**IN THE DISTRICT COURT OF APPEAL**
**FIRST DISTRICT, STATE OF FLORIDA**

**CASE NO. 1D10-5460**

DANIEL JOHN DUSS, a minor child, by and through REGIONS BANK, the guardian of his property;

Appellant,

v. L.T. Case No. 03-CA-4933

MARTIN A. GARCIA, M.D., an individual; NORTH FLORIDA OBSTETRICAL & GYNECOLOGICAL ASSOCIATES, P.A., a Florida for profit professional association;

Appellees.

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**ON APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA**

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND FACTS

This appeal arises from a jury verdict and judgment rendered in favor of the Defendants, Martin A. Garcia, M.D., and North Florida Obstetrical & Gynecological Associates, P.A. (referred to collectively as "Dr. Garcia"). Plaintiff, Daniel John Duss, a minor child, by and through Regions Bank, the guardian of his property ("Plaintiff"), asks this Court to reverse the judgment and remand for a new trial.

Plaintiff raises two issues on appeal. First, Plaintiff contends that the trial court improperly excluded certain opinion testimony from Plaintiff's standard of care expert, whose testimony the trial court had previously ruled admissible. Second, Plaintiff asks this Court to reverse the judgment and grant a new trial based upon the improper bolstering of two defense experts.

### Introduction

Dr. Garcia is the obstetrician/gynecologist (OB/GYN) who delivered Plaintiff and his fraternal twin brother, Andrew. (2nd Supp. R-I-2-3.)[1] Dr. Garcia relied on a device known as a vacuum extractor to assist with delivery, admitting that he applied the vacuum extractor to Plaintiff six times between 7:28 a.m. and

[1] The record on appeal consists of four parts: the original record ("R"); the supplemental record, filed February 7, 2011 ("Supp. R"); the second supplemental record, filed February 16, 2011 ("2nd Supp. R"); and the third supplemental record, filed March 10, 2011 ("3rd Supp. R"). Citations include volume and page numbers (*e.g.*, 2nd Supp. R-X-1435).

8:00 a.m. on December 3, 2002. (2nd Supp. R-I-2-3.) Dr. Garcia applied the vacuum once on Plaintiff's twin brother. (R-XVIII-88-89.)

The evidence is undisputed that Plaintiff suffered a bilateral ischemic brain injury, evidenced primarily by a cerebral infarct (or stroke) in his middle cerebral artery. (R-XII-27, 67; R-XII-24-26, 68-69, 75-76; Supp. R-VI-604-609; 2nd Supp. R-II-253.) Plaintiff has since been diagnosed with cerebral palsy. (Supp. R-VI-612.) Questions at trial surrounded the timing of Plaintiff's ischemic brain injury, including whether Dr. Garcia breached the appropriate standard of care and whether Dr. Garcia's negligence was a legal cause of harm to Plaintiff. (2nd Supp. R-I-4.)

Plaintiff contended that Dr. Garcia acted unreasonably when he failed to properly monitor and manage the labor and delivery of Plaintiff. Because Dr. Garcia neglected to properly rely on information available to him through electronic fetal monitoring, he did not anticipate Plaintiff's "crash." (Supp. R-I-19-20, 57.) Plaintiff suffered the loss of oxygenated blood flow to his brain, or ischemia. (*See id*. at 21-22; Supp. R-V-.)

Plaintiff also alleged that Dr. Garcia negligently misused the vacuum extractor to assist the delivery. Plaintiff did not contend that the vacuum, in and of itself, was inherently unsafe. Rather, he alleged that Dr. Garcia breached the standard of care when he used the vacuum excessively, repeatedly, and

inappropriately on an infant who was not a suitable candidate for its use. (Supp. R-I-6-11, 14-17, 21-22.) The pressures within infant's brain – together with the mother's contractions – reduced blood flow to the brain, created an ischemic injury (Supp. R-V-503), and caused Plaintiff's stroke (Supp. R-I-22, 42-43; Supp. R-VI-604-609; Supp. R-VII-664, 689).

The defense denied that Dr. Garcia failed to use reasonable care or that Dr. Garcia caused Plaintiff's brain injury. (Supp. R-III-218-19, 226, 266-67.) The defense claimed that Plaintiff instead suffered an ischemic stroke in utero. (*Id*. at -218-21.) The defense attributed the stroke to a reduction in blood flow to and from Plaintiff's placenta, which was caused by his mother's preeclampsia and the resulting increase in her blood pressure. (*Id*. at 223, 229.) This led to the formation of a blood clot, which traveled to Plaintiff's brain and lodged in his left middle cerebral artery. (*Id*. at 218-19, 223-24, 229.)

**Proceedings Before Trial**

Plaintiff filed suit against Dr. Garcia for medical negligence in 2003. (R-I-1-7; R-I-8-23.) Originally, claims were brought on his behalf by his parents, John Joseph Duss, III and Krystal T. Duss (referred to individually as the "Father" and "Mother"). (R-I-1-7; R-I-8-23; R-I-35-57.) Plaintiff alleged that his injuries "were a direct and proximate result of the negligence" of Dr. Garcia and the OB/GYN's "failure to comply with the accepted standards of care…." (R-I-11.) Dr. Garcia

admitted that he owed a duty of reasonable care but denied that he had breached that duty in his care and treatment of the Plaintiff. (2nd Supp. R-I-3, 4.)

Discovery proceeded. In December, 2003, when the Plaintiff and his twin brother were a year old, the family was involved in a serious automobile accident. Plaintiff's Mother was killed, and his Father was seriously injured. Thereafter, Plaintiff was allowed to substitute Regions Bank, as the guardian of his property, as the party-plaintiff. (R-I-103-104.) Trial was initially scheduled for January, 2010.

**Motions in Limine**

Both parties filed numerous motions in limine before trial. For example, the defense asked the trial court to prohibit certain testimony of Barry S. Schifrin, M.D., Plaintiff's standard of care expert. (R-IV-664-75 (the "Schifrin Motion").) The defense sought to limit testimony from Dr. Schifrin that he had collected and provided data to the FDA related to the use of vacuum extractors and to exclude evidence of other claims or lawsuits used in his research. (R-IV-665-66.) Dr. Garcia also argued that because Dr. Schifrin had acknowledged at his deposition that he was not an expert in perinatal brain injury, "he should not be permitted to give opinions on causation" at trial. (R-IV-666; R-IV-675.)

Similarly, the defense sought an order in limine concerning evidence of the association between the use of vacuum extractors at birth and causation of stroke.

(R-III-489-99 (the "*Frye* Motion").) Dr. Garcia asked the trial court to exclude the testimony of four of the Plaintiffs' experts, including Dr. Schifrin, under the standards established by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). (R-III-491-92.) The defense argued that there was no evidence to suggest that "the causation theories espoused by Plaintiffs' experts [concerning a causal link between use of the vacuum extractor during delivery and stroke] have gained general acceptance in the relevant medical community." (R-III-492.) Dr. Garcia asserted that "Plaintiffs' experts are not qualified to present opinion testimony on the subject of causation of strokes in neonates." (*Id*.)

The defense criticized the lack of peer-reviewed articles cited by Dr. Schifrin that related the use of vacuum extractors to the causation of strokes, his reliance on case studies, and his purported lack of specialized knowledge to "testify on the causal link between vacuum-extractor assisted deliveries and the incidence of strokes in neonates." (R-III-494; *id*. at 496.) Dr. Garcia emphasized in the *Frye* Motion that Dr. Schifrin had testified at deposition that he would defer to another expert on the issue of whether Plaintiff's stroke was related to an injury suffered around the time of his birth. (R-III-496.)

Along with the Schifrin and *Frye* Motions, the defense filed a motion in limine to allow its standard of care expert, John Thorp, M.D., to testify to the *lack* of literature supporting a causal link between vacuum-extractor assisted delivery

and incidences of stroke in infants. (R-IV-672-82 (the "Thorp Motion").) The defense argued that "evidence of the lack of medical literature does not fall within the definition of hearsay evidence," nor could such testimony be regarded as an impermissible reference to specific authoritative texts. (*Id*. at 678-79.)

The trial court heard argument on the defense's various motions in limine on December 1, 2009. At that hearing, counsel for Dr. Garcia argued that because Dr. Schifrin had acknowledged that he is not a perinatal brain damage expert, he should not be permitted to testify as to "anything on causation." (2nd Supp. R-X-1435, 1436.) According to the defense's theory, before Dr. Schifrin could testify as to "how this vacuum allegedly causes stroke," he would have to be qualified to "treat[] and diagnose[] brain damage in babies." (2nd Supp. R-X-1436; *see id*. at 1441.)

The trial court initially disagreed, noting that Dr. Schifrin, as an obstetrician, was qualified to testify as to the use and misuse of the vacuum. (2nd Supp. R-X-1435, 1437; *see id*. at 1441.) After further argument from defense counsel, the trial court questioned Plaintiff's intent to elicit evidence of causation from Dr. Schifrin. (2nd Supp. R-X-1437.) Plaintiff responded that Dr. Schifrin could "correlat[e] obstetrical events to an ischemic injury." (2nd Supp. R-X-1438.)

