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.
_____/

REPLY BRIEF OF PETITIONERS ON THE MERITS

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

SCHLESINGER LAW OFFICES, P.A.
1212 Southwest Third Avenue
Fort Lauderdale, FL 33316
scott@schlesingerlaw.com
jjordan@schlesingerlaw.com
and
BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 350
444 West Railroad Avenue
West Palm Beach, FL 33401
(561) 721-0400
Attorneys for Petitioners
pmb@FLAppellateLaw.com
aah@FLAppellateLaw.com

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iv-v
ARGUMENT	1-23
POINT I	1-16
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.	
A. Saunders I Establishes Error in This Case	2-8
B. Dr. Sandberg's Testimony Was Also Improperly Admitted Because He Answered Hypothetical Questions That Were Based on Incorrect Facts	8-9
C. 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	9-13
D. The Error in Admitting Dr. Sandberg's Speculative Testimony Was Compounded Later in Trial Through Dr. White's Testimony	13-14
E. Defendants Cannot Prove the Trial Court's Error is Harmless	14-16
POINT II	17-21
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.	

POINT III 22-23

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.]

CONCLUSION 24

CERTIFICATE OF SERVICE 25

CERTIFICATE OF COMPLIANCE 26

TABLE OF AUTHORITIES

CASES	PAGE
Alston v. Shiver, 105 So.2d 785 (Fla. 1958)	22
Armiger v. Associated Outdoor Clubs, Inc., 48 So.3d 864 (Fla. 2d DCA 2010)	23
Bombardier Aerospace Corp. v. Signature Flight Support Corp., 123 So.3d 128 (Fla. 5th DCA 2013)	22
Cox v. St. Joseph's Hospital, 71 So.3d 795 (Fla. 2011)	20
Drayton v. State, 763 So.2d 522 (Fla. 3d DCA 2000)	22
Friedrich v. Fetterman & Associates, P. A., 137 So.3d 362 (Fla. 2013)	20
Gold, Vann & White, P.A. v. DeBerry, 639 So.2d 47 (Fla. 4th DCA 1994)	22
Loureiro v. Pools by Greg, Inc., 698 So.2d 1262 (Fla. 4th DCA 1997)	23
Marion County Hospital District v. Akins, 435 So.2d 272 (Fla. 1st DCA 1983)	17
Miller v. Phillips, 959 P.2d 1247 (Alaska 1998)	7

Munoz v. South Miami Hosp., Inc.,
764 So.2d 854 (Fla. 3d DCA 2000) 7, 8

Richbow v. Dist. of Columbia,
600 A.2d 1063 (D.C. 1991) 6

Sanders v. ER Operating Limited Partnership,
157 So.3d 273 (Fla. 2015) 20

Saunders v. Dickens,
151 So.3d 434 (Fla. 2014) 1, 4, 8

Shufflebarger v. Galloway,
668 So.2d 996 (Fla. 3d DCA 1995) 23

Smith v. State,
7 So.3d 473 (Fla. 2009) 9

Special v. West Boca Medical Center,
160 So.3d 1251 (Fla. 2014) 17

Stark v. Semeran,
665 N.Y.S.2d 233 (N.Y. App. Div. 1997) 7

Tomlian v. Grenitz,
782 So.2d 905 (Fla. 4th DCA 2001), approved in part, 12, 13
disapproved in part by Grenitz v. Tomlian, 858 So.2d 999 (Fla. 2003)

University of Florida Board of Trustees v. Stone,
92 So.3d 264 (Fla. 1st DCA 2012) 20

STATUTES

§ 768.13, Fla. Stat. 17
§ 768.13(2)(b)(2)(a), Fla. Stat 17, 19

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

The Defendants ask this Court to apply an abuse of discretion standard of review. But, the trial judge admitted evidence relying on its (incorrect) interpretation of district court of appeal decisions **quashed** by this Court after the trial (Saunders v. Dickens, 151 So.3d 434 (Fla. 2014) (Saunders II); IB:9-11). Thus, the trial court committed an error of law. The trial court also failed to properly follow the rules of evidence on numerous other issues, as addressed in the Initial Brief.

