IN THE SUPREME COURT
OF FLORIDA

CASE NO. SC 10-302

Third DCA Case No. 3D07-3314

PUBLIC HEALTH TRUST OF
MIAMI-DADE COUNTY,

Appellant,

v.

ODETTE ACANDA, etc.,
et al.,

Appellee.
_____/

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**APPELLANT THE PUBLIC HEALTH TRUST'S REPLY BRIEF**

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## ARGUMENT

### I. THE FAILURE TO COMPLY WITH FLA. STAT. § 768.28(7) MANDATES A DIRECTED VERDICT.

Appellee admits that a plaintiff must prove service of process upon the Department of Financial Services. Ans. Br. at 19. Appellee asserts, however, that she did prove service of process prior to resting and argues that there is no time limit for proof of service. *Id*.

The strict requirements of *Anthony v. Gary J. Rotella & Assocs.*, 906 So.2d 1205 (Fla. 4th DCA 2005), and *Levine v. Dade County School. Board*, 442 So.2d 210 (Fla. 1983), were violated. The requirement is that Plaintiff prove compliance with Fla. Stat. § 768.28(7) before a motion for directed verdict. Plaintiff had rested. T-454. Indeed, the fact that Plaintiff moved to re-open is an admission that she did rest. T-705. The doctrine of estoppel precludes Plaintiff from moving to *re-open* and, on appeal, claiming Plaintiff's resting was ambiguous. Contrary to Appellee's position, *Town of Oakland v. Mercer*, 851 So. 2d 266, 268-69 (Fla. 5th DCA 2003), cannot be limited to inconsistent positions involving multiple defendants. *Federated Mut. Implement & Hardware Ins. Co. v. Griffin*, 237 So.2d 38, 41 (Fla. 1st DCA 1970), holds that a party cannot take inconsistent positions in the same action. Despite such inconsistent positions, Appellee inaccurately claims she did not rest to distinguish *Silber v. CNR Industries*, 526 So. 2d 974 (Fla. 1st DCA 1988). However, *Silber* prohibits

changing evidence to alter the *existing facts* and then using proof of the new facts to avoid a directed verdict. *Id*. at 978. *Silber* thus prohibits the alteration of evidence and seeking to re-open after an "ambiguous" resting, on rebuttal, or at any point during the trial. *Id*.[1] In addition , the trial court never allowed Plaintiff to reopen her case and therefore there was never any proof at trial of compliance with Fla. Stat. § 768.28(7). *Williams v. Miami-Dade County*, 957 So.2d 52, 52 (Fla. 3d DCA 2007), requires that a directed verdict be entered when Plaintiff has not proven compliance with Fla. Stat. § 768.28(7).

The trial court, well within its discretion, refused to admit the affidavit and refused to allow Plaintiff to re-open her case to admit the affidavit where Plaintiff did not list the affidavit in the pretrial order. T-705; R-146-48; R-39-42. Nor did Plaintiff list a witness to prove compliance with §768.28(7). R-39-42. In fact, Plaintiff manufactured the affidavit in question after she rested her case at trial. T-705. Yet, the court's order required Plaintiff to list *all* exhibits and *all* witnesses. R-26-27. To allow Plaintiff to create evidence, list such evidence and re-open, in violation of the pre-trial order, would constitute an abuse of discretion. *See*

[1] *Silber* is consistent with *Klein v. Royale Group*, 578 So. 2d 394, 395 (Fla. 3d DCA 1991). Indeed, *Klein* cites *Silber*. *Id*. *Klein* simply holds that belated compliance, prior to a hearing on the motion to dismiss, would avoid a dismissal. *Klein* did *not* hold that changing the evidence at trial, as in *Silber*, was appropriate. Thus, *Klein* in no way justifies Plaintiff's failure to prove and admit an undisclosed affidavit during a trial.

