IN THE
SUPREME COURT OF FLORIDA

Case No. 93,353

SHIRLEY G. SAWCZAK,

Petitioner,

vs.

ALAN L. GOLDENBERG, M.D., ALAN L. GOLDENBERG, M.D, P.A., J. STERNBERG and S. SCHULMAN, M.D. CORP., ALAN ALARCON, M.D., and HUMANA, INC. d/b/a WESTSIDE REGIONAL MEDICAL CENTER f/k/a HUMANA HOSPITAL BENNETT,

Respondents.
_____/

ANSWER BRIEF OF RESPONDENT, HUMANA, INC. d/b/a WESTSIDE REGIONAL MEDICAL CENTER f/k/a HUMANA HOSPITAL BENNETT

On Discretionary Review from the Fourth District Court of Appeal

CLARK J. COCHRAN, JR., ESQUIRE
HAL B. ANDERSON, ESQUIRE
BILLING, COCHRAN, HEATH, LYLES & MAURO, P.A.
Attorneys for Humana, Inc. d/b/a Westside Regional Medical Center f/k/a Humana Hospital Bennett
888 S.E. Third Avenue, Suite 301
Fort Lauderdale, FL 33316
(954) 764-7150

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PREFACE

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In accord with the requirement of Rule 9.800 of the Florida Rules of Appellate Procedure that citation style be in the form prescribed by the latest edition of The Bluebook: A Uniform System of Citation, where not otherwise directed by the Rules, this brief follows Bluebook Rule 10.7 and omits subsequent history citations for cases older than 2 years which were denied discretionary review. See Fla.R.App.P. 9.800(n) (1997); Harvard Law Review Association, The Bluebook: A Uniform System of Citation rule 10.7, at 66 (16th ed. 1996).

CERTIFICATE OF SIZE AND TYPE

Pursuant to the Supreme Court of Florida's Administrative Order of July 13, 1998, Respondent certifies that this brief employs proportionately spaced 14 point Times New Roman type which exceeds the legibility standards set by Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE AND THE FACTS

Dr. Alan Goldenberg, a private surgeon with his own professional association, severed the wrong glandular duct when removing Plaintiff's gall bladder. (T. 851). Instead of severing the duct near the gall bladder as he intended, Dr. Goldenberg cut the portion of the duct which carries bile from Plaintiff's liver to her intestines. When the problem became apparent, Plaintiff filed a medical negligence action against Dr. Goldenberg, his professional association, and the cast of supporting players who are present in most major surgeries. (R. 70).

This appellee, Humana Inc, d/b/a Westside Regional Medical Center, f/k/a Humana Hospital Bennett ("the hospital"), was the hospital where the surgery was performed. (R. 70). Alan Alarcon, M.D. was the radiologist who reviewed films taken by Dr. Goldenberg while he performed surgery. (R. 70). Sternberg & Schulman, M.D. Corp. ("the radiology group") was Dr. Alarcon's employer, a separate corporation under contract to the hospital to provide radiologic services. (R. 70); (T. 2063). Various other doctors, initially joined as defendants, were dismissed prior to verdict and are not the subject of this appeal.

The Trial and the Plaintiff's Four Million Dollar Verdict

At trial, the evidence against Dr. Goldenberg was overwhelmingly one-sided. He admitted that, as the surgeon, his first responsibility was to identify Plaintiff's

anatomy correctly. (T. 828). He chose to perform the operation laparoscopically through a fiber optic device rather than through an open belly operation. (T. 2498). He knew -- and it was generally recognized -- that the risk of mis-identifying the anatomy was of particular concern with his chosen method of surgery. (T. 829-30, 884).

To offset this risk, he had at his disposal three separate tools, specifically designed to enable him to observe and identify the proper duct. One was the laparoscope itself -- a fiber optic scope which allowed him to observe Plaintiff's organs and his surgical tools directly on a television screen throughout the entire surgery. (T. 744, 831). The second device was a fluoroscope, which uses a stream of X-rays to display the radioactively died ducts in real-time motion on a second television screen. (T. 902-03, 958, 1145). He also had available specialized X-ray films, known as cholangiograms, which he could have used to identify anatomy, rather than merely gallstones, if he had so directed. (T. 750, 832).

Yet, despite all of these tools and despite knowing the critical importance of cutting the correct duct, Dr. Goldenberg severed the wrong duct and admitted having done so during his testimony at trial. (T. 851). So clear was Dr. Goldenberg's negligence that the trial court directed a verdict against him on liability. (T. 3161-63). Thus, the jury was left with three main issues: damages, the

negligence of the radiology defendants, if any, and the vicarious liability of the hospital, if any.

The obvious negligence of Dr. Goldenberg sharpened the unusual alignment between defendant Goldenberg and Plaintiff that shaped the trial from the outset. At the beginning of the Plaintiff's case-in-chief, Dr. Goldenberg joined the Plaintiff's line of attack against the radiology defendants by testifying unfavorably against the radiologist, Dr. Alarcon. (T. 750-51). Dr. Goldenberg's expert radiologist further assisted the Plaintiff's case against the radiologists by testifying that the radiologic films were inadequate. (T. 2591-92, 2596). He even went so far as to call the work of Dr. Alarcon "disastrous." (T. 2696). Dr. Goldenberg's effort to implicate his co-defendants was recognized by his own counsel who told the jury in closing: "Now, I think it's probably pretty obvious to you that my position on the issues of liability are adversary to the radiology defendants....[T]hat puts me with Mr. Fiore [plaintiff's counsel] on some of these things that have come up." (T. 3335). Thus, in evidentiary strategy, trial conduct, and argument, Dr. Goldenberg and his counsel blatantly allied themselves with the Plaintiff.

Although Plaintiff and Dr. Goldenberg worked assiduously to implicate the radiology defendants -- and by extension, the hospital -- there was abundant evidence for the jury to conclude that the fault lay with Dr. Goldenberg alone. Dr.

Goldenberg admitted that the primary purpose for requesting radiologic interpretation of the cholangiograms was to check for gallstones. (T. 833). He admitted that he personally targeted the fluoroscope and the X-ray equipment for taking cholangiograms himself. (T. 1148, 1165). Plaintiff's expert surgeon confirmed that Dr. Goldenberg directed the taking of cholangiograms. (T. 958-59). Furthermore, in real-time, the fluoroscope had revealed a significant anomaly in the duct shortly after Dr. Goldenberg began his surgery, which anomaly Dr. Goldenberg admitted both having seen and having failed to appreciate as a significant indication of likely error. (T. 1155). He also observed that radioactive dye was leaking from the duct. (T. 1156-69). Finally, Dr. Goldenberg conceded that he never asked the radiologist, Dr. Alarcon, to verify the correct duct, despite there being an operating room intercom directly to Dr. Alarcon. (T. 1181).

