Electronically Filed 10/07/2013 03:39:35 PM ET

RECEIVED, 10/7/2013 15:43:39, Thomas D. Hall, Clerk, Supreme Court

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 REPLY BRIEF ON THE MERITS

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

EATON & WOLK, PL
BY: DOUGLAS F. EATON
FBN: 0129577
Attorneys for Petitioner
One Biscayne Tower, Suite 3100
2 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 249-1640
Telecopier: (786) 221-2009
Email: deaton@eatonwolk.com

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page

AUTHORITIES

I. INTRODUCTION

In his Answer Brief, the Defendant makes some unexpected but important concessions that render much of the dispute in this case moot. First, the Defendant concedes that *Ewing v. Sellinger*, 758 So.2d 1196 (Fla. 4th DCA 2000) was wrongly decided:

> *Muñoz* and *Sta-Rite* hold that [the testimony of the subsequent treater] "cannot be used to break the causal chain as a matter of law." Dr. Dickens agrees, which may be the fundamental problem with *Ewing* and is the difference between it and *Goolsby* and *Muñoz*. (AB36-37)

The Defendant reiterates his agreement two pages later when he states, "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." (AB39)

Finally, the Defendant "does not disagree" that a "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 specialty that the subsequent treater's testimony would meet the standard of care.'" (AB40)

These are three of the central issues on appeal. Yet despite these concessions, the Defendant still insists that his closing argument was not reversible error. What the Defendant fails to recognize, however, is that if *Ewing* was wrongly decided, then his counsel's closing argument was a misstatement of the law that merits a new trial. We need look no further than the Fourth District's opinion here to reach this conclusion. The Fourth District ruled that "We find that

under current law in our district (*Ewing*), defense counsel's causation argument was permissible." If *Ewing* is not good law, then the closing argument was impermissible, because, as the Fourth District also noted, "It is … improper for counsel to misstate the law during closing argument. See *City Provisioners, Inc. v. Anderson*, 578 So. 2d 855 (Fla. 5th DCA 1991)" By conceding *Ewing's* invalidity, the Defendant has conceded the Plaintiff's entitlement to a new trial.

II. ARGUMENT

A. THE STANDARD OF REVIEW AND THE PROPER VIEW OF THE EVIDENCE.

The Defendant argues that this Court must review the propriety of the offending closing argument under an abuse of discretion standard and cites to *Murphy v. International Robotic Systems, Inc.* 766 So.2d 1010 (Fla. 2000). *Murphy* bears no relationship to the instant case. *Murphy* sets forth the standard for determining whether or not unobjected-to improper closing argument constitutes fundamental error so as to require reversal. The questions here are entirely different: Did the Defendant's counsel make misstatements of law in making his *Ewing* causation argument and in arguing that Plaintiff's case was deficient because she failed to prove the negligence of Dr. Pasarin?

Both are pure questions of law, which are subject to *de novo* review. While there is a rather surprising lack of clarity in the case law on this particular question, the application of general principles of appellate review yields the correct answer on the standard. As explained in *State v. Burnette*, 881 So.2d 693, 694 (Fla. 1st DCA 2004), "The standard of review in this case is de novo because the trial court granted a new trial based on a matter of law, not for lack of sufficiency of the

evidence." *See also Geibel v. State*, 817 So. 2d 1042, 1044-45 (Fla. 2d DCA 2002) ("Although appellate courts generally review a trial court's ruling on a motion for new trial based upon an abuse of discretion standard, a trial court's failure to apply the correct legal standard to a motion for new trial is a legal error subject to *de novo* review.

And as the District Court noted in its opinion, in discussing a court's decision whether or not to give a specific jury instruction, "a trial court's discretion in this area is limited by case law," so the decision is "reviewed under a mixed standard of *de novo* and abuse of discretion." *Saunders v. Dickens*, 103 So. 3d 871, 878-79 (Fla. 4th DCA 2012) That is, the question of whether the instruction is a correct statement of the law is reviewed *de novo*, and whether or not it was appropriate to give a legally correct instruction is reviewed for an abuse of discretion. The trial court is given no deference when deciding questions of law. See *Van v. Schmidt*, 38 Fla. L. Weekly S618, at *14 (Fla. 2013). This Court reviews *de novo* the question of whether the arguments made below were improper statements of the Plaintiff's burden of proof.

