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IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,673

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.	:	

REPLY BRIEF OF PETITIONER
ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

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PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, Petitioner, vs. GREGORIA VALCIN and GERARD VALCIN, her husband, Respondents.	ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

STATEMENT OF THE CASE AND FACTS

After stating that "the facts of this case are neither complex nor lengthy," the respondents (hereinafter plaintiffs) have set forth an eighteen-page statement of the case and facts in which they ignore the basis upon which the trial court granted defendant's motion for summary judgment. (Brief of Respondents, p. 1) The defendant moved for and the trial court granted a summary judgment in this case because the record conclusively shows that plaintiffs' only medical witness, Dr. Daniel Hammond, admitted in no uncertain terms that he is not familiar with the standard of care applicable to the surgical procedure performed on Mrs. Valcin. Dr. Hammond stated that he was not familiar with the accepted standard of care for performing a tubal ligation "[b]ecause I have not inquired about it, number one, and number two, since I've not fraternized with the obstetricians in this sense." (R. 119-120) Plain-

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tiffs have totally ignored the fact that because Dr. Hammond was not familiar with the accepted standard of care, plaintiffs were without expert medical testimony in a case requiring expert testimony.

Dr. Hammond did not testify that his lack of familiarity with the accepted standard of care was in any way related to the existence or non existence of an operative note. Nor did he testify that he would have been familiar with the accepted standard of care if an operative note existed. The existence or non existence of an operative note was never shown, on this record, to be relevant to Dr. Hammond's lack of familiarity with the accepted standard of care. Plaintiffs do not address this fact in their brief.

Defendant did not move for nor obtain a summary judgment for the reason suggested by plaintiffs at page twenty-four of their brief, namely, that without an operative note, plaintiffs' medical witness could not formulate an opinion establishing that the defendant's conduct departed from the accepted standard of care. To the contrary, defendant moved for a summary judgment because plaintiffs were without an expert inasmuch as Dr. Hammond admitted that he was not familiar with the accepted standard of care applicable to allegations upon which defendant was charged with negligence, either in the performance of the surgery or in informing plaintiff of the risks incidental thereto. (R. 78) As plaintiffs fail to address this issue, it must be assumed that plaintiffs agree that their medical witness was without knowledge of the accepted standard of care.

Plaintiffs also totally ignore in their lengthy statement of the case and facts, and fail to explain how Dr. Hammond, given his lack of familiarity with the accepted standard of care applicable to the surgery performed on plaintiff, could qualify as an expert on the adequacy of the handwritten note.

While steadfastly maintaining that no operative note existed, plaintiffs also ignore the portion of the testimony of Dr. Hammond where he stated that there was an "operative note on the progress note," and that "the operating doctor did make a brief handwritten note." (R. 154, 169) Concerning this handwritten operative note, Dr. Hammond testified that this note was not "an operative note of a legitimate variety." (R. 154-155) However, plaintiffs were without any testimony from a qualified expert who was familiar with the accepted standard of care for the surgery described in the handwritten note, as to whether the operative note was of a legitimate or illegitimate variety.

Respondents' statement of the case and facts is also totally silent as to petitioner's contention that there are no allegations in the pleadings, and that no motions of any type were ever filed in the trial court questioning in any respect the sufficiency or the adequacy of the hospital's medical records. Respondents state at page one of their brief that the hospital failed "to maintain and produce [upon plaintiffs' demand] statutorily required matters ...." However, at no place in their brief do respondents reveal that this contention was ever raised in the trial court. Nor can respondents point to any place in the record where the trial judge was ever given the opportunity to pass upon the ques-

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tion. Instead of giving the trial judge discretion to decide what should be done, if anything, when a party challenges the sufficiency of matters produced during discovery, the Third District adopted a per se rule of law which, unless quashed by this Court, will govern hospitals in all cases where the adequacy or the existence of medical records is challenged.

PRELIMINARY STATEMENT

At pages 27 through 45 of their brief, plaintiffs have reversed the order of the issues presented by petitioner, and have chosen to discuss last, petitioner's first point concerning the adoption by the Third District of the rebuttable and conclusive irrebuttable presumptions of negligence applicable to hospitals. Because of the importance of this issue in changing the law applicable to hospitals, petitioner will address the issues in their original order.

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.

Plaintiffs contend that the District Court did not intend to adopt the rebuttable and conclusive, irrebuttable presumptions of negligence as a "pure" matter of law. (Brief of Respondents, p. 16)

In actuality, the Third District adopted two different rules of law. The first rule of law adopts a rebuttable and a conclusive, irrebuttable presumption of negligence applicable to

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hospitals when a surgeon's operative note is alleged to be missing, as follows:

> [W]e 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 [the surgeon] 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 still 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 [plaintiff].

