IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

ALEXIS CANTORE, a minor, by and through her natural parents and legal guardians, FELIX and BARBARA CANTORE; and FELIX CANTORE and BARBARA CANTORE, individually,

Petitioners,

vs. CASE NO. SC15-1926

WEST BOCA MEDICAL CENTER, INC., d/b/a WEST BOCA MEDICAL CENTER; and VARIETY CHILDREN'S HOSPITAL d/b/a MIAMI CHILDREN'S HOSPITAL,

Respondents.
_____/

BRIEF OF PETITIONERS ON MERITS

On appeal from the Fourth District Court of Appeal of the State of Florida

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INTRODUCTION

In this medical-malpractice case, Plaintiffs/Appellants ask this Court to quash the Fourth District's decision affirming the defense verdict and Final Judgment in the Defendants/Appellees' favor. At trial, based on **then-existing** case law in the Fourth District, the trial court permitted the Defendant health care providers to utilize testimony of the minor Plaintiff's treating physician at the second of these health care providers, that had the minor Plaintiff been brought to his care earlier in the day in question (as Plaintiffs contend should have been done), his treatment decisions and the minor Plaintiff's outcome would have been the same. During the briefing of this case in the Fourth District, this Court quashed and disapproved of those prior decisions in the Fourth District. See Saunders v. Dickens, 151 So.3d 434 (Fla. 2014) (Saunders II). Plaintiffs contend that the Fourth District, in affirming here, has essentially cast aside Saunders II. This Court should reverse on this important issue, where the Fourth District has ignored the entire premise of this Court's decision. The Plaintiffs also ask this Court to reverse the directed verdict granted on the application of the Good Samaritan Act.

STATEMENT OF THE FACTS

Alexis Cantore ("Lexi") was diagnosed at the age of twelve with hydrocephalus, otherwise known as "water on the brain," which results from an excess amount of cerebral spinal fluid within the cranium (T3:200, 205). The

condition is not uncommon; it occurs in approximately five percent of children (T3:201). Hydrocephalus is a result of a blockage in the circulation of the cerebral spinal fluid, within and around the brain, usually caused by a blocked aperture, the Sylvian aqueduct, through which the fluid leaves the brain (T1:62; T3:205, 223). Lexi was born with a benign tumor which, as it grew, blocked the Sylvian aqueduct that connects the third and fourth ventricles of the brain, restricting the outflow of the cerebrospinal fluid (T3:222; T11:1374; T20:2696).

A surgical procedure known as endoscopic third ventriculostomy ("ETV") relieves the blockage in patients with hydrocephalus by creating an opening in the third ventricle (T3:206; T20:2696). That surgery was performed on Lexi in August 2006 by Dr. John Ragheb, a pediatric neurosurgeon at Miami Children's Hospital ("MCH"), and it relieved the blockage of the cerebral spinal fluid (T3:206; T11:1387). As of that time, Lexi had not suffered any permanent injury as a result of the hydrocephalus; she was not impaired and was a normal child being educated in the public school system (T3:206, 251; T11:1386).

However, subsequent to her ETV surgery, scar tissue began to develop over the Sylvian aqueduct, narrowing it and restricting the flow of the cerebrospinal fluid (T3:237, 259). In December 2007, Lexi had a CAT scan done at the West Boca Medical Center ("WBMC") emergency room which showed enlarged ventricles, indicating that the fluid was starting to accumulate in the brain (T3:206;

T4:373). MRIs done in March and June 2008 showed "progressive transependymal CSF migration" (T4:375; T39:5209-10). Dr. Ragheb scheduled Lexi for a repeat ETV to be done on July 28, 2008 (T3:206).

At approximately 2:30 p.m. on July 3, 2008, Lexi began experiencing painful headaches and vomiting while at home (T3:273). Those symptoms in combination are strong indications that the fluid pressure in the brain is increasing (T3:207). At approximately 3:30 p.m., Lexi's parents came home, learned of her condition, and immediately called Dr. Ragheb's office at MCH (T20:2722-3). Dr. Ragheb's surgical nurse told Mrs. Cantore to bring Lexi to MCH, but if she could not get there, get her to the nearest hospital for a CAT scan (T20:2722-23).

Lexi's father called 911, and the Coral Springs Fire Department ("CSFD") arrived at the house in ten minutes (T20:2723). Mrs. Cantore asked them to take Lexi to MCH where she had been previously treated by Dr. Ragheb (T20:2725). However, CSFD declined that request and took Lexi to the nearest hospital, which was WBMC (T3:209).

Lexi arrived at WBMC at 4:29 p.m. (T27:3434). She was triaged within ten minutes, however, on the three tiered scale of emergency categories: emergent, urgent and non-urgent, the triage nurse categorized her in the middle category, i.e. urgent (T7:712-14). Lexi was given Toradol, a strong pain reliever, but it was not strong enough to eliminate her headaches, and she continued to vomit (T3:270).

After being triaged, Lexi was seen by Dr. Freyre-Cubano ("Dr. Freyre"), a pediatrician at WBMC in her first job as an emergency room doctor, even though she had not been trained in that specialty (T12:1415-17, 1426-28; T13:1633). Mrs. Cantore told Dr. Freyre that Lexi had hydrocephalus, that she had an ETV procedure, and a repeat ETV was scheduled, and that she had spoken Dr. Ragheb's office and he wanted Lexi down at MCH as soon as possible (T8:930; T12:1463; T21:2838).

From 4:36 p.m. until 6:26 p.m., Lexi was the only patient in the WBMC emergency room (T12:1441). Dr. Freyre ordered a CAT scan of Lexi (T12:1460). WBMC had a record of the December 2007 CAT scan taken of Lexi in December 2007 (T13:1612, 1633).

At approximately 4:51 p.m., Dr. Leighton, a radiologist, issued a report confirming that Lexi's condition was worsening, as the CAT scan showed that the ventricles were larger than they had been on the previous CAT scan (T3:211). In addition to the immediate symptoms Lexi was suffering, the risk was that if the fluid became totally blocked, the pressure would build up and the brain could herniate at the foramen magnum (where the skull connects with the spinal cord) (T3:247). This would result in serious permanent brain damage or death (T20:2668).

At approximately 5:40 p.m., Dr. Freyre called Dr. Sandberg, a pediatric neurosurgeon at MCH, to obtain permission to transfer Lexi as a patient, and she told him that Lexi was "stable" (T12:1526-29). That characterization became an issue, as Lexi was still suffering from unrelenting painful headaches (despite the administration of Toradol), was vomiting bile (despite the administration of Zofran), and was drifting in and out of consciousness (T3:274; T12:1497; T20:2730; T30:4006; T33:4322-23). Dr. Sandberg agreed to accept the transfer, and instructed Dr. Freyre to contact the MCH ER to arrange for transportation (T12:1530). Dr. Freyre called MCH and spoke with Dr. Romig, the ER attending physician, who notified the communications center to ask for the helicopter (T8:932-33; T12:1529-30). No one from MCH told WBMC what time the helicopter was to arrive (T7:723).

MCH has a helicopter transportation service known as "LifeFlight" which Dr. Romig contacted to transfer Lexi to that hospital (T7:732; T28:3702-03). Nurse Torres, the director of the ER at WBMC, testified that she would normally expect the LifeFlight helicopter to arrive 20-30 minutes after the transfer was accepted (T7:726). There is no testimony that anyone at WBMC asked how long it would take for the helicopter to arrive (T18:2305). In the absence of the expedited availability of the helicopter service, it is undisputed there were two

ambulance services available which could have taken Lexi to MCH, which was 53 miles from WBMC, on an emergency basis (T9:1065; T19:2519).

