IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 10-302
Third DCA Case No. 3D07-3314

THE PUBLIC HEALTH TRUST OF
MIAMI-DADE COUNTY d/b/a
JACKSON MEMORIAL HOSPITAL,

Appellant,

vs.

ODETTE ACANDA, as Personal
Representative of the Estate of Ryan
Rodriguez, Deceased,

Appellee.
_____/

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

A jury awarded Odette Acanda, as personal representative of the estate of Ryan Rodriguez, a verdict against the Public Health Trust (the Trust) for the wrongful death of her baby, Ryan. The trial court denied the Trust's motions for JNOV and new trial. The Third District affirmed. Public Health Trust of Miami-Dade County v. Acanda, 23 So.3d 1200 (Fla. 3d DCA 2009).

Born at 29 weeks gestation, Ryan had normal Apgar scores of 8 and 9 (T.160, 558) and a 90-95% chance of survival (T.101-02; see also T.543). He was delivered early via c-section because Ms. Acanda had HELLP syndrome (severe pre-eclampsia) and low amniotic fluid; but those conditions did not cause his death (T.106-09,111).

Ryan died in Jackson Memorial Hospital (JMH) from a pseudomonas infection when he was five days old. Everyone agreed that he acquired the infection in the hospital (T.98-99, 290, 534-35, 571, 657-58). Ms. Acanda contended that Ryan died because the Trust employees negligently failed to treat the infection until hours before his death (T.355-58).

In its motion for directed verdict, the Trust raised three issues: failure to serve the Department of Financial Services (DFS) as required by §768.28(7), Fla. Stat.; failure to satisfy the "locality rule" for the standard of care; and that Dr. Gerhardt, the attending physician, was the "captain of the ship" and not an employee of the Trust, therefore absolving the Trust of responsibility (T.465-67; R.115-20). The Trust also moved for new trial, arguing that Plaintiff's counsel made improper statements in voir dire, opening statement and closing argument, and that the verdict was contrary to the manifest weight of the evidence.

The trial court denied the motions and the Third District affirmed, addressing only the issue of compliance with §768.28(7).

a. Plaintiff's Compliance With §768.28(7), Fla. Stat.

The Third District's opinion sets out important facts missing from the Trust's brief: (1) After Ryan's father testified, and Plaintiff's counsel stated they were "going to rest", when the trial court asked Plaintiff's counsel if they were resting, they responded, "*No, No*," and explained that they needed "to make sure we have the proper stipulations that we think we have before we rest,"23 So.3d at 1201. (2) Plaintiff served process on DFS, filed the proof of service the next morning, and proffered it to the trial court. 23 So.3d at 1201-1202. (3) The Third District granted Plaintiff's motion to supplement the record with a certified copy of the notice of filing with the returns of service attached. 23 So.3d at 1201-1202 and n.3. See R.475, 491-494. This is how the issue developed:

Ms. Acanda's complaint alleged that she had complied with all statutory conditions precedent and requirements of Florida Statutes (R.6). The Trust answered with a general denial (R.15-16) and, in its affirmative defenses, alleged that it "has not waived sovereign immunity and the Complaint fails to state a cause of action because Plaintiff has failed to serve process in conformity with Section 768.28(7), Fla. Stat. (1990)" (R.17). The answer asked for dismissal (R.17), but the Trust did not set a hearing or raise this issue until it moved for directed verdict at trial (T.467).

Contrary to the Trust's Brief at p.2, Plaintiff had not rested when the Trust moved for directed verdict. After Ryan's father testified, Plaintiff's counsel stated, "Your Honor, we are *going to* rest now and start with some procedural matters that we want to take up with the Court" (T.454).[1] The court told the jury, "the plaintiff is *getting close to resting* or has rested" (T.454). At sidebar, Plaintiffs' counsel (Ms. Tejedor and Mr. Diez-Arguelles) made clear that they had *not* rested:

Mr. Gressman: Have they officially rested?

Ms. Tejedor: *No, No.*

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[1] All emphasis is added unless otherwise noted.

> The Court: That was the oddest resting I've ever seen
> Ms. Tejedor: We need to introduce a few records and stuff.
> Mr. Diez-Arguelles: *We need to make sure we have the proper stipulations that we think we have before we rest*

(T.455). The Trust's brief and the dissent below overlook this reference to stipulations.

After a brief discussion about other matters, the court excused the jury (T.456). The parties stipulated that the residents and fellow involved in Ryan's treatment "were employees and the incident occurred at Jackson as the defendant in this case" (T.463-64). The court announced it would reserve ruling until the morning on the admissibility of mortality tables, which Plaintiff had not yet moved into evidence or presented to the jury (T.464). The court asked, "Now, *assuming you have rested*, any motions anybody wants to make outside of the jury at this time or not?" (T.464).

It was then that the Trust moved for directed verdict, arguing, among other grounds, that Plaintiff failed to comply with §768.28(7) (T.464-67; R.115-20).

Plaintiff's counsel exclaimed, "I thought I resolved that issue" (T.467-68). The Trust responded that they had not, and argued that Plaintiff had not served process on DFS (T.468). Plaintiff's counsel asked the court for time overnight to look at the Trust's case law and to review their file, reiterating, "I thought I had taken care of this all with opposing counsel" (T.472-73). The court also wanted to study the cases and said it would hear Plaintiff's response the following morning (T.474-75).

The next morning, Plaintiff's counsel announced that he had served DFS and handed the affidavits of service to the judge (T.481). The stamp on the Notice of Filing shows that it was filed at 10:08 a.m. on August 9th, 2007 (R.471,491). He explained why the motion surprised him: He had asked defense counsel several times, "are there notice problems, are there notice problems. He left me with the

impression, my impression wrongfully, that notice was not an issue." (T.482). He argued that, as pled, the Trust had the burden of proving it was entitled to sovereign immunity, and that the law provided no time limit for service on DFS, but allowed service any time up until the verdict (T.482-84). He asked leave to put on evidence regarding the service, as well as the other issues raised in the motion for directed verdict, stating:

> I thought we were closing with stipulations and no problems so therefore, if we presented a problem in the case by filing the affidavit at this point, we would respectfully request permission to open up the case to present that in evidence which I think we can present that in rebuttal but if it's required in our case in chief, the affidavit, I would request permission to open up the case.

(T.495). The court reserved ruling, asked for written arguments, and instructed the defense to go forward with its case (T.497)[1]. The parties submitted memoranda (R.115-20; R.142-45), and Plaintiff filed a motion to reopen the case (R.146-48).

The Trust presented the testimony of two treating doctors, Dr. Gerhardt, the attending physician, and Dr. Gupta, a resident. It rested (T.671) and renewed its motion for directed verdict (T.673). Plaintiff's counsel again pointed out that Plaintiff had not yet rested (T.680), and the court reserved ruling (T.680-81). Plaintiff asked to present the affidavit of service as an exhibit in rebuttal (T.684, 700-704).

Contrary to the Trust's assertion at p.2, the affidavits were sworn (R.472-74, 492-94). Although not notarized, they state "Under penalty of perjury I declare that I have read the foregoing documents and that the facts stated in it are true. Notary not required pursuant to Fl. Statute 92.525 Sec (2)" (R.474, 494), or similar

[1] When court resumed, the transcript inaccurately reflects Mr. Diez-Arguelles, Plaintiff's counsel, presenting the deposition of Dr. Gerhardt (T.506). It is apparent from the context, including the judge's prior instruction that the defense should go forward with presentation of its testimony (T.497), that the speaker is the Trust's attorney. Thus, the introductory phrase, "the Plaintiff having rested," should not be attributed to the Plaintiff as an admission of any kind.

language. They state the date, time and place of service, and the person on whom they were served.

Plaintiff presented the Notice of Filing with the affidavits to the court, which announced it was "received through the clerk," and "noted" the county's objection Plaintiff moved to reopen the case and offered to fly in the process server to testify. The court denied the motion to reopen, and reserved ruling on all motions for directed verdict (T.705).

After the jury returned a verdict for Plaintiff, the Trust moved for judgment notwithstanding the verdict (R.308), and for new trial (R. 167). The Trust argued that Ms. Acanda "failed to prove compliance with Fla. Stat. §768.28(7) during their case in chief which finished on August 8, 2007" (R.313). The motion did not acknowledge the evidentiary issues pending at the time of its motion, or the stipulation issue. The court denied the post trial motions (R.459). The Trust appealed.

Of the many issues the Trust raised on appeal, the Third District addressed only service of process on DFS under §768.28(7), affirming based on two reasons.

First, the court found that the motion was premature because it was not clear that Plaintiff had rested when the Trust made its motion, noting:

> In response to the direct question of whether the Plaintiff had "officially rested," Plaintiff's counsel responded, "No, No." And, the trial court "reserved" at least one evidentiary issue in Plaintiff's case for determination the following morning.

23 So.3d at 1202. Second,

> Even if we were to conclude that the Plaintiff had rested her case when the hospital was permitted to argue its motion for directed verdict, the notice requirement at issue had been satisfied by the following morning before a ruling on either the "reserved" evidentiary matter or the hospital's motion for directed verdict. This satisfied both the requirements of §768.28(7) and this Court's prior precedents.

