SUPREME COURT OF FLORIDA

MADHU PARIKH, M.D.,

Appellant.

v.

CASE NO. 67,033

ROSANN CUNNINGHAM, ET VIR.,

Appellees.

INITIAL BRIEF OF AMICUS CURIAE

FLORIDA MEDICAL ASSOCIATION, INC.
FLORIDA HOSPITAL ASSOCIATION, INC.

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INTRODUCTORY NOTE

Amicus curiae, Florida Medical Association, Inc. and Florida Hospital Association, Inc. file this Initial Brief pursuant to the consents granted by this Court on May 28 and May 29, 1985. This Initial Brief is filed in further support of the position of the Appellant Defendant, Madhu Parihk, M.D.

STATEMENT OF THE CASE

AND OF THE FACTS

Amicus curiae, Florida Medical Association, Inc. and Florida Hospital Association, Inc. adopt in full the Statement of the Case and the Statement of the Facts, as set forth in the Initial Brief of the Appellant Defendant Madhu Parikh, M.D.

ARGUMENT

THE FLORIDA MEDICAL CONSENT LAW, §768.46, FLORIDA STATUTES (1983), IS A LEGISLATIVE CODIFICATION OF PREVIOUSLY EXISTING COMMON LAW DOCTRINE. PROPERLY VIEWED IN THIS CONTEXT, §768.46 DOES NOT CREATE AN UNCONSTITUTIONAL, IRREBUTABLE PRESUMPTION BUT A VALID LEGISLATIVE ENACTMENT.

In a broad and comprehensive effort to head off or at least ameliorate a perceived medical malpractice crisis[1] the 1975 Florida Legislature enacted Ch. 75-9, Laws of Florida, otherwise known as the "Medical Malpractice Reform Act of 1975."

Chapter 75-9 primarily addressed three substantive areas of law including those relating to (1) the availability of medical liability insurance through mandatory risk pooling by insurance companies; (2) setting forth a scheme whereby negligent and/or incompetent physicians licensed by the State of Florida could be properly disciplined and otherwise regulated through existing administrative procedures; and (3) procedural and substantive additions and modifications to the then existing tort law system regarding civil lawsuits to assist the recovery of damages caused by malpracticing physicians and other health care providers. The Florida Medical Consent Law (hereinafter referred to as §768.46) was one of numerous provisions

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[1]See preamble of Ch. 75-9.

relating to additions and modifications in this third area.

Section §768.46, has remained unchanged since its adoption in 1975 despite an enormous amount of amendment in Part II of Chapter §768, Florida Statutes.

This section is popularly referred to as the "Informed Consent law." At least one commentator early on noted that "[f]ew legal theories in the medical malpractice area have been so thoroughly and intensely debated as the doctrine of informed consent."[2] Even a cursory review in this area will convince the most casual of observers that such intensive debate has not waned with the passage of time.

In the present context, the pertinent provisions of §768.46 state:

> (3) No recovery shall be allowed in any court in this state against any physician licensed under chapter 458 . . . in an action brought for treating, examining or operating on a patient without his informed consent when:
>
> (a)1. The action of the physician, osteopath, chiropractor, podiatrist, or dentist in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community; and
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> 2. A reasonable individual, from the information provided by the physician, osteopath, chiropractor, podiatrist, or dentist, under the circumstances, would have a general understanding of the

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[2]Medical Malpractice Reform Act. 4 Fla. State L. Rev. 50 (1976).

> procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among other physicians, osteopaths, chiropractors, podiatrists, or dentists in the same or similar community who perform similar treatments or procedures; or
>
> (b) The patient would reasonably, under all the surrounding circumstances, have undergone such treatment or procedures had he been advised by the physician, osteopath, chiropractor, podiatrist, or dentist in accordance with the provisions of paragraph (a).
>
> (4)(a) A consent which is evidenced in writing and meets the requirements of subsection (3) shall, if validly signed by the patient or another authorized person, be conclusively presumed to be a valid consent. This presumption may be rebutted if there was a fraudulent misrepresentation of a material fact in obtaining the signature. (emphasis supplied).

In Cunningham v. Parihk, the Fifth District Court of Appeal held that §768.46 created an unconstitutional, conclusive presumption because it deprived the plaintiff of the right to rebut the presumption in a fair manner, thus failing the two pronged test set forth by this Court in Straughn v. K&K Land Management, Inc., 326 So.2d 421 (Fla. 1976). 10 FLW 321.

The decision of the Fifth District is incorrect because, among other things[3], the decision disregards the common law context within which the enactment arose and further, because the Fifth District "overinterpreted" the clear terms of the statute.

