

RECEIVED, 8/7/2013 15:18:33, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-2314

RUBY SAUNDERS, individually,
and as Personal Representative of
the Estate of Walter Saunders,

Petitioners,

v.

WILLIS DICKENS, M.D.,

Respondent./

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

AMICUS CURIAE BRIEF OF THE FLORIDA JUSTICE ASSOCIATION
IN SUPPORT OF THE PETITIONERS

George A. Vaka, Esq.
Florida Bar No. 374016
gvaka@vakalaw.com
Nancy A. Lauten, Esq.
Florida Bar No. 0593052
nlauten@vakalaw.com
VAKA LAW GROUP, PL
777 S. Harbour Island Blvd., #300
Tampa, FL 33602
(813) 549-1799 (phone)
(813) 549-1790 (facsimile)

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST1

SUMMARY OF THE ARGUMENT1

ARGUMENT2

CONCLUSION19

CERTIFICATE OF SERVICE 20

CERTIFICATE OF COMPLIANCE21

TABLE OF AUTHORITIES

Cases

City of Coral Gables v. Jordan

186 So. 2d 60, 62 (Fla. 3d DCA), affirmed, 191 So. 2d 38(1966))..... 12

Cox v. St. Josephs Hospital

71 So. 3d 795, 799 (Fla. 2011)..... 5

Del Valle v. Sanchez

170 F. Supp. 2d 1254, 1275-76 (S.D. Fla. 2001)..... 9

Donshik v. Sherman

861 So. 2d 53, 57 (Fla. 3rd DCA 2003)..... 8

Dosdourian v. Carsten

624 So. 2d 241 (Fla. 1993)..... 14

Ewing v. Sellinger

758 So. 2d 1196 (Fla. 4th DCA 2000). 3, 4, 8, 19

Gooding v. University Hospital Building, Inc.

445 So. 2d 1015, 1018 (Fla. 1984)..... 4, 5, 10

Goolsby v. Qazi

847 So. 2d 1001 (Fla. 5th DCA 2003) 7, 8, 10

<u>Government Employees Ins. Co. v. Krawzak</u>	
675 So. 2d 115, 118 (Fla. 1996).....	13
<u>Hack v. Janes</u>	
878 So. 2d 440, 442 (Fla. 5 th DCA 2004)	16
<u>Hamilton v. Hardy</u>	
37 Colo.App. 375, 387, 549 P.2d 1099, 1109 (1976).....	7
<u>Holmes v. Area Glass, Inc.</u>	
2013 WL 3853225 (Fla. 1 st DCA July 26, 2013).....	12
<u>Lanz v. Geico General Ins. Co.</u>	
803 So. 2d 593, 595 (Fla. 2001).....	13
<u>McKeithan v. HCA Health Services of Florida, Inc.</u>	
879 So. 2d 47 (Fla. 4 th DCA 2004)	4
<u>Morrison v. State</u>	
818 So. 2d 432 (Fla. 2002).....	11
<u>Munoz v. South Miami Hospital, Inc.</u>	
764 So. 2d 854, 857 (Fla. 3 rd DCA 2000)	5, 6, 7, 8, 10
<u>Public Health Trust of Dade County v. Valcin</u>	
507 So. 2d 596, 600 (Fla. 1987).....	16, 17, 18

<u>Saleeby v. Rocky Elson Construction, Inc.</u>	
3 So. 3d 1078, 1083 (Fla. 2009).....	12
<u>Saunders v. Dickens</u>	
103 So. 3d 871, 877 (Fla. 4th DCA 2012).....	2
<u>Seley v. G.D. Searle & Co.</u>	
423 N.E. 2d 831, 839 (Ohio 1981).....	6
<u>Sta-Rite Industries, Inc. v. Levey</u>	
909 So. 2d 901 (Fla. 3 rd DCA 2004).....	9
<u>State Bd. of Medical Examiners v. McCroskey</u>	
880 P.2d 1188 (Colo.1994).....	7
<u>Tampa Drug Co. v. Wait</u>	
103 So. 2d 603, 609 (Fla. 1958).....	9
<u>Tampa Electric Co. v. Jones</u>	
138 Fla. 746, 190 So. 26 (1939).....	4
<u>Universal Ins. Co. of North America v. Warfel</u>	
82 So. 3d 47, 51-54 (Fla. 2012)	16, 17
<u>Vucinich v. Ross</u>	
893 So. 2d 690, 695 (Fla. 5 th DCA 2005)	8

