IN THE SUPREME COURT OF FLORIDA

CASE NO.: 72,338

LINDA K. PADDOCK,

Petitioner,

vs.

CHAWALLUR DeVASSY CHACKO, M.D.,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FIFTH DISTRICT

RESPONDENT'S AMENDED BRIEF ON JURISDICTION

HARRY K. ANDERSON, ESQUIRE
One South Orange Avenue
Suite 650
Orlando, Florida 32801
(407) 422-1781

-and-

E. CLAY PARKER, ESQUIRE
J. SCOTT MURPHY, ESQUIRE
PARKER, JOHNSON, OWEN, McGUIRE
& MICHAUD
108 East Hillcrest Street
Orlando, Fl 32802
(407) 425-4910

Attorneys for Respondent

TABLE OF CONTENTS

TABLES OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

I. INTRODUCTION

Outrageous is perhaps the closest, yet still inexact, word which comes to mind after reading Petitioner's misguided and unprofessional attempt to influence this Court by inferring the existence of some sort of conspiracy amongst three appellate judges, one trial judge, respondent and his counsel to suppress facts and deny Petitioner "justice".

Under the guise of demonstrating to the Court why it should exercise its discretion to review this case, Petitioner has resorted to invective and vituperation. While Respondent's counsel have been forced to fend off such attacks directed against them throughout the course of this litigation, this Court should neither condone nor permit such unethical attacks directed at the judiciary by counsel with "thirteen years of appellate practice.''

As losing parties often say, only they speak "the truth" and only they are "principled". As amply demonstrated by Petitioner's brief, itself, the latter is one quality clearly lacking in Petitioner's position. As for the truth, suffice it to say that Petitioner's "version" is so misleading and inaccurate that two courts and four judges have already rejected it.

While it is inappropriate to go beyond the face of the District Court's decision in a jurisdictional brief, as Petitioner has done, we feel compelled to make the following points.

First, the District Court's recitation of the facts on pages three and four of its opinion is completely accurate. Dr. Chacko suggested that Respondent be hospitalized, but she deferred to her parents. Petitioner's mother deferred to her husband. Before speaking to Petitioner further, Dr. Chacko called the hospital and

reserved a bed for Petitioner. Petitioner's father, concerned about insurance, did not think his daughter needed to be hospitalized, and never gave his consent for his daughter's hospitalization.

At trial, Petitioner's own experts assumed and based their opinions on the fact that hospitalization was recommended, but rejected. Petitioner's contention, at trial, was that something more than the telephone conversations was necessary. Specifically, Petitioner contended that Dr. Chacko should have arranged a face to face interview, and **if** observations and examinations warranted it, Dr. Chacko should have involuntarily committed Petitioner.

The District Court's rejection of such a theory forced Petitioner to, for the first time, argue in her Motion for Rehearing that Dr. Chacko's recommendation of hospitalization was not made strongly enough; that "voluntary" hospitalization could have been accomplished had Dr. Chacko insisted and/or threatened invoking the Baker Act procedures.

Petitioner is engaging in a game of semantics, quarrelling with the terms used by the District Court. The point being made by the District Court was that Dr. Chacko had no legal duty or authority to "non-consensually take a patient into his custody and compel her hospitalization". In other words, Dr. Chacko had no duty to "demand and insure" hospitalization by taking control of Petitioner's life away from her, whether it was under the guise of "voluntary" or "involuntary hospitalization".

In conclusion, three judges of the District Court did not lie,

were not dishonest, and were not guilty of anything except a refusal to be brow-beaten by the "experienced" Appellate counsel's insults, threats and ridicule as set forth in Petitioner's Motion for Rehearing. Petitioner's childish reiteration of these comments does not, and should not, form the basis for convincing this Court to accept jurisdiction.

With that said, we now turn to the alleged conflict between the District Court's decision here, and Wale vs. Barnes, 278 So.2d 601 (Fl. 1973) and Cromartv vs. Ford Motor Co., 341 So.2d 507 (Fl. 1976).