And because it does not appear that any Court has adopted a rule that a misstatement of the law in closing argument is reversible *per se*, the trial court's decision is also subject to the harmless error standard.[1] *See Clewis v. State*, 605

[1] We have similarly been unable to find any cases that hold that a misstatement of the law on the burden of proof is harmless error. Even the Fourth District's opinion here seems to concede that an improper statement of the law would require reversal. The cases it cites support that conclusion. *See Paul v. State*, 980 So. 2d 1282, 1283 (Fla. 4th DCA 2008) and *City Provisioners, Inc. v. Anderson*, 578 So.

So.2d 974, 975 (Fla. 3d DCA 1992). Because it is subject to this standard, this Court is obligated to review the entire record, not, as the Defendant has repeatedly and incorrectly asserted, only the evidence favorable to the prevailing party. *See Special v. Baux*, 79 So. 3d 755, 771 (Fla. 4th DCA 2011), *review granted*, 90 So. 3d 273 (Fla. 2012) ("The approach to harmless error analysis in a civil case should begin with an examination of the entire record by the appellate court, including a close examination of both the permissible evidence upon which the jury could have relied and the impermissible evidence which may have influenced the verdict.") It is for this reason that we presented both sides of the evidence in our initial brief.

While the Defendant doesn't characterize it as such, he appears to be making a harmless error argument when he repeatedly yet incorrectly asserts that we failed to proffer evidence on a key issue of causation – namely that a correct diagnosis of cervical cord compression would have resulted in cervical surgery during July 2003. We would be remiss if we failed to rebut this assertion even though it is the Defendant's burden to prove "that it is more likely than not that the [complained-of] error did not influence the trier of fact and thereby contribute to the verdict." *Special v. Baux* at 771.

Specifically, Dr. Dickens argues as follows:

> "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

---

2d 855 (Fla. 5th DCA 1991).

> cervical spine surgery should have been done *first* in July 2003." (AB11) (emphasis supplied)

Defendant's counsel very carefully selected the words used above to convey the impression that the Plaintiff's case was missing a crucial element of proof. However, when we actually parse the language used, we can see that the construction utilized was both disingenuous and, in fact, contradicted by both the evidence and the Defendant's own concessions.

We first address the Defendant's statement that there was no testimony from a *neurosurgeon* that cervical spine surgery should have been done in July 2003. This statement is flawed for two reasons. First, it presumes a neurosurgeon was the only competent witness who could provide this testimony. Second, it is arguably inaccurate.

First, as the Defendant noted in his answer brief, our spine surgery expert, Dr. Dan Cohen, did testify that, "Mr. Saunders should have had cervical spine surgery in July 2003."[2] (AB9). This Court, and frankly, counsel for the Defendant, are both well aware that an expert may offer testimony against a doctor of a different specialty so long as he has the "requisite education, training and experience" and practices the same surgical procedures as the specialist, even if their actual titles are different. *See Meyer v. Caruso*, 731 So.2d 118, 126 (Fla. 4th

[2] In closing argument, Defendant's counsel made a similar misstatement of the evidence: "And there exists no evidence to the contrary *other than two doctors saying*, had the film been done, the surgery would have gotten done." (AB20, T.816)

DCA 1999). The Defendant made no objection to Dr. Cohen's qualifications at trial, as there was no basis for an objection. He was eminently qualified to render an opinion on whether or not a reasonable neurosurgeon should and would have operated on Mr. Saunders' spine in July 2003.

Therefore, when Dr. Dickens' counsel used the word neurosurgeon during closing argument to imply to the jury that our case was somehow deficient for failure to provide testimony *from a neurosurgeon* as opposed to an orthopedic spine surgeon, he was once again misstating the law and deceiving the jury.

As a second point, Defendant's neurosurgery expert, Dr. Danielson, did agree that the standard of care required a neurosurgeon to operate as quickly as possible once the diagnosis of cervical cord compression had been made. (T. 266-267, 353) Since our experts contended that the diagnosis should have been made in July 2003, the Defendant's own neurosurgeon also provided the necessary testimony that a reasonable neurosurgeon would have performed neck surgery that month.

