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IN THE SUPREME COURT OF FLORIDA

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PAMELA MARRERO,

Appellant,

v.

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

Appellee.

Case No. 65,400

BRIEF OF RESPONDENT
CONSTANTINE KITSOS, M.D. ON THE MERITS

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PREFACE

This Brief is submitted on behalf of Respondent, CONSTANTINE KITSOS, M.D., (KITSOS), one of several defendants in the trial court. This cause stems from a jury verdict in KITSOS' favor finding that he was not guilty of medical malpractice.

The parties will be referred to in the same manner as they were referred to in Petitioner's brief. KITSOS also will use the same symbols employed by Petitioner. All emphasis in this brief will be supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner sued the hospital, both surgeons and the anesthesiologist involved in her surgery on March 24, 1980. (R-1-6). She settled with the hospital, only after the close of all the evidence. (TR-1166-1172).

KITSOS did not have exclusive control over Petitioner throughout the surgical procedure. (TR-818-820). He did not transport her to the operating room. (TR-774; 820). He did not place her on the operating table. (TR-774). These duties are performed by hospital employees. (TR-820). KITSOS did not perform the first operating procedure, a hemorrhoidectomy performed by GOLDSMITH. (TR-306-307; 774). At that time, Petitioner had been placed in the lithotomy position at the instruction of GOLDSMITH. (TR- 746). Prior to the time KITSOS commenced his surgical procedure, Petitioner was moved from the lithotomy position to a supine position, routinely used by KITSOS

to perform the surgical procedure he performed on Petitioner. (TR-307-311). KITSOS did not participate in moving Petitioner from the lithotomy to supine position. (TR-310-312; 775). While KITSOS performed his surgery, the anesthesiologist (BREWSTER) was present throughout the entire operation. (TR-775). Also present throughout the surgical procedure was a scrub nurse, a circulating nurse, and another doctor assisting in the operation. (TR-776). All of these personnel were hospital employees (TR-776).

Throughout KITSOS' surgery, Petitioner's arms were abducted on armboards at approximately a sixty degree angle. (TR-777). Petitioner's arms already were placed on the armboards when KITSOS walked into the operating room to perform his surgery. (TR-777).

Although Petitioner called no expert witness with expertise in plastic surgery, the medical experts she did call, with one exception, acknowledged that the placement of her arms at a sixty to seventy degree angle on armboards is consistent with the proper standard of care. (TR-173-175; 277). Petitioner's experts acknowledged they found nothing in the medical records that KITSOS did anything to place her arms in an incorrect or faulty position. (TR-239). Dr. Jack Norman, KITSOS' expert, board certified in plastic surgery (TR-833-834), testified that the standard of care in the Dade County community in surgical procedures like that performed by KITSOS on Petitioner is to place the arms on armboards at an angle between sixty and ninety degrees on armboards with the palms down. (TR-836). The only

"expert" evidence purporting to contradict this testimony came from one, Dr. Judd Bochner, in deposition testimony read to the jury. Dr. Bochner is a 75 year old general surgeon (TR-581-582), who performed no abdominal surgery since 1974. (TR- 620). His present vocation is to testify in medical malpractice cases. He never has testified for a defendant in a malpractice case. (TR-640). He has served as an expert witness on behalf of plaintiffs for attorney Sheldon Schlesinger in a number of Broward County malpractice cases. (TR-640-642). He also has testified on behalf of plaintiffs in several other malpractice cases in Dade County. (TR-643-647). He never even saw Petitioner. (TR-650). He was the only expert who opined that abduction of the arms on armboards at a sixty degree angle would fall below the appropriate standard of care. (TR-590-591). All the other experts testified abduction of the arms at such an angle was consistent with the standard of care.

KITSOS testified that Petitioner's arms remained at the sixty degree angle, with palms down, abducted on armboards throughout his surgical procedure lasting two and one-half to three hours. (TR-321; 778-779). Most of KITSOS' operations are longer than the one performed on Petitioner. (TR-789-790). He has performed operations without incident lasting as long as five or six hours where the arms are positioned between forty-five and sixty degree angles on armboards. (TR-790). Nor was there anything unusual in the performance of two surgeries (by GOLDSMITH and KITSOS) on the same day. (TR-789).

