. 2d 409 (Fla. 4th DCA 2006) (opinion that decedent had at least a 60% chance of surviving if treated in a hospital was based "on the fact that prior to the accident, despite underlying medical problems, including diabetes, hypertension, and some heart problems, [the decedent] was healthy and able to function."); *McQueen v. Jersani*, 909 So. 2d 491 (Fla. 5th DCA 2005) (viewing the evidence and reasonable inferences in the light most favorable to plaintiff, opinion that decedent likely would not have had cardiac episode which caused his death or would have survived was sufficient to create a jury issue); *Singleton v. W. Volusia Hosp. Auth.*, 442 So. 2d 235 (Fla. 5th DCA 1983) (opinion that negligence aggravated plaintiff's condition was based on evidence that defendants could have diagnosed his condition on three occasions when he came in complaining of abdominal pains).

[5] *See, e.g., Hughes v. Slomka*, 807 So. 2d 98 (Fla. 2d DCA 2002) (notwithstanding some internal inconsistencies in plaintiff's expert's causation testimony, expert's competent opinion that patient's leg more likely than not could have been saved had a vascular disorder been diagnosed sooner was sufficient to go to jury);

Petitioners also erroneously contend that by examining whether the expert opinions had any factual support to render them anything more than mere speculation, the district court impermissibly usurped either the function of the jury,[6] or the function of the expert in our legal system. (Br. pp. 32-34). While the subheading of their brief states the district court usurped the jury's function, the argument under this heading is that only the expert -- and not the jury -- can determine the facts. They claim that "the issue of causation in the case was clearly beyond the capability of lay jurors and judges to decide," and "expert testimony is required to prove the facts in a medical malpractice case" "because judges and juries are not competent to decide those facts themselves." (Br. p. 33). Further,

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Lawrinson v. Bartruff, 600 So. 2d 22 (Fla. 2d DCA 1992) (competent opinion of expert witness on causation was sufficient to go to jury where expert opined that, within reasonable medical probability, a two-month delay in diagnosis of aggressive form of skin cancer caused the plaintiff damage); *Mezreh v. Bevis*, 593 So. 2d 1214 (Fla. 2d DCA 1992) ("There was competent expert testimony which, as we have said, was not improperly allowed that had defenants[sic] not breached the standard of care, plaintiff's breast cancer 'more likely than not' would have been completely cured."); *Zack v. Centro Espanol Hosp., Inc.*, 319 So. 2d 34 (Fla. 2d DCA 1975) (*citing Wale* and holding that a competent expert opinion is direct evidence, sufficient to make a prima facie case on the issue of causation).

[6] Petitioners rely upon *Atkins v. Humes*, 110 So. 2d 663 (Fla. 1959), and *Golden Hills Turf & Country Club, Inc. v. Buchanan*, 273 So. 2d 375 (Fla. 1973). *Atkins* stands for the unremarkable proposition that expert testimony is required in a medical malpractice case where the method of treatment is challenged. *See also Sims v. Helms*, 345 So. 2d 721 (Fla. 1977). *Golden Hills* is distinguishable because in that case, the appellate court "determined that it could render an independent judgment on the facts, even though the evidence adduced below was not challenged." 273 So. 2d at 376.

"[t]he sufficiency of the facts required to form an opinion must normally be decided by the expert himself." (Br. p. 32). From this, they conclude that there was competent evidence to support the verdict "in the face of the *prima facie* case presented by the opinion testimony of the plaintiffs' experts." (Br. p. 34).

Their complaint is that their hired expert's opinion that "it is so because I think it is so" cannot be legally challenged, even though she admittedly had no experience treating this type of patient with tPA, and the medical literature upon which she relied did not address the subject, as the issue has never been studied.

They also complain that "a panel of three judges (whom we must assume have no real medical expertise, not to mention any expertise in the treatment of stroke victims and their prospects for recovery from tPA treatment) have told an internationally recognized stroke expert and the neurologist who would have treated Mr. Cox had he been called in time that they did not know what they were talking about – and told them that as a matter of law!" (Br. p. 33). Petitioners' feigned concern for the neurologist is a *non sequitur* because the neurologist himself testified that he would not have treated Mr. Cox with tPA, and never would have signed the Petitioners' attorney's opinion letter, if he had been given the true facts concerning Mr. Cox's history of subdural hematoma. Thus, Dr. Berges himself testified that the initial opinion was not based on the true facts. Moreover, it was speculative because he had absolutely no experience treating

patients with a history of subdural hematoma with tPA.[7]

This leaves Petitioners with the "internationally recognized stroke expert," who was hired for the purposes of this litigation, and said her opinion was based on clinical experience she did not actually possess and medical literature that did not actually exist. According to Petitioners, only the expert-for-hire can determine whether this opinion has a proper legal basis.

Petitioners have it backwards. It is the judiciary's function to evaluate legal sufficiency, and an expert's use of the right "magic words" cannot divest the court of its jurisdiction. The facts of this case cogently demonstrate why the law does -- and must -- insist that expert opinion be more than pure speculation to sustain a verdict.

Gooding did not hold as Petitioners suggest, that a court must accept a bare opinion where the opinion is not supported by clinical experience or medical data, and is wholly speculative. Rather, in *Gooding*, this Court explained the plaintiff's standard of proof, quoting *Prosser, Law of Torts*, as follows:

> On the issue of the fact of causation, as on other issues essential to his cause of action for negligence, the plaintiff, in general, has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct

[7] Petitioners apparently see no irony in relying on an opinion which was based on data which omitted this critical fact, then insisting that Dr. Berges himself cannot look behind that bare opinion to determine whether it is based on fact, and thus non-speculative.

