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JUL 2 1998
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE
SUPREME COURT OF FLORIDA

Case No. 93,353

SHIRLEY 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.

ON PETITION TO INVOKE DISCRETIONARY JURISDICTION
TO REVIEW THE DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S BRIEF ON JURISDICTION AND APPENDIX

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STATEMENT OF THE CASE AND FACTS

Shirley Sawczak brought the medical malpractice action below as a result of serious injuries she sustained after her common bile duct was completely severed during what was supposed to be a routine laparoscopic gall bladder removal procedure on April 7, 1992. She brought the action against Dr. Alan Goldenberg, the surgeon performing the operation, and his professional association; Dr. Alan Alarcon, the radiologist who reviewed x-ray films that were taken during the operation, and his employer, Sternberg & Schulman, M.D. Corp. ("the radiology group"); and Humana Hospital Bennett, where the procedure was performed. (R.70)

After a 13 day trial, the trial court directed a verdict of liability against Goldenberg.[1] (Tr. 3162) The jury returned a verdict assessing the plaintiff's damages as $4,000,629 but finding that none of the other defendants were liable for negligence in causing Sawczak's injuries. (R.1059) The trial court entered judgment for all defendants except Goldenberg (R.1518); and upon the trial court's denial of the post-trial motion (R.1516), an appeal to the Fourth District followed.

Based on the evidence presented at trial, Goldenberg's negligence in misidentifying Sawczak's ductal system anatomy and severing her common bile duct, the main duct which carries bile from the liver to the intestines, rather than her cystic duct, was clearly established. Moreover, it was largely undisputed that, as a result of the botched surgery, Sawczak has suffered permanent and severe liver damage, which, according to expert testimony, will require a liver transplant in the future. (Tr. 935) The central factual dispute presented to the jury was

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[1] Although claiming to be "devastated" by the injury he caused to Sawczak (Tr. 1158), Goldenberg filed a petition for bankruptcy on the last day of trial immediately before the jury was to commence deliberations. (Tr. 3551; R. 1098) Sawczak obtained emergency relief from the bankruptcy stay. (R. 1406-17) Since then, the bankruptcy court has upheld Goldenberg's exemption of $3,751,678 of his $3,791,119 in assets (the remaining assets are non-saleable). Order Overruling Creditor's Objections to Claimed Exemptions, In re Alan L. Goldenberg, M.D, P.A., No. 96-22043-BKC-RBR (S.D. Fla. Dec. 19, 1996). Sawczak has appealed this ruling.

whether the radiologist, Alarcon, who interpreted the intraoperative x-rays of Sawczak's ductal system before Goldenberg severed the wrong duct, shared responsibility for Sawczak's injuries. As Sawczak contended, Alarcon should have discovered that Goldenberg was in the wrong place or had misidentified the anatomy and, therefore, should have alerted him that the ductal anatomy was not properly visualized or clarified or recommended more films to clarify the anatomy. Alarcon's liability was vigorously contested.

It is on this issue that Sawczak did not receive a fair trial. She was deprived of a fair trial because of numerous improper statements during closing argument by counsel for the radiologist, radiology group and the hospital. Because of space limitations, only the most glaring examples of such improper comments can be included.

1. Counsel for Defendant Alan Alarcon, M.D. (Crane Johnstone)

a. Accusing Plaintiff's Counsel of a Fraud on the Court

During closing argument, the radiologist's attorney, Mr. Johnstone, raised the blatantly improper and unfounded accusation that plaintiff's counsel was in collusion with Goldenberg and had "choreographed" his direct examination:

> MR. JOHNSTONE: **That's what's been going for the last two and a half weeks. And it's been clear to you, and it's been clear to everybody that there has been a unified, joint effort from this side of the room (Indicating), and this side of the room to choreograph, and to have witnesses testify ahead of time knowing what the questions are going to be --**[2]
>
> MR. FIORE: Excuse me. I object to this.
>
> THE COURT: Sustained as to the comments related to the attorneys. Please proceed.
>
> MR. JOHNSTONE: **I think everybody in this courtroom has seen what's been going on in the last couple of weeks.**

[2] All emphasis is added except as otherwise stated.

MR. FIORE: Judge, he did it again.

THE COURT: Sustained, Counsel.

MR. RUSSOMANNO: He should be admonished.