Throughout KITSOS' procedure, Petitioner remained in the supine position. (TR-781). Her body was not moved during the surgery. (TR-322-323). The operating table briefly was flexed, bringing the bottom part of the table up, to facilitate closing Petitioner's surgical wound. (TR-781; 326-327). KITSOS testified that her operation was a standard procedure, and nothing untoward occurred. (TR-781-783). The hospital scrub nurse and circulating nurse also testified that they could recall nothing unusual happening during Petitioner's surgery. (TR-1080; 1092; 1096-1097). Had anything unusual occurred, it would have been noted on hospital records or incident reports. (TR-1084; 1092).

During surgery, drapes were placed around the operative field (Petitioner's abdominal area) to prevent infection. (TR-320). Consequently, KITSOS had no direct vision to Petitioner's head or arms; he only could feel the armboards behind him while he was operating on her stomach. (TR-323).

GOLDSMITH's expert witness, Dr. Charles Ripstein, a board certified specialist in rectal and colon surgery (TR-727-728), and KITSOS' expert, Dr. Norman, each testified that the anesthesiologist would retain full control over a patient during surgery while the patient is draped and the surgeons are concentrating on performing surgery in the immediate surgical area. (TR-730-731; 740; 841-842).

Following his surgery, KITSOS finished making his notes on the hospital chart, while BREWSTER concentrated on awakening Petitioner from the anesthesia. (TR-335). BREWSTER determined when she was awake sufficiently to be removed from the operating

table. (TR-335). KITSOS did not participate in removing Petitioner from the operating table to the recovery room bed. (TR-335-336). KITSOS did not go with her from the operating room to the recovery room. (TR-339;819). Nor was he with her when she was wheeled back to her hospital room by hospital employees. (TR-819-820).

Petitioner's expert witnesses offered opinion testimony that an injury occurred to her left arm due to pressure or stretching of the brachial plexus nerves. (TR-162; 208-209; 584-585). However, the same witnesses acknowledged there was nothing in any of the medical records indicating either hyperabduction of Petitioner's arms or any other incident during surgery that might have caused undue pressure or stretching of her brachial plexus nerves. (TR-235-237). Petitioner's expert, Dr. Marshall Abel, acknowledged that there are cases in medical experience when brachial plexus injuries occur following surgery, and the cause is a complete mystery. (TR-244). Dr. Bernard Tumarkin, a psychiatrist-neurologist, testified that either her "traction injury" theory or another "inflammatory process" theory (involving some form of allergic or viral process) were possible causes of her injury. (TR-270-271).

Dr. Tumarkin also testified that Petitioner did not do everything she might have to correct her arm injury. (TR-274). She failed to wear an arm sling as she had been advised by her treating physician, Dr. Abel. (TR-274). She also failed consistently to attend physical therapy sessions. (TR-274). Another psychiatrist who treated Petitioner, Dr. Fernando Gonzalez,

testified she had a tendency to "dramatize" her physical disability, and he observed that her physical symptoms obviously were "exaggerated". (TR-993; 1023). Dr. Gonzalez testified that he believed Petitioner's injury possibly could be a "fictitious disorder" or an unconscious ". . . need to play a sick role . . ." (TR-994- 995). Petitioner was admitted to a Cleveland hospital in 1977 for treatment of a psychiatric problem. (TR-662-663).

A neurologist, Dr. Ray Lopez, called by BREWSTER, testified that most cases involving the particular type of injury (to the brachial plexus nerves) suffered by Petitioner have no obvious cause. (TR-1004-1005). An anesthesiologist called by BREWSTER, Dr. Bradley Smith, testified that a brachial plexus neuropathy may be caused by an allergic reaction to an antibiotic. (TR-968; 972). Petitioner was administered the antibiotic Manidal during her surgical procedure. (TR-972). Another anesthesiologist, Dr. Jerome Modell, chairperson of the department of anesthesiology at the University of Florida College of Medicine (TR-1054), testified that Petitioner's positioning on the operating table in the supine position with arms positioned at a sixty to seventy degree angle throughout KITSOS' surgery was compatible with the standard of care in the community. (TR-1059).