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[3]These "other things" are discussed in detail in the Initial Brief of the Appellant, Dr. Parikh.

As a general rule, and overlooked by the Fifth District, it must be presumed that no change in the common law is intended unless the statute explicitly so states. Sand Key Associates v. Board of Trustees, etc., 458 So.2d 369 (Fla.2d DCA 1984). In addition, inference and implication of a modification, amendment or rejection of the previously existing common law cannot be substituted for clear expression. Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1977); Sand Key Associates, supra. A statute designed to change the common law must do so in clear and unequivocal terms. Carlile, supra; City of Pensacola v. Capitol Realty Holding, 417 So.2d 687 (Fla.1st DCA 1982).

Statutes, including §768.46, are to be construed with reference to appropriate principles of common law, and when possible they should be construed so as to make them harmonize with existing law and not conflict with long settled principles. Vanner v. Goldshein, 216 So.2d 759 (Fla.3d DCA 1968). In Ellis v. Brown, this Court cited with approval the following language:

> "To know what the common law was before the making of a statute, whereby it may be seen whether the statute be introductory of a new law, or only affirmative of the common law, is the very lock and key to set open the windows of a statute. Further, as a rule of exposition, statutes are to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to

> make any alteration other than what is specified, and besides what has been plainly pronounced; for, if the parliament had that design, it is naturally, said they would have expressed it." Potter's Dwar.St. 185. 77 So.2d At 847. (emphasis in original).

Certainly, the clear terms of §768.46 cannot fairly be read to explicitly or even implicitly modify the common law regarding the question of informed consent. In fact, the same Fifth District Court of Appeal has already held that §768.46 appears to codify the previously existing law in this particular area. Ritz v. Florida Patient's Compensation Fund, 436 So.2d 987 (Fla.5th DCA 1983).[4]

Prior to the enactment of Ch. 75-9, Laws of Florida, Florida Courts had adhered to the rule that consent is a prerequisite to medical treatment. Zaretsky v. Jacobson, 99 So.2d 730 (Fla.3d DCA 1958), Chambers v. Nottebaum, 96 So.2d 716 (Fla.3d DCA 1957). Furthermore, the issue of whether there has been an informed consent has always been an issue to be determined by the trier of fact when the facts conflict with regard to the factors underlying the adequacy of that informed consent. E.G. Ditlow v. Kaplan, 181 So.2d 226

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[4]Ritz was a 3-0 opinion authored by Chief Judge Orfinger and concurred in by Judge Cowart (who coincidentally also concurred in the opinion presently on appeal). Judge Sharp filed a partial concurrence and partial dissent in Ritz, but his partial dissent did not address the issue of codification of existing law, however, but was directed elsewhere.

(Fla.3d DCA 1965); Bowers v. Talmage, 159 So.2d 888 (Fla.3d DCA 1963); Chambers, supra.[5]

Section §768.46 does not purport to change nor does it change the previously existing law.[6] In fact, it does not automatically raise any presumption. Instead, and contrary to what may be inferred from the opinion of the Fifth District, no presumption arises until and unless the trier of fact considers all of the circumstances surrounding the consent issue, including the medical procedure proposed, the risks inherent in the procedure, and in that light, the adequacy and reliability of the means chosen to communicate the information to the patient. Dandashi v. Fine, 397 So.2d 442 (Fla.3d DCA 1981). See also Gassman v. U.S., 589 F. Supp. 1534.

In Thomas v. Berrios, 348 So.2d 905, 907 (Fla.2d DCA 1977), a case which proceeded the enactment of Ch. 75-9, the Third District Court of Appeal stated:

> In obtaining the consent to an operation or a course of treatment, a physician has an obligation to advise his patient of the material risks involved.

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[5]Both prior to and subsequent to the enactment of Ch. 75-9, surgery in the absence of any consent or beyond the scope of the consent obtained by the physician has been regarded as a battery. Chambers v. Nottebaum, 96 So.2d 716 (Fla.3d DCA 1970); Meretsky v. Ellenby, 370 So.2d 1222 (Fla.3d DCA 1979). This is not at issue in the present case.