At approximately 5:50 p.m., MCH ER received the call from WBMC regarding the transfer, and approximately 20 minutes later the MCH dispatcher for LifeFlight received the request for the helicopter transport (T7:818; T8:888). At approximately 6:37 p.m., the MCH dispatcher paged the transport team for the helicopter, which had been involved in another transport, and it took time to assemble the team (T18:2316; T28:3725). Approximately half an hour later the helicopter lifted off from Miami and arrived at WBMC at 7:21 p.m. (T7:727). While the transport team was at Lexi's bedside by 7:25 p.m., for some unknown reason the team took thirty minutes to assess Lexi and did not leave WBMC's ER until 8:00 p.m.; resulting in the helicopter not lifting off from WBMC until 8:09 p.m., 48 minutes after landing (T8:896, 911-12). The Plaintiffs presented expert testimony that 48 minutes was an unreasonably long time for LifeFlight to be on the ground at WBMC under these conditions (T7:760). Ben Roldan, the LifeFlight paramedic on Lexi's transport, testified his patient assessment takes three to four minutes, and another five minutes to switch over the monitoring equipment (T35:4537).

Nurse Olsen, the LifeFlight nurse, performed a physical exam of Lexi (T27:3468; P's Ex. 2 – V10:1860-63). She testified that Lexi was non-verbal and

was not awake (T27:3468; T36:4691). It was obvious Lexi was in pain from her facial expressions (T36:4691). Lexi was awakened and Nurse Olsen asked her questions (T36:4693). Lexi did not answer the questions, and indeed she never spoke (T36:4691). Nurse Olsen's report stated Lexi was "oriented to person" because Lexi responded to her mother, albeit Nurse Olsen was unable to explain how this responsiveness was demonstrated (T36:4693). Nurse Olsen admitted Lexi was not oriented as to time or place (T36:4693).

At 8:25 p.m., approximately four hours after Lexi had arrived at WBMC, the helicopter landed at MCH, at which point Lexi went into cardiorespiratory arrest as her brain began to herniate (T4:358; T14:1883; T33:4246). Her pupils were enlarged, and the transport team had to bag her and provide oxygen (T20:2741; T35:4562). Dr. Sandberg, who had been waiting for her arrival, immediately drilled a hole in her skull to insert a catheter to drain the cerebral spinal fluid, which "shot up like a rocket" (T3:259, 310). However, Lexi's brain had already herniated (T20:2677).

Due to the events of that day, Lexi suffered permanent brain damage with significant neurological defects, including the inability to eat or drink, and significant mental impairment (T3:232; T11:1329). She will never be able to live independently, nor engage in gainful employment (T11:1332; T15:2019).

STATEMENT OF THE CASE

Plaintiffs, as the parents of Lexi, filed this lawsuit against Defendants, West Boca Medical Center Inc., d/b/a West Boca Medical Center (WBMC); and Variety Children's Hospital d/b/a Miami Children's Hospital (MCH) (R30:5754-5804). The Plaintiffs alleged that the Defendants had not properly provided medical treatment to Lexi on July 3, 2008, including that they did not ensure that she was transported to MCH expeditiously which was necessary under these circumstances.

Deposition Testimony of Dr. Sandberg and Dr. White

As noted above, Dr. Sandberg performed a ventriculostomy when Lexi finally arrived at MCH (T3:259, 310). Dr. Sandberg was never named as a Defendant in this lawsuit. In the Opinion below, the Fourth District characterized Dr. Sandberg as a "neutral third-party witness," and the Plaintiffs disagree with that characterization. Cantore v. West Boca Med. Ctr., 174 So.3d 1114, 1121 (Fla. 4th DCA 2015). Dr. Sandberg was deposed before trial (T26:3331), and his deposition was set as a discovery deposition (SR93:9191-92). He moved to Texas before trial, and, thus, his discovery deposition was his only testimony available for trial (T26:3330, 3334; SR93:9192, 9203).

Plaintiffs moved in limine to strike Dr. Sandberg's deposition testimony (R36:6900-02). Plaintiffs noted that Dr. Sandberg was not an expert witness, but a treating physician (R36:6901-02). Dr. Sandberg testified in his deposition that he

had no knowledge or specific recollection of what he was told of Lexi's condition before she arrived at MCH, had not reviewed any records from either hospital before his deposition, and specifically testified he could not comment on Lexi's condition at WBMC (T2:122-124, 139-141).

Dr. Sandberg admitted he was merely speculating that Lexi would have had the same outcome had she arrived at MCH earlier in the evening (R36:6901-02). Dr. Sandberg admitted his testimony was not based on facts he recalled or medical records, and was only conjecture based on a hypothetical situation proposed by defense counsel that never in fact occurred (R36:6902).

WBMC filed a response in opposition (R37:7148-57). WBMC stated there was probative value in Dr. Sandberg testifying of his "habit and routine as a treating physician in this case," as well as his independent recollection of Lexi and the facts (R37:7149-50). WBMC also asserted that a treating physician may testify on what he or she would or would not have done "in a certain situation . . . even though speculative" (R37:7152).

WBMC contended that the instant case is "similar" to Ewing v. Sellinger, 758 So.2d 1196 (Fla. 4th DCA 2000) (R37:7152), and that Dr. Sandberg's testimony could support a directed verdict in its favor by breaking the causal chain between its actions and Lexi's injuries (R37:7152) (citing Ewing). WBMC also asserted Dr. Sandberg's testimony was admissible since Plaintiffs were going to

present expert testimony that a ventriculostomy would have been performed if Lexi had arrived at MCH earlier in the evening (R37:7153-54).

The parties addressed Dr. Sandberg's testimony at a pre-trial hearing (SR93:9045-47). Plaintiffs' counsel noted that Dr. Sandberg was testifying as a treating physician and that Dr. Sandberg's hypothetical opinions on how he would have treated Lexi earlier in the evening were based upon an incorrect factual premise (SR93:9186-87, 9190, 9192-93, 9203). That is, contrary to his assumption, the medical records revealed Lexi was not awake, alert, and oriented times three when she arrived at MCH (T8:896, 899-900; T36:4689-91). As a result, defense counsel's hypothetical questions to Dr. Sandberg resulted in inadmissible testimony (SR93:9187). No doctor would have performed a ventriculostomy on a stable, awake, alert and "oriented times three" patient (SR93:9187). Plaintiffs' counsel also noted that, as Dr. Sandberg admitted, he merely speculated on how he would have treated Lexi earlier in the evening since he had no specific recollection of her condition at that time (SR93:9192-93).

Both Defendants contended that Dr. Sandberg could opine on what he would have done to treat Lexi, pursuant to Ewing and Saunders v. Dickens, 103 So.3d 871 (Fla. 4th DCA 2012) (Saunders I). In the pre-trial hearing addressing this issue, WBMC's counsel argued that the testimony was admissible even if hypothetical questions posed to Dr. Sandberg were not based on all of the facts of

Lexi's condition; and that any defects in the factual predicate simply went to the weight of the testimony (SR93:9197).

While the trial judge advised WBMC's counsel he was incorrect to suggest Dr. Sandberg could answer hypothetical questions that do not contain all facts, she deferred ruling until trial (SR93:9205-08, 9268). At trial, the trial court overruled Plaintiffs' objections to the use of Dr. Sandberg's deposition (T2:179-81).

Plaintiffs note that at the time of trial, the plaintiff in Saunders I had sought discretionary review based on the conflict of that case and decisions from other District Courts of Appeal. See SC12-2314. Some months after trial in the instant case, this Court granted review of Saunders I. See Saunders v. Dickens, No. SC12-2314, 2013 WL 6978504 (Fla. Jun. 3, 2013) (SR93:9195-99). And, as explained infra, during the briefing of this case in the Fourth District, this Court quashed Saunders I and disapproved of Ewing. See Saunders v. Dickens, 151 So.3d 434 (Fla. 2014) (Saunders II). Nonetheless, with Saunders I and Ewing reflecting the law as interpreted by the Fourth District at the time of trial, and with the trial court rejecting the Plaintiffs' arguments that Dr. Sandberg's testimony was also inadmissible as speculative and based on hypotheticals, the trial court overruled Plaintiffs' objections.

Dr. Sandberg's deposition was read to the jury over Plaintiffs' objection (T2:178-79; T26:3406-07). In it Dr. Sandberg repeatedly admitted that he did not

recall any conversations with any medical professionals at WBMC or LifeFlight, or with Lexi's mother (T26:3330, 3335-38, 3344-45, 3349-51, 3354-56, 3360-3363, 3368, 3384, 3389-90). In fact, Dr. Sandberg testified he was not qualified to comment on anything other than his treatment of Lexi once she was admitted to MCH (T26:3340). Dr. Sandberg added that "the only thing that I can comment on is what I took care of" (T26:3342).[1] Dr. Sandberg also explained it was impossible to discuss Lexi's neurologic exam and status as reported by professionals at WBMC because he was not there to examine her (T26:3399).

