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

RESPONDENT, ST. JOSEPH'S HOSPITAL'S ANSWER BRIEF ON JURISDICTION

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STATEMENT OF CASE AND FACTS

Petitioner's jurisdictional brief contains statements which are not found in the 2d District's opinion ("Opinion") and which are not borne out by the record.

Mr. Cox was seen by a "visitor" at a friend's car dealership on the morning of his stroke. (A.3). Upon this first encounter Mr. Cox "appeared normal when he first spoke with the visitor, but was incapacitated and unable to speak and walk when the visitor returned 15 to 20 minutes later. (A.3). This person was able to narrow the onset of Mr. Cox's stroke to a 15 to 20 minute period and this information apparently was related to the responding EMT's. (A.3).

Mr. Cox's medical records indicated he has suffered a subdural hematoma approximately 2½ years before his stroke. (A.3). Doctors are able to treat ischemic strokes with a tissue plasminogen activator drug, referred to as tPA, which dissolves blood clots. (A.2-3). The drug must be administered no more than 3 hours after the onset of the stroke if administered intravenously and no more than 6 hours after onset if administered intra-arterially. (A.3). Given the increased risk for hemorrhaging associated with tPA, the drug is contra-indicated for any patient who has previously suffered a subdural hematoma. (A.3).

The Petitioners' evidence on causation came from two sources: trial testimony by Dr. Nancy Futrell, and an opinion letter later recanted from Dr. Eddy Berges, a neurologist who treated Mr. Cox. (A.4).

Dr. Futrell testified that she has given tPA 40 to 50 times and that, on three occasions, she has given to patients with contra-indications. (A.4). Although she testified about the successful outcomes for those 3 patients, she said nothing about the results in her other cases. (A.4). On cross-examination, Dr. Futrell admitted that she had never to her knowledge given tPA to a patient with a prior intra-cranial hemorrhage. (A.4). Dr. Futrell testified that she believed "to a high degree of medical probability" that "Mr. Cox, had he received tPA would have had a very good recovery and have minimal or no neurologic deficit". (A.5). Her opinion and conclusion was based on "a combination of what we can find in the medical literature in clinical experience that [she has] from having given the drug and seeing which patient it works on and, of course, we have the additional resource of our colleagues that we know what's happened to their cases." (A.5). The Opinion notes "She did not elaborate further." (A.5).

On cross-examination, the medical literature on tPA was discussed and Dr. Futrell was questioned about the NINDS Study.[1] (A.5). Dr. Futrell concurred with the NINDS Study that the rate of successful outcomes increases from 20 percent to 31 percent when tPA is given. (A.5). There was no evidence of Dr. Futrell's own experience with patients to suggest that Mr. Cox's chances of benefiting from tPA

[1] The NINDS Study refers to the National Institute of Neurological Disorders and Stroke Recombinant Tissue Plasminogen Activator Stroke Study Group, the conclusions of which were reported in the December 14, 1995, issue of the New England Journal of Medicine. (A.5, n.1).

therapy exceeded those of other patients. (A.7). Dr. Futrell never testified that she witnessed or achieved a greater success rate with tPA than documented in the NINDS Study to be 31 percent. (A.7). She never compared any aspects of Mr. Cox's physical condition to those of patients who had successful interventions in order to suggest that he, as opposed to 69 percent of all patients, was predisposed to a positive outcome from tPA therapy. (A.7).

The other evidence of causation was an initial opinion letter from Dr. Berges which asserted that Mr. Cox had been a suitable candidate for tPA treatment and he likely would have recovered from his stroke if the treatment had been given. (A.6). However, Dr. Berges withdrew his opinion when he learned of the medical record of Mr. Cox's subdural hematoma. (A.6). The district court held that "Dr. Berges's initial opinion letter also suffered from the same fatal flaw, in that he offered nothing to support his bare assertion that Mr. Cox more likely than not would have recovered if he had been treated with tPA." (A.7). Dr. Berges later rejected any suggestion that he would have administered tPA to someone with Mr. Cox's medical history. (A.7).

SUMMARY OF ARGUMENT

There is no express and direct conflict because none of the decisions cited by Petitioners, or the Florida Evidence Code, conflict with the opinion of the 2d District. Instead, the 2d District relied upon well-established law that it is the duty

of the trial court to direct a verdict if the expert opinion upon which causation is predicated is purely speculative and not grounded in fact and opinion.

