o.a. 9-7-90

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 75,172

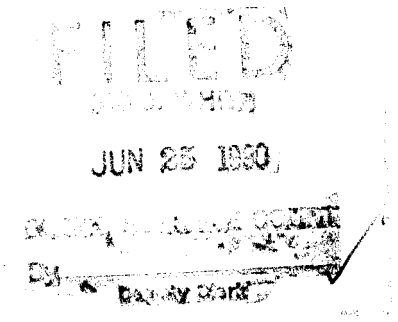
MARK N. GOLDSCHMIDT, M.D.,

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 REPLY BRIEF ON THE MERITS

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GENERAL PRELIMINARY COMMENTS ON RESPONDENTS' ANSWER BRIEF

1. The Holmans claim "surprise" (at page 11) with the argument that agency had not been sufficiently pled. How can such claim be made with a straight face, when the Holmans stipulated at the pre-trial conference, after their expert, Abramson, had gratuitously accused Dr. Soud with negligence and Dr. Goldschmidt with vicarious liability therefore, that the only issue to be tried was Dr. Goldschmidt's negligence, and declined to request any amendment to the pleadings?

2. The Holmans (also at page 11) seek to excuse one of their many oversights at the trial below -- their failure to submit a proper instruction on the issue of actual agency -- claiming that the form of the instruction was rendered moot by the trial court's refusal to allow their request to amend the complaint at the charge conference. Such contention ignores the clear language of Rule 1.470(b) of the Florida Rules of Civil Procedure, which plainly states in part, that ". . . No party may assign as error . . . the failure to give any charge unless he requested same. . . ."

See also: Taylor v. State, 350 **So.** 2d 13 (Fla. 4th DCA 1977), cert. den., 359 **So.** 2d 1221 (Fla. 1978), wherein the Court stated:

> In this case the defendant requested an instruction which in our opinion is inadequate and incomplete. The trial court is not required to give such an instruction, nor is it obligated to re-write the requested instruction to make it right. . . .

And see: Powell v. Goldner, 483 **So.** 2d 468 (Fla. 3d DCA 1986), wherein the failure to request an appropriate curative instruction constituted a waiver of appellant's right to

complain of the admission in evidence a statement of the Florida Driver's Handbook which contained an incorrect statement of the law.

3. The Holmans (again at page 11) cite Dowling v. Nicholson, 135 So. 288 (1931), a case which has no applicability here, because in Dowling, the plaintiff at least alleged that the defendant was acting through a servant.

4. The Holmans can cite no Florida case in support of their argument that agency/vicarious liability need not be pled in a tort action. That is because the law in Florida is to the contrary. Tamiami Trail Tours. Inc. v. Cotton, 463 So. 2d 1126 (Fla. 1985); Designers Tile International Corp. v. Capital C Corporation, 499 So. 2d 4 (Fla. 3d DCA 1986).

5. At page 26, the Holmans contend that by defending Dr. Soud's actions through the testimony of experts, Dr. Goldschmidt tried the agency issue by consent. Such contention, however, ignores the obvious relevancy of such testimony -- that such expert testimony was intended to (and did) completely discredit Abramson's overreaching deposition testimony, where, "grasping at straws", he attempted to "saddle" Dr. Goldschmidt with Dr. Soud's alleged negligence in addition to his own. The District Court even recognized such relevancy in its opinion, at page 503.

6. Di Teodoro v. Lazy Dolphin Development Co., 418 So. 2d 428 (Fla. 3d DCA 1982) (discussed at pages 31 and 32 of Respondents' Brief) is factually inapposite to our situation, because there, the testimony as to the totally unrelated intentional tort of the employee was clearly not relevant for any purpose, where the plaintiff had only pled negligent maintenance of the stairway. In the instant case, however, Abramson's

unsupported opinion testimony was relevant to the issue of causation, and further furnished a golden impeachment opportunity, to demonstrate the total lack of credibility of his testimony.

