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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. | : | ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT |
| GREGORIA VALCIN and GERARD VALCIN, her husband, | : | |
| Respondents. | : | |

# BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

INTRODUCTION

This is a petition for review in an action for medical malpractice, wherein the Third District Court of Appeal adopted both a rebuttable, as well as a conclusive, irrebuttable presumption of negligence applicable to all hospitals in the State of Florida. The Third District held that if a hospital is unable to locate or account for a surgeon's operative note, then a presumption arises "that the surgical procedure was negligently performed [by the surgeon], which presumption may be rebutted by the hospital by the greater weight of the evidence." However, if a fact finder determines that a hospital "intentionally fails to make or maintain such records," then "a conclusive, irrebuttable presumption that the surgical procedure was negligently performed [by the surgeon] will arise ...." Valcin v. Public Health Trust of Dade County, 473 So.2d 1297, 1306 (Fla. 3d DCA 1984).



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Although plaintiff failed to allege any issues in the trial court concerning the existence or adequacy of the surgeon's operative note, the Third District raised this issue for the first time on appeal, and adopted the aforementioned presumptions of negligence based upon a statement made by plaintiff's subsequent treating physician that an operative note which was handwritten by the surgeon failed to satisfy his criteria as to the adequacy of an operative note.

Because of the pervasive effect the Third District's decision will have on the ability of hospitals 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 recede from its adoption of either the rebuttable or the conclusive, irrebuttable presumption of negligence of the surgeon. The presumptions adopted by the Third District not only collide with numerous decisions of this Court, but also affect adversely every hospital in the State of Florida.

## 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. (R. 265)[1/] A Pomeroy tubal ligation was performed on plaintiff six days after she gave birth. (R. 266) A Pomeroy ligation is a procedure whereby intervening sections of the right and left fallopian tubes are surgically removed. (R. 122, 153) Nineteen months after the Pomeroy ligation was performed, plaintiff sustained a ruptured ectopic pregnancy for which she was treated by Daniel Hammond, M.D., at Cedars of Lebanon Hospital. (R. 95, 105)

Dr. Hammond performed a repeat tubal ligation on the plaintiff. (R. 114, 126) According to Dr. Hammond, plaintiff's ectopic pregnancy was caused by the fact that the left tube had recanalized, meaning that the two ends of the tube had grown towards one another, and an opening had reestablished into the tube, requiring Dr. Hammond to repeat the sterilization procedure. (R. 114, 124)

Dr. Hammond explained that ordinarily when the Pomeroy ligation is performed and an intervening knuckle of each tube is removed, the tubes drift apart. (R. 124, 144-145) Dr. Hammond observed that after the earlier Pomeroy ligation was performed on plaintiff, the tubes did not drift apart. (R. 124, 145) According to Dr. Hammond, "there was a scar which represented the area of ligation, but the two ends of the tube were closely proximated on both sides and I would be inclined to think that obviously, the left tube had recanalized under these circum-

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1/ In this brief "R" refers to Record on Appeal. All emphasis is supplied unless otherwise indicated.

stances." (R. 124) Dr. Hammond stated:

> Now, I don't know why this Pomeroy sterilization did not drift apart, like the ordinary sterilization does. I have no idea as to why this didn't occur.

(R. 145) Dr. Hammond concluded that he could only speculate as to why the tube recanalized. (R. 167)

Dr. Hammond observed that plaintiff "did well" following the surgery at Cedars of Lebanon Hospital. (R. 126) He saw her twice in his office for post operative checkups. (R. 126) The plaintiff was discharged from further treatment with instructions to return if she had any problems. (R. 126-127)

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) the hospital 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). (R. 1-6) Defendant answered the complaint and denied the material allegations. (R. 15-16)

There were no allegations in the complaint that the physician who treated plaintiff was negligent in failing to prepare medical records, or that the hospital was negligent in failing to maintain records of plaintiff's care and treatment. Similarly, there were no allegations that plaintiff was fraudulently

induced to consent to the surgery. (R. 1-6)

Plaintiff's treating physician was deposed. Dr. Hammond, who was plaintiff's only medical witness, 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.

(R. 119-120) 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. (R. 154) However, he believed the operative note was not of a "legitimate variety" because, in his opinion, there should have been a separate dictated operative note, "or a note that is written in longhand of a detailed nature," in addition to the operative note on the patient's progress records. (R. 154-155)

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 ...." (R. 154) 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." (R. 169) 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." (R. 156) Dr. Hammond testified a Pomeroy ligation has a one-half to one percent failure rate (R. 118), which can occur if the tubes recanalize or grow back together, as in this case. (R. 162-163) 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 ....

(R. 163) 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." (R. 122)

Dr. Hammond testified that Jackson Memorial Hospital is a teaching hospital utilized by the University of Miami School of Medicine, and that the Pomeroy operation was the method of sterilization used at Jackson Memorial Hospital. (R. 125) Concerning the "performance of the surgery" on plaintiff, Dr. Hammond stated:

> A. I could not make any statement concerning the fact that they were negligent because, obviously, they did a Pomeroy sterilization and obviously this is the sterilization that was being done at the medical school ....

(R. 125)

Although he admitted he was not familiar with the accepted standard of care, Dr. Hammond testified that he would not have performed a tubal ligation 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. (R. 142-143, 159-160, 167-169)

> 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.

(R. 159)

Dr. Hammond testified that when he, as a doctor, writes medical records, they are at times "rather sketchy and sparse ...." (R. 100) Although the attending surgeon at Jackson wrote a brief handwritten operative note on the progress chart of the patient, instead of a "formal" operative note, Dr. Hammond

testified "there is enough peripheral evidence to give us information as to what was probably done ...." (R. 172) The failure to have a formal operative note did not "adversely affect the patient" according to Dr. Hammond. (R. 171) 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.

