O.a. 2-6-85

IN THE SUPREME COURT OF FLORIDA

65400

THIRD DISTRICT CASE NO: 82-1324 & 82-1435

PAMELA MARRERO,

Petitioner,

vs.

MALCOLM G. GOLDSMITH, M.D., et al.,

Respondent.

_____/

BRIEF OF RESPONDENT
MALCOLM G. GOLDSMITH, M.D.

STEPHENS, LYNN, CHERNAY, KLEIN
One Biscayne Tower, Suite 2400
Miami, Florida 33131
(305) 358-2000

BY: ROBERT M. KLEIN, ESQUIRE

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INTRODUCTION

Respondent MALCOLM G. GOLDSMITH, M.D., was a defendant in this trial court action seeking damages as a result of alleged medical malpractice, and an Appellee before the District Court of Appeal, Third District. Petitioner PAMELA MARRERO was the plaintiff before the trial court. The other defendants included Respondents CONSTANTINE KITSOS, M.D., and WILLIAM BREWSTER, M.D., as well as NORTH SHORE MEDICAL CENTER. NORTH SHORE settled with the MRS. MARRERO on the last day of the jury trial in this matter, and is not a party to this appeal. In this brief, the parties will be referred to as Plaintiff/Petitioner and Defendants/Respondents, as well as by name.

Petitioner in this matter seeks review of a jury verdict which was rendered after a two week trial. All three Respondents were favored with a jury verdict.

The following symbols will be used for reference purposes:

"R" for references to the record on appeal;

"T" for references to the trial court transcripts; and

"DT" for page references to deposition testimony which was read at trial.

All testimony has been supplied by counsel, unless indicated to the contrary.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

While Petitioner's statement of fact is essentially accurate, the distinctions between the several procedures which were performed by the various physicians are occasionally blurred. In addition, given the primary focus of Petitioner's argument in this matter, some of the expert testimony which was elicited at trial requires clarification. For this reason, RespondentGOLDSMITH believes that it would be appropriate to briefly recount critical aspects of the factual and expert testimony which was adduced at trial either in support of or in opposition to the Plaintiff's claims against DR. GOLDSMITH.

DR. GOLDSMITH is a colon and rectal surgeon who has taught surgery in Australia, England and the United States. He is Board certified in colon and rectal surgery, and has also received certification from the highest governing bodies of his profession in England and Australia. (T 742-744)

The procedure which DR. GOLDSMITH performed in this instance was an excisional hemorrhoidectomy. He has performed that procedure between five hundred and a thousand times over the course of the past sixteen years. During that entire period of time, DR. GOLDSMITH never had a patient who sustained an injury to the brachial plexus. (T 745-746; 750)

DR. GOLDSMITH'S procedure was actually the first of two separate operations which PAMELA MARRERO underwent on the same day. The hemorrhoidectomy took no more than twenty to thirty

minutes. Throughout that period of time, MRS. MARRERO'S arms remained on arm boards, which were level with the surgical table itself. Her arms were abducted away from her body at an angle of something less than sixty degrees. (T 750-751; 760-761)

DR. GOLDSMITH testified that he is always concerned about the placement of a patient's arms during surgery, because of the possibility of a traction or stretch-related nerve injury. Because of this concern, surgeons are taught not to abduct a patient's arms beyond ninety degrees, and to avoid posterior deflection. (T 747-751) DR. GOLDSMITH has taught positioning to other surgeons throughout the world, and characterized this positioning as generally-accepted. (T 753-754)

All of the Plaintiff's own experts--with one notable exception--agreed that the position related by DR. GOLDSMITH was appropriate and generally accepted as the standard of care throughout the medical community. Virtually every physician who testified--again with one notable exeception--also agreed that MRS. MARRERO could not have sustained a traction injury to her brachial plexus during the twenty to thrity minutes that it took DR. GOLDSMITH to perform his surgical procedure.

