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SUPREME COURT OF FLORIDA

CASE NO. SC12-2314

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

Petitioner,

v.

WILLIS DICKENS, M.D.,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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

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I. STATEMENT OF THE CASE AND FACTS

A. An overview

Ruby Saunders' husband, Walter Saunders, now deceased, presented to Dr. Willis Dickens, a neurologist, on July 7, 2003, complaining of difficulty walking.[1] According to Plaintiffs' experts, Walter Saunders was suffering from cervical cord compression that would eventually lead to quadriplegia. Dr. Dickens ordered MRIs of the brain and the lower back, but not the neck, and then referred him to a neurosurgeon, Dr. Guillermo Pasarin. Without ordering further studies, Dr. Pasarin elected to surgically treat the lumbar disc disease he saw on the lumber films.

Mr. Saunders failed to improve after the first surgery, so in late September 2003, Dr. Pasarin ordered further MRIs of Mr. Saunders' back and neck. The new MRIs revealed cervical cord compression. As a result, Dr. Pasarin recommended that Mr. Saunders have cervical decompression surgery. For various reasons, Mr. Saunders did not end up having the surgery, and he progressed to quadriplegia.

The Plaintiffs sued Dr. Pasarin, Dr. Dickens and others, alleging that their negligence in failing to properly diagnose and treat Mr. Saunders' cervical cord compression in July 2003 led to Mr. Saunders quadriplegia. Plaintiffs settled with all defendants except Dr. Dickens. The case proceeded to trial in late 2009.

At trial, Plaintiffs' experts testified that Dr. Dickens should have ordered an

[1] The statement of the case and facts is summarized from the face of the decision sought to be reviewed. (App 1-4)

MRI of the neck, which would have revealed the cervical cord compression and would have prompted a reasonable neurosurgeon to perform neck surgery as soon as possible, and that the surgery would have prevented Mr. Saunders' quadriplegia.

Dr. Dickens' 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. Dr. Pasarin testified that even if Dr. Dickens had provided him with an MRI of the neck showing cord compression and reported the upper extremity symptoms he found, Dr. Pasarin still would not have done anything differently with respect to his care and treatment.

At the close of the evidence, Dr. Dickens moved for a directed verdict, which was denied, arguing that under *Ewing v. Sellinger*, 758 So.2d 1196 (Fla. 4th DCA 2000), Dr. Pasarin's testimony made it impossible for the Plaintiffs to prove that Dr. Dickens' negligence was a cause of harm to Mr. Saunders because it broke the causal chain.

During closing argument, defense counsel's central argument was that the Plaintiffs did not meet their burden to prove causation, relying on Dr. Pasarin's testimony that he would not have acted differently even if had been made aware of upper body symptoms and had seen an MRI of Mr. Saunders' cervical spine showing cord compression in July 2003. Defense counsel argued, over Plaintiffs' objection, that it was Plaintiffs' burden to prove that "[b]ut 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." The jury returned a defense verdict.

Plaintiffs appealed the defense verdict and argued that while the closing argument may have been permissible in the Fourth District under *Ewing v. Sellinger*, 758 So. 2d 1196 (Fla. 4th DCA 2000), it would not have been permissible in the Third or Fifth Districts as a result of two cases decided subsequent to *Ewing* -- *Muñoz v. South Miami Hospital, Inc*., 764 So.2d 854 (Fla. 3d DCA 2000) and *Goolsby v. Qazi*, 847 So.2d 1001 (Fla. 5th DCA 2003). The district court acknowledged the existence of the conflict but declined to act upon it, and affirmed the judgment based on *Ewing*. The district court denied our subsequent motion to certify conflict. This Court granted our Petition for discretionary review.

B. Medical chronology.

While this case presents a pure question of law, it is nevertheless important for the Court to familiarize itself with the undisputed medical chronology and the respective theories of liability and causation set forth by both parties. First, we will provide a summary of the undisputed facts, which we have drawn from the medical records admitted into evidence at trial. (R.811-813) Walter Saunders presented to Willis Dickens on July 7, 2003, complaining of difficulty walking and

numbness in his hands and feet. Dr. Dickens performed a neurological exam and found symptoms in both Mr. Saunders' upper and lower extremities, bilaterally. Thinking Mr. Saunders may have had a stroke, Dr. Dickens first ordered an MRI of the brain which came back negative. A stroke could have explained the complaints in both the arms and the legs. (T.116) He next ordered an MRI of the low back, which revealed lumbar disc disease, but which would only explain Mr. Saunders' leg complaints. (T. 62-63) He did not order an MRI of the neck, which would have shown radiographic evidence of cervical cord compression, which the Plaintiffs alleged was the root of all Mr. Saunders' problems. (T. 35-36, 176-178)

Dr. Dickens ordered a neurosurgical consult from Dr. Guillermo Pasarin. Dr. Pasarin saw Mr. Saunders on July 10, 2003 and performed his own examination. He did not document any upper extremity findings. He reviewed the Lumbar MRI films. He failed to review Dr. Dickens' examination note or discuss the case with Dr. Dickens. (T. 678-679) On July 15, 2003, without considering any other potential cause for Mr. Saunders' gait disturbance, Dr. Pasarin opted to perform surgery -- an L3-S1 laminectomy. The surgery did not result in material improvement for Mr. Saunders. It was also done improperly. Unfortunately, Dr. Pasarin failed to remove the lamina at L5-S1, which was the area of greatest nerve root constriction.

Mr. Saunders remained in the hospital until the end of July, at which point

he was discharged to a rehabilitation facility. During a September 11, 2006 office visit, Dr. Pasarin ordered an MRI of his neck, mid-back and lower back, for the sake of "completeness." (T.683) He ordered these films even though Mr. Saunders had yet to exhibit upper body symptoms in Dr. Pasarin's presence. (T.683) The September 27, 2003 MRIs demonstrated that Mr. Saunders had severe cervical cord compression and also that the lumbar surgery had not been successful. At this point, Dr. Pasarin belatedly determined that Mr. Saunders needed cervical cord decompression surgery and sent Mr. Saunders for medical clearance. Mr. Saunders was medically cleared on October 28. Despite being cleared, Dr. Pasarin failed to schedule the surgery.

Having been in a wheelchair for several months as a result of his cervical cord compression, on December 11, Mr. Saunders developed a deep venous thrombosis in his leg and was readmitted into Broward General. Because of the DVT, he was no longer a surgical candidate. Because his cervical cord compression remained untreated, his condition progressed from paraplegia to partial quadriplegia. Mr. Saunders returned to Broward General in January 2007, where he came under the care of another neurosurgeon, Dr. Amos Stoll. Dr. Stoll ordered MRIs of the neck and low back, determined that the lumbar surgery was incomplete and needed revision, and determined that Mr. Saunders also needed cervical cord decompression surgery. He elected to perform the lumbar surgery

first. Mr. Saunders did not see any improvement from the surgery. Mr. Saunders was unable to undergo the cervical surgery, and he remained paralyzed up until the date of trial. He passed away on April 5, 2010.

Unsurprisingly, the Plaintiffs' experts and Defendant's experts presented two entirely different opinions on liability and causation. First, we will summarize the Plaintiffs' experts' opinions and then we will summarize the Defense experts' opinions.[2]

C. Plaintiffs' theory of liability and causation.

Plaintiffs first presented the testimony of Dr. Dan Cohen, a spinal surgeon who examined Mr. Saunders. Dr. Cohen testified that Mr. Saunders' was an "ASIA B" quadriplegic, which could not result from lumbar nerve injury. (T. 32) Instead, Mr. Saunders' quadriplegia was caused by cord compression at the C4-5 level of his neck. (T. 33) Cord compression is caused by damaged discs pressing on the spinal cord. If not relieved, the pressure can lead to paralysis. Dr. Cohen

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[2] In the Fourth District, Dr. Dickens incorrectly argued that the facts must be stated in the light most favorable to Dr. Dickens as the prevailing party, citing to *Smith-Barney, Inc. v. Potter,* 725 So.2d 1223, 1224 (Fla. 4th DCA 1999). This standard is only applicable when the basis for a challenged holding is a disputed fact. *See Burmeister v. American Motorists Insurance Co.,* 403 So.2d 541, 542 (Fla. 4th DCA 1981); *Atlas Properties v. Didich*, 213 So.2d 278 (Fla. 3rd DCA 1978); and *Sasser v. Humana of Florida, Inc.,* 404 So.2d 856 (1st DCA 1981). The primary issue on appeal is a pure question of law. Thus, this standard has no applicability in this appeal. In any event, the underlying facts in this case were essentially undisputed. The dispute arose in determining the meaning of those facts.