Wale v. Barnes

278 So. 2d 601, 603 (Fla. 1973)..... 4

Ward v. Ochoa

284 So. 2d 385, 387 (Fla. 1973)..... 13

Other Authorities

C. Ehrhardt, Florida Evidence §608.5 (2013 Edition) 11

C. Ehrhardt, Florida Evidence § 303.1 (2013 Edition)..... 16, 17

STATEMENT OF INTEREST

The Florida Justice Association (“FJA”) is a large voluntary statewide association of approximately 3,000 trial lawyers concentrating on litigation in all areas of the law. The members of the FJA care deeply about the integrity of the legal system. The members of the FJA are pledged to the preservation of the American legal system, protection of individual rights and liberties, and the right of access to courts and trial by jury. Those interests are implicated by the issues before this Court. The FJA has been long been actively involved in debating issues relating to the medical malpractice system, and has often participated as amicus curiae in Florida’s courts. The FJA believes its input may be of assistance to the Court in resolving the issues raised in this case, and that this Court’s decision will have a tremendous impact on its members and their clients.

SUMMARY OF THE ARGUMENT

The issue presented in this medical malpractice action implicates the long-standing fundamental principle that trials are supposed to be a search for the truth. The Fourth District’s ruling runs afoul of this principle and allows a defendant to unfairly avoid liability where there is otherwise prima facie evidence that there is liability. This Court should resolve this inequity by adopting the proposals

advocated by the Petitioner which give deference to the bedrock foundation of a jury trial—to give justice to the litigants.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE DEFENDANT’S CLOSING ARGUMENT, PLACING THE BURDEN ON THE PLAINTIFF TO PROVE THAT THE SUBSEQUENT TREATING PHYSICIAN WOULD NOT HAVE ACTED NEGLIGENTLY, WAS PROPER.

Defense counsel maintained during closing argument that Plaintiffs could not prove that Dr. Dickens’ failure to diagnose Walter Saunders’ cervical cord compression could not have been the cause of injury because Dr. Pasarin, the subsequent treating surgeon and a former defendant in the case, testified that such a diagnosis would not have prompted him to do anything differently. Specifically, Dr. Pasarin testified that “if Dr. Dickens had ordered a cervical MRI in July 2003 and the radiographic findings were identical to those seen in the September 2003 films, Dr. Pasarin still would not have conducted the cervical decompression surgery at that time, given that Dr. Pasarin's exam did not find any upper extremity dysfunction.” Saunders v. Dickens, 103 So. 3d 871, 877 (Fla. 4th DCA 2012). The Plaintiffs had settled with Dr. Pasarin, so they were not permitted to present evidence regarding Dr. Pasarin’s motives for testifying the way he did. Not surprisingly, the jury returned a defense verdict, which the Fourth District

affirmed. The court disagreed that Dr. Dickens made an impermissible burden-shifting argument on the issue of Dr. Pasarin's negligence. Rather, the court found that what Dr. Dickens appeared to be arguing was that the Plaintiffs failed to present evidence of causation. Id.

In reaching the result in this case, the Fourth District relied on its earlier decision in Ewing v. Sellinger, 758 So. 2d 1196 (Fla. 4th DCA 2000). In Ewing, the trial court granted a post-trial directed verdict in favor of a doctor in a medical malpractice case involving the injuries sustained during the labor and birth of the plaintiffs' child. The plaintiffs maintained they presented a prima facie case of negligence that had Dr. Sellinger performed a risk evaluation on the mother before her labor began, he would have ordered that a physician be present at the birth. Plaintiffs' expert testified that because of fetal distress shown on the fetal monitor strips, a cesarean section would have been performed by 7:00 p.m. If that had been done, injury to the mother and child would have been avoided. However, the on-call physician at the hospital that night testified that if he had been asked at any point during the mother's labor to intervene in the case and had reviewed the fetal monitoring strips, he would not have performed a cesarean section. The Fourth District affirmed the directed verdict in favor of Dr. Sellinger based on its conclusion that the causal chain from the negligence to the plaintiffs' injuries had