(R. 166)

Although Dr. Hammond was critical of the fact that the surgeon who performed the surgery on Mrs. Valcin wrote "a brief handwritten note" (R. 169), as opposed to "a formal operative note" (R. 155), Dr. Hammond testified that any failure to prepare a formal note did not injure the plaintiff:

> Q. That's not negligence of a doctor that adversely affects the patient, is it, Doctor?
>
> A. Yes. That's correct.

(R. 171)

On these facts, the Third District held that an operative note does not exist, and that there is a presumption of negligence on the part of the hospital. The Third District also held 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 that the surgeon had negligently performed the surgical procedure arises in this case. (R. 276-278) In addition, the court held that a jury could find that plaintiff's consent to the surgery was fraudulently obtained. (R. 266)

In order to avoid unduly lengthening this brief, petitioner will refer to additional facts of record in the argument section that follows, especially in regard to the issues of whether plaintiff's consent to the surgery was obtained by fraud.

## SUMMARY OF ARGUMENT

The Third District Court of Appeal adopted a rebuttable, and a conclusive, irrebuttable presumption of negligence that must be applied in this and future cases where either the existence or the adequacy of a hospital's medical records are challenged. The rebuttable, as well as the conclusive, irrebuttable presumption of negligence fail to satisfy the requirements of due process of law. Long standing decisions of this Court establish that presumptions result in a denial of due process 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 conclusive, irrebuttable presumption of negligence fails to satisfy the requirement that there be a right to rebut in a fair manner. Similarly, the rebuttable, and the conclusive, irrebuttable presumptions of negligence are not premised upon and fail to satisfy the requirement of a rational connection between the established fact and the presumed fact.

In adopting the conclusive, irrebuttable presumption of negligence, the Third District overlooked the evidence code which was adopted by the legislature and by 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). According to Section 90.301(2), Florida Statutes, presumptions are rebuttable "except for presumptions that are conclusive under the law from which they arise." The Florida legislature has enumerated specific standards of recovery in actions for medical malpractice, none of which include either a conclusive or a rebuttable presumption of negligence against a hospital. Section 768.45, Florida Statutes. In fact, according to the legislative mandate, even the presence of a foreign body in a patient, such as paraphernalia commonly used in surgery, is only "prima facie evidence of negligence on the part of the health care provider." Section 768.45(4), Florida Statutes.

The Third District encroached upon the legislative domain in adopting presumptions of negligence applicable to health care providers. It is peculiarly a legislative function to enact rules of law, such as fashioned by the Third District,

which will significantly change the standards of recovery in medical malpractice actions, contrary to existing legislation. Section 768.45, Florida Statutes.

The Third District's decision requires the fact finder to determine, under appropriate instructions, whether the hospital was negligent or acted intentionally in its inability to produce or account for a surgeon's operative note. If the fact finder, or in this case a jury, determines that the surgeon intentionally failed to prepare a formal operative note, in addition to the handwritten note, or that the hospital's record keeping activities were intentional, a directed verdict on liability will be entered against the hospital, according to the Valcin decision, and the only remaining issue for the jury to decide will be the amount of plaintiff's damages. However, if the jury determines the hospital was negligent in its record keeping activities, the hospital may rebut the presumption that the surgical procedure was negligently performed by the surgeon. If the hospital rebuts the presumption of negligence by the surgeon, the jury is free to decide without aid of the presumption whether, in fact, the surgeon departed from the accepted standard of care, and if so, whether such departure proximately resulted in injury to the plaintiff. Thus, the jury must be allowed to consider evidence on the issue of the hospital's liability, if it determines that the hospital was negligent in its record keeping activities; yet the same jury must be instructed, as a matter of law, to disregard the evidence of the surgeon's compliance with the standard of care in the treatment of the patient, if it determines

that the hospital acted intentionally, because in that case the surgeon is conclusively assumed to be negligent in the care and treatment of the patient and a directed verdict on liability will be entered against the hospital. The presumptions adopted by the Third District are therefore unworkable and inequitable in practical operation.

The Third District erroneously decided issues which were never raised below, and granted relief on matters outside the pleadings, in holding that there was evidence to support plaintiff's claim that she was "fraudulently induced" to consent to surgery. In order to allege that a representation was fraudulent, the fraud must be alleged in plaintiff's complaint. American International Land Corp. v. Hanna, 323 So.2d 567, 569-570 (Fla. 1975); Rule 1.120(b), Florida Rules of Civil Procedure. Although fraud was never pled below, the Third District raised this issue for the first time on appeal, and thereby adjudicated an issue entirely outside the pleadings, contrary to this Court's decision in Cortina v. Cortina, 98 So.2d 334, 337 (Fla. 1957).

The defendant is entitled to a summary judgment on the issues of negligence and lack of informed consent because both causes of action require expert medical testimony in order to establish a departure from the accepted standard of care. As plaintiffs' medical witness was not familiar with the accepted standard of care for the performance of a tubal ligation, the trial court correctly found that plaintiffs were without expert medical testimony to support the allegations of the complaint. Sims v. Helms, 345 So.2d 721 (Fla. 1977); Thomas v. Berrios,

348 So.2d 905 (Fla. 2d DCA 1977).

## POINTS INVOLVED

I

WHETHER THE DISTRICT COURT ERRED IN ADOPTING A REBUTTABLE AS WELL AS A CONCLUSIVE, IRREBUTTABLE PRESUMPTION OF NEGLIGENCE APPLICABLE TO ALL HOSPITALS IN FLORIDA, WHERE THE ATTENDING PHYSICIAN PREPARES A HANDWRITTEN INSTEAD OF A "FORMAL" OPERATIVE NOTE, AND THE EVIDENCE IS UNDISPUTED THAT THE PATIENT WAS NOT ADVERSELY AFFECTED BY THE ABSENCE OF A "FORMAL" NOTE.