The court also permitted Dr. Peritz Sheinberg to testify ". . . as to the nature and extent of the claimed injuries, . . ." of Petitioner. (TR-873). Dr. Sheinberg acted as a court appointed physician. He is the chairman of the Department of Neurology at the University of Miami School of

Medicine. (TR-882-883). He has held had that position since 1961. (TR-883). He has been specializing in neurology for approximately 32 years and has been board certified since 1955. (TR-884). Dr. Sheinberg conducted an examination of the Petitioner, who was accompanied by her attorney, on September 30, 1981. (R-1482-1484). Following his examination, he rendered a report, and three days later he rendered a second report after reviewing the medical records and depositions of expert witnesses in this case. (R-1485-86).

At the conclusion of his examination on September 30, 1981, Dr. Sheinberg concluded that the position of Petitioner's upper left extremity ". . . was not the natural position that the arm would have taken if allowed to follow gravity. It was held too close to the side." (R-1483). He also concluded that the disparity between motor function as well as the absence of atrophy demonstrated to him that plaintiff's initial injury to the brachial plexus nerves was not "organic in character." (R-1484). Dr. Sheinberg testified at his videotaped deposition that he concluded following his examination on September 30, 1981, that Petitioner ". . . was participating either consciously or unconsciously in the position of her arm. . . ." (TR-894). He testified a "very substantial percentage of the patient's functional disability . . ." either was "psychiatric" or "fictitious". (TR-895).

On October 2, 1981, after Dr. Sheinberg had reviewed the relevant medical records, he rendered a second report indicating that Petitioner had suffered a "progressing lesion" indicating

that her brachial plexopathy was attributable to an inflammatory process, not a traction plexopathy. (R-1486).

POINTS INVOLVED

POINT I

WHETHER THE TRIAL COURT PROPERLY REFUSED A RES IPSA LOQUITUR JURY INSTRUCTION AGAINST KITSOS WHEN THE EVIDENCE DEMONSTRATED THAT PETITIONER WAS NOT UNDER KITSOS' EXCLUSIVE CONTROL AND THAT HER INJURY WAS NOT ONE THAT WOULD, IN THE ORDINARY COURSE OF EVENTS, HAVE OCCURRED WITHOUT NEGLIGENCE ON KITSOS' PART, PARTICULARLY WHEN PETITIONER FAILED TO ESTABLISH THE INSTRUMENTALITY OF HER ALLEGED INJURY.

POINT II

WHETHER REVERSIBLE ERROR WAS COMMITTED: (a) BY THE TESTIMONY OF DR. PERITZ SHEINBERG AS TO THE NATURE AND EXTENT OF PETITIONER'S INJURY AND (b) BY REFERENCE OF COUNSEL (WITHOUT OBJECTION) FOR PETITIONER, THE HOSPITAL, AND BREWSTER (BUT NOT GOLDSMITH OR KITSOS) TO DR. SHEINBERG AS THE "COURT APPOINTED" PHYSICIAN.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY REFUSED A RES IPSA LOQUITUR JURY INSTRUCTION AGAINST KITSOS WHEN THE EVIDENCE DEMONSTRATED THAT PETITIONER WAS NOT UNDER KITSOS' EXCLUSIVE CONTROL AND THAT HER INJURY WAS NOT ONE THAT WOULD, IN THE ORDINARY COURSE OF EVENTS, HAVE OCCURRED WITHOUT NEGLIGENCE ON KITSOS' PART, PARTICULARLY WHEN PETITIONER FAILED TO ESTABLISH THE INSTRUMENTALITY OF HER ALLEGED INJURY.

Petitioner relies on hornbook law for the proposition that she was entitled to a res ipsa loquitur jury instruction, allegedly because the instruction would have been supported by competent evidence. (Appellant's Brief p. 15-16). The cases she cites for this proposition did not involve a res ipsa loquitur instruction. Florida case law demonstrates that a res ipsa loquitur instruction is not proper simply because a plaintiff contends ". . . the thing speaks for itself." The res ipsa loquitur doctrine in Florida is one of ". . . extremely limited applicability." Goodyear Tire & Rubber Co. v. Hughes Supply, Inc., 358 So.2d 1339, 1341 (Fla. 1978). In the Goodyear case, the Florida Supreme Court said:

> . . . It [res ipsa loquitur] provides an injured plaintiff with a common-sense inference of negligence where direct proof of negligence is wanting, provided certain elements consistent with negligent behavior are present. Essentially, the injured plaintiff must establish that the instrumentality causing his or her injury was under the exclusive control of the defendant, and that the accident is one that would not, in the ordinary course of events, have occurred

without negligence on the part of the one in control. . . . (358 So.2d at p. 1341-1342).

