OA 9-7-90

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 75,172

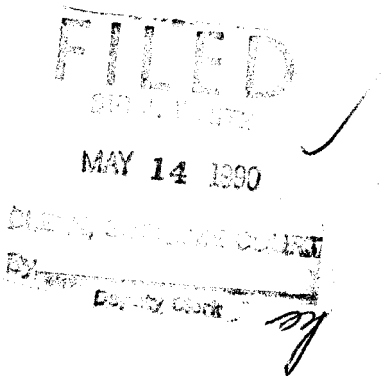
MARK N. GOLDSCHMIDT, M.D.,

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 THE MERITS

COMMANDER LEGLER WERBER DAWES
SADLER & HOWELL, P.A.

CHARLES COOK HOWELL, III
Florida Bar No. 097235
The Greenleaf Building
200 Laura Street
Post Office Box 240
Jacksonville, Florida 32201-0240
(904) 359-2000

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER CITATIONS

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 the minor plaintiff, Taletha Holman.

The first and only time Dr. Goldschmidt saw Taletha was on August 12, 1983. During his physical examination, he specifically considered appendicitis and ruled it out. (R. 158, 169, 178) Based upon his examination, the overall presentation of symptoms, and his clinical judgment, Dr. Goldschmidt diagnosed Taletha's condition as gastroenteritis (R. 82-83), and he sent Taletha home with her mother, with instructions to call him back if Taletha did not improve. (R. 68)

On August **14,** 1983, because Taletha had not improved, a phone call was placed to Dr. Goldschmidt's office. The call was returned by Dr. Gary Soud, an independent pediatrician who maintained his own office and staff but who, through prior arrangement with Dr. Goldschmidt, "covered" for him one weekend per month and one half day per week, billing directly any of Dr. Goldschmidt's patients he saw for any services he rendered. (R. **466-467)** Dr. Soud offered to see Taletha at the hospital, but the Holmans declined the offer. (R. **72)**

On August 16, 1983, another call was placed to Dr. Goldschmidt's office. Because Dr. Goldschmidt was still out of the office, the Holmans were offered an appointment with Dr. Soud that same day, or an appointment with Dr. Goldschmidt the following day. The Holmans again declined the appointment with Dr. Soud **(R.** 75), but when Taletha's

condition continued to deteriorate, her parents took her to the emergency room of St. Vincent's Hospital, where she was operated on for a ruptured appendix.

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 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 appendicitus [sic] 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 office on August 16 were mentioned in the complaint (in paragraphs 7 and 8, respectively), neither Dr. Soud nor Dr. Goldschmidt's office staff were expressly referred to or identified, nor was it alleged that the information conveyed during either of those telephone conversations constituted actionable negligence.

On June 23, 1987, the discovery deposition of Dr. David Abramson, a well-traveled professional expert witness retained by the Holmans, was taken. Abramson gratuitously stated that in his opinion, not only was Dr. Goldschmidt negligent on August 12, but 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 Holmans' 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. 243, 245)

In his case, Dr. Goldschmidt called Dr. James Talbert, a pediatric surgeon on the faculty of the University of Florida College of Medicine, and Dr. Robert Colyer, a local

pediatrician, both of whom testified that Dr. Goldschmidt's care and treatment of Taletha Holman comported with the accepted standards of medical care. (R. 510, 610) Evidence was also introduced which, among other things, rebutted Abramson's opinion as to Dr. Souds 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 no evidence at trial of any control or right of control by Dr. Goldschmidt over the actions of Dr. Soud while Dr. Soud was 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 Holmans' 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. (R. 654-658)

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. . . ." (R. 666-667)

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 Florida First District Court of Appeal (with a vigorous dissenting opinion by Judge Thompson) reversed and remanded the case for a new trial, 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]

Dr. Goldschmidt's Motion for Rehearing was denied on November 16, 1989, Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed, and on April 20, 1990, this Court accepted jurisdiction of the case.

SUMMARY OF ARGUMENT

The District Court erred in holding that there was a "triable issue regarding Dr. Goldschmidt's liability for the negligent acts of Dr. Soud, if any." [Holman v. Goldschmidt, 550 **So.** 2d 499 (Fla. 1st DCA 1989), at 501.

