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IN THE SUPREME COURT
OF FLORIDA

CASE NO. SC12-2314
Lower Tribunal Case No. 4D09-5302

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

Petitioner,

v.

WILLIS DICKENS, M.D.,

Respondent.

**ON DISCRETIONARY REVIEW OF A
DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT**

ANSWER BRIEF ON THE MERITS OF RESPONDENT WILLIS DICKENS, M.D.

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PREFACE

This request for the Court's discretionary review is of a September 27, 2012 Opinion on Motion for Rehearing of the District Court of Appeal of the State of Florida, Fourth District.

Petitioner Ruby Saunders, individually, and as Personal Representative of the Estate of Walter Saunders, will be referred to as "Ms. Saunders."

Respondent Willis Dickens, M.D., will be referred to as "Dr. Dickens."

Ms. Saunders' Brief on the Merits will be cited as "IB__."

Florida Justice Association's Amicus Curiae Brief will be cited as "ACB___."

The record will be cited as "R__-__" to indicate document and page.

The trial transcript will be cited as "T____."

Dr. Dickens' Appendix will be cited as "A__-__."

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STATEMENT OF THE CASE AND OF THE FACTS

A. Introduction

Dr. Dickens disagrees with Ms. Saunders' statement of the main issue. As the Fourth District phrased it, the main issue is whether Dr. Dickens, a neurologist, made an "impermissible burden-shifting argument" regarding his alleged negligence or whether he permissibly argued that Ms. Saunders failed to carry her burden of proof that any alleged negligence on his part caused harm to Walter Saunders, her now deceased husband. *Saunders v. Dickens*, 103 So. 3d 871, 878 (Fla. 4th DCA 2012).

The issue was decided in Dr. Dickens' favor by a jury, unlike the cases on which Ms. Saunders relies, and the Fourth District correctly recognized that Dr. Dickens' argument was that she failed to present the testimony of any neurosurgeon, or for that matter any medical expert, who would have first performed cervical spine surgery in July 2003 even if given a cervical spine MRI. As the trial court and the Fourth District held, her focus on Dr. Pasarin misunderstands Dr. Dickens' position. Furthermore, while she argues here that Dr. Pasarin's testimony should not have been allowed, she made no such argument at the trial level or before the Fourth District.

Dr. Dickens also disagrees with Ms. Saunders' position that the facts should not have been stated in the light most favorable to him as prevailing party (IB6 n2). There were clearly factual disputes on negligence and causation, because those were

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the issues on which the case was submitted to the jury. If the facts had been undisputed, the issue would have been one of law decided by the court, not the jury.

Dr. Dickens further disagrees, as did the trial court and the Fourth District, that his "defense was primarily based on testimony elicited from Dr. Pasarin, which (unbeknownst to the jury) was given when Dr. Pasarin was still a defendant in the case" (IB2). Dr. Dickens' defense was primarily based on the testimony of his expert neurologist, who testified that his treatment was within the standard of care, his expert neurosurgeon, who stated that he would not have performed the cervical spine surgery first even if a cervical spine MRI had been done, and a subsequent treating neurosurgeon, who agreed with them. It is only to trigger this Court's jurisdiction that Ms. Saunders focuses on anything Dr. Pasarin said or did.

The second issue that Ms. Saunders raises here is whether the trial court abused its discretion in declining to strike Dr. Dickens' pleadings for events that occurred during the presuit investigation period based on its finding that Dr. Dickens complied with all presuit requirements within the required timeframes. *See Saunders*, 103 So. 3d at 877. As the Fourth District also correctly held, Ms. Saunders showed no abuse of that discretion.

On both issues Dr. Dickens believes that the jury, the trial court, and the Fourth District decided correctly and that there is no conflict between the Opinion and any

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case from this Court or Florida's district courts. In support, Dr. Dickens provides his own Statement of the Case and of the Facts, taken from the Opinion and the record.

B. The Alleged Burden-Shifting Issue

Dr. Dickens' closing argument was based not only on Dr. Pasarin's testimony and conduct, as Ms. Saunders describes it (IB2-3), but on all of the testimony, evidence, and jury instructions. As he explains below, he primarily argued two issues: Ms. Saunders' failure to present any evidence that a neurosurgeon would have performed the cervical spine surgery first in July 2003 even if a cervical spine MRI had been done at that time; and his own expert neurosurgeon's testimony that he also would not have performed the cervical spine surgery first if a cervical spine MRI had been done in July 2003.

1. The Fact Testimony on the Causation Issue

Trial took place over six days in late 2009. Dr. Dickens did not primarily base his defense on Dr. Pasarin's testimony (IB2). He presented his own testimony and that of two experts, a neurosurgeon and a neurologist. According to that testimony, at the time Dr. Dickens saw Mr. Saunders he was in a wheelchair, and his complaints of pain in the back and legs, difficulty walking, numbness and weakness in the lower extremities, and numbness and cramping in his hands and feet were consistent with his diabetes (T547, 550-51). There was no complaint of neck pain or history of upper

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extremity problems, and Mr. Saunders' upper extremity reflexes were intact (T201, 442, 444-45, 544, 547).

Dr. Dickens admitted him to the hospital and, based on the admitting history and physical showing symptoms consistent with lumbar stenosis, ordered MRIs of Mr. Saunders' brain and lumbar spine (T306, 454-57). Dr. Dickens testified that he did not order a cervical spine MRI because neither Mr. Saunders' complaints nor the examination justified that further test (T549). The lumbar spine MRI report showed severe narrowing of the spinal canal in that region (T311-13, 316, 457, 548). Because surgery is the treatment most likely to alleviate the condition, and neurologists defer to neurosurgeons on that issue, on July 9, 2003 Dr. Dickens requested a consultation with Guillermo Pasarin, M.D., a neurosurgeon (T306, 314, 457, 489, 591).

Dr. Pasarin's testimony, to which there was no objection, established that his July 10, 2003 examination found no evidence of upper extremity cramping and numbness (T603-04, 661-65). He did find other things on the lumbar spine MRI, however, including lumbar stenosis, and decided to operate to relieve the compression (T315, 457, 592). He never considered the need to order a cervical spine MRI or a diagnosis of cervical myelopathy given the absence of any complaints suggesting them (T603-04, 661). He later testified that even if he had been presented with symptoms not explained by lumbar stenosis he would not have ordered a

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cervical spine MRI because there were no symptoms indicating its necessity (T661, 676-77). His July 2003 surgery decompressed Mr. Saunders' lumbar area to the extent he believed possible (T323, 607). As of August 7, 2003, Dr. Pasarin saw some improvement from the lumbar surgery and still saw no sign of upper extremity dysfunction or heard any complaint from Mr. Saunders about his hands (T609-11).

By September 1, 2003, however, Dr. Pasarin did not believe that Mr. Saunders had sufficiently improved, ordered a repeat lumbar MRI and, for the first time, mid-back and neck MRIs because of the lack of significant improvement (T325, 359, 609). Even as of September 2003, Dr. Pasarin believed that the issue was Mr. Saunders' lumbar spine, but he ordered the cervical spine MRI to ensure that the neck was not involved (T609-11). The lumbar MRI showed an incomplete decompression and continuing pressure on the lowest level of the spine, which meant that the lumbar surgery had not been successful, and the cervical spine MRI showed pressure on the cervical spinal cord (T326-28, 352, 617-18, 662).

Dr. Pasarin's October 3, 2003 office visit note states that Mr. Saunders told him before the lumbar surgery he had "no problems with his hands or arms," they were "working up until the point of surgery," but since the July 2003 surgery they were "progressively worse" (T352, 617-20, 654-55, 675-76). Dr. Pasarin's examination also showed, for the first time, evidence of abnormal reflexes and cervical

myelopathy and recommended that Mr. Saunders have a multilevel decompressive surgery within the next 30 days (T353-54, 618-25, 659-60). Although Mr. Saunders was cleared for the second surgery, it did not take place in 2003 because he "got lost" between October and December 11, 2003 (T357-58, 630-32, 635).

