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SUPREME COURT OF FLORIDA

CASE NO.: SC15-2294

SIMON DOCKSWELL and
SANDRA DOCKSWELL,

Petitioners,

vs.

BETHESDA MEMORIAL HOSPITAL,
INC.,

Respondent.
_______________________________________/

On Discretionary Review from the Fourth District Court of Appeal Case No. 4D13-2936

PETITIONERS' BRIEF ON THE MERITS

BILLBROUGH & MARKS, P.A.
By: Geoffrey B. Marks
100 Almeria Avenue, Suite 320
Coral Gables, Florida 33134
Email: gmarks@attyfla.com
Tel: (305) 442-2701
Fax: (305) 442-2801

Counsel for Petitioners

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INTRODUCTION

The petitioners seek review of the Fourth District Court of Appeal's decision affirming a final judgment following a verdict in favor of the defendant in a medical negligence action. *Dockswell v. Bethesda Memorial Hosp*., 177 So.3d 270 (Fla. 4th DCA 2015). The final judgment was entered by the Honorable Meenu Sasser of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

We contend that the Fourth District's holding that a plaintiff is not entitled to a standard jury instruction that negligence is presumed, and the defendant has the burden of proving that it was not negligent in a medical malpractice action based on an unintended foreign object, directly and expressly conflicts with Florida Standard Jury Instruction 402.4c approved by this Court in *In re Standard Jury Instructions in Civil Cases - Report No. 09-01*, 35 So.3d 666 (Fla. 2010), and the Third District Court of Appeal's decision in *Kenyon v. Miller*, 756 So.2d 133 (Fla. 3d DCA 2000). The Fourth District has erased the statutorily codified presumption of a defendant's negligence in section 766.102(3), and the standard jury instruction.

The petitioners, Simon Dockswell and Sandra Dockswell, were the plaintiffs in the trial court. In this brief we refer to them as petitioners, plaintiffs, or by name.

The respondent, Bethesda Memorial Hospital, Inc., was the defendant in the trial court. In this brief we refer to it as respondent or by name.

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References to the record on appeal are designated by R and the volume number: and the page number, e.g. (R1:1). References to the supplemental record on appeal, which contains the trial transcript, are designated by SR and the volume number: and the transcript page number, e.g. (SR1:1).

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STATEMENT OF THE CASE AND FACTS

A. Pretrial

Simon Dockswell was admitted for colon resection surgery at Bethesda Memorial Hospital on April 29, 2011. A 10-mm Jackson Pratt ("JP") external drainage tube was placed in his body at the time of surgery. (SR11:475-76). A nurse removed the tube but left a 4.25 inch piece of the tube in Dockswell. (SR10:321-22).

Dockswell, and his wife, sued Bethesda Memorial Hospital for medical negligence. In their complaint the plaintiffs allege that the Hospital departed from the standard of care when a nurse negligently and carelessly failed to properly remove the JP tube from Mr. Dockswell's body. The plaintiffs further alleged that the Hospital was negligent by failing to realize that a significant piece of this tube remained in Mr. Dockswell's body. (R1:1-4).

B. Trial Testimony

Dr. George Mueller performed the initial colon surgery on Mr. Dockswell and placed a JP drain in his patient to evacuate fluid postoperatively. (SR11:475-476). Mr. Dockswell was on severe pain medication the day after surgery. (SR12:697). Mr. Dockswell had a general recollection of a nurse coming into his room and mentioning the need to remove a tube or drain. (SR12:696-697, 718-724). Mr. Dockswell later testified that he could not recall whether he asked the nurse if the

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process would hurt, but remembered his wife saying that a similar process had hurt her. (SR12:718). Mr. Dockswell could not describe what the nurse looked like or the time of day when this occurred. (SR12:697). Mr. Dockswell also testified that he did not see the nurse pull out the tube or drain. (SR13:697). Mr. Dockswell explained that he was "groggy" when the drain was removed the day after surgery. (SR12:718).

Mrs. Dockswell recalled that a nurse came into her husband's room the day after the surgery and the nurse mentioned that she was going to remove a tube. (SR12:651). According to Mrs. Dockswell, Nurse Porges looked like the nurse who was in her husband's room the day after surgery to remove the tube. (SR12:653).

While Mrs. Dockswell was present in the room, she was not near the bedside, and instead had to move to the other side of the room so as not to be in the nurse's way. (SR12:651-52). She saw and heard the nurse pull down the covers over her husband and mention that the process might hurt, but then the nurse easily and quickly pulled out the tube with a fast movement. (SR12:652). Despite her description of the removal and her testimony that she was watching the removal of the drain, Mrs. Dockswell admitted that she was not able to see the tube, nor was she able to see the tube actually leave her husband's body. (SR12:652, 667). She did not examine the JP drain and she would not have known what she was looking at if she saw this drain. (SR12:652). Mrs. Dockswell testified that the nurse who removed the

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tube did not look at it, and instead wrapped everything up and left the room. (SR12:653). The nurse made no comment about the tube that was removed from Dockswell. (SR12:653).

Nurse Porges did not remember Dockswell, nor did she have an independent recollection of removing the JP drain tube on April 30, 2011. (SR10:291). Based on her review of the medical records, Nurse Porges testified that she was the one who removed the JP drain from Dockswell. (SR10:321-22, 328). When asked how a portion of the JP drain was left in Dockswell, Nurse Porges testified "I don't know." (SR 10:323). The jury was read the corporate defendant's interrogatory answers stating that "Katie Porges has no recollection of removing the JP tube. Dr. Mueller says he did not order it to be removed on April 30. It is therefore impossible to say anything with certainty about the removal." (SR9:256).

Nurse Porges agreed that she is supposed to look at the drain to ensure that it was entirely removed. (SR10:320). She conceded that a portion of a JP drain is not supposed to remain in a patient, and that it would be unacceptable to leave a portion of a JP drain in a patient if she were aware of the same. (SR10:325).

