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,

v.

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

Appellee.

THE PUBLIC HEALTH TRUST'S AMENDED INITIAL BRIEF

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STATEMENT OF THE FACTS AND CASE

a. Statement of the Case.

On Friday, August 10, 2007, the jury herein rendered a verdict for the Plaintiffs finding the Public Health Trust 100% negligent and the University of Miami zero percent negligent as well as assessing damages in the amounts of $1.2 million for Ms. Acanda and $800,000 for Mr. Rodriguez. T-898; R-464-65.

The trial court reserved on the motion for directed verdict. T-901. The judge, upon announcement of the verdict, indicated that a transcript of the proceedings would assist her in deciding the motion for directed verdict. T-901-902. The Defendant ordered the transcript and provided said transcription to the trial court upon receipt of the same. T-902.

Both orally and in writing, the Defendant moved for directed verdict based on (a) the "captain of the ship" doctrine which absolves all beneath the attending physician; *i.e.*, residents, fellows and nurses, for the decision not to prescribe antibiotics to the baby; (b) the lack of proof of proximate cause particularly of alleged nurses' negligence in the provision of a make-shift incubator and placement of an Ambu bag close to the infant; (c) the failure of Plaintiffs to comply with the "locality rule" which requires Plaintiffs to show a violation of the local or Florida standard of care; and (d) Plaintiffs' failure to comply with Fla. Stat. § 768.28(7). T-464-505; R-115-20.

b. Facts Related to Section 768.28(7) Issue.

It was undisputed that, at the close of Plaintiffs' case, they had failed to comply with Fla. Stat. § 768.28(7). Plaintiffs, on August 8, 2007, rested. T-454. Plaintiffs below never objected to the timing of the motion for directed verdict. After Defendant moved for directed verdict, the trial court asked if Plaintiffs had complied. T-472. The Plaintiffs requested a recess for the evening to check their pleadings file to see if they *had* complied with Fla. Stat. § 768.28(7). T-472. The next morning, after staying up all night, Plaintiffs' counsel produced an unsworn affidavit purportedly showing that the Department of Financial Services was served shortly after 8 a.m., that same day, on August 9, 2007. T-481; 483-484. Plaintiffs finally admitted that, as of August 8, they had not served the Department of Financial Services. T-481. Plaintiffs instead argued that there was no time limit for such service. T-481-84. Defendant, pursuant to the trial court's instruction, prepared a written motion for directed verdict which cited *Williams v. Miami-Dade County*, 957 So. 2d 52, 52 (Fla. 3d DCA 2007), holding that a directed verdict is proper where Plaintiff has *failed to prove compliance* with Fla. Stat. § 768.28(7). R-115-20. When the Court inquired concerning *dicta* in *Miami-Dade County v. Lopez*, 889 So. 2d 146, 148 (Fla. 3d DCA 2006), stating it was too late to turn back the clock and serve process after the jury returned the verdict, the Trust's counsel responded that *Lopez* which affirmed the immunity from suit, merely mentioned

the failure to comply after the jury returned a verdict, because the plaintiff therein did not even comply with Fla. Stat. § 768.28(7) at the close of the defense case. T-678. Defendant argued that such a statement was *not* even *dicta* since the *Lopez* court did not in any way sanction waiting until after the Plaintiffs rest their case to comply with Fla. Stat. § 768.28(7). T-678-79.

The Plaintiffs filed an affidavit and requested that the Court allow them to reopen their case to allow them to enter an unsworn affidavit into evidence and to produce a witness to verify service of process. T-705. The trial court denied Plaintiffs leave to reopen their case. T-705. Defendant objected to the authenticity and lack of predicate for the entry into evidence of the affidavit. T-705. Additionally, Defendant objected to the document as an improper subject of rebuttal. T-705. The order denying the post-trial motions fails to address the issue of compliance with Fla. Stat. § 768.28(7). R-459-65.

c. Facts and Background Related to Remainder of the Case.

During opening statement, Plaintiffs' counsel stated in front of the entire jury panel that the Defendant would report an adverse verdict to a juror's employer, Cedars Hospital. Appendix, A-1, at 4-5. At the time of *voir dire*, the Trust was negotiating to assume control of Cedars Hospital. Ultimately, the University of Miami assumed control of Cedars Hospital. Defendant moved to

strike the panel. Appendix, A-1, at 3, lines 24-25. The motion was denied. Appendix, A-1, at 5, line 11.

The evidence concerning the authority of Dr. Tilo Gerhardt, an attending physician employed by the *University of Miami*, was undisputed. According to Dr. Gerhardt, none of the residents, fellows or nurses had any authority to override his order not to prescribe antibiotics. T-515, lines 21-25; 516, lines 1-4; 522, lines 10-13; 522, lines 21-25. The Plaintiffs' experts, Dr. Bradley Yodar and Dr. Marc Weber, both testified that the attending physician had ultimate authority and made the decision not to prescribe antibiotics. T-172, lines 18-25; 173, lines 1-6; 177, lines 11-14; 177, lines 15-25; 178, line 1; T-413, lines 18-21; 414, lines 2-8.

The lack of evidence of violation of the *Florida* standard of care was also undisputed. Neither expert for Plaintiffs expressed any opinion that the Florida standard of care was violated. T-97; 274; 308; 315; 320-21. The experts, a neonatologist and a pediatrician, opined only that the standard of care for residents, fellows and nurses was violated. T-97; 274; 308; 315; 320-21.

Dr. Marc Weber indicated that the nurses committed negligence by using a make-shift incubator and placing an Ambu bag near the baby. T-276; 293-94. However, Dr. Weber testified that these were only possible causes of the infection. T-276; 293-94;. Plaintiff's experts testified that the probable cause of the infection was respiratory equipment. T-99-100; 191-92; 276; 293-294. Although Plaintiffs

originally alleged negligence on the part of the respiratory therapists, they ultimately abandoned such a claim. R-6-14; T-13; 713. No evidence was produced regarding negligence on the part of the respiratory therapists. The jury instructions were revised to reflect that the *only* employees of the Trust who were arguably negligent were the residents, fellows and nurses. T-713.

At the conclusion of the Plaintiffs' rebuttal argument, the trial court reserved ruling on the motion for mistrial because the Plaintiffs' counsel, despite the sustaining of objections, repeated that the Trust was responsible for the negligence of Dr. Tilo Gerhardt, an attending physician at the University of Miami. T-805-11; 824. The jury instructions and pleadings were clear that the Trust was responsible only for residents, fellows and nurses. T-713; 879-80.

The trial court further indicated that counsel for Plaintiffs had violated the Golden Rule during closing argument but opined that the arguments were "harmless". R-459-63; T-817. Counsel, referring to the jury, said they all knew the value of a life. T-817. The trial court also denied a motion for mistrial based on arguments concerning failure to call a witness. T-767-69.

As stated in the motion for directed verdict, the undisputed evidence was that Dr. Tilo Gerhardt was the "captain of the ship." R-115-20. His orders cannot be overridden by any resident, fellow or nurse. It was also undisputed that neither

expert for the Plaintiffs testified that the residents, nurses or fellows violated the local or Florida standard of care. T-97; 274; 308; 315; 320-21.

