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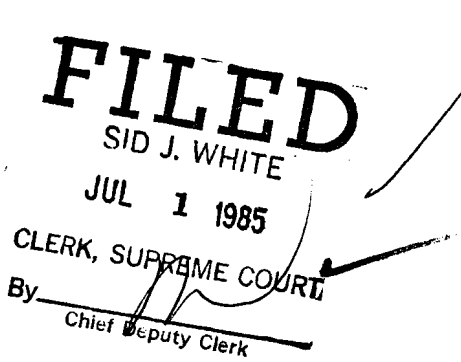
IN THE SUPREME COURT
STATE OF FLORIDA

CASE #67,033



MADHU PARIKH, M.D.,

Petitioner,

vs.

ROSANN CUNNINGHAM and
RONALD CUNNINGHAM, her
husband,

Respondents.
_____/

APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA
CASE #83-763

RESPONDENTS' REPLY BRIEF

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TABLE OF CONTENTS

CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

The Respondents were the Plaintiffs in the trial court and Appellants in the Fifth District Court of Appeals.

Petitioner was the Defendant at trial and Appellee in the Fifth District Court of Appeals.

Reference to the transcript of the trial will be (RA/).

STATEMENT OF THE CASE

Respondents adopt Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

Respondents do not believe Petitioner's Statement of the Facts state facts relevant to this appeal. Additionally, Petitioner's Statement of the Facts contains factual matters raised by the testimony in deposition read into evidence but not part of the record on appeal. (See this Court's Order Vacating an Order Granting Appellant's Motion to Supplement Records). For these reasons, Respondents restate the Statement of the Facts presented to the Fifth District Court of Appeals.

Rosann Cunningham a white 36 year old female, had elective breast surgery performed by the Defendant, Dr. Parikh on April 29, 1980. (RA/176)

Medically the operation is known as a Subcutaneous Mastectomy and is the surgical removal of all breast tissue beneath the skin down to the chest wall muscle, leaving intact the outer skin envelope and the nipple/aerola complex. (RA/55,399-400) The tissue is replaced either at the time of the original surgery or after a short delay, with a gel filled implant. (RA/582) The implant is placed either in the original breast pocket or beneath the pectoralis (chest wall) muscle. (RA/582) Although this is considered a very controversal surgery, such was not germane to the trial nor this appeal. (RA/528-529) In spite of this controversy there is general agreement among the authorities on the subject as to the

indications for the surgery, the material risks of the surgery, and the reasonable alternatives to the surgery. (RA/528).

The hospital chart indicates and Dr. Parikh testified, that he saw Mrs. Cunningham, pre-operatively, on April 26 and April 28. (RA/450) He testified that on both occasions he fully explained the surgery, the risks, possible complications and alternatives of the surgery. (RA/468,490-492)

Mrs. Cunningham testified that she was on so much medication that she had only the barest of recollection of the first visit but definitely recalled the second visit. (RA/347) She testified that the second visit was solely for the purpose of taking pre-operative pictures of her breast and that there was absolutely no discussion of any risks, complications, or alternatives to the surgery. (RA/349-351) She further testified that it was her understanding that the proposed surgery was the only surgery which would have alleviated her breast problems and was therefore absolutely necessary. (RA/353)

She testified that on the April 28th visit, Dr. Parikh told her that after the surgery she would look fairly normal, that she would be able to wear a bathing suit and probably would look better than she ever did before. (Ra/354).

The consent to surgery was signed by Mrs. Cunningham on April 28th after this second visit with Dr. Parikh. (RA/390) The consent is a standard form used by the hospital that leaves a blank place for the nurse obtaining the consent to fill in the name of the surgery. It does not list the specific risks,

complications, and alternatives of the particular surgery, but rather simply recites that these matters have been explained to the patient. (RA/404).

There was no written consent introduced into evidence which specified the actual name of the surgery and the specific risks, complications, and alternatives which Dr. Parikh claimed he explained to Mrs. Cunningham prior to the April 29th surgery.

The surgery was performed on April 29th and was uneventful. Dr. Parikh chose to delay insertions of the implants until September, 1980, at which time he surgically placed them under the pectoralis muscle, bilaterally. (RA/361).