> of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.
>
> *Prosser, Law of Torts*, § 41 (4th Ed. 1971) (footnotes omitted).

Gooding, 445 So. 2d at 1018. The district court followed this principle and noted that "[a] medical expert's opinion is not exempt from this rule" and, as this Court explained in *Gooding*, "'when the matter remains one of pure speculation or conjecture . . . it becomes the duty of the court to direct a verdict for the defendant.'" *St. Joseph's Hosp.*, 14 So. 3d at 1127.

Posner v. Walker, 930 So. 2d 659 (Fla. 3d DCA 2006), is noteworthy. In that case, the Third District analyzed the substance of the plaintiff's expert's testimony and held that the causation opinions were totally speculative -- even when the expert purported to testify "within reasonable medical probability" and "more likely than not" -- where the evidence demonstrated that what the expert claimed should have been done would not have affected the outcome. *Id.* at 664-68.

Posner demonstrates the obvious -- that an appellate court must review the entire substance of an expert's testimony to determine if it actually supports an opinion that the alleged negligence "more likely than not" caused the injury. *See also Jackson County Hosp. Corp. v. Aldrich*, 835 So. 2d 318, 327-28 (Fla. 2d DCA

2002) (rejecting plaintiffs' contention that alleged esophageal intubation "more likely than not" caused decedent's death where plaintiff's expert's opinions about decedent's ability to survive absent the alleged negligence were demonstrated to be "pure speculation and conjecture").

This rule is not unique to Florida, but is followed around the nation. As the Texas Supreme Court explained, when an appellate court examines whether there is legally sufficient evidence of causation to sustain a jury verdict, it is not bound by even the most impressively credentialed expert's bare opinion, even when the expert uses the right "magic words" of "legalese." Instead, the court must evaluate the facts and data upon which the opinion is based. Otherwise the expert's use of the "magic words" would remove the jurisdiction of the appellate courts to determine the legal sufficiency of the evidence in any case requiring expert testimony:

> Several of the Havners' experts testified that Bendectin can cause limb reduction birth defects. Dr. Palmer testified that, to a reasonable degree of medical certainty, Kelly Havner's birth defect was caused by the Bendectin her mother ingested during pregnancy. We have held, however, that an expert's bare opinion will not suffice. The substance of the testimony must be considered.
>
> In *Schaefer*, . . . [a]n expert testified that based on a reasonable medical probability, the plaintiff's disease resulted from his employment. . . . Nevertheless, this Court looked at the testimony in its entirety, noting that to accept the expert's opinion as some evidence "simply because he used the magic words" would effectively remove the jurisdiction of the appellate courts to determine the legal sufficiency of the evidence in any case requiring expert testimony. *Id.*

at 202-05. After considering the record in *Schafer*, this Court held that because there was no evidence of causation because despite the "magic language" used, the expert testimony was not based on reasonable medical probability but instead relied on possibility, speculation, and surmise. *Id.* at 204-205.

Other courts have likewise recognized that it is not so simply because "an expert says it is so." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 421 (5th Cir. 1987). When the expert "br[ings] to court little more than his credentials and a subjective opinion," this is not evidence that would support a judgment. *Id.* The Fifth Circuit in *Viterbo* affirmed a summary judgment and the exclusion of expert testimony that was unreliable, holding that "[i]f an opinion is fundamentally unsupported, then it offers no expert assistance to the jury." *Id.* at 422; *see also Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir.) ("[A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."), *cert. denied*, 519 U.S. 819, 117 S. Ct. 73, 136 L.Ed.2d 33 (1996); *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1360 (6th Cir. 1992) (holding evidence legally insufficient in Bendectin case when no understandable scientific basis was stated).

It could be argued that looking beyond the testimony to determine the reliability of scientific evidence is incompatible with our no evidence standard of review. If a reviewing court is to consider the evidence in the light most favorable to the verdict, the argument runs, a court should not look beyond the expert's testimony to determine if it is reliable. But such an argument is too simplistic. It reduces the no evidence standard of review to a meaningless exercise of looking to see only what words appear in the transcript of the testimony, not whether there is in fact some evidence. We have rejected such an approach.

Justice Gonzalez, in writing for the Court, gave rather colorful examples of unreliable scientific evidence in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995), when he said that even an expert with a degree should not be able to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system. If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no. In

> concluding that this testimony is scientifically unreliable and therefore no evidence, a court necessarily looks beyond what the expert said. . . . The testimony of an expert is generally *opinion* testimony. Whether it rises to the level of *evidence* is determined under our rules of evidence, including Rule 702, which requires courts to determine if the opinion testimony will assist the jury in deciding a fact issue. While Rule 702 deals with the admissibility of evidence, it offers substantive guidelines in determining if the expert testimony is some evidence of probative value.

Merrell Dow Pharms, Inc. v. Havner, 953 S.W.2d 706, 711-12 (Tex. 1997) (internal citations omitted).

That it is the function of the court, and not the expert, to examine whether an expert's opinion is supported by sufficient facts to render it non-speculative is well settled, as demonstrated by legions of cases around the nation. For example, in *City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009), the Texas Supreme court held a directed verdict should have been granted where the plaintiff's treating oncologist's opinion on causation was speculative because the studies and materials he based the opinion on did not support it:

> Bare, baseless opinions will not support a judgment even if there is no objection to their admission in evidence. In *Coastal Transportation Co. v. Crown Central Petroleum Corp.*, we summarized settled law as follows:
>
> > [A]lthough expert opinion testimony often provides valuable evidence in a case, "it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness." *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999). Opinion testimony that is conclusory or speculative is not relevant evidence,

> because it does not tend to make the existence of a material fact "more probable or less probable." . . . This Court has labeled such testimony as 'incompetent evidence,' and has often held that such conclusory testimony cannot support a judgment. ... Furthermore, this Court has held that such conclusory statements cannot support a judgment even when no objection was made to the statements at trial. *Dallas Ry. & Terminal Co. v. Gossett*, 156 Tex. 252, 294 S.W.2d 377, 380 (1956) ("It is well settled that the naked and unsupported opinion or conclusion of a witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection.")

