IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SIXTH DISTRICT

NORMA LABADY and
JUDE LABADY,

Appellants,

v.

ORLANDO HEALTH, INC.,

Appellee.

Case No.: 6D24-0108

L.T. No.: 2019CA002386

# APPELLANTS' INITIAL BRIEF

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## PREFACE

Appellants, NORMA LABADY and JUDE LABADY, were Plaintiffs below and will be referred to in this brief as "Appellants", "Plaintiffs", or by name.

Appellee, ORLANDO HEALTH, INC., was Defendant below and will be referred to in this brief as "Appellee", "Defendant", or by name.

The following references will be used in this brief:

| | |
|---|---|
| [R._] | Reference to Bates Stamp Number for the Record on Appeal in 6D24-0108 |
| [T._] | Reference to Page Number for the Trial Transcript submitted in 6D24-0108 |

## STATEMENT OF JURISDICTION

This appeal arises from a final judgment arising out of a jury verdict. Jurisdiction exists in this Court pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(A).

## STATEMENT OF THE CASE AND FACTS

On February 21, 2019, the Labadys filed their Complaint against Defendants Orlando Health, Inc.; Jeffrey H. Feld, M.D.; Wendelly J. Vasquez, M.D.; and The Women's Center of Orlando, LLC. [R.43-50]

Norma Labady was an obstetric patient of the Defendants. [R.44] Mrs. Labady was sent to Orlando Health on August 2, 2017 by her physicians due to concerns of pre-eclampsia and gestational diabetes. [R.44] Orlando Health evaluated Mrs. Labady from August 2, 2017 to August 3, 2017. [R.45] She was instructed to return the following week for a planned delivery. [R.45]

Mrs. Labady's C-section was scheduled for August 10, 2017.

On the morning of August 9, 2017, Mrs. Labady went to Defendant's hospital for pre-admission testing. Nurse Isabel Vasquez provided the treatment and care on the morning of August 9th – the last morning that Baby N was alive. [T.664]

Plaintiffs claimed that based on the medical records and how Mrs. Labady presented on August 9th with intermittent abdominal pain and a diagnosis of preeclampsia, gestational diabetes, advanced maternal age, high blood pressure, and other factors, Nurse Vasquez

had an obligation to call Dr. Feld, Mrs. Labady's treating OB/GYN, or to call an on-call doctor, [T.664-681], and to take other actions regarding the treatment and care of Mrs. Labady and Baby N that would have saved Baby N. [T.664-681]

Nurse Vasquez made no attempt to go up the chain of command within the hospital that was available to her. [T.667] Nurse Vasquez simply sent Mrs. Labady home. [T.666]

At some point in time during the afternoon/evening of August 9th, Baby N died. [T.668]

Plaintiffs' position was this death was preventable, and Mrs. Labady should have been admitted into the hospital and her and her baby monitored until her scheduled C-section could take place. [T.674]

In fact, Defendant's own nurse expert, Tracy Keith, testified:

> Q. Do you know that Dr. Feld testified here that if Nurse Vasquez would've called him on the morning of August 9, 2017, that he would've admitted her into the hospital for monitoring? [*See* T.1002-1003]
>
> A. I'm aware of that testimony, but there's no indication for Isabel Vasquez to call them based on what she evaluated and the blood pressure and the fetal movement that was determined during her visit. There's no indication for her to call him.

* * *

Q. He could have kept her there for monitoring until the C-section the next day, August 10th, right?

A. If he determined that that was needed, that would have been his decision.

Q. And that's the -- that's his decision to make as the treating physician?

A. That is correct.

[T.1390:6-14; 1391:1-7][1]

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[1] Dr. Feld testified as follows:

Q. Did anybody, any nurse, any staff, any CNA, anybody from Winnie Palmer Orlando Health call you on August 9, 2017, to discuss these complaints and these review of symptoms with you?

A. No, sir.

Q. Had any nurse or staff member from Winnie Palmer called you on August 9th and advised you that Ms. Labady was there, she had these new complaints and discussed these symptoms with you, what would you have done?

A. Gone to the hospital to evaluate her. Just likely admit her to the hospital.

Q. And would you have monitored her and the baby until the C-section was scheduled the next day?

A. Yes.

[T.1002:19-1003:8]

Nurse Keith was allowed to testify that Nurse Vasquez and other nurses did not deviate from the standard of care. [T. 1326; 1380; 1389] But Plaintiffs' nurse expert, Nurse Attard, testified in her trial deposition that Nurse Vasquez was negligent and deviated from the standard of care with respect to care and treatment of Mrs. Labady – but her testimony was *excluded* from the jury. *See* Nurse Attard's excluded testimony cited at pages 11-13, *infra*.