Plaintiff's first expert witness was Dr. John Kruse, an anesthesiologist. According to Dr. Kruse, MRS. MARRERO'S arms would have had to have been extended at an angle of greater than seventy degrees for a period of time in excess of thirty to forty minutes before a traction injury could have occurred. In fact, Dr. Kruse agreed that the injury could not have occurred during

DR. GOLDSMITH'S procedure. In addition, however, he testified that the injury could have occurred prior to the commencement of surgery, or at some point between the time that Petitioner left the surgical suite and returned to her room, after spending some time in the recovery room. (T 170-174)

According to Dr. Marshal Abel, the Plaintiff's treating neurologist, who was called as an expert witness by MRS. MARRERO, traction injuries to the brachial plexus are only reported to occur where a patient's arm is hyperabducted beyond ninety degrees. In addition, however, Dr. Abel testified that an arm must be hyperabducted for something in excess of forty minutes before a traction injury can occur.

> Most of the time, the lower limits have been placed at about 40 minutes. I believe the hemorrhoidectomy lasted only a half hour. I doubt if the hemorrhoidectomy lasting that long, you know could--you could get a significant traction in that short period of time. We are generally talking about procedures lasting over an hour, two, three, four hours. (T 238)

Dr. Abel had never even heard of a brachial plexus injury occuring during a hemorrhoidectomy. (T 237)

Dr. Bernard Tumarkin, the Plaintiff's treating psychiatrist (who is also a neurologist), also agreed that one is generally not concerned about a brachial plexus injury where a patient's arm is not abducted at an angle of more than ninety degrees. In fact, according to Dr. Tumarkin, there is generally no pressure on the nerves or any other kind of traction absent some kind of unusual positioning of the body--which was not utilized in this case--until the arms are abducted at angles approaching one hundred and eighty degrees. (T 276-280)

Virtually every expert who was called by the various Respondents concurred in the belief that a traction injury could not have occurred during DR. GOLDSMITH'S surgery. They also agreed that a patient's arms are routinely abducted at angles up to ninety degrees during the kind of surgery which was performed by DR. GOLDSMITH.

DR. GOLDSMITH'S expert witness was Dr. Charles V. Ripstein (improperly spelled as Ribstein in the transcripts), a surgeon who is board certified in general surgery, thoracic surgery and colon and rectal surgery. Dr. Ripstein is a practicing surgeon, although he was previously a professor of surgery and chairman of the Department of Surgery at the Albert Einstein College of Medicine in New York City. He has also taught surgery at Cornell University and the University of Miami. (T 727-728)

According to Dr. Ripstein, it is routine to have a patient's arms abducted at angles of fifty to sixty degrees during a hemorrhoidectomy. In fact, he testified that ninety percent of all hemorrhoidectomies are performed with a patient's arms in that position. Dr. Ripstein did not believe that a traction-related brachial plexus injury could occur as a result of that degree of abduction, and also did not believe that an injury to the brachial plexus could occur during an operation which only required some twenty to thirty minutes. In fact, Dr. Ripstein had never seen or read about a traction-related brachial plexus injury occurring during a twenty to thirty minute operation. (T 729-731; 740)

Similar opinions were expressed by Dr. Jack Norman, a Board certified plastic and general surgeon (T 836-840); by Dr. Bradley Smith, Chief of the Department of Anesthesiology at Vanderbilt University Medical School (who noted that he had never heard of a traction injury occurring where arms were abducted at an angle of no more than sixty to seventy degrees away from the body) (T 950-952); and by Dr. Jerome Modell, Chairman of the Department of Anesthesiology at the University of Florida School of Medicine and Chief of Anesthesia at Shands Teaching Hospital (T 1058-1061). In addition, Dr. Ray Lopez, a local board certified neurologist testified concerning other potential causes of a brachial plexopathy which would be unrelated to the positioning of a patient's arms, including allergic reactions to either anesthesia or antibiotics. (T 1001-1006)

