IN THE CIRSUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI DADE COUNTY, FLORIDA

CASE NO. 12-44628-CA-04

NANCY CASTILLO, as Personal Representative of the Estate of JOSEPH CASTILLO,

Plaintiff,

v.

GREATER FLORIDA EMERGENCY GROUP, LLC, RENE RODRIGUEZ, M.D., COMPREHENSIVE PRIMARY CARE SPECIALISTS, ISIDRO PUJOL, D.O., BAPTIST HOSPITAL OF MIAMI, INC., ATLANTIC EMERGENCY PHYSICIANS OF SOUTH DADE, INC., and MIGDALIA GARCIA-GONZALEZ, M.D.

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PLAINTIFF NANCY CASTILLO'S RESPONSE IN OPPOSITION TO DEFENDANT, BAPTIST HOSPITAL OF MIAMI, INC.'S MOTION FOR FINAL SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW.

Plaintiff, Nancy Castillo, by and through undersigned counsel, hereby files this Response in Opposition to Defendant Baptist Hospital of Miami, Inc.'s Motion for Final Summary Judgment and Supporting Memorandum of Law, and states as follows:

I. ESTABLISHED FACTS[1]

[1] In support of this response, Plaintiff relies upon the deposition testimony of Nancy Castillo, the deposition testimony of Vicente Garcia and the medical records of Joseph Castillo created and maintained by Hialeah Hospital; all of which have been previously filed with this Court. Relevant excerpts of these depositions and records are contained as exhibits herein. In addition, Plaintiff relies upon the affidavit of Plaintiff's expert Sukhjit Takhar, M.D., also included as exhibit "D" herein.

Plaintiff Castillo accepts the statement of facts presented by Baptist, as far as that recitation goes. Baptist, however, omits several important facts necessary to properly assess its motion for summary judgment. Those facts are contained below:

Paragraph 12 of Baptist's Motion correctly indicates that the Miami-Dade Fire Rescue report contains the notation "slip/trip/fall." However, Baptist fails to note that the paramedics questioned about this entry characterized it as a general notation intended to identify a broad category of injury, but is *not* intended to be indicative of what caused Mr. Castillo's fall. (Ex. "A" p. 7). Indeed, Vicente Garcia, of the paramedic crew that tended to Mr. Castillo testified "[It] is a generic entry because a fall, whether it be tripping or fall from a ladder, just fall under one category. . . . The fall, slip trip, it would be just that. I think it might also cover if he was dizzy, but I'm not too sure." (Ex. "A" pp. 10-11). Mr. Garcia further testified that he had no idea how Mr. Castillo fell. (Ex. "A" p. 7).

Baptist also omits mention of the hospital records generated by Rene Rodriguez, M.D., who treated Mr. Castillo immediately after the paramedics brought Castillo to Hialeah Hospital. In these records, Dr. Rodriguez not only details Mr. Castillo's complaint as having "fainted and hit the left side of his head," but diagnosed Mr. Castillo's condition as follows: "Syncopal Episode [fainting][2]; Head Trauma; Possible Small Parasagital Right Subdural H." (Ex. "B" pp. 1; 5; 9; 16). Further, these records demonstrate that the paramedics reported to Mr. Castillo's health care providers at Hialeah Hospital that Mr. Castillo had, indeed, fainted. (Ex. "B" p. 1).

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[2] syn·co·pe: brief loss of consciousness associated with transient cerebral anemia, as in heart block, sudden lowering of the blood pressure, etc.; fainting. *Dictionary.com Unabridged*. Random House, Inc. http://dictionary.reference.com/browse/syncope (accessed: August 17, 2013).

Applying these facts and the reasonable inferences taken therefrom, it is clear that Defendant Baptist's motion should be denied. *See Warring v. Winn-Dixie Stores, Inc.*, 105 So. 2d 915, 918 (Fla. 3d DCA 1958)("[A] summary judgment the movant not only admits the basic facts established which are favorable to the adverse party, but also every conclusion or inference favorable to the adversary that might be reasonably inferred from the evidence.").

