

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

LAWRENCE M. DESTEFANO,

CASE NO.: 5D06-75

Appellant,

vs.

ADVENTIST HEALTH SYSTEM SUNBELT
HEALTHCARE CORPORATION;
ADVENTIST HEALTH SYSTEM/SUNBELT,
INC.; SUNBELT HEALTH CARE CENTERS,
INC.; ROLLINS BEDFORD CORPORATION
d/b/a SUNBELT HEALTH CARE & SUBACUTE
CENTER; SHCC SERVICES, INC.; and
ORLANDO REGIONAL HEALTHCARE
SYSTEM, INC.,

Appellees.

APPELLANT'S INITIAL BRIEF

NICHOLAS A. SHANNIN, ESQUIRE

Florida Bar Number: 0009570

1707 Bridlewalk Court

Gotha, Florida 34734

Telephone: (407) 296-6296

E-Mail: nshannin@orllaw.com

Attorneys for Appellant,

LAWRENCE M. DESTEFANO.

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIESiii

PRELIMINARY STATEMENT.....1

STATEMENT OF THE CASE AND OF THE FACTS.....2

 A. Neglect of Ms. DeStefano 2

 B. Setup of Mr. Destefano 7

 C. Battery and Conspiracy 15

 D. Pretrial and Trial..... 16

SUMMARY OF THE ARGUMENT 18

ARGUMENT.....19

I. "COMPARATIVE DEFAMATION" IS NOT A DEFENSE RECOGNIZED UNDER FLORIDA LAW AND THE CONSIDERATION OF THIS DEFENSE BY THE JURY WAS REVERSIBLE ERROR..... 19

 A. Standard of Review 19

 B. Prefatory Remarks 20

 C. The jury improperly reduced Mr. Destefano's award based upon a legal theory not existent in Florida defamation law 20

II. FIVE IMPROPER DIRECTED VERDICTS 24

 A. Standard of Review 24

 B. Adventist Health Systems/Sunbelt, Inc., doing business as Florida Hospital, should not have been released on a Motion for Directed Verdict 26

 C. Sunbelt Healthcare Centers, Inc., doing business as Adventist Care Centers should not have been released by motion for directed verdict..... 28

D.	Adventist Health System Sunbelt Healthcare Corporation should not have been released by motion for directed verdict.....	29
E.	The claim for conspiracy should have been decided by the jury and not removed from them by motion for directed verdict.....	32
F.	The claim of battery against Mrs. Destefano should not have been taken from the jury by motion for directed verdict.	34
III.	THE TRIAL COURT'S REFUSAL TO ALLOW PLAINTIFF'S NURSING EXPERT TO TESTIFY AND REFUSAL TO ALLOW CRITICAL DCF RECORDS TO BE ADMITTED BOTH CREATED REVERSIBLE ERROR IMPACTING DAMAGES.....	36
A.	Standard of Review	36
B.	The court's order barring the testimony of plaintiff's nursing expert is clear error.....	36
C.	DCFS records, offered for proof and scope of defamation, not for the truth of the matters asserted, were improperly excluded from trial ...	42
1.	No confidentiality issue exists	43
2.	As evidence of the publication of defamatory statements, the records are not hearsay.....	43
3.	The DCFS records are admissible public records and reports, pursuant to §90.803(8)	45
	CONCLUSION.....	47
	CERTIFICATE OF COMPLIANCE.....	48
	CERTIFICATE OF SERVICE.....	48

TABLE OF AUTHORITIES

Cases

<i>Hart v. Stern</i> , 824 So. 2d 924 (Fla. 5 th DCA 2002)	19
<i>Gross v. Lyons</i> , 721 So. 2d 304 (Fla. 4 th DCA 1998).....	19
<i>Valencia v. Citibank International</i> , 728 So. 2d 330 (Fla. 3rd DCA 1999)	22, 23
<i>Rasner v. Wellington Regional Medical Center</i> , (Fla. 4 th DCA 2002).....	23
<i>Bass v. Riveria</i> , 826 So. 2d 534 (Fla. 2 nd DCA 2002)	23
<i>Sheffield v. Superior Insurance Company</i> , 800 So. 2d 197, 202-03 (Fla. 2001)....	24
<i>Cadora v. Karp</i> , 91 So. 2d 806 (Fla. 1957)	25
<i>Dania Jai Lai Palace, Inc. v. Sykes</i> , 450 So. 2d 1114 (Fla. 1984)	25, 26, 27, 29
<i>Bruce Construction Corp. v. The State Exchange Bank</i> , 102 So. 2d 288 (Fla. 1958)	25
<i>Equico Lessors, Inc. vs. Marucha Machinery Corp. of America</i> , 523 So. 2d 665 (Fla. 5 th DCA 1988)	29, 30
<i>Pappalardo v. Richfield Hospitality Services, Inc.</i> , Fla. 4 th DCA 2001).....	30
<i>Orlando Executive Park, Inc. v. PDR</i> , 402 So. 2d 442 (Fla. 5 th DCA 1981)	30
<i>Rami v. Furlong</i> , 702 So. 2d 1273 (Fla. 3 rd DCA 1997)	32, 33
<i>Gonzalez v. Largin</i> , 797 So. 2d 497 (Fla. 5 th DCA 2001)	33
<i>Pascale v. Federal Express Corporation</i> , 656 So. 2d 1351 (Fla. 4 th DCA 1995)	34, 35
<i>Jennings v. Ray</i> , 484 So. 2d 1267 (Fla. 5 th DCA 1986).....	35

<i>Klose v. Coastal Emergency Services of Ft. Lauderdale</i> , 673 So. 2d 81, 84 (Fla. 4 th DCA 1996).....	36
<i>State Paving Corp. v. Coastal Emergency Services of Ft. Lauderdale</i> , 673 So. 2d 81, 84 (Fla. 4 th DCA 1996)	36
<i>Pascual v. Dozier</i> , 771 So. 2d 552 (Fla. 3 rd DCA 2000)	36
<i>Rose v. State</i> , 506 So. 2d 567 (Fla. 1 st DCA 1987).....	37
<i>Allen v. State</i> , 365 So. 2d 456 (Fla. 1 st DCA 1978).....	37
<i>Salas v. State</i> , 246 So. 2d 621 (Fla. 3 rd DCA 1971)	37
<i>Ferraro v. Federal Insurance Company</i> , 479 So. 2d 159 (Fla. 4 th DCA 1985).....	38
<i>Huck v. State</i> , 881 So. 2d 1137 (Fla. 5 th DCA 2004).....	41, 42
<i>Reichenberg v. Davis</i> , 846 So. 2d 1233 (Fla. 5 th DCA 2003)	42, 46
<i>Lee v. Department of Health and Rehabilitative Services</i> , 698 So. 2d 1194 (Fla. 1997)	42, 46
<i>Pauline v. Lee</i> , 147 So. 2d 359	44
<i>Porter v. Ferguson</i> , 14 Fla. 102 (1851)	44
<i>Lombardi v. Flaming Fountain, Inc.</i> , 327 So. 2d 39, 40 (Fla. 2d DCA 1976).....	44
<i>American Ideal Mgt. v. Dale Village</i> , 567 So. 2d 497 (Fla. 4 th DCA 1990)	44
<i>Tyler v. Garris</i> , 292 So. 2d 427 (Fla. 4 th DCA 1974)	44
<i>University of North Florida v. Unemployment Appeals Commission</i> , 445 So. 2d 1062 (Fla. 1 st DCA 1984).....	46
<i>Sykes v. Seaboard Coastline Railroad Company</i> , 429 So. 2d 1216, 1221 (Fla. 1 st DCA 1983).....	46

Other Authorities

Florida Statute § 90.702.....37, 38
Florida Statute §90.105 41
Florida Statute §415.107..... 43
Florida Statute §90.801(1)(c)..... 44
Wigmore on Evidence, 3d Ed., §1772 et seq..... 44
Florida Statute §90.805..... 45
Florida Statute §90.802..... 45
Florida Statute §90.803..... 45
Florida Statute §90.804..... 45
Florida Statute §90.803(8)..... 45, 46

PRELIMINARY STATEMENT

This is an appeal from a Final Judgment entered after a jury verdict in a civil action for defamation. This action involves the Appellant who is the Plaintiff below and referred to as “Plaintiff” or by his proper name, “LAWRENCE M. DESTEFANO” who is acting in his individual capacity and as Personal Representative of the Estate of Carolina Destefano, deceased. LAWRENCE M. DESTEFANO was and is a resident of Orange County, Florida.