Petitioner relies on Borghese v. Bartley, 402 So.2d 475 (Fla. 1st DCA 1981). The Borghese case was before the trial court and was argued by counsel at the charge conference. (TR-1186). The Court reiterated established Florida law that before the enactment of Section 768.45(4), Florida Statutes (1981) the doctrine of res ipsa loquitur was applicable in medical malpractice cases ". . . where the patient was in the exclusive control of the hospital and/or treating physician and received injuries unrelated to his treatment, which would not normally occur in the absence of negligence. . . ." (Citations omitted). While apparently under the exclusive control of both the surgeons and hospital employees, Mrs. Borghese suffered a "full thickness burn" on her lower left leg unrelated to the surgical procedure involving the removal of some large veins from her left upper thigh which were grafted onto two coronary arteries. On those facts, the court determined that a summary judgment in favor of the hospital and surgeons was improper.

Petitioner does not cite or discuss the holding of this Court in Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981) or the holding in Guzman v. Faraldo, 373 So.2d 66 (Fla. 3d DCA 1979). See also, Benigno v. Cypress Community Hospital, Inc., 386 So.2d 1303 (Fla. 4th DCA 1980). Both Chenoweth and Guzman factually are apposite this case.

In Chenoweth, the patient suffered damage to the ulnar region of her left arm following a hysterectomy. Like Petitioner

in this case, she contended the injury occurred due to a compression injury to the ulnar nerve that occurred during surgery. This Court rejected Mrs. Chenoweth's contention she was entitled to a res ipsa loquitur instruction. Citing its earlier holding in Goodyear Tire & Rubber Company v. Hughes Supply, Inc., supra, and Guzman v. Faraldo, supra, as well as Anderson v. Gordon, 334 So.2d 107 (Fla. 3d DCA 1976), this Court said the circumstances attendant to Mrs. Chenoweth's injury were not such that in light of past experience ". . . negligence is the probable cause and the defendant is the probable actor. . . ."

In Guzman, the Plaintiff suffered an injury to her eleventh cranial nerve at the base of her skull which runs under a neck muscle and extends into the shoulder area. She alleged that she suffered the injury during open heart surgery performed by the defendant surgeon. On appeal, the plaintiff alleged that her case should have been submitted to the jury on a res ipsa loquitur theory. The Court rejected her contention:

> . . . The doctrine [res ipsa loquitur] is not applicable here because the plaintiff failed to present more than a possibility that the injury was caused by the operational procedure. The instrumentality of the injury must first be established in order for the control of that instrumentality to serve a basis for the submission of a cause of action on the theory that the defendant, being in full control of that instrumentality, must have caused the injury. (Citation omitted). (373 So.2d at p. 68).

In Anderson v. Gordon, supra, the Court rejected plaintiff's contention that she was entitled to a res ipsa loquitur instruction. The Court said:

> To be entitled to an instruction on the application of the rule of res ipsa loquitur, plaintiff's proof must show that the circumstances eliminate every other conclusion save that the defendant was at fault. See McKinney Supply Co. v. Orovitz, Fla. 1957, 96 So.2d 209 and Martin v. Powell, Fla.App. 1958, 101 So.2d 610. Further, in medical malpractice actions the rule may be invoked only where a layman is able to say as a matter of common knowledge and observation that the consequences of the professional treatment were not such as ordinarily would have followed if due care had been exercised. The rule, however, 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. See, Annot., 162 A.L.R. 1265, 1269 (1946). Last, the fact that the treatment was unsuccessful or terminated with poor or unfortunate results does not of itself raise an inference of negligence nor is it sufficient to invoke the doctrine of res ipsa loquitur. Trotter v. Hewett, Fla.App. 1964, 163 So.2d 510. (334 So.2d at p. 109).