Almost immediately after the September surgery, one and then both implants migrated upwards causing Mrs. Cunningham concern and anguish over her appearance and a great deal of pain. (RA/363)

Dr. Parikh followed her during October and November and in December advised her she would have to have further surgery. He told her that she had quite a bit of excessive breast skin and in order to give her a more normal appearance, he would have to surgically remove this excess skin, remove and relocate both nipple/areola complex and reposition both implants. (RA/364,369,489-491)

He did warn her that she could lose one or both of her nipples because of poor circulation, but did not, according to the evidence, offer her any alternative surgical or non-surgical

approaches. (RA/365-356)

Based on Dr. Parikh's advice, Mrs. Cunningham signed a surgical consent and the above described operation was performed on December 10, 1980. As a result of this surgery Mrs. Cunningham did in fact lose the nipples of both breasts and subsequently underwent further breast reconstruction by Dr. John Bostwick at Emory University in Atlanta. (RA/365,367,372)

Suit was filed alleging a lack of informed consent to both the April and December surgeries and negligence in the performance of the December surgery.

At the conclusion of the Plaintiffs' case and then at the conclusion of the evidence Defendant moved for directed verdict urging that the Plaintiff had not alleged nor proved fraud and therefore the clear language of F.S. 768.46 entitled Defendant to a directed verdict on the informed consent issues.

Mrs. Cunningham agreed there was no evidence of fraud on the part of Dr. Parikh but argued that F.S. 768.46 is unconstitutional. (RA/112-121, Volume 6 of 7, 278 in Volume 7 of 7)

The Court reserved ruling on both occasions on Defendant's motion. (RA/276).

At the charge conference Mrs. Cunningham urged the Court to instruct the jury on the Informed Consent charge in Florida Standard Jury Instruction 5.3. Defendant argued he was entitled to a charge based on the wording of the Informed Consent Statute. (RA/1053-1062).

The Court agreed with Defendant and charged the jury: (RA/281-282)

> "Now, reasonable care on the part of a physician in obtaining the informed consent for treatment of a patient consists of providing the patient information sufficient to give a reasonable person a general understanding of the proposed procedure, of any medically acceptable alternative treatment or procedure, and the substantial risks and hazards inherent to the procedure which are recognized by other physicians in the same or similar communitiy who perform similar procedures.
>
> > "A consent which is evidenced in writing, if signed by a person, who under all the circumstances is mentally and physicially competent, shall be conclusively presumed to be a valid consent." (Emphasis added).

The jury returned a verdict for Defendant on all issues.

SUMMARY OF ARGUMENT

Petitioner is arguing for a much broader interpretation of the Informed Consent Statute that he argued at trial. In the trial court he said his burden was to simply produce a signed consent and he was entitled to a directed verdict since Respondents had no evidence of fraud in obtaining Mrs. Cunningham's signature.

He now argues that the correct interpretation is to allow a jury to decide if the physician met certain tests and if he did, then and only then does a conclusive presumption arise that the consent is valid.

He and the Amicus also argue the Informed Consent Statute is simply a codification of the common law of this State.

Respondents say Petitioner is wrong on both points. The Informed Consent Statute is clear: a signed consent, absent proof of fraud in obtaining the signature, creates a conclusive presumption that the physician advised the patient of the planned procedure, the material risks and the reasonable alternatives. The signature also conclusively proves the patient was given enough information to enable a reasonable patient to understand the procedure, risks and alternatives. In short, the jury is told to believe the physician, not the patient, if she signed the consent and has no evidence of fraud.

On the second point, there has never been a Florida case decision creating any type of presumption in favor of a physician, conclusive or otherwise.

Respondents urge this Court to affirm the lower court because the Informed Consent Statute does not pass the two prong test this Court has established for statutorily created presumptions.

To pass constitutional muster, a presumption statute must (1) bear a reasonable relationship between the fact proved and the fact presumed; and, (2) there must be a fair way to rebut the presumption.

The fact proved is Mrs. Cunningham signed a general consent form. The facts conclusively presumed are (1) Petitioner acted as a reasonably careful physician would have acted under the same or similar circumstances and (3) that he gave Mrs. Cunningham enough information about the planned procedure that a reasonably prudent patient would have a general understanding of the planned procedure, the material risks of the procedure and the reasonable alternatives. The only way the patient can rebut these conclusively presumed facts is to prove the physician made fraudulent misrepresentations to her in getting her to sign the consent.

Respondents feel that with or without evidence of fraud they did not have, nor would any patient have, a fair way to rebut

the conclusive presumption.

