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IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

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

Respondent.

/

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

PETITIONERS' BRIEF ON JURISDICTION

On Review from the District Court of Appeal, Second District Case No. 2D12-5244

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STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

The Respondent, ROBERT GRANICZ, as Personal Representative of the Estate of JACQUELINE GRANICZ ("Respondent"), the plaintiff in a medical malpractice action who sought damages from Petitioners, JOSEPH S. CHIRILLO, JR., M.D., JOSEPH S. CHIRILLO, M.D., P.A., and MILLENNIUM PHYSICIAN GROUP, LLC ("Dr. Chirillo"), following his spouse's suicide, appealed a summary final judgment entered in favor of the Petitioners, the defendants below, to the Second District Court of Appeal. In a five-page order, the trial court had thoroughly analyzed the events leading to Mrs. Granicz's suicide and the lack of evidence as to whether there were any indicia to Petitioners and others that Mrs. Granicz intended to commit suicide. The trial court concluded that "[t]o hold that Dr. Chirillo had a duty to prevent the suicide of an outpatient which, by the record evidence including testimony of Plaintiff's experts, was not foreseeable, would be contrary to the laws of this state." *Opinion*, at 5; (A3:5).

On appeal, the district court reversed the summary final judgment entered in Dr. Chirillo's favor on the ground that the Respondent provided expert testimony regarding the standard of care for a primary physician when a patient being treated for depression calls the physician's office and complains of certain symptoms. The

district court deferred to the standard of care opinion of Respondent's experts and did not conduct its own foreseeability analysis as it pertained to Dr. Chirillo's duty of care. In reversing, the district court certified conflict with *Lawlor v. Orlando*, 795 So. 2d 147 (Fla. 1st DCA 2001), expressly disagreeing with *Lawlor* that a psychotherapist "did not have a legal duty to prevent the patient's suicide because the suicide was unforeseeable," and the *Lawlor* court's rejection, as part of its foreseeability analysis, of "the plaintiff's expert testimony setting forth the applicable standard of care, how it was breached, and how the breach proximately caused the patient's suicide." *Opinion*, at 7.

Dr. Chirillo moved for rehearing and rehearing *en banc*, and for certification of a question of great public importance. Dr. Chirillo suggested that the court overlooked pertinent facts that would have caused it to conclude that Petitioners created no foreseeable zone of risk despite the conclusion of Respondent's experts. Dr. Chirillo suggested that the Second District certify to this Court the question of whether, in a medical malpractice action, a trial court is required to defer to the patient's experts' allegations as to the standard of care, or independently examine the evidence to determine whether a physician's conduct created a foreseeable zone of risk. On April 11, 2014, Dr. Chirillo's post-opinion motions were denied.

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B. Statement of the Facts

Mrs. Granicz had a history of preexisting depression and was taking Prozac when Dr. Chirillo began to treat her in 2005. *Opinion*, at 2. Dr. Chirillo prescribed Effexor. *Id.* She stopped taking the Effexor months before her death. *Id.*

However, until October 8, 2008, the day before Mrs. Granicz's suicide, Dr. Chirillo believed Mrs. Granicz was taking the Effexor as prescribed. *Id.* On that date, Mrs. Granicz called Dr. Chirillo's office and spoke to his medical assistant. *Id.* Mrs. Granicz reported that she had not felt right since late June or July, and had stopped taking the Effexor, thinking it might be the cause of her symptoms, such as crying easily, mental strain, feeling funny for a few weeks, not sleeping well, and gastrointestinal problems. *Opinion*, at 2-3. That day (the day before Mrs. Granicz's death), after reading his assistant's note, Dr. Chirillo made samples available at his office for Mrs. Granicz of a different anti-depressant, Lexapro, and determined he would refer her to a gastroenterologist. *Opinion*, at 3.

Mrs. Granicz's daughter Renee, a nurse, spoke to Mrs. Granicz two days before her death, and Mrs. Granicz did not show any signs of being suicidal. *Opinion*, at 3. Mrs. Granicz's death by suicide was a shock to both Renee and Mrs. Granicz's husband, Respondent, who spoke to Mrs. Granicz and saw her drive out of their residential community mere hours before her suicide. *Id.*; (R.2 383-84).

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Dr. Chirillo moved for summary judgment on the ground that Petitioners owed no duty to prevent Mrs. Granicz from committing an unforeseeable suicide, while not in his control, as a matter of law. *Opinion*, at 4. Pertinent to the conflict here, in opposition to Dr. Chirillo's motion, Respondent filed transcripts of the depositions of two expert witnesses, Dr. Tonia Werner, and Dr. Michael Yaffe. *Id.* Respondent's experts testified that, "given [Mrs. Granicz's] history and the information she conveyed in her October 8th phone call, the standard of care required Dr. Chirillo to see her, assess her condition to determine if she was having thoughts of suicide, and intervene if necessary." *Id.* The experts also testified that Dr. Chirillo's failure to see Mrs. Granicz "caused her death because Dr. Chirillo would have been able to discern that she had suicidal ideations and would have intervened." *Opinion*, at 6.