THE COURT: I ask the jury to disregard the last comment by counsel. Let's please proceed to comment on the evidence or the lack of evidence in the case.

(Tr. 3451-52)

b. Challenging Plaintiff to Present Additional Radiologists

Despite the pretrial order limiting each attorney to one expert per specialty (R.263), Alarcon's counsel made the highly improper argument that plaintiff's counsel could have brought in all the radiology experts they wanted. See Tr. 3439-40: "that's the only radiologist that they ever called in their case in chief. They had two solid weeks to call whomever they chose. They called one witness by deposition to say that Dr. Alarcon fell below the standard of care."

c. A Verdict Against the Radiologist Would Be A First

Mr. Johnstone improperly told the jury that there had never been a case in which the radiologist was found negligent in assisting a surgeon. This commentary was highly prejudicial, inflammatory, and a violation of Florida Bar Rule 4-3.4(e) because Mr. Johnstone was "testifying" about matters outside of the evidence presented in the case:

> MR. JOHNSTONE: Mr. Fiore asked a couple of witnesses whether they had ever served as experts before in cases where the radiologist was being accused of doing something wrong in a lap chole case. They all said no. **Nobody has seen such a case.** That was a great question. Not one of those experts has ever testified in a case where the general surgeon claims the radiologist misled him. **Why? Because that's preposterous. There are no cases.** No one can tell you about any other similar case. There are no instances that any of these people can tell you about where a general surgeon was misled by a radiologist when he's identifying the anatomy and removing a gallbladder. (Tr. 3459-60)

d. Appeals to the Community Conscience; "God Help Any Physician"

The effort by Alarcon's counsel to appeal to the conscience of the community was a flagrantly improper argument:

> MR. JOHNSTONE: Half justice is injustice if you let Dr. Goldenberg come into this courtroom at this stage and say really for the first time, long after the suit was filed, that this radiologist in some way misled him, or sandbagged him, you will have said to Dr. Alarcon and to the other defendants that it's okay to change your story. **It's okay to shift and maneuver and manipulate the facts to protect yourself financially. And that in the Broward County area, here in Florida, it's okay if you come in and make things up to protect yourself. That's what you're telling everybody who looks at this case.** (Tr. 3453)

Mr. Johnstone also improperly tried to appeal to the sympathy of this "Broward County" jury and remind them of how his client supposedly helps the downtrodden of Broward County:

> He gets sued, shows up for deposition. He sits down, and Mr. Fiore presented him with a single document. This is what he's presented with in his deposition (Indicating). You've been sued. The surgeon in the case, Goldenberg, is claiming you did something wrong. You're said to have misled him. Have a seat. **You're in a lawsuit, and you're going to be in a lawsuit for the next two and a half years.** Okay. That's what he is presented with. Here's what he's given at his deposition. Remember that the group that he worked for he long since left. **He's over at Glades General. He's making an hour and a half drive, working migrants [sic] and underprivileged in Belle Glade, Florida,[3] where he's the radiologist at the hospital, running the show over there for those folks as we speak.**
>
> And at the time he was sued—and keep in mind radiology group Sternberg and Schulman had dissolved. And the radiologists migrated on to other practices and other communities, other cities. **So, okay, you're sued. Have a seat. You're going to be around awhile.**

(Tr. 3465-66) This comment is also improper because Mr. Johnstone was attempting to evoke sympathy for his client because he had been in the lawsuit for "two and a half years" and implied

[3] Compare Norman v. Gloria Farms, Inc., 668 So.2d 1016, 1021 (Fla. 4th DCA) ("Defense counsel's remarks during his closing impermissibly went far beyond traditionally impermissible golden rule arguments with a totally improper appeal to the jurors' self-interest as hunters, fellow Okeechobee residents and 'the conscience of the community.'"), rev. denied, 680 So.2d 422 (Fla. 1996).

that somehow it was due the inappropriate behavior on the part of plaintiff's counsel who brought him into the suit.

