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

CASE NO.: 4D17-1627

AJAIB MANN, M.D. and AJAIB S. MANN HOSPITALISTS, INC.,

Appellants,

vs. L.T. Case No.: 14-013975

GARY PETTIGROSSI, AS PERSONAL REPRESENTATIVE OF THE ESTATES OF ANN PETTIGROSSI and GERARD PETTIGROSSI,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT, SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

Dr. Mann is not entitled to a new trial. Because Dr. Mann did not truly assert an "empty chair" defense, the trial court correctly precluded his attempt to relitigate the "causal negligence" of Dr. Ghanavati, who – as a matter of law – was not liable. The trial court also did not err in interpreting the excited utterance exception to the hearsay rule to allow Mrs. Pettigrossi's probative, relevant testimony. Te final judgment on the jury's verdict should be affirmed.

STATEMENT OF THE CASE AND FACTS

Plaintiff asks the Court to consider additional facts, as follows:

Pleadings. In his amended affirmative defenses, Dr. Mann identified only Nurse Ganzy as a *Fabre* defendant: a non-party whose actions or omissions contributed to the death of Mr. Pettigrossi, and as to whom damages (if recovered) should be apportioned. (R. 880-81.) Dr. Mann did not seek leave to amend to add Dr. Ghanavati, the treating neurologist, as a *Fabre* defendant. (*See* R. 876-82.)

Unopposed motion for summary judgment. Although originally a co-defendant, Dr. Ghanavati sought summary judgment before trial. (R. 644-51; *see* R. 1150-1236.) He submitted the relevant pleadings, deposition excerpts, medical records, and the opinion of his expert neurologist. (R. 644-51; R. 1150-1236.)

Dr. Ghanavati pointed to a lack of expert testimony establishing, within a reasonable degree of medical probability, that his acts or omissions deviated frm the

standard of care or proximately caused Mr. Pettigrossi's death. (R. 648.) (*Id*.) Dr. Ghanavati submitted an affidavit from his own expert, a board-certified neurologist who opined that: 1) Dr. Ghanavati did not deviate from the applicable standard of care; and 2) his actions (and alleged failures to act) did not cause or contribute to Mr. Pettigrossi's death. (*Id*. at 648-49; R. 1232-34.)

Dr. Mann did not oppose Dr. Ghanavati's summary judgment motion or seek a continuance. (*See* A:6-7.) The trial court granted the motion and rendered a final judgment for Dr. Ghanavati (R. 666, 680), which was not stipulated to by Plaintiff (A:137; R. 1391). Dr. Mann did not seek rehearing or appeal. (R. 869; R. 1391.)

Plaintiff's motion in limine on the "empty chair" defense. Before trial, Plaintiff moved to preclude the defense's attempt to prove that Mr. Pettigrossi's injuries could be blamed on Dr. Ghanavati's alleged negligence. (R. 869-70.) Plaintiff relied on the collateral estoppel effect of Dr. Ghanavati's summary final judgment, which was not opposed or appealed by Dr. Mann. (*Id*.; R. 1391.)

At the hearing on Plaintiff's motion, Dr. Mann's counsel explained that he intended to elicit testimony from an expert neurologist to show the liability of Dr. Ghanavati for Mr. Pettigrossi's death. (R. 1362, 1365-66.) Defense counsel argued the expert neurologist should be allowed to testify that "Dr. Ghanavati should have diagnosed and put the … team members, the other physicians, on notice" that Mr. Pettigrossi could potentially experience cardiorespiratory arrest. (R. 1367; *see* R.

1365-66.) In the trial court's opinion, the defense wanted to prove the negligence of a non-party under *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), without having pled the affirmative defense. (R. 1367.)

The trial court ruled that Dr. Mann could not call another expert to testify that the non-party treating neurologist deviated from the standard of care "because then you're getting into [F]abre." (R. 1367; *see* R. 1364, 1370-71.) Defense counsel was instructed that he could argue Dr. Mann did not deviate from the standard of care because Gullain-Barre Syndrome (GBS) is a complicated disease that a hospitalist may not recognize without information from a neurologist. (R. 1367, 1370-71.)

When Plaintiff's motion in limine was reheard, the defense explained its intent to rely on the expert neurologist's testimony to argue that the treating neurologist, as a specialist, should have told Dr. Mann, a generalist, what to look for in treating Mr. Pettigrossi. (A:145.) Because "[t]hat was not done here," defense counsel continued, Dr. Ghanavati caused Mr. Pettigrossi's death. (A:145-46, 147, 154.)

The trial court reiterated that Dr. Mann could argue to the jury that he was not at fault because of his lack of familiarity with GBS, which is treated by a neurologist. (A:156.) But the court instructed counsel not to elicit evidence blaming Dr. Ghanavati for his alleged negligent failure to advise Dr. Mann. (A:156; *see* A:154.) The court later entered a written order granting Plaintiff's motion in limine. (R. 1391-92.)

Evidence at trial. At trial, Dr. Mann testified that he had never diagnosed or treated a patient with GBS. (T. 419-20.) He relied on a consulting neurologist, Dr. Ghanavati, to diagnose and treat Mr. Pettigrossi. (T. 416, 424-25, 431.) Moreover, the defense elicited testimony from its expert hospitalist, who opined that Dr. Mann consulted with the right specialists and appropriately relied on the treating neurologist for information related to Mr. Pettigrossi's diagnosis and treatment. (T. 1174-75, 1177, 1181-82.)

Plaintiff's expert hospitalist testified, *inter alia*, that Dr. Mann should have admitted Mr. Pettigrossi to the ICU when he learned of the critical blood pressure and heart rates. (T. 590-92, 596-98, 599, 600-1.) The request for a stat cardiologist consult, while appropriate, was not enough. (T. 601-3.) Dr. Mann should have first admitted Mr. Pettigrossi to ICU, and then called the consultant. (T. 600-2, 665.) Plaintiff's expert hospitalist also testified that Dr. Mann should have followed up with Nurse Ganzy to confirm that the patient had been seen by the cardiologist. (T. 601-3, 651-52, 665.)

In his early seventies, Mr. Pettigrossi was hospitalized on Wednesday, March 21, 2012. (T. 984-86.) Mrs. Pettigrossi visited her husband on Thursday and Friday (March 22 and 23); when she saw him that Saturday afternoon (March 24), she was shocked by his appearance. (T. 994.) He was "paralyzed in his arms and his legs" and "couldn't move." (T. 994; *see* T. 590-91 (Plaintiff's expert neurologist testified

that by March 24, Mr. Pettigrossi was "essentially paralyzed with his upper and lower extremities").) In the opinion of Plaintiff's expert hospitalist, this was not a mild case of GBS, but a patient "in trouble." (T. 590-91.)

At 11 pm on Saturday, March 24, Mr. Pettigrossi called his wife. He was so incapacitated that he had to ask a nurse to hold the phone to his ear. (T. 998-99; *see* T. 1017-18, 1020-22.) According to Mrs. Pettigrossi, her husband stated, "Get me out of here, they're killing me." (T. 1002-4.)

Three hours earlier, Mr. Pettigrossi had experienced increased heart rates and elevated blood pressures significant enough for the nurse on duty to call and report the critical levels to Dr. Mann. (T. 1004; *see* T. 593-94, 596-97.) Mrs. Pettigrossi was never informed of the nurse's call to Dr. Mann or his order for a stat cardiology consult and stat EKG. (T. 1004.) Mr. Pettigrossi continued to experience elevated heart rates and blood pressure levels; he needed constant oxygen. (T. 591; T. 1362-66.) In the opinion of Plaintiff's expert hospitalist, Dr. Mann should have immediately transferred Mr. Pettigrossi to the ICU. (T. 597-98, 599, 601-3.)

The 11 pm telephone call was the last time Mrs. Pettigrossi spoke with her husband. (T. 1005.) Five hours later, at 4:30 am on Sunday, March 25, he suffered a cardiac arrest. Although he was eventually resuscitated and moved to the ICU, he never regained consciousness. (T. 1004-6.) He died April 9. (T. 1005-6.)

Closing argument. In closing argument, defense counsel emphasized to the jury that Dr. Mann could not fairly be blamed for the death of Mr. Pettigrossi. (T. 1534-35, 1539-40, 1562-63, 1567-68, 1573-74.) Defense counsel argued that had Nurse Ganzy "done her job," carried out Dr. Mann's order for a stat cardiology consult, and "met the standard of care," Mr. Pettigrossi's death "would not have happened." (T. 1535; *see* T. 1548-50, 1562-63, 1567-68, 1572, 1573-75.)

Moreover, defense counsel noted that, after Dr. Mann saw the patient on March 24, three more physicians saw Mr. Pettigrossi. (T. 1543.) Among the three was Dr. Ghanavati, "the specialist who manages this disease process." (T. 1543-44.) Defense counsel reminded the jury that Dr. Ghanavati, like the other two specialists, did not transfer Mr. Pettigrossi to the ICU. (T. 1543-44.) And "yet," as Dr. Mann's counsel noted, "they're blaming Dr. Mann." (T. 1544.) Defense counsel asked: "Is that fair?" (*Id*.; *see also id*. ("[I]s it fair, is it right, is it justice to blame Dr. Mann and ask for $5 million that he isn't even responsible for?").)

