OA 11-7-89

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO.: 73, 949

FILED
SID J. WHITE
AUG 9 1989
CLERK, SUPREME COURT
By
Deputy Clerk

M. DAVID SIMS, M.D.,

Petitioners,

v.

MARY BROWN,

Respondent.

ON PETITION FOR REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF ON THE MERITS OF PETITIONER M. DAVID SIMS, M.D.

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TABLE OF CITATIONS

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INTRODUCTION

This brief is filed on behalf of DR. DAVID M. SIMS, Petitioner, a Defendant in the medical malpractice action below. Respondent is MARY BROWN, the Plaintiff in the trial court. SOUTH MIAMI HOSPITAL and DR. CHRISTIAN KEEDY were also Defendants before the trial court and are presently Petitioners as well. The following symbols will be used for reference purposes:

"R" - For references to the record on appeal.

"T" - For references to the trial transcript.

"A" - For references to the deposition of Dr. Wilfredo Albanes read at trial.

"S.R." - For references to the supplemental record on appeal.

Unless otherwise indicated, all emphasis has been supplied by Petitioner.

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STATEMENT OF THE CASE

On April 6, 1982, MARY BROWN filed a medical malpractice action against DAVID SIMS, M.D., CHRISTIAN KEEDY, M.D., SOUTH MIAMI HOSPITAL FOUNDATION, INC., FLORIDA PHYSICIANS INSURANCE RECIPROCAL, FLORIDA PATIENTS COMPENSATION FUND, and CARNERICK LABORATORY. (R. 1-4) The amended complaint filed by MARY BROWN alleged that the Defendants had negligently cleared the Plaintiff for elective surgery and that they had performed the surgery negligently. (R. 13-22) There was no evidence presented at trial that the surgery was performed negligently. The Plaintiff claimed in her amended complaint that she had suffered a stroke as a result of the Defendants negligence. (R. 13-22)

On June 24th, 1985, the Plaintiff filed a motion for summary judgment on the issue of liability or, alternatively, to shift the burden of proof to the Defendants. (R. 89-98) The Plaintiff alleged in her motion, that the critical issue in the case was whether DR. KEEDY had negligently performed a consultation shortly after Plaintiff's admission on April 7th, 1980. The Plaintiff argued that DR. KEEDY'S failure to prepare a consult sheet or other medical records for the April 7th consultation required that the burden of proof as to DR. KEEDY'S negligence be shifted from the Plaintiff to the Defendants. (R. 89-98)

On September 20th, 1985, Judge Orr heard argument on Plaintiff's motion. On September 30th, 1985, the trial court entered an order denying Plaintiff's motion for summary judgment, but shifting the burden of proof to the Defendants. (R. 101-102) The trial court specifically found that the Plaintiff was

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entitled to have the burden of proof shifted to the Defendants solely on the issue of DR. KEEDY'S negligence and the performance of his April 7th consultation, due to the absence of the consultation report.

Trial in this cause began April 8th, 1986 and concluded on April 18th, 1986. On April 17th, 1986, the trial court granted DR. SIMS motion for directed verdict. (T. 988) The trial concluded on the next day with a finding by the jury of no negligence on the part of DR. CHRISTIAN KEEDY and SOUTH MIAMI HOSPITAL.

The Plaintiff timely appealed the jury verdict, and DR. KEEDY filed a cross-appeal directly relating to the court order shifting the burden of proof to the Defendants.

The Third District Court of Appeal reversed the judgments rendered by the trial court and the jury and remanded this cause to the trial court for a new trial consistent with its opinion. All Defendants sought the jurisdiction of this Honorable Court based on direct and express conflicts with the decision rendered by the Third District Court of Appeal in the instant cause. This Court accepted jurisdiction on July 14th, 1989.

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STATEMENT OF THE FACTS

This is a medical malpractice action brought against M. DAVID SIMS, a Gynecologist, CHRISTIAN KEEDY, a Neurosurgeon and SOUTH MIAMI HOSPITAL. (R. 1-4) The action involves the alleged negligence of the Defendants in clearing MARY BROWN for elective abdominal surgery. (R. 13, 40-41) MARY BROWN suffered a stroke shortly after such surgery. (R. 13-22)

On April 4th, 1980, DR. SIMS saw the Plaintiff in his office to evaluate an abnormal ovarian cyst. (T. 273, 277, 542) DR. SIMS conducted a complete physical examination which included listening to the Plaintiff's heart and lungs with a stethoscope. (S.R. 14-15) While conducting the physical examination, MARY BROWN complained to DR. SIMS of pain and weakness in her right hand and arm as well as weakness. (S.R. 16) DR. SIMS also recalled that MARY BROWN was holding her arm in a cradled position. (R. 1245) Due to these complaints and observations DR. SIMS requested that DR. KEEDY, the neurosurgeon, conduct an examination of MRS. BROWN, one day prior to her scheduled hysterectomy. (SR 400-401)

MRS. BROWN, had been seeing DR. KEEDY since 1978 with complaints of cervical pain and right arm weakness. (T. 1019-1021) DR. KEEDY'S diagnosis was cervical osteoarthritis, a problem with the joints in the neck. To relieve the pain in the neck and the arm, DR. KEEDY performed a cervical fusion on January 12, 1978. (T. 480). MARY BROWN saw DR. KEEDY three more times over the next year, complaining of the same problems. Each time DR. KEEDY attributed her continued difficulties to her prior

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treatment for radiculitis.

DR. SIMS requested that DR. KEEDY see MARY BROWN because he was concerned about the surgical procedure as the following colloquy indicates:

QUESTION: Doctor, what concerns did you have about this patient in view of the complaints of pain and weakness in the right arm?