The only probable cause of the deadly infection was through the respiratory equipment. Plaintiff did *not* pursue any claim against the respiratory therapists. The therapists were deleted as potential negligent employees of the Trust. T-713. The only actors who could be charged with negligence were residents, fellows and nurses. T-713; Jury Instructions, R-126-41. Without a hearing, the trial court denied all post-trial motions renewing motions for directed verdict, seeking a judgment notwithstanding the verdict and requesting a new trial. R-167-307; 308-399; 459-65. The appeal was timely filed. R-450-58. The Third District Court affirmed the judgment. Judge Suarez, however, wrote a dissent.

SUMMARY OF ARGUMENT

A directed verdict should have been entered at the close of Plaintiff's case. By admission, Plaintiffs failed to serve process upon the Department of Financial Services and failed to prove such service. The trial court refused to allow Plaintiffs to reopen their case and, therefore, a directed verdict was mandated.

The trial judge avoided even discussing Plaintiff's failure to prove compliance with Fla. Stat. § 768.28(7) in the order denying the post-trial motions. On August 8, 2007, Plaintiff rested. Plaintiff pleaded for time to look over her file to see if she had complied. On August 9th, Plaintiff finally admitted that she had

not complied as of August 8th, but she had by the morning of August 9th achieved service upon the Department of Financial Services. Plaintiff sought to reopen her case to permit her to prove service, but the trial court denied the motion to reopen.

Plaintiff failed to object to the timing of the motion for directed verdict at the trial level. Plaintiff only developed an argument that the motion for directed verdict was premature when she argued before the Third District. Plaintiff thus waived any argument that the motion for directed verdict was properly denied since it was made prior to Plaintiff's resting.

This Court should reverse the Third District's opinion since it is based on an argument Plaintiff waived by failing to object at the trial level to the timing of the motion for directed verdict. Moreover, where Plaintiff created an excuse to delay the entry of the directed verdict, used a pretense to comply with Section 768.28(7), and sought unsuccessfully to reopen to prove compliance, this Honorable Court should reverse the Third District's Opinion and refuse to sanction Plaintiff's conduct that relies on a pretense and nullifies the language and purpose of Fla. Stat. § 768.28(7). The Third District has in effect sanctioned a revision of the statute that renders precedent requiring strict compliance with Fla. Stat. § 768.28 a nullity. Such a revision would create liability for the state, its subdivisions and officers beyond the strict dictates of the statute.

A directed verdict was further justified by the unrebutted evidence that the attending physician, Dr. Tilo Gerhardt, was the "Captain of Ship" who absolved the Public Health Trust's residents, fellows and nurses of any liability. Moreover, failure to show that any Trust employee violated the Florida or local standard of care necessitates a directed verdict.

If this Honorable Court declines to mandate the entry of a judgment notwithstanding the verdict, Plaintiffs' improper *voir dire*, opening statement and closing argument would necessitate a new trial. During *voir dire*, Plaintiffs' counsel stated that Defense counsel would in effect punish an employee of Cedars Hospital if she rendered a verdict for Plaintiffs. Further improper statements in Plaintiffs' opening statement and closing argument included (1) matters not in evidence; (2) assertions that Dr. Tilo Gerhardt, a University of Miami doctor, was an employee of the Public Health Trust; (3) references to failure to call witnesses; (4) arguments that violated the Golden Rule; and (5) improper analogies to the Bible that measure the value of a life.

The competent and proper evidence was overwhelmingly in favor of Defendant. The verdict was thus based on prejudice and was contrary to the manifest weight of the proper, competent evidence in the case. The finding of no negligence on the part of the University of Miami where its doctor, Tilo Gerhardt,

made the decision not to prescribe antibiotics utterly defies common sense and reason. Such a verdict, fraught with error, cannot stand.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT WHERE PLAINTIFFS PROVIDED NO EVIDENCE OF COMPLIANCE WITH FLA. STAT. § 768.28(7) PRIOR TO RESTING THEIR CASE.

The Third District Opinion overlooks the unequivocal statement of Plaintiff on August 8, 2007: "Your Honor, we are going to rest *now*. . ." (emphasis added). T-454. At the point of resting, Plaintiff had not complied with Fla. Stat. § 768.28(7). *See Public Health Trust v. Acanda*, 23 So.3d 1200, 1203-04 (Fla. 3d DCA 2009) (Dissent outlining the sequence of statements regarding resting).

Then, the court asked, *assuming* Plaintiff rested, are there any motions anybody wants to raise outside the presence of the jury? T-464. Plaintiff did not object to the court's statement or argue that motions for directed verdict would be premature. Defendant then moved for directed verdict on August 8, 2007. The following day, on August 9, the Court even recognized that "Yesterday, the defense had raised three issues for a directed verdict *at the close of the plaintiff's case*. . ." T-481. (emphasis added). Once again, the Plaintiff *never* objected to the trial court's determination that the motion for directed was raised *after* Plaintiff rested.

Moreover, Plaintiff's counsel admitted on August 9 that she closed *yesterday* and then asked to re-open or present the affidavit of service on rebuttal. T-495. Then, further acknowledging that Plaintiff had rested on August 8, the Court questioned Plaintiff's counsel "[y]ou mean, that every time the defense makes an argument for a directed verdict, I'm supposed to tell you if I think they're right – if I think they're right and have their – I'm supposed to *reopen* the case and let you do whatever it is that you haven't done up to this point in time?" T-496 (emphasis added).

Rather than asserting that Plaintiff had not rested, Plaintiff's counsel immediately responded regarding the issue of *re-opening*. T-496. On August 9, Plaintiff *never* stated that she "rests" because she had already rested on August 8. The first witness on the morning of August 9 was Defendant's doctor presented by the Trust on direct examination. T-507. The jury was told on August 8 that the Plaintiff "now rests." T-454. It was announced to the jury that the defense was calling its first witness on August 9 since Plaintiff *had rested*. T-506. Instead of asserting that Plaintiff had never rested, Plaintiff sought to re-open the case and fly the process server to Miami to testify. T-705. Such statements belie any claim that Plaintiff had not rested. The trial court denied the request to re-open. T-705. The Opinion thus has overlooked the fact that Plaintiff rested *before* the motion for directed verdict was articulated and affirmed based on a misreading of the Record.

Importantly, the Third District's Opinion also overlooks the trial court's refusal to allow the Plaintiff to re-open to introduce the alleged compliance with Fla. Stat. § 768.28(7). T-705. This fact demonstrates that the Plaintiff's case was already closed, as the Court specifically denied the Plaintiff the ability to reopen (which would not make any sense if the case was still open). In contrast, the premise for the majority opinion is that Plaintiff rested *after* the motion for directed verdict. Plaintiff even admitted that she failed to comply prior to resting. T-481. Accordingly, the premise for the decision is wrong. Contrary to the majority's opinion in *Public Health Trust v. Acanda*, 23 So.3d at 1203, 1204, the Plaintiff rested prior to the motion for directed verdict. This matter should therefore be reheard to apply the correct reading of the Record and reverse the judgment herein.

