0/A 6-3-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,673

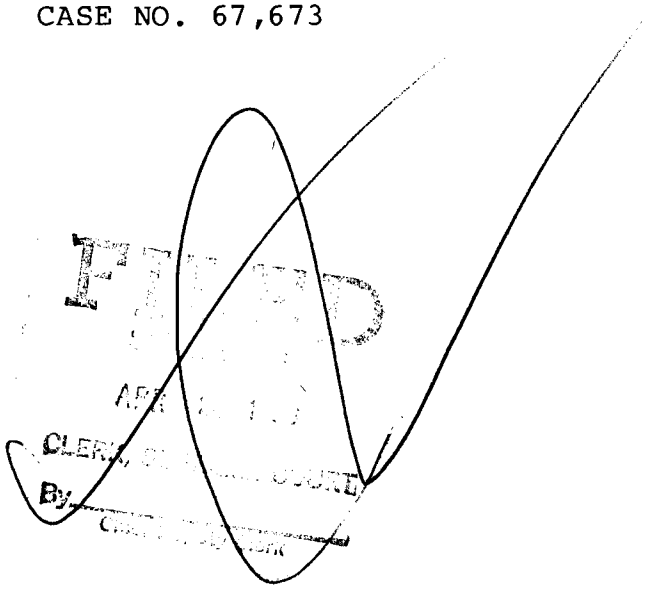
PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL,

Petitioner,

vs.

GREGORIA VALCIN and GERARD VALCIN, her husband,

Respondents.



BRIEF OF RESPONDENTS ON THE MERITS

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I.

INTRODUCTION

The respondents, GREGORIA VALCIN and GERARD VALCIN, her husband, were the appellants in the District Court of Appeal, Third District, and were the plaintiffs in the trial court. The petitioner, PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, was the appellee/defendant. In this Brief of Respondents on the Merits the parties will be referred to as the plaintiff(s) and the defendant and, where necessary for clarification, by name. The symbol "R" will refer to the record on appeal. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

Although the facts of this case are neither complex nor lengthy--indeed, a relating of all pertinent occurrences has been minimized as a result of the defendant's failure to maintain and produce (upon plaintiffs' demand) statutorily required matters--plaintiffs still feel compelled to set out with some detail the events of this case. A review of the defendant's brief reflects a composite picture premised on inference, innuendo and (out of context) paraphrasing of facts, all inconsistent with the procedural posture of this case, to-wit: on appeal from trial court granting of the defendant's motion for summary final judgment. For example, at page 2 of its brief the defendant states:

> "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."

With all due regard for the defendant's right to ultimately argue the merit of its position, this case appeared in the District Court on appeal (by the plaintiff) from an adverse summary final judgment in a medical negligence case. Therefore, the duty of the District Court was to determine whether, on the record before it, the trial court erred in finding the absence of genuine issues of material fact. The plaintiff will argue the significance of this at a later point in this brief. However, contrary to the defendant's repeated assertions (that the court was not), the District Court was well within its constitutional ambit in considering the legal significance of the absence of an "operative note"!

At pages 4 through 9 of its brief the defendant cites to selected portions of the deposition testimony of Dr. Daniel Hammond and emphasizes those portions of his deposition testimony defendant deems favorable to it. Suffice it to say at this particular juncture there exists in Dr. Hammond's deposition evidence favorable to the plaintiff's position. The defendant's recitation of Dr. Hammond's testimony simply ignores that which is favorable to the plaintiff. This case is

not on appeal from a jury verdict in favor of the defendant. At this point in time, at this stage of the proceedings, and in this brief of the plaintiffs, any evidence supportive of the defendant's assertions will (probably) be ignored and all inferences of fact and intendments of testimony favorable to the plaintiff will be highlighted. Perhaps the highlight of defense omission can be gleaned from the following--presented at pages 7 and 8 of the defendant's brief:

> ". . .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 . . ."

Yet Dr. Hammond further stated--all opinions rendered being within a reasonable degree of medical probability (R. 140, Deposition of Dr. Hammond, page 47):

> ". . .She (the plaintiff) had undergone a pomeroy ligation and the ligation obviously failed.
>
> "Now, whether this was done properly or not is not, in my opinion, possible to ascertain without an operative note of a legitimate variety.
>
> "The operative note on the progress note does not --is not revealing in this respect.
>
> "I would not have done the procedure six days after surgery. The implication--I'll have to change that, six days after delivery. The implication here is that the colonization of the uterus with bacteria, which inevitably occurs after delivery, might have gotten into the tubes and prevented adequate healing

of the tubes and may have contributed toward the failure of the pomeroy sterilization.

* * *

"So, I would say from my point of view, the timing may have contributed toward the failure. The procedure may have contributed toward the failure, BUT WE WON'T KNOW THAT BECAUSE OF THE LACK OF THE OPERATIVE NOTE.

Q. This lack of the operative note, is that unusual?

A. Every operation should be accompanied by a dictated note or a note that is written in long-hand of a detailed nature as to the procedure, the findings and the results, so that not having an operative note is not acceptable medical care." (R. 154, 155; Deposition of Dr. Hammond, pages 62 and 63).

The deposition testimony of Dr. Hammond does express his opinion concerning "enough peripheral evidence to give us information as to what was probably done." However, Dr. Hammond's statement concluded with the following:

". . .But the doubt is always lingering and always there." (R. 173, Deposition of Dr. Hammond, page 80).

In light of the defendant's manner of proceeding, and as a necessary consequence of defense tactics, properly viewing the facts and circumstances of this case in a light most favorable to the non-moving plaintiff, the record reflects the following.

A.

THE DECISION AND THE ACT

In May of 1978, after Gregoria Valcin had given birth to her fifth child at Jackson Memorial Hospital, she asked to be sterilized (R. 197; Deposition of Valcin, page 12). Accordingly

Dr. Shroder, a member of the hospital staff at Jackson Memorial Hospital, did, six days after the birth, perform a pomeroy tubal ligation on the plaintiff. About a year and a half later Mrs. Valcin suffered a ruptured ectopic (tubal) pregnancy which almost caused her death. As a consequence of the alleged medical negligence, Mrs. Valcin sustained permanent physical and emotional problems (R. 1-6; R. 148-153; R. 185-249, Deposition of Gregoria Valcin).

B.

THE LAW SUIT AND ITS DISCLOSURES

In 1981 Mrs. Valcin, joined by her husband, sued the defendant (R. 1-6) and in a 3-count complaint alleged that the Hospital (through its agents, servants and employees):

1. Breached its warranty that the sterilization procedure performed on Mrs. Valcin would be 100% effective;

2. Failed to fully inform her of the risks of a sterilization procedure in obtaining her consent; and

3. Negligently performed the sterilization procedure.

As the District Court of Appeal, Third District, correctly noted (the record affirmatively demonstrates the correctness of District Court notation, R. 91, 92):

> "It appears without dispute that during her hospitalization, Mrs. Valcin executed two consent forms preceding the sterilization surgery. One of these forms, a 'Consent for Operative and Other Special Procedures,' states, in pertinent part, 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 ackowledge that no guarantees have been made to me concerning the results of the operation or procedure.'