testified that had Mr. Saunders' neck been operated on to remove the compression in July 2003, when Mr. Saunders first presented to Dr. Dickens, Mr. Saunders would not have progressed to quadriplegia. (T. 46-47) Dr. Cohen testified that the reasonable response to cervical cord compression like Mr. Saunders' was to decompress it as soon as possible. (T. 48)

Dr. Cohen noted that there were numerous symptoms in Dr. Dickens' initial history and physical note on July 7, 2003 that could not be explained by lumbar spine disease. (T. 62-63) For example, Dr. Cohen testified that the problems that Mr. Saunders had with his bowel and bladder were related to a cervical cord injury, not the lumbar spine injury. (T. 64)

Plaintiffs next presented the testimony of Dr. Daniel Hanley, a neurologist from John Hopkins Medical School. Dr. Hanley testified that Dr. Dickens breached the standard of care by failing to order an MRI of Mr. Saunders' neck after his initial evaluation. (T. 110) Dr. Hanley explained that the standard of care requires neurologists attempting to diagnose conditions like Mr. Saunders' to cover all of the areas that could be responsible for the symptoms, starting with the brain, then the neck, then the thoracic spine, and finally the lumbar spine. (T. 113-116) Dr. Dickens jumped from the brain to the lumbar spine, passing over the neck, even though many of Mr. Saunders' symptoms could not be explained by lumbar disc disease. (T. 117, 123-131) These symptoms would have prompted a

reasonably prudent neurologist to look at Mr. Saunders' neck as a potential cause. (T. 117) Dr. Hanley opined that had Mr. Saunders been properly diagnosed and treated in July 2003, his condition would have stayed the same or improved, and he would not have spent the remainder of his life in a wheelchair. (T. 178-179)

Under cross-examination, defense counsel attempted to establish areas where Dr. Pasarin had fallen below the standard of care. Dr. Hanley testified that Dr. Pasarin was required to review Dr. Dickens' notes, perform his own examination of the patient, order all necessary exams, and follow the patient after surgery. (T. 203-210) When questioned on the type of neurosurgical procedure that should have been used for Mr. Saunders, Dr. Hanley conceded that he would defer to a neurosurgeon on such issues. However, he would not defer on the fact that the neurological symptoms found by Dr. Dickens meant that Mr. Saunders needed cervical decompression surgery. If Dr. Pasarin disagreed, Dr. Hanley testified that the standard of care required Dr. Dickens to obtain a second opinion from a different neurosurgeon. (T. 211-214)

On re-direct, Dr. Hanley testified that Dr. Pasarin missed Mr. Saunders' upper body symptoms because he did not perform a thorough examination in his initial workup of Mr. Saunders. (T. 244) He noted that Dr. Pasarin himself had written in his October 3, 2003 note that had he learned of Mr. Saunders' problems in his hands in July 2003, then Dr. Pasarin would have ordered an MRI of the neck.

(T. 246-247) Dr. Hanley testified that if an MRI of the neck had been done in July, Mr. Saunders' cord compression would have been diagnosed, surgery would have occurred, and Mr. Saunders' quadriplegia would have been prevented. (T. 248)

During the Plaintiffs' case in chief, Plaintiffs also read into evidence testimony from the Defendant's experts, Dr. Gary Danielson and Dr. Alan Herskowitz. First, Dr. Danielson, a neurosurgeon, agreed that in July 2003, Walter Saunders was suffering from cervical myelopathy. (T. 263) He agreed that the weakness that was found in Mr. Saunders' legs was unrelated to any condition other than cervical cord compression. (T. 264) He agreed that Dr. Pasarin's surgical error (leaving the L5-S1 lamina intact in the initial surgery) did not cause Mr. Saunders' quadriplegia because the L5-S1 lesion was not Mr. Saunders' problem. (T. 265-266) Finally, he agreed that the standard of care required that cervical decompression surgery be performed sooner rather than later once the condition was diagnosed. (T. 266)

Dr. Herskowitz, a neurologist, agreed that Dr. Dickens never reached a diagnosis for the findings in Mr. Saunders' hands during the July 7 exam. (T. 267) He agreed that during the July hospital admission, Dr. Dickens was the captain of the ship and was ultimately responsible for Mr. Saunders' treatment. His responsibility did not end when Dr. Pasarin became involved. (T. 268) Dr. Herskowitz also confirmed that he, a neurologist, discusses his patients with

neurosurgeons prior to their surgery. (T. 268) Finally, on Cross Examination, Dr. Dickens admitted a diagnosis of cervical myelopathy can be made based simply on radiologic findings of cord compression and a gait disturbance, *in the absence of other neurological symptoms.* (T. 466-467)

D. Defendant's theory of liability and causation.

The Defendant first offered the testimony of Dr. Gary Danielson, a neurosurgeon. In direct contradiction of his deposition testimony, read in the Plaintiffs' case in chief, Dr. Danielson testified that all of Mr. Saunders' major complaints on July 7, including his difficulty walking, could be explained by the findings in the lumbar MRI and that his primary problem at this time was his back, not his neck. (T. 314, 346, 380) Dr. Danielson testified that it was entirely appropriate to operate on the lumbar spine at that time. (T. 315-316) Dr. Danielson testified that even considering the upper body findings identified in Dr. Dickens' note, it was still appropriate to perform low back surgery. (T. 318)

Dr. Danielson also opined that Dr. Pasarin deviated from the surgical standard of care by leaving the L5-S1 lamina intact. According to him, in addition to leading to a second lumbar surgery, this deviation also caused additional injury, including continued pain, weakness and numbness. (T. 327-328, 413-414) Dr. Danielson admitted that once Dr. Pasarin diagnosed the cervical cord compression in October, it was important to operate as quickly as possible. (T. 353-354) The

failure to do so violated the standard of care and caused additional damage to Mr. Saunders. (T. 357)

Dr. Danielson opined that Mr. Saunders' outcome from neck surgery in November 2003 would have been the same as the outcome from neck surgery in July 2003. (T. 358) He went on to suggest that if Dr. Pasarin had, in fact, performed the lumbar surgery correctly in July, Mr. Saunders would have had a greater return of function, which would have prevented Dr. Pasarin from diagnosing the cervical cord compression until October 2003, because Dr. Pasarin (unlike Dr. Dickens) failed to detect any upper body symptoms until that date. (T. 358-359) He also opined that if Dr. Pasarin had done the surgery correctly the first time, Dr. Stoll would only have been left with the neck surgery to perform, which would have increased the odds of that procedure going forward in January 2004. (T. 361)

Dr. Dickens testified briefly in his own defense. He maintained that none of the upper extremity symptoms he documented on July 7 were related to Mr. Saunders' neck, and that the numbness and the tingling were caused by diabetes. (T. 452, 474) He felt that all of Mr. Saunders' gait difficulties were related to the lumbar spine. (T. 461)

Dr. Herskowitz was offered as the Defendant's neurology expert. His opinion was that all of Mr. Saunders' gait problems were related to his lumbar disc

disease. (T. 547, 551) He did not believe that Mr. Saunders had any symptoms related to cervical cord compression in July 2003. (T. 549)

Finally, the jury heard from Dr. Pasarin via deposition. Dr. Pasarin believed that Mr. Saunders suffered from two problems occurring at two different times. In July 2003, Mr. Saunders was suffering from lumbar disc disease. In September 2003, he began suffering from cervical cord compression. (T. 650, 660) After making the diagnosis of cervical cord compression in October 2003, Dr. Pasarin felt that decompression of the cervical spine should have been done within a month. (T. 604, 625) He felt that Mr. Saunders' outcome from neck surgery would have been better in October 2003 than it would have been in January 2004. (T. 629)

But Dr. Pasarin's most critical testimony, which is the subject of this appeal, arose from questions regarding his potential actions if he had received different information about the patient's condition prior to surgery. Dr. Pasarin testified that the upper extremity findings in Dr. Dickens' July 7 note would not have prompted him to order an MRI of the neck. (T. 661, 676-677)[3] He also testified that had Dr.

