IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-1926

ALEXIS CANTORE, FELIX CANTORE and BARBARA CANTORE,

Petitioners,

vs.

WEST BOCA MEDICAL CENTER INC. d/b/a WEST BOCA MEDICAL CENTER, et. al.,

Respondents.

ANSWER BRIEF ON THE MERITS OF RESPONDENT,WEST BOCA MEDICAL CENTER, INC. D/B/A WEST BOCA MEDICAL CENTER

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

---

Michael K. Mittelmark, Esq.
Florida Bar No. 791751
mmittelmark@michaudlaw.com
Jennifer Perrone
Florida Bar No.116823
jperrone@michaudlaw.com
MICHAUD, MITTELMARK, MAROWITZ & ASRANI, PLLC
Attorneys for Respondent, West Boca Medical Center, Inc.
d/b/a West Boca Medical Center
621 N.W. 53rd Street, Suite 260
Boca Raton, Florida 33487
Tel: (561) 886-3390
Fax: (561) 392-0582

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

This is an appeal from a Final Judgment for West Boca Medical Center, Inc. d/b/a West Boca Medical Center rendered by the Honorable Lucy Chernow Brown on March 11, 2013 following a jury verdict.

Petitioners, Alexis Cantore, Felix Cantore and Barbara Cantore are referred to as their proper names, "Petitioners," "Plaintiffs" or "Appellants." Respondent, West Boca Medical Center, Inc. d/b/a West Boca Medical Center is referred to as "Respondent," "West Boca Medical Center," "WBMC," "Defendant" or "Appellee". Respondent, Variety Children's Hospital d/b/a Miami Children's Hospital is referred to as "Miami Children's Hospital" or "MCH".

The Record Index is set forth in one (1) original and three (3) supplemental record indices. References to the Record are indicated as "Rx y-z," where "x" is the volume and "y-z" is the page number. The forty-three (43) volume trial transcript is found in the first Supplemental Record at volumes SR1-3 to SR1-26. These transcripts are referred to as "Tx y-z" where "x" is the record volume of the first supplemental index, and "y-z" is the page number.

STATEMENT OF THE FACTS

West Boca Medical Center offers the following additions to Petitioners' statement of the facts:

Alexis Cantore was born in 1994. Unbeknownst to her parents, Felix Cantore and Barbara Cantore, Alexis Cantore suffered from a congenital condition, communicating hydrocephalus caused by a tumor at her brainstem. Alexis Cantore's hydrocephalus was not diagnosed until twelve (12) years later, in July 2006, after her chronic medical issues such as fatigue, weakness and progressive gait disturbances and her declining school performance were noted. (T37:4782-83; T39:5171). From the time she was born through her twelfth birthday, Alexis Cantore's cerebral spinal fluid was backing up in her brain and replacing working brain structure resulting in a significant loss of underlying brain matter. (T37:4790-91, 4794).

The first documented event leading toward Alexis Cantore's hydrocephalus diagnosis occurred on April 25, 2006 when Coral Springs Fire Rescue took her to West Boca Medical Center after she complained she felt like she was going to "pass out" on the school playground. Additionally, Alexis Cantore had been dull and expressionless, and she was a clumsy child according to her parents. (T39:5171).

Eventually, Alexis Cantore was seen by treating pediatric neurosurgeon, John Ragheb, M.D. on July 28, 2006 at Miami Children's Hospital who appreciated papilledema, vomiting and headaches consistent with long-standing increased intracranial pressure. (T37:4784-85; T39:5173). After making the hydrocephalus diagnosis, Dr. Ragheb recommended surgical intervention to address Alexis Cantore's increased intracranial pressure caused by hydrocephalus. However, because Alexis Cantore showed no acute deterioration, an elective procedure was scheduled several days later. On August 2, 2006, a burr hole in the skull to pierce through the membrane in order to relieve intracranial pressure, known as an endoscopic third ventriculostomy ("ETV") was successfully performed by Dr. Ragheb at MCH. (T37:4787, 4785). Almost immediately, Alexis Cantore showed marked improvement in her physical and mental condition which continued for the remainder of 2006 and most of 2007.

Nevertheless, on December 29, 2007, Alexis Cantore's mother noted she looked like she was "passing out." Alexis Cantore was again taken by Coral Springs Fire Rescue to West Boca Medical Center's emergency department with complaints of vomiting and diarrhea, and she was triaged as urgent. Additionally, a CT scan of her head was performed which showed enlarged ventricles. (T8:804).

On this date, the WBMC emergency department physician on duty, Dr.

Costa, discussed Alexis Cantore's symptoms with the pediatric neurosurgeon on-call at MCH, David Sandberg, M.D. who concurred the issues were most likely associated with a viral illness and only outpatient follow-up was recommended. (T26:3336-37). As a board certified pediatric neurosurgeon, Dr. Sandberg's course of action with transferring physicians who have eyes on the patient is always the same and his recommendations are based on the clinical information conveyed to him by the transferring physician. (T26:3337). Thus, prior to the events which were the subject of the medical malpractice action, there were three (3) documented instances of Coral Springs Fire Rescue taking Alexis Cantore to the West Boca Medical Center emergency room for signs and symptoms consistent with hydrocephalus [April 25, 2006, December 29, 2007 and July 3, 2008], one (1) documented instance of a CT scan being taken [December 29, 2007] and one (1) documented instance of Dr. Sandberg communicating with the emergency room physician at WBMC discussing Alexis Cantore's care and treatment [December 29, 2007].

In the six (6) months between Alexis Cantore's visits to the WBMC ER on December 29, 2007 and July 3, 2008, Alexis Cantore continued to follow up with the pediatric neurosurgeon who initially performed the ETV, Dr. Ragheb for her obstructive hydrocephalus. On December 31, 2007, Dr. Ragheb's chart noted that

two (2) days ago Alexis Cantore had diarrhea, she "fainted", was taken to the ER and had a CT done. It was further documented that her "vent[ricle]s [were] ok but [there were] no prior films to [compare]".

A similar entry reflecting a visit to the West Boca Medical Center ER due to a fainting episode and diarrhea was made on January 11, 2008. On this date, there was an entry in Dr. Ragheb's office chart that "mom notes [Alexis Cantore] is a little off[,] 'staring'[,] 'pale' [and] 'spacey'". Dr. Ragheb's progress note referenced the "CT scan performed on December 31, 2007 in the WBMC ER which again reveals marked diffuse ventriculomegaly involving the lateral and third ventricles." Dr. Ragheb also documented his opinion, similar to one made by Dr. Sandberg on December 29, 2007 when he was called by ER physician Dr. Costa: Alexis Cantore's "syncopal episodes" were **not "related to her hydrocephalus**. Nevertheless, Dr. Ragheb wanted Alexis to have another MRI scan of the brain.

On March 7, 2008, an MRI of the brain and cerebral spinal fluid (CSF) flow study was performed. On March 14, 2008, Dr. Ragheb examined Alexis Cantore and documented that the MRI "suggests stable if perhaps a slightly increased ventricular system, but an increase in the periventricular signal abnormality compared with the study from a year prior. Dr. Ragheb further documented that

Alexis Cantore was “not as bright or spontaneous as she has been in the past”. Dr. Ragheb also documented that a repeat third ventriculostomy may be required if Alexis Cantore’s symptoms increase in frequency.

One (1) month later, Alexis Cantore saw Dr. Ragheb on April 17, 2008, and he did not raise any concerns about a failing ETV. However, the MRI of the brain performed two (2) months later on June 17, 2008 revealed transependymal migration of CSF and a partial obstruction of the third ventriculostomy. The CSF flow study performed on this date was also consistent with a partial obstruction of the third ventriculostomy. On that date, Dr. Ragheb noted that Alexis Cantore’s parents were still concerned about her affect and the paucity of spontaneous speech. Dr. Ragheb believed Alexis Cantore's new MRI scan showed progressive transependymal CSF migration when compared to the study from November 2007 and worse from the study that was performed in April 2008. As a result, Dr. Ragheb again determined that Alexis Cantore’s ETV was not functioning optimally and beginning to fail after his physical examination and reviewing the MRI films and CSF flow studies. (T37:4807).

At the conclusion of the June 17, 2008 visit, Dr. Ragheb recommended Alexis Cantore undergo a repeat third ventriculostomy. Consequently, approximately two (2) weeks before her July 3, 2008 visit to the WBMC ER

Alexis Cantore's treating pediatric neurosurgeon, Dr. Ragheb was recommending the third ventriculostomy be repeated on an elective basis. In fact, no sense of urgency was conveyed to Alexis Cantore and her family on June 17, 2008. As a result, the repeat ETV was scheduled to proceed over a month later on July 28, 2008. (T39:5183, 5185).