Plaintiffs alleged in their complaint that Mrs. Labady received medical treatment that was below the acceptable standard of care from the Defendants. [R.45]

The Labadys pled five (5) counts in their Complaint. Those counts were as follows:

- Count I – Medical Negligence of Orlando Health
- Count II – Medical Negligence of Jeffrey H. Feld, M.D.
- Count III – Medical Negligence of Wendelly J. Vazquez, M.D.
- Count IV – Vicarious Liability Against The Women's Center
- Count V – Loss of Consortium as to Jude Labady

[R.45-49] [R.74-84]

On July 22, 2022, the discovery deposition of Jan Attard, RN was taken. [R.3480-3631] Nurse Attard's report was an exhibit to that discovery deposition. [R.3426-3456] In that discovery deposition, Nurse Attard testified that Orlando Health, Inc.'s nurses deviated from the standard of care (including Nurse Vasquez). Nurse Attard testified in her discovery deposition that such deviation included not calling the OB/GYN, Dr. Feld, or going up the chain of command. She also testified the patient should have had continued monitoring. [R.3341]

Nurse Attard also testified in her discovery deposition about the fact that the patient had "gotten a respiratory therapy treatment at 9:12 in the morning" – suggesting that the patient was having a problem. [R.3353] And Nurse Attard did not see "answers to that." [R.3353] Vasquez had an obligation to follow all the protocols, and this was not done, especially with such a high-risk patient and "knowing how serious preeclampsia is". [R.3353]

Significantly, Nurse Attard stated in her report which was attached to her discovery deposition:

> Nurse Expert maintains Critical knowledge and awareness is taken from the medical record. It is the Duty of Nurse to obtain vital signs in lieu

of treatment. Per Standard of Care, Monitoring is performed. Isabel was provided "last clear chance" to assess, evaluate and intervene. Had Isabel placed Norma on the fetal monitor machine, or within watchful eyes of Isabel perhaps the situation would have been different. Isabel failed to embrace the last clear chance, to intervene, thus preventing Infant girl's death, Norma's infant daughter.

* * *

8/9/2017 Nurse Expert Maintains 9:12 am Respiratory Therapy Treatment. 10:20 am 8/9/2017 Pre-Admission Check List was performed by Isabel Vasquez, RN. . . . Systems assessment here, focused on "Pain". Isabel Vasquez, RN excluded discussion of physical systems, except Pain, with no discussion of Gestational Diabetes, Glyburide, Hypertension stating it was not required.

Nurse Expert maintains "When you assess a patient, you look at the entire situation. . . ."

[R.3594]

Order on admission to triage, written on a prescription pad. The STAT nature of the order means Due to her glucose instability and her diagnosis of preeclampsia, Mrs. Labady required admission to the hospital with continuous fetal monitoring to avoid vascular events and perfusion issues to the fetus. The standard of care for pre-eclampsia is to place the patient on a baby ASA daily and to consider anti-coagulant therapy to prevent blood clots. The autopsy report indicated that the baby had a blood clot in the umbilical cord. It is alleged

that blood thinners and/or ASA could have prevented this outcome.

[R.3595-3596]

* * *

I find sufficient facts to warrant a breach of the standard of care. Defendants collectively and individually are duty bound to provide reasonable care to the patient per the guidelines and policies and procedures set by Orlando Health (Winnie Palmer Medical Center); to evaluate the history and physical, to evaluate present findings and report findings to the on-call physician in a timely manner. Nurses are duty bound to evaluate history and physical, monitor progression of care, have the utmost situational awareness, and monitor the big picture. Nurses are duty bound to perform systems assessment, evaluate labs, "dig deep", question, when necessary, review past pregnancies, know patient's story, psychological history, understand sufficient to communicate to and to collaborate with physician, and or Attending Physician on call high risk symptoms of unstable blood sugar, maternal not understanding blood sugar teaching, weight gain, elevated blood pressure occur.

[R.3596]

Standard of Care required that Mrs. Labady be admitted to the hospital for delivery of her baby due to poorly controlled gestational diabetes. Nurse could have gone up the chain of command. They could have demanded the plan work. Mrs. Labady's gestational diabetes was poorly managed with glucose levels out of range for a prolonged period. Discharging Mrs. Labady

> with inadequate glucose control put this baby at risk for intrauterine demise and/or stillbirth. 37.5 weeks infant could have been admitted/delivered based on poor glucose control. Due to glucose instability and preeclampsia, Mrs. Labady required notice, awareness, and admission to the hospital with continuous fetal monitoring to avoid vascular events and perfusion issues to the fetus. This is a Nursing judgment. Mrs. Labady presenting with high-risk symptoms unstable blood sugars, obesity, edema, and elevated blood pressures. Elevated 24-hour urine creatine of 450 resulted in severe preeclampsia. Failure to identify, report, and treat Mrs. Labady in a reasonable time resulted in harm and damages resulting in death to Mrs. Labady's infant girl, asserted as the basis of this claim.
>
> [R.3598]
>
> * * *
>
> Participating in and allowing a "flawed system" are the departures that plaintiffs' expert attributes to care. Care and treatment provided to Plaintiff and her child did not meet currently accepted Nursing Standards for the management of diabetes and preeclampsia of pregnancy. Had the Nursing Team conducted antepartum fetal surveillance, during the period after identification of preeclampsia, the infant would have likely survived.
>
> [R.3600]

In the discovery deposition, counsel for Defendant did not address all of the specifics in Nurse Attard's report – especially with respect to Nurse Vasquez. [R.3330-3364]

On February 28, 2023, and on March 30, 2023, the Labadys filed their Expert Witness List. [R.1546-1549; 1635-1638; 1870-1871] On June 26, 2023, the Labadys filed their Amended Exhibit List. [R.2018-2024] On June 27, 2023, the parties filed their Joint Pre-Trial Statement. [R.2051-2112]

On November 15, 2023, the *trial video deposition* of Labadys' nurse expert, Jan Attard, was taken. [R.5685-5828]