As Plaintiff explained, Dr. Schifrin had candidly admitted that he was not qualified to testify that "the baby's ultimate outcome [was] related to an injury

suffered around the time of birth." (*Id*.) Yet to the extent that expert testimony was elicited to establish the timing of the injury – in other words, that Plaintiff's ultimate injury was caused by an ischemic event during labor and delivery – Plaintiff argued that Dr. Schifrin knew why and when the "hypoxic ischemic mechanical traumatic events during labor and delivery" happened. (*Id*. at 1438-39.) Quoting Dr. Schifrin's deposition, counsel for Plaintiff stated:

> And…[Dr. Schifrin] says, "If somebody says that's when it happened, okay, that's what the baby's injury is due to, that's an ischemic injury during labor and delivery, directly or indirectly, then I have a couple of positions. One, there are obvious mechanical ischemic asphyxial traumatic events that are present in the last 45 or 40 minutes of the baby's delivery that are competent to produce the injury. Those events occur as a result of failures in the standard of care."

(*Id*. at 1439.) Once Plaintiff's counsel explained that Dr. Schifrin could "correlate breaches in the standard of care to the baby's injury," the trial court stated, "I'm with you on it. You don't have to read all the rest …." (*Id*.)

The trial court ruled for Plaintiff on the question of causation. (*Id*. at 1439, 1441.) The trial court disagreed with the defense's assertion that for Dr. Schifrin "to talk about causation in this case, the cause of the stroke, he would have to be an expert on perinatal brain injury." (2nd Supp. R-X-1441.) Instead, the trial court ruled that the defense could elicit the limitations of Dr. Schifrin's expertise on cross-examination. (*Id*.)

With regard to the FDA evidence, the trial court ruled that Dr. Schifrin could not testify as to the number of vacuum-related claims or lawsuits sent to the FDA. (2nd Supp. R-X-1435, 1437, 1439.) The trial court clarified, however, that the jury could learn that that Dr. Schifrin was hired by the FDA to evaluate adverse outcomes associated with vacuum extraction delivery. (*Id*. at 1445.)

The trial court heard argument on the *Frye* and Thorp Motions at the December 1, 2009 hearing. (2nd Supp. R-X-1387-1425, 1465-68.) Although the defense asserted that there was "no peer review literature that links vacuums and strokes" (2nd Supp. R-X-1465; *see id*. at 1398-99, 1400-1401, 1404), the trial court ruled that the experts' testimony was pure opinion testimony not subject to *Frye* (2nd Supp. R-X-1388, 1324-25).

The defense sought permission to question whether Dr. Thorp was "aware of any literature from a peer review perspective that links vacuum and causation of strokes." (2nd Supp. R-X-1465.) Plaintiff relied upon the case law prohibiting improper bolstering. (*Id*. at 1465-66.) In addition, Plaintiff argued that without establishing substantial similarity between vacuum-assisted deliveries, the purported lack of recorded documentation of injury would be "irrelevant." (*Id*. at 1467.) The trial court, persuaded by Plaintiff, agreed that to permit Dr. Thorp to testify to the lack of medical literature would be improper bolstering. (*Id*.)

After the December 1, 2009 hearing, the trial court entered its written order. (2nd Supp. R-I-29-30.) The trial court denied the *Frye* and Thorp Motions in their entirety. (2nd Supp. R-I-29, 30.) Consistent with its verbal rulings, the trial court denied the Schifrin Motion in part, finding that Dr. Schifrin would be permitted "to discuss his opinions on causation." (2nd Supp. R-I-30.) The trial court agreed, however, that Dr. Schifrin would not be permitted "to put forth evidence of the data collection (claims and suits) he submitted to the FDA nor the FDA's findings or reports." (*Id*.)

**The Mistrial**

On January 11, 2010, trial began. Dr. Schifrin appeared as Plaintiff's first witness. (3rd Supp. R-II-179-224.)

In the course of his direct examination, Dr. Schifrin was asked by Plaintiff to "assume that there is neuroradiological proof that…[Plaintiff] suffered a bilateral ischemic brain injury sometime between December 2nd…and December 5…2002." (3rd Supp. R-II-184.) With that assumption, Dr. Schifrin testified that he could reasonably narrow the time window within which Plaintiff's brain injury occurred. (*Id*.) Dr. Schifrin explained the effect of the force and pressure on an infant's head from use of the vacuum extractor. (*Id*. at 224-25.) In Dr. Schifrin's opinion, those forces were sufficient to cause an ischemic brain injury, given the circumstances surrounding Dr. Garcia's use of the vacuum. (*See id*. at 225-26.)

According to Dr. Schifrin, Dr. Garcia did not provide Plaintiff and his Mother with acceptable and appropriate care. (3rd Supp. R-II-239.) Dr. Schifrin testified without objection that Dr. Garcia's conduct "contributed to obvious ischemia in the baby during this period of time [before delivery]." (*Id*.) Dr. Schifrin opined that if Dr. Garcia had reasonably followed the guidelines for the conduct of the Mother's second stage of labor, Plaintiff would not have suffered an ischemic brain injury. (*Id*. at 246-47; *see also id*. at 245 (testifying that "a reasonable standard of care would have resulted in a normal baby").)

Plaintiff then elicited testimony from Karen Lanier, his aunt. (*See* 2nd Supp. R-I-39-40.) The defense moved for a mistrial based on the witness's misconduct. The trial court granted the mistrial (*id*.), and rescheduled the trial for the three-week docket beginning August 23, 2010 (2nd Supp. R-I-37-38).

**Proceedings at Trial**

Trial began as scheduled. In his opening statement, counsel for Plaintiff outlined basic principles of safe medicine that every physician must follow. (Supp. R-I-3.) The three basic principles violated in this case, according to Plaintiff's counsel, included: (1) Dr. Garcia's failure to take the time to perform medical procedures as safely as possible; (2) Dr. Garcia's failure to take the time needed to listen to his patients; and (3) Dr. Garcia's failure to take the time needed to use medical equipment safely. (Supp. R-I-3-4, 13, 66.)

Plaintiff's counsel pointed to Dr. Garcia's misuse of the vacuum extractor and electronic fetal monitoring as examples. (Supp. R-I-6-11, 14-17, 21.) Counsel emphasized that Dr. Garcia could have relied on electronic fetal monitoring to rule out any problem, but neglected to do so. (Supp. R-I-57.) "And so," in the words of Plaintiff's counsel, "Dr. Garcia didn't realize that what he was doing was causing [Plaintiff's] problem." (Supp. R-I-57.)

In his opening statement, defense counsel denied that Dr. Garcia failed to use reasonable care or that Dr. Garcia caused Plaintiff's brain injury. (Supp. R-III-218-19, 226, 266-67.) Defense counsel emphasized to the jury that the evidence would show that the vacuum extractor itself is a safe product, and that Dr. Garcia had sufficient reasons to rely on the vacuum extractor for Plaintiff's delivery. (Supp. R-III-241-43.) "The experts and the treating physicians," according to defense counsel, would tell the jury that "vacuums don't cause these kind of strokes…in these kinds of children" (Supp. R-III-253; *see id*. at 257) and did not cause Plaintiff's ischemic stroke (Supp. R-III-254-55, 256).

**Testimony of Plaintiff's Expert Witnesses**

Plaintiff elicited testimony from four expert witnesses: (1) Barry D. Pressman, M.D., a neuroradiologist (Supp. R-IV); (2) Barry S. Schifrin, M.D., an obstetrician/gynecologist and specialist in maternal-fetal medicine (Supp. R-V; R-VI); (3) Marcus Hermansen, M.D., a neonatologist (Supp. R-VI); and (4) Ronald

S. Gabriel, M.D., a pediatric neurologist (Supp. R-VII). Drs. Pressman, Hermansen, and Gabriel all gave testimony on causation. Dr. Schifrin was Plaintiff's only standard of care expert.

**Plaintiff's Expert Neuroradiologist**

Plaintiff first elicited testimony from his expert neuroradiologist, Dr. Pressman, to establish the window of time for Plaintiff's ischemic brain injury. (Supp. R-IV-306-307.) The neuroradiologist did not testify as to the circumstances surrounding Dr. Garcia's use of the vacuum extractor (*id*. at 360-61), and could not state whether use of the vacuum specifically caused Plaintiff's brain injury (*id*. at 336, 339, 359). Dr. Pressman testified that he relies on the neonatologists, OB/GYNs, maternal-fetal specialists and neurologists to review medical records and pinpoint the time of injury. (*Id*. at 307-308, 311.)

Dr. Pressman concluded that Plaintiff suffered an ischemic brain injury between December 2, 2002 and December 5, 2002. (Supp. R-IV-296-97, 308, 311.) Explaining that the injury was asymmetrical, Dr. Pressman considered mechanical forces to be the likely cause of the ischemic injury. (*Id*. at 319-20, 339, 361-63, 365-66.) Had the injury been more of a hypoxic event – meaning inadequate oxygen in the blood – then the entire brain would have been equally affected. (*Id*. at 296-97, 319-21.) Dr. Pressman also believed that a clot in the

Plaintiff's left middle cerebral artery would not explain the brain damage shown on the films. (*Id*. at 304, 318.)