Along with this strong evidence of Dr. Goldenberg's exclusive responsibility for this surgical error, there was also strong evidence that the hospital had neither authorized nor held out Dr. Goldenberg nor Dr. Alarcon as its actual or apparent agents. For example, Plaintiff first sought treatment from Dr. Goldenberg, in his own private practice upon the referral of her private family doctor. (T. 2493-94). She agreed to have her surgery performed at the hospital for reasons such as her prior satisfactory experience there, its reputation and the quality of its food,

including Friday night lobster dinners. (T.2407-09, 2492, 2505). Most significantly, the jury was presented Plaintiff's written acknowledgement that she knew private doctors, specifically the radiologists, would render her care at the hospital. (T. 2502-03); (Resp. App. 1). From such evidence during the thirteen days of trial, and in spite of the concerted effort by Plaintiff and Dr. Goldenberg to implicate the other defendants, the jury concluded that Dr. Goldenberg was 100% liable. The jury specifically found that neither Dr. Goldenberg nor Dr. Alarcon was an actual or apparent agent of the hospital, and the jury also found that the hospital was not itself negligent. (R. 1059-61). The jury awarded Plaintiff $4,000,629 in damages against Dr. Goldenberg alone, an amount greater than that suggested by Plaintiff's counsel in closing argument. (R. 1059-61).

Plaintiff's Motion for New Trial Exclusively on Liability

In spite of such a substantial damage award, Plaintiff moved for a new trial seeking to retry only the jury's determination as to the lack of liability of the hospital and Dr. Goldenberg's other co-defendants. (R. 1119). Plaintiff raised no objection to the jury's multi-million dollar damages award in her favor. The motion for new trial as to the hospital was primarily based on three arguments which have become the basis for appeal.

First, Plaintiff attacked closing comments by the hospital's defense counsel as constituting fundamental error. (R. 1122-54). The comments of which Plaintiff complained were a few statements which involved the idiomatic use of the word "I" in discussing the evidence during the hospital's hour-long closing. Such statements, in context, reflect counsel's position as to specific facts and inferences of record, and each first person reference was made as a mere figure of speech, as opposed to an expression of personal opinion. Plaintiff never objected to any of these comments. Nonetheless, for the first time in her motion for new trial, Plaintiff claimed such remarks were sufficiently "sinister" to strip the jurors of their rational powers and to prevent them from making a fair determination of the hospital's liability. Plaintiff made no claim that these comments had any adverse impact whatsoever on the jury's ability to rationally determine Plaintiff's damages.

In an attempt to tar all defendants with a single brush, Plaintiff also sought to impute any error from comments by counsel for other defendants to the hospital as well. (R. 1122-54). Most of these comments, like all those of the hospital counsel, were not objected to. For those comments that Plaintiff did object to, the trial court gave appropriate rulings and instructions. At the close of all of the evidence, Plaintiff both withdrew her motion for mistrial and refused to propose any further

curative instructions. (T. 3548-49). Thus, Plaintiff denied the trial court any opportunity to address the comments further before the jury began to deliberate.

As a second basis for new trial, she asserted that the trial court abused its discretion in allowing the radiologist and the radiology group to call one expert witness for each of the medical disciplines at issue: radiology and surgery. (R. 1158). The trial court's order on this matter was entered in response to Plaintiff's pretrial motion to limit the number of experts at trial and re-affirmed at a subsequent hearing held at Plaintiff's request. (R. 195, 221, 263, 805, 1307-86). This limitation on expert testimony was loosely applied to the Plaintiff because, in addition to presenting testimony on radiologic practices from her radiology expert, Plaintiff was also allowed to introduce testimony on radiologic practices from her surgical expert, Dr. Livingstone, as well. (T. 879); (I.B. 17).

And as a third basis for a new trial, Plaintiff also complained that the court declined to give her requested special instructions on detrimental reliance and on a non-delegable duty exception to the independent contractor rule under agency law. (R. 1161). The first instruction was denied as an unnecessary and improper reformulation of the standard instructions. The non-delegable duty instruction was denied initially because it was a confusing deviation from the standard instructions. (T. 3184). The instruction was not preserved in the transcript. Subsequently, the

court rejected a revised version of the instruction as being untimely because it was submitted only after the conclusion of closing arguments. (T. 3541-32). The trial court proceeded to charge the jury by using the standard instructions applicable to the case, including vicarious liability, agency, apparent agency, and independent contractors. (T. 3566-77). Despite this use of the standard instructions, Plaintiff insisted that the trial court's instructions were so defective as to require a new trial. (R. 1161).

After accepting legal memoranda on these three alleged bases for a new trial, among others, the trial court conducted a hearing and ultimately denied the motion for new trial. (R. 1516). Final judgment was entered in favor of the hospital on June 11, 1996. (R. 1518). The judgment and denial of Plaintiff's motion for new trial were affirmed on appeal to the Fourth District Court of Appeal. Sawczak v. Goldenberg, 710 So.2d 996 (Fla. 4th DCA 1998) (copy included in I.B. App. 1). Plaintiff now petitions this Court to review the decision of the district court, raising essentially the same three grounds and seeking a new trial only on liability. (R. 1519).

ISSUES ON APPEAL

ISSUE I

WHETHER THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL BECAUSE OF DEFENSE COUNSEL'S CLOSING ARGUMENT.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING THE NUMBER OF EXPERT RADIOLOGY WITNESSES TO ONE PER PARTY.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING PLAINTIFF'S CONFUSING AND INAPPOSITE JURY INSTRUCTIONS.

SUMMARY OF ARGUMENT

The unobjected-to comments by counsel for the hospital during closing argument which included idiomatic uses of "I think" or "I believe" were incidental to and in the context of the discussion of specific facts and evidence. When read fairly and in context, these few references in the course of an hour-long closing argument by the hospital's counsel related to counsel's position as to what the evidence demonstrated and did not constitute any accusations against opposing counsel, nor did they impermissibly assert the personal opinions of counsel. Such comments clearly did not prevent the jury from rational consideration of the evidence or provide the only possible explanation for the verdict in favor of the hospital so as to create fundamental error. As it was, the verdict in favor of the hospital on the issue of liability was supported by competent and substantial evidence.

Similarly, the comments of the defense counsel for the other defendants, which comments Plaintiff also claims warrant a new trial, were not improper, let alone so egregious as to interfere with the essential justice of the jury verdict. Moreover, had the comments of any defense counsel been improper, the Plaintiff waived the right to new trial as to those comments to which objections were sustained by having failed to move for mistrial and having declined the opportunity to request further curative instructions to the jury. Most importantly, the hospital is not legally bound by the

comments of counsel for the other, wholly separate defendants especially in view of the separate attorneys, separate evidence, and separate argument for each defendant. The hospital was sued by Plaintiff as a patently distinct entity and charged with both direct and vicarious liability. The jury's verdict even confirmed the separateness of the defendants in its determination that no agency relationship existed between them. Plaintiff cannot lump all defendants together now merely because it serves her purposes on appeal.

