IN 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
ASSOCIATION OF FLORIDA, LLC,

Respondents.
_____/

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

# PETITIONERS' BRIEF ON JURISDICTION

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## AUTHORITIES

## I. STATEMENT OF THE CASE AND FACTS

At the age of 69, William Cox suffered a stroke, caused by a blood clot.[1/] He was rushed to St. Joseph's Hospital by emergency medical personnel and came under the care of Dr. Eric Castellucci. Although he arrived in the emergency room within minutes of suffering the stroke -- well within the three-hour window for the administration of a tissue plasminogen activator drug (tPA), which dissolves blood clots -- neither the hospital nor Dr. Castellucci bothered to determine the time of onset, and he was never given the drug as a result. The consequences were devastating. The jury found that both the hospital and Dr. Castellucci had acted in "reckless disregard" of Mr. Cox's health, and that their disregard caused Mr. Cox considerable damage.

Both defendants appealed to the District Court of Appeal, Second District. They did not challenge, and the district court did not disturb, the jury's finding of "reckless disregard." Based entirely upon a single decade-old study of the efficacy of tPA therapy -- a study in which the rate of success was 31% -- the defendants challenged the sufficiency of the evidence to support the jury's finding of fact that the defendants' reckless disregard of Mr. Cox's health caused him damage. And based exclusively upon that decade-old study, the district court agreed with the defendants, disregarded expert medical opinion testimony proving a *prima facie* case of causation, reversed Mr. Cox's judgment, and ordered entry of a judgment in the defendants' favor.

The district court acknowledged that Mr. Cox presented the opinion testimony of two highly qualified experts -- an internationally recognized expert in the treatment of

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[1/] The following is taken from the face of the opinion below (A. 1-8).

stroke patients, and the on-call neurologist who would have administered tPA to Mr. Cox if he had been called on time. And the district court acknowledged that both experts opined that, "to a high degree of medical probability" and "more likely than not," had Mr. Cox been given tPA treatment, he would have had a very good recovery. The district court also acknowledged several of its own decisions holding that an expert opinion satisfying the "more likely than not" standard was sufficient to defeat a motion for directed verdict on the issue of causation, but declined to follow them because "the plaintiff's expert testimony on causation [in those cases] was not constrained by statistical evidence revealing success rates of less than fifty percent, as in this case" (A. 8). In addition, although the district court possessed no medical expertise on the subject itself, and actually set out in its opinion a number of the facts upon which one of the experts based her opinion, it declared the experts' causation opinions "speculative" because unsupported by sufficient "facts" upon which the opinions were based.

As we will demonstrate in the argument that follows, these conclusions are in express and direct conflict with decisions of this Court and other district courts of appeal on at least two, and more likely four, questions of law.

## II. SUMMARY OF THE ARGUMENT

The district court's decision is in express and direct conflict with decisions of this Court and other district courts of appeal holding: (1) that an expert opinion that a medical defendant's conduct, "to a high degree of medical probability" or "more likely than not," caused the patient damage is direct evidence on the issue, sufficient to defeat

a motion for directed verdict; and (2) that an expert may give a competent opinion without disclosing the underlying facts supporting the opinion. The decision also conflicts with at least two other settled principles governing the sufficiency of the evidence in medical malpractice cases.

## III. ARGUMENT

### A. The district court's decision conflicts with decisions holding that an expert opinion that a medical defendant's conduct, "to a high degree of medical probability" or "more likely than not," caused a patient damage is direct evidence on the issue, sufficient to defeat a motion for directed verdict.

The leading decision is, of course, *Wale v. Barnes*, 278 So.2d 601, 605 (Fla. 1973), in which this Court squarely held that an expert opinion on the issue of medical causation is *direct* evidence on the issue, sufficient to defeat a motion for directed verdict. And this decision has been the polestar guiding the lower courts ever since. There are numerous decisions that follow *Wale v. Barnes* on this point -- all of which squarely conflict with the decision sought to be reviewed here.[1/] Indeed, we have been unable to find a single decision after *Wale v. Barnes* in which a Florida appellate court has ever held that a verdict can be directed in favor of a medical defendant in the face of expert medical testimony presenting a *prima facie* case on the issue of causation.

The district court acknowledged this line of decisions in its opinion, but then

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[2/] The following are representative: *Harris v. Gandy*, 34 Fla. L. Weekly D264 (Fla. 1st DCA Jan. 30, 2009); *Olsten Health Services, Inc. v. Cody*, 979 So.2d 1221 (Fla. 3d DCA 2008); *Hancock v. Schorr*, 941 So.2d 409 (Fla. 4th DCA 2006); *McQueen v. Jersani*, 909 So.2d 491 (Fla. 5th DCA 2005); *Singleton v. West Volusia Hospital Authority*, 442 So.2d 235 (Fla. 5th DCA 1983).

purported to "distinguish" them on the ground that "the plaintiff's expert testimony on causation [in those cases] was not constrained by statistical evidence revealing success rates of less than fifty percent, as in this case." Most respectfully, this attempt to "distinguish" *Wale v. Barnes* and its progeny on the point confuses the general with the specific and rests upon a logical fallacy.

