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

CASE NO. 1D14-4035

JAMES MARCUS JIMENEZ,

Appellant,

v. L.T. Case No. 2007-CA-001623

TERRANCE SAVAGE and JAMES C. SPATES, as Joint Personal Representatives of the ESTATE OF SCHANAE BAILEY-SAVAGE, deceased,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES

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STATEMENT OF THE CASE AND FACTS

Defendant/Appellant, Marcus Jimenez ("Dr. Jimenez"), appeals the final judgment on a jury verdict awarding $2,900,000.00 to Plaintiffs, Terrance Savage and James L. Spates, for the wrongful death of Schanae Bailey-Savage ("Bailey-Savage"). (R-XXV-4283-84.)

At her death, Bailey-Savage was married to Terrance Savage. (T-III-444.)[1] James C. Spates is the child of Bailey-Savage and James L. Spates. (T-III-524-25.) Mr. Savage and Mr. Spates are joint personal representatives of the Estate.

Death of Bailey-Savage. Bailey-Savage died on Sunday, April 24, 2005, after a non-tunneled dialysis catheter that Dr. Jimenez had placed into her jugular vein dislodged. (T-II-190; T-III-428, 466-69.) Dr. Jimenez did not secure the catheter with the removable wing that the manufacturer provides with the device. Dr. Jimenez admitted that he has never used a removable wing to secure a catheter; instead, he typically uses Steri-Strips. (T-I-116-18; T-V-631, 671; T-VI-796.) Dr. Jimenez's expert, Dr. Khoriaty, described Steri-Strips as "a sort of tape, an adhesive closure." (T-VI-795.)

On the morning of April 24, 2005, Bailey-Savage was at home with her husband, his godson, and her son, James. She had showered and was in her bedroom, dressing for church. (T-III-464-66.) Mr. Savage was in the dining room

[1] Plaintiffs cite the original volume and page numbers of the trial transcript.

with the children when he heard his wife cry his name in a high-pitched, panicked voice. (T.-III-467-68.) He immediately went to the bedroom, where he saw Bailey-Savage lying unconscious on the floor. Blood was spurting out of her body and was splashed on a mirror and on the bedroom door. (T-III-468-69.) She was bleeding from the hole in her vein where the catheter had dislodged. (T-III-470.) Mr. Savage saw no bandaging, tape or gauze on his wife's chest or on the catheter. (*Id*.) The tip of the catheter had come out, but the rest of the catheter remained attached to her body. (T-III-470.) He called 911 and followed instructions to try to stop the bleeding. (T-III-472.) Emergency Medical Services arrived to transport Bailey-Savage to Baptist Hospital in Pensacola. (T-III-473-74.) Mr. Savage followed, and was joined there by other family members. (T-III-474-75.)

Bailey-Savage never regained consciousness. (T-III-477.) When Mr. Savage returned home from the hospital, he saw signs that she had been changing the dressing on her catheter. (T-III-476.) Gauze was open, and the alcohol pad was ripped; everything was in the same place where she typically changed the dressing. (*Id*.) The dialysis center had given her the materials the day before her death. (*Id*.)

A forensic pathologist, Leroy Riddick, M.D., conducted the autopsy of Bailey-Savage. He determined that the cause of Bailey-Savage's death was exsanguination (loss of blood) from the dislodgement of the catheter. (T-III-428.) Dr. Riddick also saw evidence of an air embolism. (T-III-429.) An air embolism

can occur when a catheter is dislodged. Air comes in through the tube, then the jugular vein and the brain, causing a patient to die almost instantly. (T-I-80.)

Health History of Bailey-Savage. Bailey-Savage was twenty-six years old when she died. (R-XV-2864; R-XIX-3303.) She had been receiving hemodialysis treatment for kidney disease. (T-III-420-21.) She was also being treated for lupus, erythematous, kidney disease, hypertension and seizure disorder. (T-III-420.)

Bailey-Savage's Treatment for Kidney Disease. Bailey-Savage's dialysis treatment required the use of a dialysis catheter. (T-II-189.) A dialysis catheter is placed in the jugular vein of a patient's right or left side. (T-III-422.) The jugular vein is a major vein, from the head along the side of the neck. (*Id*.) A dialysis catheter is a large catheter or tubing with two separate channels. (T-II-190.) There are two different types of dialysis catheters: a permanent (tunneled) catheter, and a temporary (non-tunneled) catheter. (*Id*.)

In the course of her treatment, Bailey-Savage had both tunneled and non-tunneled catheters. Shortly before her death, her left tunneled catheter became infected. Dr. Jimenez removed the infected catheter and replaced the permanent catheter with a right internal jugular temporary catheter. (T-V-617-18.)

Manufacturer's Instructions for Bard-Niagara Catheter. The temporary catheter used by Dr. Jimenez is known as a Bard-Niagara catheter. (T-III-361; T-V-632.) (Photos of the catheter (R-VI-815; R-XIX-3341) are attached. (A-1).) The

device includes two suture wings. The rotatable wing is farthest from the exit site.[2] Dr. Jimenez typically sutured this wing to the skin of patients. (T-V-654; T-VI-763.) However, the second wing (the removable suture wing) is used to secure the catheter at the exit site. (T-II-200-1; T-II-277-78.) Dr. Jimenez's practice was never to use this second, removable suture wing. (T-V-657, 671; T-II-199.)

Paragraph 20 of the manufacturer's instructions, included in the package that contains the device, directs the physician to use the removable wing. The instructions state:

> **When placing the catheter, use the removable suture wing to minimize movement at the exit site.** (I) Using your fingers, squeeze the suture wing together so that it splits open and place the wing around the catheter near the venipuncture site. (II) **Secure the wing onto the catheter by tying sutures around the wing using the suture grooves.** (III) **Secure the removable wing in place by suturing through the holes or by using adhesive wound closures.**

(R-XIX-3412-13 (emphasis added).)

Plaintiffs presented expert testimony to demonstrate that Dr. Jimenez breached the standard of care because he failed to secure Bailey-Savage's catheter with the removable suture wing supplied by the manufacturer. (R-XXI-3678, 3687.) This failure caused the catheter to dislodge from her vein and for her to die, either from exsanguination or from an air embolism. (R-XXI-3678, 3679.)

[2] The terms "exit site" and "insertion site" were used interchangeably at trial and refer to the incision where the catheter is inserted into the patient's body, closest to the jugular vein. (*See* T-II-261, 277-78; T-V-678.) Plaintiffs will use the term "exit site" for consistency.

Plaintiffs' counsel explained in his opening statement: "When a physician sticks a tube about the size of a ball point pen into a patient's jugular vein, such that if it falls out or comes out the patient is going to die, the physician must adequately secure that catheter, that tube to the patient's body." (T-I-76.)

Dr. Kaye, Plaintiffs' standard of care expert at trial, testified that use of the removable wing is critical; taping the catheter tube directly to the skin without using the removable wing at the exit site is not secure. (T-II-200-1, 262.) Because Bailey-Savage had been discharged from the hospital within a day or two of having the catheter inserted, Dr. Kaye believed suturing was required. (T-II-205-6.) In Dr. Kaye's opinion, Dr. Jimenez's reliance on tape or adhesive wound closures to secure the catheter at the exit site would have been a breach of the standard of care. (*Id*.) Dr. Jimenez admitted in his testimony at trial that he has never used a removable wing to secure a catheter at the exit site. (T-V-671.)

The Trial Court's Rulings on the Manufacturer's Instructions. Plaintiffs argued that the instructions were evidence of the standard of care. (R-XXI-3743-45.) The trial court repeatedly ruled that the instructions did not exclusively establish the standard of care and would not be admitted into evidence. The trial court ruled, however, that Plaintiffs could question Dr. Kaye about the instructions as one of the factors he considered in determining the standard of care. (R-XXI-3777-78; R-XXV-4392; T-I-87; T-II-202-03; T-IV-596; T-IV-603-4.)

References to the Manufacturer's Instructions. At trial, Plaintiffs' references to the manufacturer's instructions were interrupted by defense counsel's objections. Plaintiffs never stated the contents of the instructions to the jury, as defense counsel conceded. (T-IV-603-4.) The record reflects only the following references to the instructions:

> (1) A comment by Plaintiffs' counsel in opening statement that "the manufacturer provides the means." (T-I-84);
>
> (2) A comment by Plaintiffs' counsel in opening statement that the "manufacturer instructs the physician to use the wing and sew it at the insertion site." (T-I-88);
>
> (3) Dr. Kaye's testimony that he considered the manufacturer's instructions in concluding that Dr. Jimenez's placement of the catheter did not meet the standard of care. (T-II-202);
>
> (4) An unanswered question during Plaintiffs' direct examination of Dr. Kaye as to what the manufacturer's instructions provided. (T-II-202);
>
> (5) An unanswered question during the Plaintiffs' direct examination of Dr. Kaye regarding whether the standard of care required physicians to follow the manufacturer's instructions. (T-II-275);
>
> (6) A question, without reference to the instructions or their contents, from Plaintiffs' counsel to defense witness Dr. Khoriaty. (T-VI-791); and
>
> (7) A comment, interrupted by a defense objection during Plaintiffs' closing argument, that Dr. Kaye testified he had to consider the manufacturer's instructions. (T-VIII-1049.) Defense counsel requested a curative instruction, to which the court agreed. (T-VIII-1050-51.)

