OA 9-790

V

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,172

1st DCA NO. 87-01492

LT NO. 85-11071-CA

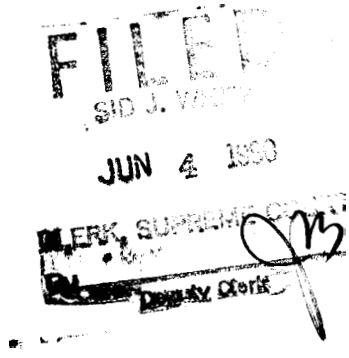
MARK N. GOLDSCHMIDT, M.D.,

Petitioner,

vs.

JERRI TALETHA HOLMAN, a minor, by and through her next friends and guardians, JEFF HENRY HOLMAN and SANDRA GAIL HOLMAN,

Respondents.



RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE

Jerri Taletha Holman, a minor, filed this malpractice action with her parents, Jeff and Sandra Holman against Mark N. Goldschmidt. The complaint alleges

- in paragraph four, that at all times material hereto that the minor, Taletha was under the care of the defendant, Mark N. Goldschmidt, for medical care and treatment.

- in paragraph five, that Goldshmidt holds himself out as a specialist in pediatrics and adolescent medicine and Taletha had been his patient for a number of years.

- in paragraph six, that on August 12, 1983, the minor plaintiff was taken to his office and a history was related consisting of fever, vomiting, no appetite and abdominal pains. Goldschmidt examined her and concluded that she had an intestinal virus and advised that she be fed jello and gatorade. No tests were performed and Goldschmidt advised that she was not in need of further medical treatment.

- in paragraph seven, that on August 14th. 1983. Sandra Holman called the office of Goldschmidt and related that her child had the same symptoms but was definitelv worse but she was not given an indication that her child was in need of further medical treatment.

- in paragraph eight, that on August 16th, 1983, Sandra Holman called the office of Goldschmidt and related that the same symptoms existed and obtained an appointment for August 17th.

- in paragraphs nine and ten, that later on August 16th, the child was taken to the emergency room of St. Vincent's Hospital. She was attended by W.J. Garoni, Jr. M.D. and others. It was determined that she had a perforated appendix, severe peritonitis. She was critically ill, subjected to surgical procedures and sustained permanent losses.

- in paragraph thirteen, that plaintiffs selected Goldschmidt for the purpose of providing medical care for their child and they relied upon Goldschmidt: Goldschmidt aureed to provide the medical care and undertook to provide the medical care for Taletha.

- in paragraph fourteen, that notwithstanding said agreement and undertaking, Goldschmidt rendered medical care and treatment to the minor plaintiff in a manner described in the previous paragraphs which is a departure from the accepted and reasonable standards of medical care and treatment for physicians in such cases.

- in paragraph fifteen, that Taletha received negligent care and treatment consisting of a failure of Goldschmidt to diagnose her symptoms as appendicitis and failing to alert about the need for additional medical care.

- in paragraph sixteen, that as a result of the aforesaid neuligence and treatment, Taletha became critically ill and subjected to surgical procedures and intensive care which would have been unnecessary had she received prompt

competent medical attention and she would undergo further medical care and treatment because of the failure to diagnose her condition or alert to the meaning and consequences of the symptoms of Jerri Taletha Holman. (RI 1-5)

In a general answer, Goldschmidt admits that he is a physician specializing in pediatric medicine who rendered medical care and treatment to the minor plaintiff and denies the remaining allegations. (RI 6)

The pre-trial stipulation contains the following stipulations of fact:

"Stipulations of Fact

1. Dr. Mark N. Goldschmidt is a licensed medical doctor practicing in Florida and he is board certified as a pediatrician.

2. On August 12, 1983, Taletha Holman was seen as a patient by Dr. Goldschmidt. A history was taken and an examination conducted by Dr. Goldschmidt who made a diagnosis of gastroenteritis.

3. On August 14, 1983, a phone call was made concerning the child's condition to the office of Dr. Goldschmidt which was returned by Dr. Gary Soud.

4. On August 16, 1983, a phone call was made to Dr. Goldschmidt's office and an offer made by Dr. Goldschmidt's office for the child to be seen by Dr. Soud that day or Dr. Goldschmidt the next day. Later on August 16, 1983, Taletha was taken by her parents to the emergency room of St. Vincent's Hospital where she was diagnosed as having a ruptured appendix with peritonitis." (RI 28-29)

The case proceeded to trial on July 13, 1987 and a verdict was returned in favor of Goldschmidt on July 15, 1987. A judgment was entered thereon July 16, 1987. (RI 84)

A motion for new trial was filed and denied. **(RI 94-95)** The motion for new trial raised the issues presented in an appeal to the First District Court of Appeal.

A detailed majority opinion determined that the pleadings were sufficient to allow the Holmans to present evidence of Dr. Soud's action in responding to the call to Dr. Goldschmidt as evidence of negligence in fulfilling Goldschmidt's continuing duty of care in respect to the treatment of Taletha and the parties knowingly tried the issue of Dr. Soud's negligence as acts on behalf of Goldshcmidt. Secondly, the concurring cause instruction should be given where there is a concurring natural condition that operates in conjunction with the alleged malpractice. This Court has accepted jurisdicition to review the decision, **Holman v Goldschmldt, 550** So.2d **499** (Fla. 1st DCA **1989).**

The events pertaining to the use of defendant's discovery deposition of David Abramson, M.D., being utilized as the medical testimony in trial for the plaintiff are not altogether relevant to this statement but neither the transcript nor briefs can be browsed without that question arising. The pre-trial conference was held on July **1, 1987;** plaintiffs filed a motion for continuance on July **2, 1987** on the basis that contact could not be made with Abramson. Plaintiff did not ask any questions and prepare this deposition taken on June **23, 1987** for trial. **(RI 34-35)** This

motion was denied but a renewed motion was granted on the day of trial July **13, 1987**. (RI **38-43).** Plaintiffs withdrew the motion for continuance on the belief that discovery would be closed and sanctions sought against plaintiff's only expert. An order dated September **15, 1987** denying plaintiff's motion for a new trial includes the following:

> "The Court determined that plaintiffs' amended motion for continuance was well taken and granted the continuance. Plaintiffs' counsel was advised that the Court was upset with his expert witness because plaintiffs' expert was advised of the trial date and failed to indicate his unavailability for trial during deposition, face to face conversation, or in correspondence. In the expert's deposition, the expert indicated that he would be available for trial if needed.
>
> This Court indicated that if plaintiffs' expert made that representation knowing that he would be unavailable and failed to convey that information to plaintiffs' counsel during their discussions and correspondence, all along knowing he was plaintiffs' only witness, the Court would take such action as it deemed warranted and appropriate. Defense counsel inquired as to the appropriateness of sanctions, assessing costs and expenses against the witness and the Court advised that it would consider the matter upon presentation of supporting legal authority.
>
> Plaintiffs' counsel then advised the Court that he needed to confer with plaintiffs over whether to proceed to trial or whether to obtain the requested continuance."