The Defendant next states, "There was no testimony from any *neurologist* that a neurosurgeon's decision on how and when to operate should be second guessed." This is simply false. While our neurology expert, Dr. Hanley, testified that he would defer to a surgeon's decision on the order in which to do the procedures, he specifically testified that he would *not* defer to a surgeon's decision to not operate on the neck and would have instead found a different neurosurgeon who would have performed the surgery. (T.214-215) Dr. Dickens even

acknowledges this testimony in his answer brief. (AB11)

Defendant finally states that there was no testimony that the cervical spine surgery should have been done *first* in July 2003, as opposed to second, after lumbar surgery. No such testimony was required because the order of the procedures was irrelevant. It was only necessary to establish that the cervical surgery should have been performed in July 2003. As the Defendant previously noted, Dr. Cohen testified that "Mr. Saunders should have had cervical spine surgery in July 2003," thus meeting that requirement. (AB9) The Plaintiff presented sufficient competent evidence to support a Plaintiff's verdict. Defendant has thus failed to establish that, more likely than not, the erroneous closing argument was harmless.

B. JURISDICTION WAS CORRECTLY GRANTED IN THIS MATTER. THE FOURTH DISTRICT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THE FIFTH AND THIRD DISTRICTS.

Defendant's arguments on the propriety of this Court's decision to accept jurisdiction were *not* "unavailable to him during the jurisdictional briefing" (AB28 FN3); they are, in fact, the very same arguments raised in the jurisdictional brief. Since this Court has already rejected those arguments by accepting jurisdiction, we won't waste space responding to them here.

C. IF A COURT CANNOT RULE FOR THE DEFENDANT BASED SOLELY ON THE TESTIMONY OF THE SUBSEQUENT TREATING DOCTOR, THE JURY CANNOT FIND FOR THE DEFENDANT BASED SOLELY ON THE TESTIMONY OF THE SUBSEQUENT TREATING DOCTOR.

The central disagreement in this case is whether the prohibition stated in

Muñoz and *Goolsby* – that the exculpatory testimony of a subsequent treating physician cannot sever the causal chain – applies to the jury in the same manner as it applies to the trial court. We contend that it does, and the Defendant contends that it does not. The Defendant argues that the instant case is distinguishable from *Muñoz, Ewing,* and *Goolsby*, because in each of those cases the trial court disposed of the case as a matter of law where here, a jury rendered a defense verdict.[3]

The procedural posture of the case is simply not relevant. If, as the Defendant concedes, he "may not rely on the subsequent treating physician's testimony alone to relieve himself of liability," then it is both impermissible to tell the jury that they may find for the Defendant based on that testimony alone, and impermissible for the jury to reach a verdict for the defendant based on that testimony alone.

Similarly, if the Plaintiff "[was] not obliged to prove that the [subsequent treating physician] would not have been negligent [if properly informed], or the precise steps the [subsequent treating physician] would have taken to insure the health of her patient," (*Goolsby* at 1004) then it is both impermissible to tell the jury the Plaintiff was obliged to prove that the subsequent treating physician would have performed neck surgery even though he testified he would not have, and impermissible for the jury to reach a verdict for the Defendant because they felt the

3 This argument is undermined by the procedural posture of *Sta-Rite Industries, Inc. v. Levey,* 909 So.2d 901 (Fla. 3rd DCA 2005), which was an appeal of a Plaintiff's jury verdict. Defendant's argument that the testimony of the property manager cut off the causal chain was rejected by the Court on the authority of *Munoz*.

Plaintiff failed to meet this non-existent obligation.

The Defendant repeatedly protests in his brief that his counsel didn't make these arguments in closing, in the apparent hope that if he repeats a falsehood often it enough it will become true. In one instance, he states that "he did not argue that Ms. Saunders was required to prove what Dr. Pasarin would have done."(AB34) The problem with this statement is that he did:

> 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. You *must* determine that that's the case or otherwise there is no legal cause. (T.798) (emphasis supplied)

If we break this argument down into its component parts and compare them to the argument the Defendant claims he did not make, we can see they align perfectly.

1. The Plaintiff's claim must be = *Ms. Saunders was required to prove...*

2. That Dr. Pasarin would have operated on Mr. Saunders neck in July = *What Dr. Pasarin would have done*.

Defendant's counsel reiterated that the jury "must" determine that Dr. Pasarin would have operated, otherwise there was no legal cause. While the English language is sometimes subtle and open to interpretation, this is not one of those times. Defendant's counsel argued that the Plaintiff had to prove that Dr. Pasarin would have acted differently if properly warned -- the very argument prohibited by *Goolsby* and *Muñoz* . See *Muñoz* at 857 ("What the [non-party] 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.")

The Defendant insisted to the jury that we had the obligation to prove something we did not have an obligation to prove in order to prevail. Since *Ewing* was wrongly decided, as conceded by the Defendant, this argument is a misstatement of the law, and would have undoubtedly misled the jury, which entitles the Plaintiff to a new trial.