There are two Defendants: Adventist Health System Sunbelt Healthcare Corporation, which is the “Grandparent” corporation and is referred to as “Grandparent” or “Adventist Health Systems”; Adventist Health Systems/Sunbelt, Inc. d/b/a Florida Hospital, and is referred to as “Florida Hospital,” a wholly owned subsidiary of said “Grandparent”; Sunbelt Health Care Centers, Inc. d/b/a Adventist Care Centers, and is referred to as “Adventist Care Centers,” a wholly owned subsidiary of said “Grandparent”; and Rollins Bedford Corporation, the licensed operator of and referred to as “Sunbelt Health Care & Subacute Center” or “SUNBELT,” the subject nursing home. Collectively the forenamed Defendants will be referred to as “Adventist Health System, et al.” The other Defendant is Orlando Regional Healthcare System, Inc., which owns and operates and is referred to as “Orlando Regional Medical Center” or “ORMC.” All Defendants

were and are corporations, authorized to do and doing business in Orange County, Florida.

The record is contained in 109 Volumes. Volumes 1-88 contain various court documents, evidence, and hearing transcripts, and are referred to as "Rx, y-z," where "x" is the Volume number and "y-z" is the Page number(s). Similarly, Volumes 89-109 contain the trial transcripts. Transcript Volumes 1-21 are referred to as "Tx, y-z." All emphasis in quoted material is added unless otherwise noted.

STATEMENT OF THE CASE AND OF THE FACTS

A. Neglect of Mrs. Destefano

Plaintiff, LAWRENCE DESTEFANO, was total and sole caregiver of his mother, Mrs. Destefano, from January 1999 until her death. (T14, P1890). Mrs. Destefano was suffering late-stage Alzheimer's disease and due to her severe functional impairment the Plaintiff was required to feed, bathe and attend to his mother's toileting needs and general incontinence. When Mr. Destefano made the decision to become primary caregiver of his mom versus placing her in a nursing home, there came a transition point whereby Plaintiff had to temporarily place Mrs. Destefano in an adult foster care facility so he could fly back home to shut his business down. In his absence Mr. Destefano had asked friends to check on his mom. Plaintiff cut his trip short when his friends began reporting back that they

felt Mrs. Destefano's health was declining. Plaintiff had been away for approximately three weeks before he rushed back. When Plaintiff arrived at the foster home, he found his mom had developed a massive purple blister on each heel. In size they were slightly larger than golf balls. Her buttocks and genital area had a severe blistering rash with massive reddening. Plaintiff again found a massive purple blister on his mom's coccyx. As he carried his mom out of the foster home, Mr. Destefano promised his mother he would never allow her to suffer like that again and he would never leave her side. (T14, P1895-7).

On September 15, 1999, Plaintiff brought his mother to Florida Hospital Orlando for treatment (T14, P1903).¹ Mrs. Destefano was admitted into a private room where a cot was provided for Plaintiff's son who lived, cared for and slept in the same room with his mom until September 19, 1999. That day, she was transferred for rehabilitative care to Sunbelt Health Care & Subacute Center Orlando, which is a nursing home facility across the street from, and affiliated with Florida Hospital.

The nurses' notes at SUNBELT indicate that Mrs. Destefano was first seen by a nurse on "9/19/99" at "7:45" p.m. (T5, P528). The next nursing entry was on

¹ From Mrs. Destefano's admission forward, these facts provided in Sections A through C of this statement may be found in T14, P1903-1972, unless otherwise noted.

“9/20/99” at “10:00” a.m. Upon admission to SUNBELT there was a period of over 14 hours during which the Plaintiff’s mother had no nursing note history to indicate that she was checked on. The next nursing entry was on “9/21/99” at “0500” and again upon admission to SUNBELT there was a period of 19 hours during which the Plaintiff’s mother had no nursing note history to indicate that she was checked on, moved or rotated to prevent aggravation of the ulcers that developed in the foster care home or the development of new ones.

On September 20, 1999, at approximately 5:45 p.m., the Plaintiff entered SUNBELT and noticed that his mother was missing a wound dressing that had a standing physician's order for her right heel. Plaintiff asked the SUNBELT staff nurse repeatedly if she could dress the right heel wound on his mom. (T6, P684). The SUNBELT staff nurse ignored each request by assuring him they would get to it when they had time. Mr. Destefano offered to dress the wound himself and asked the SUNBELT staff nurse for the 4X4’s, accuzyme and kling, explaining that he was his mom’s primary caregiver and had done the wound dressing at home many times before. When the SUNBELT staff nurse denied Plaintiff this opportunity by telling him he was not authorized to perform this procedure, the Plaintiff obtained a pen and paper and prepared a hand-written note that read:

SUNBELT HEALTH CARE
9/20/99 ORLANDO
6:15 PM NO WOUND DRESSING
ON CAROLINA DESTEFANO RM #307

WITNESS (signed by Carol Boze),
CAROL

(T14, P1913-14) In his last effort to prod the attending staff nurse, Carol Boze, to take care of his mom's wounds, Plaintiff confronted her and asked that she either sign the note or dress the wound. To Plaintiff' disbelief, she opted to sign the note.

The next morning the SUNBELT Director of Nursing (DON), Rachel Bean, and Nurse Manager, Mary Thornton, and administrators were apprised of the note-signing incident. At approximately 8:40 a.m., on September 21, 1999, Mr. Destefano returned to the SUNBELT facility to initiate discharge plans for his mom. As Plaintiff walked the corridor to his mother's room, he saw three or four individuals standing outside. Plaintiff walked past them into his mom's room.

The SUNBELT Director of Nursing (DON), Rachel Bean, and Nurse Manager, Mary Thornton, followed Mr. Destefano in. (T6, P687). They began shouting at Mr. Destefano, telling him he had no authority to obtain signed documentation from their nursing staff, and that doing so was illegal. Bean and Thornton repeatedly shouted demands and threats that Mr. Destefano relinquish the signed note or the police were going to be called.

Noticing his mother still in the same position as the night before, Plaintiff pulled out the same piece of paper the staff nurse, Carol Boze, had signed the previous evening and made the second following notation:

9/21/99 MOM STILL IN SAME POSITION
AS LAST NIGHT. NOT MOVED OR ROTATED
TO KEEP OFF WOUNDS ON BUTTOCKS

When Mr. Destefano continued to refuse the Director of Nursing, Rachel Bean's, demand to relinquish the note, Adventist Health System, et al. and Orlando Regional Medical Center retaliated and set in motion the following events:

At some point during the confrontation between the DON, Nurse Manager and Plaintiff, the Nurse Manager, Mary Thornton, exited the room, walked directly across the corridor from Mrs. Destefano's room and appeared in the doorway of the office of Mrs. Constance Standish, the MDS² Coordinator for SUNBELT who overheard loud noises emanating through the closed door of Mrs. Destefano's room. When Mrs. Standish looked up from her desk where she was seated, Mary Thornton said to her:

"We're going to get this guy. We are going to say he was sexually inappropriate with his mother. We have done this before." (TR6, P688).

² The MDS Coordinator was responsible for a review of all Patients' records to determine compliance with Medicare and Medicaid requirements.

When Mrs. Standish was asked how she interpreted Mary Thornton's remarks she said, "I interpreted it to mean they were going to set him up."

B. The Setup of Mr. Destefano

Following through with her threat, Nurse Manager Thornton testified that on September 21, 1999 at approximately 9:00 a.m. she witnessed the Plaintiff's son sexually abusing his comatose mom when she saw him passionately giving her a mouth-to-mouth kiss for an extended time (TR6, P738, P749; TR7, P775) and published in Mrs. Destefano's medical chart the following:

"The DON and myself witnessed the son giving his mother a passionate kiss on the lips which lasted an extended time." (T6, P722, 24,34; T7, P765, 84).

The SUNBELT Director of Nursing, Rachel Bean, had also reported and published in Mrs. Destefano's chart the following:

"We entered the room at that time we witnessed Mr. Destefano kissing his mother intimately on the lips." (T9, P1066).

