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 REPLY BRIEF ON THE MERITS

Herman J. Russomanno
Robert J. Borrello
RUSSOMANNO & BORRELLO, P.A.
Museum Tower, Suite 2101
150 West Flagler Street
Miami, Florida 33130
Telephone: (305) 373-2101
Facsimile: (305) 373-2103

Attorneys for Appellant Shirley Sawczak

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STATEMENT OF THE CASE

The Defendants advance various assertions in their briefs that are either false or unsupported by the record:

1. *Sawczak and Goldenberg entered a "secret" Mary Carter Agreement.* To bolster their "fair comment on the evidence" argument, Alarcon and the radiology group make the blatantly false assertion that Sawczak entered into a "secret settlement agreement" to "insulate" Goldenberg from financial liability in exchange for remaining in the litigation. In support, they rely on Goldenberg's "Emergency Motion to Set Aside Order Modifying Automatic Stay," filed in the bankruptcy court the day after closing argument had concluded. (R. 1408)

Goldenberg's motion (which the bankruptcy court denied) was an unverified assertion by his bankruptcy attorney. The alleged "agreement" was not attached. Rather, the assertions in the motion were flatly contradicted by the trial counsel for Goldenberg and counsel for Sawczak in open court, before the start of the trial, who advised the court and all parties that no agreements had been entered. (Tr. 246) Following the trial, at the hearing on the motion for new trial, Sawczak's counsel again confirmed that no such agreement existed. (6/11/96 Tr. at 20-21)

Further, if such an agreement had been entered and Goldenberg was "insulated" from liability, there was no reason for him to file for bankruptcy in the first place. Goldenberg's motion to set aside the order lifting the automatic stay, which was based on the alleged "agreement," was denied by the bankruptcy court. (R. 1416-17) Sawczak has diligently pursued her claims against Goldenberg in the bankruptcy proceeding and, following Goldenberg's shielding of virtually all of his assets, on appeal. See Initial Br.

at 1 n.1. In neither the bankruptcy proceeding nor the district court appeal has Goldenberg raised this alleged "agreement" as a defense to Sawczak's claim or otherwise made reference to it since that time.
[1]

Moreover, even assuming that a "secret" agreement existed, such agreement—unknown to the defense lawyers until after closing argument—could not furnish them any basis to accuse Sawczak's counsel of collusion with Goldenberg during closing argument. Defendants' attempted reliance now on this non-existent and unknown "agreement" reflects that they had no basis to make their repeated assertions of collusion.[2] Their other evidence, that Goldenberg, who had been deposed at least four times, knew he would be called as a witness and had an idea what questions would be asked, provides no basis for a charge of collusion. Like Goldenberg, Alarcon had been deposed at length and would likely have given the same response to such questions. Equally absurd is Defendants' arguments that because Goldenberg was not cooperating with the other Defendants, he was therefore cooperating with Plaintiff. One must believe that counsel for the other three defendants never expected cooperation from a co-defendant against whom they sought to have held 100% liable for Sawczak's injuries.

Interestingly, while Alarcon denies his counsel's comments in closing were "tantamount to accusing Plaintiff's counsel of fraud," he now claims that it "appears

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[1] Sawczak submitted as an appendix to his reply brief to the Fourth District the memoranda filed in the bankruptcy court and briefs in the district court along with the bankruptcy court's order upholding Goldenberg's exemptions. No mention of the purported "agreement" is made anywhere in these papers.
[2] The trial court gave the purported agreement no weight. (6/11/93 Tr. at 38-39)

that the representations by Plaintiff's counsel and Goldenberg's counsel … were false." Thus, Defendants would have the Court believe that they never intended to insinuate that Plaintiff was committing a fraud upon the jury (by colluding with the surgeon to blame the radiologist) at the same time they now seek to use the alleged fraud (of a secret Mary Carter agreement) to justify their improper comments.

The reality is that the statement by Alarcon's counsel of the "unified, joint effort" "to choreograph" testimony which "everybody in this courtroom has seen" (Tr. 3451-52) was a direct charge that Sawczak's counsel was misleading the jury and court and perpetrating a fraud. Sawczak objected to these comments. Although the court sustained the objection, such defense comments, along with many others, attacked the integrity of Sawczak's counsel and deprived her of a fair trial. See Owen Corning Fiberglas Corp. v. Morse, 653 So.2d 409 (Fla. 3d DCA 1995).