ANSWER: I was concerned about it in reference to pre-surgery and in reference to the fact that we planned to do the indicated surgical procedure and wanted to be sure that there was no problems relative to her central nervous system or relative to the neck that precluded us from doing our surgery. (Depo. of DR. SIMS, pg. 21)

DR. KEEDY visited MARY BROWN in her room at South Miami Hospital on April 7, 1980, where she had been admitted for a hysterectomy and a right salpingo oophorectomy. DR. KEEDY testified that he performed a satisfactory neurological examination of MARY BROWN, 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. (S.R. 410)

DR. KEEDY did not write a report for his April 7th, 1980 consultation. He testified that he did not make any notations on MARY BROWN'S chart because the consult sheet was not available. However, DR. KEEDY did give DR. SIMS, orally, a pre-surgical neurological clearance to operate on MARY BROWN. (SR 448) MARY BROWN stated in her deposition, that she heard Dr. Keedy tell DR. SIMS that he was going to approve the operation. (Depo. of MARY

BROWN, pg. 39)

MARY BROWN was not only examined by DR. KEEDY, the neurologist, but was also seen by a SOUTH MIAMI HOSPITAL staff physician, Dr. Wilfredo Albanes. Dr. Albanes was a general practitioner in Cuba from 1945 to 1965. (A. 4) He has been licensed to practice in the State of Florida since 1973 or 1974 and has worked at South Miami Hospital, Victoria Hospital, Christian Hospital, Opa-Locka Hospital and Holiday Hospital. (A. 6) Dr. Albanes, the in-house physician, of SOUTH MIAMI HOSPITAL testified that he also performed a physical examination and took a history of MRS. BROWN. (S.R. 755-756) Dr. Albanes typically examines patients by palpating both sides of the neck while looking for lumps or large carotid pulse. (S.R. 768) MRS. BROWN'S neck was supple with no palpable thyroid, and her blood pressure was normal. (T. 1067-1068, SR 767). Dr. Albanes also testified that there is a policy rule at SOUTH MIAMI HOSPITAL that surgical patients are to be examined by in-house physicians, unless the attending physician prefers to do his own history. (A. 12) SOUTH MIAMI HOSPITAL has a list which indicates which physicians do not want histories done by in-house physicians. (A. 12) DR. SIMS' name does not appear on this list, indicating that he wants histories of his patients taken by in-house physicians. (A. 12)

In addition to the examinations conducted by DR. KEEDY and Dr. Albanes a pre-anesthesia evaluation on the Plaintiff was performed by Dr. Polvaranti, and the Plaintiff's blood pressure was found to be within a normal range. (T. 90-91) Anesthesio-

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logists perform physicals and history just like other doctors. (T. 237) The pre-operative suite nurse also found the patients blood pressure to be within normal range. (T. 92-97).

MARY BROWN'S initial post surgical recovery was normal. (T. 776) However, she began having problems during the early morning hours of April 9th. (T. 776) Dr. Levinson, a vascular surgeon who had participated in the surgery examined MARY BROWN and noticed symptoms of a stroke which developed over the next few days. (T. 776-782) X-rays revealed a near total occlusion in the left carotid artery. (T. 780)

The Plaintiff's expert witness regarding the standard of care rendered by DR. SIMS was Dr. Gross. Dr. Gross is not Board Certified in obstetrics and gynecology, he is certified in neurological surgery. (T. 419) The court allowed Dr. Gross to testify as to what needed to be done with respect to examining a patient prior to hysterectomy surgery, although counsel for DR. SIMS had argued that Dr. Gross had no experience or very little experience in gynecological surgery. (T. 291, 300) Counsel for DR. SIMS argued that Dr. Gross did not have enough experience in gynecology to render any opinions as to DR. SIMS however, the trial court overruled counsel's objection and let Dr. Gross testify. (T. 291, 306) Dr. Gross had never done any of the operations normally performed by a gynecologist, such as: cesarean section,[1] hysterectomy, oophorectomy, slapincto-oophorectomy or episiotomy. (T. 381)

At trial Dr. Gross testified that it was good medical

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[1]Dr. Gross helped with a cesarean section in 1928 (T. 381)

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practice for DR. SIMS to get a consult from DR. KEEDY. (T. 388) Dr. Gross also testified that if a neurologic consultant called in for a patient about to have surgery does not feel competent to give clearance, then he or she should advise that an internist be consulted. (T. 429, 430)

During the course of the trial the Plaintiff also attempted to have Dr. Sidney Cohen testify as to the care rendered by Dr. SIMS. According to the expert witness interrogatories propounded to the Plaintiff, Dr. Cohen was to express opinions only as to DR. KEEDY and Dr. Albanes and not as to DR. SIMS. In Plaintiff's answers to interrogatories, she specifically stated:

> Dr. Cohen will testify that Dr. Keedy and Dr. Albanes should have listed to MARY BROWN'S carotid arteries and that she was not appropriately cared for post-operatively. Her pre-operative physical examinations were cursory at best and not adequate. It is not adequate medical care for a consulting physician to fail to record a report on his consultation.

Counsel for DR. SIMS, stated during trial it was his understanding that Dr. Cohen was not to testify as to DR. SIMS, and counsel did not initially voir dire Dr. Cohen. (T. 58) Counsel's belief was also shared by the court.

