IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,673

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PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL,

Petitioner,

vs.

GREGORIA VALCIN and GERARD VALCIN, her husband,

Respondents.

ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

INTERVENOR/PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Because the purpose of this brief is to present the position of the Florida Hospital Association regarding the presumptions of negligent surgery fashioned by the Third District Court of Appeal and the brief of the Public Health Trust of Dade County, d/b/a Jackson Memorial Hospital, states the case and facts adequately and fully, the Association adopts that statement.

SUMMARY OF THE ARGUMENT

The Third District misreading of Dr. Hammond's testimony confronts hospitals with burden of proof rules and presumptions of surgical negligence that are insurmountable and dangerous.

Aside from the due process aspect of "a conclusive, irrebuttable presumption that the surgical procedure was negligently performed" by the surgeon, solely because the hospital

is unable to locate or account for the surgeon's operative note, every hospital is endangered by the additional command that "judgment as to liability shall be entered in favor of" the plaintiff, thereby suffering what the Third District called the "ultimate sanction of entering a judgment as to liability against the hospital".

Hospitals are endangered by the Third District's misreading of "Dr. Hammond's testimony as stating that no operative note existed within the hospital's medical records", and then applying to the misreading a non sequitur consequence solely in the context of a hospital's surgeon-employee relationship as if there are no hospitals whose medical staff surgeons are not employees but are appointees to whom the hospital has granted practice privileges.

To the danger of every hospital whose medical staff surgeons are not employees but are appointees having practice privileges, the result was adjudication of issues "entirely outside the issues made by the pleadings".

POINT INVOLVED

The Third District's misreading of testimony and consequent adjudication of issues "entirely outside of the issues made by the pleadings", resulting in a holding that despite the surgeon's handwritten "operative note" on the patient's "progress note", no operative note exists, could adversely affect any of the approximately 250 hospitals in this State.

ARGUMENT

The Third District's misreading of testimony and consequent adjudication of issues "entirely outside of the issues made by the pleadings" could affect adversely any of the approximately 250 hospitals in this State.

The misreading resulted in, and the danger to hospitals turns primarily on, a holding that despite the surgeon's handwritten "operative note" on the patient's "progress note", no operative note exists.

"We read Dr. Hammond's testimony as stating that no operative note existed within the hospital's medical records. At the very least, the hospital...did not conclusively show on this record that an operative note exists." (R.280; Footnote to Order clarifying Opinion)

Dr. Hammond's testimony quoted on page 9 of the Opinion is directly to the contrary. There he testified to the existence of an "operative note on the progress note". (R.273) Later he testified, "the operating doctor did make a brief handwritten note" (R.169), but inferred that the handwritten note was not "of a legitimate variety" and said it was not "revealing" for his purposes. (R.273; Opinion page 9)

The Opinion holds on page 9: "It is apparent...that the records of the surgical procedure...do not exist". (R.273)

The Opinion further holds on page 9: "Dr. Hammond was able to testify that a delay of six days before performing a post-birth sterilization would fall below the accepted standard

of medical practice in the community...". (R.273)

Those holdings are flatly contrary to the facts, and need to be evaluated in light of Dr. Hammond's testimony that he did not "have an opinion as to what the general standard is... Because I have not inquired about it, number one, and number two, since I've not been involved in obstetrical activities for ten years or so, I have not fraternized with the obstetricians in this sense". (R.119-120)

The foregoing poses for every Florida hospital the question whether it can rely on a handwritten operative note on a patient's progress note, or must it adamantly require an operative note as a separate document, and, if so, may the separate document be handwritten or must it be typewritten?

It also poses for every Florida hospital the question where, as here, there is no pleading issue regarding the existence, nature, character or sufficiency of an operative note, and the hospital's medical records have been made available to Plaintiff's Counsel (R.88), but Plaintiff's treating physician, testifying in that capacity and not as a qualified expert, questions the nature of the operative note but not its existence, is it nevertheless necessary for the hospital to "conclusively show" that an operative note exists?

The medical records containing the handwritten "operative note on the progress note" had been made available to Plaintiff's Counsel (R.88), who made them available to Dr. Hammond (R.121-122). Without reference to (or disregarding)

those facts, the Opinion holds on pages 10-11: "where evidence peculiarly within the knowledge of the" hospital "is, as here, not made available to the party which has the burden of proof, other rules must be fashioned". (R.274-275) The Third District then proceeded to fashion them "entirely outside of the issues made by the pleadings", and to the potential danger of every Florida hospital.