**Plaintiff's Standard of Care Expert**

Plaintiff next elicited testimony from Dr. Schifrin, his only standard of care expert. Dr. Schifrin is an OB/GYN who is board certified both in general obstetrics and gynecology and in maternal-fetal medicine. (Supp. R-V-383-84.) He consults in high-risk obstetrics and also serves as an assistant professor in obstetrics and gynecology at the University of Southern California. (*Id*. at 400-401, 408, 418-19.) He has testified as a medical-legal expert throughout his career. (*Id*. at 407-408.)

Dr. Schifrin testified as to the importance of electronic fetal monitoring, especially for high-risk deliveries. (Supp. R-V-391-92, 396-98.) He estimated that in his years of practice he has reviewed more than a quarter million fetal heart rate tracings, elicited from electronic fetal monitoring. (*Id*. at 398.) He has written two books on fetal monitoring, along with numerous articles and chapters of textbooks. (*Id*. at 402-403.) He has researched and published on the topic of the use of vacuum-assisted delivery devices and whether improper vacuum extraction can result in cerebral infarct, or stroke. (*Id.* at 427.) In 1998, he participated in a controlled study of vacuum-assisted deliveries that compared infants who had

suffered adverse outcomes associated with vacuum use with infants who had normal outcomes. (*Id*. at 500-501.)

Dr. Schifrin also teaches residents how to use electronic fetal monitoring and when vacuum-assisted delivery may be appropriate. (*Id*. at 416.) In his role as a consulting obstetrician, he continues to assist other physicians in deciding on the course of action for labor and delivery. (*Id*. at 421.) He lectures to medical residents and nurses on conduct of the second stage of labor. (*Id*. at 421-22.)[2]

Dr. Schifrin testified that based upon his review of the labor and delivery records in this case, Dr. Garcia did not practice safe medicine in the manner that he delivered Plaintiff. (Supp. R-V-430-31.) Dr. Schifrin reviewed Plaintiff's fetal heart rate tracings, recorded during the Mother's labor. (*Id*. at 427-430.) He found no evidence of chronic fetal hypoxia on the tracings. (*Id*. at 442.) He testified that he believed, within a reasonable degree of medical certainty, that Plaintiff had not suffered any neurological insult in the 24 to 48 hours before birth. (*Id*. at 446.)

Dr. Schifrin focused on the minutes before Plaintiff's birth on December 3, 2002. Dr. Schifrin testified that as of 7:28 a.m. on the morning of the delivery, neither the Plaintiff nor his twin brother had suffered any brain injury. (*Id*. at 468.)

[2] The second stage of labor is "the time of labor when the opening of the uterus, the cervix has disappeared, has gone away, and the head is now capable…of coming down and being delivered." (Supp. R-V-421-22.)

Nor did Dr. Schifrin find any evidence of placental insufficiency that would cause oxygen deprivation. (*Id*.)

At 7:34 a.m., Dr. Garcia first applied the vacuum extractor. (Supp. R-V-492.) Although Dr. Garcia testified that he decided to use the vacuum because he could hear the Plaintiff's heartbeat decreasing, Dr. Schifrin noted that he saw no evidence of any deceleration in the Plaintiff's heart rate at that time. (*Id*. at 491-92.)

Dr. Schifrin testified to the lack of adequate information available to Dr. Garcia (at or around 7:34 a.m.) to safely conduct a vacuum assisted delivery. (*Id*. at 495-96, 498, 505.) Dr. Schifrin stated that a reasonably careful physician would attempt to elicit a better tracing; once more information is available, the physician could manage problems. (*Id*. at 496-97.) Dr. Schifrin cautioned:

> The notion that a vacuum is under all respects a benign procedure is not reasonable. You must understand that it is associated with significant, not frequent but with significant risk,…especially if it is done as part of fetal distress, for example.

(*Id*. at 495.)

Based upon his review, Dr. Schifrin saw no indication for intervention; the baby was "making progress" and showed "no obvious fetal distress or any fetal problem going into this." (*Id*. at 498-99, 500.) He testified that within the standard of care applicable to a reasonably careful obstetrician, there were contraindications to use of the vacuum at that time. (*Id*. at 506.) Dr. Schifrin also

discounted any notion of maternal exhaustion by 7:34 a.m. to justify use of the vacuum to assist delivery. (*Id*. at 508-510; *see also* R-VI-813-815.)

Dr. Schifrin described Dr. Garcia's management of the delivery at and around this time as "not only unsafe," but "dangerous." (Supp. R-V-513-514.) Dr. Garcia again used the vacuum extractor at 7:40 a.m. and 7:43 a.m. (*Id*. at 514.) Dr. Schifrin explained that there was no information to reflect how Plaintiff tolerated the vacuum at 7:40 a.m., but by 7:43 a.m., "between the vacuum and the pushing, he tolerated it [use of the vacuum] very poorly." (*Id*. at 514-515.)

By 7:48 a.m., Dr. Schifrin noted "a very low heart rate," which represented a "potentially ominous" and "dramatic change in the character of the tracing" and "rather large" decelerations in Plaintiff's heart rate. (*Id*. at 517-518.) Dr. Schifrin believed that Dr. Garcia did not provide reasonable care to Plaintiff during that time period. (*Id*. at 518.) The decelerations likely represented ischemic events. (*Id*. at 518, 521-22.)

After two or three pulls with the vacuum, Dr. Schifrin testified that "there would seem no other rational thing to do other than to do a cesarean section." (*Id*. at 519.) Use of the vacuum extractor "should not exceed 15 minutes or, for these circumstances, probably three pulls." (*Id*.) The decelerations in Plaintiff's heart rate shown on the tracings during the approximately fifteen minutes without use of

the vacuum likely reflected the mother's pushing and the contractions and "invit[ed] the inference" that Plaintiff had already been injured. (*Id*. at 519-20.)

At approximately 7:57 a.m., Dr. Garcia again applied the vacuum extractor. (Supp. R-V-520-21.) Dr. Schifrin could not understand any legitimate medical reason for resuming use of the vacuum at that time. (*Id*. at 521.) Nine of twelve minutes reflected no information on the tracing, which – according to Dr. Schifrin – was "quite unreasonable care." (*Id*. at 522-23.)

Dr. Schifrin testified that a vacuum extractor can cause the type of ischemic brain injury suffered by the Plaintiff. (*Id*. at 502-503.) He explained the harm that can be caused by misuse of the vacuum, which includes the stretching of the arteries that lead to the brain and, because of increased pressure, the diminution of blood flow to the infant's brain (or ischemia). (*Id*. at 501-502, 503-504.) Dr. Schifrin stated that the use of a vacuum extractor six times on a thirty-five-week-old infant was unreasonable. (*Id*. at 498.)

**Objections to Dr. Schifrin's Opinion**

Counsel for Plaintiff instructed Dr. Schifrin to "assume that the neuroimaging studies revealed that [Plaintiff] suffered bilateral ischemic injury to his brain that occurred between … December 2, 11:30, and December 5 at 11:30." (*Id*. at 523.) Based upon this assumption, Plaintiff's counsel asked Dr. Schifrin:

"Do you have an opinion as to whether…the obstetrical circumstances or conditions existed which could result in ischemic injury?" (*Id*.)

Defense counsel interrupted before Dr. Schifrin could answer, and asked to voir dire the expert. (*Id*.) In voir dire, Dr. Schifrin testified that as an obstetrician, he was not able to state what caused the brain injury. (*Id*. at 524.) He agreed that it was not his role to "tell the jury that this baby's ultimate outcome is related to an injury suffered around the time of the birth." (*Id*. at 524-25.) Dr. Schifrin stated that he is not a pediatric neurologist, radiologist, or expert in infant middle cerebral artery infarct. (*Id*. at 525.) The specific cause of Plaintiff's injury was outside his area of expertise. (*Id*. at 526.)

Defense counsel asked the trial court to exclude this aspect of Dr. Schifrin's opinion because "the expert is not qualified to comment on the cause of [Plaintiff's] injury." (*Id*. at 526.) Plaintiff's counsel disagreed, arguing that the question "had to deal with whether obstetrical conditions existed which could create circumstances which would result in…an ischemic brain injury," something that Dr. Schifrin "very definitely" could answer. (*Id*.) The trial court sustained the defense's objection. (*Id*.)

Counsel for Plaintiff then continued his direct examination of Dr. Schifrin. (Sup. R-V-527.) Dr. Schifrin testified that he saw periods of ischemia within Plaintiff's brain reflected on the tracings. (*Id*. at 527, 531, 532-33.) He believed

the evidence of ischemia resulted from misuse of the vacuum extractor, which had been applied "without sufficient indication, without sufficient care, and…excessively." (*Id*. at 527.)