Dr. Stacey Shinder, first began treating Dockswell in April 2006. (SR11:596). At a July 2011 visit, Dockswell specifically complained about right lower quadrant discomfort, and Dr. Shinder advised Dockswell to get reevaluated by Dr. Mueller if

the symptoms persisted. (SR12:605, 633).

Mr. Dockswell saw Dr. Mueller on August 31, 2011, complaining of right a lower quadrant abdominal pain, and the doctor ordered a CT scan. (SR11:489). The CT scan revealed, among things, a fragment of the drain catheter. Dockswell returned for the CT scan results on September 2, 2011, and was told about the JP tube fragment in his body and the need to remove it immediately. (SR11:492-494). Dockswell had surgery the next day. (SR11:494). Based on the urgency to remove the JP tube fragment, Dockswell was not weaned off of his blood thinner medication, which caused him to suffer an abdominal wall bleed and that required a longer hospitalization. (SR11:497-500). In his opinion as to how or why the foreign body was left in Dockswell, Dr. Mueller testified that "the simplest answer was that the tube was fractured when an attempt was made to remove the drain." (SR11:509). It was his opinion that when the nurse attempted to remove the drain, it fractured and a piece was left in Dockswell. (SR11:509).

The plaintiffs' expert witness, Dr. Robert W. Bailey, is a general surgeon who handles mostly abdominal cases. (SR10:381-82). Dr. Bailey examined the CT scan ordered when Mr. Dockswell returned to Dr. Mueller with complaints of right lower quadrant pain that showed that a fragment of the drain previously placed in Dockswell still remained in him. (SR10:388-89). Dr. Bailey opined that Dr. Mueller

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had to remove the fragment because it "was a foreign body that shouldn't be there, and it had been there for quite some time." (SR10:392-93). The intra-operative photograph taken during Dockswell's second surgery at Bethesda Memorial Hospital revealed part of the JP drain fragment, including where the drain broke off and the end of the drain. (SR10:393-94).

Dr. Bailey defined a foreign body as "anything that is not normally or could not normally be present within a patient's abdomen. So it's either a suture, or it could be a drain. It could be a sponge. It could be a piece of mesh used to repair a hernia. All those are generally termed foreign bodies." (SR10:397). A JP drain is a synthetic material that should normally stay in a patient with a colon resection for two to three days. (SR10:397). Dr. Bailey reiterated that foreign bodies are not meant to remain in the body for more than a few days and the standard of care requires a timely removal. (SR10:406).

He also opined that there was a breach in the standard of care as to the technique used to remove the JP drain from Mr. Dockswell, since there was some indication that this drain was removed with a rapid, fast pull instead of a slow and gentle process. (SR10:401). Dr. Bailey also believed that the defendant deviated from the standard of care by failing to document the removal of the JP drain, as the failure of the nurse removing the drain to inspect and verify that a piece was missing.

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(SR11:401-03).

Dr. Lawrence R. Sands is a colon and rectal surgeon and he testified for the defense. (SR12:750). Dr. Sands did not contest the fact that a piece of a JP drain had been left in Dockswell, nor did he contend that this piece was supposed to remain in the patient. Dr. Sands admitted that the right lower quadrant pain about which Dockswell complained in August of 2011 probably resulted from the JP fragment in his body. (SR12:800-803). In Dr. Sands' opinion, however, Dockswell did not sustain any long-term injury as a result of the retained JP drain fragment. (SR12:764).

Nurse Jenny Beerman gave expert witness testimony for the defense in this case. (SR13:859). She testified that when removing a device, one generally should make sure it all comes out so this can be recorded, "[b]ut you don't know what you don't know." (SR13:917). Nurse Beerman explained that when a nurse, including herself, removes an "uneventful" tube, she would not look at it to see if everything is intact. (SR13:917-19). Nevertheless, she admitted, "[s]hould I [look] at everything? Probably. But, you know, when it's a non-event and it comes out gently, I don't." (SR13:919).

C. The charge conference, jury instructions and verdict

The charge conference occurred during the trial on May 23, 2013. (SR13:954).

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Dockswell sought a standard jury instruction based on the presumption of negligence of a foreign body found in Florida Standard Jury Instruction 402.4c. The plaintiff requested that the jury be instructed: "Negligence is failure to use reasonable care. The presence of a JP drainage tube fragment in Simon Docskwell's body establishes negligence unless Defendants prove by the greater weight of the evidence that they were not negligent." (R3:431; SR13:960).

The plaintiffs' proposed verdict form asked the jury to decide negligence based on the shifted burden: "Did the Defendant, Bethesda Memorial Hospital, prove by the greater weight of the evidence that they were not negligent related to the JP drainage tube fragment which was a legal cause of loss, injury or damage to Simon Dockswell?" (R3:441).

In opposition the defendant argued that the plaintiffs' request for a shifted burden instruction is a codification of the res ipsa loquitur instruction in the medical malpractice context, which had been ruled upon by the court prior to the trial.[1]

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[1] Prior to trial the plaintiffs moved for summary judgment, or alternatively, requested a res ipsa loquitur jury instruction. (R1:104-200;R2:201-255). In support of their request for a res ipsa loquitur instruction, the plaintiffs argued that: despite the defendant's alleged lack of knowledge as to who removed the JP drainage tube, this tube would have been removed by a healthcare provider under the defendant's exclusive control; the presence of a foreign body that remained uninspected, undetected and unreported for four-and-one-half months was prima facie evidence of negligence under section 766.102(3)(b), Fla. Stat.; and a foreign body, such as a fragment of a JP drainage tube, left in a patient's body ordinarily does not occur

(SR13:962). The defendant further argued that the statute upon which the foreign body standard jury instruction is based applies in instances where a plaintiff is unable to provide any information or expert testimony to support their claim. However, according to the defendant, the plaintiffs had a medical expert testify about the breaking of the JP drainage tube, as well as Mrs. Dockswell's testimony about what she observed in the removal of the tube. The defendant also argued that the plaintiffs had alleged that the nurse negligently removed the tube, which is different than a foreign body situation, and that the statute regarding foreign bodies applies only when there is no claim of negligence other than the foreign body left in the patient. (SR13:963-68).

