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IN THE SUPREME COURT OF FLORIDA

JOSEPH S. CHIRILLO, JR., M.D.,
JOSEPH S. CHIRILLO, M.D., P.A.,
and MILLENNIUM PHYSICAN
GROUP, LLC,

Case No.: SC14-898
DCA Case No.: 2D12-5244

Petitioners,

v.

ROBERT GRANICZ, as Personal
Representative of the Estate of
JACQUELINE GRANICZ, Deceased,

Respondent.
_____________________________________/

RESPONDENT'S BRIEF ON JURISDICTION

On Discretionary Review from the District Court of Appeal,
Second District

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STATEMENT OF THE CASE AND FACTS

The Facts

Jacqueline Granicz was a fifty-five year old mother of two and the wife of Respondent Robert Granicz, the Plaintiff and Appellant below. Joseph S. Chirillo, Jr., is a board certified family practitioner who is trained to treat patients with depression and routinely does so as part of his practice.

Dr. Chirillo began treating Jacqueline Granicz for depression in 2005, when he prescribed an antidepressant known as Effexor. She had a history of depression and had previously taken Prozac. On October 8, 2008, Mrs. Granicz called Dr. Chirillo and spoke to his medical assistant. According to the note the medical assistant left for Dr. Chirillo, Mrs. Granicz had stopped taking Effexor, had not "felt right since late June-July," cried easily, was under mental strain, was not sleeping well, was taking more sleeping pills, and was experiencing gastrointestinal problems.

Dr. Chirillo was aware that patients who stopped taking Effexor abruptly had an increased risk of suicide, and that Mrs. Granicz' complaints about crying, mental strain and insomnia were new signs of worsening depression. Yet Dr. Chirillo made no attempt to talk to or see her. Instead, he prescribed a different antidepressant, Lexapro, which would have no therapeutic effect for weeks and was itself known to produce suicidal ideations.

Jacqueline Granicz overdosed on Lexapro and hanged herself the following afternoon.

The Case

Respondent, as Personal Representative of his wife's estate, filed suit against Dr. Chirillo in September of 2010. Petitioners moved for summary judgment in August of 2012 on the ground that Dr. Chirillo owed no duty to Jacqueline Granicz as a matter of law. Respondent provided the trial court with the depositions of two qualified experts who testified that, given the changes in Mrs. Granicz's condition, the standard of care required Dr. Chirillo to examine her to determine if she was having suicidal thoughts, and that, more likely than not, the examination would have revealed those ideations and permitted intervention. Petitioners provided the trial court with no expert testimony.

Focusing on the fact that Mrs. Granicz never spoke of suicide or expressed any suicidal ideations, that she had never attempted suicide, and that nobody in the family saw it was coming, the trial court granted summary judgment on the basis that Dr. Chirillo had no duty to prevent her unforeseeable suicide.

Respondent appealed, arguing that the trial court erred in focusing on whether Jacqueline Granicz's suicide was foreseeable – a causation question for the jury to decide, and one on which he had presented the only expert testimony – rather than on whether Dr. Chirillo had a duty to treat his patient in accordance

with the prevailing standard of care based on the foreseeable zone of risk that exists in a doctor-patient relationship. The Second District agreed and reversed:

> By focusing on whether Jacqueline's suicide was foreseeable, the trial court analyzed Dr. Chirillo's duty under the standard for proximate cause. The proper inquiry that the court should have made to determine the legal issue of duty "is whether the defendant's conduct created a foreseeable zone of risk, *not* whether the defendant could foresee the specific injury that actually occurred."

Opinion at 6 (quoting *McCain v. Florida Power Corp.,* 593 So.2d 500, 504 (Fla. 1992)).

The Second District also certified conflict with the First District's decision in *Lawlor v. Orlando,* 795 So.2d 147 (Fla. 1st DCA 2001). Respondent filed its Notice to Invoke Discretionary Jurisdiction on May 6, 2014.

SUMMARY OF ARGUMENT

Although the Second District's certification of conflict between its decision and the First District's decision in *Lawlor* gives the Court discretionary jurisdiction, closer examination of the two cases demonstrates that no direct conflict exists.

The suicide in *Lawlor* involved a "former patient" who had not seen his psychotherapist in months and had experienced several significant, intervening life events the defendant was unaware of. The question thus became whether the defendant had some ongoing supervisory duty, custodial or otherwise. The First

District held that she did not, drawing on an earlier Florida decision holding that healthcare providers have no duty to commit, hospitalize or otherwise involuntarily take an outpatient into custody. Dr. Chirillo, on the other hand, was treating Jacqueline Granicz for depression on an ongoing basis, and she called seeking help for worsening symptoms the day before she committed suicide. There was no question of custodial supervision. The question was whether Dr. Chirillo, like physicians in most circumstances, had a duty to treat her according to prevailing standards of care. In keeping with existing law, the Second District held that he did.

