O/A 2-6-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,400

PAMELA MARRERO,

Petitioner,

vs.

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

Respondents.

BRIEF OF PETITIONER ON THE MERITS

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LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

Petitioner was--personal injury/medical malpractice in the operating theatre plaintiff in the trial court and appellant in the District Court of Appeal, Third District. In the District Court of Appeal, petitioner sought review of adverse final judgments rendered pursuant to jury verdict finding all three attending physicians not guilty of any negligence. Petitioner raised two points on appeal challenging the trial court's (1) refusal to instruct the jury on the doctrine of res ipsa loquitur; and (2) allowing the court appointed physician to be repeatedly referred to during examination and during closing argument as the "court appointed physician." She raises these same points in this merits brief.

The parties will alternately be referred to herein as they stand before this Court and as follows: petitioner as "MARRERO;" and respondents as "GOLDSMITH," "KITSOS," and "BREWSTER," respectively. The symbols "R" and "TR" shall stand respectively for the record on appeal and transcript of trial proceedings.

All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

II.

STATEMENT OF CASE AND FACTS

A.

THE COMPLAINT--THE INJURY

Petitioner's complaint (R. 1-6) named the three respondents and the North Shore Medical Center, Inc., a hospital, as defendants. The petitioner has settled with the hospital. The complaint contains the following pertinent allegations which shorthand the basic facts of this case and disclose the gravamen of petitioner's cause of action and the issues tried at trial:

* * *

"COMES NOW, the Plaintiff and sues the Defendants and alleges:

* * *

"2. At all times material hereto the Defendants, MALCOLM G. GOLDSMITH, M.D., [surgeon] CONSTANTINE KITSOS, M.D., [plastaic surgeon] and WILLIAM L. BREWSTER, M.D., [anesthesiologist] were and are duly licensed physicians engaged in the practice of medicine in Dade County, Florida.

* * *

"4. That on or about March 24, 1980, the Plaintiff, PAMELA MARRERO, was admitted to the NORTH SHORE MEDICAL CENTER, INC. to undergo surgery to be performed by the Defendants, MALCOLM G. GOLDSMITH, M.D., and CONSTANTINE KITSOS, M.D.

"5. Surgery was performed on March 24, 1980, with the Defendant, WILLIAM L. BREWSTER, M.D., administering a general anesthetic, with the Defendant, MALCOLM G. GOLDSMITH, M.D., performing an external and internal hemorrhoidectomy, and with the Defendant, CONSTANTINE KITSOS, M.D., performing an abdominal dermolipectomy [a "tummy tuck"] and dressing [excising] a hemangioma [cyst] of the right eyelid.

"6. Immediately after surgery the Plaintiff, PAMELA MARRERO, complained of pain and numbness in her left shoulder, arm, and hand,

which was diagnosed as a left brachial plexapathy, which has continued to get worse and which has become a permanent condition.

"COUNT I"

* * *

"8. The Defendant, MALCOLM G. GOLDSMITH, M.D., was negligent in his care and treatment of the Plaintiff in one or more of the following:

"1) In negligently failing to exercise reasonable care both before and during the surgical procedure performed on the Plaintiff, PAMELA MARRERO, and during her recovery.

"2) In negligently and carelessly failing to exercise reasonable care during the Plaintiff's pre-operative stay in the hospital by not requiring sufficient time from her entry in the hospital to the time of the surgery for adequate sedation and rest and in not examining her before surgery.

"3) In negligently failing to supervise the positioning of the Plaintiff, PAMELA MARRERO, on the operating table before surgery, and of failing to monitor her position while surgery was being performed.

"4) In negligently allowing the Plaintiff, PAMELA MARRERO, to undergo two long surgical procedures at one time, one a 'clean' plastic procedure immediately following a 'dirty' hemmorrhoid procedure, calling for several body positioning changes and increasing the chances for infection without fully informing the Plaintiff of the dangers of this procedure.

"5) In negligently failing to properly utilize shoulder braces and arm boards during surgery to prevent undue pressure to be placed on the patient.

* * *

COUNT II

* * *

"11. The Defendant, CONSTANTINE KITSOS, M.D., was negligent in his care and treatment of the Plaintiff in one or more of the following

particulars: [Here appellant repeated the allegations contained in sub-paragraphs 8(1) - (5) of the complaint as quoted, supra.]

* * *

COUNT III

"14. The Defendant, WILLIAM L. BREWSTER, M.D., was negligent in his care and treatment of the Plaintiff in one or more of the following particulars:

"1) In negligently failing to exercise reasonable care both before and during the surgical procedure performed on the Plaintiff, PAMELA MARRERO, and during her recovery.

"2) In negligently and carelessly failing to exercise reasonable care during the Plaintiff's pre-operative stay in the hospital by not requiring sufficient time from her entry in the hospital to the time of the surgery for adequate sedation and rest and in not examining the Plaintiff before surgery.

"3) In negligently failing to supervise the positioning of the Plaintiff on the operating table before surgery, and in failing to monitor her position while surgery was being performed.

"4) In negligently failing to properly utilize shoulder braces and arm boards during surgery to prevent undue pressure to be placed on her upper extremities.