11. SUMMARY OF THE ARGUMENT

A. The District Court's decision, that Dr. Chacko was, as a matter of law, under no duty to non-consensually take the Petitioner into his custody and involuntarily hospitalize her does not conflict with Wale vs. Barnes, 278 So.2d 601 (Fl. 1973). Whether a legal duty exists (as opposed to the "nature and extent" of such a duty) between the parties is a question of law for the court to decide. The decision in Wale vs. Barnes does not hold to the contrary, nor do any of the other cases cited by Petitioner.

B. The District Court's determination that the failure of Dr. Chacko to arrange a "face to face" examination of Petitioner was not, as a matter of law, a proximate cause of Petitioner's self inflicted injuries does not conflict with Wale vs. Barnes, 278 So.2d 601 (Fl. 1973). There was no "direct evidence" on the issue of proximate cause, since Petitioner presented no testimony that such a contact would have prevented the Plaintiff's suicide attempt.

Similarly, the District Court's decision does not conflict with Cromarty vs. Ford Motor Co., 341 So.2d 507 (Fl. 1976), since the court found the expert testimony to be speculative with no basis in evidentiary fact. The basis of the expert testimony was not fact, but speculation as to (1) what Dr. Chacko might have learned during an in person examination and (2) what Dr. Chacko might have done with that information.

III. ARGUMENT

A. THE DISTRICT COURT'S DETERMINATION THAT DR. CHACKO WAS, AS A MATTER OF LAW, UNDER NO DUTY TO NON-CONSENSUALLY TAKE THE PETITIONER INTO HIS CUSTODY AND COMPEL HER HOSPITALIZATION DOES NOT CONFLICT WITH WALE VS. BARNES.

For the third time in this litigation, Petitioner repeats the argument that the "nature and extent'' of a physician's duty is a question of fact, to be determined upon expert testimony. And, for the third time, we acknowledge this as being a correct statement of the law, but totally irrelevant to the issue here.

In order for there to be an issue as to the "nature and extent" of a physician's duty under certain circumstances, the Court must first determine, as a matter of law, whether such a duty exists. Florida Power & Lisht vs. Lively, 465 So.2d 1270, 1273 (Fl. 3d DCA 1985). It is not the role of "experts" to dictate what legal duties exist: they merely explain the parameters of the standard of care, once a duty is established'by the Court.

The trial court determined, and the District Court agreed, that a psychiatrist has no duty to assume custodial care of a patient. In other words, the court found Chat, under any version of the facts, there was no duty on the part of Dr. Chacko to assume responsibility for the Petitioner's actions and decisions, nor any

duty to take control of her life away from her.

The decision in Wale vs. Barnes, 278 So.2d 601 (Fl. 1973) does not in any way conflict with this holding. In Wale, there was no issue as to the existence of a duty between the Plaintiff and Defendant. The Court properly presumed that an obstetrician had a duty to deliver Plaintiff's child in accordance with the "nature and extent" of the standard of care, as determined by the jury.

The District Court's decision here was in accordance with established Florida law. While there are no Florida cases on point, a few analogies to other situations clearly demonstrate the correctness of the Court's decision.

In emergency situations, courts have long held that a person is under no affirmative duty to rescue a person in distress, but once that duty is assumed, the person has an obligation to act reasonably. See, Prosser, Law of Torts, §2 (4th ed. 1971); Restatement 2d (Torts) §§ 314-21. Similarly, police officers have no duty to arrest certain individuals, but once they have arrested a particular individual, they have a duty to act reasonably. See, Everton vs. Willard, 468 So.2d 936 (Fl. 1985).

Similarly here, the District Court determined that Dr. Chacko had no duty to assume custodial care of the Plaintiff. Of course, if he had voluntarily assumed that duty, he would then have had a duty to act reasonably. See, e.g., Nesbitt vs. Community Health of South Dade. Inc. 467 So.2d 711 (Fl. 3rd DCA 1985); North Miami General Hospital vs. Krakower, 393 So.2d 57 (Fl. 3rd DCA 1981); Dillman v. Hellman, 283 So.2d 388 (Fl. 2nd DCA 1973).