The only expert who testified that a traction-related brachial plexus injury could have occurred during DR. GOLDSMITH'S involvement with MRS. MARRERO was Dr. Judd Bockner, a general surgeon who has not practiced medicine since he moved to Florida in 1974. Contrary to the testimony of every other witness in the case--including the Plaintiff's own experts--Dr. Bockner testified that a brachial plexus injury could have occurred even with a patient's arm abducted at a minimal angle. Thus, according to Dr. Bockner, MRS. MARRERO'S arms should have been kept at her side. Further, according to Dr. Bockner, arm boards should not have been used. (T 587-593)

Even Dr. Bockner had to concede that the forty-five degree angle of abduction alone could not cause a brachial plexopathy without posterior displacement of the arms. Dr.

Bockner nevertheless assumed that there was posterior deflection of MRS. MARRERO'S arms, since he believed that the arm boards were necessarily lower than the level of the operating table. There was no testimony to that effect at trial. And in fact the only affirmative evidence on that point was to the contrary. (T 606; 757-759)

Finally, it should also be noted that Dr. Bockner (who is not a neurologist) did not know how long it would take for a brachial plexus injury to occur even if arm boards had been inappropriately placed in accordance with his perception of the standard of care. (T 607)

Respondent GOLDSMITH reserves the right to supplement this factual statement in the argument portion of the brief, as necessary. Respondent will otherwise concur in the statement of the case which has been related by Petitioner and the remaining Respondents.

POINTS ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE JURY ON THE DOCTRINE OF RES IPSA LOQUITUR.

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING DR. PERETZ SCHEINBERG TO TESTIFY CONCERNING THE CAUSE OF PETITIONER'S BRACHIAL PLEXOPATHY, AND IN OTHERWISE ALLOWING THE DEFENDANTS TO REFER TO DR. SCHEINBERG AS THE COURT-APPOINTED PHYSICIAN.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO CHARGE THE JURY ON THE DOCTRINE OF RES IPSA LOQUITUR.

Initially, Respondent GOLDSMITH will concur with the arguments which have been raised by Respondent KITSOS. To the extent possible, Respondent GOLDSMITH will attempt to avoid belaboring those points which have been raised by DR. KITSOS. However, some repetition cannot be avoided.

For example, Respondent KITSOS has argued that the doctrine of res ipsa loquitur was inapplicable in this instance because MRS. MARRERO was not under the exclusive control of any one of the Respondents for the entire period of time when the brachial plexopathy could have occurred, i.e., from the point in time when MRS. MARRERO was first anesthetized, until the point when she first recognized that she was having a problem with her shoulder, after she returned to her room. Thus, while the Plaintiff might have had a legitimate argument in favor of application of the doctrine of res ipsa loquitur had she not settled with the Hospital immediately prior to the time that the case went to the jury, since at least one hospital employee was involved with MRS. MARRERO'S care at all pertinent times prior to the point when she first noticed her problem, a charge on res ipsa loquitur would have been wholly inappropriate once the Hospital was out of the case.

DR. GOLDSMITH'S limited involvement with MRS. MARRERO provides what is perhaps the most eloquent argument against utilization of a res ipsa charge. DR. GOLDSMITH'S procedure lasted

between twenty and thirty minutes. Prior to the commencement of his surgery, the patient was anesthetized and otherwise prepared for surgery, and then placed in position for the procedure. DR. GOLDSMITH was not even in the operating theater at that time.

After completion of the hemorrhoidectomy, DR. GOLDSMITH left the operating theater. He was therefore not present during the balance of the two to three hour procedure which was performed by DR. KITSOS. Nor was he present when MRS. MARRERO was removed from the operating table, or when she was transferred to the recovery room, and then ultimately to her own room.