The alleged malpractice occurred on July 3, 2008, when it was documented Alexis Cantore was suffering from headache, nausea and vomiting. Just like they did on April 25, 2006 and December 29, 2007, Coral Springs Fire Rescue arrived at the Cantore's home. On examination at 4:09 p.m., Alexis Cantore had a perfect Glasgow Coma Scale of 15, regular rate and rhythm and a normal papillary response. (T7:793-95). Per Coral Springs Fire Rescue policy, Alexis Cantore was taken directly from her home at 4:21 p.m. to WBMC where she arrived at the emergency department at 4:29 p.m. Alexis Cantore was immediately seen by the triage nurse, who triaged her as urgent and documented at 4:36 p.m. she was awake and alert, moving all extremities, had a normal neurological exam and normal papillary response. (T27:3438-39, 3441). A CT of the brain was ordered "STAT" at 4:47 p.m. by the emergency medicine physician on duty, Jacqueline Freyre, M.D. and was completed at 4:51 p.m. even before she had hands on Alexis. (T7:804, 806; T24:3150).

At 4:54 p.m., Alexis Cantore was first evaluated by Dr. Freyre, a board certified pediatrician who received her emergency medicine training at a major trauma center and who documented a normal papillary exam. (T7:803; T9:1121). By 5:14 p.m., Alexis Cantore was re-assessed by a triage nurse with non papillary deficits appreciated. (T7:813). One (1) minute later, the charge nurse contacted MCH regarding the transfer after communicating with Dr. Freyre. (T7:829; T23:2996-97). At 5:18 p.m., a board certified diagnostic radiologist and fellowship trained neuroradiologist reviewed the images of Alexis Cantore's CT scan, compared them with her December 29, 2007 study and recognized findings consistent with worsening hydrocephalus. (T24:3157, 3178-79, 3183-84). By 5:40 p.m., Dr. Freyre had reviewed the radiologist's report on the CT and directly communicated with MCH pediatric neurosurgeon, Dr. Sandberg regarding acceptance of the transfer. (T7:808-810; T32: 4209-10). This time, contrary to December 29, 2007, Alexis Cantore signs and symptoms were consistent with worsening hydrocephalus that needed to be addressed by her treating pediatric neurosurgeons at MCH. Dr. Freyre got it right. Dr. Sandberg agreed. At the time Dr. Freyre discussed Alexis Cantore's care and treatment with Dr. Sandberg at 5:40 p.m., she was stable.

At 6:11 p.m., Dr. Freyre placed a phone call to MCH emergency department

physician, Dr. Romig regarding Alexis Cantore's transfer and provided the necessary clinical information to facilitate the transport. (T7:817-18; T8:886-88). Additionally, between 6:00 p.m. and 7:00 p.m. Dr. Freyre spoke with a second MCH emergency department physician, Dr. Valeron regarding LifeFlight's estimated time of arrival after she appreciated a brief drop in Alexis Cantore's heart rate while she was vomiting but which resolved shortly thereafter. (T7:824; T27:3450-52; T25:3257, 3261-62). During the time Alexis Cantore was in the WBMC ER, Dr. Freyre communicated to three (3) healthcare providers at MCH, including Dr. Sandberg that she was stable.

The WBMC Administrative Supervisor followed-up with the MCH Operations Administrator at 6:20 p.m. and learned transport needed to be completed by the on-coming shift's pilots. (T27:3456-57; T38:5096-97; T34:4448). At that time, WBMC personnel were aware the LifeFlight transport crew was en route with an estimated arrival time of 7:00 p.m. and printed the necessary medical records to accompany Alexis Cantore to MCH. (T7:800; T27:3454). LifeFlight arrived at WBMC at 7:21 p.m. and MCH personnel arrived in the emergency room at 7:25 p.m. at which time care of Alexis Cantore was transferred to LifeFlight. (T7:837).

At 7:30 p.m., LifeFlight nurse Holly Olsen examined Alexis Cantore and

noted she was able to nod her head in response to questions and was responsive to Barbara Cantore which are signs inconsistent with neurological deterioration. (T27:3468-69; T37:4820). Additionally, Alexis Cantore was oriented to person, processing and following commands, had full motor function, clear breath sounds and her pupils were equal, round and reactive to light. (T38:5018-19; T34:4446, 4455). At 7:45 p.m., similar to the conversations Dr. Freyre had with MCH healthcare providers, Dr. Sandberg, Dr. Romig and Dr. Valeron, Nurse Olsen provided a medical report to MCH pediatric intensivist, Dr. Machado, corroborating Alexis was stable for air transport. (T8:905, 909-10, 912). Subsequently, Nurse Olsen obtained critical care transport orders while the LifeFlight crew continued to monitor Alexis Cantore's vital signs and assess her condition until lift off at 8:09 p.m. (T8:905, 909-10, 912).

At all times while at WBMC, Alexis Cantore remained neurologically stable without significant hypertension or slowing of her heart rate which was a strong indication she was not going to suffer a sudden brain herniation. (T37:4813-14). Alexis Cantore's hemodynamic stability not only reassured her healthcare providers at WBMC, but was a basic necessity to effectuate the transport per Dr. Sandberg's standard instructions. (T26:3337, 3346; T8:905-06, 908-12). Moreover, during transport, Alexis Cantore remained awake, and she was able to

protect her airway. (T38:5023-24).

Unfortunately, Alexis Cantore suffered an entirely unpredictable, acute decompensation as LifeFlight landed at MCH. Instead of going to the pediatric intensive care unit (PICU) as Dr. Machado ordered, she was taken directly to the MCH emergency department. (T37:4806-08, 4810). Dr. Sandberg was present in the hospital "by the grace of God at the time she was being rolled in," and he began preparing for an emergent ventriculostomy that ultimately saved Alexis Cantore's life. (T26:3352, 3380-81).

It was undisputed at trial that WBMC did not have a pediatric neurosurgeon on staff or the ability to relieve Alexis Cantore's intracranial pressure. (T8:987). At all times at WBMC, Alexis Cantore's worsening hydrocephalus condition could not be relieved with diuretics or intubation. (T37:4822-23). Alexis Cantore required a neurosurgical procedure to divert the fluid causing increased cranial pressure which was the only definitive treatment. (T37:4878, 4886-87). Moreover, the only pediatric neurosurgeons in the South Florida community working at the time were at MCH where Alexis Cantore had always received treatment for her hydrocephalus condition in 2006, 2007 and 2008. (T26:3369). Accordingly, expert testimony established the correct decision was made to transfer Alexis Cantore via LifeFlight helicopter to the closest (and only)

appropriate facility, MCH that could provide definitive pediatric neurosurgical care which ultimately saved her life. (T27:3432).

STATEMENT OF THE CASE

Respondent, West Boca Medical Center offers the following additions to Petitioners' statement of the case:

On October 15, 2010, Felix and Barbara Cantore, individually, and as parents of Alexis Cantore filed a medical negligence claim, naming West Boca Medical Center, Miami Children's Hospital, Jacqueline Freyre-Cubano, M.D. and Emergency Pediatric Services, PA as Defendants. (R30:5754-5804). Petitioners alleged Alexis Cantore was injured as a result of all of the Defendants' failure to arrange and effectuate a timely transfer for neurosurgical care. WBMC was alleged to be both directly and vicariously liable for the alleged negligence of Dr. Freyre based on theories of non-delegable duty, agency and apparent agency. WBMC denied it was vicariously liable for Dr. Freyre and all Defendants denied negligence on the part of any healthcare provider. Additionally, all Defendants raised the protections of Florida Statute §768.13 et. seq., commonly referred to as the "Good Samaritan Act" as an affirmative defense.

On April 20, 2012, counsel for WBMC took the discovery deposition of non-party pediatric neurosurgeon, Dr. Sandberg regarding his involvement in

Alexis Cantore's care at WBMC on December 29, 2007 and July 3, 2008. Dr. Sandberg's deposition testimony, read at trial, confirmed he was a co-treating physician on both of these dates. Moreover, Dr. Sandberg was provided with his operative report that was prepared after his emergency ventriculostomy procedure which refreshed his recollection as to the events on July 3, 2008, and he was also shown medical records from WBMC which accompanied Alexis Cantore during her transfer and illustrated conversations he had with healthcare providers at WBMC that evening. (T26:3341-45).