For the patient without evidence of fraud the statute clearly creates a conclusive presumption in favor of the physician. Once the signed consent is introduced into evidence, the physician will have met his burden of proving conclusively that no material issues of fact remain for a jury to decide and he is thus entitled to a Summary Final Judgment or Directed Verdict on liability.

The patient who can prove fraud proves an intentional tort thus subjecting the physician to punitive damages and loss of insurance coverage. He may also lose his license to practice medicine upon proof of fraud.

The District Court's conclusion that the statute fails the two prong constitutional test should be affirmed.

ARGUMENT

Petitioner argues that a broader interpretation can and should be placed on Florida Statute 768.46 than was placed by the Fifth District in finding the statute unconstitutional. That "broader" interpretation is said to be that the statute really envisions a jury first considering whether the physician met two prerequisites prior to getting to the issue of the validity of the patient's signature and the statutory presumption. If, it is argued, a jury determines the physician failed in either respect to meet his duty, no presumption arises.

This argument is directly contrary to the clear wording of the statute and to what Petitioner so forcefully argued at the trial of this case in his Motion for Directed Verdict. Specifically at Page 112 of Volume 6, he stated:

> "...on the issue of informed consent we have the Florida Statute that basically provides that where there is a written consent form that is validly signed by the patient, that creates a conclusive, not rebuttable but a conclusive presumption that the consent was valid.
>
> "...we do have in evidence the three consent forms that Mrs. Cunningham testified that she had read and understands and did not have a question about and signed before each of the operations.
>
> "...And, under the Florida Medical Consent Statute, as I read that, it says it shall be a conclusive presumption." (Emphasis added).

Petitioner's argument at the trial level that all he need produce is a signed consent is the only reasonable, logical, or even broad, interpretation that can be placed on Florida Statute 768.46. For the reasons discussed herein Respondents urge that the statute was correctly declared unconstitutional by the Fifth District.

Petitioner and the Amicus brief also argue that Florida Statute 768.46, Subsection 4(a)(b) is simply: "...a codification of previously understood and widely applied principles relating to the determination of the Informed Consent issue..."

This is simply not true. There is no Florida case that creates any presumption in favor of either party upon the production of a signed consent. This conclusive presumption provision is entirely legislatively conceived.

Respondents fully agree with Petitioner's historical setting for the passage of the statute in question. The malpractice laws passed in 1975 were in response to a perceived medical malpractice crisis. Whether the laws passed were the factors that alleviated that crisis, while debatable, is not germane to this appeal. But, this Court only needs to look to the legislative history of a statute if there is ambiguity in the statute; otherwise effect need only be given to the plain meaning of its terms. Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983); State v. Egan, 287 So.2d 1 (Fla. 1973).

The plain, unequivocal language of the statute is that a written consent, signed by the patient, is conclusively presumed

to be a valid consent.

Stated in its simpliest terms, the statute provides that a patient's signature on a consent form conclusively proves that the physician acted as his reasonably careful colleagues, with similar training and experience, would have acted under similar circumstances, practicing in similar communities.

The signature also creates a conclusive presumption that the physician imparted enough information to the signator that would have enabled a reasonable patient (NOT THE SIGNATOR) to have a general understanding of the procedure, the risks and the alternatives.

An exception is allowed in the case of provable fraud. However, as will be seen below, this is truely an illusory exception that works to the patient's detriment, not benefit.

"Presumptions", whether legislatively enacted or judicially pronounced and whether conclusive or rebuttable, have been a longstanding subject of commentary and controversy.(1) Professes Allen, in his excellent review of the subject,(2) concludes that when instructing a jury on presumptions and their relationship between facts proved and facts presumed:

> "The effect of instructing on a presumption that is to be weighed as evidence is either to make a comment on the evidence or to manipulate a burden of persuasion. In neither case does reliance on the concept of a presumption facilitate the process, but it does obfuscate the issues at hand. By relying on presumptions to make judicial comment on the evidence, we have avoided facing the question of the proper role of comment. At the same time we have injected an irrational component into the jury decision making process. We have

probably injected an even greater irrational component into the decision making process by relying on a presumption of this kind to shift burdens of persuasion, since there is no way of knowing just how high a burden of persuasion these instructions will be translated into by juries. Moreover, various juries will undoubtedly view the instruction, and the burden it implicitly imposes, in differing ways. Thus, the instruction probably has the additional undesirable effect of contributing to ad hoc decision making by juries." (Emphasis added)

In Straughn v. Land Management, Inc., 326 So.2d 421 (Fla. 1976), this Court said for a statutory presumption to pass constitutional muster:

"The test for the constitutionality of statutory presumptions is two fold. First, there must be a rational connection between the fact proved and the ultimate fact presumed. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943); United States v. Gainey,, 380 U.S. 63, 66, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965). Second, there must be a right to rebut in a fair manner. Goldstein v. Maloney, 62 Fla. 198, 57 So. 342 (1911); Black v. State, 77 Fla. 289, 81 So. 411 (1919)".

