IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO.: 73, 949
DCA-3 NO.: 86-2031

MARY BROWN,

Plaintiff/Appellant,

vs.

M. DAVID SIMS, M.D.; SOUTH MIAMI HOSPITAL FOUNDATION, INC.; THE FLORIDA PATIENTS COMPENSATION FUND; AND FLORIDA PHYSICIANS PROTECTIVE TRUST,

Defendants/Appellees.

DEFENDANT/APPELLEE'S BRIEF ON DISCRETIONARY JURISDICTION OF THE SUPREME COURT

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STATEMENT OF THE CASE AND FACTS

This is a medical malpractice action brought against M. DAVID SIMS, a gynecologist, CHRISTIAN KEEDY, a neurosurgeon and South Miami Hospital. (A. 1-2) The action involves the alleged negligence of the Defendants in clearing MARY BROWN for elective abdominal surgery. MARY BROWN suffered a stroke shortly after such surgery. (A. 1)

DR. SIMS saw the Plaintiff in his office on April 4th, 1980 to evaluate an abnormal ovarian cyst. DR. SIMS conducted a complete physical examination which included listening to the Plaintiff's heart and lungs with a stethoscope. While in DR. SIMS office, MARY BROWN complained of pain in her right hand and arm as well as weakness. DR. SIMS also recalled that MARY BROWN was holding her arm in a cradle position. DR. SIMS requested that DR. KEEDY, the neurosurgeon conduct an examination of MRS. BROWN due to complaints of pain and weakness in her arm, one day prior to her scheduled hysterectomy. (A. 2)

DR. KEEDY visited MARY BROWN in her room at South Miami Hospital on April 7th, 1980 where she had been admitted for the operation. It is important to note that DR. KEEDY had treated MARY BROWN previously for cervical disc problems. DR. KEEDY testified that he performed a neurological examination, while MARY BROWN contended that KEEDY'S only examination was to test her grip with a hand shake. Nonetheless, DR. KEEDY admitted that he did not auscultate the carotid arteries in MARY BROWN'S neck and that he never carries a stethoscope with him. (A. 2)

DR. KEEDY did not write a report for his April 7th, 1980

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consultation. He testified that he did not make any notations on BROWN'S chart because the consult sheet was not available. He did however orally give DR. SIMS a pre-surgical clearance to operate on MARY BROWN. (A. 3)

Dr. Albanes, the Staff Physician at South Miami Hospital took a patient's history and testified that he also performed a physical examination of MRS. BROWN. The evidence is conflicting as MARY BROWN declared that Dr. Albanes never touched her. (A. 3)

The Plaintiff's expert witness regarding the standard of care rendered by DR. SIMS was Dr. Gross. Dr. Gross testified that it was good medical practice to get a consult from DR. KEEDY in a case such as this. (A. 4)

The Plaintiff then attempted to have Dr. Sidney Cohen testify as to the standard of care rendered by DR. SIMS. During the voir dire examination of Dr. Cohen the court ruled that he was not qualified to testify as to standard of care rendered by DR. SIMS. Dr. Cohen is a Board Certified Neurologist in New York since 1951 and is associated with a New York Hospital. However, the last time that Dr. Cohen had anything to do with actual obstetrics and gynecological work was in his first year as an intern in 1943 when he delivered a baby. Thus, the trial court found in the record that the doctor did not possess sufficient training, experience and knowledge in obstetrics and gynecology to testify as to DR. SIMS care and treatment of MARY BROWN.

Based on the opinion of Dr. Gross, at the conclusion of the evidence, in a ten day trial, the court directed a verdict for

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DR. SIMS. On the following day the jury returned verdicts in favor of DR. KEEDY and the Hospital. (A. 2)

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SUMMARY OF THE ARGUMENT

The Third District Court of Appeal in the instant case never deferred to the trial court's inquiry regarding the training, experience, and knowledge of Dr. Cohen, a neurosurgeon to testify as to the standard of care of DR. SIMS, the Petitioner, a gynecologist. It is incumbent upon this court to recognize that although the Third District Court of Appeal cites Chenoweth v. Kemp in support of its decision to reverse this cause and to allow Dr. Cohen to testify, the Third District Court of Appeal is in direct conflict with Chenoweth v. Kemp.

The court in Chenoweth was primarily concerned with the determination that the trial court must make in order to allow or disallow a proffered expert from testifying. While the Chenoweth court on its facts said, that the lower court erred in not allowing two neurosurgeons to testify that a gynecologist and anesthesiologist were negligent in positioning a patient on the operating table, it is more important to recognize why this court found that to be error. This court held in Chenoweth that:

> "The record is clear that the court made this determination, not upon any finding that they did not possess sufficient training, experience, or knowledge to provide such expert testimony, as allowed under paragraph (c) of §768.45(2), but solely because they were neither specialists nor board certified in either gynecology or anesthesiology."