2. *"Overwhelming" evidence supports the verdict*. At the heart of Defendants' arguments is the assertion that the improper comments were not prejudicial and may be justified because the evidence was "overwhelming" that the radiologist shared no responsibility for injuries. In support, Defendants rely on the same cumulative expert testimony to which Sawczak objected pretrial. Defendants' unspoken premise is that where there are multiple co-defendants in a medical malpractice trial and each is permitted to submit expert testimony against a plaintiff's one expert, no error is prejudicial because the "overwhelming" evidence (i.e., all the defense experts' testimony) will be against the plaintiff. Defendants, however, cite no case that holds that because they were permitted to introduce cumulative expert testimony, that very cumulative testimony, by sheer weight, absolves them from other

erroneous rulings by the trial court.

Furthermore, Defendants mischaracterize Sawczak's theory to craft their argument that the supposed "overwhelming" evidence was against Sawczak. Thus, Alarcon claims that Sawczak argued that Goldenberg "clipped the wrong duct [i.e., the common bile duct] before he took the x-ray films and sent them to Dr. Alarcon," and thus there was no way that Alarcon could not have seen on the x-ray films that Goldenberg negligently placed a metallic clip on the wrong duct. Having built this strawman, Defendants then proceed to argue that "[e]very other witness" argued to the contrary: no such clips existed at the time of the x-rays.

In reality, Sawczak did not argue that any clips were placed on the wrong duct before the x-rays were taken. As noted in our initial brief, Alarcon's negligence arose from his failure to alert Goldenberg that the tip of the catheter was in the common bile duct, that the cystic duct could not be seen on the films, and that there was no evidence on the films that the catheter had been inserted in the cystic duct as it should have been. In short, Goldenberg was in the wrong place at the time of the x-rays. Had Alarcon reported this to Goldenberg, the subsequent clipping and transection of Sawczak's common bile duct would have been avoided.

Thus, the allegedly "overwhelming" evidence by the defense on this subject missed the point of Sawczak's theory of negligence against the radiologist and, consequently, did not conflict with Plaintiff's trial theory. There was no "overwhelming" evidence which rendered harmless the error below.

Finally, Alarcon misstates Goldenberg's testimony by arguing that Goldenberg acknowledged that he was in the right place before the x-rays were taken and that the

misidentification occurred after the films were sent to Alarcon in radiology. Although his testimony was somewhat confusing and inconsistent, Goldenberg testified that when the x-rays were taken he did not realize that he was in the wrong place and since then learned he was. (Tr. 818-21, 1348-50)

3. *Sawczak "withdrew" or "abandoned" her motion for mistrial.* As argued in our initial brief, the trial court's refusal to reserve ruling on Sawczak's motion for mistrial was utterly unfair, arbitrary, and an abuse of discretion. The trial court offered no justification for requiring Sawczak to "fish or cut bait." Nor do the Defendants here.

4. *Defense counsels' improper arguments were a "response in kind" to Plaintiff's closing*. Defendants attempt to justify their improper comments by stating that Plaintiff did it first, quoting Plaintiff's comments, including such time-honored statements as "[y]ou hold the power to right wrong." Defendants, however, offer no explanation nor cite to any case to support their assertion that these innocuous comments were improper.

ARGUMENT AND CITATION OF AUTHORITIES

I. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL BASED ON IMPROPER COMMENTS DURING CLOSING ARGUMENT

Alarcon attempts to portray his counsel's collusion comments as merely "pointing out that both Plaintiff and Dr. Goldenberg were trying to place the blame for Plaintiff's injury on the other Defendants." This misstates the improper comments, which accused Plaintiff's counsel of "choreographing" testimony, a charge that goes way beyond an observation that Sawczak and Goldenberg both argued that the

radiologist was liable. Likewise, the other statements (for example, that Sawczak's counsel "twist[ed] Dr. Alarcon's notes or testimony; "I can't believe he [Sawczak's counsel] said that") were blatant attacks on Sawczak's counsel, not a "permissible inference" from the evidence as Defendant argues. Defense counsel's statement that "[t]his lawsuit would never have been brought against Dr. Alarcon" if Goldenberg "accept[ed] responsibility" was not a fair comment on evidence at trial. It was a simultaneous attack on Plaintiff's counsel and an injection of counsel's opinion implying counsel's knowledge of matters outside the record.

