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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
DEC 28 1984
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

CASE NO. 65,400

PAMELA MARRERO,

Petitioner,

vs.

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

Respondents.

ANSWER BRIEF OF RESPONDENT
BREWSTER, ON THE MERITS.,

THORNTON & HERNDON P.A.,
720 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Attorneys for Respondents.

STATEMENT OF CASE AND FACTS

The issues involved in this Appeal deal with evidence adduced before the trial court during the trial of the matter. Consequently, any references to or reliance upon allegations in the Complaint, as set forth in the brief of the Petitioner, is misplaced. Thus, in this portion of his brief, the Respondent, BREWSTER, will attempt to delineation, without undue repetition, the salient facts.

As the court knows from the briefs previously submitted in this matter, the Petitioner, PAMELA MARRERO, underwent a surgical procedure at North Shore Hospital. The surgeries were performed by the Respondents, GOLDSMITH and KITSOS, with the Respondent BREWSTER being the anesthesiologist for both procedures. Further, during the operation and at the subsequent recovery room period, the Petitioner was attended to by several hospital employees. Following the surgery, the Petitioner sustained a neurological or "nerve" injury to the brachial plexis.

Suit was filed by the Petitioner naming as, initial Defendants, the Respondents, BREWSTER, GOLDSMITH, KITSOS as well as NORTH SHORE HOSPITAL. Further, the trial of the matter was conducted with Northshore Hospital as a Defendant up until the close of all the evidence at which time the previously referred to settlement with the Defendant Hospital was effectuated. Thus, at the time the matter was submitted to the jury for consideration, the only parties to the case were the

Respondent physicians.

During the trial of the matter, the uncontradicted evidence showed that the Respondent BREWSTER did not have "exclusive" control over the Petitioner throughout the operations in question. Specifically, the testimony of the Hospital Operating Room personnel revealed that, at various points, they were "in control" of the Petitioner and physically involved in contact with her. For example, while in the recovery room, the Petitioner was under the sole care of the recovery room nurse, one PEGGY HAMMOND (T1105-1109); during the operation itself, the Petitioner was physically moved from one position to another by the scrub nurse, STEPHANIE NORICK, another nurse, and an Orderly (T1080-1082, T-1033); the Petitioner was initially positioned on the operating room table by the circulating nurse (T-1082); and, at the end of the operation, hospital operating room employees moved the Petitioner from the operating room table to the recovery room bed (T-1077). There was no evidence produced at the time of trial that the Respondent BREWSTER exercised any control over the aforementioned examples. Additionally, not brought out in the Petitioner's statement of the facts, is the testimony of their own expert witnesss, DR. KRUSE, which was that the 'injury" was not limited to the operating room suite, but could have occurred prior to surgery, on the way to the recovery room, in the recovery room, or during transport from the recovery room to the patients room (T173-174).

Next, in terms of significance and salient facts, is important to note as pointed out by the District Court, that the Petitioner, in her case, offered direct evidence of negligence on behalf of the Defendants. This is, even at this juncture, reinforced by the Petitioner, in her brief on the merits wherein they relate, in summarising the testimony of Dr. Kruse, that Dr. Kruse was of the opinion that there was a departure from accepted standards of care in the positioning of the patient/petitioner.

Lastly, the evidence before the trial court was that the injury or type of injury sustained by the Petitioner can occur without negligence. For example, Dr. Ray Lopez, a Defense expert, testified that, many times, these injuries occur without any obvious cause or reason (T1004-1005). Further, Dr. Bradley Smith, another Defense expert, testified that this type of injury can be due to an allergic reaction to drugs and that the Petitioner, PAMELA MARRERO, was allergic to an antibotic, Mandol, which she did , in fact, receive during her hospitalization. (T968-972).

Thus the evidence at trial showed that the Petitioner was not under the exclusive control of the Respondent, BREWSTER (or for that matter under the exclusive control, jointly or severally, or any of the Respondent Doctors) and that the injury sustained by her is not of the type that is "most probably" due to negligence.

POINTS INVOLVED ON APPEAL

POINT I

WHETHER THE TRIAL COURT PROPERLY REFUSED A RES IPSA LOQUITUR JURY INSTRUCTION AGAINST THE RESPONDENT BREWSTER.