In January 2004 Mr. Saunders was readmitted to the hospital and seen by Amos Stoll, M.D. (T360). Dr. Stoll testified that he obtained additional MRIs and concluded that two surgeries were necessary – first the low back to complete the decompression and then the neck (T230-31, 360-61, 586). On January 9, 2004 Dr. Stoll performed the first of the two surgeries (T413, 583). Mr. Saunders passed away before the cervical spine surgery was performed (T231).[1]

2. The Expert Testimony on the Causation Issue

Dr. Dickens presented the testimony of a neurologist and a neurosurgeon. Again, rather than state the testimony in the light most favorable to Dr. Dickens, Ms. Saunders improperly portrays this testimony in the dimmest possible light (IB10-13). Dr. Dickens therefore restates the testimony.

---

[1] While Mr. Saunders was in a wheelchair in December 2003, Ms. Saunders' statement that it and his paraplegia were "as a result of his cervical cord compression" is not a statement of the evidence in the light most favorable to Dr. Dickens and was absolutely a disputed issue of fact (IB5). This is just one example of the reason that Dr. Dickens relied on cases such as *Smith-Barney, Inc. v. Potter*, 725 So. 2d 1223, 1224 (Fla. 4th DCA 1999), before the Fourth District. Nor do Ms. Saunders' three cases stand for the proposition that she states (IB6 n2). If anything, they support Dr. Dickens' position.

After establishing his expertise, Allan Herskowitz, M.D., the neurologist, testified that all of Mr. Saunders' July 2003 gait problems were related to the lumbar disc compression, and not the cervical spine, so the focus at that time was properly on Mr. Saunders' legs, not his hands (T512-27, 543). He explained that a patient could not have a complaint of back pain caused by a neck problem because that is an anatomical impossibility (T543). In detail, he then recounted Mr. Saunders' complaints and examination results, none showing neck pain or involvement, and related each to a compression of the lumbar spine, not the cervical spine (T543-49).

Dr. Herskowitz related the hand numbness and tingling to the diabetes and concluded that there was "absolutely no indication at that time that there was anything wrong with the cervical spine" (T549-51). His professional opinion was that Dr. Dickens had acted "extremely appropriately" and that he, Dr. Herskowitz, would have acted in the same way (T555).

Guy Danielson, M.D., Dr. Dickens' neurosurgeon, also first established his expertise, then explained that in his practice, after reviewing all the records from the referring neurologist and examining the patient, he is frequently required to order additional tests that he believes necessary (T270-87, 289-92). He said that the patient's chief complaint is the most important consideration but other complaints are never ignored (T304-05).

Based on the records that he reviewed regarding Dr. Pasarin's treatment of Mr. Saunders, the complaints and symptoms, the examinations, and the MRIs, Dr. Danielson testified that the decision to operate on Mr. Saunders' lumbar spine was within the standard of care and the "only good choice" at that point (T312-16). He reiterated that was his opinion whether or not Dr. Pasarin had all of the information available from Dr. Dickens, including the hand numbness, because those same hand problems are consistent with issues having nothing to do with cervical compression and the lumbar compression, in comparison, was unquestionable (T317-20). He also explained that if cervical spine surgery had been done first in 2003 it would not have relieved Mr. Saunders' chief problem, which was the condition of his legs (T320-22).

Ms. Saunders also presented the testimony of two experts, an orthopedic surgeon and a neurologist. She did not present the testimony of a neurosurgeon. Dan Cohen, M.D., the orthopedic surgeon, did not see Mr. Saunders until March 2006, when he was wheelchair dependent with weakness and numbness in the hands (T30-31). Dr. Cohen said it was possible that the quadriplegia could be caused by a problem with the lumbar spine but, based on the July 2003 complaints and the September 2003 MRI, Mr. Saunders should have had cervical spine surgery in July 2003 (T34-36). He never testified, however, that the cervical spine surgery should

be done first, and he admitted that the decision to obtain further tests and whether or not to operate is for the surgeon, not the neurologist (T59-60).

Daniel Hanley, M.D., Ms. Saunders' neurologist, who had testified for Ms. Saunders' counsel in the past, said that Mr. Saunders' July 2003 symptoms dictated investigation of his cervical spine as a potential source of the problems (T110, 117, 123-24, 184). His differential diagnosis, however, was that there was lumbar stenosis and cervical stenosis and that there were "four distinct ways that the surgeries could have been done and the order in which they could be done" and, on those decisions, he would defer to a neurosurgeon (T91-92, 160).

Although Dr. Hanley testified that Dr. Dickens "could have considered other options," he also conceded: (a) Mr. Saunders made no complaint of upper extremity problems to treaters he saw several weeks, and then four days, before he saw Dr. Dickens; (b) hand numbness, which Mr. Saunders had complained of intermittently since 2002, could be a diabetic neuropathy; (c) Dr. Dickens included Mr. Saunders' complaints of hand numbness in his notes; (d) the reason for that inclusion was for a referral surgeon such as Dr. Pasarin; (e) after a complete examination and access to Dr. Dickens' notes, Dr. Pasarin diagnosed "no upper extremity dysfunction," and his notes did not mention any complaints of hand problems; (f) Dr. Hanley did not know that Dr. Pasarin did a complete examination; (g) the first sign of upper extremity

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problems was in Dr. Pasarin's October 3, 2003 notes; and (h) Dr. Hanley never read, and did not believe that he needed, the depositions of Dr. Pasarin and Dr. Stoll to form his opinions (T110, 185-204).

And, while Dr. Hanley testified that if a neurosurgeon decided not to operate he would obtain the opinion of a second neurosurgeon, he admitted that if the question was "as to where, and there were several areas," he would defer to the neurosurgeon as to "which surgery to do and in what order to do the surgery" (T214-15).

There was no testimony from any neurosurgeon that cervical spine surgery should have been done in July 2003. There was no testimony from any neurologist that a neurosurgeon's decision on how and when to operate should be second-guessed. There was no testimony that the cervical spine surgery should have been done first in July 2003. The testimony was only that if a cervical spine MRI had been done at that time and if Dr. Pasarin had seen it and decided to perform a cervical decompression first then Mr. Saunders may not have experienced increased symptoms (T46-47). And there was no objection to Dr. Pasarin's testimony regarding what he did or would have done if a cervical spine MRI had been done in July 2003.

3. The Jury Instructions on Negligence and Causation

The case was submitted to the jury on the evidence outlined above and on the issue whether Dr. Dickens was negligent in failing to order a cervical spine MRI in July 2003 and whether that negligence caused Mr. Saunders' injury (R5-834-41; T701-06). Among the jury's instructions were the following (T719-22):

> The issue for your determination on the negligence claim of Walter and Ruby Saunders against Willis Dickens, M.D. is whether Willis Dickens, M.D. was negligent in the care and treatment of Walter Saunders. And, if so, whether such negligence was a legal cause of loss, injury or damage sustained by plaintiffs.
>
> * * *
>
> If, however, the greater weight of the evidence does support the claim of Walter and Ruby Saunders, then you shall consider the defenses raised by Willis Dickens, M.D.
>
> On the first defense, the issue for your determination is whether Guillermo Pasarin, M.D. was also negligent in his care and treatment of Willis Saunders and, if so, whether such negligence was a contributing legal cause of the loss, injury or damage complained of.
>
> If the greater weight of the evidence shows that both Willis Dickens, M.D. and Guillermo Pasarin, M.D. were negligent and that the negligence of each contributed as a legal cause of loss, injury or damage sustained by Walter and Ruby Saunders, you should determine and write on the verdict form what percentage of the total negligence of all parties to this action is chargeable to each.

The verdict form also directed the jury to decide separately whether there was negligence on the part of Dr. Dickens and Dr. Pasarin that was a legal cause of loss, injury, or damage to Mr. Saunders (T850).