In his rebuttal argument, Plaintiff's counsel characterized the defense as "limited" because defense counsel did little to explain or justify Dr. Mann's conduct in his closing argument. (T. 1578-80.) As Plaintiff's counsel argued:

> The defense here is not a defense of Dr. Mann. They've given up on that. You've heard it by how much time they spent on blaming the nurses.
>
> ….

But that's their defense. They want to blame the nurse.

(T. 1578.) He continued, noting that the "limited defense" was "mostly centered around … the other doctors." (T. 1579.) Over objection, Plaintiff's counsel argued:

> [W]hat you did hear in defense of Dr. Mann mostly was along the lines of, "Well, three other physicians all saw him and how are you going to blame him when none of them thought that he needed to be in the ICU?"
>
> But what's the glaring, glaring difference? …. Not one of those doctors was given that information about the critical values, change in his condition. Not one of them.

(T. 1580-81.)

Jury verdict. The jury found that: (i) Dr. Mann's negligence was a legal cause of Mr. Pettigrossi's death, awarded $2,850,000 in damages, and charged the hospitalist with 85% of the fault; and (ii) Nurse Ganzy's negligence was a legal cause of Mr. Pettigrossi's death, apportioning 15% fault to her. (R. 1684-85.)

Post-trial proceedings. After the jury returned a verdict in Plaintiff's favor, Dr. Mann's liability insurer sought to be added to the final judgment. This request was denied. (R. 1797-1812.) Final judgment was entered for $2,422,500 (R. 1813-14), which was later fully bonded for Dr. Mann's instant appeal.

SUMMARY OF ARGUMENT

Dr. Mann, the defendant-hospitalist, did *not* proffer an "empty chair" defense. In reality, he proffered a backdoor *Fabre* defense – and called it an "empty chair" defense – to undo his counsel's prior strategic choice to ignore a co-defendant's

summary judgment motion. Dr. Mann's counsel could have pled and presented, and perhaps should have pled and presented, a *Fabre* defense when the defendant-neurologist, Dr. Ghanavati, moved for summary judgment. At that summary judgment hearing, Dr. Mann's counsel could have presented the exact same expert neurologist testimony that he sought to later introduce at trial for his purported "empty chair" defense, and that presentation might or might not have avoided the conclusive, non-appealed summary judgment that Dr. Ghanavati was neither negligent nor the cause of Mr. Pettigrossi's death.

Dr. Mann's Trojan-horse tactic of trying to disguise a *Fabre* defense in the form of an "empty chair" defense, if allowed by this Court, will have unintended, harmful consequences for the justice system. Plaintiffs will be forced to oppose <u>any</u> pre-trial summary judgment in favor of <u>any</u> defendant, even if discovery has shown that some defendants bear no or little fault. Plaintiffs will be forced to put up this opposition for fear that, when the trial is held, the remaining non-dismissed defendants will point the finger at the previously dismissed defendants, alleging the dismissed defendants are guilty "empty chairs." This result is unfair and unjust both to injured plaintiffs and to defendants whom, discovery has shown, are not responsible for the plaintiffs' injuries.

Dr. Mann's "empty chair" argument does not merit a reversal or a new trial. The trial court correctly relied on collateral estoppel to exclude the defense expert

neurologist's opinions related to the treating neurologist's "causal negligence." The summary final judgment for Dr. Ghanavati – which Dr. Mann did not oppose or appeal – established the treating neurologist's lack of liability. Dr. Mann was precluded from using an "empty chair" to sneak into the trial an expert neurologist's standard-of-care opinions to prove that Dr. Ghanavati – who had been granted summary judgment without objection from Dr. Mann – was wholly or partially responsible for Mr. Pettigrossi's death. Dr. Mann did not plead or preserve the defense that he truly sought to present below – an apportionment of fault to Dr. Ghanavati under *Fabre*.

In a true "empty chair" defense, a defendant points to a non-party as the *sole* cause of the plaintiff's injury. But that is not what Dr. Mann did here. Tellingly, Dr. Mann sought to blame Mr. Pettigrossi's death on the negligence of not one, but *two* non-parties: Nurse Ganzy and Dr. Ghanavati. Dr. Mann cannot logically fit the facts of this case into an "empty chair" defense. He has mischaracterized his defense to avoid the collateral estoppel of Dr. Ghanavati's unopposed summary final judgment. Dr. Mann's tactic of using a false "empty chair" defense to smuggle into the trial expert testimony on a dismissed defendant's standard of care would have confused the jury and blurred the distinction between *Fabre* and "empty chair" defenses.

The trial court also did not err in allowing Mrs. Pettigrossi to testify to Mr. Pettigrossi's statement, "Get me out of here, they're killing me." Because Plaintiff

did not rely on this testimony for the truth of the matter asserted, the statement was not hearsay. Alternatively, the trial court did not abuse its discretion in treating Mr. Pettigrossi's late-night telephone call to his wife as an excited utterance, admissible as an exception to the hearsay rule. Mr. Pettigrossi's age and physical and mental condition – together with the facts surrounding his hospitalization and the subject of his phone call – provided ample evidence of his excited or stressful state of mind. The hearsay statement was not only relevant, but probative of the damages for mental pain and suffering that she sustained because of her husband's death.

ARGUMENT

I. The trial court did not err in barring Dr. Mann's attempt to relitigate the "causal negligence" of Dr. Ghanavati, who – as a matter of law – was not liable. Dr. Mann cannot avoid the preclusive effect of the unopposed summary final judgment for Dr. Ghanavati.

Standard of Review. A trial court's ruling interpreting and applying the collateral estoppel doctrine is reviewed de novo. *Aronowitz v. Home Diagnostics, Inc.*, 174 So. 3d 1062, 1065 (Fla. 4th DCA 2015). Generally, a trial court's decision to admit evidence is reviewed under the abuse of discretion standard. *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008).

Merits. The trial court correctly precluded Dr. Mann from introducing his expert neurologist's opinions, and from arguing that Dr. Ghanavati's breach of the standard of care proximately caused Mr. Pettigrossi's injury and death. This was not an "empty chair" defense. Instead, it was a misguided effort by Dr. Mann to prove –

without pleading – Dr. Ghanavati's liability for fault under *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).[1]

A true "empty chair" defense is a causation defense. *See, e.g., Vila v. Philip Morris USA Inc.*, 215 So. 3d 82, 86-87 (Fla. 3d DCA 2016). The "empty chair" refers to "some non-party" who is "the *sole* legal cause of the harm alleged." *Id*. at 86 (emphasis added) (citing *Phillips v. Guarneri*, 785 So. 2d 705, 706 n.4 (Fla. 4th DCA 2001)). Unlike a *Fabre* defendant, the "empty chair" is "not placed on the verdict form and there is no apportionment of fault." *Id*.

Here, Dr. Mann does not seek to prove that Dr. Ghanavati, the former defendant and treating neurologist, was the sole proximate cause of Mr. Pettigrossi's death. Instead, Dr. Mann argues that he was entitled to elicit expert testimony to prove that, because Dr. Ghanavati negligently breached the relevant standard of care in treating Mr. Pettigrossi, the former defendant/treating neurologist should share in the liability. This is not an "empty chair" defense.

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[1] In *Fabre*, the Florida Supreme Court ruled that in determining non-economic damages, "fault must be apportioned among all responsible entities who contribute to the accident even though not all of them have been joined as defendants." *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1263 (Fla. 1996); *accord* § 768.81(3), Fla. Stat. (2017). "[T]o include a nonparty on the verdict form pursuant to *Fabre*, the defendant must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty." *Nash*, 678 So. 2d at 1264; *see* § 768.81(3)(a)1-2, Fla. Stat. (2017) (requiring a defendant who intends to allocate any or all fault to a non-party to "affirmatively plead the fault of a nonparty," "identify the nonparty, if known," and prove, "by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries").

The trial court accurately distinguished a true "empty chair" defense from the *Fabre* defense that Dr. Mann tried to assert. Dr. Mann seeks to relitigate the issue of the treating neurologist's "causal negligence" for Mr. Pettigrossi's injury and death. (Init. Br. 21.) Yet the summary final judgment for Dr. Ghanavati – which Dr. Mann did not oppose or appeal – exonerated the treating neurologist from fault. *See S. Bell Tel. & Tel. Co. v. Fla. Dept. of Transp.*, 668 So. 2d 1039, 1041 (Fla. 3d DCA 1996) (citing *Stogniew v. McQueen*, 656 So. 2d 917 (Fla. 1995)); *accord Crowell v. Kaufmann*, 845 So. 2d 325, 327 (Fla. 2d DCA 2003).

Dr. Mann cannot avoid the preclusive effect of the unopposed summary final judgment for Dr. Ghanavati. The trial court correctly prevented Dr. Mann's efforts to circumvent the collateral estoppel effect of the unopposed summary judgment.