The Evidence

Goldschmidt testified that vomiting, fever and stomach ache were symptoms of appendicitis. (RII **94)** He had no position on the dysuria - pain on urination. (RII **94-95)** Goldschmidt testified that there were some common symptoms

between gastroenteritis and appendicitis. (RII 90) Goldschmidt indicated that the history that he obtained that she was eating on the morning of the 12th was not consistent with appendicitis. This history is not contained in his notes. (RII 97) He had no recollection of the examination itself. (RII 100) While Goldschmidt indicated there was some generalized abdominal tenderness, some fever, history of vomiting and stomach ache, he did not do any confirmatory checks for appendicitis. He did not check for rebound tenderness because the tenderness elicited was not significant enough. (RII 117-121)

The time required for doing a rebound check, percussing the abdomen, doing a rectal exam, listen for bowel sound would require two or three minutes of time. (RII 123)

None of the symptoms or tests available for ascertaining the existence of appendicitis are reliable. (RII 128)

Dr. James Talbert testified on behalf of the defendant and indicated that the history and examination conducted by Goldschmidt were consistent with his diagnosis of gastroenteritis. Talbert indicated that the missing key element in this presentation of symptoms was abdominal pain - that abdominal pain is the first symptom. (RIV 512-514) Talbert indicated that a CBC is of relatively little use in differentiating between gastroenteritis and appendicitis. (RIV 517) That a urinalysis was important only in excluding

the patient who may have a urinary tract infection with symptoms mimicking appendicitis. **(RIV 518)** That x-rays are rarely helpful in diagnosis of appendicitis - that listening to the bowel sounds is not necessarily helpful because the sound can be similar with gastroenteritis and appendicitis. **(RIV 519-521)**

Appendicitis is difficult to diagnose generally because appendicitis can mimic a lot of other conditions and there is no totally reliable technique available that can clearly distinguish appendicitis from other problems. **(RIV 532)**

Like Talbert, **R.F.** Colyer, Jr., a pediatrician called by the defense, testified that Goldschmidt met the appropriate standard of medical care for the treatment that was rendered to Taletha Holman. **(RV 610)** Colyer testified that the various tests and procedures available for appendicitis were confirmatory tests that one would do after arriving at a presumptive diagnosis. **(RV 613)**

David Abramson, in his deposition which was read to the jury, indicated that he did not believe that a diagnosis of gastroenteritis was compatible with the history and findings. **(RIII 220)** Abramson indicated that there was virtually no such thing as normal symptoms for appendicitis which can occur with a variety of symptoms or lack of symptoms. It is something that must be expected in a child with abdominal pain when the abdominal pain is not explainable otherwise.

RIII 224) He testified that the child may have had gastroenteritis two days earlier when she was vomiting and had a fever but when she started getting better and then became worse again, this suggested some overlying disease or new condition such as appendicitis or Reye's syndrome or something more serious than viral gastroenteritis. (RIII 207) Before the child was sent home, there should have been a further examination and some lab work. (RIII 207-208)

William J. Garoni, Jr., M.D., was called as a witness by the plaintiffs. Garoni was the physician who saw the child on August 16, 1983 when she was admitted to St. Vincent's Hospital critically ill. (RIV 376-386) Garoni testified concerning her condition on his examination, operations which he performed on August 16th and August 24th. (RIV 386-389) Without detailing all of the complications that existed in the surgical procedures, the fact that these were not ordinary procedures can be obtained from the fact that he found two quarts of pus in the pelvic area. (RIV 394-395) He testified that she would have adhesions for life. (RIV 397) He testifies concerning subsequent hospitalizations due to intestinal obstruction from the adhesions and those complications. (RIV 396-401)

The examination by Dr. Goldschmidt on August 12, 1983 of Taletha Holman is set forth on the following page:

Date AUG. 1 2 1983 Age 6yrs-7mos
Wgt 55½ Hgt
Temp 98⁵ (o) H.C./B.P.

cc: (V) febrile 8/10 - seemed better 8/11 - played, ate well, no (V) / (V) started again this afternoon c̄ fever (102°) / c/o stomachache / had voided 3-3 ¾ / c/o dysuria last am /

PE Chef - [illegible] - [illegible]
Heart - [illegible]
Chest, lungs OK
Abd - [illegible] generalized tenderness

Imp gastro - [illegible] appendicitis [illegible]

Rx - gastro diet - watch closely

Date AUG. 1 7 1983 Age
Wgt Hgt
Temp H.C./B.P.

Phone call - apparently some mild degree of GI symptoms [illegible] phone call. did not sound very sick to Dr. [illegible] but [illegible] offered - continued on clear liquids. Did not call on 8/15 - but did call [illegible] 8/16 (afternoon) + described [illegible] + reports poor appetite for solids but handling fluids well - offered visit c̄ Dr. [illegible] on 8/16 - decided to wait for am appt. Then [illegible] am - [illegible] in evening + was admitted. Apparently went to [illegible] ER [illegible] T perf appendix / peritonitis + [illegible] - under care of Dr. [illegible] support of [illegible] care team - will watch c̄ them

SUMMARY OF THE ARGUMENT

After the examination and diagnosis of gastroenteritis by Goldschmidt of the Holman child on August 12, 1983, the Holman's called the office of Goldschmidt on August 14, 1983 concerning the child. This call was returned by a pediatrician, Gary Soud, M.D. through an arrangement that Goldschmidt worked out with Soud. There was considerable conflict between the testimony of Soud and the Holmans. David Abramson, M.D., testified through deposition that even considering the Soud version of the conversation, Soud deviated from the appropriate standard of care by failing to indicate to the Holmans that the child needed to be seen by a physician. The defense presented evidence that Soud's telephone response was appropriate. The essential facts pertaining to this call on August 14th were alleged although Soud was not identified by name. As set forth by the majority opinion in the First District, the trial court erred in not permitting the jury to determine whether Soud deviated from the required standard of care and whether Goldschmidt was responsible for that negligence.

No reasonable construction can be given to the complaint other than that the Holmans anticipated holding Goldschmidt responsible for the failure to alert the Holmans of Taletha's need for additional medical care by reason of the phone call made to the office of Goldschmidt on August 14th. The

complaint in paragraph seven alleges that on August 14th, a phone call was made to the office of Goldschmidt reporting that Taletha's symptoms were worse and no indication was given to the Holmans that further medical care was needed. There was expert testimony that there was a deviation from the appropriate standard of care when the Holmans were not informed of the need for medical care even if the Soud version of the phone call was accepted as true. (Tr. 245)

Upon being surprised during the charge conference with the theory that agency had not been pled, Holman's moved to amend the pleadings to conform to the evidence. The trial judge disregarded the testimony of Abramson indicating that there was no evidence that Soud was negligent. (Tr. 657) The form of instruction was rendered moot by such ruling since it was definite that neither the requested instruction or any other instruction on the point would be permissible.

There is nothing in the record to suggest surprise on the part of the defense or that the defense failed to fully prepare and fully address during trial the issue of negligence on August 14th and Goldschmidt's responsibility for this negligence; the issue was tried without objection.

In **Dowllng v Nicholson,** 135 *So.* 288 (1931), there were allegations of an automobile accident and that defendant by his servant was careless and negligent. **Dowling** states that **it is** not necessary to designate the particular person guilty

of negligence. In **White v Central Dispensary, 99** F2d 355 (D.C. 1938), the lower court was reversed in a malpractice action for sustaining a demurrer on the basis it had not been alleged that the improper diagnosis was made by one acting within the scope of his employment. On appeal, Goldschmidt has concentrated on the absence of Soud's name in the complaint and the absence of the expression "within the scope of employment" but fails to give any meaning to the presence of the operative facts alleged in the complaint.

Instruction 5.1(b) on concurring cause was rejected with the suggestion that it is appropriate only where there is concurring negligence and that there was no concurring negligence alleged in this case. Cases have not confined its application to other negligence. In the charge conference, the trial court observed a familiarity with these and also that parental negligence would be argued. (Tr. 665-667)

There was no charge on concurring cause or intervening cause. It was error to deny the Holmans' requested charge on concurring cause because there was a natural concurring cause of appendicitis and the defense, while not pleading contributory negligence, stressed the fact that the doctor had to rely on the parents to provide information and follow instructions. There was evidence permitting the jury to infer the mother did not provide an accurate history and did not pay attention to instructions by Goldschmidt in watching

the child and calling back as well as negligence thereafter in not seeking follow up medical attention. Goldschmidt's responsibility for the negligence of Soud was removed from jury consideration but that testimony remained with the real danger that a jury could view this negligence as a concurring cause which absolved Goldschmidt. Plaintiff's evidence was that the negligence of Soud was an extension of Goldschmidt and they combined. The question of whether the standard instruction on concurring cause should have been given is not a close call.