Alarcon's counsel also improperly implied that a verdict against his client would be a first and would affect the practice of medicine in Florida:

> MR. JOHNSTONE: They have just said you should have told the surgeon something he already knew about. **Well, that's preposterous. If that's what makes a med mal case in this state, then God help any physician who is sued.** (Tr. 3465)

e. Personal Comments on Credibility of Witnesses or Merits of the Case

Mr. Johnstone's closing argument was riddled with his personal opinions, over objection, regarding the credibility of witnesses and the merits of the case:

> MR. JOHNSTONE: Dr. Goldenberg had already been in the suit for over a year and he had already been deposed twice. He had been asked his position on this case in written questions and in depositions. And, yes, it's when I got involved in the case, **I said, well, wait a minute. I want to question this man too. Because a lot of what he's saying doesn't make sense to me or to anyone else that's looked at this case.** (Tr. 3442)
>
> * * * *
>
> [Mr. Fiore's] trying to suggest to you, and has for days, that because these four films that Alan Goldenberg wanted and ordered shot do not show the intraductal system up by the liver, it's the biliary tree above this level—because the surgeon did not have those films he was somehow misled or sandbagged. **Well, that's preposterous.**[4] ... Folks, if there had been an injury that was found on the 10th by Dr. Goldenberg that showed an injury in the right or left hepatic ducts, or up near the liver, or in the high area of the common hepatic duct that is not seen on some of the films, **then they would have a legitimate beef. There would be a problem in that regard, and they might have a lawsuit.** But that's not what happened in this case. (Tr. 3446)
>
> * * * *
>
> Why did we spend twenty-five or thirty minutes with Dr. Rush the other afternoon at 5:30, 6:00 o'clock at night talking about clips? **Why would Mr. Fiore try and suggest that Dr. Rush did not see any clips on these films when he was talking about ERCP films? Why would he do that? I will tell you why.**

[4] This is another one of the three occasions where Mr. Johnstone used the term "preposterous." (Tr. 3446, 3460, 3465)

MR. FIORE: Your Honor, I object to this. You have dealt with this before on Friday.

THE COURT: Counsel, let's refrain from personal attacks on the attorneys. Let's comment upon the evidence. Please proceed.

MR. JOHNSTONE Yes, sir. Let me suggest to you that we spent a great deal of time with many of the expert witnesses talking about issues that have never been issues in this case. When the attorneys on the other side of the courtroom got frustrated—please don't take this out on us. **It's frustrating and it's annoying. And it makes one angry to sit and listen for days and days about non-issues,** about issues that the expert witnesses themselves have never considered issues in the case.... (Tr. 3447-48)

* * * *

MR. JOHNSTONE: The only reason that we have been in this courtroom for the last two and a half weeks, as Mr. O'Hara pointed out, is because long after he got sued and finally recognized the true gravity of what he had done, and what his financial responsibility was, Dr. Goldenberg decided that he could come into this courtroom. **He could have the gall and the guts to sit in that stand and tell you that the radiologist did something wrong, and that he should not be responsible for paying these damages to this woman himself.** That's what's been going for the last two and a half weeks. (Tr. 3451)

* * * *

Why did we spend hours and hours and hours on that? The reason is because the merits of the case are so weak, opposing counsel feels it's necessary to spend time on non-issues, and suggesting that somebody is trying to walk away from their responsibility. He never has. He's in this courtroom. And he accepts what you're going to do. And he believes, and I think justly, he believes that **you people are not going to be snowed. You're not going to be misled. You're not going to be led by the nose like children down a path that leads from Dr. Goldenberg to Dr. Alarcon.** He knows you're not going to do that. This man believes in the jury system, believes that **you people are bright enough and smart enough** to leave the smoke and mirrors and all of these non-issues aside and concentrate on what the evidence in the case has been. (Tr. 3468-69)

f. The Expert as a "Hired Gun"

Alarcon's counsel improperly referred to plaintiff's vocational rehabilitation expert, Larry Forman, as a "hired gun" (Tr. 3471, 3473-74) and ridiculed Mr. Forman's physical appearance. See Tr. 3473-74: "He's clueless. He has no idea.... [D]o you remember him? The feisty little guy with the beard?"