The Opinion further overlooks the legal significance of the trial court's explicit denial of Plaintiff's request to re-open. T-705. This ruling was a discretionary decision. *See Thrifty Super Market v. Kitchener*, 227 So. 2d 500, 502 (Fla. 3d DCA 1969) ("This question is directed to the sound judicial discretion of the trial court, and the exercise of such discretion will not be reversed upon appeal unless the appellant demonstrates a clear showing of abuse."). The trial court was fully within its discretion to refuse to allow the Plaintiff to reopen her case-in-chief to create and introduce evidence that did not even exist when she closed her case. Because the trial court properly exercised its discretion, an element of Plaintiff's

case-in-chief was not proven, and to this day, still is not in the trial record (as the Plaintiff's case was never reopened). *See Williams v. Miami-Dade County*, 957 So. 2d 52, 52 (Fla. 3d DCA 2007) (mandating that a plaintiff must *prove* compliance with Fla. Stat. § 768.28(7) in her case-in-chief). Thus, the decision of the trial court to deny the Plaintiff's request to re-open necessarily means that, on appeal, there is *no evidence* of compliance upon which this Honorable Court can affirm the judgment.

The Court should not create a rule whereby plaintiffs are able to circumvent motions for directed verdict where a plaintiff has not presented evidence essential to her case-in-chief at the time of the motion. Here, after closing, Plaintiff asked the trial court for additional time to check her file to respond to the Defendant's motion for directed verdict and to answer the Court's inquiry as to whether she already complied with section 768.28(7) – a statutory element of her case-in-chief. T-472. Instead of checking her file or the relevant case law, Plaintiff appears to have hired a process server and served the Department of Financial Services – thus creating evidence necessary for her case-in-chief after resting and without reopening. T-481. Such practices are inconsistent with the rules of civil procedure and should not be sanctioned, much less mandated, by this Honorable Court. *See Silber v. Cn'R Industries of Jacksonville, Inc.*, 526 So. 2d 974, 978 (Fla. 1st DCA 1988) (holding that a party should not be allowed to "reopen its case, change the

evidence to *alter the existing facts* and then adduce proof of the new facts as altered by using evidence of such changes") (emphasis supplied). Moreover, the statutory requirement of service on the Department of Financial Services is rendered meaningless by the Third District's newly adopted interpretation of the statute whereby service of the complaint can be effected *after* the close of Plaintiff's case-in-chief in the trial of that complaint. *See American Home Assur. Co. v. Plaza Material Corp.*, 908 So. 2d 360, 367-68 (Fla. 2005) (holding that courts should avoid readings of statutes that render parts of the statute meaningless.)

In addition, affirming the judgment below sanctions a misleading representation as to why a recess was necessary. This decision authorizes all plaintiffs who realize that they did not comply with Fla. Stat. § 768.28(7), to refuse to answer the question as to whether they complied, construct a pretense for a recess and, without noticing the Court or the Defendant, comply with Fla. Stat. § 768.28(7) during the recess. A consequence of the Opinion under review is to encourage plaintiffs to act in a deceptive or evasive manner, because, if the Plaintiff is honest with the trial court, the trial court can and should direct a verdict where there is no compliance with Fla. Stat. § 768.28(7). *A fortiori*, this Court should not on *appeal* allow Plaintiff in effect to re-open her case where the trial court refused to allow Plaintiff to do so. T-705.

Affirming the judgment would establish an impossible situation for a defendant properly asserting grounds for directed verdict. At the close of Plaintiff's case, the trial court, without objection from the Plaintiff, requested that the parties make any motions. If the Trust had not then presented its motion, Plaintiff would have argued that the Trust waived any motion for directed verdict. Under the Opinion, however, if the Trust had presented its motion, which it did, Plaintiff could then wait and argue that it was premature for the first time on appeal. The Defendant, under the Opinion, is placed in an impossible "Catch 22". If the Defendant refuses to move for directed verdict, where the Plaintiff voices no objection to the timing of the motion, a waiver occurs. If the Trust accedes to the trial court's request, the motion would be considered premature under the Opinion. This situation is untenable and supports reversal.

Moreover, the Opinion has overlooked that the doctrine of estoppel which precludes Plaintiff from taking inconsistent positions on the same facts in the same case. *Town of Oakland v. Mercer,* 851 So. 2d 266, 268-69 (Fla. 5th DCA 2003). Here, Plaintiff moved to reopen (which would be impossible unless the case was closed). The trial court denied the motion. Yet here Plaintiff claims that she had not rested.

The Opinion establishes another untenable rule that is in direct conflict with the existing precedent. In particular, the Opinion permits a party suing a

governmental entity to close her case-in-chief without having complied with a necessary component of the statute granting a limited waiver of sovereign immunity, and then to defeat a motion for directed verdict raising sovereign immunity, by creating and relying on new evidence obtained after her case-in-chief was closed, and without being permitted to reopen the case. *See Public Health Trust v. Acanda*, 23 So.3d at 1202 ("Even if we were to conclude that the plaintiff had rested her case when the hospital is permitted to argue its motion for directed verdict, the notice requirement at issue had been satisfied by the following morning before ruling on either the 'reserved' evidentiary matter or the hospital's motion for directed verdict.").

In an unprecedented manner, the Court deviates from several precedents as recognized by the dissent of Judge Suarez. As Judge Suarez has pointed out, "based on the record, the required, strict, construction of the mandatory terms of section 768.28(7), and *legal precedent from this Court* and others, the trial court was required to grant the directed verdict." *Id.* at 1204-05 (emphasis added).

For example, in *Williams v. Miami-Dade County*, 957 So. 2d 52, 52 (Fla. 3d DCA 2007), the Third District affirmed the trial court's order granting a directed verdict in favor of Miami-Dade County, because plaintiff failed to prove compliance with the service of process requirements of section 768.28(7). Such failure was fatal to the plaintiff's action. There can be no doubt that *Williams* is in

direct conflict with the instant decision. Case after case conflicts with the Third District's Opinion.

Metropolitan Dade County v. Lopez, 889 So. 2d 146, 146-48 (Fla. 3d DCA 2004), held that section 768.28(7) required service on the Department of Insurance to be strictly construed as part of sovereign immunity and leaves the trial court no choice but to grant a directed verdict in favor of Miami-Dade County where failure to serve process on the Department was asserted as a defense and properly raised in a motion for directed verdict at the close of the plaintiff's case.

In addition, *Miami-Dade County v. Meyers*, 734 So. 2d 507, 508 (Fla. 3d DCA 1999), reversed and remanded a trial court's decision not to grant a directed verdict, with directions to enter judgment for the County where the defendant had properly raised Section 768.28(7) as a defense on a motion for directed verdict before the case went to the jury.

Further, and once again contrary to the instant decision, *Metropolitan Dade County v. Braude*, 593 So. 2d 563, 564 (Fla. 3d DCA 1993), reversed a jury verdict where plaintiff failed to serve process pursuant to Fla. Stat. § 768.28(7), remanded the matter to the trial court for entry of judgment for defendant, and held that the denial of the motion for directed verdict was error. *Meyers*, *Williams*, *Lopez* and *Braude* thus directly conflict with the instant decision herein. *See also Scarlett v. Public Health Trust of Dade County*, 584 So. 2d 75 (Fla. 3d DCA 1991), *overruled*

on other grounds by Chandler v. Novak, 596 So. 2d 749 (Fla. 3d DCA 1992) (requiring that Plaintiff prove at trial compliance with Fla. Stat. § 768.28).