On November 24, 2023, a Joint Notice of Settlement was filed on behalf of the Labadys and Defendants Jeffrey H. Feld, MD; Wendelly J. Vasquez, MD; and The Women's Center of Orlando, LLC. [R.2341]

The only remaining defendant for the jury trial was Orlando Health, Inc. [R.2341]

On November 25, 2023, Defendant Orlando Health, Inc. filed its Motion to Strike Standard of Care Opinions of the Labadys' Expert Elizabeth Moore, M.D. [R.2342-2361] The trial court granted this motion on December 5, 2023. [R.3648]

On November 26, 2023, Defendant Orlando Health, Inc. filed its Motion to Strike Causation Opinions of the Labadys' Expert Jan Attard, RN. [R.2484-2492]

Trial took place from November 27, 2023 through December 5, 2023. [T.1-1982]

***Summary of Relevant Facts***

The key issue for trial was whether Orlando Health, Inc., by and through its nursing staff, was negligent in the care and treatment of the Plaintiff, Norma Labady. [R.1479] Vital to Plaintiff's case was the testimony of expert witness Nurse Jan Attard. Nurse Attard was listed by Plaintiffs on their expert witness list:

> Nurse Attard is expected to testify regarding issues related to standard of care, causation and damages. Nurse Attard's opinions are based on her review of the issues involved in this case, as well as her education, training and experience.

*See* March 30, 2023 Plaintiff's Amended Expert Witness List, Page 2. [R.1636]

During her "trial deposition", Nurse Attard gave expert opinions regarding the applicable nursing standard of care as it related to the facts of the case. Among others, these include the following:

> Q. Upon learning this information, the presence of pain that was described and is detailed in the August 9, 2017, Orlando Health record, does the applicable standard of care require that Nurse Vazquez should call Dr. Feld? . . .
>
> [*Binger* objection]

A. . . . the presence of pain would cause any nurse in preadmission testing to do some fetal monitoring, to call Dr. Feld to see if he's willing to perform an NST or any -- . . .

Q. What is an NST?

A. A nonstress test to make sure that the baby is healthy.

Q. Did Nurse Vazquez perform any fetal monitoring on the morning of August 9, 2017?

A. No, she did not.

Q. Did Nurse Vazquez call Dr. Feld on the morning of August 9, 2017?

A. No.

* * *

Q. Nurse Attard, did Nurse Vazquez perform respiratory therapy to Norma Labady during her morning visit at Orlando Health on August 9, 2017?

A. Yes.

Q. What is respiratory therapy?

A. Respiratory therapy occurs when either the oxygen saturation goes down and we're just trying to increase the -- the oxygen saturation to a level that is what we call normal, or it's when a patient has an episode for whatever reason of respiratory distress.

Q. And after Nurse Vazquez performed this respiratory therapy to Ms. Labady on the

> morning of August 9, 2017, did Nurse Vazquez report this up the chain of command?
>
> A. No.
>
> Q. Does the applicable standard of care require Nurse Vazquez to report the respiratory therapy up the chain of command?
>
> A. Yes.
>
> [*Binger* objection]

[R.5728-5731]

Nurse Attard was further precluded from offering an opinion on her understanding of what should be done when there is a diagnosis of preeclampsia. [R.5713:12-20] As stated by Nurse Attard:

> Q. Nurse Attard, based on your education, training, and work history as a licensed registered nurse, what is your understanding of what should be done when there is a pre -- a diagnosis of preeclampsia?
>
> A. My understanding with a diagnosis of preeclampsia is the patient is hospitalized and monitored, and we decide when we're going to deliver.

[R.5713:12-20]

This opinion was based on her education, training and work history as a licensed registered nurse. The specific objection was "That goes beyond the basis of her expert opinions. It's a diagnosis."

Nurse Attard was not asked, nor did she answer, with a diagnosis. [R.5713] She simply testified to what is done with a patient when there is a diagnosis of preeclampsia.

At the end of the first day of trial – November 27, 2023 – Defendant's "*Binger* objections" to the trial deposition of Nurse Attard were heard by the trial court. [T.235-276] The Defendant argued that the trial deposition testimony contained expert opinions that were not contained in either the expert report or the discovery deposition testimony. [T.252-276] *See* quoted testimony, *supra*.

After argument, the trial court sustained the objections and struck the above portions of the expert testimony. [T.270, 274-75] The trial court specifically discussed its understanding of *Binger*:

> And under Binger, Binger should not require either party to pull out what might be some opinion when the question is asked very carefully, "What are your opinions?" Okay, here's an opinion, here's an opinion. "Do you have any other opinions?" And that was clearly asked. There's no section in this report that I saw indicating support for the proposition that failure to report the respiratory therapy up the chain of command was a violation of the nursing standard of care. So looking at the other piece that we haven't dealt with here is my trial procedures and the order controlling -- think the order controlling trial. But certainly my trial procedures clearly summarize the

> applicable state of the law, which is an expert's opinion is wholly admissible unless a report was provided or deposition was taken, and then they are limited to the opinion set forth in that report and/or in that deposition. In this case, the nurse is limited to the opinions they gave -- she gave in her report and in her deposition. That's not in it, that the failure to report the respiratory treatment was a violation of a standard of care by anyone. Here's what -- so I'm sustaining that objection . . .

[T.275-76] (e.s.)