Dr. Schifrin testified that he had researched the issue of ischemic brain injury resulting from vacuum assisted delivery devices. (*Id*.) As part of that research, he determined the obstetrical conditions within which ischemic brain injury can occur. (*Id*. at 527-28.) When asked whether he had made "any determinations in that regard in this case," defense counsel again objected. (*Id*. at 528.) The trial court sustained the objection. (*Id*.)

Counsel for Plaintiff asked Dr. Schifrin whose role it is to determine that the vacuum caused ischemic brain injury. (*Id*.) Dr. Schifrin responded that it is "ordinarily a collaborative effort." (*Id*.) As an obstetrician, Dr. Schifrin can tell when ischemia occurs, but not when the ultimate injury occurs. (*Id*. at 529.) His role is to testify as to when "there are events…competent to produce the problem, not that they did produce the problem." (*Id*. at 529, 531.) Dr. Schifrin testified that Plaintiff's ischemia resulted from Dr. Garcia's failure to use reasonable care in his management of the labor and delivery (*id*. at 532, 533), including his failure to use the vacuum extractor with reasonable care (*id*. at 534). Trial was adjourned on the afternoon of August 25, 2010, without the completion of Dr. Schifrin's testimony. (*Id*. at 534-35.)

**Plaintiff's Proffer of Dr. Schifrin's Opinion**

The next morning at trial, Plaintiff proffered testimony from Dr. Schifrin. (2nd Supp. R-II-259-66.) Dr. Schifrin testified that, depending on the presence of neonatal nurses and physicians, obstetricians may not necessarily be responsible for the care of babies once delivered. (*Id*. at 262.) Nonetheless, he stated that obstetricians are trained to recognize obstetrical conditions that have the potential to cause neurological injuries in order to avoid or eliminate those conditions, thereby hopefully avoiding or eliminating neurological injury during childbirth. (*Id*. at 262-63.)

Dr. Schifrin explained that he had researched and written on obstetrical conditions that may neurologically injure fetuses. (2nd Supp. R-II-263-64.) He agreed that the purpose of the publications was to enable obstetricians both to recognize potentially harmful obstetrical conditions and to take corrective action to eliminate those conditions and avoid neurological injury to the fetus. (*Id*. at 264.) Dr. Schifrin testified that he had an opinion as to whether Dr. Garcia's failure to provide reasonable care to Plaintiff created the obstetrical conditions known to potentially cause neurological injury in newborns. (*Id*.) In Dr. Schifrin's opinion, Dr. Garcia "in fact put the baby in harm's way by the conduct of the second stage of labor." (*Id*.)

Within this context, Plaintiff asked the trial court for permission to present to the jury Dr. Schifrin's opinions that Dr. Garcia's failure to provide reasonable care created obstetrical conditions known to potentially cause neurological injury in newborns. (2nd Supp. R-II-265.) Plaintiff's counsel stated that Dr. Schifrin would not testify "whether the neurological injury actually resulted"; "[t]hat's somebody else's job." (*Id*.) The trial court declined Plaintiff's request. (*Id*.) According to the trial court:

> Well, no, he's offering an opinion as to causation, which he has quite candidly admitted that he's not equipped to do. And it's at least implicit in the question of causation, so I stand by my prior ruling.

(*Id*.)

**Conclusion of Dr. Schifrin's Testimony**

On his second (and final) day of his testimony, Dr. Schifrin opined that the ischemia shown on the tracing was preventable through proper monitoring, availability of information, and adequate attention to the infant's responses. (R-VI-812, 821-22.) Dr. Schifrin concluded that Dr. Garcia did not provide reasonable obstetrical care when he: (1) failed to safely use the vacuum extractor on Plaintiff; and (2) failed to properly and effectively rely upon electronic fetal monitoring to manage the delivery. (*Id*. at 829-30, 831.) In Dr. Schifrin's opinion, Dr. Garcia did not safely deliver Plaintiff. (*Id*. at 831.) On redirect, Dr. Schifrin affirmed that

there was no basis to believe that Plaintiff's injury occurred before use of the vacuum. (*Id*. at 867-68.)

**Plaintiff's Additional Causation Experts**

In his case in chief, Plaintiff elicited expert testimony on causation from two additional experts: (1) Dr. Hermansen, a neonatologist; and (2) Dr. Gabriel, a pediatric neurologist.

Plaintiff's expert neonatologist, Dr. Hermansen, did not render any opinion as to the standards of obstetrical care or the quality of Dr. Garcia's care for Plaintiff and the Mother. (Supp. R-VI-652-63.) Through differential diagnosis, Dr. Hermansen diagnosed the cause of Plaintiff's ischemic stroke as a mechanical injury, caused by use of the vacuum extractor. (*Id*. at 604-609.) Potential causes of stroke refuted by Dr. Hermansen included: (1) heart defects; (2) clotting disorders; (3) maternal drug use; (4) placental clots; and (5) other problems with the infant's placenta before birth. (*Id*. at 607-611.)

Dr. Hermansen sought to testify that the incidence of vacuums causing strokes had been "well-reported." (Supp. R-VI-607.) Defense counsel interrupted with an objection, claiming "that's improper testimony." (*Id*.) The trial court initially overruled the objection, but then reversed its ruling, stating:

> I'm sorry, no, I'm wrong. Yes, I get your point. Objection is sustained.

(*Id*.)

Dr. Hermansen continued his opinion without reference to any other sources. (*See id*.) In Dr. Hermansen's opinion, Plaintiff's stroke resulted from use of the vacuum extractor; specifically, from the stretching of this high-risk, pre-term infant's blood vessels by the pull of the vacuum, which blocked the flow of blood through the vessels. (Supp. R-VI-607-609, 610-611, 625.)

Dr. Gabriel, a pediatric neurologist, also testified on Plaintiff's behalf. (Supp. R-VII-659-808.) Dr. Gabriel readily admitted that he was not an expert on standard of care. (*Id*. at 725-26.) He had no opinion as to whether Dr. Garcia had appropriately used the vacuum extractor. (*Id*. at 685, 725-26.)

Dr. Gabriel testified only as to causation. (Supp. R-VII-664-65, 749.) In Dr. Gabriel's opinion, Plaintiff suffered a cerebral infarct "as a consequence of the vacuum extraction, which caused stretching, twisting, torsion, even kinking of the vessels that go to the brain." (*Id*. at 664.) The stretching of the blood vessels reduced the blood flow to the Plaintiff's brain, an ischemic injury. (*Id*. at 664-65, 688, 701.) According to Dr. Gabriel, vacuum extraction can produce this kind of a brain injury; the stretching and twisting of the blood vessels caused by the vacuum's pulling on the baby's head is "known as a phenomenon…and occurred in Plaintiff's case." (*Id*. at 689.)

Together with the reduction in blood flow, Dr. Gabriel testified, Plaintiff suffered an additional complication after delivery: the loss of blood caused by

bleeding over the surface of the skull bone and under the skin. (Supp. R-VII-664.) Dr. Gabriel concluded that "the combination of the stretching of the vessels, reducing the blood flow and the loss of blood resulted in…[Plaintiff] now having both a combination of cerebral palsy as well as cognitive and language and psychosocial retardation." (*Id*. at 665.)

**Dr. Garcia's Motion for Directed Verdict**

At the close of Plaintiff's case in chief, the defense moved for a directed verdict. (2nd Supp. R-II-247-51; 2nd Supp. R-XI-1610-29.) The defense argued that Plaintiff had failed to prove that Dr. Garcia's alleged breach of duty caused the ischemic brain injury. (2nd Supp. R-II-247.) The trial court denied the motion for directed verdict on causation. (2nd Supp. R-XI-1628-29.)

**Testimony of the Defense Experts on Causation**

The defense then presented its case. The defense sought to explain the cause of the injury as an ischemic stroke suffered by Plaintiff in utero, before the onset of labor. (*E.g.*, R-XII-27, 67; R-XIII-24-26, 68-69, 75-76.) The cause of the stroke, according to the medical experts for the defense, was an embolus[3] that lodged in the Plaintiff's left middle cerebral artery. (R-X-18-20, 24; R-XIII-25.)

[3] An embolus is "a piece of material that travels from one place to the other and blocks a vessel, thereby stopping the blood flow from getting to a part of the brain that is beyond where the blockage occurs…." (R-XIII-25-26, 47.)

The defense's neuroradiologist, Dr. Sze, conceded that a single clot would not explain all the damage to Plaintiff's brain. (R-X-88-89.) Dr. Sze testified that the damage to the right side of the brain could have been caused by a "watershed infarction," leading to less oxygenated blood to the Plaintiff's brain, or by smaller emboli. (R-X-31-33.) Similarly, the defense's expert neonatologist, Dr. Fox, noted that the right side of Plaintiff's brain suffered significantly less damage, explaining that the cause could be smaller emboli. (R-XIII-52-53.) The defense also elicited evidence to suggest that the mother's preeclampsia – and resulting high blood pressure – may have impaired the placenta's function (R-XII-28, 83-84, 95), leading to the deprivation of oxygen to Plaintiff's brain before birth (R-X-19-20).