Notwithstanding that testimony, both Defendants read the portions of the deposition in which Dr. Sandberg provided extensive opinions on matters beyond his actual treatment of Lexi at MCH. Dr. Sandberg testified that based on WBMC's medical notes provided to him [by defense counsel during the deposition], Lexi "was fine over in West Boca, she was awake and alert and then she was transferred over, and sometime between the time when she left there and the time when she arrived here, she deteriorated" (T26:3356). Dr. Sandberg stated

[1] Although the trial court overruled Plaintiffs' objection at the outset of trial, Plaintiffs' counsel renewed her objection after a portion of Dr. Sandberg's deposition was read to the jury, after Dr. Sandberg repeatedly stated he did not recall anything about Lexi's care until she arrived at MCH (T26:3365) ("I would just like to renew my objection to Dr. Sandberg's deposition, after we've heard 36 pages of "I don't recall," "I don't know," "I don't remember.") (T26:3365).

that there were very few cases he could recall where a person is alert and oriented times three, by report, and then deteriorated en route to the hospital (T26:3378).

MCH's attorney then posed hypothetical questions to Dr. Sandberg on how he would have treated Lexi if she arrived at MCH an hour or two earlier (T26: 3376-80). Defense counsel asked Dr. Sandberg to assume Lexi remained stable, and was neurologically alert and oriented times three at all times through the transport (T26:3375-76). Dr. Sandberg testified that he would not have intubated Lexi if she had these symptoms, "as you suggested" (T26:3376). The following exchange occurred, which both Defendants relied upon to sever any causal chain between their conduct and Lexi's injuries (T26: 3379-80) [Emphasis supplied]:

> Defense counsel: My question is, assuming Lexi had arrived to the hospital, Miami Children's Hospital, one, two hours earlier, and I'm not saying that she should have, or I just want you to assume if she arrived one to two hours earlier, in terms of what happened to her, where she actually ended up herniating. Is that correct?
>
> A. Correct -- presumably.
>
> Q. Presumably herniating. This event which happened to her, where you had to do the ventriculostomy, if she was transferred sooner, one to two hours sooner, do you have an opinion whether or not what happened to her could have been avoidable?
>
> A. My opinion is that if she arrived in the hospital one to two hours earlier, if I were physically in the hospital, it would have been the exact same outcome. If I were not physically in the hospital, it would have been a worse outcome.
>
> Q. Okay. And you mentioned -- and let me take the first one. If you were physically present in the hospital, if the exact same thing

happened, it would have been the same outcome. Would you please tell us why so?

A. I mean, if she deteriorated as quickly as was reported, what she would have gotten was a ventriculostomy when she deteriorated, which is exactly what she got. If she hadn't deteriorated and I wasn't in the hospital -- I mean, my opinion is that she would have died relatively quickly or would have been brain dead if I was not physically present. She dilated her pupils very quickly. When somebody has fixed and dilated pupils, they often do not ever recover; they often die. And so if she came in -- **This is all conjecture, of course. But if she came in and was awake, alert and oriented times three**, and I was concerned about her and her ventricles looked worse, we would have arranged for a procedure to be done that night or the next morning and we would have arranged an operating room and, **I guess, based upon what happened, she would have deteriorated and she would have wound up getting the ventriculostomy in the ER or the PICU, which is exactly what happened**.

Q. It would have been the same outcome?

A. **I can only guess**.

Later in trial, Dr. Steven White, WBMC's emergency room expert on standard of care, was asked to comment on what Dr. Sandberg would have done if Lexi arrived at MCH earlier in the evening (T32:4176, 4234). The trial court overruled Plaintiffs' objection (T32:4234-35). Dr. White testified that Dr. Sandberg stated he would not have done anything differently at an earlier point (T32:4236). Dr. White stated his experience was consistent with what Dr. Sandberg testified he would have done earlier in the evening (T32:4236).

In closing, both Defendants emphasized Dr. Sandberg's testimony that he would not have performed a ventriculostomy earlier in the evening (T42:5525-29, 5590-91, 5658-59, 5664-65). Both defense attorneys told the jury that the Plaintiffs failed to "keep" their "promise" made in Opening Statement that the evidence would show that had Lexi arrived earlier, Dr. Sandberg would have – earlier in the evening -- recognized intracranial pressure and would have performed the surgery to avoid the devastating consequences of herniation (T42:5525, 5564-65).

In deliberations, the jury asked for the transcript portion of Dr. Sandberg's deposition testimony, as well as Dr. Ragheb's deposition (T42:5760). The trial court instructed the jury that the court reporter had not prepared the testimony in transcript form, and that they were to rely upon their memories and notes (T42:5766). The jury returned to deliberate (T42:5767). However, the jury obviously deemed these depositions critical, because later that afternoon they again requested Dr. Sandberg's and Dr. Ragheb's depositions and, if not, a copy of what was read in open court (T42:5767-68). The trial judge instructed the jury the depositions were unavailable, and again that they were to rely upon their memories or notes (T42:5769).

The Directed Verdict on the Application of the Good Samaritan Act

At the conclusion of all the evidence, Defendants renewed their Motions for Directed Verdict applying the Good Samaritan Act and the associated reckless disregard standard and asking the trial court for a directed verdict on liability (T. 40:5279-80). The trial court denied the motion as to liability, ruling that there was sufficient evidence to create a jury question as to whether Defendants acted with reckless disregard (T40:5279). The second part of the motion, asking the court to apply the reckless disregard standard as a matter of law, was granted (T40:5280). The court stated that the evidence was consistent that Lexi was in an emergency situation, although Defendants may not have classified it that way (T40:5280). The court concluded that despite the conflicting evidence, the physicians were being sued for providing medical services in an emergency situation and, therefore, the reckless disregard standard applied as a matter of law (T40:5280).

In closing argument, Defendants argued they should not be held liable since Lexi was not in an emergency situation but was stable; that LifeFlight does not provide emergency transportation, and that the change in Lexi's vital signs was only temporary (T42:5540-44;5553;5561;5563;5621;5625;5638;5649-50;5656).

The Jury Instructions and Verdict Form

At the end of Defendants' case, Plaintiffs moved for a directed verdict against WBMC as to its liability for the acts of Dr. Freyre (T40:5256). Plaintiffs

argued that WBMC had a non-delegable duty to provide emergency medical services to Lexi and was therefore liable for Dr. Freyre's conduct, with whom it had contracted to provide such services (T40:5256-67). The court granted the motion (T40:5267-69).

However, the jury instructions and verdict did not reflect the trial court's ruling. Despite the trial court's determination that WBMC was liable for Dr. Freyre's acts, the jury instructions (T41:5393-94) and verdict form (R43:8367) asked the jury to determine whether Dr. Freyre was an agent or apparent agent of WBMC. The verdict form also allowed the jury to apportion fault to Dr. Freyre, independently from WBMC (R43:8367).

The Verdict and Fourth District's Decision

The jury returned a verdict finding that Defendants did not act with reckless disregard. The trial court denied Plaintiffs' Motion for New Trial. In affirming, the Fourth District noted that in Saunders II, this Court held that "a physician cannot insulate himself or herself from liability for negligence by presenting a subsequent treating physician who testifies that adequate care by the defendant physician would not have altered the subsequent care" (Cantore, 174 So.3d at 1117 (quoting Saunders II, 151 So.3d at 442)). Such testimony is irrelevant and inadmissible. Cantore, 174 So.3d at 1117 (citing Saunders II).

Yet, the Fourth District claimed this case was factually different because Dr. Sandberg was not just a subsequent treating physician. Cantore, 174 So.3d at 1119. According to the Fourth District, Dr. Sandberg was a "co-treating physician and thus his role exceeded that of a subsequent treating physician" Id. Dr. Freyre had requested Dr. Sandberg's expertise at 5:40 p.m. until Alexis was transferred, and WBMC medical personnel followed Dr. Sandberg's instructions. Id. Using a second label to describe Dr. Sandberg, the Fourth District stated Dr. Sandberg "essentially became a co-treating physician or, at a minimum, a consulting treating physician." Id.