Trial Testimony of Dr. Kaye. Dr. Kaye testified at trial regarding Dr. Jimenez's breach of the standard of care. (T-II-176.) Dr. Kaye is a physician

specializing in radiology, with subspecialties in vascular and interventional radiology. (*Id*.) Interventional radiology uses minimally-invasive procedures and imaging guidance. (T-II-177.)

Dr. Kaye explained dialysis to the jury. Dialysis is an artificial process where a machine takes over the function of the kidneys. (T-II-186.) Three or four times a week, blood is removed from the patient's body and cycled through a machine that functions like the kidneys, removing toxins from the blood. (T-II-187, 189.)

Dr. Kaye has years of experience placing long-term tunneled dialysis catheters. (T-II-192.) Over the past twenty years, Dr. Kaye has placed approximately 1,000 tunneled (long-term) and non-tunneled (temporary) catheters. (*Id*.) He identified for the jury the same type and brand of catheter that Dr. Jimenez used for Bailey-Savage. (T-II-194.)

The Standard of Care and Dr. Jimenez's Breach. Dr. Kaye testified that he was familiar with the standard of care for an interventional radiologist placing a Bard-Niagara catheter in a patient's jugular vein in April, 2005. (T-II-196-97.) He reviewed the medical records, autopsy report, and autopsy photographs, and read the depositions of Dr. Jimenez, Mr. Savage, Nurse Ryder, and the defense expert, Dr. Khoriaty. (T-II-181, 196-97, 198.) Dr. Kaye also considered the

manufacturer's instructions in determining whether Dr. Jimenez breached the standard of care. (T-II-202.)

According to the medical records of Bailey-Savage, Dr. Jimenez did not use the removable wing to secure the catheter near the exit site. (T-II-198.) Dr. Jimenez agreed that he did not use the removable wing. (T-II-199.) Dr. Kaye did not see any reference in the patient's records to Dr. Jimenez's use of tape, adhesive, or anything else to secure the exit site. (T-II-199.)

Dr. Kaye testified that Dr. Jimenez breached the standard of care because he did not properly secure the catheter inserted into Bailey-Savage's jugular vein. (T-II-199.) He stated that the removable wing should be used at the exit site, which is closest to where the catheter enters the jugular vein and thus the most important site to secure. (T-II-200.) If the catheter dislodges, "there's going to be a big hole in the vein, and a lot of blood is going to come out very quickly." (T-II-201.) An air embolus can also occur. (*Id*.) Because Bailey-Savage was discharged from the hospital shortly after the insertion of the temporary catheter, Dr. Kaye opined that it would have been a breach of the standard of care for Dr. Jimenez to rely on anything other than sutures (such as tape or adhesive wound closures) to secure the catheter at the exit site. (T-II-201, 205-6.) Dr. Kaye stated: "[Y]ou don't want to have somebody outside a hospital away from medical personnel with a catheter that comes out with a big hole in the vein bleeding to death." (T-II-201-2.)

Dr. Kaye rejected Dr. Jimenez's explanation that he chose not to use sutures at the exit site because of an alleged increase in the risk of infection. (T-II-208.) First, Dr. Kaye stated, sutures were used to attach the rotatable wing to a different part of the catheter. Second, the use of Steri-Strips or other adhesive dressing is more likely to cause infection because of the perspiration and fluids that can accumulate under the tape. (*Id*.)

Dr. Kaye explained to the jury the process of inserting and securing the Bard-Niagara catheter. (T-II-209-12.) The physician should suture the catheter to the removable wing and then suture the wing to the patient's skin and subcutaneous tissue. (T-II-212.) If the catheter is secured with the removable wing, Dr. Kaye testified, the catheter will not dislodge. (*Id*.)

Plaintiffs' Proffer on Causation. Plaintiffs proffered testimony from Dr. Kaye on causation. Dr. Kaye concluded that, more likely than not, Dr. Jimenez's failure to use the removable wing and suture the catheter at the exit site was a contributing cause of Bailey-Savage's death. (T-II-261.) The catheter was not appropriately secured, which allowed it to dislodge. Dr. Kaye concluded, based on his knowledge, experience, and practice, that had the catheter been properly secured, it would not have dislodged. (*Id*.)

Dr. Kaye noted that the portion of the catheter that was sutured remained in place, while the portion that was not sutured came out of Bailey-Savage's vein.

(T-II-261-62.) Dr. Kaye disagreed with Dr. Jimenez's view that Steri-Strips would have secured the catheter in place and prevented it from dislodging. Steri-Strips do not hold the catheter to the same degree or with the force of sutures. Sutures are the strongest method of binding materials together and are used by physicians to secure something in place. (T-II-261-63.)

Dr. Kaye testified that Dr. Jimenez did not mention in his report that he used Steri-Strips on the catheter. (T-II-263.) Dr. Kaye recalled that Dr. Jimenez stated that he put 2 x 2 gauze over the exit site and then tape, adhesive, or Tegaderm (an adhesive sterile dressing) over that. (*Id*.) In Dr. Kaye's opinion, this is not secure. Similarly, had Dr. Jimenez used Steri-Strips directly on the catheter, the catheter would not have been secure. (*Id*.) Suturing signals a patient when force is applied to the catheter. The suture is attached to the skin and subcutaneous tissue. To pull out a sutured catheter, a patient has to rip out the skin and tissue underneath. (T-II-264.) This can be extremely painful. Patients will often complain if the sutures are tugging. (*Id*.)

Defense counsel asked Dr. Kaye whether there was any scientific evidence to show that the catheter became dislodged inadvertently, rather than intentionally. (T-II-265.) Dr. Kaye noted that after the catheter came out, Bailey-Savage "called for her husband and screamed," which indicated that she had not intentionally pulled out the catheter. (*Id*.) Dr. Kaye stated that catheters are sutured "because of

experience over the years in having catheters and catheters that come out." (T-II-266.) The medical community has determined that suturing is the most secure method of keeping a catheter in place. (*Id*.)

Dr. Kaye testified that it was more likely than not that the catheter came out accidentally, as opposed to Bailey-Savage intentionally removing the catheter. (T-II-266-67.) On his proffer on redirect, Dr. Kaye stated there was no evidence that Bailey-Savage pulled the catheter out intentionally. (T-II-267.) Whatever the exact mechanism that caused the catheter to dislodge, Dr. Kaye explained, the catheter was not secure. The force was enough to pull the catheter out at the exit site, but was not sufficient to break the sutures on the other part of the catheter. (T-II-267-68.)

***Daubert* Ruling.** After this proffer, the trial court ruled on evidentiary considerations relevant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The trial court found acceptable Dr. Kaye's reasoning that the catheter dislodged because it was not properly secure. (T-II-269.) The trial court agreed to allow Dr. Kaye's testimony that if the removable wing had been sutured, the catheter would likely have not dislodged. (*Id*.) Further, the trial court ruled that Dr. Kaye could testify: (1) the portion of the catheter that was sutured remained in place; (2) Steri-Strips were not as secure; (3) if Steri-Strips were used to attach the

catheter, the catheter could catch on something and pull loose; and (4) if sutures are used, the application of force sends the patient a pain message. (T-II-269-70.)

The trial court concluded that Dr. Kaye could state whether it was possible for a catheter to be pulled out intentionally. (T-II-271-72.) The trial court added, however, that it would not permit a question that implied or inferred there was evidence that the catheter had been intentionally pulled out. (T-II-272.) There was no such evidence here. The defense understood this ruling. *(Id.)*

Dr. Kaye's Causation Testimony. In his testimony before the jury, Dr. Kaye disagreed with the testimony of Dr. Jimenez and the defense expert, Dr. Khoriaty, that suturing the removable wing at the exit site would significantly increase the risk of infection. (T-II-277.) Sutures are less likely to cause infection than Steri-Strips or adhesive. The risk of infection from suturing is very low, while the benefit is a "secured catheter that doesn't come out and somebody doesn't bleed to death." (*Id*.)

Dr. Kaye testified that more likely than not, Dr. Jimenez's failure to use the removable wing and failure to suture the catheter at the exit site was a contributing cause of the catheter becoming dislodged. (T-II-277-78.) The catheter was not properly secure. (T-II-278.) Where the catheter was sutured, whatever force was applied was enough to dislodge the catheter, but not enough to pull out the sutures. The sutures worked and held. Unlike tape or adhesives, the sutures are attached to

the subcutaneous tissue. Sutures signal the patient when force is applied to the catheter; the more the sutures are tugged, the more painful it is. (*Id*.)