Given this sequence of events, MRS. MARRERO cannot in good faith argue that she was under DR. GOLDSMITH'S complete control throughout all critical phases of her surgery. For that reason alone, a res ipsa loquitur instruction would have been inappropriate. CHENOWETH v. KEMP, 396 So.2d 1122 (Fla. 1981); GOODYEAR TIRE & RUBBER COMPANY v. HUGHES SUPPLY, INC., 358 So.2d 1339 (Fla. 1978); BENIGNO v. CYPRESS COMMUNITY HOSPITAL, INC., 386 So.2d 1303 (Fla. 4th DCA 1980); GUZMAN v. FARALDO, 373 So.2d 66 (Fla. 3rd DCA 1979); ANDERSON v. GORDON, 334 So.2d 107 (Fla. 3rd DCA 1976). Cf. Florida Standard Jury Instruction 4.6.

Unquestionably, as far as DR. GOLDSMITH is concerned, this case did not present facts or circumstances attendant to MRS. MARRERO'S injury such that "'in the light of past experience, negligence is the probable cause and the defendant is the probable actor.'" CHENOWITH, supra, at 1125, citing from GOODYEAR, supra at 1342. Virtually every expert who testified on this point--including the Plaintiff's own experts--agreed that a traction injury to the brachial plexus could not have occurred

within twenty to thirty minutes, even assuming (despite the lack of any direct testimony) that MRS. MARRERO'S arms had been improperly hyperabducted during DR. GOLDSMITH'S procedure. Most of these experts also testified that there are numerous other potential causes for brachial plexopathy, including viral infection and an allergic reaction to either anesthesia or preoperative antibiotics.

The only "expert" who even remotely suggested that MRS. MARRERO'S problem could be related to something which occurred during DR. GOLDSMITH'S surgery was Dr. Judd Bockner, a self-styled "Jack-of-all-trades," who has made his living during the past ten years by testifying as a plaintiff's expert on numerous occasions in cases involving a variety of specialties. Yet even Dr. Bockner had to concede that he was unable to state how long MRS. MARRERO'S arms would have had to have been hyperabducted before a traction injury to the brachial plexus would occur. Given such testimony, Respondent GOLDSMITH would submit that a res ipsa instruction would have been both prejudicial and improper.

There is one other guideline for application of a res ipsa instruction which merits comment. As was noted in ANDERSON, supra, res ipsa may not be applied "where expert medical evidence is required to show not only what was done, but how and why it occurred, since the question is then outside the realm of the layman's experience." Supra at 109.

In this instance, both the Plaintiff and the Defendants presented substantial medical testimony in order to corroborate the various theories which were advanced concerning the etiology

of MRS. MARRERO'S brachial plexopathy. The parties presented testimony concerning both the mechanism of injury during a surgical procedure, i.e., hyperabduction and posterior deflection of the arms, as well as the other possible causes of damage to the brachial plexus. Clearly, this testimony went far beyond the realm of an average juror's medical knowledge. Given such direct "cause and effect" testimony, and the complex nature of the injury, an instruction on res ipsa loquitur would not have been proper.

The Fourth District's opinion in BENIGNO v. CYPRESS COMMUNITY HOSPITAL, INC., 383 So.2d 1303 (Fla. 4th DCA 1980), perhaps best summarizes Respondent's argument in this regard. In BENIGNO, the Court rejected the plaintiff's arguments in favor of application of a res ipsa loquitur jury instruction, noting that the plaintiff had failed to establish the essential elements of the doctrine, or to otherwise demonstrate "a lack of available evidence" pertaining to the occurrence.

> In fact, contrary to application of the doctrine, plaintiff presented substantial direct testimony regarding the defendant's alleged negligence in placing decedent in the chair. In attempting to prove the hospital's negligence, plaintiff introduced the testimony of numerous experts, the hospital personnel, and the doctors and nurses involved in decedent's care. Supra at 1304.

