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.

REPLY BRIEF OF PETITIONER ON THE MERITS

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and
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TOPICAL INDEX

LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

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.

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

II.

STATEMENT OF CASE AND FACTS

Petitioner stands on the statement of case and facts contained in her main brief. For the sake of emphasis, she would point out the following:

1. Petitioner, who had no prior brachial plexus complaint, 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 performed had anything whatsoever to do with her arm.

2. All respondents, and the hospital in which the operation took place, denied any departure from the standard of care.

3. Petitioner, who was under the effects of anesthesia, could only testify at trial that she went into the

operating theatre with a good left arm and came out with a bad left arm.

4. Dr. John Kruse, petitioner's expert anesthesiologist, testified, inter alia, that--the sterile hospital records did not contain evidence which would indicate a departure from the standard of care (TR 169); and the greater cause of injury and the brachial plexus in the operating theatre is trauma. (TR 181-183)

5. Dr. Marshall Abel, petitioner's treating neurologist, testified, in essence, that--petitioner was suffering from acute brachial plexopathy caused by trauma (TR 202-203); in his opinion her condition was not caused by a virus (TR 215-217); 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)

6. Petitioner's expert, Dr. Judd Bochner, a neurosurgeon, testified, in essence, that--the treatment received virtually had to be below the standard of care because injuries of the kind suffered by petitioner simply do not occur in the absence of trauma.

7. Even respondents' expert, Dr. Bernard Tumarkan, psychiatrist and neurologist, testified that the greater probability here is that petitioner suffered a traumatic traction or contraction injury and not an injury caused by a virus or other causes (TR 270-271).

8. In sum, the general tenor of the testimony adduced by petitioner 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.

9. The testimony adduced at trial by respondent is detailed at pages 7-10 of petitioner's main brief. Suffice it to say that no one in the operating theatre and none of respondents' experts could explain what happened here.

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.

Petitioner relies on the argument contained under this heading at pages 15-25 of her main brief.

Petitioner would address the following reply to the arguments advanced by respondent KITSOS in his brief:

1. The difference between this case and CHENOWETH v. KEMP, 399 So. 2d 1122 (Fla. 1981) and GUZMAN v. FARALDO, 373

So. 2d 66, (Fla. 3 DCA 1979) is that here MARRERO adduced sufficient evidence to require a jury instruction on res ipsa loquitur to the effect that what happened to her would not normally occur in the absence of negligence.

2. In ANDERSON v. GORDON, 334 So. 2d 107 (Fla. 3 DCA 1976), the District Court, inter alia, stated, "Plaintiff's proof must show that the circumstances eliminate every other conclusion save that the defendant is at fault." This statement is not only erroneous, it illustrates a misconception and lack of understanding of the entire raison d'etre for the res ipsa loquitur rule. The plaintiff does not have to eliminate every other possibility. If the plaintiff shows that what happened is the type of thing which does not "ordinarily happen in the absence of negligence," the burden is then shifted to the defendant to show that it was not negligent. The question of whether or not the defendant was negligent is for the jury.

3. KITSOS/plastic surgeon argues that he did not have "exclusive control" over MARRERO during the surgical procedure. He ignores the fact that he was the only surgeon present while he was working, and was the "captain of the ship." KITSOS tries to "shovel if all off" onto GOLDSMITH. This simply can't be allowed to happen in a case of this description. Everyone present in that operating theatre must be deemed responsible here unless he or she can prove that they were not guilty of negligence. That's the whole reason for the existence of the res ipsa loquitur rule.

4. KITSOS/plastic surgeon is way off base in even mentioning the fact here that MARRERO settled with the hospital. That has nothing whatsoever to do with the merits of this case. KITSOS, in arguing that there is testimony in this record to indicate that the type of injury suffered here can occur in the absence of negligence, is way off base as well. That argument ignores the fact that MARRERO provided testimony to the effect that injury cannot happen in the absence of negligence. MARRERO was entitled to a jury instruction here on the question because there was evidence to support her theory of the case. The fact that that theory was contested by the defendants is a totally irrelevant consideration.

5. KITSOS/plastic surgeon clearly demonstrates a lack of understanding of res ipsa loquitur principles by concluding his argument with the following paragraph:

> * * *
>
> "In this case, both the trial court and the 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 loquitur jury instruction. That determination certainly was correct in KITSOS case, when he never even had exclusive control of the petitioner."
>
> * * *

Under the doctrine of res ipsa loquitur a claimant perforce cannot show the "immediate, precipitating cause" of the injury. Indeed, MARRERO lost this case in the District Court because that court felt she had gone too far in attempting to prove the existence of negligence. What she had attempted to

prove was the fact that the injury she suffered doesn't normally occur in the absence of negligence.

MARRERO would address the following reply to the arguments advanced by GOLDSMITH in his statement of facts and in the argument section of his brief:

1. GOLDSMITH, too, views the record in the light most favorable to the wrong party and ignores the rule that if a party has evidence to support his theory of the case, he is entitled to have the jury instructed with regard to that theory notwithstanding the presence of conflicting evidence adduced by his opposition.

2. Insofar as GOLDSMITH reiterates the arguments advanced by KITSOS, MARRERO has already replied thereto herein, supra.

3. GOLDSMITH'S argument regarding settlement with the hospital makes no sense at all.

4. GOLDSMITH argues "I couldn't have done anything wrong because I was only there for a half an hour." <u>This argument ignores MARRERO'S expert testimony to the effect the injury could have occurred in that space of time.</u> More importantly, this argument ignores the fact that--given some GOLDSMITH responsibility for positioning as surgeon in charge during his procedure--it was probably the positioning itself which caused the problem. GOLDSMITH would argue that one who positioned the patient taking five minutes to do so and then went to lunch couldn't be held responsible for negligence in placement simply because it would take a length of time for

the negligent placement to produce injury. This argument makes no sense.

5. GOLDSMITH obviously recognizes the weakness of his argument because he makes a scandalous attack on the character of MARRERO'S expert, Dr. Judd Bochner. GOLDSMITH does this when he has never in this case argued that Dr. Bochner cannot be considered a qualified "similar health care provider." Certainly, GOLDSMITH raised no point on cross appeal in this regard below.

6. Contrary to the assertion made by GOLDSMITH, the tenor of MARRERO'S expert opinion here, and indeed of the testimony of defendants themselves, was that this type of injury does not normally occur in the absence of negligence. MARRERO'S expert merely speculated on wherein the negligence might lie.

7. Respondent BREWSTER, even more so than the other respondents, views this record in the light most favorable to the wrong party. He advances no arguments to which MARRERO has not already directed a reply.

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."

MARRERO relies on the argument made under this point in her main brief. She does not desire to reply to the arguments advanced by respondents.

V.

CONCLUSION

It is respectfully submitted that for the reasons stated herein, and in petitioner's main brief on the merits, 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 Reply Brief of Petitioner was mailed to the following counsel of record this 9th day of January, 1985.

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