*Wolfson v. Ins. Co. of Florida*, 451 So. 2d 1005, 1006 (Fla. 3d DCA 1984) (error to allow witnesses, who were not listed on the pre-trial catalog, to testify) *Bogosian v. State Farm Mut. Auto Ins. Co.*, 817 So. 2d 968, 971 (Fla. 3d DCA 2002) (failure to list expert witnesses in pretrial catalog required exclusion of such experts); *Tomlinson-McKenzie v. Prince*, 718 So. 2d 394, 395 (Fla. 4th DCA 1998) (holding that the trial court has broad discretion to determine whether or not to admit an exhibit not disclosed in a pretrial catalog). Moreover, Appellee's Answer Brief in the Third District, admits that "reopening a case is within the trial court's discretion…"

*King v. Miami-Dade County*, 970 So. 2d 839 (Fla. 3d DCA 2007), a P.C.A., upheld a directed verdict where Plaintiff failed to list witnesses or exhibits to show compliance, *even though* an affidavit proving service of process upon the Department of Financial Services was in the court file. Judge Simons held that the failure to list an exhibit or witness, *despite compliance shown in the court file*, is fatal. R-388-95; *King*, 970 So. 2d at 839.

Plaintiff cites cases[2] on re-opening but they do not involve an undisclosed affidavit, proffered in violation of the pre-trial order and created during trial to

[2] *Heller & Co., Southeast v. Pointe Sanibel Dev. Co.*, 392 So.2d 306, 308 (Fla. 3d DCA 1981); *Gates v. Dept. of Transp*., 513 So. 2d 1386 (Fla. 3d DCA 1987), *Sobel v. Jefferson Stoves, Inc*., 459 So. 2d 433 (Fla. 3d DCA 1984), *Eli Witt Cigar & Tobacco Co. v. Matatics*, 55 So. 2d 549, 552 (Fla. 1951), *Akins v. Taylor*, 314 So.

alter the evidence. *Silber* and *Bogosian* fully justify the trial court's refusal to allow hearsay evidence of § 768.28(7) compliance. [3]

Moreover, Defendant did *not* engage in "gotcha" tactics. *Lopez v. Dublin Co.*, 489 So. 2d 805 (Fla. 3d DCA 1986), condemns "gotcha" tactics where the stipulation was *as to the issue in question*. Here, the Defendant stipulated as to *notice* under § 768.28(6) but *not* Section 768.28(7) *service of process*. In the instant case, *Williams* mandates a directed verdict where no stipulation existed as to § 768.28(7) compliance, because Plaintiff rested and the trial court, within its discretion, excluded an undisclosed affidavit proffered in violation of the pretrial order.[4]

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2d 13 (Fla. 1st DCA 1975), *Lotspeich v. Neogard Corp*., 416 So. 2d 1163, 1165 n. 2 (Fla. 3d DCA 1982).

[3] Appellee never filed a cross-appeal on this issue.

[4] Plaintiff's additional arguments lack merit. As a matter of law, the Trust is a governmental entity to which § 768.28 applies. *See Menendez v. North Broward Hosp. Dist.*, 537 So. 2d 89, 90-91 (Fla. 1988). *Menendez* and *Schmauss v. Snoll*, 245 So. 2d 112, 113-14 (Fla. 3d DCA 1971), hold that a sovereign's conduct cannot waive its immunity, such as the immunity from suit where Plaintiff fails to comply with § 768.28. This Court has decided, in a manner similar to the judicial notice in *Morgan Drive Away, Inc. v. Mason*, 183 So.2d 202, 204 (Fla. 1966), that the Public Health Trust is a political subdivision as a matter of law. *Sheriff of Orange County v. Boultbee*, 595 So. 2d 985, 986-87 (Fla. 5th DCA 1992), holds that once the governmental entity asserts §768.28 as a defense, Plaintiff must prove compliance. *Boultbee* does not require that the government prove it is a sovereign. Nor does *Boultbee*, *Williams* or any other case indicate that a stipulation as to notice justifies failing to prove compliance with § 768.28(7). Further, Plaintiff fails to explain how she was deceived by a stipulation as to *notice*. No stipulation as to *service* existed. Plaintiff's ignorance of the law does not excuse the failure to comply.