The trial took place over several days – starting on November 27, 2023, and ending on December 5, 2023. [T.1-1982]

On December 5, 2023, the jury submitted their verdict. [R.3650-3651]

> We, the jury, return the following verdict:
>
> 1. Was there negligence on the part of Orlando Health, Inc., d/b/a Winnie Palmer Hospital's nurses or nursing staff which was a legal cause of loss, injury, or damage to Norma Labady?
>
> YES _____ NO ____√____
>
> If your answer to Question 1 was NO, your verdict is for the Defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom.

[R.3650-3651]

On December 13, 2023, the trial court entered its final judgment in favor of Defendant Orlando Health, Inc. [R.3677]

On December 15, 2023, the Labadys filed their Motion for New Trial. [R.3678-3689] The trial court denied this motion on December 21, 2023. [R.3690-3691]

On January 12, 2024, this appeal was taken. [R.3706-3712]

## SUMMARY OF THE ARGUMENT

*Binger* does not support exclusion of Nurse Attard's testimony in this case. Nurse Attard was listed by Plaintiffs on their expert witness list: "Nurse Attard is expected to testify regarding issues related to standard of care, causation and damages. Nurse Attard's opinions are based on her review of the issues involved in this case, as well as her education, training and experience." Nurse Attard's testimony in her trial deposition was consistent with her prior discovery deposition and prior report. *See* Statement of Case and Facts, *supra*. There was no surprise testimony. Defense counsel failed to ask detailed questions in Nurse Attard's discovery deposition, and the Defendant's failure to ask the right questions during a discovery deposition does not warrant exclusion of Nurse Attard's key testimony in this case.

Specifically, under *Binger*, "the test for exclusion of evidence for non-disclosure during pretrial discovery is whether the opposing party was prejudiced in his preparations for trial." *Gouveia v. Phillips*, 823 So.2d 215, 222 (Fla. 4th DCA 2002). *See also Moore v. Gillett*, 96 So.3d 933 (Fla. 2d DCA 2012).

Nurse Attard's testimony did not prejudice Defendant's counsel in its preparation for trial. The question of whether Orlando Health, Inc.'s nursing staff, including Nurse Isabel Vasquez, was negligent in its care/treatment of Plaintiff and Baby N was the central issue in this case. Defendant's counsel was fully prepared to address this issue, and it did so with its own nurse expert.

**In fact**, Defendant's nurse expert, Tracy Keith, was allowed to give expert testimony before the jury that Nurse Vasquez was never negligent and she met all the requirements of pre-admission testing. [T.1326; 1380; 1389]. She specifically told the jury that even with all the symptoms Mrs. Labady presented to Orlando Health, Inc. (on August 9th and prior), Nurse Vasquez had no obligation to call Dr. Feld. [T.1349; 1351]

Nurse Keith's testimony that Nurse Vasquez did everything right is directly contrary to the testimony of Plaintiffs' nurse expert – Nurse Attard. *See* pages 11-13, *supra*. But the jury did not hear Plaintiff's expert's testimony on this issue because the trial court excluded this testimony under *Binger*.

Under these circumstances, Nurse Attard's testimony should not have been excluded. Nurse Attard's testimony regarding the

negligence of Nurse Vasquez was critical to Plaintiff's case, and Plaintiff was severely prejudiced by the exclusion of this testimony.

The exclusion of Nurse Attard's expert testimony was extremely prejudicial to Plaintiffs – as demonstrated by the jury's finding of no negligence by this Defendant.

There was no prejudice to the defense. Moreover, the trial court never even made a determination, on the record, as to whether use of this expert witness testimony would prejudice the objecting party, the Defendant. Nor did the trial judge consider, as to Nurse Attard's expert testimony cited herein, the required *Binger* factors.

## STATEMENT OF PRESERVATION

### I. The trial court abused its discretion in excluding key testimony of Plaintiffs' main expert, Nurse Jan Attard, under *Binger*.

#### A. Standard of review.

The general rule is that the exclusion of expert testimony is reviewed for abuse of discretion. However, a court's erroneous interpretation of the evidence code and applicable case law when exercising its discretion in determining the admissibility of expert testimony is subject to *de novo* review. *Magical Cruise Company Ltd. V. Martins*, 330 So.3d 993 (Fla 5th DCA 2021).

A trial court's discretion in determining the admissibility of expert testimony is limited by the evidence code and applicable case law. *Cooper v. Gonzalez*, 374 So.3d 841, 843 (Fla. 5th DCA 2023). *See also Nardone v. State,* 798 So.2d 870, 874 (Fla. 4th DCA 2001).

A ruling that is unsupported by the record constitutes a clear abuse of discretion. *Moore v. Gillett*, 96 So.3d 933, 937 (Fla. 2d DCA 2012); *Dobbins v. Dobbins*, 584 So.2d 1113, 1116 (Fla. 1st DCA 1991).

## II. The exclusion of Plaintiffs' key witness testimony regarding negligence of the nursing staff denied Plaintiffs due process.

### A. Standard of review.

Whether the trial court has violated a party's due process rights is subject to de novo review on appeal. *Babcock New Haven, LLC v. Teimouri*, 392 So.3d 166, 168 (Fla. 5th DCA 2024). The denial of due process is fundamental error that can be raised for the first time on appeal. *Blechman v. Dely*, 138 So.3d 1110, 1114 (Fla. 4th DCA 2014); *Palm Beach County v. Wilson*, 386 So.3d 937, 939 (Fla. 4th DCA 2024).