II. DEFENDANT'S CITED AUTHORITY IS INAPPOSITE

Defendant notes that "Plaintiff's theory is that Joseph Castillo fainted in his bathroom and suffered a head injury which led to his death," and argues that the inference that Castillo fainted cannot be proven to the exclusion of all other reasonable inferences. Defendants argue that the prohibition against stacking of inferences entitles Defendant to summary judgment in its favor. (Motion, p. 5- 6). Defendant relies exclusively on the following legal principle in support of their motion for summary judgment: "if a party to a civil action depends upon the inferences to be drawn *from circumstantial evidence* as proof of one fact, it cannot construct a further inference upon the initial inference in order to establish a further fact unless it can be found that the original, basic inference was established to the exclusion of all other reasonable inferences." *Nielsen v. City of Sarasota*, 117 So. 2d 731, 733 (Fla. 1960)(emphasis added). (Motion, at 5).

This principle of law upon which Defendant's motion is premised has no application to the present case, however, because Castillo relies on *direct* evidence, not *circumstantial* evidence, to establish that Mr. Castillo fainted.

In the present case the medical records from Hialeah Hospital, signed off on by treating physician and current defendant Rene Rodriguez, M.D., contain the following diagnosis:

"Syncopal Episode; Head Trauma; Possible Small Parasagital Right Subdural H." In addition, Mr. Castillo's records indicate that his nuero exam was "positive for syncope." (Ex. "B" p. 10).

Further, these records contain the following narrative, taken by Dr. Rodriguez:

> This 46 years old White Male presents to ER via EMS-Ground with complaints of . . . TODAY THE PATIENT GOT UP FROM BED TO GO TO THE BATHROOM, HE FAINTED AND HIT THE LEFT SIDE OF THE HEAD. THE PATIENT ALSO HAS NECK PAIN. HE HAS BEEN SICK IN BED.. rr5

(Ex. "B" p. 9).

This narrative, written by Mr. Castillo's treating physician, details the complaint made by Mr. Castillo himself for purpose of obtaining medical diagnosis or treatment and is therefore admissible evidence of Mr. Castillo's condition under Section 90.803, Florida Statutes.

As the Florida Supreme Court in *Singleton v. State*, 105 So. 3d 542, 544 (Fla. 2d DCA 2012), noted:

> Direct evidence is evidence which requires only the inference that what the witness said is true to prove a material fact; e.g., "I saw A shoot B" is direct evidence that A shot B. Circumstantial evidence is evidence which involves an additional inference to prove the material fact; e.g., "I saw A flee the scene" is circumstantial evidence of A's guilt and direct evidence of flight.
> Charles W. Ehrhardt, *Ehrhardt's Florida Evidence* § 401.1 (2011 ed.);

Here, in order to prove that Mr. Castillo did indeed faint, the jury need only infer that Dr. Rodriguez' diagnosis and/or the history provided to Dr. Rodriguez by Mr. Castillo is true. Therefore these entries in Castillo's medical records are direct, not circumstantial, evidence. Defendant's sole legal theory of defense in its motion is therefore entirely inapplicable. Clearly, Castillo does not merely "allege [her] beliefs as evidence" as stated in *Cohen v. Arvin*, 878 So. 2d 403, 405 (Fla. 4th DCA 2004); but has put forth direct (and overwhelming) evidence to establish the predicate fact that Mr. Castillo fainted. Because the principle of law solely relied on by Defendant has no application to this case, Summary Judgment should be denied.

III. DEFENDANT CANNOT PROVIDE A REASONABLE ALTERNATIVE THEORY AS TO THE CAUSE OF CASTILLO'S FALL.

A. DEFENDANT'S ATTEMPT TO CREATE DOUBT AS TO THE CAUSE OF CASTILLO'S HEAD INJURY IS DEPENDENT ON UNSUPPORTED CONJECTURE.

As noted above and contrary to Defendant's contention, *direct* evidence clearly demonstrates that Mr. Castillo fainted, causing him to fall and strike his head. Despite this clear evidence, Defendant argues that the cause of Mr. Castillo's fall remains in doubt. Defendant's attempt to create doubt as to the cause of Mr. Castillo's fall is based upon pure speculation, and is unsupported by the evidence.