The instant decision is also contrary to *Freedman v. Freedman*, 345 So. 2d 834, 835 (Fla. 3d DCA 1977), where it was held that the trial court should direct a verdict at the close of plaintiff's case where the plaintiff did not present sufficient evidence on an issue for which the plaintiff bore the burden of proof. In fact, for the first time, the Third District's majority opinion allows the trial court to ignore the dictates of prior precedent and, without permitting additional evidence, refuse to direct a verdict.

Indeed, the instant decision further conflicts with *City of Miami Beach v. O'Hara*, 166 So. 2d 598, 600-01 (Fla. 3d DCA 1964), *cert. denied*, 172 So. 2d 597 (Fla. 1965), which held that the trial judge departed from essential requirements of law by failing to enter a judgment notwithstanding the verdict where plaintiff did not prove compliance with a requirement that it notify the City. *O'Hara* further indicates that the Third District herein has in effect legislated by tolerating non-compliance with a statute despite the Legislature's clear mandate. Such a deviation from the sovereign immunity statute and the proper scope of an appellate court's review constitutes an issue of great public and exceptional importance and justifies a reversal. *See U.S. v. Kubrick*, 444 U.S. 111, 117-18 (1979).

Finally, as recognized by the dissent, this decision will nullify the mandatory compliance provisions of the statute and violate separation of powers in that the Third District has rewritten the statute to allow non-compliance so long as the trial court does not make a decision on a motion for directed verdict. Indeed, the statutory requirement of service on the Department of Financial Services is rendered meaningless by the Third District's newly adopted interpretation of the statute whereby service of the complaint can be effected *after* the close of Plaintiff's case-in-chief in the trial of that very complaint. *See American Home Assur. Co. v. Plaza Material Corp.*, 908 So. 2d 360, 367-68 (Fla. 2005) (holding that courts should avoid readings of statutes that render parts of the statute meaningless.) Such an overstepping of the judicial boundaries regarding sovereign immunity and separation of powers mandates reversal.

The instant decision affects a class of constitutional and state officers, namely those sued in their official capacities. Prior to this opinion, such officers were protected from plaintiffs who failed to strictly comply with the requirements of Fla. Stat. §768.28(7). For the first time, the Third District has deviated from the Court's dictates that such requirements must be strictly construed. The instant opinion in effect allows a plaintiff to avoid a directed verdict where she has not complied with such strict requirements. Such a decision constitutes an overstepping of the boundaries of a court's domain and, in effect, loosens a

legislative requirement for waiver of sovereign immunity that affects state or constitutional officers in their official capacities. *See Beard v. Hambrick,* 369 So.2d 708, 710 (Fla. 1981). The Third District's decision, if affirmed, undermines sovereign immunity for such officers.

Particularly as to waiver of sovereign immunity, the appellate court has no authority to extend the waiver beyond the boundaries set by the Legislature. *Richman v. Shevin,* 354 So.2d 1200, 1205 (Fla. 1977), *cert. denied*, 439 U.S. 953 (1978); *Federal Ins. Co. v. Southwest Florida Ret. Ctr., Inc.,* 707 So.2d 1119, 1121 (Fla. 1998). Indeed, *Spangler v. Florida State Turnpike Authority,* 106 So.2d at 1205, shows that the instant Opinion's waiver of sovereign immunity beyond the boundaries set by the Legislature, expressly and improperly affects a class of state and constitutional officers.

The Fifth District in *Sheriff of Orange County v. Boultbee,* 595 So. 2d 985 (Fla. 5th DCA 1992), has ruled that plaintiffs must comply with the strict requirements of Fla. Stat. § 768.28 and the plaintiff must prove such compliance at trial.

In addition, *Silber v. Cn'R Industries of Jacksonville, Inc.*, 526 So. 2d 974, 978 (Fla. 1st DCA 1988), holds that plaintiff should not be permitted to create evidence after resting, which was permitted here. Moreover, Plaintiff herein violates the holding in *Mercer*, 851 So. 2d at 268-69, where estoppel prohibits

Plaintiff from inconsistently seeking to move to re-open a case below and then claiming on appeal that she had not rested at the time she sought to re-open.

The Fifth District's decision in *Re-Employment Servs., Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d 467 (Fla. 5th DCA 2007), conflicts with the instant decision by holding that the burden to establish proper service of process is upon the party seeking to invoke the court's jurisdiction. The instant decision, contrary to *Re-Employment Services*, holds that Plaintiff herein need not satisfy such a burden and, instead, can avoid a directed verdict by complying after the presentation of her case in chief. This decision thus conflicts with the upshot of *Re-Employment Services*, which requires Plaintiff to prove proper service of process as part of her case in chief.

Further, the instant decision conflicts with *Canada Dry Bottling Co. of Florida, Inc. v. K.M.A., Inc.*, 349 So. 2d 846, 847-48 (Fla. 2d DCA 1977), which holds that once the plaintiff has failed to prove a part of a claim, it is incumbent on the trial court to dismiss or enter a directed verdict, and that it would depart from the essential requirements of law to remand the case to allow plaintiff to re-open and present evidence where the trial court excluded hearsay. This Opinion, which allows Plaintiff in effect to re-open her case on appeal and present evidence after the motion for directed verdict and to create evidence after the motion for directed

verdict, is in direct conflict with the decision of the First District Court of Appeal. T-705; *Silber*, 526 So. 2d at 978.

Finally, and as stated previously, the statutory requirement of service on the Department of Financial Services is rendered meaningless by the Third District's newly adopted interpretation of the statute whereby service of the complaint can be effected *after* the close of Plaintiff's case-in-chief in the trial of that very complaint. *See American Home Assur. Co. v. Plaza Material Corp.*, 908 So. 2d 360, 367-68 (Fla. 2005) (holding that courts should avoid readings of statutes that render parts of the statute meaningless). Indeed, this Honorable Court has reiterated the importance of compliance with Fla. Stat. § 768.28. *See Menendez v. North Broward Hospital District*, 537 So. 2d 89, 90-91 (Fla. 1988); *Menendez*, 584 So. 2d at 569.

Instead of following this Court's precedent, the majority opinion has deviated from the requirements enunciated by the Legislature, as interpreted by this Court, that plaintiff must strictly show and comply with Fla. Stat. § 768.28. Numerous courts have held that, even as to technical or procedural deficiencies, and particularly as to waiver of sovereign immunity, the appellate court has no authority to extend the waiver beyond the boundaries set by the Legislature. *Richman v. Shevin*, 354 So. 2d 1200, 1205 (Fla. 1977), *cert. denied*, 439 U.S. 953 (1978); *Federal Ins. Co. v. Southwest Florida Ret. Ctr., Inc.*, 707 So. 2d 1119,

1121 (Fla. 1998); *Spangler v. Florida State Turnpike Authority*, 106 So. 2d 421, 424 (Fla. 1958); *U.S. v. Kubrick*, 444 U.S. 111, 117-18 (1979). Such a ruling and deviation from prior precedent are matters of great public importance that mandate reversal.