"The other form, a "Consent for Authorization for Sterilization", states, in pertinent part, that:

'It has been explained to me by Dr. Sharpe that this operation [a bilateral tubal ligation] is intended to result in sterility, but this is not guaranteed.'" (R. 267).

During the course of the litigation the deposition of Mrs. Valcin was taken (R. 185). While the plaintiffs respect the defendant's stated decision, "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" (See: Brief of Defendant, page 9), the plaintiffs believe the defendant can go only so far in ignoring the subject record. The deposition testimony of Mrs. Valcin reflects in essence and relevant pertinent part:

* * *

"Q. And did you have any questions to ask the doctors or nurses at the hospital, as to what sort of sterilization you should have?

"A. Yes, they told me it was very simple; that they would tie my tubes up and they cut it and burn it and the chances of getting pregnant was nil.

* * *

"Q. Let me show you a document that is called a special consent form, that purports to have your signature on it.

Would you look at this and tell me whether or not that is your signature on the lower right side?

"A. It looks like my signature, yes.

"Q. Do you recall signing this document?

"A. Well, I signed so many documents. With these hospitals, they don't give you a chance to read it any way. They say sign here.

"Q. This is called a special consent form, another one, voluntary sterilization request. It looks like it is the same signature. Is it?

"A. Uh-huh.

"Q. If you mean yes, you have to say yes.

"A. Yes, yes.

"Q. Okay, well, did you sign it?

"A. Well, it looks like my signature.

"Q. It says here on the form that, 'It has been explained to me by Dr. Sharpe that this operation is intended to result in sterility but this is not guaranteed.'

Then it goes on to say that, 'I understand that a sterile person cannot conceive or bear children and I understand that fertility cannot be restored.'

Then it says, 'Each of us does hereby release Jackson Memorial Hospital, Dade County, Florida, the Board of County Commissioners, the Public Health Trust and all physicians, and nurses of said hospitals of any and all claims, demands,

suits, actions, arising out of or by reason of this operation.'

Were you told that at the time you signed this document?

"A. Well, like I said, I signed a lot of documents. I even signed that I was going to have a natural childbirth and they did not give me that, so I mean, I don't know what I should believe at this time.

What I signed, is what I wanted, when I was conscious, but the minute I got the hospital room, everything went blurry because they gave me a lot of anesthesia.

"Q. The part I am really interested in, Mrs. Valcin, is the part that says that the operation, the bilateral tubal ligation, is intended to result in sterility but that it is not guaranteed.

Were you told that?

"A. No, they told me that this one is perfect. This one would not go against it because they had a special method of doing this, that they cut it and burnt it and sealed it and there would be no chance of getting pregnant again. Millions have taken this operation and nobody had ever come up yet pregnant. This is what I was told.

"Q. Who told you that?

"A. One of the doctors. I can't tell you which doctor because there was so many.

* * *

"Q. Did anyone again tell you even though the voluntary sterilization request says that the procedure is not guarantee, that it would be?

"A. That even though it said it is guaranteed, that it wouldn't be guaranteed?

"Q. Yeah, yeah.

"A. No, nobody went into that kind of detail.

"Q. Did they definitely tell you that after having the sterilization, you could not possibly become pregnant?

"A. Yes.

"Q. And in what words did they use? Can you repeat as best you can what these doctors told you?

"A. Yes, because I was so ill and I asked one.

I said, is this guaranteed that I wouldn't have any kids any more, because I hate to go through this again, because I was very ill. I couldn't walk or move because this lower part of my hip was paralyzed.

"Q. What did the doctor say?.

"A. He said, yes, this is guaranteed. No way you can come up pregnant with this.

"Q. And you of course did; you did get pregnant?

"A. Well, yeah.

"Q. And I assume you weren't using any birth control at the time you got pregnant?

"A. Why should I? They told me I was okay.

* * *

"Q. Mrs. Valcin, when you went in to have the baby, didn't you make it clear to them at that time, when you first went in, in May to have the baby, that you wanted to have your tubes tied, so you wouldn't have any more children?

"A. Yes.

"Q. And did you talk with doctors about it at that time?

"A. Uh-huh.

"Q. Do you remember whether or not you signed any document when you first went into the hospital about the tubal ligation or not?

"A. I think I did sign a paper saying I was going to have a tubal ligation.

"Q. And then, while you were there, you had the baby and then they told you for one reason or another that you would have to wait four or five or six days before they could do the bilateral tubal ligation, is that correct?

"A. Uh-huh.

"Q. And during that period of time, from the time you had the delivery, until you had the tubal ligation, you spoke with other doctors about the procedure, is that correct?

"A. I have spoked to one doctor about it and he told me, 'Yes, they are going to do it', but he didn't go into details until the day I was going to have it.

"Q. But you recall them telling you that this was guaranteed, that you wouldn't have to worry about pregnancy after you had this done, is that correct?

"A. Yes.

"Q. And you believed them?

"A. Yes.

"Q. And that is why you went ahead with the procedure?

"A. Right, yes.

"Q. Did you ever give them permission to do anything careless or negligent with regard to the bilateral tubal ligation?

"A. No."

(R. 197, 201-205, 217-224, 233, 241, 242)

* * *

Discovery also produced the deposition testimony of Dr. Hammond, from which we learn:

* * *

"Q. Can you take a look at the handwritten operative note concerning the tubal ligation that the patient had received at Jackson Memorial Hospital in May of 1978 and can you tell me whether or not you can determine from that note whether or not that is describing a tubal ligation by the Pomeroy method standard or Pomeroy with some variation?

"A. No, one cannot. This is not the operative note. This is a note that's in the progress notes that should be written by every surgeon in order to acquaint the people on the floor with the nature of the procedure and the circumstances surrounding that.

An operative note is generally---

"Q. I know. I know it's usually dictated and typed, but I suspect what may have happened here is somehow or other, it got handwritten by the doctor, but not typed, because I don't have a typed one.

"A. This is not a satisfactory statement because this is B.T.L., bilateral tubal ligation. This says nothing about the technique.

"Q. You can't make that determination?

"A. No. There is a note written by a R.N. above this in the progress notes, which says fallopian tube tied and ligated left and fallopian tube tied and ligated right. So, the nurse's notes is more complete than the physician's.