The Defendants state the Fourth District had the benefit of Saunders II. This Court reviews the Fourth District's reasoning. This Court has no reason to defer to the Fourth District because it had the relevant case law when it decided this case. The Fourth District contorted Florida law to affirm the trial court's ruling.

A. Saunders II Establishes Error in This Case

West Boca Medical Center ("WBMC") contends there is no express and direct conflict with any other decision (WBMC AB:25-36). Plaintiffs addressed each conflict area in the Initial Brief. First, the Fourth District's decision misapplies and expressly and directly conflicts with Saunders II. This Court's decision prohibits the testimony of a treating physician to opine on causation (and to disprove causation at that) under hypothetical circumstances that never occur. Dr. Sandberg did exactly that to insulate the Defendants from liability. The Fourth District ignored the reasoning of this Court's important decision, and effectively relegated Saunders II to a footnote just one year after it was issued.

The Defendants contend that Saunders II is distinguishable in a number of ways. The Defendants state that Dr. Sandberg was not a "subsequent treating physician," since he treated Lexi in the past, and was consulted by Dr. Freyre on the day of the alleged medical malpractice. They contend that Saunders II is only applicable when a treating physician opines on hypothetical causation issues before the treater provides any care (e.g., MCH AB:42; WBMC AB:22).

This Court should reject this illogical interpretation of Saunders II. 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. Dr. Sandberg improperly testified of what would have been his

subsequent medical care under circumstances that never actually occurred (T26:3375-76; 3379-80). This is no different in practice than the treating physician testimony this Court expressly held is prohibited. By contrast, the Defendants were appropriately entitled to present Dr. Sandberg's testimony on factual matters regarding Lexi's actual stay at WBMC, as reflected in medical records.

The Defendants also contend that Dr. Sandberg's testimony was admissible because he was not a named defendant and did not try to exculpate himself from liability (MCH AB:43; WBMC AB:22). Saunders II did not carve out this loophole, either. This Court's decision is not dependent on a treating physician's motivation to testify, but on the barrier it imposes to a plaintiff's case, and the improper diversion away from the jury's proper consideration of the legal issues.

To prove causation, the Plaintiff had to prove that had Lexi arrived hours earlier to MCH, her devastating condition would have been alleviated by a reasonably prudent doctor's medical intervention. The fact that Dr. Sandberg reasonably treated Lexi when she **did** arrive at MCH did not open the door to his speculative testimony on what he may have done had Lexi arrived hours earlier.

The Defendants also claim the testimony was permissible since Dr. Sandberg testified about causation scenarios under both parties' theories of this case. The Defendants ignore that: (1) the Plaintiffs posed their hypothetical questions to Dr. Sandberg at a pre-trial discovery deposition; and (2) the Plaintiffs

argued before and at trial that none of Dr. Sandberg's causation testimony was admissible. The Plaintiffs did not open the door to this testimony because of their deposition questioning, and their prejudice is not alleviated because of this fact.

The Defendants also contend the testimony is permitted under Saunders II because Dr. Sandberg presented "expert" testimony (e.g., MCH AB:1; 29-30). They contend that since Dr. Sandberg treated Lexi in the past and was advised on the day in question, "it is illogical to conclude Dr. Sandberg should not be permitted to testify as to the timing of neurosurgical intervention" (WBMC AB:29). And, the Defendants assert it would be unfair for a plaintiff to present expert testimony on how a physician should have responded in light of the patient's condition, but prohibit testimony from a treating physician on these issues (MCH AB:32-33). They claim it was necessary for the jury to hear from experts on both sides. Id.

These are not credible arguments. Both parties presented designated expert witnesses on the timing of neurological intervention. The Defendants did not list Dr. Sandberg as an expert, and he was Lexi's treating physician. He treated Lexi when she arrived to MCH. He would have treated Lexi if she arrived earlier in the evening. The Defendants do not cite any case in Florida, or otherwise, that has approved a treating physician's testimony on causation regarding circumstances

that did not occur, let alone regarding circumstances where the treating physician's testimony was utilized to disprove causation.