The Fourth District then switched to a third label. The Fourth District stated that the level of care and instruction by Dr. Sandberg pre-transfer was intertwined with Dr. Freyre's alleged failure to appropriately treat Alexis. Id. The Fourth District reasoned that just as juries should hear from more than one of a plaintiff's treating physicians regarding their care and decision-making, the jury was properly allowed to hear Dr. Sandberg's testimony – presented by the Defendants – as a "co-treating/consulting or 'hybrid' treating physician expert witness." Id.

The Fourth District shifted a fourth time regarding Dr. Sandberg, stating it was necessary for the jury to hear from experts to determine how a reasonably prudent physician would have acted and this included Dr. Sandberg's testimony regarding when he performs emergency ventriculostomies. Id. at 1119-20. Also,

as a "treating physician, neurosurgeon, and expert," Dr. Sandberg was qualified to answer even questions based on certain facts that did not occur, "as experts are allowed to do." Id. at 1120. Finally, the Fourth District stated Dr. Sandberg was just a "neutral third-party witness with no motivation to deny wrongdoing or avoid liability as he was never a defendant," unlike the treating physician in Saunders II. Id. at 1121. Dr. Sandberg was, of course, the on-call MCH physician when Lexi first presented to WBMC.

The Fourth District did not address a separate issue raised by Plaintiffs on appeal, the trial court's directed verdict on the application of the Good Samaritan Act. Plaintiffs address that issue below in Point II.

The Fourth District did briefly mention another issue raised on appeal, the trial court's decision to allow the jury to determine whether Dr. Freyre was an apparent or actual agent of WBMC, and whether to apportion fault to her. The Fourth District stated that the trial court correctly permitted WBMC to place Dr. Freyre on the verdict form, similar to a Fabre defendant. Id. at 1121 (citing Fabre v. Martin, 623 So.2d 1182 (Fla. 1993)). The Fourth District held this ruling "preserve[d]" WBMC's defense that it was not vicariously liable for Dr. Freyre's conduct. Id. Plaintiffs address that issue below in Point III.

SUMMARY OF ARGUMENT

The Plaintiffs are entitled to a new trial due to the trial court's erroneous decision to allow Dr. Sandberg's testimony. Dr. Sandberg, a treating physician who operated on Lexi when she arrived to MCH, was permitted to testify as to what he would have done to treat Lexi if she arrived under his care hours earlier under circumstances that did not in fact exist. This testimony was utilized by WBMC, the initial health care provider, and MCH, to break the chain of causation and argue that what the Plaintiffs allege should have been done -- bring Lexi to MCH an hour or two earlier -- would have made no difference in her eventual outcome.

This Court disapproved this type of testimony in Saunders II, decided during the briefing of this case in the Fourth District. This Court held this type of testimony was patently unfair to a plaintiff, diverted the jury from what a plaintiff alleges a reasonably competent medical provider would have done at an earlier point in time, unfairly insulates health care provider defendants from liability, and is hence inadmissible. The Fourth District carved out artificial distinctions to do an end-around of this Court's important decision. The fact that Dr. Sandberg was advised on Lexi's medical care while she was at MCH does not alter the reasoning of this Court's decision. The Fourth District's shifting and confusing characterizations of Dr. Sandberg as a treating physician, hybrid expert, consulting

expert, and expert witness, ignore the fact he operated on Lexi and that the Defendants improperly utilized his testimony to argue there could be no causation.

Even if not prohibited under Saunders II, Dr. Sandberg's testimony was inadmissible. Dr. Sandberg was improperly permitted to give speculative testimony based on circumstances that did not occur. This Court and others have correctly prohibited this type of testimony. The Fourth District also misused cases allowing plaintiffs to introduce treating physician testimony as to their care to prove their case; here, the Fourth District improperly gave approval to defendants to introduce the treating physician testimony to disprove their own patient's case.

Next, the trial court erred by granting a directed verdict on the application of the Good Samaritan Act's "reckless disregard" standard because there was conflicting evidence as to whether Lexi was stable or in need of emergency medical services, as those terms are used in the statute, see §768.13(2). While Plaintiffs contended that Lexi's condition was an emergency from the time she arrived at WBMC, Defendants denied that and claimed her condition was stable, and thus, there was no need for urgency in her transfer to MCH. Without the directed verdict, Defendants would have to admit Lexi was an emergency services patient in order to obtain the benefit of the reckless disregard standard, as the legislature intended it to be applied. However, even after the directed verdict, the Defendants continued to argue to the jury that Lexi's condition was not an

emergency and that she was stable, yet they still were given the benefit of the heightened standard of care, i.e. reckless disregard in the jury instructions.

Finally, the trial court erred in asking the jury to determine on the verdict whether Dr. Freyre was an agent of WBMC and in allowing the jury to apportion fault to her when it had already ruled as a matter of law that the hospital had a non-delegable duty under the circumstances. In addition, because WBMC was liable for Dr. Freyre's conduct, as a matter of law, she could not be a Fabre defendant. If this Court reverses and remands for a new trial, then this issue should be decided to avoid repetition of the error on re-trial.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING DR. SANDBERG'S SPECULATIVE TESTIMONY OF WHAT HE WOULD HAVE DONE IF LEXI HAD ARRIVED EARLIER AND IN ADMITTING DR. WHITE'S TESTIMONY ON THAT SUBJECT.

Standard of Review

A trial court's decision to admit evidence is reviewed under the abuse of discretion standard. See Special v. West Boca Medical Ctr., 160 So.3d 1251, 1274 (Fla. 2014). A trial court's discretion "is circumscribed by the rules of evidence" and a trial court abuses that discretion when its ruling is based "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Id.

Merits

A. Saunders I Establishes Error in This Case

In the trial court, the Defendants relied upon Saunders I to justify the admission of Dr. Sandberg's [speculative] testimony as to how he would have treated Lexi had she arrived at MCH earlier in the evening (R36:6901-02; R37:7152; SR93:9192-93, 9195-99; T26:3379-80). The trial court's decision to admit this testimony [over repeated objections] was specifically premised on Saunders I, and Ewing (T2:179-81). Had the trial in this matter occurred **after** Saunders II, the trial court likely would have excluded Dr. Sandberg's testimony.[2] Dr. Sandberg's testimony is prohibited under Saunders II.

In Saunders II, the plaintiff contended an initial treating physician was negligent because he failed to perform a cervical MRI in July 2003, and failed to recognize the plaintiff had a cervical cord compression which warranted surgery. The plaintiff's condition worsened so that he could not later have a surgery that would have been performed by a subsequent treating physician. The plaintiff sued both physicians. The subsequent treating physician was deposed and his claim was settled before trial. At trial, the initial treating physician presented the deposition of the subsequent treating physician who testified that even if the initial physician

[2] Accordingly, it does not seem that the trial court's decision should be reviewed under an abuse of discretion standard of review. The trial court based its decision on its interpretation of the law, which has been quashed and disapproved of.

had performed a cervical MRI in July 2003, he would not have operated on the plaintiff then. Saunders II, 151 So.3d at 438. In closing argument, defense counsel told the jury that the initial treating physician was not liable since the subsequent treating physician still would not have performed an operation in July 2003. Id. at 438-39. The jury returned a defense verdict, which the Fourth District affirmed in Saunders I.

This Court disagreed in Saunders II and granted the plaintiff a new trial. This Court explained that a plaintiff has the burden to establish the care provided by the (initial treating) physician was not that of a **"reasonably prudent physician."** Id. at 441 (emphasis in original). Requiring a plaintiff to "establish a negative [by confronting the subsequent treating physician's causation testimony] inappropriately adds a burden of proof that simply is not required under the negligence law of this State." Id. at 442. It is only the specific conduct of a health care provider that is evaluated. Id. Thus, "a physician cannot insulate himself or herself from liability for negligence by presenting a subsequent treating physician who testifies that adequate care by the defendant physician would not have altered the subsequent care." Id.

