IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,673

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

BRIEF OF PETITIONER
ON JURISDICTION
(With Separate Appendix)

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INTRODUCTION

This is a petition for review in an action for medical malpractice, wherein the Third District Court of Appeal adopted a conclusive irrebuttable presumption of negligence applicable to all hospitals in the State of Florida. Because of the pervasive effect the Third District's decision will have on the ability of hospitals in Florida to deliver health care to the citizens of the state, the Florida Hospital Association, which represents 220 hospitals in the State of Florida, was permitted to intervene in these proceedings following the filing of the Third District's opinion on June 5, 1984. The Third District, on August 20, 1985, modified its opinion on rehearing because, as originally written, the court erroneously placed a duty on hospitals to obtain the patient's informed consent. The court, however, declined to

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recede from its adoption of a conclusive irrebuttable presumption of negligence. Because the adoption of this presumption not only collides with numerous decisions of this Court, but also adversely affects every hospital in the State of Florida, the Florida Hospital Association has joined in this brief to urge this Court to accept jurisdiction to review the decision of the Third District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

The respondent, plaintiff below, Gregoria Valcin, asked to be sterilized after she delivered a child while a patient at Jackson Memorial Hospital in Miami. (App. 1)[1/] A Pomeroy tubal ligation was performed on plaintiff six days after she gave birth. (App. 2) More than a year later plaintiff sustained a ruptured ectopic pregnancy for which she was treated by Daniel Hammond, M.D., at Cedars of Lebanon Hospital. (App. 35-36)

After plaintiff was discharged by Dr. Hammond, she brought suit against petitioner, defendant below, the Public Health Trust of Dade County, d/b/a Jackson Memorial Hospital, alleging in three counts that (1) defendant expressly warranted that the sterilization procedure "would, in fact, make her sterile," and breached the warranty (Count I); (2) "negligently failed to properly advise ... that the Plaintiff ... could become pregnant with an ectopic pregnancy ..." (Count II); and (3) that the sterilization procedure was negligently performed (Count III). (App. 19-24)

1/ In this brief "App" refers to Petitioner's appendix. All emphasis herein is supplied unless otherwise indicated.

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Defendant answered the complaint and denied the material allegations. (App. 25-26)

Plaintiff's treating physician was deposed. Dr. Hammond, who was plaintiff's only expert witness (App. 17, 31-32), frankly stated he could not testify as an expert because he was not familiar with the standard of care:

> Dr. Hammond, are you presently familiar with what the accepted standard of care is in the community for performing a tubal ligation among the physicians in this community and in asking that question, I don't mean do you have your own personal opinion as to what you think is most effective, but do you have an opinion as to what the general standard is?
>
> A. No, I do not.
>
> Q. In this community?
>
> A. 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.

(App. 59-60) Although Dr. Hammond was not familiar with the standard of care, he was critical of the operative note which the attending surgeon had prepared. Dr. Hammond testified there was "an operative note on the progress note" or records of the patient. (App. 94) However, he believed the operative note was not of a "legitimate variety" because there should have been a separate dictated operative note in addition to the operative note on the patient's progress records. (App. 94-95) Dr. Hammond testified that based upon the hospital records, plaintiff "had undergone a tubal ligation of a Pomeroy type, presumably, since this was the notation that was made on the progress notes ...." (App. 94)

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Moreover, Dr. Hammond testified the patient's records did, in fact, reveal that "a bilateral tubal ligation was performed by the Pomeroy method, the operating doctor did make a brief handwritten note and there was a pathology report verifying there was a tubal ligation performed by the Pomeroy method." (App. 109) Given this information, Dr. Hammond testified that even "if the formal operative note had said a Pomeroy ligation was done, this would not really help us know why this one failed," because "Pomeroy ligations fail even when they are done in an ideal situation."[2/] (App. 96)

Dr. Hammond testified a Pomeroy ligation has a one-half to one percent failure rate. (App. 58) In fact, he testified:

> Q. Okay. So, what did happen is exactly the same thing that can happen when the tubal ligation is performed by the very finest surgeon and the very finest hospital and the patient has the very finest care that could be provided by anyone anywhere?
>
> A. That's correct ....