ARGUMENT

A. NO CONFLICT EXISTS WITH *WALE V. BARNES* OR *GOODING V UNIVERSITY HOSPITAL BUILDING, INC.*, BECAUSE ONE OF PETITIONER'S EXPERTS RETRACTED HIS OPINION AND THE OTHER EXPERT'S OPINION LACKED ANY FOUNDATION

Petitioner principally relies upon two opinions for the argument that there exists a conflict sufficient to establish the jurisdiction of the Court: *Wale v. Barnes*, 278 So. 2d 601, 605 (Fla. 1973) and *Gooding v. University Hospital Building, Inc.*, 445 So. 2d 1015 (Fla. 1984). However, Petitioner's conclusion that any medical opinion will stand to prevent entry of a directed verdict is not consistent with these prior holdings of the Court. An examination of the competency of the expert opinion, as with any evidence, is always required for such an opinion to establish causation. The *Wale* and *Gooding* cases are clearly distinguishable because the expert opinions in the present case were not competent, in addition to one of them being withdrawn.

Medical opinions may only present a prima facie case on the issue of causation if those opinions are valid and withstand the scrutiny of clinical empirical testing and/or of the expert's actual experience. See *Gooding at* 1018. Otherwise, a witness testifying as an expert could espouse an opinion that was

supported only by the witnesses own supposition and speculation. Florida's Evidence Code and opinions of this Court are consistent on this point. *Id.*

An examination of *Wale v. Barnes* reveals the Petitioner's flawed logic that if an expert opines that an outcome is "more likely than not" to occur that no further inquiry needs be made, or is appropriate. In *Wale*, the expert testified that the doctor was negligent based upon the assumption that the forceps had slipped when applied to the baby being born. *Id. at 603.* There was no evidence that the forceps should never be used, or should always be used; instead, the inquiry was whether a proper method had been carried out improperly.

In contrast, Petitioners' expert relied upon her own supposition that the tPA therapy would have "more likely than not" had "a very good recovery." As the 2d District noted, this expert had not experienced such a result in her own clinical practice on a patient who had a prior subdural hematoma, not even once. She eschewed the contra-indications for this therapy in instances other than subdural hematomas and came to the unsubstantiated conclusion that favorable results could be reached across the board. Not only did the empirical studies not support her assumption but the conclusions were that only 31% would have a favorable result. In order to survive a motion for directed verdict, Petitioners needed to show that there would be more than a 50% chance of that favorable outcome. *Gooding, at 1017-1018.* Dr. Futrell attempted to satisfy this requirement by concluding that

Mr. Cox would have fit into the 31% category, making it a 100% chance that he would have a favorable outcome. Yet, she had no research or clinical experience to support that statement which rendered it only a guess.

Petitioners contend that the clinical statistics which firmly establish that application of the tPA therapy would have a favorable result in only 31% of cases merely created a factual question for the jury to determine. This overlooks the fact that Dr. Futrell's opinion was incompetent to establish "direct evidence" since it lacked foundation in either her personal experience or other recognized medical laboratory testing.

Gooding v. University Hospital Building, Inc., 445 So. 2d 1015 (Fla. 1984), is not in conflict either. Petitioners do not contend that it is a conflict, only that it was "misapplied" by the 2d District. In *Gooding*, the plaintiff's expert did not opine that immediate diagnosis and surgery would more likely than not have enabled Mr. Gooding to survive; it would have only affected the chance to survive. This Court quoted *Prosser, Law of Torts* § 41 (4th Ed. 1971) when it held in *Gooding*:

> 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 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.*

Gooding, at 1018 (citing *Prosser, §41*). (emphasis added).

Petitioners do not explain how the 2d District misapplied *Gooding*. The Opinion expressly cites the record which showed: a) Dr. Futrell had never given tPA to a patient with a prior intracranial hemorrhage; b) did not give the results or outcomes for the pool of forty to fifty patients to whom she had administered tPA; and c) could not show why she questioned the accuracy of the reports of Mr. Cox's prior subdural hematoma since she had not reviewed them. Each of these items underscores why Dr. Futrell's opinion was necessarily premised on the type of "pure speculation or conjecture" which this Court and Prosser have advised invokes the court's duty to direct a verdict.

B. THE OPINION DOES NOT CONFLICT WITH SECTION 90.705(1) OF FLORIDA'S EVIDENCE CODE

Petitioner contends the Opinion conflicts with section 90.705(1), Florida Statutes, because it references *Harris v. Josephs of Greater Miami, Inc.*, 122 So. 2d 561, 562 (Fla. 1960). *Harris* was an appropriate authority to cite because the testifying doctor opined the claimant suffered from a work-related injury resulting from a dye in the employer's shop but the expert did not attempt to locate the offending substance. In the same way, Dr. Futrell made assumptions without her own personal experience or medical data to support it. Thus, *Harris* neither creates a conflict nor was misapplied in any way.