(App. 12-13) The Third District's holding sets forth a rule of law applicable to hospitals. Although plaintiffs state that the court's holding does not in fact announce a rule of law, as an appellate court, the district court is limited in its review capacity to settling questions of law, and is not authorized to review or decide questions of fact. Cripe v. Atlantic First National Bank, 422 So.2d 820, 821 (Fla. 1982); Manufacturers National Bank of Hialeah v. Canmont Int'l, Inc., 322 So.2d 565 (Fla. 3d DCA 1975).

The second rule of law adopted by the Third District is much more inclusive than the first rule. After stating the rule of law, as set forth above, which is applicable to hospitals, the Third District announced that its holding as to hospitals is in fact applicable to all health care providers, in general. As stated by the Third District:

> Thus, we hold that where a health care provider, statutorily and morally charged with the responsibility of making and maintaining records as 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.

(App. 13) Despite these unambiguous holdings by the Third District, plaintiffs contend that "[i]rrespective of what the defendant asserts throughout its brief," the District Court did not ignore this Court's holding in Hine v. Fox, 89 So.2d 13 (Fla. 1956), that in medical malpractice cases "negligence will not be presumed but must be proved." (Brief of Respondents, p. 23)

The Third District not only overlooked the rule of law announced by this Court in Hine v. Fox, supra, but also disregarded the numerous decisions of this Court cited in petitioner's main brief 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. (Brief of Petitioner, p. 15)

Plaintiffs seem to deny that the District Court adopted either the rebuttable or conclusive, irrebuttable presumptions of negligence, stating at page 39 of their brief that "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." Moreover, contrary to the rule of law announced by the Third District, plaintiffs deny altogether that

the District Court adopted a conclusive, irrebuttable presumption of negligence. Plaintiffs engage in hyperbole by stating at page 38 of their brief:

> 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 presumpion of negligence and a fair reading of its opinion does not lead one to that conclusion. [Emphasis supplied]

Plaintiffs' analysis of the Third District's holding is utterly contradictory, and irreconcilable with the actual holding of the court.

In adopting the rebuttable and conclusive, irrebuttable presumptions of negligence, the Third District ignored this Court's admonition in Lipe v. City of Miami, 141 So.2d 738, 743 (Fla. 1962), that:

> It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions which were before the trial court. Matters not presented to the trial court by the pleadings or ruled upon by the trial court will not be considered by this Court on appeal. [Emphasis supplied]

Plaintiffs have not favored this Court with any references to the record showing that the existence or adequacy of the defendant's hospital records was ever raised as an issue or ruled upon by the trial court. As this issue obviously was not tendered to the trial judge, it was not available to the parties for review on appeal by the District Court. Mariani v. Schleman, 94 So.2d 829, 832 (Fla. 1957).

In order to justify the adoption of the rebuttable and conclusive, irrebuttable presumptions of negligence, the Third District raised the issue for the first time on appeal, and relied upon the

testimony of a medical witness who is admittedly not qualified as an expert because he is not familiar with the accepted standard of care.[1/] The Third District also weighed the testimony of Dr. Hammond on an issue which was never raised by the pleadings nor ruled upon by the trial court, contrary to this Court's holding in Yost v. Miami Transit Co., 66 So.2d 214 (Fla. 1953), that 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."

On the one hand, Dr. Hammond testified that there was "an operative note on the progress note," (R. 154) and that the "operating doctor did make a brief handwritten note." (R. 169) On the other hand, Dr. Hammond stated that the operative note was not of a "legitimate variety" because, in his opinion, there should have been "a note that is written in longhand of a detailed nature ...." (R. 154-155) Plaintiffs, however, were without any testimony from a qualified expert who was familiar with the accepted standard of care for the surgery described in the handwritten note, and therefore whether the operative note was of a legitimate variety or not, as contended by Dr. Hammond. The trial court expressly stated in the final summary judgment that it was granting defendant's motion for summary judgment because the plaintiffs' pre-trial catalog disclosed "that Daniel O. Hammond, M.D. was the only physician listed

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1/ See §768.45, F.S. (1981), wherein the legislature stated that "[t]he 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."

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by Plaintiffs as a medical expert witness," (emphasis supplied), and therefore defendant was entitled to a summary judgment as a matter of law. (R. 264) Obviously, if an expert who is familiar with the accepted standard of care can say that the surgeon's handwritten note is of a legitimate variety, this testimony would have to be weighed against the testimony of Dr. Hammond, who is not familiar with the accepted standard of care, that the handwritten note is not of a legitimate variety. Although the record conclusively established that plaintiffs do not have an expert who is familiar with the accepted standard of care, the Third District weighed Dr. Hammond's testimony and found that despite his admitted lack of familiarity with the accepted standard of care, he is in fact familiar with the accepted standard of care.

Another illustration of the District Court's weighing of the evidence appears in footnote one of the court's opinion rendered on "appellee's Motion for Clarification and Rehearing." (App. 15-16) The court stated:

> 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.