The defense presented evidence that a vacuum extractor cannot cause the kind of permanent neurologic injury that the Plaintiff suffered. (R-X-21-22, 44-45; R-XII-69; R-XIII-26-27; Supp. R-II-101, 144.) A pediatric neurologist, Dr. Resnick, testified that Dr. Garcia's care and treatment – including his application of the vacuum extractor – did not cause the damage to Plaintiff's brain. (R-XIII-4, 24-25, 54-57.) Although Dr. Resnick conceded that he was not before the jury to comment on the appropriateness of Dr. Garcia's course of action during labor and delivery, the expert stated that nothing that Dr. Garcia did caused the Plaintiff's

stroke. (R-XIII-60.) Likewise, Dr. Resnick did not believe anything that happened during the Mother's labor caused the stroke. (R-XIII-76.)

**Testimony of the Defense's Standard of Care Expert**

The defense elicited evidence from one medical expert on the standard of care. The defense expert, Dr. John Thorp, is board-certified in obstetrics and gynecology, and in maternal-fetal medicine. (Supp. R-II-72.) He is a professor at the University of North Carolina School of Medicine. (*Id*. at 76.)

Dr. Thorp testified that Dr. Garcia acted within the appropriate standard of care in his management of the Mother's labor and delivery. (*Id*. at 98-102.) According to Dr. Thorp, while a vacuum extractor can fracture an infant's skull, damage his head, and cause bleeding under the skin (which may result in a subgaleal hemorrhage), the vacuum extractor is not a risk factor for stroke. (*Id*. at 101, 114-18, 143-44.) Dr. Thorp believed that Dr. Garcia appropriately applied the vacuum extractor and met all guidelines for its use in his delivery of Plaintiff. (*Id*. at 100, 131-32, 140.) Defense counsel asked his expert:

> You told us about your publications, your writing, your seminars, your various work in the field of epidemiology. Have you ever heard of the concept before this lawsuit that a vacuum assist can cause an ischemic stroke?

(*Id*. at 146.) Counsel for Plaintiff objected. (*Id*.) The trial court overruled the objection, and Dr. Thorp responded:

> I never heard of it. And I would flunk somebody on oral exams who told me that such a relationship existed. I am absolutely unaware.

(*Id*.) Dr. Thorp's direct examination then concluded. (*Id*.)

**Testimony of the Defense's Expert on Placental Pathology**

The defense's final expert was David Schwartz, M.D. Dr. Schwartz is an epidemiologist and placental pathologist. (R-XVI-5-6, 8.)

Dr. Schwartz was deposed a little over a year before trial. At that deposition, he referenced a study he considered "important": the Collaborative Perinatal Study, conducted by the National Institutes of Health (the "NIH Study"). The NIH Study, according to Dr. Schwartz, is the "largest prospective study of birth injury ever performed in this country." (3rd Supp. R-I-31.) Dr. Schwartz testified at his deposition that the raw data from the NIH Study was compiled in a textbook. (*Id*. at 32.) Neither the NIH Study nor the textbook was produced by Dr. Schwartz or shown to Plaintiff's counsel at the deposition. (*Id*. at 30-34, 138.)

Dr. Schwartz conceded at his deposition that he does not "really consider any literature authoritative." (*Id*. at 43.) He qualified his comment, stating that "there are certainly articles that are good and articles we rely on." (*Id*.) When asked whether he intended to cite any literature at trial, Dr. Schwartz testified that he might refer to the NIH Study. (*Id*. at 44.) He continued:

> But that's so much a part of our general body of knowledge now that I don't really specifically need to refer to it.

….[I]t's just what we know.

(*Id*. at 45.)

At trial, Dr. Schwartz testified that in his opinion, the injury to Plaintiff's brain resulted from placental abnormalities ("villus hypoplasia, also termed … uneven accelerated maturation," or "UAM") associated with the Mother's preeclampsia, together with the "onset of a hypercoagulable state, meaning that the fetus is prone to forming clots in his circulation, which is very abnormal." (R-XVI-42, 68-69.) Included among the slides that Dr. Schwartz showed to the jury was a chart from the NIH Study, which showed pregnancy outcomes of infants with placental abnormalities. (*Id*. at 72-75.) This slide was not among the slides produced by Dr. Schwartz at his deposition. (3rd Supp. R-I-30-34, 138.)[4]

Dr. Schwartz began to explain the chart, testifying that the chart showed pregnancy outcomes from infants with UAM, which, he stated, "[Plaintiff] does have." (R-XVI-72.) Counsel for Plaintiff objected, asserting "improper bolstering." (*Id*.) When asked by the trial court whether the chart was a "statistical compilation," Dr. Schwartz responded:

> Yes, sir, it is. It lists the causes of uneven accelerated maturation here.
>
> ….
>
> And it has pregnancy outcomes.

[4] Dr. Schwartz testified at deposition that his two rolls of slides, indexed on handwritten log sheets, corresponded only to photographs of the placenta. (3rd Supp. R-I-21-27.)

(R-XVI-72-73.) Plaintiff's counsel again objected, stating, "It's hearsay." (*Id*. at 73.) The trial court overruled the objections. (*Id*.)

Dr. Schwartz then explained to the jury how the statistics for the chart were derived and how those statistics related to Plaintiff. (R-XVI-73-74.) The expert emphasized that the chart from the NIH Study was "an outcomes table from the largest study of birth injury…ever performed in the United States." (*Id*. at 73.) According to Dr. Schwartz, the NIH Study revealed that preeclampsia (which the Mother had) is "probably the strongest" risk factor for UAM, with a statistical association of greater than 99.9 percent. (*Id*. at 73-74.) Further, Dr. Schwartz testified that the NIH Study showed "five bad outcomes of pregnancy," which included a "very high statistical association" between UAM and "neurological abnormalities" of more than 99.9 percent. (*Id*. at 74.) "You really don't get higher than that in statistics," he stated. (*Id*.)

Defense counsel asked Dr. Schwartz whether, in his experience, he had been able to "determine the outcomes of babies and come to similar conclusions with regard to outcomes when you have this type of a pathological finding [UAM]." (R-XVI-74-75.) Plaintiff's counsel objected, citing "lack of substantial similarity" and "relevance." (*Id*. at 75.) Again, the trial court overruled the objection. (*Id*.) Dr. Schwartz testified:

> Well, I certainly cannot recapitulate as counsel as suggested. I cannot recapitulate the [NIH] collaborative perinatal study. That was

> just a very well-performed, enormous study with tremendous statistical power that will never be reproduced because of the expense.
>
> However, in my practice of 25 years, I see a lot of cases with villus hypoplasia or uneven accelerated maturation in it. And so yes, based on my knowledge, training and experience, I can say that I would agree with this statistical association. I see cases not infrequently of villus hypoplasia [also known as UAM] of and by itself with no other problems where we have a baby that is stillborn or dies in the neonatal period, or if it stays alive, has neurological abnormalities. So I can completely agree with it.

(R-XVI-75.)

**Plaintiff's Rebuttal Expert**

Plaintiff presented one witness in rebuttal: Dr. Theonia Boyd, a placental pathologist. Dr. Boyd testified that she did not find any disease process in the Plaintiff's placenta that could explain his brain injury. (R-IX-33-34, 84-85, 89.)

**Closing Argument**

In closing argument, defense counsel repeatedly emphasized the lack of evidence to show that vacuum extractors cause ischemic strokes like the one suffered by Plaintiff. (R-XIX-43-44, 53, 56-57, 67, 74, 75, 77-78; 2nd Supp. R-II-257.) Defense counsel summarized the credentials of the defense experts and the treating neurologist, and argued:

> I asked them, in all of your years of experience, have you ever heard of this theory before? They all said I've never heard of it, I've never seen it, I've never heard of it.

(R-XIX-75.)

According to defense counsel, "Vacuums don't cause ischemic strokes." (R-XIX-77.) "Dr. Fox, Dr. Thorp said the same thing, Dr. Resnick. And then we have Dr. Schwartz who talked about the evidence that he saw relating to the presence of clots…." (*Id*.) Defense counsel continued:

> So have they convinced you by the greater weight of the evidence that vacuums can cause ischemic strokes? If their own experts admit to you I can't see it and I can't prove it, the manufacturer tells you, no, doesn't cause ischemic strokes, it's not there, if all of these experts with all of these credentials tell you I've never even heard of this cockamamie theory, then, in fact, it can't be proven.

(*Id*. at 77-78.)

**Instructions to the Jury**

The trial court instructed the jury to decide whether Dr. Garcia "was negligent in his delivery" of Plaintiff, and, if so, "whether that negligence was a legal cause of the loss, injury or damage" to Plaintiff. (R-V-792.) The trial court gave the standard jury instructions on negligence and causation. (R-V-789, 790, 791; 2nd Supp. R-II-256.)

**The Jury's Verdict and the Post-Verdict Proceedings**

On the afternoon of September 9, 2010, after thirteen days of trial, the jury deliberated less than an hour and a half before returning its verdict. (2nd Supp. R-II-257.) The jury answered "no" to the first question for its consideration; specifically: "Was there negligence on the part of Martin A. Garcia, M.D., which was a legal cause of loss, injury, or damage to" the Plaintiff. (R-V-800-801.) The

trial court rendered final judgment on the jury's verdict on September 14, 2010. (2nd Supp. R-II-252.)

