IN THE SUPREME COURT OF FLORIDA

CASE NO.: 75,172

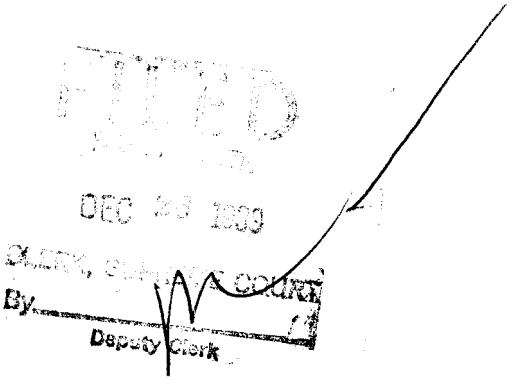
MARK N. GOLDSCHMIDT, M.D.,

Petitioner,

vs.

JERRI TALETHA HOLMAN, a minor, by and through her next friends and guardians, Jeff Henry Holman and Sandra Gail Holman,

Respondents.



REVIEW OF
THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

The Holmans brought this medical malpractice action against Mark N. Goldschmidt, M.D., charging him with negligently failing to diagnose appendicitis in Taletha Holman.

Suit was filed on August 9, 1985. The only defendant named in the complaint (Appendix "A") was Dr. Goldschmidt. The only act or omission that was alleged in the complaint to constitute "negligence" was Dr. Goldschmidt's failure to diagnose appendicitis on the only occasion he saw Taletha, August 12, 1983. Specifically, the Complaint alleged, in pertinent part, that:

> 12. . . .[H]e (Dr. Goldschmidt) was negligent in diagnosing the condition of Jerri Taletha Holman on August 12. 1983.
>
> . . .
>
> 15. Jerri Taletha Holman received negligent care and treatment consisting of a failure by Mark N. Goldschmidt, M.D. to diagnose her symptoms as appendicitis and failing to alert Sandra Gail Holman about the need of additional medical care.

Although the telephone conversations with Dr. Soud on August 14 and Dr. Goldschmidt's nurse on August 16 were mentioned in the complaint (in paragraphs 7 and 8, respectively), neither Dr. Soud nor the nurse were expressly referred to or identified, nor was it alleged that the information conveyed during either of said telephone conversations constituted actionable negligence.

On June 23, 1987, the discovery deposition of Dr. David Abramson, a well-traveled professional expert witness, was taken. He testified that in his opinion, not only was Dr. Goldschmidt negligent on August 12, Dr. Soud was also negligent on August 14, and Dr. Goldschmidt was responsible for Dr. Soud's negligence. (Abramson deposition, pages 60-61, 71-72). The next day, June 24, 1987, the Holman's attorney took the discovery deposition of Dr. Gary Soud. During that deposition, Dr. Goldschmidt's counsel made an objection (at page 9), based upon Abramson's unsupported "allegation"

that Dr. Soud was acting as Dr. Goldschmidt's agent, stating: ". . . If you all want to drop any allegations pertaining to my doctor being responsible for this gentleman's (Dr. Soud's) alleged negligence, then we'll cross that bridge. . . ."

Subsequent to that deposition, the parties entered into a Pre-Trial Stipulation (Appendix "B"), wherein it was agreed that the sole issue to be tried was:

> Whether or not Dr. Goldschmidt was negligent in the medical care which he provided to Taletha Holman . . . .

In the Stipulation, under Amended Pleadings, the parties stated, "None". The Stipulation was made a part of the Pre-Trial Order (Appendix "C"), which provided (in paragraph **1)** that, "there are no amendments or corrections to the pleadings."

During the trial, the Holmans' attorney read the deposition of Dr. Abramson, including, without objection, the opinions that Dr. Soud deviated from the appropriate standard of care on August **14,** and that Dr. Goldschmidt was responsible for Dr. Soud's negligence. (R. **245, 243)** In his case, Dr. Goldschmidt introduced evidence which, among other things, rebutted Abramson's opinion as to Dr. Soud's alleged negligence (R. **534-535, 618, 619)** and his bare, unsupported conclusory allegation that Dr. Goldschmidt was responsible for Dr. Soud's alleged negligence (R. **465-466).** There was absolutely no evidence at trial of any control or right of control by Dr. Goldschmidt over the actions of Dr. Soud while covering for him.