MCH also mentions that Plaintiffs' expert witness opined on what he would have done had Lexi arrived earlier (MCH AB:6-7, n.4). MCH even claims Dr. Sandberg's "expert" testimony was simply the "mirror image" of Plaintiffs' expert's testimony (MCH AB:14). But Plaintiffs' expert was not the physician who would have treated Lexi had she arrived to MCH earlier in the evening. Both parties had experts for this express purpose, as to whether there would have been neurological intervention, and Lexi's outcome. Dr. Sandberg improperly testified on what he would have done from his perspective as Lexi's treating physician, and what her outcome would have been had she arrived earlier in the evening.

The Defendants (and Fourth District) misapply decisions that have permitted treating physicians to testify about matters that fit within the realm of expert testimony, such as permanency and future medical care (MCH AB:18). The Defendants also improperly reach into uncharted areas by citing cases that have examined the financial relationship of treating physicians to plaintiff's counsel for purposes of pre-trial discovery (WBMC AB:27, 29). In those cases, the treating physicians testified (or would be testifying) about their treatment of their patients under circumstances that **did occur**. They did not testify under circumstances that **did not occu**r, as Dr. Sandberg did, to break the chain of causation.

The Defendants' arguments are a blatant and brazen endeavor to avoid Saunders II. This Court did not suggest that so long as treating physicians were designated as "experts," that they could opine on causation under speculative scenarios that never occurred. Under the Defendants' illogic, the treating physician in that case could have been properly designated as a hybrid expert to testify on the treatment under hypothetical circumstances that did not occur (there, the ordering of a particular medical test). This reasoning would eviscerate Saunders II.

While the Defendants do not cite any Florida law that has permitted this type of testimony, MCH cites a few out-of-state decisions (MCH AB:21-23). None of these courts have approved treating physician testimony on hypothetical circumstances that did not occur, and to insulate a defendant from liability. In Richbow v. Dist. of Columbia, 600 A.2d 1063 (D.C. 1991), a treating physician testified he would have made similar recommendations as the hospital defendant who had treated the plaintiff during the time of the alleged malpractice. The plaintiff raised a different argument in that case than here. The plaintiff contended his treating physician's testimony violated the physician-patient privilege. Id. at 1067-71. The physician also did not insulate the defendant from liability by describing whether he would have performed certain treatment under circumstances that never occurred.

In Miller v. Phillips, 959 P.2d 1247 (Alaska 1998), the defendant presented a supervising physician's testimony as to the care provided by the defendant midwife. He testified that the midwife had not deviated from the standard of care. But, again, the treating physician did not testify as to what he would have done under circumstances that did not occur, to insulate the midwife from liability. Rather, he testified as to circumstances that did occur.

Stark v. Semeran, 665 N.Y.S.2d 233 (N.Y. App. Div. 1997), is a one-paragraph decision that held the defendant doctor could present expert testimony from a treating physician on the cause of the patient's death. It is unknown what the physician's testimony would have been, let alone if it is comparable to Dr. Sandberg's testimony. This, again, also appears to have contemplated testimony on the patient's actual treatment, under circumstances that did occur. While no Florida decision has gone **that** far, these cases are not remotely analogous to the causation testimony in this case, which the Plaintiffs were powerless to effectively rebut. The Defendants stated before trial Dr. Sandberg's testimony would break the chain of causation; it did exactly that (R37:7152).

Finally on this issue, MCH contends that the Plaintiffs opened the door to Dr. Sandberg's causation testimony because their theory was that earlier intervention would have made a difference (MCH AB:44-45) (citing Munoz v.

South Miami Hosp., Inc. , 764 So.2d 854 (Fla. 3d DCA 2000)). MCH contends that since this Court "approve[d] Munoz," it "must be given due weight" in this case.