## ARGUMENT

### I. The trial court abused its discretion in excluding key testimony of Plaintiffs' main expert, Nurse Jan Attard, under *Binger*.

#### *Binger*

In *Binger*, the Florida Supreme Court determined that a trial court can properly exclude the testimony of a witness whose name has not been disclosed in accordance with a pretrial order. But this discretion of the trial court may not be "exercised blindly". It should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party. Prejudice here refers to the "surprise in fact" of the objecting party, and it is not dependent on the adverse nature of the testimony.

Other factors to consider are:

> 1. The objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness.
>
> 2. The calling party's possible intentional, or bad faith, noncompliance with the pretrial order.
>
> 3. The possible disruption of the orderly and efficient trial of the case (or other cases).

"If after considering these factors, and any others that are relevant, the trial court concludes that use of the undisclosed witness will not substantially endanger the fairness of the proceeding, the pretrial order mandating disclosure should be modified and the witness should be allowed to testify." *Binger* at 1313-14.

***Misapplication of Binger***

In the present case, the trial court misapplied *Binger*. The trial court's understanding of the applicable law was as follows. "(A)n expert's opinion is wholly admissible unless a report was provided or deposition was taken, and then they are limited to the opinion set forth in that report and/or in that deposition." [T.275]

This is clearly a misapplication of *Binger* itself resulting in an abuse of discretion regarding the stricken testimony of Nurse Attard. As stated by the Florida Supreme Court in *Binger*:

> It follows, of course, that a trial court can properly exclude the testimony of a witness whose name has not been disclosed in accordance with a pretrial order. The discretion to do so must not be exercised blindly, however, and should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party. **Prejudice in this sense refers to the surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony.** Other

> factors which may enter into the trial court's exercise of discretion are: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases). If after considering these factors, and any others that are relevant, the trial court concludes that use of the undisclosed witness will not substantially endanger the fairness of the proceeding, the pretrial order mandating disclosure should be modified and the witness should be allowed to testify.

*Binger v. King Pest Control*, 401 So.2d 1310, 1313–14 (Fla. 1981) (e.s.).

*Binger* analysis is also applied where a medical expert changes her opinion, resulting in surprise and prejudice to the opposing party. *Allstate Property & Cas. Ins. Co. v. Lewis*, 14 So.3d 1230 (Fla. 1st DCA 2009).

Based on the language used by the Florida Supreme Court, *Binger* does not support exclusion of Nurse Attard's testimony in this case. Nurse Attard was listed by Plaintiffs on their expert witness list:

> Nurse Attard is expected to testify regarding issues related to standard of care, causation and damages. Nurse Attard's opinions are based on her review of the issues involved in

> this case, as well as her education, training and experience.

[R.450; 1500; 1547; 1636; 2067; 2125; 2217]

This is compliance with *Binger* and the trial court order.

Significantly, in the present case, there was no "new opinion" by Nurse Attard. *See* pages 5-8; 10-12, *supra*. Defense counsel failed to ask the right questions at deposition, and failed to fully inquire into Nurse Attard's report which was an exhibit to her discovery deposition. Moreover, medical experts are not limited to the exact wording of their reports. As stated by the court in *Suarez–Burgos v. Morhaim,* 745 So.2d 368 (Fla. 4th DCA 1999):

> Nor is it necessary to exhaustively question the expert to discover whether the expert has come to other significant opinions not expressed in the report. Indeed, such requirements would fuel the ever increasing cost of litigation.

745 So.2d at 371.

The court in *Allstate Property & Cas. Ins. Co. v. Lewis*, 14 So.3d 1230 (Fla. 1st DCA 2009) relied on *Suarez-Burgos* and held:

> Limiting an expert's testimony to the exact wording of his or her written report, however, would create an absurd result. Such reports often contain complex medical terminology, which requires extensive explanation.

* * *

> Florida Rule of Civil Procedure 1.360(b) requires only the disclosure of a "substantial reversal of opinion" after a doctor has submitted a report. *Office Depot,* 584 So.2d at 590–91 (emphasis added). There was no substantial change between Dr. Von Thron's opinion contained in his report and his trial testimony.

14 So.3d at 1234-35.

*Dos Santos v. Carlson*, 806 So.2d 539, 540–41 (Fla. 3d DCA 2002) is instructive:

> Here, the plaintiff knew about Dr. Kagan, as his name had been provided almost two years before trial. Surely counsel could not argue that they were surprised that Dr. Kagan would testify either that the MRI was negative or that its findings were unrelated to the accident. **Any experienced trial attorney should have been able to cope with such testimony.** There would have been no disruption to the trial if plaintiff's counsel had been given a copy of the report during opening statements, as the witness would not be testifying until after the lunch recess, allowing ample time to review the report.

(e.s.)