A. The unopposed summary final judgment prevented Dr. Mann from relitigating Dr. Ghanavati's "causal negligence."

The summary final judgment for Dr. Ghanavati – which Dr. Mann did not oppose or appeal – collaterally estopped Dr. Mann from offsetting his own liability by asserting the treating neurologist's fault. *See Crowell*, 845 So. 2d at 327; *S. Bell Tel.*, 668 So. 2d at 1041; *accord Dickey v. Kitroser*, 53 So. 3d 1182, 1184 (Fla. 4th DCA 2011). The trial court correctly relied on collateral estoppel to bar Dr. Mann from relitigating the *same issues* of negligence and causation related to Dr. Ghanavati: issues "common to both causes of action" that had already been adjudicated favorably to the treating neurologist. *Stogniew*, 656 So. 2d at 919

(quotations omitted); *accord Cook v. State*, 921 So. 2d 631, 634 (Fla. 4th DCA 1992) (collateral estoppel "bars relitigation of the same issues between the same parties in connection with a different cause of action") (citations omitted).

The summary final judgment exonerated Dr. Ghanavati from liability. *See Crowell*, 845 So. 2d at 327. Summary judgment was granted because the record was devoid of evidence to support a prima facie claim against Dr. Ghanavati for medical negligence. (*See* A:6; R. 644-51; R. 666; R. 680.) Given this absence of proof, the trial court necessarily determined that Dr. Ghanavati was not negligent and did not cause Mr. Pettigrossi's death. (R. 1391; *see* R. 647-49.) This ruling does not reflect, as Dr. Mann mistakenly contends, that the trial court somehow acted as a "trier of fact" on summary judgment. (Init. Br. 31.) *Cf. Pearce v. Deschesne*, 932 So. 2d 640, 641 (Fla. 4th DCA 2006) ("[a] judge considering a motion for summary judgment is most decidedly not a 'trier of fact'"). Instead, the trial court properly reviewed the record for conflicting evidence. (*See* R. 644-51; R. 1391; A:143-44.) Finding none, summary judgment was granted for Dr. Ghanavati. *See Pearce*, 932 So. 2d at 641 (noting that "only in the absence of such [conflicting] evidence may the judge make a ruling of law that summary judgment is proper").

Specific findings of fact by the trial court were not required. The trial court determined, as a matter of law, that Dr. Ghanavati was not liable. *See Crowell*, 845 So. 2d at 327. This ruling necessarily encompassed issues related to the physician's

duty, breach of duty, and causation. (*See* R. 644-51.) *See Saunders v. Dickens*, 151 So. 3d 434, 441 (Fla. 2014) (elements of a medical malpractice action); *see also Dickey*, 53 So. 3d at 1184 (summary judgment in favor of a co-defendant would prevent remaining defendants from naming that co-defendant as a *Fabre* defendant, "even if later discovery established [the former co-defendant's] negligence"); *Crowell*, 845 So. 2d at 327 (finding that summary judgment for co-defendant physician "exonerate[d] him from fault").

The summary final judgment for Dr. Ghanavati satisfied all elements of collateral estoppel. For the doctrine of collateral estoppel to apply, the following elements must be met:

> (1) an identical issue must be presented in a prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate the issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated.

Provident Life & Accident Ins. Co. v. Genovese, 138 So. 3d 474, 477 (Fla. 4th DCA 2014). Each element is met here.

First, in his motion for summary judgment, Dr. Ghanavati argued that: (1) he did not breach the standard of care; and (2) his medical care and treatment did not cause or contribute to Mr. Pettigrossi's death. (R. 648-49.) These are the identical issues that Dr. Mann now contends he should have been allowed to prove at trial with testimony from Dr. Ostrow, his expert neurologist. (*See* Init. Br. 20-21.)

Second, the issue of Dr. Ghanavati's lack of "causal negligence" was a "critical and necessary part" of the summary judgment determination. *See Provident Life*, 138 So. 3d at 477. Absent evidence that Dr. Ghanavati deviated from the standard of care, or that any act or omission in his consultation proximately caused Mr. Pettigrossi's death, the treating neurologist became entitled to summary judgment. (*See* R. 648-49.)

The third, four, and fifth elements were also satisfied. Not only were the parties to the proceedings identical, but Drs. Mann and Ghanavati had a "full and fair opportunity" to litigate the allegations of the treating neurologist's negligence. *See Provident Life*, 138 So. 3d at 477. And, once the trial court entered its final order on summary judgment, the issues were "actually litigated." *See, e.g.*, *Lucky Nation, LLC v. Al-Maghazchi*, 186 So. 3d 12, 14-15 (Fla. 4th DCA 2016) ("[f]or an issue to have been fully litigated, a court of competent jurisdiction must enter a final decision") (quotation omitted).

Together with his motion for summary final judgment, Dr. Ghanavati submitted the relevant pleadings, excerpts from his deposition, medical records, and the opinion of his retained expert neurologist. (*See* R. 1150-1236.) Dr. Mann chose not to continue the hearing on summary judgment, to oppose the motion with disputed evidence, or to appeal. His inaction, however, does not make the trial court's resolution on summary final judgment any less binding. *See* Restatement

(Second) of Judgments § 27 cmt. d (for purposes of collateral estoppel, an issue may be "submitted and determined on … a motion for summary judgment"; "[a] determination may be based on a failure of pleading or of proof").

The trial court correctly relied on collateral estoppel to exclude the defense expert neurologist's opinions related to the treating neurologist's "causal negligence." The unopposed summary judgment precluded Dr. Mann's attempt to elicit expert neurological opinions or argue that Mr. Pettigrossi's cardiopulmonary arrest and death resulted from Dr. Ghanavati's negligent breach of the standard of care. *See Crowell*, 845 So. 2d at 327; *S. Bell Tel.*, 668 So. 2d at 1040.

B. Dr. Mann did not assert an "empty chair" defense.

Dr. Mann admits that a summary final judgment for a *Fabre* defendant precludes relitigation of the same issues between the same parties at trial. (Init. Br. 25.) He contends, however, that his "empty chair" defense did not require him to prove, by a preponderance of the evidence, that Dr. Ghanavati negligently breached the standard of care. Given that the "empty chair" defense has a lower burden of proof, Dr. Mann argues, the unopposed summary final judgment had no collateral estoppel effect, and he should have been allowed to elicit Dr. Ostrow's "exonerating expert opinions regarding Dr. Ghanavati's causal negligence" at trial. (Init. Br. 21.)

Dr. Mann's argument on appeal rests on his mistaken premise that his defense could be genuinely characterized as an "empty chair" defense. In fact, he asserted a

Fabre defense. Dr. Mann sought to prove Dr. Ghanavati's liability for Mr. Pettigrossi's death, even though the defense failed to plead or otherwise preserve its right under *Fabre* to apportion fault to Dr. Ghanavati.

Dr. Mann did not point to Dr. Ghanavati as the "empty chair" who was the *sole* cause of Mr. Pettigrossi's death. *See, e.g.*, *Vucinich v. Ross*, 893 So. 2d 690, 694 (Fla. 5th DCA 2005). The true nature of Dr. Mann's defense is perhaps best illustrated by his intent to blame Mr. Pettigrossi's death on the negligence of not one, but *two* non-parties: Nurse Ganzy and Dr. Ghanavati. Logically, Dr. Mann cannot square the facts of this case with an "empty chair" defense. Both below and on appeal, Dr. Mann has mischaracterized the true nature of his defense to avoid the collateral estoppel effect of Dr. Ghanavati's unopposed summary final judgment.

The trial court correctly refused to allow Dr. Mann's attempt to elicit expert standard of care testimony to prove the alleged "causal negligence" of the non-party/former defendant treating neurologist, which would have only confused the jury and blurred the distinction between *Fabre* and "empty chair" defenses under Florida law. (R. 1363-64, 1371.) *See also infra*, at Argument I.(C).

1. Dr. Mann's defense arose under *Fabre*.

Dr. Mann did not allege or attempt to prove an "empty chair" defense. He did not point to Dr. Ghanavati as the "empty chair": the sole legal cause of Mr. Pettigrossi's injury and death. Instead, he intended to elicit standard of care opinions

from an expert neurologist – and to argue to the jury – that Dr. Ghanavati's negligence proximately caused the death of Mr. Pettigrossi.

Specifically, Dr. Mann sought to elicit expert evidence that the standard of care required Dr. Ghanavati, as the treating neurologist, to alert the primary care team that the patient's pulmonary status, including changes in blood pressure, should be vigorously monitored. (A:49-50, 51.) As the defense expert neurologist opined, if Dr. Ghanavati had educated the primary patient team that the patient's condition could suddenly worsen, with the potential for cardiorespiratory failure – and if the defense expert had communicated his neurological findings – Mr. Pettigrossi would have been transferred to a higher level of care. (A:49-51.) There, he likely would not have had this catastrophic outcome or, the risk would "at least" have been "minimized." (A:49-50; *see id*. 81-83, 100,145.) In Dr. Mann's view, the jury should have been entitled to hear the expert evidence, find Dr. Ghanavati negligent, and apportion fault to that treating neurologist for Mr. Pettigrossi's death. (*See* R. 1362, 1365-66, 1367; A:140-41, 145-46, 147-48, 153-55.)