Dr. Kaye testified that the removal suture wing could be placed on the curved part of the catheter. (T-II-279-80.) Even if Dr. Jimenez believed he should not attach the suture wing to that curved area, he could have pulled the catheter back "a centimeter or so," which would have provided him with enough of the catheter's straight section to suture the removable wing. (T-II-280-81.) Regardless, Dr. Kaye testified, Dr. Jimenez could have used the removable suture wing. (T-II-283.)

Dr. Kaye reiterated that Dr. Jimenez's failure to follow the prevailing standard of care in securing the catheter was a contributing cause to Bailey-Savage's death. (T-II-284.) She died either from the loss of blood (or exsanguination) or possibly an air embolus. (*Id*.) The dislodgement of the catheter caused her death. (*Id*.) Dr. Kaye noted that Dr. Jimenez apparently covered the exit site with gauze and a Tegaderm dressing. (T-II-298.) Dr. Kaye did not believe this covering was meant to secure the catheter. The gauze could get caught and pull the catheter out. (*Id*.) Dr. Kaye could not state the exact mechanism that caused the catheter to dislodge. (T-II-299.)

Dr. Jimenez's Routine and Habit. Dr. Jimenez did not remember Bailey-Savage and had no independent recollection of having treated her. (T-V-618, 636,

637.) Accordingly, he testified based on the medical records and his habit and routine practice. (T-V-620-21.) Dr. Jimenez follows a standard practice when inserting a patient's temporary dialysis catheter. He testified that he would have followed the same practice with Bailey-Savage. (T-V-624-25, 632.) Dr. Jimenez admitted that his report makes no mention of how he secured Bailey-Savage's catheter at the exit site. (T-V-636.)

Dr. Jimenez explained to the jury how he would typically secure a catheter. (T-V-654-57.) Dr. Jimenez uses medical adhesive strips at the exit site. (T-V-656.) He believes the adhesive quality of the strips is much stronger than tape. (*Id*.) The site is also secured with gauze and an adhesive sheet (Tegaderm). (T-V-657.) Dr. Jimenez testified that he never uses the removable suture wing. (T-V-657-58, 671.) According to Dr. Jimenez, adhesives function the same as sutures and create less risk of infection. (T-V-658-59.)

On cross-examination, Dr. Jimenez admitted that the steps to secure Bailey-Savage's catheter were most likely performed by an interventional radiology technologist. (T-V-671.) Dr. Jimenez often relies on the technologists to secure the catheter at the exit site. (*Id*.)

Closing Argument. In rebuttal argument, counsel for the Plaintiffs responded to defense counsel's comment, made in her closing argument, regarding

Dr. Jimenez's "habit" and "practice" (T-VIII-1093, 1097) of inserting catheters. Plaintiffs' counsel argued:

> This is Dr. Jimenez's habit. This is the way he does things for every patient. Now, maybe he's got a reason to do something different. And you can help him rethink that. You can help him reevaluate his habits.

(T-VIII-1110.) Defense counsel objected. The trial court sustained defense counsel's objection and, at defense counsel's request (T-VIII-1111), gave a curative instruction (T-VIII-1112). Dr. Jimenez did not request a mistrial based on the remarks of Plaintiffs' counsel. (T-VIII-1111-14.)

The Jury's Verdict. After denying the defense's renewed motions for directed verdict and mistrial, the trial court submitted the case to the jury. The jury determined that Dr. Jimenez's negligence was a legal cause of Bailey-Savage's death and awarded Mr. Savage $700,000 for the loss of companionship and pain and suffering. (R-VII-1095.) The jury awarded $2,200,000 in damages to Bailey-Savage's son, James, for the loss of parental companionship, instruction, and guidance, and for his pain and suffering. (*Id.)*

Post-Trial Motions and Rulings. After trial, Dr. Jimenez filed a Motion for Judgment Notwithstanding the Verdict and/or Renewed Motion for Directed Verdict, Alternative Motion for New Trial and Alternative Motion for Remittitur. (R-XX-3582-96.) The trial court heard the motions on April 24, 2014. (R-XXV-4327-4409.)

At the hearing, the trial court considered Plaintiffs' use of the manufacturer's instructions. (R-XXV-4333-4397.) The trial court noted that it had permitted Plaintiffs' counsel to tell the jury that a physician would testify that in determining the correct way to secure the catheter, one of the factors he considered was the instructions of the manufacturer. Defense counsel agreed. (R-XXV-4343.) The trial court also considered the scientific data supporting Dr. Kaye's testimony. (R-XXV-4353.) The trial court recalled that he had ruled that "witnesses could testify that among the things to consider in determining a standard of care may be the manufacturer's instructions regarding a device." (R-XXV-4360.) Plaintiffs did not publish the printed instructions at trial, nor did any witness testify to the contents of the instructions. (R-XXV-4372.)

Defense counsel acknowledged at the hearing that the Florida Supreme Court had recently ruled in *Estate of McCall v. United States* that "the statutory cap is unconstitutional." (R-XXV-4399.) Defense counsel added: "There were some factual distinctions and limitations on it, but I don't think they're applicable here." (R-XXV-4400.) Defense counsel agreed that it would be appropriate for the trial court to enter a judgment without any reduction. (R-XXV-4440-1.)

The trial court concluded that Plaintiffs had presented sufficient evidence to survive a motion for directed verdict and judgment notwithstanding the jury's verdict. (R-XXV-4395, 4402.) In its written order filed May 6, 2014, the trial court

denied Dr. Jimenez's motions for judgment notwithstanding the verdict, directed verdict, and remittitur. (R-XXV-4286-87.) The trial court denied Dr. Jimenez's motion for new trial in an order dated August 5, 2014. (R-XXV-4285.) Dr. Jimenez filed his Notice of Appeal on August 28, 2014. (R-XXV-4280-81.)

SUMMARY OF ARGUMENT

Dr. Jimenez is not entitled to a new trial or to judgment notwithstanding the verdict. The final judgment on the jury's verdict should be affirmed.

First, the trial court correctly ruled that Dr. Kaye could refer to the manufacturer's instructions as one factor relevant to the standard of care. Plaintiffs fully complied with the trial court's rulings. Plaintiffs never disclosed the content of the instructions, and the instructions were never admitted into evidence. Even if the trial court erred in allowing Plaintiffs to refer to the existence of the manufacturer's instructions, this error was harmless. The trial court did not abuse its discretion in denying Dr. Jimenez's motions for mistrial and for new trial based on the manufacturer's instructions.

Second, Dr. Jimenez is not entitled to a new trial because of Plaintiffs' closing argument. Dr. Jimenez neglected to move for a mistrial after the trial court sustained his objection. Nor did he seek a new trial based on fundamental error. Dr. Jimenez did not preserve this issue for appeal. And even if he had, the remarks of

Plaintiffs' counsel were not improper "send a message" argument, but instead were fair comment on the evidence.

Third, Dr. Jimenez fails to show that the expert opinions of Dr. Kaye were inadmissible evidence of causation. On appeal, the defense cannot rely on *Daubert* or the rules against inference stacking. Dr. Jimenez failed to argue either as support for his motion for directed verdict at trial. Aside from the defense's failure to preserve two of the three arguments, the trial court correctly admitted Dr. Kaye's expert opinions. The expert's testimony satisfied both *Daubert* and *Gooding*, without violating any rule against inference stacking. Competent, substantial evidence supports the jury's verdict. The defense is not entitled to judgment notwithstanding the verdict.

Finally, because there is no basis to reverse the final judgment on the jury's verdict, the cost judgment likewise must be affirmed. Dr. Jimenez is not entitled to any reduction in the jury's award of wrongful death non-economic damages. Not only has he waived remittitur, he cannot distinguish *McCall*. The final judgment on the jury's verdict must be affirmed in its entirety.

ARGUMENT

I. PLAINTIFFS' REFERENCES TO THE MANUFACTURER'S INSTRUCTIONS DO NOT ENTITLE DR. JIMENEZ TO A NEW TRIAL.

Standard of Review. This Court reviews the trial court's denial of motions for mistrial and new trial for an abuse of discretion. *E.g.*, *Ricks v. Loyola*, 822 So. 2d 502, 506 (Fla. 2002).

Merits. Dr. Jimenez is not entitled to a new trial. Throughout his brief, Dr. Jimenez mischaracterizes the trial court's ruling on the manufacturer's instructions. In an effort to persuade the Court that Plaintiffs failed to abide by the trial court's ruling, Dr. Jimenez makes such claims as "[e]ven after four days of reminders, directives, and frequently reiterated orders by the court" not to "reference, discuss, or raise matters relating to the manufacturer's instructions as an inference or insinuation of the standard of care," Plaintiffs "continued to disobey the court and violate this ruling." (Amd. IB 22.)

Contrary to the defense's contentions, the trial court did not categorically prevent Plaintiffs from referencing the manufacturer's instructions at trial. Instead, the trial court ruled that although the instructions did not exclusively establish the standard of care and would not be admitted into evidence, Plaintiffs could question Dr. Kaye about his reliance on the instructions in determining the standard of care. (R-XXII-3777-78; R-XXV-4392; T-I-87; T-II-202-03; T-IV-596; T-IV-603-4.)