The plaintiffs countered that, despite the defendants repeated reference to res ipsa loquitur, res ipsa is a rule of evidence and the statute pertaining to foreign bodies is not intended to be res ipsa. The plaintiffs argued that when the legislature enacted the statute regarding foreign bodies, it meant that unintended pieces of medical equipment were not to remain in people, and Mr. Dockswell fell squarely into the class of persons this statute seeks to protect. (SR13:968-69).

The trial court's analysis for denying the plaintiffs' request for a standard

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absent negligence. (R1:110, 113). The trial court denied summary judgment, and also denied the request for a res ipsa loquitur jury instruction. (R2:365).

instruction, and the proper form of the verdict, follows:

> For the record, I read the Kenyon versus Miller case.
>
> I'm going to deny Plaintiff's request for the Instruction 402.4, Subsection c.
>
> I don't believe the facts of this particular case fall within the requested instruction. Here we don't -- we have plaintiff alleging we have direct evidence of negligence on the nurse. If this is not a sponge left, where we don't know who would be responsible for it.
>
> And also the language of the statute itself uses the word "discovery." And I focused also on the word "discovery" in the statute. Discovery means you wouldn't have direct evidence of negligence. Discovery means it would have been discovered after the fact, after a certain period of time. So you wouldn't know who was responsible for the negligence. And the statute uses the word "discovery." Here we know it was the nurse and that's whose negligence we are alleging.

(SR13:975).

To make matters worse for the plaintiffs, the trial court then turned to the defendant's request for a special nonstandard jury instruction. The defendant requested that the jury be instructed on the language found in the first part of section 766.102(3). The trial court granted the defendant's request for a special instruction based on the first part of section 766.102(3), that the existence of an injury does not create a presumption of negligence against a healthcare provider. (SR13:976-77; SR14:978, 982). Based on this ruling, the trial court instructed the jury that "The existence of a medical injury does not create any inference or presumption of

negligence against a healthcare provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the healthcare provider." (SR14:1069-1070).

On May 23, 2013, the jury returned a defense verdict finding that there was no negligence on the part of Bethesda Memorial Hospital that was the legal cause of loss, injury or damage to Simon Dockswell. (R2:371-72; SR15:1232). Pursuant to the jury's verdict, the trial court entered a final judgment in favor of the defendant. (R3:414).

D. Appeal to the Fourth District

The Dockswells sought review in the Fourth District Court of Appeal. On a reissued decision, the Fourth District affirmed the judgment in favor of the Hospital with a split opinion. *Dockswell*, 177 So.3d at 270. The majority opinion held that the standard instruction was not warranted because the res ipsa loquitur factors of the plaintiff having some knowledge of what occurred and being able to present "direct evidence of negligence" obviated the need for the shifted burden negligence instruction. *Id.* at 273. The majority opinion also held that the foreign body instruction was unnecessary because it "would have improperly permitted the jury to disregard the conflicting testimony of the experts." *Id.*

The dissenting opinion pointed out that "[i]n recognizing that the legislature

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codified an important exception relating to foreign bodies, our supreme court adopted Florida Standard Jury Instruction (Civil) 402.4c, which the appellant requested." *Id.* at 275. The dissent determined that "[i]f a set of facts entitles one to a legal determination that *prima facie* evidence of negligence is established, additional affirmative evidence of negligence does not *erase* the *prima facie* determination." *Id.* at 277 (emphasis in original).

The Dockswells sought review in this Court.

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SUMMARY OF THE ARGUMENT

The trial court's failure to provide the jury with the foreign body instruction prejudiced Dockswell because it denied him the presumption of the defendant's negligence and the shifted burden of proof to the defendant. Despite the express wording of the medical malpractice statute and jury instruction, the jury was not instructed that it was incumbent on the defendant to rebut the established negligence and prove that they were not negligent. In fact, the opposite occurred in this case. The jury was instructed that there was no inference of negligence and that the plaintiff was required to prove that the defendant was negligent.

The decision of the Fourth District charts a new path in Florida case law in medical malpractice cases involving foreign bodies. The Fourth District's decision amounts to nothing less than a rewrite of the medical malpractice statute and the standard instruction. The Fourth District's decision inserts into the statute and instruction the previously eliminated "how" and "why" the foreign body got into the patient and thereby eliminates the presumption of negligence and shifted burden of proof.

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ARGUMENT

At this point the body of law, be it statutes, jury instructions, cases and even commentators, on medical negligence involving a health care professional that leaves an unintended foreign object in a patient, seemed to be sailing in the same direction and toward the same horizon – until the Fourth District's decision in *Dockswell.* To understand how the Fourth District's decision heads in such a completely different direction and moves so far away from the fleet, we review the statutes, jury instructions, and case law on medical negligence actions involving foreign bodies and those not involving foreign bodies. This Court's review should result in reversal of the decision of the Fourth District.

A. How did we get the medical malpractice statute's specific reference to foreign bodies and the standard jury instruction?