Plaintiff's admitted failure to comply with Fla. Stat. § 768.28(7) mandates a directed verdict. *Williams v. Miami-Dade County*, 957 So. 2d 52, 52 (Fla. 3d DCA 2007), requires that Plaintiff prove compliance with Fla. Stat. § 768.28(7). Plaintiffs admitted that they failed to prove compliance with Fla. Stat. § 768.28(7) during their case in chief which finished on August 8, 2007. T-481. A directed verdict was thus appropriate. The trial court erred in failing to grant a directed verdict and, as importantly, in failing to rule on this argument in its order denying the post-trial motions. R-459-63.

The Trust is a governmental entity to which the strict requirements of Fla. Stat. § 768.28 apply. *See Menendez v. North Broward Hospital District*, 537 So. 2d 89, 90-91 (Fla. 1988); *Public Health Trust of Dade County v. Menendez*, 584 So. 2d 567, 569 (Fla. 1991); *Public Health Trust of Dade County, Fla. v. Dade County School Bd.*, 693 So. 2d 562, 563 (Fla. 3d DCA 1996); *Collado v. Public Health Trust*, 705 So. 2d 140, 140 (Fla. 3d DCA 1998); *Scarlett v. Public Health Trust of Dade County*, 584 So. 2d 75, 75 (Fla. 3d DCA 1991), *overruled on other grounds by Chandler v. Novak*, 596 So. 2d 749, 750 (Fla. 3d DCA 1992).

The argument that Plaintiff may wait until after resting to comply with Fla. Stat. § 786.28(7) is contrary to *Williams*. *Williams* mandates that a directed verdict be entered at the point when the Plaintiff rests and fails to prove compliance. At the point Plaintiff rested, she failed to prove compliance and later admitted that she, in fact, failed to comply prior to resting. T-481. *Cole v. Department of Corrections*, 840 So. 2d 398 (Fla. 4th DCA 2003), does not conflict with *Williams*. *Cole* dealt with service of process upon the Department prior to trial and found that the time limits of Fla. R. Civ. P. 1.070(j) did not apply to the issue of compliance with Fla. Stat. § 768.28(7). Nowhere in *Cole* is it shown that Plaintiff may comply with Fla. Stat. § 768.28(7) after resting.

The alleged compliance with Fla. Stat. § 768.28(7), after resting and after the motion for directed verdict, is a nullity. The question is whether during Plaintiffs' case in chief they proved compliance with Fla. Stat. § 768.28(7). *Metropolitan Dade County v. Lopez*, 889 So. 2d 146, 148 (Fla. 3d DCA 2004), does *not* indicate that a plaintiff can wait until after the plaintiff rests to comply. *Lopez* simply notes that, in that case, plaintiff did not even comply after the verdict. *Id*. *Lopez* cannot be read to endorse waiting until after resting to comply with Fla. Stat. § 768.28(7), especially in light of *Williams*. Indeed, the First District in *Silber v. Cn'R Industries of Jacksonville, Inc.*, 526 So. 2d 974, 978 (Fla. 1st DCA 1988), held that a party should not be allowed to "reopen its case, *change*

the evidence to *alter the existing facts*, and then adduce proof of the new facts as altered by using the evidence of such changes." (emphasis supplied). *Silber* prohibits Plaintiffs from changing existing facts to create an enforceable action. *Id.* Plaintiffs herein sought to have the Court note facts not in existence prior to the motion for directed verdict on August 8, 2007. This procedure is specifically disapproved in *Silber* and Plaintiffs' attempts to manufacture evidence after resting should be rejected. Indeed, the trial court rejected such efforts and did not allow Plaintiffs to reopen. T-705.

Judge Stuart Simons in *Anthony King v. Miami-Dade County*, Case No. 03-13964 CA 03, held that, despite the filing of letters and service of process in compliance with Fla. Stat. §§ 768.28(6) and 768.28(7), a directed verdict was appropriate where Plaintiff failed to *prove* compliance with Fla. Stat. §§ 768.28(6) and 768.28(7). Transcript of trial proceedings before Judge Stuart Simons in *King v. Miami-Dade County*. Appendix, A-2, at 4-5. Judge Simons's reasoning that the filing in the court file of proof of service of process after Plaintiff rested is insufficient is supported by *Williams*. In accordance with Judge Simons's reasoning in *Williams* and *King*, this Honorable Court should rule that the attempts to submit an unsworn affidavit of service of process the day after Plaintiffs rested and after the Defendant's argument for a directed verdict, are inadequate. Such a ruling in favor of Defendant is further compelled by the trial court's refusal to

allow Plaintiffs to reopen their case. T-705. Such a ruling has not been challenged on appeal, via a cross appeal. Thus, the record reflects that evidence of compliance was never received by the trial court. As indicated by Judge Simons in *King*, Plaintiffs must list and provide a witness to prove compliance with Fla. Stat. §§ 768.28(6) and 768.28(7). Appendix, A-3, at 4-5. Plaintiffs herein utterly failed to produce such proof of compliance with Fla. Stat. § 768.28(7). A directed verdict is therefore appropriate.

Furthermore, the Public Health Trust of Miami-Dade County is, as a matter of law, a political subdivision of the State of Florida entitled to all sovereign immunities including a dismissal or a directed verdict if Plaintiff fails to prove compliance with Fla. Stat. § 768.28(7). *See Menendez*, 537 So. 2d at 90-91; *Menendez*, 584 So. 2d at 569; *Collado*, 705 So. 2d at 140; *Public Health Trust*, 693 So. 2d at 563. It is Plaintiffs' burden to show, with specificity, that the Plaintiffs' suit falls within the waiver of sovereign immunity under Fla. Stat. § 768.28. The issue of Fla. Stat. § 768.28(7) compliance is *not* an affirmative defense but rather the issue is raised by a specific denial in that once the Trust noticed the Plaintiffs of the defect it was their burden to prove compliance therewith. *Sheriff of Orange County v. Boultbee*. 595 So. 2d 985, 986-87 (Fla. 5th DCA 1992).

The trial court erred in denying the motion for directed verdict based on the Plaintiff's failure to prove compliance with Fla. Stat. § 768.28(7) at the close of the

Plaintiff's case-in-chief. *Williams*, 957 So. 2d at 52 (requiring that Plaintiffs prove compliance with Fla. Stat. § 768.28(7) in their case in chief).

Moreover, case law indicates that, after the close of Plaintiff's case, it is too late to comply with Fla. Stat. § 768.28(7). In *Metropolitan Dade County v. Braude*, 593 So. 2d 563, 564 (Fla. 3d DCA 1992), the court held that where the County asserted the defense of the lack of service upon the Department of Insurance, which is now known as the Department of Financial Services, the trial court erred in denying the County's motion for directed verdict. In addition, *Williams*, 957 So. 2d at 52, clarifies that where, as here, plaintiff fails to prove compliance with Section 768.28, "which requires plaintiff in negligence suits against the state, its agencies and subdivisions to follow strict procedures in order to take advantage of the state's waiver sovereign immunity for a tort liability", a directed verdict is mandated. *Williams* requires that a *plaintiff* prove compliance.