The Defendants' position shows the error in this case. A **concurring judge** in Munoz reasoned that a plaintiff opens the door to a treating physician's testimony on what he or she would have done, when a plaintiff alleges that the defendant should have undertaken certain treatment, testing, etc. Id. at 858 (Cope., J., concurring). In Saunders II, this Court "approve[d]" Munoz. Saunders II, 151 So.3d at 443. This Court did not suggest it approved the concurring opinion or reasoning in Munoz. This Court approved the Third District's reversal of a judgment as a matter of law to a defendant. This Court held in Saunders II this type of speculative treating physician testimony is inadmissible. The plaintiff in Saunders II, just like here, theorized that had the defendant made different treatment decisions, subsequent medical intervention would have avoided a catastrophic outcome. The door was not opened there, or here.

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

The Defendants presented hypotheticals to Dr. Sandberg on the premise that Lexi was awake, alert, and oriented times three prior to her arrival at MCH. The record evidence does not support that classification. This testimony was improperly admitted and the Fourth District's decision expressly and directly

conflicts with decisions that prohibit a witness from answering hypothetical questions that are based on incorrect facts (IB:31-32, citing, e.g., Smith v. State, 7 So.3d 473, 501 (Fla. 2009)). This is true even for expert witnesses. Id.

The Defendants claim that "the hypothetical questions posed included proper references to the record" (WBMC AB:33). But at trial, 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). WBMC also declines to cite these record references in its Answer Brief (WBMC AB:34). MCH cites record evidence to support its version of the facts (MCH AB:28-30); however, MCH cites record evidence before the time when the Plaintiffs contended Lexi should have been operated on, 1-2 hours before her actual arrival to MCH. The record evidence is that Lexi was not awake, alert, and oriented times three at the critical time that addressed Dr. Sandberg's causation testimony which insulated the Defendants from liability (IB:5-7, 10, 33, record citations noted therein).

C. 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 Fourth District's decision also expressly and directly conflicts with decisions from this Court and other district courts of appeal that prohibit witnesses from testifying on matters that are based on guesses, speculation, or conjecture

(IB:34-35, citing cases). The Defendants' (incorrect) assertion Dr. Sandberg was an expert witness did not authorize his causation testimony.

The Defendants contend that Dr. Sandberg had personal knowledge of Lexi (e.g., WBMC AB:35). The Defendants mislead this Court on Dr. Sandberg's recollection of Lexi. For example, WBMC provides this Court with a snippet of Dr. Sandberg's testimony that he recalled Lexi's treatment and surgery; this concerns his recollection of Lexi when she was at MCH (WBMC AB:35). Dr. Sandberg could not have had an independent recollection of Lexi's condition earlier in the evening; he did not observe Lexi earlier in the evening. He admitted he did not recall Lexi's condition before she arrived at MCH (IB:9, citing T2:122-24, 139-41). Dr. Sandberg also admitted he was not qualified to address anything other than his treatment (T26:3340, 42).

Dr. Sandberg also admitted that he was speculating on how he would have treated Lexi if she arrived earlier (IB:13-14). The Defendants try to limit any qualifications to Dr. Sandberg's testimony to reflect the fact Dr. Sandberg meant he could never say for sure what would have happened under different circumstances. This perfectly shows why Dr. Sandberg, as Lexi's treating physician, should not have testified about circumstances that never occurred.

To avoid this result, the Defendants argue Dr. Sandberg testified as an expert witness, or hybrid expert witness (MCH AB:25). As explained above, this is an

end-run around Saunders II. Even setting that aside, the Defendants disclosed Dr. Sandberg as a fact witness. The Defendants presented designated expert witnesses on standard of care and causation. They did not present Dr. Sandberg as an expert, but in his role as Lexi's treating physician. The jury could only have understood his testimony in his capacity as Lexi's treating physician. He should not have been permitted to testify on how he would have treated Lexi under circumstances that did not occur, at a time that was subsequent to the alleged medical malpractice.

Notably, when the Plaintiffs objected to Dr. Sandberg's testimony before trial, the Defendants contended the testimony was admissible specifically because he was a treating physician. (IB:9-10; IB:34 n.3). While the Defendants also raised their expert witness theory to the trial court, the jury could only have reasonably observed Dr. Sandberg in his role as Lexi's treating physician. The Plaintiffs could fairly rebut the Defendants' designated expert with their own standard of care and causation experts. The Plaintiffs could not rebut the treating physician's testimony that he would not have immediately intervened if Lexi arrived earlier.