not been proven. The court stated, “Thus, what Dr. Sellinger failed to do, i.e., continue Ewing's supervision under the care of a physician, would not have affected the outcome in the instant case because the physician who was available to intervene and perform the c-section testified that he would not have done so.” See also McKeithan v. HCA Health Services of Florida, Inc., 879 So. 2d 47 (Fla. 4th DCA 2004) (plaintiffs failed to present evidence that failure of nurses to access chain of command would have affected treatment decisions of treating physician, who testified at trial).¹ Amicus believes the Fourth District’s decisions misstate the law as it pertains to medical malpractice and, as a result, the Petitioners were denied a fair trial.

The long-standing rule in Florida is that in order to prevail in a medical malpractice case a plaintiff must establish the following three elements: the standard of care owed by the defendant, the defendant’s breach of the standard of care, and that the breach proximately caused the damages claimed. Gooding v. University Hospital Building, Inc., 445 So. 2d 1015, 1018 (Fla. 1984); Wale v. Barnes, 278 So. 2d 601, 603 (Fla. 1973). Florida follows the “more likely than not” standard of causation and requires proof that the negligence probably caused the plaintiff’s injury. See Gooding, 445 So. 2d at 1018; Tampa Electric Co. v. Jones,

¹ In his concurrence, Judge Klein questioned whether the court’s ruling in Ewing was correct, but found it was unnecessary to reach the issue. 879 So. 2d at 49.

138 Fla. 746, 190 So. 26 (1939). The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. That is, “the plaintiff must show that what was done or failed to be done probably would have affected the outcome.” Gooding, 445 So. 2d at 1018, 1020. See also Cox v. St. Josephs Hospital, 71 So. 3d 795, 799 (Fla. 2011).

Contrary to what the Fourth District ruled in this case, a plaintiff in a medical malpractice suit is not required to prove that a subsequent treating physician would not have been negligent in his treatment of the patient. That argument was rejected in Munoz v. South Miami Hospital, Inc., 764 So. 2d 854, 857 (Fla. 3rd DCA 2000). The court reversed a summary judgment in favor of an obstetrician and a hospital because the record contained expert testimony that the defendants deviated from the acceptable standard of care when they failed to directly inform the child's pediatrician of the results of a pre-delivery sonogram which suggested that one of the fetus' kidneys might not be functioning properly. The obstetrician and the hospital's nurses had simply placed the information in the patient's chart. The baby's pediatrician testified that he saw her daily during her hospitalization, discussed the questionable kidney filtering with the mother, and reviewed the notes in the chart. Based on his examination, he believed the child

was fine. Thus, the pediatrician never undertook appropriate treatment for the infant's kidney condition, which ultimately led to severe kidney damage. Expert testimony established that the kidney damage could have been prevented had the appropriate treatment been rendered after delivery. 764 So. 2d at 855-56.

The Third District rejected the defendants' contention that their misconduct could not have been the legal cause of the child's condition because the pediatrician, whose job it was to treat it, had been informed of the sonogram result by the child's parents, and testified that being also told by the obstetrician or hospital personnel would have made no difference. The court found that the pediatrician's statements about what he would or would not have done in response to warnings, which should have been but were never in fact given, could not be given conclusive effect. The court stated that it was not for the defendants, "who putatively violated their standard of care by failing to warn, to argue that their not doing so had no effect on the situation, when their doing the appropriate thing would have removed all doubt." 764 So. 2d at 857. The court then quoted Seley v. G.D. Searle & Co., 423 N.E. 2d 831, 839 (Ohio 1981):

[O]nly speculation can support the assumption that an adequate warning, properly communicated, would not have influenced the course of conduct adopted by a physician, even where the physician had previously received the information contained therein. "What the doctor might or might not have done had he been adequately warned is not an element plaintiff must prove as a part of her case."

67 Ohio St.2d at 201, 423 N.E.2d at 839 (footnote omitted) (quoting Hamilton v. Hardy, 37 Colo.App. 375, 387, 549 P.2d 1099, 1109 (1976), overruled on different grounds by State Bd. of Medical Examiners v. McCroskey, 880 P.2d 1188 (Colo.1994)).