These legal precepts, when applied to the record in this case, conclusively establish that a res ipsa loquitur instruction would have been improper. The record shows that the trail court labored conscientiously on Petitioner's request for a res ipsa loquitur instruction. (TR-1243-1244). The trial court stated that such an instruction would be improper as to both GOLDSMITH and KITSOS who did not exercise exclusive control over the Petitioner prior to, throughout and subsequent to the surgery. (TR-1243-1244). Both KITSOS' and GOLDSMITH's counsel agreed to a res ipsa loquitur instruction as to the anesthesiologist (BREWSTER), provided that there was ". . . sufficient delineation to make it clear the res ipsa concept is not going to apply to

the surgeons, . . ." (TR-1245). Petitioner settled with the hospital, whose employees at all times prior to, during and subsequent to the surgery, exercised exclusive control over her. BREWSTER is the only physician who arguably exercised exclusive control over her.

Additionally, the evidence that Petitioner's alleged brachial plexopathy ". . . would not have occurred without negligence on the part of the one in control. . . ." woefully is lacking. Oftentimes, injuries like the one suffered by Petitioner following surgery are medical mysteries. Unfortunately, no medical procedure absolutely is risk free. Certainly, the array of medical talent called to testify as expert witnesses in this case attests to the fact that this was not a case where the "how and why" of Petitioner's injury was one within the common knowledge and observation of a layperson. See, Anderson v. Gordon, supra. As in the Guzman case, Petitioner failed to present anything more than a ". . . a possibility that the injury was caused by the operational procedure." She never established the instrumentality of her alleged injury. The trial court properly denied a res ipsa loquitur instruction.

A careful reading of this Court's decision in South Florida Hospital Corp. v. McCrea, 118 So.2d 25 (Fla. 1960) should be made in properly assessing Petitioner's contention a res ipsa instruction should have been given. Petitioner in reality is attempting to erode this Court's Goodyear Tire holding and make a radical extension of the res ipsa doctrine in medical malpractice cases.

The very first sentence of Petitioner's brief recognizes her injury occurred in the "operating theatre". In McCrea, the injured plaintiff suffered fractures from a fall in the recovery room, not in the operating theatre. The occurrence itself gave rise to a common sense inference of negligence in McCrea. To use this case as a means of arguing that a poor or unfortunate result or injury arising out of any surgical procedure, which may not have any explanation at all, gives rise to a similar inference of negligence almost makes physicians insurers of their surgical procedures. It is plainly ridiculous and legally unacceptable.

The issue in McCrea was different. This Court said:

> . . . In the case at bar we must assume that, absent evidence of specific negligence, the doctrine [of res ipsa] would be properly applicable. (118 So.2d at p. 30).

In this case, the District Court of Appeal said:

> We need not even consider these elements [of the res ipsa doctrine] because we find that direct proof of negligence is not wanting in this case. . . .

Of course, if the district court's result was correct (although it gave erroneous reasons for reaching its decision), the court should affirm the judgment in this case. Escarra v. Winn-Dixie Stores, Inc., 131 So.2d 483 (Fla. 1961). In McCrea, the court assumed res ipsa applied; here, the district court did not even consider if it did.

Moreover, the court in McCrea said:

> . . . The court below, in the pronouncement now under examination, places Florida among those jurisdictions which hold that the plaintiff may, in a proper case, resort to both evidence of specific negligence and to the inferences and presumptions of the doctrine of res ipsa. The decision specifically rejects alignment with those jurisdictions holding that resort to evidence tending to show or directly showing specific negligence will always render res ipsa wholly inapplicable. (118 So.2d p. 29-30).

This Court did not hold in McCrea that just because a plaintiff offers evidence attempting to show specific negligence she also is entitled to go to the jury with a res ipsa instruction. Indeed, the more evidence a plaintiff elicts on "specific negligence" and the more experts she chooses to call to explain the "how and why" her injury occurred certainly is a strong indication "the thing does not speak for itself" and a res ipsa instruction is improper.

In McCrea, this Court distinguished Martin v. Powell, 101 So.2d 610 (Fla. 2d DCA 1958), one of the cases asserted as the basis of conflict jurisdiction. This Court said:

> In Martin, the point of law pronounced is that res ipsa does not apply when, 'on proof of the occurrence, without more, the matter still rests on conjecture alone or the accident is just as reasonably attributable to the other causes, as to negligence' [101 So.2d 612] (Court's emphasis). (118 So.2d at p. 30).

In the Martin case, the plaintiff alleged a protruding object from a passing train struck and damaged his automobile. The court thought it was just as likely the car rolled into the

protruding object. Here, too, it is just as likely that no matter what degree of care KITSOS employed, Petitioner still would have suffered her injury from a virus or even for reasons unknown to medical science. Petitioner cannot seriously contend the cause of her injury was one of such "common knowledge" that it "speaks for itself" and justifies a res ipsa instruction.