MCH contends that the "core" of Dr. Sandberg's opinion testimony was elicited in response to a hypothetical question posed by Plaintiffs' counsel, "particularly [Dr. Sandberg's] key opinion" (MCH AB:27). MCH is wrong in in its characterization of what opinions were important. The testimony especially

harmful is his hypothetical causation testimony that insulated the Defendants from liability, in response to questions by defense counsel (R:75:3376-80).

The Defendants similarly state that Plaintiffs cannot complain when they posed hypothetical questions to Dr. Sandberg (MCH AB:27, n.18). As noted above, Dr. Sandberg testified at a pre-trial discovery deposition. Plaintiffs strenuously argued before and at trial that all of the hypothetical testimony was inadmissible. The testimony posed in response to Plaintiffs' hypothetical questions was equally inadmissible (R:75; T3398-99; T3400-01; 3404-05).

MCH also claims that the jury was free to disbelieve Dr. Freyre's testimony of Lexi's true condition at WBMC, and that if so, the jury would have given little weight to Dr. Sandberg's responses to hypothetical questions (MCH AB:31-32). And, MCH argues, the jury must have found Dr. Freyre's testimony was credible since the jury determined "she had not been negligent" in treating Lexi (MCH AB:31-32 (emphasis in original)).

MCH's assertion there was "no negligence" is not accurate. The jury was asked whether the Defendants' conduct was a legal cause of Lexi's injures (R8366-68). The jury may have found the Defendants deviated from the standard of care, but that this did not cause Lexi's injuries. E.g., Tomlian v. Grenitz, 782 So.2d 905, 906 (Fla. 4th DCA 2001), approved in part, disapproved in part by Grenitz v.

Tomlian, 858 So.2d 999 (Fla. 2003).[1] Dr. Sandberg's testimony impeded the Plaintiffs' ability to establish causation.

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

The trial court also erred in permitting Dr. Sandberg's speculative testimony to be utilized by Dr. White to bolster his own testimony. WBMC contends that "experts" such as Dr. White are entitled to comment on the record evidence (WBMC AB:38-39). The Plaintiffs do not quarrel with Dr. White's ability to testify on the medical decisions made by the medical professionals in this case regarding Lexi's treatment. The trial court's error is that Dr. White bolstered his own causation testimony by stating that his opinions were consistent with what Dr. Sandberg testified he would have done as Lexi's treating physician if she arrived earlier at MCH (IB:36). Decisions from this Court and other district courts prohibit this type of bolstering testimony (IB:38-39, citing cases).

---

[1] In Tomlian, supra, the verdict question was, "Was there negligence on the part of the Defendant … which was the legal cause of damage to Jacob Tomlian?" 782 So.2d at 906. The Fourth District specifically noted that that interrogatory raised both the issue of duty and causation; but that the two-issue rule could **not** be applied to preclude consideration of the issue on the ground that the plaintiff could not prove prejudice from the alleged error as to each of those issues. Id. While this Court disapproved the Fourth District's opinion in Tomlian on a different issue, it approved the Fourth District's conclusion on that issue. 858 So.2d at 1006-07.

The Defendants also cannot have it both ways. They claim Dr. Sandberg's causation testimony was permitted because he testified as a hybrid expert. If this testimony is deemed expert testimony, then Dr. White should have been precluded from testifying he agreed with another (purported) expert's testimony. That is classic bolstering. If this testimony is not expert testimony, then it is even clearer Dr. Sandberg's testimony was prohibited. The prejudice was even more palpable here, because an expert (Dr. White) bolstered his testimony based on what the treating physician would have done under circumstances that never occurred.

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

MCH does not address harmless error. WBMC's discussion of harmless error is puzzling. WBMC does not address Saunders II. There, this Court explained why this improper causation testimony—and argument by defense counsel—is so powerful. The Plaintiffs had no genuine way to rebut Dr. Sandberg's causation testimony that insulated the Defendants from liability. The fact the Plaintiffs could present their own theory of the case, and pose hypothetical questions to Dr. Sandberg on their theory, did not alleviate the powerful force of his testimony.