DON Bean finally left Mrs. Destefano's room without the Plaintiff's note and made good on her threat to call the Orlando Police Department. At 10:10 a.m., Mrs. Destefano lost her only advocate when Sunbelt Health Care & Subacute Center initiated a trespass order and had the police forcibly separate the Plaintiff's son from his mother and he was removed from the facility. (T9, P1141).

Following Mr. Destefano's removal from the premises, DON Bean moved forward with her plan to have Mrs. Destefano removed from SUNBELT and transferred to another facility. DON Bean telephoned Mrs. Destefano's physician, Dr. Black, requesting his "immediate attention." When Dr. Black arrived at SUNBELT the nursing staff reported to him about the alleged situation.

Based on these reports Mrs. Destefano was subjected to a rectal examination whereby Dr. Black could not recall signs of bright red blood. (T8, P933). Dr. Black has also testified that he never saw a bloody pad, was never "able to successfully find somebody who actually witnessed" these events and could not find any physical evidence to support any allegations of abuse (TR7, P893-894). Nevertheless, when Dr. Black found out the Plaintiff had a "trespass warrant" and was barred from the facility, the nursing staff was able to persuade him to sign a transfer order to send Mrs. Destefano to another facility that was not affiliated with SUNBELT. DON Bean called Plaintiff to explain this was actually done "to keep you and your mother as far the hell away from us as possible." (T14, P1924).

At this time, it was the consensus between DON Bean, Dr. Black and the Nursing Home Administrator, Charles Sherer, to transfer Mrs. Destefano to Orlando Regional Medical Center. (TR9, P1079-1080).

On September 21, 1999 at 12:02 p.m., Rural Metro Ambulance arrived at

SUNBELT. The nursing staff at SUNBELT reported and published to the paramedics the following:

“Nursing staff states son did a digital removal without telling anyone and it is believed this might be cause of trauma.” (T12, P1636-1637).

Paramedics transported Mrs. Destefano to the Emergency Room at Orlando Regional Medical Center at 12:34 p.m. It was reported to the ER nurse, Kelly Pipken, that she was being transported there due to the following as reported by Pipken:

“According to my records, it was for rectal bleeding. Bright red blood found on the bed.” (T12, P1634-1635).

Simultaneously while the transfer of Mrs. Destefano to ORMC was taking place, Rachel Bean placed a call at 12:09 p.m. to the Department of Children & Families (DCF) 1-800-Abuse Hotline and the DCF record of that call quotes her as publishing (R81, P14513):

1. “THE SON HAS VISITED HER AND BEEN SEEN KISSING HIS MOTHER ON THE LIPS.”
2. “THIS MORNING BRIGHT RED BLOOD WAS SEEN ON THE PAD OF HER BED. THE SON WAS PRESENT AT THE TIME.”
3. “CAROLINA WAS MEDICALLY CHECKED OUT AND FOUND TO BE BLEEDING FROM HER RECTAL AREA.”
4. “IT IS SUSPECTED SON DISIMPACTED HIS MOTHER THIS MORNING CAUSING BLEEDING

- FROM HER HEMMORIOD [SIC].
5. "CAROLINA IS BEING TRANFERRED TODAY TO ORMC TO BE EVALUATED."

At approximately 1:00 p.m., DON Bean reported in Mrs. Destefano's medical chart that she received a call from Dr. Black and published the following:

"Dr. Steely had passed on that resident's [Mrs. Destefano's] son was kneeing her in the back...and was literally dragging her across the room." (T9, P1082-4).

Dr. Black had no memory of Dr. Steely relaying the alleged abuse and Dr. Steely did not witness this. (T8, P916-7). It was told to him but he could not recall by whom and no one has ever come forward to declare they witnessed the Plaintiff kneeing his mother in the back and dragging her. While Mrs. Destefano was in room number 22 at the ER of ORMC, her ER nurse at 1310 (1:10 p.m.) reported and published the following:

1. "Pt. transported from NH [Nursing Home] with reports of finding BRB [Bright Red Blood] on sheets of bed."
2. "Para [Paramedics] reports per NH staff her son disimpacted her."
3. "Nursing home staff reports questionable impaction related to bright red blood found on bed linen."

On September 21, 1999 as the day continued, nurse Carol Boze arrived back at SUNBELT to work her regularly scheduled 3-11 p.m. shift. She caught hell from DON Bean and Nurse Manager Thornton for signing Plaintiff's note the night

before (TR5, P536). DON Bean was screaming and yelling at nurse Boze telling her she had to make late entries in Mrs. Destefano's chart (TR5, P540-541). Nurse Boze complied by backdating events that were dated 9/20/99. Of the many false and malicious nursing note entries backdated in Mrs. Destefano's chart to 9/20/99, the one that was especially vicious and heinous that subjected the Plaintiff to public hatred and humiliation was reported and published as follows:

“9/20/99 LE “Nurse went in pt's [Mrs. Destefano's] room to deliver meal to pt. and found pt's son [Plaintiff] lying on top of pt. and kissing her repeatedly.” (T5, P556-7).

Boze's testimony was that on September 20, 1999 between 5:00 and 6:00 p.m., she [Nurse Boze] saw the Plaintiff lying on top of his mom kissing her passionately and romantically for two to three minutes on the mouth, face and neck. After witnessing the sexual assault Nurse Boze said, “I don't mean to interrupt, but her supper tray is here. What would you like me to do with it?” (T5, P511-512, 520).

Back over at the Orlando Regional Medical Center ER the following reports were being published in Mrs. Destefano's chart (T12, P1632-5):

1. “Rectal bleeding per nursing home”
2. “Bright red blood per rectum”
3. “Nursing home staff reports bright red blood on bed at rectum.” (T12, P1632)

4. "Patient transported from NH [Nursing Home] with reports of finding BRB [Bright Red Blood] on sheets of bed. SP [Status Post] discussion with son by nursing home staff. Para [Paramedics] reports per NH staff, "her son disimpacted her Sunday." (T12, P1634-1635)
5. "Nursing home staff reports questionable impaction related to bright red blood found on bed linen."

When Mrs. Destefano was transferred to ORHS as a result of this Rachel Bean conveyed to ORHS personnel that she was being sent there due to rectal bleeding and required examination and treatment for that condition. She had already, in fact, been examined within the two hours prior to her transfer by Dr. Black, a Resident Physician at Florida Hospital, who found no such condition. (T7, P874-5, 880).

The decision to transfer Mrs. Destefano to Orlando Regional Medical Center, coupled with the false allegations against Plaintiff, led to and subjected Plaintiff's mother to an unnecessary and humiliating invasion, whereby an "Anoscope" was inserted into Mrs. Destefano's anus for viewing, in order to verify false allegations of rectal bleeding.

Simultaneously with setting up the transfer to ORHS, Rachel Bean placed a call to the DCFS Central Abuse Hotline where the DCFS records of that call quote her as stating:

"Carolina, age 71, suffers from the infirmities of aging due to

her advanced age. She has dementia and requires total care due to being end stage Alzheimer's. This past Sunday Caroline [sic] was placed in the nursing home, after being hospitalized at Florida Hospital South.”

This initial false report to DCFS was transcribed by Gossie Freeze who has testified that such reports are transcribed as nearly verbatim as possible.

Upon her arrival at ORMC, Mrs. Destefano was evaluated, examined as noted above and found not to have rectal bleeding. Upon being contacted by ORMC staff for the purpose of returning Mrs. Destefano to SUNBELT, Rachel Bean restated the allegations and added to them. She is quoted in the ORHS records as stating: (T13, P1696, 1746).

“Nursing home staff reports bright red blood on pad at rectum...”

“Patient’s son was witnessed lying on top of the patient, kissing her with his mouth open in a way a son would not kiss his mother.”

“We sent her to ORMC as neutral ground because the son doesn’t want the patient at Sunbelt and Sunbelt is associated with Florida Hospital.”

