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SUPREME COURT OF FLORIDA
CASE NO. 93,353 (DCA NO. 96-2253)

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.

MERITS BRIEF OF RESPONDENT, J. STERNBERG and S. SCHULMAN, M.D., CORP.

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (Continued)

PAGE

TABLE OF CONTENTS (Continued)

PAGE

TABLE OF CONTENTS (Continued)

PAGE

TABLE OF CONTENTS (Continued)

PAGE

TABLE OF CITATIONS

PAGE

TABLE OF CITATIONS (Continued)

PAGE

TABLE OF CITATIONS (Continued)

PAGE

TABLE OF CITATIONS (Continued)

PAGE

TABLE OF CITATIONS (Continued)

PAGE

TABLE OF CITATIONS (Continued)

PAGE

TABLE OF CITATIONS (Continued)

PAGE

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STATEMENT OF CASE AND FACTS*

This is an appeal from a jury verdict and final judgment in a claim of medical negligence arising from Sawczak's gallbladder surgery. (R. 1518)[1] Sawczak was awarded more than four million dollars ($4,000,629.00) in her claim against Dr. Goldenberg, yet she seeks a new trial against the remaining defendants who were found not negligent by the jury.

Sawczak's lawsuit joined a number of parties: Dr. Goldenberg (her surgeon), Dr. Alarcon (the radiologist who read intraoperative cholangiograms), J. Sternberg and S. Schulman, M.D., Corp. [Sternberg & Schulman] (the radiology group that employed Dr. Alarcon) and Humana Bennett Hospital (where the surgery was performed). (R. 70-93)

The evidence showed that Sawczak suffered from gallbladder disease and required surgical removal of her gallbladder. For many years, this operation was performed by opening the abdominal cavity (a

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*The symbol "R" refers to the Index to the Record on Appeal. The symbol "T" refers to the transcript of trial testimony.

[1]In the interest of economy, this Respondent adopts the recitations and arguments of the co-Respondents, Dr. Alarcon and Humana-Bennett.

laparotomy) so that the surgeon could directly view the gallbladder and its adjacent structures. This major surgical procedure caused significant trauma to the patient and required an extended recovery period.

By the time of Sawczak's surgery, a relatively new procedure had been developed that was far less traumatic to the patient. Laparoscopic surgery involves the insertion of a tiny camera through a small puncture wound. (T. 892-895) The surgical site is then viewed through a remote TV camera screen. Dr. Goldenberg determined that it would be appropriate to use a laparoscopic surgical procedure in removing Sawczak's gallbladder.

When a laparoscopic technique is used, the surgeon visualizes the area through a TV screen which is located near the patient's head. (T.840-851) Before the surgeon can place clamps around the surgical site and begin any cutting, he must first identify and locate all relevant anatomical structures. After the gallbladder is identified, the surgeon is supposed to follow a particular tube or duct to the point where it meets the common bile duct. The tube is then followed down to its junction with the intestines, then traced to its entrance into the liver. After visualizing the structures, which was done by Dr. Goldenberg, the cystic

duct is clipped close to the common bile duct. After the gallbladder is clipped off, an incision is made and the gallbladder is removed.

During the course of the surgical procedure, the surgeon may request intraoperative cholangiograms, or films of the gallbladder which are enhanced by the insertion of dye into a catheter. Based upon the dye pattern, the surgeon may confirm the location of various structures. Sawczak's expert, Dr. Livingstone, testified that it is within the standard of care to perform this particular gallbladder surgery without the use of a cholangiogram. (T.911) There was testimony that a cholangiogram is not necessary because the surgeon may fully visualize all relevant anatomical structures through the TV screen. (T. 753, 1155, 1159, 2167)

In this case, Dr. Goldenberg decided to obtain a cholangiogram. Dr. Goldenberg ordered the cholangiogram only to rule out gallstones, or residual calculi and not for purposes of establishing "landmarks." (T. 832, 837, 1827, 2649-2650, 3040) Dr. Goldenberg wanted the dye contrast study to verify that no gallstones were blocking the common bile duct and preventing the contrast material from flowing into the small intestines. He first placed a clip on the gallbladder side and made a small incision into a cystic duct into which the dye was injected. The

injection of the dye opacified various tissues and made them more readily visible on the x-rays. Films admitted at trial established that the dye traveled upward toward the liver bed and also toward the common hepatic duct. No clips are seen on either the common bile duct or the common hepatic duct. (T. 1193, 1249, 2353-2354, 2724, 2783-2784) This fact, coupled with the free flow of dye, established that the area was appropriately clamped prior to surgery. The defense argued throughout the case that there was no evidence of any clips which were improperly placed on either the common hepatic duct or the common bile duct at the time the films were taken and interpreted. Dr. Goldenberg's testimony repeatedly admitted that the radiologists could not have told him that the common bile duct was clipped because Dr. Goldenberg did not take this action until after the cholangiograms were completed. (T. 1193, 1249)

Several days after this surgery, Sawczak began to develop problems. (T. 793) Dr. Goldenberg performed exploratory surgery through an abdominal incision. (T. 800) At the time of this second surgery, no clips were discovered on the common hepatic duct. A clip was discovered, however, on the very bottom (distal) portion of the common bile duct. Dr. Goldenberg testified that he placed this clip at

that site after the cholangiogram films were taken during the first surgery.

In the sum and substance, there was substantial competent evidence introduced at trial that established, to the jury's satisfaction, that Dr. Goldenberg properly clipped the cystic duct of the gallbladder then obtained the cholangiograms. (T. 1190-1191, 2918) After the cholangiograms were given to the radiologist and interpreted, Dr. Goldenberg misidentified one anatomical structure, clipped the common bile duct, then removed the entire area. (T. 1003-1004, 1138, 1155, 1171, 1180, 1181-1182, 2600-2602, 2852-2853) Therefore, the evidence established that there was no negligence or breach of standard of care by either the radiologist, or vicariously by the group which employed him. (T. 1161, 1184, 2174)

As closing arguments began in this lengthy trial, Sawczak's counsel set an unfortunate tone. His closing included the following remarks:

> You hold a tremendous power in your hands. You hold the power to right wrong. (T. 3219)

* * *

Despite all the work and the efforts and the experts and everything else, we still have not the power to be able to deliver for Shirley full and complete justice. You do. (T. 3220) This operative report is pure fiction. What's on here is not what happened in this case. It's not what happened. (T. 3221-3222) If you break this down to the core, what is this case really about? What are the differences between us and them. (T. 3223)

You think of an airplane and how an airplane can fly into a mountain. And you think of the five minutes that when that control tower is guiding the plane in, that five minutes where the pilot in the cockpit is relying on what the radar and what the controller is saying. Does anybody in this courtroom dispute that that five minutes means the difference between life and death? The five minutes - so you think about that. And think about what that five minutes meant to Shirley ... Think of the pilot and the control tower. That's what this is akin to . (T. 3230-3231)

* * *

When you take these hospital records - and people look at it, ladies and gentlemen. It's sort of like a bible of pain. You're going to have these volumes because they speak out, the cry out, concerning the pain that Shirley has suffered. (T. 3264)

You, yourself, decide if a wrong has been committed to Shirley. And, oh, it has. (T. 3265)