D. THE ADMISSIBILITY OF DR. PASARIN'S TESTIMONY.

At various points in the Defendant's brief, he notes that we did not object below to the admissibility of Dr. Pasarin's testimony and therefore any argument made here regarding its admissibility on remand should not be considered.

It is true that we did not object to the admissibility of the testimony. We had no legal basis to do so, as *Ewing* was controlling in the Fourth District and even *Muñoz* held that the testimony, while speculative, is not inadmissible. We are not here requesting relief from the unobjected-to admission of Dr. Pasarin's testimony. We are requesting relief for the manner in which this testimony was used in closing argument. We raised the issue of the admissibility of Dr. Pasarin's testimony here because this Court has more to do then simply adopt one ruling and quash another. This Court will likely want to provide guidance for practitioners as to the effect of this ruling in future cases and address the uncertainties extant in some of the existing decisions. We pointed out these flaws at length in our initial brief and will not belabor them here.

Depending on what rule of law this Court adopts, Dr. Pasarin's testimony

may be deemed inadmissible, either because it is speculative; because it is incompetent due to its inherent bias; or because its probative value is substantially outweighed by its prejudicial value. Defendant has cited to no authority, and we are unaware of any, that would restrict the type of relief this Court affords an Appellant, as long as that relief flows from a properly preserved claim of error.

In the event this Court agrees with *Muñoz* that this testimony is admissible despite its flaws, we were pleased to see that Dr. Dickens agrees with us that the testimony is inherently biased. He further agrees that a jury instruction regarding that bias would be appropriate as long as the jury is instructed that the presumption only applies to the former defendant and not the experts. (AB41) We find that proposal perfectly reasonable should the Court adopt this position.

We do, however, disagree with Defendant's suggestion that we had an obligation to "explore the parameters" of exposing the inherent bias of Dr. Pasarin's testimony. There were no parameters to explore. Florida Statute §768.041(3) makes it abundantly clear that admission of evidence of a settlement, "even to attack the former defendant's credibility, is clear error and requires reversal." *Ellis v. Weisbrot*, 550 So.2d 15, 16 (Fla. 3d DCA 1989)

Setting that prohibition aside for a moment, the Defendant's suggestions for "leveling the playing field" are factually inaccurate. The Defendant incorrectly states that "Ms. Saunders never subpoenaed Dr. Pasarin for trial, or took an updated deposition after his settlement or sought any other way to level the playing field with respect to his deposition testimony." (AB41) That is simply untrue. In

fact, Dr. Pasarin was deposed twice - once before settlement by the Plaintiff and once after settlement by the Defendant, who took it by video to preserve his testimony for trial. The trial testimony video was played in its entirety for the jury. Some parts of his discovery deposition were also read to the jury. Dr. Pasarin was an adverse witness. It would make no sense at all for Plaintiff to subpoena him live at trial, and present his harmful testimony in Plaintiff's case in chief without any means to expose its bias. The only way to "level the playing field" would be to disclose the fact that he had a reason to not tell the truth because he was a former Defendant in the case, which, of course, we were prohibited by law from disclosing.

The other way to level the playing field is to instruct the jury that the testimony is presumed to be biased, and we appreciate the Defendant's concession that this presumption is appropriate under certain circumstances. (AB41) We also appreciate the Defendant's concession that the Defendant cannot rely on the subsequent treater's testimony alone to relieve him of liability but must present substantial competent expert testimony demonstrating that the subsequent treater's testimony met the standard of care. Implementing these two proposals will fix a glaring problem that has existed since *Ewing* was decided.

E. THE DEFENDANT MADE AN IMPROPER BURDEN SHIFTING ARGUMENT.

On this issue, the Defendant once again argues that his counsel did not say in closing what his counsel said. He writes, "Dr. Dickens never argued that [Ms. Saunders] had any burden to prove that Dr. Pasarin was negligent." (AB39 and

AB20) Although we believe that the falsity of this statement is by now self-evident, we will defer to the Court's interpretation of the offending argument, which is set forth on page 40 of our initial brief. Because, as the Defendant concedes, "whether or not Dr. Pasarin was correct or negligent in his decision was not [Ms. Saunders'] burden of proof and was irrelevant on Dr. Dickens' potential liability," (AB41), we believe the offending argument was improper because it implied that the Plaintiff failed to meet an obligation that the Plaintiff did not have. On its own, we believe it would require a new trial. But when considered in conjunction with the *Ewing* argument, there can be no doubt that the jury was thoroughly misled on the Plaintiff's burden of proof.