* * *

"Q. I was actually thinking more in terms of whether or not you have formed any opinion as to whether or not any of the physicians were negligent in the manner in which they carried out the procedure, not whether or not the Pomeroy method is or is not an acceptable method of performing a tubal ligation.

"A. Since I cannot find the operative report, I am not willing to give you an opinion on that.

* * *

"At this time, she apparently either approached somebody or was approached by somebody and they decided to do a sterilization on her. This was done six days postpartum and it was not done in the time area where most sterilizations are done.

"Most sterilizations are done within 24 hours. The overwhelming sterilizations are done within 24 hours. This was done six days afterwards.

"Q. Do you have an opinion, Doctor, within a reasonable degree of medical probability whether bilateral tubal ligations would have fallen below the standards if it were done, as in this case, six days postpartum with the intervening infections that you noted?

"A. I would say that if this had been my patient, I would not have entered her abdomen. I think this was an unwise thing to do, because lower abdominal pain immediately after delivery has to be considered in the context of a differential diagnosis.

She did have some pus in her urine and this was a minimal affair. There was some pus. It wasn't impressive, and cystitis would have to be considered.

In addition, one would have to consider the fact that after 24 or at the very, very most, 48 hours after delivery, the uterus is colonized with bacteria and this is then considered to be an indiscreet time to operate on the uterine appendage.

The fact she had pus in her urine made them think this was cystitis, but obviously, that could have been just a coincidental salpingitis, which means infection of the tube, which suggests that there had been some infection of the tube.

Whether this was pregnancy related or had been there before, I don't know, but in any event I would not have operated on her six days after the delivery.

* * *

Now, Pomeroy sterilizations fail even when they are done within two days, but I suspect that the probability is that the percentages go up if they're done within a rather optimum time.

So, I would say from my point of view, the timing may have contributed toward the failure. The procedure may have contributed toward the failure, but we won't know that because of the lack of the operative note.

"Q. This lack of the operative note, is that unusual?

"A. Every operation should be accompanied by a dictated note or a note that is written in longhand of a detailed nature as to the procedure, the findings and the results, so that not having an operative note is not acceptable medical care.

* * *

"Q. Doctor, in your opinion, would it be below the standards, not only for you, but as far as you're concerned for the rest of the community, the rest of the medical community, to perform the bilateral tubal ligation six days after delivery, after having reviewed the file and knowing, at least from what you're able to glean from the Jackson Memorial file, would it have been below the standard to perform the tubal ligation at that time?

"A. I believe so."

(R. 116, 117, 124, 143, 144, 156, 157)

* * *

The defendant ultimately moved for summary final judgment (R. 78-81) and urged in essence and pertinent part:

* * *

"Defendant moves for a Summary Judgment in its favor and as grounds would show that based upon the pleadings, answer to interrogatories, depositions, responses to request for admissions, affidavits on file, if any, there is no genuine issue as to any material fact and that Defendant is entitled to a Summary Judgment in its favor as a matter of law. More specifically, Defendant would show that while Plaintiffs allege in the Complaint that Defendant expressly warranted to Plaintiff GREGORIA VALCIN that the sterilization procedure that she underwent would be effective and would in fact make her ster-

ile, the actual sterilization form provides that the operation was intended to result in sterility, but that sterility was not guaranteed. The agreement further provided that the patient release JACKSON MEMORIAL HOSPITAL and all physicians and nurses of said hospital of and from any and all claims, demands, suits or actions arising out of or by reason of the sterilization operation. A copy of the Agreement is attached hereto and incorporated as a part of the Motion for Summary Judgment. Plaintiff GREGORIA VALCIN also signed a further Special Consent Form acknowledging that no guarantees were made to her concerning the results of the sterilization operation or procedure.

"Defendant would further show that Plaintiff 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."

* * *

The trial court granted the defendant's motions (R. 264). Plaintiff's "Petition for Rehearing" with the accompanying affidavit of Dr. Hammond (R. 250-253), was filed and denied (R. 256).

C.

THE APPEAL

The plaintiff's appeal to the District Court of Appeal, Third District, was successful as to Counts II and III of the Complaint. As the District Court stated, after its independent examination of the subject record was completed:

* * *

"Mrs. Valcin's deposition reveals that at the time she entered Jackson Memorial Hospital to give birth to her fifth child and, manifestly, before the execution of the consent forms and the sterilization, she discussed with Jackson personnel, nurses and doctors, her desire to be sterilized after

> the birth of the child she was then carrying. According to Mrs. Valcin, 'they' told her 'it was very simple; that they would tie my tubes up and they cut it and burn it and the chances of getting pregnant was nil.' Mrs. Valcin also testified that shortly before she signed the consent forms, she was told by two of the doctors that 'this one is perfect. This one would not go against it because they had a special method of doing this, that they cut it and burnt it and sealed it and there would be no chance of getting pregnant again. Millions have taken this operation and nobody had ever come up yet pregnant.'
>
> "Whether the indisputably false representations alleged to have been made to Mr.s Valcin by representatives of Jackson were in fact made and induced her to give her consent are quite clearly issues of fact which cannot be determined in a summary judgment hearing." (R. 268).

* * *

The District Court found the existence of genuine issues of material fact as pertained to the representations made to the plaintiff. In addition, the Court also found extant genuine issues of material fact as pertained to the extent of the information allegedly supplied to Mrs. Valcin:

> "In addition to her claim that she was induced to sign the consent forms by false assurances about the absolute effectiveness of the sterilization, Mrs. Valcin claims that the risk of ectopic pregnancy was never disclosed to her--that is, her consent, even if not fraudulently induced, was not informed. While it will be Valcin's burden at trial to establish through expert testimony that an ectopic pregnancy is a recognized substantial risk inherent in sterilization and that the alleged failure of the hospital to advise Mrs. Valcin of this risk was a departure from an accepted standard of medical practice, it was clearly the hospital's burden at this stage of the proceedings to conclusively show either that Mrs. Valcin was advised of this risk or that not advising her of this risk was in accordance with accepted standards of medical practice. (Citations omitted).

> It cannot be said that the hospital conclusively showed that Mrs. Valcin was advised of the risk of an ectopic pregnancy. The 'Consent for Authorization for Sterilization', although clearly advising Valcin of the risk of pregnancy, makes no mention of the risk of ectopic pregnancy or any other risk. The 'Consent for Operative and Other Special Procedures' limits its risk advice to 'complications from surgery and anesthesia' and 'other risks such as severe loss of blood, infection, cardiac arrest, etc., that are attendant to the performance of any surgical procedure.' These documents do not show, much less conclusively show, that Mrs. Valcin was advised of the risk of ectopic pregnancy. Thus, Mrs. Valcin's testimony that she was not advised of this risk, even if contradicted, which it was not, created a genuine issue of material fact as to whether she was so advised, in the absence of the defendant having conclusively established that not advising Mrs. Valcin of the risk of ectopic pregnancy was in accordance with accepted standards of medical practice. The defendant made no effort at all to establish the latter fact. Therefore, the summary judgment in favor of the hospital on this aspect of Mrs. Valcin's claim must be reversed as well." (R. 271, 272).