Because the respective defendants were separately sued and Plaintiff sought separate damages from each, the trial court properly exercised its discretion by limiting the amount of expert witnesses and allowing the separate defendants to call their independently retained experts at trial. No Florida case has ever held that a limitation of "one expert per specialty per party" is an abuse of discretion.

Finally, as to the third issue, the standard jury instructions with which the trial court charged the jury in this case were entirely sufficient to apprise the jury of the law applicable to Plaintiff's theories of liability. The trial court did not commit reversible error by refusing the additional confusing and inapposite instructions requested by Plaintiff.

The Plaintiff having failed to demonstrate any clear showing of abuse of discretion on the part of the trial court in denying the motion for new trial, the order denying such motion and the decision of the district court should be **AFFIRMED**.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL BECAUSE OF DEFENSE COUNSEL'S CLOSING ARGUMENT.

In her first issue, Plaintiff petitions this Court to find error in the district court's affirmance of the trial court's denial of her motion for new trial on the grounds of purported error in closing argument. As to this Respondent, the hospital, she contends that both the trial court and the district court erred when they concluded that a few unobjected-to, self-referential "I" statements in the course of an hour-long closing by the hospital's defense counsel were not fundamental error. As a fallback argument, she suggests that any error by other defense counsel in closing should also result in a new trial as to the hospital's liability, although she considers the damages award wholly adequate and unnecessary to retry.

In affirming, the Fourth District Court of Appeal applied the clear abuse of discretion standard which was established by this Court. See Sosa v. Knight-Ridder Newspapers, Inc., 435 So.2d 821 (Fla. 1983). It also heeded section 59.041, Florida Statutes, which has long mandated that new trials be granted only when neccessary to avoid a miscarriage of justice. The district court reviewed the arguments of all

defendants for fundamental error because Plaintiff had failed to object to most of the comments or failed to pursue a motion for mistrial on the few comments to which objections were made. Thus, it is the application of the fundamental error doctrine, particularly in light of the pending case of Murphy v. International Robotics Systems, Inc., 710 So.2d 587 (Fla. 4th DCA), review granted, Case No. 92,837 (Fla. 1998), that is the focus of Plaintiff's first issue.

Regardless of which of the related expressions of the fundamental error standard this Court re-affirms, the unobjected-to comments of the hospital's counsel are simply not error of any kind, let alone a miscarriage of justice so as to warrant a new trial. To suggest that the jury was able to render properly a multi-million dollar verdict on damages in favor Plaintiff without also being able to distinguish among the arguments and counsel for each of the wholly separate defendants as to liability is a contradiction that finds no merit under the case law or common sense.

A. Without Plaintiff having objected to remarks or having pursued a mistrial or curative instruction for those remarks to which an objection was sustained, all such remarks are properly reviewed only for fundamental error

Plaintiff sought review of several unobjected-to remarks by the various defense counsel during closing argument, including a series of self-referential "I" statements by counsel for Humana, by arguing that they constituted fundamental error. See Sawczak v. Goldenberg, 710 So.2d 996, 997 (Fla. 4th DCA 1998). The district court also

applied this fundamental error standard to the three remarks of the defense counsel for the radiologist to which Plaintiff did object on "golden rule" grounds because, when the trial court indicated that it would not reserve on the Plaintiff's subsequent motion for mistrial, she withdrew the motion. Id. Thus, Plaintiff's own inaction waived any assignment of error regarding argument by counsel and deprived the trial court of any opportunity to address the alleged errors. It is only after-the-fact that she asserts these grounds for the first time, and accordingly, she is subject to the fundamental error standard.

This Court has defined fundamental error in closing argument as error "so extensive that is influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury...." Seaboard Air Line R.R. Co. v. Strickland, 88 So.2d 519 (Fla. 1956). The Fourth District Court of Appeal has long used this standard. E.g., Norman v. Gloria Farms, Inc., 668 So. 2d 1016, 1023 (Fla. 4th DCA), review denied, 680 So.2d 422 (Fla. 1996); Budget Rent A Car Systems, Inc. v. Jana, 600 So.2d 466, 467 (Fla. 4th DCA 1992). The case cited by the Fourth District Court of Appeal in reviewing the present case, Murphy, 710 So.2d 587 incorporates this very standard by citing to Tyus v. Apalachicola Northern Railroad Co., 130 So. 2d 580, 587 (Fla. 1961), which restated the Strickland rule. See

Murphy, 710 So.2d at 590. Under this Court's long-held standard, the district court correctly concluded that there is no fundamental error in the present case.

B. A few idiomatic references to what the hospital counsel believed the evidence demonstrated constitute fair comment on the evidence and are not fundamental error

Plaintiff seeks to overturn a jury verdict in favor of the hospital solely because of a few idiomatic uses of "I believe" or "I think" by the hospital's defense counsel in reference to specific evidence introduced at trial. (I.B. 37-38). Plaintiff made no objection to these remarks during the hospital's hour-long closing argument. Thus, they cannot be a basis for a new trial unless they amounted to fundamental error. No such error is present here.

Perhaps the best evidence of the innocuous nature of the hospital counsel's remarks is that, in the context in which they were made, Plaintiff's counsel felt no need to object when they were made. At most, four of these comments relate to liability -- not all ten of the first person statements that Plaintiff was able to uncover with hindsight. In addition, each such comment follows a detailed discussion of specific evidence. Even had such comments been objectionable, Plaintiff's counsel's failure to object to these first person statements can only be construed as deliberate trial tactics. See Nelson v. Reliance Ins. Co., 368 So.2d 361, 362 (Fla. 4th DCA 1978). Plaintiff should not now be able to recast her intentional trial tactics as a miscarriage of justice

simply because hindsight leaves her dissatisfied with some portion of the jury's verdict.

Even had the hospital counsel's few comments even been objected to, and therefore subject to a less rigorous standard than fundamental error, they would not be reversible error of any kind. The Third District Court of Appeal, a vigilant overseer of proper closing argument, recently held that phrases such as "I think" or "I believe" do not warrant a new trial even when challenged by timely objection. Forman v. Wallshein, 671 So.2d 872, 874 (Fla. 3d DCA 1996). Quoting one learned treatise, the Forman court explained:

> The rule against statements of personal belief is an important one. *It should not be demeaned by a too-literal interpretation. It is difficult to purge your speech entirely of terms such as 'I think' or 'I believe.' While good lawyers strive to avoid these terms, it is not unethical to fall occasionally into first person references.* Similarly, it is unnecessary to preface every assertion with statements such as 'the evidence has shown,' 'we have proven,' or the like.

Id. at 875 (quoting Steven Lubet, Modern Trial Advocacy Analysis & Practice, 432-33 (1993)) (emphasis in opinion). Applying these principles to the case under review, the Forman court deemed the phraseology used by defense counsel to be a figure of speech, not an expression of personal opinion, and it affirmed the jury verdict accordingly. Id. See Lowder v. Economic Opportunity Family Health Ctr., Inc., 680

So.2d 1133, 1137 (Fla. 3d DCA 1996) (when read in context, first person figures of speech were not improper vouching).