Dr. Sandberg did not dispute the medical records inferred he spoke with emergency department personnel at WBMC including Dr. Freyre. Dr. Sandberg explained he has had numerous identical conversations with other treating physicians like the ones he had on December 29, 2007 with Dr. Costa and on July 3, 2008 with Dr. Freyre, because he is a pediatric neurosurgeon at a major institution handling prior similar situations for pediatric patients with hydrocephalus. (T26:3336-37, 3345-46). Dr. Sandberg was unequivocal that he was told on July 3, 2008 prior to Alexis Cantore landing at MCH that she was stable at WBMC with headaches and vomiting when she was transferred for pediatric neurosurgical evaluation. (T26:3343).

Furthermore, Dr. Sandberg testified his recommendation to Dr. Freyre was

for “transfer to MCH for evaluation” based on Alexis Cantore’s presentation at WBMC (T26:3390-91). Dr. Sandberg further clarified he would have recommended Alexis Cantore be intubated prior to being transferred to MCH if she was not awake and alert by report at the time he spoke with Dr. Freyre. (T26:3391). Dr. Sandberg was given the opportunity to explain the different courses of treatment he would take based on the Alexis Cantore’s neurological status. Dr. Sandberg permissibly testified “[t]here are two trees,” when describing how he cares for patients with hydrocephalus that are awake and following commands as opposed to those who are not awake and cannot follow commands. (T26:3400-01).

In this case, “hybrid” treating physician/expert witness Dr. Sandberg was the only pediatric neurosurgeon in this case who could have provided the jury with the necessary background and understanding to determine whether there was an indication for diuretics and intubation from a pediatric neurosurgery prospective as he acknowledged treating physicians preferences in caring for their patients varies widely among practitioners. (T26:3392). Again, Dr. Sandberg reiterated his communication with emergency department physicians prior to transfer would never have included recommending diuretics unless the patient was deteriorating and was consistent with his actions in this case based on his review of the record.

(T26:3392). Thus, the jury was properly allowed to hear from Dr. Sandberg about the actions he would have taken based on the clinical presentation of Alexis Cantore that was given to him over the phone. Dr. Sandberg's deposition testimony was never colored by the fact that he was a named defendant, and his testimony was never offered to address the standard of care of Dr. Freyre or the other healthcare providers at WBMC.

Dr. Freyre and Emergency Pediatric Services settled prior to trial. After a five (5) week trial, the jury returned a verdict for West Boca Medical Center and Miami Children's Hospital. Petitioners filed an appeal in the Fourth District alleging six points of error as grounds for a new trial. The Fourth District affirmed the judgment for Defendants on all counts but wrote to distinguish the facts of this case as they relate to expert physician testimony from those that were disallowed by this Court in Saunders v. Dickens, 151 So. 3d 434 (Fla. 2014), and to explain why the law as set out in Saunders did not apply to the facts in this case. Cantore ex rel. Cantore v. W. Boca Med. Ctr., Inc., 174 So. 3d 1114, 1115 (Fla. 4th DCA 2015).

In its opinion below, the Fourth District noted Dr. Sandberg was asked at deposition whether Alexis Cantore would have been intubated, assuming she remained stable, alert and oriented as to place, person and time and was at all times

neurologically intact through transport. Cantore, 174 So. 3d at 1117. Dr. Sandberg said "no" because the breathing tube is uncomfortable and requires sedation so the patient cannot speak. Id.

Dr. Sandberg was also asked whether Alexis Cantore would have ended up herniating if she had arrived one (1) to two (2) hours earlier at MCH. Id. Dr. Sandberg answered that even if Alexis Cantore had arrived two (2) hours earlier it would have been the exact same outcome because she would have still gotten a ventriculostomy when she deteriorated. Cantore, 174 So. 3d at 1117. Dr. Sandberg stated further that if Alexis Cantore was awake, alert and oriented as to place, person and time, and her ventricles looked worse, he would have arranged for a procedure to be done that night or the next morning; she still would have deteriorated and wound up getting the ventriculostomy in the emergency room or the PICU which is exactly what happened. Id.

The Fourth District noted the critical factual differences between the subsequent treating physician's care in Saunders v. Dickens, 151 So. 3d 434 (Fla. 2014) and Ewing v. Sellinger, 758 So. 2d 1196 (Fla. 4th DCA 2000)(disapproved by Saunders, 151 So. 3d at 443) which began after the negligent care at issue had occurred. To the contrary, in this case, Dr. Sandberg's involvement commenced by 5:40 p.m., or within one (1) hour of the alleged malpractice, when Dr. Freyre

requested his expertise in Alexis Cantore's neurological management at WBMC until the transfer to MCH could be effectuated, and she could received the life-saving neurosurgical care she needed. Cantore, 174 So. 3d at 1118-1119.

The Fourth District noted Alexis Cantore's condition required proper pediatric neurosurgical evaluation and treatment; WBMC did not have pediatric neurosurgical staff capable of treating her and Dr. Sandberg was the pediatric neurosurgeon on-call at MCH. Id. at 1119. The Fourth District further noted it was undisputed at some point Dr. Sandberg would have to perform a procedure to relieve the intracranial pressure on Alexis Cantore's brain and WBMC medical personnel, including Dr. Freyre, continually followed his instructions, heeded his recommendations and noted his preferences. Cantore, 174 So. 3d at 1119. Thus, the Fourth District recognized Dr. Sandberg was a co-treating physician and thus, his role squarely exceeded that of a subsequent treating physician. Id. Moreover, unlike the testifying neurosurgeon in Saunders, Dr. Sandberg was never a defendant in the instant case and his actions were never criticized by any party. Id. at 1121.

As Dr. Sandberg played such an influential role in Alexis Cantore's care and treatment at all times material to WBMC's alleged malpractice, the Fourth District noted his answers to the hypotheticals posed had bearing on his own actions as

well. Id. at 1119. Accordingly, the Fourth District found when Dr. Sandberg testified as to hypotheticals involving Alexis Cantore's earlier arrival at MCH, "he was not 'a subsequent treating physician [testifying] that adequate care by the defendant physician would not have altered the subsequent care, Saunders, 151 So. 3d at 442; rather, he was explaining **his** medical decision-making process and how different decisions made by **him** would have impacted Alexis Cantore's neurological status and condition and thereby affecting his decision to perform an emergent ventriculostomy versus a scheduled operative procedure later that evening.'" Cantore, 174 So. 3d at 1119.

The Fourth District recognized in order for the jury to be able to determine how a reasonably prudent physician would have acted in this case, it was necessary for the jury to hear from Dr. Sandberg regarding when he normally performs or when it might be necessary to perform an emergent ventriculostomy versus a regularly scheduled ventriculostomy. Id. at 1120. The Fourth District went on to note Dr. Sandberg was asked deposition questions based on record evidence and his opinions regarding the timing of intervention related directly to his field of expertise which was appropriately admitted at trial. Cantore, 174 So. 3d at 1120.

Most importantly, the Fourth District pointed out that Petitioners had somewhat understated Dr. Sandberg's actual critical involvement in Alexis

Cantore's care on July 3, 2008 prior to her actual arrival at MCH because the level of care and instruction given by Dr. Sandberg prior to the transfer was essentially inseparable from Dr. Freyre's alleged failure to appropriately treat her prior to transport. Id. Thus, the jury was properly allowed to hear Dr. Sandberg's testimony including his complete medical decision-making rationale because he was a co-treating/consulting or "hybrid" treating physician/expert witness and his treatment recommendations prior to Alexis Cantore's brain herniation hinged upon his education, training and experience. Id. at 1119.

The Fourth District noted Petitioner' strategy during the course of litigation and at trial was to demonstrate Dr. Freyre failed to appreciate Alexis Cantore's true condition and as a result provided inaccurate information to multiple healthcare providers at MCH, including, but not limited to, Dr. Sandberg. Id. at 1120. The Fourth District further acknowledged "the jury heard Dr. Sandberg's testimony that **he would have made different recommendations** to intubate and administer diuretics had he been told Alexis [Cantore] was neurologically deteriorating" as Petitioners' repeatedly argued to the jury. Id. Furthermore, Petitioner' trial counsel's hypothetical questions to Dr. Sandberg assumed facts with inferences favoring their version of the case and instructed Dr. Sandberg in questions to him to assume certain facts pertaining to Alexis Cantore's condition. Cantore, 174 So.

3d at 1120. For example, the Fourth District noted Petitioners' trial counsel posed hypothetical questions to Dr. Sandberg which "assumed facts with inferences favoring their version of the case, that is, Alexis [Cantore] was symptomatic for over an hour, was drowsy, dizzy, weak, had blurred vision, vomiting too often to count, slow to respond to commands and obviously ill." Id. Moreover, the Fourth District also noted Petitioners' trial counsel "instructed Dr. Sandberg in questions to him, that Alexis [Cantore] was exhibiting those signs and symptoms and was not 'awake, alert and oriented like she's just fine.'" Id.