In its Goodyear Tire decision, this Court expressed concern ". . . that the use of a res ipsa inference in the situations presented here would essentially make it available for Plaintiffs in every products liability lawsuit." (358 So.2d at p. 1341). Respondent KITSOS certainly would hope the same concerns apply to medical malpractice lawsuits. Petitioner really seeks the best of both worlds. She wants the luxury of producing a number of experts each with a theory of "specific negligence". Then she still wants a res ipsa instruction that the mere occurrence of injury in the "operating theatre" infers negligence. Such a loose interpretation of the res ipsa doctrine would be unfair to defendants in medical malpractice cases and does violence to Goodyear Tire, supra.

Justice England wrote in Goodyear Tire:

> . . . An injury standing alone, of course, ordinarily does not indicate negligence. The doctrine of res ipsa loquitur 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. (358 So.2d at p. 1342).

By a footnote, he wrote: "This requirement is not satisfied, however, by the Plaintiff's allegations and proof of specific acts of negligence."

In this case, both the trial court and district court of appeal realized there was no "sufficient showing" of the "immediate, precipitating cause" of Petitioner's injury justifying an inference of negligence and a res ipsa jury instruction. That determination certainly was correct in KITSOS' case, when he never even had exclusive control of the Petitioner.

POINT II

NO REVERSIBLE ERROR WAS COMMITTED: (a) BY PERMITTING THE TESTIMONY OF DR. PERITZ SHEINBERG AS TO THE NATURE AND EXTENT OF PETITIONER'S INJURY AND (b) BY REFERENCE OF COUNSEL (WITHOUT OBJECTION) FOR PETITIONER, THE HOSPITAL AND BREWSTER (BUT NOT BY COUNSEL FOR GOLDSMITH OR KITSOS) TO DR. SHEINBERG AS THE "COURT APPOINTED" PHYSICIAN.

Petitioner acknowledges that Florida Rule of Civil Procedure 1.360 is substantially the same as Rule 35 of the Federal Rules of Civil Procedure. (Petitioner's brief at page 26). Hence, she recognizes that federal decisions interpreting Rule 35 are highly persuasive in interpreting Rule 1.360. At 8 Wright & Miller, Federal Practice and Procedure, Section 2234, pages 674-675, the authors state:

> Unlike some state provisions, the federal rule is silent about how the doctor is to be chosen. The usual attitude is that the moving party has no absolute right to the choice of the physician, but that when no serious objection arises, it is probably best for the court to appoint the doctor of the moving party's choice.

Perhaps the best reason expressed for such a policy is that the physician proposed by the moving party ordinarily should be satisfactory because most doctors in the actual practice of their profession are regarded as nonpartisan and fair. Barnet, Compulsory Medical Examinations under the Federal Rules, 41 Va. L. Rev. 1059, 1071 (1955). Another reason advanced for permitting the moving party (generally the defendant) to select the examining

physician under the Rule was articulated by the court in Timpte v. District Court, 161 Colo. 309, 421 P.2d 728, 729 (1966):

> . . . So long as the plaintiff may select his [her] own doctor to testify as to his [her] physical condition, fundamental fairness dictates that a defendant shall have the same right, in the absence of an agreement by the parties as to who the examining physician will be. (Citations omitted).

Numerous other courts have followed the practice of permitting the moving party (generally the defendant) to select the examining physician under the Rule, even when the opposing party interposes an objection. See, e.g., Postell v. Amana Refrigeration, Inc., 87 F.R.D. 706 (D. C. Ga. 1980) [where the court appointed a doctor requested by the defendant to testify on whether microwave radiation leakage caused plaintiff's cataracts]; Liechty v. Terrill Trucking Co., 53 F.R.D. 590 (D. C. Tenn. 1971); Edwards v. Superior Court, 130 Cal. Rptr. 14, 16 C.3d 905, 549 P.2d 846, 851 (1976).

Petitioner relies on Chorak v. Naughton, 409 So.2d 35, 39 (Fla. 2d DCA 1981) in recognition of the fact that the selection of the physician under Rule 1.360 rests within the broad discretion of the trial court, and unless an abuse can be shown on appeal, selection of a physician under the Rule by the moving party normally should not be deemed improper. See also, Edwards v. Superior Court, supra.