As the District Court noted, in each of these cases, "...the

patients were already committed to the custody of a hospital or mental institution...and thus, these custodians were in a position to exercise measures to prevent the suicidal patients from inflicting injuries upon themselves". (Slip Opinion, p. 7-8).

There is also no conflict with Hunt vs. Palm Springs General Hospital, 352 So.2d 582 (Fl. 3rd DCA 1977). There, the patient was brought to the emergency room of the Defendant hospital and seen by a resident who called the patient's private physician. The patient was sent home without being admitted, but returned a few hours later. He was then seen by his private physician who was told that the Plaintiff could not be admitted unless Plaintiff was in "critical condition". The private physician did not find the Plaintiff to be critical, the Plaintiff was moved into the hall, and after some hours, finally transferred to another hospital.

While the court speaks to the issue of the existence of a duty, it is clear that the court actually determined a legal duty might exist between the hospital and patient, but both the extent of that duty and whether the relationship between the parties was such that a legal duty would be imposed, was for the jury to determine.

In other words, the court determined that, depending on the nature of the relationship between the hospital and patient (a factual issue) a legal duty might be required of the hospital when the Plaintiff was seen by nurses and a resident and then left in the hospital hallway for several hours. The fact that the patient had not formally been admitted did not necessarily mean that no

such duty existed, nor did the fact that he was under the care of a private physician. Whether a relationship existed which would, as a matter of law, result in the imposition of such a duty, was for the jury to determine, since it depended on the facts adduced at trial.

Therefore, the Hunt decision is totally inapplicable here. Not only are the facts distinguishable, but the holding in Hunt does not conflict with the District Court's opinion here. Thus, there is no basis for the exercise of the Court's jurisdiction.

B. THE DISTRICT COURT'S DECISION THAT THE FAILURE TO ARRANGE FOR A "FACE TO FACE" EXAMINATION WAS, AS A MATTER OF LAW, NOT A PROXIMATE CAUSE OF PLAINTIFF'S INJURIES DOES NOT CONFLICT WITH WALE VS. BARNES OR ITS PROGENY OR CROMARTY VS. FORD MOTOR CO.

Petitioner's first argument is that the existence of expert testimony as to causation precludes a court from directing a verdict on the issue, and the District Court's opinion conflicts with, inter alia, Wale vs. Barnes, 278 So.2d **601** (Fl. 1973); Zack vs. Centro Espanol Hospital, Inc., 319 So.2d 34 (2nd 1975); City of Hialeah vs. Weatherford, 466 So.2d 1127 (Fl. 3rd DCA 1985) and Hunt vs. Palm Springs General Hospital, 352 So.2d 582 (Fl. 3rd DCA 1977). Petitioner again has misconstrued the District Court's opinion. The District Court, in analyzing the issue of a "face to face" contact by Dr. Chacko, found that there were only two possible results of such a contact.[1] First, Dr. Chacko could have determined there was no need for the patient to be hospitalized, (a decision that the Plaintiff's own experts would not have

[1] There was no testimony, nor any contention, that a face to face contact would, in and of itself, have "cured" the plaintiff, or somehow prevented the Plaintiff from attempting suicide.

criticized) and the patient would have attempted suicide two days later. Second, Dr. Chacko could have determined and recommended Plaintiff should have been hospitalized, a recommendation already made, but rejected, and the patient would again have attempted suicide two days later.2

Thus, no matter what happened as a result of this hypothetical contact, the Petitioner would still have attempted suicide. The District Court therefore properly concluded that, as a matter **of** law, there was no version of the facts which would support the conclusion that the failure to conduct a face to face examination "proximately caused" the Plaintiff's self inflicted injuries. This is a completely different situation from that contained in any of the cases cited by Petitioner as being in conflict with this holding.