Citing *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), the trial court initially found that it was required to "make some inquiry into the factual allegations of the case to determine whether a foreseeable, general zone of risk was created by the defendant's conduct." (A3:1). Thereafter, the trial court carefully analyzed both the lay and expert testimony with respect to whether Mrs. Granicz's suicide was foreseeable such as to impose a legal duty on Dr. Chirillo. (A3:1-5). Finding *Lawlor* persuasive, the trial court granted Dr. Chirillo's motion. (A3:1-5).

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As stated, the Second District reversed and remanded for trial after stating that the issue of the aspects of the duty owed by a physician to his or her patient "is generally resolved in medical malpractice cases by expert testimony" and holding Respondent's experts' testimonies sufficient to preclude summary judgment. *Opinion*, at 6-8. Dr. Chirillo thereafter filed a Notice to Invoke the Discretionary Jurisdiction of this Court, and this Brief on Jurisdiction follows.

SUMMARY OF THE ARGUMENT

The decision of the Second District irreconcilably conflicts with the earlier decision of the First District in *Lawlor v. Orlando*, 795 So. 2d 147 (Fla. 1st DCA 2001). In *Lawlor*, the First District held, consistent with *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), that the judiciary must conduct an independent foreseeability analysis, taking into account all pertinent factual allegations, when determining whether a physician owed a duty to a patient who committed suicide in a medical malpractice action. In *Lawlor*, the First District rejected the notion adopted by the Second District below that courts must heedlessly defer to the testimony of a patient's expert in determining whether, on summary judgment, a physician owed a duty of care in a particular case:

> Upon our review of the record on appeal, we see nothing other than the opinion of plaintiff's expert to indicate that the suicide of Dr. Orlando's patient might have been foreseeable. . . . We agree with the

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> trial court's finding that the opinion testimony of plaintiff's expert was insufficient to impose a legal duty on Dr. Orlando in light of other facts and circumstances in this case and in light of relevant Florida law which has not yet imposed a legal duty on a psychotherapist for the suicide of a client who is being treated in an outpatient situation.

Lawlor, 795 So. 2d at 148. By contrast, the Second District's decision below was dictated by its declared statement of law that "[t]he specific aspects of [a physician's duty of care] . . . is generally resolved in medical malpractice cases by expert testimony." *Opinion*, at 6. The Second District expressly relied only on Respondent's experts' testimony in holding that summary judgment was improper on the basis that the standard of care, as set forth by the experts, required Dr. Chirillo to personally assess Mrs. Granicz's condition. *Opinion*, at 7.

The Second District also expressly disagreed with *Lawlor* as to that court's "description of the psychotherapist's legal duty as a duty to prevent the patient's suicide." *Opinion*, at 7. *Contra Lawlor*, 795 So. 2d at 148 (noting that mere evidence of depression "does not necessarily create a foreseeable zone of risk *of suicide* for imposing a legal duty on [patient's] psychotherapist") (emphasis added). This conflict is equally important, since, as mentioned by *Lawlor*, the Second District's "description" of the legal duty at issue ignores Florida law which generally does not "impose[] a legal duty on a psychotherapist for the suicide of a client who is being treated in an outpatient situation." *Id.*

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JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that is certified to be in direct conflict with a decision of another district court of appeal. Fla. R. App. P. 9.030(a)(2)(A)(vi).

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT OF APPEAL WAS CERTIFIED BY THE SECOND DISTRICT COURT OF APPEAL AS IN DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN *LAWLOR v. ORLANDO,* 795 So. 2d 147 (Fla. 1st DCA 2001).

This Court should exercise its discretionary jurisdiction in order to resolve the certified conflict between the district court's opinion and *Lawlor v. Orlando*, 795 So. 2d 147 (Fla. 1st DCA 2001). In the decision below, the Second District held that the standard of care owed by Dr. Chirillo was established by Respondent's experts, and that the trial court therefore erred "[b]y focusing on whether [Mrs. Granicz's] suicide was foreseeable" with reference to the record evidence. The decision below further conflicts with *Lawlor* in that, in holding that the relevant physician's duty should not be described as a duty to prevent suicide, it ignores other Florida law, noted in *Lawlor*, that defines the duty as such.