(App. 103) Moreover, from the very hospital records which Dr. Hammond was critical of, he testified that "they did what they were supposed to because there were two fragments of tubes that were identified by the pathologist. So, they obviously had taken out an intervening knuckle of tube, which is part of the Pomeroy sterilization." (App. 62) Although he admitted he was not familiar with the standard of care, Dr. Hammond was of the opinion that

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2/ Dr. Hammond testified a Pomeroy ligation is a procedure whereby an intervening section of the tubes is surgically removed. (App. 62, 93)

petitioner was negligent in allowing the Pomeroy sterilization to be performed six days after delivery, yet he admitted that there was not any causal connection between the timing of the operation and the subsequent ectopic pregnancy. (App. 82-83, 99)

> Q. You can't make any causal connection, can you, Dr. Hammond, from having done the tubal ligation six days postpartum and then her having the ectopic pregnancy in 1980.
>
> A. That's correct.

(App. 99) Dr. Hammond testified that when he, as a doctor, writes medical records, they are at times "rather sketchy and sparse ...." (App. 40) Although the attending surgeon at Jackson did not dictate a formal operative note, and merely wrote a brief handwritten operative note on the progress chart of the patient, Dr. Hammond testified "there is enough peripheral evidence to give us information as to what was probably done." (App. 112) The failure to have a formal operative note did not "adversely affect the patient" according to Dr. Hammond. (App. 111) Dr. Hammond testified that the lack of a formal operative note would have made no difference in his evaluation of the treatment rendered at Jackson:

> Q. If you had the operative note from Jackson Memorial Hospital, would that be of assistance to you?
>
> A. Probably not, because the probability was this was described or would have been described as a Pomeroy ligation, which is a gross ligature. Now, nobody really knows why some of the gross ligature procedures fail and others don't. There is no way to tell why a failure has occurred.

(App. 106)

On these facts, the Third District held that absent a

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formal operative note, there is a presumption of negligence on the part of the hospital, that the burden of proving that the surgical procedure was properly performed was on the hospital, and that if a fact finder is not satisfied with the hospital's reasons as to the absence of an operative note that fulfills Dr. Hammond's criteria, a conclusive, irrebuttable presumption of negligent care and treatment arises in this case. The court also held that a jury could find that plaintiff's consent to the surgery was fraudulently obtained, although, as will be shown in the argument section, there was never any allegation in plaintiff's complaint that her consent to the procedure was procured by fraud.

SUMMARY OF ARGUMENT

The adoption of a conclusive irrebuttable presumption of negligence directly conflicts with numerous decisions of this Court holding that presumptions result in a denial of due process and are invalid unless there is a rational connection between the fact proved and the ultimate fact presumed, and there is a right to rebut in a fair manner. Straughn v. K & K Land Management, Inc., 326 So.2d 421 (Fla. 1976); Black v. State, 77 Fla. 289, 81 So. 411 (Fla. 1919); Goldstein v. Maloney, 62 Fla. 198, 57 So. 342 (Fla. 1911); Whitaker v. Morrison, 1 Fla. 25, 35 (Fla. 1846); Cunningham v. Parikh, 472 So.2d 746 (Fla. 5th DCA 1985). The decision is also in conflict with the decisions of this Court adopting the evidence code. In re Florida Evidence Code, 372 So.2d 1369 (Fla. 1979), 376 So.2d 1161 (Fla. 1979), 404 So.2d 743 (Fla. 1981).

The Third District also decided issues which were never

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raised below, and granted relief on matters outside the pleadings and beyond the issues raised on appeal, in violation of this Court's decision in Cortina v. Cortina, 98 So.2d 334, 337 (Fla. 1957).