The Federal Court test for measuring the constitutionality of a Florida Statute is found and applied in Owens v. Roberts, 377 F.Supp. 45 (1974) where Justice Scott announced:

"It is well established that a legislative body may provide, by statute or ordinance, that certain facts shall be presumptive evidence of other facts. Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952); Seaboard Air Line R. Co. v. Watson, 287 U.S. 86, 53 S.Ct. 32, 77 L.Ed. 180 (1932); Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932); Bandini Petroleum Co. vs. Superior Ct., 284 U.S.8, 52 S.Ct. 103, 76 L.Ed. 136 (1931); Barrett v. United States,322 F.2d 292 (5th Cir.1963), rev'd on other grounds, United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965); Amerada Petroleum Corp v. 1010.61 Acres of Land, 146 F.2d 99 (5th Cir.1944); New Port Richey v. Fidelity & D.Co.,105 F.2d 348 (5th Cir.1939). However, in order for a statutory

> rebuttable presumption to pass constitutional muster, there must be some rational connection between the fact proved and the ultimate fact to be established. Leary v. United States, 395 U.S.6, 89 S.Ct.1532, 23 L.Ed.2d 57 (1969); United States v. Romano, 382 U.S. 136, 86 S.Ct.279, 15 L.Ed.2d 210 (1965); Adler v. Board of Education, supra; Tot v. United States, 319 U.S.463, 63, S.Ct.1241, 87 L.Ed.1519 (1943); Atlantic Coast Line v. Ford, 287 U.S. 502, 53 S.Ct.249, 77 L.Ed. 457 (1933); Bandini Petroleum Co. v. Superior Ct., supra; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 (1910). Stated otherwise, due process requires that proof of the fact upon which the statutory presumption is based must carry a reasonable inference of the ultimate fact presumed, Barrett v. United States, supra, "and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate". Mobile, J.&K.C.R. Co. v. Turnipseed, supra, 219 U.S. at 43, 31 S.Ct. at 138."

Before applying this law to the facts at hand a distinction between Informed Consent cases and all other areas of medical negligence must be drawn.

Liability for lack of Informed Consent arises before any affirmative treatment by a physician. While the Plaintiff still must produce expert testimony to create a jury issue,[3] this is a hollow requirement since the expert called on behalf of the patient really only basis his testimony on what the patient tells him was or was not said prior to the particular procedure. Thus, Informed Consent cases can be viewed as passive negligence cases.

All other actions can be viewed as active negligence cases since there is some affirmative action on the physician's part either in the diagnosing of the malady (or lack thereof) or in the treatment undertaken (or lack thereof).

The clear distinction between the two is that only in the

Informed Consent cases does the patient stand on equal footing with the physician on the critical issue of liability. If a jury believes that the doctor did not advise the patient of the risks and alternatives, and that the patient would not have consented to the treatment had she been so advised, the patient wins. This in spite of the skill used in performing the medical procedure.

On the other hand, active negligence cases are recognized as a "battle of experts"[4] with the patient having no standing to be critical of the diagnosis or treatment. Indeed, by statute even some physicians cannot be critical of their colleagues.[5]

It is undoubtably this "equality of battle" in Informed Consent cases that led the physicians to lobby so strenuously for the passage of Florida Statute 768.46 in 1975, particularly subsection 4(a)(b). Passage of this Statute, as will be seen, has literally shut the door to the courthouse on cases involving swearing contests between the physician and the patient; that is, Informed Consent cases.

Applying the constitutional tests of Straughn and Owens' to the facts of this case, Respondents submit the District Court's opinion was correct. As applied to Mrs. Cunningham, the statute cannot pass constitutional muster because it deprives the patient of substantive due process and equal protection; there is no rational connection between the fact proved and the ultimate fact presumed, and there is no right to rebut it in a fair manner. Straughn v. Land Management, Inc., supra; Owens v. Roberts, supra.