Plaintiff timely served his Motion for New Trial on Monday, September 20, 2010. (2nd Supp. R-II-253-67.) Plaintiff argued that the trial court erred in excluding the expert testimony of Dr. Schifrin, Plaintiff's only standard of care expert, as to the cause of Plaintiff's neurological injury. (2nd Supp. R-II-254.)

In his Motion for New Trial, Plaintiff summarized Dr. Schifrin's proffered testimony, as follows:

> a. Dr. Schifrin is widely published on the topic of the obstetrical conditions known to have the potential to cause neurological injuries to fetuses.
>
> b. Obstetricians are trained to recognize the obstetrical conditions which have the potential to cause neurological injuries to fetuses in order to avoid or eliminate those conditions and thereby, hopefully, avoid or eliminate a neurological injury during childbirth.
>
> c. Obstetricians are to be able to recognize those obstetrical conditions known to have the potential to cause neurological injury to a fetus as those conditions start to develop and take corrective action to avoid or eliminate neurological injury to the fetus.
>
> d. Dr. Garcia failed to recognize that during [Plaintiff's] delivery, obstetrical conditions existed which were known to have the potential to cause neurological injury to fetuses.
>
> e. Because Dr. Garcia failed to recognize the obstetrical condition which had the potential to cause neurological injury to [Plaintiff], he did not take the actions necessary to avoid or eliminate that condition.
>
> f. Because Dr. Garcia did not take the corrective action necessary to avoid or eliminate the condition, he put…[Plaintiff] in harm's way

> of a neurological injury by the way he conducted the second stage of labor (i.e., Dr. Garcia, by failing to exercise reasonable care, exposed…[Plaintiff] to the conditions known to have the potential to cause neurological injury.)

(2nd Supp. R-254-55; *id*. at 262-65.)

Notwithstanding this proffer, Plaintiff argued, the trial court refused to allow the jury to consider the opinions of Dr. Schifrin that "the obstetrical conditions… known to create an environment which can cause neurological injury were created by Dr. Garcia's negligence." (2nd Supp. R-II-255.) Exclusion of the proffered testimony kept the jury from hearing evidence of the link between Dr. Garcia's negligence and Plaintiff's neurological injury. (2nd Supp. R-II-256-57.) Plaintiff's inability to tie Dr. Garcia's conduct to the ultimate injury "became a major theme of the defendants' closing arguments." (*Id*. at 257.) Consequently, Plaintiff argued, the jury returned a verdict for the defense. (*Id*.) Plaintiff asked the trial court to grant a new trial. (*Id*.)

The trial court summarily denied Plaintiff's Motion for New Trial in a written order entered September 24, 2010. (2nd Supp. R-II-268.) On October 12, 2010, Plaintiff timely filed his notice of appeal of the final judgment. (R-V-802-806.)

## SUMMARY OF ARGUMENT

Plaintiff asks this Court to reverse the jury verdict and judgment for Dr. Garcia, and to grant a new trial, for two reasons. First, the trial court improperly

excluded relevant and admissible opinion testimony from Plaintiff's standard of care expert. Second, the trial court erred in permitting the defense to improperly bolster, on direct examination, the expert testimony of two of the defense's medical experts on causation.

In both instances, the trial court reversed its pre-trial rulings in limine. The trial court's unexpected rulings deprived Plaintiff of expert evidence necessary to establish negligence and causation, yet allowed the defense to elicit improper and otherwise inadmissible evidence on crucial issues of liability. The trial court inconsistently and erroneously applied the rules of evidence, to the detriment of Plaintiff.

For example, in an abrupt reversal of its prior ruling in limine, the trial court first limited the scope of the expert opinion rendered by Dr. Schifrin, Plaintiff's only standard of care expert. Although the trial court reasoned that Dr. Schifrin was not qualified to render an opinion related to causation, the same court had previously allowed the standard of care expert to testify as to both the standard of care and the consequences of Dr. Garcia's breach of that standard, which created the likelihood of neurological injury to Plaintiff. Because there was no "substantial reason to believe that the expert is unqualified to render an opinion that will be reliable and helpful to the trier-of-fact," the trial court should not have deprived Plaintiff of his "right to present expert medical testimony of a licensed and

experienced physician." *Botte v. Pomeroy*, 497 So. 2d 1275, 1279 (Fla. 4th DCA 1986).

The trial court's exclusion of Dr. Schifrin's expert opinion prejudiced Plaintiff. The trial court sided with the defense in this "battle of the experts" by limiting the opinion testimony of Plaintiff's only standard of care expert. The trial court's ruling rendered Plaintiff unable to establish each link in the chain of causation between Dr. Garcia's negligence and the Plaintiff's ultimate brain injury. Plaintiff is entitled to reversal of the judgment, and a new trial.

The trial court also erred in allowing the defense to bolster the testimony of two of its medical experts on direct examination. Before trial, the court ruled that the defense could not elicit evidence from Dr. Thorp on the purported lack of any peer reviewed literature showing a link between vacuums and strokes. Once more, notwithstanding a pre-trial ruling in limine, the trial court changed course at trial. The trial court permitted the defense to support the opinions of both Dr. Thorp and Dr. Schwartz with references to authoritative treatises.

Use of the authoritative writings bolstered the defense's theory that placental abnormalities – and not Dr. Garcia's misuse of the vacuum – caused Plaintiff's ischemic brain injury. The tactics of the defense, which the trial court condoned, served to reinforce the credibility of the defense experts, while diminishing the credibility of the Plaintiff's experts. Because the trial court admitted improper

evidence on the crucial issues of negligence and causation, Plaintiff is again entitled to reversal of the judgment, and a new trial.

## ARGUMENT

### I. THE TRIAL COURT'S EXCLUSION OF A QUALIFIED EXPERT'S RELEVANT AND ADMISSIBLE OPINION PREJUDICED PLAINTIFF, ENTITLING HIM TO A NEW TRIAL.

#### Standard of Review

The trial court is "afforded broad discretion in determining the subject on which an expert may testify in a particular trial," *Angrand v. Key*, 657 So. 2d 1146, 1148 (Fla. 1995), and the qualifications of the expert, *Botte v. Pomeroy*, 497 So. 2d 1275, 1279 (Fla. 4th DCA 1986). While the decision of the trial court "will only be disregarded if that discretion has been abused," its discretion "is not boundless." *Angrand*, 657 So. 2d at 1148-49. The trial court may not deprive a plaintiff of the right to present expert medical testimony of a licensed and experienced physician "without substantial reason to believe that the expert is unqualified to render an opinion that will be reliable and helpful to the trier of fact." *Botte*, 497 So. 2d at 1279. Nor may the trial court exclude expert testimony that is directly relevant to issues of liability. *See id*. When the trial court errs in applying a provision of the Florida Evidence Code, the standard of review is de novo. *Shands Teaching Hosp. & Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 1st DCA 2007).

Here, the trial court erred in excluding certain expert medical testimony of Plaintiff's standard of care expert. Dr. Schifrin was qualified to testify as an expert. His proffered opinion, which was relevant and material to questions of negligence and causation, should have been admitted under section 90.702 of the Florida Evidence Code to assist the trier of fact in understanding the evidence and in determining the facts in issue. *See* § 90.702, Fla. Stat. (2010); *Botte*, 497 So. 2d at 1279.

The trial court mistakenly deprived the jury of the benefit of Dr. Schifrin's proffered expert opinion. *See Botte*, 479 So. 2d at 1279; *accord Grenitz v. Tomlian*, 858 So. 2d 999, 1003-1006 (Fla. 2003). Because Plaintiff was prejudiced by the exclusion of the proffered testimony, he is entitled to a new trial. *See Botte*, 479 So. 2d at 1279.

### A. DR. SCHIFRIN WAS QUALIFIED TO RENDER THE PROFFERED EXPERT OPINION.

In an abrupt reversal of its prior ruling in limine, the trial court limited the scope of the expert opinion rendered by Dr. Schifrin, Plaintiff's only standard of care expert. Although the trial court reasoned that Dr. Schifrin was not qualified to render an opinion related to causation, the same court had previously allowed the standard of care expert to testify as to both the standard of care and the consequences of Dr. Garcia's breach of that standard, which created the likelihood of neurological injury to the Plaintiff. Given that there is no "substantial reason to

believe that the expert is unqualified to render an opinion that will be reliable and helpful to the trier-of-fact," the trial court should not have deprived the Plaintiff of his "right to present expert medical testimony of a licensed and experienced physician." *Botte*, 497 So. 2d at 1279; *see* § 90.702, Fla. Stat.