The same distinction that the Forman court drew between one attorney's inartful figures of speech and another's wholly improper effort to supplant the law and the evidence with his own beliefs is one that applies to the present case. The hospital counsel here, in leading the jury through the evidence, did make a few first person references during his sixty minutes of argument. Read closely and in context, his phrasing is solidly in the realm of a figure of speech and not an attempt to substitute his opinions for the evidence: "I don't believe that's appropriate evidence," "I don't believe there is any liability," "Let's just talk about why I think, basically, that Dr. Goldenberg and Dr. Alarcon are independent contractors," and so forth. (T. 3490, 3499, 3506). Therefore, rather than embrace Plaintiff's belated and overly-literal objections, this Court should follow the reasoning employed by the court in Forman, supra, and decline to find error in the hospital counsel's inadvertent figures of speech.

Recent case law indicates that the district courts are in consistent agreement that remarks which are indicative of ordinary speech patterns, although perhaps showing a lack of verbal dexterity, are permissible attempts to argue from the evidence. See Wal-Mart Stores v. Sommers, 717 So.2d 178 (Fla. 4th DCA 1998). Thus, for example, in Goutis v. Express Transport, Inc., 699 So.2d 757 (Fla. 4th DCA 1997), the Fourth

District Court of Appeal, adopted the reasoning of the Forman court and held mere speech patters such as "I would propose" or "I submit" are neither unethical nor fundamental error because they do not put the lawyer's credibility on the line nor do they impermissible suggest that the attorney has access to additional information. Id. at 764. Even where a lawyer slips into a remark that come close to vouching, for example, by saying "[A]s a lawyer and an officer of the court, and an attorney ... I will tell you," the Fourth District has also recently held that such a statement does not constitute fundamental error by itself or even in conjunction with other minor, unobjected-to errors. Davis v. South Fla. Water Management Dist., 715 So.2d 996, 998-99 (Fla. 4th DCA 1998).

Likewise, the Fifth District Court of Appeal in Simmons v. Swinton, 715 So.2d 370 (Fla. 5th DCA 1998), reached a similar conclusion and reversed a grant of a new trial where the attorney had directly challenged the credibility of a witness. Id. at 373. The Simmons court explained that a remark that was apparently phrased in the first person was not error because the comment addressed contesting and conflicting evidence and called for the argument of matters and inferences. Id.

These same principles apply here. All of the hospital counsel's comments cited by Planitiff introduce or elaborate interpretations of the evidence: liability, fault, independent contract or status. They also appear as part of transitions in the argument:

"Now I'm going to switch gears..." (Tr. 3496); "Now that I've said that ...." (Tr. 3499); "Let's just talk about...."; "And I want to thank you very much on behalf of Humana Hospital....". Read in context, these statements reflect mere speech patterns as permitted in Sommers and they introduce necessary argument about the very issues and inferences in dispute at was permitted in Simmons. Thus, under a wide array of consistent district court precedent, the statements of the hospital's counsel are wholly unobjectionable, and not a basis for fundamental error.

In comparable circumstances, the Second District Court of Appeal pointed out that criticism of unobjected-to first person statements that is raised only after close scrutiny of the transcript, as we have here, presents a further reason to conclude there was no fundamental error. Wasden v. Seaboard Coast Line R.R. Co., 474 So.2d 825 (Fla. 2d DCA 1985). In Wasden, the appeals court confronted a series of first person statements that had been made by the defense during closing without objection. Id. at 828. Plaintiff had raised these statements for the first time in a motion for new trial. Id. The statements included such phrases as "I'm telling you"; "we knew"; "I would suggest to you"; and, even, "I say baloney." Id. The trial court granted the plaintiff's motion, but the Wasden court reversed the trial court's order as an abuse of discretion. Id. at 832.

The Wasden court noted that plaintiff's after-the-fact cries of outrage over unobjected-to argument must be greeted with some skepticism because they usually indicate intentional trial tactics that simply backfired. Id. at 831-32(citing Nelson, 368 So.2d at 362). The court went on to explain that fundamental error goes to the foundation of the merits of a cause of action and that "[w]here the great majority of improprieties have been identified by opposing counsel or the judge only after close scrutiny of the written transcript of the proceedings, it is less likely that there was in fact such pervasive prejudicial effect." Id. at 832. Concluding that the defense comments at issue could not, either singly or collectively, amount to a pervasive prejudicial effect, the Wasden court held the plaintiff to its trial tactics and found no fundamental error. Id.

The Second District Court of Appeal re-affirmed its skepticism toward unobjected-to statements as a basis for fundamental error in Gregory v. Seaboard Systems Railroad, Inc., 484 So.2d 35 (Fla. 2d DCA 1986). In Gregory, the court again vacated an order granting new trial on the basis of twenty-two statements such as "I think it defies belief" which had not been objected to. Id. at 39. The Gregory court referred directly to Wasden for the proposition that improprieties identified only after close, post-verdict scrutiny of the written record are unlikely to have pervasively influenced the trial. Id. The Gregory court also noted that where the jury's verdict has

adequate evidentiary support, the likelihood of the statements having prejudiced the trial is even less. Id.

In light of Plaintiff's decision not to object to the hospital counsel's first person statements in the present case, this Court should follow the Second District Court of Appeals in Wasden and Gregory and likewise find no fundamental error. Even if this Court adopts a slightly different expression of the fundamental error standard than was pronounced in Wasden and Gregory, the very same conclusion is supported under the Third District's decision in Forman, supra, and Lowder, supra. Here, the hospital counsel's statements amount to mere idiom. Though perhaps undesirable, they are no more pernicious than were the similar statements included in the arguments of Plaintiff's counsel: "We believe it is"; "We know"; "I think you know better"; "I don't think that's right"; "I want to remind you"; "And we say Shirley needs you." (T. 3231, 3256, 3530, 3280, 3281, 3290). As the statements of Plaintiff's own counsel reveal, long closings tend to produce idiomatic slips by all counsel, and such slips to balance each other out. See Jeep Corp. v. Walker, 528 So.2d 1203, 1205 (Fla. 4th DCA 1988) (declining to substitute judgment of appellate court for trial court in denying new trial for vituperative, ungentlemanly conduct on both sides); accord Hillson v. Deeson, 383 So.2d 732, 733 (Fla. 3d DCA 1980). Although perhaps less-than-exemplary, the nine or ten self-referential phrases of the hospital counsel which Plaintiff has identified only

ex post facto are too insignificant in the course of the hospital's hour-long closing to have poisoned the jury's powers of reason. The trial court's standard instruction that lawyers' comments are not evidence -- which was given three times -- more than sufficed to guide the jury in separating mere idiom from evidence. (T. 571, 576, 3249).