Munoz, 764 So. 2d at 857.

The Fifth District reached the same result in Goolsby v. Qazi, 847 So. 2d 1001 (Fla. 5th DCA 2003). In that case, evidence was presented that x-rays of the infant showed dysplasia of the hip, and that Dr. Qazi, a radiologist, was negligent in reading the x-ray as normal. A directed verdict was entered in favor of Dr. Qazi based on a purported lack of evidence that his misreading of the x-ray “caused the failure to timely treat Ashley with a Pavlik harness.” Id. at 1002.

On appeal, Dr. Qazi contended the directed verdict was correct because there was no evidence showing that the orthopedic surgeon the child was referred to saw Dr. Qazi's report and that the only person shown by the evidence to have seen it was the pediatrician who ordered the x-ray. Dr. Qazi maintained that there was no showing “that the pediatrician would have changed her treatment if she had been informed that the x-rays showed dysplasia, or that she would have attempted to influence the treatment being provided by other doctors. Further, there is no evidence that any other doctor would have acceded to any attempt by the pediatrician to intervene.” Id. at 1003. As a result, Dr. Qazi contended that

plaintiffs failed to establish that his reading of the x-rays had any effect on the outcome and the child's injury. Id. Dr. Qazi cited Ewing v. Sellinger, 758 So. 2d 1196 (Fla. 4th DCA 2000), as support for his position. Id.

The Fifth District disagreed with Ewing “if it means that the negligent failure to diagnose a condition cannot be the cause of damages if a subsequent treater testifies that he would have shrugged off the correct diagnosis.” 847 So. 2d 1003. The court agreed with the majority in Munoz that the plaintiffs were not “obliged to prove that the pediatrician would not have been negligent, or the precise steps the pediatrician would have taken to insure the health of her patient, if Qazi's reading had been positive for hip dysplasia.” Id. at 1004. See also Vucinich v. Ross, 893 So. 2d 690, 695 (Fla. 5th DCA 2005) (holding that ‘only speculation can support the assumption that an adequate warning, properly communicated, would not have influenced the course of conduct adopted by a physician, even where the physician had previously received the information contained therein’).

The rule expressed in Munoz, Goolsby, and Vucinich is consistent with the principle that the jury is entitled to decide that in the absence of the defendant's negligence, a reasonable person would have acted reasonably. As the court held in Donshik v. Sherman, 861 So. 2d 53, 57 (Fla. 3rd DCA 2003), neither the plaintiff nor the defendant is permitted to offer subjective opinions as to what would have

happened in the absence of negligence. Instead, the jury must decide, based on competent evidence, what a reasonable person would have done, or in this case, what a reasonable subsequent treating physician would have done. See Del Valle v. Sanchez, 170 F. Supp. 2d 1254, 1275-76 (S.D. Fla. 2001). See also Tampa Drug Co. v. Wait, 103 So. 2d 603, 609 (Fla. 1958) (plaintiff's proof of inadequate warning itself creates an inference that plaintiff would have heeded a reasonable warning); Sta-Rite Industries, Inc. v. Levey, 909 So. 2d 901 (Fla. 3rd DCA 2004) (one who does not warn with urgency and intensity deemed required under circumstances cannot say that failure to warn would have made no difference).

This Court should approve the reasoning of the Third and Fifth District Courts of Appeal and hold that, in accordance with established Florida law, a negligent treating healthcare provider cannot rely on the speculative and subjective testimony of a subsequent treating healthcare provider that he would not have acted differently if the initial treating healthcare provider had not been negligent. Such a ruling is particularly significant in cases where, like here, the plaintiff has settled with the subsequent treating healthcare provider and cannot explore his possible motives or biases.