Moreover, the *Sheriff of Orange County v. Boultbee*, 595 So. 2d at 986-87, further clarifies that the lack of compliance with the requirements of Fla. Stat. 768.28 is fatal where the plaintiff fails to prove compliance therewith. As stated in *Boultbee*, once there is a specific denial of compliance with Fla. Stat. § 768.28 the burden shifts to Plaintiff to prove compliance. *Id.* at 987. Case after case makes clear that a plaintiff is required not only to plead that she has complied with the Statute, but also to *prove* that she has complied with the Statute. *See, e.g., Miami-*

Dade County v. Meyers, 734 So. 2d 507, 508 (Fla. 3d DCA 1999) (holding that trial court erred in denying County's motion for directed verdict based upon the plaintiff's failure to establish compliance with service of process requirement of §768.28(7)); *Braude*, 593 So. 2d. at 564 (holding that where County asserted defense of lack of service upon the Department of Insurance, the trial court erred in denying the County's motion for directed verdict). The law in Florida is that "sovereign immunity is the rule, rather than the exception." *Pan-Am Tobacco Corporation, d/b/a Pan-Am Vend-Tronics v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984). Because Fla. Stat. § 768.28(6) and § 768.28(7) form part of the statutory waiver of sovereign immunity, these sections must be strictly construed. *Levine v. Dade County School Board*, 442 So. 2d 210, 212 (Fla. 1983); *see also, Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service*. 444 So. 2d 926, 928 (Fla.1983) (holding that waivers of sovereign immunity must be strictly construed in favor of the state and against the claimant). As this Honorable Court has observed, "[o]ur views about the wisdom or propriety of the notice requirement are irrelevant because the requirement is so clearly set forth in the statute. Consideration of the efficacy of or need for the notice requirement is a matter wholly within the legislative domain." *Levine*, 442 So. 2d at 213 (citations omitted).

Indeed, it is the Plaintiff's failure to list any witnesses to prove compliance

with Fla. Stat. 768.28(7) that is fatal to Plaintiff's claim. As repeatedly held in the Honorable Stuart Simons's courtroom, it is Plaintiff's burden to list such witnesses and present evidence of compliance with Fla. Stat. § 768.28(7) requirements. See Appendix, A-2, A-3, *Anthony King v. Miami-Dade County*, Case No. 03-13969 CA 03, *aff'd King v. Miami-Dade County*, 970 So. 2d 839 (Fla. 3d DCA 2007) (affirming a directed verdict where Plaintiff failed to prove compliance with Fla. Stat. § 768.28(7) and Plaintiff failed to list exhibits or witnesses to prove compliance) (excerpt of trial proceedings attached to Appendix). It was therefore Plaintiff's obligation to list such witnesses and not Defendant's. Defendant listed failure to comply with Fla. Stat. §768.28(7) as a defense in compliance with *Boultbee*. Once Plaintiffs were on notice, the burden shifts to the Plaintiffs to prove compliance of Fla. Stat. § 768.28(7). Once the Plaintiffs rested, it is too late to serve the Department of Financial Services. *See Lopez*, 889 So. 2d at 147; *Braude*, 593 So. 2d at 564; *Hardcastle v. Mohr*, 483 So. 2d 874, 875 (Fla. 2d DCA 1986) (requiring that Plaintiff prove compliance with Fla. Stat. § 768.28(7) in his case in chief).

II. PLAINTIFFS WAIVED ANY OBJECTION TO HEARING THE MOTION FOR DIRECTED VERDICT PRIOR TO ANY ALLEGED RESTING.

The majority has also overlooked Plaintiff's waiver of any objection to the motion for directed verdict being heard, even if the Plaintiff did not rest prior

thereto. Both at trial and in post-trial motions, Plaintiff never objected to the timing of the motion for directed verdict or any alleged premature consideration of the motion by the trial court. Such failure to object further supports the fact that Plaintiff rested prior to the motion for directed verdict. The Third District Opinion overlooks the case law holding that failure to object during trial constitutes a waiver. This issue of the timeliness of the motion for directed verdict may not be raised for the first time on appeal. *Tennant v. State*, 205 So. 2d 324, 324-25 (Fla. 1st DCA 1967); *Frenz Enterprises, Inc. v. Port Everglades*, 746 So. 2d 498, 503 n. 3 (Fla. 4th DCA 1999); *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999); *State v. Johnson*, 299 So. 2d 155, 155 (Fla. 3d DCA 1974); *Thomas v. State*, 648 So. 2d 298, 300 (Fla. 5th DCA 1995).

The instant decision defies the principle found in *State v. Johnson*, 299 So. 2d 155, 155 (Fla. 3d DCA 1974), which holds that failure to object during trial constitutes a waiver. Thus, *Johnson* would indicate that Plaintiff should not be allowed to submit issues concerning the timing of the motion for directed verdict for the first time on appeal.

The majority opinion also conflicts with the First District in *Tennant*, 205 So. 2d at 324-25, the Fourth District in *Frenz Enterprises*, 746 So. 2d at 503 n. 3, and the Fifth District in *Thomas*, 648 So. 2d at 300, which all hold that a party may not raise an issue for the first time on appeal.

III. THE ATTENDING PHYSICIAN IS THE "CAPTAIN OF THE SHIP" IN THIS CASE AND THEREFORE HIS DECISION NOT TO BEGIN ANTIBIOTICS ABSOLVES THE RESIDENTS AND NURSES.

Dr. Tilo Gerhardt, the attending physician, made the decision not to start antibiotics. T-515-22. He was in charge of the baby involved in this case. T-515-22.. Neither the nurses nor the residents can be held liable where the attending made the decision not to prescribe antibiotics. T-515-22. The action of the nurses was never shown to be either the cause of the infection or the cause of death. T-99-100; 191-92; 276; 293-94.

This Honorable Court held that a surgeon is the "captain of the ship" for acts performed under his or her control and direction. *Variety Children's Hosp., Inc. v. Perkins*, 382 So. 2d 331, 334-35 (Fla. 3d DCA 1980); *Hudman v. Martin*, 315 So. 2d 516, 517 (Fla. 1st DCA 1975); *Buzan v. Mercy Hospital*, 203 So. 2d 11, 13 (Fla. 3d DCA 1967). The evidence in this case is that Dr. Tilo Gerhardt was the attending physician and he noted in the chart that no antibiotics were provided to the baby. Dr. Gerhardt was in charge of the patient herein. T-515-22. As such, his decision not to start antibiotics absolves the residents, fellows and nurses from liability.