First of all, agency/vicarious liability is a distinct "theory of liability" or cause of action that must be specifically pled in a tort action. Designers Tile International Corporation v. Capital C Corporation, 499 **So.** 2d **4** (Fla. 3d DCA 1986). See also, Tamiami Trail Tours. Inc. v. Cotton, 463 **So.** 2d 1126 (Fla. 1985). In the instant case, plaintiffs complaint did not mention Dr. Soud with respect to the events of August 14, 1983; it did not allege that Dr. Soud was acting as Dr. Goldschmidt's agent; it did not allege that anyone was acting as Dr. Goldschmidt's agent on August 14, 1983; and it did not even allege that the medical treatment/advice given on that date constituted "negligence". Instead, the only person alleged in the complaint to have been "negligent" was Dr. Goldschmidt, and the only act of negligence with which Dr. Goldschmidt was charged was the alleged negligence in failing to diagnose appendicitis on August 12, 1983. Accordingly, the issue of Dr. Goldschmidt's alleged vicarious liability for the actions of Dr. Soud was not pled sufficiently in the complaint to allow that issue to go to the jury.

Secondly, inasmuch as agency/vicarious liability in a negligence action is a distinct cause of action, procedural due process would not have allowed the Holmans, over objection, to amend the complaint to insert that new cause of action after all the evidence was in. Arky, Freed. Stearns. Watson. Greer. Weaver & Harris. **P.A.** v. Bowmar Instrument Corporation, 537 **So.** 2d 561 (Fla. 1988); Tamiami Trail Tours v. Cotton, supra.

Neither was the issue of vicarious liability "tried by consent", as the District Court erroneously found. At no time during pre-trial discovery did Dr. Goldschmidt's counsel treat the issue as having been raised by the pleadings. Even after the Holmans' "expert" gratuitously and unexpectedly concluded on deposition that Dr. Soud had also acted negligently and that Dr. Goldschmidt was responsible for said negligence, the Holmans nevertheless later stipulated that the only issue in the case was with respect to the medical care Dr. Goldschmidt provided, and indicated no wish or desire to amend the pleadings. Accordingly, even if it could conceivably be deemed that the agency issue was raised by the expert's conclusory statements on deposition, the Holmans' abandoned that issue -- or at least Dr. Goldschmidt had every reason to believe that they had. And Dr. Goldschmidt's failure to object to that deposition testimony when read into evidence at trial cannot be taken as implied consent to try an unplead issue of vicarious liability, because such testimony was potentially relevant to the issue of causation (possible intervening cause, or possible "empty chair"), and, in addition, provided the defense an opportunity to rebut the unsubstantiated opinions of plaintiffs' "expert", thereby impeaching his credibility in the eyes of the jury.

The only charge of vicarious liability submitted by the Holmans was a pre-emptive, and therefore improper, charge which would have found Dr. Goldschmidt liable for Dr. Soud's actions as a matter of law. The charge was, therefore, quite properly denied by the trial court.

And finally, even had the "agency" of Dr. Soud and Dr. Goldschmidt's vicarious liability for Dr. Soud's actions been plead in the complaint, the evidence in the record was insufficent to support a properly drafted charge on that issue.

The District Court also erred in holding that the trial court should have given Standard Jury Instruction 5.1(b) on "concurring cause". A charge on concurring cause simply was not applicable to the facts of this case, wherein there was no issue of comparative negligence nor any argument that the patient would have suffered the same results notwithstanding lack of negligence on the part of the defendant. The note on the use of charge 5.1(b) points out that the instruction does not change the standard enunciated in 5.1(a) [which was given by the trial court], "but only negates the idea that a defendant is excused from the consequences of his negligence by reason of some other cause concurring in time and contributing to the same damage." In the instant case, Dr. Goldschmidt never contended or argued that there were any other "causes" that could conceivably "excuse" an otherwise negligent failure to diagnose the appendicitis. The sole issue submitted to and 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 v. Boca Raton Community Hospital, Inc., 511 So. 2d 313 (Fla. 4th DCA 1987), another case in which the gravamen of the cause of action was solely the question of the treating physician's errant diagnosis, there was absolutely no reasonable possibility that the jury could have been misled by the failure to give the instruction.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN HOLDING THAT THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE ISSUE OF DR GOLDSCHMIDTS VICARIOUS LIABILITY FOR THE ACTIONS OF DR SOUD

A. VICARIOUS LIABILITY IN A NEGLIGENCE ACTION IS A SEPARATE AND DISTINCT CAUSE OF ACTION OR THEORY OF LIABILITY AND WHICH WAS NOT PLED IN THE COMPLAINT.