23 So.3d at 1202.

The Trust raises multiple additional issues here.

Plaintiff's Experts and the Locality Rule

Dr. Bradley Yoder was a neonatalogist at the University of Utah School of Medicine Department of Pediatrics in Salt Lake City (T.82). He was a professor of pediatrics, and associate director of the neonatal intensive care unit there and at another center, each with about fifty beds (T.83-84). He was responsible for the education and training of medical students, pediatric residents, fellows and neonatal nurses, nurse practitioners and respiratory therapists who work in the NICU (T.84). He is board certified in pediatrics and neonatology (T.88).

Dr. Yoder was a consultant in neonatology to the U.S. Air Force Surgeon General, with responsibility for all of the neonatologists in the Air Force (T.91-92). He has published approximately sixty peer reviewed articles, one hundred abstracts, and chapters in six books on neonatology and pediatrics (T.94). Dr. Yoder testified that the interns, Dr. Gupta and Dr. Monroig; the neonatology fellow, Dr. Organero; and the nurses violated the "prevailing professional standard of care," causing Ryan's death (T.97-98; see also, e.g., T.112-113, 126-127, 131-32,138-140).

Dr. Marc Weber, a board certified pediatrician (T.260-61), did his pediatrics residency in St. Louis and at Georgetown Medical Center in Washington (T.256-57). In St. Louis, he was an attending, supervising residents in a hospital like JMH (T.266-67). He practiced pediatrics there from 1987 to 2006, and then in Spartanburg, S.C. He has supervised the care of newborns in the NICU for his whole career (T.260). He has diagnosed and treated bacterial infections like the one that killed Ryan, and is familiar with the standard of care for diagnosing and treating them, as well as the standard of care for nurses in following doctors' orders (T.260,262-63). He testified that the nurses, residents and fellow violated the prevailing professional standard of care, contributing to Ryan's death within a

reasonable degree of medical probability (e.g., T.274-75, 301-03, 308, 315, 320-22, 325, 334, 343-45, 358, 369-70).

Captain of the Ship -- The Doctors, Their Relationships and Responsibilities

The parties stipulated that the fellow and residents were employees of JMH and that the incident occurred at JMH (T.463-64). The attending, Dr. Gerhardt, was not a surgeon, and the record reflects no surgery performed on Ryan.

The complaint alleged that the Trust was vicariously responsible for the negligence of the nurses, and physicians "including but not limited to" Drs. Gupta, Monroig and Organero, respiratory therapists, nurses and staff (R.7, 11-13), but did not mention Dr. Gerhardt. In its answer, the Trust alleged that "the University of Miami and its agents and employees" were negligent, but did not name the agents or employees and did not mention Dr. Gerhardt (R.16).

Dr. Gerhardt described himself as both a professor of pediatrics at the University of Miami medical school (UM) and an attending in the division of neonatology at JMH (T.509-511). No employment contracts or contracts between UM and the Trust were introduced. Dr. Gupta testified that the attendings were employees of both UM and JMH (T.611-13).

Virtually every order in the chart was written by a resident or fellow (T.296). Dr. Gupta admitted she did not document in the chart a single phone conversation with Dr. Gerhardt about orders for Ryan's care (T.609), and that the chart did not show the team discussing whether to give Ryan antibiotics and deciding not to (T.614-15). She admitted she was responsible to make sure orders were followed, including the order for a follow-up CRP (C-reactive protein) test, which was never done (T.639).

The evidence of Dr. Gerhardt's authority was not "undisputed" as the Trust claims. Dr. Yoder testified that "the long term plans, the overall umbrella how one

should manage a patient is directed by" the attending. However, "it would depend on the situation," and sometimes residents and fellows "may have to make a decision, make an intervention or apply a treatment without necessarily fully consulting somebody else" about it. (T.171-73). The residents and fellows are responsible for daily evaluations of the baby, examining him, reviewing lab results and records, putting together a treatment plan, making recommendations to a senior physician, and documenting it all in the chart (T.173-75,187-88). It was their responsibility to follow up on the CRP test that was ordered but not performed, and to communicate with the attending about it, which they failed to do (T.127,412).

Dr. Weber said that when Ryan suffered apnea and bradycardia on February 7th, 8th and 9th, it was the responsibility of the residents and fellow to communicate that to the attending physician and, along with the nurses, to treat these changes in Ryan's condition when the attending was not in the hospital (T.427).

The Trust argues that only the attending had authority to order antibiotics, but the jury heard testimony that the residents had that authority, that they ordered medications for Ryan throughout his life, and that it was a resident who finally ordered antibiotics for Ryan shortly before he died (T.359-60,411-12). Residents also could go up the chain of command if they were concerned about a course of treatment (T.361-62). They were required to use their own independent judgment and to advocate for their patient (T.361). Dr. Organero, who had completed his residency and was more than halfway through his second year of neonatology fellowship, was ultimately responsible to the patient, not to the attending, and was responsible for his own breaches of the standard of care (T.369-70). If any of them had started antibiotics on February 9th, it could have saved Ryan's life (T.368). Their negligence caused Ryan's death (T.370).

Dr. Weber used the phrase "captain of the ship," but compared the residents

and fellow to copilots, responsible if they are at the controls when the plane crashes; the "captain of the ship" does not absolve the other doctors from their responsibilities (T.409-10).

Conflicting Evidence that Residents, Fellow, and Staff Were Negligent and that Dr. Gerhardt, the Attending, Was Not

Nobody testified that Dr. Gerhardt violated the standard of care. He never gave an order forbidding antibiotics for Ryan (T.422, see also T.614-15). And there was evidence that the other doctors failed to give Dr. Gerhardt crucial information about Ryan's condition, including that his CRP was elevated and that a follow-up CRP test was not done, and that Ryan was cyanotic or dusky, and had seven episodes of low oxygen saturation (T.127, 356, 412, 560-62, 639). There is evidence that Trust employees were negligent in other ways as well.

The nurses failed to place Ryan in an isolette when he was born (T.275-77, 293). They placed him in an open basinette with a makeshift plastic cover, exposing him to pathogens from which the isolette would have protected him, contributing to his death (T.281-93). This is probably when he was infected (T.282). They left a ventilation bag in his isolette, increasing the risk of infection (T.284). In Dr. Weber's opinion, the hospital's poor infection control measures caused Ryan's infection (T.287). Instead of gradually weaning Ryan from oxygen provided by a nasal C-pap to an oxihood as ordered, the nurses moved him directly to room air, greatly reducing his oxygen, causing stress, and contributing to his death (T.311-315).

The residents failed to check the results of an ANC test for neutrophils, a type of white blood cell which fights infection (T.348). They failed to follow their own plan of care, delaying for approximately 36 hours to treat the baby with GCSF, which would have helped him produce neutrophils (T.349, 122).

Some of their most critical breaches involved the failure to perform a repeat

CRP test, or to communicate with the attending about it. The CRP is a very early warning sign of infection (T.294). Dr. Weber testified, "I can't [emphasize] enough how important this test is in this situation" (T.308)

On February 7th, Ryan's CRP was elevated, a sign of inflammation. A resident ordered the nurses to repeat the test the following day (T.125-26, 141, 299-301). The repeat test was never done and it was never followed up (T.126, 302). It was a violation of the standard of care for the nurses not to ensure that the CRP test was done as ordered, and for the residents and fellow to fail to get the results and to follow up to make sure the test was done. (T.126-27, 301-03,307-08,368). They never did. (Id.) And they never discussed it with Dr. Gerhardt.

The CRP was the most critical test. If it had been performed as ordered and presented to the attending physician, it "clearly" would have been more elevated (T.304-05) and "surely... would have been clearly indicative of progressive infection" (T.302). The failure to obtain a repeat CRP any time after February 7th "certainly" contributed to Ryan's death within a reasonable degree of medical probability (T.303). If the residents or fellow had gotten the results and started antibiotics a day earlier, as Dr. Weber said they had the power to do, they could have saved Ryan's life (T.368). In Dr. Weber's opinion, their negligence caused Ryan's death (T.370).

Throughout its brief, the Trust complains that the jury found no liability on the part of UM and that UM employed Dr. Gerhardt. The Trust omits the evidence that Dr. Gerhardt was *not* negligent, as the Trust argued in opposition to Plaintiff's motion for directed verdict (T.696), and in its closing argument (T.846, 865-66). Dr. Gerhardt testified that he was not aware that the CRP was elevated or that Ryan had seven episodes of low oxygen saturation (T.560-62). Dr. Weber testified that it was reasonable for Dr. Gerhardt to rely on the residents to give him the results of the CRP (T.310). It was their responsibility to tell him that the CRP was

not done (T.309). "The attending is not going to go through the chart and call up the hospital lab on rounds and ask for the results. That is what residents do" (T.310). The CRP results, plus Ryan's clinical condition, should have prompted further cultures and ultimately antibiotics (T.333-34).

Voir Dire

During voir dire, a prospective juror said she worked at Cedars, which housed some of the Trust's patients and was being purchased by UM (R.524-25). Plaintiff asked if she would be concerned about rendering a verdict for Ms. Acanda if her employer found out (R.526-27). The prospective juror asked, "My name isn't going to be in there? My name wouldn't be there?" (R.527-28). Plaintiff's counsel responded that her name would be transcribed, "and then probably for Jackson they have an obligation to report back. They will report back and say –"(R.528).

