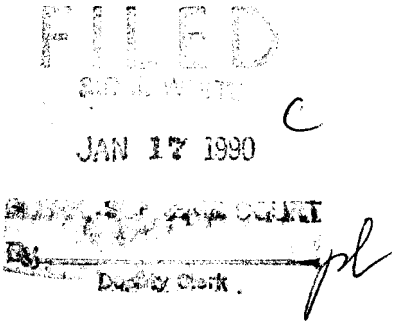
IN THE SUPREME COURT OF FLORIDA

CASE No. 75,172

DCA-1 87-01492




MARK N. GOLDSCHMIDT, M.D.,

Petitioner,

vs.

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

Respondents.

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# RESPONDENTS' BRIEF ON JURISDICTION

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## STATEMENT OF THE CASE AND FACTS

Paragraph 6 of the complaint alleged that Dr. Goldschmidt examined the minor plaintiff, Taletha Holman on August 12, 1983 and that she had history of fever, vomiting, no appetite and abdominal pains. No tests were performed and he concluded that she had an intestinal virus. The majority opinion concluded that the allegations in paragraphs 7, 14 and 15 of the complaint were sufficient to allow appellants to present evidence of Dr. Soud's actions on August 14 in responding to their call to Dr. Goldschmidt as evidence of negligence on the part of Goldschmidt in fulfilling a continuing duty of care in providing medical care to Taletha Holman. These allegations are set forth as well as paragraph 13 as follows:

> "7. On August 14, 1983, Sandra Gail Holman called the office of Mark N. Goldschmidt, M.D. from her home and related that her child, Jerri Taletha Holman, had the same symptoms except that she was definitely worse and there was no urination or bowel movement. There was no indication given to Sandra Gail Holman that her child was in need of further medical treatment."
>
> "13. Mark N. Goldschmidt, M.D., at all times material to this claim held himself out to the public as a skilled physician and specialist. By reason thereof and reliance thereon, Mark N. Goldschmidt, M.D. was selected by the plaintiffs for the purpose of providing medical care for their child, Jerri Taletha Holman. Mark N. Goldschmidt, M.D. did agree and undertake to provide medical care and attention for physicians in the area where he practices medicine."
>
> "14. Notwithstanding said agreement and undertaking, Mark N. Goldschmidt, M.D. 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."

"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 Holman about the need of additional medical care."

## SUMMARY OF THE ARGUMENT

The pleadings, the evidence and the opinion sought reviewed by petitioner herein does not permit the argument that a new theory of liability was presented during the charge conference or that plaintiff sought to amend the complaint after all the evidence was in to raise for the first time, a new cause of action. The gist of the petitioner's argument is that there were no allegations which apprised Goldschmidt that he would be held liable for the acts Soud.

The first point as viewed by the plaintiff's effort below and the majority opinion is whether it is necessary to identify an agent by name and whether it is necessary to set forth the particular facts which vest an agent with authority in a complaint.

A concurring cause instruction must be given in cases where there is evidence of other operative causes besides that of the defendant, both a natural condition and negligent conduct of someone other than the defendant. The test is whether there is evidence of another cause which could be found by the jury as combining or acting in concert with the negligence of the defendant to produce the injury.

## ARGUMENT

### A PLAINTIFF IS NOT REQUIRED TO SPECIFICALLY NAME AN AGENT BY NAME OR SET FORTH ALL FACTS WHICH CREATE THE AGENCY RELATIONSHIP

Following oral argument below, Goldschmidt was afforded an extra opportunity to find a case which supported Goldschmidt's claim that plaintiff must specifically allege an agency relationship between Dr. Goldschmidt and Dr. Soud to hold Dr. Goldschmidt liable for the acts of Dr. Soud. The decision in this case was not rendered until the parties had filed post-oral argument supplemental briefs.

The opinion rendered in this case states:

> "No Florida court decision appears to have addressed whether the agency of one acting for the principal must be explicitly pleaded in a tort case, but this pleading issue has been addressed in the context of a contract case. The rule in Florida is that one suing on a contract made for the defendant by his agent need not allege the agency in the complaint; it is sufficient for the plaintiff to allege the legal effect of the agent's action on the defendant's legal liability. **Maestrelli** v. **Arrigoni, Inc. 476** So.2d **756** (Fla. 5th DCA **1985).** The fifth district explained in **Maestrelli** that the issue of the principal's liability for the acts 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 meet due process requirements.
>
> Appellee has not offered, and we cannot perceive of, any rationale for applying a different rule in this case because it is a tort, rather than a contract, action. On the contrary, the general consensus of decisions from other jurisdictions that have considered this pleading issue in the context of tort cases is that a complaint against a principal for the tort of his agent need not disclose that the act complained of was not committed by the principal himself but was the act of his agent."

Petitioner now claims that this decisions is in headlong conflict with **Designer's Tile International Corp. v Capital C Corporation, 499** So.2d **4** (Fla **3** DCA **1986).** The complaint

filed by Designer's Tile alleged that defendant's R & S were negligent in hiring Courtesy Roofing. After the close of all evidence, plaintiff was permitted to amend the complaint to allege that R & S was vicariously responsible for Courtesy Roofing. There is nothing in that opinion to reflect that in the pleadings or trial, R & S was given notice that it would be held accountable for negligence of Courtesy Roofing.