2. Counsel for Defendant Sternberg & Schulman (Dennis O'Hara)

a. Alleged Joint Efforts by Plaintiff's Counsel and Goldenberg's Counsel

Like Mr. Johnston, Mr. O'Hara made improper references to "collusion." He stated that on a certain issue, plaintiff's counsel and Goldenberg's counsel, Mr. Fitzgerald, are "like that" and made a gesture crossing two fingers tightly and turning toward plaintiff's counsel in disgust:

> MR. O'HARA: Now, Mr. Fiore has indicated to you, Mr. Fitzgerald has indicated to you—and **you notice there's a lot going on here between the two of them.** Because what's going on in this courtroom, folks, is there is an attempt to shift the blame from that table (Indicating) there that way. So that man can avoid financial responsibility in this case. That's what's going on in this courtroom. (Tr. 3397)
>
> * * * *
>
> You have heard here for two weeks a suggestion by plaintiff's counsel and now by Mr. Fitzgerald—see **they're like this on this issue (Indicating)**. (Tr. 3406)

b. Plaintiff's Attorneys Always Ask for More than They Expect; 20% Would Make Them Happy

Mr. O'Hara's comments about what plaintiffs' attorneys do in other cases was an improper argument in derogation of the Bar Rule:

> MR. O'HARA: **You know, plaintiff's attorneys will come into a courtroom and they will put a high figure on the board and hope that you come in somewhere, you know, high.**
>
> MR. FIORE: Your Honor, I object to this. This is improper.
>
> MR. O'HARA: What's improper?
>
> MR. FIORE: I object, Your Honor.
>
> THE COURT: Overruled. Please proceed.
>
> MR. O'HARA: And the manner in which they did it in this case—3.7 million dollars they put on the board in this case—and when I address these issues of damages, I want you to understand I am in no way belittling Mrs. Sawzcak's situation or her damages. But the purpose of this lawsuit, and the purpose of assessing damages, is to give the plaintiff something what the law calls fair and reasonable, just compensation, not something unreasonable. **It's not meant to make somebody a millionaire.** That's not the purpose of what we're doing here. (Tr. 3427-28)

* * * *

MR. O'HARA: **If you were to give them twenty percent of what they're asking for, they will be delighted.** (Tr. 3429)

c. Personal Comments as to the Credibility of Plaintiff's Theories

Mr. O'Hara's multiple references to the plaintiff's theories of the case as "bogus" and "B.S." were improper comments in violation of Florida Bar Rule 4-3.4(e). He should not have asserted his personal belief as to the justness of the theories presented. Mr. O'Hara should not have continually told the jury he was "not making this up" as that line of commentary implied, not at all subtly, that plaintiff's counsel, by contrast, were making things up:

MR. O'HARA: **Now, I'm not making any of this up.** I'm not arguing. That's the testimony in this case. (Tr. 3399)

* * * *

So that's the objective evidence of why we know he was in the right place. **We're not making this up.** (Tr. 3404) .... **I'm not making this up.** This is a road map I'm giving you. (Tr. 3405)

* * * *

You can't change this. **And Mr. Fiore can stand up here and make up fifteen different scenarios** about where he tried to put this balloon catheter. But this tells you where he put it. (Tr. 3405)

* * * *

This is a road map. **This isn't B.S. This isn't an attorney's argument**. This is evidence in this courtroom which I ask you to follow, follow the road map. (Tr. 3420)

* * * *

I don't even know why it was brought up. I guess to try to make Dr. Alarcon look like a bad guy. Folks, he's not a bad guy. He's a good radiologist and he read these reports correctly. (Tr. 343-31)

3. Counsel for Defendant Humana (Mark Miller): Injecting Personal Opinion

Mr. Miller improperly stated over and over again that he did not think in his personal opinion this person or that entity was negligent or otherwise to blame:

MR MILLER: .... And notwithstanding that there was comment that the entire operative report is a piece of fiction—you may remember that comment. The entire operative report was a piece of fiction. **I don't think that statement had any place in this courtroom.** (Tr. 3488)

* * * *

But the fact of the matter is there is no evidence of that on the objective films, no evidence, none. **It's strictly a litigation device to try and spread liability from where it belongs** with Dr. Goldenberg down that table (Indicating), I suppose starting with me and working on down. **And I don't believe that that's appropriate evidence.** (Tr. 3490)

* * * *

Now, I'm going to switch gears for just a second here, because I feel that I do have an obligation to talk about damages **even though I feel very strongly there should be no liability against the hospital** . . . . (Tr. 3496)

* * * *

Now that I've said that, I want you to forget I even said that with regard to the hospital. Because, actually, that should only apply, **the way I see this case**, to Dr. Goldenberg. **I don't believe there is any liability against the hospital.** (Tr. 3499)