In Florida, the intersection between medical malpractice foreign object claims and burdens of proof occurred in *Smith v. Zeagler*, 116 Fla. 628, 157 So. 328, 329 (1934), where this Court said: "The authorities are legion to the effect that it is negligence per se for a surgeon to leave a sponge in an abdominal incision made in his patient in the course of his performance of a surgical operation upon such patient." *Id.* at 329. The *Zeagler* rule held that "[t]he burden of showing due care is upon a surgeon who leaves a sponge inclosed in a wound after performance of an

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operation" and that leaving a sponge inside a patient during the surgical process was negligence per se. *Id.*

The legislature crossed the intersection on July 1, 1976, when it enacted section 768.45(4), Florida Statutes (1977). Ch. 76-260, §12, at 692-93, Laws of Fla. Section 768.45(4) stated:

> The existence of a medical injury shall not create any inference of presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. . . . *Provided, however, the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider.*

§768.45(4), Fla. Stat. (1977) (emphasis supplied). By adopting section 768.45(4), the legislature expressly rejected the *Zeagler* rule, or negligence per se, "and adopted a rule which makes it prima facie evidence of negligence on the part of a health care provider to leave a foreign body in a patient." Thomas D. Sawaya, 6 Fla.Prac., *Personal Injury & Wrongful Death Actions*, §12:18 (2015-2016 ed); see *Beaches Hospital v. Lee*, 384 So.2d 234, 236 n.5 (Fla. 1st DCA 1980) (recognizing that if the medical malpractice action in that case had accrued after July 1, 1976, §768.45 would control and evidence of an unintended foreign body establishes prima facie evidence of negligence); *Dockswell*, 177 So.3d at 276 (Conner, J. dissenting).

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In 2010, after minor changes and renumbering, the foreign body statute came into its current form.[2] Section 766.102(3)(b), Florida Statutes (2011), states in relevant part:

> The existence of a medical injury does not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. . . . *However, the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider.*

§766.102(3)(b), Fla. Stat. (2011) (emphasis supplied).

The same year that section 766.102(3)(b) came into its current form, this Court adopted a standard jury instruction for medical negligence cases, based on section 766.102(3), Florida Statutes, setting forth the presumption of negligence and requirement that the defendant must prove that it was not negligent. *In re Standard Jury Instructions in Civil Cases - Report No. 09-01*, 35 So.3d 666 (Fla. 2010). Florida Standard Jury Instruction 402.4c states:

> c. Foreign bodies: [Negligence is the failure to use reasonable care.] The presence of (name of foreign body) in patient's body establishes

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[2] See Ch. 77-64, §8, at 111-12, Laws of Fla.; Ch. 85-175, §10, at 1194-196 Laws of Fla.; Ch. 88-1, §78, at 184-85 Laws of Fla.; Ch. 2003-416, §48, at 58-62 Laws of Fla.; Ch. 2011-233, §10, at 8-10 Laws of Fla. There have been no changes to section 766.102(3)(b) since 2011.

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> negligence unless (defendant(s)) prove(s) by the greater weight that [he] [she] [it] was not negligent.

Fla.Std.Jury Instr. (Civ.) 402.4c. "This instruction is derived from F.S. 766.102(3)." *Id* at n.1. "Before this instruction is given, the court must make a finding that the foreign body is one that meets the statutory definition. See *Kenyon v. Miller*, 756 So.2d 133 (Fla. 3d DCA 2000)." *Id.* at n.2. What we have is a statute that gave rise to a standard jury instruction, and there is nothing novel, complex or unique about the process.

B. <u>Are the foreign body statute and the jury instruction ambiguous or unclear?</u>

Of course not. In clear and unambiguous language, with plain and obvious meaning, the Florida Legislature has determined "that if a medical procedure has the unintended result of leaving a foreign body in the patient's body after the procedure is completed, that fact alone is *prima facie evidence of negligence on the part of the health care provider.*" *Dockswell*, 177 So.3d at 275 (Conner, J. dissenting) (emphasis in original). In equally clear and unambiguous language, the jury instruction states the statutory law upon which the jury should be instructed in a foreign body case.

"[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning . . . the statute must be given its plain and obvious meaning." *Velez v. Miami-Dade County Police Dep't*, 934 So.2d 1162, 1164 (Fla.

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2006) (citation and quotation omitted). Furthermore, a court is "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implication." *Id.* at 1164-65 (citation and quotation omitted). These rules of statutory construction were applied by the Court when it adopted the standard instruction on foreign bodies. Fla.Std.Jury Instr. (Civ.) 402.4c n.1 ("This instruction is derived from F.S. 766.102(3).").

When the standard instructions were revamped and revised in 2010, a new section was created devoted exclusively to medical negligence. Previously, the standard professional negligence instructions for medical malpractice were extremely limited. See Fla.Std.Jury Instr. (Civ.) 4.2a (negligence of a health care provider); Fla. Std.Jury Instr. (Civ.) 4.2b (treatment without informed consent). Furthermore, there was no professional negligence instruction for res ipsa. The res ipsa instruction was separately stated. See Fla.Std.Jury Instr. (Civ.) 4.6 (res ipsa loquitur).

As we know, in 2010 the jury instructions were not just reorganized but many new substantive instructions were added. General negligence was identified in section 401, and the res ipsa instruction was still couched with the general negligence instructions. Fla.Std.Jury Instr. (Civ.) 401.7.

The 2010 change in the instructions created a separate section for professional negligence, and a separate subsection devoted to medical negligence. Fla.Std.Jury

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Instr. (Civ.) 402.4. Thus, the medical negligence jury instructions received the benefit of both reorganization and rewriting.

Within the standard instructions of 402.4 are two instructions that prove our point. First, obviously, is the newly created instruction on foreign bodies. Fla.Std. Jury Instr. (Civ.) 402.4c. As we said above, the instruction is based on section 766.102(3). *Id.* at n.1. In the opinion adopting the revised jury instructions, this Court wrote: "Instruction 402.4c substitutes plain English for the language in former instruction 4.2 pertaining to a claim for medical negligence, based upon the presence of a foreign object in a patient's body." *In re Standard Jury Instructions*, 35 So.3d at 670.

At the same time standard instruction 402.4c on foreign bodies was created, another new instruction was created for medical negligence actions. The instruction is new in form, but not in substance. Instruction 402.4e is the medical negligence res ipsa instruction. It states: "[Negligence is the failure to use reasonable care.] If you find that ordinarily the [incident] [injury] would not have happened without negligence, and that the (describe the item) causing the injury was in the exclusive control of (defendant) at the time it caused the injury, you may infer that (defendant) was negligent unless, taking into consideration all of the evidence in the case, you find that the (describe event) was not due to any negligence on the part of

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(defendant)." Fla.Std.Jury Instr. (Civ.) 402.4e.