"Whether the ultimate sanction of entering a judgment as to liability against the hospital should be imposed depends, in our view, on what the proof ultimately shows as to the reason the [produced] records cannot be produced". (R.276; Opinion page 12)

"Since the evidence concerning the reason the [produced] records cannot be produced is peculiarly within the knowledge of the hospital, we deem it fair to preliminarily impose upon the hospital the burden of proving by the greater weight of the evidence that the [produced] records are not missing [they never have been and are not] due to an intentional or deliberate act or omission on the part of the hospital or its employees. (The hospital can act only by its employees.) (R.276; Opinion page 12)

"If the fact-finder, under appropriate instructions, determines that the hospital has sustained its burden of showing that Dr. Shroder did not deliberately omit making an operative report (the surgeon made and the hospital produced the operative note] or, if one was made, that the hospital did not deliberately remove or destroy the report [the operative

note could not have been removed or destroyed without destroying the patient's progress note of which it was a part, and which was produced], then the fact that the record is missing [it is not and was produced] will merely raise a presumption that the surgical procedure was negligently performed, which presumption may be rebutted by the hospital by the greater weight of the evidence". (Proof of a negative) (R.276; Opinion page 12)

"However, if the fact-finder is not satisfied that the records are missing [they are not and were produced] due to inadvertence or negligence, then a conclusive, irrebuttable presumption that the surgical procedure was negligently performed will arise, and judgment as to liability shall be entered in favor of" the Plaintiff. (R.277; Opinion page 13)

None of the rules so fashioned has any application to the facts, or to any issue made by the pleadings. An operative note was made. Dr. Hammond testified to its existence. He was not satisfied with it, but that was a personal, as distinguished from an expert, opinion.

Thus the Third District's misreading of Dr. Hammond's testimony[1/] confronts hospitals with burden of proof rules that are insurmountable.

Inevitably, something will be missing from some

1/The hospital sought leave to supplement the record with the operative note, but the post-opinion motion was denied by the Order clarifying the Opinion. (R.279-280)

hospital's records of treatment of a patient. In Bondu v. Gurvich, 473 So.2d 1307(Fla. 3d D.C.A.1984) "anesthesiology records had been made, but were nowhere to be found". Id. at 1310

The inability to find them resulted in the creation of the tort of "loss of the underlying malpractice action". Id. at 1313-14, Schwartz, Chief Judge, dissenting.

Under the burden of proof rules fashioned in the instant case, if an operative note is missing, the hospital has the burden of proof that "one was made" and "the hospital did not deliberately remove or destroy it". If the hospital carries that burden of proof, its success in doing so "will merely raise a presumption that the surgical procedure was negligently performed". If ever there was a non sequitur, that is one.

The Opinion adds that such "presumption may be rebutted by the hospital by the greater weight of the evidence".

The rules so fashioned overlook the fact that in most hospitals, the members of the Medical Staff are not employees, but are physicians who have been granted the privilege of practicing in the hospital. The fashioned rules are incapable of application to such a hospital in which a non-employee surgeon exercises his privilege of performing surgery on his patient, and handwrites or dictates an operative note, but the handwritten one is misplaced or the dictated one inadvertently is not transcribed.

If the non-employer hospital carries its burden of

proving that it "did not deliberately remove or destroy" the operative note, its success "will merely raise a presumption that the surgical procedure was negligently performed [by the non-employee surgeon]".

Under the fashioned rule, the non-employer hospital will be liable for the presumed negligence of the non-employee surgeon, over whose surgery it had no control [he was the captain of the ship] unless it can rebut the presumption "by the greater weight of the evidence".

If the non-employer hospital is unable to do the impossible - prove a negative - prove "by the greater weight of the evidence" that the surgical procedure was <u>not</u> negligently performed, "then a conclusive, irrebuttable presumption that the surgical procedure [by the non-employee surgeon] was negligently performed will arise, and judgment as to liability shall be entered in favor of" the Plaintiff.

For hospitals whose Medical Staff members are not employees but are appointees granted practice privileges, those holdings pose the danger of being held liable, regardless of the facts, for <u>presumed</u> negligence of such appointees.

That is not the law.

> "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."

§768.45(4), Florida Statutes (Supp.1976), as amended by

Ch.77-174, §1, Laws of Florida; now §768.45(4), Florida Statutes(1985), except that Ch.85-175, §10, Laws of Florida, substituted "prevailing professional standard" for "accepted standard".

Aside from the due process aspect of "a conclusive, irrebuttable presumption that the surgical procedure was negligently performed" by the surgeon, only because the hospital is unable to locate or account for an operative note, every hospital is endangered by the command that "judgment as to liability shall be entered in favor of" the Plaintiff. That is what the Third District called the "ultimate sanction of entering a judgment as to liability against the hospital".
(R.276; Opinion page 12)

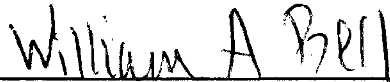
Hospitals are confronted with the dangerous holdings only because the Third District misread "Dr. Hammond's testimony as stating that no operative note existed within the hospital's medical records" (R.280; Footnote to Order clarifying Opinion), and then applied to the misreading a non sequitur consequence solely in the context of a hospital's surgeon-employee, as if there are no hospitals whose Medical Staff surgeons are not employees but are appointees to whom hospital practice privileges have been granted.

To the danger of every hospital, the result was adjudication of issues "entirely outside of the issues made by the pleadings".
Cortina v. Cortina, 98 So.2d 334,337 (Fla.1957)

CONCLUSION

The Court is urged to correct the misreading and its erroneous application and consequences, by reversing the Third District and reinstating the Judgment of the Circuit Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Intervenor/Petitioner's Brief on the Merits was mailed to WALTON LANTAFF SCHROEDER & CARSON, Attorneys for Petitioner, 900 Alfred I. duPont Building, Miami, Florida 33131 and HORTON, PERSE & GINSBERG and VIRGIN & KRAY, P.A., 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130, Attorneys for Respondents, this 18th day of March, 1986.

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