Similarly, in this instance, the Plaintiff presented direct expert testimony in order to substantiate her claims of negligence. While the Plaintiff had a remarkably difficult time coming up with any experts to testify against DR. GOLDSMITH, Dr. Bockner's sweeping condemnation included his suggestion that the various surgeons should not have used arm boards, and should have

maintained MRS. MARRERO'S arms at her sides during surgery. However incredible this testimony may have been in light of the testimony from all of the other experts at trial, it was nevertheless direct testimony by a plaintiff's expert which tied in the Plaintiff's alleged injury with a departure from appropriate standards of care by DR. GOLDSMITH. Given such direct testimony, a jury instruction on res ipsa loquitur was neither necessary nor proper.

Petitioner has cited to this Court's decision in SOUTH FLORIDA HOSPITAL CORPORATION v. McCREA, 118 So.2d 25 (Fla. 1960), and suggests that the Third District's decision conflicts with the opinion in that case. Apparently, this is based upon Petitioner's citation to language in the McCREA opinion to the effect that the "majority rule" among jurisdictions in 1960 would not have precluded application of the doctrine of res ipsa loquitur where a party has introduced evidence of specific acts of negligence "which does not clearly establish the precise cause of the injury...."

The Third District's decision does not conflict with McCREA. Rather, the Third District examined the evidence, and simply determined that res ipsa was not appropriate for application in this case, given the substantial direct proof of negligence which was offered by the Plaintiff. Thus, as the Third District noted in citing from this Court's decision in GOODYEAR TIRE AND RUBBER COMPANY v. HUGHES SUPPLY, INC., 358 So.2d 1339 (Fla. 1978), direct proof of negligence was not wanting in this case.

The Third District's citation to the GOODYEAR case, supra, clearly indicates that the intermediate appellate court did not ignore this Court's decision in McCREA. The GOODYEAR case contained a lengthy discussion of the McCREA decision, which was construed to mean:

> that there is no room for an inference of negligence where direct evidence is adduced to reveal the circumstances surrounding the occurrence and to establish the precise cause of the plaintiff's injury. GOODYEAR, supra at 1341.

And in this instance, it must be recalled that the Plaintiff did adduce direct evidence to establish both the nature of the Defendants' alleged negligence and the precise mechanism of injury.

The GOODYEAR case was cited with approval by this Court in CHENOWETH v. KEMP, 396 So.2d 1122 (Fla. 1981). The CHENOWETH case is virtually on "all fours" with this action. In CHENOWETH, the plaintiff received a neurological injury during a surgical procedure. The plaintiff argued that she had been incorrectly positioned and secured on the operating table, and presented the testimony of two neurosurgeons to corroborate her contention that the incorrect positioning had caused injury to the ulnar nerves. This Court rejected the plaintiff's contention that a res ipsa instruction would have been appropriate given the circumstances of that case, while citing to its earlier decision in GOODYEAR TIRE. CHENOWETH, supra at 1125.

It should also be noted that the CHENOWETH court did not believe that the facts and circumstances attendant to this type of injury are such that one can reasonably infer negligence, i.e., a juror would not necessarily conclude that "negligence is

the probable cause and the defendant is the probable actor." CHENOWETH, supra at 1125. The situation in this case should be no different, where the Plaintiff has also sustained a nerve injury which was allegedly caused by improper positioning during a surgical procedure. Plainly and simply, six lay jurors could not possibly conclude that this rather unusual injury--a brachial plexopathy--could only have occurred because of the negligence of one or more of the Defendants.

There is a final distinction between this case and the decisions in McCREA and BORGHESE v. BARTLEY, 402 So.2d 475 (Fla. 1st DCA 1981), cited by Petitioner. Both cases involved injuries which should not have occurred "in the light of common experience" absent someone's negligence. McCREA involved two broken legs which were sustained by a plaintiff in the recovery room subsequent to surgery. BORGHESE involved a full thickness burn which was sustained on the patient's body, at a place which was far removed from the operative cite. Those cases are readily distinguishable from the rather unusual condition which the Plaintiff developed in this instance--a condition which can be occasioned by a number of different causes, and independent of any negligence. Under the circumstances, Respondent would respectfully submit that the Third District properly relied upon this Court's decision in the GOODYEAR case as authority for its holding, rather than the McCREA or BORGHESE cases.