Our point of this detailed analysis is this. When the Fourth District held in this foreign body case that "[i]n light of the evidence presented, including the conflicting expert testimony, the foreign body instruction was neither necessary to enable the jury to resolve the issues in the case nor supported by the facts of the case", *Dockswell*, 177 So.3d at 274, that holding directly contradicts, rewrites, and effectively overrules, section 766.102(3)(b), and the jury instructions that were created in 2010 based on that law.

In a foreign body case such as this one, the instruction is mandatory based on the clear language of the statute and the standard instruction. The *Dockswell* decision inserts the common law components of res ipsa into the express statutory provision and the jury instruction, where the res ipsa doctrine was specifically carved out of the instruction on foreign bodies. There is a separate res ipsa instruction for medical negligence that does not apply to a foreign body case. To reach any other conclusion, as the Fourth District seemingly has, means that the jury instruction rewrite of 2010 was done without any thought, analysis or application of critical thinking and logic, and clearly, given the significant revisions to the jury instructions, that alternative conclusion is simply not reachable or supportable. The holding of *Dockswell* constitutes an impermissible rewriting of the statue and abrogates the legislature's

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authority. *Bennett v. St. Vincent Med. Ctr.*, 71 So.3d 828, 837-38 (Fla. 2011) (holding that insertion by a court of additional language into a statute would abrogate legislative authority).

C. The plaintiff was entitled to an instruction on his theory of the case and for the jury to make its determination on the proper burdens of proof.

The plaintiff was entitled to the foreign body jury instruction in this case, and was equally entitled not to have the jury instructed with the defendant's nonstandard instruction. "Failure to give a requested jury instruction constitutes reversible error where: (1) the requested instruction accurately states the law, (2) the facts in the case support the giving of the instruction, and (3) the instruction was necessary to allow the jury to properly resolve the issues in the case." *Florio v. Eng*, 879 So. 2d 678, 680 (Fla. 4th DCA 2004). The requested foreign body jury instruction accurately states the law. While the Fourth District found that the facts did not support the instruction, we have demonstrated the analytical error in that conclusion through statutory review and the jury instruction rewrite analysis infra. The facts in the case supported the giving of this instruction where a 4.25 inch piece of broken drainage tube left in Mr. Dockswell's body is unquestionably a foreign body. Finally, the instruction was necessary in order for the jury to properly resolve the issues in the case. The statute and instruction tell us these are the issues in this case.

The very same statute creating the text of the standard foreign body instruction that was not given was, however, used by the trial court to give a nonstandard jury instruction. In this case, the trial court compounded the error of failing to give standard jury instruction 402.4c by giving the defendant's requested special instruction that "[t]he existence of a medical injury does not create any inference or presumption of negligence against a healthcare provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the healthcare provider." (SR14:1069-1070).

In *Villar v. Pereiras*, 588 So.2d 678 (Fla. 3d DCA 1991), the Third District reversed a final judgment in favor of a defendant doctor in a medical malpractice case where the trial court gave a nearly identical jury instruction to the one in this case. The plaintiff brought a medical malpractice action against his doctor and the main issue at trial was whether the doctor "followed the standard medical procedures for applying pressure" to an arterial puncture in an arteriogram. *Id.* at 679.

During the charge conference in *Villar*, the defense proposed the following jury instruction:

> The existence of a medical injury should not create an inference or presumption against a health care provider. Plaintiff must maintain the burden of proving that an injury or loss was proximately caused by a breach of acceptable standard of care by the physician.

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The plaintiff objected because the instruction was argumentative, confusing, and unnecessary, but the trial court gave the jury instruction as requested. The jury returned a verdict for the defendant. *Id.*

In reversing, the Third District referred to comment 1 of the general negligence instruction. "Comment 1 to the Standard Jury Instruction 4.1 states that "'[t]he committee recommends that no charge be given to the effect that "negligence may not be inferred from the mere happening of an accident alone"' because "[s]uch a charge is argumentative and negative."'"" *Id.* at 679.[3] The Third District commented that "[t]he requested instruction [was] derived, in part, from Section 766.102(4), Florida Statutes (1989), which is a codification of the res ipsa loquitur doctrine. The present action, however, was not based on this doctrine." *Id.* at 679 n.1. *Villar* stands for the proposition that even in a non-foreign body medical negligence case, the language from the first part of section 766.103 should not be used as a jury instruction. See *Webb v. Priest*, 413 So.2d 43, 46-47 (Fla. 3d DCA 1982)(error for trial court to instruct jury that "[p]hysicians are allowed a wide range in the exercise of their judgment and discretion. To hold one liable, it must be shown that the course which he pursued was clearly against [course] recognized as correct by his profession"

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[3] The admonishing language still exists in the general negligence standard jury instruction. See Fla.Std.Jury Instr. (Civ.) 401.4 n.1.

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because it was confusing and suggested conflicting standards of proof and confusing as to the duty of care owed by the physician); see Fla.R.Civ.P. 1.470(b) (a trial judge should use Standard Jury Instructions and when a non standard instruction is used a trial judge should state on the record or in a separate order the legal basis for varying from the Standard Jury Instruction).

In this case, not only did the trial court refuse to give the standard jury instruction on foreign body medical negligence, it gave an instruction that expressly contradicted the approved standard instructions and a decision of the Third District. *Villar*, supra; Fla.Std.Jury Instr. (Civ.) 401.4 n.1; Fla.Std.Jury Inst. (Civ.) 402.4c. The defendant's special jury instruction merely cherry-picked favorable language from the statute, and prevented the jury from receiving an accurate statement of law on the burden of proof in medical negligence cases involving foreign bodies. The instruction given in this case told the jury that the plaintiffs have the burden of proof in a foreign body case such as this. The instruction was argumentative, negative, and wrong as a matter of law.