(App. 16) Yet, the Third District rejected the holding of the trial court that Dr. Hammond was not qualified as an expert medical witness because of his lack of familiarity with the accepted standard of care, and accepted Dr. Hammond's testimony that the handwritten note on the progress chart was not of a legitimate variety because it was not of a "detailed nature." (R. 154-155) Clearly, in any trial, based upon the Third District's resolution of the issue, the jury would have to decide whether the handwritten note is of

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a legitimate or illegitimate variety. If it is of a legitimate variety, it qualifies as an operative note. Similarly, if an expert, who is familiar with the accepted standard of care, testifies that there is sufficient detail in the handwritten note, then an operative note exists. By accepting the testimony of Dr. Hammond, who is not familiar with the accepted standard of care, the Third District is indeed imposing upon the hospital the responsibility of supervising the character or quality of the contents of the operative note. This is manifestly true, because if the jury is allowed to accept the testimony of a physician such as Dr. Hammond, who is not familiar with the accepted standard of care, that a handwritten note is not of a legitimate variety, the hospital is presumed liable for the surgeon's negligence in failing to prepare a note of a legitimate variety. In fact, under the Third District's resolution of the issue, the hospital may be adjudged conclusively and irrebuttably negligent as a result of Dr. Hammond's testimony that the handwritten note was not of a legitimate variety. Thus, the hospital is responsible for the character or quality of the contents of an operative note, although the legislature never intended such a result in requiring hospitals to maintain surgical and treatment notes. (Petitioner's Brief on the Merits, pp. 25-26)

Plaintiffs do not address defendant's argument that the per se rule of law adopted by the Third District 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.

Similarly, plaintiffs do not address the arguments advanced by defendant at pages 30-34 of its brief that the adoption of the

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rebuttable and conclusive, irrebuttable presumptions of negligence are inequitable and unworkable in practical operation because two trials will be needed to apply the presumptions as formulated by the District Court.

The decision of the Third District will result in imposing on hospitals and health care providers an inflexible rule of law which not only conflicts with numerous decisions of this Court, but is also impracticable. The decision 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.

Defendant was aware when it filed its initial brief that the medical consent law had been declared unconstitutional because it provided in Section 768.46(4)(a) that a written consent which if validly signed by the patient and which meets with the disclosure requirements of the statute shall be "conclusively presumed to be a valid consent." The statute was declared invalid in Cunningham v. Parikh, 472 So.2d 746 (Fla. 5th DCA 1985), because the conclusive presumption is neither rational nor provides the patient with the right to rebut in a fair manner.[2/] The medical consent law purported to allow the conclusive presumption to be rebutted "if there was a fraudulent misrepresentation of a material fact in

2/ Defendant relied on the decision in Cunningham v. Parikh, supra, in its initial brief and contended that the conclusive, irrebuttable presumption of negligence adopted by the Third District is unconstitutional for the same reason. (Brief of Petitioner, p. 15)

obtaining the signature." Section 768.46(4)(a), Florida Statutes. The statute has now been amended to provide that a written consent, if validly signed, shall raise a rebuttable presumption of a valid consent. Section 768.46(4)(a), Florida Statutes (1985).

The Third District asserted in its opinion that Mrs. Valcin claimed in the trial court "that her written consents to the surgery were fraudulently induced ...." (App. 2) Defendant simply contends that Mrs. Valcin never asserted a claim for fraud, either as an affirmative basis for relief or as an affirmative defense. The Third District raised the issue for the first time on appeal, contrary to this Court's decision in Cortina v. Cortina, 98 So.2d 334 (Fla. 1957). By so doing, the Third District put aside its obligation to address the issues made by the pleadings, and instead predicated its decision on a theory never alleged in the pleadings. Plaintiffs do not deny this fact.

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 Third District stated in its opinion that it will be "Valcin's burden at trial to establish through expert testimony that an ectopic pregnancy is a recognized substantial risk inherent in steriliation 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 ...." (App. 7)

The Third District recognized that expert testimony is necessary, and that an expert must be able to testify that the surgeon's alleged failure to advise "was a departure from the accepted standard of medical practice." The record conclusively shows, however, that plaintiffs do not have an expert who is familiar with the accepted standard of medical practice. Since this Court held in Sims v. Helms, 345 So.2d 721 (Fla. 1977), that a summary judgment may be entered in an action for medical malpractice if it can be conclusively established that plaintiff is without ability to produce expert medical testimony in support of her allegations of negligence, the trial court correctly entered summary judgment in favor of defendant.

CONCLUSION

The decision of the Third District Court of Appeal should be quashed.

Respectfully submitted,

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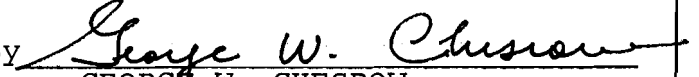
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner on the Merits was mailed to HORTON, PERSE & GINSBERG and VIRGIN & KRAY, P.A., Attorneys for Respondents, 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130, and WILLIAM A. BELL, ESQUIRE, Attorney for Florida Hospital Association, 208 South Monroe Street, Tallahassee, Florida 32301, this 12th day of May, 1986.

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