In its decision below, the Third District decided that it did not need to consider those elements which must ordinarily be established before a jury is charged on the doctrine of res ipsa loquitor. While the Third District felt that it need not

consider those elements, in light of its belief that this was not a proper case for application of a res ipsa instruction, even a cursory review of those elements will readily reflect that res ipsa should not have been applied in this case.

In the first place, MRS. MARRERO could never have established that "the instrumentality causing his or her injury was under the exclusive control of the defendants...." GOODYEAR, supra at 1341. As was noted earlier, the Plaintiff was under the control of several different physicians and the hospital at various times. The only Defendant which had complete control of the Plaintiff at <u>all</u> times while she was under anesthesia was the Defendant hospital, which settled with the Plaintiff prior to the jury verdict. None of the Defendant physicians had the Plaintiff under their complete control at all times. And as was noted above, DR. GOLDSMITH was with the Plaintiff for no more than twenty to thirty minutes.

In addition, as was noted above, this incident is not one which "would not, in the ordinary course of events, have occurred without negligence on the part of the one in control." GOODYEAR, supra at 1341, 1342.

> Plainly, the threshhold inquiry is whether that which occurred is a phenomenon which does not ordinarily happen except in the absence of due care. The initial burden is on the plaintiff to establish that the circumstances attendant to the injury are such that, in the light of past experience, negligence is the probable cause and the defendant is the probable actor. An injury standing alone, of course, ordinarily does not indicate negligence. The doctrine of res ipsa loquitor simply recognizes that in rare instances an injury may permit an inference of negligence if coupled with a sufficient showing of its immediate, precipitating cause. GOODYEAR TIRE, supra at 1339.

At the close of that quote, a footnote in the GOODYEAR opinion notes that "[t]his requirement is not satisfied...by the plaintiff's allegations and proof of specific acts of negligence.

Respondent would submit that the "light of past experience" requirement of the GOODYEAR TIRE case (and many of the other cases which have been cited herein) does not contemplate the past experience of expert witnesses or physicians; rather, this aspect of res ipsa deals with the experiences of lay persons. Yet that appears to be the position which Petitioner is taking in this case, i.e., so long as an expert takes the stand and testifies to the effect that the Plaintiff's injuries should not have occurred in the absence of negligence, then the doctrine of res ipsa loquitur may be applied. This is not the law, and Respondent would respectfully submit that a holding to that effect would render the doctrine of res ipsa loquitur applicable to virtually any negligence action.

In any complex malpractice or product liability action, the parties must resort to expert tesitmony to explain the mechanism of injury. That is precisely what was done in this case. The mere fact that the Plaintiff was under anesthesia--and that she was therefore unable to testify that her arms were improperly positioned--does not mean that direct proof of negligence was wanting, any more so than direct proof of negligence is wanting where a tire explodes while a plaintiff is driving a vehicle. In such cases, the plaintiff is not in a position to actually observe the blowout. Negligence must be proven by expert witnesses, through direct testimony. That is precisely what was done in this case. The jury simply chose to reject the

testimony of the Plaintiff's experts, and accepted the testimony of the experts who were presented by the Defendants. See GOODYEAR, supra at 1341.

II. THE TRIAL COURT DID NOT ERR IN ALLOWING DR. PERETZ SCHEINBERG TO TESTIFY CONCERNING THE CAUSE OF PETITIONER'S BRACHIAL PLEXOPATHY, OR IN OTHERWISE ALLOWING THE PARTIES TO REFER TO DR. SCHEINBERG AS THE COURT-APPOINTED PHYSICIAN.