According to the defendant, the nonstandard instruction was warranted to avoid confusion of the jury based on expert testimony put on by the plaintiffs that allegedly lacked a factual predicate. (SR14:978-79). Rather than alleviate confusion, however, the defendant's special instruction actually disregarded pertinent evidence and misled

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the jury as to the appropriate burden of proof in this case. In other words, the defendant's special instruction compounded the trial court's error of failing to give the requisite foreign body instruction.

The unambiguous medical malpractice statute and the jury instruction based on the statute set forth a clear statement that it is presumed negligence when a health care provider leaves a piece of medical equipment in the patient when it does not belong and the defendant has the burden of proof to establish that it was not negligent. The statute and instruction were determined to be ambiguous, and therefore not applicable, when the plaintiff sought their use, but the statute was determined to be unambiguous when the defense sought a disapproved nonstandard instruction. The decision of the Fourth District turns the statute and the instruction upside down and then turns them inside out.

D. Res ipsa and the non-foreign body medical malpractice cases.

Res ipsa is a shorthand expression for the rule of evidence that allows a jury to infer negligence and causation where the injury at issue is one that does not ordinarily occur in the absence of negligence. See *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So.2d 1339, 1341 (Fla. 1978). The use of the doctrine of res ipsa is allowed when the occurrence clearly speaks for itself. See *Marrero v.*

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Goldsmith, 486 So.2d 530, 531 (Fla. 1986).[4]

As we have tried to explain through statutory and jury instruction review, it is easy to understand how the broad aspect of the doctrine of res ipsa loquitur applies in a foreign body medical negligence case. An unintended foreign body case could be described as an "obvious" or "common sense" negligence claim. In fact, the Restatement would say that leaving a 4.25 inch-broken piece of drainage tube in the patient is a "matter of general knowledge, which the court recognizes on much the same basis as when it takes judicial notice of facts which everyone knows." Restatement (Second) of Torts §328D, comment d (1965). The Restatement even suggests that in a foreign body case expert testimony is not even necessary because such events do not usually occur in the absence of medical negligence. Restatement (Second) Torts §328D, comment d ("On the other hand there are other kinds of medical malpractice, as where a sponge is left in the plaintiff's abdomen after an operation, where no expert is needed to tell the jury that such events do not usually occur in the absence of negligence."); see *McDougald v. Perry*, 716 So.2d 783 (Fla. 1998) (citing comment d to section 328D and applying res ipsa in case where spare

[4] "*Res ipsa loquitur* . . . has been the source of so much trouble to the courts that the use of the phrase itself has become a definite obstacle to any clear thought, and it might be better discarded entirely." William L. Prosser, *Handbook of the Law of Torts*, section 39, at 213 (4th ed. 1971).

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tire escaped from a cradle underneath truck).

There are several decisions cited in *Dockswell* to buttress its holding that the foreign body instruction should not have been given. These decisions do not involve medical malpractice actions based on foreign bodies. Because the *Dockswell* decision essentially inserts common law res ipsa information in a foreign body case – notwithstanding the clear framework of the jury instructions that clearly differentiate common law res ips from foreign body medical neglience situations – we are compelled to explain why this analysis is wrong.[5]

In *Borghese v. Bartley*, 402 So.2d 475 (Fla. 1st DCA 1981), the plaintiff sought application of res ipsa because her injury was "outside the scope of medical treatment or diagnosis. . . ." *Id.* at 477. The *Borghese* plaintiff suffered a "full thickness burn" on her lower left leg which was "not involved in the surgical procedure." *Id.* at 475. *Borghese* held that a plaintiff can obtain a res ipsa instruction if she suffers a medical injury outside the scope of the medical treatment and when past experience dictates that negligence is the probable cause and the defendant is the probable actor.

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[5] To be clear, our position is that res ipsa, either as an evidentiary tool or as an instruction included in the standard instructions, is not part and parcel of section 766.102(3)(b) and jury instruction 402.4(c). The statute and instruction are statements of law that a defendant is presumed negligent and has the burden of proving that it is not negligent. If we could, we would simply conduct this analysis without reference to the term res ipsa, as was done in section 766.102(3)(b) and jury instruction 402.4c.

Borghese did not discuss, analyze or mention the foreign body shifting burden language of the predecessor statute to section 766.102(3). *Id.*

Marrero v. Goldsmith, 486 So.2d 530 (Fla. 1986), is not a foreign body negligence case. *Marrero* held that a res ipsa instruction should have been given when the plaintiff suffered weakness and numbness in her arm after a hemorrhoidectomy, abdominal dermolipectomy and surgery on her eyelid. The issue addressed in *Marrero* was whether the exclusive control element of res ipsa should be relaxed when the plaintiff "is in no position to prove which defendant or combination of defendants caused her injury to an area of her body remote from the surgery area, because she was unconscious when it occurred." *Id.* at 533.

In a non-foreign body medical device case where a disoriented plaintiff fell on the floor, the First District Court of Appeal wrote that "[t]he hospital patient relationship is one area where the application of the doctrine of res ipsa loquitur has been utilized to prevent injustice. See *Marrero, supra,* at 533, [...]. The unconscious patient is entitled to an explanation concerning an injury and is, thus, in many cases, entitled to the inference created by the doctrine. See *Marrero,supra; Borghese* [...]." *Keys v. Tallhassee Mem. Hosp. Med. Cent.*, 579 So.2d 201, 203 (Fla. 1st DCA 1991) (internal citations omitted).

In *McDonald v. Medical Imaging Ctr. of Boca Raton*, 662 So.2d 733 (Fla. 4th

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DCA 1995), the plaintiff fell off an x-ray table. The res ipsa instruction was not given because the plaintiff "was not unconscious when her injury occurred, there was no mystery as to how the injury occurred, and there was only one possibly culpable defendant" and the plaintiff "was able to adduce sufficient direct evidence of negligence." *Id.* at 735. *McDonald* did not discuss, analyze or mention the foreign body shifting burden language of section 766.102(3). See *Marshall v. Stein*, 662 So.2d 720 (Fla. 4th DCA 1995) (plaintiff injured by side effect of treatment and no error not to give res ipsa instruction).