Alarcon all but concedes that his counsel's statements suggesting that Sawczak could have brought in more than one radiologist expert were improper. Instead, Alarcon argues that Sawczak's counsel "cured" the error in rebuttal by informing the jury that each party had one expert per specialty. Yet, Alarcon's counsel objected to this statement as "improper argument." (Tr. 3530) Moreover, the bell had already been rung. Defendants all argued at length their "go with the numbers" theme, making it extremely improbable that the brief statement by Plaintiff's counsel at the tail end of a full day's closing arguments (around 8:20 p.m.) erased the point Defendants had repeatedly hammered in. And given Defendants' arguments to this Court that the evidence was "overwhelmingly" against Sawczak based on the cumulative experts they presented, Alarcon's statement (at 30) that "the jury could not have been left with the impression that Plaintiff had fewer experts than the Defendants because her case was weaker than the Defendants' case" is disingenuous.

In defense of their argument de hors the record below that a verdict against the radiologist would be a first, Defendants seek to stretch a question by plaintiff's counsel

concerning a defense expert's qualifications and experience. Sawczak's counsel asked a defense radiologist if he had ever served in a case involving claims that a radiologist fell below the standard of care in interpreting intraoperative cholangiograms during a laparoscopic gall bladder procedure. (Tr. 1998). The expert answered no. It was not fair comment for Alarcon's counsel to then proclaim that the reason for the expert's negative response was because "[t]here are no cases." (Tr. 3459-60). Alarcon's argument (at 32) that his counsel was "not referring to other lawsuits nor testifying as to his opinion of the existence of such lawsuits" is belied by the very comment in question.

Alarcon argues that the statement about "this Broward County jury" was "simply a comment on the interpretation that would be drawn by those that examined the verdict." If this were counsel's true intent, such a comment was indefensible, as it was an implied threat to the jury of community condemnation. See Norman v. Gloria Farms, Inc., 668 So.2d 1016, 1022 (Fla. 4th DCA 1996). Alarcon concedes that statements suggesting that an attorney likes the jury are inappropriate. His counsel's statements attempting to curry favor with the jury were improper.

Defendants defend the comment by Alarcon's counsel that plaintiff's theory was "preposterous" and "God help any physician who is sued" as "essentially" a criticism of Sawczak's causation theory. Defendants miss the point. They were free to criticize Plaintiff's causation theory. But they were not permitted to suggest to the jury that notions of community law should prevail over the facts of this case. See Norman, 668 So.2d at 1021 (condemning "all impassioned and prejudicial pleas intended to evoke a sense of community law").

Alarcon attempts to justify his counsel's litany of improper personal attacks on

the credibility of witnesses and the merits of the case by making the sweeping argument that such statements were "within the latitude afforded closing argument." A glimpse of the comments quoted in the initial brief demonstrate this is not true. Moreover, counsel referred to matters outside the record ("a lot of what he's [Goldenberg] saying doesn't make sense to me or to anyone else that's looked at this case"). Even after the trial court sustained Sawczak's objection to defense counsel's personal attacks, counsel continued: "It's frustrating and it's annoying. And it makes one angry to sit and listen for days and days about non-issues.... The reason is because the merits of the case are so weak, opposing counsel feels it's necessary to spend time on non-issues ...." Initial Br. at 27. If anything, counsel's attacks became even more strident after the objection was sustained, thus making it very unlikely that additional objection or rebuke from the trial court would have in any way changed the tenor of the defense arguments.

Defendants also make the novel argument that Alarcon's counsel can cure all errors by telling the jury that he cannot make a particular argument and then proceeding to do so. Such a contention, if accepted, could lead to the elimination of all error because counsel could say anything after providing the jury an appropriate warning or disclaimer.

Defendants make no attempt to justify the comments by Alarcon's counsel concerning Mr. Forman. They were blatantly improper. After an objection to his belittling of Mr. Forman, counsel proceeded to call Mr. Forman a "hired gun." The sustained attack on Mr. Forman ("Who's he kidding ... He's clueless.... The feisty little guy with the beard.... Or is he a hired gun ....") could not be magically erased by

an objection and comment by the court to disregard the statement. While it is true that Mr. Forman's testimony related to damages, Sawczak was still prejudiced since these comments tended to denigrate the credibility of Plaintiff's case on the truly disputed issue of the radiologist's liability.