284 S.W.3d at 816. *See also Turpin v. Merrell Dow Pharms., Inc*, 959 F.2d 1349, 1360 (6th Cir. 1992) ("[T]he expert evidence must show the elements required for a finding of causation." "Dr. Palmer, a medical doctor, is the only witness who testified in his affidavit that Bendectin caused Brandy Turpin's defects." "Upon analysis, we conclude that Dr. Palmer's conclusions go far beyond the known facts that form the premise for the conclusion stated. This conclusion so overstates its predicate that we hold that it cannot legitimately form the basis for a jury verdict."); *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422-23 (5th Cir. 1987) (rejecting physician's causation opinion: "This opinion simply lacks the foundation and reliability necessary to support expert testimony. As an unsupported opinion, it does not serve the purposes for which it is offered, that is, objectively to assist the jury in arriving at its verdict." "Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible."); *Valentine v. Conrad*, 850 N.E.2d 683, 687 (Ohio 2006) (rejecting physician's causation opinion

stated to be "based on reasonable medical probability"; "Experts often base their opinions on data and research from within their field of study. Evid. R. 702(c) requires not only that those underlying resources are scientifically valid, but also that they support the opinion"). *See also Brook Group Ltd v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict"); *Giordano v. Sherwood*, 968 A.2d 494, 489 (D.C. 2009) ("The purpose of expert testimony is to avoid jury findings based on mere conjecture or speculation." "Thus, 'the sufficiency of the foundation for [expert] opinions should be measured with this purpose in mind.'" "An expert witness opinion must be based on fact or adequate data.")[8]

[8] *See also People v. Ramirez*, 155 P.3d 371, 379 (Colo. 2007) ("[A] court may reject expert testimony that is connected to the existing data only by a bare assertion resting on the authority of the expert."); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir. 2008) ("An expert's opinions that are without factual basis and are based on speculation or conjecture are similarly inappropriate material for consideration on a motion for summary judgment"); *In re Air Disaster at Lockerbie Scotland*, 37 F.3d 804, 824 (2d Cir. 1994) ("Expert testimony as to causation may be excluded, particularly where it is speculative and conjectural"); *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007) ("But the existence of sufficient facts ... is in all instances mandatory. '[W]ithout more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible.'"); *Polzo v. County of Essex*, 960 A.2d 375, 383&384 (N.J. 2008) ("'Simply put, the net opinion rule 'requires an expert to give the why and wherefore of his or her opinion rather than a mere conclusion.'" "[A] net opinion alone is insufficient to sustain plaintiff's burden[.]"); *Com. v. Garrett*, 667 S.E.2d

Here, the Second District correctly held the opinion testimony was purely speculative. First, it was not based on any clinical experience, medical literature, data or studies. Neither Dr. Futrell nor Dr. Berges had clinical experience using tPA on patients like Mr. Cox, who had a history of subdural hematoma, and tPA has never been studied on patients with this contraindication. *See Young-Chin v. City of Homestead*, 597 So. 2d 879, 881-82 (Fla. 3d DCA 1992) (holding that the facts underlying plaintiff's expert's opinions were not established where the expert opined that decedent had little chance of surviving his injuries based on the conclusion that a microscopic examination of the brain tissue would have exhibited tearing, but no microscopic examination of the brain was ever performed).

Second, as the district court noted, the most that can be gleaned from Dr. Futrell's testimony is that the medical literature demonstrates that an ideal candidate for tPA has a 31% chance of benefiting from the drug. Mr. Cox was not an ideal candidate, nor could he have been included in the statistic because patients

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739, 748 (Va. 2008) ("an expert opinion must be based on an adequate factual foundation." "An expert must not be permitted to express an opinion that is speculative and unreliable as a matter of law."); *Horton v. W.T. Grant Co.*, 537 F.2d 1215, 1218 (4th Cir. 1976) ("Although all of the facts and observations relied upon by an expert need not be independently admissible, there still must be an adequate basis for his testimony, and it is within the discretion of the district court to decide whether such a basis has been shown"); *Tyger Const. Co. v. Pensacola Const. Co.*, 29 F.3d 137, 142 (4th Cir. 1994) ("An expert's opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record").

with a history of subdural hematoma were excluded from the study. *See Jackson County Hosp.*, 835 So. 2d at 327-28 (holding that plaintiff's expert's testimony presupposed the decedent's survivability, and was therefore speculative; expert testified that decedent had a 90% chance of survival at any major burn institution, but conceded decedent could not be included within that statistic because he had not yet been transported to such an institution). But in any event, this percentage standing alone -- with no facts given to demonstrate that Mr. Cox would have fallen into this slim statistical category -- when the expert was specifically asked to give the basis of her opinion -- is insufficient as a matter of law to satisfy legal causation.

Dr. Berges's initial opinion letter was also insufficient as a matter of law to support the jury's verdict on causation. It was not based on the facts of this case and Dr. Berges withdrew it when he learned of Mr. Cox's prior subdural hematoma.