The defense does not argue, and indeed, cannot show, that the trial court erred in allowing this limited reference to the manufacturer's instructions.

Likewise, Dr. Jimenez fails to establish any prejudice from the trial court's ruling. At trial, Plaintiffs' references to the instructions were few, brief, and interrupted by the persistent objections of defense counsel. The instructions were not offered or received into evidence, and defense counsel admitted that the contents were not disclosed to the jury. (T-IV-603-4.)

A. Plaintiffs did not violate the trial court's rulings.

Dr. Jimenez omits the trial court's explanation of its ruling at the pre-trial conference. There, the trial court told the parties that the manufacturer's instructions themselves could not come into evidence (R-XXII-3777-78.) Yet the trial court did not "prohibit[] mention of the manufacturer's instructions," as Dr. Jimenez contends. (Amd. IB 10.) To the contrary, the trial court clarified that it would not prohibit Dr. Kaye from testifying that "the manufacturer's . . . instructions, that there is a wing provided and that it's provided to be used for this purpose." (R-XXII-3777-78.)

During Dr. Kaye's testimony at trial, the trial court reiterated its earlier ruling:

> [M]y ruling was that he [Dr. Kaye] could testify as to what things he considered such as **manufacturer's instructions**, training . . . my ruling was he could testify as to all of the things he took into consideration, **including that he considered the manufacturer's**

> **instructions**, but that for him to say- -- for him to publish or to say what the instructions say, he's essentially offering the instruction into evidence, which I've made my ruling that the instruction does not establish the standard of care.

(T-II-202 (emphasis added).) The trial court continued:

> I think he's already offered testimony that among other things that establish the standard of care were the **instructions**, and I'll let him say that, you know, he took into consideration and decided what is the appropriate method of securing it in his opinion as to the proper method of securing it.

(T-II-203 (emphasis added).)

The trial court also clarified its ruling in response to the defense's motions for directed verdict and mistrial. The trial court corrected defense counsel when he suggested that the ruling was meant to exclude any mention of the "manufacturer's recommendations with regard to this removable wing":

> Actually, I didn't quite exactly say that. I didn't say no testimony. I said that the manufacturer's recommendation could not be offered as proof of the standard. I did say -- I made the determination that the doctor could testify that among the things to consider, and that he considered in determining the appropriate standard of care included the manufacturer's recommendation.

(T-IV-595-96.) As the trial court noted, the mere fact that the jury may have heard "manufacturer's instructions" or "manufacturer's recommendations" was not prejudicial. (T-IV-604.) Nor did the trial court believe that Plaintiffs sought to disclose the instructions' contents to the jury. The trial court stated:

> When those words came out during the trial, it was not in such a manner, in my judgment, that there was an emphasis to it, or an

> implication as to what exact words were in there, any subtle message to the jury to try to say the manufacturer's instructions say do this and don't do that . . . .

(*Id*.) Indeed, when the trial court asked defense counsel whether it was correct that "there was no statement by Mr. McMichael as to what was in the instruction," defense counsel responded, "You're absolutely correct, Your Honor . . . ." (T-IV-603.)

This admission effectively negates Dr. Jimenez's suggestion on appeal that Plaintiffs' references to the instructions "effectively told the jury the contents and substance of this inadmissible evidence." (Amd. IB 23.) The jury did not know the contents of the instructions and could not have assumed, as the defense suggests, that Dr. Jimenez did not "follow the manufacturer's instructions" or that the instructions "would have supported Savage's claim." (*Id*.)

The trial court did not consider Plaintiffs to have violated any ruling on the manufacturer's instructions. The trial court agreed that before trial, it had instructed the parties that Dr. Kaye could refer to the manufacturer's instructions and the purpose of the removable suture wing. As the trial court later conceded, this original ruling may have been narrowed during the course of trial, which might have initially created the appearance that Plaintiffs had crossed the line. (R-XXV-4396.) Regardless, the trial court found no violation of its ruling and denied the motion for new trial. (R-XXV-4285-87.)

Thus, Dr. Jimenez cannot claim that Plaintiffs disobeyed the trial court or violated its ruling. Plaintiffs never sought to introduce the instructions into evidence. Consistent with the trial court's ruling, Plaintiffs properly elicited testimony from Dr. Kaye that he considered the manufacturer's instructions relevant to the standard of care.

B. Dr. Jimenez cannot show that he was prejudiced by any references to the existence of the manufacturer's instructions.

Even assuming, for the sake of argument, that Plaintiffs violated the trial court's ruling, Dr. Jimenez is not entitled to a new trial. He could not have been prejudiced by Plaintiffs' few references to the existence of the manufacturer's instructions, most of which were interrupted by the defense's objections.

The record reflects only the following references to the manufacturer's instructions at trial:

> (1) A comment by the Plaintiffs' counsel in opening statement that "the manufacturer provides the means." (T-I-84.) Defense counsel objected to this comment before the Plaintiffs' counsel could say anything further. The trial court instructed the parties that Plaintiffs' counsel could state that Dr. Kaye would testify that in determining the correct way to place the catheter, "he considers a number of factors including the instructions from the manufacturer." (T-I-87.)
>
> (2) A comment by Plaintiffs' counsel in opening statement that the "manufacturer instructs the physician to use the wing and sew it at the insertion site." (T-I-88.) The trial court overruled defense counsel's objection. (*Id*.)
>
> (3) Dr. Kaye's statement that he considered the manufacturer's instructions in concluding that Dr. Jimenez's placement of the catheter

fell below the standard of care. (T-II-202.) Defense counsel did not object, and Dr. Kaye did not testify to the contents of the manufacturer's instructions.

(4) A question during Plaintiffs' direct examination of Dr. Kaye as to what the manufacturer's instructions provided. (T-II-202.) Defense counsel's objection prevented this question from ever being answered.

(5) Another question during the Plaintiffs' direct examination of Dr. Kaye as to whether the standard of care requires physicians to follow the manufacturer's instructions. (T-II-275.) Again, defense counsel's objection prevented this question from ever being answered.

(6) A question from Plaintiffs' counsel to the defense's expert, Dr. Khoriaty, asking whether the reason he had not seen a Bard catheter dislodge from a patient was because the manufacturer provides a suture wing to be secured at the exit site. There was no reference to the manufacturer's instructions. (T-VI-791.)

(7) An attempt by Plaintiffs to argue, in closing, that Dr. Kaye had testified that he considered the manufacturer's instructions. (T-VIII-1049.) There was no mention of the instruction's content. The trial court sustained the defense's objection and, at Dr. Jimenez's request, gave a curative instruction. (T-VIII-1050-51.)

Plaintiffs' references to the instructions were few, incomplete, and entirely consistent with the trial court's repeated rulings. The decisions cited by Dr. Jimenez to show "improper and highly prejudicial questions" are inapposite. Plaintiffs' references were neither improper nor prejudicial. *Cf. Ventemiglia v. TGI Friday*, 980 So. 2d 1087 (Fla. 4th DCA 2007) (violated rule of professional conduct by personally injecting highly prejudicial facts); *Sanchez v. Nerys*, 954 So. 2d 630 (Fla. 3d DCA 2007) (improper cross-examination suggested without evidence that expert had destroyed information); *Palmetto Gen. Hosp. v. Green*,

559 So. 2d 1175 (Fla. 3d DCA 1990) (snake bite victim asked medical expert at trial whether patients' blood was routinely screened for AIDS); *DeSantis v. Acevedo*, 528 So. 2d 461 (Fla. 3d DCA 1988) (counsel improperly insinuated that witnesses had been dishonest); *Oceancrest Condo. Apts., Inc. v. Donner*, 504 So. 2d 447 (Fla. 4th DCA 1987) (witness was asked whether attorney told him to change testimony); *Del Monte Banana v. Chacon*, 466 So. 2d 1167 (Fla. 3d DCA 1985) (questions had no basis in fact and were intended to insinuate facts to the jury); *Groebner v. State*, 342 So. 2d 94 (Fla. 3d DCA 1977) (prosecutor accused defendant of being "slick con-artist," solicited evidence of accused's moral character related to events after the crime, asked defendant whether he had tried to kill his former wife, and argued to jury that defendant was like a leopard that never changed his spots). Plaintiffs did not violate the trial court's ruling. *See Orvis v. Caulkins Indiantown Citrus Co*., 861 So. 2d 1181 (Fla. 4th DCA 2003). Likewise, Dr. Jimenez does not argue that the trial court failed to enforce its rulings. *See Borcheck v. State Farm Mut. Auto. Ins.*, 766 So. 2d 482 (Fla. 5th DCA 2000).

The defense argues that its objections at trial "led the jury to believe that Dr. Jimenez was 'hiding' something, and, by inference, was somehow negligent in the care he provided." (Amd. IB 23) There is no evidence to support this contention. Regardless, Dr. Jimenez has only himself to blame. The defense's misplaced objections resulted from its own misapprehension of the ruling.