Ultimately, Dr. Sandberg continued to express his opinion in terms of what he would have done under either version of the facts. Id. In other words, the Fourth District stated, "the import of Dr. Sandberg's testimony was to provide a medical explanation as to the appropriate neurosurgical **treatment under both Appellants' and Appellees' views of what actually was Alexis [Cantore]'s condition while at WBMC**." Id. (Emphasis in original). Dr. Sandberg testified as to what he understood the relevant evidence of Alexis Cantore's medical condition to be, not that the care by Dr. Freyre would or would not have altered Dr. Sandberg's treatment after her transfer to MCH. Thus, the Fourth District correctly determined that introduction of Dr. Sandberg's testimony did not fall under the type of testimony proscribed by Saunders v. Dickens, 151 So. 3d 434

(Fla. 2014) and was properly admitted by Judge Brown even if she based her decision on Ewing v. Sellinger, 758 So. 2d 1196 (Fla. 4th DCA 2000) which was disapproved by this Court in Saunders. Cantore, 174 So. 3d at 1120-1121.

The Fourth District properly characterized Dr. Sandberg as a co-treating physician or consulting treating physician who would be allowed to answer hypotheticals from both sides as a "hybrid" treating physician expert. Moreover, Dr. Sandberg was properly allowed to testify in response to a hypothetical question based on the assumption supported by the evidence that he would not have performed an emergency ventriculostomy until that night or the next morning had Alexis Cantore arrived one to two hours earlier because it bore on his own actions and was based on his understanding of her condition at the time.

The Fourth District further found Petitioners were in no way hindered or restricted from expressing their theory of liability to the jury. Id. at 1121. Moreover, since Dr. Freyre and her employer had settled out of the suit before trial, the Fourth District found the trial court correctly determined in order to preserve WBMC's remaining defense to the allegations of vicarious liability for Dr. Freyre's conduct, Dr. Freyre would have had to be added to the verdict form similar to a Fabre defendant. Cantore, 174 So. 3d at 1121.

On October 15, 2015, Petitioners filed a Notice to Invoke Discretionary

Jurisdiction alleging the Fourth District's decision expressly and directly conflicted with the decision of another District Court of Appeal or of the Supreme Court of Florida on the same question of law. Petitioners and Respondents, WBMC and MCH, filed jurisdictional briefs on the alleged conflict issue which was limited to Dr. Sandberg's testimony. WBMC contended discretionary review was unnecessary as there is no direct and express conflict between the Fourth District's decision below or any other District Court's decisions and Saunders v. Dickens, 151 So. 3d 434 (Fla. 2014). On October 11, 2016, this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

This Court should decline discretionary review as there is no direct and express conflict with the Fourth District's decision below and any other decisions including Saunders v. Dickens, 151 So. 3d 434 (Fla. 2014) concerning admission of the testimony of pediatric neurosurgeon, David Sandberg, M.D., who was properly characterized by the Fourth District as a co-treating/consulting physician of Alexis Cantore. Dr. Sandberg's care and treatment of Alexis Cantore on July 3, 2008 commenced shortly after she was seen by emergency room pediatric physician, Dr. Freyre prior to any alleged malpractice. Dr. Freyre followed Dr. Sandberg's instructions, heeded his recommendations and noted his care and treatment preferences prior to her transfer similar to many other situations

involving co-treating physicians. Additionally, Dr. Freyre not only requested Dr. Sandberg's approval for a transfer but also his expertise in proper neurological management until her transfer to MCH which made him a hybrid expert witness.

This case is not similar to Saunders v. Dickens, 151 So. 3d 434 (Fla. 2014) where: (1) the offending testimony came from a subsequent treating physician whose **treatment began after the alleged negligent care had occurred**; (2) there was testimony that adequate care by the defendant physician would not have altered the subsequent care; and (3) the offending testimony came from a physician who was a defendant at the time the testimony was offered. To the contrary, Dr. Sandberg's treatment commenced almost contemporaneously with that of Dr. Freyre, he testified to what he would have done under both Petitioners and Respondents versions of the facts, and he was never a named defendant or were his actions ever criticized by any party during the litigation. In other words, Dr. Sandberg properly provided a medical explanation as to the appropriate neurological and neurosurgical treatment under both Petitioners' and Respondents' views of Alexis Cantore's condition while at WBMC.

Moreover, the Fourth District correctly concluded introduction of his testimony did not fall under the type of testimony proscribed by Saunders v. Dickens because Dr. Sandberg testified as to what he understood the relevant

evidence of Alexis Cantore's medical condition to be and not that the care by Dr. Freyre would or would not have altered his treatment after her transfer to MCH.

The admissibility of Dr. White's testimony in no way vitiated Petitioners' right to a fair trial because there is no reasonable possibility it contributed to the verdict. The Fourth District properly determined Petitioners were not hindered in any way or restricted from expressing their theory of liability against WBMC to the jury. Moreover, the jury properly heard Dr. White's testimony as to care and treatment recommendations he would have received based on his education, training and experience.

Furthermore, this Court should decline review of all other issues raised in Petitioners' brief in an attempt at second appellate review for a new trial where it was never intended that District Courts of Appeal should be intermediate courts. Rather, under Florida's public policy, District Court decisions are intended to be final and absolute. Thus, the Fourth District's affirmance of the trial court's proper entry of a directed verdict for WBMC on application of the Good Samaritan Act under Florida Statute §768.13 and placement of Dr. Freyre on the Verdict Form go beyond the alleged conflict issue, are not outcome determinative and should stand undisturbed.

Additionally, the Fourth District correctly affirmed the trial court's entry of

a directed verdict on the application of the Good Samaritan Act where it was properly pled by WBMC, all evidence at trial conclusively established Alexis Cantore would have died without neurosurgical intervention which was not available in the WBMC emergency room and where she was never capable of receiving care and treatment as a non-emergency patient at WBMC on July 3, 2008. Any other conclusion would be inconsistent with the undisputed testimony at trial that WBMC was not equipped to treat Alexis Cantore's emergent life-threatening condition and transfer to a higher level of neurosurgical care at MCH was the only option to save her life and did save her life.

Moreover, the Fourth District correctly affirmed the trial court's decision to allow Dr. Freyre to be placed on the Verdict Form as necessary to preserve WBMC's remaining defense to the allegation it was vicariously liable for Dr. Freyre as an agent or apparent agent. Non-Delegable duty is not a theory of vicarious liability and WBMC was properly entitled to continue to raise its defense to Petitioners' vicarious liability theory of negligence against Dr. Freyre after the directed verdict on non-delegable duty was granted.

ARGUMENT

I. DISCRETIONARY REVIEW SHOULD BE DENIED BECAUSE THERE IS NO DIRECT AND EXPRESS CONFLICT WITH THIS COURT'S DECISION IN SAUNDERS V. DICKENS AND THE FOURTH DISTRICT'S DECISION OR ANY OTHER DISTRICT COURT'S DECISIONS REGARDING THE PERMISSIBLE SCOPE OF A CO-TREATING PHYSICIAN'S TESTIMONY.

Standard of Review

The standard of review for whether the Florida Supreme Court should exercise discretionary jurisdiction where a Petitioner alleges conflict jurisdiction on the same question of law is whether express and direct conflict appears from the four corners of the decisions such that the District Court announced a rule of law which conflicts with a previous pronouncement by the Court or where there is a conflicting result involving substantially the same facts. See Nielsen v. City of Sarasota, 117 So. 2d 731, 735 (Fla. 1960)(no conflict jurisdiction existed between the District Court decision and Supreme Court decision where the Supreme Court failed to find the District Court announced a rule of law which conflicted with any previous pronouncement by the Supreme Court and where there was no conflicting result involving substantially the same facts); Fla. R.App. P. 9.030(2)(A)(iv); Art. V, §3(b)(3), Fla. Const. (a decisional conflict must be both express and direct in order to meet jurisdiction requirements); Reaves v. State, 485 So. 2d 829, 830

(Fla. 1986)(petition for review was denied on closer examination as improvidently granted where no direct and express conflict existed; noting conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision); see also Weston v. Nathanson, 173 So 2d 451, 452 (Fla. 1964)(no conflict existed after thorough consideration of record, briefs and oral argument; jurisdiction will not be determined on basis of whether Supreme Court's view on merits is in accord or disagreement with view of District Court).

In addition, conflict jurisdiction may also be created where there is a misapplication of the Court's decision. See Knowles v. State, 848 So. 2d 1055 (Fla. 2003)(recognizing misapplication of Supreme Court decision can create conflict jurisdiction).