The Coxes' contention that Dr. Berges "recanted" the opinion after he was sued for giving tPA in a different case, and thus the jury was free to discredit the "recantation," while crediting the withdrawn opinion -- that was based on wrong information -- fails. The fatal flaw in Petitioners' argument is that there was no recantation. Although Dr. Berges agreed on cross-examination that he had been sued on the issue of giving tPA in another case, and that he might have discussed

that lawsuit with the Coxes' attorney (T.1592-93), he never recanted, but expressly agreed with his initial opinion that tPA would have been applicable to Mr. Cox based upon the facts that he was aware of at the time it was given. (T.1561-63; 1567; 1569). Specifically, Dr. Berges testified that he based his initial opinion on the information in Mr. Cox's emergency room medical chart, which Petitioners concede did not contain any reference to a history of subdural hematoma or any other contraindication for the drug. (T.1561-63). No one told him of Mr. Cox's history of subdural hematoma before he signed the Coxes' attorney's letter. (T.1568-69).

When Dr. Berges was asked to consider the actual facts of this case, including the history of subdural hematoma, he responded "[t]hat's a different ballgame . . . it is totally contraindicated to give T.P.A. therapy to a patient who has had an intercerebral [sic] hemorrhage." (T.1567-68). Based on the actual facts, Dr. Berges testified that tPA would not have been given to Mr. Cox. (T.1567-68; 1571; 1604-05). Thus, nothing about Dr. Berges's subsequent opinion was inconsistent with his initial opinion.

In any event, the letter was nothing more than a "net opinion," which was "unsupported by an expert medical explanation of its basis or the reason it was reached." *Sweet v. Sheehan*, 932 So. 2d 365, 369, n.2 (Fla. 2d DCA 2006). As the Second District correctly noted, there were no facts to support the bare conclusion

in the letter that Mr. Cox more likely than not would have recovered if he had been treated with tPA. In fact, when Dr. Berges was asked at his deposition about his initial "more likely than not" opinion, he conceded that, even under ideal circumstances, *i.e.*, where the drug is not contraindicated, there is a high incidence of complications and even death that results from the use of tPA:

> Q. The letter goes on to say in the final line of Mr. Brennan's letter, [] "If so, within a reasonable degree of medical probability, his neurodeficits would have resolved and been reversed." Or that is if Mr. Cox had gotten T.P.A., he'd be all well. Is that your opinion?
>
> A. Well, that's the idea. But we don't know that answer yet because we never gave T.P.A. so I don't have that answer for you but the goal of the T.P.A. is to get a patient back to normal.
>
> Q. Yes, sir, that's the goal.
>
> A. Yes, and there's a high percentage of patient[s] who go on to have a hemorrhage and die.
>
> * * *
>
> Q. . . . As of 2001 when Mr. Cox was treated, isn't it true, sir, that even then with aggressive use of T.P.A. with an appropriate patient that the majority of patients went on anyway to either die or have significant neurological impairment?
>
> A. I would, I would say there is a high incidence of complication due to the use of T.P.A. including progression and death with the use of T.P.A. even in the ideal circumstances. (T.1570-71).

Moreover, Dr. Berges had never treated a patient with tPA who had a prior subdural hematoma. (T.1606). Thus, Dr. Berges's deposition testimony did not demonstrate that Mr. Cox more likely than not would have benefited from tPA. In

fact, Dr. Berges's testimony demonstrated that (1) Mr. Cox never would have received tPA in the first instance based on his medical history, and (2) his initial more likely than not opinion presupposed that Mr. Cox had no contraindications for the drug, and thus was purely speculative.

B. The Evidence Code Did Not Change The Rule That An Expert Opinion Is Speculative When Based On Insufficient Data.

In rejecting Petitioners' experts' mere incantation of the terms "to a high degree of medical probability" and "more likely than not", the Second District applied well-established Florida law that a wholly speculative expert opinion on causation cannot support a jury verdict. *See St. Joseph's Hosp.*, 14 So. 3d at 1127-28 (*citing Harris*, 122 So. 2d at 562 ("[t]he opinion of an expert is not sufficient to eliminate the necessity of proving the foundation facts necessary to support the opinion"), and *Jackson County Hosp.*, 835 So. 2d at 327-28 (reversing denial of directed verdict in medical malpractice case where expert's opinion on causation was based on speculation)).

Petitioners erroneously contend that the enactment of the Evidence Code effectively overruled *Harris*, because section 90.705(1) permits an expert to offer an opinion without prior disclosure of the facts or underlying data. Section 90.705 did not change the rule that an expert opinion is speculative if it is based on insufficient data -- it just made a procedural modification to that rule to allow the expert to give an opinion without prior disclosure of the underlying facts or data.

See Centex-Rooney Const. Co. v. Martin County, 706 So. 2d 20, 28 (Fla. 4th DCA 1997) (noting that section 90.705 does not change the rule that an expert opinion is incompetent if it is based on insufficient data); *Husky Indus. Inc. v. Black*, 434 So. 2d 988, 993 (Fla. 4th DCA 1983) ("The rule precluding expert testimony based on insufficient data, although procedurally modified by Florida's evidence code so as to allow the giving of the opinion without *prior disclosure* of the underlying facts of data, remains substantively the same.").[9] Section 90.705 provides that once the basis for an expert's opinion is inquired into, the expert must establish the underlying facts and data:

> (1) . . . an expert may testify in terms of opinion or inferences and give reasons without prior disclosure of the underlying facts or data. On cross-examination the expert shall be required to specify the facts or data.
> (2) Prior to the witness giving the opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for the witness's opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

§ 90.705(1) & (2), Fla. Stat.