4. The Closing Arguments on Negligence and Causation

During closing, Ms. Saunders' counsel argued that Dr. Dickens was negligent in failing to order a cervical spine MRI given Mr. Saunders' symptoms, that Dr. Pasarin was also negligent in not performing the cervical spine surgery, and that a reasonably prudent neurosurgeon would have performed the surgery if a cervical spine MRI had been done in July 2003 (T733-55). He stated that "[a]ll the experts related Mr. Saunders' symptoms to "something above the lumbar level" and that diabetes was a "red herring" when it came to the complaints of hand numbness (T734-36). He admitted however, that Dr. Dickens correctly diagnosed the lumbar problem and that Mr. Saunders needed lumbar surgery as well as cervical spine surgery (T743-45). He also admitted that the order of the two surgeries was "not necessarily key" (T745).

On Dr. Pasarin, he admitted that Mr. Saunders did not report any problem with his hands but argued that Dr. Pasarin should have asked him specifically about them nevertheless (T728). He also admitted that Dr. Pasarin did not review Dr. Dickens' notes or confer with Dr. Dickens before performing the lumbar surgery (T746).

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Toward the conclusion of his argument, Ms. Saunders' counsel told the jury:

> Now, Mr. Woulfe is going to say that none of this matters because Pasarin testified that he wouldn't have done anything differently even if he had these films. Of course, he is going to say that.
>
> The same way that Dr. Dickens is going to say that he didn't need any other information and that none of these symptoms are attributable to cord compression or peripheral neuropathy or his mannerisms or insignificant findings. Because to do otherwise is to admit they made a mistake. Of course, they are not going to admit they made a mistake.
>
> Even in the face of clear evidence that Pasarin performed surgery at a wrong level and another surgeon had to do it again, he doesn't admit he made a mistake. He said, I meant to do that. That's what I was intending to do. He is on the verdict form. He is not going to admit his fault.
>
> * * *
>
> You need to assume that had [Dr. Dickens] ordered the right test and a cervical spine showed what everybody said it would have shown, that it would have been the same at that point.
>
> That the surgeon would have acted in a reasonable, prudent manner. Not in a negligent manner, like Dr. Pasarin did. Not like Dr. Pasarin said he would have done.
>
> Dr. Cohen testified to it. Dr. Danielson testified he needed both. That's what a reasonable prudent surgeon would have done.

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> Definitely needed cervical. Dr. Danielson said he needed both. Those are the opinions of what a reasonably, prudent neurosurgeon would have done.
>
> * * *
>
> We are not saying that Dr. Dickens is a hundred percent to blame here, because that's not what the facts are of this case. The facts are that both had an opportunity to get this diagnosis right. Both of them missed it.
>
> I will say that Dr. Dickens is the only doctor who documented that he had all the information necessary to make this diagnosis, all these upper extremity findings.
>
> Dr. Pasarin, either because the symptoms weren't there on July 10th or because he didn't do as thorough exam as Dr. Dickens, didn't have that information. He testified that without that information, he wasn't going to make that diagnosis (T749-57).

Dr. Dickens' counsel argued that the jury should not go beyond the first question on the verdict form, regarding his alleged negligence, because Ms. Saunders "failed to put on evidence to the degree that it's reached a preponderance in which Dr. Dickens is negligent and that his alleged negligence was the legal cause of injury to Mr. Saunders" because neither Dr. Pasarin nor a reasonable neurosurgeon would have performed the cervical spine surgery first even if given the cervical spine MRI (T775-97).

On the negligence prong of the question Dr. Dickens' counsel explained that the expert testimony confirmed that Dr. Dickens was correct in his approach to Mr.

Saunders' complaints of low back pain, leg pain, and difficulty walking, because the brain MRI was to rule out causes such as stroke and the lumbar MRI then explored compression as the cause of the complaints (T778-80). And he reminded the jury that the lumbar MRI confirmed exactly what Dr. Dickens diagnosed – nearly complete obliteration of the lumbar spinal canal (T782-83). That was the "main problem," and it is medically correct to address it first (T786).

Dr. Dickens' counsel then discussed each of the entries in the July 2003 record and the testimony that each was irrelevant to, not consistent with, or marginally related to cervical cord compression (T786-788).

> So what does this mean? "Does that necessarily mean that he doesn't have any problem going on in the cervical area"? No, but it's definitely not something of great significance at that point in time. Those findings that were made were very slight. So slight, in fact, that Dr. Pasarin when he examined him three days later he didn't have them. He tested them and he didn't have them (T789-90).

He summarized:

> Now, where has Dr. Dickens done something that is inappropriate and unreasonable? It hasn't happened. He has followed the major problems. He has ruled on the problem that could come from the brain. The major problem is now being assessed. The diagnostic study to try and figure out has been done and it shows a terrible problem easily explaining most of the problems that are going on with this man (T790-91).

And, finally, he told the jury:

> So in regards to the verdict form, "Was there negligence on the part of Willis Dickens, M.D., which was a legal cause of loss, injury or damage to Walter Saunders?" The answer is no. There is no negligence at all. The plaintiff has not proven their case of negligence against Dr. Dickens (T797).

On the causation prong of the first question, which is the focus of Ms. Saunders' burden-shifting argument, Dr. Dickens' counsel explained: "But for Dr. Dickens not doing the MRI, the neck MRI, Dr. Pasarin would have operated on Mr. Saunders' neck in July. That is what the plaintiffs claim must be and it hasn't remotely come close" (T798). Ms. Saunders' attorney objected that was "not a correct statement of the law," and the court instructed the jury to follow the law it had been given (T798).

Dr. Dickens' attorney continued:

> Actually, it's not that they have met their burden of proof with the preponderance of evidence. There is no evidence to support their claim. None.
>
> Now, remember what they put on? No neurosurgery evidence at all. They said in the opening statement though that we feel Dr. Pasarin and Dr. Dickens are equally responsible. But they put on no evidence of the neurosurgeons at all.
>
> Who put on all of the evidence of the neurosurgeons? We did. We brought to you all the evidence of Dr. Pasarin? We brought to you - -

At that point Ms. Saunders' attorney objected again, this time raising the argument that she makes here: "He is saying that we didn't put any evidence on. It is not our burden. This is an affirmative defense. It's their burden to prove the negligence of Dr. Pasarin. For him to suggest that we didn't put any evidence on is saying they didn't meet a burden we don't have" (T799-800).

Dr. Dickens' attorney responded that his argument was that Ms. Saunders put on no evidence of a "link between the alleged negligence and the damages," not Dr. Pasarin's negligence or standard of care (T800). "I said they didn't put [on] any evidence. I didn't say they needed to do a thing" (T800). The court ruled that Ms. Saunders' counsel could handle her objection in rebuttal (T800-01).

Dr. Dickens' counsel continued: "The plaintiffs avoided the neurosurgery testimony like the plague in this case. They didn't even given their experts the testimony of Dr. Pasarin or Dr. Stoll" (T801). Again Ms. Saunders' counsel objected that Dr. Dickens' counsel was "talking about a burden," and the court overruled the objection (T801). Dr. Dickens' attorney continued again:

> They didn't give [their experts] any testimony at all about the facts of the case. Dr. Pasarin, the man who is right in the middle of this entire case, the man who is the one who did the surgery, the man who testified under oath it made no difference whatsoever to him if Dr. Dickens had ordered the cervical [spine] MRI and it showed the same thing in July as it showed in September because he

wouldn't have operated on the neck anyway in July. That's what he testified to.

They gave none of that information to any of their experts, none of it. Didn't get him Dr. Stoll's deposition, which is very, very important . . . .

* * *

What did Dr. Danielson testify to in regards to Dr. Pasarin? He testified that it was appropriate and within the standard of care to operate just as Dr. Pasarin did. It was appropriate to operate on the low back.

* * *

. . . He testified more probably than not, had Mr. Saunders been operated on in early November that he would be the same or similar to if he had been operated on in July. So Dr. Pasarin had the opportunity then to be able to correct the problems and unfortunately Dr. Pasarin lost the patient.