POINT I

THE TRIAL COURT ERRED IN NOT PERMITTING THE JURY TO CONSIDER WHETHER GOLDSCHMIDT WAS RESPONSIBLE ON AUGUST 14, 1983 FOR ANY MALPRACTICE OF GARY SOUD, M.D. IN PROVIDING HEALTH CARE SERVICES TO JERRI TALETHA HOLMAN.

This was the point raised by the Holman's below. Certainly, it contains issues that can be restated. But petitioner's restatement of this issue with a conclusion that an unpled new theory of liability surprised them in the charge conference ignores reality. As stated by petitioner, the first point includes the assumption that the issue of Goldschmidt's responsibility was not raised by the pleadings. The First District observed that this is not consistent with the defendant's evidence or defense counsels commentary during Soud's deposition. The evidence was set forth in the deposition of Abramson and precisely known to Goldschmidt prior to trial. Although petitioner

characterizes the complaint as being a void on the subject, the operative facts of August 14th are alleged and without mystification. Petitioner may restate the issue as initially raised by Holman as follows:

1. Whether there should be a different rule for alleging agency in contract cases from tort cases?

2. Whether it is necessary to identify an agent by name in a tort case in order to admit evidence and prove agency?

3. Whether it is necessary to allege the specific facts in a tort case which vest an agent with authority?

First, Goldschmidt claims that no where in the complaint is it alleged that Goldschmidt is responsible for what occurred on August 14, 1983. The complaint should not be read as isolated parts but as a whole. The complaint alleges that at all times mentioned, Taletha Holman was under the care of Goldschmidt - that Goldschmidt was selected for the purpose of providing medical care for Taletha - and that Goldschmidt undertook to provide medical care for Taletha. **The complaint alleges that the office of Goldschmidt was called on August 14th and it was related that Taletha had the same symptoms but was definitely worse but no indication was given that Taletha was in need of further medical treatment.** The complaint says the incidents alleged amounted to a departure from the accepted standard of care and Taletha received negligent care and treatment because her condition was not

diagnosed and she was not alerted about the need for additional care. The complaint says Taletha became critically ill and underwent surgical procedures because of the failure to diagnose and the failure to alert as to the meaning and consequences of her symptoms.

On appeal, petitioner assigns no meaning to the allegations pertaining to August 14th although facts alleged therein fit perfectly with the negligence and consequences the complaint assigns to Goldschmidt. The evidence did not hint that the Holmans called Soud. The Holmans called Goldschmidt and Goldschmidt had selected Soud to respond to Goldschmidt's calls. Goldschmidt necessarily knew that it was Soud handling Goldschmidt's call from the Holmans on August 14th. Goldschmidt necessarily knew that the Holmans were claiming Goldschmidt was accountable for the continuing failure to alert the Holmans of the significance of Taletha's symptoms when Goldschmidt was given additional opportunity to do this when they called Goldschmidt's office on August 14th and related that Taletha was definitely worse. The complaint is not ambiguous. If the complaint is read as a whole and the allegations pertaining to August 14th are given any meaning, plaintiff's theory is unmistakable.

During the trial, considerable facts were elicited pertaining to the Goldschmidt - Soud relationship. The jury could find Goldschmidt responsible for any negligence of Soud

based on testimony of Goldschmidt or Soud or Sandra Holman.

The Goldschmidt - Soud Arrangement

Soud was called by the defense and testified that he was board certified in pediatrics and that he had an arrangement with Goldschmidt where they would cover for each other on weekends. Each took a weekend off every month and each took a half day off every week. They took turns covering calls made for the other. (RIV 465-466)

Soud would keep telephone message slips on calls he took concerning Goldschmidt's patients. He had a note that on a Sunday, the 14th, he received a call about Jerri (the minor plaintiff). Soud related that he did not suspect appendicitis because the caller indicated there was no abdominal pain. He did not have Goldschmidt's notes from the previous Friday but he did not believe that would change anything. (RIV 467-474)

Soud was asked in the trial:

"Q All right. At any time was Taletha Holman your patient?

A No, she was not.

Q And when you phoned or returned the phone call for the Holmans, you were doing this for Dr. Goldschmidt?

A That's right." (RIV 482-483)

Goldschmidt testified that he expected parents to call him back if there was a problem. (RII 163, 166) He was rotating the handling of calls with Dr. Soud on certain

weekends and Soud would mail him notes on Monday or Tuesday that had been taken on his patients. He would also alert Soud about patients that concerned him. (RII 162-165)

There is no controversy concerning the circumstances which led to the telephone conversation on August 14, 1983. The telephone call was made by Sandra Holman to the office of Goldschmidt and a response was received from Soud. Testimony of Goldschmidt's does not leave any doubt about issue of Soud's authority to act for Goldshmidt on August 14th:

> Q Okay, sir. Now, in terms of the one visit that you've indicated, you got or you made the arrangements for Dr. Soud to call patients back. So you could have an evening off, you swapped off with him, right?
>
> A Yes.
>
> Q And the Holmans, they had no choice in who was going to call them back or anything; they called you and Dr. Soud called them back?
>
> A Correct.
>
> Q Dr. Soud was doing this for you?
>
> A Yes."

Weeks prior to trial, plaintiff's expert identified negligence on the part of Soud (Tr. 243, 255) and that Goldschmidt was responsible for this deviation from the appropriate standard of care stating that Soud should have informed the parents that the child was in need of immediate medical attention. (Tr. 243)

This is not a situation in which the defense was sandbagged. The defense was alerted to plaintiffs' position

and the deposition of Soud contains a confession by the defense that this point was understood. Soud was questioned in his deposition concerning discussions that he had with the defense attorney concerning the Holman records. From Soud's deposition:

> "Q Okay, fine. Do you regard these as confidential patient records?
>
> A Yes, I do.
>
> Q Did you discuss these records with Mr. Edwards just before I came into your office?
>
> A Yes, I did.
>
> Q At that time were they confidential patient records?
>
> A Yes, they were. I discussed only the call from the Holmans.
>
> Q Did you have a medical authorization from the Holmans permitting you to discuss this with Mr. Edwards?
>
> MR. EDWARDS: Let me just object at this point. Number one, your expert has already testified this gentleman was operating as an agent of my doctor and was working with my doctor. And i have the right to speak to people that are working with him. And, according to your expert, that's the situation.
>
> **If you all want to drop any allegation pertaining to my doctor being responsible for this gentleman's alleged negligence,** then we'll cross that bridge --" (Soud's deposition 9) (Emphasis added)

The First District sums up the situation as follows:

> "Consistent with this expression of the issues, Dr. Goldschmidt's counsel did not object at trial to appellants' presentation of Dr. Abramson's deposition testimony wherein Abramson testified that Dr. Soud deviated from the appropriate standard of care in not instructing appellants on August 14 to immediately take Taletha to him or to the hospital for examination. (R 245) Likewise, appellee's counsel did not object to

Dr. Abramson's deposition testimony that appellee was responsible for Dr. Soud's negligence. (R 243) Appellee's own counsel elicited testimony from Dr. Soud that he and appellee had an arrangement whereby they would each take off one weekend a month and one-half day a week, and during their time off each doctor would cover for the other (R. 465-466); that the Holmans called appellee's office on August 14 and Dr. Soud returned that call because he was "covering" for appellee's patients directly when covering for appellee. (R. 466) appellee's counsel also questioned both Drs. Talbert and Colyer as to whether the actions of Dr. Soud comported with the appropriate standards of care. (R. 534-535, 618, 619) This testimony was not relevant to the issue of Dr. Goldschmidt's negligence in diagnosing Taletha on August 12, the single issue allowed to go to the jury; it was relevant only to rebut the contention that Dr. Soud acted negligently in treating Taletha on behalf of Dr. Goldschmidt. At the very least, the testimony taken as a whole presented an issue for the jury concerning Dr. Goldschmidt's responsibility for any negligence of Dr. Soud in responding to the call on August 14.