Plaintiff's attempt to liken the present case to the facts of Riley v. Willis, 585 So.2d 1024 (Fla. 5th DCA 1991), is without support. The Riley case involved a plaintiff's counsel who, after telling the jury what *he* would have done if *he* were the defendant, proceeded to tell the jury that the defense lawyers were keeping the defendant from telling the truth on the witness stand. Riley, 585 So.2d at 1028. Such facts are a far cry from the hospital counsel's use of "I believe" or "I think" when reviewing the specific aspects of record with the jury, as happened here.

Furthermore, the jury in this case not only reached a verdict with an adequate record to support its conclusions, but the jury did so in a way that reflects no particular partiality to one side or the other. Here, they awarded Plaintiff multi-million dollar damages. The members of the jury then looked to Dr. Goldenberg's own admissions and the testimony of the expert radiologists to conclude that he alone was the cause of Plaintiff's injuries. The jury also heard Plaintiff acknowledge that she received written notice that her doctors were rendering private care at, but not on behalf of, the

hospital.[1] Plaintiff presented no direct evidence to the contrary. On such a record, the present case, even more than Gregory, supra, illustrates a jury verdict wholly on the merits without a hint of prejudice. The jurors in this case were simply not as feeble-minded as Plaintiff would suggest.

C. The closing comments of other defense counsel cannot be attributed to the hospital and do not amount to fundamental error in any event

1. The hospital stands separate from the other defendants both in the nature of its defense and in the conduct of its case

Apparently recognizing the futility of her argument in hindsight that the hospital counsel's remarks constituted fundamental error, Plaintiff attempts to tar all defendants with a single brush: punishing the hospital with a new trial for the alleged errors by other defense counsel in closing argument. The mere fortuity of being a co-party, however, does not mean that each adopts the arguments or shares the strategies of the other parties. Here, the hospital was represented before the jury by independent counsel. The hospital counsel made opening and closing statements to the jury, separate and apart from the other defendants. Hospital counsel presented a separate

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[1] (T. 2500-03). The appellate record was supplemented with Plaintiff's written acknowledgement of this point, Plaintiff's Exhibit No. 13 at trial, by order of the district court, entered October 8, 1997.

case-in-chief and often conducted independent cross-examination. Even more significantly, the hospital's liability depended ultimately on issues of agency which were of no import and were not addressed by the other defendants. Thus, the hospital was a patently distinct entity to the jury, and Plaintiff should not now be able to lump all defendants together by attributing error by one as error for all.

Plaintiff's argument in this regard is premised on one lone case, Owens Corning Fiberglas Corp. v. Morse, 653 So.2d 409 (Fla. 3d DCA), review denied, 662 So.2d 932 (Fla. 1995). Owens Corning stands for the proposition that multiple, explicit assaults on plaintiff's counsel by one of several defense counsel can so damage the plaintiff's counsel in the eyes of a jury that it is appropriate for a trial court to exercise its discretion and grant a new trial. Id. at 411. The assaults made on the plaintiff's counsel in Owens Corning were numerous, brutal and direct: "He is excellent at confusing issues. He is excellent at hiding the ball. He is a master of trickery." Id. at 410. The accusations continued when the same defense counsel said that the plaintiff's counsel also prodded witnesses to give scripted testimony. Id. On such a record, the court found that "these derogatory comments *specifically* attack[ed] the integrity of opposing counsel" and justified the trial court's grant of a new trial. Id. at 411 (emphasis added).

Thus, Owens Corning, aside from standing uniquely alone in its holding, also applies only to the narrow circumstance of multiple, *specific* attacks on opposing

counsel were sufficiently egregious to have persuaded the trial judge to grant a new trial. The case does not stand for the larger proposition that Plaintiff advances; namely, that error by any one defense counsel necessarily impairs the jury's consideration of the merits of a case against another defendant. And Owens Corning certainly does not apply to the present case where there are no specific attacks on opposing counsel and where the trial judge, after witnessing the entire trial, found no prejudice sufficient to cause him to invoke his broad discretion to grant a new trial.

In such circumstances, it is improper -- and in fact a pernicious form of prejudice -- to penalize one defendant for the allegedly inflammatory conduct of a separate defendant. See Stephens Group v. Gencorp, Inc., 549 So.2d 1051, 1053 (Fla. 4th DCA 1989) (deeming it a substantial injustice to compel a new trial for one defendant when reversible error was committed by another, especially when the verdict against the first defendant was supported by substantial, competent evidence); see generally, Phillip J. Padavano, Florida Appellate Practice § 14.5, at 236 (1988) ("the reversal of an order as to one party does not automatically require reversal as to any co-party"). Great injustice would surely result here if Plaintiff were allowed to veto the jury's verdict exonerating the hospital upon the substantial record supporting the verdict on the hospital. The trial, when considered in its entirety, simply has not resulted in the type

of miscarriage of justice which must be established to support a new trial. See § 59.041, Fla. Stat.

2. The comments of the remaining defense counsel reveal no fundamental error, and Plaintiff has waived any sustained objections by refusing to move for a mistrial or request additional curative instructions

Many of the arguments of other defense counsel which Plaintiff seeks to assert against the hospital were, like all of those made by counsel for the hospital, not objected to. Furthermore, those that were the subject of objection and sustained were later waived for purpose of appeal by Plaintiff's failure to pursue a mistrial. Every District Court of Appeal requires that the objecting party preserve its sustained objections by either moving for a mistrial or requesting an appropriate curative instruction. E.g., Russell v. Guider, 362 So.2d 55, 55 (Fla. 4th DCA 1978). The motion must be nearly as contemporaneous as possible and before submission of the issue to the jury. Ed Ricke & Sons, Inc. v. Green, 468 So.2d 908 (Fla. 1985); Cumbie v. State, 380 So.2d 1031, 1033 (Fla. 1980). The salutary and vital purpose of this requirement is to give the trial court every opportunity to consider the alleged error and to cure it prior to the jury's deliberation. Accordingly, in the present case, Plaintiff waived even her sustained objections by withdrawing her motion for mistrial and refusing to allow the trial court to give additional curative instructions. (R. 3548-49).

Thus, the fundamental error doctrine continues to apply, and Plaintiff continues to fail to meet it.

In this regard, and for the economy of the Court, the hospital adopts the arguments of defendants / respondents, Dr. Alan A. Alarcon and J. Sternberg & S. Schulman, M.D. Corp. with the additional observation that the trial court met its responsibilities by keeping the jury firmly focused on the evidence rather than the argument of counsel. In fact, the trial court reiterated three different times that lawyers' comments are not evidence. (T. 571, 576, 3249). The court also instructed the jury twice to rely on their own collective memory. (T. 3287, 3529). Various counsel reminded the jury of these instructions. (T. 3306, 3490). Thus, the argument was well-supervised and the jury well-instructed.