It is also not credible to suggest Dr. Sandberg's testimony actually "supported [Plaintiffs'] theory," and that the jury was presented with "two independent theories of the case" (WBMC AB:38). The testimony was entirely

unhelpful to Plaintiffs' case. Dr. Sandberg was not a neutral third-party witness because his medical care at MCH, after the alleged medical malpractice, was not criticized. The Defendants, as the beneficiaries of the error, fall well short of proving there is no reasonable possibility Dr. Sandberg's powerful testimony did not contribute to the verdict. The jury obviously deemed his testimony critical; they requested his testimony during deliberations—twice (IB:15).

The Defendants also do not address closing argument (WBMC AB:37-41). The Defendants told the jury in closing that Dr. Sandberg's testimony disproved the Plaintiffs' case and the Plaintiffs failed to honor their promise in opening to establish he would have performed surgery had Lexi arrived earlier in the evening (IB:15; 26; 39; T42:5525-29, 5590-91, 5658-59, 5664-65). This is similar to Saunders II and further restricted Plaintiffs' ability to establish causation.

WBMC also claims any error was harmless since Dr. White's testimony was "similar" to Dr. Sandberg's recommendations (WBMC AB:38-39). As noted above and in the Initial Brief, this improper testimony exacerbated the harm. It bolstered Dr. White's causation testimony, and undermined Plaintiffs' ability to have this case decided under the proper considerations established by this Court in Saunders II. The proper focus should have been whether the Defendants provided reasonably prudent care, and whether this caused Lexi's injuries. It should not have been

whether the reasonably prudent care would have made no difference to Dr. Sandberg personally.

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.

This Court should exercise jurisdiction over this non-conflict issue for the three reasons identified in the Initial Brief and not disputed in WBMC's Answer Brief.[2] This Court has addressed non-conflict issues when they are sufficiently significant, as it did recently in Special v. West Boca Medical Center, 160 So.3d 1251, 1261-65 (Fla. 2014). West Boca contends the Court should not address this issue because it is not "outcome determinative," citing Marion County Hospital District v. Akins, 435 So.2d 272 (Fla. 1st DCA 1983). However in Akins the issue had become moot and that was the reason the First District did not address it. Here, the directed verdict on the application of the Good Samaritan Act ("GSA") would not be moot if this Court reverses on Point I, and it would be critical to the retrial since it would establish the standard of care applicable to the Defendants.

The GSA was obviously intended to grant protection to healthcare personnel and entities that provide medical care to emergency patients. It applies to any act or omission "which occurs prior to the time the patient is stabilized and is capable of receiving medical treatment as a non-emergency patient." § 768.13(2)(b)(2)(a),

[2] MCH does not address this issue.

Fla. Stat. There was clearly a dispute of fact on this issue as the unified position of the Defendants at trial was that Lexi was stable at all times prior to landing at MCH and that there was no emergency treatment necessary, or even contemplated, prior to that.

Contrary to WBMC's statement, Lexi was never treated or categorized as an "emergent" patient. It was undisputed she was classified from the outset by Dr. Freyre at the second tier of triage, i.e. "urgent," which is a step below "emergent" (T7:712-14). Dr. Freyre explicitly testified that Lexi's condition was **not an emergency situation** (T12:1509-10):

> Q: [B]ut in your training as a physician, is this training—is this [Lexi's condition] taught to you as being something that's urgent—emergent?
>
> A: **Not emergent.** In her current status, when I evaluated her, **she was stable.** [E.S.]

Dr. Freyre testified that Lexi's condition did not rise from the level of "urgent" to "emergent" until she showed signs of impending herniation, which Defendants claimed occurred only after she landed at MCH. (T12:1510).

Additionally, Dr. Freyre testified that (T42:5625):

> [S]he [Lexi] was stable. So there was no reason why she couldn't wait an hour, two or three.

Another defense expert, quoted in closing argument, testified that it was foreseeable that Lexi could have the symptoms she had at WBMC "for days" and still have "successful treatment." (T42:5660).