[3] Interestingly, despite Dr. Pasarin's repeated insistence that he would not have looked at Mr. Saunders' neck in the absence of upper body symptoms, (T. 655) this is exactly what he did, as he ordered the MRI of the neck on September 11th in the absence of upper body symptoms. (T. 683) Additionally, this testimony contradicted the statement he made in his office note of October 3rd, 2007, where he stated "If [Mr. Saunders] had told me had any problems with his hands or weakness of his hand, we have likely pursued MRI of the neck before we pursued

Dickens ordered a cervical MRI at that point, and the radiographic findings were identical to those ultimately seen in the September 27 films, Dr. Pasarin would still not have performed neck surgery if *his* exam did not find upper extremity dysfunction. (T. 656)

Essentially, Dr. Pasarin refused to concede that any of the medical evidence that either existed (Dr. Dickens' note) or should have been obtained (the cervical MRI) would have changed his course of conduct. Of course, Dr. Pasarin was a former defendant, a fact the jury was not privy to, and had he testified otherwise, he would have been admitting his own liability. [4] This testimony was central to Defendant's closing argument, and Plaintiffs contend that the manner it was used in the argument was improper and merits a new trial.

E. Improper closing argument.

At the close of the evidence, the Defendant moved for a directed verdict based on the argument that Dr. Pasarin's testimony made it impossible for the Plaintiffs to prove that Dr. Dickens' negligence was a cause of harm to Mr. Saunders. The court denied this motion. (R.834-863, T.703)

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lumbar surgery." (T.676)

[4] In contrast, both Dr. Cohen and Dr. Danielson confirmed that the standard of care requires a reasonable neurosurgeon to operate as quickly as possible once the diagnosis is made. (T. 48, 266-267, 353) Dr. Dickens and Dr. Danielson both confirmed that cervical cord compression can initially manifest solely as a gait disturbance. (T.467, 264) Dr. Cohen testified that a patient with symptomatology and radiographic evidence of cord compression is a surgical candidate. (T.40,48)

Defense counsel's primary argument in closing was that Dr. Pasarin's testimony made it impossible for the Plaintiffs to prove that Dr. Dickens' negligence caused injury to Mr. Saunders. This argument was repeated several times. The first argument was properly objected to, and overruled, obviating the need for further objections. The first use of this improper argument was as follows:

> MR. WOULFE: 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.
>
> MR. EATON: Objection, Your Honor. That's not a correct statement of law.
>
> THE COURT: The Court has already instructed the jury on the applicable law in the case.
>
> MR. WOULFE: You must determine that that's the case or otherwise there is no legal cause. (T.798)

Defense counsel immediately followed that argument with an improper argument misstating the respective burdens of proof for each party:

> MR. WOULFE: 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 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 - -

> MR. EATON: Your honor, it's their burden. They are saying it's our burden. It's not our burden. (T.798-799) (emphasis supplied)

A sidebar was held during which Plaintiffs' counsel objected to both lines of argument. The court overruled the Plaintiffs' objections and allowed both lines of argument to continue. (T. 800-801) After completion of the sidebar, defense counsel made the following additional improper arguments:

> MR. WOULFE: The plaintiffs avoided the neurosurgery testimony like the plague in this case. They didn't even give their experts the testimony of Dr. Pasarin or Dr. Stoll. Both doctors heavily - -
>
> MR. EATON: Your Honor, objection.
>
> THE COURT: I'm sorry.
>
> MR. EATON: Objection. He is talking about a burden. Objection.
>
> MR. WOULFE: I'm not talking about any burdens at all.
>
> THE COURT: Overruled.
>
> MR. WOULFE: They didn't give them 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. (T.801-802)
>
> . . .
>
> Dr. Pasarin testified had I been given the information by the patient, I would have ordered the film. Had Dr. Dickens ordered the film, I wouldn't have done anything different. That was his testimony. I

would have operated on the low back. So how is it that it can be said that had Dr. Dickens ordered the cervical spine MRI, surgery would have been done on the cervical spine if Dr. Pasarin, the doctor who was there, who was the neurosurgeon said, "I wouldn't have done it. I wouldn't have done it?" (T.803)

Defense counsel then showed a segment of Dr. Pasarin's testimony (T. 812-813) and continued his argument:

> Dr. Pasarin testified clearly that had the MRI been done, he wouldn't have changed what he did. He would have done the lumbar surgery and followed the patient from that point forward. And therefore you can't say, in fact there is no evidence that but for Dr. Dickens' failure to order the neck MRI the surgery would have been done in July. There is no evidence whatsoever to support that. (T. 813-814)
>
> . . .
>
> Now, they want to suggest to you that somehow things would have been different if there would have been someone other than Dr. Pasarin. I guess that's what they are going to suggest to you.
>
> Well, Dr. Pasarin was the doctor there. It is sheer speculation about what anybody else might have done. And there isn't anybody else that was involved in this. There has been no testimony whatsoever, no testimony whatsoever that Dr. Dickens should have called in another neurosurgeon, none.
>
> 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. (T. 815-816)

Defense counsel next incorrectly suggested that no expert testified as to what a reasonable neurosurgeon would have done had a cervical MRI been ordered in July 2003. (T. 818)[5]

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[5] Dr. Cohen testified "when you recognize symptomatology and you do imaging,

Defense counsel's final improper closing argument was as follows:

> Because there isn't anybody that's testified that anyone would have operated in July. And certainly not Dr. Pasarin who made it crystal clear with that evidence in front of him he wouldn't have operated. He would have operated on the low back. (T.821)
>
> . . .
>
> Is he a big fat liar? That's up for you all to determine. But the fact of the matter is, he was the neurosurgeon to make the decision. And had he been given that information, he wouldn't have changed his decision and nothing would have changed at all until October 3rd when he should have gotten the surgery done then. (T.822)

At the conclusion of this argument, Plaintiffs' counsel requested a curative instruction from the court regarding the Defense Counsel's improper argument shifting the burden of proof. The court denied the request and the subsequent motion for mistrial. (T. 824-826)

This closing argument relied on an improper statement of the plaintiff's burden to prove causation that is effectively impossible to overcome, as it required the plaintiff to demonstrate, to a certainty, that a properly informed Dr. Pasarin would have acted in a manner different from his testimony. Given this argument, it was not a surprise that the jury returned a defense verdict. Despite acknowledging that its sister District Courts did not agree, the Fourth District held

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diagnostic studies to ensure that that is the cause of the symptomatology i.e. in the neck, then you decompress the cervical spine as soon as you are able to do that." (T. 48) Even the Defense neurosurgeon testified that standard of care requires a neurosurgeon to operate as quickly as possible once the diagnosis is made. (T. 266 -267, 353)

that the argument was nonetheless permissible in the Fourth, and affirmed the verdict.

II. ISSUE ON REVIEW

WHETHER THE DISTRICT COURT OF APPEAL 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.

III. SUMMARY OF ARGUMENT

In the interest of preserving space to thoroughly argue the complex and important issues in this appeal, we respectfully request the Court's indulgence in allowing us to forego the summary of argument.

IV. ARGUMENT

A. Standard of review.

This Court reviews pure questions of law on a *de novo* basis. *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003) No deference is given to the judgment of the lower courts.

B. The Defendant's closing argument would have been improper in the Third and Fifth Districts.

Defense counsel spent the vast majority of his closing argument not rebutting the claims that Dr. Dickens was negligent, but instead arguing that even if he had been negligent, it would not have changed the outcome for Mr. Saunders, because Dr. Pasarin had testified that he would not have done anything differently,

even if Dr. Dickens had done what the Plaintiffs contended the standard of care required.

Specifically, Plaintiffs' experts contended that Dr. Dickens should have suspected a cervical cord lesion as the reason for Mr. Saunders' many complaints, including his inability to walk, and ordered a cervical MRI as a result. All of the experts concurred that a cervical MRI would have shown a similar degree of cervical cord compression in July, 2003, as was eventually revealed in the September 27 MRI. Thus, had the MRI been performed in July, a reasonable neurologist would have reached the diagnosis of cervical cord compression. Plaintiffs' experts further explained, presented with the clinical findings present in July, combined with the radiographic findings that would have been seen in the cervical spine had it been imaged at that time, a reasonable neurosurgeon would have operated on Mr. Saunders' neck. Even Dr. Danielson confirmed that a reasonable neurosurgeon should operate on the neck as soon as possible after a diagnosis of cervical cord compression is reached.