POINT II

WHETHER THE TRIAL COURT WAS CORRECT WITH RESPECT TO ALLOWING DR. SHEINBERG TO TESTIFY ON THE ISSUE OF LEGAL CAUSE AND WHETHER REVERSABLE ERROR WAS DEMONSTRATED BY REFERRING TO HIM AS THE COURT APPOINTED PHYSICIAN.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY REFUSED RES IPSA LOQUITUR INSTRUCTION AGAINST THE RESPONDENT BREWSTER.

It is axiomatic that, under Florida Law, in order for the doctrine of res ipsa loquitur to apply, two essential elements must be proven or established by the Plaintiff at the time of trial. First, it must be conclusively demonstrated by the Plaintiff that the instrumentality causing the injury was under the exclusive control of the Defendant. Secondly, in addition to the foregoing, the Plaintiff must also establish that the injury is one that would not, in the ordinary course of events, have occurred without negligence on the part of the one in control. Goodyear Tire & Rubber Company v. Hughes Supply Inc., 358 So.2nd 1339 (Fla. 1978). Simply stated, as pointed out above, the Plaintiff failed, at the time of trial to meet either one of these standards.

First, the uncontradicted testimony at the time of trial revealed that hospital personnel (the Hospital not being a party to the suit at the time of submission to the jury) during various stages of the procedure, were "in control" of moving and/or positioning the Petitioner/Patient, PAMELA MARRERO. The obvious corollary is that, during these periods of time, the Respondent BREWSTER did not exercise exclusive control over the Patient/Petitioner and, accordingly, this criterion was not met.

With respect to the second criterion, the evidence showed that there were other causes for the Plaintiff's injury other than negligence. In Anderson v. Gordon., 334 So.2nd 107 (FLA 3rd Dist. 1976) the District Court stated that:

> "To be entitled to an instruction on the application of the rule of res ipsa loquitur, Plaintiff's proof must show that circumstances eliminate every other conclusion save that the Defendant was at fault. (Citing cases). 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 or nearly would have followed if due care had been exercised..... 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. Id. at 109

The application of simply logic shows that the Petitioner failed to produce the requisite proof necessary to establish this second criterion for res ipsa loquitur.

Further, the application of this principle has been previously set forth by this court in Chenoweth v. Kemp, 396 So.2nd 1122 (FLA. 1981). In Chenoweth, the Patient suffered a nerve injury following a surgical procedure (i.e. a hysterectomy) which was, as here, contented to have been caused by improper positioning during surgery. This court held, in Chenoweth that a res ipsa loquitur instruction was not appropriate since it could not be said that the alleged negligence was the probable cause of the injury. Obviously, the same reasoning holds forth in this case as well.

In addition to the Petitioner, the instant case, failing to establish the above requisite two criteria for the application of res ipsa loquitur, as pointed out by the court, the Petitioner,had direct proof of trial regarding the alleged negligence of the Defendants. Specifically, as pointed out earlier, the Petitioner,

through her own expert witness, Dr. John Kruse, brought forth testimony that her injury was due to improper positioning during the time of surgery and that this improper positioning fell below accepted medical standards i.e, constituted medical negligence. Thus, with direct proof, on the Plaintiff's case, of negligence, the doctrine of res ipsa loquitur was no longer applicable. Benigno v. Cypress Community Hospital, 386 So.2nd 1303 (FLA. 4th Dist. 1980); Metropolitan Dade County v. St. Claire, 445 So.2nd 614 (FLA. 3rd Dist. 1984).

Lastly, on the issue of res ipsa loquitur, the significance of the Petitioner's assertion that the arm was injured during surgery and therefore the doctrine applies, is negated by Florida Statute 768.45 (4) which provides that:

> The existence of a medical injury shall not create any inference or presumption of negligence against the health care provider, and the claimant must maintain the burden of providing that an injury was approximately caused by a breach of the accepted standard of care by the health care provider.

Thus, as shown in a medical negligence action, the doctrine of res ipsa loquitur is one of extremely limited application and, for the reasons stated above, not applicable, in any fashion based upon the evidence adduced at the time of trial in the instant matter.

ARGUMENT

POINT II

THE TRIAL COURT WAS CORRECT WITH RESPECT TO ALLOWING DR. SCHEINBERG TO TESTIFY ON THE ISSUE OF LEGAL CAUSE AND NO REVERSIBLE ERROR WAS DEMONSTRATED BY REFERRING TO HIM AS THE COURT APPOINTED PHYSICIAN.