"5) In negligently failing to provide adequate follow-up care to the Plaintiff.

COUNT IV

[In this count appellant alleged that the hospital, with whom she has settled, was also guilty of negligence.]"

* * *

The long and the short of it then is that petitioner--

who had no prior brachial plexus complaints--entered the operating room for the performance of relatively minor elective surgery, and emerged from the procedure some four and a half hours later with a permanently injured and virtually useless left arm. None of the operative procedures had anything whatsoever to do with her arm.

The respondents, of course, denied all allegations of negligence, and, after extensive intermediate skirmishing, the case was tried before a jury.

B.

TRIAL TESTIMONY--PETITIONER'S WITNESSES

At trial, petitioner and her expert witnesses gave the following pertinent testimony:

1. Appellant, who was under the effects of anesthesia, could only state that she went into the operating theatre with a good left arm and came out of the procedure with a bad left arm.

2. Dr. John Kruse, petitioner's expert anesthesiologist, testified, in essence, that--the sterile hospital record does not contain evidence which would indicate a departure from the standard of care (TR 169); however, in his opinion there was a departure from the standard of care in the positioning of the patient so that her left arm had pressure placed upon it for a long enough period of time to cause permanent injury to the brachial plexus neurosystem (TR 162-166, 169); everyone in the operating room is to some extent responsible for what occurred here (TR 169); and, he considered and rejected as a diagnosis brachial neuritis rather than trauma,

which can cause the same or a similar condition and is brought about by viral infection, this because the greater cause of injury to the brachial plexus in the operating theatre is trauma. (TR 181-183)

3. Dr. Marshall Abel, petitioner's treating neurologist who first examined her on the day after the subject operations, testified, in essence, that--petitioner was suffering from acute brachial plexopathy caused by trauma (TR 202-203); in his opinion the her condition was not caused by a virus (TR 215-217); and he formed his opinion notwithstanding the fact that the sterile record here did not reflect that anything unusual occurred during the course of the operations. (TR 255-256)

4. Respondent's expert, Dr. Bernard Tumarkin, a called out of turn, psychiatrist and neurologist, testified, in essence that--nothing contained in the hospital records indicated that any untoward event or procedure occurred (TR 268); the records do reflect that the petitioner had no complaints before surgery and a permanently damaged brachial plexus post surgery (TR 268-269); and, the greater probability here is that appellant suffered a traumatic traction or contraction injury and not an injury caused by a virus or other causes (TR 270-271).

5. Petitioner's expert, Dr. Judd Bochner, a neurosurgeon, testified, in essence, that--petitioner suffered injury while in the operating theatre caused by trauma (TR 584-585); the treatment she received was below the applicable standard of care (TR 584-585); the respondents, including even

GOLDSMITH who finished his portion of the operation in twenty minutes to half an hour, simply should not have kept petitioner's arms in a "traction" position for so long a period (TR 585-587); petitioner's arms were in a traction position at a 60 to 70 degree angle from her body for approximately two and one half hours, and this fell below the standard of care (TR 591-594).

The general tenor of the testimony adduced by petitioner then was that she had to have suffered a traumatic traction injury which had to be the result of a departure from the requisite standard of care. Put another way, a traumatic traction injury does not occur in the operating theatre unless there is a departure from the standard of care.

C.

TRIAL TESTIMONY--RESPONDENTS' WITNESSES

At trial respondents and their witnesses testified, in essence, as follows:

1. Respondent BREWSTER, the anesthesiologist, testified that--he did not talk to respondents, GOLDSMITH and KITSOS, prior to administering anesthesia (TR 65-66); this was routine procedure and arm boards were used (TR 70-71); the nurses actually put petitioner's arms on the arm boards at the routine angle of 45 degrees (TR 70-75); the arm boards were never moved after they were initially put in place, although the petitioner was repositioned twice, once for the hemorrhoidectomy and once for the "tummy tuck" (TR 75-77). The injury suffered by petitioner is called a "traction" injury and well recognized in the literature as possibly being caused by posi-

tioning of the arms of a patient while under anesthesia (TR 83); everyone in the operating room is responsible to prevent the occurrence of such an injury (TR 82-83); nothing he did and nothing he saw during the course of the operation was unusual or could have caused this traumatic injury (TR 100); and, he knew of no cause for the condition and was "baffled by the fact" that petitioner had the condition. (TR 99)

2. Respondent GOLDSMITH, the surgeon who performed the hemorrhoidectomy, testified that--he didn't know how the injury occurred (TR 122-123); although an injury of this type doesn't happen to people while walking down the street and is usually caused by trauma, it does not require a stretching for the brachial plexus to malfunction nor is it necessary that the cause be traumatic (TR 144); such an injury "doesn't occur during normal living conditions" (TR 144); and he did nothing wrong and noticed nothing unusual during the course of time he was in the operating room. (TR 753)

3. Respondent KITSOS, the plastic surgeon, testified that-- when he arrived in the operating room, petitioner's arms were positioned at a 60-degree angle from the body on the arm boards with palms down (TR 316); while he performed his surgery, there was no change in the position of the arms and nothing unusual happened with the arms or anything else during the course of the operation (TR 318-320, 778-781); there was no departure from the standard of care by anyone in the operating theatre (TR 778-780); he was not acquainted with any authorities on the subject of brachial plexus injury in the operating theatre (TR

363-368); and he could not explain precisely what happened to petitioner's arm (TR 825-826).