As testified to by the decedent's wife, Mr. Castillo had been increasingly ill for several days. Mr. Castillo was running a consistent high fever; he would not eat and drank only minimally. (Ex. "C" p. 1). Mr. Castillo remained in bed due to his condition. (Ex. "C" p. 1).

Mrs. Castillo testified that the bathroom in which she would ultimately find her husband was rather small. The room had a sink on the left, a toilette in the middle, and a shower immediately next to the toilette on the right. There were no rugs or other obstructions on the floor of the bathroom upon which Mr. Castillo might trip. (Ex. "C" p. 2).

Mrs. Castillo testified that she was in the family room of her home when she heard a "thump" from the master bedroom/bathroom area. She rushed to the bathroom, where she found her husband unconscious, lying on the bathroom floor. Mr. Castillo was lying with his head in the shower and his legs in front of the sink. Mr. Castillo had the sweat pants he had been wearing around his knees, and there was excrement in the toilette immediately behind him. (Ex. "C" p. 2).

Mrs. Castillo called 9-11 and paramedics were dispatched. The paramedics noted that the call indicated that Mr. Castillo had fainted. Although the paramedics' report indicates that the

incident was classified as a "slip/trip/fall" they testified that this classification could not be taken to show that Mr. Castillo did not faint, but merely indicates that a fall of some kind facilitated the injury. The paramedics found that Mr. Castillo's heartbeat was irregular. They believed that Mr. Castillo had suffered from a cardiac event, and administered aspirin. (Ex. "A" pp. 13-14).

The paramedics informed the hospital staff that Mr. Castillo had fainted. (Ex. "B" p. 1). Mr. Castillo informed his treating physician that he had fainted. The treating physician, Dr. Rodriguez, diagnosed a syncopal (fainting) episode. Mr. Castillo's records indicate that his nuero exam was "positive for syncope." (Ex. "B" p. 10).

Despite these facts, Defendant Baptist argues that Mr. Castillo may not have fainted, but simply tripped. Under Defendant's theory, Mr. Castillo may have gotten up to use the restroom, and while in the process of relieving himself decided to get up and walk over to the sink with his pants around his knees. At this point, Defendant contends that Mr. Castillo must have tripped on his pants, falling in such a manner that his head wound up in the shower next to the toilette, and his lower body in front of the toilette and sink. Under Defendant's theory, Mr. Castillo must have forgotten that his happened, and instead reported to the paramedics that he had fainted, and again repeated that story to his treating physician. Mr. Castillo's healthcare providers must have blindly followed Mr. Castillo's story, and included it in their diagnosis.

Respectfully, Defendant's alternate theory of Mr. Castillo's fall is at odds both with the evidence and common sense. Further, this theory is premised entirely on a single passage in the paramedics' report, which the paramedics themselves testify does not support Defendant's theory.

Thus, Defendant's argument regarding improper stacking of inferences is unavailing not only because it attempts to apply a rule specifically limited to circumstantial (rather than direct)

evidence, but because Defendant has not put forward a reasonable alternative inference capable of casting doubt on Castillo's contention that the decedent's injuries were precipitated by fainting. Baptist's Motion for Summary Judgment raises sheer, unsupported speculation in place of evidence, and should therefore be denied. *See Gonzalez v. B & B Cash Grocery Stores, Inc.*, 692 So. 2d 297, 299 (Fla. 4th DCA 1997)("Defendant contends that even if the substance were wax, there is no proof that the slippery condition causing plaintiff's fall resulted from the waxing of the floors the night before. Defendant suggests, as another possibility, that the slippery condition could be the result of leakage from one of its store's wax products. This possibility, however, involves sheer speculation without any basis in the record. Even if this were a reasonable inference, the existence of reasonable inferences contrary to those asserted by plaintiff should not result in the entry of summary judgment….Rather, it would be for a jury to determine whether a preponderance of the evidence supports the inferences suggested by plaintiff.")(internal citations omitted)

B. THE REMAINDER OF CASTILLO'S CASE DOES NOT RELY ON IMPROPER CONJECTURE.

Finally, Defendant presents a straw man argument designed to indicate that Castillo cannot prove what may have happened had Defendant not behaved negligently. Defendant poses a series of hypothetical questions such as, what care might have been administered, or what outcome might have been obtained? Defendant then maintains that, because it offers no answers to these questions, the results are unknowable.

