

DA 11-7-89

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,949

M. DAVID SIMS,)
Petitioner,)
vs.)
MARY BROWN,)
Respondent.)

FILED
AUG 21 1989
SUPREME COURT
TERRY CLARK

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION¹

This is a companion to Cases No. 73,964 and 73,965, in which the Petitioners are Dr. Christian Keedy and South Miami Hospital. Respondent, Mary Brown, has filed a single brief on the merits in those two cases. That brief contains an extensive statement of the case and facts. To avoid burdening this Court with undue repetition, we respectfully ask the Court to consider that statement of the case and facts in connection with this proceeding also, in order to have additional background. The issues raised by Petitioner Sims are completely different from those in the other two cases. The abbreviated statement of the case and facts in this brief contains only the trial testimony that needs to be considered in connection with Dr. Sims' points.

STATEMENT OF THE CASE AND FACTS

Mary Brown had a stroke during or after surgery (R 874-75; T 776-77) performed by Dr. Sims at South Miami Hospital. According to neurosurgeon Keedy, who cleared Mary for surgery, the stroke caused some devastating consequences (R 33).

Mary sued Keedy, Sims and South Miami Hospital for negligently clearing her for major elective surgery, without an adequate history or physical examination (R 13-22). At trial, board certified neurosurgeon Sidney Gross testified that Sims was

¹The following abbreviations will be used:

T Transcript of Trial
R Record on Appeal
A Appendix to this brief
PX Plaintiff's Exhibit
SR Supplemental Record

All emphasis is ours unless otherwise indicated.

negligent in operating on Mary without himself doing a complete physical examination, including listening to the arteries in her neck, and documenting this in the record, or referring her to an internist or general physician who would do the examination (T 369-72):

Q. Dr. Gross, is there any significant difference in the way a patient such as Mary Brown should be cleared for surgery which is dependent upon whether the surgery is gynecological or neurological?

A. There is no difference.

Q. Why not, Doctor?

A. Well, human beings are pretty much alike and a surgeon about to undertake any major operation or minor operation wants to know the condition of the patient's nervous system, the condition of the vessels in the neck, and the condition of the heart, the condition of the lungs, also certain fundamental laboratory tests on the blood and on the urine to ascertain that the patient is a good risk or can be gotten to be the very best risk possible for that operation.

Q. 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?

* * *

A. 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, then it would be adequate.²

* * *

It was his obligation if he didn't feel he was competent to clear Mrs. Brown to get the opinion, first of all, of Dr. Keedy because of previous surgery. And then, of a generalist or an internist concerning the neck, the heart, and the lungs.

Q. And, did Dr. Sims depart from accepted medical practice in not doing so?

A. He did.

Q. And did that cause or contribute to the injuries of Mrs. Brown?

A. I am certain that had the lesion in the carotid artery been discovered and had that been taken care of first, this operation of carotid endarterectomy done by a competent vascular surgeon, carries with it a risk of two or five percent as to morbid or mortality.

I believe she wouldn't have suffered a stroke and would be well today.

On cross-examination, Dr. Gross further testified (T 432):

. . . This patient, she had hypertension. She was on estrogen and she was a smoker. Three risk factors for stroke and therefore if such a patient is about to have a major surgical operation, a complete clearance, no matter who was going to do the surgery should be obtained.
. . .

Notwithstanding Dr. Gross' specific testimony that Sims was negligent, the court granted a directed verdict in Sims' favor

²Sims testified he did not listen to the carotid arteries in Mary's neck (R 1169).

at the conclusion of plaintiff's case (T 988).

The court refused to permit the neurologist offered by Mary to testify with respect to whether Sims did a thorough physical examination prior to Mary's operation (T 120, 137).³ Dr. Cohen was not asked to testify with respect to whether Dr. Sims was or was not negligent. Mary proffered the following outside the presence of the jury:

MR. SIEGEL (T 114): . . .

I tell you the question I will ask. One of the questions will be, "Did Mary Brown have a thorough physical examination prior to the performance of surgery?"

I am not going to mention Dr. Sims by name. I don't know what the answer is going to be. That is one of the questions, and Dr. Sims did have a physical examination in the patient's chart.

* * *

MR. SIEGEL (T 120): I am just going to ask if it's a thorough physical. I don't care what kind of a doctor. It could be done by a monkey.

* * *

BY MR. SIEGEL (T 137-38):

³The obvious reason for posing the questions in this manner was to connect up with Mary's offer of the JCAH accreditation manual which required hospitals and the doctors who practiced in them to document on a patient's chart and have performed a thorough pre-surgery physical. The JCAH manual and survey report and issues relating to these documents are discussed at length in Mary's combined brief addressing issues raised by South Miami Hospital and Dr. Keedy.