* * *

Which then brings us again to this same question of but for Dr. Dickens ordering the cervical spine films there would have been surgery in July. Let's forget Dr. Pasarin for the moment, okay.

Let's forget that Dr. Pasarin has testified under oath that in his opinion there was a main problem that this man had in the low back that needed to be operated on in July . . . . Forget that.

Let's go take a look in January as to whether or not, whether or not the failure to order the MRI would have led to surgery on the neck. Dr. Amos Stoll (T801-07).

Finally, Dr. Dickens' attorney reminded the jury of Dr. Stoll's testimony that given the findings the lumbar surgery should have been done first (T810-11). He also told the jury that Dr. Hanley, Ms. Saunders' neurologist, deferred to the decision of the neurosurgeon on the order of the surgeries (T814-15). And he concluded: "So how is it that there is any evidence at all to link the alleged negligence of Dr. Dickens in failing to call for the cervical spine MRI and Dr. Pasarin's not doing the surgery There is no connection whatsoever. . . . And there exists no evidence to the contrary other than two doctors saying, had the film been done, the surgery would have gotten done. . . . There was no neurosurgeon testimony on the part of the plaintiffs to suggest what a reasonable neurosurgeon would have done under those circumstances" (T816-17). Ms. Saunders' attorney again asked the court to give a curative instruction that she did not have the burden of proving that Dr. Pasarin was negligent, and the court again declined (T825).

During his entire closing argument, Dr. Dickens' counsel never once suggested that Ms. Saunders had to prove Dr. Pasarin's negligence to satisfy her burden of proof. His position was that she had to put on evidence that a reasonably prudent neurosurgeon would have performed the cervical spine surgery first if given a cervical spine MRI – and she did not. The only mention of Dr. Pasarin's negligence was by Ms. Saunders' counsel.

In rebuttal, Ms. Saunders' attorney told the jury: "You are entirely misled when [Dr. Dickens' attorney] said that we had any responsibility whatsoever to prove anything with respect to Dr. Pasarin. We have no responsibility. . . . Our case is against Dr. Dickens. We said that we think the cervical cord surgery was the primary one. But we didn't quarrel in doing this in an order. Dr. Stoll said he can do them in either order, but you have got to do both" (T828-30). He told the jury that the issue was what a reasonable neurosurgeon, not Dr. Pasarin, would have done if given the cervical spine MRI (T831).

Then he said: "If Dr. Stoll had seen this individual in July of 2003, he would not be in a wheelchair today, because Dr. Stoll would have recommended both surgeries" (T835). Dr. Dickens' attorney objected that the comment was mere speculation, and the court reminded the jury that there can be no speculation on what might have been (T835). Ms. Saunders' attorney replied that it was "in the record" (T836). He also argued that <u>if</u> Dr. Dickens had given a cervical spine MRI to Dr. Pasarin and Dr. Pasarin had refused to perform a cervical decompression <u>then</u> it was Dr. Dickens' responsibility to "get somebody else in there" (T837).

During their deliberations the jury returned the following question: "Do we have Dr. Stoll's report or records or deposition? Can we get a copy?" (T859). The court advised: "The answer is the only thing that's in evidence is Dr. Stoll's report

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or medical records that are part of the Broward General records" (T861). The jury returned their verdict finding no "negligence on the part of Willis Dickens, M.D., which was a legal cause of loss, injury or damage to Walter Saunders" (R5-831-32; T863). On December 14, 2009 the court entered the Final Judgment (R5-908).

C. The Presuit Investigation Issue

The Saunders began these proceedings before Mr. Saunders' death. They initially sued a number of defendants, including Dr. Pasarin, alleging that their negligence combined to cause Mr. Saunders' injuries (R1-1-7). On February 15, 2005 they filed a petition for a 90-day extension of the 2-year statute of limitations pursuant to section 766.104(2), Florida Statutes, extending the statute of limitations to, at the earliest, April 10, 2006 (A1).

On September 30, 2005, before adding Dr. Dickens as a defendant, they sent him a presuit notice, tolling the statute of limitations for another 90 days, until July 9, 2006, pursuant to section 766.105(4), Florida Statutes (R1-155-58). Over the next three months the Saunders' attorney and an agent for Dr. Dickens' insurer repeatedly corresponded with respect to the agent's request for additional medical records and a 30-day extension of presuit to complete her review once the records were received (R1-144-160). That request extended the statute of limitations expiration date to August 8, 2006 if the x-ray films were received by that time.

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However, in January 2006, within the presuit period, the Saunders demanded presuit arbitration (R1-106). At that point, the agent retained an attorney to represent Dr. Dickens (R1-106). Under section 766.207, Florida Statutes, no response to a demand for arbitration is required. Such a demand does, however, indicate that the matter is proceeding through the statutory presuit process where, typically, attorneys are involved.

By March 2006, before the end of presuit,[2] Ms. Saunders had filed suit against Dr. Dickens and, in April 2006, a Second Amended Complaint (R1-35-43, 59-68). By May 24, 2006, still well within the extended presuit period, Dr. Dickens' attorney had completed the presuit review and investigation, provided Ms. Saunders' attorney with an affidavit establishing the lack of reasonable grounds to pursue Dr. Dickens, and advised Ms. Saunders' attorney that all of the requested medical records had still not been received (R1-132-65). Consistent with the letter, Dr. Dickens' Answer and Affirmative Defenses denied any liability and affirmatively alleged that any claimed injury was caused by others (R1-75-78).

Late in May 2006, based on her theory that the presuit period had expired before Dr. Dickens' compliance, Ms. Saunders moved to strike his Answer and

[2] The statutory 2 years, the 90 days requested by the Saunders, the 90-day presuit period, and the 30 days requested by the agent, was the minimum possible period given the Saunders' failure to produce all the requested medical records.

Affirmative Defenses (R1-93-97, 100-13). Dr. Dickens' Response explained the presuit chronology, the extensions, the parties' various communications during the presuit period, and the statutory compliance before expiration of the statute of limitations (R1-132-37). The Motion to Strike was denied by the trial court, now a judge on the Fourth District (R1-170).

D. The Appeal

Following return of the verdict and entry of Final Judgment, Ms. Saunders appealed to the Fourth District. On the presuit compliance issue, the court found no abuse of discretion.

On the closing argument issue, the court noted a trial court's broad discretion in ruling on motions for new trial and mistrial, cautioned that counsel are not permitted to mislead the jury on the burden of proof or misstate the law, and then stated:

> We disagree that Dr. Dickens made an impermissible burden-shifting argument on the issue of Dr. Pasarin's negligence when Dr. Dickens argued that the plaintiffs failed to present testimony from any neurosurgeon that he would have done anything different than Dr. Pasarin. Rather, Dr. Dickens appears to be arguing that the plaintiffs failed to present evidence of causation, in light of Dr. Pasarin's testimony that if Dr. Dickens had ordered a cervical spine 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.

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> Pasarin's exam did not find any upper extremity dysfunction.
>
> The cases that plaintiffs rely upon are easily distinguishable, as those cases involved situations where either (1) counsel made comments attacking opposing counsel or accused opposing counsel of "hiding something," or (2) counsel had commented in closing argument on the failure of the other side to offer evidence that counsel had successfully excluded at trial.

While the court cited *Ewing v. Sellinger*, 758 So. 2d 1196, 1198 (Fla. 4th DCA 2000), in concluding that Dr. Dickens' closing argument was permissible, it also distinguished the case on the basis that here the case was submitted to the jury, "thus allowing plaintiffs to argue to the jury in closing why they should reject Dr. Dickens' causation argument." *Id.*

SUMMARY OF ARGUMENT

Neither the trial court nor the Fourth District erred in holding that Dr. Dickens' closing argument was permissible, and the admissibility of Dr. Pasarin's testimony was never an issue in either court. Dr. Dickens never argued that Ms. Saunders had to prove that Dr. Pasarin was negligent. Rather, he argued, alternatively: (a) Ms. Saunders failed to prove either negligence or causation because she presented no evidence that a neurosurgeon would have performed cervical spine surgery first even if a cervical spine MRI had been done in July 2003; and (b) he proved lack of causation because his expert neurosurgeon and Dr. Stoll testified that they would have proceeded with surgery just as Dr. Pasarin did even if given a cervical spine MRI. The jury was free to accept either argument without any reference whatsoever to Dr. Pasarin's alleged negligence. Ms. Saunders' inaccurate revision of the evidence and argument did not create a basis for reversal at the Fourth District and does not give this Court conflict jurisdiction.