> **THE COURT:** This person (referring to Dr. Cohen) was not going to testify with respect to the health care provided by DR. SIMS. That was my understanding (T. 20)

When the Plaintiff attempted to have Dr. Cohen testify against DR. SIMS a voir dire examination was conducted. During this voir dire examination it was revealed that Dr. Cohen, just like Dr. Gross, is not Board Certified in obstetrics or gynecology. (T. 122) Unlike Dr. Gross, Dr. Cohen is Board

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Certified in Neurology, not in neurological surgery. (T. 122) As Dr. Cohen had explained earlier, a neurologist, such as himself, and neurosurgeons, such as Dr. Gross, are trained in the same neurological field. (T. 81) The difference in the two fields concern curing methods. A neurologist's treatment consists primarily of medications or various physiotherapeutic modalities while neurosurgeons spend most of their time in the neurological diseases that are amenable to surgical corrections. (T. 81) Therefore, the only distinction between Dr. Cohen and Dr. Gross, as pointed out by counsel for DR. SIMS, is that Dr. Gross does in fact perform surgery. (T. 292) This distinction is another factor which led to court to exclude the testimony of Dr. Cohen as to the standard of care rendered by DR. SIMS, as the Court stated:

> **THE COURT:** This doctor (Dr. Gross) falls in a slightly different category than Dr. Cohen. . . . (R. 300)

Later on, the Court stated:

> **THE COURT:** . . . I didn't have to reach that question with respect to Dr. Cohen because he wasn't a hands on surgeon in my judgment. (T. 302)

In voir dire examination it was also revealed that Dr. Cohen just like Dr. Gross has very little experience with the common gynecological operations. Dr. Cohen just like Dr. Gross has never performed a C-section, hysterectomy, oophorectomy, celiosalpingectomy, pelvic floor repairs, nor has he ever performed a surgical procedure for a right ovarian cyst. (T. 125-127) Based upon the above testimony the trial court ruled:

> **THE COURT:** . . . I don't believe that it has been shown to my satisfaction, that this

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> 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 a relating field of medicine so as to be able to provide such expert testimony as to the prevailing of DR. SIMS' specialty. But, I realize that's not the specific findings of acts but it means I don't think that his experience qualifies him to testify about DR. SIMS.

There was no other testimony at trial that gave any indicia that DR. SIMS was negligent in the care and treatment of MARY BROWN. After the Plaintiff rested the trial court directed a verdict in favor of DR. SIMS.

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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 neurologist to testify as to the standard of care of DR. SIMS, a board certified gynecologist. The trial court excluded Dr. Cohen for a myriad of reasons. Dr. Cohen is a board certified neurologist in New York since 1951 and does not perform any surgeries. Dr. Cohen has never performed any of the common procedures that gynecologists perform. In particular, Dr. Cohen has never performed a cesarean-section, hysterectomy, oophorectomy, celiosalpingectomy, any pelvic floor repairs, and any surgical procedures for a right ovarian cyst. In fact, the last time that Dr. Cohen delivered a baby was in 1943. Based upon the above facts the trial court explicitly ruled that Dr. Cohen does not possess the "sufficient training, experience and knowledge as a result of practice or teaching in the obstetrics and gynecologic specialty." The court further stated that he did not believe that Dr. Cohen had the capability to testify as to any presurgical clearance as Dr. Cohen did not perform surgeries.

Although the Third District Court of Appeal relies on 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 clearly 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 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 Court had sufficient information to 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.

Dr. Cohen was never disclosed as an expert witness that would be rendering any opinions relative to DR. SIMS care and treatment of MARY BROWN. In answers to sworn interrogatories the

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Plaintiff never revealed that Dr. Cohen was going to testify relative to the care and treatment of MARY BROWN. Dr. Cohen was only going to testify that, "DR. KEEDY and Dr. Albanes should have listened to MARY BROWN'S carotid arteries and that she was not appropriately care for post operatively. Her pre-operative physical examinations were cursory at best and not adequate. It is not adequate medical care for a consulting physician to fail to record a report in his consultation." The answers to interrogatories clearly failed to apprise this Defendant that Dr. Cohen had any expert opinions relative to DAVID SIMS.

For this reason, DR. SIMS' counsel did not initially cross-examine Dr. Cohen. Counsel's understanding was also shared by the Court as the Court stated with reference to Dr. Cohen, "this person was not going to testify with respect to the health care provided by DR. SIMS. That was my understanding."

The failure to timely disclose Dr. Cohen as an expert, as well as the fact that Dr. Cohen did not possess sufficient training, experience or knowledge to testify relative to DR. SIMS clearly mandates the reversal of the Third District Court's opinion.

The directed verdict entered in favor of DR. SIMS was appropriately granted by the trial court. The trial court reviewed the testimony of Dr. Gross, the only expert witness to testify relative to the care and treatment rendered by DR. SIMS and found that there was no evidence presented by the Plaintiff upon which the jury could properly find for the Plaintiff. The only evidence presented was that DR. SIMS should have obtained a

medical clearance from a consultant who specialized in neurology and from an internist or generalist. DR. SIMS did receive an opinion from DR. KEEDY, the neurosurgeon and was given medical clearance by DR. KEEDY to operate on MARY BROWN. Further, DR. SIMS received a complete history and physical from Dr. Albanes, a generalist, who is an in-house physician at SOUTH MIAMI HOSPITAL. As such there was no evidence to support a verdict for the Plaintiff and the Court was correct in granting M. DAVID SIMS, M.D. motion for directed verdict. Therefore, the Petitioner, M. DAVID SIMS, M.D. would respectfully request that this Honorable Court reverse the decision of the Third District Court of Appeal and reinstate the verdict entered by the trial court in this cause.