At the charge conference after all the evidence was in, the Holmans sought an instruction which would have found Dr. Goldschmidt responsible for any negligence on the part of Dr. Soud as a matter of law. The trial court rejected the requested instruction, and denied the Holman's motion to amend the pleadings to conform to the evidence, finding that there was no claim or evidence in the record of agency or any

other relationship that would render Dr. Goldschmidt vicariously liable for the negligence, if any, of Dr. Soud.

The trial court also denied the Holmans' request that the jury be charged with Standard Jury Instruction 5.1(b) on concurrent cause, finding, as a long time member of the Florida Supreme Court Committee on Standard Jury Instructions (Civil), that "the charge, when it was drafted, was intended only to apply in concurring cause situations", and that "I don't think it belongs in this case, . . . I don't think it's appropriate. . . ."

The case was submitted to the jury on the issue of Dr. Goldschmidt's negligence, as alleged, on August 12, **1983,** and whether said negligence was a legal cause of the damages being claimed.

The jury returned a verdict for Dr. Goldschmidt; but the District Court of Appeal (with a vigorous dissenting opinion by Judge Thompson) reversed and remanded the case for a new trial (and subsequently denied Dr. Goldschmidt's Motion for Rehearing), finding that the trial court erred **(1)** in ruling that there was no triable issue of agency pled or tried by consent and (2) in refusing to give the requested Standard Jury Instruction 5.1(b) on concurring cause. Holman v. Goldschmidt, *550* **So.** 2d **499** (Fla. 1st DCA **1989)** [Appendix "D"]

SUMMARY OF ARGUMENT

The decision of the district court of appeal is the first instance in which a Florida court has held that **(1)** that agency/vicarious liability is not a "theory of liability" or distinct cause of action that need be specifically pled in a tort action in order to submit that issue to the jury, (2) a complaint can, over objection, and consistent with due process, be amended after all of the evidence is in to raise for the first time a new cause of action, **(3)** an unpled issue is tried by consent by failing to object to evidence

consistent with that issue, even though the evidence is also relevant to an issue raised in the pleadings, and there is no reason to object to the evidence at the time it is offered, or that **(4)** a charge on concurring cause must be given even where comparative negligence has not been pled as an affirmative defense and there is no other "cause" concurring in time that is or could be contended to excuse an otherwise negligent defendant from the consequences of his negligence.

As such, the decision of the court of appeal is in express and direct conflict with a number of well-settled principles of law enunciated in decisions of the Supreme Court and other district courts of appeal.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL WHICH ESTABLISH THE FOLLOWING PRINCIPLES OF LAW:

I.

AGENCY/VICARIOUS LIABILITY IS A "THEORY OF LIABILITY" OR DISTINCT CAUSE OF ACTION THAT MUST BE SPECIFICALLY PLED IN A TORT ACTION

In holding that even in a tort action, a principal's liability for the agents **of** his agent is not a "theory of liability", in the sense of a cause of action, that must be pleaded to invoke the trial court's subject matter jurisdiction and to meet due process notice requirements [citing Maestrelli v. Arrigoni, Inc., **476 So.** 2d **756** (Fla. 5th DCA **1985)** -- a contract action] the district court's opinion is in direct and headlong conflict with Designers Tile International Corp. v. Capital C Corporation, **499 So.** 2d **4** (Fla. 3d DCA **1986)** which expressly holds that vicarious liability is a distinct cause **of** action that must be specifically pled.

The district court's opinion is also in direct and express conflict with Tamiami Trails Tours. Inc. v. Cotton, 463 So. 2d 1126 (Fla. 1985), which also recognizes agency/vicarious liability as a distinct theory of tort liability.

11.

PROCEDURAL DUE PROCESS WILL NOT PERMIT A PLAINTIFF, OVER OBJECTION, TO AMEND THE PLEADINGS TO STATE A NEW CAUSE OF ACTION AFTER ALL THE EVIDENCE IS IN

There is direct and express conflict with Arky, Freed, Sterns, Watson, Greer, Weaver & Harris, **P.A.** v. Bomar Instrument Corp., 537 So. 2d 561 (Fla. 1988), wherein our Supreme Court, through Justice Barkett, stated:

> For the same policy reasons underlying Dober [Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981)*], we conclude that litigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared. . . .

Even the dissent in Arky, Freed, agreed:

> In each of the cases cited for conflict, there was no effort to amend the pleadings to state a new cause of action until after the plaintiff had presented its evidence. In each instance, the Court properly held that to permit an amendment at this point would unfairly prejudice the defendant.