This Court held that the speculative evidence is per se inadmissible. Indeed, this Court approved the conflict cases that had characterized subsequent treating physician causation testimony as speculative. See id. at 440-41 (discussing

Goolsby v. Qazi, 847 So.2d 1001 (Fla. 5th DCA 2003); and Muñoz v. South Miami Hosp., Inc., 764 So.2d 854 (Fla. 3d DCA 2000)).

Saunders II requires reversal. Like Saunders II, the Defendants here utilized the later treating physician's testimony (Dr. Sandberg) of his medical decisions he would have made under different circumstances than occurred (Lexi being brought to MCH earlier in a different condition) to argue they could not have caused any injuries. Like Saunders II, the Defendants relieved themselves from liability because of that testimony. The only issue for the jury was whether it concluded a reasonably prudent doctor **in Dr. Sandberg's shoes** would have operated had Lexi been brought to MCH an hour or two earlier than she was, and what her outcome would have been. Dr. Sandberg's speculative causation opinions were irrelevant and inappropriate in this trial.

Like the plaintiff in Saunders II, Plaintiffs were unfairly placed in the position of trying to **disprove** that what Dr. Sandberg testified he would have done is not actually what he would have done. This is virtually impossible with any treating physician, and was virtually impossible since Dr. Sandberg's deposition was all that was available at trial, and it had only been noticed as a discovery deposition. Lexi should only have been required to prove whether a physician in Dr. Sandberg's **position** under the facts, exercising reasonable care, would have performed the surgery at an earlier time in the evening. But Dr. Sandberg was a

fact witness, her treating physician, who should never have been permitted to speculate about circumstances that never occurred.

Also similar to Saunders II, the Defendants told the jury in closing argument they could not be liable based on Dr. Sandberg's testimony (T42:5525, 5564-65). Even worse in this case, the Defendants told the jury in closing arguments that Plaintiffs' trial counsel failed to "keep" her "promise" made in opening statement that the evidence would show that had Lexi arrived earlier in the day, Dr. Sandberg would have recognized intracranial pressure and would have performed the surgery to avoid the catastrophic consequences of brain herniation (T42:5525, 5564-65). This closing argument is not sustainable in light of Saunders II. The Fourth District's decision is in express and direct conflict and should be quashed by this Court. See also Dorsey v. Reider, 139 So.3d 860, 862, 866 (Fla. 2014) (quashing a decision of a district court of appeal that misapplied this Court's precedent).

B. The Fourth District's differing classifications of Dr. Sandberg do not alter the fact he was Lexi's treating physician, and his speculative testimony was used to disprove causation

While the trial court did not have the benefit of Saunders II, the Fourth District did. Nonetheless, the Fourth District ignored the reasoning of this Court's important decision, and effectively relegated Saunders II to a footnote just one year later. In approving the admission of Dr. Sandberg's testimony, the Fourth District referred to Dr. Sandberg as a (1) "co-treating physician," (2) "co-treating physician

or, at a minimum, a consulting treating physician"; (3) "co-treating/consulting or 'hybrid' treating physician expert witness"; and (4) "treating physician, neurosurgeon, and expert." Cantore, 174 So.3d at 1119-20.

The fact that Dr. Sanders was not solely a "subsequent" treating physician after the initial health care provider's negligent medical care has concluded is an artificial distinction that has eviscerated the entire premise of this Court's decision in Saunders II. Dr. Sandberg testified on his subsequent medical care under circumstances that never actually occurred. Thus, he opined (based upon the questioning and circumstances posed to him by defense counsel) that had Lexi arrived at the hospital earlier in the evening, she would have had the same outcome under his care (T26:3375-76; 3379-80). This is no different in practice than the treating physician testimony this Court expressly held is prohibited in Saunders II.

The Plaintiffs presented evidence that a reasonably prudent physician in Dr. Sandberg's shoes would have treated Lexi such that she would have had a different outcome than now being catastrophically injured. How could the Plaintiffs effectively persuade the jury on this theory when Dr. Sandberg himself testified the outcome actually would have been the same based on the medical decisions he personally would have made had Lexi arrived earlier in the evening? The Fourth District's different labels for Dr. Sandberg cannot mask the power and prejudice of this testimony. The Defendants did not present Dr. Sandberg as an expert witness -

- they had expert witnesses on standard of care and causation. They presented his testimony as a treating physician, which he unmistakably was at all times.

As for Dr. Sandberg's role in advising medical providers at MCH or regarding his medical care, the Plaintiffs did not quarrel with Dr. Sandberg's testimony as to his treatment of Lexi. But the Fourth District incorrectly blurred together Dr. Sandberg's **factual** testimony of what **happened** with his **speculative** testimony of circumstances that **never happened**, i.e., an earlier arrival to MCH.

In trying to distinguish Saunders II, the Fourth District stated that "Florida law is clear that the jury should hear from a plaintiff's treating physicians—as in more than one, when there are more than one involved—regarding their care, recommendations, and medical decision-making." Cantore, 174 So.3d at 1119 (citing Ryder Truck Rental, Inc. v. Perez, 715 So.2d 289, 290 (Fla. 3d DCA 1998)). The Fourth District conflicted with and misapplied this line of cases, and also ignored the impact of Dr. Sandberg's causation testimony in this case.

The issue of whether trial judges can limit the use of treating physicians' testimony has arisen where **plaintiffs have presented their treating physicians** to testify on matters of causation and permanency arising from their treatment. See e.g., Ryder, supra; and Gonzalez v. Martinez, 897 So.2d 525 (Fla. 3d DCA 2005); but see Vargas v. Gutierrez, 176 So.3d 315, 323 (Fla. 3d DCA 2015) (holding that

the plaintiff violated the one "expert per specialty" rule in presenting four pathologists), review granted, SC15-1924 (Fla. Oct. 10, 2015).

That line of cases has no application to Dr. Sandberg's testimony in this case. The Plaintiffs did not present Dr. Sandberg as a witness. The Defendants presented Dr. Sandberg as a treating physician, to break the chain of causation, even though -- as set forth in more detail below -- he testified he was not qualified to address anything other than his treatment of Lexi (T26:3340, 42). Saunders II unequivocally held that such testimony is speculative and inadmissible. The Fourth District's suggestion that Dr. Sandberg's testimony could be reclassified and he could testify as an "expert" or "hybrid" expert would cast aside Saunders II as a footnote in Florida law. All defendants will declare that treating physicians providing medical care have such blended roles and should be permitted to testify on defendants' behalf's to insulate the defendant health care providers from liability. Saunders II does not approve this.

While not mentioned by the Fourth District, the Defendants also turned to another line of cases that has examined the role of treating physicians for purposes of *pre-trial discovery*. See Worley v. YMCA, 163 So.3d 1240 (Fla. 2015), review granted SC15-1086, Sept. 1, 2015; Steinger, Iscoe & Greene, P.A. v. GEICO General Ins. Co., 103 So.3d 200, 203 (Fla. 4th DCA 2012). This Court should reject the Defendants' attempt to avoid the impact of Saunders II.

That line of cases also could not be utilized to support the admission of Dr. Sandberg's testimony. Whatever the rules in place regarding pre-trial discovery regarding the connection between plaintiffs' counsel and treating physicians who present testimony on their behalf, these cases also involve scenarios where plaintiffs utilized their own treating physicians to testify on matters of causation and permanency arising from their treatment.

Saunders II does not even implicitly suggest that this case precedent can be applied to allow Defendants to present these treating physicians to present someone such as Dr. Sandberg as a treating physician, to break the chain of causation. Clearly, this Court understood the distinction in Saunders II, when this Court declared it *per se* inadmissible for treating physicians providing subsequent medical treatment to present causation testimony that, in fact, operates to break the chain of causation. There can be no meaningful comparison between retained expert witnesses and Dr. Sandberg's role in this case, where his testimony shielded the Defendants from liability. As for Dr. Sandberg's role in making recommendations for neurological management to WBMC personnel, this is irrelevant to his speculative causation testimony. Dr. Sandberg should not have been permitted to opine on what he personally would have done under circumstances that never occurred.

C. **Dr. Sandberg's Testimony Was Also Improperly Admitted Because He Answered Hypothetical Questions That Were Based on Incorrect Facts**

Even if there were permissible circumstances for Dr. Sandberg to testify on causation matters under circumstances different than what he faced in his actual treatment of Lexi, Dr. Sandberg's testimony still should have been inadmissible. His opinions were premised on incorrect assumptions of Lexi's medical condition earlier in the evening: that Lexi never deteriorated at WBMC and was awake, alert, and oriented times three prior to her arrival at WBMC.