When an unpleaded issue is tried by express or implied consent, it is to be treated in all respects as if raised by the pleadings, whether or not a motion is made to amend the pleadings to conform to the evidence. Rule 1.190(b), Fla. R. Civ. p.; **De Teodora V. Lazy Dolphin Development Company,** 418 **So.** 2d 428 (Fla. 3d DCA 1982), pet. for rev. denied, 427 ***So.*** 2d 737 (Fla. 1983). As noted previously, defendant did not object to any of the evidence on this issue, and in view of defense counsel's stated understanding of the issues during pretrial discovery, there was no apparent prejudice to the defendant in maintaining his alleged defense. Thus, notwithstanding the sufficiency of the complaint to allege the issue of Dr. Goldschmidt's liability for Dr. Soud's negligent acts on august 14, the issue was ripe for the jury's determination by virtue of having been tried by the parties' implied, if not express, consent. The court's denial of appellants' motion to amend the pleadings to conform to the evidence and the consequent foreclosure of any issue and argument regarding Dr. Goldschmidt's responsibility for Dr. Soud's negligence deprived the appellants of their right to have the jury decide an essential issue and constitutes reversible error requiring a new trial on all issues. **See Doctor's Memorial Hospital, Inc., v. Evans,** 14 **F.L.W.** 1106 (Fla. 1st DCA, May 12, 1989)."

In the initial appellate brief, the Holmans cited two cases, Maestrelli **v** Arrigoni, 476 So.2d 756 (Fla. 5th DCA **1985)** and Pacific Mut. Life Insurance **Co. v** Barton, 50 F.2d 362 (CCA Fla. **1931)** for the proposition that an act done through an agent may be alleged according to its legal effect as the act of the principal without alleging the agency. These cases are clear on the point and no effort was made by Goldschmidt to challenge these. In contract cases, the act may be alleged without reference to any agency or the agent as if the act were that of the principal. Instead, Goldschmidt stresses that those cases are not applicable simply because they involve contracts rather than torts. However, no reasoning is divulged as to why there should be a different rule for torts. The reasoning of Maestrelli and Pacific Mutual is applicable here because the particular agreement and arrangements that Goldschmidt had with Soud gave Goldschmidt a full understanding of all facts. Plus, the complaint and the discovery attached responsibility to Goldschmidt for the events of August 14th.

Soud was not identified by name in the complaint. It is not necessary to identify the negligent agent or negligent servant by name. In Dowling **v** Nicholson, **135 So.** 288 **(1931)** there were allegations of an automobile accident and that defendant by his servant was careless and negligent. The complaint was attacked on the basis that there was no

allegation that there was a relationship between the defendant and any specified party. Dowling states that it is not necessary to designate the particular servant guilty of the negligence:

> "In actions where negligence is the basis of recovery, a declaration is sufficient if it contains allegations of sufficient acts causing injury, with an averment that they were negligently done."

It is not necessary to allege that a particular person was acting within the scope of his authority. In White **v.** Central Dispensary, **99** F2d 355 **(D.C.** 1938), there were allegations of a failure to make a proper diagnosis; there was an appeal after a demurrer by the hospital was sustained. A hospital had been successful with a demurrer which had claimed, among other things, that a complaint against it was defective for failing to aver *** that a co-defendant was its agent and acted within the scope of his employment in making the alleged improper diagnosis. No facts were alleged from which it could be determined whether or not the physician was acting within the scope of his authority.

On this point, White relies on Bank of Metropolis **v** Guttschlick, **14** Pet. **19, 10** L.ed **335** which was an action for specific performance - an objection was directed to the complaint because it alleged that the agreement was made through the president and cashier without alleging their authority. This objection was rejected by the United States

Supreme Court which is quoted in **White** as follows:

> "Now even assuming, for the sake of giving the objection its full force, that the making of this agreement was not within the competency of these officers, as such, yet it was unquestionably in the power of the bank to give authority to its own officers to do **so**. When, then, it is averred that the bank, by them, agreed, this averment, in effect, imports the very thing, the supposed want of which constitutes the objection: because, upon the assumption stated, the bank could have made no agreement but by agents having lawful authority. Nay, it would have been sufficient, in our opinion, that the bank agreed, without the words, 'through the president and cashier:' for it is a rule in pleading, that facts may be stated according to their legal effect. Now the legal effect of an agreement made by an agent for his principal, whilst the agent is acting within the scope of his authority, is, that it is the agreement of the principal. Accordingly, it is settled that the allegation that a party made, accepted, endorsed, or delivered a bill of exchange, is sufficient, although the defendant did not, in fact, do either of these acts himself, provided he authorized the doing of them. Chitty on Bills, 356, and the authorities there cited. This principle has been applied too, in actions ex delicto, as well as ex contractu. In *6* Term Rep. 659, **it was held, that an allegation that the defendant had negligently driven his cart against plaintiff's horse, was supported by evidence, that defendant's servant drove the cart. In this aspect of the question, it was one, not of pleading, but of evidence." [14** Pet. at page 27.1 (emphasis added)

An annotation on the necessity of pleading that tort was committed by servant in action against master appears in 4 ALR2d 292. It states at page 293:

> "Language appears in many decisions indicating the belief of the courts that the declaration, petition, or complaint in an action against a master or principal for the tort of his servant, employee, or agent need not disclose that the wrongful act was not committed by the master himself but was rather, the act of the servant. In other words, the plaintiff's pleading in such an action is sufficient if it charges the misconduct against the defendant personally without mention of the servant or agent."

While there is not total unanimity, the weight of authority set forth in this annotation is heavily in favor of permitting allegations of the operative facts without the necessity of identifying that the negligent act or omission was through an agent or specifying the agent's authority.

Many of the decisions involve corporations and corporations can only act through agents. The natural question then is whether a distinction exists when the defendant is an individual. The featured case in the annotation is **Clifford S. Banks v. Edgar G. Watrous, 134** Conn 592, 59 A2d 723 where it was alleged that defendant cut trees on plaintiffs property - proof was introduced that persons other than the defendant cut and removed the trees. Defendant appealed an adverse verdict stating specifically that evidence of acts of agents in cutting trees should not have been admitted without allegations of agency. This point was rejected with the court observing:

> "The court could well conclude that he could not reasonably have failed to appreciate that the plaintiff would seek to charge him on the basis of the acts of his employees in cutting the trees. Such a conclusion would justify the admission of the question to which the defendant objected."

This annotation also sets forth numerous cases where the point has arisen in a slightly different manner - the complaint does not allege agency and during the trial objections are made as to the proof of negligence through acts of agents. Evidence that the wrong was committed by a

servant or agent is commonly held admissible and will sustain a recovery. A large number of cases are cited where the defendant is an individual - the precedent is for allowing evidence of negligence by an agent to be introduced without any allegations of agency. Chitty on Pleading is cited in several cases including one in the annotation, **Guffey v Mosely** (1858) 21 Tex 408 for the proposition that an action against a master for the negligence of his servant may be alleged without noticing the servant. Apparently, the concept is not confined to corporations and may have been practiced before the concept of corporations. The skimpy support for requiring the agency to be pled seems to be limited to a few cases where the wrongful act was an intentional tort.