The study involved stroke patients with various degrees of impairment, some much more serious than the symptoms with which Mr. Cox presented to the emergency room within minutes after his stroke. The issue presented to the jury was whether *Mr. Cox* would have benefitted from tPA treatment, not how many patients in a random sample of stroke victims would benefit from tPA treatment. And even then, the study demonstrated that at least 31 out of every 100 stroke patients *will* benefit from tPA treatment (which, of course, is why the treatment is available to the right patients). The task faced by the medical experts in this case was to determine, based on all the evidence available to the defendants at the time, whether *Mr. Cox* would have been one of the 31 patients who would benefit from the therapy or one of the 69 who would not.

Both experts testified, in effect, that Mr. Cox, "to a high degree of medical probability" and "more likely than not," fell into the category of those 31% who would benefit from the therapy, not into the category that would not. The decade-old "statistics" certainly presented a conflict in the evidence, since they would have supported a jury finding that Mr. Cox would not "more likely than not" have benefitted from the therapy, but the "statistics" were not *dispositive* of the issue. At most, they simply presented a conflict in the evidence that it was the jury's function to resolve.

And because the plaintiffs' experts provided direct evidence on the issue of whether the defendants' reckless disregard caused *Mr. Cox* damage, that evidence was sufficient to prevent a directed verdict in the defendants' favor.

The point can be made in perhaps a different way, closer to home. Law School Aptitude Test (LSAT) scores run the gamut from poor to outstanding -- and statistically at least, the chances of scoring in the top quarter are only 25%, and the chances of scoring in the bottom three-quarters are 75%. By the district court's logic in this case, a law school admissions committee should reject all applicants because the chance that any one of them scored in the top quartile was only one in four. That would not happen, of course, because each applicant has an *individual* score, so each applicant can be placed in the quartile belonging to that test score, and those who scored in the top quartile can be admitted.

But that is precisely the point that the district court failed to appreciate -- that *Mr. Cox's* chances of benefitting from tPA therapy have to be tied to his *individual* chances -- not to the chances of a random sampling of others whose chances may have varied from zero to 100. And that is what the plaintiffs' experts did. Most respectfully, *Wale v. Barnes* and its numerous progeny cannot fairly be "distinguished" in the manner in which the district court finessed the plaintiffs' experts' opinion testimony in this case.

*Gooding v. University Hospital Building, Inc.*, 445 So.2d 1015 (Fla. 1984), did not require a different conclusion, and it was misapplied by the district court. In *Gooding*, unlike the plaintiffs' experts in this case, the plaintiff's expert did *not* testify

that the chances of the decedent's survival were "more likely than not": "Dr. Bailey, however, failed to testify that immediate diagnosis and surgery more likely than not would have enabled Mr. Gooding to survive." 445 So.2d at 1017. *Absent* such testimony, this Court concluded that there was no cause of action for a mere "loss of a chance" to survive and that the defendant was therefore entitled to a directed verdict.

In the instant case, if the plaintiffs' experts had testified that *Mr. Cox* had only a 31% chance of benefitting from tPA treatment, then the district court's reversal of the plaintiffs' judgment would be correct. But that is not what the plaintiffs' experts said. They offered their expert medical opinion that, "to a high degree of medical probability" and "more likely than not," Mr. Cox would have benefitted from tPA treatment. And that is precisely what the *Gooding* decision requires to present a *prima facie* case on the issue of causation: "The plaintiff must show that the injury more likely than not resulted from the defendant's negligence in order to establish a jury question on proximate cause." 445 So.2d at 1020. The plaintiffs' experts therefore provided the evidence that was missing in *Gooding*, and that evidence should have been sufficient to withstand the defendants' motion for directed verdict. Most respectfully, the conflict with *Wale v. Barnes* and its progeny is undeniable.

### B. The district court's decision conflicts with decisions holding that an expert can give a competent opinion without disclosing the underlying facts supporting the opinion.

Apparently uncomfortable with its conclusion that the plaintiffs' experts' opinions could be disregarded entirely because "constrained" by a decade-old study of a random sample of stroke patients, the district court went on to declare the experts' opinions "speculative" because unsupported by sufficient "facts." As authority for this conclusion, it relied upon a decision of this Court decided half a century ago: *Harris v. Josephs of Greater Miami, Inc.*, 122 So.2d 561 (Fla. 1960). The problem with this reliance is that *Harris* is no longer the law. Florida's Evidence Code, enacted more than a quarter century ago, now permits an expert to give a competent opinion without disclosing the underlying "facts": "Unless otherwise required by the court, an expert may testify in terms of opinion or inferences and give reasons without prior disclosure of the underlying facts or data." Section 90.705(1), Fla. Stat.