POINT INVOLVED

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

ARGUMENT

In Whitaker v. Morrison, supra at 35, this Court in one of its initial decisions adopted the following rule of law applicable to presumptions:

> But presumptions can only stand when they are compatible with the conduct of those to whom it may be sought to apply them; and still more must give place, when in conflict with clear, distinct and convincing proof. [Citations omitted]

The Third District's adoption of a conclusive irrebuttable presumption collides with this rule of law because defendant is afforded no opportunity to rebut the presumption of negligent treatment in cases where a fact finder is not satisfied as to the reasons why an operative note was not prepared, even though, as in this case, Dr. Hammond testified that the presence of such a note would not have been determinative because Pomeroy sterilizations fail when performed under ideal conditions. (App. 96, 106) The decision is also in conflict with the decision in Straughn v. K & K Land Management, Inc., supra, which holds that a presumption denies due process unless first, there is a "rational connection between the fact proved and the ultimate fact presumed," and second, there

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is "a right to rebut in a fair manner." Neither requirements are complied with here. Accord, Cunningham v. Parikh, supra. It is not rational to presume that an operation was negligently performed merely because the surgeon's notes are written into the patient's progress notes rather than being embodied in a separate, dictated and typed operative note. Indeed, Dr. Hammond testified that the failure to have such an operative note is "not negligence of a doctor that adversely affects the patient ...." (App. 111) Not only is a rational relationship between the established fact (lack of an operative note) and the presumed fact (negligent treatment) irrational, there is no opportunity to rebut the presumption.

The Third District's decision is in direct conflict with the decisions of this Court adopting the evidence code as rules of this Court. In re Florida Evidence Code, 372 So.2d 1369 (Fla. 1979), 376 So.2d 1161 (Fla. 1979), 404 So.2d 743 (Fla. 1981). In the cited decisions, this Court adopted as a court rule, Section 90.301(2), Florida Statutes, which provides that "[e]xcept for presumptions that are conclusive under the law from which they arise, a presumption is rebuttable." There is no "law" from which the presumption adopted by the Third District arises which accords a conclusive effect to the presumption. To the contrary, this Court has consistently held, contrary to the Third District's holding, that the party against whom a presumption is applied must not be deprived of the right to rebut the presumption. Goldstein v. Maloney, supra; Whitaker v. Morrison, supra. In the case at bar, if the physician failed to dictate an operative note, because he was satisfied with the notes of the procedure which he wrote in

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the patient's progress chart, a conclusive irrebuttable presumption arises, with no opportunity to disprove the presumed fact. This Court, by its decisions adopting the evidence code, held in Section 90.301(3) that "nothing in this chapter shall prevent the drawing of an inference that is appropriate." However, this Court, in adopting Section 90.301(2), determined that presumptions are rebuttable, and can only be made conclusive "under the law from which they arise." The Third District's adoption of a conclusive presumption conflicts with the decisions of this Court adopting the evidence code.

Finally, the Third District held under Section II of its opinion that plaintiff alleged that the consent she signed was procured by fraud. In order to allege that a representation was fraudulent, the alleged fraud "must appear with reasonable certainty in plaintiff's complaint." American International Land Corp. v. Hanna, 323 So.2d 567, 569-570 (Fla. 1975). Even a cursory review of the complaint by the Third District would have revealed that no issue of fraud was ever pled or raised in the trial court by plaintiff. (App. 19-24) The Third District raised this issue and others which were never pled in conflict with this Court's holding in Cortina, supra, that the adjudication of an issue "entirely outside of the issues made by the pleadings cannot stand ...."

CONCLUSION

Petitioner respectfully urges that there is direct conflict between the decision of the District Court of Appeal, Third District, in the case at bar and the decisions of this Court and of

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other district courts of appeal in the cases cited herein. Petitioner respectfully prays this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal pursuant to Art. V, § 3(b)(3), Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on Jurisdiction (With Separate Appendix) was mailed to VIRGIN & KRAY, P.A., 44 West Flagler Street, Miami, Florida 33130 and GARY E. GARBIS, P.A., 701 S.W. 27th Avenue, Suite 1000, Miami, Florida 33135, Attorneys for Respondents; and WILLIAM A. BELL, ESQUIRE, Attorney for Intervenor/Petitioner, Florida Hospital Association, 208 South Monroe Street, Tallahassee, Florida 32301, this 30th day of September, 1985.

George W. Chesrow
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