In the Holman case, Goldschmidt had notice in the pleadings, before trial and during the trial that plaintiff's were seeking to hold him responsible for events subsequent to August 12, 1983 - the incident specified in the complaint on August 14th. The events of August 14th were identified and described in paragraph 7 of the complaint. Paragraph 14 of the complaint alleges that 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.

The majority opinion notes that the allegations of the complaint are sufficient to give notice that the Holmans were looking to Dr. Goldschmidt, and not others unknown to them, to provide follow-up care. Because Taletha Holman was not doing well after a day or so, they called Dr. Goldschmidt office on August 14th and received instructions from someone not named in the complaint but who must have been either Goldschmidt himself or someone authorized to act for him in the care of his patients. It was not necessary to name the person who responded on behalf of Goldschmidt.

Further, unlike the cases petitioner avers to be in conflict with Holman, the issue was tried by both parties without any basis of surprise to defendant at trial.. There is nothing in the record to suggest that defendant did not understand the plaintiff's theory of liability for the events of August 14th. On pages 503 and 504 of the majority opinion, details are set forth showing defendant's grasp of plaintiff's pleading and defendant's evidence showing that it was an issue fully appreciated and addressed by defendant. Petitioner seems excited by a lengthy dissent but there are not any points in that dissent which are not adequately explained in the majority opinion. The dissent attempts no interpretation of the allegations of paragraph 7 of the complaint describing the events of August 14 nor does the dissent explain why the defense fully addressed plaintiff's theory of the case during the trial with expert testimony concerning the standard of medical care received by Taletha Holman from Dr. Soud on August 14th. In order to find that there is a conflict with another opinion, it is necessary to ignore pertinent allegations in the complaint and the response before and during the trial by the defense. The allegations pertaining to August 14th have no meaning except as construed by the majority opinion below and which was also the same construction given this language by the defense prior to trial and during the trial. Plaintiff did not seek to amend the complaint to state a new cause of action; in fact, no amendment was sought until the trial court deemed these allegations insufficient during the charge conference.

Plaintiff sought to clarify the matter for the trial court. The defense claim that a new cause of action was raised in the charge conference and the defense had no way of anticipating that plaintiff expected to hold Goldschmidt responsible for the negligence alleged on August 14th differs markedly from the references to the record made by the majority opinion. The defense asked Dr. Soud about his arrangements for "covering" for Dr. Goldschmidt and the defense utilized both Dr. Talbert and Dr. Colyer to testify that the actions of Soud on August 14th comported with the appropriate standards of care. (opinion page 503)

**THE TRIAL COURT ERRED IN DENYING THE HOLMAN'S REQUEST TO GIVE STANDARD JURY INSTRUCTION 5.1(b) ON CONCURRING CAUSES.**

With much perspicuity, the majority opinion sets forth an analysis of the cases on this point and concludes that it was error to deny the requested instruction in this instance. Because of the ongoing peritonitis, an instruction on concurring cause was necessary to insure that the jury understood that the defendant could be held liable even though another operative cause was present.

When the alleged negligence of August 14th was excluded, the jury had been informed by plaintiff's evidence that Soud was negligent on August 14th. The plaintiff's evidence was that the negligence of August 14th was a continuation of the negligence of Goldschmidt on August 12th - the negligence on each day operated in combination with the other.

The petitioner claims there was no issue of comparative negligence and there was no argument that the patient would

have suffered the same results notwithstanding the defendant's negligence. The instruction on concurring cause is given based on the evidence or lack of evidence. Petitioner's argument does not tell the whole story. Petitioiner references the absence of a pleading alleging comparative negligence and says there was no argument that Sandra Holman caused the injury but the petitioner does not claim that there was no evidence presented from which the jury could determine negligence existed on the part of Sandra Holman on August 12th and thereafter. Regardless of how the evidence happens to develop, the existence of evidence of a concurring cause is sufficient for the charge to be applicable. If the charge is correctly stated, the evidence supports the instruction and the instruction is necessary to allow the jury to properly resolve all the issues, failure to give the instruction is reversible error.

## CONCLUSION

Petitioner seeks to characterize the majority opinion as conflicting with decisions of this Court and others when in fact, no such conflict exists. There is no reason to quash the decision of the District Court of Appeal.

Respectfully submitted,

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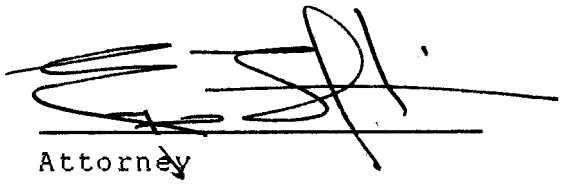
## CERTIFICATE OF SERVICE

**I DO CERTIFY** that a copy hereof has been provided to Charles Cook Howell, **111, 200** Laura Street, **Post** Office **Box 240,** Jacksonville, Florida **32201-0240,** attorney for petitioner, by mail this 14th day of January, **1990.**



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