II

WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT A JURY WAS ENTITLED TO FIND THAT PLAINTIFF'S CONSENT TO SURGERY WAS PROCURED BY FRAUD WHERE PLAINTIFF NEVER ALLEGED THAT SHE WAS FRAUDULENTLY INDUCED TO UNDERGO SURGERY.

III

WHETHER THE HOSPITAL WAS ENTITLED TO A SUMMARY JUDGMENT ON THE ISSUES OF NEGLIGENCE AND INFORMED CONSENT WHERE PLAINTIFFS' ONLY MEDICAL WITNESS ADMITTED THAT HE WAS NOT FAMILIAR WITH THE ACCEPTED STANDARD OF CARE, AND THEREFORE PLAINTIFFS WERE WITHOUT EXPERT TESTIMONY TO ESTABLISH THEIR CLAIMS OF MEDICAL MALPRACTICE AND LACK OF INFORMED CONSENT.

## ARGUMENT

### POINT I

THE DISTRICT COURT ERRED IN ADOPTING A REBUTTABLE AS WELL AS A CONCLUSIVE, IRREBUTTABLE PRESUMPTION OF NEGLIGENCE APPLICABLE TO ALL HOSPITALS IN FLORIDA WHERE THE ATTENDING PHYSICIAN PREPARES A HANDWRITTEN INSTEAD OF A "FORMAL" OPERATIVE NOTE, AND THE EVIDENCE IS UNDISPUTED THAT THE PATIENT WAS NOT ADVERSELY AFFECTED BY THE ABSENCE OF A "FORMAL" NOTE.

In Hine v. Fox, 89 So.2d 13, 15 (Fla. 1956), this Court,

in an action for medical malpractice against a physician, held that "in cases involving charges of malpractice against a professional man, negligence will not be presumed but must be proved." The Court, in adopting this rule of law, reasoned that a physician "should not be convicted on speculation or other than reasonable proof of the charge." More recently, this Court in Gooding v. University Hospital Building, Inc., 445 So.2d 1015, 1018 (Fla. 1984), defined the burden of proof in an action for medical malpractice as follows:

> To prevail in a medical malpractice case a plaintiff must establish the following: the standard of care owed by the defendant, the defendant's breach of the standard of care, and that said breach proximately caused the damages claimed.

The Third District Court of Appeal ignored this Court's admonition in Hine v. Fox, supra, that "negligence will not be presumed, but must be proved," and adopted for the first time in Florida, two presumptions that will in the future either shift the burden to the hospital to prove that a surgeon was not negligent, or entirely foreclose the hospital from defending the issue of its liability for alleged malpractice, as a result of a conclusive, irrebuttable presumption of negligence by a surgeon.

According to the decision of the Third District Court of Appeal, where the existence or the adequacy of an operative note is challenged, either a rebuttable or a conclusive, irrebuttable presumption of negligence of the surgeon will operate in the trial court, depending upon whether the hospital is determined by a fact finder to have acted negligently or intentionally in

its inability to produce or account for the surgeon's operative note.

In adopting a rebuttable, as well as a conclusive, irrebuttable presumption of negligence of the surgeon, the Third District disregarded 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).

Both the rebuttable, and the conclusive, irrebuttable presumptions of negligence fail to satisfy the requirement of a rational connection between the fact proved and the ultimate fact presumed. Additionally, the conclusive, irrebuttable presumption fails to satisfy the requirement that there be a right to rebut in a fair manner.

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]

More recently, this Court, in Straughn v. K & K Land Management,

Inc., supra, held 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 is a "right to rebut in a fair manner." Accord, Cunningham v. Parikh, supra.

The requirement of a rational connection between the fact proved and the ultimate fact presumed has been explained as requiring "a natural or reasonable inference from the facts or circumstances from which the presumptions are raised ...." Goldstein v. Maloney, 57 So. 342, 344 (Fla. 1911). Similarly, the right to rebut in a fair manner requires that "the party affected is afforded reasonable opportunity to submit to the jury all the facts on the issue." Black v. State, 81 So. 411, 413 (Fla. 1919).

When tested against these standards, the presumptions adopted by the Third District fail to satisfy either requirement, and should be adjudged invalid.

The presumptions adopted by the Third District fail to satisfy the requirement of a rational connection between the fact proved and the ultimate fact presumed because, as in this case, it is not rational to presume that an operation was negligently performed merely because the surgeon writes a "brief handwritten note" of the surgery as opposed to a "formal" operative note. This is especially true in this case where the plaintiffs' medical witness who criticized the operating surgeon's note making procedure was not even familiar with the accepted standard of care in the community for the type of surgery involved.

There are additional, compelling reasons why neither the rebuttable nor the conclusive, irrebuttable presumptions adopted by the Third District satisfy the test of rationality in this case. Plaintiffs' medical witness testified that the presence of a "formal" operative note would not have been determinative in his evaluation of the surgery performed on plaintiff because Pomeroy sterilizations fail when performed under ideal conditions. As stated by Dr. Hammond, what happened to plaintiff "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 ...." (R. 163)

The presumptions adopted by the Third District also lack rationality because they operate regardless of whether there is any proximate causal relationship between the established fact and the presumed fact, and consequently the damages sustained by plaintiff. For example, in this case, although Dr. Hammond was critical of the operative note prepared by the attending surgeon at Jackson Memorial Hospital, he nevertheless testified that the failure to have such an operative note is "not negligence of a doctor that adversely affects the patient ...." (R. 171) In addition, Dr. Hammond stated that from the surgeon's handwritten note, the pathologist's report, and the nurses' notes, there was "enough peripheral evidence to give us information as to what was probably done." (R. 172) Yet, if the jury finds that the attending surgeon acted intentionally in failing to dictate a formal operative note in addition to his handwritten

note, the conclusive, irrebuttable presumption operates so as to require, as stated by the Third District, that "judgment as to liability shall be entered in favor of Valcin." Valcin, supra at 1063. It defies rationality to hold a health care provider liable for damages when a proximate causal relationship between the established fact (lack of a formal operative note) and the presumed fact (negligent performance of the surgical procedure) is entirely lacking.