[9] The cases relied upon by Petitioners on this point simply illustrate the procedural modification to the rule. *See, e.g., Jackson v. State*, 648 So. 2d 85 (Fla. 1994); *Florida Dep't of Transp. v. Armadillo Partners, Inc.*, 849 So. 2d 279 (Fla. 2003); *Fried v. State Farm Mut. Auto. Ins. Co.*, 904 So. 2d 566 (Fla. 3d DCA 2005); *Myron v. S. Broward Hosp. District*, 703 So. 2d 527 (Fla. 4th DCA 1997); *City of Hialeah v. Weatherford*, 466 So. 2d 1127 (Fla. 3d DCA 1985).

"Moreover, not only must the underlying facts or data form a sufficient basis for an expert's opinion, but the underlying facts or data upon which the opinion is based must themselves be relevant." *Husky Indus.*, 434 So. 2d at 993. Under section 90.704, the underlying facts or data themselves need not be admissible in evidence if they are of a type that are reasonably relied upon, but they must still exist.

C. Where, As Here, There Is A Glaring, There Was No Improper Inquiry Into The Sufficiency Of The Expert's Facts or Data.

The district court's conclusion that the expert opinion was entirely speculative is completely consistent with *Quinn v. Millard*, 358 So. 2d 1378 (Fla. 3d DCA 1978),[10] which explains that:

> While an expert's opinion cannot be utilized to supply substantial facts necessary to support that opinion, the sufficiency of the facts required to form an opinion must normally be decided by the expert himself . . . Therefore, it is usually up to the opposing side to refute these conclusions, and, unless the omissions are glaring, such deficiencies relate to the weight rather than the admissibility of the expert's testimony.

Id. at 1382.[11] *Daniels v. State*, 4 So. 3d 745 (Fla. 2d DCA 2009), is illustrative.

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[10] *Abrogated on other grounds by Ridley v. Safety Kleen Corp.*, 693 So. 2d 934 (Fla. 1996).

[11] *See also Centex-Rooney Constr. Co. v. Martin County*, 706 So. 2d 20, 28 (Fla. 4th DCA 1997); *Lopez v. State*, 478 So. 2d 1110, 1110-11 (Fla. 3d DCA 1985); *Gershanik v. Dep't of Prof'l Regulation, Bd. of Med. Exam'rs*, 458 So. 2d 302, 305 (Fla. 3d DCA 1984); *H.K. Corp. v. Estate of Miller*, 405 So. 2d 218, 219 (Fla. 3d DCA 1981); *City of Hialeah v. Weatherford*, 466 So. 2d 1127, 1128-29 (Fla. 3d DCA 1985).

There, the district court held that the State's expert witness lacked a sufficient basis to opine that a child's reaction to a particular procedure used to test for the presence of sexually transmitted diseases tended to suggest that sexual abuse had occurred. *Id.* at 746-48. The district court explained that the basis for this opinion was challenged by the defense through a *voir dire* examination, during which the expert explained "(1) children typically reacted in one way during the procedure in question and (2) K.D. did not exhibit a similar reaction. From these facts, the expert, Ms. Shulman, inferred that K.D.'s behavior 'suggested' that she had been sexually abused." *Id.* at 748.

However, the district court noted that the expert's logic was flawed because:

> she did not testify that in her experience, children who did not exhibit a typical reaction during the procedure were likely to have been sexually abused. In fact, Ms. Shulman could not establish the critical missing link because she had never seen a child who reacted to the procedure in the same way that K.D. had reacted. Therefore, Ms. Shulman's unstated assumption that children who did not exhibit a typical reaction to the procedure are likely to have been sexually abused constituted the only foundation for the existence of the facts necessary to the support of her stated opinion.

Id. Here, Dr. Futrell also could not establish the critical missing link because she had never administered tPA to a patient like Mr. Cox who had a prior subdural hematoma to see how the drug worked. And, she admitted its effectiveness had never been studied in such patients.

II. THE DECISION BELOW SHOULD ALSO BE AFFIRMED BASED ON DR. BERGES'S TESTIMONY THAT HE NEVER WOULD HAVE ADMINISTERED TPA TO MR. COX.

The district court did not reach Dr. Castellucci's alternative directed verdict argument below. Dr. Castellucci was also entitled to a directed verdict based upon Dr. Berges's testimony, which established that Mr. Cox never would have received the drug in the first instance.[12]

The Coxes' theory presupposed that if the onset had been learned, Dr. Berges would have opted to administer tPA to Mr. Cox. It was based on speculation that Dr. Berges would have disregarded the clear FDA contraindications, or that Mrs. Cox may not have reported her knowledge of her husband's prior subdural hematoma when asked. But, the evidence did not support this conjecture. Dr. Berges unequivocally testified that he would have asked about Mr. Cox's medical history and would not have administered tPA and Mrs. Cox unequivocally testified she was aware of, and would have reported, the prior subdural hematoma.

At trial, the following portion of Dr. Berges's deposition taken January 8, 2007, was read to the jury:

> Q. Suppose you had actually gone to see Mr. Cox in the emergency room, sir, and learned at that time that Mr. Cox, approximately two and half years earlier, had a moderate size subdural hematoma or intracranial bleed; would that change

[12] Once this Court has accepted conflict jurisdiction over a case, the Court may decide all issues necessary to a full and final resolution. *See Hall v. State*, 752 So. 2d 575, 577-78 & n.2 (Fla. 2000); *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982).

your opinion as to whether T.P.A. therapy was most appropriate for Mr. Cox?

A. That's a different ballgame.

Q. What do you mean it's a different ballgame?

A. Because it is totally contraindicated to give T.P.A. therapy to a patient who has had an [intra]cerebral hemorrhage.

Q. So if, in fact, Mr. Cox had suffered a moderate sized subdural hematoma approximately two and half years prior to your visit to the emergency room, if you had been called immediately, would he have received T.P.A.?

