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' REPLY BRIEF ON THE MERITS

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ARGUMENT

A. 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 answer brief cites no authority demonstrating that the Fourth District's analysis of section 766.102(3), Florida Statutes, and jury instruction 402.4c is correct. None. Instead, the answer brief demonstrates a continued misunderstanding of the statute and instruction and how they squarely and unequivocally apply to this case. When the burden shifts to the defense to prove it was not negligent, the plaintiff is entitled to rebut those arguments and evidence, but it does not mean that the jury is instructed that the plaintiff has the burden of proof in the case. Any statement to the jury from the trial court is a misstatement of law.

Plaintiffs had a one count complaint for medical negligence. (R1-5). As we have tried to make clear, for determination of whether the statute and instruction apply, it matters not one bit why or how the broken piece of tube was left in the patient's body, it is the fact that medical equipment was improperly left in the body that justifies the instruction, as clearly required by section 766.102(3)(b). Upon the mere allegation and proof that a broken piece of tube was left in the plaintiff's body, the plaintiff was entitled to a jury instruction on the shifted burden of proof. "If a set of facts entitles one to a legal determination that *prima facie* evidence of negligence

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is established, additional affirmative evidence of negligence does not *erase* the *prima facie* determination." *Dockswell*, 177 So.3d 270, 277 (Fla. 4th DCA 2015) (Conner, J. dissenting).

The defense argues in its answer brief that this was a "quasi-retained foreign body claim," and that the plaintiff was required to submit separate negligence instructions. See answer brief at 6, 7. Other than the decision of the Fourth District under review, the defense cites no case law, statutes, commentary, or any legal authority to support the argument. And this was not a "quasi-retained" foreign body. It was real, it was painful, and did not belong in Mr. Dockswell's body. (SR5:799, 800 (pictures of the broken tube).

In this case, the trial court invited the parties to submit an instruction on the two "claims" despite the plaintiffs' position that it had submitted a written instruction in compliance with the statute and the standard instruction. (SR13:973). The trial court took a very short break, and then immediately announced its ruling that it was not going to give the plaintiffs requested instruction. (SR13:975). The trial court's ruling was not predicated on the mistaken two claims analysis, but on a total rejection of the standard instruction because there was some evidence of who was negligent and a belief that "discovery" as used in the statute meant knowledge of the wrong doer. (SR13:975).

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In our case, the plaintiffs requested an instruction that was completely rejected by the trial court. The colloquy about a "bifurcated" instruction never amounted to anything more than talk because the trial court came back and completely rejected plaintiffs' requested instruction in total. There was nothing for the plaintiffs to submit because the trial court had summarily rejected the application of the statutory instruction in total. The proper analysis to be applied here comes from *Florio v. Eng*, 879 So.2d 678 (Fla. 4th DCA 2004), where the court held that "a party is entitled to have the jury instructed upon his theory of the case. . . ." See *Pollock v. CCC Investments I, LLC*, 933 So.2d 572 (Fla. 4th DCA 2006). The request of the trial court to submit another instruction was an adoption of the defense theory of the case, not the plaintiffs.[1]

B. Defense nonstandard jury instruction was error

The Fourth District Court of Appeal did not address the plaintiffs' argument that it was error to give a nonstandard jury instruction based on section 766.102(3)(b). We raised the argument in this Court to demonstrate the complete picture of the trial court's misunderstanding of section 766.102(3)(b) and Fla. Std. Jury Instr. (civ.)

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[1] Given the ruling of the trial court that it did not find the statute and instruction applicable at all in this case, the suggestion that plaintiffs should have submitted a retooled or revised instruction would have been both a futile and useless act, and worse added more confusion to the totality of the jury instructions. See *Haimovitz v. Robb*, 130 Fla. 844, 178 So. 827, 830 (1937).

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402.4c, as well as the Fourth District's erroneous interpretation of the statute and instruction.

In the initial brief we cited two decisions clearly holding that it is error to give a jury instruction in a medical malpractice case that the existence of a medical injury should not create an inference or presumption against a health care provider. See *Villar v. Pereiras*, 588 So.2d 678 (Fla. 3d DCA 1991); *Webb v. Priest*, 413 So.2d 43, 46-47 (Fla. 3d DCA 1982). We also cited the language in Fla.Std.Jury Instr. (Civ.) 401.4 n.1, that no instruction should be given from the mere happening of an accident because such an instruction is argumentative and negative. The answer brief makes no mention, let alone argument, about these on point and dispositive authorities that demonstrate absolute error in the instruction.

The defense argument is that because their expert testified that "the tube broke" and that the plaintiff argued that breaking the tube was negligence, the jury would get confused unless it had the following instruction: "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).

The argument has no merit. The argument (and the Fourth District's failure to

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recognize the error in the instruction) demonstrates a fundamental misunderstanding of section 766.102 and the standard instruction that foreign bodies are prima facie evidence of negligence and the defense carries the burden of proving that it was not negligent. This case is not about the existence of a medical injury. This case is about a very specific form of medical negligence with a very specific burden of proof.

Without referring to the errant defense instruction, Judge Conner's dissenting opinion in the Fourth District demonstrates a clear understanding of why such an instruction is wrong. "If 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." *Dockswell*, 177 So.3d at 277 (Conner, J. dissenting).

The defense is not entitled to an instruction that undermines and undercuts the express language of the medical malpractice statute and this Court's instruction – which did not include the language cited by the defense and used by the trial court. A foreign body in medical negligence actions is not a mere accident and the plaintiff does not carry the burden of proof demonstrating negligence. To allow such an instruction would render the effect of the statute null, and render the language of the statute – "however" – meaningless. The defense argument cannot carry the day, and the decision of the Fourth District must be reversed for the statute and the instruction

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to have their intended application and effect.

CONCLUSION

After surgery on the plaintiff, a nurse broke a drainage tube and left a 4.25 inch piece of tube in the plaintiff. (SR5:799, 800; SR10:321-22). The plaintiff requested the standard jury instruction in medical negligence cases involving foreign bodies that is based on the medical malpractice statute. The trial court refused to give the instruction and instead gave an instruction that was argumentative and eliminated the returned the burden of proof to the defenses. The Fourth District affirmed this unwarranted deviation from the standard instruction and statute, and the decision essentially rewrites the statute and the instruction.

Based on the foregoing argument and authority, the decision of the Fourth District Court of Appeal must be reversed, and the matter remanded to the trial court for a new trial.

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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 July7, 2016.

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CERTIFICATE OF COMPLIANCE

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

By: _____
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