None of these cases apply to the issue of whether the standard jury instruction should be given in a foreign body medical malpractice case for two reasons. First, and foremost, none of these "res ipsa" medical malpractice cases involve the foreign body prima facie evidence clause of section 766.102(3), or its predecessor. None.

Second, in light of section 766.102(3)(b), res ipsa has no bearing on a foreign body medical malpractice case. In medical negligence cases not involving a foreign body, res ipsa applies if there is a) an absence of direct proof negligence; b) the instrument causing injury is in the exclusive control of the health care provider; and c) the accident is of the type that would not have occurred without negligence. See

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Marrero, 486 So.2d at 532.[6] If "[t]here comes a point, however, when a plaintiff can introduce enough direct evidence of negligence to dispel the need for the inference" then res ipsa may not apply. *Id.* Res ipsa has been applied when the plaintiff is unconscious, senile, or has an unexplained injury that is unrelated to the surgical procedure. See *Marrero*, *Borghese*, *Keys*, supra.

Res ipsa is infused with issues of lack of direct proof, control, and knowledge of the plaintiff. None of these issues matter in a foreign body case. Section 766.102(3) contains nothing to suggest that the legislature intended to incorporate the requirements of common law res ipsa loquitur in the burden shifting statute. There is no requirement in section 766.102(3)(b) that the plaintiff establish a combination of being unconscious with an unexplained injury which is unrelated to the surgical procedure to justify the res ipsa instruction. The statute does not contain an evaluation of direct versus indirect evidence, control by the defendant, and whether the accident is related or not to the medical service. The statute has eliminated all of these factors of common law res ipsa. These requirements do not exist in the

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[6] The medical negligence res ipsa instruction is more narrow and states if the jury finds that ordinarily the incident would not have happened without negligence, and that the item causing the injury was not in the exclusive control of the defendant at the time it caused injury, the jury may infer that the defendant was negligent unless, taking into consideration all of the evidence in the case, the jury finds that the event was not due to any negligence on the part of the defendant. Fla.Std.Jury Instr. (Civ.) 402.4e.

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language of the statute and they do not exist in the standard jury instruction.

E. *Kenyon v. Miller* – where the foreign body statute and res ipsa meet, briefly.

Kenyon v. Miller, 756 So.2d 133 (Fla. 3d DCA 2000), is a foreign body medical case, but not one that qualified for application of the statutory exception of section 766.102(3). Nor did it qualify for a common law res ipsa jury instruction.

In *Kenyon*, the doctor operated on the patient to repair an incisional hernia from a previous hysterectomy. The doctor used surgical mesh which was intended to incorporate with the body tissue. The mesh became infected twice resulting in two subsequent surgeries to remove the infected mesh. *Id.* at 134.

The parties' experts gave conflicting testimony and opinions. Despite the conflicting testimony, the plaintiff requested the standard res ipsa instruction 4.6 (now Fla.Std.Jury Instr. (Civ.) 402.4e). The instruction was given over the defense objection. *Id.* at 135. The jury returned a verdict for the plaintiff. On appeal, the Third District reversed.

The *Kenyon* court analyzed whether a res ipsa instruction was applicable. The Third District court noted that simply because surgery is unsuccessful or the result is poor is not sufficient to invoke the doctrine of res ipsa loquitur. *Id.* at 136. The *Kenyon* court also explained that merely because the plaintiff is unconscious during surgery is not by itself sufficient to satisfy the first element of res ipsa loquitur.

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Rather, the case law requires a "combination of an unconscious plaintiff with an unexplained injury which is unrelated to the surgical procedure or treatment" to justify the res ipsa inference. *Id.* at 136 (citations omitted). The *Kenyon* court also determined that a res ipsa instruction "improperly permitted the jury to disregard the conflicting expert testimony and infer negligence solely on the facts that all of the mesh in the [plaintiff's] body was not removed during the second surgery, and that [plaintiff's] infection recurred nearly a year and a half later." *Id.*

The *Kenyon* court also addressed whether the plaintiff would have been entitled to an instruction based on section 766.102(3). In *Kenyon*, the court held "that the discovery of a 'foreign body' such as surgical paraphernalia is prima evidence of negligence, is clearly inapplicable in a case such as this where the mesh was intentionally placed in [plaintiff's] body as part of her treatment, and like screws, plates, pacemakers, and/or artificial joints was intended to permanently remain in her body." *Id.* at 136-37. *Kenyon* makes it crystal clear that the foreign body exception applies when the medical paraphernalia does not belong in the body. Note two on use for standard instruction 402.4c recognizes the *Kenyon* holding by requiring the trial court to make a threshold decision on whether the foreign body belongs or not.

The majority decision in *Dockswell* cited *Kenyon* as support for its conclusion that the standard instruction was not warranted in this case. The *Dockswell* majority

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relied upon the portion of *Kenyon* determining "that the res ipsa instruction improperly permitted the jury to disregard the conflicting expert testimony on the standard of care and infer that the doctor was negligent solely based on the presence of the infected surgical mesh." *Dockswell*, 177 So.3d at 273.

The *Dockswell* court determined that

> a foreign body instruction was not necessary to allow the jury to resolve the issues in the case. As in *Kenyon,* the Dockswells and the hospital presented conflicting expert testimony on whether the nurse met the standard of care or was negligent. The use of the foreign body jury instruction would have improperly permitted the jury to disregard the conflicting testimony of the experts. Where sufficient facts were known to enable the parties to present conflicting expert testimony on reasonable care, the issue of whether the nurse failed to meet the standard of care and was negligent "should have been left to the jury based upon their assessment of the credibility of the expert witnesses." *See Kenyon,* 756 So.2d at 136.
>
> In light of the evidence presented, including the conflicting expert testimony, the foreign body instruction was neither necessary to enable the jury to resolve the issues in the case nor supported by the facts of the case.

Dockswell, 177 So.3d at 273-74.