Notwithstanding this, the Defense repeatedly argued that because Dr. Pasarin had testified that even if he had cervical MRI films in July of 2003 showing the same cervical cord compression that the September 27, 2003 MRI showed, he would not have operated on Mr. Saunders' neck at that point. Because of this testimony, defense counsel argued that the Plaintiffs could not prove their

case against Dr. Dickens and a defense verdict was required, essentially as a matter of law, because the Plaintiffs were *required to prove that Dr. Pasarin would have done something differently than he testified to*. In the Fourth District, this argument was, unfortunately, permissible, under *Ewing v. Sellinger*, 758 So.2d 1196 (Fla. 4th DCA 2000), which suggests that the Plaintiffs here had to prove that Dr. Pasarin himself would have acted differently instead of proving, as we did, that a reasonable neurosurgeon in Dr. Pasarin's place would have acted differently.

Since *Ewing* was decided, both the Third District and the Fifth District have addressed the same issue and reached the opposite conclusion in four separate cases. First, in *Muñoz v. South Miami Hospital, Inc.,* 764 So.2d 854 (Fla. 3D DCA 2000), summary judgment was granted because a subsequent treating physician testified that even if he had been informed of the results of a diagnostic test, his actions would not have changed. In rejecting the argument that such testimony can cut off the chain of legal causation, the court stated:

> It is 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. As was said in *Seley v. G.D. Searle & Co.:*
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> > [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."

Muñoz at 857. (citations omitted) See also *Sta-Rite Industries, Inc. v. Levey*, 909 So.2d 901 (Fla. 3D DCA 2005) (Following *Muñoz*); and *Delvalle v. Sanchez,* 170 F.Supp.2d 1254 (S.D. Fla. 2001) (Following *Muñoz*)

The rationale set forth in *Ewing* was also rejected by the Fifth District. In *Goolsby v. Qazi,* 847 So.2d 1001 (Fla. 5th DCA 2003), the trial court directed a verdict for the defendant doctor because the doctor argued that there was no showing that the subsequent treating pediatrician would have changed her treatment if she had been informed that the diagnostic study was positive. The Defendant obtained a directed verdict, and on appeal, relied on *Ewing v. Sellinger*. The Fifth District disagreed with *Ewing* and stated as follows:

> 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 diagnosis.

Goolsby at 1003. The court went on to state 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 the Defendant had properly read the diagnostic study. *Goolsby* at 1004.[6] See also *Vucinich v. Ross*, 893 So.2d 690 (Fla. 5th DCA 2005) (Following *Goolsby*.)

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[6] In Judge Klein's concurrence in *McKeithan v. HCA Health Services of Florida*, 879 So.2d 47 (Fla. 4th DCA 2004), he acknowledged that *Ewing* was now in conflict with *Munoz* and *Goolsby* and suggested that he was no longer "sure we were correct in *Ewing*." *McKeithan* at 49. Although he did not specifically reveal

C. It is the defendant's burden to prove that the testimony of a subsequent treating physician meets the standard of care. Failure to do so renders the testimony irrelevant and inadmissible.

Ideally it would be enough to say that *Ewing* was wrongly decided, *Muñoz* and *Goolsby* were correctly decided, and this Court should therefore approve *Muñoz* and *Goolsby,* disapprove *Ewing* and quash the district court's decision in part in the instant case. Unfortunately, it is not that simple. *Muñoz* and its progeny raise as many questions as they answer. And if this Court is going to resolve the conflict between the Districts, it should do so in a manner that doesn't leave open questions.

While we believe *Muñoz* was correctly decided, we recognize that it contains some inherent contradictions. First, it labels the testimony of the subsequent treating physician as "speculative." Normally, under Florida law, speculative testimony is inadmissible as a matter of law. *See Jones v. State*, 908 So.2d 615, 621 (Fla. 4th DCA 2005) and *All American Pool Surface, Inc. v. Jordan*, 870 So.2d 885, 886 (Fla. 3d DCA 2004). Yet in the same sentence in which the court calls these statements speculative, it holds that they are not inadmissible, without offering any rationale in creating this strange exception to

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the reason for his concern, it was likely the fact that the directed verdict in *Ewing* acted as a "get out of jail free" card for the initial physician, Dr. Sellinger. This left the subsequent treater and co-defendant Dr. Anderson to bear responsibility for 100% of Ewing's damages because his testimony was deemed to have broken the causal chain for Dr. Sellinger's liability. *Anderson v. Ewing*, 768 So.2d 1161, 1166 (Fla. 4th DCA 2000)

the rules of evidence and otherwise settled law.[7]

But then, *Muñoz* seems to hold that because this testimony, though admissible, is nevertheless still speculative, it cannot be used to break the causal chain *as a matter of law.* Specifically, *Muñoz* states "[a]nd it is 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." *Muñoz* at 857. The Third District reiterated this holding in *Sta-Rite Industries, Inc. v. Levey,* 909 So.2d 901 (Fla. 3rd DCA 2005), when it stated "one who does not warn with the urgency and intensity deemed required under the circumstances *cannot* say that failure would have made no difference." *Sta-Rite* at 905. It is difficult to read those two statements to mean anything other than: as a matter of law, the defendant cannot argue that a subsequent treater's testimony breaks the causal chain.

If this testimony does not break the causal chain as a matter of law, then it cannot be probative of any element of the defense. It is also quite obviously highly prejudicial as, by its very nature, it suggests to the jury that Plaintiff's complaints regarding the defendant are meaningless, because even if the defendant had acted in accordance with the Plaintiff's allegations, the outcome would have been no different. Therefore, because this testimony's prejudicial value is extraordinarily

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[7] The opinion makes it clear that the court initially held that the statements should have been inadmissible, but changed that position on rehearing.

high, and its probative value, according to *Muñoz* and *Sta-Rite*, appears to be zero, it must be deemed inadmissible.

This argument, however, is circular. Because this testimony is speculative, it cannot be used to break the causal chain. Because it cannot be used to break the causal chain, it is therefore no longer relevant. Because it is no longer relevant, it is thus inadmissible.

A simple solution to clean up this argument would be to simply reaffirm the principle set forth in *Drackett Products Co. v. Blue,* 152 So.2d 463, 465 (Fla.1963), which held that:

> A statement by a witness as to what action he would have taken if something had occurred which did not occur-particularly in those instances where such testimony is offered for the purpose of supporting a claim for relief or damages-or what course of action a person would have pursued under certain circumstances which the witness says did not exist will ordinarily be rejected as inadmissible and as proving nothing

See also LeMaster v. Glock, Inc., 610 So.2d 1336, 1338 (Fla. 1st DCA 1992) ("It has long been the rule that a witness's opinion as to what would have happened if circumstances were different constitutes rank speculation that is not competent evidence[.]")

Applying this principle to this type of testimony would simply render it inadmissible in all circumstances, albeit on a solely evidentiary basis. However, holding that this testimony is always inadmissible would also be consistent with

two other policy arguments set forth by the Third District. The first is "the rule that medical professionals must, under some circumstances, see to it that serious conditions which they know about be, in fact, remedied either by themselves or by someone else competent to do so." *Muñoz* at 856. This means that if Dr. Dickens had made the correct diagnosis and provided it to Dr. Pasarin, he should not be able to rely on Dr. Pasarin's unreasonable choice to do nothing to absolve him of liability. He would still have a responsibility to find another surgeon who would have performed the necessary surgery. Plaintiff's neurology expert made this exact point. (T. 211-214)

The second policy argument is that a defendant "cannot escape liability simply because a second physician had the opportunity to correct the initial negligent acts but failed to do so." *Daniels v. Weiss*, 385 So.2d 661, 664 (Fla. 3d DCA 1980). Dr. Dickens should not be absolved of liability simply because Dr. Pasarin also failed to make the proper diagnosis, and testified that even if he had been given the correct diagnosis, he would not have acted differently.