[6]Compare the language of LSA-R.S. 40: 1299.40, The Louisiana Uniform Consent Law, with §768.46. In LaCaze v. Collier, 434 So.2d 1039 (La. 1983) it was held that that enactment

(Footnote Continued)

Miriam Mascheck, Inc. v. Mausner, 264 So.2d 859 (Fla.3d DCA 1972); Bowers v. Talmage, 159 So.2d 888 (Fla.3d DCA 1963). The extent of the duty is aptly described in ZeBarth v. Swedish Hospital Medical Center, 81 Wash.2d 12, 499 P.2d 1 (1972), as follows:

> The duty of a medical doctor to inform his patient of the risks of harm reasonably to be expected from a proposed course of treatment does not place upon the physician a duty to elucidate upon all of the possible risks, but only those of a serious nature. Nor does it contemplate that the patient or those in whose charge he may be are completely ignorant of medical matters. A patient is obliged to exercise the intelligence and act on the knowledge which an ordinary person would bring to the doctors' office. The law does not contemplate that a doctor need conduct a short course in anatomy, medicine, surgery, and therapeutics nor that he do anything which in reasonable standards for practice of medicine in the community might be inimical to the patient's best interests. The doctrine of informed consent does not require the doctor to risk frightening the patient out of a course of treatment which sound medical judgment dictates the patient should undertake, nor does the rule assume that the patient possesses less knowledge of medical matters than a person of ordinary understanding could reasonably be expected to have or by law should be charged with having. Nor should the rule declaring a

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(Footnote Continued)
superseded in Louisiana, previously existing jurisprudential rules defining "consent to medical treatment." 434 So.2d at 1046. Section A. of R.S. 40:1299.40 specifically redefined the physician's duty of disclosure requiring the consent form to set forth in writing, inter alia, known risks of the listed procedures for which consent was sought to be obtained. Significantly, Subsection A. of LSA-R.S. 40:1299.40 begins with the phrase "Notwithstanding any law to the contrary, . . ." No such similar legislative intent can be gleaned by from the clear terms of §768.46.

> duty to inform be so stated or applied that a physician, in the interest of protecting himself from an overburden of law suits and the attendant costs upon his time and purse, will always follow the most conservative therapy--which, while of doubtful benefit to the patient exposes the patient to no affirmative medical hazards and the doctor to no risks of litigation. Thus, the information required of the doctor by the general rule is that information which a reasonably prudent physician or medical specialist of that medical community should or would know to be essential to enable a patient of ordinary understanding to intelligently decide whether to incur the risk by accepting the proposed treatment or avoid that risk by foregoing. A doctor or specialist who fails to discharge this duty to inform would thus be liable as for negligence to the patient for the harm proximately resulting from the treatment to which the patient submitted. . . .
>
> The duty of the physician to inform and the extent of the information which may be required varied in each case depending upon the particular circumstances. Blye v. Rhodes, 216 Va. 645, 222 S.E.2d 783 (1976)

This is not meaningfully different from that which is required by §768.46(3) and (4) as explained by the Third District in Dandashi, before any presumption could ever arise. There really has been nothing new wrought by §768.46 except a codification of previously understood and widely applied principles relating to determination of the informed consent issue, despite the legislative reference to a "conclusive" presumption.

Ironically, the precise misinterpretation of §768.46 which has occurred in this case was predicted at least ten years ago by another commentator:[7]

> The Conclusive Presumption of Valid Consent. One unacquainted with the evolution of the common law of "informed consent" could easily go astray in reading the next section of the statutory amendment:
>
> > (4)(a) A consent which is evidenced in writing and meets the requirements of subsection (3), shall, if validly signed by the patient . . . be conclusively presumed to be valid consent . . . .
>
> If the validity of the consent is the basic issue in these cases, then a strictly physician-oriented court might order a directed verdict for a defendant who provides one witness testifying in his favor -- if the court is also satisfied that a "reasonable individual" would have gained a general understanding regarding the implications of the recommended treatment, and the patient had signed a consent form. A court is more likely, however, to leave the question of medical standard and the patient's understanding to jury reckoning. Such being the case, the import of this section of the statute would be no more than guidance to the trial judge in his drafting of an appropriate jury instruction. Of course, the uninformed interpreter might read this section to require that the defendant receive a directed verdict if he has provided a written consent and evidence of compliance with sections (3)(a) and (b) of the amendments, or with section (3)(c)." (emphasis supplied).

As a result, the Fifth District disregarded the clear terms of §768.46, which requires the trier of fact to consider all of the evidence before it with regard to how the written

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[7]Problems of Medical Malpractice. Walter Probert, 28 U.Fla. L.R. 56, 65 (1975).

and signed consent form was obtained. If the jury does not believe that the patient was adequately or appropriately informed under all of the surrounding circumstances of the case, no presumption (and especially no conclusive presumption) in favor of the physician ever arises. In fact, the informed consent issue would be decided in favor of the patient, ipso facto. The common law preceding Ch. 75-9 was not one iota different.