In response to the false allegations by Bean, ORHS contacted the Orlando Police Department, triggering a criminal investigation of the allegations. After speaking with ORHS personnel and learning that they wished to transfer Mrs. Destefano back to SUNBELT, Bean placed a second call to the DCFS Hotline

where she is quoted as stating (R.81):

“Carolina is disabled due to the infirmities of aging as evidenced by advanced age. She is in bad physical shape. Her son was recently laying on top of her and kissing her passionately. When staff entered the room and surprised him he stopped. Later blood was found on an underpad which he explained as being caused by him disimpacting her on a weekly basis. A doctor examined her and only found evidence of bleeding hemorrhoids but there is no reason for him to provide such care without the knowledge of the nursing home staff. Carolina was transferred to Florida Hospital South for examination. He followed her there and trying to make her walk, he drug her around the floor pulling a bandage off of the ankle that has a decubitus on it.

He forced her mouth open and pours water in her mouth trying to force her to drink which endangers her. There are serious concerns regarding abuse neglect.

Carolina is currently at Orlando Regional Medical Center. She will be discharged and sent elsewhere for placement. Where is currently unknown.”

On September 23, 1999, Bean transmitted by facsimile to DCFS copies of the falsified nursing notes prepared by herself, Mary Thornton and Carol Boze. Additionally, she transmitted to DCFS a memorandum prepared by Dr. John Steely, a first year Resident Physician at Florida Hospital in which he stated:

“I first came into contact with Mrs. Destefano and her son on her admission to Florida Hospital on September 15, 1999. Over the next two days Mrs. Destefano’s condition improved. I assured Mr. Destefano he could leave her alone to find housing for them. Several of the nursing staff reported that Mr. Destefano was interfering with his mother’s care and the care he provided seemed inappropriate. They could not say it was deliberate abuse, but

perhaps the son did not know. Nevertheless, I wrote an order that the son not participate in care unless directed and educated by nursing and physical therapy. Some examples reported to me he would place his knee in her back and pull her arms upward so she would stand, continuously inserted food in her mouth until she began to gag so that she would reflexively swallow, and would literally drag his mother for a walk until she became exhausted and the heel ulcer began to bleed. I can not in good faith state that Mr. Destefano abuses his mother. However in my dealings with him regarding care and treatment, Mr. Destefano appeared angry and defensive. (T10, P1276, 81).

Significantly, Dr. Steely's "To Whom it May Concern Letter" was written at the specific request of the Risk Management of Florida Hospital and Dr. Richard Milhone, Dr. Steely's Program Director in his role as a then first year Resident Physician. (T10, P1282-83).

C. Battery and Conspiracy

Plaintiff presented evidence demonstrating that while Carolina Destefano was a resident at SUNBELT, one or more agents of ADVENTIST SUNBELT, without authorization or consent, took blood from the decedent through the use of a syringe for the purpose of planting her blood on her bed pad. DNA testing in the record has confirmed that it was Mrs. Destefano's blood and Plaintiff's expert witness on blood stains and splatter patterns, Stuart James, has testified that the stains are consistent with those he was able to duplicate using a syringe. (T17, P2364).

This was done as part of the scheme to frame Plaintiff, Lawrence Destefano, and to bolster their accusations that he sexually abused his dying mother. This scheme was furthered by the agents of ORHS when nurses Kelly Pipkin and Lillian Folley each expressed to others, including DCF, the same “sexually inappropriate” story that had been used to defame Mr. Destefano by those at Florida Hospital. (T12, P1644-47; T13, P1722-3).

D. Pre-Trial and Trial

The initial and most glaring publication of the defamatory statements made by both Defendants were documented in the DCFS records. Yet, those records were never viewed by the jury, and excluded as hearsay pre-trial. (R46, P7655). Also excluded by the judge was the testimony of Plaintiff’s medical documentation expert who would have explained the impropriety of the late entries that were used to defame Mr. Destefano. At trial, the judge struck not only the count for battery, but also the count for conspiracy, as well as three of the four corporate entities under the Adventist Healthcare umbrella, even though the DCFS records would have assisted the triers of fact to weigh these claims, and despite the existence of evidence still produced at trial sufficient for which a jury could perform its function. (T17, passim). The most egregious factor regarding the granting of the DVs, however, is that they were granted in the absence of the Plaintiff himself,

who was involuntarily removed from these proceedings because of a Baker Act proceeding initiated by neither the court nor anyone known to be present during Mr. Destefano's testimony. (T16, P2204-5). The Baker Act attempt was unfounded and the Plaintiff returned to the trial the next day, but not before the judge had eliminated two-thirds of the defendants and half of the causes of action.

Despite these obstacles, the jury ultimately did get to deliberate on those limited claims left to them, and they returned a verdict in the Plaintiff's favor against Rollins Bedford of one million dollars in compensatory damages and one million in punitive damages. (T21, P2838). The judge had allowed, over objection, the jury to reduce the compensatory award for "republication" by the Plaintiff, and thus the award was reduced by \$500,000.00. (T21, P2839). Because the jury was improperly denied the opportunity to deliberate regarding the counts and because Defendants were removed from their consideration and the improper reduction of the award that was given, Plaintiff timely filed his notice of appeal. (R66, P11527).

SUMMARY OF THE ARGUMENT

It all started with a note. On September 19, 1999, Mr. Destefano was the sole caregiver for his invalid 71-year-old mother who was suffering from the latter stages of Alzheimer's disease. He had asked a nurse to sign a note stating that his mother had not received a dressing on her right heel wound and to his surprise, the attending nurse signed the note. (T14, P1913-14). What followed was an incredible series of events whereby Mr. Destefano was maliciously defamed, including explicit allegations that he was on multiple occasions sexually inappropriate with his 71-year-old mother. (T5, P556-7; T9, P1427; T13, P1709-10).

Six years later, a jury agreed that Mr. Destefano had been maliciously defamed, and awarded him \$1,500,000.00 in compensatory and punitive damages. (T21, P2838, 83). Prior to reaching that verdict, however, the trial court took from the jury their opportunity to deliberate about the counts for conspiracy and for battery and removed four of the Defendants involved. (T19, P5514). The trial court then allowed the jury to reduce by 50% Mr. Destefano's comparative damages based on a legal theory that is not supported by Florida law. (T21, P2339). Accordingly, this case has an unusual appellate stance since the Appellant is not the Defendant but instead the Plaintiff who successfully obtained a seven-digit

award from the jury. Because this award was improperly reduced, because important additional information was withheld from that jury and because the jury did not get the opportunity to reach a decision on the additional counts and additional Defendants that had caused Mr. Destefano's suffering, the Plaintiff is the Appellant here and seeks the review by this Court to rectify those errors and to remand for a new trial on damages.

ARGUMENT

I. “COMPARATIVE DEFAMATION” IS NOT A DEFENSE RECOGNIZED UNDER FLORIDA LAW AND THE CONSIDERATION OF THIS DEFENSE BY THE JURY WAS REVERSIBLE ERROR.

A. Standard of Review

Traditionally, trial courts are accorded broad discretion in formulating jury instructions, requiring an abuse of discretion for reversible error to be found. See *e.g.*, *Hart v. Stern*, 824 So. 2d 924 (Fla. 5th DCA 2002). Where, as here, however, a party objects to a non-standard jury instruction, the propriety of which is solely dependant upon a theory of law, that determination should be made pursuant to a legal review. See *Gross v. Lyons*, 721 So. 2d 304 (Fla. 4th DCA 1998), (holding that once a Court decides to give a [non-standard] instruction, it should have accurately and completed stated the law). Here, where there was no Florida case

law to support the legal theory espoused by the non-standard jury instruction requested and given, this court should apply Gross and reverse and find that the jury instruction provided resulted in a miscarriage of justice because it permitted the jurors to reduce an award in contravention of applicable Florida law.

B. Prefatory Remarks

Appellant must note that the relief requested in this issue is not the primary relief requested by the Appellant in this case. Mr. Destefano seeks a new trial against all defendants as provided for in issues 2 and 3 *infra*. Because this issue, however, is determinable purely upon proper application of the law, and does not require the same level of factual background as do the following issues, it was believed that providing this issue first to assist this Court to quickly ascertain the existence of reversible error regarding the verdict below, the scope of the error to be determined through review of those additional and broader issues to follow.

C. The jury improperly reduced Mr. Destefano's award based upon a legal theory not existent in Florida defamation law

There is no defense recognized by any Florida court known as “comparative defamation,” whereby a jury would be asked to reduce a defamation verdict on the basis of republication or “self publication” of the defamatory statements. Despite the fact that no such legal theory exists, the trial judge overruled the objections

raised to both the jury instructions and the verdict form and allowed this novel and improper reduction to be made by the jury. (T19, P2577, 2600). This was error.