In an attempt to establish a rational relationship between the lack of a formal operative note and the rebuttable and conclusive, irrebuttable presumptions of negligence adopted by the court, the Third District determined:

> There is little question that Valcin's ability to prove her negligence claims against the hospital has been substantially prejudiced by the absence of critical hospital records.

Valcin, supra at 1306. While the Third District found "substantial prejudice," Dr. Hammond, plaintiffs' medical witness, unequivocally stated that the failure of the attending surgeon to prepare a formal note in addition to the handwritten note was "not negligence of a doctor that adversely affects the patient ...." Similarly, although the Third District termed the formal operative note as a "critical" hospital record, Dr. Hammond testified that a formal operative note would have made no difference in his evaluation of the surgery:

> 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.

(R. 166) There was no dispute that the surgical procedure performed on plaintiff was, in fact, a Pomeroy sterilization. Dr. Hammond testified that the hospital records revealed this fact. (R. 125, 169) Moreover, the Third District, in the second sentence of its opinion, stated that defendant "performed a Pomeroy tubal ligation on Valcin six days after the birth." Valcin, supra at 1299. Thus, the description of the surgery, as a Pomeroy ligation, which Dr. Hammond said should have been embraced within a formal operative note, as opposed to being disclosed from the facts revealed in the surgeon's handwritten note, the pathologist's report, and the notes of the nurses in attendance during the surgery, was well known to Dr. Hammond. It was for this reason that Dr. Hammond concluded that "there is enough peripheral evidence to give us information as to what was probably done ...." (R. 172)

The Third District's finding of "substantial prejudice" and its characterization of a formal operative note as "critical" in this case resulted from an impermissible weighing of the evidence, the purpose of which was to supply a justification for the presumptions of negligence adopted by the court. In Yost v. Miami Transit Co., 66 So.2d 214 (Fla. 1953), this Court held that such weighing of evidence is impermissible.

> In matters of summary judgment neither the trial court nor the appellate court is justified in weighing facts and meting out justice according to the conclusion reached.

Apart from the lack of rational relationship between the established fact (lack of a formal operative note) and the presumed fact (negligent performance of the surgical procedure), there is no opportunity to rebut the conclusive, irrebuttable presumption of negligence adopted by the Third District.

In Goldstein v. Maloney, 62 Fla. 198, 57 So. 342, 344 (Fla. 1911), this Court held that in order for presumptions of evidence to comply with due process, the opposite party must not be "deprived of the right to rebut the presumptions in some fair manner duly provided or accorded by the rules of law or procedure." The Third District's adoption of a conclusive, irrebuttable presumption collides with this rule of law. The hospital is afforded no opportunity to rebut the presumption of negligence in cases where a fact finder is not satisfied as to the reasons why a formal 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. The conclusive, irrebuttable presumption of negligence results in a denial of due process since an irrebuttable presumption of negligence forecloses any "right to rebut in a fair manner." Straughn v. K & K Land Management, Inc., 326 So.2d 421, 424 (Fla. 1976).

The Third District's adoption of a conclusive, irrebuttable presumption of negligence was never contemplated by this



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Court in the decisions 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, Florida Statutes, which provides:

> 90.301. Presumptions defined; inferences
> (1) For the purposes of this chapter, a presumption is an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established.
>
> (2) Except for presumptions that are conclusive under the law from which they arise, a presumption is rebuttable.
>
> (3) Nothing in this chapter shall prevent the drawing of an inference that is appropriate.

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 at 344. In the case at bar, if the attending surgeon failed to dictate a formal operative note, because he was satisfied with the note of the procedure which he wrote in the patient's progress chart, a conclusive irrebuttable presumption arises that the procedure was negligently performed, with no opportunity to disprove the presumed fact.

The legal effect of the conclusive, irrebuttable presumption of negligence is not to provide a rule of evidence, but to

create a substantive rule of law wherein negligence of the operating surgeon must be assumed conclusively whenever a fact finder is not satisfied with the reasons why the surgeon did not prepare a separate operative note that fulfills the criteria of the person scrutinizing the sufficiency of the note.

Professor Wigmore, in his treatise, Evidence in Trials at Common Law, Vol. 9, § 2492 at 307-308 (Revised Ed. 1981), describes the effect of a conclusive presumption as follows:

> In strictness there cannot be such a thing as a 'conclusive presumption.' Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence.

Accord, McCormick, Evidence § 342 at 804 (Cleary Ed. 1972); Vol. 1, Weinstein's Evidence, Article III, Presumptions at 300-2 (1985).

It is because the operative effect of a conclusive presumption is to express a rule of substantive law, that this Court in adopting the evidence code provided that presumptions are rebuttable, and can only be made conclusive "under the law from which they arise."

The Florida legislature has set forth specific "standards of recovery" in medical malpractice actions, none of which include either a rebuttable or a conclusive, irrebuttable presumption of negligence by a surgeon against a hospital. In 1976, the legis-

lature observed the existence of a medical malpractice crisis that "poses a dire threat to the continuing availability of health care in our state," and that "our present tort law/liability insurance system for medical malpractice will eventually break down," unless "fundamental reforms" in the system were undertaken. In response, the legislature enacted as part of a comprehensive reform of the system, specific standards of recovery which are to be complied with in order to establish medical negligence. Chapter 76-260, § 12, Laws of Florida at 662-663, 692-693. Section 12 of the act was codified as Section 768.45, Florida Statutes. Section 768.45(1) provides:

> In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 768.50(2)(b), the claimant shall have the burden of proving by the greater weight of the evidence that the alleged actions of the health care provider represented a breach of the accepted standard of care for that health care provider. The accepted standard of care for a given health care provider shall be that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances. 2/

Similarly, the legislature provided in Section 768.45(4), Florida Statutes, that the existence of a medical injury "shall not create any inference or presumption of negligence against the health care

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2/ In 1985 the Florida legislature amended Section 768.45, Florida Statutes, to provide that the "claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider."

provider," and that "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."