A. If I would have known that he had, if I have a patient who has an intracerebral hemorrhage or a subdural hematoma at the time that he came into the hospital, regardless of how long he has been a stroke in evolution, it's contraindicated to have a T.P.A. therapy.

(T.1567-68).

Dr. Berges testified that if he had been called within the three-hour timeframe to administer tPA, he would have asked Mrs. Cox questions about Mr. Cox's medical history, including whether there was any total or partial contraindication to the use of tPA. (T.1569; 1579-80).

Petitioners speculate that Dr. Berges may not have learned of the subdural hematoma because Mrs. Cox, whose native language was Spanish, had "halting" English, and because they claim she "thought that her husband [] only had a 'bruise' to his brain." (Br. p.14). This argument must be rejected because it was undisputed that Mrs. Cox was aware of her husband's prior subdural hematoma, which she

interchangeably referred to as a "hematoma" or "bruise." "I knew he had a hematoma, which is a bruise"; "I knew it was a hematoma. A bruise is the word we use, a bruise." (T.1426). Mrs. Cox testified that she would have disclosed this condition to the treatment team had she been asked. (T.1426-29; 1444-45; 1447). In addition, Dr. Berges testified that he had no problems communicating with Mrs. Cox, as he is fluent in Spanish and communicated with Mrs. Cox in her native tongue. (T.1587-88).

It was undisputed that tPA's manufacturer and FDA guidelines explicitly provide that a history of subdural hematoma is a contraindication for tPA in a stroke patient due to the drug's inherent risk of causing hemorrhaging. (T.539-40; 559; 890; 899; 988-90; 1127). It was also undisputed that it would be within the standard of care for a physician to follow the FDA guidelines and refuse to administer tPA to a stroke patient with any history of subdural hematoma. (T.989; 1128).

Dr. Berges made it clear that he follows FDA guidelines for tPA therapy and views the guidelines as absolute. (T.1592-93). Dr. Berges "would not even consider" giving tPA to a patient with a history of subdural hematoma. (T.1574). Thus, it cannot be established that Dr. Castellucci's failure to learn the onset of Mr. Cox's stroke symptoms caused him harm. *See Ewing v. Sellinger*, 758 So. 2d 1196 (Fla. 4th DCA 2000), *rev. denied*, 789 So. 2d 345 (Fla. 2001).

In *Ewing*, the plaintiff alleged that Dr. Sellinger, an obstetrician, was negligent in failing to conduct a risk evaluation for the plaintiff prior to labor. *See id.* at 1196-97. The plaintiff theorized that had the obstetrician done so, he would have been required to direct that a physician, rather than nurses, attend her labor and delivery. *See id.* The plaintiff's labor was prolonged, and the nurses eventually sought the assistance of Dr. Anderson, the on-call physician; however, both mother and child suffered permanent injuries. *See id.* The plaintiff claimed that the outcome would have been different if her labor and delivery had been attended by a physician, because a physician would have noted distress on the fetal monitor strips and would have ordered a caesarian section. *See id.*

The Fourth District Court of Appeal affirmed a directed verdict in favor of Dr. Sellinger because Dr. Anderson, the on-call physician at the hospital that night testified that, had he been called and reviewed the fetal monitor strips, he would not have elected to perform a caesarian section, as the labor was progressing adequately. *See id.* at 1198. It concluded that what the plaintiff alleged that Dr. Sellinger had failed to do (continue the plaintiff's supervision under the care of a physician) would not have affected the outcome because the physician who was available to intervene and perform a caesarian section testified he would not have done so. *See id. See also McKeithan v. HCA Health Servs. of Fla., Inc.*, 879 So. 2d 47, 48 (Fla. 4th DCA 2004), *rev. dism.*, 901 So. 2d 873 (Fla. 2005) (affirming

directed verdict for defense in medical malpractice action where "the plaintiffs presented no competent testimony as to causation, that had the [defendant] accessed the chain of command, such conduct would likely have led to a different outcome for the patient" because "plaintiffs failed to present evidence that the failure of [defendant] to access the chain of command would have affected the treatment decisions of the treating physician, who testified at trial").

As in *Ewing*, the Coxes wholly failed to prove that what Dr. Castellucci failed to do affected Mr. Cox's outcome. Because Dr. Berges specifically testified that he would have questioned Mrs. Cox about any total or partial contraindications, including any history of subdural hematoma, and that he would have followed FDA guidelines and refused to administer tPA to Mr. Cox, it is clear that Dr. Castellucci's alleged failures to further investigate Mr. Cox's onset did not "more likely than not" cause Mr. Cox's injuries.

Furthermore, it was undisputed at trial, and Petitioners' experts testified, that it would have been within the standard of care for a neurologist to follow FDA guidelines for tPA therapy and refuse to administer the drug to Mr. Cox based upon his prior history of subdural hematoma. In a concurring opinion to *McKeithan*, Judge Klein, who participated on the *Ewing* panel, cast doubt on whether the *Ewing* opinion was correct based upon expert testimony in a companion case, which arose from the same trial but was not consolidated with

Ewing for purposes of appeal. *See McKeithan*, 879 So. 2d at 49 (Klein, J., concurring).

In the companion case, *Anderson v. Ewing*, 768 So. 2d 1161 (Fla. 4th DCA 2000), *rev. dismissed*, 901 So. 2d 873 (Fla. 2005), there was evidence that if Dr. Anderson had examined the plaintiff, it would have been below the standard of care for him to fail to perform a caesarean section. *Id.* at 1163. Thus, the companion case to *Ewing* involved evidence that what the Fourth District had relied upon in concluding that the plaintiff had not established causation (Dr. Anderson's testimony that he would not have elected to perform a caesarian section even if he had examined the plaintiff), would in fact be a breach of the standard of care.