In closing argument, West Boca's attorney stated that (T42:5553):

> [W]e had a sick child who came in with her worried parents. That is a pretty ordinary event in a pediatric emergency room. It's not uncommon at all.
>
> Moreover, Alexis remained stable with us ….

In closing, defense counsel also quoted from the testimony of Dr. Kleinman as to his opinion that Lexi "was stable all the way up until the end of transport" (T42:5656).

As to why the Defendants perceived no urgency to transport Lexi, defense counsel stated in closing "So why would they wait? Well, that's **because the patient was stable** …." (T42:5621) (emphasis added). Clearly there was evidence that the GSA did not apply because according to Defendants' witnesses Lexi was stable and received treatment as a "nonemergency patient." § 768.13(2)(b)(2)(a).

WBMC states "LifeFlight transfers were considered emergent" without providing any record citation (WBMC AB:45). In fact, Dr. Keith Meyer, the medical director for LifeFlight, testified that LifeFlight "was never intended to be about speed. It's more about quality and safety," and that comparing it to

emergency trauma hawk transport or fire rescue is "sort of comparing an apple to an orange" (T29:3774).

Therefore, despite the evidence presented by Defendants that Lexi was stable and not "emergent" from her arrival at WBMC until after landing at MCH, the trial court granted a directed verdict that the GSA applied as a matter of law. The result was an intolerable paradox that the Defendants were evaluated under the reckless disregard standard, which was intended to apply to emergency patients, even though the Defendants repeatedly argued in their closing that the delay in transporting Lexi was not "reckless disregard" because there was no emergency.

WBMC avoids arguing that there was no issue of fact as to whether the GSA applied to the facts of this case; it just presents and spins selected evidence it believes supports the statute's application. However, this Court has repeatedly quashed district court decisions which direct a verdict where there were material issues of fact, see Cox v. St. Joseph's Hospital, 71 So.3d 795 (Fla. 2011); Friedrich v. Fetterman & Associates, P. A., 137 So.3d 362 (Fla. 2013); Sanders v. ER Operating Limited Partnership, 157 So.3d 273 (Fla. 2015); and it should do so here. Under analogous facts, the First District determined there was an issue of fact regarding the application of the GSA in University of Florida Board of Trustees v. Stone, 92 So.3d 264, 267 (Fla. 1st DCA 2012), and WBMC makes no effort to distinguish that case.

The trial court's ruling, which the Fourth District declined to correct, created an absurd situation in which the Plaintiffs' position was that their daughter's condition was an emergency and the Defendants did not act expeditiously to transfer her to the specialist physicians who could have quickly eliminated any danger. The Plaintiffs presented evidence that the failure of the Defendants to do so resulted in Lexi becoming profoundly brain damaged. However, the Defendants contended that they were entitled to be evaluated under the standard for emergency patients, i.e. "reckless disregard," despite presenting evidence that Lexi's condition was never an emergency, she was stable the entire time, and therefore they could not be liable for their decision not to hurry in getting her transported. This absurd situation will continue upon remand unless this Court corrects it by addressing this issue.

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.]

WBMC argues that this Court should not address this issue because it is not "outcome determinative" (WBMC AB:46). Although Plaintiffs do not seek reversal based on the error claimed here, it could become reversible error in a new trial if the jury finds negligence on the part of WBMC and is required to apportion fault. Accordingly, if the Court reverses for new trial, addressing this issue now will conserve the time and resources of the courts (both trial and appellate). Moreover, it is common for this Court and the District Courts of Appeal to address issues that are not "outcome determinative" when reversing for new trial so that mistakes made at the first trial are not repeated, giving rise to additional appeals. See, e.g., Alston v. Shiver, 105 So.2d 785, 790 (Fla. 1958); Bombardier Aerospace Corp. v. Signature Flight Support Corp., 123 So.3d 128, 131 (Fla. 5th DCA 2013); Drayton v. State, 763 So.2d 522, 524 (Fla. 3d DCA 2000); Gold, Vann & White, P.A. v. DeBerry, 639 So.2d 47, 55 (Fla. 4th DCA 1994).