And there are certain elements of damage that Shirley is entitled. Some are what I refer to as "no brainers." (T. 3265)

And there is no evidence, ladies and gentlemen, that these medical bills that there is - you've heard and I will

> discuss it in a moment about this Medicare - that any of these bills have been touched by any of that.
>
> And we have to gauge later on what the pain is, you take these - what I refer to as these 1,483 days. You take the hours in a day, it's over 35,000 and 400 hours of pain. And it doesn't leave her. (T. 3266-3267)
>
> [The defense promised] Dr. McKay is going to talk to you about what he believes is to be the reasonable anticipated requirement for future medical care in this case. That's what was promised to you in opening statement by the defense. Dr. McKay never came. (T. 3272)
>
> The very bills talk about what it costs. You don't chase rabbits. (T. 3275)
>
> And we say that Shirley needs you. And you, as the judges of the fact, you listen to the damage testimony. And you be prepared and do justice to Shirley. (T. 3290)

During the course of the closing argument on behalf of Sawczak, her attorney became so loud that one of the lawyers had to object to him "screaming at the jury." (T. 3255) When the various defense counsel had an opportunity to give closing argument, their remarks occasionally followed in kind. However, Sawczak's counsel made a judgment call and voiced only one objection to the remarks by counsel for the radiology association, Sternberg & Schulman, P.A.

During rebuttal, the improper argument by Sawczak's counsel continued:

> Let's really see if the life care plan, when they attacked our numbers, and they had Dr. McKay, and where are the foxes and hounds? Where is this man? Meaning they had a life care plan that you have not seen. Why? Could it be that those numbers are something they didn't want you all to see? (T. 3521)
>
> Sure, you're going to put all this money that you're going to need for life care needs in a volatile risk. The lawyers may want to say it, but could they ever find anybody on earth that's an economist that would come in to give such a statement? No way. (T. 3522-3523)
>
> And again if, in fact, that analogy is to be you need to be a hound, you need to be a fox. Well, try to bury - try to uncover what they have. Is there - are there facts or numbers buried? Now, a little bit farther. (T. 3523)
>
> They all should pay because they should share the blame and responsibility. Don't make this woman a ward of the state, where she has to worry about how she's going to be paid ... They are the ones that can't pass the buck. There should be no windfall for the defendants. Where is the financial responsibility? (T. 3524-3525)
>
> They didn't want to touch Dr. Livingstone. They made believe they wanted to beat up Larry Forman a little bit. And when he testifies for them, oh, he's okay. But when he comes in on our end, they make some kind of connotation how they're referring to him. (T. 3525)
>
> And so I say, you understand, as ladies and gentlemen of this jury, you understand the uniqueness of Shirley Sawczak. You understand her dignity and her

> specialness. And when you come out in a jury and you hold your head high based upon the damages, you award her a fair amount. We believe you will do justice. You will right the wrong. (T. 3526)
>
> We talked about expert witnesses. Each party was limited in this case to one per specialty. So you talk about working together in a group, Mr. O'Hara. (T. 3530)
>
> There is a lot of smoke and mirrors. (T. 3533)

During the course of trial, it was clear that there was significant cooperation between Sawczak and Dr. Goldenberg. The reason for this cooperation (which the jury did not know) was the fact that Dr. Goldenberg had declared bankruptcy and therefore any liability assigned to him would be money lost to Sawczak. (R. 1406-1417) A timely request was made to disclose any "Mary Carter" type agreements, but no such information was forthcoming. After the trial defendants learned that Goldenberg had filed a pleading in the bankruptcy court in which he acknowledged "Plaintiff asked Goldenberg to stay in the trial for the sole benefit of Sawczak ... to recover from their parties, ... [the parties agreed] that they would not pursue ... Goldenberg ... against any recovery or in any settlement. ... [and] this matter was tried differently [by Goldenberg] due to the agreement with plaintiff's counsel and

[Goldenberg's] counsel in the state court proceeding. If the plaintiff was going to proceed vigorously against [Goldenberg], [Goldenberg] would have tried the case on his ability relating to his own defenses and would have instituted different strategy." (R. 1422-1424) This document plainly established the cooperative link between Sawczak and Goldenberg, the underlying reason for it, and the lack of candor in responding to a direct inquiry about this relationship at the start of trial.

Evidence introduced at trial made it plain, despite this lack of candor, that there was a cooperative effort between Sawczak and Goldenberg. For example, Dr. Goldenberg admitted that he "pretty much knew" in advance what Sawczak's questions to him would be. Further, Goldenberg was one of the very first witnesses which Sawczak called to the stand. (T. 740) While the remaining defendants cooperated during the course of trial, Dr. Goldenberg alone did not join them.

At the conclusion of the evidence, the jury was charged with standard jury charges applicable to the facts of this case. (T. 3566-3577) The jury was instructed, *inter alia*, on the issues of vicarious liability, agency, apparent agency, and independent contractors. While Sawczak requested additional instructions to the jury, the trial court declined to

grant these instructions because they were (A) nonstandard (b) not appropriately tied to the facts of this case, and/or (c) matters which were fully covered by the standard instructions. (T. 3181, 3541, 3185, 3542)

ISSUES

I. WHETHER THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR NEW TRIAL BASED ON DEFENSE COUNSEL'S CLOSING REMARKS.

A. NO FUNDAMENTAL ERROR IS ESTABLISHED BY CLOSING REMARKS, ESPECIALLY WHERE THE ARGUMENT WAS A "RESPONSE IN KIND" TO PLAINTIFF'S CLOSING. AS A GENERAL RULE THERE MUST BE AN OBJECTION.

B. DEFENSE COUNSEL'S REMARKS CONSTITUTED FAIR COMMENT ON THE EVIDENCE.

1. Closing Argument by Counsel for Dr. Alarcon Does Not Warrant Reversal.

2. Closing Argument by Counsel for Sternberg & Schulman Does Not Warrant Reversal.

3. Closing Argument by Counsel for Humana Bennett Does Not Warrant Reversal.

C. ANY ERROR COMMITTED DURING CLOSING ARGUMENT WAS WAIVED.

D. CURATIVE INSTRUCTIONS SHOULD HAVE BEEN REQUESTED.

E. THE PARTIES ARE SEPARATE AND DISTINCT.

II. WHETHER THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION TO LIMIT RADIOLOGY EXPERTS.

III. WHETHER THE TRIAL COURT PROPERLY DECLINED TO CHARGE THE JURY WITH NON STANDARD INSTRUCTIONS WHERE PLAINTIFF'S THEORY OF CASE WAS FULLY EXPRESSED THROUGH APPROVED, STANDARD INSTRUCTIONS.

IV. WHETHER ANY NEW TRIAL MUST INCLUDE BOTH LIABILITY AND DAMAGE ISSUES.

ARGUMENT SUMMARY

Sawczak's brief focuses on the closing arguments of the various defendants. None of these comments are grounds for granting a new trial because such remarks neither approached nor crossed the lines of propriety. These statements were fair comments on the evidence. Further, any possible prejudice caused by any comments which were arguably objectionable, and to which Sawczak timely objected, was cured through the trial court's instructions. All other objections were waived because (1) Sawczak failed to object[2] and because (2) where objections

[2]During the entirety of the defendants' closing arguments, plaintiff's counsel objected only a handful of times. *See*, T. 3427, 3448, 3451-3452, 3473, 3476.

were made and sustained, Sawczak declined the opportunity to give the jury curative instructions or to ask for a mistrial. (T. 3545) Finally, a new trial is not otherwise proper because the argument did not even begin to reach the level of fundamental error.