## II. PLAINTIFF WAIVED THE THIRD DISTRICT'S BASIS FOR AFFIRMING.

As observed by Judge Suarez in his dissent in the Third District, Plaintiff failed to object to the consideration of the motion for directed verdict on April 8 and waived any argument that the motion had to be denied. In her Answer Brief, Appellee misconstrues the scope of her waiver below. Answ. Br. 30-31. Appellee also misapprehends *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999). While an appellee need not raise alternative grounds for a judgment under *Radio Station WQBA*, an appellee must raise objections to the hearing of a motion for directed verdict if, on appeal, the appellee wants to raise the issue that the trial court could not grant a directed verdict when plaintiff had supposedly not rested. *See E&I, Inc. v. Excavators, Inc.*, 697 So.2d 545, 546 (Fla. 4th DCA 1997) (holding that party waives right to complain as to hearing a motion at a time contrary to the Florida Rules of Procedure by failing to object to the timing of the hearing).

Without doubt, the record reflects that the trial court decided to consider the motion for directed verdict on April 8. Plaintiff never objected to the timing of the hearing on the motion.[5] Plaintiff did not raise this objection because she did rest.

[5] Plaintiff participated in "gotcha" tactics. Instead of checking her file overnight prior to the ruling on the motion for directed verdict, the Plaintiff purportedly served the Department of Financial Services. T-464-81. Such behavior is not in

T-454. However, if Plaintiff actually believed at the time she had not rested, she should have objected to the trial court considering a motion for directed verdict until she rested. Having not done so, Plaintiff waived any claim that consideration of the motion for directed verdict "prior to resting" was improper. *Id.* at 546. The motion for directed verdict should have been granted given that Plaintiff failed to object to the trial court's consideration of the motion on April 8 and the representation given to the Court that Plaintiff was simply going to check her file to see if she had actually already complied with Fla. Stat. § 768.28(7). T-464-81. When the Court considered the motion for directed verdict on April 8, there was absolutely no compliance with Fla. Stat. § 768.28(7) and the Court, pursuant to abundant precedent, should have entered a directed verdict at that point. T-464-81. The Plaintiff is thus not entitled to an affirmance, since she waived the argument that a motion for directed verdict cannot be granted before resting.

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

This Honorable Court is well within its discretion to consider the additional issues raised below. *Savona v. Prudential Ins. Co. of America*, 648 So.2d 705, 707 (Fla. 1995), provides that the court has authority to consider issues other than those upon which jurisdiction is based and such discretionary authority should be

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accord with a fair representation to the Court and to the Defendant as to the purpose of a recess during the pendency of a motion for directed verdict.

exercised when the other issues have been properly briefed and argued and are dispositive of the case. Such is the case here and the issues raised below, other than those upon which jurisdiction was based, are dispositive and show fundamental error.

As to the administration of antibiotics, the residents, nurses and fellows had no autonomy. Dr. Gephardt, a University of Miami employee (as recognized by the jury instructions) was in charge of the patient herein. T-515-22. The residents, nurses and fellows, who were under Dr. Gephardt, had no authority to contravene Dr. Gephardt's diagnosis that the baby, devoid of an infection, should not be started on antibiotics. T-515-523.

To avoid the unrebutted evidence that Dr. Gephardt ordered that the baby have no antibiotics and that others had no authority to countermand such an order. Plaintiff points to alleged "independent" acts of negligence of fellows, residents and nurses. However, *Gooding v. University Hosp. Bldg*, 445 So. 2d 1015, 1018 (Fla. 1984), holds that plaintiffs must prove that such "independent" 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. The Plaintiff claims that the Hospital was responsible for the water but the jury instructions and evidence at trial fail to support such an inference. The Public Health Trust was responsible only for acts of nurses,

residents and fellows. Dr. Weber specifically testified that the alleged negligence of the nurses did not cause the infection. T-276; 293-94. No fellow, nurse or resident was linked to contaminated water. Indeed, the evidence was that the direct and sole cause of the death was Dr. Gephardt's decision not to provide antibiotics. T-515-22.

Moreover, there was no evidence that Dr. Gephardt was a Trust employee. Dr. Gephardt was a *University of Miami* attending physician/professor. T-509-11. The jury instructions recognized that the Trust was only responsible for the acts of residents, fellows and nurses. Dr. Gephardt was not a fellow, resident or nurse. Plaintiff's reliance on *Jaar v. University of Miami*, 474 So. 2d 239, 245 (Fla. 3d DCA 1985), is misplaced. In *Jaar*, there was disputed evidence as to whether or not the doctor was a Trust employee and, therefore, even if the captain of the ship doctrine applied in *Jaar*, it would not absolve the Trust of liability. However, where it is clear from the evidence and the jury instructions, restricting the Trust's liability to residents, fellows and nurses, that Dr. Gephardt was a University attending, and not a resident or fellow, Dr. Gephardt's status as the "Captain of the Ship" absolves the Trust herein from liability.