4. In addition to their own "nothing unusual happened" testimony, respondents paraded hospital nurses present at one time or another in the operating theatre on the day of the operation to the stand to say that they saw nothing unusual. (TR 1072-1126)

5. Dr. Charles Ripstein, a specialist in colon and rectal surgery called as an expert witness on behalf of respondent GOLDSMITH, testified--there was no departure from the requisite standard of care by respondent (TR 729-730); GOLDSMITH couldn't have done anything wrong in any event because he was only in the operating theatre for twenty to thirty minutes and he never heard of this kind of thing occurring during a hemorrhoidectomy (TR 730); and with regard to respondent KITSOS, if the arms were never abducted to 60 or 70 degrees, it would be very unlikely that there would be a brachial plexus traction injury. (TR 735)

6. Dr. Jack Norman, a plastic surgeon, called as an expert by respondent KITSOS, testified that there was no departure from the standard of care. (TR 836-838)

7. Dr. Bradley Smith, an anesthesiologist called as an expert by respondent BREWSTER, testified that--an anesthesiologist has responsibility with regard to positioning of patient to avoid injury; the position should be monitored by everyone in the operating theatre (TR 948-950); there is nothing in the record here to disclose departure from the standard of care (TR 950); however, even though there is no record reflected

reason this could have happened, it must have been caused by trauma (TR 956-957); and this "could be" just a syndrome which would make petitioner "a statistic." (TR 958-959)

8. Dr. Ray Lopez, a defense expert neurologist, testified that--there was no departure from the standard of care; the petitioner was injured while she was under the effect of the anesthesia; and there are numbers of cases of this type of injury where the cause is never really found. (TR 107-112)

9. Dr. Jerome Modell, a defense expert anesthesiologist, testified that all respondents complied with acceptable standards of care. (TR 1059)

D.

THE CRITICAL DEFENSE WITNESS--THE "COURT APPOINTED" PHYSICIAN

On August 13, 1981, the trial court entered an order (TR 309) appointing Dr. Peritz Scheinberg, a neurologist, to conduct a physical examination of the petitioner for the following, and only the following purpose:

* * *

> "1. Plaintiff, PAMELA MARRERO, shall submit to a physical examination to be made by Peritz Scheinberg, M.D., a practicing physician in Dade County, Florida, hereby appointed examining physician for the purpose of making such examination or examinations of said plaintiff as shall be reasonably necessary to ascertain the physical condition of said plaintiff and the nature and extent of the claimed injuries."

* * *

Dr. Scheinberg was appointed using the Dade County customary "defendant's choice" approach to the problem. In the truest sense, he was a defense witness. He was not appointed for the

purposes of determining causation or departure from the standard of care.

Dr. Scheinberg prepared two reports which are attached to his deposition at (R. 1497) as exhibits 1 and 2.

Dr. Scheinberg's first report is dated September 30, 1981. In that report he confined himself to the parameters of his appointment and merely described physical condition of petitioner. He concluded by stating the following impression:

* * *

> "History of brachial plexopathy with present degree of disability extremely difficult to determine because of a powerful non-organic overlay. The disparity between motor function and the absence of atrophy is such there can be no doubt that, whatever the residual of the initial brachial plexus trauma, most of the present functional disability is not organic in character."

* * *

Dr. Scheinberg's second report is dated October 2, 1981. In that report he states that his previous report was composed and dictated prior to his review of records sent to him by defense counsel. In that report, he departed substantially from describing condition and shifted to the area of causation stating that he could infer that petitioner has a progressing lesion, and

* * *

> ". . . that then one must conclude that the patient's brachial plexopathy was not due to traction but was due to an inflammatory process. A traction plexopathy would have been maximum the instant it occurred. It would not have progressed after the original trauma were relieved." (Emphasis Dr. Scheinberg's)

* * *

It must be emphasized that both of Dr. Scheinberg's reports were letter reports directed to defense counsel.

At trial, the video tape deposition of Dr. Scheinberg was read into evidence. Prior to presenting any of the deposition to the jury, appellant's counsel made vigorous objection to allowing Dr. Scheinberg to be called as a "court appointed physician" and to allowing him to testify with regard to causation, rather than the physical condition of the petitioner. (TR 856-880) The trial court overruled these objections and allowed Dr. Scheinberg to be called as "court appointed physician" and to be referred to as "court appointed physician" extensively. (TR 882-908) In addition, the court allowed Dr. Scheinberg to testify as to causation--"this wasn't caused by trauma, but rather by an inflammatory process"--along the lines of Dr. Scheinberg's second written report. Viewed against the backdrop of this res ipsa loquitur case wherein no one could really explain what happened to petitioner in the operating room, everyone agreed that it shouldn't have happened, and very few witnesses could testify with regard to what occurred on the basis of a reasonable medical certainty or probability the impact of this testimony coming from a so-called "court appointed physician" was devastating. In addition, defense counsel made reference to the testimony of the "court appointed physician" during closing argument with equally devastating effect.