The manufacturer's instructions are plainly relevant. Whether Dr. Jimenez departed from the standard of care by failing to properly secure the catheter with the removable wing was a key issue at trial. Dr. Jimenez chose not to follow the manufacturer's instructions, which direct physicians to securely attach the catheter at the exit site by using the removable wing. Because Dr. Jimenez did not use the removable suture wing, Bailey-Savage's catheter dislodged and she died.

The trial court did not err in ruling that Dr. Kaye could testify that in deciding the relevant standard of care, he had considered the manufacturer's instructions. The trial court's ruling is consistent with the decisions of other Florida courts, which have ruled that evidence of industry standards and customs may be admissible to prove the standard of care. *See Moyer v. Reynolds*, 780 So. 2d 205, 208 (Fla. 5th DCA 2001); *see also Buck v. United States*, 433 F. Supp. 896 (M.D. Fla. 1977) (departure from standard of care in failing to follow drug manufacturer's instructions).

More specifically, the trial court did not err in allowing Plaintiffs' expert to refer to the manufacturer's instructions. Courts in other states have found that a jury may consider packaging inserts, along with expert testimony, in determining whether a defendant physician breached the standard of care. *See, e.g., Ramon v. Farr*, 770 P.2d 131 (Utah 1989) (manufacturer's inserts and parallel PDR entries are not prima facie evidence of the standard of care, but may be considered along

with expert testimony); *Morlino v. Med. Ctr. of Ocean*, 706 A.2d 721 (N.J. 1998) (jury may consider package inserts and parallel PDR references, when supported by expert testimony, to determine appropriate standard of care); *Rubin v. Aaron*, 191 A.D.2d 547 (N.Y. Ct. App. 1993) (trial court did not err in admitting evidence of package inserts on drug, nor in instructing jurors to consider inserts in assessing whether prescribing doctor departed from accepted medical practice). Still other courts have held that in certain circumstances, the manufacturer's instructions can constitute prima facie evidence of the standard of care. *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 317 P.2d 170, 180 (Cal. Ct. App. 1957); *Mulder v. Parke Davis & Co.*, 181 N.W.2d 882, 887 (Minn. Ct. App. 1970).

Here, the trial court correctly allowed Dr. Kaye to testify that he considered the instructions in determining the relevant standard of care. Even if Dr. Jimenez could show that the trial court erred, the record reflects that the defense necessarily could not have been prejudiced by Plaintiffs' mention of the instructions' existence – especially given that the contents were never disclosed to the jury.

Dr. Kaye relied on a number of factors to determine the standard of care. The manufacturer's instructions were but one consideration. Other factors included his review of Bailey-Savage's medical records and the autopsy report and photographs (T-II-196-97); his knowledge, experience, and practice of medicine (T-II-261); and his review of the testimony of Dr. Jimenez, Mr. Savage, Nurse

Ryder and Dr. Khoriaty (T-II-197-98). Moreover, Dr. Kaye considered that the sutured part of the catheter remained in place, while the unsutured part dislodged. (T-II-261-62.) He rejected Dr. Jimenez's rationale for not using sutures at the exit site, and concluded that using anything other than sutures to secure a removable wing is unsafe for a patient discharged from the hospital with a temporary catheter. (T-II-201, 208).

Dr. Jimenez's contention that he is entitled to a new trial based on the alleged hearsay content of the instructions is meritless. Because the instructions did not come into evidence nor were the contents disclosed, there can be no error here. Plaintiffs did not violate the trial court's ruling either in referencing the existence of the instructions or in eliciting Dr. Kaye's consideration of the instructions as evidence of the standard of care. Regardless, the trial court did not err in allowing Dr. Kaye to testify that he considered the instructions relevant to the standard of care. Section 90.704 of the Florida Evidence Code allows an expert rendering an opinion to rely on hearsay, even if inadmissible, "if the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed." § 90.704, Fla. Stat. (2014); *accord Vega v. State Farm Mut. Auto.*, 45 So. 3d 43 (Fla. 5th DCA 2010).

The instructions are the kind of data reasonably relied on by experts like Dr. Kaye. His expert testimony properly considered the manufacturer's instructions as

support for his opinion. Even if error could be said to exist regarding Dr. Kaye's testimony, it was harmless. *See J.J. v. Agency for Persons with Disabilities*, 2014 WL 1696188, *1 (Fla. 3d DCA April 30, 2014) (no error in admitting expert's hearsay testimony regarding disability).

C. Plaintiffs did not use the instructions to bolster Dr. Kaye's opinion.

Dr. Jimenez incorrectly contends that Plaintiffs used the manufacturer's instructions to bolster Dr. Kaye's expert opinion. Defense counsel conceded that Plaintiffs never informed the jury as to the content of the instructions. (T-IV-603-4.) Plaintiffs did not ask Dr. Kaye to read from the instructions. Without the jury's knowledge of the contents, the instructions could not have been used to bolster Dr. Kaye's testimony. The decisions cited by Dr. Jimenez are inapposite. *See Donshik v. Sherman*, 861 So. 2d 53 (Fla. 3d DCA 2003) (plaintiff's admission of report into evidence, over defense's objection); *Tallahassee Mem'l Reg'l Med. Ctr. v. Mitchell*, 407 So. 2d 601 (Fla. 1981) (improper bolstering with medical treatise)

Given Plaintiffs' adherence to the trial court's ruling, the patent relevance of the instructions as evidence of the standard of care, the fact that the instructions were never introduced into evidence nor their contents ever made known to the jury, and the few limited references at trial, the court did not abuse its discretion in denying a mistrial or new trial. There is no reasonable possibility that references to the instructions contributed to the verdict below; the error, if any, was harmless.

See Special v. W. Boca Med. Ctr., --- So. 3d ---, 2014 WL 5856384 (Fla. Nov. 13, 2014).

II. DR. JIMENEZ IS NOT ENTITLED TO A NEW TRIAL BECAUSE OF PLAINTIFFS' CLOSING ARGUMENT.

Standard of review. This Court reviews a trial court's denial of a motion for new trial under an abuse of discretion standard. *See Bocher v. Glass*, 874 So. 2d 701, 704 (Fla. 1st DCA 2004).

A. Dr. Jimenez waived any objection to the alleged improper argument of Plaintiffs' counsel.

By neglecting to timely move for a mistrial, Dr. Jimenez did not preserve the sustained objection to the remarks of Plaintiffs' counsel at closing argument. Nor did Dr. Jimenez ask the trial court to grant a new trial based on fundamental error, under the standard established by the Florida Supreme Court in *Murphy v. International Robotics Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000). Dr. Jimenez failed to preserve any error. He is not entitled to a new trial based on the closing argument of Plaintiffs' counsel.

"To preserve a sustained objection for appellate review, . . . a motion for mistrial must be made at the time the improper comment was made." *Companioni v. City of Tampa*, 51 So. 3d 452, 454 (Fla. 2010) (quotations omitted); *accord Hang Thu Hguyen v. Wigley*, -- So. 3d --, 2014 WL 2968860 at *2 (Fla. 5th DCA July 3, 2014). A simple request for a curative instruction is not enough. Once a

party objects to attorney misconduct, and that objection is sustained, the objecting party must also move for a mistrial to preserve the issue for review – even if the trial court gave the requested curative instruction. *See Hang Thu Hguyen*, 2014 WL 2968860, at *2 (citing *Companioni*, 51 So. 3d at 456); *Sanchez v. State*, 81 So. 3d 604, 610 (Fla. 3d DCA 2012). Absent a timely motion for mistrial, "the trial judge presumes that the objecting party has been satisfied and that the error has been cured." *Companioni*, 51 So. 3d at 456. "If the issue is not preserved in this manner, then the conduct is subject to fundamental error analysis" under *Murphy*. *Hang Thu Hguyen*, at *2.

Here, although Dr. Jimenez timely objected (which the trial court sustained) and requested a curative instruction (which the trial court gave), the defense never requested a mistrial. (T-1110-14.) Absent a timely motion for mistrial, the trial court properly presumed that Dr. Jimenez was satisfied with the sustained objection and instruction, and considered any error cured. *See Sanchez*, 81 So. 3d at 610. Dr. Jimenez failed to preserve for appeal his objection to the trial court's ruling. *See Companioni*, 51 So. 3d at 456; *Hang Thu Hguyen*, at *2.

Nor is Dr. Jimenez entitled to seek this Court's review of Plaintiffs' closing argument, even under a fundamental error analysis. Nowhere in Dr. Jimenez's motion for new trial did he argue that the remarks of Plaintiffs' counsel were so improper, harmful, incurable, and contrary to the interest of justice as to require a

new trial under *Murphy*. Dr. Jimenez never mentioned *Murphy* in his post-trial motion. (R-XX-3582-96.) Once again, Dr. Jimenez did not sufficiently preserve his objection to Plaintiffs' closing argument. *See, e.g.*, *Bradley v. So. Baptist Hosp. of Fla., Inc.*, 943 So. 2d 202, 207 (Fla. 1st DCA 2006).