Despite Dr. Mann's adamant denials, this is an affirmative defense under *Fabre*. *See, e.g.*, *Vucinich v. Ross*, 893 So. 2d 690, 694 (Fla. 5th DCA 2005); *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996) (citing *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993)). An "empty chair" is "some non-party" alleged to be "the sole legal cause of the harm." *Vucinich*, 893 So. 2d at 694. In

contrast, a *Fabre* defendant is a non-party who is "alleged by a party defendant to be **wholly or partially negligent**." *Id.* (emphasis added). Dr. Mann intended to elicit expert evidence, and argue to the jury, that because Dr. Ghanavati negligently breached the standard of care, he caused Mr. Pettigrossi's death. (R. 1365-66, 1367-68; *see* A:145-46, 147-48, 154.)

Dr. Mann sought to apportion fault by proving Dr. Ghanavati's "causal negligence" – even though he never pled *Fabre* or asked to include Dr. Ghanavati on the verdict form. (*See* R. 1364, 1367; *see* R. 1392.) The trial court correctly stopped this attempted "end run" around *Fabre*. (*See* A:138, 150, 156; R. 1363, 1364, 1367; R. 1364 (T. 19), 1367 (T. 32), 1371 (T. 45); *accord* R. 1392.)

Under *Fabre*, before a jury can "consider and allocate the percentage of fault attributable" to a non-party in rendering a verdict, the party defendant must identify that non-party and plead his negligence as an affirmative defense. *Vila v. Phillip Morris USA Inc.*, 215 So. 3d 82, 86 (Fla. 3d DCA 2016); *accord Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1264 (Fla. 1966). Here, Dr. Mann did not name Dr. Ghanavati as a *Fabre* defendant, or plead the treating neurologist's negligence as an affirmative defense.

Nor could Dr. Mann have done so. Once the trial court rendered the unopposed summary judgment for Dr. Ghanavati, and the judgment became final, Dr. Mann could not plead or prove that the treating neurologist's negligence

proximately caused the death of Mr. Pettigrossi. The unopposed summary final judgment in Dr. Ghanavati's favor exonerated him from liability and precluded re-litigation of the same issues related to his liability, including his alleged "causal negligence." *See S. Bell Tel.*, 668 So. 2d at 1040; *accord Crowell*, 845 So. 2d at 327.

The trial court correctly concluded, then, that the defense was not logically entitled to elicit its expert standard of care opinions or argue that Dr. Ghanavati's negligent care and treatment proximately caused injury to Mr. Pettigrossi. (R. 1392.) The unopposed summary judgment for Dr. Ghanavati absolved him of any fault.

2. The case law relied on by Dr. Mann does not allow him to prove Dr. Ghanavati's "causal negligence."

In an effort to persuade the Court that he sought only to present an "empty chair" defense, Dr. Mann relies on *Vila v. Philip Morris USA, Inc.*, 215 So. 3d 82 (Fla. 3d DCA 2016), and *Haas v. Zaccaria*, 659 So. 2d 1130 (Fla. 4th DCA 1995). Neither opinion supports Dr. Mann's argument.

First, *Vila* does not establish that the trial court here erred in excluding expert evidence of Dr. Ghanavati's "causal negligence." In *Vila*, the jury was allowed to decide whether "smoking cigarettes manufactured by Philip Morris USA Inc. was a legal cause" of the plaintiff's laryngeal cancer. 215 So. 3d at 85. But because Philip Morris never pled the liability of a non-party manufacturer as a *Fabre* affirmative defense, the plaintiff argued that the trial court erred in including this question on the verdict form. *Id*.

At trial, Philip Morris argued that, even if the plaintiff's cancer was caused by his addiction, "smoking cigarettes manufactured *by Philip Morris* was not a legal cause" of the plaintiff's injury. *Id*. at 87 (emphasis added). Philip Morris instead argued that the plaintiff's "smoking history" included years spent in the Dominican Republic, where Marlboro cigarettes were manufactured not by Philip Morris, but by E. Leon Jimenes. *Id*. Philip Morris "did not specifically identify E. Leon Jimenes as a nonparty who was responsible" for the plaintiff's injuries, nor did the defendant "ask the jury to apportion any fault to E. Leon Jimenes by seeking to include E. Leon Jimenes as a nonparty defendant." *Id*. at 86. "Philip Morris merely presented an 'empty chair' defense." *Id*. at 86-87.

Vila reiterates that an "empty chair" refers to "some non-party" who is the "*sole* legal cause of the harm alleged." *Id*. at 86 (emphasis added) (citations omitted). With a *Fabre* affirmative defense, a non-party is alleged to be "wholly or partially negligent." *Id.* In contrast, no fault is apportioned to the "empty chair." *Id*. Thus, the *Vila* court rejected the plaintiff's argument that the trial court, in submitting the question of causation to the jury, somehow placed the non-party manufacturer on the verdict form as a *Fabre* defendant. *Id*. at 86-87. Nowhere in *Vila* did Philip Morris claim the non-party manufacturer was itself *negligent*. 215 So. 3d at 86-87.

Here, unlike the facts of *Vila*, the defense specifically identified Dr. Ghanavati, a former co-defendant, as a *negligent* non-party who should share in the

fault for Mr. Pettigrossi's injury and death. Dr. Mann did not merely point to an "empty chair" as the sole legal cause of the injury; instead, he intended to blame the patient's death on the negligence of his former co-defendant, Dr. Ghanavati. Dr. Mann sought to apportion fault – either wholly or partially – to his former co-defendant (and now a non-party) for his alleged negligence.

Vila illustrates that Dr. Mann did not truly assert an "empty chair" defense. *See Vila*, 215 So. 3d at 86-87. Expert opinions related to Dr. Ghanavati's standard of care were intended to support Dr. Mann's attempt to apportion fault to the non-party treating neurologist, who was no longer a co-defendant. Yet Dr. Mann did not plead – and, given Dr. Ghanavati's unopposed summary final judgment, could not prove – that the treating neurologist should be held wholly or partially negligent for Mr. Pettigrossi's injury and death under *Fabre*. Thus, the trial court correctly rejected Dr. Mann's attempt to avoid the collateral estoppel effect of Dr. Ghanavati's unopposed summary final judgment.

Similarly, *Haas* does not entitle Dr. Mann to reversal. In *Haas*, the trial court *denied* plaintiff's motion for partial summary judgment on liability, but nonetheless excluded evidence showing that the plaintiff's injury could have occurred without negligence on the part of the defendant orthopedic surgeons. 659 So. 2d at 1132. The trial court also struck the defendants' allegations that a non-party (a vascular surgeon) was wholly or partially responsible for the plaintiff's injury. *Id*. Given this

ruling, the trial court prohibited any testimony from the defense's retained vascular surgeon experts on the appropriate standard of care. *Id*.

Dr. Mann emphasizes that the trial court in *Haas* improperly precluded the orthopedic surgeons' defenses – including an "empty chair" defense. (Init. Br. 28 (citing *Haas*, 659 So. 2d at 1131-33).) But Dr. Mann omits other important elements of the opinion. Most notably, the *Haas* Court did not limit its consideration to an "empty chair" defense, but also addressed the defendants' available *Fabre* defense. 659 So. 2d at 1133-34.

Specifically, the defense in *Haas* sought to plead and prove the negligence of a non-party: a vascular surgeon (Dr. Wengler), whom the defense contended was wholly or partially responsible for the plaintiff's injury. *Id*. at 1132, 1133-34. The orthopedic surgeon defendants in *Haas* intended to prove that Dr. Wengler was responsible for the plaintiff's injury – and to show the absence of their own negligence – with expert standard of care testimony. *Id*. at 1132, 1133. Finding that the trial court erred in excluding relevant evidence, the Fourth District ruled that the defendants should have been allowed to plead and prove Dr. Wengler's negligence, and to add his name to the verdict form under *Fabre*. *Id*. at 1133-34.

But in *Haas*, unlike this case, the non-party's fault had *not* already been decided at summary judgment. *See id*. at 1132. The orthopedic surgeon defendants were still entitled to plead an affirmative defense under *Fabre*, and to elicit expert

testimony showing that the patient's injury resulted from that non-party vascular surgeon's negligence – and not the defendants' own. *Id*. at 1133-34. The defense expert vascular surgeons' standard of care opinions were admissible to prove the defendants' *Fabre* affirmative defense against Dr. Wengler. *See id*. at 1132-34.

Haas shows that Dr. Mann did not invoke a true "empty chair" defense. Instead, he sought to elicit the defense expert neurologist's standard of care opinions and to prove Dr. Ghanavati's "causal negligence" under *Fabre*. *See Haas*, 659 So. 2d at 1133-34.

Dr. Mann cannot point to a single case that entitles him, under the status of the pleadings, to present evidence and argue that Dr. Ghanavati's negligence proximately caused Mr. Pettigrossi's injury and death. (R. 1391-92.) Dr. Mann seeks simply to relitigate the same issues, between the same parties, already decided in Dr. Ghanavati's favor at summary judgment. This he cannot do.