For example, in Wale, the experts' testimony was that the cause of the child's injuries was the improper use of forceps during delivery. Similarly, in Zack vs. Centro Espanol Hospital, Inc., 319 So.2d 34 (Fl. 2nd DCA 1975), the experts testified directly that the improper removal of a catheter caused the Plaintiff's injuries. And, in Hunt, the experts testified that Defendant's negligence caused Plaintiff's death, and that the death was avoidable.

That is exactly the type of testimony which the District Court

---

2 The only other "protective measure" that could have been taken after such a meeting was the forcible, involuntary confinement of the Plaintiff. As previously discussed, the Court held that Dr. Chacko had no legal duty to non-consensually take Plaintiff into his custody.

found lacking here. There was simply no expert testimony that had Dr. Chacko seen Petitioner in person, she would not have attempted suicide two days later. Petitioner's own experts would not have criticized Dr. Chacko if he had seen her, and decided that hospitalization was unnecessary. There was no testimony or evidence that had he recommended hospitalization, the recommendation would not have again been rejected. Thus, there was a clear break in the chain of causation, unlike the situations in the cases cited by Petitioner.

Petitioner's second argument is that because the District Court termed the expert's testimony as "speculative" rather than having "no basis in evidentiary fact", somehow this conflicts with the holding of Cromartv vs. Ford, **341** So.2d 507 (Fl. **1976).**

Petitioner has misconstrued the holding of Cromartv, by stating that this Court held that expert testimony on causation could not be speculative as a matter of law.

The Court very clearly stated:

> "We well agree with the District Court of Appeal that verdicts should not be based upon speculative and conjectural testimony with no basis in evidentiary fact." Id. at 508.

The Court concluded, however, that the expert testimony presented at trial was not "speculative", since it was based on the evidentiary fact that a part of the product had indeed fractured. It was this fact that formed the basis of the expert's testimony that a defect caused the fracture which then caused the accident.

In the instant case, there simply was no "evidentiary fact" to buttress the expert testimony on this issue. The sole "basis" for

the experts' opinions on the existence of a causal link (if there was any basis at all) between the lack of a face to face interview and Plaintiff's self inflicted injuries was not fact, but speculation by the experts as to what additional information Dr. Chacko might have discovered during such a meeting and what Dr. Chacko might have done with that information.

There were no evidentiary facts that provided this information, and the expert testimony quoted in the District Court's opinion admits as much. As a result, the Court was eminently correct in finding the testimony "speculative" as a matter of law. This holding was not in conflict with, but was in accordance with the decision in Cromartv.

There being no conflict with either Wale vs. Barnes or Cormartv vs. Ford, the Petitioner has failed to demonstrate that this Court has jurisdiction to review this matter. The Petition should therefore be denied.

V. CONCLUSION

When stripped of its insults, threats and vitriol, Petitioner's attempt to show "express and direct conflict" with the District Court's decision falls far short. Not only, is there no conflict present, the District Court's decision follows long established law on the issues of duty and proximate cause. As a result, the Petition to invoke this Court's discretionary jurisdiction should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to JOEL D. EATON, ESQ., 25 West Flagler Street, Suite 800, Miami, Florida 33130 and J.B. SPENCE, ESQ., Suite 300, Grove Professional Building, 2950 Southwest 27th Avenue, Miami, Fl 33133 this 8 day of 1988.

HARRY K. ANDERSON, ESQUIRE -and-
One South Orange Avenue
Suite 650
Orlando, Florida 32801
(407) 422-1781

E. CLAY PARKER, ESQUIRE
J. SCOTT MURPHY, ESQUIRE
PARKER, JOHNSON, OWEN, McGUIRE & MICHAUD
108 East Hillcrest Street
Orlando, Fl 32802
(305) 425-4910
Attorneys for Respondent

BY: _____
J. SCOTT MURPHY