Respondent GOLDSMITH will again adopt the arguments which have been raised by DR. KITSOS on this point. However, as was the case with Respondent's argument on the res ipsa loquitur issue, DR. GOLDSMITH'S counsel believes that several additional points should be made, notwithstanding his efforts to avoid belaboring an issue which has already been thoroughly briefed.

Petitioner correctly cites CHORAK v. NAUGHTON, 409 So.2d 35 (Fla. 2nd DCA 1981), as authority for the proposition that a trial court decision to appoint any given physician is a matter which rests within the sound discretion of the trial court judge. Under the circumstances, Respondent would submit that Petitioner must demonstrate that Judge Newman committed a palpable abuse of discretion before she will be able to claim reversible error. Based upon this record, DR. GOLDSMITH would submit that Petitioner has been unable to demonstrate that Judge Newman's rulings were either arbitrary, fanciful or unreasonable. For that reason alone, Respondent would submit that the Plaintiff has failed to carry her burden of demonstrating that Judge Newman abused his discretion. CANAKARIS v. CANAKARIS, 382 So.2d 1197 (Fla. 1980); see also DALE v. FORD MOTOR COMPANY, 409

So.2d 232 (Fla. 1st DCA 1982); PRICE V. PRICE, 389 So.2d 666 (Fla. 3rd DCA 1980); BEACHES HOSPITAL v. LEE, 384 So.2d 234 (Fla. 1st DCA 1980).

As has already been pointed out, Petitioner can hardly be allowed to predicate error upon the occasional characterization of Dr. Scheinberg as the court-appointed examining physician, when Petitioner's counsel himself referred to Dr. Scheinberg in that manner on several different occasions. In addition, however, the simple truth is that Dr. Scheinberg was the court-appointed examining physician, notwithstanding Petitioner's efforts to characterize Dr. Scheinberg as a defense doctor. Under the circumstances, Petitioner's claim of error is inappropriate.

There can be little doubt about the fact that MRS. MARRERO'S physical condition was "in controversy" in this case. Accordingly, application of Rule 1.360, Florida Rules of Civil Procedure was justified, so that the Defendants could secure the "diagnosis and conclusions" of an independent examining physician. For that reason, and pursuant to the provisions of the Rule, which require the order to "specify the time, place, manner, conditions and scope of the examination," an order was entered which appointed Dr. Scheinberg to testify "as to the nature and extent" of MRS. MARRERO'S injuries. That is precisely what Dr. Scheinberg did, and his testimony at trial did not depart from the parameters of the order which appointed him.

Respondent GOLDSMITH does feel constrained to comment upon Respondent's characterization of Dr. Scheinberg as some kind of biased, defense doctor, and the concurrent implication that

Dr. Scheinberg was somehow incapable of rendering an impartial opinion. First of all, there is absolutely nothing in the record to suggest that Dr. Scheinberg was anything other than unbiased in his review, or that he somehow colored his testimony in order to favor the defendant physicians at trial. Nor does the record reflect that the Plaintiff ever posed any opposition to Dr. Scheinberg's appointment, or that Dr. Scheinberg's credentials or impartiality were ever challenged at trial.

Respondent would suggest that it is certainly inappropriate at this late date--and in this forum--to suggest that Dr. Scheinberg should have been denominated as some kind of defense expert at trial. Respondent would respectfully submit that this is nothing more than a transparent attempt by the Plaintiff to avoid the results of what was an otherwise impartial examination, simply because Dr. Scheinberg's opinion ultimately proved to be adverse to the Plaintiff's position at trial.

If the Plaintiff truly felt that Dr. Schineberg was biased or partial, there was ample opportunity to make appropriate suggestions to that effect, or to cross-examine Dr. Scheinberg in order to question his credibility or to otherwise expose his prejudices before the jury. Petitioner's decision to forego such cross examination can only be interpreted as a calculated tactical decision, or some form of tacit recognition of Dr. Scheinberg's excellent reputation in the community. Either way, the issue of Dr. Scheinberg's bias should not be an issue at all in this appeal.[1]

1/ For an interesting contrast, compare the cross-examination of Dr. Judd Bockner by the various defense attorneys.