The court sustained the Trust's objection. At sidebar, the Trust asked for a mistrial, dismissal of the jury, and an instruction to disregard the statement.[2] The court denied the mistrial and granted the curative instruction. She told the jury that the question was inappropriate, they should not consider it, and it was improper for Plaintiff's counsel "to raise the implication that defense counsel are going to do something."(R.528). The Trust did not object to the instruction as given. The prospective juror did not sit on the jury (R.124). The record does not show that the Trust renewed any objections before the jury was sworn, or objected to the jury that was empaneled. The trial court ruled the Trust waived this objection by failing to renew it (R.460).

Use of PowerPoint

[2] The sidebar is at A-1 of the Trust's Appendix to its Amended Initial Brief. The rest of voir dire is at R.500-614. The prospective juror is identified in the Appendix as Ms. Andrews, but at R.525-29 as Ms. Taylor.

Plaintiff used a PowerPoint in opening statement. Although before trial it agreed to it, the Trust objected. Plaintiff agreed not to use it in opening. The court told the Trust to let her know if it was going to move for mistrial. The Trust did not respond (T.19-21). Plaintiff used the PowerPoint during Dr. Yoder's testimony without objection (T.137,141,145-46,151)[1], and for several minutes with Dr. Gupta before the Trust objected (T.641-48). The court ruled the Trust waived the objection and told the Trust to make its objections timely (T.644). Plaintiff removed any objectionable material from the PowerPoint with the Trust's agreement (T.648-49).

Closing Argument

The Third District did not find the closing argument worthy of discussion. Not all of the objections were raised at trial. Several curative instructions were given. The facts and procedure are discussed in detail in the pertinent argument sections.

STANDARD OF REVIEW

The standard of review for directed verdict is *de novo*. The Court must view all evidence and inferences in the light most favorable to the nonmoving party. If there is any evidence, or reasonable inference from it, to support the verdict, the verdict must be upheld. See, e.g., Banco Espirito Santo Int'l., Ltd. v. BDO Int'l, B.V., 979 So.2d 1030, 1032 (Fla. 3d DCA 2008).

The Court reviews denial of a motion for new trial for abuse of discretion. If reasonable people could differ, the Court must affirm. Brown v. Estate of Stuckey, 749 So.2d 490 (Fla. 1999); Baptist Mem'l Hosp., Inc. v. Bell, 384 So.2d 145 (Fla. 1980). The trial court is in the best position to determine the manifest weight of the evidence, or whether events raised on appeal had any prejudicial effect on the outcome of the trial. See, e.g., Bell, 384 So.2d at 146. Review of denial of a new

[1] After several references to things "we are looking at," counsel said, "I want to cover one thing with you that I didn't have on my PowerPoint." (T.162).

trial based on improper argument depends on whether the issue was preserved, Murphy v. Int'l Robotic Sys., Inc., 766 So.2d 1010 (Fla. 2000), and is discussed in Point IV.

This Court should affirm if the judgment is right for any reason supported by the record, even if it was not argued below. Malu v. Sec. Nat.Ins. Co., 898 So.2d 69,73 (Fla. 2005).

SUMMARY OF ARGUMENT

I. The trial court properly denied the premature motion for directed verdict based on §768.28(7). The statute sets no time limit for service on DFS. Plaintiff served DFS and filed and proffered proof of service, sworn under §95.525(2), Fla. Stat., before resting her case in chief. Rule 1.070(b) requires proof by affidavit, not by evidence presented to the jury. In the alternative, the trial court should have allowed Plaintiff to reopen her case to present proof of service, or should have allowed her to present the evidence in rebuttal. Moreover, the Trust must have been aware of Plaintiff's counsel's confusion about the scope of their stipulation, and should not be allowed to take advantage of a misunderstanding to defeat a meritorious case.

II. Plaintiff did not waive the argument that the motion was premature. She said she had not rested and still had to make sure of the stipulation. Plaintiff was the Appellee. Under the "tipsy coachman" doctrine, the court may affirm for any reason appearing in the record, whether Plaintiff argued it below or not.

III. The trial court properly rejected the Trust's "captain of the ship" theory. The evidence of the doctors' authority was not undisputed. The Trust was properly held responsible for the independent negligence of its residents, fellow and nurses, and their failure to give Dr. Gerhardt crucial information. The jury could have found Dr. Gerhardt was not negligent because the other doctors did not adequately inform him about Ryan's condition. The Trust introduced no contracts. There was

evidence that Dr. Gerhardt was employed by the Trust, so his responsibility, if any, properly could be attributed to the Trust.

IV. Nor was the Trust entitled to a directed verdict under the "locality rule." Plaintiff's experts were qualified under §766.102(5), Fla. Stat., and proved that the Trust breached "that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers." §766.102(1), Fla. Stat. (2004). The locality rule, even if applicable, only requires evidence of the standard in "the same *or similar* community." Plaintiff's experts, who practiced in similar communities at hospitals similar to JMH, and one of whom supervised care of babies like Ryan for the Air Force all over the world, provided sufficient evidence of that standard.

V. The trial court did not abuse its discretion in denying a new trial based on the closing argument. The arguments either were cured by instruction or curable; or were fair comment on the evidence and inferences from it; or were not the subject of a specific and timely objection or motion. The trial judge was in the best position to determine their impact and did not abuse its discretion.

VI. The trial court did not abuse its discretion in denying a new trial based on a potential juror's concern that the her employer would find out if she returned a verdict for Plaintiff. The area of the inquiry was proper. The trial court gave a curative instruction, to which the Trust did not object. The potential juror did not sit on the jury. The record does not show renewal of any objections before the jury was sworn. VII. The trial court did not abuse its discretion in denying a new trial based on the use of a PowerPoint. The trial court properly ruled that the Trust waived the objection. Plaintiff's counsel removed any objectionable materials with the acquiescence of defense counsel. The PowerPoint was cumulative and harmless.

VIII. The trial court did not abuse its discretion in denying a new trial based on the manifest weight of the evidence. Plaintiff presented two experts; the Trust presented none. There was ample evidence for the jury to find the Trust negligent and apportion zero fault to UM. There was evidence that the Trust's employees and agents were independently negligent and did not give Dr. Gerhardt critical information that would have prompted the use of antibiotics. There was also some evidence that Dr. Gerhardt was an employee of the Trust as well as UM.

The judgment should be affirmed.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR DIRECTED VERDICT, AND THE THIRD DISTRICT PROPERLY AFFIRMED, BECAUSE PLAINTIFF DEMONSTRATED COMPLIANCE WITH §768.28(7) BEFORE RESTING AND BEFORE ANY RULING.

The Third District's decision is in accord with established sovereign immunity law. Neither the trial court nor the Third District relieved Plaintiff of the requirement of §768.28(7) to serve process on DFS. The opinion expressly relies on a string of cases requiring such compliance. 23 So.3d at 1202.

Plaintiff served DFS before resting, filed proof of service, and proffered the affidavits of service (sworn pursuant to §95.525 Fla. Stat.). The court accepted the affidavits through the clerk before ruling on the motion for directed verdict. Service on DFS is not a condition precedent to the right to sue, and the statute provides no time limit for it. Cole v. Dept. of Corrections, 840 So.2d 398 (Fla. 4th DCA 2003); Turner v. Gallagher, 640 So.2d 120 (Fla. 5th DCA 1994); Lemonik v. Metro. Dade County, 672 So.2d 899 (Fla. 3d DCA 1996). The only case we have found setting any time deadline for service on DFS holds only that service after the verdict is too late. Metro. Dade County v. Lopez, 889 So.2d 146 (Fla. 3d DCA 2004). Plaintiff satisfied this requirement.

Cases involving the notice requirement of §768.28(6) are inapposite because

that section prescribes a specific time limit. It requires notice within three years after the claim accrues, and the claimant must wait six months, or until the claim is denied, to bring suit. Consequently, failure to comply with §768.28(6) is not a problem that can be fixed during trial.

In Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983), this Court held that failure to provide notice to Department of Insurance within three years of the incident required dismissal, stating that "Where *the time for such notice has expired so that it is apparent that the plaintiff cannot fulfill the requirement*, the trial court has no alternative but to dismiss the complaint with prejudice." Similarly, in Menendez v. North Broward Hosp. Dist., 537 So.2d 89, 91 (Fla. 1988), the plaintiffs conceded "that they failed to notify the Department, and that the time for notification has passed." And in Hardcastle v. Mohr, 483 So.2d 874 (Fla.2d DCA 1984), it would have been impossible for the plaintiff to comply with the notice requirement and the six month waiting period during the trial. Here, there is no time requirement for service on DFS, and Plaintiff can and did fulfill the requirement.

Courts have questioned the purpose of requiring service on DCF. See Levine, 442 So.2d at 212; Turner v. Gallagher, 640 So. 2d at 122. If it is meant to ensure that the action is defended, it has been satisfied in this case. The Trust suggests no purpose or policy that would be frustrated by affirmance here, where DFS was served and the action was vigorously defended.