E.

VERDICT--JUDGMENT--APPEAL

At the charge conference the trial court refused to charge the jury on the doctrine of res ipsa loquitur as requested by petitioner. The jury returned a not guilty verdict as to all defendants. The judgments appealed were rendered pursuant thereto. Petitioner sought review in the District Court of Appeal.

F.

APPEAL--THE DECISION SOUGHT TO BE REVIEWED--
SUPREME COURT PROCEEDINGS

In the District Court of Appeal petitioner raised just two points--Point I challenged the trial court's refusal to charge the jury on the doctrine of res ipsa loquitur; Point II challenged the trial court's refusal to prevent reference to SCHEINBERG as "the court-appointed physician," and allowing DR. SCHEINBERG to testify regarding causation.

On this record the District Court of Appeal rendered the decision sought to be reviewed affirming the final judgment appealed. Regarding petitioner's res ipsa loquitur point, the court, inter alia, held:

* * *

> "The first issue raised by Mrs. Marrero is that the trial court erred in denying her request to instruct the jury on res ipsa loquitur. The doctrine is one of extremely limited application. 'It 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.' Goodyear Tire & Rubber Co. v. Hughes Supply, Inc., 358 So. 2d 1339 (Fla. 1978). We need not even consider these elements because we find that direct proof of negligence is not

wanting in this case. To the contrary, plaintiff presented expert testimony regarding the alleged negligence of the defendants. Metropolitan Dade County v. St. Claire, No. 83-386 (Fla. 3d DCA Jan. 31, 984); Benigno v. Cypress Community Hospital, Inc., 386 So. 2d 1303 (Fla. 4th DCA 1980). Accordingly, the trial court was correct in denying the requested instruction."

* * *

Regarding petitioner's DR. SCHEINBERG point, the court stated and held:

* * *

"Plaintiff next contends that the court incorrectly allowed the court-appointed expert witness to testify as to causation when he was appointed for the exclusive purpose of ascertaining the physical condition of the plaintiff and the nature and extent of the claimed injuries. Since the doctor was competent to give an opinion as to causation and the plaintiff has been unable to show that she was surprised by the doctor's testimony (in fact, she was aware of the testimony from the doctor's written report before trial), we find no error in the admission of this testimony.

"Additionally, with respect to the court-appointed physician, the plaintiff argues that the trial court improperly allowed defense counsel to refer to the expert as the court-appointed physician. No one can dispute the fact that the doctor was appointed by the court. Therefore, the plaintiff's objection to this appellation must be that the court was placing its imprimatur on a witness who was not impartial. Mrs. Marrero did not challenge the doctor's appointment previously and, of course, may not now be heard to complaint."

* * *

In due course, petitioner timely sought certiorari in this Court. The writ has issued.

III.

POINTS INVOLVED ON THE MERITS

POINT I

WHETHER, ON THIS RECORD, THE TRIAL COURT COMMITTED HARMFUL REVERSIBLE ERROR IN REFUSING TO CHARGE THE JURY ON THE DOCTRINE OF RES IPSA LOQUITUR.

POINT II

WHETHER, ON THIS RECORD, THE TRIAL COURT COMMITTED HARMFUL REVERSIBLE ERROR IN--(1) ALLOWING DR. SCHEINBERG TO TESTIFY REGARDING CAUSATION; AND (2) ALLOWING DEFENSE COUNSEL TO REPEATEDLY REFER TO DR. SCHEINBERG AS "THE COURT APPOINTED PHYSICIAN."

IV.

ARGUMENT

POINT I

ON THIS RECORD THE TRIAL COURT COMMITTED HARMFUL REVERSIBLE ERROR IN REFUSING TO CHARGE THE JURY ON THE DOCTRINE OF RES IPSA LOQUITUR.

A.

APPLICABLE LAW

1. Re: Jury Instructions--at 32 Fla. Jur., § 140, pages 386-387, it is, inter alia, stated:

* * *

"Each party has the right to have the court instruct the jury as to the law applicable to facts in evidence introduced under the issues as made by the pleadings. In both civil and criminal cases, the court is required by statute to instruct the jury as to the law of the case. . . . Where the evidence is inconclusive or conflicting, failure of the trial judge to provide a charge that lays down standards for the jury to follow under varying permissible views of the evidence constitutes reversible error."

* * *

At 32 Fla. Jur., § 141, pages 387-388, it is stated:

* * *

"The right of a party to appropriate instructions embraces the right to request that instructions be given with reference to his theory of the case, where such theory is supported by competent evidence and the instructions are properly requested, even though such theory may be controverted by evidence of the opposing party. A requested instruction that is proper in all respects, announcing a proposition of law applicable to the case and in harmony with the theory of one of the parties, and not adequately covered by other instructions, should not be denied."

* * *

See also--POLK v. STATE, 179 So. 2d 236 (Fla. 2 DCA 1965) and HARWELL v. BLAKE, 180 So. 2d 173 (Fla. 2 DCA 1965).