Even if this testimony were held to be inadmissible, this would not change the burden of proof for the plaintiff or limit the defenses available to the defendant. The plaintiff would still have to meet the *Gooding v. University Hosp. Bldg., Inc.,* 445 So.2d 1015 (Fla.1984) standard, and prove, through competent expert testimony, that the standard of care would have required a reasonable subsequent

treater to act in the face of the information plaintiff alleged the defendant should have relayed to him.

Specifically, *Gooding* explains that in cases, like the instant one, where the Plaintiff's:

> evidence indicates that a failure to diagnose the injury prevented the patient from an opportunity to be operated on, which failure eliminated any chance of [avoiding injury], the issue of proximate cause can be submitted to a jury only if there is sufficient evidence showing that *with* ***proper*** *diagnosis, treatment and surgery* the patient probably would have [avoided injury].

Gooding at 1020. The key statement is that proof of causation is based on proof of "proper diagnosis, treatment and surgery" – i.e. treatment to the standard of care – not proof of what a particular doctor would or would not have done, irrespective of the standard of care.

This same standard would apply to the defense. Holding this testimony inadmissible would not prevent the defendant from defending against the claim by proving, through 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. Because it appears to hold otherwise, *Ewing* appears to be in conflict with *Gooding* as well, because it allows the testimony of a subsequent treater to break the causal chain without requiring the defendant to establish that the testimony meets the standard of care.

A reaffirmation of *Drackett* would thus remove this problematic testimony from the equation altogether, and level the playing field for both parties. However, we can understand why this Court might be reluctant to reach such a conclusion. Even the Third District, in *Muñoz*, chose to walk back their original conclusion that the testimony was inadmissible as a matter of law.

But if this testimony is going to be deemed admissible, it is important for this Court to set forth proper parameters and limitations on its use. There is no doubt that this testimony can be viewed as dispositive in the eyes of a jury, even if it is not treated as dispositive by the trial court.[8] The argument that the plaintiffs cannot prove that the alleged negligence of the defendant was the legal cause of the plaintiff's injury because the subsequent treater, who would have been the only one to act, testified that he would not have done anything differently, even if properly warned, is an almost insurmountable one, especially where the testifying treater is a former defendant whose bias cannot, by statute, be shown to the jury. Accordingly, if it is to be admitted, the Court should consider its inherently

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[8] Although this begs the question, if this testimony cannot serve as a basis for entry of summary judgment or directed verdict for the defense, then how can it serve as a competent basis for a jury verdict for the defense? According to *Munoz* and its progeny, the testimony of the subsequent treating physician cannot be given dispositive effect because it was speculative, which is a legal determination made by the court, not because it could be rejected as not credible, which is a factual determination to be made by the jury. A jury is no more entitled to reach its verdict on legally impermissible grounds than the court is.

speculative yet potentially case dispositive nature, and allow for its use in a manner that provides for the most level playing field between the parties.

We suggest some potential guidelines below. The first set applies to circumstances where the subsequent treating physician is only a witness, and has never had an interest in the case. It requires only the application of existing rules of law. The second set of guidelines applies to circumstances where the testimony of the subsequent treating physician was given when he was a defendant in the case, and then subsequently settled out. In recognition of the unique unfairness of the statutorily imposed prohibition on exposing the bias of this testimony, we have suggested the creation of a presumption that the jury would be instructed on. This instruction would level the playing field and deprive defendants of the unfair and misleading advantage they currently possess over plaintiffs as a result of the statute prohibiting reference to settlement.

1. Guidelines for circumstances where the subsequent treating physician was not previously a defendant.

As we mentioned above, under *Gooding,* 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." *Gooding* at 1018. In cases such as the instant one, this means that it is the plaintiff's burden to establish that had the correct diagnosis been relayed to a subsequent treating physician with the power to act on the diagnosis, that a

reasonable subsequent treating physician would have acted in a manner that more likely than not would have changed the outcome.

Where *Gooding* explains what the plaintiff must prove, *Muñoz* and *Goolsby* specify what a plaintiff *does not* have to prove. *Muñoz* states, "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." *Muñoz* at 857. *Goolsby* states 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 [the proper diagnosis had been made by the defendant]." *Goolsby* at 1004.

These holdings say that the plaintiff is under no obligation to prove what *a specific subsequent treating physician* would or would not have done had he or she been properly informed. This is a reasonable conclusion, because, as noted above, it is nigh impossible for the plaintiff to prove that the subsequent treating physician would have done something differently than what he testified he would have done.[9]

[9] Proof of what a particular person would have done is simply not the standard that a plaintiff must meet to prove causation. In *Orlando Executive Park, Inc. v. P.D.R.*, 402 So.2d 442, 448 (Fla. 5th DCA 1981), a premises liability case, the defendant argued that the "plaintiff was required to show the attack would have been prevented had reasonable measures been taken." This argument is identical to the one made in the instant case – "the plaintiff is required to show that the subsequent treating surgeon would have operated had he been informed of the correct diagnosis."

Yet this was the impossible standard that defense counsel in the instant case repeatedly insisted to the jury that we had to meet in order to prevail, and that is the reason a new trial is warranted.

So, it is clear that the plaintiff is not charged with proving that the subsequent treater's testimony was unreasonable. Instead, it is the burden of the defendant to plead and prove that the subsequent treater's testimony that he would not have acted differently in the face of the proper diagnosis would meet the standard of care of reasonable physician.

Clearly, the argument that even if the defendant was negligent, the plaintiff still cannot prove that negligence was the cause of the plaintiff's injuries because

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The Court rejected this argument, and stated:

> [T]his is not the test. Causation, like any other element of plaintiff's case, need not be demonstrated by conclusive proof:
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> > and it is enough that (plaintiff) introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant, than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise.
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> W. Prosser, Law of Torts, s 41 at 242 (4th Ed. 1977).

Orlando Executive Park, Inc. at 448. Before the defendant is heard to complain that a case of premises liability has no application to a case of medical malpractice, we would note that the jury instructions on legal cause for both types of claims are identical in all material respects. The Florida standard for proving legal cause is universal to all types of negligence claims.

the subsequent treater would not have taken any action to alter the outcome even if had been properly informed, is a plea in avoidance, and thus an affirmative defense. [10] *Tropical Exterminators v. Murray,* 171 So.2d 432 (Fla. 2nd DCA 1965) (Affirmative defenses do not simply deny the facts that the opposing party claims; they raise a new matter which defeats an otherwise apparently valid claim.) As explained by this Court in *Custer Med. Ctr. v. United Auto. Ins. Co*., 62 So.3d 1086 (Fla. 2010):

> An affirmative defense is an assertion of facts or law by the defendant that, if true, would avoid the action and the plaintiff is not bound to prove that the affirmative defense does not exist. The defendant has the burden of proving an affirmative defense.

Custer Med. Ctr. at 1096 (citations omitted)

To prevail on this affirmative defense, the defendant cannot simply rely on the testimony of a subsequent treater alone. Standing on its own, the testimony is not probative of anything, and does not rebut the standard of care testimony offered by the plaintiff's expert.

By way of explanation, we'll use the following example: At trial, a plaintiff

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[10] *Sta-Rite* seems to suggest that the burden falls on the defendant as a result of a presumption: "It must be assumed that a sufficiently emphatic warning would have made the difference." *Sta-Rite* at 906. Assuming this is a recognized presumption, it would place the burden on the defendant to rebut it by demonstrating that the proper warning or correct diagnosis would not have made a difference because the standard of care did not require a reasonable physician to take any action in response to that warning or diagnosis. We believe that treating this as a presumption would be unnecessarily complicated. This is clearly an affirmative defense, and the burden is clearly on the defendant to prove it.

produces expert testimony that the defendant made a misdiagnosis; that had the correct diagnosis been made, the patient would have been referred to a surgeon; and a reasonable surgeon meeting the standard of care would have performed surgery which, more likely than not, would have prevented injury. However, the treating surgeon who actually saw the patient testifies that even if he had been given the correct diagnosis he would have flipped a coin and would have operated only if his coin came up heads on two out of three flips.