Initially, the District Court adopted the rationale of Maestrelli v. Arrigoni, Inc., 476 So. 2d 756 (Fla. 5th DCA 1985) -- a contract case -- in holding that even in a negligence action,

> ... the issue of a 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.

In so holding, the District Court either ignored or disregarded the decision in Tamiami Trail Tours. Inc. v. Cotton, 463 So. 2d 1126 (Fla. 1985), wherein this Court expressly recognized that agency/vicarious liability is just as much a distinct theory of liability as is conspiracy or individual liability as a possessor of property who fails to control the actions of its servant on the property.

Even more on point is Designers Tile International Corporation v. Capital C Corporation, 499 So. 2d 4 (Fla. 3d DCA 1986). Quoting from that opinion:

> The defendants . . . argue as their sole point on appeal that the trail court erred in permitting the plaintiff Designers Tile to amend its complaint at the close of all the evidence so as to allege a new cause of action against the defendants R & S, to wit: an action for vicarious responsibility for the negligence of Courtesy Roofing, the firm used in repairing the subject roof. We entirely agree. The case had been fully tried on the plaintiff Designer Tile's claim against the defendants R & S for the negligent hiring of Courtesy Roofing when the subject amendment was allowed. The change in the cause of action allowed by the amendment was, in our view, a material change which under the facts of this case greatly prejudiced the defendants R & S.

Turning now to the complaint itself, and the District Court's observation that the allegations were sufficient to allow the Holmans to present evidence on the issue of Dr. Goldschmidt's alleged vicarious liability for the actions of Dr. Soud:

Paragraph 14 of the subject complaint alleges that Dr. 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."

According to "the previous paragraphs" of the complaint, the only time that Dr. Goldschmidt saw the minor plaintiff was on August 12, 1983.

In paragraph 12 of the complaint, it is alleged that Dr. Goldschmidt "was negligent in diagnosing the condition of Jerri Taletha Holman on August 12, 1983." And in paragraph 15, it is alleged that the minor plaintiff received negligent care and treatment

"consisting of a failure by Mark N. Goldschmidt, M.D. to diagnose her symptoms as appendicitus [sic] and failing to alert Sandra Gail Holman about the need of additional medical care."

Nowhere in the complaint is Dr. Gary Soud mentioned by name.

Nowhere in the complaint is it alleged that Dr. Gary Soud had any contact whatsoever with the Holmans on August 14, 1983.

Nowhere in the complaint is it alleged that Dr. Gary Soud, or anyone else, was acting as an agent for Dr. Goldschmidt on August 14, 1983.

Nowhere in the complaint is it alleged that what transpired between Mrs. Holman and either "the office of Mark N. Goldschmidt, M.D." or Dr. Gary Soud on August 14, 1983 constituted actionable negligence.

And nowhere in the complaint is it alleged that Dr. Goldschmidt is in any way vicariously liable for what occurred on August 14, 1983.

With all due respect, we submit that this complaint does not allege, nor can it be legitimately inferred from anything stated therein, that the Holmans are seeking to hold Dr. Goldschmidt vicariously liable for any alleged negligence of Dr. Gary Soud, as his "agent", in connection with Dr. Soud's dealings with Mrs. Holman after Mrs. Holman was referred to him by Dr. Goldschmidt's office on August 14, 1983.

B. THE REQUEST TO AMEND THE COMPLAINT TO STATE A NEW CAUSE OF ACTION AFTER ALL THE EVIDENCE WAS IN WAS PROPERLY DENIED.

By the time the Holmans discovered, on August 16, 1983, that their daughter had a ruptured appendix, they were aware that Dr. Goldschmidt had failed to diagnose appendicitis when he had seen Taletha four days earlier. They were also aware that during their telephone conversation with Dr. Soud on August 14, 1983, he, too, had not diagnosed appendicitis. Suit was not filed until approximately two years later, and when it was, the only defendant named in the suit was Dr. Goldschmidt, and the only negligence alleged was Dr. Goldschmidt's failure to diagnose appendicitis on August 12,1983. Nothing whatsoever was said about Dr. Soud, either that he was also negligent, or that Dr. Goldschmidt was somehow responsible for that negligence.