Both courts agreed on the rules for determining the existence of a duty under *McCain*, and both courts considered the claimant's expert testimony in their analysis. Given the different operative facts and duty questions, that they reached different results is no surprise, much less a direct conflict.

ARGUMENT

THERE IS A NO DIRECT CONFLICT BETWEEN THE SECOND DISTRICT'S DECISION IN THIS CASE AND THE FIRST DISTRICT'S DECISION IN *LAWLOR V. ORLANDO*

Notwithstanding the Second District's certification of conflict, there is no direct conflict between its decision in this case and the First District's decision in *Lawlor*. First, the two decisions involve significantly different operative facts and rest on different legal principles.

In terms of the operative facts, the suicide in *Lawlor* involved a "former patient" who had not seen the defendant in more than three months, and had experienced a number of relevant, intervening life events. 795 So. 2d at 147,149. As the trial court in *Lawlor* described it:

> [E]ven if Dr. Orlando's [prior] treatment was found to be sub-standard, she did not have a continuing duty toward the patient who committed suicide more than three months after the last visit and who had experienced a number of intervening life circumstances following the last visit to Dr. Orlando.

795 So. 2d at 149. Summary judgment was granted on the ground that the defendant's duty had "lapsed at the time of the suicide." *Id.*

Here, there was nothing "former" or "lapsed" about the relationship between Dr. Chirillo and Jacqueline Granicz. He was treating her for depression on an ongoing basis, and "treated" her the day before her suicide. For there to be a direct conflict, Mrs. Granicz would have had to commit suicide without contacting Dr. Chirillo for months about her intervening symptoms. But she did; she told his medical assistant that she had quit taking her medication, she related new symptoms of worsening depression, and she asked for help. So the forseeable zones of risk were entirely different.

The difference led the First District to a different legal principle. Citing *Paddock v. Chacko,* 522 So.2d 410 (Fla. 5th DCA 1988), where the Fifth District held that a doctor had no duty to commit or involuntarily take an outpatient into

custody, the First District declined to extend "the duty of custodial supervision and care to an outpatient relationship between a psychotherapist and a patient." 795 So.2d at 148. *Paddock* played no role in the Second District's decision in this case, and there was no issue concerning whether Dr. Chirillo had a duty to monitor, supervise, hospitalize, commit or take Mrs. Granicz into custody. The issue was whether he had a duty to provide treatment that comported with the prevailing standard of care when she sought it, a duty uniformly recognized in Florida cases, including in the context of outpatient suicide. *Perez v. United States,* 883 F. Supp. 2d 1257, 1259 (S.D. Fla. 2012); *Estate of Rotell,* 38 So.3d 783, 789 (Fla. 2d DCA 2010); *Sweet v. Sheehan,* 932 So. 2d 365, 368 (Fla. 2d DCA 2006)

Indeed, *Paddock*, which provided the basis for the First District's decision in *Lawlor*, recognized that these are separate duty questions. It affirmed the trial court's judgment notwithstanding the verdict for two reasons. One, upon which *Lawlor* relied, was that a psychotherapist had no duty to provide custodial supervision or care to an outpatient. The other was that the evidence failed to support the verdict based on the outpatient care the defendant actually did provide, an implicit acknowledgment that there was a duty to provide it. 522 So.2d at 417-418.[1]

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[1] Respondents also suggest in a footnote that the Third District rejected the duty to provide competent care to outpatients at risk for suicide in *Garcia v. Lifemark Hosps. of Florida*, 754 So.2d 48 (Fla. 3d DCA 1999). Not so. The defendant in

Second, the only intersection between the Second District's decision here and the decision in *Lawlor* involves the duty analysis prescribed by this Court in *McCain*. Both the First and Second Districts agree on the legal principles at work. *Opinion* at 5; 795 So.2d at 148. Any "conflict" must thus be teased out of the courts' respective applications of these principles to disparate facts, an iffy proposition. In this case, big picture foreseeability was obvious. Doctors can foresee that failing to treat their patients in a timely and proper fashion puts them in harm's way, *i.e.*, creates a foreseeable zone of risk, and doctors treating patients for depression can foresee that the risk includes suicide. So the Second District correctly held that Dr. Chirillo had a duty to treat Jacqueline Granicz in accordance with the prevailing standard of care – hardly a startling proposition, and one already recognized by Florida case law– and that the trial court erred by basing its determination that no duty existed on whether Mrs. Granicz' specific suicide was foreseeable – a question that, as this Court cautioned in *McCain*, is for the jury to decide in the context of causation.