The presumptions adopted by the Third District are contrary to the legislative pronouncements in this area of law. For example, under the facts of this case the court imposed a rebuttable and irrebuttable presumption of negligence, and relieved the claimant of the burden of proving that the plaintiff's injury proximately resulted from a breach of the accepted standard of care, notwithstanding the fact that her medical witness was not familiar with the accepted standard of care, and concluded that plaintiff was not injured by the lack of a formal operative note of a detailed nature.

In adopting the rebuttable and irrebuttable presumptions of negligence, the district court not only encroached upon and departed from the legislative enactments on the subject, but also failed to enunciate rules of law that would enable surgeons and hospitals to determine when a surgeon's operative note is sufficient to prevent the presumptions from becoming operable and relieving plaintiff of the statutorily imposed burden of proof.

In adopting the presumptions, the Third District relied upon Dr. Hammond's testimony that the handwritten note made by the attending surgeon was not "of a legitimate variety." (R. 154) Dr. Hammond testified that the only type of operative note which he would recognize as acceptable was "a dictated note or a note that is written in longhand of a detailed nature as to the pro-

cedure, the findings and the results ...." (R. 155) He also stated that although there was "a brief handwritten note," he was of the opinion that "not having a formal operative note is not acceptable medical care." (R. 155)

The presumptions adopted by the Third District will be unworkable and inequitable in practical operation because the court failed to provide guidelines to the surgeons and hospitals as to how formal the note must be, and how much detail must at a minimum be provided, lest the presumptions come into play in the case. This is especially true in this case where there were never any allegations raised in the pleadings challenging the sufficiency of the medical records. If all that is necessary to bring the presumptions into play is to produce a medical witness who is not familiar with the standard of care, but is critical of the surgeon's operative note, hospitals will never be able to predict when an operative note complies or fails to comply with the law created by the Third District.

In adopting the presumptions of negligence, the Third District relied upon Section 395.202, Florida Statutes (1981), which requires licensed hospitals to provide patients "a true and correct copy of all records in the possession of the hospital ...," except psychiatric records.[3/] The Third District also relied upon administrative regulations promulgated by the Department of Health and Rehabilitative Services which provide that a patient's records

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3/ Section 395.202, Florida Statutes (1981), has been replaced by Section 395.017, Florida Statutes (1985).

must contain "medical and surgical treatment notes and reports." Fla. Admin. Code Rule 10D-28.59(3); Valcin, supra at 1305, n. 7.

Although he had no knowledge of the standard care, Dr. Hammond on the other hand required operative notes "of a detailed nature." Yet, Dr. Hammond permits himself the luxury of preparing notes that are "rather sketchy and sparse" so long as they are his own. (R. 100)

Although the legislature has not seen fit to specify the level of detail necessary for operative notes, the Third District imposes rebuttable and irrebuttable presumptions of negligence on surgeons under circumstances where a physician not familiar with the accepted standard of care criticizes the sufficiency of detail in another surgeon's operative note. Moreover, as stated by the Third District in its opinion on rehearing, "although it is the duty of the physician, not the hospital, to make the operative note, the hospital has a separate duty on it to see to it that the medical records contain surgical treatment notes." Valcin, supra at 1307.

The hospitals in this state treat millions of patients every year, generating multimillions of records and papers. While the hospital is charged with maintaining these records, many of the records are created by physicians. The hospitals cannot, as they do not create the operative notes, dictate the surgeon's selection of details to be included in the notes, nor the surgeon's brevity or depth in summarizing the surgical procedure. The Third District's decision, in effect, requires hospitals to oversee and supervise the surgeon's decision as to how much of

a detailed narrative he or she will place in the operative note.

In the case at bar, if the attending surgeon described everything of consequence to him and which he observed to be significant during the operation, the hospital must nevertheless prove that he did not perform the surgical procedure negligently, or stand adjudged conclusively liable based upon the criticisms of a physician who admittedly is unfamiliar with the accepted standard of care for the surgery. Because each surgeon has his or her own style of preparing operative notes, and some may be more or less inclusive of details, the Third District erred in changing the burden of proof in a medical malpractice case, and in adopting, as a substantive rule of law, a conclusive presumption of negligence by the surgeon. This is especially true in the instant case where the medical witness who lodged criticisms against the handwritten operative note of the plaintiff's surgery, conceded that the failure to prepare a formal note to his liking was "not negligence of a doctor that adversely affects the patient ...." (R. 171)

In adopting the rebuttable and conclusive presumptions of negligence of the surgeon, the Third District overlooked the admonition of this Court "that the matter of changing the law is not to be indulged by the court but is a legislative function." Kennedy v. City of Daytona Beach, 132 Fla. 675, 182 So. 228, 229 (Fla. 1938). The legislature, in requiring hospitals to make and maintain patient records, has not yet found it necessary nor desirable to embrace Dr. Hammond's standards that operative notes be "formal" or of a "detailed nature" so as to satisfy his



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requirements. The Third District relied upon one doctor's views as the basis for adopting a rebuttable and conclusive presumption of negligence that will apply to all hospitals in Florida whose operative notes are challenged. The adoption of such presumptions, if deemed to be necessary or desirable, should be left to the legislature.

> The courts have no function of legislation, but simply seek to effectuate the intent of the legislature.

State v. Tunnicliffe, 98 Fla. 731, 124 So. 279, 281 (Fla. 1929); accord, U.S. Cas. Co. v. Town of Palm Beach, 119 So.2d 800, 802 (Fla. 2d DCA 1960)("It is not a function of the courts through judicial decision to propound remedial legislation").