Similarly, Plaintiffs' main expert, Nurse Attard, was known to Defendant almost two (2) years before trial. [R.442] Defendant took Nurse Attard's discovery deposition on July 22, 2022. Attard's report

was an exhibit to that deposition. Nurse Attard's trial deposition was taken on November 15, 2023. [R.5685-5828]

Plaintiffs' nursing expert, Janet Attard, RN, was precluded from offering opinions to the jury on Nurse Isabel Vasquez's breach of the standard of care in which she failed to report new symptoms of pain to Mrs. Labady's OB/GYN, Dr. Jeffrey Feld, and failed to call Dr. Feld. She was also precluded from offering the opinion that Nurse Vasquez should have gone up the chain of command for the respiratory therapy done. These opinions were removed from Nurse Attard's video deposition prior to playing it before the jury, after the trial court sustained the Defendant's objections to said testimony on the basis of the *Binger* standard. [T.235-276]

Again, the Court in *Binger* explains that the trial court's discretion to exclude witness testimony must not be exercised blindly and should be guided largely by a determination as to whether the objecting party will be prejudiced. See *Binger v. King Pest Control*, 401 So.2d 1310 (Fla. 1981) "Prejudice in this sense refers to the surprise in fact of the objecting party. . ." *Id.*

Nurse Attard's subject opinions, and specifically her opinions on Pages 44-45, Lines 6-25, 1-7 and Page 47, Lines 11-19, did not

prejudice the Defendant and were not a "surprise in fact." *See* pages 11-13, *supra*. [R.5728-5731] [T.260-275]

Nurse Attard testified numerous times throughout her discovery deposition that Nurse Vasquez breached the standard of care by failing to call Dr. Feld. [R.3480-3516] There is no surprise that Nurse Attard's opinion in her trial deposition was "The presence of pain would cause any nurse in preadmission testing to do some fetal monitoring, to call Dr. Feld…" Page 44-45, Lines 25, 103. [R.5728-5729] This was in response to the question: "Upon learning this information, the presence of pain that was described and detailed in the August 9, 2017, Orlando Health record, does the applicable standard of care require that Nurse Vasquez should call Dr. Feld?" See Page 44, Lines 15-20. [R.5728] Nurse Attard was physically looking at the Defendant's own medical record documenting Mrs. Labady's pain when she testified to the above opinion. [R.5726]

The same medical record, provided by the Defendant, included the respiratory therapy entry in which Nurse Attard testified that failing to report and go up the chain of command with this medical

information was a breach in the standard of care. Nurse Attard testified as follows in her trial deposition:

> Q. Nurse Attard, did Nurse Vazquez perform respiratory therapy to Norma Labady during her morning visit at Orlando Health on August 9, 2107 [*sic*]?
>
> A. Yes.
>
> Q. What is respiratory therapy?
>
> A. Respiratory therapy occurs when either the oxygen saturation goes down and we're just trying to increase the -- the oxygen saturation to a level that is what we call normal, or it's when a patient has an episode for whatever reason of respiratory distress.
>
> Q. And after Nurse Vazquez performed this respiratory therapy to Ms. Labady on the morning of August 9, 2017, did Nurse Vazquez report this up the chain of command?
>
> A. No.
>
> Q. Does the applicable standard of care require Nurse Vazquez to report the respiratory therapy up the chain of command?
>
> A. Yes.

[R.5730:25-5731:19] This opinion was also excluded pursuant to a *Binger* objection. [T.270:9-13; 275:10-16]

The Defendant had the information Nurse Attard was referring to from the outset of this case, as it was generated by its own staff. [R.3722-3779; 3780-3789; 4069-4065; 4066-5177; 5182-5614; 5615-5677] [Defendant's counsel admitted "[o]h, that -- we had it forever" as it relates to their own medical records. *See* T.258:11.]

The Defendant's own expert witnesses had reviewed and were in possession of the same medical records Nurse Attard testified to, and also had ample opportunity to rebut said testimony of Nurse Attard. [R.3722-3779; 3780-3789; 4069-4065; 4066-5177; 5182-5614; 5615-5677] There was no surprise in fact, the Defendant was not prejudiced, and this was not an ambush strategy by the Plaintiffs. The *Binger* standard was not met, and Nurse Attard's testimony was improperly excluded.

Nurse Attard was further precluded from offering an opinion on her understanding of what should be done when there is a diagnosis of preeclampsia on Page 29, Lines 12-20. [R.5713] As stated by Nurse Attard:

> Q. Nurse Attard, based on your education, training, and work history as a licensed registered nurse, what is your understanding of what should be done when there is a pre -- a diagnosis of preeclampsia?

> A. My understanding with a diagnosis of preeclampsia is the patient is hospitalized and monitored, and we decide when we're going to deliver.

[R.5713:12-20]

This opinion was based on her education, training and work history as a licensed registered nurse. The specific objection was "That goes beyond the basis of her expert opinions. It's a diagnosis." Nurse Attard was not asked, nor did she answer, with a diagnosis. [R.5713-5715] She simply testified to what is done with a patient when there is a diagnosis of preeclampsia. It was reversible error to prevent this testimony from being presented to the jury.

By disallowing Plaintiffs' nursing expert to render specific opinions outlined above, substantial prejudice resulted to the Plaintiffs in this action.

Excluding the testimony of a witness is one of the most drastic of remedies which should be invoked only under the most compelling of circumstances. Previously undisclosed expert testimony in the form of a new witness, undisclosed opinion, or substantially changed opinion, may be excluded when it is first offered after a critical point in time, **if allowing it would result in surprise and substantial**

**prejudice**. *Seven Restaurants, LLC v. Tulecki*, 391 So.3d 949, 961 (Fla. 4th DCA 2024). Here there was neither true surprise nor substantial prejudice.