The issue, what specific requirements in pleading a tort are necessary for the admission of evidence for the purpose of holding a defendant responsible for the acts of an agent has not been squarely raised in Florida. But there is nothing which suggests that Florida has or should have a position dramatically different from the majority.

In **Chambers v Cagle,** 123 So.2d 12 (Ala 1960), the complaint alleged a direct assault by the defendant. The Alabama Supreme Court held:

> "To state a cause of action against the defendant for a wrong committed by his servant, the ultimate fact necessary to be alleged is that the wrongful act was committed by the defendant. This may be alleged either by alleging that the defendant by his servant committed the act, or without noticing the servant, by alleging that the defendant committed the act."

Subsequently, Alabama enacted a statute which specifically follows the case law and eliminates any doubt as to whether agency must be pled specifically in Alabama. The natural question which is not often discussed is why have this liberal pleading on the matter of agency? First, the particular circumstances pertaining to agency are best known to the defense. Secondly, agency has so many diverse facets that the courts have opted to protect the public from potential pleadings wars on issues of agency. If contested, agency is a matter reserved for the jury and the jury can be reached without a circle dance being performed with the pleadings. Plaintiff identified the time and circumstances of an incident on August 14th which was characterized by the complaint as constituting negligence on the part of defendant. No matter how strongly the complaint is construed against Taletha Holman, it states that her mother called the office of Goldschmidt on August 14th and related that Taletha was definitely worse and there was no urination or bowel movement and the mother was not informed that Taletha needed further medical treatment - that for these reasons among others, Taletha received negligent care and treatment by the failure of Goldschmidt to alert the mother about the need for additional medical care.

Goldschmidt is in no position to generate any argument about surprise - he selected Soud and made him available to

the Holmans. Alleging a phone call with "Goldschmidt's office" on August 14th with the substance of the phone call being set out apprised defendant of plaintiff's claim. Goldschmidt knew the conversation was with Soud. Goldschmidt argues that plaintiff attempted to change the issue during the trial but Goldschmidt does not identify even through argument any item in the record which suggests that Goldschmidt was surprised or uninformed about plaintiff's theory of the case. On the other hand, defendant must give some probable meaning to the allegations - the time and circumstances of the phone call alleged and charged as Goldschmidt's negligence. The evidence came in without objection. For some reason, the defendant defended Soud's actions through the testimony of James F. Talbert, M.D. (Tr. 534-535) The defendant defended Soud's actions through the testimony of R. F. Colyer, M.D. (Tr. 618-619). Must we now assume that this defense was not for real?

This focus of attention on the negligence of Soud establishes that the defense completely understood plaintiff's theory. Whether this came from the pleadings, Abramson's deposition, clairvoyance or a mixture of all, the record shows that the issue was tried and the defense participated fully prepared. If the defense deemed it appropriate to defend the issue of Soud's negligence, the defense necessarily knew that it could be relevant only

through Soud's relationship with Goldschmidt and any evidence that existed which would distance Goldschmidt from Soud or establish Soud as an independent contractor would have been presented.

The phone call from Soud to the Holmans was part of the service rendered by Goldschmidt. Soud testified that Taletha Holman was not his patient at any time, he called for Goldschmidt. (TR. 482-483) Goldschmidt testified that after the Holmans called, they had no choice in who was going to call back. Goldschmidt testified Soud called the Holmans for Goldschmidt. (TR. 171-172) **O'Grady v. Wickman,** 213 **So.** 2d 321 (Fla. 4th **DCA),** read **Montgomery v. Stary,** 84 **So.** 2d 34 (Fla. 1955) to mean that physicians who diagnose and treat a case together without withdrawal by or discharge of either are both liable if the treatment is negligent observes some diversity and then states:

> "There are, on the other hand, many courts which have held that one physician is a joint tortfeasor with the other and is liable for his action when there is a concert of action and a common purpose existing between two doctors. *** We adhere to the determination made by these latter courts as being the better viewpoint since we feel that this view best exemplifies a duty owed to society by those who hold themselves out to be skilled in curing human ills."

The obligation of continuing attention by Goldschmidt was recognized by him in securing the arrangement with Soud. In the absence of an agreement limiting the service, a physician is under the obligation of treating a patient so

long as the professional relationship lasts. **Saunder v. Lischkoff,** 188 **So.** 815, at 819 (Fla. 1939). Soud was a pediatrician with the same type of practice as Goldschmidt and not in another specialty - he was employed by Goldschmidt to render services customarily rendered by Goldschmidt. In this instance, Soud was a borrowed servant. The practice of reversing the roles wherein Goldschmidt would be the borrowed servant for Soud does not alter the facts. This relationship is more similar to a partnership than that of an independent contractor and that relationship does not require one to be dominant over the other for responsibility to attach. Goldschmidt chose Soud, relied upon him, and Soud reported to him on contacts from Goldschmidt's patients.

The district court did not ignore and did not disregard the decision in **Tamiami Trail Tours, Inc. v. Cotton,** 463 **So.** 2d 1126 (Fla. 1985), as suggested by the petitioners brief. In **Tamiarni,** the jury could have returned a verdict against **Tamiami** on the basis that the tortuous acts of Crosby were acts within the scope of his employment. The jury returned a verdict not on the basis of agency but on the theory that **Tamiami** failed to control the actions of its servants even though acting outside the scope of employment - an issue nowhere framed in the pleadings and no motion was made to amend the pleadings. The issue arose for the first time in the charge conference and the defense had no opportunity to rebut

this theory. As discussed, the operative facts constituting negligence and Goldschmidt's responsibility for that negligence are set forth in the complaint. The defense knew that plaintiff would rely on the testimony of Abramson and that the evidence would be presented via deposition. Goldschmidt did not object to the testimony being presented and Goldschmidt fully presented rebuttal evidence through his experts. **Tamiami** provides no support whatsoever for petitioner.

In **Designers Tile International v. Capital C Corporation,** 499 **So.** 2d 4 (Fla. 3d DCA 1986), **Designers Tile** had made a claim against the defendant for the negligent hiring of a roofing concern. At the close of all of the evidence, the plaintiff was permitted to amend the complaint so as to allege a different cause of action; one in which it was sought to hold the defendant directly responsible for the negligence of the roofing firm. From the opinion, it is not clear whether this was through agency or otherwise. In any event, it was not a theory suggested by the pleadings and entirely different from the cause of action alleged. Apparently, the defendant had no opportunity to defend against the cause of action following the amendment. The Holmans did not present evidence different from that alleged and while Goldschmidt claims prejudice by way of a bare conclusion, no particular facts of prejudice are visible.

Goldschmidt elicited evidence from two experts, Dr. Talbert and Dr. Colyer, as to whether the actions of Dr. Soud purported with the appropriate standards of care. (TR 534-535, 618, 619) This evidence was relevant only for the purpose of defending against plaintiff's position that Dr. Soud acted negligently in treating Taletha on behalf of Dr. Goldschmidt. The record does not suggest that the defense was surprised or prejudiced by plaintiff's allegations and evidence.

Goldschmidt also relies heavily upon **Arky, Freed, et.al. v. Bomar Instrument Corporation, 537 So.** 2d **561** (Fla. **1988).** In the **Arky, Freed** case, plaintiff disclosed that it intended to establish negligence on the part of a law firm in failing to assert and prove a particular defense despite direct instructions by the client to do **so.** Immediately, Arky, Freed moved for a continuance or, in the alternative, to exclude all evidence relating to the new claim. Compelling distinctions exist which preclude Goldschmidt from finding comfort in **Arky, Freed.** First, there is no indication that any operative facts are alleged in **Arky, Freed** which apprises them of the issue. Secondly, **when the issue was identified, Arky, Freed** made it abundantly clear that an unpled claim was being tried without their consent. Goldschmidt did not object to plaintiff's evidence and demonstrated preparation on the issue with the presentation of rebuttal testimony from Dr. Talbert and Dr. Colyer.