The thrust of the defendant's brief is directed at the District Court's decision to judicially "adopt" both rebuttable and conclusive "presumptions" (See: Brief of Defendant, pages 13-34). The defendant's argument, as presented, is couched in terms of having the issue resolved as a "pure" matter of law. However, it must be emphasized herein--in the plaintiff's "Statement of the Case and Facts"--that the predicate for the District Court's analysis and the foundation for the District Court's holding was/is the lack of evidence statutorily required (of the defendant) to be kept! The defendant's brief argues why, how and in what manner the plaintiff's cause of action would not be successful because of the existence of supposed "other information", to-wit: the pathologist's report

and a nurse's note on the hospital chart. See: Footnote Number 6 at page 9 of the Slip Opinion (R. 265-278), which information defendant "factually" characterizes as "an operative note." (See: Brief of Defendant, page 5). However, it must be first noted and then underscored that the District Court, on "Opinion on Motion for Clarification and Rehearing", emphasized (R. 280):

> "Contrary to appellee's contention, our opinion in this case did not impose upon the hospital the responsibility of supervising the character or quality of the contents of the operative note. 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, THE RECIPIENT OF A SUMMARY JUDGMENT IN ITS FAVOR, DID NOT CONCLUSIVELY SHOW ON THIS RECORD THAT AN OPERATIVE NOTE EXISTS."

Since, upon Motion for Summary Final Judgment made, all inferences and intendments of testimony must be resolved in favor of the non-moving party--See, generally: HOLL v. TALCOTT, 191 So. 2d 40 (Fla. 1966)--it readily appears that the genesis for District Court holding is, the absence of evidence (which evidence the defendant was legislatively mandated to be required to maintain) a premise the defendant not only refuses to acknowledge the existence of (See: Brief of Defendant, pages 6-8) but one which the defendant argues--(after grudgingly) assuming that no operative note exists--should be deemed to give rise to no presumptions (hence, defendant benefits by its own wrongful conduct?) because:

> ". . .in adopting a rebuttable, as well as a conclusive, irrebuttable presumption of negligence of the surgeon, the Third District disregarded numer-

ous 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 (Citations omitted).

"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."

For the reasons to be argued, infra, the plaintiff believes the opinion of the District Court of Appeal, Third District, should, in all respects, be approved by this Court and adopted as its own. At the very least, the decision should be approved as to result and the cause remanded for jury resolution of all factual disputes.

III.

POINTS INVOLVED ON APPEAL

The plaintiff does not wish to have this Court lose sight of the precise legal point which forms the basis for this proceeding. Hence, for that reason the plaintiff will suggest to this Court the "appellate" issue may be stated as follows:

> WHETHER, ON THIS RECORD, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THE NON-EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT AND ERRED IN CONCLUDING DEFENDANT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The plaintiff cannot accept the defendant's phrasing of the issues.

As to "POINT I", the defendant states:

> 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.

The issue as phrased is premised on the defendant's belief that it can at this stage of the proceedings justifiably resolve factual disputes in its favor. Since, as will be demonstrated, infra, the defendant does not have that legal luxury, the defendant's point must fail. Genuine issues of material fact do exist as pertains (1) to the existence of an operative note and (2) to resolution of the question whether or not plaintiff was/is adversely affected by the absence of a "formal" note.

As to "POINT II", defendant states:

> 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.

For the reasons to be argued, infra--and with recognition that "fraudulent" misrepresentation is no longer a consideration in informed consent matters--it may be stated that there exists no legal requirement that the plaintiff "allege" that she was "fraudulently" induced to undergo surgery. Since there exists no such legal requirement, the defendant's point is clearly without merit.

As to "POINT III", defendant states:

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's theory once again can find factual support only after the defendant resolves disputed matters in its favor. Suffice it to say that if genuine issues of material fact exist as to any of the matters that the defendant conveniently "glosses over", the opinion of the District Court, Third District, should, in all respects, be "affirmed."

IV.

SUMMARY OF ARGUMENT

For the reasons to be argued, infra, the plaintiffs would respectfully urge this Honorable Court to approve the opinion of the District Court of Appeal, Third District, as to both reasoning and result.

It must be stated, at the outset, that the District Court did, on the subject record, hold (only) that if it was shown that plaintiffs' statutory obligtion could not be met because the defendant/health care provider caused the loss of evidence, the substance of which these plaintiffs needed to carry their burden, then the defendant/health care provider should not be allowed to automatically "escape" responsibility. Turning to well established precedent the District Court of Appeal, Third District, fashioned a procedure which merely shifted the burden of proof and imposed upon the health care provider:

> ". . .the burden of proving that the treatment which said missing records would reflect was performed non-negligently; and that where such health care provider intentionally fails to make or maintain such records, the treatment which such missing records would reflect should be deemed negligent and the provider adjudged liable."

Throughout its brief the defendant premises its contentions upon its belief that this case comes down to nothing more (and nothing less) than a "dispute" over the "type" of operative note which would be of sufficient quality to satisfy the defendant's statutory burden of maintaining appropriate hospital records. To counter this, plaintiffs will continuously hammer throughout their brief that the District Court's decision was premised upon Dr. Hammond's testimony that there existed no operative note of any type! A fair reading of Dr. Hammond's deposition overwhelmingly supports District Court reasoning and finding in this regard. As a consequence, the plaintiffs would urge this Court not to be swayed into believing that on appeal from an adverse summary final judgment the District Court "weighed" the significance of what was in the record. While the defendant would like this Court to believe that the existence of some notations in progress reports equate to an "operative note", to do so would indeed violate general principles of summary judgment law. As to this point, at this stage of the proceedings, there was no operative note! Because there was no operative note, the defendant breached the duty it owed to the plaintiff and the District Court was correct in determining that there existed a need to fashion a particular form

of relief.

The defendant's arguments all seem to be premised upon an improper view of the record. Suffice it to say at this juncture, the deposition testimony of the plaintiff, Mrs. Valcin, establishes the existence of genuine issues of material fact concerning her alleged "informed" consent. Same may be said for the deposition testimony of Dr. Hammond as it relates to the defendant's departure from the requisite standard of care.

The legal arguments advanced by the defendant [addressed to its dissatisfaction with the opinion of the District Court of Appeal, Third District] overlook completely the defendant's statutorily imposed obligation to maintain a complete set of hospital records and to provide same to a patient upon timely and authorized demand. Ignoring this duty, the defendant simply concludes--without consideration for the aggrieved former patient--that the burden imposed upon it by the District Court of Appeal, Third District, is unfair. The opinion of the District Court of Appeal, Third District, should be affirmed in all respects.