7. In the Conclusion of their brief, the Holmans boldly maintain that, "at issue was whether Soud deviated from the appropriate standard of care", and that by removing this issue from the jury, they were "ambushed in the charge conference". This is illustrative of the entire tenor of the Holmans' brief, flying, as it does, directly in the face of their stipulation at the pre-trial conference that the only issue to be tried was whether Dr. Goldschmidt deviated from the appropriate standard of care.

I.

THE TRIAL COURT CORRECTLY REFUSED TO SUBMIT THE ISSUE OF ACTUAL AGENCY TO THE JURY

A.

THE ONLY ISSUE ON APPEAL IS WHETHER THE JURY SHOULD HAVE BEEN CHARGED ON THE THEORY OF ACTUAL AGENCY

At the outset, we ask the Court to bear in mind that the only instruction requested by the Holmans on the issue of vicarious liability was an inappropriate pre-emptive charge on the theory of actual agency.

The Holmans strive mightily to gloss over this fact, however, maintaining very generally (and vaguely) that the jury should have been allowed to determine whether Dr. Goldschmidt was "responsible"(i.e., vicariously liable under some theory) for the alleged negligence of Dr. Soud.

In truth, however, the Holmans subtly (and not so subtly) attempt to inject (via a "shotgun" approach), numerous unpled and heretofore unasserted theories of vicarious liability in their brief, apparently in an effort to sustain the new trial ordered by the District Court on any possible alternative theory, should this Court agree with the trial court's ruling with respect to their efforts to go to the jury on the issue of actual agency. For example, on page **34,** the Holmans observe that the general rule of employer non-liability for the negligence of an independent contractor is "riddled with numerous exceptions", obviously hinting at the doctrines of apparent agency and non-delegable duty, which are consistently argued for (though not by name) throughout the factual recitations in the Holmans' Argument. Indeed, the Holmans expressly mention the "non-delegable duty" theory in their Conclusion.

Neither doctrine of vicarious liability is now available to the Holmans, however, because **(1)** neither doctrine was pled', **(2)** no jury instruction was requested under either theory, and **(3)** the Holmans did not brief or argue the issues before the District Court.[2]

By the same token, the other alternative theories of vicarious liability which the Holmans now attempt to inject into the case for the first time, to wit: "borrowed servant",

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[1]In Orlando Executive Park, Inc. v. Robbins, 402 So. 2d 442, 449 (Fla. 5th DCA 1981), aff'd, 433 So. 2d 491 (Fla. 1983), the District Court pointed out that the sole theory of vicarious liability allesed against Howard Johnsons (the franchisor) was that of "apparent agency", a doctrine separate and distinct from that of actual agency.

[2]The District Court expressly (and, we submit, correctly) observed (at fn. 3, p. 503 of its Opinion) that because no charge was requested on the issue of non-delegable duty, nor was such issue argued by the Holmans in their brief before that Court, the issue would not be considered on this appeal.

"partnership" (both at page 28 of said brief), and "joint venture" (introduced through citation of the O'Grady case[3] at page 27), should be promptly rejected by this Court. Instead, the Court should focus solely upon the theory of "actual agency", and whether Dr. Goldschmidt's purported vicarious liability under that theory should have been submitted to the jury.

B.

THE PLEADINGS DO NOT RAISE THE ISSUE

The Holmans argue that paragraphs 7 and **14** of their complaint were sufficient to raise issues as to whether Dr. Soud was acting as Dr. Goldschmidt's actual agent when he spoke with Mrs. Holman on the telephone on August **14,** whether his (Dr. Soud's) advice to Mrs. Holman constituted actionable negligence, and whether Dr. Goldschmidt should be held vicariously liable for such negligence.