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ISSUE I

THE TRIAL COURT WAS CORRECT IN NOT ALLOWING DR. SIDNEY COHEN TO TESTIFY AS TO DR. SIMS' ALLEGED NEGLIGENCE WHERE:

(A) DR. COHEN DID NOT POSSESS THE REQUISITE TRAINING, EXPERIENCE OR KNOWLEDGE TO PROVIDE SUCH EXPERT TESTIMONY

In the absence of the jury, and after DR. SIMS' counsel had examined Dr. Cohen, Dr. Cohen was proffered as an expert witness to testify as to the proper care and treatment of MARY BROWN. However, after an inquiry into Dr. Cohen's training, experience and knowledge as required by Florida Statute §768.45 (1979) the trial court excluded Dr. Cohen from testifying as to DR. SIMS' care and treatment of MARY BROWN.

Florida Statute §768.45 (1979) reads in pertinent part as follows:

> §768.45
>
> 2(b) If the health care provider whose negligence is claimed to have created the cause of action is certified by the appropriate American Board as a specialist, is trained and experienced in a medical specialty or hold himself out as a specialist, a "similar health care provider" is one who"
>
> 1. Is trained and experienced in the same specialty; and
>
> 2. Is certified by the appropriate American Board in the same specialty.
>
> (c) The purpose of this subsection is to establish a relative standard of care for various categories and classifications of health care providers. Any health care provider may testify as an expert in any action if he:
>
> 1. Is a "similar health care provider" pursuant to paragraph (a) or (b); or
>
> 2. Is not a similar health care provider pursuant to paragraph (a) or (b) but, to the satisfaction of the court, possesses

sufficient training, experience and knowledge to provide such expert testimony as to the acceptable standard of care in a given cause.

It is clear that Dr. Cohen does not meet the standards of subsection 2(b) since he is board certified in neurology and DR. SIMS is a gynecologist. Therefore, in order for Dr. Cohen to testify as to DR. SIMS care and treatment he has to meet the qualifications of subsection 2(c). However, after a proper inquiry the trial court ruled, Dr. Cohen did not possess the training, experience and knowledge to render opinions as to DR. SIMS. (T. 136-137)

The facts which led the trial court to exclude Dr. Cohen were:

1. Dr. Cohen is a board certified neurologist in New York since 1951. (T. 122) (Neurosurgeons perform surgery, not neurologists. Thus, Dr. Cohen does not perform surgery.) (T. 81)

2. Dr. Cohen has never performed any of the common procedures that gynecologist perform. For example:

   (A) C-Section (T. 125)
   (B) Hysterectomy (T. 125)
   (C) Oophorectomy (T. 126)
   (D) Celiosalpingectomy (T. 126)
   (E) Pelvic Floor Repairs (T. 126)
   (F) Surgical procedure for Right Ovarian Cyst. (T. 127)

The last time Dr. Cohen delivered a baby (Episiotomy) was in 1943.

Based upon the above facts the trial court ruled:

THE COURT: . . . I don't believe that it has been shown to my satisfaction, that this doctor possesses the 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 a

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> related field of medicine so as to be able to provide such expert testimony as to the prevailing of DR. SIMS specialty. But, I realize that's not the specific findings of facts but it means I don't think that his experience qualifies him to testify about DR. SIMS. (T. 136-137)

Later on in the trial, the court stated:

> **THE COURT:** . . . I didn't have to reach that question with respect to Dr. Cohen because he wasn't a hands on surgeon in my judgment. (T. 302)

Thus, it is apparent from the record that the court had sufficient evidence to rule that Dr. Cohen did not possess sufficient training, experience and knowledge in obstetrics, and gynecology and therefore was properly prohibited from providing incompetent testimony to the jury concerning DR. SIMS. Dr. Cohen did not have sufficient training, experience and knowledge in gynecology, and equally important he also had no training, experience and knowledge in any surgery.

The record clearly establishes that the trial court made sufficient findings based on sufficient facts as required by the statute. These findings and facts were ignored by the Third District Court of Appeals opinion. The Third District Court of Appeal relies on Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981) as grounds for reversal of the trial courts decision. The Third District Court of Appeal held:

> On this point the judgment cannot be affirmed. In an almost identical situation the Florida Supreme Court held that a neurologist was competent to testify as to matters of a gynecologist's presurgical standard of medical care. Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981).

However, the Third District Court of Appeal erred by stating

that the present case is an "almost identical situation" as that in Chenoweth. 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 on either gynecology or anesthesiology.

In the footnote this 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?
>
> **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 trial court's sole finding that the expert and the Defendant were not Board Certified in the same field. It is obvious that the trial court in the instant case, did not commit the same error as the trial court in Chenoweth. Although Dr. Cohen is Board Certified in neurology and not in gynecology, the record clearly shows that alone was not the reason why the trial court ruled his testimony incompetent and

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did not let him testify.[2]

It is abundantly clear that the trial court was not basing it's decision on excluding Dr. Cohen on board certification. The trial court allowed a neurosurgeon, Dr. Gross, to testify as to the standard of care rendered by DR. SIMS. Dr. Gross is board certified in neurological surgery not gynecology. Nonetheless, although Dr. Gross is not board certified in gynecology, the trial court allowed Dr. Gross to render opinions relative to DR. SIMS. The above analysis clearly shows that the trial court was looking at something more than just board certification of the witness, unlike that which was done by the trial court in Chenoweth.