Section 90.705, does provide that an expert may testify in terms of opinions or inferences without prior disclosure of the underlying facts or data. However,

section 90.705 goes on to state: "On cross-examination the expert shall be required to specify the facts or data." *Fla. Stat. §90.705(1)* Additionally, section 90.705(2) provides the party against whom the opinion is offered the right to conduct a voir dire examination directed to the underlying facts or data for the witness's opinion. If the facts and data do not have a sufficient basis, the opinions and inferences of the expert are inadmissible. *Fla. Stat.§ 90.705(2)* Without admissible expert testimony demonstrating the plaintiff would have more likely than not had a favorable result, the court has the duty to direct a verdict. *Gooding, at 1018.* Therefore, the opinion is entirely consistent with the application of the Evidence Code.

The remaining cases cited by Petitioners on this point are all recitation of the proposition that 90.705 does not require an expert to state the facts and data basis for the opinion in order to testify. None of these cases dealt with, or held, that the provisions of 90.705 relating to cross-examination or voir dire of the expert are invalid or do not apply. *See Fried v. State Farm Mutual Automobile Ins. Co.,* 904 So. 2d 566, 569 (Fla. 3d DCA 2005); *Myron v. South Broward Hospital District,* 703 So. 2d 527, 530 (Fla. 4th DCA 1997); *City of Hialeah v. Weatherford,* 466 So. 2d 1127, 1129 (Fla. 3d DCA 1985).

C. NO CONFLICT EXIST WITH EITHER *ATKINS V. HUMES* OR *QUINN V. MILLARD*

To the extent Petitioners contend that *Atkins v. Humes,* 110 So. 2d 663, 666 (Fla. 1959) creates a conflict it is apparent from a review of that holding that it is consistent with the Opinion because there is no issue that medical expert testimony is required in this case to establish the cause of damage to the patient.

Quinn v. Millard, 358 So. 2d 1378 (Fla. 3d DCA 1978), demonstrates why the opinion of the 2d District was entirely correct. In *Quinn,* defendants objected to the competency of the opinion given by the plaintiff's accident reconstruction witness. *Id.* The expert "testified on the basis of his own physical findings at the scene shortly after the accident." *Id.* at 1382. The defendants did not challenge the adequacy of the data underlying the witness' opinions at trial. *Id.* The 3d District recognized the omission of an obviously necessary fact would render the testimony incompetent, which is the same conclusion reached by the 2d District here. If the opposing party has not offered an expert opinion there may be no basis for the court to determine what would be a necessary fact to support the opinion. However, in the present case, the NINDS Study and Dr. Futrell's own testimony established the glaring omissions that the 3d and 4th Districts have ruled would render the opinion incompetent. *See also Delta Rent-A-Car, Inc. v . Rihl,* 218 So. 2d 469 (Fla. 4th DCA 1969) (cited in *Quinn).*

Dr. Futrell's opinion was incompetent because it was based on "data" that was patently insufficient, i.e. no clinical study or personal experience to establish

any success rate with the administration of tPA to patients with prior subdural hematomas. The Opinion makes this distinction clear so that it supports the same conclusion reached in *Quinn*. This is not an instance, such as in *Quinn*, where the court is called upon to make decisions about which facts are necessary to form a competent opinion. Dr. Futrell did not review the earlier screening of Mr. Cox's hematoma and merely surmised that it must have resolved. She speculated that because she had good results with three patients who were contra-indicated for tPA therapy for other reasons that Mr. Cox would have had the same result. There was no scientific or medical data at all to support such a conclusion. The opinion goes on to note that the attending physician would not have given the tPA to Mr. Cox as a patient with a prior subdural hematoma. *Compare Centex-Rooney Construction Co., Inc. v. Martin County*, 706 So. 2d 20, 27-28 (Fla 4th DCA 1998) (defendants did not call their own expert so there was no evidence about what were glaring omissions in the underlying facts relied upon by the expert) *with Lopez v. State*, 478 So. 2d 1110 (Fla. 3d DCA 1985), (defendant did not demonstrate why expert testimony on alcohol absorption had to be based on the defendant's own weight and not an average person's weight.) Thus, no conflict is present.

CONCLUSION

The Court does not have jurisdiction and the Petition should be denied.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Answer Brief of Appellant, ST. JOSEPH'S HOSPITAL, complies with the requirements of Rule 9.210, Fla. R. App. P., and is printed in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 16th day of October, 2009 to and Joel D. Eaton, Esq., Podhurst Orseck, P.A., 25 W. Flagler Street, Suite 800, Miami, FL 33130; Alan F. Wagner, Esq.,Wagner, Vaughan, McLaughlin, P.A., 601 Bayshore Blvd., Suite 910, Tampa, FL 33606; Weldon Brennan, Esq., Brennan Holden & Kavouklis, P.A., 115 South Newport Avenue, Tampa, FL 33606; Edward M. Copeland, IV, Esq., Rissman, Weisberg, et al., 1 North Dale Mabry Highway, 11th Floor, Tampa, FL 33609 and Mark Hicks, Hicks & Kneale P.A., 799 Brickell Plaza 9th Floor, Miami Florida 33131-2855.

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