Sawczak's remaining issues also fail to show harmful error or abuse of discretion. Significantly, Sawczak has not suggested (because she cannot) that the verdict is unsupported by the evidence.[3] The various respondents were separately sued and Sawczak sought separate damages from each. The trial court properly exercised its discretion when ruling that the separate defendants could call their independently retained expert witnesses.

No error is shown by restricting the jury instructions to those which have been approved and adopted by this Court and where such instructions fully expressed the law on Sawczak's theory of the case to the jury.

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[3]*See, Bishop v. Watson*, 367 So.2d 1073, 1077 (Fla. 3d DCA 1979) (in reversing order granting new trial based on improper closing, court noted that case was decided by jury on conflicting evidence and there was no contention that evidence was insufficient to support the verdict).

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR NEW TRIAL BASED ON DEFENSE COUNSEL'S CLOSING REMARKS.

A. NO FUNDAMENTAL ERROR IS ESTABLISHED BY CLOSING REMARKS, ESPECIALLY WHERE THE ARGUMENT WAS A "RESPONSE IN KIND" TO PLAINTIFF'S CLOSING. AS A GENERAL RULE THERE MUST BE AN OBJECTION.

As a general rule there must be an objection to closing arguments to preserve error. A new trial is warranted only where closing remarks are highly inflammatory and results in a miscarriage of justice. *Kelley v. Mutrich*, 481 So.2d 999 (Fla. 4th DCA 1986); Fla. Stat. § 59.041 ("No judgment shall be set aside ... or new trial granted by any court ... unless ... the error complained of has resulted in a miscarriage of justice."). "Not every inappropriate remark ... justifies a mistrial or new trial." *Kelley*, 481 So.2d at 1000. The parties are entitled only to a fair trial, not a perfect one.

It is hornbook law that a timely objection is generally necessary for the granting of a new trial based on an improper closing argument. *Good Samaritan Hosp. Ass'n v. Saylor*, 495 So.2d 782 (Fla. 4th DCA

1986). *See, Gregory v. Seaboard System, R.R., Inc.*, 484 So.2d 35 (Fla. 2d DCA), *rev. denied*, 492 So.2d 1334 (Fla. 1986) (order granting new trial reversed where there was no objection to 22 of 28 statements cited as grounds for new trial and they were not mentioned in motion for mistrial).

Where no objection is made to a closing argument, there can be no reversal unless fundamental error is shown. Fundamental error requires:

> A legal decision that the error was so extreme that it could not be corrected by an instruction if any objection has been lodged, and that it is so damaged the fairness of the trial that the public's interest in our system of justice justifies a new trial even when no lawyer took the steps necessary to give a party the right to demand a new trial.

Hagan v. Sun Bank of Mid-Florida, N.A., 666 So.2d 580, 586 (Fla. 2d DCA 1996). The fundamental error doctrine should be used "very guardedly." *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla. 1970). In the absence of a contemporaneous objection to closing remarks, a new trial is rarely warranted:

> We perceive very few instances where remarks by an attorney are of such sinister influence as to constitute reversible error, absent objection ... [T]he failure to object constitutes intentional trial tactics, mistakes of which are

> not to be corrected on appeal simply because they backfire, save in the most rare of circumstances.

Nelson v. Reliance Ins. Co., 368 So.2d 361, 362 (Fla. 4th DCA 1978).[4] Throughout the lengthy closings, Sawczak either wholly failed to object, or subsequently waived any objection when she failed to move for a mistrial after the court sustained the objection. Therefore, Sawczak must satisfy the exceedingly high "fundamental error" standard. Sawczak cannot now establish that the various remarks which she originally found not to be objectionable (because she failed to challenge them during trial) are, in fact, "exceptionally objectionable." *Hagan v. Sun Bank of Mid Florida, N.A.*, 666 So.2d 580 (Fla. 2d DCA 1996). The fact that such claimed errors were discovered only after close examination of the transcript confirms that the closing remarks had no pervasive prejudicial effect. *Wasden v. Seaboard Coastline R. Co.*, 474 So.2d 285 (Fla. 2d

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[4]*See also Lupper v. State*, 663 So.2d 1337 (Fla. 4th DCA 1994) (prosecutor's closing vouching for credibility of investigating officer not fundamental error); *Bosch v. Hajjar*, 639 So.2d 1096 (Fla. 4th DCA 1994) (although isolated comments during closing were improper, they were not fundamental error); *State Farm v. Dauksis*, 596 So.2d 1169 (Fla. 4th DCA 1992) (counsel's comments at closing were slightly inflammatory but not fundamental error); *Delmeida v. Graham*, 524 So.2d 666 (Fla. 4th DCA), *rev. denied*, 519 So.2d 988 (Fla. 1987) (Plaintiff's closing asking for "retribution" for plaintiff's injuries not fundamental error).

DCA 1996) *rev. den.* 484 So.2d 9. When each of her claims of improper argument are examined in light of whether there was an objection to the remark, the emphasis of the remark, and the context in which the remark was made, it is clear the principle of fundamental error does not apply.

Sawczak's reliance on the cases of *Seaboard Airline Railroad Co. v. Strickland*, 88 So.2d 579 (Fla. 1956) and *Tyus v. Apulachcoke Northern Railroad Co.*, 130 So.2d 580 (Fla. 1961) is misplaced. Both of these decisions reiterate the settled law that "in the ordinary case, unless timely objections to counsel's prejudicial remarks are made, this Court will not reverse the judgment on appeal. *Strickland*, 88 So.2d at 523. The *Tyus* decision fully supports the decisions of the trial court and district court in the instant case:

> We are of the opinion that when the charge delivered by the trial judge is considered together with the fact that *respondent failed to object* to the alleged prejudicial remarks relied on by the District Court of Appeal as the basis for its holding on this issue, coupled with the fact that the alleged "prejudicial conduct" took place only during petitioner's closing argument and was not so extensive that its influence pervaded the trial, it is crystal clear this case should not have been reversed even for a new trial.
>
> Moreover, it is most significant that in the instant litigation the veteran and learned trial judge, who was in the milieu of the court room throughout the trial and who

> was therefore in a much better position than this court or the District Court to determine whether the alleged prejudicial remarks were actually "in effect" of such character, denied a motion for a new trial.
>
> No useful purpose would be served by submitting the factual issues in this case to a second jury for a retrial thereof because we find that such issues were fairly considered and determined by the jury in the trial which has been completed under appropriate charges by the circuit judge who presided in the nisi prius court.

Tyus, 130 So.2d at 588. Precisely the same logic and reasoning applies in the instant action.

B. DEFENSE COUNSEL'S REMARKS CONSTITUTED FAIR COMMENT ON THE EVIDENCE.

1. Closing Argument by Counsel for Dr. Alarcon Does Not Warrant Reversal.

a. Comment on Relationship Between Plaintiff and Dr. Goldenberg was Proper.

