

IN THE SUPREME COURT,
STATE OF FLORIDA

MADHU PARIKH, M.D.,

Appellant,

-vs-

ROSANN CUNNINGHAM and
RONALD CUNNINGHAM, her
husband,

Appellees.

CASE NO. 67,033

FILED

STATE

JUL 19 1985

CLERK, SUPREME COURT.

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APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

The Appellant adheres to and adopts by reference in this Reply Brief the Statement of the Case and of the Facts contained in his Initial Brief in this cause.

The parties will again be referred to by name or by the position they occupied before the Appellate Court. The symbols for reference used in the Appellant's Initial Brief will also be used in this Reply Brief.

QUESTION PRESENTED

IS THE FLORIDA MEDICAL CONSENT LAW §768.46 CONSTITUTIONAL?

SUMMARY OF THE ARGUMENT

Regardless of what the parties argued as to the interpretation of the Florida Medical Consent Law at trial, the trial court did not direct a verdict. Rather, it submitted the issue of informed consent to the jury for its determination. The significant question before this Court is whether there is any reasonable interpretation possible which would render the statute constitutional. If so, the Court is bound to adopt that interpretation.

The test to determine if a statutory presumption is constitutional is the Straughn, two-pronged test: (1) The fact proven must bear a reasonable relationship to the fact presumed, and (2) There must be a fair way to rebut the presumption. First: the fact proven in the present case is that Mrs. Cunningham signed a consent form which stated on its face that she was advised of the procedure, the risks, and the alternatives to the procedure. The fact presumed was that she was informed of the procedure, risks, and alternatives. Second: the test requires that the statute provide a fair way to rebut the presumption. Mrs. Cunningham says she was not given a fair way to rebut this presumption because she has no evidence that her signature was obtained by fraud. Yet, the statute provided the opportunity for her to present evidence to rebut the presumption that she was advised. She testified at trial as to all of the circumstances surrounding her signing of the consent form, but her testimony was simply not factually sufficient to convince the jury that she was not fully advised. Because there was insufficient rebuttal testimony, the jury likely presumed Mrs. Cunningham gave her consent because she knew of the procedure, risks, and alternatives. Then, Mrs.

Cunningham was afforded yet another way to rebut the presumption by presenting evidence that her signature was obtained fraudulently. Because there was no evidence of fraud by affirmative misrepresentation, Mrs. Cunningham bases her claim on a supposed withholding of information necessary for her to make an informed decision. Florida recognizes that silence, when there is a legal duty to speak, can amount to fraud. However, in this case the jury was allowed to consider the sufficiency of the consent, found that Mrs. Cunningham was truly informed by Dr. Parikh when she gave her consent, and found that she had evidenced her consent by signing the written consent form.

The argument that the proof of fraud could subject a physician to punitive damages and a loss of insurance coverage as well as loss of his license to practice medicine is not relevant to the issue of the constitutionality of the Florida Medical Consent Law, and the argument is misplaced.

Mrs. Cunningham points out that the Georgia Medical Consent Law is substantially similar to the Florida Medical Consent Law. Although similarly worded, a close reading of the cases interpreting the Georgia statute reveals that the statutes are applied very differently, and Georgia no longer employs the doctrine of informed consent as it is known in Florida.

Mrs. Cunningham argues that the Florida Medical Consent Law denies her due process and equal protection. She asks the Court to sit in judgment of the legislation without establishing that this statute involves a fundamental right or a suspect classification. There is a rational basis for the statute, and there is a corresponding reasonable interpretation of it. Although the Fifth

District Court of Appeal failed to recognize this reasonable interpretation , Appellant would urge this Court to do so and to uphold the constitutionality of the Florida Medical Consent Law .

ARGUMENT

The Florida Medical Consent Law is clothed with a strong presumption of constitutional validity. The statute has remained unchanged since its adoption in 1975. Other courts have utilized a reasonable and fair interpretation of the statute and found the statute to be constitutional. The interpretation that Dr. Parikh urges this Court to apply is not only the interpretation that was applied at the trial court level, (Initial Brief, pages 25-30), but also the interpretation that was applied by at least one district court of appeal in this state and one federal court construing Florida law. Dandashi v. Fine, 396 So. 2d 442 (Fla. 3rd DCA 1981), Gassman v. United States, 589 F. Supp. 1534 (M.D. Fla. 1984). The burden of determining the need, wisdom, and appropriateness of a statute rests with the legislature, and an unreasonable interpretation of a statute should be avoided by the courts.

Mrs. Cunningham uses the Straughn v. Land Management, Inc., 326 So. 2d 421 (Fla. 1976) two-pronged test designed to determine the constitutional validity of statutory presumptions to argue that the Florida Medical Consent Law denied her due process and equal protection. Since Mrs. Cunningham clearly does not fall in a suspect classification and the statute obviously does not involve a fundamental right, Mrs. Cunningham must prove the statute does not pass the rational basis test in order to raise a successful due process or equal protection challenge. Pinillos v. Cedars of Lebanon Hospital Corp., 403 So. 2d 365 (Fla. 1981). As the Florida Medical Malpractice Reform Act has been repeatedly found to have been designed to protect legitimate state interests, her due process and equal protection challenge fails. Pinillos, supra, Florida Patient's Compensation Fund v. Von Stetina, ___ So. 2d ___, 10 FLW 286 (Fla. 1985).