We use this rather unlikely example for a reason: A person can say anything, and the mere fact that that person happens to be a doctor does not grant their unreasonable testimony any greater legal weight. Indeed, as a doctor, their testimony has no value unless it is measured against the "yardstick of the standard of care." *Muñoz, supra* at 859 (Cope, J., concurring)

So only if the defendant pleads and proves that the testimony of the subsequent treating physician meets the standard of care of a reasonable physician through expert testimony, would his testimony be relevant and admissible. However, if the defendant chooses ***not*** to prove that the testimony met the standard of care, then it would necessarily be inadmissible. Under no circumstances should the defendant be entitled to get the benefit of the testimony in breaking the chain of causation without proving that it was reasonable and met the standard of care.[11]

[11] In the instant case, Dr. Dickens' expert neurosurgeon opined that Dr. Pasarin

If the defendant pleads and proves this affirmative defense by providing substantial competent testimony from a healthcare provider of the same specialty that the subsequent treater's testimony would meet the standard of care, then the issue would be allowed to go to the jury. But, since this is an affirmative defense, the jury would have to be properly instructed that the defendant bears the burden of proving it:

Using the model jury instructions as guidance, an appropriate instruction could read as follows:

> If, however, the greater weight of the evidence supports Plaintiff's claim, then you shall consider the defense(s) raised by defendant.
> On the first defense, the issue for you to decide is:
> Defendant has alleged that his alleged negligence cannot be a legal cause of injury to the plaintiff because the subsequent treating physician has testified that he would not have done anything differently, even if provided with the information Plaintiff alleges defendant negligently failed to provide. In order to prevail, Defendant must show by the greater weight of the evidence that this testimony of the subsequent treater is consistent with that level of care, skill and

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breached the standard of care by failing for timely operate on Mr. Saunders' neck after Dr. Pasarin finally diagnosed cervical cord compression on October 3rd. (T. 352-354, 357) He agreed that the standard of care requires a reasonable neurosurgeon to operate as soon as reasonable once he or she were able to correlate clinical findings with radiographic findings of cervical cord compression,. (T.266, 345, 352-354, 401) And while he did testify that Dr. Pasarin's decision to operate on the lumbar spine in July would have met the standard of care even if he had known about Dr. Dickens' upper extremity findings (T.317-318), the hypothetical question posed to him specifically *did not* mention radiographic findings of cervical cord compression. Importantly, Dr. Danielson never testified that Dr. Pasarin would have met the standard of care if he failed to operate on the cervical spine in the presence of both radiographic and clinical findings consistent with cervical cord compression.

> treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful physicians.
> If the greater weight of the evidence supports defendant's defense on this issue, the causal chain is broken and your verdict is for the defendant. If, however, the greater weight of the evidence does not support defendant's defense on this issue your verdict should be for plaintiff in the full amount of his damages.

This is just one writer's suggestion. If the Court were so inclined, it could design whatever instruction it deems appropriate for this rather unique situation.

But, regardless of whether or not this Court feels a specific instruction is warranted for this fact pattern, the Court should make two things unequivocally clear: First, it is never the plaintiff's burden to prove that the specific subsequent treater in the case would have acted in a manner different than what he testified to. This is simply not the standard under Florida law, as we previously explained. See *Orlando Executive Park, Inc., supra.* Yet this was the burden that defendant's counsel repeatedly told the jury that we had to meet, and this is the reason the plaintiff is entitled to a new trial. Second, as the proponent of this defense, it is the defendant's burden to prove that the testimony of the subsequent treater would have met the standard of care. *Custer Med. Ctr.,* 62 So. 3d at 1096; *Gooding,* 445 So.2d at 1020

2. Guidelines for circumstances where the subsequent treating physician was previously a defendant.

While the guidelines set forth above can be utilized to address testimony

offered by any subsequent treating physician, we do think that special considerations are merited when the subsequent treating physician was a former defendant who has settled out of the case.

In this lawsuit, Plaintiff alleged that Dr. Pasarin, like Dr. Dickens, was negligent in failing to diagnose Walter Saunders' cervical cord compression during his admission to Broward General Hospital in July 2003. The Plaintiff's theory of liability was that Dr. Dickens found numerous symptoms that were consistent with cervical cord compression and compelled imaging of the cervical spine. This should have led to proper imaging studies and a diagnosis of rapidly degenerating cervical cord compression that required an urgent surgical decompression of the neck.

If Dr. Pasarin had testified, as a Defendant, that he would have ordered an MRI of the neck or operated on Mr. Saunders' neck if he had the information regarding upper body symptoms contained in Dr. Dickens' notes and/or diagnostic evidence of cervical cord compression,[12] he would have essentially been admitting liability. In order to defend himself in the lawsuit, he *had* to deny that he would have done things differently if he had been provided with information about upper

[12] Dr. Pasarin, and indeed, all of the experts agreed that if cervical spine films had been ordered by Dr. Dickens in July 2007, they would have looked essentially the same as the September 27, 2007 films that showed severe cervical cord compression. (T. 35-36, 177-178, 263, 646-647)

body symptoms, because these findings were already in Dr. Dickens' notes, which were part of the medical record available to him. He simply didn't review them.

So, Dr. Pasarin's testimony was obviously biased and unreliable. Normally, "the evidence code allows a party to attack a witness's credibility based on bias. §90.608(2), Fla. Stat. (2012). A treating physician, like any other witness, is subject to impeachment based on bias." *Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co.*, 103 So.3d 200, 203 (Fla. 4th DCA 2012). But here, that option is not available to plaintiff as a result of Florida Statute §768.041(3), which provides: "The fact of such a release or 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 Third District, in *Ellis v. Weisbrot*, 550 So.2d 15, 16 (Fla. 3d DCA 1989), held that admission of evidence of a settlement, "even to attack the former defendant's credibility, is clear error and requires reversal." As a result, the Plaintiff is not permitted to show the jury the paradigmatic reason for the former defendant's biased and self-serving testimony -- the fact that if he had testified otherwise, he would have been admitting his own liability.

The defendant presented Dr. Pasarin's testimony to the jury as if it were the competent testimony of an unbiased, neutral, treating physician, knowing full well it was none of things, and knowing that the Plaintiff had no ability to prove

otherwise.[13] This, in essence, was the perpetration of a fraud on the jury. In saying this, we don't mean to impugn defense counsel, because they were simply doing what the law allowed. But we do mean to shine a light on the fundamental unfairness of the situation, and suggest that this Court take this opportunity to remedy it.

One option, would be for the Court to determine that, because of the inherent bias and unreliability of this testimony, it cannot be used to exculpate the defendant, and is therefore inadmissible. Such a finding would not deprive the defendant of the ability to present independent expert testimony that a failure to act on the part of the subsequent treating physician would meet the standard of care. It would only deprive the defendant of the ability to mislead the jury with inherently biased testimony that the plaintiff has no way to impeach.

Another option would for the Court to exercise its inherent power to create an evidentiary presumption. As this Court previously explained, "[p]resumptions, which are created either judicially or legislatively and arise from considerations of fairness, public policy, and probability, are used to allocate the burden of proof. See generally Charles W. Ehrhardt, Florida Evidence § 301.1 (2000 ed.) *Owens v.*

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[13] Defense counsel argued that we had to prove Dr. Pasarin was lying, knowing that we could not reveal the only reason he had to lie: "Is he a **big fat liar?** That's up for you all to determine, but the fact of the matter is, he was the neurosurgeon to make the decision. And had he been given that information, he wouldn't have changed his decision." (T. 822)

Publix Supermarkets, Inc., 802 So.2d 315, 331 (Fla. 2001).

Judge Barkett has suggested that presumptions can be used "to enhance trial fairness, as when an imbalance results from one party's superior access to proof." *State v. Rolle*, 560 So.2d 1154, 1558 n.2 (Fla. 1990) (Barkett,J. concurring) Such an imbalance clearly existed here because the defendant could offer Dr. Pasarin's testimony as being unbiased and competent knowing full well that the plaintiff had no ability to expose its inherent bias and unreliability.

To enhance trial fairness, the Court could craft a presumption for these circumstances similar to the presumption of negligence set forth in *Public Health Trust of Dade County v. Valcin,* 507 So.2d 596 (Fla. 1987). To invoke the presumption, the Plaintiff would have to establish that: 1) the testimony at issue was given by a former defendant in the same case; 2) while he was still a defendant; 3) that he had settled out of the case; and 4) that the testimony would serve to exculpate the remaining defendant. If the Plaintiff established these facts, he would be entitled to a jury instruction that would inform them of the biased nature of the testimony:

> You should presume that the testimony of the subsequent treating physician that he would not have acted if given the correct information failed to meet the level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful physicians, unless defendant proves otherwise by the greater weight of the evidence.