The Florida Evidence Code does not specify the manner in which hypothetical questions can be asked to expert witnesses. See Smith v. State, 7 So.3d 473, 501 (Fla. 2009). Nonetheless, it is well-settled that hypothetical questions must be based on facts that are supported by evidence. Id. (citing North Broward Hosp. Dist. v. Johnson, 538 So.2d 871 (Fla. 4th DCA 1988)).

In spite of this established principle, defense counsel advised the court that he was permitted to pose hypothetical questions to Dr. Sandberg so long as some underlying facts were correct (SR93:9197). If it turned out some facts were incorrect, defense counsel continued, this would go to the weight of the testimony. Smith and prior precedent establish that all underlying facts must be correct.

This point is demonstrated in Nat. Harrison Assocs. v. Byrd, 256 So.2d 50 (Fla. 4th DCA 1971). As later explained in Smith, the Fourth District held that

facts submitted to an expert in a hypothetical question propounded on direct examination must be supported by competent, substantial evidence in the record. Byrd, 256 So.2d at 53. This rule prevents an expert from expressing opinions based on unstated and perhaps unwarranted factual assumptions concerning an event, facilitates cross-examination and rebuttal, and fosters an understanding of the opinions by the jury. Id.

The Fourth District further noted that, ordinarily, deficiencies in a factual predicate submitted to an expert relate to the weight and not admissibility of the opinion. Byrd, 256 So.2d at 53. At odds with defense counsel's position in this case, the Fourth District explained in Byrd that where (256 So.2d at 53):

> the factual predicate submitted to the expert witness in the hypothetical question omits a fact which is so obviously necessary to the formation of an opinion that the trial judge may take note of the omission on the basis of his common knowledge, an objection founded on the inadequacy of the predicate may be sustained.

In Byrd, the Fourth District concluded the expert's testimony on differences in speed between vehicles in a car accident should have been inadmissible since the predicate for the opinion lacked an essential fact, which was the weight of the vehicles. Similarly, another expert opinion regarding speed of a trailer at the time of impact should have been excluded, because the expert based his opinion on a fact never admitted into evidence.

Defendants' hypothetical questions to Dr. Sandberg omitted essential facts necessary to the formation of Dr. Sandberg's causation opinion. Defense counsel asked Dr. Sandberg to assume Lexi was awake, alert and oriented times three (name, place and time) during her stay at WBMC (T26:3375-76). The record evidence is that Lexi was not. Lexi's vital signs deteriorated throughout her time at WBMC. By 6:43 p.m., Lexi wanted to sleep. The LifeFlight nurse examined her at 7:30 p.m., and Lexi was asleep. While Nurse Olsen, the LifeFlight nurse, woke Lexi, she was non-verbal (T36:4691). Nurse Olsen testified Lexi was oriented to person, but this meant only that Lexi was apparently responsive to her mother (T36:4693). Lexi was not oriented times three and, shortly after admission, was not capable of identifying time, place or who she was (T8:896, 899-900).

As Plaintiffs' counsel told the court before trial, Dr. Sandberg's causation opinions were obviously absurd. No doctor would have ever performed surgery on a patient who had not deteriorated, and who is awake, alert and oriented times three. Dr. Sandberg could not competently answer these hypothetical questions premised on incorrect facts. Dr. Sandberg's testimony is inadmissible under Saunders II; it was also inadmissible at the time of trial when he answered hypothetical questions that were based on incorrect facts.

D. **Dr. Sandberg Could Not Present Causation Testimony When He Had No Independent Recollection of Lexi's Condition Before She Arrived at MCH and Merely Guessed as to How He Would Have Treated Her at an Earlier Time**

The trial court also erred for a separate reason. Even if Dr. Sandberg could be asked hypothetical questions about how he would have treated Lexi, Dr. Sandberg admitted in his deposition that he had not reviewed the medical records at either hospital and did not recall Lexi's condition before she had arrived at MCH. He also conceded that he guessed on how he would have treated Lexi if she arrived earlier. Given these admissions, the trial court erred in permitting the Defendants to introduce Dr. Sandberg's speculative causation opinion.

Section 90.604, Fla. Stat., is titled "Personal knowledge." The provision states that except as provided in another statute (§90.702, Fla. Stat.), witnesses may not testify to matters unless they have personal knowledge of the matters, as shown through the introduction of evidence. The exception in §90.702 is for expert witnesses. Again, the Defendants did not present Dr. Sandberg as an expert.[3] Rather, they presented Dr. Sandberg strictly in his role as a treating physician. As such, Dr. Sandberg could not testify as to what would have occurred, in a

[3] When the Plaintiffs objected to Dr. Sandberg's testimony before trial, the Defendants told the trial court the testimony was admissible specifically because he was a treating physician. (See Statement of Facts, *supra*, at IB9-10).

hypothetical situation, when he had no personal knowledge of Lexi's condition before she arrived at MCH.

Because Dr. Sandberg had no personal knowledge, unsurprisingly, he admitted he was only speculating on how he would have treated Lexi if she arrived an hour or two earlier (R36:6901-02). Dr. Sandberg also admitted he was unqualified to testify on anything other than his actual treatment of Lexi (T26:3340). The Defendants should not have been permitted to present opinions which the witness candidly admitted he was unqualified to give. Testimony that is based on guesses, conjecture or speculation is inadmissible as a matter of law. See Drackett Products Co. v. Blue, 152 So.2d 463, 465 (Fla. 1963):

> 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[.]"); Donshik v. Sherman, 861 So.2d 53, 57 (Fla. 3d DCA 2003) (holding that testimony as to what would have happened under a different set of circumstances was "inadmissible as conjecture or speculation.").

E. **The Error in Admitting Dr. Sandberg's Speculative Testimony Was Compounded Later in Trial Through Dr. White's Testimony**

The trial court's error in permitting Dr. Sandberg to testify was compounded later in trial. WBMC was improperly permitted to repeat for the jury, through questioning its designated and declared expert witness, Dr. White, the earlier testimony that should have been inadmissible -- Dr. Sandberg's testimony on causation (T32:4236) ("You're familiar with the testimony of Dr. Sandberg regarding what -- what he would or would not have done had Lexi come down to him earlier. Correct?" (T32:4236). Dr. White was even permitted to testify his experience was "consistent with what Dr. Sandberg has said he would do" (T32:4236).

Dr. White's testimony about Dr. Sandberg improperly bolstered both witnesses, i.e., they agreed with each other as to Lexi's outcome if she arrived at MCH earlier in the evening. See Linn v. Fossum, 946 So.2d 1032, 1035-1039 (Fla. 2006) (recognizing that expert witnesses cannot bolster their testimony by referring to opinions reached by others); Scarlett v. Oulette, 948 So.2d 859, 864 (Fla. 3d DCA 2007) (concluding that the trial court correctly prevented a plaintiff's expert witness from commenting on the credibility of another witness' expert opinion; the plaintiff's expert witness could, on the other hand, give opinions without referring to the other witness' opinion).

Dr. White did not testify that Dr. Sandberg's causation opinion was beneficial (to Dr. White) in reaching his own expert witness conclusions. Compare J.V. v. Dep't of Children & Family Servs., 967 So.2d 354 (Fla. 3d DCA 2007) (pediatrician can rely on a report from a radiologist in forming her expert opinion). Nor could Dr. Sandberg's speculative testimony have been relevant to Dr. White, whose testimony should have been strictly limited to the prevailing standard of care in the medical community.

F. **Defendants Cannot Prove the Trial Court's Error is Harmless**

In Special, supra, this Court established the harmless error standard in civil cases, placing the burden on the beneficiary of the error to prove harmless error. 160 So.3d at 1253. The Defendants are unable to meet their burden. The Fourth District stated the Plaintiffs were able to present their theory of the case, including posing questions to Dr. Sandberg. Cantore, 174 So.3d at 1121. The issue is not whether the Plaintiffs could present expert testimony and present their theory of liability. Dr. Sandberg's causation testimony was inadmissible in the first instance. The Defendants were improperly permitted to use that testimony, under their theory of the case, to disprove causation. This Court intended to put an end to this unfair trial tactic in Saunders II. As this Court explained, this causation testimony is so powerful because (151 So.3d at 442):

> It would place a burden on the plaintiff to somehow prove causation by demonstrating that a subsequent treating physician would not have

> disregarded the correct diagnosis or testing, contrary to his or her testimony and irrespective of the standard of care for the defendant physician.