2. Re: Res Ipsa Loquitur In Malpractice Cases--§ 768.45(4), Florida Statutes, provides:

* * *

"(4) The existence of a medical injury shall not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the accepted standard of care by the health care provider. However, the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider."

* * *

In SOUTH FLORIDA HOSPITAL CORP. v. McCREA, 118 So. 2d 25 (Fla. 1960), decided prior to passage of § 768.45(4), supra, the plaintiff, in the recovery room after surgery, sustained fractures of both arms. In her subsequent action against the hospital and its agents, the plaintiff alleged that she was injured as a result of the hospital's negligence

in permitting her to fall while under anesthesia, that is, while under the defendant's total control. The defendants denied that the plaintiff had suffered her injuries in a fall, denied that there was a departure from the requisite standard of care and contended that plaintiff's injuries were probably self-inflicted by the plaintiff's involuntary convulsions. Thus, in McCREA the exact cause of the plaintiff's injuries was speculative and the subject of a dispute between the parties, and evidence to establish what transpired, after all, the plaintiff was under anesthesia and under the total control of the defendants, was unavailable. In McCREA this Court adopting the majority rule that a plaintiff may, in certain cases, resort to both evidence of specific negligence as well as the inferences available under the doctrine of res ipsa loquitur, held that an instruction on res ipsa loquitur was properly given. This Court characterized the majority rule in the following terms:

* * *

> "[T]he introduction of evidence of specific negligence which does not clearly establish the precise cause of the injury, will not preclude reliance on the otherwise-applicable res ipsa doctrine. The view is taken that, except in the clearest cases, both the specific evidence and the appropriate inferences from the happening of the accident should be permitted to go to the jury, which, if it rejects the specific proof, may still find against the defendant on the basis of inference." (Emphasis the court's.)

* * *

In McCREA this Court stated in finding no conflict with FRASH v. SARRES, 60 So. 2d 924 (Fla. 1952), "there is no need or

room for the operation of any inference or presumption under the res ipsa loquitur doctrine where the evidence in the case reveals all of the facts and circumstances surrounding the occurrence in the suit and clearly establishes the precise cause of plaintiff's injury."

In BORGHESE v. BARTLEY, 402 So. 2d 475 (Fla. 1 DCA 1981), the District Court of Appeal reviewed the Florida common law relating to res ipsa loquitur in malpractice cases, and discussed the effect thereon, if any, of the quoted provisions of § 768.45(4), supra. BORGHESE involved the following facts:

> a. The plaintiff entered a hospital to undergo double aorto-coronary bypass surgery. The surgical procedure involved removal of some veins from plaintiff's left upper thigh which were then grafted onto two of the coronary arteries.
>
> b. Prior to surgery, the plaintiff was placed under general anesthesia. When she regained consciousness after surgery, she discovered the presence of a "full thickness burn" on her left lower leg, which was apparently caused by an electrocautery unit supplied by the hospital and used by the physicians during surgery.
>
> c. All those present in the operating room during the surgery denied that anything untoward had happened, and denied knowledge of the cause

of the burn.

d. The plaintiff's left lower leg was not involved in the surgical procedure.

e. The plaintiff brought a malpractice action against the hospital, the surgeons and those present in the operating room as assistants.

f. Ultimately, the trial court granted a summary final judgment in favor of the defendants on grounds that the doctrine of res ipsa loquitur could not be applied to the case, and that even if it could, the provisions of § 768.45(4), supra, abolished the doctrine of res ipsa loquitur in medical malpractice cases.

In BORGHESE, the District Court of Appeal, First District, reversed the summary final judgment, stating and holding, inter alia:

* * *

> "Before enactment of § 768.45(4), 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. Troupe v. Evans, 366 So. 2d 139 (Fla. 1st DCA 1979), cert. denied, 378 So. 2d 343; Goodyear Tire and Rubber Co. v. Hughes Supply Co., Inc., 358 So. 2d 1339 (Fla. 1978). But a physician's 'unskillfulness in diagnosis or negligence in treatment would not be inferred from the fact that a patient continued to suffer, or even died.' West Coast Hospital Association v. Webb, 52 So. 2d 803 (Fla. 1951). Appellees contend that § 768.45(4) changed the existing law and completely abolished

the use of res ipsa loquitur in actions for injury against health care providers. We disagree.

> "It is our determination that § 768.45(4), is essentially a codification of the existing rule regarding the use of res ipsa loquitur in medical malpractice cases; and that the term medical injury contained in the statute, refers to an injury sustained as a direct result of medical treatment or diagnosis, and does not encompass injuries totally unrelated thereto. Thus, when a plaintiff establishes that the injury is outside the scope of medical treatment or diagnosis, and the facts and 'circumstances attendant to the injury are such that, in light of past experience, negligence is the probable cause and the defendant is the probable actor,' the doctrine of res ipsa loquitur is applicable. Chenoweth v. Kemp, et al., 396 So. 2d 1122, (Fla. 1981) 81 FLW 243, Goodyear Tire & Rubber Co., supra.
>
> "In the present case, if Mrs. Borghese can establish at trial that her injury occurred while she was under the complete control of the physicians and/or hospital personnel, that the injury was unrelated to the surgical procedure or other medical treatment, and that the injury would not normally occur in the absence of negligence, she would be entitled to rely on the doctrine of res ipsa loquitur. See, Troupe, supra and Webb, supra."