And if there were any doubt about the continuing validity of *Harris*, this Court put that doubt to rest 15 years ago:

> Although the proponent of an expert opinion may choose to disclose the basis for the opinion, such disclosure is not required prior to eliciting the opinion. If the cross-examiner inquires about the basis of the opinion, the expert must disclose the facts or data upon which the opinion is based and the court in its discretion may require such disclosure. §90.705(1), Fla. Stat. (1991). However, *there is no requirement that the facts or data underlying an expert opinion be admitted into evidence in order to establish the basis of the opinion*. *See* §§90.704, .705, Fla. Stat. (1991).

*Jackson v. State*, 648 So.2d 85, 91 (Fla. 1994) (emphasis supplied). *Accord Florida Department of Transportation v. Armadillo Partners, Inc.*, 849 So.2d 279, 287-88 (Fla. 2003).

Other district courts have announced the same rule: *Fried v. State Farm Mutual Automobile Ins. Co.*, 904 So.2d 566, 569 (Fla. 3d DCA 2005) ("Under sections 90.704 and 90.705, Florida Statutes, an expert may state his or her opinion without setting forth the basis for that opinion"); *Myron v. South Broward Hospital District*, 703 So.2d 527, 530 (Fla. 4th DCA 1997) ("Under section 90.705, Florida Statutes (1993), an expert may testify in the form of an opinion without disclosing the underlying facts on which the opinion is based"); *City of Hialeah v. Weatherford*, 466 So.2d 1127, 1129 (Fla. 3d DCA 1985) ("Thus, the statute [§90.705] eliminates the requirement formerly placed on the party calling an expert witness to present underlying data and factual support for expert testimony"). Most respectfully, the district court's conclusion that it could entirely disregard the plaintiffs' experts' opinions because they were unsupported by sufficient "facts" undeniably conflicts with each of these decisions applying §90.705(1), Fla. Stat.

### C. The district court's decision conflicts with other settled principles of the law governing the sufficiency of the evidence in medical malpractice cases.

The district court's decision also conflicts with other settled principles of the law governing the sufficiency of the evidence in medical malpractice cases. For example, in *Atkins v. Humes*, 110 So.2d 663, 666 (Fla. 1959), this Court established that, except

in rare cases, neither a court nor a jury of lay persons can be permitted to decide what is or is not a proper diagnosis or an acceptable method of treatment of a human ailment, or whether a medical practitioner's treatment or lack thereof was a cause of damage to a patient -- that expert medical testimony is required to establish facts of that nature. *Accord Sims v. Helms*, 345 So.2d 721 (Fla. 1977).

The following proposition is also settled: " . . . The sufficiency of the facts required to form an opinion must normally be decided by the expert himself because neither trial judges nor appellate judges are usually in a position to determine precisely which facts are dispensable and which are essential to the validity of the opinion reached." *Quinn v. Millard*, 358 So.2d 1378, 1382 (Fla. 3d DCA 1978). *Accord Centex-Rooney Construction Co., Inc. v. Martin County*, 706 So.2d 20, 27-28 (Fla. 4th DCA 1997); *Lopez v. State*, 478 So.2d 1110, 1110-11 (Fla. 3d DCA 1985); *Gershanik v. Department of Professional Regulation*, 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).

Yet, that is what the district court did. Although the issue of causation in the case was clearly beyond the capability of lay jurors and judges to decide, and expert medical opinion testimony on the issue was therefore plainly required, 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!

Most respectfully, where 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, it was impermissible for the district court to reject the experts' opinions and decide those facts itself. *See Golden Hills Turf & Country Club, Inc. v. Buchanan*, 273 So.2d 375, 376 (Fla. 1973) (disapproving a district court decision rejecting unchallenged expert opinion testimony as unpractical and without foundation; reiterating that a judgment should be affirmed if supported by competent evidence, notwithstanding that an appellate court might have reached a different conclusion had it been the trier of fact).

## IV. CONCLUSION

In short, there was expert opinion testimony supporting the plaintiffs' verdict on the issue of causation sufficient to withstand the defendants' motion for directed verdict. The district court could not legitimately declare the expert testimony "constrained" and "speculative" simply because only 31 of 100 randomly selected stroke patients benefitted from tPA treatment in a decade-old study. And unless this Court is prepared to accept that decade-old "statistics" of a random sample can trump the competent testimony of highly qualified medical experts, specialists in their field, review should be granted -- and the district court's decision should be quashed.

Respectfully submitted,

By:_____
JOEL D. EATON

**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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JOEL D. EATON

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of September, 2009, to: Edward M. Copeland IV, Esq., Rissman, Weisberg, et al., One North Dale Mabry Highway, 11th Floor, Tampa, FL 33609, *Counsel for EMAF and Castellucci*; Roland J. Lamb, Esquire, Morgan, Lamb, Goldman & Valles, P.A., 500 North Westshore Blvd., Suite 820, Tampa, FL 33609, *Counsel for St. Joseph's Hospital*; Irene Porter, Esq., Hicks & Kneale, P.A., 799 Brickell Plaza, Ninth Floor, Miami, FL 33131; and to Kimberly A. Ashby, Esq., Akerman Senterfitt, 420 South Orange Avenue, Suite 1200 (32801), Post Office Box 231, Orlando, FL 32802, *Counsel for St. Joseph's Hospital*.

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