The fact proved is Mrs. Cunningham signed a general consent

form before the April and December surgeries. The "facts" presumed, conclusively, are that Dr. Parikh (1) used reasonable care in obtaining the informed consent to treat Mrs. Cunningham; (2) that he provided her with sufficient information to give a reasonable person a general understanding of the proposed procedure; (3) that he told her, and she understood, all medically acceptable alternative treatments or procedures; (4) that he told her of the substantial risks and hazards inherent to the procedure; (5) that are recognized by other physicians in the Daytona Beach or similar communities.

In actuality, the fact, conclusively presumed, is that Dr. Parikh's version of what transpired prior to surgery is correct and the only version the jury is to believe.

Assuming, arguendo that somehow this statutorily conferred conclusive credibility, bears a rational relationship to the fact proved (Mrs. Cunningham's signature), the statute still fails the second prong of the two part constitutional test: Mrs. Cunningham had no fair manner to rebut the conclusive presumption.

The statute provides in (4)(a): "This presumption may be rebutted if there was a fraudulent misrepresentation (sic) of a material fact in obtaining the signature."

Faced with this burden, Mrs. Cunningham freely admitted she had no evidence of fraud (RA/116 of Volume 6) and, indeed, even viewing the evidence in a light most favorable to Mrs. Cunningham, she had no basis to claim fraudulant

misrepresentation. (Assuming that is not a contradiction in terms). Her claim was based on the things she says were not told her. Those matters were disputed by Dr. Parikh's testimony that he gave her a laundry list of complications and alternative forms of treatment.

The elements of fraud were noted by this Court in Lance v. Wade, 457 So.2d 1008 (Fla. 1984). There Justice Overton stated, at 1011:

> "The elements for actionable fraud are (1) a false statement concerning a material fact; (2) knowledge by the person making the statement that the representation is false; (3) the intent by the person making the statement that the representation will induce another to act on it; and (4) reliance on the representation to the injury of the other party. In summary, there must be an intentional material misrepresentation upon which the other party relies to his detriment." (Emphasis added).

Does a patient's testimony that a physician did not tell her of certain risks and reasonable alternatives equate to fraudulent misrepresentation? Not in Respondents' reading of the dictates of LANCE.

Even though Mrs. Cunningham did not have any evidence of fraudulent misrepresentation, is it nevertheless fair to arbitrarily discriminate against a class of patients bringing an Informed Consent action (those who have no proof of fraud) and in favor of a second class (those who can prove fraud)? Or, assuming the withholding of information concerning risks and alternatives amounts to fraudulent misrepresentation, is there a still a fair way for the patient to rebut the conclusive presumption? (6)

In analyzing this problem one must keep in mind that in the patient's case with no evidence of fraud, the trial court is surely going to be in error if he does not grant a Summary Judgment or Directed Verdict. Why? Because the Doctor, with a signed consent, will have met the requirements of conclusively (by operation of the statute) proving the absence of a material issue of fact. Holl v. Tolcott, 191 So.2d 40 (Fla. 1966).

Indeed this exact result was reached in Watson v. Worthy, 259 S.E.2d 138 (GA. App.1979). (Appendix 1). The Georgia Medical Consent Law provides:

> "A consent to medical and surgical treatment which discloses in general terms the treatment or course of treatment in connection with which it is given and which is duly evidenced in writing and signed by the patient...shall be conclusively presumed to be a valid consent in the absence of fraudulent misrepresentation of material facts in obtaining the same."

As this Court can see this language is substantially similar to 768.46, 4(a)(b).

The Georgia Court held, at 139:

> "No question as to fraudulent misrepresentation is involved and consequently the executed form is conclusive on the issue of consent under the Medical Consent Law..(citations omitted). Consequently summary judgment was properly granted..." (Emphasis added).

It is important to note that the constitutionality of the Georgia law was not challenged in Watson and Respondents have been unable to find any case where a similar provision has been challenged on constitutional grounds. The cases cited by Petitioner do not contain provisions similar to subsection 4(a)(b).