* * *

In BENIGNO v. CYPRESS COMMUNITY HOSPITAL, INC., 386 So. 2d 1303 (Fla. 4 DCA 1980), the District Court of Appeal held that the doctrine of res ipsa loquitur could not be applied to a case where everyone agreed that the claimant fell from a chair in which he had been placed by a hospital employee pursuant to doctor's orders. In BENIGNO no one disputed the facts. However, the defendant hospital simply contended there was no departure from the requisite standard of care.

B.

LAW APPLIED

Reverting to the case at Bar and bearing in mind that where the evidence is inconclusive or conflicting, failure of the trial judge to provide a charge that lays down standards for the jury to follow under varying permissible views of the evidence constitutes reversible error, it is submitted that for the reasons which follow, the trial court committed harmful reversible error in refusing to instruct the jury on the doctrine of res ipsa loquitur:

1. Here, MARRERO established at trial "that her injury occurred while she was under the complete control of the physicians and/or hospital personnel, and that the injury was unrelated to the surgical procedure or other medical treatment" she received in the operating theatre. See BORGHESE v. BARTLEY, supra, 402 So. 2d 475.

2. At trial, MARRERO introduced evidence upon which the jury could permissibly conclude that the injury suffered by claimant "would not normally occur in the absence of negligence" and should not have occurred here. BORGHESE v. BARTLEY, supra, 402 So. 2d 475. For example:

a. MARRERO--who had no prior brachial plexus complaints--entered the operating room for the performance of relatively minor elective surgery, and emerged from the procedure some four and a half hours later with a permanently injured

and virtually useless left arm.

b. Here, as in BORGHESE, everyone connected with the operative procedure performed, including all defendants, testified that nothing unusual occurred.

c. Dr. John Kruse, appellant's expert anesthesiologist, testified, in essence, that the injury had to have occurred here as the result of negligence in the operating theatre. He testified that the injury had to have occurred as a result of positioning of the patient so that her left arm had pressure placed upon it for a long enough period of time to cause permanent injury to the brachial plexus neurosystem. (TR 162-166, 169)

d. Dr. Kruse also testified that everyone in the operating room is to some extent responsible for what occurred here, and that he rejected as a diagnosis brachial neuritis rather than trauma because the greater cause of injury to the brachial plexus in the operating theatre is trauma.

e. Dr. Marshall Abel, MARRERO'S treating neurologist, also testified that MARRERO'S injury was caused by trauma. (TR 202-203) On this record the trauma had to have occurred in the operating theatre. There could be no trauma in

the operating theatre in a case of this description in the absence of negligence and/or a departure from the standard of care.

f. Respondents' expert, Dr. Tumarkin and MARRERO'S expert, Dr. Bochner also testified along similar lines. Dr. Bochner stated that even Dr. Goldsmith, who finished his portion of the operation in twenty minutes to half an hour, would bear responsibility.

g. The undeniable general tenor of the testimony adduced by MARRERO was that she had to have suffered a traumatic traction injury, and that a traumatic traction injury does not occur in the operating theatre unless there is a departure from the standard of care, that is, negligence.

h. MARRERO'S argument here is buttressed by, rather than detracted from, the fact that defendants' parade of witnesses testified that "nothing unusual happened." Indeed, defendant BREWSTER admitted that MARRERO had a "traction" injury, that it is well recognized in the literature as possibly being caused by positioning of the arms of a patient while under anesthesia, and that he knew of no cause for the condition and was "baffled by the fact" that MARRERO had the condition.

i. Defendant GOLDSMITH testified that this

simply isn't the kind of traumatic injury which people suffer "during normal living conditions."

j. Defendant KITSOS testified that he wasn't even acquainted with any authorities on the subject, and that he could not explain precisely what happened to MARRERO'S arm.*

3. Here, the parties did not agree with regard to just how petitioner's injury came about. Petitioner contended they were caused by mispositioning of her arms during surgery. Respondents denied that this was the case. Thus, this record is not one in which the evidence "reveals all of the facts and circumstances surrounding the occurrence in the suit and clearly establishes the precise cause of plaintiff's injury."

4. The foregoing being true, the District Court of Appeal here rendered a decision in direct conflict with the cited decisions because--it announces a rule of law which conflicts with a rule previously announced by this Court and another Florida District Court of Appeal; it applies a rule of law to produce a different result in a case with substantially the same controlling facts as McCREA and BENIGNO; it misapplied precedent by its reliance on BENIGNO to support the conclusion reached here; and it misapplied and/or refused to apply applicable law to the case at Bar.

*It must be remembered that in determining whether or not it was harmful reversible error to refuse to grant the subject instruction, this Court must view the record in the light most favorable to MARRERO, and ignore any contradictory testimony relied on by the respondents.