Petitioner did not raise any "serious objection" to the appointment of Dr. Sheinberg at anytime prior to his examination of her and his reports of September 30, 1981, and October 2,

1981. (R-1482-86). Dr. Sheinberg is a physician with impressive credentials. (TR-882-887). He is the long-time chairman of the Department of Neurology at the University of Miami School of Medicine and has specialized in neurology for approximately 32 years. Petitioner does Dr. Sheinberg and the medical profession in Dade County in general a disservice when she concludes at page 28 of her brief that because the selectee under Rule 1.360 normally is made by the moving party that ". . . [t]here isn't any question at all but that in Dade County, Florida, a court appointed physician is not an impartial witness. . . ." There is nothing in this record to suggest that Dr. Sheinberg was anything but fair and impartial in his examination. Petitioner's argument is nothing more than "sour grapes" that Dr. Sheinberg's conclusions following his examination did not turn out in her favor. Query: does Petitioner suggest that the test of "impartiality" of the examining physician should be whether the opinion rendered by the doctor is in favor of the non-moving party?

She acknowledges that Dr. Sheinberg's first report of September 30, 1981, ". . . was confined to the parameters of his appointment" (Petitioner's brief at page 30). That report followed Dr. Sheinberg's physical examination of Petitioner on the same day. In that report, Dr. Sheinberg already concluded that Petitioner's injury to the brachial plexus nerves was <u>not</u> "organic in character". (R-1484). He reached this conclusion because of the absence of atrophy and the disparity between motor function. (R-1484). He also concluded following his examination that a "very substantial percentage of the patient's

[Petitioner's] functional disability . . . was not caused by a disease or trauma of the nerves or nerve roots or muscles, but was rather either psychiatric or fictitious." (TR-895). Dr. Sheinberg's observations strikingly were similar to those of a psychiatrist, Dr. Fernando Gonzalez, who Petitioner saw for treatment in close proximity to the time Dr. Sheinberg examined her (June 8, 1981 - September 14, 1981). (TR-981-82; 991-92). Dr. Gonzalez testified that Petitioner had a "tendency to dramatize" her physical disability. (TR-993). His testimony clearly indicated she might be "faking it." (TR-995). Dr. Sheinberg, who himself has substantial training in psychiatry, saw Petitioner only two and one-half (2 1/2) weeks following her last session with Dr. Gonzalez and observed in his September 30, 1981 report that the position of Petitioner's left upper extremity was <u>not</u> "natural" when walking, and did not "follow gravity." (R-1483; TR-993).

The sole objection Petitioner has to Dr. Sheinberg's testimony relates to his second report of October 2, 1981, following his review of medical records and expert depositions. She objects particularly to his conclusion that the injury to her brachial plexus nerves resulted from a "progressing lesion" . . . attributable to an "inflammatory process". According to her, this second report determined ". . . causation or departure from the standard of care." (Petitioner's brief at page 11). There is nothing in Dr. Sheinberg's second report of October 2, 1981, or his testimony, that even remotely concerns a "departure from the standard of care". (R-1485-86; TR-882-936). Petitioner

makes no reference to the testimony at trial of Dr. Sheinberg that would support a conclusion that he testified concerning "departure from the standard of care." For example, Dr. Sheinberg did not offer his opinion in either report, or his testimony, concerning the proper positioning of the patient during surgery or the proper abduction of her arms on the armboards. The reports demonstrate that he confined his inquiry strictly to his appointed responsibility to testify ". . . as to the nature and extent of the claimed injuries, . . ." (TR-873).

With respect to the causation issue, Petitioner called her treating physician, Dr. Marshall Abel, to testify that she suffered ". . . a traction injury of the brachial plexus." (TR-208-209). It would have been fundamentally unfair not to permit an independent physician, whose impartiality was not seriously impeached, to provide the jury with his opinion of the nature and extent of Petitioner's claimed injury. Cf., Postell v. Amana Refrigeration, Inc., supra.