Even as late as the pre-trial conference in July, 1987, which was held after the Holmans were aware of the opinions of their expert, Abramson, there was still no indication that any claim was being asserted against anyone other than Dr. Goldschmidt, or for anything other than Dr. Goldschmidt's alleged negligent failure to diagnose on August 12, 1983. No amendments to the complaint were requested.

Under the circumstances, 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.

In Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, **P.A.** v. Bowmar Instrument Corporation, 537 **So.** 2d 561 (Fla. 1988), this Court through Justice Barkett, stated:

> For the same policy reasons underlying Dober [Dober v. Worrell, **401 So.** 2d **1322** (Fla. **1981)**[1]], 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. Inc. v. Cotton, Supra, where this 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.**

And see: 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 Designers Tile International v. Capitol C Corporation, **499 So.** 2d **4** at 5 (Fla. 3d DCA **1986) --** "the change in the cause of action allowed by the amendment was, in our view, a material change which under the facts of this case greatly prejudiced the defendants **R** & **S.**"

'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 Souds involvement, and, indeed, 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.

C. THE ISSUE OF VICARIOUS LIABILITY WAS NOT TRIED BY CONSENT.

1. There was no pre-trial recognition/concession by Dr. Goldschmidt's counsel that the pleadings raised the issue.

During the pre-trial discovery deposition of Dr. Soud, Dr. Goldschmidt's attorney made the following statement:

> Let me just object at this point. Number one, your expert (Dr. Abramson) has already testified this gentleman (Dr. Soud) 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 allegations pertaining to my doctor being responsible for this gentleman's alleged negligence, then we'll cross that bridge --

The District Court interpreted that statement as an expression by Dr. Goldschmidt's attorney of an understanding that the issue of vicarious liability had been raised by the pleadinw. Holman v. Goldschmidt, at 503. See also, fn. 4, at p. 504. We respectfully submit that such interpretation is not only unduly strained, but erroneous. Inasmuch as the complaint did not mention Dr. Soud, did not contain a claim that Dr. Soud was negligent, did not contain a claim that anything done on the day Dr. Soud spoke to the Holmans constituted actionable negligence, and did not contain any claim that Dr. Goldschmidt was vicariously liable for Dr. Souds actions, the word "allegations" obviously refers only to Dr. Abramson's "allegation" of vicarious liability, as he was the only one who ever made any

such allegation. One can simply look at the complaint and see that nowhere is agency or vicarious liability raised as an issue.

2. Any question of possible vicarious liability was abandoned at the Pre-Trial Conference.

If there was any reason for even a suspicion that the Holmans might advance vicarious liability as a theory of liability at trial, such suspicion was certainly laid to rest at the pre-trial conference, when the Holmans, well aware of Dr. Abramson's opinion testimony, nevertheless 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 . . .", and indicated no desire to amend the complaint (so as to allege agency and vicarious liability). By their silence and acquiescence, the Holmans abandoned any claim of vicarious liability, and waived any right to reassert it, as they attempted to do, after all the evidence was in.

3. Failure to object to the expert's opinions on vicarious liability did not constitute implied consent to try the issue when the evidence was relevant to other issues beine tried.

The District Court found that by not objecting at trial to Abramson's deposition opinions and rebuttal of those opinions, Dr. Goldschmidt tried the issue of agency/vicarious liability by consent. Again we submit with deference that the District Court erred.

First of all, at the time Abramson's deposition was taken, there was no issue of vicarious liability raised in the pleadings, and no one had previously indicated that any claim would be made 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. Souds 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, the Holmans declined the opportunity to amend their complaint at the pre-trial conference to allege 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.

Abramson's testimony that Dr. Soud was negligent was, however, 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"; and the evidence introduced in the defense case was relevant to rebut Abramson's bold and unsubstantiated opinions, thereby impeaching Abramson's credibility in the eyes of the jury.