In the instant cause, the trial court made the necessary determination that Dr. Cohen did not have sufficient training, knowledge or experience to testify as to the standard of care of DR. SIMS. This finding was based on the trial court's finding that Dr. Cohen was a board certified neurologist since 1951 and

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was associated with a New York Hospital. However, the last time that Dr. Cohen had anything at all to do with actual obstetrics or gynecological work was in his first year as an intern in 1943 when he delivered a baby. Thus, the record had sufficient information from which the trial court can make the necessary determination as to the proffered experts qualifications to testify as to the standard of care of a gynecologist. Notwithstanding same, the Third District Court of Appeal reversed the opinion citing Chenoweth, which is in direct conflict with the important factors that lead to the Chenoweth decision.

The Third District Court of Appeal opinion is also in direct conflict with Wright v. Schulte, Caputo v. Taylor and Young v. Board of Hospital Directors of Lee County, as both of those cases also stress the need to make the necessary inquiry when an expert is proffered as to his training, knowledge and experience. Both of those cases made their decision as to whether or not to allow an expert to testify based on that analysis. The Third District Court of Appeal has entirely overlooked that analysis and is seeking to rely on cases that actually stand for exactly the opposite conclusion.

Therefore, it is abundantly clear that the decision of the Third District Court of Appeal in the case at bar, is in direct conflict with Chenoweth v. Kemp, Wright v. Schilte, Caputo v. Taylor, and Young v. Board of Hospital Directors of Lee County and as such this Court must exercise its jurisdiction to resolve the conflict in the instant cause.

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ARGUMENT

THE INSTANT OPINION IS IN DIRECT CONFLICT WITH CHENOWETH v. KEMP, WRIGHT v. SCHULTE, CAPUTO TAYLOR AND YOUNG v. BOARD OF HOSPITAL DIRECTORS OF LEE COUNTY

It is clear that the Third District Court of Appeal opinion in the instant cause is in direct conflict with the decision of this Court and a number of sister districts as to the issue of when to allow an expert to testify in a medical malpractice case when the expert is not a similar health care provider. The court in Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1918), was primarily concerned with the determination that a trial court needs to make in order to allow or disallow an expert from testifying. While the Chenoweth court on its facts, did say the lower court erred in not allowing two neurosurgeons to testify that a gynecologist and anesthesiologist were negligent in positioning a patient on the operating table, it is clear that the important factor is why the court found this to be error. The court in Chenoweth stated:

> The trial court, after studying this section [768.45(2)(b)(c)], refused to allow the two neurosurgeon to testify. The record is clear that the court made this determination, not upon any finding that they did not possess sufficient training experience, or knowledge to provide such expert testimony, as allowed under paragraph (c) of section 768.45(2), but solely because they were neither specialists nor board certified in either gynecology or anesthesiology.

(In the footnote the court included the following excerpt from the trial:

> Mr. Varner: It is your Honor's ruling that this particular surgeon does not have the training, experience and knowledge to provide expert testimony?

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> The Court: My ruling is that in order for him to be able to testify against these gentlemen, he should be certified.
>
> Mr. Varner: That he has to be Board Certified?
>
> The Court: He has to be a specialist. I have made my ruling, whether it is right or wrong, you have a record here. Let's not pursue it any longer. (T. 142).) Id. at 1124-25.

This Court in Chenoweth found it was error to exclude the expert testimony due to the court's reason for exclusion of witnesses and this was not based upon a finding as to their lack of training, experience or knowledge as is necessary under Florida Statute 768.45(2). In the Third District Court of Appeal opinion in the instant case, the Court entirely overlooked the fact that the court did make specific findings relating to Dr. Cohen's ability to testify and the trial court stated:

> The Court: I will make findings based on the testimony that I have heard from the Doctor, that I do not believe that it has been, has not been shown to my satisfaction, that this doctor possesses sufficient training, experience and knowledge as a result of practice or teaching in the obstetrics and gynecologic specialty.
>
> In order to show practice or teaching in related field of medicine so as to be able to provide such expert testimony as to the prevailing of DR. SIMS' specialty. But, ... it means that I do not think his experience qualifies him to testify about DR. SIMS. (R. 136-7).

It is abundantly clear, that Chenoweth is in direct conflict with the holding of the Third District Court of Appeal in the instant cause.