See also, Tamiami Trail Tours v. Cotton, where the Supreme Court observed that, "Tamiami was sandbagged" when the trial court permitted the plaintiff to go to the jury on a theory of liability not pled, stating that: "the procedural requirements of due process will not allow it to be raised in this manner." 463 So. 2d at 1128.

***In** Dober, it was significant to the Court that "the record revealed that respondents had knowledge of the alleged concealment when initiating the suit, . . ." 401 **So.** 2d at 1323. Here, the Holmans likewise had knowledge of Abramson's opinions prior to the pre-trial conference, at which time they indicated no desire to amend their complaint to charge Dr. Goldschmidt with vicarious liability for the alleged negligence of Dr. Soud.

Also in direct and express conflict with the district court's holding is: Freshwater v. Vetter, 511 So. 2d **1114** (Fla. 2d DCA **1987),** which expressly holds that "amending to state a new cause of action should not be allowed over objection." **511** So. 2d at **1115.** And see also Designers Tile International v. Capitol C Corporation, **499** So. 2d **4** at **5** (Fla. 3d DCA **1986).**

III.

FAILURE TO OBJECT CANNOT BE TAKEN AS IMPLIED CONSENT TO TRY UNPLED ISSUES WHEN THERE IS NO OCCASION FOR SUCH PARTY TO OBJECT THAT SUCH EVIDENCE IS IRRELEVANT TO THE ISSUES BEING TRIED

At Dr. Soud's deposition, Dr. Goldschmidt's counsel did recognize that Dr. Abramson had testified that Dr. Soud was acting as an agent of Dr. Goldschmidt; but the statement, "if you all want to drop any allegation pertaining to my doctor being responsible for this gentleman's alleged negligence. . . ." obviously can refer only to Dr. Abramson's "allegation", and did not, as the district court strained to find, demonstrate any "understanding" that the agency issue had been "raised by the pleadings". One can simply look at the complaint and see that nowhere is agency or vicarious liability raised as an issue.

The district court then goes on to find that by not objecting to Abramson's deposition opinions in rebuttal of those opinions, Dr. Goldschmidt tried the issue of agency/vicarious liability by consent.

First of all, at the time Abramson's deposition was taken, the complaint did not mention Dr. Soud and did not contain a claim that Dr. Soud was negligent or that Dr. Goldschmidt was vicariously liable for same. Secondly, Dr. Abramson was not qualified to testify that Dr. Goldschmidt was responsible for Dr. Soud's alleged negligence; and

the statement in his deposition was limited to a single bare conclusion, unsupported by any factual details as to how or why Dr. Goldschmidt should be held responsible for Dr. Soud's actions. Finally, at the pre-trial conference, when the parties were well aware of Dr. Abramson's opinion testimony, the Holmans nevertheless indicated that they had no wish or desire to amend the complaint (so as to allege agency and vicarious liability).

Accordingly, there was no reason for Dr. Goldschmidt to object to Abramson's unsupported opinion testimony, as agency was not a claim in the lawsuit, and there was no evidence in the record to support such a theory of liability.

Dr. Abramson's testimony that Dr. Soud was negligent, was relevant -- to the issue of causation -- as Dr. Souds subsequent negligence could have constituted an intervening cause and could also have allowed Dr. Goldschmidt (had he wished) to point to Dr. Souds alleged negligence as an "empty chair". The evidence introduced in the defense case was relevant to rebut Dr. Abramson's bold and unsubstantiated opinions, thereby impeaching his credibility in the eyes of the jury.

Accordingly, the district court's holding that the issue of agency/vicarious liability was tried by consent is in express and direct conflict with National Aircraft v. Aeroserv International, Inc., 544 So. 2d 1063 (Fla. 3d DCA 1989), wherein the Court stated:

> . . . It specifically may not be said that the defendant's failure to object to testimony which may have touched upon an unpleaded claim constituted an effective consent to a trial of such an issue, simply because that testimony was also pertinent to the issues which were properly pled and which therefore could not have been the subject of a well-taken objection. . . .

See also, as decisions in conflict with the district court's opinion: Freshwater v. Vetter, 511 So. 2d 1114 (Fla. 2d DCA 1987); Wassil v. Gilmour, 465 So. 2d 566 (Fla.