* * * *

You heard from the community-based radiologists, Dr. Alarcon, Dr. Raskin, who I asked to come into court and try to explain some of the issues in this case to you **because I didn't feel like the radiologist did anything wrong either**, and there was their radiology department in the hospital. I didn't bring in a surgeon because **I did feel that Dr. Goldenberg**, the private practitioner in this case, **did do something wrong**. (Tr. 3501-02)

* * * *

Let's just talk about **why I think**, basically, that Dr. Goldenberg and Dr. Alarcon are independent contractors. (Tr. 3506)

* * * *

And I want to thank you very much on behalf of Humana Hospital Bennett. **I think it's a good hospital. I think it did nothing wrong in this case**, nor is there any agency relationship involved. (Tr. 3520)

SUMMARY OF ARGUMENT

The Fourth District's opinion expressly and directly conflicts with decisions of other district courts and of the Supreme Court on the same point of law. This Court has jurisdiction to review the decision.

ARGUMENT AND CITATION OF AUTHORITIES

As detailed above, defense counsel made numerous improper comments in closing argument. The Fourth District ruled that although many of these comments "were improper and often egregious," the plaintiff's failure to object "specifically and contemporaneously to them waived any error that occurred." Slip op. at 1. Thus, the Fourth District eliminated the fundamental

error exception to the requirement of an objection to improper argument. According to the Fourth District, no matter how egregious and pervasive the improper comment, no error will be held absent objection to the comment. To support its ruling, the Fourth District cited Murphy v. Int'l Robotics Systems, Inc., 23 F.L.W. D447 (Fla. 4th Feb. 11, 1998), pet. for rev. pending, Case No. 92,837 (Fla.), where it ruled that "we do not think improper, but unobjected-to, closing argument in a civil case is something which is so fundamental that there should be an exception to the rule requiring objection." Id. at D447.

The Fourth District's position is expressly and directly in conflict with that of the First, Third, and Fifth Districts, and the Supreme Court of Florida, all of which have applied the fundamental error to closing arguments in civil cases where the improper comment is either egregious or pervasive. See Seaboard Air Line R.R. Co. v. Strickland, 88 So.2d 519, 523 (Fla. 1956) ("if prejudicial conduct ... in its collective impact of numerous incidents ... is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury, this court will not afford redress."); Tylus v. Apalachicola Northern R.R. Co., 130 So.2d 580, 587 (Fla. 1961) (reiterating and reaffirming fundamental error exception set forth in Strickland); see cases collected in Murphy, 23 F.L.W. at D449 n.1. The Court has jurisdiction to review the decision below. Fla.R.App.P. 9.030(a)(2)(A)(iv).

CONCLUSION

The Fourth District has set itself apart from other districts on this issue. It has refused to apply the well established and correct standard of review of whether the prejudicial comments in their collective import were so extensive that their influence pervaded the trial, thereby gravely impairing a calm and dispassionate consideration of the evidence and merits by the jury. The Supreme Court should review the decision to harmonize the conflict created by the Fourth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of July, 1998, to:

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By: _____
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1998

SHIRLEY SAWCZAK,

Appellant,

v.

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,

Appellees.

CASE NO. 96-2253

Opinion filed April 15, 1998

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John A. Frusciante, Judge; L.T. Case No. 93-12617 CA11.

Herman Russomanno, Robert J. Fiore, and Robert J. Borrello of Russomanno Fiore & Borrello, P.A., Miami, for appellant.

Shelley H. Leinicke of Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Ford, P.A., Fort Lauderdale, for appellees J. Sternberg and S. Schulman, M.D., Corp.

George, Hartz, Lundeen, Flagg & Fulmer, Fort Lauderdale, and Mark Hicks of Hicks & Anderson, P.A., Miami, for appellee Alan Alarcon, M.D.

Clark J. Cochran, Jr., and Hal B. Anderson of Billing, Cochran, Heath, Lyles & Mauro, P.A., Fort Lauderdale, for appellee Humana Inc. d/b/a Westside Regional Medical Center f/k/a Humana Hospital Bennett.

POLEN, J.