The record supports the Third District's conclusion that the motion was premature. Plaintiff's counsel stated, "we are *going to* rest now and start with some procedural matters that we want to take up with the court." Although the Trust emphasizes the word, "now," the Third District took note of the words "*going to*," and the transcript supports that interpretation. Plaintiff clarified that she was not yet resting, answering, "*No, No*," because "we need to introduce a few records and

stuff" and "*we need to make sure we have the proper stipulations we think we have before we rest.*" The parties discussed their dispute over the admissibility of mortality tables, which Plaintiff had not yet introduced, and the judge reserved ruling on it. The parties stipulated that three of the doctors were the Trust employees. When the judge decided to "assume" that Plaintiff had rested and allowed the Trust to argue its motion for directed verdict, Plaintiff's counsel was surprised by the Trust's argument, because he thought they had resolved the issue of statutory compliance by stipulation. The next morning, before court began, before the court ruled on either the mortality tables or the motion for directed verdict, Plaintiff had served DFS and filed sworn proof of service with the court. Plaintiff proffered it to the court, and asked to reopen the case if necessary to present proof of service, or to present it in rebuttal. The court denied the requests and reserved ruling on the motion for directed verdict, asked for written arguments, and instructed the Trust to go forward with its case. After the Trust presented its evidence and renewed its motion, Plaintiff again pointed to the proof of service filed that morning and argued that she had not rested yet, and the court reserved ruling. Plaintiff asked to move in the affidavits as an exhibit, and the court stated that they were "received through the clerk." All of this was done before the trial court ruled on the motion for directed verdict.

As the Third District properly found, "the cases are legion" finding it a denial of due process and violation of Fla. R. Civ. P. 1.480 to grant a directed verdict before the plaintiff has finished presenting her evidence. 23 So.3d at 1202 n.5.[2] The court adhered to well established law.

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[2] Citing Dodge v. Weiss, 191 So.2d 71, 73 (Fla. 1st DCA 1966); Sapp v. Redding, 178 So.2d 204, 207 (Fla. 1st DCA 1965); Zerillo v. Snapper Power Equip. 562 So.2d 819, 820 (Fla. 4th DCA 1990); Carmichael v. Shelley Tractor & Equip. Co., 300 So.2d 298, 299 (Fla. 4th DCA 1974). See also, e.g., Kelley v. Webb, 676 So.2d 538 (Fla. 5th DCA 1996); Porro v. Franco, 448 So.2d 614 (Fla. 3d DCA 1984).

Once the trial court reserved ruling and the parties proceeded with the case, the court was required to consider all of the evidence – including the proof of service the Plaintiff presented the morning after the motion was made. McCain v. Fla. Power Corp., 593 So.2d 500 (Fla. 1992) (once motion for directed verdict is overruled, court must consider all evidence produced, before and after motion, in making subsequent rulings). Therefore, it was proper for the trial court, post trial, to consider the evidence of service in denying the motion.

The Trust argues that the trial court did not permit Plaintiff to reopen her case to present proof of service to the jury, but Fla. R. Civ. P. 1.070(b) requires proof of service to be made "by affidavit," not by testimony presented to the jury. Consequently, it was enough to present proof of service to the court. Cf., State v. American Tobacco Co., 707 So. 2d 851,854 (Fla. 4th DCA 1998)(determination of jurisdiction for court, not jury). Re-Employment Servs., Ltd. v. Nat'l Loan Acquisitions Co., 969 So.2d 467 (Fla. 5th DCA 2007), on which the Trust relies, did not require presentation of proof of service to the jury, but to the court. Williams v. Miami-Dade County, 957 So.2d 52 (Fla. 3d DCA 2007) does not specify whether proof must be presented to the court or to the jury. Here, Plaintiff properly presented the proof of service to the trial court for its determination of the legal issue of service of process on DFS, and the court, by denying the reserved motion for directed verdict, properly determined that DFS had been served in accordance with §768.28(7).

The Trust argues that Ms. Acanda is estopped to argue here that she had not rested, because she asked to reopen, implying she had rested. The Trust ignores her attorneys' emphatic "No, No" when the court asked if they were resting, and their statement that they wanted to make sure they had the stipulations they thought they had. Town of Oakland v. Mercer, 851 So.2d 266 (Fla. 5th DCA 2003), cited by the Trust, applies estoppel to prevent a party which has obtained final

judgment on an issue against one party from taking the opposite position against a different party. It does not prevent a party from making arguments in the alternative in the same case, or from using the "tipsy coachman" doctrine, discussed in Point II below.

The Trust accuses Ms. Acanda's counsel of misleading the trial court about why they wanted more time. But there is nothing in the record to indicate that they did not check their file or review the law that evening, as they said they were going to do. If, after doing so, they took steps to remedy a deficiency they found, that is hardly misconduct justifying the ultimate sanction of an adverse judgment.

It was not Ms. Acanda who played "gotcha." The Trust should not prevail based on its own "gotcha" tactics. Although the Trust did plead failure to comply with §768.28(7), Plaintiff's counsel thought they had a stipulation, and were unaware that the Trust's counsel was stipulating only to statutory notice, not service. This was not unreasonable. Courts have referred to §768.28(7) as a "notice" requirement, as did the court below. 23 So. 3d at 1202 ("the notice requirement at issue had been satisfied...") See also Cole, 726 So. 2d at 855. The trial court properly denied a directed verdict on a ground that Plaintiff's counsel believed was covered by the agreement, especially since Plaintiff complied and moved to reopen the case.

The courts have refused to allow one party to use a stipulation to gain an unfair advantage over the other.[1] Even if there were no intent by the Trust to play "gotcha," where, as here, there is confusion and no meeting of the minds about the

[1] See generally, Lotspeich Co. v. Neogard Corp., 416 So. 2d 1163 (Fla. 3d DCA 1982)(reversing directed verdict for failure to prove issue to which parties had stipulated); Bradley v. Brotman, 836 So.2d 1129 (Fla. 4th DCA 2003) (stipulation to admission of evidence invalid where no meeting of the minds as to exact scope); Lopez v. Dublin Co., 489 So.2d 805 (Fla. 3d DCA 1986) (defendant who stipulated to be bound by plaintiff's testimony on liability in lieu of submitting to discovery could not impeach plaintiff as to matters that were subject of that discovery); Salcedo v. Asociacion Cubana, Inc., 368 So.2d 1337 (Fla. 3d DCA 1979) (condemning "gotcha" tactics).

precise scope of the agreement, the party adversely affected should not be penalized. In Sheriff of Brevard v. Lampman-Prusky, 634 So.2d 660 (Fla. 5th DCA 1994), the court refused to allow confusion about a stipulation to preclude the plaintiff from later serving the Department of Insurance. Although the court believed that Fla. R. Civ. P. 1.070 required service on the Department within 120 days, it refused to order dismissal, excusing late service because of confusion about a stipulation in which counsel for the sheriff agreed to accept service of the amended complaint.

The same rules apply to the government when it is sued as to any other defendant. The state's statutory consent to be sued "'in accordance with the general laws of this state' . . . evinces an unequivocal intent on the part of the State to abide by the traditional laws-including the equitable canons-governing tort actions in any claim filed under section 768.28." Fla. Dept. of Health & Rehab. Serv. v. S.A.P., 835 So.2d 1091, 1098 (Fla. 2002). The trial court properly refused to allow the Trust to obtain a directed verdict by taking unfair advantage of a misunderstanding.

This Court can also affirm because the trial court should have granted Ms. Acanda's requests to reopen her case.[2] Although reopening a case is generally discretionary, at the time Plaintiff moved to reopen, the proof of service was in the court file, and it was an abuse of discretion not to allow it because there cannot reasonably be a dispute about the facts shown by the proffered evidence.[3]

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[2] The Trust argues at p. 25 that Ms. Acanda is precluded from making this argument because she did not file a cross appeal. But Ms. Acanda did move for leave to file a cross-appeal. and the Third District explicitly found that the cross-appeal was unnecessary. See R.475-76. If this Court believes a cross appeal is necessary, it may treat the brief as adequate notice that she cross-appeals on this point. Ash v. Coconut Grove Bank, 448 So.2d 605, 606 n.2 (Fla. 3d DCA 1984). However, a party who seeks to uphold the judgment is not required to file a cross appeal. E.g., MacNeill v. O'Neill, 238 So.2d 614, 615 (Fla. 1970).