Argument

The Fourth District's opinion below properly distinguished facts in the instant case from the facts in Saunders v. Dickens, 151 So. 3d 434 (Fla. 2014). In fact, the Fourth District recognized the distinction between permissible testimony by a co-treating physician which occurred in the instant case versus impermissible testimony by a subsequent treating physician used as a means to relieve a defendant of liability as proscribed by the Court in Saunders. As a result, both this Court's decision in Saunders and the well-reasoned Fourth District decision in

Cantore are easily reconcilable.

The Fourth District properly recognized that Dr. Sandberg was a co-treating/consulting or "hybrid" treating physician expert witness whose care and treatment of Alexis Cantore began at 5:40 p.m. when Dr. Freyre requested his expertise in Alexis Cantore's neurological management until her transfer to MCH was completed. Cantore ex rel. Cantore v. W. Boca Med. Ctr., Inc., 174 So. 3d 1114, 1118-1119 (Fla. 4th DCA 2015); see Frantz v. Golebiewski, 407 So. 2d 283, 285 (Fla. 3d DCA 1981)(noting treating doctor, while unquestionably an expert, acquires knowledge in course of attempting to make patient well); see also Steinger, Iscoe & Greene, P.A. v. Geico Gen. Ins. Co., 103 So. 3d 200, 203 (Fla. 4th DCA 2012)(recognizing "hybrid" witness as treating physician who also provides an expert opinion).

Upon Alexis Cantore's arrival to WBMC on July 3, 2008, at 4:47 p.m. the pediatric emergency medicine pediatrician on duty, Dr. Freyre ordered a CT of her brain "STAT" and then evaluated her at 4:54 p.m. (T7:803-4, 806; T9:1121; T24:3150). Any suggestion that Alexis Cantore was not properly handled as a patient because she was triaged as "Urgent" is belied by the testimony and the medical records. The CT scan, ordered by Dr. Fryere was completed at 4:51 p.m. At 5:18 p.m. the radiologist reviewed the images of Alexis Cantore's CT scan,

compared them with her previous December 29, 2007 study and recognized findings consistent with worsening hydrocephalus. (T24:3157, 3178-79, 3183-84). Dr. Freyre reviewed the radiologist's report and by 5:40 p.m. had communicated with MCH pediatric neurosurgeon, Dr. Sandberg regarding acceptance of Alexis Cantore's transfer and proper neurological care and treatment until the transfer took place. (T7:808-810; T32:4209-10).

It was undisputed at trial that WBMC did not have a pediatric neurosurgeon on staff or the ability to relieve Alexis Cantore's intracranial pressure to effectuate a cure of her life-threatening condition. (T8:987). Alexis Cantore required a neurosurgical procedure, which had already been scheduled to occur three (3) weeks later, to divert the fluid causing increased cranial pressure which was the only definitive treatment and could not be performed at WBMC. (T37:4878, 4886-87). Further, the only pediatric neurosurgeons in the South Florida community working at the time were at MCH where Alexis Cantore had always received treatment for her hydrocephalus condition since it was first diagnosed in 2006. (T26:3369).

In fact, Dr. Sandberg had been previously contacted on December 29, 2007 by emergency room physician Dr. Costa regarding Alexis Cantore's condition and the results of a CT scan when she was brought to WBMC for similar complaints

which required his expertise to determine if hydrocephalus was the cause. (T8:804). Thus, a mere six (6) months later, Dr. Sandberg, as a pediatric neurosurgical specialist, worked together with Dr. Freyre to provide care and treatment to Alexis Cantore from the time she arrived at WBMC on July 3, 2008 until her transfer to MCH in providing instructions, recommendations and his treatment preferences to Dr. Freyre and WBMC personnel. Cantore, 174 So. 3d at 1119. Unquestionably, Dr. Sandberg's testimony was based on knowledge he acquired on July 3, 2008 "simply in the course of attempting to make [Alexis] well" as well as his prior interaction with the WBMC emergency room personnel. Ryder Truck Rental, Inc. v. Perez, 715 So. 2d 289, 290-91 (Fla. 3d DCA 1998).

Petitioners' arguments concerning Dr. Sandberg's role and testimony overlook a pivotal point that he previously exercised his medical judgment in determining whether a neurosurgical procedure would be necessary in the immediate future in his role as the neurosurgeon on-call at MCH. In other words, it is illogical to conclude Dr. Sandberg should not be permitted to testify as to the timing of neurosurgical intervention. Not only was that the very purpose of WBMC's emergency department physicians' phone discussions with him on both December 29, 2007 and July 3, 2008 regarding Alexis Cantore, but it is also a mainstay of Dr. Sandberg's practice as one of the only pediatric neurosurgeons in

South Florida capable of properly treating her hydrocephalus.

The Fourth District recognized Dr. Sandberg was a co-treating physician (along with Dr. Freyre) and thus, his role squarely exceeded that of a subsequent treating physician. Cantore, 174 So. 3d at 1119. Acknowledging Dr. Sandberg's influential role in the care of Alexis Cantore, the Fourth District pointed out Petitioners somewhat understated Dr. Sandberg's actual critical involvement in Alexis Cantore's care on July 3, 2008 prior to her actual arrival at MCH as the level of care and instruction given by Dr. Sandberg prior to transfer was essentially inseparable from Dr. Freyre's alleged failure to appropriately treat her prior to transport. Id. at 1120. Petitioners' characterization of Dr. Sandberg simply as a "later treating physician" is contrary to the Fourth District's opinion below and the evidence adduced at trial from which the jury could base its decision.

The Fourth District properly appreciated the factual differences between Dr. Sandberg's role in the instant case and the role of the subsequent treating physician defendant in Saunders v. Dickens, 151 So. 3d 434 (Fla. 2014). Cantore, 174 So. 3d at 1120-1121. Dr. Sandberg testified as to what he understood the relevant evidence of Alexis's medical condition to be; not that the care by Dr. Freyre would or would not have altered Dr. Sandberg's treatment after the transfer to MCH. Id. at 1120-1121. The Fourth District noted Petitioners' strategy during the course of

litigation and at trial was to demonstrate Dr. Freyre failed to appreciate Alexis Cantore's true condition and as a result provided inaccurate information to multiple healthcare providers at MCH including Dr. Sandberg. Id. at 1120. It was further noted that "[i]n fact, the jury heard Dr. Sandberg's testimony that **he would have made different recommendations** to intubate and administer diuretics had he been told Alexis [Cantore] was neurologically deteriorating" as Petitioners suggested. Id. (Emphasis in original).

In addition, Petitioners' trial counsel posed hypothetical questions to Dr. Sandberg asking him to assume certain facts with inferences favoring their version of the case and instructing Dr. Sandberg in questions to him to assume certain facts pertaining to Alexis Cantore's condition. Id. Inexplicably absent from Petitioners' brief is any mention of the hypotheticals that Petitioners' trial counsel posed to Dr. Sandberg which included asking Dr. Sandberg to assume certain facts favorable to their case.

This Court in Saunders v. Dickens, held "that testimony that a subsequent treating physician would not have treated the patient differently had the defendant physician acted within the applicable standard of care is irrelevant and inadmissible and will not insulate a defendant physician from liability from his or her own negligence." 151 So. 3d 434, 443 (Fla. 2014). In contrast to Saunders,

Dr. Sandberg testified he would have treated Alexis Cantore differently had the facts been as Petitioners suggested, in that he would have made different recommendations to intubate and administer diuretics had he been told she was neurologically deteriorating. Cantore, 174 So. 3d at 1120. Dr. Sandberg testified as to the two different courses of treatment that he would consider depending on a patient with hydrocephalus' neurological status by starting with the preface "[t]here are two trees." Dr. Sandberg further explained how he cares for patients with hydrocephalus that are awake and following commands and those patients who are not awake and cannot follow commands. (T26:3400-01).

Dr. Sandberg's testimony substantially differs from the type of offending testimony this Court found inadmissible in Saunders. The Fourth District recognized this distinction in the testimony and further elaborated as to how Dr. Sandberg's testimony differed from that of the offending testimony in Saunders. The Fourth District noted Dr. Sandberg continued to express his opinion in terms of what he would have done under either version of the facts. Id. In other words, "the import of Dr. Sandberg's testimony was to provide a medical explanation as to the appropriate neurosurgical treatment under both Appellants' [Petitioners] and Appellees' [Respondents] views of what actually was Alexis [Cantore's] condition while at WBMC." Cantore, 174 So. 3d at 1120. The Fourth District, well aware of

this Court's decision in Saunders, reviewed the entire record and determined the introduction of Dr. Sandberg's testimony did not fall under the type of testimony proscribed by Saunders and was properly admitted. Id. at 1120-1121.