This instruction is modeled on Standard Jury Instruction 402.4d. It can be incorporated into the previous instruction that we proposed above.

Either one of these two actions would level the playing field for plaintiffs, but would not deprive defendants of the right to try and prove that this testimony met the standard of care. What is clear is that the status quo is unacceptably unfair to the plaintiff and should not be allowed to stand.

For the reasons set forth above, the district court's decision should be quashed, *Ewing v. Sellinger* should be disapproved, and the cause should be remanded with directions to afford the Plaintiffs a new trial on all issues.

D. Additional bases for quashing the district court opinion and awarding a new trial.

Although this court accepted jurisdiction based on inter-district conflict on one of our arguments below, the Court may address other issues properly raised. *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 563 (Fla. 2005) (Citing to *Savoie v. State*, 422 So.2d 308, 310 (Fla.1982) We respectfully request that the court consider two additional errors made by the trial court, both of which serve as an independent basis to award a new trial.

1. The Defendant made a second misstatement of the Plaintiffs' burden of proof in closing argument.

The Ewing argument was one of two improper burden shifting arguments made by defense counsel in closing argument. In the second improper argument,

counsel repeatedly suggested that the Plaintiff had failed to produce evidence regarding the negligence of Dr. Pasarin – evidence that only the Defendant had a legal obligation to produce.

Specifically, defense counsel argued as follows:

> Now, remember what they put on? No neurosurgery evidence at all. They said in the opening statement that though 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 the evidence of the neurosurgeons? We did. We brought to you all the evidence of Dr. Pasarin. . . . The Plaintiffs avoided the neurosurgery testimony like the plague in this case. They didn't even give their experts the testimony of Dr. Pasarin or Dr. Stoll. . . . They gave none of that information to any of their experts, none of it. . . . He never had the testimony of Dr. Pasarin at all about what Dr. Pasarin was thinking or anything like that. They didn't have it. (T.799-802)

The implication of these arguments is obvious: The Plaintiffs had done something wrong by failing to provide certain evidence to Plaintiffs' experts. The Plaintiffs had an obligation to present evidence of the neurosurgeon's responsibility and their failure to do so was a defect in their case. There is no truth to any of these implications.

In *Paul v. State,* 980 So.2d 1282 (Fla. 4th DCA 2008), the Court reversed a conviction because of improper closing arguments that shifted the burden of proof. The Court explained:

> When arguing to the jury, the State may not make comments that mislead the jury as to the burden of proof. The prosecutor's comment improperly shifted the burden to the defendant because it insinuated

> that the defendant needed to prove that the prosecutor's witness was lying in order to be found not guilty.

Paul at 1283. See also *Covington v. State,* 842 So.2d 170 (Fla. 3D DCA 2003); and *Gore v. State,* 719 So.2d 1197 (Fla. 1998).

In the instant case, defense counsel's comments clearly mislead the jury as to the burden of proof. They improperly shifted the burden to the Plaintiffs because they insinuated that the Plaintiffs had to prove Dr. Pasarin's negligence in order to prevail in their case. A new trial is warranted as a result.

2. **The trial court erred in failing to strike the pleadings of the defendant for failing to conduct a good faith investigation during the presuit period.**

The final issue we wish to raise is the trial court's failure to sanction the Defendant for failing to conduct a good faith investigation into the merits of the claim during the presuit period. The Fourth District dismissed this argument in one paragraph, holding that the trial court did not abuse its discretion in determining that the Defendant had met all of the presuit requirements within the required time frames.

The Fourth District applied the incorrect standard of review. Abuse of discretion applies only when the trial court must resolve a factual dispute. Here, there were no facts in dispute. Under those circumstances, the question of whether the law was properly applied by the trial court is reviewed *de novo. Aills v. Boemi*, 29 So.3d 1105, 1108 (Fla. 2010). *See also Holden v. Bober*, 39 So.3d 396, 400-01

(Fla. 2d DCA 2010) (Compliance with presuit investigation requirements is ultimately a question of law.)

a. Statement of facts.

Plaintiff sent a presuit notice of intent letter to Dr. Dickens on September 30, 2005. We engaged in the exchange of presuit discovery with Dr. Dickens' adjuster, Dana Robinson, up until December 21, 2005. On December 21, 2005, Ms. Robinson requested copies of Mr. Saunders' x-ray films and a 30 day extension of presuit. (R. 102-106) We sent the x-rays to a copy service.

On January 25, 2006, we sent a letter requesting arbitration. On January 27 2006, we sent an e-mail inquiring why she had not picked up the x-rays from the copy service. (R. 108) We received no response. We followed up with Ms. Robinson via phone calls, and emails on February 22, 2006, March 7, 2006, and March 14, 2006. (R.102-113) Ms. Robinson did not respond to any of the emails, calls, or the letter. (R. 102-113)[14]

On April 13, 2006, 6 ½ months after presuit began, and 2 ½ months after notifying Ms. Robinson that she hadn't picked up the x-rays, we filed a Second Amended Complaint naming Dr. Dickens as a defendant. (R. 59-68) Dr. Dickens

[14] Although defense counsel represented at the sanction hearing that Ms. Robinson didn't receive these, he offered no evidence establishing a dispute of fact. He also indicated that it wasn't relevant to his argument, which is that as long as he performed the investigation before the expiration of the statute of limitations, he complied with the statute

filed an answer denying liability on April 24, 2006. (R. 75-78) On May 16, 2006, Plaintiffs filed a motion to strike Dr. Dickens' pleadings for failure to participate in presuit. (R. 93-97) On May 30, 2006, Dr. Dickens' counsel sent a denial of presuit letter, which included an Affidavit executed by Dr. Allan Herskowitz on May 24, 2006, one week *after* Plaintiff had filed her motion to strike. (R. 138-165)

On December 1, 2006, Judge Damoorgian heard Plaintiffs' motion to strike Dr. Dickens' pleadings. At the hearing on Plaintiffs' Motion to Strike, defense counsel admitted that:

> [W]hen I first became aware when the lawsuit was turned over to me and I became aware, *which was in early May*, that apparently a response had not been provided to presuit, I then went ahead and retained the expert, got the records, got the affidavit prepared after the expert had reviewed the records, and in the meantime, we also got Mr. Eaton's Motion for Sanctions. And Dr. Herskowitz reviewed the materials, and felt that Dr. Dickens had not done anything wrong and signed the affidavit, and that was that. (H. 19) [15]

Thus, defense counsel admitted that he provided the medical records to his expert for a review *for the first time* in May, 2006, long after presuit had expired and *after* he had answered on behalf of Dr. Dickens, denying liability. The trial court nevertheless denied the motion for sanctions.

b. The unambiguous language of Fla. Stat. 766.203 required the trial court to strike the pleadings of the defendant.

[15] The Hearing transcript was not part of the original record. Accordingly, we moved to supplement the record at the district court level. References to the hearing transcript will be designated (H.-).

We turn now to the application of the statute to these undisputed facts. Due to the repeated amendments to Chapter 766, most recently in 2003, the statute is filled with redundancies and circular references. In spite of these, the obligations placed on the defendant to investigate and respond to plaintiff's presuit notice of intent remain clear. We reprint the relevant portions of the Statute below, underlining the 2003 Amendments:[16]

766.106(3) Presuit investigation by prospective defendant:

> (a) No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant. During the 90-day period, the prospective defendant or the defendant's insurer or self-insurer ***shall*** conduct a review as provided in s. 766.203(3) to determine the liability of the defendant. … Unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses.
>
> (b) ***At or before the end of the 90 days***, the prospective defendant or the prospective defendant's insurer or self-insurer ***shall*** provide the claimant with a response:
>
> 1. Rejecting the claim;
> 2. Making a settlement offer; or
> 3. Making an offer to arbitrate in which liability is deemed admitted and arbitration will be held only on the issue of damages.

Fla.Stat. 766.106(3)(2003).

Florida Statute 766.203(3)(2003) provides:

766.203(3) Presuit investigation by prospective defendant. Prior to

[16] We highlight these changes because much of the jurisprudence on chapter 766 deals with prior versions of the statute.