Goldschmidt also cites **City** of **Ft. Walton Beach v. Grant,** 544 **So.** 2d 230 (Fla. 1st DCA 1989). The city never pled as an affirmative defense that the plaintiff (councilmen seeking reimbursement for legal fees) violated the Sunshine law and that such violation constituted bad faith eliminating an award of attorney's fees under section 111.07. Further, that evidence was elicited by the trial judge and never raised by **the parties** in the pleadings or at trial.

Bilow and **City of Ft. Walton Beach** do not resemble **Holman** on a factual basis. However, in **De Teodora v. Lazy Dolphin Development Company,** 418 **So.** 2d 428 (Fla. 3d DCA 1982), the plaintiff alleged that a tavern was negligent in failing to maintain hand rails on the stairs but elicited testimony from a witness that a bartender pushed a witness into the plaintiff causing plaintiff to fall down the stairs. No objection was made to that testimony and the defense cross examined the witness on this intentional tort by the bartender. After all of the evidence was presented,

plaintiff moved to conform the pleadings to the evidence introduced a trial and the trial judge refused. This case was reversed on the basis that the defense had waived any objection to the admission of the evidence and although the issue was not raised in the pleadings, whatsoever, the defense had waived any objection to the introduction of the testimony by not objecting thereto. The case for permitting the jury to decide the issue of Goldschmidt's responsibility for Soud's negligence is much stronger than **De Teodora** or the cases cited therein. If the issue was not adequately pled, a better case for permitting an amendment pursuant to Florida Rules for Civil Procedure 1.190 (b) does not exist.

Goldschmidt contends that the instruction requested on agency was incorrect and the evidence not sufficient for submission to the jury. The trial court did more than simply deny the requested instruction, the trial court removed the issue and shutout any instructions on agency. The First District states:

> "Thus notwithstanding the sufficiency of the complaint to allege the issue of Dr. Goldschmidt's liability for Dr. Soud's negligent acts on August 14th, the issue was ripe for the jury's determination by virtue of having been tried by the parties' implied, if not, express, consent. The court's denial of appellant's motion to amend the pleadings to conform to the evidence and the consequent foreclosure of any issue and argument regarding Dr. Goldschmidt's responsibility for Dr. Soud's negligence deprived the appellants of their right to have the jury decide an essential issue and constitutes reversible error requiring a new trial on all issues. see **Doctor's Memorial Hospital, Inc.** v. **Evans,** 14 F.L.W. 1106 (Fla 1st **DCA** May 12, 1989)

Finally, Goldschmidt contends that the only evidence that Goldschmidt was responsible for any negligence of Soud comes from the opinion of Abramson and an asbestos case is cited, **Dorse v. Armstrong World Industries, Inc.** 513 **So.** 2d 1265 (Fla. 1987) in which the principal, the federal government is not a party and a defendant Eagle-Picher is seeking a safe harbor under a "government specification defense". The facts there bear no similarity to those in Holman but Goldschmidt has previously urged that there was an absence of control of Soud by Goldschmidt and implies that Soud is an independent contractor.

As previously discussed, Goldschmidt obtained Soud for the purpose of handling calls and responding to Goldschmidt's patients. The phone call from Soud to the Holmans was part of the service rendered by Goldschmidt. **Soud testified that Taletha Holman was not his patient** at any time and that he called for Goldschmidt. (Tr. 482-483) Goldschmidt testified that after the Holmans called him, they had no choice in who was going to call back. Goldschmidt testified that Soud called the Holmans for Goldschmidt. (Tr. 171-172) By the arrangement, Soud was required to be available and return phone calls to Goldschmidt on August 14th. The jury should be required under these facts to find that he is the agent of Goldschmidt. Even if it is determined that he is an independent contractor as implied by the defense, this does

not provide Goldschmidt with an escape.

The general rule that an employer may not be held liable for the negligence of an independent contractor is "riddled with numerous exceptions", **City of Coral Gables v Prats,** 502 **So.** 2d 969 (Fla. 3d DCA 1987). In **Stuyvesant Corp v Stahl,** 62 **So.** 2d 18 (Fla. 1952), a hotel received $1,500 per year from Dave Shattuck as a concessionaire in parking cars. He in turn hired others to help him with the compensation coming from tips. The case turned not on the degree of control exercised but on the fact that the parking of automobiles was a part of the service rendered to hotel guests. Without exception, the evidence showed that the phone call from Soud to the Holmans was part of the service rendered by Goldschmidt.

POINT II

THE TRIAL COURT ERRED IN NOT GIVING STANDARD INSTRUCTION 5.1(b) WHEN THERE WAS A NATURAL CONCURRING CAUSE AND THE EVIDENCE ALSO PERMITTED A JURY TO CONSIDER OTHER NEGLIGENCE AS A CONCURRING CAUSE.

Requested Instruction 12 reads as follows:

> "In order to be regarded as a legal cause of loss, injury or damage, negligence need not be the only cause. Negligence may be a legal cause of loss, injury or damage, even though it operates in combination with the act of another, some natural cause or some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such loss, injury or damage.

Unquestionably, the natural force which set in motion this calamity was an appendeceal problem. Jerri Taletha Holman had appendicitis. Appendicitis was a concurring cause. In **Goodman v. Becker,** 430 **So.** 2d 560 (Fla. App. 3 Dist. 1983), a malpractice action was based upon allegations and evidence that the physician was or should have been aware that it was inadvisable to perform an operation because of the patient's circulatory and hypertensive problems. This case contains the following language.

> "It is undisputed that this charge correctly reflects the equally unassailable principle that a wrongdoer remains liable for a consequent harm when the result is caused by a congruence of his own negligent act with a natural force or condition, often called an "Act of God," such as Goodman's pre-existing physiological and anatomical status. **Davis v. Ivey,** 93 Fla. 387, 112 So. 264 (1927); 57 **Am.** Jur. 2d Negligence Section 181 (1971); **65** C.J.S. Negligence Section 115 (1966). Moreover, there is no doubt that the failure to give an applicable concurring causes instruction constitutes reversible error."

The difference between **Goodman** and **Holman** is simple. The claim in **Goodman** is that the physician should have been aware of symptoms which precluded a procedure that was undertaken. In **Holman,** the allegation is that the physician should have been aware of symptoms which mandated further action which was not undertaken. The need for a charge on concurring cause is the same in both cases.

It was not the fault of Goldschmidt that Taletha had appendicitis and as a result, she necessarily would experience pain, an operation and hospitalization. Distinguishing this natural concurring cause from the extra damages and injuries alleged from negligence may be clear to the lawyers but there is a risk of confusion to a jury. The theme of the defense - a diagnosis of appendicitis is difficult and tricky. Symptoms and tests are not reliable (Tr. **128).** The tests are confirmatory after a presumptive diagnosis has been made (Tr. **613).** A CBC, urinalysis, rebound tenderness, listening to bowel sounds, etc. are not helpful (Tr. **512-532).** So goes their story. This permeates the testimony of Talbert, Colyer, Soud and Goldschmidt. While checking for rebound tenderness, listening for bowel sounds, doing a rectal exam, blood work, etc. would involve a minimum expense in time and money, Goldschmidt excluded appendicitis without them.