V.

ARGUMENT

ON THIS RECORD THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THE ABSENCE OF GENUINE ISSUES OF MATERIAL FACT.

A.

PRELIMINARY OBSERVATIONS

The plaintiffs would suggest to this Court that the defendant has studiously placed the proverbial cart before the horse in making its argument. Irrespective of what the defendant asserts throughout its brief, this record establishes conclusively that at no stage of the proceedings did either the plaintiff or the District Court ignore this Court's mandate (See: Brief of Defendant, pages 13 and 14, citing to HINE v. FOX, 89 So. 2d 13 (Fla. 1956), that negligence will not be presumed but must be proven!).

It must be understood that the District Court, on the facts before it (all of the facts, not just those facts which the defendant believes are favorable to it), opined/held (only) that if it was shown (or could be shown--See: HOLL v. TALCOTT, supra) that (in a medical negligence action) plaintiff's (statutory) obligation/burden could not be met because the defendant (health care provider) caused--either through intentional or negligent acts--the loss of evidence (to-wit: medical records, the nature and extent of which the Florida Legislature mandated must not only be kept but also produced to the patient upon demand)--the substance of which plaintiff needed in order to

carry his burden--which loss prevents the plaintiff from meeting his burden [without said evidence plaintiff's experts cannot (as opposed to would not) formulate an opinion establishing that the defendant's conduct departed from the legislatively prescribed "standard of care"], then the defendant (health care provider) should not be allowed to automatically "escape" responsibility but the burden of proof should shift and such health care provider:

> ". . .shall have the burden of proving that the treatment which said missing records would reflect was performed non-negligently; and that where such health care provider intentionally fails to make or maintain such records, the treatment which such missing records would reflect should be deemed negligent and the provider adjudged liable."

Because the opinion of the District Court makes eminently good sense, it should be approved and then adopted by this Court.

Assuming this Court chooses to disagree with certain portions of the District Court's opinion, the result reached by the District Court should, in all respects be affirmed and the cause remanded for jury resolution of the disputed factual matters. In point of fact it is clear that the defendant did not carry its burden as to Counts II and III of the plaintiffs' complaint. Hence, the summary final judgment appealed--as it relates to Counts II and III of the plaintiffs' complaint--should be reversed.

B.

FLORIDA LAW, RE: SUMMARY JUDGMENT AND APPELLATE REVIEW

As a direct consequence of the defendant's decision to view the facts of this case in a light most favorable to it--ignoring plaintiffs' decisional law right to have the record viewed in a light most favorable to it--the following is submitted.

In HOLL v. TALCOTT, supra, this Court stated that on appeal from a summary final judgment the appellant is entitled to have the record viewed in the light most favorable to her with every reasonable inference of fact and intendment of testimony being indulged in her favor and against the party who has moved for (and obtained) summary judgment. The party moving for summary judgment has the burden of showing conclusively the non-existence of genuine issues of material fact. If the existence of such issues, or the possibility of their existence, is reflected by the court file, it is reversible error for a trial court judge to grant the motion and enter summary final judgment thereon. Further, if the existence of fact issues or the possibility of their existence is reflected by the record, or the record raises even the slightest doubt in this regard, the summary final judgment must be reversed on appeal and the cause remanded for a full trial on all issues. E.g., WILLS v. SEARS, ROEBUCK & COMPANY, 351 So. 2d 29 (Fla. 1977); WILLIAMS v. FLORIDA REALTY & MANAGEMENT COMPANY, 171 So. 2d 176 (Fla.App.3d 1973); LAMPMAN v. CITY OF NORTH MIAMI, 109

So. 2d 273 (Fla.App.3d 1968). See also: VISINGARDI v. TIRONE, 193 So. 2d 601 (Fla. 1967).

It was recognized in WILLIAMS v. FLORIDA REALTY & MANAGEMENT COMPANY, supra, at page 177:

> "When a defendant moves for a summary judgment, the trial court does not determine whether the plaintiff can prove (his) case but only whether the pleadings, depositons and affidavits conclusively show that (he) cannot prove (his) case."

In CONNELL v. SLEDGE, 306 So. 2d 194 (Fla.App.1st 1975), the First District Court of Appeal summarized the rules regarding summary judgment and made the following observations:

1. A summary judgment proceeding is not a trial by affidavit or deposition.

2. A summary judgment may be granted only in cases where there is no issue of material fact.

3. The allegations of the complaint (when the defendant moves for summary judgment) must be accepted, for the purposes of the motion, as true.

4. If the pleadings, depositions, answers to the interrogatories, admissions, affidavits and other evidence in the file raise the slightest doubt upon any issue of material fact, then a summary judgment may not be entered.

5. A party against whom a summary judgment is sought is not required to file a counter-affidavit in order to defeat the motion.

In FONTAINBLEAU HOTEL CORPORATION v. SOUTHERN FLORIDA HOTEL AND MOTEL ASSOCIATION, 294 So. 2d 390 (Fla.App.3d 1974),

the Court had occasion to state:

> "It is axiomatic that summary judgments should be granted with great caution and where there exist issues which are in conflict as reflected by the pleadings, and the record before the trial court supports the conflict in factual matters, a summary judgment should not be granted." 294 So. 2d at p. 390.

More recently, it was recognized in DAWSON v. SCHEBEN, 351 So. 2d 367 (Fla.App.4th 1977), that even if some facts are not in dispute, where different inferences might be drawn from some of the undisputed facts, summary judgment is improper.

Regarding the often relied upon "presumption of correctness" usually accorded a trial court order sought to be reviewed, this Court, in WILLS, supra, stated:

> "Mindful as we are of the presumption of correctness which attaches to an order of the trial court, nevertheless we must draw every possible inference in favor of the party against whom the motion is made. . ." 351 So. 2d at p. 32.

C.

"CONSENT"--ON THIS RECORD, PROPERLY VIEWED--NEITHER INFORMED NOR FREELY GIVEN

At page 34 of its brief the defendant, in presenting argument in support of its second point on appeal, urges District Court error in its "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. The precise legal error:

> "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 . . ." See: Brief of Defendant, pages 36 and 37.

The plaintiff would respectfully disagree with the conclusion reached.

First, it may be observed that (former) § 768.46(4)(a) provided:

> "A consent which is evidenced in writing and meets the requirements of Subsection (3) shall, if validly signed by the patient or another authorized person, be conclusively presumed to be a valid consent. THIS PRESUMPTION MAY BE REBUTTED IF THERE WAS A FRAUDULENT MISREPRESENTATION OF A MATERIAL FACT IN OBTAINING THE SIGNATURE."