[3] The Trust relies on King v. Miami-Dade County, 970 So.2d 839 (Fla. 3d DCA 2007), a PCA with no discussion or citation. It has no precedential value. See, e.g., Dept. of Legal Affairs v. District Court of Appeal, 5th Dist., 434 So.2d 310 (Fla. 1983) (noting "great danger" in allowing use of PCA as precedent);

Because public policy favors deciding cases on their merits, case law supports reopening where a plaintiff has omitted proof of compliance with §768.28. In Gates v. State of Fla. Dept. of Transp., 513 So.2d 1386 (Fla. 3d DCA 1987), the court held it was an abuse of discretion to deny the plaintiff's motion to reopen her case to prove that statutory notice had been given. And, in Sheriff of Orange County v. Boultbee, 595 So.2d 985 (Fla. 5th DCA 1992), the Fifth District reversed and ordered a directed verdict for failure to prove compliance with the notice requirement of §768.28(6), but pointed out that the plaintiff "did not ask the trial court to reopen her case when this deficiency was raised in appellant's motions for directed verdict," implying that, had plaintiff moved to reopen, it should have been granted and the directed verdict could have been avoided. 595 So.2d at 987.[4]

For similar reasons, courts have held that, when a defendant moves to dismiss for failure to comply with §768.28(7), the action should be abated or stayed, but not dismissed with prejudice, pending compliance. Cole v. Dept. of Corrections, 840 So.2d 398, 400 (Fla. 4th DCA 2003), citing Rubin v. State, Dept. of Transp., 728 So.2d 1175 (Fla. 2d DCA 1998); Cannon v. Yeager, 658 So.2d 591 (Fla. 2d

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Berek v. Metro. Dade County, 396 So.2d 756,759 n.3 (Fla. 3d DCA 1980); decision approved, 422 So.2d 838 (Fla. 1982). Consequently, the PCA in King should not influence the Court's decision here. The Trust's Appendix contains excerpts of transcripts from that case, which show that, unlike the present case, the plaintiff in King did not move to reopen his case. See A-2 p.3-5; A-3 p.6.

[4] See generally, Midland-Guardian Co. v. Hagen, 370 So. 2d 25 (Fla. 2d DCA 1979)(abuse of discretion to deny leave to reopen where documents already were in court file); Walter E. Heller & Co., Southeast v. Pointe Sanibel Dev. Corp., 392 So.2d 306,308 (Fla. 3d DCA 1981) ("Because the defect . . . could have been remedied so easily, the denial of leave to [reopen], even if requested after the parties had rested or the court had ruled, would probably have constituted an abuse of discretion"). Accord, e.g., Sobel v. Jefferson Stores, Inc., 459 So.2d 433 (Fla. 3d DCA 1984) (reversing denial of motion to reopen, made after motion for directed verdict, to allow evidence that defendant owned store where plaintiff fell); Eli Witt Cigar & Tobacco Co. v. Matatics, 55 So.2d 549,552 (Fla. 1951) (trial court properly reopened case after defendant argued motion for directed verdict); Akins v. Taylor, 314 So.2d 13 (Fla. 1st DCA 1975) (abuse of discretion to deny motion to reopen case to introduce defendant's interrogatory answers identifying driver of vehicle); Lotspeich, 416 So 2d at 1165 n.2 (in contribution action, abuse of discretion to refuse to allow plaintiff to reopen case, after motion for directed verdict, to introduce release signed by plaintiff in underlying case).

DCA 1995); and Platt v. Fla. Dept. of Health & Rehab. Serv., 659 So.2d 1251 (Fla. 1st DCA 1995). See also Turner v. Gallagher, 640 So.2d 120 (Fla. 5th DCA 1994).

The Trust erroneously relies on Silber v. CNR Industries, 526 So.2d 974 (Fla. 1st DCA 1988).There, the plaintiff had not paid the stamp tax on a note at the time he rested. The court held he could not pay the tax and then move to reopen his case to prove it. Cf. Klein v. Royale Group, 578 So.2d 394 (Fla. 3d DCA 1991) (reversing dismissal for failure to pay stamp tax, where plaintiff did so between time of motion to dismiss and time of the hearing).

But Plaintiff had not rested when she served DFS. When the court asked if she had rested, she answered, "No, No," pointing to several remaining matters, including whether they had stipulations covering issues including this one. Moreover, in Silber, the consequence of reopening was to expose the defendant retroactively to attorneys' fees for enforcement of an unenforceable note. Here, there is no such exposure to a retroactive award of fees; there is only a determination of this case on the merits. The Silber court remanded for enforcement of the note without the fees or dismissal without prejudice, not a directed verdict as the Trust seeks here.

Alternatively, the trial court should have allowed Plaintiff to present the proof of service in rebuttal. "Material testimony should not be excluded because offered by the plaintiff after the defendant has rested, although not in rebuttal, unless it has been kept back by a trick, and for the purpose of deceiving the defendant and affecting his case injuriously." Williamson v. State, 111 So. 124,127 (Fla. 1926). There was no trick or effort to deceive the Trust here, and the trial court should have allowed Plaintiff to present the proof of service as part of her rebuttal.[5]

[5] Although it might have been Plaintiff's burden to prove service, under the pleadings it should have been the Trust's burden to prove it was a sovereign entity for which service on DFS was required. See generally, Nash v. Wells Fargo Guard Services, 678 So.2d 1262,1264 n.1 (Fla. 1996)(burden of proof on any point is on party asserting it); but see Schmauss v. Snoll, 245 So.2d 112 (Fla. 3d DCA 1971)(sovereign immunity not an affirmative defense). The Trust offered no evidence of that fact. The Trust was created by Ch. 25A of the Dade County Code.

II. PLAINTIFF DID NOT WAIVE ANY OBJECTION TO A RULING ON THE MOTION FOR DIRECTED VERDICT BEFORE SHE RESTED.

The Trust's argument that Plaintiff waived any objection to the directed verdict ignores both the record and fundamental principles of appellate review.

Protesting, "No, No," and pointing out that there were still procedural matters and evidentiary issues to be determined, and, "We want to make sure we have the proper stipulations we think we have," are not waivers. By the time the Trust renewed its motion, Plaintiff was still arguing that she had not rested . In her response to the Trust's Motion for JNOV, Ms. Acanda argued that she had served DFS in compliance with the statute, filed the proof of service, and marked it as an exhibit, before the trial court ruled on the motion for directed verdict, before the Trust began presenting its case in chief, and before the jury returned its verdict (R.434-435). The court had not ruled on the admissibility of the mortality tables, and Plaintiff did not introduce them into evidence until the end of the case. Plaintiff's vigorous objections, and the actual state of the record, do not support a waiver.

Even if Plaintiff had not argued it at trial, it was proper for the Third District to affirm based on the prematurity of the Trust's motion for directed verdict.

In most of the cases the Trust cites at p. 29 as holding that "a party may not raise an issue for the first time on appeal," the appellant sought reversal based on an argument it had not made to the trial court. The law is settled that, absent jurisdictional or fundamental error, an *appellant* may not obtain reversal based on an argument not raised below. Aills v. Boemi, 29 So.3d 1105 (Fla. 2010).

The court might have taken judicial notice of this if the Trust requested it and gave notice. See §§90.202(10), 90.203, 90.204, Fla. Stat. But it made no request and gave no notice. Thus, judicial notice was not proper. See Powell v. Powell, 433 So.2d 1374 (Fla. 1st DCA 1983)(judicial notice of local child support guidelines violated §90.204, where no notice to parties or opportunity to offer additional information). A court must base its decision on evidence in the record, not on what it thinks is true. Walter E. Heller & Co. v. Pointe Sanibel Dev. Corp., 392 So.2d 306,309 (Fla. 3d DCA 1981).

But the rule is different for an *appellee*. The Trust cites Dade County School Board v. Radio Station WQBA, 731 So.2d 638, 644 (Fla. 1999), for the rule that a claim not raised in the trial court cannot be considered on appeal, but fails to note WQBA's discussion of "the exception to the general rule," culminating in this conclusion:

> If an appellate court, in considering whether to uphold or overturn a lower court's judgment, is not limited to consideration of the reasons given by the trial court but rather must affirm the judgment if it is legally correct regardless of those reasons, it follows that an *appellee*, in arguing for *affirmance* of a judgment, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below. It stands to reason that the appellee can present *any argument supported by the record even if not expressly asserted in the lower court*. ... [A]n *appellee need not raise and preserve alternative grounds for the lower court's judgment in order to assert them in defense when the appellant attacks the judgment on appeal*.

731 So.2d at 645. Accord, Malu v. Security Nat. Ins. Co., 898 So.2d 69, 73 (Fla. 2005).

Ms. Acanda was the Appellee in the Third District. She was entitled to argue "any basis which would support the judgment in the record." Nothing precludes her from arguing here that she had not rested when the Trust moved for directed verdict.

Nor can Plaintiff's requests to reopen the case be construed as waivers, because the trial court stated it was "assuming" that Plaintiff had rested when it allowed the Trust to argue its motion for directed verdict[6]. Plaintiff did the only thing she could do in light of the trial court's assumption – she moved to reopen the case. In fact, Plaintiff's written motion notes that she was moving to reopen

[6] In fact, when the Trust later renewed its motion, (T.673-79), Plaintiff's counsel responded, "Your Honor, I haven't rested yet" (T.680). The court reserved ruling (T.680-81). Shortly after that, Plaintiff again proffered the proof of service, and the court announced it was "received through the clerk" (T.705).

"proactively" (R.148). Doing so did not constitute a waiver of her argument that she had not rested, and she is not estopped to assert that here.

ARGUMENT POINTS III-VIII

A. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO ADDRESS THE TRUST'S ADDITIONAL ISSUES NOT ADDRESSED BELOW.

This Court should not address Points III - VIII because the only issue addressed below was Point I, and that was the basis on which this Court accepted jurisdiction.