What this court requested in Chenoweth was for the trial court to make findings based on the training, experience, or knowledge as is necessary under Florida Statute §768.45(2). The record clearly indicates that the court had sufficient facts showing that not only was Dr. Cohen inexperienced in performing the common non-surgical procedures that gynecologists perform, but Dr. Cohen was also inexperienced in performing any surgery since he was a neurologist. As evidenced by the court's finding, Chenoweth is not applicable to the case at bar, because in the case at bar, the court made and stated the findings the Chenoweth trial court failed to state. Therefore, it is abundantly clear that Chenoweth is in direct conflict with the holding of the

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[2]It should also be noted that the two experts erroneously excluded from testifying in Chenoweth where neurosurgeons. Dr. Cohen is a neurologist, thus he does not perform any surgical procedures.

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Third District Court of Appeal in the instant cause.

Not only is the Third District Court's interpretation of Chenoweth misplaced but an application of the Third District court's holding would lead to undesirable results. The Third District Court of Appeal, in rewriting Florida law on competency of medical experts, seems to be saying that a neurologist is always competent to testify as to matters of a gynecologist's pre-surgical standard of medical care, without showing that the expert is trained, experienced and knowledgeable in said area. Further, not all physical examinations use the same methods and not all seek the same results. Dr. Gross testified that although he learned how to perform pelvic examinations, breast examinations, pap smears, tests for glaucoma, color blind tests and depth perception tests as part of physicals in medical school, he does not do these examinations on all of his patients. (T. 283-288) The issue presented to the trial court was whether DR. KEEDY'S examination was a proper medical examination for a pre-operation physical for the purpose of a gynecological operation. It was demonstrated that Dr. Cohen did not have training, experience or knowledge in gynecology and Dr. Cohen did not have training, experience or knowledge in gynecological surgery or any other kind of surgery as he is a neurologist.

The Third District Court opinion in the instant case also ignores Wright v. Schulte, 441 So.2d 660 (Fla. 2d DCA 1983). The Court in Wright again determined the necessity of making an initial determination in a medical malpractice case when the expert was not a similar health care provider. The Third

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District Court of Appeal in its opinion 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 was to 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 us 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 of 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 witness' lack of training, experience or knowledge.[3] The trial court in the instant cause, properly made it's decisions based upon the findings stressed by Wright, however the Third District Court has substituted its judgment for that of the trial court, whose rulings come cloaked in a presumption of correctness.

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

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[3]The trial court in the instant case did more than the trial court in Wright. The trial court did not exclude Dr. Cohen just because he was not a surgeon. The trial court excluded Dr. Cohen because he was not a surgeon and he had no experience in gynecology.

patients. As the court stated,

> Section 768.45(2)(c), Florida Statutes, 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. The First District Court of Appeal in Caputo reviewed the trial record and made the necessary findings and analysis, as did the trial court in the case at bar. However, the Third District Court of Appeal in the instant case did not review the record. Upon a proper review of the record the Third District Court of Appeal could only have determined the trial judge had sufficient facts and basis to make his ruling. As a matter of fact, the trial judge himself asked questions of the expert witness, Dr. Cohen, before excluding him from testifying against DR. SIMS. (T. 131) The Third District has improperly substituted itself into the trial proceedings.

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 testify about the standard of care applicable to a psychiatric nurse. The trial court found that the psychiatrist was not a "similar health care provider"

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and the expert did not satisfy the trial court as to the level of training, experience and knowledge. The Second District affirmed and held that "the record supports the trial court's dissatisfaction with the psychiatric's experience and knowledge relevant to the standard of care in issue, including, for example, the psychiatric's lack of familiarity with the day to day practices of a psychiatric nurse." Young, at 1081.

The facts in the instant case are analogous to those in Young. The Plaintiff's expert, Dr. Cohen, was not a similar health care provider. Again, Dr. Cohen was a neurologist and DR. SIMS was a gynecologist. The trial court after proper inquiry was not satisfied that Dr. Cohen's training, experience and knowledge would properly aid the trier of fact. The record clearly shows that Dr. Cohen lacked familiarity, as in Young, with the day to day practices of gynecology and surgery.

However, even if the court had let Dr. Cohen testify relative to DR. SIMS, Dr. Cohen's testimony would have been cumulative of Dr. Gross as is clearly shown in the transcript. Thus, any evidence that would have been elicited from Dr. Cohen would have been a mere duplication. In Smith v. Coastal Emergency Services, Inc., 14 FLW 445, Feb. 24, 1989, the Fourth District Court of Appeal found:

> "No reversible error demonstrated in the trial court's limitation of Dr. Altman's (Pediatrician) testimony. . . . Furthermore, the trial judge has 'a great deal of discretion in ruling upon the qualifications of expert witnesses'. . . . In addition, §768.45(2) provides that, if the witness is not a 'similar health care provider' but possesses sufficient training, experience and knowledge to provide expert testimony on the

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> subject to the satisfaction of the court, he is competent to testify. Finally, Dr. Altman's (Pediatrician) testimony regarding Dr. Dickens (Neurologist) treatment, if favorable to appellant, would simply have been cumulative because Dr. Korman, a Neurologist, testified on behalf of appellant against Dr. Dickens. Cited to: Andrews v. Tew, 512 So.2d 276, 279 (Fla. 2d DCA 1987), rev. denied, 519 So.2d 988 (Fla. 1988)

As in Smith, any opinion rendered by Dr. Cohen would have been cumulative and therefore if the exclusion of Dr. Cohen's testimony was error, it was harmless error.