First, it is important to note that this invitation to error was not extended by all Defendants, but only by counsel for ROLLINS BEDFORD. (T19, P2573). Defendant ORHS elected not to join ROLLINS BEDFORD or its sister corporations in proceeding with this defense, and repeated its request not to have that defense included on its portion of the verdict form when presented to the jury. (T19, 2579, 2602). It is telling that despite the joint applicability of such a defense, if it existed, that ORHS did not feel it appropriate to have such a defense raised on their behalf and went to specific lengths to make sure that the verdict form as to them would not have the same deduction applied. And the reason for this election was clear: no case law exists to support the legal theory alleged.

It had been conceded at a hearing a year prior to the trial that no case law existed directly on point for the proposition being issued by ROLLINS BEDFORD and the other ADVENTIST HEALTH SYSTEM entities. (R67, P11582). That hearing involved an attempt by those Defendants to assert that the republication of the defamatory statements should somehow act as a bar to the continued maintenance of the case. That summary judgment motion was denied. (R46, P7521-22). In the year that followed, no additional case law surfaced that would

have changed the prior status of “no case law directly on point.” To the contrary, not only was “direct” case law lacking, but no “indirect” case cited had held that a Florida court may provide the jury with an instruction and a line on a verdict form with which to invite a percentage reduction of defamatory damages for republication. Plaintiff sought to have Florida Standard Jury Instruction 4.3 provided to the jury, but instead the court agreed to the unsupported modification requested, and the result was a 50% reduction in the compensatory damages awarded by the jury, or a direct “savings” of \$500,000.00 for ROLLINS BEDFORD as a direct result of the improper instruction and verdict form.

Defendant persuaded the court by citing to the Third District Court’s decision *Valencia v. Citibank International*, 728 So. 2d 330 (Fla. 3rd DCA 1999) as an authority for its proposed non-standard jury instruction. *Valencia*, a terse one-page opinion, does not, however, provide for a “comparative defamation” defense. Instead, the court in *Valencia* addressed a very different issue where the only defamation that occurred was because the Plaintiff, a former employee, told a prospective future employer of those comments. This situation is wholly inapplicable to a non-employment scenario where the allegations, accepted by the jury, were that the publication of the defamatory statements that were made by the defendant to third parties directly, including at a minimum in this case the

Department of Children and Families, the Orlando Police Department, and individuals with ORHS. Nothing in *Valencia* can be construed to justify a percentage reduction of defamatory damages caused by defamation as a result of the Plaintiff's republication of defamation that already occurred to third parties. This is confirmed by noting that the thirteen citations to *Valencia* by other courts have never extended *Valencia* to such a novel application. See, e.g., *Rasner v. Wellington Regional Medical Center* (Fla. 4th DCA 2002); *Bass v. Riveria*, 826 So. 2d 534 (Fla. 2nd DCA 2002). Quite to the contrary, these cases cite *Valencia* for its statement of the elements of a cause of action for defamation, and those elements do not include any reduction for further publication of the false, defamatory statements by the Plaintiff. *Rasner*, 837 So. 2d at 442; *Bass*, 826 So. 2d at 535.

Not only is there no case law to support the non-standard jury instruction requested and obtained by the Defendant, but the instruction if proper would promote poor public policy. Here, the Defendant was found by the jury to have made false statements to third parties regarding Mr. Destefano abusing his 71-year-old, comatose, Alzheimer's suffering mother. (T13, P1709-10). A victim of such defamation may elect to tell no one of this incredible wrong, but the Defendant should not benefit by the fact that a victim is unwilling to silently suffer the indignity that has been heaped upon him. This is particularly true in a case where

the defamation has caused two separate governmental agencies to investigate the matter leaving an individual potentially defenseless if he does not speak up about the wrong that has been done to him, and quickly. (T14, P1939-42.)

By way of legal analogy, the Florida Supreme Court has acknowledged that there is often a prudent strategy in talking openly about a subject in an attempt to minimize the prejudicial impact of adverse evidence. *See Sheffield v. Superior Insurance Company*, 800 So. 2d 197, 202-03 (Fla. 2001). The case here, however, is much stronger: instead of preemptively disclosing the information first, the Plaintiff had first been defamed to third parties, and only then proceeded to take steps to clear his name. The authorization by the court of both jury instruction and verdict form permitting a diminishment of Mr. Destefano's recovery by \$500,000.00 for his willingness to defend himself holds no support in the model jury instructions, no support in the Florida case law and should result in a reversal by this Court.

II. FIVE IMPROPER DIRECTED VERDICTS:

The Judge erred by denying the jury the opportunity to fairly determine this case by granting three Defendant corporations directed verdict motions and removing entirely the supported counts for battery and conspiracy.

A. Standard of Review

Review of a trial court's granting of a directed verdict motion by an appellate court is *de novo*. When a trial court removes an issue from consideration by the jury, the court must determine that there is *no evidence* to support a jury finding for the party against whom the verdict is sought. *Cadora v. Karp*, 91 So. 2d 806 (Fla. 1957). As noted by the Florida Supreme Court in *Dania Jai Lai Palace, Inc. v. Sykes*, 450 So. 2d 1114 (Fla. 1984), it does not lie within the province of the court to weigh evidence or determine questions of credibility and, where there is the possibility of different conclusions or inferences from the evidence, the court should submit the issue to the jury. *Dania Jai Lai Palace, Inc. v. Sykes*, 450 So. 2d at 1121 (*citing Bruce Construction Corp. v. The State Exchange Bank*, 102 So. 2d 288 (Fla. 1958)). Pursuant to the standard enunciated by the Florida Supreme Court in *Dania Jai Lai*, sufficient issues exist such that the lower court should have allowed five of the six issues ruled on below to have been considered by the jury.³ It is noteworthy, however, that a determination by this Court that even one erroneous grant of a directed verdict would require a reversal and remand for a new trial as to that Defendant or issue respectively.

³ In addition to the five directed verdicts discussed below, the court also granted a directed verdict for defendant SHCC SERVICES, INC. (T19, P2360). Plaintiff does not raise as error its dismissal from this case.

B. Adventist Health Systems/Sunbelt, Inc., doing business as Florida Hospital, should not have been released on a Motion for Directed Verdict

The seminal case regarding directed verdict motions in a situation of multiple interrelated corporate defendants is the Florida Supreme Court decision *Dania Jai Lai Palace, Inc. v. Sykes*, 450 So. 2d 1114 (Fla. 1984). In *Dania*, the lower court granted a directed verdict motion regarding liability, finding two companies to be closely linked. The District Court affirmed. *Id.* at 1121. The Florida Supreme Court reversed, holding that a directed verdict is improper unless there is no evidence to support a jury finding for the party against whom the verdict was sought. *Id.* The court continued that, "[w]e express no opinion on what the preponderance of the evidence shows; that question is proper for the jury to determine." *Id.* The court then distinguished other cases that attempted to resolve issues concerning closely related companies by indicating that those cases did not involve directed verdicts "and thus not subject to the stringent rules of review governing directed verdicts." *Id.* at 1122.

In the instant case, the Judge withheld from the jury the opportunity to determine as finders of fact whether Florida Hospital participated in the defamation of Larry Destefano (T17, P2339-2356). During her deliberations on the motion for mistrial, the Judge heard testimony regarding three separate Florida Hospital

employees involved in the preparation of a memorandum, signed by Dr. Steely, both containing defamatory information of itself and supporting the interrelated defamatory comments made by others in their controlled corporations. (T10, P1276, 81; T17, P2345). Either the memo signed by Dr. Steely or the bolstering of Rachel Bean's separate defamatory statements should have been sufficient under *Dania* to proceed forward to the jury. The Court, however, even in the face of three separate employees involved in the situation and a memorandum signed by one of its physicians containing defamatory information, concluded that:

[T]he statements that are attributed to these agents are not in and of themselves defamatory. And in any event, the privilege, which either arises statutorily or by common law, *is not overcome here either by the greater weight of the evidence or certainly not by clear and convincing evidence.* So, with respect to that entity [Florida Hospital], I would grant your motion. (T17, P2356).