The Fourth District's analysis and application of *Kenyon* to this case is just simply wrong. In a foreign body medical negligence case, use of the required Florida Standard Jury Instruction cannot possibly improperly permit the jury to disregard the conflicting testimony of experts when the Legislature has determined that the burden of proof in a foreign body case falls on the defendant. §766.102(3)(b), Fla. Stat.

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To further demonstrate how the "confusion of experts" argument is fundamentally flawed, we return to the standard jury instructions. Well before there was a singular jury instruction on foreign bodies, there were standard instructions that juries are to consider all the evidence and make credibility determinations, including on expert testimony. See Fla.Std.Jury Instr. (Civ.) 601.1 (weighing the evidence); Fla.Std.Jury Instr. (Civ.) 601.2 (believability of witnesses, including experts). It is presumed that the jury will follow the trial court's instructions, including the standard instructions on credibility and believability of witnesses given in every medical negligence case. It is presumed that the jury will make witness credibility determinations, including experts. There is simply no justification for making the leap that a jury will fail to follow its instructions of making credibility determinations if also instructed that a defendant is presumed negligent when it leaves a foreign body in the patient and then carries the burden of proving that it was not negligent. None.

F. No mention of the Fourth District's own decision generally touching on the foreign body statute.

What makes the Fourth District's *Dockswell* decision a real head scratcher is the absence of any reference or discussion of their own decision in *Castillo v. Visual Health and Surgical Center, Inc.*, 972 So.2d 254 (Fla. 4th DCA 2008). In *Castillo* the plaintiff had a pterygium in her right eye surgically removed by a doctor. The

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doctor left a fragment of a sponge on the plaintiff's eye. The plaintiff moved for a directed verdict citing the shifted burden of proof of section 766.102(3), and argued that the defendant had presented only guesswork and speculation as to how the defendant doctor failed to see the sponge. The trial court denied the motion for a directed verdict and the Fourth District affirmed. *Id.* at 255.

As *Castillo* correctly commented "[t]he parties have not cited, nor has our own research revealed any Florida case law interpreting section 766.102(3)(b), Florida Statutes." *Id.* at 257. The *Castillo* court then stated "that the burden, when shifted to the defendant[s], cannot be met by pure speculation and conjecture." *Id.* If there is conflicting expert testimony, the jury is free to accept or reject the testimony. The Fourth District concluded that "the trial court did not err in making it a jury question as to whether the defense met their burden in overcoming the presumption created by section 766.102(3), Florida Statutes." *Id.* at 257.

The Fourth District has now contradicted itself by holding in one opinion that the instruction is proper because the jury can resolve conflicting expert testimony, *Castillo*, but then holding in another opinion that the instruction is improper because it causes juror confusion in resolving conflicting expert testimony, *Dockswell*. That is why we said *Dockswell* is a real head scratcher. In our case, the trial court and the Fourth District did not afford the plaintiff an opportunity to have the jury answer the

question as to whether the defense met their burden in overcoming the presumption created by section 766.102(3). The Fourth District's decision does not point in the same direction as all the other law on foreign bodies in medical negligence actions.

CONCLUSION

Both the Florida Legislature and this Court have determined that the presence of a foreign body is prima facie evidence of negligence and that the defendant has the burden of proving that he or she was not negligent. §766.102(3), Fla. Stat; Fla.Std.Jury Instr. (Civ.) 402.4c. In a medical negligence action based on the presence of a foreign body, control by the defendant, remoteness of the injury, unconsciousness or mental state of the plaintiff, and direct evidence of negligence, are all irrelevant in light of the express wording of the medical malpractice statute and the standard jury instruction.

The theory of plaintiffs' case was that a foreign body was left in the plaintiff that did not belong there. The "how" or "why" the foreign body got there are not relevant to the plaintiffs' burden of proof. They are only relevant to the jury's determination of whether the defendant produced sufficient evidence to establish that it was not negligent. To hold otherwise would render the statute and jury instruction meaningless.

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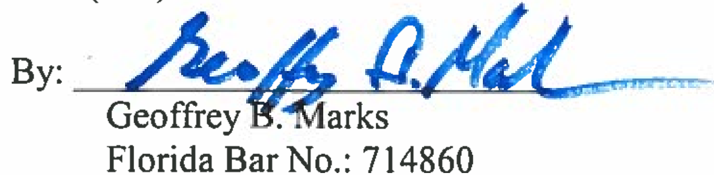
The *Dockswell* decision charts a new path in Florida case law in medical malpractice cases involving foreign bodies. The *Dockswell* holding rewrites the medical malpractice statute and rewrites the standard jury instruction based on the statute. *Dockswell* holds that despite the authority of a statute and an instruction, the plaintiff is not entitled to have the jury instructed on its theory of the case which is based on statutory law. The decision must be quashed with directions for the trial court to conduct a new trial.

BILLBROUGH & MARKS, P.A.
Attorneys for petitioners
100 Almeria Avenue, Suite 320
Coral Gables, Florida 33134
Email: gmarks@attyfla.com
Tel: (305) 442-2701
Fax: (305) 442-2801



By: ______________________
Geoffrey B. Marks
Florida Bar No.: 714860

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to William R. Jones, Law Office of William R. Jones, III, P.A., 9155 South Dadeland Boulevard, Suite 1412, Miami, FL 33156, wrjones@aol.com; Barbara W. Sonneborn, Michael D. Burt, and William T. Viergever, Sonneborn Rutter Cooney & Smith, P.A., 1545 Centrepark Drive North, West Palm Beach, FL 33401, bws@srcke.com, mburt@srcke.com, wtv@srcke.com, and Roy D. Wasson, Wasson & Associates, Chartered, Courthouse Plaza, Suite 600, 28 West Flagler Street, Miami, FL 33130, roy@wassonandassociates.com, e-service@wassonandassociates.com, by email on May 16, 2016.

By:
Geoffrey B. Marks

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing initial brief was typed in Times New Roman 14pt.

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