Defense experts excused his failure to perform simple,

available and inexpensive checks; an invitation for the jury to deduce - you can not hold Goldschmidt responsible because of the nature of this concurring natural cause.

The opinion in **Holman** observes that confusion can arise from the instruction on negligence when there is a concurring cause, natural or negligent, and no instruction on concurring cause is given. The trial court instructed:

> "Negligence is a legal cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said that, but **for** the **negligence**, the **loss**, injury or damage would not have occurred."

When two or more causes can be gathered from the evidence, the "but for" instruction states that the defendant would be liable only when the resulting injury would not have occurred but for the negligence of the defendant which infers that it must be the only cause. There is a need for the concurring cause instruction. **Holman** states:

> "The legal concept of concurring cause is not a matter of common knowledge among lay persons, and apparently is a matter of some confusion to lawyers and judges. Therefore, the "idea that a defendant is not excused from the consequences of his negligence by reason of some other cause concurring in time and contributing to the same damages" is not something the courts should assume the average juror comprehends without assistance by proper instruction from the court."

In **Higgins** v. **Johnson, 434** So.2d **977** (Fla. 3d **DCA 1983),** the trial court was reversed for refusing to instruct on concurring and intervening cause in a malpractice case. **A**

chiropractor treated the plaintiff for a low back strain but the problem was cancer. Certainly, the failure to discover the malignancy timely did not produce the cancer. The failure to give an instruction on concurrent cause was held to be reversible error. There is no meaningful distinction between the subject case and **Higgins.**

In Tilly **V** Broward Hospital, 458 So.2d 817 (Fla. 4th DCA 1984), there was a premature baby that had numerous medical problems and surgery was performed on two occasions. There was testimony that the hospital was negligent and the hospital contended that death was due to natural causes. The trial court based its refusal to give the instruction on concurring cause because it was covered by the instruction on intervening negligence which was given. The case was reversed because the charge on concurring cause was not given. The record contained much testimony on the inherent problems of premature babies as well as testimony on the possible negligence of the hospital. In Holman, the record contains much expert testimony concerning the inherent problems of appendicitis and the possible negligence of Goldschmidt, Sandra Holman and Soud.

In Miller **V** Court, 510 So. 2d 926 (Fla. App. 4 Dist. 1987), a malpractice action, the plaintiff alleged that a coma resulted from negligent medical treatment which aggravated a pre-existing condition, diabetes. Miller states:

"The standard jury instruction 5.1(b) on concurrent causes is applicable when the plaintiff's injury is caused by a doctor's negligence, acting upon and combined with the plaintiff's pre-existing physical condition. **Goodman v Becker,** 430 So. 2d 560 (Fla. 3d DCA 1983); **Higgins v Johnson,** 434 So. 2d 976 (Fla. 2d DCA 1983) and **Marrero v Salkind, M.D.,** 433 So. 2d 1224 (Fla. 3d DCA 1983), petition for rev. denied, 444 So. 2d 418 (Fla. 1984). In the instant case, there was evidence presented that Dr. Court's alleged negligence combined with Mrs. Miller's pre-existing diabetic condition caused her coma. Dr. Court's negligence was alleged to be his taking Mrs. Miller off her diabetic medicine and his failing to substitute an alternative drug. This evidence entitled Mrs. Miller to an instruction on concurring causes, and the failure to give such instruction constituted reversible error. See **Goodman; Higgins;** and **Marrero.**

Goldschmidt's answer does not contain anything but a denial. However, the defense in the trial and argument injects the issue of negligence on the part of the mother. The First District does not comment on this aspect but the record discloses that the defense submitted evidence suggesting that Sandra Holman provided an incomplete or inaccurate history. Goldschmidt testified:

"Q If the complaint had been related to your nurse had been vomiting and pain on Wednesday, do you think she would have indicated pain separate from where she puts stomach ache down further on?

A I believe so.

MR. LOFTIN: Your Honor, I would object to this as being entirely speculative.

THE COURT: Rephrase your question.

That's sustained.

BY MR. EDWARDS:

Q Sir, based upon your experience with your nurse, the fact that you have worked with her for three years, what

would you expect from her if the Holmans had related the fact that they had -- that Taletha had stomach pain on Wednesday?

MR. LOFTIN: Your Honor, I would make the same objection.

THE COURT: This time it is overruled.

A Knowing her, I would expect her to write down vomiting and pain along with fever on the 10th of August."

The cross examination of Sandra Holman is geared to placing the responsibility on her (Tr. 63-76). This cross concludes:

"Q And he said I will meet you at the hospital, isn't that what he told you?

A No, sir. He said I can put her in the hospital and give her IV.

Q And you were the one that had seen her for the last two days and knew how much she had been able to drink and how much she had been able to go to the bathroom and that sort of thing, is that correct?

A. Yes, Sir"

The defense also suggested negligence on the part of Sandra Holman in the following testimony from Goldschmidt.

"Q What is your impression of whether or not Mrs. Holman left with this knowledge that she was supposed to make sure that the child was properly hydrated?

A I would assume that she would follow through on it, that she had instructions to follow them, and would know how to do it.

Q One of the things you talked a little bit about with Mr. Holman, I'm sorry, Mr. Loftin, is that your impression here was gastroenteritis. You gave them a gastroenteritis sheet and gave them some instructions.

A Call me if you are uncomfortable or worried.

PAGE(S) MISSING

Q Why is that?

A Because any disease can change and any diagnosis can be changed. Nothing is black and white."

* * *

"Q Okay. What I'd like for you to specify, if you can for the jury, why you believe this was gastroenteritis instead of appendicitis?

A All right. Now, there are a couple of things that would make me suspect appendicitis which weren't there, and I'm basing this on the information that i feel I got, that the child was eating that morning, the child had an appetite, and I have yet to see a case of appendicitis with a child have an appetite at that point.

The child did not have severe, localized tenderness, the pattern of pain was not consistent with appendicitis. The child, both from my nurse's notes and from what I assume are my notes, did not start with abdominal pain, especially in the belly button area, pain that shifted, and just the child did not look or act that way.

Q Okay. Would the order in which the child's symptoms occurred have played any role either?

A Vomiting, when it occurs with appendicitis, and again I have -- I know it's recorded as a symptom of appendicitis, the several dozen children I've seen with appendicitis, vomiting has not been one of the symptoms.

So pain and the loss of appetite are the two symptoms to me that are the most reliable indicators.

Q What do you usually see, first with a child, and we're talking about children within this conversation, no adults, what do you normally see first with children that have appendicitis?

A Usually there will be some pain."

* * *

"Q All right. When you asked parents to call you back if there's a problem, do you expect them to do so?

A I have got to rely on them for some judgment."

Dr. James Talbert, an expert called by the defense, stressed the sequence of the symptoms in the history. He testified that while "stomach ache" was contained in the history - there is no history of pain having been the initial factor. Pain is the first symptom (RIV 513) and that it would be unusual for a patient to be able to eat after the onset of illness.

The defense point suggesting negligence on the part of Sandra Holman permitted a jury to infer that she failed to give an accurate history and identify the symptoms - failed to listen to Goldschmidt's instructions about calling back which were given at the time of the examination. Although Sandra Holman was not charged with negligence and the word "negligence" was not affixed to her by the defense, a major thrust throughout was that Sandra Holman was negligent.

Pertinent excerpts from the charge conference on this issue are as follows:

> "THE COURT: 5.1(b), defendants want to be heard on that?
>
> MR. HOWELL: Which one is that, Judge?
>
> THE COURT: This is concurring cause.
>
> MR. HOWELL: Yeah. I don't think there's any evidence of any concurring cause or anything else in this case.
>
> THE COURT: Well, let me tell you the thing that concerns me about 5.1(b), there are several cases out now that say that 5.1(b) should be given when requested when you have a negligence, comparative negligence situation between the plaintiff and the defendant, and I'm sure you all are going to argue in your closing arguments it was the parent's negligence for not

bringing the child in as soon as they should have.