In order to justify the adoption of the presumptions of negligence, the Third District placed reliance upon this Court's prior decision in Mercer v. Raine, 443 So.2d 944 (Fla. 1983). In Mercer, this Court affirmed the trial court's exercise of discretion in entering a default judgment against a defendant as a result of an intentional and willful disregard of the trial court's discovery order. This Court observed that trial courts have discretionary power to grant sanctions, and the trial court's decision in this regard should not be disturbed, if it satisfies the test of reasonableness. This Court stated:

> As we noted in Baptist Memorial Hospital, Inc. v. Bell, 384 So.2 145 (Fla. 1980), which dealt with discretionary power to grant or deny a new trial, the trial judge is granted this discretionary power because it is impossible to establish a rule of law for every conceivable situation which could arise in the course of a trial. Likewise, it is impossible

> to establish rules for every possible sequence of events and types of violations that may ensue in the discovery process.

Id. at 946. The Third District's decision in Valcin violates the principle announced in Mercer. The record is entirely lacking in any allegations that the surgeon failed to make, or that Jackson Memorial Hospital failed to maintain an operative note. The plaintiff never filed any motions suggesting that defendant failed to comply with discovery requests. In fact, in compliance with the trial court's pretrial order, the hospital filed a pretrial catalog stating that "[d]efendant has furnished Plaintiffs' counsel with a copy of the Jackson Memorial Hospital records that it intends to put in evidence." (R. 88) As there was never any challenge to the sufficiency of the medical records lodged in the trial court, the trial judge was never confronted with the issue of whether sanctions should be imposed against the hospital for the failure of the surgeon to prepare a "formal" operative note, instead of the handwritten note which appeared on the progress note of the plaintiff. Contrary to this Court's holding in Mercer, the Third District did "establish a rule of law for every conceivable situation," by adopting presumptions of negligence that apply whenever a criticism is lodged against a surgeon's operative note, despite the absence in the trial court of any allegations or motions attacking the operative note. In fact, the only exception to the rule of law adopted by the Third District is "[w]here the failure to produce the records is shown to be beyond the hospital's control, as for example,

caused by an act of God." Valcin, supra at 1309, n. 9.

The Third District's decision in Valcin takes away the trial court's discretion to determine what should be done, if anything, if there is a failure to produce an operative note. Moreover, The Third District restricted the trial court's discretion in this area, although the issue was never passed upon by the trial court. In so doing, the Third District departed from the holding in Jones v. Neibergall, 47 So.2d 605, 606 (Fla. 1950):

> We will not divine issues from the ether nor attempt to adjudicate those not presented by the pleadings or ruled on by the trial court.

The presumptions adopted by the Third District will have a pervasive effect on hospitals in Florida. In adopting the presumptions, the Third District held that where a "fact-finder, under appropriate instructions, determines that the hospital" did not deliberately fail to produce or account for an operative note, then a presumption that the surgical procedure was negligently performed by the surgeon will arise, "which presumption may be rebutted by the hospital by the greater weight of the evidence." However, "a conclusive, irrebuttable presumption that the surgical procedure was negligently performed will arise, and judgment as to liability shall be entered" in favor of plaintiff, if the "fact-finder is not satisfied that the records are missing due to inadvertence or negligence ...." Valcin v. Public Health Trust of Dade County, 473 So.2d 1297, 1306 (Fla. 3d DCA 1984).

In medical malpractice actions the plaintiff will no longer have to carry the burden of establishing the standard of care owed by the defendant, the defendant's breach of the standard, and that said breach proximately caused the damages sustained. When a medical witness, not familiar with the standard of care, challenges the sufficiency of the detail in a surgeon's operative note, as in the instant case, negligence of the surgeon will be presumed, and in the case of an irrebuttable presumption, must be assumed conclusively. The presumptions will operate despite Dr. Hammond's admission that the failure of the operative note to satisfy his criteria "is not negligence of a doctor that adversely affects the patient ...." (R. 171)

According to the Third District's decision, the presumptions will be applied by instructing the jury that if it determines the surgeon did not make an operative note, or that one was made but the hospital is unable to produce or account for it, the hospital must carry the burden of proving by the greater weight of the evidence that the surgeon was not negligent in performing the surgical procedure, and upon failure to meet this burden, the surgeon will be presumed to have been negligent. Moreover, because of the effect of the conclusive, irrebuttable presumption of negligence adopted by the Third District, the fact finder must also be instructed to disregard the issues of liability, including any evidence that the surgeon was not negligent in performing the surgical procedure, and merely determine the amount of plaintiff's damages, if it finds that the hospital acted intentionally in not producing the operative note

or, that the surgeon acted intentionally in preparing a brief handwritten, instead of a formal operative note. Thus, as formulated by the Third District, the fact finder (in this case, the jury), must be instructed on the effect of the two presumptions against the surgeon, depending upon whether the health care provider was negligent, or acted intentionally in its record keeping activities.

In Mercury Cab Owners' Association v. Jones, 79 So.2d 782, 784 (Fla. 1955), this Court held that "when substantial evidence contrary to a presumption is introduced ... the presumption falls out of the case," and does not "acquire the attribute of evidence in the claimant's favor." The same rule was explained by this Court in Grulle v. Boggs, 174 So.2d 26, 29 (Fla. 1965), as follows:

> 'Presumptions disappear when facts appear; and facts are deemed to appear when evidence is introduced from which they may be found.'

See also Section 90.302, Florida Statutes.