For whatever reason the Fifth District misinterpreted or ignored that portion of §768.46(4) which states that:

> A consent which is evidenced in writing and meets the requirements of subsection (3) . . . . (emphasis supplied)

Section §768.46 does not mandate that the requirements of subsection (3) be met in writing (although a written and signed consent which is that complete would be helpful), and it would appear that the burden of meeting these requirements could be met with appropriate proofs through witness testimony. This is precisely what occurred in the present case before the trial court, where the jury resolved the conflicting evidence on the quality of the information communicated to Mrs. Cunningham in favor of Dr. Parikh.

The Fifth District erroneously assumed that §768.46 modified, amended or repealed the pre-existing common law

concepts regarding the issue of informed consent and for this reason, among others, its opinion is incorrect.

The Fifth District also "overinterpreted" §768.46, when it stated:

> Therefore, the provision permitting the patient to rebut the statutory presumption only by showing that the patient's consent was obtained by a fraudulent misinterpretation of a material fact is neither logically nor legally adequate to meet, refute or rebut the statutorily "conclusive" presumption that the physician did timely and adequately perform is affirmative duty to properly advise the patient. 10 FLW at 322 (emphasis in the original).

Contrary to this statement, §768.46 nowhere states that the presumption may be rebutted only by a showing of a fraudulent misinterpretation. The statute says, rather, that the presumption may be rebutted in this fashion, but it does not otherwise limit rebuttal in any way. Clearly, the evidentiary facts proferred by the patient with regard to the quality of the information imparted to him or her by the physician is acceptable rebuttal evidence as well.

Furthermore, a fraudulent act or statement by one which intentionally induces another to act to his detriment has always been regarded by the common law as both actionable in its own right and, alternatively, as an affirmative defense. E.G. Biscayne Blvd. Properties, Inc. v. Graham, 65 So.2d 858 (Fla. 1953); Ross v. Richter, 187 So.2d 653 (Fla.2d DCA

1966). This further buttresses the present position that §768.46 merely codified the then existing law and neither added nor removed any rights from either the patient or the physician through its enactment.

In the present case, Dr. Parikh proffered a written and signed consent form and testified as to what he informed his patient, Mrs. Cunningham. For her part, Mrs. Cunningham presented rebuttal evidence and contradictory testimony on the issue of what information was or was not imparted to her. The jury chose to render its decision for Dr. Parikh. The patient clearly exercised her right to rebut in a fair manner and simply was unpersuasive in her efforts. Section §768.46(4) did not foreclose Mrs. Cunningham from preparing and arguing rebuttal as to the informed consent issue. Contrary to the decision of the Fifth District, §768.46 does not create an unconstitutional, irrebuttable presumption and the record on appeal in the present case is wholly unsupportive of Mrs. Cunningham and the Fifth District Court of Appeal.

Because §768.46 merely codified the previously existing law regarding the issue of informed consent and because the patient was actually allowed to present rebuttal evidence to the jury, it is clear that §768.46 does not create an unconstitutional, irrebuttable presumption. For these reasons the decision of the Fifth District should be reversed and the judgment of the trial court should be reinstated.

CONCLUSION

The presumption that a patient's consent is valid does not arise under §768.46 unless the information required by subsection (3) has been provided in the manner prescribed, and the consent has been evidenced in writing and signed. The signing of the consent form is but one of the requirements, and standing alone, it cannot create the conclusive presumption.

In construing the statute so that it will have a different effect, and thus change the common law, the District Court of Appeal, Fifth District, failed to follow the judicial mandate often recited by the Court and repeated in 1979, in State v. Cormier, 375 So.2d 852, at 854:

> Legislative enactments are presumptively valid, and, when reasonably possible, all doubts as to the validity of the statute are to be resolved in favor of its constitutionality. State v. McDonald, 357 So.2d 405 (Fla. 1978); Rollins v. State, 354 So.2d 61 (Fla. 1978). Further, it is a basic axiom of statutory construction that words of common usage, when appearing in a statute, should be construed in their plain and ordinary sense. Tatzel v. State, 356 So.2d 787 (Fla. 1978).

Wherefore, Florida Medical Association, Inc. and Florida Hospital Association, Inc. respectfully urge this Court to reverse the decision of the District Court of Appeal as announced in its opinion filed February 7, 1985, and hold

§768.46, Florida Statutes (1983), to be a valid act of the Florida Legislature.

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By Frederick B. Karl
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 3rd day of June, 1985 to Nolan Carter, Esq., P.O. Box 2229, Orlando, Florida 32801 and to James W. Smith, Esq., 605 S. Ridgewood Avenue., Daytona Beach, Florida 32014.

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