The hypothetical questions posed to Dr. Sandberg by both sides were based on the interpretation of the WBMC records in evidence. Moreover, the hypothetical questions posed included proper references to the record and went directly to the heart of Dr. Sandberg's care and treatment of Alexis Cantore. More importantly, Dr. Sandberg could properly explain how different decisions by him would have impacted Alexis Cantore's neurological status and condition thereby affecting his decision to perform an emergent ventriculostomy versus a scheduled operative procedure later that evening. Cantore, 174 So. 3d at 1119.

The Fourth District plainly stated "Dr. Sandberg was asked deposition questions based on record evidence." Id. at 1120. Further, as Dr. Sandberg's testimony regarding the time of intervention related directly to his field of expertise in pediatric neurosurgery, the Fourth District concluded the hypothetical questions and answers were appropriately admitted at trial over objections on grounds of speculation and improper hypothetical based on Dr. Sandberg's qualifications as a treating physician, neurosurgeon and expert. Cantore, 174 So. 3d at 1120.

Petitioners continue to ignore the well-settled Florida law that juries are entitled to weigh admissible testimony from hypotheticals along with the other evidence as long as there is evidence in the record to support the hypothetical question. The Fourth District correctly found "Dr. Sandberg's testimony was properly admitted as it was based on admissible hypothetical questions from both sides." Cantore, 174 So. 3d at 1121. See e.g., Seibels, Bruce & Co. v. Giddings, 264 So. 2d 103, 106 (Fla. 3d DCA 1972)(in propounding a hypothetical, a party is entitled to use evidence even if it be conflicting, viewed in a light most favorable to him; trial court erred in excluding hypotheticals posed to experts that would have permitted them to give opinion as to speed where there was evidence which tended to show a point of impact and photos which depicted damages to vehicles on which opinions could be based); Redwing Carriers, Inc. v. Watson, 341 So. 2d 1049, 1050 (Fla. 4th DCA 1977)(trial court properly allowed accident reconstruction expert to give opinion that driver had been able to take evasive action so as to avoid accident where facts contained in hypothetical were properly based upon a version of the testimony of eyewitnesses which the jury had right to accept); Linehan v. Everett, 338 So. 2d 1294, 1295-1296 (Fla. 1st DCA 1976)(hypothetical to doctor which included facts to be assumed the opinion of initial doctor who had no independent recollection of examining patient but based

on his notes gave opinion that he conducted examination of patient's back and it was within normal limits was sufficiently factual to be proper); see also Burnham v. State, 497 So. 2d 904, 906 (Fla. 2d DCA 1986)(it is not necessary for a hypothetical question to be limited to only the facts that are directly established by the evidence; such a question can be based upon an assumed state of facts which the evidence in the record tends to prove, even by inference).

Moreover, Petitioners' claims that Dr. Sandberg's testimony was not sufficiently based on recollection of events prior to Alexis Cantore's arrival at MCH is refuted by the record evidence and without merit. Dr. Sandberg was provided with his operative report which refreshed his recollection as to the events of July 3, 2008, and he discussed several medical records from WBMC regarding conversations he had with healthcare providers. (T26:3341-45). Dr. Sandberg's July 3, 2008 operative report reflected "[h]e was told that she was stable" at WBMC and he testified he "remember[ed] very well the details of what happened when Alexis Cantore arrived at MCH on the night he was on call and performed an emergent surgery." Dr. Sandberg also had an independent recollection that Alexis Cantore "deteriorated in the helicopter," "was trying to die," presented with a "very poor neurological status," "had dilated one or both pupils," her intracranial pressure was very high and she was intubated.

After careful review of the record and the state of Florida law after this Court's decision in Saunders, the Fourth District determined the trial court's evidentiary decisions were legally correct and not an abuse of the court's sound discretion despite the Saunders decision which overruled the Ewing v. Sellinger case. Cantore, 174 So. 3d at 1121. The Fourth District acknowledged the jury clearly rejected Petitioner' theory of the case and could properly conclude Dr. Freyre and WBMC did not act with reckless disregard. Id.

Accordingly, where it has **not** been shown from the four corners of the opinions themselves that the Fourth District's decision in Cantore ex rel. Cantore v. W. Boca Medical Center, Inc., 174 So. 3d 1114 (Fla. 4th DCA 2015) and this Court's decision in Saunders v. Dickens, 151 So. 3d 434 (Fla. 2014) are irreconcilable or that there has been any misapplication of the Court's decision in Saunders, no express and direct conflict exists and the Court should decline review. See Art. V, §3(b)(3), Fla. Const.

WBMC further adopts the arguments made by MCH in points II and III of their Answer Brief.

II. A NEW TRIAL IS NOT WARRANTED AS THERE IS NO REASONABLE POSSIBILITY THAT ANY ERROR IN THE ADMISSION OF DR. WHITE'S TESTIMONY CONTRIBUTED TO THE VERDICT CAUSING A MISCARRIAGE OF JUSTICE.

Standard of Review

The test for harmless error is whether the beneficiary of the error has demonstrated that there is no reasonable possibility that the error contributed to the verdict. Special v. W. Boca Med. Ctr., Inc., 160 So. 3d 1251, 1256 (Fla. 2014). "The purpose of the harmless error analysis is to 'conserve judicial labor by holding harmless those errors which, in the context of [a] case, do not vitiate the right to a fair trial and, thus, do not require a new trial.'" Special v. W. Boca Med. Ctr., Inc., 160 So. 3d 1251, 1254-55 (Fla. 2014) (quoting State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986)). Appellate courts must evaluate harmless error on a case-by-case basis after examination of the entire record to determine whether "the error complained of has resulted in a miscarriage of justice." Special, 160 So. 3d at 1255 (quoting §59.041, Fla. Stat. (2003)).

Argument

The Fourth District properly determined Petitioners were in no way hindered or restricted from expressing their theory of liability to the jury. Cantore ex rel. Cantore v. W. Boca Med. Ctr., Inc., 174 So. 3d 1114, 1121 (Fla. 4th DCA 2015). The Fourth District noted Petitioner's strategy during the course of the litigation and at trial was to demonstrate Dr. Freyre failed to appreciate Alexis Cantore's true condition and as a result provided inaccurate information to multiple healthcare

providers at MCH including, but not limited to Dr. Sandberg. Cantore, 174 So. 3d at 1120. The Fourth District further acknowledged "the jury heard Dr. Sandberg's testimony **that he would have made different recommendations** to intubate and administer diuretics had he been told Alexis [Cantore] was neurologically deteriorating" as Petitioners' repeatedly argued to the jury. Id. at 1120.

Furthermore, at trial, there was no restriction on testimony that supported Petitioners' theory of causation so the jury was presented with two independent theories of the case. Petitioners' trial counsel's hypothetical questions to Dr. Sandberg assumed facts with inferences favoring their version of the case, that is, Alexis Cantore was symptomatic for over an hour, was drowsy, dizzy, weak, had blurred vision, vomited too numerous to count, slow to respond to commands and obviously ill. (T26:3397-98). Petitioners' trial counsel further instructed Dr. Sandberg that Alexis Cantore was exhibiting those signs and symptoms and was not "awake, alert and oriented like she's just fine". (T26:3397-98). Moreover, Dr. Sandberg's testimony supported Petitioners' theory that the outcome would have been prevented had Alexis Cantore been transferred to MCH earlier. (T26:3401). Thus, both conflicting theories of the case were properly and thoroughly presented and appropriately left to the jury's determination.

Expert witnesses, such as WBMC's retained emergency room expert, Dr.

White are entitled and in fact expected to comment on the record evidence. It is axiomatic in medical malpractice cases this Court has pronounced "[e]xperts are qualified to render opinions based on their experience, background and training". Linn v. Fossum, 946 So. 2d 1032, 1040 (Fla. 2006). Dr. White's opinion that his experience in cases in which he has been involved in a transfer concerning neurosurgery has been similar to the recommendations made by Dr. Sandberg in this case and thus did not constitute improper bolstering. In the present case, there is no concern that the jury would be misled that Dr. White's opinion had the approval of other experts in the field because, quite simply, he did not even suggest he had as much as a "curbside consult" with unidentified individuals not subject to cross-examination regarding this case. Linn, 946 So. 2d at 1040-41.

Furthermore, WBMC's defense at trial included substantial evidence that the timing of brain herniation is unpredictable even in the setting of increasing intracranial pressure. (T26: 3396, T:374806-08, 4810). Numerous physician witnesses with experience in treating patients with hydrocephalus testified during the five (5) week trial that a rapid deterioration is a rare event even in patients with chronic hydrocephalus such as Alexis Cantore. (T25: 3246-48). The Fourth District acknowledged the presentation of this testimony from physician witnesses at trial and further noted that "[w]hich actual condition Alexis [Cantore] was in

while in the care of Dr. Freyre and WBMC was thus a decision appropriately left up to the jury's determination". Cantore, 174 So. 3d at 1120.