Further, and specifically, under *Binger*, "the test for exclusion of evidence for non-disclosure during pretrial discovery is whether the opposing party was prejudiced in his preparations for trial." *Gouveia v. Phillips*, 823 So.2d 215, 222 (Fla. 4th DCA 2002). *See also Moore v. Gillett*, 96 So.3d 933 (Fla. 2d DCA 2012).

Nurse Attard's testimony did not prejudice Defendant's counsel in its preparation for trial. The question of whether Orlando Health, Inc.'s nursing staff, including Nurse Vasquez, was negligent in its care/treatment of Plaintiff was the central issue in this case. Defendant's counsel was fully prepared to address this issue, and it did so with its own nurse expert.

Defendant had its own experts testify that its nursing staff was not negligent. [T.1297-1397] For example, Orlando Health, Inc. submitted expert Tracy Keith, RN, a nurse who "will provide opinions related to standard of care." [R.1828] Defendant also had all of its medical records pertaining to its care and treatment of Plaintiff. [T.258]

*See Spalding v. Zatz*, 70 So.3d 692, 698 (Fla. 5th DCA 2011) (finding no prejudice where the objecting party was prepared to address the claimed "surprise" testimony with his own contrary evidence).

Defendant's nurse expert, Tracy Keith, was allowed to give expert testimony before the jury that Nurse Vasquez was never negligent and she met all the requirements of pre-admission testing. [T.1326; 1380; 1389]

She specifically told the jury that even with all the symptoms Mrs. Labady presented to Orlando Health, Inc. (on August 9th and prior), Nurse Vasquez had no obligation to call Dr. Feld. [T.1349; 1351] Nurse Keith's testimony highlighted the significance of this issue when addressing the question of negligence of the nursing in this case:

> Q. Do you know that Dr. Feld testified here that if Nurse Vasquez would've called him on the morning of August 9, 2017, that he would've admitted her into the hospital for monitoring?
>
> A. I'm aware of that testimony, but there's no indication for Isabel Vasquez to call them based on what she evaluated and the blood pressure and the fetal movement that was determined during her visit. There's no indication for her to call him.

* * *

> Q. He could have kept her there for monitoring until the C-section the next day, August 10th, right?
>
> A. If he determined that that was needed, that would have been his decision.
>
> Q. And that's the -- that's his decision to make as the treating physician?
>
> A. That is correct.

[T.1390:6-14; 1391:1-7]

Nurse Keith's testimony that Nurse Vasquez did everything right is directly contrary to the testimony of Plaintiffs' nurse expert – Nurse Attard. But the jury did not hear Plaintiff's expert's testimony on this issue because the trial court excluded this testimony under *Binger*.

Under these circumstances, Nurse Attard's testimony should not have been excluded. Nurse Attard's testimony regarding the negligence of Nurse Vasquez was critical to Plaintiff's case, and Plaintiff was severely prejudiced by the exclusion of this testimony.

The trial court's exclusion of Nurse Attard's testimony regarding what should be done where there is a diagnosis of preeclampsia was also erroneous. Again, Defendant had its expert fully prepared and Defendant's nurse expert did in fact address this issue before the

jury. Nurse Keith was permitted to give her opinion about what should be done when there has been a diagnosis of preeclampsia. [T.1332-1333; 1347-1348; 1351; 1387-1388; 1393-1394]

And yet, again, the jury never got to hear *Plaintiff's* nurse expert on this same issue.

There was no surprise, no prejudice to Defendant. Nurse Attard's testimony should have been admitted.

The Defendant had knowledge of these opinions, the Plaintiffs did not act in an intentional manner nor bad faith, and there was no disruption to the orderly and efficient trial of the case.

Furthermore, the trial court never even made a determination, on the record, as to whether use of the witness testimony would prejudice the objecting party, Defendant. In this case, there was neither surprise nor prejudice to the opposing party as Defendant was aware of Nurse Attard's testimony. The only prejudice here was to Plaintiffs.

In the present case, the record is clear that, as to the excluded Nurse Attard expert testimony, the trial court failed to "consider: (1) the opponent's ability to cure any prejudice, (2) whether the proponent's noncompliance with the pretrial order was in bad faith,

(3) whether the trial would be disrupted, and (4) any other relevant factor." *Cooper* at 844. The trial court did not address all of the *Binger* factors. This is a clear abuse of discretion and reversible error.

It is incumbent upon that the trial court to analyze the *Binger* factors before exercising its discretion to admit or exclude late-disclosed exhibits or witness testimony. The courts have held that the trial court's failure to do so will result in reversal. *Montero v. Corzo*, 320 So.3d 976, 980 (Fla. 3d DCA 2021). *See also Heritage Prop. & Cas. Ins. Co. v. Killmeyer*, 382 So.3d 708, 712 (Fla. 4th DCA 2024) ("[I]t is incumbent upon the trial court to analyze the *Binger* factors **before** exercising its discretion to admit or exclude late-disclosed exhibits or witness testimony") (e.s.); *Cooper* at 844 ("When considering whether to exclude or limit such untimely disclosed testimony, the trial court is to consider: (1) the opponent's ability to cure the prejudice, (2) whether the proponent's noncompliance with the pretrial order was in bad faith, (3) whether the trial would be disrupted, and (4) any other relevant factor"); *Montero* at 980 ("In making this determination, the *Binger* Court set forth several factors a trial court should consider: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the

existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case, and as such, it is incumbent upon the trial court to analyze all these *Binger* factors before exercising its discretion to admit or exclude late-disclosed exhibits or witness testimony"); *Heritage Prop.* at 712 ("[I]t is incumbent upon the trial court to analyze the *Binger* factors before exercising its discretion to admit or exclude late-disclosed exhibits or witness testimony") (e.s.).