The Fourth District stated Dr. Sandberg was just a "neutral third-party witness with no motivation to deny wrongdoing or avoid liability as he was never a defendant," unlike the treating physician in Saunders II (A9). Dr. Sandberg was, of course, the on-call MCH physician when Lexi first presented to WBMC (A3). The record clearly shows Dr. Sandberg was trying to defend WBMC and his former employer, MCH. The fact that Dr. Sandberg had not been sued is irrelevant to the substantial prejudice faced by the Plaintiffs. The Plaintiffs were improperly forced to establish a negative at trial. How could the Plaintiffs effectively overcome Dr. Sandberg's "it would have made no difference **to me**" testimony?

Dr. Sandberg provided extensive testimony on matters beyond his treatment of Lexi (T26:3356, 3375-80). Defense counsel presented lengthy hypotheticals to Dr. Sandberg that arriving at MCH earlier in the evening would have made no difference, to break the chain of causation (T26:3379-80). Furthermore, as noted above, a defense expert witness, Dr. White, improperly bolstered his testimony by confirming his assessment was consistent with Dr. Sandberg's opinions that he had read and reviewed [that he would have treated Lexi the same earlier in the evening] (T32:4236). This compounded the harm to the Plaintiffs.

The harm was further increased by the Defendants' emphasis of Dr. Sandberg's testimony in closing (T42:5525-29, 5590-91, 5658-59, 5664-65). Defense counsel criticized Plaintiffs' trial counsel for failing to prove to the jury Dr. Sandberg would have performed a surgery earlier in the evening, which would have prevented the devastating consequences suffered by Lexi (T42:5525, 5564-65).

Finally, Dr. Sandberg's testimony was obviously essential to the jurors. They asked for a copy of Dr. Sandberg's deposition twice during their deliberations, but were told to rely on their recollection of the evidence (T42:5760, 5766-69). The Defendants cannot meet their burden to prove harmless error, and this Court should remand for a new trial.

POINT II

THE TRIAL COURT ERRED BY ENTERING A DIRECTED VERDICT ON THE ISSUE OF THE APPLICATION OF THE GOOD SAMARITAN ACT ("GSA"), SECTION 768.13, FLORIDA STATUTES, WHERE THERE WAS CONFLICTING EVIDENCE.

Standard of Review

The standard of review on appeal of the trial court's ruling on a motion for directed verdict is de novo. Christiansen v. Bowen, 140 So.3d 498, 501 (Fla. 2014).

Why The Court Should Address This Issue

Plaintiffs recognize that it is unusual for this Court to address an issue other than the decisional conflict, but it is respectfully submitted that consideration of this issue is warranted for numerous reasons:

1) The trial court's ruling violates the basic principle that a directed verdict should not be granted where there is a conflict in the evidence. Friedrich v. Fetterman & Associates, P.A., 137 So.3d 362, 365 (Fla. 2013);

2) This trial court's ruling dictated the standard of care applicable in the case, that is, it resulted in a jury instruction that Plaintiffs could only prevail if they proved that the Defendants treated Lexi with reckless disregard; and

3) As noted in University of Florida Board of Trustees v. Stone, 92 So.3d 264, 267 (Fla. 1st DCA 2012), "[t]here is surprisingly little case law discussing the GSA"; there has been no additional case law addressing §768.13, Fla. Stat., since Stone.

Merits

The trial court's decision to grant a directed verdict on the application of the GSA, §768.13, Fla. Stat., and to instruct the jury to apply the reckless disregard standard of care, was erroneous because the evidence was conflicting whether Lexi's need for treatment and transportation was an emergency service for purposes of that statute. The directed verdict allowed Defendants to rely on the reckless disregard standard as to Plaintiffs' claim, and yet also argue to the jury that there was no emergency and that Lexi did not need to be quickly transported to MCH.

Section 768.13(2)(b)(2)(a), Fla. Stat., provides that to prevail, a plaintiff must prove that a defendant acted with reckless disregard if liability is based on "any act or omission of providing medical care or treatment, including diagnosis… which occurs prior to the time the patient is stabilized and is capable of receiving medical treatment as a non-emergency patient…." While it was Plaintiffs' position that Lexi's condition was an emergency from the time she arrived at WBMC, the Defendants contended there was no emergency and her condition was stable. WBMC did **not** classify Lexi's treatment as an emergency during the triage process, and at trial the defense presented extensive testimony that she was stable until her brain herniated. As a result, if the Defendants' version of the facts was

accepted by the jury[4], they were not entitled to the lower standard of care of §768.13.

At trial, Plaintiffs' position was that Lexi needed immediate transportation to MCH because if she did not get to a neurosurgeon quickly, she would suffer catastrophic injuries. Obviously, that is exactly what transpired. Plaintiffs presented evidence that Lexi's condition was an emergency in that respect (T3:226, T7:714).

However, defendants presented evidence that Lexi's condition was not an emergency, and that there was no need to expedite Lexi's transportation to MCH. Dr. Freyre testified that Lexi was "stable" and that her condition would transition from "urgent" to "emergent" only "when she starts showing signs of impending [brain] herniation" (T12:1509-10). Dr. Monica Kleinman, one of Defendant's experts, testified that Lexi was stable "up until the very end of the transport" (T29:3903; 3911). Dr. Steven White, another defense expert also testified that Lexi was stable and remained that way until she was on the LifeFlight helicopter (T32:4211-13). Dr. James Goodrich, another defense expert, testified that Lexi was stable until her transfer to MCH (T37:4812).

[4] The Florida Supreme Court has approved standard jury instructions for cases in which there is a factual issue as to whether §768.13(2)(b), Fla. Stat., applies. See Fla. Std. Jury Inst. (Civ.) 402.16a.

Keith Meyer, M.D., medical director of LifeFlight, testified that as an intrafacility transfer service, LifeFlight does not transport patients who need emergency transportation (T29:3773). He told the jury that LifeFlight "was never intended to be about speed. It's more about quality and safety" (T29:3374). If a patient needs emergent transport, they should call Trauma Hawk (T29:3774).

After the trial court granted the directed verdict (T40:5279-80), finding as a matter of law, that Lexi's condition was an emergency medical situation and that the GSA applied, defense counsel still argued to the jury that Lexi was "stable" and there was no need to rush her to MCH. Counsel for WBMC still argued to the jury repeatedly that Lexi was "stable" (T42:5539, 5540, 5553, 5561, 5563, 5574). During his closing, counsel for WBMC also played for the jury an excerpt from the videotaped deposition of Dr. Freyre, where she testified to her assessment that Lexi was "stable" (T5543-46). Counsel for WBMC argued (T42:5553):

> Moreover, Alexis remained stable with us, meaning she didn't code while she was in our emergency room, she didn't have her decompensation in our emergency room.

Counsel for MCH also argued to the jury that Lexi was stable until her brain herniated (T42:5615, 5621, 5638, 5662), and read testimony to support that contention (T42:5625, 5656, 5657). Defense counsel explained Lexi's move to the Intensive Care Unit as simply an attempt to "expedite" her care, and that it did not mean this was an emergency situation (T42:5544). All of this argument was

designed to persuade the jury that there was no rush to transport Lexi because she was stable (T42:5553, 5561, 5563). In other words, WBMC wanted to convince the jury that there was no medical emergency.

There was obviously a conflict in the evidence regarding Lexi's condition, and the directed verdict on the application of §768.13, allowed Defendants to unfairly exploit that conflicting evidence.

