

**SUPREME COURT OF FLORIDA**

CASE NO.: SC15-2294

Lower Tribunal No.: 4D13-2936; 502012CA006331XXXXMB

SIMON DOCKSWELL and  
SANDRA DOCKSWELL,  
his wife,

Petitioners,

vs.

BETHESDA MEMORIAL HOSPITAL,  
INC., a Florida corporation.

Respondent.

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**RESPONDENT'S ANSWER BRIEF  
TO PETITIONERS' INITIAL BRIEF ON THE MERITS**

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Respectfully submitted,

/s/William T. Viergever

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RECEIVED, 06/27/2016 02:28:37 PM, Clerk, Supreme Court

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**STRICKEN**

## **STATEMENT OF THE FACTS AND CASE<sup>1</sup>**

Respondent provides this Statement of the Facts and Case because Petitioners' statement excludes the critical facts and history that demonstrate that the trial Court correctly decided to not apply the foreign body presumption of negligence to the distinct claim that the nurse applied excessive force, breaking the tube. The trial Court recognized that one of Plaintiff's two claims was a quasi-retained foreign body claim, but that the alternative claim of applying excessive force was a distinct claim with distinct damages, for which there was absolutely no authority, common law or statutory, to apply a presumption of negligence.

This is a medical malpractice case that involved the post-surgical removal of a JP drainage tube by a nurse caring for the patient in the patient's room in the days after surgery. This case did not involve overlooking a foreign body when concluding a surgery and closing the patient. It was intended that the JP drain would remain in the patient post surgery, to be removed by the floor nurse post operatively. The testimony was that the removal of the drain post operatively was routine and innocuous. The testimony established that the removal of JP drains is

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<sup>1</sup>All references are to the record on appeal (R. ), and the supplement to the record on appeal (SR. )

accomplished by the floor nurse sliding the JP drain out, by hand, in the patient's room while the patient is awake. It was undisputed that is what occurred here.

In this instance Nurse Kathleen Porges removed the JP drain pursuant to protocol. Plaintiffs both testified at deposition that the removal was uneventful. However, unbeknownst to everyone, the tip of the drain did not come out with the rest of the tubing. Mr. Dockswell was subsequently discharged. Approximately four months later, after Mr. Dockswell had experienced some pinching sensations, it was learned that the tip of the JP drain remained in his abdomen. It was then surgically removed. This lawsuit followed.

Plaintiffs asserted four theories of negligence against the nurse. One was a quasi-retained foreign body claim, alleging that Nurse Porges had negligently inspected the tube after it broke and was removed, overlooking the fact that not all of the JP drain had come out when she removed it. The only damages associated with this quasi-retained foreign body claim were those associated with a delay in performing the surgery to remove the fragment, because even if Nurse Porges had not overlooked the foreign body and **immediately** realized that the entire drain had not come out, a second surgery was necessary. This factor made this case unlike typical foreign body cases where the foreign body is overlooked prior to the surgical closing. Unlike a classic retained foreign body case, the oversight here occurred

post-surgical closing. In a typical retained foreign body case where the oversight results in the object inadvertently being left in the patient and the surgical site being closed, the oversight causes the need for a second surgery to remove the foreign body. That was not the situation in this case. Here, the drain was intended to remain in the patient after the completion of the surgery, to subsequently be removed by the floor nurse. Here, when Nurse Porges removed the drain, even if she had immediately realized that the tip had been retained, the second surgery to remove the tip was going to be necessary. The oversight by nurse Porges did not cause the second surgery. Plaintiff essentially suffered no objective injuries as a result of the delay in removing the tip of the JP tube. Thus, if Plaintiffs proceeded solely on a claim of retained foreign body, there were virtually no damages recoverable.

Therefore, Plaintiffs asserted an additional theory of liability in order to attempt to recover damages for the second surgery. Plaintiffs alleged that Nurse Porges negligently applied excessive force when removing the drain tube, causing it to break. If the jury accepted Plaintiffs' alternative theory that Nurse Porges violated the nursing standard of care by applying excessive force when removing the drain tube, causing it to break, Plaintiffs could recover damages for the second surgery.