3. The trial court did not impermissibly shift the burden of proof to Dr. Mann.

Given the actual nature of Dr. Mann's defense, the trial court's ruling did not "improperly shift … the burden of proof." (Init. Br. 30.) As a practical matter, the trial court never required Dr. Mann to establish the absence of causation by proving, within a reasonable degree of medical probability, that Dr. Ghanavati breached the standard of care. Instead, *Dr. Mann* argued that he was entitled to elicit "exonerating expert opinions" establishing Dr. Ghanavati's "causal negligence." (Init. Br. 21.)

Additionally, the record reflects that Dr. Mann did present evidence, and argue to the jury, that Mr. Pettigrossi's injury and death possibly may have resulted from the inaction of the former-defendants/treating physicians – including Dr. Ghanavati.

The trial court indicated before trial that it would allow Dr. Mann to argue that because treatment of GBS is not within his specialty as a hospitalist, he should have been entitled to rely on the treating neurologist's expertise. (A:155-56; R. 1367-68, 1370-71; *see also* A:147-48, 150-51.) At trial, Dr. Mann testified that GBS is a rare disease, which he had never before encountered in his practice. Dr. Mann also elicited expert evidence showing that he complied with the appropriate standard of care by retaining the appropriate specialists to consult and assist in the patient's treatment. The treating neurologist, Dr. Ghanavati, was among those specialists consulted. According to Dr. Mann's expert, the hospitalist had a right to rely on the specialists – including Dr. Ghanavati, the specialist responsible for diagnosing, treating, and managing neurological diseases like GBS.

Further, Dr. Mann presented evidence that three specialists saw Mr. Pettigrossi on Saturday afternoon (March 24), after Dr. Mann had examined the patient. Yet as Dr. Mann emphasized to the jury, not one of the three treating physicians ordered Mr. Pettigrossi's transfer to the ICU – even though they, like Dr. Mann, all had the ability to do so. (T. 1542-44.)

In closing argument, defense counsel emphasized the decision of Dr. Ghanavati, "the specialist who manages this disease process," *not* to transfer the patient to the ICU, despite increases in his pulse rate:

> And so Dr. Ghanavati doesn't send him to the intensive care unit and he's testified, "I didn't think he needed to go the intensive care unit," yet they're blaming Dr. Mann. Is that fair?

(T. 1543-44.)

This evidence provided the jury with other possible explanations of the cause of Mr. Pettigrossi's cardiorespiratory arrest and death. The trial court did not require Dr. Mann to present expert testimony establishing the standard of care of any of the former defendants/treating physicians, including Dr. Ghanavati. The jury heard the evidence and the argument that Dr. Mann was not to blame for the patient's injury and death. Nonetheless, the jury rejected this defense, found that Dr. Mann's negligence was a legal cause of Mr. Pettigrossi's death, awarded $2,850,000 in damages, and charged Dr. Mann with 85% of the fault. (R.1684-85.)

The trial court did not commit reversible error in excluding the "exonerating expert opinions regarding Dr. Ghanavati's causal negligence." (Init. Br. 21.) The proffered expert testimony was not the only evidence that could have exonerated Dr. Mann. In fact, the defense was allowed to introduce evidence – and argue to the jury – that Dr. Mann was not to blame for Mr. Pettigrossi's death. While Dr. Mann may be unhappy with the jury's verdict, he is not entitled to a new trial.

C. The trial court did not err in ruling that the jury would be confused by Dr. Mann's attempt to blame both Nurse Ganzy and Dr. Ghanavati for Mr. Pettigrossi's death.

The trial court also did not err in ruling that the admission of expert testimony and argument related to Dr. Ghanavati's purported breach of the standard of care of would likely confuse the jury. (R. 1391-92.)

First, as the trial court correctly explained, the typical "empty chair" defense contemplates a showing that the plaintiff's injury is attributable "*solely* to the negligence of a person not party to the suit." *Clement v. Rousselle Corp.*, 372 So. 2d 1156, 1158 (Fla. 1st DCA 1979) (emphasis added); *accord Vucinich v. Ross*, 893 So. 2d 690, 694 (Fla. 5th DCA 2005) (quoting *Phillips v. Guarneri*, 785 So. 2d 705, 707, n.4 (Fla. 4th DCA 2001)); *Loureiro v. Pools by Greg, Inc.*, 698 So. 2d 1262, 1264 (Fla. 4th DCA 1997). The term "empty chair" refers to "some non-party" who is "the sole legal cause of the harm alleged." *Vucinich*, 893 So. 2d at 694 (citation omitted).

The defense contends that Florida courts' use of the term "sole" means that as between Dr. Mann and Dr. Ghanavati, "there is no sharing of liability." (Init. Br. 33-34.) Yet here, Dr. Mann did not intend to argue that Mr. Pettigrossi's death was caused solely by the negligence of "some non-party." *Vucinich*, 893 So. 2d at 694; *see Clement*, 372 So. 2d at 1157. Dr. Mann did not suggest, for instance, that Plaintiff sued the wrong doctor. *See Vila*, 215 So. 3d at 86-87; *see also King ex rel. Murray*

v. Rojas, 767 So. 2d 510, 511 n.1 (Fla. 4th DCA 2000) ("When a defendant in a negligence action alleges that a plaintiff's injury resulted from someone else's negligence rather than his own, the defendant is simply elaborating on the simplest defense of them all, namely that [the] plaintiff has sued the wrong person"). Nor did Dr. Mann rely only on a general denial of his own negligence. *See Clement*, 372 So. 2d at 1157. Instead, Dr. Mann sought to affirmatively prove that liability for Mr. Pettigrossi's death should be shared by two non-parties: (1) Dr. Ghanavati, who was not named as a *Fabre* defendant; and (2) Nurse Ganzy, who was. (R. 1362, 1365-66, 1367, 1369; A:140-41, 145-47.)

To allow Dr. Mann to elicit expert opinion testimony from a neurologist as to the appropriate standard of care – when the treating neurologist was no longer a defendant – would have created a real risk of confusing the jury with irrelevant evidence. (*See* R. 1356-57; R. 1364 (T. 19), 1371 (T. 45).) The jury also could have inferred that Dr. Ghanavati had settled with Plaintiff. This is impermissible,[2] and would had led to the need for an equally impermissible curative instruction that Dr. Ghanavati had been found not liable as a matter of law. (*See* R. 1356-57.)

Dr. Mann further emphasizes that under the case law, a defendant may assert that the same non-party is both an "empty chair" and a *Fabre* defendant. (Init. Br.

[2] *See Bern v. Camejo*, 168 So. 3d 232 (Fla. 3d DCA 2014) (reversing judgment where defendant had been allowed to tell the jury that the plaintiff blamed a person no longer a party to the suit and, in fact, had initially sued that former defendant).

34 (citing *Haas*, 659 So. 2d at 1132-34; *Graham v. Brown*, 1994 WL 456631, *1-4 (M.D. Fla. Aug. 18, 1994).) Yet neither *Haas* nor *Graham* addressed the collateral estoppel effect of an unopposed summary final judgment in favor of that non-party, a former defendant. Indeed, *Graham* simply considered the legal validity of the "empty chair" defense to deny a pre-trial motion to strike affirmative defenses. 1994 WL 456631, *3. Given the preclusive effect of the unopposed summary judgment, Dr. Mann could not plead and prove that Dr. Ghanavati's negligent care proximately caused Mr. Pettigrossi's death.

Dr. Mann's defense was really nothing more than an attempted end-run around the *Fabre* requirements. Dr. Mann essentially admits as much. (Init. Br. 34 (noting that the defense concerned "the causal impact of the care rendered by" the non-party/former defendant.) The effect of the trial court's ruling, then, was not to bar a true "empty chair" defense.

In any event, Dr. Mann was allowed to present evidence and argument on alternate causes of Mr. Pettigrossi's injury and death. Dr. Mann elicited expert testimony that he had called in the right consults, and was entitled to rely on the expertise of Dr. Ghanavati and the other specialists. Dr. Mann emphasized that Dr. Ghanavati is the specialist responsible for diagnosing, treating, and managing GBS. (*See* T.1543-44.) Dr. Ghanavati and two other specialists saw Mr. Pettigrossi after Dr. Mann on the afternoon of March 24, yet none of the specialists ordered the

patient to be transferred to the ICU. Given this evidence, defense counsel repeatedly argued to the jury that Dr. Mann should not be blamed for Mr. Pettigrossi's death. (*E.g.*, T. 1543-44.) The jury rejected Dr. Mann's arguments.

Dr. Mann cannot fault Plaintiff's counsel, or the trial court, for limiting his defenses at trial. Dr. Mann elected to name only Nurse Ganzy as a *Fabre* defendant. He chose not to defend against or appeal the summary final judgment in favor of Dr. Ghanavati. Dr. Mann cannot complain that the trial court mistakenly excluded "exonerating expert opinions" proving that Dr. Ghanavati's negligence caused or contributed to Mr. Pettigrossi's death. (Init. Br. 20-21, 34-36.)