B. Dr. Jimenez cannot show that the isolated remarks of Plaintiffs' counsel at closing were improper or prejudicial.

Should this Court address the merits, Dr. Jimenez is still not entitled to relief. The remarks were not improper "send a message" argument, but instead were fair comment on the evidence – especially when considered in the context of the defense's own closing. The trial court's curative instruction was enough to cure any impropriety. And Dr. Jimenez cannot show that the isolated remarks of Plaintiffs' counsel were so highly prejudicial and inflammatory as to warrant a new trial. Assuming that Dr. Jimenez can establish error, there is no reasonable possibility that the error contributed to the jury's verdict.

1. The remarks were not improper "send a message" argument.

First, the remarks of Plaintiffs' counsel were not improper argument. Plaintiffs' counsel did not ask the jury to "punish" Dr. Jimenez – either for his conduct, generally, or for his disregard of the manufacturer's instructions. Plaintiffs' counsel argued:

> This is Dr. Jimenez's habit. This is the way he does things for every patient. Now, maybe he's got a reason to do something different. And you can help him rethink that. You can help him reevaluate his habits.

(T-V-1110.) As the trial court correctly noted, Plaintiffs' counsel did not ask the jury to "punish" Dr. Jimenez. (T-V-1111.)

Nor did Plaintiffs' counsel improperly ask the jury to "send a message" to Dr. Jimenez with its verdict. *Cf. City of Orlando v. Pineiro*, 66 So. 3d 1064, 1070-71 (Fla. 5th DCA 2011); *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 552, 554-55 (Fla. 3d DCA 2000); *Erie Ins. Co. v. Bushy*, 394 So. 2d 228, 229 (Fla. 5th DCA 1981). Plaintiffs' counsel did not use the words "send a message." *Cf. Murphy v. Murphy*, 622 So. 2d 99, 102 (Fla. 2d DCA 1993); *Maercks v. Birchansky*, 549 So. 2d 199, 199 (Fla. 3d DCA 1989); *Erie Ins. Co.*, 394 So. 2d at 229. His comments that "you can help [Dr. Jimenez] rethink" and "[y]ou can help him reevaluate his habits" did not invite the jury to use its verdict to punish Dr. Jimenez. *Cf. Murphy*, 622 So. 2d at 102 (counsel's argument that "I want to send a message to the community . . . so they won't think they can get away with stealing some elderly folks monies"); *Erie Ins. Co.*, 394 So. 2d at 229 (improperly asking jury to "send a message to those people and let them know that they are going to have to pay a penalty").

Dr. Jimenez misapprehends the import of Plaintiffs' closing argument. Nowhere in his remarks did Plaintiffs' counsel ask the jury to award substantial damages "so that [Dr. Jimenez] would stop inserting dialysis catheters without using the removable wing." (Amd. IB 25-26.) *Cf. Pineiro*, 66 So. 3d at 1070-71

(arguing that "the money [awarded] does help to tell [the decedent's] mother and father that you, the jury, recognize that what has been done is wrong and should not have ever happened"); *Kloster Cruise*, 762 So. 2d at 554-55 (arguing that jury should "tell" the defendant "by the verdict that it is significant"). Similarly, Plaintiffs' counsel did not argue – as Dr. Jimenez now contends – that the jury should punish Dr. Jimenez with its verdict "so that he would change his manner of practicing medicine." (Amd. IB 28.) *Cf. Pineiro*, 66 So. 3d at 1070-71 (suggesting to jury that "a significant verdict . . . [would] send a message to stop these experiences from happening and . . . make others less likely to act irresponsibly"); *Kloster Cruise*, 762 So. 2d at 554-55 (asking jury to "tell" defendant "to anticipate accidents before they happen" was improper).

Plaintiffs' counsel did not impermissibly ask the jury to use its verdict to "send a message" to Dr. Jimenez. Because the remarks of Plaintiffs' counsel were not improper, the trial court did not err in denying the motion for new trial.

2. The remarks of Plaintiffs' counsel were fair comment.

Aside from Dr. Jimenez's inability to show that the objected-to argument asked the jury to "send a message," he is not entitled to a new trial for yet another reason. The comments of Plaintiffs' counsel were fair comment.

In his rebuttal argument, Plaintiffs' counsel responded to a consistent theme of the defense: namely, that Dr. Jimenez had secured Bailey-Savage's catheter as

he had been trained, in the same way that he had "hundreds and thousands of times." (T-VIII-1093.) In closing argument, defense counsel asked the jury: "Where is the evidence that they said he did it wrong? There isn't." (*Id*.) The defense relied on Dr. Jimenez's "habit" and usual "practice" to explain why Dr. Jimenez did not recall exactly how he had secured the catheter in this patient. (T-VIII-1093, 1097.) Defense counsel explained: "Dr. Jimenez has been doing this procedure for many, many years, hundreds and thousands, and that's his practice. He didn't remember it. But again, don't allow the plaintiffs to deflect [blame] because of memory." (T-VIII-1097-98.)

The remarks of Plaintiffs' counsel as to Dr. Jimenez's "habits" were fair comment on the evidence. *See Tanner v. Beck ex rel. Hagerty*, 907 So. 2d 1190, 1197 (Fla. 3d DCA 2005); *Dubus v. Pietz*, 728 So. 2d 769, 770 (Fla. 1st DCA 1999) Noting that "[t]his is the way [Dr. Jimenez] does things for every patient," the argument of Plaintiffs' counsel that "[n]ow, maybe he's got a reason to do something different" could refer to the untimely death of Bailey-Savage – which, Plaintiffs argued, directly resulted from Dr. Jimenez's negligent practice. (T-VIII-1109-10.) By informing the jury that "you can help [Dr. Jimenez] . . . rethink" and "[y]ou can help him reevaluate" his habits (T-VIII-1110), Plaintiffs' counsel responded to the defense's recurring theme that Dr. Jimenez had not acted

negligently in securing the catheter in this patient the same way that he had "hundreds and thousands" of times before (T-VIII-1093, 1097).

"Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment." *Mann v. State*, 603 So. 2d 1141, 1143 (Fla. 1992). The objected-to comments of Plaintiffs' counsel must be viewed "within the context of the closing argument as a whole and considered cumulatively within the context of the entire record." *Rivera v. State*, 840 So. 2d 284, 287 (Fla. 5th DCA 2003) (citations omitted). Once the trial court sustained the objection and gave its curative instruction, Plaintiffs' counsel moved on to another argument. Given the context of the closing arguments as a whole, and the evidence presented to the jury, the remarks of Plaintiff's counsel constituted fair comment. *See id*.; *see also Pineiro*, 66 So. 3d at 1072 ("contextually," comment by plaintiff in response to defense's closing did not require reversal).

3. The error, if any, was harmless.

Even if the jury could have drawn an improper inference from the remarks of Plaintiffs' counsel, any potential prejudice was cured by the trial court's instructions. *See Tanner*, 907 So. 2d at 1196-97; *Dozier v. Hodges*, 849 So. 2d 1094, 1095 (Fla. 3d DCA 2003). The trial court sustained the objection and directed Plaintiffs' counsel to "move on to something else." (T-VIII-1111-12, 1113-14.) Meanwhile, the trial court informed the jury that "by your verdict, you

will be doing two things": determining whether Dr. Jimenez was negligent and a legal cause of Bailey-Savage's death; and if so, deciding damages to compensate Plaintiffs for the loss. (T-VIII-1112-13.) This curative instruction was consistent with the language of the jury instructions, which the trial court had already given. (*See* T-VIII-1030-33.)

Thus, the jury was twice instructed that it should award damages to compensate the Plaintiffs for their loss only if Dr. Jimenez's negligence was a legal cause of Bailey-Savage's death. The trial court's instructions adequately cured any potential prejudice created by the remarks of Plaintiffs' counsel. *See Freeman v. State*, 761 So. 2d 1055, 1070 (Fla. 2000); *Jackson v. Pena*, 58 So. 3d 303, 304 (Fla. 5th DCA 2011); *Tanner*, 907 So. 2d at 1196.

The trial court did not abuse its discretion in denying Dr. Jimenez's motion for new trial. *See Jackson*, 58 So. 3d at 304. Plaintiffs easily show that any error complained of by Dr. Jimenez did not contribute to the jury's verdict. *See Special*, 2014 WL 5856384, at *4.

The isolated remarks of Plaintiffs' counsel – especially when considered together with the evidence, the trial court's instructions to the jury, and defense counsel's own closing argument – did not cause the jury to "punish" Dr. Jimenez by awarding excessive damages. Throughout the five-day trial, the jury heard detailed testimony from qualified experts on the prevailing standard of care and Dr.

Jimenez's failure to follow that standard. The jury's award of $2,900,000 in damages for the loss of Bailey-Savage, a young wife and mother, was not punitive.