Plaintiff sought to distinguish *Siegel v. Husak*, 903 So. 2d 209, 214 (Fla. 3d DCA 2006), *rev. denied*, 952 So. 2d 1198 (Fla. 2007), which held that the existence of a legal duty is a question of law. Plaintiffs maintain that the nurses

committed independent acts of negligence, including leaving an Ambubag in the baby's area and not following an order to do a test on the baby. As an initial matter, this means that the residents and fellows cannot form the basis of a claim. Second, *Gooding v. University Hospital Building*, 445 So. 2d 1015, 1018 (Fla. 1984), holds that plaintiffs must prove such acts caused the injury, more likely than not. The evidence was to the contrary. Dr. Marc Weber testified that the likely cause of the infection was through respiratory equipment. T-276; 293-94. Dr. Weber specifically testified that the alleged negligence of the nurses did not cause the infection. T-276; 293-94. Dr. Weber testified extensively that, even without the test, numerous red flags and other tests were sufficient to require that antibiotics be provided. T-276-94. Since the nurses did not proximately cause the injury, they cannot under *Gooding*, 445 So. 2d at 1018, be held liable.

Further, the residents, nurses and fellows who were under Dr. Gerhardt did not have authority to contravene Dr. Gerhardt's diagnosis that the baby did not have an infection and therefore should not be started on antibiotics. T-515-523. Dr. Gerhardt testified, without rebuttal, that it was his decision not to medicate the baby with antibiotics. T-515-23. Dr. Gerhardt had the ultimate decision-making authority whether or not to administer antibiotics. T-515-23.

IV. THE LOCALITY RULE APPLIES AND MANDATES A DIRECTED VERDICT.

The locality rule in Florida is applicable. Judge Gersten held in a concurring opinion that Plaintiffs in medical malpractice actions were required to show that the Florida standard of care was violated. *Siegel*, 943 So. 2d at 216.

Citing *Sweet v. Sheehan*, 932 So. 2d 365 (Fla. 2d DCA 2006); and *Torres v. Sullivan*, 903 So. 2d 365 (Fla. 2d DCA 2006), Judge Gersten in a concurrence found that in Florida, the locality rule applies and that Plaintiffs had to show that the physician or nurse violated the standard of care in Florida and *not* a national standard of care. *Siegel*, 943 So. 2d at 216. No case indicates that the locality rule does not apply in Florida. Therefore, a judgment notwithstanding the verdict was mandated, because no evidence of the local standard of care or its violation was presented. T-97; 274; 308; 315; 320-21.

Plaintiff argued that the concurrence in *Siegel*, 943 So. 2d at 216, citing *Sweet v. Sheehan*, 932 So. 2d 365 (Fla. 2d DCA 2006), and *Torres v. Sullivan*, 903 So. 2d 365 (Fla. 2d DCA 2006), no longer applies. However, the statute, as recognized by Plaintiff, requires that Plaintiff's experts testify as "similar health care providers." Fla. Stat. § 766.102(5). The baby was in the newborn ICU, and received emergency medical services. Under such circumstances, §766.102(9), as Plaintiff concedes, requires compliance with the locality rule. Plaintiff failed to show that Drs. Weber and Yodor were similar health care providers practicing in a

similar community. Contrary to *Garver v. Eastern Airlines*, 553 So. 2d 263, 268 (Fla. 1st DCA 1989), cited by Plaintiff, the trial court never took judicial notice that the Plaintiff's doctors or their communities or hospitals were similar to these of Jackson Memorial Hospital. Plaintiff's doctors did not testify in compliance with the locality rule or establish that they were similar health care providers. Thus, a directed verdict was mandated.

V. THE IMPROPER CLOSING ARGUMENT OF PLAINTIFFS NECESSITATES A NEW TRIAL.

A. The Closing Argument Of Plaintiffs That The Trust Was Responsible For Dr. Tilo Gerhardt, As An Employee Of The Trust, Constitutes Harmful, Reversible Error.

From the inception of this trial to the point of the jury instructions, Plaintiffs maintained that the Public Health Trust is *solely* responsible for its nurses, residents and fellows. Dr. Tilo Gerhardt was an attending physician, employed by the University of Miami, and *not* a nurse, resident or fellow. As recognized during the rebuttal argument of Plaintiffs, the Plaintiffs' statement that the Trust was also responsible for Dr. Gerhardt's acts was so highly improper that the Court felt compelled to reserve ruling on Defendant's multiple motions for mistrial. R-167-307; T-746; 747; 753; 769; 806; 810; 825; 879; 880. Such a statement cannot be viewed as harmless because the jury returned a verdict of zero negligence on the part of the University of Miami. Plaintiffs' counsel, seeking a favorable verdict, formulated an argument contrary to the pleadings, the evidence, the jury

instructions and the law. Dr. Gerhardt testified that he was a University of Miami professor. T-509-11. Moreover, Defendant had moved *in limine* to preclude Plaintiff from claiming that Dr. Gerhardt's negligence was somehow linked to the issues of the Trust's negligence. R-83-85. *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156, 1157-58 (Fla. 5th DCA 1994), *rev. dismissed*, 649 So. 2d 232 (Fla. 1994), holds that counsel may not flaunt motions *in limine* and improperly argue on closing argument. This outrageous statement resulted in an erroneous finding that the University of Miami was not negligent. The sanction in *Blalock* for such behavior is a new trial. *Id*.

The error also led to a double recovery and windfall for the Plaintiffs since they have already recovered through a settlement with the University of Miami for Dr. Gerhardt's alleged negligence. R-167-307. Under these circumstances, this verdict is improper and must be vacated. Courts have consistently condemned improper double recoveries. *See, e.g.*, *Besnett v. Besnett*, 437 So. 2d 172 (Fla. 2d DCA 1983); *Goldstein v. Serio*, 566 So. 2d 1338, 1340 (Fla. 4th DCA 1990). Moreover, Plaintiffs' counsel's improper closing argument seeking a double recovery further requires a new trial. *See Blalock*, 640 So. 2d at 1157-58.

B. References To Matters Not In Evidence Mandate A New Trial.

During Plaintiffs' closing argument, Plaintiffs referred not only to irrelevant theories of liability but also to matters not in evidence. T-767-69. No evidence

was adduced that infected or unsanitary water was used by the Trust. Yet, Plaintiffs claimed in closing that such water was provided in the Trust's Neonatal Intensive Care Unit. T-767-69. No such evidence exists in the trial record. The use of *non-existent* evidence in closing should not be sanctioned. *Blalock*, 640 So. 2d at 1157-58, holds that such conduct necessitates a new trial.

C. Plaintiff's Repeated References To The Failure To Call Witnesses Constitute Reversible, Harmful Error.

Plaintiffs repeatedly stated, despite the sustaining of Defendants' objections and motions for mistrial, that the Trust failed to call doctors to the stand. T-767-69. *Lauder v. Economic Opportunity Family Health Center*, 680 So. 2d 1133 (Fla. 3d DCA 1996), and *Dixon v. State*, 430 So. 2d 949 (Fla. 3d DCA 1983), hold that such statements constitute reversible, harmful error. The trial court herein correctly sustained the objections and should have granted a new trial where a substantial verdict was rendered following such prejudicial and erroneous statements. T-767-69.