Dr. Mann fails in his creative attempt to avoid the preclusive effect of Dr. Ghanavati's unopposed summary final judgment. While Dr. Mann criticizes the trial court for barring a defense that he now contends was crucial to his case, only he and his trial counsel are to blame.

D. Even if the trial court erred, its ruling was harmless.

The trial court correctly interpreted the doctrine of collateral estoppel in ruling that Dr. Ghanavati's unopposed summary final judgment – which established his lack of liability – prevented Dr. Mann from eliciting expert opinion testimony as to Dr. Ghanavati's "causal negligence" for Mr. Pettigrossi's death. Yet even if the trial court erred (which it did not), the error was harmless. *See, e.g., Special v. W. Boca*

Med. Ctr., 160 So. 3d 1251 (Fla. 2014). None of the examples of prejudice cited by Dr. Mann is persuasive.

1. Dr. Mann did elicit expert evidence, and argue to the jury, that he should not be blamed for his failure to transfer Mr. Pettigrossi to the ICU.

Dr. Mann first argues that his expert neurologist's opinions were important to diminish the testimony of Plaintiff's experts that Dr. Mann negligently failed to transfer Mr. Pettigrossi to the ICU. According to Dr. Mann, Dr. Ostrow would have opined that Dr. Ghanavati "breached the standard of care by failing to properly inform Dr. Mann … [of] the appropriate management and course of treatment" of GBS. (Init. Br. 36.) Under "controlling 'empty chair' case law," Dr. Mann contends, he was entitled to rely on his expert's opinion to argue other possible causes of Mr. Pettigrossi's injury and death. (*Id*. at 37.)

Dr. Mann seeks to relitigate issues of "causal negligence" already decided in Dr. Ghanavati's favor at summary judgment. This he cannot do. And, the defense did, in fact, point to Dr. Ghanavati's conduct in arguing that Dr. Mann should not be blamed for Mr. Pettigrossi's death. (T. 1542-44, 1547, 1560, 1562-63, 1567-68, 1573-74.)

For instance, the defense used the testimony of its expert hospitalist to refute Plaintiff's claims that Dr. Mann should have known the serious risks of GBS and the proper course of treatment. The defense expert testified that Dr. Mann consulted

with the right specialists and was entitled to rely on the expertise of those physicians. (T. 1174-75.) As the defense expert hospitalist explained to the jury, a neurologist is the correct specialist to manage potential problems or causes of muscle weakness, like those experienced by Mr. Pettigrossi. (T. 1177.) Dr. Mann was not required to research the disease process of GBS, which is relatively rare. (T. 1180, 1181-82.) Instead, the defense hospitalist expert opined that Dr. Mann appropriately relied on the treating neurologist for information related to diagnosis and treatment of the condition. (T. 1181-82.)

Further, the defense expert hospitalist testified that Dr. Mann's decision not to transfer Mr. Pettigrossi to the ICU was not negligent. In the defense expert's opinion, Dr. Mann could have appropriately relied on the neurologist's decision. (T. 1183-84.) Dr. Ghanavati saw Mr. Pettigrossi on that Saturday afternoon (March 24) and was aware of the patient's increased heart rate and elevated blood pressure. (T. 1205.) Nonetheless, Dr. Ghanavati did not order Mr. Pettigrossi's transfer to the ICU, even though the neurologist was best qualified to treat GBS. (*See* T. 1184-85, 1205.)

Defense counsel relied on this evidence to reiterate the defense's continuing theme: Dr. Mann should not be blamed for Mr. Pettigrossi's death. The jury heard the evidence and the argument, but rejected Dr. Mann's defense that he was not to

blame. The trial court's exclusion of the defense expert neurologist's opinions did not prejudice Dr. Mann.

2. The trial court did not rule inconsistently in denying the directed verdict as to Nurse Ganzy.

Next, Dr. Mann suggests that the trial court unfairly "barr[red] Dr. Mann's empty chair defense" based on Dr. Ghanavati's summary judgment, while refusing to grant a directed verdict on Dr. Mann's *Fabre* defense against Nurse Ganzy. (Init. Br. 37-38.) In Dr. Mann's view, the trial court's grant of summary judgment for Dr. Alayoubi established, as "undisputed fact," that Nurse Ganzy never told him about the stat cardiology order. (*Id*.) Dr. Mann argues the trial court should have directed a verdict on his *Fabre* defense and found Nurse Ganzy negligent as a matter of law – even though the jury ultimately found this, as a matter of fact.

Dr. Mann cannot compare the trial court's exclusion of his expert neurologist's opinions with denial of the directed verdict on the *Fabre* defense. Notwithstanding Dr. Ghanavati's favorable summary final judgment, the defense sought to prove his negligence. In comparison, Plaintiff did not try to blame Dr. Alayoubi, the treating cardiologist, for Mr. Pettigrossi's death. (*See* T. 1522-24.)

Dr. Alayoubi's summary judgment established *his* lack of fault – not that Nurse Ganzy herself must have been negligent. Likewise, Dr. Alayoubi's testimony did not indisputably prove the nurse's failure to meet the standard of care. Dr. Alayoubi testified that he was called for the cardiology consult at 1:50 am on

Sunday, March 25. (T. 1285, 1286-87.) He was called by Nurse Ganzy for management of the patient's hypertension and never spoke with Dr. Mann. (T. 1285-86, 1287-88, 1293.) Dr. Alayoubi did not recall Nurse Ganzy, or his conversation with her. (T. 1286, 1288, 1289, 1290.) His understanding, however, was that the patient was stable, and the call was for a routine consult. (T. 1291-92 ("[s]he didn't tell me – it was not a stat consult"); T. 1301-02 (based on information from the nurse, he believed the 1:50 am call was a routine consult); T. 1304 ("I was not told it was a stat consult").)

Even if, as Dr. Mann contends, Dr. Alayoubi unequivocally asserted that he was not told by Nurse Ganzy about the stat consult, the jury was not required to accept his testimony as undisputed fact. Indeed, the defense's nursing expert, Ms. Coffey, admitted that the medical records reflected Nurse Ganzy did request a stat cardiology consult. (T. 1424-25.) Plaintiff's expert hospitalist also testified that the record reflected a significant dispute as to the facts surrounding the cardiology consult – including when the cardiologist was called and what he was told by the nurse. (T. 646-47, 650-51, 664; *see also* T651 (stating, "*if* he ordered a stat consult and the nurse did not carry that out, that's a deviation from the standard of care").)

In any event, Plaintiff's expert hospitalist testified, *Dr. Mann* should have followed up with Nurse Ganzy within forty-five minutes to an hour after ordering the cardiology consult. (T. 601-03, 651-52, 664.) Dr. Mann, as the primary care

physician, was responsible for the patient. (T. 568-69, 602, 651-52, 665.) He should not have left that to chance. (T. 664.) Had Dr. Mann followed the standard of care – and followed up on the cardiology consult – there would have been no need even to consider whether Nurse Ganzy correctly communicated the information to Dr. Alayoubi. (*See* T. 665, 667-68.)

Alternatively, assuming *arguendo* that the trial court erred in refusing to direct a verdict as to Nurse Ganzy, Dr. Mann cannot show that he was prejudiced. The jury heard the evidence and the argument. Defense counsel specifically relied on Dr. Alayoubi's testimony in arguing to the jury that Nurse Ganzy never informed the treating cardiologist that it was a stat consult. (T. 354-56; T. 1554-56, 1567-68.) Had Nurse Ganzy "done her job," carried out Dr. Mann's order for a stat cardiology consult, and "met the standard of care," defense counsel argued, Mr. Pettigrossi's death "would not have happened." (T. 1535; *see* T. 1548-50, 1562-63, 1567-68, 1572, 1573-75.) Based on the disputed facts, the jury determined that Nurse Ganzy's negligence was a legal cause of Mr. Pettigrossi's death, and apportioned 15% fault to her. (R. 1684-85.)

While Dr. Mann may be unhappy with the apportionment of fault to Nurse Ganzy, this was not a "defeat" of his *Fabre* affirmative defense. Dr. Mann repeatedly argued that he was not to blame. (T. 1535, 1562-63, 1567-68, 1573-74.) Plaintiff did

not seek – nor did the trial court grant – a directed verdict against Dr. Mann on the question of Nurse Ganzy's negligence.

Likewise, Dr. Mann cannot suggest that he was prejudiced by his supposed inability to argue that Dr. Alayoubi should have admitted Mr. Pettigrossi to the ICU. Plaintiff initially raised both an "empty chair" and a *Fabre* objection to defense counsel's attempt to blame Dr. Alayoubi for his failure to admit Mr. Pettigrossi to the ICU. (T. 1534.) Implicit in defense counsel's argument was the suggestion that Dr. Alayoubi, like Nurse Ganzy, should be found at fault. (*See* T. 1533-34.) Unlike Nurse Ganzy, however, Dr. Alayoubi was not named as a *Fabre* defendant – and, given the unopposed summary judgment, he necessarily could not have been. The trial court correctly sustained Plaintiff's objections.