Failure to object did not constitute trial of the issue by consent. The rule is accurately stated in National Aircraft Services. Inc. v. Aeroserv International. Inc., **544 So.** 2d 1063 (Fla. 3d DCA 1989), at 1064:

> . . . 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 plead and which therefore could not have been the subject of a well-taken objection. . . .

See also: Freshwater v. Vetter, 511 **So.** 2d 1114, 1115 (Fla. 2d DCA 1987) -- ". . . he was not in a position to object to the evidence offered by Freshwater since it was consistent with the claim framed by Freshwater's pleading that Vetter was an alter ego of Royal Cove. . . ."; Wassil v. Gilmour, 465 ***So.*** 2d 566, 569 (Fla. 3d DCA 1985) -- ". . . The fact that Gilmour did not object to plaintiffs testimony concerning his subsequent promises did not result in his impliedly consenting to the trial of the 'new contract' issue. . . . This is so because the evidence in question was relevant, so that an objection could not properly have been asserted, to an issue which was directly raised in the existing pleadings and was being tried. . ."; and Dysart v. Hunt, 383 **So.** 2d 259, 260 (Fla. 3d DCA 1980) -- ". . . the record demonstrates that the evidence . . . was fully consistent with and pertinent to the plaintiffs position on the issue which was framed by the pleadings and which was actually being tried. . . . There is thus no basis for finding that the defendant's failure to object to that evidence constituted an express or implied consent to try the unpled and quite different damage question. . . ."

In Tucker v. Daugherty, 122 **So.** 2d 230 (Fla. 2d DCA 1960), the Court stated, at 232:

> . . . After strenuous objection of the attorney for the defendants, the Court allowed and granted plaintiff's 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 was no way that Dr. Goldschmidt could tell that the Holmans would press 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.

Perhaps the District Court overlooked its earlier decision in Bilow v. Benoit, 519 **So.** 2d 1114 (Fla. 1st DCA 1988), wherein the Court stated (at page 1116):

> But in order to rely on questions and answers not objected to during trial as evidencing the opposing party's implied consent to try unplead issues, it must be shown that such questions and answers are irrelevant to any pled issues; the 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. . . . 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.

And in City of Fort Walton Beach v. Grant, 544 ***So.*** 2d 230,238 (Fla. 1st DCA 1989), we read:

> . . . Councilmen's failure to object to Judge Fleet's questioning regarding the "secret" meeting cannot be construed as implied consent to try to Sunshine Law issues, where the questioning

> may have been relevant to the issues presented in the pleadings, and the Councilmen would have no reason to object. . . .

D. THE ONLY CHARGE SUBMITTED ON VICARIOUS LIABILITY WAS INAPPROPRIATE AND IMPROPER, AND THEREFORE PROPERLY DENIED.

The Holmans never requested a proper instruction on the issue of agency, such as Florida Standard Jury Instruction 3.3(b)(1). Instead, the only instruction requested by the plaintiffs on the issue of agency was a gre-emptive instruction that instructed the jury that Dr. Goldschmidt is responsible for any negligence of his agent, Dr. Soud. (Plaintiffs' Requested Instruction No. 7) There was no basis in the record for instructing the jury, as requested by the Holmans, that Dr. Goldschmidt is responsible for any negligence on the part of Dr. Soud as a matter of law.

E. THERE WAS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT ANY CHARGE ON VICARIOUS LIABILITY.

The only testimony in the record on vicarious liability was Abramson's factually unsupported conclusory opinions that Dr. Soud was negligent, and, more significantly, that Dr. Goldschmidt was responsible for Dr. Soud's negligence. There was no evidence in the record, however, that Dr. Soud's actions on August 14, 1983 were in anyway controlled by Dr. Goldschmidt or even subject to his right of control. [See, Florida Standard Jury Instruction 3.3(b)(1). See also, Dorse v. Armstrong World Industries. Inc., 513 So. 2d 1265 (Fla. 1987) -- "the existence of a true agency relationship depends upon the degree of

control exercised by the principal."] Without such evidence, the Holmans would not have been entitled to any charge on vicarious liability. In fact, had the "agency" issue been properly pled by the Holmans, on the state of this record Dr. Goldschmidt would have been entitled to a summary judgment or a directed verdict at trial on that issue.