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This case is also in direct conflict with Wright v. Schulte, 441 So.2d 660 (Fla. 2d DCA 1983). The court in Wright again determined the necessity to make certain initial determinations in a medical malpractice case when the expert was not a similar health care provider. The instant case has failed to acknowledge the necessity and the importance of deferring to the trial court as to the proffered experts training experience and knowledge. In Wright the court held,

> the trial judge must determine whether the proffered expert possesses sufficient training, experience, and knowledge to provide expert testimony as to the acceptable standard of care in a given cause. The trial judge in the case before use did not do this; he simply rejected Dr. Shanklein on the ground that he is not a surgeon and, therefore, was incompetent to testify as to the standard or care in a case involving alleged negligence in the performance of a surgical procedure. Id. at 661-2.

Again, just as Chenoweth is in direct conflict with the Third District Court's findings in the instant case so is Wright, as the court in Wright stressed the necessity to make sufficient inquiry and findings based upon the witnesses lack of training experience or knowledge, similarly so did the trial court in the instant cause, however the Third District has refused to acknowledge same.

Similarly in Caputo v. Taylor, 403 So.2d 551, 554 (Fla. 1st DCA 1981), the Court found no error in the trial court's ruling that a pathologist was not qualified to testify as to the standard of proper care and treatment of potential breast cancer patients. As the court stated,

> Section 768.45(2)(c), Florida Statutes,

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> provides that a doctor may testify as to the expected standard of care for a given health care provider if he is a similar health care provider or if it is established to the satisfaction of the court that he possesses sufficient training, experience and knowledge to provide such expert testimony as to the acceptable standard of care in a given case. Dr. Feegel is not a "similar health care provider" since he is not a gynecologist. The question then became one for the trial court as to whether the witness had sufficient training and knowledge to allow him to testify as to an acceptable standard even though he is not a similar provider.

When the court in Caputo, reviewed the record they found that the trial court had not abused its discretion in refusing to allow the pathologist to testify. This is important as the Caputo Court also made the necessary findings and analysis, as did the trial court in the case at bar.

Similarly, in Young v. Board of Hospital Directors of Lee County, 426 So.2d 1080 (Fla. 2d DCA 1983), the trial court did not err in refusing to allow a psychiatrist to testifying about the standard of care applicable to a psychiatric nurse. The trial court found that the psychiatrist was not a "similar health care provider" and the expert did not satisfy the trial court as to the level of training, experience and knowledge. The Second District affirmed and held; "The record supports the trial court's dissatisfaction with the psychiatrist's experience and knowledge relevant to the standard of care in issue, including, for example, the psychiatrist's lack of familiarity with the day-to-day practices of a psychiatric nurse." Young at 1081.

Dr. Cohen was not a similar health care provider since he was not an obstetrician or gynecologist. The trial court then

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determined that he lacked sufficient training and knowledge necessary to testify as to the standard of care at issue.

The Court made sufficient inquiry once it determined that Dr. Cohen was not a gynecologist but rather was a neurosurgeon. The Court then went on to evaluate whether he had sufficient training and experience in light of the fact that he would be testifying as to the standard of care of a gynecologist. The trial court was not satisfied that Dr. Cohen did not have that necessary training and experience. There is certainly ample evidence to support the trial court's dissatisfaction with Dr. Cohen being able to render an opinion as to the standard of care afforded by DR. SIMS in the instant cause. That determination is the exact determination that was required to be made in Chenoweth v. Kemp, Wright v. Schulte, Caputo v. Taylor, and Young v. Board of Hospital Directors of Lee County. It is therefore apparent that the Third District Court of Appeal in the instant cause is in direct conflict with those cases as the Third District has refused to follow the dictates of this Court and adhere to the trial court's inquiry. Therefore, it is abundantly clear, that this Petitioner is entitled to review of this cause as the opinion of the Third District Court of Appeal is in direct conflict with the decision of this Court and the sister districts.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 4th day of April, 1989, to: **PAUL SIEGEL, ESQ.,** Sinclair, Louis, Siegel, et al. 1125 Alfred I. DuPont Bldg., Miami, FL 33131; **JOHNATHAN LYNN, ESQ.,** Stephen, Lynn, Chernay & Klein, P.A., 9100 South Dadeland Blvd., One Datran Center, Suite 1500 Miami, FL 33156; **RONALD C. KOPPLOW, ESQ.,** 1950 S.W. 27th Avenue, Miami, FL 33145; and **JAMES E. TRIBBLE, ESQ.,** Blackwell, Walter, et al., 2400 Amerifirst Bldg., One S.E. Third Avenue, Miami, FL 33131.

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