They contend (at page **15** of their Answer Brief) that a charge of negligence (though not against Dr. Soud) is implicit in paragraph 7, which negligence is incorporated into the allegations (in paragraph **14)** that Dr. Goldschmidt's medical care and treatment "in a manner described in the previous paragraphs" constituted a deviation from the accepted standard of care. They further contend that to find otherwise would render the allegations as to the events of August **14** (the subject of paragraph 7) "meaningless".

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[3] O'Grady v. Wickman, 213 So. 2d 321 (Fla. 4th DCA 1968) -- where the question was whether ##aconcert of action and a common purpose existed between the two doctors" so that one doctor could be held vicariously liable for the actions of the other.

At no time on this appeal, however, have the Holmans contended that Dr. Goldschmidt was negligent or that he is vicariously liable for the events which occurred on August 16, described in paragraph 8 of the complaint.

Paragraph 8 is no different from paragraph 7.

Neither paragraph is "meaningless".

Both paragraphs describe the subsequent events leading to ultimate hospitalization, i.e., the telephone calls to Dr. Goldschmidt's office relating Taletha Holman's continually deterioriating symptoms.

However:

Neither paragraph alleges that Dr. Goldschmidt rendered medical care or treatment on either day;

Neither paragarph alleges that Dr. Goldschmidt was in any way involved with the patient on either day;

Neither paragraph alleges that Dr. Soud, or anyone else for that matter, was acting as an agent for Dr. Goldschmidt on either day;

Nor does either paragraph allege that what transpired on either day constituted actionable negligence.

In short, there is nothing in either paragraph 7 or paragraph 8 that would apprise anyone that the Holmans intended to try to hold Dr. Goldschmidt vicariously liable for the actions of Dr. Soud (or for any other person) under a theory of actual agency.

The Holmans' argument for the significance of paragraph 7, at the same time ignoring paragraph 8, is therefore inconsistent.

C.

DENIAL OF THE REQUEST TO AMEND AFTER THE DEFENSE HAD ALREADY PUT ON ITS CASE DID NOT CONSTITUTE AN ABUSE OF DISCRETION

As pointed out in Petitioner's Brief on the Merits (pages 10-14), procedural due process would not have permitted the Holmans to amend the pleadings to state a totally new cause of action (vicarious liability) after all the evidence was in. Nor was the issue tried by consent. (Please refer to pages 15-20 of Petitioner's Brief on the Merits.) Indeed, any question of possible vicarious liability was abandoned at the pre-trial conference when the Holmans, though fully aware of the "opinions" of their expert, nevertheless declined the opportunity to request an amendment of the complaint. Furthermore, the Holmans did not request leave to amend at the close of their case either. Instead, they waited until Dr. Goldschmidt had put on his entire case before seeking to amend.

In the defense case, Dr. Goldschmidt introduced just enough evidence to demonstrate the total absurdity of Abramson's "off-the-cuff" opinions accusing Dr. Soud also of negligence and Dr. Goldschmidt with "responsibility" for Dr. Soud's actions. Because vicarious liability was not an issue, however, Dr. Goldschmidt did not present the sort of detailed evidence going to the crucial "control" issue that certainly could have been prepared and introduced had the issue been properly raised before trial and identified as an issue at the pre-trial conference. The Holmans' contention that Dr. Goldschmidt would not have been prejudiced by allowing the requested amendment at the close of all the evidence simply ignores reality.

The trial court therefore did not abuse its discretion in refusing the request to amend, which did not come until the end of the case. Nor have the Holmans been able to demonstrate any abuse of discretion. (See, McSwiggan v. Edson, 186 So. 2d 13 (Fla. 1966)).

D.

THE EVIDENCE WOULD NOT HAVE JUSTIFIED A CHARGE ON ACTUAL AGENCY

The Holmans devote considerable space in their brief to a discussion of the evidence[4] -- evidence which they contend supports an instruction to the jury on Dr. Goldschmidt's "responsibility" for the negligence, if any, of Dr. Soud.