Returning now to the question of "fairness". For a patient in Mrs. Cunningham's plight, there simply is no cause of action for Informed Consent once she signs that form. Surely this conclusive presumption extends the doctrine of Caveat Emptor beyond all bounds of fairness, reason and reality. A patient goes to a physician entrusting her body, health and very often her life to him. How is the patient, unskilled in medical matters, to know her physician has fully explained all material risks and reasonable alternatives? The physician is the person in the far superior position to know the material risks and reasonable alternatives. Most important, the dispute over what was said or not said does not surface until after a poor medical result has occurred. Who then has the most at stake, the patient or the physician?

Justice Cordoza said, long ago, a truth that still holds forth today: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 93 (1914).

Of what value is that right if a person, absent proof of fraudulent misrepresentation, is not allowed to tell a jury he would not have elected to have something done to his body had he been told of all of the material risks and reasonable alternatives? The answer is obvious, it is worthless.

But what of the patient who can supposedly prove fraudulent

misrepresentation? Or, if it can be said that the failure to advise of the risks and alternatives amounts to fraud, is that patient's burden fair?

As shown below, this class of patients cannot fairly rebut the presumption either.

The plain language of the statute requires proof of an intentional tort, fraud, in order to ever get to the negligence issue. The statute says: "...if there was a fraudulent misrepresentation (sic) ..." This clearly places the burden of proving the intentional tort of fraud on the patient. The statute does not say "evidence of" or any similar language; it requires proof there was fraud. What then is the practical effect of this proof?

This proof subjects the physician to punitive damages in Informed Consent cases since fraud is, by definition, an intentional tort. American International Land Corp. v. Hanna, 323 So.2d 567 (Fla. 1975). Also, if one views the consent form as a contract between the patient and the physician, proof of fraud rebuts and breaches that "contract". What now is the Plaintiff to do with the doctrine that punitive damages are not recoverable for breach of contract? American International Land Corp. v. Hanna, supra; Associated Heavy Equipment Schools, Inc. v. Masiello, 219 So.2d 465 (Fla. 3rd DCA 1969); Griffith v. Shamrock Village, Inc., 94 So.2d 854 (Fla. 1957).

Next, Respondents would call to this Court's attention the Plaintiff's burden of proof under this statute. Plaintiff must prove that four separate and distinct acts occurred: First, that

the physician committed the intentional tort of fraud in obtaining her signature by intentionally misrepresenting a material fact, on which the patient relied. Second, that the patient consented to the procedure because of the fraudulent misrepresentation. Third, that the physician negligently failed to tell her of one or more of the material risks of the procedure and one or more of the reasonable alternatives. Fourth, that she would not have consented to the procedure had she been told of the omitted material risks and reasonable alternatives. Respondents submit that this is an insurmountable burden.

The patient now has to find a physician who will opine that the defendant physician was negligent and that the material misrepresentation was fraudulent! Or, did the legislature mean for the fraud question to be a jury issue not needing expert testimony to aid them? One certainly gets no hint from reading 768.46, the sole statutory basis of this action.

As was so correctly noted in Clarke v. Sanders, 363 So.2d 843 (4th DCA 1978), at 844:

> "It is common knowledge it is difficult to obtain expert testimony in professional malpractice cases and it is obvious malpractice can hardly be proved without such evidence...."

Negligence is easy to prove compared to proving a physician was guilty of fraud and should be made to pay both compensatory and punitive damages.

In practical application what happens when a jury finds the doctor did fraudulently misrepresent a material fact and was

negligent in failing to tell the patient some or all of the material risks and reasonable alternatives? First, it is obvious a jury cannot legally find for the Plaintiff without finding there was a fraudulent misrepresentation in obtaining the consent. Thus in all Informed Consent cases won by the Plaintiffs there will be at least a verdict for compensatory and punitive damages because of a finding of fraud. Even if a jury awarded no punitive damages they still must find fraud.(7) Where does this then leave the Plaintiff and the physician? Since there cannot be a verdict for negligence without first a verdict for fraud, is the jury to apportion the compensatory damages between the fraudulent misrepresentation and the negligence?

Since 768.46 gives us no guideline and since there is only one total injury, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) and Gutirrez v. Murdock, 300 So.2d 689 (Fla. 3rd DCA 1974) can be read as holding that a jury may not apportion damages between two theories of liability. Thus, we now have a verdict based either on fraud or a mixture of fraud and negligence.