Q. Doctor Cohen, let me show you a blowup which you have before you, Page 5,⁴ Mary Brown's medical chart for the admission, April 7, 1980.

Does that exhibit or document in front of you record a current⁵ physical examination prior to the performance of surgery on this particular patient in the setting we have talked about?

A. No.

Q. Explain just very briefly, why not?

A. Because he doesn't give the reason for what alerted him to request a neurosurgical opinion about her progressive weakness in the right upper extremity for the previous week.

He doesn't include a neurological examination neuromuscular examination under the group of physical examination and didn't listen for a neck bruit.

Dr. Cohen was familiar with histories and physical examinations done by gynecologists prior to surgery (T 122). He has OB/GYN patients all the time (T 123). Dr. Cohen had done a physical examination on a patient for pre-surgical clearance as recently as the day before he testified (T 131). He regularly does pre-surgery physicals, including neurological and gynecological patients (T 132). The Court made a specific finding that Dr. Cohen did not "possess sufficient training, experience

⁴Page 5 referred to is page 5 of Mary's hospital chart (PX 1) showing the physical examination of Dr. Sims. A copy is at page 9 of the appendix to this brief.

⁵Mary's counsel believes this word should be "thorough" rather than "current" since the entire focus of the examination of Dr. Cohen was whether there was a thorough pre-op physical examination.

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" (T 136-37).

Defense counsel convinced the court that the 1985 Medical Malpractice Reform Act and its provision requiring five years of teaching or experience in a field prior to testifying applied to the instant case, even though section 48 of Chapter 85-175, Laws of Florida, specifically provided that that statute did not apply to any cases that were filed before its October 1, 1985 effective date (T 194-97).

Dr. Sims saw Mary in his office on April 4, 1980 and did a physical examination. He listened to her heart and lungs with a stethoscope, but not to the carotid artery in her neck (R 1169). In his office, according to Sims, Mary complained of pain in the right hand and arm and weakness in the right arm. He did not note that anywhere in his chart (R 1172). Dr. Sims wanted Keedy to see Mary prior to the proposed surgery in connection with the complaints of pain and weakness in her right arm. He was concerned about the surgery he planned to do. He wanted to be sure that Mary had no problems relative to her central nervous system or relative to her neck that precluded him from doing the surgery (R 1175). Sims explained to Dr. Keedy that he was concerned about Mary's complaints of pain and weakness in her right arm (R 1178). Sims recalled that in his office on Friday afternoon, April 4, 1980, Mary was holding her arm in kind of a cradle position (R 1245).

Dr. Sims specifically testified that he did not ask Dr. Keedy to do a medical clearance, and that Dr. Keedy did not do a medical clearance (R 1256-57):

Q. Now, one of the things that's marked here, Doctor, about almost two-thirds of the way to the bottom, [on the hospital chart "preoperative check list"], the word medical clearance obtained and notified on the right, under the column MNA. Apparently meaning not applicable?

A. Yes.

Q. What is meant by medical clearance obtained and here the nurse puts NA?

A. You have well described it. Medical clearance. I am a surgeon, is usually having a clearance by a consultation with an internist or a cardiologist and any patients with whom we have any reason to feel any question as to their operability.

That really doesn't include the consultation I had with Dr. Keedy, wasn't making a medical clearance.

The hospital's expert witness, a board certified specialist in obstetrics and gynecology, testified that house physician Albanes did not need to auscultate Mary's carotid arteries because that doctor was only doing a "routine, cursory type examination" (T 1066-67).

The Third District Court of Appeal decided that the directed verdict in favor of Dr. Sims was erroneous (A 3-4):

I.
DIRECTED VERDICT FOR DR. SIMS

One of appellant's experts, Dr. Gross, a neurosurgeon, testified at trial that Dr. Sims departed from accepted medical practice by neglecting to obtain a written opinion from a competent physician clearing the patient for

surgery and that this departure was a cause of the plaintiff's stroke. Dr. Cohen, another expert neurologist 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."

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). The holding has been followed this court, Scozari v. Muscarella, 434 So.2d 27 (Fla. 3d DCA 1983); Fetell v. Drexler, 422 So.2d 89 (Fla. 3d DCA 1982), and is a settled rule of law in this state. Wright v. Schulte, 441 So.2d 660 (Fla. 2d DCA 1983), rev. denied, 450 So.2d 488 (Fla. 1984); Mitchell v. Angulo, 416 So.2d 910 (Fla. 5th DCA 1982), and elsewhere, Radman v. Harold, 279 Md. 167, 367 A.2d 472 (1977). The harmless error doctrine, as applied in Chenoweth, can have no application here because it is the presurgical omission, rather than a surgical mishap, which allegedly caused the damage. Based on the expert testimony of the neurosurgeon, that Dr. Sims' conduct fell below accepted medical standards in the community, a directed verdict was inappropriate.