3d DCA 1985); Dysart v. Hunt, 383 **So.** 2d 259 (Fla. 3d DCA 1980); and Tucker v. Daugherty, 122 So. 2d 230 (Fla. 2d DCA 1960), in which the Court stated:

> . . . After strenuous objection of the attorney for the defendants, the court allowed and granted plaintiffs motion to amend the pleadings to conform to the evidence. In this we think the trial court erred. It has been held in **a** negligence case that where the plaintiffs were not proceeding on the acts of negligence alleged in the complaint and the defendants could not discern this until the conclusion of the plaintiffs' case, it could not be said that the defendants had expressly or impliedly consented to a different ground for the action being proven. . . . In this case, . . . there was no way that the defendants could tell until the conclusion of all the plaintiffs evidence that the plaintiff was not proceeding on the basis of the acts of negligence alleged in the complaint.

By the same token, in the instant case there is no way that Dr. Goldschmidt could tell that the Holmans would make a claim or seek a charge based upon alleged agency and vicarious liability until that charge **was** actually requested after all the evidence was in. Indeed, Dr. Goldschmidt had every right to assume that he would only be going to the jury on the issue of his own personal negligence because of the Holmans' failure to request leave to amend their complaint at the pre-trial conference.

The district court's holding that the agency/vicarious liability issue was tried by consent is not only in express and direct conflict with the above-cited district court decisions, but other decisions by the First District Court of Appeal as well. Bilow **v.** Benoit, 519 So. 2d 1114, 1116 (Fla. 1st DCA 1988) -- "Rule 1.190(b) is not intended to permit a party to catch an opposing party by surprise and inject new, unpled issues in the case after the evidence is closed." See also: City of Ft. Walton Beach v. Grant, 544 So. 2d 230, 238 (Fla. 1st DCA 1989).

IV.

A CHARGE ON CONCURRING CAUSE IS NOT APPLICABLE TO THE FACTS OF THIS CASE

That holding that it was reversible error not to give a charge on concurring cause conflicts with Wilson v. Boca Raton Community Hospital, Inc., 511 So. 2d 313 (Fla. 4th DCA 1987). The Wilson court pointed out that the gravamen of that case was solely the question of the treating physician's errant diagnosis. Id. at 314. Likewise, in the case at bar, the only issue was whether Dr. Goldschmidt negligently failed to diagnose Taletha Holman's condition. Under those circumstances, the Wilson court held that even if failure to give a concurring cause instruction was error, it was harmless error because there was "no reasonable possibility that the jury could have been misled by the failure to give the instruction.", quoting Tilley v. Broward Hospital District, 458 **So. 2d** 817, 818 (Fla. 4th DCA 1984). Ibid. See also, Ruiz v. Cold Storage & Insulation Contractors, Inc., **306** So. 2d 153, 154 (Fla. 2d DCA 1975).

The majority opinion of the court below cites numerous cases in which the failure to give a concurring cause instruction constituted reversible error; however, none of those cases involved a claim of failure to timely diagnose the patient's condition, wherein there was no issue of comparative negligence nor any argument that the patient would have suffered the same results notwithstanding the defendant's negligence. ***As*** is pointed out in the note on use of charge 5.1(b), the concurring cause instruction does not change the standard enunciated in 5.1(a), "but only negates the idea that a defendant is excused from the conseauences of his negligence by reason of some other cause concurring in time and contributine to the same damage." (Emphasis added). Dr. Goldschmidt never argued that the plaintiffs were guilty of comparative negligence, nor was it argued that

Taletha's resulting condition would have been the same notwithstanding the alleged failure to timely diagnose. [For that matter, Dr. Goldschmidt did not contend or argue that there were any other "causes" that could conceivably "excuse" an otherwise negligent failure to diagnose the appendicitis. The sole issue decided by the jury in this case was whether Dr. Goldschmidt was negligent in failing to timely diagnose Taletha's condition, and the jury found he was not. This was not a "concurring cause" case; and as in Wilson there was absolutely no reasonable possibility that the jury could have been misled by the failure to give the instruction.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction, quash the decision of the District Court of Appeal, reinstate the verdict of the jury, and remand this action for entry of judgment in accordance with the verdict of the jury.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to EUGENE LOFTIN, ESQUIRE, 220 E. Forsyth Street, Jacksonville, Florida 32202 by mail this 22nd day of December, 1989.

Charles Cook Howell

Attorney