In addition to the quasi-retained foreign body and excessive force claims discussed above, Petitioners' asserted two other theories against Nurse Porges. Directed verdicts were entered on the other two theories of liability. Thus, the case went to trial on the two remaining claims, the allegations of excessive force breaking the tube, and the claim of negligently inspecting the tube after removal. The only damages associated with the claim of missing the foreign body were those that could be attributed to a delay in doing the second surgery. The distinct damages associated with the claim of applying excessive force or speed during the removal were damages associated with undergoing the second surgery.

On the quasi-retained foreign body claim, Petitioners had an expert witness testify that the nursing standard of care required a careful inspection of the tube after removal and that failure to realize a fragment remained in the patient was a breach of the inspection standard of care. The overlooking of the fragment delayed the second surgery to remove it. On the second claim that the nurse breached the standard of care by applying excessive force or speed, breaking the tube, Petitioners' expert testified that because the drain tube broke, there must have been excessive force or speed applied.

At the charge conference, the trial court recognized the distinction between the two claims that Petitioners were pursuing. The trial court understood that the

claim that the nurse applied excessive force during the removal causing the drain to break was a straight-forward medical malpractice claim for which there was no presumption of negligence. The trial court likewise recognized that after the tube broke, and was removed, the claim that the nurse overlooked the fact that a fragment remained in the patient was a quasi-retained foreign body claim that might warrant the foreign body jury instruction.

Defense counsel argued that there could be no presumption of negligence that the nurse negligently applied excessive force, breaking the drain tube. Defense counsel argued that the two claims had distinct damages. The trial court acknowledged these arguments, but recognized that there may be a basis to provide the foreign body instruction on the distinct claim that after the tube was broken and removed, the nurse overlooked that a fragment remained in the patient. The trial court invited separate instructions on the two claims (SR. 13, 970-971). Despite the trial court's suggestion, Petitioners' counsel chose not to proffer separate instructions, continually insisting that the presumption of negligence should apply to both the active claim of applying excessive force, and the quasi-retained foreign body claim of failing to inspect the drain tube after removal.

The trial court declined to instruct the jury that the presumption of negligence regarding overlooking a retained foreign body also applied to the claim of breaching



the nursing standard of care by applying excessive force resulting in different damages.

Petitioners' expert witness on nursing standard of care regarding the claim of excessive force testified that because the tube broke, there must have been excessive force applied. Petitioners' counsel reiterated that argument during closing. Based on the improper inference Petitioners' expert witness and argument were seeking to have the jury draw, defense sought and obtained the jury instruction based on Fla. Stat. §766.102, indicating that the presence of a medical injury is not itself enough to infer negligence.

### **SUMMARY OF THE ARGUMENT**

The trial court correctly invited Petitioners to offer separate instructions to the jury on the quasi-retained foreign body claim, imposing the presumption of negligence on that claim of overlooking the retained fragment, while correctly not imposing the presumption of negligence on the claim that the nurse breached the standard of care by applying excessive force and breaking the tube. When Petitioners declined to proffer separate instructions, the trial court correctly declined to apply the retained foreign body presumption of negligence to Petitioners' claim that the nurse breached the nursing standard of care by applying excessive force causing the tube to break.

Regardless of the Fourth District Court of Appeal's analysis of the relationship between the *res ipsa* doctrine and the statutory retained foreign body claim, it is clear that the trial court correctly suggested that the retained foreign body instruction may be appropriate on the quasi-retained foreign body claim of overlooking the fragment, but that the presumption of negligence should not apply to the claim that the nurse caused the second surgery by negligently applying excessive force and breaking the tube.

Petitioners made a strategic decision not to proffer separate instructions on the two claims. Thus, there is no basis for a reversal of the jury verdict.