> issuing its response to the claimant's notice of intent to initiate litigation, during the time period for response authorized pursuant to s. 766.106, the prospective defendant or the defendant's insurer or self-insurer ***shall*** conduct an investigation as provided in s. 766.106(3) to ascertain whether there are reasonable grounds to believe that:
>
> > (a) The defendant was negligent in the care or treatment of the claimant; and
> > (b) Such negligence resulted in injury to the claimant.
>
> Corroboration of lack of reasonable grounds for medical negligence litigation ***shall*** be provided with any response rejecting the claim by the defendant's submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(5), at the time the response rejecting the claim is mailed, which statement ***shall*** corroborate reasonable grounds for lack of negligent injury sufficient to support the response denying negligent injury.

Florida Statute 766.206(3)(2003) provides:

> 766.206. Presuit investigation of medical negligence claims and defenses by court.
>
> (3) If the court finds that the response mailed by a defendant rejecting the claim is not in compliance with the reasonable investigation requirements of ss. 766.201-766.212, including a review of the claim and a verified written medical expert opinion by an expert witness as defined in s. 766.202, the court ***shall*** strike the defendant's pleading. ("pleading" replaced "response" in the September 15, 2003 amendment). (italic emphasis supplied)

This statutory language must be viewed in a manner that effectuates the intent of the legislature, which is set forth in §766.201. The relevant portions of which are excerpted below:

> 766.201. Intent.
> (1)(d) The high cost of medical negligence claims in the state can be substantially alleviated by ***requiring early determination of the merit***

> ***of claims***, by providing for early arbitration of claims, ***thereby reducing delay and attorney's fees***, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury.
>
> (2) It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan ***shall consist of two separate components, presuit investigation*** and arbitration. ***Presuit investigation shall be mandatory and shall apply to all medical negligence*** claims and ***defenses***. Arbitration shall be voluntary and shall be available except as specified.
>
> (a) Presuit investigation ***shall*** include:
>
> (1) ***Verifiable requirements that reasonable investigation precede*** both ***malpractice*** claims and ***defenses*** in order to eliminate frivolous claims and defenses.
> (2) Medical corroboration procedures

Read together, it is impossible to misconstrue the purpose of the statute: Presuit investigation is *mandatory* and *shall* apply to all medical negligence defenses. Presuit investigation *shall* include a reasonable investigation prior to asserting malpractice defenses in order to eliminate frivolous defenses, and medical corroboration procedures. During the 90 day period, the prospective defendant *shall* conduct a review as provided in 766.203(3) to determine the liability of the defendant. At or before the end of the 90 days, the prospective defendant *shall* provide the claimant with a response. Prior to issuing its response, the prospective defendant *shall* conduct an investigation as provided in 766.106(3) to ascertain whether there are reasonable grounds to believe that the defendant was negligent and such negligence caused injury. Corroboration of lack of reasonable

grounds for medical negligence litigation *shall* be provided with any response rejecting the claim by the defendant's submission of a verified written medical expert opinion. The repetitive nature of the statute only emphasizes its mandatory nature.

This mandatory language applies not only to the defendant, but also to the court. If the court finds that the response mailed by the defendant rejecting the claim is not in compliance with the reasonable investigation requirements of the statute, including review by and an affidavit from an expert, then "the court *shall* strike the defendant's pleading."

Nowhere in the statute is there a provision that would allow a defendant to delay their investigation and send their response until *after* they had already denied liability in their answer to a complaint. Nowhere in the statute is there a requirement that the plaintiff suffer prejudice as a prerequisite to sanctioning the defendant for non-compliance. The statutory language is clear and unambiguous, and as such, it must be given its plain meaning. *Rollins v. Pizzarelli*, 761 So.2d 294, 299 (Fla. 2000).

c. The Defendant's argument that he had until the expiration of the statute of limitations to complete the presuit investigation is without merit.

In the instant case, it is undisputed that the Defendant's expert did not review the medical records during the significantly extended presuit period. The

statute did not provide the trial court with discretion to find that the defendant was in compliance with the reasonable investigation requirements. As a matter of law, he was not. And under those circumstances, Section 766.206(3) does not provide the trial court with *any* discretion as to the sanction required - - "the court ***shall*** strike the defendant's pleading." This was not a situation where there was evidence in the record that would excuse the defendant's insurer's noncompliance. The only record *evidence* is that the insurer simply stopped responding.

Dr. Dickens' argument below was that even though he failed to obtain expert review during the presuit period, he did obtain a review and respond before the statute of limitations ran. Although the District Court appeared to be comfortable with the trial court's refusal to sanction, it may have been less so with respect to the Defendant's argument, because it failed to include any of the relevant facts on this issue in the opinion. This is likely because the argument is ludicrous on its face.

First, whether Dr. Dickens complied with the statutory requirements during the plaintiff's statute of limitations is completely irrelevant. As explained by the Florida Supreme Court in *Major League Baseball v. Morsani,* 790 So.2d 1071, 1074-75 (Fla. 2001), the "prime purpose underlying statutes of limitation is to protect defendants from unfair surprise and stale claims. . . . '[T]hey afford parties needed protection against the necessity of defending claims which, because of their

antiquity, would place the defendant at a grave disadvantage.'" They do not, however, increase the timeframe putative medical malpractice defendants are provided by the statute to complete their presuit obligations.

Plaintiffs are in a completely different position. Because, at common law, there was no fixed time for the filing of lawsuits, statutes of limitation restrict the right of a plaintiff to bring suit. It thus makes perfect sense that a plaintiff in a medical malpractice case does not artificially reduce the time he has to bring his claim merely by the filing of presuit. Instead, he should have as long as the law allows under the statute of limitations to comply with the presuit statute, which places yet another restriction on his rights.

All of the cases relied on by the defendant below discuss the ability of a *plaintiff* to comply with presuit within the statute of limitations when their initial presuit was defective. None of them stand for the proposition that a defendant is entitled to thwart the legislative intent to encourage the early determination of the merit of these claims by simply refusing to conduct an investigation until the *plaintiff's* statute of limitations is about to run. Under the Defendant's logic, if a plaintiff filed presuit the day after the death of his spouse, the defendant would not have to conduct a reasonable investigation into the merits of the claim until almost two years had passed, because the investigation would at least have occurred prior to the expiration of the *plaintiff's* statute of limitations. There is no basis for such

an absurd result in the statute or in the case law.

The intent behind the statute, as clearly stated in § 766.201, is to obtain an early determination of a claim's merits, and to encourage prompt resolution of such claims. Here, the Defendant failed to have an expert evaluate the claim prior to answering the complaint, which means that when he denied liability, he had no idea whether his defense was meritorious or frivolous. If defendants are not required to comply with the clear mandates of the statute, then defendants have no incentive to actually evaluate claims during the presuit period. They can simply wait to see if a plaintiff bothers to file a lawsuit and then have the claim reviewed, which completely defeats the purpose of the statute, and makes it solely an obstacle to prevent plaintiffs from reaching the courthouse, but places no commensurate burden on defendants.

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court quash the District Court's decision in part, disapprove *Ewing v. Sellinger*, and remand to the district court with directions to reverse the defendant's judgment and order a new trial. Additionally, if this Court determines that the Defendant's failure to comply with his presuit obligation merits the sanction of the striking of his pleadings, this Court should remand with directions to order a new trial on damages only.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing electronically served this 29th day of **July, 2013**, to: **NANCY W. GREGOIRE, ESQ.**, Kirschmaum, Birnbaum, et al. *(Attorneys for Respondent)* , 1301 East Broward Blvd., Suite 230, Fort Lauderdale, FL 33301 (gregoirecourt@kblglaw.com); and **GEORGE A. VAKA ESQ.** and **NANCY L. LAUTEN, ESQ.,** Vaka Law Group, P.L., 777 S. Harbour Island Blvd., Suite 300, Tampa, Florida 33602 (gvaka@vakalaw.com; nlauten@vakalawgroup.com) (*Attorneys for Amicus Curiae Florida Justice Association*).

Respectfully submitted,

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CERTIFICATE OF FONT SIZE AND PITCH

WE HEREBY CERTIFY that the above and foregoing Appellant's Initial Brief is typed in Times New Roman, 14pt. font.

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