There is certainly ample evidence to support the trial court's unequivocal determination that Dr. Cohen could not render an opinion as to the care afforded by DR. SIMS in the instant cause as it relates to the prevailing standard for Board Certified gynecologists. 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 purposely in direct conflict with those cases, as the Third District has refused to follow the dictates of this Court and has refused to adhere to the trial court's determination after proper inquiry. The trial court's finding that Dr. Cohen did not have the sufficient training, experience and knowledge in gynecology or surgery, compounded with the fact that Dr. Cohen, according to the interrogatories, was not to testify against DR. SIMS mandates the reversal of the Third District Court of Appeal decision and affirmance of the trial court's granting of a directed verdict in favor of DR. SIMS.

(B) PLAINTIFF'S SWORN RESPONSE TO EXPERT WITNESS INTERROGATORIES CLEARLY STATED THAT DR. COHEN WOULD NOT BE ASKED TO RENDER ANY OPINIONS AS TO DR. SIMS

During discovery, the Plaintiff was propounded expert witness interrogatories. The Plaintiff gave the following sworn responses to the interrogatories:

> 2. As to each expert state the following:
>
> * * *
>
> (B) Substance of facts and opinions to which each will testify.
>
> Dr. Cohen will testify that Dr. Keedy and Dr. Albanes should have listened to MARY BROWN'S carotid arteries and that she was not appropriately cared for post-operatively. Her pre-operative physical examinations were cursory at best and not adequate. It is not adequate medical care for a consulting physician to fail to record a report on his consultation.
>
> . . .
>
> Dr. Gross will testify that Dr. Keedy should have listened to the patient's carotid arteries considering her pre-op symptoms. If is not yet clear what his testimony will be in connection with Dr. Albanes and SIMS.

It is clear from the answers to interrogatories that DR. SIMS reasonably relied on the Plaintiff's sworn statement that Dr. Cohen was not going to testify relative to his care and treatment of MARY BROWN. For this reason, DR. SIMS counsel, did not initially cross examine Dr. Cohen:

> **MR. SIEGEL:** Okay. You can inquire, gentlemen.
>
> **MR. DYWER:** I have no inquiries. As I understand it, this witness is not going to testify relative to DR. SIMS. If that is the case, I have no questions. (T. 58)

Counsel's understanding was also shared by the court, as the

following colloquy between Plaintiff's counsel and the court reveal:

> **THE COURT:** First of all, you said it wasn't. I would have a prior examination of this doctor in respect to that
>
> You say you weren't, that's number one.
>
> **MR. SIEGEL:** I am not asking him - -
>
> **THE COURT:** This person was not going to testify with respect to the health care provided by DR. SIMS. That was my understanding. (T. 20)

"A primary purpose of pretrial discovery is to discover evidence relevant and pertinent to triable issues pending before court so that litigation no longer proceeds as a game of "Blind Man's Bluff." Reynolds v. Hoffman, 305 So.2d 294 (Fla. 3d DCA 1974). DR. SIMS was never aware that Dr. Cohen, was going to testify relative to his treatment of MARY BROWN because no notice of same was provided to DR. SIMS, although proper discovery to ascertain if such testimony would be offered was propounded by DR. SIMS. This court stated in a footnote in Binger v. King Pest Control, 401 So.2d 1310 (Fla. 1981):

> It remains the obligation of each attorney to learn through interrogatories, depositions or any other means he selects, the nature of the testimony which will be offered and the extent to which he intends to meet or deal with it at trial. Id, at 1313.

Counsel for DR. SIMS made the necessary inquiry outlined in Binger. However, counsel's reliance on interrogatories and discovery are useless when the opposing party deviates from his sworn testimony.

In Eastern Airlines, Inc. v. Dixon, 310 So.2d 336 (Fla. 3d DCA 1975), it was held that "what relief to grant Defendant

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because of Plaintiffs' failure to fully and completely answer interrogatories was for the trial court's discretion." The relief the trial court decided to grant in this case was to exclude the testimony of Dr. Cohen as to DR. SIMS.[4] It is of paramount importance to note that Dr. Cohen's testimony was also excluded because, the trial court found he did not possess the sufficient training, experience or knowledge to testify against DR. SIMS.

The relief granted by the trial court in the instant case has been consistently held proper on review. In Sayad v. Alley, 508 So.2d 485 (Fla. 3d DCA 1987), the court held that "the trial court did not abuse its discretion in restricting the testimony of the Defendant's expert accident reconstructionist to subject matter which had been timely revealed in discovery and in precluding his opinion as to an area which had not." Further, the court in Herold v. Computer Components International, Inc., 252 So.2d 576, (Fla. 4th DCA 1971) held, "as an alternative to dismissal the court may limit Plaintiff's introduction of evidence with respect to any of the matters embraced by the answers to the propounded interrogatories." Id, at 581.

Another clear statement of this position is Sturdivant v. Yale-New Haven Hospital, 476 A.2d 1074 (Conn. App. 1984), where the court held, "that the Plaintiff's failure to include Garell's (Medical Expert) proposed testimony on causation in her answer to interrogatory number sixty-nine was a failure to answer the

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[4]Dr. Cohen was allowed to testify against Dr. Albanes and Dr. Keedy, just as the answers to the interrogatories indicated he had been retained to do.

interrogatory fairly, thereby justifying sanction. . . . [P]rohibiting the party who has failed to comply from introducing designated matters into evidence." Id at 1076.

There is no doubt that DR. SIMS would have been surprised and prejudiced in this case if Dr. Cohen would have been permitted to provide expert testimony against him. For opposing counsel to suddenly state at trial that a previously identified expert will now testify on undisclosed grounds against one's client is definitely a surprise. The court in Capital Bank v. G & J Investments Corporation, 468 So.2d 534 (Fla. 3d DCA 1985) stated, "where a party is prejudiced by the testimony of an undisclosed expert, reversal is required. The requisite prejudice in such cases does not depend upon proof that the testimony was adverse in nature, but only that the objecting party was surprised in fact." Id at 535.