Short of an outright ban of a subsequent treater's subjective and often self-serving testimony, the Court should adopt the two-tiered approach proposed by the

Petitioner. (Petitioners' Initial Brief p. 28-39) Under Gooding, a medical malpractice plaintiff is charged with introducing evidence establishing that had the correct diagnosis been given "to a subsequent treating physician with the power to act, a reasonable subsequent treating physician would have acted in a manner that more likely than not would have changed the outcome." (Petitioner's Initial Brief p. 28-29) Per Munoz and Goolsby, the plaintiff is not required to prove that the subsequent treating physician would have acted in a manner contrary to what he testified. Accordingly, when the subsequent treater is not named a party in the case, the defendant should be required to present competent expert testimony "that the standard of care did not require a reasonable subsequent treater to take any action, even if he or she had received the information that plaintiff alleged should have been supplied." (Petitioners' Initial Brief p. 26) (emphasis added) If the subsequent treater's testimony is shown by expert testimony to satisfy the standard of care of a reasonable physician, his testimony about what he would have done would be admissible. If it does not, then he would not be allowed to testify on that subject. Such a ruling would prevent the situation in which an initial treating healthcare provider is absolved from liability, not because he was not negligent, but simply because the subsequent treating healthcare provider testifies that he

would not have done anything differently, thereby breaking the causal chain between the initial treater's negligence and the plaintiff's injuries.

The solutions advanced by the Petitioner are of significant importance when the subsequent treating physician also is a defendant in the case, but settles with the plaintiff before trial. The long-standing rule in Florida is that any party may impeach a witness by attacking his credibility. §90.608, Fla. Stat. Section 90.608(2) permits the credibility of a witness to be attacked by showing that the witness is biased. Matters that may demonstrate bias include those that "relate to the interest of the witness, favoritism and corruption." C. Ehrhardt, Florida Evidence §608.5 (2013 Edition). This rule exists because a person's emotions and feelings "may consciously or unconsciously taint the person's perception of the events about which he or she is testifying." Id. Thus, interest, motive, and animus "are never collateral matters on cross-examination and are always proper." Id. See, e.g., Morrison v. State, 818 So. 2d 432 (Fla. 2002) (disclosing witness's self-interest is proper method of attacking witness's credibility).

A different rule applies, however, to witnesses who were once parties in a case. Section 768.041(3), Fla. Stat., provides that the fact of a release, covenant not to sue, "or that any defendant has been dismissed by order of the court shall not be made known to the jury." The reason for this rule is that §768.041 and §90.408,

Fla. Stat. (Compromise and Offers to Compromise) “promote Florida’s public policy favoring settlement by excluding such prejudicial evidence at trial.” Saleeby v. Rocky Elson Construction, Inc., 3 So. 3d 1078, 1083 (Fla. 2009). Informing the jury that there had been a settlement is “‘immediately and completely destructive to the possibility of a fair trial.’” Id. at 1085 (quoting City of Coral Gables v. Jordan, 186 So. 2d 60, 62 (Fla. 3d DCA), affirmed, 191 So. 2d 38(1966)). “[I]t is a practical impossibility to eradicate from the jury’s minds the considerations that where there has been a payment there must have been liability.” Id. (quoting City of Coral Gables v. Jordan, 186 So. 2d 60, 63 (Fla. 3rd DCA 1966) (internal citation omitted)).

This Court has made it absolutely clear that evidence that a witness has settled with a party and obtained a release is inadmissible even if it shows that the witness has a self-interest and bias in testifying. Saleeby v. Rocky Elson Construction, Inc., supra. The Court has found that neither statute contained “an implicit exception permitting such evidence to be used for impeachment purposes.” 3 So. 3d at 1086. Admission of such evidence at trial is reversible error. See, e.g., Holmes v. Area Glass, Inc., 2013 WL 3853225 (Fla. 1st DCA July 26, 2013). What that means is that the possible motive or potential bias of a witness who was once a defendant in the action can never be presented to the jury. The plaintiff is

prohibited from showing the jury that a witness, who was a defendant at the time, testified the way he did in order to protect his own self interest.

This statutory prohibition conflicts with the fundamental principle that the “search for the truth, in order to give justice to the litigants, is the primary duty of the courts.” Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973). Jury trials are an integral part of the search for that truth. As such, the Court has taken “a strong stand against charades in trials.” Government Employees Ins. Co. v. Krawzak, 675 So. 2d 115, 118 (Fla. 1996). In order to protect the integrity of the jury system, it is the policy of this Court that the proceedings be transparent. Lanz v. Geico General Ins. Co., 803 So. 2d 593, 595 (Fla. 2001). As part of that policy, this Court has consistently required full disclosure of the identity and status of the parties at trial. In Lanz and Krawzak, the Court held that the jury is to be made aware of the precise identity of an uninsured motorist carrier if it is a party at trial. The Court stated that to do otherwise would be a “pure fiction” in violation of the policy against charades at trial. Krawzak, 675 So. 2d at 118.

