

OA 11-7-89

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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO.: 73, 949

M. DAVID SIMS, M.D.,)
)
 Petitioners,)
)
 v.)
)
 MARY BROWN,)
)
 Respondent.)

FILED

SID J. WHITE

SEP 11 1989

CLERK, SUPREME COURT

By  Deputy Clerk

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

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

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SUMMARY OF THE ARGUMENT

Respondent's primary assertion in their Answer Brief is that a verdict should not have been directed in favor of DR. SIMS as there was testimony elicited that a medical clearance should have been obtained from an internist or generalist, and was not. It is clear that the Respondent is not accurately representing the trial testimony. Both Dr. Keedy and Dr. Albanes testified that they had given DR. SIMS medical clearance to perform surgery on MARY BROWN. The Plaintiff's own expert Dr. Gross, a neurosurgeon testified that he was able to determine from the record that DR. SIMS got a neurological consult from Dr. Keedy. Dr. Gross further testified that when a neurological consult is called for in a patient that is 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 did not feel competent to give clearance, then call, advise that an internist be called in. (T. 429, 430)

DR. SIMS not only received a medical clearance from Dr. Keedy he also received a medical clearance from a generalist prior to performing any surgery on MARY BROWN. MARY BROWN was examined by Dr. Albanes, the inhouse physician of South Miami Hospital. Dr. Albanes did a complete history and conducted a thorough physical examination of MARY BROWN. (T. 393, 394)

The trial court was correct in refusing to allow Dr. Cohen to testify as to the proper care and treatment of MARY BROWN. Contrary to Respondent's assertions, the trial court did not

"incant" any special formula. Rather the trial court made a proper and careful inquiry into Dr. Cohen's training, experience, and knowledge as required by Florida Statute §768.45. Respondent completely ignores all relevant facts by stating that the exclusion of Dr. Cohen "was completely without support in the record and it had no validity whatsoever".

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

1. Dr. Cohen is a Board Certified Neurologist in New York since 1951. Neurosurgeons perform surgery, neurologists never perform surgery. Therefore, Dr. Cohen does not perform surgery.

2. Dr. Cohen has never performed any common procedures that gynecologists typically perform. Dr. Cohen has never performed a C-section, hysterectomy, oophorectomy, celiosalpingectomy, pelvic floor repairs, or surgical procedure for right ovarian cyst. In fact, the last time Dr. Cohen delivered a baby was in 1943.

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.

Respondent completely ignores and makes no reference to the fact that Dr. Gross was allowed to testified as to the care rendered by DR. SIMS to MARY BROWN. However, even if the court had let Dr. Cohen testify relative to DR. SIMS, Dr. Cohen's

testimony would have been cumulative of that offered by Dr. Gross. 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 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.

It is abundantly clear that 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. Further, the trial court was equally correct in excluding the testimony of Dr. Cohen as there was a clear demonstration in the record that Dr. Cohen did not possess sufficient training, experience, or knowledge to render any opinions as to the care rendered to MARY BROWN by M. DAVID SIMS, M.D.

Therefore, the Petitioner 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.

ARGUMENT

ISSUE I

**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**

Respondent's main contention that a medical clearance was not obtained for the surgery to be performed on MARY BROWN and that Dr. Keedy was not consulted in order to provide a medical clearance is simply erroneous. It is abundantly clear from the record in this cause that Dr. Keedy was called to insure that MARY BROWN could safely undergo surgery. Dr. Keedy visited MARY BROWN in her room at South Miami Hospital on April 7th, 1980. Dr. Keedy testified that he had performed a satisfactory neurological examination of MARY BROWN, while MARY BROWN contended that Dr. Keedy's only examination was to test her grip with a hand shake. Dr. Keedy then gave DR. SIMS orally, a pre-surgical neurological clearance to operate on MARY BROWN. In fact, MARY BROWN stated in her deposition, that she heard Dr. Keedy tell DR. SIMS that he was going to approve the operation.