Similarly, neither the trial court nor the Fourth District departed from Florida law in declining to strike Dr. Dickens' pleadings for failure to comply with section 766.203, Florida Statutes. The Saunders' premature filing forced Dr. Dickens to file his Answer and Affirmative Defenses or suffer default, he completed his compliance before expiration of the extended presuit period, and he had no obligation to even do

so because he had not received all of Mr. Saunders' requested medical records by that time. The Saunders' decision to file suit before expiration of the extended presuit period and statute of limitations did not eliminate Dr. Dickens' right to complete his presuit after suit was filed.

ARGUMENT

I. THE FOURTH DISTRICT DID NOT ERR IN HOLDING THAT DR. DICKENS' CLOSING ARGUMENT WAS A PERMISSIBLE COMMENT ON MS. SAUNDERS' FAILURE TO PROVE CAUSATION AND NOT AN IMPERMISSIBLE BURDEN-SHIFTING ARGUMENT.

A. The standard of review is whether the Court has conflict jurisdiction based on the Opinion's alleged misinterpretation of Florida law.

Dr. Dickens agrees that the Court's review of the Opinion's interpretation of Florida law is de novo (IB18). However, while he understands that the Court has preliminarily accepted conflict jurisdiction, he believes that the jurisdictional issue should be readdressed, because the Opinion neither misinterprets Florida law nor expressly and directly conflicts with any of the cases on which Ms. Saunders relies. *See, e.g., Patrick v. Gatien*, 103 So. 3d 132, 132 (Fla. 2012).[3]

Furthermore, the standard of review before the Fourth District was abuse of discretion, because the issue framed there by Ms. Saunders was whether she was entitled to new trial based on the allegedly improper closing argument. *See Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010, 1030 (Fla. 2000).

[3] The arguments that Dr. Dickens makes here were not available to him during the jurisdictional briefing, because he was limited to the face of the Opinion and the cases on which Ms. Saunders relied.

Last, while much of Ms. Saunders' Initial Brief is devoted to suggesting solutions to the alleged error in this case, Dr. Dickens believes that the suggestions should be rejected because at no point in this litigation did Ms. Saunders ever argue that Dr. Pasarin's testimony was inadmissible, speculative, or should be accompanied by a jury instruction. Dr. Dickens believes that there was no error in this case and that the Court should find that it is without jurisdiction.

B. The Fourth District correctly held that Dr. Dickens' closing argument was permissible because it was based on Ms. Saunders' failure to present evidence that any neurosurgeon would have performed cervical spine surgery before lumbar spine surgery and on Dr. Dickens' evidence that a reasonable neurosurgeon would not have done so, not on whether Ms. Saunders failed to prove that Dr. Pasarin was negligent.

Dr. Dickens disagrees that he spent the "vast majority" of his closing argument on causation, or argued that Ms. Saunders was required to prove that Dr. Pasarin would have done "something differently than he testified to," or told the jury that she was required to prove that Dr. Pasarin was negligent (IB18-20). Those contentions are based on Ms. Saunders' misinterpretation of the closing, and they were rejected by both the trial court and the Fourth District. Dr. Dickens also disagrees that Ms. Saunders presented any evidence of what a "reasonable neurosurgeon" would have done, and Dr. Danielson never testified that the cervical spine surgery should have

been done before the lumbar surgery (IB19). Those statements are all based on Ms. Saunders' misunderstanding of the record.

In closing, Dr. Dickens reviewed the evidence, then addressed his own alleged negligence, and then, on causation, first argued that Ms. Saunders presented "[n]o neurosurgery evidence" to link any conduct on his part to Mr. Saunders' injury and then argued that he had presented evidence that a reasonable neurosurgeon would have done just as Dr. Pasarin did even if a cervical spine MRI had been available (T770-825). He never suggested that the issue was Dr. Pasarin's negligence, or that Ms. Saunders was required to prove Dr. Pasarin's negligence, or that the standard of care with respect to Dr. Pasarin was even at issue. His position was that there was no evidence that a reasonably prudent neurosurgeon would have acted any differently than Dr. Pasarin if given a cervical spine MRI (T800). Alternatively, he argued that he presented evidence through his expert neurosurgeon and Dr. Stoll on which the jury could find that a reasonably prudent neurosurgeon would have acted just as Dr. Pasarin did if given a cervical spine MRI (T800-16). Ms. Saunders admits that this is exactly the testimony that Dr. Dickens was required to present (IB32-33).

Only by ignoring all of that evidence and misinterpreting Dr. Dickens' position is Ms. Saunders able to argue that he impermissibly shifted any evidentiary burden to her and that his closing is permissible only in the Fourth District under *Ewing*, 758

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So. 2d at 1197-98, but not in the Third or Fifth Districts under *Goolsby v. Qazi*, 847 So. 2d 1001, 1002 (Fla. 5th DCA 2003), and *Munoz ex rel. Munoz v. South Miami Hospital, Inc.*, 764 So. 2d 854, 855-56 (Fla. 3d DCA 2000) (IB19-21). That purported conflict is the basis on which the Court accepted jurisdiction, and Dr. Dickens disagrees both that there is any conflict between the Opinion and *Goolsby* or *Munoz* and that there was any improper argument.

First, even assuming that Dr. Dickens' argument was improper, an assumption with which he disagrees, that does not automatically give the Court conflict jurisdiction. Article V, section 3(b)(3) of the Florida Constitution gives the Court review jurisdiction only of a decision of a district court that "expressly and directly conflicts with a decision" of this Court or another district court "on the same question of law." As the Court said in *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960), conflict jurisdiction is based on the "announcement of a rule of law which conflicts with a rule previously announced" or the "application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case." Here, neither exists, because the Opinion does not expressly and directly conflict with *Goolsby* or *Munoz* or state a rule of law contrary to the rule stated in either case.

Unlike this case, *Ewing*, *Goolsby*, and *Munoz* were decided at the trial level as a matter of law on similar facts. In *Ewing*, 758 So. 2d at 1196, the trial court entered directed verdict in favor of a treater based on a subsequent treater's testimony that he would have done nothing differently if given certain missing information. In *Goolsby*, 847 So. 2d at 1003, the trial court entered directed verdict in favor of a treater based on a plaintiff's failure to present evidence that a subsequent treater would have acted differently if given certain missing information. In *Munoz*, 764 So. 2d at 855, the trial court entered summary judgment in favor of a treater based on a subsequent treater's testimony that the missing information would have made no difference.

The common theme of the three cases is that the issue of causation was taken from the jury and decided as a matter of law. Where the Third and Fifth Districts disagreed with the Fourth District is the correctness of that outcome. While *Ewing* affirmed the directed verdict in favor of the treater, *Goolsby* and *Munoz* reversed, holding that the testimony of a subsequent treating physician cannot be dispositive on the issue of causation. *See Goolsby*, 847 So. 2d at 1003; *Munoz*, 764 So. 2d at 857.

In *Goolsby*, 847 So. 2d at 1003, the court said: "We disagree 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

diagnoses." In *Munoz*, 764 So. 2d at 855-56, the court explained that the initial treater's liability "should not have been taken from the jury" based on the speculation of a subsequent treater that the missing information would not have made a difference. And as Judge Klein later noted in *McKeithan ex rel. McKeithan v. HCA Health Services of Florida, Inc.*, 879 So. 2d 47, 49 (Fla. 4th DCA 2004) (Klein, J., concurring specially), *Ewing* is questionable in allowing causation to be taken from the jury. That is the difference between *Ewing* on one hand and *Goolsby* and *Munoz* on the other. But that difference is irrelevant here.