This Court's power to address additional issues is discretionary. See Savona v. Prudential Ins. Co. of America, 648 So.2d 705 (Fla. 1995) (on question certified from federal court, this Court declined to address other issues); Thom v. McAdam, 626 So.2d 184 (Fla. 1993) (on conflict jurisdiction, court declined to address nonconflict issues); Phantom of Brevard, Inc. v. Brevard County, 3 So.3d 309, 312 n.2 (Fla. 2008) (same); Anstead, Kogan, Hall and Waters, The Operation and Jurisdiction of the Supreme Court of Florida, 29 Nova L. Rev. 431, 523 (2005) (Court has "absolute discretion" to decline to address other issues).

In Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982), this Court exercised its discretion to decline to address an issue that was not the basis for its jurisdiction, emphasizing "the finality of district court decisions" and finding that there was "no reason for us to allow petitioners a second appeal" on those issues. 409 So.2d at 21. The Trust had the opportunity to fully brief and argue the additional issues in the District Court of Appeal, which unanimously rejected them. The Trust has not offered any reason why this Court should allow it a second appeal on those issues.

B. THE TRUST'S ADDITIONAL ARGUMENTS ARE WITHOUT MERIT

III. THE TRUST WAS NOT ENTITLED TO A DIRECTED VERDICT BASED ON ITS "CAPTAIN OF THE SHIP" THEORY.

Generally, a hospital is vicariously liable for the negligence of its employees, nurses, residents and fellows. See, e.g., Variety Children's Hosp. v. Perkins, 382 So.2d 331,334 (Fla. 3d DCA 1980). The "captain of the ship" or "borrowed servant" doctrine transfers that liability to a doctor only in limited circumstances, most often in surgical cases. The nurse or other personnel "must be under the complete control of the doctor." Bradley v. Southern Baptist Hosp. of Fla., Inc., 943 So.2d 202,205 (Fla. 1st DCA 2006). Ryan had no surgery.

The Perkins court refused to apply the doctrine to a post-surgical situation, reasoning:

> A contrary holding . . . would both expose every admitting physician to liability for the actions of hospital employees merely because he remains generally in charge of the patient's care; and simultaneously relieve the hospital of responsibility for services which it alone should provide and for which it is paid. Each of these results is entirely undesirable and completely contrary to the decided cases. . . .

382 So.2d at 335. Even if an attending may be in charge of the case, the hospital remains responsible for care given by its doctors, nurses and staff in the hospital. Id.

Moreover, the doctrine applies only in the complete absence of independent negligence by the hospital personnel. Siegel v. Husak, 943 So.2d 209,214 (Fla. 3d DCA 2006) (no evidence of independent negligence by nurse practitioner). Here, the residents and fellow had some autonomy and were responsible for their own actions, and all kinds of hospital employees committed acts of independent negligence.

They failed to place Ryan in an isolette at birth. They weaned him directly to room air. They left a bag in his isolette. They failed to follow up on the repeat CRP test, which was never performed, and which probably would have shown the

presence of an infection and prompted them to begin antibiotics. They failed to tell Dr. Gerhardt about the CRP, or about Ryan's deteriorating condition. They failed to tell Dr. Gerhardt about the episodes of low oxygen saturation, apnea and bradycardia, or to treat these changes in Ryan's condition when the attending was not there. They failed to check the results of an ANC test. They delayed treating Ryan with GCSF, which had been ordered and which would have helped him fight the infection.

Although the Trust contends only the attending could order antibiotics, the jury heard testimony that the residents and fellow had that authority, that they ordered medications for Ryan throughout his life, and that it was a resident who finally ordered antibiotics shortly before Ryan died. Residents also could go up the chain about a course of treatment. They have an obligation to use their own independent judgment and to advocate for their patients. The second year fellow was ultimately responsible to the patient for his own breaches of the standard of care. If any of them had started antibiotics by February 9th, it could have saved Ryan's life. These independent acts of negligence are attributable to the hospital, not to Dr. Gerhardt.

Even if the doctrine were applicable, and Dr. Gerhardt were responsible for the negligence of the fellow, residents, nurses or staff, on this record any responsibility of Dr. Gerhardt could be attributed to the Trust. Dr. Gerhardt testified that he was both a "professor of pediatrics at the medical school" and an attending "in the division of neonatology" at JMH. In her deposition,[1] Dr. Gupta testified that attendings were employed by both UM and JMH. From their ambiguous testimony, Dr. Gerhardt could have been an employee of either or both. See Jaar v. University of Miami, 474 So.2d 239,245 (Fla. 3d DCA 1985) (doctor was employee of both UM and the Trust; therefore both were liable for his negligence). Therefore, even if

[1] Admissible as substantive evidence under Fla.R.Civ.P. 1.330(a)(3)(F) and §§90.801(2), 90.803(22), Fla. Stat., or as an admission under §90.803(18) because she was still employed by the Trust (T.594-95).

Dr. Gerhardt were the "captain of the ship," any negligence for which he is responsible could still be attributed to the Trust, even if it could also be attributed to UM.[2]

Finally, if there were any evidence to support a "captain of the ship" theory, it would have supported, at most, a jury question, not a directed verdict. See Lighterman v. Porter, 548 So.2d 891 (Fla. 3d DCA 1989); Buzan v. Mercy Hosp., 203 So. 2d 11 (Fla. 3d DCA 1967). The disputed extent of authority of the residents and fellow was for the jury to resolve. Further, as the court noted in Bradley, "the doctor only becomes liable for the nurse's negligent acts involving professional skill and knowledge, with the hospital remaining liable for the nurse's acts which are purely ministerial." See also Siegel v. Husak, supra., (applying doctrine to nurse's negligent diagnosis because it required professional skill and judgment.) At least some of the acts alleged here, such as following up on the repeat CRP test, which the expert described as most critical, or having the proper equipment, which would have prevented the infection to begin with, are ministerial. Therefore, the Trust was not entitled to a directed verdict on this issue.

IV. THE TRUST WAS NOT ENTITLED TO A DIRECTED VERDICT BASED ON THE "LOCALITY RULE."

Section 766.102, Fla. Stat. (2004) sets the standard of care. It requires expert testimony that the defendant breached "the prevailing professional standard of care for that health care provider," defined as "that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers." §766.102(1). "Similar health care providers" who may testify about specialists and nonspecialists are defined in §766.102(5). That subsection does not contain any locality rule.

Before 2004, the statute did mention locality. According to the Historical Note in Florida Statutes Annotated, Ch. 2003-416, §48, Laws of Florida, rewrote §766.102, which formerly, in subsection (2)(a)(3), listed "[practice] in the same or

[2] Because negligence of UM was pled as a Fabre defense (R.16), and was not pled by the Plaintiff, it was the Trust's burden to prove it. See Nash v. Wells Fargo Guard Serv., 678 So.2d 1262,1264 (Fla. 1996).

similar medical community" as one of the qualifications for a "similar health care provider to testify against a non-specialist. That no longer appears in that portion of the statute.

The only places that the term "same or similar community" or locality now appear in the statute are in §766.102(7), pertaining to experts on the standard of care for "administrative or other nonclinical issues" for a facility; §766.102(9), concerning experts on the standard of care for emergency medical services in a hospital emergency department;[3] and §766.103(3), the informed consent statute. None of those subsections applies to the care provided to baby Ryan.

Even if the concurring opinion in Siegel v. Husak, 943 So.2d 209, 215-16 (Fla. 3d DCA 2006), on which the Trust relies, were correct, it is inapplicable to this case. The claim in Siegel arose in 2001, before the statute was amended. See 943 So.2d at 211-12. Ryan died on February 10, 2005, long after the 2003 amendment which dropped the mention of locality in §766.102(2)(a)(3).

Neither the former Florida Standard Jury Instruction on Professional Negligence, nor the new one, mention the locality rule. See FSJI 4.2 (2009); FSJI 402.4a (2010).

Furthermore, the cases discussing the locality rule – including the concurrence in Siegel, 943 So.2d at 215 – almost always refer to the "same or *similar*" community. See Torres v. Sullivan, 903 So.2d 1064, 1067 (Fla. 2d DCA 2005); Sweet v. Sheehan, 932 So.2d 365, 366-67 (Fla. 2d DCA 2006). See also, e.g., Bourgeois v. Dade County, 99 So.2d 575, 577 (Fla. 1957) ("same or similar communities").

As the court observed in Schwab v. Tolley, 345 So.2d 747, 753 (Fla. 4th DCA

[3] The Trust argues at p. 32 that this subsection applies to emergency treatment provided to Ryan in the NICU, but by its terms it only applies to treatment in "a hospital *emergency department*". §766.102(9)(a). Moreover, §766.102(9)(b)(2) refers to "same *or similar* localities."

1977), there is "no basic difference in that standard in Palm Beach County and elsewhere in the United States. This is a matter of common sense as well as case precedent." Accord, Marks v. Mandel, 477 So.2d 1036, 1039 (Fla. 3d DCA 1985) ("Dr. West professed great familiarity with the standard of care in the United States for these types of cases; there is no difference in that standard in Dade County").

At the time of trial, Dr. Yoder practiced in NICUs in Salt Lake City, a community reasonably similar to ours.[4] Dr. Yoder also had supervised all Air Force NICUs throughout the United States. It is a reasonable inference – one that must be accepted on a motion for directed verdict – that he was therefore familiar with the standard of care in the similar community here.