Thus, the jury was also presented with significant and substantial testimony from which they could conclude that WBMC, through its employees, servants, agents and/or apparent agents, met the standard of care. On the other hand, this was not a case where the jury was presented with a single piece of evidence from which to find that sudden brain herniation was inevitable for Alexis Cantore on July 3, 2008. See Mazine v. M&I Bank, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011)(admission of affidavit was harmful error where affidavit was only evidence as to amount of defendant's default in foreclosure action).

Courts have held that restricting testimony so the jury is left with the impression there is only a single theory of causation is not harmless. See e.g., R.J. Reynolds Tobacco Co. v. Mack, 92 So. 3d 244 (Fla. 1st DCA 2012)(harmful error to exclude evidence on family history of cancer and occupational exposure as possible cause of laryngeal cancer); Benjamin v. Tandem Healthcare, Inc., 93 So. 3d 1076 (Fla. 4th DCA 2012), rev. denied 2013 WL 1777111 (Fla. 2013)(harmful error to exclude testimony from witness where party was denied opportunity to establish there was support for its theory); Special v. W. Boca Med. Ctr., Inc., 160 So. 3d 1251 (Fla. 2014)(plaintiff's inability to critically address issue with defense

expert witness significantly handicapped their case).

Where, as here, it is shown that there is no reasonable possibility that any alleged error in admitting Dr. White's testimony contributed to the verdict and any alleged error did not result in a "miscarriage of justice," the error alleged is harmless and this Court must affirm the defense verdict. §59.041, Fla. Stat. (2016); Special v. W. Boca Med. Ctr., Inc., 160 So. 3d 1251 (Fla. 2014); see also, Rodriguez v. State, 187 So. 3d 903 (Fla. 3d DCA 2016)(during jury trial in civil commitment proceeding finding defendant a sexually violent predator, medical expert's comment that "we don't have any way of knowing if this was the first time he raped anybody…" where offender had prior conviction for rape was harmless error under Special, analysis where expert was one of four mental health experts opining on defendant's proclivity toward sexual violence). Consequently, there was ample information provided to the jury, which as the fact finder and with full knowledge of Petitioners' theory of this case was able to find there was no negligence without causing a "miscarriage of justice".

III. THIS COURT SHOULD DECLINE REVIEW OF NON-CONFLICT ISSUE ON THE TRIAL COURT'S DIRECTED VERDICT ON APPLICATION OF THE GOOD SAMARITAN ACT BECAUSE IT WAS NOT OUTCOME DETERMINATIVE AND WAS PROPERLY ENTERED IN WEST BOCA MEDICAL CENTER'S FAVOR AT TRIAL.

Standard of Review

The Court should decline review of an issue that is not outcome determinative. See Marion County Hosp. Dist. v. Akins, 435 So. 2d 272, 273 (Fla. 1st DCA 1983)([i]t is a long-standing rule of appellate jurisprudence that the court will not undertake to resolve issues which, though of interest to the bench and bar, are not dispositive of the particular case before the court). Moreover, public policy in Florida dictates that District Court of Appeal decisions are meant to be final and such courts are not intended to be intermediate courts. Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980).

However, should this Court exercise its discretion, the Fourth District correctly affirmed the trial court's entry of a directed verdict for WBMC on application of the Good Samaritan Act, §768.13, et. seq. "The standard of review on appeal of a trial court's ruling on a motion for directed verdict is *de novo*." Martin County v. Polivka Paving, Inc., 44 So. 3d 126, 131 (Fla. 4th DCA) rev. denied, 48 So. 3d 837 (Fla. 2010)(quoting Fina v. Hennarichs, 19 So. 3d 1081, 1084 (Fla. 4th DCA 2009) rev. dismissed 34 So. 3d 1 (Fla. 2010)); see also Young v. Becker & Poliakoff, P.A., 88 So. 3d 1002 (Fla. 4th DCA) rev. denied 103 So. 3d 144 (Fla. 2012). "When an appellate court reviews the grant of a directed verdict, it must view the evidence and all inferences of fact in a light most favorable to the

nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." Meruelo v. Mark Andrew of Palm Beaches, Ltd., 12 So. 3d 247, 250 (Fla. 4th DCA 2009).

Argument

Florida Statute §768.13, commonly known as the "Good Samaritan Act" provides a healthcare provider acting under emergent circumstances shall not be held liable for civil damages arising out of the provider's treatment unless such damages result from medical care "demonstrating a reckless disregard for the consequences so as to affect the life or health" of the patient. §768.13(2)(b)(1), Fla. Stat. Petitioners never asserted that WBMC did not meet the definition of a healthcare provider under the Act or that application of the Good Samaritan Act was not properly pled as an affirmative defense.

§768.13(2)(b)(1), Fla. Stat. provides that immunity under the Good Samaritan Act applies to medical care occurring "prior to the time the patient is stabilized **and is capable of receiving medical treatment as a nonemergency patient**." (Emphasis added). The Good Samaritan Act focuses on whether the patient's emergency medical condition was stabilized to the point that it no longer required emergency care." University of Fla. Bd. of Trs. v. Stone, 92 So. 3d 264, 270 (Fla. 1st DCA 2012). Moreover, "emergency services" include those services

that are "provided for the diagnosis or treatment of an emergency medical condition prior to the time the patient is stabilized and capable of receiving treatment as a nonemergency patient." Id. at 270.

The Good Samaritan Act applied in the instant case as the undisputed evidence at trial was that WBMC did not have the pediatric neurosurgical personnel on staff capable of treating Alexis Cantore's hydrocephalus condition which was only going to get worse without the proper pediatric neurosurgical evaluation, recommendations and surgical treatment. The evidence at trial further established Alexis Cantore required a neurosurgical procedure to divert the fluid causing increased cranial pressure which was the only definitive treatment. (T37:4878, 4886-87). From the moment she arrived at WBMC's emergency department by ambulance, Alexis Cantore was treated in an emergency fashion as she was triaged as urgent, a CT of her brain was ordered "STAT" and blood and urine tests were performed.

Additionally, the evidence established Alexis Cantore's worsening hydrocephalus condition could not be relieved with diuretics or intubation at any time while she was a patient in WBMC's emergency room. (T37:4822-23). Petitioners' causation neurology expert, Waden Emery, III, M.D. testified at trial that Alexis Cantore was always receiving care and treatment under emergency

circumstances while at WBMC as a result of her neurological emergency and if she had left WBMC and gone home she would have died. (T3:214-15; T4:370-71). Dr. Emery further testified Alexis Cantore needed to receive emergent care and emergent intervention to be performed by somebody who was credentialed to perform such intervention in an emergent way from the time she arrived at WBMC until the time she left WBMC. (T3:214-15; T4:370-71).

Moreover, LifeFlight transfers were considered emergent. Accordingly, expert testimony established the correct decision was made to transfer Alexis via LifeFlight helicopter to the closest (and only) appropriate facility, MCH that could provide definitive pediatric neurosurgical care which ultimately saved her life. (T27:3432).

Just because Alexis Cantore was stable for transport to MCH where she was to receive evaluation and treatment for her worsening hydrocephalus condition and/or hemodynamically stable does not automatically translate that she was "stabilized and capable of receiving medical treatment as a nonemergency patient" as contemplated under the Act. Thus, the trial court correctly ruled that "reckless disregard" was the applicable standard for the jury to determine liability against WBMC under the Act as a matter of law.

IV. THE COURT SHOULD DECLINE REVIEW OF NON-CONFLICT ISSUE ON THE PLACEMENT OF SETTLING DEFENDANT DR. FREYRE ON THE VERDICT FORM BECAUSE IT WAS NOT OUTCOME DETERMINATIVE AND THE TRIAL COURT'S RULING WAS PROPERLY AFFIRMED BY THE FOURTH DISTRICT.

Standard of Review

This Court should decline review of an issue that is not outcome determinative. See Marion County Hosp. Dist. v. Akins, 435 So. 2d 272, 273 (Fla. 1st DCA 1983)([i]t is a long-standing rule of appellate jurisprudence that the court will not undertake to resolve issues which, though of interest to the bench and bar, are not dispositive of the particular case before the court). Moreover, public policy in Florida dictates that district court of appeal decisions are meant to be final and such courts are not intended to be intermediate courts. Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980).