There is no reasonable possibility that the jury, after a five-day trial, relied on two isolated comments to "punish" Dr. Jimenez for his "deliberate[] disregard of the manufacturer's instructions" and his "manner of practicing medicine and patient care." (Amd. IB 28.) Even accepting the defense's characterization of Plaintiffs' argument as "inflammatory," those comments did not influence the jury's verdict. Dr. Jimenez is not entitled to a new trial.

III. DR. JIMENEZ IS NOT ENTITLED TO DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT. PLAINTIFFS INTRODUCED COMPETENT, SUBSTANTIAL EVIDENCE OF CAUSATION.

Standard of Review. This Court reviews de novo the trial court's ruling on a motion for judgment notwithstanding the verdict. *Specialty Marine & Indus. Supplies, Inc. v. Venus*, 66 So. 3d 306, 309 (Fla. 1st DCA 2011). The Court must "view all the evidence in a light most favorable to the non-movant, and in the face of evidence which is at odds or contradictory, all conflicts must be resolved in favor of the party against whom the motion has been made." *Id*. A jury verdict must be upheld if supported by competent substantial evidence. *Id*.

A. Dr. Jimenez failed to preserve two of the three grounds that he now relies on to show the purported lack of "admissible causation evidence."

Dr. Jimenez did not preserve for this Court's review two of the three grounds that he now argues; specifically, that Dr. Kaye's expert opinions were inadmissible under *Daubert* and that Plaintiffs relied on "impermissible inference pyramiding." (Amd. IB 28-30, 31-35.) Dr. Jimenez timely moved for a directed verdict at the close of the Plaintiffs' case, and again at the close of all the evidence. However, the defense argued only that Dr. Kaye's causation opinions did not satisfy the standard established in *Gooding v. University Hospital Building, Inc.*, 445 So. 2d 1015 (Fla. 1984). (T-IV-593-95 (because Dr. Kaye "did not know the mechanism by which . . . [the catheter] came out," "the probabilities are equally balanced that . . . [the catheter] could have come out somehow inadvertently, or it could have come out purposely").) The trial court denied the defense's motion for directed verdict (T-IV-599), which Dr. Jimenez renewed at the close of all the evidence (T-VI-843-44). Only when Dr. Jimenez filed his post-trial motion did he seek relief on the three grounds that he now argues on appeal. (R-XX-3582-96.)

Dr. Jimenez's post-trial motion did not sufficiently preserve his arguments on appeal. Rule 1.480(a) requires that a motion for directed verdict "state the specific grounds therefor." Fla. R. Civ. P. 1.480(a). The only specific ground stated by Dr. Jimenez in moving for directed verdict at trial was the "equally balanced

probabilities" argument under *Gooding*. Because Dr. Jimenez submitted his cause to the trier of fact, at the end of all the evidence, without moving for a directed verdict under *Daubert* and the rules against inference stacking, he has waived his right to make that motion. *See Smith v. Hooligan's Pub & Oyster Bar, Ltd.*, 753 So. 2d 596, 598-99 (Fla. 3d DCA 2000); *accord Perlman v. Ferman Corp.*, 611 So. 2d 1340, 1341 (Fla. 4th DCA 1993).[3] He is not entitled to rely on either argument on appeal. *See Smith*, 753 So. 2d at 599.

B. The trial court correctly admitted Dr. Kaye's expert opinion on causation.

Aside from Dr. Jimenez's failure to preserve two of his arguments for review, he is not entitled to relief. The trial court did not err in denying the defense's motions for directed verdict and judgment notwithstanding the verdict.

1. Dr. Kaye's causation opinions complied with *Daubert*.

Consistent with the requirements of section 90.702, Florida Statutes, the trial court correctly admitted Dr. Kaye's expert opinions on causation. Dr. Kaye based his testimony on the medical records, the autopsy report and photographs, deposition testimony, and his medical education, training, and experience in placing the same model catheter. Plaintiffs established a sufficient basis for Dr.

[3] Unlike *Perlman*, Dr. Jimenez cannot argue, in the alternative, that he is entitled to a new trial. The motion for new trial did not allege that the jury's verdict was against the manifest weight of the evidence. (R-XX-3582-96.) *See Nordyne, Inc. v. Fla. Mobile Home Supply, Inc.*, 625 So. 2d 1283, 1285 (Fla. 1st DCA 1993).

Kaye's expert medical testimony. *See Newman v. McNeil Consumer Healthcare*, 2013 WL 4460011 (N.D. Ill. March 29, 2013).

Dr. Kaye's testimony that the catheter was inadvertently dislodged was not "pure opinion." Contrary to the defense's contention, there is "evidence about what happened on the morning of April 24, 2005." (Amd. IB 29.) Dr. Kaye relied on the testimony of Bailey-Savage's husband, who was there that morning. Bailey-Savage's behavior in calling out to her husband and screaming showed that she was not committing suicide. (T-II-265, 267.) Dr. Kaye saw no evidence that the catheter was intentionally pulled out. (T-II-267.)

In Dr. Kaye's reasoned opinion, the catheter dislodged from the exit site because it was not properly secured. Sutures are used when physicians "want to secure something in place." (T-II-262.) "[E]xperience over the years in having catheters and catheters that come out" has taught the medical community that "suturing is the most secure method . . . of keeping a catheter in place." (T-II-266.) Sutures provide a signal to patients when too much force is applied to the catheter. (T-II-264.) Steri-Strips or adhesives would not secure the catheter with the same force as sutures. (T-II-262, 263.)

Regardless of whether any witness "saw or was told what the decedent was doing" on the morning of April 24, 2005 (Amd. IB 29), enough force was applied to dislodge the catheter. (T-II-267-68.) "The force was not sufficient to break the

sutures on the . . . movable portion of the catheter," but was enough to allow the unsutured part of the catheter to dislodge from the vein. (T-II-268.) Dr. Kaye concluded, then, that Dr. Jimenez's failure to use the removable wing to secure the catheter contributed to the catheter's dislodgement. (T-II-261.) Had the catheter been sutured at the exit site, he opined that the catheter, more likely than not, would **not** have pulled out of Bailey-Savage's vein. (T-II-261.)

Dr. Kaye used reliable principles and methods to render his opinion. He considered – and rejected – the suggestion that Bailey-Savage intentionally pulled out the catheter. He concluded that the catheter, more likely than not, would not have dislodged had Dr. Jimenez secured the catheter with the removable suture wing. Dr. Kaye considered possible causes, and then relied on the evidence and his education and experience to eliminate all causes but one. This methodology, known as the "differential etiology" analysis, is widely accepted under *Daubert*. *E.g.*, *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999); *Heller v. Shaw Indus.*, 167 F.3d 146, 155-56 (3d Cir. 1999); *Stoddard v. Pliva*, 2013 WL 6199268, *6 (E.D.N.C. Nov. 27, 2013). Dr. Kaye applied this method reliably to the facts here.

Dr. Jimenez's attacks on Dr. Kaye's causation opinions are unfounded. Dr. Kaye's opinion was not "wholly personal and speculative," nor was it "pure opinion testimony." (Amd. IB 29.) Plaintiffs met the *Daubert* standard.

2. Dr. Kaye's causation opinion met the *Gooding* standard.

Dr. Jimenez is not entitled to a directed verdict under *Gooding*. Dr. Jimenez's contention that "the probabilities were evenly matched as to whether Bailey-Savage intentionally or inadvertently pulled out the catheter" contradicts the evidence. (Amd. IB 30.) There was absolutely **no** evidence that Bailey-Savage intentionally pulled out the catheter. (T-IV-598-99.) The defense did not suggest this alternative theory to the jury. (T-VIII-1087-89, 1099.) Plaintiffs are not required to negate an inference that does not exist.

Assuming *arguendo* that Plaintiffs were required to refute the inference, they met this burden. (T-IV-599.) The forensic pathologist testified that he did not see any evidence that Bailey-Savage had intentionally pulled out the catheter. (T-III-440.) Likewise, Plaintiffs' expert found no evidence that Bailey-Savage committed suicide. (T-II-267.)

Plaintiffs introduced additional evidence to prove that Bailey-Savage did not intentionally remove the catheter. (T-IV-599.) Her husband testified that Bailey-Savage was an upbeat, likeable person with a positive attitude. She cooperated with her doctors and cared about her health. (T-III-450, 453, 457, 463.) On the morning of April 24, 2005, Bailey-Savage was in a good mood. She had set out supplies to clean and bandage the catheter. While she was getting ready for church, her husband heard her yell his name in a high-pitched, panicked voice. In the short

time that it took Mr. Savage to reach the bedroom, Bailey-Savage had already collapsed on the floor. The tip of the catheter was out and she was bleeding profusely. (T-III-464-70.)

This evidence refutes any suggestion that Bailey-Savage intentionally pulled out the catheter. Dr. Jimenez cannot claim, then, that the probabilities of negligent and non-negligent conduct were "evenly matched."