Here, in contrast to *Ewing*, but consistent with *Goolsby* and *Munoz*, the question of causation was presented to the jury, as was the question of negligence. The jury, not the court as a matter of law, found either that Dr. Dickens was not negligent or that his negligence was not the cause of Mr. Saunders' injury – because it was given only a general verdict form. Ms. Saunders has not argued any error with respect to the jury's possible finding regarding negligence. While the two-issue rule may not apply, as the Fourth District held, citing *Grenitz v. Tomlian*, 858 So. 2d 999, 1001 (Fla. 2003), that is nevertheless a fundamental difference between this case and *Ewing*, *Goolsby*, and *Munoz*. The Opinion therefore announces no rule of law in conflict with those cases nor allows a different result on the same controlling facts. Because neither of those tests is met, the Court is without conflict jurisdiction.

Furthermore, while it is a federal case and thus cannot give the Court jurisdiction, like the other cases on which Ms. Saunders relies, *Del Valle v. Sanchez*, 170 F. Supp. 2d 1254, 1275 (S.D. Fla. 2001) (IB21), was not a jury verdict. It was

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a summary judgment based on a defense argument that a subsequent treater would not have changed his treatment if the missing information had been communicated. *See Id.* Rejecting the argument as a matter of law, the court explained that there was evidence in the record from which a "fact finder can conclude" that the initial physician was negligent. *Id.* at 1276. Here, consistent with *Del Valle*, the fact finder – the jury – found either that Dr. Dickens was not negligent or that his alleged negligence did not cause Mr. Saunders' injuries.

Second, as Dr. Dickens explained above, his argument was not impermissible. Contrary to Ms. Saunders' position, Dr. Dickens never argued that she had to prove Dr. Pasarin's negligence or that of a "*specific subsequent treating physician*" (IB29). He argued that she had to prove that any alleged negligence on Dr. Dickens' part caused Mr. Saunders' injury, and she did not do so because she presented no evidence that any reasonably prudent neurosurgeon would have performed the cervical spine surgery before the lumbar surgery if a cervical spine MRI had been done in July 2003.

As Ms. Saunders admits (IB28-29), proof that Dr. Dickens' alleged negligence more likely than not caused Mr. Saunders' injury is an element of her case, and that is all that Dr. Dickens ever argued. *See Cox v. St. Josephs Hosp.*, 71 So. 3d 795, 799 (Fla. 2011); *Gooding v. University Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984). He did not argue that Ms. Saunders was required to prove what Dr. Pasarin would have done – and that is the fundamental difference between Ms. Saunders' position and the Fourth District's Opinion. Whether the jury accepted that Ms. Saunders presented no proof of causation or whether it accepted Dr. Dickens' experts'

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testimony is immaterial, because in either event Dr. Dickens' argument was not improper. In the absence of any conflict with *Goolsby* or *Munoz*, and in the absence of any improper closing argument, the Court should decline jurisdiction.

C. Whether Dr. Pasarin's testimony should have been admitted was not before the trial court, was not before the Fourth District, and should not be considered here.

As Ms. Saunders' Initial Brief makes clear (IB22-39), her real focus is not on any conflict with *Goosby* or *Munoz* or whether Dr. Dickens' argument is impermissible. It is on whether Dr. Pasarin's testimony is admissible. The Court should not entertain that issue, Ms. Saunders' suggestions regarding handling that issue in the future, or the Florida Justice Association's similar amicus suggestions, for a number of reasons.

First, Ms. Saunders never raised any challenge to the admissibility of Dr. Pasarin's testimony, or called it speculative, or demanded that it be accompanied by a jury instruction, either before the trial court or before the Fourth District, and it is not the issue on which she sought conflict jurisdiction. While the Court may address any issue properly raised before it once its jurisdiction is secured, as a rule it declines to do so unless the issue has first been presented to the lower courts, as it was in the cases on which Ms. Saunders relies but which it was not in this case. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1080 n26 (Fla. 2001); *Jones v. State*, 908 So. 2d 615, 621 (Fla. 4th DCA 2005); *All American Pool Surface, Inc. v. Jordan*, 870 So. 2d 885, 886 (Fla. 3d DCA 2004). That should be the response here.

Second, even if the admissibility of Dr. Pasarin's testimony were preserved below, argued before the Fourth District, or the basis of Ms. Saunders' argument for conflict jurisdiction, the Court should decline to review it in this case because the Court cannot confirm that it was the basis for the jury's verdict given the testimony of Dr. Dickens' neurosurgical expert and Dr. Stoll, Mr. Saunders' treating neurosurgeon, that they also would not have performed the cervical spine surgery first. Whether or not Dr. Pasarin's testimony had any effect on the verdict is, therefore, irrelevant because the verdict was otherwise supported by substantial competent evidence. Because the admissibility of Dr. Pasarin's testimony is beyond the scope of the alleged conflict, the Court should decline to address it. *See Bifulco v. Patient Business & Financial Services, Inc.*, 39 So. 3d 1255, 1256 (Fla. 2010) (declining review of a claim beyond the scope of the conflict).

Third, whether *Ewing* was correctly decided or conflicts with any other Florida case is not before the Court (IB22, 26).[4] Nor is whether *Munoz* incorrectly uses the label "speculative" in referring to the subsequent treater's testimony or in allowing its admission for the jury's consideration (IB22-24, 27 n8). On the effect of the testimony, Ms. Saunders argues that both *Munoz* and *Sta-Rite Industries, Inc. v. Levey*, 909 So. 2d 901, 905-06 (Fla. 3d DCA 2004), hold that it "cannot be used to break the causal chain *as a matter of law*" (IB23). Dr. Dickens agrees, which may be the fundamental problem with *Ewing* and is the difference between it and *Goolsby*

[4] The Court denied review. *See Ewing v. Sellinger*, 789 So. 2d 345 (Fla. 2001).

and *Munoz*.[5] But that error did not occur here, because there was no decision by the trial court as a matter of law. Ms. Saunders' argument to the contrary confuses the concept of legal rulings with a jury's finding based on the same evidence (IB23-24).

Fourth, Dr. Dickens disagrees with Ms. Saunders' analysis of Dr. Pasarin's testimony here and the impact of cases such as *Drackett Products Co. v. Blue*, 152 So. 2d 463, 465 (Fla. 1963), and *LeMaster v. Glock, Inc.*, 610 So. 2d 1336, 1338-39 (Fla. 1st DCA 1992) (IB24-28). While *LeMaster*, 610 So. 2d at 1338-39, rejected an officer's speculative testimony regarding what he would have done during an arrest, it did so in the context of summary judgment proceedings but noted that the evidence "may be circumstantial evidence that the jury could consider. . . ." In *Drackett*, 152 So. 2d at 465, the Court disallowed lay testimony related only to state of mind based on nothing more than speculation and conjecture. The court also recognized, however, instances in which testimony regarding what a witness would have done under different circumstances was admissible. *See, e.g., U.S. v. Aleli*, 170 F.2d 18, 20 (3d Cir. 1948); *Searfoss v. Lehigh Valley R. Co.*, 76 F.2d 762, 763 (2d Cir. 1935) (holding that a witness's testimony of what he would have done under certain circumstances presented a jury question).

In contrast to the types of cases on which Ms. Saunders relies, in medical malpractice cases such as this, and in other contexts involving opinions based on professional expertise and experience, experts uniformly testify to their opinions of

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[5] *Sta-Rite* was also a jury verdict, not a decision by a trial court as a matter of law.

what might or might not have occurred, or what they would or would not have done, under different circumstances, because those projections are inherent in the concept of expert testimony on causation. *See, e.g., Cox*, 71 So. 3d at 800-01; *Hancock v. Schorr*, 941 So. 2d 409, 411, 413 (Fla. 4th DCA 2006); *Hadley v. Terwilleger*, 873 So. 2d 378, 383 (Fla. 5th DCA 2004); *Orlando Executive Park, Inc. v. P.D.R.*, 402 So. 2d 442, 448 (Fla. 5th DCA 1981).