Petitioner relies on the dissenting opinion in Scott v. Spanjer Brothers, Inc., 298 F.2d 928, 95 A.L.R. 2d 383 (2d Cir. 1962). She ignores the majority opinion, authored by a respected jurist, Judge Kaufman. In Scott, the defendants appealed the appointment by the trial judge of a physician, one Dr. Lawrence Kaplan, to conduct a court appointed examination of the plaintiff. The court found no reversible error. The court said:

> It is also urged on this appeal that Dr. Kaplan was biased because he allegedly had a great deal of experience as a 'plaintiff's doctor.' Assuming that this was so, it would

> not ipso facto support an inference that the doctor would not give an honest opinion in the present case. Moreover, we have made a careful study of the doctor's testimony, and find that it was open and fair. The issue really resolves itself to one of credibility. The appellants had an opportunity to cross examine the doctor and to develop any claim of bias; but the record indicates that while Dr. Kaplan was examined carefully on the medical aspects of the case, appellants chose not to ask a single question concerning the doctor's alleged bias. Under these circumstances they cannot complain that the jury, whose province it was to determine credibility, may have believed his testimony.

By a footnote, the court pointed out that the trial judge had opened the door for appellants to inquire whether the doctor had testified before for plaintiffs or defendants, but the appellants chose not to probe any further into his alleged bias. Here, Petitioner does not refer to any evidence that Dr. Sheinberg is a "defendant's doctor" who consistently renders testimony favorable to defendants in medical malpractice cases. Dr. Sheinberg, in this record, stands in sharp contrast to Petitioner's own "hired gun" expert, Dr. Bochner, who unmistakably is a "plaintiff's expert" in medical malpractice cases. (TR-640-647).

Petitioner cross examined Dr. Sheinberg extensively. (TR-907-931). She refers to no testimony of the doctor reflecting bias or partiality. Moreover, the credibility of Dr. Sheinberg's conclusions in both of his reports was subject to cross examination. Petitioner's counsel elicited a response on cross examination from Dr. Sheinberg that he was "court appointed." (TR-908). In his closing argument, Petitioner's

counsel referred to Dr. Sheinberg as "the court appointed doctor". (TR-1255). In fact, Petitioner's counsel in closing argument argued that by some of his responses to questions on cross examination ". . . Dr. Sheinberg agreed that this was a traction injury", the same conclusion reached by her treating physician, Dr. Abel. (TR-1256).

Petitioner complains that Dr. Sheinberg was referred to "extensively" as the "court appointed physician," citing pages 882-908 of the transcript. (Petitioner's brief at page 12). The only reference to Dr. Sheinberg's court appointment in those 26 pages is at page 887 of the transcript in two questions propounded by BREWSTER's counsel. No objection was made by Petitioner, nor was there a request for a curative instruction. BREWSTER's counsel also referred to Dr. Sheinberg as "court-appointed" twice in his closing argument. (TR-1331, 1335). Again, Petitioner did not object, nor could she, since her own counsel already had made the very same reference to Dr. Sheinberg in his closing argument. (TR-1255).

Petitioner does not direct the court's attention to any reference to Dr. Sheinberg as the "court appointed" doctor by counsel for KITSOS or GOLDSMITH . Nor does she refer the court to any objection made by her counsel either to any question asked Dr. Sheinberg in which the reference to his "court appointment" was made, or to any objection to the use of such language by counsel for BREWSTER in closing argument. Of course, it is the general rule that if error is to be predicated on improper argument by counsel, an objection must be made at the time the

argument is presented, since the effect of improper argument might be removed by a curative instruction to the jury. See, generally, 32 Fla.Jur. Trial Section 136. An objection made for the first time on appeal ordinarily is made too late. Ibid. There simply is nothing in this record demonstrating reversible error or an abuse of discretion by the trial court by permitting Dr. Sheinberg to testify as to the nature and extent of Petitioner's injury.

CONCLUSION

For the reasons stated and based upon the authorities cited and discussed, the final judgment entered pursuant to the jury verdict in favor of KITSOS should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee Constantine Kitsos, M.D., has been provided by United States mail to Melvin C. Alldredge, Esquire, Alldredge & Gray, 518 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130; John E. Herndon, Esquire, 720 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130; Robert Klein, Esquire, One Biscayne Tower, Suite 2400, Two South Biscayne Boulevard, Miami, Florida 33131 and Edward A. Perse, Esquire, Horton, Perse & Ginsberg, Suite 410, Concord Building, 66 West Flagler Street, Miami, Florida 33130, this 17th day of December, 1984.

Evan J. Langbein