Garcia was an emergency room physician who saw the decedent twice – once for an accidental post-surgical overdose of pain medication, and once for injuries suffered in a car accident. The plaintiff contended that the defendant had a duty to do a psychological work up and treat the decedent's psychiatric ailments. The Third District declined to impose the duty for reasons having no bearing on this case: "[t]he nature of an emergency room physician's job is to treat the patient for the emergency which brought them there, and move on … . [There is no] duty to treat each of them for every conceivable medical condition that they might have." *Id.* at 49.

Zone of risk foreseeability was less obvious in *Lawlor*, where the defendant's treatment ended more than three months before the decedent committed suicide, the decedent had experienced a number of significant, intervening life events, and the duty the plaintiff sought to impose was a continuing one to safeguard the patient. In analyzing the foreseeable zone of risk, the First District also focused on whether the decedent's particular suicide was foreseeable given that, at the time the defendant last saw him, he had never mentioned, threatened or attempted suicide, and suicide screening indicated that he was not at risk. Under the duty analysis prescribed by *McCain*, these would ordinarily be facts going to causation rather than duty, and that drew the Second District's criticism: "As did the trial court in this case, the First District determined that the psychotherapist did not have a legal duty to prevent the patient's suicide because the suicide was unforeseeable." *Opinion* at 7. Whether, given the unique facts and duty at issue in *Lawlor,* those specifics should have been considered in the context of zone of risk forseeability, or whether considering them merged the duty and causation analyses into a hybrid foreseeability analysis as the Court warned against in *McCain* – is an open question, but the point here is that it is not one that goes to the facts or issues in this case or creates direct conflict. The point is demonstrated by the fact that the rule emerging from the First District's duty analysis in *Lawlor*, hybrid or otherwise, could comfortably be applied here:

> *To the extent that the patient continues to receive care from a provider, the duty to render a proper diagnosis is ongoing*; however, a provider is not necessarily liable for the harm to a patient as a result of an earlier diagnosis when it is clear that psychiatric care has been terminated. For example, a mental healthcare provider does not owe a duty to a patient who commits suicide several months after treatment has been completed, where an examination of the patient during care revealed no sign of suicidal tendencies, there was no evidence of prior suicide attempts, and a suicide screening showed no risk of suicide.

Perez, 883 F. Supp. 2d at 1286 (interpreting *Lawlor*) (emphasis added).

Finally, Petitioners also argue that the decision here conflicts with *Lawlor* regarding the proper role of expert testimony in the duty analysis – that the Second District exclusively relied on and “heedlessly deferred” to it; whereas the First District conducted the requisite independent legal analysis and rejected the plaintiff’s expert testimony. Petitioners mischaracterize what both courts did.

The duty here came straight from the nature of the doctor-patient relationship and existing Florida law, not from the testimony of Respondent’s experts. *Opinion* at 6. It was a product of the most general duty principle of all, “that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others.” *McCain*, 593 So.2d at 503. Treating patients does that.

Petitioners take the Second District to task for adding that “specific aspects of this duty...[are] generally resolved in medical malpractice cases by expert

testimony." *Opinion* at 6 (citations omitted). But that is an accurate observation. What a doctor's overarching duty of due care requires him to do in a given situation, i.e. what the standard of care requires, is generally a matter for expert testimony, and it may have a bearing on the existence of duty. As this Court has pointed out, the duty determination requires a factual inquiry, and the same facts may be relevant to both duty and proximate cause. *McCain*, 593 So.2d at 502, 502 n.1.

Lawlor also recognized that facts supporting "forseeability can be relevant to both the element of duty and the element of proximate causation," 795 So.2d at 148 (citations omitted), and it considered the expert testimony the plaintiff presented. The First District did not conclude it had no place in the analysis, but rather that it was "insufficient to impose a legal duty … in light of other facts and circumstances" and the duty the plaintiff sought to impose. 795 So.2d at 148. As already discussed, however, the facts, the circumstances and the nature of the duty at issue in *Lawlor* were materially different than those here, so that any difference in the impact expert testimony may have had in the duty analysis in the two cases creates no direct conflict.

CONCLUSION

For the above reasons, it is respectfully submitted that the Court should decline to exercise its discretionary jurisdiction to review the decision below.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via electronic mail to: Scott A. Cole, scott.cole@csklegal.com, Daniel M. Schwarz, Daniel.schwarz@csklegal.com, Cole Scott & Kissane, P.A., Counsel for Petitioners, Dadeland Centre II, Suite 1400, 9150 South Dadeland Boulevard, Miami, FL 33156 this 9th day of June, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a), Fla. R. App. P., undersigned counsel hereby certifies that this brief is submitted in Time New Roman 14 point font.

By: */s/James B. Tilghman*