Equally important is the wisdom from this Court that "excess passions are aroused in a case like this when the stakes are so high." Jeep Corp. v. Walker, 528 So.2d 1203, (Fla. 4th DCA 1988) (affirming trial court's denial of new trial despite slight misconduct by both sides). This same recognition of the need for some latitude in heart-wrenching, high stakes personal injury cases was echoed by a sister district court that is likewise known for its vigilance in policing closing argument: "In a case such as this one, involving horrible human tragedy and almost immeasurable loss, it must be expected that counsel during closing summation to the jury will engage in

sometimes emotional and heated debate." Metropolitan Dade County v. Dillon, 305 So.2d 36, 40 (Fla. 3d DCA 1974) (affirming jury verdict).

Ultimately, as various district courts have recognized, it is the conduct of the parties that is on trial, not that of their lawyers. See Lemoine v. Cooney, 514 So.2d 391 (Fla. 4th DCA 1987) (noting the unfairness of punishing client for lawyer's improprieties and upholding jury verdict); accord Hagan v. Sun Bank of Mid-Florida, N.A., 666 So.2d 580, 584-84 (Fla. 2d DCA 1996) (cautioning against depriving parties of a verdict of their chosen jury). Moreover, even where the comments of counsel are improper, a new trial is not required where such remarks are not so egregious as to interfere with the essential justice of the result. Rohrback v. Dauer, 528 So.2d 1362 (Fla. 3d DCA 1988). In view of this jury's discerning verdict in the present case and all of the evidence in support of that verdict, the arguments of defense counsel were clearly not so egregious as to interfere with the essential justice of the result. The only sound conclusion is that the jury deliberated well and fairly in the service of justice. Accordingly, this Court should rule, as did the Rohrback court, that the trial court did not abuse its discretion in denying Plaintiff's motion for new trial.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING THE NUMBER OF EXPERT RADIOLOGY WITNESSES TO ONE PER PARTY.

As her second issue on appeal, Plaintiff contends that the trial court erred in allowing the radiologist and the radiology group, each of whom was a separate party, to present one expert each per specialty at issue. (I.B. 40). Of concern to the Plaintiff is that each defendant, including the hospital, exercised its prerogative under the trial court's "one expert per specialty per party" rule, to call a radiology expert. Plaintiff also complains that allowing Dr. Margarita Alarcon to testify as a fact witness from the hospital's radiology department violated the trial court's limitation on experts.

The complaint about Dr. Margarita Alarcon should be rejected with dispatch. She testified only as to her conduct on the day after Dr. Goldenberg's ruinous surgery. (T. 3085). Her testimony yielded only four and one-half pages of transcript, and she was not tendered as an expert. (T. 3083-87). She was merely called as one of the treating physicians who handled the relevant radiology films and reports. Although Plaintiff creatively characterizes this witness as being a "quasi-expert," see I.B. 44, treating physicians are not classified as expert or "quasi-expert" witnesses, but as ordinary fact witnesses who are not subject to any "one expert per specialty" rule for each party. See Ryder Truck Rental, Inc. v. Perez, 715 So.2d 289, 291 (Fla. 3d DCA

1998) (reversing trial court's exclusion of treating physician's testimony because witness should not have been impeded by trial court's limitation on experts). Even one of the cases relied upon by Plaintiff has recognized this rule. See Carpenter v. Alonso, 587 So.2d 572, 573 (Fla. 3d DCA 1991). And so insignificant was Dr. Margarita Alarcon's factual testimony to what transpired during the surgery that Plaintiff's counsel declined to cross-examine her. (T. 3087). Plaintiff's argument as to this witness is simply meritless.

Regarding the true experts in the case, Plaintiff does not cite a single case where a trial judge has been reversed for imposing a "one expert per specialty per party" limitation as the trial judge did below. The absence of any authority for Plaintiff's argument is explained by the broad discretion of a trial court to limit the number of expert witnesses and to manage the conduct of the litigation. See Fla.R.Civ.P. 1.200(b)(4). Webb v. Priest, 413 So.2d 43, 45 (Fla. 3d DCA 1982) (recognizing limitations on experts as matter of discretion); accord Pevsner v. Frederick, 656 So.2d 262, 266 (Fla. 4th DCA 1995) (Farmer, J., concurring specially). The specific rule applied in this case, one expert per specialty per party, is treated under the case law as an entirely unremarkable exercise of that discretion. See Ryder, 715 So.2d at 290.

In keeping with its broad authority in this area, the trial court acted appropriately and within its discretion. Before crafting the particular limitation, the trial court

reviewed two motions from Plaintiff and also held a lengthy pre-trial hearing. (R. 195, 221, 263, 1307-86). Only after this deliberate review did the court reach its determination that the preparation of an adequate defense by the separately represented defendants justified separate experts. (R. 805, 1307-86). Plaintiff even explained the court's ruling to the jury:

> Experts, one per specialty. We talked about expert witnesses. Each party was limited in this case to one per specialty.... Everybody has hone per specialty.

(T. 3530: 4-6, 16-17). Thus, the jury suffered no illusion about the arrangement of the experts.

That medical malpractice cases are inherently a battle of experts is well recognized in the case law. Cf. Lake v. Clark, 533 So.2d 797 (Fla. 5th DCA 1988). As was noted in Lake, "[a] medical malpractice case is always necessarily a battle of expert witnesses. Within only very broad limits all qualified opinion testimony should be allowed; that is, not disallowed because it is cumulative to other evidence." Lake, 533 So.2d at 799 (discussing experts who testify on prevailing professional standard of care). Plaintiff not only joined in this battle of experts but was able to neutralize any numerical comparisons by explaining to the jury that each party was limited by court order to one expert per specialty. (T. 3530).

And despite Plaintiff's pained cries on appeal of having only one expert to speak to radiology issues, she presented the jury with radiologic testimony from multiple "experts." Plaintiff not only presented the radiologic opinions of her expert radiologist, but she also elicited testimony against the radiology defendants from her expert surgeon, Dr. Livingstone, as well. (T. 879); (I.B. 17). Furthermore, Dr. Goldenberg's radiology expert, Dr. Pevsner, weighed in heavily on Plaintiff's side, testifying that the radiologic films were inadequate and "disastrous." (T. 2591-92, 2596, 2696). Dr. Goldenberg's counsel joined in the fray on Plaintiff's behalf by mocking the experts of his co-defendants: "And they brought in experts of their own. One had a surgeon. Each one had a radiologist. They load this case up with radiological opinions. They are all Dr. Alarcon's apologists." (T. 3320).

That each defense counsel may have been able to count a certain number of witnesses in his or her client's favor on some points is no different from Plaintiff's counsel having pointed out to the jury the absence of expert defense witnesses to oppose their client's experts on other points: "Our numbers aren't right? Come in with your person. You tell us why our numbers are off.... [W]hy: [sic] did this not happen? Why did you not hear what occurred?" (T. 3273: 6-8, 12-14). In short, Plaintiff complains of nothing more than the normal contest between experts that comprises most medical malpractice litigation. Plaintiff fails to demonstrate any prejudice from

such conventional evidentiary disputes and fails to show an abuse of discretion by the trial court in controlling the number of experts.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING PLAINTIFF'S CONFUSING AND INAPPOSITE JURY INSTRUCTIONS.