That same concern is not present here because it was undisputed at trial that it would have been within the standard of care for Dr. Berges to follow FDA guidelines and refuse to administer tPA to Mr. Cox. (T.989; 1128).

In their answer brief below, Petitioners argued that *Ewing* was rejected by *Munoz v. South Miami Hospital, Inc.*, 764 So. 2d 854 (Fla. 3d DCA 2000), and *Goolsby v. Qazi*, 847 So. 2d 1001 (Fla. 5th DCA 2003). However, neither decision rejects *Ewing*, and both decisions are distinguishable from *Ewing* and this case.

First, *Munoz* does not reject the *Ewing* decision in any manner. To the contrary, *Munoz* distinguishes *Ewing* based upon the facts of that case, where there

was conflicting evidence as to what actions the subsequent physician (who was also a party to the lawsuit) would have taken had the first physician acted appropriately. *See Munoz*, 764 So. 2d at 856 ("[A]s the concurring opinion correctly points out, Dr. Ugalde's statements about what he would or would not have done in response to warnings which should have been but were never in fact given are themselves in internal conflict."). *Munoz* is also distinguishable because there was evidence in that case to establish that the subsequent physician's actions breached the standard of care. *See id*. at 856 & 858, n.3.

Similar to *Munoz*, in *Goolsby*, there was no evidence one way or the other to establish what steps the subsequent physician would have taken had the first physician not breached the standard of care, and thus, it was pure speculation on the defendant's part to argue that his breach in the standard of care did not affect the outcome. *See Goolsby*, 847 So. 2d at 1003-04. Additionally, the *Goolsby* Court stated that it disagreed with *Ewing* to the extent that decision "means that the negligent failure to diagnose a condition cannot be the cause of damages if a subsequent treater testifies that he would have shrugged off the correct diagnosis." *Goolsby*, 847 So. 2d at 1003. Thus, unlike the case at bar, in both *Munoz* and *Goolsby*: (1) the evidence was disputed as to what action the subsequent physician would have taken; and (2) the evidence established, or there at least remained a factual issue as to whether the subsequent physician's hypothetical conduct would

have been a breach in the standard of care.

Quite simply, *Munoz* and *Goolsby* do not apply here, where the undisputed testimony of Dr. Berges, a non-party physician, established that he would not have done what Petitioners claim he may have (given Mr. Cox tPA), and the undisputed evidence further established that Dr. Berges's decision not to give Mr. Cox tPA would be fully supported by the standard of care.

III. ALTERNATIVELY, DR. CASTELLUCCI IS ENTITLED TO A NEW TRIAL.

A. The Trial Court Erred In Prohibiting Dr. Castellucci's Counsel From Eliciting Testimony Regarding The Negligence Of TFR.

Dr. Castellucci was improperly precluded from presenting evidence regarding the negligence of TFR, a non-party. Dr. Castellucci sought to elicit testimony during the cross-examination of Petitioners' expert, Dr. Miley, consistent with his deposition, where he opined that the paramedic, Lt. Oliver, was negligent if he knew information about the onset of Mr. Cox's stroke, and failed to communicate that information to Dr. Castellucci or the nurses. (T.997-1001; R.3460-62).

The evidence established that paramedics are trained to canvas the scene of a medical incident for pertinent information and for the time of onset in stroke patients. (T.647-48; 1717-18). Lt. Oliver testified that he was told by Mr. de Villa that Mr. Cox had been acting normal five or ten minutes before he was discovered

in a collapsed state. (T.639-40; 671-72). Notwithstanding his acknowledgement that this was "vitally important" information regarding the onset of Mr. Cox's stroke symptoms (T.649), Lt. Oliver never told anyone at the hospital this information (T.672), and failed to include this information in the run report. (T.638-39; 649-50).

It was undisputed at trial that it was reasonable for Dr. Castellucci to believe that TFR had gathered the appropriate information from persons present at the scene, and that it was reasonable for Dr. Castellucci to rely upon the information given to the nurses by TFR that onset was unknown. (T.865-67; 995; 1717-21; 1730-31).

Notwithstanding this evidence, the trial court granted Petitioners' anticipatory *ore tenus* motion in limine at trial relating to the negligence of TFR based upon the argument that Dr. Castellucci had not raised a *Fabre* defense. (T.999-1001). However, the concepts of *Fabre* and proximate causation are entirely distinct. "*Fabre* defendants are non-parties which are alleged by a party defendant to be wholly or partially negligent and should be placed on the verdict form so there can be an apportionment of fault against them for non-economic damages . . . ." *Phillips v. Guarneri*, 785 So. 2d 705, 706 & n.1 (Fla. 4th DCA 2001). On the other hand, the term "empty chair defendant" refers to the argument that "some non-party is the sole legal cause of the harm alleged but, unlike a *Fabre*

defendant, this non-party is not placed on the verdict form and there is no apportionment of fault." *Id.* at 707 & n.4.