However, should the Court exercise discretion, the Fourth District correctly affirmed the trial court's decision to allow placement of Dr. Freyre on the Verdict Form. Rulings on the admission of evidence are reviewed under the abuse of discretion standard. See Simmons v. State, 934 So. 2d 1100, 1116 (Fla. 2006) cert. denied, 549 U.S. 1209 (2007). Similarly, in general, the standard of review for jury instructions is abuse of discretion. See Garrido v. State, 97 So. 3d 291 (Fla.

4th DCA 2012). The trial court abuses its discretion only if the evidentiary ruling is based on either an erroneous view of the law or on a clearly erroneous assessment of the evidence. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

Argument

The Fourth District properly affirmed the trial court's decision to allow placement of Dr. Freyre on the Verdict Form based on WBMC's affirmative defense regarding alleged agency and/or apparent agency. Failing to place settling defendant, Dr. Freyre on the Verdict Form would have deprived WBMC of its defense to Petitioners' claim that it was vicariously liable for Dr. Freyre under theories of agency and/or apparent agency. Additionally, it was necessary to determine whether the jury believed that Dr. Freyre, as an agent or an apparent agent of WBMC acted with reckless disregard. Thus, it was no import that WBMC did not seek to add Dr. Freyre as a Fabre defendant prior to the close of all of the evidence.

Petitioners' proposed verdict form would have eliminated any specific reference to Dr. Freyre and misled the jury regarding which physicians were the subject of the question and further deprived WBMC of its agency and apparent agency defense. The trial court appropriately removed confusion by eliminating

the overbroad term "physicians" from the verdict form because Dr. Freyre was the only physician at WBMC against whom there had been testimony and the only individual for whom WBMC could be potentially vicariously liable.

The trial court properly determined in order to preserve WBMC's remaining defense to the allegations it was vicariously liable for Dr. Freyre, she would have had to be added to the Verdict Form similar to a Fabre defendant. In this case, Petitioners tried their case with an attempt to establish the negligence of Dr. Freyre was a legal cause of Alexis Cantore's injuries. See Fabre v. Marin, 623 So. 2d 1185 (Fla. 1993); Nash v. Wells Fargo Guard Servs., Inc., 678 So. 2d 1262, 1264 (Fla. 1996). There was no way the jury could have been misled or confused by Dr. Freyre's name on the Verdict Form when her actions were one of the main focuses of the five (5) week trial.

Florida law is clear that there is a tangible and meaningful difference between a verdict where an appropriate Fabre defendant is left off and where a court allows a non-party to be placed on the verdict form but the jury decides there was no negligence on behalf of all defendants. In the instant case, the jury found Dr. Freyre and WBMC did not act with reckless disregard and "[p]laintiff should not get a second chance to litigate the issue" where the jury clearly rejected Petitioners' theory of the case after being presented with all of the evidence.

Loureiro v. Pools by Greg, Inc., 698 So. 2d 1262, 1264 (Fla. 4th DCA 1997); see also Shuffelbarger v. Galloway, 668 So. 2d 996, 997 (Fla. 3d DCA 1995)(reversed and remanded for determination of liability and apportionment of damages of settling defendant improperly left off verdict form).

The court in Loureiro v. Pools by Greg, Inc. addressed a similar issue when it found harmless error in including a non-party on the verdict form even though negligence of the non-party was not pled. 698 So. 2d at 1262. The court in Loureiro reasoned "[t]he non-party's inclusion on the verdict form did not affect [plaintiff's] ability to litigate the issue of [defendants'] liability." Id. Petitioners' theory of the case and litigation strategy was to portray Dr. Freyre as an incompetent, poorly trained emergency room physician who was reckless and caused Alexis Cantore's damages because she was ill-equipped to deal with the emergency before her. Just as the court in Loureiro recognized, the issue of the alleged Defendants' 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 the matter." Loureiro, 698 So. 2d at 1264.

Moreover, the fact that the trial court found that WBMC had a non-delegable duty for Dr. Freyre did not deprive them of defending the vicarious liability claims. Although on its face a claim for Non-Delegable Duty sounds similar to vicarious

liability claims asserted in agency and apparent agency claims, it is, in reality a claim for direct liability. Armiger v. Associated Outdoor Clubs, Inc., 48 So. 3d 864 (Fla. 2d DCA 2010). Thus, WBMC was properly entitled to raise the separate issue of vicarious liability which was accomplished by having Dr. Freyre on the Verdict form.

Accordingly, this Court should affirm the trial court's decision to allow placement of Dr. Freyre on the Verdict Form based on WBMC's affirmative defense regarding alleged agency and/or apparent agency and where it was necessary to determine whether the jury believed that Dr. Freyre, as agent or apparent agent of WBMC, acted with reckless disregard.

CONCLUSION

This Court should decline discretionary review after further consideration where there is no direct and express conflict with the Fourth District's decision below and this Court's decision in Saunders v. Dickens, 151 So. 3d 434 (Fla. 2014) or any other District Court of Appeal decision concerning admission of Dr. Sandberg's testimony. In addition, the Court should decline review of non-conflict issues regarding the Good Samaritan Act and placement of Dr. Freyre on the Verdict Form since neither issue is outcome determinative and were properly affirmed by the Fourth District Court of Appeal.

Respectfully submitted,

Michael K. Mittelmark, Esq.
Florida Bar No. 791751
MICHAUD, MITTELMARK, MAROWITZ & ASRANI, PLLC
Attorneys for Respondent, West Boca Medical Center, Inc. d/b/a West Boca Medical Center
621 N.W. 53rd Street, Suite 260
Boca Raton, FL 33487

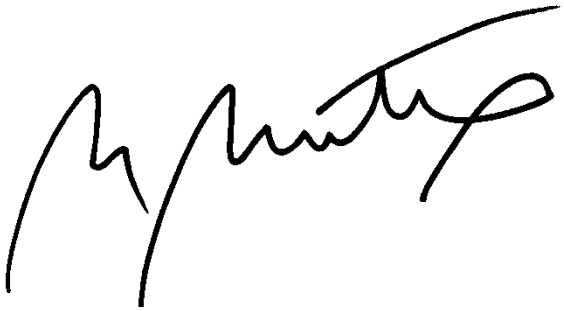
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Service to all counsel of record on the attached service list on this the 6th day of February, 2017.

By:_____
MICHAEL K. MITTELMARK, ESQ.
Florida Bar No.: 791751

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).



By: _____
MICHAEL K. MITTELMARK, ESQ.
Florida Bar No.: 791751

SERVICE LIST

Cantore v. West Boca Medical Center
152.148

Scott Schlesinger, Esq.
Schlesinger Law Offices, P.A.
1212 S.W. Third Avenue
Ft. Lauderdale, FL 33316
Tel: (954) 467-8800
Fax: (954) 523-4803
Primary E-service: scott@schlesingerlaw.com; jjordan@schlesingerlaw.com
Attorneys for Petitioners: Alexis Cantore, et al.

Andrew Harris, Esq.
Philip M. Burlington, Esq.
Burlington & Rockenbach, P.A.
Courthouse Commons, Suite 430
444 West Railroad Avenue
West Palm Beach, FL 33401
Tel: (561) 721-0400
Fax: (561) 721-0465
Primary E-service: aah@FLAppellateLaw.com; jew@FLAppellatelaw.com; pmb@FLAppellatelaw.com
Attorneys for Petitioners: Alexis Cantore, et al.

Scott E. Solomon, Esq.
Norman Waas, Esq.
Falk, Waas, Hernandez, Cortina, Solomon & Bonner, P.A.
135 San Lorenzo Avenue, Suite 500
Coral Gables, FL 33146
Tel: (305) 447-6500
Fax: (305) 447-1777
Primary E-service: servicessolomon@falkwaas.com; servicenwaas@falkwaas.com
Attorneys for Respondent: Variety Children's Hospital d/b/a Miami Children's Hospital

Elliot H. Scherker, Esq.
Julissa Rodriguez, Esq.
Stephanie L. Varela, Esq.
Greenberg Traurig, P.A.
333 SE 2nd Avenue, Suite 4400
Miami, FL 33131
Tel: (305)579-0500
Fax: (305)579-0717
Primary E-service: scherkere@gtlaw.com; rodriguezju@gtlaw.com; varelas@gtlaw.com
Attorneys for Respondent: Variety Children's Hospital d/b/a Miami Children's Hospital

****

Michael K. Mittelmark, Esq.
Michaud, Mittelmark, Marowitz & Asrani, PLLC
621 NW 53rd Street, Suite 260
Boca Raton, Florida 33487
Tel: (561) 886-3390
Fax: (561) 392-0582
Primary E-service: pleadings@michaudlaw.com
Attorneys for Respondent: West Boca Medical Center, Inc. d/b/a West Boca Medical Center