Sawczak first focuses on two comments by Dr. Alarcon's attorney[5] about the apparent cooperation between Sawczak and Dr. Goldenberg against the remaining defendants. These comments were no

[5]Sternberg and Schulman respond to this portion of Sawczak's brief in an abundance of caution. This issue is unrelated to Sternberg & Schulman and, as set forth more fully in Section IE, cannot form the basis of a request for new trial as to Sternberg & Schulman.

more than permissible inferences drawn from the attorney's view of the evidence. *Bertolotti v. State* 476 So.2d 130, 134 (Fla. 1985) ("The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence.").

The record shows that Dr. Goldenberg, who was one of Sawczak's first witnesses, admitted that he "pretty much knew" in advance what the Sawczak would ask him at trial. Throughout the trial, the other three defendants/ respondents cooperated and worked together but Dr. Goldenberg did not. The facts and evidence therefore establish that counsel's remark was a fair, permissible inference from the evidence. *See, e.g., Forman v. Wallshein*, 671 So.2d 872 (Fla. 3d DCA 1996) (counsel may call the opposing party a "liar" where there is an evidentiary basis to do so, relying on this Court's holding that attorney can state his deduction from the evidence).

Sawczak inaccurately claims that Dr. Alarcon's attorney accused her counsel of fraud. The comment that both Sawczak and Dr. Goldenberg tried to place the blame for that injury on the other defendants neither calls counsel a liar nor claim that counsel had

"tricked" the jury, as in *Owens Corning Fiberglass Corp. v. Morse*, 653 So.2d 409 (Fla. 3d DCA), *rev. denied*, 662 So.2d 932 (Fla. 1995). Dr. Alarcon never disputed that Sawczak had a legitimate injury, rather, he fully agreed that her injuries were legitimate. Indeed, the jury verdict acknowledges the existence of injury and the evidence as to its sole cause. Sawczak's remaining case cites are also distinguishable because those cases involved counsel calling the opposing litigants' case a fraud or accusing them of perjury, or improper arguments which were coupled with other significant trial errors which do not exist here.[6]

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[6]*See Venning v. Roe*, 616 So.2d 604 (Fla. 2d DCA 1993) (counsel told jury among other things that plaintiff's entire case was a "scheme" worked up by the plaintiff's attorneys and plaintiff's medical expert and called plaintiff's case "a work of fiction."); *Schubert v. Allstate Ins. Co.*, 603 So.2d 554 (Fla. 5th DCA), *rev. dism.*, 606 So.2d 1164 (Fla. 1992) (inflammatory comments made in both opening statements and closing argument); *Sun Supermarkets, Inc. v. Fields*, 568 So.2d 480, 481 (Fla. 3d DCA 1990), *rev. denied*, 581 So.2d 164 (Fla. 1991) ("counsel was allowed to continuously remark to the jury that the defense counsel had lied to the jury and that he committed a fraud"); *Moore v. Taylor Concrete & Supply Co., Inc.*, 553 So.2d 787 (Fla. 1st DCA 1989) (lawyer's repeated comments as to his personal opinion of the evidence may not have been sufficient to require a new trial, however, new trial required due to prejudicial effect of eliciting improper liability testimony); *Maercks v. Birchansky*, 549 So.2d 199 (Fla. 3d DCA 1989) (objected to remarks made many times and "[e]qually impermissibl[y]", counsel displayed excluded evidence to the jury); *Griffith v. Shamrock Village*, 94 So.2d 854 (Fla. 1957) (court's instruction following improper comment suggested that judge agreed that counsel's statements were

Any negative implication by Dr. Alarcon's closing is vitiated by Dr. Goldenberg's bankruptcy pleadings. As Dr. Goldenberg's "Emergency Motion to set Aside Order Modifying Automatic Stay" clearly proves, Sawczak and Dr. Goldenberg (1) discussed the doctor's pending bankruptcy; (2) Sawczak asked Goldenberg to stay in the trial "for the sole benefit of Sawczak ... to recover from third parties"; (3) they agreed "that they would not pursue ... Goldenberg ... Against any recovery or in settlement ..."; and (4) "[t]his matter was tried differently" because of the agreement and otherwise "would have tried the case on his ability relating to his own defenses and would have instituted different strategy." (R. 1406-1417) These pleadings admit the very matters raised by Dr. Alarcon's closing and show that Sawczak and Dr. Goldenberg falsely represented that there were no agreements between them. Dr. Alarcon's closing argument was not only proper, but in fact specifically mandated by this Court. *Dosdourian v. Carsten*, 624 So.2d 241 (Fla. 1993).

In *Dosdourian*, this Court broadly voided "Mary Carter" agreements including agreements (like the one here) where a defendant

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proper deductions from the evidence).

receives a covenant not to sue in exchange for remaining in the litigation. *Id.* at 246-248.[7] This Court also held that public policy requires the disclosure of all secret settlement agreements. Thus, even if an agreement is "not the usual Mary Carter agreement,"[8] it must be disclosed. *Id.* The Sawczak/Goldenberg agreement falls within that scope of the *Dosdourian* opinion because it was a secret agreement to insulate Dr. Goldenberg from financial liability in exchange for remaining in the litigation. Just as in *Dosdourian*, the jury had a right to know that there was "in fact, no actual dispute" between Sawczak and Goldenberg.

Assuming, *arguendo*, that Dr. Alarcon's comments had been improper, the brief remarks on this issue cannot constitute reversible error. The trial court sustained both objections, and the court instructed the jury to disregard the remarks. This Court must assume that the jury,

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[7]In *Dosdourian*, the plaintiff agreed to settle his claim against one of defendants in exchange for her insurance policy limits and her continued participation in the litigation through trial and judgment. *Id.* at 242.

[8]In the "usual" Mary Carter agreement, the defendant secretly agrees with the Plaintiff that if the defendant continues to defend himself in court, his maximum liability will be diminished proportionately by increasing the liability of the other co-defendants. *Id.* at 243.

as instructed, disregarded this comment. *Wasden v. Seaboard Coast Line R. Co.*, 474 So.2d 825 (Fla. 2d DCA 1985), *rev. denied*, 484 So.2d 9 (Fla. 1986).

b. No Reversible Error Arises From Unobjected to, Proper Comment On Weight To Be Given Plaintiff's Radiology Expert's Deposition Testimony.

Dr. Alarcon accurately said that Sawczak had two weeks to call her witnesses. It was fair to infer that the fact that Sawczak's decision to quickly read Dr. Russell's testimony at the day's end reflected the level of importance she attached to this witness. *See, e.g., Linehan v. Everett*, 338 So.2d 1294 (Fla. 1st DCA 1976) (plaintiff's attorney should have been allowed to comment in closing argument that defendant's IME physician was not called by defendants to testify at trial).