As her final issue on appeal, Plaintiff challenges the trial court's denial of two of her requests for non-standard jury instructions. (I.B. 46, 48). One instruction attempted to have the trial court define "reliance" and "detriment" in specific factual terms related to Plaintiff's attempted proof of her case. The other instruction dealt with non-delegable contractual duties -- a proposed exception to the bar against vicarious liability for the acts of independent contractors. (I.B. 46).

Plaintiff's first assignment of error is baseless. The general rule is that where there is no reasonable possibility that the jury could have been mislead by failure to give the instruction, then the trial court's denial of the proposed jury instruction must be affirmed as a proper exercise of discretion. Goldschmidt v. Holman, 571 So.2d 422, 425 (Fla. 1990); Wilson v. Boca Raton Community Hosp., 511 So.2d 313, 314 (Fla. 4th DCA 1987). Here, the court gave the standard jury instructions on agency,

apparent agency, and independent contractors. (T.3566-77). Plaintiff's attempts to have the court define "detriment" and "reliance" specifically in terms of her evidence at trial is nothing more than an improper attempt to place the weight of the court behind one party's interpretation of the evidence. When the entire instructions are considered in the aggregate in light of the evidence, as the law requires, Matalon v. Greifman, 509 So.2d 985, 986 (Fla. 3d DCA 1987), it is patently clear that the jury was not mislead by the trial court's adherence to standard instructions.

Plaintiff's other requested instruction went to non-delegability. The trial court rejected this proposed instruction as confusing and non-standard.[2] The trial court found the revised instruction to be "more appropriate than the original one"; however, the court denied it as untimely since the attorneys no longer had the opportunity to argue to the jury about the application of the proposed instruction to the evidence. (T. 3541-42).

On this record, Plaintiff has no error to assert. The law accords no right to have an instruction that confuses the jury, as Plaintiff's initial instruction on non-delegable duty was found to do. See Reyka v. Halifax Hosp. Dist., 657 So.2d 967, 969 (Fla. 5th

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[2] (T. 3184). No copy of the proposed instruction exists in the transcript. What Plaintiff has quoted instead on appeal is a revised version of the instruction that she submitted as part of her motion for new trial. It was only after the conclusion of the closing argument that Plaintiff sought to re-introduce a revised instruction on this exception. (T. 3421).

DCA 1995) (no entitlement to confusing instruction);see also Webb v. Priest, 413 So.2d 43, 46 (Fla. 3d DCA 1982) (reversible error to give confusing instruction). Plaintiff's failure to make a proper record of the initial instruction is an oversight by Plaintiff which renders the trial court's ruling presumptively correct. McNair v. Pavlakos/McNair Dev. Co., 576 So.2d 933, 933 (Fla. 5th DCA 1991). In denying Plaintiff's revised instruction as untimely, the trial court was merely enforcing the rule that all written requests for instructions be filed "[n]ot later than the close of the evidence." See Fla.R.Civ.P. 1.470(b). Had the untimely instruction been given, counsel would have been deprived of the opportunity to discuss the instruction with the jury.

Plaintiff also has no right to an instruction that is inapplicable to the law and the facts of the case. Llompart v. Lavechia, 374 So.2d 77, 80 (Fla. 3d DCA 1979) (no right to instruction on issue not directly presented to the jury). As an initial matter, Plaintiff's brief cites no record evidence at all for her supposed entitlement to the non-delegability instruction. In support of her claim of entitlement to a non-delegable duty instruction, Plaintiff relies solely on an emergency room physician case, Irving v. Doctors Hospital of Lake Worth, Inc., 415 So.2d 55 (Fla. 4th DCA 1982). The emergency room setting of Irving, however, is a unique factual context. In Irving, the plaintiff went first to a hospital for urgent medical services and was cared for there by

a physician with whom the hospital had contracted to provide emergency service. Irving, 415 So.2d 55. The plaintiff in Irving had neither notice of this independent contractor arrangement, nor opportunity to choose other care. See id. at 58. Furthermore, the emergency room physician worked only in the hospital's emergency room, was paid $35.00 per hour by the hospital, had no patients of his own, kept no records, and sent no bills. Id. at 56. Based on this evidence, the Irving court concluded that, despite the general rule of non-liability for the actions of independent contractors, the jury should have been instructed to consider whether the implied contract between the plaintiff and the hospital created an absolute duty to render medical care which could not be delegated through its contracting with the emergency physician. Id. at 61.

The basis for the Irving court's conclusion was a series of emergency room cases from other states which have recognized the factual peculiarity of emergency care being rendered by contract physicians in hospital emergency rooms. Id. (citing, *inter alia,* Mduba v. Benedictine Hosp, 52 A.D.2d 450, 384 N.Y.S.2d 527 (1976); Jenkins v. Charleston Gen. Hosp. & Training School, 110 S.E. 560 (W.Va. 1922)). By their very facts, Irving and its antecedents are wholly distinct from the context of elective surgery by a private physician that characterizes the case at bar.

The Fourth District Court of Appeal confirmed the narrow, fact-specific nature of Irving in the subsequent case of Reed v. Good Samaritan Hospital Association, Inc.,

453 So.2d 229 (Fla. 4th DCA 1984). In Reed, the patient went to an emergency room because of sickle-cell anemia for which she had been under the care of her private physician. Id. at 230. She was treated by an emergency room physician only after she awaited her private physician who ultimately made the decision to admit her. Id. Although the patient sought to hold the hospital vicariously liable under Irving for her private physician's delay in admitting her to the emergency room, the trial court directed a verdict against her on this point. Id.

The Reed court based its affirmance of the trial court on the fact that the patient chose to have her private doctor determine her treatment and not the hospital or its contract physicians. The court in Reed rejected the application of Irving, as well as the related emergency room physician cases, because each "on its facts, makes it abundantly clear that it was concerned with the negligence of the emergency room physician who was paid a salary by the hospital and possessed no private patients." Id. at 230. Thus, Reed acknowledges that not even all urgent care rendered in a hospital's emergency room raises the Irving non-delegable duty. Rather, the decision to use a private physician eliminates the relevance of the Irving rule, even though care is ultimately provided in a hospital setting. See Reed, 453 So.2d at 230. Accord Albain v. Flower Hosp., 553 N.E.2d 1038, 1047 (Ohio 1990), paragraph four of syllabus overruled by, Clark v. Southview Hosp. & Family Health Ctr., 628 N.E.2d 46 (Ohio

1994) ("Hospitals do *not* have a non-delegable duty to assure the absence of negligence in the medical care provided by private independent physicians granted staff privileges by the hospital.")