Contrary to what the defendant asserts, there exists no authority to support the defendant's theory that a plaintiff seeking to establish defense responsibility for damages sustained as the result of an alleged failure to obtain "informed consent" need allege in his (or her) complaint an independent cause of action for "fraud." Nor does there appear to be any authority anywhere requiring the plaintiff to allege "fraud" in order to obtain the benefit of the statutorily created "presumption." See, for example: Florida Standard Jury Instruction 4.2(b)--Professional Negligence and elements contained therein.

Further, the pertinent section of the above cited statute was held unconstitutional in the case of CUNNINGHAM v. PARIKH, 472 So. 2d 746 (Fla.App.5th 1985) because:

"Subsection (4)(a) requires the consent to be in writing and to meet the requirements of subsection (3), since it goes on to say that if validly signed by the patient, the consent shall be conclusively presumed to be a valid consent. This presumption may be rebutted only if there was a fraudulent misrepresentation of a material fact in obtaining the patient's signature. The plaintiff cannot prove that the action of the physician was not in compliance with subsection (3) since the statute raises a conclusive presumption that the written consent is valid in the absence of fraud. Accordingly, the conclusive presumption in § 768.46(4)(a), Florida Statutes, is unconstitutional.

"The unconstitutionality of this presumption is not eliminated or relieved by the statutory provision permitting a rebuttal when the patient's signature is obtained by a fraudulent misrepresentation of a material fact. The physician's duty to timely and adequately inform the patient is an affirmative duty requiring an affirmative act. Thus, this duty can be breached by a mere nonaction, omission or nonfeasance. A breach of this duty does not require an affirmative act or misfeasance or malfeasance, such as the making of an affirmative misrepresentation of a material fact by the physician. The statutorily presumed fact is that the physician timely and adequately performed his affirmative duty to properly advise the patient. Therefore, the provision permitting the patient to rebut the statutory presumption only by showing that the patient's consent was obtained by a fraudulent misrepresentation of a material fact is neither logically nor legally adequate to meet, refute or rebut the statutorily 'conclusive' presumption that the physician did timely and adequately perform his affirmative duty to properly advise the patient." 472 So. 2d at pp. 747 and 748.

Further, the Legislature, responding to the judicial fiat of CUNNINGHAM, supra, did, effective October 1, 1985, amend § 768.46(4)(a) so that it now provides:

"A consent which is evidenced in writing and meets the requirements of subsection (3) shall, if validly signed by the patient or another authorized person, RAISE A REBUTTABLE PRESUMPTION OF A VALID CONSENT."

Because an appellate court must apply the law in the State as it exists at the time of appellate disposition, it is clear the foundation for the defendant's argument no longer exists. It has long been recognized in this State that where a statute or principle of law that is controlling or material to the merits of an action is repealed, or the law otherwise is changed, during the pendency of the cause, the law as so changed then becomes applicable and controlling in trial and decision of the action. This rule has been applied even where the change in the law occurred after judgment but during the pendency of a direct appeal therefrom. See, for example: FLORIDA EAST COAST RAILWAY COMPANY v. ROUSE, 194 So. 2d 260 (Fla. 1966); INGERSON v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, 272 So. 2d 862 (Fla.App.3d 1973) and SEABOARD COASTLINE RAILROAD COMPANY v. CAMPBELL, 285 So. 2d 62 (Fla.App.1st 1973), wherein the Court stated:

> "Since the primary point urged for reversal in the case at bar rests upon the failure to give an instruction based on a statute which has since been repealed, the statute can hardly be said to be controlling law of this case. . ." 285 So. 2d at p. 62.

The plaintiff would suggest to this Court the issue (of the need to plead "fraud") is moot.

Additionally, properly viewing the facts and circumstances of this case in a light most favorable to the non-moving plaintiff, See: HOLL v. TALCOTT, supra, and CONNELL v. SLEDGE, supra, plaintiff's deposition itself demonstrates genuine

issues of material fact concerning "guarantees" and "informed" consent. The defendant's second point presented for review is without merit and District Court reversal of the summary final judgment appealed should be approved.

D.

PLAINTIFFS' EXPERT AND THE STANDARD OF CARE

In Point III of its brief (which point is indisputedly intertwined with defendant's Point I, defendant studiously separating the two for obvious reasons), defendant urges the correctness of trial court granting of the defendant's motion for summary final judgment because:

> ". . .The record revealed without conflict that plaintiff was without necessary expert testimony to substantiate the allegations of her complaint." (Brief of Defendant, pages 37 and 38).

The record before this Court--properly viewed--demonstrates Dr. Hammond's opinions concerning the defendant's "departures" from the requisite standard of care. As Dr. Hammond himself noted--with the absence of an operative note no departure from the accepted standard of care could be made. Hence, while the defendant again urges that it should prevail <u>because</u> of the absence of the operative note, its absence should not be the determinative factor in resolving this cause <u>in favor of</u> the defendant!

The plaintiff candidly admits that without the operative note no expert testimony was presented to establish "medical negligence" in the <u>performance of</u> the sterilization procedure. However, the plaintiff will just as candidly note <u>the absence of</u>

defense evidence to conclusively show either that Mrs. Valcin was advised of the risk (of ectopic pregnancy) or that not advising her of this risk was in accordance with accepted standards of medical practice. As the District Court observed:

> "It cannot be said that the hospital conclusively showed that Mrs. Valcin was advised of the risk of an ectopic pregnancy. The 'Consent for Authorization for Sterilization', although clearly advising Valcin of the risk of pregnancy, makes no mention of the risk of ectopic pregnancy or any other risk. The 'Consent for Operative and Other Special Procedures' limited risk advice to 'complications from surgery and anesthesia' and 'other risks such as severe loss of blood, infection, cardiac arrest, etc. that are attendant to the performance of any surgical procedure.' These documents do not show, much less conclusively show, that Mrs. Valcin was advised of the risk of ectopic pregnancy. Thus, Mrs. Valcin's testimony that she was not advised of this risk, even if contradicted, which it was not, created a genuine issue of material fact as to whether she was so advised, in the absence of the defendant having conclusively established that not advising Mrs. Valcin of the risk of ectopic pregnancy was in accordance with accepted standards of medicla practice. The defendant made no effort at all to establish the latter fact."

As the plaintiffs demonstrated to this Court in their Statement of the Case and Facts, the defendant's motion for summary final judgment was premised upon its belief that the plaintiffs presented "no evidence" to sustain their burden of proof. In truth and in fact, the record is silent as to any defense evidence as to any pertinent matter. As a consequence, the District Court correctly reversed the summary final judgment appealed.

E.