The lack of objection to this remark prevents Sawczak from pursuing this matter on appeal. *Good Samaritan Hosp. Assn., supra.* The remark lacked the necessary fundamental, sinister nature to support Sawczak's prayer for a new trial. Furthermore, during rebuttal, Sawczak's counsel fully eliminated any chance that the jury could be misled by stating:

> Experts, one per specialty. We talked about expert witnesses. Each party was limited in this case to one per specialty ...
>
> * * *
>
> Everybody has one per specialty. We had Dr. Livingstone as our surgeon. We had Dr. Russell as our radiologist ... Johnstone had a surgeon ... Johnstone had a radiologist ... O'Hara had a surgeon ... the hospital had a radiologist ... O'Hara had a radiologist, as well. So everyone had one per specialty. That's how that came down.

(T. pp. 210-211)). Thus, the jury was not left with an improper impression as to why Sawczak had fewer total experts than the combined defendants.

Even assuming *arguendo*, that the comment does not comply with the Code of Professional Conduct, there is still no fundamental error. The purported errors in this case are not of the level of those cases Sawczak relies on.[9] Indeed, the courts routinely do not find such comments, even where objectionable, to be fundamental error. *See for*

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[9]*See for example: Sacred Heart Hospital of Pensacola v. Stone*, 650 So. 2d 676 (Fla. 1st DCA), *rev. denied*, 659 So.2d 1089 (Fla. 1995) (fundamental error based on such errors as calling a witness a liar, repeatedly telling the jury that counsel believed the party was not negligent, and asking the jury to deal "very, very harshly" with the defendants).

example, Kelley, 481 So.2d at 1000 (Fla. 4th DCA 1986) (unprofessional remark does not necessarily justify a mistrial or a new trial); *Hartford Acc. and Indem. Co. v. Ocha*, 472 So.2d 1338, 1343 (Fla. 4th DCA), *rev. dism.*, 478 So.2d 54 (Fla. 1985) (improper rhetoric harmed the reputation of the legal profession but did not require new trial). Many other courts have likewise found that unethical comments do not constitute fundamental error. *Wasden v. Seaboard Coast Line R.R. Co.,* 474 So.2d 825, 830-31 (admission of unethical comments is not tantamount to fundamental error); *Gregory v. Seaboard System Railroad*, 484 So.2d 35 (Fla 2d DCA), *rev. denied*, 492 So.2d 1334 (Fla. 1986) (remarks regarding counsel's disbelief in the defendant's testimony did not deny the defendant a fair trial); *Bishop v. Watson*, 367 So.2d 1073 (Fla. 3d DCA 1979) (closing argument comment of counsel suggesting that jury discount witness's testimony does not amount to fundamental error).

c. No Reversible Error Arises From Unobjected to Comment That Plaintiff's Theory of Liability Was Found Unprecedented by Expert Witnesses.

Several witnesses testified that they had never seen a surgeon blame a radiologist for the surgeon's misidentification of the anatomy. Even Dr. Goldenberg did not try to blame the radiologists of his own

error. (T. 1159, 1184) The comment in issue was merely a fair inference from the admitted evidence and was not "testimony" by counsel. Once again, Sawczak waived any error associated with this remark by failing to object. The case of *Bellsouth Human Resources Admin., Inc. v. Colatarci*, 641 So.2d 427 (Fla. 4th DCA 1994), cited by Sawczak, reiterates the necessity for a contemporaneous objection, stating "We do not mean to imply by quoting from *Stokes [v. Wet 'N Wild, Inc.*, 523 So.2d 181 (Fla. 5th DCA 1988)] that it may not be necessary to object or move for a mistrial in this district." *Id.* at 429.[10]

d. No Reversible Error Arises From Remarks on the Jury's Role.

Sawczak complains that Dr. Alarcon's attorney noted that a verdict against Dr. Alarcon would improperly approve of Dr. Goldenberg shifting his responsibility for the injury to Dr. Alarcon. Counsel's passing remarks did not play to any special sensitivities or fears of a Broward County jury. The jury was not asked to make an example of Dr. Goldenberg nor was there any threat that a verdict for Sawczak would adversely affect the availability of medical care in Broward

[10]In any event, the *Colatarci* court reversed for a new trial on other grounds and its comments regarding closing argument were merely dicta.

County. Accordingly, Sawczak's reliance on *Norman v. Gloria Farms, Inc.*, 668 So.2d 1016 (Fla. 4th DCA 1996), is misplaced. (Hog farms's counsel specifically warned a jury of hog-hunters that "a verdict ... against the [the defendant] is going to bring an immediate halt to hog hunting in Okeechobee.") The instant comment was a fair inference from the evidence and was proper. *See Brumage v. Plummer*, 502 So.2d 966 (Fla. 3d DCA 1987), *rev. denied*, 513 So.2d 1062 (Fla. 1987) (new trial order reversed because counsel's closing remarks -- that defendant/doctor's negligence was so gross that to allow doctor to walk out of courtroom without liability was unconscionable -- were proper comment on the evidence).

Once again it must be noted that even if the statement had been improper, any error was waived because Sawczak failed to object and the error was not "fundamental." *See e.g., Blue Grass Shows, Inc. v. Collins*, 614 So.2d 626 (Fla. 1st DCA), *rev. denied*, 624 So.2d 264 (Fla. 1993) (argument that jury was the "conscience of the community" and verdict would set the standard as to "what kind of protection you want for the citizens of this town," was not fundamental error); *Florida Crushed Stone Co. v. Johnson*, 546 So.2d 1102 (Fla. 5th DCA 1989) (conscience of

community argument not reversible error where not followed with a request that the jury punish the opposing side).

The jury was never asked by Dr. Alarcon's attorney to "send a message." Counsel's "God help physician's" comment - made without objection - did no more than criticize Sawczak's theory. The statement did not constitute inherently prejudicial, fundamental error. *See, Collins, supra* (even improper "conscience of community" argument does not create fundamental error). Plaintiff's reliance on the case of *Baptist Hospital, Inc. v. Rawson*, 674 So.2d 777 (Fla. 1st DCA 1996) *rev. den.* 682 So.2d 1100 (Fla. 1996) is misplaced. In *Rawson*, the plaintiff's attorney not only used the word "ridiculous," but argued that a verdict for the defendant would "breed irresponsible medicine," that counsel had "transposed" himself into the plaintiff and woke up in "A cold sweat," and that the defendant's defense was an "insult to your system of justice." *Id.* at 1024. No similar remarks were made here.

e. Counsel Did Not Improperly Comment On the Credibility of the Witnesses or Merits of the Case.

Counsel need not delete the work "I" from his vocabulary when giving a closing argument. The mere passing use of the term "I" or "we" is simply a figure of speech and does not vouch for the credibility of the

witnesses or express personal opinion about the merits of the case. *See, Forman v. Wallshein*, 671 So.2d 872 (Fla. 3d DCA 1996) (use of "I think" and "I believe" in defendant's counsel's closing argument was merely "a figure of speech and could not reasonably be understood as a prohibited expression of personal opinion."); *Wasden*, 474 So.2d 832 ("use [of] the words, "I'm telling you, "I say baloney," "I would suggest to you," "we knew," was in context of commenting upon matters in evidence and "[a]lthough such phrases might have been better avoided, they do not render the closing argument inflammatory.")

No harm followed any of these remarks because Dr. Alarcon's counsel also told the jury that his opinions were irrelevant. Moreover, the court instructed the jury in the beginning of the trial, during closing, and again during the jury charges that counsel's statements are not evidence and that the jury's verdict must be based on the evidence.