As to the merits, WBMC argues that Dr. Freyre had to be included on the verdict form to preserve its defense that she was not an agent or apparent agent (WBMC AB:47). It also claims that the trial court's determination as to non-delegable duty did not deprive it of defending the vicarious liability claim (WBMC AB:49-50). These arguments are misguided. The agency/vicarious liability issue was moot after the trial court correctly determined that WBMC had a non-delegable duty to provide emergency services to Lexi. See Armiger v. Associated Outdoor Clubs, Inc., 48 So.3d 864, 875 (Fla. 2d DCA 2010) (noting that when a defendant is subject to a nondelegable duty, the potential responsibility of an agent "is not relevant to the analysis of the business owner's liability"). The trial court's decision as to that issue obviated the need for a determination on agency and, as such, WBMC could not present defenses to it to the jury.

WBMC also argues that Plaintiffs' proposed verdict form would have misled the jury (WBMC AB:47). However, as discussed in the Initial Brief (IB:48-49), the proposed verdict form laid forth clearly and accurately the issue to be decided by the jury regarding WBMC's negligence. There was nothing misleading.

WBMC relies upon Loureiro v. Pools by Greg, Inc., 698 So.2d 1262 (Fla. 4th DCA 1997), and Shufflebarger v. Galloway, 668 So.2d 996 (Fla. 3d DCA 1995), to support its position (WBMC AB:48-49); however, as discussed in the Initial Brief (IB:49-50), those cases are inapposite.

CONCLUSION

For the reasons stated above and in the Initial Brief of the Petitioners on the Merits, this Court should quash the Fourth District's decision, reverse the Final Judgment, and remand this case for a new trial.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on March 23, 2017.

Scott Schlesinger, Esq.
SCHLESINGER LAW OFFICES, P. A.
1212 Southwest Third Avenue
Fort Lauderdale, FL 33316
scott@schlesingerlaw.com
jjordan@schlesingerlaw.com
and
BURLINGTON & ROCKENBACH, P. A.
Courthouse Commons/Suite 350
444 West Railroad Avenue
West Palm Beach, FL 33401
(561) 721-0400
Attorneys for Petitioners
pmb@FLAppellateLaw.com
aah@FLAppellateLaw.com
kbt@FLAppellateLaw.com
jrh@FLAppellateLaw.com

By: /s/ Philip M. Burlington
PHILIP M. BURLINGTON
Florida Bar No. 285862

By: /s/ Andrew A. Harris
ANDREW A. HARRIS
Florida Bar No. 10061

/jrh

CERTIFICATE OF TYPE SIZE & STYLE

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

/s/ Andrew A. Harris
ANDREW A. HARRIS
Florida Bar No. 10061

SERVICE LIST

Cantore v. West Boca Medical, etc., et al.
Case Nos. SC15-1926

Elliot H. Scherker, Esq.
Julissa Rodriguez, Esq.
Stephanie L. Varela, Esq.
GREENBERG TRAURIG, P.A.
Wells Fargo Ctr., Ste. 4400
333 Southeast Second Ave.
Miami, FL 33131
(305) 579-0500
scherkere@gtlaw.com
rodriguezju@gtlaw.com
varelas@gtlaw.com
miamiapellateservice@gtlaw.com
Attorneys for Variety Children's Hosp., d/b/a Miami Children's Hosp.

Scott Solomon, Esq.
Norman Waas, Esq.
Andrew P. Rodriguez, Esq.
FALK, WAAS, HERNANDEZ, CORTINA, SOLOMON & BONER, P. A.
135 San Lorenzo Ave., Ste. 500
Coral Gables, FL 33146
(305) 447-6500
servicessolomon@falkwaas.com
servicenwaas@falkwaas.com
servicearodriguez@falkwaas.com
Attorneys for Variety Children's Hosp. d/b/a Miami Children's Hosp.

Michael K. Mittelmark, Esq.
Meghan K. Zavoina, Esq.
MICHAUD, MITTELMARK, MAROWITZ & ASRANI, PLLC
621 Northwest 53rd St., Ste. 260
Boca Raton, FL 33487
(561) 392-0540
mmittelmark@michaudlaw.com
mzavoina@michaudlaw.com
Attorneys for West Boca Medical Center