This Court has strongly condemned “Mary Carter” agreements because “secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion.” Ward v. Ochoa, 284 So. 2d at 387. In order to prevent such deception, the Ward court

ruled that the agreements had to be disclosed. This Court ultimately banned the use of Mary Carter agreements. Dosdourian v. Carsten, 624 So. 2d 241 (Fla. 1993). The Court found that “even possible collusion between the plaintiff and the settling defendant creates an inherently unfair trial setting that could lead to an inequitable attribution of guilt and damages to the nonsettling defendant.” Id. at 244. The Court also found that “Mary Carter agreements, by their very nature, promote unethical practices by Florida attorneys” because the lawyer for the settling party “must necessarily make misrepresentations to the court and to the jury in order to maintain the charade of an adversarial relationship.” Id. Thus, “even if the parties and counsel conduct themselves with honesty and integrity, a cloud of doubt remains over the proceedings because of the information withheld from the jurors.” Id. at 243 (quoting Dosdourian v. Carsten, 580 So. 2d 869, 872 (Fla. 4th DCA 1991)).

Here, the testimony of Dr. Pasarin that was presented to the jury was taken while he was still a defendant in the case. Obviously, it was in his best interest to testify that his actions would not have changed if he had received different information about Mr. Saunder’s condition. He was being sued. He certainly was not going to admit to the Plaintiffs, or anyone else for that matter, that he committed malpractice. Had there not been a settlement and Dr. Pasarin remained

in the case, Plaintiffs would have been permitted to impeach him like any other witness to establish bias. However, §768.041(3) and this Court's precedent prohibited Plaintiffs from doing so. The beneficiary of that prohibition was Dr. Dickens. He now had uncontradicted testimony from the subsequent treating physician that any omission or error on his part was basically irrelevant and, therefore, could not have been a proximate cause of Mr. Saunder's injuries. Defense counsel took full advantage of the statutory prohibition against disclosure by challenging Plaintiffs to prove that Dr. Pasarin was lying, knowing full well that Plaintiffs could not do so without violating the statute and committing reversible error. It was inherently unfair to the Plaintiffs to, in effect, absolve Dr. Dickens of liability simply because Dr. Pasarin, a settling defendant, also failed to make the correct diagnosis, but self-servingly testified that he would not have acted differently had he been given the correct diagnosis. The end result is that the Plaintiffs were denied a fair trial.

Prohibiting the introduction of such evidence at trial or, alternatively, creating the evidentiary presumption crafted by the Petitioners are two reasonable methods for promoting this Court's policy of transparency in judicial proceedings and remedying the injustice that occurred in this case. (Petitioners' Initial Brief p. 37-39) Excluding the evidence would not prohibit a defendant from presenting

competent expert testimony at trial that the subsequent treating physician's failure to act met the standard of care. It would prevent the jury from being deceived by this inherently unreliable testimony.

The second option is to create an evidentiary presumption. A presumption is “an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established.” Hack v. Janes, 878 So. 2d 440, 442 (Fla. 5th DCA 2004) (citing § 90.301, Fla. Stat.). Except for presumptions “that are conclusive under the law from which they arise, presumptions are rebuttable.” §90.301 (2), Fla. Stat. Florida recognizes two types of presumptions. The first type is the vanishing presumption. With this type of presumption, when credible evidence comes into the case contradicting the basic fact or facts giving rise to the presumption, the presumption vanishes and the issue is determined on the evidence just as though no presumption has ever existed. Universal Ins. Co. of North America v. Warfel, 82 So. 3d 47, 51-54 (Fla. 2012) (explaining the nature and history of presumptions in Florida); § 90.302 (1), Fla. Stat. The jury is never told of this type of presumption. Public Health Trust of Dade County v. Valcin, 507 So. 2d 596, 600 (Fla. 1987). “Bursting bubble” or “vanishing” presumptions are employed “primarily to facilitate the determination of an action,” rather than “to implement public policy.” C. Ehrhardt, Florida Evidence § 303.1 (2013 Edition).