Regardless of whether a jury is entitled to apportion damages among nonparties, a jury is always entitled to consider whether the sole proximate cause of an injury was due to the negligence of a non-party. *See Clement v. Rousselle Corp.*, 372 So. 2d 1156, 1159 (Fla. 1st DCA 1979), *quoting Santiago v. Package Mach. Co.*, 260 N.E.2d 89, 92, 93 (Ill. Ct. App. 1970), ("defendant could avoid all liability by proving that the Sole proximate cause of the injury was the conduct of another."); *Black v. Montgomery Elevator Co.*, 581 So. 2d 624, 625 (Fla. 5th DCA 1991) (it is permissible for a defendant "to point to an empty chair" and "argue that a non-party is responsible for the plaintiff's injuries."). *See also Loureiro v. Pools by Greg, Inc.*, 698 So. 2d 1262, 1264 (Fla. 4th DCA 1997) ("Even had the issue of non-party liability been omitted from the instructions and the verdict form, [the defendant] could still have contended at trial that it was not negligent and that the negligence of others was the sole legal cause of injury.").[13]

[13] Petitioners argued below, with no authoritative support, that the Legislature's 1999 amendment to the comparative fault statute, section 768.81, Florida Statutes, effectively eliminated a defendant's right to defend a tort action on the basis that an unpled non-party was the proximate cause of a plaintiff's injuries. This is incorrect. The 1999 amendment to section 768.81 partially abrogated joint and several liability for economic damages on a sliding scale basis and merely codified the law of Florida as it already existed in accordance with this Court's 1996 decision in *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262 (Fla. 1996), which established the pleading requirement to include a non-party on the verdict

The evidence that TFR was negligent constituted a permissible "empty chair" defense, and the fact that TFR was not a *Fabre* defendant did not preclude Dr. Castellucci from introducing evidence and arguing that TFR was the sole proximate cause of Mr. Cox's injury.

B. Failure To Instruct The Jury That A Directed Verdict Was Entered On Petitioners' Claims Of Professional Negligence.

At trial, Petitioners asserted liability against Dr. Castellucci based upon theories of ordinary professional negligence and reckless disregard for the life or health of Mr. Cox pursuant to the Good Samaritan Act, Section 768.13, Florida Statutes. At the beginning of *voir dire*, the trial court read the prospective jurors a statement about the case, which instructed them this was a negligence case. (T.72). During opening statements, the Coxes' attorney told the jury that this was a negligence case, and counsel for Dr. Castellucci similarly focused on the negligence cause of action. (T.376; 409-10; 434-35).

At the end of opening statements, the trial court instructed the jury on the

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form to apportion fault. Nothing in the post-1999 statute indicates that the Legislature intended to abolish the "empty chair" defense or to alter Florida law on proximate cause. Petitioners rightfully conceded below that *Phillips*, 785 So. 2d at 705, which recognizes the distinction between "empty chair" defendants and *Fabre* defendants, was decided subsequent to the 1999 statute, although they incorrectly characterized the Fourth District's discussion as "definitional dicta." (AB, p. 47). Moreover, at least two other district courts have recognized the continued applicability of the empty chair defense subsequent to the 1999 amendment. *See Vucinich v. Ross*, 893 So. 2d 690, 692-94 (Fla. 5th DCA 2005); *Pearson v. Royal Caribbean Cruises, Ltd.*, 751 So. 2d 125, 126 (Fla. 3d DCA 2000).

standard for professional negligence. A physician's negligence was defined as the failure to use "that level of care, skill and treatment which, in the light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful professionals." (T.450). This was followed by an instruction on when negligence is a legal cause of loss, injury or damage. (T.450). The trial court told the jury that the preliminary instructions were given because the jury could be taking notes. (T.451-52). Throughout the trial up through the close of evidence the jury heard testimony on the issue of professional negligence as well as testimony on the issue of reckless disregard. (T.831-32; 916; 976-81; 1706-08; 1731-33).

At the close of evidence, Petitioners agreed that the higher level of culpability pursuant to the Good Samaritan Act was applicable to the care and treatment rendered by Dr. Castellucci. (T.1959-60). Pursuant to a stipulation of the parties, the trial court entered a directed verdict in favor of Dr. Castellucci as to the professional negligence claims. (T.1960).

Dr. Castellucci requested that the trial court instruct the jury that Petitioners could not proceed on a theory of professional negligence against Dr. Castellucci, and that the jury could only consider whether Dr. Castellucci's conduct was in reckless disregard for the life and health of Mr. Cox. (T.1907-13; 1975-76). Dr. Castellucci requested the following jury instruction to precede Standard Jury

Instruction 9.1(e): "The Court has determined and now instructs you, as a matter of law, that Plaintiffs cannot recover on a negligence claim against Eric Castellucci, M.D." (R.3446). The request was refused. (T.1912-13; 1976). Thus, the jury was permitted to deliberate the case without being instructed that any evidence demonstrating ordinary professional negligence on the part of Dr. Castellucci was insufficient to establish liability.

This refusal misled the jury and prejudiced Dr. Castellucci's right to a fair trial. *See ITT-Nesbitt, Inc. v. Valle's Steak House of Fort Lauderdale*, 395 So. 2d 217, 220-21 (Fla. 4th DCA 1981) (reversible error for trial court to refuse to instruct jury that a directed verdict was granted in favor of defendant on certain claims).

Simply permitting defense counsel to argue that a directed verdict had been entered during closing arguments was insufficient to cure the prejudice sustained. As the trial court correctly instructed the jury at the beginning of trial, the court was solely responsible for instructing the jury on the law, and arguments of counsel "are not to be considered by you as either evidence in the case or as your instructions on the law." (T.369-71; 447). Thus, the jury was not permitted to rely upon Dr. Castellucci's closing argument to learn which issues in the case it was entitled to consider.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed. Alternatively, this Court should discharge jurisdiction as improvidently granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. mail this **3rd** day of **March, 2010** to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing answer brief complies with the font requirements of Rule 9.210(a)(2). It is typed in Times New Roman 14-point font.

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