Similarly, Dr. Weber, a board certified pediatrician, did his pediatric residency at St. Louis University and at Georgetown Medical Center. As an attending in St. Louis, he supervised residents in a hospital like JMH, and then practiced pediatrics there, supervising care of newborns in the NICU throughout the course of his practice. He has been involved in, and knows the standard of care for, diagnosing and treating bacterial infections like the one that killed Ryan, in a hospital like JMH, in a major metropolitan area. This satisfies any requirement of testimony about the standard of care in the "same or similar community," if that were, in fact, the requirement.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A NEW TRIAL BASED ON THE CLOSING ARGUMENT.

The Trust raises five closing argument issues, but gives short shrift to objections, rulings or curative instructions. The standard of review depends on those facts. Murphy v. Int'l Robotics Sys., Inc., 766 So.2d 1010 (Fla. 2000).

[4] See generally Garver v. Eastern Airlines, 553 So.2d 263, 268 (Fla. 1st DCA 1989) (judicial notice that Los Angeles is a large metropolitan region); Morgan Drive Away, Inc. v. Mason, 183 So.2d 202 (Fla. 1966) (this Court took judicial notice of "commercial domination" of area by Leon County and City of Tallahassee).

If the objection was preserved, the argument must be "highly prejudicial and inflammatory" 766 So. 2d at 1013 n.2. The objection must be timely, it must assert specific grounds, and those grounds must be the same as the grounds argued on appeal Aills v. Boemi, 29 So.3d 1105, 1108-1109 (Fla. 20100).

If the issue was not preserved by objection, request for curative instruction and motion for mistrial, the Trust must show that it was (1) improper; (2) harmful; (3) incurable and (4) so damaging to the fairness of the trial that the public's interest in our system of justice requires a new trial. Murphy, 866 So. 2d at 1031.

a. Dr. Gerhardt's Relation to The Trust

Although the Trust claims "multiple motions for mistrial," Plaintiff only briefly mentioned Dr. Gerhardt's relationship to the Trust; there was an immediate sidebar and, although the objection was overruled, when it was mentioned in rebuttal the court sustained the objection and told the jury to disregard it (T.805-11, 872-73).[5] This argument was not a feature of the trial.

The Trust conceded at p.5 of its initial brief below that the jury instructions "were clear that the Trust was responsible only for residents, fellows and nurses" (See T.713; 888-89). These admittedly clear instructions, combined with the standard instruction that the lawyers' argument is not evidence (T.760) and that the jury must decide the case based only on the evidence and the law as instructed by the court (T.886-87), obviated any possible prejudice that could have resulted.

The Trust contends that it moved in limine to prevent any argument that it was responsible for Dr. Gerhardt, but it does not point to any ruling on that motion. While a party is bound to obey an *order* in limine, she is not required to obey a *motion.*

[5] Most of the transcript pages the Trust cites at p.33 do not concern Dr. Gerhardt at all. They concern a juror who allegedly fell asleep (T.746, 747); the use of a PowerPoint (T.753); Plaintiff's argument about the lack of evidence supporting the Trust's position (T.769); and alleged golden rule arguments (T.825).

The Trust tries to find harm in the assignment of zero fault to UM. Nobody testified specifically that Dr. Gerhardt was negligent. The Trust called no experts. Plaintiff's experts said the residents and fellow did not adequately communicate with him about Ryan's condition and test results. The Trust itself argued in closing that Dr. Gerhardt was *not* negligent (T.846, 865-66). A defendant who fails to present proof of a non-party's negligence, and who argues that the non-party was not negligent, waives the right to have any fault apportioned to the non-party. Nash v. Wells Fargo Guard Serv., Inc., 678 So.2d 1262, 1265 (Fla. 1996). The jury properly could have allocated no fault to UM on account of any negligence of Dr. Gerhardt.

Alternatively, there was evidence to justify allocating any fault of Dr. Gerhardt to the Trust. Dr. Gupta testified that attendings were employees of both UM and JMH (T.611). See generally Jaar, supra. (employment by both UM and the Trust).

The Trust's "double recovery" argument is meritless. Settling with one defendant and proceeding against another is not a "double recovery." See, e.g., Wells v. Tallahassee Mem. Reg'l Med. Ctr., 659 So.2d 249, 252 (Fla. 1995).

b. Mention of Contaminated Water

The Trust contends there was no evidence to support Plaintiff's mention in closing argument of contaminated water. It cites T.767-69, which does not mention water. There was evidence to support Plaintiff's mention of the water in closing.

Ryan was killed by a pseudomonas infection acquired in the hospital. Dr. Yoder testified that the bacteria was present in "water supplies" and most commonly gets on health care providers' hands and equipment from a contaminated water source in a hospital due to failure to maintain sterility and cleanliness; and that Ryan acquired the infection in the hospital (T.98-99, 192, 282-83). Dr. Weber testified that the source of the infection was likely "from the respiratory equipment, from the water, from the humidified air oxygen that was being administered to the

baby" (T.404).

Plaintiff's counsel discussed this testimony in closing argument, and the court reminded the jury that argument is not evidence (T.875-76). Counsel may argue reasonable inferences from the evidence. Murphy, 766 So.2d at 1028-29. This argument was based on the evidence and reasonable inferences from it.

c. References to lack of Evidence Contradicting Plaintiff's Case

Plaintiff argued: "And who is Dr. Organero, because we didn't hear from him. They didn't bring Dr. Organero in this courtroom to tell you, yes, I provided appropriate care to this baby. They didn't bring Dr. Monroig into this courtroom". The trial court sustained the Trust's objection. At sidebar, the court ruled that Plaintiff could argue that the jury did not hear from those doctors because "that is a fact the jury did not hear from them," but not that it was the Trust's obligation to bring them in; it denied the Trust's motion for mistrial (T.766-69).

Plaintiff's counsel then argued to the jury, "*We didn't hear from* Dr. Monroig or Dr. Organero. They didn't tell us about the care they provided was appropriate or within the standard of care. . ." and went on to point out that neither Dr. Gerhardt nor Dr. Gupta testified that they complied with the standard of care (T.769). There was no insinuation that the Trust was hiding anything.

Plaintiff's counsel spoke the truth. The Trust called only Dr. Gerhardt and Dr. Gupta – no other treaters and not a single expert. Plaintiff's counsel pointed out gaps and deficiencies in the evidence. In a civil case, a plaintiff is permitted to comment on the lack of evidence to rebut her evidence. In Gianos v. Baum, 941 So.2d 581 (Fla. 4th DCA 2006), the court held that it was reversible error to refuse to allow the plaintiff's counsel to argue that "we don't have any pathologists on the defendant's side." The court held that this was a "fair comment on the evidence presented" where the Defendant did not present any testimony from a pathologist. 941 So. 2d at 585. See generally, Wal-Mart Stores, Inc. v. Sommers, 717 So.2d 178

(Fla. 4th DCA 1998) (argument about absence of incident report proper where it "neither suggested that the attorney had access to off-the-record information nor appealed to the conscience of the community"); Linehan v. Everett, 338 So.2d 1294 (Fla. 1st DCA 1976) (plaintiff should have been permitted to comment on defendant's failure to call doctor who examined plaintiff on defendant's behalf).

This case is not like Lowder v. Econ. Opportunity Family Health Ctr., Inc., 680 So.2d 1133 (Fla. 3d DCA 1996). There, before trial, the plaintiff misled the defendant to believe that it would not matter if the defendant did not call a particular witness, but in closing, the plaintiff argued an adverse inference from the defendant's failure to call that witness. Here, Plaintiff did not mislead the Trust, and did not suggest that the Trust was hiding anything by failing to call those doctors. Plaintiff argued that the Trust did not rebut Plaintiff's case at all – not with retained experts or treating doctors. The argument was a fair comment on the lack of evidence to rebut the Plaintiff's two expert witnesses.

d. No Golden Rule Argument

The Trust does not point to any golden rule argument in the transcript; it cites only the verdict and final judgment (T.898; R.464-65). The only "golden rule" objection was to an argument that told the jury to use its own judgment and experience to determine the amount of damages:

> We have presented to you experts on medicine and we have presented them to you for days. But we have not presented to you any experts on the harm caused to this family. And the reason for that is, you are the experts on that. You-all know what it is to bear a child, to raise a child, to love a child. You know the value of the loss of a son.

(T.816-17). The court sustained the Trust's objection. The Trust did not ask for a curative instruction. When the Trust later moved for mistrial based on an unspecified golden rule argument, the court ruled there was no golden rule violation (T.825).

A golden rule argument asks jurors to put themselves in the plaintiff's shoes and award the amount they would like to receive themselves. Metro. Dade County v. Zapata, 601 So.2d 239, 241 (Fla. 3d DCA 1992) (asking jury to "walk in their shoes"). Cf. Grushoff v. Denny's, Inc., 693 So.2d 1068 (Fla. 4th DCA 1997) (asking "'how much is it worth to you when you go to the dentist . . .' may be calling upon the personal experience of the jurors [but] it is not asking them to place themselves in the position of the appellant to experience *her* pain") (court's emphasis). The Standard Instructions tell the jurors that "there is no exact standard for fixing the compensation" for this kind of damages. See FSJI 6.5(a)(2009); FSJI 502.2(2010). Plaintiff only asked the jury to use its experience to determine "the value of the loss of a son," not to experience Ms. Acanda's pain at that loss.