The statement by Alarcon's counsel that the trial court had "good reason" not to direct a verdict against Alarcon was an improper comment on a court's ruling. It implied that the trial court agreed that Alarcon was not liable. Informing the jury that a directed verdict had been entered against Goldenberg is not the same as commenting to the jury on the trial court's not directing a verdict against Alarcon. The comment was improper and prejudicial. Had Sawczak objected to this sinister comment, she would only have emphasized its importance to the jury.

The statements by the radiology group's counsel were not mere references to the fact that Sawczak and Goldenberg both argued that the radiologist was responsible. Counsel stated "you notice there's a lot going on here between the two of them," suggesting an improper joint effort against the radiologist. Such statements reinforced and echoed the comments by Alarcon's counsel of collusion.

Defendant was free to challenge the plaintiff's damage claim and suggest his own view as to the proper amount of damages. However, counsel may not comment on what "plaintiff's attorneys" do or suggest that plaintiffs would be "delighted" to receive twenty percent of what they were asking for. Such comments improperly suggest matters outside the record and castigate members of the profession. Sawczak's objection to these comments was overruled. The comments were prejudicial because they tended to attack the credibility of Sawczak's counsel, which

put Sawczak at a disadvantage to the defendants on the key issue in dispute: the radiologist's liability.[3] Finally, unless the radiologist group's counsel was clairvoyant, his 20% statement can not be considered fair comment on an assertion that was "later" made in closing by the hospital's attorney.

Defendants dispute that the comments by the radiology group's counsel were intended to suggest that Sawczak's counsel, as contrasted to him, was making things up. Yet, immediately after stating that he was "not making this up," defense counsel stated that "Mr. Fiore can stand up here and make up fifteen different scenarios." The message to the jury: Plaintiff is making things up; Defense counsel is not. Likewise, there is no defense for statements such as "B.S.," "bogus," "bass-akward," all of which were assaults on the credibility of Sawczak's counsel.

The hospital's counsel made at least 10 references to what he thought or believed, not five as stated by Alarcon (at 41). More importantly, his statements were not simply figures of speech. He was vouching for the credibility of one side or the other: e.g., "I didn't feel like the radiologist did anything wrong either;" "I think it's a good hospital. I think it did nothing wrong in this case." The prejudicial error was that defense counsel converted closing argument into a credibility contest of the attorneys. Thus, while counsel for Alarcon and the radiology group attacked the credibility and integrity of Plaintiff's counsel, the hospital's counsel sought to act as though he was imparting his neutral wisdom to the jury.

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[3] While it is true that the comment in Hartford Acc. & Indem. Co. v. Ocha, 472 So.2d 1338 (Fla. 4th DCA 1985), was not enough alone to warrant a new trial, in this case there were many other improper comments.

II. THE TRIAL COURT ERRED IN REFUSING TO LIMIT CUMULATIVE EXPERT TESTIMONY

A. The Cumulative Radiology Experts

Defendants argue that since Plaintiff knew that her claims against the radiology group were vicarious, she should have sought to modify the trial court's original ruling limiting "each attorney" to one expert witness per specialty. Yet, Plaintiff need not have sought any additional relief until the experts had been deposed when it become clear that their testimony was cumulative. Accordingly, Sawczak moved, one month before trial, to strike the cumulative experts. (R. 805-13) There was nothing improper about this procedure.

Contrary to the assertions of the hospital (at 31-32), the trial court made no "deliberate" determination. Instead, the court simply reasoned that "what is good for the goose is good for the gander" (R. 1379) and refused to consider the substance of the motion to strike the cumulative experts. That was an arbitrary ruling, not a proper exercise of discretion.

B. The Cumulative Surgical Experts

As noted above, the trial court refused to modify its pretrial order as it related to cumulative expert testimony as requested by Sawczak on the basis that it was to late to do so at that time (which was before trial) and the order was clear. Nevertheless, in the middle of trial after finding that Sawczak would suffer prejudice, the trial court allowed the radiology group to call a second backup surgical expert without showing good cause as required by the same order. The trial court's ruling was based on its justification that Sawczak could read "whatever" she wanted from Dr. Corbitt's

deposition. (Tr. 1614). In fact, Sawczak was permitted to read only one page of testimony from that deposition. (Tr. 2368-70) The trial court's actions were unfairly prejudicial and arbitrary.