It should be noted that Sawczak's counsel objected to only one statement. The objection was sustained and defense counsel was told to "refrain from personal attacks on the attorneys. Let's comment upon the evidence." (T. 128) Thus, any error associated with that remark was cured. The cases cited by plaintiff concur.

f. "Hired gun" Reference was Limited, Cured and Harmless Error.

When Larry Forman was referred to as a "hired gun," Sawczak's counsel immediately objected. The trial court cured any error with its instruction to the jury to disregard the comment. *Budget Rent-A-Car Systems, Inc. v. Jana,* 600 So.2d 466 (Fla. 4th DCA), *rev. denied,* 606 So.2d 1165 (Fla. 1992), cited by Sawczak, squarely held that a curative instruction removed any prejudicial effect of a "hired gun" reference. *Id.* at 468. Further, comment is irrelevant to her claim of reversible error because it relates solely to damages and Sawczak seeks a new trial on liability only. Moreover, the jury awarded the Sawczak more damages that either Forman testified to or she requested.

g. No Error Arises From Unobjected to Remark Which Did Not Comment on the Court's View on Dr. Alarcon's Liability.

Counsel's statement that the court had not directed a verdict against any defendant other than Dr. Goldenberg "with good reason" was not a reference to the court's impartiality. Instead, it was merely a fair comment on the evidence and the status of the trial -- that liability against Goldenberg was clear but that the liability against the remaining defendants presented a fact question for the jury. Sawczak's own brief acknowledges that "the issue of liability and causation as to the

radiologist [sic] were hotly contested." (Appellant brief, P.7) There is no error in informing the jury that a directed verdict has been granted as to a party. *Conklin Shows, Inc. v. Clementi*, 448 So.2d 588 (Fla. 5th DCA 1984).

2. Closing Argument by Counsel for Sternberg & Schulman Does Not Warrant Reversal.

a. Proper Comment on Relationship Between Plaintiff and Dr. Goldenberg.

All statements by counsel for defendant Sternberg & Schulman were fair comments and inferences from the evidence. All of the remarks fell within the wide latitude which is afforded to counsel during closing argument. *See, for example: Hagan v. Sun Bank of Mid-Florida, N.A., supra; Tate v. Gray*, 292 So.2d 618 (Fla. 2d DCA 1974); *Nelson v. Reliance, supra. See also* Section IC, infra. The two references to the relationship between Sawczak and Dr. Goldenberg were made in the context that their factual and legal viewpoints were singularly aligned. In both instances, counsel pointed out specific examples where the identical view of the facts was stated by Sawczak and Dr. Goldenberg, but by no one else. For example, the evidence established that only Sawczak and Dr. Goldenberg said that the cholangiograms were

performed to verify the anatomy - other parties' testimony clearly established the procedure was performed to look for gallstones. Only Sawczak and Dr. Goldenberg said a "congenital anomaly" existed. Thus, it was a fair comment on the evidence that Goldenberg was aligned with the Sawczak on these issues and that both these parties were contrary to all other defendants' positions.

b. Argument that 20% of Sawczak's Requested Damages was Sufficient, if Error, was Harmless.

Sawczak has thrice conceded that counsel's 20% comment "may not have swayed to the jury on the damages issue." (Plaintiff's Memo, p. 25, Appellant's Brief p. 29, Petitioner's Brief p. 34). Indeed, Sawczak does not even seek a new trial on damages. Clearly, this remark had no impact on the jury in light of the multimillion dollar verdict which was rendered against Dr. Goldenberg. Sawczak nevertheless makes a convoluted argument that a comment which related only to damages somehow affected the jury's deliberations only on the liability issue. This argument is wholly illogical.

There is simply no support for Sawczak's assertion that disagreeing with her counsel's damage suggestion effectively portrayed her counsel as liars. Defense counsel plainly stated that he was "in no

way belittling Mrs. Sawczak's situation or her damages" but that the Sawczak's damages request was simply not fair and reasonable. This argument was amply supported by the record. As counsel for the hospital later explained during his closing, if you placed Sawczak's money in investments bearing ten and a half percent interest, you would need twenty-five to forty percent less than Sawczak's suggested figure to arrive at this same future value. If a plaintiff's counsel can suggest a verdict amount, it should be equally proper for defense counsel to challenge the reasonableness of such sum.

Sawczak's reliance on *Hartford Acc. and Indem. Co. v. Ocha,* 472 So.2d 1338 (Fla. 4th DCA 1985) is wholly misplaced. While the *Ocha* court disliked an argument that Sawczak's attorneys "always ask for at least ten or fifteen times what they want," *Id.* at 1343, the court specifically found this comment was not highly prejudicial and affirmed the trial court's denial of a new trial on this basis. *Id.* The same result should occur here. *See also, Laberge v. Vancleave*, 534 So.2d 1176 (Fla. 5th DCA 1988), *rev. denied*, 545 So.2d 1369 (Fla. 1988) (defense counsel's comment that plaintiffs' attorneys routinely ask for eight to ten times what a case is worth does not require a new trial). It should again

be noted that a suggestion of any verdict figure by plaintiff's counsel is not a comment on the evidence, but is merely his own opinion as to the worth of a case. The case law has long permitted this practice. *Ratner v. Arlington*, 111 So.2d 82 (Fla. 3d DCA 1959); *Wasden v. Seaboard Coastline R. Co., supra.* A defendant should be permitted to rebut such statements of opinion and draw inferences about the value of a claim, whether suggesting a dollar figure or a percentage of the plaintiff's figure as an appropriate verdict range.

c. Counsel Did Not Improperly Comment on the Credibility of the Parties' Theories.

Counsel's use of the phrase "I'm not making this up" was clearly not an implication that Sawczak's counsel was making things up. The phrase was simply used -- while specifically referring to poster-size reproduction of pages of testimony -- to point to the testimony and evidence in the record and to emphasize that such trial evidence supported counsel's arguments. The statements did no more than allowing him to easily distinguish between those remarks where he directly referenced allow him to easily distinguish between those remarks where he directly referenced testimony and those instances where he was drawing inferences from the testimony.

While the terms "bogus" and "B.S." were perhaps indelicate, the isolated use of these words cannot create fundamental error. *See for example: Wasden, supra*, (use of term "baloney" not highly inflammatory). No objection was raised to any of these clearly harmless comments. No fundamental error is shown. The trial court correctly denied Sawczak's motion for new trial.

3. Closing Argument by Counsel for Humana Bennett Does Not Warrant Reversal.

When quoted comments[11] by counsel for the hospital are read fairly and in context, it is clear that he did not accuse Sawczak's counsel of fraud. The comments did not no more than point out evidence which shows that Sawczak emphasized the wrong points and focused on non-dispositive issues.

Sawczak picked out a mere handful of instances where counsel used such phrases as "I don't think" or "I don't believe." As discussed in Section I.C. supra, the use of these types of phrases, although perhaps

[11]Sternberg & Schulman respond to this portion of Sawczak's brief in an abundance of caution. This issue is unrelated to Sternberg & Schulman and, as set forth more fully in Section IE, cannot form the basis of a request for new trial as to Sternberg & Schulman.

not a preferred techniques for argument, are neither inflammatory nor fundamental error.[12] It also bears repeating that the trial court repeatedly told the jury that attorneys' statements were not evidence.