This case is factually similar to University of Florida Board of Trustees v. Stone, 92 So.3d 264 (Fla. 1st DCA 2012). In that case, the plaintiff's decedent presented at the Starke Hospital emergency room with severe stomach pain and vomiting, and tests ruled out cardiac issues. However the physician on duty determined that surgical intervention might be necessary. A surgeon was not available at Starke Hospital, so the patient was transferred by ambulance to another hospital with a surgeon. There was a dispute between the parties as to whether the decedent ever became medically stabilized after arriving at Starke Hospital, with the plaintiff presenting evidence that the decedent remained nonresponsive and in excruciating pain, and the treating physicians testifying that he was stabilized, resting comfortably, and able to carry on a conversation.

In Stone, the trial court granted a directed verdict that the GSA did **not** apply and the plaintiff received a substantial verdict. The First District reversed, ruling, *inter alia*, that there was a factual question for the jury as to whether the GSA

applied. In Stone, the court noted that while treating health care providers determined that surgery may have been required because of "a possible life threatening condition," the surgical consultation was not ordered "stat" but was scheduled for the next morning. 92 So.3d at 271. The First District held (Id.):

> In light of these, and other, conflicts in the evidence, the question as to whether Mr. Stone was stabilized and capable of receiving medical treatment as a nonemergency patient (and, hence, whether the heightened standard of proof in the GSA applied) was for the jury to decide.

Stone is not distinguishable on its facts and, since it explicitly holds that the physicians' subjective view of the patient's condition is a relevant consideration, the testimony of the treating physicians in the case sub judice was necessarily probative and compelled the denial of the Defendant's motion for directed verdict.

In summary, both Defendants argued and presented evidence that Lexi's condition was not an emergency and there was no need to transfer her quickly. That evidence created a factual issue as to whether the "reckless disregard" standard of §768.13 applied here, and the Motion for Directed Verdict should have been denied.

POINT III

THE JURY SHOULD NOT HAVE BEEN ASKED TO DETERMINE WHETHER DR. FREYRE WAS AN APPARENT OR ACTUAL AGENT OF WEST BOCA MEDICAL CENTER OR TO APPORTION FAULT TO HER.

[This issue is conditional and should only be addressed if this Court reverses for a new trial based on either of the prior points.]

Standard of Review

The standard of review for a question of law is de novo. See Sumner Group, Inc. v. M.C. Distributec, Inc., 949 So.2d 1205, 1206 (Fla. 4th DCA 2007).

Merits

If this Court remands this case for a new trial, then it should also consider whether the jury should have been asked to determine whether Dr. Freyre was an agent or apparent agent of WBMC, and whether the jury should have been permitted to apportion fault to her as a Fabre defendant independent of WBMC. These matters should not be presented to the jury under the facts and law of this case. This could only confuse the jury, and prejudice the Plaintiffs.

Generally, an employer of an independent contractor is not liable for the negligence of the independent contractor; however, liability will lie where the employer has a non-delegable duty to the plaintiff. See Newbold-Ferguson v. AMISUB (N. Ridge Hosp.), Inc., 85 So.3d 502, 505 (Fla. 4th DCA 2012). "Where

there is a non-delegable duty, the employer hiring an independent contractor to perform services encompassed within that duty is vicariously liable when those services are performed negligently." M.S. v. Nova Se. Univ. Inc., 881 So.2d 614, 620 (Fla. 4th DCA 2004) (citations omitted).

The trial court determined that WBMC had a non-delegable duty to provide competent emergency services to Lexi, thereby making it liable for the negligence of Dr. Freyre. As such, there was no reason to ask the jury to determine whether Dr. Freyre was an agent or apparent agent of WBMC. There was no legal significance to these questions and it is likely they confused the jury.

It was also improper to include Dr. Freyre on the verdict form as a Fabre defendant. In Suarez v. Gonzalez, 820 So.2d 342, 347 (Fla. 4th DCA 2002), the court held that a non-party for whom the defendant was liable for on the basis of a non-delegable duty, should not have been included on the verdict form as a Fabre defendant. See also Nash v. Wells Fargo Guard Services, Inc., 678 So.2d 1262, 1264 (Fla. 1996) (holding that a defendant could not "rely on the vicarious liability of a nonparty to establish the nonparty's fault"); Grobman v. Posey, 863 So.2d 1230, 1235 (Fla. 4th DCA 2003) (addressing derivative liability).

WBMC argued, and the Fourth District agreed, that failing to place Dr. Freyre on the verdict form would have deprived WBMC of its defense that Dr. Freyre was not its agent or apparent agent. Cantore, 174 So.3d at 1121. However,

that argument is misplaced. The trial court had already determined that WBMC had a non-delegable duty to Lexi and directed a verdict in favor of the Plaintiffs on that issue. Consistent with this ruling, the trial court instructed the jury that WBMC was liable for any negligent actions of Dr. Freyre. The trial court's decision as to that issue obviated the need for a determination on agency. Whether Dr. Freyre is an agent or not was irrelevant.

The trial court's ruling on WBMC's non-delegable duty also made clear that Dr. Freyre's negligence was part and parcel of WBMC's negligence and, thus, there was no need to add her as a Fabre defendant.[5] Furthermore, WBMC did not have to include the agency or Fabre questions on the verdict form to preserve the issue. The issue was sufficiently preserved when it objected to the entry of directed verdict on the non-delegable duty issue. Including the agency questions on the verdict form after the trial court had determined the non-delegable duty issue was akin to leaving in a question about a claim which had been dismissed. It was unnecessary and served only to confuse the jury.

WBMC also argued that Plaintiffs' proposed verdict form would have misled the jury. The jury would not have been misled. Dr. Freyre's negligence, if any, could have been considered by the jury just as it considered the negligence of

[5] It is undisputed that regardless of the jury's apportionment, WBMC would have been liable for the damages the jury determined were caused by Dr. Freyre, given the trial court's directed verdict on non-delegable duty.

those others whose negligence WBMC was liable for. Rather, the treatment of her and her negligence **as separate from WBMC** is what could have misled the jury. Here, there was no legal basis for apportioning fault against Dr. Freyre separately from WBMC.

WBMC relied upon Loureiro v. Pools by Greg, Inc., 698 So.2d 1262 (Fla. 4th DCA 1997); the Fourth District also cited it, noting:

> [T]he issue of the defendant's negligence "was fully litigated at trial and the presence of the Fabre defendants on the verdict form did not disturb the jury's ability to consider that matter."

Cantore, 174 So.3d at 1121 (quoting Loureiro, 698 So.2d at 1264). However, the court's reliance on its own opinion in Loureiro was erroneous. In Loureiro, the court found that **it was error** to include non-parties on the verdict form as Fabre defendants when the issue had not been properly pled by the defendants. The issue then was whether the improper inclusion of the Fabre defendants in the jury instructions and verdict form warranted a reversal of the judgment in favor of the defendants. The court determined that the error was not reversible error because the jury had found that the defendant was not negligent, thus, apportionment never came into play.

Here, Plaintiffs did not seek to have the Final Judgment reversed based upon the erroneous inclusion of Dr. Freyre on the verdict form as a Fabre defendant, or because the jury was asked to rule on agency. Instead, Plaintiffs raised this as a

conditional issue to be addressed only if a new trial was granted based upon one of the other issues raised in this appeal. Thus, the only issue raised here is whether the trial court erred, not whether such error was reversible error.

Defendants also cited Shufflebarger v. Galloway, 668 So.2d 996 (Fla. 3d DCA 1995), for the proposition that if Dr. Freyre was not included as a Fabre defendant, it would be reversible error. However, Shufflebarger is not applicable here because the Fabre defendant there was a settling **joint tortfeasor**, not someone for whom the defendant was liable, as is the case here.

The jury should not have been permitted to consider whether Dr. Freyre was an agent of WBMC and to apportion damages as to her when the court had already correctly determined that WBMC had a non-delegable duty to Lexi as to the care provided by Dr. Freyre. Accordingly, should this Court quash the Fourth District's decision with instructions for a new trial to be granted, it should advise the trial court not to make the same mistake again. Although Plaintiffs have not argued that the error was reversible error, the error could become reversible error if, on retrial, a jury finds fault on the part of Defendants and must apportion fault.

CONCLUSION

This Court should quash the Fourth District's decision, reverse the Final Judgment, and remand this case for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on December 1, 2016.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioners hereby certify that the type size and style of the Brief of Petitioners on the Merits is Times New Roman 14pt.

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