An even stronger case is made for a jury question based on the improperly excluded testimony of Dr. Cohen. We have spoken to this point with nauseating repetition. It is only in the absence of any evidence that a court should direct a verdict for a defendant. If the evidence is conflicting, or will admit of different reasonable inferences, or if there is any evidence tending to prove the issues, it should be submitted to the jury as questions of fact and not to be taken away to be passed upon by the judge as questions of law. Quarrel v. Minervini, 510 So.2d 977 (Fla. 3d DCA 1987), rev. denied, 519 So.2d 987 (Fla. 1988); Idy

Corp. v. Fenton, 454 So.2d 13 (Fla. 3d DCA 1984); Dandashi v. Fine, 397 So.2d 442 (Fla. 3d DCA 1981), (citing Hendricks V.Dailey, 208 So.2d 101 (Fla. 1968); Behar v. Root, 393 So.2d 1169 (Fla. 3d DCA 1981); Laird v. Potter, 367 So.2d 642 (Fla.3d DCA), cert.denied, 378 So.2d 347 (Fla. 1979).

SUMMARY OF THE ARGUMENT

There is no express and direct conflict between the instant decision of the Third District Court of Appeal and Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981) or any of the other decisions cited by Dr. Sims. There was testimony by Dr. Gross that Dr. Sims was negligent for not obtaining a medical clearance. Dr. Sims bases his whole argument in this Court on an assertion that a medical clearance was performed by Dr. Keedy, but counsel for Dr. Sims overlooked their own client's testimony that Dr. Keedy did not do a medical clearance.

It was erroneous for the lower court to refuse to permit Dr. Cohen to testify that Dr. Sims had not done a thorough pre-surgery physical examination of Mary. The witness was qualified to testify about the surgical clearance under Chenoweth v. Kemp, supra, and the other cases discussed by the parties.

ARGUMENT

We prefer to address the issues raised by Dr. Sims in reverse order, since the testimony of Dr. Gross by itself was enough to prevent entry of a directed verdict. As the Third District put it "an even stronger case is made for a jury question based on the improperly excluded testimony of Dr. Cohen," so we will discuss the excluded Cohen testimony second.

POINT I

THE COURT ERRED IN ENTERING A DIRECTED VERDICT FOR DR. SIMS IN THE FACE OF EXPERT TESTIMONY THAT HE WAS NEGLIGENT IN NOT OBTAINING A MEDICAL CLEARANCE BEFORE MARY BROWN'S SURGERY.

Dr. Gross testified that Dr. Sims needed to have Mary cleared for surgery by neurosurgeon Keedy because Dr. Sims was interested in the previous surgery that was done by Dr. Keedy. But Dr. Gross also testified quite unequivocally that Sims should have obtained a medical clearance from an internist or general practitioner, who would examine the arteries in the neck, the heart, the lungs, x-rays, and do a complete physical. Since Mary had high blood pressure, was on estrogen, and was a smoker, three of the risk factors for stroke, she needed to have a complete clearance before a major surgical operation, no matter what kind of surgery it was. At pages 31 and 32 of their brief, counsel for Dr. Sims wax eloquent about there being no necessity for a medical clearance from a generalist or internist because Dr. Sims purportedly requested a medical clearance from Dr. Keedy. That is simply argument of counsel. Dr. Sims' own testimony, quoted above, was that "Dr. Keedy, wasn't making a medical clearance."

It is clear from the record that Dr. Sims⁶ did not do a

⁶On page 4 of his brief, it is stated that "Dr Sims conducted a complete physical examination which included listening to the Plaintiff's heart and lungs with a stethoscope (SR 14-15)." We are unable to locate the testimony that Dr. Sims did a "complete physical examination" -- particularly at pages 14 and 15 of the supplemental record, which don't even exist. The record of his physical does show that he listened to Mary's heart and lungs (A 9). It is fantasizing to suggest that Dr. Sims' physical examination shown at page 9 of the

medical clearance for Mary Brown, house physician Albanes did only a cursory physical examination, and Dr. Keedy was not requested to and did not do a medical clearance. That is why Mary Brown had a stroke with devastating consequences during her surgery. It was absolutely appropriate to reverse the directed verdict for Dr. Sims.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO PERMIT A BOARD CERTIFIED NEUROLOGIST TO TESTIFY THAT GYNECOLOGIST SIMS DID NOT DO A THOROUGH PRE-OPERATIVE PHYSICAL EXAMINATION.