Because the statute withstands constitutional challenge on the due process and equal protection basis, Mrs. Cunningham must prove that the Florida Medical Consent Law fails the Straughn two-pronged test of statutory presumption by showing: (1) that the fact proved (Mrs. Cunningham signed a consent form which stated she had been advised of the procedure, risks, and alternatives) does not have a rational connection to the fact presumed (she signed with a general understanding of the procedure, risks, and alternatives) and (2) that she had no fair way to rebut any of these elements.

The fact proven is that Dr. Parikh obtained Mrs. Cunningham's consent in a manner consistent with other reasonable practitioners practicing the same speciality in the same community. The fact proven is that he provided Mrs. Cunningham sufficient information about the operation such that a reasonable prudent patient would have a general understanding of the planned procedure, the material risks of the procedure and the reasonable alternatives. It is also proven that Mrs. Cunningham was mentally and physically competent to sign the consent form under all of the surrounding circumstances. It is only when the above requirements of the statute have been met or proven that the presumption would apply. The correct application of the first prong of the test compels a conclusion that there is a reasonable relationship between the proof of the above-mentioned facts and the presumption that Mrs. Cunningham gave an informed consent to the medical procedure.

Mrs. Cunningham bases her claim on the second prong of the Straughn test, i.e., this statute does not provide a fair way to rebut the presumption. She

says the only way a patient can rebut the presumption is by a showing of a fraudulent misrepresentation. This is simply not accurate. First, the statute provides that the presumption "may" be rebutted in this fashion. Second, Mrs. Cunningham was given a full and fair opportunity at trial to rebut each of the elements that the physician had to establish before the presumption of informed consent arose. Third, Mrs. Cunningham could have rebutted the presumption by proving fraudulent misrepresentation in the obtaining of her signature on the consent form even after the presumption arose. Morganstine v. Rosomoff, 407 So. 2d 941 (Fla. 3rd DCA 1981). In Morganstine, the patient testified that the surgeon had told him there was no risk to back surgery. Since the physician had testified at trial that there were risks inherent in back surgery, the appellate court held that the doctor's earlier statement could support an allegation of fraudulent misrepresentation in the course of obtaining the patient's signature on a consent form.

Mrs. Cunningham bases her claim on the withholding of information that was necessary for her to make an informed decision, as opposed to a claim of affirmative misrepresentation. She suggests that if a physician simply fails to tell a patient about material risks or alternatives to a surgical procedure, the patient could never successfully allege fraud. Mrs. Cunningham overlooks the line of Florida cases which indicate that silence can amount to fraud where there is a legal duty to speak. Hauben v. Harmon, 605 F. 2d 920 (5th Cir. 1979); Robson Link & Co. v. Leedy Wheeler & Co., 154 Fla. 596, 18 So. 2d 523, 532 (1944); Hirschman v. Hodges, O'Hara and Russell Co., 59 Fla. 517, 51 So. 550, 554 (1910); 27 Fla. Jur. 2d Fraud and Deceit, §36 (1981). The above-cited cases stand for the basic proposition that if a person has a legal duty to advise

another of a material matter, a failure to do so may indeed constitute fraud. In the context of the present case, the Florida Medical Consent Law places a legal duty upon the physician to advise a patient of the material risks of a procedure, as well as reasonable alternatives to the procedure. Under the facts of this case, as well as any other similar case, if the patient can establish that there was a material risk or an acceptable medical alternative to a particular procedure and that the physician failed to so advise the patient, a prima facie case of fraud could be made out by the patient under Florida law. Mrs. Cunningham failed to rebut the presumption of informed consent because she testified Dr. Parikh could have told her about the risks of the procedure and she simply did not remember them.

Mrs. Cunningham points out that the Georgia Medical Consent Law is substantially similar to the Florida Medical Consent Law. Although similarly worded, a close reading of the cases interpreting the Georgia statute reveals that the Georgia law only requires the physician to disclose in general terms the patient's treatment or course of treatment. There is no additional requirement in the Georgia statute, as there clearly is in the Florida statute, that the physician must also disclose to the patient the material risks and any medically accepted alternatives to the procedure. The Georgia appellate courts have specifically held under their statute that there is no legal duty on the part of the physician to disclose any risks inherent in a medical procedure. Georgia simply does not follow the doctrine of informed consent as it is known in Florida. Simpson v. Dickson, 306 S. E. 2d 404 (Ga. App. 1983); McMullen v. Vaughan, 227 S. E. 2d 440 (Ga. App. 1976).

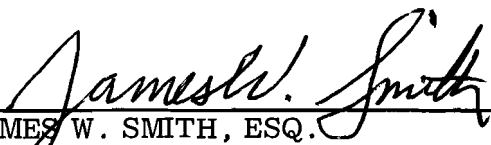
CONCLUSION

Mrs. Cunningham is asking this Court to sit as a superlegislature and judge the wisdom of a 1975 legislative response to a threatened legitimate state interest. This has been expressly precluded by the U. S. Supreme Court in City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) and this Court, in Von Stetina, supra and State v. Bales, 343 So. 2d 9 (Fla. 1977). Appellant would respectfully request the Court to quash the decision of the Fifth District Court of Appeal, and to declare the Florida Medical Consent Law constitutional.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail to: Nolan Carter, Esq., P. O. Box 2229, Orlando, FL 32802 and Frederick B. Karl, Esq., 1501 E. Park Avenue, Tallahassee, FL 32301, by U.S. Mail, this 18th day of July 1985.

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