Dr. Schifrin's proffered opinion concerned the prevailing standard of care, the relevant circumstances surrounding the standard of care, and the consequences of the defendant's breach of care. Contrary to the trial court's ruling, Dr. Schifrin was qualified to render an expert opinion that correlated the breach of Dr. Garcia's standard of care with an increased likelihood of harm from neurological injuries. *See* § 766.102(5), Fla. Stat. (2010). Not only do Dr. Schifrin and Dr. Garcia share the same specialty, the expert testified that he has experience evaluating, diagnosing and treating ischemic injuries suffered by newborns: the same "medical condition that is the subject of the claim." § 766.102(5)(a)1, Fla. Stat.

Yet the defense argued, and the trial court apparently agreed, that because Dr. Schifrin testified as a maternal-fetal specialist – and not a pediatric neurologist, neonatologist, or radiologist – he lacked the necessary qualifications to render *any* opinion related to the potential causes of Plaintiff's neurological injury. Under Florida law, however, an expert is not limited simply to the knowledge that he gains through personal experience. *See Wright v. Schulte*, 441 So. 2d 660, 662 (Fla. 2d DCA 1983) ("to give an opinion on medical questions, one may be

qualified by study without practice, or by practice without study); *cf. Marsh v. Valyou*, 977 So. 2d 543, 548 (Fla. 2007) ("[e]xperts routinely form medical causation opinions based on their experience and training"). A witness may be qualified to testify as an expert when he acquires specialized knowledge, whether from "knowledge, skill, experience, training, or education." § 90.702, Fla. Stat.; *accord Botte*, 497 So. 2d at 1279.

Plaintiff established that Dr. Schifrin has the requisite training, education, and experience to testify as to whether Dr. Garcia's failure to provide reasonable care created obstetrical conditions known to potentially cause neurological injury in newborns. (*E.g.*, 2nd Supp. R-II-262-65.) The proffered opinion related directly to the circumstances surrounding the standard of care and the consequences of a breach of that standard, which were issues for the jury's determination. *See* Fla. Std. Jury Instr. (Civil) 402.4 (standard jury instruction for professional negligence); *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984).

The proffered expert testimony was relevant and admissible, and offered by a qualified medical expert. The jury should have been permitted to hear Dr. Schifrin's opinion. Any objections by the defense to Dr. Schifrin's qualifications "should have been addressed to the weight of his testimony and not its admissibility." *Botte*, 497 So. 2d at 1279; *accord Ferraro v. Fed. Ins. Co.*, 479 So. 2d 159, 160 (Fla. 4th DCA 1985).

In rejecting the proffer, the trial court reasoned that Dr. Schifrin offered an opinion that was "at least implicit in the question of causation" – which the expert conceded he was "not equipped to do." (2nd Supp. R-II-265.) Admittedly, Dr. Schifrin had stated that as an obstetrician, he could not define the exact cause or timing of Plaintiff's stroke, his ultimate brain injury. (Supp. R-V-524-26, 529; 2nd Supp. R-II-265.) Yet Dr. Schifrin was not asked to testify to the ultimate cause of Plaintiff's neurological injury. (2nd Supp. R-II-265.) Plaintiff relied upon an expert neuroradiologist, neonatologist, and pediatric neurologist to prove the specific cause of Plaintiff's ischemic stroke. (Supp. R-IV-319-21, 339, 361; Supp. R-VI-607-611, 625; Supp. R-VII-665-65, 689.) By comparison, Plaintiff asked Dr. Schifrin to state whether Dr. Garcia's breach of the standard of care created obstetrical conditions known to potentially cause neurological injury. (2nd Supp. R-II-265.)

This was an expert opinion that Dr. Schifrin was well-qualified to render. "The objection voiced and sustained was directed to a proper question which would have produced an admissible answer." *Id*. at 1005. The trial court erred in excluding the admissible opinion of a qualified expert. *See id*. at 1003, 1005-1006; *Botte*, 497 So. 2d at 1279.

### B. THE EXCLUSION OF THE PROFFERED EXPERT TESTIMONY PREJUDICED PLAINTIFF.

The trial court's exclusion of Dr. Schifrin's expert opinion prejudiced Plaintiff. The trial court sided with the defense in this "battle of the experts" by limiting the opinion testimony of Plaintiff's only standard of care expert. The trial court's complete and abrupt reversal of its prior order in limine prejudiced Plaintiff, rendering him unable to establish each link in the chain of causation between Dr. Garcia's negligence and the Plaintiff's ultimate brain injury. For the reasons set forth below, Plaintiff is entitled to a new trial.

#### 1. By limiting the opinion testimony of Plaintiff's only standard of care expert, the trial court impermissibly interfered with the "battle of the experts."

First, the trial court excluded relevant and material testimony from Plaintiff's only standard of care expert. For this reason alone, the trial court's error was not harmless. *See Stewart v. Price*, 718 So. 2d 205, 209 (Fla. 1st DCA 1998); *accord Cenatus v. Naples Community Hosp., Inc.*, 689 So. 2d 302, 304 (Fla. 2d DCA 1997).

This case, like many medical malpractice cases, "was necessarily a 'battle of the experts.'" *Stewart*, 718 So. 2d at 209 (quoting *Cenatus*); *accord Lake v. Clark*, 533 So. 2d 797, 798 (Fla. 5th DCA 1988). In deciding the admissibility of expert testimony, trial courts "must resist the temptation to usurp the jury's role in evaluating the credibility of experts and choosing between legitimate but

conflicting scientific views." *Marsh*, 977 So. 2d at 549. The plausibility of any expert opinions should have been an issue for the trier of fact. *See Marsh*, 977 So. 2d at 549-50; *see also Berry v. CSX Transp.*, 709 So. 2d 552, 571 (Fla. 1st DCA 1998) (mere disagreement among experts in interpreting the same data "is not a valid reason for excluding the plaintiffs' experts' opinions altogether" under *Frye*).

The trial court mistakenly intervened in the battle, however. Siding with the defense, the trial court refused to allow Dr. Schifrin, a standard of care expert, to render an opinion related to the increased likelihood for neurological injury created by a breach of the standard of care. In contrast, the trial court permitted one of the defense's experts on causation (Dr. Resnick, a pediatric neurologist) to testify that Dr. Garcia did not breach the standard of care. (R-XIII-60, 76.) Rather than allow the jury to hear all of the conflicting expert opinions – and to weigh the experts' credibility and qualifications – the trial court excluded Dr. Schifrin's relevant and admissible expert testimony. The trial court impermissibly usurped the jury's role.

### 2. The trial court's reversal of its pre-trial ruling prejudiced Plaintiff.

In limiting Dr. Schifrin's opinion, the trial court completely reversed its prior ruling. Before trial, the trial court denied the defense's attempt to preclude certain expert testimony from Dr. Schifrin related to causation. (2nd Supp. R-X-1438-39, 1441.) The trial court rejected the defense's assertion that for Dr. Schifrin "to talk about causation in this case,…he would have to be an expert on perinatal brain injury." (2nd Supp. R-X-1441.) The trial court agreed with Plaintiff that Dr. Schifrin was qualified to render an opinion that correlated breaches in the standard of care to the infant's ischemic injury. (*See* 2nd Supp. R-X-1435, 1437-39.)

And at the first trial, Dr. Schifrin testified without objection that Dr. Garcia's failure to provide reasonable care during labor and delivery caused Plaintiff's ischemic brain injury. (3rd Supp. R-II-60-61, 62-63, 67-69.) The expert opined that if Dr. Garcia had reasonably followed the guidelines for conduct of the second stage of the Mother's labor, Plaintiff would not have suffered that injury. (*Id*. at 68-69.)

Yet at the August, 2010 trial, the trial court abruptly reversed itself, refusing to permit Plaintiff to elicit any evidence linking Dr. Garcia's mismanagement of the labor and delivery with an increased likelihood of neurological injury. This reversal in the trial court's ruling prejudiced Plaintiff. The trial court prevented the jury from learning:

> what a reasonably careful obstetrician would have appreciated from the circumstances of…[Plaintiff's] delivery (i.e., that obstetrical conditions existed which a reasonably careful obstetrician would have recognized as having the potential to cause neurological injury to a fetus),
>
> what a reasonably careful obstetrician faced with these circumstances would have done or not done to avoid or eliminate those obstetrical conditions in order to avoid or eliminate neurological injury to the fetus, and
>
> that Dr. Garcia's negligence put…[Plaintiff] in harm's way of a neurological injury by the manner in which he conducted the second stage of labor (i.e. Dr. Garcia was negligent in failing to appreciate the obstetrical conditions known to have the potential to cause a neurological injury to…[Plaintiff], failing to take corrective action to avoid or eliminate those conditions so as to avoid or eliminate neurological injury to…[Plaintiff], or both).

(2nd Supp. R-II-256.)

### 3. The trial court's ruling prevented Plaintiff from establishing each link in the chain of causation.

Dr. Schifrin's proffered testimony "supplied an essential link in the alleged chain of causation" between Dr. Garcia's breach of the standard of care and Plaintiff's neurological injury. *Botte*, 497 So. 2d at 1279. Exclusion of the proffered testimony kept the jury from hearing that Dr. Garcia "in fact put the baby in harm's way" by his conduct of the second stage of the Mother's labor. (2nd Supp. R-II-264.)