Because the Third District has coupled a rebuttable with a conclusive, irrebuttable presumption, and decreed that the jury must determine "under appropriate instructions" whether the hospital was negligent or acted intentionally in its record keeping activities, the hospital will be irreparably prejudiced in any trial of the cause. The jury must be allowed to consider evidence on the issue of the hospital's liability if it determines that the hospital was negligent in its record keeping activities. Yet the same jury must be instructed as a matter of law to dis-

regard the evidence of the surgeon's compliance with the standard of care in the performance of the surgery, if it determines that the hospital acted intentionally, because in that case the surgeon is conclusively assumed to be negligent in performing the surgical procedure, and a directed verdict on liability must be entered against the hospital, leaving only the issue of damages to be decided by the jury.

To avoid this result two trials must be held. The first trial must be held to determine whether the hospital was negligent or acted intentionally in its record keeping activities. The second trial must be held on the issues of liability and damages if the rebuttable presumption of negligence applies, or solely on the issue of damages if the conclusive, irrebuttable presumption of negligence applies. If the first jury determines that the hospital's record keeping activities were intentional, a directed verdict on liability will be entered against the hospital according to the Valcin decision, and only damages need be tried. However, if the jury determines the hospital was negligent in its record keeping activities, the hospital may rebut the presumption of negligent surgery. If the hospital rebuts the presumption of negligent surgery, the jury is free to decide without aid of the presumption whether, in fact, the surgeon departed from the accepted standard of care, and if so, whether such departure proximately resulted in injury to plaintiff. However, if the same jury was allowed to determine whether the hospital acted intentionally in its record keeping activities, the jury would have to be instructed, according to the Valcin decision,

to disregard all evidence on the issue of liability, if it determines that the hospital's conduct was intentional, because in that event the surgeon is conclusively assumed to have performed the surgical procedure negligently, and a directed verdict on liability will be entered against the hospital. Unless two trials are held, the same jury that is instructed to determine liability must be instructed to ignore liability if it finds the failure to make or maintain records was deliberate. To require two trials will add unnecessary expense to an already overburdened and overtaxed health care delivery system in Florida. The presumptions of negligence adopted by the Third District are not only irrational and inflexible, but also inequitable and unworkable. The decision of the Third District Court of Appeal adopting the presumptions of negligence by the surgeon should be reversed.

## POINT II

THE DISTRICT COURT ERRED IN HOLDING THAT A JURY WAS ENTITLED TO FIND THAT PLAINTIFF'S CONSENT TO SURGERY WAS PROCURED BY FRAUD WHERE PLAINTIFF NEVER ALLEGED THAT SHE WAS FRAUDULENTLY INDUCED TO UNDERGO SURGERY.

Prior to undergoing surgery at Jackson Memorial Hospital, plaintiff signed two forms consenting to the surgery. The first form was titled, "Consent for Operative and Other Special Procedures," and states that:

> The procedures listed [bilateral tubal ligation], their possible benefits, other methods of treatment, and complications from surgery or anesthesia have been fully explained to me by Dr. Sharpe. I have also been informed there are

> other risks such as severe loss of blood, infection, cardiac arrest, etc., that are attendant to the performance of any surgical procedure. I am aware that the practice of medicine and surgery is not an exact science, and I acknowledge that no guarantees have been made to me concerning the results of the operation or procedure.

The second form, titled, "Consent for Authorization for Sterilization," states that:

> It has been explained to me by Doctor Sharpe that this operation [bilateral tubal ligation] is intended to result in sterility, but this is not guaranteed.

(R. 267) Although Mrs. Valcin acknowledged in the consent for sterilization form that it had been explained to her that sterility is not guaranteed, she testified, contrary to consent for authorization, that she was told by someone, prior to surgery, that "this is guaranteed." (R. 204)

The Third District held:

> Although the alleged oral assurance of one hundred percent effectiveness cannot support an action for breach of warranty, it can, as will be seen, support Mrs. Valcin's claims that her written consents to the surgery were fraudulently induced by this false assurance ....

Valcin, supra at 1300.

At no time during the proceedings in the trial court did plaintiff allege that she was fraudulently induced to consent to the surgery. Even a cursory review of the complaint by the Third District would have revealed that such allegations are entirely absent from the complaint. (R. 1-6)

In American International Land Corporation v. Hanna, 323 So.2d 567, 569-570 (Fla. 1975), this Court held that allegations of fraud "must appear with reasonable certainty in plaintiff's complaint." See also Rule 1.120(b), Florida Rules of Civil Procedure. There are no allegations in plaintiff's complaint that the hospital or its agents knowingly or intentionally misrepresented material facts upon which plaintiff was intended to act, in order to induce her to consent to surgery, and that plaintiff relied on the representations.

Despite the absence of any allegations of fraud, the Third District relied upon its prior decision in Morganstine v. Rosomoff, 407 So.2d 941 (Fla. 3d DCA 1981), to hold that an issue of fact existed as to whether there was a "fraudulent misrepresentation of a material fact in obtaining the patient's signature on the written consent ...." Valcin, supra at 1301.

In Gruber v. Cobey, 152 Fla. 591, 12 So.2d 461, 462 (Fla. 1943), this Court held:

> In our system of jurisprudence, it is axiomatic that a judgment must respond to the issues made by the pleadings. The judgment in this case fails to meet that requirement. In fact it was predicated on theory not set up in the pleadings or warranted by the evidence. It is therefore void and ineffective.

Accord, Cortina v. Cortina, 98 So.2d 334 (Fla. 1957). The decision of the Third District raised and decided the issue of fraudulent misrepresentation, for the first time on appeal. Because the issue of fraudulent misrepresentation was not an issue in the trial court, the trial judge never had the opportunity to

consider the issue. Because the issue was never tendered to the trial court it was not available to the Third District to decide on appeal. In deciding this issue, the Third District not only strayed beyond the pleadings, but ignored its prior holding in Ormsby v. Ginolfi, 107 So.2d 272, 274 (Fla. 3d DCA 1958), that:

> This subject was not raised by the pleadings pursuant to which the summary judgment was entered, and it follows that it has no place on this appeal.