PRESUMPTIONS AND THE HOSPITAL'S CONCERNS

The thrust of the defendant's argument is, of course, directed to District Court holding:

> ". . .that where a health care provider, statutorily and morally charged with the responsibility of making and maintaining records as a part of its obligation to promote the safe and adequate treatment of patients, negligently fails to do so, such health care provider shall have the burden of proving that the treatment which such missing records would reflect was performed non-negligently; and that where such health care provider intentionally fails to make or maintain such records, the treatment which such missing records would reflect shall be deemed negligent and the provider adjudged liable." (R. 78).

The defendant's arguments in opposition to the District Court's holding, while understandable, should not be accepted by this Court. Further, the defendant's arguments (presented in support of the position) flows neither logically nor legally.

It can be restated at this juncture that the defendant is wrong in asserting that District Court holding ignored this Court's admonition in HINE v. FOX, supra, that "negligence will not be presumed, but must be proved." As a matter of fact, the District Court specifically addressed this contention and stated:

> "Thus, as a general rule, it is the plaintiff's burden to prove medical malpractice and, except in that class of cases where the conclusion of medical malpractice can be reached through the exercise of the jurors' common knowledge and expertise (citation omitted), expert testimony is required to satisfy this burden. . ." (R. 274).

However, the District Court further noted that the subject

cause was not a situation to which the general rule could fairly apply:

> "Where evidence peculiarly within the knowledge of the adversary is, as here, not made available to the party which has the burden of proof, other rules must be fashioned. . ." (R. 275, 276).

It may therefore be said that the subject cause does not involve the "general rule" but rather the exceptions thereto.

The defendant next complains that:

> "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. (Citations omitted).
>
> "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.
>
> * * *
>
> "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 plaintiff's medical witness who criticized the operating surgeon's notemaking procedure was not even familiar with the accepted standard of care in the community for the type of surgery involved." (Brief of defendant, pages 15 and 16).

The plaintiff would urge this Court to find nothing wrong with

the District Court's analysis and ultimate holding:

1. The plaintiff would suggest to this Court that it is rational to ascribe a presumption where evidence "peculiarly within the knowledge of the adversary is, as here, not made available to the party which has the burden of proof." It is especially rational where, as a consequence of the failure of the party to produce that evidence, a recognized cause of action is lost.

2. Further, where said cause of action is lost because expert testimony (required under the circumstances) needed to establish the subject cause of action cannot be obtained, the establishment of a (rebuttable) presumption itself establishes "a right to rebut in a fair manner." Indeed, the District Court of Appeal, Third District, did not, in any way, limit the defendant's right to rebut the presumption.

In point of fact, the defendant's argument is addressed not to the defendant's concern with its inability to "rebut" but, rather, with the end result--it could be ultimately found responsible even in circumstances of "no medical negligence" or, under circumstances wherein proof of medical negligence would be tenuous at best. It is respectfully suggested to this Court that there exists no easy solution to the subject dilemma. However, the District Court determined, both as a matter of law and as a matter of public policy, that this situation have a remedy:

> "Because, as a matter of policy and fairness, we believe it would be unduly harsh to impose liability on the hospital where it is has negligently failed in this duty, but unduly lenient to simply condone such errors at a patient's expense, we have concluded that the burden should shift to the hospital to prove that it was not guilty of medical malpractice. . ." (R. 278, 279).

In attempting to set aside District Court holding the defendant further asserts:

1. Plaintiff's 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;

2. 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;

3. 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; and

4. 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.

The plaintiff would suggest to this Court the defendant's assertions are without merit.

As to those defense contentions premised upon its belief that this case comes down to nothing more (and nothing less) than a "dispute" over the "type" of operative note which would be of sufficient quality to satisfy the defendant's statutory burden (of maintaining appropriate hospital records), it must be continuously hammered by this plaintiff that District Court decision was premised upon Dr. Hammond's testimony that there existed no operative note of any type! A fair reading of Dr. Hammond's deposition overwhelmingly supports District Court reasoning and finding in this regard. As the District Court stated:

> ". . .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, the recipient of a summary judgment in its favor, did not conclusively show on this record that an operative note exists." (R. 280).

Hence, this Court should not be swayed into believing that on appeal from an adverse summary final judgment the District Court "weighed" the significance of what was in the record. As to this point there was no operative note. As a consequence the defendant breached the duty it owed to the plaintiff and on the subject record there can be no lawful dispute as to that fact. Indeed, the defendant's repeated references to the "lack of a formal operative note" suffer the same deficiency as the other contentions raised. It is premised on a factual finding

favorable to the defendant. Of course, if one assumes that there was an "operative note" and uses that assumption as the foundation--the starting premise--for the argument advanced, then arguably there can never be any "proximate causal relationship" between the established fact and the presumed fact. However, properly viewing the facts and circumstances of this case in a light most favorable to the plaintiff, we start with the lack of any operative note. With its absence the plaintiff cannot produce expert testimony to carry plaintiff's statutorily imposed burden. It therefore logically follows that since the loss of the plaintiff's cause of action is premised entirely on the absence of the operative note, a rational relationship exists!

As pertains to the defendant's assertion delineated above as number 4 (there is no opportunity to rebut the conclusive, irrebuttable presumption of negligence adopted by the Third District), it must be remembered that the defendant has reversed the sequence of events. In addition, this assertion is again premised on the defendant's belief that the District Court's opinion applies where an operative note exists. It is patent from an examination of the District Court's opinion that the District Court did not intend the aggrieved defendant to have no opportunity to rebut the conclusive, irrebuttable presumption of negligence and a fair reading of its opinion does not lead one to that conclusion. Unmder the District Court holding, the defendant is afforded full and fair opportunity

to present whatever evidence it chooses to establish the validity of its defense. The only "change" that the District Court of Appeal, Third District, effectuated was to shift the burden of proof. No restrictions are placed on the defendant. Should the trier of fact determine the issue adversely to the defendant, then the plaintiff is entitled to have (liability) judgment entered in her favor and must then carry the traditional "plaintiff's burden of proof" as pertains to the issue of damages. The defendant's interpretation of the District Court's holding is much too restrictive and is certainly (and understandably) self-motivated.

As to the defendant's contentions that the District Court adopted a (prohibited) conclusive irrebuttable presumption of negligence, the defendant's arguments must be viewed in the context of what the District Court actually stated, which is:

* * *

> "There is little question that Valcin's ability to prove her negligence claim against the hospital has been substantially prejudiced by the absence of critical hospital records. 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 records cannot be produced. Since the evidence concerning the reason the 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 records are not missing due to an intentional or deliberate act or omission on the part of the hospital or its employees. 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 or,

> if one was made, that the hospital did not deliberately remove or destroy the report, then the fact that the record is missing 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. However, if the fact-finder is not satisfied that the records are missing 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 Valcin."