Before discussing the merits of this issue, it should be pointed out to the court that the case relied upon by the Petitioner for "conflict" jurisdiction in this matter were in all cases dealing with the subject of res ipsa loquitur. Thus, by discussing the issues surrounding the Court Appointed Physician, the Respondent BREWSTER wishes to point out that he does not, in any way, waive his right to assert that the issue of the Court Appointed Physician is not one that is properly before this Court.

First, with respect to the reference to Dr. Sheinberg as the "Court Appointed Physician", the Petitioner, through her Counsel, elicited, upon cross-examination, Dr. Sheinberg was "Court Appointed" (T-908) and, further, referred to him as the "Court Appointed Doctor" in their closing argument (T-1255). Thus, it appears to be nothing more than "sour grapes" to complain now of unfairness resulting when Respondent's Counsel, at the time of trial, made the same references. Further, as previously pointed out to this court, when references to Dr. Sheinberg's "Court Appointed" nature were made during closing argument, no objection was voiced by the Petitioner's trial Counsel, and, therefore,any right to assert this as reversable

error has long since been waived.

Turing to the scope of Dr. Sheinberg's testimony and his opinion regarding the etiology of the Petitioner's condition, the Order which appointed Dr. Sheinberg gave him the authority to examine the Plaintiff (and thus relay any findings of that examination) regarding the "nature and "extent" of the Petitioner's "injury". "Nature" according to Webster's New Collegiate Dictionary 8th Edition, means, in the instant context the "type" or "inheritant character" of the "injury": i.e., is it a "traction injury" a "compression injury" or "inflammatory" in nature? Thus, at the outset, Dr. Sheinberg's opinion concerning the source of the Petitioner's medical problem fell within the orbit of his appointment as a Court Appointed Physician.

Consequently, the testimony that he did, in fact, give was appropriate and not in any way erroneous.

Additionally, as a practical matter, it is a common everyday experience in personal injury litigation for a Court Appointed Physician to testify regarding the source (e.g. normally the accident) of the physical condition he has observed. This is in keeping with the spirit and intent of Rule 1.360 which is to allow parties to litigation the opportunity for an independent and neutral medical evaluation to be conducted and not be "stuck" with the testimony of a treating physician. As argued to the District Court, the Petitioners, who have the burden, have cited no significant authority for their position but instead rely upon unfounded assertions that any time a Defendant's attorney request a Court Appointed Physician, that the Court Appointed Physician is, ipso facto, bias for the defense. Nothing in the record or

in the decisional law of this State supports such statements or assertions. Also, no attempt whatsoever was made to cross-examine Dr. Sheinberg or voire dire Dr. Sheinberg at the time of trial concerning any inherant "bias" which, as an aside, is normally a question for the jury in weighing the testimony of the witness and is not to be considered as a matter of law by the Court as a pre-requisite for the exclusion or admission of the testimony at the time of trial.

Thus, the Petitioners have shown nothing, either in terms of significant authority, or in terms of anything in the record, which would, in any way, demonstrate reversable error or an abuse of discretion by the trial court when Dr. Sheinberg was permitted to testify and give his opinion concerning the etiology of the Petitiner's condition.

CONCLUSION

Based upon the reasoning and authorities stated above the Final Judgment entered pursuant to the jury verdict and the opinion of the District Court, Third District, in favor of the Defendant BREWSTER should be affirmed.

Respectfully submitted,

THORNTON & HERNDON, P.A.
720 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
(305) 358 - 2500

BY _____
JOHN EDWARD HERNDON, JR.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent was mailed to the following counsel of record this 19th day of December, 1984.

Melvin C. Alldredge, Esquire
Alldredge & Gray,
518 Biscayne Building
19 West Flagler Street
Miami, Fl. 33130

Robert Klein, Esquire
One Biscayne Tower
Suite 2400
Two South Biscayne Blvd
Miami, Fl. 33131

Edward A. Perse, Esquire
Horton, Perse & Ginsberg,
Suite 410,
Concord Building,
66 West Flagler Street
Miami, Fl. 33130.

Evan J. Langbein, Esquire
908 City National Building
25 West Flagler Street
Miami, Florida 33130

JOHN EDWARD HERNDON, JR.,