To the same effect, see Lipe v. City of Miami, 141 So.2d 738, 743 (Fla. 1962)("Matters not presented to the trial court by the pleadings or ruled upon by the trial court will not be considered by the court on appeal").

The decision of the Third District on the issue of fraudulent misrepresentation is based upon a matter entirely outside of the pleadings and cannot stand. Cortina, supra.

## POINT III

THE HOSPITAL WAS ENTITLED TO A SUMMARY JUDGMENT ON THE ISSUES OF NEGLIGENCE AND INFORMED CONSENT WHERE PLAINTIFFS' ONLY MEDICAL WITNESS ADMITTED THAT HE WAS NOT FAMILIAR WITH THE ACCEPTED STANDARD OF CARE, AND THEREFORE PLAINTIFFS WERE WITHOUT EXPERT TESTIMONY TO ESTABLISH THEIR CLAIMS OF MEDICAL MALPRACTICE AND LACK OF INFORMED CONSENT.

The defendant moved for summary judgment on the grounds, among others, that "[p]laintiff has no proof whatsoever that the sterilization procedure was performed without proper pre-operative advice to the patient, or that the sterilization itself was performed in a negligent manner." (R. 78)

The defendant asserted these grounds because the record revealed without conflict that plaintiff was without necessary

expert testimony to substantiate the allegations of her complaint. During the course of discovery, defendant propounded interrogatories requesting plaintiffs to disclose whether they intended to call any expert witnesses at trial. Plaintiffs responded "unknown at this time." (R. 60, ¶41) Plaintiffs also stated that they had not retained an expert in the action. (R. 58, ¶36)

Plaintiffs filed a notice of trial stating that the cause was at issue and ready for trial. (R. 26) After the trial judge entered an order of pretrial conference (R. 62) and an order setting the cause for trial (R. 66), plaintiffs filed a pretrial catalog indicating that they intended to call Dr. Daniel Hammond, plaintiff's treating physician, as their only medical witness. (R. 89)

Dr. Hammond was not an expert witness, but a treating physician, who was admittedly unfamiliar with the accepted standard of care in the community for performing a tubal ligation. (R. 119-120, 167) Because of his lack of familiarity with the standard of care owed by the defendant, his testimony could not satisfy the standards of recovery set forth by this Court in Gooding v. University Hospital Building, Inc., supra at 1018:

> To prevail in a medical malpractice case a plaintiff must establish the following: the standard of care owed by the defendant, the defendant's breach of the standard of care, and that said breach proximately caused the damages claimed.

Similarly, Section 768.45 of the Florida Statute requires compliance with the standards of recovery set forth by the legislature in order to prevail in an action for medical malpractice.



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Section 768.45(1) provides, in pertinent part, that "the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the accepted standard of care for that health care provider." 4/ Absent an expert who had knowledge of the accepted standard of care, plaintiff was simply without proof of essential elements of her cause of action. The trial judge entered a final summary judgment for defendant because it appeared without genuine issue as to any material fact "based upon the pleadings, answers to interrogatories, depositions, and the Pre-Trial catalogs of the parties ... that Daniel O. Hammond, M.D. was the only physician listed by the Plaintiffs as a medical expert witness ...." (R. 264)

The trial judge properly entered summary judgment for the defendant based upon the affirmative showing that plaintiffs' medical witness was without knowledge of the accepted standard of care, and therefore was unqualified to offer expert medical testimony in support of plaintiff's allegations of medical negligence. In Holl v. Talcott, 191 So.2d 40, 47 (Fla. 1966), this Court held that a defendant may show the absence of genuine issues of material fact by "showing conclusively that the plaintiff is unable to present requisite proof of negligence charged in the pleadings." Because plaintiffs' medical witness could not

4/ Section 768.45(1) was amended in 1985 to require the claimant to prove that the actions of the health care provider represented a breach of the "prevailing professional standard of care for that health care provider."

testify to the accepted standard of care, it was conclusively established that plaintiff was without ability to produce expert medical testimony in support of her allegations of negligence. Sims v. Helms, 345 So.2d 721 (Fla. 1977); Thomas v. Berrios, 348 So.2d 905 (Fla. 2d DCA 1977).

After the trial court entered final summary judgment, plaintiff filed a motion for rehearing stating that "new evidence was revealed" to plaintiffs' attorney in a discussion with Dr. Hammond. Plaintiffs submitted an affidavit from Dr. Hammond stating that the consent forms signed by plaintiff should have warned of the specific risk of an ectopic pregnancy, and that a failure to warn of this fact "falls below the standard of care of any physician performing a bilateral tubal litigation [sic] in this community ...." (R. 252-253)

The trial judge, in his discretion, rejected the affidavit as untimely. (R. 256) The trial judge was empowered with discretion in declining to consider an affidavit filed for the first time with a motion for rehearing. Coffman Realty Inc. v. Tosochatchee Game Preserve, Inc., 413 So.2d 1 (Fla. 1982) affirming 381 So.2d 1164 (Fla. 5th DCA 1980). Moreover, in his affidavit Dr. Hammond does not refute or qualify his early admission that he was not familiar with the accepted standard of care "for performing a tubal ligation among the physicians in this community ...." (R. 119-120)

The theories of liability advanced by plaintiff - negligence in the performance of the surgery and lack of informed

consent - both required expert medical testimony in order to establish the accepted standard of care. Thomas v. Berrios, 348 So.2d 905, 908 (Fla. 2d DCA 1977). As plaintiff was conclusively shown to be without expert medical testimony to support her allegations of negligence and lack of informed consent, the trial court correctly entered summary final judgment in favor of defendant. Sims v. Helms, supra.

## CONCLUSION

The decision of the Third District Court of Appeal reversing the judgment of the trial court should be quashed.

Respectfully submitted,

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