Assuming the insurers writing coverage in Florida draft their policies tracing the applicable wording of F.S., Sections 768.45, 768.46, 768.48, 768.49, 768.50, 768.51 and 768.54, one sees quite readily there would be no coverage for a physician found guilty of fraudulent misrepresentation. These provisions all speak of "negligence of a health care provider", not fraud. Quite a result for a statute that was passed to lower and make available malpractice insurance for doctors in Florida! Carter

v. Sparkman, 335 So.2d 802, 805, 806, (Fla. 1976). It seems axiomatic that insurance coverage that never has to be paid out should be cheap. Indeed, it should be free.

Even if this coverage reasoning does not pertain, since we have no actual policy to review, it is abundantly clear that in at least two situations the physician will be paying at least the punitive damages out of his own pocket.

First, if he is an employee of a State agency, F.S. 768.28(5) provides: "The state and it's agencies and subdivisions shall be liable for tort claims...but liability shall not include punitive damages...:"

Or, if the doctor is a member of the Patient's Compensation Fund, F.S. 768.54(2)(b) says: "The fund shall not be responsible for payment of punitive damages awarded for actual or direct negligence of the health care provider member."

Thus, we see at least two very clear examples of how legislative zeal to further immunize the medical profession, in actuality statutorily exposes them to punitive damages and a potential loss of insurance coverage. And, possibly their license to practice. (See Medical Practices Act, Section 458.331(m)(o)(p)(t) (See Appendix 2).[8] And it clearly burdens the injured patient with the problems of trying to collect her judgment from a physician who undoubtably has skillfully protected his personal assets.

It should be clear from this analysis that neither the patient, who has evidence of fraudulent misrepresentation, nor the one who does not, has a "fair" way to rebut this conclusive

presumption. Straughn v. Land Management, Inc, supra.

The patient who has no evidence of fraud faces either summary judgment, directed verdict, or virtually certain jury verdict against her if the jury follows the court's instruction. Or, as likely would have happened in this case, a Judgment Notwithstanding the Verdict if the jury had found for Mrs. Cunningham on either of the informed consent issues. Recall, the trial court reserved ruling on Defendant's motion for directed verdict on the informed consent issues.

The patient who can prove fraudulent misrepresentation, is caught in a true "Catch 22" situation. She must come forward with her evidence of fraud. But if she does, she faces the stark probability of being unable to collect her judgment or at least portions thereof.

Truly this legislation is arbitrary, oppressive, intrinsically unfair, irrational in the extreme, and denies substantive due process and equal protection of the law.

And why is there a need for this presumption? According to a fairly recent article in The Orlando Sentinel by the President of the Orange County Medical Society, doctors win over 80 percent of the cases tried against them! (See Appendix 3) If this statistic is to be believed it is the patient who needs the help of a presumption. That is unless we are to abandon the informed consent doctrine altogether, as this legislation effectively does.

Is this legislative protection so bad? It is when one

considers that long haul truckers and airline pilots do not enjoy any special interest legislative protection. While a doctor can only kill or maim one patient at a time, a trucker can wipe out entire families with one negligent act. Similarly an airplane pilot can kill or permanently injure literally hundreds of people in one single mishap.

Respondents submit that the legislature's efforts to alleviate oneorous insurance premiums are laudatory, whether directed toward vehicle operators or persons rendering professional services. But, those statutes must yield to individual rights protected by the Florida Constitution, a document enacted by the direct vote of the people of the State.

The Fifth District Judges undoubtably had this in mind when they unanimously held that a patient faced with this statute, does not have a fair way to rebut this conclusive presumption and, therefore, found the statute unconstitutional. Respondents submit that decision should be affirmed by this Court.

CONCLUSION

The Florida Medical Consent Law, F.S. 768.46 clearly discriminates against the patient and in favor of the physician, thus, denying the patient equal protection of the laws as guaranteed by the Florida and Federal Constitution.

The law is unconstitutional because there is no rational relationship between the fact proved by producing the signed consent and the facts presumed because of the written signature of the patient.

Even assuming there is some rational relationship between the facts proven and the facts conclusively presumed, the patient does not have a fair way to rebut the presumption and therefore the law is clearly unconstitutional.

Respondents ask this Court to affirm the findings and conclusions of the Fifth District Court of Appeals.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery this 28th day of June, 1985, to: JAMES W. SMITH, ESQUIRE, 605 S. Ridgewood Avenue, Daytona Beach, Florida 32014 and GORDON D. CHERR, ESQUIRE, P.O. Drawer 229, Tallahassee, Florida 32302.

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