MR HOWELL: Well, we haven't raised comparative negligence and the defense is not an issue.

THE COURT: I understand.

MR. HOWELL: I don't think it's a concurring cause. It's no negligence. I mean, we did what we had to do, then you have to rely on the parents to do what they are supposed to do. That's the whole tenor of the case.

MR. EDWARDS: The testimony, even from the plaintiffs' experts, is the doctor has a right to rely on information given to the parents, and the question here is whether or not the doctor was negligent based upon the information given so that it's not being used in an --in the manner in which the cases address.

MR HOWELL: Plus he's only been charged for negligence for that August the 12th visit. Anything that happened after that --

THE COURT: Let me tell you candidly what concerns me about this charge. The charge, when it was drafted, was intended only to apply in concurring cause situations.

Several courts in the last year have held it's error in situations where we never believed it was intended to be used not to give the charge when it was requested.

Now, I agree with you, I think it's -- there's --I don't think it belongs in this case, but I don't think it can hurt you to give it, and I don't want to create reversible error if I can avoid it.

If you want to not give it and take that chance, I'll do it, but I'm just concerned that they are going to go off on a tangent if this goes off on appeal, if you win, if it goes up on appeal.

MR. HOWELL: Where is the charge?

THE COURT: Here. Here it is.

MR. HOWELL: There isn't any evidence of concurring negligence here. Even the parents, if they are negligent at all, it came afterward.

THE COURT: Do you want me not to give it?

MR. HOWELL: I don't think it's appropriate in this case.
THE COURT: Do you want me not to give it?

MR. HOWELL: Yes.

THE COURT: I'm going to deny it. I agree with you. I don't think it's appropriate. I'm just warning you.

MR. HOWELL: All right. We'll take that chance.

THE COURT: All right.

MR. LOFTIN: Your Honor, they are certainly going to argue, I'm sure, that to the jury that the parents were at fault here, even though they have not pled any contributory negligence or comparative negligence or anything.

THE COURT: But, see, that doesn't make it a concurring cause unless the defendant is also at fault, and it has to operate at the same time as the defendants' negligence.

And if the only possible negligence of the defendant occurred on August 12th and the defendant -- and the plaintiffs, the parents' alleged failure to act reasonably occurred subsequent to August 12th, that's not a concurring cause.

It may be an intervening cause, but it's not a concurring cause, and I don't think it's appropriate. I'm going to reject it."

The distinction between a concurring cause and intervening cause is sometimes difficult for lawyers. The jury did not have the benefit of an instruction on either. The jury had before it the concurring cause of appendicitis and in addition, a strong suggestion of negligence on the part of Sandra Holman in not relating the symptoms accurately and not listening to the instructions given to her by Goldschmidt on August 12, 1983.

The key to whether a charge on concurring cause is

appropriate is the evidence. Many times, the issue of concurring cause that develops in the evidence can not be found in the pleadings. A concurring natural cause is not a defense and it is not likely to be identified as a concurring cause in the pleadings. Likewise, negligence of a concurring cause may develop in the evidence without an allegation of comparative negligence. It is not the pleadings or the trial court's interpretation of the evidence that determines the appropriateness of a concurring cause instruction. The concurring cause instruction was appropriate here because the defense stressed that the physicians had to rely on the accuracy of the symptoms reported by the parents and for the parents to listen to the instructions given by the physician and generated a suggestion that the negligence of Sandra Holman was a concurring cause in her child not receiving appropriate medical attention. Negligence of the mother as a concurring cause was put into play by Talbert when he emphasized the relevance of the sequence of symptoms in the history which Goldschmidt relied upon in missing the appendicitis; Goldschmidt attached importance to instructions he gave the mother on August the 12th. This evidence forced the jury to evaluate whether the mother was negligent in relating an accurate history and whether the mother failed to listen to the instructions of Goldschmidt. The defense had the benefit of their evidence and argument but the plaintiff did not have the benefit of the law on concurring cause.

Goldschmidt asserts that **Wilson v Boca Raton Community Hospital, Inc.,** 511 **So.** 2d 313 (Fla. 4th **DCA** 1987) is controlling but **Wilson** does not reject the cases cited by **Holman,** saying **it** may have been error not to give the charge. The majority opinion distinguished **Wilson** by noting that the critical fact in issue was whether the plaintiff had told the physician that he ingested the poisoning or whether he only said **it** was sprayed upon him. The instructions given were adequate to inform the jury of the law concerning this position of that issue. **Wilson** stands alone. **No** other case has followed **Wilson. Wilson** creates a risk that this charge can be given depending upon the idiosyncracies of the trial judge. **It is** an invitation to an array of appeals and a collection of cases that are tedious to reconcile. Here, the trial court advised the defense in the charge conference "** but I don't think **it** can hurt you to give **it,** and **I** don't want to create reversible error if **I** can avoid **it.**" The defense responded with "We'll take that chance." If the charge could not hurt the defense then why would the defense be willing to risk a reversal on appeal in the face of **Goodman, Higgins, Tilly** and **Miller** signalling this as a danger zone? Any possible confusion inures to the benefit of the defendant. The defense wanted the benefit of the evidence of other concurring causes without the jury having the benefit of the instruction and being informed on the law.

CONCLUSION

The complaint is unequivacal on the allegations of facts. The Holmans alleged that Goldschmidt was responsible for the phone call that took place on August 14th. The evidence is unequivacal that Soud was acting for Goldschmidt in returning the phone call to the Holmans and that at all times Taletha Holman was the patient of Goldschmidt and not Soud. The record does not permit an inference that Goldschmidt objected to this evidence but instead was prepared and did confront the issue of Soud's negligence with expert testimony that Soud functioned within the prescribed standard of care. In view of this, plaintiffs had no reason to anticipate that agency was an issue. It appeared to be established. At issue was whether Soud deviated from the appropriate standard of care but this was totally removed from the jury. If the agency had been contested, the issue of non-delegable duties would have arisen. Plaintiffs were ambushed in the charge conference.

The jury could have concluded that Goldschmidt was negligent but that Soud had the "last chance" and it would be unfair to hold Goldschmidt responsible for Soud's negligence. The jury could have thought Sandra Holman was negligent in not giving a more accurate picture of Taletha's symptoms and in not listening to Goldschmidt. The jury could have thought that the appendicitis, tricky to diagnose, was the major culprit and they had no instruction advising them whether or

how to consider the natural concurring cause of appendicitis. The test is not that the Holmans demonstrate prejudice on appeal as Goldschmidt and the dissent below seem to suggest but whether "there was any reasonable possibility of confusion". On that test, the majority below found no doubt.

If giving the charge is fairly debatable, why not give it? It is a correct statement of the law. It is does not do any harm. It may prevent confusion and the return of a verdict which is contrary to the law. It is difficult to quarrel with the standard set forth in **Wilson**, to wit, the failure to give a concurring cause instruction is not reversible error when there is no reasonable possibilitv that the jury could have been misled by the failure to give it. At trial and before verdict, plaintiff sought the instruction thinking it would be helpful for a multiple of reasons. The majority in **Holman** recognizes and identifies some of those reasons. Eroding **Wilson**, as sought by the dissent in **Holman**, will unnecessarily expand the demands on the appellate process and invite litigants to put time and money into appeals which will not be necessary if the trial court is simply required to instruct on the law - give the standard jury instructions.

Respectfully,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of respondent's answer brief has been furnished to Charles Cook Howell, III by hand this 1st day of June, 1990.

Attorney for Respondent