F. THE TRIAL COURT WAS WITHOUT DISCRETION TO FIND THAT DR. DICKENS TIMELY COMPLIED WITH THE PRESUIT REQUIREMENTS AND HIS PLEADINGS SHOULD HAVE BEEN STRICKEN.

At every stage of this proceeding, Defendant has misstated the undisputed record evidence on this issue. Unfortunately, this pattern has been continued here, and we are forced to waste precious space correcting the record. In order to remove all doubt on this important issue, we are providing a supplemental appendix which contains the record evidence on this matter along with the hearing transcript. The specific misstatement has varied from brief to brief, but it generally involves an accusation that the Plaintiff failed to provide medical records that the Defendant needed to complete his presuit investigation.

In the Defendant's answer brief, the misstatement takes the following form: "Because the Saunders never provided [the Defendant's adjuster] with all of the

requested x-rays, the presuit period remained open." (AB45) This is a blatant falsehood, and the Defendant knows it, because he conceded in his Fourth District answer brief that the undisputed evidence demonstrated that the adjuster was notified on January 27, 2006 that the x-rays were available for her to pick up whenever she wanted. (4TH DCA AB at 10) The evidence in question, an email reminding the adjuster that the x-rays were available for pick-up from a copy service at her convenience, is attached as page SA001 of our supplemental appendix.[4] The undisputed record evidence is that the adjuster never responded to this e-mail or any others over the next two months. (SA 003-007) The undisputed record evidence is that Defendant's counsel first provided the medical records, *and films*, to their Expert to review in early May, over three months after the adjuster was reminded about the availability of the films. (SA 044)[5] No further records were requested. The denial letter was issued on May 30, 2006, and the expert's affidavit attached to it indicated that he had reviewed the medical records *and "all pertinent films,"* so it is clear that someone representing the Defendant did pick them up. (SA 015) It is thus undisputed that the Defendant had everything he needed for his expert to review the claim as of January 27, 2006, *because no additional records or films changed hands after that date.*

And not only is there no record evidence to suggest that the Plaintiff somehow

[4] Rather than have the Court hunt through the record, we have collected the relevant documents in this supplemental appendix for the convenience of the Court.

[5] Defense counsel's admissions related to this issue are printed in full in our Initial Brief at 43.

impeded the Defendant's ability to investigate this claim, there was absolutely no argument made at the trial level that this was the case, either in the Defendant's response to Plaintiff's Motion for Sanctions, (SA 018-025) or at the hearing on the motion. (SA 026-052) The *only* argument made below, and thus, the only argument preserved for appeal, was that the May 30, 2006 denial letter was timely because it was sent before the expiration of the statute of limitations. (SA 021-022,034-035,043-044)

Thus, the only question before this Court is whether or not the expert review and issuance of the affidavit was timely under the statute. And that question is reviewed not for an abuse of discretion but *de novo*. A trial court has no discretion to disregard or re-write statutory time limits. The denial letter was sent on May 30, 2006, *241* days after presuit was initiated, *123* days after we provided notice that the x-rays were available for pickup, *93* days after the expiration of the 30 day extension we agreed to provide after the films were made available, and *46* days after suit was filed. The Defendant's response is either untimely, or the statute does not mean what it says and a Defendant is entitled to ignore its deadlines with impunity, as long as it completes its presuit investigation before the expiration of the statute of limitations.

This is a binary choice. There is no third option. And truly, for the reasons set forth in our initial brief, there really is only one choice. To accept the Defendant's

argument requires that the statute be ignored or re-written, something this Court cannot do. And because the compliance was untimely, the statute required the trial court to strike the Defendant's pleading.

Plaintiff respectfully request the relief requested in the Conclusion stated in her initial brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing electronically served this ___ day of **September, 2013**, to: **NANCY W. GREGOIRE, ESQ.**, Kirschbaum, 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,

EATON & WOLK, PL
One Biscayne Tower, Suite 3100
2 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 249-1640
Telecopier: (786) 221-2009
Email: deaton@eatonwolk.com

By: /s/ Douglas F. Eaton

DOUGLAS F. EATON
FBN 0129577

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.

By: /s/ Douglas F. Eaton
DOUGLAS F. EATON
FBN# 0129577