Here, the trial court engaged in precisely the practice prohibited by the Florida Supreme Court in *Dania*. The Judge took it on herself to determine what the greater weight of the evidence would be, and used her weighing of the evidence to grant a directed verdict and thereby remove this important entity from the jury's consideration just prior to their opportunity to weigh the evidence themselves. The trial court's election to do so was error and requires reversal.

C. **Sunbelt Healthcare Centers, Inc., doing business as Adventist Care Centers should not have been released by motion for directed verdict**

Sunbelt doing business as Adventist Care Centers (Sunbelt) was the parent company of the Rollins Bedford Corporation. (T17, P2356). Rollins Bedford, the employer of staff nurses, Mary Thornton and Carol Boze, through their agents clearly defamed Mr. Destefano, as found by the jury. (T5, P556-7). Rachel Bean, however, was the individual most active with regard to the dissemination of the defamatory statements regarding Mr. Destefano. During the motion for directed verdict, movant's counsel admits "there has been a lot of discussion about where is Rachel Bean employed." (T17, P2356). The jury should have been permitted to make the decision as to whether or not Rachel Bean served Sunbelt as, at a minimum, one of her masters. First, her W-2 was introduced into evidence indicating that Sunbelt was the employer of both Ms. Bean and another witness, Chuck Sherer. (R88, P15880). A second piece of evidence was introduced through Mr. Sherer providing to the jury an indication that Ms. Bean was considered a "corporate employee," referring to Sunbelt. (T17, P2358). Yet a third piece of evidence demonstrating a level of control by Sunbelt over Rachel Bean involved the testimony of Chuck Sherer that the president of SHCC, Michelle Fetters, terminated Rachel Bean's employment (T12, P1566-67). Despite having

each of these pieces of evidence before the court, the court, without explanation, granted Sunbelt's motion for directed verdict and removed that entity from the jury's consideration as well. (T17, P2360).

As discussed, *supra*, the instructions from the Florida Supreme Court require that a court must determine that there is *no evidence* before granting a directed verdict motion. *Dania*, 450 So. 2d at 1121. For the second time in as many motions, the court - apparently - took it upon itself to weigh the evidence for which organization Rachel Bean was an agent. The court's weighing of the factors regarding master and servant may well not have been the same as the jury's would have been if Sunbelt had been allowed to reach the jury. *Dania*, 450 So. 2d at 1114; see also *Equico Lessors, Inc. vs. Marucha Machinery Corp. of America*, 523 So. 2d 665 (Fla. 5th DCA 1988) (holding that in a direct verdict motion, all facts must be construed "most strongly in favor of the appellant - which the trial jury may or may not have done given the opportunity.") Here, as in *Equico* and *Dania*, the jury should have been given the opportunity, and the directed verdict motion was granted improperly.

D. Adventist Health System Sunbelt Healthcare Corporation should not have been released by motion for directed verdict

Adventist Health Systems/Sunbelt Healthcare Corporation is the "grandparent" corporation, with each of the prior entities being wholly owned subsidiaries of this highest of these corporations. Accordingly, the arguments to be raised for this entity would be the same "apparent agency" cases cited above. *Equico Lessors, supra*; see also *Pappalardo v. Richfield Hospitality Services, Inc.* (Fla. 4th DCA 2001) (regarding merger of liabilities for corporation and parent companies); *Orlando Executive Park, Inc. v. PDR*, 402 So. 2d 442 (Fla. 5th DCA 1981). In full candor to this tribunal, however, there is a very significant impediment to advancing with seeking the reversal of this directed verdict motion: it was stipulated to at trial. (T17, P2338). The trial judge even followed up on the stipulation, verifying precisely which entity was being stipulated to, in this case, Adventist Health Systems/Sunbelt Corporation, referred to as Healthcare Corp. In the face of this stipulation, what possible basis would exist to allow this court to review that motion? The answer to that lies in the record transcripts, just five pages prior to that stipulation occurring. It was at this juncture, moments before the stipulation, that trial counsel for the Plaintiff raised a "point of inquiry" seeking answers from the court about a simply incredible event that had happened just prior. (T17, P2333). Mr. Destefano had finished his lengthy cross-examination, been excused, sat through the testimony of another witness and then been

permitted to leave for a 70-minute lunch break when, without warning or notice to his attorney, he was detained and compelled to proceed with the involuntary confinement procedures of Florida's Baker Act. (T16, P2203-2213). Plaintiff's counsel was clearly unprepared and baffled by the sudden occurrence that took Mr. Destefano forcibly away from the courtroom. The trial court indicated that it was not at its request that this had occurred, nor was it aware of who the complaining party was. (T16, P2204-5).

In determining what they could do with regard to proceeding, Plaintiff's trial counsel indicated that he had one more videotape to play and then he had intended on resting. (T16, P2211). It was at this point that trial counsel raised to the court that his client had the constitutional right to be present at his civil trial, and that while he was reticent to do anything without his client being there, he would be willing to play the video, but again repeated that his client would be entitled to be there for directed verdict motions. (T16, P2212). Accordingly, trial counsel raised the appropriate objection to proceeding with directed verdict motions in the compelled, temporary and involuntary absence of the Plaintiff. Nonetheless, the trial court elected to proceed with the directed verdict motions after the video had played and Plaintiff rested, despite the continuing involuntary absence of the Plaintiff. As a result, the Plaintiff was denied the opportunity to confer with his

attorney prior to the stipulation to this directed verdict motion. (T17, P2338). Accordingly, this court should view the proceeding with each of the directed verdict motions and the compelled, involuntary and temporary absence of the litigant a fundamental error and not hold Mr. Destefano to a stipulation made by his counsel without the opportunity to confer with Mr. Destefano who had been an active participant in the Plaintiff's strategy throughout the trial.

E. The claim for conspiracy should have been decided by the jury and not removed from them by motion for directed verdict

Kelly Pipkin and Lillian Folley were agents of Defendant, ORHS, the one Defendant not part of the Adventist Health Systems Group. These two individuals each stated to others the same “sexually inappropriate” story that had been used to defame Mr. Destefano at Adventist. (T12, P1644-47). The jury, through its verdict, has verified as finder of fact that the statements made about Mr. Destefano at Adventist were false. How then, other than by agreement between individuals at Adventist and individuals at ORMC does this malicious and defamatory story get repeated?

That inference is sufficient to support a claim of civil conspiracy and the claim should not have been taken from the jury. In support of their motion, ORHS relied on the Third District Court of Appeal decision *Rami v. Furlong*, 702 So. 2d

1273 (Fla. 3rd DCA 1997). Plaintiff believes that the *Rami* case is an appropriate guide and that its analysis properly applied would support a finding that the directed verdict was error. *Rami* holds that circumstantial evidence may be used to prove a conspiracy “when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary.” *Id.* The only other “inference” that can be drawn from the mirror image stories regarding Mr. Destefano coming from two ORHS employees is that they actually witnessed Mr. Destefano doing such acts. The jury has already weighed that question and would find that the alternative inference would not be supported by them. Accordingly, a reasonable interpretation of *Rami* would be that Florida law supports permitting the jury to make this decision as opposed to allowing the trial court to step in and weigh these inferences itself.

This Court has expressly held that the entry of a directed verdict is proper only when the evidence and all inferences of fact, construed most strictly in favor of the non-moving party, cannot support in the minds of the jurors any reasonable difference as to any material fact or inference. *Gonzalez v. Largin*, 797 So. 2d 497 (Fla. 5th DCA 2001) (internal citations omitted). Here, where there were two inferences that could reasonably have been garnered from the facts before the jury, the jury should have been allowed to be the finder of fact in making that

determination, and the election of the Court to take that fact finder status away from them regarding the conspiracy count requires reversal.

F. The claim of battery against Mrs. Destefano should not have been taken from the jury by motion for directed verdict

Florida courts have repeatedly found that a trial judge usurps the province of the jury by granting directed verdicts when it is the function of the jury to weigh and evaluate evidence. See e.g. *Pascale v. Federal Express Corporation*, 656 So. 2d 1351 (Fla. 4th DCA 1995) (special caution required because it is the function of a jury to weigh and evaluate evidence). Evaluating the claim for battery, when taking all reasonable inferences in the light most favorable to the non-moving party, it is clear that the jury's function to weigh and evaluate evidence was usurped here, causing a reversible error.