There is no question but that the trial court was correct in rejecting the pre-emptive instruction on actual agency requested by the Holmans, which was the only instruction they ever requested. The evidence does not even support a proper instruction on the issue of actual agency, because there was no evidence whatsoever of the vital element of control or right to control.

In order to submit an issue of vicarious liability to the jury on a theory of actual agency, there must first be some evidence that the alleged principal either controlled or had a right to control the day-to-day activities of the alleged agent in connection with the work being performed. Vasauez v. Board of Regents. State of Florida, 548 **So.** 2d 251 (Fla. 2d DCA 1989); Bryant v. Duval County Hospital Authority, 459 **So.** 2d 1154 (Fla. 1st DCA 1984). See also, Dorse v. Armstrong World Industries. Inc., 513 **So.** 2d 1265 (Fla. 1987) (the

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[4]They also pointedly but for no stated reason, discuss the circumstances under which they came to read the deposition of Dr. Abramson at trial (pages 4-5), and the nature of Taletha Holman's damages (page 8) -- neither of which is particularly pertinent to the issues before this Court.

test of actual agency is the same, regardless of the factual setting). The Holmans have not pointed to any such evidence in their brief.

In fact, few if any of the other traditional indicia of an actual agency relationship [such as selection and engagement of the servant/agent, payment of wages or power of dismissal, DeRosa v. Shands Teaching Hospital and Clinics. Inc., 504 So. 2d 1313,1315(Fla. 1st DCA 1987)] are present in the "Goldschmidt-Soud arrangement" to which the Holmans refer at page 16 of their brief.

In any event, absent evidence of the vital element of control or right of control, had the issue of actual agency been properly pled, Dr. Goldschmidt would have been entitled to a directed verdict on that issue.

11.

THIS WAS NOT A "CONCURRING CAUSE" CASE

The trial court instructed the jury as follows:

> The issues for your determination on the negligence claim of Taletha Holman against Dr. Mark N. Goldschmidt are whether Dr. Goldschmidt was negligent in diagnosing the medical condition of Taletha Holman and, if so, whether such negligence was a legal cause of loss, injury or damage sustained by Taletha Holman. (R. 732)
>
> . . .
>
> 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. (R. 733)

Despite the comments by the District Court majority, we respectfully submit that such charge does not imply that the doctor's negligence must be the only cause. The jury was positively instructed that the doctor's negligence need only be a cause of injury to the minor plaintiff. Further, the jury was told that the doctor's negligence could be a legal cause if it produces "or contributes substantially to producing" injury, again clearly indicating that the doctor's negligence, if any, could subject him to liability even in the face of other possible contributing causes, so long as his negligence "contributes substantially" to producing the injury.

Neither does the "but for" language of the standard jury instruction on legal causation imply that the doctor's negligence must be the only cause of injury in order for the doctor to be found liable, especially when considered in light of the evidence in this case.

There simply was no potential for jury confusion by the Court's instructions. Had there been any such potential, it is certain that the Holmans' attorney would have addressed such possibility in his final argument, where he could easily have explained clearly to the jury the fact that if they found that Dr. Goldschmidt had been negligent, he would be liable even though they might also feel that the minor plaintiffs damages were contributed to by the negligence of other persons or some other natural cause.

The fact is that there was no evidence of a true "concurring cause" in this case. The Holmans mention the alleged negligence of Dr. Soud, but his negligence occurred two days after Dr. Goldschmidt saw the patient. At best, his negligence, if any, would constitute an "intervening cause".

The Holmans argue that the jury did not have the benefit of a charge on intervening cause (page 45), and complain that, "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 Souds negligence." (page **48)** Just as they failed to plead vicarious liability and failed to request a proper instruction on actual agency (or on any other theory of vicarious liability), they likewise failed to request a charge on "intervening cause". Once again, the Holmans are asking the Court, without legitimate excuse or justification, to relieve them from the consequences of their many oversights below.