Defendant's argument ignores the nature of medical negligence cases, in which expert witnesses routinely offer their opinions as to what, within a degree of medical probability, caused the injury complained of, and how that injury may have been avoided. *See* § 90.702, Fla. Stat.

This case is no different. Here, Castillo alleges that Baptist, through its agent, was negligent in failing to adequately diagnose and treat Mr. Castillo when Castillo presented at Baptist in obvious distress. The gravamen of Castillo's case is that, had Baptist properly evaluated and cared for Mr. Castillo, his ailment would have been cured or at least treated in such a manner that the incident in question would not have occurred and, thus, Baptist's failure to properly diagnose and treat Mr. Castillo is a cause of his death. Expert testimony is the proper method of substantiating such a contention. *See, e.g. Gelsthorpe v. Weinstein*, 897 So. 2d 504, 510 (Fla. 2d DCA 2005)("Accordingly, medical expert testimony concerning the causation of a medical condition will be considered pure opinion testimony-and thus not subject to *Frye* analysis-when it is based solely on the expert's training and experience.").

Castillo has submitted the affidavit of infectious disease expert Sukhjit Takhar, M.D., who testifies that:

> It is obvious to me from my review of the records that Mr. Castillo fainted and specifically, the records of Hialeah Hospital indicate that Mr. Castillo arrived there at 4:36pm on May 4, 2010, with head trauma including visible hematoma and laceration to his left forehead suffered from falling after fainting.
> ***
> Based in Mr. Castillo's febrile condition, transient episodes of hypotension and history of diabetes, he should not have been discharged on May 3, 2010 given his condition. Under the circumstances, the discharge of Mr. Castillo on May 3, 2010 fell below the standard of care for a health care provider such as Dr. Garcia-Gonzalez.
> It is my opinion with a reasonable degree of medical probability that had Mr. Castillo been admitted to Baptist Hospital on My 3, 2010 as opposed to being discharged, more likely than not he would not have lost consciousness under circumstances where he could fall and injure himself as he did according to

> subsequent Hialeah Hospital records. Within a reasonable degree of medical probability Mr. Castillo's dehydration, low blood pressure and fever, individually or in combination with each other, caused or contributed to his fainting. Standard of care treatment would have required Mr. Castillo to be hydrated, monitored and treated as necessary, more likely than not preventing a fainting episode and avoiding head trauma from a fall.

(Ex. "D" pp. 3-4). Thus, Plaintiff has provided expert testimony identifying a breach in the standard of care, the cause of Mr. Castillo's injury, and the expert's opinion that, had defendant not fallen below the standard of care, Mr. Castillo's death could have been avoided. This admissible expert testimony, once again, is direct evidence to be submitted to a jury. Defendant Baptist's motion should be denied.

CONCLUSION

WHEREFORE, based upon the above facts and authorities, Plaintiff Castillo respectfully requests that Defendant Baptist's motion for summary judgment be denied.

Respectfully submitted,

Kenneth J. Bush, Esq.
KENNETH J. BUSH P.A.
255 University Dr.
Coral Gables, Fl. 33134
Phone: 305-443-3795
Fax: 305-443-3843

-And-

Brett C. Powell , Esq.
THE POWELL LAW FIRM, P.A.
18001 Old Cutler Rd. Suite 646
Palmetto Bay, Fl. 33157

Phone: 305-232-0131
Fax: 305-232-0191

By: _____
BRETT C. POWELL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via electronic mail on August 19, 2013, and via hand deliver on August 20, 1013 to: Leslie McCormisck, Esq., Wicker, Smith, O'Hara, McCoy & Ford, P.A. 2800 Ponce De Leon Blvd. Suite 800 Coral Gables, Fl. 33134; miacrtpleadings@wickersmith.com

By: _____
BRETT C. POWELL