Appellant, Shirley Sawczak, appeals from a jury verdict and judgment rendered in favor of appellees, Alan Alarcon, M.D. ("radiologist"), J. Sternberg & S. Schulman, M.D. Corp. ("radiology group"), and Humana, Inc. ("hospital"), in this hotly contested medical malpractice action arising from injuries Sawczak sustained after her common bile duct was completely severed during routine gall bladder surgery in 1992. Although she was awarded $4 million against a fourth defendant, Alan L. Goldenberg, M.D., her surgeon, she alleges error warranting a new trial occurred in the three other defendants' closing arguments, their cumulative expert testimony, and the court's failure to give her requested special jury instruction on agency. We affirm on all points raised.

Sawczak first claims that the court should have granted her a new trial based on defense counsel's improper remarks during closing arguments. These remarks fell within a host of categories, including appeals to the community conscience of the jury, expression of counsel's personal beliefs, and reference to facts not in evidence. Although her attorney failed to object specifically to almost all of these statements, she argues that the cumulative effect of such comments constituted fundamental error. While we agree with Sawczak that many of defense counsel's arguments were improper and often egregious, her attorney's failure to object specifically and contemporaneously to them waived any error that occurred. See Murphy v. Int'l Robotics Systems, Inc., No. 97-0388 (Fla. 4th DCA Feb. 11, 1998); Nelson v. Reliance Ins. Co., 368 So. 2d 361 (Fla. 4th DCA 1978).

The only comments to which her attorney objected specifically and contemporaneously occurred during the following exchange:

> RADIOLOGIST'S COUNSEL: It's important that you understand that [Sawczak's expert] has been hired by these folks for years. His job is to come in and put big numbers up ... He's clueless. He has no idea. He comes in - do you remember him? The feisty little guy with the beard? Do you remember him? Would you think he was a credible and likable witness? Did you think that he made an effective credible and believable guy?

SAWCZAK'S COUNSEL: I object, the golden rule for about the last ten minutes.

RADIOLOGIST'S COUNSEL: Ask yourself- ask yourself-

COURT: Counsel, could you please refrain from such comments. Please proceed.

RADIOLOGIST'S COUNSEL: Ask yourselves when you go back: Do you think that this guy is a credible, believable witness? Or is he a hired gun who was asked to put the biggest numbers he can conceivably think of up on the board?

SAWCZAK'S COUNSEL: Judge, I object.

The trial court sustained her objection, and sua sponte instructed the jury to disregard the comment. Sawczak then moved for a mistrial, coupled with a request that the court reserve ruling on the motion until after the jury rendered its verdict. The court denied the request and told Sawczak, in essence, to "fish or cut bait." Sawczak then withdrew her motion. After the jury exonerated all three defendants of liability, she moved for a new trial, which was denied.

While we find the above comments are not golden rule-type arguments, Sawczak still argues that they constituted an improper attack on the credibility of her expert and otherwise violated Rule 4-3.4(e) of the Rules Regulating the Florida Bar.[1] See Airport Rent-a-Car, Inc. v. Lewis, 701 So. 2d 893 (Fla. 4th DCA 1997). Sawczak's attorney failed, however, to assert these grounds as a basis for his objections at trial. Again, without reaching the merits of her argument, we find her attorney did not preserve this issue for appeal. See Tillman v. State, 471 So. 2d 32 (Fla. 1985)(holding that, to be preserved for appeal, an issue must be presented to the lower court and the specific legal argument to be argued on appeal must be part of that presentation).

As to Sawczak's remaining points on appeal, we affirm. See Webb v. Priest, 413 So. 2d 43 (Fla. 3d DCA 1982); Florida Power & Light Co. v. McCollum, 140 So. 2d 569 (Fla. 1962).

AFFIRMED.

GLICKSTEIN and DELL, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

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[1] That rule provides:

A lawyer shall not:

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

SHIRLEY SAWCZAK

Appellant(s),

vs.

ALAN L. GOLDENBERG, M.D., etc., et al.
Appellee(s).

CASE NO. 96-02253

L.T. CASE NO. 93-12617 CA11
BROWARD

May 26, 1998

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed April 30, 1998, for rehearing and motion for determination of cause en banc is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK

cc: Herman J. Russomanno
Robert J. Fiore
Ronald A. Fitzgerald
Crane A. Johnstone
Alyssa Campbell
Dennis M. O'Hara
Mark Miller
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