IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,949

3D DCA NO. 86-2031

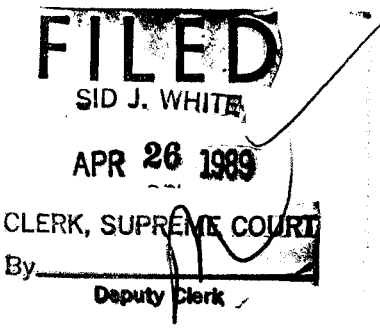
M. DAVID SIMS, M.D.,)

Petitioner,)

vs.)

MARY BROWN,)

Respondent.)



RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF FACTS[1]

The jurisdictional brief of Dr. Sims includes numerous facts not set forth in the decision of the Third District Court of Appeal. Resort to the "record proper" a la Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965) is no longer proper. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Rather than moving to strike the brief and possibly delaying disposition of the case, we simply ask this Court to ignore the improper references to the trial record.

The Third District characterized the issues in the trial court as follows (A 7):

> The disputed issues on the negligence claim included: 1) whether there was a thorough presurgical physical examination; 2) whether a report of that examination was available to the operating physician and other professional staff persons for the purpose of making critical judgments regarding the patient's treatment; 3) whether a thorough physical examination and creation of an adequate medical record, to include the patient's history, would have alerted the treating physician and hospital staff that the patient was not a candidate for the contemplated surgery; and 4) assuming that minimal standards of care required thorough physical examination and an available written report of that examination, whether the absence of either or both was a causal factor in the patient's subsequent injuries. (Emphasis added.)

The appellate court found that the trial court erred in excluding from evidence the "Interpretation" section of the

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[1]The abbreviation "A" is used for the appendix to Sims' brief on jurisdiction. In two related cases, numbers 73,964 and 73,965, Dr. Keedy and South Miami Hospital also seek certiorari based on contentions that the reversal due to exclusion of the JCAH Survey Report conflicts with other decisions.

Accreditation Manual of the Joint Commission on Accreditation of Hospitals, the relevant portion of which is set forth at page 6 of the opinion:

> The report of the physical examination. This report shall reflect a comprehensive current physical assessment .... The medical record shall document a current, thorough physical examination prior to the performance of surgery. (Emphasis added.)

In this setting, in addressing the issues relating to Dr. Sims, the appellate court noted that (A 4):

> Dr. Cohen, another expert neurologist[2] called by the Plaintiff, was not permitted to testify that Dr. Sims failed to conduct a thorough presurgical physical examination. Cohen testified that he regularly does presurgical physicals for neurological and gynecological patients. In excluding his testimony the trial court made a finding that Dr. Cohen did not "possess sufficient training, experience and knowledge as a result of practice or teaching in the obstetrics and gynecologic specialty and that his experience does not qualify him to testify about Dr. Sims." (Emphasis added.)

In a later section of the opinion, the Third District found (A 11):

> It is clear from all the evidence, especially the improperly excluded evidence, that the appellees breached a duty to conduct thorough presurgical physical examinations and to prepare written reports of the examinations. The improperly excluded evidence, i.e., industry-wide standards and expert medical testimony, was relevant to both duty and proximate cause elements of the negligence claims. (Emphasis added.)

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[2]The original opinion said "neurosurgeon" but this was corrected by the Order on Motion for Clarification in the appendix to this brief.

SUMMARY OF ARGUMENT

The Third District Court of Appeal decided that a neurologist should have been permitted to testify that a gynecologist failed to conduct a thorough pre-surgical physical examination. The issue in this case is not whether a mistake was made during the surgery, but whether there was substandard care before the surgery even began. The decision is completely consistent with Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981) in which this Court decided that neurosurgeons should have been permitted to testify about the way the patient was positioned on the operating table under the care of a gynecologist and an anesthesiologist. In the instant case, the Third District Court of Appeal specifically relied upon Chenoweth and followed it. Nothing in the decision and nothing said in the opinion is remotely inconsistent with this Court's Chenoweth case. Similarly, there is nothing whatsoever to establish any conflict between the instant case and the other three District Court of Appeal decisions relied upon by Dr. Sims. In the absence of an express and direct conflict required by our constitution, this Court is without certiorari jurisdiction.

ARGUMENT

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE INSTANT OPINION AND ANY OF THE CASES CITED BY SIMS.