Moreover, Plaintiffs were not required to prove that Dr. Jimenez's negligence was the sole cause of Bailey-Savage's death. *See Whitney v. R.J. Reynolds Tobacco Co.*, --- So. 3d ---, 2014 WL 6851406, *3 (Fla. 1st DCA Dec. 5, 2014). Instead, Plaintiffs needed only to prove that Dr. Jimenez's negligence was "a legal cause" of the injury. *See id*. at *3-4. Ample evidence showed that Dr. Jimenez's negligent failure to properly secure the catheter, more likely than not, was a substantial factor contributing to Bailey-Savage's death.

Plaintiffs' expert evidence was not pure speculation or conjecture. *Cf. Gooding*, 445 So. 2d at 1018. The trial court correctly denied the defense's motions for directed verdict. Plaintiffs presented evidence from which the jury could find that Dr. Jimenez's negligence more likely than not caused the catheter to dislodge, and Bailey-Savage to die. *See Cox v. St. Josephs Hosp.*, 71 So. 3d 795, 801 (Fla. 2011).

3. Dr. Kaye's testimony did not require the impermissible stacking of inferences.

Finally, Dr. Jimenez argues that he is entitled to a directed verdict because Plaintiffs' case "relies upon unsupportable inferences." (Amd. IB 34-35.) He contends that "Dr. Kaye's opinions regarding the mechanism for the dislodging of the catheter violate the well settled rule that a party may not impermissibly pyramid inferences." (Amd. IB 32.) Dr. Jimenez's argument contradicts the facts and the law.

To argue that "there is no evidence as to what occurred on the morning of April 24, 2005" (*id*.) is to misstate the facts. Regardless of Dr. Kaye's inability to specify exactly how the catheter dislodged, the evidence is undisputed: on the morning of April 24, 2005, the catheter pulled out of Bailey-Savage's jugular vein, creating a "big hole in the vein" that caused her death. (*See* T-II-278, 284; T-III-428, 469-70.) Plaintiffs proved beyond a reasonable doubt that the catheter dislodged on April 24, 2005. Where, as here, "a predicate inference is the only reasonable inference that can be made from the evidence, it is no longer an inference but is deemed an established fact." *Voelker v. Combined Ins. Co. of Am.*, 73 So. 2d 403, 407 (Fla. 1954).

The defense has "taken what is essentially one inference" on causation – that Dr. Jimenez's negligent failure to secure the catheter caused it to dislodge – "and attempted to stretch it out into multiple inferences." *O'Malley v. Ranger Constr.*

Indus.,133 So. 3d 1053, 1055-56 (Fla. 4th DCA 2014). This is improper. "There is no stacking of inferences here requiring application of these rules." *Id*.

The trial court did not err in allowing the jury to decide causation. When the evidence is "susceptible of a reasonable inference supporting the claim of negligence," and "also susceptible of reasonable inferences which refute the claim," a jury question is presented. *Streeter v. Bondurant*, 563 So. 2d 729, 732 (Fla. 1st DCA 1990) (citing *Voelker*, 73 So. 2d at 406).

Dr. Kaye testified that Dr. Jimenez's negligent failure to follow the prevailing standard of care in securing the catheter was, more likely than not, a contributing cause of Bailey-Savage's death. (T-II-278, 284.) This evidence was not speculative. Plaintiffs' expert relied on established facts to render his expert opinion, including undisputed evidence that:

- Dr. Jimenez did not use the removable suture wing to secure the catheter at the exit site;
- Dr. Jimenez did use the rotatable wing to suture the catheter to the skin in another location, approximately two inches below the exit site;
- Sutures, where used, provide a signal to patients when the catheter is moved, so that if the catheter is tugged or pulled, the patient experiences pain;
- The catheter dislodged at the exit site;
- The catheter remained attached where it had been sutured; and

- Bailey-Savage died because the catheter dislodged, leaving a hole in her jugular vein.

Competent, substantial evidence supports the jury's determination that Dr. Jimenez's negligent failure to secure the catheter was a legal cause of Bailey-Savage's death. Dr. Jimenez is not entitled to judgment notwithstanding the verdict.

IV. DR. JIMENEZ IS NOT ENTITLED TO REVERSAL OF THE COST JUDGMENT OR TO REMITTITUR UNDER SECTION 766.118.

Standard of Review. Because the prevailing party is entitled to an award of taxable costs as a matter of right, this Court reviews de novo the cost judgment. *See Reinke v. Wal-Mart Stores*, 773 So. 2d 592, 592 (Fla. 1st DCA 2000). A trial court's denial of remittitur is usually reviewed for an abuse of discretion. *Whitney v. Milien*, 125 So. 3d 817, 818 (Fla. 4th DCA 2013). Where, as here, the trial court's ruling concerns a pure question of law, the standard of review is de novo. *Rittman v. Allstate Ins. Co.*, 727 So. 2d 391, 393 (Fla. 1st DCA 1999); *see W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 8 (Fla. 2012).

Merits. The award of costs, together with the final judgment on the jury's verdict, must be affirmed. Dr. Jimenez shows no basis for reversal of the final judgment. Thus, he is not entitled to reversal of the cost judgment. *Cf. Todora v. Venice Golf Ass'n*, 869 So. 2d 1232, 1233 (Fla. 2d DCA 2004).

Likewise, the trial court correctly refused to reduce the jury's award of non-economic damages, pursuant to *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014). The defense lists four arguments that purportedly distinguish *McCall* from the facts here. Not only did Dr. Jimenez fail to preserve the issue for appellate review, his conclusory assertions lack merit.

Dr. Jimenez has waived his claim to remittitur. The trial court heard argument on the post-trial motions a little more than a month after the Florida Supreme Court's decision. Defense counsel conceded that under *McCall*, "the statutory cap is unconstitutional." (R-XXV-4399.) She added, "There were some factual distinctions and limitations on it, but I don't think they're applicable here." (R-XXV-4400.) When Plaintiffs urged the trial court to enter judgment on the total amount awarded, the trial court asked defense counsel whether she had "[a]ny concern" regarding execution of a final judgment "at this time." Defense counsel replied, "No, Your Honor." (R-XXV-4400-1.)

Plaintiffs' counsel informed the trial court that under *McCall*, any issue concerning the motion for remittitur was "moot." (R-XXV-4402-3.) Defense counsel made no effort to distinguish *McCall*, to limit its precedential value, or to otherwise argue that *McCall* does not apply to the facts here. The trial court advised the parties that it would enter an order denying the motion "on the

authority of McCall." (R-XXV-4403.) Once the trial court entered its written order, Dr. Jimenez did not seek rehearing. Instead, he appealed. (R-XXV-4280-89.)

Dr. Jimenez failed to preserve this issue for review. Not only did his counsel concede that *McCall* struck down the statutory caps as unconstitutional, Dr. Jimenez never asked the trial court to distinguish *McCall*. (R-XX-3594-95; R-XXV-4400-3.) Dr. Jimenez should not be heard to argue, for the first time on appeal, that *McCall* does not apply. *See Quinell v. Platt*, 23 So. 3d 746, 747 (Fla. 1st DCA 2009).

Alternatively, should the Court address this issue on the merits, Dr. Jimenez is not entitled to any reduction in the damages awarded. *McCall* does not "lack precedential value." (Amd. IB 35.) Five of the seven justices agreed that the statutory cap on wrongful death non-economic damages violates the right to equal protection under the Florida Constitution. 134 So. 3d at 897, 916, 922. While two of the five justices may have relied on a different rationale, the majority reached the same conclusion: section 766.118's cap on non-economic damages is unconstitutional. *McCall* is not a plurality decision. (Amd. IB 35.)

Nor did the Fifth District err in relying on *McCall* to reverse a trial court's reliance on the statutory cap. *Shoemaker v. Siger*, 141 So. 3d 1225, 1225 (Fla. 5th DCA 2014). *McCall* applies both retrospectively and prospectively. *E.g.*, *Melendez v. Dreis & Krump Mfg. Co.*, 515 So. 2d 735, 736 (Fla. 1987).

Siger illustrates the correct application of a new judicial decision, from a court of last resort, to a "pipeline" case. *See D'Aquisto v. Costco Wholesale Corp.*, 816 So. 2d 1231, 1232 (Fla. 5th DCA 2002) ("pipeline cases" are "cases pending in the trial court or on appeal at the time of the new decision"). Before *McCall*, the *Siger* court had already per curiam affirmed the judgment. 141 So. 3d at 1225. After *McCall*, the Fifth District recalled the mandate, reversed the trial court's ruling, and remanded for entry of an amended judgment, without reduction. *Id*.

Finally, Dr. Jimenez cannot claim that the statutory caps should be applied on a per claimant basis. Nowhere in *McCall* did the Court so limit its holding. 134 So. 3d at 897. The Court's ruling applies equally to single and multiple claimant claims. *See id*. at 909, 912-14, 919-21. *McCall* is indistinguishable.

CONCLUSION

For the foregoing reasons, the final judgment on the jury's verdict and the cost judgment should be affirmed. Dr. Jimenez is not entitled to a new trial, or to judgment notwithstanding the verdict.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished, via electronic mail, to the following counsel of record on February 27, 2015:

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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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