The element of surprise is definitely present in the instant case. Twice during the trial[5] counsel for DR. SIMS told the court that it was his understanding that Dr. Cohen was not to testify against DR. SIMS. This belief was also shared by the court. MARY BROWN'S counsel did nothing to disclose this eventuality, choosing, apparently, to conceal this from DR. SIMS' counsel so as to ensure the surprise. The purpose of interrogatories is to prevent surprise and trial by ambush, but same cannot be avoided without the truthful and complete disclosure that our rules require.

It is apparent that the trial court had little choice and

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[5]T. 114 and T. 119

was correct in excluding Dr. Cohen's testimony. Dr. Cohen was never revealed to DR. SIMS as a possible adverse witness during discovery and Dr. Cohen did not have sufficient training, knowledge or experience to render any opinions relative to DR. SIMS.

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ISSUE II

THE TRIAL COURT WAS CORRECT IN GRANTING A DIRECTED VERDICT FOR DR. SIMS WHERE THERE WAS NO EVIDENCE OF NEGLIGENCE BY DR. SIMS IN HIS CARE AND TREATMENT OF MARY BROWN

The trial court, when deliberating as to whether to grant DR. SIMS' motion for directed verdict, asked the Appellant what specifically was said by Dr. Gross. (T. 957) Plaintiff's counsel stated that he wasn't positive whether Dr. Gross said DR. SIMS should have auscultated the patient's carotid artery.[6] Nonetheless, Dr. Gross did say that if DR. SIMS did not do that himself, he should have obtained medical clearance. (T. 957)

> **MR. SIEGEL:** Did the admitting surgeon, DR. DAVID SIMS, who was a specialist in obstetrics and gynecology, depart from the accepted standard of care in connection with his clearance of the patient for surgery? . . .
>
> **DR. GROSS:** If he depended on others to pass on the condition of MRS. BROWN, he certainly should have had the opinion first of all, by a neurosurgeon because he was interested in the previous surgery that MARY BROWN underwent at the hands of DR. KEEDY.
>
> But he should have had a clearance from an internist or a generalist who would have x-rayed MARY BROWN thoroughly if he didn't do it himself, if he felt he was to pass on a general physical examination including the arteries in the neck, the heart, and the lungs, and made such a statement in the record than it would be adequate. . . .
>
> It was his obligation if he didn't feel he was competent to clear MRS. BROWN to get the

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[6]Dr. Charles Kalstone, Dr. Sims expert witness called out of turn with the permission of the court and all parties, testified that in his opinion gynecologists do not auscultate the carotid artery, and since I have evaluated this case, I have checked with a lot of gynecologists. (T. 889) Dr. Kalstone was appointed for a two year position as Chief of Gynecology at Doctors Hospital in Coral Gables, Florida and was the only witness put on the stand that actually specialized in gynecology.

opinion, first of all, of DR. KEEDY because of previous surgery. And then, of a generalists or an internist concerning the neck, the heart and the lungs. (T. 369-371)

Dr. Gross also testified that from the record he was able to determine that DR. SIMS got a neurological consult from DR. KEEDY. (T. 388) He further testified that it was good medical practice to get a consult from DR. KEEDY.[7]

QUESTION: You consider that (DR. SIMS getting a neurological consult from Dr. Keedy) good medical practice under the circumstances of that case, do you not?

ANSWER: Yes. (T. 388)

. . .

Later in the proceedings, Dr. Gross testified "a neurologic consultant that is called in for a patient that's about to have surgery, he would get a very careful internal history and find out that she had been admitted for hypertension and then go into it much more thoroughly and if he didn't feel competent to give clearance, then call, advise that an internist be called in." (T. 429-430)

It is obvious from the above testimony that the uncontradicted evidence in the record is that DR. SIMS did not need to obtain a medical clearance from a generalist[8] or internist, once he requested a medical clearance from DR. KEEDY.

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[7]During the directed verdict motion, it was pointed out to the court that the Plaintiff stated in her deposition that she wanted the operation approved by Dr. Keedy before she gave her consent. (T. 964)

[8]Steadman's medical dictionary at 23rd Edition, at page 575 defines a generalist as a "general physician or family physician; a physician trained to take care of the majority of non-surgical diseases, sometimes including obstetrics.

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A generalist or internist had to be brought in only if DR. KEEDY was not competent to give that clearance. To interpret the above testimony to mean that DR. SIMS needed to obtain clearance from both DR. KEEDY and a generalist or internist would be grasping an inference from outside the record, would be a misstatement of fact and further would be a needless and expensive duplication of efforts. It would be a duplication of efforts because if DR. KEEDY did not feel competent to give clearance, we would have two possible different generalists or internists giving surgical clearance to the same patient, a generalist or internist called in by DR. SIMS and an internist called in by DR. KEEDY. Further, what importance would there be in calling in DR. KEEDY if a generalist or internist would have had to be called in anyway. Appellant has not even argued that DR. KEEDY'S participation was not necessary.