Further, the record unequivocally demonstrates that MARY BROWN was also examined by Dr. Wilfredo Albanes, a South Miami Hospital Staff Physician prior to surgery. The Respondent completely ignores Dr. Albanes examination. Although, Respondent would characterize Dr. Albanes examination as "cursory", the record does not bear out this description. Rather, as testified to by Dr. Gross, Plaintiff's own expert the word "clear" appeared in Dr. Albanes chart next to heart, lungs, abdomen, extremities,

neurological, review of systems/general, neuromuscular, genitourinary, urinary and gastrointestinal, (T. 395, 396) Therefore, Dr. Albanes did an examination of each of those systems and DR. SIMS was certainly reasonable in relying on said examination. Dr. Gross stated that "physicians are trained observers and you assume that they would have done their job and done an examination. (T. 395, 396) Therefore, DR. SIMS was certainly correct in assuming that Dr. Albanes and Dr. Keedy did a complete and thorough examination of MARY BROWN.

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 the normal range. Anesthesiologists perform physicals and histories. (T. 237) The pre-operative suite nurse also found the patient's blood pressure to be within the normal range.

Respondent's assertions that DR. SIMS did not have a medical clearance for MARY BROWN is without foundation. DR. SIMS received clearance from a neurologist and an internist prior to performing any surgery on MARY BROWN. DR. SIMS clearly met the standard of care enunciated by the Plaintiff's expert. DR. SIMS did everything that Dr. Gross stated should have been done prior to surgery and there was no credible evidence presented of any negligence on the part of DR. SIMS. As there was no testimony to establish that DR. SIMS breached any standard of care to MARY BROWN or that DR. SIMS proximately caused her injury, the

granting of a directed verdict in favor of DR. SIMS was entirely proper and should be affirmed by this Court.

ISSUE II

THE TRIAL COURT WAS CORRECT IN NOT ALLOWING DR. SIDNEY COHEN TO TESTIFY AS TO DR. SIMS CARE AND TREATMENT OF MARY BROWN WHERE DR. COHEN DID NOT POSSESS THE REQUISITE TRAINING, EXPERIENCE, OR KNOWLEDGE TO PROVIDE SUCH EXPERT TESTIMONY

The trial judge after hearing the qualifications of Dr. Sidney Cohen, a neurologist including Dr. Cohen's training, experience, and knowledge held that Dr. Cohen did not possess sufficient training, experience, and knowledge to render opinions as to DR. SIMS. Respondent's assertions to the contrary are simply spurious. Respondent would have you believe that defense counsel influenced the trial court into making this finding. However, the finding is based on substantial competent evidence unrefuted by the Respondent in their brief. The facts which lead the court to exclude Dr. Cohen where:

1. Dr. Cohen is not a gynecologist;
2. Dr. Cohen has never performed any surgery;
3. Dr. Cohen is a Board Certified Neurologist in New York since 1951;
4. Dr. Cohen has never performed any common procedures that gynecologists typically perform;
5. Dr. Cohen has never performed a C-section, hysterectomy, oophorectomy, celiosalpingectomy, pelvic floor repairs, or surgical procedure for a right ovarian cyst; and
6. Dr. Cohen has not even delivered a child since 1943.

Based upon the above facts the trial court clearly and simply 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 obstetric and gynecologic specialty.

In order to show practice or teaching in a 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)

The trial record clearly establishes that the trial court makes sufficient findings based on more than adequate facts as required by the statute. Respondent's attempts to analogize this case with Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981), fail. Chenoweth is not an identical situation to the instant cause. Rather, the court in Chenoweth clearly held:

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.

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 did not let him testify.¹

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.

Respondent entirely ignores the fact that even if the trial court had let Dr. Cohen testify relative to DR. SIMS, Dr. Cohen's testimony would have been cumulative to that of Dr. Gross. Any evidence elicited from Dr. Cohen would have been a mere duplication of that provided by Dr. Gross. As the court in Smith v. Coastal Emergency Services, Inc., 14 FLW 445, Feb. 24, 1989, clearly held:

"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,

¹It 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.

§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 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)

The record clearly supports 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. 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 Plaintiff's own answers to 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.

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 mailed 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 Datan Center, Suite 1500 Miami, FL 33156; **RONALD C. KOPLOW, 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 7th day of September, 1989.

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