## IV. THE LOCALITY RULE MANDATES A DIRECTED VERDICT.

Plaintiff argues that Chief Judge Gersten's concurrence in *Siegel v. Husak*, 943 So. 2d 209, 216 (Fla. 3d DCA 2006), no longer applies. However, the statute

requires that Plaintiff's experts testify as "similar health care providers." Fla. Stat. § 766.102(5). Additionally, the baby was in the newborn ICU (NICU), and received emergency medical services. The NICU is an "emergency department." Under such circumstances, § 766.102(9) 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 court never took judicial notice that the Plaintiff's doctors or their communities or hospitals were similar to those 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. PLAINTIFF'S CLOSING ARGUMENT REQUIRES A NEW TRIAL.

The closing argument of Plaintiff was highly prejudicial and inflammatory under *Murphy v. International Robotics Systems, Inc.*, 766 So. 2d 1010, 1013 n. 2 (Fla. 2000). Further, the argument was improper, harmful, incurable and 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. Appellee fails to deny that the arguments were improper.

In violation of the jury instructions and contrary to the evidence, Plaintiff's counsel improperly claimed Dr. Gerhardt was an employee of the Trust. T-713;

889-90. The trial court's inconsistent rulings sustaining and overruling objections to this improper argument do not justify the harmful and improper argument of Plaintiff. Such an argument and the court's error likely led to a conclusion that Dr. Gerhardt who failed to order antibiotics was not responsible for his own negligence but that the Trust was. Plaintiff's doctors claimed that the failure to prescribe antibiotics led to the death. Such a claim pins responsibility upon the University and Dr. Gerhardt. The improper closing argument, however, impermissibly shifted the responsibility for Dr. Gerhardt's negligence to the Trust.

Moreover, none of Plaintiff's evidence established that there was contaminated water at Jackson. *See* T-98-99, 192, 282-83, 404. Yet, Plaintiff's counsel claimed in closing that contaminated water was provided in the Trust's Neonatal Intensive Care Unit. T-767-69. Again, no such evidence exists in the record. Moreover, Counsel was not simply drawing an inference, but actually claimed that there was contaminated water without evidence. T-767-69. The improper reliance on *non-existent evidence* in closing *necessitates* a new trial. *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156, 1157-58 (Fla. 5th DCA 1994).

Additionally, Plaintiff fails to justify her repeated argument that Defendant failed to call doctors to the stand. T-767-69. She also fails to distinguish *Dixon v. State*, 430 So. 2d 949 (Fla. 3d DCA 1983), holding such statements to be reversible, harmful error.

Appellee on page 43 of her brief attempts to distinguish *Lowder v. Economic Opportunity Family Health Center, Inc.*, 680 So. 2d 1133, 1135 (Fla. 3d DCA 1996), on the basis that the plaintiff there requested that the jury draw an adverse inference from the failure to call witnesses. The nature and tenure of counsel's statements that the Trust did not bring Dr. Organero and Dr. Monroig into the courtroom to discuss the standard of care and the care they provided strongly implied that the jury could draw an adverse inference. T-766-69. The very high risk that the jury will draw a negative inference is behind *Dixon*'s and *Lowder*'s prohibition of references to witnesses who did not testify. The court not only permitted this improper argument, but also allowed Golden Rule arguments.

Plaintiff's argument asked the jury to step in the shoes of the Plaintiff. The statement, "you all know what it is to bear a child, to raise a child, to love a child," constitutes a direct Golden Rule plea. T-816-17. The Trust moved for a mistrial; however, the trial court reversed itself and found there was no Golden Rule argument. T-825. When the court reversed its prior ruling that counsel's clear plea to have the jury place themselves in Plaintiff's shoes as to the loss of a child, the Trust preserved the harmful error for review.