III. THE TRIAL COURT ERRED IN REFUSING TO PROPERLY INSTRUCT THE JURY

The hospital incorrectly asserts (at 35) that Sawczak did not timely submit the proposed instruction on the exception to the independent contractor defense. Sawczak originally proposed the instruction at the charge conference taken verbatim from Irving v. Doctors Hosp. of Lake Worth, Inc., 415 So.2d 55 (Fla. 4th DCA), rev. denied, 422 So.2d 842 (Fla. 1982).[4] The trial court declined to give this instruction on the grounds that it was confusing. (Tr. 3181-84; 3205-12) Plaintiff's counsel objected and advised that he would revise the instruction. (Tr. 3212) Following closing argument, Sawczak reiterated her request for the instruction and presented a modified instruction before the jury was charged (Tr. 3540-42). Thus, there is no basis to argue that this instruction was not timely submitted. None of the parties submitted proposed instructions before the close of the evidence. The hospital was not prejudiced since it was on notice of the substance of the instruction before closing argument and knew counsel would be redrafting it. Moreover, the trial court abused its discretion in determining that the original jury instruction was confusing.

The hospital's argument is also off the mark because Sawczak has not argued

[4] Contrary to the hospital's assertion, the proposed instructions are found in the record at pages 46-47 of Sawczak's motion for new trial. (R.1167) No party has disputed that the quoted instructions accurately reflect the instructions proposed at the charge conference. The issue is preserved for appellate review.

that the non-delegable duty jury instruction applied to hold the hospital responsible for Goldenberg's negligence. Rather, that instruction related to the hospital's responsibility for the acts of the radiologist. (See Tr. 3183) The hospital has confused the distinct arguments relating to the two instructions at issue. Sawczak's proposed instruction correctly stated the exception to the general rule that a principal is not liable for the negligence of an independent contractor. The trial court therefore erred in failing to so charge the jury.

As to the proposed detrimental reliance instruction, the hospital incorrectly argues (at 35) that is improperly sought "to place the weight of the court behind one party's interpretation of the evidence." The instruction simply defined elements that the jury was called to determine. The hospital concedes (at 39) that one of the reasons Sawczak chose their hospital was its reputation in the community. Plaintiff was prejudiced because the hospital's counsel was able to argue successfully that the elements of Sawczak's apparent agency claim were not met, yet the Plaintiff was unable to counter with the relevant law. (Tr. 3516-18) Finally, the hospital ignores the authority which holds that the apparent agency theory of vicarious liability is not limited to the emergency room setting. Cuker v. Hillsborough County Hosp. Auth., 605 So.2d 998 (Fla. 2d DCA 1992).

CERTIFICATE OF SERVICE

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

Esther E. Galicia, Esq.
George, Hartz, Lundeen, Flagg & Fulmer, P.A.
Attorneys for Defendant Alan Alarcon
3rd Floor, Justice Building East
534 South Andrews Avenue
Ft. Lauderdale, Florida 33301

Shelley Leinicke, Esq.
Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Lane, P.A.
Attorneys for Defendants J. Sternberg and S. Schulman
One E. Broward Boulevard, 5th Floor
P.O. Box 14460
Ft. Lauderdale, Florida 33302

Clark J. Cochran, Jr., Esq.
Billing, Cochran, Heath, Lyles & Maura, P.A.
Appellate Attorney for Defendant Humana, Inc.
888 S.E. Third Avenue, Suite 301
Ft. Lauderdale, Florida 33316

Robert J. Fiore, Esq.
ROBERT J. FIORE, P.A.
Counsel for Appellant
Courthouse Tower, Suite 401
44 West Flagler Street
Miami, Florida 33130
Telephone: (305) 374-8919
Facsimile: (305) 358-4019

RUSSOMANNO & BORRELLO, P.A.
Counsel for Appellant
Museum Tower, Suite 2101
150 West Flagler Street
Miami, Florida 33130
Telephone: (305) 373-2101
Facsimile: (305) 373-2103

By:_____
Herman J. Russomanno (Fla. Bar No.240346)

By:_____
Robert J. Borrello (Fla. Bar No. 764485)