5. Lastly, and most importantly, this Court must remember that: in a medical malpractice case, unlike other cases, the plaintiff must produce expert testimony re: a departure from the standard of care or suffer grant of motion for summary judgment or directed verdict; in a medical malpractice res ipsa loquitur case this rule must be relaxed; however, the defendants then come to trial with experts who testify there was no departure from the standard of care; under such circumstances the plaintiff must at least be allowed to adduce expert testimony to the effect that the injury would not normally occur in the absence of a departure from the standard. If there were any other rule, the plaintiff could never avail himself of the doctrine of res ipsa loquitur.

POINT II

ON THIS RECORD THE TRIAL COURT COMMITTED HARMFUL REVERSIBLE ERROR IN--(1) ALLOWING DR. SCHEINBERG TO TESTIFY REGARDING CAUSATION; AND (2) ALLOWING DEFENSE COUNSEL TO REPEATEDLY REFER TO DR. SCHEINBERG AS "THE COURT APPOINTED PHYSICIAN."

Florida Rule of Civil Procedure 1.360 contains the following pertinent provisions:

* * *

"(a) Order for Examination. When the mental or physical condition, including the blood group, of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce the person in his custody or legal control for examination. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of

the examination and the person or persons by whom it is to be made.

"(b) Report of Examining Physician.

"(1) If requested by the party against whom an order is made under subdivision (a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnosis and conclusions, with similar reports of all earlier examinations of the same condition. After delivery the party causing the examination to be made shall be entitled upon request to receive from the party against whom the order is made a similar report of any examination of the same condition previously or thereafter made, unless in the case of a report of examination of a person not a party the party shows that he is unable to obtain it. On motion the court may order delivery of a repoert on such terms as are just and if a physician fails or refuses to make a report, the court may exclude his testimony if offered at the trial."

* * *

The quoted Florida rule is patterned after and substantially the same as Federal Rule of Civil Procedure No. 35. It is well established that where a Florida rule is modelled after a federal rule, the federal decisions analyzing the subject are highly persuasive in ascertaining the intent and operative effect of the provision of the Florida rule. See--WILSON v. CLARK, 414 So. 2d 526 (Fla. 1 DCA 1982); ZUBERBUHLER v. DIVISION OF ADMINISTRATION, STATE DEPARTMENT OF TRANSPORTATION, 344 So. 2d 1304 (Fla. 2 DCA 1977); and numerous cases cited therein.

An excellent analysis of the history and case interpretation of Federal Rule 35 is contained in 8 Wright & Miller, Federal Practice & Procedure, 1970 through 2239, pages 662-699.

Regarding conduct of the actual physical examination, a number of Rule 35 questions arose. At 8 Wright & Miller, supra, § 2236, pages 684-686, it is, inter alia, stated:

* * *

> "There have been varying views on whether the attorney for the examined party may be present during the examination, with the difference in view perhaps reflecting the indecision of the courts about whether the examination is part of an adversary proceeding, in which the examining doctor is acting for the other side, or whether the doctor is an impartial expert seeking only the truth. There would seem to be some instances in which the presence of the attorney would be clearly inappropriate. . .
>
> * * *
>
> "The only reason that would support permitting an attorney to be present is that the doctor must ask the examined party questions during the examination. He must be permitted to take the party's history and to ask such other questions as will enable him to formulate an intelligent opinion concerning the nature and extent of the party's injuries. He should not, however, ask questions that might obtain admissions bearing on the issue of liability. Those courts that permit the attorney to be present reason that a lay person should not be expected to evaluate the propriety of every medical question at his peril.
>
> "The danger against which the presence of the attorney is intended to protect can be minimized in other ways, particularly by excluding from evidence any statements made by the party to the doctor relating to non-medical matters. Noting this, some courts have adopted the sensible rule that the attorney should not be allowed to be present as a matter of right but only on application to the court showing good reason therefor. Other courts seem to say that under no circumstances will an attorney be allowed to be present over objection."

* * *

At 8 Wright & Miller, supra, § 2239, pages 695-699, the authors point out that there has been much interest exhibited in various proposals made to provide for impartial medical

examinations in appropriate cases, and that some federal courts have made local rules to that effect. However, it should be noted that the need for local rules of this type only points out the fact that in practice, a court appointed physician is usually anything but an impartial witness. Under the customary procedure, the defendant is usually given his choice of witnesses. An impartial witness rule rather than being consistent with the provisions of the medical examination civil rule would better be regarded as a codification of the common law power of the judge to call his own witness. There isn't any question at all but that in Dade County, Florida, a court appointed physician is not an impartial witness. He is the selectee, normally, of the defendant. That Florida courts treat this rule provision in such a fashion is evidenced by the decision rendered by the District Court of Appeal, Second District, in CHORAK v. NAUGHTON, 409 So. 2d 35 (Fla. 2 DCA 1981), where the court stated:

* * *

> "Finally, we have not overlooked the Choraks argument that the trial court erred in appointing a physician of appellee's choice to examine Mr. Chorak under the provisions of Florida Rule of Civil Procedure 1.360(a). We reject this point because we do not find that the court abused its discretion in appointment of the physician requested by appellees."