Testimony such as the physicians' here is permissible so long as it is based on their experience, observation, research, and substantial competent evidence, and not mere speculation or state of mind. *See, e.g., Haliburton v. Singletary*, 691 So. 2d 466, 471 (Fla. 1997) (noting that there was no reasonable probability that had an expert testified the outcome would have been different). In fact, the entire tenor of the case was what various professionals would have done if a cervical spine MRI had been done in July 2003 in advance of any surgery. Even if the argument had been preserved, which it has not, to suggest that Dr. Pasarin's testimony was inadmissible because it was speculative makes all the other experts' testimony inadmissible also, because each testified what they would have done under different circumstances. No case from this Court supports that outcome.[6]

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[6] Ms. Saunders' next argument impermissibly presumes that Dr. Dickens' conduct was negligent (IB25-28). Dr. Dickens, however, presented evidence that his conduct was consistent with the standard of care, and there is no basis on which to conclude that the jury disagreed. Therefore, whether her two policy arguments should be considered in different circumstances is irrelevant here, and Dr. Dickens does not believe it necessary to address them.

Also contrary to Ms. Saunders' position (IB24), there is a fundamental difference between the statement "as a matter of law, the defendant cannot argue" and the statement "the defendant cannot argue as a matter of law" (IB23-24). The distinction has been explained in cases such as *Reeves v. Fleetwood Homes of Florida, Inc.*, 88 So. 2d 812, 819 (Fla. 2004). Although it may be true that Dr. Pasarin's testimony cannot be used to support a judgment in favor of Dr. Dickens as a matter of law, no Florida case holds that the testimony cannot be used to support a judgment in favor of Dr. Dickens as a matter of fact, particularly when there was no objection to its admission and it is unquestionably probative on the issue of causation. That is all that occurred in this case.

D. Whether or not Ms. Saunders' suggestions should be considered in an appropriate case, they should not be considered here.

Dr. Dickens disagrees that Ms. Saunders' suggestions apply here, because the admissibility of Dr. Pasarin's testimony was never raised below, Ms. Saunders presented no competent evidence of causation, and Dr. Dickens presented substantial competent evidence of lack of causation beyond the testimony of Dr. Pasarin. Furthermore, contrary to Ms. Saunders' repeated contention, Dr. Dickens never argued that she had any burden to prove that Dr. Pasarin was negligent (IB33-36). Therefore, the suggested guidelines cannot be applied to support reversal of the Fourth District's Opinion.

Beyond that, Dr. Dickens has the following comments on Ms. Saunders' suggestions (IB28-39). There are only three possibilities: (1) a subsequent treating

physician was not sued; (2) a subsequent treating physician was sued but was dismissed for some reason, including settlement; and (3) a subsequent treating physician was sued and did not settle. In the first and third instances, Ms. Saunders suggests that the defendant physician may not rely on the subsequent treating physician's testimony alone to relieve him or herself of liability but must present substantial competent testimony from a health care provider "of the same speciality that the subsequent treater's testimony would meet the standard of care" (IB28-34). Dr. Dickens does not disagree, but believes that no jury instruction is necessary.

In the second instance, which is this case, Ms. Saunders suggests that the deposition testimony that Dr. Pasarin gave before settling was necessarily self-serving and protective, because at the time he was subject to liability if he had admitted a departure from the standard of care (IB35-36). She contends that by trial the testimony was infected with the same bias but that she was not permitted to advise the jury that Dr. Pasarin had settled with her (IB36-37). Dr. Dickens disagrees with Ms. Saunders' accusation that this was "fraud on the jury," that this was ever an issue below, and that his comment regarding Dr. Pasarin shifted any burden to her (IB37-39). Furthermore, his counsel's "liar" comment made no reference to Ms. Saunders or any burden on her part. He merely told the jury that whether or not Dr. Pasarin was telling the truth was for its consideration (T822).

As the Third District said in *Harris v. Grunow*, 71 So. 3d 186, 189 (Fla. 3d DCA 2011), section 768.041(3), Florida Statutes, "ordinarily prohibits the disclosure to the jury of a 'release or covenant not to sue, or that any defendant has been

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dismissed by order of the court.'" Here, however, no effort was made below to explore the parameters of "ordinarily," or cure any alleged prejudice from Dr. Pasarin's testimony, because until the case reached this Court the issue was Dr. Dickens' allegedly burden-shifting closing argument, not the admissibility of Dr. Pasarin's testimony. Ms. Saunders never subpoenaed Dr. Pasarin for trial, or took an updated deposition after his settlement, or explored any other way to level the playing field with respect to his deposition testimony. As she acknowledges, she did not do so because whether or not Dr. Pasarin was correct or negligent in his decision was not her burden of proof and was irrelevant on Dr. Dickens' potential liability (IB35).

As to Ms. Saunders' suggestion regarding an evidentiary presumption (IB37-39), Dr. Dickens believes that any such instruction should be given to the jury only if there is a timely objection at trial to the testimony of a subsequent treating physician who settled before trial and the testimony at issue was given while the physician was a defendant in the case. Any such instruction should, however, also explain to the jury that the presumption applies only to the testimony of the subsequent treating physician and not to any other substantial competent evidence that the defendant physician presents on the standard of care.

E. Dr. Dickens made no other "misstatement" of Ms. Saunders' burden of proof in closing argument.

Saunders' second argument, that Dr. Dickens "misstated" or "shifted" the burden of proof, is also incorrect and the portion of the closing argument that she relates is taken out of context (IB39-41). Placed back into context, as the trial court

and the Fourth District concluded, the argument was specifically and permissibly directed at legal causation:

> They gave none of that information [regarding Dr. Pasarin] to any of their experts, none of it. Didn't give him Dr. Stoll's deposition. . . . None of that was given to them.
>
> * * *
>
> . . . You heard Dr. Hanley. He was looking at Dr. Pasarin's notes. He concluded things from Dr. Pasarin's notes. He never had the testimony of Dr. Pasarin all about what Dr. Pasarin was thinking or anything like that. They didn't have it.
>
> And it is necessary. And I think you all would agree it's necessary in order to be able to determine the issues in this case. Without it, there is no way it could be done, because of the fact that <u>there has to be a determination made but for the negligence, the surgery would have been done</u> (T802) (emphasis supplied).

Not only does the argument not suggest that "Plaintiffs had done something wrong" (IB40), it does not suggest that Ms. Saunders had the burden of proof on Dr. Pasarin's negligence. It suggests only that Ms. Saunders failed to carry her burden of proving that anything Dr. Dickens did or did not do would have resulted in a different outcome given the testimony not only of Dr. Pasarin but also of Dr. Stoll and Dr. Dickens' other experts. Ms. Saunders' contention that the argument had anything to do with Dr. Pasarin's negligence is based only on her own confusion.

For the same reasons, Dr. Dickens also disagrees with Ms. Saunders that the criminal cases she cites undermine the Final Judgment here (IB40-41). *See Gore v. State*, 719 So. 2d 1197, 1199 (Fla. 1998) ("The standard for a criminal conviction is

not which side is more believable, but whether, taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt."); *Paul v. State*, 980 So. 2d 1282, 1283 (Fla. 4th DCA 2008) (holding that the state's comment improperly shifted to the criminal defendant the burden of proving that a state witness was lying); *Covington v. State*, 842 So. 2d 170, 173 (Fla. 3d DCA 2003) (holding that the State could not suggest a "weighing" standard when it had the burden to prove guilt beyond a reasonable doubt). There was no second impermissible closing argument.