11.

DENIAL OF THE REQUESTED CHARGE ON CONCURRING CAUSE WAS NOT REVERSIBLE ERROR

A. THIS WAS NOT A "CONCURRING CAUSE" CASE.

The trial judge, a long-time member of the Florida Supreme Court Committee on Standard Jury Instructions (Civil), stated, at the charge conference, 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. . . ."

We respectfully submit that the trial court was correct.

The concurring cause instruction, by its very language, expressly applies only to "other causes" that occur at the same time as the defendant's negligence, i.e., true "concurring" causes.[2]

Furthermore, as is pointed out in the note on the use of charge 5.1(b), the concurring cause instruction does not change the standard enunciated in 5.1(a), "but only negates the

[2]As the trial court pointed out, ". . . 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 defendant's negligence." (R. **668)**

idea that a defendant is excused from the conseauences of his negligence bv reason of some other cause concurring in time and contributing to the same damage." (Emphasis added)

The District Court found that the minor plaintiffs underlying and pre-existing developing appendicitis was a sufficient "concurrent cause" to require the giving of the requested instruction. This finding was based, however, upon a mistaken impression that "this disease process or condition by itself could have caused the peritonitis and injury despite the defendant doctor's proper diagnosis and treatment of the condition." 550 **So.** 2d 499, at 508. The only evidence in the record, however, was that had Dr. Goldschmidt made the correct diagnosis on August **12,** 1983 (which the Holmans claim was how Dr. Goldschmidt was negligent), the condition would probably have been treated before the appendix ruptured and developed into peritonitis, with much less resulting injury to the minor plaintiff. In other words, under the evidence in this case, the underlying condition itself could not have caused the resulting damage absent the alleged negligent failure of Dr. Goldschmidt to make the correct diagnosis on August 12, 1983; and had the doctor made the correct diagnosis on that date, the appendix would have been surgically removed prior to rupture, with no resulting peritonitis. Accordingly, Dr. Goldschmidt could neither logically nor legally have argued that the underlying physical problem somehow "excused his failure to diagnose that problem (and no such contention was advanced in final argument); and the underlying appendicitis therefore could not possibly constitute a potential "other cause" or "concurrent cause" as contemplated by 5.1(b).

The only other potential "other cause" of the minor plaintiffs damages referred to by the District Court in its opinion was the actions of Dr. **Soud.** Dr. Soud's contact with the

Holmans did not, however, occur "at the same time" as Dr. Goldschmidt's alleged negligence. Instead, it occurred two days after Dr. Goldschmidt was alleged to have negligently failed to diagnose the appendicitis. Dr. Soud's actions, therefore, could not constitute a "concurring cause".

In addition, although the actions of Dr. Soud could possibly have constituted an "intervening cause"[3], no jury instruction was requested by the Holmans on "intervening cause", nor was any attempt made by Dr. Goldschmidt in final argument to "excuse" his alleged negligent failure to diagnose appendicitis on August 12 by the later actions of Dr. Soud.

The majority opinion cites numerous cases in which the failure to give a concurring cause instruction constituted reversible error. None of those cases, however, 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.

With deference, we submit that this simply was not **a** "concurring cause" case.

---

[3]The District Court (at page 508, fn. 9), opines that, "the negligence of Dr. Soud as contended by plaintiff cannot be treated as **an** independent intervening cause rather than a concurring cause. . . .", but this statement is obviously based upon the erroneous impression that Dr. Soud was acting as Dr. Goldschmidt's "agent", for whom Dr. Goldschmidt would have been vicariously liable -- an impression which we hopefully have dispelled in the preceding section of our Argument.

B. THE JURY COULD NOT HAVE BEEN MISLED.

To warrant reversal of a verdict for failure to give a requested instruction, it must be established not only that the facts supported the need for the requested instruction, but, in addition, that the failure to give the instruction confused or misled the jury. Ruiz v. Cold Storage and Insulation Contractors. Inc., 306 So. 2d 153 (Fla. 2d DCA 1975), cert. den., 316 So. 2d 286 (Fla. 1975). See also, Robv v. Kingsley, 492 So. 2d 789 (Fla. 1st DCA 1986).