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In *Lawlor*, the former patient of a psychotherapist committed suicide. *Id.* at 147-48. The trial court granted summary judgment in favor of the psychotherapist on the ground that "the suicide of a former patient was not sufficiently foreseeable to impose a duty under the circumstances." *Id.* at 147. On appeal, the First District affirmed, finding the psychotherapist owed "no legal duty under the facts of [the] case." *Id.* at 148. In explaining why summary judgment was proper, the First District explained, "[t]he necessary examination of facts, which the supreme court recognizes may be essential in determining whether or not a legal duty exists, does not make any part of the duty analysis of a jury question." *Id.* (discussing *McCain*, 593 So. 2d at 502). The court expressly approved of the trial court's "review[] of *all the supporting materials*, including the deposition and affidavit of plaintiff's expert." *Id.* (emphasis added). The court held, "[u]nder *McCain*, the trial court correctly considered all of the factual allegations in performing the foreseeability analysis as to the duty element. While there is a foreseeability analysis that would be performed by the trier of fact in regard to proximate causation, the duty analysis of the trial court must result in a finding of duty as a matter of law before the issue of proximate causation becomes relevant." *Id.* Notwithstanding the opinion of the plaintiff's expert, the First District recited that the testimonies of the patient's ex-wife and others, demonstrating a lack of any indication that the patient had suicidal

tendencies, in support of its holding that the psychotherapist's alleged conduct did not create a foreseeable zone of risk of suicide. *Id.*

The district court below identified two related conflicts between its opinion and *Lawlor*. First, in reciting that the First District in *Lawlor* "determined that the psychotherapist did not have a legal duty to prevent the patient's suicide because the suicide was unforeseeable" and that the *Lawlor* court "rejected the plaintiff's expert testimony setting forth the applicable standard of care," the district court recognized conflict with *Lawlor* in that it held it should rely solely on the Respondent's experts' testimony as establishing the applicable standard of care. *Opinion*, at 7. Second, the district court disagreed with *Lawlor* that the duty at issue should be characterized "as a duty to prevent the patient's suicide." *Id.* Instead, the district court agreed with the *Lawlor* dissent that the psychotherapist there owed a "duty to provide 'appropriate psychotherapy.'" *Id.*[1] Accepting jurisdiction over this case will allow this Court to resolve each of these related conflicts, and thereby address 1) whether, in a medical malpractice action, Florida

[1] Proper definition of the scope of the duty, at least in the context of suicide, is relevant to this Court's concern in the proximate causation context that health care providers should not have to defend cases where "serious disease processes are not arrested because another course of action could possibly bring about a better result." *See Shartz v. Miulli*, 127 So. 3d 613, 621 (Fla. 2d DCA 2014) (quoting *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1019-20 (Fla. 1984)).

Statutes, a trial court is required to "consider[] all the factual allegations in performing the foreseeability analysis as to the duty element," *see Lawlor*, 795 So. 2d at 148, as opposed to acceding to the standard of care opinion of the patient's expert, and 2) whether, in the case of suicide, a physician's duty should be characterized as a duty to prevent the suicide.[2]

CONCLUSION

For the foregoing reasons, Dr. Chirillo respectfully requests that this Court exercise its discretionary jurisdiction to review the decision below such that the merits of the conflict may be briefed and considered.

[2] Whether a physician-defendant is entitled to define the legal duty as a duty to prevent suicide is legally significant because Florida law has developed differently in the context of suicide. As a general rule, a physician does not owe a patient a duty to prevent suicide unless the patient is already confined. *See Paddock v. Chacko*, 522 So. 2d 410, 415-16 (Fla. 5th DCA 1988) ("There is some precedent in Florida law for liability predicated upon the negligent failure to safeguard and protect a psychiatric patient with suicidal tendencies. . . . It has been recognized as a general rule that there is no liability for the suicide of another in the absence of a specific duty of care. As an exception to this general rule, it is well established that a hospital or sanatorium owes its patients or inmates a specific duty of care.") (citation omitted); *Garcia v. Lifemark Hosp. of Fla.*, 754 So. 2d 48, 49 (Fla. 3d DCA 1999) ("Generally, a doctor is not liable for the suicide of a patient," but noting exception "when the patient is confined to a hospital"); *Lawlor*, 795 So. 2d at 148 ("[N]o Florida cases extend the duty [to safeguard a patient from harming himself] of custodial supervision and care to the outpatient relationship between a psychotherapist and a patient.").

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via electronic mail to: James B. Tilghman, Jr., (emailservice@stfblaw.com) Stewart, Tilghman, Fox, Bianchi & Cain, P.A., One S.E. Third Avenue, Suite 3000, Miami, Florida 33131, on this 15th day of May, 2014.

Respectfully submitted,

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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 Times New Roman 14-point font.

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