Even if this was error, there was no harm. Ultimately, defense counsel argued to the jury – without objection – that like the other consulting physicians, Dr. Alayoubi did not order Mr. Pettigrossi's admission to the ICU. (T. 1569.)

> And Dr. Alayoubi, when he was finally called, apparently was given information, as well, and didn't transfer him to the ICU either. *Shouldn't blame Dr. Mann for that.*

(T. 1569 (emphasis added).)

3. Plaintiff's "limited defense" comment was not improper or prejudicial.

Next, Plaintiff's counsel did not unfairly argue to the jury that Dr. Mann advanced a "limited defense." (Init. Br. 38-39 (citing *JVA Enters., I, LLC v. Prentice*,

48 So. 3d 109, 115 (Fla. 4th DCA 2010); *State Farm Mut. Auto. Ins. Co. v. Thorne*, 110 So. 3d 66, 73-75 (Fla. 2d DCA 2013).) Dr. Mann suggests that in closing argument, Plaintiff's counsel capitalized on the evidence that he had successfully stricken: the "empty chair" defense and the standard of care opinions of the defense's expert neurologist. This is not true.

In his rebuttal argument, Plaintiff's counsel characterized the defense as "limited" because defense counsel did little to explain or justify Dr. Mann's conduct in his closing argument. (T. 1578-80.) As Plaintiff's counsel argued:

> The defense here is not a defense of Dr. Mann. They've given up on that. You've heard it by how much time they spent on blaming the nurses.
>
> ….
>
> But that's their defense. They want to blame the nurse.

(T. 1578.) He continued, noting that the "limited defense" of Dr. Mann was "mostly centered around … the other doctors." (T. 1579.) Over objection, Plaintiff's counsel argued:

> [W]hat you did hear in defense of Dr. Mann mostly was along the lines of, "Well, three other physicians all saw him and how are you going to blame him when none of them thought that he needed to be in the ICU?"
>
> But what's the glaring, glaring difference? …. Not one of those doctors was given that information about the critical values, change in his condition. Not one of them.

(T. 1580-81.)

The import of the rebuttal argument is clear. Plaintiff's counsel argued that the defense focused on blaming other physicians and Nurse Ganzy, without explaining why *Dr. Mann* neglected to appreciate the precipitous decline in Mr. Pettigrossi's condition. Nowhere in his rebuttal argument did Plaintiff's counsel seek to highlight the defense's lack of expert neurological opinions. *Cf. Thorne*, 110 So. 3d at 73-75 (plaintiff's counsel improperly emphasized the defense's lack of expert evidence, when plaintiff had successfully limited that expert testimony); *JVA Enters.*, 48 So. 3d at 115 (same).

4. The jury's apportionment of fault to Nurse Ganzy was not against the manifest weight of the evidence.

Lastly, Dr. Mann cannot claim that the jury's apportionment of fault was "manifestly unjust." (Init. Br. 39.) The jury heard the evidence and the arguments, and attributed 15% of the fault to Nurse Ganzy. The jury's decision was consistent with the evidence, which showed that Dr. Mann was responsible for managing Mr. Pettigrossi's care and treatment. (*E.g.*, T. 602-3.) The jury's apportionment of 85% fault to Dr. Mann, as the hospitalist responsible for managing Mr. Pettigrossi's care, was not against the manifest weight of the evidence.

The trial court's rulings did not prejudice Dr. Mann. The jury heard sufficient evidence to allow for a finding that Dr. Mann was not to blame for Mr. Pettigrossi's death. Nonetheless, the jury rejected the defense's theories, and found Dr. Mann liable.

For all these reasons, Dr. Mann is not entitled to a new trial. The trial court did not err in precluding Dr. Mann from relitigating issues of Dr. Ghanavati's "causal negligence," which had been finally adjudicated in the treating neurologist's favor before trial. Dr. Mann cannot blame Plaintiff or the trial court for his defense counsel's failure to properly plead, or preserve, a *Fabre* affirmative defense against the non-party/former defendant, Dr. Ghanavati. And, even if the trial court erred in excluding the evidence and argument related to Dr. Ghanavati's negligence, that error was harmless.

II. The trial court did not abuse its discretion in admitting Mr. Pettigrossi's excited utterance.

Standard of Review. Generally, a trial court's decision to admit evidence is reviewed under the abuse of discretion standard. *E.g.*, *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008).

A. Mr. Pettigrossi's statement was not hearsay.

Preliminarily, Mr. Pettigrossi's statement should not be considered hearsay. Plaintiff did not offer the hearsay statement ("Get me out of here, they're killing me") to prove the truth of the matter asserted. *See* § 90.801(1)(c), Fla. Stat. (2017). Plaintiff did not suggest that Dr. Mann should be liable for murdering his patient. Instead, the testimony allowed the jury to better understand the ordeal experienced by Mr. and Mrs. Pettigrossi. (T. 997-99, 1001-2; T. 1529-30.) This relevant, probative evidence supported Mrs. Pettigrossi's own claim for damages for mental

pain and suffering caused by her husband's injury and death. (*See* T. 998, 1001-2; T. 1529-30; R. 1685.) For this reason alone, the trial court did not err in admitting Mrs. Pettigrossi's testimony. *See Dade Cnty. School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) ("if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record").

B. Mr. Pettigrossi's statement qualified as an excited utterance.

Alternatively, if this Court finds the statement is hearsay, the trial court did not err in allowing Mrs. Pettigrossi's testimony under the excited utterance exception. Before admitting a statement as an excited utterance under section 90.803(2), Florida Statutes, the trial court must first determine whether the declarant has the "necessary state of mind" for his statement to qualify as an excited utterance. *D.F. v. State*, 730 So. 2d 384, 384 (Fla. 4th DCA 1999). This is a preliminary question of fact. *Mariano v. State*, 933 So. 2d 111, 116 (Fla. 4th DCA 2006). Absent an abuse of discretion, the trial court's ruling will not be disturbed on appeal. *D.F.*, 730 So. 2d at 384; *see Mariano*, 933 So. 2d at 116-17.

Under section 90.803(2), the "statement or excited utterance" must relate to "a startling event or condition" and must be made while the declarant "was under the stress of excitement caused by the event or condition." § 90.803(2), Fla. Stat.; *see Hudson*, 992 So. 2d at 107. "A statement qualifies for admission as an excited

utterance when (1) there is an event startling enough to cause nervous excitement; (2) the statement was made before there was time for reflection; and (3) the statement was made while the person was under the stress of the excitement from the startling event." *Rogers v. State*, 660 So. 2d 237, 240 (Fla. 1995) (citing *State v. Jano*, 524 So. 2d 660, 661 (Fla. 1988)).

So long as "the excited state of mind is present when the statement is made, the statement is admissible if it meets the other requirements" of section 90.803(2). *Jano*, 524 So. 2d at 661 (quotation omitted). In deciding whether the requisite state of stress or excitement existed, the trial court may consider "the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event and the subject matter of the statements." *Williams v. State*, 967 So. 2d 735, 748 (Fla. 2007) (quoting *Jano*, 524 So. 2d at 661). An excited utterance need not be made contemporaneously with the event. *Hudson*, 992 So. 2d at 107. The excited state "may exist a substantial length of time after the event." *Mariano*, 933 So. 2d at 116.

The statement also must be made "without time for reflection." *Hudson*, 992 So. 2d at 107 (quotation omitted). "Time for reflective thought" provides the declarant with "time to contrive or misrepresent." *Id*. "Thus, where the time between the event and the statement is long enough to permit 'reflective thought,' the statement will be excluded unless there is evidence that the 'declarant did not in fact engage in a reflective thought process.'" *Browne v. State*, 132 So. 3d 312, 317 (Fla.

4th DCA 2014) (citation omitted). Generally, a narrative of past events, even if made close to the startling event and while the declarant was upset, is not considered to be an excited utterance. *E.g.*, *Mariano*, 933 So. 2d at 117-18.

Here, the trial court did not abuse its discretion in admitting Mrs. Pettigrossi's testimony. Mrs. Pettigrossi testified that at 8 pm on Saturday, March 24, she received a telephone call from her husband, in which he stated, "Get me out of here, they're killing me." (T. 1002-4.) This was the last time she spoke with him. (T. 1005.) Five hours later, at 4:30 am on Sunday, March 25, he suffered a cardiac arrest. Although he was eventually resuscitated and moved to the ICU, he never regained consciousness. (*See* T. 1004-6.) He died April 9. (T. 1005-6.)

Dr. Mann contends that Plaintiff failed to show that Mr. Pettigrossi's statement qualified as an "excited utterance." The record shows, however, that Mr. Pettigrossi had the requisite state of mind for his statement to qualify as an excited utterance. (*See* T. 996-99, 1001-2.)

In his early seventies, Mr. Pettigrossi had already been hospitalized since Wednesday, March 21. (T. 984-86.) Mrs. Pettigrossi visited her husband on Thursday and Friday (March 22 and 23); when she saw him that Saturday afternoon (March 24), she was shocked by his appearance. (T. 994.) He was "paralyzed in his arms and his legs." (T. 994; *see* T. 590-91.) He was "in trouble." (T. 590-91.)