The only issue for the jury's determination in this case was whether or not Dr. Goldschmidt was negligent in failing to properly diagnose and treat the appendicitis on August 12, 1983. The jury could not have been misled or confused by the absence of a concurring cause instruction.

It was admitted by all parties that the appendix ruptured, causing damage to the minor plaintiff. The only issue for determination by the jury was whether or not Dr. Goldschmidt was negligent in failing to identify and treat the condition before it ruptured.

The jury was never told that Dr. Goldschmidt could be liable only if his negligence was the only cause of the resulting injury. Instead, it was properly charged that it was to determine whether Dr. Goldschmidt was guilty of negligence as alleged, and if so, whether such negligence "was a (emphasis added) legal cause of loss, injury or damage sustained by Taletha Holman." (R. 732)

No attempt was made by Dr. Goldschmidt in final argument to use any of the so-called "concurring causes", either as an "empty chair" or as a defensive shield (to "excuse" his own alleged negligence), the failure to instruct the jury on "concurring cause" could not

have had any material effect on the jury's verdict finding no negligence on the part of Dr. Goldschmidt, and any error in not giving the charge would therefore have been harmless."

The instant case is quite similar to Wilson v. Boca Raton Community Hospital, Inc., 511 **So.** 2d 313 (Fla. 4th DCA 1987). In Wilson, a patient died of paraquat poisoning. The issue at trial was whether the treating physician's misdiagnosis of the poisoning was the cause of death. Like Taletha Holman's injury from a ruptured appendix, there was no question in Wilson but that the poisoning caused Wilson's death. The plaintiffs appealed an adverse jury verdict, on the grounds that underlying poisoning (like the underlying appendicitis) was a concurring cause, and that a charge on concurring cause should therefore have been given.

The Wilson court pointed out that the gravamen of that case was solely the question of the treating physician's errant diagnosis (as in the instant case as well). 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" (511 **So.** 2d at 314), quoting Tilley v. Broward Hospital District, 458 **So.** 2d 817, 818 (Fla. 4th DCA 1984). See

---

[4]Indeed, the final argument of the Holmans' counsel confirms that Dr. Goldschmidt never made any attempt during the trial of the case to "excuse" his own alleged negligence by the alleged negligence of Dr. Soud or by the minor plaintiffs own underlying developing appendiceal condition itself, because nowhere did the Holmans' counsel indicate any perceived need to rebut such a position or cure any possible jury "confusion" on the causation issue (by, for example, pointing out that under the trial court's instructions, the evidence need only show that Dr. Goldschmidt's negligence was a cause of the injury to the minor plaintiff, rather than the sole cause.)

also, Ruiz v. Cold Storage and Insulation Contractors, Inc., 306 So. 2d 153, 154 (Fla. 2d DCA 1975).

Here, Dr. Goldschmidt never argued that the Holmans were guilty of comparative negligence, nor was it argued that Taletha's resulting condition would have been the same even with a timely diagnosis. 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.

We respectfully submit that there was absolutely no reasonable possibility that the jury could have been misled by the failure to give the instruction.

CONCLUSION

The District Court has held that even where there is no proof of any of the elements essential to establish a true "agency" or "master-servant" relationship, including most significantly no proof whatsoever of the key element of control or right of control, a physician can nevertheless be held vicariously liable for the actions of another, truly independent, physician "covering" for him on a weekend or day off. The potential adverse impact of such holding on such things as medical malpractice liability insurance premiums, and the current method by which most physicians obtain much needed time off from work, could be significant.

Furthermore, the District Court's opinion that a charge on concurrent cause should have been given under these facts can only lead to further potential jury confusion over the causation issue, by encouraging trial courts to give the charge in cases "out of an abundance of caution" in which the Florida Supreme Court Committee on Standard Jury Instructions never intended that it be given.

For the foregoing reasons, therefore, we respectfully submit that this Court should 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.

COMMANDER LEGLER WRBER
DAWES SADLER & HOWELL, P.A.

CHARLES COOK HOWELL, III
Florida Bar No. **097235**
The Greenleaf Building
200 Laura Street
Post Office Box **240**
Jacksonville, Florida **32201-0240**
(904) 359-2000

Attorneys for Petitioner

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 10 day of May, 1990.

Attorney