It is from the above that the defendant argues (See: Brief of Defendant, page 24):

> "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. . ."

The defendant's assertion is true: The District Court did "relieve the claimant of the burden of proving that the plaintiff's injury proximately resulted from a breach of the accepted standard of care", as well it should have! The defendant's argument ignores the precarious and tenuous position in which hospitalized patients find themselves. As this Court recently stated in MARRERO v. GOLDSMITH, 11 F.L.W. 35, Florida Supreme Court Case Number 65,400 (Opinion filed January 23, 1986) (in discussing why res ipsa loquitur should be allowed in medical negligence cases even where some direct evidence of malpractice may be presented):

> ". . .It is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who

> submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who receives permanent injuries of a serious character, obviously the result of someone's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries during the course of treatment. . .
>
> * * *
>
> "The control at one time or other, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants. THIS, WE THINK, PLACES UPON THEM THE BURDEN OF INITIAL EXPLANATION. . . ."

This Court found therein no legal impediment in shifting to the medical community the burden of proof. Such is the instant cause!

At pages 26-31 of its brief the defendant complains that the District Court holding places an unfair burden on the hospitals of this State:

> "The hospitals in this State treat millions of patients every year, generating multi-millions 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 defendant's argument is unfounded in fact and, hence, is patently unfair. The District Court did not engage in medical semantics or in a characterization or weighing of the evidence.

As previously noted, the District Court premised its opinion on the fact that there existed no operative note. The defendant's protestations notwithstanding, this case does not and should not devolve into a discussion concerning "sufficiency" of an operative note. None exists! In light of this, it may be stated that the defendant's concerns are both premature and without merit.

At page 31 of its brief the defendant states:

> "When a medical witness, not familiar with the standards 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. . ."

Again, this issue is premature. The District Court's opinion is premised on the non-existence of the operative note. Indeed, it is the defendant which insists (repeatedly) that Dr. Hammond's testimony be "construed" in a manner which would be consistent with the defendant's argument. Whether or not it could be so construed, on appeal from an adverse summary final judgment the defendant is not possessed of such authority. HOLL v. TALCOTT, supra.

Throughout its brief the defendant argues just how difficult its life will be carrying the unreasonable burden as imposed by the District Court of Appeal, Third District. Sight should not be lost of the following. This case involves a citizen's right (a right possessed of all citizens, all litigants, individual, corporate, public and private) to not suffer

a fatal consequence where a party/litigant opponent negligently or intentionally does not maintain or produce evidence (of whatever type) which was exclusively within its possession and was placed into its possession as a direct consequence of legislation passed to insure the continued protection of public health and safety. While the defendant cries "Foul" to this Court--aggressively seeking relief from the perceived unfairness of the District Court's holding--it must be remembered that the District Court fashioned its relief because of the defendant's unique situation and not in spite of it:

> "Our holding takes into account that the maintenance of thousands of hospital records is a burdensome undertaking in which errors may be expected to occur, but it is nonetheless the hospital's duty to maintain such records for, inter alia, the benefit of the patient. Because, as a matter of policy and fairness, we believe it would be unduly harsh to impose liability on the hospital where it has negligently failed in this duty, but unduly lenient to simply condone such errors at a patient's expense, we have concluded that the burden should shift to the hospital to prove that it was not guilty of medical malpractice. Where, however, the patient has been deprived of access to essential records through the deliberate acts or omissions of the hospital, we deem it appropriate that the hospital be foreclosed from any opportunity to rebut the presumption of medical malpractice and that liability be imposed on it, the patient being left with the burden of proving damages only. We trust this will encourage the implementation of appropriate safeguards to avoid negligence in the maintenance of hospital records and, at the same time, deter intentional and deliberate misconduct." (R. 278, 279).

Throughout its brief the defendant harps upon the absence from § 768.45, Florida Statutes, of sanctions to cover the instant situation and clings therefore to the mistaken (and

legally erroneous) belief that because the Legislature did not provide sanctions the courts of this State are powerless to so act. Such belief, and the argument flowing therefrom, is simply not worthy of extended reply. First, this Court did, in MARRERO v. GOLDSMITH, supra, shift the burden of proof and place upon the medical community the burden of explanation. Secondly, it has long been recognized in this country--as stated in the opinion sought to be reviewed:

> ". . .Courts will intervene to prevent a party from benefitting from its own misconduct. . ." (R. 276).

Hence, whether one turns to the expert testimony of Dr. Hammond ["not having an operative note is not accepted medical care"] or to the statutory enactments [Chapter 395, Florida Statutes, 1985], the result is the same: The defendant cannot benefit by its own misconduct!

Lastly, the plaintiff must emphasize that Dr. Hammond testified--without doubt or equivocation:

> "This is not the operative note." (Deposition of Dr. Hammond, page 23; R. 116).

Immediately after that statement Dr. Hammond began to describe what constitutes an operative note. He was cut off by <u>counsel</u> for the defendant, which counsel <u>then testified</u>:

> "I know. I know it's usually dictated and typed, but I suspect what may have happened here is somehow or other, it got handwritten by the doctor, but not typed, because I don't have a typed one." (Deposition of Dr. Hammond, page 24).

From beginning to end the defendant's argument is premised on

its belief that District Court holding has included in its foundation the existence in the subject record of "operative notes." Nothing can be further from the truth. The expert medical testimony presented established the non-existence of an operative note. Counsel for the defendant agreed that no operative note was extant and then engaged in a fanciful and hypothetical scenario concerning his opinion as to why no "typed one" existed. The defendant's entire argument is premised on a "fact" injected (improperly) into the record by its counsel. Dr. Hammond's testimony is, on the other hand, consistent with the subject record, to-wit: No operative note exists.

The District Court opinion should be approved in all respects.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the plaintiff respectively suggests to this Court that the opinion of the District Court of Appeal, Third District, should, in all respects, be approved.

Respectfully submitted,

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VII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondents on the Merits was served, by U.S. mail, this 17th day of April, 1986, on:

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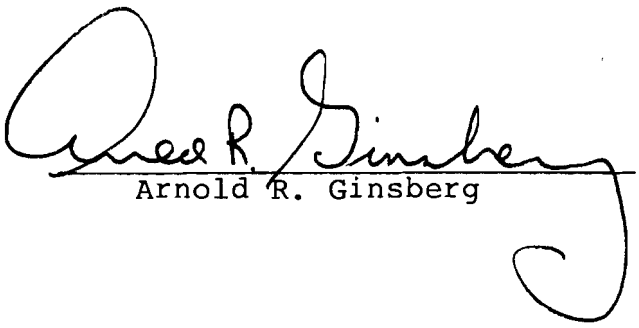

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