However, even if we interpret Dr. Gross' testimony to mean that the proper standard of care is to get clearance from both an internist or generalist, this standard of care was met. DR. SIMS obtained the clearance for surgery from DR. KEEDY.[9] Further, the Plaintiff MRS. BROWN was also examined by Dr. Albanes, the in-house physician of South Miami Hospital. In Cuba between 1945-1965, Dr. Albanes was a general practitioner. (A. 4) A general practitioner would fall under the category of a generalist, according to Steadman's definition. Thus, DR. SIMS did everything that the Plaintiff's expert witness stated should have

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[9]The Plaintiff stated in her deposition, that she heard DR. KEEDY tell DR. SIMS that he was going to approve the operation. (Depo. of MARY BROWN, pg. 39)

been done prior to surgery, using whichever interpretation this Court would want to give to Dr. Gross testimony.

In reviewing the history and physical examination conducted by Dr. Albanes, Dr. Gross agreed that the word clear means that the physician looked at the area and found that there was nothing abnormal or irregular about it. (T. 393-394) Dr. Gross also agreed that the word "clear" appeared in Dr. Albanes chart next to: heart, lungs, abdomen, extremities, neurological, review of systems general, neuromuscular, genitalia, urinary and gastrointestinal. (T. 395-397) Before commencing this examination of Dr. Albanes' chart, Dr. Gross stated that physicians are trained observers and you assume that they will have done their job and done an examination. (T. 393) Therefore, according to Plaintiff's own expert, DR. SIMS should have assumed that Dr. Albanes and DR. KEEDY did a correct examination of MRS. BROWN and it is reasonable that DR. SIMS relied upon that presumption of correctness.

The record clearly shows that DR. SIMS had the results of two physicals of MARY BROWN prior to surgery upon which he was entitled to rely.[10] Therefore, DR. SIMS met the standard of care as enunciated by Dr. Gross if Dr. Gross' testimony means that DR. SIMS needed to obtain clearance from both DR. KEEDY and a generalists or internist. DR. SIMS did everything that Dr. Gross stated should have been done prior to surgery, and therefore Dr.

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[10]Besides DR. KEEDY'S and Dr. Albanes' examinations, the anesthesiologist, Dr. Polvaranti, and the pre-operative suite nurse found MARY BROWN'S blood pressure to be within normal range. (T. 90-97)

Gross presented no credible evidence of any negligence of DR. SIMS.

This Court in Gooding v. University Hospital Building Inc., 445 So.2d 1015 (Fla. 1984) reviewed the standard necessary to prevail in a medical malpractice action and held:

> To prevail in a medical malpractice case a plaintiff must establish the following: the standard of care owed by the defendant's breach of the standard of care, and that said breach proximately caused the damages claimed. In this case Dr. Bailey's testimony established the standard of care and the hospital's breach of that standard when its emergency room staff failed to diagnose and treat Mr. Gooding. The critical issue here is whether the district court correctly decided that the hospital was entitled to a directed verdict because the plaintiff failed to prove causation. We hold that it did and approve the decision of the district court.

In the case sub judice, the Respondent has failed to introduce one scintilla of evidence as to any malpractice occasioned by DR. SIMS' care of MARY BROWN. To the contrary, DR. SIMS did everything that Dr. Gross stated should have been done. In addition to not demonstrating any breach of the standard of care owed, Plaintiff even after trial has proven incapable of establishing any proximate causation whatsoever. As Gooding, quoting Prosser, explained:

> In negligence actions Florida courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injury. See: Tampa Electric Co. v. Jones, 138 Fla. 746, 190 So. 26 (1939); Greene v. Flewelling, 366 So.2d 777 (Fla. 2d DCA 1978), cert. denied, 374 So.2d 99 (Fla. 1979); Bryant v. Jax Liquors, 352 So.2d 542 (Fla. 1st DCA 1977), cert. denied, 365 So.2d 710 (Fla. 1978). Prosser explained this standard of proof as follows:

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> On the issue of the fact of causation, as on other issues essential to his cause of action for negligence, the plaintiff in general, has the burden of proof. [He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result.] A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

As the Supreme Court of Florida stated in Swilley v. Economy Cab of Jacksonville, 56 So.2d 914, 915 (Fla. 1951):

> It is too well settled for comment that it is the duty of the trial court to direct a verdict for the defendant if no evidence is submitted upon which the jury could lawfully find a verdict for the plaintiff. It is not a question of whether any evidence is submitted. There may be plenty of evidence produced. The test is whether or not it is sufficient to convince the jury of the truth of the cause of action, or whether as reasonable men they could draw any inference as to its truth or falsity. If it fails to meet this test, it should not be submitted to the jury. . . If the evidence as a whole with all reasonable inferences from it does not as a matter of law tend to prove the cause of action alleged, a verdict for defendant should be directed.

See also: Wilson v. Bailey-Lewis-Williams, Inc., 194 So.2d 293 (Fla. 3d DCA 1967); Baro v. Wilson, 134 So.2d 843 (Fla. 3d DCA 1961); National Car Rental System v. Bostic, 423 So.2d 915 (Fla. 3d DCA 1983).

There was no testimony to establish that DR. SIMS breached any standard of care to MRS. BROWN or that DR. SIMS proximately caused Appellant's injury, and as such the granting of a directed

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caused Appellant's injury, and as such the granting of a directed verdict in favor of DR. SIMS was proper.

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CONCLUSION

For the aforementioned reasons, Petitioner/Defendant, DAVID SIMS, M.D. believes that the granting of the directed verdict by the trial court in his favor should be affirmed in all respects. The Petitioner would request that the decision of the Third District Court of Appeal be reversed and judgment entered in accordance with the granting of the directed verdict by the trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered to: **PAUL SIEGEL, ESQ.**, Sinclair, Louis, Siegel, et al., 1125 Alfred I. DuPont Bldg., Miami, FL 33131; and mailed to: **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, this **8th** day of **August**, 1989.

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