Plaintiff further fails to rebut the fact that references to the story of the death of the prodigal son in the Bible are veiled attempts to ask the jury to measure the value of a life. T-817-18. As in *Public Health Trust v. Geter*, 613 So. 2d 126,

126-27 (Fla. 3d DCA 1993), this argument is (1) improper, (2) harmful, (3) incurable, and (4) so damaging to the fairness of the trial that the public interest requires a new trial. *Murphy*, 766 So. 2d at 1031.

Plaintiff also fails to show how Dr. Gerhardt, who ordered that the patient not receive antibiotics, could be found free of negligence and that the Trust — an entity that did not even employ Dr. Gerhardt — be 100% negligent. Such a finding is only explained by the cumulative effect of an improper closing argument asserting that the Trust was responsible for Dr. Gerhardt, that the jury should put themselves in the shoes of the Plaintiff, that the jury should measure the value of a life, and that the jury should assess the failure of the Trust to call witnesses. The jury had no reasonable basis to find the Trust 100% liable and Dr. Gerhardt — the person whom the unrebutted evidence shows caused the injury — 0% liable. Such a finding is only explained by the improprieties in Plaintiff counsel's improper closing argument. Finally, such a finding allows the Plaintiff to recover twice for Dr. Gephardt's negligence, once through settlement with the University of Miami and then through confusion of the jury to assess his negligence as attributable to the Trust.

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

Plaintiff's counsel announced to many on the jury that Defendant and Defendant's attorneys would punish a juror if she decided the case against the Trust. R-524-27; Appellant's Appendix A-1 in the Third District, at 4-5. Four of the six jurors who decided the case heard the statement. *See* Transcript of the *Voir Dire;* R-524-27. The objection was sustained and a motion to strike the panel denied. Appellant Appendix, A-1 in the Third District, at 3-5. *Milstein v. Mutual Sec. Life Ins. Co.*, 705 So. 2d 639, 640 (Fla. 3d DCA 1998), and *Karp v. State*, 698 So. 2d 577 (Fla. 3d DCA 1997), are distinguishable in that here Defendant did move to strike the jury panel prior to the swearing of the jury as required by *Joiner v. State*, 618 So. 2d 174, 175-76 (Fla. 1993). *Karp*, which cites *Joiner*, and *Milstein* do not involve a situation where the court sustains the objection (thus recognizing the impropriety of the statement) but refuses to grant a motion to strike the panel. There is *no* need to renew the objection prior to the swearing of the jury because the trial court made the *correct* ruling in sustaining of the objection. As in *Joiner*, there is no need to ask the court to "correct" its ruling as to an objection it sustained. All errors were preserved by moving to strike the panel *after* the court *sustained* the objection.

## VII. THE PLAINTIFF'S OPENING "STATEMENT" INCLUDING MATTERS NOT IN EVIDENCE JUSTIFIES A NEW TRIAL.

Defendant objected to the *prejudicial* portion of the PowerPoint during Plaintiff's case in chief. T-19-21. The Record thus reflects that the objection to prejudicial matters *not* in evidence was objected to in opening and throughout the trial. As in *City of Miami v. Veargis*, 311 So. 2d 693, 694 (Fla. 3d DCA 1975), Plaintiff's statements mandate a new trial where counsel injects matters not in evidence into the trial.

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

Plaintiff's argument that the "independent" act of the nurses, fellows and residents justifies the 0% liability finding as to Dr. Gerhardt is not supported by the evidence adduced at trial. Plaintiff's own experts admit that the nurses' actions *did not* cause the death and that the cause of death was the failure to provide antibiotics. Judge Pineiro's decision in *Miami-Dade County v. Merker*, 907 So. 2d 1213, 1216 (Fla. 3d DCA 2005), to grant a new trial where there was a finding of no liability on the part of a *Fabre* defendant whose liability was established by the evidence should be followed herein. Plaintiff's whole case was that antibiotics should have been given to this child. Setting Dr. Gerhardt's liability at 0% is contrary to the manifest weight of the evidence and mandates a new trial.

## CONCLUSION

The judgment should be reversed and remanded with instructions to direct a verdict in favor of the 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, Esquire**, 300 Sevilla Avenue, Suite 209, Coral Gables, Florida 33134; **Maria D. Tejedor, Esquire**, Attorneys Trial Group, 540 N. Semoran Boulevard, Orlando, Florida 32807 this 13th day of September, 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