Three hours before Mr. Pettigrossi called his wife, he had experienced increased heart rates and elevated blood pressures significant enough for Nurse Ganzy to call and report the critical levels to Dr. Mann. (T. 1004; *see* T. 593-94, 596-97.) Mrs. Pettigrossi was never informed of the nurse's call to Dr. Mann or his order for a stat cardiology consult. (T. 1004.) Mr. Pettigrossi continued to experience elevated heart rates and blood pressure levels; he needed constant oxygen. (T. 591; T. 1362-66.) In the opinion of Plaintiff's expert neurologist, Dr. Mann should have immediately transferred Mr. Pettigrossi to the ICU. (T. 597-98, 599, 601-3.) Mr. Pettigrossi was so incapacitated that he had to ask a nurse to hold the phone to his ear. (T. 998-99; *see* T. 1017-18, 1020-22.)

Mr. Pettigrossi's age and physical and mental condition, along with the facts surrounding his hospitalization and the subject of his phone call, provided ample evidence of his stressful state of mind. *See Williams*, 967 So. 2d at 748. The trial court did not abuse its discretion in treating Mr. Pettigrossi's late-night telephone call to his wife as an excited utterance. *See id*.

Nonetheless, Dr. Mann suggests that before Mr. Pettigrossi made the telephone call to his wife, he had time for reflective thought. Dr. Mann asserts that neither he nor anyone else "was doing anything untoward to Mr. Pettigrossi at the time of his phone conversation with Mrs. Pettigrossi, let alone 'killing' him." (Init. Br. 41.) According to Dr. Mann, because Mr. Pettigrossi's hearsay statement "did

not contemporaneously reflect an observation," the excited utterance exception does not apply. (*Id*.)

Dr. Mann misinterprets the excited utterance exception. An excited utterance need not be made contemporaneously with the event. *Hudson*, 992 So. 2d at 107. There is no "bright-line rule of hours or minutes" to test the time between the stressful event and the declarant's statement. *Rogers*, 660 So. 2d at 240. An excited state "may exist a substantial length of time after the event." *Mariano*, 933 So. 2d at 116 (citation omitted). Plaintiff was not required to prove that Dr. Mann was engaged in "untoward" conduct at the time of the patient's phone call.

For that matter, the "startling event" that precipitated Mr. Pettigrossi's phone call should not be limited to a single event. Although the nurse measured critical values in heart rate and blood pressure at 8 pm on March 24 – and contacted Dr. Mann with that information – Mr. Pettigrossi's condition continued to deteriorate. (*See* T. 590-91; T. 1362-66.)

Even if the timing is unclear, the record shows that Mr. Pettigrossi lacked "the reflective capacity necessary for conscious misrepresentation." *Williams*, 967 So. 2d at 948. His hearsay statement was not a narrative. *Cf. Mariano*, 933 So. 2d at 117. When Mrs. Pettigrossi answered the late-night phone call on that Saturday, Mr. Pettigrossi blurted, "Get me out of here, they're killing me." (T. 995-96, 1002.) Mrs. Pettigrossi sought to reassure her husband by telling him that she would return to the

hospital "early, early in the morning" (T. 1003), but the call ended before she had an opportunity to ask the nurses any questions (T. 1017-18, 1020-22). She assumed the nurses must have hung up on her; her husband "couldn't have." (T. 1020-21.)

Facts surrounding Mr. Pettigrossi's physical and mental condition, the circumstances surrounding his hospitalization, and the nature of the phone call are relevant. Mr. Pettigrossi did not have the "reflective capacity necessary for conscious misrepresentation." *Williams*, 967 So. 2d at 748. The trial court properly allowed Mrs. Pettigrossi's testimony under the excited utterance exception. Dr. Mann does not satisfy "the abuse of discretion standard necessary to overturn the trial court's evidentiary ruling." *Id*.

C. The probative value of Mr. Pettigrossi's statement was not "substantially outweighed by the danger of unfair prejudice."

Next, Dr. Mann fails to show that the excited utterance was more prejudicial than probative. Mrs. Pettigrossi sought damages for the loss of her husband's companionship and protection, and for her mental pain and suffering. The hearsay statement was not only relevant, but probative of her damages.

Dr. Mann argues that the hearsay statement was, at best, minimally probative of Mrs. Pettigrossi's non-economic damages. According to Dr. Mann, had Mrs. Pettigrossi acted on her husband's request to "get him out" of the hospital, he would have died "just the same, if not sooner." (Init. Br. 42.)

Dr. Mann overlooks evidence surrounding the circumstances of Mr. Pettigrossi's statement. Mrs. Pettigrossi testified that she was "horrified" by the phone call. Thinking that her husband may have been frustrated by his continued hospitalization, she sought to reassure him, telling him that she would be there early the next morning. (T. 1003.) Regardless of whether Mrs. Pettigrossi should have treated her husband's statement literally, she did not return to the hospital on Saturday night. (T. 1529-30.) That phone call, however, was the last time Mrs. Pettigrossi spoke with her husband. (T. 1005; T. 1529.)

Certainly, the phone call – and its effect on Mrs. Pettigrossi's mental state – are relevant to a determination of the damages she sustained for mental pain and suffering. (T. 998; T. 1529-30; R. 1685.) *See Walt Disney World v. Goode*, 501 So. 2d 622, 626-27 (Fla. 5th DCA 1986) (upholding damages to parents for pain and suffering caused by loss of child); *Coast Cities Coaches, Inc. v. Donat*, 106 So. 2d 593, 596-97 (Fla. 3d DCA 1958) (parent's impaired mental condition from loss of child may be considered element of mental pain and suffering in wrongful death action).

Mr. Pettigrossi's statement was not unfairly prejudicial. The statement did not have an "undue tendency" to suggest a "decision [by the jury] on an improper basis." *Harrison v. Gregory*, 221 So. 3d 1273, 1275 (Fla. 5th DCA 2017) (citations omitted). Plaintiff did not rely on the statement to prove Dr. Mann's fault (T. 1529-

30) – much less that he was guilty of murder. *Cf. Harrison*, 221 So. 3d at 1275 (defendant's statement, "I just killed a kid," would suggest improper basis for jury to resolve fault in wrongful death action). Instead, Plaintiff elicited the testimony as evidence of Mrs. Pettigrossi's reaction to the loss of her husband. (T. 1529-30.)

Plaintiff did not seek to inflame the passions and emotions of the jury. Evidence of Mrs. Pettigrossi's mental pain and suffering was relevant to her claims for damages. Just as the jury was entitled to consider evidence of the couple's long and happy marriage, evidence related to the late-night phone call was admissible to show the effect of this "ordeal" on Mrs. Pettigrossi. (T. 998.) Admission of this relevant, probative evidence was not *unfairly* prejudicial. *See, e.g.*, *State v. Andres*, 552 So. 2d 1151, 1153 (Fla. 3d DCA 1989).

D. The trial court's error, if any, was harmless.

Even assuming, for the sake of argument, that the trial court erred in admitting the hearsay statement, the error was harmless. Plaintiff's counsel mentioned Mr. Pettigrossi's phone call in closing but did not repeatedly emphasize the statement. (T. 1529-30.) *Cf. State Farm Fla. Ins. Co. v. Figueroa*, 218 So. 3d 886, 889-90 (Fla. 4th DCA 2017) (irrelevant, prejudicial evidence "came up at trial" multiple times); *Shaw v. Jain*, 914 So. 2d 458, 461 (Fla. 1st DCA 2005) (defense's repeated references unfairly prejudiced plaintiff); *Harbor Ins. Co. v. Miller*, 487 So. 2d 46,

47-48 (Fla. 3d DCA 1986) ("repetitive, highly emotional testimony" required reversal).

Plaintiff relied on the hearsay statement to show Mrs. Pettigrossi's reaction to the loss of her husband of more than fifty years. Rather than "12 more years of enjoying each other's company," Mrs. Pettigrossi was left to wonder why she did not go to the hospital that Saturday night. (T. 1529-30.) Nowhere in his closing argument did Plaintiff's counsel suggest that the jury should rely on Mr. Pettigrossi's statement as proof of Dr. Mann's fault. *Cf. Opsincs*, 185 So. 3d at 659. Nor was this relevant testimony so "highly emotional" that it necessarily "must have colored the jury's approach to the evidence." *Fla. Patient's Comp. Fund. v. Von Stetina*, 474 So. 2d 783, 790 (Fla. 1985). Mrs. Pettigrossi's description of her husband's phone call did not "inflame the jury."

Dr. Mann cannot show, then, that the trial court abused its discretion in admitting Mrs. Pettigrossi's testimony. Her husband's statement, even if hearsay, was admissible under the excited utterance exception. This relevant testimony was not substantially outweighed by the danger of unfair prejudice. The trial court properly admitted the evidence, which was relevant to Mrs. Pettigrossi's claims for her mental pain and suffering from this ordeal.

CONCLUSION

For all the foregoing reasons, the final judgment should be affirmed. Dr. Mann is not entitled to a reversal of the judgment on the jury's verdict or to a new trial.

Respectfully submitted,
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