The trial court, who "had the benefit of hearing the remark in the context and manner in which this argument was delivered," Porta v. Arango, 588 So.2d 50 (Fla. 3d DCA 1991), did not abuse its discretion in denying a new trial.

e. Biblical References and Cumulative Effect of Argument

The Trust argues that "references to the Bible" about the death of a son urged the jury to "measure the value of life." But, unlike the argument in Public Health Trust v. Geter, 613 So.2d 126 (Fla. 3d DCA 1993), Plaintiff's argument did not ask the jury to measure the value of Ryan's life. Plaintiff used the story of the prodigal son to ask the jury to think about what the loss of a child is worth (T.817-18). See Wilbur v. Hightower, 778 So.2d 381 (Fla. 4th DCA 2001) (distinguishing between "value of a human life" and "value of a loss" arguments). The value of the loss of Ryan, suffered by his parents, is exactly what the jurors were supposed to determine.

The Trust did not object to this argument at trial. The Trust has not shown that it was improper, harmful and incurable, and so damaging to the fairness of the trial that the public interest requires a new trial. Murphy, 766 So.2d at 1030-1031.

"Counsel should not be so restricted in argument as to prevent references by way of illustration to principles of divine law as may be appropriate to the case." Farina v. State, 937 So.2d 612, 629 (Fla. 2006).

Nor does any cumulative effect justify a new trial, especially where the trial court, who was present at trial, declined to grant one. The Trust argues that the Court should not "sanction such improper conduct in closing." Plaintiff denies any "improper conduct," but even if there were any, "the primary concern of courts must be how the improper closing argument affected the fairness of the trial proceedings." Murphy 766 So.2d at 1029.

The argument caused no harm. The verdict, two million dollars for the parents of a dead baby, was not excessive. Compare, e.g., St. Mary's Hosp., Inc. v. Brinson, 685 So.2d 33 (Fla. 4th DCA 1996) ($9 million verdict for death of nineteen-month-old child); Kammer v. Hurley, 765 So.2d 975 (Fla. 4th DCA 2000) ($2.5 million to each parent for wrongful stillbirth).

Nor can the cumulative error argument rest on the allocation of no fault to UM. The Trust did not present a single expert to say that Dr. Gerhardt was negligent. The court instructed the jury that the Trust was only responsible for the negligence of residents, fellows and nurses. In placing all of the responsibility for Ryan's death on them, the jury likely focused on their independent negligence, such as their failure to convey crucial information to Dr. Gerhardt, their failure to follow up on the CRP test, which would have led to antibiotics, and their decision to put Ryan on room air. The jury was entitled to do that.

The concept of cumulative error is not an excuse for cobbling together a group of arguments that were not prejudicial or harmful, or were poorly preserved. Bryan v. State, 748 So.2d 1003, 1008 (Fla. 1999) (where individual allegations of error are without merit, cumulative error argument must also fail). Nothing here, singly or in combination, justifies overturning the trial judge's informed exercise of discretion.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A NEW TRIAL ON THE BASIS OF VOIR DIRE

When Plaintiff's counsel began discussing a prospective juror's concerns about whether JMH would find out if she returned a verdict for the Plaintiff, the trial court promptly sustained the Trust's objection and gave a curative instruction. The record reflects no objection to the instruction that was given, and the woman did not sit on the jury. The record does not show that the Trust renewed any objections before the jury was sworn, or objected to the jury that ultimately was empaneled. The Trust is not entitled to a new trial on this basis.

The area of inquiry was proper. See generally, e.g., Tieso v. Miami-Dade County, 426 So.2d 1156 (Fla. 3d DCA 1983) (asking county employee whether job would affect his ability to return verdict against county not golden rule argument). In Henry v. State, 586 So.2d 1335 (Fla. 3d DCA 1991), a prospective juror in a criminal case worked as a secretary for the state attorney's office. The trial court had asked her whether she would be concerned if she saw the prosecutor at work and he asked her about her verdict. 586 So.2d at 1336. The court held that the juror's response to that and other questions left a reasonable doubt about the juror's ability to be impartial. 586 So.2d at 1337. If responses to such questions provide grounds to excuse a juror for cause, then it must be appropriate to ask them. The focus of the question was not on the Trust's behavior. The focus was on the prospective juror's feelings.

Moreover, any possible prejudice was cured. The trial court instructed the jury that Plaintiff's counsel's statement was inappropriate and "not proper," and that they should not consider it. The woman did not serve on the jury.

The Trust did not preserve the objection. An objection to events during voir dire must be renewed before the jury is sworn to give the trial court "one last chance to correct a potential error and avoid a possible reversal on appeal," and to

allow counsel "to reconsider the prior objection once a jury panel has been selected." Carratelli v. State, 961 So. 2d 312, 319 (Fla. 2007). See also Karp v. State, 698 So.2d 577 (Fla. 3d DCA 1997) (refusal to strike venire because of inflammatory remarks not preserved where defendant failed to renew objection before jury was sworn.)

The Trust has not demonstrated that it was harmed in any way, or that the trial court abused its discretion in denying the motion for mistrial.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A NEW TRIAL BASED ON OPENING STATEMENT AND USE OF A POWERPOINT.

In opening statement, Plaintiff's counsel used a PowerPoint which the Trust contends was not in evidence. However, as the Trust has conceded, the PowerPoint was used throughout the trial – for most of that time, without objection. The Trust waived this issue.

When the Trust objected during opening statement, Plaintiff stopped using it. When the court asked if the Trust was going to ask for a mistrial, the Trust did not respond. Plaintiff used the PowerPoint, apparently including a graph of premature babies' survival rates and Ryan's medical chart, in her examination of Dr. Yoder. The Trust never objected.

When the Trust finally objected, the trial court ruled that the Trust waived the objection because Plaintiff had been using the PowerPoint for "five or ten minutes," and asked the Trust to make timely objections. Plaintiff's counsel then reviewed the PowerPoint with the Trust's counsel, removing everything they asked her to.

A PowerPoint is really no different from a chalk board or an easel. See Milson v. State, 832 So.2d 897 (Fla. 3d DCA 2002) (no abuse of discretion to allow prosecution to use PowerPoint in closing). The witness could have used a blowup poster of the chart and annotated portions as he spoke.

The trial court properly concluded that the Trust waived its objection. A party cannot allow evidence to be used without objection, and then complain about it later. See, e.g., Kight v. American Eagle Fire Ins. Co., 170 So.664 (Fla. 1936); Aills v. Boemi, 29 So.3d 1105, 1108 (Fla. 2010) (requiring "timely, contemporaneous objection at the time of the alleged error"). Moreover, even improper evidence is harmless if it is cumulative to evidence admitted without objection. Broward County Sheriff's Office v. Brody, 969 So.2d 447 (Fla. 4th DCA 2007) (cumulative poster boards highlighting parts of plaintiff's medical treatment harmless).

VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A NEW TRIAL BASED ON THE MANIFEST WEIGHT OF THE EVIDENCE.

The Trust urges this Court to grant a new trial based on the manifest weight of the evidence, citing Miami-Dade County v. Merker, 907 So.2d 1213 (Fla. 3d DCA 2005), which affirmed an order granting new trial. It argues at p. 40 that this Court "is in the same predicament as [the trial judge] was in Merker."

This Court's situation is nothing like that of the trial judge in the Merker case. This case comes to this Court on review of an order denying new trial. The Trust's argument confuses the roles of different actors in the legal process.

> Clearly, it is a jury function to evaluate the credibility of any given witness. . . . Moreover, the trial judge should refrain from acting as an additional juror. . . . Nevertheless, the trial judge can and should grant a new trial if the manifest weight of the evidence is contrary to the verdict. . . . The trial judge should only intervene when the *manifest* weight of the evidence dictates such action. However, when a new trial is ordered, the abuse of discretion test becomes applicable on appellate review. . . .

Smith v. Brown, 525 So.2d 868, 870 (Fla. 1988) (citations omitted). On review, the appellate court "must recognize the broad discretionary authority of the trial judge and apply the reasonableness test to determine whether the trial judge committed an abuse of discretion." Brown v. Estate of Stuckey, 749 So. 2d 490, 497-98 (Fla.

1999).

There was no abuse of discretion here. Contrary to the Trust's argument, there is no "unrebutted" evidence that UM was negligent. See Point III. And, as discussed in Point IV, there was ample evidence from which the jury could find that the Trust violated the local standard of care. The trial court did not abuse its discretion in denying the motion for new trial on the basis of the manifest weight of the evidence.

CONCLUSION

Respondent respectfully asks this Court to affirm.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via FedEx to: ERIC K. GRESSMAN, ESQUIRE, R.A. CUEVAS, JR., ESQUIRE, STEVE STEIGLITZ, ESQUIRE, Assistant County Attorneys, 111 N.W. 1st St., Miami, FL 33130 this _____ day of August, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

____I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

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