The facts before the jury were ample. Rachel Bean had told Nurse Folley that Mr. Destefano had inserted his finger into his mother's rectum to disimpact her digitally. (T13, P1710). Rachel Bean had also relayed to her that Dr. Black had told her that Mrs. Destefano had hemorrhoidal tissue that may have been caused by digital penetration. (T13, P1774). Calls were made to DCF regarding the existence of BRB [bright red blood] on Mrs. Destefano's bed sheet. (T79, P1052-54). The bed pad did, in fact, have a blood splatter on it. (R86, Exhibit 6).

Finally, Plaintiff provided the jury with expert testimony on whether the elongated bloodstain was consistent with drainage of blood from the rectum of an individual lying on the bed pad and the expert opined that it was not consistent. (T17, P2364). The expert further opined that “within reasonable scientific probability, the bloodstain did not come from the rectum of an individual lying in the bed.” (T17, P2365). Finally, based on his training, experience and experiments performed relative to this case, “the pristine bloodstain was created artificially and not naturally.” (T17, P2366).

The jury was free to accept, reject, or otherwise interpret the testimony of the expert who had opined for them, and to otherwise weigh and evaluate the evidence as is their province. *Pascale*, 656 at 1353. This is not to say that the jury had to find in favor of the Plaintiff; simply that, when taking the findings or different reasonable inferences based upon the facts presented to the jury, the directed verdict motion should have been denied. *Jennings v. Ray*, 484 So. 2d 1267 (Fla. 5th DCA 1986)(where conflicting evidence or differing reasonable inferences may be drawn, directed verdict motion must be denied). Here, the jury was improperly denied its opportunity to draw those reasonable inferences that were well-founded by, amongst other evidence, the fixation of Rachel Bean on the existence of the blood on the pad in conjunction with the testimony provided to the jury by the

Plaintiff's expert witness, Stuart James. The directed verdict motion was error and requires reversal.

III. THE TRIAL COURT'S REFUSAL TO ALLOW PLAINTIFF'S NURSING EXPERT TO TESTIFY AND REFUSAL TO ALLOW CRITICAL DCF RECORDS TO BE ADMITTED BOTH CREATED REVERSIBLE ERROR IMPACTING DAMAGES.

A. Standard of Review

Trial court's decision whether to admit or exclude evidence is generally subject to an abuse of discretion. *Klose v. Coastal Emergency Services of Ft. Lauderdale*, 673 So. 2d 81, 84 (Fla. 4th DCA 1996). The trial court, however, commits reversible error when it excludes evidence that is proper and significant for a jury's review. *See State Paving Corp. v. Zebrowski*, 544 So. 2d 279 (Fla. 4th DCA 1989). Similarly, the trial court abuses its discretion when improperly excluding proper expert testimony. *Pascual v. Dozier*, 771 So. 2d 552 (Fla. 3rd DCA 2000).

B. The Court's Order Barring the Testimony of Plaintiff's Nursing Expert is Clear Error

Defendant had use of a "Medical Documentation Expert Nurse" at trial, yet Plaintiff was prohibited from using his. (T18, P2440-69; R67, P11672-3). This unfair and prejudicial result requires reversal. In its pre-trial Motion in Limine, Defendant SUNBELT objected to Plaintiff's medical documentation expert Laurie

Miles claims that:

- (a) She was not a Registered Nurse licensed in the state of Florida;
- (b) Her exposure to the Florida Nurse Practice Act was in preparation for her offering her opinion in this matter;
- (c) She had not reviewed the version of the Florida Nurse Practice Act in effect at the time the alleged improper documenting occurred; and
- (d) At deposition, she did not identify statutes or professional standards stating how documenting was to be performed.

(R43, P7194). Regarding the lack of Florida licensure, it is settled law in Florida that the lack of Florida licensure in a professional capacity on the part of a proffered expert witness is not a basis, without more, for disqualification. In *Rose v. State*, 506 So. 2d 567 (Fla. 1st DCA 1987), the trial court's refusal to qualify a psychologist based upon his lack of licensure in the state of Florida was reversed. The *Rose* court stated, "It is equally clear that a witness need not have a specific degree or license in order to testify as an expert". §90.702, Fla. Stat. specifically provides that a witness may be qualified as an expert "by knowledge, skill, experience, training, or education". See also *Allen v. State*, 365 So. 2d 456 (Fla. 1st DCA 1978)(that neither a doctorate nor prior experience as an expert witness are essential prerequisites to being qualified as an expert witness). In *Salas v. State*,

246 So. 2d 621 (Fla. 3d DCA 1971), the court stated, “An expert is defined in §90.702 as a person who is qualified as an expert in a subject matter ‘by knowledge, skill, experience, training, or education’. It applies not only to persons with scientific or technical knowledge but also to anyone with any specialized knowledge. A witness may qualify as an expert by his study of authoritative sources without any practical experience in the subject matter”.

Similarly, in *Ferraro v. Federal Insurance Company*, 479 So. 2d 159 (Fla. 4th DCA 1985), the appellate court reversed the trial court’s disqualification of an expert dentist based upon the lack of licensure in Florida. The *Ferraro* court stated, “We cannot agree with the trial court that Dr. Gerughty was not qualified to testify as an expert and find that such ruling constitutes an abuse of discretion.” In the *Ferraro* case, the expert in question, although not licensed in Florida, was a licensed dentist in both California and South Carolina and, as noted by the court, “able to perform exactly the same services in those two states as might be performed in Florida.”

The credentials of Ms. Miles in regard to her qualifications as an expert were extensive. (R34, P5095-99; R46, P7604-05). She was currently licensed as a Registered Nurse in the state of New Mexico and by virtue of her compact license, she is also qualified as a Registered Nurse in the states of Arizona, Arkansas,

Delaware, Idaho, Iowa, Maine, Maryland, Mississippi, Nebraska, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Utah and Wisconsin and thereby permitted to practice in those states. She was specifically licensed as a Registered Nurse in the states of New Hampshire, Maine and Massachusetts. She has been awarded an Associates Degree in nursing, a Bachelor's Degree in Behavioral Sciences-Psychology and a Master's Degree/M.B.A. in Health Care Administration. Ms. Miles has practiced as a Registered Nurse for more than fifteen (15) years, including nursing management and supervisory experience. She has had practical work experience both in hospice and nursing home environments, and has worked in utilization review, nursing documentation review and similar capacities for Blue Cross and Blue Shield of New Mexico and hospice and nursing home facilities located in the states of New Mexico and New Hampshire. An argument that the mere lack of a licensure as a Registered Nurse in the state of Florida disqualifies her as an expert strains logic past the breaking point.

The argument regarding the familiarity with the Florida Nurse Practice Act as well as the argument with regard to identification of statutes or professional standards is similarly illusory. An examination of both the deposition testimony and the written opinion of Ms. Miles in this regard contain specific references to Florida Administrative Code violations as well as testimony that, with regard to the

specific issues of nursing record documentation upon which her opinion is to be offered, the standards and criteria are essentially uniform throughout the United States. Her further testimony is that she reviewed the Nurse Practice Act statutory changes covering the years 1999, 2000, 2001, 2002, 2003 and 2004 to determine whether or not there were substantial changes in the applicable requirements. Her qualifications as an expert are substantial. If anything, these matters were best left to cross examination of the expert with regard to the weight to be accorded her opinion by the jury.

The remaining arguments advanced in the body of the Motion in Limine with regard to other areas of inquiry regarding Ms. Miles were also premature. They do not relate to her qualifications as an expert, nor do they relate to proper subjects of expert testimony. Rather, they dealt with the alleged objectionability of specific questions and her responses thereto in her discovery deposition. Specifically, counsel for Defendants addressed questions to Ms. Miles relating to “standard of care” rendered to Mrs. Destefano. They then objected to her opinions in response to their questions. As noted in the hearing transcript, counsel for Plaintiff expressed a specific commitment that no inquiry into such areas would be made during the course of the trial. “I’m not going to have this expert say that there’s gross negligence or negligence. She’s going to say that it’s custom in the

industry that documentation is as follows, and that did not follow that in this case.”

Clearly this testimony and expert opinion was both relevant and material on the issue of the fabrication of the records to support false allegations.