II. THE FOURTH DISTRICT CORRECTLY REJECTED MS. SAUNDERS' ARGUMENT REGARDING DR. DICKENS' PRESUIT COMPLIANCE.

A. The Fourth District correctly applied an abuse of discretion standard.

Dr. Saunders disagrees that the Fourth District applied an incorrect standard of review (IB41-42). While interpretation of a statute is subject to de novo review, in this case the issue was whether the trial court was within its discretion in finding that Dr. Dickens complied with presuit based on the disputed facts before it. The factual disputes are clear from a comparison of Dr. Dickens' statement of the relevant facts and that of Ms. Saunders (IB42-43). That issue is subject to review for abuse of discretion. *See DeCristo v. Columbia Hosp. Palm Beaches, Ltd.*, 896 So. 2d 909, 911 (Fla. 4th DCA 2005); *Vincent v. Kaufman*, 855 So. 2d 1153, 1155 (Fla. 4th DCA 2003).

B. The Fourth District correctly affirmed the trial court's ruling on the presuit compliance issue.

The issue before the Fourth District was whether the trial court correctly concluded that nothing in the present version of Chapter 766 required it to strike Dr. Dickens' pleadings. As Ms. Saunders admits (IB44-46), section 766.206, Florida Statutes, states that if the court finds a defendant's statutory response is not in compliance with the reasonable investigation required by Chapter 766, it shall strike the defendant's pleading. She fails to recognize, however, that the conclusion "shall" follows only if the condition "if" is met, and the condition "if the court finds" implies a factual finding by the trial court. Here the court did not find that any noncompliance on Dr. Dickens' part warranted striking his pleadings, and the Fourth District found no abuse of that discretion.

As Ms. Saunders argues (IB44), section 766.106(3), Florida Statutes, provides that a prospective defendant has 90 days after the notice of intent is filed to complete the presuit investigation and provide a response. Section 766.203 requires the defendant to conduct the investigation dictated by section 766.106 and provide a corroborating expert opinion in its response. Ms. Saunders has not suggested that Dr. Dickens' response was substantively insufficient in any way under section 766.106, so the only question was the timeliness of his response.

On that issue, the Saunders extended the statute of limitations, and thus the presuit compliance period, to July 9, 2006 under section 766.104(2), and it was extended a further 90 days under section 766.106(4), which gives a prospective

defendant 90 days for compliance after receipt of the notice of intent and tolls the presuit period and statute of limitations during that time. *See Jaszay v. H.B. Corp.*, 598 So. 2d. 112, 113 (Fla. 4th DCA 1992); *De Young v. Bierfeld*, 581 So. 2d 629, 629 (Fla. 3d DCA 1991).

The presuit statutory time frame is also subject to further agreed continuances. *See* § 766.106(4), Fla. Stat.; *Kukral v. Mekras*, 678 So. 2d 278, 281 n2 (Fla. 1978). In this case, as Florida law permits, Ms. Robinson requested, and received, a further extension until 30 days after she received all of the requested x-rays. Because the Saunders never provided her with all of the requested x-rays, the presuit period remained open. *See* § 766.204(2), Fla. Stat.; *Martin Memorial Medical Center, Inc. v. Herber*, 984 So. 2d 661, 664 (Fla. 4th DCA 2008) (citing *Escobar v. Olortegui*, 662 So. 2d 1361, 1364 (Fla. 4th DCA 1995)) (holding that a trial court may find that a party's failure to provide medical records relieves the adverse party of the obligation to provide a corroborating expert affidavit). Dr. Dickens thus completed his statutory presuit requirements by May 24, 2006, within the still-open statutory presuit period.

Nor does the Saunders' premature suit against Dr. Dickens deprive him of his statutory rights. To the contrary, section 766.106(3)(a) dictates that no suit may be filed against a defendant during the 90-day period given the defendant to complete his own investigation. In this case, because that 90-day period was extended, the Saunders' premature suit against Dr. Dickens not only violated the statute, it also forced Dr. Dickens to respond to the lawsuit and raise as an affirmative defense the Saunders' failure to comply with the presuit requirements (R1-75-78). *See Hospital*

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Corp. of America v. Lindberg, 571 So. 2d 446, 448 (Fla. 1990) (holding that premature filing subjects a complaint to dismissal).

Furthermore, section 766.206, Florida Statutes, under which a trial court may dismiss or strike, applies only "[a]fter the completion of presuit investigation." Since the Saunders never gave Dr. Dickens the opportunity to complete his investigation because of their failure to produce the requested medical records, section 766.206 did not apply. On Ms. Saunders' first argument, therefore, the Fourth District was within its discretion in concluding that the trial court did not abuse its discretion in declining to strike Dr. Dickens' pleadings.

In addition, Dr. Dickens complied with Chapter 766's presuit requirements before the statute of limitations expired. As Chapter 766 allows, the statute, and thus the time to comply with the presuit requirements, was extended 120 days to September 8, 2006. *See, e.g., Rothschild v. NME Hospital, Inc.*, 707 So. 2d 952, 952 (Fla. 4th DCA 1998); *Porumbescu v. Thompson*, 987 So. 2d 1275, 1276-66 (Fla. 1st DCA 2008). Dr. Dickens completed the presuit requirements by May 24, 2006, well within the extended statute of limitations. A number of Florida cases establish his right to do so. *See Kukral*, 678 So. 2d at 282; *Lindberg*, 571 So. 2d at 448; *Vincent*, 855 So. 2d at 1156; *Maguire v. Nichols*, 712 So. 2d 784, 785 (Fla. 2d DCA 1998). That the rule applies equally to a defendant's compliance is beyond question. *See Kukral*, 678 So. 2d at 284 (citing *George A. Morris, III, M.D., P.A. v. Ergos*, 532 So. 2d 1360 (Fla. 2d DCA 1988)).

The Fourth District's Opinion comports with the numerous Florida cases holding that the harshest sanctions – dismissal and the striking of pleadings – are not appropriate in circumstances such as these. *See DeCristo*, 896 So. 2d at 911; *McPherson v. Phillips,* 877 So. 2d 755, n3 (Fla. 4th DCA 2004); *Popps v. Folz*, 806 So. 2d 583, 585 (Fla. 4th DCA 2002); *Pagan v. Smith*, 705 So. 2d 1034, 1036 (Fla. 3d DCA 1998); *Morris*, 532 So. 2d at 1361. Under all but the most egregious circumstances significantly prejudicial to the opposing party or when the statute of limitations has run – neither of which applies here – Chapter 766 is to be construed as allowing access to the courts. *See Patry v. Capps,* 633 So. 2d 9, 13 (Fla. 1994); *Williams v. Campagnulo,* 588 So. 2d 982, 983 (Fla. 1991); *Vincent*, 855 So. 2d at 1156.

As the court said in *Ragoonanan by Ragoonanan v. Associates in Obstetrics & Gynecology*, 619 So. 2d 482, 483 (Fla. 2d DCA 1993), the statutory provisions "were not intended to require presuit litigation of all the issues in medical negligence claims nor to deny parties access to the court on the basis of technicalities." That constitutional imperative applies equally to plaintiffs and defendants. *See Popps*, 806 So. 2d at 585 (citing *De La Torre v. Orta ex rel. Orta*, 785 So. 2d 553, 555 (Fla. 3d DCA 2001)). Ms. Saunders' suggestion that defendants should "not be afforded the same protections that plaintiffs are" smacks of a violation of due process that has no legal support (IB47-50).

Finally, there is no question that the intent of the statutory scheme is to obtain an early determination of a claim's merits (IB50), but the statutes impose obligations

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on both parties to resolve a claim of medical malpractice short of litigation. In this case, the record shows that the Saunders delayed providing Dr. Dickens and his representatives with the necessary documentation to complete his statutory compliance. Under those circumstances, both the trial court and the Fourth District properly held that their own noncompliance could not be used to subject Dr. Dickens to the harshest of sanctions.

CONCLUSION

For the foregoing reasons, the Court should decline jurisdiction or affirm the Fourth District's Opinion.

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CERTIFICATE OF SERVICE

We certify that a correct copy of this document was furnished by e-mail to the persons on the attached Service List, this 10 day of September 2013.

CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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