Dr. Sidney Cohen is a board certified neurologist who sees OB/GYN patients (as a neurologist) all the time. He regularly does pre-surgery physicals for gynecological patients, and is familiar with histories and physical examinations done by gynecologists prior to surgery. His most recent physical examination on a patient for pre-surgical clearance was done the day before he testified. There was no issue in the case with respect to Dr. Sims' performance of surgery. Dr. Cohen was eminently qualified to testify about whether Dr. Sims had done a thorough pre-surgery physical, which was all Dr. Cohen was asked about.

It would be difficult to find a case closer on point than this Court's decision in Chenoweth v. Kemp, 396 so.2d 1122 (Fla. 1981), which was cited and given to the trial judge before he made his ruling on Dr. Cohen. The only difference that Dr. Sims can point out between Chenoweth and this case is that defense

appendix to this brief is "complete."

counsel here was clever enough to have the trial judge incant the formula in Fla. Stat. § 768.45(2)(c)2. But that incantation was completely without support in the record and has no validity whatsoever. Mitchell v. Angulo, 416 So.2d 910 (Fla. 5th DCA 1982); Radman v. Harold, 279 Md. 167, 367 A.2d 472 (1977) (quoted and discussed in Wright v. Schulte, 441 So.2d 660 (Fla. 2d DCA 1983)); see also, Chick 'n' Things v. Murray, 329 So.2d 302 (Fla. 1976) (trial court fact findings not binding when clearly erroneous); Greenwood v. Oates, 251 So.2d 665, 669 (Fla. 1971). The Court is requested to compare the following

testimony of Dr. Gross

Q. Dr. Gross, is there any significant difference in the way a patient such as Mary Brown should be cleared for surgery which is dependent upon whether the surgery is gynecological or neurological?

A. There is no difference.

Q. Why not, Doctor?

A. Well, human beings are pretty much alike and a surgeon about to undertake any major operation or minor operation wants to know the condition of the patient's nervous system, the condition of the vessels in the neck, and the condition of the heart, the condition of the lungs, also certain fundamental laboratory tests on the blood and on the urine to ascertain that the patient is a good risk or can be gotten to be the very best risk possible for that operation.

with its own Chenoweth (396 So.2d at 1125) language:

While it is clear that the proffered witnesses 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.

In Point IB, Dr. Sims discusses at length Mary's answers to expert witness interrogatories, without identifying the defendant who posed the interrogatories or giving a record citation for them. The trial court did not make its ruling excluding the testimony of Dr. Cohen on the basis of the interrogatories. Dr. Sims made no mention whatsoever of the present argument in his brief in the District Court of Appeal and should not be permitted to assert the argument here. A copy of Dr. Sims' argument on this point in the District Court is included in the appendix to this brief.

CONCLUSION

Upon the foregoing authorities, this Court is respectfully urged to conclude that it is without jurisdiction to review Brown v. Sims at the behest of Dr. Sims or the other petitioners, and that the decision of the Third District Court of Appeal is correct. This Court should find that certiorari was

improvidently granted and dismiss the petitions for review.

Respectfully submitted,

PAUL SIEGEL, ESQ.

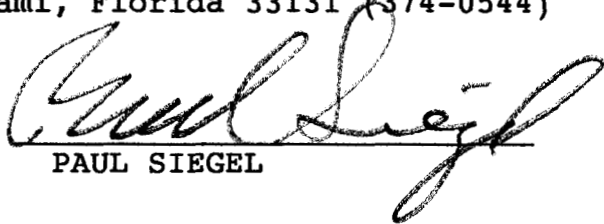
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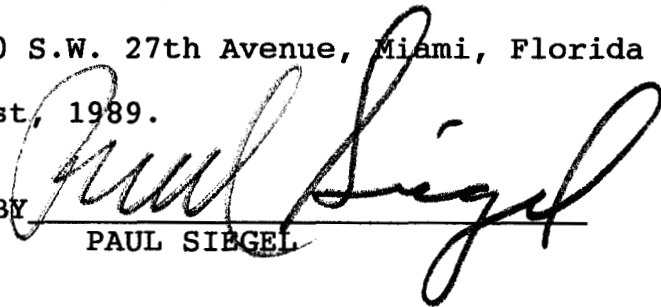


PAUL SIEGEL

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 18th day of August, 1989.

BY



PAUL SIEGEL