C. ANY ERROR COMMITTED DURING CLOSING ARGUMENT WAS WAIVED.

Sawczak unequivocally waived any error which may have occurred during the closing arguments. Sawczak readily conceded in her post trial motions that she failed to object to most arguments. As to those arguments where an objection was raised, the trial court sustained the objection, but Sawczak then failed to request a curative instruction or a mistrial. This also constitutes waiver.

Florida courts consistently hold that "a failure to request a mistrial, after no objection to improper statements in a closing argument has been sustained, constitutes a waiver of that objection." *Eichelkraut v. Kash N' Karry Food Store, Inc.*, 644 So.2d 90, 92 (Fla. 2d DCA 1994), *citing, Newton v. South Florida Baptist Hospital*, 614 So.2d 1195 (Fla. 2d DCA 1993), *rev. denied*, 621 So.2d 1066 (Fla. 1993); *See also,*

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[12] *See for example: Wasden,* 474 So.2d 832 (use of phrases "I'm telling you," "I say baloney," "I would suggest to you" were used to comment upon matters in evidence and did not render argument inflammatory).

Ed Ricke and Sons, Inc. v. Green, 468 So.2d 908, 910 (Fla. 1985) ("unless the proper argument constitutes fundamental error, a motion for mistrial must be made 'at the time the improper comment was made.'"); *Rudy's Glass Construction Co. v. Robins*, 427 So.2d 1051 (Fla. 3d DCA 1983) (objections to allegedly improper closing arguments were waived by failure of counsel to move either for a mistrial or for a curative instruction); *Russell v. Guider*, 362 So.2d 55 (Fla. 4th DCA 1978), *cert. denied,* 368 So.2d 1373 (Fla. 1979) (clearly improper comments made during closing argument did not warrant new trial in absence of contemporaneous motion for mistrial or curative instruction).

There is no support for Sawczak's attempt to convince this Court that she did not waive her request for mistrial because she initially coupled her motion with a request for the court to defer its ruling. Sawczak ignores the fact that her counsel later abandoned his request for a mistrial. Specifically, when the trial court asked during sidebar, "what is the requested relief," Sawczak's counsel responded that if the trial court would not reserve ruling on the request for mistrial, then he was not requesting one."

In the cases of *Ed Ricke & Sons, Inc. v. Green,* 468 So.2d 908 (Fla. 1985), and *Bellsouth Human Resources Admin. v. Colatarci,* 641 So.2d 427 (Fla. 4th DCA 1994), motions for mistrial were ruled upon. In the instant case, however, Sawczak's initial suggestion of a mistrial was abandoned because she never secured a ruling. *See, Newton v. South Florida Baptist Hospital*, 614 So.2d 1195, 1196 (Fla. 4th DCA), *rev. denied*, 621 So.2d 1066 (Fla. 1993) (failure to secure a ruling on an objection waives it). Although *Ed Rick* gives the trial court discretion to postpone ruling on a mistrial, it does not require that the court postpone the ruling. Thus, Sawczak clearly waived her motion for mistrial by receding from her original suggestion and filing to secure a ruling.

Sawczak's efforts to justify the failure to request a mistrial amount to nothing more than a tactical decision which "backfired". The belated request for a new trial should be denied. *Nelson v. Reliance Insurance Company, supra*, (failure to object or move for mistrial was "intentional trial tactic" which foreclosed new trial); *see also, United Services Automobile Association v. Kiibler*, 382 So.2d 1254 (Fla. 3d DCA 1980); *Blue Grass Shows, Inc. v. Collins*, 614 So.2d 626 (Fla. 1st DCA 1993); *Nadler v. Home Insurance Co.,* 339 So.2d 280 (Fla. 3d

DCA 1976) (new trial denied where counsel was waiving mistrial by stating that he would not ask for such at that stage in the proceedings).

D. CURATIVE INSTRUCTIONS SHOULD HAVE BEEN REQUESTED.

Sawczak concedes that the trial court asked Sawczak to provide a proposed curative instruction and her counsel specifically declined to do so. The courts have repeatedly held that the types of arguments complained of by Sawczak may be remedied by cautionary instructions. *See for example: Budget Rent-A-Car Systems, Inc. v. Jana*, 600 So.2d 466, 468 (curative instruction remedied "hired gun" reference); *Cummins Alabama, Inc. v. Allbritton*, 548 So.2d 258 (Fla. 1st DCA), *rev. denied*, 553 So.2d 1164 (Fla. 1989) (curative instruction sufficient where argument invites the jury to analyze petitioner's actions in light of what they would have done); *Wasden* 474 So.2d at 831 (when court instructed jury to disregard inflammatory closing remark, it must be assumed jury followed court's instruction, and no fundamental error where court told jury counsel's arguments were not evidence); *Decks, Inc. v. Nunez*, 299 So.2d 165 (Fla. 2d DCA 1974), *cert. denied* 308 So.2d 112 (Fla. 1975) (curative instruction remedied comment that "we are not here representing him for nothing"); *Dixie-Bell Oil Co., Inc. v. Gold*, 275

So.2d 19 (Fla. 3d DCA 1973) (personal attack on opposing attorney during closing was cured by instruction that only testimony from the witness stand is evidence).

None of the challenged comments in the instant case are of the same type or caliber as those comments in the cases which Sawczak has cited. *See Walt Disney World v. Blalock*, 630 So.2d 1156 (Fla. 5th DCA), *rev. dism.*, 649 So.2d 232 (Fla. 1994) (defendant "ripped off the plaintiff's thumb," WDW was compared to "'some nickel and dime carnival'" throwing 'pixie dust' to delude the jurors"); *Mohammad v. Toys R Us*, 668 So.2d 254 (Fla. 1st DCA 1996) (asking jury whether 'everyone realize[s] that they could have -- may have already settled").

E. THE PARTIES ARE SEPARATE AND DISTINCT.

Sternberg & Schulman again reiterate their prior argument that fundamental error did not occur. In the event that the final judgment and jury verdict is not affirmed, it is asserted that the defendants need not be treated, as Sawczak suggested in the trial court, like the three musketeers ("one for all and all for one"). The case of *Owens Corning Fiberglass Corp. v. Morse*, 653 So.2d 409 (Fla. 3d DCA 1995) does not mandate granting a new trial as to all parties. A new trial is not required as to all

parties unless closing remarks specifically attacked the integrity of opposing counsel so as to constitute fundamental error which deprives the plaintiff of a new trial as to all defendants. The *Morse* court determined that comments which are "similar to calling plaintiff's counsel liars and accusing the plaintiff's counsel of perpetrating a fraud on the court and the "jury" deprived the plaintiffs of a fair trial as to both defendants. The *Morse* case is readily distinguishable from the instant case, especially in light of a determination of liability in favor of Sawczak and the sizeable jury verdict in Sawczak's favor: $4,000,629.00.

II. THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION TO LIMIT RADIOLOGY EXPERTS.

While Sawczak sued multiple defendants and hoped to obtain a finding of liability against each of them separately, she nevertheless complains that she was "unfairly prejudiced" because each defendant was permitted to separately defend its interests, retain expert witnesses, and present their testimony at trial. No plaintiff, including Sawczak, should be able to sue separate, distinct, individual defendants yet "cry foul" when each of those defendants seeks to defend itself through properly retained and identified expert witnesses.

The trial court acted well within its discretion in permitting each district defendant to retain its own radiological expert witness. Well settled law establishes that determining the number of expert witnesses rests exclusively within the discretion of the trial court. *Webb v. Priest*, 413 So.2d 43, 45 (Fla. 3d DCA 1982) (two experts per party); *Ritter v. Jimenez*, 343 So.2d 659, 652 (Fla. 3d DCA 1977) (four "before and after" witnesses was permitted); *Stager v. Florida East Coast Railway Co.*, 163 So.2d 15, 17 (Fla. 3d DCA 1964) *cert. discharged*, 174 So.2d 540 (Fla. 1965) (two expert witnesses). Fla. R. Civ. P. 1.200(b)(4) (at pretrial conference, court can limit number of expert witnesses). The case law notes that in medical malpractice actions, the litigation is truly a battle of experts and with only very broad limits, all qualified opinion testimony should be allowed. *Lake v. Clark*, 533 So.2d 797 (Fla. 5th DCA 1988). The *Lake* court stated that qualified opinion testimony should not be disallowed merely because it may be cumulative to other evidence.

It should also be noted that Sawczak's counsel admitted at a hearing on March 27, 1996 (which followed the call of the trial calendar)

that the trial court's order was clear and that it had not been previously challenged.

Sawczak also complains that the defense was permitted to call Dr. Margarita Alarcon who prepared the final report regarding the four cholangiogram films in issue. Permitting a physician who is involved with the treatment to testify does not violate any limitation on expert witnesses. *Carpenter v. Alonzo*, 587 So.2d 572 (Fla. 3d DCA 1991); *Webb v. Priest, supra.*

III. THE TRIAL COURT PROPERLY DECLINED TO CHARGE THE JURY WITH NON STANDARD INSTRUCTION WHERE PLAINTIFF'S THEORY OF CASE WAS FULLY EXPRESSED THROUGH APPROVED, STANDARD INSTRUCTIONS.

It is well settled that a requested charge is properly refused where the charges given adequately state the applicable law governing the matters sought to be covered by the requested charge. *Goodman v. Becker*, 430 So.2d 560 (Fla. 3d DCA 1983); *Morganstein v. Rosomoff*, 407 So.2d 941 (Fla. 3d DCA 1981).

The information contained in Sawczak's requested instructions was adequately explained to the jury in the other, standard instruction which were given. It was entirely unnecessary for the trial court to give

the cumulative instructions requested by Sawczak, *Sears Roebuck & Co. v. McKenzie*, 502 So.2d 940 (Fla. 3d DCA 1987); *L.R. Ambassador Associates, Ltd. v. Andrews*, 492 So.2d 764 (Fla. 1st DCA 1986).

The law is well settled that the trial court is to restrict jury charges to the standard instructions unless the standard instructions are insufficient to apprise the jury of the governing law. *New Hampshire Insurance Co. v. Conner*, 468 So.2d 324 (Fla. 2d DCA 1985).

In the instant case, Sawczak's theory of the case was fully and completely expressed by the standard jury instructions which were read to the jury.

In light of the fact that the jury determined that there was no liability on the part of the defendant/ respondents which would be affected by the independent contractor instruction that Sawczak proposed, the harmless error doctrine must apply. *Pezzi v. Burnup & Sims, Inc.*, 328 So.2d 580 (Fla. 3d DCA 1976); *McDaniel v. Prysi*, 432 So.2d 174 (Fla. 2d DCA 1983); *Bryant v. Fiadini*, 405 So.2d 1341 (Fla. 3d DCA 1981).

IV. ANY NEW TRIAL MUST INCLUDE BOTH LIABILITY AND DAMAGE ISSUES.

In light of the multimillion dollar verdict in favor of Sawczak - which was even greater than the sum suggested by her counsel in closing - Sawczak's assertion that she should be awarded a new trial on liability only is impossible to grasp. Sawczak's rationale for this position is an argument that the defendants' closing arguments prejudicially "pervaded the entire trial," yet she simultaneously argues that only the liability issues were adversely affected. She continues to shout her claim of "pervasive partial prejudice" despite the absence of contemporaneous objection to these allegedly sinister remarks. Her argument also ignores the fact that a significant portion of the challenged remarks addressed damage issues, (rather than liability issues) and Sawczak clearly wants the damage verdict to stand.

The case law is clear that a new trial cannot be limited to a single issue where the jury is broadly prejudiced on all issues (as Sawczak claims is the case). *Porter v. Gordon*, 46 So.2d 19 (Fla. 1950); *Deese v. Whitebelt Dairy Farms, Inc.,* 160 So.2d 543 (Fla. 2d DCA 1964); *Cedars of Lebanon Hospital Corp. v. Silva,* 476 So.2d 696, 704 (Fla. 3d DCA 1985).

It would be inappropriate to return this case for a new trial on liability alone because a second jury would be asked to assign percentages of responsibility to the defendant/respondent for damages which a competent jury has already decided were caused solely by Dr. Goldenberg. Sawczak is, in reality, asking this Court to allow her to pursue a de facto subrogated contribution claim on behalf of Dr. Goldenberg. Clearly, this is impossible. Dr. Goldenberg could not pursue a contribution claim because of (1) the verdict absolving the respondents from liability (2) his failure to appeal the verdict and final judgment bars him from seeking to relitigate any issue related to liability of the parties. If Dr. Goldenberg cannot seek to reapportion his responsibility to Sawczak through a contribution claim against the respondents, then Sawczak cannot pursue such a claim for his use and benefit.

If the instant respondent should be required to participate in a new trial, the jury must also be permitted to decide what damages, if any, were caused by their actions, and principals of set off would also apply.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Honorable Court affirm the jury verdict and final judgment in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed November 5, 1998, to: Robert J. Borrello, Esq., RUSSOMANNO FIORE & BORRELLO, P.A., Museum Tower, Suite 2101, 150 West Flagler Street, Miami, FL 33130, Attorney for Shirley Sawczak; Clark J. Cochran, Jr., Esquire, BILLING, COCHRAN, HEATH, LYLES & MAURO, P.A., 888 S.E. Third Avenue, Suite 301, Fort Lauderdale, FL 33316, Attorneys for Westside Regional Medical Center; Ronald FitzGerald, Esquire, FLEMING, O'BRYAN & FLEMING, Post Office Drawer 7028, Fort Lauderdale, FL 33338, Attorneys for Defendants Goldenberg; Crane A. Johnstone, Esq., GEORGE, HARTZ, LUNDEEN, FLAGG & FULMER, P.A., Third Floor, Justice Building East, 524 South Andrews Avenue, Fort Lauderdale, FL 33301, Attorney for Defendants Alarcon; John W. Mauro, Esquire, BILLING, COCHRAN, HEATH, LYLES & MAURO, P.A., 888 S.E. 3rd Avenue, Suite 301, Fort Lauderdale, FL 33316, Attorneys for Westside Regional Medical Center.

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