#### ARGUMENT

**BECAUSE THE FOURTH DISTRICT CORRECTLY AFFIRMED THE TRIAL COURT'S DECISION TO INVITE PETITIONER TO SUBMIT SEPARATE INSTRUCTIONS ON THE FOREIGN BODY CLAIM AND THE SEPARATE EXCESSIVE FORCE CLAIM AND CORRECTLY DECLINED PETITIONER'S INSISTANCE THAT THE FOREIGN BODY PRESUMPTION OF NEGLIGENCE BE APPLIED TO BOTH THE FOREIGN BODY AND NON-FOREIGN BODY CLAIMS, THIS COURT SHOULD AFFIRM THE JUDGMENT ON THAT BASIS.**

Petitioners' argument in the Initial Brief suggests that the trial court refused to give the foreign body jury instruction on the quasi-retained foreign body claim regarding the oversight of the retained drain fragment. As discussed in the

Statement of Facts above, that is not what happened. The trial court suggested she would instruct separately, giving the foreign body instruction and imposing the presumption of negligence on the claim of overlooking the retained fragment of the drain, causing a delay in the second surgery, but not apply a presumption of negligence on the claim that the nurse actually applied excessive force, breaking the drain and causing the second surgery to remove the fragment. The trial court correctly refused to apply the presumption of negligence to the claim that the nurse negligently applied excessive force during the removal.

Absolutely none of the cases cited by Petitioners or Amicus remotely support the proposition that there should have been a presumption of negligence to the claim that the nurse applied excessive force, breaking the tube and causing the second surgery. To the extent the foreign body cases cited by Petitioners and Amicus apply, they would only indicate that Petitioners may have been entitled to an instruction that there was a presumption of negligence on the claim that the nurse overlooked the fact that a fragment of the drain remained in the patient when she removed the drain, causing a delay in the second surgery. None of the cases cited by Petitioners or Amicus involved, as here, separate claims of overlooking a foreign body and another breach of standard of care that caused distinct injuries separate and apart from the oversight. It would make no sense to apply the presumption of

negligence applicable to claims regarding overlooking a foreign body to separate and different claims of breaching a different standard of care causing distinct injuries. The trial court correctly concluded that although a presumption of negligence may apply to a foreign body oversight claim and those damages, there is no common law or statutory basis to apply the presumption to different claims with different injuries. Petitioners made a strategic decision to go for all or nothing. Petitioners declined the trial court's invitation to provide separate instructions on the two distinct claims. Petitioners did not want to permit the jury to find that the nurse did not negligently break the tube causing the second surgery, but merely negligently overlooked the fragment, delaying the second surgery but not causing any objective damage.

Although the Fourth District Court of Appeal took the opportunity to engage in an extensive analysis of the history and relationship of the *res ipsa* doctrine<sup>2</sup> and the statutory foreign body instruction, the Court recognized that regardless of that analysis, the trial court had offered Petitioners the opportunity to have the retained

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<sup>2</sup>Petitioners criticize the Fourth District's analysis of the *res ipsa* doctrine, now arguing that the *res ipsa* doctrine was specifically carved out of the instruction on foreign bodies and that *res ipsa* does not apply to a foreign body case. PB 21. However, that was not Petitioners' position before the trial court. Petitioners specifically sought a *res ipsa* instruction. R. 110. The trial court denied that request. R. 365.

foreign body instruction on the claim of overlooking the retained portion of the drain, if they would propose a separate instructions on the two separate claims. As noted by the Fourth District:

Recognizing the distinction between the two claims, the trial court sought a set of proposed instructions applying the foreign body instruction to only the negligent inspection claim and not to the claim that the alleged excessive speed and force during the removal of the drain.

Petitioners' strategic decision to go for all or nothing on the jury instruction regarding a presumption of negligence was theirs to make. For purposes of this particular case, the extensive analysis applied by the Fourth District Court of Appeal does not impact the correct disposition of this case. The trial court had provided an opportunity for Petitioners to proffer separate instructions on the two distinct claims, one being the alleged excessive force causing a break and the need for a second surgery, and the other being the negligent inspection claim merely causing a delay in the second surgery. Petitioners chose to not provide the alternative instructions. They have not demonstrated error, but merely an attempt at a second bite at the apple. Petitioners' real claim is anytime there is a quasi-claim of retained foreign body, plaintiff is entitled to a presumption of negligence on all claims, including distinct claims, like the one here, that cause distinct injuries separate from the oversight of the retained foreign body.