The second type of presumption is the "social policy" presumption, which affects the burden of proof. §90.302 (2), Fla. Stat. When evidence rebutting this type of presumption is introduced, the presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case. Warfel, 82 So. 3d at 53-54; Valcin, 507 So. 2d at 600. Presumptions of this nature “are expressions of social policy such as the validity of marriage, sanity in civil cases, legitimacy of a child born in wedlock, and the correctness of judgments. See C. Ehrhardt, Florida Evidence 128-33 (2013 Edition). See also Valcin, 507 So. 2d at 601(a presumption shifting the burden of proof ‘appears best to implement public policy that adequate operative notes be kept’).

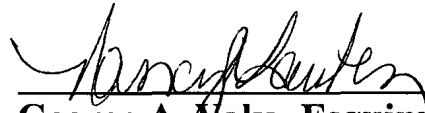
Creating a Valcin-type evidentiary presumption, to which the plaintiff would have to establish entitlement (Petitioners’ Initial Brief p. 38), would permit the defendant to present the former defendant’s testimony at trial. However, the jury would be instructed that the healthcare provider’s testimony, that he would not have acted even if given the correct information, did not meet the standard of care “unless defendant proves otherwise by the greater weight of the evidence.” (Petitioners’ Initial Brief p. 38) Application of the presumption would be limited to

situations where, like here, the witness is a former defendant who has settled with the plaintiff, and whose motives or biases for giving such testimony cannot be explored or disclosed to the jury, thereby giving defendants an unfair and unwarranted advantage. As this Court has stated, a presumption “shifting the burden of producing evidence, is given life only to equalize the parties’ respective positions in regard to the evidence and to allow the plaintiff to proceed.” Public Health Trust of Dade County v. Valcin, 507 So. 2d at 599-600. In this case, the presumption would similarly equalize the parties’ respective positions in regard to the evidence and allow the Plaintiffs to proceed. It would also promote this Court’s stated policy of protecting the integrity of the jury system and preventing charades at trial. Likewise, it would promote Florida’s public policy of encouraging settlements, something similarly situated plaintiffs may be hesitant to enter into given the unjust result that was reached in this case.

CONCLUSION

For the reasons stated herein and by the Petitioners, this Court should quash the Fourth District's decision in this case, disapprove Ewing v. Sellinger, and remand with directions to order a new trial.

Respectfully submitted,
VAKA LAW GROUP, P.L.
777 S. Harbour Island Blvd., #300
Tampa, Florida 33602
Phone: (813) 549-1799
Fax: (813) 549-1790



George A. Yaka, Esquire

Florida Bar No. 374016

Nancy A. Lauten, Esquire

Florida Bar No. 0593052

Attorneys for Amicus Curiae

Florida Justice Association


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic mail to the following individual on this 7th day of August, 2013:

Nancy W. Gregoire, Esquire, Kirschbaum, Birnbaum, Lippman & Gregoire, PLLC, 1301 East Broward Blvd. Suite 230, Ft. Lauderdale, FL 33301 (gregoirecourt@kblglaw.com) (Counsel for Respondent)

Douglas F. Eaton, Esquire, Eaton & Wolk, PL, One Biscayne Tower, Suite 3100, 2 South Biscayne Blvd., Miami, FL 33131 (deaton@eatonwolk.com) (Counsel for Petitioner)


VAKA LAW GROUP



George A. Vaka, Esquire
Florida Bar No.: 374016
gvaka@vakalaw.com
Nancy A. Lauten, Esquire
Florida Bar No. 0593052
nlauten@vakalawgroup.com
Vaka Law Group, PL
777 S. Harbour Island Blvd., #300
Tampa, Florida 33602
813.549.1799 Telephone
813.549.1790 Facsimile

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with font requirements pursuant to Fla. R. App. P. 9.100(1) and 9.210(a)(2).



Nancy A. Lauten, Esq.
Florida Bar No. 0593052