The trial court, speaking in reference to the deposition testimony of Ms Miles that the manner of preparation of the “nursing notes” by Boze, Thornton and Bean, was substantially inconsistent with prevailing national standards of nursing protocol for late entries, stated:

“We could go down a lot of rabbit holes in this case, and we’re not going down this one. This motion in limine is granted. Whether or not it was a departure from the standard of care is not relevant here to prove or disprove . . . does not tend to prove or disprove an issue of fact have. . . . I think you can make all kinds of arguments about the motivation given the so-called late entry, but the motion is granted in that regard.”

(R67, P11672). Rather than ruling on the basis that the expert was qualified or not, the trial court’s ruling seems to be an effort to improperly manage the substance and presentation of the evidence in Plaintiff’s case, instead of focusing on the proper test for admissibility of an expert.

The proper criteria for the admission of expert witness testimony is set forth in *Huck v. State*, 881 So. 2d 1137 (Fla. 5th DCA 2004). Pursuant to §§90.105, 702, first, the court must determine whether the subject matter will assist the trier of fact in understanding the evidence or determining a fact in issue. Second, the court

must determine whether the witness is adequately qualified to express an opinion on the matter.” *Huck*, 881 So. 2d at 1149.

In this instance, the substantial chronology of events that occurred involving Plaintiff and Plaintiff’s mother are contained within nursing notes and documentation prepared by nurses at SUNBELT involved in or associated with the care rendered to Mrs. Destefano. The opinion of an expert on whether or not such actions met the appropriate professional standards in preparing such documentation and whether such documentation may be fraudulent or fabricated based upon the manner in which it was prepared, would have been relevant to not just liability, but provided a further basis for a punitive award. The witness was qualified and her testimony relevant. Her testimony would have shown the flagrant nature of Defendants’ abuses and likely impacted the punitive damages awarded. The trial court’s exclusion should be reversed.

C. DCFS Records, Offered for Proof and Scope of Defamation, Not For the Truth of the Matters Asserted, Were Improperly Excluded From Trial

In its order barring the introduction of the records of the Department of Children and Family Services, the trial court cited this Court’s opinion in *Reichenberg v. Davis*, 846 So. 2d 1233 (Fla. 5th DCA 2003) and the decision in *Lee v. Department of Health and Rehabilitative Services*, 698 So. 2d 1194 (Fla. 1997) as authority for its decision. (R46, P7620). Because those cases do not relate to a

defamation setting as here, the trial court's analysis was erroneous requiring reversal.

1) No Confidentiality Issue Exists

The arguments advanced by Defendants with respect to these records is that the records of DCFS include reports, statements and notes based on phone calls or interviews from employees of Defendants and that such statements are confidential and inadmissible hearsay. Section 415.107 Fla. Stat., however, permits the disclosure of the information contained in such records when “the court determines that public disclosure of the information contained in such records is necessary for the resolution of an issue then pending before it.”

2) As Evidence of the Publication of Defamatory Statements, the Records are not Hearsay

Plaintiff sued the Defendants alleging that their employees, in the context of making false reports to DCF regarding alleged abuse or neglect, committed defamation. The records which Plaintiff sought to introduce were the very notes taken by DCFS employees about such phone calls and written statements of the tortfeasors and the following interviews with the speakers of the defamatory statements. As such, they constitute the evidence of the initial publication of the defamatory statements. In this context, the documents are admissible as the regularly maintained records of DCFS and demonstrate the initial publication of the defamatory statement. Having not been offered for the truth of the matter

asserted therein, i.e., that the defamatory statements are in fact true, they are admissible because they do not fall within the prohibited strictures of the hearsay rule in the first instance. They are being offered only to prove that the defamatory statements were, in fact, published to DCFS.

§90.801(1)(c) defines hearsay as “. . . . a statement, other than one made by the defendant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” It is well settled that out of court statements, offered only to prove that the statements were in fact made, are not hearsay. When introduced solely to establish the fact of utterance, they are admissible. *Pauline v. Lee*, 147 So. 2d 359; *Porter v. Ferguson*, 14 Fla. 102 (1851); Wigmore on Evidence, 3d Ed., §1772 et seq.

Specifically, in an action for libel and slander [defamation] “. . . if the point in issue is whether a statement was in fact made it is proper for a third party to testify himself as to what he overheard since his testimony would tend to prove only that what he heard was indeed said and not that what was said was true.” *Lombardi v. Flaming Fountain, Inc.*, 327 So. 2d 39, 40 (Fla. 2d DCA 1976). In order for a defamatory statement to be actionable it must be published. Publication requires communication to one other than the person defamed. *American Ideal Mgt. v. Dale Village*, 567 So. 2d 497 (Fla. 4th DCA 1990); *Tyler v. Garriss*, 292 So. 2d 427 (Fla. 4th DCA 1974).

In this case the oral statements made by Rachel Bean, the authorized agent of Sunbelt, in her telephone calls to DCFS on September 21, 1999 and transcribed by the employees of that agency as required by law are admissible to prove publication. Similarly, the oral statements made to DCFS Investigator Judy Simms, and noted by her as required by law, are also admissible to prove publication. Lastly, the written statements by Bean, Mary Thornton, Carol Boze and John Steely are equally admissible to show publication.

Alternatively, even if the documents in question constitute “double hearsay” as argued by Sunbelt at the hearing on the subject motion, they qualify for admission under §90.805, Fla. Stat., which states that “Hearsay within hearsay is not excluded under section 90.802, provided each part of the combined statements conforms with an exception to the hearsay rule as provided in section 90.803 or section 90.804.” The statements contained within the records and therefore the records themselves, do fall within exceptions to the hearsay rule and thus, the court’s pretrial ruling that such records are not admissible is error.

3) The DCFS Records are Admissible Public Records and Reports, pursuant to §90.803(8)

Section 90.803(8) provides that “Records, reports, statements reduced to writing, or data compilations in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to a duty imposed by law as to matters which there was a duty to report, excluding in

criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness.” As the cited rule states, in order for documents to be admissible under the second portion of §90.803(8), the documents must relate to “matters observed pursuant to a duty imposed by law as to matters which there was a duty to report.” *University of North Florida v. Unemployment Appeals Commission*, 445 So. 2d 1062 (Fla. 1st DCA 1984) and *Sykes v. Seaboard Coastline Railroad Company*, 429 So. 2d 1216, 1221 (Fla. 1st DCA 1983).

In both *Lee* and *Reichenberg*, the documents at issue were not admissions by a party but, rather, were the statements of non-parties. This critical difference was overlooked by the lower court, and in doing so prejudicially affected Plaintiff’s opportunity to present evidence that would have assisted the trier of fact to determine defamation against those Defendants released or not found liable, and would have impacted the severity of the statements heard by the jury, thereby affecting punitive damages as well. A reversal on this ground would be in conformance with the proper interpretation of hearsay in a defamation case.

CONCLUSION

The judgment in favor of all Defendants other than Rollins Bedford should be reversed and this case remanded for a new trial as to each of those Defendants. As to Rollins Bedford, because of the evidentiary issues relevant to damages not heard by the jury, Plaintiff would also request a new trial as to damages, fully aware that obtaining the requested reversal risks the potential for a lower verdict at the second trial. Mr. Destefano is willing to take that risk in order to have the opportunity to present a full and fair showing of the evidence to those jurors. Alternatively, if this Court only finds error with regard to the issue of comparative defamation, then this Court should remand with instructions that the judgment be amended to reinclude the \$500,000.00 improperly deducted from the jury's verdict under the theory of "comparative defamation".

Respectfully submitted,

NICHOLAS A. SHANNIN, ESQUIRE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the computer generated font used throughout this brief is “Times New Roman 14 point font” in compliance with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

NICHOLAS A. SHANNIN, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of September, 2006, delivered by U.S. Mail a true and correct copy of the foregoing to:

LARRY J. TOWNSEND, ESQUIRE

Mateer & Harbert, P.A.

Post Office Box 2854

Orlando, Florida 32802;

GEORGE N. MEROS, JR., ESQUIRE

GrayRobinson P.A.

301 South Bronough Street, Suite 600

Tallahassee, Florida 32301

NICHOLAS A. SHANNIN, ESQUIRE

Florida Bar Number: 0009570

1707 Bridlewalk Court

Gotha, Florida 34734

Telephone: (407) 296-6296

E-Mail: nshannin@orllaw.com

Attorneys for Appellant,

LAWRENCE M. DESTEFANO.