For example, the jury did not hear evidence that Dr. Garcia's breach of the duty of care created obstetrical conditions (such as ischemia, or the decrease in oxygenated blood flow to the brain) known to potentially cause neurological injury

in newborns, or evidence that Dr. Garcia failed to avoid or eliminate those dangerous conditions. Indeed, because the trial court excluded the expert's opinion, the jury never heard "what a reasonably careful obstetrician would have appreciated from the circumstances of…[Plaintiff's] delivery." (2nd Supp. R-II-256). This evidence was directly relevant to the question of whether Dr. Garcia failed to act as a reasonably careful physician would under "like circumstances" – which was an issue for the jury's determination. (R-V-789); *see* Fla. Std. Jury Instr. (Civil) 402.4.

The exclusion of the proffered evidence rendered Plaintiff unable to establish a link in the chain of causation between Dr. Garcia's negligence and the ischemic stroke that Plaintiff ultimately suffered. Without Dr. Schifrin's opinion, there was no expert testimony establishing that the ischemia caused by Dr. Garcia's breach of the standard of care fit within the parameters of obstetrical conditions known to cause neurological injury. This lack of a direct correlation between Dr. Garcia's misuse of the vacuum and Plaintiff's stroke "became a major theme of the defendants' closing arguments." (2nd Supp. R-II-257; *see, e.g.*, R-XIX-75, 77-78.)

Plaintiff's theory was not simply that "vacuums cause strokes," as the defense suggested. Plaintiff sought instead to prove that Dr. Garcia's mismanagement of the labor and delivery (including his failure to properly rely on

electronic fetal monitoring and his continued, excessive use of the vacuum under inappropriate circumstances) created obstetrical conditions (like ischemia) known to potentially increase the likelihood of neurological injury. Once those obstetrical conditions were created, Dr. Garcia failed to appreciate the danger and instead continued to misuse the vacuum, despite the increased potential for neurological injury. Dr. Garcia did not anticipate the "crash," and Plaintiff suffered a serious ischemic brain injury. (*See* Supp. R-I-19-20.)

Without expert evidence of the relevant circumstances surrounding the standard of care and the consequences of a breach of that standard of care, the jury rendered a verdict for the defense. The trial court's erroneous exclusion of the proffered expert opinion prejudiced Plaintiff. The jury verdict and judgment for Dr. Garcia must be reversed, and a new trial granted for Plaintiff.

## II. PLAINTIFF IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT PERMITTED IMPROPER BOLSTERING OF THE DEFENSE EXPERTS.

### Standard of Review

Generally, "[a] trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion." *Blanco v. State*, 452 So. 2d 520, 523 (Fla. 1984). Yet "a court's discretion is limited by the evidence code and applicable case law." *McCray v. State*, 919 So. 2d 647, 649 (Fla. 1st DCA 2006).

"A court's erroneous interpretation of these authorities is subject to *de novo* review." *Id*.

Here, the trial court erred in allowing the defense to bolster the testimony of its medical experts on direct examination. *See Tallahassee Mem'l Reg'l Med. Center v. Mitchell*, 407 So. 2d 601, 602 (Fla. 1st DCA 1981). Authoritative statements of facts or opinions in a published treatise, periodical, pamphlet or other writing "cannot be used to bolster the testimony of a physician on direct examination." *Medina v. Variety Children's Hosp.*, 438 So. 2d 138, 139 (Fla. 3d DCA 1983) (citing *Tallahassee Mem'l*, 407 So. 2d 601); *accord Liberatore v. Kaufman*, 835 So. 2d 404, 407 (Fla. 4th DCA 2003); *Erwin v. Todd*, 699 So. 2d 275, 278 (Fla. 5th DCA 1997); *Chorzelewski v. Drucker*, 546 So. 2d 1118, 1118 (Fla. 4th DCA 1989). Section 90.706, Florida Statutes, permits the use of medical treatises or other published writings only on cross-examination of an expert witness. *Tallahassee Mem'l*, 407 So. 2d at 602; *accord Linn v. Fossum*, 946 So. 2d 1032, 1036 (Fla. 2006).

Authoritative publications "cannot be used to bolster the credibility of an expert or to supplement an opinion of the expert which has already been formed." *Erwin*, 699 So. 2d at 278; *accord Tallahassee Mem'l*, 407 So. 2d at 602. If offered as substantive evidence, the learned treatise or authoritative publication is

inadmissible hearsay. *See Donshik v. Sherman*, 861 So. 2d 53, 56 (Fla. 3d DCA 2003).

Notwithstanding Plaintiff's timely objections, the trial court permitted the defense to support the opinions of both Dr. Thorp and Dr. Schwartz with references to authoritative treatises. For example, Dr. Thorp, the defense's expert OB/GYN, testified that Dr. Garcia acted within the appropriate standard of care in his management of the Mother's labor and delivery. (Supp. R-II-98-102.) Dr. Thorp opined that use of the vacuum extractor was not a risk factor for stroke. (Supp. R-II-101, 114-18, 143-44.) Defense counsel then asked his expert:

> You told us about your publications, your writing, your seminars, your various work in the field of epidemiology. Have you ever heard of the concept before this lawsuit that a vacuum assist can cause an ischemic stroke?

(Supp. R-II-146.) The trial court overruled Plaintiff's objection, and Dr. Thorp responded that he had "never heard of it," was "absolutely unaware," and "would flunk somebody on oral exams who told me that such a relationship existed." (*Id*.)

The trial court permitted this testimony despite its pre-trial order in limine. The trial court had previously rejected the defense's attempt to elicit Dr. Thorp's opinion on the purported lack of peer review literature linking vacuums and strokes. At trial, however, the court reversed its prior ruling and allowed the defense to improperly bolster its expert's opinion on direct. The trial court committed this error notwithstanding that it had refused to allow one of Plaintiff's

causation experts (Dr. Hermansen) to explain on direct that the incidence of vacuums causing strokes was "well-reported." (Supp. R-VI-71.) Plaintiff cites this testimony from his own expert *not* to argue that Dr. Hermansen should have been allowed to refer to outside sources, but to illustrate the trial court's inconsistent, incorrect, and prejudicial interpretation of the rules of evidence.

Next, the trial court allowed the defense to elicit testimony from Dr. Schwartz, an expert placental pathologist, of statistical correlations from the NIH Study showing "five bad outcomes of pregnancy." (R-XVI-72-74.) Over Plaintiff's objection, the defense relied on Dr. Schwartz to explain findings from the NIH Study, using the chart of "maternal outcomes" as a demonstrative aid. Dr. Schwartz testified that the NIH Study showed that preeclampsia (which the Mother had) is "probably the strongest" risk factor for UAM, one placental abnormality that the defense contends caused Plaintiff's stroke. (*Id*. at 73-74.) Dr. Schwartz then explained that the NIH Study illustrated the "very high statistical association" between UAM and infants' "neurological abnormalities." (*Id*. at 74.) He was allowed to testify that in his own experience, he completely agreed with this statistical association. (*Id*. at 75.)

The trial court impermissibly erred in allowing Dr. Thorp to bolster his credibility with references to his own publications and by permitting Dr. Schwartz to support his opinion on causation with the NIH Study. *See Liberatore*, 835 So.

2d at 406-407; *Erwin*, 699 So. 2d at 278; *Tallahassee Mem'l*, 407 So. 2d at 602. Use of authoritative writings bolstered the defense experts' opinions that placental abnormalities – and not Dr. Garcia's use or misuse of the vacuum – caused Plaintiff's ischemic brain injury. The defense's tactics served to impermissibly reinforce the credibility of its own experts, while diminishing the credibility of the Plaintiff's experts on the ultimate issues in this malpractice case. *See Donshik*, 861 So. 2d at 56; *Liberatore*, 835 So. 2d at 407; *accord Erwin*, 699 So. 2d at 278.

The trial court admitted improper evidence on the crucial issues of liability and causation. *See Tallahassee Mem'l*, 407 So. 2d at 602. Its error was not harmless. *See id*.; *Liberatore*, 835 So. 2d at 407-408; *cf. Donshik*, 861 So. 2d at 56 ("Where, as here, the competing expert opinions, on both sides, were the focal point of the trial, we cannot deem the error in the introduction of the…report to be harmless."). The jury was "deceived as to the force and credibility of the evidence." *Tallahassee Mem'l*, 407 So. 2d at 602. The jury's verdict and final judgment for Dr. Garcia must be reversed, and a new trial granted on all issues. *See Liberatore*, 835 So. 2d at 407; *Tallahassee Mem'l*, 407 So. 2d at 602.

## CONCLUSION

For all the foregoing reasons, the jury verdict and the final judgment for Dr. Garcia should be reversed, and this case remanded for a new trial.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Shelley H. Leinicke, Wicker, Smith, O'Hara, McCoy & Ford, P.A., 515 E. Las Olas Blvd., SunTrust Center, Suite 1400, P.O. Box 14460, Ft. Lauderdale, FL 33302 (Counsel for Defendants/Appellees; by United States Mail, this 21st day of March, 2011.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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