The trial court failed to address the *Binger* requirements when it excluded the Nurse Attard expert testimony cited herein:

> 1. The objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness.
>
> - The trial judge did not address this issue of prejudice. But the record shows no prejudice. *See* analysis, *supra*, demonstrating Defendant was not prejudiced and was fully prepared with its own nurse expert to refute Nurse Attard's testimony.
>
> 2. The calling party's possible intentional, or bad faith, noncompliance with the pretrial order.

- Again, the trial judge did not address. But the record demonstrates Nurse Attard was properly listed in compliance with the pretrial order and the pretrial order was followed in this case.

3. The possible disruption of the orderly and efficient trial of the case (or other cases).

- Again, the trial judge did not address.

This Court should note that in allowing other (Nurse Attard) testimony into evidence over Defendant's objection, the trial court stated she found no bad faith noncompliance with the pretrial order, and that there was no disruption of the trial. *See* T.259. This was in reference to Nurse Attard's statements regarding "chest pain". [T.252-259] But as to the specific expert testimony cited in this brief, which was excluded by the trial judge under *Binger*, the trial judge conducted no similar analysis.

## II. The exclusion of Plaintiffs' key witness testimony regarding negligence of the nursing staff denied Plaintiffs due process.

### *Due Process*

It is fundamental that the right to call witnesses is one of the most important due process rights of a party and the exclusion of the testimony of an expert witness must be carefully considered and

sparingly done. This is especially true if the witness is a party's most important witness because if the witness is stricken, that party will be left unable to present evidence to support their theory of the case. *Pascual v. Dozier*, 771 So.2d 552, 554 (Fla. 3d DCA 2000).

This is exactly the situation in this case. This was an extremely important witness to Plaintiffs' theory of the case with respect to Defendant.

Defendant's argument to the jury – that there was no negligence on part of the hospital, which was a legal cause of loss to Plaintiffs – was wholly adopted by the jury. And the testimony of Plaintiffs' main witness that there was negligence by the nursing staff and Nurse Vasquez was excluded by the trial court.

The exclusion of Plaintiffs' nurse expert's testimony was extremely prejudicial and a violation of due process. *See State v. Gerry*, 855 So.2d 157, 161 (Fla. 5th DCA 2003) ("The right to call witnesses is one of the most important due process rights of a party and accordingly, the exclusion of the testimony of expert witnesses must be carefully considered and sparingly done.").

As important due process rights are in play, the exclusion of a witness's testimony is a drastic remedy which should be utilized **only**

**under the most compelling circumstances.** Absent evidence of a willful failure to comply or extensive prejudice to the opposition, the exclusion of testimony constitutes an abuse of discretion. *State Farm Mut. Automobile Ins. Co. v. Nob Hill Family Chiropractic,* 328 So.3d 1, 7 (Fla. 4th DCA 2021). Here, there was no willful failure to comply on the part of Plaintiff and no "extensive prejudice" to Defendant. *See State Farm Mut. Auto. Ins. Co. v. Bowling*, 81 So.3d 538, 541 (Fla. 2d DCA 2012); *State v. Gerry*, 855 So.2d 157, 161 (Fla. 5th DCA 2003).

Further, the denial of due process is reviewed for fundamental error. *Palm Beach County v. Wilson*, 386 So.3d 937, 939 (Fla. 4th DCA 2024). *Blechman v. Dely*, 138 So.3d 1110, 1114 (Fla. 4th DCA 2014). The failure to give a party the chance to present witnesses or testify violates the fundamental right of a full and fair opportunity to be heard in judicial proceedings. *Perez v. Maldonato*, 324 So.3d 1011, 1013 (Fla. 3d DCA 2021).

## CONCLUSION

The trial court committed reversible error when it struck portions of the "trial deposition" of expert Nurse Jan Attard. First, the court misapplied *Binger*. As to the excluded Nurse Attard expert testimony, the trial court failed to make a proper determination as to

prejudice as well as other factors specifically stated in *Binger* and the applicable cases. Moreover, the record establishes that Defendant would not have been prejudiced by the admission of Nurse Attard's testimony. Defendant was aware of Nurse Attard's opinions and report prior to trial. Defendant was not prejudiced in its preparation for trial and in fact Defendant had its own expert testify adversely to Nurse Attard's excluded expert opinion.

Second, the trial court committed fundamental error by violating the due process rights of Plaintiffs when it took the drastic step of excluding vital testimony from Plaintiffs' most important witness, leaving Plaintiffs without the ability to present their theory of their case to the jury.

Based on the following, Appellant respectfully submits that the final judgment and order denying Plaintiff's motion for new trial be REVERSED.

## CERTIFICATE OF SERVICE

I certify that the foregoing document was furnished to Michael R. D'Lugo at ORLcrtpleadings@wickersmith.com via e-service from the Florida Courts E-Filing Portal on this 17th day of December, 2024.

/s/Jennifer S. Carroll
Jennifer S. Carroll

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable font standards and word count limit requirements as set forth in Florida Rules of Appellate Procedure 9.045 and 9.210.

/s/Jennifer S. Carroll
Jennifer S. Carroll