D. Plaintiffs' Golden Rule Argument Mandates A New Trial.

The trial court sustained Defendant's objection to Plaintiffs' Golden Rule argument that in effect asked the jury to sit in the shoes of the Plaintiffs. Given the verdict, such a comment is not harmless. The verdict utterly ignores the overwhelming contribution of the University of Miami's doctor's acts in causing the death of Ryan Rodriguez. T-898; R-464-65. The substantial award of

$2 million, together with zero percent contribution by the University of Miami, is explained by Plaintiffs' Golden Rule arguments. R-459-63; T-825. *Klein v. Herring*, 347 So. 2d 681, 682 (Fla. 3d DCA 1977), holds that such golden rule arguments justify a new trial. In the instant case, Plaintiffs' counsel stated to the jury that they know the value of loss of a son. T-817. The trial court sustained the objection but erroneously refused to grant a mistrial. T-817; 825.

E. Biblical References And The Cumulative Effect Of Plaintiffs' Improper Arguments Necessitate A New Trial.

References to the Bible as to the death of a son imply that the jury should measure the value of life. T-817-18. It was a veiled attempt to ask the jury to measure the value of a life. Such an argument was previously deemed improper. T-817-18. Such arguments are improper and necessitate a new trial. *See Public Health Trust v. Geter*, 613 So. 2d 126, 126-27 (Fla. 3d DCA 1993).

Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010, 1027 (Fla. 2000), expanded the scope of the court's inquiry when confronted with a motion for new trial based on counsel's improper closing argument. This Honorable Court's modification of the fundamental error standard for improper comments during closing reflects its concern for the serious harm that counsel can cause to the civil justice system. In short, improper arguments of counsel should *not* be tolerated. The $2 million verdict herein and the finding of 100% negligence are reflections of the impact an attorney's improper remarks had on the minds of the

jurors. T-898; R-464-65. Plaintiffs' counsel flaunted the rulings of the trial court and black letter law in using distortions of the pleadings, law, evidence and jury instructions regarding Dr. Gerhardt's status, as well as Golden Rule arguments, matters not in evidence, witnesses who were not called, and a value of a life. *Blalock*, 640 So. 2d at 1157-58, holds that the cumulative effect of improper conduct on the part of counsel will require a new trial. If this Honorable Court declines to reverse, it would in effect sanction such improper conduct in closing. *Murphy*, 766 So. 2d at 1021, holds that, where counsel's closing argument constitutes prejudicial "testimony", the court should grant a new trial. In the case at bar, counsel for Plaintiff not only "testified" that Dr. Gerhardt worked for the Trust but contravened the jury instructions and crossed the boundaries of proper conduct. T-805-11; 824. As a matter of law and policy, this Honorable Court should reverse and remand for a new trial.

VI. PLAINTIFF'S *VOIR DIRE* THAT DEFENSE COUNSEL WOULD REPORT A JUROR IN THE EVENT OF AN ADVERSE VERDICT WAS PREJUDICIAL TO DEFENDANT AND A NEW TRIAL IS MANDATED.

During *voir dire*, Plaintiffs' counsel stated that the County Attorney's Office would report an adverse verdict to Cedars Hospital, of which the Trust was in the

process of assuming control,[1] in the event potential juror #1, an employee of Cedars, decided this case against the Trust. Appendix, A-1, at 4-5. Such a statement implies punitive conduct on the part of Defendant and its counsel. The trial court found Plaintiff counsel's comment inappropriate, sustained the Defendant's objection, issued a cautionary instruction but refused to strike the panel. Appendix, A-1, at 3-5. Four of the six jurors who decided this case heard the Plaintiff accuse the defense counsel of such punitive, false and improper conduct. The only proper remedy is to grant a new trial. The holding in *Blalock*, 640 So. 2d 1157-58, would dictate that the remedy for such improper conduct is a new trial. The Third District in *Borden, Inc. v. Young*, 479 So. 2d 850, 851 (Fla. 3d DCA 1985), *rev. denied*, 488 So. 2d 832 (Fla. 1986), held in an analogous situation that counsel's comments regarding nefarious activities regarding large corporations necessitated a new trial.

VII. THE PLAINTIFFS' OPENING "STATEMENT", INCLUDING MATTERS NOT IN EVIDENCE, CONSTITUTES IMPROPER ARGUMENT AND JUSTIFIES A NEW TRIAL.

In their opening statement, the Plaintiffs repeatedly argued that the negligence of the Trust caused the death of Ryan Rodriguez. T-4-63. Plaintiffs displayed a power point presentation that was not in evidence. T-16-20. The court

[1] The Trust was believed at the time of *voir dire* to be the entity that would assume control of Cedars Hospital. Later, the University of Miami assumed control of Cedars.

sustained objections to the argumentative nature of the opening and denied the motion for mistrial; however, the court indicated that it would grant a mistrial if that portion of the power point that was shown to the jury was not entered into evidence. T-20; 21; 52; 61. The power point display was never entered into evidence. Indeed, other portions of the power point not in evidence were shown to the jury during the presentation of the Plaintiffs' case. Such conduct and display of matters not in evidence mandate a new trial. Further, the use of the power point during opening is a reflection that the entire opening statement was an improper argument. Defendant objected to the one power point that was prejudicial. T-19-21. The display of such a power point *not* in evidence, mandates a new trial. The Third District in *City of Miami v. Veargis*, 311 So. 2d 693, 694 (Fla. 3d DCA 1975), has held that injection of matters not in evidence justifies the granting of a new trial.

VIII. THE MANIFEST WEIGHT OF THE EVIDENCE MANDATES A NEW TRIAL.

The unrebutted evidence is that the finding of no negligence on the part of University of Miami necessitates a new trial. In an analogous case, *Miami-Dade County v. Merker*, 907 So. 2d 1213, 1216 (Fla. 3d DCA 2005), the Honorable Roberto Pineiro granted a new trial in a wrongful death action where the jury found no negligence on the part of a *Fabre* defendant. The *Merker* jury found no such negligence despite the testimony of the bus driver that the *Fabre* defendant's

car cut off the Metrobus causing a handicapped bus passenger to fall and subsequently die. Judge Pineiro's decision to grant a new trial was affirmed by the Third District. *Id.* at 1216. Like the negligence of the car driver, Dr. Gerhardt's negligence for which the University of Miami was responsible contributed to the death. This Honorable Court is in the same predicament as Judge Pineiro was in *Merker*. The jury's finding is contrary to the manifest weight of the evidence.

Moreover, unrebutted evidence shows that the jury had no basis to decide that the Trust violated the *local* or *Florida* standard of care. The Trust is entitled at least to a new trial, since the manifest weight of the evidence is to the contrary. *Cloud v. Fallis*, 107 So. 2d 264, 265 (Fla. 2d DCA 1958).

CONCLUSION

For any and all reasons stated above, the judgment should be reversed and remanded with instructions to direct a verdict in favor of the Public Health Trust or to order a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail to Barbara Green, Esq, 5901 SW 74th Street, Suite 205, Miami, Florida 33143; and Maria D. Tejedor, Esq., Attorneys Trial Group, 540 N. Semoran Boulevard, Orlando, Florida 32807 on this 23rd day of June, 2010.

_____
Assistant County Attorney

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been generated in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a) of the Florida Rules of Appellate Procedure.

_____
Assistant County Attorney