The principal case relied on by Sims for conflict jurisdiction is Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981). In Chenoweth, two neurosurgeons were offered as expert witnesses

on whether a specialist in obstetrics and gynecology and an anesthesiologist were negligent in the way in which they positioned and secured the patient on the operating table. This Court found (396 So.2d at 1125):

> While it is clear that the proffered witness would not have been competent to testify on certain acts performed by the appellees, such as the hysterectomy performed by Kemp or the anesthetizing performed by Szmukler, it is not at all clear that the two neurosurgeons were not qualified under the statute to testify concerning the positioning of the patient on the operating table and the effect of that positioning. The standard of care for this portion of the procedure may well be, as claimed by one of the neurosurgeons, the same for all surgeons relative to protection of the ulnar nerve from compression or other injury. We find the exclusion of these witnesses, under the circumstances, was error. However, we find it was harmless error, since it was not disputed that if the ulnar nerve injury was caused on the operating table, such would constitute a breach of the standard of care for both Kemp and Szmukler.

Far from creating an express and direct conflict with Chenoweth, the Third District strictly adhered to this Court's decision. The Court specifically noted that the testimony offered by Dr. Cohen addressed the issue of whether Dr. Sims conducted a "thorough pre-surgical physical examination". The appellate court found that Dr. Cohen should have been permitted to testify "because it is the presurgical omission, rather than a surgical mishap, which allegedly caused the damage" (A 5). The appellate court noted Dr. Cohen's testimony "that he regularly does presurgical physicals for neurological and gynecological patients." (A 4). Thus, the finding by the trial judge, blindly

repeating the statutory formula at the urging of Sims' attorney, that Dr. Cohen did not possess sufficient training, experience and knowledge as a result of practice or teaching in the obstetrics and gynecological specialty, was erroneous and not supported by the record. There is complete consonance, rather than dissonance, with Chenoweth.

Sims argues that there is direct conflict with Chenoweth because the trial court in Chenoweth did not make a finding that the witness did not possess sufficient training, experience or knowledge to provide the testimony, while the trial court in the instant case did make such a finding under the statutory formula. That is simply a factual difference between the cases, but not an express and direct conflict between the decisions. Part of the appellate process was a review by the District Court of Appeal of whether the trial court's finding of lack of statutory qualifications to testify was supported by the record. There was no record support for the finding because the issue was pre-surgical clearance, on which many different specialists could testify, rather than the way the surgery was done. Article V does not give this Court jurisdiction to make a second review of that finding.

Nor do the other three cases cited by Sims remotely present any conflict with the instant decision. In Caputo v. Taylor, 403 So.2d 551 (Fla. 1st DCA 1981), the Court found no error in a trial judge's refusal to allow a pathologist to testify about the standard of care of a gynecologist since there was agreement on the standard of care by all of the witnesses. In Wright v.

Schulte, 441 So.2d 660 (Fla. 2d DCA 1983), error was found in not permitting a physician qualified by experience and teaching to testify, even though he was now a specialist in a field different from that of Defendant. In Young v. Board of Hospital Directors, 426 So.2d 1080 (Fla. 2d DCA 1983), the record supported a trial court finding that the proffered expert did not have the level of training experience and knowledge to testify. Nothing said or decided in Brown v. Sims is remotely inconsistent with anything said or decided in these three cases.

Unfortunately for Mary Brown, Dr. Sims did not understand that his patient needed a thorough pre-surgical history and physical examination, recorded in Mary Brown's chart, before Sims operated. Now, Sims' attorneys have failed to comprehend that the decision of the Third District Court of Appeal again relates to testimony about the pre-surgical standard of care, which Chenoweth and many other cases have decided can be the subject of testimony by experts other than those who specialize in the particular part of the body to be operated upon. It is simply common sense that there are many different kinds of doctors who clear patients for surgery; they do not need to be expert on the thousands of different surgeries which can be done, in order to offer an opinion on whether the pre-surgical clearance was adequate.

CONCLUSION

No hint of express and direct conflict has been suggested by Dr. Sims. Certiorari should be denied.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Blackwell, Walker, Fascell & Hoehl, 2400 AmeriFirst Building, Miami, Florida 33131; Stephens, Lynn, Chernay & Klein, 9100 S. Dadeland Blvd., Suite 1500, Miami, Florida 33156, Carey, Dwyer, Cole, Eckhart & Mason, P.O. Box 450888, 2180 S.W. 12th Avenue, Miami, Florida 33145 and Ronald C. Kopplow, Esq., 1950 S.W. 27th Avenue, Miami, Florida 33145, this April 24, 1989.

BY _____
PAUL SIEGEL