With respect to the issue of Dr. Souds alleged negligence, we would also observe that at no time during the trial or on final argument did the defense maintain that Dr. Soud was negligent, or that his actions in any way would have excused Dr. Goldschmidt from the consequences of his failure to diagnose appendicitis on the only occasion he saw the minor plaintiff, if such failure indeed constituted negligence in the first place. Accordingly, there was no room for the jury to possibly conclude that negligence on the part of Dr. Soud could in any way insulate Dr. Goldschmidt from liability.

The Holmans next attempt to erect a "strawman" (contending that the jury could also have found Mrs. Holman guilty of negligence), which they then attempt to "knock down" by submitting that such negligence could have constituted a "concurring cause" justifying the requested instruction (pages **43** and **46).** Again, however, if the mother was negligent, such negligence occurred after Dr. Goldschmidt saw the minor plaintiff -- at best, an "intervening cause" rather than a "concurring cause".

The Holmans graciously concede (although somewhat backhandedly) that Sandra Holman was not charged with negligence, and that the word "negligence" was not affixed to her by the defense. They then argue, however, that "a major thrust throughout was that Sandra Holman was negligent." The point the Holmans are missing, however, is that what Mrs. Holman may have done or failed to do after Dr. Goldschmidt saw her daughter on August 12 would in no way be relevant to whether Dr. Goldschmidt was negligent that day. Furthermore, it matters not whether what she told Dr. Goldschmidt was accurate or not, for the sole issue was whether Dr. Goldschmidt was negligent in failing to diagnose appendicitis based upon the information he had. If he was not negligent in failing to diagnose appendicitis based upon that information, it really doesn't matter whether the information was accurate or not.

As with respect to the alleged negligence of Dr. Soud, at no time did the defense maintain that Mrs. Holman was negligent or that such negligence somehow excused otherwise negligent conduct on the part of Dr. Goldschmidt; and the Holmans' counsel obviously did not perceive any potential jury confusion in that regard, because no attempt was made to clear up any such potential confusion on final argument.

One final observation about the Holmans' arguments that the negligence of the mother could have constituted a concurring cause is that this was not recognized as a potential concurring cause by the District Court below.

With respect to the minor plaintiff's underlying appendicitis, it is true that such condition is difficult to diagnose -- but that does not make the condition a potential concurring cause. If the doctor is negligent in failing to diagnose appendicitis under any

given factual scenario, he is still negligent, no matter how difficult the condition is to diagnose. On the other hand, if he is not negligent in failing to make the diagnosis under the presenting circumstances, he is not negligent. Whether the condition itself is difficult to diagnose makes no difference. The jury must still make the determination whether the diagnosis should have been made under the existing circumstances.

The District Court, page 508 of the Opinion, stated:

> . . . It may be said with candor 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.

With all due respect, this statement is dead wrong. If Dr. Goldschmidt had made the proper diagnosis and then rendered the proper treatment, the undisputed evidence is that the appendix would have been surgically removed before it ruptured, thereby avoiding the subsequent injury.

And once again, there is no room to legitimately contend that the jury was confused by the failure to charge on concurring cause, because no contention was ever advanced that such condition would have excused Dr. Goldschmidt's failure to make the correct diagnosis, if otherwise negligent, and no effort was made by the Holmans' counsel to clear up any such potential confusion during his final argument.

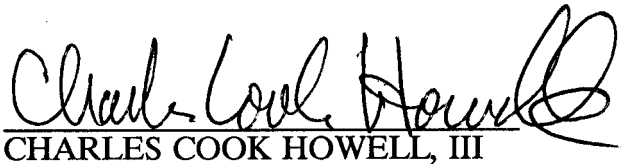
Accordingly, if any of the cases cited by the Holmans at pages 37 and **38** of their Answer Brief were correctly decided (which we do not concede), they simply have no applicability to the instant case.

CONCLUSION

For the foregoing reasons, we again respectfully submit that the 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.

Respectfully submitted,

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



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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 June, 1990.

Attorney