As far as Dade County standards are concerned, Respondent does feel that he must respond to the extra-record allegations concerning application of Rule 1.360 by the judges in the Eleventh Circuit. Contrary to Petitioner's suggestion, Circuit Court judges do not invariably appoint a doctor who has been selected by a defendant or defendants. Procedures will vary from judge to judge.

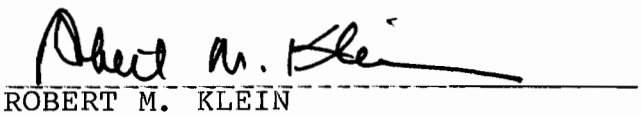
In fact, many judges will not even allow a court-appointed physician to be referred to as such, notwithstanding the fact that this same physician has actually been appointed by the court. This prevents a defendant from taking full advantage of a rule which was obviously designed to "even the score" somewhat, to the extent that the defendant is not forced to live with the testimony of a treating physician who can often be characterized as somewhat less than impartial, to put it politely.

Under the circumstances, Respondent believes that Defendants have the equal right--if not the paramount right--to insist that a jury be informed that a physician was in fact appointed by the court, when this is in fact precisely what has occurred. Conversely, Plaintiff has been unable to cite to any authority whatsoever which would support her suggestion that the Defendants should not have been allowed to refer to Dr. Scheinberg as the court-appointed examining physician, merely because his name was proposed by one of the Defendants.

CONCLUSION

For all of the reasons cited above, and in the brief which was submitted on behalf of DR. KITSOS, Respondent MALCOLM G. GOLDSMITH, M.D. would respectfully submit that the Plaintiff has failed to carry her burden of demonstrating reversible error. A res ipsa loquitur charge should not have been given to the jury in this instance, particularly once the Hospital was no longer a party to the case. Further, the trial court did not err in allowing the parties to refer to Dr. Scheinberg as the court-appointed physician, or in otherwise allowing Dr. Scheinberg to testify concerning the medically probable origin of the Plaintiff's brachial plexopathy. For these reasons, the jury's verdict should not be disturbed, and the final judgments which were rendered in favor of the Defendants should be affirmed.

Respectfully submitted,



ROBERT M. KLEIN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 17th day of December to the attached list of addressees.

STEPHENS, LYNN, CHERNAY, KLEIN
Attorneys for Malcolm Goldsmith
One Biscayne Tower, Suite 2400
Miami, Florida 33131
(305) 358-2000

BY: Robert M. Klein
ROBERT M. KLEIN

SERVICE LIST

Marrero v. Goldsmith
Appeal No: 82-1324, 82-1435
Circuit Court Case No: 82-1435

Alan E. Greenfield, Esq.
Dubbin, Berkman, Dubbin & Greenfield
Attorneys for Constantine Kitsos, M.D.
1000 Rivergate Plaza
444 Brickell Avenue
Miami, Fl 33131
(305) 373-3606

Edward A. Perse, Esq.
Horton, Perse & Ginsberg
Attorneys for Pamela Marrero
410 Concord Bldg.
66 West Flagler Street
Miami, Florida 33130
(305) 358-0427

Melvin C. Alldredge, Esq.
Alldredge & Gray
Co-counsel for Pamela Marrero
518 Biscayne Bldg.
19 West Flagler Street
Miami, Florida 33130
(305) 377-0783

John E. Herndon, Jr., Esq.
Attorneys for Dr. Brewster
720 Biscayne Bldg.
19 West Flagler Street
Miami, Fl 33130
(305) 358-2500

Evan Langbein, Esq.
908 City National Bank Bldg.
25 West Flagler Street
Miami, Fl 33130
(305) 377-8891