In view of this "vital distinction," as the Reed court put it, the facts of the present case are even further removed. See Reed, 453 So.2d at 230. Unlike any of the emergency room physician cases, Plaintiff first sought treatment from a private surgeon, Dr. Goldenberg, in his own office upon the referral of her private family doctor. (T. 2493-94). She agreed to have her surgery performed at the hospital for reasons such as her prior satisfactory experience there, its reputation, and the quality of its food, including Friday night lobster dinners. (T.2407-09, 2492, 2505). Quite significantly, when arranging to use the hospital, she acknowledged in writing that she understood that other private doctors, specifically the radiology group, J. Sternberg & S. Schulman, M.D. Corp., would assist Dr. Goldenberg with her care at the hospital. (T. 2502-03); (App. 1). Because of these facts, Plaintiff was not entitled to an Irving type instruction, and in light of the distinctions drawn in Reed, supra, it would have been error for the trial court to have given one.

The essential point missed by Plaintiff's arguments is that there has been only one duty at issue in this case: the duty to identify Plaintiff's anatomy correctly. Every single argument and expert opinion in this case turns on how Dr. Goldenberg's breach

of this duty could have been detected and by whom. And while these experts may have disagreed about the role of the radiologist, Dr. Alarcon, none disagreed that it was the surgeon's first duty to identify the anatomy properly.

Dr. Goldenberg, the "captain of the ship," began this string of undisputed testimony by admitting that his first obligation was to identify the correct anatomy. (T. 828, 1134). Plaintiff's surgical expert, Dr. Livingstone, in describing the initial stages of the operation said "of course, it's imperative that you know where you are." (T. 884). Another surgeon, Steven Unger, focused on having to do the work necessary to "find out what the anatomy is." (T. 2928). Thus, as a matter of uncontradicted evidence in this case, the first task of Dr. Goldenberg, as Plaintiff's chosen surgeon, was to find the correct portion of her body on which to operate.

Such evidence leads to the inescapable conclusion of law that the only non-delegable duty at issue in this case belonged to Dr. Goldenberg alone. This very point is illustrated by Long v. Hacker, 520 N.W.2d 195 (Neb. 1994). In Long, the Supreme Court of Nebraska reviewed a judgment in favor of a surgeon who had mis-identified the vertebrae of a patient's spine and fused the wrong ones as a result. Id. at 198. Nonetheless, the jury found for the surgeon because the trial court gave an intervening cause instruction which effectively placed the blame on the radiologist who had interpreted X-rays taken during the surgery. Id. 198-99.

On appeal, the Long court held that the instruction was error because all of the testifying medical experts and the surgeon himself agreed that it was a fundamental task of the operating surgeon to localize -- that is, identify -- the proper operative site. Id. at 201. Because of this testimony, the Long court ruled as a matter of law that the duty of care owed by the physician was non-delegable and that "[a]s a result of a nondelegable duty, the responsibility of ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another." Id. (citations omitted). Thus, it was error to treat the radiologist's interpretation of the intra-operative X-rays as an intervening cause when "the head surgeon[], is ultimately responsible for any negligent acts or omissions on behalf of himself or the operating team." Id.

Although Long is by no means binding precedent on this Court, the decisions of Irving, supra, and Reed, supra, suggest that Florida embraces sound reasoning from other jurisdictions in shaping the law of non-delegable duties for medical providers. The facts of Long, supra, track those of the present case in almost exact parallel. As applied here, Long stands for the proposition that when uncontradicted testimony establishes that the operating surgeon's first obligation was to identify the patient's anatomy correctly, then the non-delegable duty attaches to the surgeon and not to any of the supporting characters or institutions upon whom he calls to help him perform this

duty. See Long, supra. Thus, to the extent that non-delegability arises in the case at bar, it applies only to the operating surgeon, Dr. Goldenberg. He bore the ultimate, non-delegable responsibility for identifying Plaintiff's anatomy. Nowhere is there even a scintilla of evidence that the hospital contracted with Plaintiff to assume this duty in his stead, nor could there be such an arrangement.

Since the court took the determination of Dr. Goldenberg's liability away from the jury by directed verdict, it was wholly proper for the trial court to deny an instruction on what had become an irrelevant issue of law. Moreover, even were this Court to conclude that the hospital had contracted with Plaintiff to perform a non-delegable duty so as to make the jury instruction from Irving appropriate, the trial court's denial of such instruction was harmless error. Any such duty could only have arisen in connection with the actions of Dr. Alarcon, since the only other physician was Plaintiff's private, independent surgeon, Dr. Goldenberg. See Albain, 553 N.E.2d at 1047. Given the jury's conclusion that Dr. Alarcon caused none of Plaintiff's injuries, the whole issue of the hospital's vicarious liability for the actions of Dr. Alarcon is now moot.

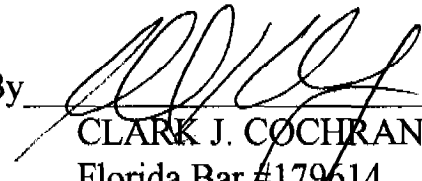
CONCLUSION

Based upon the substantial evidence in support of the jury's verdict, and the foregoing legal authorities and argument, the trial court's denial of Plaintiff's motion for new trial against Humana, Inc. d/b/a Westside Regional Medical Center and the decision of the district court should be **AFFIRMED**.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was mailed this12th day of November 1998 to Herman J. Russomanno, Esq., Robert J. Fiore, Esq. and Robert J. Borrello, Esq. of Russomanno Fiore & Borrello, P.A., Attorneys for Petitioner, 150 West Flagler Street, Museum Tower, Suite 2101, Miami, FL 33130; Ronald Fitzgerald, Esq., Fleming, O'Bryan & Fleming, Attorneys for Respondents, Alan Goldenberg and Alan Goldenberg, P.A., P.O. Drawer 7028, Fort Lauderdale, FL 33338; Esther Galicia, Esq., George, Hartz, Lundeen, Flagg & Fulmer, Attorneys for Respondent, Alan L. Alarcon, 3rd Floor, Justice Building East, 524 South Andrews Avenue, Fort Lauderdale, FL 33301; and Shelley Leinicke, Esq., Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Lane, P.A., Attorneys for Respondents, Sternberg and Schulman, M.D. Corp., One East Broward Boulevard, 5th Floor, P.O. Box 14460, Fort Lauderdale, FL 33302.

BILLING, COCHRAN, HEATH, LYLES
& MAURO, P.A.
Attorneys for Humana, Inc. d/b/a
Westside Regional Medical Center
f/k/a Humana Hospital Bennett
888 S.E. Third Avenue, Suite 301
Fort Lauderdale, FL 33316
(954) 764-7150

By 

CLARK J. COCHRAN, JR.
Florida Bar #179614
HAL. B. ANDERSON
Florida Bar #93051

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