Although there may be room for analysis of the language in the Fourth District Court of Appeal's opinion suggesting that the common law *res ipsa* factors may still be relevant when determining whether to give the statutory retained foreign body instruction, the trial court's thoughtful and careful analysis that the retained foreign body instruction could only apply to the negligent inspection, or "overlooking" claim, and not to the claim of applying excessive force, is unassailable. As discussed above, none of the cases cited by Petitioners remotely suggest that a floor nurse removing a drain tube post surgery will be presumed to have negligently applied excessive force breaking the tube and causing a second surgery. The cases may suggest that a nurse removing a drain post surgery who overlooks a retained fragment causing a delay in a surgery to remove the fragment, could be subject to the presumption. The trial judge got this issue exactly right and suggested that Petitioners' proffer separate instructions on the two issues. Petitioners chose not to do that, and have therefore not demonstrated any error by the trial court. Thus, even if this Court were to reverse portions of the reasoning in the Fourth District Court of Appeal's opinion, there is no basis to reverse the trial court's rulings, or the verdict.

### **The 766.102(3)(b) Jury Instruction Was Warranted.**

Petitioners argue that the trial Court erred by giving an instruction quoting the language of Fla. Stat. §766.102(3)(b) codifying that a medical injury does not create any inference or presumption of negligence by a health care provider. The trial court correctly gave the instruction because the only evidence that Nurse Porges applied excessive force was precisely the type of evidence the statute establishes is insufficient to support a finding of negligence. Petitioners' expert testified that because the tube broke, excessive force must have been used (SR 13: 952). This was precisely the type of situation where an instruction based on the statute was warranted. The instruction was necessary to prevent the jury from being confused by the testimony and argument that, because the tube broke, there must have been negligence. Furthermore, Petitioners' counsel had argued during closing that because the tube broke, it must have been pulled too hard (SR 14: 1000, 1061). Petitioners conceded that the requested special instruction was a correct statement of the law, but argues that it was "cumulative". (SR 14:980-81) Petitioners have not demonstrated the trial court erred by giving this instruction in light of the expert testimony and argument suggesting that the fact that the tube broke was sufficient to infer that there must have been excessive force.

## CONCLUSION

The trial court correctly invited Petitioners to propose separate instructions to the jury on the quasi-retained foreign body claim, imposing the presumption of negligence on that claim, while not imposing the presumption on the separate claim that the nurse breached the standard of care by applying excessive force, breaking the tube, and actually causing the second surgery. When Petitioners declined to proffer separate instructions, the trial court correctly declined to apply the retained foreign body jury instruction, imposing a presumption of negligence to Petitioners' claim that the nurse breached the nursing standard of care by applying excessive force while removing the drain tubing.

Because the Fourth District correctly affirmed the trial court's refusal to apply the retained foreign body presumption of negligence to the distinct claim of applying excessive force or speed, this Court can affirm Fourth District's affirmance of the judgment, regardless of the Fourth District's analysis of the interplay between the *res ipsa* doctrine and the retained foreign body instruction.

The statutory instruction on the improper inference that if something goes wrong there must be negligence was also appropriate in this case given the testimony and argument of Petitioners' counsel suggesting that because the tube broke, the nurse must have applied excessive force or speed.



Because the trial court correctly invited Petitioners to submit separate instructions on the foreign body claim and the non-foreign body claim, the conclusion of the Fourth District affirming the judgment should likewise be affirmed. Thus, Respondent requests that any opinion issued by this Court addressing the Fourth District Court of Appeal's reasoning below, include an affirmance of the jury verdict based on the trial court's correct ruling.

**STRICKEN**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic e-mail this 27th day of June 2016 to William R. Jones, Esq., 9155 So. Dadeland Blvd, Suite 1412, Miami, FL 33156 [wrjones@aol.com](mailto:wrjones@aol.com), Geoffrey B. Marks, Esq., 100 Almeria Ave., Suite 320, Coral Gables, FL 33134 [gmarks@attyfla.com](mailto:gmarks@attyfla.com), and Roy D. Wasson, Esq., 28 W. Flagler St., Ste 600, Miami, FL 33130, [roy@wassonandassociates.com](mailto:roy@wassonandassociates.com) [e-service@wassonandassociates.com](mailto:e-service@wassonandassociates.com)

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used is Times New Roman 14 point.

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