* * *

In SCOTT v. SPANJER BROTHERS, INC., 298 F. 2d 928 (2 Cir. 1962), a majority of the federal appellate court held that it was not error for the trial court to make its own appointment of a medical expert shortly before trial. Judge Hincks, dissenting in part, agreed that the appointment of an

impartial medical expert is valuable when the appointment is safeguarded to insure the impartiality of the expert and to protect the parties from surprize. He felt that this was not the situation in the case before the court. Judge Hincks then said:

* * *

"Any consideration of the desirability of court appointed experts should not overlook the fact that in the medical field, as well as in other sciences, there are many areas in which the experts are divided into opposing schools of thought. Under the conventional trial technique, the opposing parties will each generally proffer experts favorable to his position thus leaving it to the trier to decide, with such aid as cross and redirect examination may afford, which view rests upon the more reliable base--a difficult task especially for a jury. On the other hand, a judge making an a priori appointment often unaware of the existence of opposing schools in the area may inadvertently appoint an expert who, by his professional and personal attitudes, is pre-committed to a particular school and his views, with the accolade flowing from a judicial appointment, may well be decisive. Thus, the outcome of unilateral judicial appointment may be not so much an improvement of justice as the fortuitous product of arbitrary--albeit well intended--judicial action.

"The federal judges in the Western District of Pennsylvania, mindful of the concerns expressed by Judge Hincks in his dissent, supra, have limited their rule for impartial medical examination so that it is consistent with the presuppositions of an adversary system. Thus, in Gallagher v. Latrobe Brewing Co., DC Pa. 1962, 31 F.R.D. 36, one of those judges stated that it is--'completely at variance with our concept of justice to have one school of thought represented to the jury as the court's 'impartial' medical witness, if there is an honest and authoritative difference of opinion.' Accordingly, under the Western Pennsylvania District rule, the expert may be identified at the trial as an impartial medical expert appointed by the judge only if the expert in his report before trial answers 'yes' to the following question:

* * *

"'Considering all the facts presented, and based on your examination of the party, is the proposed medical testimony of any doctor who may be called as a witness in this case of such a nature or so slanted that in the present state of medical science a reasonable medical scientist could not accept it either as to diagnosis, causal connection or prognosis?'

* * *

If on the other hand, the impartial expert finds that all the testimony to be given by the experts retained by the parties is within reasonable limits given the present state of medical science, he answers the question 'no.' In such event, the court appointed physician may be called as a witness by a party, but his compensation must be paid by that party and he may not be identified as having been appointed as an impartial medical expert by the court."

Reverting to the case at Bar, it is respectfully submitted that for the reasons which follow, the trial court committed harmful reversible error here for the following reasons:

1. Dr. Scheinberg was appointed to examine MARRERO for the exclusive purpose of ascertaining "the physical condition of said plaintiff and the nature and extent of the claimed injuries." He was not appointed for the purposes of determining causation or departure from the standard of care.

2. Dr. Scheinberg's first report was confined to the parameters of his appointment.

3. Dr. Scheinberg's second report definitely constitutes a departure from his appointment. With that report he came down with both feet on the side of the respondents on the issue of causation and rendered an opinion that was not even

ventured by the respondents or any of their own retained experts. The trial court then allowed Dr. Scheinberg to testify at trial with regard to causation along the lines of his second report. This alone constituted harmful reversible error.

4. The error was compounded by the fact that the respondents' counsel were allowed extensively both during examination of the witness and on closing argument to refer to Dr. Scheinberg as the "court appointed physician." This cloaked Dr. Scheinberg, in the eyes of the jury, in the sheep's clothing of an impartial court appointed physician. He was far from that.

5. The error in allowing counsel to refer to Dr. Scheinberg as the "court appointed physician" was in turn compounded by the fact that this record clearly reflects that there was an honest difference of opinion between the petitioner's experts and the respondents' experts with regard to both negligence and causation. It simply cannot be said here that the evidence given by the petitioner's experts was not reasonable or credible of belief under any medical school of thought.

6. To sum it up then, in a res ipsa loquitur situation, where an injury should not have been present, and where reasonable medical experts disagreed on questions relating to negligence and causation in virtually a standoff swearing match, the scales were allowed to be tipped by the reference to Dr. Scheinberg as the "court appointed physician."

The District Court here rejected the foregoing argument not on its merits but because petitioner "did not challenge the doctor's appointment previously and, of course, may not now be heard to complain." The court was wrong. Petitioner couldn't challenge the appointment because respondents were rule entitled to an appointment. Petitioner couldn't challenge the specific appointment because in Dade County the respondents "get who they ask for."

V.

CONCLUSION

It is respectfully submitted that for the reasons stated herein, the decision sought to be reviewed must be quashed; and the cause remanded to the District Court of Appeal with directions to reverse the judgment appealed and order a new trial on all issues at which the jury must be charged on the doctrine of res ipsa loquitur, and, at which Dr. Scheinberg will not be referred to as "the court appointed physician," but rather, as "a defense expert."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Appellant was mailed to the following counsel of record this 21st day of November, 1984.

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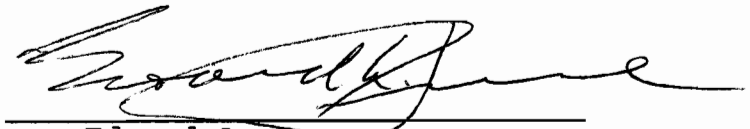

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